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

*Cases from the ICC, ICTR, ICTY, and STL*

as part of

## THE DIGITALLY DERIVED EVIDENCE PROJECT

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## Introduction

The Digitally Derived Evidence (DDE) project was launched in spring term of 2019, and sponsored by the Swiss Ministry of Foreign Affairs as of 1 January 2020, with the aim of outlining the evidentiary framework applicable to DDE in international criminal courts and tribunals, and international fact-finding missions.

The first phase of research analysed the treatment of digital evidence as expressly articulated in jurisprudence of international criminal tribunals and courts covering various evidentiary considerations such as reliability, authenticity, and provenance. The team quickly found, however, that final judgments only captured the most prominent or controversial elements of digital evidence, and therefore did not provide many examples from which to extrapolate guidelines for practitioners for the second stage of the project.

The following pages contain an excerpt of selected case summaries from the '*Analysis of Digitally Derived Evidence from the Jurisprudence of International Tribunals: Cases from the ICC, ICTR, ICTY, and STL*' Report. These case summaries track digital evidence from first introduction until final disposition to gain a deeper understanding of how courts and tribunals have incorporated digital evidence into their existing evidence regimes. To standardise the findings, the summaries cover the following information:

### I. Case Details

- Case name:
- Tribunal:
- Citation:

### II. Legal Background

- The legal system:
- The offense charged:
- Stage of the proceedings:

### III. Digitally Derived Evidence (DDE)

- Type of DDE
- Where the DDE was obtained?
- Who obtained the DDE?
- Discussion of evidentiary considerations. (Issues of authentication, preservation, hearsay etc.)

### IV. Court Analysis

- What arguments/findings was the DDE used to support?
- The reasoning of the court with respect to the DDE.
- Was the DDE admitted? Relied upon?

V. Legal Arguments

- Counsels' legal arguments surrounding DDE evidentiary considerations.
- The Court's response.

VI. Rules of Evidence

- Identify rules of evidence used in the case.
- How the identified rules of evidence were applied.

VII. Extrapolation

- Guideline(s) for practitioners from the case/transcript.

These case summaries give us a holistic understanding of the full life cycle of each piece of digital evidence and will allow us to extrapolate Practitioner Guidelines for various types of digital evidence.

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

## I. Case Details

- Case name: Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva (ICTR-98-41-T)
- Tribunal/Court: International Criminal Tribunal for Rwanda (“ICTR”)
- Citation + hyperlinks to the documents used

*Bagosora et al*, Redacted Transcript Trial Hearing, ICTR-98-41-T (TRA002392/2), 19 January 2004; Also these transcripts: 18 June 2003 - 8 July 2003 - 1 October 2003 - 6 November 2003 - 19 November 2003 - 2 December 2003 - 19 January 2004 - 23 January 2004 - 30 January 2004 - 6 February 2004 - 13 February 2004 - 16 February 2004 - 17 February 2004 - 8 June 2004 - 6 September 2004 - 16 September 2004 - 18 April 2005 - 25 April 2005 - 21 July 2005 - 26 July 2005/ 10 March 2006 - 7 June 2006 - 12 July 2006 - 13 October 2006;<sup>1</sup>

*Bagosora et al* (Prosecutor’s Motion for the Admission of Certain Materials under Rule 89(C) of the Rules of Procedure and Evidence) ICTR-98-41-T (28 April 2004);<sup>2</sup>

*Bagosora et al* (Prosecutor’s Response to Bagosora Defence Urgent Motion to Exclude Photocopies of Agenda Dated Monday, 19 February 2007) ICTR-98-41-T (26 February 2007).<sup>3</sup>

*Bagosora et al* (Defence for Kabiligi’s Response to “Prosecutor’s Motion for the Admission of Certain Materials under Rule 89(C) of the Rules of Procedure and Evidence”) ICTR-98-41-T (7 May 2004);<sup>4</sup>

*Bagosora et al* (Decision on Bagosora Motion to Exclude Photocopies of Agenda) ICTR-98-41-T (11 April 2007);<sup>5</sup>

*Bagosora et al* (Decision on the Prosecutor’s Motion for the Admission of Certain Materials under Rule 89(C)) ICTR-98-41-T (14 October 2004);<sup>6</sup>

*Bagosora et al* (Decision on Testimony by Video-Conference) ICTR-98-41-T (20 December 2004);<sup>7</sup>

*Bagosora et al* (Decision on the Prosecutor’s Request for Testimony of Witness BT via Video-Link) ICTR-98-41-T (8 October 2004).<sup>8</sup>

*Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007);<sup>9</sup>

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<sup>1</sup> All trial transcripts are available at: [https://jrad.irmct.org/result.htm#?&search=&texttype=&searchtype=&datefrom=&dateto=&datefiledfrom=&datefiledto=&source=&exhibit=&record=&lang=&witness=&type=&casenum=ICTR-98-41&organization=&accused=&extension=&fsearch=&fdatefrom=&fdateto=&fsource=&ftype=%22Transcript%22&flang=%22\\*English\\*%22&fororganization=&fcase=](https://jrad.irmct.org/result.htm#?&search=&texttype=&searchtype=&datefrom=&dateto=&datefiledfrom=&datefiledto=&source=&exhibit=&record=&lang=&witness=&type=&casenum=ICTR-98-41&organization=&accused=&extension=&fsearch=&fdatefrom=&fdateto=&fsource=&ftype=%22Transcript%22&flang=%22*English*%22&fororganization=&fcase=)

<sup>2</sup> This document is divided in three : <<https://jrad.irmct.org/view.htm?r=223763&s=>> <<https://jrad.irmct.org/view.htm?r=223764&s=>> <<https://jrad.irmct.org/view.htm?r=223765&s=>>

<sup>3</sup> <https://jrad.irmct.org/view.htm?r=223713&s=>

<sup>4</sup> <https://jrad.irmct.org/view.htm?r=217890&s=>

<sup>5</sup> <https://jrad.irmct.org/view.htm?r=223981&s=>

<sup>6</sup> <https://jrad.irmct.org/view.htm?r=218710&s=>

<sup>7</sup> <https://jrad.irmct.org/view.htm?r=219019&s=>

<sup>8</sup> <https://jrad.irmct.org/view.htm?r=218678&s=>

<sup>9</sup> <https://jrad.irmct.org/view.htm?r=223763&s=>

*Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007).<sup>10</sup>

*Bagosora et al* (Judgement and Sentence) ICTR-98-41-T (18 December 2008);<sup>11</sup>

*Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor* (Judgement) ICTR-98-41-A (14 Decembre 2011).<sup>12</sup>

## II. Legal Background

- The legal system: International Criminal Tribunal for Rwanda
- The crimes charged:
  - Gratien Kabiligi - Acquitted on all counts.
  - Théoneste Bagosora, Aloy Ntabakuze and Anatole Nsengiyumva:
    - Count 1: Conspiracy to Commit Genocide – Acquitted;
    - Count 2: Direct and Public Incitement to Commit Genocide – Acquitted;
    - Count 3: Genocide – Guilty;
    - Count 4: Crimes Against Humanity (Extermination, Persecution, Rape, Murder, Other Inhuman Acts) – Guilty;
    - Count 5: Serious Violation of Common Article 3 to the Geneva Conventions and Additional Protocol II (Violence to Life, Outrages upon Personal Dignity) – Guilty.
- Stage of the proceedings: Trial

## III. Digitally Derived Evidence (DDE)

- **Type of DDE**

**NB:** P stands for Prosecution; D stands for Defence.

### 1. **Photographs:**

- a. P55 (Cemetery);<sup>13</sup>
- b. P76B (Club with nail weapon);<sup>14</sup>
- c. P107 (Collection of 4 photographs - Building and road in Sonatubes);
- d. P111 (Collection of 9 Photographs - Memorial and locations in Nyanza);<sup>15</sup>
- e. P120A (House of Zigiranyirazo and the Presbyterian Church);<sup>16</sup>
- f. P120B (Intersection where a roadblock was erected);<sup>17</sup>

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<sup>10</sup> <https://irad.irmct.org/view.htm?r=224911&s=>

<sup>11</sup> <https://irad.irmct.org/view.htm?r=227464&s=>

<sup>12</sup> <https://irad.irmct.org/view.htm?r=231130&s=>

<sup>13</sup> *Bagosora et al* Redacted Transcript of 18/06/2003, ICTR-98-41 (TRA002007/1), 18 June 2003, p 31.

<sup>14</sup> *Bagosora et al* Redacted Transcript of 08/07/2003, ICTR-98-41 (TRA002033/1), 8 July 2003, p 45 and 84.

<sup>15</sup> *Bagosora et al* Redacted Transcript of 01/10/2003, ICTR-98-41 (TRA002114), 1 October 2003, p 13 and 47.

<sup>16</sup> *Bagosora et al* Redacted Transcript of 06/11/2003, ICTR-98-41 (TRA002169/2), 6 November 2003, p 9.

<sup>17</sup> *Bagosora et al* Redacted Transcript of 06/11/2003, ICTR-98-41 (TRA002169/2), 6 November 2003, p 9.

- g. P120C (Presbyterian Church);<sup>18</sup>
- h. P132 (Memorial with 17 names);<sup>19</sup>
- i. P134 (Collection of 9 Photographs of the Prime Minister's Residence and neighboring area);<sup>20</sup>
- j. P151 (Collection of 4 Photographs - Dead bodies);<sup>21</sup>
- k. P174 (Grenade Launcher);<sup>22</sup>
- l. P179 (Collection of 7 Photographs - Camp Kigali);<sup>23</sup>
- m. P184 (Image of a Russian Made Grenade Launcher);<sup>24</sup>
- n. P185 (Image of RGF Handled Automatic Pistols);<sup>25</sup>
- o. P186 (Collection of 3 Photographs - Landouald Ndasingwa and his family);<sup>26</sup>
- p. P187 (Collection of 4 Photographs - Family home of Landouald Ndasingwa);<sup>27</sup>
- q. P190 (Collection of Illustrations and Photographs of Military Armement);<sup>28</sup>
- r. P192 (Collection of 6 Photographs - Kanombe Camp);<sup>29</sup>
- s. P304 (Camp Kigali);<sup>30</sup>
- t. P305 (Camp Kigali aerial view);<sup>31</sup>
- u. P306 (Kanombe Camp Kigali aerial view);<sup>32</sup>
- v. P307 (Kimihurura aerial view);<sup>33</sup>
- w. P295A-C (Collection of 3 Photographs - Around Rubavu Hill);<sup>34</sup>
- x. P296 (Collection of 9 Photographs - Gisenyi Military Camp and neighborhood);<sup>35</sup>
- y. DK73 (Three persons purported to be French soldiers);<sup>36</sup>
- z. DNT83A; DNT83B (Photograph of Bashimiraho);<sup>37</sup>

<sup>18</sup> *Bagosora et al* Redacted Transcript of 06/11/2003, ICTR-98-41 (TRA002169/2), 6 November 2003, p 9.

<sup>19</sup> *Bagosora et al* Prosecutor's Final Trial Brief, ICTR-98-41-T, 1 March 2007, p 160.

<sup>20</sup> *Bagosora et al* Redacted Transcript of 19/11/2003, ICTR-98-41 (TRA002177/1), 19 November 2003, p 47-49.

<sup>21</sup> *Bagosora et al* Redacted Transcript of 2/12/2003, ICTR-98-41 (TRA004926), 2 December 2003, p 19-21.

<sup>22</sup> *Bagosora et al* Redacted Transcript of 30/01/2004, ICTR-98-41 (TRA002204/1), 30 January 2004, p 11-12.

<sup>23</sup> *Bagosora et al* Prosecutor's Final Trial Brief, ICTR-98-41-T, 1 March 2007, p 756.

<sup>24</sup> *Bagosora et al* Redacted Transcript of 13/02/2004, ICTR-98-41 (TRA002214/1), 13 February 2004, p 10-11.

<sup>25</sup> *Bagosora et al* Redacted Transcript of 13/02/2004, ICTR-98-41 (TRA002214/1), 13 February 2004, p 14-15.

<sup>26</sup> *Bagosora et al* Redacted Transcript of 13/02/2004, ICTR-98-41 (TRA002214/1), 13 February 2004, p 21-22.

<sup>27</sup> *Bagosora et al* Redacted Transcript of 13/02/2004, ICTR-98-41 (TRA002214/1), 13 February 2004, p 22.

<sup>28</sup> *Bagosora et al* Redacted Transcript of 16/02/2004, ICTR-98-41 (TRA002215/1), 16 February 2004, p 46

<sup>29</sup> *Bagosora et al* Redacted Transcript of 17/02/2004, ICTR-98-41 (TRA002216/1), 17 February 2004, p 80.

<sup>30</sup> *Bagosora et al* Redacted Transcript of 16/09/2004, ICTR-98-41 (TRA002541/1), 16 September 2004, p 11-14.

<sup>31</sup> *Bagosora et al* Redacted Transcript of 16/09/2004, ICTR-98-41 (TRA002541/1), 16 September 2004, p 14-15.

<sup>32</sup> *Bagosora et al* Redacted Transcript of 16/09/2004, ICTR-98-41 (TRA002541/1), 16 September 2004, p 15.

<sup>33</sup> *Bagosora et al* Redacted Transcript of 16/09/2004, ICTR-98-41 (TRA002541/1), 16 September 2004, p 15-16.

<sup>34</sup> *Bagosora et al* Redacted Transcript of 06/09/2004, ICTR-98-41 (TRA002725/2), 06 February 2004, p 38 and 42.

<sup>35</sup> *Bagosora et al* Redacted Transcript of 06/09/2004, ICTR-98-41 (TRA002725/2), 06 February 2004, p 38 and 42.

<sup>36</sup> <https://irad.irmct.org/result.htm#?&search=&texttype=&searchtype=&datefrom=&dateto=&datefiledfrom=&datefiledto=&source=&exhibit=&record=&lang=&witness=&type=&casenum=ICTR-98-41&organization=&accused=&extension=&fsearch=dk73&fdatefrom=&fdato=&fsource=&ftype=&flang=&fororganization=&fcase=>

<sup>37</sup> *Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) p 651.

- aa. DNT89 (Collection of 12 Photographs - St-André College and Charles Lwanga Church);<sup>38</sup>
- bb. DNT 97 (Collection of 3 Photographs - Ecole Supérieure Militaire);<sup>39</sup>
- cc. DNT126 (US Army Command and General Staff College Photo);<sup>40</sup>
- dd. DNT227 (Aloys Ntabakuze);<sup>41</sup>
- ee. DNS203 (Photograph P59 with witness markings);<sup>42</sup>
- ff. DB115 (Collection of 4 Photographs - Different Persons);<sup>43</sup>
- gg. DB355B (Collection of 13 Photographs - Buildings within Butotori Area).<sup>44</sup>

## 2. Satellite images

- a. P325 (Remera/ Kigali area);<sup>45</sup>
- b. P326 (Islamic Cultural Centre in Kigali).<sup>46</sup>

## 3. Videos

- a. P44 (Meeting between Bagosora and UNAMIR);<sup>47</sup>
- b. P109 (Massacre scenes at Nyanza);<sup>48</sup>
- c. P167 (High Commissioner Lasso Meeting);<sup>49</sup>
- d. P168A (Meeting between Bagosora, Dallaire and Kouchner) with transcripts;<sup>50</sup>
- e. P355 (President Compound);<sup>51</sup>
- f. P363 (Excerpt from “Rwanda: Finding a way Home” Insight News Television Limited);<sup>52</sup>
- g. P382 (Information about the event in the religious center in Kabgayi);<sup>53</sup>
- h. P393 (Rally Scenes);<sup>54</sup>
- i. P424A (Interview of Nsengiyumva in Gisenyi);<sup>55</sup>

<sup>38</sup> *Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) p 652.

<sup>39</sup> *Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) p 652.

<sup>40</sup> *Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) p 655.

<sup>41</sup> *Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) p 664.

<sup>42</sup> *Bagosora et al* Redacted Transcript of 10/07/2006, ICTR-98-41 (TRA003994/1), 10 July 2006, p 8-10.

<sup>43</sup> <https://irad.irmct.org/view.htm?r=197458&s=>

<sup>44</sup> *Bagosora et al* Redacted Transcript of 13/10/2006, ICTR-98-41 (TRA004952/1), 13 October 2006, p 20.

<sup>45</sup> *Bagosora et al* Redacted Transcript of 14/10/2004, ICTR-98-41 (TRA002585/1), 14 October 2004, p 29-31.

<sup>46</sup> *Bagosora et al* Redacted Transcript of 14/10/2004, ICTR-98-41 (TRA002585/1), 14 October 2004, p 29-31.

<sup>47</sup> *Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) p 312.

<sup>48</sup> *Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) p 311.

<sup>49</sup> *Bagosora et al* Redacted Transcript of 19/01/2004, ICTR-98-41 (TRA003137/2), 19 January 2004, p 59-61.

<sup>50</sup> *Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) p 314.

<sup>51</sup> *Bagosora et al* Redacted Transcript of 21/07/2005, ICTR-98-41 (TRA003134/2), 21 July 2005, p 47. (under seal).

<sup>52</sup> *Bagosora et al* Redacted Transcript of 26/07/2005, ICTR-98-41 (TRA002392/2), 26 July 2005, p 45. (under seal).

<sup>53</sup> *Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) p 311.

<sup>54</sup> *Bagosora et al* Redacted Transcript of 07/06/2006, ICTR-98-41 (TRA004727/1), 07 June 2006, p 32.

<sup>55</sup> *Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) p 315



- j. DK7 (Excerpt from “The Triumph of Evil” - by PBD Frontline);<sup>56</sup>
- k. DB70 (Interview General Dallaire - Excerpt from TV Programme Le Point);<sup>57</sup>
- l. DNT78 - DNT79 - DNT 80 (Videos of witnesses testimony in another case in ICTR).<sup>58</sup>

#### 4. **Stills images from videos**

- a. P108 (Extracted from DK7 - Military Green Vehicle);<sup>59</sup>
- b. P110A; P110B; P110C; P110D; P110E (Extracted from video P109 - Dead bodies in Nyanza);<sup>60</sup>
- c. P163 (Extracted from video P44 - Bagosora’s Face);<sup>61</sup>
- d. P164 (Extracted from video P167 - Bagosora and another man);<sup>62</sup>
- e. P165 (extracted from video P168A - Bagosora and another man);<sup>63</sup>
- f. P166 (extracted from video P167 - Collection of 7 images);<sup>64</sup>
- g. P176 (Extracted from video DK7 - Military Green Vehicle);<sup>65</sup>
- h. P362 (Extracted from video P363 - “Rwanda 1994. Compilation Sujets JT: TF1” - Jean Kambanda and his escort);<sup>66</sup>
- i. P404 (Kabgayi Cathedral).<sup>67</sup>

#### 5. **Voice recordings**

- a. P249 (Radio RTLM Broadcasts - 9 March; 2 and 3 April 1994);<sup>68</sup>
- b. DB274 (Speeches of Mr. Kambanda and Gatsinzi 10 April 1994);<sup>69</sup>
- c. NTABOLO14 (P317 Interview of Ntabakuze - KABIGRA-01 (Interview of Kabiligi) conducted by ICTR Investigators).<sup>70</sup>

#### 6. **Photocopies of Bagosora Agenda (P278)**

<sup>56</sup> *Bagosora et al* Redacted Transcript of 01/10/2003, ICTR-98-41 (TRA002114), 01 Octobre 2003, p 19.

<sup>57</sup> *Bagosora et al* Redacted Transcript of 23/01/2004, ICTR-98-41 (TRA002397/1), 23 January 2004, p 53.

<sup>58</sup> *Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) p 651.

<sup>59</sup> *Bagosora et al* Redacted Transcript of 01/10/2003, ICTR-98-41 (TRA002114), 01 Octobre 2003, p 22.

<sup>60</sup> *Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) p 415.

<sup>61</sup> *Bagosora et al* Redacted Transcript of 19/01/2004, ICTR-98-41 (TRA002392/2), 19 January 2004, p 8-9.

<sup>62</sup> *Bagosora et al* Redacted Transcript of 19/01/2004, ICTR-98-41 (TRA002392/2), 19 January 2004, 10-11.

<sup>63</sup> *Bagosora et al* Redacted Transcript of 19/01/2004, ICTR-98-41 (TRA002392/2), 19 January 2004, 11-12.

<sup>64</sup> *Bagosora et al* (Prosecutor’s Final Trial Brief) ICTR-98-41-T (1 March 2007) p 248

<sup>65</sup> *Bagosora et al* Redacted Transcript of 06/02/2004, ICTR-98-41 (TRA002392/2), 6 February 2004, p 5.

<sup>66</sup> *Bagosora et al* Redacted Transcript of 26/07/2005, ICTR-98-41 (TRA002392/2), 26 July 2005, p 45. (under seal).

<sup>67</sup> *Bagosora et al* Redacted Transcript of 12/07/2006, ICTR-98-41 (TRA003996/1), 12 July 2006, p 85.

<sup>68</sup> *Bagosora et al* Redacted Transcript of 08/06/2004, ICTR-98-41 (TRA002537/1), 8 June 2004, p 17-18.

<sup>69</sup> *Bagosora et al* Redacted Transcript of 10/11/2005, ICTR-98-41 (TRA003159/2), 10 November 2005, p 45.

<sup>70</sup> *Bagosora et al* (Decision on the Prosecutor’s Motion for the Admission of Certain Materials under Rule 89(C)) ICTR-98-41-T (14 October 2004) §12

- **Where the DDE was obtained?**
7. **Videos/ Still images extracted from TV programs/ Documentary**
    - a. DB70: TV Program Le point (14.09.1994);<sup>71</sup>
    - b. P382: Excerpt of a BBC Video Footage;<sup>72</sup>
    - c. DK7: Documentary “The Triumph of Evil” PBS Frontline;<sup>73</sup>
    - d. P363 and P355: “Rwanda: Finding the Way Home” Insights News Television Limited (10/95/A96/RWA);<sup>74</sup>
    - e. P362: Still Image from “Rwanda 1994. Compilation Sujets JT” TF1.<sup>75</sup>
  8. **Photographs**
    - a. P107 and P111: Taken by ICRC investigators;<sup>76</sup>
    - b. DB355B: Taken by the Defence Team of Bagosora in January or February 2006;<sup>77</sup>
    - c. P192: Taken by “Some” investigators (presumably from ICTR);<sup>78</sup>
    - d. P325-326: Provided by the US State Department;<sup>79</sup>
    - e. DNT83A and B: Taken by Me Tremblay and its assistant (Defence of Aloys Ntabakuze);<sup>80</sup>
    - f. DB115: Photographs extracted from the book “Rwanda: Les medias du genocide” Jean-Pierre Chrétien 1995;<sup>81</sup>
    - g. P151: Photographs taken by a colleague of the witness interrogated who was present at the time of the picture and then given to an ICTR team and to the Prosecutor (except for picture 4 for which the origin is unknown).<sup>82</sup>
  9. **The origin of the remaining evidence could not be deducted from the materials analyzed.**

## IV. Legal Arguments

- **Counsels’ legal arguments surrounding DDE evidentiary considerations.**
10. **Most of the evidence** listed above was introduced in the course of trial and identified by witnesses. Commonly, the Defence asked about the origin of the photographs and videos, *i.e.* when, where and by whom they were taken.<sup>83</sup> The Prosecutor usually argued that the purpose of

<sup>71</sup> *Bagosora et al* Redacted Transcript of 23/01/2004, ICTR-98-41 (TRA002397/1), 23 January 2004, p 53.

<sup>72</sup> *Bagosora et al* Redacted Transcript of 10/03/2006, ICTR-98-41 (TRA003186/2), 10 March 2006, p 75.

<sup>73</sup> *Bagosora et al* Redacted Transcript of 01/10/2003, ICTR-98-41 (TRA002114), 1 Octobre 2003, p 19.

<sup>74</sup> <https://irad.irmct.org/view.htm?r=197888&s=> and

<https://irad.irmct.org/view.htm?r=198393&s=>

<sup>75</sup> <https://irad.irmct.org/view.htm?r=197904&s=>

<sup>76</sup> *Bagosora et al* (Clarification Regarding Photographs) ICTR-98-41-0776 (24 October 2003).

<sup>77</sup> *Bagosora et al* Redacted Transcript of 13/10/2006, ICTR-98-41 (TRA004952/1), 13 October 2006, p 29.

<sup>78</sup> *Bagosora et al* Redacted Transcript of 17/02/2004, ICTR-98-41 (TRA002216/1), 17 February 2004, p 75.

<sup>79</sup> *Bagosora et al* Redacted Transcript of 14/10/2004, ICTR-98-41 (TRA002585/1), 14 October 2004, p 29.

<sup>80</sup> *Bagosora et al* Transcription Caviardée du 18/04/2005, ICTR-98-41 (TRA003104), 18 Avril 2005, 15-16.

<sup>81</sup> <https://irad.irmct.org/view.htm?r=197458&s=>

<sup>82</sup> *Bagosora et al* Redacted Transcript of 02/12/2003, ICTR-98-41 (TRA004926), 2 December 2003, p 15.

<sup>83</sup> See *Bagosora et al* Redacted Transcript of 09/02/2004, ICTR-98-41 (TRA002209/1), 9 February 2004, p 14.

such evidence was to be identified by witnesses and therefore that such information was irrelevant.<sup>84</sup> In this regard, despite the admission of P109 as evidence, the Defence of Ntabakuze claimed that it should not be relied upon as evidence as no witness could identify the location showed on the video.<sup>85</sup>

11. **Photographs P107 and P111.** The Defence argued that the Prosecution had not properly identified both collections of photographs, *i.e.* it could not say by whom and when the pictures were taken.<sup>86</sup> The Prosecution argued that the elements depicted in the pictures had already been identified by the witness and so that this information was irrelevant.<sup>87</sup> It further stated that identifying each photographs when presented to a witness would be too burdensome.<sup>88</sup> The President admitted the photographs provisionally, subject to further information.<sup>89</sup> The Prosecution later provided the information in a clarification by the mean of correspondence, however, it stated that it was provided without prejudice to its position that it does not create or imply an obligation to provide similar information in the future.<sup>90</sup>

12. **Photographs P151.** P151 is a collection of 4 photographs. A colleague of the witness questioned at trial, who was present at the time when the pictures were taken, took the first three photographs, however, the origin of the fourth picture could not be determined.<sup>91</sup> As the Prosecution questioned the witness with regard to the fourth picture, the Defence argued that the witness was not present and so that it was “delicate” to question him in this regard.<sup>92</sup>

13. **Video excerpts (P393 and DB70).** The Prosecution presented a short excerpt of a video of 51 minutes to a witness. It intended to exhibit the excerpt but the Defence objected that it would be better to exhibit the entire integral video. The President agreed and the 51 minutes were presented.<sup>93</sup> As of **DB70**, the Prosecution would have liked to show more of the 29 minutes video rather than only the 3 minutes, but, to save time, the Court agreed only to watch the excerpt.<sup>94</sup>

14. **Photographs and videos of dead bodies (P110A, P110B, P110C, P110E and P109).** The Defence objected that presenting visual materials directly depicting horrific massacres is prejudicial to the defendants and exceed its probative value.<sup>95</sup> The Prosecution argued that it could not explain its evidential purposes in front of the witness but briefly stated that it was with regard to the location of the events.<sup>96</sup>

15. **Aerial Photographs (P304).** The Defence objected as to the authenticity of the pictures.<sup>97</sup> They argued that they could have been enhanced or moved around by a computer and that the circumstances of the development of this picture were unknown, thus making it doubtful that they correspond to the reality in 1994.<sup>98</sup> The Prosecution argued that it intended to admit this evidence through the witness and that they were US-generated.<sup>99</sup>

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<sup>84</sup> See *Bagosora et al* Redacted Transcript of 09/02/2004, ICTR-98-41 (TRA002209/1), 9 February 2004, p 14.

<sup>85</sup> *Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) §2315.

<sup>86</sup> *Bagosora et al* Redacted Transcript of 01/10/2003, ICTR-98-41 (TRA002114), 1 October 2003, p 11 and 47.

<sup>87</sup> *Bagosora et al* Redacted Transcript of 01/10/2003, ICTR-98-41 (TRA002114), 1 October 2003, p 13.

<sup>88</sup> *Bagosora et al* Redacted Transcript of 01/10/2003, ICTR-98-41 (TRA002114), 1 October 2003, p 13.

<sup>89</sup> *Bagosora et al* Redacted Transcript of 01/10/2003, ICTR-98-41 (TRA002114), 1 October 2003, p 13.

<sup>90</sup> *Bagosora et al* (Clarification Regarding Photographs) ICTR-98-41-0776 (24 October 2003).

<sup>91</sup> *Bagosora et al* Redacted Transcript of 2/12/2003, ICTR-98-41 (TRA004926), 2 December 2003, p 15-16

<sup>92</sup> *Bagosora et al* Redacted Transcript of 2/12/2003, ICTR-98-41 (TRA004926), 2 December 2003, p 16.

<sup>93</sup> See e.g. *Bagosora et al* Redacted Transcript of 07/06/2006, ICTR-98-41 (TRA004727/1), 7 June 2006, p 32.

<sup>94</sup> See e.g. *Bagosora et al* Redacted Transcript of 23/01/2004, ICTR-98-41 (TRA002397/1), 23 January 2004, p 53.

<sup>95</sup> *Bagosora et al* Redacted Transcript of 01/10/2003, ICTR-98-41 (TRA002114), 1 October 2003, p 33-34.

<sup>96</sup> *Bagosora et al* Redacted Transcript of 01/10/2003, ICTR-98-41 (TRA002114), 1 October 2003, p 32 and 35.

<sup>97</sup> *Bagosora et al* Redacted Transcript of 16/09/2004, ICTR-98-41 (TRA002541/1), 16 September 2004, p 11-12.

<sup>98</sup> *Bagosora et al* Redacted Transcript of 16/09/2004, ICTR-98-41 (TRA002541/1), 16 September 2004, p 12.

<sup>99</sup> *Bagosora et al* Redacted Transcript of 16/09/2004, ICTR-98-41 (TRA002541/1), 16 September 2004, p 12.

16. **Satellite Photograph (P325).** Exhibit P325 is a satellite photograph with an enlargement contained in a small box, which has the title “roadblock”, so as to indicate the location of a roadblock.<sup>100</sup> The Defence objected firstly to this box, as there was no evidence corroborating the existence of such a roadblock.<sup>101</sup> The Prosecution stated its willingness not to rely on it, saying that it would even prefer the photograph without this enlargement.<sup>102</sup> Secondly, the Defence objected this exhibit was not necessary, as maps of the same area had already been admitted as evidence.<sup>103</sup> They further submitted that maps, contrary to photographs, allowed knowing the authors and date of the document.<sup>104</sup> According to them, there was lack of information in regard of the circumstances in which the picture was taken, making it doubtful whether it was really the said area.<sup>105</sup> Hence and for all these reasons, they claimed that the prejudice stemming from the use of these photographs outweighs its evidentiary value.<sup>106</sup> The Prosecution responded that maps and photographs are different types of documents, and that photographs offer more than map and allow to better look at the different areas.<sup>107</sup>

17. **Video P382.** The Prosecution proposed to watch this video footage in the presence of the witness in order to question him.<sup>108</sup> The Defence objected to the use of this piece of evidence, because the following information was missing: *when* the film was shot, *where*, by *whom*, who translated the conversations, where the conversations took place and the chain of custody.<sup>109</sup> It further raised the possibility that the video be doctored. For all these reasons, it argued that the piece of evidence was “highly questionable” and therefore that the Chamber should not accept its use.<sup>110</sup> The Prosecution answered that none of this information should bar it from showing this evidence to the witness in order to question him.<sup>111</sup> The President of the Chamber accepted that the video be showed to the witness and stated that the admission of the evidence will be dealt with later on.<sup>112</sup> Later on, the Defence raised that the Chamber should not rely on the translation made by the journalist.<sup>113</sup> The President of the Chamber answered that these elements go to the weight of evidence.<sup>114</sup> At another hearing, the Prosecution played the video without sound in order to get a location identified by the present witness as the sound had already been heard.<sup>115</sup> The Defence raised an objection, for the record, that the video should have been viewed with the sound.<sup>116</sup> They further objected to the admission of the video as being Kabgayi, as no witness had identified the video and still image (P404) derives from it as related to the Kabgayi events.<sup>117</sup> The President stated that the video was a matter of corroboration, “a reinforcement with other words”.<sup>118</sup>

18. **Tape recording of interviews (P317 and KABIGRA-01).** The Prosecutor presented these pieces of evidence in a motion and argued that it is not required for evidence to be admitted

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<sup>100</sup> <https://rad.irmct.org/view.htm?r=197633&s=>

<sup>101</sup> *Bagosora et al* Redacted Transcript of 14/10/2004, ICTR-98-41 (TRA002585/1), 14 October 2004, p 27.

<sup>102</sup> *Bagosora et al* Redacted Transcript of 14/10/2004, ICTR-98-41 (TRA002585/1), 14 October 2004, p 27.

<sup>103</sup> *Bagosora et al* Redacted Transcript of 14/10/2004, ICTR-98-41 (TRA002585/1), 14 October 2004, p 27-28.

<sup>104</sup> *Bagosora et al* Redacted Transcript of 14/10/2004, ICTR-98-41 (TRA002585/1), 14 October 2004, p 27-28.

<sup>105</sup> *Bagosora et al* Redacted Transcript of 14/10/2004, ICTR-98-41 (TRA002585/1), 14 October 2004, p 27-28.

<sup>106</sup> *Bagosora et al* Redacted Transcript of 14/10/2004, ICTR-98-41 (TRA002585/1), 14 October 2004, p 28.

<sup>107</sup> *Bagosora et al* Redacted Transcript of 14/10/2004, ICTR-98-41 (TRA002585/1), 14 October 2004, p 29.

<sup>108</sup> *Bagosora et al* Redacted Transcript of 10/03/2006, ICTR-98-41 (TRA003186/2), 10 March 2006, 65.

<sup>109</sup> *Bagosora et al* Redacted Transcript of 10/03/2006, ICTR-98-41 (TRA003186/2), 10 March 2006, 65.

<sup>110</sup> *Bagosora et al* Redacted Transcript of 10/03/2006, ICTR-98-41 (TRA003186/2), 10 March 2006, 65.

<sup>111</sup> *Bagosora et al* Redacted Transcript of 10/03/2006, ICTR-98-41 (TRA003186/2), 10 March 2006, 66.

<sup>112</sup> *Bagosora et al* Redacted Transcript of 10/03/2006, ICTR-98-41 (TRA003186/2), 10 March 2006, 67.

<sup>113</sup> *Bagosora et al* Redacted Transcript of 10/03/2006, ICTR-98-41 (TRA003186/2), 10 March 2006, 72.

<sup>114</sup> *Bagosora et al* Redacted Transcript of 10/03/2006, ICTR-98-41 (TRA003186/2), 10 March 2006, 72.

<sup>115</sup> *Bagosora et al* Redacted Transcript of 12/07/2006, ICTR-98-41 (TRA003996/1), 12 July 2006, p 82.

<sup>116</sup> *Bagosora et al* Redacted Transcript of 12/07/2006, ICTR-98-41 (TRA003996/1), 12 July 2006, p 82.

<sup>117</sup> *Bagosora et al* Redacted Transcript of 12/07/2006, ICTR-98-41 (TRA003996/1), 12 July 2006, p 83-85.

<sup>118</sup> *Bagosora et al* Redacted Transcript of 12/07/2006, ICTR-98-41 (TRA003996/1), 12 July 2006, p 83.

through a witness.<sup>119</sup> The Defence of Ntabakuze accepted the recordings<sup>120</sup> whereas the Defence of Kabiligi filed a response to the motion.<sup>121</sup> They firstly argued that the interviews conducted by ICTR investigators were not voluntary, hence contrary to Rule 95 Rules of Procedure and Evidence (RPE).<sup>122</sup> Secondly, that the improper recording made its reliability questionable, thus contrary to Rule 89(C) RPE.<sup>123</sup> Thirdly, that the recordings breached Rule 43 RPE according to which the content as well as the transcript of it should be transmitted as soon as possible to the suspect, and sealed in its presence with the Prosecutor's and Suspect signature.<sup>124</sup>

19. **Photocopies of Agenda (P278).** The Bagosora Defence filed a motion in which they claimed the lack of information from the Prosecution about the provenance of the photocopies, the chain of possession and the legality of the procurement of the agenda.<sup>125</sup> They hence suspected a manipulation of the photocopies, which would affect their reliability and render them inadmissible under Rule 95 RPE.<sup>126</sup> Moreover, the fact that only 26 pages were presented out of 180 further casted doubt on their integrity.<sup>127</sup> The Prosecution argued in its response that the accused certified that it was his writing in addition to two experts' confirmation, hence leaving no doubt about the authorship.<sup>128</sup>

- **The Court's response to these particular arguments.**

20. **Most of the evidence (Photographs and Videos).** As a starting point, the Tribunal considered the identification of materials presented by a Counsel as basic, *i.e.* when and by whom they were taken.<sup>129</sup> However, it might still be accepted without such identification when presented to a witness.<sup>130</sup> Indeed and without clear legal justification, it appears that the Tribunal agreed with the argumentation of the Prosecutor that complete identification is not an essential condition to admission.<sup>131</sup> For example, despite the lack of a precise identification of the date of a video by the Prosecution (P109 - which the Prosecution nonetheless considered to have been dated by the witness), the Court admitted the evidence and simply noted the Defence's comment.<sup>132</sup> Hence, in

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<sup>119</sup> *Bagosora et al* (Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C) of the Rules of Procedure and Evidence) ICTR-98-41-T (28 April 2004).

<sup>120</sup> *Bagosora et al* (Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C)) ICTR-98-41-T (14 October 2004) §12.

<sup>121</sup> *Bagosora et al* (Defence for Kabiligi's Response to "Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C) of the Rules of Procedure and Evidence") ICTR-98-41-T (7 May 2004).

<sup>122</sup> *Bagosora et al* (Defence for Kabiligi's Response to "Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C) of the Rules of Procedure and Evidence") ICTR-98-41-T (7 May 2004) §8-9. According to Rule 95 RPE, "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings. »

<sup>123</sup> *Bagosora et al* (Defence for Kabiligi's Response to "Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C) of the Rules of Procedure and Evidence") ICTR-98-41-T (7 May 2004) §26; According to Rule 89(C) RPE, "A Chamber may admit any relevant evidence which it deems to have probative value."

<sup>124</sup> *Bagosora et al* (Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C)) ICTR-98-41-T (14 October 2004) §4.

<sup>125</sup> *Bagosora et al* (Bagosora Defence Urgent Motion to Exclude Photocopies of Agenda Pursuant to Rule 95 Rules of Procedure and Evidence) ICTR-98-41-T (18 February 2007) §17-18.

<sup>126</sup> *Bagosora et al* (Bagosora Defence Urgent Motion to Exclude Photocopies of Agenda Pursuant to Rule 95 Rules of Procedure and Evidence) ICTR-98-41-T (18 February 2007) §2 and 15.

<sup>127</sup> *Bagosora et al* (Bagosora Defence Urgent Motion to Exclude Photocopies of Agenda Pursuant to Rule 95 Rules of Procedure and Evidence) ICTR-98-41-T (18 February 2007) §18.

<sup>128</sup> *Bagosora et al* (Prosecutor's Response to Bagosora Defence Urgent Motion to Exclude Photocopies of Agenda Dated Monday, 19 February 2007) ICTR-98-41-T (26 February 2007) §5.

<sup>129</sup> *Bagosora et al* Redacted Transcript of 01/10/2003, ICTR-98-41 (TRA002114), 1 October 2003, 13 and 47.

<sup>130</sup> See *Bagosora et al* Redacted Transcript of 30/01/2004, ICTR-98-41 (TRA002204/1), 30 January 2004, p12

<sup>131</sup> See *Bagosora et al* Redacted Transcript of 09/02/2004, ICTR-98-41 (TRA002209/1), 09 February 2004, p 14.

<sup>132</sup> *Bagosora et al* Redacted Transcript of 01/10/2003, ICTR-98-41 (TRA002114), 1 October 2003, p 38.

its judgment, the Tribunal, when referring to such evidence, commonly refers to the identification of the material that has been made by the witness and relies upon it.<sup>133</sup>

21. **Photographs P107 and P111.** In the course of the trial, the Chamber admitted provisionally the photographs, subject to further information.<sup>134</sup> After the Prosecution gave clarifications as demanded, no further information could be found with regard to the Tribunal's opinion.

22. **Photographs P151.** In response to the Defence's objection, the Chamber questioned the witness as to what he could identify on the fourth picture.<sup>135</sup> After the witness had identified the location of the picture, the Chamber stated that it should be considered as sufficient and that the photograph was "intrinsically identifiable".<sup>136</sup>

23. **Photographs and videos of dead bodies (P110A, P110B, P110C, P110E and P109).** As the Prosecution did not want to explain in details the evidentiary value of the photographs in the presence of the witness, the Chamber trusted that the Prosecution will show its existence in the course of the questioning which go beyond the depiction of the massacre and invited the Prosecution to proceed.<sup>137</sup> After the questioning, the pieces of evidence were admitted without further discussion.<sup>138</sup>

24. **Aerial Photographs (P304).** The Chamber found that the photographs must be admitted because of the questioning of the witness that was conducted in relation to it.<sup>139</sup> The Defence teams' comments are noted and they are free to challenge their authenticity later through alternative materials or witnesses.<sup>140</sup>

25. **Satellite Photograph (P325).** The Chamber admitted P325 as evidence, stating that the Prosecution will not rely on the enlargement with the mention "roadblock".<sup>141</sup> It stated that there was no harm in admitting this evidence and that it was a document, which in the face, appeared to be a photograph, reminding the important respect for the admission of evidence in common law countries.<sup>142</sup> Finally, it stated that all other issues raised by the Defence will be assessed in connection with the weight given to the evidence.<sup>143</sup>

26. **Video (P382).** The Chamber noted the Defence objection, while stating that this exhibit was a question of corroboration and reinforcement.<sup>144</sup>

27. **Tape recording of interviews (P317 and KABIGRA-01).** The Chamber held on the one hand that since the Defence of Ntabakuze made no objection to the admission of the tape recording, it can be admitted as such.<sup>145</sup> On the other hand, it analysed the contextual element of

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<sup>133</sup> *Bagosora et al* (Judgement and Sentence) ICTR-98-41-T (18 December 2008) see e.g. fn 1003, 1009, 1022, 1480, 1615 (and so on).

<sup>134</sup> *Bagosora et al* Redacted Transcript of 1/10/2003, ICTR-98-41 (TRA002114), 1 October 2003, p 13.

<sup>135</sup> *Bagosora et al* Redacted Transcript of 2/12/2003, ICTR-98-41 (TRA004926), 2 December 2003, p 20.

<sup>136</sup> *Bagosora et al* Redacted Transcript of 2/12/2003, ICTR-98-41 (TRA004926), 2 December 2003, p 20.

<sup>137</sup> *Bagosora et al* Redacted Transcript of 1/10/2003, ICTR-98-41 (TRA002114), 1 October 2003, p 35.

<sup>138</sup> *Bagosora et al* Redacted Transcript of 1/10/2003, ICTR-98-41 (TRA002114), 1 October 2003, p 38.

<sup>139</sup> *Bagosora et al* Redacted Transcript of 16/09/2004, ICTR-98-41 (TRA002541/1), 16 September 2004, p 13.

<sup>140</sup> *Bagosora et al* Redacted Transcript of 16/09/2004, ICTR-98-41 (TRA002541/1), 16 September 2004, p 13.

<sup>141</sup> *Bagosora et al* Redacted Transcript of 14/10/2004, ICTR-98-41 (TRA002585/1), 14 October 2004, p 31.

<sup>142</sup> *Bagosora et al* Redacted Transcript of 14/10/2004, ICTR-98-41 (TRA002585/1), 14 October 2004, p 31.

<sup>143</sup> *Bagosora et al* Redacted Transcript of 14/10/2004, ICTR-98-41 (TRA002585/1), 14 October 2004, p 31.

<sup>144</sup> *Bagosora et al* Redacted Transcript of 12/07/2006, ICTR-98-41 (TRA003996/1), 12 July 2006, p 83.

<sup>145</sup> *Bagosora et al* (Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C)), ICTR-98-41-T (14 October 2004) §12.

the interview of Kabiligi and found that he asked for a counsel and was not provided one; hence the recording is contrary to Rule 95 RPE and must be excluded.<sup>146</sup>

28. **Photocopies of Bagosora's agenda (P278).** Under Rule 89(C) RPE, the Chamber has discretion to admit evidence, which are considered to have probative value. Such probative value is *inter alia* determined by the authenticity of the evidence.<sup>147</sup> The Court found that the *prima facie* probative value of the photocopies had been sufficiently proven by the Prosecution and that the Defence submissions were not sufficient to render the evidence inadmissible, however, that their concerns will be taken into account in the weighing of the evidence.<sup>148</sup>

## V. Court Analysis

### • What arguments/findings was the DDE used to support?

#### 29. Photographs

- a. DNT 83A and B: Intend to show the location of Bashimiraho at a particular time;<sup>149</sup>
- b. DNT89: Location of events;<sup>150</sup>
- c. DNT97: Entrances used in a particular building;<sup>151</sup>
- d. DNT126: Shoulder pad of Major Ntabakuze;<sup>152</sup>
- e. DNT227: Shoulder pad of Major Ntabakuze in 1994;<sup>153</sup>
- f. DK73: Identification purposes.<sup>154</sup>

#### 30. Videos

- a. P44 and P168: Intend to show the power and level of authority of Bagosora;<sup>155</sup>
- b. P109: Intends to show precisely the location of the massacre so to prove that it was planned;<sup>156</sup>
- c. P382: Intends to contradict the testimony of several witnesses from the Defence and to show the inhuman conditions of Tutsis Kabgayi center in 1994;<sup>157</sup>
- d. P424A: Intend to show that it was civilians and not combatants that were targeted;<sup>158</sup>

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<sup>146</sup> *Bagosora et al* (Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C)), ICTR-98-41-T (14 October 2004) §21.

<sup>147</sup> *Bagosora et al* (Decision on Bagosora Motion to Exclude Photocopies of Agenda) ICTR-98-41-T (11 April 2007) §4 and 6.

<sup>148</sup> *Bagosora et al* (Decision on Bagosora Motion to Exclude Photocopies of Agenda) ICTR-98-41-T (11 April 2007) §5

<sup>149</sup> *Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) p 651.

<sup>150</sup> *Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) p 651.

<sup>151</sup> *Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) p 651.

<sup>152</sup> *Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) p 655.

<sup>153</sup> *Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) p 663.

<sup>154</sup> <https://irad.irmct.org/result.htm#?&search=&texttype=&searchtype=&datefrom=&dateto=&datefiledfrom=&datefiledto=&source=&exhibit=&record=&lang=&witness=&type=&casenum=ICTR-98-41&organization=&accused=&extension=&fsearch=dk73&datefrom=&dateto=&fsource=&ftype=&flang=&for ganization=&fcase=>

<sup>155</sup> *Bagosora et al* (Prosecutor's Final Trial Brief) ICTR-98-41-T (1 March 2007) p 313.

<sup>156</sup> *Bagosora et al* (Dernières Conclusions Ecrites du Procureur) ICTR-98-41-T (1 March 2007) p 212.

<sup>157</sup> *Bagosora et al* (Dernières Conclusions Ecrites du Procureur, ICTR-98-41-T, 1 March 2007, p 213.

<sup>158</sup> *Bagosora et al*, Dernières Conclusions Ecrites du Procureur, ICTR-98-41-T, 1 March 2007, p 215f.

- e. DNT 78, DNT 79; DNT 78: Intend to show contradictions between witnesses' testimonies.<sup>159</sup>
- 31. **Voice recording**
  - a. DB274: Intends to show that killings of politicians were not attributable to the army chain of command.<sup>160</sup>
- 32. **Photocopies**
  - a. P278: Intends to show Bagosora's planning and conspiracy to commit genocide. The fact that he was opposed to the admission of this evidence further show the importance of the exhibit.<sup>161</sup>
- **The reasoning of the Court with respect to the DDE.**
- 33. Discussion of evidentiary considerations. See Counsel's arguments and Court's responses above.
- **Was the DDE admitted?**
- 34. All the exhibits were **admitted** *except* one interview recording (KABIGRA-01) as discussed above.

## VI. Rules of Evidence

- **Identify rules of evidence used in the case.**
- 35. Rule 43 RPE.<sup>162</sup>
- 36. Rule 89(C) RPE.<sup>163</sup>
- 37. Rule 95 RPE.<sup>164</sup>
- 38. Rule 54 RPE.<sup>165</sup>

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<sup>159</sup> *Bagosora et al* (Major Aloys Ntabakuze Amended Final Brief) ICTR-98-41-T (23 April 2007) p 651.

<sup>160</sup> *Théoneste Bagosora and Anatole Nsengiyumva v. The Prosecutor* (Judgement) ICTR-98-41-A (14 December 2011) §529, fn. 1264.

<sup>161</sup> *Bagosora et al* (Prosecutor's Final Trial Brief) ICTR-98-41-T (1 March 2007) p 213.

<sup>162</sup> "Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded, in accordance with the following procedure: (i) The suspect shall be informed in a language he understands that the questioning is being audio-recorded or video-recorded; (ii) In the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded; (iii) At the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything he has said, and to add anything he may wish, and the time of conclusion shall be recorded; (iv) The content of the recording shall then be transcribed as soon as practicable after the conclusion of questioning and a copy of the transcript supplied to the suspect, together with a copy of the recording or, if multiple recording apparatus was used, one of the original recorded tapes; and (v) After a copy has been made, if necessary, of the recorded tape for purposes of transcription, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect."

<sup>163</sup> "A Chamber may admit any relevant evidence which it deems to have probative value."

<sup>164</sup> "No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings. "

<sup>165</sup> "At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial"



- **How the identified rules of evidence were applied.**

39. See Court's response to the particular arguments above.

## VII. Extrapolation (Guideline(s) for practitioners from the case)

### *Photographs*

1. The Counsel presenting a photograph should in principle identify when and who took it.<sup>166</sup>
2. Complete identification is not an essential condition to admission.<sup>167</sup> The lack of complete identification of a photograph (by whom, when, where) should not impede its presentation to a witness and its admission as evidence when discussed by the witness.<sup>168</sup>
3. Photographs depicting atrocities should not be used for just the purpose of shocking the audience, but also should be relevant to the case and have probative value.<sup>169</sup>
4. Not all elements of a photograph must be identified for its admission as evidence. The sole identification of the location of a photograph by a witness should be considered as sufficient for its admission as evidence.<sup>170</sup> In this regard, the Chamber stated that it should be considered as sufficient and that the photograph was "intrinsically identifiable".<sup>171</sup>

### *Videos*

5. The lack of complete identification of a video (by whom, when, where) should not impede its presentation to a witness<sup>172</sup> and its admission as evidence.<sup>173</sup>

### *Voice Recordings*

6. Recordings of an interview will not be admitted if such interviews were conducted contrary to investigation procedures, RPE and fair trials rules and if it is contested by the Defence.<sup>174</sup>

### *Photocopies*

7. Photocopies should have probative value. The probative value is *inter alia* determined by its authenticity.<sup>175</sup>
8. The demonstration of the *prima facie* probative value of photocopies, *i.e.* their authenticity, is sufficient for their admission as evidence.<sup>176</sup>

<sup>166</sup> *Bagosora et al* Redacted Transcript of 01/10/2003, ICTR-98-41 (TRA002114), 1 October 2003, 13 and 47.

<sup>167</sup> See *Bagosora et al* Redacted Transcript of 09/02/2004, ICTR-98-41 (TRA002209/1), 09 February 2004, p 14.

<sup>168</sup> See *Bagosora et al* Redacted Transcript of 09/02/2004, ICTR-98-41 (TRA002209/1), 09 February 2004, p 14-20; *Bagosora et al* Redacted Transcript of 30/01/2004, ICTR-98-41 (TRA002204/1), 30 January 2004, p12.

<sup>169</sup> *Bagosora et al* Redacted Transcript of 01/10/2003, ICTR-98-41 (TRA002114), 1 October 2003, p 35.

<sup>170</sup> *Bagosora et al* Redacted Transcript of 2/12/2003, ICTR-98-41 (TRA004926), 2 December 2003, p 20.

<sup>171</sup> *Bagosora et al* Redacted Transcript of 2/12/2003, ICTR-98-41 (TRA004926), 2 December 2003, p 20.

<sup>172</sup> *Bagosora et al* Redacted Transcript of 10/03/2006, ICTR-98-41 (TRA003186/2), 10 March 2006, 66.

<sup>173</sup> *Bagosora et al* Redacted Transcript of 12/07/2006, ICTR-98-41 (TRA003996/1), 12 July 2006, p 83.

<sup>174</sup> *Bagosora et al* (Decision on the Prosecutor's Motion for the Admission of Certain Materials under Rule 89(C)), ICTR-98-41-T (14 October 2004) §12 and 21.

<sup>175</sup> *Bagosora et al* (Decision on Bagosora Motion to Exclude Photocopies of Agenda) ICTR-98-41-T (11 April 2007) §4 and 6.

<sup>176</sup> *Bagosora et al* (Decision on Bagosora Motion to Exclude Photocopies of Agenda) ICTR-98-41-T (11 April 2007) §5

9. Concerns raised related to the authenticity of photocopies are taken into account in the weighing of evidence, they should however not impede the admission of photocopies.<sup>177</sup>

#### Note - Testimony by video-conference

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

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

The Prosecution and the Defence both filed motions in order to have witnesses testify by video-conference. On one side, the witness of the Prosecution (witness BT staying in Belgium) feared reprisals against her family and persistently refused to come to testify at the ICTR (Arusha - Tanzania).<sup>178</sup> The Prosecution argued that the testimony was fundamentally important and that it was legally not possible to compel a witness to come to testify.<sup>179</sup> The Defence teams opposed the motion and submitted in their response that accepting mere unwillingness as a ground to accept testimony by video-conference would be a dangerous precedent.<sup>180</sup> On the other side, the witness of the Defence (Major Donald McNeil staying in Canada), was unable to travel due to a recent surgery.<sup>181</sup> The Prosecution agreed with the motion, even suggesting a written deposition.<sup>182</sup>

Rule 90(A) RPE provides that the Court should in principle hear witnesses directly. The RPE of the ICTR as last amended in May 2004, unlike those of the ICTY,<sup>183</sup> did not expressly provide for the taking of testimony by video-conference.<sup>184</sup> However, Rules 54 and 71 RPE could be relied upon to justify such a testimony.<sup>185</sup> The Chamber stated that testimony by video-conference must be ordered when it is in the interest of justice.<sup>186</sup> To this end, the unwillingness or impossibility of the witness to come and the importance of the testimony must be weighed.<sup>187</sup> The Chamber reminded that hearing witnesses directly is fundamental in order to be able to observe their demeanor.<sup>188</sup> However, testimony by video-conference is not incompatible with it, even though technical interferences might alter the weight given to the testimony.<sup>189</sup> The Chamber hence granted the testimony by video-conference for both motions.

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<sup>177</sup> *Bagosora et al* (Decision on Bagosora Motion to Exclude Photocopies of Agenda) ICTR-98-41-T (11 April 2007) §5

<sup>178</sup> *Bagosora et al* (Decision on the Prosecutor's Request for Testimony of Witness BT via Video-Link) ICTR-98-41-T (8 October 2004) §2 and 13.

<sup>179</sup> *Bagosora et al* (Decision on the Prosecutor's Request for Testimony of Witness BT via Video-Link) ICTR-98-41-T (8 October 2004) §2 and 11.

<sup>180</sup> *Bagosora et al* (Decision on the Prosecutor's Request for Testimony of Witness BT via Video-Link) ICTR-98-41-T (8 October 2004) §3.

<sup>181</sup> *Bagosora et al* (Decision on Testimony by Video-Conference) ICTR-98-41-T (20 December 2004) §1.

<sup>182</sup> *Bagosora et al* (Decision on Testimony by Video-Conference) ICTR-98-41-T (20 December 2004) §3.

<sup>183</sup> See Rule 81(bis) RPE ICTY.

<sup>184</sup> See now Rule 71(D) RPE ICTR.

<sup>185</sup> *Bagosora et al* (Decision on Testimony by Video-Conference) ICTR-98-41-T (20 December 2004) §2.

<sup>186</sup> *Bagosora et al* (Decision on Testimony by Video-Conference) ICTR-98-41-T (20 December 2004) §4.

<sup>187</sup> *Bagosora et al* (Decision on Testimony by Video-Conference) ICTR-98-41-T (20 December 2004) §4.

<sup>188</sup> *Bagosora et al* (Decision on the Prosecutor's Request for Testimony of Witness BT via Video-Link) ICTR-98-41-T (8 October 2004) §12.

<sup>189</sup> *Bagosora et al* (Decision on the Prosecutor's Request for Testimony of Witness BT via Video-Link) ICTR-98-41-T (8 October 2004) §15.

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

## I. Case Details

- Case name: Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07)
- Tribunal: International Criminal Court (ICC)
- Citation:

*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), ICC-01/04-01/07-1515, Tr. Ch. II, 7 October 2009. Link: [https://www.icc-cpi.int/CourtRecords/CR2009\\_07212.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_07212.PDF);

*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, de modification de la liste des éléments à charge et de la liste des témoins à charge, ICC-01/04-01/07-1305, Tr. Ch. II, 15 July 2009. Link: [https://www.icc-cpi.int/CourtRecords/CR2009\\_05162.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_05162.PDF);

*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution's application for leave to appeal Trial Chamber II's "Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412, and 1456), ICC-01/04-01/07-1527, Tr. Ch. II, 13 October 2009. Link: [https://www.icc-cpi.int/CourtRecords/CR2009\\_07332.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_07332.PDF);

*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge et de modification de la liste des éléments à charge, ICC-01/04-01/07-1345, Tr. Ch. II, 30 July 2009. Link: [https://www.icc-cpi.int/CourtRecords/CR2009\\_05397.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_05397.PDF);

*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, et de modification de la liste des éléments à charge et de la liste des témoins à charge, ICC-01/04-01/07-1401, 18 August 2009. Link: [https://www.icc-cpi.int/CourtRecords/CR2009\\_05716.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_05716.PDF);

*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Addendum et corrigendum à certaines Requêtes de l'Accusation déposées en application de la norme 35 aux fins de dépôt d'expertises, ICC-01/04-01/07-1456, Tr. Ch. II, 4 September 2009. Link: [https://www.icc-cpi.int/CourtRecords/CR2009\\_06349.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_06349.PDF);

*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Defence Response to the Prosecution Requests to add new evidence to the List of Incriminating Evidence (ICC-01/04-01/07-1305 and 1345), ICC-01/04-01/07-1352, Tr. Ch. II, 5 August 2009. Link: [https://www.icc-cpi.int/CourtRecords/CR2009\\_05444.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_05444.PDF);

*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Observations de la Défense de Mathieu Ngudjolo relatives au mémoire de l'Accusation déposé en vertu de la norme 35 du RC et référencé sous ICC-01/04-01/07-1305), ICC-01/04-01/07-1317, Tr. Ch. II, 17 July 2009. Link: [https://www.icc-cpi.int/CourtRecords/CR2009\\_05237.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_05237.PDF);

*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Defence Response to the Prosecution Requests to add new evidence to the List of Incriminating Evidence (ICC-01/04-01/07-1345 and 1360), ICC-01/04-01/07-1406, Tr. Ch. II, 19 August 2009. Link: [https://www.icc-cpi.int/CourtRecords/CR2009\\_05750.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_05750.PDF);

*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Observations de la Défense de Mathieu Ngudjolo relatives au mémoire de l'Accusation déposé en vertu de la norme 35 du RC et référencé sous ICC-01/04-01/07-1345, ICC-01/04-01/07-1355, Tr. Ch. II, 7 August 2009. Link: [https://www.icc-cpi.int/CourtRecords/CR2009\\_05467.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_05467.PDF).

## II. Legal Background

1. Both defendants were charged with crimes allegedly committed during an attack against the Bogoro village in the DRC on 24 February 2003. The Prosecution submitted new materials which were obtained in the course of the investigation conducted during the mission to Bogoro or based upon the materials obtained during the mission. The mission took place six years after the crimes were allegedly committed. On this basis, the Defence challenged the admission of this evidence.

2. The legal system: ICC, international criminal law

3. The crimes charged:

Katanga:

- One count of crime against humanity (murder) (Article 7(1)(a));
- Four counts of war crimes: murder (Article 8(2)(a)(i)); attacking a civilian population (Article 8(2)(b)(i)); destruction of property (Article 8(2)(b)(xiii)); and pillaging (Article 8(2)(b)(xvi)).

Chui:

- Three crimes against humanity: murder (Article 7(1)(a)); sexual slavery and rape (Article 7(1)(g));
- Seven war crimes: using children under the age of 15 to take active part in hostilities (Article 8(2)(b)(xxvi)); deliberately directing an attack on a civilian population as such or against individual civilians or against individual civilians not taking direct part in hostilities (Article 8(2)(b)(i)); willful killing (Article 8(2)(a)(i)); destruction of property 8(2)(b)(xiii); pillaging (Article 8(2)(b)(xvi)); sexual slavery and rape (Article 8(2)(b)(xxii)).

4. Stage of the proceedings: Trial

### III. Digitally Derived Evidence (DDE)

- **Type of DDE<sup>1</sup>**

1. **DRC-OTP-1044-0099** – A digital 360° visual representation of the “Institut de Bogoro” (Request 1305);
2. Over 200 photographs, taken by the visual expert and by drone, which were used for the production of the visual presentation (Annex G to Request 1305);
3. **DRC-OTP-1041-0135; DRC-OTP-1041-0161; DRC-OTP-1041-0208; DRC-OTP-1041-0205; DRC-OTP-1041-0209; DRC-OTP-1041-0227** and **DRC-OTP-1041-0217** – Seven photos of human remains (Request 1305);
4. **DRC-OTP-1039-0019, DRC-OTP-1039-0021** - A video showing footage of the crime scene investigation by the ballistic experts and the log of this video (Request 1305);
5. **DRC-OTP-1044-0506 to 0520** - 15 photographs of the forensic examination of the “Institut de Bogoro” (Request 1345);
6. **DRC-OTP-1037-0014, 0018, 0025, 0050, 0060** and **0065** - Six aerial photographs of the “Institut de Bogoro” and immediate surrounding area (Request 1401);
7. 162 photographs of the exhumation and human remains, which are used by the experts in their report (Annex C to Request 1401);
8. **DRC-OTP-1039-0002, 0006, 0010, 0014, 0025** and **0032** – Six videos, recorded during the site visit of the “Institut de Bogoro”, showing the exhumation and examination of human remains and video log for each of these videos (Annex J to Request 1401);
9. **ERN DRC-OTP-1040-340** and **343** and **DRC-OTP-1046-0317** and **0392** - Four photographs of the contents of two of the sealed containers (Request 1401);
10. 395 photographs that were taken of the exhumation and autopsy (Annex N to request 1401);
11. **DRC-OTP-1046-0113 to 0127** – 15 photographs relevant for the ballistic report (Request 1401);
12. 101 photographs depicting the exhumation by the experts and the subsequent inhumation of the remains (Annex B to Request 1456).

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<sup>1</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), ICC-01/04-01/07-1515, Tr. Ch. II, 7 October 2009, para. 2.

- **Where the DDE was obtained? Who obtained the DDE?**

13. The DDE was obtained by the Prosecution in the course of the investigation conducted during the mission to Bogoro or based upon the materials obtained during the mission.

- **Status of admission**

14. The Trial Chamber II authorised the Prosecution to disclose the visual representation of the “Institut de Bogoro” and add it to its List of Incriminating Evidence; ordered the Prosecution to communicate the expert reports and the related items of evidence as rule 77 material.<sup>2</sup>

## IV. Legal Arguments

- **Counsels’ legal arguments surrounding DDE evidentiary considerations.**

### Arguments of the Prosecution:

#### *Prosecutor’s Request 1305:*

15. **DRC-OTP-1044-0099** – According to the Prosecution, adding the presentation as a whole and the report to the list of charges is useful and relevant: it will allow the Chamber, the parties and the participants to visualize the places described by witnesses during the proceedings to come.<sup>3</sup>

16. **DRC-OTP-1041-0135; DRC-OTP-1041-0161; DRC-OTP-1041-0208; DRC-OTP-1041-0205; DRC-OTP-1041-0209; DRC-OTP-1041-0227; DRC-OTP-1041-0217; DRC-OTP-1039-0019, DRC-OTP-1039-0021** – The addition is useful and justified: they are objective material elements relating to the use of firearms during the attack on Bogoro; they participate in the revelation of the truth in the present case.<sup>4</sup>

17. Over 200 photographs (Annex G (confidential) to the Request 1305) – despite their number, the photos do not present any difficulty in interpretation and were taken on a single site. In addition, many shots of the drone are duplicates in low definition with additional details such as the time when the corresponding shot in high definition was taken. The Prosecution considered that the disclosure of such photographs did not prejudice the Defense.<sup>5</sup>

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<sup>2</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), ICC-01/04-01/07-1515, Tr. Ch. II, 7 October 2009, p. 38.

<sup>3</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Mémoire de l’Accusation, en application de la norme 35, aux fins de divulgation d’éléments à charge ou relevant de la règle 77, de modification de la liste des éléments à charge et de la liste des témoins à charge, ICC-01/04-01/07-1305, Tr. Ch. II, 15 July 2009, para. 22.

<sup>4</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Mémoire de l’Accusation, en application de la norme 35, aux fins de divulgation d’éléments à charge ou relevant de la règle 77, de modification de la liste des éléments à charge et de la liste des témoins à charge, ICC-01/04-01/07-1305, Tr. Ch. II, 15 July 2009, para. 32.

<sup>5</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Mémoire de l’Accusation, en application de la norme 35, aux fins de divulgation d’éléments à charge ou relevant de la règle 77, de modification de la liste des éléments à charge et de la liste des témoins à charge, ICC-01/04-01/07-1305, Tr. Ch. II, 15 July 2009, para. 43.

18. Justification for late submission of the evidence:
- The Prosecution was unable to obtain the material earlier because the organisation of the mission required the coordination of several institutional and private actors and the deployment of considerable human, financial and technical resources;
  - The security situation in and around Bogoro has been such that the mission had to be postponed a number of times.<sup>6</sup>

*Prosecutor's Request 1345:*

19. **DRC-OTP-1044-0506 to 0520** – the addition of the photographs is useful and justified. These are physical evidence relating to the murders committed in the attack on Bogoro; it assists in establishing the truth in the present case.<sup>7</sup>

20. Justification for late submission of the evidence:
- The Prosecution was unable to obtain the material earlier because the organisation of the mission required the coordination of several institutional and private actors and the deployment of considerable human, financial and technical resources;
  - The security situation in and around Bogoro has been such that the mission had to be postponed a number of times.<sup>8</sup>

*Prosecutor's Request 1401:*

21. The Prosecutor asked permission for late disclosure of the evidence, arguing that the documents are relatively short, and the Defence will have sufficient time to prepare response.<sup>9</sup>

22. In particular with regard to **DRC-OTP-1046-0113 to 0127** – the quality of the 15 photo originals seems better than that of the “prints” of the same photographs inserted in the ballistics report,<sup>10</sup> the use of better-quality snapshots at a hearing contributes to better direction or unfolding of the debates.<sup>11</sup>

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<sup>6</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution's application for leave to appeal Trial Chamber II's "Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412, and 1456), ICC-01/04-01/07-1527, Tr. Ch. II, 13 October 2009, para. 10.

<sup>7</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge et de modification de la liste des éléments à charge, ICC-01/04-01/07-1345, Tr. Ch. II, 30 July 2009, para. 18.

<sup>8</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Prosecution's application for leave to appeal Trial Chamber II's "Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412, and 1456), ICC-01/04-01/07-1527, Tr. Ch. II, 13 October 2009, para. 9.

<sup>9</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, et de modification de la liste des éléments à charge et de la liste des témoins à charge, ICC-01/04-01/07-1401, 18 August 2009, para. 30.

<sup>10</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, et de modification de la liste des éléments à charge et de la liste des témoins à charge, ICC-01/04-01/07-1401, 18 August 2009, para. 43.

<sup>11</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Mémoire de l'Accusation, en application de la norme 35, aux fins de divulgation d'éléments à charge ou relevant de la règle 77, et de modification de la liste des éléments à charge et de la liste des témoins à charge, ICC-01/04-01/07-1401, 18 August 2009, para. 44.

*Prosecutor's Request 1456:*

23. 101 photographs – Late disclosure would not prejudice the Defence. The production of these documents should have been made with request 1401 of 18 August 2009. The Prosecution did not have these photographs in its possession on that date.<sup>12</sup>

Arguments of the Defence:

*In response to Prosecutor's Requests 1305:*

24. The Defence for Mr. Katanga did not raise any objection to the addition to the List of Evidence of the material in question.<sup>13</sup>

25. The Defence of Mr. Ngudjolo raised issues in regard to seven photos of human remains (**DRC-OTP-1041-0135; DRC-OTP-1041-0161; DRC-OTP-1041-0208; DRC-OTP-1041-0205; DRC-OTP-1041-0209; DRC-OTP-1041-0227** and **DRC-OTP-1041-0217**): The Defence of Mr. Ngudjolo questioned seven photos of human remains in Prosecution's Request 1305; in particular, these photos did not form part of the ballistic report, and it was not clear for the Defence whether they could be included separately.<sup>14</sup> The Court did not respond to this query.

*In response to Prosecutor's Requests 1345:*

26. The Defence for Mr. Katanga did not object to the addition to the List of Incriminating Evidence of the items to which Request 1345 pertained.<sup>15</sup> However, Mr Katanga's Defence reserved its position as regards their admissibility as evidence for the following reasons:

- The mission where the evidence was obtained took place many years after the event, and the Prosecution could have conducted it earlier;
- The eventual prejudicial character of the evidence resulting from this mission;
- The short time left for the preparation of the Defence.<sup>16</sup>

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<sup>12</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Addendum et corrigendum à certaines Requête de l'Accusation déposées en application de la norme 35 aux fins de dépôt d'expertises, ICC-01/04-01/07-1456, Tr. Ch. II, 4 September 2009, para. 6.

<sup>13</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Defence Response to the Prosecution Requests to add new evidence to the List of Incriminating Evidence (ICC-01/04-01/07-1305 and 1345), ICC-01/04-01/07-1352, Tr. Ch. II, 5 August 2009, para. 5.

<sup>14</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Observations de la Défense de Mathieu Ngudjolo relatives au mémoire de l'Accusation déposé en vertu de la norme 35 du RC et référencé sous ICC-01/04-01/07-1305), ICC-01/04-01/07-1317, Tr. Ch. II, 17 July 2009, para. 5.

<sup>15</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Defence Response to the Prosecution Requests to add new evidence to the List of Incriminating Evidence (ICC-01/04-01/07-1345 and 1360), ICC-01/04-01/07-1406, Tr. Ch. II, 19 August 2009.

<sup>16</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Defence Response to the Prosecution Requests to add new evidence to the List of Incriminating Evidence (ICC-01/04-01/07-1305 and 1345), ICC-01/04-01/07-1352, Tr. Ch. II, 5 August 2009, para. 7.



27. The Defence for Mr Ngudjolo questioned the credibility that may be attached to material that was collected six years after the alleged facts.<sup>17</sup> The Defence also challenged the validity of the Prosecution's justification for not having been able to conduct the examination of the site earlier.<sup>18</sup>

*In response to Prosecutor's Requests 1401:*

28. Mr Katanga – no objections.

29. Mr Ngudjolo:

- The Prosecution should not invoke simple problems of coordination of agendas or logistical obstacles to extract itself from its responsibilities under Article 54 of the Statute and accused the Prosecution of a lack of diligence;
- Since the mission took place in March 2009, the Prosecution could easily have applied to the Chamber for an extension of time limit at that point;
- The Defence was concerned about the possible alteration and loss of evidence, given that six years have passed between the alleged facts and the expert mission and raises questions about the late stage in which the Prosecution decided to carry out such important investigations.<sup>19</sup>

*In response to Prosecutor's Requests 1456:*

30. No information available from the responses of the Defence.

• **The reasoning of the ICC with respect to the DDE**

*Regarding late submission*

31. General observations on Requests 1305, 1345 and 1401:

- The parties must, to the extent possible, keep the Chamber informed of ongoing or planned fact-finding missions, before the expiration of the deadline, when it is reasonable to think that they might lead to a request for additional disclosure after the set time limit, based on regulation 35 of the Regulations;<sup>20</sup>

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<sup>17</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Observations de la Défense de Mathieu Ngudjolo relatives au mémoire de l'Accusation déposé en vertu de la norme 35 du RC et référencé sous ICC-01/04-01/07-1345, ICC-01/04-01/07-1355, Tr. Ch. II, 7 August 2009, para. 13.

<sup>18</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Observations de la Défense de Mathieu Ngudjolo relatives au mémoire de l'Accusation déposé en vertu de la norme 35 du RC et référencé sous ICC-01/04-01/07-1345, ICC-01/04-01/07-1355, Tr. Ch. II, 7 August 2009, paras. 14-17.

<sup>19</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Observations de la Défense de Mathieu Ngudjolo relatives au mémoire de l'Accusation déposé en vertu de la norme 35 du RC et référencé sous ICC-01/04-01/07-1305, ICC-01/04-01/07-1317, Tr. Ch. II, 17 July 2009, paras. 17-24.

<sup>20</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), ICC-01/04-01/07-1515, Tr. Ch. II, 7 October 2009, para. 27.

- When a party knows that it will not be able to meet a set time limit, but still intends to obtain the material in order to present it at a later stage, it must, for the reasons outlined above, file a formal application under regulation 35(2) before the deadline.<sup>21</sup>

32. The Chamber rejected the application for extension of the time limit. The Chamber, using its authority under Articles 64(3)(c) and (6)(d) and Article 69(3), allowed for its late submission as it “deem[ed] this necessary for the determination of the truth and as long as this d[id] not jeopardise the Defence’s right to have adequate time in order to prepare.”<sup>22</sup>

*Regarding relevance and nature of new materials*

33. In the case of newly discovered incriminating evidence, the Prosecution must show that the new evidence is either 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. The Chamber will then evaluate whether the new material is of such a nature that it will contribute to a better understanding of the case and the establishment of the truth.<sup>23</sup>

34. With regard to **DRC-OTP-1044-0099** (A digital 360° visual representation): it may assist the Chamber and the parties in visualising the “Institut” and its surroundings. The material in itself is not incriminating and has very limited evidentiary value. It is *simply a tool for orientation*, just like a diagram or drawing.<sup>24</sup> The Defences’ right to have adequate time and facilities to prepare is not in any way jeopardised by the late submission.<sup>25</sup>

35. With regard to 200+ photographs (submitted as Annex G to Request 1305): The Defences’ right to have adequate time and facilities to prepare is not in any way jeopardised by the late submission.<sup>26</sup>

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<sup>21</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), ICC-01/04-01/07-1515, Tr. Ch. II, 7 October 2009, para. 33.

<sup>22</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), ICC-01/04-01/07-1515, Tr. Ch. II, 7 October 2009, para. 26.

<sup>23</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), ICC-01/04-01/07-1515, Tr. Ch. II, 7 October 2009, para. 37.

<sup>24</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), ICC-01/04-01/07-1515, Tr. Ch. II, 7 October 2009, para. 39.

<sup>25</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), ICC-01/04-01/07-1515, Tr. Ch. II, 7 October 2009, para. 40.

<sup>26</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), ICC-01/04-01/07-1515, Tr. Ch. II, 7 October 2009, para. 40.

36. With regard to **DRC-OTP-1044-0099** (A digital 360° visual representation): The Chamber did not consider that the late addition of the visual presentation of the “Institut” to the List of Incriminating Evidence would cause any prejudice to the Defence.<sup>27</sup>

## V. Legal Arguments Court Analysis

### ● What arguments/findings was the DDE used to support?

37. See Arguments of the Prosecutor above containing the description why adding the particular DDE is relevant for the case.

## VI. Rules of Evidence

38. **Rules of evidence:** The Trial Chamber II issues the decision having regard to Articles 64(3)(c) and 67(l)(b) of the Rome Statute and Regulations 35(2) and 44 of the Regulations of the Court.<sup>28</sup>

## VII. Extrapolation (Guideline(s) for practitioners from the case)

1. Based in the decision of the Trial Chamber II, it follows that late submission of the evidence may preclude the parties including such evidence in the materials, unless it is sufficiently justified (the new material is of such a nature that it will contribute to a better understanding of the case and the establishment of the truth) and the attempts to obtain such evidence have been planned in advance and communicated to the court (equally applicable to DDE);<sup>29</sup>

2. To justify inclusion of newly discovered evidence when the trial is already underway, the Prosecution must show that the new evidence is either 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 equally applicable to DDE);<sup>30</sup>

3. Before video or audio material can be admitted, the Chamber will require evidence of originality and integrity. However, once this has been established, this type of exhibit may often be admitted as evidence “that speaks for itself and may be regarded, in this respect, as real

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<sup>27</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), ICC-01/04-01/07-1515, Tr. Ch. II, 7 October 2009, para. 63.

<sup>28</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), ICC-01/04-01/07-1515, Tr. Ch. II, 7 October 2009, p. 3.

<sup>29</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), ICC-01/04-01/07-1515, Tr. Ch. II, 7 October 2009, para. 37.

<sup>30</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), ICC-01/04-01/07-1515, Tr. Ch. II, 7 October 2009, para. 37.

evidence”. Since the relevance of audio or video material depends on the date and/or location of recording, evidence must be provided in this regard.<sup>31</sup>

4. Generally speaking, material which is publicly available from an open source (e.g. internet or public libraries) will only require the tendering party to provide verifiable information about where the item can be obtained. If the item of evidence is no longer publicly available at the time it is tendered, the party should clearly indicate this and provide the date and location from which it was obtained.<sup>32</sup>

5. Specifically, with regard to a digital 360° visual representation created by the Prosecutor’s expert: this material can assist the court in understanding the circumstances in which the crime occurred; however, as a piece of evidence it has almost no probative value.<sup>33</sup>

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<sup>31</sup> *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions, ICC-01/04-01/07, 17 December 2010, para. 24.

<sup>32</sup> *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions, ICC-01/04-01/07, 17 December 2010, para. 24.

<sup>33</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor’s site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), ICC-01/04-01/07-1515, Tr. Ch. II, 7 October 2009, para. 40. For similar findings of the Court with regard to visual representations, see *The Prosecutor v. Dominic Ongwen*, Prosecution Submissions in Accordance with the Scheduling Order of 4 May 2016, ICC-02/04-01/15, Trial Chamber IX, 18 May 2016, para 8.

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

## I. Case Details

- Case name: Prosecutor v. Thomas Lubanga Dyilo (ICC-01/04-01/06)
- Tribunal/Court: International Criminal Court (ICC)
- Citation + hyperlinks to the documents used:

*Prosecutor v Thomas Lubanga Dyilo* (Prosecution's Information pursuant to the 28 September 2006 Decision on the Prosecution Information in respect of the Second Decision on Rule 81 Motions) ICC-01/04-01/06-611 (25 October 2006). Link: [https://www.icc-cpi.int/CourtRecords/CR2007\\_00963.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_00963.PDF);

*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 (02 November 2006) Link: [https://www.icc-cpi.int/CourtRecords/CR2007\\_03785.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_03785.PDF);

*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-01/04-01/06-642-Corr ICC-01/04-01/06-662 (06 November 2006). Link: [https://www.icc-cpi.int/CourtRecords/CR2007\\_01066.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_01066.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Prosecution's Submission on the presentation of Video Evidence and Requests for Admission of Evidence and in relation to the Translations of the Videos) ICC-01/04-01/06 (03 March 2009). Link: [https://www.icc-cpi.int/CourtRecords/CR2009\\_01495.PDF](https://www.icc-cpi.int/CourtRecords/CR2009_01495.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Closing submissions of the Defence) ICC-01/04-01/06 (15 July 2011). Link: [https://www.icc-cpi.int/CourtRecords/CR2012\\_02509.PDF](https://www.icc-cpi.int/CourtRecords/CR2012_02509.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006). Link: [https://www.icc-cpi.int/Transcripts/CR2007\\_00005.PDF](https://www.icc-cpi.int/Transcripts/CR2007_00005.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006). Link: [https://www.icc-cpi.int/Transcripts/CR2007\\_00008.PDF](https://www.icc-cpi.int/Transcripts/CR2007_00008.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-43-EN (23 November 2006). Link: [https://www.icc-cpi.int/Transcripts/CR2007\\_00026.PDF](https://www.icc-cpi.int/Transcripts/CR2007_00026.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06 (29 January 2007). [https://www.icc-cpi.int/CourtRecords/CR2007\\_02360.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF).

*Prosecutor v Thomas Lubanga Dyilo* (Registration in the Record of Material Presented During the Hearing Held in Open Session on 02 October 2007) ICC-01/04-01/06 (08 October 2007). Link: [https://www.icc-cpi.int/CourtRecords/CR2007\\_04329.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_04329.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Prosecution's provision of electronic versions of incriminatory evidence disclosed to the Defence after the confirmation hearing) ICC-01/04-01/06-997 (23 October 2007). Link: [https://www.icc-cpi.int/CourtRecords/CR2007\\_04512.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_04512.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Prosecution's provision of electronic versions of incriminatory evidence disclosed to the Defence on 31 October 2007) ICC-01/04-01/06-1013 (02 November 2007). Link: [https://www.icc-cpi.int/CourtRecords/CR2007\\_04665.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_04665.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Prosecution's communication of originals of incriminatory evidence disclosed to the Defence on 17 December 2007) ICC-01/04-01/06-1096 (18 December 2007). Link: [https://www.icc-cpi.int/CourtRecords/CR2007\\_05173.PDF](https://www.icc-cpi.int/CourtRecords/CR2007_05173.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Submission of the Prosecution's Updated Summary of Presentation of Evidence) ICC-01/04-01/06-1363 (30 May 2008). Link: [https://www.icc-cpi.int/CourtRecords/CR2008\\_03067.PDF](https://www.icc-cpi.int/CourtRecords/CR2008_03067.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Prosecution's Closing Brief) ICC-01/04-01/06-2748-Red (21 July 2011). Link: [https://www.icc-cpi.int/CourtRecords/CR2011\\_10748.PDF](https://www.icc-cpi.int/CourtRecords/CR2011_10748.PDF);

*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 (17 October 2014). Link: [https://www.icc-cpi.int/CourtRecords/CR2014\\_08860.PDF](https://www.icc-cpi.int/CourtRecords/CR2014_08860.PDF)

*Prosecutor v Thomas Lubanga Dyilo* (Defence application for leave to present additional evidence at sentencing hearing scheduled for 13 June 2012) ICC-01/04-01/06-2892-tENG (03 June 2012). Link: [https://www.icc-cpi.int/CourtRecords/CR2013\\_03074.PDF](https://www.icc-cpi.int/CourtRecords/CR2013_03074.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-128-Red2-ENG (16 February 2006). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_05038.PDF](https://www.icc-cpi.int/Transcripts/CR2012_05038.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_00063.PDF](https://www.icc-cpi.int/Transcripts/CR2012_00063.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-FRA (03 March 2009). Link: [https://www.icc-cpi.int/Transcripts/CR2011\\_19974.PDF](https://www.icc-cpi.int/Transcripts/CR2011_19974.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009). Link: [https://www.icc-cpi.int/Transcripts/CR2011\\_20027.PDF](https://www.icc-cpi.int/Transcripts/CR2011_20027.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_01096.PDF](https://www.icc-cpi.int/Transcripts/CR2012_01096.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_05310.PDF](https://www.icc-cpi.int/Transcripts/CR2012_05310.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-117-Red3-FRA (04 February 2010). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_04409.PDF](https://www.icc-cpi.int/Transcripts/CR2012_04409.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-252-Red3-FRA (04 March 2010). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_05201.PDF](https://www.icc-cpi.int/Transcripts/CR2012_05201.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-254-Red3-ENG (05 March 2010). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_04453.PDF](https://www.icc-cpi.int/Transcripts/CR2012_04453.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-257-Red2-ENG (09 March 2010). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_05424.PDF](https://www.icc-cpi.int/Transcripts/CR2012_05424.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-259-Red2-ENG (11 March 2010). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_04407.PDF](https://www.icc-cpi.int/Transcripts/CR2012_04407.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-261-Red3-ENG (15 March 2010). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_04173.PDF](https://www.icc-cpi.int/Transcripts/CR2012_04173.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_05040.PDF](https://www.icc-cpi.int/Transcripts/CR2012_05040.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_00086.PDF](https://www.icc-cpi.int/Transcripts/CR2012_00086.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-290-Red2-ENG (19 May 2010). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_04254.PDF](https://www.icc-cpi.int/Transcripts/CR2012_04254.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-329-Red2-ENG (09 November 2010). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_04078.PDF](https://www.icc-cpi.int/Transcripts/CR2012_04078.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-162-Red2-ENG (02 April 2011). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_04524.PDF](https://www.icc-cpi.int/Transcripts/CR2012_04524.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-ENG (07 November 2011). Link: [https://www.icc-cpi.int/Transcripts/CR2011\\_19973.PDF](https://www.icc-cpi.int/Transcripts/CR2011_19973.PDF);;

*Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-02/11-01/15-T-129-Red2-ENG (06 March 2017). Link: [https://www.icc-cpi.int/Transcripts/CR2012\\_05310.PDF](https://www.icc-cpi.int/Transcripts/CR2012_05310.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012). Link: [https://www.icc-cpi.int/CourtRecords/CR2012\\_03942.PDF](https://www.icc-cpi.int/CourtRecords/CR2012_03942.PDF);

*Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012). Link: <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/06-3121-Red>

## II. Legal Background

- The legal system: International Criminal Court
- The crimes charged: conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a)<sup>34</sup> – guilty. This was upheld in the Appeals Chamber.<sup>35</sup>
- Stage of the proceedings: Conviction confirmed by the Appeals Chamber.

## III. Digitally Derived Evidence (DDE)

- **Type of DDE**
  1. **Videos**
    - a. DRC-OTP-0035-0074 (pacification meeting between armed groups);<sup>36</sup>
    - b. DRC-OTP-0102-0003 (speech by the accused indicating knowledge of the armed conflict);<sup>37</sup>
    - c. DRC-OTP-0148-0302 (documentary on the accused);<sup>38</sup>

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<sup>34</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 591 [1358].

<sup>35</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 193 [529].

<sup>36</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) p 83 lines 4-13.

<sup>37</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) p 86 line 25; p 89 lines 16-24; p 92 lines 1-6.

<sup>38</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) p 35 line 17, 24; p 36 lines 8-17.

- d. DRC-OTP-0082-0016 (private video on the Deputy Minister);<sup>39</sup>
- e. DRC-OTP-0120-0293 (speech by accused with children in the crowd);<sup>40</sup>
- f. DRC-OTP-0127-0058 (commanders being escorted by children);<sup>41</sup>
- g. DRC-OTP-0120-0294 (accused being escorted by children);<sup>42</sup>
- h. EVD-OTP-00574 (accused being escorted by children);<sup>43</sup>
- i. DRC-OTP-1001-0010 (the presidential guard<sup>44</sup> and speech by accused with children in the crowd);<sup>45</sup>
- j. DRC-OTP-0127-0064 (speech at military training camp addressed to children);<sup>46</sup>
- k. DRC-OTP-0102-0009 (speech by accused with children in crowd);<sup>47</sup>
- l. DRC-OTP-1001-0008 (interview of the accused);<sup>48</sup>
- m. DRC-OTP-0081-0007 (speech by accused with children in crowd);<sup>49</sup>
- n. EVD-OTP-00578 (accused and alleged co-perpetrators);<sup>50</sup>
- o. EVD-OTP-00573 (accused and alleged co-perpetrators);<sup>51</sup>
- p. EVD-OTP-00579 (accused and alleged co-perpetrators);<sup>52</sup>

<sup>39</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) p 36 lines 8-17.

<sup>40</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-128-Red2-ENG (16 February 2006) p 38 lines 19-20; p 41 lines 12 – 19; *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 354 [792].

<sup>41</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) para 716; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-128-Red2-ENG (16 February 2006) p 63 lines 4-14; p 66 lines 2-4.

<sup>42</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-128-Red2-ENG (16 February 2006) 51 lines 17-18, 53 lines 11-16; *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 399 [915]; p 537 [1249].

<sup>43</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) 378 [862], refers to: T-129-Red2-ENG p 27 lines 22 – 25.

<sup>44</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 68 lines 2-4; *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 536 [1255].

<sup>45</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 540 [1256]; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 70 lines 20-21.

<sup>46</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 11 line 9, p 12 line 12-18, p 14 lines 3-18; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-128-Red2-ENG (16 February 2006) p 38 lines 19-20.

<sup>47</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 540 [1257] p 545 [1266]; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 72 lines 2-5.

<sup>48</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 29 line 5, p 32 line 25, p 33 line 1.

<sup>49</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 347 [779]; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-162-Red2-ENG (02 April 2011) p 43 line 3, p 48 lines 16-25, p 49 lines 1-5.

<sup>50</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) 519 [1210], refers to: T-129-Red2-ENG p 61 line 23 to p 78 line 16.

<sup>51</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) para 1218, refers to: T-129-CONF-ENG p 13 line 23 to p 16, line 1, p 22, lines 11 – 16; T-129-Red2-ENG p 17 lines 3 – 4.

<sup>52</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 523 [1218], refers to: T-129-CONF-ENG p 79 line 13 to p 83, line 24.



q. DRC-OTP-1001-0010 (speech by accused with children in crowd);<sup>53</sup>

## 2. Photographs

- a. DRC-OTP-0013-8014 (soldier);<sup>54</sup>
- b. DRC-OTP-0216-0288 (soldier);<sup>55</sup>
- c. DRC-OTP-0214-0360 (intermediary);<sup>56</sup>
- d. DRC-OTP-0150-0146 (witness);<sup>57</sup>
- e. DRC-OTP-0184-0055 (soldier);<sup>58</sup>
- f. DRC-OTP-0138-0049 (the questioned witness);<sup>59</sup>
- g. DRC-OTP-0137-0711 (accused with alleged co-perpetrators);<sup>60</sup>
- h. DRC-OTP-0227-0397 (accused);<sup>61</sup>
- i. DRC-OTP-0227-0396 (accused);<sup>62</sup>
- j. DRC-0011-4030 (the questioned witness);<sup>63</sup>
- k. DRC-0011-4031 (the questioned witness);<sup>64</sup>
- l. DRC-0185-0810 (alleged co-perpetrators);<sup>65</sup>
- m. DRC-D01-0003-2012 (witness' family members);<sup>66</sup>
- n. DRC-D01-0003-2594 (witness' family members);<sup>67</sup>

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<sup>53</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 540 [1256]; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 70 lines 19-20.

<sup>54</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-261-Red3-ENG (15 March 2010) p 17 lines 5-24.

<sup>55</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-329-Red2-ENG (09 November 2010) p 17 lines 11-24, p 19 lines 2-6.

<sup>56</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 6 lines 1-17.

<sup>57</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-259-Red2-ENG (11 March 2010) p 12 lines 13-24.

<sup>58</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-117-Red3-FRA (04 February 2010) p 29 line 21, p 30 lines 1-9.

<sup>59</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-ENG (07 November 2011) p 32 lines 8-11, p 33 lines 7-9.

<sup>60</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) 448 [1042], refers to: T-125-CONF-FRA-CT p 16 lines 4-15; *Prosecutor v Thomas Lubanga Dyilo* (Closing submissions of the Defence) ICC-01/04-01/06 (15 July 2011) p 249 [792].

<sup>61</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) p 23 lines 14-17.

<sup>62</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) p 24 lines 5-6.

<sup>63</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) p 60 lines 21-24.

<sup>64</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) p 61 lines 10-12.

<sup>65</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) p 53 lines 12-20.

<sup>66</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) p 24 lines 24-25; p 25 lines 1-15.

<sup>67</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) p 34 lines 1-8.

- o. DRC-D01-0003-2518 (witness' family members);<sup>68</sup>
- p. DRC-D01-003-2509 (witness' family members);<sup>69</sup>
- q. DRC-D01-0003-25137 (witness' family members);<sup>70</sup>
- r. EVD-D01-00097 (witness' family members);<sup>71</sup>
- s. DRC-D01-0003-2593 (witness' family members);<sup>72</sup>

• **Who obtained the DDE? Where the DDE was obtained? What party introduced/sought the admission of the DDE?**

**1. Videos**

- a. DRC-OTP-0035-0074 - introduced by the Legal Representatives of victims a/0001/06 to a/0003/06<sup>73</sup> and obtained from publicly available video 'Guerre et Paix en Ituri' produced by United Nations Organization Mission in the Democratic Republic of the Congo (MONUC).<sup>74</sup>
- b. DRC-OTP-0102-0003 - introduced by the Legal Representatives of victims a/0001/06 to a/0003/06<sup>75</sup> and obtained from a search conducted by the DRC national authorities in the Bunia Tribunal.<sup>76</sup>
- c. DRC-OTP-0148-0302 - introduced by the Legal Representatives of victims a/0001/06 to a/0003/06<sup>77</sup> and obtained from documentary 'The Killing Fields' produced by UK broadcasting company Channel 4.<sup>78</sup>
- d. DRC-OTP-0082-0016 - introduced by the Legal Representatives of victims a/0001/06 to a/0003/06<sup>79</sup> and is a private video taken by a witness (witness number: #DRC-OTP-WWWW-0002#).<sup>80</sup>

<sup>68</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 13 lines 3-9.

<sup>69</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 46 lines 17-24.

<sup>70</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 21 lines 2-4; *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 227 [497].

<sup>71</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 3 lines 1-15.

<sup>72</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) p 24 lines 24-25; p 25 lines 1-15.

<sup>73</sup> *Prosecutor v Thomas Lubanga Dyilo* (Registration in the Record of Material Presented During the Hearing Held in Open Session on 02 October 2007) ICC-01/04-01/06 (08 October 2007) p 8.

<sup>74</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) p 82.

<sup>75</sup> *Prosecutor v Thomas Lubanga Dyilo* (Registration in the Record of Material Presented During the Hearing Held in Open Session on 02 October 2007) ICC-01/04-01/06 (08 October 2007) p 8.

<sup>76</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) p 86 lines 13-16; p 88 lines 9-5; p 89 lines 1-5.

<sup>77</sup> *Prosecutor v Thomas Lubanga Dyilo* (Registration in the Record of Material Presented During the Hearing Held in Open Session on 02 October 2007) ICC-01/04-01/06 (08 October 2007) p 9.

<sup>78</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) 35, 38-39.

<sup>79</sup> *Prosecutor v Thomas Lubanga Dyilo* (Registration in the Record of Material Presented During the Hearing Held in Open Session on 02 October 2007) ICC-01/04-01/06 (08 October 2007) p 9.

<sup>80</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) 43.

- e. DRC-OTP-0120-0293 - introduced by the Legal Representatives of victims a/0001/06 to a/0003/06<sup>81</sup> and obtained from a 'private source'.<sup>82</sup>
- f. DRC-OTP-0127-0058 – introduced by Prosecution<sup>83</sup> and the origin is redacted.<sup>84</sup>
- g. EVD-OTP-00574 – introduced by defence<sup>85</sup> and only states that the 'video was filmed at the Appellant's home'<sup>86</sup> when a MONUC delegation visited.<sup>87</sup>
- h. DRC-OTP-1001-0010 – introduced by Prosecution<sup>88</sup> but origin is unknown.<sup>89</sup>
- i. DRC-OTP-0102-0009 – introduced by Prosecution<sup>90</sup> but origin is unknown.<sup>91</sup>
- j. DRC-OTP-1001-0008 – introduced by Prosecution<sup>92</sup> and is obtained from an interview at the accused's residence.<sup>93</sup>
- k. DRC-OTP-0081-0007 – introduced by Prosecution<sup>94</sup> yet origin is unknown.<sup>95</sup>
- l. EVD-OTP-00585 – introduced by Legal Representative of victims a/0001/06 to a/0003/06<sup>96</sup> and is obtained from a publicly displayed documentary produced by Canada and ARTE France.<sup>97</sup>

## 2. Photographs

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<sup>81</sup> *Prosecutor v Thomas Lubanga Dyilo* (Registration in the Record of Material Presented During the Hearing Held in Open Session on 02 October 2007) ICC-01/04-01/06 (08 October 2007) p 10.

<sup>82</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) p 72 refers to: 27 January 2006 filing of the Prosecution, paragraphs 10 (i)-(vi).

<sup>83</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 70 [190]; *Prosecutor v Thomas Lubanga Dyilo* (Prosecution's Submission on the presentation of Video Evidence and Requests for Admission of Evidence and in relation to the Translations of the Videos) ICC-01/04-01/06 (03 March 2009) p 3 [1].

<sup>84</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) para 854; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-128-Red2-ENG (16 February 2006) p 4 lines 20, 23; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-02/11-01/15-T-129-Red2-ENG (06 March 2017) p 14 lines 6-13.

<sup>85</sup> *Prosecutor v Thomas Lubanga Dyilo* (Defence application for leave to present additional evidence at sentencing hearing scheduled for 13 June 2012) ICC-01/04-01/06-2892-tENG (03 June 2012) p 4 [8].

<sup>86</sup> *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 (17 October 2014) p 46 [160]; *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 376 [858], p 378 [862], p 538 [1252], p 539 [1254], refers to: T-129-Red2-ENG 26-28, 48, 53, 57-58.

<sup>87</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 376 [858].

<sup>88</sup> *Prosecutor v Thomas Lubanga Dyilo* (Prosecution's Submission on the presentation of Video Evidence and Requests for Admission of Evidence and in relation to the Translations of the Videos) ICC-01/04-01/06 (03 March 2009) p 3.

<sup>89</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 66.

<sup>90</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 66.

<sup>91</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 11, 89.

<sup>92</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 4 lines 6 - 9; p 27 lines 23-25.

<sup>93</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 33 line 1; *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 473 [1106].

<sup>94</sup> *Prosecutor v Thomas Lubanga Dyilo* (Prosecution's communication of originals of incriminatory evidence disclosed to the Defence on 17 December 2007) ICC-01/04-01/06-1096 (18 December 2007) p 2 [4]; *Prosecutor v Thomas Lubanga Dyilo* (Prosecution's Information pursuant to the 28 September 2006 Decision on the Prosecution Information in respect of the Second Decision on Rule 81 Motions) ICC-01/04-01/06-611 (25 October 2006) 6 [11].

<sup>95</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-162-Red2-ENG (02 April 2011) p 15 lines 16-20.

<sup>96</sup> *Prosecutor v Thomas Lubanga Dyilo* (Registration in the Record of Material Presented During the Hearing Held in Open Session on 02 October 2007) ICC-01/04-01/06 (08 October 2007) p 2.

<sup>97</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) 33; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-43-EN (23 November 2006) p 79.

- a. DRC-OTP-0013-8014 – introduced by Defence<sup>98</sup> but origin is unknown.<sup>99</sup>
- b. DRC-OTP-0216-0288 – introduced by Prosecution<sup>100</sup> but origin is unknown.<sup>101</sup>
- c. DRC-OTP-0214-0360 – introduced by Defence<sup>102</sup> but origin is unknown.<sup>103</sup>
- d. DRC-OTP-0150-0146 – introduced by Defence<sup>104</sup> yet origin is unknown.<sup>105</sup>
- e. DRC-OTP-0184-0055 – introduced by Prosecution<sup>106</sup> yet origin is unknown.<sup>107</sup>
- f. DRC-OTP-0138-0049 – introduced by Prosecution<sup>108</sup> yet origin is unknown.<sup>109</sup>
- g. DRC-OTP-0137-0711 – introduced by Defence<sup>110</sup> yet origin is unknown.<sup>111</sup>
- h. DRC-OTP-0227-0397 – introduced by Prosecution<sup>112</sup> yet origin is unknown.<sup>113</sup>
- i. DRC-OTP-0227-0396 – introduced by Prosecution<sup>114</sup> yet origin is unknown.<sup>115</sup>
- j. DRC-0011-4030 – introduced by Defence<sup>116</sup> yet origin is unknown.<sup>117</sup>
- k. DRC-0011-4031 – introduced by Defence<sup>118</sup> yet origin is unknown.<sup>119</sup>

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<sup>98</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-254-Red3-ENG (05 March 2010) p 48 line 4.

<sup>99</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-254-Red3-ENG (05 March 2010) p 48 line 4.

<sup>100</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-329-Red2-ENG (09 November 2010) p 18 line 3.

<sup>101</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-329-Red2-ENG (09 November 2010) p 18 line 3.

<sup>102</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-257-Red2-ENG (09 March 2010) p 6 line 17.

<sup>103</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-257-Red2-ENG (09 March 2010) p 6 line 17.

<sup>104</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-259-Red2-ENG (11 March 2010) p 11 line 17; p 12 lines 7 – 21; p 15 lines 11-13.

<sup>105</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-259-Red2-ENG (11 March 2010) p 15 lines 11-13.

<sup>106</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-117-Red3-FRA (04 February 2010) p 29 lines 21-23; *Prosecutor v Thomas Lubanga Dyilo* (Prosecution's provision of electronic versions of incriminatory evidence disclosed to the Defence after the confirmation hearing) ICC-01/04-01/06-997 (23 October 2007) p 2 [1]; *Prosecutor v Thomas Lubanga Dyilo* (Prosecution's provision of electronic versions of incriminatory evidence disclosed to the Defence on 31 October 2007) ICC-01/04-01/06-1013 (02 November 2007) p 2 [3].

<sup>107</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-117-Red3-FRA (04 February 2010) p 29 lines 21-23.

<sup>108</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-ENG (07 November 2011) p 32 lines 6-7.

<sup>109</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-ENG (07 November 2011) p 32 lines 8-9, 33 lines 7-10.

<sup>110</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-252-Red3-FRA (04 March 2010) p 40 line 9

<sup>111</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-252-Red3-FRA (04 March 2010) p 31 lines 6-16.

<sup>112</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) p 23 lines 14-17; p 24 lines 5-6.

<sup>113</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) p 23 lines 14-17; p 24 lines 5-6.

<sup>114</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) p 23 lines 14-17; p 24 lines 5-6.

<sup>115</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) p 23 lines 14-17; p 24 lines 5-6.

<sup>116</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-252-Red3-FRA (04 March 2010) p 60 lines 6-8.

<sup>117</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-252-Red3-FRA (04 March 2010) p 60 lines 6-8.

<sup>118</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-252-Red3-FRA (04 March 2010) p 60 line 25; 61 line 1.

<sup>119</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-252-Red3-FRA (04 March 2010) p 60 line 25; 61 line 1.

- l. DRC- 0185-0810 – introduced by Prosecution<sup>120</sup> yet origin is unknown.<sup>121</sup>
- m. DRC-D01-0003-2012 – introduced by Defence<sup>122</sup> yet origin is unknown.<sup>123</sup>
- n. DRC-D01-0003-2594 – introduced by Defence<sup>124</sup> yet origin is unknown.<sup>125</sup>
- o. DRC-D01-0003-2518 – introduced by Defence<sup>126</sup> yet origin is unknown.<sup>127</sup>
- p. DRC-D01-003-2509 – introduced by Defence<sup>128</sup> yet origin is unknown.<sup>129</sup>
- q. DRC-D01-0003-25137 – introduced by Defence<sup>130</sup> yet origin is unknown.<sup>131</sup>
- r. DRC-D01-0003-2593 – introduced by Defence<sup>132</sup> yet origin is unknown.<sup>133</sup>

Unable to find introducing party and origin

*Videos:*

- a. (DRC-OTP-0120-0294);<sup>134</sup>
- b. (DRC-OTP-0127-0064);<sup>135</sup>
- c. (DRC-OTP-0102-0009);<sup>136</sup>
- d. (EVD-OTP-00578);<sup>137</sup>
- e. (EVD-OTP-00573);<sup>138</sup>

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<sup>120</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) p 52 lines 24-25; p 53 lines 1-6.

<sup>121</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) p 52 lines 24-25; p 53 lines 1-6.

<sup>122</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) p 31 lines 5-10.

<sup>123</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) p 31 line 10.

<sup>124</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) p 33 lines 18-20.

<sup>125</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) p 33 lines 17-20.

<sup>126</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 13 lines 3-6.

<sup>127</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 13 lines 3-6.

<sup>128</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 15 lines 13-22.

<sup>129</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 15 lines 13-22.

<sup>130</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 20 line 25; 21 lines 1-4.

<sup>131</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 20 line 25; 21 lines 1-4.

<sup>132</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-290-Red2-ENG (19 May 2010) p 24 lines 5, 23.

<sup>133</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-290-Red2-ENG (19 May 2010) p 24 lines 23.

<sup>134</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-128-Red2-ENG (16 February 2006) p 49 lines 15-24.

<sup>135</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 11, 89.

<sup>136</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 11, 89.

<sup>137</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 519 [1210], it references: T-129-Red2-ENG p 61 line 23 to p 78 line 16.

<sup>138</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 519 [1210].

f. (EVD-OTP-00579);<sup>139</sup>

## IV. Legal Arguments

### • Counsels' legal arguments surrounding DDE evidentiary considerations.

#### *Videos*

##### **i. Pre-Trial**

1. (DRC-OTP-0102-0003) (DRC-OTP-0082-0016) – Defence asserts that videos disclosed in languages other than English or French should be excluded if translation is not provided before the deadline.<sup>140</sup> Prosecution states that Regulation 39(1) of the Regulations of the Court, which provides that 'all documents and materials filed with the Registry shall be in English or French, unless otherwise provided in the Statute [...]'<sup>141</sup> does not apply to the disclosure obligation in Art. 61(3)(b) of the Rome Statute, which stipulates the accused's right to 'be informed of the evidence on which the Prosecutor intends to rely at the hearing'; therefore, the request should be denied.<sup>142</sup>

##### **ii. Trial**

2. (DRC-OTP-0120-0293) (DRC-OTP-0127-0058) – Prosecution asserts that the video material 'speaks for itself' since the children are 'visibly' under the age of 15.<sup>143</sup> The Defence rejects this by stating the impossibility of reliably distinguishing between a 12- or 13-year-old and a 15- or 16-year-old based on a photograph or video extract alone.<sup>144</sup>

##### **iii. Appeal**

3. DRC-OTP-0081-0007 – the Defence states in the Appeal phase that the video did not 'allow discernment of the individual's facial features' and therefore does not show soldiers clearly under the age of fifteen; undermining its reliability.<sup>145</sup>

#### *Photographs*

##### **i. Trial**

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<sup>139</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 519 [1210], refers to: T-129-CONF-ENG p 79 line 13 to 83.

<sup>140</sup> *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 (02 November 2006) p 4.

<sup>141</sup> *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-01/04-01/06-642-Corr ICC-01/04-01/06-662 (06 November 2006) p 4 [11].

<sup>142</sup> *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-01/04-01/06-642-Corr ICC-01/04-01/06-662 (06 November 2006) p 3, 5, 10.

<sup>143</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 123 [257]; p 292 [644].

<sup>144</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 292 [644]; *Prosecutor v Thomas Lubanga Dyilo* (Closing submissions of the Defence) ICC-01/04-01/06 (15 July 2011) p 221 [704].

<sup>145</sup> *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-t-ENG (17 October 2014) p 51-52 [184-185].

4. (DRC-OTP-0013-8014) (DRC-OTP-0216-0288) (DRC-OTP-0214-0360) (DRC-OTP-0150-0146) (DRC-OTP-0184-0055) – Defence asserts that it is impossible to reliably distinguish between a 12- or 13 year old and a 15- or 16 year old based solely on a photograph. It is increasingly difficult for growing adolescents; whose physical appearance depends on numerous factors such as diet and community-specific aspects. This difficulty is ‘insurmountable’ when the observer is unacquainted with the community from which the child originates.<sup>146</sup>

No argument deliberated: (no information provided)

#### *Videos*

- a. DRC-OTP-0035-0074;<sup>147</sup>
- a. DRC-OTP-0148-0302;<sup>148</sup>
- b. DRC-OTP-0120-0294;<sup>149</sup>
- c. EVD-OTP-00574;<sup>150</sup>
- d. DRC-OTP-1001-0010;<sup>151</sup>
- e. DRC-OTP-0127-0064;<sup>152</sup>
- f. DRC-OTP-0102-0009;<sup>153</sup>
- g. DRC-OTP-1001-0008;<sup>154</sup>
- h. EVD-OTP-00578;<sup>155</sup>
- i. EVD-OTP-00573;<sup>156</sup>
- j. EVD-OTP-00579;<sup>157</sup>

#### *Photographs*

- a. DRC-OTP-0137-0711;<sup>158</sup>
- b. DRC-OTP-0227-0396;<sup>159</sup>

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<sup>146</sup> *Prosecutor v Thomas Lubanga Dyilo* (Closing submissions of the Defence) ICC-01/04-01/06 (15 July 2011) p 221 [704].

<sup>147</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006).

<sup>148</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006).

<sup>149</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-128-Red2-ENG (16 February 2006).

<sup>150</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) 33.

<sup>151</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009).

<sup>152</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 11, 89.

<sup>153</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 72.

<sup>154</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 29 lines 4-6.

<sup>155</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) 519 [1210], referencing: T-129-Red2-ENG p 61 line 23 to p 78, line 16.

<sup>156</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) 519 [1210], refers to: T-129-CONF-ENG p 79 line 13 to p 83 line 24.

<sup>157</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) 519 [1210], refers to: T-129-CONF-ENG p 79 line 13 to p 83 line 24.

<sup>158</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-252-Red3-FRA (04 March 2010) p 31 lines 6-16.

<sup>159</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) p 23 lines 14-17; p 24 lines 5-6.

- c. DRC-OTP-0227-0397;<sup>160</sup>
- d. DRC-OTP-0138-0049;<sup>161</sup>
- e. DRC-OTP-0138-0049;<sup>162</sup>
- f. DRC-0011-4030;<sup>163</sup>
- g. DRC-0011-4031;<sup>164</sup>
- h. DRC- 0185-0810;<sup>165</sup>
- i. DRC-D01-0003-2012;<sup>166</sup>
- j. DRC-D01-0003-2594;<sup>167</sup>
- k. DRC-D01-0003-2518;<sup>168</sup>
- l. DRC-D01-003-2509;<sup>169</sup>
- m. DRC-D01-0003-25137;<sup>170</sup>
- n. EVD-D01-00097;<sup>171</sup>
- o. DRC-D01-0003-2593;<sup>172</sup>

- **The Court's response to these particular arguments.**

## *Videos*

### **1. Trial**

5. DRC-OTP-0120-0293) (DRC-OTP-0127-0058) (DRC-OTP-0081-0007) (EVD-OTP-00574) (DRC-OTP-0127-0058) (DRC-OTP-0120-0294) - Chamber only relies on video evidence

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<sup>160</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) p 23 lines 14-17; p 24 lines 5-6.

<sup>161</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) p 23 lines 14-17; p 24 lines 5-6.

<sup>162</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-ENG (07 November 2011) p 32 lines 8-9, p 33 lines 7-10.

<sup>163</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) p 60 lines 6-8.

<sup>164</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) p 60 line 25; p 61 line 1.

<sup>165</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) p 52 lines 24-25; p 53 lines 1-6.

<sup>166</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) p 31 line 10.

<sup>167</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) p 33 lines 17-20.

<sup>168</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 13 lines 3-6.

<sup>169</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 15 lines 13-22.

<sup>170</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 20 line 25; p 21 lines 1-4.

<sup>171</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 2 lines 24-25.

<sup>172</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-290-Red2-ENG (19 May 2010) p 24 lines 23.



that depicts children who are ‘clearly’ or ‘plainly’ under the age of 15.<sup>173</sup> Regarding one video, the Court compares the ‘size and general appearance’ of certain individuals with other children and men in their vicinity; establishing that they are visibly below this age.<sup>174</sup> However, in another video, a person is deemed ‘obviously younger than the other males’ in the frame, yet the Chamber is unable to determine whether he is younger than 15.<sup>175</sup> However, it was ‘unpersuaded’ by the Defence’s assertion that there was a lack of video evidence demonstrating underage.<sup>176</sup>

6. The Court asserts that it is ‘generally possible to identify children who are clearly below 15 years of age’ without specifying the factors that indicate this.<sup>177</sup>

7. (DRC-OTP-1001-0010) (DRC-OTP-0102-0009) (DRC-OTP-0120-0294) – Chamber does not rely on video evidence where age could not be fully ascertained.<sup>178</sup>

8. EVD-OTP-00574 – the ‘size and general appearance’ of the individuals, compared to those in their surroundings, concludes their age as below 15.<sup>179</sup>

9. (DRC-OTP-0120-0293) (DRC-OTP-0120-0294) (DRC-OTP-1001-0008) – video evidence corroborated with documentary evidence establishes the crimes of the accused.<sup>180</sup>

## 2. Appeal

10. The Appeals Chamber establishes the Prosecution’s argument of video evidence speaking ‘for itself’ as not reliable in asserting the age of individuals beyond reasonable doubt. However, jurisprudence from national courts and the Special Court for Sierra Leone demonstrate that video evidence may be relied on for establishing the element of age.<sup>181</sup>

11. Additionally, the reasonableness of the Trial Chamber’s finding depends on whether it exercised caution in determining the age of individuals through video images, which is common practice in domestic jurisprudence. Since the Court did not rely on videos where children were not depicted as below 15 years of age, the Appeal Chamber found the Trial Chamber to be reasonable.<sup>182</sup>

12. The Appeals Chamber comments on the Trial Chamber’s reasoning regarding the age element, where they consider that it could have been ‘more extensive’ in explaining their analysis.<sup>183</sup>

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<sup>173</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 292 [644]; p 347 [779]; p 375 [854]; p 376 [858], p 377 [860].

<sup>174</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 378 [862].

<sup>175</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 538 [1250].

<sup>176</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 535 [1244].

<sup>177</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 369 [837].

<sup>178</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 538 [1250]; p 539 [1255]; p 540 [1257].

<sup>179</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 378 [862].

<sup>180</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 398 [912]; p 475 [1112]; p 501 [1169]; p 523 [1218].

<sup>181</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 82-82 [219-221].

<sup>182</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 82-82 [221-222].

<sup>183</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 83 [222].

Argument not deliberated:

*Videos:*

- a. DRC-OTP-0035-0074;<sup>184</sup>
- b. DRC-OTP-0148-0302;<sup>185</sup>
- c. DRC-OTP-0127-0064;<sup>186</sup>
- d. EVD-OTP-00578;<sup>187</sup>
- e. EVD-OTP-00573;<sup>188</sup>
- f. EVD-OTP-00579;<sup>189</sup>

*Photographs*

- p. DRC-OTP-0137-0711;<sup>190</sup>
- q. DRC-OTP-0227-0396;<sup>191</sup>
- r. DRC-OTP-0227-0397;<sup>192</sup>
- s. DRC-OTP-0227-0397;<sup>193</sup>
- t. DRC-OTP-0138-0049;<sup>194</sup>
- u. DRC-0011-4030;<sup>195</sup>
- v. DRC-0011-4031;<sup>196</sup>
- w. DRC- 0185-0810;<sup>197</sup>

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<sup>184</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006).

<sup>185</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006).

<sup>186</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-130-Red2-ENG (18 February 2009) p 11, 89.

<sup>187</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 519 [1210].

<sup>188</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 519 [1210].

<sup>189</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) 237 [520], refers to: T-129-CONF-ENG p 79 line 13 to p 83 line 24.

<sup>190</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) 448 [1042]; *Prosecutor v Thomas Lubanga Dyilo* (Prosecution's Closing Brief) ICC-01/04-01/06-2748-Red (21 July 2011) p 54 [119].

<sup>191</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) p 23 lines 14-17; p 24 lines 5-6.

<sup>192</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) p 23 lines 14-17; p 24 lines 5-6.

<sup>193</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) p 23 lines 14-17; p 24 lines 5-6.

<sup>194</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-ENG (07 November 2011) p 32 lines 8-9, p 33 lines 7-10.

<sup>195</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) p 60 lines 6-8.

<sup>196</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) p 60 line 25; 61 line 1.

<sup>197</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) p 52 lines 24-25; p 53 lines 1-6.

- x. DRC-D01-0003-2012;<sup>198</sup>
- y. DRC-D01-0003-2594;<sup>199</sup>
- z. DRC-D01-0003-2518;<sup>200</sup>
- aa. DRC-D01-003-2509;<sup>201</sup>
- bb. DRC-D01-0003-25137;<sup>202</sup>
- cc. EVD-D01-00097;<sup>203</sup>
- dd. DRC-D01-0003-2593<sup>204</sup>

## V. Court Analysis

- **What arguments/findings was the DDE used to support?**

### *Videos*

13. (DRC-OTP-0035-0074) (DRC-OTP-0148-0302) (DRC-OTP-0082-0016) (DRC-OTP-0127-0064) (EVD-OTP-00578) (EVD-OTP-00573) (EVD-OTP-00579) (DRC-OTP-0137-0711) – illustrates accused’s relations with co-perpetrators.<sup>205</sup>
14. (DRC-OTP-0120-0293) (DRC-OTP-1001-0010) (DRC-OTP-0127-0064) (DRC-OTP-0102-0009) – demonstrates accused’s awareness of child soldiers by addressing them,<sup>206</sup> and his involvement in recruiting and encouraging them;<sup>207</sup> therefore, indicating individual criminal responsibility.<sup>208</sup>

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<sup>198</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) p 31 line 10.

<sup>199</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) p 31 line 10.

<sup>200</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 13 lines 3-6.

<sup>201</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 15 lines 13-22.

<sup>202</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 21 lines 1-4.

<sup>203</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 2 lines 24-25.

<sup>204</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-290-Red2-ENG (19 May 2010) p 24 line 23.

<sup>205</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 519 [1210]; p 523 [1218]; p 448 [1042]; p 449 [1044]; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) 36-39, 41; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) p 83 lines 4-13.

<sup>206</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) 88; *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 317 [713]; p 540 [1256], refers to: T-130-Red2-ENG p 70 lines 19 – 21.

<sup>207</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) 325 [729]; 584 [1343]; 585 [1347], refers to: -128-CONF-ENG 28 line 25 to 29, line 8 and T-128-Red2-ENG p 37 lines 2 – 6.

<sup>208</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (14 November 2006) 51, 72, 86-87, 118; *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 325 [729]; p 585 [1348], refers to: T-128-Red2-ENG, page 38, lines 19 – 20; T-128-Red2-ENG p 41 lines 12 – 19.

15. DRC-OTP-0102-0003 – accused having knowledge of the armed conflict.<sup>209</sup>
16. (DRC-OTP-0127-0058) (DRC-OTP-0120-0294) (EVD-OTP-00574) – illustrates commanders being escorted by children ‘clearly’ below the age of 15.<sup>210</sup>
17. (DRC-OTP-0081-0007) (EVD-OTP-00585)<sup>211</sup> – shows accused making a speech with children in the crowd; indicating his awareness of them.<sup>212</sup>
18. DRC-OTP-1001-0008 – demonstrates the accused’s authority as President and political leader of army.<sup>213</sup>

### *Photographs*

19. (DRC-OTP-0013-8014) (DRC-OTP-0216-0288) (DRC-OTP-0184-0055) – witness identifying soldiers.<sup>214</sup>
20. DRC-OTP-0214-0360 – witness asserting the identity of an intermediary.<sup>215</sup>
21. DRC-OTP-0150-0146 – witness asserting the identity of another witness.<sup>216</sup>
22. (DRC-OTP-0227-0397) (DRC-OTP-0227-0396) – identification of the accused in location where he gave a speech in the presence of child soldiers.<sup>217</sup>
23. (DRC-OTP-0138-0049) (DRC-0011-4030) (DRC-0011-4031) – identification of questioned witness to assert their identity and reliability.<sup>218</sup>
24. DRC- 0185-0810 – identification of co-perpetrators.<sup>219</sup>
25. (DRC-D01-0003-2012) (DRC-D01-0003-2594) (DRC-D01-0003-2593) – witness required to identify family members to ascertain their identity and reliability.<sup>220</sup>

<sup>209</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006) p 86 line 25, p 89 lines 16-24, p 92 lines 1-6.

<sup>210</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 375 [854]; p 378 [861-862]; p 399 [915]; p 537 [1249]; p 538 [1252]

<sup>211</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 317 [713].

<sup>212</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) 347 [779]; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-162-Red2-ENG (02 April 2011) p 43 line 3, p 48 lines 16-25, p 49 lines 1-5.

<sup>213</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 490 [1149-1150]; p 521 [1213].

<sup>214</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-261-Red3-ENG (15 March 2010) p 19 line 18; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-329-Red2-ENG (09 November 2010) p 20 lines 3-8; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-117-Red3-FRA (04 February 2010) p 30 lines 1-3.

<sup>215</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 76 [155]; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-257-Red2-ENG (09 March 2010) p 6 lines 1-17.

<sup>216</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-259-Red2-ENG (11 March 2010) p 11, line 17, p 12 lines 7 – 21; p 15 lines 11-13.

<sup>217</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) p 23 lines 14-17; p 24 lines 5-6.

<sup>218</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-ENG (07 November 2011) p 32 lines 8-11, 33 lines 7-9; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) 60 lines 21-24, 61 lines 10-12; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-ENG (07 November 2011) p 32 lines 8-9.

<sup>219</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) p 53 lines 12-20.

<sup>220</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) p 34 lines 1-8; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-290-Red2-ENG (19 May 2010) p 24 lines 24-25;

26. (DRC-D01-0003-2518) (DRC-D01-003-2509) (DRC-D01-0003-25137) (EVD-D01-00097) – inability of witness to identify relatives in a picture; therefore, impacting their reliability.<sup>221</sup>

- **The reasoning of the Court with respect to the DDE.**

**Status of admission:**

*Videos*

- 27. DRC-OTP-0127-0064 – admitted<sup>222</sup> and relied upon.<sup>223</sup>
- 28. DRC-OTP-0081-0007 – relied upon<sup>224</sup> [no information on admission in the available sources].
- 29. DRC-OTP-0120-0293 – admitted<sup>225</sup> and relied upon.<sup>226</sup>
- 30. EVD-OTP-00574 – relied upon<sup>227</sup> [no information on admission in the available sources].
- 31. DRC-OTP-0127-0058 - admitted<sup>228</sup> and relied upon.<sup>229</sup>
- 32. DRC-OTP-0120-0294 – 6 out of 7 excerpts relied upon<sup>230</sup> [no information on admission in the available sources].
- 33. DRC-OTP-0102-0009 – 1 out of 2 excerpts relied upon<sup>231</sup> [no information on admission in the available sources].
- 34. DRC-OTP-1001-0008 – 2 out of 3 excerpts relied upon<sup>232</sup> [no information on admission in the available sources].
- 35. EVD-OTP-00578 – relied upon<sup>233</sup> [no information on admission in the available sources].

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p 25 lines 1-15; *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) p 31 lines 11-25; p 32 lines 1-25; p 33 lines 1-15.

<sup>221</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 46 lines 17-20; 21-24.

<sup>222</sup> *Prosecutor v Thomas Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06 (29 January 2007) p 17 fn 48; p 155.

<sup>223</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 344 [774]; p 584 [1344].

<sup>224</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 397 [911]; *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) 70 [190]; 103 [277]; 133 [359]

<sup>225</sup> *Prosecutor v Thomas Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06 (29 January 2007) p 17 fn 48; p 155.

<sup>226</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 354 [793].

<sup>227</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 399 [915]; p 376 [858]; p 378 [862].

<sup>228</sup> *Prosecutor v Thomas Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06 (29 January 2007) p 17 fn 48, p 155.

<sup>229</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 173-174 [375 – 376]; p 375 [854]; p 376 [857].

<sup>230</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 239 [523]; p 377-378 [860-861]; p 381 [869]; p 523-524 [1218-1219]; p 537-542 [1249-1260].

<sup>231</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 545 [1266].

<sup>232</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 474 [1112]; p 501 [1169]; p 521 [1213].

<sup>233</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 519 [1209].

36. EVD-OTP-00573 – relied upon<sup>234</sup> [no information on admission in the available sources].
37. EVD-OTP-00579 – relied upon<sup>235</sup> [no information on admission in the available sources].
38. DRC-OTP-0120-0294 – 1 out of 7 excerpts not relied upon<sup>236</sup> [no information on admission in the available sources].
39. DRC-OTP-1001-0010 – 1 of 3 excerpts not relied upon<sup>237</sup> [no information on admission in the available sources].
40. DRC-OTP-0102-0009 – 1 out of 2 excerpts not relied upon<sup>238</sup> [no information on admission in the available sources].
41. DRC-OTP-0082-0016 – admitted<sup>239</sup> [no information on reliability in the available sources<sup>240</sup>].

No information provided on admissibility or reliability:

- a. DRC-OTP-0035-0074;<sup>241</sup>
- b. DRC-OTP-0102-0003;<sup>242</sup>
- c. DRC-OTP-0148-0302;<sup>243</sup>

### *Videos*

Photographs were not demonstrated for determining the guilt of the accused but rather the reliability of the witnesses.<sup>244</sup>

42. DRC-OTP-0137-0711 – only one photograph is mentioned, where the Chamber establishes it as 'inconclusive' evidence, where it cannot demonstrate the nature of the relationship between the accused and co-perpetrators.<sup>245</sup>

No information provided on admissibility or reliability:

- a. DRC-OTP-0013-8014;<sup>246</sup>

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<sup>234</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 519 [1210]; p 523 [1218].

<sup>235</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 519 [1210].

<sup>236</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 538 [1250].

<sup>237</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 539 [1253].

<sup>238</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 540 [1257].

<sup>239</sup> *Prosecutor v Thomas Lubanga Dyilo* (Decision on the confirmation of charges) ICC-01/04-01/06 (29 January 2007) p 17 fn 48, p 155.

<sup>240</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006).

<sup>241</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006).

<sup>242</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006).

<sup>243</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-34-EN (13 November 2006).

<sup>244</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 94 [189] for example: p 157 [337]; p 186 [408]; p 225-226 [493-494]; p 226 [496]; p 228 [498].

<sup>245</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 448-449 [1042-1044] (admitted as it appears in judgment).

<sup>246</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 63 [124] (admitted as it appears in judgment).

- b. DRC-OTP-0216-0288;<sup>247</sup>
- c. DRC-OTP-0214-0360;<sup>248</sup>
- d. DRC-OTP-0150-0146;<sup>249</sup>
- e. DRC-OTP-0184-0055;<sup>250</sup>
- f. DRC-OTP-0138-0049;<sup>251</sup>
- g. DRC-OTP-0227-0397;<sup>252</sup>
- h. DRC-OTP-0227-0396;<sup>253</sup>
- i. DRC-0011-4030;<sup>254</sup>
- j. DRC-0011-4031;<sup>255</sup>
- k. DRC- 0185-0810;<sup>256</sup>
- l. DRC-D01-0003-2012;<sup>257</sup>
- m. DRC-D01-0003-2594;<sup>258</sup>
- n. DRC-D01-0003-2518;<sup>259</sup>
- o. DRC-D01-003-2509;<sup>260</sup>
- p. DRC-D01-0003-25137;<sup>261</sup>
- q. DRC-D01-0003-2593;<sup>262</sup>

- **Discussion of evidentiary considerations.**

43. The Trial Chamber states that it relies solely on its own assessment<sup>263</sup> and makes its own determination regarding the individuals depicted in the video excerpts, where it finds specific

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<sup>247</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 74 [152] (admitted as it appears in judgment).

<sup>248</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 74 [152] (admitted as it appears in judgment).

<sup>249</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) (admitted as it appears in judgment).

<sup>250</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-117-Red3-FRA (04 February 2010) p 30 lines 1-13.

<sup>251</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-139-Red2-FRA (03 March 2009) p 34 lines 1-24.

<sup>252</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) p 23 lines 14-17; p 24 lines 5-6.

<sup>253</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-285-Red2-ENG (17 May 2010) p 23 lines 14-17; p 24 lines 5-6.

<sup>254</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) p 60 line 8.

<sup>255</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-140-Red2-ENG (04 March 2009) p 61 line 1.

<sup>256</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-176-Red2-ENG (19 May 2009) p 53 line 6.

<sup>257</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) p 31 line 10.

<sup>258</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (22 March 2010) p 33 line 18-20.

<sup>259</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 13 line 4.

<sup>260</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 15 lines 20-21.

<sup>261</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-266-Red2-ENG (26 January 2010) p 21 line 1.

<sup>262</sup> *Prosecutor v Thomas Lubanga Dyilo* (Transcript) ICC-01/04-01/06-T-290-Red2-ENG (19 May 2010) p 24 line 23.

<sup>263</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 319 [718].

persons to be ‘evidently,’<sup>264</sup> ‘clearly’<sup>265</sup> or ‘significantly’<sup>266</sup> under the age of fifteen. The Trial Chamber believes that it is ‘fully entitled to evaluate the videos and reach reasonable conclusions as to the age of the persons depicted on them’ and exercises caution when considering this evidence.<sup>267</sup>

44. The Trial Chamber found individuals to be under 15 years old without knowledge of their names or any other identifying information. The Appeals Chamber found that it is not ‘per se’ impermissible to make a finding on the age element in circumstances where the victim’s identity is unknown.<sup>268</sup>

45. The Appeals Chamber established that Arts. 66(3) and 74(2) of the Rome Statute, as well as Rule 63(4) of the Rules of Procedure and Evidence, does not have a strict requirement for video excerpts to be corroborated with other evidence. Depending on the circumstances, a single piece of evidence ‘may suffice to establish a specific fact.’<sup>269</sup> However, this does not mean that any piece of evidence is a sufficient evidentiary basis for a factual finding.<sup>270</sup>

46. The Appeals Chamber found that jurisprudence from domestic courts and the Special Court for Sierra Leone establishes video evidence as reliable for establishing the element of age.<sup>271</sup>

## VI. Rules of Evidence

### • Rules of evidence used in the case.

47. Article 74(2) of the Rome Statute - the Chamber must ‘base its decision only on evidence submitted and discussed before it at the trial’<sup>272</sup> and the decision ‘shall be based on its evaluation of the evidence and the entire proceedings.’<sup>273</sup>

48. Article 69(2) of the Rome Statute - the ‘Court may rule on the relevance or admissibility of any evidence, taking into account [...] the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation’ of witness testimony.<sup>274</sup>

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<sup>264</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 378 [861]; p 539 [1254].

<sup>265</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 317 [713]; p 354 [792]; p 375 [854]; p 376 [858]; p 378 [862]; p 381 [869]; p 398 [912]; p 399 [915]; p 585 [1348].

<sup>266</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 537 [1249]; p 538 [1251-1252].

<sup>267</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 81 [216].

<sup>268</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 73 [197].

<sup>269</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 81 [218].

<sup>270</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 81 [218]; *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 57 [110].

<sup>271</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 82 [219-220].

<sup>272</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 art 74(2); *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 52 [98].

<sup>273</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 art 74(2); *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 107 [218].

<sup>274</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 art 69(2); *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 52 [99].



49. Article 66(3) of the Rome Statute - ‘the Trial Chamber must be convinced beyond reasonable doubt of the facts that constitute the legal elements of the crime.’<sup>275</sup>

50. Article 63(4) of the Rules of Procedure and Evidence – ‘a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court’.<sup>276</sup>

## VII. Extrapolation (Guideline(s) for practitioners from the case)

1. Video evidence may be relied on without corroborating evidence.<sup>277</sup> Although a single video image may suffice to establish a certain fact, it does not mean that ‘any piece of evidence provides a sufficient evidentiary basis for a factual finding.’<sup>278</sup> Subsequently, the Court will independently assess the reliability of the material.<sup>279</sup>

2. The lack of identifying information on the depicted person in the video does not make the evidence unreliable.<sup>280</sup> As the Court relies on its own assessment of the depicted persons, the facial or physical features may be enough to establish the age element.<sup>281</sup>

Note:

As stated above in the summary, photographs had no information regarding evidentiary value. This applies for videos as well, where ICC documents relating to videos mainly refers to:

- admission of video transcripts
- video numbering
- in one document there is reference to the rejection of a video admission due to its incriminatory nature, yet the original document is confidential ([https://www.icc-cpi.int/CourtRecords/CR2010\\_02925.PDF](https://www.icc-cpi.int/CourtRecords/CR2010_02925.PDF) para 5)
- The Defence asserts that using videos which requires the accused to demonstrate the age of depicted persons ‘reverses the burden of proof’ ([https://www.icc-cpi.int/CourtRecords/CR2014\\_08860.PDF](https://www.icc-cpi.int/CourtRecords/CR2014_08860.PDF) para 149) but here too it is focused on age element and not the probative value of video

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<sup>275</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 art 66(3); *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 81 [218].

<sup>276</sup> Rules of Procedure and Evidence (adopted and entered into force 9 September 2002) UN Doc PCNICC/2000/1/Add.1 (2000) art 63(4); *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 81 [218].

<sup>277</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 81 [218].

<sup>278</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 81 [218]; *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 57 [110].

<sup>279</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) p 319 [718].

<sup>280</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction) ICC-01/04-01/06-3121-Red (1 December 2012) p 73 [197].

<sup>281</sup> *Prosecutor v Thomas Lubanga Dyilo* (Judgment pursuant to Article 74 of the Statute) ICC-01/04-01/06 (14 March 2012) 292 [644]; 347 [779]; 375 [854]; 376 [858]; 377 [860]; p 378 [862].

- The Prosecution's response to the Appeal request ([https://www.icc-cpi.int/CourtRecords/CR2013\\_01504.PDF](https://www.icc-cpi.int/CourtRecords/CR2013_01504.PDF)) has extensive information on videos, yet only focuses on the age element

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

## I. Case Details

- **Case name:** Prosecutor v. Zdravko Tolimir (IT-05-88/2)
- **Tribunal/Court:** International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY).
- **Citation:**

*Prosecutor v. Tolimir*, Decision On Prosecution Motion For Judicial Notice Of Adjudicated Facts Pursuant To Rule 94(B), Case No. IT-05-88/2-T, Trial Chamber II, 17<sup>th</sup> December 2009 (<https://www.icty.org/x/cases/tolimir/tdec/en/091217.pdf>)

*Prosecutor v. Tolimir*, Transcript, 25<sup>th</sup> March 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/100325IT.htm>)

*Prosecutor v. Tolimir*, Transcript, 17<sup>th</sup> May 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/100517IT.htm>)

*Prosecutor v. Tolimir*, Transcripts, 7<sup>th</sup> 8<sup>th</sup> 10<sup>th</sup> 13<sup>th</sup> September 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/100907IT.htm>; <https://www.icty.org/x/cases/tolimir/trans/en/100908IT.htm>; <https://www.icty.org/x/cases/tolimir/trans/en/100910ED.htm>; <https://www.icty.org/x/cases/tolimir/trans/en/100913IT.htm>)

*Prosecutor v. Tolimir*, Transcript, 8<sup>th</sup> October 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/101008IT.htm>)

*Prosecutor v. Tolimir*, Revised Order Concerning Guidelines On The Presentation Of Evidence And Conduct Of Parties During Trial, Case No. IT-05-88/2-T, Trial Chamber II, 4<sup>th</sup> February 2011 (<https://www.icty.org/x/cases/tolimir/tord/en/110204.pdf>)

*Prosecutor v. Tolimir*, Decision On Prosecution's Motion For Admission Of 28 Intercepts From The Bar Table Case No. IT-05-88/2-T, Trial Chamber II, 20<sup>th</sup> January 2012 (<https://www.icty.org/x/cases/tolimir/tdec/en/120120.pdf>)

*Prosecutor v. Tolimir*, Consolidated Decision on Prosecution's Bar Table Motion and the Accused's Motion for Extensions of Time, Case No. IT-05-88/2-T, Trial Chamber II, 14 May 2012 (<https://www.icty.org/x/cases/tolimir/tdec/en/120514.pdf>)

*Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>)

*Prosecutor v. Tolimir*, Prosecution Filing of Public Version of Pre-Trial Brief, Case No. IT-05-88/2-PT, Pre-Trial Chamber, 29<sup>th</sup> September 2009 (<https://www.icty.org/x/cases/tolimir/custom3/en/090929.pdf>)

*Prosecutor v. Tolimir*, Zdravko Tolimir's Submission With A Pre-Trial Brief Pursuant To Rule 65 Ter (F) And Notification Of The Defence Of Alibi In Respect Of Some Charges, IT-05-88/2-PT, Trial Chamber, 28<sup>th</sup> October 2009 (<https://www.icty.org/x/cases/tolimir/custom3/en/090930.pdf>)

*Prosecutor v. Tolimir*, Prosecution Notice of Re-filing of Public Redacted Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber, 28<sup>th</sup> November 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121128.pdf>)

*Prosecutor v. Tolimir*, Public Redacted Version of Defence Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber II, 1<sup>st</sup> October 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121001.pdf>)

*Prosecutor v. Tolimir*, Public Redacted Version Of The Consolidated Appeal Brief, Case No. IT-05-88/2-A, Appeals Chamber, 28<sup>th</sup> February 2014 (<https://www.icty.org/x/cases/tolimir/custom6/en/140228.pdf>)

*Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-A, Appeals Chamber, 8<sup>th</sup> April 2015 ([https://www.icty.org/x/cases/tolimir/acjug/en/150408\\_judgement.pdf](https://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf))

## I. Legal Background

- **The legal system:** ICTY
- **The crimes charged:** One count of genocide, one count of conspiracy to commit genocide, five counts of crimes against humanity (extermination, murder, persecution, inhumane acts (forcible transfer) and deportation) and one count of the violations of the laws or customs of war (murder). The Accused was found guilty of all charges.
- **Stage of the proceedings:** Trial, Appeal, Sentence and Judgment. The Appeals Chamber confirmed Tolimir's conviction.

## II. Digitally Derived Evidence (DDE)

- **Type of DDE**

### *Videos*

1. The videos depicted a New Year's Eve party, Pilica Cultural Centre and Srebrenica related footage<sup>282</sup>. (Exh. P01029; P00624; P02471; P00083; P00991; P02798; P01349; P01024; D00280; P01137; P01027; P002789, P02734, P02228. Video compilation of Srebrenica-related footage from 1995 (ERN: V000-4458). Video of Pilica Cultural Centre (ERN: V000-6972-V000-6972))

### *Intercepted Communications*

2. The intercepted communications were from the ABiH radio and were in the form of handwritten transcriptions of intercepted radio communications, electronic data with typewritten versions of the intercepts, hard copy of the typewritten material and audiotapes of intercepts.<sup>283</sup> (Exh. P00162a; P00664b; P00699; P00311 (confidential); Ex. P00786; P00306 (confidential); P00373b (confidential); P00016c (confidential); P00244; P01539b; P00245; P00241; P01566a; P01565a; P01537a; P01227d; P01228b; P00660a; P00663a; P00663b (confidential); P02205;

<sup>282</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), note 258; *Prosecutor v. Tolimir*, Prosecution Filing of Public Version of Pre-Trial Brief, Case No. IT-05-88/2-PT, Pre-Trial Chamber, 29th September 2009 (<https://www.icty.org/x/cases/tolimir/custom3/en/090929.pdf>), para 65 and 112

<sup>283</sup> *Prosecutor v. Tolimir*, Transcripts, 7th September 2010, page 4968, lines 4-8 (<https://www.icty.org/x/cases/tolimir/trans/en/100907IT.htm>).

P00526a; P00846 (confidential); P02550; P02863 (confidential); P00651; P00378a; P00378b (confidential); P00379a; P00379b (confidential); P02553; P00850a; P00851b; P00568a; P00568b (confidential); P00483; P00345 (confidential); P00346 (confidential); P00347 (confidential); P00528a; Ex. P00529a; P00529c; P02156; P00679; P01544b (confidential); P00836a; P00394a; P00554a; P00354a; P00383a; P00561a; P02488; P02815; P00371a; P02657; P00384a; P00723a; P00578a; P00300 (confidential); P00359a; P00367a; P00368a; P02855; P02807; P00370a; P00417a; P00418a; P02875; P02457; P02463; P02464; P02465; P02466; P00411a; P02468.)

3. **Photographs** Depicting participants of certain meetings, buildings of interest such as houses and schools, men on the ground, identification of key individuals, bodies, crime scenes, prisoners and killing sites <sup>284</sup>(Exh. P02643; P02630; P02631; P01500; P01501; P01502; P01381; P00094; P01648; P01647; P01454; P01453.)

4. **Aerial Imagery** Aerial imagery depicted locations, routes and graves and destruction.<sup>285</sup> (Exh. P01840 to P01843; P01846; P01848 to P01853; P01855; P01856; P01858; P01859; P01342; D00321; P01486; P01490; P00616; P01499; P01496; P00099; P02793; P02194; P01753; P02178; P02192; P01855; P01825; P00894; P01763; P00223; P01833; P01834; P01820; P01845; P01847; P01645; P01651; P01864 to P01873; P01876 - P01880; P01883 to P01892, P01894 to P01907.)

• **Who obtained the DDE? Where the DDE was obtained? What party introduced/sought the admission of the DDE?**

#### *Videos*

5. A video was taken by an attendee at a New Year's Party.<sup>286</sup> Videos were introduced by the Prosecution.<sup>287</sup> The Prosecution also introduced the video compilation of Srebrenica-related footage from 1995 (ERN: V000-4458) and video of Pilica Cultural Centre (ERN: V000-6972-V000-6972).<sup>288</sup> Some of those videos were taken by journalists.<sup>289</sup> Some of the videos were taken by the Serb Scorpions Unit.<sup>290</sup> Video footage was also tendered by the Accused.<sup>291</sup> The video footage which was tendered by the Accused was obtained from the Association of Serb Victims and it was produced by individuals in Srebrenica present during the review of troops of the 28<sup>th</sup> Divisions during the reading out of commendations.<sup>292</sup>

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<sup>284</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), note 1181, 1217, 1317, 1452, 1845, 1866, 1960 para 305; *Prosecutor v. Tolimir*, Prosecution Notice of Re-filing of Public Redacted Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber, 28th November 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121128.pdf>), para 741.

<sup>285</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), note 1336, 1622, 2912.

<sup>286</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), note 258.

<sup>287</sup> *Prosecutor v. Tolimir*, Public Redacted Version of Defence Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber II, 1st October 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121001.pdf>), para 343.

<sup>288</sup> *Prosecutor v. Tolimir*, Prosecution Filing of Public Version of Pre-Trial Brief, Case No. IT-05-88/2-PT, Pre-Trial Chamber, 29th September 2009 (<https://www.icty.org/x/cases/tolimir/custom3/en/090929.pdf>), para 65 and 112.

<sup>289</sup> *Prosecutor v. Tolimir*, Prosecution Filing of Public Version of Pre-Trial Brief, Case No. IT-05-88/2-PT, Pre-Trial Chamber, 29th September 2009 (<https://www.icty.org/x/cases/tolimir/custom3/en/090929.pdf>), para 65.

<sup>290</sup> *Prosecutor v. Tolimir*, Prosecution Filing of Public Version of Pre-Trial Brief, Case No. IT-05-88/2-PT, Pre-Trial Chamber, 29th September 2009 (<https://www.icty.org/x/cases/tolimir/custom3/en/090929.pdf>), para 120.

<sup>291</sup> *Prosecutor v. Tolimir*, Transcript, 25th March 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/100325IT.htm>), page 852.

<sup>292</sup> *Prosecutor v. Tolimir*, Transcript, 25th March 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/100325IT.htm>), page 852, lines 10-15.

### *Intercepted communications*

6. The intercepted communications were produced by the Bosnian-Muslim side.<sup>293</sup> Seventeen intercept operators, two supervisors and a former OTP research officer and analyst Stefanie Frease described the compilation and production of the intercept evidence via *viva voce* testimony.<sup>294</sup> Frease also provided evidence of the methods used in recording the intercepts which were in the form of specific instructions and practices followed by the intercept operators that promoted reliability.<sup>295</sup> These intercepts were first recorded on tape by the Bosnian-Muslim interceptors, who then transcribed it onto paper, then into a notebook and then typed it on computer to be sent to their headquarters.<sup>296</sup> Intercepts first started coming into the OTP from the Army of Bosnia and Herzegovina (ABiH) in 1998.<sup>297</sup> A part of the intercepts was admitted in *Tolimir* through a judicial notice of adjudicated facts pursuant to Rule 94(B).<sup>298</sup> 107 exhibits were tendered through the Prosecution investigator Stefanie Frease during her testimony.<sup>299</sup> The Trial Chamber also admitted a number of intercepts from the bar table following a Prosecution motion.<sup>300</sup>

### *Photographs*

7. DutchBat Officer Elco Koster, DutchBat Officer Lieutenant Johannes Rutten and journalists took some of the photographs.<sup>301</sup> Other photographs were produced at crime scenes and showed human tissue and blood.<sup>302</sup> Photographs were introduced by both the Prosecution and Defence.<sup>303</sup>

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<sup>293</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 63.

<sup>294</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 63.

<sup>295</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 64.

<sup>296</sup> *Prosecutor v. Tolimir*, Decision On Prosecution Motion For Judicial Notice Of Adjudicated Facts Pursuant To Rule 94(B), Case No. IT-05-88/2-T, Trial Chamber II, 17th December 2009 (<https://www.icty.org/x/cases/tolimir/tdec/en/091217.pdf>), p. 53.

<sup>297</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 66.

<sup>298</sup> *Prosecutor v. Tolimir*, Decision On Prosecution Motion For Judicial Notice Of Adjudicated Facts Pursuant To Rule 94(B), Case No. IT-05-88/2-T, Trial Chamber II, 17th December 2009 (<https://www.icty.org/x/cases/tolimir/tdec/en/091217.pdf>), p. 53.

<sup>299</sup> *Prosecutor v. Tolimir*, Transcripts, 7th 8th September 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/100907IT.htm>); <https://www.icty.org/x/cases/tolimir/trans/en/100908IT.htm>); *Prosecutor v. Tolimir*, Public Redacted Version of Defence Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber II, 1st October 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121001.pdf>) note 88.

<sup>300</sup> *Prosecutor v. Tolimir*, Decision On Prosecution's Motion For Admission Of 28 Intercepts From The Bar Table Case No. IT-05-88/2-T, Trial Chamber II, 20th January 2012 (<https://www.icty.org/x/cases/tolimir/tdec/en/120120.pdf>), page 6.

<sup>301</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), note 731, 1249, 1317, 1452.

<sup>302</sup> *Prosecutor v. Tolimir*, Prosecution Notice of Re-filing of Public Redacted Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber, 28th November 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121128.pdf>), para 741.

<sup>303</sup> *Prosecutor v. Tolimir*, Prosecution Filing of Public Version of Pre-Trial Brief, Case No. IT-05-88/2-PT, Pre-Trial Chamber, 29th September 2009 (<https://www.icty.org/x/cases/tolimir/custom3/en/090929.pdf>), para 66, 82, 90; *Prosecutor v. Tolimir*, Transcript, 25th March 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/100325IT.htm>).

### *Aerial imagery*

8. The Prosecution introduced the aerial images which were provided by the US Government pursuant to Rule 70.<sup>304</sup> The US Government refused to allow the Prosecution to discuss information which related to the technical or analytical sources, methods, or capabilities of those who collected, analysed or produced the imagery.<sup>305</sup> The aerial images are thought to be taken by unmanned aerial vehicles but the exact means of creation remained classified.<sup>306</sup>

## **III. Legal Arguments**

### **• Counsels' legal arguments surrounding DDE evidentiary considerations.**

#### *Videos*

9. Prosecution: In Pre-Trial, video footage is used to corroborate the accounts of survivors.<sup>307</sup> In the Appeal, the Prosecution speaks of the abundance of evidence which illustrates the Accused's central role in Zepa, amongst which is a video recording.<sup>308</sup> [Please note: This use of the video was mentioned in the Appeals Judgement where a reference is made to the "Prosecutor v. Zdravko Tolimir, Case No. IT-05-88/2-A, Prosecution Response Brief, 16 October 2013 (confidential) (public redacted version filed on 10 March 2014)." - this document was unavailable upon search].

10. Defence: In the Appeal, the Accused challenged a video depicting a meeting with Mladic, which illustrated the Accused's central role in Zepa, claiming it is not authentic.<sup>309</sup> 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.

#### *Intercepted Communications:*

11. Prosecution: The Prosecution put forward that the 28 intercept operators and supervisors, and Stefanie Frease, all provided credible and detailed testimony establishing the reliability, accuracy and authenticity of hundreds of intercepts.<sup>310</sup> Furthermore, the reliability of the intercepts can be derived from the uniform protocols and standards followed, the contemporaneous transcription and the fact the operators were not allowed to speculate, analyse and alter the intercepts showing that they have not been revised.<sup>311</sup> Frease testified that there is a theoretical possibility that the intercepts were tampered with before coming into OTP possession.<sup>312</sup> This

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<sup>304</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 68.

<sup>305</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 68.

<sup>306</sup> *Prosecutor v. Tolimir*, Prosecution Notice of Re-filing of Public Redacted Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber, 28th November 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121128.pdf>), para 498.

<sup>307</sup> *Prosecutor v. Tolimir*, Prosecution Filing of Public Version of Pre-Trial Brief, Case No. IT-05-88/2-PT, Pre-Trial Chamber, 29th September 2009 (<https://www.icty.org/x/cases/tolimir/custom3/en/090929.pdf>), para 65.

<sup>308</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-A, Appeals Chamber, 8th April 2015 ([https://www.icty.org/x/cases/tolimir/acjug/en/150408\\_judgement.pdf](https://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf)), para 370.

<sup>309</sup> *Prosecutor v. Tolimir*, Public Redacted Version Of The Consolidated Appeal Brief, Case No. IT-05-88/2-A, Appeals Chamber, 28th February 2014 (<https://www.icty.org/x/cases/tolimir/custom6/en/140228.pdf>), para 321.

<sup>310</sup> *Prosecutor v. Tolimir*, Prosecution Notice of Re-filing of Public Redacted Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber, 28th November 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121128.pdf>), para 831.

<sup>311</sup> *Prosecutor v. Tolimir*, Prosecution Notice of Re-filing of Public Redacted Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber, 28th November 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121128.pdf>), para 832.

<sup>312</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 66.

relates to a concern of Frease and her colleagues that intercepts may have been fabricated, however Frease also testified that the team dealing with the intercepts left “absolutely no stone unturned in validating the material”.<sup>313</sup> In the Appeal, the Prosecution speaks of the abundance of evidence which illustrates the Accused’s central role in Zepa, amongst which are intercepted communications.<sup>314</sup>

12. *Defence:* The Defence opposed the intercepts which were admitted through judicial notice of adjudicated facts as the Prosecution spent a lot of court time to discussing the intercepts, included a large number of reports and introduced witnesses to testify for evidence already admitted into evidence under Rule 92bis. According to the Defence, this renders the purpose of the judicial notice senseless as the Chamber already had sufficient evidence based on which it can make a decision on their reliability and probative value.<sup>315</sup> The Defence also opposed the intercepts tendered through OTP investigator Stefanie Frease as she had not had previous training or experience with the processing of intercepts and the process she used was simply systematisation in Excel tables.<sup>316</sup> Furthermore, the OTP contacted the United States in order to obtain intercepts but at the time the OTP investigators could not verify the reliability of the intercepts.<sup>317</sup> The Defence also opposed the reliability of the intercepts due to the intercept operators lack of proper resources, professional equipment and professional training at the time of collecting the information, in addition to their inability to provide relevant information as to who intercepted particular communications and how they did so.<sup>318</sup> The Defence further opposed the reliability of the intercepts sent by the ABiH or SDB as they were sent years after being requested which suggests that they were selected materials (rather than all relevant evidence).<sup>319</sup> When intercepts are used in court proceedings as evidence, they need the approval of a relevant court which allows the interceptions to be conducted.<sup>320</sup> The Defence also argued that intercepts should not be relied on because it could be purposefully used to spread disinformation, and without other evidence such as video or audio recording it is deprived of context.<sup>321</sup> On Appeal, the Prosecution presented an intercepted communication showing the involvement of the Accused in the Zepa’s command, which was challenged by the Defence as unreliable evidence, as it was unable to prove the events which occurred during and after the evacuation.<sup>322</sup> In general for all of the intercepts, the Defence put forward that the fact some intercepts were corroborated by other sources does not justify the

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<sup>313</sup> *Prosecutor v. Tolimir*, Transcripts, 13 September 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/100913IT.htm>) page 5299 line 2-11.

<sup>314</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-A, Appeals Chamber, 8th April 2015 ([https://www.icty.org/x/cases/tolimir/acjug/en/150408\\_judgement.pdf](https://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf)), para 370.

<sup>315</sup> *Prosecutor v. Tolimir*, Public Redacted Version of Defence Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber II, 1st October 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121001.pdf>), para 129.

<sup>316</sup> *Prosecutor v. Tolimir*, Public Redacted Version of Defence Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber II, 1st October 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121001.pdf>), para 130-131.

<sup>317</sup> *Prosecutor v. Tolimir*, Public Redacted Version of Defence Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber II, 1st October 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121001.pdf>), para 132.

<sup>318</sup> *Prosecutor v. Tolimir*, Public Redacted Version of Defence Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber II, 1st October 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121001.pdf>), para 134-135

<sup>319</sup> *Prosecutor v. Tolimir*, Public Redacted Version of Defence Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber II, 1st October 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121001.pdf>), para 136.

<sup>320</sup> *Prosecutor v. Tolimir*, Public Redacted Version of Defence Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber II, 1st October 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121001.pdf>), para 139.

<sup>321</sup> *Prosecutor v. Tolimir*, Public Redacted Version of Defence Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber II, 1st October 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121001.pdf>), para 140-141.

<sup>322</sup> *Prosecutor v. Tolimir*, Public Redacted Version Of The Consolidated Appeal Brief, Case No. IT-05-88/2-A, Appeals Chamber, 28th February 2014 (<https://www.icty.org/x/cases/tolimir/custom6/en/140228.pdf>), para 321.



Trial Chamber treating all intercepts as authentic and reliable.<sup>323</sup> This reliability was presumed by the judicial notice of the adjudicated facts.<sup>324</sup>

#### *Aerial Images:*

13. *Prosecution:* Dean Manning and Jean-René Ruez who are former OTP investigators testified about the use of aerial images and illustrated their authenticity and utility by locating the gravesites through the images.<sup>325</sup> An archeologist Richard Wright used them as well further illustrating their utility.<sup>326</sup> Aerial images also are used to corroborate survivor testimony and vehicle logs.<sup>327</sup>

14. *Defence:* The Accused challenged the reliability of the aerial images due to lack of evidence of their origin, method of creation, manner of editing and how they should be interpreted or whether the Prosecution received them in their original form or whether they were modified.<sup>328</sup> The Prosecution did not specify if the images are satellite photographs, images taken by an unmanned aircraft or if they were taken by another means.<sup>329</sup> According to the Defence, this therefore rendered the aerial images unreliable evidence.<sup>330</sup>

#### • **The Court's response to these particular arguments.**

#### *Videos*

15. On Appeal, the Chamber held that Tolimir's challenge of the authenticity of the video of Zepa does not show how the Trial Chamber erred in relying on it, especially as it is corroborated by witness testimony and other evidence.<sup>331</sup> Therefore, the Appeals Chamber still considers that Tolimir was in charge in Zepa.<sup>332</sup>

#### *Intercepted Communications*

16. The chamber was satisfied that the intercepts have a high degree of validity regarding the conversations recorded due to the overwhelming weight of other evidence which is in favour of the reliability and authenticity of the intercepts.<sup>333</sup> On Appeal, the Chamber, also found that

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<sup>323</sup> *Prosecutor v. Tolimir*, Public Redacted Version Of The Consolidated Appeal Brief, Case No. IT-05-88/2-A, Appeals Chamber, 28th February 2014 (<https://www.icty.org/x/cases/tolimir/custom6/en/140228.pdf>), para 27.

<sup>324</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-A, Appeals Chamber, 8th April 2015 ([https://www.icty.org/x/cases/tolimir/acjug/en/150408\\_judgement.pdf](https://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf)), para 42.

<sup>325</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 70.

<sup>326</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 70.

<sup>327</sup> *Prosecutor v. Tolimir*, Prosecution Filing of Public Version of Pre-Trial Brief, Case No. IT-05-88/2-PT, Pre-Trial Chamber, 29th September 2009 (<https://www.icty.org/x/cases/tolimir/custom3/en/090929.pdf>), para 65 and 110.

<sup>328</sup> *Prosecutor v. Tolimir*, Public Redacted Version of Defence Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber II, 1st October 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121001.pdf>), para 158-160.

<sup>329</sup> *Prosecutor v. Tolimir*, Public Redacted Version of Defence Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber II, 1st October 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121001.pdf>), para 158.

<sup>330</sup> *Prosecutor v. Tolimir*, Public Redacted Version of Defence Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber II, 1st October 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121001.pdf>), para 160.

<sup>331</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-A, Appeals Chamber, 8th April 2015 ([https://www.icty.org/x/cases/tolimir/acjug/en/150408\\_judgement.pdf](https://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf)), para 373.

<sup>332</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-A, Appeals Chamber, 8th April 2015 ([https://www.icty.org/x/cases/tolimir/acjug/en/150408\\_judgement.pdf](https://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf)), para 376.

<sup>333</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), paras 63, 66.

Tolimir could not substantiate the claim that an intercept is unreliable.<sup>334</sup> Therefore, the Appeals Chamber maintained that Tolimir was in charge in Zepa.<sup>335</sup> The Appeal Chamber dismissed the Accused's appeal ground that the intercepts are unreliable based on factors such as they were corroborated by other independent sources, the procedures employed in producing the intercepts, methods promoting reliability such as the instructions issued to the intercept operators and the practices which they followed.<sup>336</sup> The Appeals Chamber also reaffirmed that the Trial Chamber can also rely on uncorroborated evidence if it wishes to, and given it assessed the intercepts based on the factors above, the Appeals Chamber agrees with the approach which the Trial Chamber has taken in assessing the reliability of intercepts.<sup>337</sup>

### *Aerial Images*

17. The Trial Chamber acknowledged that there is a lack of evidence on the method of creation of the images, but they do not consider this to impair the credibility of the aerial images in general.<sup>338</sup> Aerial images helping to locate gravesites vouch for their authenticity and show their utility.<sup>339</sup> Interpretation and authenticity comes from witness corroboration. The Trial Chamber found that generally, the aerial images were reliable and of probative value.<sup>340</sup>

## IV. Court Analysis

### • What arguments/findings was the DDE used to support?

#### *Videos*

18. Videos were used to find figures of killed individuals during the breakout and to determine, with the assistance of other forensic evidence and testimony, that their cause of death was unlikely to be due to combat, suicide or other.<sup>341</sup> The videos also depict killings and the aftermath of killings.<sup>342</sup>

19. Videos also showed the presence and the use of weapons, VRS soldiers walking and celebrating through empty Srebrenica post-capture and threatening behaviour of Mladic in meetings between VRS and DutchBat.<sup>343</sup>

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<sup>334</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-A, Appeals Chamber, 8th April 2015 ([https://www.icty.org/x/cases/tolimir/acjug/en/150408\\_judgement.pdf](https://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf)), para 373.

<sup>335</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-A, Appeals Chamber, 8th April 2015 ([https://www.icty.org/x/cases/tolimir/acjug/en/150408\\_judgement.pdf](https://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf)), para 376.

<sup>336</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-A, Appeals Chamber, 8th April 2015 ([https://www.icty.org/x/cases/tolimir/acjug/en/150408\\_judgement.pdf](https://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf)), para 59, 61.

<sup>337</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-A, Appeals Chamber, 8th April 2015 ([https://www.icty.org/x/cases/tolimir/acjug/en/150408\\_judgement.pdf](https://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf)), para 59.

<sup>338</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 70.

<sup>339</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 70.

<sup>340</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 70.

<sup>341</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 495 and 592.

<sup>342</sup> *Prosecutor v. Tolimir*, Public Redacted Version of Defence Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber II, 1st October 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121001.pdf>), para 343, 504.

<sup>343</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 209, 236, 246-247, 259, 1136.

20. In addition to these meetings, videos depicted the negotiations between the parties and arrangements regarding the “evacuation”. DutchBat were instructed to help with the evacuation as much as possible by the Dutch Foreign Ministry.<sup>344</sup> The Serbs giving out candy, water and bread to the Bosnian Muslims, filmed by Serb camera crews as well as the commanders interacting with civilians on the buses.<sup>345</sup> Mladic willing to receive the wounded Bosnian Muslims for treatment.<sup>346</sup>

21. The videos also show the Accused accompanying Mladic during the Zepa evacuation illustrating the senior role of the Accused and his importance in the command in Srebrenica.<sup>347</sup> Videos also illustrate the situation in Potocari, where there was civilian overcrowding and the location from where the Bosnian Muslims were collected by buses for transportation.<sup>348</sup>

### *Intercepted communications*

22. Intercepted communications were used to illustrate the communications between the parties and the preparatory acts before the attack on Srebrenica, during and after the killing, and surrounding events relating to the charges of the Accused.<sup>349</sup> For example, this includes the VRS attempting to have the Bosnian Muslims who had taken flight over the Drina River to Serbia handed to them by the Serbian authorities.<sup>350</sup>

### *Photographs*

23. The photographs showed relevant infrastructure such as schools, bodies and location of bodies, killing sites and equipment as well as weapons and damage.<sup>351</sup> Photographs were also used to corroborate survivor testimony.<sup>352</sup>

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<sup>344</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 248-254, 260, 276, 319, 617, 629, note 2768 (boarding of a bus), para 977 and 1133.

<sup>345</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 276 and 648.

<sup>346</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 249.

<sup>347</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 92, 641 and 965.

<sup>348</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para, 17 (dissenting opinion).

<sup>349</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), paras 270, 271, 274, 276, 320, 335, 338, 489, 530, 545, 556, 614, 640, 657, 790, 919, 960, 963, 966, 969, 971, 972, 978, 980, 997, 1103, 1140, 1168.

<sup>350</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 675.

<sup>351</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), note 731, 1181, 1317, 1845, 1866, 1902, 1903, 1960 and para 206; *Prosecutor v. Tolimir*, Prosecution Filing of Public Version of Pre-Trial Brief, Case No. IT-05-88/2-PT, Pre-Trial Chamber, 29th September 2009 (<https://www.icty.org/x/cases/tolimir/custom3/en/090929.pdf>), para 66, 112.

<sup>352</sup> *Prosecutor v. Tolimir*, Prosecution Filing of Public Version of Pre-Trial Brief, Case No. IT-05-88/2-PT, Pre-Trial Chamber, 29th September 2009 (<https://www.icty.org/x/cases/tolimir/custom3/en/090929.pdf>), para 84, 90.

### *Aerial Imagery*

24. Aerial imagery was used to show locations of gravesites and reburial sites and activities (primary and secondary graves).<sup>353</sup> Aerial imagery was also used to show the location of buildings and vehicles, location of large group of prisoners, as well as bodies.<sup>354</sup> Pairs and sets of aerial images document the emergence of 12 sites of disturbed earth along Cancari Road between 7 September 1995 and 2 October 1995.<sup>355</sup> Aerial images also showed disturbed earth in areas which were not the primary graves' location, leading to the discovery of secondary graves.<sup>356</sup>

### • **The reasoning of the Court with respect to the DDE. Status of admission:**

#### *Videos*

25. Videos were admitted and considered in light of all other surrounding evidence.<sup>357</sup>

#### *Intercepted Communications*

26. 02936b and 02937b – were not admitted due to not being available in eCourt and no English translation provided making the Trial Chamber unable to test their relevance.<sup>358</sup> Other intercepts admitted due to independent corroboration from other entities such as Croatian authorities and UNPROFOR.<sup>359</sup> Most intercepts were admitted.<sup>360</sup>

#### *Photographs*

27. Admitted and considered in light of all other surrounding evidence.<sup>361</sup> Multiple references to the findings of the Chamber and the “totality of evidence.”<sup>362</sup>

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<sup>353</sup> *Prosecutor v. Tolimir*, Prosecution Filing of Public Version of Pre-Trial Brief, Case No. IT-05-88/2-PT, Pre-Trial Chamber, 29th September 2009 (<https://www.icty.org/x/cases/tolimir/custom3/en/090929.pdf>), para 126-127, 130, 133, 167.

<sup>354</sup> *Prosecutor v. Tolimir*, Prosecution Notice of Re-filing of Public Redacted Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber, 28th November 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121128.pdf>), para 67, 741.

<sup>355</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), note 2498.

<sup>356</sup> *Prosecutor v. Tolimir*, Prosecution Notice of Re-filing of Public Redacted Final Trial Brief, Case No. IT-05-88/2-T, Trial Chamber, 28th November 2012 (<https://www.icty.org/x/cases/tolimir/custom5/en/121128.pdf>), note 2493.

<sup>357</sup> Ex. *Prosecutor v. Tolimir*, Transcript, 25<sup>th</sup> March 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/100325IT.htm>), page 852, 867.

<sup>358</sup> *Prosecutor v. Tolimir*, Decision On Prosecution's Motion For Admission Of 28 Intercepts From The Bar Table Case No. IT-05-88/2-T, Trial Chamber II, 20th January 2012 (<https://www.icty.org/x/cases/tolimir/tdec/en/120120.pdf>), para 13.

<sup>359</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 65.

<sup>360</sup> *Prosecutor v. Tolimir*, Transcripts, 7th 8th September 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/100907IT.htm>); <https://www.icty.org/x/cases/tolimir/trans/en/100908IT.htm>;

<sup>361</sup> Ex. *Prosecutor v. Tolimir*, Transcript, 25<sup>th</sup> March 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/100325IT.htm>), page 849, 850.

<sup>362</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 809, 827.

### *Aerial imagery*

28. Admitted and relied upon.<sup>363</sup>

Please note: the majority of the above evidence has been admitted by the Chamber simply receiving them, during witness testimony or in motions, without referring to specific evidentiary considerations which have contributed to their admission.

- **Discussion of evidentiary considerations.**

### *Videos*

29. D00280 – the Chamber considered that the video should be treated with caution as it was made immediately after the fall of Srebrenica where information was still patchy, members of the column conveying the information of the killed only had the capacity to make rough estimates of the number of casualties.<sup>364</sup>

### *Intercepted communications*

30. Intercepts were used as circumstantial evidence which contributed to finding the intent for genocide.<sup>365</sup> In general, the intercepts were thought to be reliable and authentic enough to have a high degree of validity.<sup>366</sup> There was an overwhelming weight of evidence to support their reliability and authenticity.<sup>367</sup> Furthermore, the intercepts can be considered hearsay evidence but the fact they were presented with strong corroborative evidence and were accompanied with a chain of custody increased their reliability.<sup>368</sup>

### *Photographs*

31. Regarding Rutten's evidence, the dissenting judge held that the fact some of the photos which were part of Rutten's testimony were never developed and seen, makes Rutten's evidence questionable.<sup>369</sup> This shows the impact of photographs, which cannot be authenticated, on other evidence.

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<sup>363</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 70; Ex. *Prosecutor v. Tolimir*, Transcript, 8<sup>th</sup> October 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/101008IT.htm>), page 6367; *Prosecutor v. Tolimir*, Transcript, 17<sup>th</sup> May 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/100517IT.htm>) page 1867, 1868.

<sup>364</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 593.

<sup>365</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 790.

<sup>366</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 66.

<sup>367</sup> *Prosecutor v. Tolimir*, Decision On Prosecution Motion For Judicial Notice Of Adjudicated Facts Pursuant To Rule 94(B), Case No. IT-05-88/2-T, Trial Chamber II, 17th December 2009 (<https://www.icty.org/x/cases/tolimir/tdec/en/091217.pdf>), paras 64-66.

<sup>368</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 64

<sup>369</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>) (dissenting opinion), para 97.

## *Aerial imagery*

32. The fact there was lack of evidence illuminating the method by which the aerial images were created, did not impair their credibility.<sup>370</sup> Even without a clear chain of custody and the only corroborative witnesses being investigators from the OTP.<sup>371</sup> The Chamber found the aerial images to be generally reliable and of probative value.<sup>372</sup>

33. **Standard of Proof** The Trial Chamber makes a finding of guilt for alleged crimes once the conclusion is reached that all facts material to the elements of the crime have been proven beyond reasonable doubt by the Prosecution.<sup>373</sup> Once an Adjudicated Fact has been proposed by the prosecution and accepted by the Court, the burden to produce evidence to dispute that fact falls on the Accused.<sup>374</sup> The burden to produce is based on producing credible and reliable evidence sufficient to bring the matter into dispute.<sup>375</sup> However, the burden to prove guilt beyond reasonable doubt, remains on the Prosecution.<sup>376</sup>

## V. Rules of Evidence

### • Rules of evidence used in the case.

34. Rule 89(C) RPE – “A Chamber may admit any relevant evidence which it deems to have probative value.”

35. Rule 89 (D) RPE – “A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”

36. Rule 70(C) RPE – Matters not subject to disclosure.<sup>377</sup>

37. Rule 94(B) RPE – “At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.”

### • How the identified rules of evidence were applied.

38. **Intercepted communications** Rule 89(C) and (D) and Articles 20(1) and 21(4)(b) – the Trial Chamber denied the admission of an intercept exhibit that had previously not been admitted

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<sup>370</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 69-70.

<sup>371</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 69-70

<sup>372</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 70.

<sup>373</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 30.

<sup>374</sup> *Prosecutor v. Tolimir*, Decision On Prosecution Motion For Judicial Notice Of Adjudicated Facts Pursuant To Rule 94(B), Case No. IT-05-88/2-T, Trial Chamber II, 17th December 2009 (<https://www.icty.org/x/cases/tolimir/tdec/en/091217.pdf>), para 10.

<sup>375</sup> *Prosecutor v. Karemera et al*, Decision on Prosecution’s Interlocutory Appeal of Decision on Judicial Notice, Case No. ICTR-98-44-AR73(C), Appeal Chamber, 16 June 2006 ([http://www.worldcourts.com/icttr/eng/decisions/2006.06.16\\_Prosecutor\\_v\\_Karemera.pdf](http://www.worldcourts.com/icttr/eng/decisions/2006.06.16_Prosecutor_v_Karemera.pdf)), para 49.

<sup>376</sup> *Prosecutor v. Tolimir*, Decision On Prosecution Motion For Judicial Notice Of Adjudicated Facts Pursuant To Rule 94(B), Case No. IT-05-88/2-T, Trial Chamber II, 17th December 2009 (<https://www.icty.org/x/cases/tolimir/tdec/en/091217.pdf>), para 10.

<sup>377</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 68.

due to its re-introduction, having implications on the Accused's right to a fair trial, as there would not have been enough time to challenge the evidence.<sup>378</sup>

Rule 94(B) – intercepts admitted through judicial notice on adjudicated facts.

39. **Aerial imagery** Rule 70(C) was applied to aerial imagery stating that the Trial Chamber does not have the capacity to order the parties to produce additional evidence to the initial information provided by a person or an entity, neither can the Chamber summon said person or entity as a witness in order to obtain additional evidence. This relates to the fact the US Government refused to provide further information as to the sourcing of the aerial images.<sup>379</sup> Rule 94(B) – aerial images admitted through judicial notice on adjudicated facts.

40. **General for all types of evidence (not limited to DDE):** The Trial Chamber admitted evidence based on relevance and probative value which must be demonstrated by the tendering party.<sup>380</sup> The admission of the evidence does not speak as to its weight, as findings of facts and weight are determined later, after considering factors such as authentication and proof of identity of the source.<sup>381</sup> Even if there are objections by either side as to the authenticity or reliability of the evidence, the evidence is admitted unless it is manifestly unreasonable to do so, and the weight is to be determined later.<sup>382</sup> Evidence is still admitted even if the source does not appear as a witness.<sup>383</sup>

## II. Extrapolation (Guideline(s) for practitioners from the case)

### *Videos:*

1. When corroborated by witness testimony videos may be found to be more reliable.<sup>384</sup>
2. Videos are admitted in light of all other surrounding evidence.<sup>385</sup>

### *Intercepted Communications:*

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<sup>378</sup> *Prosecutor v. Tolimir*, Consolidated Decision on Prosecution's Bar Table Motion and the Accused's Motion for Extensions of Time, Case No. IT-05-88/2-T, Trial Chamber II, 14 May 2012 (<https://www.icty.org/x/cases/tolimir/tdec/en/120514.pdf>), para 33 and 47.

<sup>379</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 68.

<sup>380</sup> *Prosecutor v. Tolimir*, Revised Order Concerning Guidelines On The Presentation Of Evidence And Conduct Of Parties During Trial, Case No. IT-05-88/2-T, Trial Chamber II, 4th February 2011 (<https://www.icty.org/x/cases/tolimir/tord/en/110204.pdf>), para. 15.

<sup>381</sup> *Prosecutor v. Tolimir*, Revised Order Concerning Guidelines On The Presentation Of Evidence And Conduct Of Parties During Trial, Case No. IT-05-88/2-T, Trial Chamber II, 4th February 2011 (<https://www.icty.org/x/cases/tolimir/tord/en/110204.pdf>), para. 17.

<sup>382</sup> *Prosecutor v. Tolimir*, Revised Order Concerning Guidelines On The Presentation Of Evidence And Conduct Of Parties During Trial, Case No. IT-05-88/2-T, Trial Chamber II, 4th February 2011 (<https://www.icty.org/x/cases/tolimir/tord/en/110204.pdf>), para. 18.

<sup>383</sup> *Prosecutor v. Tolimir*, Revised Order Concerning Guidelines On The Presentation Of Evidence And Conduct Of Parties During Trial, Case No. IT-05-88/2-T, Trial Chamber II, 4th February 2011 (<https://www.icty.org/x/cases/tolimir/tord/en/110204.pdf>), para. 19.

<sup>384</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-A, Appeals Chamber, 8th April 2015 ([https://www.icty.org/x/cases/tolimir/acjug/en/150408\\_judgement.pdf](https://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf)), para 373.

<sup>385</sup> Ex. *Prosecutor v. Tolimir*, Transcript, 25<sup>th</sup> March 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/100325IT.htm>), page 852, 867.

3. Reliability and authenticity of intercepts may be amplified by the overwhelming weight of other corroborative evidence.<sup>386</sup> Such corroboration is even more significant when it is sourced from independent sources.<sup>387</sup>
4. Relevance of intercepts may not be tested when there is no relevant translation and this may affect the admission.<sup>388</sup>
5. Independent corroboration and overwhelming weight of other evidence may facilitate the admission of intercepts and support their reliability and authenticity.<sup>389</sup>
6. Following the specific instructions and practices in intercepting and recording communications increases intercept's reliability.<sup>390</sup>
7. The intercepts can be considered hearsay evidence but the fact they were presented with strong corroborative evidence and were accompanied with a chain of custody increased their reliability.<sup>391</sup>
8. Admission of an intercept may be denied when there is not enough time for the other party to challenge it which can result in implications for the Accused's fair trial rights.<sup>392</sup> (also when no English translation provided and available in eCourt making the Trial Chamber unable to test their relevance.<sup>393</sup>)

#### *Photographs:*

9. Photographs are admitted in light of all other surrounding evidence.<sup>394</sup>

#### *Aerial Imagery:*

10. Aerial images should be reliable and of probative value.<sup>395</sup>
11. Lack of information regarding the method of creation does not impair the credibility of aerial images.<sup>396</sup>

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<sup>386</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), paras 63, 66.

<sup>387</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-A, Appeals Chamber, 8th April 2015 ([https://www.icty.org/x/cases/tolimir/acjug/en/150408\\_judgement.pdf](https://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf)), para 59, 61.

<sup>388</sup> *Prosecutor v. Tolimir*, Decision On Prosecution's Motion For Admission Of 28 Intercepts From The Bar Table Case No. IT-05-88/2-T, Trial Chamber II, 20th January 2012 (<https://www.icty.org/x/cases/tolimir/tdec/en/120120.pdf>), para 13.

<sup>389</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>) paras 64-66.

<sup>390</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 64.

<sup>391</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 64

<sup>392</sup> *Prosecutor v. Tolimir*, Consolidated Decision on Prosecution's Bar Table Motion and the Accused's Motion for Extensions of Time, Case No. IT-05-88/2-T, Trial Chamber II, 14 May 2012 (<https://www.icty.org/x/cases/tolimir/tdec/en/120514.pdf>), para 33 and 47.

<sup>393</sup> *Prosecutor v. Tolimir*, Decision On Prosecution's Motion For Admission Of 28 Intercepts From The Bar Table Case No. IT-05-88/2-T, Trial Chamber II, 20th January 2012 (<https://www.icty.org/x/cases/tolimir/tdec/en/120120.pdf>), para 13.

<sup>394</sup> <sup>394</sup> Ex. *Prosecutor v. Tolimir*, Transcript, 25<sup>th</sup> March 2010 (<https://www.icty.org/x/cases/tolimir/trans/en/100325IT.htm>), page 849, 850.

<sup>395</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 70.

<sup>396</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 70.



12. When the actual subjects depicted on the aerial images are found/located, this vouches for their authenticity and utility.<sup>397</sup>

13. Interpretation and authentication can also derive from witness corroboration.<sup>398</sup>

*General for all DDEs:*

14. The Chamber makes determinations as to the weight and credibility of evidence but does not explain the reasoning behind these determinations for each piece of evidence separately and individually.<sup>399</sup> All evidence is analysed in light of the entire body of evidence.<sup>400</sup> The Trial Chamber prefers that evidence is introduced through a witness on the stand and requires there be a nexus between the witness and the evidence.<sup>401</sup>

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<sup>397</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 70.

<sup>398</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 70.

<sup>399</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 31.

<sup>400</sup> *Prosecutor v. Tolimir*, Judgement, Case No. IT-05-88/2-T, Trial Chamber II, 12th December 2012 (<https://www.icty.org/x/cases/tolimir/tjug/en/121212.pdf>), para 33.

<sup>401</sup> *Prosecutor v. Tolimir*, Revised Order Concerning Guidelines On The Presentation Of Evidence And Conduct Of Parties During Trial, Case No. IT-05-88/2-T, Trial Chamber II, 4th February 2011 (<https://www.icty.org/x/cases/tolimir/tord/en/110204.pdf>), para 20.