Can Social Media Corporations be held Liable Under International Law for Human Rights Atrocities?

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CAN SOCIAL MEDIA CORPORATIONS BE HELD LIABLE UNDER INTERNATIONAL LAW FOR HUMAN RIGHTS ATROCITIES?

Juliana Palmieri*

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Throughout history it has become evident that there is a dark side associated with free speech: hate speech. Hate speech has led to major atrocities such as genocide, mass shootings, and various human rights violations around the globe.

From Hitler’s use of the radio to spread negative ideas about Jewish people\(^1\) to Rwanda leaders spreading hate against Tutsi,\(^2\) hate speech is not new to our world. Leaders of nations continue to use “dehumanizing language in describing certain groups of people” and other forms of hate speech to incite violence.\(^3\) Recently, this type of speech has taken place in a new forum, or on a new platform: Facebook. Reports indicate that the inflammatory, often false, and misleading rhetoric of Myanmar officials\(^4\) was used to incite violence against the Rohingya people and justify acts of torture, rape, and mass murder.\(^5\)

In Myanmar, government officials used Facebook to spread atrocious rhetoric against the Rohingya people by posting comments and images.\(^6\) “Pour fuel and set fire so that they can meet Allah faster”; is only one of thousands of examples of this rhetoric.\(^7\) Additionally, false or misleading information was


\(^2\) Ndahiro, supra note 1.

\(^3\) Id.


\(^7\) Id.

\(^8\) Mozur, supra note 4.
spread to create a vast divide amongst the people living in Myanmar. The spread of misleading information and hate speech, combined with the preexisting tensions from poverty, major cultural differences, and refusal to grant Rohingya basic human rights, led to an outlash of violence from both sides. Ultimately, the Rohingya were mass murdered, raped, and driven from their homes.

Gambia filed this case against Myanmar with the International Court of Justice (“ICJ”) claiming that the State failed to comply with obligations set forth in the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”). The ICJ unanimously initiated an investigation into the genocide charges against Myanmar and released provisional measures. For the first time in ICJ history, the court asked the District Court for the District Court of Columbia to compel the United States company, Facebook, to release “all documents and communications produced, drafted, posted, or published on the Facebook page[s] of military officials and police forces.”

This new forum or platform for speech can be viewed as a public good. This technology has fostered global activism for many developing nations, underprivileged groups, and communities struck with natural disasters. However, opportunity for abuse is often associated with new technology. This new technology and speech platform, Facebook, entered Myanmar through their “data-light website and service”

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9 Id.
13 Id.
platform known as Free Basics. Free Basics claims to “help people experience the value and relevance of connectivity.” In Myanmar, a country with a lower level of social media literacy, many began to view Facebook as a reliable source of news.

This article examines the relevant international law associated with genocide and hate speech and examines whether there are any legal grounds to hold a corporation liable for how people chose to use its product or service in relation to human rights violations. The analysis begins with a brief overview of international criminal and human rights law, relevant treaties, jurisdictional issues, and the legal theories of corporate criminal liability and complicity. Because current international law provides no clear answer, this article proposes that international courts use a balancing test which evaluates a non-exclusive list of ten main factors.

I. THE ROHINGYA PEOPLE AND THE CONFLICT THAT SURROUNDS THEM.

Rohingya were brought to Myanmar, from Bangladesh (formerly Bengal) during the colonial period in the 1880s. Though Myanmar is predominantly a Buddhist nation, Rohingyas are Muslim and practice a variation of Sunni Islam.

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The tension between these two cultures began in the second World War. The Rohingya supported Great Britain, whereas the Buddhists supported the Japanese. The war ended, Myanmar was liberated, and the Rohingya people have been discriminated against ever since. Today, the Rohingya people live primarily in the Rakhine state of Myanmar and make up about one third of that state’s population. Conflict between the two cultures remains and is heightened by several factors including differences in language, religion, and ethnicity. In addition, Rohingya people are fighting a constant battle for fundamental human rights and native rights to the land. These factors make it clear that tensions have been and remain high.

For the past century, the Myanmar government has and continues to refuse recognizing the word “Rohingya” and treats the people who identify as Rohingya as illegal immigrants. Rohingya are not allowed to become citizens and have practically no rights. They cannot vote or participate in the global census; they can only marry with the government’s permission. They have limited access to education, religious choice, freedom of movement, and family planning services. Living in extreme poverty, with no job opportunities, and poor infrastructure have ignited the conflict between Rohingya and Buddhists.

Due to mass persecutions, Rohingya have been fleeing Myanmar since the 1970s. The most recent conflict originates from an alleged rape and killing of a Buddhist woman by Rohingya men in 2012. In retaliation, Buddhist nationalists
caused the death of many Rohingya by burning hundreds of their villages. These and following efforts displaced thousands of Rohingya, many of which began to rely on smugglers to get their families out of Myanmar.

In 2017, Myanmar government officials crafted posts, comments, and pornographic images against Rohingya and posted them to Facebook. Examples include: “[w]e must fight them the way Hitler did the Jews” and “[t]hese non-human kalar dogs, the Bengalis, are killing and destroying our land, our water, and our ethnic people […] We need to destroy their race.” In addition to hate speech, the military also used Facebook Messenger to spread “warnings.”

Later that year, Rohingya insurgents “armed with knives and homemade bombs attacked more than 30 police posts.” Consequently, Myanmar mobs and military burned down villages and killed many Rohingya. Alternatively, the “military accuses the […] Rohingyas of burning their own homes.” All things considered, UN Human rights chief Zeid Raad Al Hussein stated that the security operation in Myanmar displays “a textbook example of ethnic cleansing.”

In November 2019, Gambia filed a case against Myanmar with the International Court of Justice (“ICJ”). It claimed that Myanmar “failed to comply with its international obligation under the UN Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”). This is the...
first time an uninvolved State brought a genocide case to the ICJ.\textsuperscript{48} The ICJ found that Gambia had standing because of their interest in preventing genocide as a State Party to the Genocide Convention.\textsuperscript{49} The ICJ unanimously held that Myanmar must act promptly in the prevention of further abuses and human rights violations\textsuperscript{50} while an Independent International Fact Finding Mission\textsuperscript{51} (“Mission”) investigates fully.

The ICJ has the power to order provisional measures when “irreparable prejudice or consequences” could be caused and such risk is “real and imminent.”\textsuperscript{52} The Mission found that Rohingya people were subjected to mass killings, widespread rape, sexual violence, and the destruction of their homes, livelihood, and the denial of other essentials of life.\textsuperscript{53} It was also found that they “remain extremely vulnerable.”\textsuperscript{54} Additionally, Myanmar refused to acknowledge the genocide and has taken no concrete steps in assuring a safe return for displaced Rohingyas.\textsuperscript{55} The General Assembly determined that the State failed to “create the conditions necessary for refugees and other forcibly displaced persons to return to [Myanmar] voluntarily, safely, and with dignity.”\textsuperscript{56}

The ICJ concluded that the killings, other threatening acts, and Myanmar’s failure to “promote ethnic reconciliation”

\textsuperscript{48} Id.
\textsuperscript{49} Gam. v. Myan, supra note 11, at 3.
\textsuperscript{50} Smith & Basso, supra note 12.
\textsuperscript{52} Gam. v. Myan., supra note 11, at 5.
\textsuperscript{53} Id. at 6.
\textsuperscript{54} Id.
\textsuperscript{56} Gam. v. Myan., supra note 11, at 6.
pose a risk to Rohingya which is both “real and imminent” and capable of causing “irreparable harm.” Due to the findings of the Mission, the ICJ implemented provisional measures forcing Myanmar to take steps to (1) “prevent further genocidal acts by its own forces or groups [...] over which it has any control, direction or influence,” and (2) “preserve any evidence of wrongdoing.” Additionally, Myanmar was ordered to report to the ICJ how it planned to comply with these provisional measures. Action taken in compliance of these orders has not improved the situation for Rohingya people.

Though Myanmar denies the allegations, it has been charged with facilitating human rights atrocities by the ICJ. Facebook has been criticized for playing a “key role in spreading hate speech that fueled the violence.” The digital evidence of hate speech and fake profiles has been removed from the public site, but not from Facebook's storage. Therefore, Facebook is capable of providing the ICJ with the requested materials for further investigation into these crimes. On December 3, 2021,

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57 Id. at 5–6.
59 Id.
62 Id.
63 Id. (“In 2018, the company [Facebook] said it had removed 18 accounts and 52 pages associated with the Myanmar Military, including the page of its commander-in-chief, but preserved the data.”).
64 Id.; see also Michael A. Becker, The Gambia v Facebook: Obtaining Evidence for Use at the International Court of Justice (Part 1), EJIL.TALK! (Oct. 5, 2021), https://www.ejiltalk.org/the-gambia-v-facebook- obtaining-evidence-for-use-at-the-international-court-of-justice-part-i/ (showing how Facebook has the capability of assisting the authorities due to its internal retention of
the U.S. District Court ruled that Facebook need not disclose the materials as they were deemed by the court to be stored for the purpose of backup protection.\textsuperscript{65}

In 2019 the ICJ authorized the Prosecutor “to proceed with an investigation for the alleged crimes [in] Myanmar.”\textsuperscript{66} This means the Prosecutor will collect necessary evidence and investigate the claims “independently, impartially, and objectively.”\textsuperscript{67} This long process can result in specific individuals being held accountable for these atrocities.\textsuperscript{68} As of early 2021, the Prosecutor has yet to publish their findings.\textsuperscript{69}

II. USE OF SOCIAL MEDIA, GLOBALLY

The Internet created a global-type-of-activism, notably seen in Egypt and Tunisia.\textsuperscript{70} Activists used various social platforms to schedule protests, coordinate efforts, and inform the world.\textsuperscript{71} At the onset, these globally-collaborated events appeared beneficial for individuals to gain social freedoms, participate in government, or bring on a complete regime change.\textsuperscript{72} Some countries saw powerful, authoritarian leaders step down; some made constitutional changes to limit the power of the monarch.\textsuperscript{73}

\textsuperscript{65} See Rep. of Gam. v. Facebook, Inc., No. 20-36, 2021 WL 5758877 (D.D.C. Dec. 3, 2021) (holding that the materials stored for backup protection may not be disclosed as per the Stored Communications Act (SCA)).

\textsuperscript{66} Press Release, Int’l Crim. Ct., ICC judges authorize opening of an investigation into the situation in Bangladesh/Myanmar (Nov. 14, 2019).

\textsuperscript{67} Id.


\textsuperscript{69} See News, Int’l Crim. Ct. https://www.icc-cpi.int/news (last visited Feb. 28, 2022) (showing ICC has not published an update on the investigation “related to Bangladesh/Myanmar” from the Prosecutor’s office. This is demonstrated by using the filter “Related to” on the left side of the page).

\textsuperscript{70} Yue, supra note 15, at 817–18.

\textsuperscript{71} Id.

\textsuperscript{72} Arab Spring, HISTORY, https://www.history.com/topics/middle-east/arab-spring (last updated Jan. 17, 2020).

\textsuperscript{73} Id.
However, some resulted in more conflict and injury to the people revolting. Some countries experienced violent civil wars; some experienced no political change. Regardless of the outcome, these efforts could not have been possible without the mass-reaching and free communication tool which is social media.

There are few adults today who would not be able to recall the picture of the Syrian boy laying face-down on a beach in Turkey. The picture was posted to Twitter, where the world instantly saw the terror inflicted by the Syrian war. The world responded with laser-like focus on the humanitarian issues in Syria. However, this focus diminished almost as quickly as it had sparked. The ability to quickly, at no cost, spread this heartbreaking photo gave the world an opportunity to become emotional about the issue and aptly respond. Although social media platforms have been proven as efficient communication tools, the platforms come with a dark side.

For some countries, this dark side is shown when authoritarian leaders can create an “alternative narrative” and “weaponize Facebook” against their citizens. Various groups, leaders, and regimes worldwide have turned to the use of social media to spread their message and show the world their actions. Sometimes these messages are posted by the actors

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74 Id.
75 Arab Spring, supra note 72.
78 Id.
79 See Diane Cole, Study: What Was The Impact Of The Iconic Photo Of The Syrian Boy?, NPR (Jan. 13, 2017, 4:06 PM), https://www.npr.org/sections/goatsandsoda/2017/01/13/509650251/study-what-was-the-impact-of-the-iconic-photo-of-the-syrian-boy (explaining that within the first week, donations for Syrian refugee support had grown by 55x, and by the sixth week donations had dropped to an amount 2x what it was before the Twitter picture).
80 Id.
82 Yue, supra note 15, at 818.
83 Emma Irving, And So It Begins… Social Media Evidence In An ICC
themselves or are posted on their behalf by another group member.\textsuperscript{84} For example, Russian officials ran a social media campaign against the United States, by creating “fictitious U.S. personas on social media platforms.”\textsuperscript{85} The Philippine government used similar digital tactics.\textsuperscript{86} Officials created fake candidate profiles to create the illusion that the sitting president was not running uncontested.\textsuperscript{87} In Cambodia, the prime minister created fake Facebook profiles to increase the “likes” on his pro-government posts.\textsuperscript{88} Lastly, the military in Myanmar set up “troll accounts and celebrity pages” to “distribute lurid photos, false news, and inflammatory posts.”\textsuperscript{89}

In criminal cases, the use of social media platforms leads to evidence issues of verifiability, which leads courts to ask these social media platforms to provide user data such as IP address and other factors that help confirm where the message came from.\textsuperscript{90} In Sweden, a Syrian national was recently convicted of war crimes, based on evidence posted to Facebook.\textsuperscript{91} Such evidence was used to create a timeline proving execution had to have happened by this person’s hand.\textsuperscript{92} The ICJ, however, must determine a procedure for verifying the “notoriously susceptible problems of verifiability” that comes with using “open source evidence” from Facebook and similar companies.\textsuperscript{93} As a first step, the International Bar Association developed apps to “improve the verifiability of open source material.”\textsuperscript{94} Similarly, in response to this new source of information the International, Impartial, and Independent Mechanism (“IIIM”) partnered with organizations that collect “open source digital information” and

\textsuperscript{84} Irving, supra note 83.
\textsuperscript{85} Yue, supra note 15, at 819.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 820.
\textsuperscript{89} Id. at 819.
\textsuperscript{90} Irving, supra note 83.
\textsuperscript{91} Id.
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
social media content to enforce “accountability.”

A. Meta, Facebook & ‘Free Basics’

Meta\(^{96}\) owns the “Free Basics” app which provides free access to a selection of “data-light websites and services.”\(^{97}\) This service is available through agreements with developing nations.\(^{98}\) It is free due to a “surveillance-based business model” which harnesses a user’s data, online behavior, engagement, etc. and sells such data to advertisers.\(^{99}\) The service was originally called “Internet.org.”\(^{100}\) However, this was criticized for violating principles of net neutrality by appearing as the common carrier, the Internet, yet only offering a “light” version of the actual Internet.\(^{101}\) Depending on the country, Free Basics gave access to Facebook and other select websites only rather than broad access to the internet.\(^{102}\) As a result, Meta changed

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\(^{97}\) Solon, supra note 16.


\(^{99}\) Brown, supra note 98.


\(^{101}\) Solon, supra note 16; Klint Finley, The WIRED Guide to Net Neutrality, WIRED (May 5, 2020, 7:00 AM), https://www.wired.com/story/guide-net-neutrality/ (Net neutrality is the idea that the internet should be free and show users content without discrimination. This is because this service – similar to telecommunication services – are seen as “so crucial to the functioning of society and the economy” that legislation has been passed to ensure open access.).

\(^{102}\) Emma Roth, Facebook’s plan to offer free internet in developing countries ended up costing users, WSJ reports, VERGE (Jan. 25, 2022, 3:00 PM),
the name to “Free Basics” but concerns over net neutrality remain due to the structure of the service.103 The structure in question relates to the process of how Facebook selects which websites and services are available through the app.104 Thus, access to the internet through this service is not free and open in accordance to net neutrality laws.105 Because Fee Basics can be seen as acting as a “common carrier” to these developing nations, open access to them must be ensured.106

B. International Use of Free Basics, Generally.

Free Basics was once available in over sixty countries.107 Unfortunately fake news has been reported to be “abundant” on Free Basics, leaving users vulnerable to their effect.108 Around the globe, this issue has been the source of misinformation.109 In the Philippines, Facebook usage skyrocketed after Free Basics was introduced.110 However, “election related misinformation” spreads fast.111 In India, skepticism over Free Basic’s content neutral approach, security, privacy, and freedom of expression led to a temporary ban on the service.112 Though Egypt was one of the initial success stories, bringing internet service to one million people who had never accessed the internet before,


103 Solon, supra note 16.

104 See Solon, supra note 16 (explaining the process by which Facebook selects the websites and services that are available through the free basics app).

105 Id.

106 See generally Finley, supra note 101 (“Certain services and businesses have been seen as so crucial to the functioning of society and the economy that governments [...] have passed special laws to ensure open access to them.” Also, common carriers offer services crucial to society. Therefore, it is implied that Facebook may have been seen as a common carrier when providing its Free Basics service in various States.).

107 Brown, supra note 98.


109 Id.

110 Brown, supra note 98.

111 Id.

regulators decided not to renew the contract.\textsuperscript{113} Neither side gave an official reason for the service shutdown.\textsuperscript{114} Some assume this shutdown was due to Facebook’s involvement as a “crucial [player] in organizing demonstrations” which caused the Arab Spring uprising, toppling former president Hosni Mubarak.\textsuperscript{115}

Globally, the ability to seek, receive and convey information is of the utmost importance, especially in developing States.\textsuperscript{116} Unfortunately, this public forum with mass-reaching scale can be tainted by those who misuse the platform.

\textit{C. Myanmar & Facebook}

In 2016, Meta’s Free Basics app contracted with local telecommunication services, such as Myanmar Posts and Telecommunications (“MPT”).\textsuperscript{117} The app “provides users willing to sign up for Facebook with internet access that doesn’t count against their mobile plan.”\textsuperscript{118} Essentially, users exchange their behavioral data or “traffic” through the creation of profiles on Facebook for free, yet light, internet.\textsuperscript{119} Originally success was seen in the numbers: Facebook had 9.5 million users in Myanmar in 2016.\textsuperscript{120} Their goal: to “help more people experience the value and relevance of connectivity through an open and free platform.”\textsuperscript{121}

Initially, this was seen as a great opportunity; it was known that “[i]ncreased Internet connectivity has empowered users to spread ideas, communicate with like-minded users and organize protests” when necessary.\textsuperscript{122} However, it was also met with

\begin{itemize}
  \item \textsuperscript{113} \textit{Id.}
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} Hempel, supra note 112.
  \item \textsuperscript{117} Hatmaker, supra note 16; Waring, supra note 16 (illustrating MPT as the largest operator in Myanmar having 47% market share).
  \item \textsuperscript{118} Hatmaker, supra note 16.
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} Catherine Trautwein, \textit{Facebook’s Free Basics lands in Myanmar}, MYAN. TIMES (June 6, 2016), https://www.mmtimes.com/business/technology/20685-facebook-free-basics-lands-in-myanmar.html.
  \item \textsuperscript{121} Liao, supra note 17.
  \item \textsuperscript{122} Yue, supra note 15, at 817.
\end{itemize}
contention.\textsuperscript{123} Just prior in India, Meta was criticized for being the sole decider of which websites and internet services would be accessed through the Free Basics app.\textsuperscript{124} Addressing those concerns, Meta changed their process of review.\textsuperscript{125} By the time Free Basics appeared in Myanmar, Meta developed a new set of criteria to be used when determining which websites and services would be available on Free Basics.\textsuperscript{126}

Unfortunately, Myanmar became one of the most “infamous cases,”\textsuperscript{127} where access to Facebook's platform supported ultranationalist, anti-Rohingya voices and provided a setting for the dissemination of hate speech.\textsuperscript{128} This was accomplished by the use of military-set-up “troll accounts and celebrity [profiles]”\textsuperscript{129} and their own government official profiles such as the “Office of the Commander-in-Chief, the State Counselor’s Information Committee, and the Ministry of Information.”\textsuperscript{130} They used these profiles to flood local users’ news feed with “lurid photos, false news, and inflammatory posts.”\textsuperscript{131} These inflammatory posts, and thus, the military’s rhetoric toward the Rohingya Muslims mirrored that of the Burmese nationalists.\textsuperscript{132} For example, “[t]hese non-human kalar dogs, the Bengalis, are killing and destroying our land, our water and our ethnic people [...] We need to destroy their race.”\textsuperscript{133} The military created these pages and posts with the purpose of furthering the divide: they

\textsuperscript{123} Trautwein, \textit{supra} note 120.
\textsuperscript{124} James Vincent, \textit{Facebook’s Free Basics service has been banned in India,} \textit{VERGE} (Feb. 8, 2016, 06:22 AM), https://www.theverge.com/2016/2/8/10913398/free-basics-india-regulator-ruling.
\textsuperscript{125} Trautwein, \textit{supra} note 120.
\textsuperscript{126} See id. (noting that Facebook’s new set of decision-making criteria attempted to address the concerns of net neutrality).
\textsuperscript{127} Brown, \textit{supra} note 98.
\textsuperscript{129} Yue, \textit{supra} note 15, at 819.
\textsuperscript{131} Yue, \textit{supra} note 15, at 819; Mozur, \textit{supra} note 4.
\textsuperscript{132} Yue, \textit{supra} note 15, at 820.
\textsuperscript{133} See Stecklow, \textit{supra} note 6 (citing a post that was uploaded as violence against the Rohingya peaked).
sent separate messages to the two groups signaling that one planned to attack the other and vice versa.\textsuperscript{134} The speech was dehumanizing.\textsuperscript{135} It enhanced the resulting vast divide.\textsuperscript{136}

The role Facebook played in these human rights offenses was deemed substantial due to their power to govern the content displayed and its frequency on each platform.\textsuperscript{137} The use of this speech platform by an authoritarian government became alarmingly dangerous due to the power and influence that the platform and speaker have over the innocent people.\textsuperscript{138} “Low levels of technological and social media literacy, combined with Facebook’s offering of basic services [...] and the government's own reliance on Facebook to share information, created a perfect storm in which many [people] in Myanmar viewed Facebook as their primary source of news and information.”\textsuperscript{139} Hate speech has led to violence and serious human rights violations, across the globe.\textsuperscript{140} These consequences are enhanced when social media platforms are used to create or further such a divide.\textsuperscript{141}

After many complaints were filed and initially ignored\textsuperscript{142} regarding the use of Facebook’s platform in the dissemination of hate speech, Free Basics was “accused of supporting ethnic cleansing.”\textsuperscript{143} After being criticized for responding slowly to this crisis, Facebook started censoring information related to the ethnic cleansing.\textsuperscript{144} In 2017, Free Basics quietly left

\textsuperscript{134} Yue, supra note 15, at 833.
\textsuperscript{135} See generally id. (arguing that treatment across Facebook’s platform is dehumanizing to the Rohingya people).
\textsuperscript{136} Id. at 832–34.
\textsuperscript{137} Yue, supra note 15, at 832–34.
\textsuperscript{138} Id. at 820.
\textsuperscript{139} Land & Aronson, supra note 18, at 227.
\textsuperscript{140} Yue, supra note 15, at 820.
\textsuperscript{141} Id.
\textsuperscript{142} See Stecklow, supra note 6 (stating that Facebook ignored repeated warnings from researchers and human rights activists beginning in 2013 concerning these issues).
\textsuperscript{144} Moon, supra note 108; see Yue, supra note 15, at 834 (“In 2014, Facebook only had one content reviewer who spoke Burmese and only hired three more by 2015. Facebook struggled to identify hate speech due to difficulties with the Burmese language on its platform.”); see also Stecklow, supra note 6.
Myanmar.\textsuperscript{145}

The Mission report conducted by the ICJ, outlined the hate speech which incited violence and discrimination against Rohingya.\textsuperscript{146} In 2018, this report was delivered to the Government of Myanmar, in hopes they would take immediate action to combat such evils.\textsuperscript{147} Minimal action has been taken to comply with the provisional measures ordered by the ICJ and the situation has not improved.\textsuperscript{148}

III. CAN SOCIAL MEDIA CORPORATIONS, LIKE META, BE HELD LIABLE IN THE INTERNATIONAL TRIBUNALS?

Corporations “are a fundamental part of society [and] have a moral and social obligation to respect the universal rights” of all people under the United Nations Universal Declaration of Human Rights.\textsuperscript{149} But do global corporations have a legally binding obligation to respect human rights? There are three areas within international law which lay the groundwork for the answer to this question: (1) The Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), (2) The Rome Statute and the doctrine of corporate complicity, and (3) evolving customs of International Law.\textsuperscript{150} However, a preliminary piece in holding corporations criminally liable is determining which courts hold jurisdiction.

As of now, the International Criminal Court (“ICC”) does not have jurisdiction over corporate entities; the ICC only has


\textsuperscript{146} Mission Report, supra note 116.

\textsuperscript{147} Id.

\textsuperscript{148} Singh, supra note 60; Gam. v. Myan, supra note 11, at 6.


jurisdiction over persons. Therefore, the ICC can prosecute corporate officers but not the entity itself. This means that the forthcoming discussion is contingent on jurisdiction being granted to the ICC so that it can hear cases or controversies concerning the actions of a corporation. Even if that becomes the case, a few legal hurdles remain.

First, it is important to understand the crime of genocide, its roots, and how Facebook is playing a role in this specific allegation. The Genocide Convention creates a legally binding obligation on State Parties to prevent and punish acts which constitute genocide. The Mission declared Facebook’s platform as having a “significant” role and have data that the ICJ has requested to be used as evidence in the investigation. Specifically, the ICJ wants to establish that the bad actors had criminal intent and a clear organizational plan when broadcasting hate speech on Facebook.

Secondly, this article discusses a few legal theories which may provide guidance on how the courts can hold corporations liable for human rights violations. Though the Rome Statute does not currently impose liability on corporate entities, the corporation’s officers are subject to the statute’s authority. The statute mandates a level of knowledge, constituting complicity in the atrocity, for officers to be held liable. Next, when evaluating customary international law three concepts are relevant: (1) Corporate Social Responsibility (“CSR”), (2) the

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152 See generally id. (explaining that the ICC has jurisdiction over natural persons but not legal entities).
155 Irving, supra note 95.
156 Id.
158 Domino, supra note 150, at 181.
159 See id. at 162.
duty to protect and respect,\textsuperscript{160} and (3) corporate compliance.\textsuperscript{161} Each concept comes with its own intricacies resulting in no clear solution. Lastly, an overview of global regulation of hate speech on social media platforms highlights a great disarray. Regulation is somewhat tied to the government’s views on free speech,\textsuperscript{162} which creates a vast divide among States.\textsuperscript{163}

\textbf{A. Jurisdiction over International Corporations}

The cumbersome task of determining jurisdiction requires an examination of Article 1 of the Rome Statute. It states that the ICC has jurisdiction over natural persons, not legal entities.\textsuperscript{164} In order to grant the ICC jurisdiction over corporate entities, States would have to amend Article 25(1) or supplement the statute with an “optional protocol” allowing for the prosecution of corporate entities.\textsuperscript{165}

The ICJ settles disputes among countries.\textsuperscript{166} With State consent, it can hear disputes brought by State A against a “national” of State B.\textsuperscript{167} However, this court cannot prosecute

\begin{footnotesize}
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\item \textsuperscript{162} See Anshu Siripurapu & William Merrow, \textit{Social Media and Online Speech: How Should Countries Regulate Tech Giants?}, COUNCIL ON FOREIGN RELATIONS (Feb. 9, 2021, 11:30 AM), https://www.cfr.org/in-brief/social-media-and-online-speech-how-should-countries-regulate-tech-giants (demonstrating that Western democracies, including the United States, more heavily consider free speech in their approach to managing social media companies, whereas more authoritarian countries take a tougher approach to online speech because of their more intense censorship structure).
\item \textsuperscript{163} See id. (depicting the countries which offer accessible internet, all democratic regimes, as compared to those which do not, all authoritarian regimes).
\item \textsuperscript{164} Arsanjani, \textit{supra} note 151, at 25.
\item \textsuperscript{165} Domino, \textit{supra} note 150, at 176.
\item \textsuperscript{166} \textit{The International Criminal Court}, AMNESTY INT’L, https://www.amnestyusa.org/pdfs/IJA_Factsheet_1_International_Criminal_Court.pdf (last visited Mar. 16, 2022).
\item \textsuperscript{167} \textit{Frequently Asked Questions}, I.C.J., https://www.icj-cij.org/en/frequently-asked-questions (last visited Mar. 16, 2022) (noting that if a corporation is considered a “national” the ICJ may have jurisdiction to settle the dispute between the complaining State, and the State of which the corporation is a national).
\end{itemize}
\end{footnotesize}
criminal matters such as genocide, so the point here is moot.\textsuperscript{168} The ICJ was initially involved in the Myanmar case because it was presented as a dispute between Gambia and Myanmar, a dispute between States.\textsuperscript{169}

Ultimately this means that the foregoing discussion on legal options for holding a corporation (Facebook) liable for human rights offenses (genocide in Myanmar) is contingent on either an amendment or supplement to the current Rome Statute. As the world stands now, only corporate officers can be held liable for such atrocities.\textsuperscript{170} The foregoing discussion assumes that the Rome Statute will be amended to grant jurisdiction over corporate entities to the ICC.

B. Convention on the Prevention and Punishment of the Crime of Genocide

The Genocide Convention is responsible for making genocide a punishable crime under international human rights law.\textsuperscript{171} Over 150 countries are parties to the agreement.\textsuperscript{172} It imposes obligations to prevent and punish acts constituting genocide.\textsuperscript{173} And under the agreement, the parties are encouraged to try and extradite any person charged with genocide.\textsuperscript{174} It also obligates parties to enact legislation, ensure that penalties are effective, and ultimately not commit genocide.\textsuperscript{175} The United Nations (“UN”) defines “genocide” as:

any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to

\textsuperscript{168} Id.
\textsuperscript{169} Singh, supra note 60.
\textsuperscript{170} See Scheffer, supra note 157, at 1036–37.
\textsuperscript{171} See Genocide Overview, supra note 154 (“[T]he [Genocide] Convention establishes on State Parties the obligation to take measures to prevent and to punish the crime of genocide, including by enacting relevant legislation and punishing perpetrators.”).
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
bring about its physical destruction in whole or in part;
Imposing measures intended to prevent births within the group;
Forcibly transferring children of the group to another group.\textsuperscript{176}

It is commonly understood that the crime of genocide contains two elements: one mental component and one physical component.\textsuperscript{177} The mental component requires the showing of an “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.”\textsuperscript{178} This component is difficult to prove because specific intent requires a showing that is more than dispersing a group or destroying their culture.\textsuperscript{179} There must be some “organizational plan or policy” associated with the intent to destroy the group.\textsuperscript{180}

The physical component of genocide includes five acts: “(a) killing; (b) causing serious bodily or mental harm; (c) deliberately inflicting conditions of life to bring about physical destruction; (d) imposing measures intended to prevent births; and (e) forcibly transferring children to another group.”\textsuperscript{181}

It seems unlikely that Facebook is held responsible for the crime of genocide, but recognizing this framework allows us to understand Facebook’s role in the matter. The Mission report for the Rohingya case claims that Facebook’s platform was “significant” in spreading hate speech.\textsuperscript{182} These vile Facebook posts are being used to prove criminal intent, and to support the finding that there was an organizational plan to destroy the group.\textsuperscript{183} Thus, the data that Facebook currently owns plays a substantial role in achieving justice in Myanmar.

\textbf{C. Rome Statute and Corporate Liability}

Originally, the idea that corporate entities could be held criminally liable under the Rome Statute was rejected.\textsuperscript{184} This

\begin{footnotesize}
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  \item \textsuperscript{176} G.A. Res. 260 (III) A, Convention on the Prevention and Punishment of the Crime of Genocide, art. II (Dec. 9, 1948) [hereinafter Genocide Convention].
  \item \textsuperscript{177} Genocide Overview, \textit{supra} note 154.
  \item \textsuperscript{178} Genocide Overview, \textit{supra} note 154.
  \item \textsuperscript{179} \textit{Id}.
  \item \textsuperscript{180} \textit{Id}.
  \item \textsuperscript{181} \textit{Id}.
  \item \textsuperscript{182} Irving, \textit{supra} note 95.
  \item \textsuperscript{183} See \textit{id}.
  \item \textsuperscript{184} See Scheffer, \textit{supra} note 157, at 35 (explaining that corporate liability was conditional affirmed and required complex amendments to the Rome
\end{itemize}
\end{footnotesize}
was due to the fact that most States had not yet implemented such liability within domestic law. Today, not only does the US legal system recognize corporate criminal liability, but also the United Kingdom, Netherlands, France, Italy, and Spain have incorporated this liability into their laws. As more States accept corporate criminal liability into domestic law, international legal systems will be expected to follow suit.

Conversely, corporate officers are subject to liability under the Rome Statute. The statute states that the ICC has jurisdiction over “natural persons” who are parties to the Rome Statute, and are allegedly involved in the crime. Natural persons include officers of a corporation. This means that the ICC and its Prosecutor have the authority to investigate the actions of corporate officers complacent with human rights atrocities. Therefore, an officer can be held responsible for their complicity in “genocide, crimes against humanity, war crimes, or even aggression.”

Essentially, because international courts do not have jurisdiction over corporate entities, Facebook could not be held accountable under current international law. However, because the Rome Statute applies to individuals, executives like Mark Zuckerberg may be held accountable for their role in the human rights offenses.

D. Evolving Customs of International Law

Customary International Law (“CIL”) is evidenced by

Statute).

185 Id. at 36.


187 Id.

188 Scheffer, supra note 157, at 35.

189 Id.; see also Arsanjani, supra note 151, at 25 (reaffirming individual liability of natural persons).

190 Scheffer, supra note 157.

191 Id. at 36.

192 Id.

193 See id. at 35 (showing that in recent history, the Rome Statute has been utilized in holding executives accountable).
demonstrating (1) a state practice and (2) opinio juris.\textsuperscript{194} Opinio juris asks whether international communities have an "opinion of legal obligation or necessity" to continue adhering by the proposed custom.\textsuperscript{195} There are three evolving areas of law applicable to Myanmar. The first is the concept of Corporate Social Responsibility ("CSR"); the second is the UN’s Duty to Protect and Respect; the third is the concept of corporate complicity.

1. Corporate Social Responsibility ("CSR")

The general practice of creating legal remedies for victims of corporate criminal activity is seen as evolving international law because an increasing number of States have enacted relevant domestic laws.\textsuperscript{196} Support of this trend includes an amendment to the Business and Human Rights Treaty which has been drafted and is currently being negotiated.\textsuperscript{197} This draft strives to regulate the activities of corporations in regard to international human rights violations.\textsuperscript{198} To do so, it places the onus on each State to craft and enact domestic laws holding corporations liable for these crimes.\textsuperscript{199} It is worth noting that the United States has maintained an opposition to this treaty based on the belief that a "one-size-fits-all approach represented by the proposed treaty is not the best way to address" the issues at hand.\textsuperscript{200} Regardless, the drafting of this treaty represents some agreement among States to hold companies responsible for human rights violations.

Secondly, the increase of individual companies adopting and
the increased pressure to adopt social responsibility policies\textsuperscript{201} can be viewed as validation of a sense of legal obligation to protect communities affected by their products or services. Some countries, like the Netherlands, require that companies report on their success in implementing socially responsible policies.\textsuperscript{202} More persuasive, the UN put forth the “Ten Principles” which outline the “universal consensus” that corporations should focus on human rights, labor, the environment, and anticorruption.\textsuperscript{203} In other countries where CSR policy is not yet mandated by law, major corporations have created their own policies.\textsuperscript{204} In doing so, companies like HP, Microsoft, and General Mills have been ranked as “most responsible companies.”\textsuperscript{205} Lastly, though the United States opposes the Business and Human Rights Treaty, it promotes CSR through the Bureau of Economic and Business Affairs.\textsuperscript{206} Other countries who implemented varying levels of CSR mandates are the United Kingdom, Europe, India, South Africa, and China.\textsuperscript{207}

There appears to be evidence of general practice and the \textit{opinio juris} supporting the implementation of CSR policies.\textsuperscript{208} This may present a clear path for this concept to become


\textsuperscript{203} Muchlinski, \textit{supra} note 202, at 225–26.

\textsuperscript{204} Mitchel, \textit{supra} note 201.

\textsuperscript{205} Id.


\textsuperscript{207} Singh, \textit{supra} note 206; see also Li-Wen Lin, \textit{Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China}, \textsc{OXFORD BUS. L. BLOG} (May 27, 2019), https://www.law.ox.ac.uk/business-law-blog/blog/2019/05/mandatory-corporate-social-responsibility-legislative-innovation-and (explaining how China, the first country to expressly write CSR into its corporate statute, has taken a progressive approach regarding corporate responsibility).

\textsuperscript{208} See Singh, \textit{supra} note 206 (highlighting that all the major countries have embraced CSR for various reasons and developed strict laws in its support).
international custom and ultimately have binding effects.

2. Duty to Protect and Respect

The UN Human Rights Council ("UNHRC") provides a "Protect, Respect, Remedy" framework which promotes the maintenance of international corporations while protecting human rights. There are three pillars: (1) "the State duty to protect against human rights abuses by third parties;" (2) "the corporate responsibility to respect human rights;" and (3) "greater access by victims to effective remedy." This framework is not an obligation under current international law. Instead, it imposes responsibility directly on the corporation or State to take action. Interestingly, this framework was unanimously endorsed by the Council.

A "responsibility to respect human rights means to avoid infringing on the rights of others, and addressing adverse impacts that may occur." Companies should understand that by expanding their business to other countries, they expand the scope of liability for any cause or contribution to human rights offenses. Applying to all companies and situations, this moral responsibility exists even when domestic laws and regulations lack enforcement. Recent litigation trends indicate a similar, but still pro-capitalist consensus shaping in the US. Corporations, whose supply chains involved international

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210 Duty to Protect, Respect, supra note 209, ¶ 1.


212 Ruggie, supra note 211.

213 Duty to Protect, Respect, supra note 209, ¶ 5.

214 Ruggie, supra note 211 (emphasis added).

215 Yue, supra note 15, at 821.

216 Ruggie, supra note 211.

communities such as Nestle are being sued for turning a blind eye to human rights violations occurring at their benefit.\textsuperscript{218} There seems to be “growing acceptance within companies, [investors, and communities] that there is something culpable about failing to exercise [positive] influence” in communities where abuses are occurring.\textsuperscript{220}

The law is evolving and is trending towards a general responsibility to protect communities from the blind eye of capitalism. The drafted guidelines, litigation trends in the United States, and the unanimous endorsement by the UNHRC indicate that companies are encouraged to hold themselves accountable. One day, this might lead to legislation which imposes a legal duty to protect, respect, and remedy, rather than a moral responsibility.

3. Corporate Compliance

Crimes against humanity and major human rights abuses occur in so many countries that global companies are considered to be “involved” even without actually being actively involved or aware of these abuses.\textsuperscript{221} Of course, there are examples of corporations who secretly aid human rights abusers, but the more common situation is that the abuse is happening before the company is even in the country.\textsuperscript{222} Consequently, corporations are often accused of complying with or furthering these abuses.\textsuperscript{223}

Where the actions or inactions of a company amounts to, encourages, or contributes to a human rights abuse, the company is considered to be acting in compliance with the abusers.\textsuperscript{224} Compliance, or commonly understood as aiding and


\textsuperscript{219} Ruggie, \textit{supra} note 211; Hurley, \textit{supra} note 218.

\textsuperscript{220} Clapham & Jerbi, \textit{supra} note 149, at 347–48.

\textsuperscript{221} Yue, \textit{supra} note 15, at 822.

\textsuperscript{222} Id.

\textsuperscript{223} Id.

\textsuperscript{224} Id. at 825.
abetting requires a mens rea of knowing.226 Social media companies allow the public to “report” offensive content, which only partially establishes the knowledge standard.227 For compliance to be proven, the prosecution must demonstrate that the company “knew its assistance would further criminal activity.”228 This would be shown through the use of corporate minutes, records, and cross-examination of employees, illustrating that the employees, and thus the company, possessed actual or constructive knowledge.229

Secondly, being compliant requires an actus reus, or assistance which “contributes directly and substantially to the commission of the crime.”230 Substantial assistance can be evidenced by a company’s information, personnel, services, products and resources, or banking facilities.231 This assistance, encouragement, or moral support must result in a “substantial effect on the perpetration of the crime.”232

This compliance theory rests on the idea that Facebook permitted hate speech to overwhelm its platform which led to the atrocity.233 As set forth by the International Criminal Tribunal of Rwanda, it is “inappropriate to apply international human rights law on hate speech to genocide.”234 Therefore, it is challenging to hold individual speakers responsible for hate speech which may lead to genocide, and even more difficult to

225 Domino, supra note 150, at 178.
227 Id. at 828.
228 Id.
229 Domino, supra note 150, at 179.
230 Yue, supra note 15, at 829.
231 Id.
232 Id.


234 See id. (stating “In a 2003 case before the International Criminal Tribunal of Rwanda (‘ICTR’) [...] three founders of extremist media outlets were convicted of direct and public incitement to commit genocide.” However, the judgment was reversed by the Appeals Chamber which held that “1) it was inappropriate to apply international human rights law on hate speech to genocide crimes; and 2) direct and public incitement to commit genocide was not a continuous crime.” This Chamber “drew a clear distinction between hate speech and international crimes” making it a challenge to hold individuals spewing hate speech accountable for resulting violence.).
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hold the “publishers” or “distributors” accountable.235

Complicity is well suited for scenarios where a company has
allegedly allowed for the incitement of genocide rather than for
the crime of genocide.236 This is because there is no explicit
requirement of intent; complicity only requires knowledge that
the company’s product or service was being used to facilitate the
incitement."237 Knowledge of offensive speech on social
platforms is often flagged by users for review by the company,
which helps prove that they had knowledge.238 However, it is
worth noting that while some international tribunals have
adopted the knowledge standard for determining compliance,
the ICC has not yet determined that knowledge, rather than
intent, is the proper standard.239

In creating a standard for compliant social media
companies which provide a communication tool for all, the
international community must consider the benefits from
promoting technological innovation and access and the
protection of human rights.240 But we also must remember the
very possible consequence of over-censorship and what that
means for democracy. The compliance theory might result in
over-censorship in hopes to mitigate the risk of litigation which
significantly hinders a functioning democracy by limiting the
fundamental right of free speech.

E. International Regulation of Social Media Companies,
Internationally.

Historically, non-state or private actors have only been
regulated by domestic law.241 This is due to the historic belief

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235 Id.
236 Domino, supra note 150, at 181.
237 Id.
238 See, e.g., Richard A. Wilson & Molly Land, Hate Speech on Social Media:
Content Moderation in Context, 52 CONN. L. REV. 1029, 1063 (2021)
(highlighting the abilities of users on both YouTube and Twitter to flag
offensive speech).
239 Domino, supra note 150, at 181.
240 See generally Land & Aronson, supra note 18, at 235 (stating that
protecting individuals from new technology requires states to consider impact
of non-state actors on individual rights).
241 Julian G. Ku, The Curious Case of Corporate Liability Under the Alien
Tort Statute: A Flawed System of Judicial Lawmaking, 51 VA. J. INT’L L. 353,
370 (2011).
that “[c]rimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” However currently, the average person does not view corporations as abstract. Consumers have developed intimate relationships with these companies through direct communication on social media and thus, have started to use their purchasing power to demand decency. Today, if human rights abuses were being committed in the US and a US company was compliant or furthered these abuses, the corporation would be held liable under “environmental, labor, tort, and antitrust law.” The United States Supreme Court has held that corporations have rights under the Constitution and so, they should “be subject to the ramifications of their actions.” As discussed, this legal responsibility has not yet expanded into international, human rights law.

The social media corporations, however, their product is a platform for speech and open communication. Largely, providing this platform for “free speech” in developing nations is seen as a good step towards democracy. However, when the platform is used to incite hate, accomplish crimes, or control citizens, issues of liability and justice arise. Regulation of social media corporations is messy, even in the US. Commonly


243 See generally Jessica Davis, Social Media Gives Consumers and Brands a Direct Connection, a DUCT TAOE, MKTG., https://ducttapemarketing.com/empowerment-social-media/ (last visited Mar. 17, 2022) (discussing the ease of communication via social media between consumers and producers).


245 Slye, supra note 242.

246 Yue, supra note 15, at 823–24.

247 Slye, supra note 242.

248 Yue, supra note 15, at 827.


250 See generally Rodney Smolla, § 4:1 Regulation of Internet media, in
noticed issues include: (1) social media companies are indirectly involved in the offense;\(^{251}\) (2) regulation internationally and in the United States is in disarray;\(^{252}\) (3) threatening speech on these platforms can have real-world and lingering effects;\(^{253}\) (4) the use of these platforms by government officials can become a public forum if it is regularly used for official business;\(^{254}\) and (5) these companies are legally considered private entities in the United States, and are free to censure as any private individual would under the First Amendment.\(^{255}\) The following discussion focuses on the first four issues as particularly relevant to the situation in Myanmar.

1. Social Media’s Indirect Involvement

In alleging that the ability to communicate on a social media platform led to or caused human rights abuses, it is acknowledged that these corporations are once removed from the abuse.\(^{256}\) They are not the speakers; they are the speakers’ microphones. Therefore, “there is no direct link between the social media company and the human rights violation other than a [speaker's] use of its platform.”\(^{257}\) Recently, the issue of whether a more direct link can be proved between Facebook and the hate speech prompting genocide that occurred in Myanmar has brought on a raging debate.\(^{258}\) A better understanding of Facebook’s technology which compiles users’ data, how that

\(^{251}\) Yue, supra note 15, at 827.

\(^{252}\) Siripurapu & Merrow, supra note 162.

\(^{253}\) See People In Int. of R.D., 464 P.3d 717, 730–31 (Colo. Sup. Ct. 2020) (outlining recent events where the, often anonymous, "click of a button or tap of a screen" resulted in threats made which inflicted fear on “widespread” audiences, diverted law enforcement, and magnified the destructive impact on victims).

\(^{254}\) Davison v. Randall, 912 F.3d 666, 687 (4th Cir. 2019).

\(^{255}\) Prager Univ. v. Google LLC, 951 F.3d 991, 996 (9th Cir. 2020) (holding that YouTube is a private entity which means its speech is not limited by the First Amendment).

\(^{256}\) Yue, supra note 15, at 827 (emphasis added).

\(^{257}\) Id.

compiled data is used, and its public reporting system, indicates that Facebook had some level of knowledge of the atrocities occurring and decided to continue to capitalize on it.\(^{259}\)

In Myanmar, Free Basics was free because users agreed to give up their behavioral data.\(^{260}\) Behavioral data includes points of engagement; for example, on Facebook, this includes any “like,” “comment,” or “share” of content on Facebook.\(^{261}\) Additionally, Facebook captures a user’s engagement on any other website open while that user is logged into their Facebook account.\(^ {262}\) All of this data is captured and organized to depict each user’s personal interests.\(^ {263}\) The technology creates interest and behavior segments composed of various users who engage with similar content.\(^ {264}\) Advertisers can then buy these segments of data to employ a targeted marketing campaign.\(^ {265}\) Lastly, when a user is on Facebook and sees offensive content, they can flag it and alert Facebook to the issue.\(^ {266}\) Myanmar content was flagged on multiple accounts either through the reporting process, or through direct in-person meetings and email exchanges with Facebook employees.\(^ {267}\) Unfortunately, Facebook was sluggish to address the issue, and when they finally intervened, they didn’t have a sufficient number of translators employed to properly monitor the situation.\(^ {268}\)

\(^ {259}\) See, e.g., Solon, supra note 16 (discussing an app created by Facebook which collects a large amount of user metadata).

\(^ {260}\) See Hatmaker, supra note 16.


\(^ {262}\) Id.

\(^ {263}\) Hitlin & Rainie, supra note 261.


\(^ {266}\) See How do I report inappropriate or abusive things on Facebook (example: nudity, hate speech, threats?), FACEBOOK HELP CTR., https://www.facebook.com/help/212722115425932/ (last visited Mar. 17, 2022); see also Stecklow, supra note 6 (detailing activist qualms with Facebook’s reporting process after someone reported a post about an aid worker in Rakhine State).

\(^ {267}\) Stecklow, supra note 6.

\(^ {268}\) Id.
Essentially, Facebook entered a country with known political and cultural unrest and did so, without employing enough Burmese translators for direct human oversight. If Facebook is sorting through data that includes shares, likes, and comments to create interest groups – can they identify hate speech and determine when a user’s behavior indicates an alarming amount of engagement with hate speech? Additionally, if Facebook is making billions of dollars when selling this behavioral data, are they still indirectly involved? If content is flagged repeatedly in a specific area, against a particular group of people, are they still indirectly involved? At what level do these platforms become directly involved? Or do these questions ask too much of a basic free-speech platform? These questions remain unanswered and create major issues when fundamental human rights are being violated in such a horrific manner.

2. International Regulation of Social Media & Speech

International regulation of communication companies differs greatly. For instance, in countries where the internet is at least partially free, the use of social media is not extremely restricted. The United States imposes almost no liability and the companies are largely self-regulated. In Germany, Australia, Kenya, and India content can be required to be removed either by law or governmental request. Brazil is in the process of implementing a law that may start to limit one’s freedom of expression on social platforms. On the other side,
in countries where the internet is not free such as Saudi Arabia, China, Ethiopia, and Russia, censorship and extreme government regulation is the norm.\textsuperscript{276}

It is important to keep in mind that internationally, social media companies do not enjoy the same protections as are granted in the US.\textsuperscript{277} However, even if they had such protections globally, the technological advances which allow for them to have greater control over the content portrayed on each user's "newsfeed" becomes a strong argument for protections like § 230 to no longer applying to them.\textsuperscript{278} As social media companies like Twitter and Facebook increasingly depend on algorithms and actively take part in censoring content available to users, they exhibit more control over the content and begin to resemble a traditional publisher.\textsuperscript{279} This control could create possible liability for the content posted by third parties on their platform.\textsuperscript{280}

3. Lingering, Real-world Effect of Speech on a Massive Scale

Speech through public, mass-reaching platforms can have real-world and lingering effects.\textsuperscript{281} These platforms can enable their users to spread hate and fear. Spreading hate and fear is not new nor is it specific to social media. For instance, in Nazi Germany, Hitler used the radio to enhance the anti-Semitic rhetoric and maintain power.\textsuperscript{282} Sadly, we saw this behavior repeat in Rwanda, where a particular radio station was used to spread anti-Tutsi conspiracy theories" and convince its listeners that Tutsi were “deserving of violence.”\textsuperscript{283} Radio broadcasts

\begin{itemize}
  \item \textsuperscript{276} Id.
  \item \textsuperscript{277} See 47 U.S.C.A. § 230; see also Yue, supra note 15, at 829 n.125 (“In 1996, Congress passed this Act to encourage Internet growth. In an effort to foster innovation and participation, Congress shielded websites from any liability arising from content posted by website users. While some credit this Act for the Internet boom over the past few years, some suggest that the Act overly protects websites by virtually immunizing websites from any liability.”).
  \item \textsuperscript{278} Yue, supra note 15, at 830–32.
  \item \textsuperscript{279} Yue, supra note 15, at 830–32.
  \item \textsuperscript{280} Id. at 829–30.
  \item \textsuperscript{281} People In Int. of R.D., 464 P.3d at 730–31.
  \item \textsuperscript{282} Tworek, supra note 1.
  \item \textsuperscript{283} Isabel Ivanescu, Media Manipulation, Suppression and the Rwandan Genocide (March), KENAN INST. ETHICS DUKE U. (Apr. 7, 2020),
\end{itemize}
which “guided killers to specific victims, broadcasting the names, license plate numbers and hiding places of Tutsis” led to mass killings in churches, schools, and other public places.\(^{284}\)

On the other hand, mass-reaching media formats were “critical in alerting the world to what was occurring in Rwanda”\(^{285}\) and Syria.\(^{286}\) This free, public speech platform empowers the public to become their own publishers and ultimately connect with a global audience. In addition to increasing awareness of human rights atrocities, in times of despair, this invaluable connectivity provides assurance that your family or friends are alive and well.\(^{287}\) Ultimately, there are two vastly different sides to this social-media-coin.

There are only two instances in our history where international courts found media executives guilty of genocide or crimes against humanity. The Nuremberg trials held that publishers of newspapers companies which distributed anti-Semitic rhetoric, were responsible for genocidal efforts against the Jewish population.\(^{288}\) Similarly, the International Criminal Tribunal for Rwanda held radio and other media executives liable for the genocide of Tutsis in Rwanda.\(^{289}\) Their judgment stated, “those who control the media are accountable for its consequences.”\(^{290}\) Private corporations, like Facebook, have not been held liable in international courts for their involvement,

\(\text{https://kenan.ethics.duke.edu/media-manipulation-suppression-and-the-rwandan-genocide/}\).


\(^{285}\) Ivanesuc, supra note 283.

\(^{286}\) Cole, supra note 79.

\(^{287}\) Ivanesuc, supra note 283 (“In Rwanda, media was very valuable not only as the genocide was occurring but also ex post, when it allowed Rwandans to discover what might have happened to family members, friends, or acquaintances.”).

\(^{288}\) Yue, supra note 15, at 830; see also Nuremberg Trial Judgements: Julius Streicher, JEWISH VIRTUAL LIBR., https://www.jewishvirtuallibrary.org/nuremberg-trial-judgements-julius-streicher (last visited Mar. 19, 2022) (reporting that Julius Streicher, a newspaper publisher, was found guilty of Crimes against Humanity at the Nuremberg Trials).

\(^{289}\) Lafraniere, supra note 284.

\(^{290}\) Id.
whether passive or active, in human rights atrocities.\(^{291}\)

Here, the Rohingya people of Myanmar were murdered, raped, and tormented on a mass scale.\(^{292}\) Their villages were burned.\(^{293}\) A lot of this violence can be tracked back to divisive, false, inflammatory posts by Myanmar government officials.\(^{294}\) These posts were not only offensive, but their content was further targeted so that the reader would be specifically offended, threatened, or frightened for their safety.\(^{295}\) This led to acts of violent desperation in a State where people were already battling poverty, illness, political instability, and lingering discrimination.\(^{296}\) Providing the means for open discussion, and free speech, is democratic at its core. However, history would warn us when claiming a new technology such as the “radio [is] … intended to defend democracy.”\(^{297}\) In Nazi Germany, the radio and local newspapers “unintentionally laid the groundwork for […] propaganda” inciting fear and violence among its listeners.\(^{298}\) In sum, mass-reaching speech platforms have always, and will continue to have lingering, global effects.

4. Government use of Social Media creates Public Forums

Government officials who use social media platforms for their official use create a public forum.\(^{299}\) In the United States, for example, the second circuit recognized that when a government official uses his or her private social media profile to conduct official business, that private profile becomes a public forum subjecting the speaker to the confines of the First Amendment for government speech.\(^{300}\)


\(^{292}\) Stanbridge, supra note 5.

\(^{293}\) Myanmar, supra note 29.

\(^{294}\) Mozur, supra note 4.

\(^{295}\) See id. (showing interviewees needed to remain anonymous for fear of their safety).

\(^{296}\) See Albert & Maizland, supra note 10.

\(^{297}\) Tworek, supra note 1.

\(^{298}\) Id.

\(^{299}\) Knight First Amend. Inst. at Columbia U. v. Trump, 928 F.3d 226, 237 (2d Cir. 2019).

\(^{300}\) See Knight First Amend. Inst. at Columbia U. v. Trump, 302 F.Supp.3d 541, 580 (S.D.N.Y. 2018) (holding that the use of Twitter results in a dialogue between the public and their elected public officials, i.e the President, and that
speech and discrimination, this imposes liability on the government speaker but does not place liability on Facebook. If it had, it could result in Facebook monitoring the speech of our elected officials. Do we want to place a silicon-valley company above our elected officials? In Myanmar, the government was behind the hate speech spread on Facebook. Demanding regulation and censorship of the hate speech that likely led to violent clashes would mean silencing a quasi-democratic government. Morally and in hindsight, the censorship feels justified. However, what precedent does that set? Who would regulate Facebook? Who would ensure that Facebook’s monitoring and censorship doesn’t result in discrimination? What happens when we, who deem this behavior horrific, are eventually censored too? Internationally, we have little to no guidance on these issues.

IV. FINAL NOTE AND RECOMMENDATION

Social Media companies, like Facebook, enable communication amongst people in developing nations, and around the world. Through the Free Basics service, developing nations were able to offer an internet-light version of the internet to its people at no financial cost to the user. Because the communication is free, and published at a mass scale, it became the opportune tool for both bringing global awareness and aid to communities in need and bringing mass division and violence to communities already consumed with instability. The user posts their content to as many people as who will read it; other users read it. In impoverished communities like Myanmar, this internet-light version becomes the user’s news source which creates a stronger reliance on the this dialogue creates a public forum).

301 See Asher, supra note 258 (stipulating that placing the onus on private technology companies to regulate governmental hate speech results in a diminishment of democracy).

302 Brown, supra note 98.

303 Bouckaert, supra note 77 (demonstrating the increase in awareness drawn to the Syrian refugee crisis after a picture of a drowned infant refugee was posted to Twitter).

304 Brown, supra note 98; see generally Hempel, supra note 112 (explaining how bringing low/no cost internet to economically stressed, unstable communities is a double-edged sword in that while it may provide aid, it may also bring violence).
‘truth’ of each post. Because the content published on these sites are done so by a third-party (the user), the sites claim no responsibility for the result.

This article recommends proceeding with caution when holding social media companies culpable for the content published on their sites by third parties. In doing so, the international court system should perform a balancing test, after analyzing of the criminal elements of the alleged offense (i.e. genocide, crimes against humanity). A balancing test is recommended for a few reasons. First, a balancing test creates a less predictable, “case by case” outcome allowing the world to analyze each situation against the backdrop of technological advances which are adopted and understood at that time. Because technology advances so quickly, it will be important to have this flexibility when analyzing liability. Importantly, a balancing test allows for elasticity when considering the benefits of free speech and global connectivity in that specific region against the harm created.

Fundamental factors to consider include (1) who is speaking; (2) when did the social media company enter the region, under what conditions, and did the population have a basic understanding of the internet and the company’s offering prior to entry; (3) how many are negatively affected by this violence; (4) how long does the conflict last; (5) what are the benefits associated with the social media company’s presence in this region or State; (6) how many are positively affected by these benefits; (7) what technological processes were implemented to alert executives at the company of potential platform misuse or abuse (i.e. hate speech); (8) were the processes followed by the company; (9) who at the company had knowledge of the potential misuse or abuse, and what was being done in reaction to that knowledge; (10) does violence occur and if so, can it be attributed to the speech?

A brief analysis of the first four factors indicates that in the Myanmar situation, Facebook may be held liable under this proposed test. Here, the speech came from government officials’ pages or fake pages of famous personalities and so, was likely influential on the population. Facebook entered the region

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305 Yue, supra note 15, at 832.
306 Id. at 827.
307 Yue, supra note 15, at 819.
under conditions favorable to both parties but knew that
democratic values were weak and political unrest was common.\textsuperscript{308} Therefore, the effects of enabling widespread, free
speech were unknown and should have been met with a more
cautious approach. Facebook’s Free Basics granted access to the
internet-light service which included the Facebook app, in
exchange for each user’s online behavioral data.\textsuperscript{309} That data
was likely included in the data Facebook makes accessible to
outside companies.\textsuperscript{310} Additionally, the Myanmar population
were inexperienced at using social media and the internet.\textsuperscript{311}
People were negatively affected by the violence attributed to
hate speech spread on Facebook.\textsuperscript{312} Rohingya were raped,
murdered, and tortured on a massive scale; over ten thousand
were displaced and are still without a secure home; violence was
widespread.\textsuperscript{313} The violence and hate speech did not go on
unnoticed; journalistic investigation uncovered multiple sources
who flagged this behavior to Facebook.\textsuperscript{314} Unfortunately, the
company’s response was too slow and inadequate for such a dire
situation.\textsuperscript{315} It doesn’t help that Facebook continued to
capitalize on the data being compiled from Myanmar people.\textsuperscript{316}
Lastly, this conflict started in 2012 and has not been resolved.\textsuperscript{317}
There is a strong argument that the ongoing and prolonged
nature of the violence cannot be solely attributed to Facebook’s
presence.\textsuperscript{318} This is because Free Basics entered Myanmar in
2016\textsuperscript{319} and quietly left in 2017.\textsuperscript{320} When analyzing Facebook’s

\textsuperscript{308} See \textit{id.} at 818 (explaining how some world leaders take advantage of
social media to further their political narrative and spread misinformation).
\textsuperscript{309} Solon, \textit{supra} note 16.
\textsuperscript{310} \textit{Id.;} Irina Ivanova, \textit{Facebook let some companies exploit users’ friends
user-data-according-to-uk-parliament/ (suggesting that the data collected by
Facebook from their various platforms could have also been part of the data
Facebook makes accessible to other companies).
\textsuperscript{311} Land & Aronson, \textit{supra} note 18, at 226.
\textsuperscript{312} \textit{Id.}
\textsuperscript{313} Albert & Maizland, \textit{supra} note 10.
\textsuperscript{314} Stecklow, \textit{supra} note 6.
\textsuperscript{315} \textit{Id.}
\textsuperscript{316} \textit{Id.}
\textsuperscript{317} \textit{Id.}
\textsuperscript{318} Stecklow, \textit{supra} note 6.
\textsuperscript{319} Hatmaker, \textit{supra} note 16.
\textsuperscript{320} Moon, \textit{supra} note 108.
liability, it will be important to analyze the differences in conflict prior to 2016, during the year that Facebook was present and being used to spread hate speech, and after their departure in 2017. The difference will help lead the court to a better understanding of the conflict related to Facebook’s presence.

This brief analysis is not complete; a key component to the balancing test, understanding the benefits of social media for this population and if the violence can be directly attributed to the speech require further investigation. Common benefits associated with social media usage are global and regional connectivity, communication, and access to news and educational materials. Clearly, the events which unfolded in Myanmar against the Rohingya people were horrific. The court will have to analyze exactly what was said, when it was said, for how long similar rhetoric was used, when tensions began to rise, and determine if the rhetoric represented a catalyst to the violent reaction that engulfed the State. In addition, research into the violence and speech timeline, Facebook’s flagging processes, whether such processes were followed, and Facebook’s level of knowledge of the platform abuse are necessary to complete the balancing test.

Ultimately, it is important to remember that there are situations in which having these platforms promotes growth, stability in poor communities, promotes entrepreneurism, connects families, and fosters the challenging of ideas and norms leading to innovation and progress. If Facebook is found to be compliant in Myanmar, the result may include over-censorship by a private party who acts like a public forum (at times). Because over-censorship presents a detrimental threat to democracy, holding Facebook criminally liable might not result in a favorable, long-term outcome. The atrocities which took place in Myanmar are awful, painful, and very difficult to contemplate. Those who spoke, manipulated, and those government officials who executed these crimes should and will be held responsible.