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### Platform-Enabled Crimes: Pluralizing Accountability When Social Media Companies Enable Perpetrators to Commit Atrocities

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# PLATFORM-ENABLED CRIMES: PLURALIZING ACCOUNTABILITY WHEN SOCIAL MEDIA COMPANIES ENABLE PERPETRATORS TO COMMIT ATROCITIES

REBECCA J. HAMILTON

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# PLATFORM-ENABLED CRIMES: PLURALIZING ACCOUNTABILITY WHEN SOCIAL MEDIA COMPANIES ENABLE PERPETRATORS TO COMMIT ATROCITIES

REBECCA J. HAMILTON\*

**Abstract:** Online intermediaries are omnipresent. Each day across the globe, the corporations running these platforms execute policies and practices that serve their profit model, typically by sustaining user engagement. Sometimes, these seemingly banal business activities enable principal perpetrators to commit crimes. Online intermediaries, however, are almost never held to account for their complicity in the resulting harms. This Article introduces the concept of platform-enabled crimes into the legal literature to highlight the ways in which the ordinary business activities of online intermediaries enable the commission of crime. It then focuses on a subset of platform-enabled crimes—those in which a social media company has facilitated international crimes—to understand the accountability gap associated with them. Further, this Article begins the work of addressing the accountability deficit for platform-enabled crimes by adopting a survivor-centered methodology and using the complicity of Facebook (now Meta) in the Rohingya genocide in Myanmar as a case study. It advances a menu of options that survivors, prosecutors, and legislators could pursue in parallel, including amending domestic legislation, strengthening transnational cooperation between international and domestic prosecutors for criminal and civil corporate liability cases, and regulatory action. The Article concludes by acknowledging that no single body of law is equipped to respond to the advent of platform-enabled crimes. By pursuing a plurality of proactive options, however, we can make a vast improvement on the status quo.

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\* Associate Professor of Law, American University, Washington College of Law. Sincere thanks to Diane Marie Amann, Hannah Bloch-Weber, Pamela Bookman, Jay Butler, Elena Chachko, Kathleen Claussen, Danielle Citron, Harlan Cohen, Lori Damrosch, Melissa Durkee, Kristen Eichensehr, Randle DeFalco, Andrew Ferguson, Mary Anne Franks, Maggie Gardner, Rebecca Ingber, Thomas Kadri, Chimène Keitner, Kate Klonick Steve Koh, Ryan Liss, Margaret McGuinness, Yvonne McDermott Rees, Barrie Sander, Aaron Simowitz, and Melissa Stewart, as well as the Junior Tech Scholars Forum. I am also indebted to stellar research assistance from Angela Gerrits, Madison Bingle, and Karen Reitan. Finally, my gratitude for the detailed and thoughtful editing from the *Boston College Law Review* team. All errors are, of course, my own. This Article is dedicated to the Class of 2023 in law schools across the country. Your resolve in undertaking 1L in the midst of a global pandemic suggests you are more than up to the challenge of re-imagining our legal architecture to reflect the challenges of the coming era.

## INTRODUCTION

*“We connect people. That can be good if they make it positive. Maybe someone finds love. . . . That can be bad if they make it negative. . . . Maybe someone dies . . . . And we still connect people.”*

—Facebook Vice President, Andrew “Boz” Bosworth, June 18, 2016.<sup>1</sup>

In 2011, as Myanmar began to transition (temporarily) from fifty years of military rule, the U.S.-based social media company, Facebook (now Meta), saw a market opportunity.<sup>2</sup> Meta’s launch of Facebook in the Southeast Asian nation of Myanmar quickly provided the platform a monopoly over the social media content of Myanmar citizens. Myanmar’s military, the Tatmadaw, saw an opportunity too. The Tatmadaw used Facebook to run a program that created scores of fake user profiles, attracting millions of followers.<sup>3</sup> Posing as followers of celebrities and other cultural icons, military personnel then created troll accounts to wage a successful propaganda campaign against the country’s minority Muslim population, the Rohingya.<sup>4</sup> Facebook in Myanmar was flooded with posts dehumanizing the Rohingya as “dogs” and “maggots” who must be “exterminated.”<sup>5</sup>

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<sup>1</sup> Ryan Mac, Charlie Warzel & Alex Kantrowitz, *Growth at Any Cost: Top Facebook Executive Defended Data Collection in 2016 Memo—And Warned That Facebook Could Get People Killed*, BUZZFEED NEWS (Mar. 29, 2018), <https://www.buzzfeednews.com/article/ryanmac/growth-at-any-cost-top-facebook-executive-defended-data> [<https://perma.cc/HC8P-SSJ9>]. Andrew Bosworth wrote the memo as an internal document, circulated among Facebook employees, describing the good, the bad, and the ugly of Facebook’s mission to connect people. *Id.* Upon the release of the memo, Bosworth issued a statement expressing his disagreement with his memo and explaining that he wrote it to “bring to the surface issues [he] felt deserved more discussion with the broader company.” See Sheera Frenkel & Nellie Bowles, *Facebook Employees in an Uproar Over Executive’s Leaked Memo*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/2018/03/30/technology/facebook-leaked-memo.html> [<https://perma.cc/9BCL-AFAC>] (quoting Andrew Bosworth).

<sup>2</sup> Previously, Facebook was the name of both the social media corporation and the name of its platform. Now Meta is the name of the corporation and Facebook is the name of its platform. This Article uses this current terminology to reflect the corporation/platform distinction. However, because I draw on sources from before the name change took effect, some quotes in the Article still use Facebook to refer to the corporation. The reader’s patience with this complication is much appreciated!

<sup>3</sup> 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/H7C9-64AC>].

<sup>4</sup> *Id.* Troll accounts are fake user accounts set up to create conflict and/or spread disinformation.

<sup>5</sup> Steve Stecklow, *Hatebook: Inside Facebook’s Myanmar Operation. 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/> [<https://perma.cc/T22V-4UDC>].

The Tatmadaw used Facebook to spread hate and incite atrocities against the Rohingya in a context where “Facebook is the Internet.”<sup>6</sup> As a result of the post-dictatorship environment and lack of independent news media, Myanmar users relied on Facebook to research information the same way that Western internet users perform Google searches.<sup>7</sup> The combination of such user reliance and Tatmadaw influence meant that the world the Tatmadaw created through Facebook was the world that users in Myanmar saw.<sup>8</sup> Although persecution of the Rohingya existed long before Facebook’s entrance into Myanmar, the breadth of the platform’s reach in Myanmar, coupled with an algorithmically-curated newsfeed primed for user engagement with extremist content, pushed incitement against the Rohingya to a new level.<sup>9</sup>

Facebook enabled the Tatmadaw to build overwhelming domestic support for what would become a genocidal campaign. In the course of just one month in 2017, the Tatmadaw and their civilian supporters killed an estimated 6,700–9,800 Rohingya, including 730 children younger than five.<sup>10</sup> The Tatmadaw’s systematic destruction of Rohingya villages amidst campaigns of sexual violence and torture forcibly displaced hundreds of thousands of others.<sup>11</sup> Facebook’s policies and practices enabled the speed and scale at which these atrocities occurred.<sup>12</sup> Yet, no course of legal action—at the domestic or international level—is able to account properly for Meta’s complicity in these crimes. This Article seeks to understand and address this accountability deficit.

This Article addresses accountability for social media companies that enable international crimes.<sup>13</sup> The accountability gap identified here is not unique

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<sup>6</sup> Hum. Rts. Council, Rep. of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, U.N. Doc. A/HRC/39/CRP.2, at 340–41 (2018) [hereinafter IFFMM Report].

<sup>7</sup> Lorian Leong, *Mobile Myanmar: The Development of a Mobile App Culture in Yangon*, 5 MOBILE MEDIA & COMM’N 139, 152 (2017).

<sup>8</sup> See *id.* (describing how interviewees identified Facebook as their central source of information).

<sup>9</sup> See, e.g., Karen Hao, *The Facebook Whistleblower Says Its Algorithms Are Dangerous. Here’s Why*, MIT TECH. REV. (Oct. 5, 2021), <https://www.technologyreview.com/2021/10/05/1036519/facebook-whistleblower-frances-haugen-algorithms/> [<https://perma.cc/AKU9-KUSN>] (explaining how Facebook’s “machine-learning models that maximize engagement . . . [through] controversy, misinformation, and extremism” allowed for “viral fake news and hate speech about the Rohingya Muslim minority [to] escalate[] the country’s religious conflict into a full-blown genocide”).

<sup>10</sup> See IFFMM Report, *supra* note 6, at 242.

<sup>11</sup> See *id.* at 377–79.

<sup>12</sup> See BUS. FOR SOC. RESP., HUMAN RIGHTS IMPACT ASSESSMENT: FACEBOOK IN MYANMAR 24 (2018), [https://about.fb.com/wp-content/uploads/2018/11/bsr-facebook-myanmar-hria\\_final.pdf](https://about.fb.com/wp-content/uploads/2018/11/bsr-facebook-myanmar-hria_final.pdf) [<https://perma.cc/FF5U-ML7Q>] (noting that in relation to its role in the Rohingya genocide, “Facebook has become a useful platform for those seeking to incite violence and cause offline harm”).

<sup>13</sup> For the purposes of this Article I use the term “international crimes” as shorthand for genocide, war crimes, and crimes against humanity. I will use the term “atrocities” or “atrocious crimes” for the same purpose. These general terms incorporate the specific acts that constitute international crimes, such as killing, rape, and torture.

to situations involving Facebook, nor is it confined to situations involving social media companies or other online intermediaries. It is a deficit that exists in varying degrees for corporate enablers of crime more generally. The greatest accountability deficits, however, persist in spaces where corporate complicity in crime is least visible or where, even when visible, it is overlooked for seeming “banality.”<sup>14</sup>

In 1939, criminologist Edwin Sutherland used his Presidential Address before the Annual Meeting of the American Sociological Association to introduce the concept of white-collar crime.<sup>15</sup> He explained to his audience that economists are familiar with business processes, but are not used to thinking about them from the perspective of crime.<sup>16</sup> Sutherland acknowledged that white-collar crime was “not ordinarily called crime, and [that] calling it by this name does not make it worse, just as refraining from calling it crime does not make it better.”<sup>17</sup> He nonetheless advocated for the concept in the belief that it would open up the corporate world to scrutiny by criminologists.<sup>18</sup>

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<sup>14</sup> This Article uses the term “banality” to describe the ordinary business activities of online intermediaries that can result in platform-enabled crimes. In so doing, this Article echoes the way in which Hannah Arendt, to such infamy, used the term “banality” in describing the bureaucratic systems through which Nazi war criminal Adolf Eichmann worked. This Article does not intend the analogy as a direct one. Rather, the analogy acknowledges that policies and practices of the social media companies that facilitate platform-enabled crimes do not require traditionally understood *criminality*, so much as sheer thoughtlessness. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 278 (1963).

<sup>15</sup> Edwin H. Sutherland, President, Am. Socio. Soc’y, White Collar Criminality, Thirty-Fourth Annual Presidential Address of the American Sociological Society (Dec. 27, 1939), in 5 AM. SOCIO. REV. 1, 1 (1940).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 5.

<sup>18</sup> *Id.* I am indebted to Jenny Domino for crystalizing my thinking on the role that the label of “crime” serves in relation to platform-enabled crimes. Domino is one of the few legal scholars to have devoted extensive treatment of social media companies’ roles in connection to direct perpetrators’ incitement of violence. See generally Jenny Domino, *Crime as Cognitive Constraint: Facebook’s Role in Myanmar’s Incitement Landscape and the Promise of International Tort Liability*, 52 CASE W. RESV. J. INT’L L. 143 (2020). In *Crime as Cognitive Constraint*, Domino argues that “the language of crime can limit our conceptual thinking of harm” because the existing criminal law framework, at least with respect to international criminal law, cannot readily account for the contribution that online intermediaries make to the end-result crime. *Id.* at 149. Domino worries that by invoking the language of crime we limit our thinking about liability to an ill-fitting criminal law framework. *Id.* Echoing Domino, a criminal law framework should not limit the responses available for platform-enabled crimes. Indeed, a core tenet of this Article promotes a survivor-centered approach to the accountability landscape to pluralize the legal responses under consideration beyond the dominant international criminal law framework that both Domino and I critique. This Article diverges from Domino in arguing that the language of crime helpfully *expands* rather than *limits* the understanding of and response to the actions of online intermediaries in this space. Following Sutherland’s lead, the language of crime raises the visibility of actions that are otherwise overlooked. Sutherland, *supra* note 15, at 5. It does not, however, necessarily dictate the form of our response to those actions. Indeed, there are a range of

Strands of Sutherland's argument can be seen throughout criminological scholarship. For example, labeling theory explains how the law constructs certain actors and activities as remarkable and deserving of a label, making those activities—and those who do them—both deviant and highly visible.<sup>19</sup>

The observations of labeling theory have been critiqued, extended, and transposed into contemporary spaces.<sup>20</sup> For instance, Zinaida Miller has highlighted the way in which entire justice processes have encouraged responsibility and acknowledgement while delicately demarcating which crimes are worthy of prosecution.<sup>21</sup> In other words, when legal processes emphasize certain actors and activities, they simultaneously render other actors and activities as ordinary, and thus less visible to the scrutiny of the law.<sup>22</sup> This insight, the in-

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legal responses—not only criminal, but also civil and regulatory—that exist today in relation to the broad category of white-collar crime to which Sutherland was so keen to draw attention.

<sup>19</sup> See, e.g., HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 9 (1963) (“[D]eviant behavior is behavior that people so label.” (first citing FRANK TANNENBAUM, *CRIME AND THE COMMUNITY* (1951); and then citing EDWIN M. LEMERT, *SOCIAL PATHOLOGY: A SYSTEMATIC APPROACH TO THE THEORY OF SOCIOPATHIC BEHAVIOR* (1951))).

<sup>20</sup> See, e.g., Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561, 595 (2002) (concluding, in relation to international criminal law, that “[b]y the decisions that are made by states to include some acts within the jurisdiction of new institutions to try individuals, some other acts and responsibilities are excluded”); see also Brian K. Payne, Brittany Hawkins & Chunsheng Xin, *Using Labeling Theory as a Guide to Examine the Patterns, Characteristics, and Sanctions Given to Cybercrimes*, 44 AM. J. CRIM. JUST. 230, 231–45 (exploring cybercrime through the lens of labeling theory).

<sup>21</sup> Zinaida Miller, *Temporal Governance: The Times of Transitional Justice*, 21 INT'L CRIM. L. REV. 848, 849 (2021). Of course, these same justice processes thereby delimit those wrongs which should not be recognized nor be subject to accountability. See *id.* (“[T]ransitional justice practices and discourse have often narrowed the past they deem central and the future they project.”). Tor Krever provides an excellent example of Marxist critical legal scholarship's critique of international criminal law's spotlight on individuals and resulting disregard for the role of international financial institutions in creating an environment conducive to violent conflict. See Tor Krever, *International Criminal Law: An Ideology Critique*, 26 LEIDEN J. INT'L L. 701, 701–23 (2013) (arguing that aspects of international criminal law “ignore[] the factors and forces . . . that shape or even help establish the environment from which such conflict and violence emanate”); see also Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377, 384 (2002) (noting how a fixation on crises in international law “leads us to concentrate on a single event . . . and often to miss the larger picture”).

<sup>22</sup> See generally Larissa van den Herik, *International Criminal Law as a Spotlight and Black Holes as Constituents of Legacy*, 110 AJIL UNBOUND 209, 210 (2016) (advancing ways in which to consider the International Criminal Tribunal for Rwanda's “legacy[] in a more balanced manner”). With respect to online intermediaries, the highly technical nature of platforms amplifies the opacity of their activities. Cyber-trespass laws further support this opacity by enabling online intermediaries to bar external actors from seeking to understand the inner workings of their platforms. Even in the past few years, as lawmakers have started to grasp the need to extend the reach of the law into the highly self-regulated platform economy, their efforts have seemed thwarted by a lack of technical sophistication. See, e.g., Shira Ovide, *Congress Doesn't Get Big Tech. By Design.*, N.Y. TIMES (July 29, 2020), <https://www.nytimes.com/2020/07/29/technology/congress-big-tech.html> [<https://perma.cc/8PSZ-XZ44>] (discussing how tech companies intentionally make their organizations difficult to compre-

escapable flipside of Sutherland's work, is crucial to understanding the accountability deficit for corporations implicated in platform-enabled crimes.

Drawing on Sutherland's insight from over eighty years ago, one way to begin countering the banality of the ordinary business activities of platforms is to identify these activities as problematic and worthy of legal scrutiny.<sup>23</sup> The first contribution of this Article seeks to do just that by introducing the concept of platform-enabled crimes into the legal literature.

Platform-enabled crimes refer not to crimes that online intermediaries directly commit, but instead to crimes that online intermediaries facilitate by conducting their core and otherwise unremarkable business activities. I flesh out the definition of platform-enabled crimes further in Part I.<sup>24</sup> It bears emphasizing at the outset: the term platform-enabled crime does not define a *new* crime, but is instead a concept that draws our attention to a platform's policies and practices that enable *others* to commit *existing* crimes. In this Article, the focus is on enabling existing international crimes, such as incitement to genocide. There is no principled reason, however, why the concept of a platform-enabled crime cannot be used to draw attention to the policies and practices that facilitate existing domestic crimes, such as stalking.<sup>25</sup>

Although the concept of a platform-enabled crime is novel, the notion that an entity may be liable for enabling the criminal actions of a third party is well

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hend); *see also* Thomas E. Kadri, *Platforms as Blackacres*, 68 UCLA L. REV. 1184, 1184 (describing the role of cyber-trespass laws in increasing the opacity of platform operations).

<sup>23</sup> *See supra* notes 5–8 and accompanying text (describing Facebook's actions in enabling genocide in Myanmar); *see also* van den Herik, *supra* note 22, at 210 (discussing how the “definitions and categories of responsibility” used by international criminal law ensure that “[f]acts and entities that cannot find a place within this architecture . . . remain outside the spotlight”).

<sup>24</sup> *See infra* notes 44–75 and accompanying text.

<sup>25</sup> *See infra* notes 44–75 and accompanying text. At the broadest level, platform-enabled crimes are those in which the ordinary business activities of an online intermediary, as demonstrated through its policies and practices, generate acts of omission or commission that enable direct perpetrators to commit their crimes. *See* Rebecca J. Hamilton, *State-Enabled Crimes*, 41 YALE J. INT'L L. 301, 307 (2016) (providing a parallel definition of state-enabled crimes). Readers will appreciate that platform-enabled crimes are a subset of corporate-enabled crimes. Descriptively, corporate-enabled crimes could be as useful as the term platform-enabled crimes in preserving the connection between the crime and corporate entity involved. This Article focuses on platform-enabled crimes, however, because its goal is not simply to describe this form of wrongdoing. Rather, its goal is also to catalyze a conversation about improving accountability in the aftermath of such crimes. The high degree of self-regulation permitted for social media companies—in addition to the exceptional immunities granted to U.S.-incorporated internet intermediaries under Section 230 of the U.S. Communications Decency Act (CDA)—makes the challenge of securing accountability for crimes enabled by social media companies more difficult than for crimes enabled by other types of corporations. 47 U.S.C. § 230; *see also* Michael J. Kelly, *Atrocities by Corporate Actors: A Historical Perspective*, 50 CASE W. RES. J. INT'L L. 49, 52–55 (2018) (recounting atrocities enabled by the Dutch East India Company in the seventeenth century). *See generally* Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses*, 24 HASTINGS INT'L & COMPAR. L. REV. 339 (2001) (providing insight on corporate complicity in international crimes).



settled in both tort and criminal law.<sup>26</sup> Because most platforms are not inherently dangerous, it would be unjust to impose a strict liability standard on them. Beyond this baseline, I purposely avoid *ex ante* specification of whether liability would require negligence, recklessness, or awareness. Such requirements vary across different bodies of law, and there is nothing essential to the concept of a platform-enabled crime to imply that accountability must be pursued through one body of law over another. Indeed, a core argument of this Article is that the survivors of platform-enabled crime should determine the form of accountability pursued.

As others have observed, “platform” is an unhelpfully vague term that covers a variety of technological services by an array of online intermediaries.<sup>27</sup> Still, the concept of platform-enabled crimes is useful to unify this imperfectly-defined realm of activity. It works to spotlight the policies and practices of any online intermediary that facilitates criminal harm.<sup>28</sup>

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<sup>26</sup> See 1 INT’L COMM’N OF JURISTS EXPERT LEGAL PANEL ON CORP. COMPLICITY IN INT’L CRIMES, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: FACING THE FACTS AND CHARTING A LEGAL PATH 8–16 (2008) [hereinafter INT’L COMM’N OF JURISTS EXPERT LEGAL PANEL, CORPORATE COMPLICITY VOL. 1], <https://www.icj.org/wp-content/uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf> [<https://perma.cc/SR4B-9QWD>] (providing a summary of a study of tort law across common-law jurisdictions and non-contractual law across civil law jurisdictions); see also Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1836–43 (2010) (summarizing case law on the “[t]ortious [e]nablement of [c]riminal [c]onduct”). See generally 2 INT’L COMM’N OF JURISTS EXPERT LEGAL PANEL ON CORP. COMPLICITY IN INT’L CRIMES, CORPORATE COMPLICITY & LEGAL ACCOUNTABILITY: CRIMINAL LAW AND INTERNATIONAL CRIMES (2008) (summarizing criminal law in relation to corporate complicity across domestic and international jurisdictions).

<sup>27</sup> See generally TARLETON GILLESPIE, *CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA* (2018); ROBYN CAPLAN, *CONTENT OR CONTEXT MODERATION? ARTISANAL, COMMUNITY-RELIANT, AND INDUSTRIAL APPROACHES* (2018), [https://datasociety.net/wp-content/uploads/2018/11/DS\\_Content\\_or\\_Context\\_Moderation.pdf](https://datasociety.net/wp-content/uploads/2018/11/DS_Content_or_Context_Moderation.pdf) [<https://perma.cc/G694-GU35>] (describing the wide range of platforms and differing approaches to content moderation).

<sup>28</sup> See DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 167–89 (2014) (outlining foundational work on what can be described as “platform-enabled crimes” in relation to the perpetration of domestic crimes); see also Citron, *supra* note 26, at 1816–17 (describing a range of online privacy torts that generate offline physical harm). See generally Diana Freed et al., “*A Stalker’s Paradise*”: *How Intimate Partner Abusers Exploit Technology* 1–13 (Proc. of the 2018 CHI Conf. on Hum. Factors in Computing Sys., Paper No. 667, 2018), <https://dl.acm.org/doi/pdf/10.1145/3173574.3174241> [<https://perma.cc/YDA8-2P2Z>] (describing the ways in which “abusers in intimate partner violence (IPV) contexts exploit technologies to . . . harm their victims”); Rosanna Bellini et al., “*So-Called Privacy Breeds Evil*”: *Narrative Justifications for Intimate Partner Surveillance in Online Forums*, PROC. ACM HUM.-COMPUT. INTERACTION, Dec. 2020, at art. 210 (noting that an increasing amount of literature indicates that “intimate partner abusers use digital technologies to surveil their partners”). For examples of how the concept of platform-enabled crimes can draw attention to corporate activities that are in contravention of the law, see CITRON, *supra*, at 25 (describing the accountability gap for online intermediaries that enable “cyber stalking [and] nonconsensual pornography”); Olivia Carville, *Airbnb Is Spending Millions of Dollars to Make Nightmares Go Away*, BLOOMBERG BUSINESSWEEK

Moving from the descriptive to the prescriptive, however, accountability pathways vary according to the nature of the crime enabled. For example, the pathways to accountability for domestic violence facilitated by a locally-run dating platform necessarily differ from the pathways to accountability for genocide facilitated by a social media company with operations across the globe. To understand and address the accountability gap for platform-enabled crimes one needs to move from the general to the specific. Mindful of this need for specificity, this Article focuses on the accountability deficit in relation to a subset of platform-enabled crimes: atrocities that foreign perpetrators commit against foreign victims, facilitated by U.S. social media companies.<sup>29</sup>

One reason to focus on this subset is that when platforms facilitate international crimes of grave concern to the global community, the lack of legal scrutiny of the ordinary business activities allowing such facilitation becomes particularly disturbing. Moreover, the space for this subset of platform-enabled crimes is growing rapidly as U.S. social media companies continue to expand, including into communities across the Global South.<sup>30</sup> The risk of enabling atrocities is particularly high for social media companies when they launch platforms into markets where they lack cultural competency. In such communities, the assumptions on which social media companies have built their plat-

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(June 15, 2021), <https://www.bloomberg.com/news/features/2021-06-15/airbnb-spends-millions-making-nightmares-at-live-anywhere-rentals-go-away> [<https://perma.cc/Q6L3-6JY6>] (describing a policy by Airbnb that knowingly allowed for host key duplication, enabling a rapist to lie in wait to attack a woman who rented the host's apartment through the Airbnb platform); Tom Jackman, *Backpage CEO Carl Ferrer Pleads Guilty in Three States, Agrees to Testify Against Other Website Officials*, WASH. POST (Apr. 13, 2018), <https://www.washingtonpost.com/news/true-crime/wp/2018/04/13/backpage-ceo-carl-ferrer-pleads-guilty-in-three-states-agrees-to-testify-against-other-website-officials/> [<https://perma.cc/EJ5H-4AFN>] (describing how Backpage instituted policies and practices that allowed sex trafficking to run undetected through their platform); see also Maynard v. Snapchat, Inc., 851 S.E.2d 128, 133 (Ga. Ct. App. 2020) (affirming dismissal of a claim for liability against Snapchat when the social media application's "Speed Filter" contributed to a car crash), *rev'd and remanded*, No. S21G0555, 2022 WL 779733 (Ga. Mar. 15, 2022).

<sup>29</sup> "Foreign" is understood in reference to the home state of the social media company. For the purposes of this Article, which focuses on large social media companies predominantly incorporated in the United States, "foreign" refers to non-U.S. persons.

<sup>30</sup> Drawing on the work of Boaventura de Sousa Santos, I use the term "Global South" not to refer to a geographic location, but to the experience of structural oppression. See Boaventura de Sousa Santos, *Epistemologies of the South and the Future*, 1 FROM EUR. S. 17, 18–19 (2016) (describing the global South as "a metaphor for the human suffering caused by capitalism and colonialism," rather than simply "a geographic concept"); JACOB POUSSHTER, CALDWELL BISHOP & HANYU CHWE, PEW RSCH. CTR., SOCIAL MEDIA USE CONTINUES TO RISE IN DEVELOPING COUNTRIES BUT PLATEAUS ACROSS DEVELOPED ONES 16–19 (2018), <https://www.pewresearch.org/global/2018/06/19/social-media-use-continues-to-rise-in-developing-countries-but-plateaus-across-developed-ones/> [<https://perma.cc/GX8F-XLZP>] (describing the rising usage of social media in the developing world); see also Simon Kemp, *Digital 2021: Global Overview Report*, DATAREPORTAL (Jan. 27, 2021), <https://datareportal.com/reports/digital-2021-global-overview-report> [<https://perma.cc/78E7-HCAX>] (noting the existence of "4.20 billion social media users around the world").

forms, including the absence of ongoing inter-group violence and the presence of independent media, do not necessarily hold.<sup>31</sup> As Barrie Sander explained, the shortcomings of social media platforms to modify their content regulation to “local contexts” has rendered them exposed to online violence and propaganda.<sup>32</sup> Such violence and propaganda fuel atrocities, shattering the lives of individuals and communities.<sup>33</sup> Yet, to date, social media companies’ decisions to launch their platforms in these markets and their policies and practices while operating in these locales all fall under the rubric of ordinary business activities.

A further reason to focus on the subset of platform-enabled crimes involving foreign atrocities is that such crimes raise especially thorny legal, political, and practical challenges to pursuing accountability.<sup>34</sup> The jurisdiction in which the international crime occurs, the so-called ‘host state,’ may have a weak rule of law or lack an independent judiciary following the atrocities. Such circumstances limit the ability of survivors to obtain redress in the host state from the principal perpetrators, let alone from a complicit foreign corporation. Moreover, domestic forums everywhere preference cases with a nexus to their own state, making the theoretical ability of a non-host state to exercise universal jurisdiction vanishingly rare in practice. Further, the International Criminal Court (ICC), the primary international forum for pursuing accountability for international crimes, does not have jurisdiction over corporations.<sup>35</sup> In other words, this Article concentrates on this subset not only because of the rapidity of social media platforms’ expansion into vulnerable communities and the gravity of the resulting harm, but also because this subset is the most challeng-

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<sup>31</sup> See Rebecca J. Hamilton, *Governing the Global Public Square*, 62 HARV. INT’L L.J. 117, 138–58 (2021) (discussing launches in Myanmar, India, Sri Lanka, South Sudan, and Turkey). See generally NANJALA NYABOLA, *DIGITAL DEMOCRACY, ANALOGUE POLITICS: HOW THE INTERNET ERA IS TRANSFORMING POLITICS IN KENYA* (2018) (providing a comprehensive exposition of the myriad of ways in which major social media platforms have not been designed with “partly free” societies in mind).

<sup>32</sup> Barrie Sander, *Democratic Disruption in the Age of Social Media: Between Marketized and Structural Conceptions of Human Rights Law*, 32 EUR. J. INT’L L. 159, 164 (2021).

<sup>33</sup> See Richard Ashby Wilson & Molly K. Land, *Hate Speech on Social Media: Content Moderation in Context*, 52 CONN. L. REV. 1029, 1042–45 (2021) (“[T]here is a growing body of evidence that widespread attacks on immigrants and other minorities . . . have been instigated online.”); FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES* 28 (1990) (“[I]n order to perform a genocide the perpetrator has always had to first organize a campaign that redefined the victim group as worthless, outside the web of mutual obligations, a threat to the people, immoral sinners, and/or subhuman.”); see also SHEERA FRENKEL & CECILIA KANG, *AN UGLY TRUTH: INSIDE FACEBOOK’S BATTLE FOR DOMINATION* 170 (2021) (“Facebook had thrown a lit match onto decades of simmering racial tensions . . . and had then turned the other way when activists pointed to the smoke slowly choking the country.”).

<sup>34</sup> See *supra* note 25 and accompanying text (describing the high degree of self-regulation for social media companies and the immunities available for online intermediaries more generally).

<sup>35</sup> See *infra* notes 76–107 and accompanying text.

ing type of platform-enabled crime from an accountability perspective. If it is possible to map out pathways to accountability for the least-regulated corporate entities, then there is hope for progress on all platform-enabled crimes.

This Article makes three novel contributions. The first is to introduce the concept of platform-enabled crimes to raise the visibility of the core business activities of online intermediaries that have historically eluded accountability for facilitating harm.<sup>36</sup> Second, as a counterpoint to the bulk of the legal literature in this area, this Article consciously adopts a survivor-centered approach to the question of accountability for platform-enabled crimes.<sup>37</sup> Adopting a survivor-centered approach inherently draws a plurality of responses into the accountability conversation. This methodological orientation, positioning the conversation from the perspective of survivors, thus brings about the Article's third contribution: showing what this pluralization of responses to the accountability gap might mean in concrete terms, and offering ways to overcome the challenges this approach raises.

Part I of this Article defines platform-enabled crimes.<sup>38</sup> It then narrows the focus of the Article to a subset of platform-enabled crimes—those where a U.S. social media company has facilitated international crimes—to begin understanding and addressing the accountability gap associated with them. Finally, it provides a concrete example of this subset of platform-enabled crimes by analyzing the acts of omission and commission that Facebook's policies and

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<sup>36</sup> In the context of this Article, the term “platform-enabled crimes” also serves to challenge the current disconnect between the mass-scale trauma experienced by the victims of atrocities, and the antiseptic language of corporate due diligence in response to a social media company's role enabling such crimes. This Article works to solidify that the consequences for victims remain integral to the accountability conversation, instead of a distant and decontextualized backdrop. Relatedly, this Article also seeks to ensure that a social media company's role is not minimized in efforts to hold the principal perpetrators themselves to account.

<sup>37</sup> See *infra* notes 133–158 and accompanying text. In the face of an accountability deficit, scholars typically start with an existing legal framework, such as international criminal law, and try to close the accountability gap by adapting that body of law to make the particular wrongdoing fit within it. By contrast, a survivor-centered approach inverts this process by starting with what survivors of the harm need, and trying to ensure those needs drive the conversation about how to close the accountability gap. The survivor-centered approach requires acknowledging that different bodies of law vary in the degree to which they can succeed in achieving different purposes. Criminal prosecutions, for example, generally excel in achieving retributive goals. But retributive justice may not align with the goals held by survivors of platform-enabled crimes. In the words of Yasmin Ullah, a Rohingya advocate: “It is very clear that the priority of the [Rohingya] community has yet to be informed by the legal mechanism at play and vice versa. . . . [A]s much as the judicial system may serve the purpose to deter further violations or victimization, it is retributive and not really restorative.” American Society of International Law, *International Law and the Plight of the Rohingyas: Insights from International Dispute Settlement*, at 38:20, YOUTUBE (Feb. 10, 2021), [https://www.youtube.com/watch?v=Q\\_HFr1eHgtE](https://www.youtube.com/watch?v=Q_HFr1eHgtE) [<https://perma.cc/9PU5-Z6ZU>].

<sup>38</sup> See *infra* notes 44–75 and accompanying text.

practices in Myanmar generated and the ways in which these acts enabled the Tatmadaw and its allies to commit atrocities.

Part II surveys the (perceived) binary landscape within which the conversation about accountability for this subset of platform-enabled crimes takes place.<sup>39</sup> It turns first to international criminal law, and then to the business and human rights framework. It highlights proposals that scholars and advocates have made to bring this subset of platform-enabled crimes within the remit of international criminal law, and business and human rights respectively.

Part III develops this Article's methodological commitment to putting the needs of survivors at the forefront of the conversation about pursuing accountability for platform-enabled crimes.<sup>40</sup> It canvasses the literature on survivor-centered approaches to justice, and while no list is exhaustive given the diversity of survivor responses in the aftermath of atrocities, a comprehensive view of the existing literature reveals the recurring significance of: (1) acknowledgement of wrongdoing; (2) compensation; and (3) prevention of recurrence.

Part IV draws on the three survivor-centered goals identified in Part III, and applies them to Facebook's role in the Rohingya genocide.<sup>41</sup> In so doing, it illustrates what a survivor-centered approach to accountability for platform-enabled crimes could look like. It considers the relative merits of criminal, civil, and regulatory actions. It also assesses the impact of forum location on the likelihood of achieving any given goal. The purpose of this case study is not to provide a comprehensive plan to secure accountability for Facebook's role in Myanmar, but rather to demonstrate how a survivor-centered approach begins to pluralize the legal responses available to platform-enabled crimes in general. It also reveals the legal, political, and practical constraints that currently stymie the effort to close the accountability gap.

Part V addresses the constraints identified in Part IV and sketches a path forward.<sup>42</sup> It offers a range of suggestions to be pursued simultaneously, including new regulations, statutory amendments, and transnational cooperation. It does not offer a silver bullet. Instead, it argues that there is no single or instantaneous solution that can close the existing accountability gap.<sup>43</sup> By pursuing a plurality of options to address this previously overlooked form of criminal facilitation, however, we can make a vast improvement on the status quo.

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<sup>39</sup> See *infra* notes 76–132 and accompanying text.

<sup>40</sup> See *infra* notes 133–161 and accompanying text.

<sup>41</sup> See *infra* notes 162–284 and accompanying text.

<sup>42</sup> See *infra* notes 285–322 and accompanying text.

<sup>43</sup> See JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* 270 (2019) (“As law mediates between truth and power, the possibility for real, incremental improvement—and occasionally even for transformative improvement—exists . . .”).

## I. PLATFORM-ENABLED CRIMES

Section A expands on the definition of platform-enabled crimes offered above.<sup>44</sup> Section B then examines the accountability deficit associated with this form of corporate complicity.<sup>45</sup> To do so, it narrows the discussion to the subset of platform-enabled crimes in which U.S. social media companies facilitate international crimes and describes Facebook's policies and practices in relation to the Rohingya genocide as an example.

### A. Defining Platform-Enabled Crimes

Platform-enabled crimes are about complicity. To determine if something constitutes a platform-enabled crime, one must inquire whether the principal perpetrator(s) would have committed a crime of substantively the same nature and scale if the relevant policy or practice of the online intermediary had been different.<sup>46</sup> If the answer is no, then the platform was integral to the commis-

<sup>44</sup> See *infra* notes 46–50 and accompanying text.

<sup>45</sup> See *infra* notes 51–75 and accompanying text.

<sup>46</sup> In practice, there is likely to be a sizeable gray zone involving situations where one might debate whether the policies and practices of a social media company made a meaningful difference to the nature and scale of the crimes committed. In situations where one seeks to hold a social media company criminally responsible, borrowing the elements from criminal law for aiding and abetting, also known as accomplice liability or complicity, may narrow this gray zone in the relevant jurisdiction. Thus, when international crimes are committed, an online intermediary would satisfy the *actus reus* when its policy or practice had a “substantial effect on the perpetration of the crime.” See, e.g., *Prosecutor v Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶ 249 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998). Although there is no corporate criminal liability under international criminal law, its standards for individual liability—akin to U.S. domestic criminal law, including for corporate criminality—provide a set of workable requirements. See, e.g., *id.*; *Prosecutor v Šainović*, Case No. IT-05-87-A, Judgement, ¶ 1649 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014); *Prosecutor v Taylor*, Case No. SCSL-03-01-A, Judgment, ¶¶ 436, 437, 481 (Sept. 26, 2013). The assistance provided need not be direct and may involve “practical assistance, encouragement, or moral support.” *Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶¶ 235, 249. Such a policy or practice satisfies the *actus reus* requirement when it creates an act of omission that has a “substantial effect on the commission of the crime.” See *Prosecutor v. Simić*, Case No. IT-95-9-T, Judgement, ¶ 162 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003). To satisfy the *mens rea*, an online intermediary would need knowledge—as in, awareness—that its policy or practice facilitated the principal perpetrator in executing the crime. See, e.g., *Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶ 249; *Šainović*, Case No. IT-05-87-A, Judgement, ¶ 1649; *Taylor*, Case No. SCSL-03-01-A, Judgment, ¶¶ 436–437. A social media company would not even need to “know the precise crime intended” by the principal perpetrator “as long as [it] is aware that one of a number of crimes will probably be committed and one of those crimes is committed.” Norman Farrell, *Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals*, 8 J. INT'L CRIM. JUST. 873, 882 (2010). Note, the Rome Statute of the International Criminal Court is an outlier in this respect by requiring a *mens rea* of “purpose” for aiding and abetting liability. See Rome Statute of the International Criminal Court, art. 25(3)(c), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute]. Such precision is less necessary when, as here, the term is not serving to introduce a new form of criminal liability, but rather it is being invoked as a rhetorical device to

sion of the crime, rendering it a platform-enabled crime. If the answer is yes, then the platform was not integral, and thus, it was not a platform-enabled crime.<sup>47</sup> To add granularity to this inquiry, it is useful to consider the way the policies and practices of a platform may facilitate crimes by generating acts of omission on the one hand, and/or acts of commission on the other.<sup>48</sup>

It is worth emphasizing that the target activity of platform-enabled crimes is not the violence-inciting online speech itself. That content, what Eugene Volokh has termed “crime-facilitating speech,” centers on freedom of speech doctrines and online content moderation.<sup>49</sup> The activity on which platform-enabled crimes focus is meaningfully different: namely, the policies and practices of the platform that distributes and amplifies such speech. Platform-enabled crimes function to spotlight the ordinary core business activities of a platform, demonstrated through its policies and practices, to gain a fuller picture of the actors with whom responsibility for harm lies. It serves as a reminder that the policies and practices of an online intermediary, and the acts of omission or commission they generate, intersect with the criminal actions of the direct perpetrators to produce the harm experienced by victims. Without the perpetrators, the policies and practices of an online intermediary may be innocuous, but without the policies and practices of an online intermediary, the perpetrators could not have inflicted harm on the scale that they did.

Understanding and addressing platform-enabled crimes’ accountability gap requires shifting focus from the general category of platform-enabled crimes, which encompass a vast range of harmful activities and complicit actors, to a specific subset of these crimes. Section B applies the lens of platform-enabled crimes to Facebook’s policies and practices before and during the peak of the 2017 Rohingya genocide in Myanmar.<sup>50</sup>

### *B. Facebook’s Policies and Practices in Myanmar*

Facebook’s policies and practices generated both acts of omission and acts of commission that facilitated the Tatmadaw’s crimes, culminating in the

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focus our attention on the otherwise overlooked actors and means through which certain crimes are facilitated.

<sup>47</sup> This definition aligns with the position taken by the International Commission of Jurists Expert Panel on Corporate Complicity in International Crimes that concluded a corporate entity could be held legally accountable for complicity “where the principal perpetrator would still have carried out” the crime “but the company’s conduct either increased the range of . . . [violations] committed by the principal actor, the number of victims, or the severity of the harm suffered by the victims.” INT’L COMM’N OF JURISTS EXPERT LEGAL PANEL, CORPORATE COMPLICITY VOL. 1, *supra* note 26, at 12.

<sup>48</sup> To see this approach applied to the role of Facebook in Myanmar, see *infra* notes 53–75 and accompanying text.

<sup>49</sup> See generally Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

<sup>50</sup> See *infra* notes 51–75 and accompanying text.

2017 Rohingya genocide. Subsections 1 and 2 discuss Meta's acts of omission and the acts of commission, respectively.<sup>51</sup> Subsection 3 analyzes the question of entity-level accountability.<sup>52</sup>

### 1. Acts of Omission

Meta's acts of omission that contributed to the Rohingya genocide lie predominantly within the realm of content moderation. The scale of content posted on Facebook is orders of magnitude too large for a human workforce to monitor effectively. As a result, Meta has to bolster Facebook's content moderation through machine components. Human and machine components working together offer what can be described in lay terms as a three-layered defense system to stop prohibited content from circulating on the platform.

The first layer of this defense system uses machine-based content moderation to 'read' posted content for prohibited material and screen it out automatically. The second layer relies on users to flag content that is prohibited under Facebook's community guidelines. The final layer relies on human moderators to catch what the automated system misses and to review content that users have flagged. In Myanmar, however, Facebook's policies and practices led to systemic content moderation failures at each of the three layers.

First, when Meta entered the Myanmar market the Natural Language Processing (NLP) component of Facebook's automated content moderation struggled to read Burmese typeface.<sup>53</sup> Second, Meta was slow to translate Facebook's community guidelines into Burmese, and even once it did, the reporting tools that allow users to flag hate speech for removal did not function properly. Myanmar was one of the few nations that had declined to adopt the international text encoding standard, and instead used Zawgyi, a unique standard that only recognized and encoded Burmese script.<sup>54</sup> These two standards are incompatible with each other.<sup>55</sup> Consequently, because Facebook employs the

<sup>51</sup> See *infra* notes 53–71 and accompanying text.

<sup>52</sup> See *infra* notes 72–75 and accompanying text.

<sup>53</sup> In October 2019, more than two years after the peak of the Rohingya genocide, and over five years since entering the Myanmar market, Facebook spotlighted the progress it was making in NLP for the Burmese language. See Marc Aurelio Ranzato et al., *Recent Advances in Low-Resource Machine Translation*, META AI (Oct. 16, 2019), <https://ai.facebook.com/blog/recent-advances-in-low-resource-machine-translation/> [<https://perma.cc/M8V7-4CZD>].

<sup>54</sup> See Nick LaGrow & Miri Pruzan, *Integrating Autoconversion: Facebook's Path from Zawgyi to Unicode*, ENGINEERING AT META (Sept. 26, 2019), <https://engineering.fb.com/2019/09/26/android/unicode-font-converter/> [<https://perma.cc/B78C-EDY4>] (explaining how Facebook introduced "font converters" between Zawgyi and Unicode in September 2019).

<sup>55</sup> See *id.* (noting that systems and digital platforms utilizing the international text encoding standard are unable to read accurately the text written on devices using the encoding standard specific to Myanmar). Words written on a digital platform that uses the international standard look distorted to users of devices implementing the Myanmar text encoding standard. *Id.*



international encoding standard, Myanmar's use of a different text encoding standard rendered Facebook's reporting tool nonfunctional.<sup>56</sup> Third, Meta launched Facebook in Myanmar without a human moderation team that could have served as a safety net in the face of these failures in its automated system. Only belatedly did Meta hire Burmese-speaking content moderators.<sup>57</sup> Indeed, the extent of Meta's failure to invest human resources in its Myanmar market was such that in 2017, at the peak of the genocide, Facebook had only five Burmese speaking content moderators.<sup>58</sup> There are scores of different languages and dialects inside Myanmar. Thus, simply having a handful of Burmese speakers was, as one Myanmar activist explained, like saying, "[W]ell, we have one German speaker, so we can monitor all of Europe."<sup>59</sup>

Even after activists alerted Meta that the Facebook accounts of certain Tatmadaw officials were exploiting the platform to disseminate anti-Rohingya propaganda in the midst of the 2017 genocide, Meta still failed to act. Senior General Min Aung Hlaing, the commander and chief of the armed forces, was one of those officials, pushing out racist misinformation to over a million followers. Indeed, Facebook did not begin blocking these accounts until its role in the atrocities attracted U.S. media headlines in August 2018, a year after the peak of the genocidal violence.<sup>60</sup> Such policies and practices meant that anti-Rohingya hate speech, including that which violated Facebook's own standards, proliferated unchecked across the country as the genocide unfolded.<sup>61</sup>

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<sup>56</sup> *Id.*

<sup>57</sup> Sara Su, *Update on Myanmar*, META (Aug. 15, 2018), <https://about.fb.com/news/2018/08/update-on-myanmar/> [<https://perma.cc/DTU7-L7MG>]; see also Timothy McLaughlin, *How Facebook's Rise Fueled Chaos and Confusion in Myanmar*, WIRED (July 6, 2018), <https://www.wired.com/story/how-facebooks-rise-fueled-chaos-and-confusion-in-myanmar/> [<https://perma.cc/WFD9-5ESL>] (noting that in 2013, Facebook employed only one Burmese speaker, located in Ireland); Letter from Phandeeayar, Mido, Burma Monitor, Ctr. for Soc. Integrity, Equal. Myanmar, & Myanmar Hum. Rts. Educator Network, to Mark Zuckerberg, CEO, Facebook (Apr. 5, 2018), <https://s3.documentcloud.org/documents/4432469/Myanmar-Open-Letter-to-Mark-Zuckerberg.pdf> [<https://perma.cc/4GQB-VDKN>].

<sup>58</sup> See FRENKEL & KANG, *supra* note 33, at 170.

<sup>59</sup> *Id.* at 180 (quoting a Myanmar-based activist).

<sup>60</sup> See *Removing Myanmar Military Officials from Facebook*, META (Aug. 28, 2018), <https://about.fb.com/news/2018/08/removing-myanmar-officials/> [<https://perma.cc/8A58-KR5B>] (describing Facebook's action to remove accounts "engaging in coordinated inauthentic behavior on Facebook [in Myanmar]").

<sup>61</sup> See Hamilton, *supra* note 31, at 138–42; see also BUS. FOR SOC. RESP., *supra* note 12, at 24 (describing how "Facebook has become a means for those seeking to spread hate and cause harm, and posts have been linked to offline violence"); Silvia Venier, *The Role of Facebook in the Persecution of the Rohingya Minority in Myanmar: Issues of Accountability Under International Law*, 28 ITALIAN Y.B. INT'L L. 231, 246 (2019) ("[I]t is safe to assume that should Facebook have carried out a timely and accurate assessment of the negative consequences of its business model in Myanmar, it would surely have stopped online violence and probably limited, or at least made more complicated instead of facilitating, its offline component.").

## 2. Acts of Commission

The policies and practices that generated Meta's acts of commission in Myanmar were arguably more lethal than its acts of omission, yet they have received less scrutiny. Two actions were critical to Facebook's enabling role in the Rohingya atrocities. The first was Facebook's complete domination of the social media landscape in Myanmar. When Meta launched Facebook in Myanmar in 2010, it allowed for platform usage without data charges.<sup>62</sup> This strategy led retailers to sell mobile phones in Myanmar with the Facebook app already loaded.<sup>63</sup> During years of military dictatorship, from 1962 through 2010, the majority of the Burmese lacked Internet access; therefore, the first experience of the Internet for most people in Myanmar was using Facebook.<sup>64</sup> Then, in 2016, Meta doubled down on this advantage by launching its Free Basics app in Myanmar, giving users free access to Facebook and a limited number of internet services.<sup>65</sup>

These decisions led to Facebook's monopolization of the social media market in Myanmar. They also allowed the Tatmadaw to benefit from a singular and omnipresent platform through which it could easily distribute its inciting content. The impact of Facebook's monopoly was compounded by the fact that, after so many decades of military rule, Myanmar had no history of independent media. Burmese had learned to be skeptical of state-run media, but the information they received on Facebook seemed trustworthy. Unaware of the Tatmadaw's role in producing Facebook content, few Burmese took a critical eye to the stories that entered their newsfeed through the recommendations of family and friends.<sup>66</sup>

Second, Meta designed the algorithm that curates Facebook's newsfeed with the primary goal of continued user engagement.<sup>67</sup> This goal aligns with

<sup>62</sup> Saira Asher, *Myanmar Coup: How Facebook Became the 'Digital Tea Shop,'* BBC NEWS (Feb. 4, 2021), <https://www.bbc.com/news/world-asia-55929654> [<https://perma.cc/3G6A-JVK9>].

<sup>63</sup> BUS. FOR SOC. RESP., *supra* note 12, at 12.

<sup>64</sup> *Id.*

<sup>65</sup> Toussaint Nothias, *The Rise and Fall . . . and Rise Again of Facebook's Free Basics: Civil Society and the Challenge of Resistance to Corporate Connectivity Projects*, GLOB. MEDIA TECHS. & CULTURES LAB (Apr. 21, 2020), <https://globalmedia.mit.edu/2020/04/21/the-rise-and-fall-and-rise-again-of-facebooks-free-basics-civil-and-the-challenge-of-resistance-to-corporate-connectivity-projects/> [<https://perma.cc/R5TS-BFVX>] (describing Free Basics as designed to "grow Facebook's user base while cementing the corporation's position as the gateway to the Internet for mobile users across the Global South").

<sup>66</sup> See FRENKEL & KANG, *supra* note 33, at 173 (noting that "hate speech" on Facebook was "more widely accepted and endorsed" than other forms of "state media").

<sup>67</sup> See generally Hao, *supra* note 9 (describing how "Facebook's algorithm incites misinformation, hate speech, and even ethnic violence"); Roddy Lindsay, Opinion, *I Designed Algorithms at Facebook. Here's How to Regulate Them*, N.Y. TIMES (Oct. 6, 2021), <https://www.nytimes.com/2021/10/06/opinion/facebook-whistleblower-section-230.html> [<https://perma.cc/Z4TJ-CJMC>] ("Facebook

Facebook's predominantly data sales- and advertisement-based revenue sources. Meta does not charge users for access to Facebook, but instead makes revenue from selling data about its users to those who advertise on Facebook.<sup>68</sup> The more user activity that occurs on Facebook, the more attractive Facebook becomes to advertisers.<sup>69</sup> But an inherent problem in Facebook's business model and algorithm is that human beings seem to be attracted to sensational content and stay particularly engaged with content that affirms their pre-existing biases—such as the anti-Rohingya bias prevalent in Myanmar:<sup>70</sup>

Facebook was designed to throw gas on the fire of any speech that invoked an emotion, even if it was hateful speech—its algorithms favored sensationalism. . . . [T]he system saw that [a] post was being widely read, and it promoted it more widely across users' Facebook pages. The situation in Myanmar was a deadly experiment in what could happen when the internet landed in a country where a social network became the primary, and most widely trusted, source of news.<sup>71</sup>

### 3. Entity-Level Accountability

In the aftermath of atrocities like those committed against the Rohingya, the initial focus is typically on the individuals who are the principal perpetrators. The individual perpetrators within the Tatmadaw deserve such first-order scrutiny. With respect to Meta's complicity, the actions of high-level managers and C-suite officers are important. Focusing on individuals, however, is a necessary but not sufficient response. A more complete accountability picture ne-

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has had more than 15 years to demonstrate that algorithmic personal feeds can be built responsibly; if it hasn't happened by now, it's not going to happen.”)

<sup>68</sup> As the saying goes, “If [you're not paying for the product], you are the product.” See SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 18 *passim* (2019) (providing an expansive critique of the advertising model on which Facebook is based).

<sup>69</sup> Ethan Zuckerman, *Who Filters Your News? Why We Built Gobo.Social*, ETHAN ZUCKERMAN (Nov. 16, 2017), <https://ethanzuckerman.com/2017/11/16/who-filters-your-news-why-we-built-gobo-social/> [<https://perma.cc/B7SG-GCG7>] (“Algorithmic filters optimize platforms for user retention and engagement, keeping our eyes firmly on the site so that our attention can be sold to advertisers.”).

<sup>70</sup> See Zeynep Tufekci, Opinion, *YouTube, the Great Radicalizer*, N.Y. TIMES (Mar. 10, 2018), <https://www.nytimes.com/2018/03/10/opinion/sunday/youtube-politics-radical.html> [<https://perma.cc/MG6S-E23E>] (“[YouTube's] algorithm seems to have concluded that people are drawn to content that is more extreme than what they started with . . .”). *But see* Kevin Munger & Joseph Phillips, *A Supply and Demand Framework for YouTube Politics*, OSF 25 (Oct. 1, 2019), <https://osf.io/73jys/> [<https://perma.cc/XRD2-3FM6>] (arguing that it is not the algorithm per se that creates the radicalizing effect but the community that gathers online to interact with extremist content).

<sup>71</sup> FRENKEL & KANG, *supra* note 33, at 182.

cessitates that we also hold the corporate entity *qua* entity responsible for its involvement.

Pursuing accountability from the complicit corporate entity—in this case, Meta—is essential for at least two reasons. First, the actions of individuals within the corporation may not, taken in isolation, create harm; that is to say, for corporate enablers of international crimes, “the whole may be greater than the sum of its parts.”<sup>72</sup> This is particularly true for social media companies, including Meta, given their reliance on algorithms and other forms of artificial intelligence that create distance between the actions of individual employees and the harms generated by the platform.<sup>73</sup> Second, as a related matter, the prevention of the harms examined in this Article requires change at the level of corporate policy and practice—indeed, perhaps even to the core business model of social media companies themselves.<sup>74</sup> Such radical and systemic change is a tall order and something that singling individuals out for condemnation may be unable to achieve. With the need for entity-level accountability in mind, the following Part assesses the landscape of accountability for platform-enabled crimes.<sup>75</sup>

## II. THE ACCOUNTABILITY GAP

Until very recently, the conversation about accountability for the harms wrought by these types of platform-enabled crimes has been diverted toward one of two imperfect legal frameworks: international law or business and human rights (BHR). Within international law, the dominant response is through international criminal law (ICL). ICL governs the liability of individuals for international crimes, but has no basis for holding entities to account. Relatedly, there is the law on state responsibility that can impose civil liability on state entities, but not corporations. In contrast, BHR works to “[p]rotect, [r]espect

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<sup>72</sup> See Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT’L L. 955, 962 (2008) (“While international criminal law has addressed the collective nature of these crimes by enhancing individual criminal liability, it fails to adequately capture all crimes committed by a group, especially formal organizations.”).

<sup>73</sup> See generally Joshua A. Kroll et al., *Accountable Algorithms*, 165 U. PA. L. REV. 633, 633 (2017) (articulating “a new technological toolkit to verify that automated decisions comply with key standards of legal fairness”). Governments have begun taking steps to implement accountability for algorithms. See, e.g., Alina Polyakova & Théophile Lenoir, *The Algorithm Black Box: A Transatlantic Approach*, CEPA (Apr. 7, 2021), <https://cepa.org/the-algorithm-black-box-a-transatlantic-approach/> [<https://perma.cc/596V-6KNS>] (“The European Parliament is currently debating the European Commission’s proposal on the Digital Markets Act (DMA) and the Digital Services Act (DSA), which both raise questions about the accountability and transparency of digital systems.”); see also Algorithmic Accountability Act of 2019, H.R. 2231, 116th Cong. (2019); Council Regulation 2016/679, on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (EU).

<sup>74</sup> See *infra* notes 315–322 and accompanying text.

<sup>75</sup> See *infra* notes 76–132 and accompanying text.

and [r]emedy” human rights abuses by corporate entities.<sup>76</sup> It offers a soft law approach that currently has no mechanism to enforce sanctions commensurate with the gravity of international crimes. Despite these deficits, it is this perceived binary landscape in which the accountability conversation plays out for platform-enabled crimes like the Rohingya genocide.

Two main responses followed as evidence of the Rohingya genocide and Facebook’s enabling role in it came to light. The first response came from international law. It focused on the Myanmar perpetrators, utilized international judicial mechanisms, and centered on individual criminal responsibility and state responsibility. The ICC, which has jurisdiction over international crimes including genocide, cannot exercise that jurisdiction for crimes committed on Myanmar’s territory because Myanmar has not joined the ICC. Instead, the ICC began investigating crimes against the Rohingya that occurred in neighboring Bangladesh, where it does have jurisdiction.<sup>77</sup> In terms of the law governing state responsibility, The Gambia lodged a case against Myanmar at the International Court of Justice (ICJ) for violating its obligations under the United Nations (U.N.) Convention on the Prevention and Punishment of Genocide.<sup>78</sup> Although this started addressing entity liability with respect to the Myanmar state, the ICJ does not have jurisdiction over corporate entities.

The second response, focused on Facebook, adopted a corporate responsibility approach with Meta’s voice in the lead. The corporation “commissioned an independent human rights impact assessment [of its] role . . . in Myanmar” and released the report publicly with the following summary:

The report concludes that, prior to this year, we weren’t doing enough to help prevent our platform from being used to foment division and incite offline violence. We agree that we can and should do more.

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<sup>76</sup> U.N. Hum. Rts. Off. of the High Comm’r, *Guiding Principles on Business and Human Rights*, U.N. Doc. HR/PUB/11/04, at iv (2011) [hereinafter U.N. *Guiding Principles*], [https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf) [<https://perma.cc/G8UT-K6SW>] (invoking the primary principles of the framework “developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises”).

<sup>77</sup> *See, e.g.*, Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, Case No. 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, ¶¶ 42–62 (Nov. 14, 2019), [https://www.icc-cpi.int/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF) [<https://perma.cc/TA4P-5BVV>].

<sup>78</sup> *See generally* 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, 2019 I.C.J. 178 (Nov. 11), <https://www.icj-cij.org/public/files/case-related/178/178-20191111-APP-01-00-EN.pdf> [<https://perma.cc/J2CC-ASXE>].

Over the course of this year, we have invested heavily in people, technology and partnerships to examine and address the abuse of Facebook in Myanmar, and [the impact assessment] acknowledges that we are now taking the right corrective actions.<sup>79</sup>

The first response—focusing on international judicial mechanisms—considered the atrocities but removed Meta from scrutiny because neither the ICC nor the ICJ have jurisdiction over corporate entities. In contrast, although the second response through BHR focused on Facebook, it created distance between the platform and the atrocities themselves. As the Human Rights Impact Assessment framed it, the “mistakes and shortcomings” of Facebook in connection with the genocide provided the background for the inquiry, but the emphasis remained on a “forward-looking analysis and recommendations.”<sup>80</sup>

Section A of this Part analyzes the emergence of ICL, describes its limitations in accounting for platform-enabled atrocities, and introduces arguments that proponents advance in response to these limitations.<sup>81</sup> Section B undertakes the same for BHR.<sup>82</sup>

### *A. Defaulting to International Criminal Law*

Today, in the aftermath of atrocities, it is easy to take the role of ICL for granted. But the turn to ICL is a relatively recent development, and one that has only been achieved through the concerted efforts of lawyers, scholars, states, and advocacy organizations committed to growing the field of ICL.<sup>83</sup> Indeed, the idea that individuals should be held liable for atrocities only gained traction in the post-World War II period.<sup>84</sup>

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<sup>79</sup> Alex Warofka, *An Independent Assessment of the Human Rights Impact of Facebook in Myanmar*, META (Nov. 5, 2018), <https://about.fb.com/news/2018/11/myanmar-hria/> [<https://perma.cc/EKZ3-42ML>].

<sup>80</sup> Dunstan Allison-Hope, *Our Human Rights Impact Assessment of Facebook in Myanmar*, BUS. FOR SOC. RESP. BLOG (Nov. 5, 2018), <https://www.bsr.org/en/our-insights/blog-view/facebook-in-myanmar-human-rights-impact-assessment> [<https://perma.cc/X23Z-XPEW>].

<sup>81</sup> See *infra* notes 83–107 and accompanying text. This Article does not include the law of state responsibility in this section because there is no prospect of extending this body of law to account for the scenario that is the focus of this Article.

<sup>82</sup> See *infra* notes 108–132 and accompanying text.

<sup>83</sup> See generally Frédéric Mégret, *International Criminal Justice as a Juridical Field*, CHAMP PÉNAL/PENAL FIELD, Feb. 12, 2016, at 2 (“[I]nternational criminal justice is not simply an idea in history but sustained by a quite distinct social community of professionals . . .”).

<sup>84</sup> After World War I, the Allies did try to have Kaiser Wilhelm II held individually responsible in an international criminal court, but the effort was unsuccessful. See HANS Kelsen, PRINCIPLES OF INTERNATIONAL LAW 132 (1952) (describing the unexecuted Article 227 of the Treaty of Versailles that would have imposed individual criminal liability on ex-Emperor William II “for a supreme offense against international morality and the sanctity of treaties” (quoting Treaty of Versailles art. 227, June 28, 1919, [1920] A.T.S. 1)). But “[t]he move from thinking of international law in terms of ‘ab-

## 1. Growing Development of ICL

The Nuremberg Tribunal famously stated, “Crimes against international law are committed by men, not by abstract entities . . . .”<sup>85</sup> The decision to prosecute individuals at Nuremberg did not stem from a lack of awareness about the important role that entities—ranging from state organizations like the Gestapo to private corporations like IG Farben—played in the horrors of the Holocaust. In fact, in the immediate aftermath of World War II, criminal liability for entities was considered “a way to recognize . . . the crucial role of certain organizations in enabling individuals to carry out a complex and massive campaign of aggression, enslavement, persecution, plunder, and murder.”<sup>86</sup> But the legal, political, and practical constraints of that moment led the Nuremberg Tribunal to pursue individuals at the expense of entities.<sup>87</sup>

After Nuremberg, ICL “lay dormant” until the early 1990s, stymied by the politics of the Cold War era.<sup>88</sup> In 1993, the U.N. Security Council formed an international criminal tribunal to respond to the atrocities unfolding as the former Yugoslavia broke apart.<sup>89</sup> Soon afterwards, the Council created a similar tribunal to respond to the 1994 genocide in Rwanda that killed over eight hundred thousand individuals, mainly Tutsi and moderate Hutu.<sup>90</sup>

These tribunals carried forward the legacy of Nuremberg by exclusively focusing on the attribution of individual liability for international crimes.<sup>91</sup> The adoption of the Rome Statute in 1998 further solidified the importance of indi-

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abstract entities’ to conceiving of it as a legal order about individual human beings beg[an] at Nuremberg, and transform[ed] the soul of international law.” Gerry Simpson, *Men and Abstract Entities: Individual Responsibility and Collective Guilt in International Criminal Law*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW 69, 75 (Harmen van der Wilt & André Nollkaemper eds., 2009).

<sup>85</sup> See *Judgment*, in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 171, 223 (1947).

<sup>86</sup> Saira Mohamed, *From Machinery to Motivation: The Lost Legacy of Criminal Organizations Liability*, in THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW 494, 495 (Kevin Jon Heller et al. eds., 2020).

<sup>87</sup> *Id.* at 497–98. *But see* Volker Nerlich, *Core Crimes and Transnational Business Corporations*, 8 J. INT’L CRIM. JUST. 895, 899 (2010) (arguing that the relevant paradigm shift at Nuremberg was not from entities to individuals, but from state to “non-state private actors,” and noting that “[w]hether these non-state actors are natural or legal persons is conceptually only of secondary relevance”).

<sup>88</sup> See DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* 2–3 (2014) (“[T]he Cold War precluded the construction of such an ambitious new international structure.”).

<sup>89</sup> S.C. Res. 827, ¶ 2 (May 25, 1993).

<sup>90</sup> S.C. Res. 955, ¶ 1 (Nov. 8, 1994).

<sup>91</sup> THEODOR MERON, *From Nuremberg to The Hague*, in WAR CRIMES LAW COMES OF AGE 198, 202 (1998) (“The moral importance of attaching guilt to individuals has been reaffirmed.”).

vidual responsibility by creating a permanent ICC with criminal jurisdiction over individuals for international crimes.<sup>92</sup>

International law's lack of enforcement power is an oft-lamented weakness. Indeed, many casebooks ask: "[I]s international law really law?"<sup>93</sup> The rise of individual liability and punishment brought a sense of legitimacy for international legal scholars and practitioners. The individual punishments ICL administered promised to increase the standing of international lawyers in the eyes of their domestic counterparts.<sup>94</sup>

Bringing the ICC to life at the start of the twenty-first century took an immense educational and mobilization campaign by lawyers, scholars, legislators, and civil society organizations.<sup>95</sup> That effort also positioned (one might say, marketed) ICL as the body of law best suited to express the moral condemnation of the international community in the face of mass atrocities.<sup>96</sup> As Sarah Nouwen and Wouter Werner aptly summarized the situation, "international criminal law is ever more presented as the road to global justice."<sup>97</sup>

<sup>92</sup> See Rome Statute, *supra* note 46, pt. 1, art. 1. In 2010, the statute was amended to give the ICC jurisdiction over the "crime of aggression" also, though this jurisdiction was still limited to the prosecution of natural persons. International Criminal Court Res. RC/Res.6, The Crime of Aggression (June 11, 2010).

<sup>93</sup> See Gerry Simpson, *On the Magic Mountain: Teaching Public International Law*, 10 EUR. J. INT'L L. 70, 74 (1999). See generally ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017) (providing a beautiful twist on the question of international law's legitimacy).

<sup>94</sup> See, e.g., Simpson, *supra* note 84, at 73–75 (describing how the emphasis on individual criminal liability has "become central to international criminal lawyers' self-understandings" (citing GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 655 (1999))).

<sup>95</sup> See, e.g., *Who We Are*, COAL. FOR THE INT'L CRIM. CT., <https://www.coalitionfortheicc.org/about/who-we-are> [<https://perma.cc/WZW3-W99K>] (describing the Coalition for the International Criminal Court as the "world's largest civil society partnership advancing international justice").

<sup>96</sup> See, e.g., CHRISTINE E. SCHWÖBEL-PATEL, MARKETING GLOBAL JUSTICE: THE POLITICAL ECONOMY OF INTERNATIONAL CRIMINAL LAW 11–15 (2021) (noting that international criminal justice is not discussed in detail in all of the "key philosophical global justice literature"); Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT'L CRIM. L. REV. 93, 95 (2002) ("Law operates as a means for articulation and nourishment of societal values. This expressive function has special force in international criminal law . . ."); Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 265 (2012) (noting that as "an institution in its infancy, [the ICC] has had occasion to make only a relatively small number of decisions about which defendants and which crimes to prosecute").

<sup>97</sup> Sarah M.H. Nouwen & Wouter G. Werner, *Monopolizing Global Justice: International Criminal Law as Challenge to Human Diversity*, 13 J. INT'L CRIM. JUST. 157, 162 (2015); see also Kamari Maxine Clarke, *'We Ask for Justice, You Give Us Law': The Rule of Law, Economic Markets and the Reconfiguration of Victimhood*, in CONTESTED JUSTICE: THE POLITICS AND PRACTICE OF INTERNATIONAL CRIMINAL COURT INTERVENTIONS 272 *passim* (Christian De Vos, Sara Kendall & Carsten Stahn eds., 2015) (presenting a "critique [of] the contemporary conflation of justice with law"); Karen Engle, *Anti-impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069, 1070 (2015) ("Since the beginning of the twenty-first century, the human rights movement has been almost synonymous with the fight against impunity.").



## 2. Efforts to Bring Corporate Entities Within ICL

Against the mainstream, several scholars have raised concerns about the way ICL has struggled to square individual responsibility with the reality of crimes that routinely involve group activity.<sup>98</sup> A growing body of critical scholarship questions whether ICL, with its blinkered focus on the individual, should be the default response in the face of atrocities that invariably implicate state or corporate entities as well.<sup>99</sup>

During the 1998 negotiations over the jurisdictional provisions of the Rome Statute, states discussed corporate criminal liability. The debate was fraught, however, because of the varying domestic standards among the delegations, including a lack of corporate criminal liability provisions in a number of domestic jurisdictions.<sup>100</sup> A last-minute proposal by the French delegation to grant the ICC jurisdiction over corporations ultimately failed.<sup>101</sup>

In light of this defeat, one might imagine that the value of ICL as a body of law through which to respond to atrocities would be treated with reasonable skepticism given that individuals do not commit mass atrocities in isolation. State or corporate entities are invariably implicated. Yet the recent genocide

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<sup>98</sup> This has largely involved work on expanding individual liability to the actions of groups, although the appropriateness of these efforts has been contested. *See, e.g.*, George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 550 (2005) (arguing that some uses of "the doctrine [of joint criminal enterprise] clearly violate[] the basic principle that individuals should only be punished for personal culpability"); *see also* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 79 (2005) (arguing for the reform of joint criminal enterprise in order to better serve the criminal law principle of culpability).

<sup>99</sup> *See, e.g.*, Hamilton, *supra* note 25, at 307 (describing "State-Enabled Crimes" as "instances in which state authority . . . was integral to the nature and scale of a crime"); MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 24–35 (2007) ("Perpetrators of mass atrocity are not a uniform group."); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 24–44 (1997) ("[T]he stories that constitute collective memory can contribute to social solidarity by evoking [common values] in citizens . . . ." (citing EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 79 (George Simpson trans., Free Press 1964) (1893))); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 605 (2002) ("[T]he legal paradigm is limited to punishing only a few select individuals who carried out the most egregious acts . . . .").

<sup>100</sup> *See* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 146–58 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) (providing a detailed account of the debate over the "proposal to include legal persons in the Statute").

<sup>101</sup> *Id.*

against the Rohingya in Myanmar showed, once more, the social power of ICL as a frame through which to respond to atrocities.<sup>102</sup>

Although accountability for principal perpetrators is vitally important, accountability for the entities that enabled their actions is also essential. With platform-enabled crimes, individuals and entities form two sides of the same coin. Prosecuting individuals, without also appreciating the role of entities, creates a distorted account of both how such crimes were committed and the appropriate imposition of accountability. This distortion, in turn, hampers efforts to prevent the future recurrence of these crimes, because an accurate understanding of how a crime is committed is a prerequisite to its prevention.

With such concerns in mind, scholars have continued the effort to expand the remit of ICL to cover corporate criminal liability, most recently with respect to social media companies that enable international crimes. In *Move Fast and Break Societies*, Shannon Raj Singh argues that in appropriate circumstances, an ICL prosecution of a social media company based on its complicity in atrocities would accurately capture a platform's role and advance accountability.<sup>103</sup> She acknowledges that the prosecution of corporations is not yet possible at the ICC, but nonetheless posits that state parties to the Rome Statute, the ICC's constitutive document, could amend the statute to grant such jurisdiction in the future.<sup>104</sup>

Only time will tell whether states will eventually muster the political will to overcome the challenges that frustrated the inclusion of corporate criminal liability in the Rome Statute in the first place. Arguably, the complementarity

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<sup>102</sup> See generally Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No. 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, (Nov. 14, 2019), [https://www.icc-cpi.int/CourtRecords/CR2019\\_06955.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF) [<https://perma.cc/TA4P-5BVV>] (initiating investigations into the matters occurring in Bangladesh and Myanmar).

<sup>103</sup> Shannon Raj Singh, *Move Fast and Break Societies: The Weaponisation of Social Media and Options for Accountability Under International Criminal Law*, 8 CAMBRIDGE INT'L L.J. 331, 342 (2019) ("ICL can, if applied thoughtfully, help shape the future of technology and avoid its weaponisation for campaigns of hate.").

<sup>104</sup> *Id.* at 338. A variety of arguments exist to expand the jurisdiction of the ICC more generally to permit prosecution of corporations. See, e.g., 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/WB9P-GMDU>] (advocating for "recognition of the international criminal liability of corporations by way of amendment of the Rome Statute, and . . . through an increased number of domestic prosecutions of corporate entities"); Fien Schreurs, *Nestlé & Cargill v. Doe Series: Remediating the Corporate Accountability Gap at the ICC*, JUST SEC. (Jan. 11, 2021), <https://www.justsecurity.org/74035/nestle-cargill-v-doe-series-remediating-the-corporate-accountability-gap-at-the-icc/> [<https://perma.cc/RFN5-J8N8>] (encouraging the inclusion of "corporations within the jurisdiction of the ICC").

barriers that thwarted the French proposal have not been reduced in any meaningful way since the negotiations in Rome. Even if such a major statutory amendment succeeded, however, the ICC's ability to deal with the role of platforms in enabling these crimes is questionable.

Squaring the circle to bring entity liability within the ambit of a field that has identified itself so strongly with individual liability is a monumental challenge. As former U.S. Ambassador-at-Large for War Crimes David Scheffer explains, even if states decided to reimagine the ICC as a forum for prosecuting corporations, "the tribunal carpentry required to indict corporations may prove quite daunting to master."<sup>105</sup> And in its present state, the ICC is not in a position to take this task on. The ICC, by its own admission, is overburdened and under-resourced.<sup>106</sup> As long as the ICC is overburdened by its existing caseload of individual prosecutions, it cannot be expected to undertake corporate prosecutions.<sup>107</sup>

### *B. Defaulting to Business and Human Rights*

Under the traditional view that states are the central subjects of international law, states bear the primary obligations under international law.<sup>108</sup> The Nuremberg Tribunal was a watershed moment for international law because it recognized that through ICL, individuals too could face international obligations. Yet this development did not extend the obligations of international law to non-state entities, such as corporations.

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<sup>105</sup> David Scheffer, *Corporate Liability Under the Rome Statute*, 57 HARV. INT'L L.J. ONLINE SYMP., 35, 39 (2016), [https://harvardilj.org/wp-content/uploads/sites/15/Scheffer\\_0615.pdf](https://harvardilj.org/wp-content/uploads/sites/15/Scheffer_0615.pdf) [<https://perma.cc/QAN9-3TM7>].

<sup>106</sup> Assembly of States Parties, Int'l Crim. Ct., Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report, ICC-ASP/19/16, ¶ 646 (Sept. 30, 2020), [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/ICC-ASP-19-16-ENG-IER-Report-9nov20-1800.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-16-ENG-IER-Report-9nov20-1800.pdf) [<https://perma.cc/T42V-ABWF>] ("The Experts repeatedly heard concerns that the Court should focus on a narrower range of situations, and limit its interventions to the extent possible . . . [T]he current situation is unsustainable having regard to the limited resources available.").

<sup>107</sup> See OFF. OF THE PROSECUTOR, INT'L CRIM. COURT, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2020, at 67, 72 (2020), <https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> [<https://perma.cc/8RCC-WP2F>] (citing resource constraints in decisions not to proceed with investigations in Ukraine and Nigeria); Larissa van den Herik & Jernej Letnar Čermeč, *Regulating Corporations Under International Law: From Human Rights to International Criminal Law and Back Again*, 8 J. INT'L CRIM. JUST. 725, 741–42 (2010) (noting that even without current resource constraints, the ICC Prosecutor might prioritize principal perpetrators over corporate accomplices).

<sup>108</sup> See LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 341 (1905) ("Since the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations.").

Despite extensive academic debate and advocacy, it remains the case that corporations face no direct obligations under international law.<sup>109</sup> Against this backdrop, BHR emerged as an umbrella term encompassing what are now a multitude of non-binding initiatives to encourage corporate entities to comply with international human rights law.<sup>110</sup>

## 1. Development of the BHR Framework

Over the past two decades, a BHR framework has become the default approach to addressing corporate wrongdoing. As with the growth of ICL, the growth of BHR has been beneficial in some respects. But, also like ICL, BHR has significant limitations in responding to platform-enabled crimes. First, in the technology sector, the BHR conversation has focused on government threats to “freedom of expression and privacy” as the key concerns for social media companies to guard against.<sup>111</sup> Such concerns are obviously important, but they are meaningfully different from the threats posed by genocide, war crimes, or crimes against humanity. Second, BHR suffers from an enforcement problem.<sup>112</sup> In theory, states have a duty to ensure corporate entities respect human rights. In practice, however, the entire field is characterized by a high degree of corporate self-regulation.

BHR started gaining traction at the end of the twentieth century as increasing reports came out regarding transnational corporations perpetrating or enabling harms across a range of industries.<sup>113</sup> At the 1999 World Economic Forum, then-U.N. Secretary General Kofi Annan introduced a partnership be-

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<sup>109</sup> See Eric de Brabandere, *Non-State Actors, State-Centrism and Human Rights Obligations*, 22 LEIDEN J. INT’L L. 191, 191–209 (2009) (summarizing the theoretical debate over corporations’ duties under international law). See generally ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006).

<sup>110</sup> Emphasizing the voluntary nature of BHR arguably oversimplifies what is a rapidly developing field. See Elise Groulx Diggs, Mitt Regan & Beatrice Parance, *Business and Human Rights as a Galaxy of Norms*, 50 GEO. J. INT’L L. 309, 314 (2019) (theorizing BHR as a set of “concentric rings” with norms that range from “hard law” to “soft law”).

<sup>111</sup> See, e.g., GLOB. NETWORK INITIATIVE, ANNUAL REPORT 2018: LEARNING FROM THE PAST TO EMBRACE THE FUTURE 6 (2018), <https://globalnetworkinitiative.org/wp-content/uploads/2019/06/GNI-2018-AR.pdf> [<https://perma.cc/R8AK-7388>] (describing GNI’s activities to support “the protection and advancement of freedom of expression and privacy”).

<sup>112</sup> van den Herik & Čemič, *supra* note 107, at 726 (“[T]he greatest practical hurdle that the human rights framework has not been able to overcome so far in addressing corporate human right violations is the enforcement gap.”).

<sup>113</sup> See generally, e.g., NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS (Andrew Ross ed., 1997) (describing violations in the garment industry); *World Report 1999: Special Issues and Campaigns*, HUM. RTS. WATCH (1999), <https://www.hrw.org/legacy/world-report99/special/corporations.html#oil> [<https://perma.cc/LDC5-BA2F>] (describing violations in the oil and gas industry).

tween the U.N. and the private sector through the U.N. Global Compact.<sup>114</sup> With a low barrier to entry, more than 9,500 companies have joined the initiative.<sup>115</sup> Prioritizing education, communication, and collaboration, the U.N. Global Compact describes itself as “more like a guide dog than a watch dog.”<sup>116</sup>

Annan also gave Professor John Ruggie, the U.N. Special Rapporteur on the Issue of Human Rights and Transnational Corporations, a mandate to articulate and explain “standards of corporate responsibility and accountability.”<sup>117</sup> This mandate culminated in the 2011 U.N. Guiding Principles on Business and Human Rights.<sup>118</sup> Consistent with the traditional view of international law, the direct obligations in the document remained with states, but a number of voluntary multi-stakeholder corporate compliance initiatives echo the Guiding Principles.<sup>119</sup>

For example, in the technology sector, the Global Network Initiative (GNI) dominates this multi-stakeholder space. GNI is a voluntary initiative by corporations and civil society groups to uphold human rights of free expression and privacy in response to state requests for user information and content

<sup>114</sup> Kofi Annan, U.N. Sec’y-Gen, Address to the World Economic Forum in Davos, Switzerland (Jan. 31, 1999), <https://www.un.org/sg/en/content/sg/speeches/1999-02-01/kofi-annans-address-world-economic-forum-davos> [<https://perma.cc/3PLQ-DEQX>] (proposing the establishment of the Global Compact to “give a human face to the global market”).

<sup>115</sup> *What’s the Commitment?*, UNITED NATIONS GLOB. COMPACT, <https://www.unglobalcompact.org/participation/join/commitment> [<https://perma.cc/X5M8-88XF>] (listing an additional “3,000 non-business participants”).

<sup>116</sup> *About the UN Global Compact: Frequently Asked Questions*, UNITED NATIONS GLOB. COMPACT, <https://www.unglobalcompact.org/about/faq> [<https://perma.cc/7NLN-9TVD>] (noting that participating companies “[s]ets in motion changes to business operations so that the UN Global Compact and its Ten Principles become part of strategy, culture and day-to-day operations”).

<sup>117</sup> Press Release, U.N. Sec’y-Gen., Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005), <https://www.un.org/press/en/2005/sga934.doc.htm> [<https://perma.cc/647Y-WNNL>].

<sup>118</sup> See generally U.N. *Guiding Principles*, *supra* note 76; JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS (2013) (providing a fascinating first-hand account of the process behind the development of the Guiding Principles). The Guiding Principles dominate the framing of the BHR landscape, but other sets of principles and initiatives are also important. See, e.g., INT’L LABOUR ORG., TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (5th ed. 2017), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf) [<https://perma.cc/DW9J-GWYM>]; ORGANISATION FOR ECON. COOP. & DEV., OECD DUE DILIGENCE GUIDANCE FOR RESPONSIBLE BUSINESS CONDUCT (2018), <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> [<https://perma.cc/42LK-7VRF>].

<sup>119</sup> See, e.g., *Who We Are*, BETTER COTTON INITIATIVE, <https://bettercotton.org/about-bci/who-we-are/> [<https://perma.cc/BEJ3-T6P8>] (describing the mission of Better Cotton “to help cotton communities survive and thrive, while protecting and restoring the environment”); *About Us Overview*, BUS. FOR SOC. RESP., <https://www.bsr.org/en/about> [<https://perma.cc/G68X-RH75>] (describing the mission of BSR “to work with business to create a just and sustainable world”).

moderation.<sup>120</sup> As a result, social media companies have developed comprehensive protocols to help ensure their compliance with free expression and privacy, but have not developed similarly comprehensive frameworks for preventing their complicity in international crimes.<sup>121</sup> Further, although compliance with GNI's Principles on Freedom of Expression and Privacy is evaluated by GNI-certified independent assessors through an increasingly robust assessment process, the Initiative has no direct enforcement power in the face of non-compliance.<sup>122</sup>

## 2. Efforts to Strengthen Business and Human Rights

The weakness of enforcement within BHR is widely acknowledged.<sup>123</sup> Of course, international law *can* reach corporate entities, but only indirectly through enforcement actions by the state.<sup>124</sup> There are a host of political and practical reasons why states have generally been unable or unwilling to flex their legal muscles when it comes to the corporate enablers of international crimes. These barriers have led to the status quo where BHR—and its associated *modus operandi* of self-regulation—is the default response, even in the face of crimes as grave as genocide.<sup>125</sup>

A recent resolution on corporate accountability by the European Parliament noted the shortcomings of noncompulsory benchmarks in preserving hu-

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<sup>120</sup> GLOB. NETWORK INITIATIVE, *supra* note 111, at 3.

<sup>121</sup> See *Facebook Responses to Oversight Board Recommendations in Trump Case*, FACEBOOK (2021), <https://about.fb.com/wp-content/uploads/2021/06/Facebook-Responses-to-Oversight-Board-Recommendations-in-Trump-Case.pdf> [<https://perma.cc/U24U-82KE>] (committing to implementing a “Crisis Policy Protocol” that would presumably govern situations where international crimes are imminent or unfolding).

<sup>122</sup> GLOB. NETWORK INITIATIVE, GNI ASSESSMENT TOOLKIT 24–37 (2018), <https://globalnetworkinitiative.org/wp-content/uploads/2019/11/GNI-Assessment-Toolkit.pdf> [<https://perma.cc/HZY9-P33M>] (outlining the “GNI Principles to Implementation Guidelines”). Nonetheless, there are some positive accounts of the impact of GNI in protecting freedom of expression. See, e.g., Ashley Deeks, *A New Tool for Tech Companies: International Law*, LAWFARE (May 30, 2019), <https://www.lawfareblog.com/new-tool-tech-companies-international-law> [<https://perma.cc/6UXA-8ZMR>] (“[A] number of corporate actors have made decisions that effectively enforce international law against states . . . .”); Jay Butler, *The Corporate Keepers of International Law*, 114 AM. J. INT’L L. 189, 207–09 (2020) (“[A] number of prominent internet companies . . . have signed on to the Global Network Initiative.” (citing *About: Our Members, Fellows & Observers*, GLOB. NETWORK INITIATIVE, <https://globalnetworkinitiative.org/#home-menu> [<https://perma.cc/AR6L-9GB5>] (2022))).

<sup>123</sup> See van den Herik & Černič, *supra* note 107, at 726 (describing the “enforcement gap” as the biggest obstacle for BHR).

<sup>124</sup> Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT’L L. 927, 931 (2005) (“[T]he regulation of corporations, like that of all non-state actors, has been left to states.”).

<sup>125</sup> See *supra* notes 119–122 and accompanying text.

man rights.<sup>126</sup> It proposed that the E.U. Commission promulgate a Directive to mandate due diligence, thereby requiring regulated corporations to “identify, assess, prevent, cease, mitigate, monitor, communicate, account for, address and remediate” for the possibility and occurrence of human rights violations.<sup>127</sup>

Consistent with the Guiding Principles, the European Parliament expected corporations “to respect [international] human rights” but emphasized that the duty to ensure compliance rests with states.<sup>128</sup> The proposed Directive, which the EU Commission published a draft of in February 2022, would require E.U. member states to actually *use* the legal authority they already have to ensure compliance with the Guiding Principles.<sup>129</sup>

From a global perspective, the same concerns have spurred momentum for a similar effort to strengthen BHR. For instance, a 2014 U.N. Human Rights Council resolution established an “intergovernmental working group” that has been developing a “legally binding [treaty]” on “transnational corporations . . . with respect to human rights.”<sup>130</sup> The working group released a second revised draft of the treaty in late 2020.<sup>131</sup> Although civil society groups are supportive of the treaty, the International Chamber of Commerce has major concerns and many states are reticent.<sup>132</sup>

<sup>126</sup> Resolution on Corporate Due Diligence & Corporate Accountability, EUR. PARL. DOC. P9\_TA(2021)0073 ¶ 1 (2021), [https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html) [<https://perma.cc/3NP2-XWFD>] (“[V]oluntary due diligence standards have limitations and have not achieved significant progress in preventing human rights and environmental harm . . .”).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* ¶ 2 (“[I]t is the responsibility of states and governments to protect human rights and the environment, and this responsibility should not be transferred to private actors . . .”).

<sup>129</sup> Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive, COM (2022) 71 final (Feb. 23, 2022), [https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:bc4dcea4-9584-11ec-b4e4-01aa75ed71a1.0001.02/DOC_1&format=PDF) [<https://perma.cc/496P-CWAT>].

<sup>130</sup> See Human Rights Council Res. 26/9, Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, U.N. Doc. A/HRC/RES/26/9, ¶ 1 (July 14, 2014).

<sup>131</sup> See generally U.N. OPEN-ENDED INTERGOVERNMENTAL WORKING GRP., LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES (2d Rev. Drft. 2020), [https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG\\_Chair-Rapporteur\\_second\\_revised\\_draft\\_LBI\\_on\\_TNCs\\_and\\_OBEs\\_with\\_respect\\_to\\_Human\\_Rights.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf) [<https://perma.cc/2DA2-F23Y>].

<sup>132</sup> See, e.g., AM. BAR ASS’N CTR. FOR HUM. RTS., DOCUMENTS PROJECT 11–13, 15, [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/business-human-rights/documents-project.pdf](https://www.americanbar.org/content/dam/aba/administrative/human_rights/business-human-rights/documents-project.pdf) [<https://perma.cc/8KLV-DMXK>] (“Diplomatic prospects for the treaty are highly uncertain.”); INT’L ORGANISATION OF EMPs., INT’L CHAMBER OF COM., BUS. AT OECD & CONFEDERATION OF EUR. BUS., BUSINESS RESPONSE TO THE ZERO DRAFT LEGALLY BINDING INSTRUMENT TO REGULATE, IN INTERNATIONAL HUMAN RIGHTS LAW, THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES (“ZERO DRAFT TREATY”) AND THE DRAFT OPTIONAL PROTOCOL TO THE LEGALLY BINDING INSTRUMENT (“DRAFT OPTIONAL PROTOCOL”) ANNEX 27

### III. EXPANDING THE ACCOUNTABILITY LANDSCAPE

Current approaches to mitigate the accountability gap for platform-enabled atrocities evaluate options to adapt existing accountability mechanisms. For those approaches focused on ICL, this includes expanding the jurisdiction of the ICC to encompass corporate entities.<sup>133</sup> For those approaches operating within a BHR framework, this includes working to “harden” the U.N. Guiding Principles into a treaty-based system.

There is reason to be skeptical that either of these lines of effort will bear fruit within the lifetimes of current survivors of platform-enabled crimes. Furthermore, from a methodological standpoint, these approaches raise a more fundamental concern. Attempting to fit corporate responsibility for platform-enabled crimes inside one of these two existing legal frameworks puts the cart before the horse. Before knowing what legal framework to invoke, we must know why we are pursuing accountability in the first place.<sup>134</sup>

There are, of course, as many potential answers to the question of “why accountability?” as there are people to ask. The most principled basis from which to begin, however, is by asking those who are most affected—namely the survivors of these crimes. It is this survivor-centered approach to which Section A turns.<sup>135</sup> Section B continues on to discuss the potential goals of survivor-centered approaches in greater depth.<sup>136</sup>

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(2018), <https://bit.ly/2CsAWwk> [<https://perma.cc/4ZZJ-95RH>] (raising concerns on behalf of the international business community that a legally-binding instrument will diminish “important progress [being] made” through the Guiding Principles); *UN Treaty Negotiations Kick Off Amid Major Global Uncertainties*, EUR. COAL. FOR CORP. JUST. (Oct. 27, 2020), <https://corporatejustice.org/news/un-treaty-negotiations-kick-off-amid-major-global-uncertainties/> [<https://perma.cc/W3Z5-9YUY>] (describing opposition to the draft text by a number of states including both the E.U. and China).

<sup>133</sup> See generally Hamilton, *supra* note 25 (taking a similar approach for state-enabled crimes). I previously argued forcefully for the ICC to take on a role in adjudicating the responsibility of the state to help reduce the bifurcation that exists between individual and entity liability for state-enabled crimes. *Id.* (“The roles of the individual and the state are integrated with respect to the commission of a State-Enabled Crime, yet the international legal system bifurcates these two roles at the point of adjudication.”) In the intervening five years, however, I have watched the ICC become progressively more overloaded. At the same time, I have not seen any indication it will gain the additional financial resources needed to fulfil its existing mandate. As a result, I am turning my attention away from the ICC in analyzing accountability for platform-enabled crimes. Still, I hope to preserve the ability to revisit this position in the future should the practical realities of the ICC’s situation improve.

<sup>134</sup> See Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT’L L. 1, 2–3 (2010) (emphasizing that in order to assess any given justice mechanism, “we must begin with a theory of what it is trying to achieve”). More recent inspiration comes from Diane Orentlicher’s work to understand the views of survivors in the former Yugoslavia. DIANE ORENTLICHER, *SOME KIND OF JUSTICE: THE ICTY’S IMPACT IN BOSNIA AND SERBIA* 4–8 (2018) (building standards for evaluation of a justice mechanism from the priorities of survivors).

<sup>135</sup> See *infra* notes 137–144 and accompanying text.

<sup>136</sup> See *infra* notes 145–161 and accompanying text.



### A. Survivor-Centered Approaches

Rather than starting the accountability conversation with a given legal framework and seeking to adapt that framework to cover platform-enabled crimes, this Article argues that we should start with what the survivors of platform-enabled crimes want and develop a set of legal responses to match. Importantly, however, there is no one-size-fits-all definition of justice.<sup>137</sup>

Within the same survivor group, and even for the same survivor, an account of what justice means—and thus what course of legal action might be useful to pursue—varies as a function of a number of factors. These factors include the perpetrator (such as a neighbor versus a faceless bureaucrat), the harm suffered (harm to a victim versus harm to a victim’s loved one), and the passage of time (days or months versus years or decades).<sup>138</sup> Nonetheless, there are strong normative arguments in favor of embracing, rather than sidelining, the pluralistic conceptions of justice that exist in the real world.<sup>139</sup>

Over the past two decades, scholars have increasingly recognized the importance of centering accountability efforts on the needs of survivors.<sup>140</sup> Yet actually doing so demands the ability to conduct field-based empirical research of a multidisciplinary character.<sup>141</sup> Developing a set of legal responses that will meet the needs of survivors in any given situation requires considerable insight of a local population, in addition to its values, beliefs, and way of life.<sup>142</sup>

To date, this empirical research has not been undertaken in any large-scale or systematic way with Rohingya survivors. Anecdotal statements, how-

<sup>137</sup> See generally REBECCA HAMILTON, *FIGHTING FOR DARFUR: PUBLIC ACTION AND THE STRUGGLE TO STOP GENOCIDE* (2011) (describing first-hand conversations with survivors of a range of international crimes).

<sup>138</sup> See, e.g., JONATHAN LOEB ET AL., *24 HOURS FOR DARFUR, DARFURIAN VOICES: DOCUMENTING DARFURIAN REFUGEES’ VIEWS ON ISSUES OF PEACE, JUSTICE, AND RECONCILIATION* 38–41 (2010); Laura Arriaza & Naomi Roht-Arriaza, *Social Reconstruction as a Local Process*, 2 INT’L J. TRANSITIONAL JUST. 152, 154–57 (2008) (describing the difficulties of responding to the violence in Guatemala in light of the diversity within the victim population); see also Payam Akhavan, Sareta Ashraph, Barzan Barzani & David Matyas, *What Justice for the Yazidi Genocide?: Voices from Below*, 42 HUM. RTS. Q. 1, 46 (2020) (arguing that no one should expect the voices of survivors to be routinely “consistent, equitable, or actionable”); Miller, *supra* note 21, at 849 (describing the need to acknowledge the role of the temporal in transitional justice processes generally).

<sup>139</sup> See, e.g., Nouwen & Werner, *supra* note 97, at 157 (noting the growth of international criminal law “come[s] with a profound risk: alternative conceptions of justice can be marginalized”).

<sup>140</sup> JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* 309 (2006) (“The needs and aspirations of the people who endured the atrocities must be appreciated more fully . . .”).

<sup>141</sup> See, e.g., Simon Robins, *Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal*, 5 INT’L J. TRANSITIONAL JUST. 75, 76 (2011) (describing the “highly interdisciplinary nature” of a victim-centered approach).

<sup>142</sup> See Ramji-Nogales, *supra* note 134, at 71 (“[A]n effective approach [to transitional justice] requires an inclusive and carefully structured design process.”).

ever, point to a desire for something that goes beyond punitive models of criminal justice. As Rohingya youth leaders in Bangladesh have stated, “We want to go home, we want to go to school, we want to work, and we want to be safe. That is what justice means to us.”<sup>143</sup>

A comprehensive survey of the Rohingya population involves field research that I have not been able to do in advance of this publication.<sup>144</sup> Nonetheless, as a first step this Article seeks to demonstrate how starting with even a small selection of the goals that survivors may have can pluralize available responses and strengthen accountability beyond the dominant ICL-BHR binary. To that end, this Article draws on the field work that others have done with survivors of international crimes in a range of geographic locations over the past twenty years. The Article uses this work to identify a sample set of goals that survivors may hope to achieve in their pursuit of justice. It then uses these goals to illustrate what the conversation around accountability for platform-enabled crimes could look like with the needs of survivors prioritized.

### *B. Potential Purposes Motivating the Pursuit of Justice*

To generate a plausible sample of goals that survivors of platform-enabled crimes may have in their pursuit of justice, this Article draws on existing surveys of survivors of atrocities. These surveys demonstrated a strong degree of methodological rigor that provided geographical diversity through coverage of populations across Africa, Asia, Latin America, Europe and the Middle East.<sup>145</sup>

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<sup>143</sup> Zahidullah, Shohid & Abdullah Zubair, *We, the Rohingya, Can't Wait for Justice from Faraway Courts*, FRONTIER MYANMAR (May 28, 2020), <https://www.frontiermyanmar.net/en/we-the-rohingya-cant-wait-for-justice-from-faraway-courts/> [<https://perma.cc/JM95-HWKL>].

<sup>144</sup> I am currently working with others to secure funding as part of a collaborative, interdisciplinary project to conduct this research in Bangladesh and Myanmar with the survivors of the Rohingya genocide.

<sup>145</sup> See RIM EL GANTRI & ARNAUD YALIKI, INT'L CTR. FOR TRANSITIONAL JUST. & CORDAID, 'A DROP OF WATER ON A HOT STONE': JUSTICE FOR VICTIMS IN THE CENTRAL AFRICAN REPUBLIC 33 (2021), [https://www.ictj.org/sites/default/files/ICTJ\\_Report\\_CAR\\_EN.pdf](https://www.ictj.org/sites/default/files/ICTJ_Report_CAR_EN.pdf) [<https://perma.cc/YM5V-DG33>]; Ian Harris, “Onslaught on Beings”: *A Theravāda Buddhist Perspective on Accountability for Crimes Committed in the Democratic Kampuchea Period*, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS 59, 86 (Jaya Ramji & Beth Van Schaack eds., 2005); RACHEL KERR & JESSICA LINCOLN, WAR CRIMES RSCH. GRP., KING'S COLL. LONDON DEP'T OF WAR STUD., THE SPECIAL COURT FOR SIERRA LEONE: OUTREACH, LEGACY AND IMPACT 23 (2008), <https://hybridjustice.files.wordpress.com/2017/02/kerr-special-court-for-sierra-leone-outreach-impact-legacy.pdf> [<https://perma.cc/ZTB3-4N9V>]; ORENTLICHER, *supra* note 134, at 5; PHUONG PHAM ET AL., INT'L CTR. FOR TRANSITIONAL JUST., WHEN THE WAR ENDS: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN NORTHERN UGANDA 7 (2007), [https://www.ictj.org/sites/default/files/ICTJ-Uganda-Justice-Attitudes-2007-English\\_0.pdf](https://www.ictj.org/sites/default/files/ICTJ-Uganda-Justice-Attitudes-2007-English_0.pdf) [<https://perma.cc/FV9Q-RT9C>]; PIERS PIGOU, INT'L CTR. FOR TRANSITIONAL JUST., CRYING WITHOUT TEARS: IN PURSUIT OF JUSTICE AND RECONCILIATION IN TIMOR-LESTE: COMMUNITY PERSPECTIVES AND EXPECTATIONS 35–36 (Paul Seils ed., 2003), <https://www.>

One consistent finding across each survey was that the purposes for which survivors seek justice are multi-layered.<sup>146</sup> Nonetheless, three central goals consistently appeared: (1) acknowledgement of wrongdoing; (2) compensation; and (3) prevention of recurrence.<sup>147</sup> Subsections 1 through 3 address each of these goals, respectively.<sup>148</sup> Subsection 4 discusses the significance of re-orienting the accountability conversation towards a survivor-centered approach with these goals in mind.<sup>149</sup>

## 1. Acknowledgement of Wrongdoing

Across the research reviewed, survivors consistently highlighted their need for an acknowledgement of wrongdoing.<sup>150</sup> In some cases this need manifested in the demand for a public apology from specific individuals or from entities like the state. The goal of such an apology was the desire to see genuine recognition of responsibility on the part of the perpetrators.<sup>151</sup> In other cases,

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ictj.org/sites/default/files/ICTJ-TimorLeste-Reconciliation-Expectations-2003-English.pdf [https://perma.cc/N5DU-LTB8]; PATRICK VINCK, PHUONG PHAM, SULIMAN BADO & RACHEL SHIGEKANE, INT'L CTR. FOR TRANSITIONAL JUST., *LIVING WITH FEAR: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN EASTERN DEMOCRATIC REPUBLIC OF THE CONGO* (2008), <https://www.ictj.org/sites/default/files/ICTJ-DRC-Attitudes-Justice-2008-English.pdf> [https://perma.cc/V4RW-VQSK]; Akhavan et al., *supra* note 138, at 20–21; Robins, *supra* note 141, at 75. I am conscious of the risk that the very process of administering a survey may distort pre-existing views on the topic. *See, e.g.*, Randle C. DeFalco & Savina Sirik, *The Fluctuating Visibility of Everyday Atrocity Violence in Khmer Rouge Era Cambodia*, 31 S. CAL. INTERDISC. L.J. (forthcoming 2022) (manuscript at 33), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3898763](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3898763) [https://perma.cc/LT6G-5GEN].

<sup>146</sup> *See supra* note 145 and accompanying text.

<sup>147</sup> The terminology I use to describe these three goals is imperfect, and survivors often use different phrases. One could readily substitute “apology” for “acknowledgement of wrongdoing,” or “livelihoods” for “compensation,” or “deterrence” for “prevention of recurrence.” Such differences in terminology do not detract from the consistency of the underlying concepts that survivors routinely raise in interviews.

<sup>148</sup> *See infra* notes 150–158 and accompanying text.

<sup>149</sup> *See infra* notes 159–161 and accompanying text.

<sup>150</sup> One exception to the strength of this trend was from a randomized survey of 2,620 respondents in eastern Democratic Republic of Congo. *See* VINCK ET AL., *supra* note 145, at 1. There, just three percent of those interviewed referred to an apology when asked about what justice meant to them. *See id.* at 44. The majority of respondents answered that “the meaning of ‘justice’” was to “[e]stablish the truth.” *Id.* at 45 tbl.25. One possibility is that this expressed desire for the truth is, in fact, consistent with the desire for an acknowledgement of wrongdoing. Another is that the framing of the question led respondents to focus on the kind of justice that a court could deliver, given that roughly half of respondents responded that justice should “[a]pply the law.” *Id.* When asked, “What should be done for victims?” more than 14% said they should “[r]eceive apologies.” *Id.* at 51 tbl.31. Nonetheless, this is still significantly lower than the top two responses, as over three-quarters of respondents in aggregate answered that victims should either “[r]eceive money” or “[o]ther material compensation.” *Id.*

<sup>151</sup> *See, e.g.*, Harris, *supra* note 145, at 86 (describing the importance of “genuine acknowledgement of moral failings or virtues” for Theravāda Buddhim (citing Peter Harvey, *The Dynamics of*

the desire was for the public recognition of wrongdoing from a formal institution, such as through the judgment of a criminal court.<sup>152</sup>

## 2. Compensation

The term compensation is useful shorthand, but it diminishes the significance of what survivors are seeking in their pursuit of justice. Throughout the surveys reviewed, compensation—whether in the form of money or some other material benefit—was intrinsically connected to the restoration of agency or to survivors reclaiming their lives.<sup>153</sup> Compensation was often infused with symbolic value. One survivor in the Central African Republic framed material support as a means “to recognize our humanity.”<sup>154</sup>

## 3. Prevention of Recurrence

Across the surveys, survivors consistently emphasized their need for security. Although the prevention of future wrongdoing traditionally encompasses criminal law’s purpose of deterrence, survivors often spoke of something broader than either specific or general deterrence. As researchers in East Africa observed, survivors could not prioritize the mechanisms traditionally

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Paritta *Chanting in Southern Buddhism*, in LOVE DIVINE: STUDIES IN BHAKTI AND DEVOTIONAL MYSTICISM 53, 67–68 (Karel Werner ed., 1993)); PIGOU, *supra* note 145, at 36, 40, 50 (emphasizing the need for offenders to acknowledge their wrongdoing and the significance of a public apology as such acknowledgement for Timorese victims of mass violence surveyed across twelve focus group discussions); *see also* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 102 (1998) (referring to “burning needs for acknowledgement, closure, vindication, and connection”); M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 HUM. RTS. L. REV. 203, 231 (2006) (“[V]ictims often desire that their suffering be acknowledged . . .” (citing Yael Danieli, *Justice and Reparations: Steps in the Healing Process*, 14 NOUVELLES ÉTUDES PÉNALES 303, 308–12 (1998))).

<sup>152</sup> *See, e.g.*, ORENTLICHER, *supra* note 134, at 4–8 (developing standards for evaluation of a justice mechanism from the priorities of survivors).

<sup>153</sup> *See, e.g.*, Akhavan et al., *supra* note 138, at 20–21 (noting the significance of compensation for Yazidi respondents as a way of “getting on with their lives”); Nouwen & Werner, *supra* note 97, at 171 (“To people who have been deprived of everything, compensation can make the difference between experiencing agency or total dependence on charity.”); *see also* Robins, *supra* note 141, at 75 (presenting a study of “a representative sample of 160 families” of the disappeared in Nepal “emphasiz[ing] the need . . . for economic support to help meet [their] basic needs”).

<sup>154</sup> EL GANTRI & YALIKI, *supra* note 145, at 33 (quoting an interview with a victim in Alindao, July 19, 2020); *see also* KERR & LINCOLN, *supra* note 145, at 23 (describing the “immediate concerns” of some victims, including “housing, food, jobs, education, health and war reparations”); PIGOU, *supra* note 145, at 36 (describing how the perpetrators should “compensate the families of the victims, the duration of which will depend on the individual family’s needs” (quoting a 28-year-old male professional acting as a survey participant)); Arriaza & Roht-Arriaza, *supra* note 138, at 161–63.

associated with justice, such as criminal trials or reconciliation events, until they felt safe.<sup>155</sup>

Statements from survivors appearing before the InterAmerican Court on Human Rights have spoken of their desire for legislative reforms to thwart future human rights violations.<sup>156</sup> Similarly, survivors of atrocities in the former Yugoslavia have repeatedly highlighted the need to establish comprehensive measures against repeat attacks.<sup>157</sup> Thus, although deterrence of past and future perpetrators from wrongdoing through criminal sanctions is important, survivors sought more comprehensive assurances of their future safety than can generally be secured through criminal trials alone.<sup>158</sup>

#### 4. Re-orienting the Accountability Conversation

The three goals identified above: (1) acknowledgement of wrongdoing; (2) compensation; and (3) prevention of recurrence, are not necessarily held in every survivor population. Nor do they constitute the priorities of any given population in their pursuit of justice. Rather, they are three purposes that survivors repeatedly voiced across a globally diverse set of populations. They therefore provide a reasonable basis for the task of this Article. They are sample purposes derived from the survivor-centered literature. As such, they demonstrate how starting with survivors' purposes for pursuing justice can expand the

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<sup>155</sup> See VINCK ET AL., *supra* note 145, at 24 (“Consistent with findings from prior comparable research, justice, reintegration, and reconciliation are not major priorities among respondents when peace and security are not yet met and basic needs are not satisfied.” (footnote omitted) (citing PHAM ET AL., *supra* note 145)); see also PHAM ET AL., *supra* note 145, at 23 (“Only 3 percent of respondents identified justice as a top priority, putting the emphasis on . . . peace, food, and health.”).

<sup>156</sup> Thomas M. Antkowiak, *An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice*, 47 STAN. J. INT’L L. 279, 319 (2011); see Akhavan et al., *supra* note 138, at 18 (quoting one Yazidi survivor who stated, “[w]e don’t want to live here, on this land anymore because we are afraid that the same thing will happen to us again” (alteration in original)).

<sup>157</sup> ORENTLICHER, *supra* note 134, at 7.

<sup>158</sup> Survivors’ views on this topic seem to align with the literature on the relationship between criminal trials and mass atrocity crimes. Notwithstanding some limited evidence, researchers have found it hard to demonstrate a general deterrence payoff to criminal trials when it comes to mass atrocities. See David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT’L L.J. 473, 474 (1999) (“[T]he connection between international prosecutions and the actual deterrence of future atrocities is at best a plausible but largely untested assumption.”). *But see* Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT’L ORG. 443, 443 (2016) (concluding on the basis of extensive empirical research that “the ICC can deter some governments and those rebel groups that seek legitimacy”). One credible concern is that general deterrence requires a tight link between the commission of a crime and the likelihood of punishment. See, e.g., Charles R. Tittle, *Crime Rates and Legal Sanctions*, 16 SOC. PROBS. 409, 409–23 (1969) (“Strong and consistent negative associations are observed between certainty of punishment and crimes rates . . .”). This is impossible to attain in situations where hundreds or thousands of perpetrators may be involved.

accountability conversation for platform-enabled crimes beyond the perceived binary landscape within which it currently sits.

Part IV applies these three goals to the question of accountability for Facebook's role in the Rohingya genocide.<sup>159</sup> Importantly, these sample goals do not constitute the full range of goals that the Rohingya may have in seeking accountability from Meta. At present, there is a lack of research to elucidate Rohingya views on this topic fully. Nonetheless, Part IV demonstrates what a survivor-centered approach to accountability for platform-enabled crimes might look like in concrete terms.<sup>160</sup> In so doing, Part IV illustrates how a survivor-centered approach pluralizes the accountability conversation and reveals the legal, political, and practical constraints that currently hinder this effort.<sup>161</sup>

#### IV. ACCOUNTABILITY FOR PLATFORM-ENABLED CRIMES IN MYANMAR

Meta was aware that Facebook was being used to fuel the atrocities in Myanmar as they were unfolding.<sup>162</sup> Long before whistleblower Frances Haugen testified before the U.S. Congress, local activists raised the alarm to Meta. They did so through traditional media outlets and interpersonal connections, including at least one documented face-to-face meeting in 2015 at Meta headquarters in Menlo Park, California.<sup>163</sup> David Madden, a leading digital rights activist, explicitly warned Meta's leadership of the corporation's potential complicity in the genocide in Myanmar.<sup>164</sup>

<sup>159</sup> See *infra* notes 162–284 and accompanying text.

<sup>160</sup> See *infra* notes 162–284 and accompanying text.

<sup>161</sup> See *infra* notes 162–284 and accompanying text.

<sup>162</sup> See generally Stecklow, *supra* note 5; *Hearing on “Holding Big Tech Accountable: Targeted Reforms to Tech’s Legal Immunity” Before Subcomm. on Consumer Prot., Prod. Safety, & Data Sec. of the U.S. S. Comm. on Com., Sci. & Transp.*, 117th Cong. (2021) (statement of Frances Haugen) [hereinafter *Holding Big Tech Accountable*, Haugen Statement], <https://www.commerce.senate.gov/services/files/FC8A558E-824E-4914-BEDB-3A7B1190BD49> [<https://perma.cc/92HZ-QQ75>]; The Journal, *The Facebook Files, Part 4: The Outrage Algorithm*, WALL ST. J. (Sept. 18, 2021), <https://www.wsj.com/podcasts/the-journal/the-facebook-files-part-4-the-outrage-algorithm/e619fb7-43b0-485b-877f-18a98ffa773f> [<https://perma.cc/9VMN-ND53>] (explaining how Facebook’s “emphasis on engagement incentivized the spread of divisive, sensational content and misinformation”).

<sup>163</sup> See Anisa Subedar, *The Country Where Facebook Posts Whipped Up Hate*, BBC NEWS (Sept. 12, 2018), <https://www.bbc.com/news/blogs-trending-45449938> [<https://perma.cc/CMZ6-2BPU>] (noting that some individuals began raising the alarm to Facebook as early as 2013). These warnings continued in subsequent years. See, e.g., Timothy McLaughlin, *U.N. Rights Investigators Comb New Conflict Zone: Internet Hate Speech*, WASH. POST (Nov. 26, 2018), [https://www.washingtonpost.com/world/asia\\_pacific/un-rights-investigators-comb-new-conflict-zone-internet-hate-speech/2018/11/25/cd83d5b2-dc50-11e8-b3f0-62607289efee\\_story.html](https://www.washingtonpost.com/world/asia_pacific/un-rights-investigators-comb-new-conflict-zone-internet-hate-speech/2018/11/25/cd83d5b2-dc50-11e8-b3f0-62607289efee_story.html) [<https://perma.cc/EB24-CP3Q>] (quoting Marzuki Darusman, head of the U.N. fact-finding mission, who observed, “Initially, of course, [Facebook representatives] were very defensive and reluctant to recognize that Facebook was, in fact, if not the instigator, then the facilitator of hate speech in Myanmar” (alteration in original)).

<sup>164</sup> Subedar, *supra* note 163; see Patrice Taddonio, *As Facebook Addresses Role in Myanmar Violence, Look Back at Early Warnings*, PBS FRONTLINE (Nov. 6, 2018), <https://www.pbs.org/wgbh/front>

No investigation has determined the exact degree of Meta's complicity in the genocide. Researchers have established correlations between spikes in anti-Rohingya posts on Facebook and genocidal attacks on the Rohingya population.<sup>165</sup> U.N. investigators have emphasized Meta's responsibility.<sup>166</sup> But in response to requests for data that might enable researchers to draw specific causal conclusions, Meta notified U.N. investigators that "its policies did not allow it to do so."<sup>167</sup> In October 2021, whistleblower Frances Haugen leaked internal documents underscoring what activists had long maintained: Meta not only *should* have known, but in time *did* know, that its platform was enabling ethnic violence in Myanmar.<sup>168</sup>

Although acknowledging that Meta's complicity in the Rohingya genocide has not been established in any legal proceeding, the following sections proceed on the assumption that based on information available to date, a full investigation would likely be able to demonstrate such complicity. Section A considers what legal responses might generate an acknowledgement of wrongdoing.<sup>169</sup> Section B considers what legal responses might achieve the goal of compensation from Meta for Facebook's role in the Rohingya genocide.<sup>170</sup> Section C evaluates legal measures that might prevent recurrence of such platform-enabled crimes.<sup>171</sup>

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line/article/as-facebook-addresses-role-in-myanmar-violence-look-back-at-early-warnings/ [https://perma.cc/63HH-SCX2] (quoting David Madden: "I drew the analogy with what had happened in Rwanda, where radios had played a really key role in the execution of this genocide . . . Facebook [ran] the risk of being in Myanmar what radios were in Rwanda . . .").

<sup>165</sup> Libby Hogan & Michael Safi, *Revealed: Facebook Hate Speech Exploded in Myanmar During Rohingya Crisis*, THE GUARDIAN (Apr. 2, 2018), <https://www.theguardian.com/world/2018/apr/03/revealed-facebook-hate-speech-exploded-in-myanmar-during-rohingya-crisis> [https://perma.cc/5PJH-TK5W].

<sup>166</sup> See IFFMM Report, *supra* note 6, at 340–66 (noting that Facebook had "become the main mode of communication among the public and a regularly used tool for the Myanmar authorities to reach the public").

<sup>167</sup> *Id.* at 344 & n.2997. As a result, U.N. investigators were left expressing regret "that Facebook has been unable to provide country-specific data about the spread of hate speech on its platform, which is imperative to assess the problem and the adequacy of its response." *Id.* at 344.

<sup>168</sup> See, e.g., Letter from Anonymous Facebook Whistleblower & Whistleblower Aid to SEC Off. of the Whistleblower (2021), <http://whistlebloweraid.securedrop.tor.omon> [https://perma.cc/3RNU-CA7P].

<sup>169</sup> See *infra* notes 172–210 and accompanying text.

<sup>170</sup> See *infra* notes 211–243 and accompanying text.

<sup>171</sup> See *infra* notes 244–284 and accompanying text.

### A. Acknowledgement of Wrongdoing

In the aftermath of atrocity, acknowledgement of wrongdoing can occur through various mechanisms.<sup>172</sup> In theory, the Business and Human Rights Impact Assessment that Meta commissioned to assess Facebook's role in the Rohingya genocide could have provided an effective forum to secure such acknowledgement.<sup>173</sup> The terms of the report, however, were so steadfastly focused on looking forward that Meta missed the opportunity to scrutinize its past actions thoroughly.<sup>174</sup> In publishing the report, the closest approximation to any acknowledgement of wrongdoing by Meta was its statement that "prior to this year, we weren't doing enough to help prevent our platform from being used to foment division and incite offline violence."<sup>175</sup> This is a far cry from the genuine recognition of responsibility that survivors seek.

In the absence of a formal acknowledgement of wrongdoing from Meta itself, survivors may be open to having such acknowledgement come through court proceedings. When sued, the vast majority of corporate actors will settle without admitting wrongdoing to avoid the risk of a court issuing a finding of wrongdoing by the corporation.<sup>176</sup> Thus, in practical terms, civil litigation is unlikely to achieve the acknowledgement that survivors seek. By contrast, a successful prosecution of Meta for criminal complicity could achieve the survivors' goal of acknowledgement that "what happened to them was profoundly wrong."<sup>177</sup> Indeed, the advantage of criminal liability over civil liability is its expressive signal.<sup>178</sup>

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<sup>172</sup> See, e.g., Alexei Kral, *Historian Cites Textbooks as Key Front in Battles over Citizenship and Memory*, WILSON CTR. (May 16, 2000), <https://www.wilsoncenter.org/event/historian-cites-textbooks-key-front-battles-over-citizenship-and-memory> [<https://perma.cc/W9RT-VYXG>] ("Textbook controversies reveal one important way that societies negotiate, institutionalize, and renegotiate nationalist narratives." (quoting historian Laura Hein)).

<sup>173</sup> See generally BUS. FOR SOC. RESP., *supra* note 12.

<sup>174</sup> Warofka, *supra* note 79 (displacing the focus on the genocide by stating that "[w]e know we need to do more to ensure we are a force for good in Myanmar, and in other countries facing their own crises").

<sup>175</sup> *Id.*

<sup>176</sup> See Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 487 (2006) ("[A]ny settlement that required admission of criminal fault would be no better than a guilty verdict after a trial, because of the brand it would sear onto the firm."); Dina ElBoghdady, *SEC to Require Admissions of Guilt in Some Settlements*, WASH. POST (June 18, 2013), [https://www.washingtonpost.com/business/economy/sec-to-require-admissions-of-guilt-in-some-settlements/2013/06/18/9eff620c-d87c-11e2-a9f2-42ee3912ae0e\\_story.html](https://www.washingtonpost.com/business/economy/sec-to-require-admissions-of-guilt-in-some-settlements/2013/06/18/9eff620c-d87c-11e2-a9f2-42ee3912ae0e_story.html) [<https://perma.cc/VC8N-QZ6P>] (explaining that the SEC's use of standard "neither-admit-nor-deny" language in their settlements flowed from the belief that "most defendants would refuse to settle if they had to admit wrongdoing").

<sup>177</sup> ORENTLICHER, *supra* note 134, at 5.

<sup>178</sup> See, e.g., *id.*; Buell, *supra* note 176, at 501 (noting that as compared to civil liability, "[c]riminal liability is distinguished by its communicative force").



## 1. Criminal Prosecutions in Host or Home State

Turning to the possibility of prosecution, the key question is which of the available forums would be most likely to achieve the goal of acknowledgement of wrongdoing. The answer depends on whether a given forum can overcome three broad sets of obstacles: legal, political, and practical. On the legal front, the forum must have both the substantive law to prosecute international crimes—or domestic equivalents—through corporate complicity and the jurisdiction over Meta for crimes in Myanmar. Politically, the forum must be in a state that is motivated to pursue such a prosecution. Practically, the forum must have the human and financial capacity to conduct an investigation that can both unearth information about Facebook’s internal workings and about the Myanmar crime base.

Across the literature, *host* state prosecutions are generally perceived to be preferable to *home* state prosecutions.<sup>179</sup> One rationale is practical; host state prosecutions make for easier access to crime base evidence.<sup>180</sup> Moreover, from a survivor-centered perspective, geographical and cultural proximity to survivors makes testifying less traumatic and increases the meaningfulness of any acknowledgment of wrongdoing.<sup>181</sup>

Despite the clear benefits of prosecutions being pursued in the host state, structural barriers within the court system, including bribery, jurisprudential shortcomings, or express partisan interference, may be more prevalent within a host state compared to the state of the corporation.<sup>182</sup> Unfortunately this assessment is apt when it comes to Myanmar, which has “one of the lowest commitments to rule of law in the world.”<sup>183</sup>

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<sup>179</sup> The term “host state prosecutions” refers to prosecutions in the jurisdiction where the crimes occurred, whereas “home state prosecutions” refer to prosecutions in the jurisdiction where the corporations were incorporated. See, e.g., Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT’L L. 45, 82 (2002) (“Host state enforcement has seemingly clear advantages, because it permits local control over local events.”).

<sup>180</sup> See, e.g., Wolfgang Kaleck & Miriam Saage-Maass, *Corporate Accountability for Human Rights Violations Amounting to International Crimes*, 8 J. INT’L CRIM. JUST. 699, 714 (2010) (describing “better access to the evidence” as a benefit of “conducting legal proceedings in the host state”); see also BETH VAN SCHAACK, *National Courts Step Up: Syrian Cases Proceeding in Domestic Courts*, in IMAGINING JUSTICE FOR SYRIA 265, 265–66 (Michael N. Schmitt, Shane R. Reeves, Winston S. Williams & Sasha Radin eds., 2020) (“Ideally, international criminal law cases would go forward in the domestic courts in the impacted country itself. . . . [L]ocal proceedings. . . facilitate access to evidence and for survivors and witnesses.”).

<sup>181</sup> See Ramji-Nogales, *supra* note 134, at 59–60 (“Locally grounded accountability processes have at times faced serious procedural fairness and equality concerns. . . .”).

<sup>182</sup> Kaleck & Saage-Maass, *supra* note 180, at 715.

<sup>183</sup> See Craig Evan Klafter, *Myanmar, Rule of Law, and an Imperfect Inheritance*, FLETCHER F. WORLD AFFS., Winter 2020, at 121, 122 (first citing *Rule of Law*, WORLD BANK GOVDATA360, [https://govdata360.worldbank.org/indicators/had2c21ab?country=BRA&indicator=370&viz=line\\_chart&years=1996,2020](https://govdata360.worldbank.org/indicators/had2c21ab?country=BRA&indicator=370&viz=line_chart&years=1996,2020) [https://perma.cc/6P2M-CJ5D]; and then citing *WJP Rule of Law Index*,

In terms of legal obstacles, Myanmar's penal code applies to corporations.<sup>184</sup> International crimes, however, have not been incorporated into Myanmar's penal code. It is difficult to imagine the Tatmadaw either changing the law to incorporate international crimes or pursuing a case through domestic law equivalents, given their own perpetration of crimes against the Rohingya. An even bigger obstacle, however, is a political one. Even if the relevant substantive laws existed, the Myanmar government, now controlled by the Tatmadaw, would have to initiate the prosecution. This is similarly implausible because the regime has steadfastly denied that atrocities were committed against the Rohingya.<sup>185</sup>

As Beth Van Schaack has observed, when courts in the affected country are unavailable, the judicial systems of other states provide a "second-best alternative."<sup>186</sup> Within the home state forum, U.S. federal courts could overcome the substantive legal obstacles to a prosecution for complicity with genocide or war crimes, as these crimes have been incorporated into the U.S. penal code.<sup>187</sup> U.S. federal law applies to corporations, and allows corporations to be prosecuted through aiding and abetting liability.<sup>188</sup> Nonetheless, the U.S. federal government has yet to use these provisions to prosecute a principal perpetrator of genocide or war crimes. Therefore, it seems unlikely it would pursue a complicity case against any U.S. corporation, let alone one as powerful as Meta.<sup>189</sup> The possibility of the United States pursuing such a prosecution seems

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WORLD JUST. PROJECT, <https://worldjusticeproject.org/rule-of-law-index/> [<https://perma.cc/DBJ2-UD5KJ>].

<sup>184</sup> Myanmar Penal Code of 1860 (India Act XLV), ch. II, art. 11 (1861) (defining a "person" to include "any company or association . . . whether incorporated or not").

<sup>185</sup> Rebecca Hamilton, *Myanmar's Commission Report Delivers Genocide Denial Playbook*, JUST SEC. (Jan. 31, 2020), <https://www.justsecurity.org/68383/myanmars-commission-report-delivers-genocide-denial-playbook/> [<https://perma.cc/558F-HACT>].

<sup>186</sup> Van Schaack, *supra* note 180, at 266.

<sup>187</sup> 18 U.S.C. § 2441 (criminalizing war crimes); *id.* § 1091 (defining the act of genocide). Crimes against humanity, however, have not been incorporated into the U.S. code. See Beth Van Schaack, *Crimes Against Humanity: Repairing Title 18's Blind Spots*, in ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOUR OF WILLIAM A. SCHABAS 341, 341–73 (Margaret M. deGuzman & Diane Marie Amann eds., 2018) (describing the efforts to pass such legislation).

<sup>188</sup> 1 U.S.C. § 1 ("[T]he words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . ."); 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").

<sup>189</sup> See, e.g., Madison P. Bingle, Comment, *Holes in the United States' 'Never Again' Promise: An Analysis of the DOJ's Approach Toward Atrocity Accountability*, 73 ADMIN. L. REV. 869, 891–93 (2021) (explaining how the United States has yet to prosecute alleged violators of genocide or war crimes under its substantive laws); Nicholas P. Weiss, Note, *Somebody Else's Problem: How the United States and Canada Violate International Law and Fail to Ensure the Prosecution of War Criminals*, 45 CASE W. RESV. J. INT'L L. 579, 580 (2012) (alleging that the United States contravenes its international legal duties by declining to prosecute war criminals); see also Lauren Feiner, *Face-*

even more remote against the backdrop of a low rate of U.S. corporate criminal prosecutions more generally.<sup>190</sup> Still, if this lack of political will could be overcome, U.S. prosecutors would be better-resourced than many of their foreign counterparts and could be well-positioned to take on some of the practical obstacles to obtaining evidence.<sup>191</sup>

A complicity prosecution for a platform-enabled crime requires two main types of evidence. The first type of evidence, originating in the host state, focuses on the direct crime committed. In the Rohingya situation, this would mean evidence of crimes committed against the Rohingya and the Tatmadaw's role in inciting those crimes. The second type of evidence, originating within the social media company itself, involves materials that document the policies and practices of the company that enabled the direct perpetrators to commit their crimes.

In the case of the Rohingya genocide, users have posted a huge volume of evidence about the direct crimes on Facebook. Yet, to the extent that either users or Facebook itself has subsequently removed this material from public view, prosecutors are reliant on Meta to share that content with them.<sup>192</sup> Meta has argued that under the Stored Communications Act (SCA), it is under no obligation to share this information voluntarily.<sup>193</sup>

*book Spent More on Lobbying Than Any Other Big Tech Company in 2020*, CNBC (Jan. 22, 2021), <https://www.cnbc.com/2021/01/22/facebook-spent-more-on-lobbying-than-any-other-big-tech-company-in-2020.html> [<https://perma.cc/7YAS-KWX9>] (noting that Facebook spent almost 20 million U.S. dollars lobbying Congress in 2020, which is "more than any other [technology] company").

<sup>190</sup> Mihailis E. Diamantis & William S. Laufer, *Prosecution and Punishment of Corporate Criminality*, 15 ANN. REV. L. & SOC. SCI. 453, 467 (2019) ("The vast majority of corporate crime is not referred for prosecution . . .").

<sup>191</sup> See, e.g., *About Us: Office of Global Criminal Justice*, U.S. DEP'T OF STATE, <https://www.state.gov/about-us-office-of-global-criminal-justice/> [<https://perma.cc/L5S6-8MF4>] (demonstrating the extensive expertise and resources of the Office of Global Criminal Justice within the U.S. Department of State); Joseph Rikhof, *Prosecutors on the Front Line: A Q&A with Teresa McHenry, Head of the Human Rights and Special Prosecutions Section of the U.S. Department of Justice*, PHILIPPE KIRSCH INST. (Feb. 13, 2019), <https://www.kirschinstitute.ca/prosecutors-front-line-qa-teresa-mchenry-head-human-rights-special-prosecutions-section-u-s-department-justice/> [<https://perma.cc/F5FX-5X73>] (describing the Department of Justice's substantial resources, including inter-agency support and expertise from department historians).

<sup>192</sup> See, e.g., Memorandum of Law in Support of the Republic of Gambia's Application for Order to Take Discovery Pursuant to 28 U.S.C. § 1782 at 18–25, *Republic of The Gambia v. Facebook, Inc.* (*In re* Application Pursuant to 18 U.S.C. § 1782), No. 1:20-mc-00036-JEB (D.D.C. Sept. 22, 2021); see also Thomas H. Andrews (Special Rapporteur on the Situation of Hum. Rts. in Myanmar), *Rep. of the Special Rapporteur on the Situation of Human Rights in Myanmar*, ¶ 96, U.N. Doc. A/75/335 (Sept. 1, 2020).

<sup>193</sup> See, e.g., Facebook's Opposition to Petitioner's Application Pursuant to 28 U.S.C. § 1782 at 6–12, *Republic of The Gambia v. Facebook, Inc.* (*In re* Application Pursuant to 28 U.S.C. § 1782), No. 1:20-mc-00036-JEB-DAR (D.D.C. Sept. 22, 2021); see also 18 U.S.C. §§ 2701–2712 (setting forth the relevant provisions of the SCA, including voluntary and required disclosures). The SCA exists for good reason—to protect the privacy of electronic communications. Under the SCA, elec-

Interpreting the SCA's application to social media platforms, courts have concluded that although public posts on Facebook do not receive the SCA's protections, wall posts to which users have added privacy protections, as well as non-public content retained as backup storage, fall under SCA protections.<sup>194</sup> More recently, and of significant import for survivors of the Rohingya genocide, the United States District Court for the District of Columbia dealt with an issue of first impression as to whether publicly-posted content, retained by a social media company after it deleted the content from its platform, falls within the definition of electronic storage as backup storage.<sup>195</sup>

The case arose pursuant to a civil action brought by The Gambia against Meta under 28 U.S.C. § 1782, through which a district court can order the production of evidence “for use . . . in a foreign or international tribunal.”<sup>196</sup> The Gambia sought material that Facebook had removed from its platform as part of its case against Myanmar at the ICJ, alleging that Myanmar breached its duties under the U.N. Genocide Convention on account of its role in the Rohingya genocide.<sup>197</sup> The court concluded that the posts, including anti-Rohingya material that had been posted on Facebook by the Tatmadaw and subsequently de-platformed by Facebook for violating its hate speech guidelines, was not subject to SCA protection.<sup>198</sup> As a case of first impression, the judge relied on the plain meaning of the term “backup” to agree with The Gambia's argument

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tronic service providers cannot knowingly disclose “contents of a communication” that they have in “electronic storage.” 18 U.S.C. § 2702(a)(1). The statute defines “electronic storage” in two ways. The first is a “temporary . . . storage” that is “incidental to . . . transmission.” 18 U.S.C. § 2510(17)(A). An example would be storage of a private message that has been sent by the sender but not yet opened by the recipient. The second is storage that is held “for purposes of backup protection.” § 2510(17)(B). An example would be a private message that the recipient has opened but not deleted. Congress passed the SCA in 1986; however, it did not foresee the advent of social media.

<sup>194</sup> See, e.g., *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 991 (C.D. Cal. 2010); *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659, 667–69 (D.N.J. 2013). But see Rebecca Wexler, *Privacy as Privilege: The Stored Communications Act and Internet Evidence*, 134 HARV. L. REV. 2721, 2722 (2021) (arguing that with respect to evidence sought by criminal defendants, courts have misconstrued the SCA as granting technology companies an evidentiary privilege that Congress did not provide).

<sup>195</sup> *Republic of The Gambia v. Facebook, Inc. (In re Application Pursuant to 18 U.S.C. § 1782) (Republic of The Gambia I)*, No. 20-mc-36-JEB-ZMF, 2021 WL 4304851, at \*7 (D.D.C. Sept. 22, 2021), *vacated in part sub nom.*, *Republic of The Gambia v. Facebook, Inc. (Republic of The Gambia II)*, No. 20-36 (JEB), 2021 WL 5758877 (D.D.C. Dec. 3, 2021), *reconsideration denied sub nom.*, *Republic of The Gambia v. Meta Platforms, Inc. (Republic of The Gambia III)*, No. 20-36 (JEB), 2022 WL 621397 (D.D.C. Mar. 3, 2022).

<sup>196</sup> 28 U.S.C. § 1782; *Republic of The Gambia I*, 2021 WL 4304851, at \*4.

<sup>197</sup> See *Republic of The Gambia I*, 2021 WL 4304851, at \*4; 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, 2019 I.C.J. 178, ¶ 2 (Nov. 11), <https://www.icj-cij.org/public/files/case-related/178/178-20191111-APP-01-00-EN.pdf> [<https://perma.cc/J2CC-ASXE>].

<sup>198</sup> *Republic of The Gambia I*, 2021 WL 4304851, at \*7 (concluding that “content deleted from the platform but retained by the provider [is not] in ‘backup storage’”).

that once an original post has been deleted by Facebook (“de-platformed”), the corporation’s remaining copy is no longer a “backup.” On appeal, siding with Meta, the judge concluded that the definition of “backup” would include de-platformed content since “the idea that a backup is a copy or reserve seems to contemplate the potential loss of any ‘original.’”<sup>199</sup>

Against this backdrop, a U.S. prosecutor would have to secure a warrant that would overcome the SCA’s protections in order to access evidence that has been de-platformed. This is a hurdle, but not an insurmountable one. And, as discussed further below it would be more straightforward for a U.S. prosecutor to secure this under the SCA than for a foreign prosecutor to access the same material.<sup>200</sup>

Turning to evidence regarding Facebook’s policies and practices, a U.S. prosecutor could obtain necessary material through the standard law enforcement powers of subpoena and deposition. Interestingly though, in the case of the Rohingya genocide, much of the relevant information about Facebook’s policies and practices is now publicly available thanks to the progressive efforts of activists, investigative journalists, Congressional committees, and, most recently, high-profile whistleblower Frances Haugen.

## 2. Criminal Prosecution Outside Host or Home State

The pursuit of judicial accountability for most crimes is limited to host state and home state forums. For international crimes, though, the existence of universal jurisdiction means that it is possible to look more broadly for forums through which to pursue survivors’ goals.<sup>201</sup>

Many states, and in particular those that have ratified the Rome Statute, have incorporated international crimes into their domestic legislation.<sup>202</sup> Further, many allow for the criminal prosecution of corporations.<sup>203</sup> So although

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<sup>199</sup> *Republic of The Gambia II*, 2021 WL 5758877, at \*4, \*6.

<sup>200</sup> See *infra* note 292–293 and accompanying text.

<sup>201</sup> See generally PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 16 (2001), [https://lapa.princeton.edu/hosteddocs/unive\\_jur.pdf](https://lapa.princeton.edu/hosteddocs/unive_jur.pdf) [<https://perma.cc/TVH2-6JL2>] (“The principle of universal jurisdiction is based on the notion that certain crimes are so harmful to international interests that states are entitled—and even obliged—to bring proceedings against the perpetrator . . .”). When the goal is securing individual accountability, then the ICC is a potential forum. Yet, absent an amendment to its constitutive document, the ICC has no jurisdiction over a corporate entity like Facebook. See generally Hamilton, *supra* note 31.

<sup>202</sup> See Search Results for Domestic Legislation Incorporating International Crimes, ICC LEGAL TOOLS DATABASE, <https://www.legal-tools.org/> [<https://perma.cc/C25X-9BQQ>] (search “implementation”); see also PRINCETON PROJECT ON UNIVERSAL JURISDICTION, *supra* note 201, at 16 (“Through its cornerstone principle of complementarity, the ICC Statute highlights the fact that international prosecutions alone will never be sufficient to achieve justice . . .”).

<sup>203</sup> See, e.g., Loi 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité [Law 2004-204 of March 9, 2004 on Adaptation of Justice to Developments in Crime],

there are a number of forums where there are no legal obstacles to a corporate complicity case against Meta for crimes in Myanmar, the political and practical challenges remain significant.<sup>204</sup>

Politically, the decision to pursue such a case requires spending domestic taxpayer dollars on a matter involving foreign plaintiffs and a foreign defendant.<sup>205</sup> Moreover, foreign states may seek to avoid the political tensions that would arise in their diplomatic relationship with the United States if they prosecuted a major U.S. corporation.<sup>206</sup>

The practical challenges for prosecutors outside the host or home states are also formidable.<sup>207</sup> A Dutch or Argentinian prosecutor, for example, would need to work in English and Burmese to gather evidence from foreign soil. They would also need to establish relationships with witnesses based in vari-

JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 10, 2004, p. 4567.

<sup>204</sup> See Kaleck & Saage-Maass, *supra* note 180, at 716 (“[T]he capacity and willingness of law enforcement agencies to investigate extraterritorial cases appears to be a major obstacle.” (citing Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 *MICH. J. INT’L L.* 927, 961–64 (2009))).

<sup>205</sup> See Robert C. Thompson, Anita Ramasastry & Mark B. Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 *GEO WASH. INT’L L. REV.* 841, 883 (2009) (“For a prosecutor without sufficient resources even to prosecute all serious domestic crimes, having to deal with complex crimes involving events that occurred thousands of miles away, where all of the victims are foreigners, is unlikely to be a high priority.”); see also Jodie A. Kirshner, *A Call for the EU to Assume Jurisdiction Over Extraterritorial Corporate Human Rights Abuses*, 13 *NW. J. INT’L HUM. RTS.* 1, 12 (2015) (“Even where jurisdiction has been possible, public prosecutors have demonstrated their reluctance to pursue extraterritorial human rights claims . . .”).

<sup>206</sup> In reciprocal fashion, the United States has long paid attention to the concerns of “friendly” foreign states including civil suits against foreign corporations in U.S. courts. See, e.g., Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 20, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491).

<sup>207</sup> See Thompson et al., *supra* note 205, at 883 (“In a case involving crimes committed abroad, one must gather evidence in a foreign country, obtain extradition of foreign fugitives, and ultimately try a case that involves foreign witnesses who speak languages that require in-court interpreters . . .” (citing *Universal Jurisdiction in Europe: The State of the Art*, *HUM. RTS. WATCH* (June 27, 2006), <https://www.hrw.org/report/2006/06/27/universal-jurisdiction-europe/state-art> [<https://perma.cc/RJ54-B8TH>]); see also *Swiss Decision to Close Argor Case Encourages “Head in the Sand” Attitude*, *BUS. & HUM. RTS. RES. CTR.* (June 2, 2015), <https://www.business-humanrights.org/en/latest-news/swiss-decision-to-close-argor-case-encourages-head-in-the-sand-attitude/> [<https://perma.cc/YUR7-XVBP>] (noting Swiss company Argor-Heraeus was prosecuted for dealing in “dirty African gold,” but the case was dropped in 2015). In a more promising development, a case brought by a French public prosecutor against a French corporation for facilitating torture in Egypt and Libya is continuing to progress through French courts. See *Surveillance and Torture in Egypt and Libya: Amesys and Nexa Technologies Executives Indicted*, *INT’L FED’N FOR HUM. RTS.* (June 22, 2021), <https://www.fidh.org/en/region/north-africa-middle-east/egypt/surveillance-and-torture-in-egypt-and-libya-amesys-and-nexa> [<https://perma.cc/2LMU-DCS7>] (describing how “four executives of Amesys and Nexa Technologies were indicted by investigating judges of the crimes against humanity and war crimes unit of the Paris Judicial Court”).

ous Meta offices across the globe, and with Rohingya survivors who are likely to be displaced in Bangladesh.<sup>208</sup>

In terms of direct crime evidence originating in Myanmar, the SCA further complicates the situation. A number of pending factors could influence the scope of the SCA in barring access to anti-Rohingya Facebook content. These factors include: the evolving jurisprudence on the SCA's application to social media companies and potential exceptions to the SCA's protections under circumstances of serious criminal conduct.<sup>209</sup>

In terms of obtaining evidence of Facebook's enabling policies and practices, the picture is more straightforward given the degree to which such information has been released by Meta, obtained by reporters, or leaked into the public sphere.<sup>210</sup> Still, should foreign prosecutors need material beyond what is now publicly available, the usual challenges of obtaining evidence across jurisdictions would come back into play.

In sum, the most likely pathway through which survivors of platform-enabled crimes in Myanmar could secure acknowledgment of Facebook's wrongdoing would be through a corporate criminal complicity prosecution outside Myanmar. Even if domestic prosecutors were motivated to take on such a complex case, however, they would face sizeable practical challenges in gathering necessary evidence.

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<sup>208</sup> Burmese language positions at Facebook have been advertised in Ireland. Meta Jobs Search Results for "Burmese," META, <https://www.metacareers.com/jobs> [<https://perma.cc/YR6A-T5EE>] (type "Burmese" into main search bar). "As of March 2019, over 909,000 . . . Rohingya refugees [were] resid[ing]" in camps in Bangladesh. See *Rohingya Refugee Crisis*, U.N. OFF. FOR THE COORDINATION OF HUMANITARIAN AFFS., <https://www.unocha.org/rohingya-refugee-crisis> [<https://perma.cc/A6YM-JCA8>].

<sup>209</sup> In general, the statutory scheme established by the SCA bars online intermediaries like Facebook from voluntarily disclosing SCA-protected content. It contains, however, an exception through which a foreign government can obtain SCA-protected content for the purposes of prosecuting a "serious crime." 18 U.S.C. § 2523(b)(4)(D)(i). But such an exception can only be granted pursuant to an executive agreement between the foreign government and the U.S. government, certified to Congress by the U.S. Attorney General. § 2702(c)(7). Clearly, any foreign domestic prosecutor would need support from the highest levels of their government given the extraordinary diplomatic resources needed to establish such an agreement. The 2018 CLOUD Act sought to update the existing transnational law enforcement cooperation system; to date, only the United Kingdom has successfully reached an executive agreement with the United States under the CLOUD Act. Jennifer Daskal & Peter Swire, *The UK-US CLOUD Act Agreement Is Finally Here, Containing New Safeguards*, JUST. SEC. (Oct. 8, 2019), <https://www.justsecurity.org/66507/the-uk-us-cloud-act-agreement-is-finally-here-containing-new-safeguards/> [<https://perma.cc/9NF7-MDVU>], *cross-posted on LAWFARE*, <https://www.lawfareblog.com/uk-us-cloud-act-agreement-finally-here-containing-new-safeguards> [<https://perma.cc/B2LS-GMGF>].

<sup>210</sup> See, e.g., Facebook, Inc., Annual Report (Form 10-K) (Jan. 27, 2021) <https://sec.report/Document/0001326801-21-000014/> [<https://perma.cc/LLS4-YYQP>]; Letter from Anonymous Facebook Whistleblower & Whistleblower Aid to SEC Off. of the Whistleblower, *supra* note 168.

### B. Compensation

To the extent that compensation, decoupled from an acknowledgment of wrongdoing, is a goal of survivors, civil suits provide a strong option.<sup>211</sup> In addition to the possibility of a civil suit succeeding and a court awarding damages, there is the likelihood of Meta settling in advance of judgment. Indeed, this has been the pattern common across civil litigation against major U.S. corporations.<sup>212</sup> In addition, a benefit of civil litigation is that the suit can be initiated by survivors themselves, unlike in criminal prosecutions where public prosecutors launch the legal proceedings.<sup>213</sup>

#### 1. Civil Litigation in Host or Home State

As with criminal prosecutions, there are clear advantages to selecting the host state as a forum through which to pursue civil litigation, both in terms of access to evidence and cultural and geographic proximity to survivors. Still, the challenges posed by Myanmar's legal system are significant. Myanmar's 1909 Limitations Act provides a statute of limitations on civil suits.<sup>214</sup> Its timeframe is tight and requires suits to be brought within one year of the harm.<sup>215</sup> Depending on how the law is construed, this would arguably preclude

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<sup>211</sup> See, e.g., Nicola M.C.P. Jägers & Marie-José van der Heijden, *Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands*, 33 BROOK. J. INT'L L. 833, 836 (2008) (“[T]ort law . . . serves a compensatory function. . . . [T]hat makes it an important tool of human rights enforcement from the perspective of victims of human rights violations.”).

<sup>212</sup> See Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 111–13 (2009) (“Settlement dominates outcomes of civil litigation in the United States . . .”). This is especially true for “[l]arge corporations [who] have demonstrated a willingness to pay eye-popping sums, at [their] shareholders’ expense” often because of the negative publicity associated with trial. See Sebastian Bellm, Note, *A Dual System of Justice: Financial Institutions and White-Collar Criminal Enforcement*, 96 NOTRE DAME L. REV. 2007, 2022 (2021) (quoting Bloomberg Editors, *The Case of the Missing White-Collar Criminal*, BLOOMBERG (June 22, 2014), <https://www.bloomberg.com/opinion/articles/2014-06-22/the-case-of-the-missing-white-collar-criminal> [<https://perma.cc/B9DE-WNLW>]).

<sup>213</sup> See Thompson et al., *supra* note 205, at 886 (describing some countries’ implementation of “the mixed civil/criminal mechanism of *action civile* that allows a crime victim or his representative to seek damages against a defendant in a criminal case”).

<sup>214</sup> See INT’L COMM’N OF JURISTS, STRATEGIC LITIGATION HANDBOOK FOR MYANMAR 14–15 (2019), <https://www.icj.org/wp-content/uploads/2019/09/Myanmar-Strat-Litig-HB-Publications-Report-Thematic-reports-2019-ENG.pdf> [<https://perma.cc/SPU3-TE2P>] (describing that “the 1909 [Statute of] Limitations Act . . . is not well understood in Myanmar”); Alex Batesmith & Jake Stevens, *In the Absence of the Rule of Law: Everyday Lawyering, Dignity and Resistance in Myanmar’s ‘Disciplined Democracy,’* 28 SOC. & LEGAL STUD. 573, 573 (2019) (analyzing constraints on criminal defense lawyers in areas where the rule of law is non-existent).

<sup>215</sup> See, e.g., Daniel Aguirre, *Use the Law to Protect Human Rights and the Environment from Irresponsible Investment*, THE IRRAWADDY (May 25, 2017), <https://www.irrawaddy.com/opinion/editorial/use-law-protect-human-rights-environment-irresponsible-investment.html> [<https://perma.cc/>



all claims arising from the 2017 peak of the genocide. Equally problematic are the safety challenges plaintiffs and their lawyers face when seeking justice through Myanmar courts. Rohingya survivors, who are denied citizenship under Myanmar's 1982 Citizenship Law, lack legal protections within Myanmar.<sup>216</sup> Moreover, plaintiffs' lawyers regularly cite fear of retaliation as a reason for dropping cases or not pursuing them in the first place.<sup>217</sup>

Home state litigation is more promising in terms of these safety concerns. Still, U.S. law presents a number of problems that currently preclude any civil litigation against Meta whatsoever. The first stumbling block is the Communications Decency Act (CDA), passed by Congress in 1996. Through Section 230 of that legislation, Congress sought to ensure that internet intermediaries—like the social media companies of today—would not be deterred from moderating content that users posted.<sup>218</sup> By declaring that intermediaries were neither publishers nor speakers, Congress gave legal immunity to platforms both for failing to remove unlawful content and for removing lawful content.<sup>219</sup> In practice, this means that outside of federal criminal law, certain intellectual property laws, and sex trafficking laws, Facebook has broad immunity from legal liability.<sup>220</sup> In short, Section 230 prevents a civil suit being brought against Meta for content posted on Facebook, even when that content incites genocide.

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USE5-B24K] (recounting the one-year limit being applied to claims brought by local citizens against a Thai mining corporation).

<sup>216</sup> See generally 1982 Burma Citizenship Law. Under this law, a person can only gain citizenship if they are one of the "national races" who settled Myanmar prior to 1824, which is the time of British occupation of then-Burma. See 1982 Burma Citizenship Law, ch. II, art. 3. Although there is evidence that the Rohingya have existed in that part of Myanmar for generations, the Myanmar government does not classify the Rohingya as an indigenous racial group, which excludes them from citizenship. See Raisha Waller, *Incompatible Identities: Ethnicity, Belonging, and Exclusion in Making Myanmar's Democracy*, YALE UNIV. MOD. SE. ASIA (Dec. 28, 2020), <https://seasia.yale.edu/incompatible-identities-ethnicity-belonging-and-exclusion-making-myanmars-democracy> [<https://perma.cc/7QK2-W8ZL>] ("The coexistence of Myanmar's burgeoning democracy and its ethnic cleansing of the Rohingya minority has drawn criticism that calls the nation's claim to democracy into question.").

<sup>217</sup> See INT'L COMM'N OF JURISTS, *supra* note 214, at 25 ("[M]any lawyers still fear reprisals, including harassment for example via social media, or through being subjected to unjust contempt of court proceedings or disbarment as a result of strategic litigation campaigns.").

<sup>218</sup> See generally Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM'NS L.J. 51 (1996) (providing a detailed legislative history of the CDA).

<sup>219</sup> See 47 U.S.C. § 230(c)(1)–(2) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

<sup>220</sup> See *id.*; Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 2, 132 Stat. 1253, 1253 (2018) (47 U.S.C. § 230 note (Sense of Congress)) (setting forth the provisions of the amendment in relation to facilitation of sex trafficking).

Recent events, including the insurrection on the U.S. Capitol in January 2021, have spurred interest in revisiting the broad immunities offered by Section 230.<sup>221</sup> Politicians from both major political parties have, for different reasons, begun advocating for its reform or repeal.<sup>222</sup> One such proposed amendment to Section 230 would remove immunity for the purposes of civil litigation under the Alien Tort Statute (ATS).<sup>223</sup> Still, even assuming Section 230 was amended to allow for civil litigation against Meta, there are still further hurdles to survivors securing compensation in this way.

Although the ATS has been the primary means through which non-U.S. survivors of human rights abuses have pursued accountability from U.S. corporations in recent decades, its usefulness is waning. The ATS grants U.S. federal courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>224</sup> After decades of successful litigation on behalf of the survivors of human rights abuses, however, the U.S. judiciary has progressively reined in the applicability of the ATS.<sup>225</sup>

Based on the parameters the United States Supreme Court most recently laid out in the 2021 ATS case *Nestlé USA, Inc. v. Doe*, it is uncertain whether Facebook’s role in Myanmar would still fall under the ATS. *Nestlé* involved allegations of the corporation’s complicity in human rights violations against plaintiffs in Côte D’Ivoire. In deciding the case, the Court turned to its prior 2016 opinion on the extraterritorial application of a statute in *RJR Nabisco, Inc. v. European Community* to conclude that corporate decisions made

<sup>221</sup> See, e.g., Rachel Lerman, *Social Media Liability Law Is Likely to Be Reviewed Under Biden*, WASH. POST (Jan. 18, 2021), <https://www.washingtonpost.com/politics/2021/01/18/biden-section-230/> [<https://perma.cc/26VC-9U5A>].

<sup>222</sup> See, e.g., Exec. Order. No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020); Exec. Order. No. 14,029, 86 Fed. Reg. 27,025 (May 14, 2021) (repealing Executive Order 13,925); Sara Morrison, *How the Capitol Riot Revived Calls to Reform Section 230*, VOX RECODE, <https://www.vox.com/recode/22221135/capitol-riot-section-230-twitter-hawley-democrats> [<https://perma.cc/F5PD-P6YZ>] (Jan. 11, 2021) (“[B]oth sides of the aisle ha[ve] taken to blaming Section 230 for everything they [do not] like about the big social media companies . . . .” (quoting Elliott Harmon, Interim Senior Activist of the Electronic Frontier Foundation)).

<sup>223</sup> See SAFE TECH Act, S.299, 117th Cong. § 2(2) (2021).

<sup>224</sup> 28 U.S.C. § 1350. Written in 1789, the statute lay dormant until American human rights lawyers began to revive it in the 1980s. See *Filártiga v. Peña-Irala*, 630 F.2d 876, 878 (2d Cir. 1980) (holding the Alien Tort Statute provided federal jurisdiction for a civil action brought by citizens of the Republic of Paraguay against another Paraguayan citizen for a wrongful death claim).

<sup>225</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013) (“[T]he presumption against extraterritoriality applies to claims under the ATS. . . .”); *Jesner v. Arab Bank, PLC.*, 138 S. Ct. 1386, 1403 (2018) (“[A]bsent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations.”).

within the United States by Nestlé, a U.S.-based corporation, was not enough to bring the plaintiffs' claim within the remit of the ATS.<sup>226</sup>

As the United States Supreme Court has progressively narrowed the scope of the ATS, tort claims through state courts have allowed for the pursuit of international human rights violations.<sup>227</sup> Although the legitimacy of aiding and abetting claims against corporate entities remains a contested battleground in ATS litigation, such claims are clearly possible under state tort law.<sup>228</sup> As long as Section 230 of the CDA remains in place, however, such an avenue is largely precluded.<sup>229</sup>

Moreover, even if Congress amended Section 230 to allow an ATS suit to proceed in a case where plaintiffs could demonstrate that Meta's complicity in the Rohingya genocide overcame the presumption against extraterritoriality—or even if a tort claim could lead to Burmese law overcoming Section 230 immunity in state court—U.S. courts could still use their judicial discretion to prevent the case from proceeding.<sup>230</sup>

<sup>226</sup> Nestlé USA, Inc. v. Doe, 141 S. Ct 1931, 1936–37 (2021); see *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 337–38 (2016) (“The scope of an extraterritorial statute thus turns on the limits Congress has (or has not) imposed on the statute’s foreign application . . .”). Citing to that case, eight justices of the Court in *Nestlé* signed onto part of the opinion that precluded the claim against Nestlé for lack of evidence that “the conduct relevant to the statute’s focus occurred in the United States.” *Nestlé*, 141 S. Ct at 1936 (quoting *RJR Nabisco*, 578 U.S. at 337). It is hard to say on which side of the *Nestlé* line Meta’s complicity in the Myanmar atrocities would fall.

<sup>227</sup> See Roger P. Alford, *Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089, 1091 (2014) (“[R]eframing human rights violations as transnational torts may be the only viable alternative for redressing international wrongs through U.S. litigation.”); see also Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 10 (2013) (“[E]ven under the most restrictive outcome of the *Kiobel* decision, human rights cases will continue in both federal and state courts.”).

<sup>228</sup> See RESTATEMENT (SECOND) OF TORTS § 876(a)–(b) (AM. L. INST. 1979).

<sup>229</sup> One potential caveat to this preclusion would be if plaintiffs could convince a state court to use Burmese law. In such a case, the immunity provided to online intermediaries under Section 230 may not apply. Indeed, a December 2021 class action filing by Rohingya plaintiffs lodged in California state court makes exactly this argument. See generally Class Action Complaint for: (1) Strict Product Liability; (2) Negligence; and Jury Demand, *Doe v. Meta Platforms, Inc.*, No. 21-CIV-06465 (Cal. Super. Ct. filed Dec. 6, 2021). Still, any such litigation may fall afoul of restrictive statute of limitations parameters under either U.S. or Burmese law. Hoffman & Stephens, *supra* note 227, at 19 (contrasting the ten-year statute of limitations window generally applied under the ATS with the much more condensed window for state law claims); see Aguirre, *supra* note 215 (describing the statute of limitation constraints under tort law in Myanmar).

<sup>230</sup> In *Litigation Isolationism*, Pamela Bookman showed how U.S. courts use “avoidance doctrines” including *forum non conveniens* and abstention comity, in addition to the “[p]resumption against extraterritoriality,” to protect U.S. corporate defendants from civil suits. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1091–99 (2015). Moreover, U.S. courts have long been deferential to the interests of foreign states because they do not want to generate diplomatic tensions. Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995, 1042 (2015); see Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63, 63–64 (2019) (describing the problems of “international comi-

Some have argued that in restricting U.S. forum availability, the United States loses an important deterrent opportunity to stop wrongdoing in relation to goods and services that, although sold transnationally, may also be available in U.S. markets.<sup>231</sup> Yet courts have persisted, and the use of such discretionary judicial tools like *forum non conveniens* have traditionally been assumed to shut down suits against U.S. corporate defendants completely.<sup>232</sup> This is no longer the case thanks to courts abroad—in particular within Europe, the United Kingdom, and Canada—that have opened their doors to such litigation.<sup>233</sup> In a forthcoming empirical study of the decline of ATS litigation, Oona Hathway and co-authors argue that a potential alternative for claims against human rights violators is to pursue them in foreign judicial systems.<sup>234</sup>

## 2. Civil Litigation Outside Host or Home State

Across Europe, limitations on so-called exorbitant jurisdiction serve similar ends as U.S. avoidance doctrines in terms of keeping foreign plaintiffs or events out of domestic courts.<sup>235</sup> But although the E.U. has limited the exercise of exorbitant jurisdiction in cases involving E.U. defendants, the same restrictions would not apply to a U.S. corporation like Meta.<sup>236</sup> A comprehensive review of jurisdictional rules across E.U. member states found ten who used a

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ty abstention”). See generally William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015) (providing “the first comprehensive account of international comity in American Law”).

<sup>231</sup> One can readily see how this applies to Facebook, given that litigation over policies and practices related to its operations in Myanmar could be expected to change the operation of its platform in the United States also. See Elizabeth T. Lear, *National Interests, Foreign Injuries, and Federal Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 590 (2007).

<sup>232</sup> See, e.g., Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT’L L. 157, 161 (2012). For a compelling argument for why the U.S. judiciary should stop using *forum non conveniens*, see generally Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390 (2017) (analyzing foreign plaintiffs’ foreign injury claims in American courts).

<sup>233</sup> See Bookman, *supra* note 230, at 1109–19 (“Recent developments in foreign courts have undermined the conventional wisdom that transnational litigation has no other place to go.” (citing Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT’L L. 31, 33 (2011))).

<sup>234</sup> Oona A. Hathway, Christopher Ewell & Ellen Nohle, *Has the Alien Tort Statute Made a Difference?: A Historical, Empirical, and Normative Assessment*, 107 CORNELL L. REV. (forthcoming 2022) (manuscript at 62), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3927162](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3927162) [<https://perma.cc/5V2L-CB5H>].

<sup>235</sup> See Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 474 (2006) (defining exorbitant jurisdiction as jurisdiction that “although exercised validly under a country’s rules . . . nonetheless [is] unfair to the defendant because of a lack of significant connection between the sovereign and either the parties or the dispute”).

<sup>236</sup> See Council Regulation 44/2001 of Dec. 22, 2000, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, annex I, 2001 O.J. (L12) 16.1.2001.

*forum necessitatis* doctrine where the absence of a potential or proper foreign forum constituted the basis for the domestic court to grant jurisdiction over a case, despite the absence of significant other ties to the state.<sup>237</sup>

Scholars have highlighted the potential for *forum necessitatis* to enable domestic courts in Europe to provide a forum for foreign victims of “human rights violations committed by corporations.”<sup>238</sup> Canada has also heralded emergence of a *forum necessitatis* doctrine.<sup>239</sup> In relation to a post-Brexit United Kingdom, commentators have noted that English courts have increasingly relaxed their *forum non conveniens* doctrine to accommodate transnational tort litigation in situations where no other reasonable forum is available.<sup>240</sup> Thus, as a jurisdictional matter, it would be possible to file a claim against Meta, a U.S. corporation, for complicity in torts committed in Myanmar, if neither U.S. nor Myanmar courts were open to the claims. Even with many European forums requiring some level of connection for a *forum necessitatis* case to proceed, there are a number of locales where either Meta assets or Meta’s corporate presence would readily provide such a connection.

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<sup>237</sup> See generally ARNAUD NUYTS, GENERAL REPORT: STUDY ON RESIDUAL JURISDICTION: REVIEW OF THE MEMBER STATES’ RULES CONCERNING THE “RESIDUAL JURISDICTION” OF THEIR COURTS IN CIVIL AND COMMERCIAL MATTERS PURSUANT TO THE BRUSSELS I AND II REGULATIONS 64–66 (2007) (reporting that in nine of these cases courts still need “some kind of connection with the [domestic] forum,” although the existence of Facebook’s platform in the E.U. would more than meet this low threshold).

<sup>238</sup> See generally Lucas Roorda & Cedric Ryngaert, *Business and Human Rights Litigation in Europe: The Promises Held by Forum of Necessity-Based Jurisdiction*, 80 RABEL J. COMPAR. & INT’L PRIV. L. 783, 786 (2016) (arguing for *forum necessitatis* to be viewed “as a tool offering access to justice for victims of extraterritorial human rights violations committed by corporations” (emphases omitted)); see also Gerlinde Berger-Walliser, *Reforming International Human Rights Litigation Against Corporate Defendants After Jesner v. Arab Bank*, 21 U. PA. J. BUS. L. 757, 806 (2019) (“European jurisdictional rules offer possibilities for foreign plaintiffs to sue even non-EU MNCs before European domestic courts.”).

<sup>239</sup> See Chilenye Nwapi, *Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor*, 30 UTRECHT J. INT’L & EUR. L. 24, 30 (2014) (“The forum of necessity doctrine recognizes that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction.” (quoting *Van Breda v. Vill. Resorts Ltd.*, (2010), 98 O.R. 3d 721, para. 100 (Can. Ont. C.A.))). *But see* *Anvil Mining Ltd. v. Ass’n Canadienne Contre L’Impunité*, [2012] QCCA 117, para. 103–104 (Can. Que. C.A.) (holding that the need for *forum necessitatis* jurisdiction had not been demonstrated because the plaintiffs had not shown the impossibility of having pursued the case in Australia). Interestingly, the immunity provided by Section 230 of the CDA in the United States may enable plaintiffs to demonstrate the kind of impossibility the Quebec Court sought with respect to pursuing litigation in the locale where Facebook is headquartered. See 47 U.S.C. § 230(c)(2) (“No provider or user of an interactive computer service shall be held liable . . .”).

<sup>240</sup> See, e.g., Ekaterina Aristova, *The Future of Tort Litigation Against Transnational Corporations in the English Courts: Is Forum [Non] Conveniens Back?*, 6 BUS. & HUM. RTS. J. 399, 409 (2021).

Although the legal challenges to bringing civil claims against Meta outside of either host or home state fora are surmountable, at least in theory, other challenges remain. The political challenges are lower than those associated with a criminal case, as plaintiffs are not dependent on a domestic prosecutor to initiate a suit. The practical challenges, though, are substantial; it is simply very difficult to collect testimony and gather evidence from the sites of atrocity crimes.

Huge advances have been made to overcome this problem through the collection of user-generated and other digital evidence.<sup>241</sup> In the Rohingya situation though, so much of that digital evidence is available only through Meta itself. Problematically, Meta has thus far denied efforts to release digital evidence that only it still holds, citing to the SCA.<sup>242</sup> Moreover, while there is a challenging pathway for a foreign government to seek an exception under the SCA, there is no such option for survivors themselves, or the lawyers representing them.<sup>243</sup>

In terms of evidence regarding Facebook's policies and practices, civil litigants in the Rohingya situation benefit from the availability of information obtained or leaked by investigative reporting or whistleblowing. Yet one can imagine a future case where these public transparency efforts have not been so doggedly pursued, and where civil litigants face an informational asymmetry in securing the evidence needed for their case.

In sum, the most likely pathway through which survivors of platform-enabled crimes in Myanmar could secure compensation from Meta would be through civil litigation in Europe, the United Kingdom, or Canada. In Myanmar, both legal and political problems preclude host state litigation. Litigation in the United States would be contingent upon an amendment to Section 230 of the CDA, and even then, U.S. courts could still restrict jurisdiction. By contrast, most of Europe and Canada permit civil litigation against corporations, and *forum necessitatis* could overcome any jurisdictional hurdles. Still, as with criminal prosecutions, the practical barriers to litigating such a case against Meta successfully remain high, particularly in light of the challenges involved in obtaining evidence that Meta itself holds.

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<sup>241</sup> See Rebecca J. Hamilton, *User-Generated Evidence*, 57 COLUM. J. TRANSNAT'L L. 1, 12–22 (2018) (describing the potential value of digital evidence in helping overcome challenges that international criminal investigators face in gathering evidence from sites of atrocities).

<sup>242</sup> See *supra* notes 192–200 and accompanying text.

<sup>243</sup> See 18 U.S.C. § 2523(b)(1)(B).

### C. Prevention of Recurrence

When survivors speak of preventing the recurrence of the harms they suffered, they may refer both to stopping the harms they and their families faced, as well as preventing similar harms from happening to others in the future.<sup>244</sup> In the Rohingya situation, this means stopping the spread of dangerous speech against the Rohingya on Facebook in Myanmar. It also means stopping the spread of dangerous speech on any social media platform where such speech facilitates offline violence.

A facile response is to suggest that social media platforms withdraw from markets at risk of conflict. The absence of platforms means the absence of platform-enabled crimes. Yet users in these communities stand as much, if not more, to gain from the ability to access social media platforms as users in more stable communities. Indeed, Rohingya journalists, rebel groups, and others seeking to oppose the Tatmadaw have used Facebook for coordination and awareness raising.<sup>245</sup> In other words, the goal is not to stop platforms, but to stop platforms enabling crimes.

Preventing platform-enabled crimes requires first identifying the policies and practices of a platform that can enable principal perpetrators to commit their crimes. Following the framework introduced in Part I, it is useful to divide a platform's policies and practices into those that generate acts of omission and those that generate acts of commission to enable atrocities.<sup>246</sup> The following Subsections use this omission-commission framework to address the goal of preventing recurrence: the first Subsection considers what could spur Meta to change the Facebook policies and practices that create the omissions that enable direct perpetrators to commit atrocities; the second considers the same question with respect to policies and practices that generate acts of commission.<sup>247</sup>

#### 1. Overcoming the Failure to Act

To date, acts of omission—which typically fall under the rubric of content moderation—have been the more visible targets for those, including social media companies, who seek to reduce the spread of dangerous speech online.

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<sup>244</sup> See *supra* notes 157–158 and accompanying text.

<sup>245</sup> Betsy Swan, *Exclusive: Facebook Silences Rohingya Reports of Ethnic Cleansing*, DAILY BEAST (Sept. 18, 2017), <https://www.thedailybeast.com/exclusive-rohingya-activists-say-facebook-silences-them> [https://perma.cc/6FCU-6YM7]; see also BUS. FOR SOC. RESP., *supra* note 12, at 24 (“We are not in the delete-Facebook camp, and we desperately want Facebook to succeed in Myanmar.” (quoting an unnamed interviewee)).

<sup>246</sup> See *supra* notes 44–75 and accompanying text.

<sup>247</sup> See *infra* notes 248–284 and accompanying text.

Indeed, Meta's highest profile response effort has come in the form of an oversight board focused narrowly on content moderation.<sup>248</sup>

With respect to the Rohingya situation, efforts that Meta itself has made through the BHR framework have moved slowly and focused entirely on acts of omission. Meta has been at pains to underscore the conclusion of the Human Rights Impact Assessment it commissioned. In particular, that assessment noted that it is difficult to balance user rights and protections "where the majority of the population is still developing . . . digital literacy . . . and where lack of rule of law and recent political, economic, and social history add to the challenging environment. . . . It is widely recognized that Facebook's human rights impacts in Myanmar cannot be addressed by Facebook alone . . . ."<sup>249</sup>

Although it is true that "Facebook alone" cannot solve all of these problems, this does not lessen Meta's responsibility for the Facebook policies and practices that it does have control over. This is particularly so in light of Meta's proactive decision to enter—and dominate—the Myanmar market, notwithstanding Meta's awareness of the very problems that the Impact Assessment highlights.<sup>250</sup>

One of the most consistent recommendations of the Impact Assessment was the need for Facebook to do a better job enforcing its Community Standards in Myanmar; the assessment emphasized that "effective implementation of the Community Standards in Myanmar requires Burmese staff with insight into the local context."<sup>251</sup> In Congressional testimony made in April 2018, Mark Zuckerberg said his corporation planned to "hir[e] dozens more Burmese-language content reviewers."<sup>252</sup> By late summer 2018, Meta had increased its goal to one hundred such Facebook reviewers.<sup>253</sup> Although it is unclear how many Burmese language moderators Meta has hired to date, the scale of its stated goals paled in relation to the needs in Myanmar, where Facebook users topped twenty million and where atrocities were ongoing. As re-

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<sup>248</sup> See generally Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418 (2020); Evelyn Douek, Post, "What Kind of Oversight Board Have You Given Us?," U. CHI. L. REV. ONLINE (May 11, 2020), <https://lawreviewblog.uchicago.edu/2020/05/11/fb-oversight-board-edouek/> [<https://perma.cc/7VQK-859C>].

<sup>249</sup> BUS. FOR SOC. RESP., *supra* note 12, at 3.

<sup>250</sup> *Id.* For example, the report acknowledges that operating in Myanmar presented unique challenges because "the majority of the population is still developing the digital literacy required to navigate the complex world of information sharing online." *Id.*

<sup>251</sup> *Id.* at 26.

<sup>252</sup> Evelyn Douek, *Why Were Members of Congress Asking Mark Zuckerberg About Myanmar? A Primer*, LAWFARE (Apr. 26, 2018), <https://www.lawfareblog.com/why-were-members-congress-asking-mark-zuckerberg-about-myanmar-primer> [<https://perma.cc/3SJF-JAUC>].

<sup>253</sup> Su, *supra* note 57.



cently as 2020, a U.N. Special Rapporteur observed that “hate speech and disinformation reportedly continue unabated on Facebook in Myanmar.”<sup>254</sup>

Meta’s efforts to combat the instrumentalization of Facebook in Myanmar for criminal ends ramped up dramatically following the Tatmadaw coup on February 1, 2021. Just three weeks later, Meta announced that it was banning the Tatmadaw from Facebook altogether.<sup>255</sup> Meta explained that “[e]vents since the . . . coup, including deadly violence, have precipitated a need for this ban. We believe the risks of allowing the Tatmadaw on Facebook . . . are too great.”<sup>256</sup>

Those representing Rohingya survivors agree with this assessment.<sup>257</sup> The question remains, though, why Meta did not ban the Tatmadaw years earlier, when credible allegations of its use of Facebook to fuel atrocities against the Rohingya were brought to the corporation’s attention.

One plausible explanation is that for as long as Myanmar remained on the path to opening up its market economy, the potential financial gains from Facebook in Myanmar stopped Meta from alienating the country’s most powerful institutional actor. Post-coup in 2021, however, as the prospects for market liberalization tanked, Meta could gain more value from the virtue signaling of banning the Tatmadaw than it risked losing.<sup>258</sup>

Such a cynical explanation echoes an observation that Meta employees noted in relation to the timing of Meta’s decision to suspend the Facebook account of U.S. President Donald Trump in January 2021. Notwithstanding years of suspension-worthy behavior, the decision to suspend him came only after it was clear that he and his party would no longer have a grip on political—and by extension, regulatory—power.<sup>259</sup>

A pattern of Meta failing to remedy acts of omission that constitute complicity in atrocities unless or until doing so incurs minimal risk to its financial well-being may be emerging. As whistleblower Frances Haugen stated in Congressional testimony in October 2021:

<sup>254</sup> Andrews, *supra* note 192, ¶ 23.

<sup>255</sup> Victoria Milko, *Explainer: Why Is Facebook Banning Myanmar Military Pages?*, AP NEWS (Feb. 25, 2021), <https://apnews.com/article/why-facebook-ban-myanmar-military-15f4c26c442c0d8af110594a5bb72c45> [<https://perma.cc/39HZ-EBQA>].

<sup>256</sup> Rafael Frankel, *An Update on the Situation in Myanmar*, META (Feb. 11, 2021), <https://about.fb.com/news/2021/02/an-update-on-myanmar/> [<https://perma.cc/RHL4-PZD4>].

<sup>257</sup> See, e.g., Milko, *supra* note 255 (“This is a welcome and long overdue step by Facebook.” (quoting Mark Farmaner, Director of Burma Campaign UK)).

<sup>258</sup> See Elena Chachko, *National Security by Platform*, 25 STAN. TECH. L. REV. 55, 58 n.8, (2021) (explaining that in banning the Tatmadaw in 2021, “Facebook appears to have learned from the 2017 Myanmar episode”).

<sup>259</sup> Mike Isaac & Kate Conger, *Facebook Bars Trump Through End of His Term*, N.Y. TIMES, <https://www.nytimes.com/2021/01/07/technology/facebook-trump-ban.html> [<https://perma.cc/8U7T-BXHA>] (May 18, 2021).

During my time at Facebook . . . I saw that Facebook repeatedly encountered conflicts between its own profits and our safety. *Facebook consistently resolved those conflicts in favor of its own profits.* The result has been a system that amplifies division, extremism, and polarization—and undermining societies around the world. In some cases, this dangerous online talk has led to actual violence that harms and even kills people.<sup>260</sup>

To the degree this statement is accurate, then the crucial question from the perspective of survivors is what would motivate Meta, or any social media company, to reverse course on its acts of omission in the face of atrocities incited through its platform, even when doing so will cost the company.

One possible statutory solution to the question of what might overcome a failure to act comes from a 2017 German law. *Netzwerkdurchsetzungsgesetz* requires large social media companies to delete “manifestly unlawful” posts from their platforms within twenty-four hours of being notified, or face fines of up to fifty million euro.<sup>261</sup> An important critique of this law is that it incentivizes the over-removal of content.<sup>262</sup> In terms of incentivizing Meta to hire more Facebook content moderators, however, the law is instructive. In response to the passage of the law, Meta rapidly hired 1,700 employees to work on content moderation in Germany.<sup>263</sup> Although Meta faced certain and substantial imposition of fines if it continued to let dangerous speech proliferate in Germany, it faced no such concrete threat in allowing dangerous speech to persist in Myanmar. Thus, regulatory action that publicly and credibly threatens Meta’s profits may be one way to propel the corporation to action.

Whether litigation against Meta could make a difference to the corporation’s efforts to stop the spread of dangerous speech in Myanmar is hard to say given the degree to which Meta has been shielded from any real litigation

<sup>260</sup> *Holding Big Tech Accountable*, Haugen Statement, *supra* note 162, at 2.

<sup>261</sup> See Gesetz zur Verbesserung der Rechtsdurchsetzung in Sozialen Netzwerken [Netzwerkdurchsetzungsgesetz - NetzDG] [Network Enforcement Act], Oct. 1, 2017, BUNDESGESETZBLATT, Teil I [BGBL. I] at 3352 (Ger.).

<sup>262</sup> See, e.g., *Germany: Flawed Social Media Law*, HUM. RTS. WATCH (Feb. 14, 2018), <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law> [<https://perma.cc/53MJ-TA9V>] (arguing the law “turns private companies into overzealous censors to avoid steep fines” (quoting Wenzel Michalski, Germany Director, Human Rights Watch)).

<sup>263</sup> Katrin Bennhold, *Germany Acts to Tame Facebook, Learning from Its Own History of Hate*, N.Y. TIMES (May 19, 2018), <https://www.nytimes.com/2018/05/19/technology/facebook-deletion-center-germany.html> [<https://perma.cc/Y42V-QDMJ>] (describing Facebook’s actions in hiring over 1,200 content moderators in Berlin); Max Hoppenstedt, *A Visit to Facebook’s Recently Opened Center for Deleting Content*, MOTHERBOARD: TECHBY VICE (Jan. 2, 2018), [https://www.vice.com/en\\_us/article/qv37dv/facebook-content-moderation-center](https://www.vice.com/en_us/article/qv37dv/facebook-content-moderation-center) [<https://perma.cc/Z5XD-KWMJ>] (describing Facebook’s hiring of another five hundred content moderators in Essen).

threat to date.<sup>264</sup> Regardless, the possibility of being subject to civil litigation is unlikely to prevent wrongdoing, unless such litigation forms one of a large number of suits against social media companies for platform-enabled crimes.

Drawing from studies of corporate behavior with respect to human rights violations more generally, the consensus is that the possibility of a few civil suits is unlikely to catalyze a corporation to alter its policies and practices preemptively.<sup>265</sup> A comprehensive review of the impact of human rights litigation on corporate policy and practice concluded that “[i]f only one corporation is sued the effect will be marginal, as it would be perceived as an exception.”<sup>266</sup> By contrast, “[h]aving hundreds of cases . . . sends a different signal and encourages companies to proactively limit the risk of being sued as well.”<sup>267</sup>

The previously discussed political incentives, immunities, and avoidance doctrines already make it difficult to imagine how survivors could achieve such a mass litigation effect. Removing immunity for ATS suits will not be enough to provide a mass litigation effect given U.S. courts’ narrow aperture for such suits.<sup>268</sup> If broader reforms were made to Section 230 such that social media companies were subject to civil litigation more generally, however, the picture could change.

Without Section 230 immunity, the U.S. victims of platform-enabled crimes, who are not dependent on the ATS, could use any number of domestic tort laws to pursue litigation against social media companies. Interestingly, a

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<sup>264</sup> To date there has been no successful case against Facebook for its role in facilitating human rights violations. *See, e.g.*, Complaint and Demand for Jury Trial, *Gittings v. Mathewson*, No. 2:20-cv-1483 (E.D. Wis. filed Sept. 22, 2020) (setting out a complaint later voluntarily dismissed by plaintiffs); *Force v. Facebook, Inc.*, 934 F.3d 53, 54, 57 (2d Cir. 2019) (affirming the dismissal of a case brought by U.S. citizens, victims of Hamas terrorist attacks in Israel, against Facebook for its role in “provid[ing] Hamas . . . with a . . . platform that enabled [the attacks]”), *cert. denied*, 140 S. Ct. 2761 (2020).

<sup>265</sup> Judith Schrempf-Stirling & Florian Wettstein, *Beyond Guilty Verdicts: Human Rights Litigation and Its Impact on Corporations’ Human Rights Policies*, 145 J. BUS. ETHICS 545, 547 (2017) (analyzing the “[r]ole of the [h]ome [s]tate in [h]uman [r]ights [l]itigation); *see also* Susan H. Farbstein, *Perspectives from a Practitioner: Lessons Learned from the Apartheid Litigation*, 61 HARV. INT’L L.J. 451, 495 (2020) (discussing the implications of ATS suits in “caus[ing] multinational corporations to take greater care to ensure that their operations respect human rights”); Aleydis Nissen, *Better Together: A Complementary Approach to Civil Judicial Remedies in Business and Human Rights*, PENN ST. L. REV. PENN STATIM, 2018, at 1, 3, <http://www.pennstatelawreview.org/wp-content/uploads/2018/10/122-Penn-State-Law-Rev-Penn-Statim-48-Nissen.pdf> [<https://perma.cc/9W8Z-6BDE>] (noting that lawsuits “can . . . act as an essential incentive for all [transnational corporations] to investigate and address any harmful behavior in which they might be involved through their business relationships or supply chains” (citing Schrempf-Stirling & Wettstein, *supra*)).

<sup>266</sup> Schrempf-Stirling & Wettstein, *supra* note 265, at 557.

<sup>267</sup> *Id.*

<sup>268</sup> *See supra* notes 224–234 and accompanying text.

number of U.S. plaintiffs have sought to do this already.<sup>269</sup> Their cases have failed on account of the immunities currently provided by Section 230.<sup>270</sup> Nonetheless, it seems plausible that there is enough pent-up interest in such litigation to generate a mass litigation effect if Section 230 were to be broadly reformed. Likewise, if the class action against Meta lodged in California state court succeeds in convincing the court that utilizing foreign domestic law overcomes Section 230 immunity, then one can imagine this would set a precedent for human rights litigation against online intermediaries more generally.<sup>271</sup>

Finally, scholars have noted that the shaming function of even a single criminal prosecution can motivate systemic change.<sup>272</sup> Indeed, even though the punishment inflicted on a corporation through a criminal prosecution is often the same as that imposed through a civil suit—namely a monetary fine—the former are exceptionally effective due to their powerful signal of disapproval.<sup>273</sup> Thus, survivors looking to bring safety to Facebook in Myanmar and beyond, may also consider working through the criminal law options discussed above.<sup>274</sup>

## 2. Stopping Acts of Commission

Key acts of commission by Meta that facilitated the Tatmadaw's crimes include the pursuit of a monopolization strategy in Myanmar and the design of its newsfeed algorithm.<sup>275</sup> Distinct from the acts of omission, which fall primarily under the rubric of content moderation, the acts of commission are inseparable from the business model on which Facebook is based.

To the extent the goal of survivors is to achieve comprehensive prevention against future human rights violations, it may be necessary to consider regulatory options to address these policies and practices that go beyond Face-

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<sup>269</sup> See, e.g., *Force*, 934 F.3d at 53 (“Victims, estates, and family members of victims of terrorist attacks in Israel brought action alleging that operator of social networking website provided material support to terrorist organization.”); Amended Complaint and Demand for Jury Trial at 1, *Muslim Advocs. v. Facebook, Inc.*, No. 2021-CA-001114-B (D.C. Super. Ct. filed Apr. 8, 2021) (alleging that Facebook’s failure to remove content that went against the platform’s guidelines constituted fraud and negligent misrepresentation).

<sup>270</sup> See, e.g., *Force*, 934 F.3d at 57 (affirming dismissal of the case based on Facebook’s immunity under 47 U.S.C. § 230(c)(1)).

<sup>271</sup> See Class Action Complaint for: (1) Strict Product Liability; (2) Negligence; and Jury Demand, *supra* note 229.

<sup>272</sup> See Buell, *supra* note 176, at 487 (noting that for some corporations “any settlement that required admission of criminal fault would be no better than a guilty verdict after a trial”).

<sup>273</sup> Diamantis & Laufer, *supra* note 190, at 462. *But see* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1497–1512 (1996) (providing a skeptical view that corporations view criminal fines any differently from civil fines).

<sup>274</sup> See *supra* notes 179–213 and accompanying text.

<sup>275</sup> See *supra* notes 62–71 and accompanying text.

book itself.<sup>276</sup> Although survivors cannot determine regulatory action taken by domestic governments or international bodies, their voices can lend powerful support to officials seeking to move social media companies away from the highly self-regulated space in which they currently reside. At present, there is growing political interest in strengthening public oversight of social media companies in general.

In 2021 alone, members of the U.S. Congress introduced five different bills aimed at reducing monopolistic behavior by major technology companies, including Meta.<sup>277</sup> Some of these bills could help new social media platforms enter the Myanmar market. If they could dilute Facebook's omnipresence in Myanmar's digital space, this could help reduce the impact of future Tatmadaw efforts to use the platform to incite genocide. Unfortunately, such efforts face an uphill battle with respect to Myanmar because Facebook's existing monopoly has already given it near-impenetrable "network effects."<sup>278</sup> Such effects could deter existing users from leaving Facebook, even with new social media platforms available to them. Still, such reforms could have a preventive effect in other conflict-prone regions outside Myanmar, where no existing social media company has an established monopoly.<sup>279</sup> Despite intense lobbying efforts from the technology sector, all proposed bills passed through markup in the House Judiciary Committee in June with some bipartisan backing.<sup>280</sup>

Finally on the U.S. regulatory front, whistleblower Frances Haugen has had a significant impact both in building political will for increased regulation of Meta, and in providing leaked internal documents to support efforts by legislators, prosecutors, and civil litigants. In the future, U.S. legislators might consider how to strengthen protections for whistleblowers as part of a package of reforms to improve regulation of social media companies.<sup>281</sup>

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<sup>276</sup> ORENTLICHER, *supra* note 134, at 7.

<sup>277</sup> See Merger Filing Fee Modernization Act of 2021, S. 228, 117th Cong. (2021); ACCESS Act of 2021, H.R. 3849, 117th Cong. (2021); American Choice and Innovation Online Act, H.R. 3816, 117th Cong. (2021); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021); Platform Competition and Opportunity Act of 2021, S. 3197, 117th Cong. (2021).

<sup>278</sup> See, e.g., Fred Vogelstein, *Network Effects and Global Domination: The Facebook Strategy*, WIRED (May 17, 2012), <https://www.wired.com/2012/05/network-effects-and-global-domination-the-facebook-strategy/> [<https://perma.cc/J2KM-GF48>].

<sup>279</sup> On the other hand, there is a plausible argument that a splintered social media market in Myanmar would make it harder to remove unlawful content compared to having a single chokepoint available through a single platform. (Gratitude to Kate Klonick for a thoughtful conversation on this point).

<sup>280</sup> Rachel Lerman, *Big Tech Antitrust Bills Pass First Major Hurdle in House Even as Opposition Grows*, WASH. POST (June 24, 2021), <https://www.washingtonpost.com/technology/2021/06/24/tech-antitrust-bills-pass-house-committee/> [<https://perma.cc/JK3L-M8CH>].

<sup>281</sup> See Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 128–29 (2019) (noting the effectiveness of "whistleblower protections" where "the government is relying more and more on private entities for its various governing activities").

Outside of the United States, the recent E.U. resolution discussed in Subsection II.B.2 would not only mandate but also oversee compliance with due diligence work by corporations. This resolution has the potential to serve the goal of preventing recurrence.<sup>282</sup> As an E.U. initiative, one can expect the focus of oversight to be in relation to European users. The “Brussels Effect,” however, may lead corporations like Meta to make similar improvements across their global operations.<sup>283</sup>

Overall, there is no single piece of legislation that can prevent the recurrence of Facebook or another platform enabling atrocities in Myanmar or elsewhere. The passage of a number of laws, including some of those currently debated, can directly or indirectly reduce the likelihood of platforms being complicit in international crimes. Such work could be helpfully supplemented by criminal litigation to increase further scrutiny of the policies and practices that can facilitate serious harms.

In essence, a survivor-centered approach, even on an illustrative scale, pluralizes the conversation about accountability for platform-enabled crimes in Myanmar beyond the existing ICL-BHR binary. There are, however, legal, political, and practical constraints to actualizing this approach. With those constraints in mind, Part V considers what plausible adjustments and enhancements could be made to close the accountability gap for social media companies that enable international crimes more generally.<sup>284</sup>

## V. CLOSING THE ACCOUNTABILITY GAP

This Part advances plausible options for addressing the legal, political, and practical constraints currently contributing to the accountability gap for social media companies that enable international crimes. It then turns to potential counterarguments.

Consistent with the survivor-centered approach of this Article, this Part is oriented around the legal responses that could help achieve the goals that survivors may have. Section A begins with multi-forum corporate criminal prosecution to secure an acknowledgement of wrongdoing.<sup>285</sup> Overcoming the practical hurdles to such prosecutions will likely require heavy investment in transnational cooperation mechanisms between states at both operational and diplomatic levels. In addition, although the ICC is not a litigation forum for platform-enabled crimes, it could play a cooperative role in supporting the evi-

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<sup>282</sup> See *supra* notes 123–132 and accompanying text.

<sup>283</sup> See Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 6 (2012) (“[M]ultinational corporations often have an incentive to standardize their production globally and adhere to a single rule. This converts the EU rule into a global rule—the ‘de facto Brussels Effect.’”).

<sup>284</sup> See *infra* notes 285–322 and accompanying text.

<sup>285</sup> See *infra* notes 289–294 and accompanying text.

dence collection efforts of domestic prosecutors looking to bring charges under their national laws.

Section B considers multi-forum civil litigation to secure compensation. Overcoming the legal barriers to the pursuit of civil litigation in the United States would require Congressional action to amend Section 230 of the CDA.<sup>286</sup> But in the absence of such reform, civil litigation could be pursued in a range of foreign states that are open to *forum necessitatis* jurisdiction. The primary practical challenges include obtaining documentation of the policies and practices of the social media company and securing evidence of the direct crimes committed in the host country. To address these constraints, this Section presents options to incentivize public transparency activity with respect to social media companies, including whistleblowing. It also discusses two possible pathways to amending the SCA.

Preventing the recurrence of platform-enabled crimes likely also requires regulatory action. Section C focuses on regulatory work.<sup>287</sup> In terms of the U.S. Congress, this involves not only Section 230 reform, but also antitrust regulation. The E.U. has already begun to advance regulatory proposals to strengthen oversight that could help prevent the recurrence of platform-enabled crimes. An international treaty could extend this regional focus to a global level. Section D addresses counterarguments.<sup>288</sup>

### *A. Multi-Forum Corporate Criminal Prosecutions*

It is hard to imagine a circumstance in which a social media company would acknowledge its complicity in international crimes of its own accord. Securing acknowledgement of wrongdoing through criminal proceedings is also challenging. Although there are some domestic jurisdictions in which such corporate criminal prosecutions are legally possible, there still needs to be the political will to pursue a case affecting foreign victims using domestic taxpayer dollars. Such prosecutions involve enormous practical hurdles. Still, many of these challenges are not unique to platform-enabled crimes. Some of the steps taken to overcome the difficulties of working across jurisdictions to prosecute individuals could be usefully adapted for the corporate complicity context.

One area ripe for adaptation is the “specialized war crimes [prosecutions] units” that “institutionalize[] the investigation and prosecution of grave international crimes by bringing together the necessary resources, staff, and exper-

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<sup>286</sup> See *infra* notes 295–303 and accompanying text.

<sup>287</sup> See *infra* notes 304–309 and accompanying text.

<sup>288</sup> See *infra* notes 310–322 and accompanying text.

tise” within domestic jurisdictions.<sup>289</sup> These units exist in nearly a dozen countries and have been credited with leading domestic prosecutors to pursue universal jurisdiction cases against war criminals that would have otherwise been too daunting to take on.<sup>290</sup>

A state with a well-equipped specialized war crimes prosecutions unit could begin to close the accountability gap for platform-enabled crimes by bringing in consultants, or even hiring staff, with expertise in corporate criminal prosecutions and relevant knowledge of social media companies. Even a single hire with such expertise within a war crimes unit could tangibly increase the likelihood of a prosecution for a platform-enabled crime.

Similarly, under an agreement in place across the E.U., joint investigative teams—time-limited cross-jurisdictional teams of law enforcement and judicial actors—could be expanded and adapted to support the prosecution of platform-enabled crimes.<sup>291</sup> Joint investigative teams have traditionally been used to support prosecutions of transnational crimes occurring in Europe. Through bilateral agreements, their regional scope could be expanded to reach both home state and host state, thereby improving the transnational coordination needed to prosecute platform-enabled crimes.

The impact of these coordination mechanisms, however, will remain limited whenever social media companies are the primary repositories of evidence needed for a successful prosecution. Securing evidence of the policies and practices of a U.S. social media company would typically be challenging for foreign prosecutors. Yet the Rohingya situation shows how much evidence can be made available through public transparency efforts.

Securing evidence of the direct crime, however, is likely to require foreign prosecutors to pursue at least one of two processes. Each process requires significant human and financial resources. One process, for evidence that falls outside SCA protections, includes the pursuit of a Section 1782 application to compel Meta to turn over material for use in a foreign tribunal.<sup>292</sup> The other process, for material that does fall within SCA protections, is for a foreign prosecutor to push their government to establish a strong diplomatic relation-

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<sup>289</sup> HUM. RTS. WATCH, *THE LONG ARM OF JUSTICE: LESSONS FROM SPECIALIZED WAR CRIMES UNITS IN FRANCE, GERMANY, AND THE NETHERLANDS* (2014), <https://www.hrw.org/report/2014/09/16/long-arm-justice/lessons-specialized-war-crimes-units-france-germany-and> [<https://perma.cc/2JUH-CNCK>].

<sup>290</sup> *See id.* (“[W]ithout specialized war crimes units, authorities often find these challenges daunting and consequently choose not to prioritize universal jurisdiction cases.”); *see also* David Mandel-Anthony, *Hardwiring Accountability for Mass Atrocities*, 11 DREXEL L. REV. 903, 932–51 (2019) (describing the pros and cons of “[n]ational [a]trocit[y] [c]rimes [u]nits”).

<sup>291</sup> *See Joint Investigations Teams—JITS*, EUROPOL, <https://www.europol.europa.eu/activities-services/joint-investigation-teams> [<https://perma.cc/KW5A-5UWR>] (Nov. 26, 2021).

<sup>292</sup> *See supra* note 209 and accompanying text.



ship with the U.S. Department of Justice. In so doing, a request for digital evidence under the SCA may be streamlined and expedited.<sup>293</sup> Thus, efforts by foreign prosecutors will necessarily require transnational legal or diplomatic engagement. This is by no means impossible, but does require a sizeable amount of political will.

For the discrete goal of securing acknowledgement of wrongdoing, it may be worth bringing the ICC back into the accountability conversation. Although the ICC has no jurisdiction to prosecute a social media company, it can help overcome the evidentiary challenges faced by domestic prosecutors pursuing platform-enabled crimes. The Rome Statute authorizes the ICC to “cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes . . . a serious crime under the national law of the requesting State.”<sup>294</sup> Thus, the ICC, staffed with investigators who have expertise in gathering evidence from conflict-affected areas, can share evidence that could help a domestic prosecutor—at least within a state that has joined the ICC—succeed in prosecuting platform-enabled crimes. Such practical support could provide real value given the limited resources that domestic prosecutors may experience. Achieving a successful domestic prosecution can secure the acknowledgement of wrongdoing sought by survivors.

### B. Multi-Forum Civil Litigation

A civil suit provides one effective option for securing compensation from a social media company for its role in platform-enabled crimes. Traditionally, any such suits involving foreign victims have been pursued in the United States through the ATS. That pathway is blocked for platform-enabled crimes unless Congress amends Section 230 of the CDA to provide an exception from civil immunity for ATS cases. This is exactly the amendment that the SAFE TECH Act—one of the many proposed technology bills under consideration by Congress—would make.<sup>295</sup> Unblocking this pathway, however, may prove of minimal practical use given the degree to which U.S. courts have restricted ATS litigation more generally.<sup>296</sup> It may be more fruitful to expend energy on

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<sup>293</sup> See 18 U.S.C. § 2702(c)(7).

<sup>294</sup> Rome Statute, *supra* note 46, art. 93(10)(a).

<sup>295</sup> See SAFE TECH Act, S. 299, 117th Cong. § 2(2) (2021).

<sup>296</sup> See *supra* notes 227–234 and accompanying text. Moreover, carving out an exception for ATS suits furthers a “piecemeal approach” to reform that may ultimately undermine survivors of other types of platform-enabled crimes. See, e.g., Mary Anne Franks, *Reforming Section 230 and Platform Liability*, in STANFORD CYBER POL’Y CTR., CYBER POLICY RECOMMENDATIONS FOR THE NEW ADMINISTRATION 6, 22 (Kelly Born ed., 2021), [https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/cpc-cyber\\_policy\\_recom\\_brochure\\_v3b.pdf](https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/cpc-cyber_policy_recom_brochure_v3b.pdf) [<https://perma.cc/K265-7VJP>] (“The exceptions approach is inevitably underinclusive . . .”).

pursuing civil litigation through foreign forums that are open to *forum necessitatis* jurisdiction or where the social media company in question has at least some minimal contacts.

One benefit of civil litigation is that survivors are not forced to rely on a government official with the political will required to launch a case. Civil litigation faces even greater challenges than a criminal prosecution regarding obtaining internal corporate information on policies and practices and collecting direct crime evidence of any material that is SCA protected.

Accessing materials already released to the public is the most straightforward pathway for civil litigants to obtain internal corporate documentation. This includes materials released to shareholders, obtained by investigative reporters or Congressional committees, or leaked by whistleblowers. In terms of direct crime evidence, the SCA presents a potential hurdle, but there are two possible pathways for civil litigants to pursue. The first requires a wholesale reinterpretation of the Act. The second requires a statutory amendment to the Act itself.

The argument for reinterpretation of the SCA draws on an approach advanced by Rebecca Wexler. Wexler argues that U.S. appellate courts have erred in agreeing with social media companies that the SCA bars them from disclosing evidence in any scenario outside the explicit SCA exemptions.<sup>297</sup> Courts have effectively “construe[d] the [SCA] as creating an evidentiary privilege” with respect to any evidence—in civil and criminal litigation alike—outside the non-disclosure exceptions.<sup>298</sup> She asserts this “violates a binding rule of privilege law.”<sup>299</sup> Such law requires courts not to infer an evidentiary privilege out of Congressional silence, since such privilege is “in derogation of the search for truth.”<sup>300</sup>

Although Wexler’s focus is on evidence sought by criminal defendants, the same argument applies to evidence sought by plaintiffs in civil litigation for platform-enabled crimes. Like criminal defendants, such plaintiffs do not fall under one of the SCA’s exceptions to non-disclosure.<sup>301</sup> Through Wexler’s

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<sup>297</sup> See Wexler, *supra* note 194, at 2722. The original case on this issue which courts have subsequently cited with approval was decided in 2006. See *O’Grady v. Superior Ct.*, 44 Cal. Rptr. 3d 72, 77 (Ct. App. 2006).

<sup>298</sup> Wexler, *supra* note 194, at 2722. I adopt here the definition Wexler proposes of evidentiary privilege, applicable to criminal and civil litigation alike, as “construing a statute to shield an ex ante category of relevant evidence from judicial compulsory process.” *Id.* at 2746–47.

<sup>299</sup> *Id.* at 2725 (citing *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

<sup>300</sup> *Id.* at 2722, 2725 (citing *Nixon*, 418 U.S. at 710); see also *id.* at 2758 (first citing *Nixon*, 418 U.S. at 709–10; and then citing *Pierce Cnty. v. Guillen ex rel. Guillen*, 537 U.S. 129, 144 (2003)).

<sup>301</sup> Joshua A.T. Fairfield & Erik Luna, *Digital Innocence*, 99 CORNELL L. REV. 981, 1056 (2014) (“While the SCA enumerates provisions for disclosure of this information to government entities, it is silent on access by criminal defendants and civil litigants. Courts have read this silence as prohibiting access by these parties . . . .” (citing Marc. J. Zwilling & Christian S. Genetski, *Criminal Discovery*

lens of evidentiary privilege, however, the fact that civil litigants are not referenced in the SCA should not prohibit their access to evidence.

This first approach may resonate in U.S. courts with ATS cases brought by foreign plaintiffs. Moreover, if Congress undertook broad reform of Section 230, it could open the door for U.S. plaintiffs to bring domestic tort cases that would also benefit from a reinterpretation of the SCA. Yet it may be harder for this approach to succeed in foreign courts because it relies on argumentation flowing from U.S. domestic law over the construction of a U.S. statute.

A more direct approach to overcoming the hurdle of the SCA, at least with respect to platform-enabled crimes, involves a statutory amendment to the SCA itself. Such an amendment would add another category of non-disclosure exceptions in the SCA.<sup>302</sup> The overall goal of such an amendment would be to permit disclosure in situations where SCA-protected content would help establish the truth in a legal process related to the commission of genocide, war crimes, or crimes against humanity. Such an exception would satisfy the spirit of the United States' existing international law obligations under the Genocide Convention. Further, it would require the United States to align its domestic legislation with the goals of the treaty to prevent and punish genocide.<sup>303</sup> Making such a change to the SCA itself will be more useful for litigants in foreign forums than relying on U.S. courts to reinterpret the SCA. Moreover, the current level of Congressional interest in regulating social media companies means that the suggestion is at least plausible politically.

### C. Regulatory Action

There is a long list of reforms needed to overcome the barriers to the prevention of platform-enabled crimes. Among them is the need for regulatory change. The U.S. Congress is engaged with the possibility of broad Section 230 reform.<sup>304</sup> And the United States Supreme Court may weigh in on the interpretation of Section 230 in a future case.<sup>305</sup> The quantity of scholarship on

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*of Internet Communications Under the Stored Communications Act: It's Not a Level Playing Field*, 97 J. CRIM. L. & CRIMINOLOGY 569, 580 (2007)).

<sup>302</sup> This could form the tenth exception in the list that appears at 18 U.S.C. § 2702(b).

<sup>303</sup> See generally G.A. Res. 260 (III), Convention on the Prevention and Punishment of the Crime of Genocide, Declarations and Reservations (Dec. 9, 1948); Kyle Rapp, *Social Media and Genocide: The Case for Home State Responsibility*, 20 J. HUM. RTS. 486 (2021).

<sup>304</sup> There is a wealth of scholarship on the benefits and risks of undertaking such reform. See generally, e.g., Daphne Keller, *Who Do You Sue? State and Platform Hybrid Power Over Online Speech* (Hoover Inst. Aegis Series, Paper No. 1902, 2019), [https://www.scribd.com/document/398500817/Who-Do-You-Sue-State-and-Platform-Hybrid-Power-Over-Online-Speech#from\\_embed](https://www.scribd.com/document/398500817/Who-Do-You-Sue-State-and-Platform-Hybrid-Power-Over-Online-Speech#from_embed) [<https://perma.cc/N5S9-WQGS>].

<sup>305</sup> See *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 18 (2020) (Thomas, J., statement respecting denial of certiorari) (“Paring back the sweeping immunity courts have read

this topic is immense and beyond the scope of this Article.<sup>306</sup> To the degree that any reform succeeds in conditioning online intermediaries' civil immunity on their meeting some reasonable standard of care, the technology industry's role in determining what is and is not "reasonable" will be important to consider.<sup>307</sup> A related question is whether industry best practices to support freedom of expression will be expanded to focus on the prevention of international crimes. Unless such an expansion occurs, an amendment to make Section 230 immunity conditional on a reasonable standard of care may still fail to bring scrutiny to the ordinary business activities that enable international crimes.

In terms of changing policy and practice, the progressive "hardening" of the BHR space will also be important to work on. The E.U. Resolution on Corporate Due Diligence & Corporate Liability and the nascent effort at a binding international treaty to regulate transnational corporations will become critical over the long term.<sup>308</sup>

Finally, the antitrust proposals Congress is currently advancing are unlikely to stop platform-enabled crimes. They may, however, minimize the scale of harm that can be accomplished when perpetrators seek to use a platform to incite violence. To return to the example of Myanmar, the Tatmadaw would have been much less effective if Facebook's platform had only reached twenty percent of the online population in Myanmar. Given Facebook's total domina-

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into § 230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place.”)

<sup>306</sup> There are a number of representative articles from the past five years. See generally Danielle Keats Citron, *How to Fix Section 230*, 102 B.U. L. REV. (forthcoming 2022); Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1662&context=ucfl> [<https://perma.cc/VTV6-ARY7>] (outlining how U.S. courts have misinterpreted Section 230 and providing solutions for Congress to improve Section 230 protections); Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401 (2017) (arguing that the Section 230 should be fixed either through judicial review or congressional action); Mary Anne Franks, *Section 230 and the Anti-Social Contract*, LAWFARE: DIGIT. SOC. CONT. 1 (Feb. 22, 2021), <https://assets.documentcloud.org/documents/20489870/section-230-and-the-anti-social-contract.pdf> [<https://perma.cc/XU9E-VR45>] (noting that U.S. “[c]ourts’ sweeping interpretation of Section 230 . . . [provides] powerful private actors . . . [the ability to] profit from “the exploitation and abuse of vulnerable communities,” and that congressional action has been long overdue); Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. & PUB. POL’Y 553, 557 (2018) (examining “the development of the jurisprudence regarding online advertising of sex-trafficking victims and juxtaposes the forces that created § 230 with those preventing its timely amendment”).

<sup>307</sup> Danielle Citron and Benjamin Wittes, for example, would limit Section 230 immunity to those platforms who “take[] reasonable steps to prevent or address unlawful uses of its services.” Citron & Wittes, *supra* note 306, at 419. In a similar vein, Mary Anne Franks proposes an amendment to Section 230 that would remove immunity from “a provider or user who manifests deliberate indifference to unlawful material or conduct.” Franks, *supra* note 296, at 18.

<sup>308</sup> See *supra* notes 123–132 and accompanying text.

tion of the Myanmar social media market, the speed and scale of anti-Rohingya incitement rapidly increased to deadly proportions. Although anti-trust regulation may be too late for Myanmar, such regulation could prevent monopolization in future markets. In so doing, antitrust regulation could reduce the impact of platform-enabled crimes in conflict-affected areas going forward. Moreover, antitrust regulation need not be limited to breaking up major platforms like Facebook. More fulsome structural regulation could, as Lina Khan and David Pozen argue, “reshape business incentives through bright-line prohibitions on specific modes of earning revenue.”<sup>309</sup>

#### D. Counterarguments

The major risk with most of the above suggestions is that they may accomplish changes to policy and practice that generate acts of omission—or those related to content moderation—while leaving acts of commission untouched. One can readily imagine, for example, a platform responding to an onslaught of negligence suits for its failure to remove inciting content by automating content or account removal to a degree that is overinclusive. Indeed, concerns about incentivizing platforms to over-remove content is one of the issues that has hampered Section 230 reform more generally.<sup>310</sup>

The risk of incentivizing over-removal or blocking of accounts is typically framed in terms of the negative impact on “freedom of expression.”<sup>311</sup> From the perspective of survivors of platform-enabled crimes, however, the concern is somewhat different. It is not that those who have survived atrocities do not care about freedom of expression. In many cases, and in particular for those living outside democratic systems, access to free expression through a social media platform may be the only way to raise awareness about ongoing harms.<sup>312</sup> Nonetheless, the harms generated by a curtailment of free expression

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<sup>309</sup> Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 539 (2019) (first citing K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 117–18 (2016); and then citing Tim Wu, *Antitrust Via Rulemaking: Competition Catalysts*, 16 COLO. TECH. L.J. 33, 34–35 (2017)).

<sup>310</sup> See, e.g., Citron & Franks, *supra* note 306, at 46–47 (“Conservatives claim that Section 230 gives tech companies a license to silence speech based on viewpoint.” (citing *Sen. Cruz: Latest Twitter Bias Underscores Need for Big Tech Transparency*, U.S. SENATOR FOR TEX. TED CRUZ (Aug. 16, 2019), <https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-latest-twitter-bias-underscores-need-for-big-tech-transparency> [<https://perma.cc/J9FU-DWPZ>])).

<sup>311</sup> See, e.g., *CDA 230: The Most Important Law Protecting Internet Speech*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/cda230> [<https://perma.cc/Y9YQ-76AP>].

<sup>312</sup> See, e.g., Kyaw Hsan Hlaing, *Facebook Is Still Censoring Groups Fighting the Military Coup in Myanmar*, REST OF WORLD (May 14, 2021), <https://restofworld.org/2021/facebook-is-still-censoring-groups-fighting-the-military-coup-in-myanmar/> [<https://perma.cc/9H2G-3BZN>].

are weighted differently when the alternative is online speech that generates offline violence.<sup>313</sup>

For survivors of platform-enabled crimes, the bigger concern about reforms that would incentivize the over-removal of content or accounts is that such reforms would stand in lieu of changes to those policies and practices that generate acts of commission. Such acts include launching a platform into a market without the linguistic systems or cultural competence to do so safely. Other factors include the degree to which a monopolization strategy is pursued within such a market, and the surveillance-advertising business model underlying the design of the user content algorithm.<sup>314</sup>

The dominant model around which social media platforms are currently organized has only a cursory capacity for tailoring a platform to meet the needs of a given community of users.<sup>315</sup> As Ethan Zuckerman has noted, “Facebook supports over 2 billion users from all over the world through the same basic set of tools that were originally designed to link Harvard students to one another.”<sup>316</sup>

Facebook and platforms like it were designed based on several assumptions that make sense for many (though far from all) communities in a stable neoliberal democracy. These assumptions include an absence of recent intergroup violence, the presence of independent media, and significant digital media literacy.<sup>317</sup> It seems clear, however, that when social media companies launch their platforms in communities where these assumptions do not hold, platform-enabled crimes are a serious risk.<sup>318</sup> Acknowledging this risk is the first step towards preventive measures to limit the scale of platform-enabled crimes. Comprehensive prevention, however, would require a total overhaul of the very model upon which most major platforms have been built.

In an uncomfortable echo of this Article’s critique of standard legal approaches to accountability, which seek to close an accountability gap by modifying an existing body of law, there is a problem with thinking about how to prevent platform-enabled crimes by seeking to modify an existing platform. A

<sup>313</sup> See generally Catharine A. MacKinnon, *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223 (2020); Citron & Franks, *supra* note 306, at 54–55 (describing the numerous problems that failure to address online abuse can cause victims of such abuse).

<sup>314</sup> See *supra* notes 62–71 and accompanying text.

<sup>315</sup> Different languages and scripts can be adopted, and geo-blocking techniques can tailor some content to conform to local laws, but the basic model of Facebook, Twitter, or YouTube is the same whether you are using them from a remote Pacific Island, New York City, rural South Sudan, or Saudi Arabia.

<sup>316</sup> Ethan Zuckerman, *The Case for Digital Public Infrastructure*, KNIGHT FIRST AMENDMENT INST. AT COLUM. UNIV. (Jan. 17, 2020), <https://knightcolumbia.org/content/the-case-for-digital-public-infrastructure> [<https://perma.cc/TG77-DU3Z>]. See generally NYABOLA, *supra* note 31.

<sup>317</sup> See Hamilton, *supra* note 31, at 123–25, 158 (noting that there are many communities within these democracies for whom the design of these platforms also does not function well).

<sup>318</sup> *Id.* at 159 (recounting events in South Sudan, Myanmar, and Sri Lanka as examples).

better methodological approach may be to start with what survivors seek from a platform and to explore what pathways are or could be made available to reach those goals.<sup>319</sup> One of the most promising developments in this space is a bottom-up effort by tech workers themselves who are thinking through how to “voice” their concerns or “exit” social media companies that enable harm.<sup>320</sup> And some who are choosing exit are working on starting up new companies that take a survivor-centered approach.<sup>321</sup> If the antitrust proposals currently under discussion succeed, then the future may bring a plurality of platform types. If structural reforms prohibit the most surveillance-invasive forms of ad generation, platforms could avoid being driven by the thirst of advertisers for user data. This could expand the space for the creation of algorithms designed to support behavior that counters, rather than exacerbates, inter-group bias, and that thwarts, rather than amplifies, the incitement of violence.<sup>322</sup>

### CONCLUSION

This Article has sought to identify, understand, and address the accountability gap that currently exists for crimes that are enabled by platforms. Drawing inspiration from Sutherland’s early work on white-collar criminality, it has argued that the seeming ordinariness of the core business activities of online intermediaries belie the degree to which these corporations’ policies and practices can render them complicit in the commission of crime. This Article introduced the concept of platform-enabled crimes as a rhetorical device to counter this banality. If nothing else, this Article draws the attention of legal scholars and practitioners to the way in which the policies and practices of online intermediaries generate acts of commission or omission that enable principal perpetrators to commit serious crimes.

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<sup>319</sup> See generally Neal Kumar Katyal, *Digital Architecture as Crime Control*, 112 YALE L.J. 2261 (2003) (providing an early exposition on the design of technology’s impact in cyberspace). For an excellent example of such a methodological approach, see Zuckerman, *supra* note 316.

<sup>320</sup> See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970); *Preparedness Is Power, THE TECHWORKER HANDBOOK*, <https://techworkerhandbook.org/> [<https://perma.cc/R656-496B>] (providing an impressive introduction to this work).

<sup>321</sup> THE DAIR INST., <https://www.dair-institute.org/> [<https://perma.cc/JEW5-KXR9>] (describing a “space for independent, community-rooted AI research, free from Big Tech’s pervasive influence”).

<sup>322</sup> See Thomas E. Kadri, *Networks of Empathy*, 2020 UTAH L. REV. 1075, 1080, 1085 (encouraging “empathetic design” by having technology companies “draw from people who have the experiences and perspectives conducive to understanding digital abuse. . . . This involves [including] abuse victims, for whom the comprehension comes naturally, albeit painfully” (citing Evan Selinger & Albert Fox Cahn, *Cybersecurity Workers Need to Learn from Those They’re Trying to Protect*, ONEZERO (Dec. 20, 2019), <https://onezero.medium.com/cybersecurity-workers-need-to-learn-from-victims-9db34f3db198> [<https://perma.cc/D2ND-CU2K>])); see also Wilson & Land, *supra* note 33, at 1029.

The task of addressing the accountability deficit for platform-enabled crimes required moving from the expansive category of platform-enabled crimes to focus on a particularly egregious subset. Thus, this Article delved into the specific accountability problems posed by platform-enabled crimes where social media companies enable atrocities.

By taking a survivor-centered approach, this Article freed the conversation around accountability from binary landscape of BHR and ICL. Focusing on a sample of goals that survivors may have expanded the set of potential responses. Although the myriad of civil, criminal and regulatory options explored involve challenges, none of them are insurmountable.

Concrete suggestions include: (1) hiring staff that are knowledgeable about social media companies to join specialist war crimes units; (2) facilitating information and evidence-sharing across jurisdictions; (3) utilizing existing Rome Statute provisions to get the ICC to do the same; (4) amending the SCA and Section 230 of the CDA; and (5) reducing the monopoly power of major social media companies including, by regulating surveillance-based ad generation that underlies the profit model of major commercial platforms. Succeeding with any one of the above may do more to close the accountability gap than hoping state parties will amend the Rome Statute to provide the ICC jurisdiction over corporations, or lobbying states to sign onto a new international BHR treaty.<sup>323</sup>

Work on the suggestions advanced here can and should begin immediately. All of these pathways to accountability require political will that is neither monolithic nor self-generating. Securing the political will required to get a domestic prosecutor in the Netherlands to pursue a platform-enabled crime affecting foreign victims requires a different strategy, and different actors, than what is needed to build the political will in Congress to amend the SCA. It would be a mistake, however, to think of legal and non-legal approaches to increasing accountability as operating in silos. In practice, they are likely to work in a didactical manner. Take, for example, the #deletefacebook campaign, through which users delete their Facebook accounts to protest the platform's policies and practices.<sup>324</sup> One of the reasons the campaign has not been successful enough to catalyze change is that it is hampered by the so-called network effects that stop people leaving Facebook. If all your friends are on Face-

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<sup>323</sup> See Citron, *supra* note 26, at 1831 (noting that in reference to platform-enabled crimes related to privacy torts, “second-best solutions can be preferable to first-order ones that have little chance of adoption” (citing William L. Prosser)).

<sup>324</sup> See ‘Deletefacebook’ Trends After Zuckerberg Backlash, BBC NEWS (Oct. 15, 2019), <https://www.bbc.com/news/technology-50054667> [<https://perma.cc/KCZ9-6HQJ>].



book, then no other platform can serve as a reasonable substitute.<sup>325</sup> But imagine if regulatory action both de-monopolized existing social media companies and increased the ease with which people could transfer their profiles across platforms. Such legal action could then reinvigorate a campaign like #deletefacebook, building pressure on Meta to undertake further reforms.

This Article does not offer a silver bullet to the accountability gap that currently exists with respect to platform-enabled crimes. Being clear-eyed about the way online intermediaries can enable principal perpetrators to commit their crimes is a necessary starting point for all future work on a problem that is likely to be with us for some time. By pursuing a survivor-centered approach that generates a plurality of pathways to accountability, we can make a vast improvement on the status quo.

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<sup>325</sup> See generally Robert Mark Simpson, *The Machine Stops: The Ethics of Quitting Social Media*, in OXFORD HANDBOOK OF DIGITAL ETHICS (Carissa Véliz ed.) (forthcoming 2022) (providing a fascinating discussion of the ethics of quitting social media platforms).