

## **The contribution of international courts and tribunals to the development of procedural rules**

### **OC - (ILA-14168) - JURISPRUDENCE AND THE USE OF SOCIAL MEDIA EVIDENCE IN INTERNATIONAL CRIMINAL TRIALS**

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Ann Marie Thake graduated as Doctor of Laws from the University of Malta in 2010. She was called to the Maltese bar in early 2011, and worked as a lawyer in private practice in the fields of criminal law and human rights litigation. In 2013 she obtained an Advanced Masters in Public International Law (International Criminal Law Specialisation) from Leiden University and subsequently joined a defence team on appeal at the International Criminal Tribunal for the Former Yugoslavia. She is currently a senior legal counsel within the Courts of Justice (Superior Jurisdiction) of Malta, assisting in the drafting of judgements of a civil, human rights or constitutional nature. She is a member of the Legal Experts Advisory Panel of Fair Trials, and a thesis supervisor and examiner within the Faculty of Laws' Department of International Law at the University of Malta.

##### **Abstract**

Technology advances rapidly. In the past decade alone, technological advances have completely changed the way we live, with social media meshing the digital world and the real-world together to an extent that was previously unimaginable to perhaps all but the youngest of the current generations. Law on the other hand develops slowly, especially within the international community where new laws or legal amendments are birthed after many laborious years of negotiation and diplomatic wrangling. In the meantime, as technology becomes more readily available and social media plays an ever-increasing role in our daily life, the use of social media evidence in court cannot but increase. Due to this, the courts play an important role in the development of procedural rules and guidelines for the use of digital evidence in criminal trials, through their jurisprudence and the enactment of practice directions that regulate evidentiary and procedural issues for all trials.

Although digital evidence has always had a role to play in international criminal proceedings, the Courts used to show a certain degree of reluctance in relying on digital evidence in their decisions. This was possibly due to the general reluctance to accept new forms of technology, a phenomenon which can be traced back to the advent of moveable type. Times however seem to be changing drastically. While social media evidence might currently be a novel evidentiary form in criminal trials, it has already played an essential role in the issuance of an arrest warrant by the International Criminal Court against Mahmoud Mustafa Busyf al-Werfalli on the 15th of August 2017. In issuing this arrest warrant, this International Criminal Court considered as admissible and probative social media posts, sometimes referred to in academia as open source evidence, such as videos uploaded and shared on the Facebook platform and what appear to be extra-judicial executions. Aside from considering these posts as sufficient evidence relative to the statutory standard applicable at the current stage of proceedings in accordance with article 58(1) (a) of the Rome Statute, that is "reasonable grounds to believe", the Court also considered the posts to constitute proof that al-Werfalli was unlikely to cooperate with a summons to appear in accordance with article 58 (7) of the Rome Statute. In reality, this cannot come as a surprise. Recognising the potential of the growing use of social media, in 2013 the Office of the Prosecutor had already vowed to place particular focus on the use of digital and social media evidence, establishing a Digital Forensics Team particularly for this purpose, and the increasingly important role of technology in criminal trials was once again affirmed by the Office of the Prosecutor in its Strategic Plan for 2016 - 2018, while an international protocol about the handling of social media evidence is expected to be released later on this year.

While the al-Werfalli arrest warrant decision did not enter into a discussion regarding the use of social media evidence in a criminal trial, if al-Werfalli were to appear before the Court such that the trial before him could actually commence, it is

to be expected that the admissibility, use and probative value of this evidence will be a central point of discussion in the case. In light of this, and the great likelihood that the use of social media evidence will only become more common in international criminal trials, this paper aims to examine the use of such evidence. As specific jurisprudence on the matter might be sparse due to the novel nature of the use of social media evidence in criminal proceedings, the author will make reference to the existing jurisprudence of international criminal courts and tribunals on the matter of digital evidence in order to assess its possible usefulness and impact in relation to social media evidence. Since any evidence submitted before the Court must satisfy the three-prong admissibility test relating to its relevance, probative value and prejudicial effect as established by the Rules of Procedure, the paper will also refer to the jurisprudence on admissibility of evidence which sheds lights on the interpretation of these rules.

**Palavras-chave : law of evidence, social media evidence, open source evidence**