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SHIFTING THE PARADIGM—BRINGING TO JUSTICE THOSE WHO COMMIT HUMAN RIGHTS ATROCITIES

*Mark S. Ellis*¹

MICHAEL SCHARF: Good afternoon, everybody. For those of you who are new to our events, I am interim Dean Michael Scharf, and I am also the Director of the Cox International Law Center. And on behalf of the faculty and the staff and the students of our great law school, we welcome you to the 2014 Klatsky seminar on human rights.

Now, the Cox Center actually was created in 1991 with a \$4 million-dollar endowment, but our human rights program got kicked off in 2001, ten years later, when one of our trustees of the university, Bruce Klatsky, very generously gave us a very nice endowment that goes to send two students every summer to human rights watch. And he also is on the board of trustees there and got us these permanent slots for our students, and this has launched some of our students on amazing careers in human rights, and the rest of the money goes to this endowed lecture series. And over the years, we have had some amazing people give this lecture and no more amazing than the person we are going to have today.

But some of you know, have been here over the years, you know last year we had Harold Koh, who was the former State Department legal adviser. We have had Samantha Power, who had just won her Pulitzer Prize, and it was years before she ever became our U.S. representative to the United Nations. We have had Navi Pillay, the High Commissioner for Human Rights. And it has really been a field of super stars that have come to Cleveland for the Klatsky lecture, and so today's speaker is right up there.

This is Mark Ellis. He is the Executive Director of the International Bar Association. I met him twenty years ago when he was the Inaugural Creator of the American Bar Association, CEELI program, and that stands for Central European and Eurasian Law

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1. Mark Ellis is the Executive Director of the International Bar Association (IBA). Prior to his work at the IBA, Mr. Ellis was the first director of the Central European and Eurasian Law Initiative of the American Bar Association, which provided technical legal assistance to states of the former Eastern Bloc and Soviet Union, as well as to the International Criminal Tribunal for the Former Yugoslavia (ICTY). Mr. Ellis served as the Legal Adviser to the Independent International Commission on Kosovo and advised the establishment of the Serbian War Crimes Tribunal. Mr. Ellis has also advised the defense counsels for the ICTY, the International Criminal Tribunal for Rwanda, and the Extraordinary Chambers in the Courts of Cambodia, where he directly advised the defense team of Nuon Chea.

Initiative.² That has since been morphed into a larger project of the American Bar Association, including its ROLI, its Rule of Law Initiative.³ And we have several of our alumni that are now working in the organizations that Mark started. Mark also started an organization called ILAC, the International Legal Assistance Consortium, and he is just one of those people who creates institutions that last the test of time and does good things around the world.⁴ And meanwhile, when he has time, he hop scotches around the world himself, and he is involved in transitional justice and fighting war crimes, doing—I guess you were the legal adviser to the Kosovo Commission, so the whole country of Kosovo, in part, owes its existence to Mark and his colleagues' work, and he has just done amazing things.

Well, today, he is going to be telling you about something brand new. He is actually launching it. This is the first public time anybody will hear about this, and there are some audio videos he will be sharing with you, so you are in for a real treat. Please join me in welcoming Mark Ellis, our Klatsky lecturer.

(Applause)

MARK ELLIS: Michael, thank you very much. It is a little intimidating, Harold Koh, Samantha Power, I am not any of those people. I assure you that's your A list group, but I am honored to be here. I am honored to be here primarily because in my previous visits here I have come to really appreciate and admire this institution and this law school. It is quite remarkable. You have a great reputation internationally. I have had the pleasure of working with a number of students over the years, and so it is always a pleasure to come back here and to be here at this institution. Michael Scharf, who is one of the greats in international law and is recognized worldwide, the friendship that we have had for all these many years has been something that I have treasured. So again, it is wonderful to be here.

I apologize in advance because, as Michael says, I have tried to put together a combination of a power point with embedded videos. I have never done either of those, so I am experimenting with this. But I felt when I came here my office said, well, this is a great opportunity to honk your new book, and I said "no, that would be quite boring to

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2. *See generally Rule of Law Initiative: Europe & Eurasia*, AM. BAR ASS'N, http://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia.html (last visited Apr. 9, 2015).
 3. *See generally ABA Rule of Law Initiative*, AM. BAR ASS'N, http://www.americanbar.org/advocacy/rule_of_law.html (last visited Apr. 9, 2015).
 4. *See ILAC Council*, INT'L L. ASSIST. CONSOR., <http://www.ilacnet.org/about-2/all-individuals-lista-excerpts/> (last visited Apr. 9, 2015).

do. I want to do something a little bit different,” which I hope you will generally enjoy. It is really going to be up to you to engage in this conversation. I am going to lay out this project on the pictorial evidence and human rights violations, and then, hopefully, we can have a bit of a dialogue on this.

About three years ago, I was asked by a television TV station in London called Channel 4—it is an investigative channel⁵—to look at some videos, and these videos were taken during the Civil War in Sri Lanka, and the videos are quite graphic. They were quite graphic. In fact, I have embedded some of those in here. I have kept the most graphic videos out, but I wanted to warn you about what I will show you. They asked me to come in and review these videos and to see whether or not I felt war crimes had been committed. So I reviewed those, and my answer was, yes, they were certainly evidence of war crime.

And then what surprised me is, that week when they put it on air, the first thing they said—this is again three and-a-half years ago—we cannot verify these videos. We cannot authenticate what you are about to see. And in fact, it went so far as to say if any of you, the public, have any knowledge of these videos, we would like to know. And I thought, well, now, that’s odd because that video undoubtedly raised the consciousness of those who watched it about some horrendous crimes that were being committed. But in regards to whether or not that video could be used as evidence to bring to justice those individuals who had committed the crimes, the answer was actually not.

So it got me thinking. Well, maybe there is a solution to this problem. And that led me to think with social media, I mean, the use of social media because that’s what this was, it was just a video that was sent in to this Channel 4. And then later on, as I was watching, interacting with CNN and BBC, as other videos were being used, the same thing was happening, can’t authenticate it, can’t verify it, and therefore, for me, what was the use of that? And the idea, then, was to say, well, could we create something that, in essence, answered those questions, and that made those videos relevant as evidence in war crimes prosecutions? And that’s what we started to work on, and let me start with just this introductory piece of video, and then we will see.

(Video clip is played)

5. *Sri Lanka’s Killing Fields*, CHANNEL 4 PROGRAMME INFO. (May 30, 2011), <http://www.channel4.com/info/press/programme-information/sri-lankas-killing-fields>.

MARK ELLIS: So the idea here is that you have the growth of citizen videos. All of you is much younger than I am recognize this, you use it, you see it, you see it on YouTube. The growth of the use of citizen journalism is quite astounding. There are reasons for that actually. Mainline media is no longer engaged in these environments. The liability is too great for them. So you have freelance journalists doing this, or you have citizens doing that. That's where we are. Every single video that I showed you there—and there is many more—was videos that I was asked to review, many more actually too graphic to show, but all of those were sent in to either Channel 4, CNN, BBC. And so they were giving them to them, but as you noted, they were not able to be used in any way other than being shown on YouTube. So the idea of what this is about is to be able to use videos generally

It is not as if it has never been done in the International Criminal Court for Yugoslavia⁶ or for Rwanda⁷ or for the ICC⁸, and it is used primarily for these reasons, at the trial in the sense of showing conduct or context or just knowledge of what was going on, knowledge of individuals that should have known but they didn't do anything to stop those atrocities. The threshold determination, this was something used in Sudan.⁹

Gravity is always a big issue in war crimes tribunals, particularly the International Criminal Court because they won't engage with any cases unless it meets this gravity.¹⁰ So, of course, videos can be very strong in showing that, in fact, it has reached that level. And investigations, this is one of the most important areas, I think, and that is something that we don't know about yet. Some of those videos actually were sent to—well, they were brought to an investigative journalist who came to me and did a documentary that was shown three weeks ago, and it was a similar situation. But this had to do with Nigeria and Nigerian government perpetrating crimes against

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6. *Radislav Krstic Becomes the First Person to Be Convicted of Genocide at the ICTY and Is Sentenced to 46 Years Imprisonment*, INT'L CRIM. TRIB. FOR FMR. YUGO. (Aug. 2, 2001), <http://www.icty.org/sid/7964>.
 7. Laura-Liisa Laving, *The Reliability of Open Source Evidence in the International Criminal Court* (SPRING 2014) (unpublished international human rights law thesis, Lund University), available at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordOID=4457910&fileOID=4457912>.
 8. Mike Corder, *Defense Lawyer Says Witnesses Lied at ICC Trial*, ASSOC. PRESS (Aug. 26, 2011, 11:25 AM), <http://www.utsandiego.com/news/2011/aug/26/defense-lawyer-says-witnesses-lied-at-icc-trial/>.
 9. Susana SáCouto & Katherine A. Cleary, *The Gravity Threshold of the International Criminal Court*, 23 AM. J. INT'L L. 807, 810 (2008).
 10. *Id.* at 823-26.

citizens. It had never been seen before, so that would have been an example of where those videos, if they could be authenticated, if they could be verified, could be the answer to, at least, the initial investigation that a court would be asked to do, the admissibility standards for videos for something that became quite important.

And this is where we decided we would go and speak to the International Criminal Court, to all the regional tribunals, and we conducted a research project also with DLA Piper out of its Washington office to assist us in going through all the evidentiary requirements. We wanted to know what is required to accept pictorial evidence, to accept one of those videos without having the chain of custody. So if Dean Scharf was out in the field and he was taking that video, then if he was not available, we didn't even know who he was, if he sent us that video, could that video be used in a court of law, and this is what we came up with, the admissibility standards of relevance. The reliability is probably the most important in the sense the ability to be able to authenticate it, its significance, the issue of ensuring it is not unfair, prejudice as well.

So we started looking at what those admissibility standards were, and why did we look at it? Because if we were going to build this app, then the app had to answer and had to ensure that we could tick those boxes on that. So the reliability was—the heart of that was authenticity. Just as you listened to the CNN-BBC commentator say we cannot verify this, we can't authenticate it, to authenticate the videos, you have to deal with the originality of it, the integrity, and the date and location. Those were generally what we were told in our meetings with the criminal war crimes courts. That for them was absolutely crucial. And so the court would look at when it happened, where it was shot, exactly where it was shot, the video. And it has to bring that altogether in order to build up this question of, is this video authentic? The other areas that we looked at and that we felt we had to do was whether or not the source was biased. Was there any bias to presenting the videos? Was it automatically generated, and this became the key to us.

We would have to create something that, in essence, focused on the video itself, not on who was taking it but of the act itself. But the court would always be looking at this. Was it contemporaneous to the event itself? So the longer the period was between the time the video was taken and between the time it was presented to court, the more problematic that would be. It wouldn't mean it would never be used, but these are all issues that the court would weigh.

What's the purpose? Was it for propaganda purposes that it was being used or was it, in essence, just a citizen journalist or an investigative journalist or somebody in the public just filming the event itself, and that way that would be the crucial point, whether the information can be independently verified and tested, and this gets to the issue of focusing on the app itself, on the video itself.

Can you show that it can be verified without the chain of custody? And so what does that require us to do? It requires us to embed in meta data all of these points into the app itself because right now digital evidence that is—this is what it has to do. You have to go and they have to see, the version, they have to have the original version, who filmed it, the date, and the location. It is a forensic process now that is used for any video that you want to use for a court. They have to be certain with that, and that takes a lot of time. And oftentimes, it will get you nowhere, and that's why when they show you those videos in the end, they can't, CNN or BBC, they can't answer that question, and certainly, a court is not going to be able to answer that question. And without that, then the video stops being relevant at all in a court process. But that's the current point, but what happens if you could take all of that information and embed it in the app so that when that video is sent all those questions are asked or answered?

Another person that we went to at the beginning of this process was Justice Richard Goldstone. I believe he has also been here lecturing a number of times. And we wanted to get his sense of this as well, so we brought him in as a consultant early on, and we felt that this is—the degree of credibility—listen to him about what he is talking about concerning evidentiary footage, videos, about what it would have meant back in his days, in the Yugoslav days.

(Video clip played)

MARK ELLIS: So once we had that and talked and felt that we went through the process of getting a sense of what we needed in the app, we then started to build the app. And the app here—and I have it on this fairly large Android here, so I will try to show you on this as well at times, but let me just walk you through because, particularly for the younger students, to get your sense on that, too. So it is installed. It will be—anyone will be able to install it. It will be installed—we are using Android now, phones now, and the reason is, it was easier at the time we started designing it to put it in the Android, although we will be able to design it for the iPhone. But most important it was felt to us that the Android, that's the phone that is being used in the areas that we are interested in. It is not iPhones in Syria, it is Androids, and so that's why we designed it that way. So you use this as well. And once you download it, you begin the process of setting up and creating a signature on this, including—and this was interesting. When I downloaded it on this device, this device health check gave me an X on the time and date. I said “well, that's funny.” I stole it from my son who won it, but I said that he had an Android, and I said I needed to use it.

But the time and date had never correctly been set. And so it was interesting that the app, the software immediately noted that and would not allow me to download the app, the software, until I fixed that part of it. Then the encryption is crucial, and you take six

photographs, and that becomes the encryption key. That's the key that allows you to get back into the backend security vault where you send the video.

So once you create that, it is a signature to that phone, and it tells us that it is coming from that phone, that it is a legitimate phone with a legitimate software app on it. You can put further details if you want. You can use your name if you want. You can use an alias if you want. You can give us your e-mail if you like. You don't have to because remember I don't need that information to make this relevant for evidentiary purposes, but if you want to and we may want to communicate with you, you are able to do it. Then you create a password swipe, and the password swipe is crucial because that's what allows you to move into the app itself.

And when you download it, it is just a regular camera, and it is embedded in the camera that is in your iPhone or your Android phone. But if I swipe it with three fingers, it now has—you won't see it, but it has a blue—

MICHAEL SCHARF: Border.

MARK ELLIS:—border. Thank you, Michael. The blue border means that I am now inside the eyewitness app. That becomes the security now. If I want to go out—I can go out of it, and I am back on that. Any pictures I take in the white border goes to my phone, so if you pick up my phone and you look at the photos in my photo album, whatever it is, you will see it. But once I go into this and I take a photo, then it is all part—it is behind the system, and it is behind there. And so I am creating this. Once I move into that, I am now inside the eyewitness app. I am now beginning to go into the secure part of the app. I talked to you about the meta data. This is now what the meta data captures for us in this app. Once you are inside behind the blue border and the eye, it provides all of this information, and so when you send in a video—send in a video from this app—and I will show you how that is done—it will provide you this information.

I was this morning at your coffee house by here, and I took a picture of my—actually, I was preparing for this lecture, and then I just sent it back to the London database, and I said, “well, let me know what you find.” And in about five minutes they sent me back this. You won't be able to see it.

(Indicating)

MARK ELLIS: It tells me—it went to Google. It told me exactly where it was. It shows a picture of the coffee house I was. It gives me absolutely where I was in Cleveland, here, at the law school or in this area. It gives me all this information about the GPS coordinates, exactly where it was. All that, it immediately comes through because I sent a photo, that one photo back to the backend database on this.

Let me give you a little description. You will see two young people in here that has helped us design this because everybody I have worked with on this project is about 19 years old.

(Laughter)

MARK ELLIS: That was my sense on this, but take a few minutes, just a minute on this to get just a sense of this.

(Video clip played)

MARK ELLIS: So once that is all embedded in there, the information that comes back, if you are reviewing this, if you are reviewing this backend, you immediately begin to see the picture of where it is. Here is a case of the director who took a shot, Wendy, and so it verifies that, that it verifies that that image comes from this phone. And why is that important? Because only this device can get into the secure vault. So if you try to get in without it, you can't get in.

We need to know that it is a verifiable key, that's the key that you created at the beginning. Why is that? Because it goes—always goes back to the evidentiary issues. Can you verify? Can you ensure that it is all authentic? Can you give us the time and date, where it is done and, most importantly, can you ensure it has not been manipulated? If anyone would try to manipulate with the footage, we will know because it will come up that way.

And then comes the other part, of course, is the time, date, the location, all of that information, exactly what it came out with, the sheet this morning, when I was sitting at your coffee house on this. So now it was – I was able to get into the backend database because I had the key, because I downloaded the app, and it was a select key that allowed me to do that. That means they can look at it, and they can read anything that comes its way, including the shot that I just did. Now the app stores the captured footage, as I said, in this blue area here, and I said that's my—that was my password. Those are all videos that have been taken on this device with the eyewitness app. All of those are hidden if I am not in it. So if I get out of it, they disappear. You won't see them. You can only see it when you are in on this. And so as it says here, it does not appear in the standard photo album. It only appears here when we open it up and we get inside that.

Now, here is—just to give you a couple points of what's going to happen on here—you can go in this gallery, like I am in the blue gallery, and you can start working at it. You can start taking one of the photos here, and you can open that up, and it is now encrypting again. Once I have that, I can go in there, and I can take any notes I wanted to take on this. I go back on this, and I can also pinpoint, and I can take that little—and come down here and then make a further information on there, which I am going to show you on this. You can sort the videos on however you want to do it, and as I just said, you

can take the notes on that particular video, on that camera, or as I have just done, I have tagged something.

Let's say you want to tag an individual that you have just shot before you are sending it on this. You can do that, and it allows you, then, to put additional information that you want in there, things that you might know about that particular incident that we don't – that we wouldn't know. So it provides you with just additional information as well. And we are still working on exactly what that's going to do, but that's based on our conversations as well.

So now, you are in a situation where you have to transmit it. Today at the coffee shop I was on Wi-Fi. I could immediately transmit that, but if you are not, you can hold it back. You can transmit it at a time when it is right for you, or you can transmit it immediately. This is one of the keys we felt. Once you are in the app, you have to send it back to us first. You cannot send it to YouTube. You cannot send it to anywhere else. You have to send it to us first. Why is that? Because, again, it gets back to the authenticity of it. It gets back to being able to say we can verify that. Once it is sent to us, then the user could send it elsewhere, could send it to YouTube, upload it, wherever he or she wanted to send it. But this allows us to have the first case of this.

The video—and I won't show you a video because it is too long—but it tags every single point of the video. It is tagged by times. You can press and stop it and put notes on the videos as I said earlier. That also helps us ensure that once the video comes into the backend database, we know if it has been manipulated at all, it will indicate that. And so that's another safety issue as well.

So now, you have got the whole issue of taking the app, it records, it encrypts everything, it keeps a hash value of the pixel count. That's the technology that my developers say is important because it tells you exactly if anything has been manipulated, we would know. It is bundled. It is encrypted in sign, and then it is transmitted back to the secure so-called vault on that.

Now, you might ask with all the problems of governments attacking so-called secure locations, what does the IBA, how the heck can the International Bar Association, an organization of lawyers, ensure that once these videos go into this secured vault that no one is going to try to attack it and secure it. And the idea I had was, well, go to a group that gets a hundred thousand attempts to penetrate their system every single day. And that's LexisNexis. That LexisNexis that all of you use, you should feel confident in using that because I thought, well, heck, a hundred thousand attempts to penetrate that is somebody I want on board.

And fortunately, LexisNexis works very closely with the International Bar Association, and so we approached them and sat down and said here is what we have, what do you think, and I give LexisNexis, boy, I give LexisNexis a heck of a lot of credit. If you

don't use them, you should because they are doing good things. They have built us this backend database on this, and one of the things we had to ask ourselves is where should this backend vault be? Should it be in the United States, or should it be somewhere in the Europe?

How many people think it should be in the United States?

(Showing of a few raised hands)

MARK ELLIS: How many in Europe?

(Showing majority of raised hands)

MARK ELLIS: Yeah, Europe wins.

The United States—this is another thing DLA Piper did in the sense of privacy issues, security issues. Where do you want to hold that, and it was felt that in the United States there wasn't that degree of confidence actually. I am not suggesting DLA Piper said that, I shouldn't say that, but we interpreted it that way, and we made the decision, and so that vault now is in Europe. It is in London as well.

Now, the last point I want to make because I think this is extremely important—and Justice Goldstone mentions it—we felt we had a responsibility, if we are asking people in conflict zones to use an app that could actually put their lives in jeopardy, we needed to try to provide this as secure as we can. We learned early on in this process that a hundred percent security will never be met; can't do it. But we wanted to create some sufficient security to where the user could have a sense that they could use it and feel comfortable about it.

And as a first line of defense, if a security person, a military government person were to try to take the app, your camera, first of all, since you are out of the app, you are only going to see the photo. You are just going to see a regular camera. You can only get into it remember in the secure way by swiping it and giving it whatever password you created on the digital. But we also felt that we wanted an opportunity to immediately get rid of the whole thing, and security plays—has played a very important role.

(Video clip played)

MARK ELLIS: So we felt that this was important to be able to give additional security, but we remain absolutely certain that we can't give a hundred percent certainty, but we feel fairly confident right now, and it is being tested right now actually as we speak. It just started going out testing in the field this week.

So in the end, for me, it is a puzzle that citizens' video, particularly ones that we are talking about through eyewitness can play a very important role. It can complement the witness' testimony if, in fact, you have witnesses, although, again, with this video, you don't need witnesses there to verify anything. Satellite images, that's something that George Clooney has actually been involved with in

supporting satellite images, and I suspect his wife will now be very engaged with that.¹¹ She is a real prominent human rights lawyer. I would like to say she had been rapporteur for our Egyptian report,¹² which happened about two days before it was announced that she was marrying George Clooney, and that next day in our website—as you know you can follow the usage—it peaked, and we didn’t quite know how it peaked, but then we realized it was all on that one video that we had of her presenting the report. So once again, video playing on that. So the idea that it is being used as part of this puzzle with these other areas is there, and this is kind of the conclusion that I will end with.

(Video clip played)

MARK ELLIS: And finally, in coming back full circle why this had an interest for me personally, I will refer to my book now for one second. And let me just read you a few lines because this starts this. This is a process I went through to gather as much information as I could, much of it being done by Cherif Bassiouni but others to try to get a sense of what has happened since 1945. I will just read you this.

“Since 1945, there has been 253 distinct armed conflicts in which 7.8 million people have lost their lives. However, it is estimated that the victims of repression by authoritarian state regimes were included. The total may be as high as 101 million victims between 1946 and 2008. This figure does not include those who lost their lives as a consequence of armed conflict. Their inclusion would increase the total to 202 million victims for this same period. During this same period of time, however, only 823 persons have been indicted by international regional courts for the crimes that they have committed”¹³

That’s what moved me. That’s why, whatever we can add to the matrix of instruments to bring to justice those who have committed these atrocities, we need to support. Thank you all very much for allowing me to be here.

(Applause)

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11. *George Clooney*, SATELLITE SENTINEL PROJECT, <http://www.satsentinel.org/our-story/george-clooney>.
 12. Rebecca Lowe, *Egypt: Judiciary Undermined by Badly Trained Ex-Police*, INT’L BAR ASS’N (Feb. 4, 2014), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=E6162379-D5F5-4489-BBAD-C7C990E4523E>.
 13. MARK S. ELLIS, SOVEREIGNTY AND JUSTICE: BALANCING THE PRINCIPLE OF COMPLEMENTARITY BETWEEN INTERNATIONAL AND DOMESTIC WAR CRIMES TRIBUNALS I (2014).

MICHAEL SCHARF: Take some questions?

MARK ELLIS: I am happy to take questions. I am the sure there are lots of them.

AUDIENCE MEMBER: How do you plan on getting the word out about the app to the specific people that you are looking to get it out to?

MARK ELLIS: The question about how we are going to promote this, there is going to be a two-prong kind of campaign on this starting at the beginning of next year. One will be to the general public. Our sense is we want as many people to know about it as possible and then to be able to download the video. The second is targeted groups, and these are advocacy groups in some of the countries that we feel would be needed. As I mentioned the app is being tested right now. We are using some of those groups in Syria, Egypt, Nigeria—excuse me, not Egypt, but Egypt, Iraq and Nigeria, so it would be those groups that we would focus more on in training as well. So that's the approach we'll have.

I forgot to mention, it goes into the backend data base, but of course, what do you do once it is there, and this is where there would be a team of lawyers, hopefully, maybe even some of you that will work in this field, who would be responsible for reviewing these videos and, in essence, becoming advocates. I use that term now. We want to become advocates for the videos and for the pictures, and that would be the responsibility of this legal team sitting back, in this case back in London to advocate for that.

AUDIENCE MEMBER: One of the initial slides you put up talked about the reliability of the videos as being very important for ultimate admissibility, and you put up a bullet point that you wanted to ensure that it wasn't coming from a position of bias.

MARK ELLIS: Yeah.

AUDIENCE MEMBER: And that was the one thing I didn't quite get from all of the other data that was coming in. How do you then take this very subjective issue of bias and put it into the objective video?

MARK ELLIS: Two responses in that: On that slide, that would be—that's one of the reliability part or the issue of whether it is a bias or being promoted. It goes to the weight of whether or not the video so it is not the only one. It doesn't knock it out if, in fact, it has come to the court from an advocacy group. But the issue is to date a lot of the videos have been presented just for that purpose without the verification, the authenticity. Our view is that if we can promote the eyewitness app as being one that is clearly just taking the video of the act itself, that that should help with weighing that particular provision.

But it is up to the court to decide on that. There is no question that a lot of videos that I have seen from Syria—I am sure many of

you have as well—have been taken either by the government or the opposition as well. But my view is nonetheless they show horrendous crimes on this. So I think in that case that issue would be outweighed and permitted to come in as long as those other issues are checked out.

AUDIENCE MEMBER: Could you talk about the process after these videos are in the backend—I'm sorry—could you talk about the process of selecting the videos and where they go next?

MARK ELLIS: Yeah.

AUDIENCE MEMBER: And also what you could do to keep our government out of the backend.

MARK ELLIS: Again, let me take the first—the last question first. I don't know whether we can. I think there will definitely be attempts to penetrate it. We knew that starting up, but I felt that, at least with LexisNexis as kind of a partner, that we had a better chance of ensuring they would not be successful in doing that. But again, there is not going to be a hundred percent certainty on that, but we are trying to build the ability to ensure that doesn't happen.

What happens, the first point is when that video comes back, as I mention, a legal team has to review it and has to make a determination how best do we advocate for that video. Is it a new situation where we need to bring to—we need to bring this information to an investigative commission? Do we bring it to a court? Is it an ongoing situation? If so, where should it go? Should it go to domestic, to international? This will all have to be determined.

Now, one thing behind your question that maybe one of you will ask that remember, if I download it and I do all the screening, I have the key. I keep referring to that. I have the key. You can get into the backend database now. You can send in the video. What happens if I send in a video of a murder, but it is not a war crime; it is just a murder. How about domestic violence, somebody is making a film of that. How about a lot of other things that are coming? That is a challenge that we are dealing with right now because they will be able to come in. That video will reach our backend database, because remember he or she has a key to get in. So what do we do with that video? That we've still got to work on that, what's our responsibility?

Sorry, yes.

AUDIENCE MEMBER: In the terms of, like you said, which was brilliant, I was wondering how is this going to work with the general public, this app because, as you said before, you made several examples of domestic violence, matters of homicide, involuntary manslaughter, issues around law enforcement, excessive force, and how do you protect a person who is taking these videos, and this is going to be available to the general public.

MARK ELLIS: Yeah.

AUDIENCE MEMBER: Also, on the issue of how do you ascertain context in mitigation, whoever is taking these videos, as she was

saying, there may be some bias. But how do you ascertain that? Is the video in itself all encompassing, or is there some people saying it may be subjective?

MARK ELLIS: Yeah. And I think that's a very good point. I mean, ultimately, it is going to be up to the trier of fact, to the court to determine whether or not—and I said that at the first, one of the first videos about not only the relevance but is it prejudicial? They will have to weigh all that, so that absolutely will be the decision of a court to make that argument, to make that determination. I think for us the idea of being able to, again with certainty, check the boxes for what's required to bring in that evidence is as far as we can go. In the end, the court will still have to make that determination. But they will no longer have to worry about the chain of custody for this video, where it was taken, when it was taken. They won't have to do that anymore.

AUDIENCE MEMBER: What about the person taking the video in terms of retaliation, in terms of exculpation because there has been recently issues of persons taking videos and their retaliation by various different entities, governmental entities, and how does it protect them from these entities and how does that play out with exculpation.

MARK ELLIS: It is a very good question, and I would say at the beginning of this there is that little slide that says you can add your name, your alias if you want, you can use an alias, you can put your e-mail there if you like, but actually, you don't have to do any of that. We never have to know who you are. It doesn't matter to us. What we do know is that you use this app, and we do know that whatever you film is being represented at the exact time and date and place where the meta data tells us it is being taken. And so in that way, you never have to contact us. You never have to engage in us. If you want, you can do that. You can come back into the database. You can tell us who you are, and we can engage you in it, but you don't have to do that. We allow that to be a decision that you make and not us on that.

Yes, ma'am.

AUDIENCE MEMBER: So just going back and talking about the making of the video --

MARK ELLIS: Yes.

AUDIENCE MEMBER:—you said that with just a swipe that the app and its contents can be deleted.

MARK ELLIS: A tall app can be, uh-huh.

AUDIENCE MEMBER: What if I am captured, and I don't have time to do it, I don't know if it is a suggestion or something you are working on, but you know, like in your home security system, say, that you are being held up, there is a home invasion and your alarm goes off, and instead of putting in your normal code, there is kind of an emergency code that you can put in. Is there something like that

that would be available? Say I am captured and my captors have my phone, they know about the app, and they want me to go into it and show them the video. Can I put in like an emergency code that lets you know I have been captured.

And then another question is: Is there a live option like a camera swap, meaning when I take the video, does it only show what's in front of me, or can I swap the camera?

MARK ELLIS: You can swap the camera.

AUDIENCE MEMBER: Okay.

MARK ELLIS: You can swap the camera. The thing on the security—and I think that's a very good point—the answer is no. We haven't done that. I don't think we would do that, but it is just with—I am in the blue. You saw how I was in the blue. It is one button, and I am back in the white. So it is exactly that quick, and as soon as I am back in the white border, the only thing you are going to see if you take this is whatever photos I have, that I took with the regular camera, you will not see anything I have taken with what I refer to as the blue border with the eyewitness app. You will not be able to see that, only when you can go inside it.

Now, let me—because I always like to be realistic about it, if you are using this in a country that is pretty good at figuring out how to deal with these, will they be able to take this device and say, “all right, I am going to get to the back of this. I am going to find out what's in there.” I think I would be disingenuous to say no, they would never be able to do that. Our point is, we think we wanted to create the security part for what I refer to as the first line of defense. Somebody coming up to you, can you quickly get out of it, can you dispose of it, can you erase it that quickly so that you have a better chance of not being retaliated against? I think that's the best we can do. And in the introductory points, the slides that the people will have as they close it, that's going to be—we have to make that certain. There is lots of slides here that talk about safety first and that, and that's going to be part of that, yes.

And I will go up after this.

AUDIENCE MEMBER: Question: You said that you don't have to identify yourself when you send something in, but when you download the app, is there an identification?

MARK ELLIS: No. The only thing you are identifying is I mentioned you take six photos. That's our ID process. So you take six photos, and the app is recognizing that. That becomes your signature. That's as far as we know.

AUDIENCE MEMBER: Of your piece of equipment?

MARK ELLIS: Of that equipment.

AUDIENCE MEMBER: Right.

MARK ELLIS: It is only your equipment. We don't know who you are. We don't particularly care who you are unless you want to tell us, but what we are interested in, you have downloaded the app, and

you have now created it. You have opened it. You have gone through the steps, and once you go through those steps, you have a special, what I refer to it as a key, an ID, that when you send in a video, we know it is coming from your device.

AUDIENCE MEMBER: How does that impact reliability, then, in the sense that someone can come on anonymously and stage something? Everything else can be in sequence, no changes, no anything.

MARK ELLIS: Yeah. Right. Doesn't solve that problem at all. If you want to sit up there and take—well, that's the case with any camera. If you want to stage something, you can stage it, that's not—we would never be able to prevent that. But whatever you are filming, I can tell you exactly where you are, when you did it, is there any other—as they told me, they told me there was Wi-Fi, they identified the Wi-Fi in the coffee house. So they told me that. They will tell me if there are any cell towers. They can tell me all of that. But they cannot tell me nor anyone could if that's being staged on that. That would be something that would have to, again, be dealt with in court. I'm sorry. I am going up there and—way up there.

AUDIENCE MEMBER: Just a quick question, and I don't know maybe I missed it, so you have to—the person that takes the video has to hit a send button. It is not once you start rolling the camera, it is not instantaneous? It is not happening real-time then?

MARK ELLIS: No.

AUDIENCE MEMBER: Okay.

MARK ELLIS: You have to because you may not be in a situation where you can send it. Maybe you are out in an area that doesn't have Wi-Fi or anything. So you are not going to be able to send it. Once you send it, I could show it to you on here, but once you send it, it tells you, and you can watch it. It is encrypting. Once you send it, it will go eventually. Even if you close the device, it is encrypting, and it is going to be sent, and then you know it because there is a green checkoff that tells me that it is gone.

So this morning when I sent that photo, I opened it, I tacked on that one photo, and then I hit send. And it was sending it, it was telling me it was encrypting it. It finished, it gave me a green arrow, and then I knew it had been sent. And then the backend people sent me back and said we didn't know you were in Cleveland today nor at a coffee house on that.

Yes, and then Michael.

AUDIENCE MEMBER: Do you envision a much wider application on this starting with the UN perhaps peace keeping forces? Frankly, any government I can see adopting this. As you may know, more and more policemen are being equipped with body cameras. Can you see this for perhaps archiving, maybe, post-war --

MARK ELLIS: I think—absolutely. I think one of the biggest challenges, at least in my own thinking, has been not to do too much

too soon. And so for me, the app is designed just as it says, eyewitness to atrocities. So we are going to try to educate people that this is what we are trying to garner. But could the same app, could the same application be used for everything else? Absolutely. Could you change the backend security vault, or could you, in fact, create another way of sending it? Maybe you say if you have police brutality or something, send it and check this address. You can send it there. So I see where this could continue to grow into lots of different areas.

AUDIENCE MEMBER: But even in the war crimes setting, I could see both the Hamas and the Israelis this summer wishing they had had use of this.

MARK ELLIS: Yeah, I'm sorry, and the ones that have been most—some of the people that have been most interested in this actually are the journalists, the investigative journalists. They are the ones we brought in and are eager to have do it.

Michael, and then I will go back to you.

MICHAEL SCHARF: So, Mark, you said you are beta testing this in the field now?

MARK ELLIS: Yes.

MICHAEL SCHARF: When will it roll out?

MARK ELLIS: Well, this has been kind of a long process to get this right. As I said, these are dynamic from young people. We have hired in two developers on our staff now, and we hired a director now as well. If all goes well, we would expect to launch this early next year. We have got about a month to test it, maybe 60 days to test it before it closes with the developers.

I will say this, and this is—I am delighted, and I will say this about the International Bar Association because, when we were designing this and thinking about this, I eventually then went to the board of directors and said—and fortunately IBA has some healthy reserves—and I said “I think this is a project that the IBA should take on. If not, I think it is a project that the IBA should support as an outside entity.” And I was not certain what they were going to say. Their first statement, decision was we want this to be an IBA entity, which is why I talk about it now as an IBA. But the second one was they allocated, transferred to our bank account a million dollars. Now, that was important because it meant that I don't have to worry about raising funds. It means that come next year, early next year when we launch it, we have got a million dollars to launch this thing, and I think that makes it a much more realistic chance.

But it has been a bit—as I said, we started this three and-a-half years ago, but I think all of us who are engaged with this are adamant that we will not release it until it is spot on. We just can't afford it not to be. So it takes some time and for you, the younger people, you know what that means in the sense of the technology, but for me, it has been a learning curve, but I am enjoying it.

MICHAEL SCHARF: Last question.

MARK ELLIS: Trials are usually text-based processes, a judge reads the indictment, he reads the briefs, back and forth. That's certainly the case domestically. Internationally, I wonder if you could say how important the role, the image, the role of the picture is in war crime tribunals and whether this adds particular value. I think most American judges would be very uncomfortable with some of the graphics, and they don't want to prejudice the jury, but I am wondering in an international tribunal where you don't have a jury, whether, you know, maybe you could get some trained judges to be comfortable with the images. What do you think the value of image-based evidence would provide to international tribunals?

You know, I think it is significant, and I think listening to Justice Goldstone, if anyone is going to tell me you are dead wrong on this, this is just not happening, I felt really a degree of comfort knowing that I have got Goldstone saying, yeah in fact, I wish we had it. In all of the discussions we had, particularly with the Hague, with the International Criminal Court, from the judges, the prosecutors, we had several meetings, and without question, there is a sense of excitement because I think they would want to use this. They just haven't been able to do it because of the problems of verification. But the idea of authenticating and verifying is there. I know there are a lot more questions. I know it is—my time is up. I want to thank you again. I really enjoyed being here, and I hope you enjoyed it.
(Applause)