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# The Reliability of Open Source Evidence In the International Criminal Court

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# Summary

Based on article 54 of the Rome Statute, the investigators under the Office of the Prosecutor in the ICC have an obligation to initially evaluate the obtained evidence. Considering the especially beneficial nature of the open source evidence, the so-called open source investigations are becoming more and more popular in the ICC. It is however unclear, how does the standard of reliability apply to that type of evidence and which factors should be initially evaluated by the investigators while collecting the open source evidence.

Following article 69 (4) and the admissibility test pointed out by the relevant case law, it is firstly necessary to evaluate whether the obtained evidence is relevant to the trial. The irrelevant evidence should be excluded already in the investigative phase. Secondly, it is necessary to evaluate the probative value of the evidence and weigh it against the prejudicial effect that the evidence might cause.

The assessment of probative value involves the evaluation of the reliability and credibility of evidence. While there is a certain general standard for the reliability set in article 69 (7) of the Statute, then due to the special nature of the open source evidence, it is not relevant for the evaluation of that type of evidence. While evaluating the reliability of open sources however, it is most importantly necessary to conclude whether the evidence indicates its sources in sufficient detail. While anonymous open source evidence could be admitted by the Court for limited purposes, then the weight of evidence could be considerably higher if the evidence provides sufficient indication to its sources.

Secondly, after the source of evidence is revealed, its impartiality and independence have to be evaluated. This evaluation could also involve the

assessment of the motivation of source, or its general ideology. Additionally, it is important to evaluate the prior experience with the source, the corroborating sources and the language of the source.

Further, the evaluation of the credibility of the information delivered by the source involves among others the assessment of the consistency of the information. The internal inconsistencies for an example could refer to the general incredibility of the information, while the external inconsistencies between two or more sources could refer that one of the sources could not be considered reliable. Considering the different nature of the photographic and video evidence, then the evaluation of the credibility of that type of information could be relatively different. For an example, it is necessary to evaluate the device used for taking the photo or video, but also the angle and the lighting of the image or video.

Besides those general factors affecting the reliability of evidence, which could be evaluated by the investigators during open source investigations, it has to be borne in mind, that the Court is always free to evaluate evidence on case to case basis, depending on the special circumstances of each issue under prosecution. Therefore, besides the general reliability criteria pointed out in this research, there could always be additional factors that the Chamber decides to consider and it is not possible to point out a complete and universal reliability framework.

# Preface

Not many people enjoy the privilege of accessing higher education, or, as my human rights studies during the past few years have shown, any education at all. Today I find myself among those few privileged, handing in my master thesis, which concludes yet another stage of my education.

First and foremost I would like to express gratitude to my family, who have given me the opportunity to study and follow my dreams. Thank you for your endless support and encouragement. I would also like to acknowledge Christoffer Wong for providing all the guidance, advice and help during this writing process.

Additionally, I consider it an honour to do an internship in the International Criminal Court. This opportunity and my colleagues have provided me with an indispensable insight to the international criminal procedure and contributed a lot to this research.

# Abbreviations

DRC	Democratic Republic of Congo
US	United States of America
UN	United Nations
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ECtHR	European Court of Human Rights
AC	Appeals Chamber
TC	Trials Chamber
PTC I	Pre-Trial Chamber I
PTC II	Pre-Trial Chamber II
PTC III	Pre-Trial Chamber III
OTP	Office of the Prosecutor
Rome Statute	Rome Statute of the International Criminal Court
VCLT	Vienna Convention on the Law of Treaties
ECHR	European Convention of Human Rights
ICCPR	International Covenant on Civil and Political Rights
UNHCR	United Nations High Commissioner for Refugees
⊆	Symbol used in the footnotes referring to publications of different authors in anthologies, collected works or books

# 1 Introduction

## 1.1. Background

In dealing with the most serious crimes of concern to the international community as a whole, considerable investigative work is required of the International Criminal Court (hereafter 'ICC' or 'Court') including activities as wide-ranging as exhuming mass graves, conducting forensic work, sending investigators to different countries to interview witnesses and accessing and sifting large volumes of governmental records.<sup>1</sup> In addition to the well-known and classical investigation methods, the Court also has a relatively new and little explored method in its possession, where the evidence is obtained from publicly available sources.

Today, with the evolution of the internet, a vast array of information has become retrievable with the click of a mouse and the gathering of knowledge from the so-called open sources has become a prominent aspect within the security and intelligence network.<sup>2</sup> The usefulness of the open sources has already been proven by several international and national institutions, which are constantly using open sources in their investigations. The Dutch Intelligence and Security Services Act, for instance, states that first open sources need to be checked before any other methods can be applied<sup>3</sup> and Europol, the European Union's law enforcement agency, which is fighting against serious international crime and terrorism, is regularly exploiting various open sources in its investigations.<sup>4</sup>

Open source information is information that is publicly available. In other

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<sup>1</sup>Bergsmo/Kruger c Triffterer (2008), at 1078

<sup>2</sup>Eijkman, Weggemans (2013), at 285

<sup>3</sup>Wet op inlichtingen en Veiligheidsdiensten; see also Eijkman, Weggemans (2013), at 287

<sup>4</sup>Europol Information Management, Products and Services, at 12, 16 available at <http://www.mvr.gov.mk/Uploads/Europol%20Products%20and%20Services-Booklet.pdf> accessed 25 May 2014

words; what is not 'confidential' and is out there in the public domain. It is the information that anyone can 'lawfully obtain by request, purchase, or observation'.<sup>5</sup> Examples of open information sources include the media (e.g. radio, television, newspapers, websites, blogs), official (governmental) reports, academic sources (papers, conferences, seminars), commercial data and so-called 'gray literature' such as working papers, unofficial government documents and surveys.<sup>6</sup> Not only online news pages but also 'weblogs' and 'social networking sites' including Facebook and Twitter for an example are perceived as potential valuable sources for intelligence. Here one can through information technology find unique information about the lives of millions of (world) citizens.<sup>7</sup>

The benefits of open source investigations are emphasized by security consultants, scientists, the media as well as the intelligence community. Open source information is cheap and more widely available than the traditional public information acquired by clandestine services. Moreover, it also provides extra information, which sometimes cannot be gained by other intelligence sources (e.g. human intelligence). In addition, as a result of the wide availability of (local) news coverage throughout the internet, the use of online open sources enables security — and intelligence agencies to be more up-to-date. Simultaneously, online open sources may in times of crisis — e.g. a war — be a more reliable and safe way of acquiring intelligence than by polarized human intelligence.<sup>8</sup>

Those are aspects, which can be especially beneficial for the investigations conducted by the ICC. Considering that most of the Court's investigations are taking place in relatively remote areas then basing its investigations on open sources can decrease the costs and increase the time-efficiency of the investigations. Also, as the cases under the Court's jurisdiction are often

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<sup>5</sup> National Open Source Enterprise, Intelligence Community Directive 301, July 2006 cited in Eijkman, Weggemans (2013), at 286

<sup>6</sup> Sands (2005) at 64-65; see also Eijkman, Weggemans (2013) at 287

<sup>7</sup> Eijkman, Weggemans (2013), at 287

<sup>8</sup> Ibid., at 288

those of a political nature, involving current or previous government officials then the Court might face problems regarding State cooperation while requesting evidence (such as governmental records), or the negotiations with the government authorities might be time-consuming. Therefore, the open sources are indispensable for finding information especially in the early stages of investigations.<sup>9</sup>

Moreover, it must be taken into consideration that the crimes under the Court's jurisdiction are those of a special character – the crime of genocide, crimes against humanity, war crimes and the crime of aggression.<sup>10</sup> Those crimes involve extreme violence, large territories, hundreds of different suspects, victims, witnesses and often also political propaganda against different national, religious, racial or ethnic groups. Because of the special character of those crimes, the most valuable evidence could come especially from the open sources.

For an example the ICTR case of *Nahimana, Barayagwiza and Ngeze*, popularly dubbed the *Media* case, involved the prosecution of three individuals alleged to have been the masterminds behind a media campaign to desensitize the Hutu population and incite them to murder the Tutsi population in Rwanda in 1994. The media campaign involved an establishment of a local radio channel *Radio Télévision Libre des Mille Collines* (RTLM) and *Kangura* newsletter, which were desensitizing the Hutu population and inciting them to murder the Tutsi population. In January 2007, largely based on the evidence collected from the relevant mass media, the Appeals Chamber acquitted all three defendants of conspiracy to commit genocide, and all genocide charges relating to their involvement

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<sup>9</sup> For an example, the OTP has faced major problems regarding state cooperation during its investigations in Kenya. See for an example: Thomas Obel Hansen, *Masters of Manipulation: How the Kenyan Government is Paving the Way for Non-Cooperation With the ICC*, in Open Security Conflict and Peace Building, 30 May 2012

<sup>10</sup> Rome Statute, article 5 (1)

with RTLM and *Kangura* respectively.<sup>11</sup>

Besides the well-known *Media* case, there are numerous different examples, where media has been used to spread violence against certain groups. For an example during the ICC investigations in the Republic of Côte d'Ivoire, the investigators largely referred to various publicly available media sources while describing the attacks against the civilian population. It was alleged that the government used the media, including the State-sponsored radio-television, to engage in a campaign of incitement to hatred and violence against those who were perceived to be their political opponents or belonged to foreign groups.<sup>12</sup>

In addition to the mass media, the Court has also used different publicly available NGO reports in its investigations. During the early investigations in the Republic of Côte d'Ivoire, the investigators used reports issued by Human Rights Watch and Amnesty International for an example while claiming that there is a reasonable basis to believe that different crimes against humanity had occurred and therefore an investigation should be authorized in the region.<sup>13</sup> As the NGOs generally base their reports of detailed investigations in countries, which often overlap with the Court's interest zones, then those reports can be a highly beneficial source of information for the Court.

Because of the extremely violent nature of the crimes and the large amounts of people who are affected by the violence, the investigators may often find relevant photos, videos and statements posted by the victims and witnesses on different social media channels, such as Facebook, Twitter, different blogs and personal webpages. It has been estimated that the civil war in Syria has been the most socially mediated civil conflict in history. According to a team of scholars from George Washington University and American

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<sup>11</sup> *Nahimana et al.*, AC, ICTR-99-52-A, 28 November 2007, para 1017 – 1036; see also Kagan (2008)

<sup>12</sup> Situation in the Republic of Côte d'Ivoire, OTP, Request for authorization of an investigation pursuant to article 15 (ICC-02/11-3), 23 June 2011, para 101 - 106

<sup>13</sup> *Ibid*, para 132 - 133

University an exceptional amount of what the outside world knows – or thinks it knows – about Syria’s nearly three-year-old conflict has come from videos, analysis and commentary circulated through social networks.<sup>14</sup>

It must be taken into consideration, however, that the evidence collected from open sources raises several questions, especially regarding its reliability. While some forms of illegality or violations of human rights create the danger that the evidence, such as a confession obtained from a person during interrogation, may not be truthful or reliable as it may have been proffered as a result of the duress arising from the circumstances of the violation, then other forms of evidence require preservation or collection in a manner that safeguards the integrity and reliability of evidence from tampering, corruption and tainting.<sup>15</sup> Similarly, the reliability of open source evidence might be affected by several different factors.

As it often happens with the information collected from the publicly open sources, the authors of the information might be unknown or unclear. As the author of the information is unknown then there could be a possibility that the information might be provided by someone closely related to the accused and therefore the data raise several questions concerning its independence and impartiality. Also, the information might be biased by the personal, political or religious views of the author.

It has been stated that social media creates a dangerous illusion of unmediated information flows. Those who follow YouTube videos, Syrian Twitter accounts, or Facebook postings may believe that they are receiving an accurate and comprehensive account of the conflict. Nevertheless, these flows are carefully curated by networks of activists and designed to craft particular narratives. Indeed, key curation hubs within social media

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<sup>14</sup> M. Lynch, D. Freelon, S. Aday (2014) at 5

<sup>15</sup> H. Behrens/D. K. Piragoff c Triffterer (2008), at 1334

networks may now play a gatekeeping role as powerful as that once played by television producers and op-ed page editors.<sup>16</sup>

As the open source evidence is still a relatively new trend in the Court's investigations, then the Court's view towards that type of evidence is not yet entirely clear. Regarding certain types of open source evidence, such as NGO reports, the Court has stated that they can be considered *prima facie* reliable, provided that they meet certain criteria.<sup>17</sup> On the other hand, however, the Court has pointed out that 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 thresholds.<sup>18</sup>

Generally, the questions regarding the reliability of evidence seem to be up to the Chambers to assess. Nevertheless, an initial evaluation of evidence has to be made already by the investigators during the collection of evidence. Although article 54 does not explicitly bring out the Prosecutor's obligation to verify the reliability of the collected evidence, the notion 'to establish truth' has been interpreted as a duty to initially evaluate the information and be as comprehensive as necessary in his or her investigation to establish whether criminal responsibility exists.<sup>19</sup> Therefore, the critical evaluation of the sources of information and evidence is fundamental for successful investigations.

Although the initial evaluation of evidence is required already in the investigative stage of the proceedings then the criteria, according to which the evaluation should be conducted is unclear. Similarly to the fact that the legal instruments do not pose any specific rules for the collection of open source evidence, there is also no specific criteria or standard for the initial

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<sup>16</sup> M. Lynch, D. Freelon, S. Aday (2014) at 6

<sup>17</sup> *Gombo*, TC, ICC-01/05-01/08, 27 June 2013, para 21

<sup>18</sup> *Gbagbo*, PTC I, ICC-02/11-01/11, 3 June 2013, para 35

<sup>19</sup> *Bergsmo/Kruger* v *Triffterer* (2008), at 1079

assessment and evaluation of that type of evidence.<sup>20</sup> Therefore, despite the multiple benefits of the open source investigations, it is unclear whether this type of evidence could be considered reliable and whether it meets the evidentiary thresholds for the later admissibility of evidence.

## 1.2. Purpose and Research Question

The purpose of this thesis is to conclude, which aspects of the open source evidence should be evaluated by the ICC investigators in the investigative stage. In order to reach this conclusion, the paper will analyse the reliability standard applicable to evidence in the ICC and explore how does this standard apply to the open source evidence.

It has to be borne in mind, however, that the Court has deliberately not provided a fixed standard for the reliability of evidence as the Chambers have to have an ability to assess the evidence 'freely'.<sup>21</sup> They are authorized by the Statute to request any evidence that is necessary to determine the truth, subject always to such decisions on relevance and admissibility as are necessary, bearing in mind the dictates of fairness.<sup>22</sup>

Despite this, there are several general rules on reliability specified in the Rome Statute (hereafter 'Statute') and discussed in the relevant case law, which form a certain reliability framework in the ICC procedures. By pointing out the standard of reliability applicable to open source evidence, this paper intends to provide the investigators under the Office of the Prosecutor in the ICC with certain guidelines on how to initially evaluate open source evidence so that it can be considered reliable and therefore later admissible at the trial. The research question addressed in this thesis therefore goes as follows:

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<sup>20</sup> See also *Alamuddin v PEICP* at 231

<sup>21</sup> Rules of Procedure and Evidence, Rule 62(2)

<sup>22</sup> *Lubanga*, TC I, ICC-01/04-01/06-1399, 13 June 2008, para 24

*Which are the factors affecting the reliability of open  
source evidence in the ICC?*

As already mentioned above, the investigations based on open sources are new in the ICC and the reliability of evidence collected from the open sources is a yet unexplored field of international criminal procedure. Therefore, the current research, by exploring the standard of reliability and analysing how it applies to open source evidence, makes an original contribution to the academic discussion on the topic and provides a basis for further research on the topics of reliability and open source evidence. Additionally, as the paper intends to provide certain guidelines to the investigators in the ICC, the research also possesses certain practical value.

### **1.3. Methodology and Delimitations**

While exploring the reliability of open source evidence, the current thesis will be delimited to international criminal procedures in the ICC. Therefore, a large part of the research will be based on the Rome Statute and the case law regarding the evaluation of the reliability and the admissibility of evidence. As the interpretations of the Rome Statute and the Court's judgments often refer to the case law issued by other international courts and tribunals, judgments issued by the ICTY, ICTR and ECtHR will be treated as supporting material.

The information found from open sources might serve different purposes. Some of the information might not qualify as evidence because it fails to fulfil the admissibility standards, but it could still be useful for the investigations as it might lead to new sources of information, where a more classical type of evidence could be found. For example, a post on Facebook might not serve as evidence by itself but it might lead to the discovery of a relevant witness or reveal new possible suspects. The focus of this paper

will, however, be on the information collected from the open sources in the context of justification, meaning that the information discovered in the open sources will be treated as evidence in the criminal proceedings, not merely as a lead to a more classical type of evidence.<sup>23</sup>

As there are different evidential standards for the evidence at the pre-trial stage and at the trial stage and because of the limitations of the research, this paper will be mainly focusing on the reliability standard applicable to the open source evidence at the trial stage. At the trial stage the evidential standard is relatively high compared to the evidentiary thresholds in the pre-trial stage. As stated in article 66 (3) of the Statute, in order to convict the accused, the Court must be convinced of the guilt of the accused *beyond reasonable doubt*. Further, this thesis will be delimited to the evidence serving as a proof of material elements of crimes, such as *mens rea* and *actus reus* at the trial stage. Nevertheless, in order to best illustrate the analysis of the research, several examples could also be drawn from the cases discussing evidence proving for an example the contextual elements<sup>24</sup> of the international crimes.

Although the paper intends to analyse the reliability standard applicable to open source evidence at the trial stage then in some parts of the paper, the decisions issued by the Pre Trial Chambers will be used as examples or as supporting material. Depending on the case law under question, it will however be pointed out if the decision was made in pre-trial stage and if the outcome of the assessment of evidence could be considerably different in the trial stage of proceedings.

Apart from the case law discussing the assessment of open source evidence, the paper will also point out several rules governing the assessment of

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<sup>23</sup> For the distinction between context of discovery and context of justification see: Hoyningen-Huene (2006), at 119-131

<sup>24</sup> For an example while prosecuting war crimes, the defendant's conduct must have some "nexus" to an armed conflict and regarding crimes against humanity, the defendant's behavior must be part of "widespread or systematic" attack against a civilian population. For the contextual elements in the international crimes see for an example: Kevin Jon Heller (2009)

other types of evidence, such as witness statements. In those parts of the research, it will be analysed whether similar rules might be also applicable to open source evidence. As the assessment of the reliability of witness statements is considerably more reflected in the Court's case law than the assessment of the reliability of open source evidence, it will be interesting to analyse if the same rules could also be relevant to the open sources.

The notion of 'reliability' in its classical meaning stands for dependable and consistent results of a replicable and repeatable process, and is an attribute of credibility. This process forms the basis of reliable conclusions. Credibility as a broader concept describes an extent to which a piece of evidence, either tangible or testimonial, can be believed. It involves additional attributes such as authenticity and accuracy for tangible evidence, and veracity and objectivity for testimonial evidence.<sup>25</sup>

In order to effectively address the research question and come to clear conclusions the research will distinguish in its analyses between the reliability of the source of evidence and the credibility of the information delivered by the source as it may well happen that a source considered not to be reliable delivers credible information, and the other way around. For an example, a publicly open personal blog, which is known to generally deliver false information, may occasionally deliver plausible data about certain events. Also, an NGO, which is considered a reliable source may publish a report, where the information is incredible due to a technical mistake. Therefore, the current paper will treat the notion of 'reliability' as the general trustworthiness of the source and the 'credibility' as the quality of the information, indicating whether it should be believed or not.

Therefore, the research question posed in the beginning of this paper is addressing the simplified notion of 'reliability', referring to the overall trustworthiness of the evidence, while the further analysis will differ

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<sup>25</sup> Anderson, Schum, Twining (2005) at 65; see also Appazov (2013) at 23

between the reliability of the source and the credibility of the information delivered by the source.

The current paper will start by establishing the context in which the reliability of evidence is evaluated. As it will be demonstrated, for a successful evaluation of evidence, it is necessary to consider several different aspects including the relevance of evidence, the probative value and the prejudicial effect. After pointing out the context in which the reliability is assessed, the paper will analyse article 69 (7) of the Statute and its application to the open source evidence.

The fourth and fifth part of the paper will analyse the relevant case law issued by the Court regarding the evaluation of evidence. The fourth chapter will be focusing on the case law concerning the evaluation of the sources, while the fifth chapter will focus on the evaluation of the information provided by the sources. Some of the referred case law analyses the specific type of open source evidence and some of it focuses on other types of evidence. As already pointed out above, the paper will also discuss some of the rules applicable to the evaluation of other types of evidence and analyse if they could also apply to the open source evidence.

As it was pointed out earlier, one of the purposes of the current research is to provide the investigators under the OTP in the ICC with certain guidelines on how to collect evidence from the open sources, so that it meets the criteria of reliability set in the case law. Therefore, while analysing the rules regarding the evaluation of reliability, the paper will also suggest certain methods on how to follow those rules.

## 2 The context of reliability in the ICC

According to article 69 (4) of the Statute, 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.<sup>26</sup> It has been stated that an assessment of the *prima facie* reliability of evidence by the Court can form part of an inquiry into probative value.<sup>27</sup>

In *Lubanga*, the prosecution included in its written submissions an analysis of the Statute and the relevant jurisprudence, arguing that articles 69(3) and (4) create a straightforward test for the assessment of evidence: the evidence must be relevant, have probative value and be *prima facie* reliable.<sup>28</sup> The test for the assessment of evidence was further discussed by the Trial Chamber, where the Court stated following:

First, the Chamber must ensure that the evidence is *prima facie* relevant to the trial, in that it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims. /.../

Second, the Chamber must assess whether the evidence has, on a *prima facie* basis, probative value. In this regard there are innumerable factors, which may be relevant to this evaluation, some of which, as set out above, have been identified by the ICTY. The Appeals Chamber in *Aleksovski* stated that the indicia of reliability include whether the evidence is “voluntary, truthful and trustworthy, as

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<sup>26</sup> Rome Statute art 69 (4)

<sup>27</sup> H. Behrens/D. K. Piragoff c Triffterer (2008), at 1306

<sup>28</sup> *Lubanga*, TC I, ICC-01/04-01/06-1399, 13 June 2008, para 7; *Lubanga*, TC I, ICC-01/04-01/06, 24 June 2009, para 49

appropriate; and for this purpose [the Trial Chamber] may consider both the content of the hearsay statement and the circumstances under which the evidence arose; or, as Judge Stephen described it, the probative value of a hearsay statement will depend upon the context and character of the evidence in question. /.../

Third, the Chamber must, where relevant, weigh the probative value of the evidence against its prejudicial effect.<sup>29</sup> Whilst it is trite to observe that all evidence that tends to incriminate the accused is also “prejudicial” to him, the Chamber must be careful to ensure that it is not unfair to admit the disputed material, for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber’s fair assessment of the issues in the case.<sup>30</sup>

As the Court sets the ‘rules’ for the evaluation of evidence, then in order for a piece of evidence to be admissible in the trial stage, the admissibility test set by the Trial Chamber has to be followed. Concluding from the admissibility test pointed out by the Court, the reliability of evidence should by far not be assessed in a vacuum. Instead, the assessment of reliability is a part of the overall evaluation of probative value, which is encompassed by the evaluations of relevance and the prejudicial effect.

This means that the initial evaluation of open source evidence in the investigative stage would have to follow the same admissibility test. Following the Court’s reasoning, first the relevance of a piece of evidence has to be evaluated, which is followed by the evaluation of the probative value and finally, the prejudicial effect should be assessed.

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<sup>29</sup> *Lubanga*, TC I, ICC-01/04-01/06-1399, 13 June 2008, para 28 citing *Aleksovski*, AC, ICTY, 16 February 1999, para 15

<sup>30</sup> *Lubanga*, TC I, ICC-01/04-01/06-1399, 13 June 2008, para 31

## 2.1. Relevance

As discussed above, the first test of admissibility of evidence considers the relevance of evidence. If a certain piece of evidence is ruled to be irrelevant to the trial, then the assessment will not reach the second and third tests of admissibility – the test of probative value and prejudicial effect. For an example, the Trial Chamber in *Gombo* assessed the relevance of a paper authored by Paul Melly, an independent researcher. After reaching a conclusion that the paper was irrelevant to the trial, the Chamber rejected its admission into evidence without moving on to consider the paper's probative value.<sup>31</sup>

The notion of relevance was firstly defined by the ICTY, according to which relevance is a relationship or nexus that is derived from the proffered item of evidence and the fact in issue or proposition that is sought to be proved or disproved.<sup>32</sup> In the ICC case law, the relevance has been interpreted quite similarly. As pointed out above, in *Lubanga* the Court stated that in order for a piece of evidence to be considered relevant, it has to relate to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims. Therefore, the crucial element of relevance is the relation or nexus of the evidence to the matters considered at the trial.

The relevance of a report issued by the UN was discussed by the Trial Chamber in *Gombo*, where the Court noted following:

The Chamber notes that the Mambasa UN Report - although referring to events, which occurred in a different territory - describes another intervention by the MLC troops during the timeframe covered by the charges. In particular, it refers to the role of the accused in this

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<sup>31</sup> *Gombo*, TC, ICC-01/05-01/08, 27 June 2013, para 14-15

<sup>32</sup> *Delalic et al.* ICTY, TC, IT-96-21, 19 January 1998, para. 29

intervention, allegations of abuses committed by the MLC troops, and the response to those allegations by the MLC leadership and the accused.

As such, the Chamber is satisfied that the Mambasa UN Report relates to matters that are properly to be considered by the Chamber, inter alia, the item may be relevant to a determination of the accused's ability to impose disciplinary measures and his power to prevent and repress the commission of crimes. In addition, the document may be of relevance to the Chamber's determination of the accused's relevant *mens rea* in accordance with Article 28(a) of the Statute.<sup>33</sup>

As it can be seen, in order for a piece of evidence to be considered relevant, it is not necessary that it is directly related to the events, which are under question at the trial. In this case, the Court pointed out that the report was relevant because it related to the overall role of the accused, the accused's abilities and powers etc. A piece of evidence might, however, also be relevant to numerous different aspects, which are under consideration in each case. For an example, as mentioned by the Court, the accused's *mens rea* could be evaluated based on various different pieces of evidence.

It has to be pointed out, however, that the relevance of open source evidence could often be more problematic than the relevance of other types of evidence. The reason being that the open source evidence often includes a lot of information, parts of which might be relevant to the trial, parts of which might not. While a witness can selectively reflect his or her memories or experiences related to a certain event, then the publicly available reports, news articles, photos and videos often include a lot of information, which may not be directly related to the issues considered at the trial.

For an example, an NGO report could be conducted about a certain area or country. This report might provide a lot of information about the general characteristics, historical background and population of this area or state. The information might be partly relevant to the events under question, but

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<sup>33</sup> *Gombo*, TC, ICC-01/05-01/08, 27 June 2013, para 12

a big part of it might also be irrelevant. Therefore, the nexus between the piece of evidence and the fact that is sought to be proved or disproved could differ depending on the parts of the report.

This type of situation was discussed by the Court in *Gombo*, where the Court ruled a report issued by an independent researcher Paul Melly inadmissible, because it lacked relevance to the charges against the accused. The Court noted following:

The Chamber notes that Mr Melly's Paper analyses, inter alia, the historical and cultural background of the CAR, the government of President Patasse, the crisis of 2001 in the CAR, and the extent to which the MLC and other forces were involved in the conflict.

Although there is a brief description of the relationship between the former CAR's President Patasse and Mr Bemba, the Chamber is of the view that Mr Melly's Paper, which refers to events which occurred outside the temporal scope of the charges, does not appear to contain any information with the potential to influence the Chamber's determination on the case and is therefore considered by the Chamber to be irrelevant to the charges against the accused.<sup>34</sup>

Although both of the reports, the Mambasa UN Report (referenced above) and the independent researcher's report, discuss events, which were not under consideration during the trial, then the outcome of the evaluation of relevance is considerably different. While the Mambasa UN Report was discussing events, which occurred in another territory, but were still relevant for the evaluation of other aspects under consideration at the trial, then the independent researcher's report refers to events outside the temporal scope of the charges, not related to any of the matters considered by the Chamber.

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<sup>34</sup> *Gombo*, TC, ICC-01/05-01/08, 27 June 2013, para 14

Concluding from the Court's evaluation, the line between the relevant and irrelevant parts of the open source evidence could be very fine. For a piece of evidence to be considered relevant, it has to clearly relate to the matters considered by the Chamber. After the relevance test, the next parts of the admissibility test – probative value and prejudicial effect have to be analysed.

## **2.2. Probative value and prejudicial effect**

After a piece of evidence is considered to be relevant, the probative value will be analysed, which as discussed in *Lubanga*, also includes the evaluation of reliability. The test of probative value might be especially challenging, as according to the Court, there are innumerable factors, which may be relevant to this evaluation. The factors might differ depending on the specific type of evidence, the circumstances of the case and several other aspects.

As it has been pointed out – the weight of evidence or its probative value does not have a quantum and cannot be expressed or measured in terms of grams, volts or any other precise physical measure, but rather in terms of probability judgments (for example, I am confident that X is the murderer). Thus, lawyers, judges and other legal professionals commonly refer to probability judgments in terms of non-mathematical concepts such as reliability, credibility, plausibility or likelihood to express judgments about the probative value and effect of evidence.<sup>35</sup>

The factors of probative value have been widely discussed in the tribunals' case law. Accordingly, the main elements of the probative value are the reliability and credibility. The relationship between those elements is

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<sup>35</sup> Anderson, Schum, Twining (2005) at 228 - 229; see also Appazov (2013) at 23

however unclear. In *Kunarac et al.*, the ICTY Trials Chamber defined the reliability by comparing it to credibility in the following way:

Credibility depends upon whether the witness should be believed. Reliability assumes that the witness is speaking the truth, but depends upon whether the evidence, if accepted, proves the fact to which it is directed.<sup>36</sup>

The Appeals Chamber in the ICTR has further noted:

Given the large meaning of the term 'reliability', the Appeals Chamber considers that the requirement of prima facie reliability indisputably encompasses the requirement of prima facie credibility.<sup>37</sup>

Following the Court's reasoning in *Lubanga*, where it pointed out that there are 'innumerable factors', which might be relevant to the evaluation of probative value, it seems that the reliability and credibility are both factors, which will be evaluated as components of probative value. Therefore, this approach seems to suggest that the probative value is an overall concept, involving the factors of reliability and credibility.

In each case, the probative value of evidence must be weighed against its possible prejudicial effect.<sup>38</sup> Regarding the prejudicial effect, as mentioned above, the Court pointed out in *Lubanga*, that the Chamber must be careful to ensure that it is not unfair to admit the disputed material, for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber's fair assessment of the issues in the case.

For an example, the investigators might come across a photo on the accused's Facebook page, which shows that the accused was in friendly relations with some of the suspects. The photo might however have bad quality, not entirely showing the faces of the people and therefore raise

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<sup>36</sup> International Criminal Procedure: Principles and Rules at 1024; see also *Kunarac et al.*, TC, 3 July 2000, para 7

<sup>37</sup> *Karemera et al.*, AC, ICTR-98-44-AR73.17, 29 May 2009, para 15

<sup>38</sup> *Lubanga*, TC I, ICC-01/04-01/06-1399, 13 June 2008, para 41

questions regarding its reliability. However, if there was already a suspicion that the accused had certain relationships with the suspects on the photo, then the photo could strongly prejudice the Chamber while making the decision. Therefore, the photo, which due to its bad quality could not even be considered entirely reliable, causes considerable prejudicial effect on the Chamber.

In this example, the photo could possess less of a probative value because of its bad quality. However, as mentioned earlier, there could be numerous different aspects, which affect the probative value and the reliability of open source evidence. Certain framework of reliability is set by the relevant legal instruments, but the Court has also set several rules regarding the assessment of probative value in its case law. The different rules applying to the open source evidence will be discussed in the following chapters.

### 3. Article 69 (7) of the Statute

Generally, the Statute does not provide any guidelines to the parties on how to evaluate evidence during the investigations stage. However, there is a certain general rule set by article 69 (7), which points out evidence, which cannot be considered reliable due to the way it was obtained. According to the article, evidence obtained by means of a violation of the Rome Statute or internationally recognized human rights shall not be admissible if (a) the violation casts substantial doubt on the reliability of the evidence /.../.

As it can be concluded from the provision, some forms of illegality or violations of human rights create the danger that the evidence, such as confession obtained from a person during interrogation, may not be truthful or reliable, as it may have been proffered as a result of the duress arising from the circumstances of the violation.<sup>39</sup> As there are numerous different violations, which might fall under the framework created in article 69 (7), it is possible that certain violations of the rights of the authors of open source information might also affect the reliability of open source evidence.

A violation of the Statute is a relatively straightforward concept, which could include a violation of any of the rights of an accused, victims or witnesses or other substantial or procedural provisions of the Statute, provided that the violation is causally related to the collection of the impugned evidence.<sup>40</sup> The rights of persons during investigations are mainly regulated in article 55 and further in articles 66 – 67. Besides the violations of the Statute, the provision also refers to the violations of ‘internationally recognized human rights.’ This reference directs the Court not only to the large body of treaties and declarations adopted by the UN

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<sup>39</sup> H. Behrens/D. K. Piragoff & Triffterer (2008), at 1334

<sup>40</sup> Ibid, p 1332

and other intergovernmental organizations, but also to the rich case law of institutions like the ECtHR and the UN Human Rights Committee.<sup>41</sup>

While the rights governed in the Statute are primarily relevant to other investigation methods, e.g. witness interviews, then the reference to the internationally recognized human rights might also be relevant to the open source investigations. A hypothetical human rights concern, which could arise during open source investigations is the author's right to privacy. An important dilemma with the processing of the information that is collected from the open sources, especially from the social media relates to the storage of large datasets that contain quantities of digital personal information.<sup>42</sup> For most people this profiling takes place without the data subject even knowing that he or she is being profiled - this development has led to significant concerns about privacy and data-protection as well as the right to a fair trial.<sup>43</sup>

People who are concerned with privacy and data protection in relation to data mining of open source information are not afraid, at least initially, of the loss of ownership over their — digital — personal data. They are primarily concerned that their data is disconnected from the context in which they intended it to be. When people share information (e.g. about their health), they share it with a certain audience of people (a doctor), within a certain environment (the hospital) where certain norms apply (e.g. doctor-patient confidentiality). Different to this example is the environment of social networking sites, which deceptively appear to be for a selected audience. In reality, sites like these are often fully transparent with many people listing and reproducing your pursuits. Making content publicly accessible is not equal to asking for it to be distributed, aggregated, or

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<sup>41</sup> Schabas (2010) at 849

<sup>42</sup> Eijkman, Weggemans (2012), at 291; see also Seifert, 'Data mining and Homeland Security: An overview. CRS Report for Research', *Congressional Research Service*, 2007

<sup>43</sup> Eijkman, Weggemans (2012), at 291

otherwise scaled'.<sup>44</sup> It has been argued therefore that the data mining of social networking sites for security and intelligence purposes could be considered as a violation of privacy.<sup>45</sup>

Whether the violation of the right to privacy in open sources would bring the exclusion of evidence on the bases of article 69 (7) is however questionable. On one hand, the article seems to refer that any violation of internationally recognized human rights could cast a substantial doubt on the reliability of evidence. On the other hand, however, it might be that only some, more serious violations could cast such doubt on the reliability of evidence, that it could be considered 'substantial'. In order to further analyse if a violation of internationally recognized human rights could lead to an exclusion of open source evidence on the bases of article 69 (7), it is necessary to look into the Court's case law and interpretation of article 69 (7).

### **3.1. Application of article 69 (7) in Lubanga**

In *Lubanga*, the exclusion of evidence on the grounds of article 69 (7) was discussed in relation to the violation of suspect's right to privacy during a search and seizure taken place at his home. Although the Trial Chamber concluded that there was a disproportionate infringement to the suspect's right to privacy, and therefore a violation of internationally recognized human rights, then it also stated that the evidence shall only be inadmissible *if* the violation casts substantial doubt on the reliability of evidence.<sup>46</sup>

While analysing the violations, which could cast substantial doubt on the reliability of evidence, the Chamber among other factors referred to the

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<sup>44</sup> D. Boyd, Privacy and Publicity in the Context of Big Data; see also Eijkman, Weggemans (2012), at 292

<sup>45</sup> Eijkman, Weggemans (2012), at 292

<sup>46</sup> *Lubanga*, TC I, ICC-01/04-01/06, 24 June 2009, para 39 - 40

decision made by the Pre Trial Chamber in the same case pointing out following:

The infringement of the principle of proportionality did not affect the reliability of the evidence seized from the suspect's home on the ground that had the search and seizure been conducted in full adherence to the principle of proportionality, the content of the evidence would not have been different.<sup>47</sup>

The Court therefore considerably narrowed down the violations of 'internationally recognized human rights', which might cast substantial doubt on the reliability of evidence. Following the Chamber's reasoning, while deciding whether the violation casts substantial doubt on the reliability of evidence, it is necessary to analyse whether the content of the evidence would have been different had the investigation been conducted in full adherence to the right under question. If the content of the evidence would not change depending on the adherence to the human rights during the collection of evidence, then the violation cannot be serious enough to cast substantial doubt on the reliability of evidence.

For an example, the content of a piece of evidence could change depending on the adherence of a person's human rights during interrogations. If, for example, the suspect is subject to torture or inhumane treatment during an interrogation, then it is highly likely that the content of the statement would have been different had the investigators followed the suspect's fundamental rights.

When it comes to open source investigations, it is not entirely clear whether the author's right to privacy or any other internationally recognized human right could be violated. However, even if a violation of privacy could occur, it is unlikely that the piece of evidence would get excluded based on article

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<sup>47</sup> *Lubanga*, TC I, ICC-01/04-01/06, 24 June 2009, para 85 - 86

69 (7). This is because the content of the open source evidence is not dependent on the way it is obtained.

For example, the investigators could collect information from a suspect's private Facebook page by creating a false account and therefore getting an approval from the suspect to access certain information. Even if that kind of a method would be considered to violate suspect's right to privacy then the evidence would most likely not be excluded because the content of the information would not have been different had the investigators fully adhered to the suspect's right to privacy.

Therefore it can be concluded that article 69 (7) is foremost relevant to the collection of other types of evidence. Due to the special nature of the open source it is highly unlikely that any violation falling under article 69 (7) could cast substantial doubt on the reliability of open source evidence.

## 4. Reliability of sources

Although the reliability of open source evidence is most probably not affected by the violations mentioned in article 69 (7) then there are numerous other factors, which might affect the reliability of that type of evidence. Firstly, it is necessary to point out that the authors of the open source evidence could often be unknown or unclear. Therefore the source itself could often be anonymous, making the evaluation of reliability highly complicated.

In relation to the testimonial evidence, the Court has stated that it should, to the extent possible, be based on the first-hand and personal observations of the witness. The anonymous hearsay evidence, including the anonymous NGO reports and press releases are according to the Court 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".<sup>48</sup>
- 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.<sup>49</sup>

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<sup>48</sup> *Mbarushimana*, AC, ICC-01/04-01/10-514 OA 4, 30 May 2012, para. 40; see also *Gbagbo*, PTC I, ICC-02/11-01/11, 3 June 2013, para 29

<sup>49</sup> *Gbagbo*, PTC I, ICC-02/11-01/11, 3 June 2013, para 27 - 29

As it can be seen from the Court's reasoning, for an effective evaluation of evidence, it is essentially important that the source indicates, where did it obtain its information from. This information is especially important in order to evaluate for an example the independence, motivation and impartiality of the source.

While the Trial Chamber in *Katanga and Ngudjolo* decided to take a relatively strict approach towards the anonymous open source evidence, stating that the UN or NGO reports, not providing sufficient details about their sources are automatically inadmissible and that the news articles and press releases are only admissible if written by an expert<sup>50</sup>, then the more recent approach towards an anonymous open source evidence, is more lenient. According to the Trial Chamber in *Gombo*:

The Chamber underlines once more that its determination on the admissibility into evidence of an item has no bearing on the final weight to be afforded to it, which will only be determined by the Chamber at the end of the case when assessing the evidence as a whole. /.../

/.../ Regarding a news article downloaded from the BBC webpage, the Court notes that although the document seems to have been found as a result of an internet search and was not directly downloaded from the BBC news agency from which it apparently originated, the Chamber is satisfied that it provides sufficient indicia that the document is what it purports to be, that is a press article published by the BBC on the date mentioned therein. The Majority of the Chamber is not persuaded by the defence's argument that press/media reports should be rejected where the prosecution is unable to identify the authors of such report.<sup>51</sup>

Similarly to the Trial Chamber's reasoning in *Gombo*, the Pre Trial Chamber in *Gbagbo* pointed out following:

The admissibility of anonymous NGO reports does not - in any way - predetermine the Chamber's final assessment of

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<sup>50</sup> *Katanga and Ngudjolo*, TC, ICC-01/04-01/07, 1 December 2009, para 24

<sup>51</sup> *Gombo*, TC, ICC-01/05-01/08, 27 June 2013, para 9, 25

the evidence or the weight to be afforded to it. Moreover, the Majority reiterates its view that anonymous NGO reports may be admitted for the limited purpose that the information contained therein may serve to corroborate other pieces of evidence.<sup>52</sup>

According to this approach, the evidence gathered from open sources could be admitted even when there is no information regarding its origins, but the weight afforded to the evidence might vary. While the open source evidence providing clear indication to its sources would be afforded a higher weight, then the open source evidence, which does not provide any details regarding its origins or methodology would be afforded lower weight.

Therefore, while collecting evidence from the open sources it is firstly important to check whether the source indicates its origins. While a piece of open source evidence could prove essentially important for the prosecution's case then as long as it does not provide sufficient information about its sources, its weight could be relatively small.

## **4.1. Finding the origins of the sources**

According to the verification experts, there is a list of questions, which could be asked while searching for the original source of the information:

1. Is there same or similar posts/content elsewhere on open sources?
2. When was the first version of it uploaded/filmed/shared?
3. Can you identify the location, where the information was posted?
4. Are any websites linked from the content?
5. Can you identify the person who shared/uploaded the information, and contact them for more information?<sup>53</sup>

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<sup>52</sup> *Gbagbo*, PTC I, ICC-02/11-01/11, 3 June 2013, para 22

<sup>53</sup> *Silverman/Tsubaki* ⊂ *Silverman*, at chapter 9

If similar information has been shared by several different sources, then it could often be that the source, which first published the information, is the original one and the rest are simply copying the same information. For an example, a discussion in a blog could be started by a news article. At the same time, it could also happen that the same source is delivering information to many other providers. For an example, a news correspondent is sharing information with several different news channels at the same time. In that case, the original source of the information would be the correspondent or the team providing the information, and the news channels would be the secondary sources.

It can also be helpful to find out the location of the information provider, as the ones near the events might be more precise in their reflections than the ones reflecting the events from distance. For example, while a news media provider based in the capital of the state might provide information about a rebel attack to a village then the local people living in the attacked village might provide better informed data on social media.

Regarding videos, films, photographs and audio recordings, the Trial Chamber in *Katanga and Ngudjolo* stated that 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.<sup>54</sup> The same photo or video, for an example, might be shared by various different sites and sources in different contexts.

It has been pointed out in relation to the sources of photos and videos that in order to reveal their original provenance, applications such as Google Image Search or TinEye can prove to be useful and usually the photo or video with the highest resolution/size is the original one. Additionally, for verifying provenance of images it might be helpful to:

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<sup>54</sup> *Katanga and Ngudjolo*, TC, ICC-01/04-01/07, 1 December 2009, para 24

- Check to see if the image has any metadata (data about data). Use software like Photoshop or free tools such as Fotoforensics.com or Findexif.com to see information about the model of the camera, the timestamp of the image, and the dimensions of the original image.
- Social networks like Twitter, Facebook and Instagram strip out most metadata. Flickr is an exception. Instead, try Geofeedia and Ban.jo to identify the GPS data from the mobile device that uploaded the image.

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For verifying provenance of video, it could be useful to:

- Use acronyms, place names and other pronouns for good keyword search on video sharing platforms such as YouTube, Vimeo and Youku.
- Use Google Translate when dealing with contents in a foreign language.
- Use the date filter to find the earliest videos matching the keywords.
- Use Google Image Search or TinEye to perform a reverse video thumbnail search.<sup>56</sup>

It has been stated that photographic evidence functions as a conduit of information relating to the condition of the scene and that photography provides an excellent visual communication tool to allow the crime scene to be explained and demonstrated in court together with sketches and oral evidence from the investigator who attended the scene. Nevertheless, it has to be noted that different photos could possess varying levels of subjectivity

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<sup>55</sup> Silverman/Tsubaki  $\subset$  Silverman, at chapter 9

<sup>56</sup> Ibid.

and objectivity.<sup>57</sup> The credibility of the content of photographic and video evidence will be further discussed in the 5<sup>th</sup> chapter.

## **4.2. Impartiality and independence of sources**

After the source of the evidence is revealed, it is necessary to check its impartiality and independence. Depending on the background of the source, and where it gathers its information, several concerns might raise regarding its independence. Some of the sources could be biased by the political or national views for an example, while some might also be directly related to the parties of the trial. For an example, a newspaper, which is sponsored by the government, might not be impartial, because it provides news strongly influenced by the government's political views.

The impartiality of open source evidence was discussed by the Trial Chamber in *Gombo*, where the Court noted following:

The NGO Reports can be considered prima facie reliable, provided that they offer sufficient guarantees of impartiality. Based on its review of the content of the reports under question, the Majority was satisfied that they offered satisfactory information on their sources of information and methodology, providing sufficient indicia of reliability to warrant their admission into evidence.<sup>58</sup>

The Court further pointed out that the NGO reports under question were prepared based on the information gathered during and after an investigative mission to the CAR and the majority was satisfied that the reports provide sufficient indicia of reliability to warrant their admission into evidence.<sup>59</sup> It can be assumed that the reason why the reports under question were considered to offer sufficient guarantees of reliability is the

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<sup>57</sup> Porter, G. at 40

<sup>58</sup> *Gombo*, TC, ICC-01/05-01/08, 27 June 2013, para 21

<sup>59</sup> *Ibid.*, para 19

fact that they were prepared based on an investigative mission, therefore the facts were first-hand.

While in this case questions regarding the impartiality of an open source arose in relation to the NGO reports, then the impartiality might also be questioned in relation to other open sources. Similarly to the NGOs, the news articles, for example, could be conducted following different methodologies or sources of information. While some of the news media sources could be considered independent, basing their releases on first-hand information then others could be closely related to the parties or have strong political biases.

Open sources might often spread false information benefitting some of the suspects. As the crimes under Court's jurisdiction are often related to the present or previous government officials of the states then the news media could be strongly biased to spread false propaganda or false information favoring the accused. Besides the biased news media, there might often be large groups of people favoring some of the accused and therefore spreading biased information on social media or blogs.

In order to evaluate the independence of the source, it might be important to search for the previous pieces of information that the same source has published and also other sources, that are in the network. Many social media sites provide lists of people that are associated or connected to the users, and also many news media providers provide links to similar sources with similar backgrounds. In order to evaluate the source's independence it might be helpful to consider the following questions:

- How active are they on the account? What do they talk about/share?
- What biographical information is evident on the account? Does it link anywhere else?
- What kind of content have they previously uploaded?

- Where is the uploader based, judging by the account history?<sup>60</sup>

The biographical information might often be important to evaluate as it could link the source to some of the parties to the procedure. For example, information coming from a close relative could often not be considered impartial or independent. The location where the information was uploaded could also provide relevant information about the connections and relations of the source.

Nevertheless, it must be noted that the impartiality of the sources of evidence could be questionable even if there is a clear indication to the author of the information and its methodology. For example, NGO reports, which are prepared based on on-site investigations could easily reflect the political biases of the country, where the NGO originates from. Similarly, the witnesses, who are by no means connected or related to the suspect or accused could be biased by their personal beliefs or views. Therefore, the impartiality of sources is always questionable and it is mostly impossible to find absolutely impartial and independent source of evidence.

### **4.3. Corroborating sources**

As in some of the cases the authors of open source evidence could be found and identified then it is possible for the investigators to contact the original source of the information and obtain further information. Contacting the actual source of the information might give the investigators an opportunity to ask further details about the information provided and therefore also increase the reliability of the source.

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<sup>60</sup> Silverman/Tsubaki  $\subset$  Silverman, at chapter 9

The importance of corroborating sources was stressed by the Court in *Mbarushimana*, where the prosecution had based a large part of its reasoning on the publicly available NGO reports. The Court noted following:

Although no evidence was provided to the Chamber in relation to an attack against the civilian population in Busurungi on or about 28 April 2009 then based on the witness statements, read together with UN and Human Rights Watch Reports, the Chamber is satisfied that there are substantial grounds to believe that three women were found dead near Busurungi, with wounds and signs of rape.<sup>61</sup>

Following the Court's reasoning, the open source information served as corroborating evidence for the witness statements and therefore considerably increased the reliability of the statements. Similarly to this situation, it might also happen that the open source evidence is corroborated by another piece of evidence and therefore the reliability of the evidence increases, or that multiple pieces of open source evidence corroborate each other and therefore provide more reliable information to the trial.

In *Gombo* for an example the Trial Chamber stated in relation to a press article published by the BBC that although the admission of this evidence is for limited purposes to be determined on a case-by-case basis then it could serve to corroborate other pieces of evidence.<sup>62</sup> Therefore, even if a piece of open source evidence is considered to possess relatively small amount of probative value, it could still be useful for the proceedings as it can serve to corroborate other pieces of evidence.

While finding the corroborating evidence, the guidelines issued for the crises journalists can be useful again. According to the guidelines, there are some questions, which can be asked while searching for corroborating

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<sup>61</sup> *Mbarushimana* (ICC-01/04-01/10-465-Red), PTC I, 16 December 2011, para 135

<sup>62</sup> *Gombo*, TC, ICC-01/05-01/08, 27 June 2013, para 25

sources:

- Can you confirm the identity of, and contact, the author?
- Try to find other accounts associated with the same name/username on other social networks in order to find more information:
  - If you find a real name, use people search tools (Spokeo, White Pages, Pipl.com, WebMii) to find the person's address, email and telephone number.
  - Check other social networks, such as LinkedIn, to find out about the person's professional background.<sup>63</sup>

In some of the open sources it is relatively easy to confirm the identity of the author and find contact details. For example, a report issued by Human Rights Watch generally contains the name of the author and the date when the report was issued. The search for authors might be, however, more challenging when it comes to the anonymous bloggers or social media.

As the social media sites might often not refer to the person's real name or contact details, it might be necessary to search for similar usernames in different networks, databases. Some of the networks might give information about the person's social background, the groups of people he or she is associated with etc., and some others might lead the investigators to information about the person's professional background. All this information could be helpful while identifying the author of evidence and finding corroborating pieces of information.

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<sup>63</sup> Silverman/Tsubaki  $\subset$  Silverman, at chapter 9

## 4.4. Prior experience with the source

As the investigators conduct open source searches on a regular basis, there develops a certain network of different sources. While some of the sources have history of providing accurate and trustworthy information then some other sources might be known for spreading false data. In *Ngudjolo* the Court questioned the reliability of a witness as the witness had a history of threatening and interrupting the testimony and even refusing to appear in court.<sup>64</sup> Therefore, because of the negative experiences with the specific witness, the reliability of the source decreased.

With the open sources, there are no questions arising regarding the interruptions of testimony or refusing to appear in the court. However, there are several other ways that the negative previous experiences could affect the reliability of open sources. For example, when a source has been spreading false information in the past, its reliability becomes more questionable than with the sources, which are known to provide trustworthy data. For example, a specific blogger, who is known to publish false data could be assumed to be less trustworthy than an internationally recognized NGO report, which is known to publish trustworthy information.

However, even when certain sources are known to provide credible information, it does not mean that the investigators could rely on them automatically on a regular basis. It must be considered that even known and trusted sources might make mistakes. For example, an NGO, which has provided trustworthy information in numerous previous reports could still make mistakes in its research and preparation

Therefore, the history of providing reliable, trustworthy information might raise the general reliability of a specific source, but it should always be taken into consideration that even the most trustworthy sources could

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<sup>64</sup> *Ngudjolo* (ICC-01/04-02/12-3-tENG), TC II, 18 December 2012 para 141

provide incredible information for various reasons. Hence the source must always be evaluated separately, depending on the specific information and case under investigation.

It could be helpful however to conduct a certain database of different open sources, which also reflects the previous experiences with the source, indicates possible biases that the source could have and refers to the possible corroborating sources. For an example, a blogger, whose posts are often screened by the Court and possibly used in the investigations, could have a profile in the Court's database. As the profile could indicate the trustworthiness and the prior experiences with this source, then it would make the open source investigations relatively more effective and time-efficient.

## **4.5. Language of the source**

The Court has stressed the importance of accurate translations of evidence on several instances. For an example in *Ngudjolo*, the Court noted that the interpretations could not always reflect what was said absolutely perfectly and precisely. The Chamber also noted various occasions where there were difficulties in understanding the transcriptions of statements.<sup>65</sup> While this was stated in relation the translations of witness statements, similar difficulties might also arise regarding open source evidence.

As the most accurate, instant and detailed news and reflections about events are often published by the local news media providers and the local people then it might often happen that the information is in a different language than the working languages in the Court. While there are always translators and interpreters available then depending on the content and context of the information, it might happen that some words or phrases are

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<sup>65</sup> *Ngudjolo*, TC II, (ICC-01/04-02/12-3-tENG), 18 December 2012 para 62

difficult or complex to translate to the official working languages or there are no correspondent phrases.

For example, if some of the local people are spreading statements and detailed overviews about certain violent attacks taken place in their village in Kenya and the statements are published in Swahili, it could be time consuming and challenging to give accurate translations of those statements.

Also, with the witness statements, for example, it is always known that the provided evidence is at least to some extent relevant to the proceedings, but with the information coming from the open sources, it could be that the investigators are taking the trouble of translating certain information and it turns out to be completely irrelevant and useless for the proceedings.

For those situations, there are, however, tools like Google Translate, which could help the investigators to get a general first impression about the information and when it turns out to be relevant then more specific and accurate translations can be obtained. With some more remote and exotic languages, it is however possible that those quick translation opportunities do not exist and therefore translators are necessary.

## 5. The credibility of the open source information

Even if the source of evidence can be considered reliable then it does not necessarily mean, that the information delivered by the source is also credible. For an example, in the ICTY case of *Kupreskic et al.*, the judges pointed out following:

“/.../ an enormous amount of research has determined that the relationship between the certainty expressed by a witness and the correctness of the identification is very weak. /.../ Even witnesses who are very sincere, honest and convinced about their identification are very often wrong.”<sup>66</sup>

Same could also happen to the open sources. While a source could fulfil all the reliability criterions discussed in the previous chapter, then it could still deliver incredible information. For an example, a news article, which provides information about its sources and methodology and is also corroborated by an oral statement of the author of the article, could be considered to be a relatively reliable source. At the same time, the information itself could be incredible, as it provides wrong facts.

### 5.1. Entirety of the information

In relation to witness statements, the Court has stressed that it is important to take into consideration the entirety of the testimony, having regard in particular to the capacity and the quality of their recollection. While assessing the entirety of the witness statements, the Court has discussed the level of detail provided by the witnesses in their testimonies and also the

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<sup>66</sup> *Kupreskic et al.*, AC, (IT-95-16-A), 23 October 2001 para 138

accuracy and the clear descriptions of the events.<sup>67</sup>

In *Ngudjolo*, the Court pointed out following:

The witness provided useful information on the itinerary followed by the battalion on its journey to Beni. He described clearly and with manifest attempt of accuracy the military positions within the group and those of the various commanders in charge, in addition to giving a reasonably clear description of the military discipline in force within the militia, useful details of the names of the commanders in charge of his task and information on the workings of the military tribunal.<sup>68</sup>

The level of detail, accuracy and the clear description of the events under question could also be evaluated in relation to the open source evidence. For an example, some of the open sources only provide a very general review of the events under question while some of the other sources provide a detailed overview.

Nevertheless, when it comes to the witness statements then the evaluation of the accuracy could be assumed to be important in order to evaluate whether the witness recollects the events correctly. For an example, an eye-witness could be assumed to remember the details such as the date of an attack, the clothing of the perpetrators or the weather during the attack. Those kind of details indicate that the witness is telling the truth and can remember the event clearly enough. When it comes to the open source information however, then the sources might deliberately exclude some of the information and reflect only chosen parts of certain events.

For an example, an NGO report, which is not providing information about the clothing of the suspects could not be considered less credible for this reason. Similarly, a news article, which only states that an attack has occurred in certain region, not reflecting the exact time and weather during the attack could not be considered less credible for that reason. Therefore a

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<sup>67</sup> *Ngudjolo* (ICC-01/04-02/12-3-tENG), TC II, 18 December 2012 para 53, 136 - 137

<sup>68</sup> *Ibid.*

piece of open source evidence, which is not reflecting the details of the events in accuracy could not be considered less credible for that reason.

As it was mentioned above, the open sources could provide information for different purposes. Depending on the specific purpose of the piece of evidence, the entirety and accuracy of the information might vary largely. However, even if a piece of evidence is only referring that an attack occurred in a certain location, then it does not automatically mean that this information is incredible. Here it is again relevant to stress the importance of corroborating sources. While the information provided by an open source could be very general, then it could be helpful to contact the authors of the information to gain more knowledge of the event or search for further information on other sources.

## **5.2. Consistency of the information**

In *Mbarushimana*, the prosecution based a large part of its reasoning concerning certain war crimes on the evidence collected from open sources, such as reports issued by the UN and Human Rights Watch. The Court however noted following:

Given the paucity of the information provided, the inconsistencies between the data and the lack of corroborating evidence, there are no sufficient grounds to believe that the alleged crimes occurred. /.../.<sup>69</sup>

The inconsistencies between the data might occur internally, meaning that the same piece of information contradicts itself, while it could also happen that the piece of information contradicts another document, resulting in external inconsistency.

An internal inconsistency might be the result of a technical mistake, while it

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<sup>69</sup> *Mbarushimana* (ICC-01/04-01/10-465-Red), PTC I, 16 December 2011, para 75 – 78, 115 - 122

might also refer that the information is incredible in general. For example, if a witness statement contradicts itself then it could be a clear sign that the witness is not telling the truth. Same could happen with an open source evidence, information, which contradicts itself could be easily considered incredible.

It must be taken into consideration however that a contradiction might also be a result of a technical mistake. For an example, an NGO report could provide credible information, but in one part of the report, there is an indication to a number, which is different from the one mentioned above. In such cases it could easily be, that the inconsistency does not refer to the fact that the report cannot be considered truthful or credible, but instead the inconsistency is a result of a simple mistake.

It might however also happen, that multiple different pieces of open source evidence contradict each other. For an example, a news article describes an attack to a village in one way and a local person from the village describes the attack in a different way. In those cases it could be assumed that either one of the sources provides incredible information.

In case of an external contradiction, it could be helpful to evaluate both of the sources and the information according to the criteria provided above and conclude, which one of the sources could be considered to be more reliable in general. For an example, a person might post information on social media referring that his village was attacked by a certain rebel group. A local newspaper on the other hand could post information that the village was attacked by the government forces. It could happen, that the person posting information on social media is found out to be closely related to the government forces and therefore there are considerable concerns regarding his impartiality. The newspaper however, could be considered to be impartial and therefore in this situation more reliable source.

### **5.3. Credibility of the photographic and video evidence**

As it was already discussed earlier while analysing the methods of finding out the origins of different sources, the photos and videos found on open sources could possess varying levels of subjectivity and objectivity. Depending on the quality of the material and several other aspects, the credibility of the photo or video could vary largely.

Regarding the reliability of the photographic evidence, it has been argued that the thresholds will vary depending on the type of photography and its mode of inquiry. Some of the aspects, which are relevant to the evaluation of the credibility of photographic evidence, are following:

1. The device used to take the photo could largely affect the credibility of the material, as some of the photos could be taken with high-resolution cameras, while the others could be taken with devices providing lower resolution.
2. It might also be important to evaluate the lighting of the photographic evidence as the photos taken during the day could provide clearer image of the events than the photos taken during the night, not accurately showing the faces of the people etc.
3. Additionally, it is important to evaluate the angle that the photo was taken from. For an example, when the photographer was in the middle of an attack and took a photo from his or her standpoint then it could be that the photo does not provide a whole picture of the attack. At the same time, a person who took the photo from distance,

from a window of a higher house for an example, could have captured the whole event a little more objectively.<sup>70</sup>

The same aspects could also be relevant to analyse in relation to video evidence. Videos might be taken with different devices from different angles and in different lighting. Depending on those factors, the credibility of the material could differ largely.

It has to be pointed out however, that when it comes to the photo or video evidence, then it is always best to have several different photos or videos taken by different people. For an example, a person who took a photo from her home window above a square where a rebel attack took place could have captured the whole attack, while a person who took a photo from the square could have captured specific witnesses, victims or suspects.

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<sup>70</sup> Porter (2011), at 57

## 6. Conclusions

Coming back to the research question posed in the beginning of this research and the initial purpose of the paper, there are several conclusions, which have to be pointed out. Firstly, it is necessary to state, that the initial evaluation of reliability during the investigative phase should not take place in a vacuum. Instead, the evaluation should firstly consider, whether the evidence is relevant to the aspects considered at the trial and secondly, the probative value of evidence must be weighed against its possible prejudicial effect. While the evidence considered irrelevant should be excluded already in the investigative phase, then the relevant evidence will be subject to the initial evaluation of probative value.

Although it has been stated by the Court, that there are innumerable factors, which might be relevant for the evaluation of probative value, then the assessment of reliability and credibility form a large part of this evaluation according to the present case law. While the initial evaluation of reliability involves the sources of evidence, then the evaluation of credibility concerns the information provided by the source and answers the question, whether the information should be believed or not.

According to the Statute and the Rules of Procedure and Evidence, it is one of the key principles of the international criminal procedure in the ICC that the Chamber has to be able to assess the evidence 'freely'. Nevertheless, there is a certain standard of reliability provided by the Statute and the relevant case law.

Article 69 (7) of the Statute points out that evidence obtained by means of a violation of the Rome Statute or internationally recognized human rights shall not be admissible if the violation casts substantial doubt on the reliability of the evidence /.../. As the article sets a relatively wide criterion

of violations, which might cast substantial doubt on the reliability of evidence, then it is not excluded that a violation, which occurred during an open source investigation, could also cast a substantial doubt on the reliability of evidence.

Following the Court's reasoning in *Lubanga*, it is however highly unlikely that a violation during an open source investigation could cast such doubt on the reliability of evidence, that it can be considered substantial. The reason for this is that the content of the open source evidence would not change depending on the violation. If a person's right to privacy is violated on open sources for an example, then the content of evidence would be the same, had the investigators not violated the person's right to privacy.

Apart from article 69 (7), there are however several other factors, pointed out in the relevant case law, which could affect the reliability of open source evidence. The reliability of sources for an example is highly dependent on the fact whether the source indicates where it obtained its information from or not. If there is a clear reference to the methodology and source of the information, then the Court is able to conclude whether the source is reliable or not. However, if it is unclear, where does the source obtain its information from, then the whole process of evaluation is highly complicated and often impossible.

If there is a clear indication to the source of evidence, then different factors affecting the reliability of evidence can be evaluated. The reliability might be affected by the impartiality and independence of the source for an example, as the open sources could often be related to some of the parties to the trial. Considering that the ICC trials often involve political leaders and opposition members then the news articles for an example could be biased by the publisher's political preferences.

Additionally, the reliability of sources could be affected by the fact whether there are corroborating sources, which could provide supporting information or confirm the information provided by the open sources. An NGO report for an example could be supported by an oral statement made by the author, while a post on social media could be supported by a newspaper article or a radio podcast.

The reliability of open sources could also be evaluated depending on the prior experience with the source. A source, which has a history of providing false information, could be considered less reliable, while a source, which has been trustworthy in the past, could be considered more reliable. Similarly, it is necessary to consider the original language of the source. While some of the sources publish its information in another language than the one spoken in the Court, then it must be taken into consideration, that some of the important instances could go missing during the translation process.

When it comes to the credibility of the information provided by the open sources, then it is firstly important to note that there is an important difference between the credibility of witness statements, which forms a large body of the Court's case law regarding the assessment of credibility until now, and the credibility of open source evidence.

The reason for this is that the credibility of witness statements often concerns the fact whether the witness can sufficiently recall the events under question or not. For this evaluation it is often necessary to evaluate the level of details and accuracy proved by the witness. With the open source evidence, the evaluation of accuracy and level of details is however not relevant, as the general character of the open source evidence is considerably different. News articles for an example can purposefully select the most important information to publish and NGO reports could only reflect the events, which are directly related to their interest zone.

For the evaluation of the credibility of open source evidence, it is however highly relevant to analyse the consistency of the information. The internal inconsistencies for an example could refer to the general incredibility of the information, while the external inconsistencies between two or more sources could refer that one of the sources could not be considered reliable.

Regarding the photographic and video evidence available on open sources, the credibility standards could be considerably different from the ones applicable for the rest of open source evidence. It could be relevant to evaluate the quality of the photo/video, the angle from which it was taken or the lighting of the scene.

Finally, it has to be stressed once again that the general principle in the ICC procedures is that the Court is free to assess the evidence on case-to-case basis. This means that notwithstanding those guidelines for the initial evaluation of evidence, there Court might always come to different conclusions in its assessment of evidence or require additional supporting information.

Considering the highly beneficial nature of the open source evidence to the ICC in general, and the large range of open source investigations conducted by the Court on regular basis, it is however necessary that the investigators have some type of general framework in their possession, according to which initially evaluate the open source evidence. As it was concluded from the relevant case law, certain framework can be drawn and some guidelines can be pointed out. The future case law regarding the admissibility and evaluation of open source evidence, will however decide whether this type of investigations will gain more weight in the Court's procedures or remain to serve as corroborating and secondary evidence.

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