

## Reflections on the Symptoms of Humanitarian Principles in the Investigations of International Crimes – A Study on Admissibility of Electronic Evidences in International Trials

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### Abstract

*The establishment of the International Criminal Tribunal's post-World War II is the clear sign of augmented figure of International Crimes especially. The culmination of flagship tribunals like Yugoslavia and Rwanda opened the new phase for several significant questions such as the maintenance of humanitarian principles throughout the investigation, relevancy of evidence, authenticity, and overall mechanism and its legality too. The chances of an independent investigation mechanism for international crimes may also not be denied. Under such a state of affairs, the issues of collection, preservation, and scrutiny of the evidence of the most serious International Crimes and violations of normative principles set out by International Criminal Law becomes crucial to know to ensure fair and transparent justice. Indeed, the investigation procedure required for such fairness and transparency demands unequivocal maintenance of humanitarian principles throughout the process and legality for the sake of legal authority behind. Consequently, the present paper counts the impact of the investigation mechanism on criminal for international crimes and the existence of the symptoms of humanitarian principles with its legality by analyzing several International Instruments, Judicial Decisions, and other fact findings on the record.*

**Key-words:** War Crimes, Investigation Mechanism, International Criminal Tribunals, Global Criminal Justice, Humanitarian Principles, Use of Forensic Evidence at Trial.

### 1. Introduction

International Criminal Law (ICL) is the law of international crimes. However, beyond this substantive demarcation, there is no solid and monolithic concept of ICL. Rather than the mutually

reinforcing claims, it is a complex, pluralist, or internally fragmented area of law or even an area subject to an identity crisis. In this context, some introductory remarks on the ambit of the area of ICL are warranted on the line of further observations and reflections on the Symptoms of Humanitarian Principles under International Criminal Trials and the authenticity of investigation mechanism in the light of decided cases [1]. Since World War II, many jurists, historians, and academicians are trying to find out how to charge the criminal responsibility of an individual. The reason is that Public International Law (PIL) largely and typically governs the state and its relations. The states are the major subject of PIL [2]. ICL is a relatively new branch of PIL, which came up with individual criminal responsibility for mass killing. Ethnic Cleansing in Bosnia, the genocide in Rwanda, widespread atrocities in many African countries during World War II resulted in an overweight breach of humanitarian laws.

Tragic choices for war no doubt lead the society toward devastation. However, the scourge of war can hardly be avoided. War is no doubt an entirely uncivilized mode to behave but could be justified in self-defense. However, war is not only the subject, which can purely fall under the category of ICL. It is now a day deemed to be the mature branch, which can manage and handle its issue independently. Either it may be causation, jurisdiction, justification for criminal's actions and reactions. The branch is also found adoptive with a new mechanism of recording evidence, investigation of the facts with digital tools, etc [3]. The emerging digital technologies will surely assist the investigators in leading the examination in proper directions. Moreover, few crucial questions that may exist, the argument on authenticity and reliability, are that whether the result-based technological investigation could consider relevant under ICL? Whether new technologies can assist in investigating atrocity crimes and the risks inherent to such novel approaches? Whether new technologies introduce new forms of bias into investigations or accountability, how can this risk be resolved? How long would it be justifiable to rely on the findings of evidence accompanied by a rise in deep fake technology? Whether atrocity investigations in the digital age require a new skill set for investigators? Moreover, within that all, how can it maintain the humanitarian approach concerning victims, culprit, and investigating state in the techno-based investigation? Researchers think that these are incredibly momentous questions for the front next to ICL [4].

## **2. Research Objectives**

- a) To examine the need for maintenance of humanitarian principles under ICL.

- b) To understand the basis and objectivity of evaluating the investigation mechanism.
- c) To analyze the nature of ICL with the different systems of criminal justice administration.
- d) To study the different patterns of criminal justice administration through ICL.

## **2.1. Research Hypothesis**

a) Relatively ICL is the new and unfledged approach of PIL, which needs to evaluate through a separate assignment on investigation mechanism for impartial justice.

b) Impartial and pre-identified investigation mechanisms for international crimes maintain fairness and transparency for securing justice.

## **3. Materials and Methods/Methodology**

The collection of material is done through secondary sources, including the Rome Statute, Rules relating to the collection of evidence, and many research papers on ICL. The method of research is doctrinal and empirical. In this paper, researchers trusted on few primary sources and a few seconds. However, the methodology used for the present study is a complex blend of doctrinal and non – doctrinal wherein the survey has been done for knowing the authenticity of the significance of electronic evidence at trial [5].

### **3.1. Scope of Study**

Like International Humanitarian Law (IHL), ICL is identical adhesive development of PIL. The present study mainly covers the recent trained in acceptance of electronic evidence under International Criminal Trials (ICT). The study is more specific concerning International Crimes and few International Tribunals. They undertook the task of doing global criminal justice [6]. The scope of the study extends to the recent investigation mechanism, its reliability, and admissibility as evidence. The relevant provisions of the Rome Statute have been examined with the help of few recent cases decided and about to decide. Specific observations have been marked concerning the significance of electronic evidence at trial [7]. Similarly, the emerging challenges in front of the International Criminal Court (ICC) have also been entertained. The study ended with a remarkable conclusion and suggestions. The present study covers the very recent approach of ICC and other ICT on admissibility and reliability of electronic evidences at trial. It helps to enhance students,

academicians, investigators, cybersecurity experts, and International criminal lawyers to study, analyze and criticize the admissibility of open-source information for International crimes [8].

## **4. Results and Discussion**

### **4.1. Testing Sufficiency of Investigation Mechanism for International Crimes**

From the outset, ICL founded on the well-known treaty called “Rome Statute” (Rome Statute 1998). The investigation of international crimes is fragmented over numerous jurisdictions. Considering the above phenomena, exploration of international crimes' existing investigation mechanisms, porch few common parameters without major chance of default by the prosecutor [9]. Moreover, Art. 17 and Art. 19 (1) of the International Tribunal for Rwanda (ICTR) confirms the procedure for reviewing the indictment by the Judge of the Trial Chamber. It stated that “The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that the prosecutor has established a prima facie case, he shall confirm the indictment. If not so satisfied the indictment shall be dismissed” 10].

More interestingly when one refers to Art. 20 (1) of the International Criminal Tribunal of Former Yugoslavia (ICTY Statute) will realize that both legal and humanitarian aspects have been inculcated into it by aphorism. It stated that "The trial chambers shall ensure a trial is fair and expeditious and that proceedings are conducted as per the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses" [11]. Irrespective of the rules for evidence procedure, the ICTR and ICTY fail to maintain the standard of admissibility of evidence in trial chambers. The relevancy of jurisdiction and its appropriateness remains a major issue [12]. There was a need to give some significance to some authoritative norms in the spare of admissibility and relevancy of evidence to make the decision binding and conclusive. Addressing the need for time, the Rome Statute took the shift to grip the issue under Articles 16 and 17 (Article 16 and 17 of Rome Statute 1998), which stated, "No investigation or prosecution may be commenced or proceeded with under this Statute for 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; the Council may renew that request under the same conditions” [13]. Said procedure was introduced to refine the chances of fairness and use of authenticated sanctions to examine witnesses' admissibility of evidence by willing states.

## **4.2. Admissibility and Relevancy of Electronic Evidences in International Trials**

Unlike another growing field of law, ICL could not be an exception to adopting new techniques and instrumentalities available in another field. Considering massive growth in e-governance, electronic evidence has evolved into an ultimate column for communication, documentation, and procession that go digital evidence for trials are increasingly being used in both civil and criminal litigation. The issue of threshold standard to admit the electronic evidence under ICC is less crucial and more based on the genuineness of its relevancy. Therefore, documenting investigations of international crimes in an absolute and responsible manner must be effectuated as far as possible. However, in ICC and other international criminal tribunals such as ICTR, ICTY, International Criminal Tribunal of Sierra Leone (ICTSL) enjoyed liberty by giving flexibility in adopting evidence, which was found so relevant to the fact in issue. In many cases, they do not follow too technical rules concerning admissibility. As a general rule, the investigation agencies and the courts will always prioritize the direct evidence over the circumstantial. However, exceptionally, they may go for the circumstantial evidence, which can be used to link the crime committed. Overall, sticking with only one or two methods of admissibility of evidence at International trials is more dangerous and unobvious [14]. The system developed by the ICL is the blend of almost all systems of criminal law in the world. So, domestic law's interdependency and overlapping impact on International law and vice-versa must not be avoided. Therefore, the admissibility of electronic evidence under international trial requires separate inquiry.

Few legal concepts are crucial to these inquiries, such as evidence and how electronic evidence poles apart from other evidence. Can electronic evidence be the direct evidence? What could be the authenticity of electronic evidence? How the ICL and other International Criminal Tribunals are going to value the electronic evidences? All these questions are relevant for the abovementioned queries, which tried to answer with the help of an analysis given below.

## **4.3. Does the Electronic Evidence Poles Apart from Traditional Evidences-Historical Phenomena?**

Evidence is clarifying the conflicts as to matter in issue. Evidences are more compassionate to prove the stipulations of criminal liability and its exceptions. The year 1945 was the most crucial year for the development of ICL to boost and upgrade from its original version. In 1945 the allied powers of the world committed to establishing tribunal at Nuremberg for international crimes. After around

five decades, another famous tribunal in the form of ICTY and the ICTR, by United Nations Security Council Resolutions [15].

All the tribunals created after the ICC, including Sierra Leone (Established after the Sierra Leone Civil War 1991–2002), Cambodia Tribunal, and Lebanon (Established by United Security Council by Resolution 1757), range on the testament of proficient witnesses who are experts in social sciences, scientific analyzers, inspectors of the history, etc. The birth of ICC and other International ad hoc tribunals corresponded with reassessing the use of the Internet, particularly social media and other interactive web services. Now a day, ICC has carried the adoptive pattern of admissibility of electronic evidences in its trial. However, to make electronic evidence relevant, few factors have to discuss humanitarian aspect inadmissibility and relevancy of electronic evidence in trials.

#### **4.4. Humanitarian Principles and Admissibility of Electronic Evidence Under ICL**

The ad-hock tribunals and ICC were introduced to prosecute a violation of International Humanitarian Law occurring in their respective territorial jurisdiction. The use of electronic evidence becomes more chronic to determine the conduct of the culprit. Many countries that are not part of the Rome Statute feared that they might lose their sovereignty due to the transnational electronic environment. The evidential paltriness of electronic evidence or bigotry to the same may hamper the sense of justice. Therefore, a fair chance of hearing to both parties is essential to maintain impartiality [16]. It also requires the protection of victims and witnesses at trials. Fortunately, Rome Statute has taken special care to adhere to the humanitarian principles before, during, and after the trial. For instance, as it stated, “testate parties to the treaty obligated fully to co-operate with the court in investigation and prosecution crime within the jurisdiction of the court.” Further Art. 68 of Rome Statute protects the victims, witnesses and ensures their full participation in the proceeding. Interestingly, a separate list has also been provided for the rights of the accused person. However, referring to clause 2 of Art. 68 of Rome Statute, which created a special exception to the general public hearing referred under Art. 67. It stated that “the Chambers of the court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means.” Moreover, it further stated that “such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.” So as per the Rome Statute, the qualification as to the admissibility of electronic evidence has been given to protect the victim in sexual violence or a child victim or

witnesses. However, there is a need to adopt a wider perspective to adopt forensic evidence, expert opinions, and electronic evidences to ensure the sanctity of fairness and reasonableness. The adaptability of cyber forensic in investigation mechanisms ensures accurate results for a successful trial.

Even though the words ‘electronic or other special means’ are used in common parlance, but both have a different interpretation. Electronic evidence will be counted within the category of "Documentary Evidence." In the case of Prosecutor v. Karemera, Ntirumpatse and Nzirorera the ICTR tried to define documentary evidence stating that, “It could be anything in which information of any kind has been recorded.” Therefore, the question of the inclusiveness of proof in documentary form using any electronic means cannot be a challenge unless offered to fabrication into the source. Considering the novelty of challenges in ICL, it has insisted on new sets of facts and unprecedented legal issues as to admissibility and relevancy. However, within that all, the humanitarian principles set out by the prominent decisions of the international criminal tribunals or by ICCST or by any other international instrument cannot and must not be compromised at trial [17].

## **5. ICL and Rules of Evidence**

The rules relating to the evidence for international criminal trials are derived from the international instruments and courts' rulings on it. Unfortunately, for International criminal trials, there are no uniform rules. Since the beginning, freedom has been given to the ad hoc tribunals to meet the requirement of fundamental standards of certain principles incorporated into the rules of evidence for such tribunals. The evidentiary standard to collect the evidence for international trials can be broadly categorized into three main branches. First is a power-based rule, which states the prosecutor's powers to collect the evidence by requesting the state agencies to collect evidence. Secondly, right-based rules demand the prosecutor to the unanimity of special privileges in examining and collecting evidence. Third, procedural rules stated that prosecutors could use certain techniques to gather and preserve the evidence. As far as the third category of rules relating to evidence is concerned, it found most suitable to adopt and work upon the approach of digital evidence and its admissibility in either of the form of electronic evidence. However, the question as to the contemporary challenge of admissibility and reliability will always be there.

## **5.1. Admissibility and Relevancy of Forensic, Electronic Evidences, and International Trials**

The technological revolution forces international criminal law to think and rethink the admissibility of forensic, electronic evidence at trial. The Internet has digitalized things like the real world. Digitalization extends its scope in the field of Information Technology and the overall aspect of human life. Digitalized evidences need to have some recognition and definition too. One can define Digital Evidence as "information of probative value that is stored or transmitted in the binary form." The various means of electronic evidence include compact disk, digital versatile disc, social networking, e-mails, online chat box, storage message service, multimedia messaging service and documents generated by computers, closed-circuit television (CCTV), etc. However, the Rome Statute, up to some extent, allowed electronic evidence in text and context for many marginalized groups.

In the context of ICL, when one thought of Special Tribunal for Lebanon (STL established in 2005), it was the first tribunal, which relied entirely on circumstantial evidence in the absence of direct evidence by allowing telecommunications data in the form of call records. The STL is the tribunal of an international character to have jurisdiction over the crime of terrorism. Under domestic law, electronic evidence in the trial is a very common phenomenon for investigation. However, in *Prosecutor v. Ayyash*, decided by the STL came up with a very recent experiment under international criminal law where investigation focused on the explosion and forensic evidence. Investigation placed the reliance on cell phone calls and records of the accused persons collected at the scene.

The attack had been caused on the Prime Minister of Lebanon on 14 January 2005. Mr. Rafik Hariri, the then Prime Minister, has been killed with eight other supportive staff of him. Around 13 onlookers also died in the deadly attack, and more than 200 people were injured. The *Prosecutor v. Ayyash* has been started to hear the proceeding after a year of the incident; hundreds of witnesses and thousands of exhibits have been heard. The corroboration of the evidence was the significant task of investigation agencies. For corroboration of facts with evidence, video footage on the square and other forensic evidence matched the incidence timeline. While proving the evidence on record, two models have been presented in court stating the situation before the terrorist attack and another showing the aftereffects of an attack. With the use of algorithms in the forensic investigation of evidence, the cost of these forensic examinations and calculations was incredibly high. However, the use of forensic evidence helps the prosecution to establish the case beyond a reasonable doubt. Additionally, how long the defense could help the accused disprove the reasonable doubt against him is really challenging and sometimes depends on the paying capacity of the accused. Order to disprove

the facts established on record with the help of forensic evidence requires expertise and a counter mechanism of technology.

The prosecution was also preparing the use of a call sequence table to establish the link of the accused with other culprits. The prosecution placed its reliance on call data record (CDR); the investigation went through the OTP analysis system. A one-time password stands for PIN issued for one time, valid for only one login on a digital device or computer system. With the help of cellular signal, the geo-location was tried to locate with the help of telecommunication experts. The concluding argument did after nine hearings on and before 21 September 2018; the case was finally updated on March 2019. It has been stated that the prosecution, defense, and legal representative of the victim, Prime Minister Hariri concluded after the hearing. However, judges do not form any judgment with findings of guilty of the accused yet. The judgment will be delivered soon.

However, up to some extent, the defense successfully challenges the authenticity of cellular signals, which are not working in a precise and predictable manner. In such a case, the authenticity of evidence remains at the discretion of the judge. However, there is no concrete line of admissibility of evidence in the accuser's Geotag location. Moreover, while relying on such kinds of evidence would not be a sophisticated and sound decision. With the help of forensic evidence, the court fortunately framed a charge against the other three defendants for conspiracy. It seems more challenging, stimulating, and puzzling. The case is still going on in the court; hence it is sub judice. The position will be clearer if it comes with some solid judgment on the admissibility of CCTV footage and Geo-location use by way of satellite. However, there is a need to establish a clear precedent based on microscopic inspections with strong justification when accepting such evidence at trial. However, the ICC has quite sound protocols in case of admissibility of Open-Source Evidences (OSE) [18].

## **5.2. ICC and Open-Source Evidence (OSE)**

Nowadays, evidence derived from the OSE is becoming more and more accessible for International Criminal trials. The phenomena of admission of Open Source Evidences are as old as the establishment of ICC. The Prosecutor v. Jean-Pierre Bemba Gombo (ICC-01/05-01/08) was the first case wherein the ICC outlined the rules relating to admissibility and relevancy evidence. It stated that, for an instrument to be admitted into evidence, it must pass three tests, which includes -

### **5.3. Relevance**

Relevance means the existence of the fact (physical or mental), probably more or less. The use of online open-source investigation for the International Criminal Trials could be held relevant only and when such material is a part of the process of identifying, collecting, or analyzing information that is publicly available on or from the Internet as part of an investigative process [19].

### **5.4. Probative Value**

The probative value of evidence is the combination of the exhibit's reliability and influence for determining a fact in an issue. The ICC held that to examine the evidential value; the item must also be seen to have the indicia of reliability and authenticity (The Prosecutor v. William Samoei Ruto and Joshua Arap Sang ICC-01/09-01/11).

### **5.5. Absence of Probative Value**

The absence of probative value makes the OSE irrelevant. Adia, A. and Cherrie, WI-FI, have strongly believed that the probative values will be recognized in two different means: authentication and the other by preferred methods for authentication of such evidence and other indicia for admissibility and reliability of OSE.

#### **5.5.1. By Authentication**

Authentication of the evidence is foremost essential for testing of quality. It requires ensuring that there is no tampering with the said evidence. In order to avoid manipulation, the application of the test of authentication is much required [20].

#### **5.5.2. Preferred Method for Authentication and Other Indicia**

The specific demarcation for the authenticity of OSE has been developed by ICC long back, especially in the case of admission of video, photographic and audio-based information. For all such kinds of submission, ICC used to demand the metadata to be attached with evidence and the documentation showing chain of custody. The identity of the source of information the author thereof etc., are all considered to be relevant [21].

## 6. Conclusion and Suggestions

In many contexts, it has been proved that cyber forensic and digital evidence is helpful to conduct successfully in recent times. It gives more reliability to facts even more than the statement of witnesses. It helps to feed a gap between admissibility and reliability. It minimizes the human efforts to prove the case beyond a reasonable doubt. However, it involves many challenges, such as the availability of information in massive volumes, which is very hard to store in one place. The search ability of evidence is itself a problem. Additionally, putting information on open resources invites probable danger toward the poster. The co-operation of investigating state and pre-planned e-evidence by such states is almost a few probable challenges, which need to be addressed as early as possible. The apparent simplicity of humanitarian principles and the difficulties associated with their sound application in real-life situations create a certain paradox. It is unquestionably more of an art than a science to put them into action. Applying principles entails interpreting them in a changing environment. Despite decades of experience, the ICRC continues to face contradictions, dilemmas, and sometimes rejection in its efforts to provide assistance and protection in conflict or other violent situations. Good intentions and careful planning do not always result in positive outcomes.

1. The electronic evidence must be accepted with active scrutiny by Courts with microscopic eyes.
2. The three-fold tests of admissibility and reliability must be accepted without having any compromise with set standards.
3. There is a need to develop the mechanism where electronic evidence can directly be submitted to the investigation agency, office of prosecution, International Tribunal, or ICC as the case may be.
4. There is a need to protect witnesses by keeping the name secrete and without disclosing the informer's identity.
5. There is a need to seek international co-operation and adoption of the UNCITRAL model to investigate international crimes.
6. In addition to the three folded tests mentioned above, there is a need to establish set and firm standards on relevancy and admissibility of e- evidence.
7. To ensure impartial justice, there is a need to enhance and ensure an impartial investigation mechanism by keeping all the rights of an accused person in mind.

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