

# New Wine in Old Wineskins?

New problems in the use of electronic evidence in Human

Rights investigations and prosecutions

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## Overview\*

The rapid pace of innovation removes barriers to access and reinforces the influence of information and communications technology around the world. Expanding access to the internet, digital communications, social media, and “smartphone” mobile devices have revolutionized political dissent and the documentation of political conflict. Integrating these technologies into human rights documentation practices carries great promise for improving mechanisms for individual accountability, and for potentially stopping atrocities before they happen. Yet, as new media, digital technologies, and mobile devices increasingly become primary sources of documentation, the process of collecting and preserving evidence becomes increasingly important. The rapidly changing technological environment has tested the competence of parties to establish the reliability and authenticity of electronic evidence and render it admissible in court. As the judge noted in one high profile U.S. district court case in which electronic submissions from both parties were deemed inadmissible: “considering the significant costs associated with discovery of [electronic information], it makes little sense to go to all the bother and expense to get electronic information only to have it excluded from evidence or rejected from consideration . . . because the proponent cannot lay a sufficient foundation to get it admitted.”<sup>1</sup>

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<sup>1</sup> *Lorraine v. Markel*, 241 F.R.D. 534 (D. Md 2007)

The specific legal issues in the international arena are quite different from those raised in United States courtrooms, but some of the underlying concerns are the same. The threshold standard to admit evidence in international criminal courts is typically quite low, so admissibility, the key question in much of the legal discussion in the United States, is not really the crucial issue. Rather, the question is what evidentiary weight is this tribunal going to give the evidence. This, of course, turns on a closer inspection of the reliability of the evidence in question. For the sake of those incurring the high costs associated with documenting war crimes and other atrocities, it would be prudent to think early on about the information that should be preserved in order to make the documentation as complete, trustworthy and effective as possible.

In this paper we review the experience of various international tribunals and legal actors in using electronic evidence of human rights violations in judicial settings and in human rights investigations. We examine how electronic evidence (E-evidence) is evaluated by fact-finding bodies involved in human rights investigations and under the rules and jurisprudence of international courts.<sup>2</sup> We analyze both current formal rules and practical experiences in order to shed some light on how methods of collection and preservation, as well as authentication practices and chain of custody procedures, might facilitate the use of electronic documentation in the investigation, prosecution and trial of human rights violations.

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<sup>2</sup> It is now a largely accepted legal premise across various jurisdictions that computer printouts and copies are to be treated as originals. In addition, many courts now require all evidence to be converted and submitted in electronic form. This paper does not attend to issues regarding this shift from hard to soft copies; rather, it focuses on evidence that is electronically generated and born digital.

More specifically, the analysis is based on judicial rulings, the experiences of various actors in the international human rights legal community, and on an assessment of the rules and procedures for submitting and authenticating evidence in human rights cases at the following tribunals: the International Criminal Court (ICC), the ad hoc tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR respectively), the Special Court for Sierra Leone (SCSL), the Extraordinary Chamber of the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL). The latter three are known as hybrid courts, blending international and domestic features, rules and personnel. Their rules tend to be more idiosyncratic, informed by local practices, and so their experiences should be viewed with caution. We also look at how E-evidence impacts the investigatory process at the Office of the High Commissioner for Human Rights, a UN agency that, among other things, monitors and responds to serious violations of human rights.

Though procedural rules at the ICC and the ad hoc tribunals incorporate common law elements, Chambers are closer to the Civil Law model, in that they have wide discretion to make evidentiary determinations and do not follow technical rules with respect to admissibility. Although the ICC clarified several procedural rules left to judge-made case law in the ad hoc tribunals, and there are differences among all of these courts, in practice, rules and determinations regarding admissibility and authentication are essentially the same in that there is a fairly low bar to admit evidence and reliability is determined later. Since there are no specific rules for E-evidence, the discussion synthesizes feedback from legal officers and other staff<sup>3</sup> familiar with the procedures and jurisprudence. While past experiences may not precisely predict how this evidence will be treated in the future, they

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<sup>3</sup> See Appendix 1 for the interview questionnaire

help demonstrate how conventional rules have been applied to electronic submissions thus far, and may offer some lessons going forward, particularly in the context of future decisions at the ICC.

After discussing the rulings by these various judicial and institutional bodies, we explore in depth two examples. First, we consider a recent case before the ECCC, in which the trial court decided to exclude video evidence on grounds of insufficient authentication. At the ECCC, the rules of procedure and evidence are fashioned in accordance with Cambodian law, but they must also comply with the standards established in the International Covenant on Civil and Political Rights (ICCPR).<sup>4</sup> Given the court's structure, it is unclear how its jurisprudence will influence developments in international criminal law.<sup>5</sup> However, this case demonstrates potential limits to the current tendency, seen in the ICC and the ad hoc tribunals, to let all evidence in and evaluate its worth later. In brief, the court expresses a concern, perhaps shared by others, about the potentially boundless flood of information that might wash over a tribunal and the time that might be wasted in authenticating evidence whose foundation is not easily established.

Though this particular case involves old video evidence, cases involving newer forms of E-evidence implicate similar concerns. Widening access to high-speed communications and recording devices translates into more and more documentation of events; ever cheaper electronic memory and storage means more and more information is saved; and all this leads to ever greater usage of electronic documentation at trial. While it

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<sup>4</sup> The applicable procedural law at the ECCC must be consistent with "international standards of justice, fairness and due process of law" and the fair trial rights embodied in Articles 14 and 15 of the ICCPR.

<sup>5</sup> Robert Petit and Anees Ahmed, *A Review of the Jurisprudence of the Khmer Rouge Tribunal*, 8 NW. U. J. INT'L HUM. RTS. 165, 10 (2010)

is not clear that a backlash against the flood of E-evidence has yet begun, it seems reasonable to expect one at some point in the not too distant future.

Secondly, we discuss and analyze former UN Special Rapporteur Philip Alston's process in authenticating cell phone video footage depicting extrajudicial killings carried out by Sri Lankan military officers. The case sheds light on the methods that may be used in digital video authentication when there is virtually no solid information regarding the author or how, when and where the video was created. In addition, it demonstrates the utility of E-evidence not only to establish guilt or innocence inside the courtroom, but also to trigger and underpin an international political process that might lead to an official investigation of human rights violations.

Finally, although the focus is primarily on the international judicial landscape, we also briefly examine a recent wave of initiatives to adapt evidentiary rules and procedures to the influx of E-evidence in national courts. This experience, primarily in common law jurisdictions, denotes the growing recognition that conventional evidentiary rules regarding authenticity and chain of custody need to be reexamined before they can be applied to digital and electronic evidence. We examine these developments primarily to make the point that they should not be viewed as representative of the standards that must be met in international courts, which tend to draw more from civil law. However, some examples offer useful references for advocacy groups interested in developing a systematized process of documentation, and may be particularly valuable for distinguishing among different types of E-evidence.

This discussion paper is part of a larger report on the documentation of human rights commissioned by the Center for Research Libraries. The concerns of that report go

well beyond the scope of our discussion, and the use of electronic documentation in legal settings is only one component of a comprehensive effort to create a resource for advocacy groups and organizations involved in documenting human rights injustices.

While we provide an assessment of rules and practices at international courts, the accompanying jurisprudential analysis is necessarily limited by the scope of relevant case law (though interviews with prosecutors, defense lawyers and chamber officers provide valuable insight into the inner workings of these bodies). Ultimately, the specific basis for how a trial chamber will assign evidentiary weight cannot be ascertained under formal rules of procedure. Given the limits of the analysis, we do not claim to set out minimum standards required to get evidence into court or to offer precise predictions for how the ICC will evaluate different forms of E-evidence in future cases.

Further, there is a danger in attempting to articulate general rules of evidence or universal standards for generating and storing evidence in the human rights context. Our examination of rules and practices strongly suggests that any attempt to come up with one-size-fits-all rules may cause more harm than good. The following examples make this point:

- *Local political conditions dramatically affect the kind of information one can generate, store and provide for use in authenticating E-evidence.* Courts often like to see information on the author and circumstances of a recording in order to establish its authenticity and reliability. Yet, an insistence on storing complete author/context information to help with authentication later on may well endanger an author documenting street violence under a highly repressive regime.
- *The standards for evaluating whether the evidence was properly obtained depend upon who generated and secured the information.* Our research suggests that courts are

sensitive to the circumstances under which a recording was produced or acquired, and may exclude illegally obtained evidence. At the same time, courts seem to apply different standards to government wiretaps of human rights activists, or to evidence obtained in the course of violent raids, than to street recordings of government actors committing human rights abuses.

- *The requisite level of prior disclosure may vary depending on the nature of the subject, and depending on the nature of the author.* An insistence on disclosing the purpose and possible uses of a recording prior to securing the consent of affected parties is nonsensical when recording extrajudicial executions, but may be eminently sensible when recording witness statements, or when accepting donated recordings.
- *Different downstream uses suggest different standards for evaluating the usefulness of particular materials.* Like most civil law courts, international tribunals have relatively lax standards for admitting evidence, although they may later discount its probative value. Even so, a tribunal may decide to exclude evidence if there is no information about where, when, how or by whom it was produced. A Special Rapporteur, on the other hand, might feel eminently justified in using even highly questionable evidence in deciding to open an investigation into an alleged serious violation of human rights.

In light of these and similar difficulties, we do not purport to offer a blueprint for evidentiary rules, or a set of prescriptions that should be followed by human rights chroniclers across the board. Rather, it is our hope that this survey will provide some guidance to regional activists and organizations navigating a changing and often unpredictable terrain and assist them in producing and storing electronic documentation of human rights abuses, for possible use in judicial and quasi-judicial settings.



Electronic evidence comes in several forms, including electronic documents, digital photo, audio, and video recordings, web content, e-mail, content recorded on mobile phones, and more. With such variation in form and purpose, different types of evidence contain different technical indicators of reliability and authenticity. With photographs and video, for example, timestamps can establish the time footage was recorded, technical data can show that there has been no manipulation and can confirm the identity of the source. With e-mail, electronic signatures can be used to show authorship, and other technical data can evidence the source of the files. In other words, different forms of E-evidence implicate distinct indicators of authentication. Yet, procedural rules at international courts and tribunals offer little guidance on what must be shown to authenticate new forms of E-evidence. Courts do not specify rules for E-evidence at all, let alone carve out categorical distinctions. For the most part, courts apply standard evidentiary rules and procedures to electronic evidence and make determinations about admissibility and probative value on a case-by-case basis.

While new technologies like text messaging and cell phone videos are of particular interest in the context of current and future prosecutions<sup>6</sup>, case law at the international criminal courts involving such evidence is relatively sparse. It is unsurprising that there is little precedent for the treatment of E-evidence in venues like the ICTR, ICTY, and ECCC, where the relevant conflicts happened before there was such widespread access to mobile phones and other recording devices. Additionally, because ICC prosecutions can take place

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<sup>6</sup> WITNESS, *Cameras Everywhere: Current Challenges and Opportunities at the Intersection of Human Rights, Video, And Technology* (2011), <<http://www.witness.org/cameras-everywhere/report-2011>>

long after crimes are committed, it could be years before evidence is actually submitted and evaluated at trial. Still, there have been some evidentiary decisions involving digital records, audio, video, photographic exhibits, and web content, and current investigations and cases provide additional insight. We can expect the volume of such evidence to continue to grow in importance, when the ICC considers evidence from events happening today.

### **International Courts and Tribunals**

Given the speed at which most international tribunals operate, and the fact that even twenty years ago recording technology was not as ubiquitous as it is today, video and other forms of electronic evidence historically have played merely a supporting role in criminal prosecutions. The main evidence has almost always been direct witness testimony; video and other electronic evidence depicting atrocities might be used to back up “primary sources,” but it has rarely been the basis of a prosecution. In the new digital age, however, recording devices – primarily telephones – are more and more often also present at the scene of the crime, and may in time become central evidence at trial, or the impetus for an international investigation or prosecution.

Though most of the international tribunals have not yet grappled head on with the standards that should be applied to E-evidence, we can discern both the current and the likely future standards to be applied from current norms and practices in the international arena. The ad hoc tribunals and the ICC approach evidentiary questions, especially those concerning authenticity, reliability, and the distinction between admissibility and evidentiary weight in much the same way. In the following discussion we refer to particular

bodies and their holdings and rules, but it is clear that these rules or very similar ones would apply in nearly all international tribunals dealing with potential human rights violations.

Admissibility as a separate inquiry:

For purposes of admissibility, as for most other purposes, electronic evidence falls within the general category of “documentary evidence,” broadly defined by the ad hoc tribunals as covering “anything in which information of any kind has been recorded.”<sup>7</sup> The ultimate question for any piece of documentary evidence, whether electronic or otherwise, is whether it constitutes reliable proof of what it is offered to prove. Before coming to that, however, courts in the common law world typically carry out a relatively exacting scrutiny of documentary and other evidence in order to decide whether it should be admitted and submitted to the fact finder for consideration at all. International tribunals, which draw their rules of evidence primarily from the civil law world, in contrast, usually engage in a fundamentally different analysis at the admissibility stage. As a general rule, the practice in international tribunals, as in domestic courts in the civil law tradition, is to let most if not all the evidence in, and rely on the fact finder to separate the wheat from the chaff later.

This is true even when the authenticity of a document is in question. The question of authenticity of a document is logically prior to the question of reliability. An authentic document – i.e., not a forgery – may or may not be reliable proof of what it purports to show; and yet, if a document is not authentic it is hard to imagine how it could be helpful to a fact finder. As a result, the authenticity of a document or recording of any kind is often

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<sup>7</sup> *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits Into Evidence, Case No. ICTR-98-44-T, 25 January 2008, para. 5; ICTR, *Prosecutor v. Musema*, Judgment and Sentence (TC), Case No. ICTR-96-13-T, 27 January 2000, para. 53.

considered to be a precondition for its use in a judicial proceeding. The rules of international tribunals make it quite clear, however, that neither absolute proof of authenticity nor a high showing of reliability is a precondition to admissibility.

Under the Rules of Procedure and Evidence at the ICTR and ICTY, the Trial Chamber has discretion to admit “any relevant evidence it deems to have probative value.”<sup>8</sup> The SCSL Rules similarly provide that the Chamber may admit “any relevant evidence,” and the Internal Rules of the ECCC state that all evidence is admissible, although the Chamber may reject evidence that is “irrelevant or repetitious,” or “unsuitable to prove the facts it purports to prove.”<sup>9</sup> Similarly, at the ICC, the Chamber has the authority to assess freely all evidence submitted in order to determine its relevance or admissibility.<sup>10</sup> Article 69 of the ICC Statute, which mainly derived from Rule 89 at the ad hoc tribunals, elaborates further on the criteria for admissibility of evidence, indicating that the Court should take into account the probative value of evidence.<sup>11</sup>

Chambers are careful to distinguish the showing required for admissibility from the assessment of evidential value or weight, an issue to be decided at the end of the trial in light of all of the evidence.<sup>12</sup> At the admissibility stage, the assessment of relevance and probative value only requires that evidence be *prima facie* credible; that is, it must have sufficient indicia of reliability and authenticity to establish that it appears to show what it is

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<sup>8</sup> ICTY Rules of Procedure and Evidence, Rule 89(c), ICTR Rules of Procedure and Evidence, Rule 89(c)

<sup>9</sup> SCSL Rules of Procedure and Evidence, 89(c); ECCC Internal Rules, 87(1) (Hereafter “Rules”)

<sup>10</sup> Statute of the International Criminal Court (Hereafter “ICC Statute”), Art. 64.

<sup>11</sup> *Id.* art.69 para. 4

<sup>12</sup> *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, 19 November, 2010; *Prosecutor v. Karemera et al.*, Decision on Admission of Certain Exhibits (TC), para. 6; *Prosecutor v. Simba*, Decision on the Admission of Prosecution Exhibits 27 and 28 (TC), Case No. ICTR-01-76-T, 31 January 2005, para. 12.

offered to prove.<sup>13</sup> The Chamber retains the discretion and competence to request verification of authenticity of evidence obtained out of court, but “to require absolute proof of authenticity before it could be admitted would be to require a far more stringent test than the standard envisioned by 89(c).”<sup>14</sup>

Documentary evidence can be submitted either through a witness, or “from the bar” (i.e., on the motion of the attorney). The ICTY Chamber recently offered general guidelines for both options, noting however that they are not definitive, as all evidentiary determinations are made on a case-by-case basis. To submit evidence on motion of the attorney, moving parties must provide short descriptions of each document, clearly specify the relevance and probative value of each document, explain how they fit into one or both parties’ cases, and provide the indicators of authenticity.<sup>15</sup> For evidence admitted through a witness, the party tendering the document should generally do so through a witness who is either the author or who can speak to its origins and/or content.<sup>16</sup>

Depending on the nature of the evidence and manner in which it is introduced, indicia of reliability might be internal or external to the document. Internal indicators include ostensible authorship of the document, whether it appears to be an original, and elements of the document itself, such as signatures, stamps or the form of handwriting. But,

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<sup>13</sup> *Prosecutor v. Nyiramasuhuko and Ntahobali*, Decision on Pauline Nyiramasuhuko’s Appeal on the Admissibility of Evidence (AC), Case No. ICTR-98-42-AR73.2, 4 October 2004, para. 7; *Prosecutor v. Rutaganda*, Judgement (AC), Case No. ICTR-96-3-A, 26 May 2003; para. 33; *Prosecutor v. Delalic, Mucic, Delic, and Landzo*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber of 19 January 1998 for the Admissibility of Evidence (AC), Case No. IT-96-21, 4 March 1998.

<sup>14</sup> *Prosecutor v. Delalic, et al.*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber on, 19 January 1998 on the Admissibility of Evidence (AC), Case No. IT-96-21, 4 March 1998.

<sup>15</sup> *Prosecutor v. Karadzic and Mladic*, Decision on Guidelines for the Admission of Evidence through Witnesses, Case No. IT-95-5/18-T, 19 May 2010, para. 20

<sup>16</sup> *Id.* at para. 25

a document might also be supported by external evidence: testimony regarding the place from and manner in which the document was obtained, in conjunction with its chain of custody, a showing that its contents are supported by other evidence, expert testimony on its authenticity, and so on.<sup>17</sup> In either event, documentary evidence will most often be introduced through the testimony of someone who can somehow vouch for its authenticity and reliability.

The ICTY Chamber summed up the advantages afforded to evidence tendered through knowledgeable witnesses with the following: “It is desirable that documents are tendered for admission through witnesses who are able to comment on them. A party is not necessarily precluded from seeking the admission of a document even though it was not put to a witness with knowledge of the document (or its content) when that witness gave testimony in court. However, the failure to put the document to such a witness is relevant to the exercise of the Chamber's discretion to admit the document. Further, if the document is admitted, the failure is likely to limit the value of the document in evidence.”<sup>18</sup>

Case law and the insight of those with legal experience in these tribunals indicate a preference for external authenticators via witness testimony.<sup>19</sup> One prominent defense attorney with experience at the ECCC and the ICTY contended that internal indicators like time-stamps and other metadata are not deemed as reliable, unless the moving party can

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<sup>17</sup> *Prosecutor v. Karemera et al*, Decision on Prosecution’s Motion for Admission of Certain Exhibits into Evidence, Case No. ICTR-98-44-T; *Prosecutor v. Bagosora et al*, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, Case No. ICTR-98-41-T, 13 September 2004, para. 7

<sup>18</sup> *Prosecutor v. Dordevic*, Decision on Prosecution’s Oral Motion For Admission of Evidence Tendered Through Witness Philip Coo, Case No. IT-05-87/1-T, 1 October 2009.

<sup>19</sup> Interview with Michael G. Karnavas, Defense Lawyer at the ICTY and the ECCC, October 2011.

lay a foundation for how material is generally produced.<sup>20</sup> Thus, though it is well settled that documents need not be recognized by a witness to be deemed probative, evidence confirmed by witnesses is less susceptible to challenge.<sup>21</sup>

The *Milutinovic* trial at the ICTY offers an excellent example of this. In that case, the Chamber admitted the Prosecutor's submission of footage from the BBC and CNN, finding that its reliability had been sufficiently established.<sup>22</sup> To establish the reliability of different submissions of footage, the Prosecution called camera operators or the correspondent to testify to the authenticity of the footage and submitted a statement from the person in charge of the archives at the relevant news agency. The witness testimony was provided to ensure that there was a complete chain of custody and ultimately, challenges to the footage were unsuccessful.<sup>23</sup> Other decisions reveal that witness corroboration in the form of a sworn statement may serve as a sufficient external indicator of reliability in some circumstances.<sup>24</sup>

As reliability can be shown in a number of ways, evidence of authorship, authenticity, and in some cases even the source of a document is not absolutely necessary for admission. For instance, in the *Delalic* case at the ICTY, the Prosecution filed a motion to submit as evidence videos seized from the home of the accused and from a business with which the accused was associated. Two of the videos depicted scenes of the accused at the

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<sup>20</sup> *Id.*

<sup>21</sup> Interview with Anees Ahmed, Senior Legal Officer in Chambers at the ICTR, former staff, OTP at ECCC and ICTY, September 2011.

<sup>22</sup> *Id.*, and see *Prosecutor v. Milutinovic*, Decision on Prosecution Motion to Admit Documentary Evidence, Case No. IT-05-87-T, 10 October 2006.

<sup>23</sup> Ahmed, *supra* note 22.

<sup>24</sup> See *Prosecutor v. Karemera et al.*, Decision on the Prosecutor's Motion for Admission of I-P-32 Into Evidence Pursuant to Rule 89(c), Case No. 98-44-T, 02 September 2009, Chamber determines that a sworn witness statement corroborating documentary evidence was sufficient even though the witness was not called to testify and the statement was acquired 14 years after the evidence it served to corroborate.

prison camp he was alleged to have overseen, and three others depicted the accused engaged in an interview that originally aired on a Zagreb television program discussing the conflict.<sup>25</sup> The defense objected to the reliability of the videos, contending that their authorship and source was unknown. The chamber admitted the tapes on the basis of the content itself, finding that the accused individuals were “easily recognizable”, and that it appeared they were engaged in activities related to the conduct alleged in the indictment. Here, the content of the footage, combined with the circumstances in which the videos were found, was deemed sufficient to overcome “a certain remaining uncertainty concerning the source of the exhibits,” and thus to support admission into evidence.<sup>26</sup>

These cases clearly show the relaxed standard for admissibility at the ad hoc tribunals. Ultimately, *it is very unlikely that a court would decide to not admit something* into evidence because its authenticity has not been established, particularly if is introduced through a witness who can speak to chain of custody, corroborate its contents, or confirm its source.<sup>27</sup> However, the opposing party will frequently raise objections during subsequent judicial proceedings based on authenticity and other lack of foundation going to reliability.<sup>28</sup> One tribunal lawyer noted: “it is the duty of the defense” to question the authenticity of evidence and the “duty of the prosecution to refute” such objections.<sup>29</sup> To ensure that evidentiary challenges can be adequately refuted at trial, the ICTY Office of the Prosecutor advises that it is important to establish detailed procedures that emphasize an

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<sup>25</sup> *Prosecutor v. Delalic et al.*, Decision on Application of Defendant Zejnir Delalic for Leave to Appeal Against the Decision of the Trial Chamber on 19 January 1998 on the Admissibility of Evidence (AC), Case No. IT-96-21, 4 March 1998.

<sup>26</sup> *Id.*

<sup>27</sup> Ahmed, *supra* note 22.

<sup>28</sup> Interview with Michael Karnavas, *supra*

<sup>29</sup> Ahmed, *supra* note 22.



unbroken chain of custody. Any movements of evidence should be recorded and made readily accessible for use at trial.<sup>30</sup> Without some solid indicators, reliability and authenticity objections may succeed in excluding evidence; even if they do not, they might affect its evidentiary weight.

In a 2008 ICTR decision, the Chamber declined to admit video of the accused due to insufficient indicia of “authenticity.”<sup>31</sup> The Chamber found that the prosecution did not make a prima facie showing of authenticity because there was “no mention of date or author, neither on the video footage itself nor in the Prosecutor’s Motion. Furthermore there is no information about the source and chain of custody.”<sup>32</sup> The Chamber took issue with the fact that the footage appeared to be an extract and there was no explanation for whether the full footage was available, or who extracted the parts. However, one should not read a jurisprudential shift into this decision.<sup>33</sup> While the Court may have articulated its decision to exclude footage in response to the defense’s authenticity challenge, there were a series of other factors at issue, including the question of its relevance to charges alleged in the indictment. The video depicted the accused with the Prime Minister in exile in Zaire after the genocide, a fact not contained in the indictment. In the end, this decision is a reflection of the value of the evidence and of the court’s interest in limiting materials relevant to key issues in the case.

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<sup>30</sup> International Criminal Tribunal for the former Yugoslavia, ICTY Manual on Developed Practices, 2009, <[http://www.icty.org/x/file/About/Reports%20and%20Publications/manual\\_developed\\_practices/icty\\_manual\\_on\\_developed\\_practices.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf)>, at 18.

<sup>31</sup> *Prosecutor v. Karemera et al.*, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, Case No. ICTR-98-44-T, 25 January 2008.

<sup>32</sup> *Id.* at para 22.

<sup>33</sup> Ahmed, *supra* note 22.

The decision highlights the fact that, although the standard for admissibility is quite low, ultimately international courts have significant discretion in evidentiary decision-making that is largely unchecked.<sup>34</sup> The ad hoc criminal courts assert a right not to be “hindered by technicalities.”<sup>35</sup> One Appeals decision offered that relaxed evidentiary rules are necessary to “avoid sterile legal debate over admissibility so the court can concentrate on the pragmatic issue of whether there is a real risk that the defendant will not attend the trial or will harm others.”<sup>36</sup> The unique mandate and structure of the ad hoc tribunals and special courts is such that the classic concerns of common law criminal courts on the admissibility of evidence do not apply. Here, the fact finder is not a civilian jury, but a panel of professional judges fully capable of admitting evidence and rendering objective determinations about the probative value and authenticity at the end of the trial. The drafting history and compromise reached at the Rome Conference suggests a decision to eschew the technical formalities of the common law system in favor of the flexibilities afforded by the civil law system.<sup>37</sup>

There is concern, however, about the unfairness to the accused of introducing evidence that cannot adequately be tested at trial. At the ICTY, broad admissibility under Rule 89(c) is tempered by 89(d), a provision allowing courts to “exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.”<sup>38</sup> The ICTR

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<sup>34</sup> The Chamber of Appeals for the Hague Courts is very deferential to chamber decisions and interventions with regard to an evidentiary determination are rare.

<sup>35</sup> *Prosecutor v. Sanovic*, Decision on the Admissibility of Documents of the Defense of Enver Hadzihasanovic, Case No. IT-01-47-T, 22 June 2005, para 14.

<sup>36</sup> *Prosecutor v. Sam Hanga Norman et al.*, Fofana-Appeal against Decision Refusing Bail, Case No. 04-14-AR65, 11 March 2005, para. 26.

<sup>37</sup> *Prosecutor v. Bemba Gombo*, Decision on the Admission into Evidence of Materials Contained in the Prosecution’s List of Evidence, Case No. ICC-01/05-01/08, 19 November 2010, para 16.

<sup>38</sup> ICTY Rule 89(d)

does not have an equivalent provision, but in practice uses the same criteria in its exercise of discretion under 89(c). Such discretion is incorporated at the ICC as well under a very important provision. Article 69(4) of the ICC Statute articulates probative value and the prejudice that some evidence can “cause to a fair trial or to the fair evaluation of the testimony of a witness,” effectively combining 89(c) and (d) of the ad hoc tribunal rules. This is the doctrinal mechanism the ICC could use to fashion a more robust right to confrontation and stricter authentication requirements.

Courts may also exclude evidence that is cumulative or will waste the court’s time. The experience of the ECCC (more fully described below, in a case study) suggests a cautionary note about the exercise of this discretion. If documents seem to raise questions of authenticity that will require a great deal of the court’s time to adjudicate, the court may well decide to short-circuit the process and refuse admission, particularly if the evidence is not unique. This is especially true if, as in that case, the documents are submitted on the eve of trial. In the very first case tried in that court<sup>39</sup> the judges decided not to admit certain film clips of a notorious Khmer Rouge prison camp, made by the invading Vietnamese Army after it entered the camp. The defendant raised a series of objections related to reliability and authenticity that appear relatively groundless, but that would require at least some trial time to adjudicate. In deciding to exclude the tapes, the court emphasized that they were cumulative and perhaps unnecessary and that they would waste a great deal of the court’s time on reliability determinations..

Finally, it should be noted that even evidence that is not admitted because of inadequate reliability is not precluded from being admitted at a later stage in the trial if the

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<sup>39</sup> *Case 001*, ECCC, detailed in Section below.

party can meet the high threshold for reconsideration. Once that threshold is met and further foundation is provided, the excluded evidence can be readmitted through another witness, or on the basis of other material, and it will be subject to the same threshold determination for all evidence under Rule 89(c).<sup>40</sup>

In the following case study from the ECCC, which as we have noted has rules similar to those followed at the ad hoc tribunals and the ICC, the defense challenges a video submission on grounds of questionable reliability and authenticity, and the court ultimately excludes the evidence. We include an extensive discussion, in order to illustrate in a particular case both the general standard discussed above, and some of the limits of the otherwise loose standards on admissibility followed in international courts. The case highlights some of the pitfalls that might await poorly documented and supported E-evidence, particularly where it is cumulative or otherwise not deemed vital to issues in the indictment.

### **On the limits of admissibility: the Khmer Rouge Tribunal's decision in *Case 001***

Between April 17, 1975 and January 7, 1979, the Khmer Rouge, otherwise known as the Party of Democratic Kampuchea, dismantled Cambodian society and installed a brutally repressive regime. Under the Khmer Rouge, Cambodia's schools, banks and university facilities were destroyed. Children were separated from their parents. Former government officials, foreigners, the educated, ethnic minorities and imagined political opponents were

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<sup>40</sup> See e.g. *Prosecutor v. Delalic*, Decision on Application of Defendant Zejnil Delalic for Leave to Appeal Against the Decision of the Trial Chamber on 19 January 1998 on the Admissibility of Evidence (AC), Case No. IT-96-21, 4 March 1998.

imprisoned, tortured and often executed. By the time the Vietnamese put an end to the regime, approximately two million people had died.<sup>41</sup>

After more than two decades of impunity, the international community, at the request of the Cambodian government, decided to establish an international tribunal to address these atrocities. What resulted was the Extraordinary Chambers of the Courts of Cambodia (“ECCC”). The ECCC, a hybrid tribunal situated in Phnom Penh, employs Cambodian and international lawyers and uses Cambodian and international law.<sup>42</sup>

According to the ECCC Internal Rules (“Rules”), all evidence is, in principle, admissible.<sup>43</sup> The Rules provide only two grounds for the exclusion of evidence. First, the Trial Chamber may reject evidence if the evidence is irrelevant or repetitious, impossible to obtain within a reasonable time, unsuitable to prove the facts it purports to prove, not allowed under the law, intended to prolong the proceedings, or frivolous.<sup>44</sup> Second, recorded statements that are induced via coercion or threats may not be used.<sup>45</sup>

ECCC procedural rules follow Cambodian law,<sup>46</sup> which provides that in criminal cases all evidence is admissible,<sup>47</sup> a civil law principle followed in the other international tribunals previously discussed.<sup>48</sup> Here, like other international bodies, the focus is not on whether evidence is admissible, but on how much weight the fact-finder should give to the

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<sup>41</sup> BETH VAN SCHAACK AND RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT*, 2<sup>nd</sup> Edition 162-63 (2d ed. 2010).

<sup>42</sup> *Id.* at 164-65.

<sup>43</sup> Internal Rules of the ECCC, (Rev. 8), 87(1) (Aug. 12, 2011).

<sup>44</sup> Internal Rules of the ECCC, (Rev. 8), 87(3) (Aug. 12, 2011).

<sup>45</sup> Internal Rules of the ECCC, (Rev. 8), 21(3) (Aug. 12, 2011).

<sup>46</sup> Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of democratic Kampuchea (“Agreement”), art 12 (June 6, 2003); The Law on the Establishment of the Extraordinary Chambers as amended (“Establishment Law”), art 33new (Oct. 27, 2004).

<sup>47</sup> Cambodian Criminal Procedure Code, art 321 (2007).

<sup>48</sup> French Code of Criminal Procedure, arts 353, 427, 536.

evidence.<sup>49</sup> The inquiry that guides this decision is whether the evidence is reliable, authentic and probative to ascertaining the truth.

Like many ad hoc tribunals, the ECCC may look to other international tribunals for guidance in evidentiary matters.<sup>50</sup> However, it is only authorized to do so in the event that Cambodian law is absent or unclear on a specific issue. The rules at the ad hoc tribunals provide that each of those tribunals may admit “any relevant evidence which it deems to have probative value.”<sup>51</sup> The general principle is that, as in traditional civil law systems, questions related to the authenticity of a document, hearsay, lack of foundation, signature and relevance are related to the assessment of the weight of a document, not to its admissibility.<sup>52</sup> With the ECCC’s first trial, *Case 001*, however, the Tribunal excluded at least some evidence that would have embroiled the court in lengthy proceedings to determine how much weight to give a recording in light of questions of authenticity and reliability.

*Case 001* involved charges against Kaing Guek Eav, alias Duch, for massive human rights violations. Duch is the former chairman of the Khmer Rouge S-21 Security Center (“S-21”), a place where thousands of men and women were interrogated, tortured and killed.<sup>53</sup> Just a handful of survivors remained. The trial was based on extensive documentation, the testimony of survivors, and, in large part, on the testimony of Duch

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<sup>49</sup> ECCC, *Case 002*, Decision on the Admissibility of Material on the Case File as Evidence, Case No. 002/19-09-2007/ECCC/TC, May 26, 2009, paras. 3, 5-7.

<sup>50</sup> Establishment Law, art 33new (holding that “guidance may be sought in procedural rules established at the international level” where Cambodian procedure does not “deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards”).

<sup>51</sup> See ICTY Rule 89(c); ICTR Rule 89(c).

<sup>52</sup> See e.g. *Prosecutor v. Brdanin and Talic*, Order on the Standards Governing The Admission of Evidence, Case No. IT-99-36-T, 15 February 2002, para. 13

<sup>53</sup> VAN SCHAACK AND SLYE, at 165.

himself, who was (oddly) appointed by the court as an expert on the authenticity of the documents involved.

Shortly before the initial hearing commenced, the Co-Prosecutors were given a film that depicted S-21. The film contained images of S-21 taken in the immediate aftermath of its discovery by Vietnamese forces on or about January 10, 1979. The Co-Prosecutors wished to introduce two segments. The first segment included images of the S-21 central compound and images of decapitated corpses chained to the beds. The second segment depicted Vietnamese soldiers removing two live infants and two live children from the S-21 compound. The Co-Prosecutors wanted to use the film to corroborate two points: 1) that children of arrested Khmer Rouge cadre were also brought to S-21 and (2) that conditions in S-21 were inhumane as exemplified by the images of the decapitated corpses and the malnourished children.<sup>54</sup>

The court heard the testimony of Norng Chanphal, a child survivor of S-21 who was able to identify both himself and his younger brother in the film, and acknowledged that the film segments were “relevant and probative since it is the only film footage known to have been taken of S-21 soon after its use . . .”<sup>55</sup> Nevertheless, the Trial Chamber ultimately rejected the film.<sup>56</sup> The court based its rejection in large part on the fact that it found the footage to be repetitious in substance – the court stated, for example, that it already knew children were kept at S-21, and the accused had already conceded that conditions were inhumane inside S-21. In the court’s opinion, the footage would therefore have little impact

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<sup>54</sup> ECCC, *Case 001*, Decision on the Vietnamese Film Footage Film by the Co-Prosecutors and on Witnesses CP3/3/2 and CP3/3/3, Case No. 001/18-07-2007/ECCC/TC, July 29, 2009, para. 3.

<sup>55</sup> *Id.* at para. 1.

<sup>56</sup> *Id.* at para. 8.

on the trial.<sup>57</sup> Furthermore, the Trial Chamber held that the “verification of the reliability of [the] footage, a pre-condition for its use as evidence, [would] unlikely be obtained within a reasonable time.”<sup>58</sup> The Trial Chamber’s decision does not appear to be entirely unsound: the film footage was in fact repetitive, a consideration that allows the Trial Chamber to exclude evidence under the rules.<sup>59</sup>

Though the Trial Chamber initially deemed the film footage admissible, it came to a different determination based on specific allegations set forth by the defense, many of which appear baseless.<sup>60</sup> Specifically, the defense argued (the following is a partial quote from the court’s decision, with some modifications made for legibility):

- First, the films are political in nature and present a distorted view of reality. In concrete terms, the Radio France Internationale (RFI) report, which was aired in Khmer on 4 February 2009, quoted Francois Ponchaud<sup>61</sup> as saying: “the films made by the Vietnamese are political.”
- Second, the entrance to S-21 is now situated to the east along Street 113, but in the film sequences, it was situated to the west, along Street 131.
- Moreover, the films sequences feature a sign (situated to the west), which reads: “école primaire de Tuol Sleng”. Now, with the entrance situated to the east, there is no sign above the front gate. This is therefore a misrepresentation.
- Third, on 2 or 3 January 1979, NUON Chea ordered S-21 to transfer all the detainees to Cheung Ek.<sup>62</sup>
- Duch asked to keep the detainees from Unit 8 for interrogation; there were four young combatants. The interrogators killed all four of them before leaving Office S-21, on 7 January 1979. This proves that there were no other corpses besides the four that the S-21 staff was not able to bury before they fled. However, the film sequences show more than four corpses and not those of the combatants from Unit 8. Therefore, according to Duch, this is fabricated.

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<sup>57</sup> *Id.* at paras. 4-5 (citing Internal Rule 87(3)(a)).

<sup>58</sup> *Id.* at para. 8 (citing Internal Rule 87(3)(b)).

<sup>59</sup> *See e.g.* Internal Rules of the ECCC, (Rev. 8), 87(3) (Aug. 12, 2011).

<sup>60</sup> ECCC, *Case 001*, Decision on Admissibility of New Materials and Direction to the Parties, No. 001/18-07-2007/ECCC/TC, Mar. 10, 2009, paras. 13 and 16.

<sup>61</sup> Ponchaud was a Catholic priest who lived in Cambodia during the Khmer Rouge regime and wrote a book about the experience called *Year Zero*.

<sup>62</sup> A killing field where thousands of S-21 prisoners were taken and killed.



- Fourth, everyone who was being held at S-21 was executed on 2 or 3 January 1979. Moreover, no one was taken there after 3 January 1979. So this only goes to show that there were no children by the time the Vietnamese forces arrived.<sup>63</sup>
- Further, the films feature a building with hammocks for children . . . It was not the policy of Office S-21 to provide nylon hammocks for children.
- Lastly, victims, both children and adults, were detained under harsh conditions at S-21, and were deprived of food, among other things. And yet, the children and infants featured in the films appear to be in better health than these inhumane conditions would warrant.<sup>64</sup>

What is important to note is that despite the questionable nature of some of the defense's allegations, they were enough to make the Trial Chamber reconsider its decision to admit the footage. While the Trial Chamber's decision seems to be more about the repetitive nature of the footage than about its lack of authenticity, it nevertheless held that in order to admit the footage an authenticity determination would be necessary. Moreover, the Trial Chamber concluded that, in light of the cumulative nature of the evidence, it could not justify the time and expense involved in exploring the film's authenticity and reliability. The video was excluded primarily because the court did not want to go through the time consuming process of authenticating content already established by other reliable evidence; if the evidence had been necessary to establish any critical points, it would almost certainly have been admitted. While this suggests a payoff for defense efforts to raise authenticity questions, courts would almost certainly be willing to expend more time ascertaining the reliability of *unique evidence* that is important for *key questions at trial*.<sup>65</sup>

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<sup>63</sup> One of the children depicted in this film, Norng Chanphal, testified at Duch's trial and discussed the arrival of the Vietnamese to S-21.

<sup>64</sup> ECCC, *Case 001*, Submission of the Co-lawyers for Kaing Guek Eav alias Duch Concerning the Two Sequences of Film Footage Presented by the Co-Prosecutors, Case No. 001/18-07-2007-ECCC/TC, 24 March 2009, paras 4-14.

<sup>65</sup> One complicating factor is that the film footage was submitted late. While the Trial Chamber found that Prosecutors complied with the requirements for submitting late evidence, it is possible that the fact that the footage was submitted late led the Trial Chamber to conclude that its admission would cause a significant delay, and thus to exclude the evidence.

The ECCC's second trial, *Case 002*, is scheduled to begin in late 2011. Rather than having one accused, *Case 002* has four defendants with four separate defense teams. Given the number of defense counsel as well as the amount of evidence, it is likely that the defense will raise similar issues with respect to the admissibility of evidence. As of now, Prosecutors are planning to use over 350 video recordings, including a number of documentary films by established non-governmental organizations, independent filmmakers, foreign governments and the Khmer Rouge. In addition, Prosecutors have submitted footage from the same Vietnamese film excluded in *Case 001*.<sup>66</sup> Already, the lawyers for the defendants have raised concerns regarding the authenticity of much of the evidence. The Co-Lawyers for Nuon Chea have even cited the United States' Federal Rules of Evidence, Rule 901, and suggested the Trial Chamber use a far more stringent standard to determine the authenticity and admissibility of the evidence.<sup>67</sup>

It is not clear how the Trial Chamber will rule, in part because given the scope and complexity of *Case 002*, the material may be deemed important and not repetitive. What is clear is that given the defense's success in *Case 001*, the defense teams in *Case 002* will most likely challenge the use of certain evidence in hopes of having evidence excluded on similar grounds.

This episode has ambiguous implications for organizations seeking to safeguard evidence for use in later legal proceedings. On one hand, evidence of all sorts is technically admissible, but the more crisp and simple the authenticity and reliability determination, the more likely the courts are to find that the evidence is worth the cost of establishing its

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<sup>66</sup> Rule 80 Document List (Have not heard if this is public yet)

<sup>67</sup> NUON Chea, 16<sup>th</sup> and 17<sup>th</sup> Investigative Requests. (Not sure if public yet).

probative value. If the court feels it must conduct a second trial, with witnesses and experts and outside evidence just to decide how much weight to give cumulative or repetitive evidence, then it may decide not to bother with it at all. On the other hand, the episode suggests that prosecutors will seek to use evidence regardless of its origin and original purpose, and that they might be able to do so, if it is sufficiently important to justify the cost of a trustworthiness inquiry.

Perhaps the greatest challenge to the use of documentary evidence is the problem of hearsay, and the issues it raises for the defendant's ability to fairly defend him or herself. We turn to this problem next.

#### On the Admissibility of Hearsay

Hearsay is essentially any unsworn statement made outside the courtroom offered to prove the truth of the matter asserted, including any declarations made in recordings of any kind. It would also include, of course, authenticating statements made by the authors of such recordings as to how, when, and where the recording was made, or how it was kept. Most common law jurisdictions prohibit the use of hearsay at trial based on the principle that the person making the statement should be present in court so that he or she may be cross-examined by the defendant, and his or her demeanor evaluated by the fact-finder. As previously discussed, in international criminal courts and tribunals, which incorporate many civil law traditions,<sup>68</sup> specific questions of credibility and authenticity are not determined at the admissibility stage, but later in the trial in light of all of the evidence

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<sup>68</sup> The rule against hearsay does not generally apply in civil law systems.

presented.<sup>69</sup> Further, professional judges, unlike lay juries, are ostensibly not unduly influenced by their exposure to hearsay evidence that is ultimately excluded.<sup>70</sup> Thus, in this view, there is no need to prospectively exclude documentary evidence on the basis of hearsay.

Hearsay has a particular value in international courts because of the nature of the cases being tried, which often include crimes committed on a mass scale, or in a widespread and systematic capacity over a period of time. Excluding hearsay might make it impossible to provide necessary contextual evidence. Stephen Rapp, former Chief Prosecutor in the *Prosecutor v. Charles Taylor* case at the SCSL, noted in a recent interview that hearsay evidence is important because it may be used to show a “pattern” of evidence, contributing to the guilt of the accused.<sup>71</sup> Rapp suggested that in human rights and war crimes cases, hearsay might include “testimony from individuals who have spoken to someone who directly overheard a significant and memorable communication” or “results of a thorough investigation by a reliably independent human rights observer who has received the information on the strict condition that identities will remain confidential.”<sup>72</sup> Various difficulties associated with collecting evidence of human rights violations have

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<sup>69</sup> See e.g. *Prosecutor v. Brdanin*, Order on the Standards Governing The Admission of Evidence, Case No. IT-99-36-T, 15 February 2002, para. 13; *Prosecutor v. Bagosora and others*, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, Case No. ICTR-98-41-T, 13 September 2004, para. 7;

<sup>70</sup> KARIM A. A. KHAN, CAROLINE BUISMAN, CHRIS GOSNELL, *PRINCIPLES OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE* (2010), at 390.

<sup>71</sup> Angela Stavrianou, *Admissibility of Hearsay Evidence in the Special Court for Sierra Leone*, Center for Accountability and Rule of Law, March 24, 2010

<sup>72</sup> Tracey Gurd, “Stephen Rapp, Special Court Chief Prosecutor, Answers Your Questions—Part 1, 2009,” *The Trial of Charles Taylor*, A Project of the Open Society Initiative, September 2, 2009, <<http://www.charlestaylortrial.org/2009/09/02/stephen-rapp-special-court-chief-prosecutor-answers-your-questions-part-i/>>

provided justification for rules allowing hearsay evidence in international criminal courts.<sup>73</sup>

Thus, hearsay that is relevant and appears to be sufficiently reliable is generally admissible under 89(c) and under Article 69 of the ICC statute. The fact that it is indirect evidence, or that the person making the statement is not available for cross-examination, is a factor to be considered in deciding, in light of all the evidence presented at trial, just how much weight the court should give the evidence. Depending on the circumstances and evidence in a given case, hearsay will usually be afforded less weight than in-court sworn testimony by a witness that has been cross-examined.<sup>74</sup> But if it is consistent with all the evidence in the case, it may well have decisive weight.<sup>75</sup>

Rule 92*bis* was initially formulated at the ICTY as a means of admitting a statement or previous testimony of a witness in lieu of live oral testimony. Under the ICTY provision, and its near identical forms at the ICTR and the Special Tribunal for Lebanon, a Chamber may, in lieu of oral testimony, admit information, including written statements and transcripts that do not go to the proof of the acts and conduct of the accused. If information goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment, it may be admitted if it satisfies the standard 89(c) requirement that evidence be relevant and probative of material issues and contains sufficient indicia of reliability.<sup>76</sup>

The rule sets out several non-exhaustive factors supporting admissibility under this

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<sup>73</sup> *Id.*

<sup>74</sup> *Prosecutor v. Brdanin*, Judgment, Case No. IT-99-36-T, 1 September 2004

<sup>75</sup> Stephen Rapp, former Chief Prosecutor in the *Prosecutor v. Charles Taylor* trial at the SCSL, contended in a 2008 interview: “hearsay adds value to the trial ... particularly when combined with other evidence, it can provide a very accurate picture of events” Gurd, *supra*.

<sup>76</sup> *Prosecutor v. Popovic, Beara, Nikolic, Boroveanin, Miletic, Gvero, and Panderovic*, Case No. IT-05-88/2-T. 27 August 2010

provision. Such factors include whether evidence: is of a cumulative nature;<sup>77</sup> relates to relevant historical, political or military background; consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates; concerns the impact of crimes upon victims; relates to issues of the character of the accused; or relates to factors to be taken into account in determining sentencing. Finally, the Chamber retains its discretion to admit evidence meeting these requirements in light of the overarching necessity of ensuring a fair trial, which includes the right to require that the witness appear in court for cross-examination. It should be noted that these rules and interpretations also apply to defense submissions of exculpatory evidence relating to the acts and conduct of the accused.

The ICT Appeals Chamber has been careful to clarify a distinction between 92 *bis* and the more flexible approach envisioned by 89(c). According to the Chamber, "a party cannot be permitted to tender a written statement given by a prospective witness to an investigator of the OTP under Rule 89(C) in order to avoid the stringency of Rule 92 *bis*."<sup>78</sup> Additional requirements for out of court statements are in place to protect the right of the accused to challenge evidence and cross-examine witnesses in court. Thus, footage that includes out of court witness statements may not be admitted under the pretense that it meets the relaxed requirements of 89(c).

The requirement that evidence must be unrelated to the "acts and conduct of the accused" seems highly restrictive. However, the ad hoc tribunals have interpreted this part

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<sup>77</sup> Evidence may be deemed "cumulative" when other witnesses will give or have given testimony of similar facts.

<sup>78</sup> *Prosecutor v. Galic et al.*, Decision on Interlocutory Appeal Concerning Rule 92 *bis*(c), Case No. IT-98-29-AR73.2, 7 June 2002

of the provision somewhat narrowly. A frequently cited ICTY ruling in *Prosecutor v. Galic* holds: "the phrase 'acts and conduct of the accused' in Rule 92bis is a plain expression and should be given its ordinary meaning: deed and behavior of the accused. It should not be extended by fanciful interpretation. No mention is made of acts and conduct by alleged co-perpetrators, subordinates or, indeed, of anybody else. Had the rule been intended to extend to acts and conduct of alleged co-perpetrators or subordinates it would have said so."<sup>79</sup> However, later cases clarify that evidence may not go to the acts and conduct of any perpetrator of the crimes "proximate to the accused."<sup>80</sup>

As the earlier mentioned list of factors affecting admissibility indicate, the type of evidence admitted under this rule generally relates to context or other background issues, rather than evidence pivotal to establishing the accused's responsibility for particular crimes. This would include, for example, footage or other E-evidence tending to prove the existence of an armed conflict or widespread and systematic attacks against civilian populations. This kind of evidence is required to prove the elements of the crime of genocide and other crimes against humanity.

At the Special Court for Sierra Leone, 92bis takes on a different form than its equivalent in the ICTR and ICTY, though it shares some features. The Appeals Chamber has noted that the SCSL deliberately modified the rule in order to "simplify the provision for a court operating in what was hoped to be a short time-span in the country where the crimes

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<sup>79</sup> *Prosecutor v. Milošević*, Decision on Interlocutory Appeal on the Admissibility of Evidence in Chief in the Form of Written Statements, Case No. IT-02-54-AR73.4, 30 September 2003

<sup>80</sup> *Prosecutor v. Bagosora et al.*, Decision on the Prosecution Motion for the Admission of Written Witness Statements Under Rule 92bis, Case No. ICTR-98-41-T, 9 March 2004

had been committed.”<sup>81</sup> The modified rule would allow for the admission of testimony from the Truth and Reconciliation Commission and other bodies that had already collected testimony and other evidence related to crimes in Sierra Leone.<sup>82</sup> Here, the rule is not limited to background evidence and the tribunal must weigh the potential for unfair prejudice to the accused in making its determination.<sup>83</sup> The amended SCSL rule offers the following:

Rule 92*bis*: Alternative Proof of Facts:

A) A Chamber may admit as evidence, in whole or in part, information in lieu of oral testimony.

(B) The information submitted may be received in evidence if, in the view of the Trial Chamber, it is relevant to the purpose for which it is submitted and if its reliability is susceptible of confirmation.

The rule is explained in the Appeals Chamber decision in *Fofana*: “The effect of SCSL Rule 92*bis* is to permit the reception of ‘*information*’ – assertions of fact (but not opinion) made in documents or electronic communications – if such facts are relevant and their reliability is ‘susceptible of confirmation’.<sup>84</sup> Here, under an even lower standard for reliability and authenticity than at the ICT courts, proof of reliability is not a condition of admission, only that the information be ‘capable of corroboration’ in due course.”<sup>85</sup> Still, the Chamber will

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<sup>81</sup> *Prosecutor v. Norman et al.*, Decision on Fofana Request to Admit Evidence Pursuant to Rule 92*bis*, Case No. SCSL-04-14-T, 9 October 2006

<sup>82</sup> *Prosecution v. Taylor*, Decision on Prosecutor Motion for Admission of Documents, Case No. SCSL-04-15-T-118, 30 June 2008.

<sup>83</sup> *Prosecutor v. Sesay, et al.*, Decision on the Prosecution Notice under 92*bis* to Admit the Transcripts of Testimony of TFI-256, Case No. 04-15-T,,23 May 2006, para. 4

<sup>84</sup> *Prosecutor v. Norman, et al.*, ,Decision on Appeal Against Decision on Prosecution’s Motion for Judicial Notice and Admission of Evidence, Case No. SCSL-2004-14-AR73, 16 May 2005, para. 26

<sup>85</sup> *Id.*



give any such evidence less weight absent any evidence of the source or authenticity of a piece of evidence.

A statement goes to proof of the acts and conduct of the accused if it tends to prove or disprove his acts or conduct. The SCSL has adopted the conclusion reached by the ICTY that evidence that goes to the proof of the acts and conduct of the accused applies only to “deeds and behavior,” not “statements, admissions, confessions of an accused.” Further, “acts and conduct of the accused” should “not be expanded to include all information that goes to a critical issue in the case or is material to the Prosecution’s theories of joint criminal enterprise or command responsibility.” However, like the ad hoc tribunals, the Chamber can order the cross-examination of a witness if the interests of justice require it in light of the right of the accused to a fair trial.<sup>86</sup> The SCSL Chamber maintains the right to assert its discretion to ensure the fairness of the trial, particularly where information goes to a critical element of the Prosecution’s case.<sup>87</sup> As noted, chambers still prefer to hear live testimony of witnesses who can be cross-examined when the information pertains to the acts and conduct of the accused. Thus if a witness is not available to testify, some portions of a submission may require redaction in order to protect against unfair prejudice.<sup>88</sup>

In a separate decision on a request to admit evidence under *92bis*, the *Fofana* chamber admitted an email authored by a person not testifying at trial, finding the factual assertions contained in the email to be relevant, susceptible of corroboration in due course, and not prejudicial to either party by its admission. The chamber followed that it would

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<sup>86</sup> *Prosecutor v. Sesay*, Decision on Defense Application for the Admission of the Witness Statement of DIS-129 under Rule *92bis*, Case No. SCSL-04-15-T, 12 March 2008

<sup>87</sup> *Id.* and *see also Prosecutor v. Bagosora*, Decision on Prosecutor’s Motion for the Admission of Written Witness Statements Under Rule *92bis*, Case No. ICTR-98-41-T, 9 March 2004, para 13

<sup>88</sup> RICHARD MAY AND MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE (2002) 343, 344

determine what weight, if any, to attach to the factual assertions made in the e-mail at the end of the trial, in light of the totality of evidence and whether other evidence corroborated the information.<sup>89</sup>

At the ICC, in contrast, the Rome Statute and the Rules of Procedure express a clearer preference for live witness testimony, either in court or by video or audio link. This preference is born out of the “right to examine” guarantee codified in Article 67(1)(e) of the Rome Statute. However the Rules specifically allow for “previously recorded video or audio testimony of a witness before the Court” or “the transcript or other documented evidence of such testimony,” as long there is an opportunity to examine the witness, even if the content of the statement goes to the acts and conduct of the accused.<sup>90</sup>

#### Manner of Obtaining Evidence

In this section we address a cluster of concerns regarding the manner in which evidence is obtained, which are likely to be recurring issues in the use of E-evidence of human rights violations in particular. Under the previously discussed general discretionary rule, judges at the ICC and the ad hoc tribunals *may* exclude evidence if its probative value is substantially outweighed by the prejudice it causes to the parties, or otherwise by the need to ensure a fair trial.<sup>91</sup> But, under a separate rule, courts can exclude evidence obtained in violation of internationally recognized human rights.

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<sup>89</sup> *Prosecutor v. Norman, et al.*, Decision on Fofana Request to Admit Evidence Pursuant to Rule 92bis, Case No. SCSL-04-14-T, 9 October 2006

<sup>90</sup> GIDEON BOAS, JAMES L. BISCHOFF, NATALIE L. REID, B DON TAYLOR III, INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY: INTERNATIONAL CRIMINAL PROCEDURE (2011), at 344

<sup>91</sup> *Prosecutor v. Karemera*, Decision on th Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, Case No. ICTR-98-44-T, 25 January 2008

Under Article 69(7) of the ICC Statute, “evidence obtained by means of a violation of this statute or internationally recognized human rights *shall not be admissible* if the violation casts serious doubt on the reliability of the evidence or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.”<sup>92</sup> Under Rule 95, the counterpart at the ad hoc courts, “the Chamber *shall* exclude evidence obtained by methods casting substantial doubt on its reliability or if its admission is antithetical to and would seriously damage the integrity of the proceedings.”<sup>93</sup> This rule is more generally used to exclude documentary evidence that is obtained illegally (e.g. intercepts, other video or audio records, surveillance), as opposed to evidence that is suspected of manipulation, which tends to go to authenticity and probative weight.

While some national rules of evidence and procedures require automatic exclusion of illegally obtained evidence, this is not generally the case in international courts. With the exception of the Special Tribunal for Lebanon, there is no absolute bar to the admissibility of illegally obtained evidence in international courts.<sup>94</sup> Rather, under ad hoc chamber jurisprudence, Rule 95 does not require automatic exclusion and chamber will “consider all the relevant circumstances and will only exclude evidence if the integrity of the proceedings would indeed otherwise be damaged.”<sup>95</sup> The ICTY, for example, has determined that this rule will not be used to exclude communications intercepted during

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<sup>92</sup> ICC Statute, Article 69(7)

<sup>93</sup> See ICTY Rule,95; ICTR Rule,95; SCSL Rule,95; ECCC Internal Rule 87(3)(d)

<sup>94</sup> See Special Tribunal for Lebanon Rule 126(b): “Evidence shall be excluded if obtained in violation of international standards on human rights, including the prohibition of torture.”

<sup>95</sup> *Prosecutor v. Karemera*, Decision on the Prosecutor’s Motion for Admission of Certain Exhibits into Evidence, Case No. ICTR-98-44-T, 25 January 2008.

armed conflicts, because it could be the only means of collecting evidence.<sup>96</sup> Likewise, as the ICC decision in *Lubanga* notes, “judges have the discretion to seek an appropriate balance between the Statute’s fundamental values in each concrete case.”<sup>97</sup>

Though the ad hoc courts have held that a violation of a national law can trigger exclusion under Rule 95, evidence may only be excluded under the counterpart provision at the ICC if it was obtained in violation of the Rome Statute or of some other “internationally-recognized human right.” The ICC and the ad hoc tribunals have held the right to privacy to be an internationally recognized human right that applies to suspects in human rights investigations, though these courts have not clearly defined it.

The right to privacy has been relevant to cases involving surveillance or other covert collection methods at the European Court of Human Rights. Under the European Convention of Human Rights, the right to privacy “protects a person from arbitrary or unlawful interference with family life, home, or correspondence.” ECHR jurisprudence indicates that it is not an absolute right and that other factors are relevant to a determination of whether an investigative intervention was improper. The violation could be justified if it had a legitimate aim, was legal, and was proportionate to that aim. Again, while we can expect means of obtaining electronic evidence to play a major role in future investigations and prosecutions, there is minimal case law at the ICC or ad hoc tribunals that specifically addresses the connection between these issues. However, a few cases

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<sup>96</sup> *Prosecutor v. Brdanin*, Decision on the Defense Objection to Intercept Evidence, Case No. ICT-99-36-T, 3 October 2003.

<sup>97</sup> *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/06, 29 January 2007

dealing with intercepts and covert recordings reveal the influence of ECHR jurisprudence in cases at the ICC and ad hoc courts.

As previously mentioned, the ICTY decided to allow the admission of intercepts, finding that unlawfully obtained surveillance evidence collected during armed conflicts need not be excluded, even if the defendant was able to establish a violation of the right to privacy.<sup>98</sup> In an Appeals Chamber case involving the admissibility of secretly recorded conversations between a suspect and a third party the court did not establish grounds for exclusion under Rule 95 itself.<sup>99</sup> Similarly, the ICTR declined to exclude a journalist's secret recordings of the accused allegedly discussing "exterminations," again finding the violation did not amount to "per se" grounds for exclusion under Rule 95.<sup>100</sup> These decisions reflect the concessions these courts and tribunals seem willing to allow in the context of evidence obtained during armed conflict, but they more clearly serve as a reminder of a discretionary standard in which admissibility and probative value are separate determinations, and the fact that the manner in which evidence is collected and maintained goes to its credibility as much as to its admissibility.

### **A Colombian experience**

In the context of courts that, similarly to the Lebanese tribunal, have a strict bar against the use of illegally obtained evidence, there is a recent case from Colombia that is instructive.<sup>101</sup> In March 2008 a Colombian military unit raided a suspected FARC guerrilla

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<sup>98</sup> *Prosecutor v. Brdanin*, Decision on the Defense Objection to Intercept Evidence, Case No. 99-36-T, 3 October 2003.

<sup>99</sup> *Prosecutor v. Haraqija and Morin*, Appeals Judgment, Case No. IT-04-84-R77-4A, 23 July 2009

<sup>100</sup> *Prosecutor v. Renzaho*, Decision on Exclusion of Testimony and Admission of Exhibit, Case No. ICTR 97-31-T, 20 March 2007.

<sup>101</sup> *In re Wilson Alfonso Borja Diaz*, Supreme Court of Colombia, Criminal Cassation Chamber, 18 May 2011.

encampment across the border in Ecuador. They bombed the camp extensively, and when they landed found only bodies and various hard drives, USB memory sticks, and laptop computers. The electronic storage devices allegedly contained files that appeared to implicate a Colombian legislator in extensive illegal dealings with the FARC. A criminal case was subsequently filed against this legislator on the strength of the electronic files recovered. The Colombian Supreme Court – which is not known for its sympathies for the guerrilla – nevertheless decided that the evidence was inadmissible. The decision is a virtual roadmap to the issues that can arise in these cases.

The court found that the evidence had been taken illegally and excluded it primarily on that basis, although it also shored up its decision noting serious questions of authenticity. In brief, the justices noted that the military force that conducted the raid had entered Ecuadorean territory without permission, in violation of an international treaty. It concluded that this force was operating outside the bounds of the territory as defined in the constitution, and thus that it had no authority to requisition the evidence in question. The court held that even evidence obtained outside the national territory was subject to standards of due process, which had been violated in this case. As a result, the court found that the evidence itself was “illegal” and could not be used in a legal proceeding.

Moreover, the court noted that there were important gaps in the chain of custody for the memory devices and important questions as to the authenticity of the texts supposedly recorded in those files. The texts were supposed to record emails from the legislator to members of the FARC, but they were simple Word documents, rather than messages in an email client, or in some Internet account. There was no evidence the computers themselves had ever had contact with the Internet. Finally, the memory devices

had been in the custody of the military for days before being turned over to judicial authorities. The court emphasized that none of the officials cited to testify could vouch for the authenticity or content of the files, or could complete the chain of custody. In light of its earlier finding regarding the illegality of the evidence, the court limited itself to noting, in disapproving terms, these anomalies, but did not rest on them in its decision to exclude the evidence.

### Weight

Decisions to exclude evidence are, however, a rarity. The much more important question is how the courts will weigh the evidence once admitted. While trial chambers rule on a variety of motions pertaining to evidentiary matters during the course of the trial, the rules at the tribunals and the ICC indicate that the final determinations take place after all evidence has been submitted.<sup>102</sup> For all charges in the indictment, the chamber reviews all evidence submitted at trial and determines whether the prosecution has met its burden of proof beyond a reasonable doubt.<sup>103</sup> Though only a prima facie showing of reliability is required to admit evidence, the manner of introduction and the indicators of authenticity are more heavily scrutinized for the purpose of assigning evidentiary weight at the end of the trial. While there is no discernible method or standard for assigning evidentiary weight, it seems that external sources or "authenticators" are more effective than internal sources, which could potentially be tampered with and may require a separate foundation. However, internal "authenticators" are also relevant and important. Having both is most likely to make reliability unassailable.

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<sup>102</sup> See ICC Rules 141, 142; ICTY Rule 87; ICTR Rule 87; SCSL Rule 87

<sup>103</sup> BOAS ET AL., INTERNATIONAL CRIMINAL LAW, at 354; See also ICC Rule 68

## **On the Use of E-evidence in Prosecution Indictments and Human Rights Investigations:**

The preceding discussion has focused on the decisions of courts to admit evidence in a criminal prosecution, and to some extent on the elements that go into a determination of the weight to give such evidence, once admitted, in determining the guilt or innocence of the accused. If one considers the number of human rights violations that take place, however, and the meager number of international human rights prosecutions by comparison, it is clear that most evidence of human rights violations may never see the inside of a courtroom. But as electronic documentation becomes increasingly ubiquitous, new forms of evidence could be used to establish the grounds for prosecution indictments and to provide the basis for an international investigation.

In January 2011, the Prosecutor for the Special Tribunal for Lebanon handed down an indictment charging four members of Hezbollah with orchestrating the February 2005 assassination of the Lebanese Prime Minister that also killed 21 others. Only recently unsealed, the indictment was based in large measure on circumstantial evidence established by information recorded on mobile phones. According to the indictment, evidence gathered throughout the investigation, including “witness statements, documentary evidence, and Call Data Records for mobile phones in Lebanon” ... “led to the identification of some of the persons responsible for the attack.”<sup>104</sup> The indictment includes a comprehensive description how the perpetrators’ phone use allowed investigators to track their activities and reference to other corroborative documentary

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<sup>104</sup> *Prosecutor v. Badreddine, Ayyash, Oneissi & Sabra*, Indictment, Case No. STL-11-01/1/PTJ, 10 June 2011



evidence, later revealed to include closed circuit video footage. Hezbollah officials have publicly discounted the evidence and asserted that the call data records were manipulated and “politicized,”<sup>105</sup> and contended that reliability aside, the indictment contains no direct evidence. The trial is expected to commence some time in 2012.

The following more detailed case study illustrates the decision-making process followed by one international legal actor, in using E-evidence to push for an investigation into alleged human rights violations. The main lesson of the case study is that information that may be too weak to serve as direct evidence in support of a conviction may still be incredibly useful in deciding whether to open an investigation. Indeed, such evidence may motivate international political actors to begin to expend resources on an investigation even if they were unwilling to invest in establishing the credibility of the evidence in the first place.

#### Case Study: Authenticating Video of Extrajudicial Killings in Sri Lanka

In August 2009, Channel 4 News in Britain aired a video it obtained from a group called Journalists for Democracy in Sri Lanka.<sup>106</sup> The group claimed that the video was shot on a Sri Lankan soldier’s mobile phone months earlier in the final days of the civil war. The prisoners in the footage are naked and blindfolded. They are kicked and forced to cower in the mud before being shot in the head at close range. The film shows several other prisoners who appear to have been killed earlier. A second film of the same scene (later released by Channel 4 in December 2010), pans out over the landscape, showing the bodies of a number of other naked and executed prisoners, male and female. Among them are a

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<sup>105</sup> Owen Bennett-Jones, *Hariri Murder: UN Tribunal Issues Arrest Warrants*, BBC NEWS, June 30, 2011, <<http://www.bbc.co.uk/news/world-middle-east-13972350>>

<sup>106</sup> *Tamil Tiger Video Killing is Genuine, Declares the UN*, TIMES (London), January 8, 2010

young boy and a woman later identified as a well-known Liberation Tigers of Tamil Eelam (LTTE) media anchor.<sup>107</sup> After the video aired, the Sri Lankan government strongly denied the authenticity of the footage and disputed the credibility of Channel 4's source.

In 2010, Philip Alston, an independent UN human rights expert and at the time the Special Rapporteur on extrajudicial, summary, or arbitrary executions, retained a team of forensic experts to determine the authenticity of that video tape. His goal was not to determine beyond a reasonable doubt that the extrajudicial executions apparently depicted in the video had actually taken place, but to trigger an investigation of the conduct of the Sri Lankan military at the end of the 26-year civil war between the Sri Lankan government and the LTTE. The authenticity of the video and the claim by the Sri Lankan government that it was a fake became the central axes in the controversy surrounding allegations that as many as 30,000 persons were killed in Sri Lanka in the closing months of the conflict.<sup>108</sup>

When a video of this nature is brought to the attention of the Special Rapporteur, the government, the United Nations, or another third party will ordinarily designate experts to investigate the nature and contents of the material. In this case, the United Nations would not offer Alston any resources to hire experts in order to counter the allegations by the Sri Lankan government that this was a forgery.<sup>109</sup> For Alston, who was already aware of other allegations of extrajudicial executions of Tamil fighters, a video

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<sup>107</sup> The Secretary-General, *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, March 31, 2011, < [http://www.un.org/News/dh/infocus/Sri\\_Lanka/POE\\_Report\\_Full.pdf](http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf)>

<sup>108</sup> Philip Alston, Remarks Before the United Nations Human Rights Council, June 4, 2010. <http://www.un.org/webcast/unhrc/archive.asp?go=100603#AHRC>

<sup>109</sup> Interview, Karen Engle and Daniel Brinks, with Phillip Alston, Cambridge, MA, May 2011.

shown to be authentic could provide corroboration sufficient to push for a war crimes probe involving both domestic and international proceedings.<sup>110</sup>

After viewing the video, Alston formally requested that Sri Lanka carry out an investigation. The government responded that its experts had "scientifically established beyond any doubt that this video was a fake." The Sri Lankan experts insisted that the footage could not possibly have been shot on a mobile phone and their technical analysis concluded that there had been "very amateurish" video editing and crude audio dubbing.<sup>111</sup> Alston disputed the independence of the reports, two of which were furnished by Sri Lankan military employees, and dismissed their findings as "more impressionistic than scientific."<sup>112</sup>

In response to the government's allegations, despite the lack of official resources, Alston commissioned his own reports from three independent experts: a forensic pathologist, a forensic video analyst, and a firearm and ballistics expert.<sup>113</sup> The experts would need to establish the authenticity of the footage – i.e., that the video had not been manipulated, doctored, or otherwise tampered with; and its reliability – i.e., that the content depicted really occurred and was not staged. In an interview, Alston indicated that the UN had neither existing standards for inquiries of this nature, nor an existing procedure

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<sup>110</sup> *Deeming Sri Lanka Execution Video Authentic, UN Expert Calls for War Crimes Probe*, UN NEWS CENTRE, January 7, 2010, <<http://www.un.org/apps/news/story.asp?NewsID=33423>>

<sup>111</sup> Louis Charbonneau, *Sri Lankan Execution Video Appears Authentic*, REUTERS (UK) January 7, 2010, <<http://uk.reuters.com/article/2010/01/07/uk-srilanka-un-idUKTRE6064IY20100107>>

<sup>112</sup> *Id.*

<sup>113</sup> Robert Mackey, *Video of Sri Lankan Executions Appears Authentic, UN Says*, N.Y. TIMES, January 8, 2010 <<http://thelede.blogs.nytimes.com/2010/01/08/sri-lanka-atrocity-video-appears-authentic-un-says/>>

for funding or carrying out the investigation. Alston was, therefore, largely left to his own devices.<sup>114</sup>

Using “Cognitech” video investigation software, Jeff Spivak, the forensic video analyst, stabilized and enlarged regions of interest on the film and cropped segments in order to magnify the footage. Spivak reviewed the film frame by frame and found no “breaks in continuity, no additional video layers, and no evidence of editing or image manipulation.”<sup>115</sup> He concluded that the technical attributes of the images were “entirely consistent with mobile phone footage.”<sup>116</sup> Spivak presented Alston with a frame-by-frame analysis of video and audio recordings, rejecting Sri Lankan assertions that the footage had been tampered with.<sup>117</sup> This constituted the core of the authenticity investigation. The stabilized and enlarged versions of the segments he provided to Alston were then distributed to two additional experts.<sup>118</sup>

Ballistics expert Peter Diaczuk focused on the 7.62mm AK-47 assault rifle ostensibly used in the shootings. He confirmed that the weapon depicted was an AK-47. Diaczuk then conducted experiments and videotaped live firing comparing the way the rifle behaved with and without live ammunition. He concluded that the recoil, the movement of the weapon and the shooter, and the gases expelled from the muzzle, were all consistent with firing live ammunition rather than blanks.<sup>119</sup> The final piece of the investigation was done by forensic pathologist Daniel Spitz. Spitz examined the body reaction of the victims, their

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<sup>114</sup> Interview, Karen Engle and Daniel Brinks with Phillip Alston, Cambridge, MA, May 2011.

<sup>115</sup> UN NEWS CENTRE, *supra*

<sup>116</sup> “Cognitech Announced Enhancement of UN-Requested Sri Lankan Execution Video,” February 5, 2010, <<http://www.cognitech.com>>.

<sup>117</sup> CHANNEL 4 NEWS, *supra*

<sup>118</sup> Cognitech, *supra*.

<sup>119</sup> CHANNEL 4 NEWS, *supra*

movement, and the blood evidence depicted in the video. He concluded that these were all consistent with “what would be expected” in a close range shooting and thus that the two executions shown were real and not faked.

There were some aspects of the video that could not be explained by the experts on the panel, such as the body movements of some victims and the fact that the date encoded on the video indicated it was filmed on July 17, 2009, over a month after the end of the conflict. Alston’s report concluded that the footage was authentic based on the findings of the three experts, noting that the few “unresolved” elements in the footage required further explanation or investigation, but were not enough to undermine the strong indications of authenticity. The Sri Lankan government continued to publicly cast doubt on the findings.<sup>120</sup>

In early 2011, Alston’s successor, Christof Heyns, gained access to the extended version of the footage, and dispatched the same experts to reexamine the video. Heyns subsequently concluded on the basis of the extensive technical evidence that what is depicted in the video indeed happened, and that the evidence established a prima facie case of serious international crimes. Heyns also said the longer version resolved the “unexplained elements” in the first video and recommended that the evidence be investigated by an international panel.<sup>121</sup> The expert reports established a “coherent and credible foundation for the conclusion that the extended video is authentic, and thus warrants calling for the accountability of those responsible for these atrocities.”

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<sup>120</sup> *Id.*

<sup>121</sup> *Sri Lanka War Atrocities Video Credible: UN Envoy*, REUTERS, May 30, 2011.

<<http://www.reuters.com/article/2011/05/30/us-srilanka-crimes-idUSTRE74T4GG20110530>>

Following the authentication of the video, Secretary General Ban Ki Moon commissioned a Panel of Experts (POE) on Sri Lanka to advise on steps to institutionalize accountability for human rights violations during the Sri Lankan war. The POE report found credible allegations of violations by government officials including the killing of civilians and other human rights violations against government critics. The report also said that tens of thousands of civilians might have been killed during the last five months of the war, the majority by government shelling.

The Panel of Experts examined “reports, documents and other written accounts” by UN and inter-governmental organizations, nongovernmental groups and journalists and experts on Sri Lanka,” as well as satellite imagery, photographs, and video materials. It reviewed submissions received in response to requests on the UN website, and consulted individuals with expertise or experience related to the armed conflict. The panel deemed allegations credible “when based on primary sources that the Panel deemed relevant and trustworthy. These primary sources were corroborated by other kinds of information, both direct and indirect.” The report indicated that it “could not individually verify” video submissions to the panel, so they were not treated as a direct source to meet the Panel’s threshold of credibility for the allegations, but they did help to corroborate other sources of information.<sup>122</sup>

This experience demonstrates that E-evidence is useful, indeed crucial, even if it is unaccompanied by ancillary evidence of authenticity and reliability. Alston could not count on the testimony of the soldier who filmed the scene, nor did he have access to any

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<sup>122</sup> UN Secretary-General, *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka*, March 31, 2011, available at: <http://www.unhcr.org/refworld/docid/4db7b23e2.html>. [accessed October 26, 2011]

survivors who could substantiate what the videos appeared to show. Even so, with some ingenuity, with limited resources, and through an in-depth analysis of the videos themselves, he was able to trigger a series of investigations that might ultimately lead to accountability for the violations shown. Clearly, the documentation of human rights violations is an enterprise fundamentally different than the documentation of legal financial transactions and e-commerce, the focus of much of the innovation in rules for the treatment of E-evidence. This case study demonstrates the importance of resisting attempts to import the standards for the latter, into an examination of the former.

### **National Developments**

National courts may well pose a greater challenge for those submitting E-evidence in domestic human rights-related cases, particularly in common law jurisdictions where authentication plays a more central role in the admissibility determination. Most countries so far address the influx of electronic submissions through the application of existing evidentiary frameworks. Others have created form-specific rules governing admissibility of E-evidence through legislative acts. In recent years, concerns regarding the susceptibility of digital evidence to manipulation and difficulties tracing chain of custody began to manifest, in some cases, in the form of fairly specific, and often highly technical standards for authenticating e-evidence.

In the UK, the House of Lords Science and Technology Select Committee issued a report on the admissibility of digital images, which was quite flexible in its approach and deferential to the discretion of courts in making admissibility decisions. After examining the various rules on admissibility, the report (still the most authoritative source on the

admissibility of digital images in UK Courts) concluded that digital images are admissible with proper authentication, which *might* include technical processes such as watermarking, encryption, and digital signatures, though such processes are not necessarily required.

The Committee noted several arguments against specifying new criteria of admissibility for e-evidence. The report suggests that it would be very difficult to specify the nature of the authentication technology in a manner that would not quickly become outdated as technology advances and that it would take an appreciable time for manufacturers of digital image technology to incorporate such measures, and even longer for such technology to become widely used.<sup>123</sup> The report states, “the clear trend in the development of the law is to remove prior requirements for all forms of documentary evidence, leaving it to the courts to determine whether the evidence is reliable. For these reasons we are not convinced that some sort of criteria must be met before evidence can be admitted.”<sup>124</sup> The report ultimately recommends that evidence should not necessarily be inadmissible for failing to conform to some specified technological requirement. However, while no particular authentication technology is required, using metadata to authenticate evidence would likely increase evidentiary weight at trial.<sup>125</sup>

The US has not updated the Federal Rules of Evidence and Procedure to include provisions specifically addressing admissibility or methods of authenticating electronic

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<sup>123</sup> An American Bar Association report offered that the UK has retreated from its earlier highly structured approach to admission of electronic evidence, noting: that the current “discretionary approach leaves judges free to apply the old rules to new situations in determining when authenticity and reliability of electronic evidence is demonstrated.” See “Analysis of the Rule of Evidence and the Electronic Rules of Evidence for the Republic of the Philippines,” *ABA-Asia Legal-Assessment Series*, (American Bar Association, April 2006) at 19 [hereinafter “ABA Report”]

<sup>124</sup> Select Committee on Science and Technology, *Digital Images as Evidence*, 1997-8, H.L. Fifth Report, , February 3, 1998.

<sup>125</sup> *Id.*



evidence. In 2007 a US district judge issued a Memorandum Opinion addressing the application of the Federal Rules to electronic evidence and setting out expectations for establishing its validity at trial.<sup>126</sup> In *Lorraine v. Markel*, a US Magistrate Judge refused to admit email evidence submitted by both parties in support of their claims in an insurance arbitration dispute. The opinion, which aimed to serve as a potential resource for lawyers relying on electronic evidence, notes that different types of evidence require different indicators for authenticity, and maps out the processes and mechanisms that can be used to authenticate e-mail, web content, text messages, internet chat content, digital photos and video in court.

The opinion notes that there is ample case law exploring how the Federal Rules can be extended to apply to electronic documentation. The court expects no rigid standard for authenticating electronic evidence using metadata, as no such standard exists to authenticate conventional documentary evidence. For each type of evidence, authentication depends (at least in part) on the testimony of a witness with personal knowledge and the content of the documents themselves rather than any specific standard requiring particular metadata or a particular means of storage and distribution. For each type of evidence, courts still need witnesses to attest to documentation types, practices, contents, and authorship.<sup>127</sup>

In a variety of national jurisdictions, there was some push to update rules of evidence and procedure to address e-evidence with some specificity. Canada, India, the

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<sup>126</sup> *Lorraine v. Markel Amer. Ins. Co.*, 241 F.R.D. 534 (D.Md. 2007)

<sup>127</sup> Sarah Van Deusen Phillips, "Legal Considerations for Electronic Evidence," *The Documentalist*, [May 11, 2010](http://crlgrn.wordpress.com/2010/05/11/legal-considerations-for-electronic-evidence-part-3-applying-the-rules-of-authenticity/). <<http://crlgrn.wordpress.com/2010/05/11/legal-considerations-for-electronic-evidence-part-3-applying-the-rules-of-authenticity/>>

Philippines, Singapore, the United Arab Emirates, South Africa and all passed electronic evidence-related legislative acts around the same time.<sup>128</sup> Yet, though there appeared to have been a trend toward codifying specified standards for admitting electronic evidence, the pendulum may be swinging back. It may well be that in practice, specific standards for authentication are not particularly useful in the context of a rapidly evolving technological environment.

In the Philippines, the Supreme Court sought out the guidance of the American Bar Association to review revised rules of evidence and procedure and advise on the adequacy of the more structured approach to electronic evidence. The ABA advisory report notes that Philippine Supreme Court amended the rules to extend their application to criminal proceedings, stating, “[t]his is a welcome extension of these rules as they will be very helpful in prosecuting criminal cases.” The report goes on to say, “in the opinion of the experts... there appears to be little, if any, justification for crafting a different set of standards for admissibility of electronic evidence in different types of cases.”<sup>129</sup> However, the report also found authentication requirements for electronic evidence to be overly restrictive, citing the benefit of US procedures, which permit various means of authentication, and thus are less susceptible to obsolescence as technology changes.<sup>130</sup>

Though these standards are not a reflection of what is expected to authenticate e-evidence in human rights cases at international level – most evolved in the commercial

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<sup>128</sup> Examples include the Uniform Electronic Evidence Act of 1998 in Canada; The 2000 Information Technology Act in India; The Electronic Transaction Act of 1998 in Singapore; The Electronic Transactions and Commerce Law of 2002 in the United Arab Emirates; and The Electronic Communications and Transactions Act 25 of 2002 in South Africa.

<sup>129</sup> ABA Report, *supra*, at 18 and 19

<sup>130</sup> *Id.* at 22

litigation context – they are worth noting, particularly in the countries that apply the same standards for criminal and civil cases and in light of regional courts like the European Court of Human Rights, which will not interfere with national rules of evidence. Further, national developments could have an influence on international standards over time, particularly as this kind of evidence becomes more ubiquitous. Just recently, the ICC Prosecutor filed a pre-trial request for an amendment to a chamber protocol regarding digital photographic evidence that directly referred to the national legislative developments.<sup>131</sup> Recognizing that born-electronic evidence will be increasingly prevalent in future ICC cases, the Prosecutor criticized the protocol for outlining disclosure standards for electronically recorded data, while providing no guidance on how to manage original electronic evidence related to the case.<sup>132</sup> The Prosecutor’s request called on the Chamber to develop within the protocol “special measures” applicable to cases where electronic information is collected or seized, directly referencing the specific provisions implemented in many national jurisdictions.<sup>133</sup> Ultimately, the Chamber denied the request, finding “no compelling reason to treat differently evidence depending on its nature.”<sup>134</sup>

While we do not expect international human rights tribunals to adopt them wholesale – and while we believe this would likely be a mistake – these national

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<sup>131</sup> The ICC issued an “e-Court Protocol” in *Banda v. Jerbo* requiring that all photographs be submitted in the TIFF format. In April of 2011, the Prosecutor’s office filed a pretrial request in *Prosecutor v. Callixte Mbarushimana* to amend the e-Court Protocol. The prosecutor asserted that the e-Court protocol was problematic for failing to take into account the different nature of circumstances in cases involving a significant amount of electronic evidence submissions. Essentially, if the Chamber intended for the Protocol to apply to all electronic data and other electronic items, it cannot in fact be applied efficiently to electronically or digitally-born evidence, which cannot easily be transferred to TIFF form en masse.

<sup>132</sup> See *Prosecutor v. Callixte Mbarushimana*, Prosecution Request to Amend the e-Court Protocol, Case No. ICC-01-04-01/10, 14 April 2011.

<sup>133</sup> *Id.*

<sup>134</sup> See *Prosecutor v. Callixte Mbarushimana*, Decision on Request to Amend the e-Court Protocol, Case No. ICC-01-04-01/10, 28 April 2011.

developments in standards and procedures can inform how groups involved in documenting human rights material think about the kinds of data that can be used to authenticate different forms of E-evidence. If the ICC does assert a more aggressive standard under its Article 69 authority, these references will prove useful. But, even if the lax admissibility standard remains the same and things continue to be weeded out at the end of trial, indicators of reliability will always remain key in the weight determination.

### **Conclusions:**

We begin the conclusion with a note of caution. Our task in this report was to comment on issues related to the admission and evaluation of electronic evidence in human rights prosecutions and investigations. At the same time, it is difficult not to remark upon the impact that an exceptionally lax standard might have on the rights of the accused. The goals of human rights advocates are not advanced by excessive reliance upon untrustworthy information that cannot be adequately challenged by the defense.

Already, some UN war crimes tribunals have come under fire for appearing to selectively assign criminal responsibility for widespread systematic crimes. In *War Don Don*, a documentary on the Special Court of Sierra Leone, the story centers on the prosecution of Issa Sesay, a battlefield commander for the RUF during the civil war in Sierra Leone.<sup>135</sup> The defense maintained that Sesay was effectively forced into serving the RUF, acted in a mid-level position in which he bore no authority over individuals involved in crimes across the country in areas outside his realm of authority, and was responsible for disarming the party and bringing about the end of the conflict when serving as interim

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<sup>135</sup> WAR DON DON (HBO Documentary Films 2010)

leader. Ultimately Sesay was convicted and sentenced to 60 years in prison, while several of his peers in the RUF cooperated with the prosecution, which granted immunity and paid for their cooperation. Despite what one might believe about the credibility of the parties in this particular case, the experience implicates the credibility of decisions to assign responsibility for crimes committed during armed conflicts.

This particular case did not especially raise questions related to hearsay, electronic evidence or the authenticity of documentation. However, critiques like those levied by Sesay's defense coalesce with the notion that high evidentiary standards, particularly with respect to the right to examine evidence and witnesses, should apply to core international criminal processes, where penalties are particularly severe.

This does not seem to be the stance taken thus far, at least at the stage of admissibility, which is the most visible stage at which evidence is evaluated. The primary takeaway from our investigation is that at present there is no definitive standard for admitting and authenticating E-evidence in international courts. Threshold requirements tend to be minimal, and decisions are largely discretionary and determined on a case-by-case basis. All evidentiary determinations are subject to the discretion of the court in light of several factors, including the way in which evidence is obtained and the threat of prejudice to the opposing party, the way evidence will be used at trial, the stage in the judicial process, and the circumstances of the case as a whole. Admissibility is a minor concern and reliability and authenticity go primarily to evidentiary weight. Despite efforts to articulate specified standards for authentication in some national jurisdictions, it would be a mistake to view these as a reflection of what would be necessary to authenticate electronic evidence in international courts and tribunals. Yet, these developments can help

inform efforts to establish a systematized approach to collecting, preserving, and submitting E-evidence.

The Sri Lanka experience exemplifies a technical, expert-oriented approach to authenticating digital video in order to initiate a formal UN investigation. It may be that such methods will be increasingly necessary to authenticate evidence of human rights violations in high profile cases where the reliability of the content is contested. Yet, the same evidence used to support an investigation will likely be used to support primary evidence such as witness testimony at trial. There, the best means of establishing the source of the submission and the nature of the conduct depicted would be through the testimony of the soldiers alleged to have filmed the footage. Expert testimony as to the technical reliability of the footage would then only serve to strengthen its probative value and evidentiary weight.

It may be that as electronic evidence increasingly floods the courts clearer standards may develop, though we have not yet seen this happen in actual practice. National and international experiences, and common sense, support the logical inference that the more authenticating indicators, the higher the likelihood that evidence will be admitted and given greater evidentiary weight at trial. Technical indicators of reliability may be effective “self-authenticators,” but courts maintain a preference for authentication through knowledgeable witness testimony in order to protect confrontation rights of the accused and the integrity of the proceedings. As digital videos and recordings, internet content, and other forms of E-evidence become increasingly common, motions to exclude on grounds of authenticity will likely increase and courts may well look for ways to weed through the mountains of material. Clearer, crisper evidence of authenticity and reliability

not only helps relieve the burden on the court, it should contribute to a more fair and transparent process as well.

In light of this discussion, and subject to our earlier qualifications about the limits of the jurisprudential analysis and the dangers of setting forth one-size-fits-all standards, we make the following recommendations to groups that produce, collect and store electronic evidence of human rights violations:

- Turn over materials to prosecutor’s custody as early as possible to avoid chain of custody issues, but maintain copies and record of chain of custody.
- Keep all contextual information – subject to concerns regarding the safety of the authors and other witnesses.
- Keep in mind the following technical standards:
  - First, the standard for admissibility is still very low, but probative weight determinations, based on the evidence as a whole at the end of trial, are the far more important issue.
  - Second, there are higher and lower standards depending on how evidence will be used.
  - Hearsay is generally allowed, but greater authenticity may be required. There are restrictions on hearsay used to prove the conduct of the accused, but the same evidence could be usable for a different purpose. If there is a document or recording that might not be admissible to prove that the conduct of the accused actually occurred, it may very well be admissible to impeach the credibility of a witness, for example.

- Further, in most international tribunals the fact that evidence was obtained in a way construed to violate the privacy rights of the accused, or otherwise in violation of an internationally recognized right, is not an absolute bar to admission and the determination is still in the court's discretion. At the same time, some venues, such as some domestic courts and the Lebanon tribunal, do apply a stricter prohibition on the use of illegally obtained evidence.
- Internal indicators may suffice, but it is typically better, even here, to have a witness testify to these internal markers. Therefore, seek to
  - Maintain information about possible witnesses with knowledge of the circumstances under which the evidence was produced and stored, including the author of the document/person who filmed or recorded, and eyewitnesses who can corroborate.
  - Identify witnesses who can speak to the nature of web content.
- External indicators of authenticity:
  - Establish and maintain records concerning provenance and storage, to the greatest extent feasible.
  - As this evidence becomes more and more common, we can expect a digital record from both sides. Moreover, as electronic evidence becomes more ubiquitous, so too will motions to exclude. Evidence with strong indicators, preferably both internal and external, of authenticity and chain of custody will not only be admitted, but will be more credible in the end.



## **Appendix A**

### **Questionnaire**

The Center for Research Libraries is producing a report on the use of evidence in war crimes tribunals. Specifically, the report will look at the use of "e- evidence" (e.g. videos, text messages, emails) with respect to the evidence's admissibility and ultimate probative value. The intention of the report is to provide NGOs with a "best practices" manual that will tell them how best to collect and archive e-evidence in order for the evidence to be useful during trial.

The following is a questionnaire intended for prosecutors, defense attorneys, investigators and legal officers. Please feel free to skip answers you find to be irrelevant or to expand upon answers. Please also include specific examples, if possible, of evidentiary issues you have faced or know others have faced.

I realize you may wish to speak in your individual capacity and not as an agent of a particular tribunal. I will be sure to clarify this in the report.

#### **PERSONAL INFORMATION**

Name:

Title:

Tribunal:

Previous Tribunals & Titles:

#### **TYPES OF EVIDENCE**

Have you had any experience working with any of these forms of electronic evidence? Which kinds are most prevalent? Which kinds are most likely to be challenged?

#### **INVESTIGATION**

Has electronic evidence served as the sole or primary basis for you in opening an investigation? For deciding to prosecute (if applicable)? If so, were you concerned about ensuring its authenticity at that stage?

### TRIAL (Admissibility)

Have there been any instances in which you came across e-evidence and decided not to use it? Any instance in which you didn't think evidence would get in, but did, or vice versa?

Do you see a trend in tribunals/courts about types of electronic evidence they will and won't admit (and for different purposes—establishing background v. culpability of individual and hearsay versus witness impeachment)

### TRIAL (Weight)

It is our understanding that international tribunals provides rules in which all evidence that is relevant is admissible and questions regarding authenticity go to the weight of the evidence. Is this true in practice? What is the distinction between the initial standard for admissibility and the determination of how much weight to give evidence at trial?

Are there any other internal procedures/rules regarding what must be shown to establish evidentiary weight?

### TRIAL (Generally)

Objections: What kinds of objections have you seen raised by the defense or the court/tribunal regarding e-evidence submissions?

Which have been most successful?

Are electronic evidence submissions increasingly coming from the defense?

If so, do you believe they are being held to the same standard?

### RULES OF EVIDENCE

To your knowledge, has there been any discussion of amending rules of evidence, particularly in the ICC, to attend specifically to electronic evidence [e.g. of US rules]? If so, what would those amendments include?

How persuasive are “internal” indicators for authentication such as electronic signatures, time-stamps and other metadata? Do you prefer external indicators like witness testimony?

How does the method in which the evidence is obtained implicate its admissibility or weight?

Do you know of any instances where the courts have tempered their evidentiary demands in light of the exigencies of the situation or a threat to a witness? (We are thinking about a citizen who takes a video with his camera, drops off the footage at an NGO and refuses to testify for fear of retribution.)

#### OTHER CONCERNS & RECOMMENDATIONS

If you were advising NGO, victims, documentation project on what to do to collect and preserve this kind of evidence to make it useful at trial down the road, are there any standards or practices you might recommend?

Do you know of any developments in this regard?

## Appendix B

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