The Impact of the Internet on International Criminal Law

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Abstract This chapter discusses how international criminal tribunals and courts (ICTCs) collect, receive and share information through the internet and, thus, how the internet has changed International Criminal Law (ICL). More specifically, it focuses on the flow of information from society to ICTCs and, vice versa, on the data released via the internet by the ICTCs to local communities. Thus, this chapter covers two different aspects of the work of ICTCs. First, this chapter demonstrates that the internet enhances the quality of international criminal prosecutions because of the new low-cost and increasingly accessible technologies available via the internet, social networks such as Facebook and Twitter, crowdsourcing, as well as satellite imagery and other forms of surveillance technologies that might bring about better, cheaper, and safer prosecutions. Indeed, these technologies used to pursue individuals' retribution and deterrence might, for instance, help to preserve destroyed or threatened cultural heritage for future generations. Also, it gives individuals the power to gain control over the information and evidence that are then forwarded to the ICTCs. However, these positive trends are also characterized by some setbacks. For instance, considering the scarce international practice, some doubts on the admissibility and verifiability of this type of evidence exist. Also, the relationship with third parties that store the video footages still remains unchartered territory. Second, the internet has also strengthened the outreach programs of the ICTCs enhancing quality and the quantity of data released via the internet by the ICTCs to local communities. This chapter demonstrates that the failure to engage with the local population had a negative impact on the legitimacy and legacy of the ICTCs. Thus, outreach could benefit from developments in new forms of technology to design innovative and meaningful outreach strategies.

I. Introduction

This chapter demonstrates that the development of the internet has a positive influence on International Criminal Law (ICL) under two different perspectives. First, it enhances the quality of the international criminal prosecutions because it gives individuals the power to gain control over the information and evidence that are then forwarded to the international criminal courts and tribunals (ICTCs). Second, the internet has also strengthened the outreach programmes enhancing the quality and the quantity of data released via the internet by the ICTCs to local communities.

The *revolutionary force*[1] of the internet in the early 1990s changed almost every aspect of the society, both in the private and public sphere, from the way people work to the way people interact and socialise every day. For instance, the advent of the internet modified the way we gather, collect and share information about landmarks events.[2] The Indian Ocean Tsunami on the 26th December 2004, the Saffron revolution in Myanmar in 2009, the destruction of Rohingya villages in Myanmar in 2017 and 2018 and Arab Spring demonstrations in Tunisia, Libya, Egypt and Syria, to name a few, are some examples of this phenomenon.

New low-cost and increasingly accessible technologies available via the internet, social networks such as Facebook and Twitter, crowdsourcing, as well as satellite imagery and other forms of surveillance technologies changed the way in which we document human rights abuses. For instance, although it was difficult for NGOs to enter Syria following the 2011 uprising, several videos captured by Syrian citizens through their phones and uploaded on social media showed the level of atrocities in the country.[3] Alston considers the emerging role of digital open-sources information as a third-generation fact-finding approach to human rights.[4] During the first generation, lawyers, diplomats, or experts undertook a systematic review of available information and presented them to a political body, while the second-generation approach was largely influenced by the major international human rights NGOs, such as Amnesty International and Human Rights Watch.[5]

No similar considerations exist within the field of ICL. On the one hand, the internet has changed the character of armed conflict[6] and proved itself to be an efficient, non-traditional and unofficial recruitment channel

1 Raphael Cohen-Almagor, *Confronting the Internet's Dark Side* (Cambridge: Cambridge University Press 2015), 1.
2 Aryeh Neier, 'Foreword,' Sam Dubberley, Alexa Koening and Daragh Murray, *Digital Witness* (Oxford: Oxford University Press 2020), ix.
3 Ella McPherson, 'Advocacy Organizations' Evaluation of Social Media Information for NGO Journalism: The Evidence and Engagement Models,' Am. Behav. Sci. 59 (2015), 124 (124, 125).
4 Philip Alston, 'Introduction: Third Generation Human Rights Fact-Finding,' Proceedings of the ASIL Annual Meeting 107 (2003), 61–62 (62).
5 Ibid.
6 Lindsay Freeman, 'Law in Conflict: The Technological Transformation of War and Its Consequences for the International Criminal Court,' N. Y. U. J. Int'l L. & Pol. 51 (2018–2019), 807–869.

for crimes both at the international[7] and domestic level.[8] On the other hand, the internet has been an invaluable tool in the fight against those crimes, because not only does it plays a central role in determining individual and collective accountability but also because it helps challenge the official narratives, and it is able to reach communities across the globe, as it will be demonstrated in this chapter.

In light of the above, this chapter analyses how international criminal tribunals and courts (ICTCs) collect, receive and share information through the internet. It focuses on the flow of information from the society to the ICTCs and, vice versa, on the data released via the internet by the ICTCs to local communities. Thus, this chapter covers two different aspects of the work of ICTCs. In Section III, it discusses the newly implemented use of user-generated digital evidence (intended as 'data […] that is created, manipulated, stored or communicated by any device, computer or computer system or transmitted over a communication system, that is relevant to the proceedings').[9] This may come in the form of photographs, video and audio recordings, e-mails, blogs, and social media. While the information derived from online open sources is starting to become critical in creating an evidentiary basis for international crimes, the existing literature has explored various aspects of digital investigation frameworks, focussing primarily on the challenges that the ICTCs are facing in using digital evidence.[10] Furthermore, special attention has been given to the

7 Michail Vagias, 'The Territorial Jurisdiction of the ICC for Core Crimes, Committed through the Internet,' Journal of Conflict and Security Law 21 (2016), 523–540; Ezekiel Rediker, 'The Incitement of Terrorism on the Internet: Legal Standards, Enforcement and the role of the European Union,' MJIL 36 (2015), 321–351 (342–43).

8 Natalia Krapiva, 'The United Nations Mechanism on Syria: Will the Syrian Crimes Evidence Be Admissible in European Courts?,' Calif. L. Rev. 107 (2019), 1101–1118.

9 Stephen Mason (ed.), *International Electronic Evidence* (London: British Institute of International and Comparative Law 2008), xxxv.

10 Keith Hiatt, 'Open-Source Evidence on Trial,' Yale L.J. 125 (2016), 323; Lindsay Freeman, 'Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials,' Fordham Int'l L. J. 41 (2018), 283–336; Aida Ashouri, Caleb Bowers and Cherrie Warden, 'An Overview of the Use of Digital Evidence in International Criminal Courts,' Digital Evidence And Elec. Signature L. Rev. 11 (2014), 115–126 (118); Nikita Mehandru and Alexa Koenig, 'ICTS, Social Media, & the Future of Human Rights,' Duke Law & Technology Review 17 (2019), 129–145; Danielle K. Citron and Robert Chesney, 'Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security,' Calif. L. Re. 107 (2019), 1753–1819.

new expanded role and responsibilities of third parties, such as NGOs and private actors, in locating, preserving, verifying, and analysing online visual imagery.[11] Section IV discusses the under-researched use of the internet in the outreach programmes, which aim to build awareness and understanding of the ICTCs role and activities among the affected communities.

Against this background and in line with the scope of this book, this chapter explores the direction in which ICL and its goals have been evolving since the development of the internet. Using those principles as a theoretical framework, as set in Section II, the second part of this chapter analyses the benefits and the challenges that the internet brings to ICL and, more specifically, to the ICTCs and their aim to deliver justice.

II. ICL and Its Goals: Setting the Theoretical Framework

ICL revolves around two main aims: the principle of retribution and the principle of deterrence.[12] The first is based on the idea that perpetrators deserve punishment for the crimes they have committed. In this context, punishment does not aim to obtain vengeance,[13] but it is an expression of condemnation and outrage of the international community as these crimes cannot go unpunished.[14] The second, as equally important, the objective is the principle of deterrence, which is linked to the idea that punishment

11 Alexa Koenig, "Half the Truth Is Often a Great Lie': Deep Fakes, Open Source Information, and International Criminal Law,' AJIL 113 (2019), 250–255; Róisín Á Costello, 'International Criminal Law and the Role of Non-State Actors in Preserving Open Source Evidence,' Cambridge Int'l L. J. 7 (2018), 268–283; Jay D. Aronson, 'Preserving Human Rights Media for Justice, Accountability, and Historical Clarification,' Genocide Studies and Prevention: An International Journal 11 (2017), 82–99.

12 Herbert L. A. Hart, *Punishment and Responsibility* (Oxford: Oxford University Press 1968), pp. 1–27; Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press 2007), 60.

13 Desmond Tutu, *No Future without Forgiveness* (London: Rider Books 1999).

14 ICTY, *Prosecutor v. Alekšovski*, Appeals Chamber, Judgement of 24 March 2000, IT-95–14/1, para. 185; ICTY, *Prosecutor v. Momir Nicolić*, Trial Chamber, Judgement of 2 December 2003, IT-02–60/1, paras 86–87; ICTY, *Prosecutor v. Erdemović*, Trial Chamber, Sentencing Judgment of 29 November 1996, IT-96–22-T, para. 65; ICTY, *Prosecutor v. Tadić*, Sentencing Judgement, IT-94–1-S, 11 November 1997, paras 7–9; ICTR, ***Prosecutor v. Serushago*, Trial Chamber I,,** Sentence of 5 February 1999, **ICTR 98–39-S,** para. 20.

should prevent both the offender and the society from reiterating the commission of a prohibited conduct.[15]

In addition to these, there is a Babel of further goals, which envisage a more long-term and utilitarian view for post-conflict societies. These are, for instance, the vindication of victims' rights because it has been demonstrated that prosecutions are beneficial for victims having a cathartic effect on both the individuals and the affected communities.[16] Furthermore, international prosecutions serve as a tool to permanently record history,[17] to demonstrate the existence of certain crimes[18] and to interpret the contextual elements of international offences.[19] Finally, ICL serves the purpose to achieve restorative justice and post-conflict reconciliation in order to help the society to move forward and guarantee a period of durable peace.[20]

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15 Preamble 15 of the Rome Statute of the International Criminal Law, UN Doc. A/CONF.183/9. For case-law, see ICTY, *Prosecutor v. Delatić*, Trial Chamber, Sentencing Judgment of 29 November 1996, IT 96–21-T; ICTY *Nicolić* (n. 13), 89–90; ICTY, *Prosecutor v. Delatić*, Trial Chamber I, Sentencing Judgment of 29 November 1996, IT 96–21-T. For a different point of view see ICTY, *Prosecutor v. Češić*, Trial Chamber I, Sentencing Judgment of 11 March 2004, IT-95–10-S, paras 25–26; ICC, *Situation in the DRC in the Case of Prosecutor v Thomas Lubanga Dyilo*, Pre-Trial Chamber I, Warrant of Arrest of 10 February 2006, ICC-01/04–01/06–2-tEN, para. 48. See also Hector Olasolo, *The International Criminal Court in Preventing Atrocities through Timely Intervention* (The Hague: Eleven International Publishing 2011).

16 Ernesto Kiza, Corene Rathgeber and Holger-Christoph Rohne, *Victims of War: An Empirical Study on War-Victimization and Victims' Attitudes towards Addressing Atrocities* (Hamburg: Hamburger Edition online 2006); Elisa Hoven, Mareike Feiler and Saskia Scheibel, *Victims in Trials of Mass Crimes: A Multi-Perspective Study of Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia* (Köln: Institute for International Peace and Security Law, Universität zu Köln 2013), 25–30.

17 Antonio Cassese, 'Reflections on International Criminal Justice,' JICJ 9 (2011), 271–275. For the opposite view, see ICTY (Trial Chamber), *Prosecutor v. Karadžić*, Decision On The Accused's Holbrooke Agreement Motion of 8 July 2009, case no. IT-9S-SI18-PT, para. 46; see also Jose E. Alvarez, 'Rush to Closure: Lessons of the Tadić Judgment,' Mich. L. Rev. 96 (1998), 2031–2112; Jose E. Alvarez, 'Lessons from the Akayesu Judgment,' ILSA J. Int'l & Comp. L. 5 (1999), 359–370; Martha Minow, *Between Vengeange and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press 1998), 46–47.

18 Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (3rd edn online, Cambridge: Cambridge University Press 2018), 40.

19 Jose E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda,' Yale J. Int'l L. 24 (1999), 365–483 (375).

20 Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick, N.J.: Transaction Publishers 1997).

With this framework in mind, this chapter analyses how the internet has changed the ICTCs' evidentiary system.

III. From Old Evidence to Digital Evidence

During the Nuremberg trial, the prosecution team led by Justice Robert Jackson relied almost exclusively on documents and films as evidence limiting as much as possible the use of witness testimony. His intent was to demonstrate 'incredible events by credible evidence.'[21] Indeed, cases should have been decided according to the rule of law as opposed to the emotions that survivor-witnesses would inevitably display in the courtroom.[22]

Fifty years after these happenings, the most recently established ICTCs have been making use of visual documentation or open sources, including books, documentaries, reports and photographs.[23] They grounded the admission of evidence on the principles of reliability and probative value.[24] The ICC used a similar approach, which relies on the probative value of this evidence. This principle became evident when the Office of the Prosecutor (OTP) increasingly relied on NGOs' reports. In confirming the charges in the case against Mbarushimana, the ICC disregarded all the facts that were solely based on UN and NGOs' reports arguing that it 'has not provided any other evidence in order for the Chamber to ascertain the truthfulness and/or authenticity of those allegations. The sources of the information contained in both the UN and Human Rights Watch Report are anonymous.'[25] Similarly, in *Gbagbo*, Pre-Trial Chamber I compared NGOs reports to anonymous hearsays, stating their limited probative value

21 Justice Robert Jackson, quoted in Lawrence Douglas, 'Film as Witness: Screening Nazi Concentration Before the Nuremberg Tribunal,' Yale L. J. 105 (1995), 449, 452.

22 Michael Salter, *Nazi War Crimes, US Intelligence And Selective Prosecution at Nuremberg* (London: Routledge-Cavendish 2007), 404; Alexa Koenig, Keith Hiatt and Khaled Alrabe, 'Access Denied? The International Criminal Court, Transnational Discovery, and The American Service members Protection Act,' Berkeley J. Int´L. 36 (2018), 404–409.

23 Jennifer L Mnookin, 'The Image of Truth: Photographic Evidence and the Power of Analogy,' Yale Journal of Law and Human 10 (1998), 1, 8–14.

24 Human Rights Law Centre, UC Berkeley School of Law, *The New Forensics: Using Open Source Information to Investigate Grave Crimes* (2020) 5.

25 ICC, *Prosecutor v. Callixte Mbarushimana*, judgement of 16 December 2011, no. ICC-01/04–01/10–465-Red 16–12–2011, paras 117, 194, 232 and 238.

for two reasons: first, it limited the right of the Defence to investigate and challenge the trustworthiness of the source of information and, second, the judges were unable to assess the trustworthiness of the source, making it impossible to determine what probative value to attribute to the information.[26]

Despite this timid use of open sources as evidence, contemporary international criminal investigations have been heavily dependent on witnesses' testimony.[27] However, it was soon clear that a system based on witness testimony was fragile and 'unsustainable due to a number of challenges,'[28] especially when some ICTCs conduct the investigations *in loco* while the crimes are still ongoing. This led to security issues of both the investigators in the field and of witnesses, who are vulnerable to be threatened, bribed, injured or even killed due to their participation in the proceedings. This was evident in Kenya's post-election violence in 2007–2008, which led to dropping charges against Kenyatta due to insufficient evidence and alleged intimidation of several witnesses.

While the ICTCs developed and strengthened programmes of witness protection,[29] the need for a change in the evidentiary strategy was waiting.[30] The OTP had begun introducing more digital evidence, such as some video portraying Lubanga inspecting troops with boys and girls in military fatigues.[31] Also, satellite imaging, including Google Earth, were used to track the destruction of some villages, killing of population and troop movements in *Banda Jerbo and Abu Garda*,[32] although the OTP Strategic Plan 2012–2015 underestimated the potentiality of the internet

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26 ICC, *Prosecutor v. Laurence Gbagbo*, judgement of 3 June 2013, no. ICC-02/11–01/11–432, paras 28–29.

27 Stephen Cody, Alexa Koenig, Robin Mejia, and Eric Stover, *Bearing Witness At The International Criminal Court: An Interview Survey Of 109 Witnesses* (Berkeley: Human Rights Centre, UC Berkeley School of Law 2014); Keith Hiatt, 'Open Source Evidence on Trial,' Yale L.J. 125 (2016) 323–330.

28 International Bar Association, *Witnesses before the International Criminal Court* (London: International Bar Association 2013), 20.

29 Articles 68(2) and 69(2) of the Rome Statute, Rule 87 of the ICC RPE, Regulation 21(2) of Regulation of the Court and Regulation 94 of the Registry Regulation.

30 Alison Cole, 'Technology for Truth: The Next Generation of Evidence,' 18 March 2015, available at: https://www.ijmonitor.org/2015/03/technology-for-truth-the-next-generation-of-evidence/.

31 ICC, *Prosecutor v Lubanga*, judgment of 14 March 2012, no. ICC-01/04–01/06, para. 1244.

32 ICC, *Prosecutor v Abdallah Banda Saleh Jerbo Jamus*, judgment of 28 August 2013, no. ICC-02/05–03/09; ICC, *Prosecutor v Bahr Idriss Abu Garda*, judgement of 7 March 2011, no. ICC-02/05–02/09.

as a source of evidence.[33] It was necessary to wait until the OTP Strategic Plan 2016–2018 to see the first signs of the impact of the internet on the ICC's trials.[34] In stressing the importance of using computers, the internet, mobile phones, and social media as a 'coming storm,'[35] it recommended to increasingly incorporate online open source content into their investigations to corroborate witness testimony and fill evidentiary gaps.[36]

The importance of the internet for the investigation can be seen in some milestone cases, where the ICC largely relied on digital evidence. In 2016 the *Al-Mahdi Case*, the accused pleaded guilty to having destroyed some cultural heritage sites in Timbuktu in Mali.[37] In order to corroborate this, the OTP used satellite images to show the situation of the mausoleums before, during and after the destruction. Some videos were taken from YouTube or social networks to prove the participation of the accused in war crimes.[38] Also, in the trial against Bemba and his affiliates for witness tampering and corruption under Article 70 of the Rome Statute, the OTP used screenshots of Facebook to clarify the relationship between the parties of the alleged bribery.[39]

Similarly, in 2017, the ICC issued two arrest warrants against Mustafa Busyl Al-Wefalli, commander of an elite force unit of the Libyan National Army, the Al-Saiqa Brigade, in Benghazi, allegedly responsible for having committed war crime under Article 8(2)(c)(i) of the Rome Statute.[40] The first arrest warrant was based on evidence (seven videos and transcripts of those videos) collected through the internet and, more specifically, posted by the Media Centre of the Al-Saiqa Brigade on Facebook and social

33 Alexa Koening, 'Open Source Evidence and Human Rights Cases: A Modern Social History' in: Sam Dubberley, Alexa Koening and Daragh Murray (eds), *Digital Witness* (Oxford: Oxford University Press 2020), 32–47 (34).

34 See Office of the Prosecutor, 'Strategic Plan (2016–2020),' 8 July 2015, available at: https://www.icc-cpi.int/Pages/item.aspx?name=otp-rep-150708, para. 58.

35 Peggy O'Donnell et al., *Beyond Reasonable Doubt: Using Scientific Evidence to Advance Prosecutions at the ICC* (Human Rights Centre School of Law University of California Berkeley, Workshop Report 7, 23 October 2012).

36 See Office of the Prosecutor, 'Strategic Plan (2016–2020)' (n. 34), para. 58.

37 ICC, *Prosecutor v. Al Mahdi*, judgement of 27 September 2016, no. ICC-01/12–01/15–171.

38 ICC, *Prosecutor v. Al Mahdi*, Transcript of 22 August 2016, no. ICC-01/12–01/15-T-4-Red-ENG, p. 41 ll. 4–10.

39 ICC, *Prosecutor v. Bemba*, judgement of 27 June 2013, no. ICC-01/05–01/08–2721.

40 ICC, *Prosecutor v. Al-Werfalli*, judgement of 15 August 2017, no. ICC-01–11–01/17–2.

media.[41] Those videos showed Al-Werfalli, wearing camouflage trousers and a black t-shirt with the logo of the Al-Saiqa Brigade, and carrying a weapon, while shooting three men in the head. Other videos displayed him speaking into the camera, ordering two men to proceed with an execution. Then, the two men shoot the persons kneeling, who fall to the ground. Following that, a group of volunteers and full-time investigators, known under the name of Bellingcat, geolocated the incidents in Benghazi and established the date of those videos.[42]

As suggested by Freeman, the use of digital evidence in the above-mentioned cases does not constitute an 'anomal[y] or temporary deviation […], but rather the first in a growing trend.'[43] In agreeing with this view, this chapter aims to assess how this growing trend is influencing ICL goals. More specifically, Section V will deal with it, while the following section focuses on how the communication of the ICTCs toward the local communities changed with the advent of the internet.

IV. Outreach Programmes

Outreach programmes were an unknown concept at the time when the two *ad hoc* tribunals were created.[44] It is not until 1999, five years after the investigations had begun that the ICTY President Gabrielle Kirk McDonald reported to the UN that the ICTY's work was 'frequently politicised and used for propaganda purposes by its opponents, who portray[ed] the Tribunal as persecuting one or other ethnic groups and mistreating persons detained under its authority.'[45] Thus, given that ICTY was seen as disconnected from the population, the importance of having an effective

41 Emma Irving, 'And so it Begins… Social Media Evidence on an ICC Arrest Warrant,' 17 August 2017, available at: http://opiniojuris.org/2017/08/17/and-so-it-begins-social-media-evidence-in-an-icc-arrest-warrant/.

42 See at: https://www.bellingcat.com/news/mena/2017/10/03/how-an-execution-site-was-geolocated/. See also at: https://www.bellingcat.com/news/mena/2017/09/04/geolocating-libyas-social-media-executioner/.

43 Lindsay Freeman, 'Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials,' Fordham Int'l L. J. 41 (2018), 283–335 (333).

44 Sara Darehshori, 'Lessons for Outreach from the Ad Hoc Tribunals, The Special Court for Sierra Leone, and the International Criminal Court,' New England Journal of International and Comparative Law 14 (2008), 299–307 (300).

45 Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Commit-

communication with the affected communities was recognised of paramount importance. Similarly, the majority of the population in Rwanda was not aware of the work of the ICTR.[46] Despite these concerns, the budget of these two institutions did not include any funding for outreach. A small group of States, NGOs and other institutions funded the ICTY outreach activities on a voluntary basis.[47]

Against this background, the internet has been an invaluable tool to promote access to and understanding of judicial proceedings and foster realistic expectations about the ICTCs' work.[48] For this reason, the International Residual Mechanism for Criminal Tribunals has a web page, from which it broadcasts its hearings.[49] Similarly, the ICC made outreach one of its priorities.[50] The latter, for instance, streams hearings with 30 minutes of delays to allow the redaction of the audio or visual display for confidentiality reasons.[51] In January 2009, at the opening of its first trial, Lubanga's trial, the ICC organised a public screening of the proceedings in a community hall in Bunia and, then, suspended them over security concerns.[52] After that, the ICC regularly streamed the hearings against Lubanga in the DRC.[53] Similarly, in the *Bemba* case, the ICC broadcasted some screenings of public hearings to an estimated 800,000 people nationwide.[54] More

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ted in the Territory of the Former Yugoslavia since 1991, UN Doc. A/54/187-S/1999/846 (25 August 1999).

46 Eric Stover and Harvey M. Weinstein, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press 2004).

47 See for a list of the contributors, ICTY, Support and Donations, available at: https://www.icty.org/en/content/support-and-donations.

48 ICC, Outreach Report 2010,https://www.icc-cpi.int/iccdocs/PIDS/publications/OUR2010Eng.pdf; ICC, Interacting with communities affected by crimes, https://www.icc-cpi.int/about/interacting-with-communities.

49 UNIRMCT, The Hague Branch Courtroom Broadcast, available at: https://www.irmct.org/en/cases/mict-courtroom-broadcast.

50 Hans-Peter Kaul, 'Victims' rights and peace' in: Thorsten Bonacker and Christoph Johannes Maria Safferling (eds), *Victims of International Crimes: An Interdisciplinary Discourse* (The Hague: Asser Press 2013), 223–229.

51 ICC, 'Regulations of the Court,' (2004), ICC-BD/01–05–16, Reg. 21(1) and 21(7).

52 Coalition for the International Criminal Court, 'Ntaganda's ICC trial in DRC?,' 26 March 2015, available at: https://www.coalitionfortheicc.org/.

53 M. Cherif Bassiouni, *Introduction to International Criminal Law* (Leiden: Martinus Nijhoff Publishers 2013), 361.

54 ICC, Outreach Report (n. 48), 60.

recently, the *Ongwen* case was live streaming in the affected community.[55] In addition to those, the ICC created a web page dedicated to its suspects at large[56] and has a YouTube channel, where it uploads different types of videos, with summaries narrated by the Court's judges or with simple explanations of complex decisions to facilitate the understanding of its proceedings to the public.[57]

Against this background, the second part of this chapter aims at analysing how the internet is influencing ICL goals, starting from the goals of retribution and deterrence.

V. *Retribution and Deterrence: New Positive Trends and Areas of Concern*

Retribution and deterrence are strictly linked to the impact of the internet on the ICTCs evidentiary system.[58] Section III of this chapter showed that ICTCs, and more specifically the ICC, are increasingly using digital evidence. Although this practice is recent, it has produced encouraging results. For instance, it reduces the overreliance on eyewitnesses, and it reduces the risk of witness tampering since witnesses are not going to be considered the primary evidentiary sources anymore, as clarified in Section III of this chapter. However, it is worth to be asked whether the approach to open source evidence will change depending on the facts that be proved and the stage of proceedings. For instance, according to Article 58(1) of the Rome Statute, the standard of proof for the issuance of an arrest warrant is 'reasonable grounds to believe.' Seven videos and the transcripts of those videos posted on social media were considered enough to meet this threshold in the *Al-Werfalli* case since Trial Chamber VIII issued two arrest warrants, as clarified in Section III of this chapter. Irving questions the use of digital open sources evidence when the required standards of proof becomes higher, for instance, when initiating an investigation ('reasonable basis to believe,' Article 53(1)(a)) or, later in

55 Coalition for the International Criminal Court, ''Only justice could make us feel alive again' – Week one of the Ongwen ICC trial,' 16 December 2016, https://www.coalitionfortheicc.org/.

56 Annual Report of the International Criminal Court to the United Nations on its activities in 2019/20, 24 August 2020, A/75/324, 17.

57 The YouTube Channel of the ICC is available at: https://www.youtube.com/channel/UC183T5VoMh5wISSdKPaMgRw.

58 ICC, 'Integrated Strategy for External Relations, Public Information and Outreach,' 18 April 2007, 2.

the proceedings, when 'substantial grounds to believe' (confirmation of charges, Article 61(5)) and 'beyond reasonable doubt' (conviction, Article 66(3)) are necessary.[59] In accordance with Rule 63(2), ICC judges determine the probative value and the 'appropriate weight' of admitted evidence at the end of a case, when they are considering the evidence as a whole.[60] While the golden standard rule suggests triangulating physical, testimonial and documentary evidence, the ICC developed some guidelines on how to interpret open-sources.[61]

The latter were applied to the new digital era evidence in the *Al-Mahdi*, *Bemba* and *Al-Werfalli* cases, but all of them are quite peculiar cases. Al-Madhi had already pleaded guilty, acknowledging that he had destroyed certain religious buildings in the area of Timbuktu, when the OTP decided to use some videos from YouTube against him. Also, the type of crime lends itself well to the use of digital evidence and satellite imagery. Conversely, digital technologies were used to prosecute Bemba and his associates of witness tampering under Article 70 of the Rome Statute. However, the accused was within the ICC's detention facilities, and a certain type of evidence was readily available to the investigation team. Furthermore, this case was closer to a case of national public corruption case rather than an investigation into war crimes. In addition to this, it has to be noted that both Al-Werfalli and Al-Mahdi were the direct perpetrators of the alleged crimes. Conversely, it remains to be asserted whether digital evidence can be used to demonstrate, for instance, the existence of a chain of command.

Against this background, using digital evidence also presents some challenges. These are, for instance, authentication of the evidence and its verifiability,[62] which might undermine the defendant's right to a fair trial

59 Emma Irving, 'And So It Begins… Social Media Evidence in an ICC Arrest Warrant,' 17 August 2017, available at: http://opiniojuris.org/.

60 ICC Unified Technical protocol ('e-Court Protocol') for the provision of evidence, witness and victims information in electronic form, ICC-01/04–01/10–87-Anx 30–03–2011, para. 1 [online] Available at: https://www.icccpi.int/RelatedRecords/CR2011_03065.PDF.

61 Lindsay Freeman, 'Prosecuting Atrocity Crimes with Open Source Evidence: Lessons from the International Criminal Court' in: Sam Dubberley, Alexa Koening and Daragh Murray (eds), *Digital Witness* (Oxford: Oxford University Press 2020), 48–67.

62 Lawrence Douglas, 'Film as Witness: Screening Nazi Concentration Camps before the Nuremberg Tribunal,' Yale L.J. 105 (1995), 449–481; Susan Schuppli, 'Entering Evidence: Cross-Examining the Court Records of the ICTY' in: Forensic Architecture (ed.), *Forensic: The Architecture of Public Truth* (Berlin: Stenberg Press 2014).

and, indirectly, the efficacy of the principles of retribution and deterrence. Although authentic, it might be difficult to verify online videos uploaded on online platforms because they often lack valuable metadata on the date and time of the recording.[63] For instance, the footage on Syria was largely unusable because there was no way of verifying the authenticity of the material that had been uploaded on social media.[64] These verification problems led to the idea that it was necessary to develop some apps that are able to guarantee that the uploaded material has not been manipulated or tampered with.

EyeWitness to Atrocities,[65] Videre Est Credere[66] and CameraV[67] are some examples of how these new technologies, built around an internet connection, are equipping individuals and training them to safely capture visual evidence of human rights abuses and international crimes. Those apps are free, and they can be downloaded on personal mobile phones from Google Play. When the users launch the app, it automatically transforms metadata into recording and attaches to them some hash values, which aims to verify whether the original file has been manipulated.[68] Those metadata include GPS coordinates, light meter readings and cell towers signals with the time and the location of the footage. Once the users have finished filming, they can upload the material through a secure transmission system. Then, a team of lawyers is responsible for reviewing the uploaded material, which might be used by ICTCs at their request.[69]

In order to understand whether the internet had an impact on the way ICTCs deliver retribution and deterrence, it is necessary to analyse the approach of the ICTCs towards digital evidence against the general approach to the admission of evidence in trial proceedings. According to Rules 89(c)

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63 EyeWitness, Verifying Eyewitness Video: How to Verify Footage of Human Rights Abuse.

64 Ella McPherson, 'Advocacy Organizations' Evaluation of Social Media Information for NGO Journalism: The Evidence and Engagement Models,' Am. Behav. Sci. 59 (2015), 124 (133–134).

65 See at: https://www.eyewitness.global/welcome. For a specific application see at: https://www.eyewitness.global/Combining-our-technology-with-satellite-imagery-to-uncover-environmental-crimes-in-The-Gambia.

66 See at: https://www.videreonline.org/.

67 See at: https://exposingtheinvisible.org/en/tools/camerav/.

68 Mark S Ellis, 'Shifting the Paradigm – Bringing to Justice those who Commit Human Rights Atrocities,' Case W. Res. J. Int'l L. 47 (2015), 265–282 (273).

69 Rule 104(2) ICC RPE. Assembly of States Parties to the Rome Statute of the International Criminal Court, Rules of Procedure and Evidence, First session, New York, 3–10 September 2002 (ICC-ASP/1/3 and Corr.1), part II.A.

of both the ICTY and ICTR Rules of Procedure and Evidence, judges must assess the probative value of the evidence.[70] First, in order to be admitted, the evidence must satisfy 'minimum standards of relevance and reliability.'[71] Then, judges must evaluate its weight separately.[72] Similarly, the ICC Rules of Procedure and Evidence clarifies that evidence must be admitted or rejected based on its relevance, probative value, and prejudicial impact.[73] Thus, the ICC does not require judges to rule separately on the authenticity of the evidence.[74]

With specific reference to digital evidence, the ICC adopted an 'e-court Protocol' designed to 'ensure authenticity, accuracy, confidentiality and preservation of the record of proceedings.'[75] The Protocol does not discuss the issue of probative value, which is still within the judges' discretion, but it establishes some criteria to use digital open-source evidence. For instance, it requires that metadata (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 organizations) must be attached. A strong chain of custody, which shows '[t]he movement and location of real evidence, and the history of those persons who had it in their custody, from the time it is obtained to the time it is presented in court'[76] increases the weight judges give to the evidence.[77] For this reason, an unsolvable problem, which can undermine the principle of retribution or deterrence, can be the anonymity of the user when the footage is collected through an app, which guarantees the anonymity of its users. The ICC reiterated this flexible approach towards the authenticity

70 ICTY, *Prosecutor v. Popovic, and others*, decision of 7 December 2007, IT-05–88-T, para. 4, 22, 26, 33.

71 ICTY, *Prosecutor v Brdanin & Talic*, order of 15 February 2002, case no. IT-99–36-T, para. 13; ECCC, decision of 26 May 2008, case No. 001/18–07–2007/ECCC/TC, para. 7.

72 ICTY, *Prosecutor v Brdanin & Talic*, order of 15 February 2002, case no. IT-99–36-T, para. 18; ICTY, *Prosecutor v. Boškoski & Tarčulovski*, judgment of 10 July 2008, case No. IT-04–82, para. 10.

73 ICC, *Prosecutor v Jean- Pierre Bemba Gombo*, decision of 8 October 2012, case no. ICC-01/05–01/08–2299, para. 7.

74 ICC, *Prosecutor v Jean- Pierre Bemba Gombo*, decision of 8 October 2012, case no. ICC-01/05–01/08, para. 9.

75 International Criminal Court e-Court Protocol, para. 1, ICC01/04–01/10–87-Anx 30–03–2011.

76 Bryan S. Gardner (ed.), *Black's Law Dictionary* (9th edn, St. Paul: West 2009), 260.

77 ICTY, *Prosecutor v Brdanin and Talic*, IT-99–36-T, Order on the Standards Governing the Admission of Evidence, 15 February 2002, para. 18.

of digital evidence in the *Bemba* case.[78] There, the OTP used ten audio recordings of broadcasts that provided background information about the conflict in the Central African Republic and some accounts from eyewitnesses and victims.[79] However, the defence questioned the authenticity of the recordings, considering the defence also takes aim at the prosecution's method.[80] Indeed, it stressed that the OTP did not have access to metadata (such as a timestamp or the IP address of the uploader) to assist in authentication, and it mainly relied on screenshots of Facebook pages showing the photos.[81] However, the ICC judges used a circular argument, which did not resolve the doubts surrounding the authenticity of the evidence. Indeed, they argued that 'recordings that have not been authenticated in court can still be admitted, as in-court authentication is but one factor for the Chamber to consider when determining an item's authenticity and probative value.'[82] However, to determine the probative value of the evidence, the judges should 'take into account innumerable factors, including the indicia of reliability, trustworthiness, accuracy […] as well as […] the extent to which the item has been authenticated.'[83] Whether this affects negatively, the principles of retribution and deterrence will become clear over time.

Another aspect that might challenge retribution and deterrence is the impact of digital evidence on the principle of equality of arms, under which each party should have a reasonable opportunity to present its case.[84] On the one hand, the sheer amount of incriminating evidence might create a sort of disadvantage for the defendants, especially in high-profile cases. On the other hand, the ICTCs might lack time and resources to analyse all the relevant material. For this reason, the ICTCs have developed partnerships with third-party organisations, which employ trained data scientists with forensic knowledge to verify open-source evidence.

78 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, judgement of 8 October 2012, no. ICC-01/05–01/08, paras 80–122.
79 Ibid.
80 Ibid.
81 ICC, *Prosecutor v Jean-Pierre Bemba Gombo*, judgement of 8 October 2012, no. ICC-01/05- 01/08, para. 85.
82 ICC, *Prosecutor v Jean- Pierre Bemba Gombo*, judgement of 8 October 2012, no. ICC-01/05–01/08, para. 120.
83 Ibid.
84 ECHtR, *Bulut v. Austria*, judgment of 22nd February 1996, no. 17358/90; ECtHR, *Foucher v. France*, judgment of 18th March 1997, no. 10/1996/629/812; ECtHR, *Platakou v. Greece*, judgment of 11th January 2001, no. 38460/97; ECtHR, *Bobek v. Poland*, judgment of 17th July 2007, no. 68761/01.

However, this raises some further questions on how this data is examined. Indeed, there might be the risk that although some information might be relevant for the investigators, some recording will never be transferred to the ICTCs for a criminal investigation. Unfortunately, there is too little practice to understand how to overcome those setbacks.

Finally, international criminal law cases are complex endeavour as the type of evidence used are only parts of a bigger puzzle and must be incorporated into a larger strategy for justice. Indeed, the scope of the cases before the ICTCs is often narrower than the actual extent of the crimes. For instance, the former ICC Prosecutor, Louis Moreno-Ocampo, followed a 'sequenced' approach, which meant that the OTP selected a limited number of incidents, according to their gravity, in order to carry out short investigations and propose expeditious trials.[85] However, doubts exist on the efficacy of this strategy. For instance, Lubanga was only prosecuted for the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities (child soldiers),[86] although there were allegations of other crimes, such as rape against the civilian population in the DRC.[87] In this perspective, digital evidence might help in prioritising a line of investigation or corroborating evidence alongside witness testimony.

VI. Recording History

As clarified in Section II of this chapter, one of the ICL objectives of international prosecutions serves as a tool to permanently record history.[88] From this perspective, digital evidence has several advantages.

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85 ICC, Report on Prosecutorial Strategy, https://www.icc-cpi.int/nr/rdonlyres/d673dd8c-d427-4547-bc69-2d363e07274b/143708/prosecutorialstrategy20060914_english.pdf, p. 5; Alex Whiting, 'Prosecution Strategy at the International Criminal Court in Search of a Theory' in: Florian Jeßberger and Julia Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal* Law (Cambridge: Cambridge University Press 2020), 285–304.

86 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, judgement of 7 February 2007, no. I, ICC-01/04–01/06–803-tEN.

87 See Jim Freedman, 'A Conviction in Question – Lessons from the International Criminal Court's Inaugural Trial in Justice in Conflict,' 17 January 2018, available at https://justiceinconflict.org/2018/01/17/a-conviction-in-question-lessons-from-the-the-international-criminal-courts-inaugural-trial/.

88 Antonio Cassese, 'Reflections on International Criminal Justice,' JICJ 9 (2011), 271–275.

First, it is not subject to the lure of time. International investigations generally reach the sites of the investigations months after the crimes have been committed, given that certain zones might not be physically accessed for security, diplomatic, or logistical reasons. This might also have a negative impact on witnesses, who might forget details of their testimony. Conversely, with the use of phone cameras and an internet connection, evidence collection is quicker, can be secured in real-time and reduces the risk that evidence will be lost or destroyed. Indeed, local users can capture images and videos that could be used as evidence or to corroborate or discredit witness testimony and other evidence.[89]

Second, digital evidence can secure a more thorough approach to the case. For instance, a satellite or aerial image may capture elements that were outside a person's range of vision, such as an overview of a larger area or an inaccessible location, while eyewitnesses only provide an account based on their perception and recollection of a certain event. Similarly, computer and phone records may reveal communications and patterns of communications, which might be undisclosed otherwise. This will allow the investigators to put them in context with other evidence. For instance, the digital content is not only produced by the people witnessing atrocities but sometimes also by the perpetrators who film themselves for propaganda purposes.[90]

Furthermore, the use of digital evidence has the power to cover the knowledge and cultural gap of the ICC personnel that is often called to interpret conflict-related evidence from a different social and political context. For instance, digital sources are often used to understand the

89 Bellingcat Investigation Team, 'How a Werfalli Execution Site was Geolocated,' 3 October 2017, https://www.bellingcat.com/news/mena/2017/10/03/how-an-execution-site-wasgeolocated/; See, e.g., Anna Banchik et al., Chemical Strikes on Al Lataminah (Human Rights Center, UC Berkeley School of Law, 2018), https://humanrights.berkeley.edu/publications/chemical-strikes-al-lataminah; Conor Fortune, 'Digitally Dissecting Atrocities—Amnesty International's Open Source Investigations,' 26 September 2018,available at: https://www.amnesty.org/en/latest/news/2018/09/digitally-dissecting-atrocities-amnesty-internationals-open-source-investigations/; BBC NEWS, 'Cameroon Atrocity: Finding The Soldiers Who Killed This Woman,' 24 September 2018, available at: https://www.bbc.com/news/av/world-africa-45599973/cameroon-atrocityfinding-the-soldiers-who-killed-this-woman; Steven Stecklow, 'Why Facebook is Losing the War on Hate Speech in Myanmar,' 15 August 2018, available at: https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/.

90 Jarret M Brachman, 'High-Tech Terror: Al-Qaeda's Use of New Technology,' Fletcher F. Wld. Aff. 30 (2006), 149–164.

broader context in which the crimes are committed, prove the contextual and specific element, as well as linkage evidence connecting the alleged perpetrator to the crime.[91] However, scholars accused the ICC of imposing foreign understanding when interpreting concepts engrained in the African context.[92]

Indeed, the way events are portrayed with a strictly hierarchical conception, and a linear chain of command suggests an interpretation linked to the way Nazis were perpetrating those crimes rather than an approach, which acknowledges the broader context of individual and societal causes.[93] A specific example is the case of the criminal gang called Mungiki in the Kenyan cases against Muthaura, Kenyatta, Ali. In his dissenting opinion, Judge Kaul clarified that he did not agree with the background description of the role of Mungiki provided by the OTP, according to which they possessed the necessary degree of 'state-like' organisation to target the civilian population on a large scale.[94] Scholars agree with this view. For instance, Kenneth Rodman conducted a study on the role of the National Congress Party and collective leadership/decision-making, agrees with him[95] and did not concur with the way President Al-Bashir was portrayed as 'the mastermind … [with] absolute control […] at the apex of […] the state's hierarchical structure authority.'[96] Also, Megret made

91 Lindsay Freeman (n. 61), 59.

92 David M Anderson, 'Vigilantes, Violence and the Politics of Public Order in Kenya,' Afr. Aff. 101 (2002), 531–555; Peter M Kagwanja, 'Facing Mount Kenya or Facing Mecca? The Mungiki, Ethnic Violence and the Politics of the Moi Succession in Kenya, 1987–2002,' Afr. Aff. 102 (2003), 25–49.

93 Solomon A Dersso, 'The ICC's African Problem: A Spotlight on the Politics and Limits of International Criminal Justice' in: Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (Cambridge: Cambridge University Press 2016), 61–77 (69); Severine Autesserre, 'Dangerous Tales: Dominant Narratives on the Congo and their Underintended Consequences,' Afr. Aff. 11 (2012), 202–22.

94 ICC, *The prosecutor v. Francis Kimiri Muthaura and Uhury Muigai Kenyatta and Mohammed Hussein Ali*, no. ICC-01/09–02/11; Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's Decision on the Prosecutor's Application for Summonses to Appear for Francis Kimiri Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali of15 March 2011.

95 Kenneth A Rodman, 'Justice as a Dialogue between Law and Politics: Embedding the International Criminal Court with Conflict Management and Peace Building,' JICJ 12 (2014), 437–469 (448).

96 ICC, *Prosecutor v. Omar Hassan Ahmad Al Bashir ('Omar Al Bashir')*, judgement of 17 April 2008, case no. ICC-02/05–01/09–3, para. 1.

a similar criticism[97] on the role of the former traditional doctor, Allieu Kondewa, considered by the SCLS the commander of the Civil Defence Forces and responsible for commanding war crimes.[98] These are a few examples, but the research on the field is quite extensive.[99]

Among the biggest challenges of recording history, the circumstances under which the data are stored must be mentioned. Human Rights Watch has published a report denouncing the widespread practice of social media platforms of permanently removing posts from their platforms, which contain terrorist and violent extremist content (TVEC), hate speech, organized hate, hateful conduct, and violent threats because they violate community standards.[100] Furthermore, some of them use algorithms, which identify and take down the content so quickly before any user can see it, or others have filters to prevent content identified as TVEC from being uploaded in the first place.[101]

Also, the purpose of permanently recording history is undermined by 'deep fakes,' i.e. digitally distorted content such as 'videos generated via algorithms that make it look like a person said or did something she did not.'[102] In this sense, the chain of custody plays an important role to guarantee that the evidence has not been manipulated or tampered with.[103]

Finally, it has to be noted that the use of the internet has the power to shape history not only at the macro-level but also at the micro-level. Indeed, Miguel argued that social media like FB, Instagram, Twitter and YouTube promote an 'intimate [form of] storytelling,'[104] which leads the

97 Frédéric Mégret, 'Cour Pénale Internationale et Néocolonialisme: au-delà des évidences,' Études Internationales 45 (2014), 27–50.

98 Special Court for Sierra Leone, *The Prosecutor v Moinima Fofana and Allieu Kondewa*, Judgment of 28 May 2008, no. SCSL-04–14-A, para. 69.

99 Philip Clark, *Distant Justice: The Impact of the International Criminal Court on African Politics* (Cambridge: Cambridge University Press 2018), 100–149.

100 Human Rights Watch, ''Video Unavailable': Social Media Platforms Remove Evidence of War Crimes,' 10 September 2020, available at: https://www.hrw.org/report/2020/09/10/video-unavailable/social-media-platforms-remove-evidence-war-crimes.

101 Ibid.

102 Koenig (n. 11), 252.

103 On this point see Section V.

104 Cristina Miguel, 'Visual Intimacy on Social Media: From Selfies to the Co-Construction of Intimacies Through Shared Pictures,' Social Media + Society 2 (2016), 1–10 (1).

individual towards a form of 'voluntary self-disclosure.'[105] This form of historic account pertains victims' rights.

VII. Victims' Rights

The widespread use of social networks, as well as the decreased cost of communication through mobile telephony and social media, opened up new opportunities for victims of crimes.[106] In this new context, the internet could be seen as a 'democratising' tool,[107] which shifts power to the powerless because it gives individuals across all levels of society control over the information.[108] In simple words, it gives a voice to the formerly powerless, who would have been otherwise silenced by the alleged perpetrators, the government or by those that traditionally retain information.[109] This means that people could use their phones to redirect the focus of an international criminal investigation.

Despite its many strengths, the development of the internet is also a source of some serious setbacks for victims or, more in general, for everyday citizens committed to documenting atrocities through video and photography. Indeed, this opportunity may result to be a double-edged sword given that evidence collection requires a certain degree of in-person contact. While on the one hand, it reduces the risks of retaliation against witnesses,[110] it shifts the risk from witnesses to the users who record footage through their smartphones.[111] Thus, digital evidence might expose the

105 Ibid.
106 Alston (n. 4), 62.
107 Rebecca J Hamilton, 'New Technologies in International Criminal Investigations,' Proceedings of the ASIL Annual Meeting 112 (2018), 131–133.
108 Christoph Koettl, Daragh Murray and Sam Dubberley, 'Open Source Investigation for Human Rights Reporting: A Brief History' in: Sam Dubberley, Alexa Koenig and Daragh Murray (eds), *Digital Witness* (Oxford: Oxford University Press 2020), 12–31 (18); Christine Chinkin and Mary Kaldor, *International Law And New Wars* (Cambridge: Cambridge University Press 2017), 58–68.
109 Molly Beutz Land, 'Peer Producing Human Rights,' Alberta L. Rev. 46 (2009), 1115–1139 (1116); David Patrikarakos, *War In 140 Characters: How Social Media Is Reshaping Conflict In The Twenty–First Century* (New York: Basic Books 2017), 92, 133.
110 David A Sonenshein and Robin Nilon, 'Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance,' Or. L. Rev. 89 (2010), 263–304, 263.
111 UC Berkeley First Responders: An International Workshop on Collecting and Analysing Evidence of International Crimes 4 (2014).

identity of some users, their families and endanger third parties.[112] For this reason, the user can dis-install the app or delete the original video without compromising the material uploaded once it has been transferred to the servers.[113] This guarantees a certain level of anonymity because the hash values identify the phone rather than the user. While Camera V asks for an e-mail address, it is not a compulsory requirement in the Eyewitness app.[114] However, the practical reality is that those apps are not as widely shared as some more familiar platforms like YouTube.[115] Thus, downloading the app and using it correctly might prove itself a significant obstacle for the same victims.[116]

Another equally challenging issue is represented by the involvement of third parties once the footage has been collected using an app. This material is uploaded and generally stored on the servers of NGOs. For instance, eyeWitness has a partnership with LexisNexis and secures the uploaded material on LexisNexis servers located in London.[117] Thus, it seems that individuals do not retain full control over the material they collect. Some authors, such as Caswell, believe that the preservation and availability of this evidence should be governed by the wishes of victims' families and survivors.[118] According to Caswell, this should be the primary ethical concern of documenting human rights violations to guarantee a full 'survivor-centred' approach.'[119] While this argument has some merit, it must be taken into account that ICTCs have always outsourced their investigations to third parties. This happened, for instance, in the *Lubanga* case, where the strategy to use local activists that knew better the community and attracted less attention than ICC investigative teams from The

112 On retaliation by the police arresting users for filming see N Steward Hanley, 'A Dangerous Trend: Arresting Citizens for Recording Law Enforcement,' 34 American Journal of Trial Advocacy (2010), 645- 668, 647–50.

113 EyeWitness User Safety FAQs, available at: https://eyewitness.tech/about-us/faqs/.

114 Ellis (n. 68), 273.

115 Roisin A Costello, 'International criminal law and the role of non-state actors in preserving open source evidence,' Cambridge International Law Journal 7 (2018), 268–283.

116 Kelly Matheson, Witness, *Video as Evidence Field Guide* (New York, Witness 2016), 1, 5.

117 Rebecca Lowe, 'Witnessing Atrocity' (International Bar Association), 11 June 2015, available at: https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=11e76b66-d949-4738-9347-e67fbfbb9441.

118 Michelle Caswell, 'Toward a Survivor-Centered Approach to Human Rights Archives: Lessons from Community-Based Archives,' Archival Science 14 (2014), 307–322 (309).

119 Ibid.

Hague backfired because in the first trial at the ICC, the first witness, a former child soldier, recanted his testimony because an intermediary manipulated him into testifying. Thus, the idea to avail of third-parties for the investigation is not new.[120] What is different is the '[l]ines of authority and responsibility [which] are 'obscur[ed], and fragment[ed]' as decision-making is distributed among the new mix of actors in the space.'[121] For instance, Hamilton identifies four groups of actors in this process: first, the NGOs that pushed for the creation of those apps; the technologists, who have the technical expertise to build the app; the users who record the data and, finally, the lawyers who catalogue and coordinate the user-generated evidence.

It must also be recognised that, in addition to engaging local users with a bottom-up approach through the collection of some evidence, the internet has changed the way ICTCs relate to individuals through a top-down approach. As already mentioned in Section IV, the internet has been an invaluable tool for outreach programmes. For instance, the ICC has been accused of having a neo-colonialist, and biased agenda since the majority of the defendants charged by the ICC are from the African continent.[122] Some authors even drew a parallelism between the Western investigators who fly from The Hague to Africa and back to 'extractive industry.'[123] Conversely, it has been demonstrated that outreach programmes promote victims' participation because, without a certain degree of understanding of what ICTCs do, it is unlikely that victims may come forward and participate in the proceedings.[124]

In conclusion, the use of the internet also helps in reshaping the society, incorporating diverse and less traditional canons and in challenging the narrative of official channels, as it will be clarified in the next section.[125]

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120 Elena Baylis, 'Outsourcing Investigations,' UCLA Journal of International Law and Foreign Affairs 14 (2009), 121–148.

121 Rebecca J. Hamilton (n. 107).

122 Douglas Smith, The International Criminal Court: The Long Arm of Neo-colonialism?,' International Affairs Review (1 November 2009).

123 Dustin N Sharp, 'Human Rights Fact Finding and the Reproduction of Hierarchies' in: Philip Alston and Sarah Knuckley (eds), *The Transformation of Human Rights Fact-Finding* (Oxford, New York: Oxford University Press 2016), 69–88 (78).

124 Patrick Vinck and Phuong N Pham, 'Outreach Evaluation: The International Criminal Court in the Central African Republic,' International Journal of Transitional Justice 4 (2010), 421–442.

125 Molly K. Land and Jay D. Aronson, 'The Promise and Peril of Human Rights Technology' in: Molly K. Land and Jay D. Aronson (eds), *New Technologies for*

VIII. Restorative Justice

The internet and new technologies can empower the community to find pathways to redress and to close the gap between the ICTCs and the local communities.

On the one hand, in terms of open source investigations, the evidence gathered for accountability purposes might also be used to preserve or re-create the cultural heritage that has been destroyed. Indeed, it might not only help under an architectural perspective to restore or recreate the building that has been destroyed or damaged but this evidence could be employed to develop educational materials, which aim to keep alive cultural rites, traditions and performing arts. The *Al-Mahdi* case is a clear example of that. As clarified in Section 3, Al-Mahdi was convicted for war crimes for the destruction of several religious buildings in Timbuktu. With the use of old pictures and YouTube videos, local craftsmen have already reconstructed many of the destroyed religious buildings.[126] Similarly, some organisations have understood the incredible potential of the internet and technology in this field. For instance, CyArk, a non-profit organization founded in 2003 following the destruction of 5th century Bamiyan Buddhas in Afghanistan, aims to digitally record, archive and share the world's most significant cultural heritage threatened by climate change, urban development, natural disasters and armed conflict.[127] Also, CyArk have recreated destroyed landmarks using 3D printing and virtual reality. Thus, news articles, maps, and social media posts can assist in documenting, restoring and recreating those landmarks building.

On the other hand, Section II discusses the ICTC's engagement programmes. Outreach programmes might help to fight the narrative according to which ICTCs are the new expression of the Western neo-colonialism power.[128] For instance, the ICC has been accused of being biased against the African continent.[129] The charges against the former Sudanese

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Human Rights Law and Practice (Cambridge: Cambridge University Press 2018), 1–20 (7).

126 See https://ilg2.org/2020/09/30/using-open-source-investigations-to-protect-and-preserve-cultural-heritage/.

127 See https://www.cyark.org/ourMission/.

128 Available at: https://theconversation.com/how-colonialisms-legacy-continues-to-plague-the-international-criminal-court-142063.

129 Mahmood Mamdani, 'Darfur, ICC and the New Humanitarian Order: How the ICC's 'Responsibility to Protect" is being turned into an Assertion of Neocolonial Domination,' Pambazuka News (396), 17 September 2008; Patrick Labu-

President Omar al-Bashir, Kenyan President Uhuru Kenyatta, Kenyan Deputy President William Ruto, former Ivorian President Laurent Gbagbo and former Congolese Vice-President Jean-Pierre Bemba are evidence of that.[130] Similarly, the little information about ICTCs' aims and plans foster misconceptions about their powers and activities.[131] Indeed, several studies have shown that the respect for the rule of law, accountability, and peace and reconciliation in the affected communities requires, at a minimum, some level of understanding of the work of the Court.[132]

In certain circumstances, however, logistical reasons suggested to hold some of the hearings in locations close to the locations where crimes were allegedly committed. For instance, the Trial Chambers suggested this approach in *Ruto and Sang*,[133] in *Ntaganda*[134] and in *Ongwen*.[135] However, the Presidency, the body responsible for holding hearings in a different location than The Hague, rejected those recommendations grounding its decision on costs and security risk.[136] Thus, the internet and new techno-

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da, 'The International Criminal Court and Perceptions of Sovereignty, Colonialism and Pan-African Solidarity,' AYILO/AADIO 20 (2014), 289–321.

130 Makau W. Mutua, 'Africans and the ICC' in: Kamari M. Clarke, Abel S. Knottnerus and Eefje de Volder (eds), *Africa and the ICC: Perceptions of Justice* (Cambridge: Cambridge University Press 2016) 1–36; Jean-Baptiste J. Vilmer, 'The African Union and the International Criminal Court: Counteracting the Crisis,' International Affairs 92 (2016), 1319–1342.

131 Clark (n. 99), 125.

132 Pierre Hazan, 'Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice,' International Review of the Red Cross 88 (2006), 19–47; Janine N. Clark, 'International War Crimes Tribunals and the Challenge of Outreach,' ICLR 9 (2009), 99–116; Varda Hussain, 'Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts In War Crimes Tribunals,' Va. J. Int´l L. 45 (2005), 547–585; Kingsley C. Moghalu, 'Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda,' Fletcher F. Wld. Aff. 26 (2002), 21–46; Victor Peskin, 'Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme' JICL 3 (2005), 950–961.

133 ICC, *Prosecutor v. Ruto and Sang*, Recommendation of 3 June 2013, no. ICC-01/09–01/11–763.

134 ICC, *Prosecutor v. Ntaganda*, Recommendation of 19 March 2015, no. ICC-01/04–02/06–526.

135 ICC, *Prosecutor v. Ongwen*, Recommendation of 10 September 2015, no. ICC-02/04–01/15–300.

136 ICC, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision of 36 August 2013, no. ICC-01/09–01/11–875-Anx; ICC, *Prosecutor v Ntaganda*, Decision of 15 June 2015, no. ICC-01/04–02/06–645-Red; ICC, *Prosecutor v. Ongwen*, Decision of 28 October 2015, no. ICC-02/04–01/15–330.

logies are often critical to establishing presence and enabling dialogue with the affected communities. However, since technology is unevenly distributed within and between countries, an initial assessment phase is of paramount importance. Thus, the ICTC should conduct a mapping exercise to determine the level of access and technology infrastructure within a given community.

In terms of technology tools, a useful solution would be to entrust this task to organisations active in mapping global communication infrastructure and to build partnerships with technology actors, such as the Engine Room, which is developing a project called TechScape to provide empirical data on technology use.[137] In addition to this, to fight the unequal distribution of the internet in remote and volatile realities, the ICTC could benefit from the use of innovative solutions, including a device known as 'BRCK,' which permits to access the internet without electricity.[138] However, the internet cannot help in terms of the substance of the engagement. Indeed, the ICTC must tailor their communication in multiple languages to reach different communities under investigation, as well as ensure that these messages are culturally sensitive, gender-balanced and empowering for those individuals whose voices might have been silenced within their own community.

IX. Conclusions

This chapter assessed the impact of the internet over ICL, focusing on two different aspects: evidentiary system and outreach programme. Section III discussed how the internet changed the type of evidence presented in the courtroom, while Section III demonstrated that the failure to engage with the local population had a negative impact on the legitimacy and legacy of the ICTCs. Thus, outreach could benefit from developments in new forms of technology to design innovative and meaningful outreach strategies.

With this background in mind, this chapter concluded that the internet had a positive influence on ICL goals. The internet might bring about better, cheaper, and safer prosecutions. Also, not only the use of social media is a tool to empower the individual to gain control over the information but the same technologies used to pursue individuals' retribution, and deterrence might, for instance, help to preserve destroyed or threatened

137 See at: https://www.theengineroom.org/.
138 See at: https://www.brck.com/.

cultural heritage for future generations. However, this chapter also showed these positive trends are also characterised by some setbacks. For instance, in light of the scarce international practice, some doubts on the admissibility and verifiability of this type of evidence exist. Further, the relationship with third parties that store the video footages was very concerning. For instance, YouTube recently removed many videos, accounts and channels documenting violence and human rights abuses, potentially jeopardising the future of war crimes prosecutions.