

SOCIAL MEDIA PLATFORMS: PRESERVING EVIDENCE OF INTERNATIONAL CRIMES

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I. INTRODUCTION

Jack Dorsey along with several other co-founders founded Twitter in 2006, Facebook started gaining popularity in 2007, and, in the following year, Apple released the first iPhone.¹ In the last decade, the availability of smartphones with access to the Internet, social media applications (“apps”), and recording capabilities have skyrocketed.² As

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¹ See Ami Sedghi, *Facebook: 10 Years of Social Media Numbers*, THE GUARDIAN (Feb. 4, 2014, 9:38 AM), <https://www.theguardian.com/news/datablog/2014/feb/04/facebook-in-numbers-statistics>.

² In a series of detailed reports, a reporter at The Next Web (“TNW”) analyzed the number of internet users, social media users, mobile connections and subscriptions worldwide. See Simon Kemp, *The Incredible Growth of the Internet over the Past Five Years – Explained in Detail*, THE

social media has become increasingly universal, its uses have expanded from social interactions to social movements.³ Facebook began as a platform to connect people – it was a “tool to keep up with friends and acquaintances;” however, Facebook quickly recognized its immense potential and the site began “providing a challenge to email, providing a mechanism for organizing protests and increasingly for advertising and commercial activity.”⁴ Even looking back to 2010, the popularity and availability of social media platforms worldwide was evident.⁵ While social media provides platforms to organize people and spread awareness, another key role these social media companies play is to collect and store evidence.⁶ Although there are complex issues in using “citizen media” in a court of law, social medial information (or posts), such as videos are material evidence that can be brought before domestic and international courts of law.⁷

One of the major challenges, in prosecuting international crimes—genocide, crimes against humanity, and war crimes—is attaining sufficient evidence to tie perpetrators to crimes.⁸ The increasing use of digital evidence⁹ has offered the International Criminal Court (“ICC”)

NEXT WEB (Mar. 6, 2017, 9:53 AM), <https://thenextweb.com/insider/2017/03/06/the-incredible-growth-of-the-internet-over-the-past-five-years-explained-in-detail>. In January 2012, they reported six billion active mobile subscriptions, which was eighty-six percent of the global population. *See id.* By January 2017, there were an additional 2.2 billion mobile connections, “meaning that operators activated a net average of almost 14 new subscriptions every second to deliver growth of 37%.” *See id.* TNW had only reported mobile social media user numbers since January 2015, but between then and January 2017 there had been a 50% increase in users. *See id.* From January 2016, to January 2017, there were over 864 million people who started using social media platforms on their mobile devices: a rate of around fourteen new users per second. *See id.*

³ *See* Sedghi, *supra* note 1.

⁴ Daniel Joyce, *Media Witness: Human Rights in an Age of Digital Media*, 8 INTERCULTURAL HUM. RTS. L. REV. 231, 241 (2013).

⁵ *See* Sedghi, *supra* note 1.

⁶ Esra’a Al Shafei & Melissa Tyas, *It’s About Human Rights: Social Media Platforms Must Safeguard Citizen-Generated Content*, HUFFPOST (Feb. 23, 2016, 2:19 PM), https://www.huffingtonpost.com/esraaa-al-shafei-/its-about-human-rights-so_b_9300036.html.

⁷ *See id.*

⁸ Alexa Koenig et al., HUM. RTS. CTR., *Digital Fingerprints: Using Electronic Evidence to Advance Prosecutions at the International Criminal Court* 3 (2014). The first Salzburg Workshop on Improving War Crimes Investigations, “a convening focused on the use of digital evidence to prosecute atrocity crimes (genocide, crimes against humanity, and war crimes),” was held in Salzburg, Austria, from October 23-25, 2013. *See id.* at 1. “The Human Rights Center sponsored the workshop in collaboration with CITRIS (Center for Information Technology Research in the Interest of Society), the Office of the Prosecutor of the International Criminal Court, and Salzburg Global Seminar at the Schloss Leopoldskron, an Austrian castle occupied by the Nazis during World War II and subsequently dedicated to promotive human rights and international justice.” *Id.*

⁹ For the purposes of this note, digital evidence is “data . . . that is created, manipulated, stored or communicated by any device, computer or computer system or transmitted over a

opportunities to incorporate more evidence; however, it has also offered new challenges for the court.¹⁰ Digital evidence, specifically video evidence, has the ability to help prosecutors because it can corroborate witness testimony, provide access to areas that would otherwise be inaccessible due to ongoing violence, and—in rare cases—even link high-ranking defendants to the crime scene.¹¹ To be introduced into the courtroom, videos must be authenticated and verified; however, social media platforms strip video content of its metadata (information indicating the date and place a video was filmed), making it hard to determine its accuracy, reliability, and probative value.¹²

Although the ICC and the Office of the Prosecutor have made efforts to increase capabilities to analyze video evidence, its in-house capacity is far below standards set by many technology companies.¹³ Mainstream social media platforms such as Facebook, Twitter, and YouTube have already played a powerful role in fighting international crimes and human rights violations; their potential, however, may not yet be fully realized.¹⁴ These sites have become extremely influential forces, and accordingly they may have certain responsibilities; whether these responsibilities are purely moral or could have legal traction is a big question.¹⁵ This writing assesses the possibility of creating a legal responsibility for social media platforms in maintaining, collecting, and maximizing admissibility of evidence of international crimes and human rights violations and the potential of using such evidence in court.

This Note examines international criminal law and tribunals instead of international human rights law because the prosecution of those who commit international crimes generally punishes acts affecting fundamental human rights such as life, freedom, and safety.¹⁶

communication system, that is relevant to the process of adjudication.” Stephen Mason, *Introduction to INTERNATIONAL ELECTRONIC EVIDENCE*, at xxxi, xxxv (Stephen Mason ed., 2008).

¹⁰ Koenig et al., *supra* note 8.

¹¹ *Id.* at 3-4.

¹² *Id.* at 6.

¹³ *Id.* at 7-8.

¹⁴ *See generally* Joyce, *supra* note 4.

¹⁵ The maxim “where there is great power there is great responsibility” has been widely used by people such as Theodore Roosevelt in a letter to Uncle Ben in the Spiderman Comic book. This exact quote is by Winston Churchill. *See* 152 Parl Deb HC (4th ser.) (1906) col. 1239 (UK) (“[O]ur power of intervention varies greatly. In some cases we have great and overwhelming power of intervention, in other cases we have hardly any power of intervention at all. I submit respectfully to the House as a general principle that our responsibility in this matter is directly proportionate to our power. Where there is great power there is great responsibility, where there is less power there is less responsibility, and where there is no power there can, I think, be no responsibility.”).

¹⁶ *International Criminal Law*, INT’L JUST. RESOURCE CTR., <http://www.ijrcenter.org/international-criminal-law> (last visited Nov. 9, 2017).

International criminal law plays an important role in the protection of international human rights because international criminal law has the ability to directly punish criminal actions with criminal sanctions that are the result of a State officials; therefore, the State would not likely punish itself at a domestic level while those who are responsible retain power.¹⁷ Criminal, domestic and international law, also has the important difference of holding individuals accountable instead of governments.¹⁸

Part I addresses how video evidence has been used in United States (“U.S.”) criminal trials. Part II examines the role of the media and videos in international courts of law. Part III looks at the current policies of and actions taken by mainstream social media platforms relating to video evidence. Part IV offers options for implementation of a legal duty on mainstream social media platforms to preserve evidence of international crimes.

II. VIDEO AS EVIDENCE IN UNITED STATES CRIMINAL COURTS

The ways in which courts have dealt with digital evidence have developed from the traditional evidence doctrines of authentication and admissibility.¹⁹ In order to authenticate video evidence, courts have focused on three key components of any system of information: people, process, and technology.²⁰ These elements are analyzed to assess the reliability of digital evidence by looking at (1) *who* recorded the video, (2) *what* technology was used, and (3) *where* the video came from and has been i.e., the chain of custody.²¹ Previously, video evidence was mostly recorded by professionals on video cameras, which made this information relatively easy to ascertain; however, now that citizens have access to tools such as smartphones, laptops, and tablets, this data have been harder to manage.²² Few regulations that enforce attribution of video to its source exist, and, when video is altered, there is no record of the changes, making authenticating video evidence much more challenging.²³

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Lucy L. Thomson, *Mobile Devices: New Challenges for Admissibility of Electronic Evidence*, SCITECH LAW., Winter 2013, at 32.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

Technological advances have led to the increased use of digital evidence in U.S. courts.²⁴ Digital evidence has serviced the court by expanding upon evidence in certain cases and, in others, it has provided evidence that would not have been available without the help of digital technology.²⁵ If evidence is of little probative value, it may be relatively too challenging and costly to prepare and present.²⁶ Conversely, if video or other digital evidence brings some new piece of proof that the court would not have had access to or it allows for a more in-depth analysis, then the benefit outweighs the cost.²⁷

Since the 1970's, the array of uses of video evidence has increased rapidly along with its popularity.²⁸ As courts have become more familiar and comfortable with the use of video evidence, courts have loosened the standards of admissibility and foundation requirements.²⁹ When dealing with video as evidence, courts must first consider whether it is admissible.³⁰ Two questions must be addressed: (1) Is the video probative of a fact at issue, *i.e.*, is it relevant; and (2) Does the video affect the jurors emotionally, thereby degrading their objectivity?³¹

Although the standards of admissibility and foundation requirements have become more relaxed, this writing still reviews the traditional foundation requirements for video evidence to establish an understanding of the courts' underlying valuations when assessing video footage. To be admissible, any and all types of evidence must be material, relevant, and competent.³² Video evidence, as demonstrative evidence (evidence that conveys a pertinent firsthand impression to the trier of fact) is required to be verified for authenticity.³³ The condition required a witness to the filming – the videographer, a participant in the recording, or someone else who was there – to testify to the accuracy and authenticity of the video recording.³⁴

24 Jonathan W. Hak, *The Admissibility of Digital Evidence in Criminal Prosecutions*, CRIME SCENE INVESTIGATOR NETWORK (Jan. 2003), <http://www.crime-scene-investigator.net/admissibilitydigitalevidencecriminalprosecutions.html>.

25 *Id.*

26 *Id.*

27 *Id.*

28 44 AM. JUR. *Trials* 171 §§ 9, 36-38, Westlaw (database updated March 2019).

29 *Id.* §§ 4, 50.

30 Jessica M. Sibley, *The Semiotics of Film in US Supreme Court Cases*, in *LAW, CULTURE AND VISUAL STUDIES* 179, 193 (Anne Wagner & Richard K. Sherwin eds., 2014).

31 *Id.*

32 See Hak, *supra* note 24 (providing numerous cases where digital evidence was admissible in criminal proceedings).

33 See 44 AM. JUR. *Trials* 171 § 9, Westlaw (database updated March 2019).

34 *Id.* §§ 60, 62.

However, the standards have been relaxed under the “silent witness” theory, which abandons the requirement of a witness to the filming to testify to the video’s accuracy; instead, if there is no witness available, the court can rely on a different kind of testimony.³⁵ Furthermore, courts abandoned the strict technical foundation requirements concerning the type of camera and film speed.³⁶ The American Jurisprudence Trials noted:

[B]ecause of the judicial system’s increasing familiarity with videotape and the prevalent belief that video evidence is difficult to tamper with, the trend has been away from the strict foundation requirements associated with motion pictures and tape recordings and toward a more relaxed standard.³⁷

A chain of custody testimony or expert testimony determining that the video is authentic may be sufficient to verify the accuracy of a video for submission into evidence.³⁸ With these alternatives to an eye witness, the court requires a strong showing that the video is accurate, competent, and has not been altered in a substantial way.³⁹

Another requirement for *any kind* of evidence to be admissible is the exclusion of relevant evidence that prejudices, confuses, or wastes time—excluded at the discretion of the trial judge.⁴⁰ Because video evidence can be very persuasive, judges have wide discretion to determine whether a video is more probative than prejudicial, and if it will be more useful than confusing to the trier of fact.⁴¹ This discretion is rarely overturned, and it has favored admissibility.⁴² Reversal of a trial court’s decision regarding video evidence is most common when a trial judge rules that authentication is insufficient.⁴³

Most jurisdictions in the U.S. have used four elements to govern the admissibility of video evidence.⁴⁴ These elements are as follows:

35 See *People v. Taylor*, 956 N.E.2d 431, 438 (Ill. 2011); see also 44 AM. JUR. *Trials* 171 § 60, Westlaw (database updated March 2019).

36 44 AM. JUR. *Trials* 171 § 62, Westlaw (database updated March 2019).

37 *Id.* § 4.

38 *Id.* § 60.

39 *Id.*

40 FED. R. EVID. 403.

41 44 AM. JUR. *Trials* 171 §§ 53, 77, Westlaw (database updated March 2019).

42 *Id.*

43 *Id.* § 53.

44 *Id.* § 4.

- (1) Relevance
- (2) Impartiality and accurateness
- (3) Judicial discretion relating to whether probative value outweighs prejudice or possible confusion
- (4) Issues of competence (hearsay objections or violations of other exclusionary rules).⁴⁵

Accurateness and impartiality are reflected in the need for the film to be verified and authenticated. In order for a video to be submitted to the court, the party introducing the evidence must establish reliability by showing the video (1) accurately depicts what happened, (2) has not been altered, and (3) can be linked to a location, date, and time.⁴⁶

Furthermore, the Federal Rules of Evidence require the original recording as to prove the authenticity and accuracy of the video.⁴⁷ This rule allows courts to overcome the fact that video and other media can be susceptible to inadvertent or even intentional tampering.⁴⁸ There are real consequences when electronic evidence is not authenticated. Two cases that illustrate these consequences related to electronic evidence in general are *Lorraine v. Markel American Insurance Co.*,⁴⁹ where the court denied summary judgement because the evidence was unauthenticated, and *Vinhee v. American Express Travel Related Services Co.*,⁵⁰ where the court affirmed a trial court's decision refusing to admit digital records because they were not authenticated. However, there is a technique available to authenticate video evidence that inserts a digital signature into the frames of the video as the videographer records the film.⁵¹

This digital signature is also called "metadata," which computers, phones, and other devices create and store automatically.⁵² This information can act as evidence itself, but it also provides knowledge of where electronic evidence came from, in what context it was produced, its authenticity and reliability, and even provide insight into the actions of the person recording the film.⁵³ Metadata can be analogized with

⁴⁵ *Id.*

⁴⁶ Nicholas D. Beser, Thomas E. Duerr & Gregory P. Staisiunas, *Authentication of Digital Video Evidence*, 5203 PROC. SPIE 407, 408 (citations omitted).

⁴⁷ See FED. R. EVID. 1002.

⁴⁸ See Beser et al., *supra* note 46, at 408.

⁴⁹ 241 F.R.D. 534 (D. Md. 2007).

⁵⁰ 336 B.R. 437 (B.A.P. 9th Cir. 2005).

⁵¹ See Beser et al., *supra* note 46.

⁵² See Michael J. Hannon, *Importance of Metadata in Digital Evidence for Legal Practitioners*, COMPUT. & INTERNET LAW., Oct. 2017, at 1, 3.

⁵³ See *id.*

evidentiary tools such as DNA and fingerprinting⁵⁴; all of these are tools that can be used to incriminate and exonerate.⁵⁵ In terms of possible exoneration, defendants faced with incriminating digital evidence can request a discovery order for metadata and can even mount a defense for lack of metadata.⁵⁶

III. VIDEO/MEDIA IN INTERNATIONAL COURTS

In order to evaluate how social media networks could play a role in facilitating bringing violators of international criminal laws to justice in a court, this writing lays out how international courts have used traditional forms of video as evidence, and then how “citizen media” could be used in the future. The use of traditional video footage has laid a strong foundation for the use of social media fostered video evidence.⁵⁷ Video is a powerful tool in international criminal prosecutions because the countries where these atrocities are committed often have poor record keeping and, in some cases, avoid keeping records altogether.⁵⁸

A. Admissibility of Video Evidence in International Criminal Trials

The legal standards for admissibility of evidence vary in the different courts trying international crimes. The specific procedures will be dependent on whether the court is: (1) an ad hoc criminal tribunal—such as the one created by the UN Security Council to try crimes after the former Yugoslavia broke apart, the International Criminal Tribunal for the Former Yugoslavia (ICTY),⁵⁹ (2) a domestic court with universal

⁵⁴ Hannon, *supra* note 52.

⁵⁵ Hannon, *supra* note 52.

⁵⁶ *See id.*

⁵⁷ The authentication and admittance of video evidence is further complicated when it comes from a social media website. *See How to Get Social Media Evidence Admitted to Court*, AM. BAR ASS'N (June 27, 2017), <https://www.americanbar.org/news/abanews/publications/youraba/2016/november-2016/how-to-get-social-media-evidence-admitted-to-court>.

⁵⁸ *See Regional Programs: Middle East & North Africa*, WITNESS, <https://witness.org/our-work/regional-programs/> (last visited Feb. 5, 2018 4:32 PM); *see also* Thomson, *supra* note 19; Cinemaforpeacegala, *Film Evidence for Using Child Soldiers by Lubanga*, YOUTUBE (Mar. 15, 2012), <https://www.youtube.com/watch?v=3ySF8ojE6n4>. Thomas Lubanga Dyilo was on trial in the International Criminal Court for allegedly using soldiers under the age of fifteen. *See id.* The prosecution was unable to rely on birth records because they were rarely kept, so the prosecution had to rely on video clips which showed Lubanga speaking to children at military training camps and children serving as body guards. *See id.* The successful use of video evidence by the prosecution illustrates the powerful impact video can have in any criminal court of law. *See id.*

⁵⁹ *About the ICTY*, U.N. INT'L TRIBUNAL FOR FORMER YUGO., <http://www.icty.org/en/about> (last visited Mar. 6, 2019); *see also* discussion *infra* Section II.B.

jurisdiction—where UN Member States can exercise jurisdiction over criminal violations of international law or even national law in States that have defined laws against war crimes, crimes against humanity, genocide, and torture⁶⁰; (3) the International Criminal Court—completely independent from the UN and is governed by the Rome Statute, which although is a treaty negotiated by the UN created a separate body functioning in cooperation;⁶¹ or (4) a national court of the state where the crimes were committed. There can also be hybrid courts where a mix of national and international substantive and procedural laws are applied—some examples of these include the Special Court of Sierra Leone and the Special Tribunal for Lebanon.⁶² While the procedures for admitting evidence differ, the general trend has been increasingly towards admitting video evidence as long as it is verifiable and relevant.⁶³

One specific example of rules of evidence in an international criminal proceeding is the ICC. Its procedures are based on common and civil law traditions, but when assessing admissibility of evidence, the Rome Statute moves away from the technical requirements of the common law system to a more flexible approach.⁶⁴ Under the Rome Statute of the ICC, judges considering evidence are directed to take into account both the probative value of the evidence and its possible prejudicial effect on a trial.⁶⁵ Only at the end of the case, when the judge considers the entirety of the evidence, does the judge determine the probative value and appropriate weight of the admitted evidence.⁶⁶

In determining prejudicial effect of a piece of evidence, the following are generally considered:

1. How damaging or discrediting is the evidence?
2. To what extent does the evidence support an inference of guilt or fault solely on the basis of bad character as portrayed via the evidence submitted?

⁶⁰ *Universal Jurisdiction*, INT'L JUST. RES. CTR., <http://www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction> (last visited Feb. 7, 2018).

⁶¹ *Courts & Tribunals*, U.N. DAG HAMMARSKJÖRLD LIBRARY, <http://research.un.org/en/docs/law/courts> (last visited Feb. 4, 2018).

⁶² See SARAH WILLIAMS, HYBRID INTERNATIONAL CRIMINAL TRIBUNALS: SELECTED JURISDICTIONAL ISSUES 90 (2012).

⁶³ Sukanya Pillay, *Video as Evidence*, in VIDEO FOR CHANGE: A GUIDE FOR ADVOCACY AND ACTIVISM 209, 209-10 (Sam Gregory et al. eds., 2005).

⁶⁴ Aida Ashouri, Caleb Bowers & Cherrie Warden, *An Overview of the Use of Digital Evidence in International Criminal Courts*, 11 DIGITAL EVIDENCE & ELEC. SIGNATURE L. REV. 115 (2013).

⁶⁵ Rome Statute of the International Criminal Court art. 69(4), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Ashouri et. al, *supra* note 64.

⁶⁶ Rome Statute, *supra* note 65, art. 63(2); Ashouri et. al, *supra* note 64.

3. To what extent may the evidence confuse issues?
4. To what extent is the evidence sensational, inflammatory, or injurious?
5. What is the ability to respond to the particular evidence?⁶⁷

The statute's flexibility in admissibility of evidence is highlighted in decisions of the ICC. The judges in the *Katanga and Ngudjolo Chui* trial stated that judges enjoy "a significant degree of discretion in considering all types of evidence," and further explained that "[t]his is particularly necessary given the nature of the cases that will come before the ICC: there will be infinitely variable circumstances in which the court will be asked to consider evidence."⁶⁸ The chamber, using its discretion to decide whether evidence should be admitted, should: (i) determine whether the evidence is *prima facie* relevant; (ii) resolve whether the evidence has probative value; and (iii) weigh the evidence's probative value against its prejudicial effect.⁶⁹

This wide judicial discretion leads to the ICC having a relatively low threshold for admission of evidence, commanding the larger focus to be on the proper weight that should be given to the evidence.⁷⁰ The Rome Statute, however, prefers oral testimony and requires that a judge consider whether evidence from outside of the court could have possible prejudice or a negative impact on the rights of the accused.⁷¹ When evidence from outside the court is challenged as inadmissible, however, then ICC Chamber "must ensure that the evidence is *prima facie* relevant to the trial, in that it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims."⁷² If the evidence is relevant, then the court returns to the question of the evidentiary weight of the evidence in conjunction with the rest of the evidence at the end of the trial.⁷³

⁶⁷ Pillay, *supra* note 63, at 221.

⁶⁸ Prosecutor v. Lubanga, ICC-01/04-01/06-1399, Decision on the Admissibility of Four Documents, ¶ 24 (June 13, 2008).

⁶⁹ See Michele Caianiello, *First Decisions on the Admission of Evidence at ICC Trials*, 9 J. INT'L CRIM. JUSTICE 385, 401 (2011).

⁷⁰ See Aida Ashouri et. al, *supra* note 64; see also Caianiello, *supra* note 69, at 401 ("In short, according to the ICC initial case law, flexibility and (too much) discretion are the two main characteristics of the law of evidence, as far as the issue of admissibility is concerned; the only limit being that, on a case by case approach, the rights of the accused are not unduly restricted.").

⁷¹ Rome Statute, *supra* note 65, art. 69(2); see also Caianiello, *supra* note 69, at 395.

⁷² Prosecutor v. Lubanga, ICC-01/04-01/06-1399, Decision on the Admissibility of Four Documents, ¶¶ 26-27 (June 13, 2008).

⁷³ *Id.*

The role of the media and videos in international crimes such as genocide, crimes against humanity, and war crimes has varied from case to case; media and video has been used to incite violence, to document horrific crimes and spread awareness, and try war criminals in international courts of law.⁷⁴ Arguably, the most powerful use of media and video is its use as evidence in court. Not only are people then held accountable for their crimes, but also, the use of these videos can act as a deterrent by showing that in this modern age of technology it is increasingly hard to escape punishment for international crimes. The ability for people all over the world to easily access their cellphone cameras to document mass atrocities creates a new set of problems for perpetrators – the problem of visibility to the rest of the world.

B. Examples of the Impact of Video in International Criminal Trials

In the Twentieth Century, video evidence was already being used successfully in international courts and tribunals such as the International Military Tribunal at Nuremberg (1945-46), the International Military Tribunal for the Far East (1946-48), the ad hoc International Criminal Tribunal for the former Yugoslavia (1993-2013), and the ad hoc International Criminal Tribunal in Rwanda (1994-2012).⁷⁵ And there is no doubt that as the ability to take videos on mobile devices has increased, the number of videos to be used in international criminal prosecutions will also increase. It is helpful to look at how video has been used in the past, but also this writing considers the challenges future prosecutors will face when trying to collect video evidence from social media in order to get it admitted in court. Traditional forms of video were easier to authenticate because they were taken on video cameras and computer editing was not as sophisticated. If video is to have the same power, if not more power, now and in the future, social media platforms need to preserve evidence of international crimes.

After World War II, the International Military Tribunal at Nuremberg (“IMT”) was established by the Allied Forces, along with the International Military Tribunal for the Far East at Tokyo.⁷⁶ Nuremberg,

⁷⁴ Daniel Milton, *The Islamic State: An Adaptive Organization Facing Increasing Challenges*, in THE GROUP THAT CALLS ITSELF A STATE: UNDERSTANDING THE EVOLUTION AND CHALLENGES OF THE ISLAMIC STATE, 36, 47 (Combating Terrorist Ctr. at West Point ed., 2014), <https://ctc.usma.edu/app/uploads/2014/12/CTC-The-Group-That-Calls-Itself-A-State-December20141.pdf>.

⁷⁵ *International Courts, INT'L CRIMES DATABASE*, <http://www.internationalcrimesdatabase.org/Courts/International> (last visited Mar. 10, 2019).

⁷⁶ See M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49, 53-54 (1995).

as the first multinational criminal court, held great significance for establishing precedent in the carrying out of international laws.⁷⁷ The vast and impactful use of film in the trials also set precedent. There are cases where media and video has played the part of inciting violence, documenting crimes, prosecuting war criminals, and creating a lasting image for the world to see.⁷⁸ Germany used propaganda during the Holocaust to incite genocide; images released of the concentration camps were sent back to America spread awareness, and videos taken were used as evidence in the Nuremberg Trials.⁷⁹ American troops filmed what they found when they liberated the concentration camps, but the Nazi's also filmed the graphic atrocities with pride.⁸⁰

The numbers of videos documenting the holocaust is huge and there were a plethora of different documentary mediums used as well: documentaries, newsreels, propaganda, fundraising videos, feature-length films, and reeducation videos used by the Nazi's.⁸¹ These films were used as evidence during the IMT; after one week of trial, the prosecution played an hour-log video for the court, which was a successful tactic.⁸² The film showed boundless masses of bodies, and the scenes that the Allied troops encountered when they liberated the camps⁸³; the footage of so much death and misery was appalling in a way that eyewitness testimony could not compare.⁸⁴ The use of film in a court of law was unparalleled.⁸⁵ The human impact of the undeniable visual evidence brought the Holocaust in front of the triers of fact where they were forced to grasp the atrocities that had been committed.⁸⁶ The successful use of film in the Nuremberg trials was helped by the fact that Allied troops were able to seize video evidence to be used in prosecuting war crimes once Germany was defeated.

77 See Theodor Meron, *From Nuremberg to the Hague*, 149 *MIL. L. REV.* 107, 111 (1995).

78 See "We Will Show You Their Own Films": *Film at the Nuremberg Trial*, *HOLOCAUST ENCYCLOPEDIA*, <https://encyclopedia.ushmm.org/content/en/article/we-will-show-you-their-own-films-film-at-the-nuremberg-trial> (last visited Mar. 10, 2019).

79 See Stuart Liebman, *The Majdanek trial: The Holocaust on Trial on Film*, in *THE SCENE OF THE MASS CRIME: HISTORY, FILM, AND INTERNATIONAL TRIBUNALS* 113, 113-14 (Christian Delage & Peter Goodrich ed., 2013).

80 See "We Will Show You Their Own Films": *Film at the Nuremberg Trial*, *supra* note 78.

81 See *id.*

82 *Id.*

83 See Michael Bazylar, *The Holocaust at Nuremberg: What the Record Reveals*, 39 *LOYOLA OF L.A. INT'L COMP. L. REV.* 35, 55 (2017).

84 *Id.*

85 *Id.*

86 See "We Will Show You Their Own Films": *Film at the Nuremberg Trial*, *supra* note 78.

In modern times, the end of war is not as clear cut and therefore there is no “winner” that is able to seize evidence. By the time the late 1980’s and early 90’s arrived, video use was much more widespread; however, in seeking to hold those accountable for the wars in the Balkans it proved difficult for prosecutors to obtain video evidence.⁸⁷

In May 1993, the UN Security Council created the International Criminal Tribunal for the former Yugoslavia to prosecute genocide, war crimes, and crimes against humanity after years of ethnic cleansing in the Balkans.⁸⁸ Because of the developments in technology that made filming more accessible, the amount of footage of international crimes has substantially increased since the Nuremburg trials.⁸⁹ The presence of film, accordingly, has also increased inside the courtroom.⁹⁰ The majority of the film used in the ICTY was from Yugoslavian news channels and documentaries that had previously aired in the country or other parts of Europe; however, some of the video evidence was from private sources and had been filmed by or in the attendance of the perpetrators.⁹¹ The procedural rules of the ICTY allowed plaintiffs to introduce evidence to present to the triers of fact and the court would determine its admissibility later.⁹² This allowed the video evidence to be widely included in the trials. As in the Holocaust, video was used as propaganda to incite genocide in the former Yugoslavia⁹³; subsequently, these same videos had powerful effects in holding the perpetrators accountable for their crimes.

One major difference between the Nuremberg Trials and those in the ICTY was the high ranking official being tried; the main perpetrator Slobodan Milošević, the former president of Serbia and then president the former Yugoslavia, was charged with varying international crimes in Bosnia and Herzegovina, Croatia, and Kosovo.⁹⁴ In 2001, he surrendered

⁸⁷ CHRISTIAN DELAGE, *CAUGHT ON CAMERA: FILM IN THE COURTROOM FROM THE NUREMBERG TRIALS TO THE TRIALS OF THE KHMER ROUGE* 215 (Ralph Schoolcraft & Mary Byrd Kelly eds., trans., University of Pennsylvania Press 2014) (2006).

⁸⁸ See HUMAN RTS. CTR., *BEYOND A REASONABLE DOUBT: USING SCIENTIFIC EVIDENCE TO ADVANCE PROSECUTIONS AT THE INTERNATIONAL CRIMINAL COURT* 4 (2012) https://www.law.berkeley.edu/files/HRC/HRC_Beyond_Reasonable_Doubt_FINAL.pdf.

⁸⁹ *Id.* at 7.

⁹⁰ *Id.*

⁹¹ See DELAGE, *supra* note 87, at 215-16.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See *This Day in History: Former Yugoslav President Slobodan Milosevic Goes on Trial for War Crimes*, HISTORY CHANNEL (Nov. 24, 2009), <http://www.history.com/this-day-in-history/milosevic-goes-on-trial-for-war-crimes>. While he was president of Serbia, Croatia and Slovenia attempted to secede from Yugoslavia in 1991. See *id.* Milošević sent tanks and troops to the boarder of Slovenia and stopped its succession. See *id.* Milošević also sent weapons and supplies to Serbian rebels in Croatia, fueling fighting that killed around ten thousand people before

to Serbian authorities, was extradited to the Netherlands, and put on trial at the ICTY.⁹⁵ Although he had surrendered, there was no clear winner of the war and the government was not required to turn over evidence.⁹⁶

Milošević faced two charges of crimes against humanity relating to the atrocities in Kosovo and Croatia.⁹⁷ Milošević was, most seriously, charged with genocide in connection with the Bosnian war, linking him to the Bosnian Serb leadership that performed ethnic cleansing.⁹⁸ Specifically, the indictment said Milošević had “exercised substantial influence over” and had “assisted” in driving Muslims and Croats out of Bosnia.⁹⁹ The indictment held him responsible for expelling thousands from Bosnia, killing over 7,000 Muslims in the U.N. protected zone of Srebrenica, and holding thousands of Bosnian Muslims and Croats in “inhumane conditions.”¹⁰⁰

Video evidence, although fairly easy to play at trial, was a challenge to actually get admitted into evidence and even before that, it was difficult to gain access to video archives of the former Yugoslavia and Republic of Serbia.¹⁰¹ This was much different from the Nuremberg trials where the Allied Powers had seized German archives to be used in court.¹⁰² During Nuremberg, even when a video was not formally admitted into evidence, it was still impactful because it was played during the trial and therefore became public. Despite the challenges, the prosecution claimed at the outset of the Milošević trial that it would introduce over six hundred video exhibits.¹⁰³ One of the most powerful videos is referred to as the

a ceasefire was established in 1992. *See id.* Within the year, Bosnia-Herzegovina declared it would secede and Milošević funded a rebellion there that spawned a war killing around two hundred thousand people and was ended by a peace agreement in 1995. *See id.* Subsequently, there was fighting in Kosovo between liberation forces and the Serbs along with the Yugoslav forces. *See id.* Milošević started an ethnic cleansing program against the Albanians in Kosovo, prompting NATO to launch airstrikes against Yugoslavia in 1999 which led to the eventual agreement that Milošević would withdraw Serbian forces from Kosovo. *See id.* In the meantime, Milošević made himself president of Yugoslavia in 1997. *See id.* He lost the election in 2000 but refused to step down until protests forced him to. *See id.*

⁹⁵ *Id.*

⁹⁶ Dr. Nena Tromp, *The Slobodon Milošević Trial as a Valuable Historical Source for a Better Understanding of the Disintegration of the SFRY*, YU HISTORIJA, http://www.yuhistorija.com/wars_91_99_txt01c3.html (last visited Feb. 7, 2018).

⁹⁷ *See* Sean Kenny, *The Charges Against Milosevic*, THE GUARDIAN (Mar. 11, 2006 9:36 AM), <https://www.theguardian.com/world/2006/mar/11/warcrimes.milosevictrial>.

⁹⁸ *See* Suzanne Daley, *A Full Charge of Genocide for Milosevic*, N.Y. TIMES (Nov. 24, 2001), <http://www.nytimes.com/2001/11/24/world/a-full-charge-of-genocide-for-milosevic.html>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *See* Tromp, *supra* note 96.

¹⁰² *Id.*

¹⁰³ Pillay, *supra* note 63, at 210.

“Kula camp video,” which showed Milošević celebrating the anniversary of the date that the Serbian supported paramilitary unit, the Red Berets, was created.¹⁰⁴ The video helped the prosecution prove that in 1991 Milošević had created a para-state military unit to function outside of Serbia.¹⁰⁵ The video included a speech by the Commander of the Red Berets, Franko Simatović, which stated the group was established in 1991 and recounted it had been working to “protect . . . existence of the Serbian people” throughout “its entire ethnic area.”¹⁰⁶ The video showed Milošević listening to the speech and then touring the compound.¹⁰⁷

Milošević had previously tried to downplay the role of the Red Berets and claim that it had not been founded until after the war in Bosnia; these claims were rebuked by the video. The video was “one of the most convincing pieces of evidence presented during the trial on the criminal state of mind of Milošević.”¹⁰⁸ The video also had the power to “establish[] links between perpetrators on the ground, many of whom received awards during the ceremony for bravery on the battlefields of Croatia and BiH.”¹⁰⁹ The video was admitted into evidence as proof that Milošević was not only aware of the groups military action, but also, suggested that the Serbian state had been funding the group during its operations in Croatia and Bosnia in its efforts to ethnically cleanse through murder and violence.¹¹⁰ This is an example of how video evidence can be very powerful in proving state of mind, culpability, and connection to the crime for a leader of a state; it was evidence that helped fulfil the *mens rea* requirement.¹¹¹

C. The Potential Future Power of Video Evidence in International Criminal Trials

The number of videos that exist today that would be able to tie high up leaders or on the ground perpetrators to international crimes has increased exponentially with the use of mobile devices. A case where

¹⁰⁴ See LARA J. NETTELFIELD, *COURTING DEMOCRACY IN BOSNIA AND HERZEGOVINA* 61 (2010).

¹⁰⁵ See NEVENKA TROMP, *PROSECUTING SLOBODAN MILOŠEVIĆ: THE UNFINISHED TRIAL* 129 (2016).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 130.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Gordana Knezevic, *An Inside Account of Milosevic's Unfinished Trial*, RADIO FREE EUROPE/RADIO LIBERTY (Oct. 18, 2016, 4:44 PM), <https://www.rferl.org/a/inside-account-of-milosevic-unfinished-trial/28061440.html>.

¹¹¹ NETTELFIELD, *supra* note 104, at 61.

video will undoubtedly be used in the future prosecution of war crimes is the Islamic State in Iraq and Syria (“ISIS”),¹¹² because of its comprehensive media infrastructure that creates and distributes communications in multiple languages and audiences.¹¹³ Not only, will videos produced by ISIS be useful; but also, “citizen media” taken on the ground and uploaded to social media could be used as evidence. Both of these sources of video have the potential to be as powerful (if not more powerful because of the sheer volume) as the video documentation used in the Nuremberg Trials. Although it is undecided what kind of court will be trying these crimes, social media platforms could be preserving video evidence and its metadata so that all of the videos posted could not only be used to spread awareness (whether that be in a positive way through activism or a negative way through recruitment), but also to hold perpetrators accountable.

ISIS has its own Ministry of Media that distributes online videos, radio broadcasts, digital publications, and full-length films that feature violence perpetrated by its members.¹¹⁴ These publications and other forms of media aim to spread the message of how to brutalize non-followers of the Islamic State.¹¹⁵ While media use is what makes ISIS seemingly unstoppable in terms of growth and recruitment, it also creates a silver lining of the possibility of a vast collection of video evidence to be used in the future trials against the perpetrators.

Just as the propaganda machine of the Nazis and media usage during the Rwandan genocide, ISIS’s message to eliminate non-followers could be seen as incitement.¹¹⁶ Again, the court that will be used is unknown and most likely will not be the ICC; however, this writing imagines using the Rome Statute to illustrate how media could be used in prosecution of ISIS because other procedures are not wholly dissimilar. Under Article 25(3)(e) of the Rome Statute incitement is only justiciable when it is of genocide, requiring that it be (i) direct, meaning it provokes another to commit a crime, and (ii) public, meaning that the call to action is to the masses by means such as mass media.¹¹⁷ ISIS’s use of a Ministry of Media clearly depicts its dissemination of information to the public at large, satisfying the requirement of ‘public.’ When assessing the question

¹¹² Although possibly more accurately referred to as the Islamic State, for the purposes of this note the terminology ISIS is chosen for its widespread use and familiarity.

¹¹³ Milton, *supra* note 74, at 47.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See Coman Kenny, *Prosecuting Crimes of International Concern: Islamic State at the ICC*, 33 *UTRECHT J. INT'L & EUR. L.* 1120, 1138 (2017).

¹¹⁷ *Id.*

of whether or not the incitement is direct, “the specific context and how the intended audience understood it” is considered.¹¹⁸ For example, ISIS’s magazine *Dabiq* published statements saying triumph over Jews and Christians would only be achievable “by abolishing those apostate agents . . . who must be killed wherever they are found” until there are no more who “walks on the face of the earth.”¹¹⁹ In looking at the specific context, one notes that this issue was printed at the same time religious minorities, such as Jews and Christians, were being killed because of their religion.¹²⁰

Although this example is in print rather than video, the same prosecution under Article 25(3)(e) of the Rome Statute would be available.¹²¹ Individuals that are involved closely with the dissemination of propaganda that directly and publicly incite genocide will be able to be held accountable at the ICC.¹²² Collecting this evidence now would prove viable when ISIS is eventually tried for violating international criminal law.¹²³ While publications provide a more straightforward avenue to find those who are responsible, it will be more difficult to find those who post videos posted on YouTube and other social media platforms especially if those platforms remove and do not archive such videos.

Propaganda videos have the power to be easily disseminated all over the world where they can then be used to incite violence through the use of social media. ISIS has taken advantage of this throughout its campaign. A prime example of this is a propaganda video, from September 2014, showing the beheading of Herve Gourdel, a kidnapped French citizen.¹²⁴ The opening scene of the video includes a call to arms from Abu Mohammad al-’Adani, the former spokesperson for ISIS, instructing supporters to “defend the Islamic State each one from his location . . . [by] kill[ing] a nonbelieving American or European, especially the spiteful and filthy French, or an Australian, or a Canadian.”¹²⁵ Four days after this call to arms, an ISIS supporter in Saudi Arabia tweeted a picture of an American contractor working in Riyadh and wrote: “This is a photo

118 *Id.*

119 *Id.*

120 *Id.*

121 Kenny, *supra* note 116, at 139.

122 *Id.*

123 *Id.* at 138.

124 Bryan Price, *The Strategic Implications of Combatting the IS, in THE GROUP THAT CALLS ITSELF A STATE: UNDERSTANDING THE EVOLUTION AND CHALLENGES OF THE ISLAMIC STATE*, *supra* note 74, at 92.

125 *Id.*

of an American Crusader who was walking in the streets of al-Riyah a few minutes ago. We need somebody to stab him with a knife in his back or shoot him in the head using a silenced [weapon].”¹²⁶ The tweet also concluded with the hashtag “#Al-Adani is calling upon all the supporters.”¹²⁷ Three weeks later, an ISIS supported posted a picture of that same American murdered in his car.¹²⁸

These official videos, such as the video of al-’Adani’s call to arms, are distributed within ISIS territory to its supporters but once they have it, they often end up on Twitter and other social media platforms; posted by both supporters and detractors of ISIS.¹²⁹ Once these official videos have been posted to social media platforms, algorithms will flag and remove the content; however, if it is flagged and archived, it can be used later in court. Because these official videos can be traced directly back to ISIS and are filmed with high quality, they are exemplary pieces of evidence to be used in the future by prosecution. It is important for these videos to be preserved because once the court decides to try the perpetrators, those who are guilty will try to get rid of evidence by any means possible.

Videos used in a court of law would not only be used to prosecute those involved in insemminating propaganda that has incited genocide, but also, the video itself captures evidence of war crimes, crimes against humanity, and genocide. On September 21, 2017, the UN Security Council adopted a resolution that would send investigators to Iraq in an effort to collect and preserve evidence of these crimes.¹³⁰ While these efforts allow video to be collected on the ground, it would be much easier and safer to take videos already posted on social media platforms. Although a large amount of media evidence is being created that could be used as proof of ISIS’s crimes, there is also a portion of these videos and posts that are being taken down and destroyed. This is a problem that can and should be addressed.

¹²⁶ *Id.* at 93.

¹²⁷ *Id.*

¹²⁸ *See id.* Inside the car, there was another American contractor who was shot and survived. *See id.* Saudi Arabian officials claimed that it was workplace violence after the suspected shooter was fired by the American contractor; however, that disregards the tween instructing his murder three weeks prior. *See id.*

¹²⁹ *See Milton, supra* note 74, at 53-54, 54 n.164.

¹³⁰ *See Jomana Karadshah & Chris Jackson, Fighting to Bring ISIS to Justice for War Crimes Against Yazidis*, CNN (Oct. 11, 2017 9:29 AM), <https://www-m.cnn.com/2017/10/11/middleeast/isis-yazidi-war-crimes-tribunal-investigation/index.html>.

III. SOCIAL MEDIA PLATFORMS CURRENT POLICIES & ACTIONS

Sites such as YouTube, Facebook, Twitter, and even Google, have made an effort to combat the use of their sites as a means of recruitment by extremist groups.¹³¹ These platforms have integrated algorithms that are able to flag and remove content related to violent extremism and terrorism.¹³² The platforms have supplemented the process with human judgement as well; however, because the goal is to remove content efficiently, lightning fast algorithms are the main actor when flagging and removing content.¹³³ In the fight against violent extremist, these efforts are important and effective in frustrating recruitment and incitement; but there are consequences when dealing with the issue of accountability. These platforms do not possess a legal duty to preserve the evidence because they simply are not in the business of collecting and safeguarding evidence to be used in international criminal investigations.¹³⁴

In order to address the shortcomings of these platforms' methods of removing content, it is helpful to look at their actual policies in action. YouTube announced that in July 2017 it began "developing and implementing cutting-edge machine learning technology designed to help us identify and remove violent extremism and terrorism-related content."¹³⁵ The machine learning technology has displayed its shortcomings in removing irreplaceable documentation through false positives.¹³⁶ YouTube has removed a number of Syrian opposition groups' channels, along with the hundreds or thousands of videos they uploaded.¹³⁷ For example, a YouTube channel cataloguing videos of airstrikes in Syria, Iraq, and Libya called "Airwars" has been affected as

¹³¹ See Scott Edwards, *YouTube Removals Threaten Evidence and the People that Provide It*, AMNESTY INT'L (Nov. 1, 2017, 11:37 AM), <https://www.amnesty.org/en/latest/news/2017/11/youtube-removals-threaten-evidence-and-the-people-that-provide-it>.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *An Update on Our Commitment to Fight Terror Content Online*, YOUTUBE (Aug. 1, 2017), <https://youtube.googleblog.com/2017/08/an-update-on-our-commitment-to-fight.html>.

¹³⁶ See *Machine Learning Doubles YouTube's Extremist Video Take-down Rate*, PC & TECH AUTH. (Aug. 3, 2017), <https://www.pcauthority.com.au/news/machine-learning-doubles-youtubes-extremist-video-take-down-rate-469998>.

¹³⁷ See Vincent Wood, *YouTube 'Wipe Out Evidence of Brutal ISIS Regime' in Heavy Handed Jihadi Video Purge*, EXPRESS (Aug. 16, 2017, 1:47 AM), <https://www.express.co.uk/news/world/841671/YouTube-ISIS-Islamic-State-jihadi-Syria-Iraq-Bellingcat-Airwars>.

three videos were suspended.¹³⁸ The director of the organization, Chris Woods, states that these videos are “a record of war.”¹³⁹ Because the absence of conventional media, Syrians have taken to social media.¹⁴⁰

IV. HOW & WHY SOCIAL MEDIA PLATFORMS SHOULD BE RESPONSIBLE FOR COLLECTING, STORING, AND PRESERVING EVIDENCE OF INTERNATIONAL CRIMES

This writing delves into the current policies of social media platforms regarding their removal and preservation of videos. While sites such as YouTube, Twitter, and Facebook can be highly effective at spreading awareness, they also have certain guidelines which prevent featuring videos that are against their policies such as videos that promote violent extremism.¹⁴¹ “YouTube’s community guidelines stipulate that a channel can be removed for three violations of the platform’s guidelines in a three-month period.”¹⁴² YouTube has even installed new technology that can identify and remove extremist videos without human users flagging the content themselves.¹⁴³

Social media platforms’ efforts to combat terrorist and extremist content can have both positive and negative effects.¹⁴⁴ In the battle against violent extremism, removing recruiting videos and any videos posted by terrorist groups is key in delegitimizing and stopping their spreading influence. Big technology companies such as Facebook, YouTube, Microsoft, and Twitter have responded to pressure from Western politicians to do more in the fight against the dissemination of terrorist propaganda and recruitment materials on their sites.¹⁴⁵ These social media platforms unveiled an initiative that directs the companies to log content that has been removed based on policies around terrorism.¹⁴⁶ Once the content is logged, the companies share its digital

¹³⁸ See Malachy Browne, *YouTube Removes Videos Showing Atrocities in Syria*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/world/middleeast/syria-youtube-videos-isis.html>.

¹³⁹ Wood, *supra* note 137.

¹⁴⁰ *Id.*

¹⁴¹ See Browne, *supra* note 138.

¹⁴² *Id.*

¹⁴³ See *Machine Learning Doubles YouTube’s Extremist Video Take-down Rate*, PC & TECH AUTH. (Aug. 3, 2017), <https://www.pcauthority.com.au/news/machine-learning-doubles-youtubes-extremist-video-take-down-rate-469998>.

¹⁴⁴ *Id.*

¹⁴⁵ See Jeremy Kahn, *Tech Companies Identify, Remove 40,000 Terrorist Videos, Images*, BLOOMBERG (Dec. 4, 2017, 9:00 AM), <https://www.bloomberg.com/news/articles/2017-12-04/tech-companies-identify-remove-40-000-terrorist-videos-images>.

¹⁴⁶ *Id.*

fingerprint in a shared database.¹⁴⁷ If the same content is subsequently posted to one of the other sites, it is automatically flagged for review.¹⁴⁸

This system of shared information greatly benefits the efficiency in removing terrorist related content from social media platforms. In September 2017, Twitter said that it has removed 99 percent of terrorist posts without relying on the complaints of its users.¹⁴⁹ In November 2017 YouTube said eighty-three percent of terroristic content that was removed was found by its automated system.¹⁵⁰ In December 2017, Facebook said its algorithms found ninety-nine percent of terrorist related content before users flagged the content.¹⁵¹ Notably, Facebook reported its algorithms prevented some terrorist related content from ever being published.¹⁵²

Although the positive effects are vast and imperative, there are also downfalls of the removal process. Because one of the goals is efficiency in take down rates, inaccuracy is an issue.¹⁵³ The new technology that automatically flags and removes content puts *any* content from Syria and areas where extremists operate at risk of being removed.¹⁵⁴ For example, YouTube has unintentionally removed thousands of videos that documented atrocities in Syria, which could jeopardize future prosecutions of international war crimes.¹⁵⁵ While some of these videos should be taken down, a large number should not, and this section will assess the future of this technology and how it should be employed.

Social media has already come to play a role in international human rights law, but there is much more potential for it to be an invaluable source of evidence.¹⁵⁶ Just as video was so crucial in the liberation from concentration camps, and then in the Nuremberg trials, video evidence that is uploaded today has the power to change history.¹⁵⁷ Social media allows video evidence to be more easily gathered “in the international

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See Jeremy Kahn, *Tech Companies Identify, Remove 40,000 Terrorist Videos, Images*, BLOOMBERG (Dec. 4, 2017, 9:00 AM), <https://www.bloomberg.com/news/articles/2017-12-04/tech-companies-identify-remove-40-000-terrorist-videos-images>.

¹⁵³ See Browne, *supra* note 138.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See Joyce, *supra* note 4, at 241-42.

¹⁵⁷ See Sara Ashley O'Brien, *YouTube and Syria: Tech's Role as Archivist*, CNN BUSINESS (Aug. 24, 2017, 12:22 PM), <http://money.cnn.com/2017/08/24/technology/culture/youtube-syria-videos/index.html>.

realm where evidence is so hard to come by—a process often resisted by states and perpetrators.”¹⁵⁸ With an increased influx of digital evidence, there remain challenges as Daniel Joyce notes:

Nevertheless, one thinks here of the enduring significance of the witness as truth-teller in court and as a moral guardian. To witness thus comes with responsibilities, to communicate and to act upon what you have seen and to give evidence formally if required. In an online environment it is harder to verify the accuracy of such evidence and harder of course to compel its production and test its veracity. Despite the potential of crowd-sourcing and data analytics, this remains a significant hurdle for digital media witnessing as a methodology for human rights.¹⁵⁹

And while mainstream social media sites help more and more people witness international human rights violations, this fact, in itself, does not lead to justice being served.¹⁶⁰

Many organizations, academia,¹⁶¹ and civil society actors, have devoted time and effort to assessing the legal questions and strategies to improve and streamline the use of digital evidence in the prosecution of atrocity crimes.¹⁶² Civil society actors are defined by the U.N. Office of the High Commissioner for Human Rights as “individuals and groups who engage in forms of public participation and actions around shared interest, purposes or values that are compatible with the goals of the UN: the maintenance of peace and security, the realization of development, and the promotion and respect of human rights.”¹⁶³ Such organizations and individual actors have noted that there is a struggle in the relationship between actors in civil society, that document abuses, and the framework of admissibility and use in international criminal trials.¹⁶⁴ Video and

¹⁵⁸ Joyce, *supra* note 4, at 241-42.

¹⁵⁹ *Id.* at 242 (citations omitted).

¹⁶⁰ *Id.* at 243.

¹⁶¹ Some examples include: eyeWitness Project; Atrocity Response Program at the Human Rights Center at U.C. Berkeley Law; WITNESS; Open Society Justice Initiative; Samuelson Law, Technology and Public Policy Clinic at U.C. Berkeley School of Law; Videre; Amnesty International's Citizen Evidence Lab and Digital Verification Corps.

¹⁶² See Koenig et al., *supra* note 8.

¹⁶³ U.N. High Commissioner for Human Rights, Civil Society and the United Nations Human Rights System: A Practical Guide for Civil Society 3 (2014), https://www.ohchr.org/Documents/AboutUs/CivilSociety/CS_space_UNHRSystem_Guide.pdf.

¹⁶⁴ See *Civil Society and the International Criminal Court: Local Perspectives on Fact-Finding*, INT'L JUST. MONITOR (Nov. 18, 2015), <https://www.ijmonitor.org/2015/11/civil-society-and-the-international-criminal-court-local-perspectives-on-fact-finding>.

media evidence gathered by citizens and civil society organizations are gathered for various purposes—not always legal accountability and use various methodologies—but also, the international criminal courts or tribunals have procedures that outline specific methodological parameters for admitting such evidence.¹⁶⁵ Social media platforms could make an effort to help this disparity by preserving metadata and video evidence in general so that it may be used or at least considered in the prosecution of international crimes.

While technology's potential to improve fact finding is immense—specifically in collecting and preserving information—organizations that work specifically with the purpose of gathering evidence from citizens have noted the need for guidance regarding the standards for discovering, collecting, keeping, and communicating information.¹⁶⁶ In 1986, *Human Rights Quarterly* laid out guidelines for documenting and reporting human rights violations by civil society organizations, focusing on the standardization and professionalization of citizen documentation; while these goals persist, technological advances have made them more attainable.¹⁶⁷ Many organizations have launched their own apps allowing users to record and upload photos and videos, collect and store the metadata necessary for the admissibility of digital evidence in court.¹⁶⁸ While these efforts respond to the increasing demand for citizen documentation, these apps do not have the power to effect videos that have been uploaded to mainstream social media platforms.¹⁶⁹

These organizations have focused on the standardization and professionalization of documentation; however, emphasizing the role of professionals may have a negative effect on individuals that are also capable of capturing and documenting evidence.¹⁷⁰ A top down approach to improving documentation limits the positive effects because the approach excludes individuals that may not be activists or part of any organization.¹⁷¹ If, instead, social media platforms implemented some of this technology, the effects would be exponentially more impactful on documentation efforts by allowing regular individuals to collect evidence that would have a much greater chance of being admissible in court.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

¹⁶⁷ See Brianne McGonigle Leyh, *Changing Landscapes in Documentation Efforts: Civil Society Documentation of Serious Human Rights Violations*, 33 *UTRECHT J. INT'L & EUR. L.* 44, 50-51 (2017).

¹⁶⁸ See *id.*

¹⁶⁹ *Id.*

¹⁷⁰ See Leyh, *supra* note 167, at 55.

¹⁷¹ See *id.*

While this may be unlikely due to the high cost burden it would place on social media platforms, the smaller goal of policy (either internal or government regulation) creating a responsibility to preserve videos that are taken down is less expensive and therefore more attainable.

Although it will be a challenge, the groundwork has already been laid with the launch of the Global Internet Forum to Counter Terrorism (“GIFCT”).¹⁷² The partnership aims to improve technology to help eradicate their networks of terrorist use.¹⁷³ GIFCT’s major effort thus far has been the creation of the shared database where the companies share the digital fingerprints of removed and flagged terrorist content.¹⁷⁴ In August 2017, leaders from the tech industry, government, and nongovernmental organizations met to “focus on three key areas: technological approaches, knowledge sharing, and research.”¹⁷⁵

Another aim of GIFCT is sharing best practices in dealing with terrorist recruitment and incitement. Google stated in a blog about their efforts:

Although our companies have been sharing best practices around counterterrorism for several years, in recent months GIFCT has provided a more formal structure to accelerate and strengthen this work. In collaboration with the Tech Against Terror initiative — which recently launched a Knowledge Sharing Platform with the support of GIFCT and the UN Counter-Terrorism Committee Executive Directorate — we have held workshops for smaller tech companies in order to share best practices on how to disrupt the spread of violent extremist content online.¹⁷⁶

This illustrates how social media platforms are already in the process of working together to combat terrorism by sharing best practices among themselves, and also with smaller companies. This is important because, as larger social media platforms algorithms remove content so quickly, terrorists have turned to the smaller platforms instead.¹⁷⁷

Although GIFCT focuses on counterterrorism to prevent and disrupt the dissemination of propaganda and recruitment materials, it shows that there is room for technology companies to work together to combat

¹⁷² See *Update on the Global Internet Forum to Counter Terrorism*, GOOGLE (Dec. 4, 2017), <https://www.blog.google/topics/google-europe/update-global-internet-forum-counter-terrorism>.

¹⁷³ See *id.*

¹⁷⁴ See *id.*; see also Kenny, *supra* note 116.

¹⁷⁵ *Update on the Global Internet Forum to Counter Terrorism*, *supra* note 172.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

human rights violations, war crimes, and genocide.¹⁷⁸ They responded to the pressure of Western government and in doing so teamed up with civil actors and organizations.¹⁷⁹ This is a large move towards accountability in terms of what these companies do in the realm of international social justice.¹⁸⁰

While GIFCT's efforts illustrate how social pressure can influence corporations to hold themselves to a higher moral standard, relying on social pressure and good will is overly optimistic in light of the converging economic interests. Corporations' main responsibility is to their shareholders. The duty to collect and preserve may also come from contracts, ethical codes, or state regulations.¹⁸¹ Of course, there can also be a voluntarily assumed duty; however, if it is voluntarily assumed then it can be withdrawn without consequences.¹⁸² The main situation where corporations have a duty to collect and preserve electronic evidence is when there is existing, pending, or a threat of litigation to avoid spoliation.¹⁸³ When there is no reason for the corporation to need the electronic evidence for its defense or created legal obligation by current or future litigation, the corporation does not have a duty. So, what incentive would a corporation have to create costly programs aimed at collecting and preserving evidence of international crimes without some sort of legal duty?

These social media companies have amassed influence over global and domestic politics and potential social change as well; however, these are not their area of expertise or even part of their responsibility as it stands currently.¹⁸⁴ This lack of corporate-accountability in these spheres of influence is such a problem that "promoted the UN Human Rights Council to adopt the Guiding Principles on Business and Human Rights in 2011"—illustrating that the lack of corporate-accountability not only affects human rights, but also international crimes because the two are so interrelated as explained previously.¹⁸⁵ These guidelines are not binding on corporations and largely have not been put into practice by

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ MARGARET M. KOESEL & TRACEY L. TURNBULL, *SPOILIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION* 1-2 (3d ed. 2014).

¹⁸² *Id.*

¹⁸³ *Id.* at 7.

¹⁸⁴ See Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT'L COMPARATIVE L. REV. 145, 184 (2012).

¹⁸⁵ *Id.*

corporations.¹⁸⁶ Without an affirmative legal duty, it is hard to imagine a motivation strong enough to promote corporations such as Facebook, YouTube, and Twitter to implement costly programs to help collect and preserve video evidence for the eventual prosecution in international criminal trials.

Because the collecting and preserving of videos of international crimes—crimes against humanity, genocide, and war crimes—will be costly, imposing a duty by law may be the most effective option. Germany passed legislation in June 2017 that imposes significant fines on social media companies such as Facebook, Twitter, and YouTube if they do not delete posts exhibiting hate speech in a timely manner.¹⁸⁷ The German legislation allots the platforms twenty-four hours to remove posts that clearly violate German law and have been reported by users, and seven days for cases that are not as clear cut.¹⁸⁸ The legislation forces the social media networks to reveal the identity of the poster and also make sure that users always have an “easily recognizable, directly reachable, and constantly available” avenue to submit a complaint about “prosecutable content.”¹⁸⁹

However, this of course is criticized for its effect on freedom of speech. Critics of the legislation argue that, to avoid the fine, companies will err on the side of caution and over-delete posts.¹⁹⁰ Another critique of the legislation is that private companies should not be tasked with this responsibility as it is one that belongs to the state.¹⁹¹ Facebook, in response to a draft of the legislation said, “the legislative state cannot pass on its own shortcomings and responsibilities to private companies. . . . Preventing and combating hate speech and fake news is a public task that the state cannot avoid.”¹⁹² One critic, photo-journalist and blogger Markus Hibbeler whose content was deleted, and his account banned “by accident,” said:

¹⁸⁶ *See id.*

¹⁸⁷ *See* Carla Bleiker & Kate Brady, *Bundestag Passes Law to Fine Social Media Companies for Not Deleting Hate Speech*, DW AKADEMIE (Jun. 30, 2017), <http://www.dw.com/en/bundestag-passes-law-to-fine-social-media-companies-for-not-deleting-hate-speech/a-39486694>.

¹⁸⁸ *See id.*

¹⁸⁹ *Id.*

¹⁹⁰ *See id.*

¹⁹¹ *See id.*

¹⁹² Jefferson Chase, *Facebook Slams Proposed German 'Anti-Hate Speech' Social Media Law*, DW AKADEMIE (May 29, 2017), <https://www.dw.com/en/facebook-slams-proposed-german-anti-hate-speech-social-media-law/a-39021094>.

The problem with the law is that a social network like Facebook is de facto a mirror of opinions and debates in this country. So when it's forced to perform a public legal task and told to delete posts within a week or pay millions in fines, a private company like Facebook will delete posts that shouldn't be deleted in cases of doubt. That's what I'd do if I owned a social media network.

“Hibbeler says that he wouldn't have a problem with the legislation ‘if it affected the right people’ but fears that as things stand, it would function as a ‘censorship law.’”¹⁹³ While these critiques are important considerations, social media platforms and civil society organizations with knowledge on the matter could work together to draft legislation that deals with the critiques.

V. CONCLUSION

Because of the success video evidence has been able to achieve in apprehending international criminals – in their perpetration of war crimes, genocide, and crimes against humanity – it is clear that video evidence will only become more useful as more and more people gain access to video recording devices. Additionally, the already significant and increasing number of people who use social media platforms plays a huge role in providing a platform to post this citizen recorded evidence. As this happens, social media platforms have the potential to play a key role in the battle against international crimes by collecting and preserving video evidence. Because implementing these practices will be costly, a legal duty is the best option available to empower these corporations to recognize the responsibility that comes with the fact that their sites house vast amounts of important and sometimes irreplaceable evidence.

¹⁹³ *Id.*