

**ADVANCING ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS
THROUGH CITIZEN MEDIA: AN AFRICAN PERSPECTIVE**

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PLAGIARISM DECLARATION

I declare that this thesis, ‘Advancing Accountability for Human Rights Violations through Citizen Media: An African Perspective’, which I hereby submit for the degree Doctor of Laws (LLD), at the Faculty of Law, University of Pretoria, is my own work and has not been previously submitted by me for a degree at this or any other tertiary institution.

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DEDICATION

This thesis is dedicated to all those who continue to risk their lives to expose the atrocities of the powerful so that others may obtain justice – may your sacrifices not be in vain.

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ABSTRACT

In the year 2020, there were two key events that captured global attention and further reinforced the power of citizen media evidence in exposing the truth and advancing justice. The first was the killing of George Floyd by a police officer in the United States of America that was filmed by witnesses and disseminated via social media, while the second was the Lekki Toll Gate shooting carried out by Nigerian security forces against unarmed protesters in Lagos, Nigeria which was livestreamed on Instagram. The citizen videos from these two incidents sparked global outrage, triggered investigations and, in the George Floyd case, led to court convictions. However, these examples of citizen media evidence exposing atrocities are not isolated cases, neither are they new. The ubiquity of cellphone cameras combined with the popular adoption of social media networks have radically transformed the sphere of human rights in an unprecedented way, resulting in more people documenting and exposing human rights abuses. This proliferation of citizen media evidence has enabled victims of atrocities to obtain remedy and hold the powerful to account. At the same time, leveraging citizen media evidence to achieve justice is persistently being hindered by significant legal, social, political, technological and institutional barriers.

This thesis is therefore an attempt to interrogate these barriers impeding the widespread use of citizen media evidence before domestic and international judicial mechanisms. This thesis engaged in an analysis of select African judicial systems, while also drawing lessons from international courts and tribunals as well as other domestic courts around the world. A socio-legal approach was adopted, through which the research was able to identify and isolate complex societal challenges and the role law can play in transforming the situation for the better.

A key finding of this research is that in a number of African countries, the law of evidence is not sufficiently robust to meet the challenges of the digital era. I therefore proposed a model law on citizen media evidence as one of the ways to ensure that evidence of human rights violations can continue to be used in ways that protect the vulnerable, deliver justice for victims, and prosecute perpetrators and offenders. The analysis of African case law and statutory provisions that underpinned sections of this thesis constitute original contribution to a field of research that rarely centers experiences from the Global South, especially those on the African continent.

Keywords: citizen media, citizen journalism, video evidence, law of evidence, social media, international criminal accountability, Africa.

LIST OF ABBREVIATION

AI	Artificial Intelligence
BIR	Batallion d’Intervention Rapide
CEA	The Civil Evidence Act
CPEA	Criminal Procedures and Evidence Act
DRC	Democratic Republic of Congo
ECTA	The Electronic Communications and Transactions Act
HRW	Human Rights Watch
ICC	International Criminal Court
ICT	Information and Communications Technology
ICCPR	Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ISPs	Internet Service Providers
NBC	Nigeria’s National Broadcasting Commission
NGO	Non-Governmental Organisation
OSINF	Open Source Information
OSINT	Open Source Intelligence Investigation
OTP	Office of the Prosecutor
SARS	Special Anti-Robbery Squad
UGC	User Generated Content
UN	United Nations
UNAMI	United Nations Assistance Mission for Iraq

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Chapter One: Introduction

1.1. Background to the study

So let's make sure the world sees this so they don't change the story and tell people that we killed ourselves... I didn't want us to die in vain.¹

Accountability for gross human rights violations remains central to the human rights agenda because without accountability for past and present atrocities, it becomes difficult to prevent future abuses.² Over time, systems and frameworks have been developed for the prevention of human rights abuses and for achieving accountability. Prosecutions, trials and truth commissions have been used to punish, discipline or address perpetrators of mass atrocities.³ But the conflicts and atrocities have not ceased; the Tigray crisis, Syrian war, Rohingya genocide and the conflict in South Sudan are painful reminders of this.⁴

With the need for greater accountability for human rights violations also comes the need for reliable and trustworthy evidence to hold perpetrators to account. Citizen media has emerged as a resource for realising this goal by leveraging mobile technology and social media to provide visual evidence of human rights abuses captured by citizen journalists even when trained human rights defenders and professional journalists are unavoidably absent.⁵ The expansion of mobile technology, coupled with the increase in internet access and social media

¹ CO Udeh (aka DJ Switch) sharing about why she started filming the shooting of peaceful protesters by the Nigerian military during an #EndSARS protest at Lekki Toll Gate, in Lagos State, Nigeria. Her video sent shockwaves across the country and has been at the center of different accountability mechanisms seeking to deliver justice to the victims. See L Ogunnaike 'It was a horror show: Inside the #EndSARS protests against police violence in Nigeria' 2020 <https://www.gq.com/story/endsars-protests-police-brutality-nigeria> (accessed 23 November 2020).

² See Global Centre for the Responsibility to Protect 'The responsibility to protect: Deepening our commitment to mass atrocity prevention' (2012) *Meeting Summary of the 5th Annual R2P Ministerial Meeting 2*.

³ B Hamber & S Kibble 'From truth to transformation: The Truth and Reconciliation Commission of South Africa' (1999) *Catholic Institute for International Relations Report*.

⁴ As a result of the civil war that began in Syria in 2011, more than 5.5million people have fled the country and sought refuge in other countries, according to November 2020 statistics from the UNHCR. See United Nations High Commission for Refugees 'Operational data portal: Refugee situation' (2020) <https://data2.unhcr.org/en/situations/syria> (accessed 23 November 2020). Also, due to the armed conflict that broke out in South Sudan in 2013, 7.5 million residents are in need of humanitarian assistance, while 2.2 million people have fled abroad as refugees and asylum seekers. See UN Human Rights Council 'There is nothing left for us: starvation as a method of warfare in South Sudan' A/HRC/45/CRP.3, 1.

⁵ A comparison between the Hama massacre of 1982 and the destruction of Homs in 2011 is that the former remained concealed from public knowledge for an extended period of time while the latter was being graphically publicized in real time. What made the difference is that the Homs destruction 'benefitted' from the on-site presence of digitally equipped civilian witnesses, while the Hama massacre was unknown to foreign journalists who were the major source of news back in 1982. See M Lynch, D Freelon & S Aday 'Syria's socially mediated Civil War' (2014) *United States Institute of Peace* 8.

networks, has resulted in more individuals and communities – especially marginalized ones – participating in documenting abuse in order to protect and defend their rights.⁶

For instance, when, on 20 October 2020, the Nigerian military launched a bloody assault on peaceful #EndSARS protesters in Lagos who were demanding an end to police brutality, the civilian witnesses at the scene were the ones who brought the attention of the world to the shocking horrors of that night through their video recordings⁷ and livestreams⁸ even as they simultaneously tried to resuscitate victims who had been shot by the Nigerian military. These citizen videos have served as the basis for compelling investigative reporting by many traditional media outlets who were absent on the night of the attack.⁹ Videos of that attack and others from the #EndSARS movement have also gone on to trigger numerous inquiries, including one by the International Criminal Court (ICC),¹⁰ as well as serve as evidence before judicial panels of inquiry in Nigeria.¹¹

Also, in 2010, ten years before the #EndSARS movement in Nigeria, Philip Alston – in his capacity as a UN Special Rapporteur,¹² relied on an anonymous cell phone video footage depicting Sri Lankan military officers engaged in extra-judicial killings, to call for ‘an independent inquiry to carry out an impartial investigation into war crimes and other grave violations of international humanitarian and human rights law allegedly committed in Sri Lanka.’¹³ Even though the author of the footage was unknown, the video was confirmed to be

⁶ S Gregory ‘Cameras everywhere revisited: How digital technologies and social media aid and inhibit human rights documentation and advocacy’ (2019) 11(2) *Journal of Human Rights Practice* 374.

⁷ See video posted by Milly @ideyo2k4eva on Twitter evidencing the Lekki killings (20 October 2020) <https://twitter.com/ideyo2k4eva/status/1318694671732805634?s=20> (accessed 30 November 2020).

⁸ See YouTube video showing the Lekki killings <https://youtu.be/U7bT8KdxsOE> (accessed 30 November 2020).

⁹ CNN relied on hours of citizen video evidence to piece together an investigative video report which refuted government’s denials about the events of October 20. See S Busari *et al* ‘They pointed their guns at us and started shooting – How a bloody night of bullets and brutality quashed a young protest movement’ *CNN* 2020 <https://edition.cnn.com/2020/11/18/africa/lagos-nigeria-lekki-toll-gate-feature-intl/index.html> (accessed 30 November 2020). Similarly, Aljazeera used series of citizen video footage gotten via social media to produce a video about the military assault. See Aljazeera ‘Nigeria: Protesters “shot dead” by security forces in Lagos’ 2020 <https://www.aljazeera.com/news/2020/10/20/nigerian-security-forces-use-live-fire-to-disperse-protesters> (accessed 30 November 2020).

¹⁰ C Izundu ‘ICC opens inquiry into Nigeria #EndSARS protests’ *BBC* 2020 <https://www.bbc.com/news/topics/cjnw18q4xdet/international-criminal-court> (accessed 30 November 2020).

¹¹ The Federal government of Nigeria instructed that judicial panels of inquiry be set up to investigate crimes committed by law enforcement agents related to the #EndSARS movement. One of such is the Lagos State Panel of Inquiry and Restitution which admitted citizen videos into evidence during its public hearings. See for example: video by Editi Effiong

@EditiEffiong posted on Twitter on 4 December 2020 <https://twitter.com/EditiEffiong/status/1334891033675632648?s=20> (accessed 4 December 2020).

¹² Philip Alston served as the UN Special Rapporteur on extrajudicial, summary or arbitrary executions (2004 - 2010).

¹³ United Nations 'Press Conference by United Nations Human Rights Expert Concerning Authenticity of Channel 4 Videotape Depicting Extrajudicial Executions in Sri Lanka' 2010 http://www.un.org/press/en/2010/100107_Alston.doc.htm (accessed 1 December 2020).

authentic¹⁴ and demonstrated the usefulness of citizen media in, at the minimum, triggering investigations into alleged cases of mass atrocities. Christof Heyns, who continued the Sri Lanka investigations after Alston and gained access to an extended version of the cellphone footage, said the following in a 2011 report to the Human Rights Council:

The picture that emerges is that the events that are reflected in the video in fact occurred as depicted. These videos – both the first and the extended version - show real people who are being summarily executed... The above serves as a coherent and credible foundation for the conclusion that the extended video is authentic, and thus warrants calling for the accountability of those responsible for these atrocities.¹⁵

Citizen media has therefore continued to grow in its relevance as a pertinent resource for exposing atrocities especially in contexts with limited presence of human rights investigators and journalists,¹⁶ or even completely strangulated access such as Darfur, where the Prosecutor of the ICC has acknowledged that ‘the collection of evidence continues to be significantly slowed down by lack of resources.’¹⁷ Therefore, whether it is in Syria or Nigeria, Myanmar or Sudan, accountability for mass atrocities is being advanced due to the increasing number of camera wielding civilians filming the violations.

It must be stated, however, that the use of videos and photographs as evidence in the advancement of justice and accountability is not new. The Nuremberg trials of 1945 benefitted hugely from photo and video evidence that spoke eloquently to the horrors of the Holocaust.¹⁸ So also did the trials at the International Criminal Tribunal for the former Yugoslavia (ICTY) which relied on eyewitness video, including those shot by civilians. According to Ristovska, ‘the ICTY’s Rules of Procedure and Evidence granted video its status, and the court’s architecture internalized its logic.’¹⁹ Videos that were cumulatively thousands of hours long,

¹⁴ The cell phone video evidence showing war crimes by the Sri Lankan military in 2009 was confirmed to be authentic by forensics experts but the government of Sri Lanka argued that the video was unreliable because it could have been shot anywhere other than Sri Lanka. As a result, Sri Lanka declined to undertake investigations into the alleged crimes despite the overwhelming video evidence. See: UN Office of the High Commissioner for Human Rights ‘UN expert concludes that Sri Lankan video is authentic, calls for an independent war crimes investigation’ 2010 <https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9706&LangID=E> (accessed 1 December 2020).

¹⁵ Report of the special rapporteur on extrajudicial, summary or arbitrary executions -Christof Heyns, A/HRC/17/28/Add.1 (2011) 426 & 427.

¹⁶ For instance, in 2018, videos collected from civilian witnesses and social media enabled the New York Times to create a compelling video analysis that showed the role of the Nigerian military in the killing of protest marchers in Abuja, Nigeria. See C Koettl and others ‘How an elite Nigerian unit killed dozens of protesters’ 2018 <https://www.nytimes.com/video/world/africa/100000006196505/nigeria-military-protest-massacre-video.html> (accessed 30 November 2020).

¹⁷ The Office of the Prosecutor ‘Twentieth report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593’ (2005) para 12.

¹⁸ Several videos and photos were introduced as evidence of German brutality during World War 2. See JJ Michalczyk ‘Film as visual documentation at the Nuremberg trials’ (2014) *Bloomsbury Academic*.

¹⁹ S Ristovska *Seeing Human Rights: Video activism as a proxy profession* (2021) 103.

were submitted before the ICTY, including eight hours of videotaped interviews of survivors of a village massacre which was captured by Kosovar Albanians with support from WITNESS.²⁰ Video evidence was also relied on in part by the ICC Prosecutor to show that Thomas Lubanga was guilty of war crimes by recruiting child soldiers in the Democratic Republic of Congo, making him the first person to ever be convicted by the Court.²¹ What is new is the fact that these pieces of visual evidence which used to be exclusively gathered by professionals are now being gathered by ordinary civilians. Affirming this point is Jay Rosen, a professor of journalism, who said:

It used to be that the tools of media production were in the hands of the media. And with the rise of the internet, that is no longer true... now the tools for media production have been given to the people formerly known as the audience.²²

Highlighting this shift in landscape is a comparison we can make between the documentation of the Holocaust in 1945 and the Lekki killings of 2020 that occurred in Lagos State, Nigeria. On 20 October 2020, Nigerian state security forces resorted to excessive force in a bid to disperse civilians who had gathered at the Lekki toll gate to demand for an end to police brutality as part of the #EndSARS movement. As a result of the lethal assault, no fewer than 12 people were reported to have been killed on that day and hundreds wounded.²³ On the scene was one of the protesters – Catherine Udeh (aka DJ Switch) who took out her phone and livestreamed aspects of the attack in such graphic detail that it triggered immediate national outrage and calls for justice and accountability on behalf of the victims. The power of that video evidence as recognized by DJ Switch is seen in the manner General Eisenhower, back in 1945, requested the presence of journalists at the concentration camps so that they could film the aftermath of German atrocities. Unlike DJ Switch who was able to document and broadcast the atrocity real time, this was not the case back in 1945 for the victims of the atrocity. Even when General Eisenhower later came in contact with the shocking violations at the concentration camps and realized the urgent need to visually document these atrocities, he had to first send a cable message to Washington before journalists and members of congress could come bear witness to the indescribable horrors of the camps.²⁴ The concern that some will continue to

²⁰ Ristovska (n 19 above) 96.

²¹ See *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06.

²² J Rosen ‘Bellingcat: Truth in a post-truth world’ (2018) at 06:54secs.

²³ Amnesty International ‘Nigeria: Killing of #EndSARS protesters by the military must be investigated’ 2020 <https://www.amnesty.org/en/latest/press-release/2020/10/killing-of-endsars-protesters-by-the-military-must-be-investigated/> (accessed 30 September 2022).

²⁴ BA Lindsey ‘Organized crime against civilization: the congressional investigation of liberated concentration camps in 1945’ Graduate College Dissertations and Theses, University of Vermont (2012) 4.

doubt the truth of what happened made it imperative for visual documentation that would convincingly show that Germany indeed carried out those atrocities. Lindsey puts it thus:

Photographs of the atrocities went a long way to convincing the skeptics, but for the public to believe the truth of the atrocity stories, the photos needed to be backed by the assurances of respected congressmen and editors and publishers.²⁵

In addition, Eisenhower needed the evidence to be captured ‘in order to be in a position to give first-hand evidence of these things, if ever, in the future, there develops a tendency to charge these allegations merely to “propaganda.”’²⁶ There was also an urgency to Eisenhower’s request because he wanted to prevent a situation where delay could give room for the evidence to be destroyed before it got captured.²⁷ It is in this context that another contrast can be made with the past and present approach to human rights documentation. With the present generation of citizen journalists, documentation does not have to depend on the presence of professional investigators or journalists who will usually only arrive after the violation has occurred. Rather, with the aid of mobile phone technology, documentation and dissemination can happen in real-time alongside the atrocity; thereby, making it harder to deny, conceal or refute, just as was noticeably demonstrated through the Instagram livestream of the Lekki shooting by DJ Switch. Moreover, we have also seen that the physical presence of mainstream media at the scene does not automatically translate to adequate exposure of the crimes because some governments wield their power of regulation in making sure there is underreporting by the media²⁸ and to ensure they insulate themselves from scrutiny, criticism and accountability.²⁹ Hence, there is an opportunity for citizen media to step in to fill the void created by the absence of independent media institutions or overregulated ones.

We have also seen the power of citizen media in exposing human rights violations in Uganda during the 2021 Presidential elections. Bobi Wine, an opposition leader, encouraged his supporters to use their phones to film police abuse, because according to him ‘the biggest enemy to the Museveni security apparatus now is a mobile phone with a camera.’ The determination of Ugandan citizens to expose all forms of state violence during the elections is

²⁵ Lindsey (n 24 above) 5.

²⁶ ‘Eisenhower asks congress and press to witness Nazi horrors’ *History Unfolded, US newspapers and the holocaust* <https://newspapers.ushmm.org/events/eisenhower-asks-congress-and-press-to-witness-nazi-horrors> (accessed 30 November 2020).

²⁷ Lindsey (n 24 above) 27.

²⁸ The media regulatory body in Nigeria issued a warning against media houses whose reporting of the #EndSARS protests could embarrass the government and it eventually imposed sanctions on three private TV stations that disregarded the warning. See E Akinkuotu ‘NBC fines Channels TV, Arise, AIT over #EndSARS coverage’ *Punch Newspaper* 2020 <https://punchng.com/breaking-nbc-fines-channels-tv-arise-ait-over-endsars-coverage/> (accessed 30 November 2020).

²⁹ T Besley, R Burgess & A Prat ‘Mass Media and Political Accountability’ in WBI Development Studies (ed) *The right to tell: The role of mass media in economic development* (2002) 47.

exemplified in the manner people donated airtime and mobile data so that citizen journalists like Ashraf Kasirye could livestream and document the use of water cannons, tear gas and other brutal measures to suppress civilians.³⁰

With the use of new technologies such as smart phones and cameras, the landscape of human rights documentation has dramatically changed and with it has come new sets of opportunities and challenges all of which must be tackled holistically if the human rights community must continue to hold to account the perpetrators of crimes against humanity.

1.2. Problem statement

In our viral age, where a video captured on a cell phone by an ordinary citizen has the potential to both bring war criminals behind bars or influence major policy debates such as going to war, too much is at stake to just improvise on the go.³¹

It is undeniable that the present and future landscape of human rights accountability will be greatly influenced by video evidence captured by citizen journalists. However, as viable as citizen media is to advancing accountability for human rights violations, one is confronted primarily with two dilemmas: the first is in connection with the process of evidence documentation which is done by inexperienced citizen journalists and digital witnesses which can potentially undermine the reliability of the evidence. While the second dilemma stems from the first: the limited international and domestic legal frameworks that allow for judicial and quasi-judicial bodies to robustly interrogate citizen-media-sourced digital evidence. This absence of a common set of legal standards that are consistent with the evolution we have seen in technology has made it more difficult for citizen media to be extensively utilised in the pursuit of accountability, particularly within the domestic jurisprudence of many African countries.

This research will, therefore, interrogate the limitations currently plaguing the admissibility of digital evidence in legal settings, beginning with the documentation in the field, right through to its presentation as evidence in courtrooms. The jurisprudence of international judicial bodies as well as domestic courts in Africa will be analysed with a view to arriving at

³⁰ S Hayden 'Uganda's revolution will be livestreamed' 2021 <https://www.vice.com/en/article/3an7z8/ugandas-revolution-will-be-livestreamed> (accessed 3 October 2022).

³¹ C Koettl 'The Youtube War: Citizen videos revolutionize human rights monitoring in Syria' 2014 <http://mediashift.org/2014/02/the-youtube-war-citizen-videos-revolutionize-human-rights-monitoring-in-syria/> (accessed 5 November 2020).

conclusions which can aid the realisation of greater accountability for human rights violations by leveraging citizen media.

1.3. Research questions

The primary question this research seeks to answer is:

How can citizen media be used as evidence to advance accountability for human rights violations?

In answering this main question, other questions that will be probed include:

- i. How is citizen media evidence being addressed by courts, particularly in Africa?
- ii. What gaps exist in the utility of citizen media evidence in the pursuit of justice and accountability?
- iii. What should be the guiding framework for the admissibility of citizen media evidence in courtrooms?
- iv. In what ways can citizen journalists be empowered to reliably contribute to human rights fact finding and advocacy?

1.4. Significance of the study

The study is contributing to a gradually growing scholarship around the relevance of citizen media in exposing injustice and fostering accountability. One of the unique contributions of this study is the analysis of existing statutory framework and case law around citizen media evidence on the African continent, thereby offering a perspective that is rarely seen in research papers on this subject matter.

This study also incorporates contemporary examples of citizen media evidence to highlight the enduring relevance of citizen media while juxtaposing it with older examples of digital documentation which were a precursor of what we now see today, thereby underscoring how slow the law has been in adjusting to a more rapidly evolving society. This study therefore also clearly establishes the critical need for a roadmap to be developed looking into the future of human rights investigations, fact finding and prosecutions.

The result of this study will support human rights groups seeking to leverage the power of citizen media evidence in the pursuit of accountability. It will additionally inform how legislatures in Africa approach new amendments to their laws of evidence so that they speak

more eloquently to citizen media evidence as a category of evidence encapsulated under digital evidence or computer-generated evidence as it is commonly referred to under most of the laws analysed from African courts. Pending when the laws change, this study will serve as a resource that makes the case for the ways citizen media evidence can lead to accountability in and out of courtrooms.

1.5. Clarification of terms

1.5.1. Accountability

The concept of accountability is seen across different spectrums of human endeavor – from civil law to criminal law, business management, corporate governance, politics, religion and so on. However, the form of accountability being discussed in this thesis will relate to individual criminal accountability, flowing from the preamble of the Rome Statute of the International Criminal Court (Rome Statute of the ICC) which speaks to ending impunity for perpetrators of grave crimes.³²

1.5.2. Mass atrocities

Atrocity crimes are considered to be the most serious crimes against humankind and they include three legally defined international crimes, namely: genocide, crimes against humanity and war crimes.³³ Evans is among scholars who have classified crimes against humanity and war crimes as falling within the ambit of mass atrocities,³⁴ and these crimes will be among those focused on within the context of this research, particularly in relation to the ICC and how citizen media evidence is being used in the investigation and prosecution of these crimes.

1.5.3. Citizen media

The original concept of *media* involved the dissemination of information from one source which goes on to be received in many locations. However, today, *citizen media* depicts a situation whereby the consumers of media information have turned around to be producers of information as well. The term ‘citizen media’ is now interchanged in some circles with ‘citizen journalism’, underscoring the participatory role citizens have assumed in broadcasting self-produced content to the world, also known as User Generated Content (UGC). The forms of citizen media that exist include blogs, pictures, videos, vlogs, podcasts, among others. Citizen

³² Rome Statute of the International Criminal Court, adopted on 17 July 1998 (last amended 2010), 17 July 1998, A/CONF.183/9.

³³ See arts 6, 7 and 8 respectively of the Rome Statute of the ICC (n 32 above).

³⁴ G Evans *The responsibility to protect: Ending mass atrocity crimes once and for all* (2009) 1.

media in the context of this research will, therefore, refer to digital materials evidencing perpetration of human rights abuses, documented by witnesses using tools as simple as their mobile phone. Some citizen media get shared on social media and some do not make it to social media but straight into the hands of mainstream media or human rights organisations. All these categories are what will be covered when referring to citizen media.

1.5.4. Citizen journalists

Citizen journalists are individuals not trained in the art of journalism but who generally step in when professional journalists are not meeting the informational needs of specific communities.³⁵ Citizen journalists practice citizen journalism, which has been described as a ‘phenomenon whereby people express their individual concerns about matters of direct concern to them on and across online communication platforms.’³⁶ They are individuals who purposefully or spontaneously document and disseminate footage of occurrences that they are witness to, usually leveraging basic tools such as their cellphones. Even though citizen journalists document for varying reasons, this study will selectively focus on those citizen journalists who document violations of human rights for the purpose of exposing abuse and pursuing justice for victims.

1.5.5. Digital evidence

This is an electronic form of evidence that is relied upon in a legal setting. It encapsulates the information extractable from devices such as mobile phones, cameras, computers and other electronic gadgets with documentation capabilities. For the purposes of this thesis, digital evidence shall refer to multimedia materials such as videos, images or pictures, and audio recordings derived from documentation efforts by citizen journalists.

1.6. Literature review

In his work on human rights fact finding, Alston classified citizen journalists as the third generation of human rights fact finders, after intergovernmental organisations and non-governmental organisations, which he classified as first and second generations, respectively.³⁷ He found it significant that citizen journalists were optimizing the effectiveness of organisations working in conflict and post-conflict situations. In addition to this, the fact that new technologies have made it possible for ordinary civilians to participate in human rights

³⁵ S Miller-Carpenter ‘Citizen journalism’ (2019) *Oxford Research Encyclopedia of Journalism* 1.

³⁶ Miller-Carpenter (n 35 above) 3.

³⁷ P Alston ‘Introduction: Third generation human rights fact finding’ (2013) *The American Society of International Law Proceedings*.

investigations through the documentation of atrocities is what Land termed as democratising human rights fact finding.³⁸

Democratising human rights fact finding is undoubtedly a positive development and for Clem, being able to have ordinary citizens collect and disseminate crucial information is a welcome breakthrough because it has made it increasingly difficult to hide misdeeds while secrecy and denials of atrocities can be countered by evidence presented by citizen journalists.³⁹

Alluding to the massive documentation being carried out by citizen journalists in the modern era, Edwards acknowledged this by stating that ‘never before has history been so granularly documented.’⁴⁰ He further stressed the contributory impact the documentation done by citizen journalists has on the work of international criminal accountability systems, thus:

[N]ever before has evidence of criminal acts seized upon by the international community through tribunals, including, the International Criminal Court (ICC), and the Commissions of Inquiry been so plentiful for use in securing justice for the most heinous crimes.⁴¹

The democratized access to documentation is one of the central reasons we became aware of the democracy protests in Senegal, the #EndSARS movement in Nigeria, the government’s suppression of citizens in Eswatini and the Tigray crisis in Ethiopia. It is noteworthy that the governments in these countries resorted to tactics such as internet shutdowns, to curb the volume of video evidence that gets seen by the world.

While technology has lowered the barriers to who can participate in human rights fact finding, it has at the same time opened up the space to greater critique and this has especially been one of the friction points between professional journalists and inexperienced citizen journalists. In identifying this problem, Land stated that:

This new kind of fact-finding, which I call “participatory fact-finding,” may not be as effective in “naming and shaming” states and companies that violate human rights, because the absence of the imprimatur of an established organization may render the information collected vulnerable to critique’.⁴²

³⁸ M Land 'Democratizing human rights fact finding' in P Alston & S Knuckey (eds) *The transformation of human rights fact finding* (2016).

³⁹ R Clem 'Here's how to catch atrocities and human rights violations. (We're looking at you Burundi.)' 2016 *Washington Post* <https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/23/heres-how-you-catch-atrocities-and-rights-violations-were-looking-at-you-burundi/> (accessed 5 November 2020).

⁴⁰ S Edwards 'Three impediments to technology for truth' 2015 *International Justice Monitor* <http://www.ijmonitor.org/2015/06/three-impediments-to-technology-for-truth/> (accessed 12 March 2020).

⁴¹ Edwards (n 40 above).

⁴² MK Land 'Democratising human rights fact-finding' (2015) 399 - 400.

Land in her foregoing analysis greatly underestimates the power of citizen media to name and shame states and companies. On the contrary, citizen media has been extremely effective in exposing injustice and forcing governments to admit shame and guilt. Governments have come to realize that when videos of injustice surface online, they can quickly go viral and galvanize a citizen movement which can in turn threaten the power of the political elite and stall economic activities. Hence, they would rather confront the video and seek to offer assurances that the government is taking action. An example is the racially motivated police brutality case in France to which President Macron responded saying that the images ‘shame us. France must never resign itself to violence or brutality, no matter where it comes from. France must never allow hatred or racism to flourish.’⁴³ Similarly in Nigeria, the Vice President – Prof Yemi Osinbajo – apologized to #EndSARS protesters following the eruption of demonstrations that were triggered by a video of police brutality. He acknowledged in his apology that it was unacceptable that too many people had been brutalized at the hands of the police.⁴⁴ This buttresses a few of numerous ways video evidence is bringing critical issues to the limelight in ways that cannot be ignored.

We have also seen that due to the power of citizen media to expose atrocities, governments tend to impose regulations that make it unlawful for civilians to record the police.⁴⁵ Some countries that have not imposed legal restrictions to filming the police have attempted to stifle online dissemination of video evidence by imposing arbitrary social media regulations,⁴⁶ while others have allowed their law enforcement officers to act with impunity by intimidating, arresting and confiscating the equipment of citizen journalists. This is not surprising because a government that rules with impunity does not tend to act in a manner that would allow itself to be subjected to scrutiny. Nevertheless, it becomes imperative that the

⁴³ France 24 ‘Macron says police brutality video “shames us” as pressure on govt mounts’ 2020 <https://www.france24.com/en/france/20201127-macron-very-shocked-by-police-brutality-images-as-pressure-on-govt-mounts> (accessed 28 November, 2020).

⁴⁴ Tweet by @ProfOsinbajo on Twitter (16 October 2020) <https://twitter.com/ProfOsinbajo/status/1317225279899783171?s=20&t=xwdyuxbejKCOOrwCzUuzoqA> (accessed 1 October 2022).

⁴⁵ The French government is vigorously pushing a security bill that will make it illegal to post images of police officers with the intent to cause harm. However, the risk this poses is that it will become an offense for citizens to also post video evidence of police brutality. See S Corbet ‘Uproar in France over proposed limits on filming police’ 2020 <https://apnews.com/article/race-and-ethnicity-police-paris-france-police-brutality-5bd3fbcaa92dcd7658f5047d03d89f56> (accessed 30 November 2020).

⁴⁶ In 2021, the State of Oklahoma in the USA passed a Bill that prohibits online sharing of personally identifiable information of police officers, including their photographs. See Section 1A, House Bill 2273, State of Oklahoma.

suppression of the right to record and disseminate is subjected to judicial intervention as we have seen being done in countries like the United States.⁴⁷

While the absence of organisational legitimacy can be seen as a vulnerability for citizen journalists, the many cases of citizen journalism helping to advance accountability for human rights violations is proof that not having the imprimatur of an established organisation does not reduce the power of citizen journalists to create change. Rather, this plays to citizen journalists' advantage as they are more easily able to evade censorship, especially by oppressive governments seeking to control the world's perception of them.⁴⁸ Furthermore, not being officially attached to an established organisation means they can also bypass the bureaucracy that is often associated with professionals who will usually need organisational clearance and approval before engaging with a subject matter. Additionally, most professional organisations – be it human rights or media – will usually weigh political, financial and ideological factors before getting involved in an issue and this form of self-censorship is something citizen journalists will grapple less with. Rosen also holds the view that even though citizen journalists may lack institutional backing, their impact remains significant:

The way citizen journalism investigations are trusted is different than professional journalism. In professional journalism you have the reputation of the BBC behind you... and the standards of the institution are the basis for trust. In citizen journalism, it works differently. Trust is generated not by the brand name or the glory of the institution. It's guaranteed through transparency. And so in citizen journalism investigation, what the journalist says is not, "Trust me, I'm with the BBC." It's "Don't believe me? Here's the evidence."⁴⁹

In addition to showing the evidence to build trust, citizen media has grown in its relevance and impact because a significant number of the citizens who are documenting and sharing their videos are usually doing so as a means of challenging oppressive systems, which is a feeling several others can identify with. When these citizens decide to adopt citizen media as a tool for holding their oppressors to account, they discover that they do not need anyone's permission to do so and they too can tell their truth and watch it make an impact, thereby reinforcing their sense of self identity and self-worth. This was actively at the center of the Sudan uprising which began in late 2018 and gripped the attention of the world, culminating in the ouster of Omar Al-Bashir who had ruled Sudan for close to 30 years; forcing the military

⁴⁷ *Glik v Cunniffe* (2011) 655 F 3d 78.

⁴⁸ Many governments use regulation to stifle press freedom. According to a 2019 report from the Committee to Protect Journalists, a country like Eritrea holds legal monopoly of its broadcast media, and journalists for the state media have to adhere to the government's editorial line otherwise they risk facing retaliation. See '10 most censored countries' 2019 <https://cpj.org/reports/2019/09/10-most-censored-eritrea-north-korea-turkmenistan-journalist/> (accessed 30 November 2020).

⁴⁹ Rosen (n 22 above) at 17:24secs.

to sign a power sharing agreement with the protest leaders; and inspiring other movements through the iconic photo of Alaa Salah being filmed with mobile phones as she galvanized others to act.⁵⁰

Nevertheless, Joyce in his own assessment of the contribution of citizen media to the human rights movement, also highlighted a challenge which he described as the ‘de-professionalization in moves towards citizen-generated ... media.’⁵¹ The clash between professionalism, represented by traditional media, and amateurism, represented by citizen journalists, not only poses an economic decline for the former but also results in the dissipation of ‘traditionally familiar and trusted sources of information.’⁵² The disruption has continued to reverberate across the traditional media space in an unprecedented way and Nikkanen captures it by saying ‘Journalists used to be called the gatekeepers of the public sphere, but the public sphere no longer has walls or gates.’⁵³ Land does agree that the new technologies carry the potential of destabilising traditional models of human rights fact finding including those carried out by established non-governmental organisations (NGOs) because everyone can now participate.⁵⁴ But she also acknowledges that this has made more information available for use to human rights bodies.⁵⁵

A conflict is thus presented between sacrificing standard for volume and vice versa. Alston and Gillespie concur that information dispersal is problematic and, therefore, argue that collaboration will ensure that fragmented and partial information on atrocities is collected to offer a complete and balanced picture.⁵⁶ A collaborative approach between the professionals and the amateurs appears to be most appealing if we are to capitalise on the benefits of citizen media and overcome the challenges posed by decentralisation. This is exactly what we are beginning to see in this vast ecosystem made up of legacy media, citizen journalists, human rights professionals, scientists, technologists and others. For instance, Human Rights Watch collected and analysed over 150 eyewitness videos showing police crackdown on a group of peaceful protesters at the Moth Haven neighbourhood of South Bronx, New York on 4 June

⁵⁰ A Elmileik & S Khalil ‘Tasgut bas to #SudanUprising: How social media told the story’ 2019 <https://www.aljazeera.com/features/2019/8/12/tasgut-bas-to-sudanuprising-how-social-media-told-the-story> (accessed 1 October, 2022).

⁵¹ D Joyce ‘Media witnesses: Human rights in an age of digital media’ (2013) 8 *Intercultural Human Rights Law Review* 236.

⁵² Joyce (n 51 above).

⁵³ H Nikkanen ‘They shoot citizen journalists, don’t they? Journalism in the era of citizens: curating versus outsourcing’ (2012) *FAIFE* 1.

⁵⁴ M Land ‘Peer-producing human rights’ (2009) 46 *Alberta Law Review* 1115.

⁵⁵ Land (n 54 above) 1120.

⁵⁶ P Alston & C Gillespie ‘Global human rights monitoring, new technologies and the politics of information’ (2012) 23 *The European Journal on International Law* 1093.

2020. These citizen videos were integral to proving pre-meditated assault by the police on the protesters. To present a compelling case, SITU Research (a visual investigation firm) worked with Human Rights Watch to recreate the scenes from that day, using the citizen videos, and developed a 3D model that provided an immersive geospatial experience. The result was an advocacy video and a report that exposed systemic police brutality in the US and used to demand justice for the victims of the mass arrests and brutality meted out by officers of the New York police department.⁵⁷ Similarly, the investigative report of the Lekki toll gate shooting that was produced by CNN, analysed many pieces of citizen video evidence to arrive at the conclusion that the Nigerian military opened fire on unarmed #EndSARS protesters on the night of 20 October 2020, thereby giving credence to the citizen videos and effectively countering government's disinformation tactic launched to specifically deny wrongdoing and discredit those same citizen videos as being fake.⁵⁸

From a statutory point of view, we equally have examples that acknowledge the mutually beneficial relationship between professional journalists and citizen journalists. In Nigeria, there is a formal recognition of the value of citizen journalism to professional journalism reflected in the provisions of the Nigeria Broadcasting Code, which states the following under Section 5.6.1:

In contemporary times, the impact of modern technology has significantly enabled citizen's contributions to journalism, beneficial to broadcasting. In this genre of citizens' reportage such as "User Generated Content", UGC, provides instantaneous Eye-Witness Accounts of events.⁵⁹

Heyns also, in his report at the twenty-ninth session of the Human Rights Council, recognised the 'potentially transformative role of civilian witnesses in documenting human rights violations.'⁶⁰ He, however, separately stated alongside Probert that information communication technologies 'cannot foster accountability on their own: they must be integrated into traditional forums for human rights'.⁶¹ We must realise that advocating for a collaborative, integrated approach between the old and the new will be mutually beneficial because while citizen journalists require training and guidance on documentation techniques, traditional journalists will require digital literacy in order to adjust to the new technologies that are now

⁵⁷ Human Rights Watch Report "Kettling" protesters in the Bronx – Systemic police brutality and its cost in the United States' (2020).

⁵⁸ See CNN investigative report, Busari (n 9 above).

⁵⁹ Nigeria Broadcasting Code, 6th Edition, 2016.

⁶⁰ Report of the Special Rapporteur on extra-judicial killings, summary or arbitrary executions- Christof Heyns A/HRC/29/37 1 (April 2015).

⁶¹ C Heyns & T Probert 'The power of information communication technologies for human rights' 2015 <http://www.ishr.ch/news/power-information-communication-technologies-human-rights> (accessed 25 February 2020).

reshaping their profession. The level of collaboration that is already taking place and its resultant effect will be analysed in the course of this study with specific attention given to exploring the challenges articulated above.

As citizen journalists, through their pictures, audio and video recordings, continue to ensure that human rights monitors have the needed evidence to hold accountable the perpetrators of human rights violations, judicial institutions are being confronted with the need to adjust their methods to accommodate digital evidence. A workshop report released in 2012 by the Human Rights Center, University of California explains that the increase in information on atrocities generated through citizen media signals a coming storm for which the ICC must quickly consider working with outside experts ‘to develop guidelines on the reliability and admissibility of social media and video evidence.’⁶² Koettl has noted that this must not become a mere academic exercise as he strongly believes that ‘citizen-generated documentation ultimately might have significant impact on major policy decisions’.⁶³ Eight years after the workshop report, the Berkeley Protocol on Digital Open Source Investigations was launched on 1 December 2020 and makes provision for “the professional standards that should be applied in the identification, collection, preservation, analysis and presentation of digital open source information and its use in international and human rights investigations.”⁶⁴

The ICC has already recognised the advantages that digital evidence introduces to the work of accountability and acknowledges the shortcomings within its own structure, some of which even lag behind the standards that exist in many national jurisdictions.⁶⁵ In addressing some of these drawbacks, the ICC adopted an ‘e-Court’ Protocol which tasks the Court’s Registry with providing ‘an in-court presentation solution for viewing evidence and material.’⁶⁶ As progressive as this effort is, it has major deficiencies with the most critical being that it failed to tackle the issue of the probative value of digital evidence. In *The Prosecutor v Callixte Mbarushimana* (*Callixte Mbarushimana* case), the Office of the Prosecutor (OTP) recognised

⁶² Human Rights Center ‘Beyond reasonable doubt: Using scientific evidence to advance prosecutions at the International Criminal Court’ (2012) *Workshop Report* 13.

⁶³ Koettl (n 31 above).

⁶⁴ United Nations ‘Berkeley Protocol^[1] on Digital Open Source Investigations: A Practical Guide on the Effective Use of Digital Open Source Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law’ (2022) *Resource Guide* 3. The Berkeley Protocol was drafted by a team of multi-disciplinary experts through an effort spearheaded by the Human Rights Center, University of California, Berkeley, in conjunction with the UN Office of the High Commissioner for Human Rights.

⁶⁵ Human Rights Center UC Berkeley School of Law *Digital fingerprints: Using electronic evidence to advance prosecutions at the International Criminal Court* (2014) 7.

⁶⁶ Unified Technical protocol (“e-Court” Protocol) for the provision of evidence, witness and victims information in electronic form ICC-01/04-01/10-87-Anx (2011).

gaps in the Protocol and requested that Pre-Trial Chamber I amend the Protocol.⁶⁷ The OTP argued that the significantly different set of circumstances in the *Callixte Mbarushimana* case, particularly in relation to the large volume of electronic evidence to be relied upon, was not envisaged under the e-Court Protocol, hence the need to amend it.⁶⁸ However, it is not just the ICC that needs to amend its rules of procedure to reflect current realities regarding the volume of citizen media evidence in the courtroom. Domestic courts, tribunals and truth commissions will need to review their rules to competently engage with citizen media evidence. The expectation is that as more forms of digital evidence flood judicial institutions, the rules of procedure as well as judicial practice will gradually evolve to enable for easier interaction with citizen media-sourced digital evidence. This would inevitably occur not because the institutions want to change but because they have to change, otherwise it would be virtually impossible to deliver justice in a dramatically evolved ecosystem filled with unprecedented new forms of visual evidence. The analysis of this need and proposed solutions is the focus of Chapters 4 and 6 of this thesis.

However, just as we are witnessing a surge in the trail of video evidence being created by citizen journalists, we are also confronted with a looming legal challenge whereby doubt can be easily cast on video evidence. This has become especially relevant in light of the increasing prevalence of AI-enabled media manipulation that we are witnessing in the form of deepfakes and shallowfakes, a technology which Maras and Alexandrou have warned will erode trust in video evidence and adversely affect its probative value in court.⁶⁹ They expressed the implication this will have on digital evidence in courts by stating further:

Deepfake videos are relative newcomers to digital media forensics. Videos must be authenticated before they are introduced as evidence in a court of law; however, this process is complicated by the existence of machine-learning algorithms and AI. While not yet operating at their full potential, machine-learning algorithms and AI are designed to constantly improve their performance. As such, it is only a matter of time before fake videos are so convincing that they are difficult to identify as fakes.⁷⁰

Even though establishing the veracity and authenticity of video was required during earlier uses of video as evidence in courtrooms, such as the Nuremberg trials, courts today are confronted with an entirely different set of challenges in determining the trustworthiness of video evidence. With the quantum leaps being made with technology, AI-enabled media

⁶⁷ *The Prosecutor v Callixte Mbarushimana* Prosecution request to amend the e-Court Protocol ICC-01/04-01/10 para 3.

⁶⁸ *The Prosecutor v Callixte Mbarushimana* (n 67 above) para 10.

⁶⁹ M Maras & A Alexandrou 'Determining authenticity of video evidence in the age of artificial intelligence and in the wake of deepfake videos' (2018) *The International Journal of Evidence and Proof* 1.

⁷⁰ Maras & Alexandrou (n 69 above) 6.

manipulation is now a real issue to be grappled with alongside empowering citizen journalists to capture more trustworthy visual evidence for use in the courts. Hence, in the course of this study, analysis will be made of how the increasing popularity of deepfakes in Africa pose a threat to the use of citizen media for advancing justice and accountability.

When considering the admissibility of a piece of evidence, courts are guided by either common law or civil law rules. Both systems however approach with caution any piece of evidence that appears unreliable. In the case of *Lorraine v Markel*,⁷¹ authenticity and hearsay were listed among five issues to be considered when assessing the admissibility of digital evidence.⁷² According to Pejovic, under the common-law system, the requirement of authenticity must be satisfied prior to admissibility.⁷³ In contrast, under civil law, any evidence is admissible - including hearsay evidence which requires corroboration under common law. The court however decides how much weight is to be attached to the evidence admitted.⁷⁴ Bearing in mind the opinion of Ashouri and others that 'digital evidence may raise hearsay concerns because it is not live testimony, and is removed from the originating source,'⁷⁵ it is obvious that digital evidence will 'flourish' better under a civil law system as against the inflexible common law system.

Referring to article 64(9) of the Rome Statute, Piragoff believes the ICC framework is a compromise between the common law and civil law systems:

[T]he Rome Statute... eschew[s] generally the technical formalities of the common-law system of admissibility of evidence in favour of the flexibility of the civil law system, provided that the court had discretion to 'rule on the relevance or admissibility of any evidence.'⁷⁶

Similarly, it is the observation of Ashouri and others that the ICTY and the ICTR 'have largely avoided common law rules of evidence.'⁷⁷ Therefore to holistically interrogate how citizen media evidence will be relied upon outside of international courts and tribunals, this study will cite case law examples to demonstrate how judicial bodies in Africa are already

⁷¹ *Jack R Lorraine and Beverly Mack v Markel American Insurance Company* PWG-06-1893 8.

⁷² Other considerations include: relevance, best evidence and the fact that evidence is not unduly prejudicial.

⁷³ C Pejovic 'Civil Law and Common Law: Two different paths leading to the same goal' (2001) 3 *Victoria University of Wellington Law Review* 833.

⁷⁴ Pejovic (n 73 above) 833.

⁷⁵ A Ashouri, C Bowers & C Warden 'An overview of the use of digital evidence in international criminal courts' (2013) *Salzburg Workshop on Cyber-investigations* 7.

⁷⁶ D Piragoff 'Elements of crime and rules of procedure and evidence' in RS Lee et al (eds) *The International Criminal Court* (2001) 356.

⁷⁷ Ashouri, Bowers & Warden (n 75 above) 3.

handling citizen media evidence under both the civil law system (for example the Democratic Republic of Congo) and the common law system (for example Nigeria).

The limitation to the admissibility of digital evidence is not only due to the trustworthiness or otherwise of the particular citizen media evidence. Edwards, in his explanation around the *Three Impediments to Technology for Truth*,⁷⁸ highlighted ‘Analysis’ as one of the three challenges hampering the ability of both the prosecution and the courts to work around digital evidence.⁷⁹ According to him, this handicap is suffered because there is an absence of specialization required for analysing meta-data and other ‘digital containers in which we increasingly find our evidence.’⁸⁰ The lack of expertise is very glaring within domestic courts in Africa and this has led to a weakness in the method of establishing the authenticity of citizen media evidence, which according to the laws in Nigeria and Kenya, have to be carried out through sworn affidavits of the author of the evidence in question.⁸¹ The limited expertise can be seen within other professions that will usually analyse citizen media evidence and this concern is what Wardle also raised in relation to limited journalistic capabilities for analysis and verification:

There’s a very small number of journalists globally that can do the kind of forensic verification work on videos and images which is why it is very effective to put out something that’s false and it often gets used by mainstream newsrooms that don’t know how to do these checks themselves.⁸²

The UC Berkeley School of Law has, in its Working Paper,⁸³ highlighted the challenges to the admissibility of digital evidence before international courts.⁸⁴ The Working Paper however approached this primarily from the court's perspective. As the foregoing literature analysis has revealed, the digital struggles are equally encountered by institutions, human rights defenders, professional and citizen journalists alike in their efforts to hold the perpetrators of mass atrocities accountable. While the Berkeley Protocol was launched in 2020 to address these challenges, some gaps still remain at the domestic level.

⁷⁸ Edwards (n 40 above).

⁷⁹ The other two impediments include Awareness, and Chain of Custody and Accessibility.

⁸⁰ Edwards (n 40 above).

⁸¹ Nigeria Evidence Act (2011) sec 84(2) and the Evidence Act of Kenya (Revised Edition 2014) sec 106(B).

⁸² C Wardle ‘Bellingcat: Truth in a post-truth world’ (2018) at 45:19secs.

⁸³ The Working Paper titled 'An overview of the use of digital evidence in International Criminal Courts' (2013) was the outcome of the Salzburg Workshop on Cyber-investigations held October 2013.

⁸⁴ Focus was placed on the ICC, and analysis of cases before the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Court for Sierra Leone (SCSL) and the Special Tribunal for Lebanon (STL) were carried out.

This study will therefore, in addition to its inquiry into the evidentiary impediments at international courts and domestic courts within Africa, examine the verification and authentication difficulties encountered by fact-finding organisations as well as explore ways of enhancing the probative value of digital materials produced by citizen journalists. The existing literature around the utility of citizen media evidence for justice and accountability focuses predominantly on case studies, challenges and solutions from Europe and countries in the global North. This study will therefore be filling a gap that currently exists when it comes to fully understanding the challenges and opportunities of citizen media evidence within the African context.

1.7. Methodology

What is playing itself out in the field of citizen media has become increasingly influential in the manner we approach justice and accountability. This study will therefore lend itself to the interdisciplinary socio-legal approach by navigating between the fields of law, media and technology.

Law is meant to serve a social purpose and that is why David Schiff's statement adequately captures the choice of this approach for this research:

[A]nalysis of law is directly linked to the analysis of the social situation to which the law applies, and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance, and/or change of the situation.⁸⁵

It is recognised that law will play a pivotal role in better crystalizing the role of citizen journalists and citizen media in the pursuit of accountability. Without significant changes in laws and policy, it may be difficult for the human rights community to realise the full advantages of citizen media evidence. This study therefore combines the analysis of existing legal norms with the practical everyday experiences of citizen journalists to measure how the laws and legal systems impact on the utility of citizen media.

The primary sources for this research will include treaty law, case law, journal articles, as well as Acts of Parliament from South Africa, Nigeria, Kenya, Zimbabwe and the Democratic Republic of Congo. This will specifically be used for the analysis in Chapter Four which is focused on citizen media evidence before international and domestic courts. Due to the emerging nature of the subject matter of citizen media and the technology that aids it, other

⁸⁵ DN Schiff 'Socio-legal theory: Social structure and law' (1976) 39 *The Modern Law Review* 287.

sources for this research will also include online news publications, video documentaries as well as findings from workshop convenings.

1.8. Outline of chapters

Chapter One gives the introduction to this body of research and comprises the problem statement, research questions, definition of terms, literature review, and the research methodology.

Chapter Two examines the historical factors that led to the emergence of citizen journalists and how they have been contributing towards human rights fact finding. The relevance of citizen media in triggering investigations, fostering civic participation and providing evidence of atrocities is equally explored. While the disruption to the practice of news gathering and production is also a focus under this chapter.

Chapter Three examines the several challenges plaguing citizen media from the documentation stage, through to the dissemination stage and then the evidentiary stage. Some of these challenges are cross cutting and they range from challenges such as lack of professionalism to those challenges posed as a result of new technologies like artificial intelligence.

Considering that we are at a moment in time when citizen videos are creating information for legal cases in a manner that is unprecedented, Chapter Four examines the current limitations impacting the admissibility of citizen media before judicial and quasi-judicial bodies. A key aspect of this chapter includes examining the jurisprudence of the ICC as it concerns digital evidence such as citizen media. A deep dive is also made into the rules of evidence governing the admissibility of citizen media in five African countries, namely: Democratic Republic of Congo, Kenya, Nigeria, South Africa, and Zimbabwe.

Chapter Five makes an analysis of ongoing and emerging mechanisms being engineered to ensure that citizen media and citizen journalists are able to better support the accountability agenda. Considering that some of these mechanisms are imperfect and especially skewed in favour of the Global North, a critique is made with a view to strengthening what works and changing what does not.

Chapter Six summarizes the key findings of the research, draws conclusions and also make recommendations for how the international community and other stakeholders can take

advantage of citizen media to end impunity and foster accountability for human rights violations.

1.9. Limitations to this research

This research acknowledges the differing political and legal landscapes across the world and will, therefore, not aim to establish a one-size-fits-all mechanism for the admittance of digital evidence sourced through citizen media. Moreover, the jurisprudential analysis will focus on just a few examples from international judicial bodies and five African countries. It is hoped that the conclusions of this research will serve as a guide in considering how citizen media evidence can be utilized by human rights organisations and admitted into evidence by judicial bodies for the greater purpose of achieving accountability.

It is acknowledged that there are other advanced forms of digital evidence which organisations and judicial bodies must begin to take critical note of when delivering on their mandate. For instance, geospatial technologies which employ the use of satellite imageries to prove the occurrence of an atrocity are being relied upon by organisations like Amnesty International.⁸⁶ The scope of this research will however be limited to less sophisticated, user-generated content – that is, citizen media.

It is also recognised that there is a proliferation of eyewitness videos which are filmed by the perpetrators themselves and these are already transforming how we pursue justice in courtrooms. These perpetrator videos present key evidence of human rights abuse that may have never become known through any other means. But at the same time, they generate ethical issues and questions such as: do perpetrator videos count as citizen media? Also, how can we leverage perpetrator videos to expose abuse without causing more harm? These issues however, were not extensively dissected within this thesis.

Furthermore, due to the nature and focus of this research, a lot of reliance will be placed on open-source information obtained online via platforms such as YouTube, Twitter, Facebook and other new media sources. This will include statements, citizen videos, investigations and guidelines, amongst others.

⁸⁶ The Science for Human Rights programme has been used to gain access to previously inaccessible conflict zones in order to gather compelling evidence of violations. See Amnesty International ‘Darfur: New evidence of attacks on villages’ 2009 <https://www.amnestyusa.org/darfur-new-evidence-of-attacks-on-villages/> (accessed 20 February 2020).

Chapter Two: Citizen media, citizen journalists and human rights fact finding

2.1. Introduction

As has been previously stated in chapter one, citizen media encapsulates videos, pictures or audio produced by non-professional journalists, otherwise known as citizen journalists, especially using their mobile phone as a tool.¹ While the majority of citizen media are deemed to be of lesser visual quality when compared to those produced by seasoned media houses,² it will be incorrect to conclude that all citizen media are of substandard quality. Indeed, the tools now available to citizen journalists vary from professional cameras to sophisticated smartphones capable of filming in high resolution. The more prevalent challenge comes in the area of technical know-how, and this underpins one of the main criticisms against citizen journalism – unprofessionalism. Professional journalists have been critical of citizen journalists on a number of issues including, lack of credibility, breach of ethical standards, slanted reporting, poor judgment on newsworthiness, among others.³ These will be discussed in greater detail in the course of this chapter.

The term ‘citizen media’ emerged towards the end of the 1990s and early 2000s as a form of news production outside of traditional journalism.⁴ Prior to the evolution of the cellphone camera,⁵ the practice of journalism was the exclusive preserve of professionals who had been duly educated and certified. However, as cellphone cameras became more ubiquitous, the landscape started to change and more citizens began performing the role of journalists, albeit in an amateur way, resulting in a category of people called citizen journalists. The digital revolution, and the spread of internet access in particular, has given rise to citizen journalism. Digital tools and platforms have made it easier for people to report on their own communities and their own stories. Today, the predominant consumers of information have also become producers of such information or content,⁶ and their appearance on the scene has disrupted the

¹ See Chapter 1.5.3 above.

² R Niekamp ‘Sharing Ike: Citizen media cover a breaking story’ (2010) 4 *Electronic News* 83.

³ R Noor ‘Citizen Journalism vs Mainstream Journalism: A study on challenges posed by amateurs’ (2017) 3 *Athens Journal of Mass Media and Communications* 74.

⁴ V Belair-Gagnon & CW Anderson ‘Citizen media and journalism’ (2015) *The International Encyclopedia of Digital Communication and Society* 2.

⁵ The first cellphone picture was taken by Phillippe Kahn in 1997 using a crude setup that connected a digital camera to his cellphone. The company Sharp went ahead to refine his technology and released the first commercially available cellphone in 2000. See Times Magazine ‘First cellphone picture’ <http://100photos.time.com/photos/philippe-kahn-first-cell-phone-picture> (accessed 21 May 2020).

⁶ Bruns opined saying: ‘...consumers are now far less reliant on what passes through the gates of the mainstream news organisations, but can bypass these altogether and turn directly to first-hand information providers: further,

journalism profession, turning the information dissemination spectrum from vertical to horizontal. They have used their cellphones to film everything from the use of excessive force by police⁷ to documenting war crimes,⁸ terrorist attacks,⁹ and more. Noor describes it as follows:

Citizen journalism is a concept in media that refers to journalistic activities of ordinary people. It means citizens themselves report the issues confronting them. Citizen journalism has enabled people to raise their voice on what they feel need attention. These people are, thus, termed as citizen journalists.¹⁰

It must be stated that not everyone has welcomed the label ‘citizen journalist’. As Jurrat noted, some citizen journalists actually do not want to be called ‘citizen journalists’ as many rather see themselves as activists and not journalists, hence the refusal to be bound by journalism rules and ethics.¹¹ Furthermore, groups like the National Association of Citizen Journalists have also argued that not everyone who uses a cellphone to capture an incident that they post online is a citizen journalist.¹² The group’s position is that labeling ‘accidental journalists’ as citizen journalists is a mischaracterisation:

Accidental journalists are not citizen journalists because, in most cases, they had no expectation that they would ever provide photos, videos or eyewitness reports of any event to any news entity. But once trapped or in sight of a significant event, they took action and committed what many are now calling random acts of journalism. For most accidental journalists, their first appearance as a “journalist” is also their last.¹³

While it is true that many citizen journalists are accidental journalists who coincidentally happened to be at the scene of a violation to bear witness,¹⁴ it is disconcerting to

such information providers now also often include news consumers themselves.’ See A Bruns ‘Gatewatching, not gate-keeping: Collaborative online news’ (2003) *Media International Australia incorporating culture and policy* 32.

⁷ H Siddique ‘South African police suspended over death of man dragged behind van’ 2013 <https://www.theguardian.com/world/2013/feb/28/man-dies-south-africa-police-van> (accessed 5 June 2021). In addition, the killing of George Floyd by the police was filmed by Darnella Frazier on her mobile phone. See J Salo ‘Video shows Minneapolis cop with knee on neck of black man who later died’ <https://nypost.com/2020/05/26/minneapolis-cop-puts-knee-on-neck-of-black-man-who-later-died-video/> (accessed 5 June 2021).

⁸ Most of the available information about the protracted war in Syria has been made possible through the documentation carried out by citizen journalists. See E Platt ‘Citizen journalists playing crucial role in Syrian war’ 2014 <https://time.com/3481790/syria-journalism-kobani/> (accessed 17 March 2020).

⁹ The first raw footage of the 2010 Independence Day bomb blast in Abuja, Nigeria was through citizen journalism. See S Dare ‘The rise of citizen journalism in Nigeria – a case study of Sahara Reporters’ (2010) *Reuters Institute for the Study of Journalism* 50.

¹⁰ R Noor ‘Citizen journalism vs mainstream journalism: A study on challenges posed by amateurs’ (2017) 3 *Athens Journal of Mass Media and Communications* 55.

¹¹ N Jurrat ‘Mapping digital media: Citizen journalism and the internet’ (2011) *Open Society Media Program* 13 & 17.

¹² R Ross & SC Cormier ‘Handbook for citizen journalists’ (2010) *National Association of Citizen Journalists* 57.

¹³ Ross & Cormier (n 12 above) 60.

¹⁴ S Dare ‘Wrong place, right time’ (2012) 32 *Rhodes Journalism Review* 58.

imagine, based on the argument put forward by the Association, that individuals are not regarded as citizen journalists simply because the act of journalism they carried out was done accidentally and probably as a once-off event. The frequency of the action is not what qualifies them as citizen journalists but rather the fact that they have no professional training. What validates citizen journalism as an alternative to traditional journalism is that it demonstrates the ‘autonomy of individual citizens in their desire to capture and share personal experiences of things they perceive to be in the public interest with fellow citizens without necessarily following prescribed rules or putting a price to their activities.’¹⁵

Hence, this chapter will focus on citizen journalists, accidental and otherwise, that are documenting evidence of human rights abuses and atrocities that trigger an investigation or become used as evidence in a court setting.¹⁶ Furthermore, with the evidence of how citizen journalists are disrupting and influencing professions such as journalism and human rights fact finding, this chapter will also take a look at the relevance of citizen media; how it has evolved over time to become a resource for the human rights community in countering impunity. This chapter will conclude by taking a look at the future utility of citizen media, to contemplate if, going forward, it can be regarded as a sustainable trustworthy source for exposing injustice.

2.2. Relevance of citizen media and citizen journalism

Due to the proliferation of cellphone cameras and popularity of social media, it has become more difficult for perpetrators of human rights abuses to hide because for every crime that takes place in public spaces, there is likely to be a ready witness documenting it with their cellphone.¹⁷ Having these human rights abuses documented increases the chances of holding the perpetrators to account. In addition to this is the fact that citizen media bridges the information gap and lessens the uncertainty that sometimes surrounds instances of human rights violations due to lack of sufficient evidence. Some of the ways in which citizen media and citizen journalism are relevant to human rights fact finding are discussed below.

¹⁵ D Moyo ‘Citizen journalism and the parallel market of information in Zimbabwe’s 2008 election’ (2009) 10 *Journalism Studies* 554.

¹⁶ This category is distinct from citizen journalists that produce entertainment based citizen media. The entertainment based category of citizen journalism will not fall within the scope of what will be analyzed within this chapter.

¹⁷ In some cases, it is the perpetrators themselves that document the atrocity to show to their colleagues as a trophy. See A Koenig ‘Open source evidence and human rights cases’ in S Dubberley, A Koenig & D Murray (eds) *Digital Witness – Using open source information for human rights investigation, documentation and accountability* (2020) 36.

2.2.1 Exposing injustice and triggering investigations

As far back as 1991, long before cellphone cameras became ubiquitous, the Rodney King video taken by a civilian witness – George Holliday – demonstrated to the world how capturing an atrocity on camera can make a huge difference. The Rodney King video is regarded as the first ever-viral video¹⁸ and this happened even before there was YouTube, Facebook, Twitter or any of the other social platforms that exist today.¹⁹ The video, which depicted police officers beating 25-year-old King with batons over 50 times in the space of two minutes, had many Americans shocked and outraged. The video triggered an investigation, a state trial in which the defendants were acquitted, violent protests in Los Angeles during which 50 people died and more than 2 000 got injured, a federal civil rights trial, and the conviction of two officers who were found guilty of violating King’s civil rights.²⁰

Robert Thompson, a Professor at the Syracuse University in a 2017 interview with CNN, said the following about the Rodney King video:

I don’t think you’ll be exaggerating to say this was the first viral video recorded by an individual on amateur equipment. Here we had this video of an event that had just happened and now today cellphone videos of horrible events are things we see nearly everyday. Back then, this was a whole new ball game.²¹

The Rodney King video was a pivotal moment that demonstrated the power of citizen journalism, a field that has now dramatically evolved through the years.²² Even though the eventual outcome of the Rodney King incident did not meet the expectations of some, Matheson describes that moment as the point when ‘video put human into human rights.’²³ Citizen media underscores the power of visuals in influencing public opinion and many times, re-sensitizing

¹⁸ The other note-worthy citizen video that pre-dates the era of social media is that of Abraham Zapruder who documented the assassination of US President, John F. Kennedy with his Bell and Howell camera. Even though Zapruder had caught a few seconds of the assassination on his camera in 1963, it did not appear on television until over a decade later when ABC’s Good Night America televised it in 1975. See The National UAE ‘Rodney King not the first victim of video gone viral’ 2012 <https://www.thenational.ae/uae/rodney-king-not-the-first-victim-of-video-gone-viral-1.371492> (accessed 20 January 2020). While the Kennedy video pre-dates the invention of the internet in 1976, both the Kennedy and King videos had one thing in common; they turned viral through traditional media.

¹⁹ MultiShow ‘First Ever Viral Video: Rodney King beating video’ <https://www.youtube.com/watch?v=5J7xHzI061k> (accessed 20 January 2020).

²⁰ CNN Library ‘Los Angeles riots fast facts’ CNN 18 September 2013 <http://www.cnn.com/2013/09/18/us/los-angeles-riots-fast-facts/index.html> (accessed 20 January 2020).

²¹ CNN ‘The viral video that set a city on fire’ CNN 28 April 2017 <http://www.cnn.com/videos/us/2017/04/28/rodney-king-la-riots-25th-anniversary-viral-tape-orig-nccorig.cnn> (accessed 20 January 2020).

²² Juxtaposing the 1991 Rodney King incident when there was only one grainy amateur video evidence, with the 2020 George Floyd killing which had multiple camera angles that clearly filmed the incident, is a testament to how much evolution the field of citizen journalism has witnessed over the years.

²³ A Kuvadira ‘How to use your smartphone camera to save lives’ 2016 <https://www.good.is/articles/citizen-journalist-witness-filming-human-rights> (accessed 20 January 2020).

communities to take definite stance against egregious violations of human rights. In addition, a careful observation of the act of citizen journalism will reveal how it helps enhance other human rights such as the freedom of expression and promotes participatory democracy.²⁴

In addition, citizen media has become an asset for open source intelligence investigations (OSINT) during human rights fact finding due to its publicly available data and information that is accessible through social media sites, Google Earth's satellite images, geo-referenced field documentation and other public sources.²⁵ In other words, it is publicly accessible information that anyone can 'lawfully obtain by request, purchase, or observation'.²⁶ As a result, citizen media evidence has been used to uncover crimes against humanity such as Bellingcat's work in unraveling the downing of Malaysian Airlines Flight 17 (MH17) in Ukraine²⁷ as well as Amnesty International's investigations that revealed mass burial sites on the outskirts of Bujumbura in Burundi; thus, proving that Burundi's security forces were involved in extra-judicial killings.²⁸ The bravely captured citizen videos and photos serve as a trigger for investigations and guide organisations in their inquiry into an atrocity even as they combine these citizen videos with other advanced technologies such as satellite imagery, to ultimately present a compelling case for criminal responsibility. One of the things that make citizen media valuable and relevant is that human rights activists and researchers can obtain information about an atrocity with little or no interference from a hostile government. This was the case with both the MH17 and Burundi investigations, whereby strong reliance was placed on civilian witnesses and citizen journalists whose videos and photographs were used to eventually establish the linkages between the crimes and the perpetrators. Rajvanshi highlighted this as follows:

²⁴ OD Apuke 'Another look at the possibilities and challenges of citizen journalism in Nigeria – a narrative review' (2019) 1 *International Journal of International Relations, Media and Mass Communication Studies* 60.

²⁵ Q Eijkman & D Weggemans 'Open source intelligence and privacy dilemmas: is it time to reassess state accountability?' (2012) 2 *Security and Human Rights* 285.

²⁶ Office of the Director of National Intelligence 'Intelligence Community Directive: Number 301' (2006) 8.

²⁷ C Van Extel & R Ryan 'Citizen journalists help investigators track down truth behind MH17 crash' 2015 <http://www.abc.net.au/radionational/programs/breakfast/citizen-journalists-help-investigators-mh17-crash/6624304> (accessed 11 February 2020). See also Bellingcat 'Forensic analysis of satellite images released by the Russian Ministry of Defense – a Bellingcat investigation' 2015 <https://www.bellingcat.com/news/uk-and-europe/2015/05/31/mh17-forensic-analysis-of-satellite-images-released-by-the-russian-ministry-of-defence/> (accessed 11 February 2020).

²⁸ Amnesty International 'Burundi: Satellite evidence supports witness accounts of mass graves' 2016 <https://www.amnesty.org/en/latest/news/2016/01/burundi-satellite-evidence-supports-witness-accounts-of-mass-graves/> (accessed 11 February 2020).

In Burundi's case, confirmation of the site was all about data: Amnesty's researchers cracked the case of the mass graves using mobile-phone footage that had emerged by determining the location using the video's content.²⁹

Not only are citizen videos making it possible to expose human rights abuses, they are also making accountability possible, especially where there is political or legal will to seek it. For instance, in Kenya, three police officers were arrested and arraigned in court after a cellphone video showing them dehumanising a woman went viral online.³⁰ Similarly, in South Africa, the city of Cape Town suspended two metro police officers after cellphone footage revealed them violently pulling a person with disability out of his wheelchair.³¹ In Ghana, a police officer was caught on video brutally assaulting a woman with a baby.³² The officer – Lance Corporal Godzi Frederick Amanor – was arrested and made to face criminal prosecution following public outrage to the very disturbing video of the assault.³³ Although Amanor was eventually discharged for want of prosecution, he was nevertheless subjected to internal disciplinary measures.³⁴

In Nigeria, we saw several instances of citizen video evidence being used to defend human rights during the 2020 #EndSARS protests. One of such was when two women – Treasure Nduka and Felicia Okpara – who had been unlawfully arrested and excessively beaten, were eventually released³⁵ following relentless citizen advocacy that was triggered by the emergence of the citizen video³⁶ showing their arrest. That same video was admitted into

²⁹ A Rajvanshi 'In human rights reporting, the perils of too much information' 2016 https://www.cjr.org/criticism/in_human_rights_reporting_the_perils_of_too_much_information.php (accessed 11 February 2020).

³⁰ Kenya's Directorate of Criminal Investigations publicly stated that the arrests had been made and investigations were ongoing. See DCI Kenya @DCI_Kenya's tweet posted on 11 June 2020 https://twitter.com/DCI_Kenya/status/1270991919733190659?s=20 (accessed 29 January 2021).

³¹ See AD Plato 'City suspends metro police officers with immediate effect' 2020 <https://www.capetown.gov.za/Media-and-news/City%20suspends%20Metro%20Police%20Officers%20with%20immediate%20effect> (accessed 29 January 2021).

³² Video accessible via twitter user Bridget Otoo @Bridget_Otoo posted on 20 July 2018 https://twitter.com/Bridget_Otoo/status/1020348205098258432?s=20 (accessed 29 January 2021).

³³ See the twitter announcement made by the Ghana Police Service of 21 July 2018 <https://twitter.com/GhPoliceService/status/1020570096878702592?s=20> (accessed 29 January 2021). Also very significant is the fact that President Akufo-Addo of Ghana made a public statement supporting the prosecution of the officer. See AR Alfa Shaban 'Ghana president backs prosecution of police who assaulted woman' *Africa News* 22 July 2018 <https://www.africanews.com/2018/07/22/ghana-president-backs-prosecution-of-police-who-assaulted-woman/> (accessed 29 January 2021).

³⁴ See GhanaWeb 'Policeman who assaulted woman back at post but facing police trial' 2019 <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Policeman-who-assaulted-woman-back-at-post-but-facing-Police-trial-732734> (accessed 29 January 2021).

³⁵ See O Olasunkanmi '#EndSARS: Sanwo-Olu orders police to release all arrested protesters' 2020 <https://lagosstate.gov.ng/blog/2020/10/13/endsars-sanwo-olu-orders-police-to-release-all-arrested-protesters/> (accessed 29 January 2021).

³⁶ The video was shared on twitter and it generated immense public outrage. See video posted by Banky Wellington @BankyW on 12 October 2020 <https://twitter.com/BankyW/status/1315659409465507840?s=20> (accessed 29 January 2021)

evidence during the proceedings of the Lagos State judicial panel of inquiry into atrocities by Special Anti-Robbery Squad (SARS) agents.³⁷ Felicia Okpara was later awarded compensation of N750,000 by the judicial panel following the video evidence and her own testimony.³⁸

Many other citizen videos from the #EndSARS protests became extremely important because government agents tried everything possible to evade admitting any form of wrongdoing, but these videos provided irrefutable evidence of the crimes. The videos were also relied on by volunteers of the #EndSARS legal aid team who encountered countless denials and resistance from the police in their pursuit of justice. In an interview granted to Rest of World, Tola Onayemi – one of the #EndSARS pro-bono lawyers, said: ‘The videos provided a way to time stamp, geo-tag, and verify the incidents that were said to have occurred.’³⁹

All these point to the utility of citizen media in exposing human rights abuses and providing the human rights community some of what is needed in the pursuit of justice and accountability. However, it is worth noting that an increasing number of videos that document human rights violations are being filmed by the perpetrators themselves and this creates a very challenging ethical dilemma because on the one hand, these videos are key to human rights investigations and criminal prosecutions, but on the other hand, the videos are shot by the perpetrators with the objective of dehumanizing the victim. Even though perpetrator videos help expose abuse, there is a major distinguishing factor between citizen journalists and perpetrators who also embark on filming atrocities – the intent. In the case of the perpetrators, their intention for documenting is to instill fear, humiliate the victims or to glamorise violence. Whereas, in the case of citizen journalists, majority of those who are documenting are doing it in order to expose injustice, fight impunity or seek accountability for the crimes committed. It would therefore be odd to categorise perpetrator videos under the same rubric as citizen media evidence or as a form of citizen journalism. The two do not share the same objective. Although, it is imperative for human rights investigators to critically consider how to continue leveraging perpetrator video evidence for justice without fostering the objectives or intent of the perpetrators. In Chapter four, detailed analysis will be given of precedent-setting case law that further demonstrate the power of citizen media during prosecutions.

³⁷ See video posted by Editi Effiong on 4 December 2020 <https://twitter.com/EditiEffiong/status/1334891033675632648?s=20> (accessed 29 January 2021).

³⁸ TVC News ‘Lagos #EndSARS panel awards N16.25m compensation to four victims, rejects two’ 2021 <https://www.tvcnews.tv/lagos-endsars-panel-awards-n16-25m-compensation-to-four-victims-rejects-two/> (accessed 5 June 2021).

³⁹ A Adeoye ‘Exonerated by viral video’ (2020) <https://restofworld.org/2020/exonerated-by-viral-video/> (accessed 29 January 2021).

2.2.2. Fostering citizen participation that fills a void

Citizen media started gaining prominence when an increasing number of civilians became equipped with smartphones combined with access to the internet and the popularity of social media.⁴⁰ The reality today is that a growing number of people have on them at all times, a tool to document human rights violations – their mobile camera phone.⁴¹ With their phones, they are able to capture and document, and with social media, they get to distribute their content. Gregory describes this phenomenon saying:

Participants, witnesses and perpetrators are all filming. Videos (particularly mobile video) make it possible to document and publicize human rights struggles – from monks marching for freedom in Rangoon and the election protestors in Tehran, to individual voices speaking out against injustice on YouTube.⁴²

Today, the ecosystem of information gathering and sharing has changed in that the power is now in the hands of each civilian to do as they so desire with the information they have collected with virtually no editorial oversight. This is a movement Gillmor has described as ‘We the Media’.⁴³ Although it is worth noting that despite this increased ability to independently document and share, there are other considerations such as discoverability and content moderation that stand as barriers and these are discussed in greater detail in Chapter 3.

The field of human rights documentation has also been drastically altered just as much as traditional mainstream media has been impacted because these new digital witnesses are independent of the old gatekeepers.⁴⁴ It is this disruption of the status quo that traditional media is struggling to grapple with as the hitherto protected journalism walls are crumbling. Against this backdrop, Banda stated the following about citizen journalism:

[T]he notion of citizen journalism is an indictment against what are seen as the undemocratic rituals of conventional media and journalism. There are so many

⁴⁰ Technological advances, especially in the mobile phone industry increased the speed of eyewitness reporting, making it possible to document and disseminate reports and evidence of human rights concerns in real time and in a way, previously impossible in traditional journalism. Jurrat (n 11 above) 17.

⁴¹ According to the Pew Research Center, mobile technology has rapidly spread around the world, even though at an unequal rate. See L Silver ‘Smartphone ownership is growing rapidly around the world, but not always equally’ 2019 <https://www.pewresearch.org/global/2019/02/05/smartphone-ownership-is-growing-rapidly-around-the-world-but-not-always-equally/> (accessed 20 February 2020).

⁴² S Gregory ‘Cameras everywhere: Ubiquitous video documentation of human rights, new forms of video advocacy, and consideration of safety, security, dignity and consent’ (2010) 2 *Journal of Human Rights Practice* 191.

⁴³ D Gillmor *We the media: grassroots journalism by the people, for the people* (2004).

⁴⁴ Authoritarian regimes view citizen journalists as a ‘radical threat to the status quo’ and go as far as punishing them through imprisonment or even death. See M Wall ‘Citizen journalism – a retrospective on what we know, an agenda for what we don’t’ (2015) *Digital Journalism* 8.

journalists that might be opposed to the suggestion that conventional journalism is undemocratic. But that is exactly what citizen journalism seems to be suggesting.⁴⁵

It is such a striking position held by Banda and it is one which holds a lot of truth as it can be argued that citizen media and citizen journalism are on the rise partly because more people want to be able to tell their own stories in their own way and at their own pace. When one considers the fact that citizen participation, equality and inclusion are some of the cardinal principles of a democratic society, it becomes clear why citizen journalism has received massive adoption because a lot of people have not always felt fairly represented or adequately included in the stories that receive attention from conventional media. It is not as though this desire to own and share one's truth is new, but citizen media and citizen journalism have become the vehicle for their full actualization. The guarantees under article 19 of the International Covenant on Civil and Political Rights that promote the right to freedom of expression point exactly to humanity's recognition of the importance of unhindered expression, be it in the form of speech, art or, now, video documentation.⁴⁶ However, the creation of social media platforms combined with camera capable cellphones have given a much bigger outlet for expressing this desire. It has, as a result, significantly contributed to swiftly transforming the nature of investigations both for professional journalists and the human rights community. Citizen journalists are demonstrating mastery of how one can be a frontline digital witness and online activist using their footage to bring about change.

It was through communication networks such as YouTube and Facebook, that were beyond state control, that Tunisians in 2010 brought the world's attention to the incidents surrounding the Arab Spring. Amateur videos shot on mobile phones were being streamed across North Africa and other places, thus mobilizing others to protest and also helping to expose the truth that the state-controlled media desperately tried to conceal.⁴⁷ Belair-Gagnon asserted that digital technologies such as computers, mobile phones and the internet have provided 'tools for citizens to participate in the globalization, mobilization and democratization of information.'⁴⁸ With the advent of Facebook (launched in 2004), YouTube (launched in 2005), Twitter (launched in 2006), and Instagram (launched in 2010), the platforms for dissemination multiplied and became all the more accessible to ordinary citizens.

⁴⁵ F Banda 'Citizen journalism and democracy in Africa – an exploratory study' (2010) *Highway Africa* 26.

⁴⁶ International Covenant on Civil and Political Rights (ICCPR) GA Resolution 2200A adopted 16 December 1966, entered into force on 23 March 1976 art 19.

⁴⁷ PN Howard & MM Hussain 'Democracy's fourth wave? Digital media and the Arab Spring' (2013) 19 – 20.

⁴⁸ Belair-Gagnon & Anderson (n 4 above) 7.

New technologies have made it possible for people who previously used to be subjects of news cycles to now become the agents who document, monitor, and report the events in their community. The documentation and reporting being done by citizen journalists even in the most authoritarian regimes, therefore, makes it possible for victims of human rights abuses to draw global solidarity for the injustices they may be facing. This kind of solidarity can be powerful in bringing about accountability and Jurrat explains this by citing the case of Neda Agha Soltan of Iran:

In repressive countries, eye witness reports and images taken by ordinary citizens are often the only testimony available and can help influence international politics. This was particularly apparent during the contentious 2009 Iranian presidential election, when foreign correspondents were banned from the country, local media was under governmental control and opposition journalists were imprisoned. The rest of the world and indeed many Iranians only knew about the demonstrations and the violent crackdown due to the images and reports uploaded on personal blogs, social websites or sent directly to international media. The video of the dying Neda Agha Soltan, a student who was shot by the Basij militia, became *the* iconic image for the opposition movement in Iran. The video was taken on a mobile phone, and to avoid censorship, emailed to an Iranian expatriate in the Netherlands, who uploaded it on YouTube and Facebook, and sent it to various international media outlets, which showed it immediately. Millions of people around the world watched it, and its popularity forced world leaders as well as the Iranian government to publicly comment on political developments in Iran.⁴⁹

With this increased civic participation in bringing critical attention to matters that affect them, some may despise and dismiss citizen journalists⁵⁰ for not being as thorough or objective as traditional, professional journalists. For instance, Apuke has expressed that even though citizen journalism can be factual, it usually has flaws such as lack of objectivity, impartiality and balance, which are not seen in mainstream media.⁵¹ However, others like the UN Special Rapporteur on Freedom of Expression, Frank La Rue, recognise and acknowledge the invaluable contributions citizen journalists bring to the table, thus:

Indeed, through a participatory approach, citizen journalists contribute to the creation of a richer diversity of views and opinions, including information about their communities and groups in need of particular attention, such as women, indigenous people and minorities, and play a critical watchdog role in countries where freedom of the press is not a reality. More important, they can provide immediate, insider's view of a conflict or catastrophe, whereas professional journalists may not be granted access to places where hostilities unfold or may have to travel for days before reaching a disaster zone or area.⁵²

⁴⁹ Jurrat (n 11 above) 12.

⁵⁰ According to Belair-Gagnon and Anderson, it was not until after 2004 that citizen journalism moved from being a contested medium to a mainstream one. See Belair-Gagnon & Anderson (n 4 above) 2.

⁵¹ Apuke (n 24 above) 60.

⁵² United Nations General Assembly 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (11 August 2010) A/65/284 para 63, 18.

Another factor that enables citizen media to foster civic participation is its multi-disciplinary nature. There are no barriers imposed by skill. Therefore, anyone, regardless of background, is able to be part of this community of citizen journalists, despite the glaring lack of professional capability or the journalistic technical know-how that is pervasive within this community. By lowering the bar for participation, citizen media has put the power for documentation and dissemination in the hands of civilians but has at the same time opened the doors to serious criticism from quarters seeking for a more structured and professional approach towards the coverage of violence, atrocities or breaking news.

For some of these digital witnesses, their spontaneous recording is just for documentation purposes and subsequent sharing, hence they are rarely meticulous about how the video or picture is captured. Even for those who are deliberate about filming an atrocity with the goal of holding a perpetrator accountable, there are several factors that can make it difficult to film up to professional standards, such as the usually volatile nature of the situation. Nevertheless, because citizen media has proven to be highly important in supplying a perspective to a story that may have been otherwise missing and in providing necessary evidence, attempts are being made to strengthen the way it is documented, preserved and disseminated and these are fully addressed in Chapter 5.

2.2.3 Archiving and preservation of history

In the 21st century, both the victim of an abuse and the perpetrator participate in filming instances of the violations.⁵³ These videos go on to serve the purpose of ensuring that cases of human rights abuse that have transpired are archived and preserved for future use or reference. They also function as lead evidence, especially for law enforcement agencies and human rights organisations seeking to understand the what, why, when, who and how of an incident. This is crucial because investigators will not have to query the ability of a witness to recollect in detail what they saw or experienced. Video evidence has been used to document human rights abuses for long and in 1986, the Transvaal Provincial Division Court of South Africa made the following comparison between video evidence and witness testimony:

I am convinced that the video can be a very helpful tool to arrive at the truth. It does not suffer from fading memory as do witnesses. The camera may be selective, but so is the witness' recollection, even more so. The best word artist cannot draw his verbal

⁵³ For example, a documentary created by BBC Africa Eye titled 'Cameroon: Anatomy of a killing' reveals how video taken by the perpetrator can also aid a human rights investigator in the pursuit of accountability. Video can be found at <https://www.youtube.com/watch?v=XbnLkc6r3yc> (accessed 17 March 2020).

picture as accurately and as clearly as does the cold eye of the camera. Not to mention the faltering witness who has difficulty in expressing himself.⁵⁴

With citizen media evidence, they only need to go through the stages of verification and ascertain its veracity. It eliminates having to rely solely on a witness's ability to recollect specifics of an atrocity which in itself can be retraumatizing for a victim. Forensic Architecture is a good example of an organisation that has relied extensively on citizen media to reconstruct scenes of an atrocity, showing intricate and irrefutable details. For instance, in 2017, they used a combination of citizen media, leaked videos and witness testimony to recreate compelling evidence of torture of Boko Haram suspects by Battalion d'Intervention Rapide (BIR) forces in Cameroon.⁵⁵

The role citizen media can play in historical preservation is a crucial one. The fact that many of the citizen journalists who use their cell phones to record also go further to upload it onto social media ensures that there is a repository of evidence of human rights violations. It is, however, not guaranteed that every video or photo will be around for a long time in light of the existing content takedowns being embarked upon by social media platforms.⁵⁶ Nevertheless, the protracted conflict in places like Syria is one that has benefitted from the utility of citizen media to preserve history, even as many groups, such as Mnemonic, are simultaneously ensuring that the evidence is collected, preserved and disseminated to advance the cause of justice. Considering that there is yet to be a tribunal established to prosecute the multiple war crimes arising from the decade-long war, it becomes imperative to preserve evidence of the atrocities occurring on a daily basis.⁵⁷

Citizen-led groups such as the Syrian Civil Defence popularly known as The White Helmets have used handheld cameras and those mounted on their helmets to document the war in Syria.⁵⁸ Their footage has been critical to exposing war crimes and they have been relied upon by organisations like Amnesty International and the United Nations (UN) to corroborate other witness testimonies of chemical attacks against children and airstrikes against civilian

⁵⁴ *S v Baleka & others* (1) 1986 (4) SA 192 (T), 194.

⁵⁵ See Forensic Architecture 'Torture and detention in Cameroon' <https://forensic-architecture.org/investigation/torture-and-detention-in-cameroon> (accessed 10 April 2020).

⁵⁶ H Al Khatib and D Kayyalli 'YouTube is erasing history' 2019 <https://www.nytimes.com/2019/10/23/opinion/syria-youtube-content-moderation.html> (accessed 12 November 2019).

⁵⁷ The Syrian conflict has now lasted longer than World War II, and as at March 2019, it had resulted in the internal displacement of 5.9 million people and 5.6 million refugees. See United Nations Office for the Coordination of Humanitarian Affairs 'Syria: a crisis in its 9th year in 9 figures' 2019 <https://www.unocha.org/story/syria-crisis-its-9th-year-9-figures> (accessed 12 November 2019).

⁵⁸ The volunteers who make up The White Helmets are from different backgrounds including bankers, engineers, tailors, students, carpenters, pharmacists and many more. See www.whitehelmets.org (accessed 31 January 2021).

populations, thus underscoring the inter-connected and inter-dependent nature of the relationship between those who document and those who leverage the evidence to secure justice for victims.⁵⁹ Platforms like the Syrian Archive have also been launched to ensure there is historical record of the atrocities in Syria.⁶⁰ They build archives by aggregating social media posts pertaining to the Syrian conflict, verifying and cataloguing them for use by different stakeholders. Also, the UN General Assembly in December 2016 launched a mechanism⁶¹ to assist with the coordination of evidence gathering, documentation and preservation of the crimes in Syria.⁶² This became necessary in light of several failed attempts to establish a special tribunal to try the crimes committed in the Syrian conflict or to have a case opened at the ICC.

Despite the stalemate at the level of the ICC in prosecuting war crimes in Syria, we have seen how photographic evidence that was preserved eventually became relevant in the trial and conviction of Anwar Raslan before a German court. In a landmark judgment delivered on 13 January 2021 by the Higher Regional Court in Koblenz, Germany, Raslan – a former Syrian colonel – was found guilty of crimes against humanity in the form of torture, murder, assault and rape,⁶³ all committed during the Syrian conflict and this guilty verdict was made possible due to the availability of well archived compelling visual evidence from the Caesar Photos preserved since 2011.⁶⁴

2.3. The interdependence between the old and the new

[I]t is important to acknowledge that the ever-present danger of opening up journalism to all and sundry is the potential to erode some of the vital values of the profession, such as truth-telling, fairness and balance. How citizen journalism will respond to these concerns will be crucial for its future development and consolidation.⁶⁵

Prior to the advent of new media, there were two forms of communication that dominated the media space. The first was public broadcasting involving TV, radio and newspaper outlets, and

⁵⁹ O Solon 'How Syria's White Helmets became victims of an online propaganda machine' *The Guardian* 2017 <https://www.theguardian.com/world/2017/dec/18/syria-white-helmets-conspiracy-theories> (accessed 31 January 2021).

⁶⁰ The Syrian Archive is 'dedicated to curating visual documentation relating to human rights violations...with the goal of creating an evidence-based tool for reporting, advocacy and accountability purposes.' Syrian Archive <https://syrianarchive.org/en> (accessed 12 November 2019).

⁶¹ UN News Centre 'Syria: UN approves mechanism to lay groundwork for investigation into possible war crimes' 22 December 2016 http://www.un.org/apps/news/story.asp?NewsID=55862#.WV0olYr_po4 (12 November 2019).

⁶² UN General Resolution on Prevention of Armed Conflict, A/71/L.48 para 4, 19 December 2016.

⁶³ Tagesschau 'Life imprisonment in state torture trial' (2022) <https://www.tagesschau.de/inland/olg-koblenz-staatsfolter-syrien-urteil-101.html> (accessed 13 January 2022)

⁶⁴ Trial of Anwar Raslan and Eyad Al Gharib, Higher Regional Court – Koblenz, Germany (2020) *Syria Justice and Accountability Centre and International Research and Documentation Centre*, Trial Monitoring Report 17.

⁶⁵ Moyo (n 15 above) 563.

the second was one-on-one communications through telephones.⁶⁶ Both of these forms have significantly evolved. From a time when telephone conversations could only happen between two people at any given time to a point where the norm is conference calls and group chats, we are experiencing a drastic shift from old to new media. Pages on platforms like Facebook can host thousands and even millions of participants who freely interact with each other.⁶⁷ As for the broadcasting services, new technologies have placed immense capabilities in the hands of everyone with a smartphone to become a broadcaster.

For all we have come to learn by observing digital transformation, the current status quo will only continue to evolve to allow for more people to participate online. With the information explosion we are witnessing through citizen media, it is increasingly becoming more difficult for fields like journalism and human rights fact finding to retain exclusive rights to practice their work. Just by clicking on a YouTube video, individuals can learn about anything in almost any field and become equipped virtually overnight.⁶⁸ The influx of tutorial videos on platforms like YouTube is clearly underscoring the power of visual e-learning. It is estimated that a billion hours of videos are watched on YouTube every day and more than half of YouTube views come from mobile devices.⁶⁹ In its 2015 analysis, Google discovered that more than one hundred million hours of ‘how-to’ videos had been watched on YouTube in North America alone.⁷⁰

Just as we are witnessing more citizens become producers of media, we also have non-lawyers who provide legal aid as community-based paralegals, non-doctors who perform life-saving operations in conflict zones, and many more. The point here being that the lines between certified professionals and non-professionals are being blurred and it is happening across board.⁷¹ When it comes to human rights fact finding, an inter-disciplinary approach is at work now that never used to exist. As Alston states, ‘Anthropologists, information scientists,

⁶⁶ D Miller et al ‘How the world changed social media’ (2016) 2.

⁶⁷ For instance, the Africa Facebook page has more than 215 million people following it. See www.facebook.com/facebookappAfrica (accessed 9 April 2020).

⁶⁸ Google’s Consumer Survey of April 2015 that studied users in the United States indicated that “67% of millennials agree that they can find a YouTube video on anything they want to learn” See D Mogensen ‘‘I-want-to-do’ moments: from home to beauty’ 2015 <https://www.thinkwithgoogle.com/marketing-resources/micro-moments/i-want-to-do-micro-moments/> (accessed 20 March 2020).

⁶⁹ Youtube for Press <https://www.youtube.com/yt/about/press/> (accessed 20 March 2020).

⁷⁰ Google ‘Micro-moments: your guide to winning the shift to mobile’ <https://think.storage.googleapis.com/images/micromoments-guide-to-winning-shift-to-mobile-download.pdf> (accessed 20 March 2020)

⁷¹ Banda has questioned the very notion of professional journalism and went ahead to emphasize that the ‘hitherto exclusive nature of journalism is at the core of the debate about the phenomenon of citizen journalism’. See Banda (n 45 above) 25.

architects, forensic scientists, statisticians, and many other professionals are now increasingly involved in elevating fact-finding to a much more complex and sophisticated art and science.⁷²

Despite this advancement, the civilians who trigger the investigations and prosecutions through their videos and photos are being taken to task on the need to be more professional. There have been calls for the professionalization of human rights fact finding.⁷³ The reason being that the stakes are high for organisations who are increasingly relying on the fact-finding efforts of citizen journalists. As valid as these demands are, they might add an unnecessary burden on civilians who just want to expose injustice without the technical trappings and expectations of perfection such as exposure, composition, angle, stability and so on. Jurrat shares this sentiment when she stated that ‘citizen journalists are citizens first and foremost, not trained journalists; and this should shape our expectations of what they do’.⁷⁴ Alston equally agrees with measuring our expectations when calling for professionalization because we must be ‘explicit about the principal shortcomings that the “new” fact-finders are being called upon to transcend or remedy.’⁷⁵ Moyo may however, have one of the strongest rebukes for any attempt geared towards turning citizen journalists into professionals:

The danger, particularly in the developing world, is that this new space will not end up an arena for the exercise of true citizen journalism but rather one for a staged form of citizen journalism. Citizen journalism presupposes free agency where rights-bearing citizens act spontaneously to capture and share information... it is clear that the increasing intervention by foreign nongovernmental organisations to “nurture” and aid citizen journalism can only take away the agency and autonomy of the said citizen and create disempowered citizen journalists who act primarily to please the donors.⁷⁶

The problem with this critique is that, not subjecting citizen media to improvement through the training of citizen journalists will lessen the viability of the videos and pictures being used in the context of advocacy but most especially as evidence to secure accountability for crimes. Granted, the goal should never be to make citizen journalists into professionals but the mistake must not be made of assuming that nurturing citizen journalism will disempower the actors and take away their agency or independence. Organisations must ensure that training and nurturing should have the end result of bolstering what citizens are already doing, helping them better tell their truth. Indeed, this approach is one that is adequately analysed under

⁷² P Alston ‘Introduction: Third generation human rights fact finding’ (2013) *The American Society of International Law Proceedings* 62.

⁷³ Alston (n 72 above).

⁷⁴ Jurrat (n 11 above)17.

⁷⁵ Alston (n 72 above).

⁷⁶ Moyo (n 15 above) 563.

Chapter 5 as one of the ways for strengthening the utility of citizen media in delivering justice and accountability.

Similar to the accusation that citizen media is a product of amateurs and so it should be given lesser consideration, traditional journalism has been combatting the less professional method of news sharing through blogging for some time. Hence, this wariness about something unfamiliar or something that threatens the status quo, is not new. Recognising the need for a solution is what prompted Davidson to state in her paper as follows:

Due to the increasingly popular nature of social media... the practice of blogging is an issue that needs to be re-assessed to ensure a comprehensive law is enforced that encompasses and recognises blogs as having to adhere to some form of ethics.⁷⁷

From bloggers being viewed as those who contribute nothing to society to them eventually becoming an integral part of modern-day journalism,⁷⁸ the continuing shift in perceptions is a classic example of how rapidly the legal and journalism professions must also experience a metamorphosis if they must effectively take on current day issues such as the challenges posed by the surge in the reliance on citizen journalism to garner critical evidence of human rights abuses.

In spite of its reputation as a commonly used tool by civilians, citizen media still benefits greatly from amplification from traditional media. A recognition by mainstream media lends greater credibility to forms of citizen media, especially because TV stations and newspapers are still generally perceived to be more credible and reliable than citizen media, for the simple reason that while the former is driven by professionals, the latter is primarily driven by non-professionals. This is what led Deuze *et al* to conclude that:

For all its success, citizen journalism remains dependent to a significant extent on mainstream news organizations, whose output it debates, critiques, recombines, and debunks by harnessing large and distributed communities of users.⁷⁹

Furthermore, the fact that Darnella Frazer was awarded a Pulitzer Prize in 2021 ‘for courageously recording the murder of George Floyd’⁸⁰ conveys a lot about the recognition of the journalism work, imperfect as it may be, being done by everyday citizens. At the same time, however, old media equally draws from citizen media not just for on-time reporting of breaking

⁷⁷ A Davidson ‘The role of citizen journalism in social media & its impact on journalism’ (2012) 5.

⁷⁸ For instance, a 2011 amendment by New South Wales broadened the definition given to ‘journalist’ and ‘news medium’ in such a way that non-professionals like bloggers and their blogs are recognized. See Evidence Amendment (Journalist Privilege) Act 2011 No 18, sec 126J.

⁷⁹ M Deuze ‘Preparing for an age of participatory news’ (2007) *Journalism Practice* 1(3) 335.

⁸⁰ See the 2021 Pulitzer Prize winner in special citations and awards (2021) <https://www.pulitzer.org/winners/darnella-frazier> (accessed 7 October 2021).

news, but also for times when civilians help the big media companies circumnavigate heavy restrictions usually imposed by authoritarian countries and regimes. It, thus, comes down to some form of symbiotic relationship – one where both parties benefit from each other. Citizen media has created the sort of pluralism needed in the human rights investigation and journalism fields whereby amateurs are able to support the work of professionals. The new media gives real time content to the old media, and the old media with its well-established credibility, analyzes, repackages and amplifies that voice.

Due to mobile phone technology, the idea of news-on-the-go has been made possible whereby audiences only need to check their social media on their phone to see what the latest news is. To stay relevant, most traditional media companies have had to adapt their content to fit this digital revolution. Hence, while a newspaper will still roll out print copies and a TV station will still curate the day's top stories at the top of the hour, they have all added social media platforms – Twitter feeds and Facebook pages – to spontaneously update their audiences of world happenings as they occur. It has become a case of – evolve or be extinct. This is well exemplified through the systems and synergies mainstream media companies and outlets like Aljazeera and CNN are creating.

CNN led the way with its revolutionary iReport initiative in 2006.⁸¹ By recognising the value of citizen media, CNN invited citizen journalists to submit their videos, pictures and stories to the CNN site and the organisation subsequently identified those deserving of further amplification. This method, however, soon became unpopular due to the rise of social media platforms such as Facebook and Twitter which allowed ordinary citizens circumvent the 'middleman' and immediately get their stories out themselves. By 2015, CNN had to revamp its approach and entirely abandoned the idea of inviting citizen journalists to upload to their website and rather replaced it with getting them to tag CNN on social media posts using the hashtag #CNNiReport.⁸²

Aljazeera must have learnt from CNN's experience and went straight for a method that will interphase directly with social media. They established a program called The Stream, which exclusively aggregates online sources and discussions and amplifies voices curated from the social media space.⁸³ The Stream is able to combine traditional media and new media in a way

⁸¹ CNN was one of the early adopters of incorporating citizen media into mainstream media. See Wall 'Citizen Journalism – a retrospective on what we know, an agenda for what we don't' (2015) *Digital Journalism 2*.

⁸² M Ingram 'CNN is rebooting its iReport site thanks to Social Media' *Fortune* (2015) <https://fortune.com/2015/11/12/cnn-i-report/> (accessed 21 March 2020).

⁸³ About the Stream <https://www.aljazeera.com/programmes/thestream/> (accessed 19 April 2020).

that works for both parties as explained earlier. It is no surprise that they refer to it as a ‘social media community with its own daily TV show.’⁸⁴

The temptation will be for traditional media to protect their turf and tenaciously hold on to their historical role of informing the people. But with more members of the public being able to mirror this social function, it has become apparent to mainstream media that collaboration is inevitable and provides a more sustainable approach even in the midst of their gravitation towards self-preservation.⁸⁵ This strategy is not devoid of the typical concerns with citizen media such as reliability and authenticity. However, it remains remarkable observing such collaboration take place between old and new media despite the reservations one might have of the other. The advantage this partnership creates is that it presents an ecosystem that is ‘not based on competition and who’s going to win, [but] on complementing each other.’⁸⁶ If such approach to partnership is wholly embraced, it will be to the benefit of all who are committed to exposing human rights violations and achieving justice and accountability.

It is, however, important to caution that partnership should not mean that citizen media becomes completely dependent on traditional media for its credibility. While it is a positive thing that traditional news outlets can help amplify citizen media evidence and give it more legitimacy, it is essential that citizen media’s credibility is not derived only when traditional media reproduces or amplifies it. This is a core concern because we have seen that in some situations, traditional media may occasionally fail to collaborate in amplifying citizen media because they are prohibited by authoritarian governments from broadcasting any content that makes the State look bad.⁸⁷ Therefore, retaining the ability to share citizen media through social media and improving its trustworthiness incrementally, will ensure that this form of citizen expression is not dismissed, stifled or unnecessarily censored and that it is deemed more reliable over time.

⁸⁴ As above.

⁸⁵ In 2006, a We Media conference was organized, sponsored by BBC and Reuters, which had as part of the agenda, ways for big media to better collaborate with citizen journalists. See M Butcher ‘We Media: the citizen journalism dilemma for mainstream media’ (2006) <https://www.journalism.co.uk/news/we-media-the-citizen-journalism-dilemma-for-mainstream-media/s2/a51841/> (accessed 25 March 2020).

⁸⁶ C Stokel-Walker *The revolution will be tweeted?* (2011) 65.

⁸⁷ For instance, Nigeria’s National Broadcasting Commission (NBC) moved to silence traditional media’s reportage of the #EndSARS movement of 2020. The NBC later penalized some privately owned media houses for their coverage of the protests. See I Ani ‘Nigeria’s #EndSARS movement and media suppression’ (2020) *Columbia Journalism Review* <https://www.cjr.org/analysis/nigeria-endsars-press-freedom.php> (accessed 3 June 2021).

2.4. Generations of human rights fact finding

The clash between old and new is not just in the context of traditional and digital media. It also extends to cover how investigative methods have evolved over time. Human rights fact-finding has always been a niche field requiring special skills. This is because by its very nature, for human rights fact finding to be meaningful, it must be credible.⁸⁸ Hence, for several decades, diplomats and legal experts, working for intergovernmental organisations like the UN undertook fact-finding investigations,⁸⁹ because they were deemed professional and credible. By the 1970s onward, major international non-governmental organisations embarked on investigations and carried out their fact-finding missions by interviewing witnesses – relying on their ability to recollect the incident so that the investigators can piece together what had taken place.⁹⁰

The aim of this kind of fact-finding, according to McPherson *et al*, was to ‘construct what appears to be objective and undeniable facts’ that were thereafter published as reports and made public in order to shame identified states and other actors into complying with human right norms.⁹¹ Not only was this approach time consuming and laborious, its success also depended on funding, size of the investigations team and whether the team was allowed access into the country in question or not. These two generations – the intergovernmental organisations and the international non-governmental organisations – exchanged methodologies and continued with fact-finding work until a third generation emerged.

Alston talks about the third generation of human rights factfinders as comprising of witnesses and activists enabled by information and communications technology (ICT) to provide evidence of what is taking place in conflict and post-conflict areas.⁹² He described their involvement in the new fact-finding model as follows:

Because these new technologies are potentially widely available at the local level, even in poor countries, they also open up new opportunities for local groups to take more responsibility for and to assert greater control over the process of fact-finding.⁹³

⁸⁸ T Boutruche ‘Credible Fact-finding and allegations of international humanitarian law violations: Challenges in theory and practice’ (2011) *Journal of Conflict and Security Law* 16 (1) 106.

⁸⁹ Alston (n 72 above) 61.

⁹⁰ E McPherson, IG Thornton & M Mahmoudi ‘Open source investigations and the technology-driven knowledge controversy in human rights fact-finding’ in S Dubberley, A Koenig & D Murray (Eds) *Digital witness: Using open source information for human rights investigation, documentation and accountability* (2020) 70.

⁹¹ McPherson, Thornton & Mahmoudi (n 90 above) 70.

⁹² Alston (n 72 above) 61.

⁹³ Alston (n 72 above) 62.

During the early years of citizen media proliferation, the human rights community was very slow to catch on and struggled to find its feet. It was as though it was being hit in the face with an opportunity it had no clue how to handle and thus became rather wary of it. What took place then is probably best described in the words of Amnesty International’s campaigner Maha Abu Shama, as he shared with Ella McPherson their organisational reaction to the deluge of citizen media emanating from Syria starting from 2011:

So many activists popped up in different areas—new activists whom we were not aware of. We didn’t know their history, we had not worked with them before, and the activists that we know didn’t know them either. So, especially at the beginning, when many of these activists were uploading things spontaneously online, whether on Youtube or Facebook or Twitter, we had to play catch up.⁹⁴

Shama’s words are from an organisation that has been part of the second generation of human rights factfinders for decades. But a year prior to his statement, a similar statement was being made – this time, before the UN General Assembly, challenging the ‘first-generation’ body to acknowledge and respond swiftly to the third generation of factfinders on the scene:

New technologies offer a great many potential solutions to some of these problems, and offer significant improvements in existing fact-finding methodologies. Surprisingly, however, there remains an enormous gap between the human rights and information and communications technology fields. Little sustained work has been undertaken by the human rights community as a whole to apply existing technologies or to study their potential uses and problems, and far too little attention has been given to the research and development of information and communications technologies with human rights applications. As a result, the use of information and communications technologies in human rights work is only at a nascent stage.⁹⁵

A decade later after this statement, the tide has turned and the human rights community – from NGOs, to judicial bodies, intergovernmental organisations and others – are now paying greater attention to the use of ICTs in promoting human rights. Alston also acknowledged this shift some years later⁹⁶, and the COVID-19 pandemic also forced many organizations to adapt to new realities and deeply consider the impact technology has on the promotion and protection of human rights. The underlying message has remained valid throughout the years, and it is that the human rights community rarely keeps up with technological developments until when it has become inevitable. In the White Paper on the Fourth Industrial Revolution released in 2016 by the World Economic Forum, it was stated that relying on government legislation to address present challenges is ill-advised, because they will likely be out of date by the time they are to

⁹⁴ E McPherson ‘Advocacy organizations’ evaluation of social media information for NGO journalism: the evidence and engagement models’ (2015) 59(1) *American Behavioural Scientist* 125.

⁹⁵ UN General Assembly ‘Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms’ 6 December 2016, A/65/321, 3 – 4.

⁹⁶ Alston (n 72 above) 62.

be implemented, given the extraordinarily rapid technological and social change the world is experiencing.⁹⁷

Therein lies the problem because even when legislation is eventually created to address technological advancements, those laws become obsolete so quickly; thus, leaving the law constantly on the back foot. Historically, justice and the rule of law have hardly happened rapidly. But on the contrary, technology mutates and evolves at an incredibly fast pace and so when they both collide, there is bound to be friction. While the human rights movement is still trying to figure out how it evolves, technology has moved many steps ahead.

Bearing in mind that civilian witnesses have always been central to the fact-finding missions of the two previous generations, McPherson was accurate to note that the major difference this third generation brings is the introduction of ICTs, which has equipped witnesses with the power to spontaneously and autonomously transmit information about a violation without waiting on an expert to come document that it took place.⁹⁸ Heyns, however, remarked that each of these generations serve a purpose and the aim is not for subsequent ones to invalidate previous generations but for each to ‘draw on the strengths of the others without compromising its own capacities.’⁹⁹

2.5. Citizen journalists and the future of human rights investigations

The utility of citizen media and mobile technology to the human rights community cannot be overemphasized but at the same time, it must be acknowledged that there are many challenges that plague the world of citizen media evidence one of which is trustworthiness in the midst of a rising infodemic driven largely by misinformation. ‘The lemon problem’ as described by Koettl pictures a situation whereby there is a danger that the accuracy of human rights fact finding will be susceptible to increased doubt due to the spread of misinformation that has been exacerbated by the digital age and social media networks.¹⁰⁰ For citizen media to remain relevant to future human rights investigations and prosecutions, citizen journalists need to be able to document more reliable and trustworthy evidence.

⁹⁷ World Economic Forum ‘Values and the Fourth Industrial Revolution: Connecting the dots between value, values, profit and purpose’ (2016).

⁹⁸ E McPherson ‘ICTs and human rights practice’ (2015) *Centre of Governance and Human Rights* 14.

⁹⁹ UN General Assembly ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns on the Use of information and communications technologies to secure the right to life’ 24 April 2015, A/HRC/29/37, 7.

¹⁰⁰ C Koettl ‘Sensors everywhere: using satellites and mobile phones to reduce information uncertainty in human rights crisis research’ 11 (2017) *Genocide studies and prevention* 38.

Unfortunately, the human rights community is not immune to the problem of ‘fake news’ and we have witnessed how not verifying social media or citizen media content can have far-reaching consequences, including damaging the institutional credibility of an organisation. For instance, in 2015, Kenneth Roth, the Executive Director of Human Rights Watch, tweeted a picture and inaccurately attributed it to Aleppo, Syria whereas in reality it was a picture from Gaza. After a lot of backlash, he issued a retraction through another tweet while deleting the previous one.¹⁰¹ Amnesty International has also fallen prey when it ‘accidentally used a clip of an edited – thus potentially misleading – YouTube video to communicate [its] research findings.’¹⁰² Seeing how easily these two reputable international human rights organisations could be caught up in the web of citizen media falsehoods all the more reinforces the importance of verifying every piece of evidence emanating through citizen media. Buttressing this point, Orentlicher stated:

For NGOs, the stakes in surviving such scrutiny could not be higher. The credibility of their fact-finding is their stock-in-trade. Broadly stated, the chief objective of human rights NGOs is to promote compliance with international human rights standards... Fact-finding lies at the heart of these efforts, and the fact-finding “works” when it convinces the target audience that the published allegations are well founded.¹⁰³

In addition to embarking on verification before relying on citizen media for human rights fact finding, one other concern when contemplating the future of citizen media is the lack of due diligence when compared with traditional media. It can be argued that more harm is done when an incorrect piece of information is reported as against when no information at all is reported. The accuracy of a report should always trump the rush to break the news first. This becomes critical considering the grave impact that misinformation can have. For instance, in 2021, a manipulated image of former President Jacob Zuma in an orange prison uniform went viral online and even though this was a doctored image, it nevertheless fueled anarchy that has been described as the most violent civil unrest in post-apartheid South Africa.¹⁰⁴ Similarly, in 2018, a graphic video was circulated across WhatsApp in India purporting to be Indian children being killed by gangs. The video was however from five years prior and was in connection with

¹⁰¹ See the photo posted by Kenneth Roth @KenRoth on 9 May 2015 <https://twitter.com/KenRoth/status/597005125018906625> (accessed 11 May 2020).

¹⁰² C Koettl ‘Citizen media research and verification: an analytical framework for human rights practitioners’ (2016) *1 Human rights in the digital age CGHR Practitioner Paper 4*.

¹⁰³ DF Orentlicher ‘Bearing witness: the art and science of human rights fact finding’ (1990) *3 Harvard Human Rights Journal* 92-93.

¹⁰⁴ WITNESS ‘Truth tellers – Report of a two-day mis/disinformation West Africa cross-disciplinary convening’ (2021) 12.

a gas attack that killed Syrian infants. The video fueled violent attacks across India which led to the death of at least 20 people over the course of two months.¹⁰⁵

An incomplete video account of an atrocity that is hastily shared on social media may be helpful for criminal investigators as a piece to a puzzle down the line, but at the same time may set off a domino effect that ends up igniting violence for the wrong reasons. While cautioning on the negative impact that inaccurate videos can have on already volatile situations, Koettl stated that '[s]uch content has the potential to trigger new violence and abuses in fragile communities and exaggerate existing tensions.'¹⁰⁶ If citizen media must become a vital and reliable part of human rights fact finding, then citizen journalists must consider themselves as people whose documentation has a significant impact on fact finding and investigation and, therefore, should be circumspect when disseminating citizen media evidence.

The irony is that while many citizen journalists are documenting and disseminating video evidence with the aim of holding perpetrators accountable, there is yet to be proper accountability for those who wittingly or unwittingly share misleading and incorrect information, and this has formed part of the criticism for citizen journalists. Moyo notes that:

The non-professional journalists are not accountable to anyone but themselves, and their 'journalism' is not guided or constrained by any ethical norms or principles but rather by gut feeling and commonsense. In a crisis situation . . . citizen journalism could worsen things by spreading untruths and half-truths which could lead to panic and disorder. While professional journalists are happy to tap on to this emerging resource for the raw material of their news product, they remain wary of these pitfalls.¹⁰⁷

Contrast this with the first and second generations of human rights factfinders; their reputation, which is part of their currency, can be severely and irredeemably battered if they publish unsubstantiated reports. In fact, in many cases when an erroneous publication is made, a follow-up correction, clarification or outright retraction is initiated. On the other hand, as far as citizen media is concerned, the demand for ethical compliance is there, but when a citizen journalist runs series of 'red lights' with their post, there are hardly ever any repercussions. This, in itself, creates a system of double standards which is especially frustrating for professional journalists that form part of the traditional media. Mahoney, a writer for Huffington Post, who considers himself a part of the 'old guard' harshly condemns the lack of adequate regulation for citizen journalists, stating:

¹⁰⁵ R Chitravanshi 'When fake news sparks violence: India grapples with online rumours' (2018) <https://phys.org/news/2018-07-fake-news-violence-india-grapples.html> (accessed 22 May 2020).

¹⁰⁶ Koettl (n 102 above) 2.

¹⁰⁷ Moyo (n 15 above) 562.

Citizen journalists lack any comparable checks on their ability to mess with the news cycle. Sure, journalism can be an ivory tower propaganda piece, but on its worst days it's often still better than an unchecked blogosphere filled with people searching for book deals.¹⁰⁸

Healthy skepticism should be encouraged. However, the kind of critique given by Mahoney is at the same time dismissive of the immensely relevant role citizen journalists get to play in ensuring that violence, atrocities and other happenings, do not elude one form of digital capture or the other. As explained earlier, there are several scenarios that can make it impossible for TV camera crews or human rights defenders to be present with boots on the ground at the moment a violation is occurring, but citizen journalists and other digital witnesses are always there and usually at high risks to their personal safety.¹⁰⁹ While it is easy to criticize citizen journalists for being less credible, it must be noted that they are also not beneficiaries of a wide variety of protections and privileges accorded to professional journalists¹¹⁰ and, therefore, have limited options for technical improvement and support.

Furthermore, the 'old guard' to which Mahoney belongs is not devoid of inaccurate reporting and misleading information either. The *New York Times*,¹¹¹ for example, has had its fair share of major and minor factual errors,¹¹² some of which were not corrected through any form of retraction. Although, a distinction can still generally be seen in the manner traditional media is held to account for its mistakes, which in some cases goes beyond retractions and extends to employment terminations. For instance, in June 2017, CNN retracted an inaccurate story involving President Donald Trump and Russia. The three journalists responsible for that story also resigned.¹¹³ Equally relevant here is the 2018 situation with the South African *Sunday Times*, which admitted to having published inaccurate news reports dating as far back as 2011. These reports earned the media outlet accolades and awards at the time but upon the revelation that they were false, a public apology was issued and the awards and prize money were returned,

¹⁰⁸ T Mahoney 'Citizen journalism needs a dose of journalistic ethics after Sandy' *Huffington Post* (6 November 2012) http://www.huffingtonpost.com/tyler-mahoney/hurricane-sandy-citizen-journalism_b_2082596.html (accessed 30 May 2020).

¹⁰⁹ According to Reporters without Borders, citizen journalists made up 70% of the media-related deaths that occurred in Syria from 2011 – 2013. See N Vogt 'Another Casualty of war in Syria – citizen journalists' (26 August 2013) *Pew Research Center* <http://www.pewresearch.org/fact-tank/2013/08/26/another-casualty-of-war-in-syria-citizen-journalists/> (accessed 29 May 2020).

¹¹⁰ Jurrat (n 11 above) 15.

¹¹¹ The *New York Times* is an American newspaper which had its first issue in 1851.

¹¹² P Bump 'If the *New York Times* is so inaccurate, where are all of its corrections?' *Washington Post* 27 February 2017 https://www.washingtonpost.com/news/politics/wp/2017/02/27/if-the-new-york-times-is-so-inaccurate-where-are-all-of-its-corrections/?noredirect=on&utm_term=.d595e8d78ea5 (accessed 30 May 2020).

¹¹³ J Schwartz 'CNN error extends run of journalistic mishaps' 8 December 2017 <https://www.politico.com/story/2017/12/08/cnn-trump-error-journalism-287914> (accessed 30 May 2020).

along with some staff journalists being relieved of their duty.¹¹⁴ This kind of accountability has been achieved over and over again within the traditional media space¹¹⁵ and has become the gold standard being demanded of the new generation of fact finders – the citizen journalists, who have made social media their primary outlet.

We are, indeed, beginning to see a measure of accountability being imposed on new media users as well, only that it is just not as prevalent as it is with traditional media. For instance, platforms such as Twitter have as part of their policy, the suspension of accounts that run afoul of certain regulations; and more recently, the social media platform for the first time, marked a video post as ‘manipulated video’.¹¹⁶ As necessary as citizen media regulation is, it is extremely complicated because there is the existential threat that such regulation may be hijacked by authoritarian regimes and used to gag and suppress citizen journalists. Furthermore, such regulation can potentially infringe on well-established rights such as the freedom of expression. On the extreme front, we have already started to witness countries like Nigeria craft laws and policies that will impose excessive penalties on users of social media who post misleading information.¹¹⁷ This would result in unintended consequences which is why advancing calls for regulation of citizen journalists and citizen journalism must be done with caution. The issue of establishing a regulatory framework for citizen media and citizen journalism will be adequately addressed under Chapter 5.4 of this thesis.

In order to make citizen media evidence more reliable and also maximize the value drawn from it for human rights accountability and fact-finding, organisations like WITNESS

¹¹⁴ B Siqoko ‘We got it wrong, and for that we apologise’ *Sunday Times* 14 October 2018 <https://www.timeslive.co.za/sunday-times/news/2018-10-13-we-got-it-wrong-and-for-that-we-apologise/> (accessed 22 May 2020).

¹¹⁵ More recently in May 2021, an investigative report was released that found that the BBC fell short of the standards of integrity and transparency in its 1995 interview with Princess Diana. See M Holden ‘Journalist lied to get Diana interview, BBC covered it up – report’ *Reuters* 20 May 2021 <https://www.reuters.com/world/uk/princess-diana-1995-bbc-interview-report-expected-2021-05-20/> (accessed 20 June 2021).

¹¹⁶ In its new ‘Synthetic and manipulated media policy’ Twitter stated that it will label tweets containing images or videos that may have been deceptively altered or fabricated. This is being done to help people understand their authenticity. See Twitter Help Media ‘Synthetic and manipulated media policy’ <https://help.twitter.com/en/rules-and-policies/manipulated-media> (accessed 29 May 2020). The first incident it applied this policy was in the case of a manipulated video of America’s former Vice President, Joe Biden. See C Zakrzewski ‘Twitter flags video retweeted by President Trump as “manipulated media”’ *The Washington Post* 8 March 2020 <https://www.washingtonpost.com/technology/2020/03/08/twitter-flags-video-retweeted-by-president-trump-manipulated-media/> (accessed 29 May 2020).

¹¹⁷ Two Bills before the Nigerian legislature – one on the prohibition of hate speech and the other on regulating internet falsehoods – grant the government the powers to limit social media access, shut down the internet and impose a death penalty for hate speech. See Amnesty International ‘Nigeria: Bills on hate speech and social media are dangerous attacks on freedom of expression’ 2019 <https://www.amnesty.org/en/latest/news/2019/12/nigeria-bills-on-hate-speech-and-social-media-are-dangerous-attacks-on-freedom-of-expression/> (accessed 30 May 2020).

are investing in resources that can harness and refine the skills of citizen journalists.¹¹⁸ These are some of the ways to ensure that in future cases of human rights violations, investigators and prosecutors can rely on citizen media evidence with greater degrees of confidence.

2.6. Conclusion

Recognising the contributions of citizen journalists to human rights fact finding and the pursuit of justice, citizen journalists' intervention should only seek to strengthen the evidence gathering process and not dismiss citizen media only because of its many challenges. Otherwise, it would be tantamount to 'throwing away the baby with the bath water.'

In seeking to strengthen citizen journalism, guidelines may equally be provided. It is obvious from the examples cited above that traditional media is not necessarily more accountable because it is full of professionally trained journalists. Rather, it is more accountable because of the guidelines and codes of conduct which journalists are bound by, and which are followed up by repercussions should the rules be flouted. By the same token, therefore, achieving greater accountability from citizen journalists that will invariably deliver more trustworthy evidence, can come by way of guidelines. Citizen journalists must however be aware of the difficulty of such a process and be wary of allowing any attempt at regulation become the ground for stifling fundamental human rights.

The beauty of citizen journalism is that people keep rising up by themselves and out of necessity to document the violations around them and the more proliferation of technology that occurs, particularly mobile phone technology, the more citizen journalists will emerge across the world, even in the most remote places. As ubiquitous as citizen media evidence is at the moment, it has not peaked, and the general public is bound to see an emergence of more citizen journalists, especially in Africa. Understanding this inevitability should drive us to ensure that the barriers that currently exist in limiting the utility of citizen media evidence to advance justice and accountability, are overcome. These barriers would be discussed in the next chapter.

¹¹⁸ As an organization, WITNESS trains civilian witnesses on how to more efficiently capture violations of human rights for subsequent use as evidence in courtrooms. The organization also engages with technology companies in order to get them to create/develop solutions that are relevant to civilian witnesses and the human rights community. See further: <https://witness.org/our-work/> (accessed 17 May 2020).

Chapter Three: Challenges to citizen media

3.1. Introduction

It is important to recognise that citizen media is not a magic wand that will straight out of the gate, deliver accountability without overcoming certain challenges or in fact working in conjunction with other strategies. For citizen media to foster accountability in any significant way, there are processes it goes through that I have broken down into three stages, each of which can substantially influence how effective the citizen media will eventually be in bringing about justice and accountability. The first of these stages is the documentation stage; this refers to how the occurrence is caught on any form of digital device, which in most instances will be a cellphone. The second stage is the dissemination phase, which refers to how the citizen video or picture gets shared and becomes discovered by human rights investigators. This second stage has a lot to do with the almost inextricable connection between citizen media and social media platforms when it comes to discoverability. Lastly, is the third stage, which is the evidentiary phase; the goal from the beginning is to arrive at a point where citizen media becomes used as evidence in commencing an investigation, supporting an advocacy effort or prosecution before a tribunal or court.

These three stages are fraught with challenges that can impact on the ultimate end result – the advancement of accountability for human rights violations. Therefore, this chapter will consider the challenges to citizen media from the point of documentation, to its dissemination and then finally its use as evidence. The challenges being discussed under this chapter range from the question of professionalism which impacts on the effective documentation of atrocities, to the challenges posed by existing laws that tend to frustrate the vibrant use of citizen media in court room settings. I will also discuss the problems encountered when human rights activists attempt to interact with citizen media, as they work on verification in order to deliver a compelling case using citizen media evidence. There are a few overlapping issues that touch on more than one stage; for instance, the challenges created as a result of deepfakes is one that cuts across both the dissemination and evidentiary stages. Such issues will be discussed as a separate category I have called cross-cutting challenges.

The challenges discussed under this chapter are in no way exhaustive. Furthermore, while much of what is interrogated below tends to depict everything that can get in the way of using citizen media to advance accountability, the aim is not to discourage our reliance on citizen media. Rather, the purpose of highlighting these challenges is to help recognise the weak points and give us an opportunity to reflect on how to strengthen citizen media for use in human

rights investigations. The solutions being engineered to counter these challenges are the subject of Chapter Five of this thesis.

3.2. Documentation stage

In most cases when a citizen journalist embarks on documenting a human rights violation, it is usually with the aim of having proof that can be subsequently used to hold the perpetrator accountable. In her doctoral dissertation focused on citizen journalism and police accountability,¹ Farmer interviewed community members who had used mobile phones to document police atrocities and one of them, in responding to why he is resorting to citizen journalism, stated:

I think it increases accountability. And that's the main thing is accountability. Because in the past, when things have taken place, you know there was no record of it and it's your word against theirs. I mean even now with recording, the video recording, even seeing it right before your eyes, some people look at that and say, "well you did something to deserve it".²

For many therefore, documenting the violation serves as corroborating evidence. But what the foregoing statement also highlights is a challenge that partially goes to the root of how the violation is documented – the lack of a full context of the violation in most instances which then results in skepticism about the trustworthiness of the evidence. What we usually see is the commission of the crime and not what happened prior. How this limited perspective impacts on citizen media will be fully discussed later on in this chapter.

The process of documentation is a dilemma as it raises the question of authenticity because when a postmortem is done on a video, an image or an audio, it has to pass the test of authenticity for it to be usable as a piece of evidence. Christoph Koettl, in his extensive work with verifying eyewitnesses' cell phone videos that captured atrocities committed both by Boko Haram and the military in Nigeria, stated that 'the risk of inaccuracies is enormous.'³ According to him, the verification will sometimes involve locating and interviewing eyewitnesses who can further corroborate the video evidence.

While the circumstances in which citizen journalists find themselves vary from conflict situations to instances of police brutality and so on, one common denominator is the often tense

¹ AK Farmer 'Copwatchers: Citizen journalism and the changing police-community dynamic' PhD dissertation, University of Delaware (2016).

² Farmer (n 1 above) 80.

³ C Koettl 'How technology helped us expose war crimes in Nigeria' 2015 *Amnesty International* <https://www.amnesty.org/en/latest/news/2015/06/how-technology-helped-us-expose-war-crimes-in-nigeria/> (accessed 5 November 2020).

and chaotic nature of these situations being documented and this invariably goes on to introduce challenges that impact on the manner the incident is captured by a civilian or citizen journalist. At this documentation stage therefore, I look at two challenges; one in relation to answering the question as to whether citizen journalists are allowed to record perpetrators who are public officers, who in most instances are law enforcement agents; and the other challenge is with regards to the professionalism or the lack thereof with which the violations are documented.

3.2.1. Challenge of legitimacy

The act of citizen journalism is a brave one, whether in war torn Syria, or in authoritarian states like Eritrea. Even in advanced democracies, filming violators who are sometimes the police or military, can place the citizen journalist at risk to their personal safety as there continue to be numerous accounts of police harassment and retaliation launched against daring citizens who document police violence and abuse.⁴ This has therefore raised questions regarding the legitimacy of recording law enforcement agents, who in the course of their duty, violate human rights. Does a citizen have the right to record the police? Is it worth the risk for a citizen to record state agents acting with impunity? While the position under international law is clear and is in support of the right to record, as set out below, in some national jurisdictions, such an act can warrant fines and even further violations, as will be discussed below.

Article 19 of the International Covenant on Civil and Political Rights (ICCPR) gives statutory backing to citizen media and citizen journalism. Article 19(2) in particular states as follows:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.⁵

It is difficult to believe that the drafters of the ICCPR would have envisaged a day when technological advancement will introduce other tiers into the media realm. Nevertheless, the inclusion of ‘other media’ in article 19(2) ensures that citizen media evolution is covered by this treaty provision. In 2011, while enunciating on the provisions of article 19, the Human

⁴ See Amnesty International ‘Endangered voices: Attack on freedom of expression in Nigeria’ 2019. Furthermore, in the United States, citizens whose cellphone recordings exposed police brutality and killing, have been arrested and jailed, in addition to their phones being confiscated. See: T Timm ‘People who film police violence are citizen journalists. We are with them’ *The Guardian* 10 August 2016 <https://www.theguardian.com/commentisfree/2016/aug/10/filming-police-violence-citizen-journalists-first-amendment> (accessed 25 May 2019).

⁵ International Covenant on Civil and Political Rights (ICCPR) GA Resolution 2200A adopted 16 December 1966, entered into force on 23 March 1976.

Rights Committee specifically and succinctly acknowledged the role citizen media and citizen journalists play in modern times:

States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.⁶

Not only is this a remarkable recognition of citizen media, it also further obligates states to ensure this new form of communication is not suppressed.

Interpreting the right to record as being a core part of article 19(2) should not be considered as absurd because it would only be logical to expect that for there to be the right to disseminate or impart information (as guaranteed under article 19), there must also be the right to record in the first place. This would easily compare to the argument about how it is practically impossible to fully safeguard the right to life without ensuring there is access to quality and affordable healthcare. One cannot be delineated from the other. To further buttress this, special rapporteurs Kiai and Heyns in their 2016 report to the UN Human Rights Council, affirmed that the right to record is derived from the ‘the right to seek and receive information which is protected under article 19(2) of the International Covenant on Civil and Political Rights.’⁷ They stated further in their report that:

Everyone — whether a participant, monitor or observer — shall enjoy the right to record an assembly, which includes the right to record the law enforcement operation. This also includes the right to record an interaction in which he or she is being recorded by a State agent — sometimes referred to as the right to “record back”. The State should protect this right. Confiscation, seizure and/or destruction of notes and visual or audio recording equipment without due process should be prohibited and punished.⁸

It is therefore well established under international law that citizens may record human rights violations that they are witnesses to.⁹ What is left to be seen is widespread state practice that acknowledges this right and a compliance across board by government agents. Until this

⁶ UN Human Rights Committee (HRC) General comment 34 on article 19 Freedoms of opinion and expression, 12 September 2011 CCPR/C/GC/34 para 15.

⁷ M Kiai & C Heyns ‘Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies’ (2016) A/HRC/31/66 para 68.

⁸ Kiai & Heyns (n 7 above) para 71.

⁹ Another noteworthy point from the report by the Special Rapporteurs is their definition of ‘monitors’ which includes citizen journalists. Refer to Kiai & Heyns (n 7 above) para 69.

happens, there are no guarantees that the risks attached to citizens documenting human rights violations will be ameliorated.

State security forces have always been wary of citizen journalists armed with a camera because these are the tools these civilians use to expose all manner of human rights violations perpetrated by the state and its agents. It therefore comes as no surprise that countries like Spain have taken steps to ban the filming and photographing of police officers. The Spanish parliament passed a law aimed at gagging citizen media. According to that law, individuals can be fined up to €30,000 for ‘disseminating photographs of police officers that are deemed to endanger them or their operations.’¹⁰ Although the law is seemingly targeted at punishing anyone who disseminates videos of police officers, it is highly probable that this will ultimately impede the ability of citizens to record since the goal of filming police abuse in the first place is usually to disseminate it and expose the atrocity. Nothing else better captures this than a 2021 incident in which two Spanish police officers practically attacked two civilians for filming them as they arrested another civilian.¹¹

Also very disturbing is the recent Bill that was passed into law in Arizona prohibiting individuals from filming the police from less than 8 feet away. The violation of this law is categorized as a Class 3 Misdemeanor which can attract a punishment of up to 30 days jail time, \$500 fine or 12 months’ probation.¹² The content of this law goes contrary to the position of US courts affirming citizens’ right to record. In the case of *Richard Fields v City of Philadelphia*¹³ the court affirmed that ‘recording police activity in public falls squarely within the First Amendment right of access to information. No doubt the press has this right, so does the public.’¹⁴ The Court, in its judgment, went further to recognise the gap that bystander videos fill by providing a different perspective of an event separate from police dashboard cameras, and how integral these videos become to finding out the truth in circumstances when the ‘police choose not to record or withhold their footage from the public.’¹⁵ Having a law like the one in Arizona that prohibits recording the police not less than 8 feet away, ignores the fact that this

¹⁰ The Guardian ‘Spain’s new security law sparks protests across country’ 2014 <https://www.theguardian.com/world/2014/dec/20/spain-protests-security-law-parliament> (accessed 10 August 2017).

¹¹ J Leighfield ‘Police in Arrecife accused of excessive brutality during arrest’ 2021 <https://www.euroweeklynews.com/2021/02/09/police-in-arrecife-accused-of-excessive-brutality-during-arrest/> (accessed 30 March 2021).

¹² State of Arizona House Bill 2319: An Act Amending Title 13, Chapter 37, Arizona Revised Statutes, by adding Section 13-3732; relating to law enforcement activities (2022).

¹³ *Richard Fields v City of Philadelphia et al* (2017) United States Court of Appeals for the Third Circuit, Case no 16-1650.

¹⁴ *Richard Fields case* (n 13 above) 14.

¹⁵ *Richard Fields case* (n 13 above) 14 – 15.

would not be logical in all circumstances, such as protests and demonstrations. Moreover, enacting such law has the potential of discouraging people from filming altogether for fear of breaching the 8 feet rule and attracting not just jail time but also a criminal record next to their name.

It must be stated that the usual clampdown against recording security agents is not targeted only against citizen journalists but against professional journalists alike.¹⁶ In its 2020 report, the United Nations Assistance Mission for Iraq (UNAMI) referenced attacks on the media stating: ‘Journalists also reported being injured at the site of demonstrations despite being identifiable as press, being assaulted and harassed, having their equipment confiscated or material deleted, and, in some cases, being temporarily detained.’¹⁷ The significant difference however is that while professionals have added legitimacy due to recognised institutional backing, citizen journalists are left exposed and vulnerable with their legitimacy further called into question because they do not possess certification, do not belong to a professional body, do not carry a recognised corporate identification and do not have the support of an organized body.¹⁸

As an acknowledgement of this reality, the Human Rights Council, through a resolution in 2018, urged States to pay particular attention to the safety of those recording peaceful protests by ensuring they do not suffer harm and that they have access to redress in the event that they become victims of any human rights abuse.¹⁹ It is imperative to note that as significant as this resolution is, it does not go far enough because it tends to only give protections to the right to record during protests. Whereas, what is needed is for the right to record to be recognised in all circumstances involving a public officer carrying out their public duty.

(a) Case study: Nigeria

In Africa, the Nigeria Police Force recently ran a social media information series on how to improve citizen relations with the police during an arrest and one of their instructions was for

¹⁶ For instance, a group of journalists from France 2 television network were recently arrested by police while filming anti-coal protesters in Queensland, Australia. See: B Smee ‘Adani protest: French journalists arrested while filming anti-coal activities’ *The Guardian* 22 July 2019 <https://www.theguardian.com/business/2019/jul/22/adani-protest-french-journalists-arrested-while-filming-anti-coal-activities> (accessed 23 July 2019).

¹⁷ See UNAMI OHCHR report ‘Human rights violations and abuses in the context of demonstrations in Iraq-October 2019 to April 2020’ 7.

¹⁸ In the report by UNAMI OHCHR, it was noted that traditional journalists expressed concerns over the protection of citizen journalists because they lacked training in digital and physical security. See UNAMI OHCHR report (n 17 above) 41.

¹⁹ Human Rights Council Resolution 38/11 ‘The promotion and protection of human rights in the context of peaceful protests’ (2018) A/HRC/38/L.16 paras 8 & 18.

citizens not to use their phone ‘indiscriminately while being arrested.’²⁰ Requests for clarification on the word ‘indiscriminately’ never received any official response and thus leaves one wondering if the Nigeria Police Force is willfully encouraging its agents to prevent citizens from recording arrests or other police misconduct.²¹ This tweet that demonstrates a subtle resistance to civilians filming the police is consistent with overt cases in which law enforcement officers intimidate citizens for filming them. One such instance is the case involving 41 year old Annibong Annankwu who was arrested and subsequently sued on charges of breach of peace for recording the police, and assault for obstructing arrest.²² There was also the case of Mary Ekere who, despite being a journalist, was arrested, jailed and arraigned before a magistrate court, after she was seen taking pictures of state agents harassing street traders.²³ Further still, during the #EndSARS protests of 2020, two women – Felicia Okpara and Treasure Nduka – were arrested and subjected to inhumane treatment for filming police abuse.²⁴

Even though there is no provision under Nigerian law that explicitly protects the right to record, there are no provisions prohibiting it either. Moreover, I will argue that sections of the Nigerian constitution contain provisions that can be applied to defend the right to record. For instance, section 22 stipulates as follows:

The press, radio, television and other agencies of the mass media shall at all times be free to uphold the fundamental objectives contained in this Chapter and uphold the responsibility and accountability of the Government to the people.²⁵

A key phrase to pay attention to in the foregoing constitutional provision is ‘and other agencies of mass media’. Considering that civilian witnesses are regarded as citizen journalists, I will argue that they legitimately fall under the categorization of ‘other agencies of mass media’ because even though they typically do not work within traditional media houses, they are agents

²⁰ Refer to the official Twitter handle of the Nigeria Police Force (@PoliceNG). See tweet <https://mobile.twitter.com/policeng/status/1127870568626302976> (accessed 21 May 2019).

²¹ A few Nigerians replied to the post asking the Police Force to define what they meant by indiscriminate use of phone during arrests, such as this example: <https://twitter.com/ayoolakassim/status/1127948929969131521?s=20> (accessed 13 January 2020).

²² The Punch Newspaper ‘Man in court for allegedly filming policeman on duty’ 20 December 2018 <https://punchng.com/man-in-court-for-allegedly-filming-policemen-on-duty/> (accessed 9 July 2019).

²³ C Ukpogon ‘Akwa Ibom throws journalist in jail for taking photos’ *Premium Times Nigeria* 18 September 2019 <https://www.premiumtimesng.com/news/top-news/352888-akwa-ibom-govt-throws-journalist-in-jail-for-taking-photos.html> (accessed 2 October 2019).

²⁴ Lagos Metropolitan ‘My ordeal by Felicia Okpara, victim of #EndSARS police assault’ 16 October 2020 <https://lagosmetropolitan.com/2020/10/16/exclusive-my-ordeal-by-felicia-okpara-victim-of-endsars-police-assault/> (accessed 30 March, 2021). Felicia Okpara was later awarded monetary compensation of N750,000 (seven hundred and fifty thousand naira) by the Lagos State judicial panel of enquiry for the assault against her by the Nigeria police. See I Adediran ‘#EndSARS: Panel awards N16million to four victims’ *Premium Times* 27 March 2021 <https://www.premiumtimesng.com/news/top-news/451628-endsars-panel-awards-n16-million-to-four-victims.html> (accessed 30 March, 2021).

²⁵ Constitution of the Federal Republic of Nigeria, 1999.

of mass media. Besides, the UN has alluded to the fact that protections accorded to media personnel should not be limited only to those formally trained as journalists but should also extend to ‘community media workers, citizen journalists and others who may be using new media as a means of reaching their audiences.’²⁶

The second key phrase to analyse under section 22 is ‘uphold the responsibility and accountability of the Government to the people’. This is important because it essentially indicates that members of the media should exercise press freedom in order to ensure government accountability. Since recording state agents helps foster accountability through the provision of digital evidence of their crimes, I will contend that it is not far reaching to consider section 22 as an applicable constitutional provision that protects the right to record. Although, it will be of additional benefit to have court jurisprudence around this issue in order to clearly establish this right locally and bring it at par with what exists under international law as well as in other domestic courts like the US.

(b) Case study: South Africa

Juxtaposing the case of Nigeria with that of South Africa however, the law in the latter is more explicit. Provisions of South Africa’s Police Standing Order 156 supports the taking of photographs and recording of videos of police activities:

Section 10 [3] [a] Although the media may be prohibited in terms of section 69 of the South African Police Service Act, 1995, from publishing certain photographs and sketches, a media representative may not be prohibited from taking photographs or making visual recordings.

... [c] A media representative may under no circumstances be verbally or physically abused and cameras or other equipment may not be seized unless such camera or equipment may be seized as an exhibit in terms of any law. Under no circumstances whatsoever, may a member willfully damage the camera, film, recording or other equipment of a media representative.²⁷

In as much as the foregoing provision exists, there are a few challenges. On a closer look, section 69 of the South African Police Service Act (SAPS Act) seems to be a claw back clause to the provisions of section 10(3)(a) of Police Standing Order 156. On the one hand section 10(3)(a) of the Police Standing Order makes provision for the taking of videos and photographs, but then on the other hand, section 69 of the SAPS Act prohibits the taking of photographs of someone in a manner that it will be prejudicial to an ongoing investigation, or publishing the photographs of a suspect or witness without the prior written permission of the

²⁶ UN Plan of Action on the safety of journalists and the issue of impunity CI-12/CONF.202/6, 2.

²⁷ Standing Order (General) 156 – Media Communication in the South African Police Service, Issued by Consolidation Notice 16/2003.

National or Provincial Commissioner. While the determination of what will be prejudicial to an investigation would be a matter for the courts to decide, this provision can quickly become the grounds upon which the police in South Africa deny citizens and professional journalists the right to record particularly in that moment when such recording is most paramount.

In practice, police officers in South Africa have not refrained from intimidating people who try to record them, to the point of physical assault and demanding for the footage to be erased, despite the provisions of section 10(3)(c) of Standing Order 156.²⁸ But in addition to this, a glaring concern in the provisions of Standing Order 156 is the constant use of the phrase ‘media representative’ which underscores my earlier point made about how citizen journalists struggle more with legitimacy due to their stand-alone status. The use of the phrase ‘media representative’ suggests that provisions of Standing Order 156 are only applicable to employees of media houses, which citizen journalists are not. Despite there not being a direct mention of ‘citizen journalists’ in this provision however, the courts will hopefully not find problems applying it to protect citizen journalists since the crux of the provision is more in relation to safeguarding the right to record and not so much about the qualification of the person recording.

Moreover, the interpretation of Standing Order 156 is already being expanded to cover citizen journalists. In addition to the Standing Order, an internal memo buttressing the right of citizens to record police activity was circulated by the City of Cape Town’s Safety and Security Directorate, stating *inter alia* that ‘there is no law and or legal provision which prohibits members of the public from taking photographs and/or video clips of members carrying out their duties.’²⁹ While these are incremental steps taken to clarify the right to record in South Africa, having constitutional provisions or case law set a precedent will more firmly establish this right.

(c) Case study: United States of America

In the United States, the precedent set by the courts is that citizens have the right to record as long as it does not hinder the law enforcement agents from carrying out their duties, especially because filming the police can help expose wrongdoing.³⁰ The right to record has been litigated and the courts have held that this right falls within the provisions of the First Amendment rights

²⁸ S Valentine ‘South African Police repeatedly force journalists to delete photos’ 2015 *Committee to Protect Journalists* <https://cpj.org/blog/2015/03/south-african-police-force-journalists.php> (accessed 23 May 2019).

²⁹ IOL News ‘It’s not illegal to film cops while they’re doing their job’ (2018) <https://www.iol.co.za/capeargus/news/its-not-illegal-to-film-cops-while-theyre-doing-their-job-14642810> (accessed 23 May 2019).

³⁰ See *Richard Fields case* (n 13 above) 862 F 3d 353.

of the U.S. constitution, which makes provisions for freedom of speech and the free press.³¹ In *Simon Glik*, the U.S. Court of Appeals held, *inter alia*, that:

Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting "the free discussion of governmental affairs"... a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.³²

In addition, the court unanimously ruled to reject the distinction being made about Simon Glik not being a reporter. It stated as follows :

changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.³³

This ruling is significant and serves as an excellent example of what one hopes to see affirmed by the courts in African countries like Nigeria and South Africa. Also noteworthy is the argument presented on the importance of the right to record by the Civil Rights Division of the U.S. Department of Justice in relation to the case of *Christopher Sharp v Baltimore City Police Department et al*, thus:³⁴

it is the United States' position that any resolution to Mr. Sharp's claims for injunctive relief should include policy and training requirements that are consistent with the important First, Fourth and Fourteenth Amendment rights at stake when individuals record police officers in the public discharge of their duties. These rights, subject to narrowly-defined restrictions, engender public confidence in our police departments, promote public access to information necessary to hold our governmental officers accountable, and ensure public and officer safety.³⁵

Affirming that by protecting citizens' right to record also helps engender accountability is an acknowledgement of the power of citizen video evidence. In this regard, the United States presents an exemplary model for other countries with regards to their respect for the right to record. Although, as progressive as the US courts and Justice department have been in upholding the significance of citizen journalists and citizen media, we have at the same time been confronted with the reality that simply having the law is not enough, it must be

³¹ *Simon Glik v John Cunniffe* (2011) 655 F 3d 78.

³² *Glik* case (n 31 above).

³³ *Glik* case (n 31 above).

³⁴ Civil Case No CCB-11-2888. In this case, the plaintiff had alleged that officers of the Baltimore Police Department seized his phone and deleted video evidence that showed police officers arresting a woman.

³⁵ Letter from United States Department of Justice, Civil Rights Division, JMS:TDM:RJO; DJ 207-35-10 (2012).

complemented with implementation and enforcement. A lot still needs to happen even in the United States to bring the police force into full compliance with the constitutionally guaranteed right to record because several examples abound of police officers harassing citizens for filming.

According to a report by the Civil Rights Division of the U.S. Department of Justice which investigated the Ferguson Police Department, it stated that despite the lawsuits affirming the right of citizens to record, ‘it appears that FPD [Ferguson Police Department] continues to interfere with individuals’ rights to protest and record police activities’³⁶, including using arrest as a punitive measure for those who film.³⁷ The report cites a protest incident in 2015 when police officers took measures to prevent people from filming:

A protester in a wheelchair who was live streaming the protest was also arrested. Another officer moved several people with cameras away from the scene of the arrests, warning them against interfering and urging them to back up or else be arrested for Failure to Obey. The sergeant shouted at those filming that they would be arrested for Manner of Walking if they did not back away out of the street, even though it appears from the video recordings that the protesters and those recording were on the sidewalk at most, if not all, times.³⁸

These incidents point to the fact that the law alone is not enough, which is an issue underpinned by the social-legal theory. There is the need for vigorous and relentless advocacy around the right to record and its implementation. Citizens must be made aware of this right and law enforcement agents must continually be reminded of their obligation to respect it.

Additionally, it must be stated that justice for victims of crime is not a given simply because there is citizen media evidence of the incident. Citizen media is always only a part of the puzzle and while most citizen videos usually depict the ‘what’, investigators and prosecutors always need more than that to make a case. They need to know the when, the who, the how, and if possible, the why. But it begins with such evidence in itself being documented appropriately, a challenge that still plagues most citizen media evidence.

3.2.2. Challenge of professionalism

In the South African case of *Moloko v Commissioner Diale & others* we see how the courts are unwilling to admit into evidence any video that is unclear or of low quality.³⁹ In this case, the

³⁶ United States Department of Justice Civil Rights Division ‘Investigation of the Ferguson Police Department’ (2015) 27.

³⁷ An officer arrested an African-American woman for filming the police man who arrested her husband and the police subsequently deleted the video evidence from her phone. As above.

³⁸ United States Department of Justice Civil Rights Division (n 36 above) 28.

³⁹ *Moloko v Commissioner Diale & others* (2004) 25 ILJ 1067 (LC).

Applicant had been dismissed from her employment by the 3rd Respondent on the ground that she assaulted a customer at the store. The applicant challenged her dismissal and the matter went to arbitration where the arbitrator concluded that even though there was fair reason for discipline, the sanction was too harsh and ordered for the Applicant to be re-employed. Still dissatisfied with this ruling, the Applicant filed before the Labour court, seeking for the arbitration award to be set aside on the basis that reliance was placed on a piece of video evidence which was low in quality and an unsworn statement.⁴⁰ The Labour court agreed with the applicant when it said the following about the video quality:

The videocassette was brought to court and I had an opportunity to observe it. The recordings are so poor that I could not recognise any assault on any person. I have watched the videocassette in different video machines on several occasion. Despite this I was not able to identify any person being assaulted.⁴¹

This eventually led the court to rule that the dismissal of the Applicant was ‘both substantively and procedurally unfair’ because the employer had no evidence to prove any assault on any customer⁴².

The challenge of low-quality video evidence encountered in the *Moloko case* is one of the biggest concerns that continue to have a detrimental effect on the utility of citizen media. Many videos are shaky, blurry and sometimes omit capturing key elements such as name badges, insignia, landscape shot of the area and more, thereby making it easy for the video to be discredited. So while the videos may be relevant, they are not usable because they do not effectively expose key information. Mobile technology therefore becomes insufficient in the absence of the capacity to film capably.⁴³

Ironically, Bushey, in an article, referenced some informal studies made which reveal that ‘the blurry, amateur quality of camera phone images may increase the public's confidence that the footage is authentic’.⁴⁴ Many have come to associate shaky and blurry videos with civilian witnesses, which is partly why a group of Norwegian filmmakers in 2014 embarked on a controversial project to expose the grave war crimes in Syria by producing a shaky video bearing semblance with what will have been taken by a civilian witness with a cell phone in

⁴⁰ *Moloko case* (n 39 above) para 2 - 4

⁴¹ *Moloko case* (n 39 above) para 10

⁴² *Moloko case* (n 39 above) para 16

⁴³ S Gregory ‘Cameras Everywhere: Ubiquitous Video Documentation of Human Rights, New Forms of Video Advocacy, and Considerations of Safety, Security, Dignity and Consent’ (2010) 2(2) *Journal of Human Rights Practice* 192.

⁴⁴ J Bushey ‘Trustworthy citizen-generated images and video on social media platforms’ (2015) *IEEE Computer Society* 1553.

Syria.⁴⁵ Theirs was a botched attempt that drew intense criticism from the human rights community, which stressed that such ‘stunts’ only help feed the false narrative that citizen media cannot be trusted in the pursuit of accountability.

When it comes to advancing accountability through citizen media, I will argue that the clearer the imagery, the less disputable and more compelling the evidence will be. Even though there are tools that can be used to analyse blurry videos and extract valuable information, those with this skill set are currently very few and the demand for their expertise is extremely high.⁴⁶ It will therefore be more effective if citizen journalists learned how to capture less shaky videos that show greater clarity. Besides, when it comes to using citizen media to advance accountability, it is not the perception in the court of public opinion that will swing the balance of justice in the right direction. Rather, it is the sheer ability to prove the authenticity of the footage and link it to the violation and perpetrator.

It is therefore imperative to reinforce the importance of effective documentation that strengthens the reliability of citizen media evidence. This does not imply that sharp footages should be exempt from the verification process. It only means that the sparse and already very strained human resource that verifies these footages will spend less time trying to extract the relevant details from the footage. For instance, their starting point will not be to spend days trying to decipher the location or perpetrators of a crime. Instead, they can invest the time in establishing why the evidence is relevant in proving elements of the alleged crime. Moreover, with better documented visuals, citizen media will eventually attract fewer attacks to its credibility and legitimacy.

It is understandable why an untrained civilian will not be paying so much attention to some of these important details, more so because the circumstances under which they document are usually volatile and tense, hence there is little room for the citizen journalist to perform a balancing act of documenting the violation and capturing specific details at the same time. Nevertheless, if citizen media evidence must be used to hold perpetrators accountable, it must provide evidence that not only shows the crime but also gives indications as to who the perpetrator is and where it took place. Gregory buttresses this when he said:

a key part of citizen witnessing as it encounters the edges of evidentiary investigations is helping citizen witnesses understand that filming the insignia on military uniforms or

⁴⁵ R Mackey ‘Norwegian filmmakers apologize for fake Syria video’ *New York Times* 18 November 2014 <https://www.nytimes.com/2014/11/19/world/europe/norwegian-filmmakers-apologize-for-fake-syria-video.html> (accessed 16 July 2017).

⁴⁶ C Koettl ‘Citizen media research and verification: an analytical framework for human rights practitioners’ (2016) *Human rights in the digital age: CGHR Practitioner Paper 1*.

an inflammatory speech in a town square is often far more important than the direct documentation of another horrendous attack.⁴⁷

In my personal experience of using citizen media evidence to establish a violation of human rights, seemingly mundane things such as capturing a mountain range in the middle of nowhere can significantly improve the chances of being able to successfully geolocate where the violation occurred. But in many cases, citizen journalists are primarily focused on capturing only the violation and unintentionally leaving out some other key details that could assist in an investigation such as location, identifying markers of the perpetrators, equipment used in the violation, and so on.

The scrutiny over citizen media is needed. With more scrutiny, the community of citizen journalists can get better with how they document abuses and atrocities and rise above the fray of typical government tactics of discrediting or undermining the validity of citizen media evidence. This however cannot be left for the witnesses to figure out. If the human rights and journalism communities are demanding professionalization in the area of documentation, then citizen journalists have to be properly trained. We cannot place demands for more effective documentation of mass atrocities without organizing how exactly that will happen. In stressing the need for media literacy training for citizen journalists, Moeller made the following submission:

citizen journalists often have no formal journalistic training, nor do they typically have training in the essential roles independent media play in ensuring accountable and transparent government. Previously, if journalism values were not learned in schools and universities, they were inculcated in newsrooms. Citizen journalists have not typically had that kind of teaching.⁴⁸

Although, while pushing for professionalization of citizen journalists, we must take caution not to burden them with the trappings of traditional journalists which will make it difficult for more people to adopt citizen journalism. Emphasis should continue to be on effective documentation, ethical considerations and their personal safety, and since we cannot foresee those who will end up being accidental witnesses to an atrocity, it might be important to integrate this training into school curriculums under a category that addresses civic participation.

3.3. Dissemination stage

Visibility of an atrocity is one of the steppingstones towards justice. An unknown violation, no

⁴⁷ S Gregory 'Ubiquitous witnesses: who creates the evidence and the live(d) experience of human rights violations?' (2015) *Information, Communication and Society* 1382.

⁴⁸ SD Moeller 'Media literacy: Citizen journalists' (2009) *Center for International Media Assistance* 11.

matter how egregious, is unlikely to benefit from seeing justice done. Which is why we often find that citizen journalists make use of social media to disseminate videos and pictures of violations that they have captured with the hopes that someone or an organisation with the capacity to utilize the evidence will discover it and act upon it. In some other cases, citizen journalists send their footage directly to news media outlets or human rights organisations but there are no guarantees that it will be acted upon as such information may not be deemed as priority to the organisation or it may be outside of their purview of work. Therefore, the decision to disseminate citizen media evidence has to be approached strategically. Whether or not to share a citizen video, where to share it, when to share it and how to share it, are all key factors to be considered in realising maximum impact for a piece of citizen media evidence.

For instance, in the case involving the killing of Walter Scott,⁴⁹ the citizen video that provided evidence of the shooting was deemed effective not only because of what it revealed but also because of when and how it was released.⁵⁰ As a result of the strategic release of the citizen video, the perpetrator, who in this case was police officer Michael Slager, was arrested and charged with murder and went on to be sentenced to 20 years in prison.⁵¹

Nevertheless, there remains a number of issues that impede the effective dissemination of citizen media and I shall be discussing three of those below.

3.3.1. Social media gatekeepers

A sizeable amount of human rights violations and mass atrocities occurring around the world are being brought to global attention through citizen media.⁵² In countries like Syria which is largely inaccessible to professional journalists,⁵³ learning about what is going on predominantly

⁴⁹ *United States of America v Michael Slager* (2018) 2:16-cr-00378-DCN.

⁵⁰ J Zammuto 'Bearing witness – a guide to capturing effective video' *Future Hindsight podcast* (14 June 2019) starting at 03:20 via <https://soundcloud.com/future-hindsight/jackie-zammuto> (accessed 29 January 2021). In this case, the video evidence was released after the police had filed their official report which then had obvious inconsistencies when compared to the citizen video evidence that actually showed the incident as it truly happened.

⁵¹ J Lartey 'Former officer Michael Slager sentenced to 20 years for murder of Walter Scott' *The Guardian* 7 December 2017 <https://www.theguardian.com/us-news/2017/dec/07/michael-slager-walter-scott-second-degree-murder> (accessed 29 January 2021).

⁵² A few examples of such were curated in 2013 and these range from citizen videos showing the physical abuse carried out on migrant workers in Saudi Arabia, to videos highlighting bombings in Syria, protests in Sudan against arbitrary and unlawful arrests, a pregnant woman being tasered by the police in the United States, amongst others. See 'Human Rights Channel: 2013 Year in Review' https://www.youtube.com/watch?v=Mil3zPB_S-4 (accessed 20 July 2019).

⁵³ Entering Syria since the start of the conflict in 2011 has not only been dangerous for journalists, the government of Syria has also periodically refused entry to international reporters. See M Wall & S El Zahed 'Embedding content from Syrian citizen journalists: The rise of the collaborative news clip' (2014) *SAGE* 1.

comes from the videos and photos caught by citizen journalists and shared on social media.⁵⁴ Unfortunately, there is a disturbing pattern which entails the erasure of courageously captured citizen media by social media platforms.⁵⁵ This presents an enormous challenge to the utility of citizen media, a situation which if not addressed, can have significant impact on the pursuit of accountability and a wiping out of historical records of mass atrocities.

YouTube announced in 2017 that it will use machine learning and artificial intelligence (AI) to comb through the tons of videos uploaded to its platform every minute and take down any that presents extreme violence.⁵⁶ In their defence, this is being done to combat the rise of violent extremism since terrorist groups now also use YouTube⁵⁷ to spread their propaganda.⁵⁸ The challenge here however is not that terrorism related content is being taken down, but that many of the content being erased also include evidentiary materials for investigators, prosecutors and human rights defenders.⁵⁹ The algorithm that identifies the videos and photos is driven by AI and is currently imperfect.

For instance, the algorithm is built to identify material such as violent extremism⁶⁰ but it is not yet perfectly capable of distinguishing between a video uploaded by a civilian risking his life to get the word out and an ISIS fighter pushing a terrorist's propaganda. This has led to over 400,000 Syrian related videos being deleted and 216 channels being suspended.⁶¹ As expected, this erroneous deletion has drawn criticism from human rights defenders such as Al-

⁵⁴ According to Syria Tracker, data collected between June 2011 and February 2014 showed that a far greater amount of reports on Syria came through crowdsourcing and not traditional media. Specifically, when it came to reports about Aleppo, 184 were from news articles while crowdsourcing accounted for 18,776. See SAGE Publications 'Citizen journalism gets more stories out than traditional reporting in war torn Syria' (2014) *SAGE Publications* <https://phys.org/news/2014-06-citizen-journalism-stories-traditional-war-torn.html> (accessed 21 June 2019).

⁵⁵ A Asher-Schapiro 'YouTube and Facebook are removing evidence of atrocities, jeopardizing cases against war criminals' *The Intercept* <https://theintercept.com/2017/11/02/war-crimes-youtube-facebook-syria-rohingya/> (accessed 17 March 2018).

⁵⁶ YouTube 'An update on our commitment to fight terror content online' August 2017 <https://youtube.googleblog.com/2017/08/an-update-on-our-commitment-to-fight.html> (accessed 17 March 2018).

⁵⁷ In a study carried out between 8 March and 8 June 2018 by the Counter Extremism Project, it was found that 1,348 ISIS videos were uploaded on to YouTube within the three-month period. See Counter Extremism Project 'The eGLYPH Web Crawler: ISIS Content on YouTube' (2018).

⁵⁸ A 2017 report reveals that ISIS propaganda videos play a central role in radicalization. It was found that 83% of Americans who had been charged with ISIS related crimes had watched ISIS propaganda videos including those of executions. See RA Pape & others 'The American face of ISIS: Analysis of ISIS -related terrorism in the US March 2014 – August 2016' (2017) 5.

⁵⁹ S Ristovska 'Human rights collectives as visual experts: the case of Syrian Archive' (2019) 18(3) *Visual Communication* 343. See further, S Varghese 'YouTube's drive to clean up its platform is erasing vital evidence of potential war crimes' 2019 *FFWD* <https://ffwd.medium.com/youtubes-drive-to-clean-up-its-platform-is-erasing-vital-evidence-for-open-source-investigators-48ec9aa460d2> (accessed 3 August 2019).

⁶⁰ Counter Extremism Project (n 57 above) 4.

⁶¹ A Rosen 'Erasing history: YouTube's deletion of Syria war videos concerns human rights groups' March 2018 <https://www.fastcompany.com/40540411/erasing-history-youtubes-deletion-of-syria-war-videos-concerns-human-rights-groups> (accessed 18 March 2018).

Khatib of Syrian Archive who argues that the citizen videos from Syria are not propaganda nor are they extremist content but are possibly the only evidence that an attack happened.⁶² With the flawed deletion, human rights investigations will no doubt suffer a setback, as has been underscored by Higgins who has used YouTube videos to advance the cause of accountability through the Bellingcat project:

The playlists were being used in various reports by different organisations, as well as being used to share information about war crimes with justice and accountability organisations. Their deletion seriously impacts our work on justice and accountability.⁶³

Also, organisations like the Human Rights Watch (HRW) have advocated against these content take-downs, affirming that they are a clear and present impediment to their work of human rights fact finding as well as other efforts aimed at advancing accountability. In 2020, HRW wrote letters to Google, Facebook and Twitter citing specific examples of content takedowns that were no longer accessible to them in their investigations into human rights abuses.⁶⁴ An excerpt of the letter to Google states:

Social media content, particularly photos and videos posted by perpetrators of human rights abuses, victims, witnesses, and others has become an important element not only in our work, but also in that of national and international judicial officials, including at the International Criminal Court (ICC) in The Hague. This content has also played a central role in supporting documentation work by media and other nongovernmental organisations. At the same time, technology companies including Google have ramped up efforts to permanently remove material they categorize as TVEC [Terrorist and Violent Extremist Content] from their social media platforms, which can include documentation of human rights abuses.

While we acknowledge that content removal may be appropriate in certain cases, we are concerned that Google's definition of terrorism is overly broad, imprecise, and at odds with international humanitarian law. We are also concerned that, with Google permanently removing content, human rights workers and criminal investigators are losing access to potentially vital evidence of abuse.⁶⁵

Although an appeal can be lodged at YouTube to have a video reinstated,⁶⁶ this may not always be possible for many reasons. For instance, the author of the video may have gone off the grid due to lack of internet, may have relocated or may have been killed in a subsequent

⁶² K O'Flaherty 'YouTube keeps deleting evidence of Syrian chemical weapon attacks' *WIRED* 2018 <https://www.wired.co.uk/article/chemical-weapons-in-syria-youtube-algorithm-delete-video> (accessed 18 July 2019).

⁶³ J Robbins 'YouTube deleted war crime evidence in Syria' August 2017 <https://www.ibtimes.co.uk/youtube-deleted-war-crime-evidence-syria-1635140> (accessed 20 March 2018).

⁶⁴ Human Rights Watch presented 320 cases of take-downs from YouTube, 227 from Facebook and 72 from Twitter in which content relevant to human rights investigations had been taken down by these platforms. See Human Rights Watch 'Video Unavailable – Social media platforms remove evidence of war crimes' (2020) Annexes I – III.

⁶⁵ Human Rights Watch (n 64 above) 70 – 71.

⁶⁶ See YouTube Help 'Appeal community guidelines actions' <https://support.google.com/youtube/answer/185111?hl=en> (accessed 30 January 2021).

attack. Not to mention instances where YouTube simply refuses to reinstate the video. According to Google’s Transparency Report covering October 2020 – December 2020,⁶⁷ over 9 million videos were removed for violating the platform’s community guidelines.⁶⁸ One of the causes for concern is the fact that 95% of these takedowns were executed by the YouTube algorithm; a system flawed with imperfections. Out of the 9,321,948 videos taken down, 223,008 were appealed and only 83,346 were reinstated, representing about 37% of the videos appealed. This reveals that YouTube rarely reinstates videos even after appeals are made.⁶⁹

For example, while investigating the 2015 airstrike that occurred in Sabr Valley, northern Yemen, an investigator with Bellingcat came across new footage in 2019 that was of greater quality and specificity than the one he had previously seen in 2015. By the time he tried to access the footage a day later, it had already been taken down by YouTube and this would have stalled his investigations because all attempts to get it through YouTube failed. He was however able to obtain the footage via Mnemonic as they had archived it as part of their Yemeni Archive initiative.⁷⁰ Moreover, requesting for the reinstatement of a video is only applicable in cases where the video was known to researchers and investigators. One cannot request for a video to be reinstated if it was never discovered before it was taken down.⁷¹

On the contrary, Facebook’s policy recognises and makes a distinction between videos uploaded to propagate violent extremism and those uploaded for evidentiary reasons. The company’s policy on violence and graphic content stipulates as follows:

We allow graphic content (with some limitations) to help people raise awareness about issues. We know that people value the ability to discuss important issues such as human rights abuses or acts of terrorism.⁷²

⁶⁷ See ‘Google Transparency Report’ <https://transparencyreport.google.com/youtube-policy/appeals> (accessed 18 February 2021).

⁶⁸ According to the report, 20.6% of these videos were taken down for containing graphic and violent content, while 0.8% were taken down for promoting violence or violent extremism. This data is important in light of what was stated earlier about how most videos of human rights abuse will likely be classified into one these two categories and thus erroneously taken down by the YouTube algorithm. See O’Flaherty (n 62 above).

⁶⁹ See further J Alexander ‘YouTube rarely reinstates removed videos – even when creators appeal’ *The Verge* 2020 <https://www.theverge.com/2020/2/28/21157476/youtube-video-removal-appeal-takedown-community-guidelines-report> (accessed 18 February, 2021).

⁷⁰ Human Rights Watch (n 64 above) 24.

⁷¹ The data from Google’s transparency report reveals that 35.9% of the over 9 million videos removed from YouTube over a 3-month period, were taken down before they received any views. This implies that more than 3 million videos were flagged and taken down, primarily by the YouTube algorithm. See ‘Google Transparency Report – YouTube community guidelines enforcement’ (Oct 2020 – Dec 2020) <https://transparencyreport.google.com/youtube-policy/removals> (accessed 18 February, 2021).

⁷² Facebook Community Standards <https://www.facebook.com/communitystandards/graphic-violence> (accessed 1 August 2019).

Even though the framing of the policy is placed more in the context of freedom of expression (that is the ‘ability to discuss’), it nevertheless makes a significant distinction when it ties it to human rights abuses and also recognises the central role a platform like Facebook plays in the discovery of evidence relating to human rights abuses. Unfortunately, the existence of this policy has not stopped Facebook’s algorithms from erasing content that could be useful for proving the occurrence of an atrocity.⁷³ Such move by Facebook has been perceived as a betrayal to the human rights cause, with activists like Dubberley arguing that it does not ‘foster trust in their claim that they support human rights.’⁷⁴

social media platforms have begun to change the tools we have come to rely on, with little or no consultation. Many of those platforms have, over the years, invited us to workshops and conversations, telling us how much they value our work and how much they respect human rights. We believed them. But suddenly they are pulling the rug out from under us, hindering our ability to protect human rights.⁷⁵

Having human personnel fill in for the gaps and cover the lapses and inaccuracies created by algorithms is an option being explored by some social media companies. For example, Facebook moved to recruit 3,000 additional people to complement its already 4,500 strong community operations team.⁷⁶ Despite the significant move, this team of humans with finite abilities is incapable of fully and effectively taking on the mammoth task of moderating the heaps of posts that appear on Facebook every day.⁷⁷ YouTube, for instance, created its appeal process for content take-down because it acknowledges that ‘we understand that we sometimes make mistakes.’⁷⁸ In addition to the impossible task of having effective human control over the massive content, there is also the risk of psychological trauma that these human verifiers face. Being the ones to watch hours of violent videos before deciding which video is

⁷³ One of such deletions happened in 2017 when Facebook took down graphic video that showed the execution of 18 people following orders from Mahmoud Mustafa Busayf al-Werfalli. Fortunately, due to the fact that the video had been preserved by those who shared it on other social media platforms, the International Criminal Court was able to issue an arrest warrant relying heavily on video evidence discovered through these social media sites. See *In the case of The Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli* Warrant of arrest (15 August 2017) ICC-01/11-01/17. See also B Warner ‘Tech companies are deleting evidence of war crimes’ *The Atlantic* 2019 <https://www.theatlantic.com/ideas/archive/2019/05/facebook-algorithms-are-making-it-harder/588931/> (accessed 2 August 2019).

⁷⁴ S Dubberley ‘Facebook just blindfolded war crimes investigators’ *Newsweek* 2019 <https://www.newsweek.com/facebook-graph-search-war-crimes-investigators-1444311> (accessed 30 July 2019).

⁷⁵ Dubberley (n 74 above).

⁷⁶ A Sulleyman ‘Mark Zuckerberg: Facebook hiring 3,000 to stop heartbreaking violent videos’ 3 May 2017 <https://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-live-murder-videos-hire-3000-stop-heartbreaking-violence-mark-zuckerberg-a7715871.html> (accessed 19 March 2018).

⁷⁷ For instance, as at June 2019 Facebook reported that it has 1.59 billion active users on the platform every day. See Facebook Stats <https://newsroom.fb.com/company-info/> (accessed 25 July 2019). This will invariably result in a multiplier effect on the amount of posts made which has been estimated to include 136,000 photos every 60 seconds. See ‘The top 20 valuable Facebook statistics – updated July 2019’ *Zephoría Digital Marketing* <https://zephoría.com/top-15-valuable-facebook-statistics/> (accessed 25 July 2019).

⁷⁸ YouTube Help (n 66 above).

deleted and which one remains can have a negative toll on a person's mental health.⁷⁹ It is therefore not surprising that these platforms resort to machines and artificial intelligence to help do the work.

Social media gatekeepers like Twitter, Facebook and YouTube have tried to find solutions, albeit imperfect ones, to the problem of their platforms being misused because they have been blamed for being complicit in the rise of violent extremism around the world due to the ease with which anyone can use these platforms to advance any agenda without scrutiny. After the 2017 London bridge terrorist attack, Prime Minister Theresa May rebuked online platforms for not doing enough:

we cannot allow this ideology the safe space it needs to breed. Yet that is precisely what the internet and big companies that provide internet based services provide. We need to work with allied, democratic governments to reach international agreements that regulate cyberspace to prevent the spread of extremism and terrorist planning. And we need to do everything we can at home to reduce the risks of extremism online.⁸⁰

Lawsuits have also been commenced against some of the biggest social media platforms for aiding in the recruitment and radicalization of terrorists.⁸¹ In a string of cases filed against Twitter and Facebook blaming them for the terrorist attacks in Paris and Brussels, the plaintiff's lawyer argued that social media platforms should be held up to similar standards of due diligence as banks are:

If you or I tried to send money to Hamas, we wouldn't get around the block. Banks are required to check before they do any wire transfers. Why is it any different to provide a communications platform to Hamas, to ISIS?⁸²

The courts in America have also addressed matters relating to the responsibility of social media companies for what is shared on their platform. In the case of *Fields v Twitter*,⁸³ a U.S. district court judge ruled that Twitter could not be held responsible for 'material support' in a terrorist attack because it is merely a service provider that offers a platform for free speech

⁷⁹ It is reported that high performing Facebook moderators look at 400 or more posts per day and these include those of graphic violence and hate speech. See: The Verge 'Inside the traumatic life of a Facebook moderator' 2019 <https://www.youtube.com/watch?v=bDnjinCtFk4> (accessed 25 June 2019).

⁸⁰ CBC News 'Enough is Enough, U.K. PM says after latest London attacks' 4 June 2017 <http://www.cbc.ca/news/world/london-bridge-van-stabbings-may-1.4145367> (accessed 19 March 2018).

⁸¹ CBS News 'Social media sites sued by families of Pulse nightclub victims alleging aid for ISIS' 20 December 2016 <https://www.cbsnews.com/news/twitter-facebook-google-pulse-orlando-nightclub-victim-families-sue-social-media-sites-isis/> (accessed 19 March 2018).

⁸² Associated Press 'Lawsuits blame Facebook and Twitter in terror attacks in Paris, Brussels.' 19 January 2017 <http://www.latimes.com/business/technology/la-fi-tn-lawsuits-social-media-terror-20170119-story.html> (accessed 19 March 2018).

⁸³ *Fields v Twitter Inc* 16-cv-00213-WHO U.S. District Court Northern District of California.

without creating the speech itself. The 9th US Circuit Court of Appeals upheld this ruling in 2018 when it stated that:

We conclude that Twitter has the better of the argument and hold that to satisfy the ATA’s “by reason of” requirement, a plaintiff must show at least some direct relationship between the injuries that he or she suffered and the defendant’s acts.⁸⁴

While this case does not place responsibility on social media platforms for the extremist content posted on their sites, what it also does not do is exonerate them from the responsibility of regulating such content after it has been posted. The Council of Europe on the other hand takes a much more different approach of holding the company directly responsible for what is posted on its platform as exemplified in the case of *Delfi AS v Estonia*.⁸⁵ In this case, the Grand Chamber of the European Court of Human Rights ruled to uphold the decision of the domestic courts that penalized Delfi – an online news outlet – for its failure to effectively regulate defamatory comments made under one of its articles.⁸⁶ While this case concerns the issue of defamation, it is nonetheless indicative of what the court’s position will likely be in relation to content take downs; it would be to hold the platform accountable.

Granted, social media platforms should have policies that do not allow the spread of hate or harm via their platforms. As a matter of fact, many of the major platforms already have such guidelines in place as made clear by a group of authors from Swansea University.⁸⁷ However due to the relentless pressure, particularly from Western governments, these social media platforms continue to restrict free expression by deleting content in a bid to avoid liability. They are demonstrating their commitment to fighting extremism and have in the process taken extreme approaches to the problem as can be seen in some of their policies. For example, the following category of posts are among those prohibited according to YouTube’s policy on violent or graphic content:

Footage, audio, or imagery involving road accidents, natural disasters, war aftermath, terrorist attack aftermath, street fights, physical attacks, sexual assaults, immolation, torture, corpses, protests or riots, robberies, medical procedures, or other such scenarios with the intent to shock or disgust viewers.⁸⁸

It is bewildering that YouTube will prohibit the sharing of videos showing protests, riots or the aftermath of war because these are exactly the kinds of materials that citizen journalists

⁸⁴ *Fields v Twitter Inc* 16-1715 (2018) U.S. Court of Appeals for the Ninth Circuit.

⁸⁵ *Delfi AS v Estonia* (2009) European Court of Human Rights 64569.

⁸⁶ *Delfi AS v Estonia* (n 85 above) 58.

⁸⁷ S Macdonald & others ‘Regulating terrorist content on social media: automation and the rule of law’ (2019) *International Journal of Law in Context* 183.

⁸⁸ YouTube violent or graphic content policies <https://support.google.com/youtube/answer/2802008?hl=en> (accessed 20 July 2019).

are documenting and making available for evidentiary purposes. Moreover, having the policy make reference to ‘intent to shock or disgust viewers’ as a ground for taking down content, is highly problematic. Not only is it almost impossible to deduce ‘intent’ at a surface level, especially by an algorithm, the reality is that the shock value of some videos of war crimes and other atrocities is the exact ingredient that sometimes forces us to act to remedy such grave injustice.

At the same time however, such extreme policy measures are better understood, not accepted, when placed in the context of laws in countries like France that impose up to a 4% fine on a platform’s global turn over for failure to take down specific content within 24 hours of it being flagged.⁸⁹ This French regulation comes on the heels of Australia’s law which imposes strict measures on social media companies for failure to ‘expeditiously’ remove terrorist related content from their platform.⁹⁰ According to section 474.34 (9) (10) of the law, the penalty can range from 3 years imprisonment for employees of the company, to 10% of the company’s profit for that year.⁹¹

A significant difference between the Australian and French law is that while the latter has a specified time period of 24 hours, the former uses the vague term ‘expeditious removal’⁹² which will have to be subjected to technical interpretations and the discretion of the court. Quite noteworthy also is the fact that in 2022, Nigeria’s National Information Technology Development Agency (NITDA) developed a draft code of practice targeted at regulating social media platforms and included a provision which requires social media platforms to ‘act expeditiously’ and take down any unlawful content within 24 hours of it being reported by a user or a government agency.⁹³ Having words like ‘unlawful’ and ‘expeditiously’ as part of the framing of the provision creates the kind of ambiguity that can be abused if it is not subjected to further interpretation by the courts. But one common feature across the Australian, French and Nigerian examples is how catastrophic these provisions can be for the expression and protection of human rights alike, a concern which has been vented by those in the civil society and tech spaces such as Mozilla when it highlighted the dangers of such regulations:

The definition of ‘terrorist’ content is extremely broad, opening the door for a huge amount of over-removal (including the potential for discriminatory effect) and the

⁸⁹ Bill no. 388, aka the Avia Law, adopted by the National Assembly, in new reading, aimed at combating hateful content on the Internet (2020).

⁹⁰ Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019.

⁹¹ n 90 above, sec 474.34 (9)(10).

⁹² n 90 above, sec 474.34 (1)(d).

⁹³ Code of Practice for Interactive Computer Service Platforms/Internet Intermediaries (2022) para 3.

resulting risk that much lawful and public interest speech will be indiscriminately taken down.⁹⁴

Technology, as seen in the use of algorithms, is not a silver bullet to the spread of extremist content online. It therefore becomes important to involve human beings who can make nuanced decisions about what videos or accounts need to be taken down. But the magnitude of the problem that has been created due to oversaturation of the internet with eye-witness videos and citizen media, makes it practically impossible to expect social media platforms to resolve this situation solely through human intervention. Adding to this is the fact that social media companies are torn between combatting the spread of terrorism and also respecting human rights such as the freedom of expression. In a joint press statement released on 6 December 2016, Facebook, Microsoft, Twitter and YouTube made a commitment to curbing online terrorist content because they agree that ‘there is no place for content that promotes terrorism on [their] hosted consumer services.’⁹⁵ They however went further in the same press release to state that ‘[t]hroughout this collaboration, we are committed to protecting our users’ privacy and their ability to express themselves freely and safely on our platforms.’⁹⁶

Hence, on the one hand, they want to safeguard the freedom of expression while also avoiding government-imposed sanctions by clamping down on certain forms of content but being confronted with a decision on the most effective way of navigating this conundrum – through limited human resources or flawed algorithmic systems. This in itself has resulted in a lot of flip-flopping in the application of platform policies and standards⁹⁷ as it is obvious that these platforms are still grappling with figuring out what constitutes the perfect approach because one must also recognise that apart from the problem of evidentiary erasure being created by virtue of these take downs, there is equally the reality that such deletion will only make it more difficult to identify and investigate terrorists by monitoring their online activity.⁹⁸ While addressing Twitter’s suspension of terrorism related content on its platform, a report by the Brookings Institute identified the paradox in this situation and recommended against suspensions:

⁹⁴ O Bennett ‘The EU terrorist content regulation – a threat to the ecosystem and our users’ rights’ 2018 <https://blog.mozilla.org/netpolicy/2018/11/21/the-eu-terrorist-content-regulation-a-threat-to-the-ecosystem-and-our-users-rights/> (accessed 28 July 2019).

⁹⁵ Facebook Newsroom ‘Partnering to help curb spread of online terrorist content’ <https://newsroom.fb.com/news/2016/12/partnering-to-help-curb-spread-of-online-terrorist-content/> (accessed 19 March 2018).

⁹⁶ Facebook Newsroom (n 95 above).

⁹⁷ While censoring online content in accordance to their community standards, social media platforms have been accused of inconsistent application of their own rules. See DL Hudson ‘Free speech or censorship? Social media litigation is a hot legal battleground’ (2019) *ABA Journal*.

⁹⁸ Bennett (n 94 above).

The process of suspension does create certain new risks. Most importantly, while suspensions appear to have created obstacles to supporters joining ISIS's social network, they also isolate ISIS supporters online. This could increase the speed and intensity of radicalization for those who do manage to enter the network, and hinder social pressures that could lead to de-radicalization.⁹⁹

The dilemma that therefore exists is one that does not have just a singular solution. We already see that algorithms are causing more problems and human moderation is insufficient. Laws are also having the unintended consequence of stifling freedom of expression. What is therefore urgently needed is a socio-legal response where the policies, laws, algorithms and human efforts all collectively center the rights of people. This has to be crafted through a democratically inclusive process and not just by governments alone or the social media companies but by the wide range of stakeholders including civil society groups and citizen journalists. Even though we cannot prevent people from engaging in harmful behaviours or posting hateful content, what we can and must do is develop systems that reduce the harm caused. We need new rules for this road.

3.3.2. Digital divide

The internet has dramatically changed the way people communicate, exchange information, organise and rally around key issues such as human rights violations or atrocities.¹⁰⁰ Hence, through social media platforms and the internet, the scope and magnitude of information dissemination has increased exponentially. Data and digital evidence can be viewed in real time or accessed relatively quickly, achieving goals perhaps once unachievable. This has often prompted a swifter response to human rights violations across the world and has also served as digital evidence for those seeking to hold violators accountable both nationally and internationally.¹⁰¹

Digital divide under this section will therefore address the inequalities that exist in relation to internet access and knowledge. In this case, my argument is that the digital divide

⁹⁹ JM Berger & J Morgan 'The ISIS Twitter census – Defining and describing the population of ISIS supporters on Twitter' (2015) 3.

¹⁰⁰ The internet has achieved so many things including enabling social organizing, setting speech free, among others. See D PoKempner 'The internet is not the enemy: As rights move online, human rights standards move with them' (2017) *Human Rights Watch World Report*, 41.

¹⁰¹ During the #EndSARS protests in Nigeria and the gruesome killings of peaceful protesters at Lekki Toll Gate in 2020, the internet made it possible to effectively disseminate citizen media evidence and counter the misinformation and false narrative being peddled by the government. These atrocious crimes against civilians who were exercising their constitutional right to protest against police brutality, drew the attention, fury and outcry of both national and international actors as a result of the visibility that was made possible by the internet. See S Dark '#EndSARS: How Nigerians harness social media against police abuse' 2020 <https://www.aljazeera.com/news/2020/10/25/endsars-how-nigerians-use-social-media-against-police-brutality> (accessed 30 March 2021).

between countries plays a significant role in whether or not citizen media gets disseminated and becomes discovered for use in the advancement of accountability.¹⁰² The concerns around digital divide and the importance of closing the gulf that currently exists were highlighted by the UN Human Rights Council when it called on States to apply ‘a human rights based approach in providing and in expanding access to internet.’¹⁰³ Due to its empowering nature, access to the internet can no longer be viewed as being just a mere convenience but as a human right. This has been further clarified by the likes of La Rue¹⁰⁴ who underscored this point by stating:

the unique and transformative nature of the Internet not only... enable[s] individuals to exercise their right to freedom of opinion and expression, but also a range of other human rights, and to promote the progress of society as a whole.¹⁰⁵

Furthermore, if we thoroughly interrogate the provisions of Article 19 of both the International Covenant on Civil and Political Rights, and the Universal Declaration of Human Rights, we will find that access to the internet in the digital era is inseparable from the attainment of the right to freedom of expression which comprises of the ‘freedom to seek, receive and impart information and ideas of all kinds.’¹⁰⁶ Although authors like Cerf argue that internet access is more of an enabler of rights, and not a right in itself,¹⁰⁷ and he chooses to classify it rather as a civil right and not a human right because it is not something intrinsic to our existence as humans.¹⁰⁸ Cerf further argues that it will be erroneous for us to place any form of technology in the exalted category where we currently have rights such as freedom from torture.¹⁰⁹

The problem with Cerf’s argument however is the fact that civil rights are intricately linked to other rights and the fulfilment of one leads to the enjoyment of others.¹¹⁰ If the civil right to vote is not protected, it potentially leads to tyrannical rule by a minority, which in turn

¹⁰² Digital divide can also play a role in whether or not citizen media evidence exists in the first place, depending on technological advancement in certain regions of the world.

¹⁰³ United Nations General Assembly ‘The promotion, protection and enjoyment of human rights on the internet’ (27 June 2016) A/HRC/32/L.20, 5.

¹⁰⁴ Frank La Rue is the former UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (2008 – 2014).

¹⁰⁵ United Nations General Assembly ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression-Frank La Rue’ (2011) A/HRC/17/27.

¹⁰⁶ ICCPR (n 5 above) art 19(2).

¹⁰⁷ VG Cerf ‘Internet Access is not a Human Right’ *New York Times* 4 January 2012 <https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html> (accessed 30 April 2020).

¹⁰⁸ Cerf (n 107 above).

¹⁰⁹ Cerf (n 107 above).

¹¹⁰ This speaks to the principle of the interdependence and indivisibility of human rights which addresses the notion that the fulfilment of one right depends wholly or in part on the fulfilment of another right. See United Nations Population Fund ‘Human Rights Principles’ (2005).

results in the denial of other freedoms as we have come to witness in most authoritarian regimes. In countering Cerf's argument, Edwards expressed his disagreement by stating that:

The curious bit of his piece though, isn't the claim that Internet Access is not a human right, but rather the exceptionally narrow portrayal of human rights from a legal and philosophical perspective... and the increasing necessity of internet access for the world's most impoverished as it relates to health, education, employment, the arts, gender equality – all things we have the right to enjoy, means that Information Technologies (yes, the Internet) are inseparable from the rights themselves.¹¹¹

Others like Best directly argue that internet access is not just an enabler of other rights but a right in and of itself. It is his position that 'a symmetric information right to some extent requires the Internet, and thus access to the Internet itself has become a human right.'¹¹² His position is being bolstered by the increasing number of countries that are recognising internet access as a human right. In 2010, the Supreme Court of Costa Rica declared internet access as a fundamental human right¹¹³ and went further in 2017 to hold that slow internet speeds also constitute a human rights violation.¹¹⁴ France has also made a determination on the issue through its Constitutional Council which stated in a decision that:

In the current state of the means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right implies freedom to access such services.¹¹⁵

Realising how integral access to the internet is to rights such as freedom of expression, places the challenge of digital divide in clearer perspective because without internet access, there is no way for victims of human rights abuses to personally become the vanguards of their own story through digital platforms and as such reduces the chances of certain atrocities being rapidly discovered by the human rights community. At the same time, it will be extremely misleading to conclude that just because reports of a violation did not show up on our social media timelines means that they are non-existent. Based on data published in 2020, there are 8 African countries among the top 10 most disconnected countries by share of population.¹¹⁶

¹¹¹ S Edwards 'Is internet Access a human right?' 10 January 2012 *Amnesty International* <https://www.amnestyusa.org/is-internet-access-a-human-right/> (accessed 23 July 2019).

¹¹² ML. Best 'Can the internet be a human right?' in S Hick, EF Halpin & E Hoskins (eds) *Human Rights and the Internet* Volume (2004) 24.

¹¹³ 'Acceso a internet es un derecho fundamental' 2010 <https://www.nacion.com/el-pais/servicios/acceso-a-internet-es-un-derecho-fundamental/J7TYWCB4WFABRDAK4SGN3CLFZM/story/> (accessed 18 March 2021).

¹¹⁴ W Anders 'Costa Rica's high court orders changes to internet speed restrictions' 2017 <https://news.co.cr/costa-ricas-high-court-orders-changes-internet-speed-restrictions/63366/> (accessed 18 March 2021).

¹¹⁵ The Constitutional Council decision number 2009-580 (10 June 2009) para 12.

¹¹⁶ C Ang 'Where will the next billion internet users come from?' 2020 <https://www.visualcapitalist.com/the-next-billion-internet-users-worldwide/> (accessed 20 March 2021).

Rank	Country	% of Population	Unconnected People
1	North Korea	100%	25,722,103
2	South Sudan	92%	10,240,199
3	Eritrea	92%	3,228,429
4	Burundi	90%	10,556,111
5	Somalia	90%	14,042,139
6	Niger	88%	20,977,412
7	Papua New Guinea	88%	7,761,628
8	Liberia	88%	4,372,916
9	Guinea Bissau	87%	1,694,458
10	Central African Republic	86%	4,132,006

Even though the number of internet users has now gone over 4 billion people, according to statistics released in January 2021,¹¹⁷ African countries still have some of the lowest levels of internet penetration in the world.¹¹⁸ Some of the countries we have come to associate with repression and poor human rights record are also among those that have the lowest levels of internet penetration. For instance, as shown in the data above, 92% of those in Eritrea, are not connected to the internet. Whereas Eritrea's poor human rights record is one that has received criticism from the UN which has expressed deep concerns about the government's complicity in imposing severe restrictions to fundamental freedoms including arbitrary arrests and detentions, forced labour amongst others.¹¹⁹

¹¹⁷ As at the beginning of 2021, there are now approximately 4.66 billion people connected to the internet, with 92.6% of this number being users who access the internet using a mobile device. See Data Reportal 'Digital around the world' <https://datareportal.com/global-digital-overview> (accessed 20 March 2021).

¹¹⁸ Central Africa has the lowest with 12% internet penetration and is a far cry from the 94% found in Northern Europe, the 88% in North America and 58% in South East Asia.

¹¹⁹ See 'Eritrea: UN expert says embracing human rights vital to shape successful future' 2018 <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23262&LangID=E> (accessed 2 August 2019).

The implication of this is that, if there are human rights violations, they may never be heard of or may be quickly drowned out by overwhelming information from other regions with higher internet penetration.¹²⁰ We have seen this play out in the global response and outrage to incidents that have occurred in the global north vis-à-vis those that took place in the global south. For instance, in January 2015, two acts of terror took place in the same week but only one caught the attention of the world – the Charlie Hebdo attack in Paris. Around the same period when this attack was taking place in Paris, there was a massacre in a village called Baga located in Northern Nigeria.

The irony comes from the fact that even though approximately 2000 people were killed in Baga, as compared to the 12 in Paris, it was the latter that seemed to grip the world's conscience. The shooting at Charlie Hebdo became a trending hashtag – #JeSuisCharlie, world leaders condemned the attack, there were all manner of street marches and more.¹²¹ But for Baga, there was silence; a silence that is partly attributable to the discrepancy in internet connectivity between both locations.¹²² It is possible to argue that there is a tendency for terrorists attacks in the West to draw more attention based on a feeling of connection to these places and the less frequent nature of such attacks. Like Paul Slovic, an American, acknowledged:

The psychological distance between us and France is smaller than the psychological difference between us and Nigeria. There's a sense of personal vulnerability [in the Paris attack] that I don't think one gets from the Boko Haram attacks.¹²³

When we take the feeling of 'personal vulnerability' as argued by Slovic and combine it with the swift government response to the Paris attacks vis-à-vis the downplaying of the Baga massacre by the Nigerian government, one is tempted to make an excuse for why the Paris attacks got more sympathy compared to Baga. But while I acknowledge that these factors played a role, I believe that the most significant factor is the readily available videos, pictures and statistics pouring out about the Paris attacks that made a difference in how the world was able to relate. In Baga, there was no mobile phone connectivity because Boko Haram had

¹²⁰ In some countries, the digital divide is worsened by government restrictions on the internet. This will be addressed in the next section.

¹²¹ It was reported that there were over 40 presidents and prime ministers who marched along with more than 1 million people on the streets of Paris in solidarity for the Charlie Hebdo attacks. See L Alderman & D Bilefsky 'Huge show of solidarity in Paris against terrorism' *New York Times* 12 January 2015 <https://www.nytimes.com/2015/01/12/world/europe/paris-march-against-terror-charlie-hebdo.html> (accessed 2 August 2019).

¹²² E Zuckerman 'Media coverage of Charlie Hebdo and the Baga massacre: a study in contrasts' *The Conversation* 13 January 2015 <https://theconversation.com/media-coverage-of-charlie-hebdo-and-the-baga-massacre-a-study-in-contrasts-36225> (accessed 30 February 2021).

¹²³ C Alter 'Why Charlie Hebdo gets more attention than Boko Haram' *TIME* 2015 <https://time.com/3666619/why-charlie-hebdo-gets-more-attention-than-boko-haram/> (accessed 2 August 2020).

destroyed the telecommunications masts.¹²⁴ Hence the resulting dearth of information about the incident made it easy for the horrific incident to be glossed over. Till date we do not know the names of the children, men and women who were killed in this village and this unfortunately impacts on how far we can pursue accountability for these atrocities. Analysis of the attacks that have been made by human rights groups to reinforce the occurrence and scale of the atrocity was done by relying heavily on satellite imagery.¹²⁵ In contrast with Charlie Hebdo, there were numerous videos and images shared on social media that revealed aspects of the shooting, we even know their names and ages, and this made it possible for people's senses to be triggered and for law enforcement to eventually track down those responsible.¹²⁶

It could have been argued that the scale of violence is sometimes what determines mainstream media's reportage of a conflict but as has been indicated in the example above, if scale were a core factor, then the world would have been just as outraged and concerned with the Baga massacre as it was with the Charlie Hebdo shooting. Furthermore, while other factors, such as numbness from the frequency of violence, could have contributed to the reduced visibility of the Baga massacre, there is no denying the fact that the digital divide impacted the manner in which the world responded or did not respond to the Baga massacre when compared to Charlie Hebdo. It is worth noting at this point that colonialism is an equally important factor that influences how the news of atrocities and conflicts from the global south are projected to those in the global north. Lilie Chourialaki addressed this when she stated that 'who acts on whose suffering reflects patterns of economic and political agency across global zones of influence and their historical divisions, North and South or East and West'.¹²⁷ This, arguably, might be why a video like Kony 2012 from Uganda captured the attention of the world, including those in the global north.

The digital divide cannot only be seen in the imbalanced reportage but also in the areas of access and representation as well. Advanced technology and technological tools are consolidated in the hands of a few and those few are in more advanced countries. For instance, hardly will you find human rights organisations in Africa, whether at national or grassroots level, making use of 3D technology or satellite imagery in establishing a case of mass atrocities

¹²⁴ W Ross 'Boko Haram crisis: Why it is hard to know the truth in Nigeria' *BBC* 2015 <https://www.bbc.com/news/world-africa-30794829> (accessed 2 August 2020).

¹²⁵ A Taylor 'Did Boko Haram attack leave 150 dead - or 2000? Satellite imagery sheds new light' *The Washington Post* 14 January 2015 <https://www.washingtonpost.com/news/worldviews/wp/2015/01/14/did-boko-haram-attack-leave-150-dead-or-2000-satellite-imagery-sheds-new-light/?noredirect=on> (accessed 2 August 2020).

¹²⁶ See New amateur footage of Charlie Hebdo terrorist attack <https://www.youtube.com/watch?v=oODuTiw1tYE> (accessed 30 April 2020).

¹²⁷ L Chourialaki 'The spectatorship of suffering' (2006) *SAGE Publications* 84.

despite the fact that we have seen how these technologies are instrumental in the advancement of accountability. In the case study of Burundi's mass graves, it took the involvement of Amnesty International, relying on witness testimony and advanced technology, to present compelling evidence of mass graves and extra-judicial killings by state security forces.¹²⁸ The technology ecosystem is skewed in favour of the global north and the scales are not being balanced quickly enough. This must change for us to stand a chance of protecting some of the world's most vulnerable people.

3.3.3. Over saturation

Depending on what part of the world you are, your efforts at placing the spotlight on an injustice through citizen media and citizen journalism may prove difficult or outrightly impossible. With the increasing citizen participation also comes the problem of oversaturation which is proving to be a problem for human rights investigations. We are at an unprecedented moment in history where we have an incredible amount of information about virtually every major atrocity but which at the same time is creating a difficulty for the easy discoverability of some other atrocities. Citizen journalism has created this massive chaos of information to the extent that a major dilemma for human rights organisations has now become sifting through the overwhelming records. Syria Justice and Accountability Centre is a nonprofit organisation that is collecting videos which can hopefully help foster 'transitional justice and accountability efforts'¹²⁹ and the organisation is already having to contend with downloading as many as 2000 citizen videos a day.¹³⁰ Limited access to internet data is not the only concern but there are also issues of storage space and ultimately the ability to determine the utility of all the videos – a task which the organisation has already conceded to be impossible.¹³¹

For some citizen journalists, the whole point of documenting human rights violations is so that someone will pay attention and use the evidence to deliver justice in some way. However, being heard or seen is largely dependent on a number of factors, including – but not limited to – digital literacy and digital footprints. The first relates to a citizen journalist's

¹²⁸ Refer to report by Amnesty International 'Burundi: Suspected mass graves of victims of 11 December violence' 29 January 2016 <https://www.amnesty.org/en/documents/afr16/3337/2016/en/> (accessed 24 March 2022). There was also a UN expert delegation made up of three people from the global south. Their mission however made use of the traditional mode of investigation involving witness interviews, site visits, stakeholder engagement and others.

¹²⁹ Syria Justice and Accountability Centre <https://syriaaccountability.org/what-we-do/> (accessed 15 March 2020).

¹³⁰ J Palca 'Activists build human rights cases with the help of cell phone videos' 2017 http://www.npr.org/sections/parallels/2017/05/31/529825301/activists-build-human-rights-abuse-cases-with-help-from-cellphone-videos?utm_campaign=storyshare&utm_source=twitter.com&utm_medium=social (accessed 20 March 2020).

¹³¹ Palca (n 130 above).

understanding and use of the technology; and the other has a correlation with how entrenched a citizen journalist's presence is on the internet, which more directly impacts on the problem of discoverability. Both these conditions further reinforce pre-existing disadvantages across regions of the world where some are more digitally empowered than others and the imbalance created as a result of the digital divide is what sometimes determines whether an atrocity gets noticed or not.¹³²

The responsibility is however not solely on the citizen journalist. While there are instances of civilians being unable to get the word out about atrocities that they have been witnesses to due to digital illiteracy or the sheer lack of digital connectivity, there are also situations in which under resourced investigators and human rights groups are inundated with the nightmare of sifting through Open Source Information (OSINF) in order to identify that one video or picture that serves as relevant evidence. It has been argued that the fact that a piece of user generated content (UGC) evidence is public does not mean it is accessible or readily discoverable.¹³³ This oversaturation and deluge of information has made it extremely daunting for the short staffed, over stretched human rights groups and investigators to discover relevant citizen media and subsequently stitch it together in a manner that will be useable for advocacy or prosecution.

As Aronson describes it, the human labour that accompanies citizen media analysis is time consuming and 'prohibitively expensive'.¹³⁴ This is in addition to the findings by Dubberley and others, which have linked a lot of post-traumatic stress disorder with the graphic and emotionally disturbing content that human verifiers have to interact with daily.¹³⁵ From their research, they found that repeated exposure to graphic content had a negative impact on the viewer and in one of their conclusions, stated the following:

we conclude that the duration that one works on distressing eyewitness media is, in fact, an important factor that increases the risk of the individual to developing symptoms of vicarious trauma. As one journalist told us: "Six years is too long to be working on this".¹³⁶

¹³² As was shown in the examples from Ghana, Kenya, Nigeria, and South Africa above, it takes the videos going viral most times before accountability mechanisms kick into place.

¹³³ S Edwards 'Three impediments to technology for truth' *International Justice Monitor* 2015 <https://www.ijmonitor.org/2015/06/three-impediments-to-technology-for-truth/> (accessed 5 April 2018).

¹³⁴ JD Aronson 'Computer vision and machine learning for human rights video analysis: Case studies, possibilities, concerns and limitations' (2018) *Law and Social Inquiry* 1.

¹³⁵ S Dubberley, E Griffin and HM Bal 'Making secondary trauma a primary Issue: A study of eyewitness media and vicarious trauma on the digital frontline' (2015).

¹³⁶ S Dubberley *et al* (n 135 above) 26.

Therefore, in order to avoid the consequences that come with over exposure to these graphic contents, we may discover that fewer people are willing to work in this field. Individuals are too exhausted from viewing too many horrific images and videos and would rather quit in order to protect their mental health. For an industry that is still struggling to gather enough human experts, this introduces a whole new challenge altogether. Nevertheless, it is imperative for us to discover as many forms of citizen media and citizen journalism as possible so as to avoid a scenario whereby repeated violations are taking place in a community for months or even years, without the world stepping in simply because we have not figured out how to cut through the saturation.

If human rights accountability will be fostered in every place where it matters, the gap created by digital divide has to be bridged. Recognising this growing concern, solutions are already being engineered to address it and even though they are still imperfect, it is worth mentioning that the technology now exists for speedily and digitally analysing videos for relevant content.¹³⁷ If this technology can be perfected, then it will become an invaluable tool for law enforcement officers scouring through hours of video footage to find how a crime occurred; human rights professionals poring over tons of conflict videos to find that singular clue that will tie all the pieces together; and finally for prosecutors who want to be able to rely on several pieces of evidence to further strengthen their case.

3.3.4. Internet shutdowns

Government restrictions in form of internet shutdowns and platform restrictions is one of the ways in which the dissemination of citizen media or digital evidence can be hampered to the detriment of accountability and the pursuit of justice.¹³⁸ The common thread, in this regard, is that internet shutdown and platform restrictions have become tools for impeding freedom of expression, limiting the ability of citizens to expose human rights atrocities, silencing dissent and stifling the flow of information during protests, civic unrest or elections. According to Parks

¹³⁷ The E-Lamp vision and machine learning tool was developed by the Center for Human Rights Science at Carnegie Mellon University and it allows analysts to search through large volumes of video for key and relevant cues that will speed up the process of verification and analysis. See CMU's Human Rights Video Analysis Toolbox <https://aladdin1.inf.cs.cmu.edu/human-rights/E-LAMP> (accessed 29 May 2020).

¹³⁸ Internet shutdown is an intentional disruption of Internet or electronic communications, rendering them inaccessible or effectively unusable, for a specific population or within a location, often to exert control over the flow of information Accessnow 'No more internet shutdowns! Let's #KeepItOn' 30 March 2016 <https://www.accessnow.org/no-internet-shutdowns-lets-keepiton/> (accessed 25 July 2021).

and Thompson:¹³⁹

In the digital era, the internet shutdown has become another technique of media control, but shutdowns vary from country to country and have different temporalities, scales, forms, and impacts. An Internet shutdown can be short term and temporary or protracted over time. A shutdown can impact a limited or vast number of Internet users within given territory; its effects may be focused or extensive, and their severity can be minimal or severe. A shutdown can involve mobile networks or be targeted at specific social media platforms.

Altogether, complete internet blockage, internet filtering, blocking of specific messaging and social media services and threats of imprisonment¹⁴⁰ and torture are being used as tactics to bury incriminating information or evidence by activists or citizen journalists from the watchful eyes of the world. In this regard, Chung rightly categorizes the internet as a ‘double-edged sword’, capable of equipping people around the world with the opportunity to expand their freedoms whilst also providing a forum for repression and propaganda creation by authoritarian governments.¹⁴¹ Sadly, according to Eicher, state repression of this kind, ‘go hand in hand with other human rights violations, and can cause serious implications for advocates trying to catch the attention of those outside their political borders.’¹⁴² This statement resonates clearly in the context of citizen media and digital evidence dissemination and raises serious concerns for the ability of citizen journalists in the affected countries to disseminate information safely or leverage on global attention to potentially trigger investigations or other accountability mechanisms for human rights violations and atrocities. The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association in his 2021 report underscores this concern when he stated that ‘shutdowns have been adopted alongside other repressive tactics, including the criminalization of journalists and human rights defenders.’¹⁴³

Bau and Calandro also agree that internet interruptions by state agents represents a

¹³⁹ This can take the form of a slow or technical internet shutdown. A slow shutdown has to do with an assemblage of regulatory mechanisms (state centric information and internet policies) implemented ‘over time’ with the aim of inhibiting, and criminalising certain kinds of online content creation, alternate news production and dissemination. A technical shutdown is more short term and usually entails state authorities switching off or blocking access to the internet or platforms within its sovereign border. It is often characterised by a ‘full internet blockade’, ‘platform blocking’, or deliberate large-scale black-outs of digital communication. L Parks & R Thompson ‘The slow shutdown: Information and internet regulation in Tanzania from 2010 to 2018 and impacts on online content creators’ (2020) 14 *International Journal of Communication* 4290.

¹⁴⁰ In Nigeria, following the ban placed on Twitter by the government on June 4, 2021, the Attorney General of the Federation directed that prosecution be commenced against anyone that sends out tweets using VPNs. See N Princewill & S Busari ‘Nigerians can now be prosecuted for sending tweets following ban on Twitter’ 2021 <https://edition.cnn.com/2021/06/05/africa/nigeria-prosecute-twitter-users-intl/index.html> (accessed August 5 2021).

¹⁴¹ J Chung ‘Comparing online activities in China and South Korea: The internet and the political regime’ (2008) *Asian Survey* 728.

¹⁴² KG Eicher ‘Transnational advocacy networks and human rights issue emergence amidst internet repression: A case study of Syria and Egypt’ Thesis for International Relations, College of Wooster, 2013 36.

¹⁴³ CN Voule ‘Ending internet shutdowns: a path forward’ A/HRC/47/24/Add para 4.

profound restriction on freedom of speech and expression, which are cornerstones for the democratic functioning of a country.¹⁴⁴ This raises questions about the motives of governments that resort to such measures. Notwithstanding, many of the internet shutdowns that have occurred have been justified under the guise of legitimate reasons such as maintaining law and order, protecting public safety, reducing public resistance, fighting terrorism, or maintaining national security.¹⁴⁵ Many African countries are implicated in this matter, whether it is during protests, elections, political unrests, coups or with respect to human rights abuses and atrocities. Some of these countries are Egypt, Cameroon, Uganda, Burundi, Central African Republic, Mali, Zambia, Ethiopia, Chad, DRC, Congo Brazzaville, Gabon, Zimbabwe, Niger, and Togo, Gambia and Tanzania.¹⁴⁶

For instance in 2011, the Egyptian government in response to the Arab Spring protest, ordered the Internet Service Providers (ISPs) to shut down all international connections to the internet, severing internet services to its citizens.¹⁴⁷ Authorities also adopted harsh measures to dispel protesters and end the popular uprising and internet shutdown was notably one of the ways by which this was done.¹⁴⁸ Coming down from North Africa to Sub-Saharan Africa; the human rights violations that happened in Cameroon suffered visibility as a result of repression tactics by the government in form of internet shutdowns. Between 2017 and 2018, Cameroon brazenly blocked access in half of the country for more than 230 days to curb information flow, suppress perceived and potential civil and political unrest whilst ensuring that human rights violations are not brought to limelight either by traditional media or citizen journalists.¹⁴⁹ Zimbabwe has similar stories of the use of internet shutdowns by the government to suppress protests and curtail the dissemination of potential evidence (including videos and photographs).¹⁵⁰

In January 2019, Zimbabwe used digital blackout to conceal reports of violent crackdown and the excessive use of military force on protesters, resulting in reports of deaths,

¹⁴⁴ V Baú & E Calandro ‘Digital media and information rights’ (2019) *The International Encyclopedia of Media Literacy* 4.

¹⁴⁵ R Shandler & D Canetti ‘A reality of vulnerability and dependence: Internet access as a human right’ (2019) *Israel Law Review* 85.

¹⁴⁶ Bau & Calandro (n 144 above) 5.

¹⁴⁷ Shandler & Canetti (n 145 above) 86.

¹⁴⁸ Shandler & Canetti (n 145 above) 86.

¹⁴⁹ G De Gregorio & N Stremlau ‘Internet shutdowns and the limits of law’ (2020) *International Journal of Communication* 4255.

¹⁵⁰ All internet service providers in the country were ordered by the government to suspend operations, leaving millions with no access. F Madenga ‘From transparency to opacity: storytelling in Zimbabwe under state surveillance and the internet shutdown’ (2020) *Information, Communication & Society* 2 & 3.

mass arrests, and gunshot wounds.¹⁵¹ This has an adverse impact on citizen journalists who rely on the internet as a means to challenge the State. According to Madenga:

Government directives now limit internet access in order to pre-emptively stop circulating videos of police brutality and pictures of army tanks terrorizing bystanders – images similar to those many shared during the violent post-election crackdown in August 2018.¹⁵²

Internet shutdowns on the African continent have been growing in their frequency to the extent that the African Commission on Human and Peoples' Rights passed Resolution 362 in which it expressed concern about the 'emerging practice of State Parties of interrupting or limiting access to telecommunication services such as the internet, social media and messaging services' and proceeded to urge States to respect and protect the rights of their citizens to access the internet.¹⁵³

Noteworthy is that the aforementioned challenges are not only limited to Africa. It affects other countries such as India and Myanmar which are responsible for some of the longest and most prolonged internet shutdowns in the world.¹⁵⁴ The situation in Myanmar and India fit the profile with regards to human rights violations and the autocratic clampdown on the dissemination of citizen media to the detriment of accountability and the pursuit of justice. In February 2021, when the military junta in Myanmar implemented a nationwide internet shutdown, it ensured that access was denied to all social media platforms, while VPNs that were used to circumvent the restriction, were also blocked.¹⁵⁵ The effect was that the shutdowns allowed the junta's security forces to act with impunity as they carried out arrests and violent crackdowns in the middle of the night.¹⁵⁶

Internet shutdowns are clearly a challenge to the pursuit of accountability. Whether it is in Sudan where it was used to deter citizens from filming police repression¹⁵⁷ or in Ethiopia where the shutdown made it difficult to verify the scale of the violence in Tigray,¹⁵⁸ shutdowns

¹⁵¹ Madenga (n 150 above) 3.

¹⁵² Madenga (n 150 above) 3.

¹⁵³ ACHPR resolution 362 Resolution on the right to freedom of information and expression on the Internet (2016) ACHPR/Res.362(LIX).

¹⁵⁴ Accessnow 'Shattered dreams and lost opportunities: A year in the fight to #KeepItOn' 2021 <https://www.accessnow.org/keepiton-report-a-year-in-the-fight/> (accessed 22 March, 2021).

¹⁵⁵ Voule (n 143 above) para 27.

¹⁵⁶ United Nations General Assembly 'Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews' (4 March 2021) A/HRC/46/56 para 74.

¹⁵⁷ Voule (n 143 above) para 35.

¹⁵⁸ C Wilmot 'Ethiopia's cracking down in Tigray. But activists are spreading the news' (2020) <https://www.washingtonpost.com/politics/2020/11/17/ethiopia-cracking-down-tigray-activists-are-spreading-news/> (22 March 2021).

have become anti-human rights and unjustifiable in many of the situations where it has been imposed.

3.4. Evidentiary stage

The challenges to be discussed under this heading are those that impact on the ability or otherwise of using citizen media in court as evidence in the pursuit of justice and accountability. While a full analysis will be made in the next Chapter on how citizen media is being used at domestic and international courts, it is important to discuss here these challenges because if not overcome, they will limit the utility of citizen media as an evidentiary tool in courtrooms.

The rules and standards of evidence go a long way in determining the admissibility of citizen media and due to the high threshold, that must be met, it is possible for a video that does not meet these standards to be excluded. Freeman has noted that in recent years, ‘there has been notable increase in the exclusion of evidence, particularly for items of new media that have not been properly sourced.’¹⁵⁹ For instance, if a video is to be used as linkage evidence to prove who committed a crime, presenting an edited version, even if not maliciously altered, can have a negative impact on the trustworthiness of the visual evidence but if it is meant to be used as lead or corroborative evidence, the requirements are less strict.¹⁶⁰

The high standard for citizen media evidence is to be expected, as the law has not always been readily welcoming of visual forms of evidence. For instance, going back to the 19th century when photography was first introduced into the courtroom, it was met with opposition from virtually every legal actor, including judges.¹⁶¹ But as Mnookin reflects, a shift eventually occurred:

The meaning and epistemological status of the photography were intensely contested, both inside and outside the courtroom... the judicial response to photographic evidence helped to bring about broader changes in both courtroom practice and the conceptualization of evidence. Superficially, the legal use of photography steadily expanded: within twenty years of its invention, the new technology was employed as evidence in courtroom settings, and by the turn of the century, photography had become a routine evidentiary tool.¹⁶²

The shift towards embracing more visual evidence has occurred, but challenges still remain. Every form of evidence is open to its form of challenge, but citizen media is susceptible

¹⁵⁹ L Freeman ‘Digital evidence and war crimes prosecutions: The impact of digital technologies on international criminal investigations and trials’ (2018) 41(2) *Fordham International Law Journal* 293.

¹⁶⁰ ‘Using video for documentation and evidence new tactics in human rights’ 2014 <https://www.newtactics.org/conversation/using-video-documentation-and-evidence> (accessed 3 October 2019).

¹⁶¹ Aronson (n 134 above) 3.

¹⁶² JL Mnookin ‘The image of truth: Photographic evidence and the power of analogy (1998) 10(1) *Yale Journal of Law and the Humanities* 4.

to greater scrutiny because it is typically documented by individuals lacking in fact finding skills. Furthermore, the fact that citizen media is subject to manipulation and has been previously used to intentionally mislead, fuels the flames of doubts about its reliability.¹⁶³ This risk of manipulation therefore underscores ‘the importance of developing and deploying robust and defensible digital verification practices.’¹⁶⁴

It is partly due to the foregoing that judicial bodies have hesitantly admit digital evidence. Research carried out by University of California Berkeley, School of Law has found that international courts rarely admit digital information as direct evidence – as one establishing a fact.¹⁶⁵ In the opinion of the courts, digital evidence is better introduced along with other forms of evidence such as *viva voce* which is perceived to hold greater probative value.¹⁶⁶ Further jurisprudence that is accessible reveals judges' gravitation towards physical evidence and witness testimony over and above digital evidence.¹⁶⁷

It must also be acknowledged that peculiar challenges arise in relation to sourcing and managing citizen media evidence in light of the ubiquitous nature of cell phone cameras and recording devices today as against what obtained some 20 years ago.¹⁶⁸ Even though the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) interacted with digital evidence,¹⁶⁹ they did so in adjudication of crimes committed prior to the proliferation of camera phones and such other devices upon which citizen media now thrives. The flurry of civilian witness and bystander videos as seen today, were not there when the ICTY and ICTR were established in 1993 and

¹⁶³ For instance, a video depicting a 'heroic' Syrian boy rescuing a Syrian girl during a shootout made its way onto Youtube on 10 November 2014 and within days had been viewed by many around the world. The video however misled millions into initially believing that the scenario was real, whereas it was staged by Norwegian film producer John Hagen who presented it in the typical citizen video capture format: unsteady and slightly fuzzy. The action was heavily criticized by human rights activists claiming that it undermined the genuine efforts by both professional journalists and civilian witnesses who were risking their lives to document the rights violations ongoing in Syria. See: New York Times 'Norwegian filmmakers apologize for fake Syria video' *New York Times* 18 November 2014 http://www.nytimes.com/2014/11/19/world/europe/norwegian-filmmakers-apologize-for-fake-syria-video.html?_r=0 (accessed 5 November 2020).

¹⁶⁴ E McPherson & T Probert 'Special procedures in the digital age' (2017) in A Nolan & others (eds) *The United Nations special procedures system*, 267.

¹⁶⁵ A Ashouri, C Bowers & C Warden 'An overview of the use of digital evidence in international criminal courts' (2013) Salzburg Workshop on Cyber-investigations 4.

¹⁶⁶ Ashouri & others (n 165 above) 4.

¹⁶⁷ Human Rights Center UC Berkeley School of Law *Digital fingerprints: Using electronic evidence to advance prosecutions at the International Criminal Court* (2014) 5.

¹⁶⁸ The year 2000 saw the advent of cell phone cameras with Samsung and Softbank Mobile (formerly J-Phone) releasing phones with in-built digital cameras with a 0.35 megapixels capturing capacity. See S Hill 'From J-Phone to Lumia 1020: A complete history of the camera phone' 2013 <http://www.digitaltrends.com/mobile/camera-phone-history/> (accessed 24 February 2020).

¹⁶⁹ For example, in *The Prosecutor v Karamera* ICTR-98-44-T para 208, the tribunal admitted video evidence of a rally marked Exhibit P12 and corroborated by the transcript of a radio broadcast.

1994 respectively. Due to the rapidly changing technological landscape, the competence of modern judicial and quasi-judicial bodies to interact with citizen media in its multiple evidentiary flavours is being put to the test. This therefore calls for some new tailor-made evidentiary rules to be developed at the international level, and for prosecutors as well as human rights NGOs to equally develop their capacity to leverage the opportunities citizen media offers to their work of fact finding and evidence gathering.

A failure to establish new mechanisms that can adequately absorb citizen media will be feeding into the age-long perception that the problem with law and human rights is that they stay rooted in methods of the 20th century whereas technological advancements in the 21st century are transforming how the world responds to current global challenges. This is a concern aptly articulated by the now late Justice Weeramantry of the International Court of Justice as far back as 1993:

We must therefore anticipate some of the grave problems that advances in technology will pose for the disciplines of law and human rights. In fact, it already appears to lawyers who are now taking an increasing interest in this topic, that while science and technology are racing ahead, law and human rights are looking on helplessly from the sidelines because there is very little that they can do to match the speed of technology. Law moves very slowly, while technology moves with lightning rapidity. The result is that technology is racing out of legal control. In consequence, there can be grave damage to human rights as well.¹⁷⁰

Therefore, in order to increase prosecutorial successes, the issue of how judicial and quasi-judicial bodies effectively interact with citizen media in the form of digital evidence is of key concern. As aptly noted in the leading US case of *Lorraine v Markel*, the court acknowledged that ‘electronic evidence will constitute much, if not most, of the evidence used in future motions practice or at trial.’¹⁷¹

The tide is indeed changing because in 2017, the International Criminal Court for the first time, issued a warrant of arrest in which it cited videos derived from social media as part of its evidence.¹⁷² With this development, we begin to see a progressive approach towards the use of citizen media to advance international justice but to ensure this trajectory is sustained, some of the challenges discussed below need to be overcome.

¹⁷⁰ CG Weeramantry ‘The impact of technology on human rights’ (1993) <https://archive.unu.edu/unupress/lecture4.html> (accessed 1 December 2020).

¹⁷¹ *Jack R Lorraine and Beverly Mack v Markel American Insurance Company* PWG-06-1893 8.

¹⁷² *The Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli* (n 73 above).

3.4.1. The challenge of verification

Verification of citizen media is extremely important if it must be used for advocacy, investigation or prosecution. Like McPherson said, ‘verification is necessary for the transformation of information into useable evidence.’¹⁷³ While a citizen journalist might be reporting a violation in order to move the world to action, a human rights investigator is looking at the material to explore the possibilities of extrapolating sufficient evidence to establish whether there has been a prosecutable violation or not. It must however be stated that the whole aim of verification is not to have a potential piece of evidence depict what we want it to but rather to ascertain whether the said evidence is all it purports to represent. As aptly stated by De Rosa ‘the information you’re seeing on social media should be the first step towards trying to verify what actually occurred, rather than the final word.’¹⁷⁴ As a result, if due diligence is applied to the process of verification, there will be no ambiguity as to the relevance, reliability or otherwise of a video or picture. Instead, it will allow us discover what piece of citizen media is relevant and reliable and that which is not.

Verification is critical to citizen media because of the non-professionalism of those involved in this fact-finding process.¹⁷⁵ At a time when social media is hostile to the truth, it becomes all the more necessary to carry out verification to counter the spread of fabricated and altered media. This is one of the down sides to the participatory nature of citizen media – the fact that ‘information generated... can be mistaken, exaggerated, or even intentionally misleading – both in ways that are well intentioned and those that are not.’¹⁷⁶ Indeed if every source within the social media space was known and trusted, then there will be lesser need for verification.¹⁷⁷ But as we have come to realise, with human rights investigations, no source can be deemed perfectly reliable and authoritative to the extent of not requiring verification because they are also susceptible to passing on incomplete sets of facts or a completely false narrative. Buttry reflects on the necessity for verification as follows:

The need for verification starts with the simple fact that many of our information sources are wrong. They may be lying, maliciously or innocently passing along

¹⁷³ E McPherson ‘Digital human rights reporting by civilian witnesses: Surmounting the verification barrier’ in RA Lind (ed) *Producing theory in a digital world 2.0: The intersection of audiences and production in contemporary theory* (2015).

¹⁷⁴ A De Rosa ‘Using social media as a Police Scanner’ in C Silverman (ed) *Verification handbook – a definitive guide to verifying digital content for emergency coverage* (2014).

¹⁷⁵ MK Land ‘Democratizing human rights fact finding’ in P Alston & S Knuckey (eds) *The transformation of human rights fact finding* (2016) 409.

¹⁷⁶ Land (n 175 above).

¹⁷⁷ P Meier ‘Verifying crowdsourced social media reports for live crisis mapping: an introduction to information forensics’ (2011) 14.

misinformation... They may be in harm's way and unable to provide everything they know, or unable to see the full picture or events as they unfold.¹⁷⁸

Verifying citizen media content will, in most cases, start with tracing the provenance of such media in order to determine whether or not it has been altered or manipulated. This step is essential due to the prevalence of metadata deletion which occurs when content is uploaded on to some social media platforms such as Twitter and Facebook.¹⁷⁹ Ordinarily, when a picture is taken, the information file, otherwise known as metadata, can provide us with details about when it was taken, where it was taken, the kind of device used, the focal length and more. All these are relevant information critical for verification. However, some social media platforms delete the metadata, hence leaving investigators with the task of applying other tools in analysing the media and the verification tools deployed in carrying out this exercise will significantly vary depending on the amount of information available from the visual evidence. Even when the metadata has not been deleted, establishing the chain of custody – which provides the documentation and transfer trail of such media – is critical in revealing what alterations, if any, may have been applied to the original file. According to Meier, the entire process of verification can be broken down into two steps, both of which require some level of skill: the first being authentication of the source, and the second – triangulation of the content as valid. No matter the upheavals, every content must pass at least one of these steps for it to be considered for use as evidence.¹⁸⁰

However, it is extremely difficult to verify citizen media. It is a process that is reliant on skilled human capital which most human rights organisations and courtrooms do not yet have, especially in Africa. Compared to the recording of a video or taking of a picture, verification is a more specialized field that requires training and mastery and hence cannot be easily executed by unskilled individuals.¹⁸¹ Verification becomes more of an arduous task particularly in situations where the citizen journalist captured the violation in an open field, an enclosed room, or an environment with little or no visual clues that will help establish the location of the violation.

¹⁷⁸ S Buttry 'Verification fundamentals: Rules to live by' in C Silverman (ed) *Verification handbook – a definitive guide to verifying digital content for emergency coverage* (2014).

¹⁷⁹ In a survey carried out by the International Press Telecommunications Council, it was shown that a number of social media platforms deleted the metadata of media content uploaded on to their sites. See 'Social Media Sites Photo Metadata Test Results' <http://www.embeddedmetadata.org/social-media-test-results.php> (accessed 2 October 2019).

¹⁸⁰ Meier (n 177 above).

¹⁸¹ R Fricke and J Thomsen 'Video verification in the Newsroom' in V Mezaris et al (eds) *Video verification in the fake news era* (2019) 302.

In addition to this is identifying the perpetrator, which will be made difficult if the visual evidence being relied upon does not clearly capture any identifying markers or facial features. Some actually hold the opinion that verification is too challenging or outrightly impossible.¹⁸² While verification is practically impossible to achieve in some situations, a more common occurrence is that verification is time consuming and may not be rapid enough to meet the urgency required in most instances to act upon breaking news and curb further violations from being perpetrated. Others like Koettl have also acknowledged that the sheer volume of videos coming from conflict situations makes it humanly impossible to verify everything.¹⁸³

Having a verified piece of citizen media content however gives its user corroborating evidence and a measure of power over the attacks that are usually launched by those implicated in an attempt to undermine the credibility of such citizen media. On the other hand, the inability to verify citizen media stands as a barrier to the professional use of such evidence because human rights organisations or media houses will rather protect their reputation than stake it on an unverified video which, if fake, will cause significant damage to institutional credibility. Fricke and Thomsen argue in favour of this when they stated that ‘the publishing organisation should always consider that the trust of their readers in the disseminated information is an important value and builds the basis for its reputation.’¹⁸⁴ But beyond the issue of credibility, what the inability to verify also does is that it emboldens the perpetrator to deny liability or culpability.¹⁸⁵

Very key here is the case of Ahmed Biasi.¹⁸⁶ Ahmed is a Syrian who was brutalised by military forces in the early days of the Syrian conflict. When the video of his victimisation got shared online, the government dismissed it as fake, claiming that it was shot in Iraq. In a bid to prove the truth of his suffering, Ahmed took the drastic step of returning to the location of his torture and capturing on video as many details as he could to prove that the incident did occur, including filming his identity card. But this led to his revictimization as he got arrested, was imprisoned and eventually made to refute his claims on national television. Such an injustice

¹⁸² Meier (n 177 above) 1.

¹⁸³ C Koettl ‘Twitter to the rescue? How social media is transforming human rights monitoring’ 2013 *Amnesty International* <https://blog.amnestyusa.org/middle-east/twitter-to-the-rescue-how-social-media-is-transforming-human-rights-monitoring/> (accessed 21 June 2019).

¹⁸⁴ Fricke & Thomsen (n 181 above).

¹⁸⁵ In a citizen video posted online which showed a migrant worker being beaten by someone who appeared to be a Saudi man, the government tried to downplay its authenticity by claiming ‘There is no proof this is real yet’. See M Jamjoom ‘Saudi official questions authenticity of video beating’ *CNN* 2013 <https://edition.cnn.com/2013/11/05/world/meast/saudi-arabia-beating-video/> (accessed 23 April 2019)

¹⁸⁶ Gregory (n 47 above) 1380.

could have been avoided by resorting to digital verification rather than what Ahmed had to go through just to establish the truth of what happened.

Equally relevant is the livestream video of DJ Switch from the #EndSARS protests that took place at the Lekki Toll Gate on the night of 20 October 2020 which documented the aftermath of the Nigerian army's brutality. While her Instagram livestream was obvious evidence of the presence of Nigerian State forces at the Lekki Toll Gate, it did not stop the government from launching a disinformation campaign aimed at discrediting DJ Switch and her video evidence.¹⁸⁷ The efforts of government at discrediting the footage was so relentless and unyielding that a number of people started to doubt the veracity of the video evidence from that tragic night.¹⁸⁸ It took the release of an investigative report by CNN, which verified DJ Switch's video and others from that night, for many to believe again.¹⁸⁹ A year later, the Lagos Judicial Panel of Inquiry which had been mandated by government to investigate the incident, released a report that further confirmed what the video evidence showed, thus indicting the Nigerian government:

The testimony of the EndSARS protesters, especially Miss Serah Ibrahim, Mr. Onileowo Legend, Miss Dabira Ayuku, Miss Kamsichukwu (all of whom were personally present at the Lekki Toll Gate on October 20), as to the fact that the Army shot live bullets, video evidence of casualties, all lend credence to the fact that the Army shot at the protesters at the Lekki Toll Gate on October 20, 2020 which resulted into deaths and other physical injuries.¹⁹⁰

Verification is indispensable and must continue to be prioritized by all those involved in the entire spectrum of using citizen media evidence to pursue justice. Although tools and methods¹⁹¹ have been developed to carry out verification, there seems to be an 'arms race' between those working to uncover the truth in a bid to advance accountability versus those who

¹⁸⁷ The Guardian 'Nigerian government claims DJ Switch is a front for destructive forces' 2020 <https://guardian.ng/news/nigerian-government-claims-dj-switch-is-a-front-for-destructive-forces/> (accessed 12 December 2021).

¹⁸⁸ On two separate occasions, I personally engaged in an analysis of the video evidence with individuals who questioned whether the videos had been manipulated simply because the government had pushed narratives suggesting that if the video evidence were real as has been claimed, why are the families of the dead not coming forward

¹⁸⁹ S Busari 'They pointed their guns at us and started shooting – How a bloody night of bullets and brutality quashed a young protest movement' 2020 <https://edition.cnn.com/2020/11/18/africa/lagos-nigeria-lekki-toll-gate-feature-intl/index.html> (accessed 19 December 2021).

¹⁹⁰ Lagos State Judicial Panel of Inquiry on Restitution for Victims of SARS Related Abuses and Other Matters 'Report of Lekki Incident Investigation of 20th October 2020' (2021) 301.

¹⁹¹ For example, the Office of the Prosecutor at the International Criminal Court has established a Scientific Advisory Board which will 'provide recommendations to the Prosecutor on the most recent developments in new and emerging technologies and scientific methods and procedures that reinforce the capabilities of the Office in the collection management and analysis of scientific evidence relating to the investigation and prosecution of crimes of genocide, crimes against humanity and war crimes.' Refer to ICC <https://www.icc-cpi.int/Pages/item.aspx?name=pr1022&ln=en> (accessed 9 April 2018).

seek to mislead and further make citizen media less trustworthy.¹⁹² Developing new tools for verification is also proving to be a fleeting advantage due to the fast-paced nature of technological advancement. As new verification tools are developed, they quickly become obsolete because of another technology that makes obfuscating the truth a lot easier for people with ulterior motives, thus leaving us with no other option than to keep evolving really fast.¹⁹³

3.5. Cross-cutting challenges

As indicated at the beginning of this chapter, there are some challenges that surface as a challenge under more than one phase. I will discuss three of them under this category and they are: the challenge with limited perspectives; witness protection; and the challenge with deepfakes.

3.5.1. The challenge of limited perspectives

Very rarely do we find that a singular piece of citizen media evidence will tell the full story of an atrocity. This rarity is due to the fact that each witness captures a violation from a specific angle and furthermore, and equally significant, with some level of inherent bias. It is important to realise that every witness that presses the record button holds one form of bias towards the victim, the perpetrator or the situation which invariably informs how they document the particular violation. This therefore results in us having small pieces of visual evidence relating to the same violation, which can be both good and bad at the same time. It is good to have these many small pieces because it gives us the benefit of seeing the violation through different lenses. The challenge however comes when there are not enough small pieces because then what we end up with is a stack of visual evidence that is insufficient to make a strong case in the absence of additional corroborating pieces of evidence. For instance, in order to make sense of the hundreds of videos that emanated from the 2014 Euromaidan protests in Kiev which showed clashes between riot police and civilians, a group of computer scientists and designers embarked on a project to support human rights lawyers in Ukraine who were trying to organize, analyze and present the large volume of videos to potentially prove the illegal use of force by the police.¹⁹⁴

The same way a prosecutor's case is strengthened with multiple witnesses and corroborating evidence, so also, citizen media becomes more compelling when there are

¹⁹²Edwards (n 133 above).

¹⁹³ Edwards (n 133 above).

¹⁹⁴ JD Aronson and others 'Reconstructing Human Rights Violations Using Large Eyewitness Video Collections: The Case of Euromaidan Protester Deaths' (2018) 10 *Journal of Human Rights Practice* 162.

multiple vantage points. In relation to this, Koettl stated that because the way we approach human rights investigations is changing, it is important to ‘have the most complete view possible [with] different angles and different viewpoints.’¹⁹⁵ Van Schaack also addresses the importance of video evidence providing a bigger picture if a prosecutor must rely on it to prove the elements of a war crime:

In today's armed conflict situations, we often see a lot of video evidence of conflict scenes or of victims. This can be helpful crime base evidence, because it will tend to prove that there was an armed conflict underway and that individuals were killed. However, a close up video of a bleeding victim does not necessarily prove the existence of a war crime... such a video may not prove that the victim was a civilian or even that the victim was killed in hostilities and not in a car accident. This is where context can be very important. Even simply panning out to show the entire scene in which this victim is situated can help to eliminate ambiguities about what the video actually shows.¹⁹⁶

It is in the nature of citizen media for each video or image to reflect just an aspect of an entire story. Investigators will have to stitch pieces together before arriving at a presentable body of evidence that provides an understanding of how the events of a human rights violation unfolded. Although this process is arduous and time consuming, it nevertheless must be embarked upon if majority of citizen media, as we currently have them today, are to be used as evidence of a violation. Weizman stated in his book that:

for every shot that includes a beater and a beaten or a shooter and a victim, there are many more that include only one or the other, or just audio, or things that happened just before or after the incident. Their relation to other images and the main incident is not obvious. It is harder to view and understand incidents that slip between images. Images containing partial information are rarely broadcast and are often discarded as trash. Searching through this image flotsam, we can sometimes find, synchronize, and reassemble images to reenact incidents visually and virtually in space.¹⁹⁷

In overcoming the challenge of limited perspectives usually presented by citizen media, researchers at the University of California, Berkeley developed a tool called Rashomon that helps aggregate the diverse angles from which witnesses must have documented an atrocity, synchronizes it and then presents it as a holistic picture.¹⁹⁸ More recently in June 2022, SITU Research launched a tool called *Codec* which enables users to manage high volumes of video evidence, analyze them and present in an easily readable form rendered in a compelling 3D

¹⁹⁵ H Hodson ‘Multi-shot video can identify civil rights abusers’ 2013 <https://www.newscientist.com/article/mg21829236-100-multi-shot-video-can-identify-civil-rights-abusers/> (accessed 12 August 2017).

¹⁹⁶ B Van Schaack ‘Crime base v linkage evidence’ <https://www.newtactics.org/comment/7430#comment-7430> (accessed 3 October 2019).

¹⁹⁷ E Weizman *Forensic architecture: Violence at the threshold of detectability* (2017).

¹⁹⁸ ‘The Rashomon Project – an open source toolkit for assembling and analyzing multi-perspective video timelines’ <http://automation.berkeley.edu/rashomon/> (accessed 12 August 2017).

model after aggregating the data.¹⁹⁹ These multi-perspective tools makes it more feasible to have a coherent interpretation to the cases of violence and abuse. But just as important will be to train citizen journalists in order to ensure their footage captures as much information as possible if the circumstances permit.

3.5.2. Witness protection

The issue of witness protection for citizen journalists cuts across all three phases - from documentation through to dissemination as well as the evidentiary phase. Witnesses are not only at risk when capturing violations, they are also at risk when disseminating the documented violations through online platforms, and as we have seen in some cases, they also face threats when it comes to prosecution of the accused.²⁰⁰

Many citizen journalists take great risks in documenting atrocities. The fact that they are documenting a violation already indicates that they are most likely located within a volatile, unstable situation. They are constantly exposed to dangers to their wellbeing both digitally and physically and this poses a huge challenge to citizen media both at the documentation, dissemination and evidentiary phases. I will however focus more on the documentation and dissemination phases.

In the debates surrounding the reliability of citizen media and standard setting, a continuing concern is the amount of risk that citizen journalists face in the process of documenting and disseminating these human rights abuses. As McPherson rightly stated:

Human rights advocacy about violations inevitably presents a threat to the government actors identified as perpetrators. An unfortunate consequence, neither uncommon nor diminishing, is the retaliation of these actors through discrediting discourses, physical threats, or attacks to silence their critics.²⁰¹

In as much as the citizen journalists have produced a significant body of evidence for human rights defenders,²⁰² it has come at a cost to the civilians who staked everything to capture it and has also offered to authoritarian regimes the information needed to quash anti-

¹⁹⁹ SITU Research Codec *A collaborative tool for managing video evidence* (2022).

²⁰⁰ Witness intimidation played a significant role in the withdrawal of the case against William Ruto and Joseph arap Sang before the ICC. See 'Termination of Ruto and Sang case at the ICC: Witness tampering means impunity prevails over justice again' (2016) *FIDH* <https://www.fidh.org/en/region/Africa/kenya/termination-of-ruto-and-sang-case-at-the-icc-witness-tampering-means> (accessed 30 October 2019).

²⁰¹ E McPherson 'Social media and human rights advocacy' (2017) *Routledge Companion to Media and Human Rights* 279 – 288.

²⁰² HK Ismail & others 'The role of citizen journalism in addressing human rights issues through websites and e-newspapers in Jordan' (2018) 1(2) *Scholar Journal of Applied Sciences and Research* 41.

government uprisings and silence leading voices in the fight against human rights violations.²⁰³ On 20 October 2020, during the #EndSARS protests in Nigeria, Obianuju Catherine Udeh (also known as DJ Switch) used her phone to livestream the attack of the Nigerian army on peaceful protesters and as a result, she has had to go into exile because of the threats to her life.²⁰⁴

The tools that civilian witnesses use in getting the word out and pushing for accountability, such as their mobile phones, are fitted with GPS systems that make it easy for them to be tracked. The challenge thus arises with how to ensure that the same tools being used for activism do not become the same that will be used for citizen oppression. In describing how fatally compromising the internet and other ICT tools can become, Radolf said the following in a 2011 interview:

When we get online, we do so with all of our human rights intact. But these rights are often ignored or threatened and transgressed by repressive states and conservative groups... The tools that we use to communicate, share and create change with are the same tools that the state and anti-progressive forces can use to track, trace and target us.²⁰⁵

This situation presents a real dilemma. On the one hand, the internet is the tool citizens use to express themselves and disseminate information of violations but at the same time, it can become the Achilles' heel of citizen journalism. It ultimately creates a situation in which we are almost forced to choose between protecting citizen journalists, while losing the exposure of human rights violations, or exposing them and practically placing a target on their backs. As Aronson makes abundantly clear, basically, what we are experiencing is a situation in which 'social media... makes it easier for repressive governments and groups to conduct surveillance on political activists and ordinary citizens documenting their crimes and demanding change.'²⁰⁶

In order to protect the safety of a citizen journalist or that of the victim, it is sometimes more appropriate not to disseminate the evidence publicly or to conceal the identities of those connected to the video. A case that demonstrates the dangers of disseminating the evidence without a well thought out strategy is the killing of Eric Garner in 2014 by Daniel Pantaleo, a police officer attached to the New York City Police Department. The killing was caught on a

²⁰³ According to Reporters Without Borders, 10 citizen journalists were killed in 2019 and 134 were imprisoned. https://rsf.org/en/barometer?year=2019&type_id=233#list-barometre (accessed 10 November 2019).

²⁰⁴ S Haynes 'She livestreamed the shooting of peaceful protesters in Lagos. Now in exile, DJ Switch is still fighting for the future of Nigeria' 2020 <https://time.com/5922305/dj-switch-nigeria-endsars/> (accessed 11 February, 2021).

²⁰⁵ S Tolmay 'ICTs – a double edged sword for Women Human Rights Defenders' 2011 <https://www.awid.org/news-and-analysis/icts-double-edged-sword-women-human-rights-defenders> (accessed 23 April 2018).

²⁰⁶ J Aronson 'Mobile phones, social media and big data in human rights fact-finding – Possibilities, challenges and limitations' in P Alston & S Knuckey (eds) *The transformation of human rights fact-finding* (2016) 449.

cellphone camera by the victim's friend – Ramsey Orta, who went ahead to release the video. Orta however became a target of police intimidation and was subsequently imprisoned – a treatment that has been deemed as retaliation for his bold move to expose police brutality to the world. A grand jury refused to indict the officer that choked Garner to death. On the contrary however, Ramsey Orta, the citizen journalist, was sent to jail on unrelated charges of drug and gun possession.²⁰⁷

There is an obligation on states to refrain from gagging citizen journalists through the use of death threats, arrests, imprisonments or other methods. The state further has an obligation to protect civilians from third party violations. Unfortunately, in most cases, we have seen that the state is at the helm of pedalling the intimidations against citizen journalists. This is in violation of international human rights guarantees such as those enshrined under the UDHR and the ICCPR. Article 19(2) of the ICCPR stipulates as follows:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.²⁰⁸

Even though the ICCPR was adopted in 1966, this provision is applicable to new and digital media. Frank La Rue, the former UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, confirmed this as well in his 2011 report²⁰⁹ to the Human Rights Council in which he stated that:

article 19 of the Universal Declaration of Human Rights and the Covenant was drafted with foresight to include and to accommodate future technological developments through which individuals can exercise their right to freedom of expression. Hence, the framework of international human rights law remains relevant today and equally applicable to new communications technologies such as the Internet.²¹⁰

Seeing therefore these protections afforded to citizen journalists under the Covenant, human rights defenders ought to vigorously take non-compliant states to task until they respect and uphold the rights of everyone to document and disseminate information without intimidation or interference. Furthermore, in addition to this protection under international law,

²⁰⁷ A Safdar 'NY man who filmed Eric Garner's death heading to jail' *Aljazeera* 1 October 2016 <https://www.aljazeera.com/indepth/features/2016/10/ny-man-filmed-eric-garner-death-heading-jail-161001074627241.html> (accessed 27 July 2019).

²⁰⁸ Article 19(2) International Covenant on Civil and Political Rights.

²⁰⁹ United Nations General Assembly (n 103 above).

²¹⁰ United Nations General Assembly (n 103 above) para 20.

citizen journalists, due to the fact that they are civilians, have another layer of protection under international humanitarian law, should they find themselves in situations of armed conflict.²¹¹

If drastic steps are not taken to curb the risks faced by citizen journalists in the course of their evidence documentation and dissemination, we will continue to have a situation where investigators will grapple with not just the casualties they are investigating, but also the casualties of those reporting. If organisations and media houses will not risk sending their staff into conflict zones due to the concerns to personal safety, the least the international community can do is to find means of safeguarding the citizen journalists who are risking everything to make sure that violations do not go undocumented. The solution should not be to simply ask these witnesses to stop filming atrocities, because for them, they are bearing witness through video and pictures with the hopes that someday justice will be served. Frank La Rue alluded to the disparity in the protection available to citizen journalists and those enjoyed by professional journalists:

citizen journalists enjoy less protection than their counterparts in traditional media, as they do not have the support of media organisations and networks, in particular the organisational resources, including lawyers and financial resources, which can help shield them from harassment.²¹²

Keeping in mind the contributions citizen journalists make towards providing evidence, their safety and protection must therefore be taken as seriously as prosecutors take the protection of witnesses scheduled to appear in court to present or corroborate evidence of a crime, especially those implicating high ranking state officials; their protection must be regarded as top priority the same way mainstream media goes to extreme lengths to protect its sources. Robert Picard has described this as a duty of care and a moral obligation owed to citizen journalists:

All media are increasingly relying on photos, video, and information provided by citizen journalists. They have a moral obligation to speak out when authorities inappropriately constrain, detain, or attack them.²¹³

Some of the ways that have been devised for keeping witnesses safe in their dissemination efforts is the use of end-to-end encryption for communicating. Hence, human rights activists are encouraging the use of communication apps such as Telegram and Signal

²¹¹ United Nations General Assembly 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (11 August 2010) A/65/284 para 78.

²¹² United Nations General Assembly (n 103 above) para 65.

²¹³ G Cooper 'Does mainstream media have a moral obligation towards citizen journalists?' 14 July 2015 <http://theconversation.com/does-mainstream-media-have-a-moral-obligation-towards-citizen-journalists-43359> (accessed 24 April 2018).

that are regarded as highly secure and virtually impossible to compromise or hack.²¹⁴ The difficulty with this however is the fact that it will only be effective in cases where there is already an existing relationship between the citizen journalist and the investigator. It will not apply in situations of new conflicts or fresh discoveries. Besides, Telegram is already being targeted by some governments such as Russia and Iran, both of which are threatening to ban its use in their countries. In the case of Iran, Telegram is being targeted because it was used to successfully organize a mass protest in 2017,²¹⁵ while in the case of Russia, the authorities are threatening to ban it for its refusal to hand over the users' data.²¹⁶

Staying anonymous while sharing citizen media online is an alternative that can and has been explored by some in order to minimize the risks of threats and violence. However, many critics have regarded anonymity as one of the major pitfalls of citizen media because it makes it harder to ensure that information is correct and that its author takes responsibility for posting.²¹⁷ It is however understandable that citizen journalists choose to stay anonymous even though full anonymity is not always realisable.

It will be an inaccurate assumption to expect that all citizen journalists are familiar with some of the techniques to observe in order to enhance their personal safety. This brings to the fore the need to embark on enlightenment campaigns and create learning tools which can be referred to. Although as indicated above, making these techniques public also means that the perpetrators can access them and devise counter measures against the human rights community. Nevertheless, I believe this is a risk worth taking as a means of protecting citizen journalists.

3.6. Conclusion

Even when citizen media meets the minimum threshold of expectation in relation to relevance, authenticity and reliability, having more appropriately documented videos does not necessarily translate to accountability. We will need strong institutions to seal the accountability agenda. Even though citizen media helps to significantly bridge the gap created by insufficient evidence, it is sometimes not enough to guarantee accountability because the political will must also be

²¹⁴ The Signal protocol is regarded as one of the most secure end-to-end encryption available, even stronger than Apple's iMessage. See B Barrett 'The year encryption won' *WIRED* (2016) <https://www.wired.com/2016/12/year-encryption-won/> (accessed 25 September 2019).

²¹⁵ K Fox 'Iran threatens to shut down Telegram Social Media app' 4 January 2018 <https://edition.cnn.com/2018/01/03/middleeast/iran-protests-social-media-ban-intl/index.html> (accessed 23 April 2018).

²¹⁶ M Seddon 'Telegram rejects Russian demand to hand over user data' 2 April 2018 *Financial Times* <https://www.ft.com/content/84a878da-3664-11e8-8b98-2f31af407cc8> (accessed 23 April 2018).

²¹⁷ N Jurrat 'Mapping digital media: Citizen journalism and the internet' (2011) *Open Society Media Program* 14.

present for there to be a chance at delivering justice and accountability. When we consider the barrage of video evidence coming out of Syria and see the impasse over the best strategy for holding the Syrian government accountable, it is a stinging reminder of the limited power of video, especially when there is no political will. Molly Land puts it this way:

In many instances, the failure to respond to conflicts and humanitarian crises around the world is not due to a lack of information but a lack of political will. In some instances, there can of course be information deficits, particularly when the conflict occurs in remote or isolated regions. Often, however, we have more than enough information about what is happening and the impact that these events are having on human rights, but the information is not translated into effective action.²¹⁸

The challenges to citizen media keep evolving and as a human rights community we are not quickly coming up with solutions. Some of the challenges discussed under this chapter have been around since the proliferation of mobile phones started to occur. Considering the great risks that many citizen journalists face in getting the word out about human rights atrocities using the power of their smartphone, the least we can do is make sure their efforts are not in vain.

To progress further therefore, the human rights community must begin to take on specific aspects of these challenges and begin to forge workable solutions. In Chapter Four, I go into an in-depth analysis of how, citizen media and digital evidence is being used in the courtroom to advance justice, as well as some of the barriers in the way of citizen media being fully used as evidence before different courtrooms in Africa.

²¹⁸ D Bauman 'New ways of monitoring human rights' 2015 *UConn Communications* <http://today.uconn.edu/2015/03/new-ways-of-monitoring-human-rights/> (accessed 26 July 2017).

Chapter Four: Citizen media evidence in the courtroom

4.1. Introduction

Beginning with Nuremberg where Nazi leaders were put on trial, right up to international criminal tribunals for Yugoslavia and Rwanda, and then the International Criminal Court – which has been described as ‘the most dramatic marker yet in the long human struggle for accountability’¹ – individuals have been prosecuted and tried in order to bring about lasting peace to a world constantly at war.

Citizen media has provoked a public encounter with human rights violations due to its visual component and widespread reach and we are beginning to see it being used more and more as evidence in courtrooms. The visuals from some of the world’s gravest conflicts have reinforced an international debate for why perpetrators of atrocities must be held accountable. Sliwinski describes the influence of visuals on human rights by saying that ‘the conception of rights did not emerge from the abstract articulation of an inalienable human dignity but rather from a particular visual encounter with atrocity.’²

The supply and clarity of evidence is clearly one of the most important values that citizen media brings to accountability for international crimes and other violations of human rights. People are using video in powerful ways: from exposing the military attack on unarmed protesters in Nigeria, to documenting the chemical attacks in Syria, atrocities are being brought to light and as a result, justice and accountability have a fighting chance. Although it is important to highlight that even though the idea of citizen media evidence is a recent one, the use of video as evidence during trials is not. As far back as 1945 during the Nuremberg trials, video showing the crimes committed at the Nazi concentration camps was entered into evidence.³ Additionally, the US Chief Prosecutor, Robert Jackson, stated the following during his opening statement before the International Military Tribunal in Nuremberg, ‘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.... 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

¹ E Paris *The sun climbs slow: The International Criminal Court and the struggle for justice* (2009) 19.

² S Sliwinski *Human rights in camera* (2011) 58.

³ See 1945 Nazi Concentration Camp Footage – Nuremberg Trials <https://www.youtube.com/watch?v=1v86HlujtR0> (accessed 25 October 2018). See further: ‘Reactions to film shown at Nuremberg’ <https://encyclopedia.ushmm.org/content/en/film/reactions-to-film-shown-at-nuremberg> (accessed 25 October 2018).

voices.’⁴ All these buttresses the fact that using video evidence in a courtroom is not new. What is different today however is that citizen journalists are involved, alongside professionals, in producing video and other forms of digital evidence in such high volumes that we are presented with both an opportunity and a dilemma. An opportunity because these videos serve as evidence against the perpetrators. But it is a dilemma at the same time because the human rights community is still trying to figure out how to maximize this moment to secure greater justice for victims of atrocities.

The jurisprudence around the use of citizen media as evidence is gradually developing both domestically and internationally, and we have seen this in the more recent cases before the International Criminal Court (ICC) in which the Office of the Prosecutor (OTP) relied on citizen media to secure a conviction.⁵ Some of these cases will be discussed in greater detail in the course of this chapter. The fact that citizen journalists and other local activists do not face some of the legal, diplomatic or practical challenges that staff of the ICC and other established human rights groups sometimes face when accessing evidence at the location of an atrocity, has made citizen media evidence all the more valuable due to its spur-of-the-moment, real time documentation. This was succinctly highlighted during the workshop organized by the Berkeley Human Rights Center:

The OTP does not have the resources to be on the ground in every conflict country that may one day become the focus of an ICC trial. By the time OTP investigators arrive to gather preliminary information for potential investigations and trials, relevant evidence may have been tampered with, removed from the scene of the crime, or destroyed; these factors increase the ICC’s reliance on third parties. Having relationships with first responders who can document and preserve information about crimes soon after they occur can prove essential for gathering admissible evidence for successful prosecutions. Without NGO cooperation, the OTP may never discover or obtain the relevant evidence to ensure perpetrators are held responsible for their crimes.⁶

The issue of difficulty in accessing the scene of an atrocity in certain instances cannot be overstated. In the wake of the Syrian uprising, Garance Le Caisne – a journalist – testified during the Anwar Raslan trial that she was only able to enter Syria in 2012 by using a fake name on her passport because ‘it was hard to enter the country as a western journalist.’⁷ Hence

⁴ ‘Combating holocaust denial: Evidence of the Holocaust presented at Nuremberg’ <https://encyclopedia.ushmm.org/content/en/article/combating-holocaust-denial-evidence-of-the-holocaust-presented-at-nuremberg> (accessed 21 December 2021).

⁵ *The Prosecutor v Thomas Lubanga Dyilo (The Lubanga Case)* International Criminal Court (14 March 2012) ICC-01/04-01/06.

⁶ Human Rights Center ‘First Responders: an international workshop on collecting and analyzing evidence of international crimes’ (2014) 4.

⁷ Trial of Anwar Raslan and Eyad Al Gharib, Higher Regional Court – Koblenz, Germany (2020) *Syria Justice and Accountability Centre and International Research and Documentation Centre*, Trial Monitoring Report 16, 2.

citizen journalists are filling a void by being present to bear witness, albeit sometimes at great personal risks.

It is however pertinent to note that several gaps still exist in the use of citizen media for accountability, specifically within legal settings and for the pursuit of legal accountability. Some of these issues were echoed at a training held in Morocco to discuss the use of citizen media as evidence in legal proceedings:

[I]t became clear that while the stakeholders recognized the value of video evidence, and despite the widespread use of cameras in today's society, the question of how these respective jurisdictions view the use of video in a legal setting has not been given due attention. Many participants were unfamiliar with the substance and the significance of the legal frameworks regulating video evidence in their respective home countries. Front line defenders, who often risked their lives to capture video footage, were frustrated that lawyers often did not use their footage, and lawyers expressed concerns that the quality of the video footage they receive seldom passed the higher bar required for it to be used as evidence in a court of law.⁸

As will be shown in this chapter, these concerns run through the fabric of many countries in Africa. Beyond the lack of specificity on the applicable laws (in cases where these laws actually do exist), there is also the hesitation to engage with citizen media evidence. One can understand why the courts sometimes tread with caution in their interaction with citizen media evidence as some judges have expressed how they consider the ease of manipulation as a major reason for their hesitation, like Supreme Court Justice Tobi stated in the Nigerian case of *Araka v Egbue* adjudicated under the country's old Evidence Act:

In this age of sophisticated technology, photo-tricks are the order of the day and secondary evidence produced in the context of section 97 (2) (c) could be tutored and therefore not authentic. Photo-tricks could be applied in the process of copying the original document with the result that the copy which is secondary evidence does not completely and totally reflect the original... The court has not the eyes of an eagle to detect such tricks.⁹

Similarly, in the South African case of *Moloko v Commissioner Diale & Others* the learned Judge stated that 'Wide use of video films in the entertainment industry has resulted in the techniques of illusion and deception being brought to powerful perfection. For this reason,

⁸ T Vassefi 'Video as evidence in the Middle East and North Africa: An interview with PILnet and WITNESS' (2017) 11.

⁹ *Hon. Justice EO Araka v Hon Justice Don Egbue* (2003) 17 NWLR (PT 848) 1. See also *Ekiti State Independent Electoral Commission & ors. v Peoples Democratic Party (PDP) & anor* (2013) LPELR – 20411 (CA) where the Judge stated that 'With our modern communication technology, anything is possible. Documents and signatures are easily manipulated to the extent that genuineness of documents can no longer be ascertained by mere observation with the eyes.'

any such video recordings used in any tribunal should be authenticated if reliance is to be placed upon them.’¹⁰

Therefore, in this chapter, I will take a look at the different ways through which citizen media has evolved into an unprecedented tool for advancing human rights accountability within the courtroom. I will engage in an analysis of the changing landscape for citizen media admissibility before international courts and domestic courts in Africa. I will specifically be looking at some cases before the International Criminal Court (ICC) and the role video evidence played. At the domestic front, I have chosen to analyse the applicable laws that govern the admissibility of digital/electronic evidence in the Democratic Republic of Congo, Kenya, Nigeria, South Africa and Zimbabwe, in order to decipher if they are up to date with the fast-evolving technology-based pieces of evidence. The choice of these countries was made to cover the three sub-regions within Sub-Saharan Africa, namely Central Africa, East Africa, West Africa and Southern Africa. By virtue of this selection, I also get to analyse what obtains under both civil law and common law systems as well as the trends within Anglophone and francophone African countries. In addition, I will be addressing the general approach in the domestic courts of the aforementioned countries towards the admissibility of digital evidence, particularly those obtained through mobile phones. Finally, I will make a brief comparative analysis with what obtains in other jurisdictions such as Germany, Sweden and the United States of America. I will conclude this chapter with recommendations of what needs to change in order to guarantee a future where citizen media evidence can continue to be used to hold perpetrators accountable through the courtrooms.

4.2 The role of citizen media in international crimes prosecutions

The availability of evidence is a core ingredient in criminal prosecutions. By virtue of the ICC’s Rome Statute, the burden of proof in criminal prosecutions indicates that he who asserts must prove the guilt of the accused beyond reasonable doubt.¹¹ In essence, the claimant or prosecutor must present compelling evidence that backs up the claim of a crime or violation and the persuasion is not on a balance of probability, which is the legal standard in civil suits, but rather it has to be beyond all reasonable doubt, which is a higher standard required in criminal cases. This standard is sustained in line with the principle of fair hearing because the accused is presumed innocent until proven guilty which is why article 66(3) of the Rome Statute explicitly

¹⁰ *Moloko v Commissioner Diale & others* (2004) 25 ILJ 1067 (LC) para 8.

¹¹ Rome Statute of the International Criminal Court, adopted on 17 July 1998 (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6 art 66 (2) (3).

provides that ‘[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.’

Furthermore, under the Rules of Procedure and Evidence for the former ICTY and ICTR, Rule 87A stipulates that ‘[a] finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.’ This is important because the higher standard required under criminal prosecution is the reason why the quality of the evidence presented, be it citizen media evidence or not, must also be of the highest standard possible since a conviction cannot be based on mere suspicion or probability of guilt. Quite significantly, the ICC’s Trial Chamber II in the *Katanga case* took a position that underscores the need to consistently present compelling evidence, otherwise, it would not be able to hand down a guilty verdict:

It is the Chamber’s position that the fact that an allegation has not, in its view, been proven beyond reasonable doubt, does not necessarily mean that the Chamber questions the very existence of the alleged fact. It simply means that it considers that there is insufficient reliable evidence to adjudge the veracity of the alleged fact in the light of the standard of proof. Accordingly, finding an accused person not guilty does not necessarily mean that the Chamber finds him or her innocent. Such a determination merely demonstrates that the evidence presented in support of the accused’s guilt has not satisfied the Chamber “beyond reasonable doubt”.¹²

It is worth mentioning that while the Trial Chamber found Katanga guilty of four counts of war crimes and one count of crimes against humanity, it acquitted Katanga on other charges relating to sexual crimes and the recruitment of child soldiers because ‘the evidence presented in support of the accused’s guilt did not satisfy it beyond reasonable doubt of the accused’s responsibility for these crimes.’¹³

In addition to the burden of proof as it pertains to criminal cases, the courts and judges are further guided by specific rules of procedure and evidence in the conduct of trials. An analysis of evidentiary procedures before select international criminal justice mechanisms will be analysed below to determine how these rules facilitate or impede the admissibility of citizen media evidence.

¹² *Prosecutor v Germain Katanga*, Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07-3436 para 70.

¹³ ICC ‘Germain Katanga found guilty of four counts of war crimes and one count of crime against humanity committed in Ituri, DRC’ (2014) <https://www.icc-cpi.int/Pages/item.aspx?name=pr986> (accessed 10 January 2022).

4.2.1. Rules of procedure and evidence under the International Criminal Tribunal for the former Yugoslavia

Prior to the establishment of the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were courts that relied on visual evidence during trial.¹⁴ The Trial Chamber of the ICTY acknowledged that video and photographic evidence shown during the trials played a significant role in helping the judges better visualize the terrain where the violations occurred.¹⁵

The ICTY, founded in 1993 and the ICTR, founded in 1994, were established to prosecute international crimes that occurred at a time prior to the proliferation of mobile phone technology and the age of social media. Even though the Tribunals had cases involving the use of digital and video evidence, they did not have to grapple with the volume of video evidence the ICC is now confronted with in this era. Regardless of this however, the case law and rules of procedure and evidence give us an insight into how these tribunals interacted with digital evidence.

By virtue of Rule 89(C) of the Rules of Procedure and Evidence for the ICTY ‘[a] Chamber may admit any relevant evidence which it deems to have probative value.’¹⁶ Furthermore, Rule 85(A)(vi) stipulates that the Chamber will allow the presentation of any relevant information that may assist it in determining whether or not the accused is guilty of the charges. The combination of these two Rules indicates that there is the possibility for digital evidence such as citizen media evidence to be admitted before the Tribunal. Although it is important to note that paragraph VI under Rule 85(A) was not in the original version of the Rules and was only introduced in the amendment of 10 July 1998. Nevertheless, an important takeaway from the combination of these two Rules is that the major condition for admitting evidence before the Tribunal is that it should be relevant and should have probative value. In other words, the evidence should be able to help prove or disprove the fact in dispute, and it is authentic as well as reliable.

Also, noteworthy is the position of the Trial Chamber in the case of *Prosecutor v Zenjnil Delalic et al*, where it stated that the threshold standard for the admissibility of evidence should not be set too high because documents are admitted into evidence ‘not as ultimate proof of guilt or innocence, but to provide a context and complete the picture presented by the evidence

¹⁴ One of the cases before the ICTY that significantly made use of video evidence was *Prosecutor v Zdravko Tolimir*, IT-05-88/2-T.

¹⁵ *Prosecutor v Stanislav Galić* Judgment IT-98-29-T (2003) para 805.

¹⁶ A similar provision can be found under Rule 89(c) of the ICTR’s Rules of Procedure and Evidence.

gathered.¹⁷ This is significant in that the Trial Chamber views evidence tendered as a piece of a puzzle and will consider other corroborating pieces of evidence to reach its conclusions.

It would therefore seem that the only grounds upon which evidence would not be admissible by the Tribunal is if it is obtained through any means that raises doubt as to its reliability or if its admission would cause significant damage to the integrity of the proceedings.¹⁸ This provision was made in order to guarantee a fair trial, which is why Rule 89(D) also stipulates that ‘A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.’

While the Judges are by law allowed to admit virtually any relevant piece of evidence that is non prejudicial, the question of authenticity becomes a key determinant as to what weight is attached to such evidence. The Trial Chamber made it clear in unequivocal terms that:

[T]he Trial Chamber wishes to make clear that the mere admission of a document into evidence does not in and of itself signify that the statements contained therein will necessarily be deemed to be an accurate portrayal of the facts. Factors such as authenticity and proof of authorship will naturally assume the greatest importance in the Trial Chamber’s assessment of the weight to be attached to individual pieces of evidence.¹⁹

It is obvious that just as important as admitting the evidence is, the authenticity of such evidence must also be prioritized by the party presenting the evidence as this affects the weight the court attaches to the evidence. A piece of evidence without any weight ascribed to it is fundamentally worthless. The case of *Prosecutor v Slavko Dokmanović*,²⁰ gives us a good glimpse into how the ICTY approached the question of authenticity – by relying on corroborating evidence and expert testimony. Slavko Dokmanović had been charged alongside three others for the mass killing at Ovčara, near Vukovar, Croatia, of approximately 200 Croatian and non-Serb persons who had been forcibly taken from Vukovar Hospital on 20 November 1991.

It was therefore pertinent to establish during the trial that the four defendants were involved in the execution of the victims. Dokmanović, who was the President of the Vukovar municipality at the time, pleaded not guilty to the charges, arguing that he was not present at

¹⁷ *Prosecutor v Zenjnil Delalic et al*, Decision on the motion of the prosecution for the admissibility of evidence (1998) para 20.

¹⁸ Rule 95, Rules of Procedure and Evidence, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (2015) IT/32/Rev.50.

¹⁹ *Prosecutor v Zenjnil Delalic et al*, (n 17 above) para 20.

²⁰ *Prosecutor v Mile Mrkšić and others*, IT-95-13a-I.

the scene as he was somewhere else. His alibi was supported by video evidence presented by his Defense team which carried both date and time stamps that matched the date and time of the mass killing. In the video Dokmanović can be seen with other colleagues driving in a car in the direction of Vukovar thus making the point that he could not have been involved in the mass killing if he was at another location driving with colleagues. The Prosecution was convinced that the video submitted by the Defense was partially altered and as a result they sought to impeach the evidence. An investigator with the Office of the Prosecutor, Vladimir Dzuro, was sent to Vukovar to film the route that Dokmanović and others had been shown to drive through in the Defense's alibi video. Upon a side-by-side comparison of both clips, there were obvious discrepancies in the footage that had been presented by the Defense vis-à-vis the one filmed by Dzuro.

One of the key distinguishing features was that the trees which appeared at the end of the alibi video showing the end of Dokmanović's journey were not the same as the ones seen in Dzuro's video evidence. Adding the testimony of an expert witness, Professor Paul Tabbush who is an expert in dendrology, the Prosecutor was able to prove that the Defense's video evidence was unreliable. Although this did not still link Dokmanović to the scene of the crime, it proved the alibi video evidence as inauthentic and also undermined the credibility of his defense. Dokmanović eventually committed suicide before his verdict and the case against him was terminated, but two of the remaining three defendants in the case were later found guilty and sentenced accordingly.²¹

It is obvious from Dokmanović's case that a pathway taken for the authentication of evidence before the tribunal is to obtain testimony about such evidence from an expert who is knowledgeable about digital forensics. We also see from other cases such as *Prosecutor v Stanislav Galić* where film, photographs and sound recordings were part of the evidence, that the court relied on expert testimony to a great extent.²²

This approach is favourable to citizen media evidence because the author of a piece of video evidence does not have to be present to corroborate or authenticate their evidence. Rather, an expert in digital forensics or digital verification can assist the court to determine the

²¹ *Prosecutor v Mile Mrkšić, Miroslav Radić, Veselin Šljiv Ančanin*, Judgment (2007) IT-95-13/1-T, para 710 – 716.

²² *Stanislav Galić Case* (n 15 above) para 179. The Trial Chamber heard a total of 171 witnesses and admitted 1,268 exhibits as well as 15 experts' reports.

authenticity of the evidentiary material. This allows the evidence to still be relied upon in the event that the author is unknown, deceased or unable to appear in court for security reasons.

4.2.2. Rules of procedure and evidence under the International Criminal Court

The ICTY and ICTR were precursors to the International Criminal Court (ICC) and a number of the features regarding admissibility of evidence from these tribunals found their way into the ICC rules and statute. For instance, similar to the international tribunals, the judges at the ICC have some latitude when it comes to admitting evidence. By virtue of article 64(9) of the Rome Statute, the Trial Chamber has the power to rule on the admissibility and relevance of evidence. In furtherance of this, article 63(2) of the ICC's Rules of Procedure and Evidence bestows the Trial Chamber with the authority 'to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.' The use of the word 'freely' places the decision in the hands of the judges to determine the admissibility and weight of every form of evidence brought before it, as long as it shall be in the interest of justice, and specifically in the interest of the victims.²³ Going even further to bolster the flexibility of the judges on this matter is article 64(8)(b) of the Rome Statute that allows the presiding judge to 'give directions for the conduct of proceedings' as well as the submission of evidence by the parties. The guiding principles are that while ruling on the admissibility and relevance of evidence, the Court must ensure that a fair trial is upheld,²⁴ and that admitting such evidence would not damage the integrity of the proceedings.²⁵

The ability of the Trial Chamber Judges to set the tone of the proceedings is good because it does create the room for new and sophisticated forms of digital evidence to be admitted into evidence, since they were not explicitly captured under the rules. But at the same time, the lack of specificity can also present its own unique set of challenges, especially because the judges all come from different legal systems. For example, there is a divergent view on when during the trial a determination should be made on the admissibility of evidence. In the case of *The Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, the Prosecutor and the Defense requested that the court should rule on the admissibility of evidence on a rolling basis in order to avoid uncertainty. However, the Trial Chamber rather concluded that 'any decision on the admissibility and relevance of the evidence submitted will be deferred to the final judgment, except when an intermediate ruling is required under the Statute or otherwise

²³ Rule 69, ICC Rules of Procedure and Evidence.

²⁴ Article 69(4) Rome Statute.

²⁵ Article 69(7) Rome Statute.

appropriate.²⁶ Whereas, in the case of *The Prosecutor v Al Hassan*, an opposite position was taken by the Trial Chamber:

[T]he Chamber considers that it is appropriate to exceptionally consider the admissibility of this material upfront at this stage and not to defer the decision for consideration at the judgment stage... The Chamber considers that deciding on the status of this submitted material at this stage will provide clarity for the parties and participants going forward and is relevant to both the fairness and efficiency of the proceedings.²⁷

These varying positions result in uncertainty. While not disputing the discretion of the Judges to approach the issue of evidence with a measure of flexibility, a foreseeable challenge with deferring the admissibility of evidence till much later in the trial or at judgment stage is that Judges may become overwhelmed due to the increasing volume of digital evidence being relied upon during trials. Freeman and Llorente also argue that ‘digital evidence may increasingly require the Trial Chambers to make early deliberations on admissibility to allow the parties to introduce arguments at the time, improving the judges’ understanding of that evidence.’²⁸ Besides, while the flexibility of the ICC allows certain liberties with the analysis of evidence, the impact it would have is that there are no visible standards.²⁹

Although the Rules of Procedure and Evidence do not make explicit reference to digital or video evidence, the practice of the court reveals how it is adjusting to this form of evidence. The analysis of some of the cases below demonstrate the approach and disposition thus far to the use of video evidence at the ICC.

4.2.3. The *Thomas Lubanga* case

The ICC for a long time has regarded witness testimony to be central to its trial proceedings. This stems from the provisions in its rules, for instance article 69(2) of the Rome Statute states as follows:

The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure

²⁶ *Prosecutor v Laurent Gbagbo and Charles Blé Goudé*, Decision on the submission and admission of evidence, ICC-02/11-01/15, 10.

²⁷ *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Public redacted version of ‘Decision on requests to the submission into evidence of Mr Al Hassan’s statements’ ICC-01/12-01/18 para 25.

²⁸ L Freeman and RV Llorente ‘Finding the signal in the noise – International criminal evidence and procedure in the digital age’ *Journal of International Criminal Justice* 19 (2021) 183.

²⁹ K Hiatt ‘Open source evidence on trial’ (2016) *The Yale Law Journal Forum* 125, 329.

and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.³⁰

The over reliance on *viva voce* witness testimony has resulted in notable shortcomings in some cases and this has led to the Court criticizing the prosecution for its failure in presenting sufficient material evidence.³¹ The International Bar Association has encouraged the Office of the Prosecutor (OTP) to ‘source and utilise additional forms of evidence in place of exclusive reliance on witness testimony.’³² which may include video footage and electronic evidence in addition to other forms of evidence, including forensic materials. This was put to the test in the case of Thomas Lubanga.

Thomas Lubanga Dyilo became the first person to be convicted by the ICC. He was sentenced to 14 years imprisonment after being found guilty of war crimes of ‘enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities.’³³ In addition to his prison sentence, the Trial Chamber also approved and ordered the start of ‘symbolic collective reparations for the victims.’³⁴ Since Lubanga was charged with conscripting and using child soldiers in the DRC, the prosecutor had to prove beyond reasonable doubt that one or more persons under the age of 15 were enlisted and used to fight in hostilities.³⁵ During the trial, evidence was introduced in oral, written and audio-visual form.³⁶

As part of its case, the prosecution presented oral testimony of nine alleged child soldiers but these oral testimonies were greatly undermined due to series of inconsistencies and contradictions that subsequently led the court to conclude that a number of the prosecution witnesses were unreliable:

The Chamber has taken into account the psychological impact of the events that have been described in evidence, and the trauma the children called by the prosecution are likely to have suffered. The Chamber accepts that some or all of them may have been exposed to violence in the context of war, and this may have had an effect on their testimony. Additionally, they were often interviewed on multiple occasions following these events. Nonetheless, for the reasons identified in the relevant analysis for each witness, the inconsistencies or other problems with their evidence has led to a finding

³⁰ Article 69(2) of the Rome Statute.

³¹ International Bar Association (IBA) ‘Witnesses before the International Criminal Court: An International Bar Association International Criminal Court Programme report on the ICC’s efforts and challenges to protect, support and ensure the rights of witnesses (2013) 19.

³² IBA (n 31 above) 20.

³³ *The Lubanga case* (n 5 above).

³⁴ ICC ‘Lubanga’s case: ICC judges approve plan on symbolic reparations’ 21 October 2016 <https://www.icc-cpi.int/Pages/item.aspx?name=pr1247> (accessed 22 October 2019).

³⁵ International Criminal Court ‘Elements of Crimes’ (2011) art 8 (2) (b) (xxvi).

³⁶ *The Lubanga case* (n 5 above) para 93.

that they are unreliable as regards the matters that are relevant to the charges in this case.³⁷

Even though the prosecution argued that the contradicting oral testimonies were partly as a result of the presence of the accused in the room,³⁸ the court nevertheless insisted that some of the witnesses were unreliable and there was the possibility that they were giving false evidence.³⁹ The lack of persuasion which these oral testimonies had was to the extent of the court concluded that the prosecution had not succeeded in establishing beyond reasonable doubt that these witnesses had been conscripted while under the age of 15 to fight in hostilities.⁴⁰

In addition to the lack of accuracy and reliability of the oral testimonies, the prosecution was also unable to establish the age of the children by relying on corroborating evidence such as school records or x-ray examinations. On the one hand, the school records of the witnesses contained inaccuracies and hence were deemed unreliable.⁴¹ On the other hand, the x-ray examination of bone and teeth of the alleged child soldiers was challenged by the defense as lacking in precision because they were not based on a Sub-Saharan Africa model, but rather on American and European models that had not been updated in fifty years.⁴² Hence the court acknowledged that the x-ray evidence will not provide an exact age but an approximate one, and as such treated the evidence with caution. Additionally, the prosecution was unable to approach village chiefs or family relatives of the witnesses for corroborating evidence of their age because it did not want such investigation to endanger the life of the witnesses or that of their family members.⁴³

It is in the midst of these several obvious shortcomings in the oral and forensic evidence that the video evidence presented by the prosecution became a core ingredient in helping establish the elements of the crime Thomas Lubanga had been charged with. The series of video clips used by the prosecution during the trial had been captured by some courageous NGOs in the DRC and they showed Lubanga addressing child soldiers at a military camp as well as having them serve as his bodyguards.⁴⁴ This series of video evidence relied upon by the

³⁷ *The Lubanga case* (n 5 above) para 479.

³⁸ *The Lubanga case* (n 5 above) para 431.

³⁹ *The Lubanga case* (n 5 above) para 426 and 441.

⁴⁰ *The Lubanga case* (n 5 above) para 480.

⁴¹ *The Lubanga case* (n 5 above) para 464.

⁴² *The Lubanga case* (n 5 above) para 176.

⁴³ *The Lubanga case* (n 5 above) para 172.

⁴⁴ See 'Film evidence for using child soldiers by Lubanga' <https://www.youtube.com/watch?v=3ySF8ojE6n4> (accessed 25 October 2019).

prosecution were compelling and corroborated aspects of some of the witness testimonies to the extent that the court was persuaded to conclude that:

On the basis of the accounts of P-0016, P-0030, P-0041 and P-0055 as well as the video footage, the Chamber is satisfied that between September 2002 and 13 August 2003, Thomas Lubanga, as President and Commander-in-Chief of the UPC/FPLC, used a significant number of children under the age of 15 within his personal escort and as his bodyguards.⁴⁵

The defense appealed the decision of the Trial Chamber on a number of grounds including arguing that it was unreasonable for the Trial Chamber to come to a finite conclusion regarding the age of the children based on video excerpts:

The Chamber... grounded its judgment on evidence that we would describe as subsidiary, ancillary; namely footage - video footage - or testimony, relying solely on a subjective appreciation and visual appreciation, or understanding, or determination, with regard to the age of the soldiers....⁴⁶

Therefore, in relation to the question about grounding the determination of the age of the child soldiers solely on video evidence, the Appeals Chamber ruled that ‘there is no strict legal requirement that the video excerpts had to be corroborated by other evidence in order for the Trial Chamber to be able to rely on them.’⁴⁷ This finding was arrived at by relying on the provisions of Rule 63(4) of the Rules of Procedure which stipulates as follows:

Without prejudice to article 66, paragraph 3, a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, in particular, crimes of sexual violence.⁴⁸

Although the judges also remarked that this does not mean any single piece of evidence will be sufficient. It must still meet the minimum evidentiary standards and the courts must approach it cautiously.⁴⁹

When addressing the question as to whether images from a video are sufficient in determining the age of the child soldiers, the position of the Appeals Chamber was that the Trial Chamber was not unreasonable in its conclusions because it applied a large margin of error and ‘made findings as to the age of the children only where the children were, in its assessment, “clearly” under the age of fifteen years.’⁵⁰

⁴⁵ *The Lubanga case* (n 5 above) para 869. See also paragraphs 792, 793, 912 and 915 in which the court alluded to corroborating video evidence as forming the basis of its conclusions.

⁴⁶ *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 Appeals Hearing – Closing Submissions 6.

⁴⁷ *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 A 5 Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction 81.

⁴⁸ International Criminal Court ‘Rules of procedure and evidence’ (2013).

⁴⁹ Thomas Lubanga’s Appeal Judgment (n 47 above) 82.

⁵⁰ Thomas Lubanga’s Appeal Judgment (n 47 above) 83.

These findings by both the Trial and Appeals Chambers of the ICC are significant because they recognise the value of video evidence. Furthermore, it is noteworthy that the ICC was able to constructively engage with digital evidence as presented in the Lubanga case, despite the fact that this was the court's first trial to make use of evidence in such format and at the time, there were no direct or explicit provisions in the rules that referenced video and digital evidence. The Lubanga case has therefore been precedent setting in many ways and steered the ICC in the direction of improving its capacity to interrogate video and digital evidence. But it is also clear from the Lubanga case, and subsequent ones that followed at the ICC,⁵¹ that oral testimonies from witnesses no longer form the major tool in a prosecutor's arsenal for proving beyond reasonable doubt the elements of a crime and the rationale behind this shift was well captured by the IBA:

While an eyewitness account provides that witness's perception and recollection of an event, a video may capture elements that were outside a person's range of vision or that the individual has forgotten; a satellite or aerial image may show an overview of a larger area or an inaccessible location; and data such as phone records or computer records may show communications and patterns of communications relevant to an individual's activities and knowledge of events. This information, when presented as evidence, has the potential to better enable judges to discharge one of their key functions: to ascertain the truth about crimes charged within the jurisdiction of the ICC. In addition, the increasing prevalence of digital technology, in particular, mobile phones, mobile phone cameras and computers, even in remote locations, makes such technologically derived evidence an inevitable component of the ICC's investigations.⁵²

Freeman argued in a similar vein, stating that 'the more recent cases at the ICC have been significantly stronger from an evidentiary standpoint than the initial witness-focused cases advanced by the Prosecution,'⁵³ and this is as a result of the OTP's increased reliance on video evidence captured on cellphone cameras as well as those collected through satellite imagery. We see proof of this not just in the Lubanga case but also in cases such as *Prosecutor v Al Mahdi*,⁵⁴ in which the 700 pieces of documentary evidence, including video and photographic evidence, against the defendant, led to him pleading guilty during trial.⁵⁵ The Prosecution also acknowledged its reliance on video evidence to prove its case when it stated, *inter alia* that:

[T]he Prosecution will use satellite images, photographs, videos and other material gleaned from the Internet which are included on the list of our evidence material to

⁵¹ *The Prosecutor v Ahmad Al Faqi Al Mahdi* (27 September 2016) ICC-01/12-01/15-171.

⁵² International Bar Association (IBA) 'Evidence matters in ICC Trials: An International Bar Association International Criminal Court & International Criminal Law Programme report providing a comparative perspective on selected evidence matters of current importance in ICC trial practice' (2016) 20.

⁵³ L Freeman 'Digital evidence and war crimes prosecutions: The impact of digital technologies on international criminal investigations and trials' (2018) 41(2) *Fordham International Law Journal* 289.

⁵⁴ *The Prosecutor v Ahmad Al Faqi Al Mahdi* (n 51 above).

⁵⁵ ICC 'Case information sheet: The situation in the Republic of Mali: *The Prosecutor v Ahmad Al Faqi Al Mahdi* ICC-01/12-01/15' July 2021 <https://www.icc-cpi.int/CaseInformationSheets/Al-MahdiEng.pdf> (accessed 24 August 2020).

show the situation of the mausoleums before, during and after the destruction, including the participation of the accused. These elements are authentic and have been accepted by the Defence and which are solid proof corroborating the plea of guilt entered by the accused.⁵⁶

The Trial Chamber ultimately found Al Mahdi guilty as a co-perpetrator of the war crime consisting in intentionally directing attacks against religious and historic buildings in Timbuktu, Mali. He was sentenced to nine years in prison and reparations were ordered for the victims.⁵⁷

4.2.4. Other examples from the ICC

We have also witnessed the role of citizen media evidence in the issuance of a warrant of arrest for Mahmoud Mustafa Busayf al-Werfalli.⁵⁸ Al-Werfalli has been charged with murder as a war crime in the context of seven Libyan incidents and this is the first time in the history of the ICC that an arrest warrant was issued based solely on video evidence obtained via social media.⁵⁹ It was part of the conclusion of the Pre-Trial Chamber that the frequency with which the execution videos were posted on social media, coupled with the extent of their cruelty, formed sufficient grounds upon which the warrant of arrest was issued within the purview of article 58(7) of the Rome Statute.⁶⁰

While this is a first for the ICC, it will certainly not be the last considering that more conflicts, atrocities and war crimes are being documented on video and posted to social media. This trajectory is something the OTP itself highlighted through its 2016 – 2018 Strategic Plan when it acknowledged that ‘the widespread availability of phones with photo/video applications as well as extensive general access to the internet has meant that people are increasingly uploading relevant information onto the internet.’⁶¹ Hence, the OTP has as its strategic Goal 4, the adaptation of its investigative and prosecutorial capabilities to operate within a fast-changing technological environment.⁶²

The foregoing cases demonstrate the willingness of the ICC to continue relying on video evidence during trials. With citizen media however, the barrier to its utility during prosecution

⁵⁶ *The Prosecutor v Ahmad Al Faqi Al Mahdi* Trial Hearing transcripts https://www.icc-cpi.int/Transcripts/CR2016_05767.PDF (accessed 28 August, 2020) 41.

⁵⁷ *The Prosecutor v Ahmad Al Faqi Al Mahdi* Reparations Order ICC-01/12-01/15-236.

⁵⁸ *The Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli* Warrant of arrest (15 August 2017) ICC-01/11-01/17.

⁵⁹ The content of Al-Werfalli’s warrant of arrest made constant reference to video footage that depicted his crime and which was posted to social media on a certain date. See Al-Werfalli’s warrant of arrest (n 58 above) paras 11-22.

⁶⁰ Al-Werfalli’s warrant of arrest (n 58 above) para 29.

⁶¹ ICC ‘Office of the Prosecutor: Strategic Plan 2016 – 2018’ ICC-ASP/14/22 para 25.

⁶² ICC (n 61 above) 15.

before international tribunals and courts will not predominantly be in relation to its admissibility, but rather its authenticity. With emerging technologies making it easier to manipulate videos, prosecutors must not only believe their video evidence to be authentic. They must be able to prove to the court that it is, be it through digital verification, expert witness testimony or other corroborating pieces of evidence.

4.3. Citizen media evidence and universal jurisdiction

Universal Jurisdiction is the ‘ability of any state to try persons for crimes committed outside its territory that are not linked to the state by the nationality of the suspect or the victims or by harm to the state’s own national interests.’⁶³ It is a principle of law that is grounded in the notion that there are some crimes which are so egregious and grave that they affect the international community and for this reason, States owe a duty to repress such crimes by holding the perpetrators to account. In order for this principle to be effective, a State is required to have made provision for universal jurisdiction over specific international crimes within its domestic law. According to the 2011 survey carried out by Amnesty International, 164 out of the 193 UN member states have established universal jurisdiction within their domestic laws in relation to one or more crimes under international law.⁶⁴

While universal jurisdiction has been around since the aftermath of World War II, we have increasingly seen greater dependence on this principle in recent years. For instance, there were 16 universal jurisdiction related convictions in 2019, which is double the number of convictions for the year 2018.⁶⁵ We are also witnessing an increasing number of countries, particularly in Europe, invoking the principle of universal jurisdiction to prosecute war crimes. Countries like Sweden, Germany, France and the Netherlands have been taking steps in their domestic courts to prosecute perpetrators of war crimes committed in countries like Syria and Iraq. What is quite peculiar about these prosecutions is that there has been a strong reliance on citizen media and open-source evidence during the trials. Universal jurisdiction has taken on much greater significance in light of the failures of the UN Security Council to refer the situation of mass atrocities in a country like Syria to the ICC for prosecution. The International Commission of Jurists in 2021, acknowledged the impasse with the accountability mechanism in Syria when it stated in a report that:

⁶³ Amnesty International ‘Universal Jurisdiction: a preliminary survey of legislation around the world’ (2011) 1.

⁶⁴ Amnesty International survey (n 63 above) 1.

⁶⁵ Trial International ‘Universal Jurisdiction Annual Review 2020 – Terrorism and international crimes: prosecuting atrocities for what they are’ (2020) 13.

As time passes, evidence, which is critical to accountability processes, continues to be inaccessible, lost, destroyed, or deteriorates. And while the ICC is the only permanent body tasked to investigate and prosecute atrocity crimes, it cannot achieve the goal of ending impunity alone.⁶⁶

The ICJ in that report underscored the complementary role played by domestic courts and mechanisms in securing justice and encouraged more States to develop the capacity of their national jurisdictions ‘to pursue universal and other extraterritorial jurisdiction cases.’⁶⁷ The more domestic courts toe this path, the more we are able to remedy the wrongdoings perpetrated against victims of war crimes and other crimes against humanity.

Some case analysis from Germany and Sweden will be made in the next section. These two countries have been chosen due to their long-standing commitment to prosecuting international crimes by leveraging the principle of universal jurisdiction. Germany, for instance, was the first country where an individual was convicted of the crime of genocide using universal jurisdiction,⁶⁸ while Sweden has prosecuted individuals for genocide and crimes against humanity committed in countries like Rwanda.⁶⁹

The cases being analysed below will show that universal jurisdiction has become a means for ensuring that no country is a safe haven for perpetrators of international crimes. Even as perpetrators of crimes seek refuge in these European countries, their victims who could not obtain justice in the countries where the crime was committed (sometimes due to lack of political will), now look to universal jurisdiction as a pathway to justice. Secondly, what the cases will reveal is how integral citizen media and open-source evidence were to investigating and prosecuting these cases.

4.3.1 Germany

In 2002, the Federal Parliament of Germany passed the Völkerstrafgesetzbuch (VStGB) otherwise known as the Code of Crimes against International Law. The VStGB in effect domesticated the Rome Statute of the ICC and section 1 of the VStGB provides as follows:

⁶⁶ International Commission of Jurists ‘The future of accountability mechanisms: Twenty recommendations’ (2021) 2.

⁶⁷ ICJ report (n 66 above) 3.

⁶⁸ This was in the case of *The Prosecutor v Nikola Jorgić* 2 BvR 1290/99. Jorgić – a Bosnian Serb – was charged with the crime of genocide perpetrated against the Muslim population in the Doboj region of Bosnia and Herzegovina. Jorgić was found guilty and sentenced to life imprisonment.

⁶⁹ *Public Prosecutor v Stanislas Mbanenande* Case no. B 6659-13 (2014). The defendant – a Swedish national of Rwandan origin – was charged with the crime of genocide and crimes against humanity. He was sentenced to life imprisonment.

This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.⁷⁰

It is on the basis of this law that we have seen some very significant cases being prosecuted in Germany which relied on visual and digital evidence. One of such is *The Prosecutor v Rami K*.⁷¹ In this case, the defendant, a former lieutenant in Iraq's armed forces, was convicted of war crimes by a High Court in Berlin for serious and degrading treatment of persons protected under international humanitarian law. In March 2015, the defendant had taken part in the 'Battle of Tikrit' against units of the Islamic State (IS) terrorist group. A photograph was taken of him holding up two decapitated heads of IS fighters and this was subsequently posted on Facebook and also saved on to the defendant's tablet PC.⁷² Later in 2015, the defendant sought refuge in Germany but was arrested by German police on 29 August 2016 for disrespecting and degrading the dead, and the evidence on his device was among the digital materials relied upon to trigger an investigation that then led to a trial in German court.⁷³

The defendant pleaded guilty to the crimes but the court needed to rely on corroborating evidence as required under German law, because an accused cannot be convicted solely on a guilty plea.⁷⁴ As a result, in addition to the photographic evidence, the prosecution also relied on video evidence of the crime that had been shot on a smartphone and this further reinforced the defendant's admission of guilt.⁷⁵

Under the German Code of Criminal Procedure (Strafprozessordnung – StPO), judges shall exercise their discretion when it comes to determining what evidence is relevant and admissible⁷⁶ as well as the value placed on the evidence.⁷⁷ In this particular case, the court obtained expert testimony from the Office for the Military Counterintelligence Service to determine the authenticity of the photographs.⁷⁸ In March 2017, the defendant was ultimately found guilty of war crimes and sentenced to 20 months in prison.

⁷⁰ Section 1, Act to Introduce the Code of Crimes against International Law (2002).

⁷¹ *Rami K* case Kammergericht Berlin Strafsenat 172 OJs 26/16 (3/16).

⁷² *Rami K* case (n 71 above) para 34 – 37.

⁷³ *Rami K* case (n 71 above) para 38 -39.

⁷⁴ Section 257c(2) German Code of Criminal Procedure (StPO). See also BVerfG Judgment of the Second Senate (2013) 2 BvR 2628/10, para 68 where the Federal Constitutional Court stated that “a plea bargain as such may never constitute the basis for a judgment, but that only the – adequately reasoned – conviction of the court concerning the facts it needs to establish remains decisive.”

⁷⁵ *Rami K* case (n 71 above) para 54

⁷⁶ Section 244 StPO.

⁷⁷ Section 261 StPO.

⁷⁸ *Rami K* case (n 71 above) para 47.

Another example of carefully documented visual evidence that has made a substantial difference in exposing acts of war crime is the “‘Caesar photos’. The Caesar photos are a collection of over 50,000 photographs depicting dead detainees in detention centers run by the Assad regime in Syria.⁷⁹ These images were captured and archived by a government contracted photographer code-named ‘Caesar’ between 2011, after the Syrian uprising started, and 2013, just before Caesar fled the country. The very disturbing and damning images became public for the first time in January 2014 through the Carter Ruck Report⁸⁰ and this triggered several demands for accountability for these crimes against humanity.⁸¹ Eventually in 2019, Anwar Raslan – a former colonel in the Syrian regime, and Eyad Al-Gharib – a former Syrian regime intelligence officer, were arrested in Berlin on charges of war crimes and crimes against humanity.⁸²

The Higher Regional Court in Koblenz, Germany, assumed universal jurisdiction over this first ever trial of officials of the Syrian regime in connection with the international crimes perpetrated in Syria and some of the Caesar photos were admitted into evidence during trial. In assessing the authenticity of the photographic evidence, the court in Koblenz relied on the testimony of Dr Markus Rothschild – a forensic expert, who along with his team analysed almost 27,000 photographs of 6,821 victims.⁸³ When in February 2021, the court convicted Al-Gharib and sentenced him to four-and-a-half years in prison,⁸⁴ the presiding judge remarked about the power of the visual evidence saying ‘A personal note on this: I will not forget those images.’⁸⁵ Then in another groundbreaking judgment, the court, in January 2022 found Anwar Raslan guilty of crimes against humanity and sentenced him to life imprisonment.⁸⁶

The verdicts in both Al-Gharib and Raslan’s case are an acknowledgement of the grave crimes committed in Syria and the determination to hold the perpetrators to account. These

⁷⁹ Human Rights Watch ‘If the dead could speak – Mass deaths and torture in Syria’s detention facilities’ 2015

⁸⁰ Carter-Ruck & Co. Solicitors of London ‘A report into the credibility of certain evidence with regard to the torture and execution of persons incarcerated by the current Syrian regime’ (2014).

⁸¹ M Simon and K Bolduan ‘His first mission was to smuggle war crimes evidence. Now it’s to convince congress to act’ 2019 <https://edition.cnn.com/2019/10/08/politics/syria-defector-caesar-in-washington/index.html> (accessed 13 January 2022)

⁸² J Karadsheh et al ‘Germany opens landmark trial of Syrian regime officers accused of crimes against humanity’ 2020 <https://edition.cnn.com/2020/04/23/middleeast/syria-germany-trial-intl/index.html> (accessed 21 January 2022).

⁸³ Human Rights Watch Report ‘Seeking Justice for Syria – How an alleged Syrian intelligence officer was put on trial in Germany’ 2022 <https://www.hrw.org/feature/2022/01/06/seeking-justice-for-syria/how-an-alleged-intelligence-officer-was-put-on-trial-in-germany> (accessed 21 January 2022).

⁸⁴ BBC ‘Syria torture: German court convicts ex-intelligence officer’ 2021 <https://www.bbc.com/news/world-europe-56160486> (accessed 21 January 2022).

⁸⁵ Human Rights Watch Report (n 83 above).

⁸⁶ L Morris & V Guinan-Bank ‘Syrian intelligence officer is convicted of crimes against humanity, gets life in prison in landmark German trial’ 2022 <https://www.washingtonpost.com/world/2022/01/13/germany-syria-war-crimes-trial/> (accessed 21 January 2022).

verdicts also ensure that the courageous act of documenters like Caesar, who had to smuggle out the photographs by putting them in his belt and shoes,⁸⁷ was not in vain. Although the Caesar photos do not fall within the category of everyday citizen media evidence because of who captured them, their relevance in helping deliver justice demonstrate the key role visual evidence plays within the international criminal accountability framework. The same rules of evidence that were used in admitting and analysing the relevance and probative value of the Caesar photos, are the same rules that will be used if the author of the evidence is a citizen journalist.

4.3.2 Sweden

In Sweden, the law governing proceedings in both criminal and civil cases is the Swedish Code of Judicial Procedure (CJP) which allows for the free admission and evaluation of evidence. For instance, the CJP gives the court the discretion to determine what evidence is relevant and as a result ‘if the court finds... an item of evidence offered is unnecessary or evidently should be of no effect, the court shall reject that proof.’⁸⁸ Furthermore, while there is no specific guidance on how the court should adjudge probative value, the law provides for the court to evaluate evidence ‘in accordance with the dictates of its conscience.’⁸⁹ On the premise of these two provisions of the CJP, we can conclude that the judges are free to admit any form of evidence, including video evidence, as long as it is deemed relevant, after which it would then determine its probative value.

In 2014, Sweden adopted the Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes.⁹⁰ This law gives Swedish courts universal jurisdiction to prosecute these crimes and in 2016, we saw this being put to use.

On 13 March 2016, Haisam Omar Sakhanh – a Syrian national with permanent refugee status in Sweden was arrested on suspicions of war crimes⁹¹ following extensive investigations that were triggered by a partially censored video published by the New York Times which

⁸⁷ G le Caisne ‘They were torturing to kill: inside Syria’s death machine’ (2015) <https://www.theguardian.com/world/2015/oct/01/they-were-torturing-to-kill-inside-syrias-death-machine-caesar> (accessed 13 January 2022).

⁸⁸ Chapter 35, Section 7, Swedish Code of Judicial Procedure.

⁸⁹ Chapter 35, Section 1, Swedish Code of Judicial Procedure.

⁹⁰ Swedish Code of Statutes - Act on criminal responsibility for genocide, crimes against humanity and war crimes, SFS 2014:406 (2014).

⁹¹ Trial International ‘Make way for justice #4 – momentum towards accountability’ (2018) *Universal Jurisdiction Annual Review* 73.

showed the brutal killing of seven soldiers in the Idlib province of Syria.⁹² Haisam Sakhanh was tried before the Stockholm District Court in January 2017 which convicted him and sentenced him to life imprisonment.⁹³ The court came to its guilty verdict by relying on the video that showed Sakhanh as one of the executioners of the seven Syrian soldiers, as well as other videos and photographs sourced from Facebook and YouTube. In reaching its conclusions, the court relied on expert testimonies from the National Forensic Centre (NFC) and the National Board of Forensic Medicine (NBFM). The court needed to establish among other things, that the video and audio had not been manipulated, to which end they firmly ascribed high probative value to the videos based on the analysis provided by the experts, to the extent that the court concluded stating that:

The evidential value of the films is very high. The crime for which Haisam Sakhanh is charged has been filmed and presented to the district court as evidence. The content, together with what the NFC and forensic authorities have reported, provides such support for Haisam Sakhanh's confessions that it is proven that he has acted in the manner alleged by the prosecution.⁹⁴

The role video and photographic evidence are playing in these prosecutions cannot be overstated. It is so significant that the first three Syria-related trials for international crimes that were completed in Sweden were ‘based on incriminating photographs and videos which were used by the war crimes prosecutor to build [the] cases.’⁹⁵

Furthermore, the different pieces of video evidence in the *Sakhanh case* allowed the prosecutors and the court to have a good grasp of the crime without necessarily visiting the crime scene unlike in the case of *Public Prosecutor v Stanislas Mbanenande*⁹⁶ (which was also tried in Sweden) wherein the prosecutor had to visit Rwanda several times to view the crime scenes while aspects of the legal proceedings were also held in Rwanda. The major difference being that the Rwanda genocide happened at a time that predates the introduction of mobile cellphone and social media, whereas the Syrian war has been well documented by both perpetrators and citizen journalists, using their cellphones after which these images and videos get shared on social media sites.

⁹² New York Times ‘Syrian rebels execute 7 soldiers’ 2013 <https://www.nytimes.com/video/multimedia/10000002421671/syrian-rebels-execute-7-soldiers.html> (accessed 28 December 2021). Warning: the video is graphic.

⁹³ *Prosecutor v Haisam Sakhanh*, Stockholm District Court, Case no. B 3787-16.

⁹⁴ *Haisam Sakhanh case* (n 93 above) para 20. Quote translated from original judgment in Swedish.

⁹⁵ Human Rights Watch ‘These are the crimes we are fleeing – Justice for Syria in Swedish and German courts’ (2017) 44.

⁹⁶ *Stanislas Mbanenande case* (n 69 above).

Of course, it must be acknowledged that universal jurisdiction can only be exercised when the perpetrator is within the territory of the prosecuting authority. Nevertheless, the convictions we have witnessed emerge out the German and Swedish jurisdictions are noteworthy and will undoubtedly continue to shape the future of international criminal justice. If more countries invoke universal jurisdiction, it means that victims of international crimes will have a chance at realising justice and reparations. When we consider countries like Nigeria where there has been no political will to hold to account the perpetrators of the Lekki toll gate killing during the #EndSARS protests, despite the substantial citizen media evidence, universal jurisdiction becomes a pathway towards realising justice for the victims and their families someday in the near future.

4.4 Citizen media and accountability in African courts

While in Africa, we have seen the principle of universal jurisdiction being invoked to prosecute international crimes,⁹⁷ the focus of this section is on how citizen media is generally regarded under domestic laws and within the domestic courts of specific African countries

Based on the complementarity principle, the ICC has secondary jurisdiction and can step in to prosecute crimes when States are unable or unwilling to act.⁹⁸ But having discussed how room is being made for greater use of citizen media and digital evidence at the level of the ICC, it is useful to analyse what obtains in relation to the admissibility and use of digital evidence in some African countries namely, Nigeria, South Africa, Kenya, Zimbabwe and the DRC. These countries were selected due to their considerable political and economic influence in their respective sub-regional blocs on the African continent (i.e. Western Africa, Southern Africa, Eastern Africa and Central Africa)

4.4.1 Nigeria

(a) Introduction to the available statutory provisions

Prior to the 2011 Evidence Act of Nigeria, the country's rules of evidence were governed by an outdated Act from 1943 that had barely seen any substantial amendments.⁹⁹ One of the shortcomings of the old Evidence Act Cap E14 is that it made no provision for electronic or digital evidence. So, whereas technology and digital innovation have significantly advanced, it

⁹⁷ In 2015, Hissène Habré – former president of Chad – was charged with crimes against humanity, torture and war crimes and was tried before the Extraordinary African Chambers in Senegal. On 30 May 2016, Habré was found guilty and sentenced to life imprisonment.

⁹⁸ See Article 17 of the Rome Statute.

⁹⁹ Z Adangor 'What is Innovative in the Evidence Act, 2011?' (2015) 43 *Journal of Law, Policy and Globalisation* 34.

was an upheaval trying to introduce electronic evidence into the courtrooms. The courts have long since grappled with this challenge as reflected in *Esso West Africa Inc v T Oyegbola*.

The law cannot be and is not ignorant of the modern business methods and must not shut its eyes to the mysteries of computer. In modern times reproduction and inscriptions on ledgers or other documents by mechanical process are common place and section 37 cannot therefore only apply to books of account.¹⁰⁰

The foregoing was the dilemma in the late 1960s. It is therefore unsurprising that by 1996, in the case of *Egbue v Araka*, Justice Pats-Acholonu expressed his frustrations with the old Act saying:

[O]ur Evidence Act is now more than 50 years old and is completely out of touch and out of tune with the realities of the present scientific and technological achievements. Most of its sections are archaic and anachronistic and need thorough overhaul to meet the needs of our times. But alas it is with us like an albatross on our neck....¹⁰¹

In some instances, the courts got creative and stretched the law to accommodate digital evidence in the absence of specific provisions. In the case of *Ogolo v IMB Ng. Ltd.*,¹⁰² the Court of Appeal held that by virtue of section 74 of the now repealed Nigerian Evidence Act, the court can take judicial notice of the fact that banks had evolved with the times and therefore adopted the use of computers in their transactions.

A decade later however, after the decision in *Ogolo v IMB Ng*, the same Court of Appeal took a more restrained approach in the case of *UBA v SAFPU*¹⁰³ when it stated, in relation to the wrongfulness of the High Court's admission of evidence generated from computers, that:

Though the appellant's counsel made reference to the modern day practice of using computer in the day-to-day business of the bank, it is my opinion that the law remains as it is. It has not been amended by the National Assembly, although it is high time they did that and I am bound to apply the law as it is... Hence, I will not deviate from my primary function in interpreting the law as made by the legislature to that of law making. I therefore hold that the lower court was in error when it admitted Exhibit D2 in evidence in this case.¹⁰⁴

From the foregoing, it seems obvious, and reasonable that in the case of Nigeria, the judges are sometimes quite hesitant to go beyond their duty of interpreting the law. Hence, they stay within the confines of what is already expressly provided even if such law might contain some lacunae. In a paper delivered in 2016, Justice Omolaye-Ajileye indicated that the reason why admissibility of computer-generated evidence was not provided for under the old Evidence

¹⁰⁰ *Esso West Africa Inc. v T Oyegbola* (1969) NMLR 19 (198) High Court of Lagos State.

¹⁰¹ (1996) 2 NWLR (Pt. 433) 688 at 710 – 711.

¹⁰² *Ogolo v IMB Nig. Ltd.* (1995) 9 NWLR (pt. 419) 324.

¹⁰³ *UBA v Sanni Abacha Foundation for Peace and Unity (SAFPU)* (2004) 3 NWLR (Pt. 861) 516.

¹⁰⁴ *UBA v SAFPU* (n 103 above) 543.

Act was due to the ease with which they can be manipulated. But he also acknowledged that the courts cannot ‘run away from electronic evidence’ and in order to avoid a miscarriage of justice, judges need to have ‘rudimentary knowledge of ICT’.¹⁰⁵

It is against this backdrop and the clamour for a more robust evidence Act in keeping with the times, that Nigeria enacted the 2011 Evidence Act, which even though not perfect, makes provision for the admissibility of digital and electronic evidence.¹⁰⁶

i. Available statutory provisions

Though limited in its direct applicability and interpretation, Nigeria’s 2011 Evidence Act serves as a fundamental legal framework upon which citizen media can thrive within.

section 84 of the 2011 Evidence Act is by far the most relevant provision in the Act that deals with the admissibility of electronic evidence. It provides as follows:

84(1) In any proceeding, a statement contained in a document produced by a computer shall be admissible of any fact stated in it....

On its surface, this section may come across as making provision for documents generated from a desktop or personal computer system. However, an observation of the Act’s interpretation section reveals so much more. Starting with the word ‘document’, Section 258(1) indicates the scope of what is covered, which includes:

- (a) books, maps, plans, graphs, drawings, photographs, and also includes any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter;
- (b) any disc, tape, sound track or any other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it; and
- (c) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it; and
- (d) any device by means of which information is recorded, stored or retrievable including computer output.¹⁰⁷

Although the interpretation section makes no direct mention of the term ‘citizen media’, the range of items covered under ‘document’ include those that make up citizen media such as photographs, film, soundtrack, and others. Therefore, this invariably means that citizen media

¹⁰⁵ A Omolaye-Ajileye ‘Admissibility of Electronic Evidence in Civil and Criminal Proceedings’ (2016) 2.

¹⁰⁶ Nigeria Evidence Act 2011.

¹⁰⁷ Nigeria Evidence Act (n 106 above) sec 258(1)(a-d).

evidence can be introduced into Nigerian courts by relying on the broad provisions of section 84(1) combined with section 258(1). Moreover, the interpretation section of the Evidence Act goes further to indicate that ‘computer’ means ‘any device for storing and processing information.’¹⁰⁸ The Court of Appeal, in the case of *Georgestone v Nya* also relied on the provisions of section 258 to conclude that a video tape that was submitted as evidence, falls within the definitions of an electronically generated document.¹⁰⁹ By virtue of the foregoing, I will argue that this interpretation encapsulates devices such as mobile phones and as such, there is relevant legal provision within Nigeria’s legal framework that can be relied upon in utilizing citizen media in the pursuit of accountability, even though it must also be acknowledged that these provisions fall short in terms of their specificity to citizen media evidence.

ii. Relevant case law

The application of the law in practice can be analysed in a few of the cases that have come before the courts.¹¹⁰ In the case of the ALUU 4 which involved the mob killing of four University of Port Harcourt students in Rivers State, cellphone video evidence of the killing that had been posted on YouTube was relied upon by the prosecution. Even though the defence objected to its admissibility on the grounds of provenance, the Judge overruled the objection and admitted the video as evidence on the grounds of relevance.¹¹¹ The video eventually contributed to the conviction of the perpetrators.

Another relevant case in which video was tendered as evidence is the case of *The Nigeria Police v Elisha Abbo*, in which the defendant was accused of physically assaulting a woman in a shop.¹¹² The video of the assault was captured on CCTV footage and formed a significant piece of evidence relied upon by the prosecution. Despite the overwhelming video evidence however, the case was dismissed by the Magistrate citing the lack of diligent prosecution by the police.¹¹³ But determined to obtain justice, the victim - Osimibibra Warmate – filed a fundamental rights law suit at the High Court of the Federal Capital Territory and this

¹⁰⁸ Nigeria Evidence Act (n 106 above) sec 258.

¹⁰⁹ *Georgestone v Nya* (2022) LPELR-57250 (CA).

¹¹⁰ There has been only one decision from the Supreme Court of Nigeria (*Kubor v Dickson*) in which some clarity was given as to the admissibility of electronic evidence. There have however been other cases in lower courts in which electronic evidence was admitted as evidence.

¹¹¹ E Yafugborhi ‘ALUU 4: Court admits video evidence of murder scene’ 2013 <https://www.vanguardngr.com/2013/10/aluu-4-court-admits-video-evidence-murder-scene/> (accessed 14 August 2020).

¹¹² Suit number CR/010/2019.

¹¹³ See QE Iroanusi ‘Assault: Court dismisses suit against Senator Elisha Abbo’ 2020 <https://www.premiumtimesng.com/news/top-news/406149-assault-court-dismisses-suit-against-senator-elisha-abbo.html> (accessed 28 August 2020).

time the court found Senator Abbo guilty and ordered him to pay a compensation of fifty million naira.¹¹⁴ In its judgement, the court stated that the video evidence combined with the medical report of injury sustained did speak for themselves and corroborated the applicant's claims of being subjected to inhumane and degrading treatment by the Respondent.¹¹⁵

Noteworthy was the allegation made by the respondent that the video evidence was doctored by the Applicant who then made it to go viral on social media but the court rejected these submissions, stating that 'The Respondent placed nothing before this Honourable Court to substantiate or prove this assertion among others.'¹¹⁶ The Court considered the applicant to have discharged the burden of proof by tendering its video evidence and other supporting documentary evidence, but it maintained that the respondent did not provide evidence to support his claims, thereby leading Honourable Justice Samirah Umar Bature to rule that:

[I]n the instant case I am of the considered opinion that for the Respondent to merely depose in the counter affidavit that he did not slap the Applicant or subject or cause the Applicant to be subjected to any torture, inhuman or degrading treatment, is not sufficient denial contemplated by law in view of Exhibits B2, B3 and B4... Moreso, in my humble view, for the Respondent to discharge the burden or onus shifted on him, he needs to go beyond deposition in the counter affidavit and tender Exhibits or credible documentary evidence to back up his deposition...¹¹⁷

The foregoing cases demonstrate the utility of video evidence (sometimes citizen video) in Nigerian courtrooms. Although it is important to note that, especially in the *Warmate case*, there was nothing to indicate that the court relied on the analysis of an expert who could ascertain the authenticity of the video evidence. Rather the court concluded that the evidence spoke for itself.¹¹⁸

(b) Procedure for admissibility of digital/electronic evidence

Under Nigerian law, electronic evidence that will be tendered will undergo judicial scrutiny and some of the safeguards put in place under the Evidence Act are seen in section 84(2). The admissibility of digital or electronic evidence is premised on the stipulated conditions which I have chosen to paraphrase as follows:

- i. that the evidence was produced by a computer (or a device) which was in regular operational use;

¹¹⁴ *Osimibibra Warmate v Senator Elisha Abbo* (2020) FCT/CV/2393/19 High Court of the Federal Capital Territory 22.

¹¹⁵ *Warmate case* (n 114 above) 18.

¹¹⁶ *Warmate case* (n 114 above) 20.

¹¹⁷ *Warmate case* (n 114 above) 20.

¹¹⁸ *Warmate case* (n 114 above) 18.

- ii. that the computer was processing other pieces of evidence similar to the one to be admitted;
- iii. that there was no computer/device malfunction that affected the integrity of the evidence;
- iv. that the evidence is consistent with the kind of data produced by the computer in the course of its regular use.¹¹⁹

In addition, a certificate must be presented alongside the evidence in order to authenticate its content and affirm that the conditions of section 84(2) were met, and this shall be ‘signed by a person occupying a responsible position in relation to the operation of the relevant device.’¹²⁰ It is obvious that this particular provision was inserted in order to shield the court from admitting manipulated video evidence but it has also been a problematic provision due to the lack of uniformity that has characterized the compliance with its requirement for certification. In practice, there is no standard for what the certificate should look like and the Act offers no guidance on that either. Then comes the challenge of who is qualified to sign the certificate. Considering that the owner/author/operator of the computer or device may be unavailable for several reasons including loss of life, threats to life or anonymity – circumstances that are not uncommon with citizen journalists – the admissibility of the electronic evidence is put in jeopardy. Relevant here is the election petition case of *Kubor v Dickson*¹²¹ in which the Supreme Court upheld the decision of the lower court to rule against admitting the electronic evidence because it failed to meet the standards put forth in section 84(2) and section 84(4). Which is why the more liberal approach taken by the court in *Blaise v FRN* is significant:

The mere fact that compliance is demanded as a matter of law with the provisions of section 84 and its sub-provisions on the admissibility of computer-generated documents, does not mean that we should as well consign the use of ordinary common sense required for doing most thing to the dustbin. There is no way in the circumstances of this case that the EFCC would be in any position to produce a certificate stating the status of the computer from which the complainant/petitioner generated exhibit ‘A’ in the United Arab Emirates (UAE). It must be borne in mind that the said exhibit ‘A’ having been forwarded to the EFCC and not printed from its computers, that by asking the EFCC to produce a certificate in order that there may be compliance with the section is to seek the performance of a feat by the EFCC which is clearly unattainable.¹²²

¹¹⁹ Nigeria Evidence Act (n 106 above) sec 84(2)(a-d).

¹²⁰ Nigeria Evidence Act (n 106 above) sec 84(4).

¹²¹ *Dr Imoro Kubor & anor v Hon Seriake Henry Dickson & ors* (2012) LPELR-9817 (SC).

¹²² *Blaise v FRN* (2017) 6 NWLR (part 1560) 132.

Furthermore, Honourable Justice Sankey of the Court of Appeal also stated the following in *Brila Energy Ltd v FRN*:

There is no single approach to authentication applicable across board. Instead, the most appropriate form of authenticating electronic evidence will often depend on the nature of the evidence and the circumstances of each particular case. However, such evidence may be authenticated by direct testimony from a witness with personal knowledge, by comparison with other authenticated evidence or by circumstantial evidence.¹²³

In applying common sense to this issue, the courts must also ensure that the whole essence of certification – which is to elicit truth as to the authenticity and reliability of the electronic evidence – is still accomplished. This, I will contend, cannot and should not be satisfied only by a signed certificate which in itself may contain irregularities. Rather it should be subject to interrogation and cross examination during trial, preferably by an expert who can give analysis as to the metadata, chain of custody and overall reliability of the evidence. This becomes even more necessary in light of the latter part of section 84(4) which gives room for abuse of this provision when it stated that: ‘for the purpose of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.’ Leaving the trustworthiness of a piece of evidence to the *best of the knowledge* of who states it sets the stage for anyone with a nefarious agenda to abuse it. This sentiment is shared by Honourable Justice Akhiero who also argues that section 84(4) is not stringent enough to prevent abuses and suggested that ‘where the court is to rely on a mere certificate to lay foundation for the admissibility of electronic evidence, the certificate should be issued by an expert.’¹²⁴

Regardless of the foregoing, it is obvious from the provisions relating to electronic evidence in Nigeria, that it is not futuristic enough,¹²⁵ but is rather geared towards fixing most of the challenges that had arisen from electronic banking and other commercial transactions preceding the enactment of the Evidence Act. This partly explains why section 84 is titled ‘[a]dmissibility of statements in documents produced by computers’. It was aimed at addressing civil and criminal issues emerging from business interactions or transactions.

One of the propelling factors that necessitated the amendment of the Evidence Act was the increasing reliance on computer technology for everyday usage, coupled with a rapidly

¹²³ *Brila Energy Limited v Federal Republic of Nigeria* (2018) LPELR-43926 (CA) para 23.

¹²⁴ Paper presented at the 2013 Annual General Meeting of the Magistrates Association of Nigeria, Edo State Branch. PA Akhiero ‘Admissibility of electronic evidence in criminal trial: how practicable?’ (2013) 25.

¹²⁵ A careful observation of the provisions of S. 84(2) reveals that it is a replica of S. 69 of the 1984 Police and Criminal Evidence Act of the United Kingdom which has now been repealed. This goes to underscore the constrained, non-revolutionary nature of this provision of Nigeria’s 2011 Evidence Act. Nigeria Evidence Act (n 106 above) sec 84 (2).

evolving e-commerce market in Nigeria.¹²⁶ The provisions of the 2011 Evidence Act, particularly section 84, do not appear to have been formulated with the mindset of the electronic evidence involving videos of war crimes, extra-judicial killings, police brutality or other egregious violations of human rights and this is obvious from the textual framing of section 84. At its core, this is a problem because one cannot casually dismiss the need to have the framing incorporate language that reflects admissibility of electronic evidence of human rights atrocities and not just computer printouts. Are the provisions of the current Act at a position where they can be relied on to introduce video evidence of human rights violations? The answer is yes. This however in no way indicates that the provisions are adequate. There is no doubt that if the provisions of section 84 were to be drafted today, they will be broader and will take into cognizance the ubiquity of smartphones which has resulted in an abundance of cellphone video evidence. Even if we do not have an amendment to the Act in the near future, it is hoped that we will see more litigation that will develop robust case law involving video evidence of human rights atrocities before Nigeria's domestic courts.

In the 2021 case of *COP v Ikpe Aga Boniface*¹²⁷ the court engaged with a piece of audio evidence that had been recorded using a mobile phone. The audio evidence was extracted from the mobile phone and reproduced on a compact disc which was then tendered in court as evidence. The defense however raised an objection on the ground that 'the conditions for the admissibility of such electronically generated evidence had not been fulfilled by the prosecution.'¹²⁸ The defense argued that the witness through whom the evidence was being tendered was not the maker of the compact disc and as such was incapable of telling the court the conditions under which the audio was reproduced. On this basis, the defense urged the court to mark the evidence as rejected. The court ruled the evidence to be admissible because it was relevant and went further to state that 'if at the judgment stage, the disc is found not to serve any purpose in the just determination of this case, it will be expunged.'¹²⁹ In this particular case, the evidence was eventually expunged because the court could not rely on the copy of the audio from the mobile phone due to its lack of clarity which seemed to suggest that the equipment used in making the copy was not in good working condition.

Section 84(4) of the Evidence Act provides for the means through which the authenticity of digital/electronic evidence can be proved – by presenting a certificate stating, among many

¹²⁶ SK Agwu 'Appraisal of electronic evidence in Nigerian courts' (2019) 3.

¹²⁷ *COP v Ikpe Aga Boniface MAD/259C/2021*, Chief Magistrate Court, Ekiti State of Nigeria.

¹²⁸ *Boniface case* (n 127 above) 7.

¹²⁹ *Boniface case* (n 127 above) 7.

other things, that the device was in good working condition. This requirement is meant to clarify concerns around chain of custody and reliability but it has its shortcomings, as has been previously articulated,¹³⁰ part of which is the absence of experts who can, through digital verification, corroborate the reliability, or otherwise, of the video evidence. It must be stated however that, the issue of incorporating experts has both a practical element and a cost factor to it because the courts have to be well resourced to engage the services of a digital verification expert. Till date, there are still some Nigerian courts that are not computer oriented and in which things as basic as judicial proceedings are still being captured using long hand writing. It therefore becomes almost impossible to expect such courtrooms to engage in technical analysis required of citizen video evidence. While it is unsustainable to continue relying on the requirement of a certificate as a means of proving authenticity, there is work to be done first in upgrading the courtrooms themselves and making them technology oriented.

As we continue to see a gradual rise in the use of video evidence before judicial bodies and tribunals in Nigeria, especially video evidence captured on mobile phones, human rights groups and the judiciary to pay keen attention to how such evidence will increasingly be treated before the courts. For instance, recently, the Lagos State Judicial Panel of Inquiry and Restitution¹³¹ relied on a plethora of citizen videos and photographs during its hearings on State violence. One of such was the visual evidence submitted by a witness – Serah Ibrahim – including videos and pictures of victims of army brutality.¹³²

It is significant to note that while the judicial panel allowed for the admissibility of this citizen media evidence, there were questions posed regarding the authentication of the video evidence.¹³³ The witness, in responding to the question of authentication embarked on a demonstration that attempted to walk the panel through the process for authenticating the video evidence.¹³⁴ This is indicative of what will soon become a regular feature in the country's judicial system. It is imperative therefore that there is statutory and judicial guidance for how

¹³⁰ See Section 4.4.1(b) above on the procedure for admissibility of digital evidence.

¹³¹ The Lagos State judicial panel of inquiry and restitution for victims of SARS related abuses and Lekki toll gate incident, was established on October 19, 2020 to address cases of police brutality. It was set up in response to a resolution by the National Economic Council, following the demands for justice for atrocities committed by the SARS unit of the Nigeria police.

¹³² I Adediran 'Lekki shooting: Witness presents video evidence of people killed, injured' 2021 <https://www.premiumtimesng.com/regional/ssouth-west/460277-lekki-shooting-witness-presents-video-evidence-of-people-killed-injured.html> (accessed 11 July 2021).

¹³³ The witness was asked if she could authenticate the videos and pictures she had captured on her phone and tendered as evidence before the panel, to which she responded in the affirmative. See Channels Television '#EndSars coordinator tenders new evidence on Lekki toll gate shooting' Oral testimony of Sarah Ibrahim <https://youtu.be/unGFT8HRS9Q?t=405> starting at 06:45 seconds (accessed 11 May, 2021).

¹³⁴ See Channels Television '#EndSARS coordinator plays videos showing shooting of protesters at Lekki tollgate' https://youtu.be/CvmJh_I6cPw?t=1305 starting at 21:45 seconds (accessed 11 May 2021).

such evidence will be admitted and authenticated, even as the courts continue to be technically fitted to meet this challenge.

A model law that sets out what this can look like is provided for in Chapter Six of this thesis.

4.4.2 South Africa

(a) Available statutory provisions

South Africa has an Act of parliament solely dedicated to electronic evidence but its scope is limited and is not at par with the wide range of issues that need to be covered under electronic and digital forms of evidence, including satellite imagery and citizen media.¹³⁵

The Electronic Communications and Transactions Act 25 of 2002 (ECTA) is formulated in a manner that addresses cases arising predominantly from electronic transactions and not necessarily providing for digital evidence such as videos and photographs. For instance, the purpose of the ECTA reads thus:

To provide for the facilitation and regulation of electronic communications and transactions; to provide for the development of a national e-strategy for the Republic; to promote universal access to electronic communications and transactions and the use of electronic transactions by SMMEs; to provide for human resource development in electronic transactions; to prevent abuse of information systems; to encourage the use of e-government services; and to provide for matters connected therewith.¹³⁶

The ECTA was meant to be a replacement of its predecessor – the Computer Evidence Act 57 of 1983 but I do not consider the ECTA to have gone far enough. Despite this limited scope, a silver lining may rest in the definition section of the ECTA in which it broadly categorizes *data* as ‘electronic representations of information in any form’ and goes further to define *data message* as ‘data generated, sent, received or stored by electronic means...’¹³⁷ The Honourable Justice Bozalek expressed a similar viewpoint about the ECTA in his ruling in the trial within a trial case of *The State v Terrance Stephan Brown*, where he stated *inter alia* that:

Although electronic data in the form of images such as photographs and videos are not specifically referred to in either definition, in my view, on a purposive interpretation of the ECTA’s provisions, they constitute a form of information.¹³⁸

The Judge made this statement as part of the reasons that informed the decision to admit into evidence images found on a mobile phone. It seems therefore to be the practice of the

¹³⁵ The Electronic Communications and Transactions Act 25 of 2002 of South Africa.

¹³⁶ Preamble to the Electronic Communications and Transactions Act.

¹³⁷ The Electronic Communications and Transactions Act 25 of 2002 sec 8.

¹³⁸ *The State v Terrance Stephan Brown* 2015 128 ZAWCHC (CC) 54/2014 para 16. The Judge in this case admitted into evidence images that had been obtained from a cellphone.

courts to, despite the weakness in the ECTA, interpret the law in such a way that allows for citizen media evidence.

(b) Analysis of the case law and the procedure for admissibility of digital/electronic evidence

In *Skhosana v The State*¹³⁹ the appellant had been found guilty of ‘housebreaking with the intent to steal’ by the Magistrate Court. One of the pieces of evidence relied on by the prosecution was CCTV footage as well as a cellphone picture. Both were admitted but the appellant upon his appeal to the High Court contended that the Magistrate did not objectively assess the evidence.¹⁴⁰ The appellate court however upheld the decision of the lower court stating that the cellphone evidence met the evidentiary threshold:

In order for a cell phone photo to become relevant, it should firstly have bearing on the issues to be decided by the court. Secondly, it should be verified as being a true image of what was captured by the person who took it. Thirdly, it should be clear and not edited. Fourthly, it should be presented in court to be viewed. Fifthly, the device on which the photo was captured, should be reliable. If all these factors are present, the court can take judicial notice of it and admit it. In this case, the clothing the perpetrators were wearing was crucial. The security officer confirmed he took the photo and that it depicted the type of clothing the Appellant and his co-accused were wearing. The photo was clear and it was presented in court for all to see it. The accuracy of the security officer’s cell phone was not disputed, accordingly, this Court accepts it captured and stored the photo accurately.¹⁴¹

What can be distinctly deduced from the foregoing is the judge’s interpretation of what constitutes admissible digital evidence. The five requirements relate to the issues of relevance, authenticity, originality (that it is unedited), chain of custody and reliability. These are factors that are appropriate to demand of any piece of digital evidence, especially citizen media. It is further made clear from the judge’s dictum that all five factors must be present for the court to take judicial notice of the evidence and admit it. In as much as meeting all these standards might be difficult, it is considered to be integral to establishing the trustworthiness of the evidence and whether or not it corroborates other pieces of evidence presented by the prosecution. Unarguably, these standards are in place to safeguard the principle of fair hearing and the rights of an accused in a manner that is not detrimental to the administration of justice. Nevertheless, I will argue that courts should not take a hard line approach against digital evidence that does not meet requirements such as originality because there will be instances where it is impossible to retrieve the original file and a copy will have to be relied upon by the parties.¹⁴² There have

¹³⁹ *Skhosana v The State* A213/2014 High Court of South Africa.

¹⁴⁰ *Skhosana v The State* (n 139 above) para 7.

¹⁴¹ *Skhosana v The State* (n 139 above) para 12.

¹⁴² Relying on copies of video evidence such as those downloaded from social media will increasingly become the norm as the citizen journalism and citizen media landscape grows.

already been cases in South Africa, where admissibility has been challenged on the grounds that the digital evidence was not presented in its original form.¹⁴³

Further to this is the requirement highlighted in *Skhosana v The State* whereby the Judge lays out one of the prerequisites of admissibility as being that the digital evidence has not been edited. Again, while this is a useful safeguard for the rights of the accused, it is an extremely broad prerequisite that if stringently applied by the courts, may lead to the exclusion of several pieces of citizen media evidence that may have inadvertently been edited but still retain their integrity.

Admittedly, under ideal circumstances, the preference will be for the author of a video or digital evidence to directly give testimony to corroborate and contextualize the circumstances surrounding the capturing of such evidence. But I will contend that rather than advancing an argument for digital evidence to be in its original form prior to being admitted, the approach should rather be to critically interrogate the chain of custody in addition to obtaining expert testimony that can clarify the authenticity and reliability or otherwise of the digital evidence. This is where a distinction needs to be drawn between originality and authenticity and I will rely on the statement made by Justice Hefer in the case of *S v Niewoudt*:

Even if it is accepted that proof of authenticity is a prerequisite for the admissibility of a tape recording, the recording cannot be excluded from the evidence solely on the ground that interferences appear in it. On the contrary, when it is borne in mind that the danger which has to be guarded against is the admission of a recording in respect of which there is a reasonable possibility that it is a distorted version of the reality, it is obvious that every “interference” has to be examined in order to determine whether such a possibility exists. But not every interference necessarily or even probably points to the absence of authenticity: it would be absurd, for example, to exclude a recording from which part of a conversation had been accidentally erased solely because of such defect. Naturally the evidential value thereof would, depending on the materiality of the missing part, be affected but there can be no objection to the admissibility of the recording where there is no suggestion of any lack of authenticity. The same applies to deliberate interferences.¹⁴⁴

Granted, the foregoing statement was in relation to the admissibility of a tape recording. But the same approach can apply to other forms of digital evidence like videos. There will always be practical limitations that will make it impossible for the court to gain access to the original file of a piece of digital evidence but this should not impede the ability of the court in

¹⁴³ See *Motata v Nair No and another* 2008 53 ZAFSHC (7023/2008). In this case, the defendant appealed against the decision of the Johannesburg Magistrate court which granted the prosecution permission to play five cellphone videos during trial. The defendant argued that the originality and authenticity of the videos must first be ruled on through a trial-within-a-trial before the court can make a determination as to whether or not the evidence is admissible.

¹⁴⁴ *S v Niewoudt* 1990 74 ZASCA (267/87).

using technical intuition and enlisting expert testimony to ascertain if the evidence before it has retained its integrity or has been manipulated with the intent to mislead. The prioritization of authenticity is also key when one considers that a significant number of citizen media evidence that will be presented in courts will be copies pulled from social media platforms and not necessarily from the direct source or the author of such evidence. For as long as it is possible to establish the relevance of the evidence, the position of the court should be to admit the evidence. While the weight attached to such evidence may then be determined based on considerations such as chain of custody and authenticity.

Undoubtedly, the jurisprudence of the courts in Nigeria and South Africa is paving the way for the use of citizen media. Although the lack of specificity in the laws will soon become apparent when more citizen media and other sophisticated forms of digital evidence get presented in these courtrooms. At the moment, it will seem that the method of verification being carried out in these domestic courts is not a surgical one but one based on certification and witness testimony.

Just like Hofman rightly observed, '[w]hat is missing in the South African law of evidence are detailed procedures that the courts have approved as complying with the general law and Constitution for collecting evidence, storing it and presenting it in court. Only when these procedures are in place will the South African law of electronic evidence be fully effective.'¹⁴⁵

4.4.3 Kenya

(a) Available statutory provisions

Section 78A of the Evidence Act of Kenya provides the legal framework for the admission and application of digital evidence. Kenya's law relating to the admissibility of digital evidence is similar in many ways to the other countries that have been so far examined under this section, and just like Nigeria and South Africa, it also falls short of directly and unequivocally bringing cellphone generated evidence and other advanced technologies within the purview of the law.

The position in Kenya is that 'in any legal proceedings, electronic messages and digital material shall be admissible evidence.'¹⁴⁶ This provision looks very promising until one goes further to observe section 78A(4) of the Evidence Act of Kenya which states as follows:

Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any

¹⁴⁵ J Hofman 'Electronic Evidence in South Africa' (2006) 30.

¹⁴⁶ The Evidence Act of Kenya Cap 80 (Revised Edition 2014) sec 78A (1).

civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.¹⁴⁷

The general framing of this provision tends to suggest that this it is particularly geared towards business transactions – a common thread we have seen throughout the Nigerian and South African laws as well. Nothing within the Evidence Act of Kenya makes reference to social media or mobile phone technology. For a law that was revised as recently as 2014, and more than a decade into the mobile technology revolution, it is unfortunate that this was a lost opportunity to holistically address other forms of digital evidence besides the common example of computers and business transactions.

(b) Analysis of the case law and the procedure for admissibility of digital/electronic evidence

Despite the limitations of the law on digital evidence, the courts in Kenya have not been handicapped in admitting cellphone footage as evidence. In the case of *MNN v ENK*¹⁴⁸ the court stated that a ‘mobile phone is an electronic device, and it is one of the devices envisaged in section 106B of the Evidence Act.’¹⁴⁹ This is very significant for the admissibility of citizen media evidence. The courts have been able to make this determination based on the framing of section 106B which goes as far as stipulating that:

any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer... shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible,

as long as they comply with the following conditions:

- (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
- (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
- (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was

¹⁴⁷ Evidence Act of Kenya (n 146 above) sec 78A(4) .

¹⁴⁸ *MNN v ENK* (2014) Civil Suit no 31 of (OS) High Court of Kenya.

¹⁴⁹ *MNN v ENK* (n 148 above) para 8.

out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.¹⁵⁰

If the foregoing provisions look familiar, it is because they are the exact same provisions found under section 84(2) of Nigeria's 2011 Evidence Act,¹⁵¹ with a few word changes. Further to this, and just like the Nigerian Evidence Act, the Kenyan Evidence Act also requires a certificate to be signed 'by a person occupying a responsible position in relation to the operation of the relevant device...'¹⁵² In the election petition appeal case of *Martha Karua*,¹⁵³ the Court of Appeal upheld the decision of the High Court when it rejected cellphone evidence that had been tendered without a certificate. In support of the High Court's ruling, the appeal court stated:

Furthermore, it was submitted that the mandatory conditions for admission of electronic evidence under Section 106B of the Evidence Act were not fulfilled in that there was no certificate to vouch for the authenticity and integrity of the evidence... The election court was therefore correct, it was urged, when in its ruling of 21st May 2018, it held that the photographs were inadmissible and did not form part of the record.¹⁵⁴

Prior to the *Martha Karua* case, there was the 2015 decision of the Court of Appeal in *County Assembly of Kisumu*¹⁵⁵ in which the court emphasized the necessity of an accompanying certificate, while also explaining the rationale behind this requirement:

In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced.¹⁵⁶

The judges further acknowledged that the Evidence Act did not specify the format the certificate is meant to take and they recommended that it may be in the form of a sworn affidavit.¹⁵⁷ While this judicial guidance around the requirement of a certificate is helpful, I will contend that the submission of a certificate might become perfunctory and will not accomplish the true goal of verification and authentication which is extremely important when considering electronic and digital evidence. So far, Kenyan courts have made the submission of a certificate

¹⁵⁰ Evidence Act of Kenya (n 146 above) sec 106B (2) (a-d).

¹⁵¹ The Nigeria Evidence Act (n 106 above) sec 84(2).

¹⁵² The Evidence Act of Kenya (n 146 above) sec 106B (4) (a – d).

¹⁵³ *Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others* (2018) eKLR.

¹⁵⁴ n 153 above, para 47.

¹⁵⁵ *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* (2015) eKLR.

¹⁵⁶ n 155 above, para 66.

¹⁵⁷ n 155 above, para 68.

mandatory,¹⁵⁸ and while the requirement of a standard certificate is very laudable as it helps establish provenance and authenticity, there needs to be additional standards put in place, such as obtaining the expert testimony of a court appointed technology expert who, through a verification process, can present/testify on the credibility and authenticity of the evidence. This is not being recommended in a bid to make it more difficult to admit video evidence but to rather ensure that there is no miscarriage of justice. Just the same way an autopsy report is not presented by anyone other than a forensic pathologist due to the scientific nature of the process, so also should the courts not assume that anyone can clarify the credibility of a video, photograph or other form of electronic evidence, just by looking on its surface. Besides, obtaining expert testimony as to the authenticity of video evidence, is an approach we saw many of the international courts take during trials, as discussed above.¹⁵⁹

It is noteworthy to highlight that outside of the African continent, India is another country whose Evidence Act has similar provisions mandating the presentation of a certificate to accompany an electronic evidence.¹⁶⁰ However the Supreme Court of India recently broke away from the mandatory requirement of a certificate under section 65B(4) of the Indian Evidence Act by stating that:

[W]e clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.¹⁶¹

This clarification was essentially stating that the courts can waive the requirement whenever the need arises, especially if the evidence is relevant.¹⁶² This is quite significant because the court, in the same case, gave priority to the process of authentication when it said:

[I]t will be wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case.¹⁶³

This approach by the Supreme Court of India underscores the point I stated earlier when addressing the over reliance on certification which we have seen in the case of Nigeria and

¹⁵⁸ See *Republic v Barisa Wayu Matuguda (2011) eKLR* where the court ruled the digital evidence to be inadmissible because it was not accompanied by a certificate. See also *Nonny Gathoni Njenga & anor v Catherin Masitsa & anor (2014) eKLR*.

¹⁵⁹ See Chapter 4.2.

¹⁶⁰ Indian Evidence Act (1872) sec 65B(4). See <https://indiankanoon.org/doc/1953529/> (accessed 27 August 2020).

¹⁶¹ *Shafhi Mohammad v The State of Himachal Pradesh* (2018) Supreme Court of India para 12.

¹⁶² The court stated that ‘admissibility of an electronic evidence cannot be ruled out on any technicality if the same was relevant.’ See *Shafhi Mohammad v The State of Himachal Pradesh* (n 161 above) para 3.

¹⁶³ *Shafhi Mohammad v The State of Himachal Pradesh* (n 161 above) para 3.

Kenya especially. Courts must rather begin to adopt the pathway of digital verification involving expert testimony which will be more rigorous and serve the interest of justice better than the certificates will.

4.4.4. Zimbabwe

(a) Available statutory provisions

In Zimbabwe, the admissibility of video evidence or digital evidence is still a developing area in need of attention in order to meet the current technological trends that makes it possible for violations captured through mobile phone technology to be used to achieve the ends of justice and accountability.

The existing laws of evidence in Zimbabwe include the Civil Evidence Act [Chapter 8:01] (2007) and the Criminal Procedures and Evidence Act [Chapter 9:07] (2016). Both laws are very limited in their coverage of digital evidence, confining majority of its interpretations to paper-based documents, thereby creating a legal vacuum in the current digital and technologically advanced world.¹⁶⁴

Nevertheless, a slight opportunity for the admissibility of digital evidence exists by virtue of the provisions of section 279 of the Criminal Procedures and Evidence Act, which states as follows:

(2) A photograph or plan relating any matter which is relevant to the issue in any proceedings shall be admissible in evidence at any stage of such proceedings subject to the conditions that—

(a) any person who is a competent and compellable witness in such proceedings and upon whose indications or observations such photograph or plan was taken or prepared shall be called as a witness, either before or after such photograph or plan is put in by the party tendering such evidence.¹⁶⁵

First is that the Act takes into consideration the admissibility of photographs. Although the framing of section 279(2) tends to give off the understanding that the kind of photographs being referred to are not digital photographs but rather the relic film photography or printed photographs. It is an especially painful let down that the Criminal Procedures and Evidence Act failed to explicitly mention digital or electronic evidence, even though it was enacted at a time brimming with examples of human rights violations captured on cellphones and brought to limelight through the actions of citizen journalists. Nevertheless, the use of the word

¹⁶⁴ P Huni & P Dewah ‘Admissibility of digital records as evidence in Bulawayo High Court in Zimbabwe’ (2019) *Journal of the South African Society of Archivists* 135.

¹⁶⁵ The Criminal Procedures and Evidence Act of Zimbabwe (2016) sec 279.

‘photograph’ is a starting point and can be seen as a precursor into the possible progressive interpretation by the courts to incorporate or accommodate other forms of digital evidence, especially videos.

Second, if we were to observe the provisions of section 279(2)(a) exclusively, the conditions for the admissibility of photographic evidence requires the author of such evidence to be present as a witness. Under normal circumstances, this should not be problematic, except that in the case of citizen media evidence, the author of a piece of evidence may be unavailable for a variety of reasons. Fortunately, the Act under section 279(2)(b) provides that the evidence of such author will be admitted in accordance with section 255 which stipulates that the evidence will be admitted if it can be proven on oath to the satisfaction of the court that the witness is ‘dead or incapable of giving evidence... or cannot be found after diligent search....’¹⁶⁶ However, based on the ever present concern that videos and photographs are susceptible to manipulation, tampering, deletion and alteration, among other challenges, the courts in Zimbabwe have demonstrated that they place a lot of value on provenance and chain of custody as a means of establishing the authenticity and reliability of video evidence. They have shown that it is not enough for the author of the photographic evidence to personally give evidence, it must also be established that the evidence under consideration has not been manipulated.

Turning then to the Civil Evidence Act of 2007, we see some similarities with the Criminal Procedures and Evidence Act but also some stark differences in the approach to video and photo evidence. Similar to the Criminal Procedures and Evidence Act (CPEA), the Civil Evidence Act (CEA) under section 21, also makes provisions for photographic evidence, with very similar wordings as the CPEA’s section 279. The major difference, however, which requires greater attention, is in relation to the admissibility of video evidence.

While the CPEA makes no mention of video evidence, the CEA, under section 38, addresses the admissibility of video evidence in such a manner that is more progressive than the CPEA which was actually amended in 2016 (nine years after the CEA’s amendment entered into force). Section 38 of the CEA covers evidence such as ‘video and audio tapes and similar material all of which are described as follows:

(1) In this section— “recording material” means any magnetic tape or wire, disc or similar article or material on or by means of which sounds or sounds and pictures may be recorded.

¹⁶⁶ The Criminal Procedures and Evidence Act (n 165 above) sec 255(2)(a)(i & iii).

(2) Recording material shall be admissible as evidence of the things recorded thereon.¹⁶⁷

This provision paves the way for video and photo evidence from mobile phones to be potentially admitted. It is quite significant because it is also different from many of the provisions under the domestic laws of other African countries analysed above, especially because it separately tackles computer generated evidence.¹⁶⁸ Further to this, the CEA makes provision for how the court should approach the issue of authenticity and the weight to be attached to video evidence, by stating that:

(3) In estimating the weight, if any, to be given to anything recorded on recording material, a court shall have regard to all the circumstances affecting its accuracy or otherwise and, in particular, to—

(a) whether or not the recording has been or may have been edited or interfered with in any way and, if it has, whether the editing or interference has materially affected its accuracy or authenticity;

(b) whether or not the recording is original or a copy and, if it is a copy—

(i) the reason why the original recording has not been tendered in evidence; and

(ii) whether or not the copy may safely be relied on;

(c) any independent evidence which may verify the things recorded on the recording material.

The foregoing firmly recognises that not every copy of a piece of visual evidence should be disregarded on the basis of it not being in the original form. It rather encourages the court to interrogate what is most paramount, that is, whether or not the copy can be safely relied on. Moreover, the provision also makes allowance for admitting video evidence that may have been edited as long as such editing does not affect the integrity or authenticity of the evidence. All these are germane in the context of citizen media evidence because, as has been previously discussed, it will not always be possible to obtain the original file of a video evidence, and edits such as face blurring for safety purposes, should not result in the exclusion of critical video evidence since it does not affect the integrity of the footage. It is equally noteworthy that section 38(3)(c) welcomes the introduction of ‘any independent evidence’ that can be used to verify the video recording being tendered before the court. The implication of this is that digital verification mechanisms can be used to authenticate the trustworthiness of the evidence in addition to expert witnesses being invited to verify, as against the court relying solely on the testimony of the author of the evidence (who may be inaccessible or unavailable).

¹⁶⁷ The Civil Evidence Act of Zimbabwe Chapter 8:01 sec 38.

¹⁶⁸ The Civil Evidence Act (n 167 above) sec 13.

Despite the fact that the phrases ‘citizen media’, ‘digital evidence’ and even ‘electronic evidence’ were conspicuously omitted in the text of the CEA and the CPEA, provisions like those found in section 21 and section 38 of the CEA still set the foundation for future broadening of the scope of these laws to be more inclusive of newer forms of evidence. Hence it is imperative that the laws are amended without delay to reflect modern realities because in as much as the provisions cited above can be interpreted or stretched to include digital evidence, it is not a guarantee that this will be the practice in reality. Indeed, research carried out by Huni and Dewah reveals that evidence obtained from social media platforms such as Whatsapp and Facebook were not readily acceptable as evidence in Zimbabwean courts because it is ‘difficult to authenticate them.’¹⁶⁹ Consequently, even as the laws are being modified, capacity for authentication and verification must also be bolstered to ensure fairness in the administration of justice. An additional benefit of updating the laws is that no ambiguity will exist as to what is covered by the law, so that there is consistency from the courts when approaching issues of digital and citizen media evidence.

(b) Analysis of the case law and the procedure for admissibility of digital/electronic evidence

In the case of the *State v Tungamiraimadzokere and others*,¹⁷⁰ the High Court agreed to admit a video recording as evidence. The video in question was submitted by the accused to prove his alibi. However, even though the court deemed the video admissible on the ground that it was presented by its author¹⁷¹ it concluded that it had no probative value because it had been discredited for two main reasons; one was the fact that the date the video was recorded could not be established from the footage since the timestamp function of the device was not activated during the recording.¹⁷² Second, was that the court did not have confidence that the chain of custody was devoid of tampering or manipulation.¹⁷³ The court was right to prioritize these issues in determining the authenticity of video evidence which invariably goes to the weight the court attaches to such evidence. If video evidence must be used to deliver justice, it should meet the evidentiary standards of relevance and reliability. Although the video evidence in this case did not meet these evidentiary standards, the approach of the court is precedent setting and shows that its disposition to citizen media evidence would be similar. In other words, even though the provisions of the 2016 Criminal Procedures and Evidence Act do not explicitly

¹⁶⁹ Huni & Dewah (n 164 above) 142.

¹⁷⁰ *The State v Tungamiraimadzokere & others* HH 523-16, CRB 55/12.

¹⁷¹ *The State v Tungamiraimadzokere & others* (n 170 above) 17.

¹⁷² *The State v Tungamiraimadzokere & others* (n 170 above) 16.

¹⁷³ *The State v Tungamiraimadzokere & others* (n 170 above) 16.

speak to the admissibility of citizen media evidence, the courts would be inclined to admit it if it is deemed relevant, authentic, verifiable and reliable.

4.4.5. Democratic Republic of Congo

(a) Available statutory provisions

The Democratic Republic of Congo (DRC) has unfortunately been marked by ongoing conflict, war, corruption and tussle over the control of natural resources which has resulted in serious human rights violations and mass atrocities including sexual violence with impunity.¹⁷⁴

The country is also unique from all our previous analysis in that first, it runs a civil law legal system, and second, any form of evidence may be used to prove an atrocity during criminal proceedings in the DRC because the courts are guided by the ‘*principe de la liberté de la preuve*’, which connotes that offenses can be proven by any means of evidence.¹⁷⁵ The principle of ‘*intime conviction*’ also allows judges the discretion over the admissibility and weight of the evidence presented, according to their own conscience.¹⁷⁶ By extension, there is no specificity when it comes to the admissibility of digital evidence or in particular, citizen media evidence. According to Zikudieka and Bustin, ‘there are no special rules concerning the disclosure of electronic documents, let alone acceptable practices for electronic disclosure.’¹⁷⁷

This has resulted in digital evidence (including videos, pictures and satellite imagery) playing a significant role in recent trials held in the DRC.

(b) Analysis of the case law and the procedure for admissibility of digital/electronic evidence

The military courts have passed some landmark cases relying on digital evidence in its pursuit of justice for victims of war crimes and crimes against humanity.¹⁷⁸ One of such landmark cases

¹⁷⁴ International Legal Assistance Consortium and International Bar Association Human Rights Institute ‘Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of Congo’ (2009) 7.

¹⁷⁵ C Gabriele, K Matheson & RV Llorente ‘The role of mobile technology in documenting international crimes: The Affaire Castro et Kizito in the Democratic Republic of Congo’ (2021) 19(1) *Journal of International Criminal Justice* 113.

¹⁷⁶ Gabriele, Matheson & Llorente (n 175 above) 113.

¹⁷⁷ DB Zikudieka & O Bustin ‘Democratic Republic of Congo: Litigation and dispute resolution’ 2018 https://www.vda.pt/xms/files/v1/Artigo_OCB_-DRC.pdf (accessed 20 March 2022) 4.

¹⁷⁸ The majority of cases that involve international crimes appear before the military courts of the various regions. The subject matter jurisdiction of the military courts is derived from the Military Penal Code. However, Military courts in the DRC have taken a novel approach by applying the ICC Statute directly to proceedings in some cases of war crimes and crimes against humanity. This is made possible by virtue of article 215 of the Constitution, which puts duly ratified international treaties above Congolese legislation. In this regard, the provisions of the Rome Statute of the International Criminal Court complement the Penal Code and takes precedence when conflict between law arises. Noteworthy is that this legal reasoning and decision to use one law over the other (domestic law or treaty law) is not uniform across the region. A Trapani ‘Bringing national courts in line with international

is that of *Ndayambaje Gilbert and Nizehimana Evariste*. The accused – Ndayambaje Gilbert (alias Rafiki Castro) and Nizehimana Evariste (alias Kizito) were commanders of the rebel militia called the Democratic Forces for the Liberation of Rwanda (FDLR) and were arraigned by a military tribunal in Bukavu for the alleged murder and torture of hundreds of people in Lumenje and Kamananga as well as the pillage and arson of the villages.¹⁷⁹

Herein, the court in 2018, for the first time admitted and made use of incriminating pieces of video and picture evidence, including evidence captured using mobile phones, submitted by the affected community with support from local and international NGOs.¹⁸⁰ This led to justice for the survivors and the life sentencing of the accused persons. In its analysis, the court made reference to the principle of ‘freedom of evidence’ in its consideration of the admissibility and weight of the digital evidence presented.¹⁸¹ It also made several assertions to the impact the submitted digital documentation had in providing persuasive evidence that helped corroborate the testimonies of the victims where it would have otherwise been difficult or impossible. In this regard, it was important that the documentation captured and submitted were relevant and reliable in a way and manner that met the highest standards of criminal justice.¹⁸² According to the judges, the ‘photos and images speak for themselves’ and buttress the severe violence, brutality and suffering that the victims experienced in the hands of the FDLR soldiers.¹⁸³

This case did set a necessary judicial precedence for the use of digital evidence in courtrooms in the DRC amidst the courts’ traditional *laissez-faire* approach to the admissibility of evidence. However, this does not erase the need for statutory guidelines because without set parameters for the use of digital and citizen media evidence, a win in this case (*Ndayambaje Gilbert and Nizehimana Evariste*) does not necessarily guarantee that the courts will adopt the

norms: A comparative look at the Court of Bosnia and Herzegovina and the military courts of the Democratic Republic of Congo’ (2013) 46 *Israel Law Review* 239.

¹⁷⁹ The Case: On the 5th of May 2012, the FDLR attacked the village of Lumenje, killing approximately 14 people and wounding several others upon the accusation that they were supporting a rival local group- Raia Mutomboki. Nine days after the first attack at Lumenje, the FDLR undertook a similar attack in the village of Kamananga where more than thirty people were killed and fatally wounded. In both cases, houses and schools were looted and burned to the ground. See TRIAL International ‘Opening of a trial for crimes against humanity and war crimes in South Kivu’ 2018 <https://trialinternational.org/latest-post/opening-of-a-trial-for-crimes-against-humanity-and-war-crimes-in-south-kivu/> (accessed 5 March 2021).

¹⁸⁰ The NGO consortium (including TRAIL International, WITNESS and eyeWitness to Atrocities) assisted with documenting, authenticating and preparing digital evidence to strengthen the evidentiary records needed for prosecuting Rafiki Castro and Kizito. See WITNESS ‘Use of video evidence leads to justice in Democratic Republic of Congo’ 2018 <https://www.witness.org/video-evidence-helps-lead-to-historic-conviction-in-democratic-republic-of-congo/> (accessed 5 March, 2021).

¹⁸¹ Gabriele, Matheson & Lorente (n 175 above) 126.

¹⁸² Gabriele, Matheson & Lorente (n 175 above) 116.

¹⁸³ Gabriele, Matheson & Lorente (n 175 above) 126.

same approach to video evidence in another case, if formal rules and coherent laws are not uniformly put in place across the country.

Similarly, in another landmark judgement in 2017 – *The Kavumu case*, digital evidence including forensic photographs and videos helped strengthen the case of the prosecutors and get justice for the dozens of young girls who had been systematically raped and abused.¹⁸⁴ In this case, the Military Mobile Court in the DRC found 11 men, including a sitting local lawmaker, guilty of crimes against humanity and the perpetrators were sentenced to life imprisonment (this judgment was upheld in 2018 by the Military High Court).¹⁸⁵ This will not have been possible without an unprecedented collaboration between medical and legal practitioners alongside other law enforcement agents and activists, using forensic evidence amongst which were photographic and video evidence.¹⁸⁶ According to one of the leading partners they ‘provided clinicians with cameras, and for the first time, judges accepted forensic photographs of injuries sustained during sexual assaults and other violent attacks in court filings.’¹⁸⁷

One can therefore draw the conclusion that despite the dearth of proper regulatory framework providing for the admissibility of digital/electronic evidence, judges in the DRC are increasingly open to the use of digital evidence in the courtroom including those captured on phones. However, as discussed in the analysis of previous country studies, the complexities of admitting and relying on digital evidence means that safeguards are necessary to avoid manipulations and misrepresentation of videos or photographic evidence. In this regard, Gabriele et al also posit that clear legislative and judicial guidance are necessary for ‘collecting, preserving, analysing, curating, and presenting’ digital evidence in a manner that complies with the admissibility criteria of a court.¹⁸⁸ However, these proposed standards must at the same time

¹⁸⁴ *S (on behalf Malinda & ors) v Batumike & ors* La Haute Cour Militaire de Republique democratique du Congo RPA No 139/2018.

¹⁸⁵ The case: Between March 2013 and December 2015, young girls between the ages of 18 months and 11 years in the Congolese town of Kavumu were abducted from their homes in the middle of the night, raped, and abandoned. In 2017, the Court arraigned 20 men for crimes against humanity for serial assaults that took place over several years (rape and murder, and for membership in an armed group), setting critical precedents. 11 of the accused were found guilty while the survivors and civil parties were awarded reparations. K Naimer, M Volpellier & D Mukwege ‘The case of Kavumu: a model of medicolegal collaboration’ (2019) *The Lancet* 2651-2652.

¹⁸⁶ Naimer, Volpellier & Mukwege (n 185 above) 2651.

¹⁸⁷ S Sirkin ‘The case of the children of Kavumu: a watershed moment for justice in the Democratic Republic of the Congo’ in Human Rights Foundation of Turkey (2020) *Confronting the Global Human Rights Crisis: Towards a Novel Human Rights Movement* 54.

¹⁸⁸ Gabriele, Matheson & Llorente (n 175 above) 121.

not be overly complex or complicated in such a way that makes it difficult to admit digital evidence from citizen journalists.

4.5 Conclusion

What this chapter has shown is that video evidence is a powerful tool for advancing accountability, be it as an initial trigger for investigation or as a courtroom tool for securing convictions. We saw how it triggered investigations at the level of international courts and tribunals and its relevance in African and non- African courts. While we have witnessed a more robust use of citizen media evidence at the international level, we are seeing a gradual increase on the reliance of citizen media evidence in African countries, even though there are challenges with the rules of evidence. To begin with, the question of how to establish the authenticity of video evidence is germane. Clarifying whether a piece of evidence is authentic or not enables the court to know which evidence it can rely on that will guarantee a fair trial and will not also be prejudicial to the integrity of the proceedings. It is obvious that domestic courts in Africa need to rely more on experts in making a determination on authenticity but currently that is not common practice. Rather what is common is the presentation of certificates of compliance. While the certificates are necessary, it is recommended that they should be accompanied by experts' testimony – which may be oral, written or visual.

Furthermore, the domestic laws in all of the African countries reviewed are either outdated or inadequate and thereby make it arduous for the courts to engage with pieces of digital evidence such as citizen media evidence. The laws therefore require changes that will not just reflect contemporary development within the technology space, but that will also be futuristic as well due to the exponential growth rate of technology. Freeman explains this best when she said:

By the time standard operating procedures are created for handling digital evidence in its present state and relevant actors are trained on existing technologies, there will already be a new backlog of issues and challenges to address. Instead of being reactionary, lawyers and investigators need to get ahead of the curve and will have to look towards the future and think about how they themselves can innovate and utilize new technologies.¹⁸⁹

For instance, while the Berkeley Protocol became the response to the previous lack of a standard operating framework for the handling of digital evidence during international criminal investigations, it could not anticipate the recent explosion of AI video generating software that are enabling people to create videos by simply typing out the text. While this

¹⁸⁹ L Freeman 'Digital evidence and war crimes prosecutions: The impact of digital technologies on international criminal investigations and trials' (2018) 41(2) *Fordham International Law Journal* 334.

technology is still at an experimentation stage, some of the video results are terrifyingly good.¹⁹⁰ If we therefore do not have mandatory full disclosure of how such videos are created, this would soon become another challenge to grapple with as it would affect the already fragile trust in video evidence.

For both domestic and international courts and tribunals, it needs to be acknowledged that working with digital evidence poses a peculiar set of challenges; from the sourcing of the evidence – through methods such as OSINT, to its analysis and preservation and then its verification while all along preserving the integrity of the evidence so it is optimized for use in a courtroom. This process is what seems daunting especially when compared to the more familiar terrain of oral and documentary evidence. Just like witness testimony, citizen media evidence is not infallible. Nevertheless, it would be contrary to the ideals of justice and fairness if, despite the barrage of video and photographic evidence, courts are unable to push through for accountability simply on the grounds of lack of expertise or an inability to effectively interrogate or verify/authenticate citizen media evidence. To safeguard against such, we must hasten to evolve new systems and build capacity both within and outside of the courtroom.

We are at a point in time when technology is no longer about exclusive expertise but more about basic literacy. Judges, lawyers, human rights practitioners and investigators must avail themselves of the basic knowledge of technology so as to effectively deliver fair trial and justice. The vital point to note here is that citizen media is too important to ignore. Even though it seems that the human rights community has now come to this realisation, it is moving too slowly to make necessary changes that will usher in a dispensation that signals the shift from the old to the new. We must bear in mind that the law can only be developed when it is tested through litigation and for as long as advocates and judges maintain a do-not-touch approach with using citizen media in the court rooms, the law will become irrelevant in combatting modern day challenges and ultimately delivering accountability for human rights violations. As has been aptly stated, ‘the utility of digital images as an instrument of justice will depend on good practices being disseminated and implemented across jurisdictions, from capture to the courtroom.’¹⁹¹

¹⁹⁰ A company like Runway developed a tool that allows users to type in text of what they want to create and it gets generated into a video. This has several creative uses but at the same time presents challenges around trust in video.

¹⁹¹ Gabriele, Matheson & Llorente (n 175 above) 109.

Chapter Five: Mechanisms for strengthening citizen media

5.1. Introduction

There is a general consensus as to the relevance of citizen media. Beyond its use as a tool for galvanizing movements,¹ we also see it being used as evidence in courtrooms,² as part of human rights investigations³ and as a resource for mainstream media.⁴ It has grown from being a marginal topic,⁵ easily dismissed by professionals,⁶ to a tool for bolstering civic participation, thanks in large part to technological advancement and the proliferation of camera phones.

The ultimate challenge, however, goes to the root of the credibility of citizen media and for this reason, some have called for it to be regulated. Today, anyone can film with their phone and broadcast it. However, establishing the trustworthiness and authenticity of the footage is paramount to securing justice.

We have therefore seen the emergence of frameworks such as the Berkeley Protocol which provide an extensive guide for how citizen media evidence and open-source investigations should be conducted. Authors of the Protocol describe it as one which will establish legal and ethical norms for online open-source investigations and, in doing so, increase the likelihood that such information will be useful for justice and accountability.⁷

¹ In 2019, the iconic photograph of Alaa Salah standing on top of a car and surrounded by citizens holding up their phones to record, became a rallying point for the movement that sought the ouster of Al-Bashir as president of Sudan. The image, captured by Lana Haroun and distributed on social media, helped galvanize global support for the revolution. See T Griffin ‘People can’t stop talking about this iconic photo from the protests in Sudan’ *Buzzfeed News* 2019 <https://www.buzzfeednews.com/article/tamerragriffin/sudan-protests-woman-car-iconic-photo-alaalah> (accessed 29 September 2020).

² In March 2016, Imad Abu Shamsiyeh – a resident of Hebron – captured on camera the extra-judicial killing of a Palestinian by an Israeli soldier. This footage was relied upon by the Military Prosecution during trial before the Military Court and resulted in the conviction of the soldier who was then sentenced to 18 months in prison. See B’tselem ‘Video: Soldier executes Palestinian lying injured on ground after the latter stabbed a soldier in Hebron’ 2016 https://www.btselem.org/video/20160324_soldier_Executes_palestinian_attacker_in_hebron#full (accessed 29 September 2020).

³ In the case of *The Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli*, the warrant of arrest was issued following investigations into war crimes that were triggered by citizen videos collected from social media. *The Prosecutor v Mahmoud Mustafa Busayf Al-Werfalli* Warrant of arrest (15 August 2017) ICC-01/11-01/17.

⁴ Modern history is replete with examples of traditional media’s dependence on citizen. We saw it in happen with the World Trade Center terrorist bombing of 2001, the 2004 tsunami in Southeast Asia and the 2009 election upheavals in Iran. Please refer to C Barnes ‘Citizen journalism vs traditional journalism: a case for collaboration’ (2012) 58 *Caribbean Quarterly* 22.

⁵ HC Stephansen ‘Understanding citizen media as practice: agents, processes, publics’ in M Baker & BB Blaagaard (eds) *Citizen media and public spaces: diverse expressions of citizenship and dissent* (2016) 25.

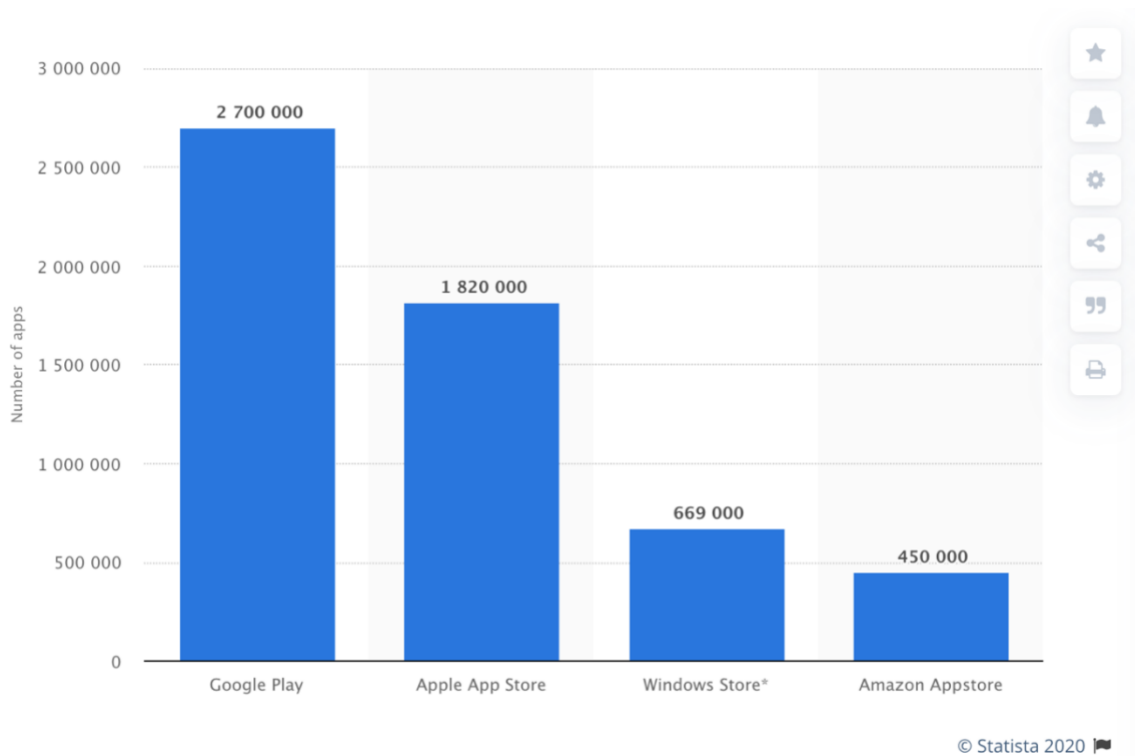
⁶ At its inception, citizen media suffered a lot of distrust from mainstream media who never deemed it as a viable alternative to traditional media. See KN Darbo & T Skjerdal ‘Blurred boundaries: citizen journalists versus conventional journalists in Hong Kong’ (2019) 4(1) *Global Media and China* 111.

⁷ Human Rights Center ‘International Open Source Investigations Protocol’ <https://humanrights.berkeley.edu/programs-projects/tech-human-rights-program/international-open-source-investigations-protocol> (accessed 24 June 2021).

This chapter considers the mechanisms being put in place by civil society groups, international bodies as well as some governments to tackle the challenges confronting citizen media evidence, as highlighted under Chapter 4. The goal is to analyse these mechanisms covering the different stages of citizen media evidence – from the documentation stage through to its deployment as a tool for accountability. Woven through the thread of this analysis is a recurring flaw seen in many of these mechanisms, which is the fact that they are centered largely around the global north and developed economies, thereby failing to provide solutions that will address the peculiar challenges of communities in the global south, specifically in Africa.

5.2. Development of mobile applications

As social interaction becomes more mobile, we are simultaneously witnessing a surge in the development of apps for mobile use.⁸ As of the second quarter of 2020, there were more than 5.5 million apps across four of the major app stores as demonstrated below.⁹



Human rights organisations have also seized this opportunity to develop mobile application solutions that can increase the reliability and overall trustworthiness of citizen media evidence. Some of these applications have been engineered to address challenges relating

⁸ S Höffken & B Streich ‘Mobile participation: Citizen engagement in urban planning via smartphones’ (2013) 202.

⁹ J Clement ‘Number of apps available in leading app stores as of 2nd quarter 2020’ <https://www.statista.com/statistics/276623/number-of-apps-available-in-leading-app-stores/> (accessed 30 September 2020).

to retaining the integrity of visual evidence, while others provide archiving solutions as well as security for the citizen journalist and others.

WITNESS is one of those human rights organisations that has committed time and resources towards strengthening citizen media evidence. For instance, WITNESS partnered with The Guardian Project to build and deploy three mobile apps that make it easier for citizen media to be documented effectively and safely. These apps include: ObscuraCam, CameraV and ProofMode.¹⁰ Another organisation whose contributions are significant within this space is eyeWitness to Atrocities that developed the eyeWitness to Atrocities app aimed at collecting and storing ‘metadata in a unique way that adheres to the toughest legal requirements.’¹¹

All the apps developed by WITNESS, The Guardian Project and eyeWitness to Atrocities help ensure that citizen journalists are equipped with all they need to bolster the reliability of their evidence in a way that also does not compromise their safety and that of others.

Addressing the issue of safety for instance, ObscuraCam was developed to protect the identity of those who appear in a video by blurring their faces. This feature is important because it prevents repressive governments from targeting and further oppressing those who dissent.¹² The risk posed by not blurring someone’s face has cost some people their freedom and this danger was succinctly expressed by an Aljazeera blogger for Syria who stated as follows:

Government forces have special teams dedicated to monitoring protests that we film and upload to the internet. A lot of Homs residents have become scared of the camera... They know a photo of them on the internet could result in several months of imprisonment and torture.¹³

It is therefore quite significant that ObscuraCam helps protect those filming and those being filmed by granting the option to conceal their identity within a few clicks, a feature that

¹⁰ All three apps tackle different aspects of the challenges confronting the trustworthiness of citizen media evidence. See D Kayyali ‘Media activists: WITNESS and Guardian Project have your back’ 2017 <https://blog.witness.org/2017/07/media-activists-witness-guardian-project-back/> (accessed 30 September 2020).

¹¹ See Eyewitness ‘Using metadata to prove the reliability and validity of footage’ <https://www.eyewitness.global/Using-metadata> (accessed 30 September 2020).

¹² In Nicaragua, 19-year-old Kevin Monzón was detained by the authorities following a video he posted online that was critical of the government. See AccessNow ‘Nicaragua is threatening TikTok activists – follow these steps to stay secure’ 2020 <https://www.accessnow.org/nicaragua-tiktok-safety-tips-activists/> (accessed 30 September 2020). Furthermore, the act of doxxing has become rampant in places like Hong Kong whereby the private information of an anti-government protester is publicly released, thereby putting them at great risk. See M Borak ‘Doxxing has become a powerful weapon in the Hong Kong protests’ 2019 <https://www.scmp.com/abacus/culture/article/3032268/doxxing-has-become-powerful-weapon-hong-kong-protests> (accessed 30 September 2020).

¹³ W Jordan ‘All a blur: Making activist video safer’ 2012 <https://www.aljazeera.com/features/2012/7/26/all-a-blur-making-activist-video-safer> (accessed 30 September 2020).

has now made its way onto platforms like YouTube, largely due to the advocacy efforts from WITNESS.¹⁴ In its 2011 report about the challenges arising from the ubiquity of cameras, WITNESS questioned the absence of an option to anonymize identities on social media platforms:

No video-sharing site or hardware manufacturer currently offers users the option to blur faces or protect identity. As video becomes more prevalent as a form of communication and free expression, the human rights community's long-standing focus on the importance of anonymity as an enabler of free expression needs to develop a visual dimension – the right to visual anonymity.¹⁵

One must be aware that while the blur tool and feature were created to keep human rights advocates and defenders safe, it can also be used by perpetrators to conceal their own identity, thus making it more difficult to hold them accountable and this might create a conundrum that the human rights community is not prepared for.

At the same time however, the blur tool does not only safeguard the lives of those in conflict situations, it is a tool that is consistent with international frameworks on the right to privacy. Article 12 of the Universal Declaration of Human Rights (UDHR) clearly stipulates that 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence.'¹⁶ Furthermore, in 2013, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression affirmed the necessity of protecting the privacy of individuals by anonymizing them, especially if they would be at risk should their identity be revealed:

Restrictions of anonymity in communication, for example, have an evident chilling effect on victims of all forms of violence and abuse, who may be reluctant to report for fear of double victimization. In this regard, article 17 of ICCPR refers directly to the protection from interference with "correspondence", a term that should be interpreted to encompass all forms of communication, both online and offline.¹⁷

In addition to blurring faces, ObscuraCam also allows a user to remove other identifying metadata, such as location, from a file before sharing.¹⁸ The absence of metadata would ordinarily be problematic in the context of digital verification and human rights investigation

¹⁴ D O'Brien 'Face-blurring comes into focus for journalists' 2012 <https://cpj.org/2012/07/face-blurring-comes-into-focus-for-journalists/> (accessed 30 September 2020).

¹⁵ S Padania & others 'Cameras everywhere: Current challenges and opportunities at the intersection of human rights, video and technology' (2011) 19.

¹⁶ In addition, Article 17(1) of the International Covenant on Civil and Political Rights also contains provisions similar to that found in Article 12 of the UDHR. International Covenant on Civil and Political Rights (ICCPR) GA Resolution 2200A adopted 16 December 1966, entered into force on 23 March 1976, Art 17(1).

¹⁷ United Nations General Assembly 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression-Frank La Rue' (2013) A/HRC/23/40 para24.

¹⁸ Guardian Project 'ObscuraCam: Secure, smart camera' <https://guardianproject.info/apps/obscuracam/> (accessed 30 September 2020).

but in this instance, ObscuraCam creates a copy and does not alter the original file, thus retaining its integrity and thereby making it possible for investigators to successfully establish the footage's veracity.

On the other hand, the development of the CameraV, ProofMode and eyeWitness apps was for the purpose of solving the challenge faced in relation to presenting reliable and verifiable citizen media evidence in court. One of the use case examples of the CameraV app comes from Brazil where a local group of activists called *Papa Reto Coletivo* were able to document more trustworthy video evidence of police abuse in the favelas using CameraV.¹⁹ These apps were designed with the goal of retaining more metadata than would ordinarily be captured on a mobile device. For example, with the eyeWitness app, this is made possible by having the app operate offline when capturing the footage. As a result, there is greater precision and accuracy when it comes to details such as location because the app is not dependent on the device's WiFi, which may sometimes be unavailable due to internet shutdown or exhausted data. Rather it relies on GPS and cell towers near the device to assign the location, amongst other things²⁰ In addition, the eyeWitness to Atrocities app offers a separate layer of encryption which makes it harder for anyone to access the evidence even if they get to unlock the mobile device. This feature is helpful considering the rampant cases of citizen video evidence being deleted by perpetrators. But in the event that access is forcefully obtained and the evidence is deleted, a backup is always available online.²¹ An app like Proof Mode goes beyond capturing details such as date, time and device used, and take it further to keep track of all modifications made to the photo or video so as to establish chain of custody and make it possible to determine if the media has been tampered with and then allows all this robust dataset to be shared securely.²²

Some of the major shortcomings of these mobile apps is that they run on technology that is not available or accessible to many communities in Africa because the apps will only operate on smartphones which the majority of Sub-Saharan Africans do not yet have.²³

¹⁹ Their story is documented and told in Al Jazeera's 'A bigger brother – Rebel geeks' <https://youtu.be/ssbezlRkxt8> (accessed 30 September 2020).

²⁰ See Eyewitness (n 11 above).

²¹ Before users can even download their footage to share, the eyeWitness app requires them to first upload it to an encrypted, secure and access-controlled server. Refer to <https://www.eyewitness.global/Using-metadata> (accessed 30 September 2020).

²² Guardian Project 'Combatting fake news with a smartphone – Proof Mode' 2017 <https://guardianproject.info/2017/02/24/combating-fake-news-with-a-smartphone-proof-mode/> (accessed 30 September 2020).

²³ L Silver & C Johnson 'Internet connectivity seen as having positive impact on life in Sub-Saharan Africa' (2018) *Pew Research Center* 12.

According to a 2018 report by the Pew Research Center, Sub-Saharan Africa has the lowest smartphone usage of any geographic region in the world with an average of 33% compared to 70% in Europe and 77% in America.²⁴ An experience that exemplifies this is that shared by Boukary Konaté from Mali about how he obtains photographic evidence from community based citizen journalists who use basic mobile phones:

[T]he author takes the photograph with his/her telephone and sends it. For that purpose, we provide every participant with three memory cards. By the time he/she sends me a memory card with “mammy-wagons” (cars that go back and forth from the capital to the rural villages), he/she uses another card. When I download the images, I resend the memory cards to the owner and so on. This combines digital tools with traditional forms of physical information relay... Due to lack of infrastructure, we must find other ways to get these voices heard.²⁵

While Konaté’s experience is from 2011, things are not drastically different today because according to the 2020 report by GSMA – the umbrella body representing mobile operators globally – there are still as many as 800 million people within the Sub-Saharan Africa region who do not have access to mobile internet.²⁶ Furthermore, a 2020 report by Econet – one of the leading telecoms provider in Zimbabwe, reveals that smartphone penetration is still low in the country, with only about 52% of Zimbabweans owning a smartphone, compared to about 90% in South Africa.²⁷ It therefore becomes clear that in resolving the problems encountered at the documentation stage, creating mobile applications like ObscuraCam, CameraV, ProofMode and eyeWitness are not a one-size-fits-all solution. While people can use ordinary mobile phones to capture photographs and videos, they will require a smartphone to access mobile apps such as eyewitness to Atrocities. Consequently, other techniques and methodologies have to be explored and considered to cater to those citizen journalists whose stories might never be heard due to the digital divide. There is also a need to develop mobile apps that more specifically serve the activists’ communities in Africa and makes use of African languages. Having such custom-built apps will increase their rate of adoption and functionality.

Furthermore, there are other mobile apps that practically make it easy for citizen media to be less believable and these apps have proven to be significantly more popular among mobile phone users when compared to those built to enhance the trustworthiness of citizen media. For example, the Reface app makes it possible for users to alter videos by swapping their faces onto

²⁴ J Poushter and others ‘Social media use continues to rise in developing countries but plateaus across developed ones’ (2018) *Pew Research Center* 14 – 15.

²⁵ B Konaté ‘Connecting Ségou villages through mobile phones’ 2011 *New Tactics in Human Rights* <https://www.newtactics.org/comment/4291#comment-4291> (accessed 30 September 2020).

²⁶ The Mobile Economy: Sub-Saharan Africa 2020 *GSMA Association* (2020) 2.

²⁷ Econet Wireless Zimbabwe Limited ‘Annual Report 2020’ 9.

that of someone else to create a realistic alternative. The app has so far been downloaded more than 100 million times from the Google Play store alone.²⁸ This is evidently higher than the number of downloads for the eyewitness to Atrocities app which is just over ten thousand downloads.²⁹ Therein lies a challenge in that the level of penetration for the apps meant to bolster citizen media evidence is much lesser than those built to entertain and invariably make evidence less believable and reliable. As a result, we cannot assume to resolve the problem by solely focusing on building apps but also ensuring these apps have a high adoption rate. Furthermore, we must also keep demanding more accountability from tech companies that create apps that can effectively roll back all the gains being made to develop more trustworthy citizen media evidence.

5.3. Training and capacity building

In the absence of being able to use mobile apps for documentation, empowering citizen journalists with the right skills to more effectively document atrocities happening in their communities is imperative in presenting more trustworthy citizen media. Such empowerment is just as important for citizen journalists who are able to utilize the mobile apps discussed in the preceding section, as well as those who are not. In this regard, an overview will be given of the contributions being made towards training and capacity building by two organisations namely: Amnesty International and WITNESS. The efforts by these organisations help ensure that from documentation through to verification, citizen media is more trustworthy and reliable. It is worth mentioning that the focus on these two organisations does not in any way ignore the vast number of other organisations – local and international – that are investing time and resources doing important work that improves the capacity of citizen journalists and bolsters the reliability of citizen media evidence. What is quite significant is that for every person trained by any of these organisations, there is a likelihood of the beneficiary cascading the skill to other people, thereby broadening the impact and reach.

Beginning with effective documentation; this is the stage in the spectrum of citizen media evidence that has arguably drawn the most criticism due to the lack of professionalism

²⁸ Reface app on Google Play Store

https://play.google.com/store/apps/details?id=video.reface.app&hl=en_GB&gl=US (accessed 12 September 2021).

²⁹ Eyewitness to atrocities on Google Play Store

https://play.google.com/store/apps/details?id=com.camera.easy&hl=en_GB&gl=US (accessed 12 September 2021).

exhibited,³⁰ because citizen journalists are generally not equipped with the technical know-how for how best to capture atrocities so that the footage will meet the highest evidentiary standards possible. WITNESS is an organisation that has recognised this challenge and embarked on training activists, citizen journalists and community groups on relevant tactics for effective filming for use in a courtroom setting.³¹

It is worth noting that this training model is a significant shift from WITNESS's initial focus on providing video cameras to as many human rights groups as possible, because the organisation came to realise that 'a video camera is only effective if the user is properly trained.'³² Therefore, as a result of its training program, the organisation has been able to aid litigation efforts by communities and has recorded historic judgments at domestic, regional and international courts.³³ For example, WITNESS trained and worked with members of the Endorois community in Kenya to present video evidence before the African Commission on Human and Peoples' Rights in support of the community's case against the Kenyan government that had evicted them from their ancestral lands. The video evidence served to corroborate claims by the Endorois and led to a groundbreaking decision by the African Commission that found the Kenyan government guilty.³⁴

Similarly, the video evidence tendered before the International Criminal Court to trigger an investigation of war crimes committed by Thomas Lubanga and his subsequent prosecution, was filmed by Bukeni Waruzi, an activist trained by WITNESS to use video strategically both for advocacy and as legal evidence. Furthermore, WITNESS worked with Waruzi's organisation – Ajedi-Ka, to produce *A duty to protect*, a video which became a centerpiece of the advocacy efforts against the recruitment of child soldiers in the DRC. Within eight years, the estimated number of child soldiers went from 30 000 down to less than 5 000.³⁵

³⁰ S Gregory 'Cameras Everywhere: Ubiquitous Video Documentation of Human Rights, New Forms of Video Advocacy, and Considerations of Safety, Security, Dignity and Consent' (2010) 2(2) *Journal of Human Rights Practice*.

³¹ WITNESS has trained more than 11,000 people in 135 countries. See <https://www.witness.org/about/> (accessed 2 October 2020).

³² P Gabriel and others 'Moving Images – WITNESS and human rights advocacy' 2008 3(2) *Innovations: Technology, Governance, Globalization* 38.

³³ See WITNESS 'Use of video evidence leads to justice in Democratic Republic of Congo' 2018 <https://www.witness.org/video-evidence-helps-lead-to-historic-conviction-in-democratic-republic-of-congo/> (accessed 19 December 2021). See also 'Indigenous communities win land rights victory in Mexico's Federal court' 2017 <https://www.witness.org/2192736-2/> (accessed 19 December 2021).

³⁴ See WITNESS Field notes: Endorois Welfare Council v State of Kenya – the role of video in human rights advocacy https://vae.witness.org/portfolio_page/the-role-of-video-in-human-rights-advocacy/ (accessed 2 October 2020).

³⁵ See 'Bukeni Tete Waruzi – why he is a WITNESS' <https://www.youtube.com/watch?v=iH8AfQCgBLg> (accessed 2 October 2020).

To complement its training programs, WITNESS has also published comprehensive open-access resources and toolkits that give guidance on how activists and citizen journalists can film human rights abuses to meet evidentiary standards³⁶ or for advocacy purposes.³⁷ Matheson, who authored the video as evidence guide explained the motivation for this intervention as being the advancement of accountability for human rights atrocities:

Since the quality of citizen video rarely passes the higher bar needed to function as evidence in a court of law, WITNESS launched our new Video as Evidence project which strives to ensure that citizen video can be better captured, organized, verified and shared to ensure that human rights investigators, analysts, and attorneys can rely on the video in their work to secure accountability in the halls of justice.³⁸

A benefit of the WITNESS training model is that it involves direct in-person trainings that are problem-specific and relevant to the predominant challenges being faced by the communities. For example, in Syria, WITNESS focused on ‘providing training and support for activists, citizen journalists, lawyers and many others who were filming human rights abuses and crimes they were witnessing on the ground.’³⁹ In the United States, the training programs are slanted heavily in favour of filming police abuse against minority groups such as immigrants,⁴⁰ and the trainings in Africa have largely revolved around war crimes and land rights.⁴¹ These trainings are geared in the right direction but more of them are needed, and in really high volumes too, because so far WITNESS has been able to train 11 350 people in 135 countries,⁴² a significant number for one organisation but also a drop in the vast ocean of citizen journalists across the world who are documenting scenes of human rights abuses every day without being anchored in the core techniques for delivering more trustworthy videos. Understanding the scale at which these trainings need to be replicated, WITNESS explicitly encourages others to adapt and replicate its training modules, strategies and resources.⁴³

³⁶ The Video as Evidence Field Guide is one of WITNESS’ resources that addresses the law and legal standards required for video evidence to be relevant, reliable and admissible. It then gives practical guidance on filming techniques to be applied if a piece of video evidence must be used in court. The guide is open access and can be downloaded via <https://vae.witness.org/video-as-evidence-field-guide/> (accessed 2 October 2020).

³⁷ S Gregory et al (eds) ‘Video for change: a guide for advocacy and activism’ (2005) WITNESS.

³⁸ K Matheson ‘Video as evidence: turning citizen video into justice’ 2014 <https://blog.witness.org/2014/10/video-evidence-turning-citizen-video-justice/> (accessed 2 October 2020).

³⁹ Video as Evidence in the Middle East and North Africa – an interview with WITNESS and PILNET (2018) <https://blog.witness.org/2018/02/video-evidence-middle-east-north-africa/> (accessed 10 October 2020).

⁴⁰ Eyes on ICE: documenting abuses against immigrant communities <https://lab.witness.org/projects/eyes-on-ice/> (accessed 10 October, 2020).

⁴¹ Phone interview with Kelly Matheson, Associate Director at WITNESS (15 September 2020).

⁴² See WITNESS Our Impact <https://www.witness.org/about/> (accessed 14 September 2021).

⁴³ WITNESS specifically states as follows: “We invite you to remix, modify and translate these materials so they are relevant to the issues you work on.” See ‘About the WITNESS Library’ <https://library.witness.org/faq/> (accessed 10 October, 2020).

A model worth considering for adaptation by proponents of citizen journalism is the community based paralegal system which helps fill the void in communities where trained lawyers are insufficient or prohibitively expensive for the poor in need of legal aid.⁴⁴ The same way citizen journalists provide real-time evidence of human rights abuses where trained journalists are not available, so also do community based paralegals respond quickly to legal disputes ranging from land rights to prisoners' rights and more where lawyers are inaccessible or inadequate.⁴⁵ Paralegals and citizen journalists step in to close a gap and even though the latter is yet to gain as much recognition as the former, the robust support given to paralegals⁴⁶ signals hope that citizen journalists will also get to that point if more deliberate efforts like those of WITNESS are replicated at scale.

In the field of citizen media verification, the capacity building efforts of Amnesty International is also of great significance. In 2016, Amnesty International established the Digital Verification Corps (DVC) to train the next generation of human rights fact finders in the skills needed to collect and verify citizen media evidence of human rights abuses in a manner that will ultimately contribute to the realisation of justice and accountability for the victims of such abuses.⁴⁷

The DVC project involves training students in select universities around the world to use technology for investigating instances of human rights violations that have been shared on social media.⁴⁸ The training received by the students enables them to verify videos and photographs from social media platforms with the goal of providing irrefutable evidence that can be used to hold governments and individuals accountable.⁴⁹ Such digital verification helps

⁴⁴ According to NAMATI "...paralegals are trained in basic law and in skills like mediation, organizing, education and advocacy. They form a dynamic, creative frontline that can engage formal and traditional institutions alike." See NAMATI 'What is a paralegal?' 2015 <https://namati.org/wp-content/uploads/2015/02/What-is-a-Community-Paralegal.pdf> (accessed 14 September 2021) 1.

⁴⁵ In Kenya, paralegals have assisted Nubians to obtain citizenship; in Mozambique they helped secure access to HIV anti-retroviral drugs and in South Africa, they recovered 4.3 million Rand from unpaid State benefits. See The Economist 'Poor law – the rise of paralegals' (2016) 2.

⁴⁶ For example, in 2012, more than 50 organizations representing 20 African countries, signed the *Kampala Declaration* which called on African governments to strengthen access to justice and accountability by embracing the potential of community based paralegals. Refer to <https://namati.org/kampala-declaration/> (accessed 10 October 2020).

⁴⁷ S Dubberley 'The digital verification corps: Amnesty International's volunteers for the age of social media' (2019) <https://citizenevidence.org/2019/12/06/the-digital-verification-corps-amnesty-internationals-volunteers-for-the-age-of-social-media/> (accessed 10 October, 2020).

⁴⁸ Currently, the DVC is made up of seven universities, namely: University of California Berkeley, University of Pretoria, University of Essex, University of Toronto, University of Cambridge, University of Hong Kong and Universidad Iberoamericana, Mexico. See M Paquette 'Universidad Iberoamericana joins Amnesty International's Digital Verification Corps' (2020) <https://citizenevidence.org/2020/10/15/universidad-iberoamericana-joins-amnesty-internationals-digital-verification-corps/> (accessed 22 October 2020).

⁴⁹ P Verhaert 'Amnesty International's Digital Verification Corps: new networks and methods of human rights research' 2017 <https://www.theengineerroom.org/digital-verification-corps/> (accessed 22 October 2020).

prevent an obfuscation of the truth, provides corroboration and lends greater credibility to citizen media especially in an era where misinformation is prevalent and the malleability of visual evidence is more apparent.⁵⁰ Of importance is the collaborative approach of the DVC which ensures that this network of volunteers are constantly aiding the investigative efforts of NGOs and newsrooms, an intervention that has become essential in light of the limited expertise and resources available in many organisations to carry out in-depth verification.⁵¹

For instance in 2017, the DVC network supported Amnesty International's investigations into the shooting incident at the Australian refugee detention center located on Manus Island and succeeded in getting government officials to acknowledge the extent of wrongdoing, after an initial denial.⁵² In its first year alone, the DVC network conducted 25 projects spanning across 14 countries and covering issues ranging from freedom of assembly to extra-judicial killings, torture, conflict and others.⁵³ One of those projects includes using amateur video footages to geolocate the torture chambers used by Cameroon's military forces in its fight against Boko Haram. The verification work carried out by the DVC contributed to report by Amnesty International on the human rights abuses perpetrated in the war against Boko Haram.⁵⁴

The significant impact the DVC project has had is proof of its relevance⁵⁵ and also underscores why it is crucial to see this skill get taught to more individuals in order to harness the power of digital verification in the pursuit of justice and accountability. The DVC project is however not perfect. One of the DVC's shortcomings is that it is elitist in nature. Members of the corps have to be registered students of universities and this inadvertently makes it an exclusive group closed off to other passionate and capable individuals who, if trained, can add substantial value to the verification of citizen media. The DVC model must scale beyond seven

⁵⁰ M Pantti & S Sirén 'The fragility of photo-truth: verification of amateur images in Finnish newsrooms' (2015) 3 *Digital Journalism* 496.

⁵¹ Having the DVC network support investigations carried by researchers of Amnesty International is proof of how important the skillset is. Furthermore, in a survey carried out among 25 journalists, it was discovered that the ability to verify was the second most important issue they identified as being integral to their work. See S Schifferes and others 'Identifying and verifying news through social media' (2014) *Digital Journalism* 5.

⁵² S Dubberley 'In the firing line: How Amnesty's Digital Verification Corps changed official narratives through open source investigations' 2017 <https://medium.com/lemming-cliff/in-the-firing-line-how-amnestys-digital-verification-corps-changed-official-narratives-through-23aee8bf415d> (accessed 22 October 2020).

⁵³ Human Rights Center 'Digital Verification Corps Summit: evaluating the first year of university-based open source investigations for human rights' (2017) 4.

⁵⁴ Amnesty International 'Cameroon's secret torture chambers – Human rights violations and war crimes in the fight against Boko Haram' (2017)

⁵⁵ The research embarked upon by the DVC fed into the investigations by Airwars and Amnesty International about the war in Raqqa which revealed that the US-led coalition was responsible for the death of at least 1,600 civilians. See Amnesty International 'Amnesty International's Digital Verification Corps wins prestigious Times Higher Education award' 2019 <https://www.amnesty.org/en/latest/news/2019/11/amnesty-internationals-digital-verification-corps-wins-prestigious-times-higher-education-award/> (accessed 22 October 2020).

universities because one cannot possibly expect a handful of volunteers to be able to meet the enormous demands of verification globally. It is really impossible to overemphasize the value of raising an ‘army’ of digital verifiers of citizen media evidence.

This leads to the next challenge: the fact that members of the DVC are student volunteers who still have to grapple with course work and academic expectations which inevitably results in students having to prioritize school deadlines over and above digital verification tasks. A solution that has been introduced by the DVC lab at the University of California, Berkeley, is to make it possible for students to earn course credits for being part of the DVC.⁵⁶ This is a model that should be replicated across all the other participating universities in order to boost commitment.

The third challenge relates to the exposure to vicarious trauma due to the interaction with graphic and disturbing imagery that is associated with the verification process. It is a real concern to the extent that it has prevented some students from joining the DVC.⁵⁷ This is however constantly being addressed by providing resiliency training to the student volunteers ‘to reduce the potential for secondary trauma related to viewing difficult user-generated content.’⁵⁸

Regardless of the foregoing, digital verification has become crucial in forging a path to justice for the world’s worst crimes⁵⁹ and the DVC model is one that should be improved upon and replicated as it helps foster the utility of citizen media evidence.

5.4. Imposing regulation and establishing regulatory frameworks

One of the major criticisms of citizen media as shared by Wood is that ‘we have more information, but it’s a morass of truths, half-truths, and what we used to call libel. It’s fast, but it’s bad.’⁶⁰ The criticism is especially so because citizen journalists are constantly being compared to professional journalists who are bound by a code of ethics and well established

⁵⁶ G Kell ‘World’s next generation of human rights investigators meets at Berkeley’ 2017 <https://news.berkeley.edu/2017/06/28/worlds-next-generation-of-human-rights-investigators-meets-at-berkeley/> (accessed 22 October 2020).

⁵⁷ In a phone conversation with M Nyarko, DVC Lab Manager at the University of Pretoria, he cited examples of students who did not join the DVC because they were worried about being exposed to too much graphic content (phone conversation dated 10 September 2020).

⁵⁸ Human Rights Center (n 53 above) 10.

⁵⁹ C Fortune ‘Digitally dissecting atrocities – Amnesty International’s open source investigations’ 2018 <https://www.amnesty.org/en/latest/news/2018/09/digitally-dissecting-atrocities-amnesty-internationals-open-source-investigations/> (accessed 22 October 2020).

⁶⁰ M Wood ‘Social media as breaking-news feed: Worse information, faster’ 2013 <https://www.cnet.com/news/social-media-as-breaking-news-feed-worse-information-faster/> (accessed 22 October 2020).

regulatory bodies. In South Africa for instance, there is the Broadcasting Commission of South Africa which acts as an independent judicial tribunal that adjudicates complaints against members of the National Association of Broadcasters. In addition, there is the Press Council of South Africa which has as one of its objectives, adherence to journalism ethics by the South African press.⁶¹ This is not peculiar to South Africa alone. Many countries have an oversight body responsible for regulating the practice of journalism by professional journalists.

However, there are no direct regulatory frameworks governing citizen journalists, which has left the door wide open for an unchecked spread of misinformation for which there are barely any cogent repercussions. This has served as jet-fuel for those clamouring for the regulation of citizen media evidence being shared on social media platforms because there is such a huge diffusion of misinformation that many are unable to decipher what is true from what is not. There is however a lot of reason to apply caution when calling for regulation to be imposed on citizen journalists or citizen media because regulation can open the door for authoritarian regimes to have more options through which to silence or restrict citizen media evidence. At the moment, citizen journalists have an added advantage which is that they do not possess licenses that can be revoked by a State or political body, as is the case with professional journalists and media houses.⁶² A 2019 report by Human Rights Watch provides details into how Tanzania enforced repressive laws that allowed it to arbitrarily shut down media houses and suspend their licenses.⁶³ Therefore, vigorously advocating for regulation of citizen media, especially if such regulation will be by the State, may result in the clamp down on citizen journalists.

Credibility is also a core value that is associated with professional journalism and this is not as spontaneously attributed to citizen media in the same way, unless and until it has been verified. One of the key findings of Reuters Institute in 2017 that validates this point is that only 24% think social media is good at separating fact from fiction, compared to 40% who think the same about traditional news media.⁶⁴ In addition, the data collected suggests that the reason for this low level of trust in social media is fueled by the ‘combination of a lack of rules

⁶¹ Constitution of the Press Council of South Africa (2018) sec 2(2).

⁶² It is not uncommon for governments in Africa to target journalists by arresting them or suspending the licenses of the media houses that are critical of government. For example, the draft amendments proposed in 2013 to Sudan’s 2009 Press and Printed Materials Act would allow the State to cancel licenses of journalists.

⁶³ Human Rights Watch ‘As long as I am quiet, I am safe – Threats to independent media and civil society in Tanzania’ (2019).

⁶⁴ Reuters Institute Digital News Report (2017) https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital%20News%20Report%202017%20web_0.pdf (accessed 4 November 2020) 10.

and viral algorithms [that] are encouraging low quality and “fake news” to spread quickly.’⁶⁵ This tends to suggest that people may begin to trust citizen media more if they perceive that there is a modicum of framework within which it operates. In the meantime, however, the more collaborative work seen between traditional media and citizen media, the more positive the perceptions of citizen media evidence will likely be.

We have seen the result of such collaboration between citizen journalists and other professionals as demonstrated through the ‘Anatomy of a Killing’ video⁶⁶ - a joint project of the British Broadcasting Corporation, Bellingcat and Amnesty International, that relied on videos gotten through social media to carry out an investigation that found Cameroonian soldiers responsible for the extra-judicial killing of two women and two children. Due to the video evidence and subsequent investigations, the soldiers were sentenced to prison for the brutal killing of the women and children.⁶⁷ Also very remarkable is the analysis done by New York Times of the Shi’ite protests that took place in Abuja, Nigeria which also relied on citizen video evidence to prove culpability of Nigerian security forces and the extent of brutality.⁶⁸ The analysis, production and reportage done by these media groups and established human rights organizations is opening up the space for better use of citizen media for accountability, thereby resulting in stronger levels of trust in citizen media evidence.

There is however the rapidly emerging threat of AI enabled media manipulation that is making it more difficult to tender an argument against regulation of citizen media and technology. Deepfakes and other forms of synthetic media that have given rise to an infodemic of misinformation and disinformation are proof that we must regulate the technology that allows for easy manipulation of videos. AI enabled media manipulation presents a modern-day challenge to citizen media evidence in the context of human rights atrocities because ‘when anything can be fake, it becomes much easier for the guilty to dismiss the truth as fake.’⁶⁹ Knight put the threat in perspective when he stated:

When fake video footage is as easy to make as fake news articles, it is a virtual guarantee that it will be weaponized. Want to sway an election, ruin the career or reputation of an

⁶⁵ Reuters Institute Digital News Report (n 64 above) 10.

⁶⁶ BBC News ‘Cameroon atrocity: finding the soldiers who killed this woman’ 2018 <https://www.bbc.com/news/av/world-africa-45599973> (accessed 14 November 2020).

⁶⁷ See Human Rights Watch ‘Cameroon: Soldiers get 10 years for murder of civilians’ 2020 <https://www.hrw.org/news/2020/09/23/cameroon-soldiers-get-10-years-murder-civilians#> (accessed 14 November 2020).

⁶⁸ D Searcey & E Akinwotu ‘Nigeria says soldiers who killed marchers were provoked. Video shows otherwise’ New York Times 2018 <https://www.nytimes.com/2018/12/17/world/africa/nigeria-military-abuses.html> (accessed 14 November 2020).

⁶⁹ C Wardle ‘Deepfake: is this video even real?’ 2019 New York Times Opinion. Watch here: https://youtu.be/1OqFY_2JE1c from 02:35 – 02:42 (accessed 30 October 2020).

enemy, or spark ethnic violence? It's hard to imagine a more effective vehicle than a clip that *looks* authentic, spreading like wildfire through Facebook, WhatsApp, or Twitter, faster than people can figure out they've been duped.⁷⁰

A premise of argument against regulation in this context is that not all technology is engineered with the goal of causing harm. In describing the dilemma with regulating deepfakes, Chesney and Citron argue that an outright ban will be harmful to other positive use cases of deepfake in other fields other than human rights, such as history, education, art and science.⁷¹ Synthesia is an example of how deepfakes can be used for a good cause. In 2019, the company used its AI video synthesis technology on a campaign to raise global awareness on malaria. Through AI, they had David Beckham speak in nine different languages and this led to the campaign recording more than 700 million digital impressions – the highest global awareness for malaria in over 3 years. Furthermore, it won the CogX award for Outstanding Achievement in Social Good Use of AI.⁷²

On the contrary is a valid concern that we must recognise how almost impossible it is to prevent the abuse of technology by the public, especially when it is made open source, thereby solidifying the arguments in favour of regulation. For instance, a desktop version of 'Fakeapp' was launched in 2018 and it allows anyone, including those without advanced technical skills, to create their own version of a fake video by relying on an open source machine-learning framework. This has unfortunately resulted in it being used to swap faces of women in pornographic videos, thereby violating these women's privacy and dignity.⁷³ The company Adobe also released an update to its After Effects software which allows people to manipulate videos by using the Content Aware Fill tool to remove unwanted elements in any video.⁷⁴ While this technology will benefit filmmakers and allow for more creative control and a faster workflow, we must also be conscious of the fact that making it commercial moves it into the territory of a potentially dangerous tool in the hands of those with nefarious motives.

⁷⁰ W Knight 'The world's top deepfake artist is wrestling with the monster he created' (2019) *MIT Technology Review*.

⁷¹ B Chesney & D Citron 'Deepfakes: A looming challenge for privacy, democracy and national security' (2019) 107 *California Law Review* 1789.

⁷² See 'Case study – David Beckham / Malaria no more / RGA' 2020 <https://www.synthesia.io/post/case-study-david-beckham-malaria-no-more-rga> (accessed 30 October 2020).

⁷³ A Flynn 'Image-based abuse: the disturbing phenomenon of the deepfake' 2019 <https://lens.monash.edu/@politics-society/2019/03/12/1373665/image-based-abuse-deep-fake> (accessed 30 October 2020).

⁷⁴ Adobe After Effects User Guide 'Remove objects from your videos with content aware fill panel' https://helpx.adobe.com/hk_en/after-effects/user-guide.html/hk_en/after-effects/using/content-aware-fill.ug.html (accessed 30 October 2020).

Not only does this form of technology enable deception, it also complicates the already arduous task of verifying content for subsequent use as prosecutorial evidence.

The stakes become much higher when we apply this to the context of evidence of mass atrocities and how with this technology, key pieces of evidence can be easily deleted from a video. Hence, companies like Adobe must realise that their innovation and business model hold the possibilities for evidence of grave human rights violations to be manipulated. This is why one of the suggested ways for regulating technology is to hold tech platforms and tech developers accountable. Achieving this may be a mammoth task because of the global nature of the platforms and developers which begs the question about which law they will be subjected to especially when the victim is within a jurisdiction where legal action would be impossible or ineffective.⁷⁵ Alternatively, Meskys is among those who believe the State must assume the position of a regulator:

Given that deep fake detection technology is difficult to create, it would be practically more efficient if the governments took a decisive stance and imposed stringent sanctions on the creation of socially harmful deep fakes. Sanctions imposed for making counterfeit money could serve as a stepping stone in determining the proportionality of (criminal) sanctions for deep fakes created for socially harmful purposes⁷⁶

Although, one must also admit that this pathway is equally filled with complexities because strict regulations may violate constitutional and international human rights protections around freedom of expression. But at the same time, the likes of Franks and Waldman while arguing in favour of regulating free speech stated that ‘Deep-fake manipulation is, at its most fundamental, a form of deliberately deceptive speech. As such, its unchecked proliferation is completely at odds with a society that values the pursuit of truth.’⁷⁷

The demand for more specific, targeted regulation also extends to social media platforms through which citizen media gets disseminated. Tech platforms like Facebook have faced intense backlash for their role in fomenting violence. A human rights impact assessment of Facebook’s presence in Myanmar found that the platform had been used to incite violence and cause offline harm:

Facebook has become a means for those seeking to spread hate and cause harm, and posts have been linked to offline violence. A minority of users is seeking to use Facebook as a platform to undermine democracy and incite offline violence, including serious crimes under international law; for example, the Report of the Independent

⁷⁵ Chesney & Citron (n 71 above) 1792.

⁷⁶ E Meskys and others ‘Regulating deep fakes: legal and ethical considerations’ (2020) 15 (1) *Journal of Intellectual Property law and Practice* 31.

⁷⁷ MA Franks & AE Waldman ‘Sex, lies, and videotape: Deep fakes and free speech delusions’ (2019) 78(4) *Maryland law Review* 894.

International Fact-Finding Mission on Myanmar describes how Facebook has been used by bad actors to spread anti-Muslim, anti-Rohingya, and anti-activist sentiment.⁷⁸

In a series of tweets posted by Jack Dorsey – the CEO of Twitter, he acknowledged the harm being caused by the platform and the need to tackle it:

...We love instant, public, global messaging and conversation. It's what Twitter is and it's why we're here. But we didn't fully predict or understand the real-world negative consequences. We acknowledge that now, and are determined to find holistic and fair solutions. We have witnessed abuse, harassment, troll armies, manipulation through bots and human-coordination, misinformation campaigns, and increasingly divisive echo chambers. We aren't proud of how people have taken advantage of our service, or our inability to address it fast enough.⁷⁹

It is against this backdrop that there have also been increasing calls for the regulation of the digital and social media space as well as the technology associated with it. It is believed that technology companies are incapable of effectively regulating themselves which has led to certain regulatory measures being imposed and we will take a look at how effective they are and if they raise additional concerns.

McGregor, Murray and Ng are among those who hold the position that it is possible to regulate tech platforms and inventors by relying on existing international human rights law (IHRL) framework, hence no need to reinvent the wheel.⁸⁰ They argue that 'a human rights based approach to algorithmic accountability offers an organizing framework for the design, development and deployment of algorithms, and identifies factors that States and business should take into consideration in order to avoid undermining, or violating, human rights.'⁸¹ Besides, a state's responsibility to protect against violations covers not just the actions of its own agents but also extends to third party violations. This was clarified by the UN Human Rights Committee when it stated:

[T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.⁸²

⁷⁸ Business for Social Responsibility (BSR) project report 'Human rights impact assessment – Facebook in Myanmar' (2018) 24.

⁷⁹ Jack Dorsey on Twitter 1 March 2018 <https://twitter.com/jack/status/969234278167949313?s=20> (accessed 14 November 2020).

⁸⁰ L McGregor and others 'International human rights law as framework for algorithmic accountability' (2019) 68 *International and Comparative Law Quarterly* 311.

⁸¹ McGregor and others (n 80 above) 313.

⁸² UN Human Rights Committee (HRC) General Comment No 31 [80] on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant CCPR/C/21/Rev.1/Add. 26 May 2004 para 8.

The Committee went further to indicate that a state party would be in breach of its obligation under the covenant if it permits or fails to ‘exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.’⁸³ What this implies is that states ultimately bear the responsibility for the failure of business enterprises to act with due diligence such that it negatively impacts on the rights of those within their jurisdiction. This is meant to be a more enforceable international obligation since it is protected by treaty law, as compared to the expectations placed on businesses themselves, which is just soft law. Principle 15 of the UN Guiding Principles on Business and Human Rights states as follows:

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.⁸⁴

Notwithstanding the existing international framework, the European Commission has recognised the need to regulate and thus adopted a set of guidelines that reflect this position. The European Commission in its 2019 communication on ensuring AI is used for social good,⁸⁵ stated, *inter alia* that:

AI technology should be developed in a way that puts people at its centre and is thus worthy of the public’s trust. This implies that AI applications should not only be consistent with the law, but also adhere to ethical principles and ensure that their implementations avoid unintended harm.⁸⁶

Although this set of guidelines are soft law and do not create any legally binding obligation for tech companies, they nonetheless are relevant in setting the foundations for policy formulation and probably a treaty in the near future. According to the guidelines, there are three components that must be present to arrive at ‘trustworthy AI’ and these are: it should comply with the law, it should fulfil ethical principles, and it should be robust.⁸⁷ A critique of these

⁸³ HRC General Comment No 31 [80] (n 82 above).

⁸⁴ It is worth noting that this framework formed the basis of the human rights impact assessment carried out on Facebook’s presence in Myanmar. See BSR project report (n 78 above) 1.

⁸⁵ European Commission (EC) Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: Building Trust in Human-Centric Artificial Intelligence COM (2019) 168.

⁸⁶ European Commission COM (n 85 above) 2.

⁸⁷ European Commission COM (n 85 above) 3.

components is that they are vague. The expert group however also provided a checklist of seven requirements that will need to be complied with prior to reaching a conclusion on the three components. These are:

- i. Human agency and oversight
- ii. Technical robustness and safety
- iii. Privacy and data governance
- iv. Transparency
- v. Diversity, non-discrimination and fairness
- vi. Societal and environmental well-being
- vii. Accountability⁸⁸

One must admit that the efforts by the European Commission are laudable, progressive and forward thinking, as they should be. But it still remains the reality that this mechanism does not protect a vast majority of the world. It most certainly does not offer protection to Africans on the African continent. Indeed, part of the wordings of the framework developed by the 52-member team of experts⁸⁹ made constant reference to the fact that the document was crafted to comply with ‘European values’. This is to be expected and only signifies the need for other regions of the world to formulate policies and regulations that will address this issue within their own cultural, political, economic and geographical context.

Fortunately, the African Commission on Human and Peoples’ Rights in 2021, became the first organ of the African Union to pass a resolution addressing the need to regulate emerging technologies in order to minimize its negative impact on the advancement of human rights in Africa. The African Commission under paragraph 5 of the resolution, called on States parties to:

urgently place on their agendas the rapid issue of AI technologies, robotics and other new and emerging technologies with a view to develop a regional regulatory framework that ensures that these technologies respond to the needs of the people of the continent.⁹⁰

⁸⁸ European Commission COM (n 85 above) 3.

⁸⁹ High Level Expert Group on Artificial Intelligence <https://ec.europa.eu/digital-single-market/en/high-level-expert-group-artificial-intelligence> (accessed 11 November 2020).

⁹⁰ Resolution on the need to undertake a study on human and peoples’ rights and artificial intelligence (AI), robotics and other new and emerging technologies in Africa ACHPR/Res. 473 (EXT.OS/XXXI) 2021.

It is significant that these frameworks in Europe and Africa are being developed but it will require more States resorting to them for us to see how effective they are in curbing and remediating harmful technology developed by companies and individuals.⁹¹ As it is obvious that some states struggle with holding giant tech companies accountable,⁹² coupled with the tendency of some other states to weaponize their power of regulation against the end users of technology,⁹³ a possible alternative to state regulation is self-regulation by tech platforms and innovators themselves. But this is not a perfect solution either as will be explained below.

5.4.1. Self-regulation by innovators and tech companies

Due to the mounting pressure to regulate and some steep penalties that have been imposed for flouting existing regulations,⁹⁴ tech platforms like Facebook are doing more to curb the use of their platform to cause harm. Facebook for instance launched its oversight board that will ‘protect free expression by making principled, independent decisions about important pieces of content...’⁹⁵ This move is among others that Facebook has taken to complement its efforts at regulating its own platform.⁹⁶ But despite Facebook’s best efforts, it will still be understaffed when it comes to policing the ginormous content being shared on its platform.⁹⁷ Even members of its new oversight board have already cautioned that they will only be reviewing very few cases and only those that raise significant questions about freedom of expression and

⁹¹ So far, implementation of the UN Guiding Principles on Business and Human Rights, especially in developing countries, has been hampered by factors such as corruption, administrative ineptitude and the need to attract foreign direct investment. See O Abe ‘The feasibility of implementing the United Nations Guiding Principles on Business and Human Rights in the extractive industry in Nigeria’ (2016) 7(1) *Afe Babalola University Journal of Sustainable Development Law and Policy* 141.

⁹² Mark Zuckerberg, the CEO of Facebook, on three occasions turned down an invitation to testify before a committee of the UK Parliament. See A Hern and D Sabbagh ‘Zuckerberg’s refusal to testify before UK MPs absolutely astonishing’ 2018 <https://www.theguardian.com/technology/2018/mar/27/facebook-mark-zuckerberg-declines-to-appear-before-uk-fake-news-inquiry-mps> (accessed 4 November 2020).

⁹³ Using the excuse of addressing security concerns, the President of Chad, Idriss Deby, blocked access to social media platforms for 16 months. See ALDahir ‘After a record 16-month ban, this president has unblocked social media access’ 2019 <https://qz.com/africa/1667263/chads-idriss-deby-unblocks-social-media-after-record-shutdown/> (accessed 4 November 2020).

⁹⁴ The US Federal Trade Commission fined Facebook \$5 Billion over its privacy policies which left the data of 87 million Facebook users vulnerable. See L Feiner & S Rodriguez ‘FTC slaps Facebook with record \$5 billion fine, orders privacy oversight’ 2019 <https://www.cnn.com/2019/07/24/facebook-to-pay-5-billion-for-privacy-lapses-ftc-announces.html> (accessed 4 November 2020).

⁹⁵ Charter of Oversight Board <https://www.oversightboard.com/governance/> (accessed 4 November 2020).

⁹⁶ E Dwoskin ‘How Facebook is trying to stop its own algorithms from doing their job’ *The Washington Post* 10 April 2019 <https://www.washingtonpost.com/technology/2019/04/10/how-facebook-is-trying-stop-its-own-algorithms-doing-their-job/> (accessed 4 November 2020).

⁹⁷ In addition to hiring more people to carry out human review, Facebook also launched a project called Third Party Fact Checking Program which enlists the support of external organizations in 14 countries. But this can seem insignificant when placed against the backdrop of the over one billion pieces of content posted on Facebook every day. See T Lyons ‘Increasing our efforts to fight false news’ 2018 <https://newsroom.fb.com/news/2018/06/increasing-our-efforts-to-fight-false-news/> (accessed 4 November 2020).

international human rights.⁹⁸ This is not surprising when one takes into account that Facebook is home to more than 2.7 billion users.⁹⁹

In addition to deploying artificial intelligence to complement real human efforts at making the right decision, Facebook has also established a program called Trusted Partner Channel. NGOs such as the European Foundation for Human Rights are part of this channel and with their input, they are able to assist Facebook in identifying posts that contravene the platform's guidelines in relation to misinformation and harmful content.¹⁰⁰ But therein again lies one of the weakness of the program: the fact that the content being flagged must have been in breach of Facebook's community guidelines gives cause to pause and ponder if those guidelines meet some core minimum standards in the first place. For instance, it is disingenuous of Facebook to be enlisting the help of third-party fact checkers while its Community Standards do not support a full take-down of false news.

Facebook's policy on false news states that 'we don't remove false news from Facebook but instead, significantly reduce its distribution by showing it lower in the News Feed.'¹⁰¹ This is a policy that has been applied by Facebook in situations like the Nigerian general elections of 2019 when, in response to a false news being flagged by the group Africa Check, Facebook said it could not take it down but will reduce its visibility.¹⁰² It is clear that such policy is in need of review if the damaging impact of false news must be averted. Moreover, it is not enough to rely on Facebook's algorithm to get the job done as the system has shown that it is not impervious to subtle deceptions.¹⁰³ But Facebook stands by this policy by claiming not to be an arbiter of truth and insisting that they will only carry out a full content take-down if there is the potential for real harm as a result of such content.

⁹⁸ T Sonnemaker 'As Facebook prepares to outsource tough content decisions to its new "Supreme Court", experts warn it still operates within a dictatorship and can't legislate a better government' *Business Insider* 2020 <https://africa.businessinsider.com/politics/as-facebook-prepares-to-outsource-tough-content-decisions-to-its-new-supreme-court/21mt4nt> (accessed 4 November 2020).

⁹⁹ S Rodriguez 'Facebook reports a decline in users in the U.S. and Canada' *CNBC* 2020 <https://www.cnbc.com/2020/10/29/facebook-fb-earnings-q3-2020.html> (accessed 4 November 2020).

¹⁰⁰ 'EFHR welcomed into Trusted Partner Channel of Facebook' 2018 <http://en.efhr.eu/2018/01/29/efhr-welcomed-trusted-partner-channel-facebook/> (accessed 5 November 2020). Within Africa, there is currently an onboarding process for the Centre for Human Rights based in South Africa to be part of this partner's network.

¹⁰¹ Facebook Community Standards https://www.facebook.com/communitystandards/false_news/ (accessed 5 November 2020).

¹⁰² As explained by D Ajikobi during the International Journalism Festival (April 2019). Refer to <https://youtu.be/ZWK11h5SYTI> (from 53:40 - 54:09).

¹⁰³ The team at Aljazeera succeeded in tricking Facebook's automated system to run false news ads. See Y Ritzen 'Exclusive: Facebook allowed fake news ads ahead of Nigeria vote' *Aljazeera* 2019 <https://www.aljazeera.com/news/2019/02/exclusive-facebook-fake-news-ads-nigerian-vote-190214115116293.html> (accessed 5 November 2020).

It is for this reason that expecting platforms to self-regulate presents some challenges, one of it being that they can cherry pick when to oblige. For example, despite the fact the Oversight Board's charter stipulates that its decisions are binding, they are technically not totally binding based on the following wording:

When a decision includes policy guidance or a policy advisory opinion, Facebook will take further action by analysing the operational procedures required to implement the guidance, considering it in the formal policy development process of Facebook, and transparently communicating about actions taken as a result.¹⁰⁴

What this implies is that there is no guarantee that Facebook will always implement every decision of the Oversight Board, particularly those touching on policy. Nonetheless, the role of third-party fact checkers and the oversight board are very essential because they help combat and contain the spread of misinformation or gratuitous graphic violence, all of which hinder greater reliance on authentic citizen media evidence. Facebook's own workforce alone is grossly inadequate. For instance, the 2019 terrorist attack on two mosques in New Zealand was streamed live on Facebook with versions of the video being spread on Twitter and YouTube. It however took a Facebook user to first report the video, 29 minutes after the live stream started before Facebook became aware that they had a problem on their hands.¹⁰⁵ This was a problem that still took them more than 24 hours to rectify. To understand the scale of the situation, Facebook had to delete approximately 1.5 million videos of the attack in the first 24 hours alone.¹⁰⁶

In an attempt to regulate the tech platforms, it is therefore obvious that the reins of such regulation cannot be handed over entirely to the companies and platforms themselves. Besides, this is consistent with a bedrock principle of natural justice: *nemo iudex in causa sua* which stipulates that you cannot be a judge in your own cause.¹⁰⁷ Rather than insisting that the platforms do whatever it takes to curb the misuse of their innovation, the human rights community should instead present a set of guidelines and frameworks that define what is expected of technology innovators and companies. Admittedly, we have found ourselves in a legal quagmire whereby on the one hand, regulation seems inevitable, but on the other hand

¹⁰⁴ Oversight Board Charter, art 4.

¹⁰⁵ Facebook Newsroom 'Update on New Zealand' <https://newsroom.fb.com/news/2019/03/update-on-new-zealand/> (accessed 4 November 2020).

¹⁰⁶ Facebook Newsroom (n 105 above).

¹⁰⁷ The principle is to guard against bias and partiality or the appearance of it. See *Kock and another v Department of Education, Culture & Sport Province of the Eastern Cape and others* (P317/2000) [2001] ZALC 47 in which the court described it as a primary procedural safeguard in South African law. This principle has also been included in the constitution of countries such as sec 36(1) of Nigeria's 1999 Constitution.

regulation may indeed result in further human rights violations. It is however not impossible to arrive at a balance.

When formulating regulations to the challenges of technology that affects many, regardless of borders, deliberate efforts must be made to ensure it is inclusive. Currently, majority of the organisations shaping the conversations and influencing the direction of regulating technology are concentrated in the global north. For example, in February 2021, the Coalition for Content Provenance and Authenticity (C2PA) was launched by Adobe, Arm, BBC, Intel, Microsoft, and Truepic as a ‘mutually governed consortium created to accelerate the pursuit of pragmatic, adoptable standards for digital provenance,’¹⁰⁸ It is a significant move towards ensuring that the provenance of images online can be established while revealing what edits, if any, have been made to such images. However, the group is overwhelmingly made up of organisations in America and Europe.

We have also seen the lack of prioritization of Africa by tech platforms like Twitter and Facebook, an issue that was discussed by activists during a workshop held in Pretoria in 2019. Faife captured the sentiments as follows:

African activists were well aware that Twitter did not have a regional office for the continent, and that Facebook only employed a small Africa team. A lack of resources implies that the region is a low priority... What’s more, local staff bring cultural and/or linguistic sensitivity that is hard to replicate outside of the region. This sensitivity is critical for making informed decisions on content moderation, especially when evaluating potential harms.¹⁰⁹

This issue has proven costly for Africans and others not in the US or Europe and nothing better exemplifies this than the recent error by Facebook of flagging #EndSARS posts on Instagram and Facebook as fake news.¹¹⁰ This happened due to the lack of prioritization of the continent coupled with the absence of local and cultural contexts, all of which were succinctly identified by African activists in the Pretoria workshop. This erroneous flagging was particularly damaging because it lent credence to claims by the Nigerian government that it was

¹⁰⁸ Content Authenticity Initiative <https://contentauthenticity.org/our-members> (accessed 29 July, 2021).

¹⁰⁹ C Faife ‘Twitter released a draft policy on synthetic media. Here’s what stood out to the activists we consulted’ (2020) <https://blog.witness.org/2020/01/twitter-facebook-synthetic-media-policy-activist-feedback/> (accessed 11 November 2020).

¹¹⁰ Series of posts that attempted to bring world attention to the killing of #EndSARS protesters were flagged on Facebook and Instagram as fake news. See D Gilbert ‘Facebook and Instagram are censoring protests against police violence in Nigeria’ 2020 <https://www.vice.com/en/article/jgqeyg/facebook-is-censoring-protests-against-police-violence-in-nigeria> (accessed 11 November 2020).

not responsible for the killings that took place during the #EndSARS protests.¹¹¹ Instagram did acknowledge its mistake rather too late and posted the following apology:

Yesterday our systems were incorrectly flagging content in support of #EndSARS, and marking posts as false. We are deeply sorry for this. The issue has now been resolved, and we apologize for letting our community down in such a time of need.¹¹²

Recognising that the impact of the technological disruptions being witnessed are not restrained by borders, there must be an intentional and strategic effort of bringing everyone to the table. Granted, the global north might be contending with the changes at a more rapid pace, but this should not eliminate the value in collectively working out solutions that will benefit from a truly global input and not just one considered through the lens of the West.

From the foregoing, it is clear that regulation is taking different forms. Imperfect as they all are, the most effective and least susceptible to further abuse remains an international regulatory framework which must now be pursued to ensure it delivers by preventing harm but also protecting the right to free expression.

5.5. Conclusion

Things seem to be at a fever pitch as all of humanity is willingly and unwillingly being dragged towards a digital future filled with complexities. In the interest of bringing everyone to the table, as many of the splinter solutions as there are should be consolidated or at least made complementary. The stakeholders all have to come together to lay out minimum guidelines that will govern all stages relating to the use and dissemination of citizen media in the digital era.

Innovators also have to think about human rights when they are engineering their technology. Power and privilege are embedded in technology and a human rights approach will require that there is a level playing field. Technology and innovation that is people centered and not institution centered is a progressive and an appropriate approach. When innovation is all that matters and not the potential negative impact of such innovation, then human rights violations are bound to occur as a result of such innovation.

Furthermore, while we look to governments and corporations to carry out sweeping changes in the human rights and technology space, there is also the need to be vigilant and monitor the kinds of regulations that are being issued which on one hand may claim to curb

¹¹¹ N Egbunike 'Official obfuscation trails the Lagos shooting of anti-police protesters' 2020 <https://globalvoices.org/2020/10/23/official-obscuration-trails-the-lagos-shooting-of-anti-police-protesters/> (accessed 11 November 2020).

¹¹² Instagram Communications posted 22 October 2020 <https://twitter.com/InstagramComms/status/1319278185289183236?s=20> (accessed 14 November 2020).

harmful or dangerous innovation but on the other hand can potentially violate human rights. The European Parliament for instance has received push back from civil society groups who state that the proposed Regulation on Dissemination on Terrorist Content Online will cripple freedom of expression online:

By placing the burden on companies to make rapid decisions in order to avoid penalties, this regulation will undoubtedly result in censorship of legitimate speech. That includes content essential “for prosecutions or other accountability processes across borders or in conflict situations.” The proposal ignores the incredible work of human rights defenders and journalists who “risk their freedom, safety, and sometimes even their lives to upload videos for the purpose of exposing abuses to the world. Without this documentation, we would have little idea what is happening in Syria, Yemen, Myanmar, the favelas of Brazil, and elsewhere.”¹¹³

This reinforces the need to begin a global consultative process that will harness all the ideas to help formulate a robust human rights framework targeted specifically at the intersection between technology and human rights. This set of rules should also bear in mind the peculiar circumstances on the African continent. Africa should either be having a seat at the table or building its own table.

In the immediate short term, there is also a responsibility we all individually bear to ensure we regulate our consumption and dissemination of information. While we are trying to make room for more engaged citizens, we must equally ensure we are creating more informed citizens. Gillmor puts this accurately when he stated that:

People often believe incorrect information even more after being presented with facts to the contrary. Once we understand our tendency to have a confirmation bias, we can challenge ourselves to recognize it. And we are not hard-wired to exist in filter bubbles of our own creation. We can train ourselves to look for information that challenges our assumptions.¹¹⁴

The time is now to incorporate media literacy and basic skills of verification and citizen journalism into educational curriculums around the world.¹¹⁵ This should be taught in-depth in journalism schools and other disciplines should have adequate exposure to it as well. It must be scaled up to millions of people across the world because with a growing awareness of the problem and the forms of manipulated media, we might stand a better chance of reducing the

¹¹³ D Kayyali ‘WITNESS brings together voices to push back on dangerous EU “Dissemination of Terrorist Content” proposal’ <https://blog.witness.org/2019/01/witness-brings-together-voices-push-back-dangerous-dissemination-terrorist-content-proposal-civil-society-letter/> (accessed 15 November 2020).

¹¹⁴ D Gillmore ‘Misinformation is a problem of supply and demand’ (2019) Essay published on Defusing Disinfo. <https://defusingdis.info/2019/03/25/misinformation-is-a-problem-of-supply-and-demand/> (accessed 15 November 2020).

¹¹⁵ The need for media literacy was also a priority issue raised at a workshop organized by WITNESS and the Centre for Human Rights. See C Faife ‘To fight deepfakes build media literacy, says African activists’ 2019 <https://blog.witness.org/2019/12/fight-deepfakes-build-media-literacy-africa/> (accessed 14 November 2020).

harms caused as a result of misinformation and rising synthetic media. Media literacy should however not just stop at educating people about the problem but also empowering them with techniques for stemming the spread of manipulated media. It is important to place greater emphasis on the techniques versus the tools because with the latter, there would always be new ways of manipulating media that would render previous detection tools obsolete. Faife elaborates further saying:

There's a lot of value in considering media literacy as a habit, and strategizing around ways we might nudge people toward behaviors that would slow the spread of misinformation. It might be something akin to call screening, a technological solution where an app gives additional context to the media presented on our phones. But it could also be something simpler – some kind of mental checklist to run through before hitting the “share” button.¹¹⁶

Lastly, considering the limited internet infrastructure in Africa, sometimes those with information of atrocity are not online to be able to get the word out. In this regard, the community based paralegal system which has been successfully used in some parts of Africa becomes a viable model for building capable citizen journalists, who can effectively document evidence of human rights atrocities and then make sure it gets into the rights hands in order to trigger accountability mechanisms.

¹¹⁶ Faife (n 115 above).

Chapter Six: Conclusion

6.1. Introduction

We are living in an era in which the ubiquity of smartphone cameras combined with access to the internet have dramatically transformed how citizens around the world interact with information. The previous consumers of information have now become producers themselves, thereby altering the media landscape. With the speed with which individuals are able to document and share videos of human rights violations, we have been offered real time evidence of violations that would have hitherto been concealed or uncorroborated with such powerful and compelling visual evidence, consequently giving us the opportunity of ensuring that violators of human rights are brought to justice.

However, despite this unique opportunity, we are not confronted with the challenge of citizen media evidence being translated into real accountability due to the multiple barriers that stand in the way, such as the absence of legal frameworks for utilizing citizen media evidence in courts, the capacity of citizens to effectively document violations thus subjecting their video evidence to criticisms of being unreliable, and the technological advancements that make it harder to trust citizen media evidence. For example, fake videos are getting easier to create and harder to detect. Consequently, trust in citizen media evidence is declining with the rise of misinformation which is aided by the advancement in technology that makes it possible for someone with a smartphone to manipulate video within a few clicks and effectively alter what we have come to believe as true.

This research was, therefore, triggered by the concern for how to optimize the utility of citizen media evidence for delivering justice and accountability in the midst of enormous challenges. I am convinced that citizen media will continue to be relied upon in greater measure when it comes to the criminal justice process and it therefore became imperative to embark on research that explored our preparedness as a human rights community to seize this opportunity to deliver on the promise of justice and accountability for victims of some of the worst human rights abuses, especially in the context of Africa.

6.2. Key findings

With this research, I set out to answer the core question: How can citizen media be used as evidence to advance accountability for human rights violations? In answering my main question, I had to interrogate how citizen media is being used before domestic and international courts; what gaps exist in the maximization of citizen media in the delivery of justice; what legal frameworks need to be adopted to facilitate the admissibility of citizen media evidence in courtrooms; and what mechanisms are needed to enable citizen journalists better contribute to human rights fact finding and advocacy? My analysis examined the factors within the courtroom as well as outside the courtroom, that contribute to either fostering the use of citizen media as evidence or hindering it.

At the commencement of my research, one of my theories was that citizen media evidence was not being fully utilized partly because of the hesitation on the part of some courts to admit it into evidence. While this is still true in some cases, one of my findings is that the weight attributed to citizen media evidence is of greater concern than the admissibility. Most courts will admit citizen media evidence once it is relevant. But many courts still grapple with how to ascertain authenticity which is what will enable them determine the weight to be attached to the video evidence before them. Consequently, there is work to be done on the part of the citizen journalists and the courts in overcoming this barrier. The citizen journalists need to develop capacity to document more trustworthy video evidence and the courts would need to engage experts that can assist it in establishing the authenticity and reliability of citizen media evidence so that the interest of justice may be served.

What this study has shown is that citizen media evidence has grown in the popularity of its usage and has gone mainstream, with a plethora of examples of it being used in and out of judicial systems to hold the powerful to account. In the year 2020, there were two key moments that caught global attention and further reinforced the notion that citizen media evidence has become critical in exposing the truth and advancing justice. The killing of George Floyd being filmed by Darnella Frazier on her phone after which she posted it to her Facebook page and the Lekki Toll Gate shooting being livestreamed by DJ Switch via her Instagram account, both exemplified how significant citizen media evidence has become in exposing atrocities and propelling justice. We witnessed the videos from both these incidents spark global outrage, trigger investigations and lead to convictions.¹ However, these examples of citizen video

¹ In the case of George Floyd, the police officer – Derek Chauvin – was found guilty of murder and sentenced to 22 years, 6 months in prison. While in the case of the Lekki Toll Gate shooting, the livestream video played a role

evidence leading to justice could be more widespread than what currently obtains, hence the need to address the challenges militating against this reality.

Additionally, it is obvious that one of the barriers to ensuring that citizen media evidence can be used to achieve accountability are the outdated laws of evidence which are in dire need of updating. A key finding of this research is that in a number of African countries, the law of evidence is not sufficiently robust to meet the challenges of the digital era. This thesis therefore provided clarity on how citizen media and digital evidence are being utilized in proceedings before domestic courts in five African countries and identified weaknesses in the existing laws. A consistent feature across these countries is that even though the judges are conscious of the transformations in technology that has necessitated a transformation in the law, they are still stuck with outdated statutory Acts that do not make provisions for new technology thereby resulting in limitations to how citizen media evidence is admitted as evidence.²

Addressing the situation will require new laws and regulations to be enacted or introduced. A challenge might be with how to make the law specific to the current challenges but also broad enough to accommodate those areas that are yet to emerge. This becomes important because technology is evolving at a much more rapid pace than the law and it would be counter-productive to have a law crafted to address a current situation only for the goal post to have shifted after such law is enacted. Adopting a socio-legal approach to this challenge becomes crucial because in addition to its relevance in formulating new laws, it also enables us undertake theoretical and empirical analysis of the nature of law and its relationship to society in the context of a rapidly changing world. Simultaneously, we must bear in mind that as we transform the rules of procedure, we must also transform the courts to be more technology oriented.

Another finding of this thesis is that the commercialization of technology has allowed for easy media manipulation which has resulted in a sabotage of many efforts geared towards developing more trustworthy citizen video evidence. This has caused an unending tussle between digital manipulations and the ability to detect them which is quite integral to separating the truth from a lie. Quenching the wildfires of modern-day video deception techniques will require setting up of frameworks that will impose boundaries on innovators of technology

during the proceedings of the Judicial Panel of Inquiry set up by the Lagos State government. There is however yet to be any prosecution pending the review of the panel's report by government.

² For instance, Honourable Justice Akhiero stated that the section providing for admissibility of electronic evidence under Nigeria's evidence act is insufficient to prevent an abuse of the law. See Chapter 4.4.1.4, footnote 124.

because the decline of the truth will not only have an impact on citizen media, but also on democratic principles.

The barriers to the use of citizen media evidence for advancing justice and accountability can be considered under two broad categories – the human barriers and the technology barriers. To overcome these, some recommendations are offered below which also incorporate solutions to the human problems as well as technology problems:

6.3. Recommendations

It is important to first establish that there is a no silver bullet to the challenges that have been addressed. The recommendations are therefore a series of steps that can be taken to add to the building blocks that will bolster the utility of citizen media evidence in the pursuit of justice and accountability. These recommendations address more of the systemic barriers and do not touch on issues such as increasing the capacity for citizen journalists to more effectively document human rights abuses because currently there are existing programs, initiatives and models already geared towards achieving that.

- 1. Regulatory body for technology and human rights:** regulation coupled with enforcement will be necessary to prevent a further decline in the protection of human rights. The same technology that has enabled the realisation of rights such as freedom of expression is unfortunately the same tool that has been used to spread dangerous misinformation, target vulnerable groups, undermine democracy, incite violence, and produce fake videos that affect the trustworthiness of citizen media. While there is a lot of evidence that inclines us to believe that technology is the enemy, the reality is that the problem has become extremely complex beyond what technology firms alone are doing. In addition to the fact that technologies are not neutral, it is important to also acknowledge society's tendencies for good and evil which is what eventually results in how the technology is used – to create positive change or to cause extreme harm. Although technology might exacerbate the problem, there is no denying the reality that individual users of technology also have a role to play in making technology work for and not against human rights. While such utopia might be difficult to realise, an area where there is a greater opportunity at success is for human rights organisations to advocate for technology that is by design, human rights respecting. Simultaneously, there is the need to formulate a set of guidelines that the international human rights community can agree on because while there is largely a consensus around the dangers of unregulated technology, there is yet to be a consensus around how that regulation should be done. A set of guidelines would be a starting point to

getting closer to the solution. For instance, there is ongoing debate on whether platforms like Facebook and Twitter are taking down too much content in violation of free expression and erasure of critical evidence of human rights abuse, versus whether they are even taking down enough in order to stem the rise of harmful misinformation, hate speech and violent extremism. Drawing the line between content moderation and free expression should clearly not be the responsibility of private tech companies but of elected representatives of the people, as well as supranational bodies like the African Union, the European Union and the United Nations. Governments and human rights bodies should not be denouncing the excessive power tech companies wield while in the same breath demanding that they be responsible for regulating free expression. It is important to be inclusive when approaching this recommendation. Such inclusivity should be multidisciplinary and multinational; ensuring that voices from especially the global south are represented, not excluded.

- 2. Domestic law on citizen media evidence:** a domestic legal framework is proposed as a solution but this does not eliminate exploring legal frameworks at the international level. Preference is however given to domestic law due to the opportunity for greater enforcement as well as the ability for more nuanced language and framing that is directly relevant to local contexts. Moreover, the laws of evidence that are applicable in most domestic courts are the domestic laws of evidence. One of the areas that need to be addressed under any law review is the issue of evidence authentication. Currently, in all the African countries reviewed in this research, the process for proving authenticity is not standardized and is susceptible to mistruths which are difficult to refute because the courts rarely engage digital verification experts. The current procedure is not sustainable and, in my opinion, does not give assurances that justice will be guaranteed. If some of these courts continue with the current model, they run the risk of derailing justice simply because they lack the capacity to interrogate video evidence in a manner that its authenticity can be unquestionably ascertained.

A significant contribution of this thesis is therefore providing a model law on citizen media evidence, as set out in Section 6.4. below, which can be adapted by legislatures seeking to amend their law of evidence. This is elucidated on further below.

- 3. Legal frameworks for protecting citizen journalists and bolstering citizen media evidence**

Among the African countries reviewed in this research, none of them have explicit constitutional provisions that protect the right of citizens to record law enforcement agents.

While South Africa does have a Police Standing Order 156 that protects this right,³ it only makes reference to ‘media representatives’ in the text, which when strictly interpreted, will only cover professional journalists and not citizen journalists. In the case of Nigeria, the right to freedom of expression has been the basis for this protection in Nigeria. In as much as this protection can be invoked to advocate for the right to record, there will be stronger guarantees when the law is explicit and direct. Such explicit provision is warranted by virtue of the continued interference of state security agents whenever citizens or even journalists attempt to record their actions in public. There is a pattern of victimizing citizen journalists who bear witness with their phone or camera, especially because they do not have any institutional backing.

Additionally, this study has found that several lacunae exist within domestic laws in relation to how citizen media evidence is utilized from the documentation stage through till the evidentiary phase when it is relied on in court. To remedy these gaps that impede the utility of citizen media, it has become necessary to provide a model law that addresses many of the challenges confronting the utility of citizen media evidence both in and outside of the courtroom. This model law is particularly formulated for the African context. The framing is based on my experience in this field and the challenges already discussed under Chapter 3. The socio-legal theory holds that Law can always serve as a catalyst for social change. Hence this model law can become a catalyst for the kind of change we need to begin to see beginning with the relationship of law enforcement officers with camera-wielding citizens, up to the functioning of citizen media evidence in formal contexts such as the courtroom.

This model law is drafted to specifically address citizens who take out their phones or other devices to document and subsequently share evidence of human rights abuses. It does not seek to make provisions for professional journalists, because they already have a range of legal protections, even though some of the text in this model law may be deemed applicable to them. The more we start to witness society’s behaviour begin to shift based on these legal provisions, the more legitimacy is given to these laws, which will invariably also have an impact on the kinds of precedent setting case law that will emerge from the courtrooms. This will be the effect of law in society and will lead to greater utilization of citizen media in advancing justice and accountability.

³ Media Communication in the South African Police Service, sec10(3)(c) Standing Order 156.

6.4. Model Law on Citizen Media Evidence

6.4.1 Citizens and citizen journalists

1. A citizen's right to record government officials, including law enforcement officers, in the discharge of their duties is a basic and vital right that must be safeguarded at all times.
 - i. This right shall extend to all circumstances involving interactions between law enforcement and members of the public, including but not limited to, protests, demonstrations, arrests, forced evictions, conflicts and others.
 - ii. The right to record encompasses the act of filming, photographing, audio recording and other modes of documentation and evidence gathering.
 - iii. The use of mobile phones, digital cameras, action cameras, drones, and other advanced technology to record shall be permissible, subject to the limitations in paragraph 6.
 - iv. A citizen may not be prevented from recording on the basis of their race, colour, age, sex, religion, ethnicity, political affiliation, socio-economic status, gender identity, sexual orientation, or professional background.
2. When recording government officials, including law enforcement officers, in the course of their duty, a citizen shall not be required to present any identification showing an affiliation with a professional body or media organisation.
3. It shall not be considered a violation of privacy when government officials, including law enforcement officers, are recorded while in public carrying out an official assignment.
4. Citizens who choose to record government officials, including law enforcement officers, shall also have the right to publish the recording through online platforms, traditional media, or other channels as they might deem fit, without any fear of retaliation.
5. No citizen may be compelled to turn over their recorded evidence except by a legal order issued by a court of competent jurisdiction.

6. The exercise of the right provided for in sections 1 and 4 of this law carries with it the responsibility to do no harm and may be subjected to limitations on any of the following grounds:
 - i. If it is found to obstruct or interfere with the conduct of government business, including effective law enforcement.
 - ii. If it may put the life of other private citizens at risk
7. In the event that there is ambiguity as to whether or not the citizen should exercise their right to record under particular circumstances, recourse shall be made to the court for a determination.

6.4.2 Law enforcement

8. Law enforcement officers shall respect the right of citizens to record their activities while on duty
 - i. Under no circumstances whatsoever, may a law enforcement officer willfully damage the camera, phone, film or other recording device or equipment of a citizen.
 - ii. The footage, audio or other piece of evidence captured by the citizen shall not be damaged, erased, deleted, altered or confiscated by law enforcement agents.
9. Law enforcement officers shall not resort to punitive measures such as arrests, intimidation, harassment, torture, insults, surveillance or other measures in order to prevent or discourage citizens from exercising their right to record state agents.

6.4.3 Court room

10. Citizen media evidence shall be admissible in evidence at any stage of a legal proceeding, subject to the condition that:
 - i. It is relevant to proving an element of the alleged violation(s)
 - ii. It is reliable, authentic, and verifiable
11. In establishing the authenticity and reliability of the evidence, the court may:
 - i. Invite the author of the evidence to testify to its content, if they are alive, accessible or available
 - ii. Subject the evidence to scrutiny and analysis carried out by a court-appointed expert with competence in digital verification

- iii. Interrogate the chain of custody of the evidentiary material
 - iv. Investigate the condition of the device or equipment used in capturing the evidence
 - v. Rely on other corroborating evidence
12. The author of a piece of citizen media or digital evidence shall not be compelled as a witness should it be deemed unsafe or impractical for them to testify
13. In estimating the weight, if any, to be given to citizen media or digital evidence, the court shall have regard to all circumstances relating to its reliability or otherwise and, in particular to:
- i. Whether or not the recording has been or may have been edited, manipulated or interfered with in any way, and, if it has, whether such editing, manipulation or interference has materially affected its authenticity and trustworthiness
 - ii. Whether or not the evidence is an original or a copy, and, if it is a copy
 - a) The reason why the original was not tendered in evidence; and
 - b) Whether or not the copy may be safely relied on;
 - c) Any other independent evidence that may verify and corroborate the contents of the evidence already presented
14. The weight attached to any piece of citizen media or digital evidence shall not be affected by the inability to establish its author
15. Citizen Media Evidence under this law refers to any form of photograph, video, audio, and other digital or open-source materials, obtained directly from the author or through open-source investigations or via social media or other online channels.

6.5. Reflection on areas for further research

While this research did an analysis of the law and practice of domestic courts in Africa in connection with citizen media evidence, this only largely interrogated the jurisprudence in sub-Saharan Africa. Therefore, an area that would benefit from further research is an analysis of the jurisprudence in North Africa in relation to the use of citizen media evidence to advance justice and accountability. Also, considering the fact that some countries across the world are prosecuting international crimes under the principle of universal jurisdiction, an analysis of the

role of citizen media in those proceedings will be illuminating. This, I believe, will provide critical insights into how these courts are analysing citizen media evidence and potentially encourage more African judges to adopt same.

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