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Georgetown Journal of International Affairs, Volume 23, Number 1,
Spring 2022, pp. 105-113 (Article)

Published by Johns Hopkins University Press

DOI: <https://doi.org/10.1353/gia.2022.0017>



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Science and Technology

Digitally Disappeared: The Struggle to Preserve Social Media Evidence of Mass Atrocities

Lindsay Freeman



It was one of the most iconic photographs in history.¹ Taken in 1972, Nick Ur's "Napalm Girl" shows a naked, nine-year-old screaming in pain, fleeing a chemical attack during

the Vietnam War. The Pulitzer Prize-winning photograph exposed the horrors of armed conflict on civilians, catalyzing worldwide outrage. It was visual evidence of weaponized napalm, an incendiary mixture that the United Nations would later ban.² The image's impact is why Norwegian author Tom Egeland posted it on Facebook along with six other photographs that changed the history of warfare.³ That is, until it was disappeared from the social media platform.

In less than twenty-four hours, the image was removed from Facebook. In its effort to regulate child pornography, the company erased an image of indisputable historical and evidentiary value. The company's blanket content moderation policy against child nudity failed to account for the context—critical context that distinguishes child sexual exploitation from war documentation. The technology giant issued a defensive statement: "While we recognize that this photo is iconic, it is difficult to create a distinction between allowing a photograph of a nude child in one instance and not others."⁴ The Editor-in-Chief of Norway's *Aftenposten* countered with an open letter criticizing Mark Zuckerberg for abusing his power, and Facebook for failing to make context-specific decisions despite the company's ample resources.⁵

Over the past decade, social media has played an important role in the documentation of armed conflicts, particularly in Syria, Iraq, Afghanistan, Yemen, Libya, and Mali.⁶ The level of insecurity in these countries, deficiencies in government cooperation, and, in some cases, lack of jurisdiction has prevented international investigative bodies from collecting evidence on the ground. Accordingly, civilian smartphones

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have become the eyes and ears of professional war crimes investigators.⁷ While “Napalm Girl” was eventually reinstated, the image’s removal illustrates how poorly thought-out social media policies can cause more harm than good by censoring newsworthy information, destroying evidence, and potentially obstructing justice.⁸ If “Napalm Girl” had been concealed from public view in its initial publication, it could not have contributed to the anti-war movement, nor could it have been used as evidence of the inhumane effect of incendiary chemical weapons. The course of history could have been dramatically different.

Videos, images, and posts on social media—often referred to as “user-generated content”—can serve as valuable evidence of international crimes, but only if they are identified by investigators in time, forensically preserved, and made available to prosecuting authorities. This article examines the impact of content moderation, retention, and disclosure policies on the investigation of war crimes, crimes against humanity, and genocide.⁹ It highlights tensions between certain human rights, such as freedom of speech, freedom of expression, access to information, and the right to privacy, as well as competing interests between counterterrorism professionals, human rights advocates, and international justice practitioners. Ultimately, this article considers whether data protection rules like the “right to be forgotten”¹⁰ can be reconciled with broader principles of international justice, like the core precept that there are horrors in this world that we must “never forget.”¹¹

Content moderation policies and practices

Content moderation policies are comprised of guidelines for curating content and removing or “de-platforming” content. Most social media companies control what users see and when they see it by curating their homepages and timelines. Curation can minimize harm by removing distressing material, but more often it is used to maximize users’ time on the platform and increase ad revenue.¹² There are no regula-

tions against this practice. If content is especially harmful or illegal, thus violating a platform’s terms of service, it may be temporarily removed or permanently deleted.

The Stored Communications Act (SCA), drafted in 1986 before social media existed, allows U.S.-based online service providers to curate or remove content without incurring publisher liability. Specifically, Section 230 of the SCA shields online platforms that host user-generated content from lawsuits based on user posts.¹³ With this in mind, most companies have chosen to regulate content to varying degrees. This system confers tremendous power on content moderators, who control what is shown and who is heard, even as the information environment plays a key role in shaping public opinion.

Curation and collective memory

Several examples illustrate the impact of media on public awareness of mass atrocities, such as the conflict in Darfur, Sudan. In 2006, the genocide in Darfur was front and center in the news, amplified by celebrities like George Clooney, Mia Farrow, Samantha Power, and then-Senator Barack Obama.¹⁴ Organized by the “Save Darfur” campaign, tens of thousands of protestors gathered in Washington, D.C. to pressure the U.S. government to end the systematic targeting of civilians by the Khartoum Government and Janjaweed Arab Militia.¹⁵ However, when the leader of the Janjaweed, Ali Mohammed Ali, was arrested and brought to The Hague to face trial before the International Criminal Court (ICC) in 2020, this significant milestone received minimal mainstream media coverage.¹⁶

Similarly, another campaign related to atrocities in Uganda demonstrated how peer-to-peer information-sharing on the internet can speed up this process. In 2012, Invisible Children launched the “KONY 2012” campaign with a video about Joseph Kony’s use of child soldiers. It became the fastest-spreading viral video in the world.¹⁷ Yet, when Dominic Ongwen, a commander under Kony in the Lord’s Resistance Army, surrendered to the ICC three years later, the millions of YouTube viewers gave it little attention.

Media can heighten public outcries by heavily covering an event, and just as easily silence them by disappearing them from the news cycle. While traditional media such as print and

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television news offer consumers standardized content, social media audiences receive personalized content. For example, YouTube uses “push algorithms” to recommend videos based on a user’s prior online history. These algorithms embed biases into search results based on a user’s behavior and perceived preferences. Social media platforms have the power to turn videos viral through content curation decisions, enabling private companies to support or oppose specific agendas with minimal oversight.¹⁸

Traditional media have always shaped how civilian populations understand war, but the internet and social media are changing the dynamics by skewing what people see and, in doing so, manipulating public perception.¹⁹ Even professional investigators, lawyers, and judges are not immune from the subtle influence of their unique information environment. While the impulse to hide or remove war imagery is understandable and sometimes necessary, it can sanitize warfare and prevent the public from seeing the gruesome reality of armed conflicts. This manipulated media environment masquerades as an accurate reflection of real events, potentially impacting evidence collection by investigators who have not been trained to be aware of and sensitive to the entirely new phenomenon of algorithmic biases when they are performing digital investigations.²⁰

Content removal and retention

Content moderation also includes the removal of content from a platform. The historical and

evidentiary value of social media war documentation is why some human rights organizations ranging from Human Rights Watch to Syrian Archive have been sounding the alarm about automated content removal, which is less discerning and exponentially faster than human review.²¹ Simultaneously, counterterrorism and national security agencies are pressuring social media companies to remove extremist content from platforms.

All companies today are aware of the social media’s role in shaping public opinion, and responsible platforms are trying to be thoughtful of moderating their content. They give less thought, however, to the importance of some of that content for supporting future criminal cases against the perpetrators of war crimes and crimes against humanity. Thus, unless the company receives a timely preservation request from law enforcement, content is often permanently destroyed shortly after its removal.²² Furthermore, such preservation requests provide for a ninety-day hold—often insufficient in years-long criminal investigations.²³

Most social media companies have terms of service prohibiting several categories of content from their platforms, including child pornography and “extremist content.”²⁴ While removing terrorism-related content makes sense from a counterterrorism perspective, it causes problems for war crimes investigators and prosecutors who want to use it as evidence in criminal cases. Several national war crimes units in Europe have successfully prosecuted ISIS members for the war crime of outrages on personal dignity based on “trophy-like” images of beheaded bodies posted to Facebook.²⁵ Without this terrorist content, such cases would be impossible.

Social media companies also voluntarily remove, blur, or add warnings to other categories of content including “hate speech,” “misinformation,” and “disinformation,” which may be identified and removed by human reviewers or algorithms.²⁶ For example, Facebook voluntarily removed content related to Myanmar, where the platform was weaponized to incite violence against the Rohingya minority.²⁷ Some commentators commended Facebook on its removal of inauthentic Burmese accounts, while

noting that the company was far too slow in responding, removing them only years after the atrocities occurred.²⁸ Social media platforms have unintentionally become effective tools for violent movements. The use of Facebook to ignite the Myanmar tinderbox of racial division illustrates the inextricable nature of social media and armed conflicts. While Facebook was not responsible for creating the racist content, its algorithm helped amplify the message.²⁹

Data preservation and privacy rights

The growth in online services has created enormous amounts of data that is collected, stored, and processed by private entities.³⁰ This data can be essential digital evidence in criminal cases, from IP addresses that lead to suspects, or geo-location data that lead to crime scenes.³¹ This is also true in international criminal justice, where commercial satellite imagery may expose mass graves, or online propaganda may establish the intent of a perpetrator to commit genocide.

Data preservation is incredibly important for human rights organizations, academic researchers, historians, law enforcement, and prosecuting authorities.³² If user-generated content is removed before international criminal investigators can identify and preserve it, the investigation becomes dependent on social media companies to voluntarily preserve and disclose such material. The SCA balances the needs of governmental investigators against the privacy of individuals by simultaneously limiting the government's ability to compel service providers to disclose user information and limiting the providers' ability to voluntarily disclose user information to the government.³³ These provisions incorporate Fourth Amendment protections as applied to digital communications.

The preservation of user-generated content and user data raises concerns about the privacy interests potentially affected by preservation, particularly when requested by the government.³⁴ Data retention policies dictate what, when, and how user-generated content or user data is preserved by social media companies.

Upon receiving a preservation request from the government, Facebook, YouTube, and Twitter will copy users' account information as provided for by Section 2703(f) of the SCA.³⁵

Without full and fast-responding cooperation from competent authorities, digital evidence and historical records can be permanently lost. Various national law enforcement and international organizations have agreements with the U.S. government to facilitate mutual legal assistance. However, surveys show that the existing legal framework for cross-border data access is problematic because of the complexity and time required to navigate the procedures. Additionally, these surveys cite the lack of data retention regimes and the volatility of data as a critical problem.³⁶ To ensure preservation of evidence, international criminal investigators must be vested with investigative authority by one or more states, have jurisdiction in the relevant location, and be able to identify evidence to be preserved with specificity.

Privacy laws suggest that preservation interferes with an individual's privacy rights, specifically the right to have one's information *not* preserved indefinitely. Europe has strong privacy and data protection laws that limit how long social media companies can retain data, particularly personal data.³⁷ These protections include the right to be forgotten, which prohibits indefinite retention of personal data. The United States uses a different approach.³⁸ While the EU confers ownership of personal data to individuals, the United States confers ownership to the data processors. These disparate approaches between Europe, the United States, and other countries further complicate data retention.

Digital archives and disclosure obligations

Social media companies like Twitter, Facebook, and YouTube remove illegal content such as child pornography and terrorist propaganda from their platforms and share it with competent authorities,³⁹ such as the National Center for Missing and Exploited Children (NCMEC), a non-profit organization established by the U.S.

Congress in 1984.⁴⁰ Data about extremist content is shared with the Global Internet Forum to Counter Terrorism (GIFCT), a non-profit organization created by Facebook, Microsoft, YouTube and Twitter in 2017.⁴¹ However, cooperation is limited to these specific contexts with no exceptions carved out for core international crimes.

When Facebook de-platformed the Myanmar content, it voluntarily retained it even without a preservation request, but it resists sharing that content with civil litigators, criminal prosecutors, and other interested parties seeking to hold the Myanmar military accountable.⁴² For an ongoing case before the International Court of Justice, The Gambia is using U.S. courts to request disclosure of de-platformed content from Facebook pursuant to 28 U.S.C. § 1782. The Gambia alleges that the requested content establishes the hard-to-prove element of “genocidal intent,” which is key to its case against Myanmar for violating the Convention on the Prevention and Punishment of Genocide. Facebook is fighting this disclosure, arguing that the SCA and user privacy prohibits it from cooperating.⁴³ While this stance is lauded by privacy advocates, it frustrates those who see accountability for genocide as the paramount goal.⁴⁴

International investigators at institutions like the ICC and the Independent Investigative Mechanism for Myanmar could argue that they should be considered as government actors under the SCA,⁴⁵ while non-governmental entities could argue that the Fourth Amendment does not apply to them at all. However, the SCA limits companies’ voluntary disclosure generally. If an exception were to be carved out for war crimes investigators, determining the definitional lines of who qualifies in this category becomes a thorny issue to navigate.

Impact on international criminal investigations

In the name of public safety and national security, social media companies attempt to police their platforms. Currently, such censorship has unintentionally thwarted international criminal

investigations by removing relevant and probative content before investigators can identify and preserve it.⁴⁶ Content curation distorts the information environment, complicating efforts to find relevant and probative evidence, while content removal impacts the availability of documentation to investigators who lack the police power to compel companies to share the removed content. Content removal and curation decisions are difficult to audit or challenge, particularly when proprietary algorithms are used.⁴⁷

Unlike national law enforcement with subpoena power, however, international courts and investigative mechanisms lack the legal authority to compel social media companies to preserve and disclose user-generated content or user data.⁴⁸ Instead, these entities are dependent on the legal assistance of the host state, which, in the case of Facebook, Twitter and YouTube, is the United States.

Conflicts between different national laws and the lack of clarity regarding preservation and disclosure obligations should be remedied to ensure the preservation of social media evidence, and adequate technical and human resources must be dedicated to ensuring a more efficient cross-border data sharing process. Therefore, adequately addressing the preservation and access problem will likely require overhauling the current system of international cooperation and mutual legal assistance.⁴⁹

Potential policy and legislative reform

The problem will worsen without reform and rethinking of the international justice system, consisting of both national law and international law. Social media companies, their users, and law enforcement have all recognized the need for the adoption of amendments to existing laws that follow a new approach adapted to digital specifics.⁵⁰ If intergovernmental organizations with investigative mandates were recognized as competent authorities, they could more effectively preserve and compel evidence from service providers.

Online content moderation is complicated, since regulating content raises freedom of speech, freedom of expression, and access to information concerns. Meanwhile, failing to moderate can undermine public safety, national security, and the right to privacy. However, social media companies can do more to mitigate harms and protect rights. The Myanmar example demonstrates the importance of hiring staff with language skills and cultural knowledge, and the value in moving into new markets slowly and only after proper due diligence. In the short term, social media companies should dedicate substantially more human and financial resources to content moderation, which requires thoughtful and context-specific analysis by individuals who are well-trained, well-informed about local culture, and fluent in relevant languages.⁵¹

However, decisions should not be left to the discretion of companies alone. Many issues could be addressed through reform of the SCA. Clearly articulated government regulations on content moderation will provide much needed transparency and consistency across platforms. Carving out narrow exceptions for potential evidence of mass atrocities should mitigate privacy concerns. Thus, national legislation in the United States to regulate social media companies and to create mechanisms for preserving evidence of war crimes is a necessary and urgent next step. The storage of digital information is not free, but so-called “Digital Lockers” for archiving social media evidence of atrocity crimes, as described by the Human Rights Center at UC Berkeley, create a model way in which states and companies can safeguard evidence for future prosecution.

Finally, social media companies should work with governments and intergovernmental organizations like the UN to develop a filtering mechanism that protects the average social media platform user from harmful, disturbing, pornographic, violent, or criminal material, but preserves potential evidence of international crimes in protected corners of cyberspace for the use of law enforcement agencies and criminal investigators.

Conclusion

Not by intention, but as a consequence of their architecture, social media platforms like Facebook, Twitter, and YouTube have become de facto evidence storage lockers for war documentation. When social media companies remove content and fail to retain it, important evidence of war crimes and human rights violations may be lost forever. This loss impairs the ability of international criminal investigators to establish the truth and hold perpetrators accountable.

The ability to moderate content has conferred immense power on social media companies, who have come to view themselves in some ways as states, while lacking the oversight which holds real state governments accountable.⁵² Leaving to private actors the responsibility to ensure an accurate historical record of events, a record which contains the potential for holding perpetrators accountable for crimes committed during armed conflicts, troublingly complicates efforts to end human rights abuse and to pursue justice around the world.

The unprecedented power that social media companies presently possess in controlling the flow of information from conflict zones to courtrooms creates an urgent need for legal reforms and revised regulations regarding these companies to ensure that critical evidence of the world’s gravest crimes is not lost.

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