

Facebook's Legal Responsibility for the Rohingya Genocide

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Introduction

SOcial media is increasingly influential in people's lives, mental health,¹ politics,² and even basic human rights. The internet can disseminate both pertinent information and harmful misinformation at a rapid pace, and much of the content spread on social media is regulated only by private companies and their guidelines. While a company's decisions regarding misinformation may be controversial in some cases, in other cases it may become deadly.

Community guidelines on social media fall short when a social media platform enters a region with a long history of tensions between ethnic groups and state-sponsored human rights abuses. The international community, nation-states as well as the United Nations ("UN"), is unprepared for the propagation of human rights abuses through social media. While international procedures exist to hold states and individuals accountable for severe human rights violations, no procedures are designed to hold corporations accountable for supporting these violations.

Myanmar³ serves as an example of the extreme abuses that can spread via social media and the need to hold private companies ac-

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1. See generally Igor Pantic, *Online Social Networking and Mental Health*, 17 *CYBERPSYCHOLOGY BEHAV. & SOC. NETWORKING* 652 (2014) (reviewing studies that link social networking use and mental health issues).

2. See generally Sue Halpern, *The Problem of Political Advertising on Social Media*, *NEW YORKER* (Oct. 24, 2019), <https://www.newyorker.com/tech/annals-of-technology/the-problem-of-political-advertising-on-social-media> [<https://perma.cc/9YFR-T6UP>] (discussing the controversy behind political advertisements on Facebook after the 2016 U.S. presidential election).

3. Myanmar was once known as Burma and some sources in this Article may refer to it as Burma. This Article will use Myanmar to refer to the nation and the term Burmese to

countable for their role in supporting an ongoing genocide. Facebook entered Myanmar, a country in the midst of extreme human rights abuses against the Rohingya which Facebook executives knew about, while having almost no moderation in place.⁴ Civilians and government officials used Facebook's platform to explicitly condone, incite, and plan genocide against the Rohingya people in Myanmar.⁵ While this took place, Facebook either ignored reports about these posts or suspended users attempting to spread information about the genocide.⁶

Facebook should be held accountable for its active role in the Rohingya genocide. This Comment examines whether Facebook can be held liable under current domestic U.S. laws or international human rights laws. It finds that application of these laws to Facebook will likely be unsuccessful at holding the company accountable. This Comment then suggests ways in which human rights law can hold social media corporations accountable and ways in which Facebook can repair its use within Myanmar.

In Section I, this Comment discusses Myanmar's history and the ongoing genocide against the Rohingya, a minority ethnic group residing in Myanmar's Rakhine State.⁷ There is still debate in the international community about whether the persecution of the Rohingya constitutes genocide under international law, and Section II applies current genocide law to the Myanmar case. It determines that the human rights abuses against the Rohingya constitute genocide. Section III examines the introduction of the internet and Facebook in Myanmar and the ways that civilians and the government have used the platform to promote genocide. Section IV applies domestic U.S. caselaw and international criminal law to Facebook's involvement and finds that the company is unlikely to be held liable under those standards. Section V then proposes regulating international corporations, particularly internet-based corporations, through the UN. It goes on to suggest ways in which Facebook can use its platform and resources

refer to the national group and language. For a historical explanation of the names Myanmar and Burma, see MICHAEL AUNG-THWIN & MAITRII AUNG-THWIN, A HISTORY OF MYANMAR SINCE ANCIENT TIMES: TRADITIONS AND TRANSFORMATIONS 7-8, 25-36, 225-44 (2012).

4. See discussion *infra* Section III.

5. *Id.*

6. *Id.*

7. *Who Are the Rohingya?*, AL JAZEERA (Apr. 18, 2018), <https://www.aljazeera.com/indepth/features/2017/08/rohingya-muslims-170831065142812.html> [https://perma.cc/WTX3-WVFJ].

to support human rights as an example for other social media corporations that may face similar situations.

I. Historical Background of Myanmar

The violence and expulsion of the Rohingya in Myanmar did not begin with Facebook. As the director of Burma, UK, Mark Farmaner, stated, “violence against the Rohingya would have happened with or without Facebook”⁸ The systematic and legal discrimination against the Rohingya occurred decades prior to Facebook’s existence and finds basis in the long and complex history of Myanmar. Awareness of Myanmar’s history and culture is necessary to understand its current state and Facebook’s role in the violence.

This section establishes the history prior to the genocide. The focus then narrows into the state’s actions against the Rohingya to lay out the case for genocide under international law, discussed in the next section.

The beginnings of Myanmar as a state, a political entity, and as a culture are subject to discourse that influences even the politics of today’s Myanmar.⁹ Histories of Myanmar published in English tend to shift focus toward the most recent century, which represents “less than 5 percent of the country’s total history”¹⁰ The topic of this paper, however, requires a focus on Myanmar’s colonial and post-colonial history to contextualize the current violence. Even so, the pre-colonial history of the country creates a backdrop for the cultural values that are currently in conflict with presumed colonial impositions.

Scientific evidence of urban civilization in Myanmar dates as far back as the second century BC.¹¹ The land’s history is thus too long to recount in its entirety, but Burmese cultural ideals often reflect back on its “golden age” from the mid-ninth to the beginning of the fourteenth century.¹² At that time, the Kingdom of Pagan was “dominated by Burmese speakers,” which allowed Burmese culture to “spread to the far reaches of the country in all directions.”¹³ Eventually, the cen-

8. Laignee Barron, *Could Facebook Have Helped Stop the Spread of Hate in Myanmar?*, TIME (Apr. 6, 2018, 5:28 AM), <https://time.com/5230474/facebook-myanmar-hate-speech-rohingya/> [https://perma.cc/Z3BQ-KVD3].

9. See AUNG-THWIN & AUNG-THWIN, *supra* note 3, at 26.

10. *Id.* at 27 (describing the problem with this approach as implicitly acknowledging “that things *external and recent* are more important than things *indigenous and ancient*.”).

11. *Id.* at 29.

12. *Id.* at 29-30.

13. *Id.* at 30.

tral power of Pagan faded, and the centers of power split and reunified across centuries.¹⁴

Throughout these reunifications, Lower Myanmar grew and expanded due to trade with India, China, Britain, and the Netherlands.¹⁵ After three wars with the British throughout the nineteenth century, Myanmar “became a province of British India.”¹⁶ The formerly dominant Burmese-speakers, “especially tradition-bound Buddhists,” were then placed at the bottom of the social, economic, and political hierarchy of the colony.¹⁷ The British formed the top of the hierarchy while the Indians and Chinese were in the middle, leading to anti-foreign sentiments from the colonized Burmese.¹⁸ The land in Rakhine, the homeland of the Rohingya, was well-suited to the wet-rice agriculture that the British sought to market.¹⁹ Rakhine became a foothold in the market and thus “an economic magnet attracting waves of migrants and seasonable workers from all directions.”²⁰ Much of the anti-Rohingya rhetoric from the Burmese government, discussed further below, stems from the significant presence of migrants in the Rakhine state.

In 1942, Japanese invaders replaced the British as the ruling power in Myanmar.²¹ The shift helped form a new identity within Myanmar characterized by anti-British sentiment, a revival of “indigenous languages, symbols and traditions,” and a politically dominant army.²² These ideals produced institutions that still maintain a strong hold on Myanmar, such as the Burma Independence Army (“BIA”), the Anti-Fascist People’s Freedom League (“AFPFL”) political party, and a parliamentary democracy.²³ Myanmar’s independence in 1948 left a vacuum of power that the army ultimately filled after a hard-fought civil war.²⁴ As the new government sought to unify the country under a Burmese identity, a Buddhist identity in particular,²⁵ the presence of

14. *Id.* at 30-31.

15. *Id.* at 32.

16. *Id.* at 32-33.

17. Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar’s Rohingya*, 23 PAC. RIM L. & POL’Y J. 683, 698 (2014).

18. *Id.*

19. *Id.* at 695.

20. *Id.*

21. AUNG-THWIN & AUNG-THWIN, *supra* note 3, at 27.

22. *Id.* at 225.

23. *Id.* at 226.

24. *Id.* at 227-28, 238.

25. *Id.* at 240.

other religious minorities in the country, particularly the Muslim Rohingya, came under scrutiny.

The history of the Rohingya in Myanmar is controversial within Burmese political rhetoric.²⁶ Initially, the Burmese government considered the Rohingya a legitimate ethnic group in Myanmar. “In 1954, Prime Minister U Nu highlighted the Rohingya Muslim political loyalty to the predominantly Buddhist country” in a speech broadcast to the country.²⁷ Rohingya people had full citizenship and National Registration Cards (“NRCs”) as documentation.²⁸ The Prime Minister’s use of the term Rohingya is notable because the anti-Rohingya narrative contends that the term was manufactured in the 1950s to “promote the political demands of the Bengalis in Myanmar.”²⁹ This argument is made with the intent to frame the Rohingyas as “illegal immigrants who migrated from East Bengal” either during British rule or right after Burmese independence.³⁰

Politicians later emphasized a distinction between indigenous Burmese and those who migrated during British rule by creating laws to clarify the citizenship status of “nationals,” “mixed bloods,” and “guests.”³¹ A military-led operation sought to take action against “foreigners who have filtered into the country illegally,” and accused Rohingya of being illegal immigrants from Bangladesh.³² These accusations resulted in Rohingya being detained and tortured as widespread violence broke out in the Rakhine State.³³ Ultimately, “approximately 200,000 Rohingya fled to Bangladesh.”³⁴ However, an agreement between Bangladesh and Myanmar led to the “[f]orced repatriation of the Rohingya,” back to the country that had declared them illegal immigrants.³⁵

26. See Zarni & Cowley, *supra* note 17, at 691.

27. *Id.* at 695.

28. *Id.* at 701.

29. *Id.* at 692. Historical records, however, reference the Rohingya and Muslims living in the Rakhine State even prior to British colonization. *Id.*

30. *Id.* at 691.

31. Ne Win, *Translation of the Speech by General Ne Win*, WORKING PEOPLE’S DAILY (Myan), Oct. 9, 1982 (translating General Ne Win, President of Myanmar, Address at President’s House (Oct. 8, 1982)), https://www.burmalibrary.org/docs6/Ne_Win%27s_speech_Oct-1982-Citizenship_Law.pdf.

32. Zarni & Cowley, *supra* note 17, at 707.

33. *Id.*

34. See *id.* at 691.

35. *Id.* at 707-08.

The government formalized its position when it enacted the Citizen Act of 1982.³⁶ Only the ethnic groups that had settled in Myanmar prior to British occupation in 1824 would be considered citizens.³⁷ The law included a list of 135 ethnic groups that would be automatically eligible for full citizenship in Myanmar, but this list excluded the Rohingya regardless of how long they had been living in the country.³⁸ The criteria to apply for citizenship were “excessively high” and “largely insurmountable for the Rohingya.”³⁹ Naturalized citizenship is only granted to those who can provide documentary evidence that they resided in Myanmar prior to 1942, which is difficult for the Rohingya to prove.⁴⁰ The law does not grant citizenship to children born to non-citizen parents, leaving Rohingya children effectively stateless.⁴¹ When the NRCs were replaced by a Citizenship Scrutiny Card (“CSC”), Rohingya who returned their NRCs were refused a CSC even if they met the conditions for citizenship.⁴² The NRCs were not returned to the Rohingya, and they were instead given Temporary Registration Cards.⁴³

The government subsequently enacted laws that restricted non-citizens from certain kinds of travel, marriage, cohabitation, and also restricted access to education and healthcare.⁴⁴ Since then, the Rohingya have been subjected to mob-led violence, often instigated by Buddhists in the Rakhine State, where the “government’s security forces did nothing to protect the Rohingya and, in many instances, took part in the violence against them”⁴⁵ There are repeated instances of large-scale violence and forced migration against the Roh-

36. *See id.* at 699-700.

37. *Id.*

38. *Id.* at 699; Rep. of the Hum. Rts. Council on Its Thirty-Ninth Session, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, at 5, U.N. Doc. A/HRC/39/CRP.2 (2018) [hereinafter Fact-Finding Mission]. Notably, there is no scientific basis for the division of the 135 national races, and the Fact-Finding Mission regards it as arbitrary due to the gaps and overlaps it leaves between the races. *Id.* at 25.

39. Zarni & Cowley, *supra* note 17, at 702.

40. *Burmese Refugees in Bangladesh: Still No Durable Solution*, 12 HUMAN RIGHTS WATCH III (2000), <https://www.hrw.org/reports/2000/burma/index.htm> [<https://perma.cc/K3RB-3NXZ>].

41. *Id.* The Human Rights Watch notes that the citizenship law violates Myanmar’s obligation under Article 7 of the U.N. Convention on the Rights of the Child, which requires the government to grant citizenship to children born in Myanmar who would otherwise be stateless. *Id.*

42. Fact-Finding Mission, *supra* note 38, at 115, 118.

43. *Id.*

44. *See* Zarni & Cowley, *supra* note 17, at 709.

45. *Id.* at 713-14.

ingya, including various human rights abuses such as arbitrary arrests, executions, enforced disappearances, torture, and rape, in the years 1991, 2001, and 2012.⁴⁶ Though the previous decades of human rights abuses cannot be ignored, the surge of violence in 2012 is the most relevant to the current topic, and so it requires more detail.

The Human Rights Council's Independent International Fact-Finding Mission on Myanmar ("the Mission") pointed to the murder of a Buddhist woman as the catalyst for the violence against the Rohingya in 2012.⁴⁷ A Burmese newspaper reported that the woman had been murdered and raped and described the three suspects as "Bengali/Islam."⁴⁸ The Mission notes that "there are doubts about the rape allegation and the ethnic origin of the accused" and that the rape allegation "was used to incite violence and hatred against the Rohingya."⁴⁹ Graphic photos of the woman's corpse circulated around "anonymous channels on the internet," blaming the Rohingya for her death.⁵⁰ Three days after the murder, the spokesperson for the President of Myanmar posted a statement on his personal Facebook account, writing in part, "Rohingya terrorists . . . are crossing the border into Myanmar with weapons Our troops have received the news in advance so they will completely destroy them We don't want to hear any humanitarian or human rights excuses."⁵¹ Two days after that post, "a crowd of 300 people . . . killed a group of 10 Muslim pilgrims travelling by bus . . ." in what, the Mission states, appears to have been a pre-planned attack.⁵² Violence spread across the Rakhine State, initially by ethnic Rakhine against the Rohingya, and later by security forces.⁵³ The Mission described the actions of the security forces as "serious human rights violations" consisting of burning houses, looting shops, mass arbitrary arrests, and extrajudicial and indiscriminate killings.⁵⁴ Satellite images used by the Human Rights Watch showed Muslim villages that were razed and destroyed, while Buddhist areas were left mostly untouched.⁵⁵

46. *Id.* at 710.

47. Fact-Finding Mission, *supra* note 38, at 147.

48. *Id.*

49. *Id.*

50. *Id.* at 147-48.

51. *Id.* at 168.

52. *Id.* at 148.

53. *Id.*

54. *Id.*

55. Zarni & Cowley, *supra* note 17, at 716.

Over 30,000 Rohingya fled via boat to escape the violence.⁵⁶ Because the Rohingya lacked citizenship rights, returning to Myanmar would likely mean facing imprisonment, meaning a significant number of Rohingya have been permanently displaced.⁵⁷ Those who did not flee on boat have also faced displacement. Over 140,000 displaced people, mostly Rohingya, are residing in camps across the Rakhine state.⁵⁸

The state rejected any claim that security forces were involved in the violence and instead characterized the events as Rohingya mobs attacking the Rakhine community.⁵⁹ The Mission nonetheless stated in definite terms that the security forces did commit human rights abuses against the Rohingya.⁶⁰ However, there is disagreement about whether these human rights abuses should be deemed acts of genocide, which is discussed in the next section.

II. Genocide Under International Law in the Case of Myanmar

The Burmese government has taken a stance on these events: there is no genocide or ethnic cleansing occurring and the Rohingya are actually illegal Bengali immigrants attempting to garner sympathy from the international community.⁶¹ The term “ethnic cleansing” is widely used by the international community in discussing the violence.⁶² Yet agreement wavers when describing Myanmar’s actions as “crimes against humanity,” and even more so with the term genocide.⁶³ Therefore, determining whether a genocide is occurring within Myanmar must come before analyzing Facebook’s responsibil-

56. *Id.* at 724.

57. *Id.*

58. *Id.* at 685-86.

59. Fact-Finding Mission, *supra* note 38, at 149.

60. *Id.* at 147-48 (“Between 2012 and 2013, security forces—sometimes acting alongside the Rakhine—committed serious human rights violations against Rohingya and Kaman across Rakhine State.”).

61. See, e.g., Zarni & Cowley, *supra* note 17, at 742-43; Beth Van Schaack, *Determining the Commission of Genocide in Myanmar*, 17 J. INT’L CRIM. JUST. 285, 297, 304 (2019).

62. Schaack, *supra* note 61, at 302; see also Zeid Ra’ad Al Hussein, United Nations High Comm’r for Hum. Rts., *Darker and More Dangerous: High Commissioner Updates the Human Rights Council on Human Rights Issues in 40 Countries* (Sept. 11, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22041&LangID=E> [https://perma.cc/8K2E-Y7AQ] (describing events in Myanmar as a “textbook example of ethnic cleansing”).

63. See Zarni & Cowley, *supra* note 17, at 698, 716.

ity in this violence as responsibility in genocide that lacks international consensus.

The UN General Assembly defined genocide in 1948 as:

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁶⁴

Article III of the Convention then sets out the crimes that “shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; [and] (e) Complicity in genocide.”⁶⁵ Tribunals have since clarified certain aspects of what constitutes genocide. For instance, genocide may consist of inflicting such conditions of life on a group that will eventually lead to the death of members of that group if maintained over time.⁶⁶ According to the International Criminal Tribunal for Rwanda (“ICTR”), it is therefore not necessary for the perpetrator to intend “to immediately kill the members of the group,” the “systematic expulsion [of members] from their homes and deprivation of essential medical supplies below a minimum vital standard,” is sufficient.⁶⁷

The Burmese government took basic protections and rights from the Rohingya by revoking their citizenship.⁶⁸ On its own, Myanmar’s citizenship law leaves Rohingya children stateless and discriminates against religious minorities, violating its international obligations.⁶⁹ Since implementing the law, the state has, at the very least, contrib-

64. G.A. Res. 260 (III) A, Convention on the Prevention and Punishment of the Crime of Genocide, art. II(a) (Dec. 9, 1948).

65. *Id.* art. III.

66. Schaack, *supra* note 61, at 293.

67. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 52 (Dec. 6, 1999).

68. See *Burmese Refugees in Bangladesh: Still No Durable Solution*, *supra* note 40.

69. BURMESE ROHINGYA ORGANISATION UK (BROUK) MYANMAR’S 1982 CITIZENSHIP LAW AND ROHINGYA (2014), <https://burmacampaign.org.uk/media/Myanmar%E2%80%99s-1982-Citizenship-Law-and-Rohingya.pdf> [<https://perma.cc/ZMC4-NCXX>] (stating that the law violates the Universal Declaration of Human Rights, the Convention on the Rights of the Child, and the UN General Assembly Resolution on the International Convention on the Elimination of all forms of Racial Discrimination).

uted to outbreaks of violence among Buddhists and the Rohingya wherein entire Rohingya communities are razed.⁷⁰ Many Rohingya are forced to flee these conditions, which can either lead to death or attempts at repatriation to Myanmar where they are considered illegal immigrants and held in camps.⁷¹ The Burmese government may not be instantly executing the Rohingya in most cases, but the continuous extraction of the group from their homes, depriving them of basic needs, and systematic persecution seems likely to result in the eventual destruction of the group.

However, intent to “render an area ‘ethnically homogeneous’” and “operations that may be carried out to implement such policy” do not on their own constitute genocide.⁷² Rather, the intent and subsequent operations can serve as evidence of the intent to commit genocide.⁷³ Intent is the central piece in the legal definition of genocide.

When, as here, the perpetrators deny any intent to commit genocide, there are many relevant factors that courts and commentators have considered in finding intent. Human rights professor Beth Van Schaack lists these factors:

The use of gratuitous violence that would be excessive in relation to military necessity or to accomplish objectives other than the destruction of the group; [t]he targeting of all members of the group without distinction . . . [a] history of other forms of discrimination or persecutory acts against members of the same protected group; [t]he detrimental effect and long-term impact of the violence in terms of the future survival of the group . . . [a]ttempts to cover up the crime and grant impunity to perpetrators; [a]ttempts to bar humanitarian assistance to the victim group . . . [t]he utterance of derogatory language or the issuance of propaganda . . . and [a]ttacks on cultural or religious property or symbols associated with the group.⁷⁴

The Burmese government has historically blocked factfinders from investigating human rights abuses within the country, so the events of 2012 were “the first abuses against the Rohingya that human rights organizations were able to effectively document based on findings and interviews inside Rakhine State.”⁷⁵ Even though organizations like Human Rights Watch have been able to enter the country to

70. See *supra* text accompanying notes 45-46.

71. See *supra* text accompanying notes 56-58.

72. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 190 (Feb. 26).

73. Schaack, *supra* note 61, at 294.

74. *Id.* at 308.

75. Zarni & Cowley, *supra* note 17, at 687, 715.

conduct interviews, the Burmese government has attempted to cut off aid to the Rohingya by having security forces arrest humanitarian workers or threaten them with violence.⁷⁶ When presented with evidence of violence against the Rohingya, the government insists that it was the work of “extremist terrorists,” spontaneous sectarian violence, or self-inflicted.⁷⁷ It is difficult to prove clear intent to destroy the Rohingya due to these limitations, but the attempts at a cover-up and blocking humanitarian aid nonetheless provide relevant evidence in the factors above.

Reports also contradict the government’s claims that the violence against the Rohingya is not state-backed and suggest there is “overwhelming involvement of state military, police (including border guards) and security forces” in committing or supporting the human rights abuses by arming the perpetrators.⁷⁸ When the government does admit to involvement, it claims that its force is in response to the “extremist terrorist” group Arakan Rohingya Salvation Army (“ARSA”), which emerged in 2016 and claimed responsibility for several attacks against police stations.⁷⁹ The Mission notes that ARSA is a “poorly armed and poorly trained group, with a small number of partly trained members but principally relying on untrained villagers to conduct attacks with sticks and knives.”⁸⁰ In addition, the government’s targeted violence and expulsion attempts clearly predate the existence of ARSA. Combating ARSA would not require the force that the military has used, which has been excessive and indiscriminate.

After a 2017 attack by ARSA, “the government ordered the military to conduct ‘clearance operations’” against Rohingya militants.⁸¹ Military forces removed protective fences from around Rohingya houses and confiscated other sharp implements prior to the attack.⁸² The military’s violence extended far beyond mere counterterrorism tactics because it specifically targeted babies and children and laid anti-personnel landmines along refugee escape routes and at the border.⁸³ Two months later, when the government claimed that the clearance operations were complete, “40[%] of all villages in northern

76. *Id.* at 718-19.

77. Schaack, *supra* note 61, at 304.

78. *Id.* at 303-04.

79. *Id.* at 298.

80. Fact-Finding Mission, *supra* note 38, at 18.

81. Schaack, *supra* note 61, at 298.

82. *Id.* at 299.

83. *Id.* at 313.

Rakhine State were partially or totally destroyed.”⁸⁴ These attacks exemplify gratuitous violence and the targeting of all members of the group without distinction.

Beyond erasing the existence of the Rohingya from Myanmar’s history, the government has both tolerated and broadcasted anti-Rohingya rhetoric, including “‘a dangerous mix of racism, xenophobia and Islamophobia’ and a narrative of dehumanization.”⁸⁵ Facebook in particular was used as a means to spread this propaganda, with then-President Thein’s Facebook posting, “Rohingyas from other countries are coming into the country. Since our Military has got the news in advance, we will eradicate them until the end! I believe we’re already doing it.”⁸⁶

The ICTY set a high standard by ruling that “genocidal intent must be the only reasonable inference to be drawn from the evidence in order to convict an individual of the crime,”⁸⁷ but the factors in Myanmar taken together leave little room for any other conclusion. With the government’s stated intentions undermined by excessive, indiscriminate violence toward the Rohingya, their statements cannot be taken at face value. The government’s actions go beyond ethnic cleansing through mass killings and deprivation of humanitarian aid and basic rights. Professor William Schabas describes genocide as “the last resort of the frustrated ethnic cleanser.”⁸⁸ The government may have initially intended to perform ethnic cleansing, but extreme violence and persecution shows that the intent is now to destroy the group. The prolonged nature of the Burmese government’s conflict with the Rohingya does not preclude an intent to destroy, which has grown more evident over the years. So evident, in fact, that a cursory understanding of the country would have alerted a social media platform of the dangers of providing the perpetrators a platform.

III. Facebook in Myanmar

Facebook and internet use are highly connected in Myanmar. The cost of both internet and SIM cards to access smartphones was once prohibitively high, which limited internet usage in 2014 to less

84. Fact-Finding Mission, *supra* note 38, at 178.

85. Schaack, *supra* note 61, at 313.

86. *Id.* at 314.

87. *Id.* at 317.

88. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 201 (2000).

than 1% of the population.⁸⁹ As prices lowered, smartphone and internet usage rose dramatically, with an estimated 50% of the population having smartphones in 2018.⁹⁰ But the rapid rise of internet access has caused digital and media literacy to become “very problematic.”⁹¹

Much of the internet in Myanmar has ended up centered on Facebook for a variety of reasons.⁹² For one, people in Myanmar tend to access the internet exclusively through smartphones,⁹³ and some phone companies have zero-rated Facebook, meaning that there are no data charges to use it.⁹⁴ When people do not otherwise know how to operate smartphones, it is easy to have the seller install the Facebook application and use only that.⁹⁵ Facebook allows for a variety of content to be shared, so it can become a one-stop shop for entertainment, connecting with friends and family, and news. As more people exclusively use Facebook, the more one needs to be on Facebook in order to keep up with breaking news.⁹⁶ Finally, it is notable that rural areas may have to wait three or four days to receive printed newspapers whereas Facebook allows for instantaneous news updates.⁹⁷

In 2017, a poll found that 73% of people in Myanmar with smartphones relied on Facebook for news.⁹⁸ Even the president used Facebook to announce his resignation.⁹⁹ This on its own may not be abnormal in many countries, but the sudden leap from internet access

89. Rainer Einzenberger, “*If It’s on the Internet It Must Be Right*”: *An Interview on the Use of Internet and Social Media in Myanmar with Myanmar ICT for Development Organisation*, 9 AUSTRIAN J. SOUTH-EAST ASIAN STUD. 301, 302-03 (2016); Libby Hogan & Michael Safi, *Revealed: Facebook Hate Speech Exploded in Myanmar During Rohingya Crisis*, GUARDIAN (Apr. 2, 2018, 8:06 PM), <https://www.theguardian.com/world/2018/apr/03/revealed-facebook-hate-speech-exploded-in-myanmar-during-rohingya-crisis> [<https://perma.cc/YF3S-6L4X>].

90. Einzenberger, *supra* note 89, at 302. *But see* Einzenberger, *supra* note 89, at 303 (noting that internet access is not evenly distributed throughout the country, with rural areas having significantly less access to internet connectivity, including in some parts of Rakhine State).

91. *Id.* at 302.

92. *Id.* at 303.

93. *Id.* at 302.

94. Olivia Solon, *Facebook Struggling to End Hate Speech in Myanmar, Investigation Finds*, GUARDIAN (Aug. 15, 2018, 9:32 PM), <https://www.theguardian.com/technology/2018/aug/15/facebook-myanmar-rohingya-hate-speech-investigation> [<https://perma.cc/A89J-ERVW>].

95. Einzenberger, *supra* note 89, at 303.

96. *Id.*

97. *Id.* at 305.

98. Barron, *supra* note 8.

99. *Id.*

to relying on Facebook for news has created a situation where propaganda and false narratives spread as widely as legitimate news.¹⁰⁰

It is this ability to spread propaganda that presumably led anti-Rohingya groups and the state itself to use Facebook. Buddhist nationalists who once spread anti-Muslim rhetoric through pamphlets or CDs could reach a much wider audience on Facebook, instantly.¹⁰¹ The rhetoric has ranged from racial epithets to photos of dead bodies, shared by nationalist groups or government officials alike.¹⁰² A digital researcher found that the amount of these kinds of posts spiked in conjunction with the military's latest operations against the Rohingya, leading him to suggest that "there was a concerted effort to influence the narrative of the conflict by the military and by Buddhist nationalists."¹⁰³ The Mission found that there was a "carefully crafted hate campaign" meant to develop "a negative perception of Muslims among the broad population in Myanmar" through the use of Facebook posts, publications, and public statements.¹⁰⁴ Politicians, leading monks, academics, and members of the government used these platforms to portray the Rohingya as "an existential threat to Myanmar and to Buddhism."¹⁰⁵ Ultimately, these are problems with the way people are using Facebook and not with the platform itself. Facebook's responsibility instead lies with both its action and inaction during the horrific human rights abuses in Myanmar.

Facebook launched its "Free Basics" initiative in Myanmar in 2016, allowing its services to be used without charging for data in order to bring its platform to rural and low-income populations.¹⁰⁶ However, Facebook received warnings about the human rights abuses in Myanmar and ongoing use of the platform to spread anti-Rohingya messages as far back as 2013.¹⁰⁷ For example, in 2014, a doctoral student held discussions with Facebook officials and provided them with examples of the ways the platform was being used to spread hatred,

100. Einzenberger, *supra* note 89, at 304.

101. Barron, *supra* note 8.

102. *Id.*

103. *Id.*

104. Fact-Finding Mission, *supra* note 38, at 166.

105. *Id.*

106. Evelyn Douek, *Why Were Members of Congress Asking Mark Zuckerberg About Myanmar? A Primer*, LAWFARE BLOG (Apr. 26, 2018, 7:00 AM), <https://www.lawfareblog.com/why-were-members-congress-asking-mark-zuckerberg-about-myanmar-primer> [<https://perma.cc/AGQ7-39N3>].

107. 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/> [<https://perma.cc/7AFL-5HA8>].

specifically showing them a Facebook page in Burmese called, “We will genocide all of the Muslims and feed them to the dogs.”¹⁰⁸ Another warning came from a tech entrepreneur in 2015, who told Facebook executives that, “its platform was being exploited to foment hatred.”¹⁰⁹ The entrepreneur later said that, “[i]t couldn’t have been presented to them more clearly, and they didn’t take the necessary steps.”¹¹⁰ Activists reported hateful posts, but these reports were often either ignored or denied for not violating community standards, which are discussed below.

Even the government could not properly communicate with the company. False allegations spread on Facebook about a Muslim man raping a Buddhist woman and ultimately instigated riots where two men were killed.¹¹¹ When the Burmese government attempted to report instances of unfounded rumors, such as the ones that started the riot, they found that Facebook had no means of understanding Burmese and needed to receive English translations of the posts.¹¹² The Chief of the Myanmar Police Force confirmed that “the government blocked Facebook to stop the incitement,” showing the government’s own acknowledgement of the role Facebook played in instigating the violence.¹¹³

In 2015, there were 7.3 million active Facebook users in Myanmar, and Facebook would be encouraging more sign-ups with its Free Basics plan in 2016.¹¹⁴ The company received various warnings about the vitriol being spread on the platform, but Facebook had no team located in Myanmar to combat these problems.¹¹⁵ As of 2015, Facebook only had four Burmese speakers to review content, who were based in Manila and Dublin.¹¹⁶ These reviewers stated that they did not actually search for hate speech; rather, they were preoccupied by a giant queue of posts that had been reported by Facebook users.¹¹⁷ There were therefore no moderators seeking out content

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. Fact-Finding Mission, *supra* note 38, at 331.

114. *Id.*; see Stecklow, *supra* note 107.

115. Stecklow, *supra* note 107.

116. *Id.* Facebook did have a translation program that could translate Burmese into English, but the results were vastly inaccurate; e.g. a post in Burmese that said, “Kill all the [Rohingya slur] that you see in Myanmar; none of them should be left alive” was translated into English as “I shouldn’t have a rainbow in Myanmar.” *Id.*

117. *Id.*

that might violate Facebook's guidelines and no real supervision of the content that was being posted.

As mentioned, many of these posts reported by Facebook users remained untouched. Facebook's community standards state, "language that incites or facilitates serious violence" will be removed.¹¹⁸ The standards also state organizations or individuals are not allowed to have a presence on Facebook if they are involved in: terrorist activity, organized hatred, mass murder, organized violence, or criminal activity.¹¹⁹ Also, content that expresses support for such groups or individuals will be removed.¹²⁰ Facebook does not allow hate speech, coordination of harm, or content that glorifies violence; however, "graphic content (with some limitations) to help people raise awareness about issues" is allowed.¹²¹

Reuters found more than 1,000 examples of content that attacked the Rohingya,¹²² all of which explicitly violated the guidelines that were on Facebook at the time of the investigation. Some of the posts with anti-Rohingya and anti-Muslim rhetoric had been up for six years.¹²³ A small sample of the types of posts from this investigation included: "[w]e must fight them the way Hitler did the Jews, damn [slur for Rohingya]" (the post had been up since 2013); "[t]hese non-human [slur] dogs, the Bengalis, are killing and destroying our land, our water and our ethnic people. We need to destroy their race;" and pornographic anti-Muslim images.¹²⁴

The Mission used Facebook's standard reporting mechanism to report a post targeting a human rights defender for allegedly cooperating with the Mission.¹²⁵ The post stated that the individual was a "national traitor" and "Muslim."¹²⁶ The Mission described, "[n]umerous comments to the post explicitly called for the person to be killed, in unequivocal terms."¹²⁷ The comments also targeted Muslims as a group: "Beggar-dog species These dogs need to be completely removed;" "[w]herever they are, Muslim animals don't know to be faithful to the country;" "[d]on't leave him alive. Remove his whole

118. *Community Standards*, FACEBOOK, at I (2020), https://www.facebook.com/communitystandards/violence_criminal_behavior [<https://perma.cc/W2J3-ZQFJ>].

119. *Id.* at I(1).

120. *Id.*

121. *Id.* at I(3), III.

122. Stecklow, *supra* note 107.

123. *Id.*

124. *Id.*

125. Fact-Finding Mission, *supra* note 38, at 341-42.

126. *Id.*

127. *Id.*

race.”¹²⁸ The Mission reported the post four times and each time received the response that “the post was examined but ‘doesn’t go against one of [Facebook’s] specific Community Standards.’”¹²⁹ The Mission stated that it then “sent a message to an official Facebook email account about the matter but did not receive a response,” and the post was only removed several weeks later “through the support of a contact at Facebook, not through the official channel.”¹³⁰

From these facts alone, Facebook would be, at the very least, negligent toward the human rights abuses taking place. But as Rohingya activists attempted to get the word out about the genocide, they found themselves suspended from the platform.¹³¹ Facebook seemed to be applying uneven policies toward content as “ultranationalists” were able to continuously violate the guidelines with little consequence, but Rohingya bloggers’ accounts were quickly shut down for “posting graphic photographs documenting the military’s human-rights abuses and voicing criticism of the military.”¹³² Where Myanmar’s military and government maintained Facebook pages that circulated offensive content, Facebook deleted ARSA’s page after the government declared it a terrorist organization for attacks on police.¹³³ Facebook stated that its decision was made as a result of the “group’s alleged violent activity, not its political aims,” while the military continued its violence against the Rohingya.¹³⁴ An activist shared screenshots of posts that had been removed by Facebook, many of which were comprised only of text describing military operations against Rohingya villages.¹³⁵ Facebook denies the accusation of removing pro-Rohingya accounts at the request of the government.¹³⁶

However, Facebook officials were warned through the years by different scholars about the ways in which the platform was being used, showing that people within the company had knowledge of the

128. *Id.*

129. *Id.*

130. *Id.*

131. Albert Fox Cahn, *Facebook’s Silencing of Refugees Reveals Dangers of Censorship Technologies*, JUST SEC. (Sept. 29, 2017), <https://www.justsecurity.org/45495/rohingya-censorship-demands-greater-transparency-facebook/> [<https://perma.cc/43VZ-79FR>].

132. Christina Fink, *Dangerous Speech, Anti-Muslim Violence, and Facebook in Myanmar*, 71 J. INT’L AFFS. 43, 48 (2018).

133. Julia Carrie Wong, Michael Safi, & Shaikh Azizur Rahman, *Facebook Bans Rohingya Group’s Posts as Minority Faces ‘Ethnic Cleansing’*, GUARDIAN (Sep. 20, 2017, 3:02 AM) <https://www.theguardian.com/technology/2017/sep/20/facebook-rohingya-muslims-myanmar> [<https://perma.cc/S4LX-KCC8>].

134. *Id.*

135. *Id.*

136. *Id.*

dangers involved and implemented no safeguards.¹³⁷ Both activists and the government gave examples to Facebook about the content circulating that violated its guidelines, once again showing that officials within the company had notice of the ongoing conflict.¹³⁸ It had only four Burmese speakers reviewing content for a country that relies heavily on Facebook.¹³⁹ Posts that expressed clear calls for violence toward the Rohingya were either ignored or were removed after a significant amount of time had passed, but posts made by Rohingya activists to document the abuses of the government tended to get shut down quickly. ARSA's page was removed due to the organization's violence, but the page used by military officials who were committing genocide was not.¹⁴⁰ Facebook had knowledge of the situation in Myanmar and repeatedly made decisions to support the government while preventing Rohingya from documenting human rights abuses.

During questioning at Facebook's Senate Intelligence Committee Hearing in 2018, the company's chief operating officer ("COO"), Sheryl Sandberg, was asked, "I think you made at least some mention of Myanmar . . . where hundreds of thousands of Rohingya Muslims are fleeing in many ways Do you believe that Facebook has a moral obligation and potentially even a legal obligation to take down accounts that are actually incentivizing violence?"¹⁴¹ Sandberg answered, "I strongly believe that. In the case of what's happened in Myanmar, it's devastating, and we're taking aggressive steps and we know we need to do more."¹⁴² The COO of the company has therefore acknowledged its potential legal responsibility and that it has not met that obligation. The company continuously acted in support of the genocide and should be held responsible for its actions.

IV. Current Domestic and International Regulations

Few clear paths are available for holding companies accountable for their role in human rights abuses, and fewer that are likely to find against a company that did not cause the abuses or explicitly support them. This section first considers domestic U.S. law as a means for

137. *See supra* text accompanying notes 107-10.

138. *See supra* text accompanying notes 106-07, 111-12.

139. *See supra* text accompanying note 116.

140. *See supra* text accompanying notes 118-24.

141. *Open Hearing on Foreign Influence Operations' Use of Social Media Platforms: Hearing Before the Select Comm. on Intelligence of the U.S. S., 105th Cong.* (2018) (statement of Sheryl Sandberg, Chief Operating Officer of Facebook).

142. *Id.*

accountability, then possible international liability under the Rome Statute.

A. Alien Torts Statute

In the United States, the Alien Torts Statute (“ATS”) allows non-citizens to bring civil actions for violations of international law.¹⁴³ This statute would only apply to recognized causes of action such as negligence.¹⁴⁴ It would be easier to bring a claim against Facebook using a negligence standard than to prove complicity in genocide under international law. Facebook officials were warned repeatedly about the way its services were being used in Myanmar and encouraged a large userbase to rely on it while having very few employees able to monitor reported posts. Facebook established its own duty by setting out content guidelines and acted on that duty when it suspended Rohingya activists and ARSA. It breached its duty by allowing posts that explicitly called for genocide against the Rohingya to remain on its site for years in violation of its guidelines. Theoretically, a Rohingya person would have a strong tort claim against Facebook.

However, caselaw has complicated the statute. In 1997, district courts extended the statute by holding that it applied not only to foreign officials but to “claims against private individuals for injuries resulting from atrocities committed in pursuit of genocide or war crimes,” including corporations.¹⁴⁵ The Supreme Court then limited the reach of the statute in *Kiobel v. Royal Dutch Petroleum*.¹⁴⁶

The case involved Nigerian nationals residing in the United States who brought suit under the ATS, alleging that Dutch, British, and Nigerian corporations aided and abetted the Nigerian government in committing violations of international law in Nigeria.¹⁴⁷ The Court looked to whether the ATS would allow a claim to “reach conduct occurring in the territory of a foreign sovereign.”¹⁴⁸ It agreed with the respondent companies that, when a statute does not clearly indicate its extraterritorial application, it should be presumed to have

143. 28 U.S.C. § 1350 (2020).

144. Beth Stephens, *Corporate Liability: Enforcing Human Rights Through Domestic Litigation*, 24 HASTINGS INT’L & COMP. L. REV. 401, 403-04 (2001).

145. Halina Ward, *Securing Transnational Corporate Accountability Through National Courts: Implications and Policy Options*, 24 HASTINGS INT’L & COMP. L. REV. 451, 455-56 (2001).

146. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013).

147. *Id.* at 108.

148. *Id.* at 115.

none.¹⁴⁹ The Court expressed concerns over foreign policy implications to reach the affairs of foreign nations as a potential for “impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”¹⁵⁰ Due to those concerns, the Court barred the petitioners’ case seeking relief for violations of international law occurring outside the United States.¹⁵¹ The Court specified that claims under the ATS must touch and concern the territory of the United States with “sufficient force to displace the presumption against extraterritorial application.”¹⁵² Mere corporate presence would not suffice because corporations are “often present in many countries, and it would reach too far”¹⁵³

The case against Facebook would be similar to *Kiobel*. Despite being a U.S. corporation, the claim would necessarily involve violations of international law that occurred specifically in Myanmar. A court would only allow a suit under ATS to go through if the party bringing the claim could sufficiently prove that the incident touches and concerns the United States beyond Facebook’s presence in the country. It might be possible to differentiate this case from *Kiobel* by emphasizing the role of the internet and social media at play in Myanmar. The actual human rights violations occurred in Myanmar, but the posts by the military, the government, and citizens advocating for genocide were on the internet—a forum accessible to the entire world. By avoiding Facebook’s role in the actual genocide itself, it is possible to argue that its negligence stemmed from allowing calls for genocide on its platform, which exists outside of any sovereign nation. It seems inevitable that a claim under ATS for violations on the internet will need to be litigated, particularly as social media plays an increasingly significant role in human rights abuses.

Outside of the ATS, there is precedent for foreign nationals bringing a case in the United States against Facebook for violations that occurred outside of the country.

B. Other U.S. Law

In *Cohen v. Facebook*, 20,000 Israeli citizens and the estates of victims of terrorist attacks brought a claim against Facebook alleging that the company supported terrorist organizations by allowing such

149. *Id.* at 116 (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010)).

150. *Id.* at 116.

151. *Id.* at 124.

152. *Id.* at 124-25.

153. *Id.* at 125.

groups to use its social media platform to further their reach.¹⁵⁴ Plaintiffs brought the claim under the Antiterrorism Act (“ATA”), which the court ruled provided statutory basis for the district court to exercise personal jurisdiction over Facebook.¹⁵⁵ The plaintiffs alleged that “Palestinian terrorists ‘use Facebook’s social media platform and Communications services to incite, enlist, organize, and dispatch would-be killers to ‘slaughter Jews.’”¹⁵⁶ More specifically, plaintiffs noted that Facebook’s algorithms allowed users to connect with other users who had similar interests, which played “a vital role in spreading” the terrorist content by allowing terrorist organizations to more effectively disseminate their message.¹⁵⁷ In addition, Facebook was aware of the use of its platform for terrorism purposes but failed to take action against these organizations or applied inconsistent standards in suspending accounts.¹⁵⁸ The court dismissed the claim brought by the Israeli citizens due to a lack of standing because they only alleged a fear of future terrorist attacks without evidence of imminent harm.¹⁵⁹

Turning to the estates of victims of terrorist attacks, the court examined Facebook’s claim for immunity under the Communications Decency Act (“CDA”).¹⁶⁰ The Act “shields defendants who operate certain internet services from liability based on content created by a third party and published, displayed, or issued through the use of the defendant’s services,” and states, “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”¹⁶¹ Plaintiffs did not dispute that Facebook met the first two prongs as a provider of an interactive computer service and that the claim was based on information provided by another information content provider.¹⁶² However, the plaintiffs argued that Facebook should be held liable for providing services to terrorist organizations because Facebook provides them account access and “refus[ed] to use available resources” to stop them.¹⁶³ The court rejected this argument be-

154. Cohen v. Facebook, Inc., 252 F. Supp. 3d 140, 145 (E.D.N.Y. 2017).

155. *Id.* at 152-54.

156. *Id.* at 146.

157. *Id.* at 146-47.

158. *Id.* at 147.

159. *Id.* at 148-49.

160. *Id.* at 155.

161. *Id.*

162. *Id.*

163. *Id.* at 157.

cause “Facebook’s choices as to who may use its platform are inherently bound up in its decisions as to what may be said on its platform, and so liability imposed based on its failure to remove users” would impermissibly derive from its status as a publisher.¹⁶⁴

The Myanmar case could similarly be brought by Rohingya under the ATA against Facebook. While it would likely be too politically-charged to deem Myanmar’s military as terrorists, the claim could be brought through the citizens who organized and spread incitements to genocide through Facebook, such as the ultranationalist Buddhist groups. Even so, the claim would be distinct from the *Cohen* case because these groups in Myanmar often had state support, whereas the alleged Palestinian terrorists were working against the Israeli government. This could make a court more wary about allowing the suit into court.

Facebook’s ability to use the CDA for immunity purposes also significantly limits the actual claim that could be brought by Rohingya victims. Most of the issues with Facebook’s involvement in the genocide is the content the company allowed on its platform in violation of its own guidelines. As the court stated in *Cohen*, decisions on what the company allows on its platform derives from its status as a publisher, and thus it would have immunity from this claim.

C. Rome Statute and the International Criminal Court

Though it may be possible to find Facebook executives liable for aiding and abetting under the Rome Statute, Myanmar is not party to the treaty and the United States has not ratified it.¹⁶⁵ The Mission states that the International Criminal Court (“ICC”) “is the most appropriate venue” for dealing with Myanmar’s serious human rights abuses and urged the Security Council to refer the situation to the ICC.¹⁶⁶ The Mission also specifies, however, that the ICC is “only in a position to prosecute those most responsible for the crimes in question” and “it should not be expected to prosecute a large number of lower-level perpetrators.”¹⁶⁷ Therefore, even if Myanmar were subject

164. *Id.*

165. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

166. Fact-Finding Mission, *supra* note 38, at 415 (noting that the ICC Pre-Trial Chamber decided that the ICC had jurisdiction over the deportation of the Rohingya because “an essential element of the crime . . . occurred on the territory” of Bangladesh, a State Party, and stated that “the same rationale may apply to other crimes,” such as “the crime against humanity of persecution”).

167. *Id.*

to the ICC's jurisdiction, the focus of the court would be on high-level government officials rather than Facebook.

If the case against Facebook were brought to the ICC, there is a possibility that its executives could be found liable. While international liability against a corporation itself does not exist, the ICTY, ICTR, and Rome Statutes "impose criminal responsibility on those who aid[], abet[] or otherwise assist[] . . . in the commission of . . . genocide, war crimes, or crimes against humanity."¹⁶⁸ It is therefore possible to find liability against corporate executives. Two elements determine whether someone can be held liable for aiding and abetting: (1) "the conduct of the person who aids and abets" and (2) "the person's mental state."¹⁶⁹ While conduct tends to be defined as "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime," the more contested issue is how to determine the actor's mental state.¹⁷⁰

The Rome Statute tends to use a purpose test for cases of aiding and abetting but the exact method of determining an actor's purpose is unclear.¹⁷¹ Professor Doug Cassel argues that the Zyklon B case follows the most reasonable interpretation of purpose.¹⁷² In this case, the defendants who sold Zyklon B to the Nazis for use in gas chambers had the purpose of making a profit, and it was likely that the defendants did not care about Hitler's goal of genocide.¹⁷³ But because they supplied the gas with the knowledge of what it would be used for, a secondary purpose must have been to encourage the continued mass killings, because otherwise they would not continue selling the gas for profit.¹⁷⁴ Scholars Andrew Clapham and Scott Jerbi suggest a similar view of direct complicity under international law. They state that complicity requires "intentional participation, but not necessarily any intention to do harm, only knowledge of foreseeable harmful effects."¹⁷⁵

Using the above interpretations of the purpose test, it seems likely that Facebook had the purpose of aiding and abetting the crimes in Myanmar, even if it was only a secondary purpose. There is

168. Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT'L HUM. RTS. 304, 307-08 (2008).

169. *Id.* at 308.

170. *Id.*

171. *Id.* at 308, 311-12.

172. *Id.* at 312.

173. *Id.*

174. *Id.*

175. Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMPAR. L. REV. 339, 342 (2001).

nothing to suggest that executives at Facebook had any intention to do harm, but they nonetheless intentionally participated in supporting the government through removing accounts that documented the human rights abuses while allowing posts that supported the government's position to remain on the website for long periods of time. While merely ignoring all posts in Myanmar may not be enough to suggest they participated in the crimes, the fact that accounts were suspended and there was a pattern of suspending accounts that supported the Rohingya shows intentional participation. As noted in prior sections, Facebook received multiple warnings regarding the use of the platform in Myanmar, as well as reports from users, which should have given the executives knowledge about foreseeable harmful effects.

V. Proposed Solutions

A. Holding Social Media Companies Accountable

Despite the significant evidence available to show that Facebook committed some wrongdoing, the above cases portray how difficult it is to hold a corporation or the members of a corporation accountable. While it is possible for the United States to implement legislation that could possibly hold domestic corporations accountable, scholars note that the effectiveness of such legislation "has been substantially diminished by the global dispersion of assets."¹⁷⁶ It is also unlikely that a country would implement legislation that would drive corporations out. Additionally, because of the wide international reach of corporations, domestic legislation would raise concerns about the United States becoming too involved in foreign disputes.

With almost no domestic solutions available, international law should adapt itself to include corporate responsibility. The United Nations Human Rights Commission ("UNHCR") "has drafted basic norms governing corporate human rights behavior," but it lacks enforcement power.¹⁷⁷ International law tends to be slow to evolve and is often reactionary. On the opposite end, the internet allows for perpetrators to organize, encourage, and commit widespread human rights abuses in no time at all. If the goal is to at least slow or deter compa-

176. Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. J. INT'L HUM. RTS. 222, 245, 250 (2008).

177. Stephens, *supra* note 144, at 402.

nies from aiding in these atrocities, the international community must respond to the challenges posed by the internet.

The UN has long struggled to address growing concerns over corporate responsibility.¹⁷⁸ After all, the focus of international law and treaties tends to be state actors, not corporations or individuals.¹⁷⁹ The expectation prevalent in the norms and guidelines regarding corporate responsibility is that states should create systems that will hold businesses accountable for violations of international law.¹⁸⁰ As discussed above, domestic remedies for Facebook's involvement in Myanmar seem unlikely. For one, the "global dispersion of assets" has made it "virtually impossible for any single state to be able to place these [multinational corporations] under their control or exercise any meaningful influence over them."¹⁸¹ Furthermore, domestic regulations might simply encourage companies to move their headquarters elsewhere, and it is unlikely that a state would want to lose the economic benefits that come from these large corporations. Internet-based corporations such as Facebook can access markets internationally with relative ease, which seems at odds with the expectation that individual states can hold them accountable. The nature of business is becoming increasingly international and thus it is likely best regulated under international law.

The Human Rights Council adopted the Guiding Principles on Business and Human Rights ("Guiding Principles") in 2011, and it is divided into three sections: (1) the state duty to protect human rights; (2) the corporate responsibility to protect human rights; and (3) access to remedy.¹⁸² The second section speaks directly to businesses and their responsibility in protecting human rights. For example, a business's responsibility to respect human rights requires the business to "avoid causing or contributing to adverse human rights impacts through their own activities," and to "[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they

178. See Connie de la Vega, *International Standards on Business and Human Rights: Is Drafting a New Treaty Worth It?*, 51 U. S.F. L. REV. 431, 432-37 (2017) (providing an overview of the UN's attempts at addressing corporate responsibility since the 1970s).

179. See *id.* at 434.

180. See *id.* at 434-35.

181. Duruigbo, *supra* note 176, at 250.

182. *Id.* at 445; John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

have not contributed to those impacts.”¹⁸³ Specifically, businesses should perform “human rights due diligence.”¹⁸⁴ This involves gauging human rights risks through drawing on “internal and/or independent external human rights expertise” and should involve “meaningful consultation with potentially affected groups and other relevant stakeholders.”¹⁸⁵ Finally, once a business identifies that they have “caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.”¹⁸⁶ The Guiding Principles are careful to maintain the focus on the state by deeming these principles a state *duty* as opposed to the corporate *responsibility*. However, the Guiding Principles also provide a general framework for how the international community can establish a corporate duty to protect human rights.

Given the hesitance in creating a duty for corporations—discussed above—it may be helpful to narrow the reach of corporate regulations. Asking the UN to regulate and monitor every international corporation does not seem feasible.¹⁸⁷ Scholars have suggested certain limitations, such as giving the state primary authority over corporations and only stepping in “when states have shown an unwillingness or inability to act,” using the International Criminal Court as a model.¹⁸⁸ Rather than corporations as a whole, the Human Rights Council could establish working groups to delve into specific sectors of business that necessarily implicate international human rights more than others. A working group with a focus on internet-based companies could research the specific ways the internet has been used to perpetuate and prevent human rights abuses, provide recommendations for ways in which these companies can work with the international community to recognize and remedy potential threats to human rights, and formulate appropriate remedies for victims.

Creating an international legal system that would hold internet-based corporations accountable is not out of the question. For instance, the Human Rights Council voted to adopt Resolution 26/9 with the goal of establishing “an open-ended intergovernmental working group . . . whose mandate shall be to elaborate an international legally binding instrument to regulate, in international human rights

183. Ruggie, *supra* note 182, at 14.

184. *Id.* at 17.

185. *Id.*

186. *Id.* at 25.

187. See Duruigbo, *supra* note 176, at 254-55.

188. *Id.* at 254.

law, the activities of transnational corporations and other business enterprises.”¹⁸⁹ The Working Group has since held panels to determine the scope, topics, and remedies that should be available in the treaty.¹⁹⁰ With the wide variety of topics that the panel addressed,¹⁹¹ the ability to narrow the focus to solely internet-based corporations in a separate working group may assist in simplifying the drafting process. In the Secretary-General’s Report on “Enhanced cooperation on public policy issues pertaining to the Internet,” the Secretary-General listed suggestions received during consultations on internet governance, such as a “permanent committee on international public policy issues pertaining to the Internet within the United Nations system,” global principles on internet governance, and “an international mechanism for the adjudication of cases of electronic crime and contract dispute”¹⁹² There is, therefore, some desire within the international community for a body that can hold corporations, including internet-based corporations, accountable.

States have already implemented laws that would hold social media companies liable for a failure to respond to illegal hate speech on their platforms. Germany’s Network Enforcement Act implements a fine on social media platforms of up to fifty-million euros for failing to remove “illegal, racist, or slanderous posts within twenty-four hours of receiving a user notification.”¹⁹³ Germany’s regulations on anti-hate speech were a push by legislators to regulate speech online that was already prohibited offline.¹⁹⁴ The law also requires social media plat-

189. De la Vega, *supra* note 178, at 446.

190. *Id.* at 451-56.

191. *Id.* at 454.

192. U.N. Secretary-General, *Enhanced Cooperation on Public Policy Issues Pertaining to the Internet*, ¶ 25, U.N. Doc. A/66/77-E/2011/103 (Mar. 4, 2019). The Report noted that invitations to participate in the consultations were circulated to:

. . . all Member States of the United Nations, Permanent Observers, United Nations system agencies, non-governmental organizations in consultative status with the Economic and Social Council, Sector members of the International Telecommunication Union (ITU) and entities accredited to the World Summit on the Information Society not otherwise included in one of those groups. Approved academic and business entities participating in the work of the Commission on Science and Technology for Development were also eligible to take part. Input was sought from some 150 international organizations as well as some 3,500 civil society and private sector entities.

Id. ¶ 8.

193. Zi En Chow, Comment, *Evaluating the Approaches to Social Media Liability for Prohibited Speech*, 51 N.Y.U. J. INT’L L. & POL. 1293, 1303 (2019).

194. Melissa Eddy & Mark Scott, *Delete Hate Speech or Pay Up, Germany Tells Social Media Companies*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/business/germany-facebook-google-twitter.html> [<https://perma.cc/9H5B-UCWM>].

forms to release transparency reports with data on removal decisions arising from the law, but the effect of the law itself is difficult to determine through an analysis of the reports.¹⁹⁵ Regardless of the law's effectiveness, it has been met with significant criticism by the international community, particularly over concerns about free speech.¹⁹⁶ The criticisms suggest that implementing international laws on speech over the internet would be controversial, and therefore discussions about international liability for internet-based corporations should begin with the most severe of human rights abuses, such as in the case of Facebook and Myanmar.

B. Using Facebook and Social Media to Combat Human Rights Abuses

While the international community contends with regulating these kinds of abuses in the future, there are actions that Facebook, and social media companies in similar situations, can take to minimize the damage. In 2018, Facebook informed the Mission that it was working to solve “hate speech and misinformation as a tool for hate speech” in Myanmar.¹⁹⁷ In doing so, Facebook banned a nationalist organization and extremist monks known for anti-Rohingya sentiment for being hate figures, which also meant that content supporting them would be removed.¹⁹⁸ Facebook stated that it preserved the data and content from these pages to make it available for international and national judicial authorities.¹⁹⁹ Simply preserving data can provide useful evidence for authorities in holding individuals accountable for supporting human rights abuses.

Facebook has already entangled itself in the country, market, and politics. Pulling its services out of Myanmar would likely be ineffective because users could continue to access the service through Virtual Private Networks (“VPNs”).²⁰⁰ Furthermore, Rohingya have been able to document the abuses inflicted on them through posts on social me-

195. HEIDI TWOREK & PADDY LEERSSEN, TRANSATLANTIC WORKING GRP., AN ANALYSIS OF GERMANY'S NETZDG LAW 4-6 (Apr. 15, 2019), https://www.ivir.nl/publicaties/download/NetzDG_Tworek_Leerssen_April_2019.pdf [<https://perma.cc/X75M-73XB>].

196. See Chow, *supra* note 193, at 1306.

197. Fact-Finding Mission, *supra* note 38, at 342.

198. *Id.*

199. *Id.* at 343.

200. Amanda Taub & Max Fisher, *Where Countries Are Tinderboxes and Facebook Is a Match*, N.Y. TIMES (Apr. 21, 2018), <https://www.nytimes.com/2018/04/21/world/asia/facebook-sri-lanka-riots.html> [<https://perma.cc/7DH8-U5N6>] (discussing a similar situation in Sri Lanka where blocking access to Facebook resulted in nearly three million users accessing the social media via VPNs).

dia.²⁰¹ Losing Facebook would cut off their access to one of the few global platforms they have, and would deprive the international community of inside knowledge into what is happening in the country.²⁰²

Facebook will need to continue, and improve, monitoring the content that gets posted to its site. This will require hiring more employees to review Burmese content. However, the increase in workers will likely only be effective in the short term.²⁰³ Social media platforms see an exponential growth in users each year so the content that requires moderation grows as well.²⁰⁴ In addition, there is a high turnover rate for content moderators²⁰⁵ due to the psychological toll of the work.²⁰⁶ Moderators must sift through gruesome and disturbing images, a task that requires more counseling and resiliency training than they receive from Facebook.²⁰⁷ Content moderation is, therefore, an unsustainable solution and relying too heavily on that alone will ignore the more significant problems caused by the platform itself.

To make positive change in Myanmar, Facebook can work with experts in the region, particularly representatives from the Rohingya community, to understand the current state of the country. From there, it can take steps to educate its users about misinformation. Facebook does not offer a wholly neutral platform,²⁰⁸ so it should provide transparent information regarding its algorithm and editorial decisions. It should curate its “News Feed” to rank stories lower if third-party fact checkers have labelled them false, as the company has already proposed.²⁰⁹

Facebook has likely made a significant profit off of the userbase in Myanmar.²¹⁰ Though it is unlikely to face any liability that would

201. Cahn, *supra* note 131.

202. *See id.*

203. *See* Chow, *supra* note 193, at 1303-04.

204. *Id.*

205. *Id.* at 1304.

206. Olivia Solon, *Underpaid and Overburdened: The Life of a Facebook Moderator*, *GUARDIAN* (May 25, 2017, 5:00 AM), <https://www.theguardian.com/news/2017/may/25/facebook-moderator-underpaid-overburdened-extreme-content> [<https://perma.cc/QPU8-S2HM>].

207. *Id.*

208. Barron, *supra* note 8; *see also* Kyle Langvardt, *Regulating Online Content Moderation*, 106 *GEO. L.J.* 1353, 1383 (2018) (using Facebook’s “Trending Topics” sidebar as an example of the human editorial control involved in content moderation).

209. Samidh Chakrabarti, *Hard Questions: What Effect Does Social Media Have on Democracy?*, *FACEBOOK* (Jan. 22, 2018), <https://about.fb.com/news/2018/01/effect-social-media-democracy/> [<https://perma.cc/NRR4-26T3>].

210. In 2018, Facebook made an average of \$6.09 per user worldwide (excluding the U.S. and Canada) with a quarterly revenue of \$13.7 billion. Kerry Flynn, *Facebook’s Making*

require damages, it would ideally take responsibility for spreading genocidal propaganda and use its assets to promote democratic institutions in Myanmar, provide digital literacy education, and provide aid and support to the Rohingya.

Conclusion

As social media expands into regions with political instability, private social media companies must be held liable for willfully participating in human rights violations. Facebook's role in Myanmar is one example of the human rights issues created when genocide is given a quick and effective platform and little regulation. Because of the international reach of the internet and social media, international law should govern these situations. However, current regulations lack enforcement power against corporations and tend to be slow to react.

Even if a treaty on human rights abuses committed by internet-based companies were in progress, the reality is that the processes in international law tend to be slow and reactionary. Meanwhile, Rohingya in Myanmar remain in danger of "further genocidal acts,"²¹¹ and technology is advancing at a rapid pace. Once a treaty is drafted, certain portions of the treaty will likely be outdated either due to technological advances or changes in the way people use the internet. A treaty will become even more outdated as years pass. This may suggest that international law is not the correct forum for regulating the internet-based businesses, but it could also be a sign that the international community needs to adapt itself to the new forms of human rights abuses.

Future research will need to look into how the international community can properly regulate human rights abuses on the internet. It may be worth using international data privacy laws, such as the European General Data Protection Regulation (more commonly known as the "GDPR"), as a template for adapting international laws to the fast-paced world of the internet.

More Money per User in North America than Ever Before, DIGIDAY (Oct. 30, 2018), <https://digiday.com/marketing/facebooks-making-money-per-user-north-america-ever/> [<https://perma.cc/Z3UX-6YVT>]. That same year, there were just over 20 million Facebook users in Myanmar. *Facebook Users in Myanmar*, NAPOLEONCAT (Oct. 2018), <https://napoleoncat.com/stats/facebook-users-in-myanmar/2018/10> [<https://perma.cc/2RDE-VAJV>].

211. Owen Bowcott, *Gambia Files Rohingya Genocide Case Against Myanmar at UN Court*, GUARDIAN (Nov. 11, 2019, 7:04 AM), <https://www.theguardian.com/world/2019/nov/11/gambia-rohingya-genocide-myanmar-un-court> [<https://perma.cc/Z67T-KN8M>].