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**TRANSLATING DATA INTO LEGAL IMPACT: EXPANDING THE
ROLE OF AIRWARS' DATABASE IN CRIMINAL JUDICIAL
PROCEEDINGS**

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Abbreviations

AI	Artificial Intelligence
AP I	Additional Protocol I to the 1949 Geneva Conventions (1977)
AP II	Additional Protocol II to the 1949 Geneva Conventions (1977)
ARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
CA 3	Common Article 3 to the 1949 Geneva Conventions
CAH	Crimes Against Humanity
DPH	Direct Participation in Hostilities
DRC	Democratic Republic of the Congo
ECtHR	European Court of Human Rights
GC	Geneva Convention (1949)
IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
NIAC	Non-International Armed Group
OSI	Open-Source Information
OTP	Office of the Prosecutor (ICC)

RS	Rome Statute of the ICC
SC Res	United Nations Security Council Resolution
SCSL	Special Court for Sierra Leone
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization

Section I

Introduction

Airwars was set up with the initial objective of conducting open-source research intended to build a permanent database of harms. Since 2014, they have documented the human cost of war to promote a more peaceful world where human lives are acknowledged and taken into account by militaries, policy-makers, and global citizens with dignity and empathy. By doing so, they have gathered documentation of different air strikes focusing on the civilian harm caused by them in different parts of the world, such as Syria, Libya, Ukraine and Gaza. Airwars' work is based on open-source investigation, collecting publicly available information on individual incidents that include civilian harm, notwithstanding the party responsible for the incident.

With hopes of furthering Airwars' work, this memo provides guidance and insight into ways of utilising and improving the information in their database. Therefore, the role of open-source investigations in the case of criminal trials will be examined, as well as the legal framework and procedural rules applicable. Following, an assessment of relevant case law is done with the aim of identifying standards and indicators the courts have established when assessing individual criminal responsibility in cases with civilian harm. Finally, recommendations are provided for Airwars to register and use their information to help future utilisation of their evidence for evidentiary purposes, such as to introduce different indicators or elements to analyse when retrieving information on an event.

Airwars conducts real-time conflict casualty monitoring by tracking international and local news agencies and NGOs; and more fragmentary social media sites, including local residents' groups, *Facebook* pages (for example martyrs' pages), *YouTube* footage of incidents, and tweets relating to specific events. Therefore, their data is based mostly on what is known as "open-source information" (OSI).

Section II looks at the evidentiary standard in international courts, mostly focusing on the jurisprudence of the International Criminal Court (ICC) and the European Court of Human Rights (ECtHR). As open-source investigation is a relatively new practice, there are, to date, no established rules regarding the admissibility of open-source investigation in courts. Moreover, the research points to the fact that judges have a certain discretion in assessing the admissibility of OSI. Nevertheless, a standard can be derived from courts' already existing rules on evidence, as well as from recent courts' practices on OSI. Although there might be new regulations on open-source in the future, the memo focuses on the current state of the arts,

which, in any case, constitutes the basis of future developments. The evidentiary standard can be drawn as follows: a two-steps procedure, including admissibility and weight of the evidence.

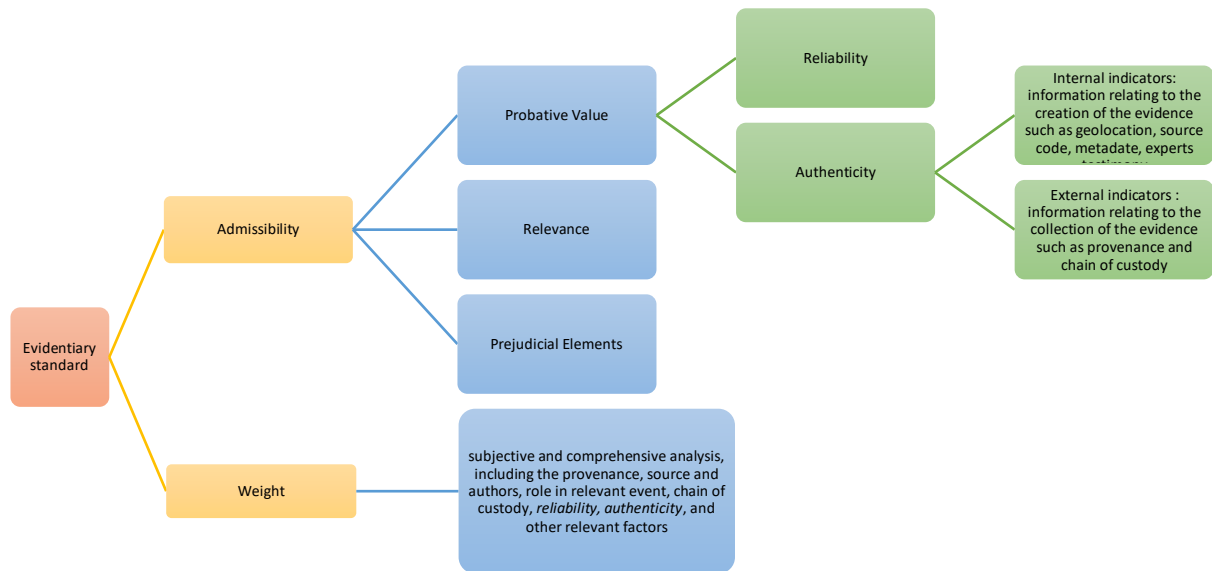
The memo then looks at the collection of open-source information and the presentation of such information to court. The findings are presented as a list of professional principles, as well as practices to be followed for the information to be considered admissible. In sum, an NGO such as Airwars needs to be transparent on its methodology, the composition of its team of investigators, the chain of custody and potential limits of its work. The memo attempts to indicate how OSI specialists can mitigate the risks of their work being considered inadmissible and/or unreliable.

Considering that the data collected via open-source investigation would be utilized in an international criminal case, Section III gives an overview of international crimes, focusing on war crimes, crimes against humanity, and genocide. The memo provides a brief overview of each crime, which allows for a better understanding of what each crime consists of, as well as the differences between them. Following that, a selection of cases is closely examined to establish the courts' approach to the different crimes and which factors were considered of greater relevance. Given the type of events that Airwars tracks, we are looking at the crimes and cases that refer to attacks against the civilian population and civilian property. The memo first addresses war crimes, before turning to crimes against humanity, and, lastly, genocide.

The objective is to determine what elements were valued by the courts to determine the occurrence of the crimes and the responsibility of those convicted. While gathering the relevant case law, we are able to draw conclusions about what was highlighted by the tribunals and of particular importance. This allows us to make direct recommendations to Airwars on how to adapt their data collection, labelling, registering and later assessment of their database. Improving data and optimising it to make it as useful for a case as possible is important, considering the role Airwars' work could have in a case. Gathering evidence and data of air attacks can contribute to showing that a certain crime has been committed not only by recording individual incidents but also by showing a certain systematicity.

Section II

1. Admissibility



1.1. General information under ICC framework:

The concept of admissibility in the Rome Statute (RS) is a fundamental aspect of the legal framework. It represents a combination of common and civil law perspectives, emphasising the importance of relevance and probative value of information.² The Court has the discretion to determine the admissibility of evidence, ensuring a fair and just legal process. The rule governing the process is found in art. 69(3) of the Rome Statute allows parties to submit evidence supporting their case. Furthermore, the Court can request the submission of any evidence it deems necessary to the case.³ In certain circumstances, judges are not obligated to remain neutral decision-makers reflecting purely adversarial models. Such a mix of law components shows the involvement of different normative elements from different law systems. Following this, the ICC's mixed regulatory system relies on the technique of 'constructive

² Bartłomiej Krzan, "Admissibility of evidence and international criminal justice", (Revista Brasileira de Direito Processual Penal, 2021), Vol. 7, No. 1, part. 3.

³ UN General Assembly, "Rome Statute of the International Criminal Court", (last amended 2010), (entered into force 17 July 1998), art. 69, <<https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>>, (accessed 23 February 2024).

ambiguity,' [by using vague terms to advance judges functions] leaving the shaping of proceedings before the Court in the hands of the judges.⁴

1.2. Normative element of the system:

The explicit reference to admissibility criteria is in Article 69 (4) of the Rome Statute: the Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.⁵

Following this, the general admissibility standard of evidence is defined by three criteria⁶. Accordingly, relevance, probative value, and prejudice (probative value as weighed against any prejudicial effect on trial fairness) constitute a three-step approach to determine the admissibility of evidence other than oral evidence.⁷ The employment of those standards means that firstly, the Court has to ensure that the evidence is *prima facie* relevant to the trial. In other words, that presented matter relates to the specific case within which the Chamber investigates charges against the accused and presents its considerations of the views and concerns of participating victims.⁸ Subsequently, the Chamber must assess whether the evidence has, on a *prima facie* basis, probative value.⁹ Eventually, where the Court has decided it would be relevant, the probative value of the evidence must be weighed against its prejudicial effect.¹⁰ All in all, the three-stage approach may often appear to be very artificial and unnecessarily unmanageable,¹¹ as it sets lengthy decisions on admissibility of evidence that are not necessary

⁴ Claus Kress, “*The Procedural Law of the ICC in Outline: Anatomy of a Unique Compromise*”, (Journal of International Criminal Justice, 2003), Vol. 1, p. 603.

⁵ Ibid. art. 69 (4).

⁶ Christopher Gosnell, “*Admissibility of Evidence*”, in KHAN, Karim A.A.; BUISMAN, Caroline; GOSNELL, Christopher (eds.). *Principles of Evidence in International Criminal Justice*, (Oxford: OUP, 2010), p. 378.

⁷ *Prosecutor v. Lubanga*, [ICC], Trial Chamber I, “*Decision on the admissibility of four documents*”, ICC-01/04-01/06-1399-Corr, [2011], para. 25.

⁸ Ibid., para. 27.

⁹ *Prosecutor v. Katanga and Ngudjolo*, [ICC], Pre-Trial Chamber I, “*Decision on the Confirmation of Charges*”, Doc. No. ICC-01/04-01/07-717, [2008], para. 77, according to article 69(4) of the Statute, probative value is one of the factors to be taken into consideration when assessing the admissibility of a piece of evidence. In the view of the Chamber, this means that the Chamber must look at the intrinsic coherence of any item of evidence, and to declare inadmissible those items of evidence of which probative value is deemed *prima facie* absent after such an analysis”.

¹⁰ *Prosecutor v. Lubanga*, [ICC], Trial Chamber I, “*Corrigendum to Decision on the admissibility of four documents*”, ICC-01/04-01/06-1399-Corr, [2011], para. 29., observing that: “whilst it is trite to observe that all evidence that tends to incriminate the accused is also “prejudicial” to him, the Chamber must be careful to ensure that it is not unfair to admit the disputed material, for instance because evidence of slight or minimal probative value has the capacity to prejudice the Chamber’s fair assessment of the issues in the case”.

¹¹ Gilbert Bitti, “*Article 64*”, In: TRIFFTERER, Otto; AMBROS, Kai (eds.). *The Rome Statute of the International Criminal Court*, Third Edition, (Oxford: Hart Publishing, 2016), p. 1619.

according to the Statute or the Rules. However, the Court practice in its respective decisions demonstrates a different approach.

Despite the general admissibility of evidence, there are limited exclusionary rules prohibiting the introduction of evidence before ICC. The standard of exclusion has been incorporated in Article 69 (7) meaning that: evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: a) the violations cast substantial doubts on the reliability of the evidence or; b) the acceptance of such evidence would be antithetical and damage the integrity of the proceeding.¹² That's why, when evidence is obtained in violation of the mentioned earlier requirements, the Court can declare it inadmissible.

One should highlight that ICC is also not bound by national rules of evidence. In the case, *Prosecutor v. Lubanga*, the Trial Chamber I concluded that evidence obtained in breach of national procedural laws, even though those rules may implement national standards protecting human rights, does not automatically trigger the application of Article 69(7) of the Statute.¹³ However, the approach mentioned above needs to be considered *lex specialis* when with the general admissibility provisions set out in Article. 69 (4) of the Rome Statute and represents a clear exception to the general approach".¹⁴ Moreover, such an approach presented in the Rome Statute shows rejection of most of the technical rules on admissibility in favour of a system of utmost flexibility.¹⁵ Nevertheless, to clarify this situation, the Trial Chamber III in *Prosecutor v. Bemba* stated that: "a ruling on admissibility is not a precondition for the admission of any evidence, as it only implies a *prima facie* assessment of the relevance of any material, on the basis that it appears to be a priori relevant to the case".¹⁶

Despite the fact that this approach provided for the admission into evidence of all items mentioned on the Revised List of Evidence, it was subsequently reversed by the Appeals Chamber. It stated that: "Trial Chamber by having a choice between ruling on the relevance and/or admissibility of each item of evidence when it is submitted or deferring its consideration until the end of the proceedings, thus making it part of its assessment of the evidence when it

¹² Ibid. art. 69 (7).

¹³ *Prosecutor v. Lubanga*, ICC, Trial Chamber I, "Decision on the Admission of Material from the Bar Table", [2009], Doc. No. ICC-01/04-01/06-1981, para. 36.

¹⁴ Ibid. para. 34.

¹⁵ Reinhold Gallmetzer, "The Trial Chamber's Discretionary Power to Devise The Proceedings Before It And Its Exercise In The Trial Of Thomas Lubanga Dyl", in Stahn, Carsten; SLUITER, Goran (eds.) *The Emerging Practice of the International Criminal Court.*, (Leiden: Brill, 2009), p. 507.

¹⁶ *Prosecutor v. Jean-Pierre Bemba Gombo*, [ICC], Trial Chamber III, "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", ICC-01/05-01/08-1022, [2010], para. 10.

is evaluating the guilt or innocence of the accused person”.¹⁷ Based on the aforementioned, one can underscore that without doubt Article 69(7) provides for a model of non-automatic inadmissibility of illegally obtained evidence.¹⁸

In accordance with the development of technologies, the Rome Statute in Article 69(2) firstly provides that the Court may admit video or audio recorded testimonial statements collected before trial, as well as documents or transcripts reporting some declarations.¹⁹ Nonetheless, in practice, it usually appears extremely cumbersome because it imposes lengthy decisions on the admissibility of evidence by making their review far too intricate. In such terms, it is also necessary to take into consideration the applicable case law.

1.3. Open-source information admissibility at ICC:

Without stringent rules governing admissibility of evidence, the jurisprudence of ICC has expounded somewhat upon the limited rules of evidence. Within the context of open-source evidence, however, given the limited exposure, the jurisprudence is also limited.²⁰ For the first time, the admissibility of open-source information has been declared in several decision within the period of 2015-2016,²¹ given the unprecedented nature of the source materials in international courts. In considering the admissibility of open-source evidence, probative value is probably the most questionable element of the three.²² In general, jurisprudence has established that reliability and authenticity are two crucial components in the assessment of probative value.²³ Reliability can be established through a variety of factors, including the origin, content, corroboration, truthfulness, voluntariness, and trustworthiness of the

¹⁷ *The Prosecutor v. Jean-Pierre Bemba Gombo*, [ICC], Appeals Chamber, Judgment on the appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled “*Decision on the admission into evidence of materials contained in the prosecution’s list of evidence*”, ICC-01/05-01/08-1386, [2011], para. 37.

¹⁸ *Supra*. 1

¹⁹ Michele Caianiello, “*First Decisions on the Admission of Evidence at ICC Trials: A Blending of Accusatorial and Inquisitorial Models?*”, (Journal of International Criminal Justice, 2011), Vol. 9, pp. 385 - 410, p. 399.

²⁰ Leiden University, ‘Leiden Guidelines on the Use of Digitally Derived Evidence’, 2022, available at <<https://leiden-guidelines.netlify.app/guidelines/#d-scope-of-the-leiden-guidelines>>, (Leiden Guidelines).

²¹ *Prosecutor v. Salim Jamil Ayyash et al.*, [ICC], Trial Chamber, “*Decision on the Admissibility of Documents Published on the Wikileaks Website*”, Case No. STL-11-01/T/TC, [2015]; *Prosecutor v. Bemba*, [ICC], Trial Chamber VII, “*Decision on Requests to Exclude Western Union Documents and other Evidence Pursuant to Article 69(7)*”, Case No. ICC-01/05-01/13-1854, [2016]; *Prosecutor v. Bemba*, [ICC], Trial Chamber VII, “*Decision on Requests to Exclude Dutch Intercepts and Call Data Records*”, Case No. ICC-01/05-01/13-1855, [2016], (Bemba Decision on Requests to Exclude).

²² Elizabeth White, “*Closing cases with open-source: Facilitating the use of user-generated open-source evidence in international criminal investigations through the creation of a standing investigative mechanism*”, (Leiden Journal of International Law, 2024), Vol. 37, pp. 228–250, p. 232.

²³ *Prosecutor v. Édouard Karemera et al.*, [ICTR], Appeals Chamber, “*Decision on Joseph Nzirorera’s Appeal of Decision on Admission of Evidence Rebutting Adjudicated Facts*”, Case No. ICTR- 98-44-AR73.17, Appeals Chamber, [2009], para. 14.

evidence.²⁴ Authenticity can be established on the basis of a number of internal indicators related to the evidence itself and external indicators related to the collection and management of evidence.²⁵ For digital evidence, relevant internal indicators relate to the creation of the evidence, such as geolocation, source codes, and metadata.²⁶ To illustrate, the ICC has primarily relied upon geolocation²⁷ and expert testimony reports²⁸ to establish internal indicators. External indicators include the provenance and chain of custody of evidence.²⁹ Additionally, it has been stated that OSI must be used as lead information or to corroborate other pieces of evidence.³⁰ Moreover, evidentiary and procedural issues have to be considered from the start of the investigation, and investigators must ensure its reliability.³¹

Even though the Chamber determines that evidence is admissible, this finding has: “no bearing on the final weight to be afforded to it, which will only be determined by the Chamber at the end of the case when assessing the evidence as a whole”.³² Although the admissibility of all evidence is determined based on standardised evidentiary tests,³³ the assessment of relevance is a more subjective and comprehensive analysis that varies depending on the category of evidence.³⁴

²⁴ Leiden University, “*Report on Digitally Derived Evidence in International Criminal Law*”, 2019, available at <leiden-guidelines.com/assets/DDE%20in%20ICL.pdf>.

²⁵ Aida Ashouri, Caleb Bowers and Cherrie Warden, “*An Overview of the Use of Digital Evidence in International Criminal Courts*”, (Digital Evidence and Electronic Signature Law Review, 2014), Vol. 11, p. 118.

²⁶ United Nations Office of the High Commissioner for Human Rights and Human Rights Center UC Berkeley School of Law, *Berkeley Protocol on Digital Open-source Investigations: A Practical Guide on the Effective Use of Digital Open-source Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law* (2022), paras. 183–194 (hereinafter: Berkeley Protocol).

²⁷ *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [ICC], Trial Chamber X, “*Public redacted version of the Decision on Prosecution’s proposed expert witnesses*”, Case No. ICC-01/12-01/18-989-Red, paras. 110, 112.

²⁸ *Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, [ICC], Pre-Trial Chamber, Second Warrant of Arrest, Case No. ICC-01/11-01/17-13, [2018], para. 18.

²⁹ Nikita Mehandru and Alexa Koenig, “*ICTS, Social Media & The Future of Human Rights*”, (Duke Law & Technology, 2019), Vol. 17, p. 144.

³⁰ *Prosecutor v Jean-Pierre Bemba Gombo*, [ICC], Trial Chamber III, “*Decision on the admission into evidence of items deferred in the Chamber’s ‘Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute’*”, [2013], para. 25., “Therefore, the Majority admits the BBC news article with the limited purpose that the information contained therein may serve to corroborate other pieces of evidence”.

³¹ “*Preparing Open Source Intelligence (OSINT) for Litigation*”, CROSStrax (19 November 2016) <https://www.crosstrax.co/investigation-best-practice/preparing-open-source-intelligence-osint-for-litigation/>, (accessed on 22.02.2024).

³² *Supra.* 27, para. 9.

³³ *Supra.* 23., p. 230 - 233.

³⁴ Lindsay Freeman, “*Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials*”, (Fordham International Law Journal, 2018), Vol. 41, issue. 2., p. 295.

1.4. OSI weight assessment in ICC

As a rule, OSI posted on social media platforms constitutes documentary evidence.³⁵ In the context of documentary evidence, Chambers will consider the evidence's provenance, source or author, as well as their role in the relevant events, the chain of custody from the time of the item's creation until its submission to the Chamber, and any other relevant information.³⁶ In addition, the reliability and authenticity of evidence are components that affect its probative value and weight.³⁷ However, usually international criminal judges are not experts in OSI or in the indicators necessary to verify it,³⁸ and therefore rely heavily on expert testimony or other corroboration³⁹ to determine the weight of digital evidence, eliminating the need for extensive case law discussion of the factors. To start with, Chambers have explicitly stated that: "it will consider all the standard evidentiary criteria for each item of evidence submitted, though it may not necessarily discuss in the judgement every submitted item".⁴⁰ For the OSI evidence to be declared admissible several criteria should be taken into account:

1.4.1. Authorship

The nature of digital evidence, especially if it is collected from an open-source platform rather than directly from an individual, can make it difficult to attribute. In this case, the content itself may be publicly available, but the information underlying it, namely the original creator, may not be.⁴¹ Even when the author publishes the content himself, users may choose to publish this evidence anonymously. The ICC usually gives preferences to to date for authored evidence, but some anonymous evidence can be admitted particularly in the context of NGO reports with anonymous testimonial evidence. Furthermore, the admissibility of anonymous digital evidence is probably not legally restricted if the indicia of reliability⁴² can be effectively established without the knowledge of its author.

³⁵ Ibid. p. 297.

³⁶ *Prosecutor v. Bemba*, [ICC], Trial Chamber III, Judgment pursuant to Article 74 of the Statute, Case No. ICC-01/05-01/08-3343, [2016], para. 247; Lubanga Admissibility Decision, *supra* 6., para. 30.

³⁷ *Prosecutor v. Bemba*, [ICC], Trial Chamber III, "Public Redacted Version of the First Decision on the Prosecution and Defense Requests for the Admission of Evidence", Case No. ICC-01/05-01/08-2012, [2011], para. 15.

³⁸ *Supra*. 33., p. 312.

³⁹ *Supra*. 24, 25.

⁴⁰ *Prosecutor v. Said Kani*, [ICC], Trial Chamber VI, "Directions on the Conduct of Proceedings", Case No. ICC-01/14-01/21-251, [2022], para. 16.

⁴¹ Laura-Liisa Laving, "The Reliability of Open-source Evidence in the International Criminal Court", Lund University, (2014), p. 37., available at <lup.lub.lu.se/luur/download?func=downloadFile&recordId=4457910&fileId=4457912>.

⁴² *Prosecutor v. Bagosora*, [ICTR], Trial Chamber I, Decision on the Request to Admit United Nations Documents into Evidence Under Rule 89 (C), Case No. ICTR-98-47-T, [2006], para. 4.

1.4.2. Chain of content management

The chain of evidence storage is a: “chronological documentation of the sequence of custodians of a piece of information or evidence, and documentation of the control, date and time, transfer, analysis and disposition of any such evidence.”⁴³ The Berkeley Protocol states that for information to be admissible as evidence, prosecutors and defence lawyers usually need to establish a chain of custody of the content.⁴⁴ For OSI evidence, such a chain can be established two ways: relying upon the testimony of the individuals who controlled the possession of the evidence from acquisition through trial.⁴⁵ By certifying the collection, storage and preservation of evidence, the chain of custody can be established, and thereby the reliability of the evidence.⁴⁶

In addition, the technology itself can similarly ensure the consistency of evidence throughout its lifecycle. When content is removed from the platform, a unique identifier known as a hash may be generated⁴⁷ [by the platform itself]. By cross-referencing the hash at the time of receipt of the content with the hash at the time of presentation in court, the consistency of these two identifiers can demonstrate the consistency of the content over time.⁴⁸ However, regarding the continuity this is hard to ensure, as it is based more in policy and practice than in technology, and these practices are becoming increasingly difficult to regulate as the storage of digital evidence becomes more complex.⁴⁹ Here, it should be noted that in the absence of encryption or the use of a third-party data storage platform, potential individuals accessing the content are beyond the control of the investigating authority.⁵⁰ Eventually, that authentication can be achieved by identifying the origin of the material, its completeness, and evidence of an unbroken chain of custody.⁵¹

⁴³ *Supra.* 27., paras. 61 - 62.

⁴⁴ *Ibid.* at v.

⁴⁵ *Supra.* 26., p. 115.

⁴⁶ *Ibid.*

⁴⁷ Rafael Braga da Silva, “*Updating the Authentication of Digital Evidence in the International Criminal Court*”, (International Criminal Law Review, 2021), Vol. 1., p. 15.

⁴⁸ *Ibid.*

⁴⁹ Human Rights Documentation Solutions: Phase I Report’, Public International Law & Policy Group, November 2022, available at <www.publicinternationallawandpolicygroup.org/hrds-phase-i-report-launch>.

⁵⁰ *Supra.* 23., p. 241.

⁵¹ Lindsay Freeman, “*Part I, 3 Prosecuting Atrocity Crimes with Open Source Evidence: Lessons from the International Criminal Court*”, (Oxford Scholarly Authorities on International Law, 2019), para. 5.1.

1.4.3. Corporate trust

In the area of evidence derived from social media platforms, investigative authorities rely heavily on the platforms themselves to obtain important information.⁵² This dependence manifests itself in two main areas: social media platforms have considerable control over the scope and enforcement of their content moderation policies, leading to the potential loss of valuable evidence; and that access to removed content and the metadata underlying both removed and publicly available content is also controlled by the platforms themselves.⁵³ For the OSI evidence to be presented in the case, they firstly need to be verified, as the Court will assess the credibility of the source and the reliability of the information. The investigative bodies [e.g. NGOs] have to verify OSI evidence by performing a two-step process: first, evaluate the source of the information and then, second, validate the content.⁵⁴

2. Collection of evidence

In our digitalised society, open source investigation is a growing component in the conduction of investigations of violations of human rights and international law.⁵⁵ The use of open source investigation allows for the collection of OSI, namely any publicly available information that can be observed, purchased or requested by any person without requiring any special status or authorised access.⁵⁶ Open source investigation is particularly important in monitoring the extent to which wars impact upon the civilian population.⁵⁷ The evidence collected in conflict-related scenarios may become extremely relevant for the prosecution of crimes before international courts and tribunals. Notwithstanding the important contribution that OSI makes to criminal proceedings, the admissibility of this type of evidence in court is not a simple task. Indeed, for OSI to be admissible, it is usually necessary to prove authenticity and chain of custody, which may be particularly burdensome and difficult in the context of open

⁵² See generally: Rebecca Hamilton, “*Future-Proofing U.S. Law for War Crimes Investigations in the Digital Era*”, (Georgia Law Review, 2023), Vol. 57, issue. 4.

⁵³ *Supra.* 23., p. 244.

⁵⁴ *Supra.* 23., para. 5.1.

⁵⁵ Siobhán Allen, Dearbhla Minogue and Ioannis Kalpouzos, ‘International Humanitarian Law & the Aerial Bombardment of Yemen: A Study of the Contribution of Online Open Source Investigations’ (GLAN, Bellingcat and Harvard Law School Advocates for Human Rights), 2.

⁵⁶ Dearbhla Minogue, Siobhán Allen and Yvonne McDermott Rees, ‘Putting Principles into Practice: Testing Open-Source Video as Evidence in the Criminal Courts of England and Wales’ (GLAN, Bellingcat and OSR4Rights, 2021), 9.

⁵⁷ Ed Millet, ‘Deploying OSINT in armed conflict settings: law, ethics, and the need for a new theory of harm’ (*Humanitarian Law and Policy*, 5 December 2023) <<https://blogs.icrc.org/law-and-policy/2023/12/05/deploying-osint-in-armed-conflict-settings-law-ethics-theory-of-harm/>> accessed 29 March 2024.

source investigation.⁵⁸ As a result, the appropriate handling and processing of OSI is crucial in increasing the probability that this evidence is admitted and used during a trial.

The present section aims to analyse the collection, preservation, and protection of OSI with a view to using it before an international court or tribunal. For this purpose, the Berkeley Protocol will serve as the benchmark for the analysis. Indeed, the Berkeley Protocol was developed to provide standardised procedures and methodological guidance in relation to open source investigation in the realms of international criminal law and international human rights law.⁵⁹

2.1. Professional Principles in OSI

The identification of methodological and ethical principles that can be followed by professionals in the collection and preservation of the evidence is particularly important as it helps in giving credibility within the legal sphere to the practice of open source investigation.⁶⁰ Credibility in a legal perspective is particularly important as it serves as a benchmark for the integrity of the legal process. Indeed, if the evidence brought before the court is not credible and cannot be trusted by judges and juries, it may be difficult to reach a fair judgement. Therefore, credibility of open source investigation helps ensure that judgments are based on genuine evidence, rather than unreliable information.

The Berkeley Protocol sets out five criteria for professionals in the collection of evidence, which will be analysed in the following order: (i) accountability, (ii) competency, (iii) objectivity, (iv) legality and (v) security awareness.

2.1.1. Accountability

Professionals involved in the collection of OSI must be accountable for their actions.⁶¹ In the legal sphere, accountability can be defined as the responsibility of each individual to act in accordance with the laws, ethical standards and professional norms. Accountability cannot exist without transparency,⁶² thus making transparency the instrument that ensures that the principle of accountability is fulfilled.

⁵⁸ Berkeley Protocol (n. 25), v.

⁵⁹ Id. at vii.

⁶⁰ Id. at 11.

⁶¹ Ibid.

⁶² Volker Röben, 'Accountability' (2020) in H el ene Ruiz Fabri (ed.), *Max Planck Encyclopaedia of International Procedural Law*, para. 6.

In light of the above, accountability in the open source investigation process is ensured through a system based on transparency, which entails clear documentation, record-keeping and oversight of the information collected.⁶³ Indeed, any person engaged in open source investigation should be aware of the potential of the methodology used to be questioned and of the possibility of being called to testify at trial.⁶⁴ As a matter of fact, all the steps performed in open source investigation shall be consistent and clearly documented with a view to make a potential external investigator in a position to replicate the process and reach the same conclusion.⁶⁵ In this regard, transparency is crucial in ensuring the potential for replicability of the collection and interpretation of the evidence.⁶⁶ This concept is tied to two questions: (i) can investigators who did not conduct the initial analysis of the materials attest that the methodology used to retrieve the information was appropriate to conduct the investigation?, and (ii) would such investigator reach the same conclusion as the original one when using the same materials and applying the same methodology?⁶⁷ An affirmative answer to both questions satisfies the transparency requirement in relation to the methodology used by the original investigator in the collection of OSI, thus fulfilling the accountability criteria.

2.1.2. Competency

Competency concerns the training and equipment of open-source investigators with appropriate technical skills with a view to enabling them to remain updated with the fast-paced development of technology and ensure that evidence collected is stored properly.⁶⁸ Indeed, activities must be conducted professionally and ethically.⁶⁹ This entails avoiding the appropriation of someone else's work by crediting all the participants to the investigation (provided that there are no security risks for the disclosure of such information) and accurately reporting all data by preserving as much as possible the integrity of the data and materials collected.⁷⁰ The data to be collected for preservation purposes will be further analysed below.

⁶³ Human Rights Center UC Berkeley School of Law, *The New Forensics: Using Open Source investigation to Investigate Grave Crimes* (Human Rights Center UC Berkeley School of Law 2017), para. 25 (hereinafter: Bellagio Report).

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Berkeley Protocol (n. 25), para. 27.

⁶⁹ Ibid.

⁷⁰ Bellagio Report (n. 62), 10.

2.1.3. Objectivity

Objectivity in the realm of open source investigation is based on a double understanding of the concept of awareness: awareness of the potential personal and cultural biases of the investigator and awareness of the inherent biases of the Internet in the collection of evidence.

The first type of objectivity aims at ensuring that the investigator works on several hypotheses without particularly favouring any of them in building their case.⁷¹ In working with several hypotheses it is important that materials both in favour and against a specific theory are collected without any discrimination.⁷² In this regard, the principle of two-factor authentication of the source is particularly relevant. This entails authenticating both the content and the source of the relevant information when it is found.⁷³ Investigators should always be aware of their own biases, which may be either conscious or subconscious, and work in order to correct them in their research.⁷⁴

Second, objectivity in relation to the structural biases of the online platform used is important. Indeed, it is crucial that the investigator is aware that the results given by the platform may be influenced by profiling systems characterising the structure of the Internet, and particularly of social media which are based on the use of profiling techniques aiming to enhance the experience of the user.⁷⁵ It is well-known that social media can be sources of misinformation, disinformation and manipulation.⁷⁶ As a consequence, objectivity in this regard entails the verification of the authenticity and credibility of the source before using the collected information as evidence.⁷⁷ In this regard, cross-reference with multiple sources is highly encouraged with a view to avoiding potential manipulation or fabricated content.⁷⁸ The investigator must be able to adapt the approach used in relation to the investigation's objectives, the platforms involved, and the nature of the social media data being analysed.⁷⁹

⁷¹ Berkeley Protocol (n. 25), para. 27.

⁷² Bellagio Report (n. 62), 10.

⁷³ Ibid.

⁷⁴ See Yvonne McDermott, Alexa Koenig and Daragh Murray, 'Open Source Information's Blind Spot: Human and Machine Bias in International Criminal Investigations' (2021) 19 *Journal of International Criminal Justice* 85.

⁷⁵ See Muhammad Bilal, Abdullah Gani, Muhammad Ikram Ullah Lali, Mohsen Marjani, and Nadia Malik, 'Social Profiling: A Review, Taxonomy, and Challenges' (2019) 22(7) *Cyberpsychology, Behavior, and Social Networking* 433.

⁷⁶ 'Introduction to Open-Source Investigation' (*True People Check*) <<https://truepeoplecheck.com/osint-open-source-investigations/>> accessed 3 March 2024.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

2.1.4. Legality

Open-source investigation should comply with the applicable law. In this regard, it is recommended that lawyers are involved in an advisory and supervisory capacity in the construction of the investigation in order to ensure that the collection of evidence complies with the law and that investigators acquire a basic knowledge of the legal framework under which they are working. Indeed, although the information retrieved through OSI are publicly available, this does not entail that there are no restrictions on the collection and use of personal data.⁸⁰ In this regard, personal data refers to any data that relates to an identified or identifiable individual. Data protection law and right to privacy, as understood in the jurisdiction in which data is processed, must always be considered when working in open source investigation.⁸¹ The laws governing these legal aspects may vary from jurisdiction to jurisdiction and, depending on which is the intended use of the data, OSI operators should be aware of this.⁸²

For the sake of the present research, in the case of the ICC, open source investigation activities are required to comply with the legal framework set forth by the Rome Statute and the operational standards and procedures established by the Office of the Prosecutor (OTP).⁸³ In fact, if the evidence collected contravenes the Rome Statute, it will not be declared admissible.⁸⁴ Admissibility before the ICC is discussed in a separate part of the present research.

2.1.5. Security Awareness

Security awareness is based on the consideration that all individuals who conduct open source investigation should have operational security awareness to ensure the minimisation of their digital trails and to make them aware of the potential risks in conducting the work.⁸⁵ Digital trail minimisation refers to the limitation of the amount of data that an individual generates while interacting with digital technologies and platforms (e.g. location, time, social media activity, browsing history).

In light of this, information security training is essential. Such training should be aimed at rendering investigators familiar with the three core pillars of information security, namely:

⁸⁰ European Commission, 'What is personal data?' (*European Commission*) <https://commission.europa.eu/law/law-topic/data-protection/reform/what-personal-data_en> accessed 1 April 2024.

⁸¹ Berkeley Protocol (n. 25), para. 28.

⁸² *Ibid.*

⁸³ Bellagio Report (n. 62), 10.

⁸⁴ *See* Art. 55, 68 and 69 Rome Statute.

⁸⁵ Berkeley Protocol (n. 25), para. 29.

confidentiality, integrity and availability.⁸⁶ Here, confidentiality entails allowing only permitted users to have access to data, integrity relates to the prevention of tempering of data by unauthorised users and availability is based on the accessibility of the system and of the data by authorised users when they need it.⁸⁷

2.2. Collection and Preservation of Evidence

Preservation and collection of evidence are crucial tasks of OSI because they ensure that relevant and potentially probative evidence are not lost.⁸⁸ Indeed, social media platforms may remove contents violating the terms of service even though such material has potential value to bring a case before a court.⁸⁹ Therefore, it is important that collection and preservation are timely and accurate, to prevent information from being lost forever.⁹⁰

Collection can be defined as the act of gaining possession of online information.⁹¹ This can be done in multiple ways: through a screenshot, PDF conversion, forensic download or other forms of capture.⁹² The method of capturing the information varies depending on the intended use of the information. It is important to remember that if the aim is that of using the evidence in the context of a judicial process, in order to have probative value, the information must contain certain information to be considered as sufficiently reliable. The elements necessary to give probative value to evidence will be discussed below. Once the evidence is collected, it is necessary to ensure that it is preserved so that the item collected remains accessible and intact over time. Indeed, preservation can be conceived as the storage and maintenance of data collected over time.

2.2.1. Information necessary in storage of evidence

As mentioned above, in the preservation of evidence, there are certain minimum standards to be respected for OSI investigators to prove evidence in court, namely: target web address, source code and full-page capture.⁹³ Additional information can help corroborate the trustworthiness of the evidence.⁹⁴

⁸⁶ Ibid.

⁸⁷ Chai Kar Yee and Mohamed Fadli Zolkipli, 'Review on Confidentiality, Integrity and Availability in Information Security' (2021) 8(2) JICTIE 34, 36.

⁸⁸ Berkeley Protocol (n. 25), para. 32.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Id. para. 153.

⁹² Id. para. 154.

⁹³ Id. para. 155.

⁹⁴ Ibid.

- **Minimum requirements for admissibility in court**
 - target web address: this is the web address of the content collected which is commonly known as uniform resource locator (URL) or identifier (URI).⁹⁵
 - source code: this is the HTML source code of the webpage in which the information had been found.⁹⁶
 - full-page capture: a complete capture of the webpage is very important as it gives the best possible representation of the evidence.⁹⁷ Such capture shall include the date and the time of collection.⁹⁸ The capture can be performed in a variety of ways: through a screenshot, PDF conversion, forensic download or other forms of capture that may be available to the investigator.
- **Additional criteria corroborating the value of the evidence**
 - embedded media files: if a webpage contains videos or images, those specific items should also be extracted and collected.⁹⁹
 - embedded metadata: metadata include: uploader user identifier; post, picture or video identifier; upload date and time; geotag; hashtag; comments and annotations.¹⁰⁰ If some or all of the aforementioned elements are present, the investigator shall include it in the storage of the information.
 - contextual data: contextual content support the evidence and shall be collected if relevant to the understanding and interpretation of the digital item. Contextual data include: comments on a video, image or post; upload information; uploader user information (e.g., username, real name or biography).¹⁰¹
 - collection data: this concept includes the name of the collector, the IP address of the machine used to collect the information, the virtual identity used and a time stamp.¹⁰² It is preferable that the system clock is synchronised with the Network Time Protocol Server to ensure that the time-related metadata are accurately registered.¹⁰³

⁹⁵ Id. para. 155(a).

⁹⁶ Id. para. 155(b).

⁹⁷ Id. para. 155(c).

⁹⁸ Ibid.

⁹⁹ Id. para. 155(d).

¹⁰⁰ Id. para. 155(e).

¹⁰¹ Id. para. 155(f).

¹⁰² Id. para. 155(g).

¹⁰³ Ibid.

- hash value: hash value refers to the unique form of digital identification which confirms by means of cryptography that the collected content is unique and it has in no way been modified or altered since the moment of collection.¹⁰⁴

2.2.2. Properties of a digital item to be protected and preserved over time

The preservation of the properties of the OSI collected is extremely important and it shall be ensured in the long term with a view to permit the access to information in a future situation. The properties of the item that must be preserved over time are: authenticity, availability, identity, persistence, renderability and understandability.

- **authenticity**

Authenticity relates to the fact that the digital item remains unchanged from the moment it was collected.¹⁰⁵ Any alteration since collection shall be documented.¹⁰⁶

- **availability**

Availability merely refers to the continuous existence of the evidence and to the fact that it is retrievable over time.¹⁰⁷ This is also linked with the reliability and credibility of the evidence, which is based on dependable and consistent results capable of being obtained by a replicable and repeatable process.

- **identity**

The digital item shall be distinguishable and identifiable from other digital items.¹⁰⁸ Giving an “identity” to the digital item is closely related to the ability of referencing the digital item itself.

- **persistence**

Persistence is related to the integrity and viability of the digital item in technical terms which entails that the item’s bit sequences must be intact, processible, and retrievable.¹⁰⁹

- **renderability**

Human beings and/or machines shall be able to interact with the digital item at stake using appropriate hardware and software.¹¹⁰

- **understandability**

¹⁰⁴ Id. para. 155(h).

¹⁰⁵ Id. para. 160.

¹⁰⁶ Ibid.

¹⁰⁷ Id. para. 161.

¹⁰⁸ Id. para. 162.

¹⁰⁹ Id. para. 163.

¹¹⁰ Id. para. 164

The user shall be able to interpret and understand the digital item.¹¹¹

2.2.3. Quality criteria

The reliability of OSI also depends on the information contained in the source itself. In particular, sources containing geospatial information which permit the localisation of the event in time and space are considered more authoritative and reliable. Provenance, meta-data, potential tampering, misattribution and authorship, and authenticity are factors to be considered when dealing with storage and preservation of the evidence.

In this regard, it is also important to label the sources appropriately to prioritise the most relevant sources and avoid the duplication of sources which may lead to over-collection of evidence. Indeed, in OSI, over-collection may be as problematic as under-collection of evidence because it undermines the trustworthiness of the investigator. In addition, certain evidence sources carry with them more probative value than others. In light of this, if several sources are used to prove the same fact, an assessment of the available information shall be made to identify which evidence potentially may “trump others” in court.

2.3. OTPLink

Before proceeding to the next section, it is worth noting a recent development with the ICC system concerning the collection of evidence, which makes this process more accessible to civil society. Indeed, in May 2023, the Office of Prosecutor launched the OTPLink, an online platform where victims, witnesses, non-governmental organisations and society at large have the possibility to digitally submit evidence relating to international crimes directly to the ICC.¹¹² The underlying idea is that of accommodating the digital transformation of criminal evidence that we are assisting to in recent conflicts with efforts being made by civil society to record with digital devices what happens in war zones with a view to produce material to assist investigation, prosecution and adjudication of international criminal crimes.¹¹³ The new platform is supported by the so-called Project Harmony, which aims at using artificial intelligence (AI) to analyse evidence and include rapid pattern identification, video and image

¹¹¹ Id. para. 165.

¹¹² The platform is accessible from the following link: <https://otplink.icc-cpi.int/>

¹¹³ Haley Evans and Mahir Azim, ‘Digital Solidarity in International Criminal Evidence’ (*Afronomics Law*, 27 November 2023) <<https://www.afronomicslaw.org/category/analysis/digital-solidarity-international-criminal-evidence>> accessed 1 April 2024.

analytics and facial identification.¹¹⁴ Although the OTPLink is an innovative and welcome development within the system of the ICC, the instrument remains problematic due to the fact that it is algorithm-based and, therefore, can lead to the biased exclusion of content submitted to the ICC.¹¹⁵ Indeed, biases are inherent in machine learning tools such as Project Harmony, as these instruments are developed on the base of the data on which they are trained.¹¹⁶ In regard to facial identification technology, concerns come from the possibility that people of certain ethnic groups are more accurately identified than people with a different skin colour.¹¹⁷ In addition, in an era in which AI is growing, it is not unthinkable that someone may taint the audio-visual documentation sent through the OTPLink with a view to intentionally mislead the investigation process.¹¹⁸ In this sense it may be dangerous to leave to an AI system the role of “gatekeeper” for the access to justice.

The OTPLink is based on Article 15 Rome Statute, under which any individual, group, State, or intergovernmental or non-governmental organisation may send information through the OTPLink portal or by post on alleged crimes within the jurisdiction of the Court to the Office of the Prosecutor.¹¹⁹ Any information provided is referred to as ‘Article 15 communications’. All communications, regardless of the source, are subjected to an assessment by the Office of the Prosecutor to analyse and verify the seriousness of the information received, filter out information on conduct or crimes that are outside of the Court’s jurisdiction.¹²⁰ This allows the identification of those that appear to fall within the Court’s jurisdiction and warrant further action.

Information sent to the OTP under Article 15 should relate to alleged crimes within the ICC jurisdiction, namely: war crimes, crimes against humanity, genocide or aggression. It is preferable, but not necessary, that the information sent includes the specific incident or set of incidents to which it is referred, the place and time of any such incidents or crimes and details

¹¹⁴ Tal Mimran and Lior Weinstein, ‘Digitalize It: Digital Evidence at the ICC’ (*Articles of War*, 14 August 2023) <<https://lieber.westpoint.edu/digitalize-it-digital-evidence-icc/>> accessed 3 March 2024.

¹¹⁵ Ibid.

¹¹⁶ Gabrielle McIntyre and Nicholas Vialle, ‘The Use of AI at the ICC: Should we Have Concerns? Part I’ (*OpinioJuris*, 11 October 2023) <<https://opiniojuris.org/2023/10/11/the-use-of-ai-at-the-icc-should-we-have-concerns-part-i/>> accessed 2 April 2024;

Gabrielle McIntyre and Nicholas Vialle, ‘The Use of AI at the ICC: Should we Have Concerns? Part II’ (*OpinioJuris*, 11 October 2023) <<https://opiniojuris.org/2023/10/11/the-use-of-ai-at-the-icc-should-we-have-concerns-part-ii/>> accessed 2 April 2024.

¹¹⁷ Haley Evans and Mahir Azim, ‘Digital Evidence Collection at the Int’l Criminal Court: Promises and Pitfalls’ (*Just Security*, 5 July 2023) <<https://www.justsecurity.org/87149/digital-evidence-collection-at-the-intl-criminal-court-promises-and-pitfalls/>> accessed 1 April 2024.

¹¹⁸ Ibid.

¹¹⁹ ‘FAQs: What is an article 15 communication?’ (*International Criminal Court*) <<https://otplink.icc-cpi.int/faqs>> accessed 3 March 2024.

¹²⁰ Ibid.

on the alleged perpetrator and victims.¹²¹ This may be particularly relevant for organisations such as Airwars as it allows a simplified access to the Court. However, given the recent introduction of this tool in the ICC system, information regarding its functioning is not available yet.

3. Presentation of Evidence – OSI at Trial

This segment looks at the trial phase, more specifically, judges’ approach to evidence during trial. It is important to keep in mind that both at the national level, as well as at the international level, including at the ICC, judges have significant discretion whether, how and when to consider all kinds of evidence.¹²² At the ICC, more specifically, according to article 63(2) of the Rules of Procedure and Evidence, “a chamber shall have the authority to assess freely all evidence submitted in order to determine its relevance or admissibility.” Thus, judges have the power to decide on any issue that arises in either the authenticity or verifiability of evidence, especially digital evidence.¹²³ In other words, the ICC procedural framework on evidentiary regimes is fairly relaxed, flexible and open, particularly with respect to expert evidence, which will be addressed below.¹²⁴ Nevertheless, it is interesting to note that, in general, it appears to be a presumption of the admission of evidence.¹²⁵

3.1. Method of assessment

Concerning the assessment of the evidence, the Court has used two different approaches throughout the judgments. First, the atomistic or deconstruction approach in which the Court favours an examination of each piece of evidence in the context of the full record before

¹²¹ ‘FAQs: What type of information can I submit?’ (*International Criminal Court*) <<https://otplink.icc-cpi.int/faqs>> accessed 3 March 2024.

¹²² For the international level, see: Matthew Gillet and Wallace Fan, ‘Expert Evidence and Digital Open Source Information: Bringing Online Evidence to the Courtroom’ (2023) *Journal of International Criminal Justice*. For an analysis and comparison of national jurisdictions, see: Natalia Krapiva, ‘The United Nations Mechanism on Syria: Will the Syrian Crimes Evidence be Admissible in European Courts?’ (2019) 107 *California Law Review*

¹²³ Chelsea Quilling, ‘The Future of Digital Evidence Authentication at the International Criminal Court’ (*Journal of Public and International Affairs*, 20 May 2022), at <https://jpia.princeton.edu/news/future-digital-evidence-authentication-international-criminal-court>. Last accessed 02/04/2024

¹²⁴ Matthew Gillet and Wallace Fan, ‘Expert Evidence and Digital Open Source Information: Bringing Online Evidence to the Courtroom’ (2023) *Journal of International Criminal Justice*

¹²⁵ Michael G. Karnavas & Noah Al-Malt, ‘Defending in the age of open source digital user-generated evidence’ (*International Criminal Law Blog*, 13 February 2023), at <https://michaelgkarnavas.net/blog/2023/02/13/defending-in-the-age-of-open-source/>

supporting a conclusion.¹²⁶ In the ICC case law, this methodological reasoning was used by Judge van den Wyngaert in the *Katanga* judgement, albeit highly criticised by her colleagues.¹²⁷

Similarly, it raised concerns, and additionally a dissenting opinion in the Appeals Chamber when deciding on the *Ngudjolo* case.¹²⁸ Second, according to the holistic approach, the Court evaluates evidence as a whole. The recent ICC jurisprudence seems to prefer this second approach. Indeed, this practice was largely followed in the *Lubanga* case by the Appeals Chamber (which uphold the evidentiary analysis of the Trial Chamber),¹²⁹ but also by the Appeals Chamber Majority decision in *Bemba et al.*,¹³⁰ by the Trial Chamber in *Ntaganda*,¹³¹ and in *Gbagbo and Blé Goudé*.¹³²

3.2. Timing of assessment

Concerning the timing of the assessment of the evidence, the court has also followed two different models throughout its judgements.¹³³ First, the admission model, which follows common law tradition, provides that the Court assesses evidence when it is submitted by the parties. This was the approach adopted by the ICC by the Trial Chambers in *Lubanga*¹³⁴ and in *Katanga and Ngudjolo*.¹³⁵ Second, following the civil law tradition, the production or submission model provides that the Court assesses the admissibility of evidence, based on its probative value, including authenticity and reliability, as well as its relevance and weight at the end of the trial after having heard all the evidence first.¹³⁶ Until then, the evidence is only

¹²⁶ Lindsay Freeman and Raquel Vazquez Llorente, ‘Finding the Signal in the Noise: International Criminal Evidence and Procedure in the Digital Age’ (2021) 19 *Journal of International Criminal Justice* 178-184

¹²⁷ Judgment pursuant to Article 74 of the Statute, *Katanga* (ICC-01/04-01/07), Trial Chamber II, 7 March 2014. See also the Concurring opinion of Judges Fatoumata Diarra and Bruno Cotte, at §4.

¹²⁸ Judgment on the Prosecutor’s Appeal against the Decision of Trial Chamber II entitled ‘Judgment pursuant to Article 74 of the Statute’, *Ngudjolo Chui* (ICC-01/04-02/12-271-Corr), Appeals Chamber Decision, 7 April 2015. See also Joint Dissenting opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser (ICC-01/04-02/12-271-AnxA).

¹²⁹ Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, *Lubanga* (ICC-01/04-01/06A5), Appeals Chamber, 1 December 2014, §22.

¹³⁰ Public Redacted Version of ‘Prosecution’s Closing Brief’, *Bemba Gombo et al.* (ICC-01/05-01/13-1905-Red), 10 June 2016, §21

¹³¹ Judgment, with public Annexes A, B and C, *Ntaganda* (ICC-01/04-02/06), Trial Chamber VI, 8 July 2019, §45.

¹³² Public Redacted Version of Reasons of Judge Geoffrey Henderson, *Gbagbo and Blé Goudé* (ICC-02/11-01/15-1263-AnxB-Red), Trial Chamber I, 16 July 2019, §§31, 255, 1056, 1121, 1667 and 1864.

¹³³ Lindsay Freeman and Raquel Vazquez Llorente, ‘Finding the Signal in the Noise: International Criminal Evidence and Procedure in the Digital Age’ (2021) 19 *Journal of International Criminal Justice* 181. See also: F. Guariglia, “‘Admission’ v. ‘Submission’ of Evidence at the International Criminal Court: Lost in Translation?” (2018) 16 *Journal of International Criminal Justice* 315-339.

¹³⁴ Decision on the admissibility of four documents, *Lubanga*, (ICC-01:04-01/06-1399), Trial Chamber I, 13 June 2008, §27.

¹³⁵ Decision on the Prosecutor’s Bar Table Motions, *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-2635), Trial Chamber II, 17 December 2010.

¹³⁶ See e.g.: *Gbagbo and Blé Goudé* (ICC-02/11-01/15- 773), Trial Chamber; *Bemba et al.* (ICC-01/05-01/13-2275-Anx), Appeals Chamber. For more, see: L. Freeman, ‘Hacked and Leaked: Legal Issues Arising From the

considered as submitted or produced before the Court. This model was followed by the Trial Chambers in *Gbagbo and Blé Goudé*,¹³⁷ as well as by the Appeals Chamber Majority Decision in *Bemba et al.*,¹³⁸ and the trial Chamber in *Ongwen*.¹³⁹

3.3. Expert evidence and testimony

Most relevant in the trial phase is the method and tools judges use to decide on evidence. In general, to decide on the admissibility and weight of OSI, Chambers at the ICC rely on corroborative evidence or expert testimony.¹⁴⁰ Indeed, open-source evidence requires verification across multiple-sources, also known as the process of triangulation. When corroborated and explained by experts, it can be highly persuasive. This segment specifically focuses on the role of expert testimonies. The ICC described experts as people who, by virtue of some specialised knowledge, skill, or training, can assist the Chamber in understanding or determining an issue of a technical nature that is in dispute.¹⁴¹

While the approach of the ICC was intended to expand the judicial role in the instruction of experts,¹⁴² in practice, the parties tend to instruct experts, or rely on experts' reports.¹⁴³ From the jurisprudence of international courts, and more specifically, the ICC and the ECtHR, we can establish some criteria for experts and for their evidence to be admitted. Therefore, if the court is satisfied that all following requirements are met, NGOs such as Airwars can be considered experts and bring to court the data collected as evidence without the need for a double check by the Court's appointed experts themselves.¹⁴⁴ In other words, this section

Use of Unlawfully Obtained Digital Evidence in International Criminal Cases', (2021) 25(2) UCLA Journal of International Law and Foreign Affairs 45, at 72.

¹³⁷ Decision on the submission and admission of evidence, *Gbagbo and Blé Goudé* (ICC-02/11-01/15), Trial Chamber I, 29 January 2016, § 12.

¹³⁸ Public Redacted Version of 'Prosecution's Closing Brief', *Bemba Gombo et al.* (ICC-01/05-01/13-1905-Red), 10 June 2016, § 21.

¹³⁹ Initial Directions on the Conduct of the Proceedings, *Ongwen* (ICC-02/04-01/15-497), Trial Chamber IX, 13 July 2016, § 24.

¹⁴⁰ Matthew Gillet and Wallace Fan, 'Expert Evidence and Digital Open Source Information: Bringing Online Evidence to the Courtroom' (2023) Journal of International Criminal Justice

¹⁴¹ ICC in *Prosecutor v Ntaganda* (ICC-01/04-02/06-2359), Judgment, Trial Chamber, 8 July 2019, citing the ICTY jurisprudence: *Prosecutor v. Galic*, Decision Concerning the Expert Witness Ewa Tabeau and Richard Philips. Case IT-98-29-T, 3 July 2002, para 2. Cited in Matthew Gillet and Wallace Fan, 'Expert Evidence and Digital Open Source Information: Bringing Online Evidence to the Courtroom' (2023) Journal of International Criminal Justice

¹⁴² For an understanding of the Court appointed experts, see Regulations of the Court, International Criminal Court, U.N. Doc. ICC-BD/01-01-04

¹⁴³ Artur Appazov, 'Expert Evidence in International Criminal Trials', in: Artur Appazov, *Expert Evidence and International Criminal Justice* (2016) Springer Cham. See also: Roger Derham & Nicole Derham, 'From Ad Hoc to Hybrid – the Rules and Regulations Governing Reception of Expert Evidence at the International Criminal Court' (2010) 14 International Journal of Evidence and Proof

¹⁴⁴ See Regulations of the Court, International Criminal Court, U.N. Doc. ICC-BD/01-01-04

explores how OSI specialists can mitigate the risks of their work being considered unreliable and/or inadmissible.

Procedural requirements:

- Identity of the experts: (Groups of) experts should identify themselves, stating the profiles of the team members working on the evidence brought to Court, their CV, their expertise, etc.¹⁴⁵ As such, the experts need to justify why the Court should consider them experts.¹⁴⁶ It must be noted that expert evidence should go beyond the typical lay person's knowledge. This justifies the experts being able to provide their opinions as evidence, addressing factors beyond those immediately apparent and reflects the special epistemic nature of expert witnesses in litigation. As OSI experts are just beginning to present their data to court proceedings, there exists no established jurisprudence regarding the criteria pertaining to their identity and professional qualifications. It seems that Courts are moving on a case-by-case basis, looking at the CV, at the experience and qualifications, and at the relevance of the expertise in the given case. Therefore, it appears important to underline the interdisciplinarity of the team, and to give detailed information on the role and experience of each member.
- Methodology: Experts should provide a report presenting the methodology and findings. This should be disclosed to either party well in advance before the expert testifies. The content of the report and proposed testimony must fall within the expert's expertise, and the evidence must potentially assist the chamber. Disclosing methodology serves two purposes. First, it allows for transparency and the possibility of (peer-)reviewing the methodology, both by the judges and court's investigators themselves and by the opposing party's experts.¹⁴⁷ Second, it is believed that other investigators who did not conduct the open-source research should be able, based on the disclosed methodology, to replicate the research and find similar conclusions.¹⁴⁸

¹⁴⁵ Artur Appazov, 'Expert Evidence in International Criminal Trials', in: Artur Appazov, *Expert Evidence and International Criminal Justice* (2016) Springer Cham, 33.

¹⁴⁶ For a list of the current experts before the ICC, consult: *List of experts before the ICC as of 17 January 2024* at: <https://www.icc-cpi.int/get-involved/experts/list-of-experts-before-the-icc>.

¹⁴⁷ Artur Appazov, 'Expert Evidence in International Criminal Trials', in: Artur Appazov, *Expert Evidence and International Criminal Justice* (2016) Springer Cham, pp. 41-42. For an example of cross-examination, see *Prosecutor v. Popovic*, Case IT05-08-T, Transcript of 15 March 2007.

¹⁴⁸ 'The New Forensics' (2018) Berkeley School of Law.

- Chain of custody: following the information listed above, the chain of custody should be disclosed for similar reasons. First, it allows for transparency on the way the evidence was collected and preserved. Second, it gives the opportunity to challenge the evidence.
- Neutrality and objectivity: In general, experts should be neutral and objective. Acknowledging that no one is fully objective or neutral, the best way to achieve this requirement is to be transparent. This requirement encapsulates those set above, including the identity of the experts and the disclosure of the methodology. On this latter aspect, it is important to indicate whether the methodology and the results have been peer-reviewed, including the two factors verification and authentication of the source and content.¹⁴⁹ Additionally, experts should recognise and notify the limits of their methodology and findings, as well as the possible bias and affiliations with the party involved in the case.
- Facts v. law: experts should not opine on ultimate issues of facts or law which are contested as these fall into the competence of the Chambers to determine. Experts should limit themselves to cover the subject matter of the evidence to be adduced and presented it in terms of likelihood.

Substantive requirements (as stated, the following information regarding the data should be included in the submission to the Court):

- Probative value of expert evidence: including internal indicators such as the date, location, provenance and meta-data, as well as external indicators, such as potential tempering, misattribution and authorship.
- (Counter-) Indicia of reliability: including origin, content, corroboration, truthfulness, voluntariness, and trustworthiness of the evidence.
- Best evidence rule: the Court tends to rely on the best evidence available in the circumstances. Experts are invited to submit the most authoritative ‘original’ version(s) of the evidence. This does not mean that only a piece of evidence for each incident should be submitted, but that for each incident, the best evidence should be carefully selected.
- Objectivity: experts should include both incriminating and exonerating factors emerging from the open-source investigation.¹⁵⁰

¹⁴⁹ ‘The New Forensics’ (2018) Berkeley School of Law.

¹⁵⁰ Matthew Gillet and Wallace Fan, ‘Expert Evidence and Digital Open Source Information: Bringing Online Evidence to the Courtroom’ (2023) Journal of International Criminal Justice.

3.4. Case study: the unofficial role of Bellingcat in *Ukraine and The Netherlands v. Russia*

The European Court of Human Rights case of *Ukraine and the Netherlands v. Russia*, decided in November 2022, illustrates how NGOs conducting open-source investigation can be involved in international disputes, without being formally appointed as Court's experts. The case saw investigative group Bellingcat play a significant role in supporting the claims brought against Russia. While not formally appointed as expert witnesses, Bellingcat's open-source investigations provided crucial evidence for the Court's considerations.

The case centred on human rights violations by Russia in eastern Ukraine. The applicants' governments presented a body of evidence, including reports and analysis by Bellingcat, to substantiate their claim.¹⁵¹ These reports employed methodologies such as geolocation of social media posts and satellite imagery analysis. Notably, Bellingcat identified a specific Russian training ground through geolocation techniques. Soldiers photographed online at this location were later linked to artillery attacks within Ukrainian territory.

Although Bellingcat did not hold an official role within the proceedings, the ECtHR acknowledged the 'credible and serious' nature of the investigations.¹⁵² This recognition signifies a noteworthy development - the Court's acceptance of evidence primarily gathered from publicly available online sources. While Russia contested the validity of such evidence, the ECtHR, following scrutiny, deemed Bellingcat's methods sound and their findings relevant to the case.¹⁵³ This decision sets a precedent for the growing importance of open-source investigations in international legal proceedings.

4. Pattern of Evidence

Neither the Rome Statute nor the Rules of Procedure and Evidence of the ICC (ICC Rules) provides a precise evidentiary rule about the requirements to admit proof of a pattern. However, the Statutes of the International Criminal Tribunal for former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) both include Rule 93, which specifically

¹⁵¹ ECHR, *Ukraine and The Netherlands v Russia* (Applications nos. 8019/16, 43800/14 and 28525/20), 30 November 2022, §§398-399

¹⁵² ECHR, *Ukraine and The Netherlands v Russia* (Applications nos. 8019/16, 43800/14 and 28525/20), 30 November 2022, §472

¹⁵³ ECHR, *Ukraine and The Netherlands v Russia* (Applications nos. 8019/16, 43800/14 and 28525/20), 30 November 2022, §§464, 472

states: “Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice.”

However, in the *Bagosora* case, the ICTR clarified that Rule 93 is just an example of a specific kind of evidence which may be admitted by the Chamber.¹⁵⁴ In that sense, the Trial Chamber explained that Rule 93 must be read alongside other norms, such as Rule 89(C), which demands other criterion, such as (i) the probative value, (ii) the relevant to trial and that (iii) the probative value of the evidence is not outweighed by the prejudicial effect. In other words, it is not enough that the pattern evidence is relevant for the trial, as it may be excluded if it causes “unfairness in the trial proceedings”.¹⁵⁵

The same reasoning is applied in the admissibility decision of the ICC regarding the evidence or group of evidence that demonstrate the existence of a pattern. The following paragraphs will provide case examples of how the ICC and the ICTY decided over pattern evidence that is considered OSI or digital evidence. Mostly, how the Chambers evaluate the three criteria mentioned in the previous paragraph, following Rule 69 of the ICC Rules.

4.1. ICC Lubanga, Judgment (14 March 2012)

Lubanga was charged with the war crime of using, conscripting, or enlisting child soldiers. Therefore, the Prosecutor had to prove “beyond reasonable doubt” that these actions were committed against people under the age of 15, with the aim that they participate actively in the national armed hostilities.¹⁵⁶ For that, the Prosecutor used some videos where children were conscripted and enlisted. For example, “EVD-OTP-00739 -evidence- was a record that was made to assist in monitoring children who were reunited with their families.”¹⁵⁷

The prosecution argued that EVD-OTP-00739 demonstrated “the systematic nature of the plan that children were to be conscripted and enlisted into, and used by, the UPC/FPLC”.¹⁵⁸ However, the probative value given to this evidence by the Court was minor, given the absence of verification regarding to which armed group or groups the children belonged.¹⁵⁹ In that sense, the Chamber assessed that the proof was not reliable enough.¹⁶⁰

¹⁵⁴ *Bagosora Case (Judgment) ICTR-98-41-AR93 (19 December 2003) 13*

¹⁵⁵ *Id.*

¹⁵⁶ Lindsay Freeman. *Digital evidence and War Crimes Prosecutions: The impact of Digital Technologies on International Criminal Investigations and Trials* (2018) 41 *FILJ* 283, 303

¹⁵⁷ *Lubanga Case (Judgment) ICC-01/04-01/06 (14 March 2012) 735*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* About this point the Chamber particularly stated “739. Assessing this evidence overall, the lack of information concerning the armed group or groups to which the children registered in logbook EVD-OTP-00739

Moreover, the Chamber stated that given the insecure conditions in Ituri, the Prosecutor failed to investigate the children's histories.¹⁶¹ Additionally to the lack of reliability, some of the witnesses during the trial were suggested to be lying about their age.¹⁶² Even despite these setbacks, the Prosecutor introduced videos, records from non-governmental organisations, letters, photographs, and maps.¹⁶³ These elements helped to demonstrate, to a greater or lesser extent, that the recruitment of children in Ituri was systematic and to build the general context around this practice.

Particularly, the Chamber mentioned public video footage that shows an event attended by Lubanga, in which a young man under the age of 15 "is filmed wearing camouflage clothing and carrying weapons".¹⁶⁴ This evidence was corroborated by a witness, who testified "that he belonged to the same group as the other soldiers in the footage."¹⁶⁵ In that sense, though the weight given to these is minimal, they helped to confirm the witness testimony and are essential to design an initial and general context of a situation.

4.2. ICC Laurent Gbagbo, Decision on the confirmation of charges (12 June 2014)

The Prosecutor brought against Laurent Gbagbo charges of crimes against humanity supposedly committed in the context of post-electoral violence in Côte d'Ivoire. These crimes were allegedly committed during and after protests supporting the presidential rival, Mr. Alassane Ouattara, especially at a women's demonstration in Abobo, and by shelling a densely populated area in Abobo.¹⁶⁶

In this decision, the Chamber noted that the evidence, which included some open-source information, demonstrated "that preparations for the attack were undertaken in advance, and that the attack was planned and coordinated".¹⁶⁷ For the Chamber, this showed a pattern of violence directed at pro-Ouattara demonstrators or activists in Darfur villages.¹⁶⁸ Even though

and listed in EVD-OTP-00474 belonged, leads the Chamber to conclude that these two documents cannot be relied on in order to establish the presence of children within the UPC/FPLC.

(...) Similarly, the Chamber is unable to rely on the contents of logbook (...) ,notwithstanding the fact that it contains information about the armed groups with which the children were associated, along with their dates of birth, because of the potential unreliability of the information when it was originally provided and the apparent lack of sufficient (or any) verification".

¹⁶¹ Id. 156

¹⁶² Id. 180

¹⁶³ Id. 93

¹⁶⁴ Id. 861

¹⁶⁵ Id.

¹⁶⁶ The Prosecutor v. Laurent Gbagbo (Decision on Confirmation of charges) ICC-02/11-01/11 (12 June 2014)

¹⁶⁷ Id. 225

¹⁶⁸ Id.

the accused were acquitted in the Trial Phase, materials like public reports were accepted in the stage of confirmation of charges.

For instance, reports from Amnesty International and Human Rights Watch supported the determination of “the widespread or systematic nature of the alleged attacks **when corroborated by other types of evidence**”.¹⁶⁹ Particularly, the Chamber stated, even though some witnesses were present when the shells struck the village of Abobo, their views were limited to their personal experience and observation in particular locations.¹⁷⁰ Therefore, the Chamber had to reinforce these facts with other documentary evidence, which included open sources, to provide information about the number of victims.

About the quality of the information provided, the Court stated that the probative value of the relevant evidence, including the OSI, would be under a “**limited ... assessment**” due to the nature of the confirmation of charges proceedings.¹⁷¹ Accordingly, this stage is “necessarily presumptive”, which would differ from the evidentiary standard in the trial stage, which is “beyond reasonable doubt”.¹⁷² Moreover, the Pre-Trial Chamber considered that the reliability and credibility of the items challenged by the defence would be evaluated in other stages in different manners.¹⁷³

4.3. ICC Al-Mahdi, Opening (22 August 2016)

Geolocation was used in the Al-Mahdi case to determine the exact location where certain events occurred, particularly the destruction of cultural property like mosques and mausoleums in Timbuktu, Mali. In this case, the Prosecutor included a research agency, Situ, that brings into the process “combining geospatial information, historic satellite imagery, photographs, open-source videos”.¹⁷⁴ Through these, the judges were able to have a comprehensive view of the various events in Timbuktu. About 600 items were admitted into the trial, including videos that showed the accused “destroying, ordering or overseeing to destroy images”.¹⁷⁵

¹⁶⁹ Id.

¹⁷⁰ Id. 54

¹⁷¹ Id. 21

¹⁷² Id.

¹⁷³ Id.

¹⁷⁴ Stefano Trevisa. Open-source information in criminal proceedings: lessons from the International Criminal Court and the Berkeley Protocol (2021) 4 *Giurisprudenza Penale* 11

¹⁷⁵ Lindsay Freeman, Prosecuting Atrocity Crimes with Open Source Evidence in Dubberley, S., Koenig, A., & Murray, D. (eds), *Digital witness : Using open source information for human rights investigation documentation, and accountability* (OUP Press 2020) 56

Among the items collected by Situ, there were online sources like *YouTube* videos or satellite images from the website *Google Earth*, which showed pictures of Mali, before and after the destruction.¹⁷⁶ In addition, there are also some public statements by Al-Mahdi explaining his willingness to destroy cultural property, which were picked up by the press after he voluntarily agreed to be interviewed publicly.¹⁷⁷ Although the Prosecutor took “extra steps to ascertain the date, time, and location” of these materials, **it did not “show concern that the images and videos may be doctored or staged”**.¹⁷⁸

As the accused pleaded guilty, the evidence was also accepted by the defence team, and, consequently, the Court did not assess the probative value of the items¹⁷⁹, nor the possible gaps during the Prosecutor’s evidence gathering. Yet, under these circumstances, the case still demonstrated the ability of the Prosecutor to create an innovative way to systematise and facilitate the presentation of the evidence, including through OSI.¹⁸⁰ More importantly, the defence did not challenge these elements, which may indicate the parties' acceptance of this type of source.¹⁸¹

Some criticised this decision, claiming that the website *Google Earth* would not exceed the standard of reliability required for a courtroom.¹⁸² However, the case approach is groundbreaking, as it revealed “how online OSI can be sourced, verified, analysed, and presented in ways that can advance legal accountability”.¹⁸³ In the same vein, the authors emphasised that the OSIs in this case, like the *YouTube* videos, were useful tools to identify the location of the buildings and the faces of some perpetrators or witnesses, thus helping the investigators to conduct “a more effective and targeted investigation”.¹⁸⁴

4.4. ICTY: Tolimir, Judgement (12 December 2012)

In this case, the courtroom established there was a pattern of killing Bosnian Muslim men from Srebrenica by Bosnian Serb Forces, which were “deployed to specifically selected remote

¹⁷⁶ Lindsay Freeman. Digital evidence and War Crimes Prosecutions: The impact of Digital Technologies on International Criminal Investigations and Trials (2018) 41 FILJ 283, 317

¹⁷⁷ *Id.*

¹⁷⁸ Leiden University, Report on Digitally Derived Evidence in International Criminal Law (2019) 25

¹⁷⁹ *Id.*

¹⁸⁰ Stefano Trevisa. Open-source information in criminal proceedings: lessons from the International Criminal Court and the Berkeley Protocol (2021) 4 *Giurisprudenza Penale* 11

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Lindsay Freeman. Digital evidence and War Crimes Prosecutions: The impact of Digital Technologies on International Criminal Investigations and Trials (2018) 41 FILJ 283, 317

locations to take part in these killings”.¹⁸⁵ According to the Tribunal, most of the killings occurred in an efficient and orderly manner.¹⁸⁶

Some of the evidence items included in the Trial were aerial images provided by the US Government.¹⁸⁷ The images support, among other things, the presence of larger groups of prisoners, graves, and bodies in particular locations.¹⁸⁸ Although these elements were not properly OSI, when they were presented to the Court, the US stated that it was not allowed “to discuss (...) any information relating to the technical or analytical sources, methods, or capabilities of the systems, organisations, or personnel used to collect, analyse, or produce these imagery-derived products”.¹⁸⁹ In that sense, it is arguable that such images, as with OSI, would also lack the authentication process.

This was actually the point made by the Defence, who challenged the reliability of these items on the basis that there was no proof of their origin, method of creation, or manner of editing.¹⁹⁰ Even though the Chamber recognized the pictures lacked these authentication features, it stated that this didn’t “impair the credibility of aerial images in general”.¹⁹¹ Particularly, the Chamber settled their authenticity because two investigators, the prosecutor and an archaeologist, “first identified and then indeed located gravesites by aerial images”.¹⁹² Therefore, the interpretation or authenticity of the images was corroborated by the testimony of the experts so that, in general, they are reliable and of probative value.¹⁹³

¹⁸⁵ Prosecutor v. Zdravko Tolimir (Judgment) IT-05-88/2-T (12 December 2012) 770.

¹⁸⁶ Id.

¹⁸⁷ Id. 68

¹⁸⁸ Id. 68

¹⁸⁹ Id. 68

¹⁹⁰ Leiden University, Report on Digitally Derived Evidence in International Criminal Law (2019) Pag 24.

¹⁹¹ Prosecutor v. Zdravko Tolimir (Judgment) IT-05-88/2-T (12 December 2012) 70

¹⁹² Id.

¹⁹³ Id.

Section III

1. Legal framework

1.1. International Humanitarian Law

International Humanitarian Law (IHL) is mainly prescribed by the Geneva Conventions of 1949 and its three Additional Protocols¹⁹⁴, they regulate the conduct of hostilities, choice and use of means and methods of warfare, and the protection of people affected by armed conflict. The treaty body of IHL is also composed of different Hague Conventions¹⁹⁵ and specific covenants regarding means and methods of warfare¹⁹⁶, such as the Ottawa Treaty on the prohibition of the use of anti-personnel landmines. Nevertheless, it is noteworthy to highlight the role of customary international law, which consists of rules that come from a general practice accepted as law and exist independent of treaty law. Customary IHL is of crucial importance in today's armed conflicts because it fills gaps left by treaty law and so strengthens the protection offered to victims and accountability efforts. The International Committee of the Red Cross (ICRC) pursuing its mandate of promoting the knowledge of IHL carried out substantive research to identify the existing rules of IHL that have become customary international law. In 2005 they published the ICRC's Study on Customary International Law with its findings, consisting of 161 rules with their respective state practice and sources.¹⁹⁷ The ICRC regularly updates the sources that support the customary status of the established rules.

For accountability in IHL regarding individuals we have to talk either about individual criminal responsibility -the attribution of international crimes to a determined person- or state

¹⁹⁴ The First Geneva Convention protects wounded and sick soldiers on land during war. The Second Geneva Convention protects wounded, sick and shipwrecked military personnel at sea during war. The Third Geneva Convention applies to prisoners of war. The Fourth Geneva Convention protects civilians, including those in occupied territory. In 1977 the first Additional Protocols were adopted, they strengthened the protection of victims of international (Protocol I) and non-international (Protocol II) armed conflicts and placed limits on the way wars are fought. In 2005, a third Additional Protocol was adopted creating an additional emblem, the Red Crystal, which has the same international status as the Red Cross and Red Crescent emblems.

¹⁹⁵ The term "Hague Conventions" describes the treaties and declarations that were adopted in The Hague and that contain rules regulating warfare. These include a series of international treaties and declarations that were adopted at two international peace conferences in 1890 and 1907 and the 1954 Hague Convention on the Protection of Cultural Property in the event of armed conflict.

¹⁹⁶ For example, there are treaty bans prohibiting the use of laser weapons, biological weapons, chemical weapons and anti-personnel landmines. There are treaty restrictions on the use of anti-personnel landmines (for states not bound by the treaty banning their use outright), anti-vehicle mines, explosive remnants of war and fragmentation weapons.

¹⁹⁷ The study was originally published by Cambridge University Press and since it has been turned into an online database accessible in <https://ihl-databases.icrc.org/en/customary-ihl>

responsibility -the attribution to a sovereign state of the breach of certain international obligations-. Both possibilities will be shortly explained below.

1.2. Individual Criminal Responsibility

The ICRC has established in the aforementioned study that the principle of individual criminal responsibility is a long-standing rule of customary international law, which means that people are criminally responsible for the commission of international crimes. Following the Rome Statute¹⁹⁸, the regime applicable to the International Criminal Court, international crimes are the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.

Individuals are not only criminally responsible for committing an international crime, but also for attempting to commit one, as well as for assisting in, facilitating, aiding or abetting their commission of. They are also responsible for planning or instigating the commission of a war crime, crimes against humanity, genocide.

As it will be explained in each corresponding section, international crimes are established, for example, in the text of the Rome Statute¹⁹⁹ or the statutes to previous international tribunals. In the case of war crimes, they are closely related to the rules of IHL, whereas the concept of crimes against humanity was developed in the context of the International Military Tribunals of Nuremberg. Finally, genocide was defined as an international crime by the United Nations General Assembly, in its first session in 1946.²⁰⁰

1.3. State Responsibility

With regards to States, responsibility is triggered by the actions of its agents, in particular its armed forces, but also by individuals or groups acting under that State's effective control. The International Court of Justice (ICJ) has jurisdiction to adjudicate disputes between States, to compel them to comply with their international obligations towards other States and to make reparation for any damage caused to other States by their wrongful acts. State responsibility for failing to comply with obligations under IHL may be invoked in front of the ICJ by other governments that have suffered harm as a result of such violations and may result

¹⁹⁸ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), ISBN No. 92-9227-227-6, UN General Assembly, 17 July 1998, <https://www.refworld.org/legal/constinstr/unga/1998/en/64553> [accessed 02 April 2024]

¹⁹⁹ Ibid.

²⁰⁰ United Nations General Assembly Resolution 96 of 11 December 1946, titled "The Crime of Genocide", was a resolution of the United Nations General Assembly during its first session that affirmed that genocide was a crime under international law. Prior to this resolution, acts of genocide were legally considered to be subsumed within crimes against humanity. A/RES/96 (I).

in reparations. However, this would be the case only for international armed conflicts. When it comes to non-international armed conflicts it is more difficult to claim State responsibility before an international judiciary body.

Building on the general obligation of the State to respect and ensure respect for IHL, the Geneva conventions and its protocols draw up a list of related, specific, and concrete obligations of the State. This would be the case of war crimes, with regards to genocide the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)²⁰¹ binds States internationally to prevent the crime of genocide. The genocidal acts are punishable, as well as the conspiracy to commit genocide, direct and public incitement to commit genocide, attempts to commit genocide and complicity in genocide. Following ICJ's case law it has been determined that third states could bring States committing acts of genocidal nature against its citizens under the UN Convention. This is because the Genocide Convention, creates obligations upon all the state parties. As the Court said: "... all the States parties to the Convention have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention. Such a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case".²⁰²

However, with regards to crimes against humanity there currently does not exist an international convention binding states to take all measures to prevent them and to establish its punishment. Noteworthy, the International Law Commission -the United Nations (UN) body of experts responsible for helping develop and codify international law- has been developing draft articles on crimes against humanity since 2014. The Draft Articles on Crimes against Humanity²⁰³ were adopted by the International Law Commission at its seventy-first session, in 2019, and submitted to the General Assembly.

²⁰¹ UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, United Nations, Treaty Series, vol. 78, p. 277, 9 December 1948, <https://www.refworld.org/legal/agreements/unga/1948/en/13495> [accessed 02 April 2024]

²⁰² On 26 January 2024, the International Court of Justice issued an interim order in response to South Africa's application instituting proceedings against Israel alleging violations of the Genocide Convention for its actions in the Gaza Strip since 7 October 2023 (South Africa v Israel). Interim order, para. 33.

²⁰³ Report on the work of the seventy-first (2019) (1 May-2 June and 3 July-4 August 2017), A/72/10, 'Draft Articles on the Prevention and Punishment of Crimes Against Humanity', available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_7_2019.pdf

2. Methodology

Given the type of events that Airwars tracks we will look at the crimes and cases that refer to attacks against civilian population and civilian property. We will begin with war crimes, the following section will analyse crimes against humanity and finally genocide. The objective is to determine what elements were valued by the courts to determine the occurrence of the crimes and the responsibility of those convicted. While gathering the relevant case law we will be able to draw conclusions of what was highlighted by the tribunals and thus provide recommendations for the assessment and registering of Airwars data.

It is important to highlight the place Airwars' work could take in a case. In cases before the ICC, the main difficulty is often establishing the individual criminal responsibility of, for example, a military officer and proving that there is a direct link between the offences and the person. However, gathering evidence and data of air attacks can contribute to showing that a certain crime has been committed and then establish the responsibility of the person who ordered that specific attack.

For the purpose of this document and to provide a more unified and updated analysis the constitutional documents of the ICC will be followed to provide the main legal framework. Thus, we will refer to the Rome Statute²⁰⁴ and other ICC documents, such as the Elements of the Crimes²⁰⁵. However, given the narrow case law the ICC has produced so-far for gathering standards and the way evidence was analysed to establish the commission of crimes, we will also look at other courts' jurisprudence on the matter, if cases are especially pertinent, such as the ICTY. Particularly this focus stems from the ICTY's being the first tribunal to judge based on the rules set out in the Geneva Conventions and establish individual criminal responsibility for the commission of war crimes related to the grave breaches regime. Moreover, the ICTY decided on several cases exclusively related to attacks against civilians, their property and specially protected objects.

While one of our main objectives at the research stage was to identify the way Courts analysed patterns in cases of civilian harm, we found that for determining individual criminal responsibility the Tribunals tend to investigate and examine responsibility for each event specifically. However, it is important to highlight that in different cases the judges did add

²⁰⁴ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), ISBN No. 92-9227-227-6, UN General Assembly, 17 July 1998, <https://www.refworld.org/legal/constinstr/unga/1998/en/64553> [accessed 02 April 2024]

²⁰⁵ ICC, Elements of Crimes, replicated from the Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010. Accessible in <https://www.icc-cpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>

special value to the magnitude of harm resulting from the attacks, or their duration to determine criminal responsibility and the occurrence of the crimes.

Regarding the structure of each section, as mentioned, we will divide the analysis according to the category of crimes: war crimes, crimes against humanity and genocide. For each category we will break down the sections according to their subtypes of crimes or specific requirements. Within each subsection different judgements will be examined, with a short description of the context and details of the case, the conclusions arrived by the judges that are pertinent to this memo's topic and finally the suggestions we can make based on said findings for Airwars to implement.

3. War Crimes

3.1. Overview War Crimes

War crimes are a serious violation of IHL, originally it was understood that they only occurred in international armed conflicts (IAC). However, international courts have clarified that war crimes occur as well in non-international armed conflicts (NIAC).²⁰⁶ The ICTY in the Tadic appeals decision ruled that the following requirements must be met for it to be considered a war crime: (i) the violation must constitute an infringement of a rule of IHL; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. It follows that it does not matter whether the "serious violation" has occurred within the context of an IAC or an NIAC, as long as the requirements set out above are met".²⁰⁷

The RS codifies war crimes in its article 8, the ICC shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. Art. 8.2.(a) mentions acts that constitute grave breaches to the Geneva Conventions in the context of an IAC, 8.2.(b) mentions acts that constitute other serious violations of the laws and customs applicable in IAC, 8.2.(c) mentions acts that constitute serious violations to Common Article 3 to the Geneva Conventions -context of an NIAC-,

²⁰⁶ N. Mezler, *International Humanitarian Law: a comprehensive introduction*, International Committee of the Red Cross (2016), p. 285-287.

²⁰⁷ *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999, para. 94.

8.2.(d) mentions acts that constitute other serious violations of the laws and customs applicable in NIAC.

We will now provide an analysis to specific war crimes in which civilians, civilian property or protected objects were targeted, including the elements required for the crime and conclusions after studying two different court decisions in which those crimes were attributed. Despite there being numerous cases before the ICC about war crimes, and case law of other tribunals on the matter, after conducting exhaustive research we have found that most of them did not deal with attacks carried out with air strikes. Therefore, attacks that involved shelling will also be discussed and certain war crimes will lack specific jurisprudence.

3.2. Specific crimes

The following war crimes are addressed in this section:

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3.2.1. Wilful killing

Framework: the war crime of wilful killing is codified in art. 8(2)(a)(i) of the RS for IAC & art. 8(2)(c)(i) of the RS for NIAC, that is, murder. According to the ICC’s Elements of Crimes, it is required to demonstrate that:

1. The perpetrator killed (or caused death to) one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949; either hors de combat, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an IAC or NIAC.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Case law: *ICTY. Prosecutor v. Dario Kordic & Mario Cerkez. Judgement of 26 February 2001, Trial Chamber.*

Context: the ICTY, in the Trial Chamber judgement of Kordic and Cerkez, (February 26, 2001) held that “[T]he elements for the crime of wanton destruction not justified by military necessity charged under Article 3(b) of the Statute are satisfied where: (i) the destruction of property occurs on a large scale; (ii) the destruction is not justified by military necessity; and (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.” (paras. 346-347).

Relevant findings:

1. The Chamber found that the *actus reus* – the physical act necessary for the offence – is the death of the victim as a result of the actions or omissions of the accused. Therefore, the conduct of the accused must be a substantial cause of the death of the victim, who must have been a “protected person”. To satisfy the *mens rea* for wilful killing, it must be established that the accused had the intent to kill, or to inflict serious bodily injury in reckless disregard of human life (para. 229).
2. The Trial Chamber relied on witness testimonies who mentioned the lack of military objectives, and that civilian buildings were targeted, police reports, and reports submitted by UN bodies.
3. The Trial Chamber mentioned the type of weapons and artillery used by the attackers.
4. The Trial Chamber found that the witness submitted by the Prosecution, who participated in the fighting, gave a balanced account of it and accepted his evidence of taking part in a cleansing operation. The Trial Chamber found that the Croatian Defence Council (HVO) attacked the municipality of Busovaca on 25 January 1993, with the use of artillery and infantry and was the beginning of a pattern of attacks in the locality. Accordingly, the Trial Chamber found that all the elements in the underlying offences relating to Busovaca in the following counts were made out: (a) Counts 3-4 (unlawful attacks on civilians and civilian objects); (b) Counts 7-13 (wilful killings, murder, inhuman acts and treatment) (para. 576).

Suggestions:

- Indicate in incident reports the proximity to military objectives, or lack thereof.
- Indicate in incident reports the duration of hostilities or the shelling/attack.

- Indicate the circumstances previous to the attack, the activities the civilians were doing, the clothes they were wearing.

3.2.2. Destruction and appropriation of property

Framework: the war crime is codified in art. 8(2)(a)(iv) of the RS for IAC. According to the ICC's Elements of Crimes, it is required to demonstrate that:

1. The perpetrator destroyed or appropriated certain property.
2. The destruction or appropriation was not justified by military necessity.
3. The destruction or appropriation was extensive and carried out wantonly.
4. Such property was protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict

Case law: *ICTY. Prosecutor v. Dario Kordic & Mario Cerkez. Judgement of 26 February 2001, Trial Chamber.*

Context: the ICTY, in the Trial Chamber judgement of Kordic and Cerkez, (February 26, 2001) held that “[T]he elements for the crime of wanton destruction not justified by military necessity charged under Article 3(b) of the Statute are satisfied where: (i) the destruction of property occurs on a large scale; (ii) the destruction is not justified by military necessity; and (iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.” (paras. 346-347).

Relevant findings:

1. The Chamber found that the *actus reus* – the physical act necessary for the offence – of the crime of extensive destruction of property as a grave breach comprises the following elements, either :
 - (i) Where the property destroyed is of a type accorded general protection under the Geneva Conventions of 1949, regardless of whether or not it is situated in occupied territory; and the

perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction; or

(ii) Where the property destroyed is accorded protection under the Geneva Conventions , on account of its location in occupied territory; and the destruction occurs on a large scale; and

(iii) the destruction is not justified by military necessity; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.

2. With regards to the wanton destruction not justified by military necessity, the Chamber ruled that the elements for the crime where:

(i) the destruction of property occurs on a large scale;

(ii) the destruction is not justified by military necessity; and

(iii) the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.

3. The analysis to determine the occurrence of the crimes and the responsibility of the accused was done jointly with the counts regarding wilfully killing civilians, which was mentioned in the section above.

4. The Trial Chamber found that the witness submitted by the Prosecution, who participated in the fighting, gave a balanced account of it and accepted his evidence of taking part in a cleansing operation. The Trial Chamber found that the HVO attacked the municipality of Busovaca on 25 January 1993, with the use of artillery and infantry and was the beginning of a pattern of attacks in the locality. Accordingly, the Trial Chamber found that all the elements in the underlying offences relating to Busovaca in the following counts were made out: (a) Counts 3-4 (unlawful attacks on civilians and civilian objects); (b) Counts 7-13 (wilful killings, murder, inhuman acts and treatment) (para. 576).

Suggestions:

- Indicate if the attack was part of an ongoing pattern of attacks on the same locality.

3.2.3 Attacking civilians & civilian objects

Framework: The war crime of attacking civilians is codified in art. 8(2)(b)(i) of the RS for IAC. According to the ICC's Elements of Crimes, it is required to demonstrate that:

- 1) The perpetrator directed an attack.

- 2) The object of the attack was a civilian population or individual civilians not taking direct part in hostilities.
- 3) The perpetrator intended the civilian population as such or individual civilians not taking direct participation in the hostilities to be the object of the attack.
- 4) The conduct took place in the context of and was associated with an international armed conflict.
- 5) The perpetrators were aware of factual circumstances that established the existence of an armed conflict.

The war crime of attacking civilian objects is codified in art. 8 (2) (b) (ii) of the RS for IAC. According to the ICC's Elements of Crimes, it is required to demonstrate that:

- 1) The perpetrator directed an attack.
- 2) The object of the attack was civilian objects, that is, objects which are not military objectives.
- 3) The perpetrator intended such civilian objects to be the object of the attack.
- 4) The conduct took place in the context of and was associated with an international armed conflict.
- 5) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Case law: *ICTY. Prosecutor v. Pavle Strugar. Judgement of 31 January 2005, Trial Chamber II.*

Context: The Accused was a Lieutenant-General of the then Yugoslav Peoples' Army charged for the unlawful artillery shelling by the JNA of Dubrovnik on 6 December 1991, which resulted in the death of two people, and two others were seriously wounded. The artillery attack started before sunrise, initially the firing was mainly concentrated on the area around Sr|, but some shelling occurred on residential areas of Dubrovnik, including the Old Town and the port of the Old Town, virtually from the outset of the attack. The shelling of Dubrovnik, including the Old Town, continued for over 10 and a half hours.

Relevant findings:

1. The Prosecution submitted that indiscriminate attacks and disproportionate attacks may be regarded as direct attacks on civilian objects (para. 278).

2. The Chamber found that the intentionality of the attack was evident given the fact that it was impossible not to know that civilians or civilian property were being targeted, with no military necessity. They once again clarified the absolute prohibition of targeting civilians or civilian objects. The Chamber clarified that for the war crime of attacks on civilian objects there is a requirement on the scale of damage that must be extensive. However, in this particular case because of the extensiveness of the damage found to have been caused the Chamber understood that there was no need to elaborate further (para. 280).
4. The Chamber clarified that civilian property covers any property that could not be legitimately considered a military objective (para. 282).
5. The Chamber established that for the *means rea* (of attacking civilian population or civilian objects, causing death and/or serious injury within the civilian population, or damage to the civilian objects) to be met the attack must have been conducted with the intent of making the civilian population or individual civilians, or civilian objects, the object of the attack (para. 283).
6. The Chamber considered that the status of the Old Town and the residence of civilians there was a long established and renowned state of affairs (para. 285), and that the military forces had it under direct observation. Thus, the movement of the civilian population would have been obvious (para. 287).
7. Moving on to the characteristics of the attack itself, the Chamber considered that the Old Town was extensively targeted, and that no military firing points or other potentially military objectives were targeted. Therefore, they concluded that the intent of the perpetrators was to target civilians and civilian objects in the Old Town. To reach this conclusion they underscored that the existing military objectives were widely separated and in positions distant from the Old Town (para. 288).
8. The Chamber clarified that civilian property covers any property that could not be legitimately considered a military objective (para. 289).
9. For the case of large scale attacks against civilian property the Chamber stated that it is required to show that a considerable amount of objects were damaged or destroyed, for example in this case it does not require for the entire village to be destroyed (Following the ICTY analysis in the Naletilic Case -paras. 584 & 596-, para. 294).
10. The Chamber also highlighted that for the war crime to have occurred the acts must have resulted in damage or destruction of said property. Thus, there is a requirement of actual damage occurring as a result of the attack (para. 308).

11. The Chamber accounted for the nature and extent of the damage, focusing on the fact that at least 52 buildings and structures were damaged after the shelling from its analysis of the damage. Given the amount of buildings that presented damages of different degrees, the Chamber was satisfied that they sustained further and significant damage during the 6 December attack (para. 319).

Case law: *ICTY. Prosecutor v. Pavle Strugar. Judgement of 17 July 2008, Appeals Chamber.*

Relevant findings:

1. The *mens rea* requirement is fulfilled when shown that the acts of violence in question were wilfully directed against civilians, either deliberately or through recklessness (para. 270).
2. The intent to target civilians can be proved through inferences from direct or circumstantial evidence. The determination of whether civilians were targeted is a case-by-case analysis, based on a variety of factors, including the means and method used in the course of the attack, the distance between the victims and the source of fire, the ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the vicinity of the incident, the status of the victims as well as their appearance, and the nature of the crimes committed in the course of the attack (para. 271).
3. To demonstrate that the attack was deliberate, the Chamber mentioned the extensive and large-scale damage and the weapons used. They highlighted the use of mortars, but also by other weapons such as ZIS and recoilless cannons and Maljutka rockets (para. 272).
4. Other elements analysed were the duration of the operation and the positioning of the weapons, which constituted sound evidence that the rockets were indiscriminately fired (para. 273).
5. The Appeals Chamber specially considered the lack of military targets within the Old Town, as well as the events of the previous weeks, to show that it was impossible not to know that civilians would be unlawfully hit. Thus reasonably demonstrating that the perpetrators did deliberately shell civilians (para. 276).

Suggestions:

- Indicate in the event report the presence of military objectives in the proximity of the attack or if there were military objectives in that space in the weeks previous to the attack.
- Indicate if known the position of the weapons used to carry out the attack.

- Suggestions based on the Framework:
- Since it is highly relevant whether a civilian was taking direct part in hostilities, it is helpful to note what the person was doing at the time (working, shopping, sleeping, playing etc.), the clothes they were wearing, as well as where the person was (in or in front of their house, at work, on a marketplace etc.)

3.2.4 Attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission

Framework: The war crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission is codified in art. 8 (2)(b)(iii) of the RS. The ICC's Elements of crimes require that:

- 1) The perpetrator directed an attack.
- 2) The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
- 3) The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
- 4) Such personnel, installations, material, units, or vehicles were entitled to the protection given to civilians or civilian objects under the international law of armed conflict.
- 5) The perpetrator was aware of the factual circumstances that established that protection.
- 6) The conduct took place in the context of and was associated with an international armed conflict.
- 7) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Case law: there is limited case law on the crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission, and the analysis focuses on cases before the SCSL and ICTR. The first case of *Prosecutor v. Hassan Sesay, Morris Kallon and Augustine Gbao inter alia* included charges of intentionally attacking peacekeeping personnel or objects involved in peacekeeping, which is a war crime under art. 8 (2)(b)(iii) RS.²⁰⁸ The case is the first judgement to specifically address the nature and scope of the offence. The second case,

²⁰⁸ 'Bahar Idriss Abu Garda Case Overview' (Coalition for the International Criminal Court) <<https://www.coalitionfortheicc.org/cases/bahar-idriss-abu-garda>> accessed 2 April 2024.

Prosecutor v. Bahar Idriss Abu Garda, also includes, amongst others, charges of intentionally attacking peacekeeping personnel or objects involved in peacekeeping. Even though the charges were eventually declined by the ICC judges due to a lack of evidence, the decision gives valuable insights into the ICC's stance towards the crime. Furthermore, the case concerns the individual criminal liability of Abu Garda; however, the following focuses on the general insights into the evidence relevant to the crime and less on how individual criminal liability was tried to be established, as the former is more relevant for Airwars' work.

Case #1: *Prosecutor v. Hassan Sesay, Morris Kallon and Augustine Gbao, Trial Chamber I, RUF Trial Judgement, (SCSL-04-15-T)*

Context: All three were senior members of the Revolutionary United Front (RUF - formed to overthrow the corrupt government) and charged with the same war crimes, crimes against humanity and other serious violations of IHL. All three were charged with attacks against UN Peacekeepers and murder of UN Peacekeepers. For feasibility reasons, and since the situations are very similar, the analysis focuses on Issa Hassan Sesay. Sessay was in the position as a RUF Area Commander (1993-1997) and as a RUF Battle Group Commander (April 1997 - December 1999). In May 2000, he became the Interim Leader of the RUF. The allegations are situated in the context of the armed conflict in Sierra Leone (1991-2002) between the RUF and the Civil Defense Forces, who were loyal to ousted president Kabbah.²⁰⁹ The Trial Chamber of the SCSL found Sesay, on 25 February 2009, guilty of various war crimes and crimes against humanity, including attacks against UN Peacekeepers and murder of UN peacekeepers.

Relevant findings:

1. The count of intentionally directing attacks against personnel involved in a peacekeeping mission related to the alleged attacks between the 15th of April 2000 and 15th of September 2000 in three different districts (para. 413).
2. The prohibition against attacks on peacekeeping personnel is not a new war crime but can be understood as a particularisation of the general and fundamental prohibition against attacks on civilians and civilian objects.

²⁰⁹ 'The Prosecutor v. Issa Hassan Sesay , Morris Kallon and Augustine Gbao' Case Overview (ICD - Asser Institute) <<https://www.internationalcrimesdatabase.org/Case/858/Sesay-et-al/>> accessed 2 April 2024.

3. The chamber found that the offence exists under customary international law in both IACs and NIACs ().
4. The chamber repeats the elements of crimes and specifies that there is no requirement for actual damage to the personnel or objects because of the attack, but the important requirement is that there was an attack (para. 220). It adopts the definition of attack as an “act of violence” as found in art. 49(1) API.
5. The chamber notes that there is no clear definition of peacekeeping missions.
6. The court finds that to determine whether peacekeeping personnel are entitled to civilian protection, the totality of the circumstances must be considered, including factors such as:
 - the relevant SC Res for the operation and the specific operational mandates
 - the role and practices actually adopted by the peacekeeping mission during the particular conflict,
 - their rules of engagement and operational orders, the nature of the arms and equipment used by the peacekeeping force
 - the interaction between the peacekeeping force and the parties involved in the conflict, any use of force between the peacekeeping force and the parties in the conflict
 - the nature and frequency of such force and the conduct of the alleged victim(s) and their fellow personnel
7. The chamber found that threats of violence are not sufficient to prove an act of violence. An act of violence against peacekeepers requires a forceful interference with which endangers the person or impinges on the liberty of the peacekeeper (para. 1889).
8. The chamber lists various incidents that were considered attacks against UNAMSIL peacekeepers. These include acts where Peacekeepers were beaten, assaulted, shot, abducted and held captive, captured and detained. All these acts were considered an attack as they constituted a forceful action which endangered the person and impinged on the liberty of the UNAMSIL personnel.
9. The chamber established that the RUF knew or had reason to know of UNAMSIL’s protected status. They mention several factors that show these requirements were met, including:
 - Prior to the assault and abduction, UNAMSIL has deployed in the area as a peacekeeping force with light equipment and no visible capacity to engage in combat. They had repeatedly conveyed their peaceful intent (by engaging in

discussion or approaching the RUF unarmed) . Hence, the perpetrators knew or had reason to know that the peacekeepers were not participating in hostilities (para. 1939).

Case #2: *The Prosecutor v. Bahar Idriss Abu Gardam, Pre-Trial Chamber I, Decision on the Confirmation of Charges, (ICC-02/05-02/09)*

Context: Bahar Idriss Abu Garda was a commander of the Sudanese rebel group Justice and Equality Movement and was involved in the fighting between the Sudanese government forces and rebel forces. The charges were situated in the context of an attack on the African Union peacekeeping mission on 29 September 2007. The mission was stationed at the Haskanita Military Group Site (MSG Haskanita) in Haskanita Village (North Darfur). During the attack, twelve peacekeepers were killed, eight were wounded, and equipment, vehicles and numerous other materials were destroyed. The attack on MSG Haskanita was allegedly carried out by the forces of the Justice and Equality Movement under the command of Abu Garda. It was alleged that Abu Garda, together with other commanders, agreed to attack MSG Haskanita, knowing that the personnel belonged to a peacekeeping mission. Thus, the allegations not only concerned violence to life under art. 8(2)(c)(i) and 25(3)(a) and/or (f) of the Statute but also the violation of art. (2)(2)(e)(iii) and 25(3)(a) based on the intentional directing of attacks against peacekeeping personnel, installations, material etc.. After the confirmation of the charges hearing in October 2009, the Pre-Trial Chamber did not confirm the charges due to a lack of evidence that clearly supported the allegations regarding Abu Garda's role in the planning to attack MSG Haskanita. The appeal by the prosecutor was rejected in 2010, and the case was closed as long as no new evidence was brought forward.

Relevant findings:

Matters related to the evidence

1. Following art. 61(7) Statute, the Pre-Trial Chamber shall “determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged” (para. 35).
2. ‘Substantial ground to believe’ shall be interpreted in accordance with art. 21(2) of the Statute and on the basis of the ECHR. The chamber applied these rulings as well as the ruling of the Pre-Trial Chamber II on the evidentiary threshold for the confirmation of charges (para. 36).

3. The evidentiary burden is required to “offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations”.
4. The chamber looked at the value of evidence that is based on summaries of interviews of anonymous Prosecution witnesses. It was found that the right to rely on summary evidence based on art. 61(5) of the Statute must be balanced with the right of defence found in art. 61(6) of the Statute, but did not categorically exclude summary evidence based on anonymous witness interviews (para. 50).
5. The chamber further found that” statements of anonymous witnesses will be given a lower probative value and will be evaluated on a case-by-case basis, according to whether the information [...] is corroborated or supported by other evidence tendered into the case file” (para. 52). Nevertheless, evidence based on anonymous witnesses was not excluded.

Matters related to the offences under art. 8(2)(c)(i), 8(2)(e)(iii) and 8(2)(e)(v)

1. The chamber looked at the different elements of the crimes (see above) and clarified how they have to be understood in the present case. The following goes through the seven different elements and highlights relevant findings.
2. The perpetrator directed an attack (objective element): the chamber found that there is no definition of the term “attack” in the Statute and that the definition is found in art. 49 API GC applies. The article defines an attack as “acts of violence against the adversary, whether in offence or defence”. The definition is only applicable in IACs, but art. 13(2) APII, which applies in NIACs, gives the term the same meaning. Furthermore, the chamber found that a causal connection between the perpetrator and the attack must exist. Meaning that the consequences of the attack must be able to be seen “as having been caused by the perpetrator” (para. 65).
3. The object of the attack was personnel, installations, material, etc., involved in a peacekeeping mission (objective element): The chamber highlights that there is not a single definition for peacekeeping and that peacekeeping has evolved over the years (para. 69 & 70). The chamber, therefore, found that peacekeeping missions are “not static and that their feature may vary depending inter alia on the context.”(para. 71).
4. The personnel or objects were entitled to the protection given to civilians and civilian objects: The chamber highlighted that civilians should only enjoy the protection afforded to them as long as they do not take a direct part in hostilities (para. 78).
5. The intent of the perpetrator (subjective element): The chamber found that the requirements for attacking civilians also apply to attacks against peacekeeping

personnel or installations, material, units, or vehicles involved in a peacekeeping mission. Hence, beyond the standard *mens rea* required in art. 30 of the Statute, the perpetrator must intend to make peacekeeping personnel subject to attack (para. 77).

6. The awareness of the perpetrator (subjective element): The chamber found that only knowledge about the factual situation, that the personnel or installation etc., were involved in a peacekeeping mission is required and no knowledge of the legal protection (para. 94).

Matters related to the evidence to establish the offences under art. 8(2)(c)(i), 8(2)(e)(iii) and 8(2)(e)(v)

1. The chamber found that there are substantial grounds to believe there had been an attack on the MSG Haskantia on 29 September 2007, based on the witness statements, UN and AU reports, media reports and press articles (para. 105). It further states that it is not the subject of the dispute if there has been an attack.
2. When looking at the UN sources used, the chamber referred to a Security Council Presidential Statement, Reports by the International Crisis Group and Reports of the Secretary-General.
3. When looking at media sources, the chamber referred to articles published by Reuters, the Guardian (online), AMIS News Bullet, and Sudan Tribune (see footnote 158, 161).

Suggestions:

- Firstly, it is highly relevant whether an attack was directed against a peacekeeping mission/peacekeeper. Thus, if there is information that the civilian who died was a peacekeeper, it would be important to have a tag for that. In case the evidence shows that the attack was against personnel or objects involved in humanitarian assistance or peacekeeping missions, further things should be checked.
- When dealing with attacks on peacekeeping missions, it is relevant to establish whether they only used force for self-protection or because of a robust mandate. It matters greatly if peacekeepers participate in hostilities because this impacts whether they lose their protection status. Hence, it matters which weapons they were carrying, whether they participated in fighting, whether they used force, etc. Although difficult to deduct from Airwars work, if there are any signs of the type of weapons carried by the peacekeeper or the video shows the activities the peacekeepers were engaged in at the moment of the attack, those can be relevant to show that the peacekeepers were/were not engaged in combat.

- Since the perpetrators have to be aware of the protective status of the peacekeepers, information on how long the peacekeepers have been in the area, which were their tasks, whether have they been in contact with different actors and the population, etc. to establish that there was a general awareness of the presence of peacekeepers in the area and their tasks.
- It is also interesting that for an attack to be successful, there must be no actual damage. Hence, incidents where there were attacks in the form of shooting, bombardment, etc., but no one was killed could still be relevant to document.
- Not regarding the documentation or collection of information but regarding the cooperation with other organisations or news outlets, there seem to be sources that are preferably used by the court and that are cited more often, such as Reuters or the Guardian in this case. This might be different depending on the court, but it is interesting to note that courts value certain sources differently.
- The most important aspect is to be aware that the war crime of attacking personnel or objects involved in humanitarian assistance or peacekeeping constitutes a different crime from attacking civilians. Having a tag for those incidents is therefore useful. Realistically, most of the other relevant information on the specific mission, its mandate and equipment would be collected from other sources, however, if there is any information to the points raised in the second suggestion, it is certainly useful to note.

3.2.5. Attacking objects or persons using the distinctive emblems of the Geneva Conventions

Framework: The war crime of attacking objects or persons using the distinctive emblems of the Geneva Conventions is codified in art. 8(2)(b)(xxiv) of the RS for IAC & art. 8(2)(e)(ii) of the RS for NIAC, that is, attacks against persons or objects displaying the distinctive emblem. According to the ICC's Elements of Crimes, it is required to demonstrate that:

1. The perpetrator attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions.
2. The perpetrator intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack.
3. The conduct took place in the context of and was associated with an IAC or NIAC.

4. The perpetrator was aware of factual circumstances that established the existence of an AC.

Case law: the existing practice of the ICC has not addressed the specific issue of the attacks on objects or persons using the distinctive emblems of the Geneva Conventions. Moreover, the jurisprudence of other international tribunals has not covered this crime, raising solely the attack against objects displaying the distinctive *1954 Hague Convention* emblem as evidence of intent in attacks committed against cultural property, which will be analysed in the following section.

Relevant findings:

- While the jurisprudence of the international courts and tribunals was not extensive on the war crime of attacking objects or persons using the distinctive emblems of the Geneva Conventions, the finding of the ICTY in the case of *Prosecutor v. Pavle Strugar* (Trial Judgment) indicates the probative value of the intentional attacks against objects displaying the distinctive emblem (para. 329).
- The observance of the emblem by soldiers proves the purpose of the objects attacked and their protected status (*ibid.*).
- The mental element could be demonstrated by proving the perpetrators' knowledge of the emblem's protection over the object or person (*ibid.*).

Suggestions:

- If the object was protected by an emblem and the emblem is visible this is important information → Therefore, having a tag for objects that show or display the emblem, would be helpful to identify the specific crime of attacking objects or persons using the distinctive emblems of the Geneva Conventions.
- Since it is relevant if the emblem could be seen/observed at the time of the attack, information on the way the object or person was attacked could be relevant → could the emblem be seen from the position that the attack was launched?

3.2.6. Attacks on protected objects

Framework: the war crime of attacking protected objects is codified in art. 8(2)(b)(ix) of the RS for IAC & art. 8(2)(e)(iv) of the RS for NIAC, that is, attacks against protected property. According to the ICC's Elements of Crimes, military necessity cannot justify these types of attacks, and it is required to demonstrate that:

4. The perpetrator directed an attack.
5. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives (hereinafter, protected objects).
6. The perpetrator intended buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.
7. The conduct took place in the context of and was associated with an IAC or NIAC.
8. The perpetrator was aware of factual circumstances that established the existence of an AC.

Special Protected Objects → Attacks on Cultural Property

Framework: the Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict (1954) and its two Protocols (1954 and 1999) prohibit the use of cultural property for any military purpose that is likely to expose it to destruction or damage in the event of an armed conflict and forbids directing any act of hostility against such property. Art. 15 of the Second Protocol defines 5 acts which constitute serious violations if committed intentionally including: “1) making cultural property under enhanced protection the object of attack, (...) 3) extensive destruction or appropriation of cultural property protected under the Convention and the Second Protocol, 4) making cultural property protected under the Convention and the Second Protocol the object of attack, 5) theft, pillage or misappropriation of, or acts of vandalism directed against, cultural property protected under the Convention”.

In the ICC framework, the war crime of attacking protected objects is codified in art. 8(2)(b)(ix) of the RS for IAC & art. 8(2)(e)(iv) of the RS for NIAC, that is, attacks against protected property, a more general category that includes cultural property-. Both provisions govern the directing of attacks against special kinds of civilian objects, reflecting the particular importance

of international cultural heritage. According to the ICC's Elements of Crimes, military necessity cannot justify these types of attacks and it is required to demonstrate that:

1. The perpetrator directed an attack.
2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
3. The perpetrator intended such buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.
4. The conduct took place in the context of and was associated with an IAC or NIAC.
5. The perpetrator was aware of factual circumstances that established the existence of an AC.

Case law: currently, the ICC has only tried one case about attacks on cultural property; therefore, we will also look into ICTY's jurisprudence on the matter and follow a chronological order for the analysis.

Case #1: *ICTY. Prosecutor v. Pavle Strugar. Judgement of 31 January 2005, Trial Chamber II.*

Context: the Accused was a Lieutenant-General of the then Yugoslav Peoples' Army charged for the unlawful artillery shelling by the JNA on the historic Old Town of Dubrovnik on 6 December 1991, which resulted in the damage of many buildings of historical and cultural significance in the Old Town. Well before sunrise, at around 0550 hours on the morning of 6 December 1991, residents of the Old Town of Dubrovnik awoke by the sound of explosions. An artillery attack had commenced. While initially, the firing was mainly concentrated on the area around Sr|, some shelling occurred in residential areas of Dubrovnik, including the Old Town and the port of the Old Town, virtually from the outset of the attack. However, the focus of the attack came to shift from Sr| to the wider city of Dubrovnik, including the Old Town. The shelling of Dubrovnik, including the Old Town, had continued for over 10 and a half hours on 6 December 1991.

Relevant findings:

1. The Chamber took into account the special characteristics of the objects in question and the place where the military operations took place. With regards to the status and condition of the place/object previous to the attack they highlighted the fact that the Old Town was a physically distinct part of the wider city, with clearly visible boundaries. That these characteristics were plain to see at a distance, and obvious to the forces given the fact that they had been carrying out operations in the area for a certain amount of time. They clarified that the Old Town was also legally distinct, given the special protection awarded to cultural property. They took special interest in the fact that there were no military positions in the vicinity of the Old Town, and thus the shelling of the Old Town was considered distinctly from the shelling of Dubrovnik (para. 279).
2. The Chamber found that the intentionality of the attack was evident given the fact that it was impossible not to know that civilians or civilian property were being targeted, with no military necessity (para. 280).
3. The Chamber considered that the status of the Old Town (...) was a long established and renowned state of affairs (para. 285), and that the military forces had it under direct observation (para. 287).
4. Moving on to the characteristics of the attack itself, the Chamber considered that the Old Town was extensively targeted, and that no military firing points or other potentially military objectives were targeted. Therefore, they concluded that the intent of the perpetrators was to target civilians and civilian objects in the Old Town. To reach this conclusion they underscored that the existing military objectives were widely separated and in positions distant from the Old Town (para. 288).
5. The Chamber highlighted that attacks against cultural property overlap with the offence of unlawful attacks on civilian objects, cultural property being the *lex specialis* (para. 302). This means that when the facts show a civilian object that constitutes cultural property being unlawfully attacked the war crime charged should be the more specific one with regards to specially protected objects.
6. The Chamber also highlighted that for the war crime to have occurred the acts must have resulted in damage or destruction of said property. Thus, there is a requirement of actual damage occurring as a result of the attack (para. 308).
7. With regards to the protection of these objects the Chamber clarified that it is not lost simply because of military activities or military installations in the immediate vicinity of the cultural property (para. 310).

8. To assess the destruction of the Old Town the Chamber analysed testimonies of residents of the Old Town and of people who visited closely after the attack, a special report, findings from UNESCO working groups and video evidence (para. 316).
9. The Chamber accounted for the nature and extent of the damage, focusing on the fact that at least 52 buildings and structures were damaged after the shelling from its analysis of the damage. Given the amount of buildings that presented damages of different degrees, the Chamber was satisfied that they sustained further and significant damage during the 6 December attack (para. 319).
10. With regards to the *mens rea* element the Chamber inferred the direct perpetrators' intent to destroy or damage property from the findings that the attack on the Old Town was deliberate, and that the direct perpetrators were aware of the civilian character of the Old Town, the unique cultural and historical character of which was a matter of renown, as was the Old Town's status as a UNESCO World Heritage site. As a further evidentiary issue regarding this last factor, the Chamber accepted the evidence that protective UNESCO emblems were visible, from the troops' positions (para. 329).

ICTY. Prosecutor v. Pavle Strugar. Judgement of 17 July 2008, Appeals Chamber.

Relevant findings:

1. To demonstrate that the attack was deliberate, the Chamber mentioned the extensive and large-scale damage, and the weapons used. They highlighted the use of mortars, but also by other weapons such as ZIS and recoilless cannons and Maljutka rockets (para. 272).
2. Other elements analysed were the duration of the operation and the positioning of the weapons, which constituted sound evidence that the rockets were indiscriminately fired (para. 273).
3. The Appeals Chamber specially considered the lack of military targets within the Old Town, as well as the events of the previous weeks, to show that it was impossible not to know that civilians would be unlawfully hit. Thus reasonably demonstrating that the perpetrators did deliberately shell civilians (para. 276).

Case #2: ICC. *Prosecutor v. Ahmad Al Faqui Al Mahdi*. Sentence of 27 September 2016, Trial Chamber III.²¹⁰

Context: the accused was charged with intentionally directing attacks against ten buildings of religious and historical character in Timbuktu, Mali. For their analysis of the elements of the crime the ICC made specific reference to the ICTY jurisprudence, including the *Struger* judgement.

Relevant findings:

1. The Trial Chamber considered that the element of ‘directing an attack’ encompasses any acts of violence against protected objects and did not make a distinction as to whether it was carried out in the conduct of hostilities or after the object had fallen under the control of an armed group (para. 15).
2. The Chamber highlighted the requirement of the result in actual damage to the objects (para. 16), that they all qualified as both religious buildings and historic monuments, because of their role in the cultural life in Timbuktu and the status of nine of these buildings as UNESCO World Heritage sites (para. 39).
3. The Trial Chamber found that the evidence establishes the deliberate manner in which attackers went from one building to another in a relatively short period of time (para. 47).
4. The Chamber clarified that the cultural property must be clearly the object of the attack (para. 47).
5. An element highlighted by the Trial Chamber was the existence of a common *modus operandi* in the way the attacks were carried out. For example, the use of the same tools (para. 48).

Conclusions:

The duration of the attacks or military operation and the artillery used are an indication of the *mens rea* element, whether from its deliberateness or recklessness.

²¹⁰ It is important to clarify that in this particular case Mr. Al Mahdi pleaded guilty to the commission of the crime and collaborated with providing a clear account of its actions as well as additional information that the Court took into account. Moreover, during the attacks to different monasteries, sanctuaries and sacred places Al Mahdi invited journalists and made several statements on the record in which he explained his acts and also made it clear that he was aware of the special protection of the buildings and undoubtedly manifested his intention to destroy them. This special context and characteristics award for a more straightforward and unquestioned analysis of the evidence to prove the occurrence of the attacks and the respective attribution.

The ICTY valued the deducible knowledge of the armed forces with regards to the location and movements of the civilian populations.

The ICC analysed the *modus operandi* used by the perpetrators to determine whether it was an intentional attack with the specific *mens rea* of targeting cultural property.

Suggestions:

- Duration of attack could be asked by Airwars, or specified when analysing the files
- When the object attacked is a specially protected object it could be asked and/or reviewed from the files if there was an emblem visibly located.
- Distance from military objectives, facilities, quarters, etc. can be indicated. Firstly, a specific label should be added when military objectives are visible in the area of the attack in the material. This could be a yes/no label. Secondly, if no military objective is visible it should be indicated whether sources from that specific event mention the presence of them in the area and the distance between them and the attack.
- The visibility of the civilian property from the place of the launch of the attack could be indicated, also taking into account previous operations in the area that demonstrate the familiarity of the attacking force with the place and vicinities.
- Airwars could ask those who submit files when the civilian building or object attack was installed there if the nature or status of the place has changed recently if it's a well-known place, and if it is online.

Special protected objects → *Attacks on hospitals or places where the sick and wounded are collected*

Framework: see above.

Case law: the following focuses on ICC cases that include attacks conducted against hospitals or places where the sick and wounded are collected as a category of specially protected objects.

Case #1 *Prosecutor v Bosco Ntaganda*, ICC, Judgment of July 8 2019, Trial Chamber IV

Context: Bosco Ntaganda was the Former Deputy of Chief of the Staff and commander of operations of the Forces Patriotiques pour la Libération du Congo [Patriotic Forces for the

Liberation of Congo](FPLC), the military wing of the Union of Congolese Patriots (UPC).²¹¹ Ntaganda is of Tutsi ethnicity, was born in Rwanda, and reached his position in the FPLC following a complex Rwandan and Congolese military career. Ntaganda was accused of 13 counts of war crimes and five crimes against humanity. The allegations are situated in the context of his role as Deputy of Chief of the Staff and Commander of Operation of the FPLC and FPLC/UPC's operations in Ituri (DRC) between on or about 6th of August 2002 and on or about 31st of December 2003. On July 8 2019, the ICC's Trial Chamber IV found Ntaganda guilty of 18 counts of war crimes and crimes against humanity. He was *inter alia* found guilty of the war crime of intentionally directing attacks against protected objects based on an attack against the health centre in Sayo. On March 30 2021, the ICC Appeals Chamber confirmed the conviction and the sentence in the case.²¹²

Relevant findings:

1. The following findings are focussed on the war crime of attacking protected objects as described above, and more specifically, hospitals and medical centres.
2. The chamber found that the UPC/FPLC soldiers looted the Mongbwalu hospital (para. 1138).
3. However, the chamber found that the pillaging of protected objects, like it was in the case of the Mongbwalu hospital, is not considered an act of violence against the adversary and concluded that it, therefore, does not constitute an attack within the meaning of art. 8(2)(e)(iv) RS (para. 761).
4. It was also found that UPC/FPLC soldiers fired projectiles at the health centre in Sayo (para. 1138).
5. The chamber decided that the shelling of the health centre in Sayo by UPC/FPLC soldiers was an attack within the meaning of art. 8(2)(e)(iv) RS (para. 1140).
6. The chamber found that 'because persons seeking treatment were present at the Sayo health centre,' it found that it was in use as a medical facility at the time of the attack. It was not found that it was used in a way that would turn it into a military objective; hence, it was concluded that the health centre qualified as a protected object under art. 8(2)(e)(iv) RS (para. 1147).

²¹¹ 'Ntaganda Case Overview' (International Criminal Court) <<https://www.icc-cpi.int/drc/ntaganda>> accessed 2 April 2024.

²¹² Ibid.

7. However, as it was a NIAC, there is no equivalent to art. 8(2)(b)(ii), and it must be shown that the perpetrator “intended to attack a building or place dedicated to one of the specific functions listed in art. 8(2)(e)(iv), and not just any object not constituting a military object” (must have been aware that they are attacking a hospital or medical centre) (para. 1147).
8. In the present case, it was found that the soldiers were aware of the purpose of the object as they referred to the health centre as a ‘dispensary’ and such “was aware that is served a medical purpose” (para. 1147).
9. Thus, the chamber found that Ntaganda was responsible as an indirect co-perpetrator for intentionally directing an attack against a protected object, namely the health centre in Sayo. It was found that only one protected object was attacked; however, the crime was considered of serious gravity as the attack disrupted the care for persons in need and because the perpetrators accepted the severe impact on patients (para. 144).²¹³

Suggestions:

- Since attacks on protected objects (buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places) are a separate war crime, a categorization that lists attacks on those objects is very helpful.
- It is crucial to know if a special protected object has or has not lost its status because it has become a military object. Therefore, it could be helpful to see if the material on a specific incident shows ‘normal activities’ related to the function of the special protected object. For example, if there were other patients, ambulances, and doctors around/in front of the hospital. Making notes on this could help to prove that the place was still used in its civilian capacity.
- In terms of questions to be answered when analysing the material for adequate labelling, our suggestions are:
 - 1) Is the targeted object a school/hospital/religious building/etc. (see above)?
 - 2) Was the targeted object previously used as a school/hospital/religious building/etc.? (see above)
 - 3) If the answer to 1 and 2 is in the affirmative, the follow-up question would be:

²¹³ sentencing judgement

Is the targeted object carrying out activities related to the nature of the building?
For example, in the case of an educational building, are classes being held, students on the premises, etc.?

Are these types of activities visible in the material? For example, are there doctors, students, medical instruments, etc.?

- 4) Is the object placed in an area dedicated to buildings of a protected nature? For example, a university campus, an outer area of hospital buildings, etc.
- In the Ntaganda case, the attack on one special protected object, namely the health centre in Sayo, sufficed for the court to prosecute Ntaganda for the war crime and the judgement clearly highlights the gravity of the crime. This underlines the “weight” of hospitals before the court and the importance of documenting these incidents in detail and with special attention.

4. Crimes Against Humanity (CAH)

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4.1. Overview Crimes Against Humanity

Article 7 Rome Statute - Crimes Against Humanity

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- a) Murder;
- b) Extermination;
- c) (...)

2. For the purpose of paragraph 1:

- a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;

- b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

4.2. General Elements of Crimes Against Humanity Under International Criminal Law

Before looking at the crime of murder and extermination individually, the following addresses some general contextual elements that apply to all crimes against humanity. These elements will be addressed in all cases and form an important base when looking at CAH. The different elements also appear in the examination of the cases below but the overview helps to understand them better within the different frameworks.

For a crime against humanity to exist, it requires:

- Someone commits a prohibited act which is (part of):
 - an 'attack'
 - is 'widespread or systematic'; and
 - 'directed against any civilian population'
- There must also be a link or nexus between the accused and the attack
- Specific requirements depending on the court:
 - ICTY Statute: requires that the attack must be committed in the context of an armed conflict²¹⁴
 - ICTR Statute: requires that the attack has a discriminatory element²¹⁵
 - ICC Statute: requires neither of these additional elements²¹⁶

'An attack'

- A person commits a crime against humanity only when the act forms part of an 'attack.'²¹⁷
- Since 'attack' does not necessarily have to refer to a 'military attack,' it does not need to involve military or armed forces.²¹⁸
- ICTY, ICTR Jurisprudence, ICC RS: there must be at least multiple victims.
- ICC: attack is "a campaign or operation carried out against the civilian population."

²¹⁴ See infra, section 7.2.2.1.7. International Criminal Law & Practice Training Materials ICLS.

²¹⁵ Ibid.

²¹⁶ Ibid.

²¹⁷ Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Judgment, 2 Sept. 1998, para. 205.

²¹⁸ See infra, section 7.2.2.1.7. International Criminal Law & Practice Training Materials ICLS.

‘Widespread and systematic’

- Describes character and scale of the attack → large-scale nature
 - Not a fixed number of victims that are required for a widespread and systematic attack
 - Difference between widespread and systematic:
 - widespread: refers to the large-scale nature of the attack and can include a massive, frequent and large-scale action that is carried out collectively and directed against a multiplicity of victims.²¹⁹
 - systematic: refers to the organised nature of the attack and the recurrence of similar attacks → involves a pattern or is part of a general strategy.
- only one is needed – either widespread or systematic suffices
- numerous factors are determinants of whether an attack is widespread or systematic (the ones relevant to *Airwars*):
 - number of criminal acts and the existence of a pattern
 - number victims
 - organisation, logistics involved, as well as temporally and geographically repeated military operation
 - means and methods
 - involvement political or military authorities

‘Directed against a civilian population’

- ‘directed against’ requires that the civilian population is the primary target of the attack rather than an incidental target.²²⁰
- ‘a’ civilian population indicates that it can be directed against both enemy nationals and against their own nationals.²²¹
- ‘civilian’ refers to non-combatants.
- ‘population’ refers to a larger body of victims - that does not mean that the whole population of an area has to be targeted.²²²
- Numerous factors are determinant of whether an attack was directed against a civilian population, such as (the ones relevant to *Airwars*):

²¹⁹ Akayesu, TJ paras.579-580; Rutaganda, TJ paras. 67-69; Alfred Musema, Case No. ICTR-96-13, Trial Judgment, Jan. 27 2000, para. 204.

²²⁰ Tihomir Blaskic, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, para.106.

²²¹ CRYER, supra at p. 241

²²² Duško Tadic, Case No. IT-94-1-T, Trial Judgment, 7 May 1997, para. 644.

- means and methods used
- number and status of the victims
- discriminatory nature of the attack
- nature of the crimes committed in the course of the attack²²³

'Policy/Organisational Requirement'

- The policy/organisational Requirement has varied depending on the court.
- While the ICTY hold that it is not required to show that the attack was carried out as part of a policy or plan,²²⁴ the ICC states that an attack must be committed “pursuant to or in furtherance of a State or organisational policy to commit such attack.”²²⁵ The policy must not be adopted by the highest level of state but can also be enacted at the regional or local level.

'Nexus'

- The act must be ‘part of’ the action and cannot be separate or simply parallel to the widespread and systematic attack directed against a civilian population.²²⁶
- An act part of the widespread attack must not be directed against several victims (unless in the case of extermination).
- To show that there is a nexus, it must be proven that:
 - the act must have the effect of furthering the attack - either by nature or consequence.
 - the actor must know that there is an attack on the civilian population and that the act is part of the attack - it cannot be based on personal reasons, but the actor must share the purpose behind the attack.²²⁷
- Numerous factors are determinants of whether an act forms a ‘part of’ of an attack (the ones relevant to Airwars):
 - characteristics, aims, nature and consequences of the attack
 - similarity between the act and the attack
 - time and place of both

²²³ Blaskic, AJ, para. 106.

²²⁴ Kunarac et al., AJ para. 98; Blaskic, AJ para. 100.

²²⁵ Rome Statute, Art. 7(2), ICC Elements of Crimes (n 85), Introduction to Art. 7.

²²⁶ Tadic, AJ para. 248, 255.

²²⁷ Mrksic, AJ para. 41; Kunarac et al. TJ para. 418; Kunarac et al., AJ para. 99.

- how the act related to the attack²²⁸

CAH in different Courts

- The ICTY and ICT statutes state the following as CAH: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial, and religious grounds; and other inhumane acts.²²⁹
- The ICC has incorporated the following additional acts: sexual slavery, forced prostitution, forced pregnancy, other sexual violence, enforced disappearance, and apartheid.²³⁰

4.3. Focus on the crime of murder and crime of extermination

Not all CAHs are relevant to Airwars because, for some of them, the kind of data Airwars collects is less relevant. Because of that, the focus of the following analysis will be on the crime of murder and the crime of extermination. These are the crimes that have the most significant relevance for air attacks, as CAH, such as imprisonment, torture or rape, are not committed or caused by air attacks. The CAH of murder and extermination are quite similar in the way that extermination can be considered the aggravated form of murder. Therefore, most case law addresses both crimes, and the cases explored under the CAH of extermination include findings regarding both crimes. Thus, the suggestions are stated together at the end of the section on CAH. Furthermore, it is essential to mention that none of the case law was in the context of a classical international armed conflict, and crimes were usually not committed by air attacks or shelling but rather by small firearms or physical violence. Nevertheless, the cases give insight into how different courts address the crimes and can indirectly be applied to the work of Airwars.

4.3.1. The Crime of Murder

Framework: as seen above murder can be considered a crime against humanity under art. 5(a) of the Statute. Murder refers to the “unlawfully and intentionally” causing the death of a person. An important element of the crime of murder is the *mens rea* - the intent of the actor to kill or

²²⁸ Kayishema, TJ para. 122.

²²⁹ International Criminal Tribunal for the former Yugoslavia, 'Statute of the International Criminal Tribunal for the former Yugoslavia' (adopted 25 May 1993) UN Doc. S/RES/827/199; ICT XX

²³⁰ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), ISBN No. 92-9227-227-6, UN General Assembly, 17 July 1998.

to inflict grievous bodily harm likely to cause death without caring about whether death ensues. The elements of murder are the same as wilful killing as a war crime, as discussed above. An important side note: it is not required to recover the body to prove that a person was murdered. There are different ways to evidence that someone was murdered.

The crime of murder requires proof of the following:

- a) the victim died
- b) an act or omission of the perpetrator caused the victim's death and
- c) the act or omission was committed with intent to kill the victim or wilfully cause serious bodily harm, which the perpetrator should reasonably have known might lead to death
- d) ... and of course, all the criteria for it to be a crime against humanity must apply (see above)

Case law: In general cases often deal with both murder and extermination as they are similar in the way that every extermination also constitutes murder. Hence, the analysis of the cases under extermination lists the findings of both crimes against humanity. The cases also help to understand the difference between murder and extermination and how the court differentiates between the two.

Case # 1 *Prosecutor v Ratko Mladic, ICTY Trial Chamber I, (Judgement) IT-09-92-T (22 November 2017)*

Context: Ratko Mladic was the Commander of the Main Staff of the army of the Serbian Republic of Bosnia and Herzegovina (VRS).²³¹ He was in this position from 12 May 1992 to 8 November 1996. He was charged with two counts of genocide, five counts of crimes against humanity, and four counts of violations of the laws or customs of war. The allegations are situated in the context of the crimes committed by the Serb forces during the armed conflict in BiH between 1992 and 1995. On 22 November 2017, the Trial Chamber I of the ICTY convicted Mladic of genocide in the area of Srebrenica in 1995 and of persecution, extermination, murder, deportation, inhumane acts, terror, unlawful attacks on civilians and the

²³¹ 'MLADIĆ, Ratko (MICT-13-56), UNITED NATIONS, International Residual Mechanism for Criminal Tribunals' <<https://www.irmct.org/en/cases/mict-13-56>> accessed 18 February 2024.

taking of hostages.²³² The analysis focuses on the charge of murder as a crime against humanity and does not look into the other charges.

Relevant findings:

- 1) As stated above the focus is on the relevant finding regarding the crime of murder and disregards the chamber's findings on the other charges.
- 2) The Trial Chamber decided to consider the following incidents of alleged murder against the applicable law:
- 3) The court then lists an extensive list of scheduled as well as unscheduled incidents. The list includes scheduled incidents such as killings of individual detainees, scheduled incidents where people were killed by shelling, and unscheduled sniping incidents.
- 4) The incidents are categorised in the following way:
 - Schedule A, Schedule B, Schedule C, Unscheduled Incidents, Schedule E and other incidents, Schedule F and other sniping incidents, Schedule G and other shelling incidents (see also table of content judgement).
- 5) The scheduled incidents by shelling included inter alia the killing of ten people in Dobrinja at a make-shift football pitch (p. 1611), the killing of at least eight people in Dobrinja who were queuing for humanitarian aid through shelling by SRK members, the killing of over 60 people at the Markale
- 6) Market in Sarajevo through shelling by members of the SRK, the killing of one civilian in Hrasnica by members of the SRK launching a modified air bomb... the list of the incidents goes over more than 14 pages. The mentioned incidents intend to give an overview of the kind of incidents listed that could be especially relevant for air wars.
- 7) Regarding the requirements of death and causality, the chamber found that in all incidents listed, the victims died and that their deaths were caused by the acts of the perpetrators (para. 3052).
- 8) Regarding Schedule A incidents, the chamber found that the victims were targeted and detained prior to the killing and that the intent requirement is met in these incidents.
- 9) Regarding Schedule B and C and unscheduled incidents, the court found that the perpetrators acted with the requisite intent due to the circumstances of the killing. B and C mainly cover the killings of detainees where if they are killed, the intention is considered to be clearer by the court.

²³² Ibid.

- 10) Regarding Schedule E incidents (which relate to the unscheduled and scheduled incidents in Srebrenica), the chamber found that because in some incidents, victims were lined up, shot in the back, where killed in large numbers or insulted, beaten or threatened before the killing, the circumstances clearly show that the perpetrators acted with the requisite of intent for the crime of murder (para. 3055).
- 11) Regarding Schedule F and other incidents (which relate to the shelling in Sarajevo), the chamber found that in all incidents, the shelling hit residential areas. The chamber recalled that the perpetrators wilfully made civilians that were not DPH, objects of their shelling. It is found that the perpetrators acted with the requisite intent (para. 3057).
- 12) In the summary of the judgement, it can be found that the Chamber ‘having considered the nature, manner, timing, location, and duration of these sniping and shelling attacks, saw that it was the intention of the perpetrators [...] to target civilians and shell the city in an indiscriminate manner (para. 4).²³³

Suggestions:

- The relevant findings show that the court lists all relevant incidents even if “only” one civilian was killed, making it important to have detailed information also on single incidents.
- Furthermore, the judgements always state the context in which the civilian was killed. Hence, if information can be obtained about what the civilian was doing at the time of the killing (working, grocery shopping, playing sports), this helps to underline in which context the person was killed and helps to establish a pattern → If civilians are continuously targeted during everyday tasks, this can indicate another level and rationale and indicate spreading terror, which is connected to another crime.
- Regarding the requirement of intent, it is relevant to know if, in certain areas, there were mainly or exclusively attacks on civilians and residential areas. If there were a lot of attacks that hit a specific area and the incidents were close both in terms of geographical and time proximity, this shows the intent to attack a certain area. For example, if a residential area is hit by different bombs in a close period of time, this clearly indicates

²³³ Trial Chamber ICTY, ‘Trial Judgement Summary for Ratko Mladić’, (22 November 2017).

that the intent was to hit this specific target. Making notes on whether the attack was part of several other attacks is therefore helpful.

4.3.2. The crime of extermination

The crimes of murder and extermination are connected, as extermination is considered to be murder on a massive scale. The ICTY Appeals Chamber found that the difference between murder and extermination lies in the fact that extermination requires “an element of mass destruction”.²³⁴ The requirement of mass or large-scale killings does not prescribe a strict number of victims needed but should be determined case-by-case. The element of “mass” (*actus reus*) can also be established by an accumulation of separate incidents; thus, a single incident does not need to fulfil the requirement of “mass”.²³⁵ It is important to highlight that extermination can also be based on the omission to act, meaning that one must not be directly involved in the killing and involvement can be indirect and remote.

The elements of the crime that prove extermination must include:

- a) the killing of persons on a massive scale (*actus reus*)
- b) the accused’s intent, by his act or omissions of either:
 - i) killing on a large scale; or
 - ii) the subjection of a widespread number of people;
 - iii) the systematic subjection of several people;
- c) the conditions of living that would lead to their deaths (*mean rea*)
- d) ...and of course, all the conditions for it to be a crime against humanity must apply (see above)

Case #1: *The Prosecutor v. Théoneste Bagosora, Gratién Kabiligi, Aploys Ntabakuze, Anatole Nsengiyumva*, ICTR-98-41-A, Judgment & Appeal Judgement

Context: The analysis will focus on Bagosora, Ntabakuze, and Nsengiyumva as Kabiligi was acquitted of all counts. All three of them were found guilty by the trial chamber of genocide, crimes against humanity, and war crimes. Bagosora was the Director of the cabinet of the Rwandan Ministry of Defence, Ntabakuze was the Commander of the elite Para Commander

²³⁴ Elizaphan Ntakirutimana et al., Case No. ICTR-96-10-A and ICTR-96-17-A, Appeal Judgement, 13 Dec. 2004, para. 516.

²³⁵ Radislav Krstid, Case No. IT-98-33-T, Trial Judgement, 2 Aug. 2001, para. 501.

Battalion, and Nsenhiyumva was the Commander of the Gisenyi operational sector.²³⁶ All three of them were charged with conspiracy to commit genocide, genocide, crimes against humanity, namely murder, extermination, rape, persecution and other inhuman acts, and war crimes.²³⁷ The analysis will focus on the findings regarding murder and also extermination. The acts were committed in the context of the Rwanda military's commission of massacres and atrocities across Rwanda between April and June of 1994. Regarding the crimes relevant to the following analysis, the Trial Chamber found that Bagorora was responsible for the killing of sixteen named individuals (including sixteen Belgian peacekeepers and Prime Minister Uwilingiyimana). It was also found that he was directly responsible for the murder of Augustin Maharangari and the killings committed at roadblocks in Kigali Prefecture. He was *inter alia* convicted for the CAH of murder and extermination. The Trial Chamber found that Ntabakuze was responsible for crimes committed in Kigali Prefecture in April 1994 and convicted him *inter alia* of the CAH of murder and extermination. The Chamber found that Nsengiyumca was directly responsible for ordering killing in the Gisenyi Prefecture and for aiding and abetting attacks. He was also convicted *inter alia* for the CAH of murder and extermination. The case is especially interesting because it also highlights the differences between murder and extermination and how the Chamber differentiates between both. The analysis looks both at the crime of murder and the crime of extermination and analyses both the Judgement as well as the Appeal Judgement, however, the findings are laid down separately.

Relevant findings in the Judgement:

1. The Chamber defined murder as: “the intentional killing of a person without any lawful justification or excuse or the intentional infliction of grievous bodily harm leading to death with the knowledge that such harms will likely cause the victim’s death” (para. 2169).
2. Hence, the Chamber found that there must not only be intent but also some kind of pre-meditation. Even though formulated differently the definition given by the Chamber resembles the one of the RS.
3. The Chamber defined extermination as: “the act of killing on a large scale” (para. 2191). The Chamber underlines that no minimum number is required.

²³⁶ Bagosora et al. Case Overview (ICD- Asser Institute).
<<https://www.internationalcrimesdatabase.org/Case/100/Bagosora-et-al/>> accessed 2 April 2024.

²³⁷ Ibid.

4. The Chamber further found that several of the events charred as extermination, when viewed separately, do not satisfy the threshold of killing on a large scale. Nevertheless, “the Chamber has considered that events for which the Accused have been held responsible together since they are essentially part of the same widespread and systematic attacks against the civilian population on political and ethical grounds” (para. 2192).
5. The Chamber underlines two points in this regard: that the crimes were committed in a relatively brief period of time and that each crime was based on the same sets of orders or authorisations from the Accused (para. 2193).
6. The Chamber then lists the killings that either by themselves or collectively satisfy the criteria of being killings on a large scale. It highlights that the killings were conducted on ethics or political grounds (para. 2193).

Relevant findings in the Appeal Judgement:

1. The analysis of the findings in the Appeal Judgment is focused on the Alleged Errors Relating to Cumulative Convictions (Ground 14). Hence, the following highlights the findings that are especially interesting in light of the differences between murder and extermination and how the Chamber convicts these crimes which are, by nature, closely connected.
2. Nsengiyum submitted that the Trial Chamber erred in law by impermissibly cumulative convictions because they convicted him of murder and extermination based on the same facts. He argued that “the count of murder should be subsumed into the counts of extermination, persecutions, and other inhumane acts” (para. 410).
3. The Appeals Chamber found that the Trial Chamber did not err in entering convictions for both murder as a crime against humanity (art. 3 RS) and violence to life as a serious violation of CA 3 GC and AP II (art. 4 RS) (para. 415).
4. The Chamber found a conviction under art. 4 RS has materially distinct elements not required for a conviction under art. 3 RS. That being the existence of a nexus between the allied crimes and the armed conflicts satisfying the requirements of CA 3 GC and art. 1 AP II (para. 415).
5. In a similar vein does the conviction under art. 3 RS requires proof of a widespread or systematic attack against a civilian population, which is not required for convictions under art. 4 RS (para. 415).

6. Nevertheless, the Chamber underlines that “cumulative conviction for extermination and murder as crimes against humanity based on the same set of facts are not permissible because, whereas extermination requires the materially distinct element that the killings occur on a mass scale, murder does not contain an element materially distinct from extermination” (para. 416).
7. Hence, the Chamber underlines that cumulative convictions under different provisions that are based on the same facts and conducts are only permissible if each provision has a materially distinct element (para. 413). Which is not the case for the CAH of murder and extermination.
8. Therefore, the Appeals Chamber found that the Trial Chamber erred in law by entering cumulative convictions for murder and extermination as CAH for the killings in Gisenyi town (para. 416).

Case #2: Prosecutor v. Radovan Karadzic (Judgement and Appeal Judgement)

Context: Radovan Karadzic was a Bosnian Serb politician and the president of the self-proclaimed Republika Srpska and was considered ‘the leader’ of the Bosnian Serbs. The ICTY brought charges against him, including allegations of genocide, murder, extermination, deportation, and other inhumane acts. The charges were brought in the context of the Bosnia War (1992-1995) and his alleged involvement and orchestration of an ethnic cleansing campaign (from at least October 1991 until 30 November 1995) of Bosnian Muslim and Croat civilians in Bosnia and Herzegovina. The campaign included acts of murder, extermination, persecution and deportation. An important part of the allegations was that Karadzic had participated in a joint criminal enterprise (JCE) “to establish and carry out a campaign of sniping and shelling against the civilian population of Sarajevo, aimed to spread terror.”²³⁸ He was further alleged of having participated in a JCE to eliminate Bosnian Muslims in Srebrenica by killing men and boys and that he participated in a JCE to take UN personnel hostage.²³⁹ The Trial Chamber Judgment on 24 March 2016 found Karadzic guilty *inter alia* of genocide, persecution, murder and extermination. On 20 March 2019, the Appeals Chamber of the ICTY upheld the judgement. The analysis again focuses on the CAH of murder and extermination and especially looks at the shelling of the civilian population.

²³⁸ Radovan Karadzic. Case Overview (IT-95-5/18).

²³⁹ Ibid.

Relevant findings:

Legal findings murder

1. Regarding the *actus reus* – The Chamber underlined that it is not necessary that proof of a dead body has been produced if the victim's death can be inferred circumstantially from other evidence which has been presented to the Chamber (para. 446).
2. Regarding *mens rea* – It must be proved that the act was committed, or the omission was made, with an intention to kill or to wilfully cause serious injury or grievous bodily harm which the perpetrator should have reasonably known might lead to death (para. 447). Hence, the *mens rea* of murder includes both direct and indirect intent.

Legal findings extermination

3. Regarding the *actus reus* - The Chamber underlined that there is no minimum number of victims of extermination (must be made on a case-by-case basis) and that it is not necessary that the victims of extermination are precisely identified by name (para. 483).
4. It further states that it was possible to establish extermination on an accumulation of separate and unrelated incidents – meaning on an aggregated basis (para. 484). But they must form part of the same murder operation.
5. Regarding the *means rea* – the Chamber states the intention that a large number of individuals be killed must be given, but not the threshold to kill a certain number (para. 485 and 486).

General Findings

6. There are pages describing numerous shelling and sniping incidents. The information includes a single incident but also general information, for example, on the daily average shells being fired per day or the general patterns (para. 3566). Since the listing and documentation regarding shelling goes over 200 pages of the Judgment, the following analysis lists the most interesting and important observations.
7. It categorises the shelling depending on the city and the area and the type of attack.
8. Certain incidents are particularly highlighted, such as: The shelling of the Old Town with people being hit who were queuing for water (para. 3566); the continuous shooting of the Bosnian Serbs of people who were trying to escape the deprivation of the city every night because of a shortage of gas, water, oil and lack of humanitarian assistance because humanitarian convoys were prevented from reaching the city (para. 3566); Children who were killed by shelling while playing in front of their house (para. 3570); the firing on the markets or flea markets,

9. The analysis regarding some incidents is very extensive and includes information on the type and size of the shell, the direction it came from and the incoming descent angle (to determine from where it was fired), which group was controlling the area it was fired from at the respective moment, and the weather (was it foggy, sunny, or at night).
10. Furthermore, there is information on general tactics and patterns of the attacks (tit of tat, combination of attacks etc.)

Suggestions:

- Considering that an incident can be convicted either for murder or extermination, not both, but that extermination is a more severe crime, collecting facts that support the existence of extermination is especially important (extermination is murder on a massive scale → need to prove the element of ‘mass destruction’).
- For extermination all factors that connect incidents are important to show the massive scale. Hence, for extermination, time plays an important role because it can help to prove that certain acts together amount to large-scale killing. Making notes on time frames where several attacks happened that were most likely conducted by the same party and against similar targets can be helpful, especially if a single incident would not amount to a large-scale killing by itself. So there could be a label on the general time/date that an incident happens as well as a separate label if the incident was part of a larger accumulation of incidents → incidents in close proximity both in time and space to each other.
- Making connections between incidents also helps to establish a pattern - as seen in the judgement. Since the judgement in the *Prosecutor v. Radovan Karadzic* case not only addressed individual incidents but also the general patterns of attacks, including the number of attacks and amount of shelling per day, grouping individual incidents from the beginning can help to make this information easily accessible. (the grouping would be based on geography (the same village, neighbourhood, city) as well as time (can be hours but also days as long as there is not significant break between the incidents))
- To a certain extent, this is also helpful for the crime of murder, however, with regard to the element of intent. As discussed above, under the suggestions for the crime of murder,

many attacks on the same area and within a reasonable time frame can prove the intent to attack this area, thus excluding the targeting of people not DPH by accident.

- It was often mentioned what civilians were doing when they were attacked since this underlines that they were persons, not DPH and that there were no military targets around. Hence, if possible, notes on the context and the activity (working, shopping, sleeping, playing, etc.) could be useful. Attacks on markets and flea markets were especially highlighted as this is an important part of civilians' everyday lives. They are often bigger, and it is more difficult to argue that they were hit by accident (compared to a standard house).
- Incidents where children died are also highlighted. They are especially vulnerable and do not pose any risk. When children are killed by shelling or sniping, this shows a certain willingness to attack (risking to) even the weakest part of the civilian population. Hence, these incidents can be especially 'valuable'. Furthermore, it is easier to prove that children were not DPH. Making a separate tag for incidents where children died/were part of the attack would be useful.
- Since it was mentioned when a civilian object such as a flea market was hit when it was foggy (as this impacts the proportionality and precautionary measures), it could be interesting to add this to specific incidents if the video shows that there were particular weather conditions.
- Of course, this is also the case whether the incident occurred during the day or night, which will often be obvious from the time of the incident. However, since this might change at certain times depending on the season, a note on the brightness at the moment of the incident could be helpful.

5. Genocide

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5.1. Overview genocide

The crime of genocide initially struggled to obtain a generic definition under international law. Currently the approach represented in the RS under Article 7 encompasses a largely accepted view on the understanding of ‘genocide’. The legal term refers to acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group. Since the recognition of the genocide was achieved after the World War II, the establishment of the legal term is connected to the adoption of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). The convention established genocide as an international crime. In the jurisprudence of the ICJ obligations under the Genocide Convention have on multiple occasions been recognized as *erga omnes*²⁴⁰, meaning that they are owed to the international community as a whole. Moreover, in the *Advisory Opinion of 1951* the ICJ that State-Parties to the Genocide Convention “...do not have any interests of their own; they merely have, one and all, a common interest...”²⁴¹, which proves a universal recognition of the crime of genocide.

Following the purpose of establishing the threshold for proving genocide, the following reference to the RS is made: “for the Rome Statute, "genocide" means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group”

The same wording is employed in the defining provision of the Genocide Convention.²⁴²

²⁴⁰ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5 February 1970, [1970] ICJ Rep. 3, at 32, paras. 33–4; Judgment of 20 July 2012, [2012] ICJ Rep. 422 (*Obligation to Prosecute or Extradite*), at 444, para. 53.

²⁴¹ *Reservations to the Convention on Genocide*, Advisory Opinion of 28 May 1951, [1951] ICJ Rep. 15, at 23.

²⁴² UN General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention), United Nations, Treaty Series, vol. 78, p. 277, 9 December 1948, art. II.

5.2. General Elements of Genocide

Before addressing the specific acts included in Article 7 of the RS, the elements common to all the categories shall be established. Two elements inherent in the nature of the crime of genocide will be addressed, namely *i)* the intention; *ii)* the group.

‘intent to destroy’

The crime of genocide involves two separate mental elements: general intent or *dolus*, covered by Article 30 of the Statute of the ICC, indicating ‘volitional (intent) and/or a cognitive or intellectual (knowledge) element’, and a special ‘intent to destroy’ that constitutes a subjective requirement complementing general intent.²⁴³ In the *Akayesu* judgement Court clarified the ‘intent to destroy’ as a ‘special intent’ or *dolus specialis*, defining it as ‘the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged’²⁴⁴. The concept that ‘intent to destroy’ refers to a special intent that, in essence, displays the volitional element in its most intense form and is purpose-based, as first proposed in *Akayesu*, is the foundation of the case-law's approach. The ICJ, later on, confirms this approach by specifying ‘special or specific intent’ as an ‘extreme form of wilful and deliberate acts designed to destroy a group or part of a group’^{245, 246}

‘a national, ethnical, racial or religious group’

The groups indicated in the legal definition of genocide constitute an exhaustive list.

National: Those, whose identity as such is distinctive in terms of nationality or national origins are classified as ‘national groups’. Both the national group of birth origin and the existing citizenship can be simultaneously linked to the national group.²⁴⁷ The nationality as described by the ICJ is “a legal bond having its basis [in] a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred ... is in fact more closely connected to the population of the State conferring nationality than with that of any other State”.²⁴⁸

²⁴³ Kai Ambos, ‘What Does “Intent to Destroy” in Genocide Mean?’ (2009) 91 International Review of the Red Cross 833.

²⁴⁴ *Prosecutor v. Jean-Paul Akayesu*, *supra* note 216, para. 498.

²⁴⁵ ICJ, *Case concerning the application of the convention on the prevention and punishment of the crime of genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, 26 February 2007, para. 188.

²⁴⁶ Ambos, *supra* note 242, at 838.

²⁴⁷ David Nersessian, *Genocide and Political Groups* (Oxford Academic 2010), at 24-25.

²⁴⁸ ICJ, *Nottebohm (Liechtenstein v. Guatemala)*, Judgment, 6 April 1955, at 23.

Ethnical: A group whose members share a similar language, culture, or other social features is sometimes referred to as an ‘ethnic group’.²⁴⁹ The ILC made the following distinctions between them and racial groups: “The ethnic bond is more cultural. It is based on cultural values and is characterised by a way of life, a way of thinking and the same way of looking at life and things”.²⁵⁰

Racial: The primary means of defining racial groupings is physical appearance. They consist of people whose identity as such is distinctive in terms of biological descent or physical characteristics.²⁵¹ Regardless of linguistic, cultural, national, or religious considerations, the group is founded on inherited physical characteristics that are frequently associated with a particular geographic area.²⁵² It is important to note that members of a group do not lose their affiliation to a group simply because they have a lower or higher degree of racial traits.

Religious: The definition pronounced by ICTR is that a ‘religious group is one whose members share the same religion, denomination or mode of worship’.²⁵³ Other applications describe religious groupings as having a common religious creed, beliefs, doctrines, practices or rituals. There is a widely supported thought that atheists and other non-theists who are targeted for genocide should be included in the idea of religious groups because of their internal beliefs.²⁵⁴

5.3. Acts of genocide

The following acts of genocide are addressed in this section:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to members of the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.

²⁴⁹ Nersessian, *supra* note 246, at 23.

²⁵⁰ Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind’ (1986) UN Doc A/CN.4/398, 58.

²⁵¹ Nersessian, *supra* note 246, at 22.

²⁵² Akayesu, *supra* note 216, para. 514.

²⁵³ *Ibid.*, para. 515.

²⁵⁴ Nersessian, *supra* note 236, at 23-24.

(a) Killing members of the group;

Framework: The act of killing members of the group with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, that is, the crime of genocide, is codified in Article 7(a) of the RS. According to the ICC’s Elements of Crimes, it is required to demonstrate that:

- 1) The perpetrator killed²⁵⁵ one or more persons.
- 2) Such person or persons belonged to a particular national, ethnic, racial or religious group.
- 3) The perpetrator intended to destroy, in whole or in part, that national, ethnic, racial or religious group, as such.
- 4) The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself affect such destruction.

Case law: *Prosecutor v. Radislav Krstic*, ICTY Appeals Chamber, (Judgement) IT-98-33-A, 19 April 2004²⁵⁶

Context: Units of the Bosnian Serb Army (VRS) Drina Corps bombarded Srebrenica and attacked UN observation stations manned by Dutch people in July 1995. By July 18, 1995, the majority of the Bosnian Muslim residents of Srebrenica had either been slaughtered or driven out by those troops. The VRS forces had all but eradicated the presence of Bosnian Muslims in Srebrenica by the end of July. Deputy Commander and Chief of Staff of the VRS Drina Corps Radislav Krstic was accused of crimes against humanity, war crimes, and genocide. In Srebrenica and its aftermath, an estimated 7,000–7,500 Bosnian Muslim men and boys lost their lives.

Relevant findings:

1. The affiliation of Bosnian Muslim population of Srebrenica to the protected group is confirmed due to their deliberate targeting by Bosnian Serbs.
2. The understanding of ‘in part’, in the definition of genocide, was examined. As Krstic was not alleged to have intended to destroy the entire national group of Bosnian Muslims, but only a part of that group. It is well established that where a conviction for

²⁵⁵ The term “killed” is interchangeable with the term “caused death”.

²⁵⁶ *Radislav Krstic*, Case No. IT-98-33-A, Appeals Chamber, (Judgement), 19 April 2004.

genocide relies on the intent to destroy a protected group ‘in part’, the part must be a substantial part of that group. (para.8)

3. The determination of the intent to destroy the Trial Chamber found that, given the patriarchal character of the Bosnian Muslim society in Srebrenica, the destruction of such a sizeable number of men would inevitably result in the physical disappearance of the Bosnian Muslim population at Srebrenica. (para.28)
4. The scale of the killing, combined with the VRS Main Staff’s awareness of the detrimental consequences it would have for the Bosnian Muslim community of Srebrenica and with the other actions the Main Staff took to ensure that the community’s physical demise, is a sufficient factual basis for the finding of specific intent. (para.35)
5. General Krstic, acting as a Commander, had effective control of the Drina Corps during the time period in which the acts of genocide took place. Moreover, it was established that having knowledge of these acts indicate he was responsible for the crime of genocide.

Suggestions:

- Emphasis could be added on the importance of documenting the targeting of protected groups. The pattern of systematic harm inflicted on a specific group, sharing common national, ethnical, racial or religious characteristics, could indicate genocidal intent (intend to destroy) the group, in whole or in part.
- The command responsibility is a vital element for incrimination of genocide. Tracking the chain of command allows identification of patterns of behaviour and decision-making within the hierarchy of perpetrators. By examining how orders were transmitted, interpreted, and executed at various levels of authority, investigators can uncover systematic patterns of violence and killings directed against targeted groups.

(b) Causing serious bodily or mental harm to members of the group;

Framework: The act of causing serious bodily or mental harm with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, that is, the crime of genocide, is codified in Article 7(b) of the RS. According to the ICC’s Elements of Crimes, it is required to demonstrate that:

1. The perpetrator caused serious bodily or mental harm to one or more persons.²⁵⁷
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Case Law:

Case #1: *Prosecutor v. Jean-Paul Akayesu*, ICTR Trial Chamber I, (Judgement) ICTR-96-4-T, 2 September 1998²⁵⁸

Context: in April 1994, following the assassination of Rwandan President Juvenal Habyarimana, extremist Hutu elements within the government and military seized power and launched a systematic campaign of violence against the Tutsi ethnic group, as well as moderate Hutus who opposed their genocidal agenda. In the town of Taba, where Jean-Paul Akayesu served as mayor of the commune, the genocide unfolded with horrifying brutality. Akayesu was charged with the performance of executive functions and the maintenance of public order within his commune, subject to the authority of the prefect. He had exclusive control over the communal police, as well as any gendarmes put at the disposition of the commune. He was responsible for the execution of laws and regulations and the administration of justice, also subject only to the prefect's authority.

Relevant findings:

1. Regarding the harm inflicted on the population, the Court has found that causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable. (para. 502)
2. Moreover, relevant acts were listed where the Chamber took serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.

²⁵⁷ This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.

²⁵⁸ *Jean-Paul Akayesu*, *supra* note 216.

Case #2: *Prosecutor v. Zdravko Tolimir*, ICTY Appeals Chamber, (Judgement) IT-05-88/2-A, 8 April 2015²⁵⁹

Context: During the relevant time, the underlying events giving rise to this case occurred in the Srebrenica and Zepa enclaves, in Eastern Bosnia, between 1992 and 1995, Tolimir was an Assistant Commander and the Chief of the Sector for Intelligence and Security Affairs of the Main Staff of the Army of the Republika Sipska (VRS). Tolimir was charged with crimes, including genocide, through his participation in two distinct joint criminal enterprises to murder thousands of able-bodied Bosnian Muslim men and boys captured from Srebrenica and to force the Bosnian Muslim population out of the Srebrenica and Zepa enclaves.

Relevant findings:

1. Drawing on the case law of the ICTY and the ICTR, the Trial Chamber held that serious bodily or mental harm must be of such a serious nature as to contribute or tend to contribute to the destruction of all or part of the group; although it need not be permanent or irreversible, it must go “beyond temporary unhappiness, embarrassment or humiliation” and inflict “grave and long-term disadvantage to a person’s ability to lead a normal and constructive life” (para. 201).
2. The Chamber states that serious mental harm must be of such a serious nature as to contribute or tend to contribute to the destruction of all or part of the group (para. 203). The ICTR Appeals Chamber in the Seromba case has held in this regard that: serious mental harm includes “more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat”.²⁶⁰

Suggestions:

- The determination of the harm is conducted on a case-by-case basis. Therefore, the indication of all potential harm suffered could increase the chances of accountability of perpetrators for inflicting serious bodily or mental harm. For instance, largely undocumented acts that potentially could result in serious bodily or mental harm are separation; mass burial; coordinated killings; inhumane and degrading treatment; starvation; persecution; interrogations combined with beatings; rape and sexual

²⁵⁹ Zdravko Tolimir, Case No. IT-05-88/2-A, Appeals Chamber, (Judgement), 8 April 2015.

²⁶⁰ Athanase Seromba, Case No. ICTR-2001-66-A, Appeals Chamber, (Judgement), 12 March 2008, para. 46.

violence; injection of pharmacological substances; threats of death, knowledge of impending death; acts causing intense fear or terror; surviving killing operations; forcible displacement; and mental torture.

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

Framework: The act of deliberately inflicting conditions of life calculated to bring about physical destruction with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, that is, the crime of genocide, is codified in Article 7(c) of the RS. According to the ICC’s Elements of Crimes, it is required to demonstrate that:

1. The perpetrator inflicted certain conditions of life upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.²⁶¹
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself affect such destruction.

Case law: *Prosecutor v. Zdravko Tolimir*, ICTY Appeals Chamber, (Judgement) IT-05-88/2-A, 8 April 2015²⁶²

Context: Tolimir was an Assistant Commander and the Chief of the Sector for Intelligence and Security Affairs of the Main Staff of the Army of the Republika Sipska (VRS) in Eastern Bosnia. See more 4.3 (b) Case #2, Context.

Relevant findings:

1. The Court analysed the act of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part in light of the jurisprudence of the ICTY and the ICTR: The underlying acts are methods of

²⁶¹ The term “conditions of life” may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.

²⁶² *Zdravko Tolimir*, *supra* note 258.

destruction that do not immediately kill the members of the group, but ultimately seek their physical destruction. Examples of such acts include, *inter alia*, subjecting the group to a subsistence diet; failing to provide adequate medical care; systematically expelling members of the group from their homes; and generally creating circumstances that would lead to a slow death such as the lack of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to excessive work or physical exertion. (para. 225)

2. The Appeals Chamber upheld the relevant findings of the ICJ in the *Croatia v. Serbia* case, citing ICTY jurisprudence, that deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part covers methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group. Such methods of destruction include notably deprivation of food, medical care, shelter, or clothing, as well as lack of hygiene, systematic expulsion from homes, or exhaustion as a result of excessive work or physical exertion. (para. 226)
3. Additionally, the Appeals Chamber confirmed that the forced displacement of a population does not constitute in and of itself a genocidal act and that those acts typically relate to the deliberate withholding or taking away of the necessities of life over an extended period. (para. 234)

Suggestions:

- Monitoring the sustenance, water, medical supply could provide necessary information for understanding the living conditions of the protected group. For example, under Article 23 of the Geneva Convention IV a party to an international armed conflict shall allow the free passage of all consignments of medical and hospital stores [...] all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases. Therefore, if a party to a conflict or an occupying power does not permit the passage of humanitarian aid or food, it could potentially influence the evidence of the genocidal intent.

(d) Imposing measures intended to prevent births within the group;

Framework: The act of imposing measures intended to prevent births with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, that is, the crime of genocide,

is codified in Article 7(d) of the RS. According to the ICC's Elements of Crimes, it is required to demonstrate that:

1. The perpetrator imposed certain measures upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The measures imposed were intended to prevent births within that group.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Case law: *Prosecutor v. Jean-Paul Akayesu*, ICTR Trial Chamber I, (Judgement) ICTR-96-4-T, 2 September 1998

Context: Jean-Paul Akayesu served as mayor of Taba commune, where Rwandan genocide unfolded with horrifying brutality. See more 4.3 (b) Case #1, Context.

Relevant findings:

1. The Chamber interpreted that the measures intended to prevent births within the group should be construed as sexual mutilation, the practice of sterilisation, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group. (para. 507)
2. Furthermore, the Chamber noted that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate. (para. 508)

(e) Forcibly transferring children of the group to another group

Framework: The act of forcibly transferring children of the group to another group with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, that is, the crime of genocide, is codified in Article 7(e) of the RS. According to the ICC's Elements of Crimes, it is required to demonstrate that:

1. The perpetrator forcibly transferred one or more persons.²⁶³
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The transfer was from that group to another group.
5. The person or persons were under the age of 18 years.
6. The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.
7. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Case law: The existing practice on the act of forcible transfer of children is scarce. Nevertheless, scholarship actively examines the topic of forced child transfers as an act of genocide. The recruitment of child soldiers by armed forces or groups perpetrating mass atrocities is discussed as a potential act of 'transfer' of children to pursue the cultural cleansing, that is, genocide. Conflicts in Syria and Darfur have been widely discussed for the active involvement of children in the warfare. Likewise, mass transfers of Ukrainian children by Russian authorities have contributed to issuance of two arrest warrants for the war crime of unlawful deportation of population (children) by the ICC on 17 March 2023.

Comment:

- An ongoing analysis of the circumstances of the numerous conflicts may contribute to the emergence of jurisprudence on the act of forcible transfer of children with genocidal intent. The monitoring systems of children involved in the warfare lack sufficient regulation and enforcement. Moreover, the high threshold and a possibility of legal

²⁶³ The term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.

evacuation in exceptional circumstances under IHL makes the proving of the genocidal intent often infeasible and susceptible to abuse. The absence of the case law does not, unfortunately, indicate non-occurrence of such atrocities but rather the insufficient investigation and legal framework on the matter.

5.4. State responsibility for the crime of genocide

Under the Genocide Convention, the link to State responsibility is placed in the wording of Article IX, drafted as follows:

*“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute”.*²⁶⁴

Therefore, the crime of genocide (and related acts mentioned in Article III of the Genocide Convention²⁶⁵) can be attributed not only to an individual perpetrator but also to a State. The element of intent herein was addressed by Marko Milanovic on the possession of genocidal intent by a State. The scholar states that the intent shall be proven for individuals whose conduct is attributed to a State and who are not necessarily state officials.²⁶⁶ This issue was also raised in the *Bosnian case* before the ICJ, where the Respondent States Serbia and Montenegro argued that the “drafting history of the Convention shows that there was no question of the direct responsibility of the State for acts of genocide”.²⁶⁷ Nevertheless, the Court concluded that “Contracting Parties to the Convention are bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them”.²⁶⁸ The same applies to other acts listed in the Convention.²⁶⁹ Therefore, the discussion over the State's responsibility for the crime of genocide has been resolved by the ICJ 2007 judgment.

Moreover, the interplay between individual and State responsibility was highlighted by the Court under the term ‘dual responsibility’.²⁷⁰ Here, the ICJ finds complementarity in the text of related provisions of the Rome Statute and the ILC’s Articles on the Responsibility of

²⁶⁴ Genocide Convention, *supra* note 170, art. IX.

²⁶⁵ *Ibid.*, art. III.

²⁶⁶ Marko Milanovic, ‘State Responsibility for Genocide’ (2006) 17 *European Journal of International Law* 567–569.

²⁶⁷ ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, para. 176.

²⁶⁸ *Ibid.*, paras. 166-167.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*, para.173.

States for Internationally Wrongful Acts (ARSIWA), indicating the effect of one without prejudice to the other.²⁷¹ In conclusion, State responsibility is not conceptually undermined by the notion of individual responsibility but rather complemented by it.

At the same time, the complicity of the State in genocide has hardly been adjudicated by international courts.²⁷² In the *Bosnian case*, the Court stated that the issue of complicity is not applicable where the direct responsibility of a State arises.²⁷³ The Court stated that in order for complicity to occur, it must be determined ‘beyond any doubt’ that the accomplice was fully aware of the principal perpetrator's *dolus specialis*, meaning that the Court can exclude the commission of the complicity crime if the criterion of awareness of the perpetrator's specific intent is not fulfilled.²⁷⁴ The knowledge of complicity is linked to Article 16 of the ARSIWA, namely that the State’s aid or assistance in the commission of an internationally wrongful act shall be committed with the knowledge of the circumstances.²⁷⁵ Hence, the difficulty arises in the need to prove the State’s alleged complicity based on its knowledge of the specific genocidal intent.

Currently, two cases concerning the Genocide Convention are pending before the ICJ. The first application submitted by Ukraine against the Russian Federation indicates grave and widespread violations of human rights.²⁷⁶ The second was submitted by the Republic of South Africa against the State of Israel whose acts and omissions are allegedly genocidal in character and intended to bring about the destruction of a substantial part of the Palestinian national, racial and ethnic group.²⁷⁷

The ICJ in the judgement on the preliminary objections to the first case rebutted the Ukrainian argument that Russia falsely asserted that Ukraine committed genocide as a justification for invasion by indicating that this issue falls outside the jurisdiction of the ICJ.²⁷⁸ This case was unique under the ‘reverse claim’ of Ukraine for Russian actions being allegedly

²⁷¹ *Ibid.*

²⁷² Eugenio Carli, ‘On State Responsibility for Complicity in Genocide: Will South Africa’s “All-in Strategy” Be Effective?’ (*EJIL: Talk!* 5 March 2024) <<https://www.ejiltalk.org/on-state-responsibility-for-complicity-in-genocide-will-south-africas-all-in-strategy-be-effective/>> accessed 30 March 2024.

²⁷³ ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro*, para. 419.

²⁷⁴ *Ibid.*, paras. 421-422.

²⁷⁵ *Ibid.*, paras. 420.

²⁷⁶ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Application Instituting Proceedings filed in the Registry of the Court on 26 February 2022.

²⁷⁷ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Application Instituting Proceedings filed in the Registry of the Court on 29 December 2023.

²⁷⁸ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening)*, Judgment on Preliminary Objections, 2 February 2024, para. 151.

inconsistent with the Convention.²⁷⁹ As of today, only one argument will proceed further, where the Court will deliver its judgement on merits, adjudicating whether there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine. As we observe the Court prefers to remain within the standard practice of deciding whether the State is responsible for genocide. Despite academic interest, the responsibility of Russia is not the subject of this case. Therefore, discussions arise on the potential case of State responsibility of Russia through proving the pattern of atrocities committed by the Russian officials or with the acknowledgement of the latter against the Ukrainian national population on the occupied territories.²⁸⁰

As for the alleged breach of obligations under the Genocide Convention by Israel, South Africa in the application fails to differentiate between the direct perpetration of genocide and Israel's complicity in genocide, therefore adding the confusion on the State responsibility. At the same time, for investigation purposes, the elements of intent or knowledge remain essential. Since military activities are conducted by official military force, meaning *de jure* organs of Israel, the attribution of direct perpetration constitutes a slightly easier task than proving the knowledge of specific intent by Israel as an accomplice State. Therefore, either the link to the officials of the State shall be acknowledged or the knowledge by State of the main perpetrators intent to commit genocide. The following practice of the Court may address some of the mentioned issues and facilitate the pursuit of justice not only in concrete cases but in future application of the Genocide Convention to potential State responsibility.

²⁷⁹ Marko Milanovic, 'ICJ Delivers Preliminary Objections Judgment in the Ukraine v. Russia Genocide Case, Ukraine Loses on the Most Important Aspects' (*EJIL: Talk!* 2 February 2024) <<https://www.ejiltalk.org/icj-delivers-preliminary-objections-judgment-in-the-ukraine-v-russia-genocide-case-ukraine-loses-on-the-most-important-aspects/>> accessed 2 April 2024.

²⁸⁰ Marc Weller, 'Time for Another Ukrainian Genocide Case?' (*EJIL: Talk!* 6 February 2024) <<https://www.ejiltalk.org/time-for-another-ukrainian-genocide-case/>> accessed 30 March 2024.

Section IV: Recommendations

Collection of evidence

1. When conducting OSI, investigators must respect the professional principles of accountability, competency, objectivity, legality and security awareness with a view to giving credibility to the evidence collected.
2. Collection of evidence in an orderly and timely manner is crucial in preventing the loss of relevant information. In this regard, target web address, source code and full-page capture of the evidence are necessary standards to be met for the evidence to be declared admissible in Court and, therefore shall be included when evidence is collected. Additional elements such as embedded media files, embedded metadata, contextual data, collection data and hash value can help corroborate the value and trustworthiness of the evidence.
3. In the preservation phase of the OSI, it is important that authenticity, availability, identity, persistence, renderability and understandability of the evidence are preserved over time.
4. In collecting and preserving OSI, labelling the sources appropriately is necessary in order to prioritise the most relevant sources and avoid duplication.

Evidence at trial

5. When submitting the evidence, Airwars should disclose the identity and professional profiles of the researchers involved in the process.
6. When submitting the evidence, Airwars should disclose its methodology.
7. Disclose the chain of custody of each piece of evidence
8. Be transparent: acknowledge the limits of the methodology, internal bias, and affiliations with the parties.
9. Indicate whether there has been any kind of peer review of the research or if other investigators have found similar results.
10. Experts should limit themselves to cover subject matters relating to evidence, rather than opening on ultimate issues of facts or law. This should be presented in terms of more or less likelihood.
11. In the substance, the evidence submitted should include the probative value, including internal and external indicators and (counter-)indicia of reliability. This is relevant both

for the admissibility assessment as well as for the assessment of the weight of the evidence.

12. When submitting the evidence, experts should attempt to bring the best evidence among all.
13. Experts should as much as possible remain objective, meaning that they need to bring both incriminating and exonerating factors emerging from their investigations.

Pattern of evidence

14. Pattern of evidence, as any other evidence, should be assessed under the standards developed by the international criminal tribunals, which are: (i) the probative value, (ii) the relevance to trial and (iii) the probative value of the evidence is not outweighed by the prejudicial effect.
15. The value of an OSI item would be evaluated differently according to stage. For example, in *the Confirmation of Charges*, the Court would evaluate it under a “limited...assessment”, as this stage is “necessarily presumptive”. This would differ from the evidentiary standard in *the trial stage*, which is “beyond reasonable doubt” and, consequently, it requires a more thorough and demanding estimation.

War Crimes

Applicable to all types of attacks targeting civilians or civilian property

16. Indicate proximity to military objectives, facilities, quarters, or lack thereof.
17. Indicate as well if there were military objectives in that space in the weeks previous to the attack.
18. Indicate if the attack was part of an ongoing pattern of attacks on the same locality.
19. Indicate the duration of hostilities.
20. Indicate -if known- the position of the weapons used to carry out the attack.
21. Indicate what the person harmed was doing at the time (working, shopping, sleeping, playing, etc.), the clothes they were wearing, as well as where the person was (in or in front of their house, at work, on a marketplace etc.). This is helpful to establish whether a civilian/peacekeeper/etc. was taking direct part in hostilities.
22. It is also interesting that for an attack, there must be no actual damage, hence also incidents where there were attacks in the form of shooting, bombardment etc., but no one was killed could still be relevant to the document.

23. The visibility of the civilian property from the place of the launch of the attack could be indicated, also taking into account previous operations in the area that demonstrate the familiarity of the attacking force with the place and vicinities.
24. Indicate the weather conditions during the attack, the time of the attack, specially whether it was during daylight hours or not, and if it occurred on a business day or a weekend or public holiday.
25. Airwars could ask those who submit files when the civilian building or object attack was installed there, if the nature or status of the place has changed recently, if it's a well-known place if it is online.
26. Not regarding the documentation or collection of information but regarding the cooperation with other organisations or news outlets, there seem to be sources that are preferably used by the court and that are cited more often, such as in this case Reuters or the Guardian.

Applicable to specific events depending on the nature of target

27. Since attacks on protected objects (buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places) are a separate war crime, a categorization that lists attacks on those objects is very helpful.
28. When the object attacked is a specially protected object it could be asked and/or reviewed from the files if there was an emblem visibly located.
29. The observance of the emblem by soldiers proves not only the purpose of the objects attacked but also their protected status.
30. It is crucial to know if a special protected object has or has not lost its status because it has become a military object. Therefore, it could be helpful to see if the material on a specific incident shows 'normal activities' related to the function of the special protected object. E.g. if there were other patients, ambulances, and doctors, around/in front of the hospital. Making notes on this could help to prove that the place was still used in its civilian capacity.
31. When dealing with attacks on peacekeeping missions, it is relevant to establish if they only used force for self-protection or because of a robust mandate. It matters greatly if peacekeepers are participating in hostilities because this impacts if they lose their protection status. Hence, it matters which weapons they were carrying, if they participated in fighting, if they used force etc.

32. Since the perpetrators have to be aware of the protective status of the peacekeepers' information on how long the peacekeepers have been in the area, which were their tasks, whether have they been in contact with different actors and the population, etc. to establish that there was a general awareness of the presence of peacekeepers in the area and their tasks.
33. The mental element of the crime could be established by the same indication of the perpetrators' knowledge that the object (or a person) was protected by the emblem.
34. In the *Ntaganda* case, the attack on one special protected object, namely the health centre in Sayo, sufficed for the court to prosecute Ntaganda for the war crime and the judgement clearly highlights the gravity of the crime. This underlines the "weight" of hospitals before the court and the importance of documenting these incidents in detail and with special attention

Crimes against humanity

35. Indicate what the civilian was doing at the time of the killing (working, grocery shopping, playing sports).
36. Indicate if the attack was directed mainly or exclusively to civilians and residential areas.
37. Indicate if military objectives were present in the area of attack, or if they were present the previous weeks.
38. Indicate the duration of the attacks, the time frames where the attacks happened.
39. Indicate if proximate attacks were conducted by the same party and against similar targets.
40. In terms of general patterns of attacks, events should indicate the number of attacks and amount of shelling per day.
41. Grouping individual incidents can help to demonstrate patterns. The grouping would be based on geography (the same village, neighbourhood, city) as well as time (can be hours but also days as long as there is no significant break between the incidents).
42. Attacks on markets and flea markets were especially highlighted as this is an important part of civilians' everyday lives. They are often bigger, and it is more difficult to argue that they were hit by accident (compared to a normal house).
43. Indicate the weather conditions during the attack, the time of the attack, specially whether it was during daylight hours or not, and if it occurred on a business day or a weekend or public holiday.

Genocide

44. In the crime of genocide, the emphasis could be added on the importance of documenting the targeting of protected groups. The pattern of systematic harm inflicted on a specific group, sharing common national, ethnical, racial or religious characteristics, could indicate genocidal intent (intent to destroy) the group, in whole or in part.
45. Command responsibility is a vital element for incrimination of genocide. Tracking the chain of command allows the identification of patterns of behaviour and decision-making within the hierarchy of perpetrators. By examining how orders were transmitted, interpreted, and executed at various levels of authority, investigators can uncover systematic patterns of violence and killings directed against targeted groups.
46. The determination of the harm in the crime of genocide by causing serious bodily or mental harm to members of the group is conducted on a case-by-case basis. Therefore, the indication of all potential harm suffered could increase the chances of accountability of perpetrators for inflicting serious bodily or mental harm. For instance, largely undocumented acts that potentially could result in serious bodily or mental harm are separation; mass burial; coordinated killings; inhumane and degrading treatment; starvation; persecution; interrogations combined with beatings; rape and sexual violence; injection of pharmacological substances; threats of death, knowledge of impending death; acts causing intense fear or terror; surviving killing operations; forcible displacement; and mental torture.
47. Monitoring the sustenance, water, and medical supply could provide necessary information for understanding the living conditions of the protected group under the crime of genocide by deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. For example, under Article 23 of the Geneva Convention IV, a party to an international armed conflict shall allow the free passage of all consignments of medical and hospital stores [...] all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases. Therefore, if a party to a conflict or an occupying power does not permit the passage of humanitarian aid or food, it could potentially influence the evidence of the genocidal intent.