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Talking Foreign Policy: October 1, 2019 Broadcast: "The Rohingya Genocide"

TFP Panel

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TALKING FOREIGN POLICY - OCTOBER 1, 2019 BROADCAST: “THE ROHINGYA GENOCIDE”¹

Michael Scharf: According to a recent UN report, Facebook bears responsibility for the worst humanitarian disaster on the planet – the mass attacks against the Rohingya people of Burma. Welcome to “Talking Foreign Policy.” I’m your host, Michael Scharf,² Dean of Case Western Reserve University School of Law. In this broadcast, our expert panelists will help us understand the Rohingya crisis, the role of Facebook, and the prospects for achieving accountability for the international crimes that have been committed against the Rohingya people in Burma. Joining us today in our studio is Dr. Paul Williams,³ the Founder of the Public International Law and Policy Group, a Nobel Peace Prize nominated NGO that was commissioned by the U.S. Department of State to document the Rohingya crisis last year. Welcome back to our show, Paul.

Paul Williams: Thanks, Michael. It’s a pleasure to be here.

Michael Scharf: We’re also joined by Professor Milena Sterio⁴ of Cleveland State’s Marshall College of Law, who has an award-winning new book out published by Cambridge University Press on international criminal law. It’s good to have you back on the show too, Milena.

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1. Transcript edited and footnotes added by Senior Cox International Law Center Fellow Laura Graham and Cox International Law Center Fellows Kathryn Meyer, Tessa Oates, and Natalie Davis.
 2. Michael Scharf is the Dean of Case Western Reserve University School of Law. He has also written and published extensively in the area of international law. *Michael Scharf*, CASE W. RES. SCHOOL OF L., <https://law.case.edu/Our-School/Faculty-Staff/Meet-Our-Faculty/Faculty-Detail/id/142> [<https://perma.cc/7FF8-G9PB>].
 3. Paul Williams is a professor at American University Washington College of Law. He is also the president of the Public International Law and Policy Group, a Nobel-Peace-Prize nominated NGO that has provided legal counsel in a dozen peace negotiations over the past twenty-two years. *Paul Williams*, AM. UNIV. WASH. COLLEGE OF L., <https://www.wcl.american.edu/community/faculty/profile/pwilliams/bio> [<https://perma.cc/ME9B-SEK9>].
 4. Milena Sterio is the Associate Dean of Cleveland-Marshall College of Law and a renowned international law expert. *Milena Sterio*, CLEVELAND MARSHALL COLLEGE OF LAW, <https://www.law.csuohio.edu/newsevents/featuredfaculty/milena-sterio> [<https://perma.cc/PJ9U-L6F4>].

Milena Sterio: It is great to be here.

Michael Scharf: We also have a newcomer, Professor Rebecca Hamilton⁵ of American University Washington College of Law, who is one of the nation's leading experts on the role of social media in inciting atrocities. Prior to becoming a law professor, Rebecca was a prosecutor at the International Criminal Court, and a foreign correspondent for The Washington Post. Welcome to Talking Foreign Policy.

Rebecca Hamilton: So glad to be here.

Michael Scharf: Our final panelist for the start of our show is Todd Buchwald,⁶ the former U.S. Ambassador for Global Criminal Justice, who has just completed a year's fellowship at The Wilson Center in Washington, D.C., and is currently a visiting professor of international law at the University of Oklahoma College of Law. Welcome back to the show, Todd.

Todd Buchwald: Thank you, Michael. It's great to be here.

Michael Scharf: And then in the second segment, we're going to be joined by Jenny Domino,⁷ the Satter Fellow at Harvard Law School. She has worked on hate speech on Facebook in Myanmar. So, without further ado, let's start out by looking at this issue, and we'll begin with some background. There's some words here that we need to get a common understanding of, and even a pronunciation. Let's start with the Rohingya. That's what I've been calling it. It's not a household word. In fact, when I looked it up how to pronounce it, I learned that in America, they usually call them the "Roe-hing-a," but in the country, they call them the "Roe-hinge-a," and we'll start with calling them the

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5. Rebecca Hamilton is an assistant professor at American University Washington College of Law and an expert in citizen activism and international law. *Rebecca Hamilton*, AM. UNIV. WASH. COLLEGE OF L., <https://www.wcl.american.edu/community/faculty/profile/rehamilton/bio/> [<https://perma.cc/S85K-MYB6>].
 6. Todd Buchwald is a former Ambassador and Special Coordinator for Global Criminal Justice at the U.S. Department of State. *Todd Buchwald*, THE WILSON CENTER, <https://www.wilsoncenter.org/person/todd-buchwald> [<https://perma.cc/Y267-8J32>].
 7. Jenny Domino is a former Satter Fellow at the Harvard Law School Human Rights Program and is a current associate legal adviser at the International Commission of Jurists. *Jenny Domino*, LINKEDIN, <https://www.linkedin.com/in/jenny-domino-a184ba153/> [<https://perma.cc/J23Q-W99W>].

“Roe-hing-a,” since we are in the United States, but we will know that.⁸ The other thing is the country where this is all taking place, Myanmar, but it’s also known as Burma, and we’ll go with Burma. So, let’s start out with Milena. Tell us about who the Rohingya people are.

Milena Sterio: Sure. The Rohingya are a Muslim minority group.⁹ Most of them used to live in the western coastal state of Rakhine in Myanmar, or Burma, as you explained.¹⁰ They have been persecuted within Burma for a number of years.¹¹ Under Burmese law, they are not officially recognized as one of the 135 official ethnic groups.¹² They have been denied citizenship in Myanmar since 1982, which has effectively rendered them stateless, and recently, many of them have experienced severe persecution, and have fled to neighboring Bangladesh.¹³

Michael Scharf: So, explain to us the history of why these people are so hated in their own country.

Milena Sterio: So, the Rohingya were originally from Bengal, which is now known as Bangladesh, and the British, these were all British colonies, the British brought the Rohingya to Myanmar during the colonial period back in the 1880s.¹⁴ Now, during World War II, the Rohingyas mostly supported the British forces, whereas the other ethnic groups from Burma, who were Buddhists, supported the Japanese.¹⁵ So there’s some animosity that goes way back to World War II. After Myanmar’s independence post-World War II, the Rohingya were not officially recognized and have been essentially discriminated against

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8. *English Pronunciation of Rohingya*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/pronunciation/english/rohingya> [https://perma.cc/YMS2-F4S9].
 9. *The Stateless Rohingya in Thailand*, CTR. FOR MIGRATION STUDIES, <https://cmsny.org/the-stateless-rohingya-in-thailand/> [https://perma.cc/NJ6K-TC46].
 10. See Chris Lewa, *North Arakan: An Open Prison for the Rohingya in Burma*, 32 FORCED MIGRATION REV. 11 (2009).
 11. *Id.* at 13.
 12. Azeem Ibrahim, *Myanmar Wants to Track Rohingya, Not Help Them*, FOREIGN POLICY (Aug. 1, 2019), <https://foreignpolicy.com/2019/08/01/myanmar-wants-to-track-rohingya-not-help-them/> [https://perma.cc/7JKE-5CAG].
 13. CTR. FOR MIGRATION STUDIES, *supra* note 9.
 14. *Id.*
 15. *The Rohingya*, HARVARD DIVINITY SCHOOL, <https://rlp.hds.harvard.edu/faq/rohingya> [https://perma.cc/MU2L-CG6V].

ever since, and starting in 1982, they were denied a status of an official ethnic group in Burma, which has effectively rendered them stateless.¹⁶ The latest violence against them was sparked by the killing of nine border police, nine Burmese border police officers in October of 2016, and the Burmese government blamed the Rohingya group as the culprits,¹⁷ which then culminated in the more severe persecution of the Rohingya over the last three years.

Michael Scharf: And so, where is the Rohingya crisis centered now?

Milena Sterio: So, hundreds of thousands of Rohingya refugees have fled to the neighboring country of Bangladesh, and many of the Rohingya refugees, 900,000 of them, live in a place called Cox's Bazar in Bangladesh.¹⁸ But the flight of the Rohingya really started back in the 1970s, and since the 1970s, nearly one million Rohingya refugees have fled Myanmar due to widespread persecution.¹⁹

Michael Scharf: Alright, so it's a horrible situation, and in a minute, we're going to talk about whether this violence can rise to the level of genocide, but to set the stage for that, Milena, can you tell us what the definition of genocide is?

Milena Sterio: Sure, so, genocide is defined in the so-called Genocide Convention, which was signed back in 1948 and came into effect in 1951 as an act committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group.²⁰ So this is a fairly narrow definition which entails the committing of a killing or another heinous act, but it has to be directed at somebody who's a member of one of these protected groups: a national, ethnic, racial, or

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16. CTR. FOR MIGRATION STUDIES, *supra* note 9.
 17. *Myanmar Policemen Killed in Rakhine Border Attack*, BBC (Oct. 9, 2016), <https://www.bbc.com/news/world-asia-37601928> [<https://perma.cc/R22D-HFZ4>].
 18. *Rohingya Emergency*, U.N. HIGH COMM'N FOR REFUGEES, <https://www.unhcr.org/en-us/rohingya-emergency.html> [<https://perma.cc/9ZEW-J6LF>].
 19. *Who are the Rohingya?*, AL-JAZEERA (Apr. 18, 2018), <https://www.aljazeera.com/indepth/features/2017/08/rohingya-muslims-170831065142812.html> [<https://perma.cc/VB6R-MHWF>].
 20. United Nations Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Convention on the Prevention and Punishment of the Crime of Genocide].

religious group, and the person has to be targeted because of their membership in the protected group.²¹

Michael Scharf: So I mentioned at the top of the show that we have Paul Williams with us. He is the president of the NGO, the Public International Law and Policy Group. Paul, I understand that your NGO was commissioned by the U.S. Department of State to undertake a study of the violence against the Rohingya just last fall, and I understand that your team went over to Bangladesh and interviewed one thousand Rohingya refugees. Can you tell us what you discovered?

Paul Williams: Yes, Michael. We pulled together a team of a dozen and a half investigators with experience at the various international criminal tribunals, and we spent two months in the refugee camps in Cox's Bazar.²² And we interviewed over a thousand, actually, one thousand and twenty-four of the refugees, fifteen thousand pages of documentation, and we identified over thirteen thousand crimes that had been committed against these people.²³ What we had discovered was basically, in sum, that it was a premeditated and well-coordinated operation that was intended not only to expel, but to exterminate, the Rohingya.²⁴ We did a follow up report, where we conducted a legal analysis, and here we brought together a dozen former U.S. government lawyers from the Department of Defense, the White House, and the State Department, and we said, "Look at this evidence in the way that you would look at it as if you were still in the U.S. government. Be critical, be jaundiced, be very focused on whether or

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21. *Id.*; see also Todd Buchwald & Adam Keith, *By Any Other Name: U.S. Government Statements about "Genocide"*, U.S. HOLOCAUST MEMORIAL MUSEUM, at 10 (Mar. 2019), https://www.ushmm.org/m/pdfs/Todd_Buchwald_Report_031819.pdf [<https://perma.cc/DRS4-DEFG>].
 22. Paul R. Williams & Jessica Levy, *Atrocities Documented, Accountability Needed: Finding Justice for the Rohingya through the ICC and Independent Mechanism*, HARV. HUM. RTS. J. (Feb. 25, 2019), available at <https://harvardhrj.com/2019/02/atrocities-documented-accountability-needed-finding-justice-for-the-rohingya-through-the-icc-and-independent-mechanism-by-paul-r-williams-jessica-levy> [<https://perma.cc/YB6F-CBRJ>].
 23. *Id.*
 24. *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar's Rakhine State: Factual Findings and Legal Analysis Report*, PILPG, at 50–51 (2018), <https://static1.squarespace.com/static/5900b58e1b631bffa367167e/t/5c058268c2241b5f71a0535e/1543864941782/PILPG+-ROHINGYA+REPORT+-Factual+Findings+and+Legal+Analysis+-3+Dec+2018+%28%29.pdf> [<https://perma.cc/5BXY-FP5N>].

not, don't apply your NGO lens, apply your government lens."²⁵ And they came back and said, "Crimes against humanity, war crimes," and they even came back and said, "this amounts to potential genocide."²⁶

Michael Scharf: Wow. They call it the "G word." It's very powerful. So what happened when you told the State Department, who had asked you to create this report, that you believed, based on the evidence, that they should say that this is genocide?

Paul Williams: The State Department, I believe, was on the cusp of identifying these atrocities, not only as crimes against humanity, but also genocide, but then it got caught up in a quintessential one-act play of Washington. The Secretary of State had a draft speech, and the speech said, "we have this evidence, we have this documentation, we the State Department find that there are crimes against humanity and," brackets, "genocide."²⁷ They put it in brackets because it was a draft speech and they were still trying to decide whether or not, in consultation with the legal office and the political folks, whether to say genocide.²⁸ A senior staffer then leaked it to the news media, and that blocked out the ability of the Secretary of State to make a determination, because he couldn't go either way. It would look like he was being manipulated by his own staff and by the news media. But Capitol Hill stepped in, and the House of Representatives, in a vote of three hundred ninety-four to one, voted that genocide had been committed against the Rohingya, and encouraged the State Department and the White House to impose economic sanctions and to pursue criminal accountability.²⁹

Michael Scharf: Wow. Alright, Ambassador Todd Buchwald, the U.S. Holocaust Memorial Museum commissioned you to produce a report, which was published this past April, on how the State Department has historically gone about deciding to say, or not to say,

25. Williams & Levy, *supra* note 22.

26. *Id.*

27. Nahal Toosi, *Leaked Pompeo Statement Shows Debate Over 'Genocide' Label for Myanmar*, POLITICO (Aug. 13, 2018), <https://www.politico.com/story/2018/08/13/mike-pompeo-state-department-genocide-myanmar-775270> [<https://perma.cc/9GR8-KJ6W>].

28. *Id.*

29. Letter from Eliot Engle, Chairman, House Committee on Foreign Affairs, to Mike Pompeo, Secretary of State, U.S. Department of State (Feb. 27, 2019), *available at* <https://foreignaffairs.house.gov/2019/2/house-foreign-affairs-committee-leadership-calls-on-administration-to-recognize-rohingya-genocide> [<https://perma.cc/MW6U-PTXE>] [hereinafter Foreign Affairs Committee Letter].

that genocide has occurred in a conflict. Can you summarize what you found and apply it to what Paul just told us about the Rohingya?

Todd Buchwald: Thank you, Michael. We spent a lot of time looking at this in our report, which was commissioned before the events that Paul is talking about. As it turns out, there is no formal process for making determinations about genocide.³⁰ There's no, you can't find a regulation or a Department procedure, but there's a kind of *de facto* process that has emerged, that you can glean from looking at the way the issue has been handled in the past. And in the sort of modern era since Yugoslavia and Rwanda, that have framed the way that the process has developed.³¹ In the Rwanda and Bosnian genocides, in both those cases, what you had was a senior level of leadership in the Department that was resistant to saying a genocide had occurred because they were afraid of being cornered into doing things that they didn't want pressure to do, and lower-level people using the idea of a genocide determination trying to press the Department principles to make it, to make the determination, writing memos up to the seventh floor to the Department principles, and the Department principles resisting.³² Then, fast forward to the next major episode, which was the Darfur genocide in determination in 2004, and you had...

Michael Scharf: And let me stop you there, because we actually have with us Professor Rebecca Hamilton, whose book, "Fighting for Darfur," is all about why the U.S. government was willing and able to use the G word, as I say, to describe Darfur. Can you, you know, complete the story that Ambassador Buchwald has begun?

Rebecca Hamilton: By the time that Darfur started unfolding, there had been a lot of publicity and a lot of work done by journalists that I think recounted just the extent of the U.S. government's failings in Rwanda ten years earlier, and that weighed very heavily on people in the State Department, including then Secretary of State Colin Powell, who really took this on as his issue and decided to hold off for a genocide.³³

30. Buchwald & Keith, *supra* note 21, at 3.

31. *Id.* at 3–4.

32. *Id.* at 5.

33. REBECCA HAMILTON, FIGHTING FOR DARFUR: PUBLIC ACTION AND THE STRUGGLE TO STOP GENOCIDE (Palgrave Macmillan, 2011), abstract, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561146 [<https://perma.cc/HNH3-LYTS>]. *See also* Foreign Affairs Committee Letter *supra* note 29.

Michael Scharf: So what is it about the word genocide that the State Department is so afraid of? Ambassador Buchwald?

Todd Buchwald: Well, I think it goes back to what we saw in the Bosnia and Rwanda era, is where the Department leadership, the administration leadership, tends to be risk-averse, and doesn't want to do something that will then create pressure on the State Department, on the administration, to intervene in a way that they're not prepared to intervene.³⁴

Michael Scharf: Are there actual legal obligations if they say it's genocide, or is it all politics?

Todd Buchwald: There are legal obligations, but when you really sort of get the wheat jobs, it's scrape the wheat from the chaff, the legal obligations aren't what's driving things.³⁵ The legal obligations are fairly minimal, insofar as it relates to this issue.³⁶ There are, as you know, obligations to criminalize genocide and so forth, but the big legal question is how to interpret the obligation to prevent genocide.³⁷ And if you look at the internal memorandum that the State Department produced in these episodes, and the advice the lawyers in the State Department were providing, it's clear that their view is that the obligation to prevent isn't an obligation to prevent in your own country.³⁸ It doesn't apply offshore, so that's not it, and that's what the department leaders get. But the fact that there's no legal obligation doesn't necessarily affect the reality for the policymakers that they will get political pressure.³⁹ I should also say that the legal interpretation is not obvious. It's not actually consistent with decisions, for example, the International Court of Justice and many scholars, but that is the internal advice that the lawyers in the Department give.⁴⁰

Michael Scharf: Alright, so we've gotten to the place where the facts indicate that it's genocide, the PILPG, Paul's NGO, officially declared it to be genocide, the U.S. Congress says it's genocide, and reluctantly, the Department of State allows that to be the last word. Let's take a short break while we mull over what that means. When we return, we'll talk about the role of Facebook in the Rohingya genocide,

34. Buchwald & Keith, *supra* note 21, at 5.

35. *Id.* at 18.

36. *Id.*

37. *Id.* at 19.

38. *Id.* at 61.

39. *Id.* at 59.

40. Buchwald & Keith, *supra* note 21, at 51, 61.

and then we'll finally look at the potential for prosecutions. We'll be back in a moment.

BREAK

Michael Scharf: Welcome back to “Talking Foreign Policy,” brought to you by Case Western Reserve University and WCPN 90.3 Ideastream. I'm Michael Scharf, Dean of Case Western Reserve University School of Law. We're talking today about the atrocities committed against the Rohingya People of Burma. Before the break we were discussing whether it matters whether the attacks are called genocide or crimes against humanity. Before we move on to discuss the role of Facebook, I want to go to Rebecca Hamilton and have you explore that a little bit further.

Rebecca Hamilton: The decision by the U.S. government to call something genocide or by any government to call it genocide makes a huge difference to victims. So whenever genocide occurs, there is intrinsic value to naming it by its proper

name. And that is something that I have heard from genocide survivors all around the world. I think it's a separate question though in terms of the policy impact and I think that a genocide determination ends up giving people less than they might imagine or hope for. A little bit to Todd's earlier point, the U.S. government will go as far as its happy to go. What we've never yet seen is a genocide determination actually impact a traditional national interest calculation. We haven't seen it mean that we're willing to have U.S. casualties or that the U.S. government is willing to have it disrupt its key diplomatic relationships.

Michael Scharf : Now what's in my opinion the most extraordinary aspect of this, is that this genocide would not have occurred, but for, according to the UN, the role of Facebook, a U.S. company.⁴¹ According to the UN report ultra-nationalists use Facebook to incite the violence against the Rohingya and that Facebook is the only source of news for the majority of the Burmese people.⁴² And they also concluded that there was a correlation between the posts on Facebook and the attack. I'm going to bring Jen Domino in. You're an expert in this area. Can you tell us more about that?

41. Tom Miles, *U.N. Investigators Cite Facebook Role in Myanmar Crisis*, REUTERS (Mar. 12, 2018, 5:40 PM), <https://www.reuters.com/article/us-myanmar-rohingya-facebook/u-n-investigators-cite-facebook-role-in-myanmar-crisis-idUSKCN1GO2PN> [<https://perma.cc/CQ5K-GUU5>].

42. U.N. Human Rights Council, Report of the Independent International Fact-Finding Mission on Myanmar, ¶¶ 73–74, U.N. Doc. A/HRC/39/64 (Sept. 12, 2018).

Jen Domino: Thanks for having me on your show. Actually, I just want to push back a little bit. So there are various sources of news and it was also in the UN report. So, you have a lot of state-owned media in Myanmar and since its transition to democracy they've also had non-state-owned media.⁴³ But the difference here is that because state-owned media has a very big- has a disproportionate amount of reach and resources compared to non-state-owned media, Facebook becomes more important, because it provided a voice to many people, which prior to their democratic transition, did not have a space where they could speak, and so, despite various media sources, leading religious and government figures still used Facebook, because it allowed them a platform which was not available to everyone before Facebook came to Myanmar.⁴⁴

Michael Scharf: So you're saying that it wasn't the only source of news, but it was an important source of news, and therefore it became very dangerous what was being posted. Well, why didn't Facebook just remove these posts inciting the violence?

Jen Domino: Actually, I also want to add that the government narrative against the Rohingya had been there for many years. And Facebook, it didn't start with Facebook, it didn't start with Facebook posts, but Facebook provided a tool to reinforce those narratives on a wider scale. And I think, to answer your question, the reason why Facebook didn't take down those posts, it wasn't just on top of their priorities.

Michael Scharf: They claim they didn't have translators, they didn't know that these inciting words were being said. Is that a credible statement from Facebook?

Jen Domino: Well, civil society had alerted them to hate speech on Facebook for years preceding the attacks. But despite the alerts Facebook didn't really do enough.⁴⁵ And in a popular interview in Vox

43. *Myanmar Profile - Media*, BBC NEWS (May 2, 2017), <https://www.bbc.com/news/world-asia-pacific-12991727> [<https://perma.cc/J2EZ-3X3G>].

44. *Human Rights Impact Assessment: Facebook in Myanmar*, BSR, at 7 (Oct. 2018), https://fbnewsroomus.files.wordpress.com/2018/11/bsr-facebook-myanmar-hria_final.pdf [<https://perma.cc/JG9M-MAPC>].

45. *Facebook 'Too Slow' in Removing Anti-Rohingya Hate Speech*, AL JAZEERA (Aug. 16, 2018), <https://www.aljazeera.com/news/2018/08/facebook-slow-removing-anti-rohingya-hate-speech-180816093622390.html> [<https://perma.cc/2QG9-YCXM>].

last year Mark Zuckerberg said himself that their systems detected hate speech, but Myanmar civil society actually corrected him days later and he apologized.⁴⁶ It was actually them and not the algorithms that detected the hate speech.

Michael Scharf: But once they brought it to his attention and he couldn't escape from the conclusion being that his Facebook was being used to incite this kind of violence, he did publicly say, "promise to take action to deal with these violent posts on Facebook,"⁴⁷ right?

Jen Domino: Yes. I think by that time though, they began to pay attention after other scandals, had occurred— Cambridge Analytica— and so there was international pressure on Facebook for a wide range of issues. And at that time, that's when they finally said, last year that we would be doing more to tackle this issue.

Michael Scharf: But even after he publicly said this in his testimony to the Senate, Reuters reported the following posts on Facebook in Burma. According to Reuters, one user posted "We must fight them the way Hitler did the Jews, damn kalars!"⁴⁸ which is a pejorative for the Rohingya. Another post showed a news article from an army-controlled publication about attacks on police stations by Rohingya militants. "These non-human kalar dogs, the Bengalis, are killing and destroying our land, our water and our ethnic people," the user wrote. "We need to destroy their race."⁴⁹ Another user shared a photo of a boatload of Rohingya refugees landing in Indonesia.⁵⁰ "Pour fuel and set fire so that they can meet Allah faster," a commenter wrote.⁵¹

46. Jen Kirby, *Zuckerberg: Facebook has Systems to Stop Hate Speech. Myanmar groups: No, it Doesn't*, VOX (Apr. 6, 2018), <https://www.vox.com/2018/4/6/17204324/zuckerberg-facebook-myanmar-rohingya-hate-speech-open-letter> [https://perma.cc/EPL6-DQFW].

47. Alexandra Stevenson, *Facebook Admits It Was Used to Incite Violence in Myanmar*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/technology/myanmar-facebook.html> [https://perma.cc/5CHA-2N7U].

48. Steve Stecklow, *Special Report: Why Facebook is Losing the War on Hate Speech in Myanmar*, REUTERS (Aug. 15, 2018, 10:51 AM), <https://www.reuters.com/article/us-myanmar-facebook-hate-specialreport/special-report-why-facebook-is-losing-the-war-on-hate-speech-in-myanmar-idUSKBN1L01JY> [https://perma.cc/RA9D-H47E].

49. *Id.*

50. *Id.*

51. *Id.*

Now, how do those get on Facebook after Zuckerberg says “I will take action to prevent that.”⁵²

Jen Domino: I think it’s also because Facebook is such a big company. The policy at the top level is very hard to translate to content moderation which is done by humans and their technology.⁵³ And so it’s just not as fast as we would want it to be.

Michael Scharf: And why didn’t he just completely withdraw Facebook from Burma?

Jen Domino: Well, I wouldn’t support that either. Because Facebook, as I said, in a country transitioning to democracy, serves a very useful role there because people don’t have a space where they could talk.⁵⁴ There’s still a lot of self-censorship in Burma and Facebook provided a space where all these people previously repressed and silent can finally speak.⁵⁵

Michael Scharf: Alright, well, so, Facebook, it’s a tool and it can be used for good or bad. Let me bring Rebecca Hamilton back into this. I understand that your current research is about how ordinary people in atrocity situations have actually been documenting the crimes they have witnessed by posting them on social media.⁵⁶ Is this type of user-generated evidence a good thing for international justice?

Rebecca Hamilton: It can be. And I think when we’re thinking about Myanmar it’s very easy to pile on the social media companies and appropriately so, but I think it’s true that for many vulnerable

52. Jason Abbruzzese, *Zuckerberg on Facebook’s Data Privacy Issues: ‘We Need to Step Up,’* NBC NEWS (Mar. 21, 2018), <https://www.nbcnews.com/tech/social-media/facebook-ceo-mark-zuckerberg-break-silence-cambridge-analytica-data-use-n858606> [https://perma.cc/XT3R-8GQM].

53. Evelyn Douek, *Facebook’s Role in the Genocide in Myanmar: New Reporting Complicates the Narrative*, LAWFARE BLOG, (Oct. 22, 2018, 9:01 AM), <https://www.lawfareblog.com/facebooks-role-genocide-myanmar-new-reporting-complicates-narrative> [https://perma.cc/SQ4Q-NA3N].

54. Emilie Lehmann-Jacobsen, *Myanmar’s Media from an Audience Perspective*, IMS-FOJO, at 16–17 (Sept. 2018), https://www.mediasupport.org/wp-content/uploads/2018/09/Audiences-in-Myanmar_2018_finalweb.pdf [https://perma.cc/Y97G-F6DL].

55. *Id.* at 16.

56. Rebecca J. Hamilton, *User Generated Evidence*, 57 COLUM. J. TRANSNAT’L L. 1, 7 (2018).

populations, social media is enabling them to document the crimes that are happening in their communities and to broadcast those crimes out to the world and that is especially important in situations like we see in Syria for example, where the government is not letting external investigators in.⁵⁷ Now, whether it's ultimately going to be a good thing for international justice? I think it depends. Certainly there's a whole lot of security issues, that come with user-generated evidence for people who are doing that documentation. And it would be really sad if international criminal investigations prioritize this kind of documentation over the sort of in-person interviews that are so important for the survivors of these crimes.

Michael Scharf: But what I'm hearing from the two of you though is that it's a pretty complicated question about what Facebook ought to be doing in Burma. It has a good role and has a bad role. It doesn't necessarily know all of the ways that it is being abused. Rebecca, what did you want to add?

Rebecca Hamilton: So, I'm also in the camp that I think Myanmar wants Facebook. They just want a better Facebook, right? Okay, but I do think there are really important questions for not just Facebook but of social media companies to be asking before they launch into markets where there isn't a strong independent media, where the rule of law is not strong, and where people are emerging from decades of civil war, and you cannot expect your product to run in the same way as it does in a liberal democracy, so you need to put systems in place in advance of going into those markets to be prepared for what can happen.

Michael Scharf: And I suppose you would say, if a very sophisticated company, a very wealthy company like Facebook did not consider that, that that was sort of a form of negligence? Inviting this kind of danger?

Rebecca Hamilton: I'm certainly very concerned about it. At the most basic level, they didn't even translate their community guidelines.⁵⁸ The standards for what you are or are not allowed to post on their site, didn't translate them into the local languages.

Michael Scharf: Was that willful blindness or was that just laziness?

57. *Id.*; see also Rebecca Hamilton, *Atrocity Prevention in the New Media Landscape*, 113 AJIL UNBOUND 262, 262 (2019).

58. Stecklow, *supra* note 48.

Jen Domino: They translated it but I think not early enough⁵⁹

Rebecca Hamilton: Exactly— they didn't translate it before they went into the market.

Michael Scharf: Okay, so now let's go back to our expert at the legal aspects of genocide, Milena Stereo. Is there precedent for prosecuting incitement to genocide by media owners?

Milena Stereo: So, there is precedent for prosecuting incitement for genocide, the first person to be prosecuted for incitement as a hate crime, as a crime against humanity, was a person called Julius Streicher who was actually prosecuted at the Nuremberg Tribunal.⁶⁰ He was the publisher of an anti-Semitic German weekly and he was prosecuted and convicted and sentenced to death at Nuremberg and at the time, this is prosecuted as a crime against humanity.⁶¹

Michael Scharf: Now was he prosecuted for the words that he published or for providing a platform for others to make these genocidal words?

Milena Stereo: He certainly did not write all of the words himself, he was the publisher of the paper. Now, there are other examples from the Rwanda tribunal. In the Rwanda Tribunal there were three defendants who were prosecuted for incitement to genocide.⁶² Now, these are individuals who actually spoke words of incitement, that's a little bit different.

Michael Scharf: Anybody who just owned a radio station and allowed the words to be used.

59. *See id.*; Steve Stecklow, *Facebook Removes Burmese Translation Feature after Reuters Report*, REUTERS (Sept. 6, 2018), <https://www.reuters.com/article/us-facebook-myanmar-hate-speech/facebook-removes-burmese-translation-feature-after-reuters-report-idUSKCN1LM200> [<https://perma.cc/HW9U-4HHZ>].

60. Michael Salter et al., *The Accidental Birth of Hate Crime in Transnational Criminal Law*, DAPHNE, at 20 (2013), https://www.uclan.ac.uk/research/explore/projects/assets/hate_crime_VOL_1.pdf [<https://perma.cc/NR4A-3RMM>].

61. *Id.* at 20, 31.

62. *Incitement to Genocide in International Law*, THE HOLOCAUST ENCYCLOPEDIA, <https://encyclopedia.ushmm.org/content/en/article/incitement-to-genocide-in-international-law> [<https://perma.cc/DP3G-AWG2>].

Milena Stereo: Well, according to the Rwanda Tribunal, legal incitement in this context means encouraging or persuading another to commit an offense by ways of communication for example, by using broadcast publications, drawings, images or speeches, and the person who is inciting has to have the intent for the person receiving this information to commit the genocide-elect.⁶³ Now, even if the person receiving the information does not commit the act, they for some reason decide not to do it, the person who is doing the incitement can actually still be prosecuted for incitement.⁶⁴

Michael Scharf: So could a social media platforms such as Facebook be held accountable for enabling incitement to genocide?

Milena Stereo: The trick here would be, is Facebook encouraging or persuading anyone to do genocidal things? And I think Facebook would say, “we’re not encouraging, we’re just this neutral platform.”

Michael Scharf: So, just being neutral or negligent, as Rebecca was saying, or just not making the priority as Jen was saying, or not caring. That’s not enough, you actually have to want it, right?

Milena Stereo: I think that could maybe mean entail criminal responsibility for some kind of criminal negligence but it’s not enough for genocide.

Michael Scharf: We’ll ask Jen this, how long did it go on that after the NGOs told Facebook this was happening, that Facebook continued to ignore the problem?

Jen Domino: To my recollection, they started alerting Facebook as early as 2011, and it was only in 2018 when they started to roll out all these initiatives to improve their content moderation, there.⁶⁵

Michael Scharf: At some point, doesn’t negligence, become some kind of *mens rea* that’s higher than intent?

63. Richard Ashby Wilson, *Inciting Genocide with Words*, 36 MICH. J. INT’L L. 277, 289–90 (2015).

64. *Id.* at 292.

65. Matthew Ingram, *Facebook Slammed by UN for its Role in Myanmar Genocide*, COLUMBIA JOURNALISM REV. (Nov. 8, 2018), https://www.cjr.org/the_media_today/facebook-un-myanmar-genocide.php [<https://perma.cc/44P8-966J>].

Milena Stereo: Intent is the highest in criminal law, and in international criminal law extremely difficult to prove.⁶⁶ And so as much as I think that there is criminal negligence on behalf of Facebook or a platform that is similar, I don't think that there is genocidal intent to incite violence.⁶⁷

Michael Scharf: Alright, so, and this is interesting. You could prosecute incitement for some other crime of violence other than genocide where depraved heart would be enough, right?

Milena Stereo: If it's a lower mens rea-

Michael Scharf: But it's because genocide has the highest level of intent that it's so hard to prosecute.⁶⁸

Milena Stereo: Yeah, remember the German publisher at the Nuremberg Tribunal was prosecuted at the time as a crime against humanity, not as genocide, so there isn't the same level of strict intent required.⁶⁹

Michael Scharf: Alright, now let me switch back over to Ambassador Todd Buchwald. What do you think the lessons are for Facebook related to the atrocities of the Rohingya people in Burma.

Todd Buchwald: Right. The thing with the social media companies is the control that the publisher as opposed to newspapers that control the publisher has over the content is more remote. But I do think we have to find ways to incentivize social media to be more vigilant. That's clearly what has to happen here, and if it doesn't, the law will catch up on the intent issues over time because it sort of can't go on this way. More broadly, I think that the issue of whether the incitement or whatever it is, to genocide shouldn't depend so much on whether it's genocide or not genocide. It just really doesn't matter. There is a facilitation of horrible atrocities and it's a mistake to put too much emphasis on the horror we feel based on whether that word does or does not fit the legal definition that's in the 1948 Genocide Convention.⁷⁰

66. MOHAMED ELEWA BADAR, *THE CONCEPT OF MENS REA IN INTERNATIONAL CRIMINAL LAW: THE CASE FOR A UNIFIED APPROACH* 412–14 (Hart Publishing, 2013).

67. *See generally* Wilson, *supra* note 63, at 280–81.

68. *Id.*

69. Eastwood, *supra* note 60, at 31.

70. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 20, art. II.

Michael Scharf: So, Ambassador when we were talking earlier about the State Department's reluctance to use what I call the "G word," it seems that most of that is political.⁷¹ The genocide word has this political power that crimes against humanity doesn't have. What you're saying is a person convicted of crimes against humanity can spend as much time in jail, and it's considered an equally bad crime.⁷²

Todd Buchwald: ... Equally has to be stopped, whether it's equally... But those are... Those are questions that, in a way, don't matter. I mean, they matter to victims, they have a certain intrinsic importance, but the ultimate thing is that we have to orient our policy to prevent these things from happening. By the time there's a serious question about whether a set of crimes constitutes genocide, it might or might not constitute genocide, but it's of a severity that warrants the kind of vigorous response that shouldn't depend on whether the word applies as a technical matter, or not. When the State Department goes through the process of deciding to say genocide there is historically, a certain reluctance, but there's historically also a difficulty with the definition. The definition has its own idiosyncrasies that have to be met that are difficult to meet.⁷³ And if you look at the international court cases, it's difficult to show genocide. My point is, don't let the naming of the crime have to occur before we're going to take steps to prevent it.

Michael Scharf: Let's just say this crime is murder. Mass murder.

Todd Buchwald: Yeah.

Michael Scharf: And it is being committed by using Facebook as an instrument for inciting it and the owners of Facebook may have been so negligent that it is a level of negligence that is depraved heart, that could be incitement for murder, not genocide but murder. Why didn't the U.S. take any action against Facebook? Could it?

Todd Buchwald: I'm not sure that anyone in the U.S. Government made the determination about Facebook's motivations that you just made. Actually, I don't really know anything about the motivation to the particular sites.

Michael Scharf: Let's ask our experts Rebecca and Jen. Did anybody in the U.S. government make those kinds of determinations?

Jen Domino: Not to my knowledge, yeah.

71. Buchwald & Keith, *supra* note 21, at 6.

72. *Id.*

73. *Id.*

Rebecca Hamilton: This has not come before the U.S. government in the way that you've presented it. And I also was going to add, I'm not sure that criminal law is the best fit for thinking about Facebook's responsibility here.⁷⁴

Jen Domino: I agree with her on that.

Michael Scharf: Okay, so then what would be...

Rebecca Hamilton: I mean, I think civil liability. It's an interesting-

Michael Scharf: So somebody could sue Facebook?

Rebecca Hamilton: Right, and in ways that no matter where you ended up with the suit, perhaps it would incentivize Facebook looking forward as they go into other markets to be really sure that they have the cultural competence to understand how their platform might be used in that market.⁷⁵

Michael Scharf: Did anybody bring such a suit?

Jen Domino: No, not yet, but that's the problem. So, just to support what Rebecca said, the problem, there's an obsession now with conceptualizing harm in terms of criminal law that in other discourses such civil liability are eclipsed. And so the problem is under international law, there's no equivalent tort that could somehow conceptualize the harm that companies like Facebook, exercise on the global stage.⁷⁶

Rebecca Hamilton: And just to be clear, I think there's absolutely a crucial International Criminal Law conversation to be had around this situation for the individual perpetrators of the genocide, but that may not be the right fit, and I personally don't think it is the right fit, for where Facebook sits within this landscape.⁷⁷

74. Oona A. Hathaway et al., *What Is A War Crime?*, 44 YALE J. INT'L L. 53, 75 (2019).

75. Ingrid Burrington, *Could Facebook Be Tried For Human-Rights Abuses?*, THE ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/technology/archive/2017/12/could-facebook-be-tried-for-war-crimes/548639/> [https://perma.cc/8NGM-N2ES].

76. *Id.*

77. Jordan J. Paust, *The Need for New U.S. Legislation for Prosecution of Genocide and Other Crimes Against Humanity*, 33 VT. L. REV. 717, 717 (2009).

Michael Scharf: Okay, well, it is time for another short break and we will have that conversation here, on Talking Foreign Policy when we return back in a moment.

BREAK

Michael Scharf: This is Michael Scharf and we're back with Talking Foreign Policy. I'm joined today by some of the world's foremost international law and human rights experts, and we've been talking about the genocide of the Rohingya people in Burma. In this final segment of our broadcast, we'll look at efforts to bring the perpetrators of some of the worst atrocities seen in years to justice. Let's begin with Dr. Paul Williams. Paul, can you tell us what, if any, efforts are currently ongoing to pave the way for accountability for these atrocity crimes in Burma?

Paul Williams: Well Michael, I'm almost certain that in the very near future we will have some degree of accountability because there are intense efforts to hold those responsible at the military and at the political level for these atrocities that have been committed against the Rohingya. The UN Human Rights Council has a commission of inquiry, which has been very active, and recently issued yet another report finding not only that genocide had occurred but that there are 600,000 Rohingya still in Burma living under the threat of genocide.⁷⁸ There's also increased domestic documentation in the refugee camps themselves. The Rohingya are themselves learning how to use social media and other tools to document what has happened to them and what is an ongoing crisis and an ongoing crime.⁷⁹ And the Bangladesh government was very clever in finding a way of getting this case before the International Criminal Court.⁸⁰ Now there's a narrow jurisdictional ban but we can come back to that and then finally there is something called the Independent International Mechanism for Myanmar which is

78. *Myanmar's Rohingya Persecuted, Living under Threat of Genocide*, UN Experts Say, OHCHR (Sept. 16, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24991&LangID=E> [<https://perma.cc/E4UF-2W3D>].

79. See, e.g., Laignee Barron, *Meet the Woman Documenting Sexual Violence Against Myanmar's Rohingya*, TIME (Mar. 27, 2019), <https://time.com/5559388/razia-sultana-rohingya-myanmar-sexual-violence-documentation/> [<https://perma.cc/2HZ2-4U9H>].

80. Michael Safi, *ICC Says it can Prosecute Myanmar for Alleged Rohingya Crimes*, THE GUARDIAN (Sept. 6, 2018), <https://www.theguardian.com/world/2018/sep/06/icc-says-it-can-prosecute-myanmar-for-alleged-rohingya-crimes> [<https://perma.cc/GWT2-6GLV>].

gathering evidence and preparing cases that could then be picked up by an international court, hybrid tribunal, or domestic prosecutions.⁸¹

Michael Scharf: And what's interesting to me about the description of all the players that you just gave us- none of them were created by the UN Security Council. And I want to go back to Ambassador Buchwald. You were at the State Department during the creation of the special investigative commission by the Security Council for the Former Yugoslavia. You were there when they created a special commission to investigate Rwanda. Why is the Security Council not involved in the creation of these mechanisms for Burma?

Todd Buchwald: There's clearly not enough consensus within the Security Council to make it happen and I think as the United States and other permanent members of the Security Council chart a Security Council policy going forward they need to take account of the fact that if they're not willing to act, the playing field will shift to other bodies.

Michael Scharf: Is there a country that is threatening the veto? I mean, you're being very diplomatic, what's really going on?

Todd Buchwald: It's very hard to get consensus from the Russians and the Chinese⁸² and this administration if you sort of think about possible scenarios, including a referral by the Security Council to the International Criminal Court, it's hard to imagine this administration in support.

Michael Scharf: But looking at the situation in Syria as a comparison, it was Russia that blocked any investigative Commission from being created for Syria through a veto is that right?⁸³

Todd Buchwald: It was Russia and China.⁸⁴

81. Williams & Levy, *supra* note 22.

82. Michelle Nicholes, *U.N. Security Council Mulls Myanmar Action; Russia, China Boycott Talks*, REUTERS (Dec. 17, 2018), <https://www.reuters.com/article/us-myanmar-rohingya-un/u-n-security-council-mulls-myanmar-action-russia-china-boycott-talks-idUSKBN1OG2CJ> [<https://perma.cc/R2XQ-K3D9>].

83. Associated Press, *Russia and China Veto UN Resolution Against Syrian Regime*, THE GUARDIAN (Oct. 4, 2011), <https://www.theguardian.com/world/2011/oct/05/russia-china-veto-syria-resolution> [<https://perma.cc/VU3X-GS8P>].

84. *Id.*

Michael Scharf: Okay and then in that case I think that was the first time in modern times the General Assembly decided to create the Commission the triple-I-M it's called.⁸⁵ And now it's the Human Rights Council that's creating the double-I double-M.⁸⁶ If you're in this area they have initials for everything, but Paul just explained to us what that stood for. And you're describing that, Ambassador, as a shift of power away from the Security Council.

Todd Buchwald: And a consequence of the Security Council not stepping up to the plate. If in a big international system if an important player isn't doing what's needed, other mechanisms, other vehicles, will be found to sort of make those things happen. To put pressure on those other vehicles. And the General Assembly does not have the power to make legally binding decisions like the Security Council has, but the pressure will be inexorable for the other bodies in the multilateral assessment to sort of find ways to deal with these issues.

Michael Scharf: And what's interesting about the double-I double-M, that's the Independent Investigative Mechanism for Myanmar, is that it is mandated to prepare criminal cases. Isn't that right?⁸⁷

Todd Buchwald: Yes.

Michael Scharf: Which is an unusual thing for one of these bodies coming out of the Human Rights Council?

Todd Buchwald: It's coming out of Human Rights Council but it's sort of modeled on the Syria example and the idea is to move from a human rights information collecting oriented body, like the fact-finding mission, to a body whose purpose is to develop sort of evidence and quality input for what would eventually be a criminal trial.⁸⁸ Notwithstanding that we don't know exactly where that criminal trial will ultimately be held, whether it be in future Myanmar or a third country or in the International Criminal Court but the idea of getting the case files ready is an important step.

85. *Syria: UN Approves Mechanism to Lay Groundwork for Investigations into Possible War Crimes*, UN NEWS (Dec. 22, 2016), <https://news.un.org/en/story/2016/12/548392-syria-un-approves-mechanism-lay-groundwork-investigations-possible-war-crimes> [<https://perma.cc/DG4M-DV5H>].

86. H.R.C. Res. 39/2, U.N. Doc. A/HRC/39/L.22, at 22 (Sep. 25, 2018).

87. *Id.*

88. *Id.*

Michael Scharf: Now Paul, you mentioned that the Human Rights Council had a previous investigative body that was a very public investigation. Is the double-I double-M a private secretive investigation?

Paul Williams: Well the Independent Investigative Mechanism for Myanmar is designed to prepare the actual cases, the profile so to speak, that could be picked up by some type of prosecutorial mechanism so you won't see a lot of release of information or of reports.⁸⁹ This will be something that the International Criminal Court or another state which is invoking universal jurisdiction, which Milena is an expert in, if they want to prosecute a general or a political leader for their responsibility in this genocide or these crimes against humanity, they can request that file.⁹⁰

Michael Scharf: You know a theme that often comes up in international laws is the principle of unintended consequences. Is it possible that an unintended consequence of creating this new mechanism is that there is now an information gap for public information and public pressure on Burma during this period of time?

Paul Williams: There's a risk of that, that's why I think it's hugely important to continue the documentation efforts and in particular to empower Rohingya NGOs, non-governmental organizations, to do their own documentation and to keep that flow of information which meets or aspires to meet international standards that can then be used as information or as evidence to keep that going because that's part of the victim catharsis process as well as laying the foundation for eventual accountability.

Michael Scharf: Now you spoke of the International Criminal Court, Ambassador Buchwald mentioned it, the International Criminal Court only has jurisdiction over the state parties when their nationals commit crimes or when crimes are committed in their territory.⁹¹ In this case the nationals who are being accused are Burmese and Burma is not a state party.⁹² So let me turn to Rebecca Hamilton. You previously served as a prosecutor at the International Criminal Court in The Hague. The ICC recently opened an investigation into the

89. Williams & Levy, *supra* note 22.

90. *Id.*

91. *How the Court Works*, ICC, <https://www.icc-cpi.int/about/how-the-court-works> [<https://perma.cc/8BHS-DNG2>].

92. *The State Parties to the Rome Statute*, ICC, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx [<https://perma.cc/5X35-FEM8>].

Rohingya situation and it was confirmed by the Pre-trial Chamber.⁹³ How is that possible given what I just said and what hurdles does the ICC face in prosecuting this case?

Rebecca Hamilton: Yeah, so the Court has said that the prosecutor can start to open an investigation and they've done this on what is an unusual theory that the prosecutor presented to the court which is that because Bangladesh, neighboring to Myanmar, is a party to the court and because some of the crimes, in particular forcible deportation or displacement of the Rohingya, are not completed until those populations are moved onto the territory of Bangladesh, that therefore the court can get jurisdiction over those crimes.⁹⁴ So we're not talking about the whole range of crimes that have been committed against the Rohingya but those where an element of the crime was committed on the territory of Bangladesh.⁹⁵

Michael Scharf: So this may be a little technical but forcible deportation is that part of the crime against humanity, of persecution, or is it part of genocide?

Rebecca Hamilton: Yes it's a crime against humanity⁹⁶ and that is what the case looks like it will go forward on but we haven't yet seen what that full case is going to look like.

Michael Scharf: What's your guess about how likely this would lead to a successful prosecution?

Rebecca Hamilton: So I think the crime base is clearly there from the documentation work that we've been discussing, that the fact-finding mission has done, that Paul's organization has done. The question, the challenge always with these prosecutions is, do you have the linkage evidence to tie this to an individual perpetrator when, as you highlighted, that perpetrator is going to be someone Burmese who is inside Myanmar? And the Myanmar government obviously has no interest in seeing accountability for these crimes.⁹⁷

93. *ICC Green-Lights Probe into Violent Crimes against Rohingya*, UN NEWS (Nov. 15, 2019), <https://news.un.org/en/story/2019/11/1051451> [<https://perma.cc/625W-ANZF>].

94. Safi, *supra* note 80.

95. *Id.*

96. *Crimes Against Humanity*, TRIAL INT'L, <https://trialinternational.org/topics-post/crimes-against-humanity/> [<https://perma.cc/4UXL-FRZS>]

97. Steve Sandford, *Rohingya End Hard Year Still in Limbo*, VOICE OF AMERICA (Dec. 26, 2018), <https://www.voanews.com/east-asia->

Michael Scharf: Paul, in your report did you name any names?

Paul Williams: We did not publicly name any names in our report.⁹⁸ As part of our collection of information and data, plenty of information was provided about the various units that were engaged in these types of activities.⁹⁹ We had a number of former military personnel who had done similar types of investigations before as part of our investigative team and they asked the questions with that in mind thinking specifically of command and control.¹⁰⁰ If you identify the unit and then you could track back the orders to see who the generals were that were either directing or aiding and abetting or complicit in this genocide.

Michael Scharf: So Milena Sterio, what would you add to this?

Milena Sterio: Sure, so I think that this is a very interesting case. I think it will definitely be a difficult case for the Prosecutor. I don't think it's impossible but I think it will be difficult. And as Rebecca mentioned I think the key is going to be the linkage evidence and the key might also be which individual the ICC actually indicts if there's a person indicted. Some of the recent cases at the ICC have demonstrated that it is really difficult to start at the top. That it is really difficult to start with the indictment of the President, Prime Minister, Foreign Minister. That it might be easier to start with the mid-level commander and that evidence might be easier to gather. And then as Rebecca mentioned the biggest problem is going to be that the government of Myanmar is not likely to cooperate at all. The government of Bangladesh is, but the linkage evidence is certainly not going to be in Bangladesh, it is going to be within the Myanmar government.

Michael Scharf: So as you've been describing it, because of the limits of the International Criminal Court, this cannot be a genocide case. Is it worthwhile for the United States or other countries to try to pursue a genocide prosecution in some other forum maybe using universal jurisdiction as Paul mentioned earlier anybody?

Milena Sterio: Well Michael, different countries around the world have universal jurisdiction statutes but for the most part universal

pacific/rohingya-end-hard-year-still-limbo [https://perma.cc/2J2M-GJXR].

98. See generally Williams & Levy, *supra* note 22.

99. *Id.*

100. *Id.*

jurisdiction prosecutions tend to be quite unpopular.¹⁰¹ They're seen by many as a waste of that country's resources, court time, if you're prosecuting someone who, yes, maybe committed horrible things in Myanmar and Bangladesh but has no connection to your country. And so as of now I don't really see the political will anywhere to have a national level prosecution. The question might be if there's some kind of a hybrid or mixed tribunal set up in the near future you know and we have seen those in Sierra Leone and in other countries.¹⁰²

Michael Scharf: Now Syria is a situation that is quite different than how you described and in part that's because there are refugees both victims and high-level perpetrators that have found themselves in France and in Germany and in other countries in Europe and they are prosecuting those people under universal jurisdiction.¹⁰³

Milena Sterio: Yes Michael, there's a universal jurisdiction case that just recently began in Germany where there's a Syrian national who's being prosecuted in Germany under universal jurisdiction but the difference there is that that person was actually in Germany already and was arrested in Germany.¹⁰⁴ As you said there's a large number of Syrian refugees in Germany or other European countries and so that's quite different than a situation where you know most of the Rohingya refugees are in Bangladesh or somewhere else.

Michael Scharf: At the end of our second segment, Rebecca Hamilton, you were suggesting that maybe prosecutions are not the best way to handle this or at least people should start thinking about civil suits. Where do you see that going?

Rebecca Hamilton: So just to clarify, my position is not that with respect to the perpetrators of genocide but when we are talking

101. *See generally Basic Facts on Universal Jurisdiction*, HUM. RTS. WATCH (Oct. 19, 2009), <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction> [<https://perma.cc/85LC-QKKF>].

102. *The Special Court for Sierra Leone*, HUM. RTS. WATCH (Apr. 11, 2012), <https://www.hrw.org/news/2012/04/11/special-court-sierra-leone> [<https://perma.cc/7R3P-DE6Y>].

103. *Justice for Syria in Swedish and German Courts*, HUM. RTS. WATCH (Oct. 3, 2017), <https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts> [<https://perma.cc/8S74-Y724>].

104. Cathrin Schaer, *Prosecuting Syrian War-Crimes Suspect from Berlin*, ATLANTIC (July 31, 2019), <https://www.theatlantic.com/international/archive/2019/07/can-germany-convict-syrian-war-criminals/595054/> [<https://perma.cc/F2CK-NTAZ>].

about a company like Facebook that has facilitated the commission of these crimes.¹⁰⁵ I don't think intentionally either but that's where I see a role for civil liability coming into play. And I think there is a risk that we're seeing played out in every country in the world that whenever horrible things happen we think oh we've got to turn to the International Criminal Court and I think we need to make sure that we have space for other forms of liability as well.

Paul Williams: I would just agree with Rebecca and follow up on that that as a nation we have to decide and as a government whether we're serious or not about the fact that genocide has been committed against the Rohingya, that there's a million refugees, and that there's you know the largest refugee camp has been created from this crisis.¹⁰⁶ And you know we have an American company Facebook which is complicit in or aiding and abetting this process.¹⁰⁷ We have very vested strategic interests in this part of the world.¹⁰⁸ We've been a leader in the past in creating these tribunals. We've got to just throw up our hands and say actually we don't care or if we do care we need to promote or need to pursue the civil avenues. We need to pursue the criminal avenues against the American companies that are engaged or supporting or allowing this to happen through their artificial intelligence algorithms and we need to put our shoulder behind the international mechanisms to hold these folks accountable. We can't sort of dabble around well it's a genocide, well it's complicated, and I think this panel has been very sort of assertive and aggressive about how there's a lot of avenues that we could be pursuing.

Michael Scharf: Let me play devil's advocate here. Paul, why should the United States and its people care about something that's going on way over there in Burma to some people that we've never even heard of before?

105. Paul Mozur, *A Genocide Incited on Facebook, With Posts from Myanmar's Military*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html> [<https://perma.cc/P776-6UFH>].

106. *Rohingya Crisis*, HUM. RTS. WATCH. (Aug. 25, 2019), <https://www.hrw.org/tag/rohingya-crisis> [<https://perma.cc/JL66-S449>].

107. 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/8YV5-WYCH>].

108. *See U.S. Relations with Burma*, U.S. DEP'T OF ST., <https://www.state.gov/u-s-relations-with-burma/> [<https://perma.cc/VDA4-PKHG>].

Paul Williams: Yeah, we just need to make that decision. We care or we don't care. Let's not pretend to care because then you create the false expectations, the false hope, and you undermine what the victims really need which is accountability and justice. So we're either going to be engaged and we're going to occupy the vacuum of stability and security around the globe or we're not and somebody else will. And we see what happens when we don't take the field and someone else does take the field. You see it in Burma. You see it in Syria.¹⁰⁹ You see it in Yemen.¹¹⁰

Michael Scharf: Now Ambassador Buchwald, it was your job to make people care right?

Todd Buchwald: I think we should care.

Michael Scharf: Why?

Todd Buchwald: I think it's a manifestation of our deepest values as a nation to care about people in a situation like this. It is unconscionable what's happening. And it may be far away but I think if the issue is explained to Americans, if they're aware of it, they do care. It's part of the deepest values of the country. And I don't think that we can have an effective foreign policy on human rights from a human rights orientation or from a security orientation that disregards it. It's inconceivable to me.

Rebecca Hamilton: We absolutely can and should make the values case for why we need to care but I think on top of that there's a very compelling self-interested case to make. We see this in Syria. When a terrible crime happens in a country, people flee and the impact of that migration is felt in countries around the world.¹¹¹ And so this idea that something is happening over there and therefore it doesn't concern us, that's just simply not viable in the world that we live in.

109. See generally *Syria Crisis: 8 Years of the Syrian War*, UNHCR, <https://www.unhcr.org/ph/campaigns/syria-crisis-8-years> [https://perma.cc/2HTG-WMJ3].

110. See generally *Yemen Crisis*, UNICEF, <https://www.unicef.org/emergencies/yemen-crisis> [https://perma.cc/DG6E-R7AQ].

111. Jon Stone, *Syrian Refugee Crisis: How Different Countries have Responded*, INDEPENDENT (Sep. 1, 2016), <https://www.independent.co.uk/news/uk/politics/syrian-refugee-crisis-how-different-countries-have-responded-france-lebanon-uk-a7220616.html> [https://perma.cc/39NW-SENP].

Michael Scharf: And Paul you were actually at the refugee camps, right?

Paul Williams: Yes in the refugee camps talking with the Rohingya.

Michael Scharf: Well what did that look like?

Paul Williams: It looked like the worst nightmare you can think of with a refugee camp. There were 900,000 people basically pushed into a very narrow band of territory with no services whatsoever other than what the UN had brought was able to bring in.¹¹²

Michael Scharf: Okay, so in my last minute I want to ask a really controversial and provocative question: the Prime Minister of Burma who won the Nobel Peace Prize and is seen as somebody who is a human rights advocate, she's just sitting there letting this happen.¹¹³ How is that possible? What are we to make of that, anyway?

Milena Sterio: I think again to go back to the definition of genocide, if you were to try to charge someone like her for genocide you'd have to prove that she had this special intent to destroy in whole or in part the Rohingya group. And so unless you can find, as Rebecca said the linkage evidence for that, that is really really hard to prosecute. You can't prosecute someone for omission to commit genocide. And so you know I think while she probably should face some kind of criminal liability, I'm not sure that the International Criminal Court would be the best institution as of now to prosecute someone like her.

Michael Scharf: So international responsibility aside, should we be very unhappy with her? Does she have any moral responsibility here?

Todd Buchwald: We should be very unhappy, yes we should, and she has a certain position, the civilian control over the military is not a concept there, but she doesn't stand up and she doesn't sort of add a moral voice to the extent that it needs to be. And I think if nothing else it's important to keep both legal and political pressure on her to do what she can to be a counterweight. She does carry a sort of moral authority in the world and she needs to use it.

112. See Williams & Levy, *supra* note 22.

113. Hannah Ellis-Petersen, *From Peace Icon to Pariah: Aung San Suu Kyi's Fall from Grace*, GUARDIAN (Nov. 23, 2018), <https://www.theguardian.com/world/2018/nov/23/aung-san-suu-kyi-fall-from-grace-myanmar> [<https://perma.cc/SFT4-4HBY>].

Michael Scharf: All right, now that gives us a lot to think about. Our producer is indicating that it's time to wrap up our program. This has gone way too fast but Paul Williams, Malena Stereo, Todd Buchwald, Jen Domino, and Rebecca Hamilton thank you all so much for providing your insights on the crisis in Burma. I'm Michael Scharf, you've been listening to Talking Foreign Policy.

END OF BROADCAST AS PUBLISHED

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