



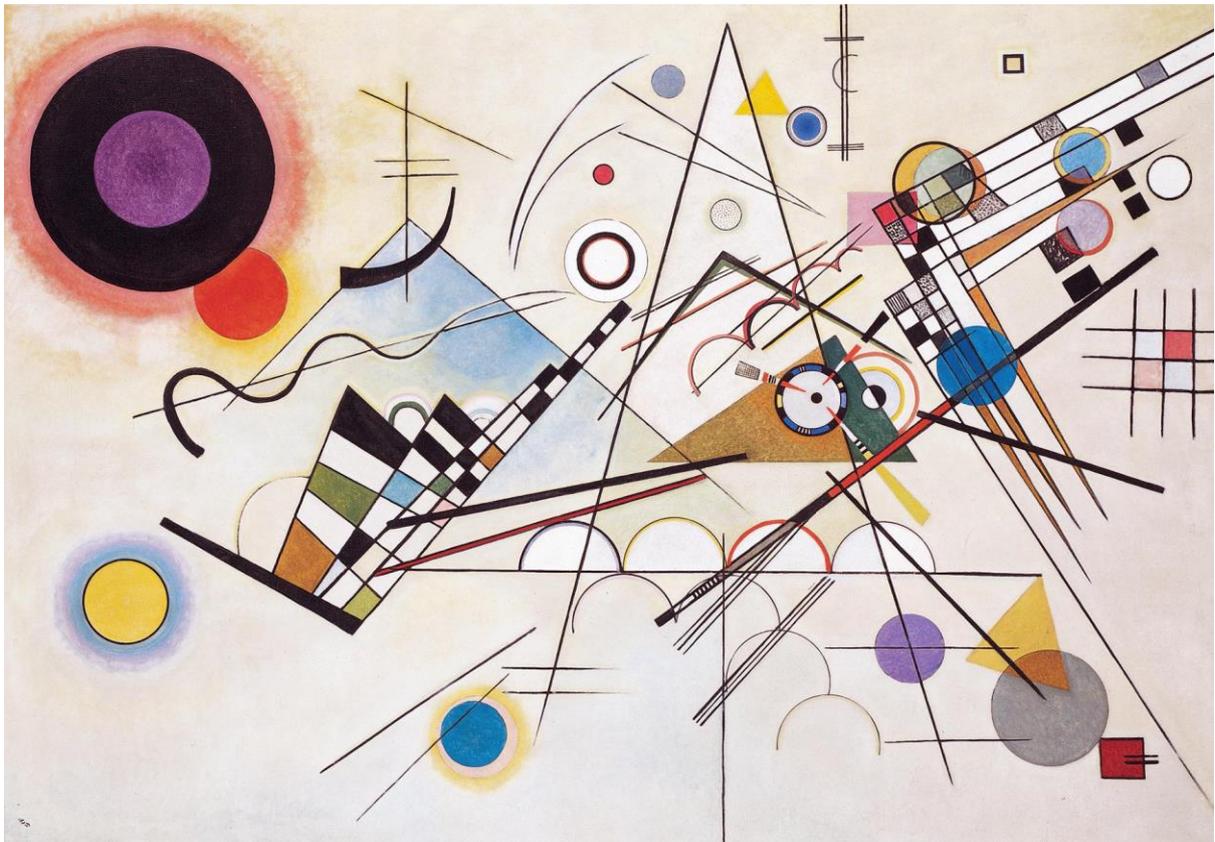
iCourts

The Danish National Research Foundation's Centre of
Excellence for International Courts

JustSites International Conference:

“Transforming Evidence and Proof in International Criminal Trials”

iCourts, Copenhagen University, April 22nd - 23rd 2021



Wassily Kandinsky, *Composition VIII* (1923)

Call for Papers

On July 1st, 2022, the International Criminal Court (ICC) will mark the twentieth anniversary of the entry into force of the Rome Statute, its constitutive treaty. Prior to the Court's establishment, and through those intervening years, scholars and practitioners have energetically debated the effectiveness of its procedural architecture, its evidential model, and its deliberations on matters of fact. The twentieth anniversary of the Rome Statute's entry into force thus provides an opportune time to re-engage with these debates, and to take stock of a dynamic field which has undergone significant development. To this end we are hosting a virtual conference, which will serve both to generate dialogue, and to facilitate engagement with innovative theoretical, and empirical work: research which advances the study of evidence and proof, shaping future practice, and laying the foundations for a dynamic research agenda.

Whilst we welcome contributions relating to the core topic of the ICC, and cognate international criminal courts and tribunals, we would encourage submissions which engage with the overarching topics, as broadly construed. We particularly welcome papers focusing on national jurisdictional approaches to international offences, in addition to theoretical and empirical works whose application reaches beyond the sphere of international criminal adjudication. Contributions may include, but are not limited to, discussions of;

- Proof and procedure in international criminal courts.
- Open Source investigations and expert scientific evidence
- Bayesian and Wigmorean inference networks
- Evidential reasoning in epistemological and ontological perspective
- Eyewitness testimony, narrative and memory
- Innovative jurisdictional approaches to international crimes

We further welcome contributions from researchers, academics, and practitioners across the fields of law, the forensic sciences, political science, psychology, data science, and allied disciplines. Interdisciplinary approaches are particularly encouraged. Interested authors should send an abstract (300 words), and a brief author biography (150 words) to karen.richmond@jur.ku.dk by the 29th March 2021. Authors will be notified of the status of their submission by the 5th of April. The organisers encourage contributors to submit their papers to a special issue of the International Criminal Law Review. Completed papers will be due by the 14th June 2021, and will undergo blind peer review. Submissions must be original and should not have been previously published elsewhere. More details on the submission process will be provided following acceptance of proposals. For further information, please do not hesitate to contact the organisers.

We are pleased to announce that our keynote Speaker will be Professor Nancy Combs, Ernest W. Goodrich Professor of Law, and Director of the Human Security Law Center at the William and Mary Law School. Professor Combs' academic work has contributed greatly to academic development in the field of evidence scholarship. Her in-depth analysis of the handling of eyewitness testimony at the ICC, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010: Cambridge University Press) has made an enduring contribution to international legal scholarship, whilst her academic studies on mass atrocities continue to make a distinctive contribution to the field.

CONFERENCE PLAN

Day 1 (Thursday 22nd April)

10.30 – 10.45 Welcome: Mikkel Jarle Chistensen, JustSites Principal Investigator Introduction: Karen McGregor Richmond, JustSites Postdoctoral Fellow	
Panel A. 10.45 – 12.15	Panel B. 10.45 – 12.15
12.30 – 1.30 Keynote Address: Professor Nancy Combs <i>“The More Things Change, The More They Stay The Same”</i>	
1.30 – 2.00 Lunch Break	
C. 2.00 – 3.30	D. 2.00 – 3.30
E. 3.45 – 5.15	F. 3.45 – 5.15
Closing Remarks	

Day 2 (Friday 23rd April)

Introduction 10.00	
Panel A. 10.05 – 11.35	Panel B. 10.05 - 11.35
Panel C. 11.45 – 1.15	Panel D. 11.45 – 1.15
1.15 – 2.00 Lunch Break	
Panel E. 2.00 – 3.30	Panel F. 2.00 – 3.30
Closing Remarks	

Join Zoom Meeting

<https://ucph-ku.zoom.us/j/61412189877?pwd=eVF2cFZSbmwwcmRHRFZSQUZ6eEdNdz09>

Meeting ID: 614 1218 9877

Passcode: 039663

Presentations will last for 20 minutes each, followed by a 30 minute joint question and answer session.

Conference presentations may be recorded with the presenter's consent for later distribution to attendees. Question and Answer sessions will not be recorded.

PLEASE NOTE: All times are CET.

Conference Plan (Thursday 22nd April)

PANEL A (10.45 – 12.15):

1. Noelle Higgins

Cultural Considerations in respect of Evidence Credibility in the International Criminal Law Framework

2. Enio Viterbo Martins

Memory as a defendant in Transitional Justice?

3. Alice Lopes Fabris

The International Community as a victim of international crime: proving and repairing the harm suffered

Chair: Zuzanna Godzimirska

PANEL B (10.45 – 12.15):

1. Mark Klamberg

Evidentiary Matters in the Context of Investigating and Prosecuting International Crimes in Sweden: Admissibility, Digital Evidence and Judicial Notice

2. Tonny Raymond Kirabira

Technology as a key tool for War Crimes Prosecutions: Lessons from the Ugandan case

3. Fatimah Elfeitori

Open Source Evidence and Case Prioritization in Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli

Chair: Mikkel Jarle Christensen

PANEL C (2.00 – 3.30):

1. Courtney Martin

Treaty-based regulation and evidence-extradition guidelines as critical tools in the fight against international criminal wrongdoing

2. Demetra Sorvatzioti

Evidence Rules v. Free Evaluation of Evidence ('I' intime conviction'): Does the ICC need Evidence Rules?

3. Jeremy Hall

Assessing evidence at the International criminal court: The difficult identification of criteria to evaluate the reliability of evidence.

Chair: Camilla Louise Johnson Wee

PANEL D (2.00 – 3.30):

1. Diletta Marchesi

The Use of Intercepted Communications at the International Criminal Court: Evidence like Any Others?

2. Giovanna M Frisso

Photographs as evidence at the ICC

3. Rossella Pulvirenti

Witness Testimony at the ICC and the Silent Revolution of Protective Measures

Chair: Nabil Orina

PANEL E (3.45 – 5.15):

1. Chiara Gabriele

Crimes against property as Crimes Against Humanity: debatable qualification or settled jurisprudence?

2. Abdulkadir Nacar

A Logical Approach to the Effect of Social Identity Motivation in Crimes Against Humanity

3. Alessandra Cuppini

The Emergence of Victims' Pro-Active Role in the Evidence-Gathering Process at the ICC: Toward an Expressivist Approach.

Chair: Karen Richmond

PANEL F (3.45 – 5.15):

1. Brandon L. Garrett, Laurence R. Helfer, and Jayne C. Huckerby

Closing International Law's Innocence Gap

2. Kerstin Bree Carlson

Rethinking Atrocity Crime and the Collective: Colombia's Special Jurisdiction for Peace (JEP)

3. Attila Nagy

The Kosovo Specialist Chambers as a challenge to the jurisdiction and authority of the ICC

4. Novitet Nezaj

Balancing judicial consideration of transitional justice of Kosovo Specialist Chambers and Specialist Prosecutor's Office (KSC & SPO)

Chair: Salvatore Caserta

Conference Plan (Friday 23rd April)

PANEL A (10.05 – 11.35):

1. Anne Herzberg

The Role of UN Documentation in Shaping Narratives at the International Criminal Court and the Implications for the Rights of the Accused

2. Sigurd D'hondt, Juan-Pablo Perez-Leon-Acevedo & Elena Barrett

Negotiating admissible testimony before the International Criminal Court (ICC)

Chair: Karen Richmond

PANEL B (10.05 – 11.35):

1. Hillary Hubley

Bad Speech, Good Evidence: Content Moderation in the Context of Open-Source Investigations

2. Solon Solomon

One image, one thousand words? Discussing the outer limits of resorting to visual digital methods in war crimes cases

3. Yasmin A. Issa Abulkher

'From Clandestinity to the Courtroom: The Contributions of Intelligence and Security Studies towards a Definition and Taxonomy of Open Source Evidence'

Chair: Mikkel Jarle Christensen

PANEL C (11.45 – 1.15):

1. Ljupcho Grozdanovski

Wigmore 4.0.: the challenging tasks of discovery and explainability in disputes involving opaque algorithmic decisions

2. Carola Lingaas

Evidence of the Genocidal Intent: Connecting the Law of Genocide with Psychology, Linguistics and Biology

3. Riccardo Vecellio Segate

Cognitive Bias, Privacy Rights, and Digital Evidence in International Criminal Proceedings: Demystifying the Double-Edged AI Revolution

Chair: Camilla Louise Johnson Wee

PANEL D (11.45 – 1.15):

1. Yuzuki Nagakoshi

The ICC's (Yet Another) Jurisdiction Problem—Enforcement in Cooperation with Non-State Actors

2. Ilaria Zavoli

Establishing the Death of an Accused Tried In Absentia: International Criminal Standards at a Crossroads

3. Annalisa Triggiano

The In Dubio Pro Reo Principle and Modern Criminal Procedures

Chair: Nabil Orina

PANEL E (2.00 – 3.30):

1. Eleni Michá

Evaluating the evidence by the UN IIMs: A new challenge for the ICC?

2. Craig Eggett

Constructing Rules of Evidence at the International Criminal Court: The Role of Principles and General Principles

3. Michelle Coleman

Right without Remedy?: The Development of the Presumption of Innocence before the International Criminal Court

Chair: Salvatore Caserta

PANEL F (2.00 – 3.30):

1. André C. U. Nwadi kwa-Jonathan & Nicholas E. Ortiz

The Proof is in the Pudding: Non-Governmental Investigatory Bodies and the Use of Third-Party Investigative Products in International Criminal Trials

2. Aastha Shah

Online Open Source Information to Online Open Source Evidence: Strengthening the Bridge between the Internet and the International Criminal Court

3. Kristina Hadzhieva

The potential and the challenges of digital evidence in international criminal proceedings

Chair: Zuzanna Godzimirska

Abstracts (Thursday 22nd April)

A1: Noelle Higgins

Cultural Considerations in respect of Evidence Credibility in the International Criminal Law Framework

In order for convictions to be legitimate, they must be based on credible evidence. This is true in respect of both domestic and international justice settings. However, what is 'credible' evidence and to whom must it 'credible'? In the context of international criminal trials, what is credible to victims and witnesses, based on their cultural context, may not be credible to judges who do not share those cultural understandings. Judges in international courts and tribunals may measure evidence 'credibility' against their own cultural background, often being influenced by Western norms. This paper asks if the international criminal law framework allows for cultural considerations when looking at the issue of credibility of evidence? It seeks to assess how international criminal tribunals have grappled with the difficult issue of credibility in respect of evidence where local customs and culture have clashed with 'accepted norms'. It will, in particular, focus on the Special Court for Sierra Leone, and discuss how witness evidence was dealt with at this Court and will question if the Court's approach to this issue has impacted on the legitimacy of its decisions. It will highlight practices in other spheres and domains of law where 'non-traditional' evidence has been accepted as credible, e.g. dance and song performances of the 'Songlines' of Indigenous peoples in Australian land claims cases, and suggest how the international criminal law framework could deal with evidence credibility issues in the future.

A2. Enio Viterbo Martins

Memory as a defendant in Transitional Justice?

Transitional Justice had has been related to the need to create and maintain "memories" of victims. However, the use of an uncertain concept of memory led some of the TJ's authors to consider it as a "Human Right" and a core of TJ's policies. It would be right of victims of a dictatorship to build a "memory", but what is nor regular studied is the unscientific aspect and collective social character of those "memories". This "right" can be observed during National Truth Commissions and in some specific projects that were organized by civil society. The concept of memory as "Human Right" led to a necessary integration of TJ and the discipline of History. Although the concepts of memory and History are frequently used as synonyms, they have different characteristics, which normally have serious methodological consequences in the application of public policies of TJ. In this sense, we demonstrate, for example, that the Truth Commissions must be observed as measures that come from the perspective often from memory, and not from history. So not only the results of these commissions must be analyzed, but also the composition, objective, powers and mainly, the historical context of such commissions must be put in perspective. We believe that "Memory" should not lead the set of "historicist" and legal practices of Transitional Justice, but lead us to implement measures that make the "presentization" of the violence committed, so that such periods of exception are not repeated. nIn this presentation, we object to respond questions that can demonstrate some of the problems of use this concept of memory in juridical practices of transitional justice, such as: How the memories of victims can be used in a due process of law? And how the accuracy of the victim's memories influence in the results of a legal process.

A3. Alice Lopes Fabris

The International Community as a victim of international crime: proving and repairing the harm suffered

The International Criminal Court's case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi* is considered an 'historic judgment' since it is the first case dedicated exclusively to the war crime of destruction of cultural property in the event of an armed conflict. It consolidated the existence of such crime in International Criminal Law and it was the first jurisdiction to establish a reparation. But, contrarily to the reparation for other international crimes and grave human rights violations, the ICC has recognized not only individuals and community as victims – as it is established by its Statute and its Rules of Procedure and Evidence –, but it also has innovated by recognizing the International Community as a victim of an international crime and that it suffered a specific harm. As stated by the 2016 judgment, the destruction of cultural property did not only affect the direct victims of the crimes – inhabitants of Timbuktu and those that practiced their religion at the mausoleum –, but also the Malian population and the International Community. According to the UN Special Rapporteur in the field of Cultural Rights, the International Community is “a collective which harm was done”, and therefore can be characterized as a victim. During the proceeding, it was highlighted that the International Community is a victim of some crimes against cultural heritage, specifically against cultural heritage protected by UNESCO, since, as a result, the same type of harm is observed. In this sense, the ICC Chamber has ordered one symbolic euro as a reparation for the harm suffered by it. The present article seeks to analyze the characterization and proof of such harm by the International Criminal Court by examining which harm was characterized and how it was proved.

B1. Mark Klamberg

Evidentiary Matters in the Context of Investigating and Prosecuting International Crimes in Sweden: Admissibility, Digital Evidence and Judicial Notice

Even with the existence and availability of criminal proceedings at international level, the assumption is, and the practical circumstances require, that most cases will need to be adjudicated at domestic level. Domestic courts have and will face similar challenges relating to evidence as those relevant for international criminal courts. The solutions adopted at the domestic level may provide guidance for international criminal courts, even more so if they express general principles of law, provided that the same solutions can be found in legal families across the world. And vice versa, legal solutions adopted and factual findings made by international courts can be used by domestic courts.

Principles and approaches on how to evaluate evidence are by their nature normally not regulated in binding legal rules, neither at an international level or in domestic contexts. However, the epistemological challenges and approaches are arguably the same regardless if evidentiary matters are dealt in an international or domestic context. This is relevant for several controversies: should fact-finding be based on a holistic (intuitive) approach or deconstruction; whether the “beyond reasonable doubt” standard is an objective or subjective standard; mathematical versus non-mathematical approaches in evaluating evidence; all controversies relating to how the “beyond reasonable doubt” standard should be understood and the ensuing practical implications from such an understanding. Thus, practitioners and scholars who may have an interest in either the domestic or international context may still be informed of solutions adopted in the other context.

Sweden has had 12 domestic trials in modern time dealing with international crimes. This paper examines in the Swedish context issues relating to admissibility of evidence and evaluation of evidence, in particular the challenges and opportunities that come with technological development. This includes different types of digital evidence, including such obtained from smartphone recordings and social

media. There will also be an account of how facts of common knowledge and adjudicated facts have been used in Swedish courts.

B2. Tonny Raymond Kirabira

Technology as a key tool for War Crimes Prosecutions: Lessons from the Ugandan case

This paper examines the role of technology in international criminal justice. The use of technology has become a firmly entrenched part of the International Criminal Court (ICC). The unique case of Uganda is used as a prism through which to examine this transformation. It takes a comparative approach regarding the use of digital evidence and witness protection at the ICC and International Crimes Division (ICD), in respect to the prosecution of two cases - Dominic Ongwen and Thomas Kwoyelo. The paper draws substantially from the review of empirical literature, court records and reports. This information is complemented with primary data from qualitative interviews with court staff, NGO representatives and lawyers. It also draws upon information obtained from the author's experience as an advocate of the high court of Uganda and Visiting Professional at the ICC. The analysis is based on the theory of complementarity, asking an important question: whether the use of technology enhances the ICC's positive complementarity approach? The paper reveals a practical overlap between the ICC and ICD regarding the use of digital evidence and witness protection. This has impacted negatively on the procedural aspects at the domestic level, limiting the participation of victims and affected communities in the trials. A suggested solution is that, in the case of domestic war crimes trials, technology should not be divorced from the traditional procedural practice. It is also argued that technology enhances the ICC's positive complementarity approach. In addition, it has the potential to enhance criminal procedures and victims' rights, while enhancing the legitimacy of the courts. All in all, the paper contributes to current debates about the role of technology in international criminal justice.

B3. Fatimah Elfeitori

Open Source Evidence and Case Prioritization in Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli

In its paper on case selection and prioritization, the OTP outlined a number of criteria to ensure it prioritized cases in which it "can conduct an effective and successful investigation leading to a prosecution with a reasonable prospect of conviction." These factors include the quantity and quality of incriminating evidence. Although "feasibility" is inapplicable as a factor for opening an investigation, operational feasibility remains a relevant factor at the case prioritisation stage. In its 2012–2015 Strategic Plan, the OTP also identified a need for more diversified evidence, a call that was reemphasized in its 2016–2018 Strategic Plan specifically with regards to open source evidence. On August 15, 2017, the ICC issued an arrest warrant against Mahmoud Busayf Al-Werfalli, a Commander of the Libyan National Army's (LNA) Al-Saiqa Brigade. The warrants followed seven separate videos of mass executions in Benghazi posted on the accused's personal social media accounts. In these videos, Werfalli was shown either allegedly executing or ordering the executions. These executions involved 33 civilians and persons hors de combat. This marked the ICC's first arrest warrant based solely on social media evidence. However, despite the horrors of the footage, Werfalli was not regarded as high on the perpetrator list by Libyans, especially in light of the thousands of heinous crimes committed by other more prominent figures of the LNA. This led to a questioning why Werfalli alone was singled out by the ICC. This paper will revisit the debate on case selection and prioritization in light of the evolution of open source evidence. Through an examination of the deliberations on the Werfalli case, it will examine the extent to which open source evidence may offer the OTP reasonable prospects of a conviction.

C1. Courtney Martin

Treaty-based regulation and evidence-extradition guidelines as critical tools in the fight against international criminal wrongdoing

It is imperative that State institutions are equipped in the fight against impunity with the requisite tools to confidently pursue alleged perpetrators of international crimes nationally, precisely because ‘the future of international law is essentially domestic’ (Sadat, Oxford, 2019). This piece has dual, mutually reinforcing findings that respond to the call for innovative jurisdictional approaches to addressing international crimes. Firstly, the author submits the Draft Convention, more specifically draft article 7, has the capacity to function as a guiding apparatus for States to domestically enact, with greater specificity, broader jurisdictional parameters by which to prevent and punish core crimes including by way of universal jurisdiction. Secondly, and as a necessary corollary, obliging States to investigate and prosecute alleged offenders seeking refuge in their territories—despite an absence of more traditional jurisdictional nexuses—requires a scrupulous appraisal of how judges, lawyers and victim/survivor groups have accessed and admitted into evidence documentation of human rights violations in pursuit of international criminal accountability. This article explores an Australian extradition case involving a Pinochet-era alleged perpetrator of atrocity crimes Adriana Rivas, who is purported to be a former mid-tier official of the Chilean regime’s then secret police, to illustrate the conclusions drawn. Essentially, in absence of national legislation enshrining universal jurisdiction by which Australian courts may have otherwise enlivened the doctrine, a formal extradition request was needed from Chile to activate its—a third-party State’s—judicial (and political) international obligations. The case study shows that evidence was obtained from Chile and extradited to Australia at the behest of the presiding magistrate and relied on to support the decision to extradite Ms Rivas. It is suggested that more traditional bilateral arrangements regarding extradition, of persons and evidence, espouse a greater willingness by States to cooperate across borders. Whilst the standard of proof in extradition proceedings differs to that of criminal court settings, the author submits such processes ought to be looked at to inform procedural guidelines to accompany instruments enshrining

universal jurisdiction. In sum, for treaty-based universality to be truly realised, deliberations by scholars and practitioners must be had regarding how evidence is (to be) requested and received by respective third-party States to quell judicial reluctance to establish and exercise the doctrine. This piece offers that draft article 7 of the Draft Convention provides the terra firma for States to establish and exercise a range of jurisdictional bases including universal jurisdiction, to be reinforced by policy guidelines regarding evidence-extradition processes for the benefit of downstream truth and justice seeking projects.

C2. Demetra Sorvatzioti

Evidence Rules v. Free Evaluation of Evidence (‘I’ intine conviction’): Does the ICC need Evidence Rules?

Over two centuries ago, it seemed that both continental and common law legal systems were on similar paths in terms of proof and evidence in criminal trials. The continental systems chose the path of free evaluation of evidence and have essentially remained with that choice. By contrast, the common law systems, through a series of judicial decisions often supplemented by legislation, developed rules of evidence. In the 21st century, the International Criminal Court [ICC] appears to have adopted a hybrid system which still favors the continental approach for the evidentiary process and proof at trial. This paper attempts to show that the common law and continental legal systems conceive questions of

evidence and proof differently. This is a conceptual problem well rooted in the legal traditions. Judicial reasoning is inevitably affected and has produced criticism. While ICC judges have statutory discretion in deciding about the admissibility or exclusion of evidence, the predominant principle remains the “l’*intime conviction du juge*”. This paper explores the extent to which this principle promotes the interests of a fair trial in the international arena. In order to develop a comparative background, some Canadian examples of rules of evidence are used to assess their utility in safeguarding a fair trial. Predominant in this analysis are the concepts of predictability, justification and transparency. Ultimately, the paper asks whether, after years of experience, the ICC should consider developing rules of evidence consistent with its particular needs and especially its unique jurisdiction. The offences prosecuted at the ICC often scrutinize lengthy periods of time, patterns of conduct and myriad victims, as compared to discrete acts which are the usual stuff of criminal courts. Perhaps evidence rules prepared distinctly for the ICC would help to resolve problems and minimise criticism, while still preserving and promoting its special international role.

C3. Jeremy Hall

Assessing evidence at the International criminal court: The difficult identification of criteria to evaluate the reliability of evidence.

Legal texts do not provide for how judges of the ICC should determine the credibility, authenticity or reliability of evidence. Consequently, they have developed over the course of their case law several points to establish the value of the evidence, based on the examinations and cross-examinations carried out by the parties and their challenges draw up in their various written observations. Nearly twenty criteria can be identified, such as the motivation to testify, the details of the facts told, cultural and social factors, as well as the traumatic nature of the events. These elements identified by judges at the ICC are similar to those used by others international criminal tribunals. In doing so, they generally distinguish *viva voce* testimony from other evidence. However, a second distinction emerges from the judgements of the Court between generic and special criteria, which creates a combined method of assessing evidence. Although judgements establish legal continuity, the analysis carried out

by judges is not always clear, and deserves greater rigor. On the one hand, a general approach to assessing evidence allows generic criteria to be grouped together to assess their credibility, authenticity and reliability. On the other hand, more specific criteria must be taken into account in order to assess the modes of proof according to certain characteristics, like language or cultural factors. These two categories of criteria then allow judges to assess evidence in an atomic and a holistic manner. The study of these criteria makes it possible to highlight their complementarity and their necessity in the face of the specificities of international crimes. Certain shortcomings can also be detected, but which should be able to be corrected by better argumentation, or even the use of certain methods of evaluation.

D1. Diletta Marchesi

The Use of Intercepted Communications at the International Criminal Court: Evidence like Any Others?

Although the International Criminal Court (ICC) mainly relies on testimonial evidence, other forms of evidence are also gaining importance. An example is the interception of communications, of which the prosecution made extensive use in the Ongwen trial. In the most recent Ongwen judgement, the Trial Chamber heavily relied on the Lord’s Resistance Army (LRA) communications intercepted by the Uganda People’s Defence Force, the Internal Security Organisation and the police, mainly to gain military intelligence to further the war efforts against the LRA. The defence argued that the intercepted radio communications are unreliable evidence, for several different reasons, including the unreliability

of their source, the purpose for which they were created and the conditions of their creation. The Trial Chamber dismissed all these arguments and concluded that the intercept materials are reliable. Leaving aside the merit of the defence's arguments in the specific case, several concerns arise. While national jurisdictions often have a detailed set of principles and rules governing the admissibility and use of intercepted communications, this is not the case at the ICC. The ICC Rules of Procedure and Evidence indeed lacks any specific rule on the issue. As a consequence, interceptions are not specifically regulated, notwithstanding the peculiarities of communications' interceptions and the potential dangers they can pose for the rights of the accused. This paper analyses the overlooked specific concerns that intercepted communications give rise to in the context of international criminal justice. It argues that intercepted communications are not like any other evidence. Hence, guidelines should be envisaged at the ICC for their admission and use.

D2. Giovanna M Frisso

Photographs as evidence at the ICC

This article will focus on visual evidence in international criminal trials, in particular photographs that depict images of the physical effects of sustained violence upon the victims of criminal acts. The relevance of this topic relates not only to the impact of technological innovations on the legal framework, but also to the presumed epistemic authority of the photograph. Recent technological developments pose questions concerning the authenticity and integrity of photographs. These questions become prominent in light of the increase in footage of potential evidence posted on Facebook, YouTube, Twitter and other social messaging sites. The presumed epistemic authority of a photograph, reflected in the idea that "photographed images do not seem to be statements about the world so much as pieces of it" (Sontag 1977, 4), enhances the risks of ambiguous, biased or incomplete messages being accepted as truth by the international community and, more specifically, the judiciary. Last, but not less relevant, the subtle effects of the ways in which images create meaning and affect society are not always clear, limiting our ability to access the impact of an image in our understanding of the depicted reality. Virginia Woolf, reflecting on pictures from the Spanish war, has already drawn attention to the fact that "when we look at the same photographs, we feel the same things" (see Sontag 2004, 4). All these concerns have an impact on the legitimacy of international criminal trials and on the potential of atrocity photographs in promoting a negative consensus about the images they depict. Within this context, the article will look at the jurisprudence of the International Criminal Court to identify how the debates concerning the authenticity and the objectivity of photographs as well as their potential in moving judges affectively have been addressed.

D3. Rossella Pulvirenti

Witness Testimony at the ICC and the Silent Revolution of Protective Measures

It has been argued that eyewitness testimony are unreliable in numerous regards and, for this reason, several scholars suggest that the International Criminal Court (ICC) should welcome the use of alternative sources of proof, such as digital evidence. However, it is uncontroversial that 20 years since the entry into force of the Rome Statute witness testimonies still underpin judicial fact-finding at the ICC. While this aspect has been object of an increasing attention by current scholarship, little consideration has been paid to the factors that guarantee those witnesses to testify. Considering that an effective prosecution for the ICC is largely dependent on both witnesses' testimony and their adequate protection from threats that may arise inside and outside the courtroom, this paper aims to fill the gap in the scholarship. It analyses the role of protective measures as understood by Article 68 of the Rome Statute (according to which "[t]he Court shall take appropriate measures to protect the safety, physical

and psychological well-being, dignity and privacy of victims and witnesses”) and Rules 87 and 88 of the Rules of Procedure and Evidence since the creation of the ICC. More specifically, it critically assesses how their use, interpretation and application had affected the probative value of the evidence provided. Indeed, the ICC early practice in witness testimony was paved with several failures. Alleged widespread and generalised witness tampering, recanted first testimony at the ICC in Lubanga, collapse of the Kenyan cases, and disclosure of witnesses’ identity by mistake in Gbagbo are few examples. This paper concludes that the ICC has learnt from its mistakes being able to transform its setbacks into precious lessons to improve its evidentiary system. This paper establishes that the correct application and interpretation of those measures encouraged witnesses to come forward with a consequent positive impact on fact-finding accuracy at the ICC and enhancement of prospects for the long-term success of the international criminal justice.

E1. Chiara Gabriele

Crimes against property as Crimes Against Humanity: debatable qualification or settled jurisprudence?

This article reflects on the possibility to qualify crimes against property as Crimes against humanity (CAH) and on the recent jurisprudence on the topic in the Democratic Republic of Congo. Crimes against property, notably pillaging and destruction of property, are recognized by the Rome Statute exclusively as War crimes. On the other hand, the classical definition of CAH is centered on the damage specific conducts cause to human beings. For a long time, this ruled out the possibility of a link between loss of property and the severe mental suffering it causes to victims. This is especially true in situations of turmoil, where the threshold to establish the existence of an armed conflict cannot be met. This is the case in many regions of the DRC, where notwithstanding the lack of intense clashes or sufficiently established organization, small armed groups are responsible of widespread acts of destruction and pillaging. In those scenarios, legal constructs do not reflect reality on the ground as the gravity of the consequences does not mirror prosecution under domestic offences.

This article examines the challenges to the classical definition of CAH and the road to qualify crimes against property as CAH of other inhuman acts. By doing so, it analyses the elements to take into account for the qualification and their interpretation by emerging jurisprudence. Particular attention is given to national jurisprudence in the DRC, it being one of the most affected countries. Finally, the article reflects on the impact of this innovative approach to international offences, both for countries with a similar context and in terms of other crimes. The inclusion of the consequences of loss of property in the context of CAH would be an important opening in evaluating the impact of violations against the environment and cultural heritage on humanity as a whole.

E2. Abdulkadir Nacar

A Logical Approach to the Effect of Social Identity Motivation in Crimes Against
Humanity

The method and content of my work based on the principles of dialectical logic. The distinction between adjective law and substantive law is very important to jurists, but they are not unrelated issues. In my work, I particularly emphasize the connection between crime theory and the law of proof. In a secular criminal system, the theory of crime and the terms used in this theory should provide logically refutable (Popper's statement is particularly preferred) propositions for the law of proof. Otherwise, a system of proof based on reason cannot be established. After expressing these principles, I can express the proposal. The subject I examine in the work is crimes against humanity. Competent criminal lawyers have stated that crimes against humanity have a definition problem. A definition is a logic tool and its

elements have been known since Aristotle. Here, there is the problem that optional acts in crimes against humanity are already regulated in national systems as crimes. What is the specific difference of crimes against humanity? As a moral term, "humanity" cannot be defined legally. As I mentioned above, logically refutable elements should be used in crime terminology. If we cannot define humanity validly in substantive law, we cannot prove this requirement of crime. How can a crime be against humanity? The expressions "against the civilian population", "widespread" and "systematic" in the definition of the relevant crimes have no rational connection with the term humanity. Then we must reconsider the distinctive aspect of the acts expressed as crimes against humanity. The conclusion of my study from the historical, psychological, sociological, and case law analysis is that in crimes against humanity, the perpetrator clearly acts with the motive of social identity. Why do I use the term motive, because "purpose" is a teleological and existential term. It is not logically refutable. Whether a crime was committed with a social identity motive can be tested in the field of social psychology, but whether a crime can fit into humanity is a transcendent and subjective question. Social identities can be thought of as an element of free will in Hegelian thought. It is also a component of social cohesion. Therefore, social identities must be preserved in order to consider the perpetrator's will and to maintain social cohesion. In this respect, acts that are already regulated as a crime should be considered as an aggravating act of punishment when committed with the motive of social identity. Since states have their own experiences of social identity conflict, these qualified cases and social identities to be observed should be examined in national courts.

E3. Alessandra Cuppini

The Emergence of Victims' Pro-Active Role in the Evidence-Gathering Process at the ICC: Toward an Expressivist Approach.

The drafters of the Rome Statute (RS) of the International Criminal Court (ICC) were presented with a unique opportunity to shape victims' participation in international criminal proceedings. However, the final draft of the RS left the task of defining the parameters and the scope of such participation to the Chambers. As a result, as the ICC's practice relating to victims' participation matured, a body of case-law has emerged, giving rise to the possibility for victims to present evidence and to challenge evidence at trial, independent of the Prosecutor's strategy. While a growing body of literature is devoted to victims' participation and evidentiary procedure, the intersect between these two areas of law is not so frequently examined. No effort has been made, either at the ICC or in the scholarship, to provide a philosophical justification for the practice of allowing victims to present and challenge evidence at trial. There is thus a need to ground this modality of victims' participation in the purposes of international criminal justice because viewing this procedure simply as a fixture of the ICC's regime of victims' participation masks its true significance and potential. This paper aspires to point that expressivism provides a coherent theoretical basis for the pro-active role of victims in the evidence-gathering process. This paper moves the discussion of the ICC's expressive role forward by exploring the idea that the Court's approach to the evidentiary procedure regulating victim participation is key for expressivist purposes because it contributes to conveying disavowal about the unacceptability of atrocity, narrating a history of past violence, and reinforcing the respect for the rule of law. It concludes that expressivism, as a theoretical basis for this modality of victims' participation, has the potential to reinvigorate our understanding of the possibilities for the evidence-gathering process at the ICC.

F1. Brandon L. Garrett, Laurence R. Helfer, and Jayne C. Huckerby

Closing International Law's Innocence Gap

Over the last decade, a growing number of countries have adopted new laws and other mechanisms to address a longstanding gap in national and international criminal legal systems: the absence of meaningful procedures to raise post-conviction claims of factual innocence. These legal and policy reforms have responded to a global surge of exonerations, which have been facilitated by the growth of national innocence organizations that increasingly work across borders. It is striking that these developments have occurred with little help from international law. Although numerous treaties recognize extensive fair trial and appeal rights, no international instrument—in its text, interpretation or implementation—explicitly recognizes the right to assert a claim of factual innocence.

We label this omission as international law’s innocence gap. The gap appears increasingly anomalous given how foundational innocence protection has become at the national level, as well as international law’s longstanding commitment to the presumption of innocence, fair trial and appellate procedures, and other criminal process guarantees.

This paper argues that the time has come to close international law’s innocence gap by recognizing a new human right to assert post-trial claims of factual innocence. We discuss three national models for reviewing innocence claims and highlight international law’s limited influence on these models. Next, we review the criteria for determining whether and how to categorize a human right as “new,” analyze the right to claim innocence against those criteria, explore how to define the content of the right, and address institutional and advocacy issues. A brief conclusion highlights the implications of our proposal for efforts to reform international and international criminal legal systems.

F2. Kerstin Bree Carlson

Rethinking Atrocity Crime and the Collective: Colombia’s Special Jurisdiction for Peace (JEP)

As part of the 2016 peace accord that sought to end more than 50 years of war, Colombia set up a special court to adjudicate atrocity crimes, the “Jurisdicción Especial para la Paz” (Special Jurisdiction for Peace) (JEP). This paper examines one of the JEP’s central innovations, its collective approach to atrocity investigation. The JEP is part court and part truth commission and is designed to uncover facts and, where appropriate, determine punishment. Among its 800 staffers in its Bogota offices, more than 100 work in its criminology division establishing crime patterns. They use algorithms to identify how and where people were victimized, in order to assemble “cases” for investigation. These cases are built to address the social harms identified by JEP sociologists. As cases progress, victim participation should also help determine the appropriate restorative sanction demanded of the perpetrator. This method of justice aims at putting the victims, not the criminals, at the center of the analysis. As one of the judges at the JEP stated succinctly, this approach amounts to nothing less than “a new criminology” because the JEP is “working with victims to understand crime, impact, and what punishment and/or reparation should be.” The JEP opened its doors in 2018 caught between a modern Scylla and Charybdis, i.e. between the twin monsters of the International Criminal Court (ICC) and the Colombian government. The ICC has been publicly investigating Colombia since 2006. The Colombian government was eager for the JEP to prosecute and contain the FARC and other disarming rebel groups, and disinclined to find itself, or the paramilitaries on its payroll, before the JEP. This paper examines how the JEP’s innovative approach to addressing collective criminality challenges established international criminal law practice, and how the JEP is navigating the dangerous waters between those who want too much or too little individual liability.

F3. Attila Nagy

The Kosovo Specialist Chambers as a challenge to the jurisdiction and authority of the ICC

Kosovo war crimes have been dealt in the past by ICTY, UNMIK, EULEX courts and now a specially made Kosovo Specialist Chambers. The ICTY was dealing with Kosovo cases and its impact in this sense has to be measured, even more that the Kosovo Specialist Chambers is supposed to cure some mistakes from the past. In specific, there is a time of more than 20 years passed after the conflict in Kosovo. Our research will deal with the idea behind the foundation of this court and its future aims. As the ICTY did earlier, the KSC will also have influence on human and minority rights, constitutional freedoms and other aspects of life in Kosovo and wider. When compared to ICC the formation of KSC is a very interesting exception as all nations in ex-Yugoslavia and worldwide have to cooperate with the ICC. Since there are states like the USA to which ICC would not apply its interesting to see that for none of the war crimes USA military could be responsible in front of KSC. As USA was part of NATO during the bombing of Yugoslavia they have been giving support to the KLA which has as found out later committed a crime during this period in 1999. Therefore USA and its military could be questioned but with the formation of the KSC a very big part of crimes will be blamed in a specific procedure to the former KLA members and now influential Kosovo politicians. In the sense of jurisdiction we can see how it has been excluded and an authority of an International court given to a 'national' court of a state which is even not recognized by the UN. Such a complex situation might serve some justice at a local level but certainly brings confusion into the sphere of International Criminal Adjudication.

F4. Novitet Nezej

Balancing judicial consideration of transitional justice of Kosovo Specialist Chambers and Specialist Prosecutor's Office (KSC & SPO): common elements and the contextual threshold of jurisdictional approaches in KSC & SPO.

This paper seeks to explore Kosovo's experience and the contextual threshold of jurisdictional approaches in international criminal law. Kosovo is considered a transitional or hybrid regime country based on democracy score.‡ Kosovo is an evidential model of to what extent external and internal judicial factors have affected transitional justice.§ This is because Kosovo experienced various and combined forms of transitional justice through UNMIK, domestic judiciary, EULEX, and recent Specialist Chambers and Specialist Prosecutor's Office. In particular, recent Kosovo Specialist Chambers and Specialist Prosecutor's Office (i.e. KSC and SPO) are established to address the Council of Europe Assembly's Report allegations on "Inhuman treatment of people and illicit trafficking in human organs in Kosovo" (2011).** Therefore, this paper seeks to explore also the contextual threshold of jurisdictional approaches of KSC and SPO and its context in the international criminal law area. The paper's hypothesis is that greater international criminal law rules' use of new forms of due process of law would be of benefit of protecting human rights if more attention is paid to the needs of counter-hegemonic ideas and practices. Questions to be addressed in this paper shall be focused on 1. Are there perceived or real inadequacies in protecting human rights globally by courts or tribunals? 2. Do international actors provide an advantage to certain countries? 3. How this may have a (un)desirable effect on international humanitarian law and community relations between nations or respective countries (recent case between Kosovo and Serbia)? 4. How may emerging hybrid courts (i.e. KSC and SPO) be made more impartial in the context of international criminal law global governance? In the final paper, I seek to empirically discuss rules of international criminal law and its standards that have reached and ought to reach in the new forms of power and legitimacy of balancing the human rights protection and perpetuation of due process of law in Kosovo transitional justice.

Abstracts (Friday 23rd April)

A1. Anne Herzberg

The Role of UN Documentation in Shaping Narratives at the International Criminal Court and the Implications for the Rights of the Accused

The Preamble to the Rome Statute explicitly references the notion of an “international community,” stating: “Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished” and “Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole.” To that end, both the Office of the Prosecutor (OtP) and the Court have relied on UN documentation (resolutions, reports) as a primary means by which to measure the views of the international community and to establish matters of both law and fact. For instance, in the Al-Mahdi case, declarations by the United Nations Economic Social and Cultural Organization (UNESCO), were used as evidence to prove the historical and cultural importance of sites in Timbuktu to support charges of war crimes for “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments,” (Rome Statute 8(2)(e)(iv)). Similarly, in the Situation in Palestine, the OtP relied on UN documentation from the General Assembly and the Committee on the Inalienable Rights of the Palestinian People to establish not only the scope of the jurisdiction to conduct an investigation, but as the basis for the narrative summary of the history of the Israeli-Palestinian conflict. This paper will examine the ways in which the OtP and the Court rely on UN documentation as evidence in ICC proceedings. It will analyze how such documentation relates to the concept of “concern to the international community”. It will also assess the interplay of such evidence with concepts of due process and rights of the accused.

A2. Sigurd D'hondt, Juan-Pablo Perez-Leon-Acevedo & Elena Barrett

Negotiating admissible testimony before the International Criminal Court (ICC)

Arguably, the ICC constitutes a legal laboratory that is still in the process of consolidating itself. Our paper intends to unpack this process of consolidation by opening up the “black box” of what happens inside the ICC’s courtroom and examining the day-by-day negotiation of the ICC trial procedure, with a specific focus on testimony by victim participants (“dual status victim participants”) called by Legal Representatives of Victims to give evidence on harm suffered by victims. To this end, we present a case analysis of an incident that occurred in the trial of Ongwen: an “objection conference” initiated by the defense, in which the testimony of a dual status victim participant is temporarily suspended to assess its admissibility. Drawing on a linguistic-anthropological framework, we first trace how the defense counsel intertextually anchors his objection in a trajectory of prior decisions from both Ongwen and other ICC cases, which presumably set a standard for the current testimony (“metapragmatic regimentation” mediated by precedent). Next, we consider how the implementation of the admissibility criteria drawn from these decisions (the “legal doctrine” distilled from it) is, in turn, informed by unexplicated, common-sense assumptions about the “ownership” of testimony, and how this inevitably adds an element of unpredictability to the resulting decision. The co-articulation of law and the social involves “short” conversion chains translating real-world instances into “legal facts” (reference), followed by more extended chains converting these facts into other legal categories (qualification). Our analysis of the objection conference shows that the intricacies of these “short” referential chains also deserve analytic attention, particularly if these “real-world instances” subject to such referencing form

an intricate part of the trial process. It is through discrete acts of “self-referencing” to the trial itself that the ICC (and other international and national criminal courts) determine the conditions under which justice can be spoken.

B1. Hillary Hubley

Bad Speech, Good Evidence: Content Moderation in the Context of Open-Source Investigations

This paper explores how content moderation on social media platforms impacts the work of open-source investigators through its routine removal of content having evidentiary value. This problem of “bad speech, good evidence” has been exacerbated by the proliferation of social media and of automated processes to moderate and remove problematic content. Indeed, these practices have rendered social media platforms susceptible to public criticism and scrutiny. However, this issue has largely been framed by a community who cares about content moderation’s impact on free expression online. This swath of concerns does not comport with those of international criminal investigators who have increasingly turned to social media platforms for evidence gathering. Rather than confronting the issue, investigators have absorbed the costs by downplaying the impact of content removal on their work and by seeking to preserve the content on their own. This paper confronts the disconnect between these two groups in their respective approaches to the problem of content removal, and poses the question: how can we reconcile these divergent approaches to mitigate the problem of content of evidentiary value disappearing? It first examines what content moderation is and why it happens, then discusses why some human rights and free expression advocates have found content moderation practices to be so problematic. Next, it looks at online open-source investigations and the obstacles to rendering content found on social media admissible as evidence, underscoring how content removal serves to exacerbate these obstacles. Finally, it lays out three core features of a “fused approach” to the problem and examines the Syrian Archive as an exemplar for its handling this type of content. While the paper does not propose any policy-based solutions, through an interdisciplinary lens, it inspires both communities to take notice of the convergence of their respective concerns and empowers them to join forces.

B2. Solon Solomon

One image, one thousand words? Discussing the outer limits of resorting to visual digital methods in war crimes cases

Drawing from the standard practice of international criminal courts and tribunals which already from the Nuremberg trials, have relied on digital visual methods to evidence international crimes, the last few years have seen both fact-finding committees as well as NGOs, resorting to videos, photographs and the use of computer graphics in order to substantiate such crimes. The citation of such visual digital material as evidence in international criminal proceedings, has not gone unchallenged. Scholars have already noted how the unattested origins of such evidence can seriously compromise its authenticity and accuracy, underlying the need for such evidence to be verified. The current article would like to take the discussion one step further, arguing that contrary to cases involving crimes against humanity or cases of genocide, in war crimes, international criminal courts should go beyond their current practice and examine not only the authenticity or accuracy of visual digital evidence, but also its probative value, given that as will be argued in the next sections, such value can be minimal or even detrimental to the defendant’s rights.

B3. Yasmin A. Issa Abulkher

‘From Clandestinity to the Courtroom: The Contributions of Intelligence and Security Studies towards a Definition and Taxonomy of Open Source Evidence’

International criminal procedure is on the verge of adjudicating the by-products of the so-called ‘third-generation fact-finding era’, where the proliferation of user-generated content, high quality commercial satellite imagery and increased virtual activity following the COVID-19 pandemic are transforming traditional criminal investigations. Information from open sources comprise an ever-increasing volume of evidence of international crimes, and have been proven not only to provide contextual and crime-based information, but also compelling linkage evidence. This perceived efficacy is vulnerable to distinctive challenges in terms of collection and verification, among others. However, a preceding and often overlooked challenge is defining open source evidence, especially during a juncture where terms such as ‘open source’ and ‘digital’ are conflated or used restrictively. On the other hand, the intelligence community has long exploited information from open sources through the discipline of open source intelligence (OSINT). Intelligence initiatives and guides were among the first to define open source information, categorise its sources and cultivate specialised techniques for its collection and analysis, and can offer an invaluable interdisciplinary baseline for determining a framework of open source evidence. This begets the research question of what definitions and source taxonomies developed by intelligence studies in relation to open source intelligence can contribute to construing a definition and framework of open source evidence as a novel evidentiary category separate from traditional evidence? This paper employs a literature analysis of intelligence and security studies to identify the parallels and lessons to be drawn towards answering the research question. The evolution of concepts such as ‘open source’ and ‘information’ will be examined in relation to criminal evidence. Moreover, similitudes between the sub-disciplines of OSINT, such as social media intelligence and open source user-generated content in international criminal investigations, will be identified and contrasted towards a taxonomy of open source evidence sources.

C1. Ljupcho Grozdanovski

Wigmore 4.0.: the challenging tasks of discovery and explainability in disputes involving opaque algorithmic decisions

In classical evidence theory, explainability is tied to tangible reality. Due to the Big Data phenomenon, this dogma seems less tenable, as decisions made without discernable motive and by non-human systems have largely challenged the longstanding belief that evidence can only consist of knowable, verifiable and therefore explainable facts (Wigmore, 1961). The epistemic kinship between legal evidence and AI is not new. Modern rationalists in evidence theory (Walton, Schum) have, for over a decade, drawn parallels between the application of probabilistic reasoning in adjudication and in AI programming. Indeed, much like litigants and courts, self-learning systems create inference-networks (associations between sets of data) in order to arrive at accurate (or at least, plausible) findings (the Wigmorean ‘argument-diagramming’). However, scholarship has not yet explored the following: under the existing systems of evidence, tailored for non-AI litigation, how can conclusions about facts be drawn, when the access to those facts is obstructed by algorithmic opacity?

To answer that question, this Article will include a comparative analysis of domestic and European AI litigation in order to uncover the argumentative strategies that allow litigants and courts to circumvent or lift the barrier of opacity. A cursory overview of this litigation allows to pinpoint two tendencies: on the one hand, courts seem to adopt an extensive view of evidentiary relevance and allow litigants to include as many facts as they can, in their attempts to successfully discuss a probandum (e.g. unfair biases, financial losses, privacy violations etc). On the other hand, claimants seem to increasingly rely on the due process safeguards and argue the benefit from a right to transparency, as corollary to the

right to a fair trial, the adversarial principle and the principle of equality of arms. The argument here is that, in any current and future AI litigation, the due process safeguards must include a horizontal right to transparency which, when applied, would allow litigants an effective access to evidentiary facts through human explanation, disclosure of algorithmic functionalities or the ‘opening of the black box.’ The ambition of this Article is, thus, to contribute to the ongoing debates on AI regulation, not by analyzing transparency as a technical compliance standard (as is usually the case) but by examining it as both a (rational) precondition for the explainability of facts and a (procedural) prerequisite to the access to facts in the context of Wigmore’s (and Walton’s) argumentative theories of evidential truth.

C2. Carola Lingaas

Evidence of the Genocidal Intent: Connecting the Law of Genocide with Psychology, Linguistics and Biology

A successful prosecution of the crime of genocide requires the proof of intent to commit a genocidal acts and the intent to destroy one of four protected groups. The *dolus specialis* can only be proved in conjunction with the identification of the victim group, at which the criminal conduct is aimed. The fact that the perpetrator often imposes a group identity does not simplify the proof of the crime. This paper argues that prosecutors should increasingly build their cases based on research in social psychology, linguistics, and biology and make use of expert witnesses for the proof of the genocidal intent. Moreover, archival research can uncover evidence to support the prosecution. Social psychology research has conclusively found that every genocide is characterized by a dehumanization of the victims, depriving them of their humanness. The victim group becomes discernible by means of othering, setting it apart as ‘other’, inferior, and a threat to the in-group. Dehumanizing discourse reveals the perpetrators’ understanding and ideologies. Linguistic research, based on critical metaphor analysis, reveals the significance of metaphors for dehumanization and intergroup hostility. Linguists can identify the intentions and ideologies behind the use of metaphors as a means to express prejudice against and vilification of the victims. Thereby, they assist in carving out the genocidal intent. Lastly, research on biosignals such as heart rate, breathing, skin conductance response or EEG can assist in measuring the impact of dehumanization. By means of electrical engineering, the courts are provided with yet another tool to prove the genocidal intent. Courts still do not fully recognize the intrinsic connection of a *génocidaire*’s understanding of the victims as ‘others’ with the intent to destroy a group. Specialized disciplines will provide them with the required evidence.

C3. Riccardo Vecellio Segate

Cognitive Bias, Privacy Rights, and Digital Evidence in International Criminal Proceedings: Demystifying the Double-Edged AI Revolution

International criminal tribunals (ICT s) have found, almost consistently, that unlawfully and/or secretly obtained evidence is admissible. De facto, defendants in international criminal law (ICL) enjoy no privacy-related procedural safeguards under either the applicable domestic law or international human rights law (IHRL). Privacy violations are not confined to those impairing defendants’ rights; they might result in premature acquittals or in misconducts vis-à-vis the victims, too. While this is practically unescapable a compromise due to the ‘high profile’ of the accused and the complexity, length, momentousness, and ‘political charge’ of these trials, over-relaxed admissibility rules become unsustainable as far as digital evidence is concerned, in that they add to the latter’s inherently low reliability and heavy cognitive impact. Facing this issue, it is legit to wonder whether artificial intelligence (AI) might mitigate privacy violations or render them no longer necessary, thus improving the fairness record of the International Criminal Court (ICC) and other ICT s.

D1. Yuzuki Nagakoshi

The ICC's (Yet Another) Jurisdiction Problem—Enforcement in Cooperation with Non-State Actors

The International Criminal Court (ICC) is without its own police force or enforcement body and must cooperate with third parties to effect an arrest. Cooperation with third parties, however, could be a high-risk strategy where the violation of suspects' human rights by the third party is a real possibility. In the Bangladesh/Myanmar situation concerning the Rohingya crisis, the ICC is reported to have received two former Myanmar military soldiers who had been under the custody of the Arakan Army (AA), an ethnic armed organization. Earlier in 2020, the AA published some video footage of government soldiers confessing to coordinated crimes against the Rohingya and expressed its intent to provide international tribunals with evidence. Despite its ostensibly well-intentioned statements, the AA has committed grave abuses such as killing and abducting civilians. The Myanmar military alleged that the two former soldiers were abducted, tortured, and forced to confess. If the allegations prove true, the ICC may be compelled to decline the exercise of jurisdiction according to the "abuse of process" doctrine as established by international tribunals. Declining the exercise of jurisdiction is only justified when it is "impossible to piece together the constituent elements of a fair trial" due to grave violations of detainees' human rights. This high standard fails to deter third parties from violating human rights in order to arrest suspects. This paper explores whether and how the ICC could prevent third parties from violating suspects' human rights, possibly through having a lower bar for the application of the abuse of process doctrine, imposing a due diligence obligation on the part of the Prosecutor to proactively investigate the circumstances of the arrest and detention, and providing clearer guidelines on the application of the doctrine.

D2. Ilaria Zavoli

Establishing the Death of an Accused Tried In Absentia: International Criminal Standards at a Crossroads

According to the *ratione personae* jurisdiction, any international criminal trial requires a living defendant: if the accused is dead, no proceeding is possible. However, the application of this principle to trials in absentia is a challenge for international criminal tribunals. Indeed, in these proceedings, the accused might have never appeared in court, with no certainty over their fate, i.e. whether they are dead or alive. Moreover, in International Criminal Justice, there are no guidelines to decide such a controversial case, and the judges are left to find appropriate evidential criteria themselves. In this context, the death of one of the accused tried in absentia in the Ayyash et al. case before the Special Tribunal for Lebanon (STL) has recently put international criminal standards at a crossroads, raising the need for clarity and a proper discussion of the topic. This paper focuses on the issue by examining the evidential criteria employed in the Ayyash et al. case to establish the death of an accused tried in absentia and by using the author's empirical findings from interviews with international practitioners involved in trials in absentia. The author argues that the STL interpretation, although innovative in its formulation, is incomplete, and it ultimately fails to address the issue adequately. It is posited that better standards are necessary in ongoing and future international criminal cases, and the author identifies and rationalises some elements (i.e. the standard of proof, the burden of proof, the type of evidence and its sources, the consequences of the decision) that international criminal tribunals should consider when deciding about a death in absentia.

D3. Annalisa Triggiano

The In Dubio Pro Reo Principle and Modern Criminal Procedures

The facts upon which the court grounds its decision must be accurately and fully proven. If the court is not completely convinced that the defendant committed a crime, the reasonable doubt principle provides that the defendant must be given the benefit of the doubt (in dubio pro reo). In dubio pro reo is a fundamental principle of any judicial system. It follows directly from the principle of the rule of law and the need to protect the rights of the defendants in criminal procedure. It is considered one of the benefits of the accused in criminal proceeding (favor defensionis) since it favours the position of the accused to the prosecutor in cases of doubt. In other words, it is a segment of the principle of fair trial. It is also tightly connected to principle of presumption of innocence and the principle of unfettered consideration of evidence. My paper will show that, although at first sight in dubio pro reo seems to be a simple principle every lawyer is familiar with, its deeper analysis leads to many complex questions and reveals multiple issues, unsuspected at first glance. After discussing the meaning and the scope of the in dubio pro reo principle in modern criminal procedure, its historic roots and modern manifestations, I will give an overview of its use in Anglo-American law and in jurisprudence of European Court of Human Rights.

E1. Eleni Micha

Evaluating the evidence by the UN IIMs: A new challenge for the ICC?

The evaluation of evidence has always been at the heart of criminal proceedings, both domestic and international ones. International criminal courts and tribunals have faced a number of challenges with respect to the assessment of evidence. Due to the complexity of the situations and the need to serve often conflicting goals (establishment of truth, fair trial requirements, expeditious proceedings, etc.) international criminal courts and tribunals resorted to assessment procedures which have been the object of controversy among academics and practitioners. For the International Criminal Court whose discretionary power on evaluating evidence is enshrined in art. 69RS together with the Rules of Procedure and Evidence (RPE), the respective methodology has not been uncontroversial. Accordingly, there are pressing questions regarding the best approach to interpreting the relevant RS and RPE provisions for the submission and evaluation of evidence. In that sense, the documentary evidence conveyed by the UN Investigative Mechanisms constitutes a rather unexplored area. Therefore, in the present study I shall proceed to examine the probative value of evidence collected by the those mechanisms with special focus in the cases of the IIM on Syria and IIM on Myanmar set up by the UNGA and the Human Rights Council respectively. Based on the Court's case-law and on the latest judgment regarding the Ongwen case (4-2-2021), I shall proceed to clarify whether and how the three-prong test of art. 69(4)RS on admissibility (relevance, probative value and non-prejudicial nature) will be applicable in the case of evidence submitted by the IIMs. Will the Court Chambers adopt a holistic assessment of all evidence or proceed to render separate rulings as warranted by the particular circumstances of the future cases? Thus, the present study is in quest of an innovative jurisdictional approach regarding the evaluation of evidence conveyed by the IIMs before the ICC.

E2. Craig Eggett

Constructing Rules of Evidence at the International Criminal Court: The Role of Principles and General Principles

The construction of rules of evidence in international criminal law is a continuous and dynamic process. The rules found in the basic documents of courts and tribunals do not operate in isolation. They remain subject to contestation and varied interpretations, with lawyers and judges having recourse to other norms and notions in constructing arguments about evidence. In building such an argument, reference may be made to an underlying 'principle', such as equality of arms, or it may be claimed that the contours of a norm may be shaped by a certain 'general principle of law', such as lawyer-client privilege. The use of 'principle' or 'general principle' here may simply be a discursive technique to convey authority on the argument made. However, it is asserted that these are distinct categories of norms that have had, and continue to have, a profound impact on the law of evidence in international criminal law. The so-called 'general principles of law' constitute a distinct category of binding legal rules, separate from 'principles' as non-definitive and value-based norms. On this basis, this paper will examine the role of principles and general principles in the operation of the rules of evidence at the International Criminal Court (ICC). Are there certain 'general principles of evidence' in international criminal law? Are these mirrored in the Rome Statute and Rules of Procedure and Evidence? Do principles or general principles allow for recourse to domestic systems in constructing arguments about evidence at the ICC? How do principles and general principles influence the interpretation of written rules of evidence at the ICC? In addressing such questions, this paper will shed light on how arguments about evidence are made and clarify the dynamic process through which rules of evidence are transformed.

E3. Michelle Coleman

Right without Remedy?: The Development of the Presumption of Innocence before the International Criminal Court

Article 66 of the Rome Statute provides for the right to the presumption of innocence before the International Criminal Court. It was included in the Rome Statute despite the fact there was limited debate during the treaty's negotiations about what the right would encompass. Article 66 specifically provides that everyone shall be presumed innocent until proven guilty, that the onus to prove guilt is on the Prosecutor, and that the standard of proof for a guilty verdict is beyond reasonable doubt. However several other issues, such as how this right should be protected, at what stages in the proceedings it applies, and what would happen in the event of a violation, have all been open to a wide interpretation by the Court.

This paper examines the development of the presumption of innocence at the International Criminal Court. It discusses how since the Rome Statute's entry into force, the presumption of innocence has gone from the text of Article 66 to a rather robust right that helps guarantee that the burden and standard of proof are upheld and ensures that suspects and accused persons have a fair trial. The paper further argues that Article 66 has been held to have application both inside and outside of the courtroom and have effect during the Situation, Pre-Trial and Trial phases. Despite these developments, what happens when the right is violated remains an open question. The paper will conclude that while the presumption of innocence may be better defined and more protective than it was 20 years ago, what happens in the case of a violation remains an area for further development.

F1. André C. U. Nwadike-Jonathan & Nicholas E. Ortiz

The Proof is in the Pudding: Non-Governmental Investigatory Bodies and the Use of Third-Party Investigative Products in International Criminal Trials

Two decades on from the entry into force of the Rome Statute, 50% of the contested cases brought by the Office of the Prosecutor ('OTP') have ended in charges being declined, withdrawn or vacated. The reasons cited are manifold, however, a common theme is the operational difficulty in properly investigating in insecure situations - if access can be obtained at all. With fourteen active OTP investigations, the pressure to build stronger cases shows no sign of abating. However, whilst ICC stakeholders have begun the herculean task of addressing this, the political backlash from the initiation of controversial investigations in Bangladesh/Myanmar, Afghanistan and Palestine is more likely to hinder than improve the OTP's ability to investigate. The threat posed by a limitation to this ability led to one NGO taking the unprecedented step of investigating international crimes itself. The Commission for International Justice and Accountability is the first NGO created to independently perform primary investigative functions, emerging as the first Non-Governmental Investigatory Body ('NGIB') in history. Through their greater appetite for risk, focus on linkage evidence and primary sources, and emphasis on local staffing, NGIBs have proven adept at accessing impenetrable situations and producing high-quality investigative products, which have been successfully deployed in a number of universal jurisdiction prosecutions. As NGIB activity becomes more commonplace, including in situations before the ICC, the question is no longer if the OTP will engage with such entities but how. Domestic jurisdictions offer examples of how this material may be used at trial; however, the practice remains diffuse and under-examined. Building on empirical research on the subject of NGIBs, interviews with relevant stakeholders, and relevant jurisprudence, this paper aims to defragment the domestic use of NGIB investigative products, in order to analyse the extent to which the same can be utilised before the ICC.

F2. Aastha Shah

Online Open Source Information to Online Open Source Evidence: Strengthening the Bridge between the Internet and the International Criminal Court

The International Criminal Court (ICC) is suffering from an evidence problem. Simultaneously, the internet, especially social media platforms, have become a rich source of potential evidence to prosecute possible crimes. The ICC acknowledged the potential usage of online open source information, wherein Pre-Trial Chamber I issued two arrest warrants against Al-Werfalli on the basis of videos extracted from social media. Online open source information can be the proverbial answer to ICC's problem of insufficient evidence. Hence, the research question at the core of the article is "How to advance the usage of online open source information as evidence before the ICC?". The article shall analyse the factors to be considered by the ICC while attaching evidentiary value to online open source evidence. The Rome Statute, the Rules of Procedure and Evidence and the case law of the ICC will be analysed to assess the same. These factors will be analysed keeping in mind the limitations/unique challenges which online open source evidence pose during the assessment of its evidentiary value. Secondly, the article shall seek to determine the practices to be adopted/factors to be kept in mind by the investigator to ensure that the online open source information is relevant, probative and does not warrant exclusion under the law. Reliance will be placed on the Berkeley Protocol on Digital Open Source Investigations (hereafter 'the Berkeley Protocol') which is considered as a guiding manifesto for investigators. Thirdly, the article shall analyse if the ICC has the required framework and infrastructure to address the potential problems that could be faced at time of evaluating the evidentiary value of online open source evidence. The ICC framework will be analysed, including the ICC e-protocol to determine its ability and efficacy in evaluating online open source evidence.

F3. Kristina Hadzhieva

The potential and the challenges of digital evidence in international criminal proceedings

The rapid technological progress has led to major changes in everyday life. New technologies, and information derived from them, have a great potential to support the fact-finding-process. Due to the widespread use of smart devices, digital evidence is gaining traction in the international field. On a national level, the impact of videos on the prosecution of human rights violations was demonstrated yet again quite vividly by last year's events in the United States: Without the recordings showing the events around the killing of George Floyd, it is questionable whether this case of police violence would have been provable. On an international level, satellite imagery, pictures and videos were introduced before the ICTY and ICTR. Overall, the use of digital evidence is increasing rapidly. For example, in the case against Al-Werfalli, the ICC-Prosecution presented videos originally shared on social media showing executions allegedly carried out by Al-Werfalli. Even though the evidentiary value of digital data is not entirely new, its availability will inevitably increase its relevance for international criminal trial. This was also recognized by the ICC-OTP within its Strategic Plans which emphasized the potential of new technologies for fact-finding. Additionally, some NGOs have made it their mission to collect digital evidence for core crimes of all forms, including videos and images. There are several advantages in utilizing digital evidence, which shall be the focus of the first section of the presentation. They have potential to close some gaps in the current fact-finding process. However, digital evidence introduces new challenges. Hence, the second section will highlight the characteristics of digital sources impacting their use within proceedings, such as the exponential increase in data, the relativity of information and the potential falsification of data. The third section will focus on the question of how to deal with digital evidence so that it is compatible with procedural rules but also, in particular, with human rights.