

Gucati and Haradinaj: The use of social media as evidence in criminal courts

1. Introduction

Facebook, Twitter, Tiktok, Youtube, these are a few of the social media platforms that our modern era has developed. While the development of these apps, as they are colloquially called, were thought as a means of bringing people closer by means of direct messaging and interaction, they can and have been used as tool to flaunt [international] crimes.

In 2016, an Iraqi migrant was convicted of war crime after a picture of him holding the head of an Islamic fighter was posted on Facebook¹, a German national was convicted of war crimes and severely humiliating and degrading treatment of deceased soldiers after a picture of him posing with the detached heads of combatants was posted on Facebook². While these are rather visual crimes which are easily identified, the use of social media by perpetrators can seem harmless but in reality, cause a great deal of damage to the victims.

In the case of *The Prosecutor v. Guçati & Haradinaj* at the Kosovo Specialist Chambers (KSC), the defendants Hysni Guçati and Nasim Haradinaj disclosed the protected information of witnesses³, they further held withering accusations as well as comments against the witnesses. These offences were broadcasted on television, and the defendants' posted comments on their respective Facebook pages, actions which undermine the proceedings as well as put the witnesses in positions in which they could be intimidated⁴.

2. Open-Source information

Open-source information is a publicly available information which is accessed through the internet. Open-source information must be distinguished from private or semi-private information which, for example, emanates from private Facebook group or information which is directly sent to individuals but never made available to the public.⁵ Private and semi-private information has been used in conjunction with open-source information in the case of international courts and tribunals.

¹ Finland, District Court of Pirkanmaa, Judgement, R 16/1304, 18 March 2016

² *The Prosecutor v. Aria Ladjedvardi*, Judgement, 5-3 StE 2/16 – 4 – 1/16, 12 July 2016

³ *The Prosecutor v. Hysni Guçati and Nasim Haradinaj*, KSC-BC-2020-07, indictment, 4 October 2021, [6]

⁴ *Ibid.* [30]

⁵ Nikita Mehandru and Alexa Koenig, 'Open Source Evidence And The International Criminal Court' (*Harvardhrj.com*, 2022) <<https://harvardhrj.com/2019/04/open-source-evidence-and-the-international-criminal-court/>> accessed 28 July 2022.

2.1 Open-source information at the Kosovo Specialist Chambers

The Kosovo Specialist Chambers, in assessing the admission of evidence, rely on the Rule of Procedure and Evidence (RPE) of the court. Rule 138 of the KSC RPE enshrines the admissibility of evidence. In this rule, for an item to be admitted as evidence during the proceedings it must satisfy a ‘three-part test’, as is the case at the ICC.⁶

“Unless challenged or proprio motu excluded, evidence submitted to the Panel shall be admitted if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect”⁷

The three-part test reveals three important factors to be satisfied in order for the item to be admitted into evidence.

- (i) **Relevance:** this is relevance of the item to the case at hand. In other words, the item should be presented in the aim of proving that one of the issues at hand is more or less likely to have happened.
- (ii) **Probative value (authenticity):** this is the ability of the item to reach its purpose to prove that the issue is more or less likely to have happened. In this regard, when assessing whether the item can be admitted into evidence, the judge will look at the reliability of the item, and as such its authenticity.
- (iii) **Prejudicial effects:** this relates to the fact that the item admitted into evidence must not contain any prejudicial effect to the rights of the accused.

One of the great challenges of open-source information is the ability to prove its authenticity in order for it to be used as evidence during the proceedings. For the authenticity of the open-source material to be proven there are various markers which differ depending on the type of open-source material. Generally, courts have two types of manners to prove the authenticity of an open-source material. A transcript may be used as an indicator to prove the authenticity of a video, which is the digital evidence. Or digital evidence such as a video may be used to corroborate verbal testimonials.⁸

In the corroboration⁹ of digital evidence there are two types of indicators which can be used. The first one is external indicators, like mentioned above this is, for example, testimonies or information in order to identify the source – this can be done through experts in the field of open-source which testify as to the authenticity of the item. Internal indicators are timestamps and meta data, this is the digital footprint of the source which can testify as to the authenticity of the source.¹⁰

⁶ Ibid.

⁷ Kosovo Specialist Chambers, Rules of Procedure and Evidence, KSC-BD-03/Rev2/2020, 2 June 2020, [138]

⁸ Aida Ashouri, Caleb Bowers and Cherrie Warden, ‘An Overview of the Use of Digital Evidence in International Criminal Courts’ (www.journals.sas.ac.uk), <<https://journals.sas.ac.uk/deeslr/article/view/2130/2060?>>, accessed 28 July 2022 [3]

⁹ Note that Rule 139 of the Kosovo Specialist Chambers, in subparagraph 3, enshrines that a “*a panel shall not impose a legal requirement that corroboration is required in order to prove any crime or criminal conduct within the jurisdiction of the Specialist Chambers*”

¹⁰ Aida Ashouri, Caleb Bowers and Cherrie Warden, ‘An Overview of the Use of Digital Evidence in International Criminal Courts’ (www.journals.sas.ac.uk), <<https://journals.sas.ac.uk/deeslr/article/view/2130/2060?>>, accessed 28 July 2022, [4]

3. Specialist Prosecutor v. Hysni Gucati and Nasim Haradinaj

In the case of Gucati and Haradinaj, the accused were indicted, not with documentary evidence of war crimes or crimes against humanity as is typically seen in international criminal tribunals, but were charged with intimidation during criminal proceedings, retaliation and violating secrecy of criminal proceedings. The conduct of the accused were made public and documented as it was perpetrated.¹¹ This made for the majority of the trial evidence to be of digital form, by means of press conferences videos, interviews, and Facebook posts.

3.1 Press conferences and interviews

In the first set of items, namely press conferences and interviews, the prosecution provided the video material with transcripts and translations. The prosecution raised the importance of these materials for the advancement of the case. Indeed, the video evidence in this category is paramount to the case, as it provides video evidence of the criminal conduct of the accused, as it was during those press conferences that the accused revealed the names and personal information of the witnesses. In their argumentation for the authenticity of the evidence, the prosecution provides that since the items are open source, they are capable of self-authentication.¹² Moreover, the defence does not contest that the items are authentic, but rather that they do not prove any form of illegal conduct.¹³

In this case, the use of the press conference and interview videos is of high probative value as it provides for authenticated proof that the criminal conduct of the accused did in fact take place. Moreover, the use of such source also helps keep any other potential witness to the criminal conduct at bay of any danger if they were to testify in court. Furthermore, the combination of visual items with written items (e.g., transcripts, translations, etc.) provides for strong bases upon which the prosecution can prove the criminal conduct of the accused.

3.2 Facebook posts

The Facebook posts which the prosecution brought to the court were of dual nature. The first nature related to the intent of the accused to publicize their criminal activity as a means to reach the public to the full extent possible.¹⁴ The second nature of the Facebook posts relates to criminal intent of the accused, namely posts which had the intent of revealing confidential information of the witnesses as well as a means of intimidation to the witnesses.¹⁵

For admissibility of the evidence, the prosecution provided that the posts were taken from open sources and as such can be self-authenticated. Moreover, they raised the point that in these posts, there was a clear identification of the sender as well as the date when the post was sent on each of the posts used. Moreover, the Facebook posts could be corroborated with the interview and press conferences thus could be dated to these occurrences. Indeed, this provided that the posts can be accurate and reliable.

¹¹ The Prosecutor v. Hysni Gucati and Nasim Haradinaj, KSC-BC-2020-07, prosecution request for admission of items through the bar table with confidential annex 1, 31 August 2021, [4]

¹² Ibid. [11]

¹³ Ibid. [12]

¹⁴ Ibid. [23(i)]

¹⁵ Ibid. [23(ii)]

Nonetheless, the defence raised the point that the Facebook accounts of Mr. Haradinaj and Mr. Gucati were not solely accessed by them, rather that they had a social media team who could have access to their accounts.¹⁶ However, this goes to the interpretation of the post during the trial phase but does not provide for any grounds for rejection of the posts as inadmissible.

4. Conclusion

To conclude, while social media evidence may come with challenges, some cases such as the one of Gucati and Haradinaj, show evidence which is not only essential in pleading a case, but also the basis for the case to be brought before criminal courts. Indeed, the case before the KSC not only heavily relied on open-source evidence but was presented through and prosecuted through interactive materials such as YouTube clips from interviews in which the defendants were seen engaging in criminal conduct, screenshots of Facebook posts which were of derogatory nature to witnesses and which were intended to intimidate the witnesses, as well as press conference videos in which the defendants were seen violating the secrecy of proceedings.

Open-source evidence shall nonetheless always be taken with a grain of salt, they are of highly probative value at time but can cause challenges relating to the reliability of the evidence at the trial. Meta data as well as timestamps are important elements to be brought both at the pre-trial phase for the admissibility of the items, as well as at the trial phase to construct a clear and lineal understanding of the reliability of the items for the judgement.

It is however important for criminal courts to welcome open-source evidence as it is a natural development of our ever changing and interconnected world. Social media and other type of online platforms are an all-encompassing part of our digital era, and as such would, in the future, present one of the main forms of evidence. Therefore, it is important for the courts to build a legal basis for these types of evidence to be admitted to court.

The case before the KSC presented an opportunity for the court to work with the struggles of our era and use social platforms as a means to end impunity of crimes for the simple fact that open-source evidence may be unreliable at times. Indeed, the judges allowed for the evidence to be used at trial thus not judging the evidence as inadmissible, but a high threshold of evidentiary standard upon both the prosecution and the defence was set. Thus, working with the tools of our time and ensuring that these tools are not overlooked and, as such, used in the future as a means to flaunt crimes and go unpunished.

¹⁶ Ibid. [26]

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