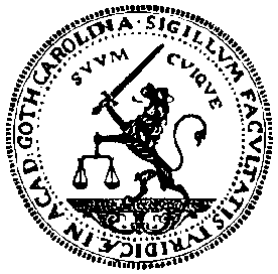

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Fact-Finding Online – A Fair Trial Offline?

An Analysis of the Admissibility of Digital Open-Source Evidence in Relation to Trial Fairness at the International Criminal Court

JAMM07 Master Thesis

International Human Rights Law
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Contents

Summary

The Office of the Prosecutor (OTP) of the International Criminal Court (ICC) faces massive evidentiary problems due to flawed state-cooperation, limited access to sites of atrocity and an insufficient budget. Meanwhile, potentially relevant digital open-source information abounds, as citizens increasingly turn to social media to spread awareness of human rights violations and possible international crimes. Using YouTube videos, Facebook posts, and other publicly available digital content as evidence at the ICC may mitigate the limitations inherent in the OTP's traditional dependence on state-cooperation to obtain evidence, hence increasing the efficiency of international criminal justice and furthering the objective of crime control. However, using digital open-source information as evidence presents new challenges of its own, with particular implications for the accused's right to a fair and expeditious trial, which is an equally important objective of the ICC procedural framework.

The OTP has long made use of evidence from open sources, and the ICC chambers have often allowed for the admission of reports from United Nations (UN) missions, non-governmental organisations (NGOs), and news agencies in the past. However, establishing facts in our "post-truth" times is an increasingly complex affair. The spread of fakes, forgery and misattributed content online, coupled with unresolved questions relating to the authentication and verification of such materials, suggest that there are reasons for the ICC bench to be cautious about admitting Instagram photos, Tweets and other online content into evidence. Furthermore, there is an ever-increasing number of private stakeholders engaged in online fact-finding, which raises questions of bias and exacerbates already existing concerns as to the equality of arms between the Prosecutor and the defence. It must therefore be assessed whether the ICC procedural framework remains effective, appropriate and capable of guaranteeing the fair-trial rights of the accused in the face of the particular challenges posed by the acquisition and use of the newest forms of evidence available online. Decisions on admissibility – i.e. on what evidence the ICC judges may base their findings – assume particular importance in this regard. The present study thus sets out to analyse the admissibility of digital open-source evidence in relation to trial fairness at the ICC. More specifically, the purpose of the thesis is to analyse what impact that the admission of digital open-source evidence may have on the accused's right to a fair trial, and to explore whether the ICC chambers can guarantee fairness through their current approach to admissibility, that is, if the OTP increasingly relies on online content to substantiate criminal allegations.

The thesis concludes that the ICC's rules on the admissibility of evidence allow for considerable judicial discretion. Thus far the ICC judges have adopted a permissive approach, allowing for unauthenticated materials and information from unknown sources to be admitted into trial. This may not sufficiently protect the accused's right to a fair trial when digital open-source evidence start flooding the court rooms in The Hague, but may deprive the defendant of his or her right to adequately test the evidence at trial, and have grave implication for his or her right to be tried without undue delay. In view of the increased spread of fakes and misattributed online materials, the large number of private parties engaged in fact-finding, risks of bias and an exacerbated substantial inequality between the parties, the present study submits that the ICC chambers must update their approach to the admissibility of evidence as far as digital open-source materials are concerned. The unfettered admission of unreliable or unauthenticated digital open-source evidence would, at best, result in a considerable loss of time and may, as a worst-case scenario, result in an unsafe verdict.

Sammanfattning

Internationella brottmålsdomstolens (ICC) åklagarkontor har stora bevisproblem på grund av bristfälligt samarbete med statsparter, begränsad tillgång till brottsplatser och en mager utredningsbudget. Samtidigt finns nu en enorm mängd potentiellt relevant digital information tillgängligt i öppna källor online, i och med att människor i krigszoner i ökande omfattning laddar upp material till sociala plattformar, likt Facebook, Twitter och YouTube. Detta i syfte att sprida medvetenhet om kränkningar av mänskliga rättigheter och potentiella folkrättsbrott. Att använda sådan digital information från öppna källor som bevismaterial vid ICC skulle kunna råda bot på de bevisinsamlingsproblem som det illa fungerande statspartssamarbetet medför för ICC:s åklagarkontor. Det skulle i sin tur bidra till billigare och bättre internationella åtal och främja en effektivare brottsbekämpning. Att använda YouTube-videor, Facebook-inlägg och Tweets som bevis skapar emellertid också nya utmaningar, med potentiellt särskilt allvarliga konsekvenser för den åtalades rätt till en rättvis rättegång.

ICC:s åklagarkontor har länge använt sig av material från öppna källor, och ICC:s kammare har ofta tillåtit rapporter från Förenta Nationerna, NGOer och nyhetsorganisationer som bevisning. Att fastställa fakta i en "postfaktisk" tid (*eng* "post truth") blir dock allt mer komplext. Internets framväxt har bidragit till en ökad spridning av felaktig information och förfalskat material och det finns utestående frågor relaterat till autentisering och tillförlitlighet vad gäller online-material. Dessutom är allt fler privata tredjeparts-aktörer involverade i utredningar online, vilket i sin tur genererar risker för partiskhet och ökad ojämlikhet (*eng* "inequality of arms") mellan åklagaren och försvaret. Det måste därför utredas huruvida internationell straffprocess, som utformades före internets tillkomst, är fortsatt effektiv och ändamålsenlig när dess regler nu måste adressera de särskilda utmaningar som användandet av digital bevisning från öppna källor aktualiserar. Att analysera ramverket som reglerar vilken bevisning som parterna får åberopa (*eng* "the admissibility of evidence") – det vill säga vilken bevisning som domarna i Haag får basera sina domslut på – är av särskild vikt. Denna uppsats syftar därför till att analysera vilken bevisning som skall tillåtas vid ICC i relation till rätten till en rättvis rättegång. Uppsatsen ämnar särskilt att utreda hur domstolens nuvarande tolkning och tillämpning av ramverket som reglerar vilken bevisning som tillåts under processen påverkar den åtalades rätt till en rättvis rättegång när ICC:s åklagare i ökad utsträckning åberopar digital bevisning från öppna källor för att underbygga åtalet.

Uppsatsen kommer fram till att ICC har antagit en flexibel och tillåtande ansats vad gäller bevis tillåtlighet, inbegripet material som inte autentiserats och information från okända källor. När digital bevisning från öppna källor börjar strömma in i Haag riskerar nuvarande tolkning och tillämpning av relevant regelverk att frånta den åtalade rätten att effektivt testa och utmana bevisning mot honom eller henne. Dessutom riskerar en för tillåtande ansats till digital bevisning från öppna källor ha allvarlig påverkan på den åtalades rätt att få sin sak prövad utan oskäligt dröjsmål. Den ökade spridningen av desinformation och förfalskat material, det stora antal privata tredjepartsaktörer som deltar i insamling av bevisning online, risker relaterat till partiskhet och ökad ojämlikhet mellan parterna, gör att ICC måste anta en selektiv ansats till digitala bevisning från öppna källor.

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Friends and family: Tack för allt!

27 May 2021, The Hague

Abbreviations

AMCHR	American Convention on Human Rights (1969)
AFCHPR	African Charter on Human and Peoples Rights (1981)
Berkeley Protocol	Berkeley Protocol on Digital Open Source Investigations (2020)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
ECtHR	European Court of Human Rights
Elements of Crimes	International Criminal Court, Elements of Crimes (2011)
Ed.	Editor(s)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights (1966)
ICCSt	Rome Statute of the International Criminal Court (1998)
ICJ Statute	Statute of the International Court of Justice (1946)
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Tribunal for the former Yugoslavia
NGO	Non-governmental organisation
OHCHR	Office of the High Commissioner for Human Rights
OSINT	Open source intelligence
OTP	Office of the Prosecutor of the International Criminal Court
RPE	The Rules of Procedure and Evidence of the International Criminal Court (2002)
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties (1969)

1. Introduction

1.1 Background

Smartphone and social-media use continues to proliferate around the world. This has resulted in abundant digital documentation, not only of vacations, family reunions, and nights out with friends, but also of alleged human rights violations and potential atrocity crimes.[1] A huge amount of data is pouring out from conflict zones as photos and videos are posted to social media by witnesses, victims and sometimes by the perpetrators themselves, as they use the internet for recruitment and propaganda purposes. Evidence derived from these publicly accessible online platforms, such as Facebook, Twitter, and YouTube, is now becoming increasingly important for criminal prosecutions.[2] Given how much contemporary communication now happens in digital space, it has even been suggested that "not knowing how to comb online platforms may soon be considered a form of malpractice."[3]

Figuring out how to use such digital open-source information as evidence is arguably more important for the ICC than for most courts. International criminal investigations are facing massive evidentiary problems – limited budgets, security risks to investigators, restricted access to sites of atrocity, and witness intimidation – that have derailed several high-profile prosecutions[4] of alleged war criminals. Furthermore, the OTP does not have its own international police force or any independent authority to compel the production of evidence.[5] Its lack of enforcement powers has therefore – historically – made the OTP dependent on voluntary cooperation from friendly states, which has been non-existent or flawed at best.[6] The availability of data online thus presents an opportunity for the OTP to overcome these obstacles and mitigate the limitations resulting from the traditional dependence on state cooperation to obtain evidence, as it allows ICC investigators to gather relevant data from Court's premises in The Hague (which also cuts costs and reduces the need to put investigators in danger).[7] National jurisdictions, on the other hand, are not faced with the same necessity of using digital open-source information as evidence, as they have the ability to order search warrants, for instance, and generally have access to the crime scene soon after a crime occurs. Furthermore, domestic authorities are rarely faced with the complexities of investigating crimes from afar during ongoing armed conflicts. The ICC is therefore likely to be a pioneer in focusing predominantly on the newest emerging forms of evidence available online.[8]

[1] Koenig (2020) at 44.
[2] Koenig & Mehandru (2019); Eurojust Genocide Network (2018) at 7-9.
[3] Koenig (2020) at 43.
[4] See e.g., Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta, *Kenyatta* (ICC-01/09-02/11), Trial Chamber V(B), 5 December 2014 [hereinafter Notice of Withdrawal, *Kenyatta*]; Judgment pursuant to article 74 of the Statute, *Ngudjolo Chui* (ICC-01/04-02/12), Trial Chamber II, 18 December 2012 [hereinafter Judgment, *Ngudjolo Chui*].
[5] Articles 86 and 87(7) Rome Statute of the International Criminal Court (1998) [hereinafter ICCSt].
[6] Demirjan (2010) at 183; Whiting (2017); Public Redacted Version of "Prosecution request for a finding on the non-cooperation of the Government of the Sudan in the case of The Prosecutor v Ahmad Harun and Ali Kushayb, pursuant to Article 87 of the Rome Statute", *Harun and Abd Al-Rahman* (ICC-02/05-01/07), Pre-Trial Chamber I, 19 April 2010, paras. 33-36 [hereinafter, Non-Cooperation Filing, *Harun and Abd Al-Rahman*].
[7] Koenig (2020) *ICC Forum*.
[8] Cole (2015).

The Libya situation, currently under investigation at the ICC, is an illustrative example as to the potential of this new kind of evidence. State-cooperation has been limited, since the Libyan government does not have control over the entire territory, but there has been an unprecedented extent of citizen engagement, in terms of online fact-finding. This has enabled the OTP to make progress in their investigations even if security concerns have prevented the Office from undertaking any meaningful investigative measures inside the country.[9] In 2017 the Pre-Trial Chamber I issued an arrest warrant against the Libyan commander Mahmoud Al-Werfalli, which marked the first time that the ICC OTP relied heavily on evidence collected from social media. The charge of murder as a war crime under Article 8(2)(c)(i) of the Rome Statute of the International Criminal Court (1998) (ICCSt) was based on seven incidents, each captured on video, that were uploaded to social media, showing Al-Werfalli shooting individuals himself as well as ordering others to commit executions. The Pre-Trial Chamber was satisfied that there were "reasonable grounds to believe" (Article 58(1) ICCSt) that Al-Werfalli had committed a crime within the Court's jurisdiction.[10]

Open-source acquisition has long played an integral role in the OTP's investigation of situations and the prosecution of cases.[11] NGOs and UN missions have written reports, gathered witness statements and interviewed victims for advocacy and accountability purposes, which the OTP often has made use of in the past. Similarly, the OTP has often submitted news articles and broadcasts provided by journalists as evidence.[12] However, before the arrival of the internet, the field of open sources was limited, and its collection often required a trip to a physical location for access. The emergence and spread of social media and camera-enabled smartphones have thus dramatically expanded the range of open sources available for mining information and potential evidence. Furthermore, social media platforms allow users to upload a broad range of material to the internet, including posts with text, video, audio, and images. With millions of content-creators online, the amount of digital information available and the number of sources has grown exponentially. This prompts the question of how the diverse forms of digital content available online should be understood, and whether it can, indeed, be evaluated and admitted into trials in The Hague based on the same criteria as more traditional forms of open-source evidence, such as paper documents provided to the OTP by news organisations, NGOs or UN missions.

To the limited extent that legal scholarship has addressed the emergence of digital open-source evidence, it has often been conceptualized in light of an ongoing process of technological development, with advances in audio and visual documentation making its way into courtrooms; "from the photograph, to the camcorder, to the cell phone recording".[13] This understanding, however, suggests that all of what needs to be known about digital open-source evidence can be understood in light of existing principles of evidence. This thesis, however, argues that the analytical frame has to be widened to also encompass the fundamental changes underway in the investigatory landscape online. There are four main reasons why.

First, the digital format of online content makes manipulation easy to accomplish, and often hard to detect, and the advent of social media has increased the spread of misinformation,

[9] Ibid.
[10] Warrant of Arrest, *Al-Werfalli* (ICC-01/11-01/17) Pre-Trial Chamber I, 15 August 2015 [hereinafter, Warrant of Arrest, *Al-Werfalli*].
[11] Baylis (2009) at 121.
[12] Freeman (2020) at 51.
[13] R. J. Hamilton (2018) at 5.

fakes and forgery. Establishing facts in these "post-truth"[14] times is thus an increasingly complex matter, and there are unresolved issues of authentication and verifiability relating to digital open-source information, that are exacerbated given the fact that it often will be difficult to ascertain when, where, and by whom a particular YouTube video or Tweet was uploaded. These concerns as to verifiability and authentication naturally affect the reliability of online materials, which, in turn, give rise to concerns that online investigations will lead to biased or incomplete findings or, as a worst-case scenario, convictions of innocent persons.[15]

Second, the expansion of the information landscape has not only had implications for what potential open-source evidence is out there, but also *how* and by *whom* it is created, acquired, verified and preserved. While open-source evidence, per definition, has always been collected and disseminated by others,[16] the emergence of digital open-source information expands the role of third parties, for several practical reasons. First, the ICC is, in a sense, a court of last resort, as it can only exercise its jurisdiction once national authorities have failed to act. Therefore, there is often a considerable time lapse (sometimes several years) between international crimes being committed and the launch of an ICC investigation. This considerably delays ICC investigators from conducting fact-finding activities.[17] Second, the OTP has limited the scale and scope of its investigations, as a matter of strategy and due to resource constraints, and the Office does not have the resources or the technical expertise to wade through the staggering volume of user-generated content online on its own.[18] Third, quite paradoxically – while the OTP risks drowning in data – some of the most relevant pieces of information risk being lost as private social-media companies routinely remove photo and video material from their platforms because of security concerns, or because it is considered too graphic and violent. The only way to ensure that material once published on social media is available for prosecutions that eventually take place is to preserve the material as quickly as possible after it is uploaded. It has therefore been suggested that the OTP should collaborate with technology companies and NGOs with expertise in digital material.[19] There exist several evidence-focused NGOs with a rich expertise on digital open-source information, who train ordinary citizens in increasingly sophisticated methods for locating and acquiring digital content with an eye to legal accountability in a broad array of jurisdictions, including the ICC. These NGOs conduct online investigations that in some instances exceed the capacity of the OTP. They are tech-savvy and well-prepared, and can quickly locate and collect this record of atrocity crimes available online, before the user-generated content is removed from social media platforms and, importantly, aid the OTP in finding the right content.[20] As noted above, the OTP has often made use of material compiled by journalists, NGOs and UN missions in the past, but what is new now is that there are multiple stakeholders, including ordinary citizens, that upload and collect information, not only for journalistic or broader advocacy purposes, but specifically intended to be used as evidence in a court room.[21] Furthermore, there are NGOs already grappling with how to verify digital open-source information and have to this end designed apps, and other technical solutions, seeking to ensure that the information is authenticated and reliable enough to

[14] Oxford Languages (2016).
[15] Abrahams & Murray (2020) at 327-328.
[16] C.f. United States Office of the Director of National Intelligence, 'Intelligence Community Directive No 301, National Open Source Enterprise', 11 July 2006, para. f(1).
[17] Koenig (2020) at 33.
[18] Baylis (2009) at 141-143; see also generally, G. Dermot (2014).
[19] Koenig et al (2014) at 11.
[20] Koenig (2020).
[21] Ibid; Koettl; Murray & Dubberley (2020) at 17.

satisfy legal standards.[22] As of late 2020 there are also international standards in place. The Berkeley Protocol on Digital Open Source Investigations, for instance, provides universal guidelines for the conduct of open-source investigations for legal accountability purposes. The protocol aims to contribute to the professionalisation of private party and citizen fact-finding and, in doing so, increasing the likelihood that such user-generated online content will be admitted in courts.[23]

Third, the ever-increasing number of private fact-finders are rarely committed to finding exonerating information that would mitigate the guilt of persons, which exacerbates already existing concerns relating to the equality of arms between the Prosecution and the defence.[24] Moreover, the original source of a YouTube video or Tweet can be difficult to ascertain, even for the most experienced online investigator,[25] and if such content from unknown internet users is admitted into evidence, it may hamper the ability of the defence to examine and probe the evidence.

Fourth, online open-source investigations give rise to unprecedented and complex issues around privacy.[26] This, again, prompts the question of whether the current interpretation and application of evidentiary rules enable ICC judges to take due regard to the particularities of digital open-source evidence and the changes underway in the investigatory landscape online.

The investigatory uses of digital open-source information and, potentially, cooperation with third parties to this end, does, indeed, present an exhilarating opportunity to overcome the massive evidentiary challenges facing the OTP. Using online content as evidence has the potential to enhance the efficiency of the OTP's investigations, which would contribute to the effective enforcement of substantive international criminal law, i.e., "crime control". But the ICC has other important objectives to attend to, apart from crime control. Other goals of international criminal justice include establishing "truth", ensuring the expeditiousness of the proceedings, respecting human rights and guaranteeing a fair trial.[27] It is of course a truism that every prosecution must be both fair and efficient, and that "efficiency" pertains to the ability to solve this conflict in a sustainable way.[28] There is, however, disagreement as to how this conflict of objectives should be solved in international criminal trials.[29]

The objectives of crime control and ensuring a fair trial compete vis-à-vis each other when it comes to the admissibility of evidence. In the interest of effectively enforcing substantive criminal law, most, if not all, evidence should be admitted, regardless if it would be fair to the accused.[30] The ICC chambers have been relatively lenient in the admission of open-source (and other) evidence in the past, and the ICC judges, who are afforded considerable judicial discretion when it comes to the admissibility of evidence, have only on rare occasions

[22] R. J. Hamilton (2018) at 16-17.
[23] Berkeley Protocol on Digital Open Source Investigations [advance version], *Human Rights Center UC Berkeley School of Law and Office of the High Commissioner for Human Rights* (2020) at vii, accessible at https://humanrights.berkeley.edu/programs-projects/tech-human-rights-program/berkeley-protocol-digital-open-source-investigations (accessed 29 March 2021) [hereinafter].
[24] R. J. Hamilton (2018) at 40.
[25] McPherson, Guenette Thornton & Mahmoudi (2020) at 73.
[26] Guay & Rudnick (2020) at 307.
[27] Klamberg (2010) at 301-302; Klamberg (2013a) at 418-420.
[28] Safferling (2012) at 63.
[29] Warbrick (1998) at 61-62; McDermott (2016) at 125.
[30] Packer (1964) at 18.

excluded evidence that has not been authenticated or lack sufficient indicia of reliability.[31] The considerable discretion afforded to judges, the abundance of private actors involved in online fact-finding, coupled with the unresolved issues as to verification and authentication of online content, suggest that there might be reason to worry about the fair-trial rights of the accused when digital open-source evidence start flooding the ICC court rooms.

Digital open-source evidence is proactively being advanced, by prominent NGOs, human rights practitioner and scholars, as part of the solution to the OTP's evidentiary challenges. The ICC is expected to face the rising tide of digital open-source evidence alone, without the support of national jurisprudence to guide its decisions. The involvement of external parties, including evidence-focused NGOs and ordinary citizens on the ground, are unavoidable aspects of introducing digital open-source evidence at the ICC. This too might have negative implications for fair-trial rights, as it raises questions about transparency, bias and the proper handling of evidence, which, this thesis argues, too must be taken into account when the ICC chambers decide on the admissibility of evidence. It is thus possible that, in some instances, digital open-source evidence should not be admitted into trial at all, as it would be fundamentally unfair to the accused if the ICC trial chambers based their verdicts on materials with such tenuous reliability, that, additionally, the defence would have only limited opportunity to test and challenge. As the ICC now enters the uncharted territory of online fact-finding, uncertainties remain as to whether the flexible rules governing the admissibility of evidence, and their current interpretation and application, are fit to address the particular challenges posed by the newest forms of evidence available online.

1.2 Purpose and Research Question

As the necessity of using digital open-source information as evidence in international criminal prosecutions grows, there is an urgent need to assess whether the ICCSt and the Rules of Procedure and Evidence (2002) (RPE) remain effective and capable of addressing the specific challenges to trial fairness posed by the acquisition and use of this new kind of evidence. In view of unresolved questions relating to the verifiability, authenticity and reliability of online materials, fakes and forgery on the rise, and an ever-increasing number of private stakeholders engaged in fact-finding online, decisions on admissibility, in particular, – i.e., what evidence the ICC judges may rely on – assume great importance.

The purpose of the present study is therefore to analyse the admissibility of digital open-source evidence in relation to trial fairness at the ICC. More specifically, the thesis aims to analyse the impact that the admission of digital open-source evidence may have on trial fairness, and to explore whether the ICC chambers can guarantee the defendant's right to a fair trial through their current approach to admissibility if the OTP increasingly relies on digital open-source evidence to substantiate criminal allegations.

Against this background, the main questions that this thesis strives to answer is:

- *Does the current interpretation and application of the rules governing the admissibility and exclusion of evidence at the ICC enable the judges to address the particular risks to the defendant's right to a fair trial presented by the submission of digital open-source evidence?*

[31] Gosnell (2018) at 375.

In order to answer the main research question, the thesis seeks to answer the following sub-questions:

- *What are the unique characteristics of digital open-source evidence that distinguish it from other forms evidence, and traditional open-source evidence in particular?*
- *What standard of fairness is applicable at the ICC, and how is the right to a fair trial interpreted and applied at the ICC?*
- *How is the framework governing the admissibility of evidence interpreted and applied at the ICC? More specifically, how and to what extent are the fair-trial rights of the accused taken into account when ICC chambers rule on the admissibility of evidence?*
- *Which factors render the admission of digital open-source evidence unduly prejudicial to the accused's right to a fair trial at the ICC, and should therefore prompt its exclusion?*

1.3 Methodology

This thesis adopts a methodology of legal dogmatics to answer the research question. This entails an analysis of applicable positive law (*de lege lata*). This analysis aims to identify and interpret the applicable and, consequently, determine the legal solution to a problem[32] Three steps are thus involved in this analysis. Firstly, the applicable law at the ICC must be identified from the recognized sources of public international law, the area of law in which this thesis is placed. Secondly, the legal rules identified have to be interpreted. Thirdly, the identified and interpreted legal rules are applied to the concrete legal matter in question,[33] that is, whether the current interpretation and application of the rules governing the admissibility and exclusion of evidence at the ICC enable the judges to address the particular risks to trial fairness presented by the emergence of digital open-source evidence.

1.3.1 Sources of Law Applied by the ICC

International criminal law and procedure originates from the same legal sources as public international law. According to Article 38(1) ICJ Statute, and acknowledged by custom, the primary sources include treaties, custom and general principles. Furthermore, decisions of international courts and international legal doctrine can be used as subsidiary means for determining the law. Being part of the international legal system, the ICC must apply these external general sources of law.[34]

However, Article 21 ICCSt makes special provision for designating the "applicable law" to be utilized at the ICC and establishes an order of priority of legal sources of general international law to be applied by the ICC bench. First, ICC judges shall look to the Statute, and then to the Court's own subordinate legislative or regulatory instruments. Here the RPE and the Elements of Crimes (2011) are explicitly referred to.[35] Second, when all of the ICC's own legislation has been considered, the ICC judges may, "where appropriate" contemplate

[32] Henriksen (2017) at 23.
[33] Ibid.
[34] Akande (2009) at 41 and 44.
[35] Other provisions of the Rome Statute provide for a variety of other subordinate instruments. Apart from the RPE (Article 51 of the Statute) and the Elements of Crime (Article 9 of the Statute), the main instruments (and the provision under which they are adopted) are; the Regulations of the Court (Article 52, ICCSt), the Staff Regulations (Article 44, ICCSt), the Financial Regulations and Rules (Article 113, ICCSt), the Regulations of the Prosecutor (Rule 9, RPE), the Regulations of the Registrar (Rule 14, RPE), the Code of professional conduct for counsel (Rule 8, RPE), and the Code of Ethics (Regulation 126, the Regulations of the Court).

the "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict".[36] Third, failing all that, ICC judges may look to the "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognize norms and standards." [37]

According to Article 21(2) ICCSt the ICC may apply its own case law as a subsidiary means of determining the law. However, the article leaves broad discretion to the ICC as to the use of case law and no distinction is made between the Pre-Trial, Trial, or Appeals Chambers of the Court. Decisions of the ICC has no precedential effect in the strict sense, but the bench will, indeed, have regard to its own precedents.[38]

According to Article 21(3) ICCSt, all legal norms within this hierarchy must be interpreted and applied in consistence with "internationally recognized human rights". While it should be noted that human rights law binds the ICC in its activities to the extent that it is part of customary international law or constitutes general principles of law (c.f. Article 21(1)(b) ICCSt), human rights are not mere subsidiary sources of law at the ICC. Rather, internationally recognized human rights provide the standard against which all the law applied by the ICC should be tested.[39] The term "application" in Article 21(3) ICCSt also implies that a certain result, that is, "consistency with internationally recognized human rights" must be reached, even if such a result does not follow from the literal application of the ICCSt, the RPE and the subsidiary sources set out in Article 21(1).[40] In the normative hierarchy of the ICC statutory framework, international human rights law, as a material source of law, thus occupy the highest position, and has come to be considered as a "super-legality" test.[41]

The ICC statutory framework does not define what should be understood as "internationally recognized human rights law". Based on the wording of the provision it has, however, been observed that it would constitute of a broad category of human rights, which would not have to reach the level of "universal recognition".[42] The jurisprudence of the ICC suggest that the Court subscribes to such a broader understanding of human rights. While the ICCPR is the most cited instrument,[43] it appears that regional recognition may be sufficient, as the Court has almost as often relied on decisions from the European Court of Human Rights (ECtHR).[44]

In order to answer the research questions this thesis applies the sources of law applied at the ICC.

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[36] Article 21(1)(b), ICCSt.
[37] Article 21(1)(c), ICCSt.
[38] Staker (2018) at 188.
[39] Bitti (2015) at 434.
[40] Ibid. at 437; Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant the Article 19(2)(a) of the Statute of 3 October 2006, *Lubanga*, (ICC-01/04-01/06-772), Appeals Chamber, 14 December 2006, para. 37 [hereinafter Appeals Judgment I, *Lubanga*]
[41] Akande (2009) at 42.
[42] Bitti (2015) at 434.
[43] Gradoni (2013) at 88.
[44] Bitti (2015) at 434-435.

1.3.2 Interpretation at the ICC

As the international criminal procedure applied at the ICC is a part of public international law, the "classic" legal interpretative methods, contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969) (VCLT) apply. These requirements of treaty interpretation are considered customary international law and must be applied in interpretation, not only of the ICCSt, but "any other norm instrument".[45] The same rules of interpretation thus extend to the procedural framework of the ICC as a whole, including the RPE even though they are not treaties, but merely internal rules of the Court.[46]

The starting point for the interpretation according to the VCLT is "the ordinary meaning of the terms".[47] Furthermore the context, other agreements between the parties to the treaty, as well as the aim and purpose of the treaty rules and the treaty generally must be considered.[48] If these means of interpretation lead to an ambiguous or manifestly absurd or unreasonable result the supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion, may be considered.[49]

As outlined above, Article 21 ICCSt provides a strict hierarchy of sources. This article not only proscribes the applicable rules at the ICC, but also the circumstances and order in which the ICC judges should interpret and apply them. Hereby Article 21 implicitly endorses a set of interpretative guidelines, giving priority to the ordinary meaning of the text of the ICCSt.[50] When invoking Article 21 the ICC judges have often emphasized that the general rules of treaty interpretation contained in Articles 31 and 32 of the VCLT apply, but they will only be invoked following an inconclusive textual analysis.[51]

However, as explained above, the application of the ICCSt, the internal rules of the Court and subsidiary sources of law – when interpreted in accordance with the rules of interpretation of the VCLT – must always accomplish a result that is compatible with internationally recognized human rights. Human rights obligations are thus given a *lex superior* status at the ICC and there is a duty to interpret and apply international criminal procedure in accordance with internationally recognized human rights. Furthermore, Article 21(3) requires the ICC to conduct the proceedings in such a way that the protection of human rights is made effective.[52]

Article 21 was clearly drafted to curtail the interpretative capacity of the ICC bench. However, Article 21(3), as put by Joseph Powderly, constitutes a "chink in the armour" of the provision, and provides an avenue via which the ICC judges "can free themselves" from the strict hierarchy of legal sources and the prioritization of textual interpretation. It allows the bench to pursue a teleological approach and, ultimately, set aside internal procedural rules to produce a result that is compatible with internationally recognized human rights.[53]

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[45] C.f., Judgment, *Tadic* (IT-94-1-A) ICTY Appeals Chamber, 15 July 1999, para. 303.
[46] C.f., Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, *Lubanga*, (ICC-01/04-01/06-108-Corr), Pre-Trial Chamber I, 19 May 2006), paras. 7(ii) and 38.
[47] Article 31(1), VCLT.
[48] Article 31(2), VCLT
[49] Article 32, VCLT.
[50] Powderly (2015) at 462; Pellet (2002) at 1079-82.
[51] See, e.g. Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, *Lubanga* (ICC-01/04-01/06-1432), Appeals Chamber, 11 July 2008, para. 54.
[52] Gradoni (2013) supra note 40, at 95.
[53] Powderly (2015) at 447.

In order to answer the research question, and determine whether the ICC trial chambers can guarantee the fair-trial rights of the accused when the OTP submits digital open-source information as evidence with their current approach to admissibility, this thesis subscribes to the interpretative methodology applied at the ICC as outlined above; prioritizing the text of the ICCSt but resorting to context, aim, purpose and external sources of law, including human rights law, when a strict textual interpretation produces a result that is incompatible with internationally recognized human rights.

1.4 Material

As to international instruments, the analysis of this thesis is delimited to the rules and principles governing the admission of evidence in the ICCSt and the RPE. However, relevant human rights instruments and jurisprudence must also be considered for the purposes of defining the applicable fair-trial standard for trials at the ICC.

Moreover, jurisprudence from the ICC and the *ad hoc* tribunals on the admissibility of evidence will be considered. While the ICC's own case law has no precedential effect in the strict sense,[54] it is nonetheless relevant to examine how the ICC chambers have interpreted and applied relevant evidentiary rules in its previous decisions. Similarly, the decisions of the ICTY and ICTR offer valuable record of judicial analysis.[55] Consequently, relevant case law from the ICC and the *ad hoc* tribunals, dealing with the admission and evaluation of evidence, will be analysed in order to answer the research question. As to the selection of cases this thesis relies on decisions that have been highlighted in the scholarly literature on the admissibility of evidence at the ICC in general, and on (traditional) open-source evidence in particular. Furthermore, particular emphasis is put on ICC jurisprudence that the other chambers follow in later cases, which signals that the decision in question is considered persuasive.

The focus of the present study is on the fairness of the trial, i.e., on the trial-stage. However, decisions on the admissibility of evidence during the pre-trial phase, ahead or during the confirmation of charges hearings at the ICC, will also be considered as they too provide useful guidance as to the interpretation and application of the admissibility test. In this vein it should be recalled that Article 21(2) ICCSt, which provides that "the Court may apply principles and rules of law as interpreted in its previous decisions" as a subsidiary means of determining the law, does not differentiate between the decisions of different chambers.[56]

Moreover, for the benefit of the analysis, in addition to the abovementioned primary legal sources, the thesis will also consider how relevant applicable law and jurisprudence have been interpreted in the scholarly literature.

As to the developments in information and communication technology and the changes underway in the investigatory landscape online, the thesis will mostly rely on accounts of those involved in online open-source investigations, that is, journalists and human rights

[54] See, Staker (2018) at 188.
[55] Gosnell (2018) at 383; Decision on the Admissibility of Four Documents, *Lubanga* (ICC-01/04-01/06) Trial Chamber I, 13 June 2008, para. 12 [Hereinafter Decision on the Admissibility of Four Documents, *Lubanga*]. Trial Chamber I accepted the Prosecutor's argument that ICTY jurisprudence is of "persuasive authority" in respect of the general admissibility standard.
[56] Bitti (2015) at 422-424.

professionals, who have pioneered the use of digital open-source information for accountability purposes. Moreover, as digital open-source information and its use as evidence is a new phenomenon it is with these practitioners that the "state of the art" and most up to date knowledge on digital-open-source information is found.[57] While the intelligence community also engages in online open-source fact-finding, the purpose of such investigations is slightly different, that is, to assist immediate policy or strategic decisions,[58] rather than acquiring information for court purposes. Furthermore, material as to online methodologies used by intelligence officials is less readily available.

1.5 Theoretical Perspective

International criminal procedure has many and diverse goals.[59] Mark Klamberg has conducted a comprehensive study into the objectives pressing for recognition in international criminal procedure, and has concluded that depending on the procedural activity, be it the collection, disclosure or admissibility of evidence, these objectives may be either concurrent or competing vis-à-vis each other.[60] Klamberg has further identified the main conflict of objectives in relation to the admissibility of evidence as being between the goals of crime control, human rights/fair trial, truth and expeditious proceedings.[61]

Guaranteeing expeditious proceedings is recognized as an objective by Article 64(2) ICCSt. Expeditiousness is related to the right of the accused to be tried without undue delay enshrined in Article 67(1)(c) ICCSt, but also encompasses a guarantee for victims and considerations as to procedural economy.[62] ICC investigations are typically lengthy endeavours, and the proponents of using digital open-source information as evidence suggest that it has the potential not only to drop the costs (and risks) relating to traditional evidence collection, but also to bring about more effective prosecutions.[63]

Articles 54(1)(a) and 69(3) ICCSt explicitly recognize that the Prosecutor and the judges respectively has a truth-seeking role. To simplify, it can be said that in adversarial systems the judge is a "finder of justice" between the parties, whereas in inquisitorial proceedings that are more "judge-driven", the Court and the judges also assume the roles of "truth-finders".[64] As will be further outlined below, the trials in The Hague are adversarial, but the pre-trial stages bear some characteristics of inquisitorial proceedings.[65] As citizens now have mobile phone cameras in even the most remote locations, online open-source evidence digital presents an opportunity to enhance the truth-telling function of the ICC as it provides new sources of relevant information and evidence.[66]

It should be noted that when assessing the goals of international criminal procedure generally, most legal scholars focus either on crime control through international prosecutions, the protection of human rights, or both,[67] and it is here that the main conflict lies as to the

[57] Freeman (2020) supra note 12, at 63.
[58] Dubberley; Koenig & Murray (2020), at 9.
[59] Damaška (2008) at 331.
[60] Ibid.
[61] Ibid. at 418-420.
[62] Ibid. at 57-58.
[63] Koenig (2020).
[64] Klamberg (2013a) at 46.
[65] See generally, Carmichael Keen (2004).
[66] International Bar Association (2016) at 20.
[67] Klamberg (2013a) at 43.

admissibility of evidence.[68] International criminal law is often described as an instrument that protects human rights as it responds to massive violations of fundamental human rights and comes into play, as a last resort, when national and international protective human rights mechanisms have failed.[69] The references to crime control and the protection of human rights is therefore somewhat ambiguous and requires clarification, as it can relate both to "crime control vis-à-vis human rights violations" and the accused's individual right to a fair trial.[70] For the sake of clarity, this thesis will separate the objective crime control and the objective of guaranteeing the accused a fair trial.

The objective of crime control, i.e. the effective enforcement of substantive international criminal law,[71] is clearly recognized by the ICCSt preambular article which states that "the most serious crimes of concern to the international community as a whole must not go unpunished […]".[72] To simplify, a pure crime control model would deemphasize the adversarial elements of criminal procedures and favour the speed and efficiency of a more inquisitorial approach, which grants judges more powers to control the proceedings and ascertain the truth.[73] The crime-control model would demand primary attention be paid to the efficiency with which the criminal process operates and would, for instance, not exclude illegally or improperly obtained evidence.[74]

However, ensuring a fair trial is also a clearly recognized objective of the ICC procedural framework,[75] which means that in the interest of fairness some evidence should not be admitted into trial. The ICCSt incorporate certain fair-trial rights and the applicable procedural framework is thus designed to limit international criminal law in its application. Even an accused of an atrocity crime under international law has a right to a fair trial that adheres to human rights principles and standards. Salvatore Zappalà has convincingly argued that respect for defence rights is necessary and central to international criminal justice:

> "Respecting the rules to establish the truth requires full consistency with rights of the accused; these must be seen as an essential component of accurate and truthful fact finding on which punishment is premised […] [and] there is no truth that can be reached without full respect of the rights of the accused."[76]

Against this background, this thesis proceeds on the assumption that international criminal procedure cannot establish the "truth" at all costs. When conducting fact-finding, be it online or offline, a fair balance must be struck between crime control, on the one hand, and the expeditiousness of the proceedings and the accused's right to a fair trial, on the other.

International human rights law is the best lens available for analysing the structures and functioning of the ICC procedural framework. Firstly, human rights law is widely accepted as a parameter for assessing domestic criminal procedures. Secondly, human rights law is particularly helpful in identifying the proper balance between the protection of individual

[68] Ibid. at 418-420.
[69] Werle & Jeßberger (2014) at 51.
[70] Klamberg (2013a) at 49.
[71] Ibid. at 43-46.
[72] Preamble, ICCSt; Article 1, ICCSt.
[73] Packer (1964) at 9-13.
[74] Ibid. at 18.
[75] Article 64(2), ICCSt.
[76] Zappalà (2010) at 135.

human rights in criminal trials against the broader interests of society, with the interest of crime control, in this case, being the most prominent.[77]

For these reasons the present study adopts a human rights perspective, with a particular emphasis put on the accused's right to a fair trial, to analyse whether the ICC procedural framework, and its rules governing the admissibility in particular, are capable of addressing the emergence of digital open-source evidence, whilst guaranteeing the fairness of the proceedings.

1.6 Contribution to Existing Scholarship

Much has been written about digital open-source information and its potential. There is, however, little legal scholarship addressing its introduction into international criminal trials. To the extent that legal scholars have covered the topic they have mostly been human rights practitioners, or activists, aiming to increase the likelihood of digital open-source information being admitted into trials in different jurisdictions.[78] As has been observed by Rebecca Hamilton, most of these accounts "paint the emergence of [digital open-source evidence] in an overwhelmingly positive light."[79]

While some legal scholars hint to potential problems relating to the fair-trial rights of the accused and underscore the importance of guaranteeing fairness,[80] no one has, as of yet, examined the use of digital open-source evidence from a human rights perspective, especially focusing on the accused's right to a fair trial.

Furthermore, most legal writings on digital open-source evidence to date have focused on the evidence collection stage,[81] mostly looking at ways to improve online investigations and different techniques for verifying online content. Risks and challenges that have been identified have mainly related to the safety of private fact-finders and witnesses on the ground, who record and upload atrocity footage to the internet.[82] Limited attention has been devoted to the fair-trial rights of the accused. This thesis therefore circles in on the ICC chambers' evaluation of evidence, and the ICC judges' ability to safeguard the accused's right to a fair trial through their decisions on admissibility. By narrowing the focus, the present contribution hopes to add something of value to the ongoing vibrant discussion about the promise of digital open-source evidence and its potential to bring about better, cheaper, and safer international prosecutions, in the interest of ensuring accountability for the worst crimes imaginable.

1.7 Delimitations

Importantly, the scope of this thesis is delimited to the admissibility of evidence at the ICC. It will not address which evidentiary value that the ICC trial chambers would or should afford to digital open-source at the end of trial when making the final judgement, which is

[77] Zappalà (2003) at 1.
[78] See, e.g., Dubberley, Koenig & Murray (2020) and Freeman (2018).
[79] R. J. Hamilton (2018) at 6.
[80] See, e.g., ibid.
[81] See, e.g., Dubberley; Koenig & Murray (2020).
[82] See, e.g., Rahman & Ivens (2020) at 257-258.

something that the ICC chambers evaluate separately from the admissibility of evidence.[83] This delimitation is motivated by the limited scope of the present study as well as the importance of analysing on what evidence the ICC chambers may actually base their findings. To put it differently, this thesis is restricted to an analysis of what evidence should be excluded to protect the reliability and integrity of fact-finding and, most importantly, what evidence that it would be unfair to the accused to rely on.

As to trial fairness, the thesis devotes particular attention to the principle of equality of arms, the right to examine and challenge evidence and the right to be tried without undue delay, as these principles/rights assume considerable importance when it comes to the admissibility of evidence.

There is dissention amongst legal commentators in relation to which actors the fair-trial rights extend, including, for instance, victims, witnesses, the Prosecution and other persons affected by ICC proceedings.[84] Due to the limited scope of this thesis it will focus predominantly on the fair-trial rights of the accused. This delimitation is further motivated by the fact that the impact of digital open-source evidence on the accused's right to a fair trial is under-researched.

While the emergence of digital open-source evidence is closely intertwined with the role of private companies that own and administer social media platforms (e.g., Google, Facebook, YouTube and Twitter),[85] their role and responsibilities in the acquisition and preservation of digital open-source information will not be covered in the present study, due to its limited scope.

1.8 Terminology

A multitude of different actors conduct online open-source investigations. However, the vocabulary of journalists and civil society actors engaged in advocacy work differs from the terminology used by lawyers and other investigators working in a legal context. The definitions below are drawn from the 2020 Berkeley International Protocol on Open Source Investigations, which seeks to address this challenge and create a common understanding of specific terms.[86]

1.8.1 Open-Source Information

Open-source information is information that any member of the public can observe, purchase or request, that is, without requiring special legal status.[87] Closed source information, on the other hand, is information with restricted access or access that is protected by law, such as privileged or classified information, and can only be obtained through particular judicial processes.[88]

[83] Decision on the admission into evidence of materials contained in the prosecution's list of evidence, *Bemba*, Trial Chamber II, (ICC-01/05-01/08-1022), 19 November 2010, para. 9 [hereinafter Admissibility Decision (2010), *Bemba*]; Jackson & Summers (2012) at 110-111.
[84] See, e.g., McDermott (2016) at 123-124.
[85] See, e.g., Koenig, Hiatt & Alrabe (2018).
[86] Berkeley Protocol, para. 13.
[87] Ibid. para. 1.
[88] Ibid.

Open-source information may include, but is not limited to, information created, shared, or collated by journalists, NGOs, international organizations, state/military actors, commercial entities, academic institutions and private individuals.[89]

Open-source *intelligence* (OSINT) is a sub-category of open-source information. "Information" is a broader label than "intelligence", which refers to actionable information provided to government and military officials, usually to assist immediate policy or strategic decisions,[90] "for the purpose of addressing a specific intelligence requirement".[91] OSINT is not the main focus of this thesis, but its practices, such as real-time monitoring, may inform certain aspects of online open-source investigations.[92]

1.8.2 Digital Open-Source Information

Digital open-source information is publicly available information, mentioned above, but in digital format. It is generally acquired from the internet, and can be accessed, for example, on public websites, internet databases or social media platforms.[93] Despite this seemingly simple definition, determining what constitutes *open-source* information is more complicated in the context of digital or online content, compared to open-source information from traditional sources. There is a lot of information available online that has been made public without the consent of the owners, for instance, hacked, leaked, exposed by security vulnerabilities or posted by a third party without proper permissions.[94] The Berkeley Protocol includes such information within the realm of "open-source information" as long as there is no unauthorised access to information on part of the investigator. The clearest distinction between closed and open-source information is thus that information derived from open sources does not involve interacting with or soliciting information from anyone.[95] This definition will be adopted for the purposes of this thesis.

Digital open-source information comprises both user-generated and machine-generated data, and may include, for instance:

- content posted on social media (e.g., Facebook, YouTube or Twitter),
- documents, images, videos and audio recordings on websites and information-sharing platforms,
- satellite imagery, maps and geospatial data,
- user data and statistical information.[96]

1.8.3 Open-Source Acquisition

Open-source acquisition is the act of gaining possession of, or access to, open-source information.[97] The term encompasses acquisition through observation, purchase or request and is synonymous with "open-source collection". However, the preferred term is acquisition because, by definition, open sources are collected and disseminated by others. Open-source

[89] Dubberley, Koenig & Murray (2020) at 9.
[90] Dubberley, Koenig & Murray (2020) at 9.
[91] Office of the Director of National Intelligence (2011) at 54.
[92] Ibid. at 10.
[93] Berkeley Protocol, para. 14.
[94] Ibid., para. 13.
[95] Ibid.
[96] Dubberley; Koenig & Murray (2020), supra note 54, at 9.
[97] Ibid. at 10.

investigators thus acquire previously collected and publicly available information second-hand.[98]

1.8.4 Digital Open-Source Evidence

Evidence is information with evidentiary value that may be legally presented, i.e., admitted, in order to establish facts in legal proceedings,[99] "by the act of the parties through the medium of witnesses, records, documents, concrete objects, etc."[100] Consequently, this thesis will refer to online content as digital open-source *evidence* once it has been presented to the Court by a party.

The ICC statutory framework does not make a legal distinction between different categories or types of evidence, nor does it specify what type of item is permissible to admit into evidence or what type is excluded. As will be further outlined in 4.1, the ICC trial chambers are, pursuant to Rule 63(2), authorised to assess all evidence "freely", in order to determine whether it is admissible.[101] However, the admissibility and evaluation of an item does, indeed, depend on the form the evidence takes.[102] It is therefore useful, for the purposes of this thesis, to put digital open-source evidence in context, in relation to other, more traditional, forms of evidence.

Article 69(2) ICCSt only refers explicitly to witness testimony, recorded testimony of a witness, documents, and written transcripts. However, despite the lack of references to different categories of evidence in the ICCSt, in legal doctrine, pursuant to interpretation of Article 69(2), evidence is often conceptualised into two main categories: (i) testimonial and (ii) documentary evidence.[103] Documentary evidence, in turn, is often treated as two separate categories; (i) written testimonial evidence,[104] and (ii) any other documentary evidence.[105]

The term "documentary evidence" is not defined in the ICCSt, nor in the RPE. However, in *Musema*, Trial Chamber I of the ICTR gave a definition of the notion "document" and stated that it is interpreted broadly, meaning anything "in which information of any description is recorded".[106] The Trial Chamber held that this interpretation is wide enough to cover not only documents in writing, maps, sketches, plans, calendars, graphs and drawings but also computerised records, databases, soundtracks, audio-material, video-material and photographs.[107]

There is agreement amongst legal commentators that digital open-source evidence will almost always fall into the category of documentary evidence, as does more traditional

[98] United States Office of the Director of National Intelligence, 'Intelligence Community Directive No 301, National Open Source Enterprise', 11 July 2006, para. f(1).
[99] Berkeley Protocol, para. 21.
[100] Black's Law Dictionary (2009).
[101] Judgment pursuant to Article 74 of the Statute, *Lubanga* (ICC-01/04-01/06-2842) Trial Chamber I, 14 March 2012, para. 24 [hereinafter Judgment, *Lubanga*].
[102] Ibid.
[103] Farthofer (2012) at 463-464.
[104] Geynor (2013) at 1045, explaining that written testimonial evidence include (i) witness statements, which are signed by the witness but not taken under oath, and without the possibility of cross-examination, and (ii) affidavits, which are taken under oath, but, similarly, without the possibility of cross-examination.
[105] Ibid.
[106] Judgment and sentence, *Musema* (ICTR-l96-13-A) Trial Chamber I, 27 January 2000, para. 53.
[107] Ibid.

evidence derived from open sources, such as analogue newspapers, radio broadcasts, public records and UN or NGO reports.[108]

In some evidence law textbooks, physical/forensic evidence is added as a third category of evidence. In certain circumstances, digital open-source evidence would qualify as such, if an analysis or scientific procedure[109] has been applied in validating or verifying the contents of a particular piece of digital open-source evidence. It could be, for instance, that a forensic processes, such as audio enhancement or photograph augmentation, have been used, or that an expert has compiled an analytical report based on raw digital data.[110] At the ICC, such forensic evidence is, generally, presented to the judges through in-court expert testimony.[111] By contrast, documentary evidence can be submitted directly by counsel "from the bar table", rather than through a witness.[112]

In sum, digital open-source information, once presented by a party to the Court, would mostly qualify as documentary evidence and thus be evaluated based on the same criteria as paper documents, and in some instances it would qualify as forensic evidence, and thus be tendered through an expert witness. Again, however, it should be emphasised that the ICC judges are empowered to evaluate any evidence "freely".

1.9 Structure of the Thesis

Firstly, Chapter 2 will recognise and consider the contours of online open-source investigations, its actors, objectives and techniques, and outline how NGOs and criminal justice advocates have pushed for introducing online content as evidence at the ICC. The chapter will also describe the OTP's use of digital open-source evidence to date. Furthermore, based on the ICC's jurisprudence on more traditional open-source evidence, as well as analogue audio and visual evidence, the chapter will also discuss how online content might be used as evidence in the future. Lastly, the chapter will draw some interim conclusions as to how digital open-source evidence resembles, and differs from, other forms of evidence.

Secondly, in order to know whether we should worry about fair trials at the ICC when digital open-source evidence is introduced, we must determine the standard by which the trial should be judged. Chapter 3 will therefore discuss the generally applicable standard of fairness, derived from international human rights law, and examine how the right to a fair trial is interpreted and applied at the ICC. The chapter will devote particular attention to the principle of equality of arms, the right to examine and challenge evidence and the right to be tried without undue delay. Furthermore, the chapter will consider how human rights bodies have dealt with illegally or otherwise improperly obtained evidence.

Thirdly, Chapter 4 will outline the applicable framework, governing the admissibility of evidence at the ICC, and analyse what principles, if any, can be derived from the Court's case law. To this end the chapter will examine how the ICC chambers have applied and interpreted

[108] Freeman (2018) supra note 77, at 64.
[109] Black's Law Dictionary (2009).
[110] Freeman (2018) supra note 77, at 64.
[111] C.f., Regulation 44(5), Regulations of the Court, which provides that 'the Chamber may issue any order as to […] the manner in which the evidence is to be presented'.
[112] Decision on the admission of material from the "bar table", *Lubanga* (ICC-01/04-01/06-1981), Trial Chamber I, 24 June 2009, para. 1 [hereinafter Bar Table Decision (2009), *Lubanga*].

the procedural rules governing admissibility in the past, mainly in relation to traditional open-source evidence and, to a certain extent, audio-visual evidence, closed or open-source.

Fourthly, after having delimitated what the requirement of fairness entails and the ability of the ICC chambers to guarantee the fair-trial rights of the accused through its rulings on admissibility, Chapter 5 will investigate how the conflict between "fairness" and "crime control" plays out when it comes to digital open-source evidence specifically.

Lastly, the concluding chapter will briefly summarise the answer to the sub-questions, as well as the main research question.

2 Digital Open-Source Evidence

The purpose of this chapter is to provide a description of the emergence of digital open-source information, the actors that pioneered its use for accountability purposes and pushed for its introduction at the ICC, as well as the techniques used for authenticating the material and verifying its contents. Furthermore, the chapter will outline how digital open-source information has been used in ICC investigations and prosecutions to date. By drawing on the Court's case law relating to other, more traditional, forms of open-source evidence, as well as audio-visual evidence, closed and open-source, the chapter will draw some interim conclusions as to how the newest forms of evidence available online is different from other forms of evidence, and traditional open-source evidence in particular. Throughout the chapter the challenges related to the use of digital open-source information as evidence in criminal cases will be highlighted, including such risks as misattributing content, and the difficulties involved in properly verifying and authenticating online materials.

2.1 Online Open-Source Investigations: Actors, Objectives and Techniques

Journalists and human rights professionals have long been attuned to the impact of the global expansion of information and communication technology.[113] Journalists pioneered the use of online open-source methods with the Arab Spring being a notable example where social-media footage was used in traditional media reporting.[114] Human rights NGOs were next in making use of online open-source footage in their traditional role of documenting and publicising human rights violations to encourage their end; especially when the security situation prevented human rights fact-finders from carrying out their work on the ground.[115] A prominent example includes a leaked video, from 2009, picturing Sri Lankan security forces executing a captured Tamil Tiger fighter. The video led the UN Special Rapporteur on extrajudicial killings to call for an international inquiry.[116]

While the use of open-source information was increasing, at this point in time few knew how to authenticate the material and verify its contents. The field of practice was very much the

[113] R. J. Hamilton (2018) at 16.
[114] Berkeley Protocol at 6.
[115] Dubberley, Koenig & Murray (2020) at 6.
[116] UN Human Rights Council (2010).

"Wild West".[117] Soon, however, both journalists and human rights fact-finders realised the risks of fakes and of misattributing online content. A rather extreme example includes a video filmed in Utah, 2009, of a group of friends playing with soft-air guns (a harmless replica that can look and sound like actual weapons) which was recycled and uploaded multiple times, alleging that it was filmed in Iraq, Syria, and Ukraine respectively. Several local news organisations broadcasted the video.[118] Similarly, in 2012, the BBC published a photo from Iraq in 2003 with an article describing a massacre in Syria.[119] In a different instance, the executive director of Human Rights Watch erroneously claimed that a drone video showed infrastructure destruction in Aleppo, while it actually depicted Gaza.[120]

With the advent of social media, online investigators began to understand that they had to be cognisant of such spread of mislabelled or faked materials, i.e. misinformation, and the intentional spread of these materials, i.e. disinformation.[121] The problem is, generally, especially prevalent during armed conflicts, where much is uncertain and ideologically motivated actors disseminate information in their own interests.[122] In response to this challenge the European Journalism Centre published The Verification Handbook in 2014, which for the first time set down a methodology to tackle how news organisations could leverage the power of content shared on Facebook, YouTube and Twitter without making mistakes.[123] Similarly, new human rights NGOs, such as Storyful and WITNESS, emerged, specialising in the verification of social media and other digital content. Best practices for authentication and verification for human rights investigations started to take form.[124]

The challenges related to authenticating and verifying a piece of online content differ in each case, and there is no single "silver bullet" to expose every online hoax, but journalists and human rights practitioners have developed a whole toolbox of methods. One such tool is "reverse image search", that is, uploading a photo into a search engine, such as Google, which in turn uses an algorithm to find similar images, thereby allowing the online investigator to find previously uploaded copies of the same photo.[125] Another is "geolocation", i.e., to determine the exact location where an image or video was recorded, by using Google Maps, and other similar tools. By comparing landmarks investigators can identify a depicted location without physically visiting the site.[126] Satellite imagery can also be helpful in this regard, and further assist in verifying the identified location, by cross-referencing landmarks, flora and fauna.[127]

As the techniques for verifying and authenticating digital open-source information improved, the human rights community soon recognised that mining online social platforms can be very important, not only in traditional human rights work, but also for building evidentiary records in relation to atrocities. In its first report on the human rights situation in Syria in 2018 the UN International, Impartial and Independent Mechanism (IIIM) stated that "[t]he volume of videos and other images— as well as the role played by social media—is unprecedented in

[117] Wardle, Dubberley & Brown (2014) at 64.
[118] Toler (2020) at 196-197.
[119] Hamilton (2012).
[120] Roth (2015).
[121] Wardle & Hossein (2017) at 20.
[122] Toler (2020) at 186.
[123] European Journalism Centre (2014).
[124] Koettl, Murray & Dubberley (2020) at 21.
[125] Toler (2020) supra note 119, at 189.
[126] Ibid. at 199-204.
[127] Ibid. at 205.

any other accountability process with respect to international crimes to date."[128] As the Syrian government has thus far stopped external actors from entering Syria, the mechanism has focused predominantly on the preservation of digital documentation, even signing a "Protocol of Cooperation" with Syrian civil society organisations that collect digital open source information.[129] Similarly, in 2018, the UN Fact-Finding Commission investigating atrocities against the Muslim minority Rohingya population in Myanmar relied heavily on digital open-source information, and Facebook posts and videos in particular, when calling for Myanmar's military leaders to be investigated for genocide and other international crimes.[130]

While journalists, human rights advocates and lawyers often face similar problems in using digital open-source information, those problems – while overlapping – are not the same. Journalists want to get a story out as soon as possible, human rights NGOs proceed more slowly, and lawyers slower still, as they need to verify content to the highest of standards to make sure that it meets evidentiary thresholds.[131] Human rights NGOs had been grappling with verification and authentication for their own purposes since a while back and now started to think about whether digital open-source information could be admitted as evidence in courts. In 2016, the NGO WITNESS launched its "Video as Evidence programme", aimed at strengthening the quality of citizen video for court purposes.[132] Soon, other organisations, such as Bellingcat and the Syrian Archive, started to train citizens around the world to collect information for legal cases.[133] Bellingcat is an interesting example of coordinated citizen-led investigative efforts aimed at verifying online content for accountability purposes. By drawing on the expertise of several tech-experts as well as through online collaborations with "the crowd" – which involves soliciting information from multiple engaged internet users – the organisation has produced compelling evidence about many and varied occurrences.[134] An investigation may start with a video shared to Facebook, with a caption suggesting that it depicts, for instance, a Russian anti-aircraft system in Luhansk, Ukraine, in control of Russian separatists.[135] Such a sighting supports an inference that the Russian military supplied weapons to rebels in Ukraine. Online investigators then proceed by cross-referencing the images of this particular missile system with other photos of Russian weaponry, to be sure that it does, indeed, depict a Russian Pantsir-S1. Next, investigators use geolocation, to establish the exact location where the images of the anti-aircraft system have been captured, and cross-reference the temporal metadata of different social-media posts (most social platforms indicate the time when the user uploaded content),[136] claiming to have sighted the weapon system, thus further confirming the appearance of these Russian systems inside Ukraine at the relevant point in time.[137] Local NGOs, such as the Syrian Archive, have similarly acquired, analysed and preserved multiple videos posted to social media indicating that the Syrian regime has deployed chemical weapons against civilians. The Syrian Archive has been able to verify the source of the videos, geo-locate the incidents and cross-reference the publishing dates on social media. Lastly, they compared their results with other credible sources, such as news coverage and NGO reports.[138]

[128] IIIM (2018) *Report,* para. 72.
[129] IIIM (2018) *Protocol.*
[130] Human Rights Council (2018).
[131] Dubberley, Koenig & Murray (2020) at 8.
[132] Matheson (2016).
[133] Koenig (2020) at 44-45.
[134] See, Bellingcat (2021).
[135] Higgins (2015).
[136] Toler (2020) supra note 119, at 191-193.
[137] Higgins (2015).
[138] Syrian Archive (2021).

Online investigators must, however, be very attentive to the risks of fakes and forgery, as some clever manipulators have figured out ways to bypass algorithms to make what they upload seem genuine. In 2014, for instance, a profile on a Russian social-media platform emerged, allegedly belonging to a "Russian soldier". The profile shared several photographs, along with a post, confessing that he launched the missile that downed the Malaysian Airlines Flight 17 (MH17), which was downed on 17 July 2014 over eastern Ukraine.[139] The fraud was eventually debunked by a Ukrainian NGO, but before they managed to do so, several news organisations had already shared the story online.[140]

To address the challenges of fakes and forgery, apps specifically designed for online open-source evidence collection have been developed. These apps can be downloaded for free and offers users anonymity by connecting the verification of uploaded images to the phone itself. The app collects meta data, GPS coordinates and light meter readings, and nearby cell tower signals are recorded so that the location and time of the photo or video can be verified. Once the user is done filming, the material is automatically encrypted and can then be sent through a secure transmission system to "secure evidence lockers" in Europe and other places.[141] In 2018 a military tribunal in Bukavu in the Democratic Republic of the Congo convicted two high-ranking commanders for murder and torture as a crime against humanity, marking the first time that such authenticated evidence gathered with a mobile-phone was used in a court. One of the victims' lawyers had documented mass graves in targeted villages with the "eyeWITNESS to Atrocities" app, developed by the International Bar Association, and an extract of this video was admitted during the trial. The app embedded the video with unchangeable data, thus identifying the time and location. The video was a powerful tool not only to convey the brutality of the crimes and the level of violence that the victims had suffered, but it also helped demonstrating the extent of the graves, which the courtroom could not visit for security reasons.[142] It should be noted that apps like the "eyeWITNESS to Atrocities app" may never replace social-media sites in terms of harnessing videos and footage potentially containing evidence of crimes, since Facebook and YouTube are more accessible to a broader public.[143] Rather than relying on unassailable metadata, investigators must therefore authenticate and verify open-source online content by using other creative methods, such as those outlines above. Nonetheless, the Bukavu case clearly illustrates the impactful nature of digital content, once it is properly authenticated and verified.

Furthermore, Amnesty International has found a way to address the overwhelming volume of user-generated online content from conflict zones, impossible for any single researcher to process. To this end, Amnesty International has trained students in open-source investigation methods, including techniques such as reverse image search, geolocation, and shadow analysis, to enable the volunteers to discover and verify videos and photos of potential human rights violations and atrocities from conflicts across the world.[144] A prominent example include Amnesty's and student volunteers' joint online open-source investigation into the destruction of Raqqa, Syria. Relevant videos and images of Raqqa were identified online, and then the destroyed buildings were geolocated, by using Google Earth. By comparing satellite imagery (new public images are available every day) it was subsequently established when the buildings were destroyed. A detailed image thus emerged of how bombs fell over the city

[139] Toler (2020) at 193; Obozrevatal (2014).
[140] Toler (2020) supra note 119, at 194.
[141] R. J Hamilton (2018) at 17-18.
[142] Irwin (2019).
[143] Whiting (2017).
[144] Dubberley (2019); Fortune (2018).

– akin to an indiscriminate attack on residential neighbourhoods. Amnesty investigators on the ground then used this information to identify survivors and witnesses,[145] and in its online report Amnesty concluded that between June and October 2017, the bombing by the US-led Coalition had resulted in over 1 600 civilian casualties, which was over ten times the Coalition's own figure.[146] However, things did not go as planned in Amnesty's online investigation into drone strikes on Saudi Arabian territory. The online investigators came across big amounts of online content that had been manipulated and made into collages, hence seeking to tell the story of what had happened from a particular angle. The montages of several different short videos, with some of them depicting human rights abuses, made verification of the content and geolocation of the incidents impossible, and Amnesty decided to halt all work on the project.[147]

In sum, how to deal with manipulated content, fakes and bias are, indeed, big challenges pertaining to the use of online open-source information for accountability purposes. As outlined above, the techniques for authenticating material and verifying its contents are becoming increasingly refined, but mistakes can still be made. As will be further outlined below, uncertainties remain not only as to how courts should evaluate online open-source information, as such, but also how courts should assess the methodologies used by online investigators for authentication and verification of online materials.

2.2 The ICC's Evidentiary Problems: Digital Open-Source Evidence as the Solution

In parallel with these developments, the OTP was struggling, and many of its cases had fallen apart due to evidentiary problems. In *Ngudjolo Chui,* for instance, Trial Chamber II acquitted the defendant. While not ruling out the possibility that war crimes and crimes against humanity had occurred, the Chamber concluded that there was not sufficient evidence to prove "beyond a reasonable doubt" that Mathieu Ngudjolo Chui was responsible for the crimes committed.[148] Similarly, during the investigation into post-election violence in Kenya (2007-2008), security concerns, threats and intimidation to the Prosecution's witnesses led the OTP to abandon its charges against President Uhuru Kenyatta. There was simply not sufficient evidence to proceed.[149] Furthermore, ICC investigators have been prevented from accessing the territory of Sudan, making it highly complicated to undertake any traditional investigative measures. In addition, ICC personnel and anyone associated with the Court have been threatened to death by the Sudanese government.[150]

These challenges led the ICC OTP to rely heavily on witness testimonies and NGO reports. Due to security concerns, however, the OTP often had to use so-called "intermediaries", local activists already onsite, that could reach out to potential witnesses. This, however, proved to be a far from ideal method to mitigate the OTP's limited access to territory. In *Lubanga*, the case very nearly fell apart, as it turned out that intermediaries had manipulated and bribed witnesses, alleged former child soldiers, into testifying.[151] Furthermore, witness testimony is unstable for other reasons. The ICC has limited subpoena power, making it highly dependent

[145] Millner et al (2019).
[146] Amnesty International (2009).
[147] Farr & Rogers (2020).
[148] Judgment, *Ngudjolo Chui*, supra note 3, paras. 7, 110, 456, 499, 503 and 516.
[149] Notice of Withdrawal, *Kenyatta*, para. 4.
[150] Non-Cooperation Filing, *Harun and Abd Al-Rahman*, paras. 33-36.
[151] Judgment, *Lubanga*, paras. 178 and 482.

on the voluntary testimony of witnesses,[152] and there is often a significant time gap between when the crimes were committed and the launch of an ICC investigations, and witnesses' memory do tend to fade with time.[153] Additionally, as will be elaborated further below (see 4.2.2.4), the OTP's very heavy reliance on NGO reports led Chambers to call on the Prosecution to increase and diversify their acquisition and use of non-testimonial evidence.[154]

As the flaws of traditional approaches to evidence collection became apparent in The Hague, the expansion of information and communications technology was already well underway. The Human Rights Center at Berkeley approached the ICC in 2012, suggesting that the Court could make better use of new and emerging technologies in their investigations and prosecutions.[155] Berkeley hosted a series of workshops on how digital open-source content could be employed to strengthen human rights investigations for legal purposes, with a particular emphasis on gathering information from smartphones and social media. The workshops brought together many of the organisations and individuals who had pioneered the adoption of digital technologies in collecting evidence for human rights legal cases, such as WITNESS and Bellingcat. Other prominent human rights NGOs, such as Human Rights Watch and Amnesty International, also attended, as did ICC investigators and former investigators and prosecutors from the *ad hoc* criminal tribunals.[156] The OTP *inter alia* stated that "a lack of resources is the greatest constraint" for the Office to produce its own digital open-source evidence,[157] and one of the key recommendations from these workshops was that the OTP should partner with technology companies and NGOs with expertise in digital material to ensure that technology could be developed and used to advance human rights and international criminal prosecutions.[158]

In the OTP 2016–2018 Strategic Plan, the Office noted that it had invested in "cyber-investigators and analysts experienced in online investigations and phone communications."[159] But due to the aforementioned resource constraints, the OTP has continued to focus on building relationships with third-parties, NGOs and other first-responders. In the OTP 2019–2021 Strategic Plan, for instance, the importance of communicating the needs of courts to citizens and first responders was emphasised. The report stated that first responders and citizens are often in a position to collect and preserve potentially relevant online content long before ICC investigators can, but citizens do not always know how to collect digital evidence in a way that ensures its integrity for use in court.[160] However, the report concluded, not partnering with third parties would risk that less evidence will be available online, or that its quality has diminished over time.[161]

At the time of these workshops, most of the thousands of hours of footage from the civil war in Syria, and other places, was still largely unusable in courts. The methods for authenticating

[152] Sluiter (2009) at 605; International Bar Association (2013) at 14.
[153] See generally, Combs (2009) at 235–273.
[154] See, e.g., Judgment, *Ngudjolo Chui*; Decision on the confirmation of charges, *Mbarushimana*, (ICC-01/04-01/10) Pre-Trial Chamber I, 16 December 2011 [hereinafter Decision on the confirmation of charges, *Mbarushimana*]; Decision on the Confirmation of Charges, *Abu Garda* (ICC-02/05-02/09), Pre-Trial Chamber I, 8 February 2010 [hereinafter Decision on the Confirmation of Charges, *Abu Garda*].
[155] Dubberley, Koenig & Murray (2020), supra note 54, at 6.
[156] Ibid. at 7.
[157] Koenig et al (2014) at 9-10.
[158] Ibid. at 9.
[159] ICC, *Office of the Prosecutor Strategic Plan 2016-2018*, 16 November 2015, Annex 1, para. 20.
[160] ICC, *Office of the Prosecutor Strategic Plan 2019-2021*, 17 July 2019, paras. 53-56.
[161] ICC, *Office of the Prosecutor Strategic Plan 2019-2021*, 17 July 2019, paras. 53-56.

and verifying the content of the uploaded images still fell short of making it admissible in a court. Moreover, it was the wrong content that was uploaded to social media. Citizens often record and upload footage of the crime itself, the shelling of a village, the bombing of a house or its immediate aftermath, and not the lead, contextual or linkage evidence that courts require.[162] To facilitate cooperation between legal actors and civil society actors, and to maximise the quality of digital information used as evidence, Berkeley's Human Rights Center collaborated with the UN Human Rights Office to develop guidelines to help professionalise online open source investigations. In December 2020 they launched the Berkeley International Protocol on Open Source Investigations, the first global guidelines for using open-source online information as evidence in international criminal and human rights investigations. The Berkeley Protocol provides an international standard for conducting online research into alleged human rights violations and atrocity crimes. Furthermore, it gives guidance on methodologies and procedures for gathering, analysing and preserving digital information in a professional, legal and ethical manner.[163]

In sum, there is now an increasingly professional investigative network pushing for the introduction of digital open-source information as evidence at the ICC. The OTP itself has recognised the need to build partnerships to enable the office to adapt to the new reality brought about by developments in information and communications technology. NGOs have technical solutions in place for facilitating authentication and verification. Furthermore, international guidelines have been developed, aimed at increasing the likelihood that online content will be admitted in national and international courts while maximising its evidentiary value.

2.3 Digital Open-Source Evidence in the ICC to Date

The push for introducing digital online-content at the ICC soon brought result. In 2015, during the trial against Jean-Pierre Bemba, the Prosecution submitted screenshots of Facebook photographs as indirect evidence to show the relationships between Bemba and other parties in an alleged bribery scheme aimed at tampering witnesses.[164] The defence contended that it was impossible to know who took the photos, when they were taken, where they were taken, who posted them, or whether the people in the photos actually were who the prosecution claimed they were.[165] Additionally, the defence counsels took aim at how the prosecution had gone about in extracting the photos from Facebook. As the Prosecution does not have direct access to Facebook's servers or data, it relied on screenshots of Facebook pages showing the photos, which meant that the Prosecution could not provide metadata, such as time stamps or IP addresses of the uploaders, to assist in the authentication of the photos. Consequently, there was no way to determine the identity of the person who posted them.[166] Ultimately the Trial Chamber did not address the admissibility or probative value of the Facebook photos as the relationship between the individuals pictured in the Facebook

[162] Koenig (2020) at 33.
[163] Berkeley Protocol, at vii.
[164] Public redacted version of the "Prosecution's Third Request for the Admission of Evidence from the Bar Table" 21 August 2015, ICC-01/05-01/13-1170-Conf, *Bemba* (ICC-01/05-01/13) Trial Chamber VII, 18 September 2015, paras. 49-53 [Hereinafter Prosecution Request, *Bemba et al*]
[165] Public Redacted Version of Defence Response to Prosecution's Third Request for the Admission of Evidence from the Bar Table, *Bemba et al* (ICC-01/05-01/13-1245) Trial Chamber VII, 9 October 2015, paras. 83-86 [hereinafter, Defence Response, *Bemba et al*].
[166] Ibid. para. 85; Ng (2020) at 150.

photographs was proved through other evidence, such as witness testimony.[167] The submission of the Facebook posts are nevertheless noteworthy as it shows that online content could be used to link high-ranking officials to crimes on the ground. Furthermore, the dispute over the screenshots illustrates the precarious nature of some digital content, relating to its authenticity and reliability – factors that are central to its admissibility and relate to the fairness of the trial.

In the following year the OTP would take its use of digital open-source evidence one step further. In 2016 the Prosecutor brought a case against Ahmad Al-Faqi Al-Mahdi, as a direct perpetrator, destroying cultural property in Timbuktu (c.f. Article 8(2)(e)(iv) ICCSt). The Prosecution *inter alia* submitted videos obtained from open sources depicting the accused engaged in destroying mosques, overseeing and ordering others to destroy mosques as well as explaining his intent to destroy mosques.[168] Furthermore, the Prosecution was able to geolocate the videos by identifying multiple points of corroboration to confirm the likely dates and locations where the incidents had occurred.[169] Unfortunately this evidence was not tested in the Trial Chamber either, as the defence agreed to the admission of the videos as part of the terms of the guilty plea. However, it is significant that the Prosecution had learnt from its mistakes in *Bemba* and undertook measures to authenticate the videos and verify their contents.

Not long after, in 2017, the ICC issued the arrest warrant against the Libyan Commander Mahmoud Al-Werfalli.[170] As noted in 1.1 above, it marked the first time that the ICC relied *heavily* on user-generated footage posted to social media to substantiate a criminal allegation.[171] The charge was murder as a war crime under Article 8(2)(c)(i) ICCSt, based on seven incidents, each captured on video showing Al-Werfalli shooting individuals himself as well as ordering others to commit executions. For each incident, the arrest warrant provided a description of the relevant content and clarified that the video was posted to social media on a particular date. The Pre-Trial Chamber was satisfied that there were "reasonable grounds to believe" (c.f. Article 58(1) ICCSt) that Al-Werfalli had committed a crime within the Court's jurisdiction.[172] Al-Werfalli has, as of yet, not shown up in The Hague and it is to date uncertain if the Trial Chamber will admit the videos during the later stages of the proceedings and what probative value will be assigned to them. However, it is notable that the OTP was confident enough in its evidence to ask the Pre-Trial Chamber to issue an arrest warrant based solely on the videos, without which there would have been no case. However, it should be noted that the warrant only specifies which social media platform the video was uploaded to in relation to one of the incidents, and in no instance does the Prosecution provide a specific web address or username in relation to the uploader.[173] This lack of specificity may have been a conscious choice made by the Prosecution for unknown reasons, but – as will outlined further below (see, 4.2.2) – such lack of specificity might, nonetheless, have implications for the admissibility of the videos at the later stages of the proceedings, as well as the defence's ability to effectively examine, test and challenge the material, which is essential for the fairness of the trial.

[167] See, Public redacted version of Judgement pursuant to Article 74 of the Statute, *Bemba et al* (ICC-01/05-01/13) Trial Chamber VII, 19 October 2016 [hereinafter Judgment, *Bemba et al*].
[168] Judgment and Sentence, *Al- Mahdi* (ICC-01/12-01/15-171) Trial Chamber VIII, 27 September 2016, para. 40, fn 93 [hereinafter Judgment and Sentence, *Al- Mahdi*].
[169] Koenig (2020) at 36.
[170] Warrant of Arrest, *Al-Werfalli*.
[171] Irving (2017).
[172] Warrant of Arrest, *Al-Werfalli*, paras. 25-28.
[173] Ibid. para. 11.

Al-Werfalli and *Al-Mahdi* clearly demonstrate that online open-source evidence can provide direct evidence, i.e., "first-hand information that supports the truth of an assertion".[174] Furthermore, *Al-Werfalli* suggests that digital open-source evidence can stand on its own, i.e., not merely corroborate other pieces of evidence. Taken together, *Al-Werfalli*, *Al-Mahdi* and *Bemba*, suggest that online open-source evidence potentially can play a significant role in proving different elements of crime as well as linking far-removed perpetrators to crimes on the ground.

2.4 The Potential of Digital Open-Source Evidence

The ICC case law on digital open-source evidence to date is scarce. The OTP has, however, ever since its inception relied heavily on information from other publicly available materials to build its cases.[175] Occasionally, audio-visual materials, closed and open source, have also been submitted, in the ICC as well as in the *ad hoc* tribunals.[176] The following section will therefore outline how the OTP has used open-source information and analogue audio-visual content in the past in order to determine, by way of analogy, what elements of crime and facts digital open-source evidence could potentially be used to prove.

It should be noted that international criminal investigations and prosecutions present unique and difficult challenges with respect to acquiring and managing evidence. The complexity of the issues, the temporal and territorial scale of the state-sponsored macro-criminality that typically characterises the crimes under the ICC's jurisdiction,[177] the number of victims and witnesses, as well as the huge quantities of other evidentiary material retrieved by international investigators, dwarf any domestic criminal proceedings. Before turning to the potential of digital open-source evidence, the structure of the core crimes will therefore be briefly outlined to provide the reader with an understanding of what elements of crime and underlying facts that must be proven in The Hague.

2.4.1 The Structure of International Crimes

The ICCSt distinguishes between the crimes, consisting of a material element (*actus reus*) and a mental element (*mens rea*), which create grounds for individual criminal responsibility, and the grounds that rule out liability, such as self-defence and necessity.[178]

Typically, a group of persons cooperate in committing international crimes. This network of persons can be more or less established, but is often part of the state or the military.[179] Importantly, the organised and collective nature of international crimes does not absolve the ICC trial chambers of the need to determine *individual* responsibility.[180] The grounds for individual criminal responsibility are found in Articles 25 and 28 ICCSt. Article 25(2) stipulates the general principle that "a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute." Article 25(3) then ists the various modes of participation, that is, individual

[174] Decision on the confirmation of charges, *Kenyatta & Ali* (ICC-01/09-02/11-382-Red), 23 January 2012, para. 83 [hereinafter Decision on the confirmation of charges, *Kenyatta & Ali*].
[175] Freeman (2020) at 58; Baylis (2009) at 131-133.
[176] See, generally, Ashouri; Bowers & Warden (2014).
[177] Werle & Jeßberger (2014) at 36.
[178] Werle & Jeßberger (2014) at 170.
[179] Ibid., at 193.
[180] Ibid.

perpetration, joint co-perpetration, and participation in the forms of ordering, inducing, or abetting the commission of a crime. Article 28 in turn expands this list to include superior responsibility.

In determining the individual responsibility, it must first be examined whether the accused fulfil the material elements of an international crime. The definitions of the international crimes, the crime of genocide, crimes against humanity, war crimes and the crime of aggression, are found in Articles 6, 7, 8 and 8 *bis* ICCSt. The material elements include individual conduct, consequence, and additional circumstances contained in the definition of a crime. The conduct required is delineated in the definitions of the different crimes, and can consist of actions or omissions, to the extent the latter is provided for in the definition. As the accused often acts together with others when committing crimes under international criminal law, it is also necessary to look for the presence of additional elements depending on the mode of participation under Article 25(3)(a)–(d) ICCSt or the superior responsibility under Article 28.

Most crimes under ICC's jurisdiction require not only incriminating behaviour, but also a specific consequence, such as causing great physical suffering to victims. Furthermore, additional circumstances are required by the definitions of crime. It could be circumstances of a factual nature, for instance a victim to be younger than 15 years old when the charges involve the recruitment of child soldiers. Sometimes the crimes can involve normative characteristics, such as whether a victim is a protected person under the Geneva Conventions. Typically, a context of organised violence, often referred to as a contextual element, is also required. It is the connection to this context that turns an ordinary crime into a crime under international law. For instance, crimes against humanity require that the individual conduct took place in the context of "a widespread or systematic attack on a civilian population" and war crimes require that "the conduct took place in the context of and was associated with an international armed conflict".[181]

Second, it must be examined whether the accused had the required levels of knowledge and intent. Article 30 ICCSt enshrines the general requirements which are applicable unless otherwise provided and requires that the perpetrator to commit the material elements of the act "with intent and knowledge".

Third, it must be examined whether any of the grounds for excluding criminal responsibility enumerated in Article 31 are present. Such grounds include mental disease, intoxication, self-defence or duress.

In sum, a lot of facts have to be proven and a lot of evidence is required to successfully prosecute crimes under ICC's jurisdiction. Against this background, the thesis now moves on to examine what elements of crime and underlying facts digital open-source evidence could potentially be used prove. First, however, the investigatory uses of digital open-source evidence will be briefly described to provide an illustration of the diverse potential of the newest forms of evidence available online.

[181] Article 7(1), ICCSt; Elements of Crimes, relating to Article 8 ICCSt.

2.4.2 The Investigatory Uses of Digital Open-Source Information

Reports produced by NGOs or UN agencies have often provided the OTP with the essential context for understanding complex and protracted armed conflicts and political violence and have been helpful in identifying significant incidents and estimating the numbers of casualties, which help ICC investigators focus their investigations.[182]

Furthermore, the OTP has already started to integrate social media and other digital open-source information into its investigations in order to run more targeted and efficient investigations. At this stage, the material is used, not as evidence as such, but rather as clues as to where investigators may find evidence. In the context of the Mali situation, for example, Timbuktu residents filmed the destruction of the cultural heritage in their city and uploaded their footage to social media. These videos enabled the OTP to monitor the events in near real time, locate destroyed buildings, pinpoint locations the ICC investigators should visit and helped the Office to identify potential witnesses to interview.[183] Information from open sources has also played an important role to find evidence in the investigation of situations in Kenya, Cote d'Ivoire, and Libya, mentioned in 1.1 above, where mobile phone use has been widespread.[184]

Before initiating an investigation, the OTP must ensure that the potential cases fall within the Court's jurisdiction. To this end the OTP must determine whether certain events occurred within a designated personal, temporal and geographic scope. Online open-source information, and satellite imagery in particular, can provide the Prosecution with crucial geospatial data to answer such "when", "where", and "who" questions. In *Al-Mahdi*, for instance, the OTP analysed images for landmarks to identify the depicted location, in order to geolocate where certain events had occurred.[185]

Furthermore, for a case to be admissible before the ICC, it must be of "sufficient gravity to justify action before the court" (c.f. Article 17 ICCSt). In this regard, the quantity of news coverage, and attention devoted to a situation by NGOs – as well as footage and citizen testimonies on social media – could be helpful indicators. In comparison, in the Côte d'Ivoire situation, the OTP investigators used reports from Human Rights Watch and Amnesty International to show that there was a "reasonable basis to believe" that acts amounting to crimes against humanity had occurred and that an investigation should be authorised in the region.[186]

The OTP must also make a complementarity assessment in order to determine whether there are any national proceedings underway and, if so, whether they are being conducted in good faith. If a state is uncooperative, the OTP can consult open-source information, including online sources, to help make this determination. For example, in the Afghanistan preliminary examination, the OTP assessed the scope and progress of relevant national proceedings in Afghanistan and in the United States "primarily on the basis of public sources, including information submitted to and reported by United Nations bodies as well as

[182] Freeman (2020) at 58; Baylis (2009) at 121.
[183] Freeman (2020) at 52 and 56.
[184] Dubberley; Koenig & Murray (2020) at 5.
[185] Freeman (2020) at 59.
[186] Request for authorization of an investigation pursuant to article 15, *Situation in the Republic of Côte d'Ivoire*, (ICC-02/11-3) OTP, 23 June 2011, paras 132-133.

the publicly available results of Congressional and DOJ [Department of Justice] inquiries in the US".[187]

2.4.3 The Potential of Digital Open-Source Evidence in the Prosecution of Cases

It should be noted that in a domestic criminal case, the starting point of a national investigation is the occurrence of a crime, and then a suspect will be sought. In international criminal cases this sequence is often reversed. As noted above, the occurrences of the crimes are often known through open-source materials and certain suspects will often have been identified already, after which the individual crimes and the suspects' connection to the crimes will be investigated. [188] A typical characteristic of international crime prosecutions that should be kept in mind in the following is therefore the distinction between crime-base evidence and linkage evidence.[189]

2.4.3.1 Crime-Base Evidence: Caught Red-Handed

There have been several atrocity crime prosecutions in national jurisdictions heavily based on digital open-source evidence. In Germany, Finland and Sweden prosecutions relying mainly on evidence derived from social media have resulted in convictions for the war crimes of outrages upon personal dignity, of taking trophy poses with human remains and other degrading acts.[190] In these cases, the perpetrators have been caught red-handed disrespecting a corpse, which is a war crime.[191] Such outrage upon personal dignity is a so-called conduct crime and does not require a specific consequence.[192] Moreover, one Swedish prosecution has successfully relied on a video depicting a summary execution, which was provided to the New York Times by a witness, and subsequently published on the journal's website.[193] However, none of these physical perpetrators were high-ranking, or the individuals most responsible for the atrocity crimes committed in Syria, and would therefore normally not be prosecuted at the ICC.

However, in *Al-Mahdi* and *Al- Werfalli* relatively high-ranking physical perpetrators were caught on tape committing the crimes under the ICC's jurisdiction, crimes they were charged with and suspected of respectively.[194] If such crime-base footage is uploaded to social media, as it often is – by witnesses, victims and sometimes the perpetrators themselves for propaganda purposes – it can reach a wide audience and be discovered by the OTP, or evidence focused NGOs, on social media.

Al-Werfalli shows that online content may be admitted as direct evidence at the pre-trial stage. Furthermore, *Al-Mahdi* suggests that it might be admitted at trial. Furthermore, digital

[187] Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, *Situation in the Islamic Republic of Afghanistan* (ICC-02/17-7-Red) Pre-Trial Chamber III, 20 November 2017, para 27.
[188] Fry (2014) at 264.
[189] Klamberg (2013a) at 97.
[190] Eurojust Genocide Network (2018) at 7-9; Judgment, (B 5595-19), Swedish Supreme Court, 5 May 2021.
[191] For the definition of committing outrages upon personal dignity as a war crime see, e.g., Elements of Crimes, relating to Article 8(2)(b)(xxi), ICCSt, especially fn 49.
[192] Werle & Jeßberger (2014) at 174.
[193] Judgment, (B 3787-16), Stockholm District Court, 16 February 2017, paras 17-25 [hereinafter Judgment, Stockholm District Court].
[194] Warrant of Arrest, *Al-Werfalli*, supra note 158; Judgment and Sentence, *Al- Mahdi*, supra note 156.

open-source evidence has proven useful not only in showing the existence of a physical crime, but also in linking far removed perpetrators to the crime and its consequences.

2.4.3.2 Linkage Evidence: Trump's Twitter, Friend Requests and the Establishment of Organisational Hierarchies

Linking the crimes to the alleged perpetrators remains one of the biggest challenges in international criminal justice. Furthermore, linkage evidence is more determinative for the decision on individual criminal responsibility and for the outcome of the case than crime-base evidence, which is often less disputed at trial. That atrocity has taken place is often known, but the key question is to determine who is most responsible.[195] As noted above, those persons most responsible for the crimes under the ICC's jurisdiction are rarely the "foot soldiers" who physically committed the crimes, but rather the persons who ordered their commission or were aware of their commission and had the power to stop the crimes but did not exercise that power.[196]

The most compelling linkage evidence, connecting an alleged perpetrator to the crime in question, is thus relevant and reliable information that helps prove responsibility for the crime, ideally such information would be documents containing direct orders.[197] Traditionally it has been difficult to acquire such information. However, as political leaders increasingly turn to Twitter to express their political messages, it cannot be ruled out that a tweet from a leader could link him or her to crimes on the ground. During the impeachment trial of former US President Donald Trump, for instance, Democrats leading the prosecution presented numerous tweets to support their allegations that Trump incited the mob to storm the US Capitol.[198]

Apart from documents (or Tweets) containing direct orders, another way to prove, or to partly prove, linkage in cases where the military is involved, is to establish the organisational hierarchy, chain of command, and relationships between actors. A defining characteristic of social-media networks is precisely the ability to "follow", "friend" and "connect" with other users on the platforms – which creates a digital record of one's relationship to others. The potential uses of social media in this regard has already been shown by the Prosecution's submission of Facebook photos in the *Bemba et al* trial.[199]

Another important aspect of determining individual responsibility for a crime is proper identification of the accused. The Court has used various criteria in this regard, including, in *Bemba*:

"The position and role of the accused at the time of the charges, the presence in and control of an area by the perpetrators and commanders, the direction from which a perpetrator came, composition of the troops, a perpetrator's uniform— including insignia, footwear, headwear, arms, and clothing, his or her language, and the perpetrator's specific behaviour."[200]

[195] Fry (2014) at 264.
[196] Freeman (2020) at 62.
[197] Matheson (2016).
[198] See, e.g., Kovach (2021); Quinn (2021).
[199] Judgment, *Bemba et al*, paras. 251-260.
[200] Judgment, *Bemba*, paras. 243.

Online open-source footage can be used to show the insignia on soldier uniforms, vehicles, and weapons which can be used to show that the direct perpetrators belonged to a specific military group.[201] For instance, Amnesty International, conducted a rigorous analysis of a video depicting extrajudicial killings that appeared on Facebook in 2018. The comments on the video suggested that the horrifying events took place in Cameroon, but the location was difficult to determine as the video showed nothing more than a dusty path, some trees and a few low buildings. Amnesty was, however, able to verify the video, geolocate the place of the incident by cross-referencing the flora and fauna. By then comparing the perpetrators' uniforms and weapons Amnesty could ultimately identify the perpetrators as members of the Cameroon military.[202]

Furthermore, as noted above (see, 2.4.2), digital open-source content can be useful to place events and people in space and time. This is relevant in identifying the accused as well as linking him or her to the physical crimes. Additionally, digital open-source evidence can be used to corroborate or contradict witness statements. In *Krstic*, the ICTY found the accused guilty, in part, based on his own testimony in which he stated that he was unaware of the presence of the army, despite the fact that a video depicted him walking past soldiers that wore uniforms pertaining to his own unit.[203]

2.4.3.3 Contextual Elements and Specific Facts: Social-Media Coverage, Satellite Imagery and the Tracking of Troop and Population Movements

The adjudication of international crimes involves more evidence relating to the historical and political context, as the context in which international crimes take place is relevant for proving them. In comparison, the political and historical context in which a domestic murder took place does not matter much for understanding or proving the crime in court.[204]

The ICC has accepted the admission of NGO, UN, and media reports to establish contextual elements when the open-source material has been corroborated by other types of evidence. In *Mbarushimana*, Pre-Trial Chamber I found that there were substantial grounds to believe that an armed conflict took place in the DRC between certain groups during a specified period, basing its decision, in part, on a Human Rights Watch Report.[205] Furthermore, in *Gbagbo*, Pre-Trial Chamber I held that high levels of news coverage of multiple events can support the assertion that the commission of crimes was widespread.[206] As stated above, high levels of footage on social media could serve this same function.

A war crime is present only if the criminal conduct took place in the context of, and was associated with, an armed conflict.[207] In this vein, it can be noted that open-source satellite imagery – showing population movements, troop locations, mass graves, and destroyed villages – has been admitted into trial before the ICTY to show that an alleged crime was sufficiently linked to an armed conflict. For instance, troop locations have been tracked to help establish that an armed group was in the area where the crimes charged were

[201] Freeman (2020) at 62-63.
[202] Amnesty (2018).
[203] Judgment, *Krstic* (IT-98-33-T) ICTY Trial Chamber, 2 August 2001, para. 278.
[204] Fry (2014) supra note 170, at 261.
[205] Decision on the confirmation of charges, *Callixte Mbarushimana*, para. 95.
[206] Decision on the confirmation of charges, *Gbagbo* (ICC-02/11-01/11-656-Red) Pre-Trial Chamber I, 12 June 2014, para. 222, fn 527.
[207] Elements of Crimes, relating to Article 8.

committed.[208] Similarly, satellite imaging, including Google Earth, was used by the ICC OTP in the investigations of Banda Jerbo and Abu Garda to track the burning and destruction of villages, troop movements and to show that civilians had to rely on the protection of peacekeeping outpost to escape the violence.[209]

Furthermore, other facts have to be proven for specific crimes under the ICC's jurisdiction. For instance, as to the recruitment of child soldiers as a war crime, the Prosecution introduced ten video clips as evidence to prove that children under the age of 15 were included within Thomas Lubanga's armed group, and to show that he was aware of this fact.[210] While a witness provided the Prosecution with these particular videos back in 2009, content of the same type can certainly be found on the internet today.

In the above-mentioned Swedish case, relating to the summary execution, the Swedish Prosecution Authority used information on YouTube and Facebook that specified the time and place where the prisoners executed in the video were captured.[211] The Court reasoned that given how little time passed between the capture and execution of the prisoners, no fair proceedings could have been held in that short time. The Court thus considered the killings summary, and thus a war crime.[212]

2.4.3.4 Mental Elements: "Images speak a thousand words indeed, but so does the accused's expressed intent"

Heads of state or high-ranking military commanders are public figures whose statements and actions are well recorded in public speeches and media interviews. Such accounts can demonstrate leaders' knowledge, views, and intent regarding the crimes in question. Analysing public speeches and official propaganda is already an increasingly important part of the OTP investigative process.[213] As outlined above, leaders have started to turn to Twitter to express political messages. It is thus plausible that social media will also prove to be a useful source to mine for information about leaders' mental states. As mentioned above, the OTP submitted videos of Al Mahdi, *inter alia* to support the allegation that he had the required state of mind.[214] As stated by trial lawyer Mr Duterte, during the trial hearing; "Images speak a thousand words indeed, but so does the accused's expressed intent."[215]

Furthermore, in *Bemba*, Trial Chamber III admitted an Amnesty International report that according to the Prosecution showed that Mr Bemba was aware of his fighters' capacity to

[208] Judgment, *Prlićm* (IT-04-74-T) ICTY Trial Chamber III, 29 May 2013, para. 518.
[209] Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", *Abdallah Banda & Saleh Jerbo Jamus* (ICC-02/05-03/09) Appeals Chamber, 28 August 2013; Decision on Confirmation of Charges, *Abu Garda*, supra note 141.
[210] Extensive testimony was heard about video evidence in the Lubanga trial from 16–20 February 2009, see e.g., Transcript, *Lubanga Dyilo* (ICC-01/04-01/06-T-127-Red-ENG) 16 February 2009; Transcript, *Lubanga Dyilo* (ICC-01/04-01/06-T-129-Red3- FRA), 17 February 2009; Transcript, *Lubanga Dyilo* (ICC-01/04-01/06-T-130-Red2-ENG), 18 February 2009; Transcript, *Lubanga Dyilo* (ICC-01/04-01/06-T-132-ENG), 20 February 2009.
[211] Judgment, Stockholm District Court, paras. 54-62.
[212] C.f., Common Article 3, Geneva Conventions of 12 August 1949; Article 75(4), Protocol Additional to the Geneva Conventions of 12 August 1949.
[213] Freeman (2020) at 62.
[214] Transcript of Trial Hearing (Open Session), *Al Mahdi* (ICC-01/12-01/15), Trial Chamber VIII, 22 August 2016, at 20.
[215] Ibid.

commit crimes. It also admitted a UN report that was sent to Mr Bemba while the conflict was ongoing to prove that he was on notice about the conduct of his troops – which was considered a further indication that Bemba had knowledge of what was occurring under his command.[216] Trial Chamber III also admitted press reports to assess the Prosecution's allegation that the conduct described in the charges was widely broadcast, which was considered to have "implications with regard to the Accused's [Bemba's] alleged knowledge of the crimes charged".[217] Similarly, the coverage and attention devoted to particular occurrences on social media can, potentially, be used to support an inference that leaders could not have been unaware what happened under their command.

2.4.3.5 Grounds for Excluding Criminal Responsibility: Unexplored Potential?

The acquisition of digital open-source evidence has so far been a project directed towards strengthening the hand of the Prosecution, against the backdrop of evidentiary challenges and prosecution failures at the ICC.[218] There is little scholarly reflection on what role digital open-source evidence can play in proving the underlying facts relating to the grounds excluding criminal responsibility. Given how much of our communication that now takes place online it is not inconceivable that exculpatory information could be found online. Such information could include, for instance, material relating to any mental illness of the accused or information as to him or her being under a state of duress.[219]

Naturally, there are no NGOs who are mobilising citizens to collect digital open-source evidence to ensure the rights of those accused of atrocity crimes.[220] However, the IBA and WITNESS, two organisations that have designed apps for collecting user-generated digital evidence, have reached out to defence counsel in different jurisdictions, with a view of encouraging them to use the apps for collecting exculpatory evidence – regrettably, with limited result.[221] The term exculpatory evidence is used here in a broader sense, not referring strictly to the grounds excluding criminal responsibility, but rather as material that shows or tends to show the innocence of the accused, that mitigates the guilt of the accused or and that may affect the credibility of prosecution evidence.[222] For example, in *Katanga*, the trial judges discovered on a site visit that claims made by witnesses could not have been possible owing to the distances between the witnesses' location and the events they allegedly witnessed.[223] Similarly, geospatial data derived from online open sources might prove useful in answering potentially exonerating when, where and who questions in this regard.

[216] Decision on the admission into evidence of items deferred in the Chamber's "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute", *Bemba* (ICC-01/05-01/08) Trial Chamber III, 27 June 2013, paras. 20-22 [hereinafter Admissibility Decision (2013), *Bemba*].
[217] Judgment, *Bemba*, para 269.
[218] R. J Hamilton (2018) at 34.
[219] C.f., Article 31, ICCSt
[220] Ibid. at 40.
[221] Ibid. at 41.
[222] Decision on the admissibility of four documents, *Lubanga*, para. 59.
[223] Judgment pursuant to Article 74, *Katanga*, (ICC-01/04-01/07-3436-tENG), Trial Chamber II, 7 March 2014, para. 168 [hereinafter Judgment, *Katanga*].

2.5 Interim Conclusions

As outlined above, there is an increasingly professional investigative network pushing for the introduction of digital open-source information as evidence at the ICC, and the OTP has recognised the increasingly important role of third parties in the collection of digital open-source materials available online. Furthermore, NGOs have technical solutions in place for facilitating authentication and verification, and international guidelines have been developed, aimed at increasing the likelihood that online content will be admitted at the ICC, while maximising its evidentiary value. While the techniques for authenticating online material and verifying its contents are becoming increasingly refined, mistakes can still be made, and uncertainties remain not only as to how the ICC should evaluate the digital open-source information, as such, but also the authentication and verification methodologies used by online investigators.

In the past, the main purpose of introducing open-source evidence into trial has been to prove circumstances, rather than the acts and conduct of the accused.[224] For instance, NGO reports have been used to prove contextual elements, such as whether the commission of crimes was "widespread" or whether there was an armed conflict at the relevant point in time. Furthermore, and as will be elaborated further 4.2.2.4 below, as a general rule, in the instances where the ICC chambers have admitted NGO reports or analogue media coverage, it has been to corroborate other evidence.

The proponents of digital open-source evidence suggest that online content too would mainly be used to corroborate other pieces of evidence.[225] However, it is not inconceivable that digital open-source evidence could stand on its own, especially if a video uploaded to Facebook, for instance, is corroborated by other evidence. This assertion gains some support from the Prosecutions reliance on social-media content alone in *Al-Werfalli*, which was accepted by Pre-Trial Chamber I as sufficient basis for issuing an arrest warrant. But it remains to be seen whether the OTP would rely less heavily on online content, at later stages of the proceedings, facing the standard for the confirmation of charges ("substantial grounds to believe" (Article 61(5) ICCSt) and conviction ("beyond reasonable doubt" (Article 66(3) ICCSt).

Digital open-source evidence differs from traditional open-source evidence in that it is more diverse and has the potential to prove more facts – facts that may be instrumental to the determination of individual guilt. Most importantly, it is capable of linking perpetrators to the crime, through answering decisive "when", "where" and "who" questions. While sources of NGO or UN reports may provide a person's perception and recollection of an event, a video derived from open sources online may capture events that were outside an individual's eyesight or that he or she has forgotten; satellite imagery may give an overview of a larger or inaccessible area; and computer records may show communication patterns relevant to an individual's relationships, activities and knowledge of events. Digital open-source evidence thus captures dimensions of events or locations that may be beyond human perception, and it can impeach untrue accounts of what happened in particular instances. Furthermore, there are increasingly refined techniques for verifying online content. In sum digital open-source information can potentially be very compelling evidence, decisive in determining the guilt of the accused.

[224] Farthofer (2012) at 476.
[225] Koenig (2020).

However, as with traditional open-source information previously relied on as evidence in the ICC, digital open-source evidence is likely to often be circumstantial, meaning that the evidence is not drawn from direct observation of a fact in issue. Apart from the instances where the perpetrator is caught red-handed, physically committing the crime, an inferential step will almost always be required to connect the dots and to link the distant perpetrator to atrocity on the ground.[226] For example, a photo shared to Facebook depicting a government official shaking hands with a high-ranking member of the guerrilla, at their headquarters, supports an inference that the official was friendly with, or even supported, the armed group in question. However, even if it is assumed that the photo is authentic, the picture might mean only that the government official met the guerrilla warrior once, or it might mean that the persons in the photo are not actually the government official or the high-ranking guerrilla member, or that the buildings in the background are not actually the guerrilla headquarters. Consequently, digital open-source evidence requires corroboration from multiple other sources to piece together what it might prove. As will be further elaborated in 5.3.6 below, the increasingly complex investigatory practices online may therefore require expert witnesses to explain what the material is, and what it means. However, when corroborated, and properly explained by witnesses, digital open-source evidence can, indeed, be very compelling.

The analysis above has also demonstrated that the potential uses of digital open-source evidence for exonerating purposes is under-researched. While it is feasible that there is such information available online, the push for using online content as evidence has so far been a project directed towards strengthening the hand of the Prosecution, rather than the defence.

It is clear that digital open-source evidence has enormous potential. Nonetheless, the compelling nature of digital open-source evidence, taken together with the growing risks of manipulation and forgery of online content, the risks for bias due to the many, and often anonymous or otherwise unknown, users engaged in online fact-finding, poses new challenges to the evaluation of evidence at the admissibility stage. In the following, the thesis will analyse whether these concerns compel the ICC chambers to rethink the rules of evidence and procedure that govern the admissibility of evidence. However, in order to know whether we should worry about the right to a fair trial when digital open-source information is introduced as evidence, we must first determine the standard by which the trial should be judged.

3 The Right to a Fair Trial at the ICC

3.1 The Applicable Standard of Fairness at the ICC

3.1.1 Adversarial, Inquisitorial, Mixed or Sui Generis Proceedings – Fairness the Overarching Requirement

There has been much debate as to how the procedural law of the ICC and its predecessors in Former Yugoslavia and Rwanda should be categorised: whether, simply put, the proceedings embrace the common law/adversarial model where the judges "keep their hands off" the active search for the truth, or whether it follows the "hands-on" approach underlying the civil

[226] Hiatt (2016).

law/inquisitorial model.[227] There is broad agreement that the ICCSt and the RPE borrow from both main procedural traditions.[228] As summarised by Salvatore Zappalà, "[…] the procedural system of the ICC amounts to an accusatorial [adversarial] system with significant inputs from the inquisitorial/non-adversarial culture: a mixed system […]".[229]

The trial as such is structured as an adversarial proceeding, but inquisitorial elements are also included in the ICC procedure. For instance, the ICC judges have comparatively strong powers during the pre-trial stage, and the Prosecutor has a neutral role, *inter alia*, required to collect incriminating and exonerating evidence equally.[230] Furthermore, as will be outlined further in ch. 4 below, the rules governing the admissibility of evidence are flexible and more similar to the civil law system in that there are few strict exclusionary rules. In comparison, common law systems contain more prohibitions and rules that exclude evidence that is considered to be irrelevant or unreliable.[231] In domestic civil law jurisdiction, the broad judicial discretion in determining the admissibility is often motivated by the fact that professional judges are better equipped to recognise unreliable evidence and to afford evidentiary value to it accordingly, compared to lay jurors, that are a typical characteristic of common law procedure.[232]

On the other hand, Frédéric Mégret, and others, have argued that international criminal procedure cannot be conceptualised simply as a conflict between domestic traditions, but that it must be approached from "a truly international point of view",[233] as international criminal procedure is largely *sui generis*.[234] The ICC chambers apply the ICCSt and the Court's internal rules of procedure and evidence, firstly, and the ICC faces unique challenges, particular to the international context. As to the admissibility requirements, it has, for instance, been held that the Court's "institutional handicaps of investigating crimes committed far away with little cooperation on the ground",[235] gives rise to a desire to maximise use of the limited amount of evidence that can be available post – or during – conflict,[236] which necessitates a broad latitude of flexibility on the part of the ICC judges when they rule on evidence.[237]

Moreover, it has been held that it is no longer important whether a rule or practice is either "adversarial" or "inquisitorial". Rather, it should be asked whether the procedural framework, and its practical application, assists the ICC in accomplishing its tasks and – importantly – whether it complies with fundamental fair trial standards.[238] As ICTY's former President, Judge Robinson, put it, "ultimately the question is not the legal system from which a particular measure or procedure comes, but whether its incorporation in the law of the Tribunal produces a result that is consistent with international standards of fairness."[239] "Fairness", Robinson continues, is used "as the plane to smooth the edges in the alignment of

[227] Klamberg (2013a) at 46.
[228] See, generally, Carmichael Keen (2004).
[229] Zappalà (2013) at 52.
[230] Article 67(2), ICCSt.
[231] Jackson & Summers (2012) at 110-111.
[232] Caianiello (2011) at 388.
[233] Mégret (2009) at 40.
[234] See also, Klamberg (2013a) at 508-511.
[235] Fry (2014) at 251.
[236] Klamberg (2013a) at 337–338.
[237] International Bar Association (2016) at 30.
[238] Kai (2003) at 35.
[239] Robinson (2005) at 1056.

the legal systems",[240] which illustrate that respect for fairness is accepted by different legal systems, although there are elements of procedure that are fundamentally different – such as the rules governing the admissibility of evidence.

Fairness is thus an overarching requirement of all criminal proceedings. It applies equally to proceedings held in a common law, civil law or "mixed" combinations of both traditions, amounting to a *sui generis* system, such as the ICC.[241]

3.1.2 International Human Rights Law – Minimum Procedural Guarantees Below Which the ICC Cannot Go

While trial fairness is easily proclaimed it is hard to define precisely. However, the normative underpinnings of the right to a fair trial in international criminal procedure are indeed derived from its predecessor – international human rights law – and there is widespread agreement that the answer as to the applicable fairness standard should be sought in the human rights principle of a fair trial.[242] While most commentators agree that compliance with human rights is the most reliable benchmark for testing the fairness of international criminal trials, there is disagreement as to the flexibility of the applicable human rights standard.

Is it acceptable to compromise the fair-trial rights of the accused to send a strong message that atrocity crimes will not be tolerated? Or is strict adherence to the accused's right to a fair trial preferable, even if doing so results in a "guilty" individual being set free because certain conditions, such as an ongoing armed conflict, make it impossible to conduct a fair trial? Here the tension between the objectives of crime control versus the accused's right to a fair trial becomes apparent.

Some commentators, such as Mirjan Damaška and Frédéric Mégret, claim that the seriousness of the crimes charged, the unique context and challenges of international criminal investigations may require the abandonment, or at least the relaxation, of certain domestic procedural arrangements.[243] It is thus argued that it suffices that international criminal proceedings are just "fair enough" and that international criminal procedures could be adjusted somewhat to address the specific practical challenges the ICC encounters with respect to the international context it operates in and the complex cases it adjudicates, i.e. that the fair trial standard in human rights law may be "contextualised".[244]

Others, such as Yvonne McDermott, argue that the ICC is under a duty to set the "highest standards of fairness" in its procedure, and that no deviation from the fair trial standard in human rights law should be allowed.[245] This, she argues, is necessary as the Court's legitimacy is linked to the perceived fairness of the proceedings.[246] Furthermore, the ICC was set up to be "complementary to national criminal jurisdictions",[247] and only accepts jurisdiction only where a state is "unwilling or unable to genuinely carry out the investigation

[240] Ibid. at 1058.
[241] Safferling (2012), at 381.
[242] Ibid.
[243] Damaška (2012) at 614 and Mégret (2009) at 75-76.
[244] Mégret (2009) at 53.
[245] McDermott (2016) at 126.
[246] Ibid. at 148.
[247] Article 1, ICCSt.

or prosecution."[248] Sara Stapleton has convincingly argued that the theory of complementary jurisdiction encompasses an understanding that the result of such a system will be a fair and effective trial: in either a national or international court. Since domestic courts cannot deviate from the human rights standard of fairness, then, logically, the ICC should not be allowed to do so either. As Stapleton puts it, there is "no point of taking a trial away from a national court because the court is unable to provide a genuine or effective forum only to confer jurisdiction on an equally ineffective, but international, forum."[249]

McDermott's and Stapleton's arguments are further supported by the fact that the ICC cannot go below a certain minimum level of procedural rights without producing a result that is incompatible with internationally recognised human rights (c.f. Article 21(3) ICCSt). While there has been some debate as to the customary international law status of the right to a fair trial in international human rights law,[250] it has been held to be beyond question that there is significant state practice and *opinio juris* on the point that the right to a fair trial must be respected.[251] Regardless if the right to a fair trial is binding in international criminal procedure as a customary norm of international law or a general principle, the interpretation and practical application of the fair-trial rights of the defendant at trial is greatly influenced by Article 21(3) ICCSt, which provides that all law interpreted and applied by the ICC must be consistent with internationally recognised human rights. As has been clarified above, compliance with internationally recognised human rights has come to be considered as a "super-legality" test, against which all rules applied at the ICC must be tested.[252] Article 21(3) ICCSt thus confirms that the Court cannot go below the standard of fairness reflected in international human rights law.

The present study thus agrees with the arguments brought forward by McDermott and Stapleton and considers that a cautionary approach is called for as to any adaptation of human rights standards due the specific exigencies of the ICC proceedings. Furthermore, as will be further elaborated in the next section, international human rights norms are certainly flexible enough not to require any adjustment to the international context.

3.2 The Right to a Fair Trial in International Human Rights Law

Provisions in international human rights instruments on the protection of individual rights in criminal trials are very similar, and through their content a solid international understanding of the human rights principle of a fair trial has evolved.[253] In all principal human rights instruments the right to a fair trial is composed by a set of distinct due-process rights, or "minimum guarantees", that "taken together, make up a single right not specifically defined".[254]

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[248] Article 17(1)(a), ICCSt.
[249] Stapleton (1999) at 604.
[250] Compare, Judgment, *Aleksovski*, (IT-95-14/1-A), ICTY Appeals Chamber, 24 March 2000, para. 104, stating that the right to a fair trial was "of course, a requirement of customary international law"; Decision on Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, *Gbao*, (SCSL-2003-09-PT), SCSL Trial Chamber, 10 October 2003, para. 41, subscribing to the "considered view that it has not been established that the right of the Accused to a fair trial has become part of customary international law" [hereinafter Decision, *Gbao*].
[251] McDermott (2016) at 36; Decision, *Gbao*, para. 39.
[252] Pellet (2002) at 1079-1082.
[253] See, Article 14, ICCPR; Article 6 ECtHR, Article 8, AMCHR; Article 7, ACHPR.
[254] See, e.g., Judgment, *Golder v. UK*, (App. no. 4451/70), ECtHR, 21 February 1975, para. 28.

All principal human rights documents recognise that all persons shall be equal before a tribunal,[255] and that the tribunal shall be competent, independent, impartial and established by law.[256] Furthermore, they list the following fair-trial rights of the accused which are widely considered necessary for a fair trial:

- to be presumed innocent,[257]
- to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her,[258]
- to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing,[259]
- to be tried without undue delay,[260]
- to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing, be informed of this right and be assigned legal assistance without payment if he or she does not have sufficient means to pay for it,[261]
- to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her,[262]
- to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court;[263]
- not to be compelled to testify against himself or herself or to confess guilt and to remain silent,[264]
- *ne bis in idem*,[265]
- *nullum crimen/nulla poena sine lege*.[266]

Furthermore, following the dynamic logic of the human rights principle of a fair trial, additional aspects of the right, that are not explicitly referred to in human rights instruments, have been developed in the jurisprudence of human rights bodies, and by the ECtHR in particular. These include, most importantly, the right to an adversarial hearing and the principle of equality of arms.[267]

However, according to the jurisprudence of human rights bodies, a violation of one of the minimum guarantees, outlined above, does not automatically lead to the conclusion that the trial has been unfair. International human rights law affords a broad margin of appreciation to states and, conversely, international criminal courts, and only "intervenes" when the convention right to a fair trial is violated to such an extent that the proceedings "as a whole"

[255] Article 14(1), ICCPR; Article 8(2) AMCHR; Article 3, ACHPR.
[256] Article 14(1), ICCPR; Article 6(1), ECHR; Article 7(1), AMCHR; Article 7(b), ACHPR.
[257] Article 14(2), ICCPR; Article 6(2), ECHR; Article 8(2), AMCHR; Article 7(1)(b), ACHPR.
[258]Article 14(3)(a), ICCPR; Article 6(3)(a), ECHR;Article 8(2)(b), AMCHR.
[259] Article 14(3)(b), ICCPR; Article 6(3)(b), ECHR; Article 8(2)(c) and (d), AMCHR; Article 7(1)(c), ACHPR.
[260] Article 14(3)(c), ICCPR; Article 6(1), ECHR; Article 8(1), AMCHR; Article 7(1)(d), ACHPR.
[261] Article 14(3)(d), ICCPR; Article 6(3)(c), ECHR; Article 8(2)(d) and (e), AMCHR; Article 7(1)(c), ACHPR.
[262] Article 14(3)(e), ICCPR; Article 6(3)(d), ECHR; Article 8(2)(f), AMCHR.
[263] Article 14(3)(f), ICCPR; Article 6(3)(e), ECHR; Article 8(2)(a), AMCHR.
[264] Article 14(3)(g), ICCPR; *John Murray v. United Kingdom*, (App. no. 18731/91), ECtHR, judgment, 8 February 1996, para. 45; Article 8(2)(g), AMCHR.
[265] Article 14(7), ICCPR; Article 8(4), AMCHR.
[266] Article 15(1), ICCPR; Article 7(1), ECHR; Article 9, AMCHR; Article 7(2), ACHPR.
[267] Safferling (2012) supra note 18, at 381.

can no longer be said to be fair.[268] Furthermore, the absence of a violation of any of the minimum guarantees will not necessarily always lead to the conclusion that the trial has actually been fair. Fairness thus goes beyond the minimum guarantees explicitly stated and the accused's right to a fair trial must be understood as a dynamic principle.[269]

The abovementioned minimum guarantees, together with fundamental principles of fairness, most importantly the right to an adversarial hearing and the equality of arms principle, create a baseline below which a court, be it national or international, cannot go. However, the assessment as to whether the trial "as a whole" is fair, affords the ICC judges with sufficient flexibility to adapt the concept of a fair trial to the international context.

3.3 The "Codification" of the Right to a Fair Trial in the ICCSt

Ensuring a fair trial is one of the explicitly recognised objectives of international criminal procedure. Article 64(2) establishes the Trial Chamber's responsibility to ensure that the trial is "fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses". Pursuant to Article 64(2) the Chamber is thus empowered to take necessary measures to safeguard trial fairness.

Accordingly, the Court has treated "fairness" as an indispensable requirement for the continuation of a trial. As stated by the Appeals Chamber in *Lubanga*; "A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped."[270]

As noted above, Article 21 ICCSt designates the "applicable law" at the ICC and clarifies that the Statute text and the Court's internal rules, are the starting point of the fairness analysis. If necessary, the next step is to look to other applicable treaties and the principles and rules of international law. Failing all that, the ICC bench shall apply general principles of law. Furthermore, pursuant to Article 21(3) the law applied and interpreted by the Court must achieve a result that is compatible with internationally recognised human rights.

While the ICCSt and the RPE do not explicitly refer to the right to a fair trial as such, the various components of the right are incorporated in several provisions of the ICCSt. Taken together they establish that defendants have a right to a fair trial by an independent and impartial tribunal.

Article 67 enumerates specific fair-trial rights of defendants. The provision contains the right to a fair and public hearing conducted impartially and lists a number of "necessary" minimum guarantees to be applied with "full equality". These include: the right to be "informed promptly and in detail of the nature, cause and content of the charge",[271] "have adequate time and facilities for the preparation of the defence",[272] "be tried without undue delay",[273] to be present at trial, and to conduct a defence and have legal counsel (assigned and paid for by the

[268] See, e.g., *Schenk v. Switzerland*, (App. no. 10862/84, A-140), ECtHR, judgment, 12 July 1988 [hereinafter *Schenk v. Switzerland*]
[269] Safferling (2012) at 381.
[270] Appeals Judgment I, *Lubanga*, para. 37.
[271] Article 67(1)(a), ICCSt.
[272] Article 67(1)(b), ICCSt.
[273] Article 67(1)(c), ICCSt.

Court if necessary),[274] "examine, or have examined, the witnesses against him or her […] under the same conditions as witnesses against him or her",[275] to have access to an interpreter,[276] and the right to silence or "not to be compelled to testify or confess to guilt."[277]

Article 55 ICCSt sets out the rights of persons during an investigation including, protection against self-incrimination and the right to silence,[278] the right not to be coerced or tortured,[279] the right to the free assistance of an interpreter,[280] the right to legal assistance,[281] and "the right to be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court".[282]

Furthermore, fundamental principles of fairness, such as the presumption of innocence, *nullum crimen/poena sine lege* and *ne bis in idem* and the right not to be tried in secret are reflected in Articles 60, 20, 22 and 32 ICCSt, respectively.

It should also be noted that the ICCSt elevates the responsibility of the Prosecutor in relation to the defendant and the defence, by providing that the Prosecutor shall investigate incriminating and exonerating circumstances equally,[283] and disclose any material "which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence."[284] Additionally, the Trial Chamber has the power to provide for disclosure of materials not previously disclosed "sufficiently in advance of the commencement of the trial to enable adequate preparation for trial."[285] Moreover, the Pre-Trial Chamber has some limited, but important, powers during investigations, enabling the Chamber to supervise the Prosecution and assist the parties in the preparation of their respective cases. For instance, the Pre-Trial Chamber can assist the parties in obtaining state-cooperation to collect evidence.[286] However, the Court's ability to enforce such a request, if the State concerned is unwilling to assist, is rather limited. Furthermore, the Pre-Trial Chamber can request the Prosecution to provide more evidence, should it see such a need during the confirmation of charges hearing.[287] In sum, these provisions must be read as incorporating the human rights principle of equality of arms, which requires the Court to ensure that neither party is put at a disadvantage when presenting its case (see, 3.5.1).[288]

The right to a fair trial in the ICCSt thus mirrors the fairness standard in international human rights law. It consists of a combination of a set of minimum guarantees and a number of

[274] Article 67(1)(d), ICCSt.
[275] Article 67(1)(e), ICCSt; see also, Article 61(6)(b), ICCSt which provides that "At the [confirmation of charges] hearing, the person may […] [c]hallenge the evidence presented by the Prosecutor".
[276] Article 67(1)(f), ICCSt.
[277] Article 67(1)(g), ICCSt.
[278] Articles 55(1)(a) and 55(2)(b), ICCSt.
[279] Article 55(1)(b), ICCSt.
[280] Article 55(1)(c), ICCSt.
[281] Article 55(2)(c), ICCSt.
[282] Article 55(2)(a), ICCSt.
[283] Article 54(1)(a), ICCSt.
[284] Article 67(2), ICCSt.
[285] Article 64(3)(c), ICCSt.
[286] Article 57(3)(b), ICCSt.
[287] Article 61(7)(c)(i), ICCSt.
[288] Decision on Prosecutor's Application for leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, *Situation in Uganda* (ICC-02/04-01/05), Pre-Trial Chamber II, 19 August 2005, para. 30 [hereinafter Decision on Leave to Appeal I, *Situation in Uganda*].

fundamental fairness principles.[289] It can be observed that the drafters of the ICCSt have amended the minimum guarantees according to the jurisprudence of the ECtHR and other human rights bodies and developed a "laudable modernized list of minimum guarantees".[290]

3.4 Some Relevant Human Rights Considerations

While the normative provisions governing the fairness of the proceedings at the ICC are clear, the interpretation and practical application of these provisions are less so. The ICC has grappled with complex issues, which are specific to the challenging international environment in which the Court operates. The responsibility of the Trial Chamber to ensure that the trial is "fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses", pursuant to Article 64(2) ICCSt, gives rise to a "whole bouquet of different aspects and dimensions" that must be taken into account.[291]

As noted above, international human rights law affords states with a broad margin of appreciation and mainly provides "minimum guarantees", thus only intervening if proceedings have been fundamentally unfair. As to the application of evidentiary principles, which is the focus of this thesis, it can be noted that it is a domain that largely falls within the margin of appreciation afforded to domestic courts under international human rights law.[292] International human rights law is mainly interested in broad outcomes, rather than the discreet ways of implementing them. An "overall examination" might be useful for an appeals court or a human rights body, in their *ex posto facto* assessments of fairness, but it does not assist the Trial Chamber when seeking to effectuate the right to a fair trial in its everyday practice, pursuant to Article 64(2) ICCSt. The concept of an "overall examination" of fairness, as applied by the ECtHR and other human rights bodies, is thus not particularly helpful in the development of precise fair-trial rights, in the context of admissibility decisions for instance.

However, the human rights principle of equality of arms, the related right to examine witnesses and challenge evidence, and the to be tried without undue delay do indeed assume central roles and must be given due regard in the admissibility evaluation. In the following, some relevant considerations will be made regarding these rights. Additionally, a few remarks will be made in relation to the exclusion of improperly obtained evidence in human rights law.

3.4.1 The Principle of Equality of Arms

The principle of equality of arms constitutes a corner stone of the right to a fair trial and is generally held to be a minimum threshold requirement for all judicial proceedings to be considered fair, impartial and consistent with human rights standards.[293] In *Lubanga* the ICC Appeals Chamber held that the equality of arms principle is an "indispensable requisite of an adversarial trial" that "permeates the entire judicial process".[294]

[289] McDermott (2016) at 39.
[290] Safferling (2012) at 384.
[291] Ibid., at 383.
[292] *Destrehem v. France*, (App. no. 56651/00) ECtHR, judgment, 18 May 2004, para. 41.
[293] Negri (2005) at 13 and Klamberg (2013b) at 1037.
[294] Decision on the Prosecutor's "Application for Leave to Reply to "Conclusions de la défense en réponse au mémoire d'appel du Procureur", *Lubanga* (ICC-01/04-01/06), Appeals Chamber, 12 September 2006, para. 6.

As noted above, the equality of arms principle is not explicitly stated in any of the major human rights instruments, but it has been developed in the jurisprudence of human rights bodies, most notably in the ECtHR.[295] Furthermore, according to ECtHR jurisprudence, and consequently reiterated by other authorities, the principle of equality of arms has been held to encompass a fundamental right to an adversarial hearing, which is intended to guarantee to both parties a reasonable opportunity to comment on each other's submissions.[296] While there has been some dissention as to the precise definition of the equality of arms principle amongst scholars, it is generally agreed that it means, in essence, that criminal proceedings must secure equality and procedural balance between the parties, so that both the defence and the Prosecution are given equal chances of winning their case.[297]

The ECtHR authorities has consistently held that equality of arms "[…] implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."[298] While the early ECtHR jurisprudence took a rather formal approach to the principle of equality of arms, interpreting it to comprise merely the accused's right to be heard, if the Prosecution had the opportunity to present its case,[299] more recent Strasbourg decisions has expanded the substantial scope of the principle. It has, for instance, in the context of witness examination, been held necessary to establish "full equality of arms" between prosecutor and defendant.[300]

At the ICC, Pre-Trial Chamber II has defined the principle as "the ability of a party […] to adequately make its case, with a view to influencing the outcome of the proceedings in its favour."[301] Furthermore, the ICTR has held that divergences in the means by which the Prosecution's and the defence's evidence is presented may constitute a breach of equality of arms.[302]

The principle of equality of arms is indeed pivotal in proceedings based on the adversarial approach. However, the balance between the Prosecution and the defence is equally important during ICC proceedings, given the unique mix of inquisitorial and adversarial elements at play throughout the investigation and trial stages. It should, however, be noted that equality of arms does not necessarily mean that the parties are given the same procedural powers and privileges. Rather, it implies that they must be placed in a position which gives them the same opportunity to properly present their cases, resulting in equal chances of success at trial.[303] It can be observed that the incorporation of the principle of equality of arms in the ICC statutory framework, outlined in 3.3 above, tip the scale to the benefit of the accused.[304] This, however, is necessary to mitigate the imbalance resulting from the

[295] Safferling (2012) supra note 18, 412.
[296] See, e.g., *Ruiz-Mateos v. Spain*, (App. no. 12952/87), ECtHR, judgment, 23 June 1993, para. 63.
[297] Negri (2005) at 514; Caianiello (2011) at 390.
[298] See, e.g., *Dombo Beheer B.V. v. the Netherlands*, (App. No. 14448/88), ECtHR, judgment, 27 October 1993, para. 33.
[299] See, e.g., *Ofner v Austria*, (App. no. 524/59), ECtHR, judgment, 23 November 1962 and *Hopfinger v Austria*, (App. No. 617/59), ECtHR, judgment, 23 November 1962.
[300] See, e.g., *Barberà, Messegué & Jabardo v Spain*, (App. no. 10590/83), ECtHR, judgment, 6 December 1988, paras. 67 and 78.
[301] Decision on Leave to Appeal I, *Situation in Uganda*, para. 30.
[302] Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, *Munyakazi*, (ICTR-97-36- R11bis) ICTR Referral Chamber, 28 May 2008, para. 65.
[303] See, e.g., Negri (2005) at 227; Caianiello (2011) at 390.
[304] Schabas (2016) at 1024-1025.

institutional benefit the Prosecutor has as an official organ of the Court. For instance, the defence does not have any explicit mandate to conduct its own investigations and there is a vast disparity in resources between the defence and the Prosecution.[305] The prosecutorial duty to investigate incriminating and exonerating circumstances equally (c.f. Article 54(1)(a) ICCSt) is therefore of utmost importance. Furthermore, to comply with the principle of equality of arms, the Prosecutor should not be allowed to benefit at trial from its advantageous position during the investigative stages. Therefore, rules such as those relating to the disclosure of evidence are necessary, given the predominant position of the Prosecutor during the investigation phase. This has been confirmed by the Appeals Chamber in *Bemba*.[306]

The ICC jurisprudence on equality of arms thus suggest that a just match-up, a "balance" between the parties during the proceedings, is required.[307] In legal doctrine this has been interpreted as a duty incumbent upon ICC chambers to make sure that the defence has sufficient, adequate facilities so that the accused does not face any "substantive disadvantage" vis-à-vis the Prosecution.[308] For instance, for the equality of arms principle to be effective and meaningful Trial Chamber II has held that it is required that "the responding party has sufficient time to prepare its response."[309]

That being said, it should be noted that the interpretation and practical application of the equality of arms principle in international criminal trials has not been without critique. As mentioned above there is a blatant disparity between the resources of the Prosecution and the defence at the ICC. This was the case at the ICTY and the ICTR too, but rather than attempting to rectify these institutional inequalities the *ad hoc* tribunals reconstructed the concept of equality of arms to the particularities of the international context. In *Tadić*, for instance, a state was unwilling to co-operate with the defence, whereas the Prosecution was granted significant amounts of state cooperation. However, the Appeals Chamber found that a "more liberal" approach to the principle, compared to its domestic implementation of the, was necessitated, and held that inequality that was not caused by any fault of the Trial Chamber would not be a breach of the right to equality of arms.[310] Similarly, in *Kayishema*, the ICTR Prosecutor had access to the sites were crimes had been committed, but the defence counsel was denied access by Rwandan authorities. The defence called for full equality of arms, but the Trial Chamber held that "the rights of the accused and equality between the parties should not be confused with the equality of means and resources",[311] and cited *Tadić* when holding that the equality of arms principle does not apply to conditions outside of the court's control. It is uncertain whether the *ad hoc* tribunals' "more liberal" approach to

[305] Jalloh & DiBella (2013) at 251.
[306] Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", *Bemba*, (ICC-01/05-01/08- 1191), Appeals Chamber, 3 May 2011, paras. 31-32, referring to, , *Garcia Alva v. Germany*, (App. no. 23541/94), ECtHR, judgment, 13 February 2001).
[307] Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, *Situation in Uganda*, (ICC-02/04-01/05), Pre-Trial Chamber II, 19 August 2005, para. 30
[308] Tuinstra (2010) at 486.
[309] Decision on the "Prosecution's Application Concerning Disclosure Pursuant to Rules 78 and 79(4)", *Katanga & Ngudjolo Chui*, (ICC-01/04-01/07), Trial Chamber II, 14 September 2010, para. 37 [hereinafter Disclosure Decision, *Katanga & Ngudjolo Chui*].
[310] Judgment, *Tadić, (*IT-94-1-A), ICTY Appeals Chamber, 15 July 1999, paras. 53-54 [hereinafter Appeals Judgment, *Tadić*].
[311] Judgment, *Kayishema & Ruzindana*, (ICTR-95-1-T), ICTR Trial Chamber, 21 May 1999, para. 20.

procedural equality, i.e., the misnomer that allowed a more restrictive, and therefore less liberal, interpretation of the notion of "equality", is compatible with international human rights law.

However, the prosecutors with the ICTY and the ICTR were not required to collect incriminating and exonerating evidence equally, as is the ICC OTP, which mitigates the inequality that can arise due to external factors to a certain degree. However, structural and resource inequalities between the defence and the Prosecution persist at the ICC. So far, the principle of equality of arms has not been made an issue in the ICC jurisprudence,[312] and it remains to be seen whether the Court will adopt the *ad hoc* tribunals' watered-down interpretation of the equality of arms principle.

3.4.2 The Right to Examine and Test Evidence

The right to examine witnesses is found in all major human rights instruments,[313] and as a corollary of this right and the equality of arms principle a defendant must also have an effective opportunity to comment on and challenge other evidence against him or her. The aim of the right is to enable the defendant to test the reliability of a witness, and other evidence, or cast doubts upon the credibility of a witness or a source.[314] However, the right to test evidence is not unlimited.

In early Strasbourg authorities the "sole or decisive rule" was central, meaning that if the defence could not examine a witness whose statement was the sole or decisive evidence of the charges, then the ECtHR consistently found a breach of the right to examine witnesses.[315] In later case law, however, the ECtHR has allowed to test the reliability of a decisive witness statement in other ways. Furthermore, the Court has opened the possibility to base a conviction solely, or to a decisive extent, on anonymous witness statements, which was previously not allowed.

In *Al-Khawaja and Tahery v. United Kingdom* it was held that if the defence has been unable to examine a decisive witness, if the witness is dead or otherwise unavailable, a breach will in many cases continue to be established. However, counterbalancing factors may serve to prevent a violation of the right.[316] Counterbalancing factors include methods for establishing the reliability of a witness statement other than by direct questioning, such as corroboration through other evidence. Particular regard seems to be given to whether the corroborative evidence, such as other witness testimony, is examined at the trial. [317]

As to anonymous witnesses, it is clear that unfamiliarity with the identity of a witness also restricts the defence's opportunities to demonstrate the witness's lack of credibility, since the defence then does not know the identity of the person called to testify and is not allowed to ask questions that could lead to the identification of the witness. It has been observed in the scholarly literature that under these conditions, the right to confrontation is impossible *in nuce*.[318] However, in *Ellis, Simms and Martin* v. *United Kingdom*, it was held that the mere

[312] Safferling (2012) at 415.
[313] Article 14(3)(e), ICCPR; Article 6(3)(d), ECHR; Article 8(2)(f), AMCHR.
[314] *Windisch v Austria*, (App. no. 12489/86), ECtHR, judgment, 27 September 1990, para. 28.
[315] See, e.g., *Lucà v Italy* (App. no. 33354/96), ECtHR, judgment 27 February 2001, para. 40.
[316] *Al-Khawaja & Tahery v United Kingdom*, (App. nos. 26766/05 and 22228/06), ECtHR, judgment, 20 January 2009, paras. 41–48.
[317] Ibid., paras. 155–158.
[318] Caianiello (2011) supra note 214, at 395.

fact that the anonymous witness statement is of decisive importance does not automatically constitute a violation of the right to examine witnesses enshrined in Article 6(3)(d) ECHR.[319] This type of infringement of the right can also be counterbalanced. The types of counterbalancing measures necessary with respect to anonymous witnesses are, however, partly different in nature, as the defence is often afforded the opportunity to examine the witness, albeit without knowing his or her identity. According to ECtHR jurisprudence counterbalancing factors of relevance include, whether information about the anonymous witness was disclosed. In this particular case information as to the witness' gang background and possible motives for lying was considered to increase the possibility of a successful cross-examination.[320] It should be noted that any restrictions must not affect the "very essence" of a party's fair-trial rights.[321]

In sum, international human rights law allows for the admittance of unchallenged evidence, and evidence from unknown or anonymous sources, and has afforded States a broad margin of appreciation, allowing infringements of the right to test evidence. Importantly, however, any such infringements must be sufficiently counterbalanced in order not to render the trial "as a whole" unfair.

As outlined above, the right of the accused "to examine, or have examined, witnesses on his or her behalf under the same conditions as the evidence or witnesses against him or her" is explicitly provided for by Article 67(1)(e) ICCSt. Furthermore, Article 69(2) states that the testimony of a witness at trial shall be given in person. The latter provision thus enshrines the principle of orality which "is intended principally to ensure the accused's right to confront the witnesses against him".[322] This requirement is, however, subject to certain exceptions, e.g., the safety and well-being of the witness, and in certain exceptional circumstances the Prosecution is allowed to submit written witness statements without cross-examination, pursuant to Article 68(5) ICCSt. Additionally, Article 54(3)(e) ICCSt allows the Prosecution to enter into confidentiality agreements in exceptional circumstances, to generate new evidence, which prevents the defence from knowing the identity of the source. Notably, however, according to the ICC procedural framework the implementation of any exception to the right to examine witnesses must not be "prejudicial to or inconsistent with the rights of the accused".[323] Furthermore, as will be further outlined below, the accused's right to examine witnesses and challenge other evidence is also guaranteed by Article 69(4), which provides that the Trial Chamber must "*take into account* [emphasis added] any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness".

3.4.3 The Right to be Tried Without Undue Delay

The right to be tried without "undue delay", or within "reasonable time", is recognised in all major human rights instruments,[324] and an expedited trial is widely considered to be a corollary of the general requirement of trial fairness.[325]

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[319] *Ellis, Simms & Martin v United Kingdom*, (App. nos. 46099/06 and 46699/06), ECtHR, judgment, 10 April 2012, paras. 76-78.
[320] Ibid., paras. 86-87.
[321] Ibid., para. 148.
[322] Decision on interlocutory appeal concerning admission of record of interview of the accused from the bar table ICTY, *Sefer Halilovic*, (IT-01-48-AR73.2), ICTY Appeals Chamber, 19 August 2005, para. 17.
[323] Article 69(2) ICCSt.
[324] Article 14(3)(c), ICCPR; Article 6(1), ECHR; Article 8(1), AMCHR; Article 7(1)(d), ACHPR.
[325] Safferling (2012), at 389.

While it is not possible to put up any absolute time limits for the duration of the proceedings, the ECtHR has made some important clarifications as to what factors should be taken into account in the assessment of whether the delay is "undue" or "unreasonable" under human rights law. Firstly, it should be noted that the relevant time starts with the "charge", and ends with the final verdict.[326] Secondly, the complexity of the case, e.g., the volume of evidence,[327] the number of defendants and/or charges, [328] will be considered. Thirdly, the conduct of the relevant administrative and judicial authorities and the defendant him/herself is relevant.[329] Fourthly, it should be noted thar the right to a speedy trial is especially important if the accused is in pre-trial detention.[330]

Article 64(2) ICCSt provides that the Trial Chamber shall ensure that the trial is "fair and expeditious". From the wording it thus appears as if fairness and expeditiousness are situated on the same level. This latter requirement of a "speedy trial" aims to protect all parties to the proceedings, including witnesses and victims, against excessive procedural delays.[331] However, Article 67(1)(c) ICCSt recognises the right to be tried without "undue delay", which is an exclusive right of the accused. This was further clarified in *Bemba* when the Appeals Chamber overturned the Trial Chamber's decision to admit into evidence all items on the Prosecution's Revised List of Evidence, without evaluating the admissibility of each item individually. The Trial Chamber had admitted all evidence out of time concerns, but the Appeals Chamber stated that "[w]hile expeditiousness is an important component of a fair trial, it cannot justify a deviation from statutory requirements."[332] Furthermore, the Appeals Chamber confirmed that the orality principle, which aims to guarantee the fair-trial right of the accused to examine witnesses, could only be departed from if it was not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally.[333] This reasoning is consistent with the fact that the human right to be tried without undue delay exists in order to protect the defendant. Hence, the principle of expeditiousness must thus not be invoked in such a way that causes unfairness to the defence.[334]

It should be noted that the proceedings in The Hague are typically lengthy, sometimes stretching over several years, which raises questions from a human rights perspective, especially if the accused is in pre-trial detention, which is regularly the case at the ICC.[335] However, parameters recognised by human rights bodies, such as the complexity of the cases before the ICC, the amount of evidence, witnesses, and victims, are mitigating factors in this regard. The ICC bench have confirmed the importance of the accused's right to be tried without undue delay, and have, at times, not authorised certain requests from the parties with reference to the right.[336] Nonetheless, it has been observed by Christoph Safferling that the human rights standard has, indeed, been stretched, and at times "reference to [the accused's right to be tried without undue delay] appears to offer no more than pure lip service."

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[326] Ibid.
[327] See, e.g., *Boddaert v. Belgium*, (App. no. 12919/87), ECtHR, judgment, 12 October 1992, paras. 37-40.
[328] See, e.g., *Eckle v. Germany*, (App. no. 8130/78), ECtHR, judgment,15 July 1982, para. 79.
[329] See, e.g., *König v. Germany*, (App. no. 6232/73), ECtHR, judgment , 28 June 1978, para. 99.
[330] See, e.g., *Abdoella v. the Netherlands*, (App. no. 12728/87), ECtHR, judgment, 25 November 1992, para. 24.
[331] Safferling (2012) at 385.
[332] Appeals Judgment, *Bemba*, para. 55.
[333] Ibid. para. 79.
[334] International Bar Association (2011) at 26.
[335] Safferling (2012) at 385.
[336] See, e.g., Decision on the Prosecution's application for a further adjournment, Kenyatta, (ICC-01/09-02/11-981), Trial Chamber V(b), 3 December 2014, paras. 50-57.

Safferling has further concluded that the considerable length of trials and periods of pre-trial detention are "a weak spot in the administration of international criminal justice."[337]

How the right to be tried without undue delay is taken into account in the context of rulings on the admissibility will be further developed below (see, 4.2.3), but first a few remarks will be made as to the exclusion of improperly obtained evidence, and the implication of the use of such evidence on the right to a fair trial.

3.4.4 The Exclusion of Improperly Obtained Evidence

The various provisions in human rights instruments that enshrine the right to a fair trial does not explicitly deal with the exclusion of improperly obtained evidence, for instance collected in violation of the law or amounting to a violation of a human right. As noted above, in general, the rules on the admissibility and exclusion of evidence are largely left to the domestic criminal procedural law. This is partly explained by the fact that relevant human rights provision mainly concern *trial* rights, with a few exceptions, such as the right to legal assistance and the right to silence that necessarily extend to the pre-trial procedure and the collection of evidence.[338] According to human rights law, it must nonetheless be examined whether the way evidence was obtained rendered the trial unfair "as a whole" in a particular case.[339] Hence, the ECtHR, and other human rights bodies, have addressed the issue of improperly obtained evidence in this indirect way, when deciding whether there has been a violation of the right to a fair trial.[340]

The ECtHR has adopted the position that the use of unlawfully obtained evidence does not necessarily lead to unfair proceedings.[341] Rather, the Court will, again, assess whether the proceedings "as a whole" were fair, "including the way in which the evidence was obtained".[342] This involves an examination of the alleged "illegality" in question and the nature and/or the gravity of the violation found (where violations of other Convention rights have occurred).[343]

The ECtHR has, however, clarified that not all irregular investigative methods are acceptable in the acquisition of evidence. The Strasbourg Court has, for instance, stated that in certain circumstances it might be required to exclude evidence obtained as a direct result of a provocation as that otherwise would deprive the defendant, from the outset, of a fair trial.[344] Additionally, violations of the fair-trial right to remain silent must, in principle, lead to the exclusion of evidence. That is, for instance, if self-incriminating statements have been made during pre-trial interrogations, without the suspect having exercised his or her right to legal assistance.[345] This is explained by the fact that, in such instances, counterbalancing is less

[337] Safferling (2012) at 300.
[338] Ho (2019), at 284-285.
[339] *Aleksandr Zaichenko v. Russia*, (App. no. 39660/02), ECtHR, judgment, 18 February 2010, para. 42.
[340] Ho (2019), at 284.
[341] *Schenk v. Switzerland* and *Khan v. the United Kingdom* (App. no. 35394/97), ECtHR, judgment, 12 May 2000 [hereinafter *Khan v. United Kingdom*]
[342] *Jalloh v. Germany*, (App. no. 54810/00), ECtHR [GC], judgment, 11 July 2006, para. 95 [hereinafter *Jalloh v. Germany*].
[343] Ho (2019), at 286.
[344] See, e.g., *Teixeira de Castro v. Portugal*, (App. no. 25829/94), ECtHR, judgment, 9 June 1998, paras. 34-39.
[345] See, e.g., *Salduz v. Turkey*, (App. no 36391/02), ECtHR [GC], judgment, 27 November 2008.

easily achieved, and a violation of such a fundamental fair-trial right would in almost all circumstances automatically render the trial "as a whole" unfair.[346]

Moreover, as indicated above, if irregular investigative measures have been used, other human rights may come in to play. Most importantly, evidence obtained in violation of the prohibition of the use of torture, inhuman, or degrading treatment and punishment,[347] and the right to privacy.[348]

The ECtHR has intervened, and held that evidence may be excluded, where privacy issues have been at stake during investigations, for instance, when unlawful wire or telephone tapping have been used,[349] or when evidence has been obtained through an unlawful seizure a suspect's property.[350] However, contrary to the prohibition of torture,[351] the right to privacy is not absolute, but can be lawfully restricted. Consequently, according to human rights law, evidence would only be excluded if it has been obtained through a disproportionate violation of the right to privacy, that was not based on a legal provision explicitly allowing it, and that was not necessary in a democratic society.[352] In fact, the Court has adopted a balancing approach and has rarely found even serious violations of the right to privacy to prompt the exclusion of evidence, as the proceedings as whole have not been considered to have been rendered unfair.[353] In this regard, the ECtHR has, *inter alia*, taken into account whether the defendant has been afforded an opportunity to challenge the evidence and oppose the use or admissibility of the evidence.[354] If evidence has been obtained in violation of the right to privacy, but a defendant has had the opportunity to raise the alleged impropriety at trial, and if the court has considered the applicant's argument and has had the discretion to decide not to use the evidence, trial fairness will, in general, not be compromised by the decision to admit and make use of evidence obtained in violation of the right to privacy.[355]

However, as to evidence obtained through torture[356] the ECtHR, as well as other human rights bodies, has adopted a categorical approach due to the gravity of the violation, whilst also holding that "the circumstances in which [the evidence] was obtained cast doubts on its reliability or accuracy".[357] Furthermore, the departure from the balancing approach, when it comes to torture, is further motivated by the fact that:

"[…] no legal system based upon the rule of law can countenance the admission of evidence – however reliable – which has been obtained by such a barbaric practice as torture. The trial process is a cornerstone of the rule of law. Torture evidence damages irreparably that

[346] Ho (2019), at 287.
[347] Article 7, ICCPR; Article 3, ECtHR; Article 5(2), AMCHR and Article 5, AFCHPR.
[348] Article 17, ICCPR; Article 8, ECHR and Article 11, AMCHR.
[349] *Schenk v. Switzerland*, joint dissenting opinion of Judges Pettiti, Spielmann, De Meyer and Carrillo Salcedo.
[350] See, e.g., *Khan v. United Kingdom*, supra note 321; P.G. & J.H. v. The United Kingdom, (App. no. 44787/98), ECtHR, judgment, 5 November 2002; Perry v. The United Kingdom, (App. no. 63737/00) ECtHR, judgment, 17 July 2003.
[351] See, e.g., *Harutyunyan & Others v. Armenia* (App. no. 58070/12) ECtHR, judgment, 5 December 2019, paras. 63 and 66.
[352] C.f., Article 6, ECHR.
[353] Ho (2019) at 283-306,
[354] Ibid. at 286.
[355] Ibid. at 289 and Jackson & Summers (2012) at 186.
[356] See e.g., *Jalloh v. Germany*, para. 107. The ECtHR has not adopted a categorical approach to evidence obtained by inhuman or degrading treatment, 'the general question whether the use of evidence obtained by an act qualified as inhuman and degrading treatment automatically renders the trial unfair can be left open'.
[357] *Gäfgen v. Germany*, (App. no. 22978/05), ECtHR [GC], judgment, 1 June 2010, para. 164.

process; it substitutes force for the rule of law and taints the reputation of any court that admits it. Torture evidence is excluded to protect the integrity of the trial process and, ultimately, the rule of law itself."[358]

In sum, there are at least two rationales underlying the exclusion of evidence in human rights law, i.e., protecting the fairness of the trial "as a whole" as well as protecting the integrity of the proceedings. As a consequence of the latter, evidence obtained through torture must be excluded according to human rights law, not only because it casts doubt upon the reliability or accuracy of the evidence. As to other illegally or improperly obtained evidence, it can only *not* be relied on at trial if the effect of the Prosecution's or investigative authorities' conduct irremediably undermines certain basic fair-trial rights – which are essential to uphold the fairness of the trial as a whole.

Similarly, the ICCSt requires the chambers to exclude evidence which is obtained in violation of the ICCSt or of internationally recognised human rights, pursuant to Article 69(7) ICCSt, if (a) "the violation casts substantial doubt on the reliability of the evidence" or if (b) "the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings". In its decisions on this matter, the Chambers have often referred *inter alia* to the jurisprudence of the ECtHR.[359] The ICC chambers' interpretation and application of this provision will be further examined in 4.2.4 below.

3.5 Interim Conclusions

There is broad agreement that the applicable fairness standard of ICC trials should be sought in international human rights law, regardless of how the ICC proceedings should be classified (i.e., as an adversarial, inquisitorial, mixed or *sui generis* system). The human rights principle of a fair trial is flexible enough to allow ICC judges to adapt it to the particular challenges inherent in investigating and prosecuting crimes in the international context, but there is a baseline, certain minimum guarantees, below which the ICC cannot go in order to avoid producing a result that is incompatible with internationally recognised human rights. Furthermore, it is clear that the "codification" of the right to a fair trial at the ICC essentially mirrors the human rights principle of a fair trial, as does he mandatory exclusionary rule in Article 69(7) ICCSt.

However, it can be observed that the *ad hoc* tribunals have accepted a somewhat watered-down application of the equality of arms principle. This is due to, in part, the particular exigencies of international criminal prosecutions, which prompted the *ad hoc* tribunals to conclude that inequality that was not caused by any fault of the tribunal would not be a breach of the equality of arms principle.[360] At the ICC, the incorporation of the equality of arms principle tips the scale to the benefit of the defence, *inter alia* by requiring the Prosecutor to conduct impartial investigations, and collect incriminating and exonerating evidence equally, by requiring disclosure of evidence that could mitigate the guilt of the defendant, and empowering the pre-trial chambers with some important powers to assist the defence in the preparation of its case. Furthermore, the ICC has recognised the importance of equality between the parties, and the jurisprudence of the Court suggests that a "balance"

[358] *Othman v. United Kingdom*, (App. no. 8139/09) ECtHR, judgment, 17 January 2012, para. 264.
[359] See, Decision on the Prosecutor's Bar Table Motions, *Katanga & Ngudjolo Chui*, (ICC-01/04-01/07), Trial Chamber II, 17 December 2010, para. 62 [hereinafter Bar Table Motions Decision, *Katanga & Ngudjolo Chui*].
[360] Appeals Judgment, *Tadić*, supra note 302, paras. 53-54.

between the parties during the proceedings, is required,[361] and that the defence must be afforded "sufficient time to prepare its response",[362] for the equality of arms principle to be effective and meaningful. However, the equality principle has yet to be made an issue at the ICC, and it remains to be seen whether the Court will subscribe to the "contextualised" interpretation of the principle, as adopted by its predecessors in Rwanda and Former Yugoslavia.

As to the examination of witnesses, and the right of the defence to probe and challenge evidence, human rights law affords States, and more importantly for the purposes of this thesis – the ICC – with a considerable margin of appreciation. The right can be limited, and a violation is only found if any infringement is not sufficiently counter-balanced, in order not to render the trial "as a whole" unfair. As will be further explained below, Article 69(4) ICCSt, requires the judges to "take into account" any prejudice caused to the accused's fair-trial rights, when ruling on the admissibility of a particular item of evidence. Thus, it will be further examined (in 4.2.3 below) whether this exercise of judicial discretion at the admissibility stage is enough to guarantee the principle of equality of arms and adequately protect the right of the defence to examine evidence against him or her.

The right to be tried without undue delay raises particular concerns in the international context, and while the complexity of the cases under ICC jurisdiction and the overwhelming volume of evidence are mitigating factors, it is clear that proceedings stretching over several years raise concerns from a human rights perspective, especially so if the accused is in pre-trial detention.

Again, how these considerations play out in practice, in relation to the admissibility of evidence in general, and as to digital open-source evidence in particular, will be further examined below.

4 The Admissibility and Exclusion of Evidence at the ICC

4.1 Overview

The ICCSt and the RPE contain rules on the collection, admission, presentation and evaluation of evidence that must be adhered to when determining whether a person is responsible for a crime under substantive international criminal law. The consistent application of evidentiary rules is an essential component of trial fairness.[363] Furthermore, as noted in 3.3 above, Article 64(2) ICCSt provides the trial chambers with the discretion to organise the proceedings in order to achieve a trial that is fair, expeditious and conducted with full respect for the rights of the accused and with due regard for the protection of victims and witnesses. There are several procedural tools available to the ICC chambers to guarantee

[361] Decision on Prosecutor's Application for Leave to Appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, *Situation in Uganda*, (ICC-02/04-01/05), Pre-Trial Chamber II, 19 August 2005, para. 30
[362] Decision on the "Prosecution's Application Concerning Disclosure Pursuant to Rules 78 and 79(4)", *Situation in the DRC*, (ICC-01/04-01/07), Trial Chamber II, 14 September 2010) para. 37.
[363] Gosnell (2018) at 442.

different aspects of trial fairness, but this thesis has circled in on decisions on the admissibility of evidence and the ICC chambers' ability to guarantee a fair trial when deciding which evidence may – or may not – be admitted and relied on at trial.

According to Article 74(2) the Court "may base its decision only on evidence submitted and discussed before it at the trial". Pursuant to Article 64(9)(a) and Rule 63 the Trial Chamber has the power to rule on the admissibility or relevance of any evidence, either upon application by a party or of its own motion. It is up to the trial judges to decide whether they want to rule on the admissibility of a piece of evidence once it is submitted into the record, or defer it to the end of trial, thus "making it part of its assessment of the evidence when evaluating the guilt or innocence of the accused person."[364] While the timing as to when the chambers evaluate the admissibility of evidence may vary, the chambers' discretion is not unlimited, and – importantly – the ICC bench cannot admit or exclude evidence without proper examination, but must evaluate the evidence item by item.[365] Moreover, a chamber must give reasons for its admissibility rulings, pursuant to Rule 64(2) RPE. Furthermore, pursuant to Rule 64(1) RPE either party can challenge the admissibility at the time the item is submitted into evidence. If challenged, it is up to the tendering party to show that evidence is admissible, as the presenting party generally has more information than the challenging party on the origins of the evidence.[366]

The ICCSt and the RPE do not designate categories of evidence, nor does it describe which type of items are permissible to admit into evidence or what type is excluded. Pursuant to Article 69(4) and Rule 63(2) RPE it is for the Chamber alone to "freely" determine the probative value of any evidence, regardless of the form it takes, in order to determine whether it is admissible.[367] However, a hierarchical order between different types of evidence is pointed out by the first words in Article 69(2), which states that "[t]he testimony of a witness at trial shall be given in person". Hence, the preferred evidence at trial in The Hague is the live testimony of a witness, and only if there are exceptional reasons will the Trial Chamber accept, for instance, a written statement or a prior recorded statement of a witness. In *Lubanga*, Trial Chamber I held that "[t]here should be no automatic reasons for either admitting or excluding a piece of evidence but instead the court should consider the position overall."[368] Trial Chamber I also clarified that it proceeds on the assumption that "the drafters of the Statute framework have clearly and deliberately avoided proscribing certain categories or types of evidence, a step which would have limited—at the outset—the ability of the Chamber to assess evidence "freely".[369] Moreover, Trial Chamber I asserted that the drafters of the ICCSt had afforded broad power to the judges as this was necessary due to the "infinitely variable circumstances in which the court will be asked to consider evidence."[370]

Albeit outside the scope of this thesis, it should also be noted that the ICCSt does not specify how different types of evidence are to be weighed by the chambers either. This is also assessed by the Trial Chamber "freely".[371] As clarified above, digital open-source evidence

[364] Appeals Judgment, *Bemba*, para. 35.
[365] Ibid. para. 2.
[366] Farthofer (2012), at 492.
[367] Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, *Katanga & Ngudjolo*, Pre-Trial Chamber I (ICC-01/04-01/07) 21 April 2008, para. 74.
[368] Decision on the admissibility of four documents, *Lubanga*, para. 29.
[369] Ibid. para. 24.
[370] Ibid.
[371] Decision on the admissibility of four documents, *Lubanga*, para. 24.

will often be circumstantial. While the ICC chambers have clarified that direct evidence will be given a higher probative value, there is nothing in the ICCSt that prevents the Trial Chamber from relying on circumstantial evidence.[372] As to hearsay, which is a type of circumstantial evidence,[373] which some digital open-source evidence would constitute, the Court has similarly clarified that it will be given less weight than other evidence, and that no conclusion could be drawn exclusively on the basis of anonymous hearsay.[374] However, if hearsay is corroborated and consistent with other admitted evidence it may well be relied on and contribute to the Trial Chamber's finding of guilt. With this in mind, it is clear that digital open-source evidence may be afforded considerable weight. Therefore, the decisions on admissibility assume great importance, as the admissibility test is designed to exclude unreliable evidence, and evidence that it otherwise would be unfair to rely on.

While the provisions governing the admissibility of evidence afford considerable freedom and flexibility the ICC judges, the general standard for admitting evidence in Article 69(4) ICCSt rests on three cardinal criteria: (i) relevance, (ii) probative value, and – most importantly for the purposes of this thesis – (iii) prejudicial effect on trial fairness.

The third prong of the admissibility test relates to the exclusion of evidence obtained by means of a violation of the Statute or internationally recognised human rights. According to Article 69(7) ICCSt such evidence "shall not be admissible if the violation of casts substantial doubt on the reliability of the evidence or if the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."

In sum, the ICCSt and the RPE can be said to "eschew generally the technical formalities of the common law system of admissibility of evidence in favour of the flexibility of the civil law system."[375] As clarified in 3.1.1 above, the absence of technical exclusionary rules is motivated by the fact that the ICC bench consists of professional judges, and therefore, it is argued, there is less of a need to exclude unreliable evidence from the outset, which might lead a lay jury to draw erroneous conclusions. Furthermore, it should be recalled that a very limited amount of evidence may be available after an armed conflict.[376] Therefore, the argument goes, the broad latitude of flexibility afforded to ICC judges when ruling on evidence is necessary as it allows the ICC chambers to take into account the differences between the cases and situations that come before it, which give rise to varying amounts of evidence in different forms.[377] Consequently, the rules governing the admission of evidence in ICC proceedings were drafted to be permissive, affording judges considerable discretion, subject to some specified issues of "fairness".[378]

The thesis now moves on to analyse the interpretation and application of the tests for the admission and exclusion of evidence generally, and open-source documentary evidence, including analogue audio-visual materials, specifically.

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[372] See, e.g., Judgment, *Lubanga*, para. 111, "[n]othing in the Rome Statute framework prevents the Chamber from relying on circumstantial evidence. When, based on the evidence, there is only one reasonable conclusion to be drawn from particular facts, the Chamber has concluded that they have been established beyond reasonable doubt".
[373] Decision on the confirmation of charges, *Kenyatta & Ali*, para. 82.
[374] See, e.g., Decision on the confirmation of charges, *Mbarushimana*, paras. 77-78 and Admissibility Decision (2013), *Bemba*, para. 25.
[375] Admissibility Decision (2010), *Bemba*, para. 17.
[376] International Bar Association (2016) at 30.
[377] Ibid.
[378] Gosnell (2018) at 375 and Safferling (2012) at 491.

4.2 The ICC's Interpretation and Application of the General Admissibility Test

While the ICC chambers are mandated to evaluate the admissibility of any evidence "freely", the specific requirements posed for the admissibility and evaluation of evidence differ, depending on the form the evidence takes.[379] The use of digital open-source evidence at the ICC must be understood in light of the general approach to the admission of evidence in trial proceedings, and while the case law relating to digital open-source evidence to date is scarce (see 2.3 above), the Court has a well-established framework in place for evaluating information derived from traditional open sources, such as NGO, UN and news agencies, i.e. traditional documentary evidence. Additionally, the ICC chambers have occasionally dealt audio-visual evidence, from both closed and open sources.

In *Lubanga,* Trial Chamber I elaborated on the three-pronged test for admissibility, contained in Article 69(4) ICCSt and made some important clarifications as regards documentary evidence. It was held that the first step consists of a determination as to whether or not the material presented is "prima facie relevant" to the case. Secondly, the Chamber must assess whether the evidence has probative value "on a prima facie basis", based on an evaluation of the "prima facie reliability" of the evidence. Thirdly and finally, the Chamber must weigh the probative value of the evidence against "any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness".[380]

The remainder of this chapter will analyse how the ICC has interpreted and applied the framework governing admissibility in the past in relation to the abovementioned forms of evidence. The purpose is thus to evaluate what evidentiary principles can be derived from the Court's case law and what factors are taken into account when the ICC chambers rule on the admissibility of documentary evidence, and especially documentary evidence from open sources. The concluding chapter, ch. 5, will then examine whether the expanding information environment, the rise of disinformation and digital fakery and the drastically growing number of private actors involved in online open-source investigations, compel the ICC chambers to rethink its current interpretation and application of the rules governing the admissibility of evidence or whether, indeed, digital open-source evidence can be evaluated based on the same criteria as paper documents.

4.2.1 Step One: Relevance

In accordance with the clarifications set out in *Lubanga*, pursuant to Article 69(4) ICCSt, the ICC trial chambers must, firstly, 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 […]". [381] If a piece of information is irrelevant to the chambers' examination, that is, if it is not "logically connected to one or more facts at issue […] in the sense that the item must have the capacity to make a fact at issue more or less probable than it would be without the item",[382] it is rejected, and the Trial Chamber will not move on to consider the second or third steps of the admissibility test. In the words of Judge Shahabuddeen; "evidence must be relevant, that is to

[379] Ibid.
[380] Decision on the admissibility of four documents, *Lubanga*, paras. 27-32.
[381] Ibid. para. 27.
[382] Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, *Bemba*, (ICC-01/05-01/08), Trial Chamber III, 8 October 2012, para. 12 [hereinafter Admissibility Decision II (2012), *Bemba*].

say, it must tend to make credible a fact which has to be established at trial; if it is not relevant, that alone suffices to exclude it."[383] In *Bemba*, for instance, Trial Chamber III deemed a research paper that described the historical and cultural background of the Central African Republic to be irrelevant to the trial and did, therefore, not move on to consider the probative value or the prejudicial effect of the report. The Chamber held that the report did not "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".[384]

For evidence to be admitted it must thus relate to the temporal and geographical scope of the charges. Hence, in *Ngodjolo and Chui* Trial Chamber II held that, naturally, the relevance of audio or video material depends on the date and/or location of the recording. For such materials to be admitted, information must be provided in this regard.[385]

Nonetheless, historic or context information, covering ethnic tensions or historical grievances, have been considered a legitimate basis for introducing a wide range of information at international criminal trials,[386] even if it has been outside the temporal or geographical scope of the charges. A broad range of facts must, indeed, be proven, due to the structure and nature of international crimes (see 2.4.1 above). Consequently, much information may be considered "relevant", especially since admissibility only requires *prima facie* indicia of relevance. Contextual elements of crime, such as "armed conflict" or "widespread or systematic attack", as well as complex structures of responsibility, require the ICC chambers to take a broad approach to relevance. For instance, alleged crimes may have been committed continuously over a long period of time, and joint criminal enterprises may have taken form many years before the physical crimes were committed. Hence, detailed information, ranging from the nature of a conflict to different aspects of attacks against civilians as well as the contours of structures of responsibility, may therefore be relevant to matters considered by the ICC chambers.[387]

However, from the ICC case law, it becomes clear that the relevance assessment often entails a trade-off between the relevance of an item and the prejudice its admission may cause to trial fairness. It is not uncommon that the Prosecution seeks to submit information about crimes or other acts that are not specifically mentioned in the indictment. Such information may be submitted to establish the accused's pattern of conduct, to show his or her (bad) character or to prove a contextual element. The international tribunals, including the ICC, have, however, limited what information is admissible in light of the prejudice such evidence could cause to the accused's rights to be "informed promptly and in detail of the nature, cause and content of the charge" or to have the charges against him or her determined impartially.[388] Information about previous criminal conduct or other acts must therefore be connected to some aspect of the charged conduct. In *Kupreškić et al* the ICTY trial chamber held that it could, for instance, be relevant to admit information about the previous criminal conduct or other acts if there is proximity in time to the crime charged, if the previous acts are similar in detail to the

[383] Separate Opinion of Judge Shahabuddeen, Decision on the Interlocutory Appeals, *Ngeze & Nahimana*, ICTR Appeals Chamber (ICTR-99-52-1) 5 September 2020, para. 19.
[384] Admissibility Decision (2013), *Bemba*, paras. 14-15.
[385] Bar Table Motions Decision, *Katanga & Ngudjolo Chui*, para. 24(d).
[386] See, e.g., Decision on the Prosecution's Motion to Admit Exhibits from the Bar Table, *Dordević*, ICTY Trial Chamber II (IT-05-87/1-T) 28 April 2009, para. 8, admitting a document showing "historical and political background in Kosovo".
[387] Gosnell (2018), at 435-436.
[388] Ibid., at 429.

acts charged, if there is a large number of occurrences of the similar acts or any distinctive features unifying the incidents. However, its relevance must be weighed against the "inflammatory nature of the similar [previous] acts and whether the [Prosecution] can provide its point with less prejudicial evidence".[389] The ICC Trial Chamber III did, for example, admit a UN report in *Bemba*, which described a previous attack by the accused's troops, even though the events described by the report took place in a different territory. Nonetheless, the report was admitted as it was deemed relevant in the determination of the ability of the accused "to impose disciplinary measures and his power to prevent and repress the commission of crimes" and potentially also in the Trial Chamber's determination of the accused's *mens rea*.[390] However, parts of NGO and UN reports, that typically contain a lot of information, have been excluded, while other parts have been considered relevant and not prejudicial.[391]

4.2.1.1 Summary: The ICC Takes a Broad Approach to Relevance

If a piece of evidence is not relevant, that is, if it does not relate to matters that are to be considered by the Trial Chamber, that alone suffices to exclude it and the Trial Chamber does not have to consider the two other prongs of the admissibility test. However, the structure and nature of the crimes under the ICC's jurisdiction requires the chambers to take a broad approach to relevance, and in practice most evidence will be considered relevant. Nevertheless, the Trial Chamber is required to consider the relevance of the evidence in light of the prejudice such evidence could cause to the accused's fair-trial rights. In this evaluation factors such as "the inflammatory nature" of information submitted is weighed against its probative value. To justify admission of information about previous criminal conduct into evidence, for instance, the information must therefore be connected to some aspect of the charged conduct. Furthermore, the ICC bench will consider whether the Prosecution can provide its point with less prejudicial evidence. It can be noted that there is a rather thin line between relevant and irrelevant documentary evidence and, as will be further outlined in 4.2.3 below, the weighing of probative value against prejudicial effect on trial fairness affords the Trial Chamber with considerable judicial discretion.

4.2.2 Step Two: Probative value

Secondly, the information submitted by the Prosecution must be considered "probative" to be admissible, meaning that it has the quality or function of proving something.[392] This second prong of the admissibility test set out in Article 69(4) ICCSt, that goes to the probative value of the evidence, also requires the information to meet some threshold of reliability, meaning essentially that the material "is what it purports to be".[393]

In *Lubanga*, Trial Chamber I clarified that there is no "finite list of possible criteria" in the assessment of probative value.[394] Similarly, in *Bemba*, Trial Chamber III held that probative value is determined via a "fact-specific inquiry" based on "innumerable factors, including the indicia of reliability, trustworthiness, accuracy or voluntariness […] the circumstances in

[389] Judgement, *Kupreškić et al*, ICTY Appeals Chamber (IT-95-16-A) 23 October 2001, para. 322 [hereinafter Appeals Judgment, *Kupreškić*].
[390] Admissibility Decision (2013), *Bemba*, para. 12.
[391] See, e.g., Decision on Prosecution's request for admission of documentary evidence, *Ntaganda*, (ICC-01/04-02/06-1838), Trial Chamber VI, para. 36
[392] See Article 69(4), ICCSt; Decision on the admissibility of four documents, *Lubanga*, paras 28-30 and Black's Law Dictionary (2009).
[393] Admissibility Decision (2013), *Bemba*, paras. 9 and 25.
[394] Decision on the admissibility of four documents, *Lubanga*, paras. 28-29 and 32.

which the evidence arose [as well as] the extent to which the item has been authenticated."[395] It should be noted that the probative value threshold is not very demanding at the admissibility stage but, again, as outlined by Trial Chamber I in *Lubanga*, it requires the tendering party to show that the evidence has probative value "on a prima facie basis", based on an assessment of its "indicia of reliability".[396]

4.2.2.1 Authentication and Provenance/Unbroken Chain of Custody – Recommended but Not Absolute Requirements

As part of showing sufficient probative value "on a prima facie basis", based on an assessment of the "indicia of reliability" of documentary evidence, the moving party should provide some indication, not only of what the material is, but also that it is authentic.[397] Authentication refers to a legal concept aimed at promoting the integrity of the trial process by ensuring that tendered evidence has not been manipulated and thus really establishes what it is offered to prove.[398]

First, it should be emphasised that authentication and reliability are related, but distinct concepts. The purpose of authentication is to ensure that the evidence has not been manipulated or tampered with, while the purpose of reliability is to establish that a piece of evidence "is what it purports to be".[399] The video footage of the Sri Lankan extra-judicial killings mentioned above provide a useful illustration in this regard.[400] The Sri Lankan government questioned the reliability of the video depicting extra-judicial killings and argued that the executions were staged.[401] In the context of court proceedings the Prosecutor would then have to show that the contents of the video was *reliable* – that it actually depicted killings of Sri Lankan prisoners – even if it was established that the footage was *authentic*, in that the video had not been manipulated.

The question of authenticity of a document is thus logically prior to the assessment of reliability, but the ICCSt and the RPE do not require judges to rule separately on the authenticity of evidence. In some cases, an item may be "self-authenticating", for instance, as to traditional documentary evidence, this would be the case with a certified document or record with official business or government logo.[402] If the parties agree that the evidence is authentic or if the evidence is reliable on the face of it, then judges may treat the evidence as authentic.[403] If the material is not "self-authenticating", it can be authenticated in a number of ways, including through external indicators, such as corroboration, expert or author testimony, or establishing its provenance/an unbroken chain of custody.[404]

In *Katanga and Ngudjolo Chui* Trial Chamber II took a strict approach to authentication and stated that "[u]nder no circumstances can the Chamber admit unauthenticated documentary

[395] Public Redacted Version of the First Decision on the Prosecution and Defence Requests for the Admission of Evidence, *Bemba*, (ICC-01/05-01/08-2012-Red), Trial Chamber III, 9 February 2012, para. 15 [hereinafter Admissibility Decision I (2012), *Bemba*].
[396] Decision on the admissibility of four documents, *Lubanga*, paras. 25-28.
[397] Admissibility Decision I (2012), *Bemba,* para. 15.
[398] Decision on Admissibility of Intercepted Communications, *Popovic et al* (IT-05-88-T) ICTY Trial Chamber II, 7 December 2017, paras. 4, 22, 26, 33-35 [hereinafter Admissibility Decision, *Popovic et al*].
[399] Ashouri, Bowers & Warden (2014), at 117, see e.g. Admissibility Decision (2013), *Bemba*, paras. 9 and 25.
[400] See, UN Human Rights Council (2010).
[401] UN News Service (2010).
[402] Admissibility Decision II (2012), *Bemba*, para. 9.
[403] Ibid.
[404] Ashouri; Bowers & Warden (2014) at 117.

evidence since, by definition, such evidence has no probative value."[405] The Trial Chamber dismissed the Prosecution's assertion that there is no basis in the ICC statutory framework that "proof of authenticity is a threshold requirement for the admissibility of documentary evidence".[406] Irrespective of the accuracy of the assertion, the Trial Chamber found it misconceived and held that admitting "unauthenticated evidence would unjustifiably burden the record of the trial with non-probative material and serve no purpose in the determination of the truth."[407] It is indeed hard to imagine how a document that is not authentic – i.e. a forgery – could be helpful to a fact-finder.

In *Bemba*, on the other hand, Trial Chamber III endorsed a more flexible approach to the authentication of documentary evidence, including evidence in digital format. The Prosecution introduced several audio recordings of broadcasts which provided background information about the conflict in the Central African Republic, the parties involved as well as accounts of witnesses and victims.[408] The Prosecution had not provided any proof of origin or integrity of the audio recordings and the Defence disputed their authenticity, referring to the practice adopted in *Katanga and Ngudjolo Chui*.[409] Nonetheless, Trial Chamber III held that "recordings that have not been authenticated in court can still be admitted, as incourt authentication [e.g., through a witness] is but one factor for the Chamber to consider when determining an item's authenticity and probative value."[410]

It has since been observed in the scholarly literature that incourt or other "official" proof of authenticity is not a precondition for admissibility and that the demanding requirements put forward by Trial Chamber II in *Katanga and Ngudjolo Chui* do not encapsulate general principles of international criminal law.[411] ICC and the *ad hoc* tribunals have often allowed for the admissibility of evidence that is challenged on grounds of authenticity in the past. For example, when the Prosecution objected to the authenticity of redacted e-mails in *Lubanga*, Pre-Trial Chamber I stated that it would discern probative value of unauthenticated evidence on a case-by-case basis.[412] In *Milutinovic* the ICTY limited the scope of unauthenticated documentary evidence in digital format to victim identification, instead of excluding the contested evidence altogether.[413] In *Blagojevic and Jokic* the ICTY evaluated the submitted documentary evidence holistically stating that it "did not consider unsigned, undated or unstamped documents, *a priori*, to be void of authenticity."[414]

As stated above, material that is not "self-authenticating" can be authenticated in different ways, including through the establishment of its provenance/chain of custody.[415] Provenance is commonly defined as, "[t]he movement and location of […] evidence, and the history of those persons who had it in their custody, from the time it is obtained to the time it is

[405] Bar Table Motions Decision, *Katanga & Ngudjolo Chui*, para. 22.
[406] Ibid.
[407] Ibid.
[408] Admissibility Decision II (2012), *Bemba*, paras. 117-122.
[409] Ibid. para. 118.
[410] Ibid. para. 120
[411] Geynor (2013) at 1065.
[412] Decision on Confirmation Charges, *Lubanga* (ICC-01/04-01/06-803-tEN), Pre-Trial Chamber I, 29 January 2007, paras. 131-32 [hereinafter Decision on Confirmation Charges, *Lubanga*].
[413] Judgment, *Milutinovic*, (IT-05-87-T), ICTY Trial Chamber, 26 February 2009, paras. 588, 617, 621 and 683.
[414] Judgment, *Blagojevic & Jokic*, (IT-02-60-T), ICTY Trial Chamber I, 17 January 2005, para. 29 [hereinafter Judgment, *Blagojevic & Jokic*].
[415] Ashouri; Bowers & Warden (2014) at 117.

presented in court."[416] Establishing provenance thus necessitates both testimony of "continuous possession" and testimony to the fact that "the object remained in substantially the same condition" throughout every step of the chain of custody.[417]

While there is no consistent definition of "authorship" in international criminal courts, authors have been considered to be persons that the court can rely for testimony regarding the origins of the evidence, that is, testimony that establishes the foundation of the chain of custody.[418] In order to find authenticity and/or sufficient reliability in the evidence, the *ad hoc* tribunals have inter alia accepted the testimony of persons who monitor interceptions of radio broadcasts,[419] record audio,[420] or even persons who have obtained aerial images that were originally taken by others[421], as "authors". Furthermore, it is clear from the jurisprudence of the *ad hoc* tribunals that author testimony can give evidence significant probative weight.[422]

However, a establishing provenance/strong chain of custody is not absolute conditions for admissibility, but rather increases the weight judges accord to the evidence. As stated by ICTY Trial Chamber II; "proof of authorship will naturally assume the greatest importance in the Trial Chamber's assessment of the weight to be attached to individual pieces of evidence."[423] However, the lack of testimony by the author, establishing the origins of a piece of evidence, will not usually preclude its admission at the ICC. In *Lubanga* Pre-Trial Chamber I noted that "nothing in the Statute or the Rules expressly states that the absence of information about the chain of custody [...] affects the admissibility or probative value of Prosecution evidence."[424] Therefore, when the Defence only gives a general objection to the admission of evidence because it lacks a chain of custody, and does not provide the reasons for its objection, "reasonable doubt is not cast upon the authenticity of the evidence such that it should be excluded."[425] In this regard, however, it should be reiterated that the party requesting that a piece of evidence should be admitted into evidence has the burden of showing that it is admissible,[426] i.e. that it is relevant and has probative value. The reasoning in *Lubanga*, should therefore be understood as authenticity, and/or otherwise establishing provenance/unbroken chain of custody, are not absolute requirements for admission. That is, under the circumstances that the Chamber does not consider flaws in provenance to render the evidence entirely unreliable, thus devoid of probative value, or that is causes undue prejudice to fairness.

Similarly, in *Bemba* Trial Chamber III admitted a BBC article that the Prosecution had found through an internet search, and that "was not directly downloaded from the BBC news agency from which it apparently originated". Despite the defence's arguments that the article

[416] Black's Law Dictionary (2009).
[417] Ibid.
[418] Ashouri; Bowers & Warden (2014) at 121.
[419] Judgment, *Popovic et al*, (IT-05-88-T), ICTY Trial Chamber II, 10 June 2010, vol I, paras. 64-66 [Judgment, *Popovic et al*]
[420] Decision on Exclusion of Testimony and Admission of Exhibit, *Renzaho*, (ICTR-97-31-T), ICTR Trial Chamber I, 20 March 2007, paras. 1-2 [hereinafter Decision, *Renzaho*].
[421] Judgment, *Tolimir*, (IT-05-88/2-T) ICTY Trial Chamber II, 12 December 2012, paras. 67-70 [hereinafter Judgment, *Tolimir*]
[422] See, e.g., Judgment, *Popovic et al*, paras. 64-66.
[423] Order on the Standards Governing the Admission of Evidence, *Brđanin & Talic*, (IT-99-36-T), ICTY Trial Chamber II, 15 February 2002, para. 18 [Order on Admission, *Brđanin & Talic*].
[424] Decision on Confirmation Charges, *Lubanga*, para. 96.
[425] Ibid. para. 98.
[426] Farthofer (2012) at 492.

should be rejected, as the Prosecution had been unable to identify its author, the Chamber was "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." [427] The Trial Chamber did not address the authenticity of the article directly, but the defence's arguments relate to the provenance of the material. It is not entirely clear from the Chamber's reasoning whether *other* factors, apart from proper authentication and/or establishment of provenance, provided sufficient indicia of reliability, or if the Chamber considered, in fact, considered the BBC article authentic on the face of it. In either case, the reasoning clearly illustrate the ICC chambers' flexible approach to authentication.

The ICTY has followed a similar approach, and has held that evidence absent author testimony will not necessarily be barred from admission.[428] In *Brđanin*, for instance, witness corroboration was helpful to establish sufficient reliability, when there was no author testimony.[429] A witness identified his and others' voices on intercepted communications which was considered to establish sufficient reliability for admission into evidence, despite an imperfect chain of custody and the fact that the evidence had actually been edited.[430] Similarly, in *Tolimir*, testimony as to the provenance of the source of aerial photographic evidence and a witness' receipt of it was considered sufficient to admit the photos into evidence, even though the methods used to obtain the material remained undisclosed, and the witness was not the "author" of the material, at least not strictly speaking.[431] Conversely, the ICTY excluded a video submitted as evidence in *Milutinovic*, when a witness' written testimony, as to whom he had given the video to, contradicted his testimony on cross-examination.[432] However, the ICTR has considered an audiotape to be inadmissible, given the absence of the author's testimony, despite that several witnesses identified the accused's voice on the incriminating recording.[433]

In the past, when the Prosecution has not been able to provide proof of authorship, the *ad hoc* tribunals have also allowed authentication of documentary evidence through other external indicators.[434] For example, in *Karemera*, the Prosecution submitted a video (documentary evidence) of a rally along with a transcript (external indicator) of the corresponding radio broadcast.[435] The ICTR Trial Chamber III held that the broadcast transcript authenticated the date of the video which was relevant in proving that the accused attended a rally. Furthermore, the ICTR has also authenticated video evidence through expert testimony, and held that radio announcements (documentary evidence), which called for the apprehension of Tutsis, were authentic after an expert witness testified (external indicator) that following the radio announcements, people actively sought out Tutsis.[436] Furthermore, two additional witnesses corroborated the expert testimony by describing the events that preceded and

[427] Admissibility Decision (2013), *Bemba*, para. 25.
[428] See Order on Admission, *Brđanin & Talic*, para. 20.
[429] Judgment, *Brđanin*, (IT-99-36-T), ICTY Trial Chamber II, 1 September 2004, para. 34, fn 38 [Judgment, *Brđanin*].
[430] Decision on the Defence "Objection to Intercept Evidence", *Brđanin*, (IT-99-36-T), ICTY Trial Chamber II, 3 October 2003, para. 13.
[431] Judgment, *Tolimir*, paras. 67-70.
[432] Judgment, Milutinovic et al, (IT-05-87-T), ICTY Trial Chamber, 26 February 2009, para. 545.
[433] *Renzaho*, supra note 226, paras. 1-2, the audio recording was later admitted when the Prosecution tendered it through the testimony of the journalist who recorded it.
[434] Ashouri; Bowers & Warden (2014) at 119.
[435] Judgement and Sentence, *Karemera et al*, (ICTR-98-44-T), ICTR Trial Chamber III, 2 February 2012, paras. 169-173, 205.
[436] Judgment and Sentence, *Rutaganda*, (ICTR-96-3-T), ICTR Trial Chamber I, 13 February 1996, paras. 357 and 370.

succeeded the radio announcements.[437] Similarly, in *Tolomir* the ICTY Trial Chamber II found that radio intercepts (documentary evidence) were authentic because they were corroborated by other intercepts and expert testimony (external indicators).[438] Experts are, indeed, useful in articulating what information the evidence actually provides, versus what is mere speculation.

Even if authentication is not an absolute requirement for admissibility, the specific markers of authenticity for open-source and audio-visual information developed in *Katanga and Ngudjolo Chui* are certainly worth outlining. As to open-source evidence Trial Chamber II stated that verifiable information that establishes where the item was obtained is required. If the item is no longer publicly available, then the tendering party must present the date and location of the acquisition.[439] Furthermore, Trial Chamber II held that for video, film, photographic, or audio evidence, proving its originality and integrity, that is, showing that it was not digitally altered, is required.[440] In view of the more flexible approach adopted in *Bemba*, proving that digital material has not been altered should be considered recommended, rather than required. Furthermore, it is clear that the ICC, so far, has not required the establishment of provenance as to documentary evidence in general, or evidence in audio-visual format specifically.[441]

It should also be noted that the ICC has developed a set of standards that are specific to digital evidence. Digital evidence and material must conform to an "e-court Protocol" even before it is submitted at the confirmation hearing.[442] The Protocol is designed to "ensure authenticity, accuracy, confidentiality and preservation of the record of proceedings",[443] and requires metadata to be attached, including the chain of custody in chronological order, the identity of the source, the original author and recipient information, and the author and recipient's respective organisations.[444] However, the Protocol is limited to harmonising the format of digital evidence, and how it should be stored in the court's systems. While the Protocol does not explicitly address issues relating to probative value, it highlights the importance attached to authentication, provenance/chain of custody of digital evidence. Even if these factors are not "absolute" conditions for admissibility, the protocol suggests that such factors are taken into account, or might be in the future, when the trial chambers assess evidentiary weight later in the proceedings.

This conclusion is supported by the reasoning in *Bemba* when Trial Chamber III refused to give much evidentiary weight to documentary evidence in digital format when its provenance has not been investigated. The Defence had relied on reports and interviews of supposedly "well-informed observers" submitted as documentary evidence.[445] These reports also

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[437] Ibid.
[438] Decision on Prosecution's Motion for Admission of 28 Intercepts from the Bar Table, *Tolimir*, (IT-05-88/2-T), ICTY Trial Chamber II, 20 January 2012, paras. 64 and 67 [hereinafter Admissibility Decision, *Tolimir*]
[439] Bar Table Motions Decision, *Katanga & Ngudjolo Chui*, para. 24(d).
[440] Ibid.
[441] See, e.g. Admissibility Decision (2013), *Bemba*, para. 25; Admissibility Decision II (2012), *Bemba*, para. 20.
[442] *International Criminal Court e-Court Protocol*, (ICC-01/04-01/10-87-Anx 30-03-2011), 28 August 2006, para. 1, available at <https://www.icc-cpi.int/RelatedRecords/CR2019_00267.PDF> [hereinafter e-Court Protocol]
[443] Ibid.
[444] Ibid. paras. 31-32.
[445] Decision on the Admissibility and Abuse of Process Challenges, *Bemba*, (ICC-01/05-01/08), Trial Chamber III, 24 June 2010, para. 255 [hereinafter Decision on the Admissibility and Abuse of Process Challenges, *Bemba*].

included digital evidence such as a "Weblog", which allegedly quoted the President of Rwanda. Furthermore, Human Rights Watch and other reports were quoted by the Defence. While the reports were considered admissible, Trial Chamber considered them to carry "little, if any" evidentiary weight, given that the provenance and reliability of these reports had not been investigated or tested.[446]

In sum, the ICC and the *ad hoc* tribunals have taken a flexible approach to authentication and/or establishing provenance/unbroken chain of custody. Taking the case-law as a whole, these factors cannot be considered as absolute requirements for admissibility, as reliability can, indeed, be shown in a number of ways. According to the ICC case law, the probative value of unauthenticated evidence, lacking complete information as to provenance, will be evaluated on a case-by-case basis. Evidence acquired from open sources, including evidence in digital format, it seems, may be admitted even when there is limited information regarding its origins. Furthermore, corroboration using external indicators, such as transcripts or witness testimony, has been accepted to show sufficient authenticity, rendering documentary evidence admissible. Moreover, if proof of authorship is provided and an unbroken chain of custody is established it will increase the evidentiary value of the evidence when the Court gives appropriate weight to the evidence as a whole, at the end of the trial.

4.2.2.2 Reliability: Evaluation of Sources and Validation of Contents

In *Bemba*, Trial Chamber III reiterated that a document, although having sufficient indicia of authenticity, may be unreliable.[447] The probative value of documentary evidence, apart from its provenance/chain of custody, also depends on its "[…] source or author, as well as their role in the relevant events […] and any other relevant information".[448]

If the source is known, his or her credibility is an important part in the evaluation of the reliability of the information provided, which too influences the probative value of the evidence. In this regard it should be emphasised that reliability is a wide concept, encompassing the concept of credibility as well as other factors, such as those outlined above. Decisions on admissibility of the *ad hoc* tribunals dealing with the difference between reliability and credibility are inconsistent, at least to a certain extent. Scholars have remarked that the reliability and credibility are occasionally used synonymously, which is wrong and causes confusion.[449] The ICC has, however, more often than not, distinguished the two concepts,[450] and taking the jurisprudence of the *ad hoc* tribunals and ICC as a whole, credibility may be defined as "truthfulness" or "honesty".[451] A credibility assessment thus answers the question whether a witness testifies according to or against his or her beliefs, that is, whether the witness is lying. By comparison, an author of open-source evidence is not

[446] Ibid.
[447] Judgment pursuant to Article 74 of the Statute, *Bemba*, (ICC-01/05-01/08-3343), Trial Chamber III, 21 March 2016, para. 237.
[448] Ibid.
[449] Klamberg (2013a) at 172.
[450] Rule 140(2)(b), RPE, "the prosecution and the defence have the right to question that witness about relevant matters related to the witness's testimony and its reliability, the credibility of the witness and other relevant matters."). See, e.g., Appeals Judgment I, *Lubanga*, supra note 30, para. 239 ("In assessing the weight to be given to the testimony of a witness, a Trial Chamber needs to assess the credibility of the witness and the reliability of his or her testimony").
[451] Klamberg (2013a) at 174.

credible if it becomes apparent that he or she has provided facts which he or she knows are false.

However, even if a witness or an author of documentary evidence can be considered credible that does not necessarily mean that the information presented is reliable and accurate. A person can, for instance, make mistakes due to deficiencies in observational accuracy. The latter, however, rather goes to the reliability of the evidence.[452]

For example, in *Kupreškić et al* a witness identified the defendants during rain, under dark and foggy conditions. Furthermore, the attackers descended upon the witness when she was sleeping, and their faces were masked with paint. The ICTY Appeals Chamber acknowledged that:

"[A]n enormous amount of research has determined that the relationship between the certainty expressed by a witness and the correctness … is very weak. […] Even witnesses who are very sincere, honest and convinced … are very often wrong."[453]

The Appeals Chamber held that the certainty of the witness in question was rather "a reflection of her personality and not necessarily an indicator of the reliability of her identification evidence."[454] Similarly, the ICTY Trial Chamber in *Brđanin* "kept in mind that the fact that a witness gives evidence honestly is not in itself sufficient to establish the reliability of that evidence."[455] In *Katanga and Ngudjolo* both parties requested the Trial Chamber II to ignore the testimony of a witness because of alleged perjury. The witness' credibility was contested when other witness statements contradicted the testimony in question. The Trial Chamber discussed the flaws resulting from the disputed *credibility* of the witness in terms of *reliability* of his statement.[456]

Credibility thus forms part of the broader reliability concept. In practice, however, the same or overlapping factors will be considered when the credibility of sources and the reliability of the information are assessed, at least to a certain extent. Such factors include, for instance, consistency, the level of detail of the information, accuracy and the clear description of the events under question.[457] Furthermore, the ICC chambers will consider the contemporaneousness of the information, whether the information and the way it was gathered can be independently verified and tested,[458] and as part of assessing the reliability of a contents provided, the chamber will also take due regard to the capacity of the witness, or the author, if asked to witness, and the quality of his or her recollection.[459]

These factors are important to consider both as to whether the witness or the author of a document is truthful, to the best of his or her knowledge, and whether the information provided is accurate and reliable. Corroboration through other evidence has often been used to verify the truthfulness and accuracy of information. For instance, in *Mbarushimana*, Pre-Trial Chamber I noted that "[n]o evidence was provided to the Chamber in relation to an

[452] Ibid. at 177.
[453] Appeals Judgment, *Kupreškić*, para. 138.
[454] Ibid. para 139.
[455] Judgment, *Brđanin*, para. 25.
[456] Decision on the Prosecution's renunciation of the testimony of witness P-159, *Katanga & Ngudjolo,* (ICC-01/04-01/07), Trial Chamber II, 24 February 2011, paras. 11–17.
[457] Judgment, *Ngudjolo Chui*, paras. 53 and 136–137.
[458] Admissibility Decision (2013), *Bemba*, para. 27 sub-paras. (a)-(e).
[459] Judgment, *Ngudjolo Chui*, 136 -137.

attack against the civilian population in Busurungi [Democratic Republic of the Congo] on or about 28 April 2009."[460] However, based on the statements of several witnesses, read together with UN and Human Rights Watch Reports, the Chamber was "satisfied that there are substantial grounds to believe that three women were found dead near Busurungi".[461] While there was some discrepancy as to the date on which this occurred, the accounts provided by the witnesses and in the reports were so consistent in their descriptions that they were considered to "clearly refer to the same events".[462] Through corroboration of other evidence, the Pre-Trial Chamber thus considered the witnesses *credible* and the information they had provided *reliable*.

Other important factors that will be considered as to the reliability of the information provided by a document concern the purpose for which the evidence was created, and whether there is any indication the source is biased.[463] Taking the ICC case law as a whole, independence, impartiality/objectivity and motivation of the source emerge as important criteria in the assessment of reliability of the source and/or the information provided. In *Katanga and Ngudjolo Chui* Trial Chamber II laid down some specific criteria for four particular categories of open sources; (i) UN agencies, (ii) NGOs, (iii) press reports and (iv) persons or entities involved in the events.[464]

As to reports from UN agencies, the Chamber stated that they are, as a general rule, considered "prima facie reliable" provided that "the author's identity and the sources of the information are […] revealed with sufficient detail".[465] As to reports from NGOs, the Chamber held that they "can be prima facie reliable if they provide sufficient guarantees of impartiality", including "sufficient information on their sources and the methodology used to compile and analyse the evidence upon which the factual assertions are based."[466] As to press reports and newspaper articles, the Chamber stated that they are in principle only admissible if provided by an expert. In the case at hand the Prosecution had;

> "[…] failed to inform the Chamber either of the background and qualifications of the journalists or of their sources, in order to satisfy the Chamber as to their objectivity and professionalism. Under these circumstances the Chamber is unable to attach sufficient probative value to the opinions of even informed bystanders such as journalists in relation to specific contested facts"[467]

As to documents emanating from persons or entities involved in the events, Trial Chamber II stated that they are generally inadmissible as they "contain opinion evidence without qualifying their authors as experts" […] [and] "the fact that the assertions are made by interested persons […] severely diminished their probative value." [468]

In sum, consistency, the level of detail of the information, independent verifiability, and corroboration are important factors to evaluate both the credibility of witnesses or authors,

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[460] Decision on the confirmation of charges, *Mbarushimana* (ICC-01/04-01/10-465-Red), Pre-Trial Chamber I, 16 December 2011, para. 135 [hereinafter Decision on the confirmation of charges, *Mbarushimana*]
[461] Ibid.
[462] Ibid.
[463] Admissibility Decision (2013), *Bemba*, para. 27 sub-paras. (a)-(e).
[464] Bar Table Motions Decision, *Katanga & Ngudjolo Chui*, para 28.
[465] Ibid. para. 29.
[466] Ibid. para. 30.
[467] Ibid. para. 31.
[468] Ibid. para. 32.

and the reliability of the information provided. Furthermore, it becomes clear that the Court has established a clear hierarchy of preference as to some open sources, based on the perceived legitimacy of the source. Official UN reports, are at the top, followed by well-established international NGOs, followed by media reports, followed by interested persons or entities. Furthermore, in the evaluation of reliability of sources, the independence, motivation and impartiality of the source emerge as important criteria. The Court thus takes into account that some open sources which reflect the views of interested persons could be biased.

4.2.2.3 Hearsay: Only Admissible if Submitted to Corroborate Other Evidence

As has become apparent in the section above, the probative value of any evidence is, in part, dependent on its source. However, authors of digital open-source evidence could often be unknown and impossible to track down.[469] This makes the evaluation of the reliability of the information more complicated. If the information provided in a document, in a NGO report for instance, comes from unknown sources it may be labelled hearsay, which is commonly defined as evidence of facts outside the direct knowledge of the testifying witness (or, conversely, in some jurisdictions, of the author of documentary evidence).[470] The ICC does not consider hearsay as a class of evidence in and of itself and, contrary to the *ad hoc* tribunals, the ICCSt and the RPE do not contain any rule explicitly allowing for hearsay evidence to be admitted. However, taking the ICC jurisprudence as a whole, it becomes clear that the ICC does not consider hearsay from anonymous sources inadmissible *per se*, but the chambers will consider the context and conditions in which such evidence was obtained, whilst considering "the impossibility of questioning the information source in court." [471]

As outlined above, in Trial Chamber II took a rather strict approach to anonymous hearsay in *Katanga and Ngudjolo Chui*, holding that UN and NGO reports are inadmissible if their authors do not provide sufficient details about their sources. Press reports, in turn, would only be admissible if written by an expert.[472] In *Bemba*, however, Trial Chamber III took a more lenient approach to NGO and press reports that too contained information from anonymous or unknown sources, which has been followed since. The defence opposed the admission of several of these reports, and argued that such reports represented "un-tested and often times anonymous allegations of crimes which neither the Chamber nor the Defence have had the opportunity to examine".[473] Nonetheless, the majority found that such accounts can be considered prima facie reliable "provided that they offer sufficient guarantees of impartiality".[474] Trial Chamber III allowed for the admission of NGO reports "for the limited purpose that the information contained therein may serve to corroborate other pieces of evidence".[475] Furthermore, the majority clarified that the admissibility determination did not predetermine the final assessment of the evidentiary weight to be given to the reports.[476] Similarly, the Trial Chamber confirmed that press reports "may be admitted for limited

[469] Freeman (2020) 65.
[470] Judgment, *Blagojevic & Jokic*, para. 21.
[471] Judgment, *Lubanga*, paras. 107-108.
[472] Ibid. paras. 29-30.
[473] Defence Response to the Prosecution's Application for Admission of Evidence from the Bar Table, *Bemba*, (ICC-O1/05-01/08-2168), Trial Chamber III, 19 March 2012, para. 50.
[474] Admissibility Decision (2013), *Bemba*, para. 21.
[475] Ibid.
[476] Ibid.

purposes to be determined on a case-by-case basis" such as to "corroborate other pieces of evidence".[477]

However, Judge Ozaki disagreed with the majority's admission of reports from the International Federation of Human Rights, Amnesty International, and the BBC, stating:

> "The sources of information relied on in the reports are not revealed with sufficient detail, and as a result it is not possible to fully investigate their reliability. Due to the lack of guarantees concerning the reliability of these reports' sources, in my judgment the probative value of the three reports is low."[478]

Judge Ozaki suggested that the weight of such reports could be strengthened if a witness would attest to the content, methodology, and authorship of the report.[479] This advice was later followed in *Gbagbo*, when the Prosecution called witnesses from NGOs to testify as to which methods they had used when producing reports in Côte d'Ivoire.[480]

Additionlly, the Court has admitted e-mails as anonymous hearsay, in *Lubanga*, notwithstanding objections from the defence regarding their credibility and authenticity (see 4.2.2.1 above).[481] In this regard, the Trial Chamber reiterated, again, that as a general rule such anonymous hearsay could be admitted, but its use will be limited to "corroborate other evidence."[482] This general rule was reiterated again in *Mbarushimana* when the defence objected to the admission of UN and Human Rights Watch reports at the confirmation of charges hearing.[483] While Pre-Trial Chamber I allowed the Prosecution to submit them into evidence the Pre-Trial Chamber stated:

> "As a general principle, the Chamber finds that information based on anonymous hearsay must be given a low probative value in view of the inherent difficulties in ascertaining the truthfulness [i.e., credibility] and authenticity of such information. Accordingly, such information will be used only for the purpose of corroborating other evidence."[484]

4.2.2.4 Summary: Innumerable Factors May Contribute to *Prima Facie* Probative Value – None an Absolute Condition

As highlighted above, the probative value of evidence must be separated from its evidentiary value. While probative value is one of the key factors when determining the admissibility of evidence, evidentiary value relates to the importance of a piece of evidence in proving a certain issue.[485] Hence, the more thorough evaluation of evidence is left to the deliberation stage when the Trial Chamber gives appropriate weight to the evidence as a whole, at the end of a case when making the final judgment.

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[477] Admissibility Decision (2013), *Bemba*, para. 25.
[478] Partly Dissenting Opinion of Judge Ozaki on the Decision on the admission into evidence of items deferred in the Chamber's "Decision on the Prosecution's Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute", *Bemba*, (ICC-01/05-01/08-2299), Trial Chamber III, 27 June 2013, para. 3.
[479] Ibid., paras. 3-5.
[480] Freeman (2020) supra note 12, at 55.
[481] Decision on Confirmation Charges, *Lubanga*, para. 99.
[482] Ibid., para. 106.
[483] Decision on the confirmation of charges, *Mbarushimana*, para. 75.
[484] Ibid., paras. 77-78.
[485] Bar Table Motions Decision, *Katanga & Ngudjolo Chui*, para. 13.

From the ICC's and the *ad hoc* tribunals' interpretation and application of the second prong of the admissibility test, outlined above, it is clear that the ICC, as the *ad hoc* tribunals, has taken a flexible approach to the authentication of documentary evidence. Authentication is merely considered to be one factor to take into consideration when the ICC trial chambers determine an item's *prima facie* reliability and probative value. [486] Similarly, provenance/an unbroken chain of custody, that can contribute to a finding of authenticity, does not necessarily always have to be established.[487] Consequently, there is no typical amount of author testimony required at the admissibility stage, and the bar for admission is usually low. The ICC would rarely decide to not admit an item into evidence because its authenticity or provenance has not been established,[488] but the Court will consider the probative value of unauthenticated documentary evidence on a case-by-case basis.[489] It can also be noted that the jurisprudence of the *ad hoc* tribunals show that corroboration through other evidence, and especially expert testimony, may be crucial in the absence of author testimony, or when the authenticity of a documentary evidence otherwise is contested. However, the Trial Chamber will afford documentary evidence little weight at the end of the trial if the Prosecution does not provide any information as to provenance and if it is entirely un-investigated and un-tested.[490]

As to the evaluation of sources, credibility is essential, i.e., that the author or witness appears to be truthful. Other factors that the ICC chambers will consider as to the reliability of information provided include its contemporaneousness, consistency, the level of detail of the information, accuracy and the clear description of the events under question.[491] Furthermore, the ICC chambers will consider any biases and the purposes for which the evidence was created, as well as whether the information and the way it was gathered can be independently verified and tested.[492] Corroboration is crucial as to the latter. Moreover, the Court has established a clear hierarchy of preference as to some open-source evidence, based on the perceived legitimacy of the source. Official UN reports are at the top, followed by well-established international NGOs, followed by media reports.[493]

If the original source of information contained in documentary evidence is not known it, naturally, makes the evaluation of reliability and probative value more complicated. However, taking the ICC case law as a whole, the chambers will often allow for evidence from unknown sources to be admitted, whilst clarifying that it will be afforded limited weight at the end of trial. As a general rule, anonymous hearsay will only be admitted into trial for the limited purpose of corroborating other pieces of evidence. It can also be noted that factors that make the judges more likely to admit anonymous content of public reports – factors which would apply to some digital open-source evidence as well – include transparency as to the methods used in the acquisition, the identities of the authors, and if the author of the report, or an expert, testifies in court: hence enabling the chamber to evaluate whether the source, and/or its content, demonstrate "sufficient guarantees of impartiality"[494].

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[486] See, e.g., Ibid; Admissibility Decision (2013), *Bemba*, para. 25.
[487] Decision on the admissibility of four documents, *Lubanga*, para. 96; Order on Admission, *Brđanin & Talic*, para. 20 and *Delalić,* para. 22.
[488] See, e.g., Admissibility Decision (2013), *Bemba*, para. 25
[489] Decision on Confirmation Charges, *Lubanga,* paras. 131-132.
[490] See, e.g., Decision on the Admissibility and Abuse of Process Challenges, *Bemba*, para. 255.
[491] Judgment, *Ngudjolo Chui*, paras. 53 and 136 -137.
[492] Admissibility Decision (2013), *Bemba*, para. 27 sub-paras. (a)-(e).
[493] See, Bar Table Motions Decision, *Katanga & Ngudjolo*, paras. 28-32.
[494] Ibid. para. 21 and Admissibility Decision (2013), *Bemba*, para. 21.

In sum, there are innumerable attributes that can contribute to a finding of probative value "on a prima facie basis" based on "sufficient indicia of reliability" – and none of the factors outlined above is an absolute condition.[495] The second prong of the admissibility test, relating to the probative value of the submitted evidence, thus allows the ICC chambers to exercise considerable judicial discretion.

4.2.3 Step Three: Prejudicial Effect on Trial Fairness

Thirdly, after a finding of the probative value "on a *prima facie* basis", the probative value must be weighed against any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.[496]

The case law of the *ad hoc* tribunals define prejudice, that must be taken into account at the admissibility stage, as how a particular practice – such as the admission of a particular piece of evidence – may "adversely affect the fairness or expeditiousness of the proceedings".[497] Prejudice should not be confused with any negative impact on a party's case. As stated by Trial Chamber I in *Lubanga*, "it is trite to observe that all evidence that tends to incriminate the accused is also "prejudicial" to him."[498]

In *Katanga and Ngudjolo*, Trial Chamber II clarified that when addressing issues of prejudice, it will consider two questions: (a) what causes the prejudice; and (b) what suffers the prejudice.[499] As to the first question, the chamber stated that "[t]he existence and extent of prejudice must be ascertained on a case-by-case basis" as it depends on "specific characteristics of the item of evidence and the nature of the alleged prejudice". Therefore, it would "serve little purpose for the Chamber to discuss all possible forms of prejudice in general terms".[500] The answer to the second question, however, can be found in Articles 69(4) and 67 ICCSt, that is, the potential impact on trial fairness.[501] What elements of "fair trial" that must be protected from prejudice is not explicitly defined by the ICC statutory framework. However, as has been clarified in 3.3 above, the fair-trial rights of the accused listed in Article 67 constitute the starting point. Furthermore, apart from these individual due-process rights, it should be recalled that the notion of a "fair trial" at the ICC also encompasses a number of key principles of fairness.

If a fair-trial right is clearly violated, determining that prejudice is undue is relatively straightforward. For instance, in *Katanga and Ngudjolo*, Trial Chamber II made clear that evidence obtained in violation of the right to remain silent and not to be compelled to incriminate oneself, or the right to counsel, would be unduly prejudicial to the fair-trial rights of the accused.[502] The evidence must therefore not be admitted. This situation, however, rather falls within the ambit of the exclusionary rule in Article 69(7) ICCSt (see 4.2.4 below).

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[495] Decision on the admissibility of four documents, *Lubanga*, paras. 28-29 and 32.
[496] Ibid. para. 31.
[497] Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, *Bagosora et al* (ICTR-98-41-A) ICTR Appeals Chamber, 19 December 2003, paras. 16-17.
[498] Decision on the admissibility of four documents, *Lubanga*, para. 31.
[499] Bar Table Motions Decision, *Katanga & Ngudjolo Chui*, para. 38.
[500] Ibid. para. 40.
[501] Ibid. para. 39.
[502] Bar Table Motions Decision, *Katanga & Ngudjolo Chui*, paras. 55-65.

Admissibility decisions often involve the weighing of probative value and prejudice, or an assessment of how much additional work the admission of a certain piece of incriminating evidence would cause, thereby potentially affecting the effectiveness of the defence. What level of prejudice then amounts to undue prejudice, prompting the Trial Chamber to consider a piece of evidence inadmissible?

As noted by Trial Chamber II in *Katanga and Ngudjolo*, decisions on the admissibility of evidence can cause an impact upon an accused's right to a fair trial in many different ways.[503] Any piece of incriminating evidence admitted, as well as any day less to prepare because of late disclosure, causes a certain inconvenience to the defence which might negatively affect the Defence's ability to provide for an effective defence or have implications for the accused's right to be tried without undue delay.

Admitting hearsay, for instance, clearly impacts the accused's ability to examine and challenge the evidence against him or her. Additionally, should the witnesses' or sources' identities be unknown to the defence, that would further restrict the defence's ability to evaluate the correctness of the information. In practice, however, if one of the fair-trial rights – such as the right to examine witnesses and challenge evidence – is impeded upon, it will be considered in terms of level of prejudice. Furthermore, the ICC bench will evaluate whether the infringement of a fair-trial right can be mitigated, as would the ECtHR (see 3.5.2 above). In *Lubanga* the Appeals Chamber held that the use of summaries of anonymous witness statements at the pre-trial stage "is not per se prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[504] However, the Appeals Chamber made it clear that the Pre-Trial Chamber would need to "[take] sufficient steps" to "ensure that summaries of evidence […] are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial."[505] The reasoning of the Appeals Chamber should be understood as the admission of anonymous hearsay actually causing prejudice to fairness, as it infringes on the accused's right to examine and challenge evidence. However, as long as its admission is sufficiently counterbalanced, the accused's fair-trial rights – while affected – may not necessarily be violated, and the trial as a whole may still be fair. After consulting jurisprudence from the ECtHR, the Appeals Chamber held that the use of summaries of witness statements in *Lubanga* had, in fact, been unduly prejudicial to the accused's fair-trial rights, as the Pre-Trial Chamber had not undertaken sufficient steps strengthen the ability of the defence to challenge the evidence. According to the jurisprudence of the ECtHR, outlined in 3.4.4 above, it should be recalled that such counterbalancing steps, as to anonymity of witnesses could, for instance, include information on their background and potential motivation for testifying.[506] Furthermore, it should be recalled that the reliability of a witness statement can sometimes be established through corroboration by other evidence, rather than by direct questioning.[507]

In the RPE, there is a rule, Rule 68 RPE, that has been amended and now allows for the admission of prior recorded testimony at trial, albeit "in-court personal testimony [being] the

[503] Ibid. para. 37.
[504]Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of PreTrial Chamber I entitled Fir st Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, *Lubanga*, (ICC-01/04-01/06), Appeals Chamber, 14 December 2006, para. 50.
[505] Ibid., para. 51.
[506] See, e.g., *Ellis, Simms & Martin v United Kingdom*, (App. nos. 46099/06 and 46699/06), ECtHR, judgment, 10 April 2012, paras. 86-87.
[507] See, e.g., *Al-Khawaja & Tahery v United Kingdom*, (App. nos. 26766/05 and 22228/06), ECtHR, judgment, 20 January 2009, paras. 155–158.

rule" at the ICC trial stage, according to Article 69(2). Potentially, audio and video recordings as well as statements collected by NGOs could be admissible under said rule.[508] However, in *Katanga and Ngudjolo Chui*, before the amendment of Rule 68, Trial Chamber II held that "unless the accused persons have either waived their right to examine the witness or had the opportunity to do so when the testimony was recorded", admission of a recorded testimony of a witness would be "unduly prejudicial to the right of the accused to examine, or have examined, adverse witnesses".[509] While the right to examine witnesses enshrined in Article 67(1)(e) ICCSt, remains unchanged, the amendment of Rule 68 now explicitly allows for infringements on the right. It has been observed that the level of prejudice that the Trial Chamber considers resulting from the admission of prior recorded testimony has changed as a result, as the admission of such testimony now has become an institutionalised practice.[510] The admission of prior recorded testimony would thus no longer be unduly prejudicial *per se*, but merely prejudicial to such a level that it does not prevent its introduction into evidence. In this vein, it should be emphasised that, according to Rule 68 RPE, prior recorded testimony can only be admitted "provided that this would not be prejudicial to or inconsistent with the rights of the accused".[511] Consequently, to make sure it is not unfair to admit the prior recorded testimony the Trial Chamber would still have to do an assessment as to level of prejudice, and whether sufficient countermeasures have been undertaken. The amended Rule 68 also provides the Trial Chamber with some helpful guidance in this regard, as the Rule states that any prior recorded testimony that "goes to proof of acts and conduct of the accused" would be more prejudicial, which "may be a factor against its introduction, or part of it".[512] However, such guidance to assist the assessment of the chamber, as to which level of prejudice is undue, are not generally included in the RPE.

As has been outlined above the ICC chambers case law on the admissibility of anonymous hearsay is somewhat inconsistent, but the chambers have clarified that hearsay will, as a general rule, only be admissible if it is submitted to corroborate other evidence. Hence, it can be inferred that the ICC bench does not consider its admittance unduly prejudicial to trial fairness.

However, in *Lubanga*, Trial Chamber I clarified that it is unfair to admit information if "[…] evidence of slight or minimal probative value has the capacity to prejudice the Chamber's fair assessment of the issues in the case".[513] Moreover, in *Katanga and Ngudjolo*, Trial Chamber II stated that the right to be tried without undue delay (c.f. Article 67(1)(c) ICCSt) requires the Chamber to exclude evidence if the time anticipated for its presentation – or subsequent evaluation by the Chamber – is disproportionate to its potential probative value. Hence, even if an item is "not devoid of probative value, the Chamber may still decide to exclude it in order to avoid the trial proceedings being burdened by unlimited amounts of repetitive or unduly time-consuming evidence."[514]

[508] International Bar Association (2016) at 43-44.
[509] Bar Table Motions Decision, *Katanga & Ngudjolo Chui*, paras. 50-51.
[510] Bartels (2019) at fn. 41.
[511] Rule 68(1) RPE.
[512] Rule 68(2)(c)(ii) RPE.
[513] Decision on the admissibility of four documents, *Lubanga*, para. 31.
[514] Bar Table Motions Decision, *Katanga & Ngudjolo Chui*, para. 41.

4.2.3.1 Summary: Balancing Prejudice Against Fair-Trial Rights Allows for Broad Judicial Discretion – Unclear Which Level of Prejudice is Tolerated

The case law outlined above makes it clear that the ICC chambers will in fact tolerate a degree of prejudice against the accused as long as it falls below a certain threshold. Furthermore, the ICC adopts the ECtHR's balancing approach in that it will consider whether the infringement on fair-trial rights, such as the right to examine witnesses and challenge evidence, can be mitigated. However, it is not entirely clear from the Court's jurisprudence when the prejudice passes the aforementioned threshold of "undue" prejudice, which perpetuates procedural uncertainty to the detriment of the accused. It could be argued that the discretion afforded to the ICC bench is necessary since the level of prejudice will depend upon many factors that may change throughout the trial, but, nonetheless, the lack of foreseeability when the ICC chambers exercise this discretion is noteworthy.

4.2.4 The Exclusionary Rule

According to Article 69(7) ICCSt "evidence obtained by means of a violation of the Rome Statute or internationally recognised human rights *shall* [emphasis added] not be admissible". While the exclusionary rule seems to be mandatory at first sight, evidence which is obtained by infringing international human rights law or the provisions of the ICCSt is not inadmissible *per se*. Exclusion of evidence is restricted to compliance with one of the two requirements listed in Article 69(7) and must only be excluded if (a) "the violation casts substantial doubt on the reliability of the evidence" or if (b) "the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings".

Article 69(7) has thus been described as having two prongs. First, a determination must be made if evidence was obtained by a violation either of the ICCSt or of internationally recognised human rights. In this regard it should be noted that a violation of national law on evidence gathering does not compel exclusion of evidence.[515] Only when the Trial Chamber finds that there has been a violation of the ICCSt and/or internationally recognised human rights does the second prong come into play, that is, the application of the two subparagraphs of article 69(7).

During the negotiations in Rome some delegations in fact wanted to exclude all evidence obtained by means of a violation of human rights, but this formulation was regarded as too broad.[516] Instead, the Rome Conference agreed on the wording above, which prompts the Trial Chamber to distinguish between minor infringements of procedural safeguards and more serious violations. Furthermore, Article 67(9) is also discretionary in nature and, as confirmed by Pre-Trial Chamber I in *Lubanga*, the judges are afforded the power to determine, on a case-by-case basis, the appropriate balance between the Statute's fundamental values.[517]

Article 69(7) constitutes *lex specialis* in relation to the general approach to admissibility of evidence enshrined in Article 69(4), which is broader in scope regarding the possible forms

[515] Article 69(8) ICCSt; Bar Table Decision (2009), *Lubanga* para. 36.
[516] Behrens (1999), at 246.
[517] Decision on the confirmation of charges, *Lubanga*¸ (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007, para. 84 [hereinafter Decision on the confirmation of charges, *Lubanga*].

of prejudice.[518] However, in *Katanga and Ngudjolo* Trial Chamber I considered that both Article 69(4) and 69(7), for the most part, protect the same two key values:

> "[F]irstly, the Statute protects the accuracy and reliability of the Court's fact-finding by requiring that evidence of questionable credibility be excluded; secondly, the Statute safeguards the moral integrity and the legitimacy of the proceedings by requiring that the process of collecting and presenting evidence is fair towards the accused and respects the procedural and human rights of all those who are involved in the trial."[519]

In sum, both Articles 69(4) and 69(7)*(a)* ICCSt aims to protect the accuracy and reliability of fact-finding. Furthermore, both Articles 69(4) and 69(7)*(b)* seek to guarantee due process, i.e., the fairness of the proceedings.

As to Article 69(7)(a) ICCSt, which relates to the reliability of evidence, it has been observed that:

> "[S]ome 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."[520]

Relying on such evidence would thus not contribute to the finding of "truth".[521] However, if the way in which the evidence was obtained does not cast doubts on its reliability Article 69(7)(b) must be considered. In this regard it can be observed that the exclusionary rule in Article 69(7) represents a clear exception to the general approach to admissibility. Therefore, as clarified by Trial Chamber I in *Lubanga*, "it is impermissible to …[add] the probative value of the evidence as a criterion of admissibility"[522] when the evidence has been obtained improperly, that is, in violation of the ICCSt or internationally recognised human rights. In contrast to the admissibility test in Article 69(4), the exclusionary rule in Article 69(7) does not entail a balancing act. Rather the application of the exclusionary rule depends on to what extent the violation affects either (a) the reliability of the evidence obtained or, if the reliability of the evidence is not affected by how the evidence was acquired, (b) how far the interference affects the right to a fair trial as a whole.

In the interest of crime control, it could be argued that all sufficiently reliable evidence that proves that the accused is guilty should be used, even if it is obtained in violation of human rights. As noted above, one of the rationales behind the exclusionary rule, however, is that an accused who has suffered an illegal attack on his or her rights before the trial, for example through torture, "should not be subject to further harm by the use of the fruits of such an attack" as evidence.[523] Torture is an example of a type of human rights violation that will prompt the exclusion of evidence in all circumstances.[524] But how does the ICC determine

[518] Bar Table Motions Decision, *Katanga & Ngudjolo Chui*, para. 39.
[519] Ibid.
[520] Decision on the confirmation of charges, *Lubanga*, para. 84, citing Piragoff (1999), at 914.
[521] Iontcheva Turner & Weigend (2019), at 264.
[522] Bar Table Decision (2009), *Lubanga*, para. 43.
[523] Klamberg (2017) at 537.
[524] Prosecution's Response to Defence Appeal against the Decision on the Defence Challenge to Jurisdiction of 3 October 2006, *Lubanga* (ICC-01/04-01/06), Appeals Chamber, 17 November 2006, para. 17, fn. 34.

whether other human rights violations render "the admission of the evidence […] antithetical to and […] seriously damage the integrity of the proceedings"?

Up to now, the ICC has dealt with two cases on the exclusion of evidence pursuant to Article 69(7) of the Rome Statute. In *Lubanga*, Trial Chamber I decided on the admissibility of evidence obtained by an unlawful seizure which infringed the right to privacy of another person than the accused. The Trial Chamber held that a violation of other persons' rights, and not only the rights of the accused, can prompt the exclusion of evidence.[525] Furthermore, the Trial Chamber considered the search in question disproportionate and held that it did, indeed, amount to a violation of the right to privacy.[526] However, the Trial Chamber noted that the reliability of evidence (c.f. Article 69(7)(a) ICCSt), was not affected by the unlawful seizure.[527] Hence the second option in Article 69(7)(b) had to be examined.
Trial Chamber I found that:

> "[…] the Statute does not "quantify" the violation of the Statute, or the internationally recognised human right, by reference to the degree of "seriousness". Therefore, even a non-serious violation may lead to evidence being deemed inadmissible, provided that one of the two limbs of the test in Article 69(7) is satisfied."[528]

Trial Chamber also cited the drafting history of Article 69(7) and noted that the proposal that the rights violation had to be "serious" was deleted from the final version of the ICCSt.[529] Nonetheless, later in the same decision Trial Chamber I took into account that "the violation was not of a particularly grave kind",[530] which speaks *against* the seriousness of the violation *not* being a factor. Furthermore, the Chamber considered the fact that the search did not directly violate the rights of the accused but instead the rights of a third person and that it was carried out by Congolese authorities and not by a member of the OTP.[531] In conclusion, the Trial Chamber therefore stated that the admission into evidence of the seized items did not "seriously damage the integrity of the proceedings", albeit that the precondition, that is, the violation of an internationally recognised human right, was satisfied.[532]

The second case in which the Trial Chamber had to deal with the exclusionary rule enshrined in Article 69(7) of the Rome Statute was in *Katanga and Ngudjolo Chui*. The defence filed a motion against the admission into evidence of a statement made by the accused when he was interrogated by Congolese authorities. The defence argued that the accused was denied presence of counsel during the questioning, and that the statements obtained from Germain Katanga were taken in violation of his right to remain silent – a right that he had under the Statute as well as under existing norms of internationally recognised human rights.[533] The chamber noted that Article 55 of the Rome Statute, which contains certain procedural safeguards and rights of the accused during the pre-trial phase, does not impose procedural obligations on states acting independently of the Court. The Trial Chamber therefore assessed whether there was a discrepancy between the protections offered by article 55(2) and the

[525] Bar Table Decision (2009), *Lubanga*, para. 37.
[526] Bar Table Decision (2009), *Lubanga*, para. 82.
[527] Ibid., para. 40.
[528] Ibid., para. 35.
[529] Ibid., paras. 35-39.
[530] Ibid., para. 48.
[531] Ibid., para. 47.
[532] Ibid., para. 48.
[533] *Katanga & Ngudjolo Chui*, para. 55.

applicable norms of internationally recognised human rights.[534] Notably, the Trial Chamber thus based its finding regarding the right to be assisted by a lawyer on jurisprudence of the ECtHR and other human rights bodies. The Trial Chamber considered the main importance of the right to counsel in the context of pre-trial interrogations to be to protect "the essence" of the accused's right to a fair trial, which was considered to be the presumption of innocence, to remain silent and not to be forced to self-incriminate.[535] Due to the long period during which the suspect was denied access to his lawyer the Trial Chamber held that there were "serious concerns that [the self-incriminating] statements [made by Germain Katanga] were obtained from him in violation of his right to remain silent and of the privilege against self-incrimination."[536] The admission of the statements would therefore be antithetical to and would seriously damage the integrity of the proceedings.

4.2.4.1 Summary: A Very High Threshold for the Mandatory Exclusion of Evidence

Article 69(7) protect the human rights not only of the accused, but also of third parties. However, breaches of national laws will not prompt the mandatory exclusion of evidence. This, it can be noted, is consistent with human rights jurisprudence.[537] Despite some inconsistencies in the ICC jurisprudence as to whether the violation of internationally recognised human rights has to be "serious", it is clear that so far only evidence obtained through serious breaches, which jeopardises the fairness of the trial "as a whole", have prompted the exclusion of evidence pursuant to Article 69(7). Again, however, it should be noted that Article 69(7) affords the ICC bench with a lot of discretionary power and the second prong of the exclusionary rule in Article 69(7)(a) and (b) puts up a very high threshold. Evidence obtained in violation of the right to privacy would in most circumstances not be "antithetical to" and "seriously damage" the integrity of the proceedings. Furthermore, only in rare instances, such as in cases of torture, would the way in which the evidence was obtained cast "substantial doubt on the reliability of the evidence". It should be noted that the threshold for exclusion of evidence is equally high in international human rights law, and it is thus concluded that the current interpretation and application of the exclusionary rule is compatible with human rights law.

4.3 Interim Conclusions

The current admissibility test in Article 69(4) ICCSt requires the ICC to determine the *prima facie* relevance and the *prima facie* probative value of a piece of evidence, based on its *prima facie* reliability. Then the Court must "take account" of any prejudice caused to fairness and weigh this prejudicial effect against the probative value of the evidence. As outlined above, each step of the general admissibility test allows for broad judicial discretion.

Firstly, the ICC takes a broad approach to relevance. Secondly, as to probative value, a central observation of relevance for the purposes of this thesis is that neither proof of authentication nor establishment of provenance/chain of custody are absolute requirements for admissibility. Thirdly, the jurisprudence of the ICC taken as a whole suggest that the Trial Chamber will in fact tolerate a certain degree of prejudice to fairness. In this regard, the ICC bench will consider whether infringements on the fair-trial rights of the accused, such as the

[534] Ibid., para. 60.
[535] Ibid., para. 62.
[536] Ibid., para. 63.
[537] See, e.g., *Schenk v. Switzerland* and *Khan v. the United Kingdom.*

accused's right to examine witnesses and effectively test evidence, can be counterbalanced. This approach is in line with human rights law, and it is possible that the reliability of evidence can be sufficiently tested, even though its origins or author is unknown, for instance if the material is tendered through an expert witness. While it clear that a certain degree of prejudice will be tolerated, it is less clear from the jurisprudence of the Court when the threshold is overstepped and prejudice to trial fairness is considered undue.

The only mandatory exclusionary rule in the ICC statutory framework relates to evidence obtained in violation of the ICCSt or internationally recognised human rights, but this rule is also discretionary in nature. Article 67(9) ICCSt sets up a high threshold and evidence will only be excluded if it is obtained through very serious human rights breaches, which, if admitted, would either cast "substantial doubt on the reliability of the evidence" or be "antithetical to" and "seriously damage" the integrity of the proceedings.

It can be concluded that the regulation outlined above, that is, the "codification" of the right to a fair trial in the ICCSt, the general admissibility test in Article 69(4) and the exclusionary rule enshrined in Article 69(7), gives rise to a tension. Article 67(1) guarantees nothing less than a "fair hearing". However, the provisions on prejudice and admissibility in Articles 69(7) and 69(4) guarantee a lot less – namely a hearing based on evidence that is not "antithetical" to fairness (c.f. Article 69(7)(b) ICCSt), or simply "takes account" of any unfairness (c.f. Article 69(4) ICCSt). It should be recalled that minor deviations from the ICC statutory framework, minor violations of internationally recognised human rights or a limited degree of prejudice caused by the admittance of a certain piece of evidence do not necessarily make the proceedings as a whole fundamentally unfair. However, it is concluded that the requirements posed for the admissibility of evidence afford the accused with rather weak guarantees for a fair trial, only protected by the judicial discretion of the ICC bench.

5 The Admissibility and Exclusion of Digital Open-Source Evidence and Trial Fairness at the ICC

In view of the broad judicial discretion afforded to the ICC chambers, the following chapter will highlight how the submission of digital open-source information as evidence might exacerbate some particular risks to the accused's right to a fair trial.

5.1. Identified Risks – Bias and Inequality of Arms

As outlined above, the human rights principle of equality of arms requires that the defendant can present his or her case to the court "under conditions that do not place him at a disadvantage vis-à-vis his opponent."[538] However, in view of the analysis conducted above, the present study submits that the emergence of digital open-source evidence risks resulting in exactly that, i.e., a disadvantage to the defence in relation to the Prosecutor.

The ICC's flexible rules on the admission of evidence benefits the Prosecution, rather than the defence. Furthermore, the Prosecution already enjoys considerable institutional and

[538] See, e.g., *Dombo Beheer B.V. v. the Netherlands*, (App. no. 14448/88), ECtHR, judgment, 27 October 1993, para. 33.

resource advantages.[539] While the *ad hoc* tribunals have rejected the idea that equality of arms would also mean equality in resources,[540] it should, nonetheless, be noted that marshalling citizens and individual internet users to upload, and in some instances collect, digital open-source information for international accountability purposes will most definitely increase the substantial inequality between the parties.

The acquisition of digital open-source evidence begins with individual citizens or internet users in a conflict-affected area, that document and upload content to the internet.[541] Citizens on the ground and individual internet users are more inclined to record, post and collect incriminatory, rather than exculpatory, evidence, i.e., material that will serve the Prosecution. Furthermore, the NGOs that have pushed for the introduction of digital open-source evidence at the ICC have done so with the aim of assisting in the investigative work of the OTP. Conversely, there are no organised groups that are mobilised by the goal of collecting exonerating information that mitigate the guilt of alleged atrocity crime perpetrators.[542] Furthermore, it is likely that people engaged in fact-finding online will put more effort into collecting materials that depict extraordinary events, or at least events that result from an action, as such footage and information is easier to discover online. However, exonerating information, or information as to what certain individuals did *not* do, is less readily discoverable.[543] The present study therefore submits that there is a risk that use of online content as evidence will feed into an evidentiary record that skews systematically in favour of the prosecution, which would further exacerbate the already existing concerns about the inequality of arms between the defence and the Prosecution during the ICC proceedings.

In this regard it should be reiterated that Article 54 ICCSt requires the Prosecutor to "investigate incriminating and exonerating circumstances equally", which is a crucial component of the "codification" of the equality of arms principle at the ICC (see, 3.3). However, partnering with NGOs that receive online materials from citizens and individual internet users raises issues as to the neutrality and objectivity of the Prosecutor during the investigation stage.

Even if the Prosecution takes his/her duty to collect exonerating evidence seriously, the selective nature of real-time evidence collection, which is a characteristic of online open-source investigations, gives rise to a related, but partly different, concern. Namely that online content uploaded or gathered by private users will reflect intra-conflict partisan bias. Digital open-source information can, admittedly, be uploaded by civilian by-standers intent on faithfully documenting atrocities committed by all parties to a conflict, but it is equally possible that it is posted or collected by a members or active supporters of a particular armed group, who only document atrocities committed by his or her enemy.[544] The concern that those doing the documentation might have a personal stake in what they are recording, is exacerbated by the fact that the original source of a Facebook post, Tweet or YouTube video will often be difficult, if not impossible, to track down.[545]

[539] Jalloh & DiBella (2013) at 251.
[540] See, Appeals Judgment, *Tadić*, paras. 53-54 and Judgment, *Kayishema & Ruzindana*, para. 20.
[541] Koenig & Mehandru (2019).
[542] R. J. Hamilton (2018) at 34; 40.
[543] Ibid, at 41 and 59-61.
[544] Ibid, at 41.
[545] McPherson, Guenette Thornton & Mahmoudi (2020) at 73.

In the following it will be assessed whether the ICC's current, very permissive, interpretation and application of the rules governing the admissibility of evidence is capable of mitigating the exacerbated inequality between the parties and the risk of bias that could be brought about by the emergence of digital open-source evidence.

5.2 The Admissibility of Digital Open-Source Evidence

To briefly recapitulate, pursuant to Article 69(4) ICCSt, and as further clarified by *Lubanga*, documentary evidence – the category in which most digital open-source evidence would fall – has to be "*prima facie* relevant" to be admissible. Furthermore, it must have probative value "on a *prima facie* basis", based on an assessment of its "indicia of reliability", and its probative value must not be outweighed by its prejudicial effect on trial fairness.[546]

5.2.4 Step One: Relevance of Digital Open-Source Evidence

As to the "*prima facie* relevance" of digital open-source evidence, many of the same issues are raised as with traditional forms of open-source evidence. When assessing the relevance of a YouTube video, for instance, the ICC judges will have to consider whether all, or only parts, of the information provided relates to matters to be properly considered by the Chamber.[547] As with contents of NGO or UN reports, some information in a Facebook post or a YouTube video, for instance, may be irrelevant, and should thus be excluded. The ICC bench is used to making such assessments, and the relevance considerations in relation to digital open-source evidence are not particularly different from those judges have taken into account as to publicly available reports and news articles in the past. However, in view of the huge amount of digital open-source information available online, the ICC chambers must take a selective approach to digital open-source evidence, in order to fulfil its duty to guarantee the expeditiousness of the proceedings as well as the accused's right to be tried without undue delay.

It should also be recalled that in *Katanga and Ngudjolo Chui* Trial Chamber II held that, naturally, the relevance of audio or video material depends on the date and/or location of the recording, and whether it relates to the temporal and geographical scope of the charges.[548] Similarly, for digital open-source evidence to be considered relevant, information as to time and place of a video, blogpost or photo must be provided. As explained above, there is growing risk of misattribution of online content, that is, that a videos or photographs are recycled. There is thus a risk that, for instance, a video – purportedly depicting a relevant event, time and location – was in fact filmed at an entirely different time and place,[549] and that the piece of digital open-source evidence in question is, in fact, not at all relevant to matters to be considered by the chamber. These concerns, however, which are particular to the use of online content as evidence, relate more to the second and third prong of the general admissibility test, i.e., probative value and prejudicial effect.

[546] Decision on the admissibility of four documents, *Lubanga*, paras. 25-28.
[547] C.f., ibid., para. 27.
[548] Bar Table Motions Decision, *Katanga & Ngudjolo Chui*, para. 24(d).
[549] Koettl, Murray & Dubberley (2020), at 21.

5.2.5 Step Two: Probative Value of Digital Open-Source Evidence

5.2.5.1 Authentication and/or Provenance/Chain of Custody

As highlighted above, digital open-source information, be it a photo, a video or a Tweet, can be easily forged or faked entirely, and partitioners involved in digital open-source investigations assert that such manipulation can be difficult to detect.[550] Moreover, the advent of social media has facilitated the distribution of disinformation and misattributed information, and the original source of online content will often be impossible to track down, making the authenticity of the material rather tenuous.[551]

Nonetheless, as has been concluded above, the ICC judges are not required to rule separately on the authentication of an item submitted into evidence, and incourt authentication, through a witness for example, is not required for evidence to be admissible.[552] In the following, some relevant considerations will be made as to how the ICC's flexible approach to authentication will play out when digital open-source information is submitted as evidence.

It is conceivable that some digital open-source evidence might be "self-authenticating",[553] since meta-data (e.g., information as to IP-address of the creator, device used, creator time and location) would be attached.[554] However, in some, if not most, instances this will not be the case. As clarified above, ICC investigators, NGOs and individual internet users do not have access to the servers of private social-media companies, such as Facebook.[555] Online investigators can therefore rarely provide complete metadata, which would make the material unassailable. Furthermore, metadata can also be manipulated,[556] which is something that the chambers must bear in mind. Hence, the ICC bench will have to consider alternative methods of authentication.

Information as to provenance/chain of custody is important in determining whether evidence has been modified or tampered with when the court assesses the accuracy of evidence in general, but as to digital open-source evidence in particular, given the prevalent risks of fakes and forgery. In this regard, it should be recalled that there is no consistent definition of "authorship", which establishes the original source of the information, in international criminal courts.[557] For instance, persons who have obtained aerial images that were originally taken by others have been accepted by the ICTY as "authors",[558] that the court could rely on for testimony regarding the origins of the evidence.[559] It is thus conceivable that the ICC would accept the testimony of a NGO official that acquired, for example, a YouTube video online, as author testimony, thus authenticating the evidence in court, if it was not possible to track down the original uploader. The investigator could testify as to the methodologies used during the online open-source investigation, when where and how the video was found and how its contents were verified. However, accepting an investigator as the "author" would not

[550] Koenig (2020).
[551] Koettl; Murray & Dubberley (2020), at 21.
[552] Admissibility Decision II (2012), *Bemba*, paras. 117-122.
[553] Ibid., para. 9.
[554] International Bar Association (2016) at 26-27.
[555] Ng (2020), at 150.
[556] International Bar Association (2016) at 26-27.
[557] Ashouri; Bowers & Warden (2014), at 121. C.f. Judgment, *Popovic et al*, paras. 64-66; Decision, *Renzaho*, paras. 1-2 and Judgment, *Tolimir*, paras. 67-70.
[558] Judgment, *Tolimir*, paras. 67-70.
[559] Ashouri; Bowers & Warden (2014) at 121.

always be sufficient to make sure that the material had not been tampered with before reaching an investigator. Even the most prominent NGOs have been known to make mistakes,[560] and in the interest of foreseeability, the ICC should therefore clarify what "amount" of author testimony is required for online open-source evidence to be authenticated. In this regard, it is submitted that the traditional approach to authentication may not be appropriate in the face of the exacerbated risk of fakes and forgeries in our "post truth" times.

However, the jurisprudence of the ICC and the *ad hoc* tribunals taken as a whole suggest that provenance/chain of custody, and thus authentication, can be shown through other external indicators.[561] Such external indicators include, expert testimony as well as corroboration through other evidence.[562] If digital open-source evidence is tendered through expert testimony, and corroborated through other evidence, it might well be properly authenticated. However, in this regard it is submitted that it is crucial that the ICC develops contemporary and clear-cut standards, not only as to what "amount" of author testimony is required, but also *when* digital open-source evidence must be tendered through expert testimony, as well as how *much* corroboration would be required for digital open-source evidence to be considered authentic. This is important, not the least, for the foreseeability, and it should be recalled that rules of evidence applied consistently is an essential component of trial fairness.

It should be noted that the Court's "e-protocol", requires that unchangeable metadata is assigned to a piece of digital evidence, even before the confirmation of charges hearing.[563] The chain of custody from the time of acquisition to submission in court can thus be safeguarded, as such information shows that the item is unique and has not been tampered with. However, as observed in relation to author testimony above, the requirements of the "e-protocol" does not account for the risk of manipulation between the time of creation of online content and the time of acquisition by an investigator.

Furthermore, it should, again, be emphasised that defects in provenance/a broken chain of custody have not precluded the admission of open-source evidence at the ICC in the past, nor was this the case at the *ad hoc* tribunals. In *Lubanga*, for instance, Pre-Trial Chamber I noted that "nothing in the Statute or the Rules expressly states that the absence of information about the chain of custody [...] affects the admissibility or probative value of Prosecution evidence."[564] Rather defects in provenance/chain of custody will go to the probative value of the evidence.[565] Notably, a BBC news article, acquired from the internet, was admitted into evidence, despite limited information as to provenance and the author of the material. The Trial Chamber thus allowed for the admission of the article as it was satisfied that the material provided "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".[566] This thesis submits that the rise of fakes and forgery must prompt a more cautious approach going forward, and the ICC chambers cannot disregard authentication and deem online content reliable on the face of it. It has been observed that official authentication or authentication in court, *inter alia* through author testimony, as a requirement for admissibility is not considered to be general principle

[560] See, e.g. C. Hamilton (2012) and Roth (2015).
[561] Ashouri; Bowers & Warden (2014) at 119.
[562] Judgment and Sentence, *Rutaganda*, paras. 357 and 370; Admissibility Decision, *Tolimir*, paras. 64 and 67.
[563] e-Court Protocol, para. 1.
[564] Decision on Confirmation Charges, *Lubanga,* para. 95-98, quotation at para. 96.
[565] See, e.g., Decision on the Admissibility and Abuse of Process Challenges, *Bemba*, para 255.
[566] Admissibility Decision (2013), *Bemba,* para. 25.

of international criminal law.[567] Nonetheless, the present study thus contends that the strict approach to authentication adopted by Trial Chamber II in *Katanga and Ngudjolo Chui* is preferable when it comes to digital open-source evidence, compared to the flexible approach endorsed in *Bemba*. Given the exacerbated risks of fakes, manipulation and misattribution brought about by the emergence of digital open-source information, Trial Chamber II's assertion that "unauthenticated evidence would unjustifiably burden the record of the trial with non-probative material and serve no purpose in the determination of the truth […]"[568] bears more relevance than ever before.

In sum, the present study therefore submits that authentication of digital open-source information is of utmost importance. Given the increased spread of disinformation and misattributed content, and the risks of fakes and forgery, digital open-source information should not be admitted into evidence if it has not been properly authenticated, despite the ICC chambers' appeasing assertions that unauthenticated evidence will be afforded less probative value when making the final judgment.

Next, if digital open-source evidence is found to be authentic (or if the Chamber is satisfied that authentication is not necessary in the given circumstances) the Court will assess the credibility of the source and the reliability of the information or claims therein.

5.2.5.2 Evaluation of Credibility of Sources and Reliability of Content

As has been clarified above, it will often be difficult for investigators to track down the original source of, for instance, a photo or video posted online.[569] While some online content comes from identifiable users, of course, many post content under pseudonymous, and sometimes material is anonymously dumped on the internet. Additionally, online content might have been shared via private chats and to different websites multiple times before it is published to the internet and can be discovered by an evidence-focused NGO or, in some instances, by the ICC investigators themselves.[570] This, naturally makes the evaluation of the credibility of the sources and the reliability of the information provided much more difficult.

However, when the original source of a piece of evidence is *known*, independence, impartiality/objectivity and motivation of the source have emerged as important criteria in the assessment of reliability of the information provided by the source.[571] Furthermore, in *Katanga and Ngudjolo Chui* Trial Chamber II seems to have established a hierarchy between some open sources, based on their perceived legitimacy, with UN agencies at the top, followed by NGOs, followed by press organisations, followed by persons or entities involved in the events.[572] This well-established standard for evaluating the credibility and reliability of traditional open sources does, naturally, not yet translate to the new actors populating the investigatory landscape online. Furthermore, as noted above, there is an exacerbated risk that the use of digital online open-source content, uploaded or gathered by private users, will reflect intra-conflict partisan bias.[573] In comparison, UN officials and human rights professionals are, generally, cognisant of issues relating to representativeness and the

[567] Geynor (2013) at 1065.
[568] Ibid.
[569] McPherson, Guenette Thornton & Mahmoudi (2020) at 73.
[570] Freeman (2020) at 65
[571] Bar Table Motions Decision, *Katanga & Ngudjolo Chui*, paras. 28-32.
[572] Ibid. para. 28.
[573] See, R. J Hamilton (2018) at 41.

importance of objectivity in a way that most bystanders and private internet users are not.[574] It is therefore important that the ICC chambers become attuned to risks relating to bias, and for digital open-source information to be admissible, information should be required as to the motivation of the source and his or her role in the relevant events. As a minimum, digital open-source evidence should thus be tendered through expert testimony.

Moreover, when it comes to digital open-source evidence, there is actually a dual-source consideration.[575] If an internet user posts a video to social media, for instance, then the Court should evaluate the credibility and/or reliability of both the platform and the individual user. The ICC chambers must understand how and why people communicate the way they do on various platforms, as there might be particular risks of forgery or manipulation on certain platforms, compared to others. Additionally, the social media coverage, and the way people communicate, might vary based on factors such as geography, social status, and age of users. In the *Al-Werfalli* arrest warrant, however, the Prosecution only specified which platform the videos depicting the executions were uploaded to in relation to one of the incidents.[576] Nonetheless, the Pre-Trial Chamber admitted the material and treated "social media" as one consistent source, [577] which is troubling.

It should, again, be emphasised that the ICC has accepted material from unknown sources in the past, in relation to NGO reports for instance, even when NGOs have provided limited information as to the sources relied on in their reports.[578] It is during such circumstances, when the original sources are unknown, that concerns as to fairness in relation to digital open-source evidence become the most acute. The Court has, however, made some important clarification as to the admissibility of materials that qualify as anonymous hearsay. The ICC chambers will, as a general rule, only admit hearsay to corroborate other evidence, and it will be given limited weight at the end of trial.[579] However, if digital open-source hearsay is corroborated and consistent with other material, it might well be relied on and contribute to a finding of guilt. Given the risk that the emergence of digital open-source evidence might distort the evidentiary record, as citizens on the ground and individual internet users are more inclined to record, post and collect incriminatory evidence, and the risk that the evidentiary record will reflect intra-conflict bias on the ground, this is troubling. In a hypothetical future trial, heavily reliant on digital open-source evidence, this might result in an unsafe verdict.

Furthermore, in the past, first-responders, NGOs or UN missions, generally gathered material to establish the broader context in which atrocities are occurring.[580] By contrast, online material is now uploaded by citizens and collected by NGOs and individual internet users with an eye to individual criminal prosecutions. Material which is specifically uploaded and collected for court purposes, is likely to fundamentally different from traditional open-source evidence. [581] As outlined above (see, 2.4), digital open-source evidence can thus be expected to be narrower in scope and focus more on the acts and conduct of the accused and/or be

[574] Ibid. at 42.
[575] Freeman (2020) at 65-66.
[576] Warrant of Arrest, *Al-Werfalli*, para. 11, specifying "[t]he video depicting this incident was posted on Facebook on 3 June 2016."
[577] Ibid. paras. 12-16 and 22.
[578] See, e.g., Decision on the Admissibility and Abuse of Process Challenges, *Bemba Gombo*, (ICC-01/05-01/08), Trial Chamber III, 24 June 2010, para. 255.
[579] See, e.g., Decision on the confirmation of charges, *Callixte Mbarushimana*, paras. 77-78; Admissibility Decision (2013), *Bemba*, para. 25.
[580] Farthofer (2012) supra note 92, at 476.
[581] R. J Hamilton (2018) at 24.

submitted to link far-removed perpetrators to crimes on the ground. The fact that digital open-source evidence may be central to the case against the accused is another reason to adopt a cautionary approach to digital open-source hearsay.

The present study thus submits that the ICC must reassess and update its approach to the evaluation of evidence from open sources online, taking into account also the platform to which the content was uploaded, as well as paying particular attention to the exacerbated risks of bias. Moreover, the Court needs to familiarise itself with the new actors in the investigatory space, with an eye to determine which sources are more legitimate than others, and thus more credible. Given the identified risks of bias, manipulation, fakes and forgery, in combination with the seemingly compelling nature of digital-open-source evidence, it is further submitted that the court should reconsider the admissibility of digital open-source hearsay. In some instances, it should not be admitted even if it is submitted only to corroborate other evidence. Why this is will be further explained below in relation to the third prong of the admissibility test, i.e., the Court's weighing of the probative value against any prejudice caused to fairness.

5.2.6 Step Three: Prejudicial Effect of Digital Open-Source Evidence

The jurisprudence of the ICC shows that unauthenticated evidence, evidence with defects in provenance and evidence from unknown sources, is not automatically excluded. Rather such evidence is subject to the ordinary admissibility test, whilst it will be afforded less evidentiary value when the judges evaluate the evidence as a whole, when making the final judgment. [582] It is doubtful that this exercise of judicial discretion is enough to adequately protect the right of the defence to examine witnesses, test and challenge evidence in general and thus safeguard the equality of arms principle when digital open-source information is submitted as evidence. The present contribution submits that the current approach to authentication, provenance/chain of custody and hearsay might result in undue prejudice to the fair-trial rights of the accused.

If unauthenticated evidence is admitted into trial, it risks causing prejudice to the right of the accused to a fair and impartial hearing, as well as his or her right to be presumed innocent. As outlined in 4.1 above, the rationale for the permissive approach to authentication, and the admissibility of evidence in general, is that there is no lay jury at the ICC. Consequently, it has been assumed that the professional judges need not be protected from drawing erroneous conclusion based on evidence with limited probative value.[583] However, the ICC judges are not yet familiar with the newest forms of evidence available online and, consequently, they too are vulnerable to the seemingly compelling nature of digital open-source evidence.[584] Therefore, this thesis submits that evidence that has not been properly authenticated should not be admitted into trial in The Hague, but judges should be prevented from relying on unauthenticated evidence. It is also submitted that the ICC chambers should rule on admissibility, and authenticity, as early as possible in order to avoid the case file being

[582] Gosnell (2018) at 375; Decision on Confirmation Charges, *Lubanga*, para. 96; Decision on the Admissibility and Abuse of Process Challenges, *Bemba*, para. 255.
[583] See, Gosnell (2018) at 375; Safferling (2012) at 491.
[584] R. J Hamilton (2018) at 42.

burdened with unreliable digital open-source evidence.[585] In a hypothetical, but certainly not improbable, future scenario when a lot of digital open-source evidence is submitted, deferring the admissibility evaluation to the final judgment risks burdening the evidentiary record with entirely unreliable evidence that the chamber will not rely on in the end. In view of the huge amount of information available online, this may result in considerable loss of time, management difficulties and, again, risk of an unsafe verdict.

As outlined in 4.2.2.2 above, the Trial Chamber cannot properly evaluate the credibility of the source and reliability of the material if it does not know who the original source of the digital open-source information is, especially as the Court is unfamiliar with the new actors populating the online investigatory space. Moreover, it is difficult to envision how the Court could provide the defence with an effective opportunity to examine and challenge such evidence, should it be admitted into evidence. Importantly, evidence coming from restricted sources presents particular difficulties for the defence as to its ability to challenge the credibility of the source and the reliability of the information provided. Possibly, however, tendering digital open-source information through an expert witness could afford the defence with a decent opportunity to examine and challenge the evidence if it comes from an unknown source. Expert testimony could allow the defence to probe the content of the material, as well as the methodologies used in acquisition, authentication (if applicable), and how its contents were verified. However, the concern in relation to the right of the accused to test evidence against him or her is further exacerbated given the format and complexity of digital open-source evidence. The contemporary methodologies used in online investigations for verifying the contents of digital open sources, outlined above (see, 2.1), are difficult to evaluate and challenge, especially for the untrained eye. As highlighted above, the defence already suffers from a considerable resource disadvantage vis-à-vis the Prosecution.[586] Nonetheless, the defence must be provided with an opportunity to fully explore the sources and challenge the evidence, as they would in relation to any other type of evidence. Hence, in order not to render the equality of arms between the parties illusory, the defence must be provided, not only with additional time for preparation,[587] but also with adequate facilities, including technical assistance, to respond to digital open-source evidence, as a condition for admissibility.

However, the significant amounts of expert testimony that may be required for admissibility, has implications for the efficiency of the proceedings and might, in some instances, infringe on the right of the accused to be tried without undue delay (c.f. Article 67(1)(c) ICCSt). As clarified by Trial Chamber II in *Katanga and Ngudjolo,* this right requires the Chamber to exclude evidence if the time anticipated for its presentation – or subsequent evaluation by the Chamber – is disproportionate to its potential probative value.[588] Digital open-source evidence will often be circumstantial. Furthermore, if it is derived from an unknown source, it will in some instances be considered as hearsay. Circumstantial evidence, and hearsay in particular, has a limited probative value, which could potentially be outweighed by the prejudice caused to the accused's right to be tried with undue delay. In the interest of expediency as well as guaranteeing the right to be tried without undue delay, a selective approach as to the admission of digital open-source evidence in general, and digital open-

[585] C.f. Appeals Judgment, *Bemba*, para. 35. The Appeals Chamber held that it is up to the trial judges to decide whether they want to rule on the admissibility of a piece of evidence once it is submitted into the record, or rather defer it to the end of trial.
[586] See Jalloh & DiBella (2013) at 251.
[587] See Disclosure Decision, *Katanga & Ngudjolo Chui*, para. 37.
[588] Bar Table Motions Decision, *Katanga & Ngudjolo Chui*, para. 41.

source hearsay in particular, is therefore recommended. Furthermore, the accused's right to be tried without undue delay is another reason to take a stricter approach to the admissibility of unauthenticated evidence. Whilst the Court has clarified that such evidence will be afforded less probative value, when making the final judgment, admitting unauthenticated evidence may, nonetheless, lead to considerable loss of time, if it is not relied on in the end.

5.2.7 The Exclusion of Improperly Obtained Digital Open-Source Evidence

Pursuant to Article 69(7) ICCSt evidence obtained by a violation either of the ICCSt or of internationally recognised human rights might prompt its exclusion. In *Lubanga*, Trial Chamber I recognised that the right to privacy is an "internationally recognised human right", a violation of which might prompt the ICC chambers to exclude the evidence.

It should be recalled that ICC investigators, or private fact-finders online, albeit in the pursuit of accountability, do use the same methods as some malicious state actors. That is, surveillance, and tracking people without their knowledge and/or consent. While technically operating in the "public" domain, online open-source investigations may, indeed, give rise to privacy concerns. Moreover, social media blurs the lines between the public and the private as most platforms and applications generate metadata.[589] Every "click", "like" or "share" leaves traces behind, and multiple inferences can be drawn from such information.[590] This is something that most internet users are unaware of which, in turn, gives rise to complex matters relating to informed consent, exacerbated by the fact that online investigations often involve the remote tracking of locations that the online investigator rarely will, or can, visit to obtain proper consent.

While the current permissive information environment benefits online open-source investigations, there are, however, certain initiatives underway and already in place, including the EU General Data Protection Regulation, which attempts to regulate the cause of privacy in the online realm. Hence, the collection of digital open-source information, especially if it is stored with private parties, such as evidence-focused NGOs, gives rise to particularly acute privacy concerns. As highlighted above, there is an abundance of content available online, and it might be hard for private party fact-finders to know what to preserve or not. Especially considering that online content, that might be potentially relevant for accountability purposes, is routinely taken down by the companies that administer social-media platforms (as it might be considered too graphic and violent). This might lead to an over-collection of materials on the part of the online investigator, due to a fear that the information might be inaccessible in the future. In this vein it should also be recalled that the ICC has clarified that the rights of third parties, and not only the rights of the accused, may prompt the exclusion of evidence pursuant to Article 67(9) ICCSt.[591] Hence, the violation of someone else's privacy online, when acquiring incriminating (or exonerating) information on a person under ICC investigation (or on a person that will be under investigation in the future), might well prompt the exclusion of evidence at the ICC. Furthermore, even if it is not ICC investigators, but state officials or, conversely, private online fact-finders that have violated someone's right to privacy it might, nonetheless, lead to the exclusion of evidence at the ICC.

[589] Guay & Rudnick (2020) at 307.
[590] Toler (2020) at 191-192.
[591] Bar Table Decision (2009), *Lubanga*, para. 37.

Depending on the nature of the material collected (e.g., if it is personal information, such as profile picture, or merely satellite imagery), and which jurisdiction the online investigator operates in, privacy laws might be transgressed. Furthermore, it is uncertain which legal consequences an online investigator's use of a pseudonym, in violation of a social-media platform's regulations, would have, for instance, if the investigator uses an alias to access closed groups or discussion forums, and whether that, in some jurisdiction, would amount to a breach of a legal norm. In this regard, however, it should be recalled that the ICC has clarified that a violation of national law on evidence gathering does not compel exclusion of evidence.[592] However, if the way in which digital open-source information was obtained amounts to a disproportionate violation of the right to privacy, Article 69(7) ICCSt comes into play. But then, again, the qualifying subparagraphs will have to be considered.

This thesis submits that it is unlikely that the reliability of the digital open-source evidence would be impacted through the way it was obtained (c.f. Article 69(7)(a) ICCSt), as it is, by definition, acquired without soliciting information from, or engaging with, anyone at all. Hence, Article 67(9)(b) would have to be considered, that is, whether the violation of the ICCSt or internationally recognised human rights render the admission of the evidence "antithetical to and would seriously damage the integrity of the proceedings". In this regard, it should be emphasised that in *Lubanga*, the Trial Chamber I was somewhat ambiguous as to whether only "serious" breaches of internationally recognised human rights would prompt the exclusion of evidence. It clarified that "even a non-serious violation may lead to evidence being deemed inadmissible could prompt the exclusion of evidence", [593] but when assessing the circumstances of the search in question, which had violated a person's right to privacy, the Trial Chamber did take into account that "the violation was *not* [emphasis added] of a particularly grave kind."[594] Upon consideration of human rights jurisprudence, the Trial Chamber did not consider that the admission of the evidence "seriously damage the integrity of the proceedings". [595] Similarly, it is thus unlikely that privacy violations in the online realm would prompt the exclusion of digital open-source evidence.

Again, it should be reiterated that the threshold for exclusion of evidence is equally high in international human rights law, and illegally or otherwise improperly obtained evidence will only be excluded once it impacts on the fairness of the trial "as a whole". Hence, the current interpretation and application of the exclusionary rule seem to be compatible with international human rights law, also when it comes to digital open-source evidence. Nonetheless, the ICC bench should take due care, and require information as to the methods used in online open-source investigations, especially if digital open-source information has been provided to the OTP by a third party. Only then would the ICC judges be able to take due regard to any privacy issues that might have arisen during the course of an online investigation.

[592] See, Article 69(8) ICCSt and Bar Table Decision (2009), *Lubanga*, para. 36.
[593] Ibid., para. 48.
[594] Bar Table Decision (2009), *Lubanga*, para. 35.
[595] Ibid., para. 48.

6. Conclusion

The purpose of this thesis was to analyse the admissibility of digital open-source evidence in relation to trial fairness at the ICC, and to assess whether the rules governing the admissibility of evidence remain effective, appropriate and – most importantly – capable of guaranteeing the accused's right to a fair trial, in the face of recent developments in information and communications technology, increased connectivity, the risks of misattribution and disinformation, and an ever-increasing number of private stakeholders engaged in fact-finding online.

In order to achieve this purpose and answer the main research question the thesis set out to answer the following sub-questions, the answer to which will be briefly summarised below.

- *What are the unique characteristics of digital open-source evidence that distinguish it from other forms evidence, and traditional open-source evidence in particular?*

The expansion of the information landscape has drastically expanded the public sources available to investigators to mine for potential evidence. Furthermore, the arrival of the internet has had implications for *how* and by *whom* it open-source information is created, acquired and verified. Ordinary citizens are increasingly involved in online fact-finding, bringing questions related to bias to the fore. Moreover, the role of other third parties, such as evidence-focused NGOs, has expanded considerably. Furthermore, the digital format of the open-source evidence available online, makes faking and forgery a big problem, and such manipulation is getting increasingly difficult to detect. This concern is further exacerbated by the increased spread of such misinformation, and outright disinformation campaigns, brought about by the arrival of social media.

Digital open-source evidence is more diverse than traditional forms of evidence acquired from open sources. It may capture occurrences beyond human perception and has the potential to prove more facts than could UN or NGO reports, for instance. In the past, the main purpose of submitting open-source evidence has been to prove circumstances,[596] (for instance, whether there was an armed conflict at the relevant point in time) whereas digital open-source evidence, which is increasingly collected specifically intended to be submitted in courts, may go to the acts and conduct of the accused, and may be submitted to prove adverse and instrumental facts, and link far-removed perpetrators to the crimes on the ground.

Digital open-source evidence is likely to often be circumstantial, just like more traditional open-source evidence, such as analogue news and reports. Hence inferential steps will be required to connect a YouTube video or satellite imagery, for instance, to the crimes charged. The fact that digital open-source evidence is a new phenomenon, its complexity as such, and the increasingly refined practices during open-source investigations, may necessitate a larger amount of author or expert testimony, compared to evidence from traditional open sources. That is, in order to clarify what the material actually is, and what it means.

The ICC chambers have clarified that traditional open-source evidence, such as NGO reports or analogue media coverage, will be afforded limited evidentiary value once admitted into trial, and that open-source hearsay, as a general rule, only is admissible if it is submitted to

[596] Farthofer (2012) at 476.

corroborate other evidence. The proponents of digital open-source evidence suggest that online content too would mainly be used to corroborate other pieces of evidence.[597] However, digital open-source evidence may, in view of its seemingly compelling nature and the increasingly refined techniques for verifying its contents, be afforded considerable weight if it is consistent with other information submitted into evidence, and especially if it is tendered through an expert.

- *What standard of fairness is applicable at the ICC, and how is the right to a fair trial interpreted and applied at the ICC?*

The applicable fairness standard of ICC trials is found in international human rights law, regardless if ICC proceedings should be classified as an adversarial, inquisitorial, mixed or *sui generis* system. The "codification" of the right to a fair trial at the ICC essentially mirrors the human rights principle of a fair trial, including the principle of equality of arms, as well as the human rights jurisprudence on the exclusion of improperly obtained evidence. By virtue of Article 21(3) ICCSt, the bench often resorts to human rights jurisprudence, and it is clear that the human rights principle of a fair trial, and the assessment as to whether the trial "as a whole" is fair, allows ICC judges to adapt it to the international context in which the Court operates, *inter alia* defined by considerable challenges as to the types and amount of evidence available post-conflict. There is, however, a baseline, certain minimum guarantees, below which the ICC cannot go without producing a result that is incompatible with internationally recognised human rights.

The *ad hoc* tribunals have adopted a watered down application of the equality of arms principle, motivated the particular exigencies of international criminal prosecutions, and has held that inequality that is not caused by any fault of the tribunal, but by external factors, would not be a breach of the equality of arms principle.[598] This raises questions from a human rights perspective. The ICC has recognised the importance of the equality principle, and the jurisprudence suggest that a match-up between the parties is required. It has *inter alia* been clarified that the principle requires that "the responding party has sufficient time to prepare its response."[599] However, the substantive scope of the equality principle has yet to be made an issue, and it remains to be seen whether the Court will subscribe to the "contextualised", and watered down, interpretation of the principle, as adopted by the *ad hoc* tribunals.

Human rights law allows for the right to examine and challenge evidence to be restricted, if the limitation of the right is counterbalanced, and does not render the trial as a whole unfair. The ICC has readily adopted this balancing approach, whilst clarifying that the chamber must "[take] sufficient steps" to ensure that evidence, from restricted sources for example, "are used in a manner that is not prejudicial to or inconsistent with the rights of the accused and with a fair and impartial trial."[600] In this regard it should also be noted that the right to be tried without undue delay, and the long periods of pre-trial detention in particular, have been identified as "weak spot[s] in the administration of international criminal justice."[601]

[597] Koenig (2020).
[598] Appeals Judgment, *Tadić*, paras. 53-54.
[599] Disclosure Decision, *Katanga & Ngudjolo Chui*, para. 37.
[600] Ibid., para. 51.
[601] Safferling (2012) at 300.

- *How is the framework governing the admissibility of evidence interpreted and applied at the ICC? More specifically, how and to what extent are the fair-trial rights of the accused taken into account when ICC chambers rule on the admissibility of evidence?*

Each step of the admissibility test in Article 69(4) ICCSt allows for broad judicial discretion. The ICC chambers have taken a broad approach to relevance and have often been satisfied that there is *prima facie* probative value, based on indicia of reliability, even if the evidence in question has not been authenticated, or if its provenance has not been established. Similarly, hearsay from unknown sources, contained in NGO reports, for instance, have been considered admissible, albeit with the important clarification that it is only allowed if it is submitted to corroborate other evidence.

Article 69(4) only requires the Court to "take account" of any prejudice caused to fairness, and it is clear from the ICC's jurisprudence that a certain level of prejudice is tolerated. However, it is less clear when the prejudice passes this threshold and is considered unduly prejudicial to trial fairness. The weighing of prejudice against the probative value of evidence allows for considerable judicial discretion, which, this thesis concludes, provides the accused with rather weak guarantees for a fair trial.

- *Which factors render the admission of digital open-source evidence unduly prejudicial to the accused's right to a fair trial at the ICC, and should therefore prompt its exclusion?*

The present contribution submits that if it is not known who posted a photo to Facebook or uploaded a video to YouTube, the ICC chambers should require extensive corroboration, *inter alia* through expert testimony, in order to sufficiently mitigate the infringements of the accused's right to test and challenge evidence. However, the complexity and time-consuming nature inherent in the evaluation of digital open-source evidence, must inevitably prompt the ICC to take a selective approach to online content, and digital open-source hearsay in particular, in order to safeguard the right of the accused to be tried without undue delay.

Furthermore, as ICC judges are not yet familiar with digital open-source evidence there is a risk that they will draw erroneous conclusions based on admitted unauthenticated evidence. Therefore, digital open-source evidence that has not been properly authenticated should not be admitted into trial in The Hague. A stricter approach to the authentication of digital open-source evidence is further motivated by the fact that the admission of unauthenticated digital open-source evidence risks burdening the trial record with unreliable evidence which the Trial Chamber realises it cannot rely on, once it evaluates the digital open-source evidence more thoroughly when making the final judgment. This might have grave implications on the right of the accused to be tried without undue delay.

While the thesis concludes that it is unlikely that privacy violations in the online realm would prompt the exclusion of digital open-source evidence at the ICC, or under human rights law for that matter, the ICC bench should require information as to the methods used in online open-source investigations, which is the only way to enable ICC judges to take due regard to any privacy issues that might have arisen during the course of an online open-source investigation.

In conclusion, the answer to main research question is briefly summarised.

- *Does the current interpretation and application of the rules governing the admissibility and exclusion of evidence at the ICC enable the judges to take due regard to the specific risks to the defendant's right to a fair trial presented by the submission of digital open-source evidence?*

The ICC's flexible approach to the admission of evidence, including evidence from open sources, might have been useful from the viewpoint of crime control, i.e., the effectiveness of justice, in the past, but as digital open-source evidence starts pouring into the courtrooms in The Hague, there is a risk that such a system will not ensure the equality of treatment of the parties, safeguard the fair-trial rights of the defendant, or advance the objective of crime control.

As more and more communications take place online, digital open-source information will often be integral to the underlying facts of the crimes charged at the ICC. Therefore, in the interests of ascertaining the "truth", as well as crime control, social media and other open sources online cannot be ignored. However, in order to achieve a result that is compatible with international human rights law, the ICC judges must develop contemporary criteria and clear-cut guidelines for the admissibility of digital open-source materials, and to authentication in particular. With fakes, and the spread of disinformation and misinformation on the rise, the ICC judges must, now more than ever, be very cautious about what they rely on and what inferences they draw from publicly available material. Moreover, it is submitted that, the current flexible approach to admissibility does not increase the expeditiousness of trials, but with the current approach, unauthenticated digital open-source evidence, for instance, may well be admitted, presented, and discussed before the ICC, but in the end it may be afforded only a limited probative value, or even turn out to be entirely unconvincing. This may lead to considerable loss of time, which puts the right of the accused to be tried without undue delay in jeopardy, without any real advantage for the effective enforcement of substantial criminal law.[602] Hence, digital open-source evidence cannot be evaluated based on the same criteria as paper documents from open sources, and if the current approach is not updated, the fair-trial rights of the accused and the expeditiousness of the proceedings risk being compromised, with only a limited, if any, advancement of the objective of crime control.

This thesis asserts that the concerns identified are not necessarily fatal to the project of using digital open-source information as evidence at the ICC, but the risks that have been highlighted should, as a minimum, give pause to those who see digital open-source evidence as a panacea to the evidentiary problems currently facing prosecutions at the ICC. While the emergence of digital open-source evidence has the potential to enhance the effectiveness of justice, the ICC chambers must take due care to ensure that fact-finding online does not compromise the fairness of the trial offline.

[602] Zappalà (2003) supra note 76, at 151.

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