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

Juliana Palmieri

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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 people¹ 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 officials⁴ 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"⁷ is only one of thousands of examples of this rhetoric.⁸ Additionally, false or misleading information was

¹ Heidi Tworek, *A Lesson From 1930s Germany: Beware State Control of Social Media*, ATLANTIC (May 26, 2019), <https://www.theatlantic.com/international/archive/2019/05/germany-war-radio-social-media/590149/>; Kennedy Ndahiro, *In Rwanda, We Know All About Dehumanizing Language*, ATLANTIC (Apr. 13, 2019), <https://www.theatlantic.com/ideas/archive/2019/04/rwanda-shows-how-hateful-speech-leads-violence/587041/>.

² Ndahiro, *supra* note 1.

³ *Id.*

⁴ Paul Mozur, *A Genocide Incited on Facebook, With Posts From Myanmar's Military*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html>.

⁵ Andrew Stanbridge, *Myanmar: Crimes against humanity terrorize and drive Rohingya out*, AMNESTY INT'L (Oct. 18, 2017), <https://www.amnesty.org/en/latest/news/2017/10/myanmar-new-evidence-of-systematic-campaign-to-terrorize-and-drive-rohingya-out/>; Hannah Beech et al., *'Kill All You See': In a First, Myanmar Soldiers Tell of Rohingya Slaughter*, N.Y. TIMES, <https://www.nytimes.com/2020/09/08/world/asia/myanmar-rohingya-genocide.html> (last updated Oct. 19, 2021).

⁶ Steve Stecklow, *Why Facebook is losing the war on hate speech in Myanmar*, REUTERS (Aug. 15, 2018, 3:00 PM), <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/>.

⁷ *Id.*

⁸ Mozur, *supra* note 4.

spread to create a vast divide amongst the people living in Myanmar.⁹ 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.¹⁰ Ultimately, the Rohingya were mass murdered, raped, and driven from their homes.¹¹

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").¹² The ICJ unanimously initiated an investigation into the genocide charges against Myanmar and released provisional measures.¹³ 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."¹⁴

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.¹⁵ 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"

⁹ *Id.*

¹⁰ Eleanor Albert & Lindsay Maizland, *The Rohingya Crisis*, COUNCIL FOREIGN RELATIONS, <https://www.cfr.org/backgroundunder/rohingya-crisis> (last updated Jan. 23, 2020, 7:00 AM).

¹¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), 2020 I.C.J. 1, 2, 6 (Jan. 23) [hereinafter Gam. v. Myan.].

¹² Alison Smith & Francesca Basso, *Justice for Rohingya: What has happened and what comes next?*, COAL. INT'L CRIM. CT. (Feb. 13, 2020), <https://coalitionfortheicc.org/news/20200213/justice-rohingya-what-has-happened-and-what-comes-next>.

¹³ *Id.*

¹⁴ *U.S. court asked to force Facebook to release Myanmar officials' data for genocide case*, REUTERS (June 10, 2020, 10:52 AM), <https://www.reuters.com/article/us-myanmar-rohingya-world-court-idUSKBN23H2E3> (internal citations omitted).

¹⁵ Neriah Yue, *The "Weaponization" of Facebook in Myanmar: A Case for Corporate Criminal Liability*, 71 HASTINGS L.J. 813, 817–18 (2020).

platform known as Free Basics.¹⁶ Free Basics claims to “help people experience the value and relevance of connectivity.”¹⁷ In Myanmar, a country with a lower level of social media literacy, many began to view Facebook as a reliable source of news.¹⁸

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.¹⁹ Though Myanmar is predominantly a Buddhist nation, Rohingya are Muslim and practice a variation of Sunni Islam.²⁰

¹⁶ Olivia Solon, *‘It’s digital colonialism’: how Facebook’s free internet service has failed its users*, GUARDIAN (July 27, 2017, 8:00 AM), <https://www.theguardian.com/technology/2017/jul/27/facebook-free-basics-developing-markets>; Taylor Hatmaker, *Facebook’s Free Basics program ended quietly in Myanmar last year*, TECHCRUNCH (May 1, 2018, 8:11 PM), <https://techcrunch.com/2018/05/01/facebook-free-basics-ending-myanmar-internet-org/>; see generally Joseph Waring, *Myanmar’s MPT launches Facebook’s Free Basics*, MOBILE WORLD LIVE (June 7, 2016), <https://www.mobileworldlive.com/asia/asia-news/myanmars-mpt-launches-facebooks-free-basics>.

¹⁷ Shannon Liao, *Facebook’s Free Basics violates net neutrality and isn’t even that good, says report*, VERGE (July 27, 2017, 1:10 PM), <https://www.theverge.com/2017/7/27/16050446/facebook-net-neutrality-digital-colonialism-internet-org>.

¹⁸ Molly K. Land & Jay D. Aronson, *Human Rights and Technology: New Challenges for Justice and Accountability*, 16 ANN. REV. L. & SOC. SCI. 223, 227 (2020).

¹⁹ Michael Scharf et al., *Talking Foreign Policy - October 1, 2019 Broadcast: “The Rohingya Genocide”*, 52 CASE W. RES. J. INT’L L. 543, 545 (2020).

²⁰ Albert & Maizland, *supra* note 10; Erin Blakemore, *Who are the Rohingya people?*, NAT’L GEOGRAPHIC (Feb. 8, 2019), <https://www.nationalgeographic.com/culture/article/rohingya-people>.

The tension between these two cultures began in the second World War.²¹ The Rohingya supported Great Britain, whereas the Buddhists supported the Japanese.²² The war ended, Myanmar was liberated, and the Rohingya people have been discriminated against ever since.²³ Today, the Rohingya people live primarily in the Rakhine state of Myanmar and make up about one third of that state's population.²⁴ Conflict between the two cultures remains and is heightened by several factors including differences in language, religion, and ethnicity.²⁵ In addition, Rohingya people are fighting a constant battle for fundamental human rights and native rights to the land.²⁶ These factors make it clear that tensions have been and remain high.²⁷

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.²⁸ Rohingya are not allowed to become citizens and have practically no rights.²⁹ They cannot vote or participate in the global census; they can only marry with the government's permission.³⁰ They have limited access to education, religious choice, freedom of movement, and family planning services.³¹ Living in extreme poverty, with no job opportunities, and poor infrastructure have ignited the conflict between Rohingya and Buddhists.³²

Due to mass persecutions, Rohingya have been fleeing Myanmar since the 1970s.³³ The most recent conflict originates from an alleged rape and killing of a Buddhist woman by Rohingya men in 2012.³⁴ In retaliation, Buddhist nationalists

²¹ Scharf et al., *supra* note 19.

²² Scharf et al., *supra* note 19.

²³ *Id.* at 545–46.

²⁴ Albert & Maizland, *supra* note 10.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*; Blakemore, *supra* note 20; *Myanmar: What Sparked Latest Violence in Rakhine?*, BBC NEWS (Sept. 19, 2017), <https://www.bbc.com/news/world-asia-41082689> (hereinafter *Myanmar*).

³⁰ Albert & Maizland, *supra* note 10; Blakemore, *supra* note 20.

³¹ *Myanmar*, *supra* note 29.

³² Albert & Maizland, *supra* note 10.

³³ *Id.*

³⁴ *Why is there communal violence in Myanmar?*, BBC NEWS (July 3, 2014),

caused the death of many Rohingya by burning hundreds of their villages.³⁵ These and following efforts displaced thousands of Rohingya, many of which began to rely on smugglers to get their families out of Myanmar.³⁶

In 2017, Myanmar government officials crafted posts, comments, and pornographic images against Rohingya and posted them to Facebook.³⁷ 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.”³⁸ In addition to hate speech, the military also used Facebook Messenger to spread “warnings.”³⁹ Buddhist groups were warned that “jihad attacks would be carried out” against them.⁴⁰ Muslim groups were warned that “Buddhist monks were organizing anti-Muslim protests.”⁴¹

Later that year, Rohingya insurgents “armed with knives and homemade bombs attacked more than 30 police posts.”⁴² Consequently, Myanmar mobs and military burned down villages and killed many Rohingya.⁴³ Alternatively, the “military accuses the [...] Rohingyas of burning their own homes.”⁴⁴ 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.”⁴⁵

In November 2019, Gambia filed a case against Myanmar with the International Court of Justice (“ICJ”).⁴⁶ 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”).”⁴⁷ This is the

<https://www.bbc.com/news/world-asia-18395788>.

³⁵ *Id.*

³⁶ Albert & Maizland, *supra* note 10.

³⁷ Stecklow, *supra* note 6.

³⁸ *Id.*

³⁹ Mozur, *supra* note 4.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Myanmar, *supra* note 29.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*; *Rohingyan crisis: UN sees ‘ethnic cleansing’ in Myanmar*, BBC NEWS (Sept. 11, 2017), <https://www.bbc.com/news/world-asia-41224108>.

⁴⁶ Smith & Basso, *supra* note 12.

⁴⁷ *Id.*

first time an uninvolved State brought a genocide case to the ICJ.⁴⁸ The ICJ found that Gambia had standing because of their interest in preventing genocide as a State Party to the Genocide Convention.⁴⁹ The ICJ unanimously held that Myanmar must act promptly in the prevention of further abuses and human rights violations⁵⁰ while an Independent International Fact Finding Mission⁵¹ (“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.”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.⁵³ It was also found that they “remain extremely vulnerable.”⁵⁴ Additionally, Myanmar refused to acknowledge the genocide and has taken no concrete steps in assuring a safe return for displaced Rohingyas.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.”⁵⁶

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

⁴⁸ *Id.*

⁴⁹ *Gam. v. Myan*, *supra* note 11, at 3.

⁵⁰ Smith & Basso, *supra* note 12.

⁵¹ *Id.*; see *Independent International Fact-Finding Mission on Myanmar*, U.N. HUM. RTS. COUNCIL, <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx> (last visited Feb. 20, 2022) (explaining that an Independent International Fact-Finding Mission is prescribed by the United Nations Human Rights Council to establish the facts and circumstances pertaining to the allegations); see also *Q&A: United Nations Fact-Finding Mission on Myanmar*, HUM. RTS. WATCH (Aug. 2, 2017, 8:28 PM), <https://www.hrw.org/news/2017/08/02/qa-united-nations-fact-finding-mission-myanmar#> (illustrating that here, the Human Rights Council asked the Mission to “focus in particular on the situation in Rakhine State” in addition to the broad mandate. The Mission is empowered to examine all allegations of human rights violations.).

⁵² *Gam. v. Myan.*, *supra* note 11, at 5.

⁵³ *Id.* at 6.

⁵⁴ *Id.*

⁵⁵ Smith & Basso, *supra* note 12; *Myanmar: Rohingya Await Justice, Safe Return 3 Years On*, HUM. RTS. WATCH (Aug. 24, 2020, 12:52 AM), <https://www.hrw.org/news/2020/08/24/myanmar-rohingya-await-justice-safe-return-3-years>.

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.”⁵⁷ 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.”⁵⁸ Additionally, Myanmar was ordered to report to the ICJ how it planned to comply with these provisional measures.⁵⁹ Action taken in compliance of these orders has not improved the situation for Rohingya people.⁶⁰

Though Myanmar denies the allegations, it has been charged with facilitating human rights atrocities by the ICJ.⁶¹ Facebook has been criticized for playing a “key role in spreading hate speech that fueled the violence.”⁶² The digital evidence of hate speech and fake profiles has been removed from the public site, but not from Facebook’s storage.⁶³ Therefore, Facebook is capable of providing the ICJ with the requested materials for further investigation into these crimes.⁶⁴ On December 3, 2021,

⁵⁷ *Id.* at 5–6.

⁵⁸ D. Wes Rist, *What Does the ICJ Decision on The Gambia v. Myanmar Mean?*, 24 AM. SOC’Y INT’L. L. (Feb. 27, 2020), <https://www.asil.org/insights/volume/24/issue/2/what-does-icj-decision-gambia-v-myanmar-mean>.

⁵⁹ *Id.*

⁶⁰ See Param-Preet Singh, *What Myanmar Is and Is Not Doing to Protect Rohingyas from Genocide*, HUM. RTS. WATCH (July 23, 2020, 8:58 AM), <https://www.hrw.org/news/2020/07/23/what-myanmar-and-not-doing-protect-rohingyas-genocide> (highlighting the ICJ’s findings that “Myanmar had not presented ‘concrete measures aimed specifically at recognizing and ensuring the right of the Rohingya to exist as a protected group under the Genocide Convention,’” and that the situation of the Rohingya community in the Rakhine state of Myanmar “has actually worsened over the past year.”); *Gam. v. Myan.*, *supra* note 11, at 6.

⁶¹ Poppy McPherson, *Facebook shares data on Myanmar with U.N. investigators*, REUTERS (Aug. 25, 2020, 2:14 PM), <https://www.reuters.com/article/us-myanmar-facebook/facebook-shares-data-on-myanmar-with-united-nations-investigators-idUSKBN25L2G4>.

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.⁶⁵

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

II. USE OF SOCIAL MEDIA, GLOBALLY

The Internet created a global-type-of-activism, notably seen in Egypt and Tunisia.⁷⁰ Activists used various social platforms to schedule protests, coordinate efforts, and inform the world.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.⁷² Some countries saw powerful, authoritarian leaders step down; some made constitutional changes to limit the power of the monarch.⁷³

the sought-after information).

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)).

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

⁶⁷ *Id.*

⁶⁸ *Human Rights Council reiterates urgent need to ensure accountability in Myanmar*, U.N. - INDEP. INVESTIGATIVE MECHANISM MYAN. (Mar. 24, 2021), <https://iimm.un.org/human-rights-council-reiterates-urgent-need-to-ensure-accountability-in-myanmar/> [hereinafter U.N. Hum. Rts. Council] (explaining that the Human Rights Council's resolution on human rights on Myanmar has “reiterated the urgent need” to hold individuals “responsible for serious international crimes and human rights violations accountable for their actions”).

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).

⁷⁰ Yue, *supra* note 15, at 817–18.

⁷¹ *Id.*

⁷² *Arab Spring*, HISTORY, <https://www.history.com/topics/middle-east/arab-spring> (last updated Jan. 17, 2020).

⁷³ *Id.*

However, some resulted in more conflict and injury to the people revolting.⁷⁴ Some countries experienced violent civil wars; some experienced no political change.⁷⁵ 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.⁷⁶ The picture was posted to Twitter, where the world instantly saw the terror inflicted by the Syrian war.⁷⁷ The world responded with laser-like focus on the humanitarian issues in Syria.⁷⁸ However, this focus diminished almost as quickly as it had sparked.⁷⁹ 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.⁸⁰ Although social media platforms have been proven as efficient communication tools, the platforms come with a dark side.⁸¹

For some countries, this dark side is shown when authoritarian leaders can create an “alternative narrative” and “weaponize Facebook” against their citizens.⁸² Various groups, leaders, and regimes worldwide have turned to the use of social media to spread their message and show the world their actions.⁸³ Sometimes these messages are posted by the actors

⁷⁴ *Id.*

⁷⁵ Arab Spring, *supra* note 72.

⁷⁶ Juliana Palmieri, *The Use of Social Media Evidence in International Courts: Where is the Line?*, PACE INT’L L. REV. BLOG (Jan. 14, 2021), <https://pilr.blogs.pace.edu/2021/01/14/the-use-of-social-media-evidence-in-international-courts-where-is-the-line/>.

⁷⁷ Peter Bouckaert (@bouckap), TWITTER (Sept. 2, 2015, 7:29 AM), <https://twitter.com/bouckap/status/639037338362978304>.

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.*

⁸¹ *Radicalization: Social Media and the Rise of Terrorism: Hearing Before the S. Comm. on Natn’l Security of the Committee on Oversight and Gov’t Reform House of Representatives*, 114th Cong. 5–7 (2015) (statement of the Honorable Mark D. Wallace, Ambassador to the United Nations).

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.⁸⁴ For example, Russian officials ran a social media campaign against the United States, by creating “fictitious U.S. personas on social media platforms.”⁸⁵ The Philippine government used similar digital tactics.⁸⁶ Officials created fake candidate profiles to create the illusion that the sitting president was not running uncontested.⁸⁷ In Cambodia, the prime minister created fake Facebook profiles to increase the “likes” on his pro-government posts.⁸⁸ Lastly, the military in Myanmar set up “troll accounts and celebrity pages” to “distribute lurid photos, false news, and inflammatory posts.”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.⁹⁰ In Sweden, a Syrian national was recently convicted of war crimes, based on evidence posted to Facebook.⁹¹ Such evidence was used to create a timeline proving execution had to have happened by this person’s hand.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.⁹³ As a first step, the International Bar Association developed apps to “improve the verifiability of open source material.”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

Arrest Warrant, OPINIO JURIS (Aug. 17, 2017), <http://opiniojuris.org/2017/08/17/and-so-it-begins-social-media-evidence-in-an-icc-arrest-warrant/> (listing the first few groups such as Al-Saiqa Brigade commander arrest and ISIS which use social media to communicate).

⁸⁴ Irving, *supra* note 83.

⁸⁵ Yue, *supra* note 15, at 819.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 820.

⁸⁹ *Id.* at 819.

⁹⁰ Irving, *supra* note 83.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

social media content to enforce “accountability.”⁹⁵

A. Meta, Facebook & ‘Free Basics’

Meta⁹⁶ 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

⁹⁵ Emma Irving, *The Role of Social Media is Significant: Facebook and the Fact Finding Mission on Myanmar*, OPINIO JURIS (Sept. 7, 2018), <http://opiniojuris.org/2018/09/07/the-role-of-social-media-is-significant-facebook-and-the-fact-finding-mission-on-myanmar/>; *Justice AI: Turning Conflict Data into Actionable Evidence*, BENETECH, <https://benetech.org/lab/ethical-ai-to-promote-justice/> (last visited Apr. 2, 2021, 9:35 PM) (providing an example of one organization which compiles open source digital information to promote accountability).

⁹⁶ See *Free Basics*, META, <https://www.facebook.com/connectivity/solutions/free-basics> (last visited Apr. 8, 2022, 5:29 PM); see also *Introducing Meta: A Social Technology Company*, META (Oct. 28, 2021), <https://about.fb.com/news/2021/10/facebook-company-is-now-meta/> (stating that Meta is the newly branded parent company governing the apps and internet services like Facebook and Free Basics).

⁹⁷ Solon, *supra* note 16.

⁹⁸ *Id.*; Deborah Brown, *Big Tech's Heavy Hand Around the Globe*, HUM. RTS. WATCH (Sept. 8, 2020, 6:30 PM), <https://www.hrw.org/news/2020/09/08/big-techs-heavy-hand-around-globe#>.

⁹⁹ Brown, *supra* note 98.

¹⁰⁰ Pavithra Mohan, *Facebook Rebrands Internet.Org App As “Free Basics”*, FAST CO. (Sept. 25, 2015), <https://www.fastcompany.com/3051576/facebook-rebrands-internetorg-app-as-free-basics>.

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 Free 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,

<https://www.theverge.com/2022/1/25/22900924/facebooks-free-internet-less-developed-costing-users-wsj>.

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.

¹⁰⁸ Mariella Moon, *Facebook’s Free Basics quietly pulled from Myanmar, other markets*, ENGADGET (May 2, 2018), <https://www.engadget.com/2018-05-02-facebook-free-basics-quietly-pulled-myanmar.html>.

¹⁰⁹ *Id.*

¹¹⁰ Brown, *supra* note 98.

¹¹¹ *Id.*

¹¹² Jessi Hempel, *Inside Facebook’s Ambitious Plan to Connect the Whole World*, WIRED (Jan. 19, 2016), <https://www.wired.com/2016/01/facebook-zuckerberg-internet-org/>.

regulators decided not to renew the contract.¹¹³ Neither side gave an official reason for the service shutdown.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.¹¹⁵

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

C. Myanmar & Facebook

In 2016, Meta's Free Basics app contracted with local telecommunication services, such as Myanmar Posts and Telecommunications ("MPT").¹¹⁷ The app "provides users willing to sign up for Facebook with internet access that doesn't count against their mobile plan."¹¹⁸ Essentially, users exchange their behavioral data or "traffic" through the creation of profiles on Facebook for free, yet light, internet.¹¹⁹ Originally success was seen in the numbers: Facebook had 9.5 million users in Myanmar in 2016.¹²⁰ Their goal: to "help more people experience the value and relevance of connectivity through an open and free platform."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.¹²² However, it was also met with

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Hempel, *supra* note 112.

¹¹⁶ Hum. Rts. Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, ¶ 466, U.N. Doc. A/HRC/42/CRP.5 (Sept. 16, 2019) [hereinafter *Mission Report*].

¹¹⁷ Hatmaker, *supra* note 16; Waring, *supra* note 16 (illustrating MPT as the largest operator in Myanmar having 47% market share).

¹¹⁸ Hatmaker, *supra* note 16.

¹¹⁹ *Id.*

¹²⁰ Catherine Trautwein, *Facebook's Free Basics lands in Myanmar*, MYAN. TIMES (June 6, 2016), <https://www.mmmtimes.com/business/technology/20685-facebook-free-basics-lands-in-myanmar.html>.

¹²¹ Liao, *supra* note 17.

¹²² Yue, *supra* note 15, at 817.

contention.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.¹²⁴ Addressing those concerns, Meta changed their process of review.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.¹²⁶

Unfortunately, Myanmar became one of the most “infamous cases,”¹²⁷ where access to Facebook’s platform supported ultranationalist, anti-Rohingya voices and provided a setting for the dissemination of hate speech.¹²⁸ This was accomplished by the use of military-set-up “troll accounts and celebrity [profiles]”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.”¹³⁰ They used these profiles to flood local users’ news feed with “lurid photos, false news, and inflammatory posts.”¹³¹ These inflammatory posts, and thus, the military’s rhetoric toward the Rohingya Muslims mirrored that of the Burmese nationalists.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.”¹³³ The military created these pages and posts with the purpose of furthering the divide: they

¹²³ Trautwein, *supra* note 120.

¹²⁴ James Vincent, *Facebook’s Free Basics service has been banned in India*, VERGE (Feb. 8, 2016, 06:22 AM), <https://www.theverge.com/2016/2/8/10913398/free-basics-india-regulator-ruling>.

¹²⁵ Trautwein, *supra* note 120.

¹²⁶ *See id.* (noting that Facebook’s new set of decision-making criteria attempted to address the concerns of net neutrality).

¹²⁷ Brown, *supra* note 98.

¹²⁸ Alexandra Stevenson, *Facebook Admits It Was Used to Incite Violence in Myanmar*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/technology/myanmar-facebook.html>.

¹²⁹ Yue, *supra* note 15, at 819.

¹³⁰ Radhika Kapoor & Sharngan Aravindakshan, *Speech Crimes and Persecution Undoing the Legacy of Nahimana*, HARV. INT’L L.J., <https://harvardilj.org/2020/09/speech-crimes-and-persecution-undoing-the-legacy-of-nahimana/> (last visited Mar. 4, 2022).

¹³¹ Yue, *supra* note 15, at 819; Mozur, *supra* note 4.

¹³² Yue, *supra* note 15, at 820.

¹³³ *See* Stecklow, *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.¹³⁴ The speech was dehumanizing.¹³⁵ It enhanced the resulting vast divide.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.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.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.”¹³⁹ Hate speech has led to violence and serious human rights violations, across the globe.¹⁴⁰ These consequences are enhanced when social media platforms are used to create or further such a divide.¹⁴¹

After many complaints were filed and initially ignored¹⁴² regarding the use of Facebook's platform in the dissemination of hate speech, Free Basics was “accused of supporting ethnic cleansing.”¹⁴³ After being criticized for responding slowly to this crisis, Facebook started censoring information related to the ethnic cleansing.¹⁴⁴ In 2017, Free Basics quietly left

¹³⁴ Yue, *supra* note 15, at 833.

¹³⁵ See generally *id.* (arguing that treatment across Facebook's platform is dehumanizing to the Rohingya people).

¹³⁶ *Id.* at 832–34.

¹³⁷ Yue, *supra* note 15, at 832–34.

¹³⁸ *Id.* at 820.

¹³⁹ Land & Aronson, *supra* note 18, at 227.

¹⁴⁰ Yue, *supra* note 15, at 820.

¹⁴¹ *Id.*

¹⁴² See Stecklow, *supra* note 6 (stating that Facebook ignored repeated warnings from researchers and human rights activists beginning in 2013 concerning these issues).

¹⁴³ Moon, *supra* note 108; Daniel Cooper, *Facebook accused of supporting ‘ethnic cleansing’ in Myanmar*, ENGADGET (Sept. 20, 2017), <https://www.engadget.com/2017-09-20-facebook-accused-of-supporting-ethnic-cleansing-in-myanmar.html?guccounter=1>.

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.¹⁴⁵

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

¹⁴⁵ Moon, *supra* note 108; Mariella Moon, ‘Free Basics by Facebook’ replaces Internet.org website and app, ENGADGET (Sept. 25, 2015), <https://www.engadget.com/2015-09-24-free-basics-by-facebook.html>; Manish Singh, *After Harsh Criticism, Facebook Quietly Pulls Services From Developing Countries*, OUTLINE (May 1, 2018, 1:49 PM), <https://theoutline.com/post/4383/facebook-quietly-ended-free-basics-in-myanmar-and-other-countries>; Hatmaker, *supra* note 16.

¹⁴⁶ *Mission Report*, *supra* note 116.

¹⁴⁷ *Id.*

¹⁴⁸ Singh, *supra* note 60; *Gam. v. Myan*, *supra* note 11, at 6.

¹⁴⁹ Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT’L & COMP. L. REV. 339, 340 (2001).

¹⁵⁰ See generally Jenny Domino, *Crime as Cognitive Constraint: Facebook’s Role Myanmar Incitement Landscape and the Promise of International Tort Liability*, 52 CASE W. RES. J. INT’L L. 143, 145 (2020) (discussing the legal character of social media content with respect to the Geneva Convention and the Rome Statute).

jurisdiction over persons.¹⁵¹ Therefore, the ICC can prosecute corporate officers but not the entity itself.¹⁵² 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.¹⁵³ 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.¹⁵⁴ 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.¹⁵⁵ Specifically, the ICJ wants to establish that the bad actors had criminal intent and a clear organizational plan when broadcasting hate speech on Facebook.¹⁵⁶

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.¹⁵⁷ The statute mandates a level of knowledge, constituting complicity in the atrocity, for officers to be held liable.¹⁵⁸ Next, when evaluating customary international law three concepts are relevant: (1) Corporate Social Responsibility ("CSR"),¹⁵⁹ (2) the

¹⁵¹ Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 25 (1999).

¹⁵² See generally *id.* (explaining that the ICC has jurisdiction over natural persons but not legal entities).

¹⁵³ See generally Ole Kristian Fauchald & Jo Stigen, *Corporate Responsibility Before International Institutions*, 40 GEO. WASH. INT'L L. REV. 1025, 1038 (2009) (illustrating the difficulties of ICC members negotiating to expand jurisdiction to legal entities).

¹⁵⁴ U.N. Office on Genocide Prevention & Responsibility to Protect, *The Genocide Convention*, <https://www.un.org/en/genocideprevention/genocide-convention.shtml> (last visited Mar. 15, 2022) [hereinafter Genocide Overview].

¹⁵⁵ Irving, *supra* note 95.

¹⁵⁶ *Id.*

¹⁵⁷ David J. Scheffer, *Corporate Liability under the Rome Statute*, 57 HARV. INT'L L.J. 35, 35–36 (2016); see generally Arsanjani, *supra* note 151 (explaining the adoption of the Rome Statute of the International Criminal Court during the UN Diplomatic Conference in 1998 and the events prior to the conference).

¹⁵⁸ Domino, *supra* note 150, at 181.

¹⁵⁹ See *id.* at 162.

duty to protect and respect,¹⁶⁰ and (3) corporate compliance.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,¹⁶² which creates a vast divide among States.¹⁶³

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.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.¹⁶⁵

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

¹⁶⁰ Office of the High Commissioner, *Guiding Principles on Business and Human Right: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 3, U.N. Doc. HR/PUB/11/04 (2011).

¹⁶¹ *Corporate Complicity & Legal Accountability*, INT'L COMM'N JURISTS, <https://www.icj.org/wp-content/uploads/2012/06/Vol.3-Corporate-legal-accountability-thematic-report-2008.pdf> (2008).

¹⁶² See Anshu Siripurapu & William Merrow, *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).

¹⁶³ See *id.* (depicting the countries which offer accessible internet, all democratic regimes, as compared to those which do not, all authoritarian regimes).

¹⁶⁴ Arsanjani, *supra* note 151, at 25.

¹⁶⁵ Domino, *supra* note 150, at 176.

¹⁶⁶ *The International Criminal Court*, AMNESTY INT'L, https://www.amnestyusa.org/pdfs/IJA_Factsheet_1_International_Criminal_Court.pdf (last visited Mar. 16, 2022).

¹⁶⁷ *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).

criminal matters such as genocide, so the point here is moot.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.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.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.¹⁷¹ Over 150 countries are parties to the agreement.¹⁷² It imposes obligations to prevent and punish acts constituting genocide.¹⁷³ And under the agreement, the parties are encouraged to try and extradite any person charged with genocide.¹⁷⁴ It also obligates parties to enact legislation, ensure that penalties are effective, and ultimately not commit genocide.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

¹⁶⁸ *Id.*

¹⁶⁹ Singh, *supra* note 60.

¹⁷⁰ See Scheffer, *supra* note 157, at 1036–37.

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.”).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

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.¹⁷⁶

It is commonly understood that the crime of genocide contains two elements: one mental component and one physical component.¹⁷⁷ The mental component requires the showing of an “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group.”¹⁷⁸ This component is difficult to prove because specific intent requires a showing that is more than dispersing a group or destroying their culture.¹⁷⁹ There must be some “organizational plan or policy” associated with the intent to destroy the group.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.”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.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.¹⁸³ Thus, the data that Facebook currently owns plays a substantial role in achieving justice in Myanmar.

C. Rome Statute and Corporate Liability

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

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].

¹⁷⁷ Genocide Overview, *supra* note 154.

¹⁷⁸ Genocide Overview, *supra* note 154.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Irving, *supra* note 95.

¹⁸³ *See id.*

¹⁸⁴ *See Scheffer, supra* note 157, at 35 (explaining that corporate liability was conditional affirmed and required complex amendments to the Rome

was due to the fact that most States had not yet implemented such liability within domestic law.¹⁸⁵ 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.¹⁸⁶ As more States accept corporate criminal liability into domestic law, international legal systems will be expected to follow suit.¹⁸⁷

Conversely, corporate officers are subject to liability under the Rome Statute.¹⁸⁸ 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.¹⁸⁹ Natural persons include officers of a corporation.¹⁹⁰ This means that the ICC and its Prosecutor have the authority to investigate the actions of corporate officers complicit with human rights atrocities.¹⁹¹ Therefore, an officer can be held responsible for their complicity in “genocide, crimes against humanity, war crimes, or even aggression.”¹⁹²

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.¹⁹³

D. Evolving Customs of International Law

Customary International Law (“CIL”) is evidenced by

Statute).

¹⁸⁵ *Id.* at 36.

¹⁸⁶ Marie Davoise, *All Roads Lead to Rome: Strengthening Domestic Prosecutions of Businesses through the Inclusion of Corporate Liability in the Rome Statute*, OPINIO JURIS (July 25, 2019), <http://opiniojuris.org/2019/07/25/all-roads-lead-to-rome-strengthening-domestic-prosecutions-of-businesses-through-the-inclusion-of-corporate-liability-in-the-rome-statute/>.

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*.¹⁹⁴ *Opinio juris* asks whether international communities have an “opinion of legal obligation or necessity” to continue adhering by the proposed custom.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.¹⁹⁶ Support of this trend includes an amendment to the Business and Human Rights Treaty which has been drafted and is currently being negotiated.¹⁹⁷ This draft strives to regulate the activities of corporations in regard to international human rights violations.¹⁹⁸ To do so, it places the onus on each State to craft and enact domestic laws holding corporations liable for these crimes.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.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

¹⁹⁴ *Customary International Law*, CORNELL L. SCH., https://www.law.cornell.edu/wex/customary_international_law (last visited Mar. 16, 2022).

¹⁹⁵ *opinio juris (international law)*, CORNELL L. SCH., https://www.law.cornell.edu/wex/opinio_juris_%28international_law%29 (last visited Mar. 16, 2022).

¹⁹⁶ Davoise, *supra* note 186 (exemplifying the enactment of domestic laws through an increase in domestic prosecutions).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ U.S. Mission Geneva, *The U.S. Government’s Continued Opposition to the Business & Human Rights Treaty Process*, U.S. MISSION INT’L ORGANIZATIONS GENEVA (Oct. 16, 2019), <https://geneva.usmission.gov/2019/10/16/the-united-states-governments-continued-opposition-to-the-business-human-rights-treaty-process/>.

the increased pressure to adopt social responsibility policies²⁰¹ 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.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.²⁰³ In other countries where CSR policy is not yet mandated by law, major corporations have created their own policies.²⁰⁴ In doing so, companies like HP, Microsoft, and General Mills have been ranked as “most responsible companies.”²⁰⁵ Lastly, though the United States opposes the Business and Human Rights Treaty, it promotes CSR through the Bureau of Economic and Business Affairs.²⁰⁶ Other countries who implemented varying levels of CSR mandates are the United Kingdom, Europe, India, South Africa, and China.²⁰⁷

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

²⁰¹ See generally Mason Mitchel, *Top Corporate Social Responsibility Trends in 2022*, SMART RECRUITERS (May 21, 2020), <https://www.smartrecruiters.com/blog/top-corporate-social-responsibility-trends-in-2020/>.

²⁰² Peter Muchlinski, *International Corporate Social Responsibility and International Law*, in NEW DIRECTIONS IN INT'L ECON. L.: IN MEMORIAM THOMAS WÄLDE 223 (Todd Weiler & Freya Baetens eds., 2011).

²⁰³ Muchlinski, *supra* note 202, at 225–26.

²⁰⁴ Mitchel, *supra* note 201.

²⁰⁵ *Id.*

²⁰⁶ Press Release, U.S. Mission Geneva, The U.S. Government's Opposition to the Business and Human Rights Treaty Process (Oct. 26, 2020); Sukhmani Singh, *Corporate Social Responsibility (CSR) laws around the World*, IPLEADERS (Aug. 16, 2014), <https://blog.ipleaders.in/corporate-social-responsibility-csr-laws-around-the-world/>.

²⁰⁷ Singh, *supra* note 206; see also Li-Wen Lin, *Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China*, 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).

²⁰⁸ See Singh, *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.²⁰⁹ 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.”²¹⁰ This framework is not an obligation under current international law.²¹¹ Instead, it imposes responsibility directly on the corporation or State to take action.²¹² Interestingly, this framework was unanimously endorsed by the Council.²¹³

A “responsibility to respect human rights means to avoid infringing on the rights of others, and *addressing adverse impacts that may occur*.”²¹⁴ 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.²¹⁵ Applying to all companies and situations, this moral responsibility exists even when domestic laws and regulations lack enforcement.²¹⁶ Recent litigation trends indicate a similar, but still pro-capitalist consensus shaping in the US.²¹⁷ Corporations, whose supply chains involved international

²⁰⁹ U.N. Secretary-General, *Rep. of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, ¶ 1, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) [hereinafter *Duty to Protect, Respect*].

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

²¹¹ *Id.* ¶ 55; see John Ruggie, *The Corporate Responsibility to Respect Human Rights*, HARV. L. SCH. FORUM CORP. GOVERNANCE (May 15, 2010), <https://corpgov.law.harvard.edu/2010/05/15/the-corporate-responsibility-to-respect-human-rights/>.

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.

²¹⁷ Linda Martin et al., *Allegations of Human Rights Violations and Other Litigation Trends*, HARV. L. SCH. FORUM CORP. GOVERNANCE (Jan. 13, 2021), <https://corpgov.law.harvard.edu/2021/01/13/allegations-of-human-rights-violations-and-other-litigation-trends/>.

communities such as Nestle,²¹⁸ are being sued for turning a blind eye to human rights violations occurring at their benefit.²¹⁹ 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.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.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.²²² Consequently, corporations are often accused of complying with or furthering these abuses.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.²²⁴ Compliance, or commonly understood as aiding and

²¹⁸ *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1016 (9th Cir. 2014) (determining whether Nestle can be held responsible for child labor violations on farms within their supply chains, internationally); Lawrence Hurley, *U.S. Supreme Court justices question human rights claims against Nestle and Cargill*, REUTERS (Dec. 1, 2020, 12:40 PM), <https://www.reuters.com/article/us-usa-court-slavery/u-s-supreme-court-justices-question-human-rights-claims-against-nestle-and-cargill-idUSKBN28B5X9>.

²¹⁹ Ruggie, *supra* note 211; Hurley, *supra* note 218.

²²⁰ Clapham & Jerbi, *supra* note 149, at 347–48.

²²¹ Yue, *supra* note 15, at 822.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 825.

abetting,²²⁵ 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.

²²⁶ Yue, *supra* note 15, at 827–28.

²²⁷ *Id.* at 828.

²²⁸ *Id.*

²²⁹ Domino, *supra* note 150, at 179.

²³⁰ Yue, *supra* note 15, at 829.

²³¹ *Id.*

²³² *Id.*

²³³ Isabella Banks, *International Criminal Liability in the Age of Social Media: Facebook's Role in Myanmar*, PUB. INT'L L. & POL'Y GRP. (Feb. 13, 2019), <https://www.publicinternationallawandpolicygroup.org/lawyer-justice-blog/2019/2/13/international-criminal-liability-in-the-age-of-social-media-facebooks-role-in-myanmar>.

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.).

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

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.”²⁴² However currently, the average person does not view corporations as abstract. Consumers have developed intimate relationships with these companies through direct communication on social media²⁴³ and thus, have started to use their purchasing power to demand decency.²⁴⁴ 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.”²⁴⁵ 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.”²⁴⁶ As discussed, this legal responsibility has not yet expanded into international, human rights law.²⁴⁷

The social media corporations, however, their product is a platform for speech and open communication.²⁴⁸ Largely, providing this platform for “free speech” in developing nations is seen as a good step towards democracy.²⁴⁹ 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.²⁵⁰ Commonly

²⁴² See Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L L. 955, 957 (2008) (quoting International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), *reprinted in* 41 AM. J. INT'L L. 172, 221 (1947)).

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

²⁴⁴ See generally *Consumers Expect the Brands they Support to be Socially Responsible*, BUS. WIRE (Oct. 2, 2019, 12:09 PM), <https://www.businesswire.com/news/home/20191002005697/en/Consumers-Expect-the-Brands-they-Support-to-be-Socially-Responsible> (highlighting consumer awareness of a brand's positive social impact).

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.

²⁴⁹ Sarah Repucci, *Media Freedom: A Downward Spiral*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-and-media/2019/media-freedom-downward-spiral>, (last visited Feb. 7, 2022).

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

Rights and Liabilities in Media Content: Internet, Broadcast, and Print (2d ed. 2010) (illustrating the various regulations placed on Internet sources by the courts).

²⁵¹ Yue, *supra* note 15, at 827.

²⁵² Siripurapu & Mellow, *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.*

²⁵⁸ See Saira Asher, *Myanmar coup: How Facebook became the 'digital tea shop'*, BBC NEWS (Feb. 4, 2021), <https://www.bbc.com/news/world-asia-55929654> (detailing how UN human rights investigators have determined that Facebook played a role in fomenting violence in Myanmar).

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.

²⁶¹ Paul Hitlin & Lee Rainie, *Facebook Algorithms and Personal Data*, PEW RSCH. CTR. (Jan. 16, 2019), <https://www.pewresearch.org/internet/2019/01/16/facebook-algorithms-and-personal-data/>.

²⁶² *Id.*

²⁶³ Hitlin & Rainie, *supra* note 261.

²⁶⁴ *Id.*; *Ad Targeting: Help your ads find the people who will love your business*, META FOR BUS., https://www.facebook.com/business/ads/ad-targeting?ref=ens_rdr (last visited Mar. 17, 2022).

²⁶⁵ *Does Facebook really not sell your data to advertisers?*, THEJOURNAL.IE, <https://www.thejournal.ie/mark-zuckerberg-facebook-sell-data-3957290-Apr2018/rnal.ie> (last visited Mar. 17, 2022).

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.²⁶⁹

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 dollars²⁷⁰ 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.²⁷¹ For instance, in countries where the internet is at least partially free, the use of social media is not extremely restricted.²⁷² The United States imposes almost no liability and the companies are largely self-regulated.²⁷³ In Germany, Australia, Kenya, and India content can be required to be removed either by law or governmental request.²⁷⁴ Brazil is in the process of implementing a law that may start to limit one’s freedom of expression on social platforms.²⁷⁵ On the other side,

²⁶⁹ *Id.*; see also LastWeekTonight, *Facebook: Last Week Tonight with John Oliver* (HBO), YOUTUBE (Sept. 24, 2018), <https://www.youtube.com/watch?v=OjPYmEZxACM> (discussing Facebook’s mishandling of their platform after an extreme growth of usership in Myanmar tragically combined with a lack of capable content reviewers monitoring hate speech posts).

²⁷⁰ Rishi Iyengar, *Here's how big Facebook's ad business really is*, CNN BUS., <https://www.cnn.com/2020/06/30/tech/facebook-ad-business-boycott/index.html>, (July 1, 2020, 9:19 AM).

²⁷¹ Siripurapu & Merrow, *supra* note 162.

²⁷² See *id.* (comparing government restriction in countries with free or partially free internet, such as the U.S. and Brazil, with countries where it is not, such as Russia and China).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

in countries where the internet is not free such as Saudi Arabia, China, Ethiopia, and Russia, censorship and extreme government regulation is the norm.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.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.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.²⁷⁹ This control could create possible liability for the content posted by third parties on their platform.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.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.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."²⁸³ Radio broadcasts

²⁷⁶ *Id.*

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.").

²⁷⁸ Yue, *supra* note 15, at 830–32.

²⁷⁹ Yue, *supra* note 15, at 830–32.

²⁸⁰ *Id.* at 829–30.

²⁸¹ *People In Int. of R.D.*, 464 P.3d at 730–31.

²⁸² Tworek, *supra* note 1.

²⁸³ Isabel Ivanescu, *Media Manipulation, Suppression and the Rwandan Genocide (March)*, KENAN INST. ETHICS DUKE U. (Apr. 7, 2020),

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,

<https://kenan.ethics.duke.edu/media-manipulation-suppression-and-the-rwandan-genocide/>.

²⁸⁴ Sharon Lafraniere, *Court Finds Rwanda Media Executives Guilty of Genocide*, N.Y. TIMES (Dec. 3, 2003), <https://www.nytimes.com/2003/12/03/international/africa/court-finds-rwanda-media-executives-guilty-of-genocide.html>.

²⁸⁵ Ivanescu, *supra* note 283.

²⁸⁶ Cole, *supra* note 79.

²⁸⁷ Ivanescu, *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 For behavior like hate

²⁹¹ Neema Hakim, *Do Not Trust Facebook to Enforce Human Rights*, OPINIO JURIS (Mar. 22, 2021), <http://opiniojuris.org/2021/03/22/do-not-trust-facebook-to-enforce-human-rights/>.

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-democratic³⁰¹ 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.³⁰² 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 need³⁰³ and bringing mass division and violence³⁰⁴ 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.³⁰⁵ Because the content published on these sites are done so by a third-party (the user), the sites claim no responsibility for the result.³⁰⁶

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 personalities³⁰⁷ and so, was likely influential on the population. Facebook entered the region

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.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.³⁰⁹ That data was likely included in the data Facebook makes accessible to outside companies.³¹⁰ Additionally, the Myanmar population were inexperienced at using social media and the internet.³¹¹ People were negatively affected by the violence attributed to hate speech spread on Facebook.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.³¹³ The violence and hate speech did not go on unnoticed; journalistic investigation uncovered multiple sources who flagged this behavior to Facebook.³¹⁴ Unfortunately, the company's response was too slow and inadequate for such a dire situation.³¹⁵ It doesn't help that Facebook continued to capitalize on the data being compiled from Myanmar people.³¹⁶ Lastly, this conflict started in 2012 and has not been resolved.³¹⁷ There is a strong argument that the ongoing and prolonged nature of the violence cannot be solely attributed to Facebook's presence.³¹⁸ This is because Free Basics entered Myanmar in 2016³¹⁹ and quietly left in 2017.³²⁰ When analyzing Facebook's

³⁰⁸ See *id.* at 818 (explaining how some world leaders take advantage of social media to further their political narrative and spread misinformation).

³⁰⁹ Solon, *supra* note 16.

³¹⁰ *Id.*; Irina Ivanova, *Facebook let some companies exploit users' friends data, U.K. email dump alleges*, MONEYWATCH (Dec. 5, 2018, 4:56 PM), <https://www.cbsnews.com/news/facebook-gave-some-companies-preferential-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).

³¹¹ Land & Aronson, *supra* note 18, at 226.

³¹² *Id.*

³¹³ Albert & Maizland, *supra* note 10.

³¹⁴ Stecklow, *supra* note 6.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ Stecklow, *supra* note 6.

³¹⁹ Hatmaker, *supra* note 16.

³²⁰ Moon, *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 entrepreneurship, 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.