

ALL ABOUT EVIDENCE



Filming for human rights can be dangerous. It can put you, the people you are filming and the communities you are filming in at risk. Carefully assess the risks before you press “record.”

INTRODUCTION

“Evidence is the most important part of an investigation. Unless an investigator is able to discover and document evidence, he or she cannot discover the truth...”

- Dermot Groome, Trial Attorney and Professor, Dickinson School of Law, Pennsylvania State University

The goal of collecting evidence is to accurately recreate the story of what happened during an incident where human rights are violated, so that you, along with investigators, lawyers, judges, and, ultimately, the world, can bring perpetrators to justice, free the wrongly accused or secure solutions to economic, social and cultural rights violations. Sometimes, the factually correct version of the story may not be the story we hoped to tell. As human rights advocates, we must be prepared to discover the truth, even if we find that the truth is not aligned with what we initially believed happened.

GOAL

The goal of this section is to provide you with a basic understanding of the definition, sources, purposes, and characteristics of legal evidence so that you can better evaluate whether your video has the potential to effectively serve as evidence.

To do this, we begin with a Field Note that illustrates why it is important to view the footage you collect with an objective eye. The remainder of the section is divided into the following parts:

PART I definition, categories, and sources of Evidence

PART II purposes of Evidence

PART III characteristics of Legal Evidence

FIELD NOTE

GHOUTA TO BHOPAL

PART I: CALL IT LIKE IT IS

A group of human rights defenders who were well informed about the alleged chemical weapons attacks on the suburbs of Ghouta, Syria, on August 21, 2013, were asked to watch video clips of the aftermath of the chemical weapons attack and compare those clips to the aftermath of an industrial disaster that occurred on December 3, 1984, in Bhopal, India, when a cloud of toxic gas escaped from Union Carbide's pesticide plant, killing thousands. The viewers were, for the most part, unfamiliar with the incident in India prior to watching the video.

WARNING: This clip contains graphic footage that may not be appropriate for all viewers:
http://bit.ly/Ghouta_Bhopal

SHOWN IN THE VIDEO

This 2.5 minute video combines footage from Ghouta and Bhopal. It first shows victims from Ghouta suffering from constricted breathing and involuntary muscle spasms, frothing at the mouth, seeping fluid from their noses and eyes, and dying. It then shows people from Bhopal suffering very similar symptoms. Watch the video: [GRAPHIC CONTENT] bit.ly/Ghouta_Bhopal



GHOUTA, SYRIA



BHOPAL, INDIA

The human rights defenders were then asked, “What does this video footage offer proof of?” In short, they answered that the video footage was proof of chemical weapons attacks in Syria and likely some sort of poisoning in India. They were right about India, but wrong about Syria.

While the answer regarding Syria was wrong, it is understandable. The human rights defenders knew additional details about the incident in Syria from the expansive media coverage of the alleged chemical weapons attacks and, in turn, made assumptions about what the video proved.

Upon discussion, however, they agreed that the videos themselves did not prove a chemical weapon attack at all. The video clips only indicate that hundreds of people in Ghouta and Bhopal suffered from some sort of massive airborne poisoning that seemed to affect everyone — from the very young to the very old. The images do not prove that a poisoning happened. The images also do not tell us how the probable poisonings happened, why they happened, or who might be responsible. While the videos don’t provide the answers to these critical questions, they do offer up invaluable leads for determining what happened in both situations.

TAKE HOME POINT

When it comes to analyzing video as evidence, we must set aside our outside knowledge and assumptions and think critically about what a video clip actually indicates and proves.

PART I

DEFINITION, CATEGORIES, AND SOURCES OF EVIDENCE

EVIDENCE DEFINED

Broadly, evidence is *anything* that can provide information about an incident being investigated. Evidence may come from many sources, as we will soon see. However, *legal evidence* is defined as “information that is admissible in court” or “trial-ready evidence.” This means that a piece of information meets a set of standards for admissibility, which we will discuss below, in Part III.

CATEGORIES OF EVIDENCE

Evidence used in criminal cases falls into two categories:

Category 1

Crime-based evidence is relevant and reliable information about what happened — what crime was committed against whom, when, and where. Crime-based video evidence might include footage of, for example, a person being assaulted, property destruction, victim injuries, a mass grave, troops confiscating humanitarian aid, etc.

Category 2

Linkage evidence is relevant and reliable information that helps prove responsibility for the crime. In other words, it helps prove who committed the crime and how they did it (e.g. individual perpetration, conspiracy, aiding and abetting, or command responsibility). This could include footage of military vehicles, uniforms, patches on uniforms, weapons, military offices, perpetrators training their forces, speeches where the suspect admits she or he was in command of the forces who perpetrated the crime, etc.



FOR MORE INFORMATION

International criminal tribunals prosecute the persons most responsible for crimes. These suspects are often situated far away from where the crimes occurred. Linkage evidence serves to connect the remote perpetrator to crimes on the ground. To learn more, see: “Proving Responsibility: Filming Linkage and Notice Evidence” vae.witness.org

SOURCES OF EVIDENCE

Evidence comes from six primary sources:

PHYSICAL

Objects that can provide information about the events.

Examples: Missile casings, rubber bullets, bruises on a victim's body, tear-gas canisters, traces of blood at a crime scene, tire marks in the mud or samples from oil washed up on shore after a pipeline spill.



TESTIMONY

Written or verbal statements given by victims or those who know them, witnesses, suspects, experts, investigators, etc. Statements can be recorded on paper, with an audio recorder, or on-camera. The decision to interview a witness on camera is complicated. To learn more see "Testimony: Filming Preliminary Interviews" at vae.witness.org.

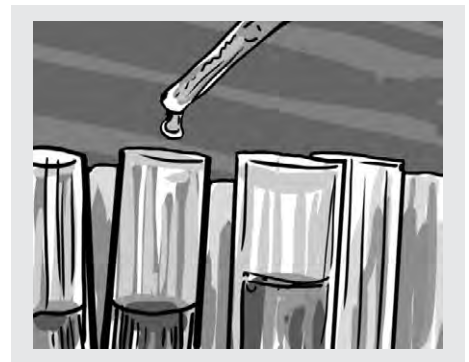
Examples: An interview with the shop owner who was running a store when it was robbed, a declaration from the husband of the woman who was sexually assaulted, or a statement from an investigator detailing his or her findings at the crime scene.



FORENSIC OR TECHNICAL ANALYSIS

Forensics and technical analysis are almost always a combination of physical evidence and testimonial evidence, as the analysis is typically presented in a report from an expert who has based his or her conclusions on physical evidence.

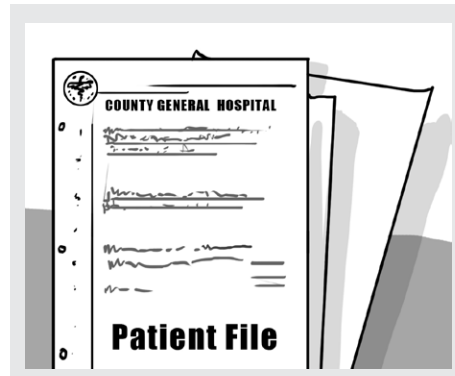
Examples: Reports on the toxicity level of the water in a local village after an alleged poisoning, the number of homes burned based on satellite imagery and videos, the type of weapon used based on the impact zone, whether there were traces of chemical weapons on a missile casing, the estimated amount of oil spilled, the estimated number of refugees, etc.



DOCUMENTS

Paper or digital records.

Examples: A written and signed order from a military commander, reports from troops in the field, medical records, phone logs, bank statements, etc.



OPEN SOURCE

Information collected from public platforms.

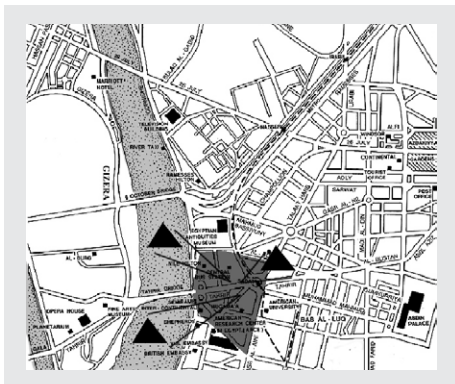
Examples: Newspaper articles, television news broadcasts, reports from human rights organizations, social media posts, including posts to Facebook, Twitter, YouTube, etc.



IMAGERY

Anything visual that provides information to investigators.

Examples: A video of live ammunition being used at protests, a photo of an eviction notice, a detailed map of a mass grave, etc.

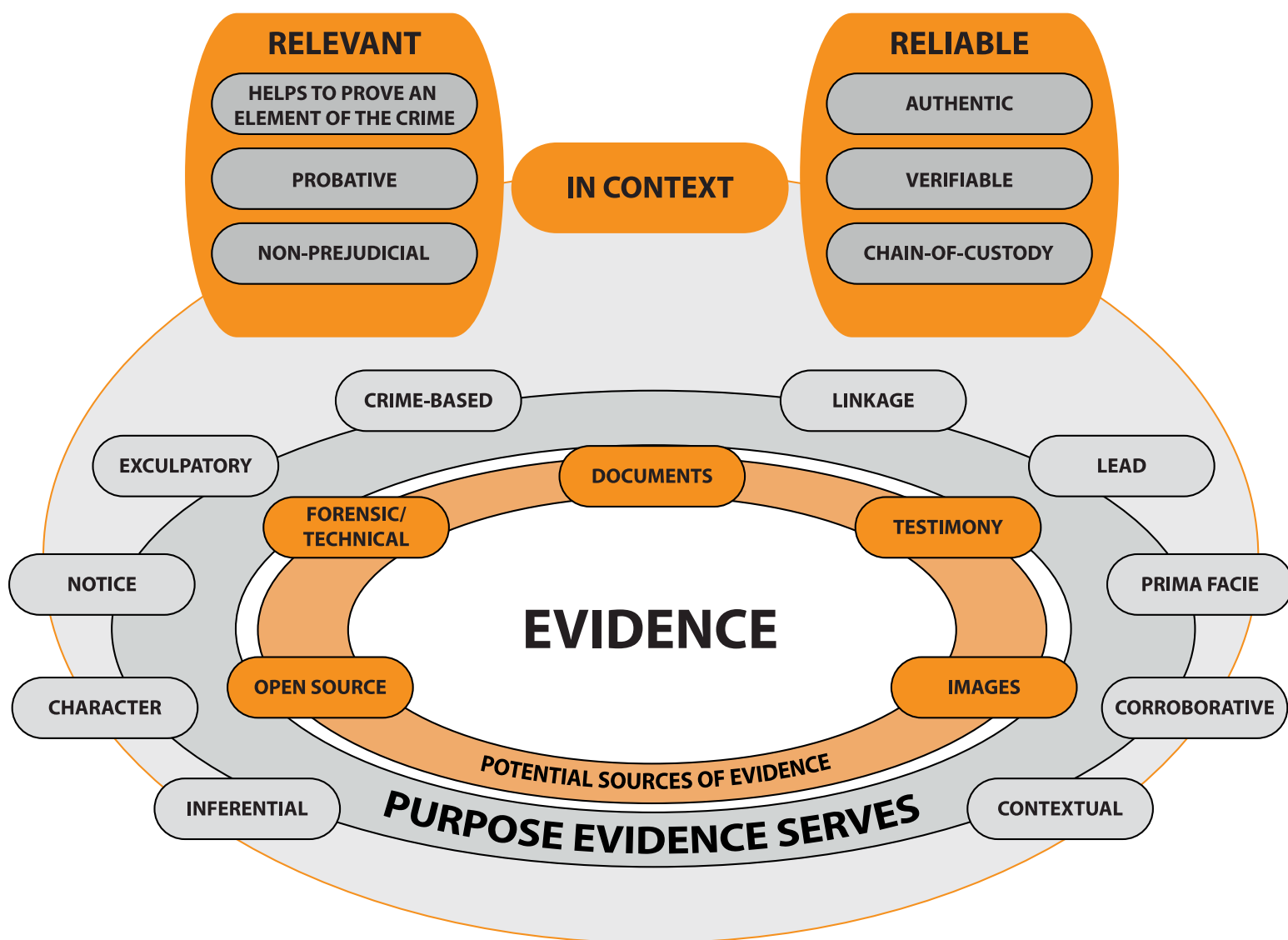


FROM AN EXPERT

“Next to DNA, the democratization of gathering of evidence by means of the universal camera ... the cell phone ... is an enormous development in terms of the potential for real justice..”

—Larry Krasner, Defense Attorney, Pennsylvania, USA

ALL ABOUT EVIDENCE



PART II

PURPOSES OF EVIDENCE

Just as video can come from a number of sources, it can also serve a number of purposes in your pursuit of the full and honest story. Additionally, keep in mind that the same video can serve several different purposes.

Here is a short list of the different ways video can support your work to secure accountability, followed by a Field Note that illustrates this. For a frontline documenter, what's most important is to understand the principle that video serves different purposes — this will help you know where to point your camera to capture more useful images. Don't worry about knowing each purpose in detail.

LEAD EVIDENCE

Initial information that points to a crime and allows us to make an educated guess about what may have happened. The information alone, however, is not sufficient to determine whether a crime actually happened. It must be further researched to determine whether an investigation should be launched.

Examples: Footage depicting the destruction of civilian schools, injuries and casualties from causes we do not see in the video, tanks driving down a street and firing in what is believed to be residential areas, air strikes, etc.



PRIMA FACIE EVIDENCE

Information that allows a key fact to be established or presumed true unless it is disproved.

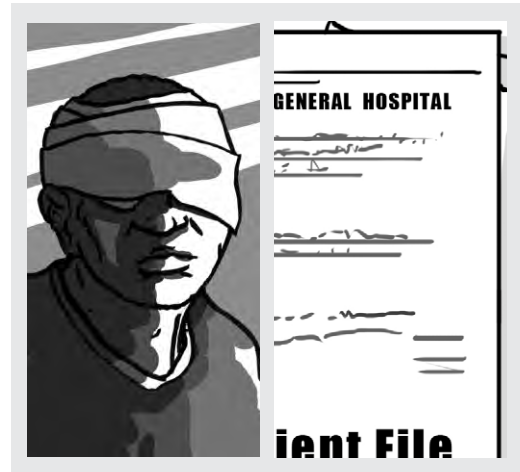
Examples: Footage of torture being administered, video of a military commander bragging that he has effective command over his troops; an image of a child soldier who cannot possibly be older than 15.



CORROBORATIVE EVIDENCE

Information that supports or verifies already existing evidence; also known as back-up information.

Examples: Footage of injuries corroborating a medical exam, video of children training for war that supports military records documenting age, or footage of a hospital destroyed by airstrikes, backing up a witness statement detailing the shelling.



CONTEXTUAL EVIDENCE

Sometimes context must be proved. For instance, a perpetrator cannot be convicted of murder as a war crime unless it is proven that the murder(s) happened in the context of an armed conflict. Absent this context, it is not a war crime, it is simply murder. In other cases, contextual evidence is not required, but can play an important role in illustrating what happened. This contextual evidence allows a judge or a jury to better understand the atmosphere, geographic location, or political climate in which the events occurred.



Examples: Footage of life in the town before the conflict, of students going to school before and after an airstrike, of a hospital before it was taken over by military personnel, including the antennas and satellite dishes that went up; footage of the water supply before and after it was poisoned, of the physical impacts of climate change on a community, of a lack of basic needs in households, of military convoys, or of speeches by military officials in the lead up to a conflict.

INFERENTIAL EVIDENCE

Information that allows us to make an educated guess as to the intent of the perpetrator which must be further corroborated.

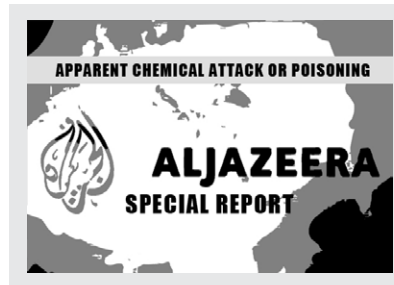
Examples: A video of a body with severe trauma caused by beating likely points to the intent to administer severe pain. Images of a mass grave of victims shot execution style, with hands bound, points to an intent to kill.



NOTICE EVIDENCE

Information that proves a military commander or civilian leader received information which ensured they knew – or should have known – that the people they had authority over were committing crimes.

Examples: Videos depicting torture that are broadcast on the television news, video reports that document crimes and are widely distributed by NGOs, videotaped public statements by defectors.



CHARACTER EVIDENCE

Information that attests to an individual's moral standing, general nature, traits, characteristics, and reputation in the community.

Examples: Videos showing the accused committing other crimes he or she is not on trial for, taking care of his or her family or the doing volunteer work in his or her community.



EXCULPATORY EVIDENCE

Information that helps prove a defendant is innocent or did not intend to commit a crime.

Examples: Security camera footage showing someone else committing the crime; footage with a verified time and date stamp showing the suspect in a different location at the time the crime was committed.



To illustrate the different purposes video can serve and how it works alongside other sources of evidence, let's look at how the UN Mission to Investigate Allegations of the Use of Chemical Weapons in Syria pieced together different sources of evidence to confirm, by clear and convincing evidence, that chemical weapons were used against civilians in Ghouta.

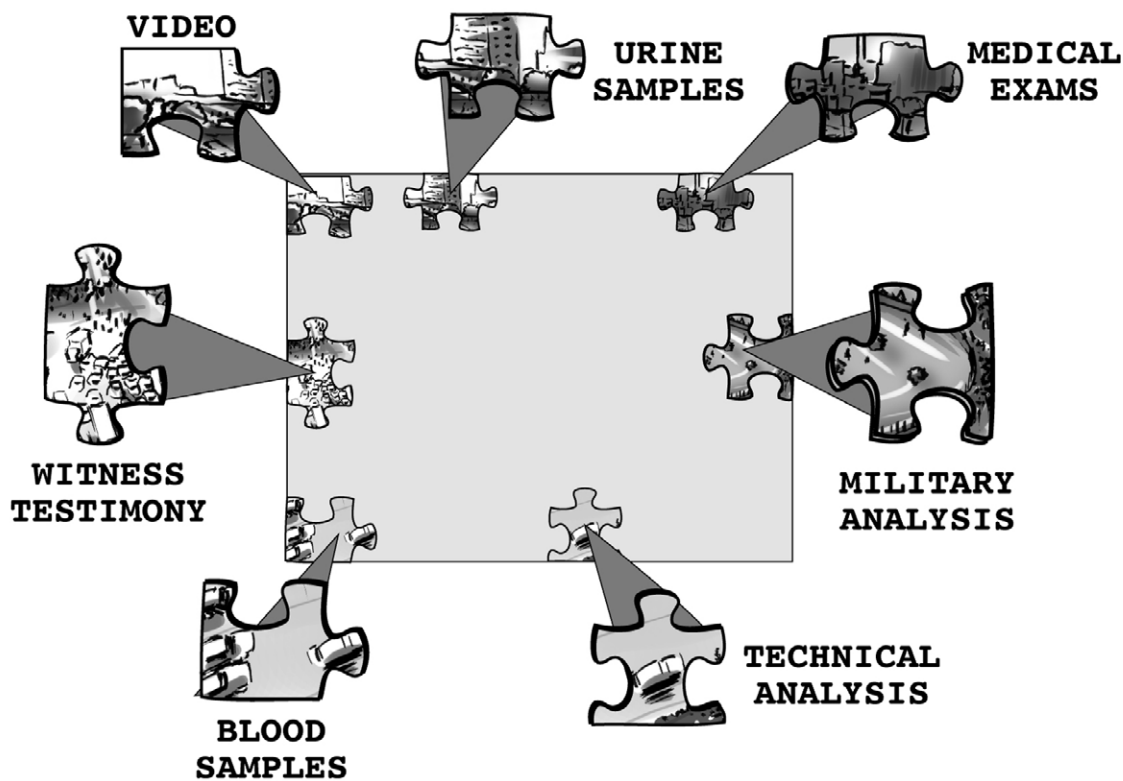
FIELD NOTE

GHOUTA TO BHOPAL: VIDEO'S ROLE IN THE INVESTIGATIVE PROCESS

PART II: VIDEO IS ONLY ONE PIECE OF EVIDENTIARY PUZZLE

As we saw in Part I of the Ghouta Field Note, while the videos from Ghouta, Syria, and Bhopal, India, did not prove a crime had been committed, the videos alerted the global community that something was very wrong. In both of these cases, videos served as what is referred to as **lead evidence**. The world learned that a crime may have been committed when it witnessed, through multiple videos,¹ a large number of people suffering from symptoms of apparent poisoning – constricted breathing and involuntary muscle spasms, frothing at the mouth, fluid seeping from their noses and eyes, and death. For Ghouta, the videos compelled the UN to send in a team of investigators to determine what happened.

Once on site, the UN investigators collected and tested blood and urine samples from victims. The samples tested positive for Sarin gas. These samples provided definitive evidence of exposure to Sarin. Lawyers refer to this as **prima facie evidence**, as it establishes a key fact – exposure to the gas. It still does not, however, establish whether the poisoning was purposeful or not.



To strengthen the conclusion that civilians were exposed to a nerve agent, the videos were considered alongside clinical medical examinations showing typical symptoms of exposure to a nerve agent, as well as testimony from survivors, nurses, and doctors, detailing the symptoms they saw and experienced after the shelling. The videos, medical exams, and witness testimony are referred to as **corroborative evidence**, because they back up the results of the blood and urine tests. Together, these sources of evidence confirm exposure to Sarin gas, but again, the evidence does not yet establish whether the poisoning was purposeful nor provide any insight into the source of the gas.

The UN investigators also completed a site visit to what was believed to be the impact zone of the rockets carrying the poison. Technical and military analysis of the impact zone, combined with subsequent laboratory tests, confirmed that the rockets and rocket fragments contained Sarin gas. This analysis of the impact zone and the weapons provided what is called **inferential evidence** because the results allowed investigators to infer that the attack was purposeful, since it would be unlikely for surface-to-surface missiles loaded with Sarin gas to launch themselves.

Witness testimony confirming that shelling took place immediately before the victims started showing symptoms of poisoning further **corroborates** the conclusion that surface-to-surface rockets were used to deliver the gas.

The next step is to prove responsibility by uncovering evidence that links the perpetrator to the crime. This is called **linkage evidence**. Without linking the crime to a person, we cannot secure accountability. In this case, initial investigations suggested that the type of rockets and launchers used in the attacks on Ghouta were weapon systems known and documented to be in the possession of, and used only by, Syrian government armed forces. If proven, this fact will likely serve as **linkage evidence** connecting the attack to the Syrian regime. For criminal accountability, it will be necessary to go a step further and identify particular individuals who ordered, carried out, assisted, or tolerated the attack.

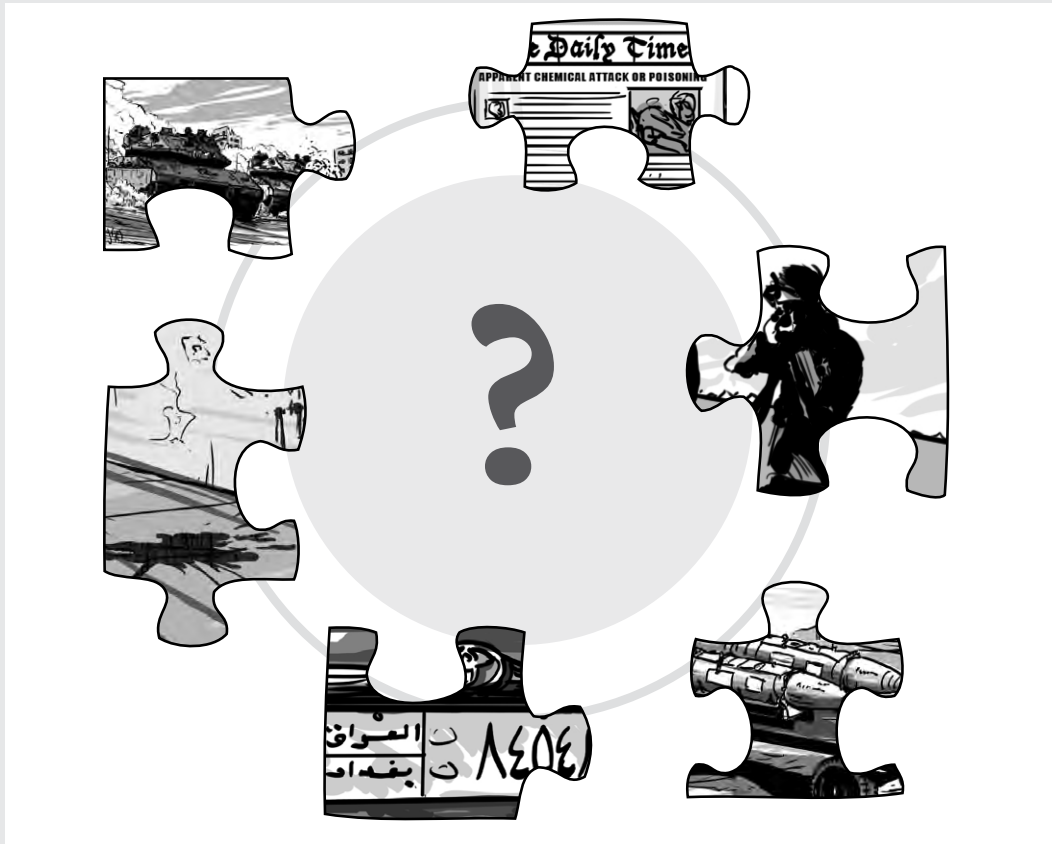
TAKE HOME POINTS

First, investigators, analysts, and lawyers prove their cases by piecing together different sources of evidence for different purposes, allowing them to tell the full story of what happened. In this case, the UN investigators were able to conclude, on the basis of clear and convincing evidence, that chemical weapons were used against civilians. They began with the videos and then used witness testimony, medical exams, medical lab results, weapons analysis, and technical assessments to confirm that the attack was purposeful.

Second, as a frontline documenter, remember that footage documenting the commission of crimes is valuable. But your efforts to capture linkage and notice evidence will likely prove to be of greater importance for long-term justice and accountability. With only 7.5 hours on the ground, combined with follow-up analysis, the UN investigation team was able to prove a crime — a chemical weapons attack against civilians — was committed, by clear and convincing evidence. This was the easy part. Proving who did it and how is much harder, and at the time of writing still had not been accomplished.

FROM AN EXPERT

Investigation has sometimes been likened to assembling a jigsaw puzzle and each piece of evidence to an individual piece of the puzzle. However, unlike the puzzle assembler, the investigator cannot look on the cover of the box to see what the completed puzzle will look like. The investigator must carefully collect the “pieces” of the puzzle from a variety of sources and then assemble them with logic and common sense in order to see that entire picture. Although a partial picture may develop as more and more pieces are added, it is not until the final piece is placed that the investigator can clearly see the entire truth.



This analogy also demonstrates the relationship between evidence and speculation. Assume that the person assembling the puzzle, like the investigator, does not know what the completed puzzle will look like. It is impossible for that person to look at any one piece and know what the entire picture is. If that person only has ten percent of the puzzle's pieces and assembles them as best he or she can, it is probably still impossible to accurately guess what the picture looks like. The person may speculate, but with ninety percent of the puzzle missing, it is very likely that he or she will be wrong. The more pieces the assembler finds, the less he or she will have to speculate about the picture. Similarly, in an investigation, the investigator must gather all the evidence and assemble it with common sense before a clear picture of what happened is revealed. While an incorrect guess about what a puzzle will look like is of no consequence, the gravity of a human rights investigation requires that an investigator never speculate or guess about the ultimate facts of a case. The investigator must carefully and methodically gather as much evidence as possible in hopes that it will be sufficient to determine, without speculation, what happened.

Excerpt from *The Handbook of Human Rights Investigations* by Dermot Groome

PART III

CHARACTERISTICS OF LEGAL EVIDENCE

To turn information into legal, trial-ready evidence that a court can trust and use in coming to a decision, the information must have two key characteristics: it must be reliable and relevant. This reliable and relevant evidence is then put in context. Context is simply about how you weave the evidence together to tell the story about what happened to whom, when, and where, as well as who should be held accountable.

RELIABILITY

For anyone to rely on your footage — the media, human rights commissioners, decision-makers, and courts — your footage must be trustworthy. For instance, reporters need to be sure that what they are showing is real, but they can choose to show footage with the caveat that “This footage has not been independently verified.” A lawyer cannot. When a lawyer submits video evidence to court, he or she must be absolutely sure the video shows what the lawyer says it shows.

Here are three key qualities that will enhance the reliability of your footage, and which can generally be achieved by following the basic filming practices below:

1) VERIFIABLE

Verification is the process of confirming that the video is what it claims to be and was taken at a specific time, date, and location. This helps the media, human rights advocates, investigators, analysts, and lawyers trust the substance of the video and use it to piece together the full story. It also strengthens the video’s chance of being used as evidence in the courtroom. The verification process applies to both the footage itself and the metadata, because both can be faked or manipulated.

Defined: Metadata

A video file has two levels of content: the images we see and embedded data that we do not. This embedded data is called “metadata.” Loosely defined, metadata is data about data. Practically speaking, metadata is information about the time, date, location, model of camera used, etc. that is automatically stored with the footage. Think of it as “behind the scenes” information. For more about metadata, see “How to Capture Metadata and Documentation” at: archiveguide.witness.org/create/what-metadata-capture.

For More Information

To learn how to film so that your footage is easily verifiable by investigators, analysts, lawyers, and potentially courts, see “Basic Practices,” “Filming Secure Scenes,” and “Adding Essential Information” at vae.witness.org.

2) AUTHENTIC

Authentic means that the original video file is free of any sort of manipulation, including changes of filename, additions, deletions, editing, or corruption, and that it was properly saved and passed along in its original format to investigators.

3) PROVEN CHAIN-OF-CUSTODY

Proven chain-of-custody means that each possession has been carefully documented as the footage makes its way from the street where it was filmed to investigators, then to lawyers, and then to the courtroom. A proven chain-of-custody helps to establish that there was no opportunity for corruption or manipulation from unknown sources.

KEY POINT

Reliability is all about techniques and it comes down to:

- using basic filming techniques that will allow your footage to be easily verified,
- keeping your original file, and
- documenting how the footage (ideally the original file) moved from capture to courtroom.

The rules of evidence vary from country to country and from court to court, so it is impossible to provide hard and fast rules about how reliable a piece of video must be to be admitted in court. The bottom line, however, is this: a video clip must be verified. It must be what you say it is. It cannot be faked or manipulated. Having the original file and being able to prove the chain-of-custody — while not absolutely mandatory in every jurisdiction — will make the verification process much easier and increase the reliability of the video. In turn, everyone — from the media to human rights commissions, to investigators, lawyers, and judges — can place more trust in it.

Relevance is about what content you decide to put inside the frame. Evidence is relevant if it helps to prove or disprove a fact that is in question in an investigation or at trial. It does not need to make the fact certain, but it must at least increase or decrease the likelihood of some fact. Here are two key qualities that will enhance the relevance of your footage:

1) HELPS TO PROVE AN ELEMENT OF AN ALLEGED CRIME

As discussed in the sections “Anatomy of a Crime” and “Collection Planning,” every crime is broken down into “elements.” A video clip is relevant if it helps to prove one of these elements. If it does not, it is likely irrelevant and will not be admitted in court. Here is a simple example:

If the International Criminal Court has charged a militia leader with the recruitment of child soldiers but not with torture, footage of children at military training camps will be relevant. Footage of adult soldiers torturing civilians – while criminal and horrific – will not likely be relevant and, in turn, will not be admitted into evidence.

There are exceptions to this. In short, there are times when evidence may clearly prove an element of a crime but will not be admitted because it is duplicative or confusing. For instance:

- If a series of photos of a mass grave have already been admitted and considered by the judge, a video may not be admitted because it provides the same information.
- A short, shaky, video that includes continuous movement with many pans and zooms may not be admitted, even though it shows that an elementary school was hit by an illegal barrel bomb, because it is impossible for a viewer to make sense of the footage.

2) IS NOT PREJUDICIAL

Even if evidence proves an element of the crime, a judge may still exclude evidence from the courtroom if the evidence is prejudicial. Evidence is prejudicial if it provokes emotional bias or misleads or unfairly sways a judge or jury. Consider the following examples of videos that may not be admitted as evidence.

- A video of an altercation with police that includes audio of inflammatory comments directed at the officers, such as, “Hey man, why are you being such an ***? Leave that man alone, ***; he isn’t doing anything. Get off of him you ***, **** cops. *** cops are all criminals.” This may not be admitted because the audio is profane and full of unsupported opinions that evoke emotion.
- A 25-year-old man is charged with assault but has no prior arrests and no recent history of violence. A video of him at age 15 starting a fight during a hockey match ten years earlier would likely not be admitted.

FOR MORE INFORMATION

To learn more about how to capture relevant footage that proves elements of a crime, see “Collection Planning” at vae.witness.org

TAKE HOME POINT

The bottom line is this — a video can be used in court if it is reliable and relevant. The more reliable and relevant it is, the more the judge or jury can trust it. Use filming techniques along with good content management practices to strengthen the reliability of your footage. To maximize the relevance of your footage, learn more about how to document elements of a crime, as this will help you decide what information to put in the camera's frame.

ADDITIONAL RESOURCES

The Handbook of Human Rights Investigation by Dermot Groome. Available online through various booksellers.

Reference Book to the Field Guide for Civil Society Investigation and Documentation of Gross Human Rights Violations by the Public International Law and Policy Group

<http://publicinternationalallawandpolicygroup.org/wp-content/uploads/2015/11/Reference-Book-to-Field-Guide-on-CSO-Investigations-Selected-Sample.pdf>

United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, Report on the Alleged Use of Chemical Weapons in the Ghouta Area of Damascus on 21 August 2013

http://www.mediafire.com/view/9b68gh9tkwcp4cj/UN_Report_2013_08_Chemical_Weapons_Investigation.pdf

END NOTES

¹ “On the Human Rights Channel, A Year of Citizen Video from Syria”

<https://blog.witness.org/2013/09/on-the-human-rights-channel-a-year-of-citizen-video-from-syria/>