

Alexa Koenig: So my name is Alexa Koenig, and I'm the executive director of the Human Rights Center at UC Berkeley School of Law where I'm also a lecturer-in-residence in Law and Legal Studies. I'm also the co-founder of the Human Rights Investigations Lab, which trains both professionals and students from across disciplines on how to use social media and other online public sources to figure out what's happening in the world of war crimes and human rights abuses and help get that information out to human rights advocates and human rights lawyers who can potentially do something with that information. I'm also the co-chair of the Global Future Council on Human Rights and Technology at the World Economic Forum. And I'm also a member of the American Association for the Advancement of Sciences Committee on Scientific Freedom and Responsibility.

Q: TK

AK: So the reason I started the lab with a colleague back in 2016 was we had been working through the Human Rights Center helping institutions like the International Criminal Court figure out why so many war crimes cases were falling apart at relatively early stages of prosecution. And in the case of the ICC, we sent a PhD student in history to visit with the ICC for the summer and she went through all the courts filings and she came back and said, look, what the judges are saying is that there are two problems. The first is that the ICC's Office of the Prosecutor is over-relying on NGO reports as a form of evidence and the judges are basically saying that that's not evidence, that's secondary reporting and you need to go get your own information.

The second thing that they were saying, and that was the bigger deal in many ways, was that the prosecutors were over-relying on witness testimonies, and while these stories from survivors are always going to be at the heart of any successful prosecution, they weren't bringing in corroborating information that could potentially shore up these stories and help keep it from being a he-said/he-said or he-said/she-said type of situation.

In addition, because there wasn't corroborating information, a lot of the survivors were being terrorized and terrified into not showing up at all, if there was a low likelihood their case would go forward and that the perpetrator might walk free and ultimately try and get some kind of revenge for what the survivors were doing and saying. So one of the things that we began doing at the Human Rights Center was hosting a series of workshops for the office of the prosecutor and different international investigators to figure out how new forms of documentation were becoming available that could be used to corroborate what survivors had said was going on in their home communities.

The first workshop that we hosted was back in 2012. We brought together people who were working with satellite imagery and other remote sensing mechanisms, people who were just beginning to figure out how smartphones could be harnessed to gather videos and photographs that would help document what was taking place, people who were working with new forms of data analytics, who could shed insight on patterns of behavior, etc.

The first day of the workshop, I think the investigators and prosecutors were probably a little bit wary of what we were doing but by the second day we had investigators lining the walls trying to see some of these new techniques for talking about or documenting what was happening in the world. From that we were told by the office of the prosecutor and others who were present that it would be really helpful to do one specifically on digital information. The first one had been shaped around science and technology, but they really wanted to understand how social media in particular could be useful to building cases. So there were two workshops that we then hosted, one that I pulled together with someone from Yahoo, and also with someone from an organization called Videre est Credere, in San Francisco in 2014 . Videre manufactures hidden cameras and trains people to take video for human rights related purposes. What I particularly respect about them is that they're very good on the physical security side.

The NSA scandal had hit a couple of months before, like right after I started organizing it but before the actual conversation. And I think there was an understandable wariness about engaging directly with anything that could be perceived of as a law enforcement body. And while the International Criminal Court is not a government actor and it's not law enforcement and has no arrest authority, etc., I think that there was an understandable hesitation without a legal framework in place to figure out how you best move forward.

One of the big takeaways from that conversation was we realized we could acquire information ourselves if we just knew how to use the platform's advanced search functionalities. So a big piece of what we began doing at the center is figuring out who'd gotten really good at combing social media for information and being able to find those needles in the haystack that could be complementary to what survivors were telling us. We began to see if we could systematize some of how we comb social media for potential evidence. Also, we began to see if we could improve the sharing of information between human rights organizations and groups like the International Criminal Court that were going after legal accountability in courts of law that would be complementary to what a lot of the big NGOs were doing to bring attention to these different crises.

We also helped the International Criminal Court set up a technology advisory board. We realized that not many people were trained in these different methods of searching the internet and that it would be probably a really good idea to build up a workforce of people who are trained in 21st century methods for sourcing information.

And from the outset I was really interested in making sure that it was a cross-disciplinary effort and wasn't confined to just students in a law school or just computer science students or investigative reporting students because I was really hopeful that we could create some kind of an environment on the Berkeley campus where people could be learning from each other and experimenting and exploring new methods of information collection. And there was an overwhelming demand from students on campus to be part of something like that.

We've also been working with the social media companies about the human rights implications of the kinds of content that they have on their platforms and how that's playing out in practice. So I know for the Human Rights Center as well as many of our partners, we've been trying to help give them new insights and encourage engagement with some of the challenges that have arisen, particularly over the last few years. And to let them know how some of the activities that they're doing to try and combat terrorism or to try and respect privacy, which are obviously interests that we hold as well, can be problematic for a lot of activists on the ground.

Q: TK

AK: One already really well publicized example would be the takedown of content from YouTube and the closing of different channels of information. The Syrian Archive based in Berlin is an organization that aggregates information from activists on the ground in Syria, many of whom are sharing information about what's happening in Syria over channels like YouTube. And I think one of the challenges has been that a lot of people are risking their lives to get information out of different countries like Syria. When those channels get shut down and that information becomes unavailable, it is very difficult to get those stories into the hands of people who are trying to do something about what is taking place.

AK: Some of the conversations with the social media companies have been letting them know that there may be alternatives to just shutting down channels. That some of the choices that they're making about which channels to shut down have been problematic. Sometimes they're not because people are trying to share propaganda but they're because activists are really legitimately trying to use their channel as a lifeline to the outside world. And, you know, I think one of the things we've had long conversations with them about is, you know, can you have a white list? And even recognizing that a whitelist in itself can be problematic because it obviously means that you're still going to be missing a lot important uses of that platform for human rights purposes. It's at least a starting place, though, when the same channels don't get shut down over and over again. The company recognizes that they actually have legitimate purposes that don't necessarily violate terms of service or community guidelines.

Q: TK

AK: There's much more awareness now than there was back in 2014, 2015 that activists are paying close attention to what happens with these takedowns. There's a growing understanding that this information does have value for international justice and accountability. One case that we were able to bring to attention was we had an individual who was roaming free, committing extra-judicial killings. When we were trying to get arrest warrants out for this individual, the company that we were talking with was really struggling to figure out how they could identify the kinds of content that was going up on their platforms that could have utility to actually become the basis for a warrant of arrest.

But the challenge is pretty acute. I appreciate the sensitivity on their part to trying to develop new systems and processes for detecting information that might have war crimes value and making sure that it's accessible to people who need that information. That said, it's been a very slow process, and I am concerned that if the solution is predominantly technologically driven, there's going to be major limitations to it. One of the learning curve pieces has been trying to help people understand what kinds of content can add value for war crimes prosecutions. And it's not always the images of the beheading itself or the killing itself, it may be of two people who are having coffee together and you can actually establish that they knew each other or it may be something that's a piece of aerial footage that helps us to understand where there might be mass grave sites, etc. And that's harder to detect by algorithm because it's just not consistent and it's not as easy to code for.

Q: TK

AK: The question is, are there rules? There are and there are not. And I think one of the issues that the global communities are struggling with at the moment is there is a real push to make sure there are rules and that people know what they are and we understand how they apply. There's been a lot of struggle over the past five or six years to figure out which existing laws currently are relevant to takedowns and information going up on social media platforms. And there's not a lot of consensus on that front.

So, for example, back at RightsCon in like 2014, I remember being in conversations around the multilateral assistance treaties, the legal process whereby state governments share information with other state governments when they're going after someone for whom there's a warrant of arrest. And I remember raising my hand and saying, well, what about the International Criminal Court or these international bodies when they need to get the same kinds of information from social media companies? And everyone looked at me blankly. I thought back then it was me who just didn't understand and was naive. Now I understand that nobody understood and everybody was naive. There was a whole new generation of information-sharing that needed to happen, but there was no infrastructure to actually understand what that could look like.

I do think what we're seeing now is a bunch of different kinds of interests in the space and different governments creating sets of laws and it's becoming very piecemeal and haphazard. So looking at, for example, the GDPR, the new privacy regulations in Europe, and the fact that those relate to Europe but not to the rest of the world. The GDPR is setting privacy standards and rules around what has to be taken down, how information and data have to be handled, that other countries may not have to follow, particularly companies that are based here in the United States. And yet at the same time, I do think the European rules, which are the most stringent, are going to set the standard in ways that are helpful in some aspects but really unhelpful in others.

Watching the maturation of social media in general, I think there's a growing argument that there should be more legal accountability today than there was when these

companies were just starting out and we - and they - didn't really understand the span of their impact. I think a fundamental concept in legal practice is that you always have two pieces to legal accountability. The prosecutor or lawyer is going to have to prove the physical act, that there was an actual violation of some rule. And then second, they also have to prove what's called the mens rea, which is the ideas in the person's head who did the wrong or is alleged to have done the wrong. You have to show that they had either criminal intent or that they were reckless in their behavior.

10, 15 years ago you probably couldn't say that there was even an awareness of this on the part of social media companies. If you were outside of a strict liability standard whereby someone just does something wrong and they're going to be liable regardless, you had no way to actually go after them. Now I think there is a growing argument that they increasingly knew or should have known about how their platforms were and are being used for nefarious purposes and there should be some kind of accountability framework for reigning that in, particularly because the companies have such a monopoly on the sharing of information over certain kinds of channels. And you know, I think we need to make sure that those places are as safe as possible.

Q: TK

AK: The basic premise that we want to give more control to the individual user or citizen on a platform is laudable and it's certainly one that many human rights activists would stand behind. That said, I think it can also be used as a tool to control access to information in ways that could be problematic. I think it also can place an undue burden on smaller organizations that maybe don't have the same kind of resources for handling data in the ways that the GDPR was designed to.

There are really strict regulations that if you're going to grab information and hold people's data, you have to adhere to certain responsibilities for either preserving that data throughout its lifecycle or shutting it down in certain kinds of ways. Well, not every NGO is going to be around forever, and there's a lot of untested, unclear areas where it could become unduly prohibitive for smaller human rights groups to comply with GDPR and still use information in ways that are socially beneficial.

Q: TK

AK: There's an understanding that people have an overwhelming need to have their stories told and to tell the stories of their loved ones who may no longer be around and to make sure that there's some form of either social or legal accountability. Some of the challenges with the legal justice side of things is that often legal cases are extraordinarily expensive to prosecute. And so it's usually only going to be a tiny handful of very symbolic cases that actually wind their way through courts. Even then war crimes cases are especially hard to investigate and to ultimately prosecute because a lot of times what you're doing as a legal investigator is you're trying to get information from a third country that maybe very hostile to the information you're trying to source.

There's often long temporal delays, so you might not be able to get on the ground until years after the conflict, and because it's a conflict setting many of the records you may need have probably been destroyed or somebody made off with them at that point. And that's one of the reasons why, not to get to back into this but some of the remote documentation work that's happening now has become really important. It's a way of accessing places that are otherwise inaccessible.

For truth and justice, one of the things that we've done over the decades at the Human Rights Center is a lot of interviewing of witnesses and what are called victim participants at the International Criminal Court. Those are people who are participating in the court cases by filling out a form and saying that they were impacted by whatever crime is under the jurisdiction of that court. We've asked them what is it that you want out of this process and what would justice look like to you? And what we hear repeatedly is that people really want to tell their stories. They want to know that someone in some official capacity has heard what they've suffered or their family members have suffered. Ideally they'd like some form of reparation as well. Particularly in lower income countries, a lot of times that's a monetary thing. Like they want their house that's been destroyed, they want to be able to rebuild it, or they want their children to be able to go to school and get an education. And they see that as what justice would be for the horrible things that they've experienced.

Now, I think there's been a lot of conversation in the truth and justice community about whether legal accountability may not be the best use of time and money if what people want is to be heard. And one of the interesting things is there was a lot of debate when the International Criminal Court was being set up about how every victim would probably want their day in court. Well, it turns out, at least according to the interviews that we did, that's not necessarily the case. Many survivors didn't want to travel all the way to the Hague, thousands of miles from their home and be around people who were potentially hostile to them. They appreciated the ability to fill out that form and tell their story and know it was going somewhere and become part of the official record.

With truth and reconciliation committees, you can look at places like South Africa, which I think arguably has what's considered one of the more successful examples in the wake of apartheid of having people be able to tell their stories. For people who were on the side of perpetrating abuses against others, for them to be held to task publicly for what they've committed. I think the challenge with those though is a lot of times today when you see truth and reconciliation committees being set up, there's a trading of immunities for telling your story. So there's a deal struck whereby you admit the horrible things that you did and we're not going to prosecute you.

For a lot of survivors, they don't feel that that's a fair deal, that you get to tell what you did and it comes to light that this person, you know, destroyed your community or your family and suddenly they're walking around free. There have been some really interesting examples too from like Rwanda where there was a real push to document who had perpetrated human rights abuses against other individuals, like killed their family member or raped them, and try and show some kind of reconciliation, showing

some degree of forgiveness. And I think there was arguably a degree of theater involved, trying to show the international community that people could get along. But if you interviewed a lot of the victims privately, they didn't necessarily feel that they had gotten out of this process what maybe they needed to have happen.

Q: TK

AK: I think what people want is they want to know that the perpetrator has genuine remorse and not as part of the bargain of letting people not go to jail. It's like if they are going to suffer and they're truly regretting what they did, that's one thing. But if it's really just sort of a logical deduction on their part, I'm going to spend no time in prison if I go ahead and admit to what I did, then it seems like they may be getting a really good deal on the process and may have zero remorse, but they're seeing it as something pragmatic to do and I think that's deeply unfulfilling.

The other challenge is that I think a lot of the truth and reconciliation committees that have been set up have problems--like what I was hearing about the one in Canada around Native American children and going to boarding schools. One of our fellows who was present for some of the hearing said it felt very one-sided, that Native American individuals were going up and talking about the horrific things that they had experienced. And then a lot of the non-Native individuals really weren't talking about their role in injustice, so it was almost like a parading of you know, a parade of terrible happenings. but there was no coming together to try and fix those terrible things. If anything, it almost felt like further exploitation of those nightmares. And I think that's something that's been very difficult to avoid in some of these instances.

Q: TK

AK: Yeah, I mean, I think that sometimes it's so contextual. So the first question would be truth and reconciliation for whom? Like are we talking about for the majority population to, you know, kind of assuage their own guilt or explore their own responsibility historically in what's happened? Are we talking about what's happened with Native Americans and genocide? Are we talking about slavery? Are we talking about gender? You know, I think that there are appropriate ways to engage in these issues that really can differ based on context and the temporal and geographic issues that come into it. Is the United States' population mature enough really deal with these things responsibly? It's not easy to have reconciliation or to even get at truth. Do we have a population that has the skills to discuss these kinds of super sensitive issues respectfully? Do we even train an entire generation how to listen to other people? And I would argue that right now, maybe we're not that great at doing that unfortunately.

I think we'd have to recommit to art, to history, philosophy, to some of the humanities, different disciplines that really are about deeply engaging with thoughts and ideas and relationships. Trauma is not linear in terms of how it unfolds or how people process it. The arts are really important for helping people explore how to even express what it is that they've experienced, which is sometimes divorced from words. One of the cruelties that legal practice does is it forces people to reduce the traumas they've experienced to

a chronological narrative that can be understood by outsiders who haven't experienced anything along those lines. And that often leaves people feeling very frustrated and unheard because so much of what they're trying to communicate just doesn't fit into that format.

Q: TK

AK: I think there's a couple of challenges. One's that if you're going to have truth and reconciliation there's a tremendous amount of trust that's required for people to be open and vulnerable. And there's also a lot of issues around control that play out over social media. So in the beginning, in a kind of idealistic phase, people were willing to trust that the platforms were in this to help people communicate and share their stories in really powerful and impactful ways. There was sort of a giddy, heady period of exploring what that could look like. These were personal sites of expression. And I do think that as there's been this move to monetize a lot of these platforms, there's been this growing recognition that actually you have very little control over your own data and your own site, who sees it is now being controlled by algorithm, by the corporation and not by you and your pool of friends in your broader community, and you have to play by their rules and play their game in order to game a system, which ultimately feels somewhat adversarial in its nature.

And I think there's a growing distrust of the companies that they're not just in it for money and that they won't kind of sell your soul for the profits that they can reap. Because of that shift in perception, it's very hard to use digital technologies right now to get at something that can be healing for the populations that would use them. Now if we could return some degree of control to individuals and if we could return some degree of trust to these ecosystems, then perhaps these could become mechanisms for telling stories in really impactful ways.

I worked on a project called Witness to Guantanamo where we interviewed men who had been detained in Guantanamo as soon as they were released to create an archive of videos of their stories. One reason it was set up was so that they would hopefully stop being interviewed by so many reporters and so many lawyers and having to tell their stories over and over and having that be such an exploitative system. And yet I think the pragmatic realities on the ground ended up being, you know, it's like who's going to have access to that data? Who's going to hold the data? And it became more about the pragmatics of it than the actual work of making sure people had a voice. And I think that happens so quickly in the day-to-day realities of how expensive and time consuming and powerful these platforms are, that we...it's very hard to have the spaces of vulnerability and trust that you need.

Q: TK

AK: There's the pragmatic realities of if 6,000 tweets are going out every second and 500 hours of video are going up to YouTube every minute, how do we find the stuff that's relevant and the bits that should be speaking to each other to tell that coherent story?

Q: TK

AK: I've always thought that journalists and lawyers make for very good bedfellows. I think that we all deal in facts and we're all trying to get stories out. We're trying to get atrocities to stop and we're trying to bring attention to under-recognized areas of pain and help to figure out how to heal them. But with witnesses, one of the challenges is that reporters swoop in at a human rights violation or atrocity and they start interviewing the witnesses, the individuals who've been part of that ecosystem. From a legal accountability perspective, that's a disaster because you want the people who've seen the most "legally important" bits of a horrific crime to be the ones who can be your witnesses and get up on a stand and tell the world what happened. But if they've been interviewed by every major newspaper and magazine before that, there are so many opportunities for them to perjure themselves or to be inconsistent and ultimately discredited on the stand. In some ways they're doing themselves a disservice if what they ultimately desire is legal accountability and not just telling the world what happened.

So one of the things we have long struggled with is how do we get reporters and legal practitioners working more in a more coordinated fashion to make sure that those witnesses who have stories to tell that are helpful for legal accountability are protected and are able to fulfill that function if they choose to do so. In terms of accountability, even if only a few symbolic cases ever go all the way, you're still putting warlords and others on notice that people are paying attention, which arguably may have some degree of deterrence effect in terms of further perpetration.

There's a guy named Malcolm Feeley who works at Berkeley, and he has a saying: the process is the punishment. That a lot of times, even when you can't get a conviction in a court of law, the fact that the world shrinks for the individual for whom an arrest warrant is out, can be, in itself, the punishment. al-Bashir of Sudan has had a warrant of arrest out from the ICC for quite some time. And while he's particularly notable for traveling around largely with impunity, there's a growing number of countries who are not tolerating his presence and where there are people waiting to arrest him the second he lands on that sovereign territory. There's a lot of calls by activists when he travels from country to country to arrest him immediately when he hits the ground. So he's got to always be watching out for that.

Same thing with the Bush Six. There were a number of cases filed in Spain some time ago for the allegations of torture at Abu Ghraib and elsewhere. And there was a moment of reckoning for some of the Bush administration when they were flying to some of the European countries where human rights lawyers had been filing cases furiously, trying to make sure that these individuals were arrested as soon as they landed. And of course it changed some of their plans, for the conversations that they can be part of, the different events they can go to. That might seem minor but in the big picture it is helping to strengthen the global community's understanding that there are consequences to actions, even if they're not always satisfying.

Q: TK

AK There's a three bucket system I usually talk about when you're setting up any kind of an ecosystem where you're trying to gather information for accountability. You need to have the physical security parts in place, the cybersecurity parts in place, the psychosocial resilience components in place, and have them all working together.

Q: TK

AK: The last thing I would say is if you're looking at the role of digital technologies and their ability to help with truth and reconciliation, I think one of the challenges that I've been trying to think through more critically is how turning towards digital mechanisms potentially spotlights certain individuals and certain atrocities over certain other individuals and certain other atrocities. So like a prime example would be chemical weapons attacks might be relatively easy to photograph in terms of the aftermath and the suffering of individuals, rape far less so and far less likely to be captured on film. Already difficult cases to prosecute or get justice for are going to become even harder to ultimately get global attention for than the ones that lend themselves to more visual imagery.

There's also the gendered nature of digital technology and the fact that in so many countries it's men who have access to cell phones and not women. And then of course there's the differential and especially hostile treatment of women when they do speak out online. What does that mean for who we get justice for going forward? I think that's a radically under-explored area of thinking through the future of justice.