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THE EVALUATION OF SOCIAL MEDIA EVIDENCE IN THE TRIALS OF ATROCITY CRIMES(*)

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Abstract: On August 15, 2017, the International Criminal Court (ICC) issued an arrest warrant against Mahmoud Mustafa Busayf Al-Werfalli, Libyan military commander, accusing him of the murder of 33 people. The pre-trial Chamber founded most of its decision on social media-based evidence. In respect, an important question may arise before the ICC as to value of the social media evidence and /or whether it will serve as a basis fort he verdict if Al-Werfalli is caught. Because, in addtion to be proliferation of social media resoruces, the difficultise of the ICC in collecting evidence and bringing witnesses from the conflict zones cause such poen sources to be used in the trial. However, the characteristics of teh social media evidence have fundamental probleme, especilally regarding the reliability of these evidences. In this articel, we go back a bit and ask a provocative question, based on "cold evidence" practice of Nuremberg Trials Prosecutor Robert Justice Jackson: "May social media evidence replace witnessing one day? The difficulties of this possibility are discuseed in the article with the point of view of restorative justice, taking into account the potantial of international criminal courts to realize the right to truth.

Keywords: International Crimes (Atrocity Crimes), International Criminal Court, E-Evidence, Social Media Evidence, Restorative Justice.

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ULUSLARARASI AĞIR SUÇLARIN YARGILANMASINDA SOSYAL MEDYA DELİLLERİNİN DEĞERLENDİRİLMESİ

Öz: Uluslararası Ceza Mahkemesi (UCM) 15 Ağustos 2017 tarihinde, 33 kişinin ölümünden sorumlu tutulan Libya askeri komutanı Mahmoud Mustafa Busayf Al-Werfalli hakkında bir yakalama kararı çıkarttı. Bu karar esasen sosyal medyadan elde edilen video görüntülerine dayanmaktaydı. Bu itibarla uluslararası ceza mahkemesinin önünde, Al-Werfalli'nin yakalanması halinde sosyal medya delillerinin değeri ve/veya hükme esas teşkil edip etmeyeceği şeklinde önemli bir sorun ortaya çıkabilecektir. Zira, sosyal medya kaynaklarının çoğalmasının yanısıra UCM'nin çatışma bölgelerinden delil toplaması ve tanık getirtmesi konusundaki zorluklar bu tür açık kaynakların yargılamada kullanılmasına sebep olmaktadır. Bununla birlikte sosyal medya delillerin karakteristiği, bu delillerin özellikle güvenilirliği konusunda esaslı sorunlar barındırmaktadır. Bu makalede biraz geçmişe dönerek Nurmberg Yargılamaları savcısı Robert Justice Jackson'ın "soğuk delil" uygulamasından hareketle kışkırtıcı bir soru sormaktayız: Acaba birgün sosyal medya delilleri tanıklığın yerini mi alacaktır? Makalede bunun zorlukları, uluslararası ceza mahkemelerinin hakikat hakkını gerçekleştirme potansiyeli gözönünde bulundurularak onarıcı adalet bakışıyla tartışılmaktadır.

Anahtar Kelimeler: Uluslararası Suçlar, Uluslararası Ceza Mahkemesi, Elektronik Delil, Sosyal Medya Delili, Onarıcı Adalet.

I. INTRODUCTION

Bounding to the increasing use of digital technology all over the world, criminal investigations becomes inevitably dependent much more on digital evidence. Social media has recently become one of the significant digital evidence which may be accepted also as an open source evidence.

The growing quantity and quality of online sources has also considerable potential to strengthen the quality of information feeding into the preliminary examination stage of situations that are being considered by the International Criminal Court (ICC).[1] The Office of the Prosecutor at the ICC (OTP) issued an arrest warrant, based heavily on information derived from social media, for Mahmoud Mustafa Busayf Al-Werfalli, Libyan military commander, on August 15, 2017 by claiming killing 33 people between June

[1] MEHANDRU Nikita - KOENIG Alexa, "Open Source Evıdence and the International Crime", **Harvard Human Rights Journal** (Online Journal), Vol. 4, 2019 (https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/, available at 1.10.2022).

3, 2016 and July 17, 2017 in Eastern Benghazi. If he gets arrested, the probative value of these social media evidence will be discussed in the Court. Again in universal level, concerning torture claims in Syria the German Federal Court of Justice issued an arrest warrant based on thousands of high-resolution images captured by Syrian defector "Caesar", among other evidences.[2] And the future implementation may go further such social media will probably be used - as it happened in national trials of international crimes - for conviction as a part of whole evidence. Thus it needs to be discussed. Furthermore, the challenges to collect strong and sufficient evidence to bring perpetrators of mass atrocity crimes to justice became much more visible on the acquittals of Bemba[3] and Mathieu Ngudjolo Chui at the ICC. However, ICC is seen as a "leading forum for testing the greatest advances in the use of technology for truth-seeking purposes."[4] By 2011, the OTP has initiated investigations concerning the atrocities commited in Kenya, The Ivory Coast and Libya in which digital evidences such as mobile phones, email, social media were critical.[5]

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2 ARAVINDAKSHAN Sharngan / KAPOOR Radhika, The Potential and Hurdles of Fighting Atrocities in the Age of Social Media (https://thewire.in/tech/social-media-atrocities-evidence available at 1.10.2022).

3 ICC acquitted Mr Bemba, Mr Kilolo and Mr Mangenda of the charge of presenting evidence that a party knows is false or forged (Article 70(1)(b) of the Rome Statute), finding that this provision only applies to the presentation of documentary evidence, not to the calling of witnesses, as in the case at hand. See, Summary of the judgment on the appeals of the Prosecutor, JeanPierre Bemba Gombo, Fidèle Babala Wandu and Narcisse Arido (Conviction) Delivered by Judge Silvia Fernández de Gurmendi Presiding Judge in this appeal 8 March 2018; https://www.icc-cpi.int/itemsDocuments/180308-summ-judg-bembaEtAl-conviction.pdf (last visited, 31.5.2019).

4 COLE Allison, Technology for Truth: The Next Generation of Evidence (https://www.ijmonitor.org/2015/03/technology-for-truth-the-next-generation-of-evidence/, available at 10.10.2018), "The extent of citizen engagement in fact-finding was unprecedented, with an overwhelming deluge of potential evidence uploaded on YouTube, Twitter, and Facebook documenting the conflict in real time. The complexities of social media verification reached crisis mode as high-stake ICC allegations of mass rape, allegedly captured on video and then removed from YouTube, were questioned by the chairman of the UN Commission of Inquiry. It became obvious that it is essential to build ways of managing technology-generated digital evidence and to join the ICC in preparing for the tidal wave of new technology before it hit the ICC and flooded the courtroom with untested evidence.".

5 "Thus the Court began to consider ways to build its relevant capacity. In 2013, in response to both the prevalence of digital evidence and calls from the judges for stronger evidence, the Office of the Prosecutor embarked on a new strategy focused on open-ended investigations, with the goal of expanding and diversifying evidence collection, and exploiting alternative, non-witness-based evidence-gathering methods. This new strategy included a focus on improving the investigators' capacity to collect and analyze digital evidence and a commitment to creating a Digital Forensics Team within the Scientific Response Unit."

As a matter of course, beside advantages of electronic evidences like carrying metadata, volume and dublicibility, persistence, dispersion and searchibility; there are severe challenges caused form their dynamic nature, changible content, environment-dependence and obsolescence[6] such as the unreliability of certain metadata (such as time stamps on video footage), degradation of video with multiple transfers, subjectivity in interpreting visual imagery, ambiguity in low-resolution photographs and satellite imagery, lack of distinctiveness in city landscapes, and more.[7] Of course legal regime of evidence has been established on hard-copy documents, and electronic evidence requires a new perspective and legal frame.[8] It is obvious that this new era needs proper legal regulation especially for collection, preservation and evaluation of social media evidence to maximize the probative weight assigned to such information in court.[9]

In this paper, it is mainly aimed to point out the potential effects - advantages and disadvantages- of social media evidence in the trials of atrocity crimes in ICC, inspiring from the implementation of Robert Justice Jackson, the chief prosecutor of US in Nuremberg trials, who had tactically relied on hard evidence documentary evidence, rather than soft evidence

Digital Fingerprints: Using Electronic Evidence to Advance Prosecutions at the International Criminal Court, Human Rights Center School of Law University of California, Berkeley, February 2014 (https://www.law.berkeley.edu/files/HRC/Digital_fingerprints_interior_cover2.pdf, available at 01.10.2022).

6 For he qualification of e-evidences and its differences form classical documantary evidence, See, STANFIELD Allison, The Authentication of Electronic Evidence, Unpublished PhD. Thesis, Brisbane, Faculty of Law Queensland University of Technology January 2016 (https://eprints.qut.edu.au/93021/1/Allison_Stanfield_Thesis.pdf, availabile at 10.10.2020).

7 FREEMAN Lindsay, "Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials", **Fordham International Law Journal Forum,** Vol. 41, No. 2, 2018, pp. 283-336.

8 STANFIELD, p. 1.

9 A report from Human Rights Center was published so-called "The New Forensics: Using Open Source Information to Investigate Grave Crimes" highlights the discussion, conclusions, and recommendations from an historic workshop on evidence collection and legal accountability that the Human Rights Center hosted in Bellagio, Italy, from 2-6 October 2017, based on the question how internet-based investigations that rely on publicly accessible information-can be strengthened to improve investigations and prosecutions by uncovering critical evidence of serious international crimes, including genocide, crimes against humanity, and war crimes. This workshop was significant being the first international effort to begin harnessing the probative power and potential of open source investigations for legal accountability. See KOENIG Alexa, The New Forensics: Using Open Source Information to Investigate Grave Crimes (Bellagio Report), California, Human Rights Center School of Law University of California, Berkeley, 2018 (https://www.law.berkeley.edu/wp-content/uploads/2018/02/Bellagio_report_2018_9.pdf, available at 1.10.2022).

(eyewitness testimony) a lot of years ago from now. But the progress of the wide usage of digital evidence in the trials made me ask a provocative question here: "May SME replace eye witnessing oneday?"

In the first part, the potential effect of the social media as evidence for the fight against impunity in atrocity crimes is tackled with. In this regard, initially explanation of the related notions such as e-evidence, e-data, meta-data, social media and open source information will be given. After that the response of "why social media should be used as evidence in international trials?" will be searched by stating the difficulties of investigations such as bringing the powerful individuals in front of the court, entering into the conflict areas, the danger for eyewitnessing and so on. The progress of social media as evidence in investigations and also trials of the atrocity crimes will also be examined both with the examples from international and national level in order to indicate the potential of social media. In national level, some of the judgements concerning atrocity crimes made by the domestic courts of Germany, Finland and Sweden are striking, resulting convictions and should be thought about.

The second part of the paper is mostly allocated to the challenges of this new type of evidence, such as preservation, storage, admissibility, reliability mainly sourced from its dynamic and changeable characteristics. Since desinformation via internet is a phenomenon especially by the intent of some groups or the perpatrators itselfs, thus authenticity (originality, integrity, date/location of the recording) is one of the main challenges for the evaluation for reliability.

In the meantime, the general challenges about the evaluation of the evidences will also be raised, such as possibility of varied judgements because of the broad discretion given to the judges, the deferment of the admissibility decisions to the end of trial etc. which may additionally effect the evaluation of social media evidences. Thus the difficult task which is expected to be handled by the ICC is tried to be demonstrated.

Finally, in the conclusion part, the present situation of SME both in the investigations and trials of atrocity crimes will be discussed. The potentials and the challenges for the admissibility of social media as an evidence and its possible future implementation will be then evaluated in respect of restorative justice.

II. POTENTIAL CONTRIBUTION OF SME TO RESTORATIVE JUSTICE: "THE EYE OF THE HISTORY"[10]

In first glance, we may ask "Why Social Media should be used as evidence in international trials?" Essentially, ICC's challenges relating to witness testimony - given below- show the need for pursuing the collection and introduction of additional forms of evidence to support and as a partial alternative to witness testimony:

- Difficulties in bringing the powerful perpetrator in front of the courts[11]
- Difficulties in gathering evidence in the field[12]
- Limited budget of the court
- Voluminous and varied body of the international crimes
- Danger for prosecutors in collecting evidence
- Danger of eyewitnessing (For eg., Lubanga case).[13]

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[10] DUFFY Aoife, "Bearing Witness to Atrocity Crimes: Photography and International Law", **Human Rights Quarterly**, Vol. 40, No. 4, 2018, pp. 776-814.

[11] "Judicial mechanisms have often failed to hold perpetrators of atrocity crimes because of insufficient evidence. In 2007, constrained by a lack of evidence, the International Court of Justice was unable to hold Serbia responsible for the Bosnian genocide. Similarly, in the case of Gbagbo and Ble Goude - charged with crimes against humanity committed during post-electoral violence in the Ivory Coast - the ICC observed that the prosecutor had failed to submit "sufficient evidence." In India, criminal courts acquitted dozens of accused persons in the 2002 Gujarat riots for lack of evidence." ARAVINDAKSHAN Sharngan / KAPOOR Radhika, The Potential and Hurdles of Fighting Atrocities in the Age of Social Media (https://thewire.in/tech/social-media-atrocities-evidence available at 1.10.2022).

[12] "For ex: In 2016, the United Nations established an International, Impartial and Independent Mechanism (IIIM) to gather documentation that could potentially be used in future prosecutions of international crimes committed in Syria. The IIIM, like other external actors, has thus far been barred from entering Syria by the Syrian government, so it has focused on the collation of digital documentation, even signing a Protocol of Cooperation with Syrian civil society groups that collect digital evidence". HAMILTON Rebecca J., "Social Media Platforms in International Criminal Investigations", **Case Western Reserve Journal of International Law**, Vol. 52, Issue 1, 2020, p. 217.

[13] Lubanga case at ICC was dependent upon prooving the age of the soldiers who were claimed to be used, conscripted or enlisted beyond reasonable doubt. (unreliable testimonies under witness coaching, difficulties entering to Ituri Region, any opportunity of speaking to family members or reaching to the school records. Video footage portraying Lubanga inspecting troops who appeared to be under the age of fifteen and presented an expert report relating to Xray examinations of bones and teeth, resulted with conviction (*The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06. https://www.icc-cpi.int/drc/lubanga).

It should be mentioned that the arguments alined are connected to each other; and obstruct reaching the factfinding in the trials of atrocities. Regarding those challenges, existence and usage of social media evidence helps the judges to reach the truth by:

- Lessening the dependence on witnesses testimony and eliminates the need to call multiple witnessess,[14]
- providing evidences due to easy access and transfer due to its intangible nature, independency from place and time, transferable in seconds,[15]
- allowing for information to be introduced in court that captures dimensions of a situation, event or location that may be beyond (contemporaneous) human perception or may provide a counterpoint to a witness's recollection.[16] (For ex; in comprehending relevant geographical relationships such as the proximity of the mass graves to Srebrenica).

Thus, looking through wide frame, the admission of social media with other types of "open source information" as evidence of atrocity crimes may finally help to the peacebuilding processes (like truth commisions) as an restorative justice instrument, contributing

- deterrence (at least for some potential perpetrators),
- naming and shaming (ex: El Salvador, Liberia),[17]
- mobilize action,
- systemic reform,
- educational materials,
- history writing, memorising etc.

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[14] VAN SCHAACK Beth, "Innovations in International Criminal Law Documentation Methodologies and Institutions", **SSRN Electronic Journal**, February 5, 2019 (https://ssrn.com/abstract=3329102 or http://dx.doi.org/10.2139/ssrn.3329102, available at 1.10.2022).

[15] See, DUFFY, p.777, about how do photography and visual media bear witness to atrocity crimes in international law.

[16] FREEMAN, p. 302.

[17] WIEBELHAUS-BRAHM, Eric, "Promoting Accountability, Undermining Peace? Naming and Shaming in Transitional Justice Processes" In FRIMAN H.R. (eds), **The Politics of Leverage in International Relations**, Palgrave Studies in International Relations Series, Palgrave Macmillan, London, 2015, pp. 86 - 102 (https://doi.org/10.1057/9781137439338_5, available at 15.10.2019).

Thanks to the criminal trials the truth is uncovered; the denial of the unfairness is prevented significantly. An official message is deeply given that old policies are rejected. It is emphasized that everybody is in the scope of law. And the victims are given the right of speak out their traumas. On the other hand it shouldn't be forgotten that the contribution of criminal courts to peacebuilding processes is quiet limited because of several reasons[18]. Thus solely a criminal court can't not assure a full peacebuilding; the legal systems should strictly include some private processes like truth commisions. But trials may still be a strong instrument for peacebuilding especially if a legal system does not include any other processes.

III. EVOLUTION OF SME IN THE TRIALS OF ATROCITY CRIMES

After World War II, a movement began in national jurisdictions to increase the use of scientific evidence. **Nuremberg** trials were heavily based on documentary evidence since the existence of methodical record keepers (photos, videos, IBM computer records). In **Yugoslavia and Rwanda,** more advanced methods such as DNA profiling, use of satellites, unmanned aerial vehicules and other cutting-edge remote sensing technologies, expert witnesses (social-legal-forensic experts) were used at trials of atrocities. With the technological develepments especially the proliferation of cellular phones and other mobile devices with cameras, drone Technologies, the the usage of internet, particulary social media and other interactive web services were begun to be accepted as evidence at **Hybrid (internationalized) courts** (Sierra Leone 2002, Cambodia 2003, Lebanon 2007).

When we focus on ICC, it can be clearly said that early cases were eyewitness focused and relied almost entirely on testimonial evidence[19]. Later on video evidence (Lubango -Dem. Reb. Of Congo), audio-recordings of radio incepts (Uganda), facebook photos (Bemba Case), records of wire tranfers, call data records and telephone intercepts, e-mails, social media posts (Bemba et al), the verdicts were taken on basis those, among other evidence. Furthermore in Al-Mahdi Case, images from google earth, videos from youtube, audioclips found in the internet- interactiv digital platforms

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[18] MURATOĞLU Cansu, **Geçmişle Yüzleşme, İmkanlar ve İmkansızlıklar**, Zoe Yayıncılık, İstanbul, 2019, ss. 157- 158; ERÖZDEN Ozan, **Geçmişle Yüzleşme ve Ceza Adaleti: Yugoslavya Deneyimi**, Dost Kitabevi, Ankara, 2017.

[19] FREEMAN, p. 302.

(Al-Mahdi) were used for both initiating investigations and partly convicting. The defendant was identified through video footage for which he willingly posed and which he himself posted to social media as progaganda and promotion of Ansar Dine's attcak on cultural heritage sites in Timbuktu. And finally, solely social media images were based to an arrest warrant for Al-Werfalli.

Some National Courts took also initiative to use the digital evidence, mostly in the trials of Syrians charged with atrocity crimes. Germany[20], Sweden and Finland[21]. The courts convicted the accused of committing war crimes upon their self-posed photos of dead people. For ex, Frankfurt am Main Higher Regional Court, Germany (12 July 2016) used the photographs in fixing the elements of crime, among other evidence. The court stated that -fixing actus reus - *'any reasonable person confronted (with the photographs) would likely feel revulsion, disgust and be horrified';* - Fixing mens rea- *"accused relaxed position in the photos" shows intent of humiliating, degrading or violating the dignity of the people who had been beheaded and the heads belonged to members of the Syrian Army.* **Blekinge District Court,** Sweden, (6 Dec 2016) convicted the accused, an Iraqi migrant, of committing a war crime by posing next to a decapitated head on a plate along with other bodies from which the heads had been severed, and shared images of himself on Facebook, in which he was wearing a military uniform. The Appeal Court further clarified the defendant's argument of being forced to pose. It assessed the photos and concluded that the defendant was actively posing, by looking directly into the camera, putting his foot on the bodies and by showing victory gestures. Stuttgart Higher Regional Court (11 Jan 2018) convicted the defendant on stating that despite the defence of acting under command the opposite is understood from the captured facial expressions and gestures of the accused. In the opinion of the Senate, his displayed cheerfulness and serenity are compatible with neither an alleged in-

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[20] I would like to address special thanks to my colleague, Lawyer Orhun Ülbegi for the translation of German Courts decisions from its orijin.

[21] For decisions, see; Prosecuting War Crimes of Outrage Upon Personal Dignity Based on Evidence From Open Sources - Legal Framework and Recent Developments in the Member States of the European Union, Hague, February, 2018 (http://www.eurojust.europa.eu/doclibrary/genocide-network/KnowledgeSharing/Prosecuting%20war%20crimes%20of%20outrage%20upon%20personal%20dignity%20based%20on%20evidence%20from%20open%20sources%20(February%202018)/2018-02_Prosecuting-war-crimes-based-on-evidence-from-open-sources_EN.pdf, available at 1.10.2022).

ner indignation nor the alleged external pressure of the superior. **Stocholm District Court** - Swedfd - (17 Feb 2017) A Syrian asylum seeker, was also convicted of participating in the mass killing of seven captured Syrian soldiers (war crime) after the New York Times published a video of the killings in September 2013, on which the accused appeared. The information found on YouTube and Facebook to determine the time and place where the capture of the soldiers took place and could therefore demonstrate that very little time passed between the capture and the execution of the prisoners.

For the first instance, it may be said that the experience of national courts seem more striking and clear then ICC's, but not satisfying to built a standard about probative value of SME due to two main reasons: (i) Each cases given which are associated with SME are based on the same war crime charge: outrages upon personal dignity, in particular humiliating and degrading treatment. Thus the nature of this crime is more convenient to be proved with photos and videos. On the contrary ICC deals with various charges. (ii) In all those cases the accused did not deny to the images. So courts grounds are not satisfying at point of reliability. For this reason we should move on to ICC, and look closer.

IV. CHALLENGES AT ICC CONCERNING EVIDENCE

1. A General Challenge About the Evaluation of Evidence

Inadmissibility of the evidence is not regulated in details in Rome Statute and Rules of Evidence, but only for prohibited evidences. Thus the judges have broad discretion about the evaluation of evidences. Furthermore, the rules of evidence are generally conducted in civil law tradition where the judges come from different legal traditions and according to the chambers the burden of proof of the reliability of a document (digital evidences are accepted as documentary or forensic evidence[22]) lies on a party seeking its admissibility. For those reasons, it is difficult to create an established jurisprudence about the admissibility of the evidence in generale, and SME in speciale.

2. Challenges Derived From the Characteristics of SME

As a matter of course, beside advantages of electronic evidences like carrying metadata, volume and dublicibility, persistence, dispersion and searchibility; there are severe challenges caused from their dynamic nature,

[22] FREEMAN, p. 296.

changible content, environment-dependence, obsolescence.[23] And this dynamic character may cause the unreliability of certain metadata (such as time stamps on video footage), degradation of video with multiple transfers, subjectivity in interpreting visual imagery, ambiguity in low-resolution photographs and satellite imagery, lack of distinctiveness in city landscapes, and different perception of the visual[24] and more.[25]

Those challenges may probably effect negatively the fair trial and the judgement both in pre-trial and trial stages of a case. Such as:

A. Availability, Storage and Preservation

At pre-trail stage inwhich the most of the evidence supposed to be gathered, one of the biggest challenges concerning the issue is preserving and collecting the evidence. According to the report of Human Rights Watch in September 10, 2020; social media platforms are taking down online content which they consider terrorist, violently extremist, or hateful in a way that prevents its potential use to investigate serious crimes, including war crimes.[26] For ex, Facebook asserted in 2018 that 99.5%of terrorism-related content was taken down by algorithms before anyone could see it.[27]

Thus, potential evidence become inaccessible, even though companies begun to make some technical efforts to preserve them. However this effect may be limited because "relying on digital evidence also means relying on the platforms who host it."[28] On the contrary, quick preservation of the evidence is very important since the territories may change hands and be reverted to regime control, certain sources may not be accessible longer.[29] The

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23 For the qualification of e-evidences and its differences form classical documantary evidence, See, STANFIELD, p. 60.

24 DUFFY, p. 783.

25 FREEMAN, p. 297.

26 HAMILTON Rebecca J., "Social Media Platforms in International Criminal Investigations", **Case Western Reserve Journal of International Law**, Vol. 52, Issue 1, 2020, pp. 213-223.

27 ARAVINDAKSHAN Sharngan / KAPOOR Radhika, The Potential and Hurdles of Fighting Atrocities in the Age of Social Media (https://thewire.in/tech/social-media-atrocities-evidence available at 1.10.2022).

28 For the efforts of Youtube and etc. See HAMILTON, p.222.

29 For ex: "The International Military Tribunal for the Far East noted that under censorship regulations photographing prisoners of war was prohibited by the Japanese government, and when it became obvious that Japan would be forced to surrender, there was a concerted effort to destroy any evidence pointing to the ill-treatment of prisoners of war and civilian internees." DUFFY, p. 780.

cases might develop years after a crime has occurred and after information has disappeared from the internet.[30]

Furthermore the legal authorities have no direct access to this sort of evidence since they are often stored abroad or by a foreign service provider. In international level mutual legal assitance- MLA or European Investigation Order (in EU level) is a prerequisite to obtain them, means possibly loss of data regarding the length of the procedures. Ofcourse, there are some efforts to bypass the processes. For ex: *In national level,* In March 2018, United States enacted a CLOUD ACT (Clarifying Lawful Overseas Use of Data) that envisages the reach of US law enforcement authority over extraterritorially located data and setting out a mechanism for foreign governments to gain expeited access to US - held data in specified circumstances. There are also similar initiatives in national level for ex, UK, Belgium and Australia. *In EU level* e-evidence initiative is currently under debate of EU parliament (unmediated third-country Access). The aim is to assure direct requests for e-evidence sent by law enforecement authorities in the EU to service providers in other EU member State.[31] The regulation provides a mechanism for law enforcement in an investigating country to bypass the mutual legal assistance process and issue a disclosure order directly to aprivate company that holds evidence of interest, even, if that private company is located outside the investigating country's territorial jurisdiction.[32] However it has also challenges about jurisdiction, the lawfulness and 'forum-shopping', inefficiency, the privacy and data protection.[33]

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30 KOENIG Alexa, The New Forensics: Using Open Source Information to Investigate Grave Crimes (Bellagio Report), California, Human Rights Center School of Law University of California, Berkeley, 2018 (https://www.law.berkeley.edu/wp-content/uploads/2018/02/Bellagio_report_2018_9.pdf, available at 1.10.2022).

31 TOSZA Stanislaw, "The European Commission's Proposal on Cross-Border Access to E-Evidence", **EUCRIM**, Issue 4, 2018. p. 213.

32 DASCAL, p. 224.

33 "Third-country access to data unlawfully bypasses existing legally-binding channels, resulting in legal insecurity and mistrust, the lawfulness and 'forum-shopping' challenge: These practices and current discussions in international and regional fora fail to pass the lawfulness test in EU law. Some security actors are using regional venues ('forum shopping') to agree on new rules that would put at risk EU rule-of-law standards by legalising unilateral law-enforcement access by third countries to data held by private-sector actors. Arguments alleging that MLA agreement models are inefficient are not substantiated by the available evidence or statistics on their uses and practical operability. Third-country access to data outside MLA agreements is contrary to EU data protection acquis". See CARRERA Sergio / FUSTER Gloria González / GUİLD Elspeth, MITSILEGAS Valsamis, **Access to Electronic Data by Third-Country Law Enforcement Authorities**, Challenges to EU Rule of Law and Fundamental Rights, Centre for European Policy Studies (CEPS) Brussels, Brussels, 2015.

Concerning storage, there are some NGO's or companies dealing wih collecting and preserving SME such as International Bar Association (IBA), Humanitarian Data Exchange (HDX), Human Rights Data Analysis Group (HDRAG). For example, The EyeWitness to Atrocities project, launched under the auspices of the International Bar Association in partnership with LexisNexis, DLA Piper, and other international law firms, offers an app that complies with legal requirements of evidence when recording videos, photos, or audio related to war crimes, crimes against humanity, genocide, and torture. The app allows the capture, storage, and verified transfer of raw footage." The authentication process includes the capture of time and location via different sources to create a digital fingerprint of the images that renders the footage non-editable. The apps also ensure a chain of custody that prevents the hacking of the contents by external agents. However we meet again the dilemma concerning the storage of large datasets that contain quantities of digital personal information significant concerns about privacy and data-protection as well as the right to a fair trial.[34]

Impunity is another obstacle before preservation of the evidence in the trial of atrocities. Because "the destruction of evidence of war" has not been regulated as a crime in the Rome Statute.

B. Admissibility (Trial Stage)

Admissibility means that evidence should be relevant to the tried issue and is one of the requirements for an evidence to be accepted in a trial. Once evidence has been found to be admissible, the next question the court will consider is the weight that will be given to the evidence.[35]

A common sense about admissibility in international level, since there is no an overarching standard, the admissibility threshold in international tribunals may be alleged generally low relative to that in common law countries like the United States.[36]

(https://www.ceps.eu/system/files/Access%20to%20Electronic%20Data%20%2B%20covers_0.pdf, available at 15.5.2020).

34 LAVING Laura-Liisa, The Reliability of Open Source Evidence in the International Criminal Court, Unpublished Master Thesis, Lund, Faculty of Law Lund University, Spring 2014 (http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=4457910&fileOId=4457912, available at 1.10.2022).

35 STANFIELD, p.11.

36 MEHANDRU Nikita - KOENIG Alexa, "Open Source Evıdence and the International Crime", **Harvard Human Rights Journal** (Online Journal), Vol. 4, 2019 (https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/, available at 1.10.2022).

According to ICC "existence of a fact at issue more or less probable." For an item to be admitted into evidence it must satisfy a three-part test involving: *a) Relevance, b) Probative value,* comprised of two parts: reliability of the exhibit, the extent to which the exhibit is likely to influence the determination of a particular issue, *c) Absence of prejudicial effect on the rights of the accused.*

Social media evidence may raise substantial concerns if the information provided with it will be determinative of the case; editing can have substantial effects on the apparent guilt of a party in ways that are problematic because they may deviate from the objective truth underlying a particular event.[37]

Reliability is one of the big challenges in front of the courts. Because it is known that some of the terror organizations use the social media for an instrument of propaganda, by making desinformation. They distribute photos or videos of corps from fake masssacres, fabricated stories of rape etc.[38] Dynamic and changeable nature of e-evidences may create authentication problem. That's why the examination of this type of evidence strictly requires **expertness of judicial authorities or the assistance of experts**.[39] It is needed to distinguish the fakes from the real ones. Reliability may be assured in two ways[40]:

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[37] MEHANDRU Nikita - KOENIG Alexa, "Open Source Evıdence and the International Crime", **Harvard Human Rights Journal** (Online Journal), Vol. 4, 2019 (https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/, available at 1.10.2022).

[38] For ex; The *New York Times* reported disturbing details of a systematic campaign led by Myanmar's military elite to use Facebook's broad reach to incite violence against the Rohingya. Through fake accounts and celebrity pages, the military disseminated anti-Rohingya propaganda, fake news, and inflammatory photos to millions of followers. As many as 700 people were involved in spreading this content to users across the country. (https://www.publicinternationallawandpolicygroup.org/lawyering-justice-blog/2019/2/13/international-criminal-liability-in-the-age-of-social-media-facebooks-role-in-myanmar, available at 1.10.2022).

[39] "For ex: During General Galic's prosecution at the ICTY, photographic evidence showing bullet wound scars on a victim's back was favored by the court over a medical certificate that presented a different account of how the injuries were acquired. In the court's estimation, the photograph was determinative because it corroborated the witness's testimony regarding the "point of entry and exit of the bullet" and supported a theory about the direction of gunfire overlooked by the medical report." DUFFY, p. 801.

[40] See International Bar Association, International Criminal Court and International Criminal Law Programme, Evidence Matters in ICC Trials, 2016 (https://www.ibanet.org/document?id=Evidence-matters-in-icc-trials, available at 8.8.2022).

a) Authenticity (originality, integrity, date/location of the recording) (the prefered method.)[41]

b) Other indicas (such as bias of source, public/private nature of information, testimonial nature of publication, contemporaseeness of the recording, purposes for which it was created, ability to independently verify).

Metadata and chain of custody are important but not enough since they may be stripped away or changed. Therefore cannot be used to corroborate critical information about the videographer and uploader, as well as the time, date, and place of filming. Thus, it is suggested to establish standards around corroboration and verification that help maximize the evidentiary weight of information derived from open sources[42]

Deferment of the decision may be another challenge concerning the admissibility. The Chambers have discretion to decide when they want to make a determination on the admissibility of the evidence - they can do it during trial as the evidence is presented by the parties or wait until their final judgment. The majority of Chambers have opted for the latter. Thus, when the parties close their cases, they do not know which items of evidence will be admitted and which, if any, will be excluded (For ex: Bemba Case). As stated by the Judge Henderson[43] there is no legal ground to leave the settled implemention issuing admissibility decisions at the end of trial, after the closure of evidence. This misguided application is also irrelevant from the legal tradition of the judges and it has impact on the respective parties' ability to efficiently and adequately prepare**.** Furthermore it might be said that this application against the international criminal law may cause the violation of defendant's right.

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41 For ex.; in the last case (Al-Mahdi) ICC did not faced a difficulty concerning admissibility of digital evidence since the suspect plead his guilt. OTP used internal investigators to verify authentication. OTP used satelite images found on Google Earth by using screenshot method. Focused on ascertaining the date, time an location but not especially the authenticity of the images. However Google Earth images positional accuracy should be questioned since they can be changed by updating. (FREEMAN, p. 318).

42 MEHANDRU Nikita - KOENIG Alexa, "Open Source Evıdence and the International Crime", **Harvard Human Rights Journal** (Online Journal), Vol. 4, 2019 (https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/, available at 1.10.2022).

43 See, A dissenting opinion of Prosecutor v Laurent Gbagbo and Charles Blé Goudé, ICC-02/11-01/15-405, https://www.icc-cpi.int/Pages/ret6cord.aspx?docNo=ICC-02/11-01/15-405 (Visited at 10.12.21).

V. DISCUSSION: MAY SME REPLACE WITNESS TESTIMONY ONEDAY?

The question was "May SME replace witness testimony oneday?", by inspiring from the practice of Robert Justice Jackson, the chief prosecutor of US in Nuremberg trials. Since, the prosecution had tactically relied on hard evidence, rather than soft evidence (eyewitness testimony). By privileging historical document over personal testimony, Jackson aimed to "establish incredible events by credible evidence"; these written documents. Actually Jackson did not prefer to inject drama of victimization into the proceeding. However as mentioned by Arrendt, the sole aim of this trial should be to render the justice and the trial should not be conducted as an ordinary exercise of the criminal law so the discussion here is whether "usefulness of the didactic trial as a tool for exploring traumatic history."[44]

It would be better to answer the question for now and for future separately:

1. Current Situation

Regarding both the technical and legal challenges concerning SME, they can not replace live testimony and be accepted as a sole or direct evidence yet. Thus, they can be used only as **circumstantial, indirect evidence.** Furthermore abundance of evidence may also help the case to reach the truth regarding the complex nature of atrocity crimes. It is notable that the aforementioned evidence produced by the photojournalist Corinne Dufka was significant to Charles Taylor's successful prosecution, but Dufka also appeared as a witness at the ICTR.[45]

Initially, for the sake of confidentiality, they should be corroborated at least with the **expert examination**, also regarding different languages or dialects of defendants, the ambiaence and etc. (Remember the first techno experience between IBM and Nuremberg tribunals for simultonaues interpretation) And also with other evidence due to protect the rights of defendant.

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[44] LAWRENCE Douglas, "History and Memory in the Courtroom: Reflections on Perpetrator Trials", In REGINBOGIN Herbert/R.SAFFERLING Christoph (Editör), **The Nuremberg Trials: International Criminal Law Since 1945**, 60th Anniversary International Conference, K G - Saur München, München, 2006, pp. 95- 105 (https://library.oapen.org/handle/20.500.12657/31639, available at 1.10.2022).

[45] DUFFY, p.813.

Regarding the needs and its potential contribution to the trials of atrocity crimes, the system should be strenthened. As stated by ICC (Pros. V. Katanga and Ngudjolo) it should not be unilaterally. Parties should be involved in order to avoid being caught of-guard by the findings. That's also related with the **temporaneus evaluation** of the admissiblity **not at the end of the trial.**

But this evaluations **depends on the qualification and content of the decision**. As very well known the degree of doubt varies according to the quality of decision such as arrest, indictment or verdicts? ICC predicated a warrant of arrest to solely a social media evidence (Al-Werfalli Case). Since in order to convict the accused, the Court must be convinced of the guilt of the accused ***beyond reasonable doubt***. However, SME can not satisfy this standard yet.

ICC refers to treaties and rules of international law but not national rules governing evidence. And it has very simple frame. According to its jurisdiction an evidence is admissible according to its i. relevance, ii. probative values, iii. prejudicial impact. But it does not regulate in what conditions an evidence are inadmissible.

However there are three points -taken all together- which may pose some challenges for admissibility

1. ICC rules does not regulate the situations of inadmissibility. So the judges have broad discretion over it.
2. Furthermore and depending upon the first challenge, judges are from different law systems. Thus the evaluations of the admissibility may vary according to the tradition which the trial judge belongs to.
3. Jugdes generally wait untill the end of trial to decide admissibility

These 3 dimensions of admissibility issue may results different evaluations about the probative value of social media evidences. It may also cause difficulty to predict the decisions. This causes lack of victim satisfaction, obstacles for further argumentation for the accused. Thus IBA also advise that best practices should be guide for all chambers regarding the rights of accused.

Ofcourse, "the visual may present an insurmountable challenge to defense arguments, by disrupting and contradicting oral testimony and hearsay

evidence. However, between the transitive function of photography and its probative role as evidence, illuminated by common law rules of evidence that exclude visual evidence which would risk prejudicing a jury."[46]

2. Future Implementation

Despite this current situation SME will highly probably be more significant and has possibility to be respected as direct evidence regarding to technical developpements in trials of atrocity crimes. Thus this new era will need to be standardized legally especially according to the varity of e-evidence. Therefore as proposed by IBA best practices should be guided. And the measures should be taken involving:

- judges should be chosen carefully. In order to understand the evidence and its significance judges need considerable backround information and context on the historical, cultural and political nature of conflict.[47]
- concerning storage and preservation collaboration should be strengthen and disseminated
- In order to deal with the destruction of evidences of war, it should be regulated as a new type of crime in Rome Statute.

VI. CONCLUSION

I had started with a question to this article, "may SME replace witness testimony oneday, in the trials of atrocity crimes, inspiring from the arguments at Nuremberg trials. One may think that why not, especially regarding the difficulties and risks of eyewitnessing. However initially I would like to call attention to the nature of the atrocity crimes. When you take the deep travma of victims into account, their rights to describe it cannot be ignored, of course if these trials are accepted as a part of peacebuilding processes beyond punishing. The struggle with impunity also requires this. It is much more significant if the victims have no opportunity for alternative peacebuilding processes such as truth commisions in their own countries.

ICC's challenges in the trials of atrocity crimes show the need for pursuing the collection and introduction of additional forms of evidence to sup-

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46 DUFFY, p.777.

47 FREEMAN, p. 298.

port and as a partial alternative to witness testimony. Social media is inevitably one of them with its advantages. However, neither the concerns about reliability nor the general challenges of evidence at ICC can be ignored both for the sake of truth and also the fair trial rights.

ICC has efforts to improve its capacity. However much work remains to be done to carve a way forward with regards to open source/social media evidence. The approach taken to this type of evidence will be determinative for future implementation in conflicts such as Syria and Yemen. The complexity of SME evidence will continue to be a challenge in front of international criminal courts, especially in ICC. However, acquitions of the law such as fair trial should also be preserved. Fortunately Rome Statute also refers to the article 6 of European Convention on Human Rights. Remembering the very beginning of the trials of international crimes which ignored the fundamental rights such as principle of legality and right to a natural judge, the social media evidence should not cause a step backward.

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