

# CROWDSOURCING 'CITIZEN DIGITAL EVIDENCE': PARTICIPATION OF CIVILIAN POPULATION DURING THE ARMED CONFLICT BETWEEN RUSSIA AND UKRAINE

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## Abstract

*There is an ongoing proliferation of armed conflicts and international crimes around the world. While states and multinational organisations often fail to resolve these conflicts through traditional channels of diplomacy and mediation, more active participation of the civilian population in the collection, verification, and preservation of digital evidence (e-evidence) on core international crimes such as genocide, crimes against humanity, war crimes and the crime of aggression can magnify voices of affected communities and highlight the human dimension of crimes which is often missing in official criminal proceedings. Although the process of 'crowdsourcing citizen digital evidence' is a relatively new phenomenon, this article will demonstrate how close cooperation between individual documenters, government institutions, civil society, and international organisations in Ukraine contributed to a stronger standing of witnesses, victims, and other representatives of affected communities in national and international criminal proceedings. The abundance and ubiquitous use of these novel forms of digital documentation by various actors during ongoing armed conflicts necessitates a rigorous examination of potential risks and advantages of collecting, processing, and using new digital evidence in international criminal justice.*

## 1 Introduction

This article addresses the current phenomenon of involving the civilian population as the 'first responders' in the process of collecting 'new digital evidence'<sup>1</sup> for war crimes documentation during the armed conflict between the Russian Federation and Ukraine. The evidence discussed in this paper is new due to the novel sources, devices, and methods for collecting digital materials. Satellite images, GPS data, footage from CCTV cameras and drones, as well as evidence scraped from a variety of new social media networks like Instagram and Telegram are different from 'traditional digital evidence', because they encompass a multitude of digital platforms and actors involved in the custody, control, analysis, and disclosure of this new type of evidence. Characteristics of this evidence

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<sup>1</sup> Such new digital evidence may include photos, videos, GPS locations, footage of security cameras, satellite images, footage of drones, cyber event data recorders etc. See types of digital evidence at Forensic Focus, 'Types Of Devices Examined In Digital Forensics Investigations' (Forensic Focus, 28 June 2023) <<https://www.forensicfocus.com/articles/types-of-devices-examined-in-digital-forensics-investigations/>> accessed 23 February 2024.

include, among other things, the possibility of making copies that would be similar to the original source, a risk of tampering with and destroying the evidence, and the relatively easy way of storing and sharing it. Another important characteristic of new digital evidence is that it is often openly available online and does not require a court decision to access it, which accelerates the process of evidence collection and pre-trial investigation. Considering that digital materials have been ‘recognised as evidence in the decisions of the European Court of Human Rights’<sup>2</sup> and the International Criminal Court (ICC),<sup>3</sup> collecting new digital evidence during ongoing conflicts becomes an essential element of present and future accountability efforts initiated by domestic and international actors.

The background of this research is the war in Ukraine with its unprecedented number of atrocity crimes, which raises the question of effective documentation and investigation activities during an ongoing international conflict. Many domestic and international investigators are involved, which poses the challenges of potential duplication of work, overdocumentation, and timely coordination. As crimes committed in Ukraine potentially constitute such international core crimes as genocide, crimes against humanity, war crimes, and aggression, it is the responsibility of the international community to support Ukraine in its current accountability efforts.

Although the previous research has already addressed the topic of digital evidence and cyber investigations from the perspectives of plaintiffs, defence, and prosecution, the novel character of digital investigation initiatives requires a more nuanced approach that will take into consideration the standing of witnesses, victims, and other vulnerable groups, whose voices have been often disregarded in criminal proceedings. Therefore, the purpose of this research is not to criticise ongoing digital efforts to document war crimes in Ukraine, but rather to find potential weaknesses and risks of using new types of digital evidence in criminal proceedings from the perspective of vulnerable groups directly affected by armed conflicts. This, in turn, will help identify the advantages of using new digital evidence that could mitigate the risks and strengthen the position of witnesses, victims, and other affected communities.

The analysis of applicable norms of international law, decisions of international tribunals, and first war crime trials in Ukraine will be instrumental in answering a research question about the rationale for involving civilians in virtually all ongoing war crime documentation efforts in Ukraine and its potential significance for the transformation of

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<sup>2</sup> The cases of ‘P. and S. v. Poland’ (2002), ‘Eon v. Poland’ (2013), ‘Shuman v. Poland’ (2014). See in Blahuta, Roman & Movchan, Anatolii & Movchan, Maksym. (2021). Use of Electronic Evidence in Criminal Proceedings in Ukraine. Proceedings of the International Conference on Social Science, Psychology and Legal Regulation (SPL 2021), available at <<https://dspace.lvduvs.edu.ua/bitstream/1234567890/4808/1/%D0%BC%D0%BE%D0%B2%D1%87%D0%B0%D0%BD.pdf>>, accessed 14 June 2024.

<sup>3</sup> For instance, Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence (27 September 2016) and in other cases addressed in the next sections.

international criminal justice towards a stronger victim-centred approach, which is becoming a trend in a domestic and international context.<sup>4</sup> This research outlines a list of factors applicable to new digital evidence that can either strengthen or weaken the standing of witnesses and victims as participants and beneficiaries in national and international criminal proceedings.

After the introduction, the second section presents the research question and outlines possible reasons for involving civilians in war crimes documentation efforts in Ukraine. The third section provides an overview of risks associated with the misuse of new digital evidence, which could have a negative impact on the standing of victims and witnesses in criminal proceedings during the Russia-Ukraine war. The fourth section enumerates the advantages of the new digital evidence that could potentially mitigate the risks of using this type of evidence. The fifth section proposes how to overcome the risks and amplify the advantages of the new digital evidence. The concluding section summarises the recent trends of digital initiatives and explains why they could further strengthen a 'victim-centred' and 'victim-narrated' approach in international criminal justice.

## 2 Engaging civilians in war crime documentation efforts

### 2.1 New digital evidence as a key component of the war crimes documentation effort in Ukraine

Digital evidence collected by civilians has become an integral part of both national and international initiatives to document war crimes in Ukraine.<sup>5</sup> The fact that a great variety of non-institutional investigators such as investigative journalists<sup>6</sup> civil society organisations<sup>7</sup> and open-source intelligence (OSINT) groups<sup>8</sup> started considering and reviewing this new 'grass-roots' digital evidence collected by civilians in Ukraine could also mark a significant shift towards a 'victim-centred' and 'victim-narrated' approach in the criminal justice process. This research is also necessitated by the growing field of digital forensic intelligence and its specialists that can help with the investigation of war crimes by using modern digital analysis of behaviour, developing new AI-enabled facial recognition systems, and using 'Big Data' analysis to process the multitude of photos and videos available in public access.

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<sup>4</sup> Avril McDonald, 'Chapter 9. The Development of a Victim-Centered Approach To International Criminal Justice For Serious Violations Of International Humanitarian Law', *International Humanitarian Law: Prospects* (Brill Nijhoff 2006).

<sup>5</sup> Alexa Koenig, 'From "Capture to Courtroom": Collaboration and the Digital Documentation of International Crimes in Ukraine' (2022) 20 *Journal of International Criminal Justice* 829.

<sup>6</sup> 'War Crimes Investigation Unit' (*The Kyiv Independent*) <<https://kyivindependent.com/war-crimes/>> accessed 26 February 2024.

<sup>7</sup> 'Truth Hounds – Truth-Hounds' <<https://truth-hounds.org/en/homepage/>> accessed 26 February 2024.

<sup>8</sup> 'Molfar OSINT Agency (Open Source Intelligence)' <<https://molfar.com/en>> accessed 26 February 2024.

The growing use of digital evidence and OSINT explains the necessity to address the Research Question about the rationale for involving civilians in war crime documentation efforts in Ukraine. The reasons for involving civilians in documentation initiatives can explain why civilian participation is not just a temporary phenomenon but rather a systemic change leading to the lasting and profound transformation of international criminal justice with regard to its new victim-centred approach. In terms of national documentation efforts by the third (civic) sector in Ukraine, both the association of civil society organisations known as the 5 AM Coalition, which includes more than thirty human rights NGOs,<sup>9</sup> and the office of the Prosecutor General of Ukraine with the civic group 'IT Defenders' draw upon 'citizen evidence'<sup>10</sup> submitted by civilians to collect, verify, and preserve digital materials on war crimes and crimes against humanity committed by Russia in Ukraine<sup>11</sup> The 5 AM Coalition relies on digital tools for collecting digital evidence<sup>12</sup> while actively cooperating with OSINT groups in other countries.

Furthermore, the unprecedented accountability initiatives<sup>13</sup> launched by non-governmental organisations to support Ukraine in its documentation efforts rely on using photo, audio, and video materials scraped from social media or obtained with the help of digital 'first responders' trained or instructed by NGOs. Among the documentation initiatives launched by civic organisations, the most noticeable initiative in this regard is the Public International Law and Policy Group<sup>14</sup> with its Ukraine Memorialization and Accountability Initiative.<sup>15</sup> It is also possible to observe a movement towards systematization and collaboration among organisations that work with OSINT. The most prominent collaborative project in the field is the 'Investigative Commons', established by the Dutch investigative journalist group Bellingcat, German NGO Mnemonic, a research group 'Forensic Architecture', and other organisations specializing in OSINT to avoid

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<sup>9</sup> The 5AM Coalition, available at <<https://www.5am.in.ua/en>>, accessed 4 February 2024.

<sup>10</sup> RWC App and WarCrimes.gov.ua – a platform developed by the Office of the Prosecutor General of Ukraine and the civic group "IT Defenders" to document war crimes and crimes against humanity committed by Russia in Ukraine, available at <<https://warcrimes.gov.ua/>>, accessed 4 February 2024.

<sup>11</sup> Natalie Huet, 'A Race against Time to Collect Digital Evidence of Ukraine War Crimes' (*euronews*, 6 April 2022) <<https://www.euronews.com/next/2022/04/06/how-digital-evidence-of-war-crimes-in-ukraine-is-being-collected-verified-and-stored>> accessed 9 February 2024.

<sup>12</sup> According to its most recent report d.d. 31 January 2024, the 5AM Coalition works with a number of databases such as the Cloud environment of the eyeWitness to Atrocities application created in 2015 by the International Bar Association (IBA); the 'Ukrainian Archive' by the Berlin-based NGO Mnemonic with its more than 6 million open source files and the joint database of the Coalition in I-DOC with profiles of more than 4.3 thousand victims. See 'Ukraine 5 AM Coalition Summed up the Results of 2023 and Decided on Further priorities. Human Rights Centre Zmina. Centr Prav Ludyny ZMINA' (31 January 2024) <<https://zmina.ua/en/event-en/ukraine-5-am-coalition-summed-up-the-results-of-2023-and-decided-on-further-priorities/>> accessed 8 February 2024.

<sup>13</sup> 'Helping Ukraine to Bring the War Criminals to Account | EEAS' <[https://www.eeas.europa.eu/eeas/helping-ukraine-bring-war-criminals-account\\_en?s=167](https://www.eeas.europa.eu/eeas/helping-ukraine-bring-war-criminals-account_en?s=167)> accessed 9 February 2024.

<sup>14</sup> See the Public International Law and Policy Group, <<https://www.publicinternationallawandpolicygroup.org/policy-planning-ukraine>>, accessed 4 February 2024.

<sup>15</sup> See the Ukraine Accountability Initiative at <<https://www.ukrainetjdoc.org/ukraine-accountability-initiative-information-page-en>>, accessed 4 February 2024.

the duplication of work and overdocumentation by organisations dealing with international crimes committed in the course of several ongoing conflicts including the war between Russia and Ukraine.<sup>16</sup> Besides a more significant role played by the new digital evidence in the accountability efforts for war crimes committed in Ukraine, it appears that there is an emerging agreement<sup>17</sup> among international organisations and main stakeholders in the field of criminal justice in Europe,<sup>18</sup> and internationally that digital evidence and OSINT are already an indispensable element of all international investigations.<sup>19</sup> International organisations and investigators in Ukraine, such as the Joint Investigative Team (JIT) under Eurojust and the Atrocity Crimes Advisory Group (ACA) for Ukraine,<sup>20</sup> often use and refer to digital evidence in their reports and briefings.<sup>21</sup> Furthermore, ICC and Eurojust have cooperated to produce the Guidelines for civil society organisations that document international crimes and human rights violations.<sup>22</sup> It is also hardly a coincidence that the Office of the Prosecutor<sup>23</sup> at the ICC and Eurojust have recently almost synchronically introduced their platforms for the collection and preservation of digital evidence on international crimes (the OTPLink<sup>24</sup> and the Core International Crimes Evidence Database,<sup>25</sup> respectively).

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<sup>16</sup> See the Investigative Commons, <<https://investigative-commons.org/>>, accessed 04 February 2024.

<sup>17</sup> Ronald Niezen, 'Open-Source Justice: Digital Archives and the Criminal State' in Ronald Niezen and Sarah Federman (eds), *Narratives of Mass Atrocity: Victims and Perpetrators in the Aftermath* (Cambridge University Press 2022).

<sup>18</sup> Stanisław Tosza, 'European Union · The E-Evidence Package Is Adopted: End of a Saga or Beginning of a New One?' (2023) 9 *European Data Protection Law Review* 163.

<sup>19</sup> Paul R Williams and Nicole Carle, 'The War in Ukraine: A Case Study in Modern Atrocity Crime Documentation International Law and the New Cold War: Role of International Law in the Russia-Ukraine Conflict' (2023) 55 *Case Western Reserve Journal of International Law* 7.

<sup>20</sup> See the Atrocity Crimes Advisory Group (ACA) for Ukraine, at <[https://www.eeas.europa.eu/eeas/questions-and-answers-atrocity-crimes-advisory-group-aca-ukraine\\_en](https://www.eeas.europa.eu/eeas/questions-and-answers-atrocity-crimes-advisory-group-aca-ukraine_en)>, last accessed on 04.02.2024.

<sup>21</sup> I.e., see a set of guidelines to assist civil society organisations to collect and preserve information related to international crimes and human rights violations developed by Eurojust together with the EU Network for investigation and prosecution of genocide, crimes against humanity and war crimes ('Genocide Network') and the Office of the Prosecutor of the ICC, 'Joint Investigation Team into Alleged Core International Crimes in Ukraine: One Year of International Collaboration | Eurojust | European Union Agency for Criminal Justice Cooperation' <<https://www.eurojust.europa.eu/news/joint-investigation-team-alleged-core-international-crimes-ukraine-one-year-international>> accessed 6 February 2024.

<sup>22</sup> 'Documenting International Crimes and Human Rights Violations for Criminal Accountability Purposes: Guidelines for Civil Society Organisations | Eurojust | European Union Agency for Criminal Justice Cooperation' <<https://www.eurojust.europa.eu/publication/documenting-international-crimes-and-human-rights-violations>> accessed 28 February 2024.

<sup>23</sup> Karim A.A. Khan, 'Technology Will Not Exceed Our Humanity - Digital Front Lines' <<https://digitalfrontlines.io/2023/08/20/technology-will-not-exceed-our-humanity/>> accessed 8 February 2024.

<sup>24</sup> 'ICC Prosecutor Karim A.A. Khan KC Announces Launch of Advanced Evidence Submission Platform: OTPLink | International Criminal Court' <<https://www.icc-cpi.int/news/icc-prosecutor-karim-aa-khan-kc-announces-launch-advanced-evidence-submission-platform-otplink>> accessed 7 February 2024.

<sup>25</sup> 'Start of Operations of Core International Crimes Evidence Database and New International Centre for Prosecution of the Crime of Aggression to Be Based at Agency | Eurojust | European Union Agency for

Considering that in Ukraine and other countries affected by conflicts, a significant part of such digital evidence comes from victims and witnesses, who are, as a rule, the first to document crimes, the greater prominence of digital evidence is also a tribute to the ‘first responders’, whose voices and stories are magnified and finally heard in the global digital community. The growing trend towards a pervasive and prevalent use of ‘citizen digital evidence’ by a great variety of domestic and international actors at a pre-trial stage during armed conflicts raises the question of risks and advantages of working with this new type of evidence. While other authors have already addressed various strengths and weaknesses of digital evidence and OSINT from the perspective of a plaintiff, prosecution, or defence,<sup>26</sup> the goal of this research is to understand how new methods of digital investigations and digital forensics can either elevate or undermine the role played by victims and witnesses in criminal trials.

## 2.2 Rationale for using new digital evidence collected by civilians in the documentation of war crimes

This section will address the reasons behind the active and direct participation of civilians in the efforts to collect and preserve digital evidence and OSINT during armed conflicts. While the scope and intensity of crimes remain, an important factor justifying the civilian engagement in the crimes documentation, the section explains why the institutional co-optation of grass-roots level investigative activities initiated by civil society actors is probably the only efficient way to avoid confusion and ensure a higher level of coordination among numerous investigators working in Ukraine. The reasoning behind the growing involvement of the civilian population in the war crimes documentation efforts can shed light on some of the risks and advantages such increased civilian participation could potentially bring along. First and foremost, in Ukraine, the process of ‘citizen evidence’ crowdsourcing became necessary due to the scope and intensity of atrocities committed on the territory of the country within a relatively short time. For instance, during the first three months of the full-scale invasion, ‘[a] website set up by the office of Ukraine’s Prosecutor General, [warcrimes.gov.ua](http://warcrimes.gov.ua), has received more than 10,000 submissions of detailed evidence from citizens...The government’s efforts are supported by a legion of outside human-rights groups, citizen sleuths, cyber-volunteers, retired military officials, journalists, and open-source analysts with experience documenting this kind of proof in previous conflicts.’<sup>27</sup> After the full-scale invasion launched by Russia on 24 February 2022, the Ukrainian law-enforcement agencies, investigators, and the national system of criminal justice, which had no prior experience in war crimes investigations,<sup>28</sup>

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Criminal Justice Cooperation’ <<https://www.eurojust.europa.eu/news/start-operations-core-international-crimes-evidence-database-and-new-international-centre>> accessed 7 February 2024.

<sup>26</sup> Alexa Koenig and Lindsay Freeman, ‘Cutting-Edge Evidence: Strengths and Weaknesses of New Digital Investigation Methods in Litigation’ (2022) 73 UC Law Journal 1233.

<sup>27</sup> Vera Bergengruen, ‘How Ukraine Is Crowdsourcing Digital Evidence of War Crimes’ (*TIME*, 18 April 2022) <<https://time.com/6166781/ukraine-crowdsourcing-war-crimes/>> accessed 8 February 2024.

<sup>28</sup> Gyunduz Mamedov, ‘Institutionalization of Justice in Ukraine’ (*Ukrainska Pravda*) <<https://www.pravda.com.ua/eng/columns/2022/12/1/7378856/>> accessed 9 February 2024.

have 'faced an unprecedented surge in the numbers of alleged mass atrocity crimes committed in the areas of hostilities and parts of Ukraine's (de)occupied territories. Eight months into the war, the Office of the Prosecutor General of Ukraine has already registered over 47,000 instances of alleged crimes, including war crimes and the crime of aggression.'<sup>29</sup> While at the time of the preparation of this publication, the Office of the Prosecutor General has registered more than 136,000 war crimes and the crime of aggression,<sup>30</sup> the frequency of registered cases depends on the current situation on the frontline (i.e., de-occupation of previously occupied territories, where new atrocity crimes could be uncovered) and the intensity of attacks launched by Russia against civilian infrastructure in Ukraine.

Another reason for involving civilian documenters of war crimes is the impossibility of assessing the situation on the territories that are currently not under the control of the Ukrainian government. According to the Global Conflict Tracker by the Centre of Preventive Studies, although Ukraine has managed to recapture 54 percent of the occupied territory, Russian forces still occupy 18 percent of the country (appr. 100,000 square kilometres).<sup>31</sup> The civilian population is often the only source of information about crimes perpetrated on the occupied territories, which is one of the reasons why the Russian occupation authorities usually dismantle telecommunication equipment<sup>32</sup> and jam or re-route the Internet<sup>33</sup> on the territories captured by them in their attempt to isolate residents of the occupied territories. While it is now hard to estimate how long the process of de-occupation would take, the thorough verification and authentication of reports and digital materials provided by the civilian population could be a source of invaluable scene-of-crime evidence<sup>34</sup> that otherwise would be destroyed or manipulated by the alleged perpetrators. For instance, the documentation of the destruction in the city of Mariupol<sup>35</sup> became possible thanks to city residents whose photo and video materials contain evidence subsequently erased and hidden by the Russian occupation authorities.

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<sup>29</sup> Iryna Marchuk, 'Domestic Accountability Efforts in Response to the Russia–Ukraine War: An Appraisal of the First War Crimes Trials in Ukraine' (2022) 20 *Journal of International Criminal Justice* 787.

<sup>30</sup> See the website of the Office of the Prosecutor General of Ukraine 'Офіс Генерального Прокурора' <<https://www.gp.gov.ua/>> accessed 10 February 2024.

<sup>31</sup> See 'War in Ukraine' (*Global Conflict Tracker*) <<https://cfr.org/global-conflict-tracker/conflict/conflict-ukraine>> accessed 23 February 2024.

<sup>32</sup> 'Russian Occupiers Cut Internet, Mobile Connection in Kherson to "isolate" City' (*The Kyiv Independent*, 23 October 2022) <<https://kyivindependent.com/russian-occupiers-cut-internet-mobile-connection-in-kherson-to-isolate-city/>> accessed 10 February 2024.

<sup>33</sup> Adam Satariano and Scott Reinhard, 'How Russia Took Over Ukraine's Internet in Occupied Territories' *The New York Times* (9 August 2022) <<https://www.nytimes.com/interactive/2022/08/09/technology/ukraine-internet-russia-censorship.html>> accessed 10 February 2024.

<sup>34</sup> Laura King, 'Tymophiy's Diary: A Boy Orphaned by War Chronicles His Fury and Grief' (*Los Angeles Times*, 5 August 2022) <<https://www.latimes.com/world-nation/story/2022-08-05/dreams-do-not-come-true-in-ukrainian-boys-war-time-diary-lament-and-loss>> accessed 26 February 2024.

<sup>35</sup> 'Beneath the Rubble: Documenting Devastation and Loss in Mariupol' (*Human Rights Watch*, 8 February 2024) <<https://www.hrw.org/feature/russia-ukraine-war-mariupol>> accessed 11 February 2024.

Finally, the main reason behind the increasing engagement of civilians and non-institutional investigators, such as NGOs, in the systematic process of war crimes documentation is that spontaneous investigation activities at the grassroots level urgently require institutional coordination and assistance from law enforcement agencies. Without such coordination, necessary training, and technical support, numerous investigations into international crimes initiated by the media, the OSINT community, civil society, and ‘first responders’ could potentially cause more damage to pre-trial proceedings and confusion among the public due to conflicting information coming from multiple ‘investigators’. To ensure clarity and more effective use of available resources required for the investigation of a continuously growing number of registered criminal cases, the chief prosecutor of the ICC, Karim Khan, is right to call ‘for an international ‘overarching’ strategy’ to coordinate efforts’ around documentation related to Ukraine to strengthen efficiencies and avoid causing inadvertent problems for each other’s investigations.’<sup>36</sup> The need to achieve a higher level of coordination has also received broad support among the participants of the Ukraine Accountability Conference, which aims to facilitate cooperation and map existing investigation activities conducted in Ukraine.<sup>37</sup> Most importantly, such a unique model of collaboration between global and domestic actors documenting crimes in Ukraine ‘is going to result in a big shift for international justice’,<sup>38</sup> which could potentially change the documentation of international crimes both in Ukraine and in many countries affected by armed conflicts.

### **3 Risks of new digital evidence – implications for victim-centred criminal justice**

This section will address various risks associated with the use of digital evidence, especially in relation to their possible negative impact on the standing of victims and witnesses in criminal proceedings during the ongoing Russia-Ukraine war. The purpose of this analysis is twofold. On the one hand, due to the growing reliance of national and international actors on grass-roots digital evidence and OSINT, it is important to highlight relevant weaknesses and limitations to avoid the potential misuse of such digital materials while documenting international crimes during armed conflicts. On the other hand, a thorough analysis of risks and pitfalls associated with the documentation of war crimes in Ukraine could contribute to a larger effort to develop clear standards and procedures for scrutinizing the integrity of digital evidence in international criminal justice. The safety and security of digital documenters, as well as risks of overdocumentation,

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<sup>36</sup> Alexa Koenig, ‘From “Capture to Courtroom”: Collaboration and the Digital Documentation of International Crimes in Ukraine’ (2022) 20 *Journal of International Criminal Justice*, p. 840.

<sup>37</sup> In particular, “[t]he promoted measures aim at aligning and combining interventions from national authorities and all relevant national and international organisations, in order to strengthen and expand the capacity and resources available for investigations in Ukraine.” Ministerie van Buitenlandse Zaken, ‘Ukraine Accountability Conference: A Step towards Justice - News Item - Government.NL’ (14 July 2022) <<https://www.government.nl/latest/news/2022/07/14/ukraine-accountability-conference>> accessed 11 February 2024.

<sup>38</sup> Priyanka Shankar ‘Going after War Crime Perpetrators – DW – 07/14/2022’ <<https://www.dw.com/en/icc-chief-calls-for-overarching-strategy-to-probe-war-crimes-in-ukraine/a-62476910>> accessed 11 February 2024.

disinformation, and violence escalation, will be instrumental in forging an understanding of the potential implications digital evidence and OSINT may have for victim-centred justice.

The growing importance and dependence on grass-roots digital evidence among the global and domestic actors involved in the international initiatives on war crimes documentation is the main reason why this new type of evidence should be subjected to thorough scrutiny in line with clear standards agreed by all stakeholders in the field of international criminal justice. In case the new digital evidence manifestly fails to meet the admissibility standards due to the manipulation and fabrication techniques used by malicious actors who want to compromise the credibility of digital evidence,<sup>39</sup> there must be a procedure in place to ‘red flag’ such compromised evidence before it misleads investigators, prosecutors, and courts that often do not have the required expertise or knowledge of digital forensic tools.

This will significantly help all actors involved in the documentation process agree on ‘the limits of such information’s potential use as evidence, including how to challenge the authenticity and reliability of that information.’<sup>40</sup> Other points of concern are related to the process of collecting digital evidence and potential risks to civilians who might be caught in actual physical hostilities and suffer harm while documenting war crimes.<sup>41</sup> While many experts mention overdocumentation as one of the risks that can potentially lead to the re-traumatization of victims interviewed by multiple investigators,<sup>42</sup> the uncontrolled dissemination of alleged ‘war crimes evidence’ and ‘self-incriminatory videos’ online could also lead to the escalation of violence, fuel conflicts through disinformation and compromise the safety of people who collected the digital evidence.<sup>43</sup>

These and other risks deserve serious consideration in light of the growing international importance of the new digital evidence. On the one hand, novel techniques such as a digital reconstruction of a crime scene<sup>44</sup> developed in line with clear principles of digital war crimes investigation and documentation could potentially address some of the challenges inherent in digital documentation. On the other hand, the rapidly evolving threat

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<sup>39</sup> Eliot Higgins, ‘How Open Source Evidence Was Upheld in a Human Rights Court’ (*bellingcat*, 28 March 2023) <<https://www.bellingcat.com/resources/2023/03/28/how-open-source-evidence-was-upheld-in-a-human-rights-court/>> accessed 25 February 2024.

<sup>40</sup> Koenig (n 1), p. 836. See also Koenig and Freeman (n 23).

<sup>41</sup> ‘Global Advisory Board on Digital Threats during Conflict’ <<https://www.icrc.org/en/document/global-advisory-board-digital-threats>> accessed 15 February 2024.

<sup>42</sup> Williams and Carle (n 16); Koenig, ‘From “Capture to Courtroom”’ (n 3).

<sup>43</sup> ‘Global Advisory Board on Digital Threats during Conflict’ (n 38).

<sup>44</sup> ‘SITU – Crime Scene: Bucha’ <<https://situ.nyc/research/projects/crime-scene-bucha>> accessed 23 February 2024.

of 'deep-fake technology'<sup>45</sup> and the growing role of AI in warfare<sup>46</sup> could pose new theoretical and practical problems<sup>47</sup> in both domestic and international legal discourse.

### 3.1 New digital evidence as a potential source of disinformation and conflict

Among the most serious potential risks of new digital evidence vis-à-vis the standing of victims and witnesses in criminal proceedings is its highly sensitive content that could spread disinformation, cause public outrage, and further escalate the conflict. This is the nature of evidence in any atrocity crimes investigation that it, as a rule, contains graphic content depicting torture, murder, and other forms of extreme violence that can shock and put under significant psychological stress even professional investigators trained to deal with such type of materials.<sup>48</sup> If the general public is exposed to such graphic content without any explanation of its context and the meaning of events depicted in publicized digital materials, the exposed digital content could undermine investigation efforts. In simple terms, any investigation into atrocities or war crimes documentation effort would be counterproductive if the discovered evidence provokes even more atrocities, the proliferation of conflict, and, thus, a higher number of victims affected by the conflict. Furthermore, digital evidence, which leads to further violence and conflict, will certainly undermine the credibility of those who collected it. Cyber materials with witness and victims' testimonies that could fuel war hostilities pose a question of whether the true intention of war crimes documenters is to ensure accountability for perpetrated crimes or rather to increase animosity between the two sides of the conflict.

The ICRC Global Advisory Board elaborates on this risk in its final report on digital threats during armed conflicts where '[t]he malicious use of digital technologies and the spreading of harmful information is increasingly destabilizing societies and aggravates vulnerabilities among the civilian population...far beyond the theatre of conflict, directly or indirectly causing damage, injury, or death to civilians, and further escalating conflicts...Civilians may unknowingly amplify harmful content.'<sup>49</sup> The spread of harmful information becomes especially relevant in the context of crimes related to sexual violence. Ukraine's Prosecutor General Andriy Kostin confirmed 'the...focus [of his office] on such crimes and the setting up of a specialized unit [of well-trained prosecutors] within the War Crimes Department to deal with war-related sexual violence', as quoted

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<sup>45</sup> Asher Flynn, Jonathan Clough and Talani Cooke, 'Disrupting and Preventing Deepfake Abuse: Exploring Criminal Law Responses to AI-Facilitated Abuse' in Anastasia Powell, Asher Flynn and Lisa Sugiura (eds), *The Palgrave Handbook of Gendered Violence and Technology* (Springer International Publishing 2021) <[https://doi.org/10.1007/978-3-030-83734-1\\_29](https://doi.org/10.1007/978-3-030-83734-1_29)> accessed 15 February 2024.

<sup>46</sup> Guido Acquaviva, 'Crimes without Humanity?: Artificial Intelligence, Meaningful Human Control, and International Criminal Law' [2023] *Journal of International Criminal Justice* mqad024.

<sup>47</sup> Yvonne McDermott, Alexa Koenig and Daragh Murray, 'Open Source Information's Blind Spot: Human and Machine Bias in International Criminal Investigations' (2021) 19 *Journal of International Criminal Justice* 85.

<sup>48</sup> Henk Sollie, Nicolien Kop and Martin C Euwema, 'Mental Resilience of Crime Scene Investigators: How Police Officers Perceive and Cope With the Impact of Demanding Work Situations' (2017) 44 *Criminal Justice and Behavior* 1580.

<sup>49</sup> 'Global Advisory Board on Digital Threats during Conflict' (n 38).

in Marchuk.<sup>50</sup> Because of the great public attention and importance of investigations and evidence about crimes related to sexual violence, attempts to disclose incomplete information about these crimes during the pre-trial stage could trigger disinformation campaigns aimed at undermining the credibility of ongoing criminal proceedings.

Furthermore, disclosing sensitive evidence to third parties without a court's authorization in pending cases could call into question the fairness of proceedings and integrity of ongoing investigations. An example of such pre-trial miscommunication on available evidence was the dismissal of Ukraine's Ombudswoman Lyudmila Denisova one year before the end of her term amid allegations that she 'had focused too much on graphically outlining cases of sexual violence for which she did not provide any evidence.'<sup>51</sup> While Denisova's dismissal has been followed by a disinformation campaign on several German and Russian websites claiming that Ukrainian officials merely invented cases of sexual violence perpetrated by Russian soldiers,<sup>52</sup> public disclosure of highly sensitive information about alleged crimes at the pre-trial stage could cast doubts on the efficiency of investigations, further traumatize victims, as well as set the ground for the dissemination of harmful information that can compromise the standing of victims and witnesses as participants and beneficiaries of criminal proceedings.

### 3.2 War crimes documentation and security of digital 'first responders'

The story of cyber documentation of war crimes is essentially a story of 'digital first responders', victims and witnesses, who are willing to collect evidence in the epicentre of military hostilities and provide testimonies that could potentially put their safety and security at risk. While this research focuses on the collection process of digital materials for war crimes documentation, the Ukrainian government has used various digital platforms to collect intelligence on the movement of Russian troops to improve Ukrainian air defence capabilities.<sup>53</sup> Although both forms of collecting digital intelligence for military and civilian purposes (war crimes documentation) may entail considerable risks for the involved civilian population, in the context of the International Humanitarian Law (IHL), 'civilians do not lose protection against attack if they are using digital means for any reason other than a direct participation in hostilities, such as in a personal capacity, as journalists, or for documenting crimes.'<sup>54</sup> This means that victims and witnesses as

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<sup>50</sup> Marchuk (n 24), p.793. "Face the Nation with Margaret Brennan," September 18, 2022: Cuellar, Kostin, Johnson, Pape - CBS News' (16 September 2022) <<https://www.cbsnews.com/news/face-the-nation-with-margaret-brennan-september-18-2022-cuellar-kostin-johnson-pape/>> accessed 26 February 2024.

<sup>51</sup> Sophie Timmermann, 'Reports of Sexual Violence in the War: Why the Ukrainian Parliament Dismissed Human Rights Chief Denisova' (*correctiv.org*, 11 August 2022) <<https://correctiv.org/fact-checking-en/2022/08/11/reports-of-sexual-violence-in-the-war-why-the-ukrainian-parliament-dismissed-human-rights-chief-denisova/?lang=en>> accessed 26 February 2024.

<sup>52</sup> *ibid.*

<sup>53</sup> 'ePPO - a Mobile Application for Informing about Cruise Missiles and Kamikaze Drones • Mezha.Media' (14 October 2022) <<https://mezha.media/en/2022/10/14/eppo-a-mobile-application-for-informing-about-cruise-missiles-and-kamikaze-drones/>> accessed 26 February 2024.

<sup>54</sup> See 'the final report of the ICRC Global Advisory Board on Digital Threats during Conflict' (n 35), p.11.

'digital first responders' should not become a target of a military attack when they collect digital materials on alleged war crimes. However, the reality of warfare on the ground often diverges from the requirements of international law.

In particular, the UN Human Rights Monitoring Mission in Ukraine 'continued to document additional cases of serious human rights violations from before the reporting period, confirming patterns previously identified, including killings of civilians, enforced disappearances and torture of civilians.'<sup>55</sup> According to independent reports, civilians, among whom were minors, became victims of enforced disappearances and torture in Ukraine, because Russian forces had a suspicion that the civilians were filming them and transmitting information to the Ukrainian authorities.<sup>56</sup> In an early war crimes case adjudicated by a Ukrainian court, Vadim Shishimarin<sup>57</sup> and four other Russian soldiers have been found guilty of the murder of an unarmed elderly civilian man who was talking on his phone on 28 February 2022. Marchuk mentions in her appraisal of the case that, although Shishimarin's 'life imprisonment was reduced to 15 years of imprisonment...[on appeal,] the Ukrainian judiciary has signalled that convicted war criminals would receive lengthy imprisonment terms.'<sup>58</sup> Although the Ukrainian court has not checked the victim's call log, which could have confirmed that he had a protected 'civilian status' and was not transmitting information to the Ukrainian army as the defendants in the case suspected, this case confirmed that a mere allegation of recording or sharing information was a sufficient reason for Russian troops to attack unarmed civilians in the area of military hostilities. Williams and Carle also indicate in their case study on modern atrocity crime documentation in Ukraine that '[the threat of] enforced disappearances and arbitrary detentions of [Ukrainian] civilians by Russia...would initially discourage victims and witnesses from coming forward in this context [of remote war crimes documentation].'<sup>59</sup> Even though Ukrainian authorities and NGOs provide security warnings and safety tips to civilians who decide to use their digital devices for the documentation of war crimes, additional consideration and analysis would be necessary to ascertain that the documentation effort does not put victims and witnesses' safety and security in a position of unnecessary or increased personal risk.

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<sup>55</sup> 'Head of UN Human Rights Monitoring Mission in Ukraine Presents the Latest Human Rights Report | United Nations in Ukraine' <<https://ukraine.un.org/en/248423-head-un-human-rights-monitoring-mission-ukraine-presents-latest-human-rights-report>, <https://ukraine.un.org/en/248423-head-un-human-rights-monitoring-mission-ukraine-presents-latest-human-rights-report>> accessed 26 February 2024.

<sup>56</sup> Daria Shulzhenko, "Torturing People Is Fun for Them." 16-Year-Old Ukrainian Recalls His 3 Months in Russian Captivity' (*The Kyiv Independent*, 5 August 2022) <<https://kyivindependent.com/torturing-people-is-fun-for-them-16-year-old-ukrainian-recalls-his-3-months-in-russian-captivity/>> accessed 26 February 2024. See similar cases of abducted minors accused of filming Russian troops in Halya Coynash, 'Russians Imprisoned 14-Year-Old Boy and Girls in Kherson and Mykolaiv Oblasts' (Human Rights in Ukraine) <<https://khpg.org/en/1608811472>> accessed 26 February 2024.

<sup>57</sup> See materials of the Vadim Shishimarin case in English available at "Ukraine War Crimes Trial Database by Megumi Ochi, at <https://alkaline-lantana-adf.notion.site/Ukraine-War-Crimes-Trial-Database-66fada9c1e9f416185ac180562814e86?pvs=4> (as of 26.02.2024)."

<sup>58</sup> Marchuk (n 27), p. 797.

<sup>59</sup> Williams and Carle (n 20), p.38.

### 3.3 Duplication of efforts and a risk of overdocumentation

Multiple investigators and documentation initiatives create confusion about cases that have been overdocumented and could also mislead investigators, prosecutors, and judges concerning actual evidence and witness statements available. Alexa Koenig mentions, for example, in her evaluation of the digital documentation of international crimes in Ukraine that the risk of overdocumentation could lead ‘to disclosure challenges (if prosecution teams don’t know what, exactly, they are holding) to logistical challenges related to being able to locate relevant pieces of data when needed...Overdocumentation can also create potential problems for privacy and legal process — for example, when competing stories enter the public record, or when prosecutors are unaware of the full scope of data they possess and thus struggle to meet disclosure obligations.’<sup>60</sup> The overdocumentation-related problems of disclosure, privacy, and competing testimonies could weaken the standing of witnesses and victims, whose voices could be lost in the ‘flood of evidence’.

At the same time, the ensuing ‘information noise’ could distract and mislead all participants in criminal proceedings. In other words, if malicious actors want to compromise a given pre-trial investigation of alleged war crimes, they can try to ‘overwhelm’ the court with alternative testimonies, witness statements, and evidence that would contradict each other and create an appearance of ‘plausible deniability’ for those who perpetrated the crimes. Representatives of Russia have employed a similar strategy in the case of *Ukraine and The Netherlands vs Russia*<sup>61</sup> before the European Court of Human Rights. In particular, lawyers representing the government of Russia attempted to undermine the credibility of the open-source evidence by presenting various contradicting versions of the same image.<sup>62</sup> While the Court has rejected the arguments presented by the representatives of Russia that judges relied in their conclusions on evidence purposely manipulated by the OSINT community, the ‘gaslighting’ approach used by Russia in this particular case to cause self-doubt and confusion among trial participants demonstrates that similar tactics can be employed in future trials that will involve a plethora of digital materials and sources of evidence.

## 4 Advantages of new digital evidence – implications for victim-centred criminal justice

The advantages of the new digital evidence could mitigate the above-mentioned risks of using this type of evidence. While it is necessary to determine the limits of using digital

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<sup>60</sup> Koenig (n 3), pp. 839-840. See also Jennifer Easterday, Jacqueline Geis, and Alexa Koenig, ‘Seven Essential Questions for Ethical War Crimes Documentation’ (*Human Rights Center*, 1 June 2022) <<https://medium.com/humanrightscenter/seven-essential-questions-for-ethical-war-crimes-documentation-6e891f498da6>> accessed 27 February 2024.

<sup>61</sup> *Ukraine and The Netherlands vs Russia* App nos. 8019/16, 43800/14 and 28525/20.

<sup>62</sup> An image of a Russian soldier and his military unit at the border with Ukraine. See detailed information in Higgins (n 36).

evidence in the documentation and prosecution of international crimes, digital evidence and OSINT could also strengthen the standing of victims and witnesses in criminal proceedings, due to the advantages they offer. The widespread availability and diversity of these digital materials could contribute to the establishment of a broad network of digital repositories that would increase accessibility, safety, and public visibility of evidence collected by victims and affected communities. A resulting virtual forum of evidence on core international crimes committed during various conflicts is, in turn, an important step toward public awareness, commemoration of victims, and non-repetition of past crimes. Documenters of international crimes eventually form their international digital communities to share information and best practices on using digital evidence at both the pre-trial and trial stages. Whether this cooperation continues in the form of training or standard setting, it contributes to the much-needed professionalization of grass-roots documentation communities and the harmonization of digital investigation strategies. Finally, regardless of its probative value and admissibility as evidence in court, digital materials empower victims and affected communities by magnifying their voices and describing the human dimension of crimes, which is often missing in official statistics and reports of public officials in charge of criminal proceedings.

#### 4.1 A network of digital repositories to strengthen accountability efforts

Unlike physical evidence, with its limited accessibility and visibility to the public, digital evidence provided by witnesses and victims will be available indefinitely in digital space to anyone who would like to access it. Similar investigative initiatives in the past have created a digital track record of core international crimes that would be impossible to deny or relativize in the future. These digital archives set the record straight and ‘bring the [digital reconstruction of] crime scene to national courtrooms globally.’<sup>63</sup> An example of such clear and convincing evidence would be visual investigation practices<sup>64</sup> used by the Investigative Team to Promote Accountability for Crimes Committed in Da’esh/ISIL (UNITAD).

According to Karim Asad Ahmad Khan, the Special Adviser Head of UNITAD to the Security Council in 2021, the investigative team has used “modern technology 3d laser scanners, pictures, photographs, and videos, so that a record can be created that will stand the test of time.” “The greater challenge, the greater imperative...is we do not forget, next week or next month.”<sup>65</sup> In a landmark decision of ‘The Prosecutor v. Ahmad Al Faqi Al Mahdi’,<sup>66</sup> the ICC has also relied on self-incriminatory statements, videos, and

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<sup>63</sup> ‘UNITAD Launches Multimedia Video Demonstrating Evidence of Crimes against Yazidi Community | Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (UNITAD)’ <<https://www.unitad.un.org/news/unitad-launches-multimedia-video-demonstrating-evidence-crimes-against-yazidi-community>> accessed 27 February 2024.

<sup>64</sup> *ibid.*

<sup>65</sup> ‘UNITAD Launches Multimedia Video Demonstrating Evidence of Crimes against Yazidi Community | Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (UNITAD)’ (n 61).

<sup>66</sup> *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Judgment and Sentence (27 September 2016).

other digital evidence that proved the involvement of jihadist Al Mahdi in the destruction of the United Nations Educational, Scientific and Cultural Organisation (UNESCO) heritage sites in Mali in 2012-2013.<sup>67</sup> In a similar case related to the conflict in Darfur ‘The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus’,<sup>68</sup> the ICC has indicted two military commanders based on satellite images from Google Earth and other open-source digital evidence.<sup>69</sup> At the national level, in the so-called Al-Khatib trial,<sup>70</sup> the Koblenz Higher Court in Germany has made a significant contribution to the international accountability for serious crimes committed in Syria by relying on photos and other open-source materials collected and authenticated by various civil society organisations with the help of witnesses.<sup>71</sup> These national and international efforts to strengthen accountability for international crimes can contribute to the ongoing expansion of a network of interconnected digital repositories of victims’ and witnesses’ testimonies that can set an example for future digital documentation initiatives.

#### 4.2 A network of documenters to support international criminal justice

We can now see an emerging network of institutional and non-institutional documenters and investigators that cooperate and learn from each other in the context of the war in Ukraine and armed conflicts in other countries. This is quite a transformative process for the system of international criminal justice because, for the first time in its history, institutional actors such as national law enforcement agencies, courts, and International Non-Governmental Organisations (iNGOs) are attempting to engage non-institutional actors in joint efforts to document international crimes. This cooperation occurs in the form of training like in the case of ‘[t]he NGO Witness [which] helps turn citizens into *de facto* reporters by teaching them how to film in a way that is more likely to be trusted by news media and judicial investigators’,<sup>72</sup> or the guidelines developed as a result of cooperation between Eurojust and the office of the ICC Prosecutor ‘to assist civil society organisations

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<sup>67</sup> See Harvard Law Review, Comment on ‘Prosecutor v. Ahmad Al Faqi Al Mahdi’ (*Harvard Law Review*, 10 May 2017) <<https://harvardlawreview.org/print/vol-130/prosecutor-v-ahmad-al-faqi-al-mahdi/>> accessed 27 February 2024.

<sup>68</sup> Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, Case no. ICC-02/05-03/09-124 (16 March 2011).

<sup>69</sup> ‘The Prosecutor v. Banda’ (*International Criminal Court Project*, 15 February 2024) <<https://www.aba-icc.org/cases/case/the-prosecutor-v-banda/>> accessed 27 February 2024.

<sup>70</sup> See the verdict in the al-Khatib trial before the Koblenz Higher Court. ‘„Al-Khatib“-Verfahren vor dem OLG Koblenz (2020/21)’ (*Philipps-Universität Marburg*) <<https://www.uni-marburg.de/de/icwc/dokumentation/monitoring/verfahren/syrien/verfahren-vor-dem-olg-koblenz-al-khatib-2020-21>> accessed 27 February 2024.

<sup>71</sup> ‘Q&A: First Syria State Torture Trial in Germany | Human Rights Watch’ (6 January 2022) <<https://www.hrw.org/news/2022/01/06/qa-first-syria-state-torture-trial-germany>> accessed 27 February 2024.

<sup>72</sup> Huet, ‘A Race against Time to Collect Digital Evidence of Ukraine War Crimes’ (n 9).

to collect and preserve information related to international crimes and human rights violations, which may become admissible evidence in court.<sup>73</sup> At the national level in Ukraine, the 5 AM Coalition is expanding its network of OSINT communities. It also develops a joint platform for Ukrainian and international organisations to access the results of collaborative documentation efforts.<sup>74</sup> Regardless of the mode of cooperation chosen between institutional actors, civil society, and first responders, these diverse initiatives contribute to the creation of a broader network of ‘citizen documenters’ who are highly motivated, ready to learn, and share the same goal with their institutional counterparts, namely to ensure accountability for grave international crimes.

The emergence of such alliances and networks can ultimately advance the cause of bringing perpetrators of international crimes to justice. This cooperation can be state-driven and voluntary in the format of continuous data collection through the e-governance App ‘Diia’, which was developed by the government of Ukraine and used by Ukrainian citizens to crowdsource evidence on crimes committed by Russian troops.<sup>75</sup> The networks of citizen documenters could also emerge thanks to specialised mobile Apps like the ‘EyeWitness to Atrocities’ application developed by LexisNexis Rule of Law Foundation for the secure transmission of verifiable footage of atrocities from eyewitnesses to experts who can categorize, index, verify and share it with responsible institutional investigative authorities.<sup>76</sup> The EyeWitness has contributed to expanding the network of non-institutional documenters in Ukraine when, during the first months of Russia’s full-scale invasion, its application ‘has seen a surge in use and has been used over 31,000 times to upload footage of potential war crimes from Ukraine since February 2022’.<sup>77</sup> Documentation networks can also facilitate cross-sectoral cooperation with tech companies like in the case of Meta (Facebook), which is developing a protocol to preserve conflict-related content with potential evidence of international crimes.<sup>78</sup> The Starling Lab, a research centre of Stanford University, which uses blockchain technology and cryptographic methods to document international crimes, is another example of an interdisciplinary academic re-

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<sup>73</sup> ‘Documenting International Crimes and Human Rights Violations for Criminal Accountability Purposes: Guidelines for Civil Society Organisations | Eurojust | European Union Agency for Criminal Justice Cooperation’ <<https://www.eurojust.europa.eu/publication/documenting-international-crimes-and-human-rights-violations>> accessed 28 February 2024.

<sup>74</sup> See ‘Ukraine 5 AM Coalition Summed up the Results of 2023 and Decided on Further priorities. Human Rights Centre Zmina. Centr Prav Ludyny ZMINA’ (31 January 2024) <<https://zmina.ua/en/event-en/ukraine-5-am-coalition-summed-up-the-results-of-2023-and-decided-on-further-priorities/>> accessed 8 February 2024.

<sup>75</sup> See the mobile App Diia, <<https://go.diia.app/>> accessed 8 February 2024.

<sup>76</sup> EyeWitness, ‘eyeWitness to Atrocities App’ <<https://www.eyewitness.global/our-work.html>> accessed 28 February 2024.

<sup>77</sup> Dylan Carter, the Brussels Times, ‘Mobile App Helps Lawyers Prosecute War Crimes’ <[https://www.brusselstimes.com/world-all-news/413308/mobile-app-helps-lawyers-prosecute-war-crimes?utm\\_source=pocket\\_reader](https://www.brusselstimes.com/world-all-news/413308/mobile-app-helps-lawyers-prosecute-war-crimes?utm_source=pocket_reader)> accessed 14 June 2023.

<sup>78</sup> Alexa Koenig, ‘Meta’s Oversight Board Recommends Major Advance in International Accountability’ (*Just Security*, 22 June 2023) <<https://www.justsecurity.org/87015/metasp-oversight-board-recommends-major-advance-in-international-accountability/>> accessed 28 February 2024.

search initiative tapping into a global network of non-institutional actors involved in accountability initiatives based on the active integration of victims and witnesses into international criminal justice processes.

### 4.3 Digital evidence and empowerment of affected communities

It is rather unfair that both national and international criminal justice systems sometimes disregard and downplay original stories narrated by victims and witnesses who seek justice with the help of institutional actors such as police, prosecutors, and judges. At the pre-trial stage, the dry language of police, investigative, and forensic reports provide a detailed technical account of perpetrated crimes. Still, it often fails to include the human dimension of a tragedy caused by a criminal act. It is especially true in the context of war crimes and crimes against humanity. No formal language, forensic technique, or thorough legal analysis of the elements of war crimes could ever deliver the dismay, horror, and despair of civilians who witnessed atrocities and survived military hostilities. At the same time, the rational, emotionally detached, and systemic approach of institutional investigators inadvertently normalizes crimes that eventually fall under standard crime categories and become mere figures in official crime statistics. Similar to a domestic criminal justice system, where conflict is a prerogative and 'property' of state institutions,<sup>79</sup> international armed conflicts, whose devastating impact mainly falls on the affected civilian population, become a property and exclusive responsibility of international organisations and diplomatic missions.

After an initial shock, the news of war crimes, atrocities, and the severity of armed conflicts do not necessarily cause wide moral outrage and condemnation. These crimes become a part of daily news reports on yet another human tragedy in a long list of previous wars and atrocities.<sup>80</sup> The direct involvement of victims and witnesses in the criminal justice process could change the usual state-driven institutional dynamics of resolving conflicts. Audio-visual materials on alleged war crimes collected with the help of communities affected by armed conflicts have the potential to bring these conflicts beyond constrained legal narratives and definitions by situating grave human rights violations within a broader context of human emotional expressions comprehensible for all. As we could observe in the grass-roots documentation conducted '[i]n Ukraine, both the testimony and the images we see of war crimes are powerful and persuasive.'<sup>81</sup> Koenig further explains the numerous advantages provided by the digital reconstruction of crime

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<sup>79</sup> Nils Christie, 'Conflicts as Property' (1977) 17 *The British Journal of Criminology* 1.

<sup>80</sup> Ronald C Kramer, 'Chapter 8 From Guernica to Hiroshima to Baghdad: The Normalization of the Terror Bombing of Civilians', *State Crime in the Global Age* (Willan 2010) 8.

<sup>81</sup> Ronald Niezen, 'Using Digital Evidence to Prosecute War Crimes' <<https://www.nationalmagazine.ca/en-ca/articles/law/opinion/2023/using-digital-evidence-to-prosecute-war-crimes>> accessed 28 February 2024.

scenes in the Al Mahdi<sup>82</sup> and Al Hasan<sup>83</sup> cases before ICC, as well as the latest technological break-through, which ‘now includes the possibility of introducing virtual reality, placing judges and other legal actors at the (simulated) centre of an atrocity.’<sup>84</sup> The possibility of seeing and experiencing (literally) the crime scene through the eyes of victims and witnesses who collected digital evidence would, hopefully, bring the exact technological change to domestic courtrooms globally. Marchuk mentions that in the war crime case of Aleksandr Bobykin and Aleksandr Ivanov,<sup>85</sup> sentenced by a Ukrainian court for shelling residential areas and destroying civilian infrastructure in the Kharkiv region of Ukraine, constant military hostilities in the affected settlements obstructed the investigation, and ‘no evidence was presented on the civilian casualties (if any) that ensued as a result of the attacks.’<sup>86</sup> An opportunity to use an interactive digital platform or a map of war crimes<sup>87</sup> created with the help of visual materials and testimonies from the affected civilian population could allow Ukrainian courts to assess crime scenes in the territories that are either occupied or affected by military operations.

## 5 Overcoming risks and amplifying advantages of new digital evidence

While there are justified concerns about some vulnerabilities of using new digital evidence, this research argues that it is possible to strengthen the standing of victims and witnesses in criminal proceedings by building upon strengths and learning from previous experiences of digital documentation initiatives. With regard to the risk of digital evidence as a potential source of harmful information, it is essential to consider that freedom of expression plays a vital role during ongoing armed conflicts. In its recommendation on societal resilience against harmful information, the ICRC Global Advisory Board advises to ‘uphold the right to freedom of expression...[d]uring armed conflict...[when] derogations and restrictions of this right must be narrowly construed and comply strictly with the principle of legality, necessity, and proportionality to protect legitimate objectives set out in international human rights law.’<sup>88</sup> At the same time, it is equally important to adhere to procedural rules and discovery procedures to avoid unauthorized disclosure of sensitive information about the pre-trial investigation, which can trigger the dissemination of information harmful to victims and witnesses. As digital initiatives for documenting war crimes in Ukraine and other countries teach us, the usual procedure<sup>89</sup> is to

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<sup>82</sup> Prosecutor v. Ahmad Al Faqi Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence (27 September 2016).

<sup>83</sup> Prosecutor v. Al Hassan Ag Abdoul Aziz, Case no. ICC-01/12-01/18.

<sup>84</sup> Koenig, ‘From “Capture to Courtroom”’ (n 3), p. 839.

<sup>85</sup> Aleksandr Bobykin and Aleksandr Ivanov, Kotelevskyy District Court in the Poltava Oblast, Case No. 535/244/22, 31 May 2022. See materials of the Bobykin and Ivanov case in English at ‘Ukraine War Crimes Trial Database by Megumi Ochi, at <https://alkaline-lantana-adf.notion.site/Ukraine-War-Crimes-Trial-Database-66fada9c1e9f416185ac180562814e86?pvs=4> (as of 26.02.2024).’

<sup>86</sup> Marchuk (n 27), p. 798.

<sup>87</sup> See ‘A map of Russian War Crimes’ (*Russian War Crimes*) <<https://www.russianwarcrimeshouse.org>> accessed 29 February 2024.

<sup>88</sup> ‘Global Advisory Board on Digital Threats during Conflict’ (n 39), p. 12.

<sup>89</sup> Koenig and Freeman (n 23).

cross-check and verify digital materials before building a case and engaging prosecution authorities and courts that can decide whether, when, and how to disclose the information. Unauthorized disclosure of unverified and contradictory information could be, on the contrary, a sign of disinformation campaigns, whose goal is to sow doubt, confuse the public, and undermine the credibility of evidence provided by witnesses and victims.

Although victims, witnesses, and civic documenters have different perspectives on the process of collecting digital evidence, all these groups belong to the same category of the so-called 'first responders', i.e., individuals who are often the first ones to access a crime scene during or moments after a crime happened. They also collect materials that could be further used by investigators, prosecutors, and judges. This research investigates the possibilities to strengthen the standing of both victims and witnesses in criminal proceedings. In this context, while various digital investigators naturally have different roles to play in the system of criminal justice, this paper asserts that all groups of digital documenters can be empowered through their more proactive participation in the investigation of crimes. At the same time, civic digital initiatives to document crimes are essential for victim-centred justice, because they present often-discarded views and experiences of communities directly affected by a conflict.

The security of digital documenters in the war zone must be at the forefront of any war crime documentation initiative if it wants to maintain the moral high ground of fighting international crimes without putting the lives of those who document them at unnecessary risk. In this context, it does not matter whether digital documenters are institutional or non-institutional (victims, witnesses, and other individual 'first responders'), they all face the risk of emotional burn-out and re-traumatization because of their experiences of documenting atrocity crimes. In the same vein, the risk of re-traumatization is higher for all these categories of documenters if they are subjected to repeated interviews where, on multiple occasions, they must explain evidence collected by them. While under the current rules of international law, civilians do not lose protection against military attack if they use digital means for documenting crimes,<sup>90</sup> state and non-state actors that engage the civilian population in documentation efforts are obliged to develop additional safeguards and security procedures that will protect such civilians during ongoing military hostilities. The risk of overdocumentation comes along with a potential risk of re-traumatization if multiple documenters interview the same victims and witnesses repeatedly.

To amplify the advantages of new digital evidence and to overcome the risks associated with its use, one can rely on the emerging international and domestic networks of non-institutional documenters, whose increasing coordination and cooperation with institutional actors could minimise the risk of re-traumatization through the shared access to common databases of testimonies available also to law enforcement, prosecutorial, and judicial authorities. Therefore, the main advantage of new digital evidence manifests itself in numerous networks that use and rely on it across various disciplines, professions,

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<sup>90</sup> 'Global Advisory Board on Digital Threats during Conflict' (n 39), p. 11.

and institutions. To amplify the advantages of digital evidence means to amplify the voices of people who joined these networks and devoted themselves to the documentation of international crimes. Because the involvement in such digital documentation efforts is based on a shared understanding of the importance and urgency of addressing core international crimes, the broad international networks of digital documenters already have sufficient knowledge, motivation, and diverse expertise necessary to overcome challenges, maximise the impact of e-evidence and empower those who use it in their work. The key is to support the proliferation of networks dealing with international crimes and their further integration into the existing mechanisms of collaboration among all actors in the field of international criminal justice.

The Ukrainian NGO 'Truth Hounds', for instance, has created a backup mirror database to share testimonies and materials of documented cases with the investigating authorities in real time.<sup>91</sup> I also entirely agree with Williams and Carle in their assessment that some risks associated with overdocumentation, i.e., 'witness impeachment' over contradicting testimonies, are exaggerated due to 'the very high number of perpetrators and victims...[and] the magnitude of atrocities...[which] has spurred the need for capable and knowledgeable documenters to fill the gaps left by the ICC and Ukrainian Office of the Prosecutor.'<sup>92</sup> Furthermore, as Williams and Carle point out, 'there are also other reasons to document atrocity crimes outside of preparing for trial, such as for creating a historical record, or providing a space for victim catharsis.'<sup>93</sup> Even if the probative value of potentially 'over-collected' evidence is not sufficient, it will remain a significant contribution to victim-centred criminal justice, because it can allow addressing issues of transitional justice, truth, and reconciliation<sup>94</sup> that cannot be immediately resolved within the ongoing trials on war crimes committed in Ukraine.

## 6 Conclusions

Considering the growing significance of digital evidence collected by 'digital first responders', victims, and witnesses, during the ongoing armed conflicts, the victim-centred approach is expected to play a more important role in domestic and international criminal proceedings. After analysing practices of domestic and international accountability efforts, applicable law, and relevant decisions of national and international tribunals, this research concludes that there is a strong rationale for involving the civilian population in the systemic efforts to document international crimes committed on the territory of Ukraine since the full-scale military invasion launched by Russia on 24 February 2022. First, the scope and intensity of crimes committed by Russian troops have overwhelmed Ukrainian authorities to the extent that the help of civil society and citizen

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<sup>91</sup> See 'Truth-Hounds' <<https://truth-hounds.org/en/homepage/>> accessed 28 February 2024.

<sup>92</sup> Williams and Carle (n 20), pp. 33, 34.

<sup>93</sup> Williams and Carle (n 20), pp. 33, 34.

<sup>94</sup> For the multitude of roles played by transitional criminal justice see Nandor Knust, 'Strafrecht Und Gacaca | Duncker & Humblot' <[https://www.duncker-humblot.de/buch/strafrecht-und-gacaca-9783428142392/?page\\_id=1](https://www.duncker-humblot.de/buch/strafrecht-und-gacaca-9783428142392/?page_id=1)> accessed 29 February 2024.

documenters was welcomed and appreciated by a great variety of actors involved in the accountability initiatives in Ukraine. Second, digital evidence ‘crowdsourced’ from citizens via specialised Apps and platforms was often the only effective way to learn about crimes committed in the areas of military hostilities and (de)-occupied territories. Finally, leaving multiple grass-roots documenters without institutional support and coordination could have jeopardised ongoing pre-trial proceedings and dispersed valuable resources necessary to deal with the continuously growing number of registered war crime cases in Ukraine.

All these considerations, combined with the increasing need for information-sharing between global and domestic actors documenting crimes in Ukraine, could mark a major shift towards a ‘victim-centred’ and ‘victim-narrated’ approach in international criminal justice. The need for greater involvement of victims and witnesses in international accountability efforts is especially relevant now in response to insecurities induced by the ongoing proliferation of armed conflicts.<sup>95</sup> There is a risk of unintentional ‘normalization’ of war and mass atrocity crimes through at times an overly formalistic approach in state-led criminal investigations and information gathering into war crimes. Furthermore, the unauthorised disclosure of sensitive evidence at a pre-trial stage can contribute to disseminating harmful information via disinformation campaigns that could undermine the credibility of testimony and evidence provided by victims and witnesses. This risk could be addressed by strict adherence to procedural rules and discovery procedures counterbalanced by the need to uphold the right to freedom of expression even during an armed conflict. At the same time, the personal security and safety of civilians documenting crimes in a war zone or occupied territories must become the highest priority for both state and non-state actors, whose accountability efforts could be compromised by the excessive risks imposed on non-institutional documenters. The possible overdocumentation and the associated risk of victims’ re-traumatization in criminal investigations could also be mitigated through new techniques like digital reconstruction of crime scenes as well as active information sharing between institutional and non-institutional stakeholders involved in the war crimes documentation. These and other steps towards victim-centred criminal justice could strengthen the standing of victims and witnesses as participants and beneficiaries in the criminal procedure.

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