

ONE IMAGE, ONE THOUSAND WORDS?  
DISCUSSING THE OUTER LIMITS OF RESORTING TO  
VISUAL DIGITAL EVIDENCE IN CASES INVOLVING  
INTERNATIONAL CRIMES

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*Abstract*

*Visual digital evidence plays a cardinal role in international law, particularly when it comes to international criminal law and the documentation of international crimes. This Article argues that resorting to visual digital evidence in cases involving international crimes should take place with cognizance of the prejudicial bias that such pieces of evidence can exert. In that sense, echoing the general impact of digital evidence on international criminal law, as stressed in the Berkeley Protocol on Digital Open Source Investigations as well as the Leiden Guidelines on the Use of Digitally Derived Evidence, this Article discusses why international courts as well as quasi-judicial bodies should make limited use of visual digital evidence in two major instances. The first comprises cases where visual digital evidence comes to add nothing to the identification of a specific individual as the culprit of an international crime. The second refers to instances where such evidence offers nothing or little to the question around the gravity of the international crime in question.*

## I. INTRODUCTION

The last few years have seen quasi-judicial bodies and even non-governmental organizations (NGOs) resorting to videos, photographs, and the use of computer graphics in order to substantiate international crimes.<sup>1</sup> These organizations draw on a practice that international criminal courts and tribunals have endorsed since the Nuremberg trials.<sup>2</sup> Although no settled definition for digital evidence exists, experts on digital evidence largely agree that it comprises “any data stored or transmitted using a computer that support [or] refute

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<sup>1</sup> See, e.g., Rep. of the OPCW Fact-Finding Mission in Syria Regarding an Alleged Incident in Khan Shaykhun, Syrian Arab Republic April 2017, ¶4.2, Annex 2, S/1510/2017 (June 29, 2017); Hum. Rts. Council, Rep. of the Detailed Findings of the Indep. Comm’n of Inquiry Established Pursuant to Hum. Rts. Council Resol. S-21/1, ¶ 192, U.N. Doc. A/HRC/29CRP.4 (June 24, 2015) [hereinafter HRC Report on Gaza Conflict]; Hum. Rts. Council, Detailed Findings of the Indep. Int’l Fact-Finding Mission on Myan., ¶¶ 126–39, U.N. Doc. A/HRC/42CRP.5 (Sept. 16, 2019); Emma Irving, *Suppressing Atrocity Speech on Social Media*, 113 AJIL UNBOUND 256 (2019).

<sup>2</sup> Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 YALE L.J. 449, 450–51, 454, 466 n.67 (1995); Christian Delage, *Bringing History into the Present Through Film: An Historian in the Archives of Nuremberg*, 37 CINÉASTE 34, 35 (2011). For the fact that the International Criminal Tribunal for the Former Yugoslavia (ICTY) resorted to aerial images showing mass graves near Srebrenica to substantiate its verdict that a massacre took place, see Lindsay Freeman, *Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials*, 41 FORDHAM INT’L L.J. 283, 302 (2018). Instances where the International Criminal Court (ICC) and its organs have resorted to such visual digital methods include cases involving the use of cellular phone images in the assertion of potential crimes investigated in the context of Kenya and Libya and the use of satellite images in the cases of Sudan and Mali. See Freeman, *supra*, at 289.

a theory of how an offense occurred or that address critical elements of the offense such as intent or alibi” or data that is stored or transmitted in a digital or binary form.<sup>3</sup>

Resort to digital evidence has been so broad that its use has sparked two large projects on both sides of the Atlantic in the last few years. In the United States in 2022, the Berkeley Protocol on Digital Open Source Investigations was published as a synergy between the U.N. High Commissioner of Human Rights and the Human Rights Center at the University of California, Berkeley.<sup>4</sup> In Europe, in the same year, the Leiden Guidelines on the Use of Digitally Derived Evidence in International Criminal Courts and Tribunals were published.<sup>5</sup> The Berkeley Protocol’s stated aim is to “identify international standards for conducting online research into alleged violations of international human rights law and international humanitarian and criminal law.”<sup>6</sup> The Leiden Guidelines are meant “to assist practitioners by comprehensively outlining the essential elements which should be considered before submitting [digitally derived evidence] to an international criminal court or tribunal.”<sup>7</sup> In other words, neither of these documents relate to the question of how the international adjudicator, judge, member of a quasi-judicial Committee of Inquiry, or other panel must assess the relevance of digitally derived evidence after such evidence has been admitted. Moreover, whereas the Berkeley Protocol acknowledges the psychological impact such evidence can exert for the investigator of international crimes,<sup>8</sup> any reference to such psychological impact is missing from the Leiden Guidelines. By focusing on the main phase of the proceedings and discussing how visual digital evidence can psychologically impact people called to make legal judgments by creating a bias in international proceedings that should not be condoned, this Article touches upon an issue left unaddressed by the aforementioned initiatives, yet should be included in future endeavors.

Scholars have already brought forth reservations to the unfettered use of visual digital methods as evidence and have pointed out to a number of possible problems this use may beget. These problems range from the authenticity

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<sup>3</sup> Jasmin Ćosić & Zoran Ćosić, *The Necessity of Developing a Digital Evidence Ontology*, PROC. OF THE 23RD CENT. EUR. CONF. ON INFO. & INTEL. SYS. 325 (2012), <http://archive.ceciis.foi.hr/app/public/conferences/1/papers2012/iss5.pdf>.

<sup>4</sup> OFF. OF THE U.N. HUM. RTS. HIGH COMM’R & HUM. RTS. CTR. & U.C. BERKELEY SCH. OF L., *Berkeley Protocol on Digital Open Source Investigations*, U.N. Doc HR/PUB/20/2 (2022) [hereinafter *Berkeley Protocol*].

<sup>5</sup> Sofia Aalto-Setälä et al., *Leiden Guidelines on the Use of Digitally Derived Evidence*, KALSHOVEN-GIESKES F. ON INT’L HUMANITARIAN L. (2022), <https://leiden-guidelines.com/guidelines> [hereinafter *Leiden Guidelines*].

<sup>6</sup> *Berkeley Protocol*, *supra* note 4, at vi.

<sup>7</sup> *Leiden Guidelines*, *supra* note 5, at 3.

<sup>8</sup> *Berkeley Protocol*, *supra* note 4, ¶ 78.

and source of this evidence and the need for such evidence to be verified,<sup>9</sup> especially once open-source evidence is involved,<sup>10</sup> to the storage of digital evidence and its ability to ultimately be retrieved from thousands of digital information pieces produced online every day. Scholars have equally underlined how bias is inherent in the decision-making processes involving evidence in general<sup>11</sup> and visual digital evidence in particular.<sup>12</sup> Nevertheless, nothing has been written so far on the bias that decision-makers like international adjudicators face once exposed to visual digital evidence.

This Article does not argue that such bias should lead altogether to the non-admission of visual digital evidence, but rather that judicial and quasi-judicial bodies should be cautious in admitting such evidence and do so only in cases where such reliance on this evidence is necessary for the question of whether an international crime has been committed, or for the elucidation of the identity of the culprit. For example, visual digital evidence has been essential in proving that the crime of genocide has occurred in the case of Myanmar and the Rohingya minority<sup>13</sup> or that war crimes were committed in Srebrenica.<sup>14</sup> Equally, in *Krstić*, a case involving the genocide of Bosnian Muslims in Srebrenica,<sup>15</sup> the ICTY concluded that the defendant knew,

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<sup>9</sup> Sam Dubberley et al., *Introduction: The Emergence of Digital Witnesses*, in DIGITAL WITNESS: USING OPEN SOURCE INFORMATION FOR HUMAN RIGHTS INVESTIGATION, DOCUMENTATION, AND ACCOUNTABILITY 5 (Sam Dubberley et al. eds., 2019); Armis Sadri, *The International Criminal Court and Digital/Open-Source Evidence: Challenging the Standard of Proof of ICC and the Dilemma of Imperilling the Universal Right to Fair Trial and Personal Dignity of Parties*, 4 INT'L CRIM. CT. BAR ASS'N NEWSL. 20, 20 (2019).

<sup>10</sup> Open-source information is information that is publicly available on the internet and can be accessed without the need of a warrant or the employment of coercive or illegal methods. See ALEXA KOENIG, HUM. RTS. CENT., U.C. BERKELEY SCH. OF L., THE NEW FORENSICS: USING OPEN SOURCE INFORMATION TO INVESTIGATE GRAVE CRIMES 7 (2018); Keith Hiatt, *Open Source Evidence on Trial*, 125 YALE L.J.F. 323, 324 (2016).

<sup>11</sup> Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Legal Decision Making*, 88 CORNELL L. REV. 583 (2003); Robert R. Kuehn, *Bias in Environmental Agency Decision Making*, 45 ENV'T L. 957 (2015); Lee J. Curley et al., *Cognitive and Human Factors in Legal Layperson Decision Making: Sources of Bias in Juror Decision Making*, 62 MED., SCI. & L. 206 (2022). For bias in the course of military investigations, see Tomer Broude & Inbar Levy, *Outcome Bias and Expertise in Investigations under International Humanitarian Law*, 30 EUR. J. INT'L L. 1303 (2019). For the case of bias stemming after exposure to visual images, see Shiri Krebs, *Through the Drone-Looking Glass: Visualization Technologies and Military Decision-Making*, LIEBER INST. WEST POINT (Feb. 11, 2022), [https://lieber.westpoint.edu/visualization-technologies-military-decision-making/?fbclid=IwAR3BfHjj52ZiiNUzlQea5g3WQekVimNUxtAVkJ\\_NZb8O8GumCxtZF-WIU0A](https://lieber.westpoint.edu/visualization-technologies-military-decision-making/?fbclid=IwAR3BfHjj52ZiiNUzlQea5g3WQekVimNUxtAVkJ_NZb8O8GumCxtZF-WIU0A).

<sup>12</sup> *Berkeley Protocol*, *supra* note 4, ¶ 27.

<sup>13</sup> See *infra* Part II.

<sup>14</sup> Freeman, *supra* note 2, at 302.

<sup>15</sup> *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

despite his denial, of the arrival in the region of his command of a certain sabotage unit, due to the existence of a video which showed Krstić walking past soldiers with uniforms of this unit.<sup>16</sup> Yet, with the emphasis placed so far by scholars and courts on the admissibility of visual digital evidence,<sup>17</sup> no rules have been solidified so far on the probative value and relevance of such evidence following its admission in the course of an international trial.<sup>18</sup> This makes international adjudicators more vulnerable to an uneven influence that an admitted video can exert as compared to witness testimony due to the mixture of sound and image that such a video entails. This does not mean that reliance on visual digital evidence should not take place at all. Rather, the argument is that we must rethink under which circumstances reliance on such evidence should take place. For example, visual digital evidence may be utterly important for proving factual issues. On the other hand, this evidence becomes less important once international courts and quasi-judicial bodies are called to assess legal questions such as the legality of the resort to force in the first place by the state or non-state actors accused of war crimes.

Whereas this Article focuses its analysis inside the international criminal law framework, the relevant arguments and conclusions can extend beyond international criminal bodies, into other international courts, or even quasi-judicial bodies like Commissions of Inquiry. For example, it must be noted that the Commission of Inquiry on Eritrea relied on satellite images in order to confirm the use of certain detention facilities in the country,<sup>19</sup> and the same is true for the Commission of Inquiry on Syria in a bid to attest laws of war violations and possible crimes committed during the conflict in the country.<sup>20</sup>

The analysis will proceed as follows: the next Part will discuss how visual digital evidence has been used so far in international criminal law. The Article will then discuss how images can impact our emotional world, before it further

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<sup>16</sup> *Id.* ¶ 278.

<sup>17</sup> Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10-87-Anx, Annex to Decision on Issues Relating to Disclosure: Unified Technical Protocol (“e-Court Protocol”) for the Provision of Evidence, Witness and Victims Information in Electronic Form, ¶ 1, (Mar. 30, 2011), [https://www.icc-cpi.int/RelatedRecords/CR2011\\_03065.PDF](https://www.icc-cpi.int/RelatedRecords/CR2011_03065.PDF); Aida Ashouri et al., *The 2013 Salzburg Workshop on Cyber Investigations: An Overview of the Use of Digital Evidence in International Criminal Courts*, 11 DIGIT. EVIDENCE & ELECTR. SIGNATURE L. REV. 115, 116 (2014).

<sup>18</sup> For the fact that relevance has generally been the issue in international documents accepting resort to digital evidence, see Remigijus Jokubauskas & Marek Świerczyński, *Impact of the Council of Europe Guidelines on Electronic Evidence in Civil and Administrative Law*, 9 GLOB. J. COMPAR. L. 1, 11–13 (2020).

<sup>19</sup> Hum. Rts. Council, Rep. of the Detailed Findings of the Comm’n of Inquiry on Hum. Rts. in Eri., U.N. Doc. A/HRC/29/CRP.1, Annex VI at 467–76 (June 5, 2015).

<sup>20</sup> Hum. Rts. Council, Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/44/61, ¶ 2 (Sept. 3, 2020).

delineates factual and legal grounds which support the caveated reliance on visual digital evidence in cases involving international crimes.

## II. INTERNATIONAL CRIMES AND THE USE OF VISUAL DIGITAL EVIDENCE

The end of the previous century and the first years of the current saw an increase in the creation of international criminal courts and tribunals. The International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court all constitute examples of the proliferation of international judicial bodies assigned to try international crimes.<sup>21</sup> Yet, with scholars expressing skepticism about whether international criminal justice could deliver its aims,<sup>22</sup> domestic judges started to increasingly become involved in proceedings involving international crimes.

For example, domestic judges have served on courts established by the international community. The Special Court for Sierra Leone,<sup>23</sup> the Extraordinary Chambers in the Courts of Cambodia,<sup>24</sup> the Special Tribunal for Lebanon,<sup>25</sup> and the Kosovo Specialist Chambers<sup>26</sup> are all examples of courts of hybrid form where national judges sat alongside their international peers. Yet, more recently, the war in Syria has underlined the role domestic courts can also play to the distribution of international criminal justice. Along these lines, domestic judges have become seized of international crimes in the course of proceedings opening in national jurisdictions,<sup>27</sup> either due to the fact that the

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<sup>21</sup> Fausto Pocar, *The Proliferation of International Criminal Courts and Tribunals: A Necessity in the Current International Community*, 2 J. INT'L CRIM. JUST. 304 (2004).

<sup>22</sup> See NANCY AMOURY COMBS, *FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* 3 (2010) (including further references to other authors).

<sup>23</sup> Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L.F. 185, 232 (2001).

<sup>24</sup> JOHN D. CIORCIARI & ANNE HEINDEL, *HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* 14–40 (2014); Laura McGrew, *Hybrid Court, Hybrid Peacebuilding in Cambodia*, in *TRANSITIONAL JUSTICE, INTERNATIONAL ASSISTANCE AND CIVIL SOCIETY: MISSED CONNECTIONS* 144 (Paige Arthur & Christalla Yakinthou eds., 2018).

<sup>25</sup> Giorgia Tortora, *The Special Tribunal for Lebanon and the Discussion of Residual Mechanisms*, 104 AM. SOC'Y INT'L L. PROC. 45, 45 (2010).

<sup>26</sup> Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* [ZaöRVrv] 967, 988 (2016); Silvia Steininger, *The Kosovo Specialist Chambers: A New Chapter for International Criminal Justice in the Balkans*, *VÖLKERRECHTSBLOG* (Mar. 14, 2018), <https://voelkerrechtsblog.org/de/the-kosovo-specialist-chambers>.

<sup>27</sup> Patrick Kroker & Alexandra Lily Kather, *Justice for Syria? Opportunities and Limitations of Universal Jurisdiction Trials in Germany*, *EJIL:TALK!* (Aug. 12, 2016), <https://www.ejiltalk.org/justice-for-syria-opportunities-and-limitations-of-universal->

victim or the culprit are nationals of the particular State or due to reliance on the universal jurisdiction doctrine.<sup>28</sup> This emergence of domestic courts as major protagonists in the trying of international crimes has equally placed them in the epicenter of the use of visual digital evidence as incriminating evidence.<sup>29</sup> In a number of cases which have reached the courtroom in different European countries, judges have relied on videos and photos in order to assert that international crimes relating to the conflict in Syria have been committed.<sup>30</sup>

On an international level, as mentioned above regarding the cases of Krstić and of Srebrenica, the use of visual digital evidence before international criminal courts and tribunals has firm roots in the jurisprudence of the ICTY.<sup>31</sup> The ICC has largely drawn on this legal heritage. Whereas the Prosecutor's volition to resort to visual digital evidence has been emphasized in the context of the investigation opened on Russia's invasion of Ukraine,<sup>32</sup> the use of such

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jurisdiction-trials-in-germany; Thierry Cruvellier, *European Justice Strikes on Crimes in Syria*, JUSTICEINFO.NET (Feb. 21, 2019), <https://www.justiceinfo.net/en/tribunals/national-tribunals/40383-european-justice-strikes-on-crimes-in-syria.html>. For a list of Syria-related cases that opened in European jurisdictions the last few years, see *Syrian Civil/Criminal Cases & Investigations of War Crimes (2011-Present)*, CTR. FOR JUST. & ACCOUNTABILITY, [https://cja.org/wp-content/uploads/2020/02/Syria-Cases-January-2020-Update.Final\\_.pdf](https://cja.org/wp-content/uploads/2020/02/Syria-Cases-January-2020-Update.Final_.pdf) (last visited Feb. 25, 2023). Indicatively, in Germany, there are over one hundred international criminal law-related investigations underway, many of which relate to Syria and Iraq. See U.N. Secretary-General, *The Scope and Application of the Principle of Universal Jurisdiction*, ¶¶ 37–40, U.N. Doc. A/77/186 (July 18, 2022).

<sup>28</sup> Kroker & Kather, *supra* note 27.

<sup>29</sup> Karolina Aksamitowska, *Digital Evidence in Domestic Core International Crimes Prosecutions: Lessons learned from Germany, Sweden, Finland and The Netherlands*, 19 J. INT'L CRIM. JUST. 189 (2021).

<sup>30</sup> For an example before Swedish courts, see the case of Droubi where the defendant was sentenced for torture after videos of him torturing another man in Syria were found on his cell phone as well as uploaded to Facebook. *Facebook 'Torture' Video Leads to Sweden Arrest*, THE LOCAL (Feb. 2, 2015, 3:59 PM), <https://www.thelocal.se/20150202/syria-fighter-charged-in-sweden-over-war-crime>; *Sweden Sentences Syrian Rebel to Five Years for War Crime*, BBC (Feb. 26, 2015), <https://www.bbc.com/news/world-middle-east-31639378>. For cases before German courts, see the case of Aria Ladjedvardi, where the defendant posted on Facebook videos of him defiling persons he had executed. See Eléonore Coeuret, *German Jihadist Convicted of War Crime*, ILAWYER (July 14, 2016), <http://ilawyerblog.com/german-jihadist-convicted-war-crime>; Karolina Aksamitowska, *Digital Evidence in Domestic Core International Crimes Prosecutions*, 19 J. INT'L CRIM. JUST. 189, 199 (2021). Along these lines, see also the Ousamma case before the Dutch courts, Hof 's Gravenhage juli 23, 2019, NJ 2019, Cases 09/7480003-18 & 09/7480003-19, Judgment, §§ 5.3.2, 5.3.3.

<sup>31</sup> See sources cited and text accompanying *supra* notes 15–17.

<sup>32</sup> *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 State Parties and the Opening of an Investigation*, INT'L CRIM. CT. (Mar. 2, 2022), <https://www.icc-cpi.int/Pages/item.aspx?name=2022-prosecutor-statement-referrals-ukraine>; see also Mike Corder, *ICC Prosecutor Launches Ukraine War*

evidence has always been at the epicenter of the Court's activities, following the investigations on Libya.<sup>33</sup> It is inside this Libyan framework, for example in the case of Al Werfalli, that the Prosecutor relied on video documentation of murders posted on social media to issue an arrest warrant.<sup>34</sup>

Even beyond the Libyan context, the ICC has resorted to visual digital evidence in a number of other cases. For example, in *Bemba*, the prosecution presented two Facebook screenshots as evidence; the defense immediately scrutinized the authenticity of these screenshots and their ability to be admitted as evidence.<sup>35</sup> Similarly, *Al-Mahdi* was a case which stressed the importance of digital evidence in international criminal proceedings.<sup>36</sup> Satellite images and videos were used in order to convict Al Mahdi for the destruction of cultural monuments in Mali.<sup>37</sup>

ICC jurisprudence also offers an interesting indication of the ambivalent way international criminal judges have faced visual digital evidence so far. On one hand, echoing a sense of cautiousness vis-à-vis these pieces of evidence, the ICC judges held that the originality of this evidence must be proven for it to be admitted.<sup>38</sup> At the same time, once admitted, the ICC judges tend to grant absolute probative value to visual digital evidence. For example, in the *Lubanga* case, the judges determined the age of the alleged child soldiers based on a video the prosecution presented to the trial.<sup>39</sup> The defense argued that the video should not be relied upon because the video lacked corroboration, but the Appeals Chamber held that there was no need for the video to have such corroborating evidence to be relied upon by the judges.<sup>40</sup> In that

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*Crimes Investigation*, ASSOCIATED PRESS (March 3, 2022), <https://apnews.com/article/russia-ukraine-genocides-crime-war-crimes-europe-499d7b6a9e955f659284b2edc6f1c508> (citing Assistant Professor Marieke de Hoon, who notes that open-source investigations are possible in the case of Russia's invasion to Ukraine, which could include the use of satellite images and social media posts).

<sup>33</sup> Alison Cole, *Technology for Truth: The Next Generation of Evidence*, INT'L JUST. MONITOR (Mar. 18, 2015), <https://www.ijmonitor.org/2015/03/technology-for-truth-the-next-generation-of-evidence>.

<sup>34</sup> Prosecutor v. Al-Werfalli, ICC-01/11-01/17, Warrant of Arrest, ¶¶ 13–22 (Aug. 15, 2017).

<sup>35</sup> Yvonne Ng, *How to Preserve Open Source Information Effectively*, in DIGITAL WITNESS: USING OPEN SOURCE INFORMATION FOR HUMAN RIGHTS INVESTIGATION, DOCUMENTATION, AND ACCOUNTABILITY, *supra* note 9, at 150.

<sup>36</sup> Alexa Koenig et al., *New Technologies and the Investigation of International Crimes: An Introduction*, 19 J. INT'L CRIM. JUST. 1, 1–2 (2021).

<sup>37</sup> Prosecutor v. Al Mahdi, ICC-01/12-01/15, Transcript of 22 August 2016, at 28, 41, 44 (Aug. 22, 2016), [https://www.icc-cpi.int/transcripts/cr2016\\_05767.pdf](https://www.icc-cpi.int/transcripts/cr2016_05767.pdf).

<sup>38</sup> Prosecutor v. Katanga, ICC-01/04-01/07, Decision on the Prosecutor's Bar Table Motions, ¶ 24 (Dec. 17, 2010).

<sup>39</sup> Prosecutor v. Lubanga, ICC-01/04-01/06, Judgment on the Appeal of Mr Thomas Lubanga Dyilo Against His Conviction, ¶¶ 216–18 (Dec. 1, 2014).

<sup>40</sup> *Id.*



sense, even in the absence of other pieces of evidence and without accounting for possible bias exerted by the projected images, the judges decided to rely on this video for the defendant's conviction.<sup>41</sup>

The use of visual digital evidence to document international crimes or breaches of international law goes beyond trials in the realm of the ICC. As noted above, in a case that was not decided by the ICC due to lack of jurisdiction, but was heard by the International Court of Justice (ICJ), videos posted on Facebook were indispensable as evidence of the fact that Myanmar perpetrated genocide against the Rohingya minority.<sup>42</sup>

The aforementioned examples portray the benefits new technologies have for the investigation and successful prosecution of international crimes. Equally though, scholars have emphasized how new technologies can also present challenges for international justice.<sup>43</sup> New technologies can not only set the stage for asserting whether a crime has been committed, but sometimes they can encourage the crime itself. For example, in the previous case of Myanmar and the Rohingya genocide, social media was used to incite hatred against the Rohingya and fuel attacks.<sup>44</sup> Equally, new technologies not only elucidate the circumstances under which the crime took place, but also augment the bias exerted on international adjudicators and decision-makers, be they prosecutors, judges, or members of fact-finding missions. This is particularly true with visual digital evidence due to the power that images can exert on the human psyche. Given this impact, the next sections will discuss two broader categories of cases involving international crimes where visual digital evidence should be cautiously considered. This does not mean it should not be considered at all. Yet, this should be done on auxiliary grounds,<sup>45</sup> once resort to other written evidence is not enough to answer the question of

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<sup>41</sup> *Id.* ¶ 223.

<sup>42</sup> See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Application Instituting Proceedings and Request for Provisional Measures, 2019 I.C.J. 178 (Nov. 11); see also Emma Irving, 'The Role of Social Media is Significant': Facebook and the Fact Finding Mission on Myanmar, *OPINIO JURIS* (Sept. 7, 2018), <http://opiniojuris.org/2018/09/07/the-role-of-social-media-is-significant-facebook-and-the-fact-finding-mission-on-myanmar>.

<sup>43</sup> Federica D'Alessandra & Kirsty Sutherland, *The Promises and Challenges of New Actors and New Technologies in International Justice*, 19 *J. INT'L CRIM. JUST.* 9 (2021).

<sup>44</sup> For the fact that visual digital evidence such as videos posted on social platforms like Facebook's have been used to fuel attacks against the Rohingya in Myanmar, see Silvia Venier, *The Role of Facebook in the Persecution of the Rohingya Minority in Myanmar: Issues of Accountability under International Law*, 28 *ITALIAN Y.B. INT'L L.* 231 (2019); Hum. Rts. Council, Detailed Findings of the Indep. Int'l Fact-Finding Mission on Myan., U.N. Doc. A/HRC/42CRP.5, ¶ 466 (Sept. 16, 2019).

<sup>45</sup> For the fact that new technologies in evidence should be used as "'force-multiplier' for other evidence" due to the challenges they present, see D'Alessandra & Sutherland, *supra* note 43, at 14.

whether the crime has been committed, or to determine the identity of the culprit.

### III. THE PSYCHOLOGICAL IMPACT OF VISUAL DIGITAL EVIDENCE AS A GROUND FOR LIMITING ITS USE IN INTERNATIONAL CRIMINAL PROCEEDINGS

The psychological impact visual digital evidence can exert in an international trial was pinpointed from the early stages of international criminal justice. For example, in the Nuremberg trials, the judges exposed to a film of the Nazi atrocities retired in silence, without announcing when the next session would be.<sup>46</sup> Equally, the use of techniques such as projecting of certain parts of the video in slow motion or the use of stop-action, where the side presenting the video as evidence can freeze in certain moments, can beget bias. This is because the presenting side can freeze the moments it wants to present its stance more favorably, while letting the rest of the video play as is, with no further emphasis to the points that the presenting side deems should not be stressed.<sup>47</sup> In that sense, the judges are subconsciously presented with an eschewed, subjectively painted version of the events.

As human beings we rely on our senses, and we tend to accept the subjective way we perceive our surrounding environment as objective truth.<sup>48</sup> To the extent that they are genuine, our tendency is to believe that videos and photos cannot but say an “objective” truth.<sup>49</sup> Videos and photos do, in essence, convey a subjective perception of a given reality. It is for this reason that Mehandru and Koenig have stressed that when assessing digital images, courts must know where, how, and by whom the relevant images were captured.<sup>50</sup> Cognizance of the subjectivity inherent in visual digital evidence is all the more important in the realm of criminal proceedings. There, prior bias and established preconceptions can create an adverse impression regarding the defendant or predetermine a certain impression about the propensity of a certain

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<sup>46</sup> Douglas, *supra* note 2, at 455.

<sup>47</sup> Adam T. Berkoff, *Computer Simulations in Litigation: Are Television Generation Jurors Being Misled?*, 77 MARQ. L. REV. 829, 850–51 (1994).

<sup>48</sup> JAMES B. GLATTFELDER, INFORMATION-CONSCIOUSNESS-REALITY: HOW A NEW UNDERSTANDING OF THE UNIVERSE CAN HELP ANSWER AGE-OLD QUESTIONS OF EXISTENCE 395–411 (2019); Gary Hatfield, *Perceiving as Having Subjectively Conditioned Appearances*, 44 PHIL. TOPICS 149 (2016).

<sup>49</sup> Riccardo Vecellio Segate, *Cognitive Bias, Privacy Rights and Digital Evidence in International Criminal Proceedings: Demystifying the Double-Edged AI Revolution*, 21 INT'L CRIM. L. REV. 242, 255 (2021).

<sup>50</sup> Nikita Mehandru & Alexa Koenig, *Open Source Evidence and the International Criminal Court*, HARV. HUM. RTS. J.: ONLINE J. (Apr. 15, 2019), <https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court>.

individual to commit a crime.<sup>51</sup> Along these lines, given that sight is the predominant sense through which we perceive the outer environment,<sup>52</sup> exposure to visual images not only helps answer certain questions investigators or judges may have on certain crimes, but equally shapes our emotional reaction to certain people or events.<sup>53</sup>

Whereas studies have not been consistent on the level of impact images exert on the judgment of judges and of the jury in the realms of criminal trials, these studies have pointed out that such an impact does exist.<sup>54</sup> For example, psychologists have studied how graphs impact comprehension and render messages more palpable and transmissible to the human brain.<sup>55</sup> Graphs involving different colors and shapes—including, for example, those generated by computer simulations—may affect the judges' readiness to interact with the graph, accepting with no further questions the elements the graph presents.<sup>56</sup>

This psychological impact that visual digital evidence can exert becomes more crucial in international criminal trials. In contrast to other international courts and tribunals where a conviction brings in only State liability, and possibly questions of damages, the ICC, as well as other international criminal

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<sup>51</sup> For example, in a relevant experiment, jurors were shown to be biased towards juveniles tried as adults. See Connie M. Tang & Narina Nunez, *Effects of Defendant Age and Juror Bias on Judgment of Culpability: What Happens When a Juvenile Is Tried as an Adult?*, 28 AM. J. CRIM. JUST. 37 (2003). For research finding a belief that rape defendants who had dated a black female were considered less likely to commit another rape in the future, see Cynthia E. Willis, *The Effect of Sex Role Stereotype, Victim and Defendant Race, and Prior Relationship on Rape Culpability Attributions*, 26 SEX ROLES 213 (1992).

<sup>52</sup> Lauren Reinerman-Jones et al., *Senses in Action*, in HUMAN FACTORS IN PRACTICE: CONCEPTS AND APPLICATIONS 9 (Haydee M. Cuevas et al. eds., 2017).

<sup>53</sup> Mental health studies have noted how individuals have been psychologically impacted even through their indirect exposure to a certain event, for example, by watching a traumatic event on television. See Patrick A. Palmieri et al., *Prevalence and Correlates of Sleep Problems in Adult Israeli Jews Exposed to Actual or Threatened Terrorist or Rocket Attacks*, 6 J. CLIN. SLEEP MED. 557, 560–62 (2010); see also William E. Schlenger et al., *Psychological Reactions to Terrorist Attacks: Findings from the National Study of Americans' Reactions to September 11*, 288 JAMA 581, 584 (2007) (concluding in the case of NYC residents in the aftermath of the 9/11 attacks that “[t]he prevalence of probable PTSD was also significantly associated with the number of hours of TV coverage of the attacks that participants reported watching on September 11 and in the following few days”); Jennifer Ahern et al., *Television Images and Probable Posttraumatic Stress Disorder After September 11: The Role of Background Characteristics, Event Exposures and Perievent Panic*, 192 J. NERVOUS & MENTAL DISEASE 217 (2004).

<sup>54</sup> Darby Aono et al., *Neuroscientific Evidence in the Courtroom: A Review*, COGNITIVE RSCH.: PRINCIPLES & IMPLICATIONS, 2019, at 1, 17.

<sup>55</sup> See Priti Shah & James Hoeffner, *Review of Graph Comprehension Research: Implications for Instruction*, 14 EDUC. PSYCH. REV. 47 (2002).

<sup>56</sup> See *id.* For the fact that a U.S. court ruled that computer simulations should be admitted with no further hearing, see Berkoff, *supra* note 47, at 835.

courts and tribunals, extends liability to the individual.<sup>57</sup> It is important to stress that sometimes visual digital evidence can offer little to the question of whether the defendant committed a certain act but can contribute the most to the creation of a certain climate.<sup>58</sup> By creating impressions against a defendant, rather than bringing in new incriminatory evidence, the use of visual digital means may drift the court away from impartial standards, compromising the defendant's right to a fair trial. Based on that, the Nuremberg Tribunal as well as domestic jurisdictions, have held that visual digital evidence should not be admissible in cases where it serves as cumulative evidence and does not establish *per se* the defendant's guilt.<sup>59</sup>

The creation of bias through the psychological impact that images exert can work both ways. Certainly, if the prosecution brings forth videos where the accused party is shown perpetrating similar crimes in cases other than the one before the court, the judge may be persuaded of the need for the defendant to be harshly punished. Yet, States can also resort to visual digital methods to exonerate their armies from criminal liability. In this regard, some armies equip their combat soldiers with cameras on their helmets so they have proof of how an operation took place if they are faced with war crimes charges.<sup>60</sup> Similarly, States have used videos to demonstrate that attacks on a particular target were approved only once it was certified that there were no civilians in the vicinity.<sup>61</sup> Visual images could also unveil combatants hiding among civilians or storing ammunition in civilian sites. While such videos are important for deciphering the liability of each party to the conflict, if they are used with the purpose of showcasing the military ethics of the State whose national is being prosecuted, they can equally exert a form of bias on judges, this time not against but in favor of the defendant. If a party to a conflict is portrayed, for example, as generally adhering to the laws of war, the

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<sup>57</sup> See Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>58</sup> Douglas, *supra* note 2, at 457 (citing TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 187 (1992)) (describing this phenomenon in the Nuremberg trials).

<sup>59</sup> Douglas, *supra* note 2, at 466–67. For the fact that this is the case with some U.S. courts, see Pierre Paradis, *The Celluloid Witness*, 37 U. COLO. L. REV. 235, 257–60 (1965).

<sup>60</sup> Sarah Basford Canales, *Mandatory Body Cams on Soldiers 'A Very Good Idea', General Angus Campbell Says*, CANBERRA TIMES (Nov. 22, 2020), <https://www.canbereratimes.com.au/story/7022737/mandatory-body-cams-considered-for-troops-following-war-crimes-report>; see also Dan Lafontaine, *Army Approves Fielding of New Tactical Media Kits*, U.S. ARMY (Feb. 28, 2018), [https://www.army.mil/article/201186/army\\_approves\\_fielding\\_of\\_new\\_tactical\\_media\\_kits](https://www.army.mil/article/201186/army_approves_fielding_of_new_tactical_media_kits) (describing the U.S. Army's use of media kits to gather visual and audio data while in the field).

<sup>61</sup> See THE STATE OF ISR., *THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS* ¶ 157 (2009).

implication is that this adherence carries into the particular case before the court concerning a particular defendant or incident.

The need for international criminal judges to be aware of the role psychology can play in criminal proceedings echoes the similar need in domestic law jurisdictions when they refer to the exclusion of “prejudicial evidence,” which can create bias against the defendant, infringing upon his right to a fair trial.<sup>62</sup> Exclusion of such evidence can thus be seen as related either to the violation of the right to a fair trial or more broadly to the very concept of prejudicial evidence as evidence negating *ipso facto* the integrity of the proceedings, regardless of their attachment to any further human rights violations. The first approach is largely undertaken by civil law countries following the inquisitorial system in criminal proceedings,<sup>63</sup> whereas the latter is characteristic in common law jurisdictions.<sup>64</sup>

Studies have demonstrated how even judges can be affected by legally irrelevant information.<sup>65</sup> Along these lines, international criminal judges should not be deemed shielded from any bias that visual digital methods can exert.<sup>66</sup> This fact should not lead them to exclude a priori visual digital evidence, but rather, they should assess it cautiously in cases where either it does not help to resolve the legal question of the case, or it disproportionately affects the integrity of the proceedings and the defendant’s right to a fair trial. These two issues will be discussed in the next sections.

#### IV. LIMITING THE USE OF VISUAL DIGITAL EVIDENCE ON FACTUAL GROUNDS

The first limitation in the use of visual digital evidence is factual and is related to the exigencies of international criminal proceedings. As noted,<sup>67</sup> such evidence is useful in cases where the questions revolve around the circumstances of the crime or the identity of the culprit. Yet, if the questions that need to be answered extend beyond this framework, it is doubtful whether

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<sup>62</sup> See, e.g., FED. R. EVID. 403 (U.S.) (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice.”).

<sup>63</sup> See Jenia Iontcheva Turner & Thomas Weigend, *The Purposes and Functions of Exclusionary Rules: A Comparative Overview*, in *DO EXCLUSIONARY RULES ENSURE A FAIR TRIAL? A COMPARATIVE PERSPECTIVE ON EVIDENTIARY RULES* 255, 261 (Sabine Gless & Thomas Richter eds., 2019).

<sup>64</sup> See, e.g., FED. R. EVID. 404 (U.S.); Criminal Justice Act 2003, c. 44, §§ 98–113 (Eng. & Wales). Regarding the United Kingdom, see also *O’Brien v. Chief Constable of South Wales Police* [2005] UKHL 26 ¶ 32 (Lord Phillips of Worth Matravers) (UK).

<sup>65</sup> My Bergius et al., *Are Judges Influenced by Legally Irrelevant Circumstances?*, 19 *L. PROBABILITY & RISK* 157, 162 (2020).

<sup>66</sup> Segate, *supra* note 49.

<sup>67</sup> See discussion *supra* Part II.

visual digital methods can play a preponderant role in international criminal justice.

The question that should be asked is whether and to what extent war images depicting the suffering of civilians following an attack should be presented to international adjudicators. Civilians bearing extensive wounds, orphaned children, and extensive material damage in houses and other infrastructure undoubtedly constitute images that speak to our hearts. But if digital evidence is meant to help the international judge find the truth on whether a crime has been committed or about the identity of its culprit, the question is whether these images add anything to that particular quest.

This question takes an additional dimension in the realms of modern warfare. Modern warfare tactics involve increasingly urban warfare and the hiding of combatants among civilians.<sup>68</sup> This, by definition, leads to targeting and operational decisions which, strictly speaking, may be in the ambit of the laws of war, still create a stark and distressful visual impact to the extent that their legality is ultimately questioned.<sup>69</sup>

For example, the use of white phosphorous does not violate the laws of war.<sup>70</sup> Yet, its use in heavily populated areas has been denounced due to the extensive burns it causes to affected civilians. The targeted killings policy in general,<sup>71</sup> the targeted killings in particular of members of security forces other than combatants, such as policemen,<sup>72</sup> and the Israeli knock on roof practice<sup>73</sup> all enter this category where the question of whether war crimes have been committed does not relate to the factual proof of certain incidents but to whether they are legally characterized as violations of the laws of war. To the legal arguments that will erupt for and against, visual digital methods

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<sup>68</sup> Jonathan Horowitz, *Precautionary Measures in Urban Warfare: A Commander's Obligation to Obtain Information*, HUMANITARIAN L. & POL'Y BLOG (Jan. 10, 2019), <https://blogs.icrc.org/law-and-policy/2019/01/10/joint-blog-series-precautionary-measures-urban-warfare-commander-s-obligation-obtain-information>.

<sup>69</sup> For the limitations that stem from accountability during military operations, see *Georgia v. Russia (II)*, App. No. 38263/08, ¶ 141 (Jan. 21, 2021), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-207757%22%5D>. *But see id.* ¶ 9 (Judges Yudkivska, Wojtyczek & Chanturia, dissenting).

<sup>70</sup> I.J. MacLeod & A.P.V. Rogers, *The Use of White Phosphorous and the Law of War*, 10 Y.B. INT'L HUMANITARIAN L. 75, 82 (2007); Matthew J. Aiesi, *The Jus in Bello of White Phosphorous: Getting the Law Correct*, LAWFARE (Nov. 26, 2019, 8:00 AM), <https://www.lawfareblog.com/jus-bello-white-phosphorus-getting-law-correct>.

<sup>71</sup> For the general framework that should govern targeted killings in cases where an armed conflict exists, see David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171 (2005); Solon Solomon, *Targeted Killings and the Soldiers' Right to Life*, 14 ILSA J. INT'L & COMPAR. L. 99 (2007).

<sup>72</sup> See Hum. Rts. Council, Report on the United Nations Fact-Finding Mission on the Gaza Conflict, ¶ 33, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009).

<sup>73</sup> HRC Report on Gaza Conflict, *supra* note 1, ¶¶ 235–39.

have little to offer because it is not the facts that are in dispute, but their legal interpretation. In that sense, images of civilians bearing phosphorus burns, large number of corpses, or destroyed houses are limited in what the images can add to the legal debate on the legality of these practices.

Equally, the graphic depiction of areas where international crimes allegedly took place may be relevant, yet of limited utility to prosecuting these crimes. The graphic depiction of the areas shelled during the siege of Tripoli in Libya falls into this category.<sup>74</sup> Whereas it is easier now with 3D graphics to see concretely how the different neighborhoods of the city were shelled, it is questionable how such visualization can serve the purposes of the international criminal trial and the distribution of justice. If the images are meant to keep track of shelling incidents, this task could be performed equally through the non-visual recordkeeping. If the purpose of the graphics is to show that Tripoli was heavily shelled, the ICTY reached the same conclusion in the *Dragomir Milošević* case concerning the siege of Sarajevo without any resort to graphic depictions.<sup>75</sup> In this particular case, the mode of the attacks used in the conflict, meaning the continuous shelling of the city with no concrete targets, was enough for the ICTY to conclude that these attacks were indiscriminate and were meant to spread terror to affected civilians.<sup>76</sup> There is no reason to assume that an international criminal court could not do the same in the case of Tripoli. Yet, irrespective of whether 3D depictions add also substantial information to the case, it is true that they equally facilitate the sentencing of the defendant by exerting a deep psychological effect on the judges and the jury and augmenting the possibility of human bias or error.<sup>77</sup>

On this account, international criminal courts and tribunals have been cautious in accepting such images or 3D depictions as evidence. In the case of *Katanga*, the ICC decided to admit as demonstrative evidence with “little evidentiary value” satellite images that depicted the village of Bogoro.<sup>78</sup> In the *Ayyash* case, heard by the Special Tribunal for Lebanon, the judges admitted as “‘demonstrative’ exhibits” 3D depictions before and after the explosion in Beirut in February 2005 that the Prosecution brought to the Chamber’s

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<sup>74</sup> See *All Belligerents in Libya, 2011*, AIRWARS, <https://airwars.org/conflict-data/?country=libya> (last visited Feb. 25, 2023).

<sup>75</sup> Prosecutor v. Milošević, Case No. IT-98-29/1-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Dec. 12, 2007).

<sup>76</sup> *Id.* ¶¶ 912, 1006.

<sup>77</sup> See Sarah Zarnsky, *Why Seeing Should Not Always Be Believing: Considerations Regarding the Use of Digital Reconstruction Technology in International Law*, 19 J. INT’L CRIM. JUST. 213, 219–21 (2021).

<sup>78</sup> Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Disclosure of Evidentiary Material Relating to the Prosecutor’s Site Visit to Bogoro on 28, 29 and 31 March 2009, ¶ 39 (Oct. 7, 2009).

attention.<sup>79</sup> The Chamber held, though, that such depictions would be used merely for evaluating other pieces of evidence.<sup>80</sup>

#### V. LIMITING RESORT TO VISUAL DIGITAL EVIDENCE ON STRUCTURAL GROUNDS AFFECTING THE FAIRNESS OF THE PROCEEDINGS

The question of whether visual digital evidence can ultimately compromise the integrity of the proceedings and the defendant's right to a fair trial is not unique to international criminal bodies. It applies also to domestic courts, but it is exacerbated in international criminal proceedings. Domestic jurisdictions have cautioned against admission of images of poor quality to the extent that, as unreliable evidence, they can be seen as compromising the defendant's right to a fair trial.<sup>81</sup> In international criminal proceedings, the ICTR and the ICTY have both stressed how cautious the international judge must be in relying on visual identification evidence and how "even the most confident witnesses who purport to identify an accused" can lead to "miscarriage[s] of justice."<sup>82</sup> Yet, the tribunals have not always adhered to these visual identification standards they have themselves set.<sup>83</sup> This has been explicitly underlined in the *Lubanga* case before the ICC through the dissenting opinion of Judge Anita Ušacka. In her opinion, Judge Ušacka stressed how, although the ICC has proclaimed a "cautious approach" in the assessment of visual digital evidence whose probative value is questionable, in practice it has not

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<sup>79</sup> Prosecutor v. Ayyash, Decision on Prosecution's Motion to Admit into Evidence Photographs, Videos, Maps, and 3-D Models, STL-11-01/T/TC, ¶ 9 (Special Trib. For Leb. Jan. 13, 2014).

<sup>80</sup> *Id.*

<sup>81</sup> English courts have been instructed to examine whether the image is sufficiently clear so that the jury can compare it with the defendant in court, to take into account the amount of time the witness recognizing the defendant through a photograph has spent with him, or whether that witness has acquired familiarity with the photographic material by spending hours examining it. See Attorney Generals Reference (No. 2 of 2002) [2002] EWCA Crim 2373, [2003] 1 Cr App R 21, ¶ 19 (UK). For the argument that identification of suspects through videos or images should not be admitted as pieces of evidence if such evidence is not clear due to such unreliable evidence compromising fairness of the proceedings, see Christina Begakis, *Eyewitness Misidentification: A Comparative Analysis Between the United States and England*, 15 SANTA CLARA J. INT'L L. 173, 192 (2017).

<sup>82</sup> Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeal Judgment, ¶ 34 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001); see also Prosecutor v. Ndindabahizi, Case No. ICTR-2001-75-I, Judgment and Sentence, ¶ 24 (July 15, 2004) (encouraging caution when dealing with eyewitness testimony); Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, Judgment and Sentence, ¶ 49 (May 16, 2003) (noting the inherent difficulties of identification evidence).

<sup>83</sup> COMBS, *supra* note 22, at 18.



adhered to this position.<sup>84</sup> Along these lines, Judge Ušacka criticized the Appeals Chamber for accepting as evidence videos which nevertheless were either blurry or did not show the full face of its protagonists.<sup>85</sup> According to Judge Ušacka, these videos did not provide objective criteria which could lead to convictions beyond reasonable doubt, but rather created a prejudicial effect.<sup>86</sup>

A second peril to the integrity of the proceedings stems from the question of how such evidence has been obtained. In cases like those involving the genocide of the Rohingya in Myanmar or the conflict in Syria, a large amount of the relevant visual evidence has been produced by third parties, like NGOs and individuals.<sup>87</sup> Yet, reliance on these third parties begets two major questions that courts must address. The first relates to cases where the person who captured such images was not permitted to be present in the location where the images were created.

In cases of a person infiltrating a closed military area or the theatre of military operations and documenting possible crimes taking place there, the State can always argue that such videos and photos cannot be used as evidence since, absent any State permission for the person to be there, the images have been illegally captured.<sup>88</sup> The fact that the individual contravened domestic law arrangements to record international crimes must be considered by international criminal judges called to discuss the admissibility of any produced

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<sup>84</sup> Prosecutor v. Lubanga, ICC-01/04-01/06-3121 A 5, Dissenting Opinion of Judge Anita Ušacka, ¶¶ 1, 53 (Dec. 1, 2014), [https://www.icc-cpi.int/RelatedRecords/CR2014\\_09850.PDF](https://www.icc-cpi.int/RelatedRecords/CR2014_09850.PDF); see also *id.* ¶¶ 61, 65, 75.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* ¶¶ 1, 53, 61, 65, 75.

<sup>87</sup> With regards to the Rohingya genocide, Amnesty International's fieldwork gathered over 200 interviews as well as videos and photographs. ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ¶ 15 & n.19 (Nov. 14, 2019). For the case of the Syrian conflict, see Beth Van Schaak, *Mapping War Crimes in Syria*, 92 INT'L L. STUD. 282, 285 (2016).

<sup>88</sup> For the argument that State consent is relevant in the case of journalists who want to report from places where that State's army conducts military operations, see WILLIAM H. BOOTHBY & WOLFF HEINTSCHEL VON HEINEGG, *THE LAW OF WAR: A DETAILED ASSESSMENT OF THE U.S. DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 103* (2018). For the fact that international law accommodates for the existence of "war correspondents" under certain parameters, see Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(4), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (referring to war correspondents); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International and Armed Conflicts art. 79, June 8, 1977, 1125 U.N.T.S. 3 (referring to journalists); see also Alexandre Balguy-Gallois, *The Protection of Journalists and News Media Personnel in Armed Conflict*, 86 INT'L REV. RED CROSS 37 (2004); Prosecutor v. Brđanin, Case No. IT-99-36, Decision on Interlocutory Appeal, ¶ 29 (Dec. 11, 2002).

visual digital evidence. Whereas civil law jurisdictions have appeared more adamant *a priori* not admitting any illegally obtained evidence, common law jurisdictions have appeared more flexible in the matter, allowing the admission of such evidence if it does not seriously compromise the integrity and fairness of the proceedings.<sup>89</sup>

International criminal courts and tribunals have followed the common law stance on the issue.<sup>90</sup> Articles 95 and 117 of the ICTY and ICTR Rules of Procedure, respectively, stipulate that no piece of evidence will be admitted if it is “obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.”<sup>91</sup> Equally, subsections 4 and 7 of Article 69 in the ICC Statute set a framework where even illegally obtained evidence is not automatically excluded; rather, the judges assess its reliability, effect on the integrity of the proceedings, and the prejudice such evidence may cause to the defendant’s right to a fair trial.<sup>92</sup>

Inside this framework, the emphasis on the word “seriously” renders clear that the disqualification of such evidence based on its nature is the exception rather than the norm in international criminal practice. It is true that in the past, both in the realms of the ICTY and the ICC, the courts have held that evidence acquired through violation of domestic law is not to be declared *ipso facto* inadmissible.<sup>93</sup> Nevertheless, violation of domestic law provisions is not an unimportant issue that can be easily dismissed by a judicial institution that aims to uphold the law. Rather, international criminal bodies are called to

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<sup>89</sup> For the argument that, in common law jurisdictions, illegally obtained evidence can be admissible if it is accurate and does not compromise the fairness of the proceedings, see Berkoff, *supra* note 47, at 838 (discussing the U.S. view); PETRA VIEBIG, *ILLICITLY OBTAINED EVIDENCE AT THE INTERNATIONAL CRIMINAL COURT 2* (2016) (describing that courts in continental law jurisdictions largely base their judgments on the exclusionary rule according to which illicitly obtained evidence is not admitted).

<sup>90</sup> By doing so, international criminal courts and tribunals take a similar stance with other international courts, such as the European Court of Human Rights. See Hock Lai Ho, *The Fair Trial Rationale for Excluding Wrongfully Obtained Evidence*, in *DO EXCLUSIONARY RULES ENSURE A FAIR TRIAL? A COMPARATIVE PERSPECTIVE ON EVIDENTIARY RULES* 283, 284 (Sabine Gless & Thomas Richter eds., 2019).

<sup>91</sup> Int’l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 95, U.N. Doc. IT/32/Rev.46 (Oct. 20, 2011); see also Int’l Crim. Trib. Rwanda, Rules of Procedure and Evidence, Rule 117, U.N. Doc. MICT/1/Rev.7 (Dec. 2020).

<sup>92</sup> Rome Statute, *supra* note 57, at art. 69; see also VIEBIG, *supra* note 89, at 105–06; Prosecutor v. Gombo, ICC-01/05-01/13, Public Redacted Version of “Further Corrected Version of ‘Prosecution’s Consolidated Response to the Appellants’ Documents in Support of Appeal”, ¶¶ 18–20, nn.11–13 (Oct. 13, 2017).

<sup>93</sup> See Amal Clooney, *Collection of Evidence*, in *PRINCIPLES OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE* 240, n.44 (Karim Khan et al. eds., 2010). For the fact that evidence acquired through torture can never be deemed admissible, however, see Segate, *supra* note 49, at 252–53.

assess any violations of law vis-à-vis parameters such as the importance of the provided evidence, the gravity of the crime in question, or the difficulty in obtaining such evidence without violating domestic laws of the State accused of international crimes.<sup>94</sup>

Of course, there lurks a danger for the rule of law and for international transparency. If States can cite violations of domestic law provisions in order to argue that recordings were created by persons who lacked authority to do so in the first place, States can use this as an excuse to legislate harshly on the issue and deny access even to members of the press. On this account, I do not argue that visual digital evidence should be taken with a grain of salt once it is produced by persons whose presence in the battlefield is provided for in the realms of international law, even if States have barred these people from accessing the field of battle. This would mean reducing reliance on evidence from journalists, camera crews, and foreign correspondents. At the same time, more cautiousness should be exerted towards individuals who find themselves in the battlefield without any prior army permission and for which international law does not envision any such battlefield presence in the first place. In other words, images taken by a photographer or a cameraman managing to enter the conflict zone, even though the army has prohibited his presence there, should be more openly welcomed in international proceedings than images coming from an individual who is not a member of press and who for political or ideological reasons decided to defy any warnings to avoid the particular conflict zone. This is the case, given that freedom of the press must be sustained even in conditions of war and under the premises that members of press act inside a professional framework when it comes to the presentation of facts around a certain conflict. These guarantees are lacking in cases where images and videos are taken only by individuals who have managed to infiltrate into the field of battle with no prior press credentials or without the military's consent. Nowadays, the ease with which someone can take a photo or a video through a cell phone renders the production of images something that can be undertaken any time, by any person, with no particular expertise. In that sense, international crimes can be documented by victims of atrocities or enemy belligerents, sometimes even by persons who have themselves perpetrated such crimes.<sup>95</sup> International stakeholders, including international adjudicators, must be cognizant of the fact that third party documentation of international crimes is still evidence of the fact that these crimes may have taken

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<sup>94</sup> See, e.g., Rome Statute, *supra* note 57, at arts. 17, 53, 69, 78. For the fact that these parameters are included in the Australian federal legislation, see *Evidence Act 1995* (Cth) s 138.

<sup>95</sup> See Konstantina Stavrou, *Open-Source Digital Evidence in International Criminal Cases: A Way Forward in Ensuring Accountability for Core Crimes?*, OPINIO JURIS (Jan. 26, 2021), <https://opiniojuris.org/2021/01/26/open-source-digital-evidence-in-international-criminal-cases-a-way-forward-in-ensuring-accountability-for-core-crimes>.

place. The way these videos and images have been obtained, though, can open a cycle of politicization against the international bodies agreeing to admit them as evidence and rely on them for their final verdict.

Along these lines, the parties whose interests align with exclusion of such evidence can argue that this evidence must not be admitted. In the common law tradition—which the international criminal institutions reflect on the matter of evidence admission, as stated above—evidence whose probative value is outweighed by contestations of unfair prejudice may be excluded.<sup>96</sup> This is the case either because such evidence cannot be deemed reliable<sup>97</sup> or because it is no longer considered relevant. Whereas the latter is the stance under the U.S. Federal Rules of Evidence,<sup>98</sup> even in this case, the objection to taking such evidence into account lies in its credibility. As the *Daubert* standard discussion in U.S. procedural law has revealed, when it comes to scientific evidence, reliability is a layer that buttresses the relevancy parameter.<sup>99</sup> As can be easily imagined, when visual digital methods are being brought as evidence against a State, that State can attack the reliability of such evidence by citing “unfair prejudice” grounds only because a particular video or image comes from an NGO or third party whose political agenda may conflict with the government’s policies. Mehandru and Koenig underline how it is important for any visual digital evidence to be introduced in an international trial together with contextual information.<sup>100</sup> This can allow international judges and members of quasi-judicial bodies to assess such evidence in its correct context, minimizing any risks of bias the visual evidence can exert.

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<sup>96</sup> See FED. R. EVID. 403 advisory committee’s note; Mary Mikva, *An Indelicate Balance: Rule 403 of the Federal Rules of Evidence*, 30 LITIG. 36, 36 (2003). Regarding the relevant arrangement in the United Kingdom, see Police and Criminal Evidence Act 1984, c. 60, § 78 (UK).

<sup>97</sup> See Calvin William Sharpe, *Reliability Under Rule 702: A Specialized Application of 403*, 34 SETON HALL L. REV. 289 (2003) (discussing the relationship between probative value, prejudicial effect, and reliability of expert testimony).

<sup>98</sup> See sources cited *supra* note 95.

<sup>99</sup> See Thomas L. Bohan, *Scientific Evidence and Forensic Science Since Daubert: Maine Decides to Sit out on the Dance*, 56 ME. L. REV. 101, 105 (2004); Solon Solomon, *International Criminal Courts and the Introduction of the Daubert Standard as a Mode of Assessing the Psychological Impact of Warfare on Civilians: A Comparative Perspective* 92–103 (June 1, 2019) (Ph.D. dissertation, King’s College London), [https://kclpure.kcl.ac.uk/portal/files/115693026/2019\\_Solomon\\_Solon\\_1270287\\_ethesis.pdf](https://kclpure.kcl.ac.uk/portal/files/115693026/2019_Solomon_Solon_1270287_ethesis.pdf). For the fact that digital evidence holds similarities with scientific evidence, see Lindsay Freeman, *Researcher*, Hum. Rts. Ctr., Presentation at the Workshop on Evidence Collection and Legal Accountability, Organized by the Berkeley Hum. Rts. Ctr. (Oct. 2017).

<sup>100</sup> Nikita Mehandru & Alexa Koenig, *ICTS, Social Media & The Future of Human Rights*, 17 DUKE L. & TECH. REV. 129, 132 (2019).

## VI. VISUAL DIGITAL EVIDENCE IN INTERNATIONAL LAW: QUO VADIS?

The aforementioned observations about the restrictive role visual digital evidence is bound to play in certain instances should not be seen as pertaining only to international criminal trials. On the contrary, the arguments put forth here acquire another value once seen in the context of trials undertaken by courts beyond the ICC, such as the ICJ or the European Court of Human Rights (ECtHR). In fact, as the war in Ukraine has shown us, all three courts—the ICC, the ICJ, and the ECtHR—can become seized in parallel by cases stemming from the same factual situation.<sup>101</sup> In that sense, visual digital evidence that can be used before the ICC could also be brought forth before the other two courts. This broadening of the visual digital evidence role beyond international criminal justice is important given that international courts largely rely on written evidence, meaning there is little to no reliance on oral testimonies.<sup>102</sup> Visual digital evidence provides the opportunity for the notion of evidence, in general, to attain another dimension that the visualization effect provides, similar to the effect live testimony of a witness before these courts would offer. It is inside this framework that the bias elements discussed in the previous section should be present in the judges' minds, especially if the State accused of certain international law violations puts forth politicization claims and decides not to appear before the international court in question.<sup>103</sup>

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<sup>101</sup> See *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime in Genocide (Ukr. v. Russ.)*, Application Instituting Proceedings, 2022 I.C.J. 182 (Feb. 26); *Statement of the ICC Prosecutor, Karim A.A. Khan QC on the Situation in Ukraine*, INT'L CRIM. CT. (Feb. 28 2022), <https://www.icc-cpi.int/Pages/item.aspx?name=20220228-prosecutor-statement-ukraine>; Marko Milanovic, *The Russia-Ukraine War and the European Convention on Human Rights*, LIEBER INST. WEST POINT (Mar. 1, 2022), <https://lieber.westpoint.edu/russia-ukraine-war-european-convention-human-rights>.

<sup>102</sup> Alina Miron, *Fact-Finding or Just Evidence Assessment?*, VÖLKERRECHTSBLOG (April 29, 2021), <https://voelkerrechtsblog.org/fact-finding-or-just-evidence-assessment>.

<sup>103</sup> For politicization claims regarding the international criminal law institutions, see Geoff Dancy et al., *What Determines Perceptions of Bias Toward the International Criminal Court? Evidence from Kenya*, 64 J. CONFLICT RESOL. 1443, 1444 (2020); Line Engbo Gissel, *A Different Kind of Court: Africa's Support for the International Criminal Court, 1993-2003*, 29 EUR. J. INT'L L. 725, 726 (2018); *Israel to Tell ICC: You Don't Have Authority to Investigate Us*, TIMES OF ISR. (Apr. 8, 2021, 5:29 PM), <https://www.timesofisrael.com/israel-to-tell-icc-you-dont-have-authority-to-investigate-us>. For the fact that the United States has taken an in-between position, not accusing the ICC of bias, yet declaring that an ICC investigation in cases involving U.S. nationals would be “inappropriate,” “unwarranted,” and “unjustified,” see *ICC Requests Permission to Investigate U.S. Military Personnel*, FIN. TIMES (Nov. 20, 2017), <https://www.ft.com/content/dac58c08-ce1d-11e7-9dbb-291a884dd8c6>.

These politicization claims should not lead courts to exclude visual digital evidence just because it is not pleasant to a certain party to the proceedings. Having international bodies concede to such argumentation would paralyze international justice and would mean that international law violations could be left with no punitive repercussions. Yet, the politicization claims that States—rightly or not—put forth call for international bodies to be more skeptical and responsible when they justify recourse to visual digital evidence. Otherwise, the fear lurks that any politicization debate attached to the notion of visual digital evidence can ultimately be used by States to put international institutions on the defensive, creating a vicious circle of claims and responses which ultimately mars these institutions' credibility.

This means that in the two scenarios discussed in this Article, the probative value of visual digital evidence must be seen as having an auxiliary basis to the extent that traditional means of written or oral evidence cannot prove with certainty whether the crime has been committed or the identity of the culprit. It is inside this framework that international criminal tribunals have been cautious, so far, to always buttress any visual digital evidence with the testimonies of the victims, the same way they have done with written evidence.<sup>104</sup> For example, in the *Tolimir* case, the ICTY Trial Chamber was provided aerial images, but the prosecution was reluctant to provide further details on the technical and analytical methods used to produce these photos.<sup>105</sup> Hearing an argument put forth from Tolimir's defense team against the admission of these photos as evidence, due to lack of information on whether they were original or modified,<sup>106</sup> the Trial Chamber decided to admit them but only in conjunction with forensic and anthropological reports and the testimonies of two witnesses which made a linkage between the particular photos and the burial sites which indicated the crimes committed.<sup>107</sup>

## VII. CONCLUSION

As technology advances, some international criminal law scholars fear that any produced videos and images will be portrayed as uncontested evidence.<sup>108</sup>

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<sup>104</sup> See Yvonne McDermott, *The Admissibility and Weight of Written Witness Testimony in International Criminal Law: A Socio-Legal Analysis*, 26 LEIDEN J. INT'L L. 971 (2013).

<sup>105</sup> Prosecutor v Tolimir, Case No. IT-05-88/2-T, Judgment, ¶¶ 67–68 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12, 2012).

<sup>106</sup> Prosecutor v Tolimir, Case No. IT-05-88/2-T, Defence Final Trial Brief with Corrigendum, ¶ 158 (Int'l Crim. Trib. for the Former Yugoslavia Oct 1, 2012).

<sup>107</sup> Prosecutor v. Tolimir, *supra* note 105, ¶¶ 69–70.

<sup>108</sup> See Emma Irving, *And So It Begins... Social Media Evidence in an ICC Arrest Warrant*, OPINIO JURIS (Aug. 17, 2017), <http://opiniojuris.org/2017/08/17/and-so-it-begins-social-media-evidence-in-an-icc-arrest-warrant> (noting that it remains to be seen whether the ICC will assess visual digital evidence vis-à-vis the higher evidentiary burden

This Article argues why this should be far from true not only because of questions surrounding the origin of these videos, but also due to the psychological bias visual digital evidence can exert on judges and other decision-makers. It is true that, so far, visual digital evidence rightly plays a cardinal role in international criminal proceedings when it comes to factual questions around the circumstances under which a crime has been committed or around the identification of a culprit. At the same time, judges and other decision-makers relying on such evidence in order to formulate their opinions should be aware of the implicit bias this evidence can exert through its psychological impact.

Visual digital evidence will continue to be crucial in international proceedings. As its use becomes more widespread, so will the moral and legal dilemmas this use brings forth. In the technological era in which we live, new technologies can create the impression that they can lead to clear-cut perceptions on their need as instruments of justice in cases involving international crimes. When it comes to visual digital evidence, this is far from true. The psychological impact this evidence can exert is something that international bodies and officials dealing with these cases should always have in mind.

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required for conviction of a defendant compared to that required for the issuance of an arrest warrant).