

THE LEIDEN DDE GUIDELINES

ON THE USE OF DIGITALLY DERIVED EVIDENCE AT
THE INTERNATIONAL CRIMINAL COURTS AND
TRIBUNALS

(“Teaser” - Document on Videos)

DIGITALLY DERIVED EVIDENCE PROJECT

Kalshoven-Gieskes Forum International Humanitarian Law

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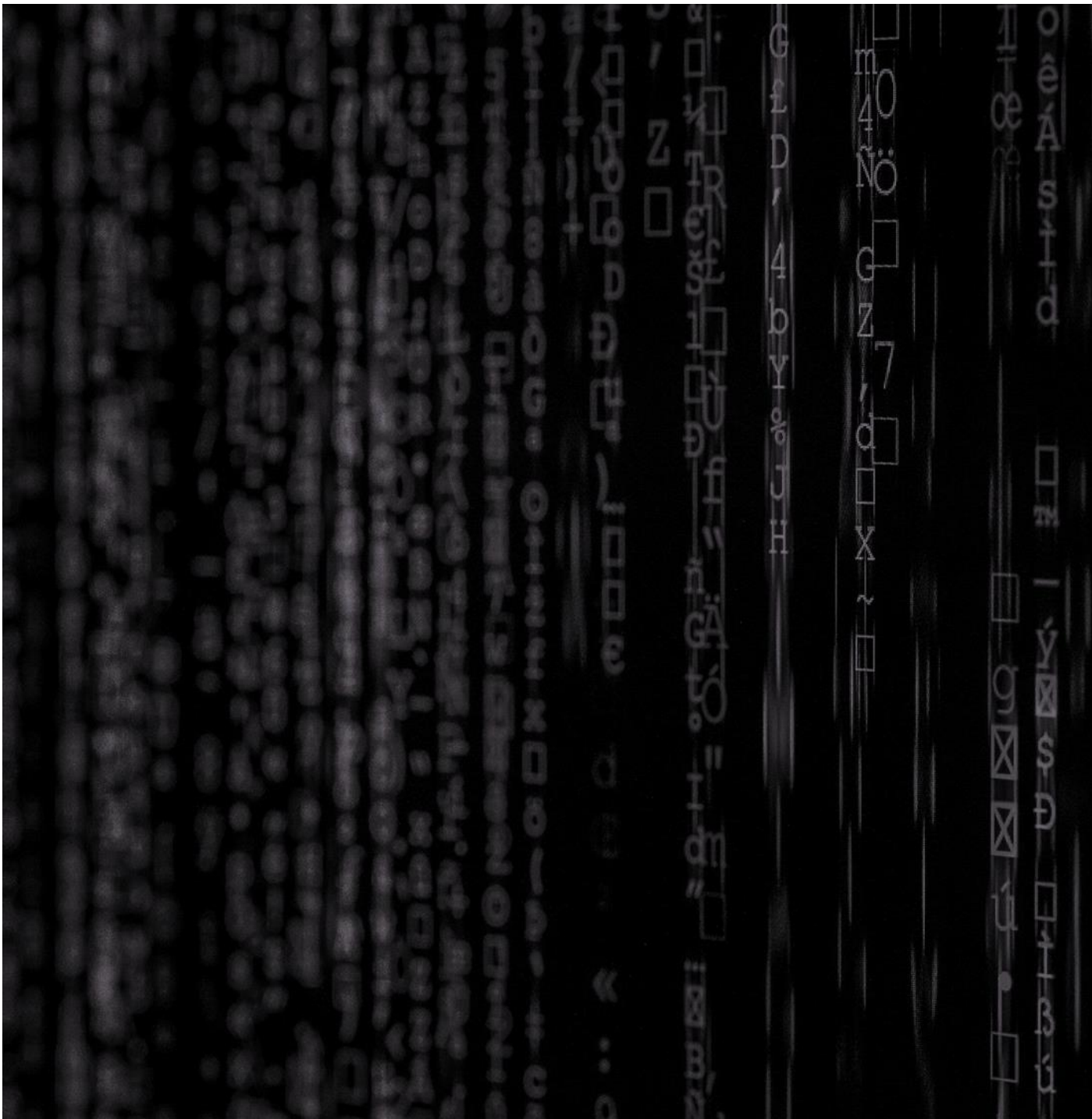
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INTRODUCTION

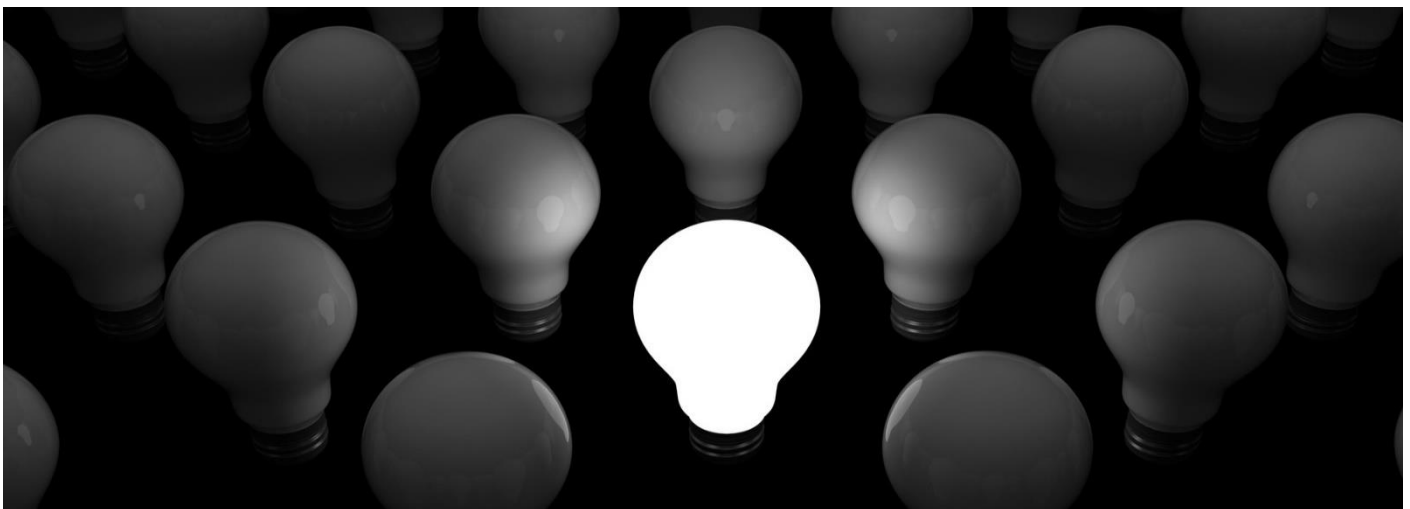
Our Project

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

Acknowledgements

The Digitally Derived Evidence Project was launched in spring 2019, involving close collaboration between professors, researchers, Ph.D. candidates and LL.M. students from our Leiden International Humanitarian Law Clinic. Particularly in the development of the international case summaries that resulted in this document, we would like to thank the IHL Clinic students (Spring 2020) Panayiotis Constantinides, Tom Flicker, Elsy Grivel, Gabriela Krasteva, Madeeha Majid, Danylo Nedvetskyi, Kseniia Soloveva, Ail Lee Tan and Amanda Wallin, who were supervised by Sharon Pia Hickey and Alla Ershova.

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The objectives of the Reference Guidelines

The objective of this document is to build on the international case summaries document. In the international case summaries document, an extensive number of cases were separately examined in order to identify pronouncements on DDE. The essential considerations pertaining to the DDE listed were then compiled into the reference guideline for each case. The aim of the reference guidelines is to summarise the essential arguments of the Prosecution, Defence, and the Chambers. The reference guideline will ultimately be used to extrapolate legal standards on the treatment of DDE at the ICCTs.

Methodology

To develop this document, international case summaries were prepared. In these summaries, thousands of pages of court records were analysed aiming to identify whenever relevant discussions on DDE were present. This includes counsels' arguments and the pronouncements by the judicial chambers, as well as relevant information about the case, the Court and rules of procedure and evidence.

The objective of the reference guidelines is to extract the most essential information from the international case summaries. The information was divided in the reference guidelines by type of DDE, stage of proceedings (arrest warrant; pre-trial; trial; appeals), court or tribunal and finally the arguments of the parties and the Chamber. Dividing the reference guidelines by various stages of the proceedings allows for burdens of proofs at specific stages of the proceeding to be considered. The following template was used:

I. TYPE OF DDE

A. STAGE OF THE PROCEEDINGS

Name of Court/Tribunal

o Full Case Name

- The arguments of the Prosecution***
- The arguments of the Defence***
- The Court's response***

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

Once the most relevant information related to Digitally Derived Evidence is selected from the international case summaries, extrapolations are made based exclusively on the Courts' sayings. These extrapolations represent the general rules that can be deduced from the Courts' pronouncements that will, later, become the guidelines for practitioners.

Alongside the "reference guidelines" a "cases covered and gaps in research" document was created in order to underline where further research needs to be done on cases at the ICCTs. The following template was used:

1. Name of the case

- Name of Court/Tribunal***
- Stages covered in summaries***
- Stages missing in summaries***
- Information missing in stages covered in summaries, e.g. Prosecution's arguments for videos during Trial stage.***
- Type of DDE covered in summaries.***

VIDEOS



VIDEOS

PRE-TRIAL

International Criminal Court (ICC)

Prosecutor v. Laurent Gbagbo and Charles Blé Goudé (ICC-02/11-01/15) *#authenticity #relevance #chainofcustody*

EXTRAPOLATION

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

⊗ The arguments of the Prosecution

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

⊗ The arguments of the Defence

2. Defence Counsel asserted that several elements needed to be taken into account when assessing the value of evidence, including “the nature, credibility, reliability, provenance of that item of evidence and its link with the charges made against the alleged perpetrator of the facts.”⁵

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

¹ *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, P-T. Ch. I, 3 June 2013, at 13, para. 27.

² *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, P-T. Ch. I, 3 June 2013, at 13, para. 27.

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

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

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

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

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

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

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

⊗ **The Court’s Response**

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

6. In relation to the quality of individual items of evidence, the Court considered that it would be “unhelpful to formulate rigid formal rules, as each exhibit and every witness is unique and must be evaluated on its own merits.”¹¹

7. However, the Court did consider “it useful to express its general disposition towards certain types of evidence.”¹² It stated that it was preferable for Chambers to have “as much forensic and other material evidence as possible. Such evidence should be duly authenticated and have clear and unbroken chains of custody.”¹³

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

#probativevalue #objectivity #reliability

EXTRAPOLATION

- **Interviews captured in a video which may not be objective or reliable should receive low-probative value.**¹⁴
- **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.**¹⁵

⊗ **The arguments of the Prosecution**

1. The Prosecution submitted that “there are no details identifying who produced the video clip, how interviewees were selected, or other conditions surrounding the content of the

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

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

¹⁰ *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, P-T. Ch. I, 3 June 2013, at 12, paras. 25-35.

¹¹ *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, P-T. Ch. I, 3 June 2013, at 13, para. 26.

¹² *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, P-T. Ch. I, 3 June 2013, at 13, para. 26.

¹³ *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, P-T. Ch. I, 3 June 2013, at 13, para. 27.

¹⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, P-T. Ch. II, 15 June 2009, at 25-36, para. 104.

¹⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, P-T. Ch. II, 15 June 2009, at 25-36, para. 104.

interviewee's statements."¹⁶ The Prosecution limited its submissions to argue that "the video clip is not inconsistent with the Prosecution's case. (...) The fact that this interviewee speculates that the 'anti-MLC' segment of the CAR population may have been supporters of the rebels, is consistent with the Prosecution's theory that the MLC systematically victimised civilians who were perceived to be sympathetic to Bozize's rebels."¹⁷ The Prosecution did not comment on the fact that the video was produced by the MLC troops.

⊗ The arguments of the Defence

2. During the confirmation hearing, the defence presented a video [video produced by the MLC troops interviewing people in Sibut; interviewees claim MLC was freeing CAR population from Bozizé's troops¹⁸] as exculpatory evidence. The Defence argued that although the video was made by the MLC, there are no signs of intimidation or coercion.¹⁹ It further argued that the "statements [of the interviewees] that have been recorded are hardly consistent with a population that is being hounded and hunted by so-called Bemba's men. They are welcoming the assistance of the MLC to support the government that they themselves elected."²⁰ Thus, the Defence concluded that "in assessing the overall veracity and credibility of the Prosecution evidence, when weighing it with evidence, which is fundamentally and irreconcilably contradictory" the Chamber should bear in mind these facts.²¹

⊗ The Court's Response

3. The Chamber concluded that a "low probative value should be attached" to the video.²² The Chamber, in assessing its probative value, noted that "the video is part of the MLC archives and was produced by MLC members in the town of Sibut in early 2003, at a time when the CAR was still under attack."²³ It noted that "the interviewees' statements taken by a party to the conflict in time of war may be driven by fear and therefore may not be objective and reliable."²⁴ It concluded that "a low probative value should be attached to this video-based evidence."²⁵

¹⁶ *Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution's Written Submissions Regarding the Confirmation Hearing Held On 12-15 January 2009, ICC-01/05-01/08-377, P-T. Ch. III, 26 January 2009, at 10, para. 31.

¹⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, Prosecution's Written Submissions Regarding the Confirmation Hearing Held On 12-15 January 2009, ICC-01/05-01/08-377, P-T. Ch. III, 26 January 2009, at 10, para. 32.

¹⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Pre-Trial Ch. II, 15 June 2009, at 35, para. 102.

¹⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Transcript Confirmation Hearing, ICC-01/05-01/08-T-12-ENG WT, T. Ch. III, 15 January 2009, at 135, lines 13-22.

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

²¹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Transcript Confirmation Hearing, ICC-01/05-01/08-T-12-ENG WT, T. Ch. III, 15 January 2009, at 135, lines 13-22; and at 136, lines 1-3.

²² *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, P-T. Ch. II, 15 June 2009, at 36, para. 104.

²³ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, P-T. Ch. II, 15 June 2009, at 25-36, para. 104.

²⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, P-T. Ch. II, 15 June 2009, at 25-36, para. 104.

²⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, P-T. Ch. II, 15 June 2009, at 25-36, para. 104.

EXTRAPOLATION

- **Videos should be translated into one of the working languages of the Court at the time of commencement of the confirmation hearing and should be made available to the Chamber and the Defence, otherwise the videos will be inadmissible.²⁶**

⊗ **The arguments of the Defence**

1. The Defence argued that “all video material disclosed by the Prosecution, the original form of which is in whole or in part in a language other than English or French, and for which a translation into English or French was not disclosed to the Defence prior to the 9 October 2006 [disclosure] deadline, be excluded from the evidence on which the Prosecution can rely at the confirmation hearing.”²⁷

⊗ **The arguments of the Prosecution**

2. The Prosecution stated that Regulation 39(1) of the Regulations of the Court, which provides that “all documents and materials filed with the Registry shall be in English or French, unless otherwise provided in the Statute”²⁸ does not apply to the disclosure obligation in Article 61(3)(b) of the Rome Statute, which stipulates the accused’s right to “be informed of the evidence on which the Prosecutor intends to rely at the hearing”; therefore, the request should be denied.²⁹

⊗ **The Court’s Response**

3. “Considering that pursuant to Article 61(3) of the Statute, within a reasonable time before the hearing, Thomas Lubanga Dyilo must be provided with a copy of a document containing the charges on which the Prosecutor intends to bring him to trial and be informed of the evidence on which the Prosecutor intends to rely at the confirmation hearing; and that, pursuant to Article 67(1) of the Statute, in the determination of any charge, Thomas Lubanga Dyilo is inter alia entitled to be informed promptly and in detail of the nature, cause and content of the charge, in a language which he fully understands and speaks.”³⁰

²⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence “Request to exclude video evidence which has not been disclosed in one of the working languages,” ICC-01/04-01/06-676, P-T. Ch. I, 7 November 2006, at 3.

²⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Corrigendum to Request to exclude video evidence which has not been disclosed on one of the working languages, ICC-01/04-01/06-642-Corr, P-T. Ch. I, 02 November 2006, at 4, para. 1.

²⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Response to the Defence “Request to exclude video evidence which has not been disclosed in one of the working languages,” ICC-01/04-01/06-662, P-T. Ch. I, 6 November 2006, at 4, para. 11.

²⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Response to the Defence “Request to exclude video evidence which has not been disclosed in one of the working languages,” ICC-01/04-01/06-662, P-T. Ch. I, 6 November 2006, at 3, para. 5.

³⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence “Request to exclude video evidence which has not been disclosed in one of the working languages,” ICC-01/04-01/06-676, P-T. Ch. I, 7 November 2006, at 3.

4. The single judge noted that “the material was transmitted to Defence [...] and that Thomas Lubanga Dyilo fully understands and speaks Swahili [the language the documents were transmitted in].”³¹

5. “Considering, however, that under no circumstances may evidence not translated into one of the working languages of the Court at the time of commencement of the confirmation hearing be admitted into evidence insofar as the Chamber must be in a position to fully understand the evidence on which the parties intend to rely at the hearing; and considering, therefore, that pursuant to Article 69(4) of the Statute, video excerpts (i) which are not translated into one of the working language of the Court by 9 November 2006 [...] and (ii) whose translation is not made available to the Chamber and the Defence by that time must be declared inadmissible.”³²

TRIAL

International Criminal Court (ICC)

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

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

EXTRAPOLATION

- A video of a broadcaster which displays elements such as the date of emission shown during almost the entire duration of the video, a logo of the TV programme and the image and voice of the interviewee with no interruptions in what seem to be full answers to the questions posed by the interviewer bears sufficient indicia of reliability, originality and integrity.³³

⊗ The arguments of the Prosecution

1. The Prosecution argued that the video [a recording of a program called “A Coeur Ouvert” containing an interview of Mr Olivier Kamitatu, MLC Secretary General] “is relevant and has probative value to demonstrate, inter alia, the Accused’s knowledge of the crimes committed in CAR.”³⁴

³¹ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence “Request to exclude video evidence which has not been disclosed in one of the working languages,” ICC-01/04-01/06-676, P-T. Ch. I, 7 November 2006, at 3.

³² *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence “Request to exclude video evidence which has not been disclosed in one of the working languages,” ICC-01/04-01/06-676, P-T. Ch. I, 7 November 2006, at 3.

³³ *Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of “Decision on the Prosecution’s application for admission of materials into evidence pursuant to Article 64(9) of the Rome Statute” of 6 September 2012, ICC-01/05-01/08-2299-Red, T. Ch. III, 8 October 2012, at 41, para. 81.

³⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, Annex A to the Prosecution’s application for admission of materials into evidence pursuant to Article 64(9) of the Rome Statute, ICC-01/05-01/08-2147-AnxA-Red, T. Ch. III, 28 February 2012, at. 5.

⊗ **The arguments of the Defence**

2. Defence argued that “the video is relevant to and probative of many aspects of the defence case.”³⁵ The Defence did not dispute the authenticity of the video nor did it allege that its admission may be prejudicial to the defence.³⁶

⊗ **The Court’s Response**

3. The video was admitted.³⁷ The Chamber held that the video bears “indicia of reliability, originality and integrity such as a date of emission shown during almost the entire duration of the video, a logo of the TV programme and the image and voice of Mr Olivier Kamitatu, with no interruptions in what seem to be full answers to the questions posed by the interviewer.”³⁸ “The Chamber is of the view that there is no reason to believe that the admission of the video recording will have a prejudicial effect on a fair trial.”³⁹

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

#relevance #probativevalue #prejudice

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

EXTRAPOLATION

- **When a guilty plea is entered at pre-trial stage, the Trial Chamber must determine if the evidence submitted and agreed upon by the parties, including any DDE, assists in independently “determining the facts of the case” as required under Article 65(1)(c)(ii) of the Rome Statute.⁴⁰**
- **When deliberating on whether to convict the accused, the Trial Chamber will consider the relevance, probative value, and potential prejudice of evidence, such as DDE, along with any live testimony heard.⁴¹**

³⁵ *Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of “Decision on the Prosecution’s application for admission of materials into evidence pursuant to Article 64(9) of the Rome Statute” of 6 September 2012, ICC-01/05-01/08-2299-Red, T. Ch. III, 8 October 2012, at 40, para. 80.

³⁶ *Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of “Decision on the Prosecution’s application for admission of materials into evidence pursuant to Article 64(9) of the Rome Statute” of 6 September 2012, ICC-01/05-01/08-2299-Red, T. Ch. III, 8 October 2012, at 41, para. 81.

³⁷ *Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of “Decision on the Prosecution’s application for admission of materials into evidence pursuant to Article 64(9) of the Rome Statute” of 6 September 2012, ICC-01/05-01/08-2299-Red, T. Ch. III, 8 October 2012, at 41, para. 81.

³⁸ *Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of “Decision on the Prosecution’s application for admission of materials into evidence pursuant to Article 64(9) of the Rome Statute” of 6 September 2012, ICC-01/05-01/08-2299-Red, T. Ch. III, 8 October 2012, at 41, para. 81.

³⁹ *Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of “Decision on the Prosecution’s application for admission of materials into evidence pursuant to Article 64(9) of the Rome Statute” of 6 September 2012, ICC-01/05-01/08-2299-Red, T. Ch. III, 8 October 2012, at 41, para. 81.

⁴⁰ *Prosecutor v. Admad Al Faqi Al Mahdi*, Judgement and Sentence, ICC-01/12-01/15-171, T. Ch. VIII, 27 September 2016, at 15, paras 29, 44.

⁴¹ *Prosecutor v. Admad Al Faqi Al Mahdi*, Direction on the conduct of the proceedings, ICC-01/12-01/15-136, T. Ch. VIII, 22 July 2016, at 8, para. 16.

⊗ **The arguments of the Prosecution**

1. At trial the Prosecutor stated: “In view of the guilty plea entered, the public must understand, therefore, today that the Prosecution does not intend to deal with each of the 700 pieces of evidence that have been filed before the Court, we will deal only with specific aspects; namely, starting with an interactive platform, the Prosecution will use satellite images, photographs, videos and other material gleaned from the Internet which are included on the list of our evidence material to show the situation of the mausoleums before, during and after the destruction, including the participation of the accused. These elements are authentic and have been accepted by the Defence and which are solid proof corroborating the plea of guilt entered by the accused.”⁴²

⊗ **The arguments of the Defence**

2. The defence did not challenge the admissibility as they were accepted by the Defence.⁴³

⊗ **The Court’s Response**

3. During the Directions on the Conduct of the Proceedings, the Presiding Judge stated that it was “unnecessary to regulate how evidence is presented if an admission of guilt is made, as the parties have already submitted the evidentiary materials for the Chamber to consider pursuant to Article 65(1)(c)(ii) of the Statute.”⁴⁴ The Judge went on to state: “The Chamber will consider the relevance, probative value, and potential prejudice of evidence, along with testimony of the three Prosecution witnesses, in deliberating whether to convict the accused pursuant to Article 65(2) of the Statute.”⁴⁵

4. In the judgment, several pieces of evidence, including video, were used to determine the “established facts of the case” and whether the accused's admission of guilt was supported by those established facts.⁴⁶

5. The Trial Chamber stated: “Although there is no corroboration requirement when assessing evidence, the Chamber paid particular attention to whether evidence could establish the facts independently of the Accused’s admissions.”⁴⁷

6. In particular, the Chamber emphasised that “the Agreement [between Defence and OTP] and Mr Al Mahdi’s admissions to be both credible and reliable in full. Mr Al Mahdi went into extensive detail as to the events in question, often volunteering specific information not strictly necessary in order to prove the charge. The Chamber has been able to independently corroborate

⁴² *Prosecutor v. Admad Al Faqi Al Mahdi*, Transcript Trial Hearing, ICC-01/12-01/15-T-4-Red-ENG, T. Ch. VIII, 22 August 2016, at 41, lines 4-12.

⁴³ *Prosecutor v. Admad Al Faqi Al Mahdi*, Transcript Trial Hearing, ICC-01/12-01/15-T-4-Red-ENG, T. Ch. VIII, 22 August 2016, at 41, line 11.

⁴⁴ *Prosecutor v. Admad Al Faqi Al Mahdi*, Direction on the conduct of the proceedings, ICC-01/12-01/15-136, T. Ch. VIII, 22 July 2016, at 8, para. 16.

⁴⁵ *Prosecutor v. Admad Al Faqi Al Mahdi*, Direction on the conduct of the proceedings, ICC-01/12-01/15-136, T. Ch. VIII, 22 July 2016, at 8, para. 16.

⁴⁶ *Prosecutor v. Admad Al Faqi Al Mahdi*, Judgement and Sentence, ICC-01/12-01/15-171, T. Ch. VIII, 27 September 2016, at 15, para. 29; at 26, para. 44.

⁴⁷ *Prosecutor v. Admad Al Faqi Al Mahdi*, Judgement and Sentence, ICC-01/12-01/15-171, T. Ch. VIII, 27 September 2016, at 15, para. 29.

almost all of Mr Al Mahdi's account with the evidence before the Chamber, strongly indicating that the entire account is true."⁴⁸

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

#transcripts #translations

EXTRAPOLATION

- **When a video has been formally submitted, any transcripts and translations of that video may be also considered as formally submitted irrespective of whether the transcripts or translations were on the list of evidence formally submitted.⁴⁹**

⊗ The arguments of the Prosecution

1. On 27 November 2015, the Office of the Prosecutor filed its fifth bar table request seeking to admit 108 items into evidence,⁵⁰ including “open-source video-clips obtained on the internet of interviews by Babala and Kilolo with various media outlets before and after their release from detention.”⁵¹ No particular considerations regarding DDE were made.

⊗ The arguments of the Defence

2. “Both the Bemba and Babala Defence object to five items being formally submitted on grounds that the Prosecution did not include them in its list of evidence. Four of these items are annexes to an independent counsel report, and the fifth is a transcript of a video (the video itself is on the list of evidence, but the transcript is not).”⁵²

⊗ The Court's Response

3. The Chamber recognized the formal submission of the video transcript.⁵³

4. The Chamber found: “given that the video concerned was indicated on the list of evidence, the defence was given ample notice that the video itself may be submitted during the trial and no

⁴⁸ *Prosecutor v. Admad Al Faqi Al Mahdi*, Judgement and Sentence, ICC-01/12-01/15-171, T. Ch. VIII, 27 September 2016, at 26, para. 44.

⁴⁹ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on “Prosecution's fifth request for the admission of evidence from the bar table,” ICC-01/05-01/13-1524, T. Ch. VII, 14 December 2015, at 5, para. 7.

⁵⁰ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Public redacted version of the “Prosecution's fifth request for the admission of evidence from the bar table,” of 27 November 2015, ICC-01/05-01/13-1498-Red, T. Ch. VII, 30 November 2015, at 3, para. 1.

⁵¹ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Public redacted version of the “Prosecution's fifth request for the admission of evidence from the bar table,” of 27 November 2015, ICC-01/05-01/13-1498-Red, T. Ch. VII, 30 November 2015, at 14, para. 36.

⁵² *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on “Prosecution's fifth request for the admission of evidence from the bar table,” ICC-01/05-01/13-1524, T. Ch. VII, 14 December 2015, at 4, para. 4.

⁵³ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on “Prosecution's fifth request for the admission of evidence from the bar table,” ICC-01/05-01/13-1524, T. Ch. VII, 14 December 2015, at 5, para. 7.

prejudice is caused by considering the transcript once the video is recognised as formally submitted. In principle, the Chamber considers that recognising the formal submission of audio-visual material automatically includes recognising the formal submission of any associated transcripts or translations which were duly disclosed. This would be the case irrespective of whether these transcripts/translations were on the list of evidence or formally submitted, though it is clearly preferable to formally submit these associated documents so there is no confusion as to their status.”⁵⁴

5. It reasoned that “it would be unduly formalistic to recognize the submission of a video but not a written record designed to faithfully reflect its contents for better comprehension.”⁵⁵

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

EXTRAPOLATION

- **An expert may be asked (by a party to the proceedings) to explain his or her methodology for assessing DDE referred to in their report.**⁵⁶
- **An expert may also be asked (by a party to the proceedings) to explain specific differences he or she found in comparing what was shown in a video versus what had been documented in a medical report involving a physical examination.**⁵⁷
- **The expert witness may be asked to explain certain terms referred to in the Report, and the expert may refer to the video for visible assistance in his or her explanation.**⁵⁸
- **What matters is the content and quality of the video material, as well as its relevance to the issue at stake, rather than the volume of evidence.**⁵⁹

⊗ The arguments of the Prosecution

1. An expert was provided with several documents from the OTP to prepare his report. These documents related to the death of Mr. Diakite Yaya and included an external examination Report and a forensic Report prepared by two doctors, a funeral document, a video, and a witness

⁵⁴ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on “Prosecution’s fifth request for the admission of evidence from the bar table,” ICC-01/05-01/13-1524, T. Ch. VII, 14 December 2015, at 5, para. 7.

⁵⁵ *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on “Prosecution’s fifth request for the admission of evidence from the bar table,” ICC-01/05-01/13-1524, T. Ch. VII, 14 December 2015, at 5, para. 7.

⁵⁶ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 14, lines 7-11.

⁵⁷ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 14, lines 7-14.

⁵⁸ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 14, lines 20-15; at 16, lines 14-19.

⁵⁹ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquiescement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, Opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-1263-AnxA, T. Ch. I, 16 July 2019, at 24, para. 35.

statement.⁶⁰ The Prosecution asked the expert to explain how he proceeded when he assessed these documents.⁶¹ The expert explained that he first “had to view the video to see, without being influenced by what other forensic experts had said, or the report of the witness's interview.”⁶² When he did so he became “immediately aware of the fact that only part of the video contained what one could see of the victim [Mr Yaya], and when it came to the trauma and injury, which was captured on the video.”⁶³ Secondly, he had taken the components of the video apart, “picture by picture and compared them with the description of the injury [described] in two [forensic] reports” that were provided to him.⁶⁴

2. The Prosecution requested that “the report and the documents having been referred to by the expert [including the video] be produced into evidence”.⁶⁵ It noted that the witness had already confirmed that he had seen the documents previously and that it would be a waste of time to show each document one by one during the hearing.⁶⁶

⊗ **The arguments of the Defence**

3. Counsel requested the Court to show the documents and videos to the expert so that he could clarify that those were the correct documents that would be produced in evidence.⁶⁷

⊗ **The Court's Response**

4. The Court agreed with the Prosecution that it was not necessary to show the documents, including the video, to the witness during the hearing and said “We will not waste time. It's okay, they're in.”⁶⁸

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

6. Judge Cuno Tarfusser held that the volume of evidence, including videos, documentary items and witnesses did not make a trial complex, but instead what mattered was “obviously the content and the quality of the material, as well as its relevance to the issue at stake.”⁶⁹

⁶⁰ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017 at 13, lines 17-18; at 14, lines 3-4.

⁶¹ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017 at 14, lines 4-5.

⁶² *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 14, lines 7-11.

⁶³ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 14, lines 7-11.

⁶⁴ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 14, lines 7-14.

⁶⁵ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 18, lines 8-12.

⁶⁶ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 18, lines 20-22.

⁶⁷ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017 at 18, lines 16-19.

⁶⁸ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, ICC-02/11-01/15-T-201-Red2-ENG, T. Ch. I, 11 October 2017, at 18, lines 23-14.

⁶⁹ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, Opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-1263-AnxA, T. Ch. I, 16 July 2019, at 24, para. 35.

7. The Judge considered that the evidence given by the experts were “irredeemable unsuitability to meaningful contribute to the trial by way of compelling conclusions which would be of any use to the Chamber.”⁷⁰

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

#excerpt #transcript #translation #date

EXTRAPOLATION

- **Instead of video excerpts, the video should be submitted in its entirety to assist the Court to contextualise the portions identified by the party seeking admission as being most relevant.**⁷¹
- **Video should be submitted with a full transcript and a translation. Depending on the stage of the proceedings, the Court may order the Registry to prepare a full transcript and/or a translation.**⁷²
- **The late transcription and/or a translation of a document may have no bearing on the upcoming closure of the presentation of evidence.**⁷³
- **(Evidence 1) In response to a party tendering a video, an opposing party may tender the additional excerpts to assist the Court in contextualizing the portions sought to be admitted.**⁷⁴
- **(Evidence 2) The tendering party should sufficiently demonstrate that the proposed evidence is unique and goes beyond other evidence on the record to be admitted.**⁷⁵
- **(Evidence 3) When a witness appears on a video that the party intends to tender into evidence, the relevant video (or excerpts) should be tendered through the witness during the examination-in-chief and not through the bar table. Given the length of videos, the Court may grant an additional time for the examination-in-chief of a witness.**⁷⁶

⁷⁰ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Reasons for oral decision of 15 January 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, Opinion of Judge Cuno Tarfusser, ICC-02/11-01/15-1263-AnxA, T. Ch. I, 16 July 2019, at 25, para. 36.

⁷¹ *Prosecutor v. Bosco Ntaganda*, Decision on second Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2240, T. Ch. VI, 21 February 2018, at 8, para. 10.

⁷² *Prosecutor v. Bosco Ntaganda*, Decision on second Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2240, T. Ch. VI, 21 February 2018, at 8, para. 10.

⁷³ *Prosecutor v. Bosco Ntaganda*, Decision on second Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2240, T. Ch. VI, 21 February 2018, at 8, para. 10.

⁷⁴ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 7-8, para. 15.

⁷⁵ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 10, para. 21.

⁷⁶ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 12, para. 23.

- **The reliability of a video may be proven through a witness who commented upon the video.⁷⁷**
- **If a party wishes to present a video to a witness, it must establish that the witness has personal knowledge of the making of the recording or its contents by playing a brief excerpt of the video to the extent strictly necessary for the witness to confirm his/her personal knowledge of it.⁷⁸**
- **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.⁷⁹**
- **The party seeking admission should provide “substantiation of the time when the video is supposed to have been shot.”⁸⁰**
- **If the party fails to provide any substantiation of the time when the video was shot, the video may be considered of low probative value and this might be outweighed by the prejudice that admission of the video would cause, resulting in the video not being admissible.⁸¹**

⊗ **The arguments of the Defence**

1. “On 5 February 2018, the defence team for Mr Ntaganda filed a request for the admission into evidence of 20 items from the bar table (‘Request’). It submits that the documents, which largely address events that are contextual, are prima facie reliable and probative of relevant facts.”⁸² “Seven excerpts of Document 8, DRC-OTP-1002-0014 [a video], are submitted together with their corresponding transcript and translation, Document 9, DRC-D18-0001-6623. The Defence avers that these excerpts are footage partly broadcast in June 2003 which provide context to the security situation in and around Bunia following the arrival of the Artémis forces.”⁸³

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

3. Evidence 1: “The Defence tendered into evidence four excerpts of video DRC-OTP-0127-0064 citing together with their related transcriptions DRC-OTP-0165-027626 and translations DRC-OTP-0165-0349. The Defence submits that the video depicts a ceremony during which ranks were given out to FPLC soldiers in the presence of FNI and Lendu community leaders and related

⁷⁷ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016, ICC-01/04-02/06-1802-Red, T. Ch. VI, 24 February 2017, at 11, paras 24-25.

⁷⁸ *Prosecutor v. Bosco Ntaganda*, Decision on the conduct of proceedings, ICC-01/04-02/06-619, T. Ch. VI, 2 June 2015, at 19, para. 56.

⁷⁹ *Prosecutor v. Bosco Ntaganda*, Decision on the conduct of proceedings, ICC-01/04-02/06-619, T. Ch. VI, 2 June 2015, at 19, para. 56.

⁸⁰ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, ICC-01/04-02/06-1838, 28 March 2017, at 29, para. 63.

⁸¹ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, ICC-01/04-02/06-1838, 28 March 2017, at 29, para. 63.

⁸² *Prosecutor v. Bosco Ntaganda*, Decision on second Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2240, T. Ch. VI, 21 February 2018, at 3, para. 11, , citing *Prosecutor v. Bosco Ntaganda*, Second Defence Request for the admission of evidence from the bar table, ICC-01/04-02/06-2208-Conf, T. Ch. VI, 5 February 2018, paras. 16-17; and its confidential Annex A (ICC-01/04-02/06-2208-Conf-AnxA).

⁸³ *Prosecutor v. Bosco Ntaganda*, Decision on second Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2240, T. Ch. VI, 21 February 2018, at 7, para. 10, citing *Prosecutor v. Bosco Ntaganda*, Second Defence Request for the admission of evidence from the bar table, ICC-01/04-02/06-2208-Conf, T. Ch. VI, 5 February 2018, paras. 16-17; and its confidential Annex A (ICC-01/04-02/06-2208-Conf-AnxA), at 7-8.

events in Katoto and is illustrative of Mr Ntaganda's efforts to reach out to the Lendu community and to promote reconciliation."⁸⁴

4. Evidence 2: "The Defence tenders into evidence two excerpts of video DRC-D18-0001-0425, a press conference following the signing of the *cessez le feu* agreement between the UPC and the RCDGoma dated February 2003, together with their related translations. It submits that the speech by Thomas Lubanga depicted therein, given in Mr Ntaganda's presence, demonstrates the UPC/FPLC's efforts towards peace and reconciliation with all communities."⁸⁵

5. Evidence 3: "The Defence tenders into evidence four excerpts of video DRC-D18-0001-043657 and five excerpts of video DRC-OTP-0118-000258 and their related transcriptions and translations. It submits the videos, depicting a ceremony in Langu in 2004 (...) which demonstrates Mr Ntaganda's successful efforts to (...) promote reconciliation. The Defence further notes that, considering that Witnesses D-0305 and D-0306 were present during the event depicted on the videos, they could be understood as related to these videos; however, in the interests of efficiency, it requests that it be permitted to tender the proposed excerpts from the bar table, on the understanding that some portions of the videos will be shown to the witnesses during their examination-in-chief."⁸⁶

6. The Defence also submitted that Materials (Sketch, Document and Videos) used with a Witness "lack sufficient indicia of reliability and as such, ought not to be admitted under Rule 68(2)(c) of the Rules."⁸⁷

7. Furthermore, the Defence objected to the submission by the Prosecution of three audio/visual recordings "on grounds including that they contain factual information prejudicial to the accused which outweighs any probative value."⁸⁸

⊗ The arguments of the Prosecution

8. On the Defence's request to admit into evidence seven excerpts of a video, "the Prosecution argues that the excerpts tendered by the Defence are too selective and that it would be more appropriate for the entire video to be admitted, a proposal not opposed by the Defence."⁸⁹

9. On the Defence's request to admit into evidence videos during the sentencing proceedings:

10. Evidence 1: "While not opposing the admission of the excerpts proposed by the Defence, the Prosecution requests that, should the Chamber admit them into evidence, it should also grant the admission of two extensions of two of the excerpts, so that the Chamber can properly evaluate the nature of the event depicted therein and the related Defence submissions. The Prosecution

⁸⁴ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 7, para. 14.

⁸⁵ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 10, para. 20.

⁸⁶ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 10-11, para. 22.

⁸⁷ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016, ICC-01/04-02/06-1802-Red, T. Ch. VI, 24 February 2017, at 9, para. 21.

⁸⁸ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution's request for admission of documentary evidence, ICC-01/04-02/06-1838, 28 March 2017, at 29, para. 62.

⁸⁹ *Prosecutor v. Bosco Ntaganda*, Decision on second Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2240, T. Ch. VI, 21 February 2018, at 7-8, para. 10, citing *Prosecutor v. Bosco Ntaganda*, Prosecution response to the "Second Defence request for the admission of evidence from the bar table", ICC-01/04-02/06-2223-Conf, T. Ch. VI, 12 February 2018, paras. 18-19; and ICC-01/04-02/06-2208-Conf-AnxA, at 7-15.

specifically submits that the further proposed excerpts illustrate the reason for the presence of Lendu leaders at the event depicted in the video.”⁹⁰

11. Evidence 2: “The Prosecution avers that the event depicted in the video has already been extensively dealt with during Mr Ntaganda’s testimony as well as in the Defence’s closing brief and that the Defence has already presented extensive evidence on – and the Chamber made factual findings in relation to – the UPC’s policy with respect to peace and ethnic reconciliation.”⁹¹

12. Evidence 3: “The Prosecution argues that the Defence’s request should be rejected *in limine*, as the Chamber already ruled that the excerpts are to be tendered during the allocated time for examination-in-chief of D-0305 and D-0306.”⁹²

13. “The Prosecution also avers that the Sketch, Document and Videos used with the Witness during his [REDACTED] are sufficiently reliable for admission in the Ntaganda case as the Witness authenticated and provided further information about them.”⁹³

14. The Prosecution sought admission of three audio/visual recordings [two of them are videos: DRC-OTP-0159-0441 is a video reportage on the presence of alleged child soldiers in Ituri; DRC-OTP-0082-0016 is a 1 hour 41 minute long video of, at time stamps 00:02:58 to 00:47:20, Mandro training camp purporting to show Chief Kahwa, Commander Kisembo and the accused].⁹⁴

⊗ The Court’s Response

15. On the Defence’s request to admit into evidence seven excerpts of a video, “the Chamber considers that it would be more appropriate to admit the video in its entirety, notably to assist in contextualizing those portions initially identified by the Defence as being most relevant. The Chamber further finds this video to be *prima facie* relevant, considers that it has probative value, and is satisfied that no undue prejudice arises from its admission in full. Accordingly, it admits Document 8 [video] into evidence. Under these circumstances, the Chamber finds it appropriate to be provided with a full transcription of the video and, in light of the current stage of the proceedings, instructs the Registry to prepare a transcript thereof, and/or a translation, as appropriate, which shall be admitted into evidence instead of Document 9. The Chamber therefore admits the full transcript of Document 8, (...) and, in this regard, clarifies that the remaining procedural steps identified in the disposition below [namely, the direction for the Registry to prepare a transcript and/or a translation, as appropriate, of Document 8, DRC-OTP-1002-0014] shall have no bearing on the upcoming closure of the presentation of evidence.”⁹⁵

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

17. Evidence 1: “In light of their content, and considering that the Prosecution does not dispute the authenticity of the video excerpts, the Chamber finds that the excerpts of video DRCOTP-0127-0064 proposed for admission into evidence by both parties are unique and go beyond other

⁹⁰ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 7, para. 14.

⁹¹ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 10, para. 20.

⁹² *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 10, para. 22.

⁹³ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016, ICC-01/04-02/06-1802-Red, T. Ch. VI, 24 February 2017, at 8, para. 19.

⁹⁴ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, ICC-01/04-02/06-1838, T. Ch. VI, 28 March 2017, at 29, para. 62.

⁹⁵ *Prosecutor v. Bosco Ntaganda*, Decision on second Defence request for admission of evidence from the bar table, ICC-01/04-02/06-2240, T. Ch. VI, 21 February 2018, at 8, para. 10.

evidence on the record and are prima facie relevant to the Chamber's assessment of Mr Ntaganda's conduct after the events forming part of the charges. Especially as concerns issues the Defence wishes to bring to the attention of the Chamber, and considers that their probative value has been sufficiently established. The Chamber also considers that the additional excerpts proposed by the Prosecution may assist the Chamber in contextualizing the portions sought to be admitted by the Defence. Furthermore, the Chamber is satisfied that no undue prejudice would arise from their admission. Accordingly, the Chamber admits the excerpts of video DRCOTP-0127-0064 as proposed by the Defence and the Prosecution and their related transcriptions and translations into evidence."⁹⁶

18. Evidence 2: "The Chamber considers that the Defence has not sufficiently demonstrated that the aforementioned proposed evidence is unique and goes beyond other evidence on the record. It specifically notes that, in its Judgment, the Chamber indeed dismissed arguments concerning the alleged genuineness of the message of peace and ethnic reconciliation of the UPC. In light of the foregoing, the Chamber decides not to admit the excerpts of video DRC-D18-0001-0425 tendered by the Defence and their related transcriptions and translations into evidence."⁹⁷

19. Evidence 3: "Considering the Defence's submission that Witnesses D-0305 and D-0306 appear on the videos extracts of which the Defence intends to tender into evidence, the Chamber considers it more appropriate – as already indicated in its previous ruling – that the excerpts be tendered during the examination-in-chief of the aforementioned witnesses. Considering further the length of the extracts to be tendered and the procedure for having videos admitted through witnesses, the Chamber grants the Defence's request for an additional 15 minutes for the examination-in-chief of Witnesses D-0305 and D-0306, respectively, and rejects its request for admission of the tendered excerpts of DRC-D18-0001-0436 and DRC-OTP-0118-0002 and their related transcriptions and translations from the bar table."⁹⁸

20. On the issue of the reliability of a video proven through a witness, the Chamber held that "the specific portions of the Videos were both used with the Witness and commented upon by him."⁹⁹ "In light of the above, the Chamber finds that the Materials bear sufficient indicia of reliability for the purposes of Rule 68(2)(c) of the Rules."¹⁰⁰

21. The Chamber declined to admit the video reportage on the presence of alleged child soldiers in Ituri [DRC-OTP-0159-0441] considering "the Prosecution has failed to provide any substantiation of the time when the video is supposed to have been shot (except for noting that the video was broadcast on 13 June 2003) and armed groups concerned, the Chamber considers the probative value of the video to be very low. The limited probative value is outweighed by the prejudice that admission of the video would cause."¹⁰¹

22. On the issue of the conduct of proceedings, the Chamber held that "[i]f a party wishes to present audio-visual material to a witness, it must establish that the witness has personal

⁹⁶ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 7-8, para. 15.

⁹⁷ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 10, para. 21.

⁹⁸ *Prosecutor v. Bosco Ntaganda*, Decision on requests for admission of evidence related to sentencing from the bar table, ICC-01/04-02/06-2402, T. Ch. VI, 13 September 2019, at 12, para. 23.

⁹⁹ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016, ICC-01/04-02/06-1802-Red, T. Ch. VI, 24 February 2017, at 11, para. 24.

¹⁰⁰ *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution application under Rule 68(2)(c) for admission of prior recorded testimony of Witness P-0016, ICC-01/04-02/06-1802-Red, T. Ch. VI, 24 February 2017, at 11, para. 25.

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

knowledge of the making of the recording or its contents. This may be achieved by playing a brief excerpt of the audio-visual material only to the extent strictly necessary for the witness to confirm his/her personal knowledge of it. Once this has occurred, the party may play the excerpt(s) of the recording it intended to present to the witness. Regardless of whether the party is allowed to present such recordings to a witness, the audio-visual material itself will not be considered for the truth of its contents unless it is admitted into evidence.”¹⁰²

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

#corroboration #newsreport #journalism #relevance #probativevalue

EXTRAPOLATION

- **Videos that are only partially not in a working language of the Court and are not translated, can be submitted on condition that the tendering party will provide translation into a working language of the Court.¹⁰³ The access of the party to the tendered videos allows that party to comment on the videos’ relevance and probative value in relation to what the tendering party purported to utilize them for.¹⁰⁴**

⊗ The arguments of the Prosecution

1. Video footage of locations in Northern Uganda, following attacks perpetrated by the LRA, was introduced by the OTP, which obtained it from the Ugandan and international media organisations.¹⁰⁵ The prosecution stated: “Evidence [including video evidence] is relevant. It contains information on the background, existence and nature of the armed conflict. The submitted items [including video] identify the LRA as an armed group involved in the conflict in Northern Uganda. They contain information on crimes perpetrated by the LRA against civilians. The items also corroborate evidence that will be presented to the Chamber by witnesses who will provide oral testimony at trial.”¹⁰⁶

2. According to the Prosecution, “the evidence was probative and had sufficient indicia of reliability. Items include open source materials that were created contemporaneously to the charges, at a time before International Criminal Court proceedings were contemplated. Several items were generated by local media organisations with particular knowledge of the conflict” or “by well-known media organisations with a global presence.”¹⁰⁷

¹⁰² *Prosecutor v. Bosco Ntaganda*, Decision on the conduct of proceedings, ICC-01/04-02/06-619, T. Ch. VI, 2 June 2015, at 19, para. 56.

¹⁰³ *Prosecutor v. Dominic Ongwen*, Decision on Defence Request regarding the Evidentiary Regime, ICC-02/04-01/15-1546, T. Ch. IX, 19 June 2019, at 3, para 1.

¹⁰⁴ *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, T. Ch. IX, 28 March 2017, at 21-2, para 48.

¹⁰⁵ *Prosecutor v. Dominic Ongwen*, Prosecution’s request to submit 1006 items of evidence from the ‘bar table’, ICC-02/04-01/15-654, T. Ch. IX, 16 January 2017, at 8, para. 22.

¹⁰⁶ *Prosecutor v. Dominic Ongwen*, Prosecution’s request to submit 1006 items of evidence from the ‘bar table’, ICC-02/04-01/15-654, T. Ch. IX, 16 January 2017, at 8, para 22.

¹⁰⁷ *Prosecutor v. Dominic Ongwen*, Prosecution’s request to submit 1006 items of evidence from the ‘bar table’, ICC-02/04-01/15-654, T. Ch. IX, 16 January 2017, at 8-9, para 23.

⊗ The arguments of the Defence

3. The Defence claimed that the “descriptions of some of the contents of the videos and audios do not match the contents indicated by the Prosecution in its annex.” Thus, the Defence argued that it could not “properly respond to the relevance and probative value where the material does not reflect what is purported and this prejudiced the Defence.”¹⁰⁸

4. The Defence argued that “news reports should be approached with caution as standards of proof for the purposes of journalism are not to the same level as for criminal trials. If the Prosecution wants to submit the accounts contained in these news reports, then it should have independently interviewed the persons concerned.” Regarding videos produced by Ugandan media sources, the Defence argued that “it must be recalled that the context was that of a conflict. The aphorism “in war the first casualty is the truth” is relevant to assessing the probative value of material generated by the news media that was protected by one party to the conflict.”¹⁰⁹

5. Finally, the Defence stated that “many items have been provided which lack transcripts in one of the official languages of the Court linked to the item. Neither the Chamber nor most members of Mr Ongwen’s Defence can understand the material and thereby evaluate its veracity or indeed even content.”¹¹⁰

⊗ The Court’s Response

6. The Chamber stated that the “items of evidence will be recognised as formally submitted during the trial and consideration of their relevance, probative value, and potential prejudice would be deferred until the judgment.”¹¹¹

7. Regarding the transcripts in one of the official languages of the Court, the Chamber noted that “several of the items the Defence points to can be understood in English.”¹¹² The Chamber also noted that “much of the material the Defence points to, and which cannot be understood in English, are only partially not in a working language of the Court. In many cases, only minor intelligible portions of the materials are not translated. However, the Chamber, and the participants, must be in a position to thoroughly understand the evidence. Thus, the Chamber deems it appropriate to recognise the un-translated materials objected to by the Defence as submitted conditional on the provision of translation into a working language of the Court.”¹¹³

8. Moreover, the Chamber was not convinced by the Defence’s argument that the contents do not match the Prosecution’s description, which according to the Chamber were in themselves comments on the relevance and probative value of the materials.¹¹⁴ The Chamber pointed out that

¹⁰⁸ *Prosecutor v. Dominic Ongwen*, Defence Response to “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’” 02/04-01/15-701, with confidential Annex A and public Annexes B and C (ICC-02/04-01/15- 654), ICC-02/04-01/15-701, T. Ch. IX, 7 February 2017, at 5, para. 12.

¹⁰⁹ *Prosecutor v. Dominic Ongwen*, Defence Response to “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’” 02/04-01/15-701, with confidential Annex A and public Annexes B and C (ICC-02/04-01/15- 654), ICC-02/04-01/15-701, T. Ch. IX, 7 February 2017, at 5-6, para. 13.

¹¹⁰ *Prosecutor v. Dominic Ongwen*, Defence Response to “Prosecution’s request to submit 1006 items of evidence from the ‘bar table’” 02/04-01/15-701, with confidential Annex A and public Annexes B and C (ICC-02/04-01/15- 654), ICC-02/04-01/15-701, T. Ch. IX, 7 February 2017, at 6, para. 14.

¹¹¹ *Prosecutor v. Dominic Ongwen*, Decision on Defence Request regarding the Evidentiary Regime, ICC-02/04-01/15-1546, T. Ch. IX, 19 June 2019, at 6, para 9.

¹¹² *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, T. Ch. IX, 28 March 2017, at 6, para 9.

¹¹³ *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, T. Ch. IX, 28 March 2017, at 6, para 9.

¹¹⁴ *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, T. Ch. IX, 28 March 2017, at 21-2, para 48.

Defence had “access to the documents and was able to comment on their relevance and probative value in relation to what the Prosecution purported to utilize them for. Thus, the Prosecution’s Pre-Trial Brief and the factual details of the confirmed charges provided the Defence with ample detail to make the relevant arguments.”¹¹⁵

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

#stand-alonevideo #corroboration #content

EXTRAPOLATION

- **The Court can make an inference from the content of the video to the extent the video allows to make a definite finding.**¹¹⁶

⊗ The arguments of the Prosecution

1. The Prosecution relied “on a number of video excerpts to establish that some of the UPC/FPLC recruits were “visibly” under the age of 15.”¹¹⁷

⊗ The arguments of the Defence

2. The Defence rejects this by stating that “it is impossible to distinguish reliably between a 12 or 13 year-old and a 15- or 16-year-old on the basis of a photograph or video extract alone.”¹¹⁸

⊗ The Court’s Response

3. “Given the undoubted differences in personal perception as regards estimates of age and, most particularly in the context of this case, the difficulties in distinguishing between young people who are relatively close to the age of 15 (whether above or below), the Chamber has exercised caution when considering this evidence. Even allowing for a wide margin of error in assessing an individual’s age, the Chamber has concluded that it is feasible for non-expert witnesses to differentiate between a child who is undoubtedly less than 15 years old and a child who is undoubtedly over 15.”¹¹⁹

4. “The Chamber accepts that for many of the young soldiers shown in the video excerpts, it is often very difficult to determine whether they are above or below the age of 15.”¹²⁰ However, the Chamber also “observes that there are children who could be under the age of 15 but they appear too briefly [in a video] to enable a definite finding.”¹²¹ “Instead, the Chamber has relied on video

¹¹⁵ *Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Request to Submit 1006 Items of Evidence, ICC-02/04-01/15-795, T. Ch. IX, 28 March 2017, at 21-2, para 48.

¹¹⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 377, fn. 2432.

¹¹⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 292, para. 644.

¹¹⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 292, para. 644; See also *Prosecutor v. Thomas Lubanga Dyilo*, Closing submissions of the Defence, ICC-01/04-01/06-2773-Red-tENG, T. Ch. I, 15 July 2011, at 221, para. 704.

¹¹⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 292, para. 643.

¹²⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 292, para. 644.

¹²¹ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 377, fn. 2432.

evidence in this context only to the extent that they depict children who are clearly under the age of 15.”¹²²

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

#belateddisclosure #transcripts #translation #originality #integrity #relevance

EXTRAPOLATION

- **A video is only disclosed to the Defence from the moment it can fully understand what its precise content is. It will only be possible for the Defence to fully understand the contents of a video after: the relevant persons appearing in the recording have, to the extent possible, been identified; the location(s) of the recording has or have been indicated as precisely as possible; the date and time of the recording has or have been indicated as precisely as possible; the audible spoken words and visible written texts have, to the extent that they are relevant to the evidence, been translated into one of the working languages of the Court.**¹²³
- **A video, its transcript and translation must be seen as forming integral parts of the same item of evidence.**¹²⁴
- **Until the transcript and the necessary translations into one of the working languages of the Court have been provided to the Defence, the Prosecution has not complied with its disclosure obligations and its obligations under regulation 39(1) of the Regulations.**¹²⁵
- **Labour-intensiveness of transcribing and translating video material is not an “exceptional circumstance” in the sense of regulation 35(2) (last sentence) but may constitute a “good cause” in the sense of regulation 35(2) (first sentence).**¹²⁶
- **Because a video, its transcript and translation must be seen as forming integral parts of the same item of evidence, it would be incoherent to impose restrictions on one, but not the other.**¹²⁷

¹²² *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, at 292, para. 644.

¹²³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 5, para. 9.

¹²⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 9, para. 13.

¹²⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 9, para. 13.

¹²⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 6-7, paras. 7-8.

¹²⁷ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 10, para. 18.

- The interest of the Chamber in receiving the transcripts and translations after the deadline in order to understand the original videos may outweigh their late submission.¹²⁸
- A video may be disclosed after the deadline for disclosure to substitute the passages that overlap with a previously disclosed video if it is of superior quality. However, the Court may not admit the additional material that does not overlap if the party does not justify late disclosure under Regulation 35(2) of the Court Regulations.¹²⁹
- Evidence of “originality and integrity” must be provided before a video can be admitted into evidence.¹³⁰
- Evidence must be provided regarding the date and/or location of audio or video material, as their relevance depends on it.¹³¹

⊗ The arguments of the Prosecution

1. The Prosecution sought the belated disclosure of 25 transcripts and 14 translations of 25 videos as incriminating evidence.¹³² It argued that “it was not possible to finalise these transcripts and translations earlier because of the length of time required to undertake such a task.”¹³³ It added that “although these transcripts and translations are not yet disclosed, the actual videos were disclosed as incriminating evidence at least seven months prior to the commencement of the Trial¹³⁴ and that, “[a]ccordingly, the Defence has been well positioned to prepare its defence on the basis of the video footage already provided.”¹³⁵

2. The Prosecution also sought the belated disclosure of new incriminating video evidence that was recently obtained.¹³⁶ It determined that “the video footage within it mostly overlaps with” a

¹²⁸ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 10, para. 15.

¹²⁹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 11-12, paras. 20, 25.

¹³⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, T. Ch. II, 17 December 2010, at 19, para. 24.

¹³¹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions, ICC-01/04-01/07-2635, T. Ch. II, 17 December 2010, at 19, para. 24.

¹³² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions, ICC-01/04-01/07-1260, T. Ch. II, 30 June 2009, at 5, para. 7.

¹³³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions, ICC-01/04-01/07-1260, T. Ch. II, 30 June 2009, at 5, para. 7.

¹³⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions, ICC-01/04-01/07-1260, T. Ch. II, 30 June 2009, at 5, para. 8.

¹³⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions, ICC-01/04-01/07-1260, T. Ch. II, 30 June 2009, at 5, para. 8.

¹³⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions, ICC-01/04-01/07-1260, T. Ch. II, 30 June 2009, at 6, para. 12.

video previously disclosed as incriminating evidence¹³⁷ but is of “superior video and audio quality” and contains “limited, but relevant, additional footage contained within it.”¹³⁸ It argued that “the Defence will not suffer prejudice from the addition of video” since much of the footage is contained in a video already disclosed; [i]f this application is granted, Defence will receive the video three months in advance of the Trial.”¹³⁹

3. The Prosecution also requested authorization “to make redactions to the transcript and translation” of a video that was previously disclosed with protective measures [voice distortions and redaction of name]. It argued that such redactions of the transcript and translation of the video should correspond to the protective measures obtained for the video “to ensure the continued effectiveness of the protective measures applied to the video.”¹⁴⁰

4. The Prosecution tendered “into evidence five (5) video and audio recordings, as well as their transcripts and translations. The video recordings submitted with this motion are prima facie reliable: the images they show are clear and understandable; the date and location of filming, as well as the individuals captured on them, are easily discernible. These videos depict, for the most part, the aftermath of attacks or show various political actors active in Ituri. They are relevant to establish the historical context of the armed conflict. Finally, some of the video and audio recordings originate from MONUC or Radio Candip/RTNC and were either publicly broadcast or are otherwise publicly available”.¹⁴¹ The Prosecution also argued that even though many of the submitted “videos related to the historical contextual and background elements of the case, are not in dispute, and have been subject to an agreement – albeit partial- between the parties (...) the Defence remains in a position to challenge this evidence through means other than calling their authors to testify, such as the examination of other witnesses or adducing documentary evidence. Pursuant to the applicable law, the fact that evidence is proffered without accompanying witness testimony does not cause per se a prejudice to the Defence”.¹⁴²

⊗ The arguments of the Defence

5. In light of the case’s procedural history, the Defence submitted that “the Prosecution has had ample time since the start of the case against Mr Katanga, 20 months ago, to disclose all its

¹³⁷ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions, ICC-01/04-01/07-1260, T. Ch. II, 30 June 2009, at 6, para. 13.

¹³⁸ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions, ICC-01/04-01/07-1260, T. Ch. II, 30 June 2009, at 7, para. 14.

¹³⁹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions, ICC-01/04-01/07-1260, T. Ch. II, 30 June 2009, at 7, para. 15.

¹⁴⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions, ICC-01/04-01/07-1260, T. Ch. II, 30 June 2009, at 8, para. 19.

¹⁴¹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution’s Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute, ICC-01/04-01/07-2290, T. Ch. II, 16 July 2010, at 9, para. 31.

¹⁴² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution’s Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute, ICC-01/04-01/07-2290, T. Ch. II, 16 July 2010, at 9, para. 19.

incriminating videos and their corresponding transcripts and translations.”¹⁴³ “The Defence, which has had some experience translating documents (there is no general translation facility provided to the Defence) is sceptical of the OTP’s arguments about the average time necessary to transcribe videos. Even if these times are accurate the Prosecution must have been aware of the facilities available to it after so many years.”¹⁴⁴ It submitted that “the current Prosecution’s request concerns too many documents and is too late”¹⁴⁵ and that “the Prosecution should have anticipated the amount of work required by the transcripts and translations of videos and organised its resources in consequence in order to respect the imperative deadlines set in the Chamber’s Order [...] and in the Decisions on the disclosure of the Table of Incriminating Evidence.”¹⁴⁶ The “Prosecution’s Application does not demonstrate good cause but, instead, reveals that the Prosecution has not displayed enough diligence. It should have been prepared to disclose the transcripts and translations of the videos by the time it was required to file its List of Incriminating Evidence.”¹⁴⁷

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

7. Finally, the Defence objected to the belated disclosure of a new incriminating video evidence “because it is proposed to submit it after the initial deadline for the disclosure of incriminating material and because of its limited relevance.” It underlined that the Prosecution has “already disclosed a video which includes most parts of this new video”. Additionally, the Defence noted that “the Prosecution intends to interview the witness who has provided the new video, to authenticate it and obtain certain clarification regarding its contents, which would lead to the disclosure of further material (transcript and eventual translation of this interview) to the Defence. Thus, in light of the near date of the trial, the submission should be denied.”¹⁴⁸

8. In response to the Prosecution’s motion seeking admission of 122 videos/audios, the Defence stated: “[v]ideo recordings should be used with the witnesses that can comment on them. 60 And whilst videos may be admitted into evidence, the oral and/or written commentary should not form part of that evidence. With regard to the authenticity of the videos, mention must be made of their date, their author, their source, and their chain of custody. Also, the footage must be

¹⁴³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Defence Objections to the Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260), ICC-01/04-01/07-1284, T. Ch. II, 9 July 2009, at 5, para. 10.

¹⁴⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Defence Objections to the Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260), ICC-01/04-01/07-1284, T. Ch. II, 9 July 2009, at 5, para. 11.

¹⁴⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Defence Objections to the Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260), ICC-01/04-01/07-1284, T. Ch. II, 9 July 2009, at 6, para. 13.

¹⁴⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Defence Objections to the Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260), ICC-01/04-01/07-1284, T. Ch. II, 9 July 2009, at 6, para. 14.

¹⁴⁷ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Defence Objections to the Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260), ICC-01/04-01/07-1284, T. Ch. II, 9 July 2009, at 6, para. 15.

¹⁴⁸ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Defence Objections to the Prosecution’s Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and Translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260), ICC-01/04-01/07-1284, T. Ch. II, 9 July 2009, at 6, para. 16.

complete insofar as it must not be an extract (if extracted, the Prosecution must show whether the full footage is available and who extracted the parts).”¹⁴⁹

⊗ The Court’s Response

9. The Court allowed the late submission of transcripts and translations of the 25 videos.¹⁵⁰ However, it made extensive considerations on the matter. It considered the Defence’s allegation that the delay was due to a lack of diligence to be unfounded because the Court “has to operate with finite means, which, in this case, may translate into a limited capacity of the Prosecution for generating transcripts and translations.”¹⁵¹ However, the Chamber stressed “that a persistent lack of resources can never be an excuse for not complying with legal obligations or not respecting deadlines, much less for ignoring the rights of the Defence to have adequate time for preparation and to be tried without undue delay”¹⁵² and that the fact that “transcribing and translating video material is especially time consuming, cannot be considered as an ‘exceptional circumstance’” for the purposes of the exception of regulation 35(2) (last sentence).¹⁵³ Limited resources and labour-intensiveness can constitute “good cause” in the sense of regulation 35(2) (first sentence) but noted that “no mention of forthcoming transcripts or translations was made [by the Prosecution] in the relevant disclosure notes” that “did not even indicate clearly that such transcripts and translations were still missing and forthcoming.”¹⁵⁴

10. Also, the Chamber expressed concern that, “although the videos were disclosed before the time limit, they were provided to the Defence without a transcript or translation”, wondering “to what extent the Defence has been able, as the Prosecution alleges, to usefully exploit these videos”. The Chamber has itself examined a sample of the videos and found it extremely difficult to understand their precise content without the transcript and translation.”¹⁵⁵

11. The Court considered that “a video is only disclosed to the Defence from the moment it can fully understand what its precise content is [...] [I]n most cases, it will only be possible for the Defence to fully understand the contents of a video after: (1) the relevant persons appearing in the recording have, to the extent possible, been identified; (2) the location(s) of the recording has or

¹⁴⁹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Katanga Defence Response to Prosecution Bar Table Motion, ICC-01/04-01/07-2348, T. Ch. II, 30 August 2010, at 14, para. 45.

¹⁵⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 10, para. 15.

¹⁵¹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 5, para. 5.

¹⁵² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 6, para. 6.

¹⁵³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 6, para. 7.

¹⁵⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 7, para. 8.

¹⁵⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 5, para. 9.

have been indicated as precisely as possible; (3) the date and time of the recording has been indicated as precisely as possible; and (4) the audible spoken words and visible written texts have, to the extent that they are relevant to the evidence, been translated into one of the working languages of the Court.”¹⁵⁶

12. The Chamber noted that “there are several ways in which the Prosecution can provide this information [about a video] to the parties and the Chamber. For example, the videos could have sub-titles or spoken commentary. In the present case, the Prosecution chose to rely on transcripts and the translation thereof in order to comply with its disclosure obligations.”¹⁵⁷

13. The Chamber concluded that “the transcripts and translations form an integral part of the video and must for that reason be considered as constituting one and the same piece of evidence – when one is missing, the evidence is not complete. Therefore, until the transcript and the necessary translations into one of the working languages of the Court have been provided to the Defence, the Prosecution has not complied with its disclosure obligations and its obligations under regulation 39(1) of the Regulations.”¹⁵⁸

14. However, the Court noted that “neither of the Defence teams raised its voice when the [25] videos were initially disclosed without transcript or translation, and only one of the Defence teams [Defence for Mr. Katanga] has responded to the Application. The Defence for Mr. Katanga requests for the Application to be denied but does not seem to object to the continued reliance of the Prosecution on the 25 videos in question”.¹⁵⁹ [no reasoning given as to why did not object].

15. Therefore, the Chamber was in a position “where it is requested to reject the submission of the transcripts and translations as being unjustifiably late, while the videos would still remain on the List of Incriminating Evidence. Given that the Chamber needs the transcripts and translations in order to understand the original videos, it considers that it has a proper interest in receiving the transcripts and translations and therefore allows their submission.”¹⁶⁰

16. Furthermore, the Chamber allowed for the redactions of the transcript and translation of the video. The Court considered that “this request [apply the same protective measures with regard to the transcript and translation of the video as it was authorized to apply to the video itself] is a logical consequence of the protective measures it authorized with regard to the video. It held that

¹⁵⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the “Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”, ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 8-9, para. 11.

¹⁵⁷ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the “Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”, ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 9, para. 12.

¹⁵⁸ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the “Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”, ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 9, para. 13.

¹⁵⁹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the “Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”, ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 9, para. 14.

¹⁶⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the “Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)”, ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 10, para. 15.

“a video, its transcript and translation must be seen as forming integral parts of the same item of evidence. It would therefore be incoherent to impose restrictions on one, but not the other.”¹⁶¹

17. Regarding the additional disclosure of new incriminating video evidence, the Court allowed the late disclosure of the passages of the video that overlap with the video that was already disclosed because it agreed that it is of better audio-visual quality than the previous one and considered that it would “be to the benefit of all parties and the Chamber itself if the video material is of better quality.”¹⁶² However, it did not admit the additional material as the fact that the Prosecution did not obtain the video before the disclosure deadline “was mainly a consequence of the Prosecution’s continuing investigation [...]”¹⁶³

18. Additionally, the Court stated that “the Prosecution must either show that the new evidence is more compelling than evidence already disclosed to the Defence, or that it brings to light previously unknown facts which have a significant bearing upon the case.”¹⁶⁴ However, the Prosecution did not provide a transcript and translation of the new video¹⁶⁵ and therefore, “the Chamber is not in a position to evaluate whether the new evidence [the portion of the footage which does not overlap with the existing one] is either more compelling than previously disclosed evidence or brings to light a significant new fact” and is “therefore unable to accept the request.”¹⁶⁶

19. In relation to the arguments raised by Prosecution and the Defence regarding the admission of 122 videos/audios, the Chamber held that “[b]efore video [...] material can be admitted, the Chamber will require evidence of originality and integrity. However, once this has been established, this type of exhibit may often be admitted as evidence “that speaks for itself and may be regarded, in this respect, as real evidence. Since the relevance of [...] video material depends on the date and/or location of recording, evidence must be provided in this regard.”¹⁶⁷

¹⁶¹ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 10, para. 18.

¹⁶² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 11, para. 20.

¹⁶³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 12, para. 25.

¹⁶⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 15, para. 30.

¹⁶⁵ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 15, para. 31.

¹⁶⁶ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRCOTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", ICC-01/04-01/07-1336, T. Ch. II, 27 July 2009, at 15, para. 32.

¹⁶⁷ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions, ICC-01/04-01/07-2635, T. Ch. II, 17 December 2010, at 19, para. 24.

International Criminal Tribunal for Rwanda (ICTR)

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

#authenticity #chainofcustody #relevance

EXTRAPOLATION

- **Prima facie authenticity of videos may be indicated via the date or author on the video footage, information about the source and the chain of custody.**¹⁶⁸
- **For the video extract to be admitted, the video should be provided in full or the tendering party should indicate whether the full footage was available, or who had extracted the parts of the video.**¹⁶⁹
- **Videos originating from the news reports can be admitted if any accompanying comments made by the journalists will be disregarded by the Chamber.**¹⁷⁰

⊗ **The arguments of the Prosecution**

1. The Prosecutor wanted to admit several videos and reports from various origins. This material originated from various TV production companies and was *prima facie* authentic on viewing. It arguably amounted to a species of real evidence recording events as they occurred: it provided a snapshot of how things looked on the ground. Insofar as there may be commentary by journalists, the judges of the Chamber were invited to disregard its content where necessary.¹⁷¹

⊗ **The arguments of the Defence**

2. Mr. Nzirorera's Defence contends that there is no probative value to admitting a video of various scenes in Rwanda without them having been shown to a witness.¹⁷² Additionally, the Defence argued that "Trial Chambers have held that news reports lack sufficient indicia of reliability to be admitted at the ICTR and even the Special Court of Sierra Leone."¹⁷³

3. Matthieu Ngirumpatse's Defence noted that the Prosecution wishes to admit several videos and reports from various sources and is aware that the comments of the journalists cannot be entered into evidence, asking the Chamber to disregard them. "However, in the case of videos, it is not simply a matter of ignoring the commentary. It would be forgetting that a report also involves a choice of images and editing that may present information in a way that is completely different from the actual report. The Defence has already had to object to the introduction into evidence of a document which was presented as the speech of Prime Minister KAMBANDA and which included

¹⁶⁸ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, para. 22.

¹⁶⁹ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, para. 22.

¹⁷⁰ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor's Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, para. 35.

¹⁷¹ *Prosecutor v. Édouard Karemera et al.*, Prosecutor's Motion for Admission of Certain Materials Under Rule 89(C) of the Rules of Procedure and Evidence, ICTR-98-44-T, T. Ch. III, 26 November 2007, at 5, para. 14.

¹⁷² *Prosecutor v. Édouard Karemera et al.*, Joseph Nzirorera's Response to Prosecutor's Second Motion to Admit Exhibits from the Bar Table, ICTR-98-44-T, T. Ch. III, 3 December 2007, at 19, para. 99.

¹⁷³ *Prosecutor v. Édouard Karemera et al.*, Joseph Nzirorera's Response to Prosecutor's Second Motion to Admit Exhibits from the Bar Table, ICTR-98-44-T, T. Ch. III, 3 December 2007, at 19, para. 100.

comments and images which were not contemporaneous with the speech. In these circumstances, the Chamber is asked to reject these videos outright.”¹⁷⁴

4. Edouard Karemera’s Defence argued that, generally “[t]he examination of the documents reveals that in most cases the source of these documents is not specified, and when the source is specified, it is not reliable because the conditions for obtaining it are not specified.” Regarding the videos, it argued that their source was not indicated.¹⁷⁵ “The admissibility of documentary evidence requires the identification of its source to verify its authenticity and accuracy. It appears that the documents which the Prosecutor requests to be admitted into evidence, apart from the imprecision of their source, are neither original nor certified documents.”¹⁷⁶ Therefore, the Defence requested the Chamber to reject the Prosecutor’s request to admit the documents.¹⁷⁷

⊗ The Court’s Response

5. The Chamber stated that “[d]ocumentary evidence consists of documents produced as evidence for evaluation by the Tribunal. For the purposes of this case, the term ‘document’ is interpreted broadly, being understood to mean anything in which information of any description is recorded. This interpretation is wide enough to cover not only documents in writing, but also maps, sketches, plans, calendars, graphs, drawings, computerized records, mechanical records, electro-magnetic records, digital records, databases, sound tracks, audio-tapes, video-tapes, photographs, slides and negatives.”¹⁷⁸

6. The Chamber excluded a video that did not have sufficient indicia of authenticity. The Trial Chamber found that the Prosecutor had not made a “prima facie showing of its authenticity.” The Chamber noted that there was “no mention of the date or author on the video footage itself nor in the Prosecutor’s Motion”. Furthermore, the Chamber found that there was “no information about the source and the chain of custody.” Finally, the Chamber noted that “the video footage appeared to be an extract and the Prosecutor had not indicated whether the full footage was available, or who had extracted the parts submitted.”¹⁷⁹

7. The Chamber admitted three audio/video material constituting a contemporaneous recording of events from Insight News Television Limited and France 3.¹⁸⁰ It considered these documents relevant “as they depicted violence and killings in Rwanda, which were related to the issue of whether there was knowledge of the killings on the part of the government, and/or whether the relevant authorities exercised control.” However, the Chamber decided to disregard any accompanying comments made by the journalists.¹⁸¹

¹⁷⁴ *Prosecutor v. Édouard Karemera et al.*, Mémoire en réponse pour M. Ngirumpatse sur la ‘Prosecutor’s Motion for Admission of Certain Materials under the Rule 89(C) of the Rules of Procedure and Evidence’, ICTR-98-44-T, T. Ch. III, 4 December 2007, at 3, para. 8.

¹⁷⁵ *Prosecutor v. Édouard Karemera et al.*, Réponse à la Requête du Procureur tendant à faire admettre certains documents en preuve sous le régime de l’Article 89(C), ICTR-98-44-T, T. Ch. III, 4 December 2007, at 4.

¹⁷⁶ *Prosecutor v. Édouard Karemera et al.*, Réponse à la Requête du Procureur tendant à faire admettre certains documents en preuve sous le régime de l’Article 89(C), ICTR-98-44-T, T. Ch. III, 4 December 2007, at 5.

¹⁷⁷ *Prosecutor v. Édouard Karemera et al.*, Réponse à la Requête du Procureur tendant à faire admettre certains documents en preuve sous le régime de l’Article 89(C), ICTR-98-44-T, T. Ch. III, 4 December 2007, at 6.

¹⁷⁸ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, para 5.

¹⁷⁹ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, para. 22.

¹⁸⁰ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, para. 35.

¹⁸¹ *Prosecutor v. Édouard Karemera et al.*, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, ICTR-98-44-T, T. Ch. III, 25 January 2008, para. 35.

APPEALS

International Criminal Court (ICC)

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

#corroboration

EXTRAPOLATION

- There is no strict legal requirement that the video had to be corroborated by other evidence for the Court to be able to rely on them and establish a specific fact.¹⁸²
- Video images may be relied upon to establish the age of the depicted beyond the reasonable doubt.¹⁸³

⊗ The arguments of the Defence

1. Mr Lubanga's overarching argument is that it was unreasonable for the Trial Chamber to assess the age of individuals on the basis of video excerpts.¹⁸⁴ The Defence states that the video did not "allow discernment of the individual's facial features, precluding any verification in that regard,"¹⁸⁵ thus, "the Chamber manifestly misjudged the video excerpts it accepted as establishing the presence of child soldiers under the age of 15."¹⁸⁶

⊗ The arguments of the Prosecution

2. The Prosecutor argues that the Trial Chamber did not err and requests that the Appeals Chamber reject Mr Lubanga's arguments.¹⁸⁷ The Prosecutor argues that the approach of the Trial Chamber was reasonable because the Trial Chamber "was fully entitled to evaluate the videos and reach reasonable conclusions as to the age of the persons depicted on them"¹⁸⁸ and that the Trial Chamber itself noted that it had "exercised caution when considering this evidence."¹⁸⁹

¹⁸² *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A. Ch., 1 December 2012, at 81, para. 218.

¹⁸³ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A. Ch., 1 December 2012, at 83, para. 222.

¹⁸⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Requête de la Défense aux fins de présentation d'éléments de preuve supplémentaires dans le cadre des appels à l'encontre du « Jugement rendu en application de l'Article 74: du Statut » et de la « Décision relative à la peine, rendue en application de l'article 76 du Statut », ICC-01/04-01/06-2942-Red, A. Ch., 21 November 2012, paras 7-12, 19; *Prosecutor v. Thomas Lubanga Dyilo*, Transcript, ICC-01/04-01/06-T-363-Red-ENG (WT), A. Ch., 20 May 2014, at 6, line 10, to 8, line 25.

¹⁸⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Mr Thomas Lubanga's appellate brief against the 14 March 2012 Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2948-Red-tENG, A. Ch., 17 October 2014, at 51, para. 184; at 52, para. 186.

¹⁸⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Mr Thomas Lubanga's appellate brief against the 14 March 2012 Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2948-Red-tENG, A. Ch., 17 October 2014, at 52, para. 188.

¹⁸⁷ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A. Ch., 1 December 2012, at 73, para. 193.

¹⁸⁸ *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Response to Thomas Lubanga's Appeal against Trial Chamber I's Judgment pursuant to Article 74, ICC-01/04-01/06-2969-Red, A. Ch., 18 February 2013, at 70, para. 162.

¹⁸⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Response to Thomas Lubanga's Appeal against Trial Chamber I's Judgment pursuant to Article 74, ICC-01/04-01/06-2969-Red, A. Ch., 18 February 2013, at 73, para. 165.

3. Video images are routinely admitted as evidence in international tribunals because “the video footage contained therein will usually speak for itself”.¹⁹⁰ Judges in national jurisdictions have considered video evidence to be at least as reliable as eyewitness testimony. Testimony from lay witnesses is appropriate to assess age.¹⁹¹ There was accordingly no error in the Trial Chamber’s reasoning on the age of the child soldiers in the videos.¹⁹²

⊗ The Court’s Response

4. The Appeals Chamber found that “it is not *per se* impermissible to make a finding on the age element of the crimes in circumstances where the identity of the victim is unknown.”¹⁹³

5. The Appeals Chamber confirms that “there is no strict legal requirement that the video excerpts had to be corroborated by other evidence in order for the Trial Chamber to be able to rely on them. Depending on the circumstances, a single piece of evidence, such as a video image of a person, may suffice to establish a specific fact.”¹⁹⁴

6. In relation to the Prosecution’s argument that video evidence “speaks for itself”, the Appeal Chamber held that “[i]t is not generally at issue that video images may be relied upon to establish facts. Rather, the question is whether video images may be relied upon to establish the age of the individuals beyond reasonable doubt.”¹⁹⁵

7. Additionally, the Appeal Chamber confirmed “the Trial Chamber was indeed aware of the limitations of determining age on the basis of physical appearance, including video images, and expressed caution with regard to age assessment on that basis. It found, in relation to several individuals depicted in the video excerpts, that it was not convinced that they were under the age of fifteen years.”¹⁹⁶

International Criminal Tribunal for the Former Yugoslavia (ICTY)

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

#authenticity #corroboration

EXTRAPOLATION

- Videos may be found to be more reliable if they are corroborated by witness testimony and other evidence.¹⁹⁷

¹⁹⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74, ICC-01/04-01/06-2969-Red, A. Ch., 18 February 2013, at 70-71, para. 162.

¹⁹¹ *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74, ICC-01/04-01/06-2969-Red, A. Ch., 18 February 2013, at 72, para. 163.

¹⁹² *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s Response to Thomas Lubanga’s Appeal against Trial Chamber I’s Judgment pursuant to Article 74, ICC-01/04-01/06-2969-Red, A. Ch., 18 February 2013, at 73, para. 164.

¹⁹³ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A. Ch., 1 December 2012, at 73, para. 197.

¹⁹⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A. Ch., 1 December 2012, at 81, para. 218.

¹⁹⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A. Ch., 1 December 2012, at 82, para. 219.

¹⁹⁶ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, A. Ch., 1 December 2012, at 83, para. 222.

¹⁹⁷ *Prosecutor v. Zdravko Tolimir*, Judgement, IT-05-88/2-A, A. Ch., 8 April 2015, at 155, para. 373.

⊗ The arguments of the Prosecution

1. [The Prosecution’s arguments have not been found.]

⊗ The arguments of the Defence

2. Accused challenged “a video depicting a meeting with Mladic, which illustrated the Accused’s central role in Zepa, claiming it is not authentic.¹⁹⁸ The Defence challenged the authenticity of the video arguing that it contradicts the reasons of logic as it shows Tolimir in a civilian suit (which was like the suit he was wearing in Vienna and Dayton negotiations) while all others were in uniforms.

⊗ The Court’s Response

3. The Chamber held that “Tolimir challenges the authenticity of the video evidence [of Zepa] of his presence, but fails to show an error in the Trial Chamber’s reliance on that video, along with other evidence, including the eyewitness testimony of Witness Torlak, to conclude that Tolimir was present at the meeting.”¹⁹⁹

In this section:



14

Cases have been extrapolated



3

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



3

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

¹⁹⁸ *Prosecutor v. Zdravko Tolimir*, Public Redacted Version of The Consolidated Appeal Brief, IT-05-88/2-A, A. Ch., 28 February 2014, at 75, para. 321.

¹⁹⁹ *Prosecutor v. Zdravko Tolimir*, Judgement, IT-05-88/2-A, A. Ch., 8 April 2015, at 155, para. 373.