



WITNESS (www.witness.org) uses the power of video to open the eyes of the world to human rights abuses. By partnering with local organizations around the globe, WITNESS empowers human rights defenders to use video as a tool to shine a light on those most affected by human rights violations, and to transform personal stories of abuse into powerful tools of justice. Since its founding in 1992, WITNESS has partnered with groups in more than 60 countries, bringing often unseen images, untold stories and seldom heard voices to the attention of key decision makers, the media, and the general public -- prompting grassroots activism, political engagement, and lasting change.

Video for Change

A Guide for Advocacy and Activism

Edited by
Sam Gregory, Gillian Caldwell,
Ronit Avni and Thomas Harding

'Video as Evidence' Chapter by Sukanya Pillay

Pluto Press LONDON • ANN ARBOR, MI in association with WITNESS

- Visit www.witness.org/store for more information on this book, or to purchase a bound copy
- Please contact us at videoadvocacy@witness.org to let us know how you are using this material
- Use the WITNESS forum at www.witness.org/forum to tell others about your own experiences using video for change.

First published 2005 by Pluto Press: 345 Archway Road, London N6 5AA and 839 Greene Street, Ann Arbor, MI 48106 www.plutobooks.com

Copyright © WITNESS, 2005

The right of the individual contributors to be identified as the authors of this work has been asserted by them in accordance with the Copyright, Designs and Patents Act 1988.

British Library Cataloguing in Publication Data

A catalogue record for this book is available from the British Library

ISBN 0 7453 2413 4 hardback

ISBN 0 7453 2412 6 paperback

Library of Congress Cataloging in Publication Data applied for

6

Video as Evidence

Sukanya Pillay

Video can be a powerful source of evidence for lawyers and advocates seeking to right wrongs and create change. You do not need to be a lawyer to film or use video for evidence. This chapter aims to help you think through what you will need to do in order to be effective, including how to think through the filming, editing, and submission of video for evidence.

Many will remember the footage of the Rodney King beating by policemen in Los Angeles. This footage was only 81 seconds in duration but its image was seared into people's minds, and rights groups everywhere demanded justice. Over the course of the 1990s, advocates and lawyers throughout the world developed the use of video footage as a powerful source of evidence.

Video evidence has been used in local and national courts, before internationally constituted tribunals such as the International Criminal Tribunals for Rwanda (ICTR) and the Former Yugoslavia (ICTY), before UN treaty bodies that monitor state compliance with international treaties, and before local nongovernmental people's tribunals such as the People's Tribunal on Food Security in Thailand.

But the use of video evidence has deeper roots than the Rodney King footage. Helen Lennon, a scholar of the use of video in war crimes tribunals, traces the use of film and contemporary video to advance rights causes back to the end of World War II. In 1945, the four Allied Occupational powers—the United States, the United Kingdom, the Union of Soviet Socialist Republics and France—established the International Military Tribunal at Nuremberg to prosecute top-level Nazi leaders. Each country introduced film evidence of alleged atrocities committed by the Nazi regime throughout Europe. Similarly, at the International Military Tribunal for the Far East, established and administered by General Douglas MacArthur of the US Army in 1946, admitted film evidence of alleged atrocities in East Asia. These precedents helped lay the groundwork for the contemporary

international war crimes tribunals for the former Yugoslavia and Rwanda (established by the UN Security Council in 1993 and 1994, respectively) to admit video evidence at trial on a regular basis. For example, in the current proceedings against Slobodan Milosevic, the prosecution indicated that it would introduce more than 600 video exhibits.

This chapter focuses on recording and/or using video evidence—both visual images and recorded testimony—in judicial or quasi-judicial bodies, as well as before advisory bodies and commissions. This video can be both video shot specifically as evidence, or found for use as evidence after the fact. Remember that in most cases you will not be submitting evidence directly, but via the prosecution or defense. The legal system will then determine whether your evidence is admissible and how much weight should be assigned to it.

Whenever you may be considering submitting your video evidence to a decision-maker, there are certain rules or themes you should consider to improve the chances that (i) the body will allow your video to be admitted and (ii) the body will be persuaded by your video. Of course, the standards and rules will vary across jurisdictions and venues. Where possible, we have aimed to provide you with a flavor of the sorts of rules that you may encounter. In some instances, we also tell you where you can find the rules that will apply to the court or tribunal before which you are appearing. But you must always ensure that you have obtained the rules of procedure and admissibility that pertain to your video evidence. For example, if you wish to admit video evidence to a tribunal in China, you must obtain any formal rules that govern that tribunal's proceedings; you should also consider how that tribunal has dealt with video evidence in earlier proceedings. We do however believe there are some general considerations that apply to all video evidence. We hope these will be useful as you record, collect, or submit your video evidence.

QUESTIONS TO ASK YOURSELF BEFORE USING VIDEO AS EVIDENCE

Advocates who are recording, collecting or submitting video evidence should consider the following questions.

For what are you using video evidence?

First, identify your reason for using video evidence. Once you know the purpose of the video evidence, you will be able to make better decisions about which segments of your footage to use, how best to

present the footage, how to attempt to corroborate or support the content of the footage, and how to take necessary steps to ensure goals for the evidence can be met. If you are collecting video footage for use as evidence, your camera operator must bear this in mind at every stage of recording footage. For example, is the video meant to show a specific incident to prove that a violation occurred? Is it intended to prove the identity of a specific accused person, or to establish a pattern of behavior and/or official acquiescence? Should the video support specific witness testimony or provide geographical and other information that will help clarify witness testimony?

The Rodney King case is an example that illustrates how video evidence may be employed for different uses. The footage in question depicted the beating of a black US citizen by a mob of white police officers. It was broadcast across North America, sparking widespread interest in what seemed to be a clear case of police brutality. However, the defense team relied on the evidence to present a case for justified assault, resulting in the acquittals that sparked the Los Angeles riots of 1992.¹ The same video evidence was used again on appeal, but this time the prosecution reaped the benefits of the footage. An enhanced version of the tape was employed, along with other supporting pieces of evidence, to solidify a guilty verdict for two of the officers involved.² The Rodney King case shows how video evidence can be employed in very different ways to achieve very different results. The key is to keep the specific goal in mind when presenting footage to a court, as it may suggest what additional evidentiary support may be required.

What is the intended audience for the footage?

There may be a number of options for the use of a video, and an advocate should strategically determine the best outlet for it. Even the most compelling evidence will be of little use if it does not reach the right audience. Keep in mind the answers to the first question, since the use to which you are going to put the footage may well determine your audience. Providing victims with redress for specific human rights violations, for example, may require that evidence be submitted to a judicial body. Educational initiatives, however, may be better served by reaching the widest audience, in which case releasing the footage through the media could be the best strategic option. For lawyers, the jurisdictional rules of decision-making bodies and past practice will help to determine the correct forum. For other advocates, the potential outlets for video are too varied to be canvassed here.

An advocate working for an NGO documenting patterns of state behavior on torture may wish to submit video evidence directly to the UN Committee Against Torture, the body that monitors state implementation of the UN Convention Against Torture. For more information on the accessibility of these specific human rights venues to video, consult the WITNESS Video for Change manual, online at <www.witness.org>.

How can the evidence be used?

The answer to this question depends on the forum in which the video evidence is to be presented. Different jurisdictions have specific rules regarding what evidence can be admitted, and when such evidence should be provided to the other side. An advocate may find that the procedural rules are dense or vague. A non-lawyer should contact lawyers involved in proceedings before the relevant body for advice. For example, in the case of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda (the ICTY and ICTR), it is possible to contact the respective offices of the prosecutor and defense attorneys.

What is the format of the footage?

Different jurisdictions will use and have access to different technology (i.e. MiniDV, VHS, DVD, Hi8 recording, and playback formats, able to play back either one or both of NTSC or PAL tapes). For further information on production formats, see Chapter 4 and the Appendices. You need to ensure that your video is in a format that can be viewed where you want it to be. The procedural rules may dictate whether you must provide originals, copies, or excerpts. And, as will be discussed further, some formats may be considered more reliable than others.

ALWAYS OBTAIN AND USE VIDEO EVIDENCE WITH THE UTMOST CAUTION

Always obtain and use video evidence with the utmost caution. You must be careful when *recording*, *storing*, and *using* video footage.

You or your camera operator may be taking risks recording footage. In some jurisdictions, human rights abusers may retaliate against people who take part in public demonstrations or who speak out against perpetrators. Governments, paramilitaries, or other authority figures may use your videotape to identify a witness or to identify

bystanders and to retaliate against these individuals. Take the utmost care to ensure that the privacy and anonymity of witnesses and bystanders are protected, especially where there is a chance of retaliation. For more details on how to do this, see Chapter 2.

All those involved in creating of video evidence, from the witness to the camera person, should be aware of the risks involved in making the video. They should be given the opportunity to provide informed consent to the risks. See Appendices III and IV for sample release forms that help explain and authorize the ways in which the footage may be used. Be sure this form is adapted as appropriate and translated into the relevant language before use. Whenever possible, consent for use of the footage should be obtained when it is shot. At the same time, you must be mindful that as circumstances change in a jurisdiction, the level of danger to the consenting witness may increase. As a result, you should try to verify a witness' willingness to have their previously recorded statement introduced into evidence. Remember that even if your witness is no longer available because he or she has been given safe harbour elsewhere, or has died, his or her family at home may still be subject to reprisal.

Considerations regarding witness anonymity in video testimony

You must always protect the anonymity of witnesses where necessary. This includes *every* situation where a witness requests anonymity before, during, or after having provided you with information.

However, where a witness has requested anonymity (which may be more common in human rights and war crimes cases owing to the increased possibility of reprisal), a judicial decision-maker may be reluctant to admit video evidence. In some cases it will be impossible or unproductive to use anonymous witnesses. For example, some judicial bodies will require that a witness be identified, or the identity or position of the witness may be integral to the person's evidence. In such circumstances, there may be ways to protect the identity of the witness to a certain extent. The ICTR and ICTY, for example, provided for "closed sessions" in which witnesses in need of protection were able to testify without revealing their identities. It is vital to find, be aware of, and make use of any mechanisms in place to protect vulnerable individuals.

In most jurisdictions, due process and fairness dictate that an accused is entitled to the right to cross-examine his or her accuser, so that he can directly confront a witness who is testifying against him. The cases highlighted below show how some courts view anonymous

testimony as being in conflict with those principles and thus may be reluctant to admit anonymous testimony. As video advocates, we must bear these decisions in mind. You may need corroborating evidence to secure a conviction in criminal cases if you are reliant on an anonymous witness.

The European Court of Human Rights (ECHR) considered the use of anonymous witness evidence in a case involving organized crime, *Kostovski vs The Netherlands*.³ Kostovski complained to the ECHR that his right to a fair trial, guaranteed in Article 6 of the European Convention on Human Rights, was violated when he was convicted based on anonymous witness statements read into evidence. The Netherlands argued that anonymous testimony should be admitted because witnesses in organized crime cases were often intimidated, or feared for their safety. The ECHR noted that it understood the importance of struggle against organized crime, and generally permits domestic governments and courts to decide on evidence admissibility issues. However, in *Kostovski*, the ECHR held that the reliance on anonymous statements to secure a conviction in this case “involved limitations on the rights of the defence which were irreconcilable” with the right to a fair trial.

Similarly, the Canadian Supreme Court has cautioned against using videotaped witness statements as the *sole* basis to convict. It cites the unknown circumstances, which may surround the taping of witness statements, the inability to cross-examine a witness, or the inability for a judge to physically view a witness’ demeanour before making a conclusion.⁴

LEGAL CATEGORIES OF VIDEO EVIDENCE: DIRECT AND CIRCUMSTANTIAL

Whatever legal jurisdiction you are working in, video evidence generally falls under one of two categories: (1) direct evidence or (2) circumstantial evidence. Each category is explained below, as is (3), refuting (or rebuttal) evidence.

Direct evidence

As the name suggests, you may have “direct” evidence that can be used to prove a particular event occurred or to prove an element of a crime. For example, a video showing X beating Y is direct evidence proving the allegation that Y was beaten by X. The evidence is called

“direct” evidence because it specifically establishes a key matter before a court.

Video evidence has been used as direct evidence in domestic jurisdictions. In both Canada and in the United States, video footage has been used as a “silent witness” in situations where there are no human eyewitnesses to a crime, but in which a video camera, such as a security or surveillance camera, records the crime. In *R vs Nikolovski*,⁵ for example, the video evidence was security camera footage that showed the accused robbing a store. The Supreme Court of Canada held that the video evidence was clear and compelling, so there was no need for any verbal or written corroborating evidence to support it—the accused could be found guilty on the basis of the video evidence alone.

In a case from the United States involving criminal drug charges, a video showed the number of marijuana plants being grown, and the US Court of Appeals concluded that a videotape provided direct evidence to prove the key issue in dispute (the number of plants), and no other evidence was required.

Circumstantial evidence

Unlike evidence that directly proves an incident or element of a crime, circumstantial evidence proves conditions that could reasonably lead to the inference that an incident occurred, or establish elements of a crime. For example, a videotape showing Y injured and X in an agitated state holding a weapon, may be used to prove that X was at the scene of the beating in an agitated state with a weapon. He therefore *could* have carried out the beating. By contrast, a film of the actual beating of Y by X would be direct evidence of the beating.

Circumstantial video evidence has been used by the International Criminal Tribunal for Rwanda (ICTR). In the *Rutaganda*⁶ case, the ICTR Chamber considered whether the accused, who was the second Vice President of the National Committee of the Interahamwe (the Youth Militia), would have been aware of the level of violence occurring under his command at the time of the Rwandan genocide. Video evidence was introduced specifically to refute statements by defendant George Rutaganda that he was unaware of the level of violence going on around him. The Chamber was shown a video of two women who were forced to kneel in the street and were executed. In the video, the women were struck so hard by a broom handle that their necks broke; the execution occurred in broad daylight in a crowded street. The video was used to establish that Rutaganda would

have likely been aware of this execution, or at least of other similar incidents. The fact that the violence was prevalent and open helped establish, at a minimum, the acquiescence of those in command.

In several jurisdictions, including the UK, the US,⁷ and Canada, “similar fact evidence” or “evidence of previously disreputable conduct,” may be used to demonstrate that an accused has in the past behaved in a manner similar to the allegation in issue. In each jurisdiction, it is not generally acceptable to submit evidence of prior crimes as proof of a current charge. However, it may be admissible when previous conduct can be shown to be strikingly similar to the conduct with which the accused is currently charged and thus is submitted as circumstantial evidence that he engaged in the same conduct again. The precise standards for admissibility of this type of evidence vary by jurisdiction. The domestic treatment of this type of circumstantial evidence may be instructive at the international level, or in other domestic jurisdictions. If you have videotape that shows a consistent pattern of behavior by an individual, an institution, or a state, you may consider submitting it as circumstantial evidence.

Circumstantial evidence can be extremely important, in two ways: as corroborative evidence, and as contextual evidence.

Corroborative evidence

Video can play an important role in corroborating, or supporting, verbal or written testimony. Video footage can corroborate witness testimony of violations that otherwise may be difficult for lawyers to prove, or even for judges to conceptualize. At the ICTY, in *Stakic*⁸ the II Trial Chamber relied upon corroborating video evidence to find that there was selective destruction of Muslim and Croat homes while Serb homes were left untouched. This pattern was made obvious by the video evidence submitted that Muslim and Croat homes were specifically targeted—this was not merely a biased perception of the testifying witnesses.

Corroborative evidence can be useful to strengthen a witness’ testimony in the face of skilled or aggressive cross-examination. A witness who has given testimony may be questioned aggressively by opposing counsel who may question the witness’ memory, or cast doubt on the witness’ motives during cross-examination. Corroborative evidence can help prove that a witness has accurately testified regarding events in issue, thus eliminating any suspicion that the witness is biased or simply incorrect.

Contextual or demonstrative evidence

In many international fora, the adjudicators are not from the location in which the relevant events occurred. As a result, contextual evidence may play an important role in painting a clear picture of what occurred. As the name suggests, contextual evidence provides a *context* for testimony or facts in issue. This evidence is not primarily used to prove or corroborate facts (though it can, see *Akayesu* below), but to help judges and adjudicators to understand the atmosphere, geographic location, or political climate in which events in issue may have occurred.

In the *Akayesu*⁹ case, the ICTR was shown footage of rivers clogged with bodies. This imagery did not prove that a specific event occurred, nor did it contribute to establishing elements of a specific allegation. However, it did provide a powerful visual image of an otherwise almost unimaginable scene. In short, the image demonstrated for the court just how bad the situation in Rwanda was. Indirectly, this evidence contributed to the credibility of witnesses who described equally horrific scenarios that an uninformed listener might believe to be exaggerated.

The ICTY has also admitted video to understand the context in which crimes may have occurred. In *Kunerac*,¹⁰ the ICTY was shown footage of Radovan Karadzic and Alija Izetbegovic in a parliamentary exchange. This evidence was used to explain the “ever more aggressive nationalist propaganda, a hardening of the ethnic divide and the organization of political rallies.” In the *Tadic* trial, the ICTY was shown footage of the region in which alleged crimes occurred in order to familiarize the court with the geography and layout of the areas.¹¹ In a similar effort to provide the court with context, the prosecution in *Kordic and Cerkez*,¹² was permitted to submit “dossiers” or “village binders” including video and video stills (i.e. photographic stills taken from the video footage) and transcripts relating to the conditions in, for example, Tulica village. Contextual video evidence was used extensively by the prosecutor to show specific damage to the village, and to assist witnesses who were describing the village.

Refuting (or rebuttal) evidence

This final category of evidence may involve either direct or circumstantial evidence—its distinguishing feature is its *use*. After a witness has testified, opposing counsel or the judge in some legal systems can ask questions and conduct a cross-examination. During

cross-examination, a witness' claims can be tested for accuracy and truthfulness. In this process, opposing counsel may use video evidence to contradict, *refute* (rebut), or undermine a witness' previous statements. Outside the human rights context, video evidence has commonly been used to refute other evidence in personal injury cases; for example, in these cases, the refuting video evidence has been used to rebut the plaintiff's testimony regarding the severity of injuries, or to show the plaintiff engaged in activities inconsistent with the claimed injury.¹³ For example, someone claims his back is injured and he can't work. But he is captured on video lifting his 5-year old child and jogging.

Video evidence may also be used to refute an allegation, a specific factual finding of a lower court, or another type of evidence.

USING VIDEO EVIDENCE: NAVIGATING THE RULES

You will also need to keep in mind the procedural requirements that also must be met before a court will admit a video in evidence. These requirements are found in procedural rules, qualitative criteria such as clarity, footage quality, organization, and availability of the original source material including raw footage. In this section, we will discuss the general issues you should keep in mind when considering whether and how to use your video footage as evidence.

Remember also that in most tribunals, only the prosecutor or defense attorney may submit evidence, including videotapes. Other individuals and organizations cannot do this. You will need to work with one of the parties and convince them to submit the video evidence.

Once you know the purpose you wish your video evidence to serve, research the likelihood that it will be admitted at the forum where you plan to appear. The forum's rules should guide your filming practices. If you want to use video footage that someone else took, analyze the guidelines and choose footage that is likely to be accepted as credible and relevant.

Here we can outline basic principles that may be instructive when using evidence in any forum. In the event that specific rules of evidence and/or procedure are available, it is important to consult those as well. Each forum generally has its own rules, some of which may be available online.

Whether you are appearing in court, before a tribunal, or even before a village council, customs and practices will determine how

evidence is presented to a fact-finder. Courts and tribunals will typically have these rules formally recorded, and the fact-finders or opposing counsel will require lawyers submitting evidence to follow these rules. For example, the ICTR and ICTY both have specific “Rules of Procedure and Evidence,” which set out how evidence is to be admitted, and have provisions relating to types of evidence such as witness testimony, expert testimony, proof of facts other than by oral evidence, evidence of a consistent pattern of conduct, evidence of sexual abuse etc., and what must be disclosed to the opposing side.

In general, once you have a copy of the relevant rules of procedure and evidence, look for the following:

- Rules specifically addressing video evidence. Many rules of evidence will not refer directly to video, in which case the general rules will apply. In either case, it is a good idea to look for any evidentiary rule that refers directly to video or visual evidence.
- Rules of evidence that specifically prohibit the use of video.
- Discretion given to adjudicators or prosecutors. It is important to know who possesses discretion with respect to admissibility of evidence.
- Any notice requirements. Many jurisdictions require parties to provide notice to the decision-maker (court or tribunal) and to opposing counsel, of the nature and content and other pertinent details regarding the evidence you wish to introduce. Failure to comply with notice requirements may prevent you from using otherwise admissible evidence.

It is crucial that you comply with the particular rules of procedure relating to video evidence. Before appearing in any forum, you must be sure to obtain a copy of the rules and comply with those rules. Remember that rules of evidence are subject to change, are often quite general, and tend to favor admission of evidence. The unwritten practices of the body may be as instructive as the rules themselves. Be sure to find out about customs and practices in a jurisdiction—for example, decisions to date by judges in the same forum, particularly if there are no written rules that specifically reference video.

USING VIDEO EVIDENCE: ADMISSIBILITY, AUTHENTICITY, AND WEIGHT

While the rules of evidence vary from one body to the next, there are two basic stages at which a decision maker will consider the use

of evidence—the admissibility stage, and the weighting or evaluation stage. The first stage will determine whether the evidence will be used *at all*, and the second will determine how much weight, or influence, the evidence will have in the proceeding.

Admissibility stage

In the absence of any rule that specifically permits or excludes evidence, the fact-finder will evaluate whether evidence should be admitted. This determination will generally involve whether the evidence is (1) relevant, including an evaluation of “probative value” against “prejudicial effect,” and (2) reliable.

Admissibility: Establishing relevance

The overriding concern in any debate about whether or not to admit evidence is *relevance*.

The party seeking to introduce any evidence must convince the adjudicator that the evidence is relevant to the issue before the court. Relevance can be established by showing that:

- The evidence relates directly to proving an issue in the case (direct evidence).
- The evidence helps to prove an issue in the case as it proves conditions that could reasonably lead to the inference that an incident occurred or elements of a crime exist (circumstantial evidence).

Admissibility stage: Assessing prejudicial impact

In making its determination whether evidence is relevant, a court will also evaluate whether its probative value outweighs its potential prejudicial effect. In this analysis, the fact-finder will balance two basic considerations:

- The *probative value* of the video evidence, which is an assessment of how useful the video is to prove the issue being tried.
- The *prejudicial effect*, which is an assessment of how damaging the evidence is, or if it unfairly plays on the fact-finder’s emotions.

Fact-finders such as a judge will generally apply the following considerations to determine the *probative value* of a piece of evidence, including video evidence:

- The strength of the evidence.
- The extent to which the evidence directly or indirectly contributes to findings or potential findings about facts at issue.

Determining the *prejudicial effect* of a piece of evidence is not an exact science. Visual evidence has the potential to be very persuasive or influential, which means that it also has the potential to be highly prejudicial. Video that merely provides “shock value,” or serves solely to besmirch the reputation of the accused/opposing side will not be admitted, because it will be considered prejudicial and, therefore, inadmissible.

The following criteria are generally used to determine the *prejudicial effect* of a piece of evidence:

- How damaging or discrediting is the evidence?
- To what extent does the evidence support an inference of guilt or fault solely on the basis of bad character as portrayed via the evidence submitted?
- To what extent may the evidence confuse issues?
- To what extent is the evidence sensational, inflammatory, or injurious?
- What is the ability to respond to the particular evidence?

To summarize, the more the evidence proves an element of the offense rather than provokes an emotional reaction the more likely it is to be admitted. If evidence proves very little, but could unfairly prejudice a fact-finder, it is unlikely to be admitted. Visual evidence, such as video, is frequently found not to be relevant if it is exceedingly graphic and does not shed much light on issues in the case.

Case study: Establishing relevance, a hypothetical case

In the context of a war crimes prosecution, a video depicting dead bodies at the site of a massacre is turned over to the prosecution. The massacre occurred in Plainville on August 1, 1972. The accused in the case is alleged to have participated in the massacre. The footage, taken shortly after the massacre took place, clearly shows the geographic location, provides a panoramic view of the scene, and contains several close-ups of many of the men, women, and children slain. The video shows the condition of the bodies, as well as their position

relative to other landmarks in Plainville. Some of the close-ups are very graphic, and likely to shock the average viewer. Clearly, as the footage shows the immediate aftermath of the massacre at issue, it is factually relevant, but is it overly prejudicial?

The answer depends on the issues in the case. Assume, for example, that the defense claims that (1) the massacre did not occur, or (2) the “massacre” was a military conflict, and did not involve civilians (i.e. women and children). In such circumstances, the video would probably be considered relevant as it contributes significantly to issues that must be decided.

If, however, the defense admits that a massacre of civilians occurred at Plainville on August 1, 1972, and the only fact at issue is the accused’s presence or participation, would the video still be relevant and admissible? In such circumstances the same video might not be admitted because it would contain images that could be very prejudicial to the accused (as he/she may be unfairly associated with the evidence), but would not shed light on the fact at issue.

Admissibility stage: Reliability, accuracy, and authentication

In addition to being relevant, evidence must be *reliable*. For video evidence to be reliable, you must be able to establish that the footage is authentic. In other words, the decision-maker will want to be sure that the evidence has not been fabricated, falsified, or tampered with, and that it has not been manipulated in a way that would mislead.

Here we review some of the typical issues that may arise regarding the authentication of video footage.

The reliability of a piece of evidence is a paramount consideration for a judicial decision-maker considering whether to admit that evidence into the proceedings. For video evidence to be considered reliable, the adjudicator must be able to trust what he or she sees. This is a particularly important analysis since video is subject to technological or other manipulation by the filmmaker, who may also, purposefully or inadvertently, film in a way that does not accurately depict a subject. How, then, can one establish reliability? There are a number of ways that reliability may be demonstrated. Depending on the circumstances, consider the following issues:

- Reliable technology
- Filming practices for reliability

- Source of the video
- Chain of custody
- Authentication of footage through an appropriate witness

Reliable technology Video is susceptible to digital manipulation, such as alteration or the insertion of computer-generated images that can falsify the depiction of events. There are a number of ways to help prove that an existing video is accurate. Witness authentication and careful treatment of the evidence after it is created can help to ensure that decision-makers trust the images they are shown. Some technological considerations can be addressed before and during filming (in the event that you are present or involved in the video documenting) that may aid efforts to establish reliability of the footage.

These considerations include, first, *choice of format*. There are growing concerns about the susceptibility of video evidence to technological manipulation with the increasing use of digital technology (analog formats remain more difficult to manipulate, and, therefore, more difficult to challenge). According to film expert Peter Thomas, digital images are, for now, still very difficult to fake convincingly. Dr Thomas cites the admission of phone taps on CD into the proceedings at the ICTY regarding Slobodan Milosevic, and asserts that, given the relative ease of technological manipulation of that evidence, digital video evidence is not likely to be excluded as a class from judicial proceedings.

A second consideration is *technological authentication*. In some circumstances, you may also be able to use a process called *digital watermarking* to show that the video has not been tampered or falsified.¹⁴ According to Hany Farid, an Assistant Professor in Computer Science and the Center for Cognitive Neuroscience at Dartmouth College, a digital watermark is an imperceptible identification code or signature integrated into a digital or analog medium (sound, image, or video). This technology has been used by copyright owners to identify illegally distributed material. If an imperceptible watermark is inserted into a video at the time of recording, then tampering can be detected by simply verifying that the watermark has been unchanged from the time of its recording. Although digital watermarking is versatile in that it can be used with digital or analog video (or with sound or photographic images), it is a process that is not available in all circumstances, because to insert a watermark at the time of recording requires a special-purpose

camera that inserts the watermark as the video is being recorded. There are also questions about the potential for users to remove or manipulate the watermark that have not yet fully been tested. Accordingly, we advise that you ensure you have a witness to testify to the authenticity of your video evidence.

A third consideration is *intentional alterations*. In some circumstances, you may intentionally alter your visual evidence to bring attention to a specific fact or issue. For example, you may enlarge a photographic still from a video recording to show a weapon held in an accused's hand. In such circumstances, draw the court's attention to the alteration, and provide the altered or enhanced copy along with the original, unaltered copy.

Filming practices for reliability Even the most scrupulous camera-person may inadvertently film in a way that calls the accuracy of an image into question. For example, a debate was sparked by 1992 footage of a Bosnian detention camp. An image of Bosnian internees taken by British journalists was shot from close-up, and it was, therefore, unclear whether the persons depicted were surrounded and in effect enclosed by the barbed wire in the shot, or were simply standing behind it. Any controversy could have easily been avoided had a wide shot been used to establish the scene before zooming in.

Actual and perceived impartiality are important considerations in an assessment of reliability. For video to be considered impartial, it must be free of bias to the extent possible. This means that the footage must be shot fairly, without attempts to mislead the audience. In *Tadic*, the ICTY addressed the issue of impartiality in video recordings of witness interviews. The ICTY concluded that defense counsel had manipulated video evidence by bribing individuals to testify to certain events on camera; he was held in contempt of court and found guilty of professional misconduct.¹⁵ Certainly, this is a most extreme case of an impartial recording, but it illustrates the importance of accurate videography.

Case study: The case of the provocative title

In 2000, the Columbia University School of Law Human Rights Clinic teamed up with WITNESS to document the discrimination against and deportation of individuals of Haitian descent residing in the Dominican Republic. Arturo Carrillo, of the Columbia Human Rights Clinic, explained:

In our case, we needed to do the substantive analysis. We needed to find what rules in Dominican law and their immigration regimes were being broken, as well as within the international system, including the Inter-American system. In our case, there are United Nations instruments that also apply.

They decided they would take their case to three different international institutions: the Inter-American Commission and Court, as well as the United Nations Human Rights Committee.

Two different versions of the video were made. The first video was 13 minutes long and in Spanish for the Inter-American Court. The second was prepared in English for the UN. In both videos they flashed the specific articles of law on screen, followed by testimony provided by specific individuals involved in the case (whose testimony was representative of wider patterns of violations), which corroborated claims of violation of each article. In both videos the articles referenced, along with the overall argument, directly paralleled a written submission that provided more substantive and detailed information on the case.

The first submission was called “El Apartheid Del Caribe: Caso #12.271 Ante La Corte Interamericana de Derechos Humanos” (Caribbean Apartheid: Case #12.271 Before the Inter-American Court of Human Rights). Arturo recognizes that:

Our original title was not strategically a good idea. We had decided to use something someone said from one of our interviews: Caribbean Apartheid... But as a title, this was an exaggeration, and when it came time to go to court, we had a bit of a scare, because we realized that the Dominican Republic could block the viewing of the video on the basis of its biased title!

In the end, the video was admitted in evidence, but Professor Carrillo advises that “in a legal setting the title should appear neutral, with a technical name.” The video was renamed and re-edited for the UN screening, “Mass Expulsions of Suspected Haitians in the Dominican Republic: Recent Episodes in a Recurring Practice.”

Presenting video in a court setting is like presenting a witness. It needs to appear neutral and credible. Arturo suggests, “make the video look as professional as possible. Use the tools to make it professional.” In this case, the video complemented a written submission. The power of the video helped use individual stories to connect with the viewer at an emotional level, and to substantiate the detailed legal argument that related to a broader set of abuses.

Arturo concluded the videos had more impact at the UN level than at the Inter-American Court:

There are such differences between a judicial hearing (the Inter-American Court) and a briefing over lunch (the UN). The more formal the procedure, the less space you'll have for this kind of video advocacy. But the biggest contribution a video can make is to put a human face on violations.

The following is a list of some considerations to keep in mind as you film to help ensure that your footage is reliable and impartial. Note that in some aspects, this filming style will differ from a style used to film for more traditional documentary where stopping the camera is relatively common, and where you are also focused on gathering cutaways and B-roll. Filmmakers often need to make a conscious decision to film in an evidentiary mode.

1. During recording, keep the camera running: If recording is stopped, you must have someone available to testify why filming ceased, and what occurred during the interruption, especially if you are filming live events critical to the case at hand, or an interview. Frequent pausing or stopping will detract from the perceived authenticity of the footage, and will also make it harder for a viewer to follow.
2. Time and date stamp: Whenever possible, have time and date stamped onto your footage. With most digital cameras, time and date are automatically recorded on the tape. If your video camera does not permit this, then record the time and date verbally and clearly at the outset of recording, along with a brief description of what you are doing.
3. Quality: Ensure that the video you are recording is the highest quality possible. Both picture and sound quality will be used to measure the accuracy of the depiction.
4. Include *all* relevant information: Do not assume that what you are shooting is obvious. Remember that the film may be viewed long after it is shot, and may be viewed by persons who have never traveled to the site. Include all relevant information in your video. When interviewing a witness in a situation that does not present security risks, have them state his or her name, position, location, and time of filming on camera. If filming a geographic location, it is helpful if you can include shots such as street signs

or landmarks that can help to identify the location, in addition to an on-camera verbal statement regarding location. If you are recording footage of an event (e.g. a demonstration), be sure to make sure you have sufficient wide shots of the entire area to give the viewer a sense of the entire relevant surroundings, to properly contextualize other detailed scenes you wish to highlight.

Note: Again, a camera operator must be cognizant of the dangers posed for witnesses and/or for people appearing in video footage. Although anonymous sources may lack the reliability of identified ones and therefore be less persuasive in court, potential risks should be identified and, whenever possible, reduced through careful filming. See discussion earlier in this chapter, and Chapter 2.

5. When interviewing a witness: Make sure the witness is allowed to speak freely and that you are not posing leading questions (questions that suggest a “correct” or specific response), although you can of course ask questions and can ask a witness to clarify an answer. An appropriate question would be: “Did you see anyone at the scene of the crime holding a knife?” A leading question would be: “Did you see Annabel at the scene of the crime holding the knife”—if there were no prior testimony regarding Annabel or her connection to the crime. If you pay attention to this when you are interviewing, the viewer will not feel manipulated, nor forced to see things from only one point of view. They will also have an opportunity to take in relevant contextual information that will enable a better decision regarding the relevance, probative value, and admissibility of the particular incident or event showcased by your video.

Source of the video Even in the absence of technological manipulation of evidence, all video evidence is susceptible to manipulation during the filming process. A biased camera operator or a filmmaker with a specific agenda may film in a way that does not accurately depict a given scene. It is important to be able to demonstrate the accuracy of the images.

When footage is recorded for purposes other than courtroom evidence, there can be a presumption that the video is unbiased, but this will depend on whether the source is considered to be unbiased. If you are using footage recorded by a third party with the intention of submitting it as evidence, provide the court with written information on the source, including the nature of the work done by the third party. If footage is recorded with the intention of creating evidence, e.g. an NGO recording a street demonstration to capture any evidence

of unlawful crowd control, you will have to ensure that the footage is reliable by showing impartiality and accuracy, which are both discussed below.

In proceedings before the ICTY and ICTR, considerable video evidence was obtained from journalists, and in some instances, from civilians. Courts can sometimes be more reluctant to accept video submissions from NGOs who may have an advocacy agenda. There is more work to be done with the judicial system to enhance the perceived and actual credibility of human rights documentors who do their work rigorously and professionally, notwithstanding the fact that it may ultimately be used to support an advocacy position.

Establishing chain of custody It is often appropriate, or even necessary, to have the person(s) involved in shooting a video testify as to its accuracy and to the circumstances surrounding filming. If the court chooses to question the authenticity of the footage, the source will be the first step and they may be called upon to testify and be cross-examined. If the source of the footage is deceased or unknown, you should provide a reconstruction to the extent possible, of how the footage (or a copy thereof), came into your possession. This is often referred to as a *chain of custody*, which shows who had access to the footage and can help to rebut any allegations of fabrication.

It is therefore important that you are able to detail for an adjudicator the whereabouts of the film *at all times*. In the event that alterations (i.e. editing) occurs, you must retain an unedited master copy, and ideally be able to produce it upon request, as well as to testify as to its whereabouts at all times to allay concerns that it may have been tampered with. You must know, and should limit, the number of people who have access to the master copy. If the master changes hands at any point (including providing raw footage to a duplication facility), you should be able to provide a detailed log of everyone who had access to the footage, i.e. indicating the *chain of possession*, which should clearly indicate the dates and each person in possession of the relevant evidence. And you may have to present the witnesses to support the authenticity and accuracy of the log.

Establishing the accuracy of video footage through a witness All evidence, including video evidence, must be introduced before a court or tribunal through the verbal (i.e. live testimony) or written testimony (i.e. a sworn affidavit) of a witness that attests to the authenticity and accuracy of the evidence. The process of establishing authenticity is described above. (Note: Some courts will not accept an affidavit and

instead will require real witness testimony, especially if there is an objection from the other side.)

Video evidence is most likely to be admitted as accurate, meaning that it depicts what actually happened, if it is introduced through the testimony of (1) the camera operator; (2) another person present at the shooting of the footage; or (3) an expert.

1. The camera operator: The camera operator can be a vital witness. As mentioned, you should have the camera operator available to the court for questioning, or if this is not possible, obtain a sworn affidavit from the camera operator.
2. Other persons with direct knowledge of the accuracy of the footage: Depending on the source of the footage and the reasons it was recorded, the court may take a more flexible approach in admitting video evidence. For example, at the ICTR in the *Rutaganda* decision, journalist Nick Hughes obtained footage from TV Rwanda and compiled an edited montage. The montage was introduced in evidence at the ICTR, through the testimony of Nick Hughes because the journalist at TV Rwanda who had originally recorded the footage could not be located. Because Hughes edited the footage, was present during many of the incidents depicted in the video, and could confirm that the video accurately depicted those incidents, Hughes's testimony was considered sufficient to establish the authenticity of the edited montage and it was admitted into evidence.

Quick tips: General reliability checklist

Use the following suggestions as a checklist to ensure you are recording and submitting the most reliable, accurate, authentic, and impartial video evidence possible:

- *Source information:* You must be able to identify the source of your video footage, meaning the person who did the recording and their institutional affiliation, if any, as well as the date, time and circumstances of the recording.
- *Technology used:* Take all the steps described in this chapter to ensure that you can prove that manipulation has not occurred. You should also be able to attest if necessary, to the type of equipment used to record the footage, and whether it was functioning properly.
- *Never edit the master:* Keep your master copy in a safe, climate-controlled environment (ideally with steady temperatures of 68° Fahrenheit and 30% humidity), and make a copy of the master (a "submaster") that you keep



in a separate, equally safe place and use for editing or screening when necessary. Ensure that the master copy is available to the court, should it be requested. Rules may require that the opposing side may control access to the original.

- *Chain of custody*: You must be able to establish the tape's whereabouts, and who had access to the footage at all times since the time it was recorded.
- *During recording, keep the camera running*: Especially when you are recording an interview or an event in progress, keep the camera running to avoid questions raised by lapses in time.
- *Time and date stamp*: Whenever possible, have time and date stamped onto your footage; if this is impossible, meticulous notes may be sufficient.
- *Quality*: Ensure that the video you are recording is the highest quality possible.
- *Relevant information*: Include all relevant information in your video.

3. **Expert testimony**: Expert testimony has been considered sufficient in many jurisdictions to introduce video evidence. A person with historical, geographical, or political expertise, for example, may be able to testify convincingly as to the accuracy of a video without actually having been present at filming. The general principle appears to be that authentication through a witness can occur provided that the witness has actual knowledge of the accuracy of the video's contents, either because he/she was present during recording, or because he/she has expertise recognized regarding the depicted events.

Weighting or evaluation stage

In many jurisdictions, once a court or tribunal has decided to admit video evidence into the proceedings, the fact-finder will have to determine how much *weight*, or influence, to give to the evidence. This will typically depend upon the legal use of your video evidence. Many of the same considerations that went into assessing whether the video was sufficiently reliable to be admitted into evidence at all will continue to be important as a judicial decision-maker decides what impact the evidence will have on the outcome.

There is a wide range of possible weightings that may be attributed to an individual piece of evidence:

- It may be of little weight at all, if the counsel submitting the evidence has been unable to establish a legal purpose for doing so (i.e. direct, circumstantial, corroborative, contextual, or refuting), or if problems with the evidence (such as clarity or

reliability) were insufficient to bar its use, but still enough to taint its effectiveness.

- Evidence may be considered determinative of a specific issue, particularly if it is viewed in corroboration with other evidence.

Remember that admissibility is not all that matters—getting the evidence admitted is merely a first step, albeit an important one. The “better” the evidence is—the clearer, the more obviously reliable, the more impartial—the better the chance that it will be given significant weight.

Case study: Admitted, but with no weight

Video evidence was admitted, but given little weight, in the case of *Gangaram Panday vs Suriname*.¹⁶ Asok Gangaram Panday died while in the custody of the military police in Suriname, and a petition was brought to the Inter-American Court on Human Rights. The petitioner took a videotape of the body in the morgue before it was cremated, and that tape was submitted by the Commission in support of allegations that the deceased was tortured while in detention.

The quality of the tape was poor, and it was taken approximately a week after the death, leading the forensic pathologist, whose report was also submitted by the Commission, to conclude that it was impossible to rely on it to arrive at a precise diagnosis. Both the quality of the tape and the fact that it was shot a week after the death contributed to the weight it was given.

We hope this chapter has helped demystify the ways in which you might be able to use your visual imagery as a powerful source of evidence in court or in another form of legal proceeding. Because of the range of possible venues around the world, we have tried to keep our commentary broad and inclusive, yet suggestive of some of the key practices to keep in mind when considering the use of video as evidence. Hopefully, this chapter has given you some general guidelines and some pointers as to where to go for the information you need to make the difference you have in mind. The bottom line is this: do not feel intimidated by the legal system. It is, in theory if not always in practice, designed to ensure and promote justice. We can all do our part to ensure that it lives up to its powerful potential.

NOTES

1. "The Rodney King Trials," *Seeing Is Believing*, at <<http://www.seeingisbelieving.ca/handicam/king/>>.
2. *United States of America vs Stacey C. Koon et al.*
3. *Kostovski vs The Netherlands*, Application number 00011454/85 (1989) ECHR,. available at <<http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=1214094604&Notice=0&Noticemode=&RelatedMode=0>>.
4. *R. vs C.C.F.* [1997] 3 S.C.R. 1183.
5. [1996] 3 S.C.R. 1197.
6. *The Prosecutor vs Georges Anderson Nderubumwe Rutaganda* (Rutaganda, Georges, ICTR 96-3).
7. See, for example, *Drew vs U.S.*, 33i F2d 85 (D.C. Cir. 1964).
8. *Prosecutor v. Milomir Stakic* (Case No. IT-97-24-T).
9. *The Prosecutor vs Jean-Paul Akayesu* (Case No. ICTR-96-4-T).
10. *The Prosecutor vs Kunarac et al.*, IT-96-23 and IT-96-23/1, "Foca" Trial Chamber II (2001) at para. 17, available at <<http://www.un.org/icty/foca/trialc2/judgement/index.htm>>.
11. *The Prosecutor vs Dusko Tadic* (IT-94-1), available at: <<http://www.un.org/icty/cases/jugemindex-e.htm>> and <<http://www.un.org/icty/tadic/trialc2/judgement/index.htm>>.
12. *The Prosecutor vs Dario Kordic and Mario Cerkez* (IT-95-14/2), available at <<http://www.un.org/icty/kordic/trialc/judgement/index.htm>>.
13. See, for example, *Vladimir Jamandilovski vs Telstra Corporation Limited*, No. NG22 of 1994 FED No. 1012/94 (Federal Court of Australia, New South Wales District Registry, General Division); *Amorgianos vs AMTRAK* 303 (2002) F.3d 256; 2002 U.S. App. 59 Fed. R. Serv. 3d, 639 Docket No. 01-7508 (U.S. Court of Appeals for the Second Circuit). Australian Administrative Appeals Tribunal (General Administrative Division) in *Ravi Wickramasinghe vs Comcare Australia*, No. A96/401 & A96/444 AAT No. 12465, Canberra, 15 18 July 1997 (hearing), 4 December 1997 (decision).
14. Information on digital watermarking provided by Hany Farid, an Assistant Professor in Computer Science and the Center for Cognitive Neuroscience at Dartmouth College, an expert in this field.
15. *Prosecutor vs Dusko Tadic*, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, IT-94-1 (2001), available at <<http://www.un.org/icty/tadic/appeal/vujin-e/index.htm>>.
16. Gangaram Panday Case, Judgment of January 21, 1994, Inter-American Court for Human Rights (Ser. C) No.16 (1994).