

The Probative Value of Archival Documents

Essential

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Cover picture

The Archives of the Philippine Solidarity Network in the Netherlands are in the custody of the University of the Philippines – Diliman – Library in Manila, Philippines.
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“The few times I have been successful in ‘making the case’ it is because the documentary evidence substantiated and gave strength to lived experience,” an experienced human rights advocate says.¹ The UN High Commissioner for Human Rights agrees, calling documentary evidence “vital” for prosecution initiatives.

Documentary evidence may have advantages over personal testimony, as it may help to prove matters more quickly and succinctly. It is not subject to the difficulties presented by intimidation and changing disposition of witnesses. Although always subject to interpretation, it can often provide more conclusive evidence of specific events or orders than personal recollections or conjectures.²

Transitional justice or dealing with the past mechanisms, such as truth commissions, tribunals, reparation programs and vetting process, all rely on documentary evidence to help verify, support, or challenge testimonial evidence. Truth commissions and tribunals use extensive oral evidence, but buttress or contest that testimony with documents, while reparation panels and vetting processes use mainly documents, paper or electronic, for their findings.

Each of these mechanisms is likely to apply different rules to determine the admissibility of evidence. These rules may be found in the national legislation that creates the truth commission, in the criminal procedure law that governs the work of a domestic court or in the rules of procedure and evidence of an international or hybrid tribunal.³ The discussion below outlines some common sense notions about what elements make it more or less probable that a document is what it purports to be. These may not be appropriate for all legal systems.

To use a document as evidence requires an assessment of its authenticity and reliability.

The international standard for records management (ISO 15489) states that authoritative records should have authenticity, reliability, integrity, and useability.⁴ The first two of these - authenticity and reliability - result from the way the record was created. These elements are crucial in determining the probative value of a document.

An authentic record is “one that can be proven a) to be what it purports to be; b) to be been created or sent by the person purported to have created or sent it, and c) to have been created or sent at the time purported.”

A reliable record is “one whose contents can be trusted as a full and accurate representation of the transactions, activities or facts to which they attest and can be depended upon in the course of subsequent transactions or activities.”

A record has integrity if it is “complete and unaltered.”

A useable record is “one that can be located, retrieved, presented and interpreted” (understood).

Records that are authentic and reliable are valuable as evidence of the origins, structure, functions, procedures and significant transactions of an institution or organization. Archivists term this “evidential value,” and many - perhaps most - records in archives are saved for their evidential value. In addition, some records derive their value and are retained by archives for the information they contain as distinct from their evidential value; archivists call this the “informational value” of records.

Examples help clarify the difference between evidential and informational value. In the U.S. National Archives, the FBI file on Dr. Martin Luther King is saved for its evidential value, that is, evidence of what the FBI did while they were following and reporting on King’s movements. The FBI file is not needed for information

⁴ Information and documentation – Records management – Part 1: General, ISO 15489-1:2001(E), International Organization for Standardization.

¹ Email, Barbara Rose Johnson to author, 2012-09-19.

² Rule-of-Law Tools for Post-Conflict States: Prosecution initiatives, HR/PUB/06/04, Geneva: United Nations High Commissioner for Human Rights, 2006, p. 13.

³ International tribunals are the International Criminal Court, the International Tribunals for the Former Yugoslavia and Rwanda, and the International Court of Justice. Hybrid courts are courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crimes occurred; they include the UN-established courts in Kosovo and East Timor, the Special War Crimes Chamber in Bosnia, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon.

on King himself - there are plenty of other sources for that - but it is essential to understanding what the FBI did to and about him. Similarly, the Special Court for Sierra Leone used the radio logs books of the rebel group Revolutionary United Front to show the hierarchy of the group as reflected in who could give orders to whom. That is evidential value.

Images from satellites are used for many purposes in transitional justice processes, including locating mass graves created during the war in Bosnia in 1995 and identifying burned villages in the Central African Republic in 2013. The images themselves are not needed to provide evidence that a satellite was built, purchased, launched, flown in a particular orbit, or maintained; rather, the imagery from the satellite is saved for the information it contains about places and phenomena on the ground: classic informational value.

Documents have specific characteristics that make them particularly useful evidence. They include the circumstances under which the document is created, the time when it is made, the use made of the document by the creating or receiving entity, and the location where the document is stored. This report looks at each of these in turn, then turns to some special problems that arise when deciding upon evidential value: the distinction between an original or a duplicate, and the accuracy of transcripts or translations.

2 Circumstances under which the document is created

Five circumstances under which the document is created or received are important to evaluating its authenticity and reliability:

1. Was it made during the course of a regular activity for this institution?
2. Was it a regular practice to make this type of document?
3. Does a law or regulation require that the document be made?
4. Was the document made by a knowledgeable person?
5. Does the creating institution have strong internal controls over the actions of its employees?

2.1 Made of a regular activity

The first question to ask is whether the document reflects a regular activity of an organization, authority, armed group, police station, or other entity. Does the activity that the document reflects fall within the office's normal scope of duty? Is it information that the receiving entity usually got?

For example, the document is a press release and it is identified as coming from the press office of the foreign ministry. That is a document completely consistent with the regular duties of that office. The first assessment is that it is authentic. But now imagine that the document is a receipt for the sale of land and it is said to come from the press office. Selling land is not a normal duty of a press office. Immediately the document raises suspicions.

Understanding the functions and sphere of activity of the entity, including the territory in which is authorized to operate and the way the entity is organized to carry out the functions, is absolutely necessary in order to evaluate the documents of that entity. It can be time-consuming to learn the history of the entity, including the way it carried out its affairs at various periods of its existence, but the time spent understanding the relationships and powers of the entity will

be repaid when the authenticity of a document must be evaluated.

2.2 Made as a regular practice

This question is about the practice of documenting an activity, not about the activity itself. Was the document made by a regularly conducted activity as a regular practice? Did the entity always make this kind of record? Are other examples available?

For example, the head of an office had a meeting every morning with the press officer, the chief of congressional relations, and his personal aide. No minutes were ever kept. Now a document has been found that seems to be the minutes of one of those meetings. To use it, the researcher must determine why it was made and whether it is authentic.

“The habit and system of making such a record with regularity calls for accuracy through the interest and purpose of the entrant; and the influence of habit may be relied on, by very inertia, to prevent casual inaccuracies and to counteract the possible temptation to misstatements.”⁵

⁵ Wigmore on Evidence (Chadbourn rev., 1974), vol. 5, para. 1522, quoted in Heather MacNeil, *Trusting Records: Legal, Historical and Diplomatic Perspectives*. Dordrecht, The Netherlands: Kluwer Academic Publishers, 2000, pp. 38-39.

Or the hospital always maintains a log of the persons who are admitted each day for surgery. A logbook that contains an entry for each day is likely to be authentic. The entries may not be accurate - that is another matter entirely - but the logbook probably is what it purports to be.

In a bureaucracy, persons make a habit of creating certain types of records. The very regularity of that creation suggests that the record may be good evidence of what the bureaucracy did.

2.3 Is required to be made

In governments, some laws require that certain information be recorded or filed. Nongovernment structures,

too, usually have internal rules on reporting and recording information. The questions to be asked in this instance are: is the document in question is one that was required by law or internal regulation to be recorded and filed? If so, does the information in the document comply with the requirements?

For example, government laws usually require that any person wishing to enter the country must fill out a form declaring who he is. A pharmacist may be required by law to keep a record of all sales of drugs that are controlled by law. The land registry must record all sales of land. The hospital must record all births and deaths.

In the non-government sector, a business will require employees to report when they are absent from work because of illness. A church may require its clergy to record the names of all persons admitted to its full communion. A donor may require a report from the donee as to how the money given was spent.

These kinds of documents have a presumption of authenticity. The duty to record a type of information is more than a duty to a supervisor: it is a duty to an institution or a government. Persons do not lightly ignore these requirements for recording information.

Also, a document that is produced routinely, particularly if a regulation requires it (such as a weekly statistical report from a field operation to headquarters), is probably more reliable than a unique, one of a kind memorandum. The latter is likely to be a self-conscious document, produced for a particular purpose. In other words, a record made by a person with a business duty to record the information, made in the course of the regularly conducted activity, and made as a regular practice has a color of authenticity.

2.4 Made by a knowledgeable person

This question does not concern either the activity or the document itself but instead looks at the author of the document. Is the author a person with knowledge of the matter? Did the person have a job within the organization that suggests he would be in a position to know what is written? Was the person authorized or qualified to make the record?

For example, a list of persons who paid dues to an organization that was kept by the treasurer of the organization is a document made by a person with direct knowledge of the matter and who was authorized to make the record. Handwritten notes made by a participant in a meeting for personal use are similarly authentic, although they may not have been required to be made and may not be reliable.

2.5 Made in an institution with strong internal controls

Documents created when internal controls in a bureaucracy are effective are generally more reliable than documents created when internal control is weak or nonexistent. While it is true that subordinates lie to superiors, when the control of the superior is believed to be strong, the subordinates are wary. Writing a century ago, John Henry Wigmore, the author of the classic work on evidence, remarked that if the person made the record “under a duty to an employer or other superior, there is an additional risk of censure and disgrace from the superior, in case of inaccuracies,” a motive for accuracy “most powerful and most palpable.”

During the reign of J. Edgar Hoover at the U.S. Federal Bureau of Investigation, for example, field offices planning risky or illegal activities sent telegrams in advance to headquarters, with the first word reading “UACB”: Unless Advised to the Contrary by the Bureau. If the field office got in trouble later, they wanted the cover of having given headquarters the opportunity to object in advance.

Strong controls can be exerted by non-governmental entities, too. For example, a letter found by an *Associated Press* employee in 2013 “inside a building formerly occupied” by al-Qaeda fighters in Timbuktu, Mali, addressed to an al-Qaeda member in 2012 complained that he “failed to turn in his expense reports,” demonstrating the importance of regular records to al-Qaeda operations.⁶

⁶ The *Associated Press* article with links to the letter in Arabic and English is at <http://bigstory.ap.org/article/ap-exclusive-rise-al-qaida-saharan-terrorist>

3 Time when the document is created or received

This evaluative element has two parts: when was the document created and when was the document received. These questions are of particular importance when it is crucial to know who knew what when.

A document that is contemporaneous with the action is generally more reliable than an account produced later. A document made at or near the time of the occurrence is not influenced by subsequent events that may change the way the person views what happened. A report filed by a police officer from a crime scene will likely differ from an account of the crime scene written in a memoir or recalled in an oral history, and it may differ from the account in a summary report written when the case is solved or set aside.

For example, in the United States, the famous “Watergate case” that resulted in the only resignation of a president in United States history began with the police arresting five men for burglary. The arrest report at the time probably said simply that a break-in had occurred, which was true, but in retrospect it was a political espionage operation.

The second question is when did the recipient of a document receive it. Receipt can be shown in many ways, from logs of arriving mail to “read receipts” from the opening of email to date stamps on documents as they are received to logs of delivery persons. Determining when a document was actually read is usually difficult, but linking receipt with the movements of the recipient -for example, was the person in the office or traveling at the time the document arrived -provides some evidence that the knowledge of the matter was available to the recipient.

4 Uses of the document by the creating entity

4.1 Used for a transaction

Records may capture evidence of actions (that is, an activity of a single person) or transactions (activity between two or more persons). A document that is created to do something (for example, a telegram instructing a secret police agent to travel to a specific location on a specific date) is usually more reliable than a memorandum for the record that is prepared to validate a single person’s recollection of an event. The first is a transaction - between two people - and the second is an action of a single person. Similarly, the minutes of a meeting that have been prepared by a person taking notes at the time and then circulated for editing by all participants may be more complete or accurate than the notes taken by a single participant in the meeting for his own private recollection. (To be sure, there are times when the group editing results in minutes in which conflicts are obscured, while they appear clearly in private notes.) Unless both persons in a transaction are attempting to create a false record, a record of a transaction is likely to be more reliable than the record of an action.

4.2 Used by more than one person

Records that are used by more than one person are more likely to be reliable than records that are used by only one person. The classic example here is hospital records on the treatment of patients. If a medical staff member gives a patient an injection, the staff member records the action and makes every effort to keep accurate notes of what medicine was given. Although this is the record of an action, it is a record that is subsequently used by other staff members to determine what medicine is in the person’s system and when the next treatment needs to be given. And that means that there is great pressure on the accuracy of the record.

Card indexes and their electronic equivalent, such as card files used by police to record information about “persons of interest,” are generally reliable because they

are internal tools that must be used by more than one person. They are usually in a standard form - that is, not idiosyncratic to one person - and they are often updated as new information arrives. If the index contains an error, such as not referring to the correct document number, the error will be detected by a subsequent user, making this kind of file almost self-correcting. And if the card file or electronic database correctly refers the user to other documents, it serves to validate the authenticity of those documents, too.

4.3 Used for employee benefits

Documents that relate to the benefits of employees, such as the personnel files that document years of service or the medical files that document on-the-job injuries, are usually reliable because the employees demand that the records be correct. This internal pressure makes personnel records systems operate with a fair degree of accuracy. Personnel records usually have an index (in earlier times on file cards, today usually in an electronic system) that also provides a crosscheck on reliability. In countries that undertake a program of vetting, that is, assessing a person's integrity to determine his or her suitability for public employment, personnel records are an important source of generally reliable documents.



Piles of documents in the National Police Historical Archive of Guatemala when they were found in 2005. © Archivo Histórico de la Policía Nacional, AHPN, Guatemala

5 Location of the document

5.1 Location when found

If documents are found in a place where, if authentic, they would likely be, whether in an office or in a records storage area or in an archives that is the legitimate successor of the records creator, they are presumed to be the documents of that entity. This is also true of individual documents within a file or individual emails within a personal mailbox: the documents can be identified with the creating entity.

In 2005 Guatemala's Human Rights Ombudsman discovered the records of the national police, which had been disestablished as part of the 1996 peace accords ending Guatemala's civil war in buildings on an active police base in Guatemala City. In 2013, the minister of defense of Argentina announced that records of the military junta, 1976-1983, were found in the basement of the headquarters of the Argentine Air Force, including the secret minutes of the junta. The location of these discovered records tends to accord them authenticity.

If the documents are in an archives, professional standards demand that they are maintained according to the entity that made and received them; this is the principle of provenance. Further, the archives will if at all possible maintain the documents in the original order in which they were filed, allowing future researchers both to find items cross referenced by the document and also to use any indexes that were created to locate the document. And the original filing order will show the user the documents that are linked to one another, both physically and logically, in an "archival bond."

5.2 Chain of custody

The succession of offices or persons who had custody of a body of documents from their creation is known as the chain of custody of the documents. An unbroken chain of custody is particularly helpful when prosecutors try to get a court to admit a document into evidence. Maintaining a record of the chain of custody of

documents allows the investigator to trace who had the opportunity to alter the document. Conversely, it helps an investigator prove that the document is legitimate by showing the history of the custody of the document.

For example, an agency inspector general may demand that an office send to him their file on a particular matter. He may decide to return it or he may decide to keep that file within his investigation of the matter. In the first instance, there will likely be correspondence and receipts showing the file going and coming. In the latter case, only the sending of the file will be documented. If the inspector general kept the file, archivists will leave it there, a principle of maintaining it in its location of "last current use." And the chain of custody will be clear to an investigator who wants to use the file.

6 Special Issues

6.1 Originals and duplicates

An "original" of a document is the document itself or any counterpart intended to have the same effect by a person making or issuing it. An "original" of a photograph includes the negative or any print made directly from it. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."

A "duplicate" is a counterpart produced from the original by means of a variety of techniques, including photography, mechanical or electronic re-recording, or other techniques that accurately reproduce the original.

A "copy" is a duplicate of an original document, prepared simultaneously or separately, usually identified by function (for example, official copy, file copy, retained copy, certified copy) or by method of creation (for example, carbon copy, printout, Xerox). A record copy is a copy of a document that is placed on file as the official copy; it may also be called the file copy.

The evidential value of the document may depend on whether the item is an original. For example, a weekly report is prepared by unit A and sent to its headquarters. Unit A will surely keep a copy of the report; if it was the era of typewriters, the copy was probably made by sandwiching a sheet of carbon paper between a sheet of good quality paper and a flimsy paper. The good quality paper, often with a letterhead on it, will be the one sent to headquarters and the flimsy will be the one retained by the creating office. Both are absolutely authentic: one is the original document sent and the other is the original document retained. Unit A may also have sent copies to other units in the agency; in the paper records era, these were usually produced by adding carbon paper and flimsy paper to the letterhead-paper-and-carbon-paper-sandwich but they might also have been produced by xeroxing either the sent or retained original. When the other units receive these

copies, they become the authentic received items that go into their files. These are all original duplicates, made at the time of the creation of the original and treated as its surrogate.

Duplicates, of course, may be created at any time after the original was created. Whether these later copies are authentic depends on the integrity of the system producing the reproduction and what happened to the copy once it is made; that is, the chain of custody of the copy. For example, if one office finds that it does not have a document that it needs for its work, it may ask an office that does have one to provide a copy. Often this is an oral request, and the document simply is copied (by paper, photography, or electronic means) and handed over or electronically transmitted; the requesting office then places it in the files, either with or without stamping or logging its receipt. If it is the type of document that should be in that office and meets the other tests for authenticity, it can probably be considered authentic if it is needed for later use. If, however, it is a unique copy and is unlike other documents found in the files, its authenticity may be questioned.

Archivists and other document custodians can make and certify copies of documents of all types found within the files they manage. Archival certification only means that the copy is a true copy of the found document; it does not attest to the reliability of the information within the document or its authenticity.

6.2 Accuracy of transcripts or translations

Audio recordings of meetings, court sessions, interviews, interrogations or telephone taps are more reliable than transcripts. The process of rendering speech into writing is one that is subject to error. Transcripts can be audited for accuracy and completeness to verify the fidelity of the transcript to the recording.

Accuracy problems also arise with translations, which may become an oral record or a written transcript or both. If the transcript is of a translation, the transcript may need to be verified against both the translator's words and the original words spoken. When multiple languages are involved, such as the three or four languages used in an international tribunal or truth commission, the problem grows exponentially.



Translations are used regularly in international Tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY). © ICTY.

The elements listed above are equally valid for reviewing documents from governments and documents originating in the private sector. They are more easily applicable to records of institutions than to personal papers maintained by an individual, although certain elements do apply, such as the test of contemporary creation which may be applied to an entry in a person's diary.

This discussion has not touched on the entire issue of determining whether a document has been intentionally altered, is a forgery, or is in any other way falsified. Nor has the discussion addressed specifically the issues regarding the means of judging the authenticity and reliability of electronic records, although many of the same elements of proof can be used.

Archivists try mightily to maintain the integrity of the records in their care, so that users can rely on the records to be complete and unaltered from the day they arrived at the archives to the day they are presented to the researcher. Yet archivists know that not all documents in their custody are reliable guides to what truly happened. Because they know that documents do sometimes lie, archivists urge users to test a document against these common sense elements and decide for themselves whether this is a document to be trusted. Then and only then should the user decide that the document is in such condition as to create no suspicion concerning its authenticity and so is a reliable foundation for building a truthful history of events.

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About swisspeace

swisspeace is an action-oriented peace research institute with headquarters in Bern, Switzerland. It aims to prevent the outbreak of violent conflicts and to enable sustainable conflict transformation.

swisspeace sees itself as a center of excellence and an information platform in the areas of conflict analysis and peacebuilding. We conduct research on the causes of war and violent conflict, develop tools for early recognition of tensions, and formulate conflict mitigation and peacebuilding strategies. swisspeace contributes to information exchange and networking on current issues of peace and security policy through its analyses and reports as well as meetings and conferences.

swisspeace was founded in 1988 as the “Swiss Peace Foundation” with the goal of promoting independent peace research in Switzerland. Today swisspeace engages about 40 staff members. Its most important clients include the Swiss Federal Department of Foreign Affairs (FDFA) and the Swiss National Science Foundation. Its activities are further assisted by contributions from its Support Association. The supreme swisspeace body is the Foundation Council, which is comprised of representatives from politics, science, and the government.

swisspeace is an associated Institute of the University of Basel and member of the Swiss Academy of Humanities and Social Sciences (SAHS).

The Dealing with the Past Program

The Dealing with the Past Program

The Dealing with the Past Program of swisspeace supports governmental and non-governmental actors in the design, implementation, monitoring and evaluation of DwP activities. The program contributes to the research-policy nexus at swisspeace through its research projects, research events, conferences, publications and teaching.

Archives and Dealing with the Past

Archives and Dealing with the Past is a joint project of the Human Security Division (HSD) of the Swiss Federal Department of Foreign Affairs (FDFA) the Swiss Federal Archives (SFA) and swisspeace. It provides support to actors in the field of transitional justice and dealing with the past related to the protection, preservation and management of human rights archives.

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