



INTERNATIONAL
NUREMBERG
PRINCIPLES
ACADEMY

E-Procedure

The Impact of the Increased
Usage of Digital Evidence and
Sophistication of Technology
on the Rules and Practices of the
International Criminal Court

Cluster C

What are the legal standards
governing digital evidence before
the International Criminal Court?

C



The International Nuremberg Principles Academy and its mandate

The International Nuremberg Principles Academy (Nuremberg Academy) is a non-profit foundation dedicated to the advancement of international criminal law and human rights. It was established by the Federal Republic of Germany, the Free State of Bavaria and the City of Nuremberg in 2014. The Nuremberg Academy is located in Nuremberg, the place of the first international trial before the International Military Tribunal. For the first time in history, an international tribunal was authorised to hold leading representatives of a state personally accountable for crimes under international law.

The foundation carries forward the legacy of the Nuremberg Trials and the “Nuremberg Principles”, which comprise the principles of international law recognised in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal. They were formulated by the International Law Commission of the United Nations General Assembly in 1950.

Conscious of this historic heritage, the Nuremberg Academy supports the fight against impunity for universally recognised international core crimes: genocide, crimes against humanity, war crimes and the crime of aggression. Its main fields of activity include providing a forum for dialogue by convening international conferences and expert meetings, conducting interdisciplinary and applied research, engaging in specialised capacity building for practitioners of international criminal law and human rights education. Dedicated to supporting the worldwide enforcement of international criminal law, the Nuremberg Academy upholds the Nuremberg Principles and the rule of law with a vision of sustainable peace through justice, furthering knowledge and building capacities of those involved in the judicial process in relation to these crimes.

Project Summary

The International Nuremberg Principles Academy (Nuremberg Academy) has developed an interdisciplinary project that explores challenges relating to the use of digital evidence in international criminal proceedings.¹ With the continued advancement of information and communication technologies and the increased usage of digital information in the documentation of human rights (HR) abuses and core international crimes, the operations in judicial and quasi-judicial mechanisms are likely to be impacted. The project seeks to address and consider the potential impact of the challenges raised in this context on the rules of procedure and evidence (RPE) in international criminal courts and tribunals. Considering the Nuremberg Academy's vision of furthering knowledge and building capacities of those involved in the judicial process in relation to core international crimes, the project focuses on the legal framework of the International Criminal Court (ICC), as the first permanent international criminal court.

The project consists of five clusters that will take place both consequentially and simultaneously, as appropriate, and is estimated to be complete in 2023. Clusters A and B collected manuals and guidelines relating to judicial proceedings and digital evidence, which are now available through an online repository called the "Digital Evidence Database". Cluster C focuses on analysing international and internationalised criminal jurisprudence concerning digital evidence and delivered a report encompassing a legal and comparative assessment of practices and standards. The current Cluster D analysed the correlations between international HR and international criminal law (ICL) investigations as they pertain to digital evidence. The Cluster C and D reports were finalised in 2022, and in 2023 the Nuremberg Academy is focusing on analysing the various challenges identified with respect to the ICC legal framework.

Regarding Cluster C and its methodology, the Nuremberg Academy conducted varied research into the ICC's case law and also the case law of the *ad hoc* tribunals and other relevant jurisprudence to gain deeper understanding of the developed practice with respect to in/admissibility and weight of evidence. Initially, our aspiration was to advance the scope of the research to include more comparative assessment of varied domestic practices with regard to in/admissibility and weight of digital evidence. In 2021 the Academy developed a questionnaire assessing the changes in the legislation and possibly in case law more widely, and domestically. This questionnaire was shared with some relevant institutional contacts but due to the limited resources and various changes through 2020 and 2021, the Nuremberg Academy was unable to follow up and analyse the relevant information further. The decision was taken to limit the scope of the research within Cluster C and focus on the ICC and compare the practices, where relevant, with the *ad hoc* tribunals.²

¹ More information about the project can be found at International Nuremberg Principles Academy, 'Digital Evidence' <<https://www.nurembergacademy.org/projects/detail/45ed2d129b0e19459764c4684e317a95/digital-evidence-23/>> accessed 13 December 2022.

² The questionnaire is an internal document but available for sharing and further discussion with the interested stakeholders.

With respect to the ICC practices, the research question focused on what are the legal standards governing digital evidence before the ICC. The question was answered focusing on in/admissibility standard at the ICC, highlighting the differences in the pre-trial and trial stages and their corresponding burden of proof. You will be able to find the report detailing our findings in Annex 1. Following this exploration, further research was conducted with respect to “weight of evidence” and Trial Chamber’s assessment of the weight of evidence. Annex 2 attaches the brief legal memorandum prepared while exploring the practices of various chambers with regard to the weight of evidence.

While each Annex has its limitation, the added value of Cluster C to the project is important.

It outlines the admissibility and inadmissibility standard that seems, in principle, to follow the practices of the *ad hoc* tribunals. What is different at the ICC is however worth mentioning and definitely require further reflection in our final analytical stage of the project. This includes:

- varied standards of proofs depending on the stage of proceedings
 - submission versus admission model practices and their implications especially with respect to the rights of the litigants, and also discretion of judges afforded with respect to these practices
- usage of terminology with respect to criteria defined for the in/admissibility and weight of evidence consideration and their consistent application

The Nuremberg Academy is grateful to various experts and consultants who helped us bring this report together. Special thanks go to Dr Emilie Hunter for drafting the annex 1 and to Olivia Flasch for preparing the annex 2 to of this report. Both reports were thoroughly reviewed by the Academy.

This report and the Cluster D report are an internal bi-product – they advance our exploration and help us build on the analytical work that is ongoing with respect to the main project research question:

Considering the increased usage of digital evidence (and relevant changes) in the prosecution of core international crimes, should the Rules of Procedure and Evidence of the International Criminal Court be amended? If so, how and why?

The Nuremberg Academy welcomes feedback on this report and the project and further engagement with relevant stakeholders in addressing the project question.

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Cluster C Report: What are the legal standards governing digital evidence before the International Criminal Court?

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1 EXECUTIVE SUMMARY

This report outlines the legal standards applied in the jurisprudence of the International Criminal Court (ICC) regarding the admissibility, and inadmissibility (exclusion) of digital evidence (DE) and digitally derived evidence (DDE).¹ It does so through the form of a legal digest of the Court's engagement with various types of DE and DDE, drawn from 46 motions, requests, filings, decisions, judgments and dissenting or separate opinions from 15 cases to identify the standards governing the use of DE and DDE by the ICC Chambers (hereinafter referred to as the ICC case collection or data set). For a full list see Annex 1). This was supplemented by transcripts, to provide context or further information regarding specific decisions; cases and decisions from the International Criminal Tribunal for the former Yugoslavia (ICTY), where lacunae or contradictions were identified; and a small literature collection of 8 Reports, Guidelines and Academic literature, to gauge existing approaches to the themes of the report and to minimise duplication.

The collection was reviewed three times: first to identify trends, gaps and terminology; second to extract relevant paragraphs from the ICC case collection, using text comprehension, keyword searches and cross references; and third to revise and verify data. The collection of quotations was then analysed using chronological cluster analysis and cohort analysis, before the report was drafted and reviewed. This exercise took place between July 2021 and February 2022 with a total allocation of 30 research days. Further edits were made in April–May 2022. The Nuremberg Academy is grateful to the experts who reviewed the report and provided feedback and comments.²

From the case collection, it was possible to organise the chambers engagement with the admissibility or inadmissibility of digital forms of evidence through each of the criteria or requirements found in the ICC's legal framework. Furthermore, Chambers were found to engage with matters of authenticity, accuracy and hearsay, which have been organised as part of the probative value determinations.

	PRE-TRIAL	TRIAL
Relevance	<i>Katanga and Ngudjolo Chui; Mbarushimana; Kenyatta; Yekatom and Ngaïssona</i>	<i>Katanga and Ngudjolo Chui</i>
Probative value	<i>Katanga and Ngudjolo Chui; Lubanga</i>	<i>Katanga and Ngudjolo Chui; Ongwen; Bemba; Ntaganda</i>

¹ Article 69(4), (7), (8), Rome Statute; Rules 63(4) and 64(1), Rules of Procedure and Evidence (RPE); Regulation 26(2), Regulations of the Court and section 1, E-Court Protocol.

² Five experts from the American Bar Association, the International Bar Association, the International Development Law Organisation and Leiden University provided feedback, in written form and through an expert workshop, convened on 20 May 2022. The Academy together with the report authors produced summaries of the feedback: records are available from the Academy.

	Authenticity	<i>Lubanga; Kenyatta et al; Katanga and Ngudjolo Chui; Al-Werfalli</i>	<i>Katanga and Ngudjolo Chui; Gbagbo and Blé Goudé; Bemba; Ongwen; Ntaganda</i>
	Accuracy		<i>Bemba et al; Ongwen</i>
	Hearsay evidence	<i>Gbagbo; Lubanga; Kenyatta et al; Mbarushimana</i>	<i>Katanga and Ngudjolo Chui</i>
	Prejudicial effect	<i>Katanga and Ngudjolo Chui</i>	<i>Bemba</i>
	Inadmissibility due to violation of RS / IHRL	<i>Mbarushimana</i>	<i>Bemba et al</i>
	Reliability or integrity infringements	<i>Yekatom and Ngaïssona</i>	<i>Bemba et al; Yekatom and Ngaïssona</i>
	Non-application of national laws	<i>Mbarushimana</i>	<i>Bemba et al</i>
	Inadmissibility related to belated disclosure		<i>Yekatom and Ngaïssona; Bemba et al</i>

Figure 1 - Table detailing the Chambers engagement with the admissibility and inadmissibility of digital evidence in accordance with the ICC's legal framework and criteria.

In completing the report, certain trends, inconsistencies and observations have been identified and are shared below.

Admission versus submission of evidence

Two approaches to the admission of DE and DDE are evident in the case collection, reflecting distinct phases of the Court's practise in the treatment of evidence by the judicial chambers. In the earlier cases, notably *Lubanga*, *Katanga and Ngudjolo Chui*, and *Ntaganda*, the respective Trial Chambers utilised an approach described in literature as the 'admission' approach, in which the admissibility of evidence is ruled on each time an item is tendered at trial.³ In 2016, the *Gbagbo and Blé Goudé* Trial Chamber issued a Decision, where it chose to defer its decision on the admissibility, relevance or probative value of the evidence tendered to the deliberation of the judgment.⁴ Referred to as the 'submission' approach, it has become the dominant approach with subsequent cases adopting this model at trial.⁵

It is important to note that while Chambers can choose to determine the relevance or admissibility of evidence whenever they find most appropriate, they cannot evade this responsibility and must "consider the relevance, probative value and potential prejudice of each item of evidence at some point in the proceedings – when evidence is submitted, during the trial, or at the end of the trial".⁶

³ Fabricio Guariglia, "Admission' v. 'Submission' of Evidence at the International Criminal Court: Lost in Translation?" (2018) Journal of International Criminal Justice 1.

⁴ TC I, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the submission and admission of evidence (29 January 2016), [ICC-02/11-01/15-405](#), para. 12.

⁵ Bemba et al, Ongwen, Yekatom and Ngaïssona, Al Hassan

⁶ AC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', (3 May 2011), [ICC-01/05-01/08-1386](#), para. 37.

Notwithstanding the general application of the submission approach, Chambers have maintained their discretion to assess the admissibility of evidence upon its tendering “whenever required by the Statute or the Rule”, and notably “may rule on admissibility of certain items whenever this may be necessary or appropriate in order to preserve the expeditiousness and fairness of proceedings, including upon a request of the parties relating to a specific item of evidence, or categories of evidence”.⁷ In *Bemba*, the Appeals Chamber outlined instances in which admissibility determinations were to be made upfront as the evidence was tendered: most notably when considering its statutory obligations under Article 64 (2) Rome Statute (ensuring that the trial is fair, expeditious and conducted with full respect to the rights of the accused, and with due regard for the protection of victims and witnesses).⁸ For example, an upfront assessment of admissibility would be necessary in the context of motions regarding evidence obtained in violation of the Rome Statute or human rights norms (as required by Article 69 (7); see also below section on inadmissibility) or when admitting pre-recorded testimony (as required under Rule 68).⁹

While the ‘submission’ approach could result in a reduction of opportunities for the evidence to be contested, leading to fairness issues for the Defence, concerns that the burden of proof may be shifted away from the tendering party, as well as shrinking opportunities for admissibility to be discussed meaningfully, it could also be considered to provide greater certainty to all parties on the evidence that will be used to determine guilt or innocence and can allow for a more accurate assessment taken in light of the evidence as a whole.¹⁰ The latter is particularly important in cases in which DE and DDE can be complex, novel or high in quantity and scale. As

⁷ TC I, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the submission and admission of evidence, (29 January 2016), [ICC-02/11-01/15-405](#), paras 14-17. For example, the *Bemba et al.* Chamber assessed the admissibility of items of DE such as **call data records, intercept evidence, and Western Union financial records** prior to the Judgment, “as these newer types of evidence were unprecedented at the ICC” (Freeman, p. 293), and assessment ahead of judgment was primarily in response to contests on the basis of human rights violations.

⁸ AC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’ (3 May 2011), [ICC-01/05-01/08-1386](#), para. 37. Also cited in TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jen-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido*, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf) (24 September 2015), [ICC-01/05-01/13-1285](#), para. 13.

⁹ AC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled ‘Decision on the admission into evidence of materials contained in the prosecution’s list of evidence’, (3 May 2011), [ICC-01/05-01/08-1386](#), para. 37. Also cited in TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jen-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido*, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), (24 September 2015), [ICC-01/05-01/13-1285](#), para. 13.

¹⁰ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jen-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido*, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), (24 September 2015), [ICC-01/05-01/13-1285](#), para. 10.

noted by Chambers, submission preserves expeditiousness, saving time as relevance and probity do not need to be assessed on the item's submission and again at the end of proceedings.¹¹

Within the case collection, there were no instances where the submission approach was contested or challenged on grounds of fairness by the Defence in the context of DE or DDE. However, less systematic engagement with the relevance, probative value and prejudicial effect of items of DE or DDE in cases that adopted the 'submission' approach could be observed, with only brief references to the admissibility of digital evidence in judgments.¹² This stands in contrast to documents within the case collection from the 'admission approach' cases, such as the **Katanga Bar Table Motion**, whose detailed and methodological approach is regularly cited in this, and other, reports. However, it is also noted that these earlier decisions addressed the admissibility of types of DE or DDE that may have been considered novel or new to the Court and which in later cases, the tendering of such forms of evidence no longer triggered uncertainty over their properties or evidentiary value to judicial proceedings. For example, in the **Ongwen** judgment, **videos** and **photos** were only addressed briefly and references to their probative value as corroborative evidence were included only in footnotes.¹³ This consideration seems borne out by subsequent cases where the submission approach has been adopted, where the admissibility of DE or DDE is discussed more extensively occurs where novel or new forms of digital evidence were brought before the Court. For example, the **Bemba et al.** Chamber assessed the admissibility of items of DE such as **call data records, intercept evidence and Western Union financial records** prior to the Judgment, "as these newer types of evidence were unprecedented at the ICC".¹⁴ Similarly, **intercepted radio recordings with enhanced audio** were discussed extensively by the **Ongwen** TC in the Judgment (see extracts on Ongwen radio intercepts and audio enhancements under section on probative value and accuracy, respectively).¹⁵

Authenticity of DE and DDE was the most frequently assessed factor

The authenticity of DE and DDE was the most frequently assessed factor or criteria pertinent to admissibility, at both the pre-trial and trial stages. Review of the dataset suggests that authenticity pertains to the intactness of the material - whether it is intact, complete, genuine or has been tampered with, whereas accuracy has more consistently been defined in the context of content relevance or correctness and whether the evidence (as enhanced, manipulated or captured) accurately captured or represented the content (in its original state). While the Chambers were for the most part consistent in this distinction, the **Ntaganda** Judgment was an exception, where photographs taken in Kobu were held to be authentic on the basis of testimony

¹¹ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aime Kilolo Musamba, Jen-Jacques Mangenda Kabongo, Fidele Babala Wandu and Narcisse Arido*, Decision on Prosecution Requests for Admission of Documentary Evidence (ICC-01/05-01/13-1013-Red, ICC-01/05-01/13-1113-Red, ICC-01/05-01/13-1170-Conf), (24 September 2015), [ICC-01/05-01/13-1285](#), para. 11.

¹² For example, in the **Ongwen** judgment, only the videos and photos from Lukodi camp (see section on probative value).

¹³ See extracts on **Ongwen** videos and photographs from the Lukodi camp under section on probative value.

¹⁴ Freeman, p. 293.

¹⁵ See extracts on **Ongwen** radio intercepts and audio enhancements under sections on probative value and accuracy, respectively.

corroborating their content, rather than through reference to their intactness.¹⁶ It is unclear whether this choice of wording intended to depart from jurisprudence, but this raises the issue of inconsistency in terminology (see below).

It is also worth noting that the authenticity of DE and DDE is often addressed at earlier stages of proceedings, prior to admissibility considerations, having been assessed during four cases at pre-trial and as part of the admissibility assessment during trial in four cases.¹⁷ Pre-Trial Chambers decisions varied in the efforts taken to verify the authenticity of materials: in **Lubanga** and **Kenyatta** the PTC asserted that there can be an assumption of authenticity, given the early stages of proceedings,¹⁸ while in **Katanga and Ngudjoli Chui** and **Al Werfali** Chambers sought to derive authenticity from other sources or from the material's own indicia. The Trial Chambers have provided more consistent requirements for authentication. Criteria put forth included placing the onus on the submitting party to tender relevant authenticating data for the materials,¹⁹ alongside criterion to authenticate specific types of digital evidence. While the criteria for most types of DE or DDE considered appears to be more developed, the factors to authenticate OSINT materials, namely its online location, falls below those recommended by OSINT manuals.²⁰

- **General responsibility to tender authenticating data: Katanga Trial Chamber**
 - Authenticating data should be tendered by the submitting party to ensure the verification of materials [Katanga].²¹
- **Video, photos and AV: Bemba, Ongwen, Ntaganda**
 - Information on source, originality and integrity, date, location should be submitted [Bemba].²²
 - The entire source should be submitted rather than excerpts [Bemba].²³

¹⁶ TC VI, *Prosecutor v. Bosco Ntaganda*, Judgment (8 July 2019), [ICC-01/04-02/06-2359](#), paras 281-282.

¹⁷ It is worth noting that, with the exception of Al Werfali (PTC), Ongwen (TC) and Ntaganda (TC) the different Chambers' engagement with authenticity took place prior to the adoption of the submission approach to evidence. The impact of the submission approach on determining the authenticity of DE or DDE is hard to measure from the data set. Concern has been noted that the submission approach may weaken the authentication of DE or DDE or compound the challenges anticipated by the submission approach. While the Katanga PTC required the tendering party to submit authenticating data with the DE or DDE at the time of tendering, engagement with such data under the submission approach may be delayed until the Trial phase, switching the burden to other parties to contest or challenge the data and postponing assessment of authenticity until the Trial phase.

¹⁸ PTC I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of the charges (29 January 2007), [ICC-01/04-01/06-803-tEN](#), para. 97 and PTC II, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of the Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012), [ICC-01/09-02/11-382-Red](#), para. 355.

¹⁹ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), paras 22-24.

²⁰ E.g. The Berkeley Protocol recommends scrutiny of the file's contextual information, including embedded metadata, linked information and the source (it's online provenance, uploader or author).

²¹ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), paras 22-24.

²² TC III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute" of 6 September 2012 (8 October 2012), [ICC-01/05-01/08-2299-Red](#), para. 122.

²³ TC III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute" of 6 September 2012 (8 October 2012), [ICC-01/05-01/08-2299-Red](#), para. 83.

- *Consistent in-court authentication through corroboration is preferred although in-court corroboration is not always required for every piece [Bemba, Ongwen, Ntaganda].*²⁴
- **Telecoms / intercepts /enhanced audio recordings: Bemba, Ongwen**
 - *Recorded track times should match with de minimis deviations [Bemba, Ongwen];*²⁵
 - *Summaries and logbooks should match [Ongwen];*²⁶
 - *Chain of custody logs [Bemba].*²⁷
- **Call data records: Bemba**
 - *Corporate watermarks of the telecommunications provider;*
 - *Convergence of call logs and numbers with the conversations and timelines;*
 - *Expert testimony;*
 - *Court records and actions to corroborate authenticity;*
 - *Role of Registry in generating or receiving material.*²⁸
- **OSINT: Katanga**
 - *Online location of items is required.*²⁹

Accuracy of DE or DDE was only considered by the Chambers in the context of audio recordings that had been manipulated (i.e. enhanced) or that had technical issues (problems with synchronisation of sound).

In terms of other relevance criteria, the accuracy of DE or DDE was examined less frequently and exclusively in relation to audio recorded, intercept and enhanced, evidence. In **Ongwen**, the Trial Chamber found enhanced audio evidence to be accurate (i.e. faithful reproductions) to the original audio recordings in light of expert witness testimony, which attested to the process of manipulation or enhancement.³⁰ The only other case where accuracy was addressed, **Bemba**, affirmed the accuracy of telecommunications evidence with reference to additional sources that confirmed that audio recordings were an accurate reflection of conversations that took place in spite of synchronisation issues.³¹

²⁴ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), fn. 4440 and fn. 4622; TC VI, *Prosecutor v. Bosco Ntaganda*, Judgment (8 July 2019), [ICC-01/04-02/06-2359](#), paras 281-282; TC III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” of 6 September 2012 (8 October 2012), [ICC-01/05-01/08-2299-Red](#), para. 120.

²⁵ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), para. 654; TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute (19 October 2016), [ICC-01/05-01/13-1989-Red](#), para. 219.

²⁶ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), para. 656.

²⁷ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute (19 October 2016), [ICC-01/05-01/13-1989-Red](#), para. 222.

²⁸ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute (19 October 2016), [ICC-01/05-01/13-1989-Red](#), paras 219-225.

²⁹ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), para. 24.

³⁰ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), paras 651-657.

³¹ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute (19 October 2016), [ICC-01/05-01/13-1989-Red](#), para. 219.

Audio Visual material can be relied upon as *real evidence* once originality and integrity has been established

The *Katanga* TC found that AV material could be admitted as ‘real evidence’ that ‘speaks for itself’ once it had established its originality and integrity.³² However, there was no evidence of this occurring subsequently, within the data set. For example, videos and photographs in *Ongwen* were assigned probative value solely as corroborative evidence.³³

Probative value of certain forms of digital evidence requires the submission of additional information

Efforts to engage with the probity of some types of digital evidence led Chambers, in some cases, to set out criteria that must be met before it could engage with the probative value of the type of evidence.

- **Audio and visual materials:** DE or DDE containing audio content must be accompanied by translation in one of the working languages of the Court in order to determine its probative value. Chambers have also required that video submissions must be accompanied by a translation in one of the working languages of the Court. Without this, the Chambers in *Lubanga* declared it was not possible to assess the probative value of video evidence, rendering it inadmissible.³⁴
- **Anonymous hearsay evidence:** sufficient information on the authors and sources of open source content is required to be able to assess its probative value. Anonymous hearsay evidence derived from open-source reports and news media (e.g. by the UN, NGO, third State reports) was assessed with some frequency at both pre-trial and trial stages. While a range of different criterion was discussed, there was some consistency in ascribing such materials a low probative value due to the absence of sufficiently detailed information on the author, source and methodology of the materials. Chambers consistently limited such evidence to a role in corroborating other evidence.

Inadmissibility of DE or DDE on the grounds of a human rights violations has concerned alleged breaches of the right to privacy and have failed each time

Challenges to the admissibility of evidence on the basis of alleged breaches of the right to privacy were made, and rejected, with regard to digital finance information, call data records and call location data. While general tests have been elucidated by Trial Chambers to decide whether evidence is inadmissible due to violations of the Statute or international human rights, such tests do not distinguish between types of evidence.

Citation of earlier decisions regarding admissibility of DE or DDE is infrequent or rare

The dataset is notable for the infrequent citation or reference to earlier decisions or case law regarding the admissibility of DE or DDE, even where Chambers were assessing similar or identical

³² TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), para. 24.

³³ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), See e.g. paras 1758, 1760, 1761, fn. 4440, fn. 4622.

³⁴ PTC I, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Defence “Request to exclude video evidence which has not been disclosed in one of the working languages” (7 November 2006), [ICC-01/04-01/06-676](#), p. 4.

challenges. This is in contrast to other legal tests and indicia, where citation has become *de rigeur*. The **Katanga** Bar Table Motion Decision, for example, engages thoroughly with the admissibility of different forms of DE or DDE and provides the most authoritative engagement with digital forms of evidence by the Court to date. However, while other parts of this Decision have been widely cited in Court filings,³⁵ the parts relevant to digital evidence has only been cited in one TC decision.³⁶

Inconsistent terminology regarding DE and DDE

The language used by Chambers and parties to the proceedings to identify or refer to different forms of DE or DDE within the case collection is inconsistent at best. As part of the first review, a standardised [glossary](#) was created to harmonise the language used in the report. However, it should be noted that the Chambers do not apply such consistency, while there is also at present, no commonly accepted set of terms regarding digital forms of evidence. In parallel, several types of DE or DDE identified in this report, such as UN reports and other documentary material shared online, photographs, audio and video, could be considered at the margins of the definition of DE or DDE. However, in light of the rapid developments in the forms of DE and DDE tendered as evidence, and the continuing inclusion of these evidence types within definitions of DE and DDE, such materials were retained within the case collection.³⁷

Unresolved issues regarding criteria or tests for admissibility

In some cases, efforts by parties to assert indicia or criteria to determine the admissibility of specific forms of digital evidence were not resolved within the judicial records of the dataset:

Authenticity and reliability of email correspondence: A bar table request by the Prosecution in **Bemba** sought to assert several indicia to assert authenticity and reliability of email correspondence between the accused, different sections of the Court and another individual, including “the relevant headers, including sent/received indications, times, dates, and addressees (many of whom reflect obviously valid Court email extensions)”.³⁸ However, the Chamber but did not engage further with these materials.

³⁵ E.g. regarding the 3-step admissibility approach (relevance, probative value, prejudicial effect). See *Ntaganda* Prosecution’s first request for the admission of documentary evidence, [ICC-01/04-02/06-1064](#); *Ntaganda* Prosecution’s request for the admission of exhibits from the bar table, [ICC-01/04-02/06-1770](#); *Bemba* Public redacted version of “Prosecution’s Response to Babala’s Request for the Admission of Evidence from the Bar Table Motion”, 20 April 2016 [ICC-01/05-01/13-1821-Conf](#). These decisions cite the *Katanga* Bar Table Motion for the 3-step approach to admissibility and in the context of the practice of Chamber in admitting documentary evidence from the bar table in the absence of authenticating witnesses.

³⁶ *Ntaganda* Decision on Prosecution’s request for admission of documentary evidence, [ICC-01/04-02/06-1838](#). This decision cites *Katanga* on the condition that, in the context of tendering evidence through a bar table motion, the moving party must demonstrate the item’s “relevance and probative value, including with regard to its authenticity”; failure to do so will result in the item not being admitted.

³⁷ Equally, given that the E-Court Protocol requires the digitisation of all evidence tendered to proceedings, it has been remarked that all forms of evidence are now accessed digitally.

³⁸ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Public redacted version of the “Prosecution’s Third Request for the Admission of Evidence from the Bar Table”, 21 August 2015, ICC-01/05-01/13-1170-Conf (18 September 2015), [ICC-01/05-01/13-1170-Red](#), para. 17.

Authentication of Social Media *photographs*: In *Bemba* the Prosecution sought to admit Facebook **photographs** to link individuals and corroborate other evidence but were left unaddressed in the final judgment.³⁹ The defence argued that the photos were not prima facie authentic or reliable “because the prosecution provided no material supporting the attribution of the Facebook pages”, which the prosecution disputed.⁴⁰

In-court authentication of DE material is not an absolute requirement: While Trial Chambers in *Bemba* and *Katanga* have asserted that in-court authentication, or authentication by witness testimony, was not an absolute requirement in determining the authenticity of AV materials, the *Ntaganda* TC rejected the admission of documentary evidence tendered by the Prosecution as it was not admitted through a witness and the Prosecution had failed to provide “sufficiently specific reasons” as to why this was not the case,⁴¹ further specifying that evidence tendered outside of witness testimony may fail the probity vs prejudice assessment as the accused would not be able examine adverse witnesses.⁴²

³⁹ *According to Freeman*: “In its final judgment, the Trial Chamber did not address these photographs from Facebook, giving no clear ruling either way. This is likely because the facts that photos were submitted to prove was proved through other evidence, such as witness testimony admitting that a relationship between the individuals pictured existed. The Chamber did not need to address the admissibility of these photos, since they were not relevant to its decision, thus kicking the can down the line to future Chambers to decide on the admissibility of social media photos, perhaps in a case where they play a more significant role in directly proving the elements of the crimes.

⁴⁰ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Public Redacted Version of Defence Response to Prosecution’s Third Request for the admission of Evidence from the Bar Table, ICC-01/05-01/13-1170, (9 October 2015), [ICC-01/05-01/13-1245-Red](#), (also ‘Katanga Bar Table Motion’), paras. 83-84.

⁴¹ TC VI, *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, (28 March 2017), [ICC-01/04-02/06-1838](#), para. 13.

⁴² TC VI, *Prosecutor v. Bosco Ntaganda*, Decision on Prosecution’s request for admission of documentary evidence, (28 March 2017), [ICC-01/04-02/06-1838](#), para. 14.

2 INTRODUCTION

This report outlines the legal standards applied in the jurisprudence of the International Criminal Court (ICC) regarding the admissibility, and inadmissibility (exclusion) of digital evidence (DE) and digitally derived evidence (DDE). It contributes towards the Nuremberg Academy's project "E-procedure: Evidence in Time of Increased Use of Technology and Digitalisation" which aims to analyse the current standards and practices regarding the collection and use of digital evidence in core international crimes and human rights violations. The project is organised into five research clusters, where this report forms part of Cluster C:

- A. A Repository Mapping Existing Guidelines on Digital Evidence Practices and Standards
- B. Research Gap: A Mapping of Missing Guidelines on Digital Evidence Practices and Standards
- C. Jurisprudence Regarding the Substantive and Procedural Rules Governing Admissibility and the Evidentiary Weight of Digital Evidence**
- D. Human Rights Correlations of Digital Evidence
- E. Recommendations or Amendments to the ICC Rules of Procedures

2.1 Methodology

The report focuses on the application of the ICC's framework regarding the **admissibility and inadmissibility (exclusion) of digital evidence (DE) and digitally derived evidence (DDE)** at the pre-trial, trial and appeals phases. Building upon previous research by the Nuremberg Academy on this Cluster, a collection of 46 motions, requests, filings, decisions, judgments and dissenting or separate opinions from 15 cases was made to identify and review the standards governing the use of DE and DDE by the ICC Chambers. Transcripts were referred to on an ad-hoc basis, to provide context or further information regarding specific decisions, but were not exhaustively used due to the scale and length of such materials. A second collection of cases and decisions from the ICTY was provided, and consulted where lacunae or contradictions were identified, while a small literature collection of 8 Reports, Guidelines and Academic literature was made and consulted in parallel, to gauge existing approaches to the themes of the report and to minimise duplication.

A first review of the collections sought to identify common trends, gaps and terminology, and led to the development of the glossary or terminology list (see below) to ensure consistency. A research outline was then developed, using the regulatory framework of the ICC, considering the admissibility of digital evidence and digitally derived evidence, and grounds for its exclusion or inadmissibility. Each of the ICC materials were then reviewed against this outline, using text comprehension supported by keyword searches and cross references to other paragraphs or documents. Relevant paragraphs were classified by the case, its stage of proceedings and the type of DE or DDE and catalogued against the relevant part(s) of the outline. Following this overarching sweep of materials, chronological cluster analysis was performed, to group the data according to common traits or characteristics. Cohort analysis, that is analysis of data by the type of evidence, takes place only where trends or gaps have been identified.

2.2 Limitations

A report such as this carries with it inherent limitations, most notably in the breadth of sources it could consider. This report addresses judicial engagement with DE and DDE through references to such evidence types within the decisions and judgments of pre-trial, trial and appeals chambers. It does not address the submissions made by parties to the proceedings and only infrequently refers to transcripts, where this can verify, contextualize or illuminate references within the aforementioned decisions and judgments. As such, the report is conditioned to making observations about the forms of DE or DDE that the judges do engage with and is silent about what is excluded or omitted from the pages of the decisions or judgments reviewed.

A second limitation can be observed regarding the **scale of evidence and range of evidence types** that are submitted by parties to an ICC case in the course of its proceedings, evidenced by **early** cases requiring “in-depth evidence charts” to assist in the organization and categorization of materials, and the development of e-court procedures to govern the efficient management of submissions. Coupled to this, many **evidence disclosure lists are confidential**, leading to difficulties in verifying specific pieces of evidence that were referenced in judgments and/or other available filings and their eventual exclusion from the final review. Due to the scale of potential filings and transcripts, as well as constraints imposed by issues of confidentiality or redactions, it was not possible to follow specific forms of digital evidence through the court process.

The third limitation, or rather observation, concerns the varied level of detail that different chambers or presiding judges went into when engaging with DE or DDE in the judgments or various filings. While all cases included in the dataset included DE and DDE, the references to such forms of evidence varied considerably. Without reviewing the transcripts of relevant hearings, it is inferred that the disclosed submissions, decisions or judgments address evidence that was either more vigorously contested or of a higher evidentiary value.

A final and minor limitation or challenge concerns the varied **nomenclature** adopted by different chambers or presiding judges, which was met by the adoption of the glossary of terms which seeks to unify the terminology used in the report with regards to the types of DE or DDE discussed within the case collection.

2.3 Structure

The report is divided into two substantive sections: Admissibility of Digital Evidence and Inadmissibility (Exclusion) of Digital Evidence. The first section on admissibility is subdivided into i) relevance; ii) probative value; and, iii) prejudicial effect. The probative value section is further divided into authenticity, accuracy, and hearsay. The second section on the inadmissibility (exclusion) of digital evidence is divided into: i) digital evidence obtained in violation of the Rome Statute or international human rights; ii) reliability of evidence or integrity of proceedings infringed due to human rights violation; iii) non-application of national laws other than human rights norms; and iv) inadmissibility (exclusion) of evidence due to belated disclosure of issues on relevance and admissibility.

2.3.1 Admissibility of digital evidence

The admission of digital evidence follows the same procedure as all other forms of evidence, whereby the regulatory framework affords each Chambers the discretion to determine admissibility of evidence, taking into account its relevance, probative value and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.⁴³ Parties can apply to the Chambers to rule on the admissibility of specific items of evidence, and the Chambers have the power to rule on such applications, or determine such matters on their own motion. This regime has been criticised due to the considerable discretion afforded to the Chambers and its diverse application by the Chambers.⁴⁴ It is also worth noting that the RPE does not impose a legal requirement for corroboration in order to prove any crime, particularly those of sexual violence,⁴⁵ so long as the Court is convinced of the guilt of the accused beyond reasonable doubt.⁴⁶ Based on this regulatory framework, searches were conducted to identify discourse on the relevance, probative value and prejudicial effect of digital evidence, and were expanded to include factors of authenticity, accuracy, confidentiality and preservation of DDE.⁴⁷

2.3.2 Inadmissibility (exclusion) of evidence

Evidence can be excluded or found inadmissible where the Chambers have determined that one of two conditions have been met: (i) a human rights violation casts substantial doubt on the reliability of the evidence⁴⁸ or (ii) the integrity of the proceedings would be seriously damaged.⁴⁹ Issues of admissibility must be raised by parties at the time of submission of evidence or, exceptionally, as issues become known.⁵⁰ Exclusions can be made following the application of a party, or on the Chamber's motion, where a ruling would be made⁵¹ or as part of the general admissibility determinations made by the Chambers. However, in so doing, the Chambers shall not rule on the application of the State's national law⁵² nor apply national laws governing evidence.⁵³

⁴³ Articles 64(9), 69(4) and 69(7) Rome Statute; Rule 63(2), RPE.

⁴⁴ See e.g. Michele Caianiello, 'Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models' (2011) 36 North Carolina Journal of International Law 287; Gilbert Bitti, Article 64, in Otto Triffterer and Kai Ambos, *The Rome Statute of the International Criminal Court: A Commentary* (3rd edn, 2016), p. 1619 ("Triffterer/Ambos").

⁴⁵ Rule 63(4) RPE states that "Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence."

⁴⁶ Article 66(3) Rome Statute

⁴⁷ Regulation 26(2) and Section 1, E-Court Protocol. These four factors form part of the requirements of the court-wide evidence management system (EMS), which falls under the responsibility of the Registry. The ICC regulatory framework does not impose a duty or responsibility on the submitting parties to ensure any of these factors prior to their submission to the EMS. Despite this, searches of the data revealed the Chambers' engagement with authenticity and accuracy: no results were found regarding confidentiality or preservation of materials.

⁴⁸ Article 69(7)(a), Rome Statute.

⁴⁹ Article 69(7)(b), Rome Statute.

⁵⁰ Rule 64(1), RPE.

⁵¹ Rule 63(3), RPE.

⁵² Article 69(8), Rome Statute.

⁵³ Rule 63(5), RPE.

2.4 Glossary/terminology

In order to harmonise the more technical terminology adopted by practitioners with the more limited or rudimentary language adopted within the judicial documents of the ICC, the report adopts the following glossary of key terms, including of digital (and digitalised evidence). This glossary was compiled by review of multiple sources, including authoritative reports, guidelines and articles, as referenced.

Digital Evidence (DE): *data, information or evidence that is created, manipulated, stored or communicated by any (digital) device, computer or computer system or transmitted over a communication system, that is relevant to the proceeding.⁵⁴ This can include information which is created by and originates from digital technology⁵⁵ as well as information that transmitted or stored in a digital format⁵⁶ (see digitalised evidence).*

Digitalised Evidence/ Digitally-derived evidence (DDE): *data, information or evidence which has been converted from its original format to a virtual or digital format for the purpose of storing, archiving, organising or presenting the information.⁵⁷*

Information: any kind of tangible and intangible material which is obtained or inspected during the course of a criminal investigation. Information can be secured from numerous sources, including suspected perpetrating structures, witnesses, victims, governing entities, open sources, as well as information generated or inferred by the investigation team. Information can take a wide range of forms including documentary, physical, digital or testimonial materials.⁵⁸

Evidence: information that has been submitted to a court, which satisfies the admissibility requirements of the jurisdiction concerned, and is admitted into the record of the case.⁵⁹

Metadata: Metadata refers to the information embedded in a particular piece of digital evidence itself, that is, the data concerning the data itself.⁶⁰ Metadata contains information about an electronic file that is either embedded in or associated with the file, often includes a file's characteristics and history and may describe how, when and by whom a digital file was collected, created, accessed, modified and formatted.⁶¹ The evidence which the piece of digital evidence is purporting to can be

⁵⁴ Human Rights Center UC Berkeley, School of Law, 'Digital Fingerprints: Using Electronic Evidence to Advance Prosecutions at the International Criminal Court' (UC Berkeley, Berkeley February 2014), fn. 2.

⁵⁵ Kalshoven-Gieskes Forum, University of Leiden, 'Report on Digitally Derived Evidence in International Criminal Law' (Leiden University, June 2019) p. 5 ("KGF/Leiden Report").

⁵⁶ Eoghan Casey, *Digital Evidence and Computer Crime* (3rd ed. 2011).

⁵⁷ International Bar Association, 'Evidence Matters in ICC Trials: An International Bar Association International Criminal Court & International Criminal Law Programme report providing a comparative perspective on selected evidence matters of current importance in ICC trial practice' (August 2016); KGF/Leiden Report, p.5.

⁵⁸ Draft Nuremberg Guidelines on Non-Public Investigative Bodies, on file with author.

⁵⁹ Draft Nuremberg Guidelines on Non-Public Investigative Bodies, on file with author.

⁶⁰ KGF/Leiden Report, p.5.

⁶¹ OHCHR, Berkley Protocol on Digital Open Source Investigations (Human Rights Center, UC Berkeley School of Law, 2020) p. 79 ("Berkley Protocol").

considered primary data, while the data on the primary data (such as the date, time, location, elevation etc. when the primary data was collected) can be viewed to a secondary data.⁶² Metadata is a valuable resource in international criminal law as its presence can be used to determine the authenticity of a piece of digital evidence thereby increasing its probative value.⁶³

Multi-Value Logical Form: This is an inclusive term adaptable to future technological developments, covering novel programming languages, techniques and/or styles, including information in binary form, ternary, and all other types of existing or future possible programming languages.⁶⁴

Open-Source Evidence: Open-source intelligence (OSINT) collected from publicly available information found on the Internet that is used as evidence in a proceeding. It can consist of other forms of digital evidence, such as photographs, videos, audio clips, satellite images etc.⁶⁵

2.4.1 Types of digital evidence

Aerial Imagery: Aerial photography is the production of photographic images from balloons, helicopter, or airplanes.⁶⁶

Audio Intercept Evidence: Digital audio or radio recordings obtained via interception by authorities used as evidence in a proceeding.

Digital Communications Evidence: Data attained from digital devices, such as computers, cellular phones in the form of digital documents, emails, communications via messaging platforms, and social media posts etc. provided as evidence in a proceeding.⁶⁷

Digital Explosives Evidence: Use of technology, such as specialised computer programming and algorithms to input data collected from other forms of evidence (e.g., forensic, physical and video etc) to reconstruct explosions provided as evidence in a proceeding.⁶⁸

Financial Evidence: Evidence attained via financial investigations, containing data on financial records, wire transfers, and/or online bank transfers.⁶⁹

⁶² KGF/Leiden Report, p.5.

⁶³ KGF/Leiden Report, p.5.

⁶⁴ KGF/Leiden Report, p.5.

⁶⁵ 'Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials' (2018) 41(2) Fordham International Law Journal 283, pp.316-317 ("Freeman").

⁶⁶ KGF/Leiden Report, p. 5 citing Sean Kotz, 'What is the difference between Satellite Imagery and Aerial Photography?' (Sciencing, 13 March 2018).

⁶⁷ Freeman, p.327.

⁶⁸ Freeman, pp.310-311.

⁶⁹ Freeman, pp.323-324.

Photographs: A picture made using a camera, in which an image is focused on to light-sensitive material and then made visible and permanent by chemical treatment, or stored digitally.⁷⁰

Podcast: Coined in 2004 as a portmanteau of 'iPod' and 'broadcast', a podcast is an audio show which can be downloaded from the Internet and listened to on a computer, Mp3 player or a smartphone.⁷¹

Radio: Digital radio receivers are able to receive and decode a digital program stream into a format that you can hear and see with program details on built in screens. Digital radio is transmitted using digital signals instead of analogue which AM and FM use.⁷²

Satellite Imagery: This term may refer to various types of digitally transmitted images taken by artificial satellite orbiting the Earth.⁷³

Social media: Website and mobile applications through which people can share content and data fast, in an efficient manner and even in live-motion.⁷⁴

Telecommunications Evidence: Data collected and provided by Communication Service Providers on call data records (CDR), call location data (CLD), cell site information, and subscriber records.⁷⁵

Unmanned Aerial Vehicle (UAV) footage: Video or photo footage taken from a UAV, also known as a "drone", an aircraft without a pilot on board remotely controlled from the ground and/or flying autonomously.⁷⁶

Video: Visual multimedia source through which a series of images forms a moving picture with video and audio components corresponding with the pictures shown on screen.⁷⁷

2.4.2 Stages of proceedings / judicial records

AW: Arrest warrant

CCD: Confirmation of charges decision

PTC: Pre-Trial Chamber

TC: Trial Chamber

⁷⁰ KGF/Leiden Report, p. 5 citing 'photograph' (English Oxford Living Dictionary).

⁷¹ KGF/Leiden Report, pp. 5-6.

⁷² KGF/Leiden Report, p. 6 citing '[What is digital radio?](#)' *ABC Radio*.

⁷³ KGF/Leiden Report p. 6 citing Sean Kotz, 'What is the difference between Satellite Imagery and Aerial Photography?' (Sciencing, 13 March 2018).

⁷⁴ KGF/Leiden Report p. 6 citing Matthew Hudson, '[What is Social Media?](#)' *The Balance Small Business* (8 May 2019).

⁷⁵ Freeman, p. 312.

⁷⁶ KGF/Leiden Report, p. 6 citing G. Kurt Piehler and M. Houston Johnson, *Encyclopedia of Military Science* (SAGE Publications, Inc., 2013).

⁷⁷ KGF Report, p. 6 citing [Cambridge Dictionary](#), 'video'.

2.5 Standards of proof required during ICC proceedings

The standards of proof applicable to the different stages of criminal proceedings before the ICC were also considered when structuring the report. The evolving standards of proof at the ICC have been described as a “stairway which becomes stricter with every step taken towards trial and requires more profound evidence with each level.”⁷⁸ The Rome Statute describes four such standards, addressing preliminary examination, investigation, arrests and confirmation of charges and trial:⁷⁹

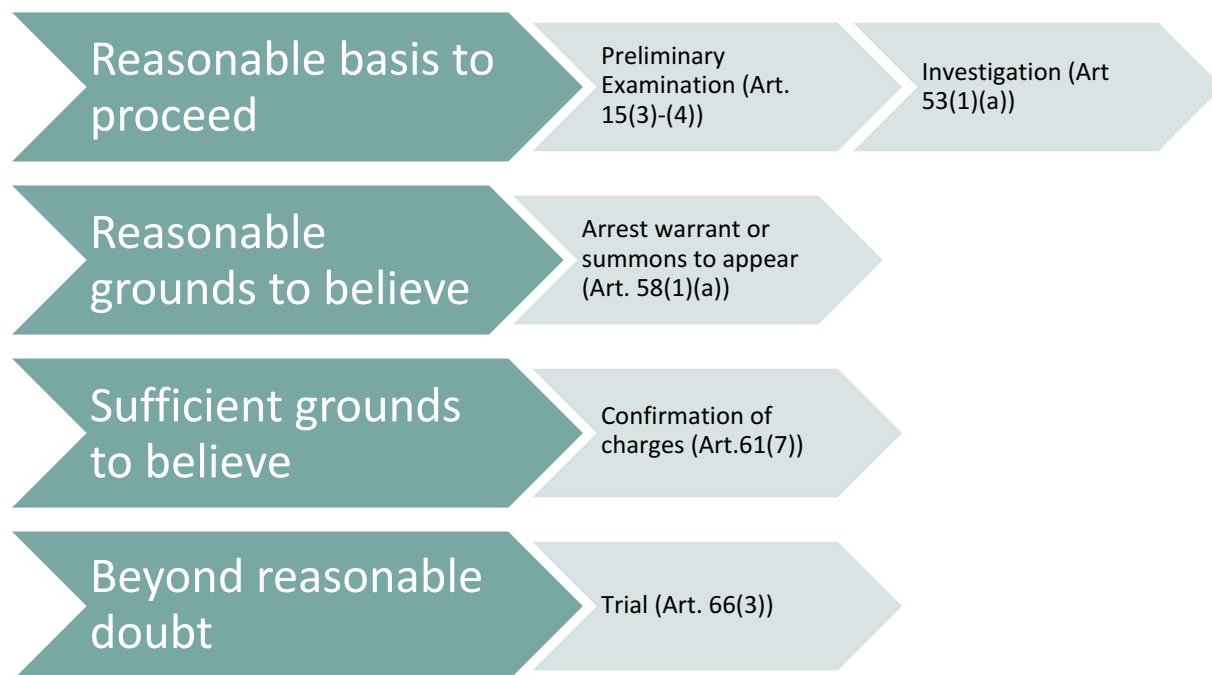


Figure 2 – Graphic depicting the standards of proof required during ICC proceedings.

2.5.1 Preliminary Examination: a reasonable basis to proceed with an investigation

During preliminary examination, both the Prosecutor and the PTC are bound by the same standard of proof, the ‘reasonable basis’ test. While the Prosecutor may determine on a case-by-case basis what would be required to satisfy this burden of proof, they are obliged to provide the PTC with supporting materials that can sufficiently substantiate their claim to enable the PTC to determine whether there is a reasonable basis to proceed.⁸⁰ Following examination of the Prosecutor’s request and supporting material, the PTC is required to determine whether there is a reasonable basis to proceed with an investigation and that the case would fall within the jurisdiction of the Court, before it can authorise the commencement of the investigation.

⁷⁸ Ignaz Stegmiller, ‘The Pre-Investigation Stage of the ICTY and the ICC Compared’, in Thomas Kreussmann (ed.), *ICTY: Towards a Fair Trial?* (Neuer Wissenschaftlicher Verlag, Wien-Graz, 2008), p. 322.

⁷⁹ See Article 83(2) for the standards of review for appeal, namely that (i) the proceedings were unfair in a way that affected the reliability of the decision or sentence, or (ii) that the decision or sentence was materially affected by error of fact or law or procedural error.

⁸⁰ Article 15(3) and (4); Article 53(1); Rule 48, RPE; Triffterer/Ambos, pp. 733-735.

The Pre-Trial Chambers has interpreted the standard of proof⁸¹ to require “a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being committed’”.⁸² However, not all information needs to “point towards only one conclusion.”⁸³

2.5.2 Investigation: reasonable grounds to believe that a crime within the jurisdiction of the Court has been committed by the suspect

During the investigation, the PTC shall issue a warrant of arrest of a person, or a request to surrender, if it is satisfied that there are ‘reasonable grounds’ to believe that the person has committed a crime within the jurisdiction of the Court. To so determine, the PTC must examine the Prosecutor’s application, and the evidence or other information submitted.⁸⁴ To follow the staircase analogy, this is a harder standard to meet than the ‘reasonable basis’ standard⁸⁵ during preliminary examination, although they share similar tests of reasonableness, whereby “a reasonable conclusion that the person committed a crime within the jurisdiction of the Court can be drawn” from the evidence submitted and, thus, does not require this to be the only reasonable conclusion that can be drawn from the evidence.⁸⁶

The ICC’s jurisprudence has typically considered that the Office of the Prosecutor has met the evidentiary burden when it offers “concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations. Furthermore, the “substantial grounds to believe” standard must enable all the evidence admitted for the purpose of the confirmation hearing to be assessed as a whole”.⁸⁷

⁸¹ *Ibid.*, para. 5.

⁸² PTC II, *Situation in the Republic of Kenya*, Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (31 March 2010), [ICC-01/09-19-Corr](#), para. 35.

⁸³ *Ibid.*, para. 34. In this respect, it is further noted that even the higher ‘reasonable grounds’ standard for arrest warrant applications under Article 58 does not require that the conclusion reached on the facts be the only possible or reasonable one. Nor does it require that the Prosecutor disprove any other reasonable conclusions. Rather, it is sufficient to prove that there is a reasonable conclusion alongside others (not necessarily supporting the same finding), which can be supported on the basis of the evidence and information available. AC, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment on the appeal of the Prosecutor against the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir” (3 February 2010), [ICC-02/05-01/09-73](#), para. 33.

⁸⁴ Article 58(1)(a).

⁸⁵ Triffterer/Ambos, pp. 839-840.

⁸⁶ Triffterer/Ambos, p. 1445.

⁸⁷ PTC I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, (29 January 2007), [ICC-01/04-01/06-803-tEN](#), para. 39. The same conclusion was made by other chambers, PTC I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges (30 September 2008), [ICC-01/04-01/07-717](#), paras 62-65; PTC I, *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges (8 February 2010), [ICC-02/05-02/09-243-Red](#), paras 35-37; PTC I, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Corrigendum of the “Decision on the Confirmation of Charges” (7 March 2011), [ICC-02/05-03/09-121-Corr-Red](#), paras 29-31 and PTC I, *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges (16 December 2011), [ICC-01/04-01/10-465-Red](#), paras 40-41.

2.5.3 Confirmation of Charges: sufficient evidence establishes substantial grounds to believe that the person committed the crimes charged

At the confirmation of charges hearing, the standard of proof increases from that of 'reasonableness' to 'substantial grounds' whereby the Pre-Trial Chamber is required to make a determination as to the sufficiency of the evidence for each of the charges put forward.⁸⁸ The facts must be identified with sufficient clarity and detail, clearly connecting the accused to the incidents, in support of the legal elements of the crimes charged, their contextual elements, as well as the criminal responsibility of the accused.⁸⁹

2.5.4 Trial and Appeal: beyond reasonable doubt

At Trial and Appeal, the ICC Statute adopts the 'beyond reasonable doubt' threshold, which requires the Prosecution to have proven its case beyond any reasonable doubt.⁹⁰ This means that there cannot be another logical explanation derived from the facts except that the defendant committed the crime. There can be no reasonable doubt as to his guilt.

⁸⁸ Article 61(5) and (7), Rome Statute; AC, *Prosecutor v. Callixte Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", (30 May 2012), [ICC-01/04-01/10-514](#), paras. 39-41.

⁸⁹ AC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court" (08 December 2009), [ICC-01/04-01/06-2205](#), fn. 163; TC I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Legal Representatives' Joint Submissions concerning the Appeals Chamber's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court (8 January 2010), [ICC-01/04-01/06-2223](#), paras 29-30 and PTC I, *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute (3 June 2013), [ICC-02/11-01/11-432](#), paras 19-20.

⁹⁰ This standard of proof is enshrined in Article 66 of the Rome Statute and is required in order for an accused to be convicted.

3 ADMISSIBILITY OF DIGITAL EVIDENCE: RELEVANCE, PROBATIVE VALUE, PREJUDICIAL EFFECT.

This section on the admissibility of digital evidence compiles references to relevance, probative value (authenticity, accuracy, hearsay), and prejudicial effect in line with Articles 64(9), 69(4) and 69(7) of the Rome Statute and Rule 63(2) of the RPE.

3.1 Relevance

The relevance of digital evidence has been engaged with in four confirmation of charges decisions (*Katanga*, *Mbarushimana*, *Kenyatta* and *Ngaïssona*). This has included assessment of the relevance of the content of **intercept evidence**, **call data records** and **media reports** (*Mbarushimana*, *Kenyatta* and *Ngaïssona*), the relevance of **photographs** were corroborated through **witness statements** (*Kenyatta*) and the means of collection of **intercept evidence** (*Mbarushimana*). During the Trial phase, issues of the relevance of digital evidence were addressed in the *Katanga* Bar Table Motion and subsequent decision. This decision set out general criteria to determine relevance, as well as specific criteria to evaluate the relevance of **audio-visual** materials (date and location) and that such evidence sources may act as standalone evidence where the originality and integrity of the source is established.

3.1.1 Pre-trial

In *Mbarushimana* the PTC found that the content of **intercept communications** was both relevant and admissible in regards to assessing the alleged the mode of liability, rejecting the Defence's challenge:⁹¹

Considering (i) the particular relevance of the intercept evidence in light of the mode of criminal responsibility alleged against Mr Mbarushimana [...] the Chamber is satisfied that the intercept evidence is both relevant and admissible".⁹²

Other Confirmation of Charges decisions have found the content of some forms of digital evidence submitted to have limited or no relevance.

In *Kenyatta et al.* the PTC found **telecommunications** evidence submitted by the prosecution to be of limited relevance in asserting the absence of phone communications between Muthaura and Ali (co-accused):⁹³

" [...] the evidence relied upon by the Prosecutor does not contain a specific reference to the phone number that Mr. Muthaura is alleged to have used to place the call, and that therefore

⁹¹ PTC I, *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of the charges (16 December 2011), [ICC-01/04-01/10-465-Red](#), paras 66-68.

⁹² PTC I, *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of the charges (16 December 2011), [ICC-01/04-01/10-465-Red](#), para. 74.

⁹³ PTC II, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of the Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012), [ICC-01/09-02/11-382-Red](#), para. 355.

it is of **limited relevance** to establish that no calls to Mr. Ali are found in the phone records concerning a single phone number allegedly used by Mr. Muthaura. In fact, it is in the view of the Chamber possible that Mr. Muthaura would use other phone numbers, as indicated by the fact that the phone number for which the Defence of Mr. Muthaura provides records is not registered in the name of Mr. Muthaura, and by the relatively low number of calls listed in the phone records”.⁹⁴

The CCD in *Yekatom and Ngaïssona* noted the limited relevance of **media reports** in *Yekatom and Ngaïssona* due to the dates of the reports, observing that:

“[T]he media reports invoked by the Prosecutor either post-date the majority of the crimes allegedly committed in Yaloké or do not reflect a date”.⁹⁵

Similarly, the *Yekatom and Ngaïssona* CCD considered the submission of **media reports**⁹⁶ to be of limited relevance on three grounds: limited information contained within them, limited reliability of the content and the absence of proof of *Ngaïssona*’s knowledge of them (and therefore of the crimes that they alleged to have been committed):

[...] the Chamber finds that media reports are also of limited relevance to support a finding to the required threshold that Ngaïssona knew of the alleged crimes committed as (i) there is no indication that such reports reached Ngaïssona; (ii) the information contained in them is limited; and (iii) it has not been demonstrated that they are sufficiently reliable, especially as regards their assumptions as to which groups were responsible for the events.⁹⁷

Finally, the *Yekatom and Ngaïssona* CCD found **call data records (CDR)** to be of limited relevance in the absence of further evidence addressing the content and purpose of the conversations.⁹⁸

“regarding to the CDRs, the Chamber observes that such records do not provide the Chamber with any kind of indicia as to the content and purpose of the conversations between Ngaïssona and the ComZones or de facto leaders of the Anti- Balaka groups on the ground. They only allow the Chamber to establish that Ngaïssona had telephone conversations with such persons, at a particular point in time. However, this alone does not allow the Chamber to make any conclusive findings to the required threshold that Ngaïssona knew about the alleged crimes

⁹⁴ PTC II, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of the Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012), [ICC-01/09-02/11-382-Red](#), para. 355.

⁹⁵ PTC II, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Corrected version of ‘Decision on the confirmation of the charges against Alfred Yekatom and Patrice-Edouard Ngaïssona (14 May 2020), [ICC-01/14-01/18-403-Red-Corr](#), fn. 444.

⁹⁶ For the purposes of this report, media reports and press articles are included as open source materials, even in instances when this cannot be verified due to the confidentiality of required materials.

⁹⁷ PTC II, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Corrected version of ‘Decision on the confirmation of the charges against Alfred Yekatom and Patrice-Edouard Ngaïssona (14 May 2020), [ICC-01/14-01/18-403-Red-Corr](#), para. 181.

⁹⁸ PTC II, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Corrected version of ‘Decision on the confirmation of the charges against Alfred Yekatom and Patrice-Edouard Ngaïssona (14 May 2020), [ICC-01/14-01/18-403-Red-Corr](#), paras 180, 200, 201, 210, 216.

being committed. When not accompanied by further evidence as to the content and purpose of the conversations concerned, CDRs are inadequate to prove that there are substantial grounds to believe that Ngaïssona knew about the alleged crimes. This is even less so when the CDRs only establish contact between members of the National Coordination other than Ngaïssona and the ComZones or de facto leaders of the Anti- Balaka groups on the ground.⁹⁹

[...] The Chamber also recalls that, in the absence of any specific indication as to the nature and content of the alleged conversations, the Call Data Records are of limited relevance, even assuming arguendo that they demonstrate contact between Ngaïssona and [REDACTED].¹⁰⁰

In *Katanga and Ngudjolo Chui* the confirmation of charges decision referred to earlier findings regarding the relevance and probity of documentary evidence when it accompanies a witness statement, to admit **photographs** depicting the wounds of witnesses and Bogoro Institute.¹⁰¹

“In evaluating this issue, the Chamber is persuaded, in part, by the findings of Trial Chamber I [*Lubanga*, Decision on admissibility of four documents]¹⁰² concerning the relevance and probative value of documentary evidence which accompanies a witness statement. In weighing the potential probative value of such documentary evidence against its possible prejudicial effect, Trial Chamber I concluded that its admission would not be prejudicial to the fairness of the proceedings when the witness statements provide a solid enough basis to test and evaluate the reliability of the evidence.¹⁰³

In the *Mbarushimana* CCD the PTC addressed the admissibility of the evidence by considering the means of collection of **intercept evidence**, finding the evidence to be admissible based on: i) the absence of allegation of bias from those who collected the intercepts; ii) the context and purpose of

⁹⁹ PTC II, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Corrected version of ‘Decision on the confirmation of the charges against Alfred Yekatom and Patrice-Edouard Ngaïssona (14 May 2020), [ICC-01/14-01/18-403-Red-Corr](#), para. 180.

¹⁰⁰ PTC II, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Corrected version of ‘Decision on the confirmation of the charges against Alfred Yekatom and Patrice-Edouard Ngaïssona (14 May 2020), [ICC-01/14-01/18-403-Red-Corr](#), para. 200.

¹⁰¹ PTC I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of the Charges (30 September 2008), [ICC-01/04-01/07-717](#), para. 161.

¹⁰² Note: in the **Decision on admissibility of four documents** in *Lubanga* cited in the Katanga confirmation of charges decision, the TC held that the relevance of the documents could be assessed through considering their internal consistency and the degree of corroboration: “The documents are, prima facie, internally consistent and are seemingly corroborated by the witness statement [REDACTED]. The prosecution accurately points out that there is consistency between the entry and exit logbooks, in that records of children entering [REDACTED] are reflected by records of them leaving. Similarly, the witness statement of [REDACTED] provides a significant degree of corroboration in that [REDACTED] is able to discuss some of the children described in the notebooks and one of the authors of the notebooks.[...] [I]n weighing the potential probative value of the evidence against its possible prejudicial effect, the admission of the documents will not be prejudicial to the fairness of the trial. The evidence is relevant to the issues in the case and for the reasons extensively set out above there are sufficient means of testing and evaluating its reliability”. See TC I, *Prosecutor v. Thomas Lubanga Dyilo*, Corrigendum to Decision on the admissibility of four documents (20 January 2011), [ICC-01/04-01/06-1399-Corr](#), paras 40-41.

¹⁰³ PTC I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of the Charges (30 September 2008), [ICC-01/04-01/07-717](#), para. 164.

intercepting the evidence; and, iii) the specificity of the evidence, in that it identified the individuals involved:

Considering [...] (ii) the fact that there is no allegation of any bias or interest in the outcome of these proceedings or the events to which the charges relate on the part of the States which collected the intercept evidence, (iii) the context in which and the purpose for which the evidence was obtained, and (iv) the specific evidence used to identify the individuals involved, the Chamber is satisfied that the intercept evidence is both relevant and admissible”.¹⁰⁴

3.1.2 Trial

Relevance where it informs the probability of fact

The *Katanga and Ngudjolo Chui* decision on the prosecutor’s bar table motion addressed several general legal issues pertaining to documentary evidence. In this decision, the TC held that a piece of evidence is relevant if it increases the probability that a fact can be determined:

“Although under articles 64(9)(a) and 69(4) **relevance** is a legal precondition to admissibility, it is primarily a logical standard. **If the evidence tendered makes the existence of a fact at issue more or less probable, it is relevant.** Whether or not this is the case depends on the purpose for which the evidence is adduced.”¹⁰⁵

Criteria for relevance

The TC developed criterion to determine the relevance and probability of evidence submissions in establishing the existence of specific facts:

Unless immediately apparent from the exhibit itself, it is the responsibility of the party tendering it to explain: (1) the relevance of a specific factual proposition to a material fact of the case; (2) how the item of evidence tendered makes this factual proposition more probable or less probable. If submissions on these points are not sufficiently clear or precise, or if the Chamber cannot ascertain the relevance of an item of evidence with reasonable precision, it may decide to reject it on those grounds.¹⁰⁶

The TC elucidated the two-fold purpose of the relevance criterion as (i) the legal basis to exclude irrelevant evidence from the trial; and (ii) defining the purpose of that item of evidence in proceedings:

The Chamber notes that the relevance criterion serves two different purposes. First, it is the legal basis for excluding irrelevant evidentiary material from the trial. Second, it defines the purpose of a specific item of evidence in the proceedings. If a party has tendered an item of

¹⁰⁴ PTC I, *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of the charges (16 December 2011), [ICC-01/04-01/10-465-Red](#), paras 71-74.

¹⁰⁵ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), para. 16.

¹⁰⁶ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), para. 16.

evidence as proof of a particular proposition, the Chamber will in principle admit it only for that purpose, even if the entire exhibit is admitted into evidence. Accordingly, if the same item of evidence could also prove another proposition than the one(s) for which it was tendered, the Chamber will not consider the evidence in relation to that additional proposition, unless the parties were given an opportunity to address this aspect of the evidence.

Finally, the Chamber notes that in a case involving more than one accused, the fact that an item of evidence is only relevant to one of the accused and bears no relation to another co-accused, is not a ground for objection by the latter. Objections based solely on this ground will therefore be dismissed”.¹⁰⁷

AV and relevance through identifying features of date and location

In the same decision, the **Katanga and Ngudjolo Chui** TC found that, to be relevant, **AV material** must have date and location of recordings established:

“Before video or audio material can be admitted, the Chamber will require evidence of originality and integrity. [...] Since the **relevance** of audio or video material depends on the date and/or location of recording, evidence must be provided in this regard”.¹⁰⁸

AV and standalone evidence where originality and integrity has been established

The Chamber clarified that, where relevant, **AV material** could be admitted as real evidence that speaks for itself:

“However, once this has been established [originality and integrity of evidence], this type of exhibit may often be admitted as evidence that speaks for itself and may be regarded, in this respect, as real evidence”.¹⁰⁹

3.2 Probative value

At the Pre-Trial phase, the Chambers considered the probative value of **photographs** and **videos** in two cases. In **Katanga**, the Chambers accepted that **photographs** can be accorded probative value according to a two-pronged proportionality test. In contrast, **video** submissions which had not been translated into working languages of the Court were found to be inadmissible in **Lubanga** as their probative value could not be understood. The probative value of five forms of digital evidence (**radio intercepts, broadcast radio, satellite imagery, videos and photographs**) was examined during the trial phase of four cases (**Katanga, Ongwen, Bemba** and **Ntaganda**). The judgments considered definitions of probative value, including that authentication by testimony is not a requirement for determinations of probity or relevance. They also considered factors that strengthened or weakened

¹⁰⁷ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), paras 16-18.

¹⁰⁸ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), para. 24.

¹⁰⁹ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), para. 24.

the probity of forms of digital evidence submitted, based on content or the authenticating details, as well as the corroborative value of **videos** or **photographs**.

Pre-trial:

In *Katanga and Ngudjolo Chui*, the Pre-Trial Chambers considered that **photographs** may serve to authenticate documentary evidence and may be afforded weight in proportion to two tests:

In the view of the Chamber, where authentication of documentary evidence can be derived from other sources, including witness statements, photographic evidence will be admissible for the purposes for which it is submitted and will be accorded probative value in proportion to (i) the level of authentication provided by the witness who introduces the evidence, and (ii) the reliability of the accompanying witness statement”.¹¹⁰

Building upon an earlier *Lubanga* decision, the *Katanga and Ngudjolo Chui* PTC accepted the probative value of the **photographs** as they were accompanied, and thus authenticated, by **witness statements**:

“In evaluating this issue, the Chamber is persuaded, in part, by the findings of Trial Chamber I [*Lubanga*, Decision on admissibility of four documents] concerning the relevance and **probative value** of documentary evidence which accompanies a witness statement.”¹¹¹

In *Lubanga* the PTC held that **videos** which had not been translated into a working language of the Court were inadmissible under 69(4):

“Considering, however, that under no circumstances may evidence not translated into one of the working languages of the Court at the time of commencement of the confirmation hearing be admitted into evidence insofar as the Chamber must be in a position to fully understand the evidence on which the parties intend to rely at the hearing; and considering, therefore, that pursuant to article 69(4) of the Statute, video excerpts (i) which are not translated into one of the working language of the Court by Thursday 9 November 2006 at 9h30 and (ii) whose translation is not made available to the Chamber and the Defence by that time must be declared inadmissible”.¹¹²

3.2.1 Trial:

In the *Katanga and Ngudjolo Chui* decision on the prosecutor’s bar table motion, the TC set out its definition of probative value and evidentiary weight, determining that probative value is determined based on the inherent characteristics of the evidence, while evidentiary weight pertains to the importance attached to the item in light of all the available evidence on the same issue, and is to be assessed at the end of the trial:

¹¹⁰ PTC I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of the Charges (30 September 2008), [ICC-01/04-01/07-717](#), para. 165.

¹¹¹ PTC I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of the Charges (30 September 2008), [ICC-01/04-01/07-717](#), paras 164-165.

¹¹² PTC I, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the Defence "Request to exclude video evidence which has not been disclosed in one of the working languages" (7 November 2006), [ICC-01/04-01/06-676](#), p. 3.

“The Chamber **wishes to remind the parties that probative** value and evidentiary weight are two similar but distinct concepts. Under article 69(4) of the Statute, probative value is a key criterion in any determination on admissibility. It follows that the Chamber must determine the probative value of an item of evidence before it can be admitted into the proceedings. **Probative value is determined on the basis of a number of considerations pertaining to the inherent characteristics of the evidence.** Evidentiary weight, however, is the relative importance that is attached to an item of evidence in deciding whether a certain issue has been proven or not. It depends on the intrinsic quality and characteristics of the item of evidence, but also on the amount and quality of other available evidence on the same issue. Thus, unlike probative value, evidentiary weight is assessed at the end of a trial, when the Chamber has heard all other evidence admitted in the case”.¹¹³

The TC in *Bemba* held that evidence does not need to be authenticated officially or by a witness in court for it to hold probative value:

“[T]here is no strict requirement establishing that every piece of evidence must be authenticated officially or by a witness in court in order for it to be considered authentic, reliable and holding probative value”.¹¹⁴

In *Ongwen*, LRA radio communication intercepts collected by the Uganda authorities for military intelligence were described as highly probative:¹¹⁵

“All intercepted evidence of LRA’s radio communications has been considered and, overall, the Chamber considers these communications to be **highly probative evidence in this case.** They reveal the LRA’s contemporaneous communications during the period relevant to the charges, giving a unique window into their conversations. Their importance demands that the Chamber set out a precise foundation for its conclusions on when a recorded conversation occurred and who was communicating”.¹¹⁶

The *Bemba* Chamber also found that **broadcast audio** had limited probative value and could, at most, be used to corroborate other evidence:¹¹⁷

“in particular, **the information contained therein may serve to corroborate other pieces of evidence and might be examined when assessing the prosecution's allegation that the conduct described in the charges was widely broadcast** which, according to the prosecution,

¹¹³ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), para. 13.

¹¹⁴ TC III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” of 6 September 2012 (8 October 2012), [ICC-01/05-01/08-2299-Red](#), para. 120.

¹¹⁵ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), paras 614-618.

¹¹⁶ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), para. 686.

¹¹⁷ TC III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” of 6 September 2012 (8 October 2012), [ICC-01/05-01/08-2299-Red](#), paras 117-128.

may have implications with regard to the accused's alleged knowledge of the crimes charged. **In light of this envisioned limited usage of the information contained in the radio recordings, the Majority is of the view that there is no reason to believe that the admission of these recordings will have a prejudicial effect on a fair trial**".¹¹⁸

Satellite images of Lipri and Songolo presented in the *Ntaganda* case analysed by an expert witness to show signs of possible destruction due to their depiction of cleared areas with structures and rooftops missing,¹¹⁹ were afforded low probative value as they were taken a month after the attack. The Chamber expressed a preference for the most contemporaneous evidence:

"[] The Chamber observes that both the video and the satellite image were **taken more than a month after the Lipri attack, and are therefore of limited use to establish whether, and if so how, any destruction took place during the events that are subject to the charges.** Further, the Chamber heard evidence that those living in Lipri tried to quickly restore their houses after the assault (P-0127: T-139, pages 73 to 75; and P-0121: T-173, page 82). Mindful of the possibility that Lipri inhabitants restored some of the houses prior to the video or satellite image being taken, **the Chamber considers it appropriate to rely on the most contemporaneous evidence, namely the witnesses' accounts and observations, including eye-witnesses, who were present during the attack on 18 February 2003 or came to Lipri immediately after to witness the destruction**".¹²⁰

In the same decision, the TC rejected the admission of three **videos** on the grounds of insufficient probative value, describing the two ways in which a piece of evidence can be considered probative enough to influence the Chamber's decision:

"In order to be admissible, evidence must, to some significant degree, advance the Chamber's inquiries. There are two ways in which an item of evidence can influence the Chamber's decision: (a) the item of evidence may significantly help the Chamber in reaching a conclusion about the existence or non-existence of a material fact; or (b) the item of evidence may significantly help the Chamber in assessing the reliability of other evidence in the case.

Unlike relevance, there are degrees of significance, depending on the measure by which an item of evidence is likely to influence the determination of a particular issue in the case. Although some evidence may be relevant, it may not be sufficiently material to persuade or dissuade the Chamber of anything. The Chamber will thus consider what impact the admission of the evidence would have on the issues before it. If the potential impact is "little to none", then the Chamber will be unlikely to admit it as it will not advance its enquiry. If, on the other

¹¹⁸TC III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute" of 6 September 2012 (8 October 2012), [ICC-01/05-01/08-2299-Red](#), para. 128.

¹¹⁹ TC VI, *Prosecutor v. Bosco Ntaganda*, Judgment (8 July 2019), [ICC-01/04-02/06-2359](#), fn. 1748, fn. 1293.

¹²⁰ TC VI, *Prosecutor v. Bosco Ntaganda*, Judgment (8 July 2019), [ICC-01/04-02/06-2359](#), fn. 1748.

hand, the impact ranges from "some to considerable", the evidence will probably be sufficiently significant for admission".¹²¹

The **Ongwen** judgment also identified numerous pieces of digital evidence to hold probative value as corroborative evidence. A post-attack **video** of Lukodi camp filmed by government investigators in the days after the attack was described as corroborating the results of the Lukodi camp attack:¹²²

"The Chamber is satisfied that the video discussed by P0017 and Martin Kalyemenya is the authentic video taken in the days after the attack and shows the impact of the attack on the camp and the civilians that lived within it. The video has **probative value as corroborative evidence** of the results of the attack on Lukodi IDP camp".¹²³

Similarly, **photographs** of the Lukodi investigation, including photos of sick and injured individuals were found to corroborate the types of injuries suffered by civilians in the attack:¹²⁴

"The Chamber is of the view that the photographs have **probative value as corroborative evidence** of the types of injuries suffered by civilians in the course of the attack".¹²⁵

Photographs taken in Kobu depicting the aftermath of the attack in the **Ntaganda** case were described as probative in depicting the aftermath of the Kobu massacre despite their poor quality:¹²⁶

"Despite the poor quality of some of the photographs and noting that the evidence on the record as to who took the photographs and how they were developed is indeed unclear, the Chamber notes the consistent evidence that photographs were taken at the site from witnesses whom it considers credible as to their presence at the scene in the days after the alleged killings. It further notes the consistent testimony from seven witnesses that the photographs depict the scene they saw in Kobu. The Chamber therefore considers the Defence arguments that P-0301 and P-0805 failed to recognise photographs during initial interviews with the Prosecution to be unsubstantiated. The Chamber notes the consistent testimony from witnesses who said they recognised victims in certain photos, and considers the Defence assertion that such identifications were implausible and indicative of contamination to be similarly unsubstantiated. The Chamber also notes the consistency between the images depicted in the photographs and the scene described by eyewitnesses, and that a pair of blue trousers found on one of the skeletal remains exhumed in Kobu looks similar to the trousers in one of the Kobu Photographs. Finally, the Chamber considers to be unsubstantiated the Defence assertion that there are indications that these photographs are not a reflection of any scene in Kobu. Having

¹²¹ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), paras 34-35.

¹²² TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), See e.g. paras 1758, 1760, 1761, fn. 4440.

¹²³ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), fn. 4440.

¹²⁴ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), fn. 4622.

¹²⁵ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), fn. 4622.

¹²⁶ TC VI, *Prosecutor v. Bosco Ntaganda*, Judgment (8 July 2019), [ICC-01/04-02/06-2359](#), para. 281.

regard to all of the aforementioned, the Chamber is satisfied that the Kobu Photographs depict the aftermath of the ‘Kobu massacre’.”¹²⁷

3.2.2 Authenticity of Digitally Evidence¹²⁸

The authenticity and accuracy of evidence and materials are defined as two of four factors required to ensure the integrity of the Court-wide evidence management system, rather than as part of the criteria to determine admissibility of evidence.¹²⁹ Despite the absence of a clear definition within the Court’s legal apparatus, authenticity of **DDE** has been dealt with by Chambers in four cases at pre-trial¹³⁰ and five cases at trial¹³¹ while accuracy was addressed in two trial judgments.¹³²

In two pre-trial decisions, **Lubanga** and **Kenyatta**, the Chambers did not seek to actively verify the authenticity of **digital materials**, but rather assumed that materials submitted were authentic. However, other decisions, **Katanga** CCD and **Al Werfalli** AW, undertook different measures to authenticate digital materials (**photographs** and **video**) including scrutiny of metadata and an expert report attesting to authenticity.

Judicial scrutiny of the authenticity of **DDE** submissions increased during trial proceedings, including a general requirement that the submitting party bears a burden of proof to ensure that authenticating data is submitted which can verify documentary evidence materials.¹³³ Other indicators or verification requirements were also set out to authenticate different types of **DDE**, including:

- **Video, photos and AV:** Information on source, originality and integrity, date, location, submission of entire source rather than excerpts and consistent in-court authentication (corroboration),¹³⁴ although in-court corroboration is not always required for every piece [Bemba, Ongwen, Ntaganda].¹³⁵

¹²⁷ TC VI, *Prosecutor v. Bosco Ntaganda*, Judgment (8 July 2019), [ICC-01/04-02/06-2359](#), para. 282.

¹²⁸ Authenticity is placed here as a sub-section of probative value on the basis of i) the [Katanga Bar Table Motion](#): “If at the time of tendering an item of evidence, the party is unable to demonstrate its relevance and probative value, including its authenticity, it cannot be admitted” (para. 13; see also paras 20ff on authenticity as part of the probative value of the evidence, falling within the broader admissibility assessment); and, ii) the Ntaganda Decision on Prosecution’s request for the admission of documentary evidence ([ICC-01/04-02/06-1838](#)) which reaffirms this: “If at the time of tendering an item, the party is unable to demonstrate its relevance and probative value, including with regard to its authenticity, the document cannot be admitted” (para. 16).

¹²⁹ Regulation 26(2) and Section 1, E-Court Protocol.

¹³⁰ Authenticity: Pre-Trial/ Pre-Trial: Lubanga; Kenyatta; Katanga; Al Werfalli.

¹³¹ Authenticity: Trial/ Katanga; Gbagbo; Bemba; Ongwen; Ntaganda.

¹³² Accuracy: Trial/ Bemba and Ongwen.

¹³³ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#).

¹³⁴ TC III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” of 6 September 2012 (8 October 2012), [ICC-01/05-01/08-2299-Red](#), paras 83, 120, 122; TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), fn. 4440 and fn. 4622; TC VI, *Prosecutor v. Bosco Ntaganda*, Judgment (8 July 2019), [ICC-01/04-02/06-2359](#), paras 281-282.

¹³⁵ TC III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” of 6 September 2012 (8 October 2012), [ICC-01/05-01/08-2299-Red](#), para. 120.

- **Telecoms / intercepts / enhanced audio recordings:** recorded track times match with de minimis deviations [Bemba, Ongwen];¹³⁶ matching summaries and logbooks [Ongwen];¹³⁷ chain of custody logs [Bemba].¹³⁸
- **Call data records:** corporate watermarks of the telecommunications provider; correspondence of call logs and numbers with the conversations and timelines; expert testimony; court records and actions to corroborate authenticity; role of Registry in generating or receiving material [Bemba].¹³⁹
- **OSINT:** location of items [Katanga].¹⁴⁰

3.2.2.1 Pre-trial:

Early jurisprudence of the PTC appears to show limited engagement in verifying the authenticity of digital materials. Judges in the **Lubanga** confirmation of charges hearing decided to assume the authenticity of materials included in the parties' evidence lists, including **video clips**.¹⁴¹

"at the stage of the confirmation hearing, the scope of which is limited to determining whether or not a person should be committed for trial, it is necessary to assume that the material included in the parties' Lists of Evidence is authentic".¹⁴²

Similarly, in the **Kenyatta et al.** confirmation of charges decision, the Chambers considered that there were no circumstances in which to doubt the authenticity of **phone records** submitted by the defence, particularly when seen in combination with witness testimony:

"the Chamber notes that during the confirmation of charges hearing the Defence of Mr. Muthaura contested the account of Witness OTP-4 by asserting that no phone call took place between Mr. Muthaura and Mr. Ali. In support, the Defence relies on phone records and information obtained from witnesses [redacted] and Beatrice Murnthi (D12-42). The Chamber has not identified any circumstance casting doubt upon the authenticity of the phone records provided."¹⁴³

¹³⁶ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), para. 654; TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute (19 October 2016), [ICC-01/05-01/13-1989-Red](#), para. 219.

¹³⁷ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), para. 656.

¹³⁸ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute (19 October 2016), [ICC-01/05-01/13-1989-Red](#), para. 222.

¹³⁹ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute (19 October 2016), [ICC-01/05-01/13-1989-Red](#), paras 219-225.

¹⁴⁰ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), para. 24.

¹⁴¹ PTC I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of the charges (29 January 2007), [ICC-01/04-01/06-803-tEN](#), para. 97.

¹⁴² PTC I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of the charges (29 January 2007), [ICC-01/04-01/06-803-tEN](#), para. 97.

¹⁴³ PTC II, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of the Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012), [ICC-01/09-02/11-382-Red](#), para. 355.

In contrast, the confirmation of charges decision in *Katanga and Ngudjolo Chui* considered that the authenticity of **photographs** depicting the wounds of witnesses and Bogoro Institute could be derived through other sources:¹⁴⁴

“In the view of the Chamber, where authentication of documentary evidence can be **derived from other sources**, including witness statements, photographic evidence will be admissible for the purposes for which it is submitted and will be accorded probative value in proportion to (i) the level of authentication provided by the witness who introduces the evidence, and (ii) the reliability of the accompanying witness statement”.¹⁴⁵

In the second *Al-Werfalli* arrest warrant, the Pre-Trial Chamber considered that the authenticity of a **video** showing the suspect shooting victims could be asserted based on its own indicia, an expert report attesting to its authenticity and corroboration by a victim:

“sufficient indicia of authenticity to be relied upon at this stage of the proceedings” since the “Prosecutor [] submitted an **expert report on the authentication of the video**” which concluded that there were “no traces of forgery or manipulation.” The location was also **confirmed by a victim**.¹⁴⁶

3.2.2.2 Trial:

In a 2010 *Katanga and Ngudjolo Chui* decision on the prosecutor’s bar table motion, the TC addressed authenticity as one of several factors informing the admissibility, specifically the probative value of **documentary evidence**,¹⁴⁷ reasoning that authenticity must be the first factor to be determined:

“In the absence of authentication, there can be no guarantee that a document is what the party tendering it purports it to be. Under no circumstances can the Chamber admit unauthenticated documentary evidence since, by definition, such evidence has no probative value. [...]”

Moreover, the TC affirmed that parties must demonstrate the authenticity of evidence that they tender, unless the evidence item is self-authenticating or the parties agree to its authenticity:

“unless an item of evidence is self-authenticating, or the parties agree that it is authentic, it is for the party tendering the item to provide admissible evidence demonstrating its authenticity. Such evidence may be direct or circumstantial but must provide reasonable grounds to believe that the exhibit is authentic, which, although not a particularly high standard, does impose a burden of proof on the party tendering the evidence. If no authenticating evidence is provided whatsoever, the documentary evidence will be found inadmissible. It is insufficient merely to

¹⁴⁴ PTC I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of the Charges (30 September 2008), [ICC-01/04-01/07-717](#), para. 161.

¹⁴⁵ PTC I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of the Charges (30 September 2008), [ICC-01/04-01/07-717](#), para. 165.

¹⁴⁶ PTC I, *Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, Second Warrant of Arrest (4 July 2018), [ICC-01/11-01/17-13](#), para. 18.

¹⁴⁷ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#).

state that "the information provided satisfies the required indicia of reliability and each document presents an intrinsic coherence and prima facie probative value, in light of the whole body of evidence introduced in this case" [*Katanga*, Prosecution's Submission of Material as Evidence from the Bar Table Pursuant to Article 64(9) of the Statute]. A mere general reference to the record of the trial is unsatisfactory since it is not for the Chamber to start its own investigations into material which may prove a document's authenticity and reliability".¹⁴⁸

Turning to the authentication of **videos, films, photographs and audio recordings**, the bar-table decision set out four cross-cutting tests to determine authenticity: originality, integrity, date and location of recording in order for **AV evidence** to be admitted:

"the Chamber will require evidence of originality and integrity. However, once this has been established, this type of exhibit may often be admitted as evidence that speaks for itself and may be regarded, in this respect, as real evidence. Since the relevance of audio or video material depends on the date and/or location of recording, evidence must be provided in this regard".¹⁴⁹

In *Bemba*, the TC addressed several disputes regarding the authenticity, originality and integrity of ten **audio recordings**,¹⁵⁰ first noting its preference for whole or complete items rather than excerpts:

"The Chamber considers it useful to refer to its previous findings as regards recordings. The Chamber has expressed a preference for the admission of whole documents or recordings rather than excerpts.

The Chamber went on to assert that in-court authentication was not an absolute requirement in determining the authenticity of every submission of **AV material**:

"The Chamber has also stated that recordings that have not been authenticated in court can still be admitted, as in-court authentication is but one factor for the Chamber to consider when determining an item's authenticity and probative value. As stated above, there is no strict requirement establishing that every piece of evidence must be authenticated officially or by a witness in court in order for it to be considered authentic, reliable and holding probative value".¹⁵¹

¹⁴⁸ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), paras 22-23.

¹⁴⁹ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), para. 24.

¹⁵⁰ TC III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute" of 6 September 2012 (8 October 2012), [ICC-01/05-01/08-2299-Red](#), paras 117-128.

¹⁵¹ TC III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute" of 6 September 2012 (8 October 2012), [ICC-01/05-01/08-2299-Red](#), para. 120.

The authentication of **video** via witness testimony was accepted by the Trial Chamber in **Ongwen**, with regards to a post-attack video of Lukodi camp filmed by government investigators in the days after the attack.¹⁵²

“P-0017 and Martin Kalyemenya discuss the content of the video in their testimonies, describing the scenes in the video and demonstrating that the video was taken during the course of the post-attack investigation which they participated in. The Chamber is satisfied that the video discussed by P0017 and Martin Kalyemenya is the authentic video taken in the days after the attack and shows the impact of the attack on the camp and the civilians that lived within it. The video has probative value as corroborative evidence of the results of the attack on Lukodi IDP camp.”.¹⁵³

The **Ongwen** Trial Chamber also accepted witness testimony as a means to authenticate **photographs** of the Lukodi investigation, including **photos** of sick and injured individuals, triangulating the **photographs** together with **video** and testimony.¹⁵⁴

“The Chamber also notes that when viewing the images in line with the videos, it is clear the photographs were taken over the course of the investigators’ visits to Lukodi IDP camp and the hospital in Gulu. Both P-0017 and Martin Kalyemenya discussed (sic) the photographs taken at the hospital of the persons injured in the Lukodi attack. Both witnesses testified that the photographs are of the Lukodi victims they saw at the hospital during their visit in the course of the investigation”.¹⁵⁵

In **Ntaganda**, **photographs** taken in Kobu depicting the aftermath of the attack were challenged by the defence disputing their authenticity, and asserting that:¹⁵⁶

“[...] there are serious grounds to believe that witnesses extensively discussed [the photographs], shared them amongst themselves, and coordinated their testimony to falsely claim that these depict the aftermath of the ‘Kobu massacre’.

While the TC acknowledged the poor quality of some of the **photographs**, alongside unclear information on who took the **photographs** or how they were developed, it ultimately rejected the defence’s submissions, considering the **photographs** to be authentic based on the corroboration by different witnesses:

“the Chamber notes the consistent evidence that photographs were taken at the site from witnesses whom it considers credible as to their presence at the scene in the days after the alleged killings. It further notes the consistent testimony from seven witnesses that the photographs depict the scene they saw in Kobu. The Chamber therefore considers the Defence arguments that P-0301 and P-0805 failed to recognise photographs during initial

¹⁵² TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), see e.g. paras 1758, 1760, 1761, fn. 4440.

¹⁵³ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), fn. 4440.

¹⁵⁴ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), fn. 4622.

¹⁵⁵ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), fn. 4622.

¹⁵⁶ TC VI, *Prosecutor v. Bosco Ntaganda*, Judgment (8 July 2019), [ICC-01/04-02/06-2359](#), para. 281.

interviews with the Prosecution to be unsubstantiated. The Chamber notes the consistent testimony from witnesses who said they recognised victims in certain photos, and considers the Defence assertion that such identifications were implausible and indicative of contamination to be similarly unsubstantiated. The Chamber also notes the consistency between the images depicted in the photographs and the scene described by eyewitnesses, and that a pair of blue trousers found on one of the skeletal remains exhumed in Kobu looks similar to the trousers in one of the Kobu Photographs. Finally, the Chamber considers to be unsubstantiated the Defence assertion that there are indications that these photographs are not a reflection of any scene in Kobu. Having regard to all of the aforementioned, the Chamber is satisfied that the Kobu Photographs depict the aftermath of the ‘Kobu massacre’.”

The Chambers in *Ongwen* considered the measures taken to authenticate **enhanced audio recordings**, noting that the summaries of the **enhanced audio recordings** and the logbook entries taken by the interceptors matched, indicating that the enhancements did not distort the contents of the recordings:¹⁵⁷

“When evaluating a particular enhanced audio, the Chamber has considered various indicators to ensure that an enhanced audio is a copy of an original. The Chamber verified whether the labelling of the enhanced audio matches the original recording it is purportedly linked to. The Chamber listened to the enhanced audio to ensure it has at least the same general impression that it contains men speaking in a non-working language over the radio. In this broad sense, and despite being unable to understand the non-working languages spoken, the Chamber checked that the enhanced audio contents are consistent with the original audios. The Chamber also compared the recorded track times on the original and enhanced tapes to see if they sufficiently correspond. If more than de minimis discrepancies exist, the Chamber endeavoured to determine why this was so. The Chamber has also considered these indicators against the full body of evidence, meaning that there may still be sufficient evidence to conclusively link an enhanced audio to an original even if – for instance – the original/enhanced audio track times do not align. [...]

The Chamber cannot find reasonable doubt that the intercepted audio recordings (as enhanced) are altered on the basis of abstract possibilities not grounded in the evidentiary record. The Chamber emphasises that no witness played the enhanced audios – including former LRA soldiers – commented on there being anything unusual about the way they sounded. The Chamber is also able to compare the intercept witnesses’ summaries of the enhanced audio to the logbook entries prepared contemporaneously to when the recording occurred. When the summary matches the logbook – as it consistently did – then this further demonstrates that the audio enhancement did not distort the spoken contents of the original tape”.¹⁵⁸

¹⁵⁷ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), paras 651-654, 656.

¹⁵⁸ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#),

The **Bemba** TC rejected the admission of an excerpt of an **audio recording** in the absence of information on its source, originality and integrity:

“[...] the prosecution should provide recordings in full and not just excerpts of them, and unless the recording bears sufficient indicia that it is what it purports to be (i.e. an RFI transmission), the prosecution must also provide information on its source, originality and integrity”.¹⁵⁹

The same judgement went on to identify five indicia of authenticity of **call data records**: corporate watermarks of the telecommunications provider; correspondence of call logs and numbers with the conversations and timelines; expert testimony on the origins of **call data records (CDR)**; court records and actions which further corroborated authenticity and the role of the Registry in generating or receiving such material:

“First, some communications and logs do have inherent indicia of authenticity. For example, some call logs bear the corporate watermarks of the telecommunications provider. As another example, some of the Detention Centre communications begin with persons identifying themselves as the ICC when connecting Mr Bemba’s calls.

Second, the content of every communication in evidence matches the allegedly corresponding logs and attributed numbers. When the Chamber is able to recognise peoples’ voices on a given call and independently attribute their telephone numbers, the speakers invariably correspond to the telephone numbers in the logs. Some calls discuss concrete events, such as the imminent testimony of specific Main Case defence witnesses, which can be indexed to specific points in time. Most communications also touch upon subject matters from the Main Case, known only to a limited number of people, such as the Accused. Without exception, these logs reflect the conversations occurring on dates when they would be logically expected to occur.

Third, P-361 gave expert testimony on the origins of CDRs in this case, provided by the national telecommunication companies. On the basis of his expertise, which was unchallenged in relation to the CDRs, he determined that it was either ‘likely’ or ‘highly likely’ that all of the CDRs he analysed in this case came from the telecommunication providers indicated by the Prosecution. P-361 made it clear that these qualifications were not a reflection of any concrete doubt as to the origins of the CDRs, but rather of his experience with certain CDRs and the fact that he did not receive the CDRs directly from the telecommunications service providers. When combined with the other information before the Chamber, P-361’s testimony on the origins of these documents leads to the only reasonable conclusion which can be drawn from the evidence.

Fourth, the case record is replete with further information confirming the authenticity and chain of custody of these communications and logs. The PreTrial Chamber Single Judge directly ordered that a significant amount of evidence be provided to the parties, indicating in these orders exactly where the materials came from. Further, the Registry exhaustively chronicled all

paras 651-654, 656.

¹⁵⁹ TC III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” of 6 September 2012 (8 October 2012), [ICC-01/05-01/08-2299-Red](#), para. 122.

seized materials received and kept formal chain of custody logs. On multiple occasions, these materials were unsealed by the Registry in the physical presence of one or more Defence counsel. This all means that, if the Defence's objections concerning the lack of testimonial, authenticating evidence were to be accepted – simply to establish authenticity and chain of custody – then the Chamber would have been required to call the Pre-Trial Chamber Single Judge as a witness and hear evidence from the Registry on events Defence counsel had themselves witnessed. Such a conclusion is entirely unreasonable and overstates the Prosecution's burden of proof.

Fifth, the Registry either generated or received many of the materials challenged. The Statute mandates that the Registry's responsibilities involve the non-judicial aspects of the administration of the Court, as reflected in Article 43(1) of the Statute. It is a neutral organ tasked, *inter alia*, with making evidence available for the benefit of chambers and participants by storing it, registering it in the Court's e-court information system and adding relevant metadata in the e-Court system, as the case may be. In this regard, the information the Registry provides, most notably from the VWU and the Court's Detention Centre, is precisely the type of information which the Registry would acquire in the course of its administrative functions".¹⁶⁰

Bemba et al's defence team unsuccessfully challenged the admission of **telecommunications evidence** including **audio recordings** and **call data records** between the accused and witnesses on grounds that the prosecution failed to establish their chain of custody, and authenticity.¹⁶¹ In rejecting this assertion, the Chamber referenced the formal chain of custody logs maintained by the Registry as well as the Registry's role as a neutral organ of the Court tasked with storing and making available evidence in line with the e-Court system:

"[T]he case record is replete with further information confirming the authenticity and chain of custody of these communications and logs. The Pre-Trial Chamber Single Judge directly ordered that a significant amount of evidence be provided to the parties, indicating in these orders exactly where the materials came from. Further, the Registry exhaustively chronicled all seized materials received and kept formal chain of custody logs. On multiple occasions, these materials were unsealed by the Registry in the physical presence of one or more Defence counsel. This all means that, if the Defence's objections concerning the lack of testimonial, authenticating evidence were to be accepted – simply to establish authenticity and chain of custody – then the Chamber would have been required to call the Pre-Trial Chamber Single Judge as a witness and hear evidence from the Registry on events Defence counsel had themselves witnessed. Such a conclusion is entirely unreasonable and overstates the Prosecution's burden of proof.

¹⁶⁰ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute (19 October 2016), [ICC-01/05-01/13-1989-Red](#), paras 219-225.

¹⁶¹ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute (19 October 2016), [ICC-01/05-01/13-1989-Red](#), paras 219-225.

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The *Katanga and Ngudjolo Chui* bar table decision also touched upon issues of authenticity pertaining to **open-source information** where it would, in general, only require verification on where the item can be obtained:

"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".¹⁶³

Similarly, the TC in *Gbagbo and Blé Goudé* allowed the Defence to show an **open-source video** which had been uploaded to YouTube. The Prosecution argued that its authenticity had not been verified and it therefore should not be shown to a witness. The presiding judge over-ruled the Prosecution's objection, on the basis that the witness may be able to corroborate the video contents, thus, reasoning that authentication occurs not by assessing the properties of the item of evidence but through corroboration by other sources:

"I really do not understand this objection... the first thing to be asked to the witness is if he has ever seen it, if he knows the people which are present... If he says no, the questioning is over. Otherwise we will continue ... I think the witness is old enough, wise enough to be questions and [...] answer as to what he knows or what he have [sic] seen. So it is also good for the Court to have as much information as possible."¹⁶⁴

3.2.3 Accuracy

The accuracy of **DDE** submissions was addressed at the Trial stage in two short assessments of **phone intercepts** and **audio enhancements**, finding in *Bemba et al.* that mutually reinforcing information from various sources can determine the accuracy of **phone intercepts** in the absence of witness

¹⁶² TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute (19 October 2016), [ICC-01/05-01/13-1989-Red](#), paras 222-223.

¹⁶³ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor's Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), para. 24.

¹⁶⁴ TC I, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript: Trial Hearing, Witness CIV-OTP-P-0625 (14 March 2016) [ICC-02/11-01/15-T-29-Red-ENG](#), lines 10-16, p. 28.

testimony,¹⁶⁵ while in **Ongwen**, the Chambers considered that the expertise and qualifications of expert witnesses affirmed the accuracy of **audio enhancements**.¹⁶⁶

Trial

In addressing the accuracy of **digital communications** evidence, the TC in **Bemba et al.** rejected arguments by the defence that the absence of witnesses to authenticate the recordings should render the material inadmissible, determining that:

“Such arguments understate the array of mutually reinforcing information confirming the accuracy of the intercepted communications and their corresponding logs. In this respect, the present case is distinguishable from authorities cited by the Defence on the additional evidence required to establish the provenance of intercepted communications or CDRs [Call Data Records]”.¹⁶⁷

The **Ongwen** TC found **audio recordings** selected for enhancement by the prosecution by two experts accurate and fully reliable, citing the professional expertise and qualifications of the experts:

“The Chamber found both Alan French and Xavier Laroche to be truthful witnesses, and takes note of the careful steps taken by each to ensure that no speech would be lost in the process of audio enhancement. [...] Xavier Laroche was quite clear in stating his limitations in this field, and that he was unable to answer specific questions on the science of audio enhancement. Xavier Laroche often deferred to Alan French’s expertise on these points. Thus, the Chamber has given more weight to Alan French on matters related to the science or mechanics of audio enhancement. But, noting Xavier Laroche’s own training and experience, the Chamber is satisfied that Alan French and Xavier Laroche both have the requisite qualifications to enhance audio recordings. [...] When evaluating a particular enhanced audio, the Chamber has considered various indicators to ensure that an enhanced audio is a copy of an original. [see above under authenticity].

The Chamber finds nothing in the evidence to suggest that the enhanced audios are anything other than faithful reproductions of the originals. It must be emphasised that the Prosecution always provided the unenhanced and enhanced recordings together, so that any listener could identify potential discrepancies in the recorded contents. Alan French and Xavier Laroche also provided technical reports on the exact processes applied to each audio. [...]

¹⁶⁵ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute (19 October 2016), [ICC-01/05-01/13-1989-Red](#), para. 219.

¹⁶⁶ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), paras 651-657.

¹⁶⁷ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute (19 October 2016), [ICC-01/05-01/13-1989-Red](#), para. 219.

The Chamber cannot find reasonable doubt that the intercepted audio recordings (as enhanced) are altered on the basis of abstract possibilities not grounded in the evidentiary record. [...]

For these reasons, the Chamber considers the enhanced audios to be accurate enhancements of the originals and fully reliable”.¹⁶⁸

3.2.4 Hearsay

The value of anonymised or hearsay evidence contained within digital evidence sources such as **emails, media reports, NGO reports, open sources or summarised witness statements** was considered in detail in the pre-trial proceedings of *Gbagbo*, as well as *Lubanga, Kenyatta* and *Mbarushimana*. The Chambers addressed issues such as the process to determine the probative value; the challenges of corroborating hearsay materials; its low probative value or value as indirect evidence; the distinctions between hearsay evidence and anonymised or summarised statements; and the challenges to defence rights and probity inherent in summarised statements.

During the trial phase, the *Katanga and Ngudjolo Chui* Chambers considered the importance of sufficiently detailed information on the author’s identity and sources in asserting reliability, finding it problematic to determine reliability of anonymous hearsay information within **open source reports by the UN, NGOs and third States** or opinion evidence in **media reports**.

Pre-trial

In *Lubanga* the PTC held that the probative value of **redacted emails** containing anonymous hearsay, would be evaluated on a case-by-case basis:

“The Chamber notes that the Prosecution does not object to the admissibility of these items for the purpose of the confirmation hearing, but only to their probative value. Consequently, the Chamber will determine their probative value on a case-by-case basis, if necessary”.¹⁶⁹

In *Gbagbo*, the Chamber accepted that hearsay evidence may be attributed a sufficient probative value where sufficient trustworthiness of the source can be determined:

“[I]n this regard, that the problem with anonymous hearsay may not necessarily be resolved by the fact that the Chamber has some generic information about the source. **What matters is that enough information about the trustworthiness of the source of the information is available in order to allow the Chamber to attribute the appropriate level of probative value to the information**”.¹⁷⁰

¹⁶⁸ TC IX, *Prosecutor v. Dominic Ongwen*, Trial Judgment (4 February 2021), [ICC-02/04-01/15-1762-Red](#), paras 651-657.

¹⁶⁹ PTC I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of the charges (29 January 2007), [ICC-01/04-01/06-803-tEN](#), para. 132.

¹⁷⁰ PTC I, *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute (3 June 2013), [ICC-02/11-01/11-432](#), fn. 42.

Limitations on the corroborative value of hearsay evidence was considered in the *Lubanga* confirmation of the charges with regards to anonymous evidence contained within **NGO reports, emails, press articles**:

“the Chamber will determine their probative value in light of other evidence which was also admitted for the purpose of the confirmation hearing. However, mindful of the difficulties that such evidence may present to the Defence in relation to the possibility of ascertaining its truthfulness and authenticity, the Chamber decides that, as a general rule, it will use such anonymous hearsay evidence only to corroborate other evidence”.¹⁷¹

The *Gbagbo* PTC also considered the challenges of corroborating hearsay evidence contained within **NGO reports and press articles**:

“it should be noted that it will often be difficult, if not impossible, to determine whether and to what extent anonymous hearsay in documentary evidence corroborates other evidence of the same kind. This is because it will usually be too difficult to determine whether two or more unknown sources are truly independent of each other, and the Chamber is not allowed to speculate in this regard. The Chamber does not exclude the possibility that in exceptional cases it may be apparent from the evidence that two or more anonymous hearsay sources in documentary evidence corroborate each other because they are clearly based on independent sources. However, since even in such cases the Chamber may still not have enough information about the trustworthiness of these sources, it will be extremely cautious in attributing the appropriate level of probative value.”¹⁷²

In its decision to adjourn the confirmation of charges hearing in *Gbagbo*, the PTC provided a general statement regarding the low probative value of hearsay evidence contained within **NGO reports and press articles**:

“Although there is no general rule against hearsay evidence before this Court, it goes without saying that hearsay statements in the Prosecutor's documentary evidence will usually have less probative value. Reliance upon such evidence should thus be avoided wherever possible. This is all the more so when the hearsay in question is anonymous, in the sense that insufficient information is available about who made the observation being reported or from whom the source (irrespective of whether the source is a witness interviewed by the Prosecutor or a documentary item of evidence) obtained the information.”¹⁷³

The *Gbagbo* PTC went on to assert the limited evidentiary value of **NGO reports and press articles** in reaching the evidentiary threshold required for the confirmation of charges hearings:

¹⁷¹ PTC I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of the charges (29 January 2007), [ICC-01/04-01/06-803-tEN](#), para. 106.

¹⁷² PTC I, *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute (3 June 2013), [ICC-02/11-01/11-432](#), para. 30.

¹⁷³ PTC I, *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute (3 June 2013), [ICC-02/11-01/11-432](#), para. 29.

“Even though NGO reports and press articles may be a useful introduction to the historical context of a conflict situation, they do not usually constitute a valid substitute for the type of evidence that is required to meet the evidentiary threshold for the confirmation of charges”.¹⁷⁴

Similarly, the PTC in *Kenyatta et al.* described hearsay evidence as a form of indirect evidence, including *inter alia*, **NGO** and **media reports**, stating:

“The Chamber identifies the evidence either as direct or indirect, the latter encompassing hearsay evidence, reports of international and non-governmental organizations (NGOs), as well as reports from national agencies, domestic intelligence services and the media [...]”.¹⁷⁵

Turning to the probative value of anonymised witness statements contained within **NGO reports** and **press articles**, the *Gbagbo* PTC considered such sources to be both problematic for the rights of the defence and of low probative value:

“Heavy reliance upon anonymous hearsay, as is often the basis of information contained in reports of nongovernmental organizations ("NGO reports") and press articles, is problematic for the following reasons. Proving allegations solely through anonymous hearsay puts the Defence in a difficult position because it is not able to investigate and challenge the trustworthiness of the source(s) of the information, thereby unduly limiting the right of the Defence under article 61(6)(b) of the Statute to challenge the Prosecutor's evidence, a right to which the Appeals Chamber attached "considerable significance". Further, it is highly problematic when the Chamber itself does not know the source of the information and is deprived of vital information about the source of the evidence. In such cases, the Chamber is unable to assess the trustworthiness of the source, making it all but impossible to determine what probative value to attribute to the information”.¹⁷⁶

The *Gbagbo* PTC elaborated the distinction between anonymous hearsay evidence from **NGO** or **press reports** and anonymous or summarised witness statements which the Prosecutor can submit during the pre-trial phase, including, at the confirmation hearing:

“In relation to [anonymous hearsay evidence from NGO or press reports], unless the Prosecutor conducts further investigations, there is no prospect of more information becoming available about the source of the evidence. However, in relation to [summarized witness statements], the situation is different because the Chamber knows the identity of the witness and it may also be assumed that the witness will later be called at trial”.¹⁷⁷

¹⁷⁴ PTC I, *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute (3 June 2013), [ICC-02/11-01/11-432](#), para. 35.

¹⁷⁵ PTC II, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of the Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23 January 2012), [ICC-01/09-02/11-382-Red](#), para. 82.

¹⁷⁶ PTC I, *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute (3 June 2013), [ICC-02/11-01/11-432](#), para. 29.

¹⁷⁷ PTC I, *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute (3 June 2013), [ICC-02/11-01/11-432](#), para. 32.

However, while the Prosecutor has the power to submit **summarized witness statements** at the pre-trial phase, both the *Mbarushimana* Appeals Chamber and PTC in *Gbagbo* have forewarned that a heavy reliance on such statements will both limit the Court's ability to evaluate the credibility of witnesses and the right of the defence to challenge such evidence, notably its probative value:

"As stated by the Appeals Chamber, the "Prosecutor's reliance on documentary or summary evidence in lieu of in-person testimony will limit the Pre-Trial Chamber's ability to evaluate the credibility of the witness" [*Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of PTC I], and therefore any such evaluation will "necessarily be presumptive". The Appeals Chamber took pains to warn that Pre-Trial Chambers should "take great care in finding that a witness [whose statement was presented in summary or anonymous form] is or is not credible."

Moreover, in relation to (anonymous) summaries of witness statements, the Chamber must be sensitive to the fact that the Defence will regularly not be in a position to exercise its right to challenge such evidence, in particular its probative value".¹⁷⁸

As such, the *Gbagbo* PTC reiterated the position of earlier Chambers to decline to confirm allegations that are only supported by hearsay or **summary witness statements**:

In this regard, the Chamber adopts a similar position to the one held by other Pre-Trial Chambers, according to which the Chamber may, in order to counterbalance the disadvantageous position of the Defence, decline to confirm allegations that are supported only by anonymous or summary witness statements".¹⁷⁹

Trial

The TC in *Katanga and Ngudjolo Chui* emphasised the importance of the author's identity and information on sources in the context of **UN and NGO reports**. On the poor reliability of **reports from UN agencies** based on (anonymous) hearsay information, the *Katanga and Ngudjolo Chui* TC stated:

"Insofar as such reports emanate from independent observers who were direct observers of the facts being reported, the Chamber considers them to be prima facie reliable. However, if the author's identity and the sources of the information provided are not revealed with sufficient detail, the Chamber is unable to determine whether the contents of the report have been imparted by an eyewitness or some other reliable source. If such particulars are not available, either from the reports themselves or from their author(s), the Chamber cannot assess the reliability of the content of the reports; it is therefore unable to qualify those documents as sufficiently reliable to be admitted into evidence. Moreover, where such reports

¹⁷⁸ PTC I, *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute (3 June 2013), [ICC-02/11-01/11-432](#), paras 33-34.

¹⁷⁹ PTC I, *Prosecutor v. Laurent Gbagbo*, Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute (3 June 2013), [ICC-02/11-01/11-432](#), para. 34.

are based, for the most part, on hearsay information, especially if that information is twice or further removed from its source, the reliability of their content is seriously impugned”.¹⁸⁰

Moreover, when considering **reports from independent NGOs and third States**, the *Katanga and Ngudjolo Chui* Chamber reiterated that the absence of information on the sources and methodology used to compile the report would render it impossible for the TC to ascertain the evidence’s reliability:

“Similarly, reports emanating from independent private organisations or governmental bodies of third States can be considered prima facie reliable if they provide sufficient guarantees of non-partisanship and impartiality. They should further include sufficient information on their sources and the methodology used to compile and analyze the evidence upon which the factual assertions are based. If such particulars are not available, either from the reports themselves or from their author(s), the Chamber cannot assess the reliability of the content of the reports; it is therefore unable to qualify those documents as sufficiently reliable to be admitted into evidence. Moreover, where such reports are based, for the most part, on hearsay information, especially if that information is twice or further removed from its source, the reliability of their content is seriously impugned”.¹⁸¹

The *Katanga and Ngudjolo Chui* TC also briefly addressed the reliability of opinion evidence derived from expert assessment cited in **open source evidence** including **media reports** in the absence of information on the background and qualifications of the journalists of their sources, refusing to rely on the evidence, stating:

“Media reports often contain opinion evidence about events said to have occurred and rarely provide detailed information about their sources. Opinion evidence is, in principle, only admissible if it is provided by an expert. In the case of the newspaper accounts proffered by the Prosecution, the latter has failed to inform the Chamber either of the background and qualifications of the journalists or of their sources, in order to satisfy the Chamber as to their objectivity and professionalism. Under these circumstances, the Chamber is unable to attach sufficient probative value to the opinions of even informed bystanders such as journalists in relation to specific contested facts”.¹⁸²

3.3 Prejudicial effect

3.3.1 Pre-trial:

Following submissions to exclude the admission of **photographs** depicting the wounds of witnesses and the Bogoro institute, the *Katanga and Ngudjolo Chui* PTC confirmed that they would not be prejudicial to the fairness as they had been **corroborated by witness statements**. The Chamber also clarified, that in turn, the witness statements could test the reliability of the photographic evidence:

¹⁸⁰ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), paras 29-30.

¹⁸¹ TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), para. 30.

¹⁸² TC II, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecutor’s Bar Table Motions (17 December 2010), [ICC-01/04-01/07-2635](#), para. 31.

“In weighing the potential probative value of such documentary evidence against its possible prejudicial effect, Trial Chamber I [*Lubanga*, Decision on admissibility of four documents] concluded that its admission would not be prejudicial to the fairness of the proceedings **when the witness statements provide a solid enough basis to test and evaluate the reliability of the evidence**”.¹⁸³

3.3.2 Trial:

In *Bemba*, the prosecution tendered ten **audio recordings of broadcasts** providing information on the background of the conflict, identities of involved individuals and eyewitness and victim accounts.¹⁸⁴ The admission of one of these recordings was rejected on the basis of prejudice outweighing probity, as excerpts were provided instead of full recordings:

“[...] the prosecution should provide recordings in full and not just excerpts of them, and unless the recording bears sufficient indicia that it is what it purports to be (i.e. an RFI transmission), the prosecution must also provide information on its source, originality and integrity”.¹⁸⁵

Seven of the other **recordings** were found to have a limited (corroborative) probative value in that their consideration for limited purposes, such as to corroborate other evidence, would not have a prejudicial effect on a fair trial:

“in particular, the information contained therein may serve to corroborate other pieces of evidence and might be examined when assessing the prosecution's allegation that the conduct described in the charges was widely broadcast which, according to the prosecution, may have implications with regard to the accused's alleged knowledge of the crimes charged. In light of this envisioned limited usage of the information contained in the radio recordings, the Majority is of the view that there is no reason to believe that the admission of these recordings will have a prejudicial effect on a fair trial”.¹⁸⁶

The *Bemba* TC found that the admission of a **video recording** of a programme containing an interview of the Secretary General of the MLC would not have a prejudicial effect on a fair trial since it was found to be authentic, reliable, and was presented in full:

“The Chamber is satisfied that the video relates to matters that are properly to be considered by the Chamber, i.e. the allegations of the commission of crimes by MLC soldiers in the CAR and the knowledge of those allegations on the part of the ALC high command, which includes

¹⁸³ PTC I, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of the Charges (30 September 2008), [ICC-01/04-01/07-717](#), para. 164.

¹⁸⁴ TC III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” of 6 September 2012 (8 October 2012), [ICC-01/05-01/08-2299-Red](#), paras 117-128.

¹⁸⁵ TC III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” of 6 September 2012 (8 October 2012), [ICC-01/05-01/08-2299-Red](#), para. 122.

¹⁸⁶ TC III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of “Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute” of 6 September 2012 (8 October 2012), [ICC-01/05-01/08-2299-Red](#), para. 128.

Mr Bemba. The video material is therefore relevant to the charges. The defence does not dispute the authenticity of the video - which further bears indicia of reliability, originality and integrity such as a date of emission shown during almost the entire duration of the video, a logo of the TV programme and the image and voice of Mr Olivier Kamitatu, with no interruptions in what seem to be full answers to the questions posed by the interviewer - nor does it allege that its admission may be prejudicial to the defence. The Chamber is of the view that there is no reason to believe that the admission of the video recording will have a prejudicial effect on a fair trial. Video CAR-D04-0002-1382 is therefore admitted".¹⁸⁷

¹⁸⁷ TC III, *Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute" of 6 September 2012 (8 October 2012), [ICC-01/05-01/08-2299-Red.](#), para. 81.

4 INADMISSIBILITY OF DIGITAL EVIDENCE DUE TO A VIOLATION OF THE ROME STATUTE OR INTERNATIONALLY RECOGNISED HUMAN RIGHTS

This following section on the inadmissibility of digital evidence is organised as follows: i) digital evidence obtained in violation of the Rome Statute or international human rights; ii) reliability of evidence or integrity of proceedings infringed due to human rights violation; iii) non-application of national laws other than human rights norms; and, iv) inadmissibility (exclusion) of evidence due to belated disclosure of issues on relevance and admissibility.

Issues regarding the inadmissibility of three digital evidence sources, **digital financial records, call data records and intercepts**, have been considered in one case during pre-trial proceedings (*Mbarushimana*) and one case during trial (*Bemba*). In addition, both the prosecution and defence raised issues regarding the inadmissibility of evidence on grounds of human rights violations and integrity of proceedings in *Yekatom and Ngaïssona*, which the Chambers have not addressed due to the trial being ongoing. In all instances the issues relate to allegations of breaches to the right to privacy, while the (ir)relevance on national laws has also been considered.

In particular, the Pre-Trial Chambers has rejected defence requests to exclude intercepted **communications evidence** which the defence claimed to have been obtained illegally by national authorities and thereby unreliable, as it was unreasonable to do so at the pre-trial stage of proceedings.¹⁸⁸ During Trial, Chambers have set out a series of tests to determine whether evidence is inadmissible due to violations of the Statute or international human rights, including:

- *The process to determine inadmissibility:*¹⁸⁹
 - o *Did it violate the Rome Statute or international human rights law?*
 - o *If so, did that breach cast doubt on its reliability or would the evidence seriously damage integrity of proceeding?*
- *Assertion of the exceptions to the right to privacy under international human rights law which enable admissibility:*¹⁹⁰
 - o *The exception measures should have a basis in law*
 - o *The law should be accessible and its effects foreseeable;*
 - o *The foreseeability should be sufficiently precise to ensure that the person concerned may regulate their conduct.*

¹⁸⁸ PTC I, *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of the charges (16 December 2011), [ICC-01/04-01/10-465-Red](#), paras 66-68.

¹⁸⁹ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7) (29 April 2016), [ICC-01/05-01/13-1854](#), para. 30.

¹⁹⁰ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7) (29 April 2016), [ICC-01/05-01/13-1854](#), para. 29.

- Any findings of unlawfulness must be based on the permissible legal sources, which are the Rome Statute or international human rights law, and not unlawfulness based on national law;¹⁹¹
- No material change to the content of digital financial evidence if it had been collected legally and therefore it remained admissible.¹⁹²

Two cases have addressed the timing of challenges to the admissibility of evidence during the trial phase. In *Yekatom and Ngaïssona* a motion to exclude **call location evidence** was found to be premature as the Prosecution had yet to tender the evidence, whilst in *Bemba et al.* the Trial Chamber considered the belated disclosure of issues related to **digital financial evidence** materials by the Prosecution was unintentional and therefore remained admissible.

4.1 Digital evidence obtained in violation of the Rome Statute or international human rights

4.1.1 Trial:

In *Bemba et al.*, **digital financial evidence** attained from Western Union and collected by the Austrian authorities was presented to prove money transfers between the accused and witnesses.¹⁹³ The Chamber rejected the defence's objection to the admissibility of the documents, setting out a two-step process in its considerations: (i) whether the Rome Statute, or an internationally recognised human right were violated; and (ii) whether the impact of such a violation or breach had affected the reliability of the evidence or integrity of the proceedings in accordance to Article 69(7)(a) or (b) of the Statute.¹⁹⁴

“In accordance with Article 69(7) of the Statute, the Chamber will first consider whether the evidence was collected in violation of the Court's statutory scheme or internationally recognised human rights. If such a violation is determined, the Chamber will then consider whether this violation ‘casts substantial doubt on the reliability of the evidence’ or whether the admission of the evidence ‘would be antithetical to and would seriously damage the integrity of the proceedings’.”¹⁹⁵

The Trial Chamber also addressed the contours of the internationally recognised human right in question – the right to privacy – including its exceptions:

¹⁹¹ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7) (29 April 2016), [ICC-01/05-01/13-1854](#), paras 31-34, 60.

¹⁹² TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7) (29 April 2016), [ICC-01/05-01/13-1854](#), paras 62-69.

¹⁹³ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Judgment pursuant to Article 74 of the Statute (19 October 2016), [ICC-01/05-01/13-1989-Red](#), para. 210.

¹⁹⁴ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7) (29 April 2016), [ICC-01/05-01/13-1854](#), para. 30.

¹⁹⁵ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7) (29 April 2016), [ICC-01/05-01/13-1854](#), para. 29.

In the present case, the internationally recognised human right at issue is the right to privacy, which may not be interfered with except ‘in accordance with the law’. The ‘in accordance with the law’ standard requires, among other things, that: (i) the measure or measures in question should have some basis in law; (ii) the law in question should be accessible to the person concerned and foreseeable as to its effects; and (iii) as regards foreseeability, the law must set forth with sufficient precision the conditions in which a measure may be applied, to enable the persons concerned – if need be, with appropriate advice – to regulate their conduct”.¹⁹⁶

The Chamber concluded that the **digital financial records** were admissible as the manner in which they had been provided did not breach the accepted exceptions to the right to privacy as set out in international human rights law:

“[T]he Chamber finds that manner in which the Western Union Documents were provided is not so manifestly unlawful that it fails to be ‘in accordance with the law’ for purposes of the right to privacy as reviewed under Article 69(7) of the Statute.

4.2 Reliability of evidence or integrity of proceedings infringed due to human rights violation

4.2.1 Trial:

The **Bemba et al.** Trial Chamber continued to assess whether the hypothetical violation of the right to privacy could cast substantial doubt on the reliability of **digital financial evidence**:

“[T]he Chamber fails to see how the content of the material – and ultimately its reliability – is affected by the fact that it was unlawfully produced. If the Western Union Documents would have been obtained without any violation to the right to privacy, the content would have been the same. Accordingly, the Chamber finds that a hypothetical violation of the right to privacy does not cast substantial doubt on the reliability of the evidence”.¹⁹⁷

In assessing whether the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings, the Chamber first noted that a violation of a human right would not automatically damage the integrity of the proceedings:

“The Chamber recalls the finding of Trial Chamber I in the Lubanga Case [*Lubanga*, Article 69(7) Decision] that not any violation of an internationally recognised human right would automatically damage the integrity of the proceedings before this Court, since Article 69(7) of

¹⁹⁶ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7) (29 April 2016), [ICC-01/05-01/13-1854](#), para. 29.

¹⁹⁷ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7) (29 April 2016), [ICC-01/05-01/13-1854](#), para. 62.

the Statute provides for a ‘dual test’ of first establishing that a violation has occurred and then deciding if this violation leads to the exclusion of the evidence”.¹⁹⁸

The Chamber then considered different factors in determining whether to exclude the admission of evidence on grounds of integrity, including (i) that the (hypothetical) violation resulted from the actions of the Prosecution, who believed they were acting in accordance with the law; and (ii) the importance of the right to privacy:

“The Chamber considers the following factors to be of importance in determining whether the admission had to be excluded pursuant to *Article 69(7)(b) of the Statute*: the fact that the (hypothetical) violation resulted from actions of the Prosecution itself and not from a third party and the importance of the right to privacy, which both mitigate for an exclusion of the evidence.

Further, the Chamber notes that the relevant materials were only disclosed to the Defence during the course of the proceedings and upon order by a Chamber and that the Prosecution informed the Austrian authorities of the prior meetings and included this information also in the second RFA.

The Chamber further notes that the general terms and conditions for money transfer services by Western Union contain provisions to which the sender and receiver of the money transfer agree including, among other scenarios, that the information may be provided to third parties where there is a reasonable need to, *inter alia*, ‘help, prevent and detect crimes *crime [and] prosecute offenders*’. The Chamber does not pronounce itself on whether this constitutes a valid written consent to the disclosure of secrets pursuant to Article 38(2) No.5 of the Austrian Banking Act, which is disputed between the parties. However, the terms and conditions show that the users of Western Union had to be aware that the personal information they provided might be communicated within the Western Union group and to third parties for a number of reasons and was not subject to absolute privacy.

From the information provided by the Prosecution, it appears that the Austrian authorities themselves gave the impression that a previous screening of financial information was in *accordance with the Austrian law*. Accordingly, it can be assumed that the Prosecution believed itself to act in accordance with the existing law during the prior contacts. The belated disclosure of the information is not, in and of itself, indicative that the Prosecution acted in bad faith. Lastly, the Chamber notes that the Austrian authorities granted the RFAs in knowledge of the prior contacts of the Prosecution with Western Union and the exchange of information.

Considering the above, the Chamber is of the view that the Prosecution did not act with the deliberate intention to circumvent the national law or (hypothetically) violate the right to privacy. Further, the information that was received through the (hypothetical) violation was later also provided lawfully via cooperation with the Austrian authorities. Accordingly, the Chamber finds that the admission of the Western Union Documents is not antithetical to and

¹⁹⁸ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7) (29 April 2016), [ICC-01/05-01/13-1854](#), para. 63.

would not seriously damage the integrity of the proceedings, despite the belated disclosure of materials relating to this issue”.¹⁹⁹

In *Yekatom and Ngaïssona*, call data records (CDR) including call location data (CLD) related to a list of suspects under investigation was attained from Central African Republic (CAR) authorities upon the Prosecution’s request.²⁰⁰ The defence submitted that the evidence should be excluded as it was collected without judicial authorisation and in violation of the right to privacy:

“It [the defence] submits that the CDR were collected without judicial authorisation and that the CLD should therefore be excluded as evidence pursuant to Article 69(7) of the Statute. It requests a ruling that prior judicial authorisation is required to obtain CLD, and that CLD obtained without such authorisation should be excluded as evidence pursuant to *Article 69(7) of the Statute*.”

In order to substantiate its motion, the Defence requests the Chamber to find: (i) that information concerning the movement of a person, which is contained in the CLD, is protected by the international human right to privacy; (ii) that the fact that Prosecution obtained the CLD without a prior judicial determination violated this right to privacy; and (iii) that the admission of the CLD concerning Mr Yekatom would be antithetical to and seriously damage the integrity of the proceedings.

As to the timing of the Motion, the Defence submits that it is not premature since the Prosecution continues to obtain such CLD and the Chamber needs to adjudicate whether this praxis can continue without prior judicial authorisation. Should the Chamber not rule on the Motion at this stage, the Defence requests that it ‘take it under submission until the Chamber is ready to rule on the issue’, instead of rejecting it as premature”.²⁰¹

The prosecution responded as follows:

“In essence, the Prosecution submits that the Defence ‘fails to substantiate the statutory basis to exclude such evidence, and further, mischaracterises the relevant international human rights jurisprudence’

First, the Prosecution submits that the Defence does not meet its burden to show that the CLD was obtained in violation of any recognised *international human right*, asserting, inter alia, that said data was obtained ‘according to CAR law and consistently with international human rights law’, and that its collection was both ‘necessary and proportionate’.

Second, the Prosecution argues that the Defence fails to establish *any violation of the Statute*. Specifically, it submits that the Statute mandates ‘deference to domestic evidence collection

¹⁹⁹ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7) (29 April 2016), [ICC-01/05-01/13-1854](#), paras 65-69.

²⁰⁰ TC V, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Yekatom Defence Motion to Exclude Call Location Evidence (24 July 2020), [ICC-01/14-01/18-602](#), paras 1-2.

²⁰¹ TC V, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Yekatom Defence Motion to Exclude Call Location Evidence (24 July 2020), [ICC-01/14-01/18-602](#), paras 5-7.

procedures’ and that the Court shall not rule on the application of a state party’s law, pursuant to *Article 69(8) of the Statute*. It further submits that the CAR’s legislation does not require *judicial authorisation to obtain CLD* and that the Defence does not allege any violation of national law.

Third, the Prosecution submits that the Defence fails to show how the admission of the CLD would be antithetical to and seriously damage the integrity of the proceedings. 25 In support, it alludes, *inter alia*, to the fact that ‘the reliability and accuracy of the evidence is not compromised’ and that collecting the CLD with a judicial authorisation ‘would have produced the exact same information’”.²⁰²

The Chamber did not address the admissibility of the evidence on the basis that the Motion to Exclude was premature (see below for reasoning).

4.3 Non-application of national laws other than human rights norms

4.3.1 Pre-trial:

Communications intercepted by the French and German authorities relevant to, *inter alia*, the criminal purpose and activity of the FDLR were challenged by the **Mbarushimana** defence on the basis that the evidence was illegally obtained by authorities²⁰³

On rejecting the defence’s challenge to its reliability, the Chamber stated that the prosecution could not be reasonably required to introduce extensive evidence as to the practice of national judicial systems at this stage of the proceedings:

“[i]t would exceed the limited scope and purpose of the confirmation hearing to require the Prosecution to introduce extensive evidence at this stage of the proceedings as to the work practices of national judicial systems in accordance with which the intercepts in question were carried out [...]”.²⁰⁴

4.3.2 Trial:

In the **Bemba et al.** decision on Western Union documents, the Trial Chamber considered the scope of its powers to assess national law in determining whether evidence had violated Article 69(7):

“The parties raise several arguments concerning the application of national law and the Chamber’s power and limits to decide if evidence was obtained in accordance with national law. The Prosecution argues that the Chamber is ‘expressly and categorically prohibited’ from considering such arguments.

²⁰² TC V, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Yekatom Defence Motion to Exclude Call Location Evidence (24 July 2020), [ICC-01/14-01/18-602](#), paras 8-11.

²⁰³ PTC I, *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of the charges (16 December 2011), [ICC-01/04-01/10-465-Red](#), paras 66-68.

²⁰⁴ PTC I, *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of the charges (16 December 2011), [ICC-01/04-01/10-465-Red](#), para. 73.

The Chamber is not persuaded that the role of national law in the present inquiry is as categorically clear as the Prosecution suggests. Indeed, Article 69(8) of the Statute provides that '[w]hen deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.' Rule 63(5) of the Rules also provides that '[t]he Chambers shall not apply national laws governing evidence, other than in accordance with Article 21'. In accordance with these provisions, it is clear that the Chamber cannot analyse whether or not the Austrian authorities correctly applied domestic laws as such.

However, Article 69(7) of the Statute also requires the Chamber to explore whether a violation of the Statute or internationally recognised human rights occurred. Some specific provisions of the Statute apply directly to national authorities acting on request of the Court – such as Articles 55(2) and 59 of the Statute – making the way in which national procedures were implemented relevant in an Article 69(7) analysis. Further, any interference with the internationally recognised right to privacy must be done 'in accordance with the law', and a Chamber's analysis of this right may also have some element of reviewing national law when national authorities act pursuant to Court cooperation requests. In this way, an Article 69(7) inquiry may engage with a discussion of the application of national law, which creates tension with Article 69(8) of the Statute.

This tension requires the Chamber to balance its obligations under Article 69(7) [inadmissibility on the basis of violation of Statute or international human rights] and (8) [Court shall not rule on State's application of national law] of the Statute. The Chamber will review the application of national law only to the extent necessary to determine whether a violation occurred under Article 69(7) of the Statute. In other words, the Chamber in these situations engages with national law solely to determine if something so manifestly unlawful occurred that it amounts to a violation of the Statute or internationally recognised human rights. If the Chamber cannot conclude that such manifestly unlawful conduct occurred at the national level, the Chamber is not permitted to further examine whether a mere infringement of domestic rules of procedure transpired".²⁰⁵

The Chamber concluded that no violation of the right to privacy had occurred:

"[T]he Chamber finds that manner in which the Western Union Documents were provided is not so manifestly unlawful that it fails to be 'in accordance with the law' for purposes of the right to privacy as reviewed under Article 69(7) of the Statute. Any further inquiry would involve applying Austrian law to determine a mere infringement of national procedure, which this Chamber is expressly precluded from doing by the terms of Article 69(8) of the Statute and Rule 63(5) of the Rules. Consequently, the Chamber holds that no violation of an internationally recognised human right has occurred".²⁰⁶

²⁰⁵ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7) (29 April 2016), [ICC-01/05-01/13-1854](#), paras 31-34.

²⁰⁶ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7) (29 April 2016), [ICC-01/05-01/13-1854](#), para. 60.

4.4 *Inadmissibility (exclusion) of evidence due to belated disclosure of issues on relevance and admissibility*

4.4.1 *Trial:*

In *Yekatom and Ngaïssona* the Trial Chamber rejected a defence Motion to Exclude **call location evidence**, on the basis that the motion was premature as the Prosecution had yet to tender the evidence in question:

“The Chamber notes that a request invoking the procedural bar under Article 69(7) of the Statute necessarily implies that the evidence in question – irrespective of the evidence admission regime yet to be adopted by the Chamber – has already been submitted by a party or participant, pursuant to Article 69(3) of the Statute. However, the Chamber also takes note of the fact that the Defence itself acknowledges that it has filed its Motion ‘before the Prosecution has tendered the [CLD] through a witness or bar table motion’.

The Chamber stresses that this does not prejudice the Defence in any way in its rights. Rule 64(1) of the Rules mandates the parties and participants to raise ‘issues relating to the relevance or admissibility [of evidence] [...] at the time when the evidence is submitted to a Chamber.’ Accordingly, the Defence is not deprived of its possibility to object to the evidence in question and to present its contentions at the time the Prosecution chooses to submit the evidence.

The Chamber further notes that Rule 64(1) of the Rules ‘exceptionally’ allows for objections to be raised later ‘when those issues were not known at the time when the evidence was submitted’. The provision, however, does not provide for any other exception – namely, for objections to be raised prior to the submission of evidence. It is therefore clear that the parties and participants cannot raise any such objections before the time of submission.

Accordingly, under the specific circumstances, the Chamber considers the Motion to be premature and therefore rejects it without prejudice to any future application on the issues raised in the Motion”.²⁰⁷

In the *Bemba et al.* decision on Western Union documents, the Chamber noted that despite the belated disclosure of materials by the prosecution, the evidence would be admissible, on the basis that (i) the Prosecution did not act with the deliberate intention to circumvent the national law or (hypothetically) violate of the right to privacy; and (ii) the information that was received through the (hypothetical) violation was later also provided lawfully via cooperation with the Austrian authorities:

“[T]he Chamber notes that the relevant materials were only disclosed to the Defence during the course of the proceedings and upon order by a Chamber and that the Prosecution informed the Austrian authorities of the prior meetings and included this information also in the second RFA.

²⁰⁷ TC V, *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, Decision on the Yekatom Defence Motion to Exclude Call Location Evidence (24 July 2020), [ICC-01/14-01/18-602](#), paras 14-17.

The Chamber further notes that the general terms and conditions for money transfer services by Western Union contain provisions to which the sender and receiver of the money transfer agree including, among others scenarios, that the information may be provided to third parties where there is a reasonable need to, inter alia, ‘help, prevent and detect crimes *crime [and] prosecute offenders*’. The Chamber does not pronounce itself on whether this constitutes a valid written consent to the disclosure of secrets pursuant to Article 38(2) No.5 of the Austrian Banking Act, which is disputed between the parties. However, the terms and conditions show that the users of Western Union had to be aware that the personal information they provided might be communicated within the Western Union group and to third parties for a number of reasons and was not subject to absolute privacy.

From the information provided by the Prosecution, it appears that the Austrian authorities themselves gave the impression that a previous screening of financial information was in *accordance with the Austrian law*. Accordingly, it can be assumed that the Prosecution believed itself to act in accordance with the existing law during the prior contacts. The belated disclosure of the information is not, in and of itself, indicative that the Prosecution acted in bad faith. Lastly, the Chamber notes that the Austrian authorities granted the RFAs in knowledge of the prior contacts of the Prosecution with Western Union and the exchange of information.

Considering the above, the Chamber is of the view that the Prosecution did not act with the deliberate intention to circumvent the national law or (hypothetically) violate of the right to privacy. Further, the information that was received through the (hypothetical) violation was later also provided lawfully via cooperation with the Austrian authorities. Accordingly, the Chamber finds that the admission of the Western Union Documents is not antithetical to and would not seriously damage the integrity of the proceedings, despite the belated disclosure of materials relating to this issue”.²⁰⁸

²⁰⁸ TC VII, *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7) (29 April 2016), [ICC-01/05-01/13-1854](#), paras 66-69.

5 ANNEX

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- TC I, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute (14 March 2012), [ICC-01/04-01/06-2842](#).
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**E-Procedure: Current Practices of Affording Weight to Evidence at
the International Criminal Court**

Cluster C - Annex

Legal Memorandum

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Reviewed by Jolana Makraiová

19 May 2023

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1 Introduction

This research memorandum forms part of Cluster C of the International Nuremberg Principles Academy's (Nuremberg Academy) Digital Evidence Project, which "focuses on primarily analysing international and internationalised criminal jurisprudence concerning digital evidence".¹

It operates as a supplement to the report entitled *Cluster C: What are the legal standards governing digital evidence before the International Criminal Court?* (Cluster C Report),² which outlined the current practices identified from the jurisprudence of the International Criminal Court (ICC) regarding the admissibility and inadmissibility of digital evidence. The memorandum builds on that research by outlining the legal standards identified from the jurisprudence of the ICC regarding the weight afforded to evidence.

2 Methodology and structure

The focus of the memorandum is on admissibility decisions and trial and appeal judgments from nine separate ICC cases, which contain Chamber findings and *obiter dicta* regarding the weight of evidence and how it is determined.³ For each case, it was identified whether the admission or submission approach to the admissibility of evidence was used by the Chamber in its evaluation of the evidence, as this had an ultimate impact on the way that the Chambers evaluated the evidence and thus determined the weight to be afforded.⁴

Based on the above methodology, it was discovered that, while there is no strict set of steps or criteria to establish the weight of evidence, there are a number of factors that the Chambers rely on to assist them in their decision-making. These factors are identified and discussed in this memorandum.⁵

¹ Nuremberg Academy, "Digital Evidence" <<https://www.nurembergacademy.org/projects/detail/-45ed2d129b0e19459764c4684e317a95/digital-evidence-23/>> accessed 20 December 2022.

² E Hunter and V Suresh, "Cluster C Report: What are the legal standards governing digital evidence before the International Criminal Court?" (Nuremberg Academy, 14 July 2022) [internal work product] (Cluster C Report).

³ *The Prosecutor v. Bemba et al.*, ICC-01/05-01/13; *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07; *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06; *The Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, ICC-02/11-01/15; *The Prosecutor v. Mathieu Ngudjolo Chui*, ICC-01/04-02/12; *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06; *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15; *The Prosecutor v. Ruto and Sang*, ICC-01/09-01/11. The memorandum does not specifically address decisions by the Pre-Trial Chamber because its focus is on the consideration of the weight of evidence for the purpose of establishing the guilt or innocence of the accused at the end of proceedings, rather than any weight considerations carried out at the Pre-Trial stage.

⁴ For a brief explanation of the submission and admission approach, see section 4 below. See also generally the Cluster C Report (n 2).

⁵ The factors discussed in this memorandum are those identified from the judgments reviewed. There may be other factors relied on in other judgments that have not been considered for the purposes of this memorandum.

The memorandum is structured as follows: it begins with a review of the relevant rules from the Rome Statute and the Rules of Procedure and Evidence that pertain to the evaluation of evidence before the ICC. It then briefly sets out the distinction between the admission and the submission approaches to the admissibility of evidence and explains how the choice of approach affects the ultimate analysis and determination of the weight of evidence at later stages in the proceedings. Finally, it considers the relevant factors relied on by the Chambers in their evaluation of evidence and explains how these factors affect the determination of weight.

3 Evaluation of evidence at the ICC

The relevant rules on the evaluation of evidence at the ICC are as follows:

Article 64

Functions and powers of the Trial Chamber

[...]

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

[...]

9. The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to:

(a) Rule on the admissibility or relevance of evidence [...].⁶

Article 69

Evidence

[...]

3. The parties may submit evidence relevant to the case, in accordance with Article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.⁷

4. The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.⁸

[...]

Article 74

Requirements for the decision

[...]

2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.

[...]

⁶ Rome Statute of the International Criminal Court, 2187 UNTS 90 (adopted 17 July 1998, entered into force 1 July 2002) (Rome Statute), arts. 64(2), (9)(a).

⁷ Ibid, art. 69(3).

⁸ Ibid, art. 69(4).

Rule 63

General provisions relating to evidence

1. The rules of evidence set forth in this chapter, together with Article 69, shall apply in proceedings before all Chambers.

2. A Chamber shall have the authority, in accordance with the discretion described in Article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.

[...]

4. Without prejudice to Article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.⁹

Rule 64

Procedure relating to the relevance or admissibility of evidence

[...]

2. A Chamber shall give reasons for any rulings it makes on evidentiary matters [...].¹⁰ While not much guidance is provided to the judges on how specifically to approach the evaluation of evidence, and while the discretion afforded to the judges pursuant to the above-mentioned rules is considerable, they do set out some basic requirements to guide the judges in their decision-making. These basic requirements have been interpreted by a number of ICC Chambers to mean the following: the standard evidentiary criteria are relevance, probative value and the potential prejudice an item of evidence may cause to a fair trial or a fair evaluation of witness testimony.¹¹ A Trial Chamber is not obliged to rule on the relevance, probative value or potential prejudice of individual items of evidence at the point of their admission (although it is permitted to do so). It must, however, in its deliberation, clarify precisely how it evaluated the evidence before it. This requires it to explain sufficiently why it considers an item of evidence to be relevant and have sufficient probative value to be relied on for the Chamber's factual analysis. The Chamber must therefore, at *some point* in the proceedings, consider the relevance, probative value and potential prejudice of each item of evidence.¹² Whether a Chamber does so in the context of determining the admissibility of a piece of evidence, or in the context of considering the weight of a piece of evidence in light of all the evidence in the case, depends on whether the submission or admission approach is used. These approaches will be explained in the next section.

⁹ International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3 and Corr. 1 (2019), (Rules of Procedure and Evidence), rule 63(1), (2), (4).

¹⁰ Ibid, rule 64(2).

¹¹ *The Prosecutor v. Bemba et al.*, Trial Judgment, ICC-01/05-01/13, 19 October 2016 (Bemba et al. Trial Judgment), para. 190; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public redacted version of the First decision on the prosecution and defence requests for the admission of evidence, ICC-01/05-01/08, 9 February 2012 (Bemba Gombo Decision on Admissibility), para. 16.

¹² *The Prosecutor v. Bemba et al.*, Appeal Judgment, ICC-01/05-01/13, 8 March 2018, paras. 592, 597; Bemba Gombo Trial Judgment, para. 222; *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the admission into evidence of materials contained in the prosecution's list of evidence, ICC-01/05-01/08, 19 November 2010, para. 37; *The Prosecutor v. Germain Katanga*, Trial Judgment, ICC-01/04-01/07, 7 March 2014 (Katanga Trial Judgment), para. 75; *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the submission and admission of evidence, ICC-02/11-01/15, 29 January 2016 (Gbagbo and Blé Goudé Decision on Submission and Admission), para. 10; *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Judgment, ICC-01/04-01/06, 14 March 2012 (Lubanga Trial Judgment), para. 100; *The Prosecutor v. Mathieu Ngudjolo Chui*, Trial Judgment, ICC-01/04-02/12, 18 December 2012, (Ngudjolo Chui Trial Judgment), para. 41; *The Prosecutor v. Dominic Ongwen*, Trial Judgment, ICC-02/04-01/15, 14 February 2021, (Ongwen Trial Judgment), paras. 235–244.

4 The “admission” and “submission” approaches

As explained in the Cluster C Report,¹³ in the admission approach, the determination of admissibility takes place at a different stage of the proceedings compared to the determination of weight. When applying the admission approach, the Trial Chamber undertakes a *prima facie* review of the relevance, probative value and potential prejudice an individual item of evidence may cause to a fair trial or a fair evaluation of witness testimony to confirm whether it should be admitted into the case record.¹⁴ It then evaluates (or re-evaluates) that piece of evidence *in light of all the other evidence in the case* in the deliberation stage of the proceedings, and subsequently decides what weight should be afforded to it.¹⁵

Conversely, in the submission approach, the Trial Chamber formally acknowledges the submission of an item of evidence without considering its relevance, probative value and any potential prejudice it may cause to a fair trial or a fair evaluation of witness testimony, and thus without making a formal ruling on admissibility.¹⁶ It then considers the relevance, probative value and potential prejudice of the item of evidence when undertaking its “holistic assessment of all evidence submitted”,¹⁷ and decides what weight should be afforded to it. What thus distinguishes the evaluation of a piece of evidence for the purpose of establishing admissibility from the evaluation of evidence carried out in the deliberation stage immediately before determining weight, is that the latter evaluation is made in light of all other relevant evidence, while the former evaluation is carried out in isolation.

¹³ Cluster C Report (n 2), pp. 2-4.

¹⁴ Ngudjolo Chui Trial Judgment, para. 42; *The Prosecutor v. Ruto and Sang*, Decision on the Prosecution’s Request for Admission of Documentary Evidence, ICC-01/09-01/11, 10 June 2014 (Ruto and Sang Admissibility Decision), para. 15.

¹⁵ Bemba Gombo Trial Judgment, para. 225; Bemba Gombo Decision on Admissibility, para. 18; *The Prosecutor v. Bosco Ntaganda*, Decision on the Prosecution’s first request for the admission of documentary evidence, ICC-01/04-02/06, 19 February 2016 (Ntaganda Admissibility Decision), para. 7. See also Ongwen Trial Judgment, footnote 254.

¹⁶ Bemba et al. Trial Judgment, para. 192. See also Gbagbo and Blé Goudé Decision on Submission and Admission, para. 13.

¹⁷ Ongwen Trial Judgment para. 234 (emphasis added).

It is worth mentioning that in November 2021, the ICC judges agreed on a single evidentiary system – namely the submission approach – for all documentary, digital and physical evidence. This agreement formed part of a model which would be annexed to the internal Chambers Practice Manual, to “facilitate consistency and predictability amongst the various trial chambers in terms of the actual proceedings”.¹⁸ The agreement to use the submission approach in proceedings was a response to the recommendations contained in the final report of the Independent Expert Review of the ICC and Rome Statute System.¹⁹ In that report, the experts commented that the “inconsistent approaches adopted by different Chambers were said to be causing confusion and uncertainty among counsel” and that a suggestion had been made that the “difference should be resolved in favour of one or the other through a Regulation on the matter.”²⁰ Although the experts did not consider it to be strictly necessary that the judges agree on a single approach, they did note that doing so could be a solution should it “continue to be a problem”.²¹ Nevertheless, the judges opted to adopt the submission approach as the single agreed approach, and it may be expected that proceedings going forward will be carried out on that basis.

5 Relevance, probative value and potential prejudice

The Cluster C Report defines and elaborates on the evidentiary criteria of relevance, probative value and potential prejudice when considered by the ICC Trial Chambers.²² However, it is useful to repeat those definitions here before delving into the methods used by the Chambers to establish weight.

“Relevance” has been defined as pertaining “to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused”.²³ A piece of evidence passes the “relevance” test if it is “logically connected to one or more facts at issue, in the sense that the item must have the capacity to make a fact at issue more or less probable than it would be without the item.”²⁴ Moreover, an item will only be relevant if it has the “potential to influence the Chamber’s determination on at least one fact that needs to be determined to resolve the case”.²⁵ The relevance of an item of evidence may be assessed in isolation (when the admission approach is used) or in relation to other items of evidence in the case (when the submission approach is used).²⁶

The assessment of “probative value” is a “fact-specific inquiry”²⁷ and may take into account countless factors including “the indicia of reliability, trustworthiness, accuracy or voluntariness... as well as the circumstances in which the evidence arose. It may also take into account the extent

¹⁸ --, “ICC judges agree on reforms in response to Independent Expert Review at annual retreat” (ICC, 22 November 2021) <<https://www.icc-cpi.int/news/icc-judges-agree-reforms-response-independent-expert-review-annual-retreat>> accessed 9 May 2023.

¹⁹ --, “Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report” (30 September 2020) <https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf> accessed 9 May 2023.

²⁰ Ibid, para. 546.

²¹ Ibid, para. 550.

²² Cluster C Report (n 2), pp. 22 *et seq.*

²³ Bemba et al. Trial Judgment, para. 195; Bemba Gombo Decision on Admissibility, para. 14.

²⁴ Bemba Gombo Decision on Admissibility, para. 14. See also *The Prosecutor v. Thomas Lubanga Dyilo*, Appeal Judgment, ICC-01/04-01/06, 1 December 2014 (Lubanga Appeal Judgment), footnote 45 and its accompanying sources.

²⁵ Bemba Gombo Decision on Admissibility, para. 14.

²⁶ Id.

²⁷ Ibid, para. 15.

to which the item has been authenticated”.²⁸ The assessment of probative value includes an assessment of the “indicia of reliability”,²⁹ that is, ensuring that an item of evidence is sufficiently reliable. As stated by one Trial Chamber, to have sufficient probative value, an item of evidence “must also be seen to have the indicia of reliability, including of authenticity, that are sufficient in the circumstances in accordance with generally accepted legal principles”.³⁰

“Potential prejudice” refers to the prejudicial effect that an item of evidence’s admission to the case record may cause to a fair trial or fair evaluation of witness testimony.³¹ In considering the extent to which an item’s admission would prejudice the proceedings, the Chamber may take into account whether its admission would encroach on the accused’s rights under Article 67(1) of the Rome Statute, or whether it would potentially delay proceedings because it is unnecessary or cumulative of other evidence. However, if potential prejudice is identified, this will not necessarily preclude the item’s admission – it will only be excluded if its relevance and probative value are insufficient to justify its admission in light of the identified prejudice.³²

The next section considers the factors that are taken into account when a Chamber is conducting its holistic evaluation of all the evidence as a whole, leading to its determination of weight.

6 The holistic evaluation of evidence

6.1 Relevant factors

While there are no set rules for the Chamber’s holistic evaluation of evidence in light of all the evidence on the record, most Trial Chambers refer to the need for an item of evidence to be sufficiently reliable. In the case of oral witness testimony, this involves ensuring that the testimony is both reliable and credible,³³ and in the case of documentary evidence, it involves ensuring that the evidence is authentic.³⁴ As confirmed in *Bemba Gombo* and *Lubanga*, “[w]hile the Statute and Rules of Procedure do not specifically refer to these concepts, they are part of the evaluation of evidence required of a Trial Chamber by Article 74(2) of the Statute”.³⁵

²⁸ *Id.*

²⁹ *Bemba et al. Trial Judgment*, para 195.

³⁰ *Ruto and Sang Admissibility Decision*, para. 15.

³¹ *Bemba Gombo Decision on Admissibility*, para. 16.

³² *Id.*

³³ *Lubanga Appeal Judgment*, para. 57.

³⁴ *Bemba et al. Trial Judgment*, paras. 208, 218–224; *Bemba Gombo Trial Judgment*, para. 237; *Katanga Trial Judgment*, para. 91; *Lubanga Trial Judgment*, para. 109; *Ntaganda Trial Judgment*, para. 57; *Ngudjolo Chui Trial Judgment*, para. 57.

³⁵ *Bemba Gombo Trial Judgment*, para. 228; *Lubanga Appeal Judgment*, para. 239.

For instance, in *Ongwen*, the Trial Chamber stated that “[a]ll items of evidence which are part of the evidentiary record of the case are considered – and their relevance, reliability and weight assessed holistically in light of all the other evidence therein – when determining the guilt or innocence of the accused”.³⁶ In *Bemba Gombo*, the Trial Chamber stated that in its “holistic evaluation and weighing of all the evidence” it would assess the “reliability and credibility of the evidence it considered to be relevant to the Chamber’s determination”.³⁷ In *Ntaganda*, *Lubanga*, *Ngudjolo Chui*, *Bemba Gombo* and *Katanga*, the Trial Chambers assessed the credibility and reliability of the evidence they considered to be relevant in light of all the other relevant evidence, and decided whether incriminatory evidence should be afforded any weight and whether it established any of the alleged facts and circumstances beyond reasonable doubt, having considered the exculpatory evidence submitted.³⁸

As noted in section 5 above, reliability (and in the case of documentary evidence, authenticity) is also relied on by the Chamber when considering the probative value of an item of evidence for the purpose of establishing its admissibility. However, as explained in section 4 above, where the probative value of an item of evidence is considered for the purpose of an admissibility determination, the item’s indicia of reliability and authenticity will be considered in isolation, and on a preliminary basis.³⁹ Where the Chamber is conducting its holistic evaluation of evidence, these indicia will be considered, along with the credibility of any witness testimony, in light of all the other relevant evidence in the case. Thus, an item of evidence which may be deemed to have sufficient probative value to be admitted into the case record, may not be considered sufficiently reliable or credible, in light of all the other evidence, to be relied on for the purposes of the Chamber’s ultimate determination of the guilt or innocence of the accused. The latter determination will thus be subject to a higher threshold.⁴⁰

As stated in *Ongwen*,

[...] the relevance and probative value of a given piece of evidence could be assessed more accurately only after having received all evidence presented at trial in order to conduct such assessments in light of the entirety of the evidence submitted rather than undertaking them during trial as the evidentiary record evolved... the relevance and probative value may not be evident in the course of the proceedings, but may become so when all the evidence is received and considered.⁴¹

The distinction between the two types of analyses is best explained by way of practical examples. In both *Ntaganda* and in *Bemba Gombo*, the Trial Chambers had admitted items of documentary evidence whose authenticity and/or reliability had been challenged by the Defence,⁴² but which the Chambers considered to have sufficient *prima facie* relevance and probative value.⁴³ In *Ntaganda*, for instance, the Defence had challenged the reliability of reports, notes and databases from various non-governmental organisations and United Nations (UN) sources.⁴⁴ In

³⁶ *Ongwen* Trial Judgment, footnote 254.

³⁷ *Bemba Gombo* Trial Judgment, para. 225.

³⁸ *Ntaganda* Trial Judgment, para. 50; *Lubanga* Trial Judgment, para. 94; *Ngudjolo Chui* Trial Judgment, paras. 45–46; *Bemba Gombo* Trial Judgment, para. 225; *Katanga* Trial Judgment, paras. 79–80.

³⁹ *Ongwen* Trial Judgment, para. 244.

⁴⁰ See *Bemba Gombo* Decision on Admissibility, para. 18: “[A]ny factual analysis undertaken [...] is preliminary in nature and has been performed for the limited purpose for the Chamber’s admissibility determination. It does not in any way predetermine the eventual assessment of the evidence or the weight to be afforded to it.” See also *Ruto and Sang* Admissibility Decision, para. 15.

⁴¹ *Ongwen* Trial Judgment, para. 239.

⁴² *Ntaganda* Trial Judgment, para. 57 and footnote 132. See also *Bemba Gombo* Trial Judgment, para. 237.

⁴³ *Bemba Gombo* Trial Judgment, para. 237.

⁴⁴ *Ntaganda* Trial Judgment, footnote 132.

their final evaluation of the evidence, the Trial Chambers considered all relevant submissions and testimonial evidence related to the authenticity of the documents concerned,⁴⁵ to determine whether they were sufficiently authenticated and reliable to be relied on in their final deliberations. The Trial Chamber in *Ntaganda* found that “[w]hile the reliability and probative value of these documents is to be assessed on a case-by-case basis, the Chamber considers that, in most cases, the probative value of these documents is often too low to serve as the only basis for a factual finding. Accordingly, these documents have served mainly as corroboration for other credible and reliable evidence”.⁴⁶

The examples above explain the difference between determining that a piece of evidence, in isolation, is sufficiently probative, and determining the appropriate probative value of an item of evidence in light of all the evidence as a whole. The subsections below explain what is meant by the concepts of credibility and reliability in the case of oral and non-oral evidence.

6.2 Credibility

According to the Trial Chamber in *Ngudjolo Chui*, the Chamber begins its evaluation of evidence by assessing the credibility of all relevant evidence, in light of all the other relevant evidence on the record.⁴⁷ Evidence is considered to be credible if it appears reasonably capable of belief or reliance,⁴⁸ and is generally understood as referring to whether a witness is testifying “truthfully”.⁴⁹

Although the Trial Chamber in *Ngudjolo Chui* referred to “all relevant evidence”,⁵⁰ a credibility assessment will mainly be relevant to oral evidence, that is, witness testimony, given that it relates to the truthfulness of someone’s account.⁵¹ Documentary evidence instead typically undergoes an evaluation of its authenticity. This is discussed in the next section.

When assessing the credibility of a witness, a Trial Chamber may take into account “individual circumstances of the witness, including his or her relationship to the accused, age, the provision of assurances against self-incrimination, bias against the accused, and/or motives for telling the truth”.⁵² In this regard, the potential impact of protective measures (such as pseudonyms, voice and face distortion) may be taken into account, but will not necessarily impact the truthfulness of the witness’s account.⁵³ Additionally, the fact that certain witnesses may have benefitted from more time to review their statement does not by itself affect the witness’s credibility.⁵⁴

⁴⁵ Ibid, para. 57; Bemba Gombo Trial Judgment, para. 237.

⁴⁶ Ntaganda Trial Judgment, footnote 132.

⁴⁷ Ngudjolo Chui Trial Judgment, para. 45.

⁴⁸ Lubanga Appeal Judgment, footnote 45 and its accompanying sources.

⁴⁹ Bemba Gombo Trial Judgment, para. 228; Lubanga Appeal Judgment, para. 239; Ntaganda Trial Judgment, para. 53.

⁵⁰ Ngudjolo Chui Trial Judgment, para. 45.

⁵¹ Bemba Gombo Trial Judgment, para. 228; Lubanga Appeal Judgment, para. 239; Ntaganda Trial Judgment, para. 53.

⁵² Bemba et al. Trial Judgment, para. 202; Bemba Gombo Trial Judgment, para. 229. In the context of expert witness testimony, a Chamber will consider “the established competence of the particular expert in his or her field [and] the methodologies used” to satisfy itself that the expert is credible. See Ntaganda Trial Judgment, para. 54; Lubanga Trial Judgment, para. 11; Bemba Gombo Trial Judgment, para. 253; Katanga Trial Judgment, para. 94; Ngudjolo Chui Trial Judgment, para. 60.

⁵³ Ntaganda Trial Judgment, para. 84.

⁵⁴ Id.

Indeed, the determination of credibility is done on a case-by-case basis. Hence, even where the Trial Chamber has some reservations in relation to the credibility of the evidence of a witness, it may nevertheless be relied on to the extent that it is corroborated by other reliable evidence. Equally, there may be witnesses whose credibility is impugned to such an extent that their testimony cannot be relied on even if other evidence does corroborate parts of it.⁵⁵ The importance of corroboration will be discussed further in section 8 below.

6.3 Authenticity

An assessment of authenticity is typically carried out with respect to documentary evidence,⁵⁶ including digital evidence. As explained in the Cluster C Report, authenticity was the most frequently assessed factor in relation to digital evidence.⁵⁷ Assessing authenticity includes an assessment (to the extent known) of “the content of the particular evidentiary items, their provenance, source or author (including the author’s role in the relevant events), and any other relevant material”.⁵⁸ These elements are sometimes referred to as a document’s “indicia of authenticity” or “indicia of reliability”.⁵⁹ Indeed, as explained in passing by Judge Henderson in his Reasons (the majority opinion) in *Gbagbo and Blé Goudé*, “if it cannot be established that an item is what it purports to be, it cannot be relied upon in making findings”.⁶⁰

Sometimes, the authenticity of a document can be challenged by way of reliable and credible witness testimony. This was the case in *Bemba*, where a person “who was well placed to authenticate the Contested Items, given his occupation at the time of the relevant events, provided testimony before the Chamber impugning the items’ authenticity”.⁶¹ However, the Trial Chamber in *Bemba* took care to note that it is not “necessary that each item of evidence be authenticated via witness testimony”.⁶² The reverse can also be true – a document whose authenticity has been established (or not questioned), and whose contents speak to the same facts as the testimony of a witness, may also be used to test and confirm the credibility of the testimony of that witness, as was the case in *Katanga* and *Ngudjolo Chui*.⁶³

⁵⁵ Bemba et al. Trial Judgment, para. 204.

⁵⁶ See *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Reasons of Judge Geoffrey Henderson, ICC-02/11-01/15, 16 July 2019, (Gbagbo and Blé Goudé Reasons of Judge Henderson), reflecting the majority decision in that case, para. 32. See also Bemba et al. Trial Judgment, para. 208; Bemba Gombo Trial Judgment, para. 237.

⁵⁷ Cluster C Report (n 2), p. 4.

⁵⁸ Bemba et al. Trial Judgment, para. 208; Bemba Gombo Trial Judgment, para. 237; Katanga Trial Judgment, para. 91; Lubanga Trial Judgment, para. 109.

⁵⁹ Bemba et al. Trial Judgment, para. 208; Bemba Gombo Trial Judgment, para. 237; Katanga Trial Judgment, para. 91.

⁶⁰ Gbagbo and Blé Goudé Reasons of Judge Henderson, paras. 32, 37.

⁶¹ Bemba Gombo Trial Judgment, para. 285.

⁶² Bemba Gombo Decision on Admissibility, para. 15.

⁶³ Katanga Trial Judgment, para. 65; Ngudjolo Chui Trial Judgment, para. 121.

6.4 Reliability

Reliability is a concept that differs slightly from the concept of credibility, even though the two concepts are often referred to in tandem.⁶⁴ Although a witness may be credible, the evidence they give “may nonetheless be unreliable because, *inter alia*, it relates to facts that occurred a long time ago, or due to the vagaries of human perception”.⁶⁵ Thus, the reliability of the facts testified to by a witness “may be confirmed or put in doubt by other evidence or the surrounding circumstances”.⁶⁶

When assessing the reliability of a witness’s testimony, a Chamber might consider:

[...] the witness’s demeanour when testifying, willingness to respond to questions, spontaneity when responding, coherence, chronological pattern, structure, use of particular vocabulary, attempt at accuracy, coherence with prior recorded statements and complications in the account which are otherwise unnecessary.⁶⁷

A Chamber may also consider the extent and seriousness of any inconsistencies and their impact on the overall reliability of the witness,⁶⁸ as well as whether the events in question took place a long time ago, and any trauma the witness may have suffered leading to difficulties in providing a coherent, complete and logical account.⁶⁹ A Chamber will be mindful of memory having faded with regard to certain details and may make appropriate allowances for this.⁷⁰ Indeed, inconsistencies, contradictions and inaccuracies may sometimes speak in favour of the truthfulness of a witness’s account.⁷¹ With respect to expert testimony, a Chamber may consider the extent to which the expert’s findings were consistent with other evidence on the record and the general reliability of the expert’s evidence.⁷²

With respect to documentary evidence, once the authenticity of a document has been assessed, a Trial Chamber will consider whether the document is reliable. In this regard, several Trial Chambers have noted that a document, despite being authentic, may still be unreliable.⁷³ The Chambers have not specifically explained when such a situation might occur. However, guidance may be taken from *Lubanga*, in which the Trial Chamber decided not to rely on a document produced by the Prosecution because there was “no evidence before the Chamber as to the

⁶⁴ See e.g., Ntaganda Trial Judgment, para. 50; Lubanga Trial Judgment, para. 94; Ngudjolo Chui Trial Judgment, paras. 45–46; Bemba Gombo Trial Judgment, para. 225; Katanga Trial Judgment, paras. 79–80.

⁶⁵ Bemba Gombo Trial Judgment, para. 228; Lubanga Appeal Judgment, para. 239.

⁶⁶ Bemba Gombo Trial Judgment, para. 228; Lubanga Appeal Judgment, para. 239; Ntaganda Trial Judgment, para. 53.

⁶⁷ Bemba et al. Trial Judgment, para. 203.

⁶⁸ Lubanga Trial Judgment, para. 102.

⁶⁹ Bemba Gombo Trial Judgment, para. 230; Ngudjolo Chui Trial Judgment, para. 53.

⁷⁰ Bemba et al. Trial Judgment, para. 203.

⁷¹ Ibid, para. 204. See also *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Dissenting Opinion of Judge Herrera Carbuccia, ICC-02/11-01/15, 16 July 2019 (Gbagbo and Blé Goudé Dissenting Opinion of Judge Herrera), para. 34: “Specific circumstances, such as the lapse of time, prior testimony and in-court testimony, interpretation issues, PTSD or other conditions affecting memory must be taken into consideration – the main responsibility of the Trial Chamber is to look past such inconsistencies while evaluating them to consider whether the evidence as a whole is reliable and credible.”

⁷² Ntaganda Trial Judgment, para. 54; Lubanga Trial Judgment, para. 11; Bemba Gombo Trial Judgment, para. 253; Katanga Trial Judgment, para. 94; Ngudjolo Chui Trial Judgment, para. 60.

⁷³ Bemba et al. Trial Judgment, para. 208; Bemba Gombo Trial Judgment, para. 237; Katanga Trial Judgment, para. 91.

circumstances in which the document was drafted or obtained”.⁷⁴ This was despite the fact that: (1) the document had indicia of authenticity, including appropriate letterheads and signatures, (2) the Prosecution had obtained it from the UN, (3) no explanation had been provided as to why a false document of that kind would have been provided at that stage to the UN, and (4) its validity had not been questioned.⁷⁵

The next section explains how the Chambers use the factors above to afford weight to evidence.

7 Affording weight to evidence

Once a Trial Chamber has assessed the credibility (or authenticity) and reliability of a piece of evidence or witness testimony, it is able to assess what weight should be afforded to it.⁷⁶ Typically, these assessments will happen at the same time. A Chamber will consider the reliability, and credibility or authenticity, of a piece of evidence in the context of all the other evidence on the record, and where the other evidence puts any of these factors into question, the piece of evidence which is being considered may be afforded less weight. Where, in the context of all the evidence, a piece of evidence retains its credibility or authenticity, and reliability, and there is no other evidence which puts these factors into question, an item of evidence may be afforded more weight.

The following sections explain how this is done in practice, with regard to different types of evidence.

7.1 Documentary evidence

Where the author of a document can be questioned in court, this will often be the starting point for a Chamber. However, where the parties have not been able to test the author of the documentary evidence, the Chamber may take this aspect into account when attributing weight to the evidence.⁷⁷ In those situations, the Chamber will consider the indicia of authenticity set out above,⁷⁸ to establish who the author or recipient of the document may have been. Depending on its findings, this will also impact the weight afforded to the document.

Thus, in *Lubanga*, the Trial Chamber refrained from affording significant weight to a document because it did not bear a particular date, document number, and nor was it signed or stamped.⁷⁹ In *Bemba Gombo*, the Trial Chamber attached no weight to a document because “the wording and format of the document as well as its date, content, and notification procedure, indicate that it is a fabrication”.⁸⁰

⁷⁴ *Lubanga Trial Judgment*, para. 1087.

⁷⁵ *Id.*

⁷⁶ *Lubanga Appeal Judgment*, para. 239; *Ngudjolo Chui Trial Judgment*, paras. 45–46; *Bemba Gombo Trial Judgment*, para. 225, 237; *Katanga Trial Judgment*, paras. 79–80, 91; *Bemba et al. Trial Judgment*, para. 208.

⁷⁷ *Bemba et al. Trial Judgment*, para. 207.

⁷⁸ See section 6.3 above.

⁷⁹ *Lubanga Trial Judgment*, para. 1182. See also *Bemba Gombo Trial Judgment*, para. 512; Gbagbo and Blé Goudé Reasons of Judge Henderson, para. 99.

⁸⁰ *Bemba Gombo Trial Judgment*, paras. 292–293.

As further mentioned above, a document may be authentic but nevertheless unreliable. Thus, in *Bemba Gombo*, three witnesses had provided corroborated testimony as to the authenticity of a particular document. However, the Chamber was not convinced of the document's reliability because:

Colonel Moustapha's signature on the Operations Report is upside down. [Witness] D19, who claimed to be familiar with the Operations Report, gave evasive and uncooperative testimony attempting to explain the evidently upside down signature. [Witness] D19's testimony is also evasive on other details of the Operations Report's creation.⁸¹

As the Chamber was not convinced of the document's reliability, it attached no weight to it.⁸²

7.2 Witness testimony

As explained above, the evaluation of witness testimony will typically begin with an assessment of the credibility of the witness and reliability of their testimony, in light of all other relevant evidence. The determination of weight then follows that assessment. In *Bemba et al.*, the Trial Chamber attached no weight to a witness's explanation concerning the purpose or nature of a particular payment because the witness's explanations were "long and confusing, differing in style and structure compared to the rest of his testimony, suggesting that he struggled to find a response".⁸³

In the same case, the Trial Chamber treated one witness's testimony with caution and attached limited weight to it, because the content and manner of his answers demonstrated that his account was "strategically directed to protect his and Mr Kilolo's interests".⁸⁴ Nevertheless, the Trial Chamber found certain parts of his testimony, such as the recognition of voices and telephone numbers reliable because the witness had "readily and spontaneously replied to these questions" showing a demeanour which was "very much in contrast to the rather evasive and defiant manner he generally displayed when questioned on other issues".⁸⁵

In *Ngudjolo Chui*, the Trial Chamber similarly found that one witness appeared to hold:

[...] a certain interest in supporting Mathieu Ngudjolo's case. To the Chamber such conduct is indicative of an attempt by the witnesses to avoid harming the accused's case by their answers. Accordingly, in light of the evidence before it, the Chamber can only attach little weight to their testimony on the subject.⁸⁶

Where a witness was "elusive, sometimes contradictory, and cautious in his answers", insisting "several times on a particular explanation without any relevance to the question" and requesting that questions that were objectively clear and comprehensible be repeated; "an apparent stalling tactic", the Trial Chamber in *Bemba et al.* did not afford much weight to his testimony.⁸⁷

⁸¹ Ibid, para. 299.

⁸² Ibid, para. 301.

⁸³ Bemba et al. Trial Judgment, para. 437.

⁸⁴ Ibid, para. 548.

⁸⁵ Ibid, para. 549.

⁸⁶ Ngudjolo Chui Trial Judgment, para. 515.

⁸⁷ Bemba et al. Trial Judgment, para. 595.

In *Katanga*, the Trial Chamber considered “with great circumspection” the weight to be attached to two witnesses’ statements due to the existence of certain contradictions in their testimonies.⁸⁸ In *Bemba*, the Trial Chamber found that a witness’s testimony was unreliable on a number of issues and that the witness’s:

[...] demeanour evinced evasiveness; he was often uncooperative, refusing to answer questions from the Prosecution, to the point that the Chamber and the Victims and Witnesses Unit (VWU) had to warn him as to the consequences of refusing to testify or providing false testimony more than once.⁸⁹

As a result, the Chamber found the witness “not credible and his incomplete testimony entirely unreliable” and attached “no weight to his evidence”.⁹⁰

In the *Ongwen* case, the Trial Chamber considered in detail the testimony of various witnesses, finding the following:

1. More weight was afforded to the testimony of witnesses who provided “more specific and contextualised testimony” regarding certain details.⁹¹
2. Less weight was afforded to a “confusing explanation” of a witness, as to whether or not he received money for witness-related expenses.⁹²
3. Less weight was afforded to the testimony of witnesses who did not actually see the events they were describing, but merely speculated, or were told of them by others.⁹³
4. More weight was afforded to the testimony of witnesses who saw or participated in the specific events they described.⁹⁴
5. More weight was given to the testimonies of two witnesses whose prepared lists of persons killed in a particular attack overlapped significantly.⁹⁵

7.3 Hearsay evidence

When evaluating hearsay evidence, the Chamber will take a “cautious approach”, taking into account “the context and conditions in which such evidence was obtained, and with due consideration of the impossibility of questioning the information source in court”.⁹⁶ The fact that evidence is hearsay does not deprive it of probative value but indicates that the weight or probative value afforded to it may be less, depending on the circumstances.⁹⁷

⁸⁸ Katanga Trial Judgment, para. 282.

⁸⁹ Bemba Gombo Trial Judgment, para. 355.

⁹⁰ Ibid, para. 356.

⁹¹ Ongwen Trial Judgment, paras. 278, 397.

⁹² Ibid, para. 561.

⁹³ Ibid, paras. 1419, 1455, 1485, 1488.

⁹⁴ Ibid, para. 1547, footnote 5239.

⁹⁵ Ibid, footnote 5239.

⁹⁶ Bemba Gombo Trial Judgment, para. 238; Katanga Trial Judgment, para. 90; Ntaganda Trial Judgment, para. 68.

⁹⁷ Bemba Gombo Trial Judgment, para. 238; Ntaganda Trial Judgment, para. 67.

In this regard, anonymous hearsay and anecdotal testimony may be considered less reliable than direct evidence, and thus given less weight,⁹⁸ according to Judge Henderson in his Reasons in *Gbagbo and Blé Goudé*. In that case, Judge Henderson, whose Reasons reflected the majority opinion, remarked that a UN report cited by the Prosecutor was “wholly based on anonymous hearsay” and considered that “no meaningful evidentiary weight can be ascribed to such evidence”.⁹⁹

8 The relevance of corroboration in affording weight

Corroboration or corroborative evidence is understood as evidence which tends to confirm the truth or accuracy of certain other evidence by supporting it in some material particular.¹⁰⁰ Corroboration only occurs when two pieces of evidence independently confirm the same fact.¹⁰¹ Although corroboration is not a legal requirement to prove the commission of a crime,¹⁰² it tends to be used where there are reliability or credibility issues with the evidence of a witness or a document.¹⁰³

Thus, in *Bemba Gombo*, the Defence challenged the reliability of certain audio recordings and their transcripts due to technical issues with synchronisation of speech. The Chamber reviewed the recordings on a case-by-case basis, and where there were plausible discrepancies, the Chamber only relied on a recording if it was corroborated by other evidence.¹⁰⁴ Similarly, where a witness was evasive with regard to his own conduct, the Chamber only relied on their testimony (particularly where the witness testified to the behaviour of the accused), to the extent that it was corroborated by other evidence.¹⁰⁵

However, sometimes, the extent of reliability and credibility issues are such that even with corroborating evidence, these issues cannot be overcome. For instance, in *Bemba Gombo*,

[T]he Chamber’s concerns as to P65’s credibility and the reliability of his evidence are not limited to certain issues; rather, they impact the overall quality and content of P65’s evidence, and thus *cannot be overcome, even if corroborated by other reliable evidence*. Accordingly, the Chamber attaches no weight to P65’s evidence.¹⁰⁶

The extent to which a piece of evidence is sufficient to prove a fact on its own depends on the issue and the strength of the evidence.¹⁰⁷ Where a single piece of evidence is insufficient to satisfy the Chamber of a fact beyond reasonable doubt, the Chamber could still be satisfied based on the cumulative effect of the relevant evidence as a whole.¹⁰⁸ This is the value of corroboration in determining weight.

⁹⁸ *Gbagbo and Blé Goudé* Reasons of Judge Henderson, para. 202.

⁹⁹ *Ibid*, paras. 285, 909.

¹⁰⁰ *Ibid*, para. 46.

¹⁰¹ *Ibid*, para. 47.

¹⁰² Rules of Procedure and Evidence, rule 63(4); Ngudjolo Appeal Judgment, para. 148.

¹⁰³ *Bemba et al.* Trial Judgment, para. 204.

¹⁰⁴ *Ibid*, para. 227.

¹⁰⁵ *Ibid*, para. 231.

¹⁰⁶ *Bemba Gombo* Trial Judgment, para. 347 (emphasis added).

¹⁰⁷ *Ibid*, para. 245; *Lubanga* Trial Judgment, para. 110.

¹⁰⁸ *Ntaganda* Trial Judgment, para. 74.

Certain types of evidence may be used as corroborative evidence only, that is, to corroborate other evidence such as witness testimony. For instance, UN and NGO reports were relied on by the Chamber in *Gbagbo and Blé Goudé* only to corroborate other evidence or to give further detail about the circumstances in which the alleged crimes were committed. They did not serve as the sole source of evidence.¹⁰⁹

9 Conclusion

This memorandum has considered the approach of the ICC in affording weight to evidence. The determination of weight is the ultimate assessment that the Chamber makes after evaluating individual items of evidence in light of all the relevant evidence on the record. The determination of weight will depend on the strength of the evidence and, sometimes, whether it is corroborated by other evidence.

The strength of the evidence is apparent after an assessment of the reliability, credibility and/or authenticity of the evidence. These evidentiary criteria are assessed taking into account a plethora of factors, and their assessment will differ depending on whether the evidence is oral or documentary. In conclusion, the judges carry a wide discretion in evaluating evidence at the ICC, and while there are a number of similar factors that the Chambers tend to consider, the determination of weight will ultimately be case-specific.

¹⁰⁹ *Gbagbo and Blé Goudé* Dissenting Opinion of Judge Herrera, para. 31.

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