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## Crime as Cognitive Constraint: Facebook's Role in Myanmar's Incitement Landscape and the Promise of International Tort Liability

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# CRIME AS COGNITIVE CONSTRAINT: FACEBOOK’S ROLE IN MYANMAR’S INCITEMENT LANDSCAPE AND THE PROMISE OF INTERNATIONAL TORT LIABILITY

*Jenny Domino*<sup>1</sup>

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	143
INTRODUCTION .....	144
I. BACKGROUND .....	150
II. GAP .....	163
A. <i>Prohibited speech under international law</i> .....	164
1. International human rights law.....	164
2. International criminal law .....	165
B. <i>Legal responsibility for direct and public incitement to commit genocide</i> .....	166
1. State responsibility .....	166
2. Individual (criminal) responsibility .....	167
C. <i>Corporate responsibility</i> .....	168
III. CRITIQUE .....	173
A. <i>Corporate criminal liability</i> .....	175
B. <i>Crime as cognitive constraint: Facebook as a “useful instrument” for hate speech in Myanmar</i> .....	178
IV. THE PROMISE OF TORT.....	183
A. <i>Rationale</i> .....	185
1. Sanction and criminal law’s design .....	186
B. <i>Cause of action</i> .....	188
1. To whom the duty applies: the public-private flip .....	189
2. Duty.....	191
3. To whom the duty is owed; causation .....	193
C. <i>Design</i> .....	194
V. CONCLUSION.....	196

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## INTRODUCTION

Is Facebook's role in the spread of incitement in Myanmar criminal? In 2018, the United Nations Independent International Fact-Finding Mission on Myanmar (FFM) described Facebook's "significant role" in the spread of incitement to discrimination and violence against Myanmar's Rohingya Muslims.<sup>2</sup> Although the FFM described in detail the speakers' responsibility for the Facebook posts, the precise nature of Facebook's responsibility in moderating (or failing to moderate) harmful content was unclear.

Facebook's tragedy in Myanmar is a striking example of how international law's current regimes of responsibility for incitement to genocide results in a *gap*. The extant regime, with its focus on states and natural persons, is incapable of fully accounting for the different actors and technologies involved in the rich and complex narrative of mass violence. One popular response to the lack of corporate liability is to expand domestic and international prosecution of legal or juridical persons.<sup>3</sup> However, by evaluating the role of social media platforms in the spread of incitement, particularly the damage wrought by Facebook in Myanmar, this article hopes to contribute to that literature by showing how crime can operate as a cognitive constraint in appreciating different modalities of corporate involvement in situations of mass atrocity. By emancipating ourselves from this dominant cognitive frame, we can imagine a broader network of international liabilities. One possibility is tort. For this purpose, Facebook's ban of Myanmar's commander-in-chief from the platform<sup>4</sup> merits further consideration. It remarkably embodies a *regulatory paradox*, where the traditional roles of regulator (state) and regulated entity (non-state) are reversed. This article examines the implications of the *exercise* of this awesome power in articulating an international tort liability and establishing a related mechanism.

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2. Human Rights Council, Rep. of the Independent Int'l Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/64, ¶ 74 (Sept. 12, 2018) [hereinafter *FFM Report Summary*].
  3. See, e.g., Oliver Salas, *Corporate Liability of Energy/Natural Resources Companies at National Law for Breach of International Human Rights Norms*, BUS. & HUM. RTS. RESOURCE CTR. (Dec. 31, 2011), [https://www.business-humanrights.org/sites/default/files/media/dissertation\\_finaldraft.pdf](https://www.business-humanrights.org/sites/default/files/media/dissertation_finaldraft.pdf) [<https://perma.cc/T4Y2-GFJ3>].
  4. *Removing Myanmar Military Official from Facebook*, FACEBOOK, <https://about.fb.com/news/2018/08/removing-myanmar-officials/> (last updated Dec. 18, 2018).

At an international symposium held in 2019 on the subject of Law and Atrocity Prevention, I was asked to speak on a panel about “regulating social media that *fosters* atrocity crimes.”<sup>5</sup> The word choice for the panel discussion – “fosters” — was very telling. It reveals the uncertain legal character of social media companies’ involvement in instances of incitement to violence posted on the platform, including the crime of direct and public incitement to commit genocide under the Genocide Convention and the Rome Statute (alternatively, “incitement to genocide”).<sup>6</sup> Such ambivalence was similarly apparent in the FFM report. The FFM found that ultranationalist monks, military leaders, and government officials were responsible for posts that constituted incitement to violence and persecution against the Rohingya Muslims of Myanmar’s Rakhine State.<sup>7</sup> Discriminatory rhetoric and calls for violence created a social environment which facilitated the armed confrontations between Myanmar’s military – the Tatmadaw – and the non-state armed group, Arakan Rohingya Salvation Army. This, in turn, resulted in the present Rohingya refugee crisis.<sup>8</sup>

In contrast, the FFM’s description of Facebook’s involvement was less straightforward:

The Mission has no doubt that the prevalence of hate speech in Myanmar significantly contributed to increased tension and a climate in which individuals and groups may become more receptive to incitement and calls for violence. This also applies to hate speech on Facebook. The extent to which the spread of messages and rumours on Facebook has increased discrimination and violence in Myanmar must be independently and thoroughly researched, so that appropriate lessons can be drawn and similar scenarios prevented. Similarly, the impact of the recent measures

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5. Case Western Reserve University School of Law, *Atrocity Prevention: The Role of International Law and Justice - Part 3*, YOUTUBE (Oct. 7, 2019), [https://www.youtube.com/watch?v=kT\\_wdRS2pGA](https://www.youtube.com/watch?v=kT_wdRS2pGA).
  6. Long, *supra* note 4; Rome Statute of the International Criminal Court, art. 25(3)(e), Jul. 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]; Convention on the Prevention and Punishment of the Crime of Genocide, art. III(c), Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].
  7. See U.N. Human Rights Council, Rep. of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, ¶ 1319, U.N. Doc. A/HRC/39/CRP.2 (Sept. 17, 2018) [hereinafter *Detailed Findings of the FFM*].
  8. See *id.*; *Rohingya Refugee Crisis*, U.N. NEWS, <https://news.un.org/en/focus/rohingya-refugee-crisis> [https://perma.cc/2W6H-FBG5].

taken by Facebook to prevent and remedy the abuse of its platform needs to be assessed.<sup>9</sup>

The FFM found that social media played a “significant” role in the spread of incitement in Myanmar, and that Facebook served as a “useful instrument” for hate speech<sup>10</sup> “in a context where for most users Facebook *is* the Internet.”<sup>11</sup> To be used, to serve as an instrument – by using the passive voice to describe Facebook’s actions, the FFM obscured the platform’s agency and avoided the attribution of legal responsibility to Facebook as a company engaged in the business of content moderation. Such silence is to be expected. International law has only recognized two regimes of legal responsibility – for states and natural persons – in regulating incitement to genocide. The Genocide Convention imposes on states the duty to prevent and punish genocide within their borders (including incitement to genocide),<sup>12</sup> while international criminal law prosecutes natural persons for statements amounting to direct and public incitement to commit genocide.<sup>13</sup> In contrast, the UN Guiding Principles on Business and Human Rights

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9. *Detailed Findings of the FFM*, *supra* note 7, ¶ 1354. Even prior to the release of the FFM report, the UN Special Rapporteur on the situation of human rights in Myanmar Yanghee Lee expressed concern that Facebook had been a site of incitement to violence against the Rohingya. Similarly, FFM Chair Marzuki Darusman described Facebook to have played a “determining role” in the conflict and have “substantively contributed to the level of acrimony and dissension and conflict in Myanmar. See Tom Miles, *U.N. Investigators Cite Facebook Role in Myanmar Crisis*, REUTERS (Mar. 12, 2018), <https://www.reuters.com/article/us-myanmar-rohingya-facebook/u-n-investigators-cite-facebook-role-in-myanmar-crisis-idUSKCN1GO2PN> [<https://perma.cc/AR9N-97XN>]; Eli Meixler, *U.N. Fact-finders Say Facebook Played a Determining Role in Violence Against the Rohingya*, TIME (Mar. 12, 2018), <http://time.com/5197039/un-facebook-myanmar-rohingya-violence/> [<https://perma.cc/A6D2-5AV6>].
  10. I use the term “hate speech” here following the FFM’s terminology, but note the lack of definition of hate speech under international law and the varying treatment across jurisdictions on hate speech legislation. Incitement to violence, however, constitutes a narrower scope of prohibited expression. See generally *Hate Speech Explained: A Toolkit*, ARTICLE 19 (Dec. 23, 2019), <https://www.article19.org/resources/hate-speech-explained-a-toolkit/> [<https://perma.cc/78J4-AZK8>]; Susan Benesch et al., *Dangerous Speech: A Practical Guide*, DANGEROUS SPEECH PROJECT (Jan. 9, 2020), <https://dangerousspeech.org/guide/> [<https://perma.cc/5QGE-TRYC>] (coining the word “dangerous speech” and differentiating it from “hate speech”).
  11. *FFM Report summary*, *supra* note 2, ¶ 74.
  12. *Genocide Convention*, *supra* note 6, art. V, VIII.
  13. *Id.* art. III(c), art. IV.

(UNGPs) provide a template to guide corporate conduct without assuming the form of legal obligation.<sup>14</sup>

Calls for accountability have been consistent with this framework. The FFM recommended investigation for possible genocide, crimes against humanity, and war crimes; the UN Independent Investigative Mechanism for Myanmar was established soon after to collect and preserve evidence that may be used in a court of law.<sup>15</sup> Separately, the Prosecutor of the International Criminal Court (ICC) is now looking into acts of deportation that spilled onto neighboring Bangladesh, a state party to the Rome Statute.<sup>16</sup> This would circumvent Myanmar's status as a non-state party to the treaty and allow the prosecution of individuals found to be most responsible for the deportation of the Rohingya.<sup>17</sup> Demand for state responsibility ensued. In November 2019, The Gambia filed an application before the International Court of Justice (ICJ) concerning Myanmar's alleged violation of its *erga omnes* obligations under the Genocide Convention, which Myanmar is a party to.<sup>18</sup> Importantly, The Gambia devoted a substantial portion of its application to describe the "hate propaganda" against the Rohingya.<sup>19</sup> In an unprecedented order, the ICJ granted jurisdiction to rule on The Gambia's request for provisional measures and enjoined Myanmar to

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14. *Guiding Principles on Business and Human Rights*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (2011), [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf) [<https://perma.cc/LSD2-XAUX>] [hereinafter *UNGPs*].
  15. *Detailed Findings of the FFM*, *supra* note 9, ¶¶ 63, 1441, 1511, 1711; U.N. Human Rights Council, Resolution Adopted by the Human Rights Council on 24 March 2017, ¶ 11, U.N. Doc. A/HRC/Res/34/22 (Apr. 3, 2017) (creating the FFM); U.N. Human Rights Council, Situation of human rights of Rohingya Muslims and other minorities in Myanmar, ¶ 22, U.N. Doc. A/HRC/39/L.22 (Sept. 25, 2018) (creating the Independent Investigative Mechanism for Myanmar).
  16. Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ¶ 43 (Nov. 14, 2019), [https://www.icc-cpi.int/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF) [<https://perma.cc/T7S8-RMUQ>].
  17. *Id.*
  18. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gam. v. Myan.*), Application Instituting Proceedings and Request for Provisional Measures, ¶ 15 (Nov. 11, 2019).
  19. *Id.* ¶¶ 37–46.

prevent further acts of genocide within its borders, including the crime of direct and public incitement to commit genocide.<sup>20</sup>

Myanmar's incitement landscape thus presents a striking picture of how international law's current regimes of responsibility appear to result in a *gap*, incapable of fully accounting for the different actors and technologies involved in the rich and complex narrative of mass violence. Recent trends to address the lacuna for corporate liability in mass atrocity contexts involve hardening the soft law framework contained in the UNGPs through a legally binding instrument, which would impose on states the obligation to prosecute juridical persons at the national level,<sup>21</sup> and to expand the coverage of the Rome Statute to allow the prosecution of juridical persons before the ICC.<sup>22</sup> These movements comprise two sides of the same coin. Although my paper is not focused on individually evaluating these approaches, much less urge proponents to abandon criminal law altogether, I argue broadly that such approaches exhibit an unquestioning attitude towards the primacy of crime to conceptualize harm, which can operate as a cognitive constraint in appreciating different modalities of corporate involvement in mass atrocity contexts.

As various scholars, legislators, and policymakers develop theoretical and policy approaches to regulate social media,<sup>23</sup> this article

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20. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gam. v. Myan.*), Order, Request for the Indication of Provisional Measures, ¶¶ 37, 86 (Jan. 23, 2020).
  21. See UN Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (revised draft as of July 16, 2019), [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf). [<https://perma.cc/V53H-VXCU>].
  22. *Id.* art. 6(7)(a).
  23. See, e.g., Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1037-42 (2018) (discussing the dangers of the European Commission's Code of Conduct on Countering Illegal Hate Speech Online); *B-Tech Project*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/EN/Issues/Business/Pages/B-TechProject.aspx> [<https://perma.cc/JM67-CPZ2>] (seeking "to provide authoritative guidance and resources to enhance the quality of implementation of the United National Guiding Principles on Business and Human rights with respect to a selected number of strategic focus areas in the technology space"); UN Human Rights Council, Rep. of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/HRC/38/35, ¶ 2 (Apr. 6, 2018) (recommending human rights principles for content moderation); Ben Wagner, *Can Germany's 'Lex Facebook' Be Saved? A Business and Human Rights Analysis*, GLOBAL VOICES (Mar. 13, 2018), <https://globalvoices.org/2018/03/13/can-germanys-lex-facebook-be->

hopes to contribute to the conversation by showing how the language of crime can limit our conceptual thinking of harm. By freeing ourselves from this dominant cognitive frame, a broader network of international liabilities is up for imagining. One possibility is international tort liability. For this purpose, Facebook's ban of Myanmar's commander-in-chief from the platform deserves consideration.<sup>24</sup> It remarkably embodies a *regulatory paradox*, where the traditional roles of regulator (state) and regulated entity (non-state) are reversed. This highlights the agency of social media platforms and the process of content moderation that lies at the heart of their business. As Tarleton Gillespie defines, a "platform" is an online site or service where content is provided by users but the company offering the technology moderates user content and activity as an "essential" (rather than "ancillary") undertaking.<sup>25</sup> This article examines the exercise of private regulation of state actors' speech – in the form of content moderation – in distilling generalizable principles for an international tort liability and the institutional design of a related mechanism, extending Maya Steinitz's blueprint for an International Court of Civil Justice (alternatively, ICCJ).<sup>26</sup>

It bears emphasizing that the focus on Facebook is not intended to single out one platform; rather, it is meant to provide a legal-theoretical

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saved-a-business-and-human-rights-analysis/ [https://perma.cc/9J2W-HYA9]; *Regulating Social Media: We Need a New Model that Protects Free Expression*, ARTICLE 19, (Apr. 25, 2018), <https://www.article19.org/resources/regulating-social-media-need-new-model-protects-free-expression/>

24. Long, *supra* note 4.
25. TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA 18-23, 40 (2018) (defining "platform" as "online sites and services that (a) host, organize, and circulate users' shared content or social interactions for them, (b) without having produced or commissioned (the bulk of) that content, (c) built on an infrastructure, beneath that circulation of information, for processing data for customer service, advertising, and profit," and (d) whose essential function includes the moderation of content and user activity through "some logistics of detection, review, and enforcement"). In contrast, the term "platform" conjures a picture of "progressiveness" and "egalitarianism" which suggests a myth of neutrality. See Tarleton Gillespie, *The Politics of 'Platforms'*, 12 NEW MEDIA & SOC'Y, May 1, 2010, at 347, 349-351; Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1151 (2018) (arguing that free speech problems in any era "are shaped by the communications technology available for people to use and by the ways that people actually use that technology").
26. Maya Steinitz, *The Case for an International Court of Civil Justice*, 67 STAN. L. REV. ONLINE 75 (2014).



response to what other experts have already commented upon.<sup>27</sup> It is also meant to function as a cautionary tale for technologies operating in incitement contexts.<sup>28</sup> The term “speech” used in this article refers to the full range of modalities of expression. This article will proceed in four parts. Part I begins with an account of Myanmar’s speech landscape following the country’s political transition, and Facebook’s role in shaping public discourse against the Rohingya. Part II provides an overview of prohibited speech under international law and the current regimes of legal responsibility for incitement to genocide. Laying out the legal landscape for speech in this manner will reveal how extant regimes result in a *gap* in liability for corporate involvement in mass atrocity crimes. Part III discusses the common response to this gap – to push for the prosecution of juridical or legal persons, whether domestically or internationally. However, I will argue, using Facebook in Myanmar as an example, how translating harm in the language of crime can eclipse other cognitive frames, such as tort. Part IV briefly sketches the promise of international tort liability and the contours of an international mechanism, building on Steinitz’s blueprint for an International Court of Civil Justice.

## I. BACKGROUND

The outbreak of violence in October 2016 and August 2017 in Myanmar’s Rakhine state forms the factual situation of the ICC’s investigation.<sup>29</sup> These attacks did not spring from nowhere; they were the culmination of decades of government-orchestrated communal tension between Rakhine Buddhists and Rohingya Muslims.<sup>30</sup> In the years preceding the attacks, “nationalistic political parties and politicians, leading monks, academics, prominent individuals, and

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27. See sources cited, *supra* note 23.

28. For instance, after Facebook banned Senior-General Min Aung Hlaing from the platform, Myanmar military accounts started to appear in the Russian social media platform, VKontakte. *After Facebook ban, Myanmar military accounts are moving to Russian social media site Vkontakte*, GLOBAL VOICES ADVOX (Sept. 7, 2018), <https://advox.globalvoices.org/2018/09/07/after-facebook-ban-myanmar-military-accounts-are-moving-to-russian-social-media-site-vkontakte/> [https://perma.cc/3EJ4-GGZ2].

29. Situation in the People’s Republic of Bangladesh/Republic of Myanmar, Case No. ICC-01/19, Prosecutor’s Request for Authorisation of an Investigation Pursuant to Article 15, ¶ 5 (July 4, 2019), [https://www.icc-cpi.int/CourtRecords/CR2019\\_03510.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_03510.PDF) (stating that “the 2017 wave of violence was closely related to another wave of violence that started on or about 9 October 2016”).

30. See Francis Wade, MYANMAR’S ENEMY WITHIN: BUDDHIST VIOLENCE AND THE MAKING OF A MUSLIM ‘OTHER’ (2017).

members of the Government”<sup>31</sup> had fanned the flames of animosity through incendiary rhetoric.<sup>32</sup> At key political moments, the Myanmar government manufactured communal tension to distract the general public from pressing economic problems and/or justify the Tatmadaw’s reign.<sup>33</sup> The FFM identified many statements advocating for national, racial, or religious hatred constituting incitement to discrimination, hostility or violence prohibited under Article 20 of the International Covenant on Civil and Political Rights (ICCPR), and which the FFM concluded may even constitute persecution in the context of crimes against humanity under article 7(1)(h) of the Rome Statute.<sup>34</sup>

The Rohingya bear the brunt of the animosity, further entrenching their status as stateless persons and therefore, outsiders, in Myanmar.<sup>35</sup> For instance, the Rohingya were commonly depicted as a foreigner<sup>36</sup> despite many of them having lived in Myanmar prior to British colonial rule.<sup>37</sup> Pejorative descriptions of Rohingya as “kalar,” “liar,” “Bengalis that sneaked in,” and “unwanted persons” manifested this bias.<sup>38</sup> Religion, national identity, and existential threat were interwoven seamlessly, such that a threat to racial and religious purity constituted

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31. *Detailed Findings of the FFM*, *supra* note 7, ¶ 696.
  32. *Id.* ¶ 728 (noting the government’s portrayal of violence beginning in 2012 as “intercommunal” and attributed to a coordinated plan to “instigate violence and build tensions”). *See also* Wade, *supra* note 30.
  33. Wade, *supra* note 30, at 34, 108–09.
  34. *Detailed Findings of the FFM*, *supra* note 7, ¶¶ 696–748, 1319.
  35. The Rohingya are not considered citizens under Myanmar’s 1982 Citizenship Act. *See Citizenship and Human Rights in Myanmar: Why Law Reform is Urgent and Possible*, INT’L COMM’N OF JURISTS (June 2019), <https://www.icj.org/wp-content/uploads/2019/06/Myanmar-Citizenship-law-reform-Advocacy-Analysis-Brief-2019-ENG.pdf> [<https://perma.cc/U8NV-FZ7Q>]; *Tools of Genocide: National Verification Cards and the Denial of Citizenship of Rohingya Muslims in Myanmar*, FORTIFY RIGHTS, at 44 (2019), <https://www.fortifyrights.org/downloads/Tools%20of%20Genocide%20-%20Fortify%20Rights%20-%20September-03-2019-EN.pdf> [<https://perma.cc/38EC-KNW8>].
  36. Matt Schissler, Matthew J. Walton & Phyu Phyu Thi, *Reconciling Contradictions: Buddhist-Muslim Violence, Narrative Making and Memory in Myanmar*, 47 J. OF CONTEMP. ASIA, July 2017, at 376; *Buddhism and State Power in Myanmar*, INT’L CRISIS GROUP, at 7-9 (Sept. 5, 2017), <https://d2071andvip0wj.cloudfront.net/290-buddhism-and-state-power-in-myanmar.pdf>.
  37. *Detailed Findings of the FFM*, *supra* note 7, ¶¶ 4724–4773; *See* Thant Myint-U, *THE HIDDEN HISTORY OF BURMA: RACE, CAPITALISM, AND THE CRISIS OF DEMOCRACY IN THE 21<sup>ST</sup> CENTURY* (W.W. Norton & Company, Inc., 2020).
  38. *Detailed Findings of the FFM*, *supra* note 7, ¶¶ 1312–1313.

a matter of national security.<sup>39</sup> Anti-Muslim narratives abroad, such as the US “war on terror,” were exploited to reinforce manufactured prejudices.<sup>40</sup> This fed the narrative that the Rohingya were a threat not only to Myanmar’s Bamar ethnic group, but also to the predominant Buddhist religion.<sup>41</sup> It affirmed the genuine fear felt by many that if the “Western Gate” of the country had not been protected against Muslim Bengals, then “Myanmar and the rest of Buddhist South East Asia would have been Muslim a long time ago.”<sup>42</sup>

Myanmar’s democratization in 2011 from decades of military rule was a harbinger of a new era. For one, the law and practice of pre-publication censorship were abolished. Prior to this, articles required “careful vetting by the censor board,” and those deemed a threat to national security were literally cut out from the publication.<sup>43</sup> The political transition was also marked by “open trade policies and privatization.”<sup>44</sup> The telecommunications industry was liberalized soon after. This, again, was groundbreaking. Before transition, “the Internet was only available to a select few, as it was prohibitively expensive.”<sup>45</sup>

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39. Wade, *supra* note 30, at 195 (noting that the “nation had become so deeply entwined with the faith that one could not be distinguished from the other”); Jonathan Liljeblad, *The Efficacy of National Human Rights Institutions Seen in Context: Lessons from the Myanmar National Human Rights Commission*, 19 YALE HUM. RTS. & DEV. L. J. 95, 113 (2017) (describing the position of the Tatmadaw as a “defender of national unity and peace”).
40. Matt Schissler, *On Islamophobes and Holocaust Deniers: Making Sense of Violence, in Myanmar and Elsewhere*, CONFLICT IN MYANMAR: WAR, POLITICS, RELIGION 283, 292 (Nick Cheesman and Nicholas Farrelly, eds. 2016): (“...the use of global arguments about Muslims elsewhere is an important part of reinforcing a sense of general threat from Muslims at home. This is a parallel, but in Myanmar it also appears to be a productive interrelationship: the strand of argument about Islam in the world that is used to bolster a larger narrative of Muslim threat in Myanmar explicitly draws on discourses that have grown into global prominence as a part of the ‘War on Terror’”); Wade, *supra* note 30, at 83.
41. *Detailed Findings of the FFM*, *supra* note 7, ¶¶ 1314–1317; Wade, *supra* note 30, at 195–96.
42. *Buddhism and State Power in Myanmar*, *supra* note 36, at 7, 9.
43. Wade, *supra* note 30, at 102.
44. Susan Banki and Ja Seng Ing, *Precarity and Risk in Myanmar’s Media: A Longitudinal Analysis of Natural Disaster Coverage by The Irrawaddy*, MYANMAR MEDIA IN TRANSITION: LEGACIES, CHALLENGES AND CHANGE 191 (Lisa Brooten, Jane Madlyn McElhone, Gayathry Venkiteswaran, eds., 2019); Amy Chua, *The Paradox of Free Market Democracy*, HARVARD INT’L L. J. 287, 293 (2000) (noting that the version of capitalism and the kind of democratic transition unfolding in many developing countries is not the same as what happened in the developed world).
45. *Detailed Findings of the FFM*, *supra* note 7, ¶ 1343

Pre-2011, a mobile SIM card cost around US \$1,500-2,000; by 2011, it cost US \$1.50.<sup>46</sup> Mobile phones became affordable and broadband subscriptions increased.<sup>47</sup> Thus, the country woke up from five decades of military rule greeted by smartphones; this was the populace's "first experience with *any* form of telephony."<sup>48</sup>

Social media platforms gained more users as access to the Internet became easier.<sup>49</sup> Facebook currently enjoys an estimated 20 million active users<sup>50</sup> of the country's 54 million demographic.<sup>51</sup> Unsurprisingly, hate speech flourished on the platform.<sup>52</sup> Facebook posts helped

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46. Jason Motlagh, *When a SIM Card Goes From \$2000 to \$1.50: Myanmar opens its wireless market, cuing a frenzy*, BLOOMBERG (Sept. 29, 2014), <https://www.bloomberg.com/news/articles/2014-09-29/myanmar-opens-its-mobile-phone-market-cuing-carrier-frenzy> [<https://perma.cc/F6U7-Y72U>].
  47. *Myanmar's mobile revolution*, BANGKOK POST (Jun. 20, 2016), <https://www.bangkokpost.com/world/1015225/myanmars-mobile-revolution> [<https://perma.cc/WUR6-4TY2>]; *Detailed Findings of the FFM*, *supra* note 7, ¶ 1342; Michelle J. Foster, *The Business Environment for News Media in Myanmar: 2018*, INTERNEWS (2018), <https://internews.org/resource/business-environment-news-media-myanmar-2018> [<https://perma.cc/V2BQ-59TU>] (finding that mobile phone penetration has exceeded 100% as of 2018).
  48. Lorian Leong, *Mobile Myanmar: The Development of a Mobile App Culture in Yangon*, 5 MOBILE MEDIA & COMMUNICATION 139, 140 (2017) (stating that Huawei and Android dominated the market as of 2014).
  49. *Detailed Findings of the FFM*, *supra* note 7, ¶ 1344, n.2975 ("It is suggested that Facebook enjoys more than 90 per cent share among social media platforms in Myanmar, and that this has been so since 2012."). As of August 2019, Facebook enjoys almost 95% market share in the country. *Social Media Stats in Myanmar - February 2020*, STATCOUNTER GLOBALSTATS, <http://gs.statcounter.com/social-media-stats/all/myanmar> [<https://perma.cc/2BV2-37JM>]; Catherine Trautwein, *Facebook Racks Up 10m Myanmar Users*, MYANMAR TIMES (June 13, 2016), <https://www.mmtimes.com/business/technology/20816-facebook-racks-up-10m-myanmar-users.html>. For an anecdotal account, see Craig Mod, *The Facebook-Loving Farmers of Myanmar*, THE ATLANTIC (Jan. 21, 2016), <https://www.theatlantic.com/technology/archive/2016/01/the-facebook-loving-farmers-of-myanmar/424812/>. See also Leong, *supra* note 48, at 11-12 (discussing how mobile shop-keepers acted as "warm gatekeepers" for mobile users who were not digitally literate, by installing apps in mobile phones remarkably without receiving any financial incentive from app companies).
  50. *Detailed Findings of the FFM*, *supra* note 9, ¶ 1344.
  51. *Myanmar Population 2020*, WORLD POPULATION REV., <http://worldpopulationreview.com/countries/myanmar-population/> [<https://perma.cc/NN4P-TE6L>].
  52. *See Sticks and Stones: Hate Speech Narratives and Facilitators in Myanmar*, C4ADS (2016), <https://static1.squarespace.com/static/566ef8b4d8af107232d5358a/t/56b>

reinforce public discourse against the Rohingya by “extending” pre-existing relationships and cultural practices. The echo-chamber effect of the platform, where users’ newsfeed would show content conforming to their preferences, facilitated the “visually assisted claim-making” that has proven useful for portraying the image of Muslims as a religious “Other,” and whose seemingly evil practices clashed with Buddhism’s virtues.<sup>53</sup> Facebook posts thus merged “into a sonic background in which their recurrence [was] significant not for their detail but for their tonal consistency,” a “mnemonic recitation” confirming “both the existence of the threat as perceived and, also, of the community of perceivers.”<sup>54</sup>

With the sudden opening of the country to democracy, foreign investment, and technology, Myanmar has been confronted with what Amy Chua calls “the paradox of free-market democracy”.<sup>55</sup> Developing nations are suddenly bombarded by market-compatible ideologies on one hand, and “potentially market-subversive” ethno-nationalism on the other hand.<sup>56</sup> As mentioned, purveyors of hate speech ranged from

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41f1ff8baf3b237782313/1454645026098/Sticks+and+Stones.pdf; *Detailed Findings of the FFM*, *supra* note 7, ¶¶ 1310, 1352. This conclusion is supported by academic scholarship highlighting the paradoxical “emancipatory capacity” of the Internet and mobile devices in developing nations, along with the ability to “enhance existing social, economic, and knowledge divides.” Leong, *supra* note 48, at 143 (citing Sinikka Sassi, *Cultural Differentiation or Social Segregation? Four Approaches to the Digital Divide*, 7 NEW MEDIA & SOCIETY, October 2005, at 684; DiMaggio et al., *Digital Inequality: From Unequal Access to Differentiated Use*, in SOCIAL INEQUALITY 355 (Kathryn Neckerman ed., 2004); PIPPA NORRIS, DIGITAL DIVIDE: CIVIC ENGAGEMENT, INFORMATION POVERTY, AND THE INTERNET WORLDWIDE (2001); Jan A.G.M. van Dijk, *Digital Divide Research, Achievements and Shortcomings*, 34 POETICS 221 (2006)).

53. GERARD MCCARTHY, ROUTLEDGE HANDBOOK OF CONTEMPORARY MYANMAR 95-96 (Adam Simpson, Nicholas Farrelly & Ian Holliday eds., 2018) (discussing, as an example, the disaster relief operations which both Muslims and Buddhists used to portray that their respective religions were models of virtue and selflessness that the other group apparently did not possess).
54. Matt Schissler, *New Technologies, Established Practices: Developing Narratives of Muslim Threat in Myanmar*, ISLAM AND THE STATE IN MYANMAR: MUSLIM-BUDDHIST RELATIONS AND THE POLITICS OF BELONGING 211, 232 (Melissa Crouch ed., 2015). *See also* Leong, *supra* note 48, at 143 (discussing how mobile phone studies show how users “incorporate cultures and cultural needs into mobile phones, expressed in language, habits, and assistance”).
55. Chua, *supra* note 44, at 288.
56. *Id.* at 315 (defining ethnonationalism is one in which the nation is “defined in terms of assumed blood ties and ethnicity”). *See also* *Buddhism and State Power in Myanmar*, *supra* note 36, at 8 (describing Buddhist nationalist sentiments against economic networks of the Chinese in Mandalay and Taunggyi).

ultranationalist monks, military generals, local and national government officials, and politicians, including members of the National League for Democracy (NLD), the political party of State Counsellor Aung San Suu Kyi.<sup>57</sup> These figures used Facebook to manipulate the narrative on the Rohingya in two ways: first, they used the platform to post or share hate speech to a broader audience; second, they maintained official Facebook pages and accounts that easily connected them with like-minded constituents. This rendered the platform an important aspect of political life in Myanmar.<sup>58</sup>

Ashin Wirathu, a member of the MaBaTha (“Association for the Protection of Race and Religion” renamed “The Buddha Dhamma Charity Foundation”<sup>59</sup>), was the most outspoken monk responsible for spreading hateful rhetoric. His aggressive lobbying led to the passage of the controversial Protection of Race and Religion Laws in 2015, which targeted Muslim cultural practices.<sup>60</sup> These laws disallow polygamous marriages, regulate the marriage of Buddhist women to non-Buddhist men, and require birth spacing for women from certain ethnic groups.<sup>61</sup> Wirathu also used the derogatory word “Mout Kalar” to generally refer to Muslims, including Rohingya.<sup>62</sup> Even the late U Ko Ni, a prominent Muslim advisor to the NLD,<sup>63</sup> was a regular target of Wirathu’s vitriolic posts.<sup>64</sup> Wirathu referred to him as a “Mout Kalar MP” or “Mout Kalar Nga Ni,” and questioned his role as a Muslim in Myanmar politics.<sup>65</sup>

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57. See *Detailed Findings of the FFM*, *supra* note 7, ¶ 696.

58. See *id.*

59. Moe Moe, *Ma Ba Tha Changes Name, Still Officially Illegal*, THE IRRAWADDY (Sept. 3, 2018), <https://www.irrawaddy.com/news/ma-ba-tha-changes-name-still-officially-illegal.html>; Htet Naing Zaw, *Ma Ba Tha is a Necessity: Military*, THE IRRAWADDY (June 19, 2019), <https://www.irrawaddy.com/news/burma/ma-ba-tha-necessity-military.html>.

60. *Buddhism and State Power in Myanmar*, *supra* note 36, at 11.

61. *Detailed Findings of the FFM*, *supra* note 7, ¶ 600. For a concise account of MaBaTha’s prominence in Myanmar’s Buddhist-majority society, see *id.* at 10-11. For a brief description of the Race and Religion Laws, see *id.* at 11-13. See also Matthew Walton, *What are Myanmar’s Buddhist Sunday Schools Teaching?*, EAST ASIA FORUM (Dec. 16, 2014), <https://www.eastasiaforum.org/2014/12/16/what-are-myanmars-buddhist-sunday-schools-teaching/> (describing how MaBaTha, along with “different organisations have been creating networks of Buddhist Sunday schools in an attempt to instill Buddhist values in children”).

62. *Detailed Findings of the FFM*, *supra* note 7, ¶ 1312.

63. *Id.*

64. *Id.*

65. *Id.*

When Facebook took down Wirathu's page in late January 2018,<sup>66</sup> the page had "hundreds of thousands of followers,"<sup>67</sup> a substantial amount given the 18 million Facebook users in Myanmar then.<sup>68</sup> Facebook banned MaBaTha and Wirathu for violating Facebook's Dangerous Individuals and Organizations policy.<sup>69</sup>

The Myanmar civilian government and military, likewise responsible for spreading hate speech and false information against the Rohingya, also maintained Facebook pages.<sup>70</sup> The Facebook page of the Tatmadaw's Office of the Commander-in-Chief, Senior General Min Aung Hlaing, had 2.9 million followers before it was taken down by Facebook in August 2018.<sup>71</sup> Senior General Min Aung Hlaing's separate official Facebook page had 1.4 million followers before it was taken down.<sup>72</sup> Other government agencies also amassed a huge social media following. The official page of the State Counsellor's Information Committee has 400,000 followers,<sup>73</sup> while that of the Ministry of Information has 1.5 million followers.<sup>74</sup> The Facebook page of these two government agencies are still on the platform, despite having posted anti-Rohingya narratives in the past, as reported by the FFM.<sup>75</sup> Similarly, the newspaper, *Global New Light of Myanmar*, operated by the Ministry of Information and whose previous publications depicted

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66. *Facebook Says Page of Firebrand Anti-Rohingya Myanmar Monk Wirathu Removed*, THE STRAITS TIMES (Feb. 27, 2018), <https://www.straitstimes.com/asia/se-asia/facebook-says-page-of-firebrand-anti-rohingya-myanmar-monk-wirathu-removed>.
67. Laignee Barron, *Nationalist Monk Known as the 'Burmese bin Laden' Has Been Stopped From Spreading Hate on Facebook*, TIME (Feb. 28, 2018), <http://time.com/5178790/facebook-removes-wirathu/>.
68. *Facebook blacklists Myanmar hardline Buddhist group*, FRONTIER MYANMAR (June 7, 2018), <https://frontiermyanmar.net/en/facebook-blacklists-myanmar-hardline-buddhist-group>
69. *Id.*; Sara Su, *Update on Myanmar*, FACEBOOK (Aug. 15, 2018), <https://about.fb.com/news/2018/08/update-on-myanmar/>; *Removing Myanmar Military Officials from Facebook*, FACEBOOK (Aug. 28, 2018), <https://newsroom.fb.com/news/2018/08/removing-myanmar-officials/>; Miles, *supra* note 9.
70. *See Removing Myanmar Military Officials from Facebook*, *supra* note 69.
71. *Detailed Findings of the FFM*, *supra* note 7, ¶ 1329, n.2942.
72. *Id.* ¶ 1329.
73. *Id.*
74. *Id.*
75. *See, e.g., id.* ¶ 1340 (discussing how the State Counsellor's Information Committee dismissed the allegations of sexual violence against the Rohingya as "fake rape"). *See also id.* ¶¶ 757 n.1619, 801 n.1762, 836 n.1850, 846 n.1891, 857 n.1917, 866 n.1933.

all Rohingya, including civilians and children, as “ARSA terrorists”<sup>76</sup> continues to maintain a Facebook presence.<sup>77</sup> It is unclear as to how Facebook interprets its Community Standards definition of “dangerous organizations”<sup>78</sup> to justify the ban of one account while allowing others to stand.

Other Facebook services were also used. In a notable example, two versions of a chain message were distributed through Facebook messenger in September 2017.<sup>79</sup> One version called on Buddhists to “unite” against the common enemy in light of a supposedly planned jihad attack by Muslims on September 11 of that year.<sup>80</sup> Another version contained the same message but with the actors reversed; Muslims were warned of a supposed impending attack by the MaBaTha and other ultranationalists on the same date.<sup>81</sup> In an interview with *Vox* in April 2018, Mark Zuckerberg shared that Facebook’s “systems” were able to detect this Facebook Messenger scam.<sup>82</sup> Myanmar civil society organizations pushed back in an open letter addressed to Zuckerberg, arguing that the effective “systems” that he was describing were, in fact, the very same organizations that were alerting Facebook on the matter days after the fake content had already been widely shared.<sup>83</sup> For years, civil society groups served as *de facto* monitors, flagging problematic content to Facebook officials.<sup>84</sup> This underscored

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76. *Id.* ¶ 1335.

77. The page has over 90,000 followers as of February 2020. The Global New Light of Myanmar (@TheGNLM), FACEBOOK, (Feb. 18, 2020), <https://www.facebook.com/TheGNLM/>.

78. *See Banning More Dangerous Organizations from Facebook in Myanmar*, FACEBOOK (Feb. 5, 2019), <https://about.fb.com/news/2019/02/dangerous-organizations-in-myanmar/>.

79. *Detailed Findings of the FFM*, *supra* note 7, ¶ 1348.

80. *Id.*

81. *Id.*; John Reed, *Hate speech, Atrocities, and Fake News: The Crisis of Democracy in Myanmar*, FINANCIAL TIMES (Feb. 22, 2018), <https://www.ft.com/content/2003d54e-169a-11e8-9376-4a6390addb4>.

82. Jen Kirby, *Mark Zuckerberg on Facebook’s Role in Ethnic Cleansing in Myanmar: ‘It’s a Real Issue,’* *Vox* (Apr. 2, 2018), <https://www.vox.com/2018/4/2/17183836/mark-zuckerberg-facebook-myanmar-rohingya-ethnic-cleansing-genocide>.

83. Open letter from Myanmar civil society organizations, to Mark Zuckerberg, CEO of Facebook (Apr. 5, 2018), <https://drive.google.com/file/d/1Rs02G96Y9w5dpX0Vf1LjWp6B9mp32VY-/view>.

84. Steve Stecklow, *Why Facebook is Losing the War on Hate Speech in Myanmar*, REUTERS (Aug. 15, 2018), <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/>. At one point, members of Myanmar civil society would



the platform's own inadequate controls.<sup>85</sup> In the open letter, Myanmar civil society expressed their frustration with Facebook's "over-reliance on third parties, a lack of a proper mechanism for emergency escalation, a reticence to engage local stakeholders around systemic solutions and a lack of transparency." Zuckerberg issued an apology soon after.<sup>86</sup>

As I have discussed elsewhere,<sup>87</sup> Facebook's user base in Myanmar involves both the ordinary citizen and the state. The official Facebook pages of Myanmar officials and government agencies demonstrate the reliance of state actors on the platform in carrying out official duty. To an extent, this move is not different from US President Donald Trump's use of Twitter to appeal directly to his political base.<sup>88</sup> However, what appears to set apart Myanmar from other contexts is the broader speech landscape in which narratives are spun and gain traction. Myanmar's transitional phase to democracy cannot be discounted. Although pre-publication censorship was abolished,<sup>89</sup> journalists and dissenters are

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bring up posts in a private messaging group that included both Myanmar civil society and Facebook employees such as Mia Garlick, then-policy director for Facebook for Asia-Pacific. *Id.* Garlick has since been reassigned to serve as Director of Policy for Australia and New Zealand. See *Mia Garlick*, FAMILY ONLINE SAFETY INSTITUTE, <https://www.fosi.org/people/mia-garlick/> (last visited March 25, 2020).

85. *Removing Myanmar Military Officials From Facebook*, *supra* note 70. See also *Detailed Findings of the FFM*, *supra* note 7, ¶ 1352 n.2991 (quoting a statement by Mark Zuckerberg before the United States Congress: "We've been too slow to deal with the hate and violence in places like Myanmar [...]. The challenges we face in a country that has fast come online are very different than those in other parts of the world, and we are investing in people, technology, and programs to help address them as effectively as possible.").
86. Kevin Roose and Paul Mozur, *Zuckerberg Was Called out Over Myanmar Violence. Here's His Apology*, N.Y. TIMES (Apr. 9, 2018), <https://www.nytimes.com/2018/04/09/business/facebook-myanmar-zuckerberg.html>.
87. Jenny Domino, *How Myanmar's Incitement Landscape Can Inform Platform Regulation in Situations of Mass Atrocity*, OPINIO JURIS (Jan. 2, 2020), <http://opiniojuris.org/2020/01/02/how-myanmar-incitement-landscape-can-inform-platform-regulation-in-situations-of-mass-atrocity/>; Jenny Domino, *How Facebook is Reconfiguring Speech in Situations of Mass Atrocity: Lessons from Myanmar and the Philippines*, OPINIO JURIS (Jan. 1, 2019), <http://opiniojuris.org/2019/01/01/how-facebook-is-reconfiguring-freedom-of-speech-in-situations-of-mass-atrocity-lessons-from-myanmar-and-the-philippines/>.
88. See Michael D. Shear et al., *How Trump Reshaped the Presidency in Over 11,000 Tweets*, N.Y. TIMES (Nov. 2, 2019), <https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-presidency.html>.
89. Aung Hla Tun, *Myanmar Government Abolishes Direct Media Censorship*, REUTERS (Aug. 20, 2012),

still heavily prosecuted under draconian defamation laws.<sup>90</sup> This creates a chilling effect on public participation and free press coverage of sensitive political events.<sup>91</sup> Further, state-owned media remain unmatched in terms of resources and reach,<sup>92</sup> enabling the state to manage public discourse effectively. Ironically, democracy gave more impetus for state ownership of media channels as a way to “amplify the government’s messaging.”<sup>93</sup>

Against this background, Facebook carved out a space where the “tea shop and the 8 o’clock news meet.”<sup>94</sup> In the Myanmar context, the 8 o’clock news represented the sanitized news that was typically aired during pre-2011 Myanmar, while the tea shop provided a “quintessential...place to learn...what the 8 o’clock news was *not* [then] discussing.”<sup>95</sup> Combining these two metaphors, Facebook served as the place where both “military leaders and activists share the same virtual space, and where there is no direct way for state authorities to control or censor dissenting voices.”<sup>96</sup> Myanmar’s socio-political context thus magnifies the importance of platforms, similar to other Global South contexts such as Kenya.<sup>97</sup> Despite military ownership of media

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<https://www.reuters.com/article/us-myanmar-censorship-idUSBRE87J06N20120820>.

90. See Christopher Zara, *Jailed For A Facebook Poem: The Fight Against Myanmar’s Draconian Defamation Laws*, FASTCOMPANY (July 13, 2017), <https://www.fastcompany.com/40438242/jailed-for-a-facebook-poem-the-fight-against-myanmars-draconian-defamation-laws>.
91. Defamation is currently penalized under six different laws, some of which allow criminal complaints to be filed by persons other than the person allegedly defamed. For an overview, see Gayathry Venkiteswaran, Yin Yadanar Thein & Myint Kyaw, *Legal Changes for Media and Expression: New Reforms, Old Controls*, in MYANMAR MEDIA IN TRANSITION: LEGACIES, CHALLENGES AND CHANGE 59 (Lisa Brooten, Jane Madlyn McElhone & Gayathry Venkiteswaran eds., 2019).
92. See *Myanmar Profile - Media*, BBC NEWS (May 2, 2017), <https://www.bbc.com/news/world-asia-pacific-12991727>.
93. Michelle J. Foster, *The Business Environment for News Media in Myanmar: 2018*, INTERNEWS (2018), <https://internews.org/resource/business-environment-news-media-myanmar-2018>.
94. Yan Naung Oak and Lisa Brooten, *The Tea Shop Meets the 8 O’clock News: Facebook, Covergence and Online Public Spaces*, MYANMAR MEDIA IN TRANSITION: LEGACIES, CHALLENGES AND CHANGE 325, 329 (Lisa Brooten, Jane Madlyn McElhone, Gayathry Venkiteswaran, eds., 2019).
95. *Id.* at 328.
96. *Id.* at 329.
97. NANJALA NYABOLA, DIGITAL DEMOCRACY, ANALOGUE POLITICS: HOW THE INTERNET IS TRANSFORMING THE POLITICS IN KENYA 204-205 (2018)

conglomerates,<sup>98</sup> government officials exploit the populist appeal of the platform to its advantage, humanizing authority figures to the level of the ordinary citizen and average Facebook user. This gives the illusion of equality between state officials and ordinary citizens, reinforcing the narrative of democracy. For Jack Balkin, “digital technologies highlight the culture and participatory features of freedom of expression.”<sup>99</sup> In Myanmar, platforms appear not only to “highlight” these features inasmuch as help *bring about* a participatory culture in a country in the midst of democratic transition. This conforms to Facebook’s expressed commitment to promote “voice,”<sup>100</sup> where both state and citizen are Facebook users equally subject to the platform’s rules. This would have an important implication later on, when Facebook banned Myanmar’s commander-in-chief from the platform.<sup>101</sup>

Kate Klonick described platforms as the “new governors,”<sup>102</sup> where private rules regulate individual expression alongside speech laws. This reinforces Duncan Kennedy’s position of the collapse of the public-private distinction, where binaries merely feed into each other in a referential “loop.”<sup>103</sup> Kennedy argues that, “[a]lthough these [public and private] distinctions are not synonymous, they are all in a sense ‘the

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(describing the importance of platforms in Kenya to coordinate public action).

98. Oliver Spencer & Yin Yadanar Thein, *Has Facebook Censored Myanmar’s Commander-in-chief?*, FRONTIER MYANMAR (Aug. 29, 2018), <https://frontiermyanmar.net/en/has-facebook-censored-myanmars-commander-in-chief> (arguing that the Myanmar military’s highest ranked officer cannot be censored as the military “owns several television stations and newspapers,” and therefore still has the opportunity for expression).
99. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3 (2004).
100. Monica Bickert, *Updating the Values that Inform Our Community Standards*, FACEBOOK (Sept. 12, 2019), <https://newsroom.fb.com/news/2019/09/updating-the-values-that-inform-our-community-standards/>; Facebook also describes its mission as giving people “the power to build community and bring the world closer together... to stay connected with friends and family, to discover what’s going on in the world, and to share and express what matters to them.” *Our Mission*, FACEBOOK, <https://newsroom.fb.com/company-info/> (last visited March 25, 2020).
101. Antoni Slodkowski, *Facebook Bans Myanmar Army Chief, Others in Unprecedented Move*, REUTERS (Aug. 27, 2018), <https://www.reuters.com/article/us-myanmar-facebook/facebook-bans-myanmar-army-chief-others-in-unprecedented-move-idUSKCN1LC0R7>.
102. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1603 (2018).
103. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1354 (1982).

same...’ [I]t is hard to define any one of them without reference to all.”<sup>104</sup> Facebook’s speech regulation demonstrates this “loopification.” Its system of governance mimics constitutional structures. The Community Standards function as law, content moderators enforce the law, and the Facebook Oversight Board will interpret the law as a “supreme court”<sup>105</sup> charged with deciding challenging content.<sup>106</sup>

Importantly, Facebook’s ban of the Tatmadaw commander-in-chief from the platform brings to its fullest expression platforms’ state-like power. In a regulatory paradox,<sup>107</sup> the traditional roles of regulator (state) and regulated corporate entity (non-state) are reversed. In this light, platforms not only regulate individual expression, and trigger the threat of collateral censorship,<sup>108</sup> they also regulate state speech. The irony is not lost in a country where the military imposed decades of heavy censorship on its citizens. This seems to be another distinction

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104. *Id.* at 1349.

105. Hanna Kozłowska, *Facebook Will Have a Supreme Court-like Body Within a Year*, QUARTZ (Nov. 16, 2018), <https://qz.com/1465898/mark-zuckerberg-facebook-to-have-a-supreme-court-within-a-year/>. *But see* Symposium, *Platform Society: Copyright, Free Speech, and Sharing on Social Media Platforms*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 1, 12–14 (2019), video available at <http://www.fordhamiplj.org/2019/10/10/the-27th-annual-iplj-symposium-platform-society-copyright-free-speech-and-sharing-on-social-media-platforms-friday-october-4-2019/> (disagreeing on the characterization of the Oversight Board as a “supreme court” under the current institutional design because the Board, in addition to deciding cases on appeal, has the power to issue advisory opinions that will shape Facebook’s content policy); OVERSIGHT BOARD, <https://www.oversightboard.com> (last visited May 17, 2020).

106. *See* Nick Clegg, *Welcoming the Oversight Board*, FACEBOOK (May 6, 2020), <https://about.fb.com/news/2020/05/welcoming-the-oversight-board/>; Brent Harris, *Establishing Structure and Governance for an Independent Oversight Board*, FACEBOOK (Sept. 17, 2019), <https://about.fb.com/news/2019/09/oversight-board-structure/>; *A Conversation with Mark Zuckerberg, Noah Feldman, and Jenny Martinez*, FACEBOOK (June 27, 2019), <https://newsroom.fb.com/news/2019/06/mark-challenge-jenny-martinez-noah-feldman/>.

107. *Removing Myanmar Military Officials from Facebook*, FACEBOOK (Aug. 28, 2018), <https://newsroom.fb.com/news/2018/08/removing-myanmar-officials/>; Antoni Slodkowski, *Facebook Bans Myanmar Army Chief, Others in Unprecedented Move*, REUTERS (Aug. 27, 2018), <https://www.reuters.com/article/us-myanmar-facebook/facebook-bans-myanmar-army-chief-others-in-unprecedented-move-idUSKCN1LC0R7>.

108. *See generally* Klonick, *supra* note 103; Jack Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011, 2016–17 (2018); Jack Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2298 (2014).

between Global South and Global North contexts.<sup>109</sup> Leaving aside the realpolitik that likely moved platforms to regulate (or not regulate) the speech of state actors as platform users, the implications on corporate responsibility are still worthy of examination. Whereas corporate accountability was originally envisioned to regulate corporate interference with the exercise of individual human rights,<sup>110</sup> Facebook's ban of a state actor's speech shows a corporation taking on the task to regulate state action, including in fulfilling the latter's duty to protect human rights.

One important question with respect to regulating social media that fosters atrocity crimes is how international law should apply to the work of platforms. Relatedly, the FFM recommended that Facebook and similar companies "apply international human rights law as basis for content moderation."<sup>111</sup> This suggestion echoes the stand of the UN Special Rapporteur on freedom of expression, non-governmental organizations, and commentators on the subject.<sup>112</sup> Some portions of

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109. Interestingly, Twitter banned Syrian president Bashar al-Assad's account after it mourned the death of Iranian Major General Qassim Soleimani due to a targeted US drone strike. Twitter also temporarily suspended or restricted the accounts of the supreme leader of Iran and leader of Venezuela's national assembly. See Ben Norton, *Under US Pressure, Social Media Companies Censor Critical Content and Suspend Venezuelan, Iranian, and Syrian Accounts*, THE GRAYZONE, (Jan. 12, 2020), <https://thegrayzone.com/2020/01/12/us-pressure-social-media-censoring-suspending-venezuela-iran-syria/>. Instagram similarly removed accounts expressing support for Soleimani, citing US sanctions against Iran as the basis. Casey Newton, *Why Activists Get Frustrated with Facebook*, THE VERGE (Jan. 14, 2020), <https://www.theverge.com/interface/2020/1/14/21063887/activists-facebook-iran-free-speech-authoritarianism>. In contrast, despite President Trump's Twitter statements on "quickly and fully" striking back and "perhaps in a disproportionate manner" against Iran should it retaliate for the Soleimani killing, Twitter did not suspend Trump's Twitter.

110. See *Corporations*, AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/what-we-do/corporate-accountability/> (last visited March 25, 2020).

111. *Detailed Findings of the FFM*, *supra* note 7, ¶ 1718.

112. UN HUMAN RIGHTS COUNCIL A/74/486, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (Oct. 9, 2019) (discussing the applicability of international human rights law to regulating online hate speech); UN HUMAN RIGHTS COUNCIL A/HRC/38/35, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (April 6, 2018), at 15-16 (recommending that content moderation should adhere to the principles of legality, necessity and proportionality, and non-discrimination originally designed for states under the ICCPR); ARTICLE 19, Self-regulation and 'hate speech' on social media platforms (2018); Evelyn Mary Aswad, *The Future of Freedom of Expression Online*, 17 Duke Law & Technology Review 26 (2018).

Facebook's Community Standards are said to reflect legal norms. Klönick likened the protected categories of Facebook's Hate Speech policy to those of the US Civil Rights Act of 1964.<sup>113</sup> Moreover, the values that inform Facebook's Community Standards now make reference to "international human rights standards."<sup>114</sup> The question of normative alignment becomes more crucial in light of the establishment of Facebook's Oversight Board.<sup>115</sup> Perhaps a more important question in the context of mass atrocities is whether there exists a need to regulate and impose legal obligations on companies, or if self-regulation is enough. If regulation is necessary, should this be international or regional<sup>116</sup> in form, or will domestic regulation suffice? In pursuing these questions, it is crucial to consider the current relevant regimes of international legal responsibility to know the conceptual limitations that can hinder our exploration.

## II. GAP

In the report, the FFM concluded that the inciteful rhetoric on Facebook could amount to persecution as a crime against humanity or as advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence that must be

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113. Klönick, *supra* note 102, at 1645 n.327 (citing §§ 201–202, 703, "outlawing discrimination based on race, color, religion, sex, or national origin").
114. Monica Bickert, *Updating the Values that Inform our Community Standards*, FACEBOOK (September 12, 2019), <https://newsroom.fb.com/news/2019/09/updating-the-values-that-inform-our-community-standards/>; Evelyn Douek, *Why Facebook's 'Values' Update Matters*, LAWFARE (Sept. 16, 2019), <https://www.lawfareblog.com/why-facebooks-values-update-matters>; However, Klönick maintains that the influence of American law cannot be overlooked, particularly because Facebook's policymakers are steeped in American free speech norms. See Klönick, *supra* note 102, at 1621–22; Thomas E. Kadri & Kate Klönick, *Facebook v. Sullivan: Public Figures and Newsworthiness in Online Speech*, 93 S. CAL. L. REV. 37, 61 (2019).
115. I suggested, for example, using the work of relevant human rights institutions such as the ICC as a signpost that can guide the Oversight Board's case selection. See Jenny Domino, *How Myanmar's Incitement Landscape Can Inform Platform Regulation in Situations of Mass Atrocity*, OPINIO JURIS (Jan. 2, 2020), <http://opiniojuris.org/2020/01/02/how-myanmars-incitement-landscape-can-inform-platform-regulation-in-situations-of-mass-atrocity/>.
116. See, e.g., *EU Code of Conduct on Countering Illegal Hate Speech Online*, EUROPEAN COMMISSION (June 30, 2016), [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online\\_en#theeucodeofconduct](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combating-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en#theeucodeofconduct).

prohibited and punished.<sup>117</sup> In this section, I will map out the relevant framework for prohibited speech under international law. First, I will briefly describe the content of prohibited speech, i.e., the different types of speech that may be restricted under international human rights law and punished under international criminal law. Second, I will delineate the legal responsibility of various actors, i.e., states and natural persons, for the crime of direct and public incitement to commit genocide. In light of the FFM's recommendation to investigate potential commission of genocide in Myanmar<sup>118</sup> and the legal proceedings instituted by The Gambia at the ICJ concerning Myanmar's alleged violation of the Genocide Convention,<sup>119</sup> it is not farfetched to apply the legal framework for direct and public incitement to commit genocide to this issue. My discussion henceforth will be grounded by the applicable framework for this form of prohibited speech. Importantly, incitement to genocide has the clearest international legal framework with relatively the most developed judicial precedent.<sup>120</sup> It thus presents the strongest framework for informing the corporate responsibility to "respect" human rights under the UNGPs. I will then examine the degree of guidance that corporations can glean from this framework. Finally, I will illustrate how the Facebook issue in Myanmar leaves open a *gap* for corporate responsibility for incitement to genocide caused by these fragmented lines of responsibility.

A. *Prohibited speech under international law*

1. International human rights law

Limitations on speech must conform to the requirements of Article 19(3) of the ICCPR on legality, necessity, and proportionality, i.e., the limitation must be contained in a validly enacted law; must be necessary to achieve a legitimate aim, such as (a) respecting the rights or reputations of others or (b) protecting national security, public order, or public health or morals; and the means used proportionate to securing that aim.<sup>121</sup> Article 20 of the ICCPR prohibits two types of speech: 1) any propaganda for war and 2) any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." State parties to the ICCPR must regulate, not necessarily penalize, these forms of expression.<sup>122</sup> Under the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious

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117. *Detailed Findings of the FFM, supra* note 7, ¶¶ 1310, 1319

118. *Id.* ¶¶ 1439-1441.

119. *See supra* note 18 and accompanying text.

120. *See infra* Part 2.

121. International Covenant on Civil and Political Rights art. 19(3), Dec. 16, 1966, 999 U.N.T.S. 171.

122. *See id.*

hatred that constitutes incitement to discrimination, hostility or violence, states must distinguish three forms of expression: those requiring penal sanction; those only justifying a civil or administrative sanction, but not prosecution; and finally, those not requiring any form of sanction at all, but nonetheless “raises concern in terms of tolerance, civility and respect for the rights of others.”<sup>123</sup> The Rabat of Action recommends the adoption of both legal and policy measures to tackle the root causes of discriminatory speech.<sup>124</sup>

Other treaties also prohibit certain forms of speech. The International Convention on the Elimination of All Forms of Racial Discrimination prohibits incitement to racial discrimination and incitement of violent acts against a certain race or group of persons of another color or ethnic origin.<sup>125</sup> The Genocide Convention prohibits direct and public incitement to commit genocide. Under Article III(c), incitement to genocide is a crime.<sup>126</sup>

## 2. International criminal law

The Statutes of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) incorporated the crime of incitement to genocide under the Genocide Convention as one of their punishable acts.<sup>127</sup> The Rome Statute similarly transplanted this crime in the text, but converted incitement to genocide from a crime to a mode of committing genocide under Article 25(3)(e).<sup>128</sup>

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123. U.N. High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the Expert Workshops on the Prohibition of Incitement to National, Racial or Religious Hatred*, ¶ 20, U.N.Doc. A/HRC/22/17/Add.4 (Jan. 11, 2013).

124. *Id.* ¶¶ 21–26.

125. International Convention on the Elimination of All Forms of Racial Discrimination art. 4, Dec. 21, 1965, 660 U.N.T.S. 195.

126. Genocide Convention, *supra* note 7, art. III(c).

127. Statute of the International Criminal Tribunal for Rwanda art. 2(3)(c), Nov. 8, 1994; Statute of the International Criminal Tribunal for the Former Yugoslavia art. 4(3)(c), May 25, 1993.

128. Rome Statute, *supra* note 6, art. 25(3)(e). See RICHARD ASHBY WILSON, INCITEMENT ON TRIAL: PROSECUTING INTERNATIONAL SPEECH CRIMES 33 (2017) (explaining that the “odd placement” of incitement to genocide under Art. 25 of the Rome Statute as a mode of criminal liability rather than a crime under Art. 6 was likely a result of inadvertence); GREGORY GORDON, ATROCITY SPEECH LAW: FOUNDATION, FRAGMENTATION, FRUITION 385 (2017) ((arguing that this demotion is an “optical perception”); Thomas E. Davies, *How the Rome Statute Weakens the Internal Prohibition on Incitement to Genocide*, 22 HARV. HUM. RTS. J. 245, 245–46 (2009); Wibke Kristin Timmerman, *Incitement in International Criminal Law*, 88 INT’L REV. RED CROSS 823, 825 (2006).



As for incitement of other Rome Statute crimes, such as crimes against humanity, there is no equivalent crime. Under the Rome Statute, speakers can be prosecuted for speech as a form of contributory liability to the main crimes against humanity charge.<sup>129</sup> In the ICC's *Ruto and Sang* case, for instance, Sang was charged for *contributing* to the commission of crimes against humanity instead of being charged for a crime of *incitement* to commit crimes against humanity.<sup>130</sup> In the ICTY and ICTR, hate speech was prosecuted as a constitutive act of persecution in conjunction with other persecutory acts, but to date it is not settled whether hate speech by itself can constitute persecution.<sup>131</sup> In the ICTR's *Nahimana* case, Judge Theodor Meron registered a strong dissent to the inclusion of hate speech as one of the bases for Nahimana's conviction.<sup>132</sup> Citing US cases such as *Brandenburg v. Ohio*, Judge Meron opined that "every idea is an incitement"<sup>133</sup> and statements short of "direct threat of violence or an incitement to commit imminent lawless action" are not criminal.<sup>134</sup> If anything, these disagreements signal the rugged terrain of speech prosecution under international law.<sup>135</sup>

*B. Legal responsibility for direct and public incitement to commit genocide*

1. State responsibility

The Genocide Convention clearly defined the role of state and natural person in regulating genocide – states have a duty to prevent

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129. Rome Statute, *supra* note 6, art. 25(3)(d).

130. The Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11, Majority Opinion (April 5, 2016) [hereinafter *Ruto and Sang*].

131. See Richard Ashby Wilson & Matthew Gillet, *The Hartford Guidelines on Speech Crimes in International Criminal Law*, HUMAN RIGHTS INSTITUTE 48–60.

132. The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, ICTR 99-52-T, Judgement and Sentence (Dec. 3, 2003)

133. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v. The Prosecutor, Case No. ICTR-99-52-A, Partly Dissenting Opinion of Judge Meron ¶ 16 (Nov. 28, 2007) (citing *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting)).

134. *Id.* ¶ 4. See also Jenny Domino, *Market Failure? Re-examining the Metaphor of the Marketplace of Ideas in the Philippines*, STRATBASE ADR INSTITUTE (2019), <https://adrinstitute.org/2019/06/04/adri-occasional-paper-market-failure-re-examining-the-metaphor-of-the-marketplace-of-ideas-in-the-philippines/> (noting the global influence of the metaphor of the marketplace of ideas, including in incitement jurisprudence of international criminal courts).

135. See INCITEMENT ON TRIAL, *supra* note 128.

and punish, while individuals are to be prosecuted.<sup>136</sup> In particular, state parties to the treaty have the duty to enact necessary legislation that would “give effect” to the provisions of the treaty and to “provide effective penalties” for any of the punishable acts enumerated.<sup>137</sup> National laws criminalizing incitement to genocide are consistent with Article 20 of the ICCPR on allowable limitations on the right to freedom of expression.<sup>138</sup> Penalizing incitement to genocide is an allowable limitation as long as it meets Article 19(3) requirements of being validly enacted, necessary to protect a legitimate aim, and the limitation proportionate to achieve that aim.<sup>139</sup>

## 2. Individual (criminal) responsibility

Just as the Genocide Convention imposes a legal obligation on states, it provides under Article IV that natural persons committing any of the acts under Article III shall be punished, “whether they are constitutionally responsible rulers, public officials or private individuals.”<sup>140</sup> Such persons must be tried “by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”<sup>141</sup>

Under the treaty, the crime of direct and public incitement to commit genocide has two distinct elements. First, language must be “direct.”<sup>142</sup> In *Prosecutor v. Akayesu*, the Trial Chamber held that the speech must assume “a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement.”<sup>143</sup> This contemplated literal and figurative speech. For instance, *Prosecutor v. Akayesu*, *Prosecutor v. Ruggiu*, *Prosecutor v. Kajelijeli*, and *Prosecutor v. Niyitegeka* all revolved around how the “work” metaphor was deployed in various statements.<sup>144</sup>

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136. Philippa Webb, *Binocular Vision: State Responsibility and Individual Criminal Responsibility for Genocide*, in *THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW* 148 (Van den Herik & Stahn eds., 2012) (discussing international law’s two regimes of responsibility for genocide).

137. *Genocide Convention*, *supra* note 6, art. V.

138. International Covenant on Civil and Political Rights, *supra* note 121, art. 20.

139. *Id.* art. 19(3).

140. *Genocide Convention*, *supra* note 6, art. IV.

141. *Id.* art. VI.

142. *Id.* art. III(c).

143. *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, ¶ 557 (Sept. 2, 1998).

144. *Prosecutor v. Ruggiu*, ICTR-97-32-I, Judgment and Sentence, ¶ 44(iv) (June 1, 2000); *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Judgment and

The second element of the crime is that communication must be “public.”<sup>145</sup> This generally contemplates “speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.”<sup>146</sup> The speaker need not speak in large public assemblies to qualify the communication as “public.” It is sufficient if statements are communicated to “smaller audiences,” so long as these were made in a public space to an “unselected audience.”<sup>147</sup> This interpretation is supported by the *travaux préparatoire* of the Genocide Convention, from which the crime of direct and public incitement to commit genocide in the ICTR and ICTY Statutes was lifted.<sup>148</sup> “Private” incitement is not penalized.<sup>149</sup>

These elements are important to keep in mind for my later discussion on how crime can operate as a cognitive constraint in understanding corporate involvement in mass atrocity crimes. For now, I will proceed to discuss the corporate responsibility framework under the UNGPs and its implications for social media platforms operating in mass atrocity contexts.

### C. Corporate responsibility

The UNGPs do not impose on corporations any legal obligation and do not result in legal liabilities.<sup>150</sup> Instead, the corporate “responsibility”

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Sentence, ¶¶ 491, 493, 531, 676, 823, 856, 897 (Dec. 1, 2003); *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Judgement and Sentence, ¶ 257 (May 16, 2003).

145. *Genocide Convention*, *supra* note 6, art. III(c).

146. *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment, ¶ 559 (Sept. 2, 1998).

147. *Kalimanzira v. Prosecutor*, ICTR-05-88-A, Judgment (Oct. 20, 2010).

148. *Id.* ¶ 158 (referring to “public speeches or in the press, through the radio, the cinema or other ways of reaching the public”).

149. Private incitement can be prosecuted as instigation, but not direct and public incitement as an inchoate crime. *Prosecutor v. Akayesu*, ICTR 96-4-A, Judgement, ¶ 480 (June 1, 2001).

150. The mandate of the UN Special Representative of the secretary-general on human rights and transnational corporations and other business enterprises was, among others, “to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights,” and did not include the drafting of a legally binding instrument that would impose legal obligations on states and corporations. *Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises*, UN OFF. OF THE HIGH COMM’R FOR HUM. RTS.

to respect human rights is based on the “basic expectation society has of business in relation to human rights.”<sup>151</sup> The lack of legal obligation on corporations under international law can be traced to the state-centric design of the international legal system,<sup>152</sup> where only states are considered subjects capable of fulfilling legal obligation. This assessment of international law, however, has been criticized. Rosalyn Higgins, for one, described this phenomenon as “an intellectual prison of our own choosing.” She instead referred to corporations as “participants.”<sup>153</sup> Andrew Clapham, on the other hand, preferred to imbue corporations with “limited international legal personality.”<sup>154</sup>

In the beginning of his mandate, John Ruggie noted the failure of the draft *2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with respect to Human Rights* (“draft 2003 Norms”).<sup>155</sup> The draft 2003 Norms would have, if adopted, directly obligated transnational corporations and other business enterprises to come up with “internal rules of operation”<sup>156</sup> that would implement the following rights in their business: right to security of persons, workers’ rights, equal opportunity and non-discriminatory treatment, respect for national sovereignty and human rights, environmental protection, and consumer protection.<sup>157</sup> The

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<https://www.ohchr.org/EN/Issues/Business/Pages/SRSGTransCorpInd ex.aspx> (last visited March 25, 2020).

151. JOHN GERARD RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* 90–94 (2013) (narrating how Shell lost its “social license” with the Ogoni tribe in Nigeria to make the point that social norms “exist over and above compliance with laws and regulations”) [hereinafter *JUST BUSINESS*].
152. See Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 *NW. J. INT’L HUM. RTS.* 223, 226 (2008).
153. ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 49 (1994).
154. ANDREW CLAPHAM, *HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS* 238, at 279 (2006).
155. UN Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2, *Economic, Social, and Cultural Rights Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (Aug. 26, 2003) [hereinafter *Draft 2003 Norms*].
156. *Id.* ¶ 15.
157. *Id.* ¶¶ 2–14; Paragraph 10 of the 2003 Norms arguable provides the best example: “Transnational corporations and other business enterprises shall recognize and respect applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of

message seemed simple enough – ignore the rights that did not apply (e.g. fair trial rights), and implement the ones that did. Ruggie concluded that this approach was not only without any “authoritative basis in international law – hard, soft, or otherwise,” it likewise did not articulate an “actual principle for differentiating human rights responsibilities based on the respective social roles performed by states and corporations.”<sup>158</sup> Consequently, the draft 2003 Norms had the unintended effect of imposing on *all* transnational corporations binding standards culled from treaties that *not all* states have signed or ratified.<sup>159</sup> This led to its demise, i.e. it was declared to have no legal standing.<sup>160</sup>

Working within this contestation, Ruggie capitalized on companies’ “social license to operate” to regulate corporate behavior, using human rights law as a source of normative content rather than of legal obligation.<sup>161</sup> Corporate responsibility to respect human rights means “that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.”<sup>162</sup> For this purpose, the UNGPs serve as “a global standard of expected conduct for all business enterprises wherever they operate.”<sup>163</sup> They “elaborate the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template.”<sup>164</sup> Principle 12 makes a direct reference to the International Bill of Human Rights, including the ICCPR, as being the human rights framework

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corruption, and authority of the countries in which the enterprises operate.”

158. John Ruggie, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, ¶¶ 60, 66, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006) [hereinafter Ruggie 2006 Report].
159. *Id.* ¶ 66.
160. U.N. Commission on Human Rights Report on the Sixtieth Session, U.N. Doc. E/CN.4/2004/127 (2004) (affirming that the 2003 Norms “has no legal standing” and does not give rise to any “monitoring function” on the part of the UN).
161. JUST BUSINESS, *supra* note 151, at 90-94; John Ruggie, Protect, Respect and Remedy: A Framework for Business and Human Rights, ¶ 54, U.N. Doc A/HRC/8/5 (Apr. 7, 2008).
162. UNGPs, *supra* note 14, at 13 (principle 11).
163. *Id.* (commentary to principle 11).
164. UN Human Rights Council, A/HRC/17/31, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (Mar. 21, 2011) [hereinafter Ruggie 2011 report]; UNGPs, *supra* note 15, at 13-14 (Principle 12).

from which to draw expected standards of corporate conduct.<sup>165</sup> The UNGPs also refer to international criminal law.<sup>166</sup> Principle 13 cautions companies against involvement in gross human rights abuses through the conduct of human rights due diligence.<sup>167</sup> It also articulates the different ways that corporations create a human rights impact – causing or contributing to the impact, or being linked to the impact through its product, operations or services. This applies to mass atrocity contexts, including Facebook’s involvement in the spread of incitement in Myanmar. It explains why in the (belated) human rights impact assessment commissioned by Facebook in 2018, Business for Social Responsibility (BSR) concluded that with respect to hate speech and incitement to violence in Myanmar, Facebook is “directly *linked* to them via the actions of users on its platform that violate Facebook’s Community Standards.”<sup>168</sup> The finding tracks the language of the UNGPs.

In the context of incitement to genocide, there are two relevant regimes to guide platforms’ content moderation: international human rights law and international criminal law. Both the FFM as well as the UN Special Rapporteur on freedom of expression recommended the use of international human rights law as basis for content moderation policy.<sup>169</sup> Facebook’s revised “preamble” to its Community Standards is a significant example of this application. In the words of Facebook: “Our commitment to giving people voice remains paramount. We also focus on authenticity, safety, privacy and dignity in writing and enforcing our Community Standards.”<sup>170</sup> These competing values – particularly voice and safety – somewhat resemble the structure of

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165. UNGPs, *supra* note 14, at 13–14 (principle 12).

166. *Id.* at 8–10 (principle 7); *id.* at 14–15 (principle 13).

167. *Id.* at 14–15.

168. Business for Social Responsibility, *Human Rights Impact Assessment: Facebook in Myanmar*, at 35 (2018), [https://fbnewsroomus.files.wordpress.com/2018/11/bsr-facebook-myanmar-hria\\_final.pdf](https://fbnewsroomus.files.wordpress.com/2018/11/bsr-facebook-myanmar-hria_final.pdf) [hereinafter *BSR Report*]. Notably, the BSR report, which identified *potential* adverse human rights impacts in Myanmar, was commissioned after actual impacts had already occurred and only published after the FFM had released its report.

169. *Detailed Findings of the FFM*, *supra* note 7, ¶ 1718; UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/HRC/38/35 (April 6, 2018).

170. Monika Bickert, *Updating the Values that Inform our Community Standards*, FACEBOOK (Sept. 12, 2019), <https://about.fb.com/news/2019/09/updating-the-values-that-inform-our-community-standards/>.

Article 19 and 20.<sup>171</sup> Expression is generally allowed (“voice”; Article 19) except when certain rights are at risk (“safety”; Article 20 prohibited speech).<sup>172</sup>

However, Facebook is silent as to how it intends to strike a balance between these competing values.<sup>173</sup> The lack of definition of hate speech under international law, and its ambivalent treatment across jurisdictions and even within international criminal tribunals (e.g. *Nahimana* case), limit granular incorporation of human rights law in content moderation policy.<sup>174</sup> There is no given set of words that exhaustively and conclusively amounts to allowable and prohibited content.<sup>175</sup> The slippery nature of language, coupled with the differing contextual resonance of specific expressions, contribute to the challenge.

At the very least, the usefulness of the ICCPR is in ensuring procedural guarantees in content moderation (e.g. transparency and oversight, due process).<sup>176</sup> In the US, for instance, Danielle Keats Citron called for “technological due process,” likening platforms’ content moderation to the quasi-judicial function exercised by US

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171. See International Covenant on Civil and Political Rights, *supra* note 121, arts. 19–20.

172. *Id.*

173. Douek, *supra* note 114.

174. Barrie Sander, *Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of a Human Rights-Based Approach to Content Moderation*, 43 FORDHAM J. INT’L L. 939, 969 (2020) (acknowledging the difficulty of “translation of general human rights principles into particular rules, processes and procedures tailored to the platform moderation context”).

175. One commentator defends the substantive usefulness of the ICCPR to content moderation without, however, articulating it to a level of detail required by platforms’ community guidelines. See Evelyn Mary Aswad, *The Future of Freedom of Expression Online*, 17 DUKE L. & TECH REV. 26, 43 (2018) (using Twitter as an illustrative case of community guidelines’ incompatibility with international human rights law). *But see id.* at 57–59 (acknowledging criticisms).

176. *But see* Sander, *supra* note 174 (manuscript at 5) (further classifying process into two distinct dimensions: (i) process referring to transparency, oversight and stakeholder engagement, and (ii) procedural-remediation referring to user notification and availability of appeal in the review of content). See also *Self-regulation and ‘Hate Speech’ on Social Media Platforms*, ARTICLE 19, at 1, 5, 20 (2018); UN Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/HRC/38/35, at 15–16 (Apr. 6, 2018) (recommending that content moderation should adhere to the principles of legality, necessity and proportionality, and non-discrimination originally designed for states under the ICCPR).

administrative agencies.<sup>177</sup> The creation of Facebook's Oversight Board also enriches the appeal process for content moderation decisions.<sup>178</sup> This was also described as an effort to provide and diversify public reasoning, and offer a veil of legitimacy for Facebook's content moderation decisions.<sup>179</sup>

The state-like behavior of platforms in moderating users' speech has thus generated state-like protections for content restrictions. These initiatives constitute voluntary techniques for companies to adopt at will. The application of international human rights law so far has been internal to the business of content moderation. In contrast, conversations on legal regulation of platforms operating in mass atrocity contexts have yet to occur widely. Current regimes of legal liability for incitement to genocide are also unable to translate the role of platforms into existing modes of criminal participation, which I shall now discuss.

### III. CRITIQUE

One popular approach to fill the gap in corporate accountability is to turn to criminal law. For Karen Engle, the "turn to criminal law" has catapulted crime to become the dominant mode for evaluating gross human rights violations.<sup>180</sup> Human rights law presently situates the

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177. Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249, 1258 (2008).

178. Ben Gilbert, *Facebook is Spending \$130 Million to Create a 'Supreme Court' that Can Override Mark Zuckerberg - Here's Everything We Know About It*, BUSINESS INSIDER (Feb. 16, 2020), <https://www.businessinsider.com/facebook-moderation-independent-oversight-board-supreme-court-mark-zuckerberg-explained-2020-2>.

179. Evelyn Douek, *Facebook's "Oversight Board:" Move Fast with Stable Infrastructure and Humility*, 21 N.C. J. OF L. & TECH. 1, 17 (2019).

180. Karen Engle, *Anti-Impunity and the Turn to Criminal Law in the Human Rights Agenda*, 100 CORNELL L. REV. (2015); Frédéric Mégret, *International Criminal Justice as a Juridical Field*, 8 JUSTICE PÉNALE INTERNATIONALE 1, 2 (2016); Gideon Boas, *What's in a Word: The Nature and Meaning of International Criminal Justice*, in INTERNATIONAL CRIMINAL JUSTICE: LEGITIMACY AND COHERENCE (Gideon Boas, William A. Schabas & Michael P. Scharf eds., 2012) (noting the "extraordinary achievement" to build international criminal law "from next to nothing in under 20 years" and illustrating the victory of ICL through the tension between ICL and truth commissions); see also Karen Engle, *Self-Critique, (Anti) Politics and Criminalization: Reflections on the History and Trajectory of the Human Rights Movement*, in NEW APPROACHES TO INTERNATIONAL LAW: THE EUROPEAN AND AMERICAN EXPERIENCES (J.M. Beneyto & D. Kennedy eds., 2012) (narrating how peace and justice became pitted against each other and the turn to criminal law led to the trend of rejecting amnesties in the peace process context); David Kennedy, *International Human Rights Movement: Part of the Problem?*,



fight for impunity front and center, going after perpetrators “with a vengeance.”<sup>181</sup> This seems to be based on the “unstated assumption” that a move towards criminalization is a “clear success for the human rights movement.”<sup>182</sup> Criminal prosecution has become *the* way by which to realize justice, and its expansion – with respect to perpetrators, constitutive acts, and territorial jurisdictions<sup>183</sup> – remains the only question for its proponents. As Frédéric Mégret observes, even mainstream critiques of international criminal law are “constitutive” of the field, such that critiques are mainly aimed at expanding international criminal law’s “toolbox.”<sup>184</sup>

The popularity of international criminal law coincides with the “paradigm shift” in international law from a state-centric legal order to one that places responsibility on natural persons.<sup>185</sup> In this light, it resembles David Kennedy’s description of human rights discourse as hegemonic.<sup>186</sup> According to David Kennedy, the language of human rights has become the “dominant and fashionable vocabulary for thinking about emancipation” and “crowds out other ways of understanding harm recompense.”<sup>187</sup> The repercussion of this is to “strengthen” the state apparatus by “structuring liberation as a

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15 HARV. HUM. RTS. J. 101 (2002) [hereinafter *International Human Rights Movement: Part of the Problem?*].

181. (*Anti*) *Politics and Criminalization*, *supra* note 180, at 58.
182. *Anti-Impunity and the Turn to Criminal Law*, *supra* note 180, at 1071; *Self-Critique*, *supra* note 180, at 57. *Contra* Theodor Meron, *Human rights Law Marches into New Territory: The Enforcement of International Human Rights in International Criminal Tribunals*, THE MAKING OF INTERNATIONAL CRIMINAL JUSTICE (2011) (appearing to suggest that international criminal law and human rights law complement each other); Christine E.J. Schwöbel, *The Comfort of International Criminal Law*, 24 L. CRITIQUE 169, 171 (2013) (interpreting Meron’s description of the relationship between ICL and human rights law as complementing each other).
183. *See, e.g.*, International Criminal Court Pre-Trial Chamber I, Request under Regulation Article 46(3) of the Regulations of the Court, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, No. ICC-RoC46(3)-01/18 (Sept. 6, 2018).
184. Mégret, *supra* note 180 (observing that the critics of the field are also “deeply influenced by one’s position within it”); Schwöbel, *supra* note 182, at 24 (noting that ICL is expanded by the actors constituting and implementing it whether as a judge, practitioner, or academic).
185. Larissa van den Herik and Jernej Letnar Cernic, *Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again*, 8 J. INT’L CRIM. JUST. 725, 740-741 (2010).
186. *See International Human Rights Movement: Part of the Problem?*, *supra* note 180, at 108.
187. DAVID KENNEDY, THE DARK SIDES OF VIRTUE 9–10 (2004).

relationship between an individual right holder and the state.”<sup>188</sup> This consequently “leaves unattended or enhanced the powers and felt entitlements of private actors.”<sup>189</sup>

International criminal law is no different; it seeks a different goal through similar means. The dominant and fashionable vocabulary for thinking about justice now is to prosecute the persons most responsible. Mass atrocity crimes are attributed to a “few bad individual perpetrators, even monsters,”<sup>190</sup> with the effect of obscuring structural causes, political contexts, and the “ideological content” of such crimes.<sup>191</sup> In framing justice in terms of prosecution and individual agency, criminal law overemphasizes the role of individual actors and effectively decontextualizes the event. This has led to a description of international criminal law’s liberal features as reductionist.<sup>192</sup>

Expanding the “toolbox” to include legal or juridical persons within the scope of the ICC’s personal jurisdiction conforms to this paradigm shift.<sup>193</sup> Corporate criminal liability under international law feeds the behemoth. In this section, I will demonstrate how this can limit our thinking of harm and operate as a cognitive constraint in evaluating corporate involvement in mass atrocity contexts.

#### A. *Corporate criminal liability*

Corporate executives can be prosecuted under international criminal law. There is no contest here. The Nuremberg Tribunal, for instance, prosecuted the officers and directors of companies complicit in the Nazi regime.<sup>194</sup> In the ICC’s *Ruto and Sang* case, Sang was a

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188. *Id.* at 16.

189. *Id.* at 11.

190. Karen Engle, *Mapping the Shift: Human Rights and Criminal Law*, 112 PROC. ASIL ANN. MEETING 84, 85 (2018) [hereinafter *Mapping the Shift*]; Mégret, *supra* note 180, at ¶ 18 (noting that one of the promises of international criminal law is “more systematic accountability” compared to the state-based, civil sanctions and dispute settlement mechanism, as well as the “ability to differentiate ‘bad apples’ (individuals) and societal structures that is presented as more modern and discriminating”).

191. *Anti-Impunity and the Turn to Criminal Law*, *supra* note 180, at 1121. See also *Mapping the Shift*, *supra* note 190, at 85; Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT’L L. 561, 594 (2002).

192. Carsten Stahn, *Liberals vs. Romantics: Challenges of an Emerging Corporate International Criminal Law*, 50 CASE W. RES. J. INT’L L. 91, 98 n.31 (2018).

193. *Regulating Corporations under International Law*, *supra* note 185, at 740–41.

194. For an overview, see Michael J. Kelly, *Atrocities by Corporate Actors: A Historical Perspective*, 50 CASE W. RES. J. INT’L L. 49 (2018). See also INT’L COMMISSION OF JURISTS, 2 CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: REPORT OF THE INTERNATIONAL COMMISSION OF

corporate executive of the radio station, Kass FM, where he aired his vitriolic statements as a radio host.<sup>195</sup> The controversy that remains pertains to the prosecution of the corporate entity. Currently, there is no consensus on corporate criminal liability under international law. This, along with the continuing massive influence of corporations globally,<sup>196</sup> contribute to scholarly preoccupation on the topic. At the time of drafting of the Rome Statute, the proposal to prosecute corporations was rejected due to a lack of state practice, which would have the effect of undermining the principle of complementarity.<sup>197</sup> Caroline Kaeb argues that the landscape has changed since then.<sup>198</sup> More national jurisdictions presently recognize corporate criminal liability; no less than the Special Tribunal for Lebanon acknowledged in 2014 that legal persons are not exempt from international criminal prosecution.<sup>199</sup>

David Scheffer offers two viable options in effecting the change on the international plane: either amend Article 25(1) of the Rome Statute, so that the ICC is expressly given jurisdiction to prosecute juridical persons, or negotiate an optional protocol to the Rome Statute that would allow the prosecution of corporations, subject to the same process that an Article 25(1) amendment would entail.<sup>200</sup> Despite the elaborate and politically challenging exercise of treaty negotiations, some aver that the benefit of an amendment is not in seeing more corporations prosecuted before the ICC (whose limited resources and strict

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JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLICITY IN INTERNATIONAL CRIMES 12-15 (2008) [hereinafter CORPORATE COMPLICITY REPORT].

195. See *Joshua Arap Sang*, TRIAL INTERNATIONAL (Aug. 23, 2016), <https://trialinternational.org/latest-post/joshua-arap-sang/> [<https://perma.cc/LN32-VWJ9>].
196. See Caroline Kaeb, *The Shifting Sands of Corporate Liability under International Criminal Law*, 49 GEO. WASH. INT'L L. REV. 351, 354-55 (2017); David Scheffer, *Corporate Liability under the Rome Statute*, 57 HARV. INT'L L. J. 35, 38 (2016); van den Herik & Cernic, *supra* note 193, at 725.
197. This was due to the lack of customary international law on domestic prosecutions of corporations for similar acts, which would undermine the defining feature of the Rome Statute – the principle of complementarity. See Scheffer, *supra* note 196, at 38.
198. Kaeb, *supra* note 196, at 379–81.
199. See Kaeb, *supra* note 196 at 379-381 (discussing the implications of the Special Tribunal for Lebanon case, Al Jadeed S.A.L. and Karma Al-Khayat case); See also In the Case Against New TV S.A.L. and Karma Mohamed Tahsin al Khayat, STL- 14-05/PT/AP/ARI26.1, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, ¶ 74 (Special Trib. for Leb. Oct. 2, 2014).
200. Scheffer, *supra* note 196, at 38-39; See also Kaeb, *supra* note 196, at 382.

admissibility thresholds might be hard to overcome).<sup>201</sup> Rather, the advantage of such an amendment lies in its normative potential.<sup>202</sup> It could form authoritative basis to push for criminal prosecution of corporations in *national* courts, obviating the lengthy norm-making process required by customary international law.<sup>203</sup> Ironically, such purpose recalls the lack of state practice and clear customary norm expressed during the Rome Statute negotiations as basis for excluding corporate criminal liability in the Rome Statute.

The new draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (“draft BHR treaty”) similarly attempts to crystallize criminal prosecution of corporations for serious international crimes, but domestically. Articles 6 and 7(a) require states to enable domestic prosecution of corporations – without prejudice to the domestic prosecution of individuals – for crimes within the jurisdiction of the Rome Statute.<sup>204</sup> Importantly, it avoids the approach of the draft 2003 Norms by putting back the onus on states to regulate businesses domiciled within their territory.<sup>205</sup> Unlike the proposal to amend the Rome Statute to prosecute juridical persons,<sup>206</sup> the draft BHR treaty formally relies on national systems to criminalize and punish, not on an international mechanism.<sup>207</sup>

Corporate criminal liability has been viewed as a necessary step to close the accountability gap.<sup>208</sup> To be fair, Article 6(7) of the draft BHR

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201. See Marie Davoise, *All Roads Lead to Rome: Strengthening Domestic Prosecutions of Businesses through the Inclusion of Corporate Liability in the Rome Statute*, OPINIO JURIS (July 25, 2019), <https://opiniojuris.org/2019/07/25/all-roads-lead-to-rome-strengthening-domestic-prosecutions-of-businesses-through-the-inclusion-of-corporate-liability-in-the-rome-statute/> [https://perma.cc/5RU2-YFJ6].

202. *See id.*

203. *Id.*

204. See Carlos Lopez, *The Revised Draft of a Treaty on Business and Human Rights: A Big Leap Forward*, OPINIO JURIS (Aug. 15, 2019), <https://opiniojuris.org/2019/08/15/the-revised-draft-of-a-treaty-on-business-and-human-rights-a-big-leap-forward/> [https://perma.cc/3LL8-VSGC].

205. *Id.*

206. Scheffer, *supra* note 196 at 38-39.

207. Lopez, *supra* note 206.

208. CORPORATE COMPLICITY REPORT, *supra* note 194, at 56 (opining that “[rejection of criminal prosecution of corporations in the Rome Statute] should not preclude the States Parties to the ICC Statute from including a provision for corporate criminal responsibility in the future”). *See also* Joanna Kyriakakis, *Prosecuting Corporations for International Crimes: The Role for Domestic Criminal Law*, INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY 108, 136-37 (Larry May & Zachary Hoskins eds., 2009).

treaty also obligates the state to impose civil and administrative sanctions against corporations.<sup>209</sup> However, the addition of a penal sanction has arguably generated more celebration, as it would, for one, solve the “persistent ambiguity” surrounding corporate criminal liability.<sup>210</sup> It is worth emphasizing that efforts towards prosecuting corporations internationally or domestically for serious international crimes share a similar objective – to expand the coverage of crime. The stories thus far have been one of accommodation: if criminal law does not cover corporations, then *make* it so. It reflects the assumption that criminal law should be the lens through which harm must be appreciated. The only question that remains is how to adjust the rules of the game.

*B. Crime as cognitive constraint: Facebook as a “useful instrument” for hate speech in Myanmar*

The Facebook issue in Myanmar demonstrates how international criminal law provides no cognitive frame for comprehending the split between speaker and non-state curators of speech in instances of incitement to genocide posted online. Responsibility is rendered more difficult to articulate because platform involvement is unhinged from the laws of territoriality and physicality. In the BSR report, Facebook was found to be “directly linked” to such speech, using the language of the UNGPs, but the concept of “direct link” is not conceptually available in the language of crime.<sup>211</sup> The language of crime thus leaves out other possible actors beyond the speaker. It also potentially hinders tinkering with other remedies.

Traditional cases of corporate entanglement in gross human rights violations required a knowing act or omission on the part of a corporate agent. This was apparent in the prosecution of corporate officers before the Nuremberg Tribunal for using slave labor and supplying weapons to exterminate the Jews.<sup>212</sup> In its legal conception, complicity is understood as aiding and abetting.<sup>213</sup> Complicity generally required

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209. Lopez, *supra* note 204.

210. Nadia Bernaz, *Including Corporate Criminal Liability for International Crimes in the Business and Human Rights Treaty: Necessary but Insufficient*, BUSINESS & HUMAN RIGHTS CENTRE <https://www.business-humanrights.org/en/including-corporate-criminal-liability-for-international-crimes-in-the-business-and-human-rights-treaty-necessary-but-insufficient> [https://perma.cc/HR23-RG6V] (last visited Feb. 5, 2020); *See also* Davoise, *supra* note 201.

211. *BSR Report*, *supra* note 168, at 35.

212. *See* Ole Kristian Fauchald & Jo Stigent, *Corporate Responsibility Before International Institutions*, 40 GEO. WASH. INT’L L. REV. 1025, 1036-37 (2009).

213. *What is Complicity or Accomplice Liability?*, FINDLAW, <https://criminal.findlaw.com/criminal-law-basics/what-is-complicity-or->

knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.<sup>214</sup> The finding of guilt depended on whether the accused possessed actual or constructive knowledge based on the circumstances.<sup>215</sup> The implication of this for corporate criminal liability is to adopt a mode of determining culpability for corporate entities, which inherently act through natural persons. There are different models for conceptualizing corporate behavior to be repurposed for prosecution.<sup>216</sup> Michael J. Kelly, for instance, adheres to the view of attributing the acts and knowledge of the corporate officer to the corporate entity.<sup>217</sup> As applied to the *I.G. Farben* case, this would make use of a “complicity standard of knowledge to impute parts of what each individual defendant knew to a unified whole on the part of the company.”<sup>218</sup> This can be traced through “corporate minutes, transactional records, and aggressive cross-examination.”<sup>219</sup>

Recall that in the previous section I discussed the two distinct elements of incitement – that communication must be direct and public. These elements reveal that the crime of incitement places the onus of liability on the individual speaker. There is no distinction between publishers and broadcasters from a criminal lens; all content producers are considered inciters. Julius Streicher was convicted at the Nuremberg Tribunal of crimes against humanity<sup>220</sup> for publishing speeches and articles that actively called for the annihilation of Jews, portraying them as a group deserving to be “exterminated root and branch.”<sup>221</sup> In

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accomplice-liability.html [<https://perma.cc/FC48-SMTN>] (last visited Feb. 5, 2020).

214. CORPORATE COMPLICITY REPORT, *supra* note 195, at 17, 21–22. *But see Rome Statute*, *supra* note 6, at art. 25(3)(c) (appearing to heighten the standard by requiring that the aider or abettor possess the “purpose of facilitating the commission of the crime”).
215. Oona A. Hathaway et al., *Aiding and Abetting in International Criminal Law*, 104 CORNELL L. REV. 1593, 1614 (2019).
216. *See* Kaeb, *supra* note 196, at 384–85; Carsten Stahn, *supra* note 192, at 96–97.
217. Michael J. Kelly, *Atrocities by Corporate Actors: A Historical Perspective*, 50 CASE W. RES. J. INT’L L. 49, 76–77 (2018).
218. *Id.* at 76.
219. *Id.*
220. *See* *Julius Streicher*, TRIAL INTERNATIONAL, <https://trialinternational.org/latest-post/julius-streicher/> [<https://perma.cc/3RTV-EXNW>] (ast visited Feb. 6, 2020). At that time, there was no crime of incitement to genocide under international law.
221. International Military Tribunal Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg 14 November 1945 – 1 October 1946 Vol. 1*, at 302–303 (1947),

the ICTR, the *Media Trial* defendants – Barayagwiza, Nahimana, and Ngeze – were prosecuted in their respective capacity as executive committee chairman of Radio Television Libres des Milles Collines, as broadcaster, and as *Kangura*'s newspaper editor.<sup>222</sup> In the ICC case, *Prosecutor v. Ruto and Sang*, Joseph Arap Sang, a radio broadcaster, was charged of contributing to the commission of crimes against humanity based on the following acts, among others:

placing his show Lee Nee Emet at the disposal of [Ruto's] organization, advertising the meetings of the organization, fanning the violence through the spread of hate messages explicitly revealing desire to expel the Kikuyus, broadcasting false news regarding alleged murders of Kalenjin people in order to inflame the atmosphere in the days preceding the elections; and broadcasting instructions during the attacks in order to direct the physical perpetrators to the areas designated as targets.<sup>223</sup>

In all these acts, the agency of the speaker is crystal clear. In the analog era, speakers own and control the technology to be used at their disposal in committing the crime. This meant that incitement need only be spoken in order to be publicly communicated. By controlling who had access to communication, only a singular message prevailed, enabling passive reception of inciteful propaganda. The 'public' element of the crime was satisfied due to publishers and broadcasters' control of the platform. This also explains why incitement to genocide has been described as "state-sponsored speech."<sup>224</sup> In the analog era, the state was in the best position to co-opt radios and newspapers to deliver its message. It does not contemplate a situation where the technology is within the control of a third party removed from the speaker and the criminal statement.

Enter Facebook. In the platform era, private speech intermediaries have wrested control from the state. The inciter and speech

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[https://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-I.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf)  
[<https://perma.cc/8UCC-SK47>].

222. See *Court Finds Rwandan Journalists Guilty of Inciting Genocide*, N.Y. TIMES (Dec. 3, 2003), <https://www.nytimes.com/2003/12/03/international/africa/court-finds-rwandan-journalists-guilty-of-inciting.html> [<https://perma.cc/AWD5-Y2PS>].

223. Situation in the Republic of Kenya in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 355 (Jan. 23, 2012), [https://www.icc-cpi.int/CourtRecords/CR2012\\_01004.PDF](https://www.icc-cpi.int/CourtRecords/CR2012_01004.PDF) [<https://perma.cc/7628-ARDX>].

224. See Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT'L L. 485, 496 (2008).

infrastructure owner are split between two actors. State and citizen are both reduced to platform users, and the intermediary curates the message imparted and received. Curation is facilitated by organizing user content to be made more visible to other users,<sup>225</sup> in line with the platform's Community Standards and deployed through algorithmic design. Thus, on top of being spoken, incitement is also necessarily coded by a third party in order to be publicly communicated. Such third party is distanced from the content producer physically but also mentally, thus negating knowledge and purpose of the criminal design. This distinguishes platforms from traditional media (journalist, broadcaster, publisher): platforms are not privy to the production of content and do not claim it as their own. In contrast, a journalist who writes an article and the publisher who decides to run it both exercise ownership over the act of communication.

Well-aware of the challenges of prosecuting social media platforms as publishers and broadcasters for incitement to genocide, Shannon Raj Singh alternatively proposes to extend aiding and abetting liability to social media platforms by comparing them to weapons suppliers.<sup>226</sup> Citing cases from the ICTY, the Special Court for Sierra Leone, and the Zyklon B poison gas case (collectively, "*ad hoc* tribunals"), Singh argues that complicity is "well-suited" because there is no need for intent to commit the crime, only "knowledge of the end use of [the company's] products."<sup>227</sup>

A significant constraint of this thesis is its reliance on the assumption that the *mens rea* for aiding and abetting only requires knowledge, which was adopted in the *ad hoc* tribunals but not at the ICC.<sup>228</sup> As Singh admits, aiding and abetting liability under Article 25(3)(c) of the Rome Statute requires a stricter standard – "purpose" to facilitate the commission of the crime, rather than mere knowledge that the act will assist in its commission.<sup>229</sup> However, there was no discussion of how the Rome Statute framework would alter her analysis. Although using Myanmar's incitement landscape as a case study, Singh did not conclude that, based on her theory, Facebook can be prosecuted for its role in Myanmar's incitement landscape.<sup>230</sup> Rather, she used the Facebook dilemma to argue that aiding and abetting liability can be useful "for future scenarios."<sup>231</sup>

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225. See CUSTODIANS OF THE INTERNET, *supra* note 25, at 41.

226. See Shannon Raj Singh, *Move Fast and Break Societies: The Weaponization of Social Media and Options for Accountability Under International Criminal Law* 331, 8 CAMBRIDGE INT'L L. J. 331 (2019).

227. *Id.* at 336.

228. *Id.* at 334 n. 12.

229. *See id.*

230. *See id.* at 336.

231. *Id.*



The applicability of Singh’s argument under the Rome Statute framework is therefore uncertain. I argue that in the case of Facebook in Myanmar, the “knowledge” and “purpose” requirements are not met. Facebook’s cross-border involvement requires neither physical presence in a host State that characterized the usual examples of corporate complicity nor a knowing act or omission on the part of the corporate officer, which could be used as basis to prosecute the corporate officer as an individual or could be used to impute knowledge to the corporate entity. Although physical proximity is not required, it is nonetheless a good indication of knowledge and purpose. In Facebook’s case, intermediary involvement is characterized by product policy and algorithmic design. As I showed in Part 1, Facebook was largely ill-equipped to understand, much less, review, Myanmar content during the relevant period. The platform was thus distanced from the inciter’s criminal utterance both *ex-ante* and *ex-post*. In contrast to corporate officers privy to the supply of weapons to persons most responsible for acts of genocide, there is no privity, much less purpose, in the case of the Facebook product policy manager in charge of tweaking the Community Standards, the human content moderator tasked to review and moderate content, the engineer feeding data into Facebook’s algorithms, or even Zuckerberg as controlling stockholder himself.

This is not to say that social media platforms – or their owners or agents – will never possess the knowledge or purpose necessary for prosecution. There can be instances where the facts may satisfy both.<sup>232</sup> In this regard, Singh’s creative suggestion to establish an independent alert mechanism to at least help expose corporate “knowledge” is well-taken.<sup>233</sup> Nonetheless, my intention is to show how criminal law is not always an adequate cognitive frame in conceptualizing corporate involvement in mass atrocity crimes. As Facebook’s role in Myanmar has shown, there are various modalities of corporate harm in mass atrocity contexts that fall through the cracks, but the fixation on perceiving harm through the lens of crime hinders other conceptual approaches. My aim here is not to displace the international criminal law regime altogether, but to question its place on the pedestal and advocate for a broader network of international liabilities that can be concurrently or alternatively pursued.

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232. See, e.g., *2020 International Criminal Court Moot Court Competition Problem*, International Criminal Court Moot Court Competition, <http://iccmoot.com/wp-content/uploads/2013/10/ICCMCC-2020-Problem-Final.pdf> [<https://perma.cc/HZD5-H4UB>] (having as one of its main questions whether, on the basis of the specific facts of the hypothetical, the Defendant meets the purpose requirement under Article 25(3)(c) of the Rome Statute).

233. See Singh, *supra* note 227, at 340–42 (proposing an independent alert mechanism that will have “notification,” “connective,” and “accountability” functions).

The point remains that the FFM found that Facebook had a crucial role to play.<sup>234</sup> Facebook as a company did ignore Myanmar civil society's calls to pay more attention to the prevalence of hate speech on the platform in the years preceding the 2016 and 2017 outbreaks of violence. Facebook commissioned a human rights impact assessment only in 2018, years after market entry and after it had wreaked havoc in the country. It was only in 2018 when Myanmar-specific improvements noticeably surfaced on the platform, including hiring more Myanmar-fluent human content reviewers and forming a Myanmar team.<sup>235</sup> No early warning signs or emergency escalation mechanisms appear to have been set up early on, as Myanmar civil society lamented.<sup>236</sup> Facebook's content moderation pre-2018 revealed a poor understanding of the socio-political context of Myanmar, particularly the state's longstanding persecution of ethnic minorities.<sup>237</sup> These circumstances show that corporations may be involved in mass atrocity crimes in different ways, and criminal law may not always have the words for all modalities of corporate transgression.

#### IV. THE PROMISE OF TORT

The usefulness of tort to accommodate new modalities of harm, especially as a response to technology, is not new. In their seminal article arguing for a right to privacy, Samuel D. Warren and Louis D. Brandeis justified the development of a right to privacy as an actionable tort under US law due to intrusions into personal space facilitated by technology.<sup>238</sup> In a similar manner, as technology refines corporate involvement in mass atrocity crimes, this article aims to develop a tort

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234. *Detailed Findings of the FFM*, *supra* note 7, ¶ 1347.

235. See Sara Su, *Update on Myanmar*, FACEBOOK (Aug. 15, 2018), <https://newsroom.fb.com/news/2018/08/update-on-myanmar/> [<https://perma.cc/Z7SW-KEQJ>]; *Removing Myanmar Military Officials from Facebook*, FACEBOOK (Aug. 28, 2018), <https://newsroom.fb.com/news/2018/08/removing-myanmar-officials/> [<https://perma.cc/4VQZ-UQCD>]; *Product Policy Forum Minutes*, FACEBOOK (Nov. 15, 2018), <https://newsroom.fb.com/news/2018/11/content-standards-forum-minutes/> [<https://perma.cc/4CZG-MR36>].

236. See Euan McKirdy, *Facebook: We Didn't Do Enough to Prevent Myanmar Violence*, CNN BUSINESS (Nov. 6, 2018 11:49 AM), <https://www.cnn.com/2018/11/06/tech/facebook-myanmar-report/index.html> [<https://perma.cc/K27C-J8MN>].

237. See Julia Carrie Wong, *'Overreacting to Failure': Facebook's New Myanmar Strategy Baffles Local Activists*, THE GUARDIAN (Feb. 7, 2019), <https://www.theguardian.com/technology/2019/feb/07/facebook-myanmar-genocide-violence-hate-speech> [<https://perma.cc/MM62-JHL2>].

238. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

to conceptualize various modalities of involvement. The proposal here neither seeks to solve all business and human rights issues nor abandons criminal law mechanisms, which are properly meant to try individuals – and perhaps, in appropriate cases in the future, corporate entities – responsible for serious international crimes. Instead, the object of this article is to highlight how certain cases of corporate involvement in mass atrocity crimes may not fit traditional models, which appear to justify a broader network of international liabilities. For that purpose, this section invites further thinking on how to harness tort principles for different manifestations of corporate harm.

The tort liability set out here can potentially be brought before Maya Steinitz’s proposed International Court of Civil Justice, an international court that would adjudicate cross-border mass tort involving the most serious harms.<sup>239</sup> In justifying its creation, Steinitz discussed the “flawed” transnational mass tort resolution in Alien Tort Statute (ATS)-type litigation, especially national courts’ reluctance to exercise jurisdiction over foreign-cubed cases.<sup>240</sup> Beth Stephens similarly argues that the “need to invoke international law to address ‘domestic’ violence implies a breakdown of domestic legal remedies.”<sup>241</sup> Nonetheless, Steinitz is clear-eyed about the aim of an ICCJ. It does not offer a “perfect solution;” rather, its creation should be justified by “whether it would present a significant progress over existing reality.”<sup>242</sup> The tort proposal outlined here shares this objective— to carve out a corporate liability that can close the gap in legal responsibility under international law and accommodate different manifestations of corporate harm in mass atrocities. This section builds on Steinitz’s work by elaborating on the kinds of cases cognizable by the ICCJ.

Significantly, my reference to tort here does not necessarily call for an international version of the ATS. Rather, the point of this exercise is to open up the conceptual analogies offered by tort law. The proposed liability contemplates corporate involvement in acts constituting Rome Statute crimes, but where types of liability are structured around tort law. Despite the variance in approach across jurisdictions, the essence of tort law is the same: to provide recompense for a negligent or

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239. See *The Case for an International Court of Civil Justice*, *supra* note 26, at 75.

240. Foreign-cubed cases involve a case where the plaintiff, defendant corporation, and the alleged injury occurred in a foreign jurisdiction. MAYA STEINITZ, *THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE* 95 (Cambridge University Press, 2018).

241. Beth Stephens, *Conceptualizing Violence under International Law: Do Tort Remedies Fit the Crime*, 60 ALB. L. REV. 579, 593, 605 (1997) (describing how criminal law and tort law regimes can “complement” each other).

242. STEINITZ, *supra* note 240, at 16.

intentional conduct that causes harm to someone else.<sup>243</sup> How such an international tort liability should be conceived in full detail, however, is beyond the scope of this article and deserves further study.

A. *Rationale*

In examining the wisdom of corporate criminal liability generally, V.S. Khanna argues that corporate criminal liability is “socially desirable when substantially all of its traits are socially desirable.”<sup>244</sup> But only if some are, exploring other corporate liability regimes merit further consideration. For Carsten Stahn, the “benefits of criminal responsibility over civil liability for human rights accountability are not always fully clear.”<sup>245</sup> This is because corporations are rarely the “masterminds of international crimes, but rather benefit from a given situation.”<sup>246</sup> Thus, the idea of corporate international criminal liability should not be “romanticized.”<sup>247</sup>

The appeal of tort law lies in its ability to accommodate broad categories of conduct. Tort’s flexible features enable conceptualization of different modalities of behavior, including wrongs committed in the context of an armed conflict.<sup>248</sup> Nominate torts address specific harms (e.g. defamation, trespass) whereas the more elastic tort of negligence possesses the general capacity to “recognize new wrongs, and new rights (or interests).”<sup>249</sup> Importantly, “[r]egulation is inherent in tort law.”<sup>250</sup>

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243. INTERNATIONAL COMMISSION OF JURISTS, 3 CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: REPORT OF THE INTERNATIONAL COMMISSION OF JURISTS EXPERT LEGAL PANEL ON CORPORATE COMPLIANCE IN INTERNATIONAL CRIMES 10 (2008), <https://www.icj.org/wp-content/uploads/2012/06/Vol.3-Corporate-legal-accountability-thematic-report-2008.pdf> [<https://perma.cc/D28Y-AUL4>].

244. V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1532 (1996).

245. Stahn, *supra* note 192, at 124.

246. *Id.* at 122.

247. *Id.* at 124.

248. *See, e.g.*, Eric Mongelard, *Corporate Civil Liability for Violations of International Humanitarian Law*, 88 INT’L REV. RED CROSS 665, 687 (2006) (arguing that “there is no reason why, at least in theory, a new tort should not be created for [] violations [of international humanitarian law]”).

249. Jonathan Morgan, *Torts and Technology*, in THE OXFORD HANDBOOK OF LAW, REGULATIONS AND TECHNOLOGY 522-23 (Roger Brownsword, Eloise Scotford & Karen Yeung eds., 2017).

250. *Id.* at 523. Although Ratner argues against domestic tort law due to its divergence across jurisdictions, this may be avoided precisely by negotiating a treaty that would settle these differences. *See* Steven Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L. J. 443, 543 (2001).

Tort's regulatory function can resolve competing interests. In the BSR report, for instance, one interviewee noted that there was generally nothing wrong with Facebook's Community Standards, the only problem was its poor implementation.<sup>251</sup> In the words of another interviewee: "We are not in the delete-Facebook camp... we desperately want Facebook to succeed in Myanmar."<sup>252</sup> This shows the nuanced role that platforms – and corporations generally – play, and whose behavior can be regulated by a tort mechanism that would delicately straddle the excesses of these "new governors" with that of existing ones. Further, through the adjudication of actual disputes, tort law can function as a "useful supplement" and "learning and feedback mechanism" to inform existing regulation.<sup>253</sup> Preliminary injunctive relief can also manage risks posed by technology.

### 1. Sanction and criminal law's design

Imprisonment is criminal law's defining feature. Criminal law's penalty – deprivation of liberty – explains its design. Fair trial rights, a higher burden of proof to convict, a lower standard of proof to assert a defense, the presumption of innocence, proving *mens rea* — these guarantees are put in place to protect the individual from undue incarceration. This rule applies to corporate officers and agents. If the defendant is a corporation, the effect is not the same. Juridical persons have "no soul to damn, no body to kick."<sup>254</sup> In arguing for corporate criminal liability, Kaeb proposes a mix of penalties that the ICC can impose on corporations as an alternative: "closure of implicated corporate units, general confiscation of all the company's assets (rather than the assets only associated with the criminal offense)," the "corporate death penalty" – dissolution – and monitorship.<sup>255</sup> Domestic legal systems presently allow corporate dissolution for violations that are milder in scope than tortious involvement in Rome Statute acts. Internationally, I.G. Farben was dissolved pursuant to Control Council Law No. 9 as punishment for its involvement in the Holocaust.<sup>256</sup>

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251. *BSR Report*, *supra* note 211, at 26.

252. *Id.* at 24.

253. Morgan, *supra* note 249, at 536 (citing Mary Lyndon, *Tort Law and Technology*, 12 *YALE J. OF REG.* 137, 157, 165 (1995)).

254. See John C. Coffee, Jr., "No Soul to Damn: No Body to Kick": *An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 *MICH. L. REV.* 386, 386 (1981) (quoting the Lord Chancellor of England and suggesting alternative criminal penalties that maximize the corporation's social system and the legal environment to rein in corporate behavior).

255. Kaeb, *supra* note 196, at 390, 400.

256. *Control Council Law No. 9: Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof*, art. I, in 1 *ENACTMENTS*

Khanna notes that “a higher standard of proof is only justifiable if the cost of a false corporate conviction exceeds the cost of a false acquittal.”<sup>257</sup> When an individual’s liberty is on the line, proof beyond reasonable doubt makes sense. But when the worst form of sanction constitutes a fine, it is hard to justify the highest standard of proof for the sake of utilizing crime’s symbolic function, which tort also arguably possesses.<sup>258</sup> Can corporate dissolution, then, be equated to individual incarceration? Khanna alternatively proposes a modified form of civil liability generally to capture corporate criminal liability’s desirable effects while avoiding the latter’s undesirable features.<sup>259</sup>

The compensatory nature of tort liability can make it undesirable as a cause of action against corporate involvement for Rome Statute crimes. Victims may also prefer the symbolic value of the criminal label rather than simply calling someone a tortfeasor. The perceived equivalence between the punishment upon conviction and the seriousness of the content of international crimes conjures a powerful image. After all, prisons are “highly visible reminders” of criminal law’s deterrent purpose.<sup>260</sup> In contrast, pure civil liability for corporations may not match the gravity of the acts punishable as Rome Statute crimes. Tort law “prices” while criminal law “prohibits.”<sup>261</sup> However, this concern will similarly beset corporate criminal liability due to the inherent impossibility of incarcerating a corporation. Criminal penalties will have to come in the form of a fine. Although there is no pricing insofar as putting a value to “the illegal benefit to the defendant, but rather the cost of preventing the crime to the principal,” it nonetheless involves the same transactional analysis “subject to a trade-off.”<sup>262</sup> Viewed in this light, monetary imposition is not so much a point against

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AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 225 (Nov. 30, 1945).

257. Khanna, *supra* note 244, at 1513.

258. See Mary Lyndon, *Tort Law and Technology*, 12 YALE J. REG. 137, 167–70 (1995).

259. Khanna, *supra* note 244, at 1477.

260. John C. Coffee Jr., *Does ‘Unlawful’ Mean ‘Criminal’?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 224 (1991). However, the deterrent function of both criminal and tort laws remains questionable, hence insignificant for the comparison of the two regimes for purposes of the article. See, e.g., Morgan, *supra* note 250, (noting the “highly controversial” deterrent function of tort law); James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law*, 71 THE MODERN L. REV. 217, 230 (noting that the deterrent value of criminal law, if any, is not in the severity of the sentences or the nature of the offense for which defendants are prosecuted, but in likelihood of getting caught).

261. Coffee, *supra* note 260, at 194.

262. *Id.* at 196.

tort liability for corporations *per se* inasmuch as it is an argument against corporate liability generally. Victims may nonetheless find “some satisfaction from the judicial proceeding, the opportunity to tell their story in a formal setting and the finding of liability.”<sup>263</sup>

More often than not, the threat of reputational harm is more real than a fine. When Facebook received international scrutiny for its content moderation failures, the threat of reputational damage appeared to prompt it to action. In the wake of public condemnation, Facebook banned the Tatmadaw commander-in-chief from the platform, commissioned a human rights impact assessment on Myanmar, hired more human reviewers fluent in Myanmar language, rolled out content moderation and transparency initiatives, organized worldwide Community Standards fora to better articulate their policy to the public, and announced its plan to establish the Facebook Oversight Board.<sup>264</sup> Public scrutiny turned out to be a very potent behavioral tool. It is also not guaranteed. The threat of litigation can pressure companies to internalize the risk of transgression. It eliminates the moral hazard caused by corporations’ *de facto* immunity under the current international legal framework. As Steinitz observes, corporations operating in transnational contexts have “little incentive to act with the kind of care they would exercise if they were to internalize the costs of their management decisions.”<sup>265</sup> Yet, there is no indication that the threat of penal sanction would more effectively reduce this moral hazard.

### B. *Cause of action*

In exploring the “applicable law”<sup>266</sup> for an ICCJ, Steinitz proposed that the ICCJ adjudicate “cross-border mass tort cases.”<sup>267</sup> In her view, these cases contemplate “the most serious kinds of torts” as well as environmental claims.<sup>268</sup> It would cover “intentional torts and negligence that results in physical injury.”<sup>269</sup> Intentional torts can include false imprisonment (e.g. slavery, human trafficking), battery

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263. *Conceptualizing Violence under International Law*, *supra* note 241, at 605.

264. *See* Su, *supra* note 236; *Removing Myanmar Military Officials from Facebook*, *supra* note 236; *Product Policy Forum Minutes*, *supra* note 236; Guy Rosen, *How Are Doing at Enforcing our Community Standards?*, FACEBOOK (Nov. 15, 2018), <https://newsroom.fb.com/news/2018/11/enforcing-our-community-standards-2/> [<https://perma.cc/5D4X-Q2BZ>].

265. Steinitz, *supra* note 240, at 79.

266. *Id.* at 154.

267. *Id.* at 152.

268. *Id.* at 154.

269. *Id.* at 155.

(e.g. torture), wrongful death, conversion, trespass to land, and deceit. Negligence, on the other hand, would only cover acts or omissions below an accepted standard that results in physical injury, “in keeping with the emphasis on providing redress for the most serious harms and on the pragmatic need not to overburden the court via overly broad jurisdiction.”<sup>270</sup>

A tort is defined by four basic elements: duty, breach, injury, and causation.<sup>271</sup> In this section, I will draw in general terms the kind of tort that should be cognizable by an ICCJ.

1. To whom the duty applies: the public-private flip

The duty applies to corporations that confront state authority. Comparison of corporate power to that of the state is often made in the context of corporate interference with individual human rights, where a corporation wields quasi-sovereign authority against a private individual.<sup>272</sup> For instance, public-private entanglement characterized colonial rule.<sup>273</sup> Traditional cases of business and human rights involved various arrangements of complicity between state and non-state actors.<sup>274</sup> With respect to platforms, collateral censorship involves platforms acceding to governmental demands to take down content, thereby restricting the individual user’s right to freedom of expression.<sup>275</sup> In all these examples, state power is affirmed rather than challenged, with the corporate entity either supporting or being supported by the state to undermine individual human rights.

Facebook’s ban of Myanmar’s Commander-in-Chief from the platform was one of the first expressions of the exercise of corporate

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270. *Id.*

271. *A Brief Overview of Tort Law*, LAWS (Dec. 22, 2019), <https://tort.laws.com/tort-law> [<https://perma.cc/B7WX-U3CR>].

272. *See, e.g., The Future of Freedom of Expression Online*, *supra* note 175, at 245–46, 254–266 (discussing Hedley Bull’s prediction that the international system could morph from being based on nation-states to one in which nations would share authority over their citizens with a variety of other powerful actors, including transnational corporations).

273. *See* Grietje Baars, *From the Dutch East India Company to the Corporate Bill of Rights: corporations and international law*, RESEARCH HANDBOOK ON POLITICAL ECONOMY AND THE LAW (Ugo Mattei and John D. Haskell, eds. 2015), 267-8 (noting the “plasticity” of the state and corporate forms, to serve the colonialist agenda and commercial exploitation of colonies).

274. *See generally*, MILES JACKSON, *COMPLICITY IN INTERNATIONAL LAW*, ch. 8–9 (2015).

275. *See generally*, Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018); Jack Balkin, *Free Speech is a Triangle*, 118 COLUM L. REV. 2011, 2016-2017 (2018); Jack Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296 (2014).



power wielded against a *state* actor. It is definitely not the only case to raise the issue.<sup>276</sup> This embodies Duncan Kennedy's argument of the "loopification" of the public-private distinction discussed in Part 1, where, in order to define one category, one needs to come full circle.<sup>277</sup> In this light, Klonick's description of platforms as the "new governors,"<sup>278</sup> to the extent that platforms regulate users' speech, is incomplete in incitement contexts such as Myanmar. Here, the new governors not only reign over the traditionally governed – the public — but even govern the old governors themselves. Although platforms *can* theoretically exercise this power anywhere, and ban the speech of other world leaders such as US President Trump, what differentiates Myanmar is that here, Facebook, in fact, *did*, whether rightly or wrongly. Here, private power confronts state authority.

The private-public flip in this case breaks ground. To repeat, it deviates from the traditional model of non-state actors' complicity in human rights violations of state actors. This turns on its head the issue of vertical and horizontal equalities in tort law. Nathan J. Miller highlights the difference between a public agent who commits the wrong while exercising a public function and a private individual who commits it as such.<sup>279</sup> For Miller, "[t]he victim of a public wrong and the alleged wrongdoer do not have the same bundle of rights and obligations because they are, in a sense, completely different kinds of actors. The former is a citizen, but the latter is a representative of the state and an extension of the powers granted to it by citizens collectively – such as the monopoly over the use of force."<sup>280</sup> Miller makes this distinction to argue for a public tort to address human rights abuses perpetrated by corporations. The questions posed in this paper, however, are radically different from Miller's premise.<sup>281</sup> In Myanmar's incitement landscape,

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276. See, e.g., Tara Van Ho, *Twitter's Responsibility to Suspend Trump's, and Rouhani's, Accounts, Part 1*, OPINIO JURIS (Jan. 21, 2020), <http://opiniojuris.org/2020/01/21/twitters-responsibility-to-suspend-trumps-and-rouhanis-accounts-part-1/> [https://perma.cc/SL8X-GBV9]; Tara Van Ho, *Twitter's Responsibility to Suspend Trump's, and Rouhani's, Accounts, Part 2*, OPINIO JURIS (Jan. 21, 2020), <http://opiniojuris.org/2020/01/21/twitters-responsibility-to-suspend-trumps-and-rouhanis-accounts-part-2/> [https://perma.cc/TVG6-L7JF].

277. *The Stages of the Decline of the Public/Private Distinction*, supra note 103, at 1354–55.

278. Klonick, supra note 275, at 1603.

279. See Nathan J. Miller, *Human Rights Abuses as Tort Harms: Losses in Translation*, 46 SETON HALL L. REV. 505, 538–39 (2016).

280. *Id.* at 543.

281. Miller, supra note 279, at 528 n. 128 (noting that "in the context of the discussion of MNEs that international human rights law and the law applied in ATS cases... are only concerned with the conduct of

Facebook's actions are entirely separate from the actions of inciters and speakers, including that of state users. Facebook acted as a private entity through and through. Facebook did not act under the color of law and did not moderate content at the behest of any state. Whereas traditional cases of incitement in international criminal law merged control of content producer and owner of technology in one person, I demonstrated in Part 3.b. how the social media era has metastasized control, which complicates the applicability of criminal law to conceptualize the role that platforms play.<sup>282</sup> Thus, the role of social media platforms in the spread of incitement against the Rohingya is different from, say, a local newspaper or radio station publishing or airing statements inciting violence against the group. The latter is sufficiently regulated by "old-school speech regulation."<sup>283</sup> In contrast, social media platform users are not necessarily private citizens, and those affected by user content are not limited to platform users.<sup>284</sup> The issue thus carries interesting implications on the treatment, duties, and remedies to be expected from social media platforms as private entities embroiled in public harms (e.g. crime).

## 2. Duty

To illustrate tort's usefulness in conceptualizing corporate harm, I tentatively apply one of its classic permutations – negligence – to the case study before us. I will analyze Facebook's role in Myanmar's incitement landscape through this lens. This is not meant to foreclose the careful consideration of other torts – nominate or otherwise – or various forms of liability (i.e., strict liability, fault-based liability). The application here is only meant to display the conceptual possibilities offered by tort law in interpreting corporate involvement in mass atrocity crimes.

In laying out the duty of corporations described above, I borrow the language of the UNGPs:

The responsibility to respect human rights requires that business enterprises:

- (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

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[multinational enterprises] insofar as that conduct was undertaken in conjunction with (e.g., conspiring, aiding, or abetting) states").

282. See discussion *infra* Part 3.B.

283. See Balkin, *supra* note 275, at 2306.

284. See Jenny Domino, *How Myanmar's Incitement Landscape Can Inform Platform Regulation in Situations of Mass Atrocity*, OPINIO JURIS (Jan. 2, 2020), <http://opiniojuris.org/2020/01/02/how-myanmars-incitement-landscape-can-inform-platform-regulation-in-situations-of-mass-atrocity/> [<https://perma.cc/6U78-5C55>].

(b) Seek 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 have not contributed to those impacts.<sup>285</sup>

Borrowing the language of the UNGPs is crucial to achieve normative unity with the existing framework for corporate responsibility. It can also complement domestic law initiatives contained in the draft BHR treaty.<sup>286</sup> Applying the tort of negligence in the case of Facebook in Myanmar, the duty would look like this:

The corporation must observe *reasonable care* that its product, service, or operation does not cause, contribute, or be directly linked to the perpetration of a *Rome Statute crime*.

Reasonable care. Although the UNGPs prescribe the different ways that corporations may be involved in a human rights violation (cause-contribute-linked),<sup>287</sup> the tort proposed here intends to prescribe the standard of care that corporations must exercise in order to avoid liability. Note that reasonable care here is used tentatively. Various types of liability can be explored: vicarious liability, strict liability. Various defenses can be examined: fulfilling the duty to mitigate and prevent, exercising due diligence (such as by conducting a human rights impact assessment before commencing in-country operations), exercising extraordinary diligence. A finding of fault must be clarified.

As applied to Facebook's operation in Myanmar during the relevant period, it would appear that Facebook did not exercise reasonable care to avoid its product to be directly linked to the spread of incitement against the Rohingya. As discussed in the preceding sections, despite numerous warnings and alerts from civil society, Facebook did not adequately address the problem of hate speech and incitement on the platform.<sup>288</sup> It noticeably implemented Myanmar-specific improvements only in 2018, after the Myanmar tragedy had coincided with other

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285. UNGPs, *supra* note 14, at 14–15 (principle 13).

286. *See Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises (OEIWG Chairman Revised Draft July 16, 2019)* art. 5 sec. 1, [https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG\\_RevisedDraft\\_LBI.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf) [<https://perma.cc/2BMY-K5US>] (last visited Feb. 11, 2020).

287. *See* U.N.H.R. Office of the High Commissioner, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (2011), [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

288. *See* discussion *infra* Part 2.

issues.<sup>289</sup> There was no indication that a human rights impact assessment had been done prior to market entry.

Rome Statute crime. Negligence is committed when a person or corporate entity fails to act diligently to avoid causing injury to another. For purposes of the present inquiry, I limit the scope of the tortious corporate involvement in a crime to Rome Statute crimes (genocide, crimes against humanity, war crimes, crime of aggression). These crimes have relatively settled definitions under international law. In contrast, “gross violations” of international human rights law and other similar terms are not clearly defined.<sup>290</sup> The crimes enumerated under Article 7 of the draft BHR treaty can also be substituted here, but in my view Rome Statute crimes present a more convincing framework than the draft BHR treaty’s broader list of offenses. This is because Rome Statute crimes represent the “most serious crimes of concern to the international community as a whole,”<sup>291</sup> which, in turn, would present the most pressing situations for corporations to avoid causing, contributing, or linking their products, services, or operations to. This is more so with respect to the *jus cogens* norms embodied in the Genocide Convention.<sup>292</sup> A related issue is whether the tort’s applicability in war crimes extends to “armed conflict” situations or the broader concept of “conflict-affected areas.” Again, I subscribe to the Rome Statute standard (i.e., armed conflict) for normative unity.

### 3. To whom the duty is owed; causation

Although the proposed international tort liability is not limited in application to social media platforms but to corporations that generally meet the limitations drawn here, the case of online incitement presents challenging questions for identifying the persons that may be injured by platforms operating in incitement contexts. As mentioned, incitement affects not only users but also non-users. This is consistent with Jeremy Waldron’s view that the harm in hate speech lies in the violence inflicted upon the social fabric that shapes public perception of a vulnerable group, rather than a specific assault on an individual

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289. See Su, *supra* note 235.

290. See Roger-Claude Liwanga, *The Meaning of Gross Violation of Human Rights: A Focus on International Tribunals’ Decisions over the DRC Conflict*, 44 DENV. J. INT’L L. & POL’Y 67 (2015); Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies* 27 (2013), <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> [<https://perma.cc/2MS6-GL82>].

291. *Rome Statute*, *supra* note 6, at pmb1.

292. See Louis de Gouyon Matignon, *Jus Cogens in International Law*, SPACE LEGAL ISSUES (Sept. 1, 2019), <https://www.spacelegalissues.com/jus-cogens-in-international-law/> [<https://perma.cc/R8EK-H5LY>].

person's dignity.<sup>293</sup> International criminal jurisprudence on incitement similarly betrays this difficulty in their unclear and inconsistent application of evidentiary standards and causation analyses in prosecuting speakers.<sup>294</sup>

Challenges in this area can be partly resolved depending on the structure of the tort liability adopted. For instance, if strict liability is adopted, then the problem of identifying non-users affected by speech on the platform is reduced. In any case, tort law has a looser causation requirement than criminal law.

### C. *Design*

An international mechanism can provide a cohesive conceptual template to assess corporate wrongdoing. For Steinitz, an ICCJ can play a “universalizing and harmonizing role.”<sup>295</sup> The definition of transnational corporate activity under the draft BHR treaty can be adopted. Under article 1(3), business activities refer to “any economic activity of transnational corporations and other business enterprises, including but not limited to productive or commercial activity, undertaken by a natural or legal person, including activities undertaken by electronic means.” There is merit in using this definition for an international tort liability considering the increasing number of corporations that are not characterized by the traditional triggers of market entry into a host state.<sup>296</sup>

To bring about an ICCJ, Steinitz proposes the adoption of either one of two treaties: one treaty modeled after the Rome Statute creating the ICCJ (“ICCJ Statute”), and another treaty modeled after the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“ICCJ enforcement treaty”).<sup>297</sup> These treaties involve a separate membership system:

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293. See JEREMY WALDRON, *THE HARM IN HATE SPEECH* 5 (Harvard University Press 2012).

294. See *INCITEMENT ON TRIAL*, *supra* note 128, at 8 (Cambridge University Press, 2017); GORDON, *supra* note 28, at 388; See also Domino, *supra* note 284 (explaining how this problem of identifying rightsholders or non-users affected by content moderation will similarly besiege the design of operational-level grievance mechanisms in the platform context).

295. Steinitz, *supra* note 240, at 159.

296. *But see* Sebastian Smart, *Draft Treaty on Business and Human Rights: A Digital Environment Perspective* (Aug. 14, 2019) (discussing the problem of this definition), <https://www.cambridge.org/core/blog/2019/08/14/draft-treaty-on-business-and-human-rights-a-digital-environment-perspective/> [<https://perma.cc/HKD7-PEF7>].

297. See Steinitz, *supra* note 240, at 145.

The first treaty would, inter alia, create the court and establish its jurisdiction in the territory of states parties... The Rome Statute provides a useful example. It established the ICC; delimited its relationship with the United Nations; set out, inter alia, its jurisdiction; defined the crimes it would adjudicate; adopted as law certain general principles of criminal law; determined the composition and administration of the court; outlined pretrial, trial, and appellate procedures; laid out an international cooperation and judicial assistance scheme, enforcement procedures, and obligations; and set out financing provisions.

The second treaty... would be an enforcement treaty along the lines of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention. Recognition and enforcement are the lynchpins of binding dispute resolution, and, as noted throughout, the difficulty plaintiffs encounter in obtaining enforceable judgments is the motivating problem behind the proposal to set up an ICCJ.<sup>298</sup>

The ICCJ Statute is intended for host states where the injury usually occurs, while the ICCJ enforcement treaty is meant to attract home states of transnational corporations.<sup>299</sup> However, corporate involvement in Rome Statute crimes may complicate this two-tiered membership system. The ICCJ, even if deriving its normative content from Rome Statute crimes, must be carefully designed so as not to be bound by ICC legal rulings and findings of fact. Suppose the ICCJ were to adjudicate a case involving a US company involved in a Rome Statute crime in Myanmar, where both the US and Myanmar are not state-parties to the Rome Statute. If the ICCJ Statute were designed to track the work of the ICC, this would effectively render the work of the ICC consequential for parties whose home states are not state parties to the Rome Statute. Thus, an independent legal determination of the ICCJ seems called for, in the same way that the ICJ is not bound by legal determinations of international criminal tribunals on questions of general international law.<sup>300</sup>

For Steinitz, the complementarity principle in the Rome Statute should not apply as an admissibility threshold to the ICCJ because

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298. *Id.*

299. *See Id.* at 10.

300. *See, e.g.,* Application of the Convention on the Prevention and Punishment on the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. Reports 43, ¶ 402-405 (Feb. 26) (ruling that the ICJ is not bound by the ICTY's decision as the issue relates to resolving questions of general international law).

there is no functional equivalent of a prosecutor to speak of.<sup>301</sup> Instead, “the party responsible for ‘prosecuting’ the claim is the same at the international and national levels – the plaintiffs.”<sup>302</sup> This also supports her position to vest exclusive jurisdiction in the ICCJ and exclude the requirement of exhaustion of domestic remedies for admissibility. The draft BHR treaty, if it takes effect, may change this assessment. Nonetheless, other kinds of admissibility thresholds may be incorporated. Weighing the perceived advantages of international tort liability against its anticipated challenges, there is reason to conclude that, at the least, international tort liability merits further exploration.

## V. CONCLUSION

As regulatory approaches are currently being explored, policymakers should recognize the “implicit central object” of platforms, at least in their early days – the Western, white man. Such technology was “not developed with partly free countries like Kenya [or Myanmar] in mind.”<sup>303</sup> With this article, I aimed to show how this gap in perspective can impact incitement landscapes. The Facebook dilemma illustrates how platforms can be a potent – even deadly – force in transitional countries where public infrastructure is weak, democracy is fragile, and atrocious acts are unfolding. In such contexts, the need to balance competing values of expression and safety becomes more pressing, with the scales tipping towards the latter. This article does not pretend to provide a magic formula on how to strike this balance; it does, however, aim to convince how corporations can be required to do so.

Notably, Facebook’s ban of Myanmar’s Commander-in-Chief from the platform was not prompted by an official directive from the US government (as home state) or the UN.<sup>304</sup> Facebook was pressured by the court of public opinion.<sup>305</sup> However, companies’ profit motive will not always align with the public interest, and the court of public opinion cannot solely be relied upon as the means to regulate corporate involvement in mass atrocity crimes. Thus, there seems to be merit in legally regulating corporate behavior.

This article aimed to set the tone for such future conversations. It lays out the conceptual landscape necessary to draw a regulatory framework for companies “present” in mass atrocity settings, “fostering” atrocity crimes. Facebook’s role in Myanmar’s incitement landscape displays other modalities of harm that unsettle current

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301. See Steinitz, *supra* note 240, at 160.

302. *Id.*

303. Nyabola, *supra* note 97, at 200-201.

304. See FACEBOOK, *supra* note 235.

305. See *id.*

thinking on corporate liability. The issue pushes physical and cognitive boundaries to a degree that traditional cases of transnational corporate wrongdoing have not. It exposes a *gap* created by current regimes of legal responsibility for international speech crimes, such as for the crime of direct and public incitement to commit genocide. International law clearly defines legal responsibility for states and natural persons, but an absence of legal liability persists for corporations. A dominant discourse that has emerged to address this gap is to expand the universe of crime. However, as the Facebook issue has shown, criminal law can operate as a cognitive constraint in appreciating harm. This invites us to rethink the primacy of crime and its tendency to eclipse other discourses. Once freed, a broader network of international liabilities is up for imagining. One possibility that merits further consideration is tort, writ large on the international plane.