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Non-textual evidence in international criminal prosecutions: discovering the best practices for audiovisual materials in a digital age

Hak, J.W.

Citation

Hak, J. W. (2023, November 9). *Non-textual evidence in international criminal prosecutions: discovering the best practices for audiovisual materials in a digital age*. Retrieved from <https://hdl.handle.net/1887/3656787>

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Note: To cite this publication please use the final published version (if applicable).

CHAPTER ONE

NON-TEXTUAL EVIDENCE AS A METHOD OF PROOF

Introduction

Lights! Camera! Action! The critical success of a movie is often dependent upon the work of the director. Casting, location, camera angles, lighting, and special effects shape the feel and substance of the production and its receptivity by the audience. Though there are no awards for “Best Atrocity Crime Prosecution of the Year”, the parallels between the importance of a movie’s director and the prosecutor in a criminal trial are undeniable. Decisions made by the prosecutor in the selection of evidence¹ and the way the case is presented can make the difference between a marginal case and a compelling case. This Chapter hones its focus on the effective incorporation of non-textual evidence in the presentation of the prosecution’s case.² This type of evidence often constitutes a vital component in the proof cadre of atrocity crime prosecutions.

In Section 1, I introduce the pedagogical role of the prosecutor in educating the court through the selection of evidence and case presentation strategy and contextualize the significance of this role in leading evidence. Section 2 explores the value of visual evidence generally, extolling the advantages it may possess over other forms of evidence, while also urging caution regarding the challenges it presents. Section 3 builds upon previous sections by incorporating this information into the development of the prosecution’s trial narrative. Section 4 dives into different categories of visual evidence, including the use of film, video, and photographs (4.1); maps, diagrams, charts, and tables (4.2); and remote sensing technology (4.3). Section 5 discusses how the types of non-textual evidence referred to in this chapter have been applied to atrocity crime prosecutions. In Section 6, I continue developing the four case studies first presented in the introductory chapter, focusing on the use of visual evidence as a method of proof in each case. Reflections on the value of visual evidence for proof purposes and recommendations for moving forward will be offered in the Conclusions and Recommendations section.

1. The Role of the Prosecutor in the Presentation of the Case

¹ Evidence is defined as that which tends to prove the existence or non-existence of a fact. In Law, J. (2018). *A Dictionary of Law (9th ed.)*, Oxford: Oxford University Press; The means by which any alleged matter of fact, the truth of which is submitted for investigation, is established or disproved. In Black, H.C. (1979). *Black’s Law Dictionary (5th ed.)*, Minnesota: West Publishing.

² Though the focal point in this chapter is the case for the prosecution, my comments apply equally to the defence. Primary reference to the prosecution is reflective of the fact that the burden of proof is on the prosecution throughout a trial and that the prosecution typically presents most of the evidence in court. Non-textual evidence will on occasion be referred to as visual evidence when appropriate, though they are not necessarily the same.

It may be helpful to briefly outline the different stages of proceedings during which non-textual evidence may be considered by the OTP and the court. These stages may be broadly described as the pre-trial, trial, and appellate stages. Beginning with the pre-trial stage, Art. 53 of the *Rome Statute* compels the OTP to initiate an investigation after having evaluated available information unless it is determined that there is no reasonable basis to proceed. In deciding whether to initiate an investigation, the OTP must consider, *inter alia*, whether the information available provides a reasonable basis to believe that an ICC crime has been committed. It is during this early pre-investigation stage that non-textual evidence may first be examined for its value in deciding whether to formally commence an investigation. This phase is also referred to as the “preliminary examination” stage of proceedings, which is contemplated by Art. 15(6). The Pre-Trial Chamber must first authorize the commencement of an investigation (Art. 15(3)), and once authorized, the OTP may collect and examine evidence (Art. 54(3)(a)). Evidence gathered during the investigation may be submitted to the Pre-Trial Chamber as part of the OTP’s application for an arrest warrant (Art. 58(1)).³ For example, in 2017, the Pre-Trial Chamber issued an arrest warrant for war crimes of murder for Libyan national Mahmoud Mustafa Busayf al-Werfalli based upon civilian video recordings posted to social media and obtained by the OTP during its investigation.⁴

Following a defendant’s appearance before the court, the Pre-Trial Chamber is required to hold a hearing to confirm the charges upon which the OTP intends to seek a trial (Art. 61).⁵ The Pre-Trial Chamber must determine whether there is sufficient evidence to commit the person of interest to stand trial and this is therefore the final pre-trial opportunity to consider the value of non-textual evidence in assessing the viability of the OTP’s case.⁶ Once the charges have been confirmed, the next phase is the trial. This is where non-textual evidence will find its greatest potential value and may be subject to extensive examination before the Trial Chamber. Following the decision of the Trial Chamber on accountability, the final time non-textual evidence may be considered is during appellate proceedings. Throughout this work, I will anecdotally refer to the use of non-textual evidence during the various stages of the case, but the dominant focus will be the trial itself.

The standard of proof that must be met by the prosecution varies depending upon the stage of the proceedings. To commence an investigation the standard is reasonable basis to believe (Art. 53(1)(a)); to issue an arrest warrant the standard is reasonable grounds to believe (Art. 58(1)); for

³ Technically, the “case” commences upon the issuance of an arrest warrant or summons to appear pursuant to Art. 58; *Situation in Kenya*, ICC-01/09-19, ICC PT. Ch. II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, at para. 44.

⁴ *Prosecutor v. Al-Werfalli*, ICC-01/11-01/17-2, Warrant of Arrest, 15 August 2017.

⁵ The requirement of a confirmation hearing prior to commencing a trial is a feature unique to the ICC. Klamberg, M. (ed.). (2017). *Commentary on the Law of the International Criminal Court*, Brussels: Torkel Opsahl Academic EPublisher, at 440.

⁶ The confirmation hearing is not a trial of the evidence. It is only intended to assess the sufficiency of the evidence gathered during the investigation and thus serves a necessary screening function. *Prosecutor v. Abu Garda*, ICC PT. Ch. I, 8 February 2010, at para. 48; *Prosecutor v. Ruto et al.*, ICC PT. Ch. II, 23 January 2012, at paras. 51-53; *Prosecutor v. Kenyatta et al.*, ICC PT. Ch. II, 23 January 2012, at paras. 63-65 (noted in Klamberg, *ibid*, at 441).

confirmation of charges the standard is substantial grounds to believe (Art. 61(5)); and securing a conviction requires proof beyond reasonable doubt (Art. 66(3)). Earlier stages of the proceedings thus require a lower standard of proof. However, regarding the use of non-textual evidence, I advocate that the authenticity, accuracy, and reliability of tendered non-textual evidence should be robustly provable at all stages. There is little value in utilizing evidence at an early stage that does not meet the trial standard. Thus, attention to admissibility and evidentiary weight concerns should be paramount at the outset.

As discussed in the introductory chapter, the procedures adopted by the various tribunals and courts, ranging temporally from the IMT to the ICC, reflect the incorporation of features from both adversarial and inquisitorial trial models. The dominant nod to the adversarial approach has been the use of the “two case” or contest method of case presentation, in which the prosecution, which bears the burden of proof, presents its case through the calling of witnesses and the tendering of other evidence. The role of the defence is to challenge the prosecution’s case.⁷ Once the prosecution has concluded its case, the defence may choose to present its own case, which in turn will be challenged by the prosecution. In the true adversarial model, counsel will examine their own witnesses first followed by cross examination by opposing counsel. In models that incorporate some elements of inquisitorial practice, the judges may question witnesses before counsel.⁸

Securing an Indictment is one thing, proving its allegations is quite another. Having alleged criminality, it falls squarely upon the prosecution to present a case that is sufficiently cogent to merit conviction. The role of the prosecution in the collection, organization, selection, and presentation of evidence at trial cannot be understated.⁹ Though courts retain an important supervisory role regarding evidence presentation,¹⁰ the pivotal task of building the prosecution’s case is generally within the discretion of counsel. An important *caveat* though – the selection and

⁷ Not only does the defence protect the interests of the defendant in this way but also the interests of the international criminal justice system. Stahn, C. (2020). *Justice as Message: Expressivist Foundations of International Criminal Justice*, Oxford: Oxford University Press, at 293.

⁸ Klamberg, M. (2013). *Evidence in International Criminal Trials*, Leiden: Martinus Nijhoff Publishers, at 45-48; Derham, R. and Derham, N. (2010). From Ad Hoc to Hybrid – the Rules and Regulations Governing the Reception of Expert Evidence at the International Criminal Court. *The International Journal of Evidence & Proof*, 14, 25-56, at 26-27; Ambos, K. (2003). International Criminal Procedure: “Adversarial”, “Inquisitorial” or Mixed? *International Criminal Law Review*, 3, 1-37, at 20; Friman, H. (2003). Inspiration from the International Criminal Tribunals When Developing Law on Evidence for the International Criminal Court. *The Law and Practice of International Courts and Tribunals*, 3, 373-400, at 382-383.

⁹ While investigators are primarily responsible for the collection of evidence, prosecutors perform an important function in the evaluation of evidence and providing direction for further collection as part of their role in building their case.

¹⁰ Art. 64 of the *Rome Statute* and RPE Rules 132 *bis* and 134 provide a supervisory role for the Trial Chamber. For an example of the Trial Chamber setting out guidelines for witness evidence, see *Prosecutor v. Lubanga*, ICC-01/04-01/06-1140, Decision on Various Issues Related to Witnesses’ Testimony During Trial, 29 January 2008. The Pre-Trial Chamber and Trial Chamber have sweeping powers over the length of the prosecution and defence cases, the number of witnesses they may call, how witnesses are examined, and the evidence they can lead. Boas, G., Bischoff, J.L., Reid, N.L., and Taylor, B.D. (2011). *International Criminal Procedure*, Cambridge: Cambridge University Press, at 263-266.

presentation of evidence by the prosecution must be fair, transparent, and aimed at eliciting the truth. Within that framework, the choices made by the prosecution regarding the selection and presentation of evidence are integral to the effective unfolding of their case. This requires an assessment of the triable issues, examination of the available evidence, and parsing out the relevant evidence specific to each issue. Atrocity crime prosecutions are lengthy, complex, and involve many different forms of evidence, including eyewitness testimony, statements, and affidavits; expert testimony and reports; documentary evidence; visual evidence;¹¹ and physical exhibits. Informed, thoughtful evidence selection and consideration of how it can be efficaciously presented is crucial to the development of a compelling case. As the focus of this chapter is on the use of visual evidence as a method of proof, in Section 2 I will explore the value of this type of evidence in proving allegations of criminality.

2. The Value of Visual Evidence for Proof Purposes

Intuitively, a prosecution for atrocity crimes would seem incomplete without the presentation of eyewitness testimony, although case strategy might dictate otherwise. For example, in conducting the Einsatzgruppen trial,¹² US Army Chief Prosecutor Benjamin Ferencz opted not to present powerful death camp survivor testimony and instead based the prosecution's case upon SS generated documentary evidence.¹³ This strategy allowed the prosecution case to be completed in two days, ultimately resulting in convictions for most of the defendants. While this approach was effective in terms of the result, it represents an aberration in international criminal prosecutions, which tend to rely less on a clinical documentary case in favour of a broader approach, incorporating different types of evidence.¹⁴ This section begins with a brief look at *viva voce* evidence, which has been a dominant feature in most atrocity crime prosecutions, and then considers the merits of visual evidence.

Words have traditionally been the preeminent pedagogical tool in the presentation of evidence. They can be very descriptive, evocative, and powerful in painting a picture for the court of what the witness observed or endured. Effectively delivered words can transport the witness back to the event being described and leave listeners breathless as the words wash over them. However, as

¹¹ Visual evidence in this context includes film, video, photographs, maps, diagrams, charts, tables, spreadsheets, three dimensional scans and models, forensic reconstructions in the form of animations and simulations, remote sensing images, terrestrial laser scanning, advanced visual representations, and other forms of evidence with visual form.

¹² Formally referred to as the *Trials of War Criminals before the Nuremberg Military Tribunals, United States v. Ohlendorf et al.* [1949] 4 TWC 3, conducted in Nuremberg in 1947-1948; Ferencz, B.B. and Ferencz, D.M. (2016). *Criminalizing the Illegal Use of Force*. In Schabas, W.A. (ed.), *The Cambridge Companion to International Criminal Law*, Cambridge: Cambridge University Press, 230-252.

¹³ Ferencz, B.B. (1947). Opening Statement at Nuremberg. *Trial of the Major War Criminals, vol. IV*, p. 494; *The Accountant of Auschwitz*, A Documentary Channel Production, TLNT Productions Inc, 2018; Ferencz, B.B. (undated), *The Biggest Murder Trial in History*, available at <https://benferencz.org/stories/1946-1949/the-biggest-murder-trial-in-history/> (accessed 11 May 2020).

¹⁴ This is reflective of the relative dearth of documentary evidence available to post-Holocaust prosecutors. Boas, G. et al., *supra* note 10, at 352.

captivating as eyewitness testimony can be, it is frequently unreliable. I am not casting aspersions on honest well-meaning witnesses who are trying to do their best, but rather acknowledge the well-documented frailties associated with the acquisition, retention, and retrieval of memory.¹⁵

In her seminal work, *Eyewitness Testimony*, Loftus evaluated the acquisition or perception phase of memory and noted that event and witness factors impact a witness's ability to encode information.¹⁶ Event factors include the length and frequency of exposure, the level of detail and type of facts involved, and the presence of violence. Witness factors include stress, cultural expectations, personal biases and prejudices, and perceptual focus. She noted that the retention phase, which is the period between the event and the time the witness is asked to recall it, is affected by the length of the retention period and intervening events.¹⁷ Since memories are constructed from stored and available information, gaps are subconsciously filled with inferences and intervening fragments to form a memory. Finally, she examined the retrieval phase which involves how the information is obtained from the witness, focusing on environment, the questioner, and the manner of questioning.¹⁸ A stressful environment and suggestive or aggressive questioning can impact the veracity of the information received, even from an honest witness.

Loftus found that witnesses have considerable difficulty accurately encoding information about time, speed, distance, and duration of an event, especially if the event involved some level of violence. Combs found similar deficits among atrocity crime witnesses testifying before the ICTR, SCSL, and the Special Panels.¹⁹ What is striking about the research that was undertaken independently by Loftus and Combs is that Loftus conducted her studies using willing test subjects who observed preplanned non-violent or *faux* violent events in clinical laboratory settings in 1970s America and found substantial obstacles to accurate memory encoding.²⁰ Combs studied the testimony of witnesses to actual atrocity-related events and noted similar memory impediments as well as relevant witness deficits that place many atrocity witnesses in a different category than the

¹⁵ See generally Loftus, E.F. (1979) *Eyewitness Testimony*, Cambridge, MA: Harvard University Press; Rakoff, J.S. and Loftus, E.F. (2018). The Intractability of Inaccurate Eyewitness Identification. *Dædalus, The Journal of the American Academy of Arts and Sciences*, 147(4), 90-98; Combs, N.A. (2010). *Fact-finding Without Facts: The Uncertain Evidentiary Foundation of International Criminal Convictions*, New York: Cambridge University Press.

¹⁶ Loftus, *ibid*, at 20-51.

¹⁷ Retention phase factors are significant in the atrocity crime context as witnesses may not be asked to formally describe an event for months or years after it occurred and in the interim, they may have learned information from other witnesses or investigators that can enhance, change, or compromise existing memories, or cause the witness to invent new memories. Loftus, *supra* note 15, at 52-87; Stahn, *supra* note 7, at 290.

¹⁸ Loftus, *supra* note 15, at 88-109.

¹⁹ Combs, *supra* note 15; Combs, N.A. (2015). A New Look at Fact-Finding at the ICTR: Advances in Judicial Acknowledgment. *Criminal Law Forum*, 26, 387-401.

²⁰ Morgan et al. note that crime simulations do not entail the degree of personal threat or alarm that an individual may experience during actual life-threatening events and cautioned that simulation findings must be contextualized accordingly. In a controlled experiment involving 509 military personnel experiencing actual stress, Morgan et al. found that eyewitness memories encoded during events that are personally relevant, highly stressful, and realistic in nature may be subject to substantial error. Morgan, C.A., Hazlett, G., Doran, A., Garrett, S., Hoyt, G., Thomas, P., Baranoski, M., and Southwick, S.M. (2004). Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress. *International Journal of Law and Society*, 27, 265-279, at 274.

Loftus volunteers.²¹ In short, if eyewitness evidence is unreliable in non-stressful clinical settings, as Loftus found, one can certainly expect unreliable testimony in the surreal environment of atrocity crimes. Despite these misgivings, I do not suggest that *viva voce* evidence has no place in atrocity crime prosecutions. There remains a general preference for eyewitness testimony at the tribunals and the ICC.²² For all its imperfections and foibles, *viva voce* evidence has earned a seat at the table.

Words will remain a mainstay in the trial forum, yet research in education and psychology has shown that the manner in which evidence is presented can have diverse impacts on the audience.²³ Evidence that has visual form is better integrated and remembered compared to pure testimonial evidence.²⁴ Images and visual depictions of data may be more influential than non-visual expressions of the same data.²⁵ Even the most fluent linguist may not be able to convey by words alone the full meaning of an image, not because the linguist is at a loss for words but rather because images are more vivid than words alone can effectively express.²⁶ Images strike us differently than words by connecting to internal narratives that inform our perceptions of the world around us.²⁷ While a witness or counsel may orally describe every visible aspect of an image, they cannot convey the emotions or feelings the image may engender in the viewer, nor could they, as the visceral response is deeply personal to the viewer. In this respect, choosing to describe a scene with words alone will always leave things unsaid.

²¹ These deficits include inferior education levels (most prominent), literacy, limited life experiences, cultural norms and taboos, and interpretation challenges owing to the frequent need to translate into French and then into English. Also noted is the difficulty of many witnesses to comprehend two-dimensional depictions of three-dimensional scenes (e.g., maps, diagrams, and photographs). Combs, *supra* note 15, at 22-39, 63-100.

²² Combs, *supra* note 15, at 191-192; Combs, N.A. (2013). Evidence. In Schabas, W. and Bernaz, N. (eds), *Routledge Handbook of International Criminal Law*, London: Routledge, 323-334.

²³ Porter, E.G. (2018). Taking Images Seriously. *Columbia Law Review*, 114, 1687-1782, at 1752-1753; Feigenson, N. and Sherwin, R.K. (2007). Thinking Beyond the Shown: Implicit Inferences in Evidence and Argument. *Law, Probability and Risk*, 6, 295-310, at 297-298, 309; Sherwin, R.K., Feigenson, N., and Spiesel, C. (2007). What Is Visual Knowledge, and What Is It Good For? Potential Ethnographic Lessons from the Field of Legal Practice. *Visual Anthropology*, 20, 143-178, at 156-157; Feigenson, N. (2010). Visual Evidence. *Psychonomic Bulletin & Review*, 17(2), 149-154, at 151.

²⁴ Newman, E. and Feigenson, N. (2013). The Truthiness of Visual Evidence. *Jury Expert*, 25(5), 9-14, at 9; Fiedler, B.S. (2003). Are Your Eyes Deceiving You?: The Evidentiary Crisis Regarding the Admissibility of Computer Generated Evidence. *New York Law School Law Review*, 48(1-2), 295-322, at 302. In Powell, C.E. (1996). Computer Generated Visual Evidence: Does Daubert Make a Difference? *Georgia State University Law Review*, 12(2), 577-600, at 579, the author cites the Weiss-McGrath Report which found that juror retention doubled if a visual presentation was used, and that retention increased by 650% if both a visual and oral presentation was used rather than solely an oral presentation.

²⁵ Sherwin, R. (2011). *Visualizing Law in the Age of the Digital Baroque*, London: Routledge, at 59.

²⁶ Sherwin, Feigenson, and Spiesel, *supra* note 23, at 156; Feigenson and Sherwin, *supra* note 23, at 297.

²⁷ Mootz, F. (2012). Law Among the Sight Lovers. *New York Law School Law Review*, 57(1), 61-76, at 71; Sainato, V.A. (2009). Evidentiary Presentations and Forensic Technologies in the Courtroom, The Director's Cut. *Journal of the Institute of Justice and International Studies*, 9, 38-52, at 45-47.

Our brains process visual information very differently from text and sound.²⁸ Images are processed in several channels instead of one, giving the brain a more in-depth and meaningful encoding experience.²⁹ Humans also tend to place more value on visual and aural information over more abstract data based on numbers and statistics.³⁰ Visualization reduces the number of steps the viewer must take to understand what is being presented; that is, visual information requires less imagination than words and is more direct.³¹ It connects to prior knowledge, thereby improving comprehension and memory.³² A differentiation may need to be drawn between still and moving images because a plausible claim can be made that moving images may imprint in our brain in ways so similar to a lived experience that they may be easily conflated.³³ Moving images make the experience seem more real, providing the quasi-illusion of the viewer having been present, of actually being a witness to the event.³⁴ They also tend to stimulate cognitive and emotional responses approximating those encountered when actually experiencing the event, thereby engaging the theatre of the mind.³⁵ Consumption of visual information occurs faster, more viscerally, and with a perception of increased understanding.³⁶ Consider the difference between reading a book and seeing a movie based upon the book. The reader must imagine scenery, characters, and events. Conversely, little imagination is required of the viewer when presented with images that have been selected by the director. The director's vision may be more expansive than receiving information solely through words. When this effect occurs in the courtroom, counsel and the court experience what Delage refers to as "the richness of inscribing film into a judicial process".³⁷ For these reasons, taking advantage of multimodal learning should be foremost for counsel when structuring the trial narrative.

²⁸ van Weelden, L. and van Charldorp, T. (2019). Communications Perspective on the Use of Visualisations in Dutch Court for Minor Felonies. *Utrecht Law Review*, 15(1), 26-37, at 31.

²⁹ Feigenson 2010, *supra* note 23, at 151; Spiesel, C. (2006). Reflections on Reading: Words and Pictures and Law. *International Journal of Law in Context*, 2(3), 305-320, at 317.

³⁰ McDermott, Y., Koenig, A., and Murray, D. (2021). Open Source Information's Blind Spot. *Journal of International Criminal Justice*, 19(1), 85-106, at 98.

³¹ Porter, E.G. (2018). Imagining Law: Visual Thinking Across the Law School Curriculum. *Journal of Legal Education*, 68(1), 8-14, at 9-10; Sainato, *supra* note 27, at 45; Schofield, D. and Fowle, K. (2013). Technology Corner – Visualizing Forensic Data: Evidence (Part 1). *Journal of Digital Forensics, Security and Law*, 8(1), 73-90, at 74-75.

³² Newman and Feigenson, *supra* note 24, at 9; In Schofield, D. (2009). Animating Evidence: Computer Game Technology in the Courtroom. *Journal of Information Law and Technology*, 2009(1), 1-21, at 5, the author cites several US studies which showed that people retain vastly more information when it is presented visually rather than orally.

³³ A dream of sitting on the beach, a film of sitting on the beach, and the experience of sitting on the beach could all reside in our brain in similar ways. In Silbey, J. (2018). Persuasive Visions: Film and Memory. *Law, Culture and the Humanities*, 10(1), 24-42, at 39.

³⁴ Mnookin, J. and West, N. (2001). Theaters of Proof: Visual Evidence and the Law in *Call Northside 777*. *Yale Journal of Law and the Humanities*, 13(2), 329-390, at 386-387.

³⁵ Sherwin, R.K. (2012). Visual Jurisprudence. *New York Law School Law Review*, 57(1), 11-40, at 14. In Tushnet, R. (2012). Worth a Thousand Words: The Images of Copyright. *Harvard Law Review*, 125(3), 683-759, at 691, the author asserts that pictures can trigger emotions more reliably than words can, are processed more quickly, and are easier to remember.

³⁶ Porter, *supra* note 23, at 1752; Sherwin, Feigenson, and Spiesel, *supra* note 23, at 156.

³⁷ Delage, C. (2014). *Caught on Camera: Film in the Courtroom from the Nuremberg Trials to the Trials of the Khmer Rouge*, Philadelphia, PA: University of Pennsylvania Press, at 5.

Domestic criminal prosecutions in America incorporated images hesitantly at first and more often as the twentieth century progressed.³⁸ International criminal prosecutions incorporated visual evidence from the outset, in part because the technology was more commonplace, but primarily because the task of the tribunals was more expansive than that of domestic courts. Judges were not hearing about isolated events in one location but rather crimes of epic proportions that frequently crossed national boundaries and for which words were not enough.³⁹ Images have fundamental importance in international criminal justice.⁴⁰ They are advantageous because counsel can show the court the actual scene or event, rather than relying upon what might be imagined solely from *viva voce* evidence.⁴¹ Visual evidence is an attractive tool for storytelling,⁴² especially in light of the intimacy that images can evoke⁴³ and their production of a common experience or response.⁴⁴ As Tallgren notes, images of “[p]ain, suffering, and horror send captivating messages...”⁴⁵ The value of images is their ability to bring into the present that which might otherwise be absent.⁴⁶

There appears to be a relationship between viewing an image and belief in its content, as content impacts interpretation. For example, an image with aesthetic appeal may generate a greater sense of understanding and acceptance, leading to belief.⁴⁷ Cognitive psychologists assert that understanding what we see, hear, or read is essential to forming a belief and the vividness and emotional response to what is depicted enhances our belief in the truth of the images.⁴⁸ Seeing and simultaneously experiencing images engenders a perception of verisimilitude, even if what is

³⁸ The first documented US jury trial involving photographic evidence occurred in 1859; Sainato, *supra* note 27, at 39. Photographs and other technically produced images are now commonly used in American courtrooms; Mnookin, J. (1998). The Image of Truth: Photographic Evidence and the Power of Analogy. *Yale Journal of Law and the Humanities*, 10(1), 1-74, at 2-4. This would apply equally to most developed countries.

³⁹ Freeman, L. (2018). Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials. *Fordham International Law Journal*, 41(2), 283-335, at 298.

⁴⁰ They serve as evidence of atrocities, tools for media reporting, outreach materials used by international actors in international criminal justice and NGOs, and as evidence of institutional justice by international courts. Tallgren, I. (2017). Come and See? The Power of Images and International Criminal Justice. *International Criminal Law Review*, 17, 259-280, at 263.

⁴¹ Susan Sontag, an American writer and filmmaker said of photographs generally, “Photographs furnish evidence. Something we hear about, but doubt, seems proven when we’re shown a photograph of it.” Sontag, S. (1977). *On Photography*, New York: Farrar, Straus, and Giroux, at 5.

⁴² Through their selection of evidence, the prosecution in effect tells the court about their case through a complex version of storytelling.

⁴³ The viewer is in effect a voyeur, studying images that reveal private, intimate, and disturbing scenes, becoming an unexpected witness to events that deeply affected the parties portrayed.

⁴⁴ Silbey suggests that “We make sense of a unique past recorded on film by situating it in a shared present. In this way, making sense of what is recorded in photographs or film justifies a communal judgment of guilt (and punishment) or innocence (and absolution).” Silbey, J. (2010). Evidence Verité and the Law of Film, *Cardozo Law Review*, 31, 1257-1299, at 1265.

⁴⁵ Tallgren, *supra* note 40, at 266.

⁴⁶ Sandon, E. (2018). Law and Film. In deGuzman, M.M. and Amann, D.M. (eds), *Arcs of Global Justice*, New York: Oxford University Press, 501-520.

⁴⁷ Sherwin, *supra* note 35, at 31-32.

⁴⁸ Sherwin, *supra* note 35, at 28; Sainato, *supra* note 27, at 44-47.

depicted may not be accurate or true.⁴⁹ Images capture and frame the outside world and bring it before the court for consideration. They may however prove to be equivocal in meaning, causing the viewer to assign truth to their content, justified or not.⁵⁰ This is more problematic if the image has struck an emotive chord in the viewer because once there is an emotional basis for belief, viewers are less likely to be swayed by the urgings of opposing counsel to adopt a different interpretation.⁵¹

There can be little quarrel with the proposition that images are powerful tools of persuasion, especially given the viewer's tendency to believe what is shown.⁵² One of the benefits of using images for the purposes of proof is that images are able to provide information globally, with greater efficiency than words alone. Conversely, one of the interpretive dangers is that the untrained viewer may be inclined to fill in any missing parts so that the image makes more sense.⁵³ But the untrained viewer is not equipped to properly interpret and understand all image content. The willingness to fill in visual information gaps illustrates the paradox between the considerable education required to learn to read words versus the absence of any training in how to read images.⁵⁴ In the judicial context, the naïve belief that all images can be understood correctly without assistance can lead to erroneous interpretations and injustice. Further, psychologists have found that perception and interpretation of images can be significantly affected by context; more specifically, the tendency to see what we expect to see (observer effects) and the belief that we have always seen or known something once we know it to be true (hindsight bias).⁵⁵ Semi-legible images may heighten susceptibility to these cognitive biases.⁵⁶

Visual evidence can reveal, circumvent, or hide the truth. Perspective, selective recording and editing, and other technical issues can lead the viewer away from the truth, as will be explored in Chapters Three and Four. Naïve realism, the belief that visual evidence is more informative than it really is, posits that once we comprehend what we see, we tend to believe it.⁵⁷ Images provide

⁴⁹ Sherwin notes studies that have shown that the use of a photograph at trial (even a neutral one) significantly increases the conviction rate compared to when no photos are shown (up to 38% from only 8.8%); Sherwin, *supra* note 35, at 30; Bright, D.A. and Goodman-Delahunty, J. (2006). Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making. *Law and Human Behavior*, 30, 183-202, at 186-189; McDermott, Koenig, and Murray, *supra* note 30, at 14.

⁵⁰ Mnookin, *supra* note 38, at 65.

⁵¹ Sherwin, R.K. (2018). Visual Literacy for the Legal Profession. *Journal of Legal Education*, 68(1), 55-63, at 58-59.

⁵² This topic is more fully addressed in Chapter Five.

⁵³ Porter, *supra* note 23, at 1753.

⁵⁴ Porter, *supra* note 23, at 1753. On this point, Mnookin and West urge caution, asserting that visual evidence relies on a kind of illusion, "a willingness to ignore the mechanisms by which visual evidence is made, shaped, and constructed." In Mnookin and West, *supra* note 34, at 334.

⁵⁵ Mnookin, J.L. (2014). Semi-Legibility and Visual Evidence: An Initial Exploration. *Law, Culture and the Humanities*, 10(1), 43-65, at 63-64.

⁵⁶ Mnookin defines semi-legible visual evidence as evidence that is neither entirely legible nor impossible to read. Understanding the meaning of visual evidence requires effort and sometimes expertise, and even then there may remain questions, doubt, ambiguity, and more than one interpretation. *Ibid*, at 47-48.

⁵⁷ Sherwin, R.K. (2007). Manifesto for Visual Legal Realism. *Loyola of Los Angeles Law Review* 40(2), 719-744, at 726.

both a structure to interpret them and a reminder of the key facts relevant to making an appropriate decision,⁵⁸ yet an image cannot show the broader social, legal, and political context that gave rise to incidents depicted.⁵⁹ Experience has shown that images should be carefully scrutinized to test whether they really stand for the proposition the tendering party urges upon the court.⁶⁰ For example, watching video in real-time⁶¹ will often deprive the viewer of much needed detail, whereas frame-by-frame analysis provides a more salient environment to probe deeper into each image.⁶² Visual literacy gained by education and experience is needed in order to adequately understand images for the purpose of discerning their visual truth.⁶³ Sight alone does not equate to visual literacy but is a necessary precondition for it. In this section, I have outlined some of the advantages visual evidence has over testimony, while issuing a caution that all may not be as it appears. The corresponding need to develop a robust visual literacy will be developed further in Chapters Five and Six.

3. Constructing a Visual Narrative

Section 1 outlined the role of the prosecutor in the strategic selection of evidence for presentation at trial, while Section 2 focused on the value of visual evidence generally. Section 3 combines these topics with an exploration of how the prosecution can use visual evidence as part of the trial narrative. Criminal trials and the imposition of punishment serve powerful pedagogical and expressivist roles, where public exposition of criminality and the imposition of punishment can both shame and stigmatize.⁶⁴ Quintessentially, this dramaturgical process facilitates storytelling wherein the prosecution presents its case as a complex narrative of the events and characters that gave rise to the crimes alleged.⁶⁵ Storytelling is an integral method of proof in criminal prosecutions though the rules of evidence constrain the telling within legal bounds.⁶⁶ Immanent in this process are considerations of how to best tell the story in court, appreciating that the learning curve may be vertiginous and that the manner in which a case is presented has epistemic

⁵⁸ Tait, D. (2007). Rethinking the Role of the Image in Justice: Visual Evidence and Science in the Trial Process. *Law, Probability and Risk*, 6(1-4), 311-318, at 313.

⁵⁹ Viterbo, H. (2014). Seeing Torture Anew: Transnational Reconceptualization of State Torture and Visual Evidence. *Stanford Journal of International Law*, 50(2), 281-318, at 283.

⁶⁰ Silbey, J. (2012). Images in/of Law. *New York Law School Law Review*, 57(1), 171-184, at 176.

⁶¹ Real-time refers to watching video in a motion format that approximates the actual passage of time of the event, rather than watching the images one at a time.

⁶² van Weelden and van Charldorp, *supra* note 28, at 29-30. This concept will be studied more closely in the context of the Rodney King case in Section 6.2.

⁶³ Mootz, *supra* note 27, at 67.

⁶⁴ Drumbl, M.A. (2007). *Atrocity, Punishment, and International Law*, Cambridge: Cambridge University Press, at 17.

⁶⁵ I do not use the word “story” in a pejorative sense. All cases tell a story, even if the story is horrific. Osiel posits that the prosecution narrative is one of morality play while the defence offers a tragedy for consumption. Neither case can be pegged so narrowly in my view. Osiel, M. (1997). *Mass Atrocity, Collective Memory, and Law*, New Brunswick, NJ: Transaction Publishers, 3.

⁶⁶ Stahn, *supra* note 7, at 260-261, 289-292.

significance.⁶⁷ Prosecutors must consider how to utilize available evidence to present a logical, linear,⁶⁸ informative, and interesting story, especially for an audience with limited or no knowledge of the case facts.⁶⁹ Presenting evidence is not merely an exposition of facts for later use; it is the weaving of a compelling narrative that sets up themes to be explored and integrated into final arguments for the court's consideration.

Visual evidence is a key component of most complex cases and has proven to be an integral element in the strategy of persuasion.⁷⁰ It helps tell a powerful story, to draw in and emotionally engage the court in the story being told.⁷¹ Consider the strategic decision on the part of the prosecution to show the film *Nazi Concentration Camps*⁷² in the opening days of the Nuremberg trial.⁷³ It served to fix in everyone's minds the indisputable legal and historical significance of the case, and to set the stage for the evidence to follow. In his Opening Speech, Chief Prosecutor Justice Robert Jackson said:⁷⁴

We will show you these concentration camps in motion pictures, just as the Allied armies found them when they arrived, and the measures General Eisenhower had to take to clean them up. Our proof will be disgusting and you will say I have robbed you of your sleep. But these are the things which have turned the stomach of the world and set every civilized hand against Nazi Germany.

Germany became one vast torture chamber. Cries of its victims were heard round the world and brought shudders to civilized people everywhere. I am one who received during this war most atrocity tales with suspicion and scepticism. But the proof here will be so overwhelming that I venture to predict not one word I have spoken will be denied. These defendants will only deny personal responsibility or knowledge.

No words, no German documents about planning, carrying out, and tallying up the Final Solution could be as evocative as the images the IMT was shown in this and other films. Non-fictional images can be met with incredulity when they present incredible images, as must have been the case for the images shown of the concentration camps.⁷⁵ By showing these films, the prosecution

⁶⁷ Stahn notes that the content of a criminal trial is informed by legal storytelling, which serves to give an abstract argument feeling. Stahn, C. (2018). Legacy in International Criminal Justice. In deGuzman, M.M. and Amann, D.M. (eds), *Arcs of Global Justice*, New York: Oxford University Press, 271-285; Stahn, *supra* note 7, at 15, 160-161, 260-261.

⁶⁸ Research has shown that mock jurors understand evidence better when it is presented in chronological order. Sainato, *supra* note 27, at 46-47.

⁶⁹ ICC prosecutors have a significant advantage in that the Trial Chamber typically has a reasonable command of some of the prosecution evidence due to pre-trial applications and rulings, in contrast with domestic adversarial courts which typically have limited knowledge of the prosecution's case.

⁷⁰ Tait, *supra* note 58, at 312.

⁷¹ Silbey, *supra* note 44, at 1289-1290.

⁷² United States Army, *Nazi Concentration Camps*, 1945, available at https://archive.org/details/nazi_concentration_camps_mp4 (accessed 13 August 2021).

⁷³ This film will be discussed in some detail in Section 6.1.

⁷⁴ Jackson, Justice Robert H., Opening Speech for the Prosecution at the Nuremberg Trials, November 21, 1945, reproduced in Ryan, J.G. and Schlup, L.C. (2006). *Historical Dictionary of the 1940s*, New York: Routledge.

⁷⁵ Tallgren, *supra* note 40, at 271-272.

set the stage for a “collective gaze” on the images, thereby bringing the force of the present to bear on the past, creating a narrative that made judgment possible.⁷⁶

Visual storytelling efficiently delivers content and sets the stage for interpretation and critique.⁷⁷ But counsel must consider the context in which the images were obtained and what they purport to portray. Counsel must also consider whether everyone will see the same thing, whether an expert witness is necessary to interpret and narrate the images, whether multiple interpretations are available, and whether the probative value of the images outweighs their prejudicial effect. These questions, which must be answered before presenting visual evidence, will be explored throughout this work.

It is folly to use visual evidence simply because it exists. There must be a point in introducing it, whether to advance the narrative, to aid in answering an issue in the case, or to advance the search for the truth.⁷⁸ It should be used as part of the prosecution’s narrative to corroborate, contradict, or call into question the evidence of eyewitnesses, bearing in mind the obligation to fairly present their case. An eyewitness may give an account that is corroborated or contradicted by visual evidence, impacting the theories presented by counsel. Seeing an event from different perspectives and vantage points can assist in evaluating what occurred. Visual evidence can shine a light on details that might otherwise suffer from a crisis of credulity when the only proponent of those details is an interested party.

Given the multi-perspectival depictions of events in some international criminal prosecutions, where video images may come from the police, military personnel, human rights groups, observers, combatants, and victims, video evidence allows investigators, counsel, and the court to evaluate the narrative put forth by the parties from different vantage points. This may lend credibility to one version of events over another or lead to the development of a new version. Claims of justification for lethal shootings by police and military personnel are brought into question when observers and victims record these conflicts and share them with the public, the media, and human rights organizations, potentially corroborating the claims of authorities, discounting them, or showing a different perspective.⁷⁹ Setting aside prevaricating witnesses who are determined to obfuscate the truth, honest witnesses can legitimately have different yet seemingly valid perspectives of the same event. Eyewitnesses often provide as many versions of the event as there are eyewitnesses. This makes the role of counsel doubly important when incorporating visual evidence into a cohesive, logical, and evaluative narrative for the court.

⁷⁶ Silbey, *supra* note 44, at 1271.

⁷⁷ Sherwin, *supra* note 35, at 16.

⁷⁸ Mezey, N. (2013). The Image Cannot Speak for Itself: Film, Summary Judgment, and Visual Literacy. *Valparaiso University Law Review*, 48(1), 1-40, at 17.

⁷⁹ Aronson, J.D., Cole, M., Hauptmann, A., Miller, D., and Samuels, B. (2018). Reconstructing Human Rights Violations Using Large Eyewitness Collections: The Case of Euromaidan Protester Deaths. *Journal of Human Rights Practice*, 1-20, at 2.

Counsel may use visual evidence for multifarious purposes, sometimes to ascertain the truth, other times to obscure it. The defence, whose duty is to advance the interests of the defendant by providing an effective defence,⁸⁰ may launch counter-narratives,⁸¹ and may not always be interested in presenting the complete truth because the truth may not tend to lessen the perceived accountability of their client. So too might an unscrupulous prosecutor, focused on winning at all costs, use visual evidence to unfairly support the prosecution's version of the truth. Moreover, the prosecution may use upsetting images as evidence for the primary purpose of engendering strong emotional reactions from the court, which would be inappropriate and contrary to its obligation to fairly present its case, and to ensure that the probative value of the visual evidence outweighs its prejudicial effect.

While I primarily refer to the prosecution and defence throughout this work, I would be remiss if I did not acknowledge the important role that counsel for victims play in international criminal prosecutions. The *Rome Statute* provides that the "views and concerns" of victims shall be presented and considered in the proceedings, thus changing the role of victims to that of participants.⁸² The RPE implement this directive by providing for the participation of legal representatives for victims in prosecutions and sets out parameters for their involvement in the questioning of witnesses and the provision of oral and written submissions.⁸³ The ICC Office of Public Counsel for Victims (OPCV) was established in 2005 and was considered a novelty in international criminal law.⁸⁴ The primary mission of the OPCV is to provide a meaningful and effective voice for victims in the search for truth and justice in court proceedings.⁸⁵ Victims reasonably expect "a careful, independent, fair, transparent, effective and watchful justice, mindful of the rights of all participants in the proceedings."⁸⁶ Participation of the OPCV in ICC proceedings has been the subject of some controversy and debate from the outset, including concerns of defence counsel that they may occupy the role of a second prosecutor in the case, but over the years, the OPCV has established that while their role may at times converge with that of the prosecution, their views and strategies often differ on substantive and procedural issues.⁸⁷ The participation of victims may serve to help the court better understand certain issues in light of their local knowledge and socio-cultural background.⁸⁸ It is essential that the concerns of victims be represented in ICC

⁸⁰ Set out for the ICC in the *Code of Professional Conduct for Counsel*, Arts. 13-15.

⁸¹ Stahn, *supra* note 7, at 294-297.

⁸² *Rome Statute*, Art. 68(3).

⁸³ RPE Rules 89-93; Klamberg, *supra* note 8, at 464-469.

⁸⁴ Baetens, F. and Bismuth, R. (2020). Face à Face: Interview with Paolina Massidda, Principal Counsel of the Independent Office of Public Counsel for Victims at the ICC. *The Law and Practice of International Courts and Tribunals*, 19, 137-145, at 137. Counsel for Victims may also be appointed outside of the ICC.

⁸⁵ *Ibid*, at 137-138; Suprun, D. (2016). Legal Representation of Victims before the ICC: Developments, Challenges, and Perspectives. *International Criminal Law Review*, 16, 972-994, at 974.

⁸⁶ Suprun, *ibid*, at 973.

⁸⁷ Baetens and Bismuth, *supra* note 84, at 138-139.

⁸⁸ *Prosecutor v. Katanga and Ngudjolo Chui*, ICC-01/04-01/07-1665-Corr, Corrigendum Directions for the Conduct of the Proceedings and Testimony in Accordance with Rule 140, 1 December 2009, at paras. 82-91.

proceedings as their interests may at times vary from those of the prosecution and defence. Conceivably, this may include variations in their interpretation of visual evidence as their local perspective may differ from that of outside investigators and counsel.

Though I have primarily focused on the ICC, other tribunals have also considered the participation of victims. For example, in *Prosecutor v. Ayyash et al.*, the Legal Representatives for Victims gave an opening statement, questioned witnesses, filed motions and a final trial brief, and presented closing submissions.⁸⁹ Witnesses gave *viva voce* evidence or evidence via written statement. The Trial Chamber gave extensive reasons on the principles underlying participation of victims during the trial and directions for their involvement,⁹⁰ including a specific direction that the “Participating victims cannot act as a second or auxiliary Prosecutor.”⁹¹ In setting out the applicable principles, the Trial Chamber relied upon developing ICC jurisprudence on victim participation.⁹²

When counsel proffer varied or competing interpretations of visual evidence, the court must decide which interpretation is tenable and most consistent with other reliable evidence. One would be naïve to believe that video images of an event, even multi-perspectival, can tell the whole story. Each camera view shows only what occurred within its field of view for as long as the camera recorded. We do not know what happened before or after the camera recorded its footage or whether the camera captured all that matters. Generally, the more recordings available from different vantage points and sources, the more reliably the court will be able to assess the events portrayed, after considering the disparate interpretations offered by the parties.⁹³ Using visual evidence as proof of what occurred requires an honest accounting of what happened before and after the recording as well as what occurred outside the field of view, acknowledging the importance of context. Visual evidence supplements the telling of the story, but rarely does it capture the entire story. These issues must be considered by counsel when constructing their trial narrative. Assessing a visual narrative is even more challenging once the agendas and biases of the photographer are considered, a topic which is the focus of Chapter Four.

Most trials involve direct and circumstantial evidence in the form of witness testimony, documents, and physical evidence. Expert evidence is commonplace in most complex trials. Visual evidence also occupies an important rung on the ladder of proof. No single type of evidence surpasses all others in its potential value to counsel and the court in their search for the truth. Witness testimony may suffer from the frailties outlined in Section 2. Documents and physical exhibits are more static in nature but often require interpretation by knowledgeable parties. Visual evidence presents many

⁸⁹ *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC-F3839/20200818/R331945-R334626/EN/dm, Judgment, 18 August 2020.

⁹⁰ At paras. 804-821.

⁹¹ At para. 818.

⁹² At para. 818.

⁹³ Aronson et al., *supra* note 79, at 2-3.

benefits and its own challenges, and this work explores those benefits and challenges throughout its chapters.

In this section, I have outlined the importance of constructing a trial narrative that effectively incorporates visual evidence. This will allow counsel and the court to better understand the events being examined in their search for the truth. I have also introduced the topic of utilizing expert assistance in analyzing visual evidence, which will be discussed in more detail in Chapter Six.

4. Categories of Visual Evidence

In Sections 2 and 3, I outlined the value of visual evidence generally and how it should be woven into the prosecution trial narrative. In this section, I focus on specific types of visual evidence that can be used for the purposes of proof and contend that some aspects of complex prosecutions must be presented visually to convey the full data set to the court. Case studies will be utilized to illustrate this point. Though my focus in this section will be on visual evidence presented in the courtroom, I diverge briefly to comment on the value of counsel and the court viewing the *locus in quo*⁹⁴ in person. Counsel and the court cannot attend active atrocity crime scenes for reasons of safety and because investigations and decisions to indict defendants take considerable time. Yet there may still be epistemic value for a *locus in quo* visit during the trial to develop a true sense of the location and its features and to fill informational gaps created from eyewitness evidence that is unclear or lacking in detail.⁹⁵ The ICTR, ICTY, and the ICC have occasionally taken advantage of these visits for fact-finding purposes. In *Prosecutor v. Bagilishema*,⁹⁶ all three ICTR Trial Chamber judges visited Kibuye Prefecture in Rwanda “...in order to see the locations of certain alleged events of relevance in the case, and thus to better appreciate the evidence to be adduced during the trial.”⁹⁷ This was the first *locus in quo* visit undertaken by an ICTR Trial Chamber. The ICTY Trial Chamber, in *Prosecutor v. Blagojević and Jokić*,⁹⁸ conducted a *locus in quo* visit and was able to visualize and confirm witness testimony on several key points.⁹⁹ Similar visits have occurred in other ICTR and ICTY cases¹⁰⁰ as well as in ICC cases.¹⁰¹

⁹⁴ Latin for “the place in which” and referring to the scene of a crime or event. *Oxford English Dictionary*, available at <http://oed.com> (accessed 11 September 2020).

⁹⁵ Combs, *supra* note 15, at 281-282; Damaška notes the value of judicial visits as a method of gaining information independent of the parties, in Damaška, M. (1986). *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, New Haven: Yale University Press, at 137.

⁹⁶ *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgment, 7 June 2001.

⁹⁷ At para. 10.

⁹⁸ *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgment, 17 January 2005.

⁹⁹ At para. 316, n. 1158 and 1159.

¹⁰⁰ *Prosecutor v. Karera*, ICTR-01-74-T, Judgment, 7 December 2007, para. 133; *Prosecutor v. Brdinan*, IT-99-36-T, Judgment, 1 September 2004, at para. 614, n. 1556; *Prosecutor v. Strugar*, IT-01-42-T, Judgment, 31 January 2005, at para. 316.

¹⁰¹ *Prosecutor v. Ngudjolo*, ICC-01/04-02/12-3-tENG, Judgment Pursuant to Article 74 of the Statute, 18 December 2012, at paras. 68-70; *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, 7 March 2014, at paras. 106-108.

Despite the value of *locus in quo* visits, they are infrequent events and provide only limited information. The only way to adequately convey to the court what an atrocity crime scene looked like while it was still a crime scene with bodies and other evidence *in situ* is with visual evidence. This has been essential to atrocity crime prosecutions since Nuremberg.¹⁰² The use of such evidence to display scenes and other data is the focus in the balance of this section.

4.1 *Film, video, and photographs*

The use of film, video, and photographs as evidence is well established in international criminal prosecutions.¹⁰³ Images¹⁰⁴ are a graphic portrayal of what might otherwise be presented by *viva voce* evidence and can transcend their role as evidence of history to become historical themselves.¹⁰⁵ As described in Section 2, there is often strategic value in using images to supplement testimony and other forms of evidence. Counsel must consider whether single or moving image format will be more effective in conveying visual information, when both formats are available.¹⁰⁶ In part, this choice is dependent upon the information sought to be conveyed as some information is better presented by way of still images, particularly when detailed image content is critical. Conversely, moving images often engender greater viewer comprehension as they provide certain communicative efficiencies over still images.¹⁰⁷ Studies consistently show that viewers are better at interpreting emotional content when the images are moving, rather than static.¹⁰⁸ Moving images also serve to improve recognition of targeted individuals as the viewer is given a more fluid view of the target.¹⁰⁹

¹⁰² In his 7 June 1945 report to President Truman in preparation for the Nuremberg trial, Justice Robert Jackson said, “We must not forget that when the Nazi plans were boldly proclaimed they were so extravagant that the world refused to take them seriously. Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events by credible evidence.” Report from Mr. Justice Jackson, Chief Counsel for the United States in the Prosecution of Axis War Criminals (NARA, RG 226, E 90, B 12, F 126, at 3) (quoting Delage, C. (2011). Bringing History into the Present Through Film: An Historian in the Archives of Nuremberg. *CINEASTE*, Winter 2011, 34-39, at 36). Filmic evidence was one of the key components to the credible evidence needed.

¹⁰³ Film is a thin flexible strip of celluloid, plastic, etc., coated with light-sensitive emulsion, used in photography and cinematography to record a series of images. Video is a recording of moving images made or held on magnetic tape or in digital format. Photographs (still images) can be derived from both film and video. *Oxford English Dictionary*, *supra* note 94 (accessed 12 September 2020). Real-time video typically consists of thirty images (or frames) per second in North America (National Television Standards Committee (NTSC) broadcast standard) or twenty-five frames per second in Europe, Australia, and parts of Asia (Phase Alternating Line (PAL) standard).

¹⁰⁴ When it is immaterial whether the source of the image is film, video, or photographic, I will use the generic term “image”.

¹⁰⁵ Burke, P. (2019). *Eyewitnessing: The Use of Images as Historical Evidence*, London: Reaktion Books, at 29.

¹⁰⁶ If the image was originally captured as a still image (e.g., a single photograph), it must be shown in that format. If the original recording is digital video, single images can be parsed out for display. Still images can also be parsed out from film and analog video, though somewhat easier once digitized.

¹⁰⁷ Sherwin, *supra* note 51, at 57.

¹⁰⁸ Sainato, *supra* note 27, at 45.

¹⁰⁹ *Ibid.*

Film was the primary mode of visual evidence in the tribunals until the 1990s when the convenience and technological capability of analog video replaced it. Video evidence can be obtained from numerous sources, including eyewitnesses, victims, defendants, enemy combatants, broadcast news organizations, and third-party observers such as human rights organizations and other non-governmental organizations (NGOs). These videos are typically recorded by handheld or tripod mounted video cameras and smartphones. Closed circuit television (CCTV) video may be collected by government organizations, the police, businesses, and private individuals, though rarely in the atrocity crime context. CCTV video typically employs mounted cameras, either static or capable of directed movement, that record to a local digital video recorder or to an offsite server.¹¹⁰ In many domestic jurisdictions, police agencies record video from police vehicle dashcams and body worn cameras, usually uploaded to a cloud storage system.

Images can also be obtained from an aerial vantage point, allowing for a more expansive perspective and the ability to see things not readily discernible from the ground.¹¹¹ In recent years, domestic and international investigators have made considerable use of small, unmanned aircraft systems, commonly called drones. Drones can go where investigators cannot and can obtain excellent quality high-resolution images of scenes, activities, and individuals. They provide not only a live feed but also create a digital record which can be accessed later and used in court.¹¹² Commercially available drones used by law enforcement record high definition (HD) video at a minimum of 1,920 pixels of horizontal resolution locally to a small secure digital (SD) card. Most drones record two video streams per camera, one at lower resolution which is transmitted to the pilot on the controller which can be viewed live while flying, and the second is a high-resolution file which is only visible when downloaded from the drone. Drones also record flight telemetry and navigation data which provides tangible proof as to the location of the drone when the video was recorded. Should a drone be compromised by an outside force and crash, it may still be possible to recover video from it. Drones may be audibly undetectable from the ground depending on the height of the aircraft, wind speed, and other ambient noise, giving rise to its use for surveillance purposes as well as recording scenes. Military drones have enhanced capabilities over commercially available versions.¹¹³ Aerial images can also be obtained from cameras in commercial aircraft conducting non-investigative visual surveys, and which may fortuitously have relevance to a criminal investigation.

I conclude this section with a brief word about presentation strategy when video and digital images are used in court. The use of hard copy (printed) digital images and LCD projectors and screens to

¹¹⁰ This refers to a camera's ability to pan, tilt, and zoom, as directed by a person or via computer algorithm.

¹¹¹ In this section, I will focus on near-earth cameras. Images obtained from remote sensing satellites will be discussed in Section 4.3.

¹¹² Freeman, *supra* note 39, at 330.

¹¹³ Drone information obtained from personal communication, Deputy Sheriff Scott Kuntz, Dane County Sheriff's Office, Madison, Wisconsin, US, who is a FAA licensed sUAS pilot and uses drones as part of his work, 29 March 2020.

show video and still images should be relegated to history. When digital images are printed on paper, they lose fine detail that would otherwise be viewable on a high-quality computer monitor or HD presentation screen. By presenting them electronically, portions of the image can be enlarged for more detailed examination in court.¹¹⁴ Further, with annotation software, a witness can visibly mark an image shown on the witness's monitor to point out areas or items of relevance, such markings being visible on all courtroom monitors and capable of being printed for exhibit purposes. Other platforms such as SMART Boards and ELMO Visual Presenter fulfill a similar function. Projecting images through a LCD projector onto a screen guarantees loss of detail and image resolution as the image travels through dust particles in the air and must then contend with micro-contours that are part of the screen. Additional impediments include the quality of the bulb and lens in the projector, the lighting in the courtroom, and the location of the screen relative to the fact-finders. The hard copy and LCD projection approaches to the presentation of image evidence does a tremendous disservice to visual evidence. Electronic presentation using high-quality monitors and HD presentation screens should be the norm for displaying image evidence.

4.2 Maps, diagrams, charts, and tables

In Section 4.1, I explored the use of film, video, and photographs for visualizing events, atrocity crime scenes, and other items or people of interest. For some data, these are the preferred methods of visualization. For other data, the use of maps, diagrams, charts, and tables is more effective. In this section, I outline the epistemic value of using these visual formats to convey information to the court.

Maps are quite effective for depicting the general layout of a city or the geography of rural locations. They can also be used for more targeted purposes such as denoting the location of key events and visually depicting complex data. As will be documented in more detail in Section 6.3, the *Ayyash* case made effective use of maps to show the positioning of the Hariri motorcade, the explosion and blast radius, the location of human remains, as well as the location of specific cell phones when certain calls were placed. Whether produced by governments, commercial entities, or investigators, maps can provide a clinical view that has didactic value, teaching the court about locations of interest in a manner that is familiar and readily understandable. They allow the court to locate areas of interest and gain an appreciation of distances involved. In this regard, they may provide an efficiency that is sometimes more difficult to achieve with remote sensing technology. Images obtained from earth observation satellites are more difficult to discern because they show vegetation and other topographic features that can impede comprehension of a scene – in short, they provide more data than may be necessary if the goal is merely one of location orientation.

¹¹⁴ Counsel may wish to control the presentation of images in court so that they can focus on specific portions of an image, thereby enhancing the impact of the image. Marcus, E. (2006). The New Razzle Dazzle: Questioning the Propriety of High-tech Audiovisual Displays in Closing Argument. *Vermont Law Review*, 30(2), 361-392, at 382; Lederer, F.I. (2010). Wired: What We've Learned About Courtroom Technology. *Criminal Justice*, 24(4), 18-25.

Maps constitute a form of data visualization, which is the process of using art, creativity, and math to visually present large amounts of data.¹¹⁵ In *Ayyash*, the cell phone data was voluminous and would have been largely meaningless without transposing the data to suitable mapping formats.¹¹⁶ In addition to using government and commercially produced maps for showing larger areas, two-dimensional digital depictions of smaller areas can be created by easy-to-use freeware drafting tools and more complex tools like Adobe Photoshop or Revit. More advanced mapping tools involve terrestrial laser scanning and ranging technology, a topic that will be discussed in Chapter Two. The value of using maps is that they are devoid of the emotional content that may be found in images, a feature that can be helpful for the court and for witnesses who are asked to comment on them. A *caveat* is necessary regarding showing maps to civilian witnesses. Combs found in her extensive study of ICTR, SCSL, and Special Panels cases that civilian witnesses often had difficulty deciphering maps, owing to lower levels of education and literacy, coupled with an absence of experience using maps.¹¹⁷ Further commentary on the use of maps in international criminal prosecutions will be presented in Section 5.

If the prosecution is successful in visualizing locations of interest with video and photographic images, maps, and other methods, the likelihood of the need for a *locus in quo* visit by the court is reduced. While such visits have epistemic value, they also serve to delay proceedings and present security concerns. For example, in *Prosecutor v. Galić*,¹¹⁸ in responding to the Prosecution’s Motion for the Trial Chamber to Travel to Sarajevo, the Chamber noted the value of being able “...to observe certain landmarks and places in order to get a tri-dimensional impression of these locations and to improve its ability to understand and interpret the evidence presented in court about these locations, including evidence which seems to contain contradicting elements.”¹¹⁹ However, the Chamber also noted the major security measures that would be required and the impossibility of guaranteeing the safety of the Chamber, court staff, counsel, and the defendant. The Chamber noted that it already had the substantial benefit of photographs and maps of the locations of interest, relevant video evidence, and eyewitness testimony including witnesses using sketches, such that a *locus in quo* visit was unnecessary.¹²⁰

Diagrams are helpful for illustrating micro locations and events, including the location of people, vehicles, objects, movement, etc. As further documented in Section 6.3, in *Ayyash*, diagrams were

¹¹⁵ Schofield and Fowle, *supra* note 33, at 74, 76-77.

¹¹⁶ The Chamber stated in part that “The call data records of themselves are voluminous, and, without extraction of the relevant data into a readable format, meaningless.” *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC R273784, Decision on Five Prosecution Motions on Call Sequence Tables and Eight Witness Statements and on the Legality of the Transfer of Call Data Records to UNIIIC and STL’s Prosecution, 6 May 2015, at para. 113.

¹¹⁷ Combs, *supra* note 15, at 36-38.

¹¹⁸ *Prosecutor v. Galić*, IT-98-29-T, Decision on Prosecution’s Motion for the Trial Chamber to Travel to Sarajevo, 4 February 2003.

¹¹⁹ At para. 8.

¹²⁰ At paras. 17-19.

used to depict the location of each vehicle in the Hariri motorcade as it reached the blast location and the resultant blast damage as well as the operation of relevant cell phone networks and phones, among other pertinent data. Expert witnesses also use diagrams for didactic purposes when explaining relevant aspects of science and technology to the court, prior to expounding on case specific data. In *Ayyash*, diagrams were used to illustrate the overall operation of GSM¹²¹ cellular networks and tower coverage.¹²² This approach is instructive because without first teaching the court about the applicable technology, case specific data may otherwise lack the necessary contextualization. While diagrams can be produced electronically using computer drafting programs, when produced by investigators in the field or by civilians, they may be hand-drawn. For witnesses who are comfortable using two-dimensional depictions, the use of diagrams can be a valuable adjunct to *viva voce* evidence, allowing witnesses to visualize their testimony more fully. Conceivably, even children's drawings of conflict could be tendered as proof of atrocities. Some five hundred drawings obtained in 2007 from children asked to draw their memories of the conflict in Darfur were provided to the OTP for potential use in prosecutions against government officials.¹²³ When a diagram is presented in digital format in court, witnesses may be able to use annotation software to further supplement their testimony and the diagram's content.

Charts and tables are also effective methods for organizing and presenting complex data in a format that is useful for the purposes of proof by counsel and judgment by the court. The presentation of voluminous cell phone usage data (*Ayyash*), DNA profiles obtained from mass graves,¹²⁴ suspicious money transfers,¹²⁵ etc. is best served when the data can be situated in a chart or table for more ready comprehension. The value of this method of data presentation will be further explored in Chapter Two.

4.3 Remote sensing technology: geospatial evidence

¹²¹ Global System for Mobile communication.

¹²² *Prosecutor v. Ayyash et al.*, *supra* note 89, at paras. 1588 (Exh. P549); 1622 (Exh. P549, figure 027); 1623 (Exh. 549); 1638 (Exh. 549, figure 030); 1639 (Exh. 549, figure 032); 1641 (Exh. 549, figure 018); 1668 (Exh. 549, figure 049); 1682 (figure 019); 1683 (figure 020); 1711 (Exh. P773); 1759 (Exh. P825).

¹²³ The drawings may be used in prosecutions against Ahmad Harun (Sudanese Humanitarian Affairs Minister), Ali Kushayb (militia leader), and Sudanese President Umar Hassan Al Bashir. Aradau, C. and Hill, A. (2013). The Politics of Drawing: Children, Evidence, and the Darfur Conflict. *International Political Sociology*, 7, 368-387, at 368. The viability of these drawings as evidence in an ICC prosecution have not been tested as warrants of arrest have been issued for Harun and Al Bashir but not executed. Charges were confirmed against Kushayb by the Pre-Trial Chamber on 9 July 2021, and it remains to be seen if these drawings will be tendered as evidence at trial, which commenced in April 2022. *Prosecutor v. Abd-Al-Rahman*, ICC-02/05-01/20-433, Decision on the Confirmation of Charges Against Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb'), 9 July 2021; see also ICC website, available at <https://www.icc-cpi.int/Pages/defendants-wip.aspx> (accessed 29 November 2022).

¹²⁴ *Prosecutor v. Tolimir*, IT-05-88/2-T, T. 1726-1728, 13 May 2010 and T. 1789, 14 May 2010; *Prosecutor v. Tolimir*, IT-05-88/2-T, Judgment, 12 December 2012, at para. 50.

¹²⁵ *Prosecutor v. Bemba et al.*, ICC-01/05-01/13-T-33-ENG ET WT 02-11-2015 1/38 SZ T, Trial Hearing Transcript, 2 November 2015, at p. 15-33.

In this section, I will examine the use of still images obtained from satellites located far above the earth's surface as visual evidence. Earth observation satellites (EOS) are a type of remote sensing technology¹²⁶ and are remarkable sources of visual information capable of showing significant surface detail.¹²⁷ They have the ability to show a larger geographic area and can depict locations otherwise inaccessible by ground.¹²⁸ Government agencies and military forces have long embraced the use of satellites, unmanned aerial vehicles, and other cutting-edge remote sensing technologies for intelligence gathering and combat strategy.¹²⁹ These geospatial technologies have become an important source of evidence in atrocity crime prosecutions, with civilian (and sometimes military) high-resolution satellites being made available to investigators since 1999. EOS technology encompasses a broad range of tools for the collection, management, presentation, and analysis of location-based, geographically positioned data.¹³⁰ Satellite imagery has been co-opted for use by NGOs as a method of gathering evidence in support of atrocity crime prosecutions, although its use is somewhat limited due to significant cost, limited availability due to commercial requirements, and cloud and ground cover, which can be significant geographic and seasonal impediments.¹³¹ Additional limitations include coverage area, image resolution, government restrictions, and ethical considerations.¹³²

Satellite observations can take different *postures* when monitoring a conflict area.¹³³ The *detection posture* is used by analysts to predict whether threats to civilians exist by identifying signs indicative of amassing ground forces and related infrastructure. During the early stages of atrocities a *deterrence posture* can be utilized, which is designed to warn civilians of pending attacks. Post-atrocity, analysts can assume a *documentation posture* by gathering visual evidence such as images of mass graves, burned structures, and the detritus of conflict.

Satellite imagery offers two key types of evidence: the identification of observable objects at a given point in time, and documentation of observable changes in the position and condition of

126 Remote sensing refers to the acquisition of information about geography and objects from a distance, wherein data are collected by active or passive sensors mounted on satellites, manned aircraft, or unmanned aerial vehicles. Harris, T.L., Drake, J., Wyndham, J.M., Wolfenbarger, S.R., Lott, S.D., and Lerner, M. (2018). Geospatial Evidence in International Human Rights Litigation: Technical and Legal Considerations. AAAS Scientific Responsibility, Human Rights and Law Program, at 42, doi: 10.1126/srhl.aau6090.

127 Williams, M. (2013). Satellite Evidence in International Institutions. In Purdy, R. and Leung, D. (eds), Evidence from Earth Observation Satellites, Leiden and Boston: Martinus Nijhoff Publishers, 195-216, at 207.

128 International Bar Association Report, IBA ICL Perspectives: Evidence Matters in ICC Trials, August 2016, available at <https://www.ibanet.org/document?id=Evidence-matters-in-icc-trials>, at 19-20 (accessed 28 November 2022).

129 Wang, B.Y., Raymond, N.A., Gould, G., and Baker, I. (2013). Problems from Hell, Solution in the Heavens?: Identifying Obstacles and Opportunities for Employing Geospatial Technologies to Document and Mitigate Mass Atrocities. Stability: International Journal of Security & Development, 2(3), 53, 1-18, at 1-2.

130 Harris et al., supra note 126, at 4.

131 Wang et al., supra note 129, at 5.

132 Harris et al., supra note 128, at 6-7.

133 Wang et al., supra note 139, at 3.

those objects over time,¹³⁴ thereby allowing the viewer a reconnaissance of both the past and present.¹³⁵ Because satellite images are comprised of digital data, they can be analyzed mathematically with Geographic Information Systems¹³⁶ (GIS) software, which reveals complex spatial and temporal patterns that even skilled GIS analysts may be unable to discern.¹³⁷ There is broad application for satellite imagery in atrocity crime prosecutions. For example, ICTY prosecutors utilized military satellite imagery to identify mass graves and to provide before and after comparisons of towns destroyed by aerial bombardments as evidence against perpetrators of the Srebrenica massacre.¹³⁸ In Section 5, I will provide further case examples of satellite images being used as evidence in atrocity crime prosecutions.

Satellite imagery is not without its potential limitations. While satellites provide valuable visual information, it is at a macro level and thus evidence at ground level is essential to identify responsible parties. Further, experts recommend caution when using EOS data, citing concerns that it can be manipulated with no possibility of detecting *ex post facto* changes.¹³⁹ The British Institute of International and Comparative Law recommended that standards be adopted regarding the use of EOS data in international courts, and articulates concerns regarding accuracy and variance in interpretation.¹⁴⁰ Other experts recommend that the collection and analysis of satellite data be developed into a structured discipline with established guidelines and procedures, operated by neutral experts.¹⁴¹ This latter point cannot be overemphasized – the involvement of competent experts utilizing robust operating procedures is essential in reaching an accurate and informed judgment, a topic that will be the focus of Chapter Six. As illustrated in this section, while satellite imagery has its limitations, its potential value in atrocity crime prosecutions is clear.

5. Application to Atrocity Crime Prosecutions

Atrocity crime investigations and prosecutions have profited greatly from the evidence that has emerged through the use of high-quality satellite imagery, the exponential proliferation of smartphones and the videos and photographs their users have generated, and the widespread use

¹³⁴ Wang et al. define an “observable” as “a term for anything contained in the imagery with a distinctive shape and size which may be of interest to the analyst. Examples of these points of interest may include aircraft, ships, tanks, artillery, camps for displaced persons or armed actors, and shelling craters or other evidence of damage.” Wang et al., *supra* note 129, at 6.

¹³⁵ Burke, *supra* note 105, at 192.

¹³⁶ Geographic Information Systems are computer systems used for capturing, storing, editing, analyzing, and displaying location-based data. They can layer datasets upon other datasets, produce maps, calculate distances between observable features, and perform spatial statistical analysis. Harris et al., *supra* note 126, at 43.

¹³⁷ Harris et al., *supra* note 126, at 2.

¹³⁸ Freeman, *supra* note 39, at 286-287.

¹³⁹ Williams, *supra* note 129, at 215.

¹⁴⁰ Final Report of the BIICL Study Group, *Earth Observation Data in the Legal Sector*, 19 May 2001, at 75 (quoting Williams, *supra* note 127, at 199).

¹⁴¹ Wang et al., *supra* note 129, at 15-16.

of social media and other open source sites to share images and other data.¹⁴² The use of these types of non-textual evidence and many others are discussed throughout this work and the purpose of this section is to highlight the use of these types of non-textual evidence in the context of atrocity crime prosecutions. This section is not intended to be an exhaustive catalogue of case law as that is well beyond the scope of this work, rather it is designed to illustrate that the types of evidence referred to herein have taken a firm foothold in atrocity crime prosecutions.

Satellite imagery has provided considerable value to investigators, counsel, and the court because it can be used to conduct a macro analysis of locations, including the depiction of permanent or semi-permanent landform and architectural features, as well as transitory features such as vehicles, equipment, and people. By comparing satellite imagery over time, changes may be discerned which may corroborate ground-based accounts of atrocity crime activity. Indeed, by 2010 OTP investigators commenced discussions with human rights organizations regarding the use of satellite technology to gather evidence for ICC prosecutions.¹⁴³ Satellite images are mostly associated with international conflict locations where investigators typically face significant delays in gaining access to sites of interest. As a result, there may be limited or no ability to gain timely aerial images of relevant sites using drones before marked changes have occurred. This contrasts with many domestic investigations where access to relevant sites often occurs much quicker and with the ability to visually document scenes while they remain relatively intact. Therefore, the ability to obtain targeted or routine satellite imagery can be pivotal in the atrocity crime context.

Satellite imagery has been used in various prosecutions for myriad purposes, including documenting the location of mass graves and to show before and after images of towns destroyed by aerial bombardments (ICTY);¹⁴⁴ to show locations of interest in a dynamic and complex narrative (STL);¹⁴⁵ and to show before and after images of mausoleums and mosques destroyed by criminal actions (ICC).¹⁴⁶ These cases represent only a small proportion of cases wherein satellite imagery has been relied upon but present a reasonable cross section of their value in fact-finding. Satellite imagery has also proven to be an effective adjunct in interactive 360° visual representations, which are discussed in Section 5.1 of Chapter Eight.

¹⁴² Radeva, E. (2021). The Potential for Computer Vision to Advance Accountability in the Syrian Crisis. *Journal of International Criminal Justice*, 19(1), 131-146, at 132.

¹⁴³ Koenig, A., McMahon, F., Mehandru, N., and Bhattacharjee, S.S. (2018). Open Source Fact-Finding in Preliminary Examinations. In Bergsmo, M. and Stahn, C. (eds), *Quality Control in Preliminary Examination: Volume 2*, Brussels: Torkel Opsahl Academic EPublisher, 681-730, at 694-695.

¹⁴⁴ *Prosecutor v. Limaj et al.*, IT-03-66-T, Judgment, 30 November 2005, at para. 457; *Prosecutor v. Tolimir*, *supra* note 124, at paras. 65, 67, 68, 70, 435, 454, 457, 478, 561, 564; *Prosecutor v. Popović et al.*, IT-05-88-T, Judgment (Volume I), 10 June 2010, at paras. 73-75; *Prosecutor v. Blagojević and Jokić*, IT-02-60-T, Judgment, 17 January 2005, at para. 381 FN 1397, 1398; *Prosecutor v. Krstić*, IT-98-33-T, Judgment, 2 August 2001, at paras. 114, 223, 229, 230, 238, 250, 253, 258. See also Freeman, *supra* note 39, at 286-287.

¹⁴⁵ *Prosecutor v. Ayyash et al.*, *supra* note 89, at para. 4858 (Exh. P498).

¹⁴⁶ *Prosecutor v. Al Mahdi*, ICC-01/12-01/15-171, Judgment and Sentence, 27 September 2016.

Given the proliferation of smartphones and other cameras used by eyewitnesses, victims, defendants, enemy combatants, broadcast news organizations, and third-party observers such as human rights organizations and other NGOs in conflict areas, it is not surprising that video and photographic imagery has featured prominently in atrocity crime prosecutions. It has been a feature in all the tribunals and courts, though for this section I will focus on its use in the ICTY, ICTR, and ICC. Video and photographic imagery has been used as evidence to document and establish many facts, including speeches made by defendants, illustrating the context in which they were made and to show the defendants' apparent status;¹⁴⁷ executions of civilians, opposing soldiers, and prisoners, often recorded by the perpetrators themselves;¹⁴⁸ the use of and apparent age of child soldiers;¹⁴⁹ to show defendants associating with fellow defendants;¹⁵⁰ the location of mass graves;¹⁵¹ to corroborate or challenge eyewitness testimony;¹⁵² the presence of weapons;¹⁵³ to

¹⁴⁷ *Prosecutor v. Gbagbo and Blé Goudè*, ICC-02/11-01/15-1263-Conf-AnxB, Reasons of Judge Henderson, 16 July 2019, at paras. 842, 856, 857, 958, 982, 1013, 1031, 1068, 1914, 2009, 2011; *Prosecutor v. Lubanga*, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, at paras. 710, 712, 714, 1122, 1337, 1339-1340, 1344; *Prosecutor v. Perišić*, IT-04-81-T, Judgment, 6 September 2011, at para. 575; *Prosecutor v. Karadžić*, IT-95-5/18-T, Judgment, 24 March 2016, at paras. 46, 346, 1209, 2658, 2659, 2665, 2675, 2676, 2678, 2732, 2738, 2796, 2812-2814, 2836, 2887, 3124, 3348, 4659, 4904, 5474, 5768, 5968.

¹⁴⁸ *Prosecutor v. Gbagbo and Blé Goudè*, *ibid*, at para. 1725; *Prosecutor v. Al-Werfalli*, ICC-01/11-01/17, 15 August 2017, Warrant for Arrest; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Judgment and Sentence, 18 December 2008, at para. 1340. A powerful example of this occurred during the *Milosević* trial when during the cross examination of a defence witness, the prosecution introduced a video recording which showed the execution of six men by members of the Scorpions paramilitary unit (part of the MUP) in the aftermath of the Srebrenica massacre. This was done to support the prosecution's theory that Serbia was an active participant in the war in Bosnia, not merely a supporter of the Bosnia Serbs, and to counter the evidence of the witness that no Serbian MUP units were present during the massacre. On the same day, portions of the video were broadcast on Serbian television and helped to change the popular conception of Serbian soldiers. Zveržhanovski, I. (2007). Watching War Crimes: The Srebrenica Video and the Serbian Attitudes to the 1995 Srebrenica Massacre. *Southeast European and Black Sea Studies*, 7(3), 417-430, at 424-425. Zveržhanovski opined that using this short video as evidence advanced the mission of the ICTY more than the investigations and trials themselves (at 428).

¹⁴⁹ *Prosecutor v. Lubanga*, *supra* note 147, at paras. 644, 713, 747, 779, 854, 858, 860-861, 869, 912, 915, 1213, 1216, 1218, 1242, 1252-1253, 1256, 1260-1262, 1278, 1335, 1348, 38-43 (dissent); *Prosecutor v. Katanga*, *supra* note 101, at para. 1052.

¹⁵⁰ *Prosecutor v. Lubanga*, *supra* note 147, at paras. 1209-1211.

¹⁵¹ *Prosecutor v. Gbagbo*, ICC-02/11-01/11-656-Red, Decision on the Confirmation of Charges Against Laurent Gbagbo, 12 June 2014, at para. 66; *Prosecutor v. Renzaho*, ICTR-97-31-T, Judgment and Sentence, 14 July 2009, at para. 368; *Prosecutor v. Kanyarukiga*, ICTR-2002-78-T, Judgment and Sentence, 1 November 2010, at para. 565; *Prosecutor v. Blagojević and Jokić*, *supra* note 144, at paras. 255, 312-313, 380; *Prosecutor v. Stanisić and Simatović*, IT-03-69-T, Judgment, 30 May 2013, at para. 690; *Prosecutor v. Delić*, IT-04-83-T, Judgment, 15 September 2008, at paras. 243-244; *Prosecutor v. Popović*, *supra* note 144, at paras. 358, 384, 393, 418, 502, 605; *Prosecutor v. Dordević*, IT-05-87/1-T, Judgment, 23 February 2011, at paras. 406, 412-415, 465, 469, 626-631, 1286, 1412-1417; *Prosecutor v. Ongwen*, ICC-02/04-01/15-1762-Red, Judgment, 4 February 2021, at paras. 1756-1777 FN 4440.

¹⁵² *Prosecutor v. Lubanga*, *supra* note 147, at para. 25 (dissent); *Prosecutor v. Bemba*, ICC-01/05-01/08-2012, First Decision on the Prosecution and Defence Requests for the Admission of Evidence, 9 February 2012, at para. 93; *Prosecutor v. Bemba*, ICC-01/05-01/08-3343, Judgment Pursuant to Article 74 of the Statute, 21 March 2016, at paras. 361, 413, 475; *Prosecutor v. Zigiranyirazo*, ICTR-01-73-T, Judgment, 18 December 2008, at paras. 194, 210, 355; *Prosecutor v. Nyiramasuhuko et al.*, ICTR-98-42-T, Judgment and Sentence, 24 June 2011, at paras. 1045-1047.

¹⁵³ *Prosecutor v. Katanga*, *supra* note 101, at para. 1207; *Prosecutor v. Halilović*, IT-01-48-T, Judgment, 16 November 2005, at para. 540; *Prosecutor v. Taylor*, SCSL 03-01-T, Judgment, 18 May 2012, at paras. 2441, 4780.

prove the presence of injuries;¹⁵⁴ the identification of people¹⁵⁵ and vehicles;¹⁵⁶ to show troop movements;¹⁵⁷ to illustrate that the defendant had a command position;¹⁵⁸ the presence and movement of refugees;¹⁵⁹ to depict locations where specific events occurred;¹⁶⁰ the presence of roadblocks or checkpoints;¹⁶¹ people killed by soldiers;¹⁶² Dutch Battalion soldiers being held hostage;¹⁶³ combat operations;¹⁶⁴ sniper fire and sniper nests;¹⁶⁵ and to determine bullet, missile, and mortar trajectories.¹⁶⁶ These videos and photographs may be shown as individual exhibits, as part of larger media compilations, or as an integral part of a multimedia presentation.

Maps, diagrams, sketches, drawings, charts, and tables have proven to be effective methods of establishing facts in atrocity crime prosecutions. By way of example, maps, charts, and tables were used extensively in the *Ayyash* prosecution in the STL as discussed in detail in Sections 4.2 and 6.3. Hand-drawn diagrams and sketches drawn by civilians, investigators, and others featured prominently in ICTR cases to show, *inter alia*, locations of interest such as buildings, streets, and geography;¹⁶⁷ the location of mass graves;¹⁶⁸ locations where Tutsis were killed;¹⁶⁹ the presence

¹⁵⁴ *Prosecutor v. Katanga*, *supra* note 101, at paras. 208, 814, 836; *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgment, 16 November 1998, at paras. 981, 987.

¹⁵⁵ *Prosecutor v. Katanga*, *supra* note 101, at para. 206; *Prosecutor v. Taylor*, *supra* note 153, at paras. 2694-2700, 4870.

¹⁵⁶ *Prosecutor v. Gbagbo*, *supra* note 151, at para. 44.

¹⁵⁷ *Prosecutor v. Bemba*, *supra* note 152, at para. 89.

¹⁵⁸ *Prosecutor v. Ngudjolo Chui*, ICC-01/04-02/12-3, Judgment Pursuant to Article 74 of the Statute, 18 December 2012, at paras. 444, 464, 475, 477-478, 480-482; *Prosecutor v. Delić*, *supra* note 151, at para. 188; *Prosecutor v. Delalić et al.*, *supra* note 154, at para. 666.

¹⁵⁹ *Prosecutor v. Renzaho*, *supra* note 151, at para. 626; *Prosecutor v. Blagojević and Jokić*, *supra* note 144, at paras. 141, 147; *Prosecutor v. Perisić*, *supra* note 147, at paras. 640, 642; *Prosecutor v. Delić*, *supra* note 151, at para. 82.

¹⁶⁰ *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Judgment and Sentence, 30 September 2011, at paras. 590, 782, 1412; *Prosecutor v. Halilović*, *supra* note 153, at paras. 214, 376, 389, 392, 535; *Prosecutor v. Karadžić*, *supra* note 147, at paras. 800, 1817, 1863, 1873, 2393, 3645-3655, 3659, 5173.

¹⁶¹ *Prosecutor v. Ngirabatware*, ICTR-99-54-T, Judgment and Sentence, 20 December 2012, at paras. 242, 306; *Prosecutor v. Halilović*, *supra* note 153, at para. 427.

¹⁶² *Prosecutor v. Halilović*, *supra* note 153, at paras. 410, 450, 572, 614; *Prosecutor v. Blagojević and Jokić*, *supra* note 144, at paras. 194-196; *Prosecutor v. Stanisić and Simatović*, *supra* note 151, at paras. 296, 475, 794, 798, 878-883; *Prosecutor v. Perisić*, *supra* note 147, at paras. 361, 417, 424, 453, 568, 683, 1510, 1819; *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Judgment, 3 April 2008, at paras. 152, 194, 205, 228, 234, 254-255, 264, 300, 321, 334, 363, 366, 420; *Prosecutor v. Popović*, *supra* note 144, at para. 597.

¹⁶³ *Prosecutor v. Blagojević and Jokić*, *supra* note 144, at para. 150; *Prosecutor v. Perisić*, *supra* note 147, at para. 609.

¹⁶⁴ *Prosecutor v. Stanisić and Simatović*, *supra* note 151, at paras. 584, 790.

¹⁶⁵ *Prosecutor v. Milosević*, IT-98-29/1-T, Judgment, 12 December 2007, paras. 149, 162, 228, 305, 329, 339, 389, 409, 744; *Prosecutor v. Karadžić*, *supra* note 147, at paras. 3642, 3662, 3666; *Prosecutor v. Galić*, IT-98-29-T, Judgment, 5 December 2003, at paras. 234, 252, 270, 275, 280, 288, 319, 326, 354, 378, 427, 453, 465, 535, 550, 554.

¹⁶⁶ *Prosecutor v. Karadžić*, *supra* note 147, at paras. 3639, 3678, 3679, 3683, 3694-3696, 3715-3728, 3758, 3798, 3814, 3824, 3840, 3865-3870, 3876, 3882, 3907, 3911, 3921, 3924, 3926, 3943, 3950, 3958, 4005, 4010-4014, 4068-4072, 4095, 4105, 4121-4124, 4142-4145, 4153, 4178, 4213, 4284, 4288, 4289, 4319-4325, 4448.

¹⁶⁷ *Prosecutor v. Nyiramasuhuko et al.*, *supra* note 152, at paras. 1085, 1120, 1211 FN 2589, 1543 FN 3739, 2043, 2054, 2083, 3053, 3864 FN 10428.

¹⁶⁸ *Ibid.*, at para. 1478 FN 3567.

¹⁶⁹ *Ibid.*, at para. 5378 FN 13968.

of roadblocks;¹⁷⁰ and the location of soldiers;¹⁷¹ They were also used in ICTY cases to point out, *inter alia*, the locations of buildings of interest;¹⁷² impacts sites from shelling;¹⁷³ the location of soldiers;¹⁷⁴ the location of bodies;¹⁷⁵ and villages and sites where events occurred.¹⁷⁶ They also feature in ICC cases to illustrate such things as command structure;¹⁷⁷ the geography of areas of interest;¹⁷⁸ the routes travelled by certain commanders;¹⁷⁹ the location of villages;¹⁸⁰ the structure of an IDP camp;¹⁸¹ and showing the location of a defendant during an attack.¹⁸²

As noted above, the use of satellite imagery is mostly associated with atrocity crime prosecutions rather than domestic cases whereas the other types of non-textual evidence discussed in this chapter are commonly used in both types of prosecutions. However, photographic and video images spur additional challenges in the atrocity crime context because they frequently emanate from ungoverned, sometimes anonymous sources, replete with reliability and authentication concerns. These topics will be developed in subsequent chapters.

6. Case Studies

In this section, I expand upon the use of film, video, and photographs, as well as maps, diagrams, charts, and tables, as methods of proof by exploring the case studies first presented in the introductory chapter, illustrating the power that visual evidence can bring to bear in a juridical environment. The case studies on the Nuremberg trial, the Rodney King trial, and the *Gbagbo and Blé Goudé* prosecution focus on the use of film, video, and photographs, while the case study on the *Ayyash et al.* trial focuses on the use of maps, diagrams, charts, and tables.

6.1 *The Nuremberg trial: pictorial depiction of the Holocaust*

The Nuremberg trial prosecutors determined that it was neither feasible nor advisable to attempt to convey to the IMT the horrors of the Holocaust by words and documents alone. Though there was considerable pressure to call Holocaust survivors to the witness stand, Chief Prosecutor Jackson largely rejected that approach, preferring instead to base the prosecution primarily upon

¹⁷⁰ *Ibid.*, at paras. 1466 FN 3505, 5414.

¹⁷¹ *Prosecutor v. Bizimungu et al.*, *supra* note 160, at para. 869 FN 1272.

¹⁷² *Prosecutor v. Blagojević and Jokić*, *supra* note 144, at para. 271 FN 968.

¹⁷³ *Prosecutor v. Galić*, *supra* note 165, at para. 403.

¹⁷⁴ *Prosecutor v. Gotovina et al.*, IT-06-90-T, Judgment (Volume 1), 15 April 2011, at para. 335 FN 1348.

¹⁷⁵ *Ibid.*, at para. 343 FN 1428.

¹⁷⁶ *Ibid.*, at para. 359 FN 1488.

¹⁷⁷ *Prosecutor v. Lubanga*, *supra* note 147, at para. 1175; *Prosecutor v. Katanga*, *supra* note 101, at para. 1214 FN 2807.

¹⁷⁸ *Prosecutor v. Katanga*, *supra* note 101, at para. 3 FN 5.

¹⁷⁹ *Prosecutor v. Katanga*, *supra* note 101, at para. 235 FN 413.

¹⁸⁰ *Prosecutor v. Ntaganda*, ICC-01/04-02/06-2359, Judgment, 8 July 2019, at para. 643 FN 2051.

¹⁸¹ *Prosecutor v. Ongwen*, *supra* note 151, at para. 1172 FN 2389; 1386 FN 3189.

¹⁸² *Ibid.*, at para. 1276 FN 2712.

an objective presentation of overwhelming evidence without resort to overt emotional pandering.¹⁸³ Without imprinting images upon the minds of the judges, the prosecution risked fostering a cognitive dissonance wherein the atrocities being described orally and reflected in Nazi documents might not fully correspond with the seemingly dystopian events that actually transpired. Understanding the tandem need to create a historical record and educate the IMT judges, the American War Department sent a directive to US Army Signal Corps officials to obtain “an immediate and complete coverage, by motion pictures and still pictures, of atrocities, enemy prisoners of war, concentration camps and persons who were there at the time of liberation.”¹⁸⁴ The result was the approximately one-hour long film entitled *Nazi Concentration Camps*, which begins with the following statement:

AUGUST 28, 1945

THIS IS AN OFFICIAL DOCUMENTARY REPORT COMPILED FROM FILMS MADE BY MILITARY PHOTOGRAPHERS SERVING WITH THE ALLIED ARMIES AS THEY ADVANCED INTO GERMANY. THE FILMS WERE MADE PURSUANT TO AN ORDER BY GENERAL DWIGHT D. EISENHOWER, SUPREME COMMANDER, ALLIED EXPEDITIONARY FORCES.

ROBERT H. JACKSON
UNITED STATES
CHIEF OF COUNSEL

The Certificate and Affidavit of Lt. Col. George C. Stevens (US Army) and Lt. E.R. Kellogg (US Navy) are both shown for the purpose of image authentication. The latter certificate states that the film contains 6,000 feet of film selected from a total of 80,000 feet. A map of Europe is then shown with the location of dozens of concentration camps and prisons, along with the narrator stating, “These are the locations of the largest concentration and prison camps maintained throughout Germany and occupied Europe under the Nazi regime. This film report, covering a representative group of such camps, illustrates the general conditions which prevailed.” Thereafter, images from twelve concentration camps and prisons are shown. Excepting statements made by an American prisoner of war, a Royal Air Force officer describing the liberation of Bergen-Belsen, and a German physician who was a prisoner at Belsen, only the narrator speaks. The images are deeply disturbing and capture only a fraction of the horror that transpired in the camps, yet attempt to reflect, as much as could be done in film, the historicity of Nazi atrocities.¹⁸⁵

¹⁸³ Freeman, *supra* note 39, at 299. Survivor testimony was presented but in a limited way compared to the Eichmann trial. I use the word “objectively” advisedly as there is considerable subjectivity involved in recording images, as will be discussed in Chapters Three and Four.

¹⁸⁴ Cited in Delage, *supra* note 37, at 49.

¹⁸⁵ There is academic debate about whether these images were able to effectively communicate the enormity of the trauma suffered by the prisoners. See for example, Sandon, *supra* note 46, 501-520.

The mission of the Nuremberg trial was broader than just determining whether the defendants were guilty of the charges they faced. Prosecutors needed to document Nazi atrocities for the historical record and inform the world of what had taken place. *Nazi Concentration Camps* introduced the use of film in a courtroom as a method of communicating the magnitude of the atrocities under investigation in an unforgettable and evocative manner, in an attempt to both represent and judge the horrors of the Holocaust.¹⁸⁶ Film was effectively used as a form of testimony.¹⁸⁷

Nazi Concentration Camps was shown to the IMT on 29 November 1945, the fifth day of trial.¹⁸⁸ Not only were the Nazi atrocities unprecedented, aside from any personal involvement in World War I or World War II, most people had never been exposed to images as powerful as those shown in the film.¹⁸⁹ What was shown was truly novel and crucial to the prosecution's didactic mission in educating the IMT and the world audience about the facts of the case; it also reflected the pedagogic nature of the prosecution.¹⁹⁰ Thomas Dodd, Executive Counsel to the American prosecution team, articulated the reason for showing the film thusly, "...this film which we offer represents in a brief and unforgettable form an explanation of what the words 'concentration camp' imply..."¹⁹¹ This approach utilized the camera as a mechanism through which the prosecution could reconstruct the past and situate it in the present.¹⁹²

Nazi Concentration Camps was not the only film shown during the Nuremberg trial. The Nazis also created their own filmic record, which Chief Prosecutor Jackson referred to in his Opening Speech:¹⁹³

We will not ask you to convict these men on the testimony of their foes. There is no count in the Indictment that cannot be proved by books and records. The Germans were always meticulous record keepers, and these defendants had their share of the Teutonic passion for thoroughness in putting things on paper. Nor were they without vanity. They arranged frequently to be photographed in action. We will show you their own films. You will see their own conduct and hear their own voices as these defendants re-enact for you, from the screen, some of the events in the course of the conspiracy.

¹⁸⁶ Douglas, L. (2001). *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, New Haven, CT: Yale University Press, at 5, 28. Stahn describes the showing of this film as one of the breaking points in the trial; Stahn, *supra* note 67, 271-285.

¹⁸⁷ Burke, *supra* note 105, at 189.

¹⁸⁸ Delage, *supra* note 102, 34-39.

¹⁸⁹ Douglas describes it as "...creating an irrefutable imprint upon the mind, a trauma of sight." Douglas, L. (1995). Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal. *Yale Law Journal*, 105(2), 449-482, at 473.

¹⁹⁰ Delage states that, "On no occasion should film get in the way of knowledge of the politics of concentration and extermination. Rather it was supposed to allow everyone, inside and outside the courtroom, to begin to understand it." Delage, *supra* note 37, at 82.

¹⁹¹ *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, Volume II, 14 November 1945 – 1 October 1946, proceedings of 29 November 1945, at 431-432.

¹⁹² Silbey, *supra* note 33, at 30.

¹⁹³ Jackson, *supra* note 74.

The American prosecution team also showed a film entitled *Original German Film (8 mm) of the Atrocities Against the Jews*, which in contrast to the Signal Corps film showed the actual infliction of violence against helpless victims. Depicted are naked and half-naked women being chased through streets and others being subjected to various indignities. The film is one minute long, created by the SS during the liquidation of a ghetto, and was used as an example of how the SS conducted its operations upon the civilian population. It represents an early example of films made by defendants being used against them at trial. Soviet prosecutors showed *Film Documents on the Atrocities of the German Fascist Invaders*, which showed women in their bunks at Birkenau and children showing their tattoos to liberating forces.¹⁹⁴ Other films shown included *The Nazi Plan*, containing excerpts from Nazi propaganda and newsreel films showing long-term planning and war preparation as the Nazis gained power; *Destruction of the Art of Museums of National Culture Perpetrated on the Territory of the USSR*; and *U.S. Army Film of Materials That Were Found in Reichsbank Vaults, Taken in Frankfurt When the Allied Forces Captured That City*.¹⁹⁵ The use of filmic evidence in the Nuremberg trial allowed counsel and the court to view, analyze, and judge the crimes charged.¹⁹⁶

The filmic evidence was presented for the pedagogic purpose of informing the IMT judges, as much as images could, of the enormity of what the Nazis had done.¹⁹⁷ Considering that the atrocities shown were largely without precedent, as was the method of depicting them, as impactful and disturbing as they remain today, their impact would have been even greater when shown to the IMT.¹⁹⁸ Viewers interpret images through their own lens, armed with the knowledge and experience they have at that moment. It follows that without prior visualization of Nazi atrocities, the showing of *Nazi Concentration Camps* would have been very impactful for the IMT.¹⁹⁹ It would be erroneous to conclude that powerful visual evidence would be less cogent today given the widespread visualization of violence in the news and popular culture. The polysemic nature of photography and video helps to challenge the suggestion that images lose their capacity to

¹⁹⁴ Douglas, *supra* note 186, at 67-69; Delage, *supra* note 37, at 97-98.

¹⁹⁵ Delage, *supra* note 37, at 275; Greenfield, S. (2019). Social Media Platforms: Preserving Evidence of International Crimes. *International Comparative, Policy Ethics Law Review*, 2(3), 821-848, at 831-832.

¹⁹⁶ Delage, *supra* note 102, at 36.

¹⁹⁷ Writing about atrocious images of evil inflicted by humans upon other humans, Sontag notes the power that images have to shock and haunt the viewer. Sontag, S. (2003). *Regarding the Pain of Others*, New York: Farrar, Straus, and Giroux, at 115; As Delage eloquently states, "...the presence in court of filmic traces of the acts being tried before the judges lends to the reconstitution of the past a powerful effect of cinematic realism tinted with the foreignness of time gone by." Delage, *supra* note 37, at 244; Douglas notes that, "To view *Nazi Concentration Camps* today gives an imperfect idea of what the tribunal saw fifty years ago. It was novel then – the atrocities shown." Douglas, *supra* note 186, at 27.

¹⁹⁸ Douglas, *supra* note 186, at 27.

¹⁹⁹ Observers in the courtroom noted that the judges were silent after the film concluded and left the courtroom without formally adjourning court for the day. Twist, S. (2005). Evidence of Atrocities or Atrocious Use of Evidence: The Controversial Use of Atrocity Film at Nuremberg. *Liverpool Law Review*, 26, 267-302, at 280; Landsman, S. (2005). *Crimes of the Holocaust: The Law Confronts Hard Cases*. Philadelphia, PA: University of Pennsylvania Press, at 26.

shock.²⁰⁰ It is one thing to see powerful images that have no connection to the viewer, yet quite another when the viewer is charged with the responsibility of considering them in the context of a trial.

In the Nuremberg trial, the images helped counsel and the court develop an understanding of the fragility and mortality of human life within the confined juridical setting.²⁰¹ The images were so independently evocative, neither the *viva voce* evidence of victims nor perpetrators could have dislodged their truth.²⁰² While the filmic evidence spoke more graphically than witnesses ever could, the film itself could not be cross examined.²⁰³ The admissibility of powerful visual evidence such as *Nazi Concentration Camps* in modern-day atrocity prosecutions would be contingent upon successfully undergoing a probative value versus prejudicial effect analysis.²⁰⁴

Powerful visual evidence can impact everyone in the courtroom.²⁰⁵ Shown early in the Nuremberg trial, it would have served as a visceral lens through which the entire case was viewed, offering a view of ground zero, documenting atrocities for the historical record and for juridical proof.²⁰⁶ Elie Wiesel, in *Night*,²⁰⁷ referred to concentration camps starkly as “factories of death” and *Nazi Concentration Camps* helped to visualize that verbal description.²⁰⁸ By 1945, aside from personal wartime experience, most people would have had little or no exposure to images depicting extreme violence and cruelty and so the images shown at the Nuremberg trial would have been particularly

²⁰⁰ Duffy, A. (2018). Bearing Witness to Atrocity Crimes: Photography and International Law. *Human Rights Quarterly*, 40, 776-814, at 779; See also Butler, J. (2005). Photography, War, Outrage, *PMLA* 120(3), 822-827, at 823-825. Sontag, *supra* note 197, at 23.

²⁰¹ Butler, *ibid*, at 825.

²⁰² The images also served to militate against anticipated challenges from revisionists. Landsman, *supra* note 199, at 27.

²⁰³ Twist, *supra* note 199, at 270-271.

²⁰⁴ While Art. 69(3) of the *Rome Statute* permits the Court to receive all evidence it considers relevant for the determination of the truth, Art. 69(4) provides for the weighing of probative value and prejudicial effect in respect of any piece of evidence when assessing trial fairness. It might be argued that such inflammatory images might affect trial fairness absent direct and substantial relevance to the counts before the court. A further issue would be whether the prosecution can produce witnesses regarding the evidence who can be cross examined on its content.

²⁰⁵ In jurisdictions that utilize juries, some jurors have been diagnosed with post-traumatic stress disorder and other conditions because of images they were required to view in court. Lonergan, M., Leclerc, M., Descamps, M., Pigeon, S., and Brunet, A. (2016). Prevalence and Severity of Trauma and Stressor-Related Symptoms Among Jurors: A Review. *Journal of Criminal Justice*, 47, 51-61; Haragi, M., Yamaguchi, R., Okuhara, T., and Kiuchi, T. (2020). Questionnaire Survey of a Mock Jury on Their Impressions of Medical-Legal Illustrations Aimed at Reducing Trauma and PTSD of Jurors. *Journal of Visual Communications in Medicine*, 43(2), 67-75. While visual evidence has cogent value as a didactic tool, there may be an intangible price to be paid by the viewer for the education received.

²⁰⁶ Mnookin and West refer to “ground zero” as the location where a recorded event occurred. Mnookin and West, *supra* note 34, at 385-386.

²⁰⁷ Wiesel, E. (1960). *Night*, New York: Bantam, at 64.

²⁰⁸ Sontag, referring to the images of the concentration camps, wrote, “Nothing I have seen – in photographs or in real life – ever cut me as sharply, deeply, instantaneously. Indeed, it seems plausible to me to divide my life into two parts, before I saw those photographs (I was twelve) and after...When I looked at those photographs, something broke. Some limit had been reached, and not only that of horror...” Sontag, *supra* note 41, at 17-18.

impactful.²⁰⁹ These films turned courtroom viewers into virtual witnesses. By the time these images were shown at the Eichmann trial in 1961, they occupied a less prominent role having been shown two months into the proceedings, but they still had importance in illustrating Eichmann's control over Jewish concentration camp prisoners²¹⁰ and creating a historical record.²¹¹ The images still had power – Chief Prosecutor Hausner wrote that after *Nazi Concentration Camps* was shown, the judges had tears in their eyes and they rose abruptly and left the courtroom.²¹²

Though consideration of the impact of powerful images is usually focused on the court, the defendant's reaction, if any, to such images can have a subconscious effect on the courtroom participants. Even though the Nuremberg defendants were charged with the worst crimes imaginable, in the prisoners' dock, they looked like ordinary men wearing suits, not the monsters their conduct would suggest. In his Opening Speech, Chief Prosecutor Jackson said:²¹³

In the prisoners' dock sit twenty-odd broken men. Reproached by the humiliation of those they have led, almost as bitterly as by the desolation of those they have attacked, their personal capacity for evil is forever past. It is hard now to perceive in these miserable men as captives the power by which as Nazi leaders they once dominated much of the world and terrified most of it.

Chief Prosecutor Ferencz described the Einsatzgruppen defendants as “very ordinary looking men.”²¹⁴ Eichmann Chief Prosecutor Hausner said that when the defendant first appeared in court, he “almost felt like searching him for fangs and claws”, noting that without his uniform, he looked “paltry and insignificant” as did all of the top Nazis that had been tried.²¹⁵ It is difficult to dehumanize a defendant when his actual appearance in the courtroom is rather pedestrian.²¹⁶ To use a domestic example, one of the reasons for the many conspiracy theories surrounding the assassination of US President Kennedy in 1963 is that many people could not accept that Lee

²⁰⁹ Even though my Dutch parents were in the Netherlands for all of World War II and had ample exposure to German invaders taking prisoners, abusing the civilian population, appropriating property, and bombing cities and other strategic locations, they had no conception of the true extent of Nazi atrocities.

²¹⁰ Twist, *supra* note 199, at 296.

²¹¹ The Eichmann trial marked a resurgence in the value of survivor testimony with over one hundred survivors giving evidence. Stahn, *supra* note 7, at 302. Corroborating their personal experience with filmic evidence was an excellent use of visual evidence.

²¹² Hausner preferred the use of *viva voce* evidence over film as he believed that the testimony of survivors would help people visualize the tragedy of the Holocaust. Though there were historical reasons for recording survivor testimony, its impact may be more transient than images. Hausner, G. (1966). *Justice in Jerusalem*, New York: Schocken Books, at 348.

²¹³ Jackson, *supra* note 74.

²¹⁴ Ferencz, *supra* note 13.

²¹⁵ Hausner, *supra* note 212, at 309-310.

²¹⁶ Stolk, S. (2018). A Sophisticated Beast? On the Construction of an ‘Ideal’ Perpetrator in the Opening Statements of International Criminal Trials. *European Journal of International Law*, 29(3), 677-701, at 696; Though not addressing the Holocaust prosecutions specifically, Allot paints an apt picture when he writes, “Feeble old men and their seedy subordinates shuffle into the courtroom, shrunken figures bearing no physical relationship to the physical scale of suffering for which they are responsible.” Allot, P. (2002). *The Health of Nations: Society and Law Beyond the State*, Cambridge, Cambridge University Press, at 67.

Harvey Oswald, a commoner, could kill a king.²¹⁷ It is in part to address the cognitive dissonance that sometimes exists between the crimes being tried and the appearance of the defendant in the courtroom that visual evidence finds a foothold. Beyond proof of the crimes themselves, this dissonant gap can be expunged with powerful images.

An interesting dynamic sometimes occurs in a courtroom when images are shown which depict the defendant during the commission of the crime, before or after it was committed, or the aftermath of the crime itself. Observers look not just at the images on the screen but also at the defendant's reaction to them. Though not tangible in the sense that it becomes explicit evidence, the court cannot help but subconsciously note such visible reactions.²¹⁸ Some defendants steadfastly deny viewers the satisfaction of any visible reaction but at times they may be unable to do so, and their reaction can be palpable. Such responses are not uncommon as the defendant is not just viewing the event, he or she is reliving it. Those observations can be instructive and useful in cross examination and can serve as intangible evidence of guilt. This occurred during the Nuremberg trial, where participants and observers looked for some sort of response or non-verbal acknowledgement from the defendants regarding the horrors depicted.²¹⁹ The behavior of the defendants was observed and documented by US Army psychologist Capt. G.M. Gilbert. Upon showing *Nazi Concentration Camps*, Gilbert noted that while not all defendants had a visible response, some gasped, cried, shuddered, turned away and issued denials.²²⁰ Hermann Göring said, "And then they showed that awful film, and it just spoiled everything."²²¹ Once in the prisoners' dock, the defendants cannot physically hide and their conduct in the dock becomes noteworthy.²²²

Whether as a method of proof, for didactic purposes or to create a historical record, visual evidence in the form of film, video, and photographs is an integral component in presenting the prosecution's case. It also has significance for the defence as visual evidence may be presented in the defence case to challenge the prosecution's narrative or at least show a different perspective. The use of visual evidence in the Nuremberg trial heralded a much more expansive method of presenting the case for the prosecution, an approach that has gained continued favour in the

²¹⁷ Bugliosi, V. (2007). *Reclaiming History: The Assassination of President John F. Kennedy*, New York, London: W.W. Norton and Company, Inc., at xxvii.

²¹⁸ "Even when the defendant does not admit to his crimes, his reactions when confronted with the footage constitute a sort of avowal that jeopardizes his chances of acquittal... They can undermine spurious arguments from the defence as well as serve as an instrument for elucidating the truth." Delage, *supra* note 37, at 188. Delage notes a high profile 1984 Canadian case wherein a defendant on trial for opening fire in the Quebec National Assembly reportedly "cracked" upon seeing video of the shooting spree.

²¹⁹ Duffy, *supra* note 200, at 781.

²²⁰ Gilbert, G.M. (1947). *Nuremberg Diary*, New York: The New American Library (quoting Douglas, *supra* note 186, at 106-107); Landsman, *supra* note 199, at 26.

²²¹ Gilbert, *ibid*, at 11.

²²² "The aim was to force Nazi leaders to acknowledge as their own, in camera and before a court of law, crimes for which they were accountable or responsible. Because of their physical presence in the room, the accused had to accept being seen juxtaposed to the images projected in the courtroom." Delage, *supra* note 37, at 108.

tribunals and courts that followed the IMT. The use of these forms of visual evidence in later atrocity crime prosecutions is noted in Section 5.

6.2 *The Rodney King trial: using the same video to prove different truths*

Filmic images were used by the prosecution during the Nuremberg trial to convey to the IMT a glimpse of the enormity of Nazi atrocities in a way that could not be adequately conveyed through other methods. The images were also used to create a historical record within a judicial context. The video evidence tendered by the prosecution in the King case was used for fundamentally different purposes. Unlike *Nazi Concentration Camps*, which was used to corroborate broader allegations of atrocities, the video evidence in the King case captured almost the entire event and formed the substance of the prosecution. Further, contrary to the Nuremberg trial, the video evidence was used by the King prosecutors to pursue a conviction while the same video was used by the defence to seek an acquittal. These themes will be explored below.

During the 1992 trial of LAPD officers for the beating of Rodney King in Los Angeles, the fortuitously recorded Holliday camcorder video, which captured most of the incident, became the central tenet of the prosecution's case.²²³ Unexpectedly, it also became the foundation of the defence case. Having been shown countless times on television news programs, the video was ostensibly the best objective evidence of the incident available. In the case study for this chapter, I will examine the different approaches taken by the prosecution and defence in marshalling the video evidence to advance their trial narratives.

The 81 second video was powerful. The prosecution was so invested in the video as their primary method of proof that they believed that by simply pressing play, the video would speak for itself.²²⁴ Utilizing the video evidence, the prosecution presented a case that had visual and emotional appeal, showing a disturbing scene with LAPD officers beating King with batons and administering physical blows. During their closing address to the jury, the prosecution justified their reliance on the video and the decision not to call King to testify by saying, "What more could you ask for? You have the videotape that shows objectively, without bias, impartially, what happened that night. The videotape shows conclusively what happened that night."²²⁵ While the video may have been objective, unbiased, and impartial, the prosecution fell into error by presuming that it was conclusive, and that no other interpretation was tenable.

²²³ Civilian video has become a powerful tool for social change ever since the King case, as noted in Ristovska, S. (2016). The Rise of Eyewitness Video and its Implications for Human Rights: Conceptual and Methodological Approaches. *Journal of Human Rights*, 15(3), 347-360, at 348-349, 354-355.

²²⁴ This oft used technique is unsophisticated because frequently much more can be gained from video evidence when properly analyzed and presented, a topic that will be discussed in depth in Chapter Six.

²²⁵ Gerland, O. (1994). Brecht and the Courtroom: Alienating Evidence in the "Rodney King" Trials. *Text and Performance Quarterly*, 14, 305-318, at 311.

The defence approached the Holliday video quite differently. In contrast to the single narrative approach of the prosecution, the defence displayed superior visual literacy by engaging in a thorough interrogation of the video, image by image, using it to credibly produce a visual counter-narrative of the event.²²⁶ The original video was recorded in 8 mm analog format. The defence made a digital copy of the original video, which they then used for detailed analysis. Based on the original video format, each second of video was comprised of sixty separate fields, or images.²²⁷ Discounting the first ten seconds of unfocused footage, this meant that the video contained approximately 4,260 images. While still mindful of the motion video, it was the analysis of the singular images that became central to developing the defence narrative. Through this analytical approach, the defence was able to microscopically articulate the defendants' frame of mind at each step in the encounter, along with their perceptions of the threat King posed to them.²²⁸ This approach disrupted the prosecution's appeal to emotion by stripping the visceral power of the motion video and promoting the court from mere bystander to pseudo-analyst with the requisite expert assistance. The defence used the video images, together with the testimony of the defendants and their use of force experts, to present a counter-narrative, one wherein King was the driving force of the encounter, not the officers. The experts interpreted the movements of King in a way that allowed for a more critical and diverse judgment, and an interpretation in which King was the actual aggressor.²²⁹

The prosecution advanced its trial narrative on the basis that the Holliday video presented the objective truth of the event and inferentially that no other credible interpretations of the video were reasonably available.²³⁰ Believing that the video spoke for itself, the prosecution employed poor visual literacy by assuming that only one narrative could emanate from the evidence verité. The prosecution justifiably had great faith in the communicative power of the video but faltered in their case presentation by primarily relying upon the motion video to tell its story. Watching video in real-time can produce a narrative often markedly at odds with that which surfaces with a more

²²⁶ Sherwin, *supra* note 57, at 734-735; Mezey, *supra* note 76, at 19-20; Spiesel, C., Sherwin, R., and Feigenson, N. (2005). Law in the Age of Images: The Challenge of Visual Literacy. In Wagner, A., Summerfield, T., Vanegas, B., and Samir, F. (eds) *Contemporary Issues of the Semiotics of Law*, Oxford: Hart Publishing, 231-266.

²²⁷ Parris Ward, Video technician for the defence team in the King state trial, the federal civil rights violation trial, and the ensuing civil trial, personal communication, 15 June 2021.

²²⁸ King was variously described by the officers as "aggressive", "buffed-out", "a probable ex-con", "a wounded animal", and "a monster", effectively casting King as a dangerous weapon. Watson, R. (2019). In *The Wakes of Rodney King: Militant Evidence and Media Activism in the Age of Viral Black Death*. *The Velvet Light Trap*, 84, 34-49, at 42.

²²⁹ Gerland, *supra* note 225, at 312. The success of the defendants' approach to the video was dependent upon them being able to displace King's pain for the potential of their own pain; by showing that they needed to beat King to prevent him from beating them. Torres, S. (2003). *Black, White, and in Color: Television and Black Civil Rights*, Princeton, NJ: Princeton University Press, at 53.

²³⁰ Jurors who had seen the video prior to trial expressed an inclination to convict based on the video depiction. Gerland, *supra* note 225 at 312.

sophisticated analytical approach. The prosecution's over-confidence in the power of the video helped set the stage for the acquittals that followed.²³¹

The LAPD officers may well have been guilty, but because the prosecution based their case largely on the motion video evidence, they did not explore other viable narratives that could emanate from the images. Instead, the defence effectively outlawyered the prosecution by picking up the ball they dropped and ran with it, employing a more sophisticated visual literacy.²³² The juxtaposition between the prosecution's reliance on the video to tell the story of unrestrained police brutality and the defence's retooling of the video to show permissible use of force against a violent suspect allowed for a second seemingly plausible narrative, one which sowed the seeds of reasonable doubt. I am not suggesting that the prosecution's method of presentation of the Holliday video was the only cause of the acquittals, but the juxtaposition of the defence's interpretation of King's actions based on the video paved a path for the jury to acquit. Further, the failure to present King at trial had the unintended effect of dehumanizing the incident, especially following the clinical analysis of the video by the defence.

In the subsequent 1993 federal trial against the same LAPD officers for civil rights violations arising out of the same incident, wherein King was called to testify by the prosecution, the federal prosecutors studied the failures of the state prosecution's use of the video evidence and developed a more compelling narrative.²³³ Before the federal jury, the prosecution played the video in real-time but then also broke it down frame by frame and used an LAPD use of force expert to opine on the reasonableness of the officers' parsed-out actions. Coupled with King testifying "I was just trying to stay alive, sir", the prosecution presented a much more compelling and humanized case.²³⁴ The expert spoke for the video evidence and laid down a narrative that the defence was unable to dislodge. The federal jury convicted two of the officers and acquitted the other two officers.

The Holliday video was powerful, potentially transformative evidence capable of establishing a persuasive visual trial narrative. It also heralded a new and vital role for visual documentarians, ushering into existence evidence that previously emanated only from onlooker memory.²³⁵ As a method of proof, the Holliday video was without equal, but the state trial showed that the impact of the video images on the jury was dependent upon how they were presented. Intuitively, pressing play for powerful video evidence has some appeal and merit but more than that is required to give full effect to the media. Detailed image analysis and event narration by participants and experts are essential as a means of contextualizing video content. The successful use of that approach by

²³¹ Torres, *supra* note 229, at 50. Torres argues that the prosecution's faith in the video's privileged relation to reality persuaded them that reliance upon the self-evident character of the video was justified.

²³² Mezey, *supra* note 78, at 19-20.

²³³ Gerland, *supra* note 225, at 314-315.

²³⁴ *Ibid.*

²³⁵ Watson, *supra* note 228, at 39.

the defence in the state trial worked to their advantage while the use of that same approach by the prosecution in the federal trial operated in their favour. The difference in approach, particularly at the state trial, was reflective of the unequal visual literacy displayed by the parties. What appeared at first glance to be irrefutable proof, when analyzed and presented using different approaches, gave rise to competing interpretations and unexpected results.

6.3 *Prosecutor v. Ayyash et al.: illustrating the Narrative*

The *Ayyash* prosecution, which lasted from January 2014 to August 2020, was significant evidentially because of its extensive reliance upon maps, diagrams, charts, and tables to prove essential factual allegations. It was a very complex case involving the testimony of 297 witnesses, the entry of 3,131 exhibits, 5,265 filings by counsel and the Chamber, 1,556 decisions, and 415 court hearings.²³⁶ The evidence against the four defendants consisted, in large part, of vast amounts of intricate data, including voluminous cell phone data, which was central to uncovering the network of participants and planning that led up to the deadly February 14, 2005 explosion. The prosecution, defence, and Trial Chamber made extensive use of visual evidence to explore and ascertain the facts during the trial, and the Chamber relied upon the Electronic Presentation of Evidence (EPE) program extensively in its final judgment. The prosecution presented maps, diagrams, charts, and tables to depict the vehicles in the former Prime Minister's motorcade;²³⁷ the path of travel of the motorcade;²³⁸ the positioning of the vehicles when the explosion occurred;²³⁹ the crime scene and surrounding area;²⁴⁰ the location of vehicle parts from the vehicle that contained the explosives;²⁴¹ locations where human remains were found;²⁴² interconnected mobile telephone networks and attributions of usage by defendants;²⁴³ cell site network analysis;²⁴⁴ associations between mobile phones;²⁴⁵ the location of specific mobile phones when used;²⁴⁶ predicted locations of a mobile phone;²⁴⁷ network activity for specific mobile phone groups;²⁴⁸

²³⁶ See STL website, *Overview of Prosecutor v. Ayyash et al.* (STL-11-01), available at <https://www.stl-tsl.org/en/the-cases/stl-11-01> (accessed 12 June 2021).

²³⁷ *Prosecutor v. Ayyash et al.*, *supra* note 89, at para. 1056 (Exh. P266).

²³⁸ At para. 4626 (Exh. P1923).

²³⁹ At para. 1057 (Exh. P266).

²⁴⁰ At paras. 1097 (Exh. P244); 1390 (Exh. 2D26); 1424 (Exh. P266).

²⁴¹ At para. 1300 (Exh. P244).

²⁴² At para. 1425 (Exh. P244).

²⁴³ At para. 47.

²⁴⁴ At paras. 1588, 1622, 1623, 1638, 1639, 1641, 1657, 1662, 1668, 1682, 1683, 5111 (Exh. P549); 1664 (Exh. P1152); 1699 (Exh. P550); 1711 (Exh. P773); 1759 (Exh. P825); 2023 (Exh. P1120); 2027 (Exh. P593.2); 2209 (Exh. P1118); 2676 (Exh. P2026.2); 2734 (Exh. P826.1); 2841 (Exh. 2025); 2849, 3116 (Exh. 592.1); 4293, 4295, 4296 (Exh. P1783); 4782 (Exh. P1115).

²⁴⁵ At paras. 2061 (Exh. P549); 2210 (Exh. P1116).

²⁴⁶ At paras. 2064 (Exh. P549); 2819 (Exh. P2025).

²⁴⁷ At paras. 2090, 2093 (Exh. P550); 2909 (Exh. P1111).

²⁴⁸ At paras. 2263, 2271, 2301, 2310, 2351, 2354, 2355 (Exh. P795); 2264, 2266, 2308, 2386, 2415 (Exh. P1118); 2390 (Exh. P1117); 2517, 2530 (Exh. P1935); 2732 (Exh. P592.1).

residence locations;²⁴⁹ mobile phone usage;²⁵⁰ mobile phone contact profiles;²⁵¹ locations where claims of responsibility were made from payphones;²⁵² and cell site area coverage.²⁵³ The defence presented charts and graphs showing cell site activities²⁵⁴ and cell site area coverage.²⁵⁵ Interestingly, using the EPE software, the Trial Chamber also created maps and tables and modified existing exhibits to examine data presented by the parties.²⁵⁶

The volume and intricacy of the evidence in this case is remarkable. What is also remarkable is how thoroughly counsel and the Chamber engaged with the evidence in a manner that gave it full meaning, albeit with differing interpretations. It would have been nearly impossible for counsel and the Chamber to comprehend the evidence, let alone its significance if it had not been visualized in a digestible manner. The events leading up to the explosion, the explosion itself, and the aftermath occupied a significant timeline and geographical footprint. Visualizing the data in a logical narrative allowed the Chamber to view discrete events, data, and observations in the broader context of the case and allowed the Chamber to arrive at an informed judgment. The Trial Chamber's decision to acquit defendants Merhi and Oneissi was appealed by the prosecution and relying in part upon the evidence referred to in this section, the Appeals Chamber found that the Trial Chamber misapprehended the significance of some of the visual evidence, and by re-interpreting the evidence as suggested by the prosecution, the Appeals Chamber overturned the acquittals of Merhi and Oneissi and substituted convictions.²⁵⁷ The visualized data regarding mobile phone networks, attribution, and usage was central to the appellate review.

6.4 Prosecutor v. Gbagbo and Blé Goudé: determining the origin of gunfire

²⁴⁹ At paras. 2680, 2701 (Exh. P2025); 3430, 3862, 3863 (Exh. P662); 3858 (Exh. P656); 3864 (Exh. P298).

²⁵⁰ At paras. 2204 (Exh. P1116); 2205 (Exh. P795); 2262, 2388 (Exh. P1118); 2911, 3050, 3153, 3216, 3220, 3221, 3223, 3228-3231, 3239, 3240, 3537, 4229, 4239 (Exh. P1935); 2966-2970, 2977-2979, 2982-2984, 3043, 3102 (Exh. 2026.2); 2957, 2986, 3040, 3118, 3150 (Exh. P2025); 3049, 3163, 3165, 3208, 3232, 3241 (Exh. P1111); 3053 (Exh. P2108.1); 3076, 3078, 3080 (Exh. P1936); 3117 (Exh. P2111); 3234 (Exh. 592.1); 3449, 3460, 3476, 3481, 3482 (Exh. P1962.1); 3506, 3507, 3510, 3525-3527, 3541 (Exh. 2120); 3573 (Exh. 3D430.2); 3772, 3775, 3821 (Exh. P1949); 3887 (Exh. P1952); 3887, 3896 (Exh. P1953.1); 4119, 4137, 4182, 4212-4214, 4222 (Exh. P2023.3); 4237, 4240 (Exh. P1937); 4319, 4333, 4337, 4353, 4360, 4369, 4379, 4388, 4392, 4403, 4422, 4454, 4476, 4486, 4499, 4520, 4523, 4526, 4531, 4542, 4552, 4559, 4562, 4566, 4569, 4591, 4595, 4600, 4652, 5576, 5587, 5607 (Exh. P1783); 4429 (Exh. P1115); 4578, 4607, 4609, 4613 (Exh. P1916); 4763 (Exh. 1D347); 5223 (Exh. 1793); 5342 (Exh. P1807); 5350 (Exh. P1814); 5499 (Exh. P1900); 5600 (Exh. P1923); 6680 (Exh. 1926); 6707 (Exh. P1117).

²⁵¹ At para. 3471 (Exh. P1961).

²⁵² At para. 4836 (Exh. P1923).

²⁵³ At paras. 5101 (Exh. 4D325); 5102 (Exh. 4D321); 5103, 5106, 5222 (Exh. P1783); 5104, 5588, 5606, 5654 (Exh. P592.1); 5138, 5139 (Exh. 5D355).

²⁵⁴ At paras. 5246, 5248 (Exh. 5D348).

²⁵⁵ At para. 5279 (Exh. 4D321).

²⁵⁶ At paras. 4294, 4352, 4367, 4409, 4441, 4490, 4501, 4507, 4645, 5105, 5107, 5280-5282, 5284-5294, 5533, 5544, 5545, 5571, 5578, 5588, 5675, 6662.

²⁵⁷ *Prosecutor v. Merhi and Oneissi*, STL-11-01/A-2/AC F0051/20220310/R007727-R007979/EN/af, Appeal Judgment, 10 March 2022.

Contrary to the generally high-quality filmic images relied upon by the prosecution in the Nuremberg trial and the reasonably good quality and stable video relied upon in the King case, the bystander video used in *Gbagbo and Blé Goudé* was technically very challenging and certainly less reliable as a method of proof. The nature of this video will be explored in this section.

The prosecution alleged that on 3 March 2011, a FDS convoy intentionally fired upon peaceful female anti-Gbagbo demonstrators in Abobo. The prosecution further alleged that thirteen women were shot, seven fatally.²⁵⁸ The evidential issue that arose was establishing who fired the shots that hit the victims as there was no direct evidence on this point. Expert ballistics analysis of bystander recorded video of the event identified the audio trace of twenty-seven shots being fired within less than ninety seconds, ten believed to be from a heavy calibre weapon, and the remaining seventeen from a different or lighter calibre weapon.²⁵⁹ The first three shots were likely attributed to one of the two machine guns mounted on the turret of the BTR-80 that was visible in the video.²⁶⁰ After those initial shots, panic broke out and the camera moved rapidly and haphazardly as the photographer likely feared being shot. As Judge Henderson noted, it was thereafter impossible to establish the source of the subsequent shots. Unless the thirteen victims were hit by the first three shots, believed to emanate from the BTR-80, it was not known who was responsible for their deaths and injuries.²⁶¹ It was noted that the first observation of a fallen victim appeared approximately one minute after the gunfire began. Viewing the video in its native format made it very difficult to comprehend what was depicted because of significant camera movement. Judge Henderson noted that owing to the poor quality of the video recording, it was difficult to ascertain where the turret-mounted guns were aimed.²⁶² It was not possible to determine based on available evidence that the soldiers in the BTR-80 or any other vehicles in the convoy caused the deaths and injuries.²⁶³

The video was not examined by a forensic imagery expert. In his concurring opinion, Judge Tarfusser was generally critical of the way in which the case was investigated and the way the prosecution presented their case.²⁶⁴ Regarding the video evidence of the Abobo killings, it was

²⁵⁸ Reasons of Judge Henderson, *supra* note 147, at para. 1773.

²⁵⁹ *Ibid*, at para. 1775. According to the expert, the first three bursts of gunfire occurred within seven seconds, followed by a pause of approximately forty seconds before the next series of shots were fired. By that time, the convoy had already passed the location where the demonstrators were located. According to the Chamber, it could not be determined whether the latter shots caused any of the deaths and injuries (at para. 1785).

²⁶⁰ The BTR-80 is a Russian-built armoured personnel carrier.

²⁶¹ Reasons of Judge Henderson, *supra* note 147, at paras. 1775-1776.

²⁶² *Ibid*, at para. 1779.

²⁶³ *Ibid*, at para. 1787. The Prosecutor appealed this assessment of the Abobo evidence, and in its decision upholding the acquittals the Appeals Chamber was very critical of the prosecution's categorization of this as an error of law. The Chamber did not overturn this finding. *Prosecutor v. Gbagbo and Blé Goudé*, ICC-02/11-01/15-1400 01-04-2021 1/166 SL A, Judgment in the Appeal of the Prosecutor Against Trial Chamber I's Decision on the No Case to Answer Motions, 31 March 2021. See also Concurring Opinion of Judge Eboe-Osuji, ICC-02/11-01/15-1400-Anx1-Corr-Red 09-04-2021 1/134 SL A, at paras. 226-230.

²⁶⁴ ICC-02/11-01/15-1263-AnxA, 16 July 2019, Reasons of Judge Tarfusser.

noted that the OTP ballistics expert presented little more than panoramic views of the scene.²⁶⁵ Presenting panoramic views of a crime scene when the video evidence is central to determining what happened is insufficient. Given that the civilian *viva voce* evidence was contradictory and insufficient to prove the allegations, the video evidence was of critical importance.²⁶⁶ Proper image analysis of the Abobo video may not have provided the conclusive proof required, but it would have provided the Chamber with a truer sense of the prosecution narrative and what occurred regarding the convoy and the demonstrators. The video evidence had more to offer but the Chamber did not have the benefit of this knowledge. This will be discussed in further detail in Chapter Six.

Conclusions and Recommendations

In this chapter, I have asserted that non-textual evidence is an essential component of proof in international criminal prosecutions. Given the frailties often associated with *viva voce* evidence and the additional challenges faced by some atrocity crime witnesses, allegations of serious criminality are more likely to be afforded weight by the court if victim or eyewitness testimony can be corroborated by visual evidence.²⁶⁷ As courts become more acclimatized to visual evidence, judges may be more reluctant to unreservedly accept *viva voce* evidence on its face when not materially corroborated by visual evidence – not as a matter of law, but as a matter of fact. Counsel must factor this perceived judicial preference for visual proof into their trial narrative.

Below are recommendations flowing from this chapter's content:

Recommendation 1: When constructing the prosecution narrative, counsel should strategically incorporate visual evidence to corroborate the evidence of witnesses and as independent proof of alleged facts. A wise balance of image-based evidence, maps, diagrams, charts, tables, and other forms of visual evidence is essential to sufficiently engage the court in multimodal learning. Counsel should consider that their role is in part pedagogical and should strive to teach the trial narrative to the court in an effective and compelling manner. The same considerations apply to the defence case.

While the implicit need for corroboration and the presence of ever-expanding sources of visual evidence have resulted in prosecutions becoming more complex, this is not necessarily a negative

²⁶⁵ At para. 31.

²⁶⁶ *Supra* note 147, at paras. 1778-1785.

²⁶⁷ McDermott notes the concern of some investigators that the increased prevalence of open source information in atrocity crime prosecutions may serve to devalue those parts of a case that are mostly dependent on witness testimony; McDermott, Koenig, and Murray, *supra* note 30, at 20. While there is merit to this view, perhaps a sounder perspective is to view open source visual evidence as something capable of corroborating or challenging *viva voce* evidence, concordant with the goal of finding the truth. *Viva voce* evidence can be buttressed by open source evidence as well as denigrated.

thing as the use of visual evidence, and hence the expansion of epistemic boundaries, should assist in the goal of ascertaining the truth. Images and other forms of visual evidence will often bear proof and show the truth of what has occurred. They can constitute reliable sources of accurate, veridical information, appropriate for use by the court in deciding a case. Counsel should not however assume that all viewers will draw the same conclusions from visual evidence. Caution must be exercised when viewing and interpreting images because to the untrained viewer, images may be dangerous in that they may seem so real, and their power can be irrational.²⁶⁸

Recommendation 2: Visual evidence should be accompanied by supplemental explanatory evidence designed to fully explain to the court the context in which the evidence was created and obtained and the purposes for which it is being tendered. This evidence may come from eyewitnesses, third party observers, investigators, experts, and other suitably informed individuals.

Fact-finding can go awry when counsel and the court lack the visual literacy needed to properly question the evidence and appreciate that other interpretations may be equally tenable.²⁶⁹ Visual literacy causes more critical discernment and is needed to ensure that courts correctly assess the legibility of evidence and render judgment with a full understanding of what propositions the evidence supports.²⁷⁰ The court must question what the images portray, what the portrayals mean, and how they are relevant to the issues being litigated.

Recommendation 3: When presenting visual evidence, counsel should strive to achieve and employ a robust visual literacy. Using knowledgeable and suitably qualified witnesses, visual evidence should be accompanied by competent narration designed to provide a full interpretation of the meaning of the evidence. While the court will ultimately decide the facts, sound interpretive narrative evidence is essential in assisting the court to make sound judgments on proffered evidence.

The concept of visual literacy will be explored in greater detail in Chapters Five and Six. In Chapter Two, I will examine how visual evidence can be used as a didactic tool to help educate the court.

²⁶⁸ Tushnet, *supra* note 35, at 694-695.

²⁶⁹ Sherwin, *supra* note 51, 55-63.

²⁷⁰ Mezey, *supra* note 78, 1-40; Feigenson, N. (2014). The Visual in Law: Some Problems for Legal Theory. *Law, Culture and the Humanities*, 10(1), 13-23; Sherwin, *supra* note 35, at 36.