

The “Weaponization” of Facebook in Myanmar: A Case for Corporate Criminal Liability

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The advent of social media platforms in the mid-2000s increased global communication and encouraged innovative activism by ushering new, effective ways to organize and protest. News agencies have recently reported the misuse of these platforms by individual actors and authoritarian regimes. Autocrats, in particular, twist social media platforms into weapons to silence dissent and spread hate speech. The latter category, hate speech, has contributed to some of the gravest human rights abuses globally. The increased spotlight on the weaponization of social media has motivated scholars, states, and companies to revisit the theory of corporate responsibility.

This Note unpacks the potential criminal liability of social media companies for misuse on their platforms that result in grave human rights violations. Specifically, it explores Facebook’s corporate criminal liability in light of authoritarian regimes’ misuse of its platform to incite crimes against humanity. This Note will not cover jurisdictional issues regarding corporate criminal liability. Rather, it identifies on a theoretical level, which crimes, if any, social media corporations could be held accountable for under international criminal law. While there remain significant obstacles to prosecuting such cases, this Note identifies an accountability gap between Facebook’s actions and victims of human rights abuses that occur from its platform. Ultimately, this Note concludes that corporate criminal liability is an effective form of ensuring that social media companies remain responsible in doing their part to uphold human rights.

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INTRODUCTION

“Across the board, we [Facebook] have a responsibility to not just build tools, but to make sure that they’re used for good. It will take some time to work through all the changes we need to make across the company, but I’m committed to getting this right. . . . [S]o now we have to go through all of our relationships and make sure we’re taking a broad enough view of our responsibility.”¹

In his opening statement at a joint Senate Judiciary and Commerce Committee hearing, Facebook Chief Executive Officer (CEO) Mark Zuckerberg directly claimed responsibility for issues regarding hate speech, harassment, and misinformation on Facebook’s social media platform.² At that same ten-hour hearing, Zuckerberg used the word “responsibility” forty-one times.³ With these words, the Facebook CEO rejected a longstanding argument used by companies in Silicon Valley for years—that social media “platforms aren’t responsible for the content posted by” their users.⁴

Over the past year, Facebook in particular has been criticized for failing to address the misuses of its platform.⁵ In the United States, domestic and international users spread fake news and fueled divisive online debates during the highly contentious 2016 election.⁶ Most notably, Russia utilized Facebook to carry out its disinformation campaign, designed to sow seeds of distrust in the United States.⁷ Internationally, users in Western Europe spread anti-refugee hate speech through posts and re-sharing of posts on Facebook, leading to an increased number of attacks on refugees.⁸ As Zuckerberg himself stated,

1. *Transcript of Mark Zuckerberg’s Senate Hearing*, WASH. POST (Apr. 10, 2018, 7:25 PM), <https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/> [hereinafter *Transcript*].

2. *Id.*

3. *Id.*

4. Matt Weinberger, *Mark Zuckerberg Just Renounced a Core Piece of Silicon Valley Wisdom—and It Could Come Back to Bite Facebook*, BUS. INSIDER (Apr. 11, 2018, 1:30 PM), <https://www.businessinsider.com/mark-zuckerberg-facebook-is-responsible-for-the-content-on-its-platform-2018-4>.

5. See, e.g., Zak Doffman, *1.5m Users Hit by New Facebook Privacy Breach as Extent of Data Misuse Exposed*, FORBES (Apr. 18, 2019, 3:35 AM), <https://www.forbes.com/sites/zakdoffman/2019/04/18/facebook-illegally-harvested-data-from-1-5m-users-as-it-leveraged-its-data-machine/#39f186386a2e>; David Ingram, *Facebook Critics Want Regulation, Investigation After Data Misuse*, REUTERS (Mar. 17, 2018, 6:33 PM), <https://www.reuters.com/article/us-facebook-cambridge-analytica-regulati/facebook-critics-want-regulation-investigation-after-data-misuse-idUSKCN1GU01A>; Casey Newton, *Facebook Is Losing Control of the Narrative—and Maybe the Platform*, VERGE (Mar. 20, 2018, 1:21 AM), <https://www.theverge.com/2018/3/20/17140490/facebook-cambridge-analytica-data-crisis>.

6. Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 212 (2017).

7. Scott Shane & Mark Mazzetti, *The Plot to Subvert an Election: Unraveling the Russia Story So Far*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/interactive/2018/09/20/us/politics/russia-interference-election-trump-clinton.html>.

8. Amanda Taub & Max Fisher, *Facebook Fueled Anti-Refugee Attacks in Germany, New Research Suggests*, N.Y. TIMES (Aug. 21, 2018), <https://www.nytimes.com/2018/08/21/world/europe/facebook-refugee-attacks-germany.html>.

Facebook has been transformed into a “tool[] . . . being used for harm . . . for fake news, foreign interference with elections, and hate speech.”⁹

Misuse of Facebook’s platform by authoritarian regimes has led to serious human rights abuses.¹⁰ In Myanmar, government disinformation and hate campaigns on Facebook contributed to the deaths of approximately 25,000 people, the displacement of approximately 100,000 people, and numerous incidents of rape, terror, and forced labor, as stated in the Report of the Independent International Fact Finding Mission on Myanmar (the “Report”).¹¹ The United Nations (U.N.) Independent Fact-Finding Mission in Myanmar found that many actions by the Tatmadaw military “amount[ed] to the gravest crimes under international law.”¹² While Facebook has promoted free speech and freedom of association in oppressive nations, autocrats have weaponized the platform, suppressing dissidents and inciting violence through hate speech.

Corporate liability for human rights abuses has long been a murky area of domestic and international law.¹³ Victims seeking redress for corporate abuses of human rights face challenging obstacles.¹⁴ International frameworks for corporate liability are mostly non-binding, aspirational guidelines.¹⁵ Further, to date, no international criminal tribunal wields jurisdictional authority over corporations such as Facebook.¹⁶ Applying corporate liability laws to social media companies further complicates the analysis, as prior to Zuckerberg’s surprising admission of responsibility at the above-mentioned Senate Judiciary Committee Hearing, social media companies, including Facebook, claimed that they were not responsible for the content their users post.¹⁷

At first glance, the concept of holding a social media company liable for enabling human rights abuses appears idealistic and practically impossible. Many in-house company lawyers and compliance officers, though aware of

9. Alana Abramson, *Mark Zuckerberg’s Status Update to Congress: “I’m Sorry,”* FORTUNE (Apr. 9, 2018), <https://fortune.com/2018/04/09/mark-zuckerberg-sorry-statement-congress/>.

10. Yael Grauer, *Facebook Is Not Equipped to Stop the Spread of Authoritarianism*, TECHCRUNCH (Dec. 24, 2018, 6:30 AM), <https://techcrunch.com/2018/12/24/facebook-government-silence-dissent-authoritarianism/>.

11. Human Rights Council, Rep. of the Indep. Int’l Fact-Finding Mission on Myan., U.N. Doc. A/HRC/39/64, at 13 (2018) [hereinafter Report].

12. Report, *supra* note 11, at 19. The Tatmadaw military is the official name of the armed forces in Myanmar. *Id.* at 4 (“The Tatmadaw has the right to administer and adjudicate its affairs independently, without civilian oversight.”).

13. Justice Kennedy, writing for the majority in *Jesner v. Arab Bank, PLC*, addressed the complexity of corporate liability. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1406 (2018) (“That the corporate form can be an instrument for inflicting grave harm and suffering poses serious and complex questions for the international community and for Congress.”).

14. David Scheffer, *Corporate Liability under the Rome Statute*, 57 HARV. INT’L L.J. 35, 35 (2016).

15. See, e.g., *The Ten Principles of the U.N. Global Compact*, UNITED NATIONS GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Mar. 20, 2020); OFFICE OF THE HIGH COMM’R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS “PROTECT, RESPECT AND REMEDY” FRAMEWORK 25–26 (2011).

16. Scheffer, *supra* note 14, at 35.

17. See Weinberger, *supra* note 4.

corporate governance rules, “rarely think that international criminal law is relevant to their business operations,” in large part due to the lack of enforcement of human rights laws.¹⁸ Yet, no one can deny that bad actors in recent years have increasingly utilized platforms like Facebook to engage in behavior that ultimately amount to human rights abuses.¹⁹ This raises the question: what legal responsibility, if any, does Facebook have in light of these atrocities?

Part I frames the problem of authoritarian regimes’ misuse of social media platforms and categorizes the various tools that autocrats use to transform Facebook into a weapon of disinformation. Part II discusses corporate criminal liability in international law. Extending the theory of corporate complicity to social media companies, Part III argues that courts should apply the “knowledge plus substantial act” standard to social media companies. Part IV further explores that standard using Myanmar as a case study. Lastly, Part V critiques the theory of holding Facebook criminally liable and emphasizes the role of shareholders, employees and civil society organizations to hold social media corporations accountable.

I. THE WEAPONIZATION OF FACEBOOK BY AUTOCRATS

Since the rise of the Internet in the early 1990s, “the world’s networked population has grown from the low millions to the low billions,”²⁰ now including 81% of the populations of developed countries, 40% percent in developing countries, and 15% in the least developed countries.²¹ Increased Internet connectivity has empowered users to spread ideas, communicate with like-minded users and organize protests.²²

The Internet ushered in a new wave of activism, most notably seen in the Arab Spring.²³ In 2011, an activist from Egypt observed the impact of social media on his ability to engage in activism, stating: “We use Facebook to schedule the protests . . . Twitter to coordinate, and YouTube to tell the

18. INT’L COMM’N OF JURISTS, 2 CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: CRIMINAL LAW AND INTERNATIONAL CRIMES: REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES 5 (2008).

19. See, e.g., Avi Asher-Schapiro, *Youtube and Facebook Are Removing Evidence of Atrocities, Jeopardizing Cases Against War Criminals*, INTERCEPT (Nov. 2, 2017, 11:55 AM), <https://theintercept.com/2017/11/02/war-crimes-youtube-facebook-syria-rohingya/>; Efe Kerem Sozeri, *Twitter Is Censoring Turkish Accounts for RTs and Likes*, DAILY DOT (Aug. 29, 2016, 8:45 AM), <https://www.dailydot.com/layer8/turkey-twitter-retweet-censorship/>.

20. Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, 90 FOREIGN AFF. 28, 28 (2011).

21. Press Release, Int’l Telecomm. Union, ITU Releases 2016 ICT Figures (July 22, 2016), <https://www.itu.int/en/mediacentre/Pages/2016-PR30.aspx>.

22. YVONNE ROSTECK, HOW GLOBALISATION AND MEDIATISATION CHALLENGE DEMOCRACY 39 (NCCR Democracy ed. 2019).

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

world.”²⁴ Although some scholars and reporters are hesitant to credit Facebook as the platform that unleashed the social revolutions in Egypt and Tunisia,²⁵ social media, as a whole, informed communities about developing news and accelerated communication between communities during the Arab Spring.²⁶

Social media, however, is only as powerful as the actor who wields it.²⁷ Governments around the world continue to suppress speech using traditional methods such as Internet shutdowns and restrictive laws.²⁸ In a more sophisticated manner, authoritarian governments today engage users directly on social media platforms.²⁹ Anne Applebaum, Program Director at the Legatum Institute in London, commented on this phenomenon, stating: “[Authoritarian governments] can now create a narrative saying a democra[ti]c activist was a traitor and a pedophile. . . . The possibility of creating an alternative narrative is one people didn’t consider, and it turns out people in authoritarian regimes are quite good at it.”³⁰ For Facebook in particular, scholars and news reporters coin this phenomenon as “the weaponization of Facebook.”³¹

Such governments employ a variety of tactics to construct alternative narratives on social media platforms. For example, Russia developed a number of disinformation tactics during the 2016 United States presidential election, as detailed by the United States’ indictment (the “Indictment”) of the Internet Research Agency (IRA).³² While this Note does not focus on foreign interference with sovereign democracies, the Indictment outlines key disinformation tactics used by Russia on its own citizens, in addition to

24. Saleem Kassim, *Twitter Revolution: How the Arab Spring Was Helped by Social Media*, MIC (July 3, 2012), <https://www.mic.com/articles/10642/twitter-revolution-how-the-arab-spring-was-helped-by-social-media>.

25. Jay Rosen, *The “Twitter Can’t Topple Dictators” Article*, PRESS THINK (Feb. 13, 2011, 1:08 AM), <http://pressthink.org/2011/02/the-twitter-cant-topple-dictators-article/>.

26. Rebecca J. Rosen, *So, Was Facebook Responsible for the Arab Spring After All?*, ATLANTIC (Sept. 3, 2011), <https://www.theatlantic.com/technology/archive/2011/09/so-was-facebook-responsible-for-the-arab-spring-after-all/244314/>.

27. Jessi Hempel, *Social Media Made the Arab Spring, But Couldn’t Save It*, WIRED (Jan. 26, 2016, 3:06 PM), <https://www.wired.com/2016/01/social-media-made-the-arab-spring-but-couldnt-save-it/>.

28. See, e.g., Salem Solomon, *Benin Internet Shutdown Repeats Pattern of Government Censorship Across Africa*, VOA NEWS (Apr. 30, 2019, 4:16 AM), <https://www.voanews.com/africa/benin-internet-shutdown-repeats-pattern-government-censorship-across-africa>; Samuel Woodhams, *Ethiopia’s Leader Promised to Protect Freedom of Expression. But He Keeps Flicking the Internet Kill Switch*, CNN, <https://www.cnn.com/2019/07/15/africa/ethiopia-internet-shutdowns-old-regime/index.html> (last updated Jan. 15, 2019, 11:02 AM). ADRIAN SHAHBAZ, FREEDOM ON THE NET 2018 1, 2 (2018), https://freedomhouse.org/sites/default/files/FOTN_2018_Final%20Booklet_11_1_2018.pdf.

29. See CARLY NYST & NICK MONACO, STATE SPONSORED TROLLING: HOW GOVERNMENTS ARE DEPLOYING DISINFORMATION AS PART OF BROADER DIGITAL HARASSMENT CAMPAIGNS (2018).

30. Hempel, *supra* note 27.

31. See generally Lauren Etter, *What Happens When the Government Uses Facebook as a Weapon?*, BLOOMBERG BUSINESSWEEK (Dec. 7, 2017, 1:00 AM), <https://www.bloomberg.com/news/features/2017-12-07/how-rodriago-duterte-turned-facebook-into-a-weapon-with-a-little-help-from-facebook>.

32. Indictment at 14–23, *United States of America v. Internet Research Agency, LLC*, No. 1:18-CR-00032-DLF (Feb. 16, 2018) [hereinafter Indictment].

disinformation techniques used to interfere with foreign elections.³³ Rappler, a civil society organization based in the Philippines, compared Russia's online disinformation tactics, as outlined in the Indictment, with President Duterte's use of Facebook while President of the Philippines.³⁴ Building off Rappler's comparison, the following Subparts categorize the key tactics used by autocrats in "weaponizing" Facebook to control their respective citizens.

A. FICTITIOUS ONLINE PERSONAS/"TROLLING"

State actors post on social media platforms under fictitious personas to spread defamatory information through a method known as "trolling."³⁵ According to the Indictment, Russia conducted "information warfare against the United States of America through fictitious U.S. personas on social media platforms and other Internet-based media."³⁶ In the Philippines, numerous fake accounts proliferated on Facebook as candidates geared up to campaign in 2015.³⁷ In Myanmar, the military set up troll accounts and celebrity pages, only to later flood these pages "with incendiary comments and posts timed for peak viewership."³⁸ While popular news pages outwardly devoted content to Burmese pop stars, models and other celebrities, in reality, the military controlled these pages and used them to distribute "lurid photos, false news, and inflammatory posts."³⁹

B. PROPAGANDA PAGES

Autocrats also spread propaganda explicitly on social media platforms.⁴⁰ As stated in the Indictment, the IRA operated social media pages that addressed a number of issues pertinent to voters in the United States, including "immigration . . . the Black Lives Matter movement . . . [and] religion."⁴¹ The IRA utilized a wide range of social media platforms, including YouTube, Facebook, Instagram, and Twitter to spread their propaganda.⁴²

33. *Id.*

34. Natashya Gutierrez, *Is the Philippines in Step with Russian Online Propaganda Warfare?*, RAPPLER (Mar. 10, 2018), <https://www.rappler.com/newsbreak/in-depth/197558-philippines-russia-online-propaganda-warfare-techniques>.

35. Emily Birnbaum, *Mueller Identified "Dozens" of U.S. Rallies Organized by Russian Troll Farm*, HILL (Apr. 18, 2019, 12:21 PM), <https://thehill.com/policy/technology/439532-mueller-identified-dozens-of-us-rallies-organized-by-russian-troll-farm>.

36. Indictment, *supra* note 32, at 6.

37. *See* Gutierrez, *supra* note 34.

38. 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>.

39. *Id.*

40. Indictment, *supra* note 32, at 14.

41. *Id.*

42. *Id.* at 6.

In other countries, leaders spread propaganda by boosting likes on their respective social media pages.⁴³ For example, in Cambodia, Prime Minister Hun Sen maintains his official page and often posts pro-government updates on Facebook.⁴⁴ Communications firm, Bursen-Marsteller, revealed in a 2018 report that Prime Minister Hun Sen interestingly had more Facebook fans than Cambodia had Facebook users, suggesting that Prime Minister Hun Sen bought a majority of his likes from “click farms”⁴⁵ outside Cambodia to increase his popularity.⁴⁶

C. SPREAD OF DEROGATORY AND DEFAMATORY INFORMATION

Another technique utilized by autocrats is the spread of derogatory and defamatory information, otherwise known as hate speech.⁴⁷ The Indictment charged the IRA and Russia with interfering in the presidential election by “post[ing] derogatory information about a number of candidates,” mostly supporting President Donald Trump and disparaging Hillary Clinton.⁴⁸ Authoritarian regimes are not the only actors to utilize hate speech, but their use of it is particularly dangerous because their leaders are uniquely positioned in seats of power and influence. In Myanmar, the military’s rhetoric regarding the Rohingya ethnic group mirrored that of Burmese nationalists who used “[d]ehumanizing and stigmatizing” language when speaking about the Rohingya.⁴⁹ Myanmar authorities have even denied the term “Rohingya” existed, insisting that the Rohingya “do not exist or belong in Myanmar.”⁵⁰

This last category, the spread of hate speech, has led to violent attacks on certain peoples, amounting to serious human rights concerns. Social media companies do not directly perpetrate human rights abuses, yet they play a significant role, governing the type of speech that appears on their platform and the frequency at which it appears.⁵¹ Some jurisdictions have held certain

43. Peter Ford, *Facebook’s Autocrat Problem*, THINK PROGRESS (May 18, 2018, 8:00 AM), <https://thinkprogress.org/facebooks-problematic-role-in-cambodias-diminishing-democracy-c279f8b98229/>.

44. Andrew Nagemson, *Hun Sen Fourth-Most “Liked” Leader: Report*, PHNOM PENH POST (May 3, 2018, 4:42 PM), <https://www.phnompenhpost.com/national/hun-sen-fourth-most-liked-leader-report>.

45. Companies pay workers to sit in a room and click on content, known as “click farms,” to boost their popularity and reliability to Internet users. According to the Mashable, “sometimes these farms manifest as rooms with hundreds if not thousands of phones, all at the ready for when a company pays for traffic.” Molly Sequin, *Say Goodbye to Those Fake Likes: Huge Click Farm Discovered in Thailand*, MASHABLE (June 13, 2017), <https://mashable.com/2017/06/13/thailand-click-farm-caught/>.

46. See Ford, *supra* note 43.

47. For an in-depth discussion on hate speech, see DANGEROUS SPEECH PROJECT, <https://dangerousspeech.org/> (last visited Mar. 20, 2020).

48. Indictment, *supra* note 32, at 4.

49. Report, *supra* note 11, at 14.

50. *Id.*

51. See, e.g., PAUL HITLIN & LEE RAINIE, PEW RESEARCH CTR., FACEBOOK ALGORITHMS AND PERSONAL DATA (2019), https://www.pewinternet.org/wp-content/uploads/sites/9/2019/01/PI_2019.01.16_Facebook-algorithms_FINAL2.pdf.

corporations criminally liable for human rights abuses in the past.⁵² However, such theories have not been extended to social media companies. Thus, it remains unclear whether such companies could be held criminally liable under international law for human rights abuses that occur as a result of user engagement on their platforms.

II. CRIMINAL COMPLICITY IN THE CONTEXT OF HUMAN RIGHTS

A fairly new concept, corporate criminal liability evolved from the recognition that corporations wielded significant influence in the world and were capable of committing human rights abuses with impunity.⁵³ At the World Economic Forum in 1999, then-U.N. Secretary General, Kofi Annan proposed a "global compact" among the world's business community to uphold and promote nine UN principles.⁵⁴ Annan specifically called on world businesses to make sure their own companies were "not . . . complicit in human rights abuses."⁵⁵ As companies began investing and sourcing from areas outside their home countries, their scope of liability also expanded and, as Annan raised, created "an imbalance between the economic, social and political realms."⁵⁶

Annan's proposal led to the eventual creation of the Global Compact in July 2000, which outlined the beginnings of corporate social responsibility.⁵⁷ Special Representative of the U.N. Secretary General, Professor John Ruggie, advanced this theory by further outlining the scope of corporate responsibility.⁵⁸ His efforts culminated in the creation of the Guiding Principles on Business and Human Rights.⁵⁹ These guidelines, unanimously endorsed by the Human Rights Council in 2011,⁶⁰ state that "business enterprises should . . . [t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate."⁶¹

While merely recommendations, the Global Compact and the Guiding Principles on Business and Human Rights represent the international

52. See, e.g., in the United Kingdom, *Vendata Res. PLC v. Lungowe* [2019] UKSC 20 (appeal taken from Eng.); in France, Sudip Kar-Gupta & Gilles Guillaume, *Lafarge Faces Legal Complaint Over Actions in Syria*, REUTERS (Nov. 15, 2016, 8:19 AM), <https://uk.reuters.com/article/uk-mideast-crisis-syria-lafarge/lafarge-faces-legal-complaint-over-actions-in-syria-idUKKBN13A24F>; in the United States, Alien's Action for Tort, 28 U.S.C. § 1350 (2018).

53. See Press Release, Kofi Annan, U.N. Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos (Jan. 31, 1999), <https://www.un.org/press/en/1999/19990201.sgsm6881.html>.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. JENNIFER ZERK, CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES: TOWARDS A FAIRER AND MORE EFFECTIVE SYSTEM OF DOMESTIC LAW REMEDIES 13 (2013) (preparing a report for U.N. Office of the High Commissioner for Human Rights).

59. See *id.*

60. See OFFICE OF THE HIGH COMM'R, *supra* note 15.

61. Zerk, *supra* note 58, at 13 (quoting OFFICE OF THE HIGH COMM'R, *supra* note 15, at 25).

community's increasing recognition that companies must be held accountable to both their domestic and international communities. To determine the liability of social media corporations today, the following Subparts untangle the relevant theories of corporate criminal liability and, specifically, the standard to apply for corporate complicity in human rights violations.

A. CORPORATE CRIMINAL LIABILITY

Today, corporations from all sectors operate "in countries where crimes against humanity and other gross human rights abuses occur."⁶² Corporations "may be compelled to take a stand vis-à-vis the conflict or otherwise become involved in international crimes."⁶³ Some reports uncover corporations who knowingly assist governments, armed rebel groups, or other actors to commit gross human rights abuses.⁶⁴ But more commonly, human rights abuses are often being committed prior to the corporation entering that country. Corporations, instead, may be exposed to international criminal liability by assisting or furthering the human rights abuses.

Many domestic jurisdictions have imposed criminal liability on corporations based on various domestic violations involving, *inter alia*, environmental, tort, and labor laws.⁶⁵ U.S. laws have advanced theories of corporate liability, for example the principle of *respondeat superior*, which borrows theories from tort law by holding an organization responsible for its employees' actions.⁶⁶ Notable examples under United States' domestic law include: Chiquita's payments to Colombian paramilitary groups who used the money to fund weapons and ammunition;⁶⁷ Yahoo's supply of internet records to the Chinese government, which led "to the identification and alleged torture of a human rights activist,"⁶⁸ Unocal's participation "in a Burmese gas pipeline construction project, whose security forces engaged in forced

62. Danielle Olson, *Corporate Complicity in Human Rights Violations Under International Criminal Law*, 1 DEPAUL INT'L HUM. RTS. J. 1, 1 (2015).

63. Antje K.D. Heyer, *Corporate Complicity under International Criminal Law: A Case for Applying the Rome Statute to Business Behaviour*, 6 HUM. RTS. & INT'L LEGAL DISCOURSE 14, 16 (2012).

64. See INT'L COMM'N OF JURISTS, *supra* note 18.

65. Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L L. 955, 957 (2008).

66. Michael E. Tigar, *It Does the Crime but Not the Time: Corporate Criminal Liability in Federal Law*, 17 AM. J. CRIM. L. 211, 227 (1990).

67. Alison Frankel, *Chiquita Must Face Jury in Colombian Terror-Funding Case—Miami Judge*, REUTERS (Jan. 4, 2018, 12:21 PM), <https://www.reuters.com/article/legal-us-otc-chiquita/chiquita-must-face-jury-in-colombian-terror-funding-case-miami-judge-idUSKBN1ET2C8>.

68. Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT'L HUM. RTS. 304, 305 (2008); cf. Ewen MacAskill, *Yahoo Forced to Apologise to Chinese Dissidents Over Crackdown on Journalists*, GUARDIAN (Nov. 14, 2007, 10:37 AM), <https://www.theguardian.com/technology/2007/nov/14/news.yahoo> (reporting on the fallout produced from this controversy).

labor, . . . murder[,] and rape;⁶⁹ and “Wal-mart for failing to stop suppliers from committing labor abuses.”⁷⁰ In the United Kingdom, laws on corporate criminal liability focus on the “identification principle.”⁷¹ This requires a prosecutor to prove criminal responsibility of the most senior officers who represent the “directing mind and will” of the entire organization, and whose mental state may be attributed to, or identified, with the company.⁷² These laws, dating back to the 1990s, represent the growing recognition and willingness of countries to prosecute corporations criminally.

Instead of the domestic forum, scholars suggest international courts act as the appropriate forum to resolve human rights abuses by corporations.⁷³ Jelena Aparac, former Legal Advisor for Médecins Sans Frontières, lists three justifications for why international tribunals are the appropriate forum for adjudicating human rights violations.⁷⁴ First, international tribunals are better suited to adjudicate gross violations of human rights because international law governs the gravest violations to humanity: war crimes, crimes against humanity and genocide.⁷⁵ Second, such crimes universally hurt values respected by all actors in the international community and therefore, the international forum is the best suited for adjudication.⁷⁶ Lastly, international justice can eliminate obstacles present in domestic courts.⁷⁷

In analyzing the theory of corporate criminal liability, there are two actors who may be subject to liability: the corporation itself and/or its officers and directors. Arguably, a more realistic discussion about corporate criminal liability for social media corporations focuses on holding the individual officers and directors liable rather than the corporate entity. There is, however, an argument in favor of holding the corporations themselves liable. In the United States, the Supreme Court held that corporations have First Amendment rights in *Citizens United v. Federal Election Commission*.⁷⁸ Analogizing the corporate entity with a human individual, Justice Anthony Kennedy wrote, “[c]orporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to

69. Cassel, *supra* note 68, at 306; *cf.* Duncan Campbell, *Energy Giant Agrees Settlement with Burmese Villagers*, GUARDIAN (Dec. 14, 2004, 7:04 PM), <https://www.theguardian.com/world/2004/dec/15/burma.duncancampbell>.

70. Cassel, *supra* note 68, at 305–06; *see also* John Sifton, *Walmart’s Human Trafficking Problem*, HUM. RTS. WATCH (Sept. 17, 2012, 5:43 PM), <https://www.hrw.org/news/2012/09/17/walmarts-human-trafficking-problem>.

71. *Corporate Prosecutions*, CROWN PROSECUTION SERV., <https://www.cps.gov.uk/legal-guidance/corporate-prosecutions> (last visited Mar. 20, 2020).

72. *Id.*

73. Jelena Aparac, *Which International Jurisdiction for Corporate Crimes in Armed Conflicts?*, 57 HARV. INT’L L.J. 40, 40–41 (2016).

74. *Id.* at 40–41.

75. *Id.*; *see also* Heyer, *supra* note 63, at 16.

76. *Id.* at 41.

77. *Id.*

78. 558 U.S. 310 (2010).

foster.”⁷⁹ If corporations are afforded the same constitutional protections as individuals because of their active participation in society, then corporations should also be subject to the ramifications of their actions as fully recognized entities within the legal system.⁸⁰ Additionally, scholars like Ronald Slye, Associate Professor at the Seattle University School of Law, argue that the corporate entity should be liable for the gravest human rights abuses based on a parallel theory that finds sovereign states, rather than individuals, liable for international human rights abuses.⁸¹ When discussing grave international human rights abuses by corporations, corporate criminal liability serves an important function—to provide relief to victims of these human rights violations and to deter future human rights violations.⁸²

B. STANDARD FOR CORPORATE COMPLICITY

“[T]he Rome Statute, which created the International Criminal Court (ICC),” serves as the primary source of law for international criminal law and defines major human rights abuses including “war crimes, crimes against humanity, genocide, and aggression.”⁸³ Under the Rome Statute, an individual may be held criminally liable for “committing, planning, ordering, or instigating a crime or for otherwise aiding and abetting a crime.”⁸⁴ Although the Rome Statute does not currently extend to corporations, a growing trend towards recognizing corporate liability on a domestic level raises convincing reasons to reconsider the jurisdictional scope of the Rome Statute.⁸⁵ David Scheffer explains:

[A]t that time, there were an insufficient number of national jurisdictions that held corporations liable under criminal law, as opposed to civil tort liability, which has long been universal. The principle of complementarity under the Rome Statute, a principle dependent on compatible criminal law in state party jurisdictions, would have been crippled as a consequence.⁸⁶

Considering the interplay between domestic and international laws on corporate liability, drafters of the Rome Statute were unable to fully consider the

79. *Id.* at 343 (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)).

80. See CHARLES DOYLE, CONG. RESEARCH SERV., RL75700, CORPORATE CRIMINAL LIABILITY: AN OVERVIEW OF FEDERAL LAW 13–20 (2013).

81. See Slye, *supra* note 65.

82. *Id.* at 957.

83. Aparac, *supra* note 73, at 40.

84. See INT’L COMM’N OF JURISTS, *supra* note 18, at 11 (footnotes omitted); see also Int’l Law Comm’n, Rep. of the Int’l Law Comm’n on its Second Session, U.N. Doc. A/1316, at 377–78 (1950) (“*Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.*”).

85. See Scheffer, *supra* note 14.

86. *Id.* at 38 (footnote omitted).

ramifications of corporate criminal liability under international law.⁸⁷ Simply put, "there was too little time."⁸⁸

Nevertheless, scholars continue to theorize the contours of corporate criminal liability. Expanding on the theory of complicity, Andrew Clapham and Scott Jerbi, two leading scholars on corporate criminal complicity, suggest: "[A] corporation [can] . . . be directly complicit in human rights abuses where it decides to participate through assistance of the commission of human rights abuses and that assistance contributes to the commission of the human rights abuses by another."⁸⁹ International courts and tribunals have required two elements to establish complicity in international criminal law: *mens rea* and *actus reus*.⁹⁰

Scholars have debated whether the *mens rea* element requires knowledge or purpose.⁹¹ In other words, the debate focuses on "whether the aider and abettor need merely have *knowledge* that her actions will facilitate the commission of the crime, or whether she must harbor a *purpose* to facilitate the crime."⁹² Under, Article 25(3)(c) of the ICC Statute, an individual is criminally responsible if he or she acted criminally "[f]or the *purpose* of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."⁹³ The Second Circuit in *Presbyterian Church of Sudan v. Talisman Energy, Inc.* interpreted this statute literally. To prove corporate complicity in the United States under the Alien Tort Statute (ATS), which relies on international law, the victim must establish that the corporation "intended to assist or encourage the commission of the principal offense."⁹⁴ After much debate on the standard of corporate complicity, the *Talisman Energy, Inc.* court held that "the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge alone."⁹⁵ Interpreting the Article 25(3)(c) literally, the *Talisman Energy* court set the standard for corporate legal liability as "purposefully aiding and abetting" and relied on international criminal law, namely the Nuremberg Trials and the Rome Statute.⁹⁶

While the statute explicitly includes the word "purpose" in defining intent, courts and tribunals have held that the *mens rea* standard requires an officer or director to have knowledge that the principal actor intended the human rights

87. *Id.*

88. *Id.*

89. Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMP. L. REV. 339, 346 (2001).

90. *Id.*

91. Cassel, *supra* note 68, at 307–13.

92. *Id.* at 308.

93. Rome Statute of the International Criminal Court art. 25, July 17, 1998, 2187 U.N.T.S. 38544.

94. Jonathan Clough, *Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses*, 33 BROOK. J. INT'L L. 899, 910–11 (2008); *see also* *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 268 (2d Cir. 2007) (Katzmann, J., concurring).

95. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009).

96. *See id.*

abuse.⁹⁷ This theory implicates individuals if they have knowledge and committed a substantial act in furtherance of the human rights violation.⁹⁸ In *Prosecutor v. Duško Tadić*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) defined intent as “awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering committing or otherwise aiding and abetting in the commission of a crime.”⁹⁹ The International Criminal Tribunal for Rwanda (ICTR) in *Prosecutor vs. Jean-Paul Akayesu* further clarified intent of complicity in genocide as “knowingly” such that the “accomplice knew of the assistance he was providing in the commission of the principal offense.”¹⁰⁰ As such, the substantial act must have been committed “on the basis that . . . [the corporation’s] activities or operational choices . . . contributed, in some material way, to the gross human rights abuses.”¹⁰¹

International criminal law remains unclear as to what state of mind is required to trigger corporate criminal liability. Although there is no current forum to hear these cases, this Note explores the theoretical principles of corporate criminal complicity as applied to social media corporations.

III. THE APPROPRIATE STANDARD FOR SOCIAL MEDIA COMPANIES

There are a number of considerations in determining the standard for criminal liability for social media corporations. On one hand, imposing harsh standards for criminal liability may result in social media companies refusing to operate in the host country. The fear of burgeoning criminal liability may also encourage social media companies to over-censor content and thus, lead to another form of speech suppression.¹⁰² On the other hand, the lack of criminal liability may give social media companies free rein to operate with impunity. Social media companies may continue to enter markets that have the potential to misuse their platforms without a second thought as to their responsibility. Neither extreme is ideal.

As discussed in Subpart II.A, the original advocates of corporate liability outlined concrete guidelines to primarily encourage corporations to uphold international human rights.¹⁰³ Because corporations are fictional legal entities

97. See Cassel, *supra* note 68, at 308–309.

98. Press Release, Int’l Criminal Tribunal for the former Yugoslavia, Tadić Sentence Increased to 25 Years Imprisonment, ICTY Press Release JL/P.I.S./447-E (Nov. 11, 1999).

99. *Id.*

100. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR 96-4-T, Judgement (Int’l Crim. Trib. for Rwanda Sept. 2, 1998); see also Michael J. Kelly, *Prosecuting Corporations for Genocide Under International Law*, 6 HARV. L. & POL’Y REV., 339, 340 (2012).

101. Zerk, *supra* note 58, at 30.

102. David Ingram, *Foreign Governments are Fed Up With Social Media—and Threatening Prison for Tech Employees*, NBC NEWS (Apr. 12, 2019, 9:07 AM), <https://www.nbcnews.com/tech/tech-news/foreign-governments-are-fed-social-media-threatening-prison-tech-employees-n993841> (“Faced with criminal penalties, companies will err on the side of removing content.” (quoting Eileen Donahoe, executive director of Stanford University’s Global Digital Policy Incubator)).

103. See *supra* Subpart II.A.

and cannot be sent to jail, penalties for corporate criminal activity range from criminal fines, restraints, criminal sanctions, and reputational risk, to the most severe penalty, dissolution.¹⁰⁴ The broad potential for criminal liability carries significant consequences for a variety of corporate behavior.¹⁰⁵ The threat of criminal liability may incentivize corporations to perform internal investigations, cooperate with regulators, and actively pursue settlement for alleged misconduct.¹⁰⁶ Therefore, in parsing out the standard for social media corporations, the process of holding corporations liable differs significantly from holding natural persons liable.

Because social media companies are platforms for communication, human rights abuses on these platforms are once-removed from the company, meaning there is no direct link between the social media company and the human rights violation other than a third-party's use of its platform. There would be virtually no circumstances under which a social media corporation could be found to have committed a human rights abuse under the standard adopted in *Presbyterian Church of Sudan*.¹⁰⁷ Specific intent is likely an unworkable standard for social media corporations because the strict standard would virtually immunize them from any criminal liability. Instead, the "knowledge plus substantial act" standard may be more effective to weed out corporate actions that lead to violations of human rights abuses from actions committed in the ordinary course of business.

A. THE *MENS REA* REQUIREMENT

International tribunals have generally reaffirmed "knowledge" as the requirement to prove intent.¹⁰⁸ In *Prosecutor v. Duško Tadić*, the ICTY defined intent as "awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering committing or otherwise aiding and abetting in the commission of a crime."¹⁰⁹ In *Prosecutor v. Jean-Paul Akayesu*, the ICTR relied on *National Coal Board v. Gamble*, an English case that involved corporate complicity of an employee of the National Coal Board. The court in *National Coal Board* defined intent under the theory of complicity as follows:

[A]n indifference to the result of the crime does not itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only

104. Slye, *supra* note 65, at 970.

105. Sara Sun Beale, *A Response to the Critics of Corporate Criminal Liability*, 46 AM. CRIM. L. REV. 1481, 1481 (2009).

106. *See id.*

107. *See Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

108. *See Cassel, supra* note 68, at 323–24.

109. *Prosecutor v. Duško Tadić*, Case No. ICTY 94-1-T, Appeal (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

in the cash profit to be made out of the sale, but he can still be an aider and abettor.¹¹⁰

From Justice Devlin's reasoning in *National Coal Board*, the ICTR concluded: "As a result, anyone who knowing of another's criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offense."¹¹¹ The accomplice does not need to wish that the principal offender commit the offense.¹¹² Rather the inquiry turns on whether the accomplice had knowledge.¹¹³ In *IG Farben*, the United States Military Court found that some defendants, from their leadership positions in the firm, had knowledge of the program to "expropriate" French dye to industrial plants, which were ultimately used as poison gas in Nazi concentration camps.¹¹⁴ Because the officers of the firm knew about the overall plan to use the dye as poison, the court held that IG Farben knowingly aided by explicitly or impliedly authorizing and approving the program.¹¹⁵

For social media companies, officers may have knowledge simply from embedded reporting features within the platforms that alert the company of harmful content. For Facebook, users can flag harmful content by selecting an embedded option to "report" on the platform itself.¹¹⁶ Facebook encourages this embedded form of reporting, stating that using the "report" link that appears next to the content is the best way to report abusive content.¹¹⁷ Users' flagging of harmful content alerts Facebook to certain crimes, or support thereof, that may be occurring on its platform.¹¹⁸ Once content is flagged, content reviewers review the flagged content and decide whether it should be removed according to Facebook's Community Standards.¹¹⁹

While reporting may raise suspicion of crimes that violate international criminal law, reporting alone is likely not sufficient to establish knowledge. Applying the knowledge plus substantial act standard, to establish that Facebook had knowing intent, the prosecution must show that Facebook knew its assistance would further criminal activity of user(s) on its platform. Therefore, there must be concrete indicators that Facebook knew its assistance would

110. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR 96-4-T, Judgement, 218 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998) (quoting *Nat'l Coal Bd. v. Gamble* [1958] All ER 203 at 209 (Eng.)).

111. *Id.*

112. Clapham & Jerbi, *supra* note 89, at 342.

113. *Id.*

114. Indictment at 38, *Prosecutor v. I.G. Farben*, Case No. 6, Military Tribunals at Nuremberg (May 3, 1947).

115. Harmen van der Wilt, *Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities*, 12 CHINESE J. INT'L L. 43 (Mar. 2013).

116. *How Do I Report a Facebook Profile?*, FACEBOOK, <https://www.facebook.com/help/171757096241231> (last visited Mar. 20, 2020).

117. *How to Report Things on Facebook*, FACEBOOK, <https://www.facebook.com/help/181495968648557> (last visited Mar. 20, 2020).

118. *Id.*

119. Jessica Guynn, *These Are Facebook's Secret Rules for Removing Posts*, USA TODAY, <https://www.usatoday.com/story/tech/news/2018/04/24/facebook-discloses-secret-guidelines-policing-content-introduces-appeals/544046002/> (last updated Apr. 24, 2018, 5:00 AM).

further criminal activity of the users on its platform or, in the alternative as in *IG Farben*, that Facebook knew about the overall plan to commit human rights abuses.

B. THE *ACTUS REUS* REQUIREMENT

In addition to knowledge, the complicit actor must provide the kind of assistance that contributes *directly* and *substantially* to the commission of the crime.¹²⁰ The actor may “be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime.”¹²¹

Examples of substantial conduct include:

[T]he [corporation’s] provision of goods or services used in the commission of crimes; the provision of information which leads to the commission of crimes; the provision of personnel to commit crimes; . . . the procurement and use of products or resources (including labour) in the knowledge that the supply of these resources involves the commission of the crimes; [and] the provision of banking facilities so that proceeds of crimes can be deposited.¹²²

The ICTY, in its widely cited judgment in *Prosecutor v. Anto Furundžija*, defines *actus reus* in criminal law as rendering “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”¹²³

At what level are social media corporations acting in a way that substantially effects the perpetration of crime on their platform? Such companies claim they are immune to corporate liability because they function as a “utility” and thereby, do not contribute to abuse that occurs through their platform.¹²⁴ Specifically, social media companies in the United States hide behind Section 230 of the Communications Decency Act,¹²⁵ which states: “No 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.”¹²⁶ By

120. Int’l Law Comm’n, Rep. of the Int’l Law Comm’n on its Forty-Eighth Session, U.N. Doc. A/51/10, at Art. 2, 6 (1996), http://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf.

121. *Prosecutor v. Radoslav Brdanin*, Case No. IT 99-36-A, Appeal on Judgement, ¶ 273 (Int’l Crim. Trib. for Yugoslavia Apr. 3, 2007).

122. INT’L COMM’N OF JURISTS, *supra* note 18, at 19.

123. *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶ 235, 249 (Int’l Crim. Trib. for Yugoslavia Dec. 10, 1998).

124. Owen Thomas, *Mark Zuckerberg Calls Facebook A “Utility.” He Might Want to Rethink That*, S.F. CHRON., <https://www.sfchronicle.com/business/article/Mark-Zuckerberg-calls-Facebook-a-utility-13536881.php> (last updated Jan. 16, 2019, 4:00 AM).

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. See Derek Khanna, *The Law that Gave Us the Modern Internet—and the Campaign to Kill It*, ATLANTIC (Sept. 12, 2013), <https://www.theatlantic.com/business/archive/2013/09/the-law-that-gave-us-the-modern-internet-and-the-campaign-to-kill-it/279588/>.

126. Communications Decency Act, 47 U.S.C. § 230(c)(1) (2018).

contrast, international law does not provide similar protections for social media corporations.

At first glance, social media companies do not seem to contribute to human rights abuses—they act more like megaphones by amplifying speech written by its users. During the Nuremberg Trials, the International Military Tribunal convicted Julius Streicher for inciting violence through the anti-Semitic articles he published in his weekly newspaper, *Der Stürmer*.¹²⁷ The tribunal found that Streicher incited genocide and anti-Semitism through his articles in *Der Stürmer*, which reached a circulation of 600,000 in 1935.¹²⁸ Interestingly, the tribunal did not suggest that the printing press bore responsibility, even though the articles would not have been disseminated without it. Similarly, in *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, the ICTR held three editors liable for inciting violence and killings through radio broadcasts during the Rwandan genocide.¹²⁹ In sentencing one of the three editors, Judge Pillay stated: “You were fully aware of the power of words, and you used the radio—the medium of communication with the widest public reach—to disseminate hatred and violence Without a firearm, machete or any physical weapon, you caused the death of thousands of innocent civilians.”¹³⁰ Like Streicher’s trial, the tribunal did not mention the radio broadcasting company’s liability. Drawing on these two examples, international tribunals do not seem to charge the vehicle through which information is disseminated. Under this reasoning, Facebook would likely not be found liable for materially contributing to a crime because the platform reproduces information but does not create the speech.

Facebook, however, is significantly more active in producing content than a paper press.¹³¹ The company not only reproduces information on each user’s page,¹³² but it curates a personalized Newsfeed for the user according to its algorithms.¹³³ These algorithms move content higher or lower on users’ Newsfeeds in an effort to personalize content according to user preferences.¹³⁴ This personalization is analogous to “buying a newspaper or magazine on the street and having the vendor cut out the articles that he or she decided would not

127. Judgment (Oct. 1, 1946) in 1 THE TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 304 (1947).

128. *Id.*

129. See *Prosecutor v. Ferdinand Nahimana Jean-Bosco Barayagwiza, & Hassan Ngeze*, Case No. ICTR-99-52-T, Judgment and Sentence (Int’l Crim. Trib. for Rwanda Dec 3, 2003).

130. Press Release, Int’l Criminal Tribunal for Rwanda, Three Media Leaders Convicted for Genocide, (Dec. 3, 2003), <http://unictr.irmct.org/en/news/three-media-leaders-convicted-genocide>.

131. See Josh Constine, *Facebook Changes Algorithm to Promote Worthwhile & Close Friend Content*, TECHCRUNCH (May 16, 2019, 8:14 AM), <https://techcrunch.com/2019/05/16/facebook-algorithm-links/>.

132. Newsfeed is the primary interface for Facebook and is a stream of information from various users and pages. For further information, see Cade Metz, *How Facebook Ads Work*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/technology/how-facebook-ads-work.html>.

133. See Constine, *supra* note 131.

134. *Id.*

interest you."¹³⁵ Instead of passively reproducing content like that of a paper press, Facebook actively regulates content as it sees fit.¹³⁶ Alexa Koenig, director of the Human Rights Center of the University of California, Berkeley, concurs: "[When Facebook] start[s] taking that step of targeting information, I think there's an argument to potentially be made that they're no longer like any other publishing outlet but that they're actually actively participating in who sees what and with what degree of impact."¹³⁷

Reportedly, Facebook's algorithm hides critical social and political news from some users.¹³⁸ In 2018, Facebook announced an unspecified change in its algorithm, promising that the improved version would "prioritize . . . meaningful interactions" to "bring people closer together."¹³⁹ The algorithm predicts which posts a user might want to interact with, and then promotes those posts higher in the feed.¹⁴⁰ Page posts that generate conversation between users will also show higher on a particular user's Newsfeed.¹⁴¹ In addition to regulating user content, Facebook also regulates advertisements on its platforms.¹⁴² In 2017, advertisers spent approximately 39.9 billion dollars on sponsored content for Facebook.¹⁴³

In determining whether Facebook's actions rise to the level of "substantial" assistance to a crime, the analysis should focus on Facebook's process for regulating content. Arguably, having the knowledge that certain users create content that ultimately leads to the incitement of the gravest international crimes, and having the power to control that content yet failing to do so, rises to the level of "substantial" assistance. In *Prosecutor v. Zlatko Aleksovki*, the ICTY found a military commander complicit for the mistreatment of prisoners because he was aware that his soldiers mistreated the prisoners "on a recurring basis over a period of time . . . yet with that awareness he continued to participate in sending the prisoners out to work."¹⁴⁴ Facebook's decisions impact who gets a voice and who doesn't, which significantly impacts the spread of speech. By curating

135. RENATA ÁVILA ET AL., THE INVISIBLE CURATION OF CONTENT: FACEBOOK'S NEWS FEED AND OUR INFORMATION DIETS 6 (2018) http://webfoundation.org/docs/2018/04/WF_InvisibleCurationContent_Screen_AW.pdf.

136. See Constine, *supra* note 131.

137. Ingrid Burrington, *Could Facebook Be Tried for Human-Rights Abuses?*, ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/technology/archive/2017/12/could-facebook-be-tried-for-war-crimes/548639/>.

138. ÁVILA ET AL., *supra* note 135, at 14.

139. Adam Mosseri, *Bringing People Closer Together*, FACEBOOK (Jan. 11, 2018), <https://newsroom.fb.com/news/2018/01/news-feed-fyi-bringing-people-closer-together/>.

140. *Id.*

141. *Id.*

142. Metz, *supra* note 132. Facebook's primary ad system plugs straight into the Facebook News Feed. *Id.*

143. FACEBOOK, FACEBOOK REPORTS FOURTH QUARTER AND FULL YEAR 2017 RESULTS 1 (2018), https://s21.q4cdn.com/399680738/files/doc_news/Facebook-Reports-Fourth-Quarter-and-Full-Year-2017-Results.pdf.

144. *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 67 (Int'l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Mar. 24, 2010).

content on its platform, Facebook acts less like a non-engaging bystander and more like an active participant in the promulgation of inciteful speech.

IV. CASE EXAMPLE: MYANMAR

For many years, Myanmar heavily restricted its citizens' access to the Internet.¹⁴⁵ According to the United Nations agency, International Telecommunication Union, only 1.1% of the population used the Internet in 2012.¹⁴⁶ In 2014, a quasi-civilian government loosened restrictions and the use of mobile technology exploded as Subscriber Identification Module (SIM) cards became more affordable.¹⁴⁷ Each smartphone came preinstalled with Facebook, leading Facebook to "become sort of the de facto internet for Myanmar."¹⁴⁸ Myanmar's mobile phone operators also began offering an appealing deal: use Facebook without paying any data charges.¹⁴⁹ While many individuals became quickly connected to Facebook, these users did not know how to navigate the wider Internet.¹⁵⁰ This quickly led to an increased reliance on Facebook as the primary source of news and information.¹⁵¹

The combination of increased Internet access and the growing hate campaign proved devastating to the Rohingya.¹⁵² The Rohingya, a majority Muslim group, for years, have been subject to severe religious persecution in Myanmar, a primarily Buddhist country.¹⁵³ Facebook, as the "de facto Internet" of Myanmar, became a useful tool for the Tatmadaw military and Buddhist nationalists to incite violence and hatred against the Rohingya.¹⁵⁴ Reuters News and the Human Rights Center of the University of California Berkeley School of Law found more than 1000 examples of posts, comments, images, and videos attacking Myanmar's Muslim population.¹⁵⁵ Various posts called for Rohingya citizens to be shot, set on fire, and fed to pigs.¹⁵⁶ One user posted a restaurant advertisement featuring Rohingya-style food, claiming: "We must fight them the

145. 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/>.

146. *Id.*

147. *Id.*; see also Mozur, *supra* note 38.

148. Megan Specia & Paul Mozur, *A War of Words Puts Facebook at the Center of Myanmar's Rohingya Crisis*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/world/asia/myanmar-government-facebook-rohingya.html>.

149. See Stecklow, *supra* note 145.

150. See Specia and Mozur, *supra* note 148.

151. *Id.*

152. Stecklow, *supra* note 145.

153. *Id.*

154. See Specia and Mozur, *supra* note 148.

155. Olivia Solon, *Facebook Struggles 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>.

156. *Myanmar Rohingya: Facebook "Still Hosts Hate Speech,"* BBC NEWS (Aug. 15, 2018), <https://www.bbc.com/news/technology-45196167>.

way Hitler did the Jews, damn kalars!”¹⁵⁷ Numerous posts labeled the Rohingya as dogs, maggots, and rapists, and suggested they be exterminated.¹⁵⁸

In 2017, the growing use of Facebook to incite hate speech against the Rohingya erupted.¹⁵⁹ The military spread rumors on Facebook to both Muslim and Buddhist groups that an attack from the other side was imminent.¹⁶⁰ Using the widely popular accounts they created, the Tatmadaw military signaled Buddhist nationalists via Facebook Messenger that the Rohingya would be carrying out “jihad attacks.”¹⁶¹ To Rohingya and Muslim groups, the military spread a different message—that nationalist Buddhist monks were organizing anti-Muslim protests.¹⁶²

On August 25, 2017, the Arakan Rohingya Salvation Army (ARSA), a Rohingya insurgent group, launched coordinated attacks on the military in response to the growing pressure on the Rohingya.¹⁶³ The Tatmadaw military’s response to the attack was “immediate, brutal and grossly disproportionate.”¹⁶⁴ Under the guise of eliminating the terrorist threat from the ARSA, the military targeted and terrorized the entire Rohingya population and called their actions a “clearance operation.”¹⁶⁵ As a result, by mid-August 2018, nearly 725,000 Rohingya had fled to Bangladesh.¹⁶⁶

In 2018, the United Nations Human Rights Council determined that these “clearance operations” were a result of a systematic and planned attack that was incited by Tatmadaw military disinformation campaigns on Facebook.¹⁶⁷ The Report of the Independent International Fact-Finding Mission on Myanmar (the “U.N. Report”) alleged that the Tatmadaw’s actions amounted to the gravest crimes under international law, including genocide, crimes against humanity, and war crimes.¹⁶⁸ Specifically, the U.N. Report named six Tatmadaw officials, including the Tatmadaw Commander-in-Chief, Senior-General Min Aung Hlaing.¹⁶⁹ Interestingly, the U.N. Report also mentioned Facebook specifically, stating:

The role of social media is significant. Facebook has been a useful instrument for those seeking to spread hate, in a context where, for most users, Facebook is the Internet. Although improved in recent months, the response of Facebook has been slow and ineffective. The extent to which Facebook posts

157. See Stecklow, *supra* note 145.

158. See Myanmar Rohingya: Facebook “Still Hosts Hate Speech,” *supra* note 156.

159. See Mozur, *supra* note 38.

160. *Id.*

161. *Id.*

162. *Id.*

163. Report, *supra* note 11, at 8.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 19.

169. *Id.* at 17.

and messages have led to real-world discrimination and violence must be independently and thoroughly examined.¹⁷⁰

At times, Facebook's response seemed uninformed.¹⁷¹ In 2014, Facebook only had one content reviewer who spoke Burmese and only hired three more by 2015.¹⁷² Facebook struggled to identify hate speech due to difficulties with the Burmese language on its platform.¹⁷³ Facebook's response to the Myanmar crisis was, in fact, "slow and ineffective."¹⁷⁴

V. FACEBOOK'S POTENTIAL CRIMINAL LIABILITY IN THE MYANMAR CRISIS

A. KNOWLEDGE OF TATMADAW'S CRIMES

Applying the first requirement as discussed in Subpart III.A, Facebook may have knowingly provided assistance to those who perpetrated hate crimes against the Rohingya in Myanmar.¹⁷⁵ Not only did numerous users flag content using Facebook's internal reporting system, but civil society organizations directly reported misuse of the platform to various officers at Facebook.¹⁷⁶ Users in Myanmar flagged hateful speech against the Rohingya; however, Facebook's system was unequipped to interpret the reported posts, taking days or even weeks to remove inappropriate content.¹⁷⁷ Because the Burmese script is incompatible with Facebook's platform coding, Facebook had difficulty interpreting the script even though users were flagging content.¹⁷⁸ Only recently has Facebook addressed this problem by replacing the code for Burmese script with a more accepted code, Unicode.¹⁷⁹ This technical challenge and the prolonged response from Facebook may not show "knowing assistance" in the perpetration of crimes against humanity. However, in Myanmar in particular, additional warnings from civil society organizations evidenced more than mere suspicious warnings of misuse of Facebook's platform. More significantly, because of these warnings, Facebook knew of potential crimes against humanity occurring on its platform.

170. *Id.* at 14.

171. Stecklow, *supra* note 145.

172. *Id.*

173. *Id.*

174. Report, *supra* note 11, at 14.

175. *See supra* Subpart III.A.

176. Laignee Barron, *Could Facebook Have Helped Stop the Spread of Hate in Myanmar?*, TIME, <https://time.com/5230474/facebook-myanmar-hate-speech-rohingya/> (last updated Apr. 8, 2019, 7:38 AM).

177. *Id.*

178. Alex Warofka, *An Independent Assessment of the Human Rights Impact of Facebook in Myanmar*, FACEBOOK (Nov. 5, 2018), <https://about.fb.com/news/2018/11/myanmar-hria/> ("Myanmar is currently the only country in the world with a significant online presence that hasn't standardized on Unicode—the international text encoding standard. Instead, Zawgyi is used to encode Burmese language characters and is the dominant typeface in Myanmar.")

179. Nick LaGrow & Miri Pruzan, *Integrating Autoconversion: Facebook's Path from Zawgyi to Unicode*, FACEBOOK ENGINEERING (Sept. 26, 2019), <https://engineering.fb.com/android/unicode-font-converter/>.

The role that civil society organizations played in informing Facebook directly about the misuses of its platform sets the situation in Myanmar apart. According to various reporting sources, numerous organizations personally alerted Facebook to the growing misuse as early as 2012.¹⁸⁰ In 2013, Aela Callan, an Australian documentary filmmaker who began a project on hate speech between Buddhists and Rohingya, met with Elliott Schrage, Facebook Vice President of Communications and Public Policy.¹⁸¹ Callan informed Schrage about the hate speech and fake user pages that were pervasive in Myanmar.¹⁸² A year later, Callan returned to Facebook with other Burmese civil society organizations to raise the same issues.¹⁸³ Facebook executives told Callan that the company was addressing the issue and hired one Burmese speaker based in Dublin.¹⁸⁴ David Madden, a tech entrepreneur, also claimed that he told Facebook officials in 2015 that its platform was being exploited in Myanmar during a presentation at Facebook headquarters.¹⁸⁵

To Facebook's credit, Mia Garlick, Facebook's Asia Director met with technology organizations in Myanmar in July 2014 as part of a panel discussion between technology companies, civil society organizations, and the Myanmar government.¹⁸⁶ During the discussion, Garlick promised to speed up the translation of User Guidelines and Facebook's Code of Conduct by September 2015.¹⁸⁷

While the flagged content itself does not show that Facebook had knowledge of the Tatmadaw's use of its platform, the numerous warnings by civil society organizations affirmatively supports the fact that Facebook knew about the perpetration of war crimes and genocide through the Tatmadaw's use of Facebook, and yet, did not act. Warnings of platform misuse were reported as early as 2013, four years before the "clearance operation" that led to grave human rights abuses and genocide.¹⁸⁸ The flagged content and warnings furnished sufficient information to Facebook executives that the Tatmadaw were disseminating violent hate speech on its platform. Facebook officers' actions addressing some of the concerns coupled with their decision to continue to provide services in the absence of an effective solution aimed at controlling the dissemination of hate speech shows Facebook knew of the flagged activity, yet consciously ignored it.

180. Stecklow, *supra* note 145.

181. *Id.*

182. Olivia Solon, *Facebook's Failure in Myanmar is the Work of a Blundering Toddler*, GUARDIAN (Aug. 16, 2018, 5:00 PM), <https://www.theguardian.com/technology/2018/aug/16/facebook-myanmar-failure-blundering-toddler>.

183. *Id.*

184. Stecklow, *supra* note 145.

185. *Id.*

186. Timothy McLaughlin, *How Facebook's Rise Fueled Chaos and Confusion in Myanmar*, WIRED (July 6, 2018, 7:00 AM), <https://www.wired.com/story/how-facebooks-rise-fueled-chaos-and-confusion-in-myanmar/>.

187. *Id.*

188. Stecklow, *supra* note 145.

B. SUBSTANTIAL ASSISTANCE TO TATMADAW'S CRIMES

In an independent investigation into the Rohingya in Myanmar, the Independent Fact Finding Mission on Myanmar concluded that the actions of suspected perpetrators in the Tatmadaw military arose to crimes under international law, including genocide, crimes against humanity and war crimes.¹⁸⁹ For Facebook, the inquiry is whether its actions aided or abetted these international crimes in a substantial matter. Marzuki Darusamn, chairman of the Mission, said social media has “substantively contributed to the level of acrimony and dissension and conflict, if you will, within the public.”¹⁹⁰ The U.N. Report stated there is “no doubt that the prevalence of hate speech in Myanmar significantly contributed to increased tension and a climate in which individuals and groups may be more receptive to incitement and calls for violence.”¹⁹¹ While Darusamn’s comments and U.N. Report call Facebook’s involvement “significant,”¹⁹² it remains unclear whether such involvement arises to a level of criminal liability.

Arguably, promotion of certain content did not have a substantial effect on the Tatmadaw’s campaign of genocide because there was anti-Rohingya sentiment brewing in Myanmar prior to the introduction of Facebook in the country.¹⁹³ However, Facebook undeniably chose to do business in Myanmar, knowing that the country had a long-standing history of committing various human rights abuses, and chose to introduce its platform in a community with minimal preparation and little regard to potential consequences. The key issue is whether Facebook’s promotion and selection of certain content on Newsfeeds, which increased the presence of hate speech and encouraged individuals to engage in violent behavior and hateful rhetoric, amounts to a “substantial act.”

A number of civil society organizations suggest that Facebook’s involvement in Myanmar actually led to the incitement of a number of violent acts.¹⁹⁴ In a letter sent to Zuckerberg, five civil society organizations claimed that various messages over Facebook’s Messaging platform exemplified situations where Facebook’s tools were being used to incite real harm.¹⁹⁵ The messages, translated in English, stated:

189. Report, *supra* note 11, at 16.

190. Christopher Woody, *Facebook Official Who Oversees the News Feed Says His Team Loses Sleep Over the Site’s Alleged Role in Myanmar “Ethnic Cleansing,”* BUS. INSIDER (Mar. 22, 2018, 10:18 AM), <https://www.businessinsider.com/adam-mosseri-facebook-myanmar-genocide-rohingya-lose-sleep-2018-3> (internal quotation marks omitted) (quoting Marzuki Darusman, chairman of the U.N. Independent International Fact-Finding Mission on Myanmar).

191. Human Rights Council, Rep. of the Detailed Findings of the Indep. Int’l Fact-Finding Mission on Myan., U.N. Doc. A/HRC/39/CRP.2, at 343 (2018).

192. *Id.*

193. Barron, *supra* note 176 (quoting Mark Farmaner, director of Burma Campaign UK, “violence against the Rohingya would have happened with or without Facebook.”).

194. Letter from Phandeeyar, Mido, Burma Monitor Research & Monitoring, Ctr. for Soc. Integrity, Equal. Myan., & Myan. Human Rights Educator Network, to Mark Zuckerberg, CEO, Facebook (Apr. 5, 2018), <https://drive.google.com/file/d/1Rs02G96Y9w5dpX0Vf1LjWp6B9mp32VY-/view>.

195. *Id.*

Be warned and stay alert every time you go and eat. The Kalar are planning to launch a Jihad on Monday 11 Sept. Warn your friends. The order to get ready with guns has already been issued in the army. Please forward this message in the chat box. Friends, brothers, and sisters, lets unite.

Dear Islam brother, be warned and stay alert every time you go and eat. On Sept 11 in Yangon, MaBaTha and extremist nationalists will collaborate and they will launch an anti kalar movement. Please forward this message to our brothers.¹⁹⁶

The civil society organizations claimed that these messages spread in an “unprecedented way, reaching country-wide and causing widespread fear and at least three violent incidents in the process.”¹⁹⁷

Similar to Walmart’s failure to stop suppliers from committing labor abuses,¹⁹⁸ one could argue that Facebook substantially contributed to the Tatmadaw’s crimes for failing to report or alert the Burmese government of the rising tensions. Facebook, however, cannot be wholly responsible for failing to act as a whistleblower for all human rights abuses that may occur through its platform. Alternatively, Facebook could be held accountable for substantially contributing to the military’s calculated attack against the Rohingya through another theory—rather than failing to act, Facebook disseminated information more quickly and spread the narrative of the conflict.

Reports and studies conducted in 2017 support this theory. Alan Davis, Asia and Eurasia Director for the Institute for War and Peace Reporting, conducted a two-year anti-hate speech project in Myanmar from 2015–2017.¹⁹⁹ At the beginning of the project, Davis noticed that “the vast majority of hate speech was on social media, particularly Facebook.”²⁰⁰ Not all hate speech was anti-Muslim or anti-Rohingya.²⁰¹ Over time, however, Davis began noticing that “hate speech [became] more targeted and militaristic.”²⁰² Prior to August 2017, Davis noticed posts regarding “claims of Islamic State (IS) flags flying over mosques in Yangon where munitions were being stored, of thwarted plots to blow up the 2,500 year-old Shwedagon Pagoda in Yangon and supposed cases of Islamic agents smuggling themselves across the border.”²⁰³ Signs denoting “Muslim free areas” were shared more than 11,000 times.²⁰⁴ Davis shared this information with officials and local journalists, in an effort to spur a response; however, officials and journalists refused to investigate further.²⁰⁵

196. *Id.*

197. *Id.*

198. Cassel, *supra* note 68, at 305.

199. Alan Davis, *How Social Media Spurred Myanmar’s Latest Violence*, INST. WAR & PEACE REPORTING (Sept. 12, 2017), <https://iwpr.net/global-voices/how-social-media-spurred-myanmars-latest>.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. 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>.

205. *Id.*

Relatedly, digital researcher and analyst Raymond Serrato examined about 15,000 Facebook posts from supporters of the nationalist Ma Ba Tha group.²⁰⁶ Activity within the group spiked on August 24, 2017 and August 25, 2017 when the ARSA Rohingya militants attacked the military.²⁰⁷ Posts exploded in those two days, showing a 200% increase in interaction within the Ma Ba Tha's Facebook group.²⁰⁸ Serrato believes that "Facebook definitely helped certain elements of society to determine the narrative of the conflict in Myanmar Although Facebook had been used in the past to spread hate speech and misinformation, it took on greater potency after the attacks."²⁰⁹

Davis and Serrato's research suggests that these militaristic posts formed an anti-Rohingya culture in Myanmar in anticipation of the August 2017 attack. While further research is required to confirm the extent to which the posts affected the military's actions in August 2017, Facebook undeniably acted as "a means for those seeking to spread hate and cause harm, and posts have been linked to offline violence."²¹⁰

Without a doubt, Facebook took some action to address the promulgation of hate speech on its platform. Facebook, however, acted "too slow" and too late.²¹¹ By allowing inappropriate and hateful content to remain online, Facebook substantially promoted the Tatmadaw's genocidal campaign against the Rohingya. Facebook devoted "scant resources to combat hate speech in Myanmar, a market it dominates and in which there have been regular outbreaks of ethnic violence."²¹² Prior to entering a country with a history of human rights abuses,²¹³ Facebook should have implemented safeguards, incorporated human rights into its Community Guidelines, and established proper procedure for flagging and reviewing content. As the "de facto Internet" of Myanmar, Facebook shaped the country's narrative with regard to the Rohingya and its failure to implement proper procedures in anticipation of such misuse constitutes a "substantial act" to the Tatmadaw's military operations in August 2017. Although Facebook cannot be held fully responsible for violating human rights in Myanmar, theoretically, it could be held criminally liable for its narrow involvement with the Tatmadaw military and nationalist groups weaponization of its platform.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. BUS. SOC. RESP., HUMAN RIGHTS IMPACT ASSESSMENT: FACEBOOK IN MYANMAR 24 (2018), https://fbnewsroomus.files.wordpress.com/2018/11/bsr-facebook-myanmar-hria_final.pdf.

211. Stecklow, *supra* note 145.

212. *Id.*

213. *Myanmar (Burma) Human Rights*, AMNESTY INT'L, <https://www.amnestyusa.org/countries/myanmar/> (last visited Mar. 20, 2020).

VI. CRITICISM OF CORPORATE CRIMINAL LIABILITY

As discussed in Part V, international criminal law theories of accomplice liability could justify holding Facebook criminally liable. However, even if Facebook *could* be held liable, the next question is whether it *should*.

On one hand, holding Facebook criminally liable is an effective means of encouraging the company to uphold human rights through its company operations. Instead of relying on non-binding, voluntary agreements, the threat of a criminal conviction provides more "teeth" to enforcing better business guidelines. The threat itself, through an indictment or United Nations fact-finding report, may provide more accountability than a full-blown trial because corporations deeply care about their reputation. Responding to the Myanmar crisis, Mosseri, chief engineer for Facebook's Newsfeed, admitted: "At the end of the day I really do think criticism helps us shed light on our blind spots, helps us be more self-aware, and I think that's painful but healthy."²¹⁴ In response to the U.N. Report, Facebook hired Business Social Responsibility (BSR), a non-profit with expertise in business policing and human rights, to conduct an independent assessment of Facebook's responsibility in Myanmar.²¹⁵ Although this report came three years after Facebook became aware of the Myanmar crisis, Facebook took steps in the right direction by conducting an internal audit.

On the other hand, punishing social media companies may lead to extreme consequences. One concern is that Facebook could stop operating in the country where it is being held liable altogether. Some argue that certain countries, like Myanmar, may benefit from not having Facebook in its country.²¹⁶ However, even if Facebook is not used in Myanmar, users may simply turn to other social media platforms. In fact, some reports have stated that some nationalist users have already moved from Facebook to VK, a social media network that is popular in Russian-speaking parts of the world.²¹⁷

Furthermore, the threat of a criminal conviction may encourage Facebook to over-censor content in an effort to shield itself from criminal liability. Facebook largely hesitates to remove misinformation across its platform for this exact reason.²¹⁸ Rather than removing content, Facebook downplays information by "demoting false information in the news feed using its algorithm."²¹⁹ However, as discussed above, Facebook removed accounts by a

214. April Glaser & Will Oremus, *Facebook's Alleged Role in Myanmar's Violence Is "Deeply Concerning," Says Facebook's News Feed Chief*, SLATE (Mar. 15, 2018, 3:13 PM), <https://slate.com/technology/2018/03/facebooks-alleged-role-in-myanmars-violence-is-deeply-concerning-says-facebooks-news-feed-chief.html>.

215. See Warofka, *supra* note 178.

216. Mozur, *supra* note 38.

217. *Id.*

218. Hayley Tsukayama, *Facebook Turns to Artificial Intelligence to Fight Hate and Misinformation in Myanmar*, WASH. POST (Aug. 15, 2018, 7:19 PM), https://www.washingtonpost.com/technology/2018/08/16/facebook-turns-artificial-intelligence-fight-hate-misinformation-myanmar/?noredirect=on&utm_term=.67301e624064.

219. *Id.*

number of Tatmadaw military officials, including Secretary-General Min Aung Hlaing, suggesting that Facebook is willing to take some responsibility in curtailing potential human rights abuses on its platform.²²⁰ Requiring Facebook to regulate content places significant responsibility on Facebook to determine whether certain content is harmful.²²¹ In effect, Facebook would make policy decisions in an office that is not well-versed in the cultural norms of the host country.

Some scholars and human rights activists oppose using law to enforce human rights in social media companies.²²² Without an established enforcement mechanism and clear standards for corporate complicity, social media corporations should not be held to international criminal law standards. Unclear standards invite interpretation, and enforcement of such standards may not truly uphold human rights. Further, without a court with jurisdiction, the threat of enforcement is meaningless. With clarification, however, social media corporations should be held criminally liable. Holding a “corporation criminally liable can deter” abuse and the “risk of detection and punishment will be an element in the [company’s] calculus of potential wrongdoing.”²²³

As the law on corporate criminal liability develops and the perspective on corporate liability alters, social media companies may still be held accountable through internal mechanisms. Through “shareholder activism” and “employee activism,” shareholders and employees are “coming together, to make their desires for social and environmental change heard.”²²⁴ In response to Facebook’s numerous scandals including hate speech in Myanmar, shareholders in April 2019 proposed to fire Zuckerberg as chairman and restructure the company’s corporate structure.²²⁵ Although the shareholders ultimately failed,²²⁶ these shareholders exemplify another form of oversight. Employees

220. *Removing Myanmar Military Officials from Facebook*, FACEBOOK, <https://newsroom.fb.com/news/2018/08/removing-myanmar-officials/> (last updated Dec. 18, 2018, 5:00 PM).

221. On Wednesday, Facebook CEO Mark Zuckerberg told Recode he felt “fundamentally uncomfortable sitting here in California at an office, making content policy decisions for people around the world.” Christopher Woody, *Facebook Official Who Oversees the News Feed Says His Team Loses Sleep Over the Site’s Alleged Role in Myanmar “Ethnic Cleansing,”* BUS. INSIDER (Mar. 22, 2018, 10:18 AM), <https://www.businessinsider.com/adam-mosseri-facebook-myanmar-genocide-rohingya-lose-sleep-2018-3>.

222. See Burrington, *supra* note 137 (quoting Cynthia Wong at Human Rights Watch, who stated: “The challenge is that in many countries, governments themselves are part of the problem [of hate speech]. So the government is using Facebook to spread misinformation and hate speech against minorities. It’s not something you can lay completely at the feet of Facebook—it’s not their job to fix what governments are doing.”).

223. Tigar, *supra* note 66, at 215.

224. Lauren Coulman, *Why Is Employee Activism on the Rise?*, FORBES (May 30, 2019, 4:20 AM), <https://www.forbes.com/sites/laurencoulman/2019/05/30/why-is-employee-activism-on-the-rise/#168f74e774b>.

225. Jake Kanter, *Facebook’s Activist Shareholders Are Making Another Dramatic Bid to Oust Mark Zuckerberg and Abolish the Firm’s Share Structure*, BUS. INSIDER (Apr. 13, 2019, 7:37 AM), <https://www.businessinsider.com/facebook-investors-will-vote-to-oust-mark-zuckerberg-as-chairman-2019-4>.

226. Emily Stewart, *Facebook Will Never Strip Away Mark Zuckerberg’s Power*, VOX (May 30, 2019, 2:38 PM), <https://www.vox.com/recode/2019/5/30/18644755/facebook-stock-shareholder-meeting-mark-zuckerberg-vote>.

too have demanded their companies uphold human rights efforts by organizing campaigns internally.²²⁷ A group of Google engineers began their own internal investigation into Project Dragonfly, Google's censored search engine for China.²²⁸ In an open letter to Google, these employees objected to this project, opposing "technologies that aid the powerful in oppressing the vulnerable, wherever they may be."²²⁹ This July, Google's Vice President of Public Policy, Karan Bhatia, confirmed that Google abandoned work on Project Dragonfly.²³⁰

The growing concerns regarding the weaponization of Facebook reflect the need for social media corporations to commit to investigating human rights violations. While Facebook cannot be completely responsible for the part it played in human rights violations against the Rohingya, it nevertheless remains unaccountable for its slow and ineffective response. Facebook must begin incorporating support for human rights into its business strategy as suggested in the BSR Report.²³¹

Notably, the BSR Report highlighted the role of local civil society organizations and stakeholders.²³² While corporate criminal complicity places responsibility on companies, they can rely on third parties to both notify them of potential human rights abuses on a timely basis and can hire audit companies more proactively. Civil society organizations played a significant role in the Myanmar crisis by directly notifying Facebook about certain violations and misuse of its platform.²³³ So far, Facebook has made positive steps towards addressing human rights abuses on its platform by joining the Global Network Initiative,²³⁴ a "multi-stakeholder platform" comprised of technology companies, human rights organizations, academics, and investors.²³⁵ The company also conducts comprehensive audits through third party, civil society organizations. If the goal is to deter social media corporations from aiding and abetting human rights violations, these additional forms of responsibility may be effective in helping them avoid corporate criminal complicity.

227. See Coulman, *supra* note 224.

228. *We Are Google Employees. Google Must Drop Dragonfly.*, MEDIUM (Nov. 27, 2019), <https://medium.com/@googlersagainstdragonfly/we-are-google-employees-google-must-drop-dragonfly-4c8a30c5e5eb>.

229. *Id.*

230. Jeb Su, *Confirmed: Google Terminated Project Dragonfly, Its Censored Chinese Search Engine*, FORBES (July 19, 2019, 4:31 AM), <https://www.forbes.com/sites/jeanbaptiste/2019/07/19/confirmed-google-terminated-project-dragonfly-its-censored-chinese-search-engine/#73aeac1b7e84>.

231. See Warofka, *supra* note 178.

232. BUS. SOC. RESP., *supra* note 210, at 28–29.

233. See Stecklow, *supra* note 145.

234. *Protecting and Advancing Freedom of Expression and Privacy in the ICT Sector*, GLOBAL NETWORK INITIATIVE, <https://globalnetworkinitiative.org/> (last visited Mar. 20, 2020).

235. *About GNI*, GLOBAL NETWORK INITIATIVE, <https://globalnetworkinitiative.org/about-gni/> (last visited Mar. 20, 2020).

CONCLUSION

As Zuckerberg admitted, Facebook has a responsibility to uphold human rights.²³⁶ This responsibility may also include legal responsibility under the theory of corporate criminal complicity. Issues remain outstanding with regard to jurisdiction and evidentiary proof, as shown in the Myanmar case study. However, based on the legal theories of corporate criminal complicity, Facebook could be held criminally liable for its operation of a platform used by authoritarian regimes to commit human rights abuses.

To address the obstacles of jurisdiction and evidentiary proof, the international community could propose and establish an international criminal tribunal with jurisdiction over corporations. This would certainly solve the jurisdiction issue. Furthermore, the creation of an international criminal tribunal would also address the evidentiary proof issues. Because the potential defendant, Facebook, is effectively holding the data that may furnish potential criminal liability, an international tribunal with appropriate jurisdiction could subpoena such data to investigate Facebook's involvement.

While Facebook can be held accountable through other means such as reputational costs, shareholder and employee activism, it appears not to have learned its lesson with Myanmar. In fact, Facebook is continuously entering markets where its platform can easily be weaponized.²³⁷ As part of its vision to connect the entire world to the Internet within the next five to ten years, Facebook has set up free Internet hotspots called "Express Wi-fi" in India, Indonesia, Kenya, Nigeria, and Tanzania.²³⁸ There are no reports on whether Facebook has assessed the potential impact its platform may have on human rights in those five countries. While Facebook's efforts may be beneficial to these countries, its lack of transparency with data collection and reporting remain significant problems.

Facebook is currently the ultimate regulator of content on its platform, a task it performs with little to no accountability. The threat of liability in international criminal law may encourage corporations to act more swiftly in response to human rights abuses by authoritarian regimes. As observed with the Myanmar case study, civil society organizations played a large role in alerting Facebook to potential misuses of its platform in Myanmar. Facebook would be wise to rely more heavily on these organizations to uphold human rights.

War crimes and crimes against humanity rank as some of the worst crimes in the international framework. Although corporate criminal liability is currently theoretical, civil society organizations' and governments' increasing calls for liability may eventually lead to a future where social media corporations are held accountable for their operations, and where victims can seek relief without being dismissed on purely jurisdictional and evidentiary grounds. Exploring the

236. *See Transcript*, supra note 1.

237. Nitasha Tiku, *After Troubles in Myanmar, Facebook Charges Ahead in Africa*, WIRED (Oct. 7, 2018, 7:00 AM), <https://www.wired.com/story/after-troubles-myanmar-facebook-charges-ahead-africa/>.

238. *Id.*

possibility of defining and enforcing international corporate criminal liability not only alerts social media companies to the potential consequences of their actions, but also makes significant strides towards justice for victims of the gravest human rights abuses.
