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## Tech Accountability in Face of Genocide: Gambia v. Facebook

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# **TECH ACCOUNTABILITY IN FACE OF GENOCIDE: GAMBIA V. FACEBOOK**

## ABSTRACT

*The exigent nature of genocide, inherent costs of litigation that may impede ongoing investigations, and general reluctance of tech companies toward international data disclosure underscore the need for states and intergovernmental organizations to enforce more expedient discovery procedures for cases involving crimes against humanity. The discovery case between the Gambia and Facebook illustrates how the current legal framework regulating international data disclosures is ill-equipped to nimbly address the exigence of genocide in Myanmar.*

*Existing bilateral agreements and multilateral treaties overseeing international data disclosure should be amended to compel third-party internet service providers to disclose information in the extreme and exigent case of genocide. Without further changes, efforts to compel third parties will continue to fail. Investigating bodies will continue to depend on narrow exceptions when disclosure aligns with the business interests of internet service providers.*

*Cases investigating genocide will persist in purgatory. Lives will remain hanging in the balance.*

*This Comment will focus on the discovery case between the Gambia and Facebook and its collateral effects on the ongoing investigation into the Rohingya genocide in Myanmar. In doing so, this Comment will analyze how American tech giants like Facebook conduct extensive business outside the United States and circumvent foreign regulation and government intervention to the detriment of local communities.*

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## INTRODUCTION

Against the backdrop of an unrelenting global pandemic, the world has experienced social and economic upheavals unprecedented in recent memory.<sup>1</sup> During the first few months leading up to the initial wave of lockdowns around the world, hospitals buckled and political leaders balked as the rates of infections and mortalities swelled beyond control. In the United States, communities of color have been disproportionately afflicted and underserved in nearly all COVID-19 hotspots.<sup>2</sup> Meanwhile, the killing of George Floyd in the spring of 2020 unleashed a torrent of repressed anger and anguish over the country’s lingering legacy of racial injustice.<sup>3</sup> In the wake of such tragedies, Americans have collectively reached a tipping point in grappling with systemic racism and political instability unseen since the Civil Rights Movement.<sup>4</sup>

At the same time, the future of global democracy remains bleak as the world emerges from 2020 on “the brink of a catastrophic moral failure.”<sup>5</sup> As the richest countries in the developed world race to inoculate their citizens ahead of their poorer neighbors across the developing world,<sup>6</sup> public participation in democratic governments and protection of civil liberties continue to decline as the world remains in perpetual lockdown.<sup>7</sup> Before the first week of 2021 concluded, American insurrectionists brazenly sieged the nation’s capital and

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<sup>1</sup> Editorial, *Here Comes the Coronavirus Pandemic: Now, After Many Fire Drills, the World May Be Facing a Real Fire*, N.Y. TIMES (Feb. 29, 2020), <https://www.nytimes.com/2020/02/29/opinion/sunday/coronavirus-usa.html>.

<sup>2</sup> See Jazmyn T. Moore et al., *Disparities in Incidence of COVID-19 Among Underrepresented Racial/Ethnic Groups in Counties Identified as Hotspots During June 5-18, 2020 – 22 States, February-June 2020*, CDC (Aug. 21, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6933e1.htm> (reporting disproportionate number of infections in underrepresented ethnic/racial groups in almost all hotspots from February to June 2020).

<sup>3</sup> Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

<sup>4</sup> *Id.*

<sup>5</sup> *Vaccine Nationalism Means that Poor Countries Will Be Left Behind*, ECONOMIST (Jan. 28, 2021), <https://www.economist.com/graphic-detail/2021/01/28/vaccine-nationalism-means-that-poor-countries-will-be-left-behind>.

<sup>6</sup> *Id.*

<sup>7</sup> *Global Democracy Has a Very Bad Year*, ECONOMIST (Feb. 2, 2021), <https://www.economist.com/graphic-detail/2021/02/02/global-democracy-has-a-very-bad-year>.

threatened the future of the most powerful democracy in the world.<sup>8</sup> Drawing stunning similarities to the storming of the U.S. Capitol Complex, the Myanmar military refused to accept its country's own November election results and staged a coup in February 2021, deploying martial law and detaining government officials including leader Aung San Suu Kyi.<sup>9</sup>

These recent events undoubtedly raise grave implications for the ongoing legal proceedings Myanmar and Facebook face for the atrocities committed against the Rohingya Muslims in Myanmar. In late 2019, the Gambia filed an application in the International Court of Justice (ICJ) alleging Myanmar had violated the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) by committing acts of genocide against the Rohingya Muslims.<sup>10</sup> Both the Gambia and Myanmar are parties to the Genocide Convention and thus fall under the jurisdiction of the ICJ.<sup>11</sup> In the resulting case, *Gambia v. Myanmar*, the Gambia seeks to end the genocide, prosecute government perpetrators in an international penal tribunal such as the International Criminal Court (ICC), and ensure a safe path for the Rohingya to return to Myanmar.<sup>12</sup>

Now that the Myanmar military has regained control, the UN-appointed Independent Investigative Mechanism for Myanmar (IIMM) is unlikely to continue its factfinding mission in collecting evidence of genocidal intent against Rohingya Muslims.<sup>13</sup> As such, parties seeking justice, such as the Gambia, will need alternative sources of evidence to build its case against Myanmar. Following Facebook's removal of accounts associated with the Myanmar military in 2018, the Gambia struggled to receive adequate support from Facebook, which can disclose account information of Myanmar military leaders responsible for the Rohingya Genocide.<sup>14</sup> As a result, the Gambia issued

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<sup>8</sup> Dan Barry, Mike McIntire & Matthew Rosenberg, *Our President Wants Us Here: The Mob that Stormed the Capitol*, N.Y. TIMES (Jan. 09, 2021), <https://www.nytimes.com/2021/01/09/us/capitol-rioters.html>.

<sup>9</sup> Bill Chappell & Jaclyn Diaz, *Myanmar Coup: With Aung San Suu Kyi Detained, Military Takes Over Government*, NAT'L PUB. RADIO (Feb. 1, 2020), <https://www.npr.org/2021/02/01/962758188/myanmar-coup-military-detains-aung-san-suu-kyi-plans-new-election-in-2022>.

<sup>10</sup> Priya Pillai, *The Gambia v Myanmar at the International Court of Justice: Points of Interest in the Application*, OPINIO JURIS (Nov. 13, 2019), <https://opiniojuris.org/2019/11/13/the-gambia-v-myanmar-at-the-international-court-of-justice-points-of-interest-in-the-application>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Priya Pillai, *Myanmar Coup d'État – Implications for International Justice*, OPINIO JURIS (Feb. 11, 2020), <https://opiniojuris.org/2021/02/11/myanmar-coup-detat-implications-for-international-justice>.

<sup>14</sup> Priya Pillai, *The Republic of The Gambia v. Facebook, Inc.: Domestic Proceedings, International Implications*, OPINIO JURIS (Aug. 8, 2020), <https://opiniojuris.org/2020/08/08/the-republic-of-the-gambia-v-facebook-inc-domestic-proceedings-international-implications>.

a companion discovery case in 2020, *Gambia v. Facebook*, to compel the social media company to disclose relevant evidence for the Gambia's main case against Myanmar.<sup>15</sup> On September 22, 2021, the United States District Court for the District of Columbia ruled in favor of the Gambia and ordered Facebook to disclose deleted content requested by the Gambia.<sup>16</sup> Whether Facebook will appeal remains unclear.

Regardless, this discovery case between the Gambia and Facebook reveals how the current legal framework regulating international data disclosures does not adequately address exigent cases of genocide. In fact, it underscores the need for more expedient foreign disclosure methods. Given the ICJ's unanimous finding of a "real and imminent risk of irreparable prejudice to the rights invoked by the Gambia" over the Myanmar military's acts against the Rohingya people and other Muslim minorities,<sup>17</sup> Facebook should be compelled to disclose account information of Myanmar military officials under investigation for genocide and crimes against humanity. The exigent nature of genocide, inherent costs of litigation that may further impede ongoing investigations, and general reluctance tech companies have toward international data disclosure underscore the need for states and intergovernmental organizations to enforce more expedient discovery procedures for cases involving crimes against humanity. Specifically, existing bilateral agreements and multilateral treaties overseeing international data disclosure should be amended to compel third-party internet service providers to disclose information in the extreme and exigent case of genocide. Without further changes, efforts to compel third parties will continue to fail and investigating bodies will depend on the limited instances disclosure falls within the business interests of internet service providers. As this Comment will further explore in the specific case of the Rohingya genocide in Myanmar, American social media companies that operate extensively outside the United States are often free to circumvent local regulation and government intervention and instead adopt a free-market approach of maintaining user expectations according to their own internal corporate policies.

In the event Facebook appeals, the appellate court may still rule in favor of the Gambia but try to limit disclosure. In particular, Facebook may be compelled to only provide non-content information for the seventeen identified individuals listed in the Gambia's original request, such as registered e-mail addresses,

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<sup>15</sup> *Id.*

<sup>16</sup> *The Republic of the Gambia v. Facebook*, [https://www.washingtonpost.com/context/order-in-re-the-republic-of-the-gambia-v-facebook-inc/6fd698bc-034f-43e2-a544-5592e174bc8a/?itid=lk\\_inline\\_manual\\_1](https://www.washingtonpost.com/context/order-in-re-the-republic-of-the-gambia-v-facebook-inc/6fd698bc-034f-43e2-a544-5592e174bc8a/?itid=lk_inline_manual_1).

<sup>17</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.)*, Order, 2020 I.C.J. No. 178, ¶¶ 71–76 (Jan. 23) [hereinafter ICJ Order].

names, and phone numbers associated with their Facebook, Instagram, and WhatsApp accounts. In *Gambia v. Facebook*, Facebook broadly insisted the Gambia should exhaust alternative methods of collecting user data. However, the court should dismiss this argument. Under the current regulatory scheme, foreign countries like the Gambia need to enter into a bilateral agreement with the United States, known as a Mutual Legal Assistance Treaty (MLAT).<sup>18</sup> In the extreme unlikelihood the Gambia is able to negotiate a bilateral agreement with the United States and have a gridlocked Congress ratify the treaty within a reasonable time frame,<sup>19</sup> the MLAT process generally takes an additional two years for American courts and companies to process search warrants seeking electronic content, such as posts, videos, and pictures.<sup>20</sup>

This added procedural delay will undoubtedly halt the Gambia's companion case against Myanmar unless the Gambia is able to find the requested information through alternative means. Given the current political instability in Myanmar, the IIMM is unlikely to collect additional evidence, while human rights activists face similar obstacles as the Myanmar military resorts to violence on the streets.<sup>21</sup> Effective private-sector workarounds are also unlikely, as tech companies continue to limit third parties, including investigatory journalists and war crime watchdogs, from accessing their data.<sup>22</sup> Moreover, user data sourced outside of Facebook by third parties may be scrutinized for its validity and ultimately still require some form of verification or authenticity from Facebook, defeating the whole purpose of circumventing the company in the first place.

Separately, Facebook previously promised to work with the U.N. Human Rights Council (UNHRC) and assist in providing any necessary evidence for its ongoing investigations. However, such commitments have proven difficult to fulfill without substantial external pressure from the press. In August 2020, the head of the IIMM reported Facebook had failed to share evidence highly relevant and probative of "serious international crimes" despite engaging in talks over

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<sup>18</sup> Jonah Force Hill, *Problematic Alternatives: MLAT Reform for the Digital Age*, HARV. NAT'L SEC. J. (Jan. 28, 2015), <https://harvardnsj.org/2015/01/problematic-alternatives-mlat-reform-for-the-digital-age>.

<sup>19</sup> The process of reaching an MLAT with the United States can range in time from one to eight years, as demonstrated by Israel and Ireland respectively. See U.S. Dep't of State, Office of the Legal Advisor, *A List of Treaties and Other International Agreements of the United States in Force on January 1, 2020* 1, 216, 228 (2020), <https://www.state.gov/wp-content/uploads/2020/08/TIF-2020-Full-website-view.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> *Myanmar Coup: Woman Shot at Protest Fights for Life*, BBC (Feb. 10, 2020), <https://www.bbc.com/news/world-asia-56005909>.

<sup>22</sup> Catherine Shu, *Changes to Facebook Graph Search Leaves Online Investigators in a Lurch*, TECH CRUNCH (June 11, 2019), <https://techcrunch.com/2019/06/10/changes-to-facebook-graph-search-leaves-online-investigators-in-a-lurch>.

the past year.<sup>23</sup> Within the following month, Facebook partially complied and shared deleted data associated with the military, despite claiming it had previously deleted eighteen accounts and fifty-two pages of data associated with the Myanmar military, including the commander-in-chief.<sup>24</sup> The Gambia may present these findings to the court as evidence for obstruction of justice. However, until treaties binding both the Gambia and the United States are amended, the Gambia and future states investigating genocide will continue to face lengthy challenges when requesting data from technology companies through non-voluntary means.

In Part I, this Comment will discuss how social media has propelled unprecedented social change across the world, and how Facebook in particular has attempted to balance competing interests in user privacy and regulation. Part I will also provide historical background leading up to the central case, *Gambia v. Facebook*, by outlining the timeline of events starting with (1) the deadly military crackdown in 2017 and resulting refugee crisis in northern Myanmar and neighboring Bangladesh, before progressing onto (2) the ensuing international response and U.N. investigations implicating Facebook's involvement, and then analyzing (3) the Gambia's suit against Myanmar for the Burmese Government's crimes against the Rohingya minority. Part II will dive into the actual merits of the case between the Gambia and Facebook by evaluating how the arguments of each party fare under the existing legal frameworks of international data disclosure. The Conclusion will assess the impact of the case, next steps the Gambia will have to take to move forward with its concurrent case against Myanmar, and the overall implications the case may have on future discovery measures involving the ICJ and tech companies domiciled in the United States.

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<sup>23</sup> Poppy McPherson, *U.N. Investigator Says Facebook Has Not Shared 'Evidence' of Myanmar Crime*, REUTERS (Aug. 11, 2020) (quoting Nicholas Koumjian, Head of the IIMM), <https://www.reuters.com/article/us-myanmar-facebook/u-n-investigator-says-facebook-has-not-shared-evidence-of-myanmar-crime-idUSKCN2570K9>.

<sup>24</sup> Poppy McPherson, *Facebook Shares Data on Myanmar with United Nations Investigators*, REUTERS (Aug. 25, 2020), <https://www.reuters.com/article/uk-myanmar-facebook/facebook-shares-data-on-myanmar-with-united-nations-investigators-idUKKBN25L2HE?edition-redirect=uk>; Ella Glover, *Facebook Has Now Shared Evidence About Myanmar Atrocities With IIMM*, PC GUIDE (Sept. 24, 2020), <https://www.pcguides.com/news/facebook-has-now-shared-evidence-about-myanmar-atrocities-with-iimm>.

## I. BACKGROUND

### A. *Tech Accountability in the Globalized Era of Social Media Remains Unclear*

Within the span of a generation, technological advancements have fundamentally altered the way we communicate with each other in a seemingly smaller and more interconnected, globalized community. For better or for worse, communicating on social media platforms has ushered in a new era of sharing information. Some fear the relative ease of communicating virtually has resulted in the inevitable “weaponization” of social media.<sup>25</sup> Whether instigating widespread movements for democracy in the Arab Spring revolution<sup>26</sup> or inciting insurrection at the U.S. Capitol,<sup>27</sup> social media has proven to be an astonishingly effective tool in dismantling or upholding authoritarian control, depending on who wields this double-edged sword.<sup>28</sup>

On the one hand, democracies around the world rallied in support of the young revolutionaries behind the Arab Spring movement and marveled at how hundreds of thousands of young individuals mobilized across the Middle East and North Africa on Facebook and Twitter to protest their countries’ oppressive regimes.<sup>29</sup> On the other hand, authoritarian regimes have also started to exploit social media for their own control. After banning Facebook, the Vietnamese government created its own social media platform to suppress speech and conduct surveillance on its civilians.<sup>30</sup> For the 2016 U.S. presidential elections, state-endorsed hackers from Russia disseminated misinformation and conspiracy theories on government misconduct and candidate Hilary Clinton through sophisticated advertisements and posts on Instagram and Facebook over the course of at least two years.<sup>31</sup>

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<sup>25</sup> Neriah Yue, Note, *The “Weaponization” of Facebook in Myanmar: A Case for Corporate Criminal Liability*, 71 HASTINGS L.J. 813, 817–18 (2020).

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

<sup>27</sup> Sheera Frenkel, *The Storming of Capitol Hill Was Organized on Social Media*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/protesters-storm-capitol-hill-building.html>; see Ryan Hal Budish, *International Law and the Internet: Adapting Legal Frameworks in Response to Online Warfare and Revolutions Fueled by Social Media: Click to Change: Optimism Despite Online Activism’s Unmet Expectations*, 26 EMORY INT’L L. REV. 745, 758–59 (2012).

<sup>28</sup> Yue, *supra* note 25.

<sup>29</sup> Budish, *supra* note 27.

<sup>30</sup> *Id.* at 753.

<sup>31</sup> Sheera Frenkel & Katie Benner, *To Stir Discord in 2016, Russians Turned Most Often to Facebook*, N.Y. TIMES (Feb. 17, 2018), <https://www.nytimes.com/2018/02/17/technology/indictment-russian-tech-facebook.html>.

In addition to individuals utilizing social media against state regimes and vice versa, states have begun to mobilize social media against other states to promote their own interests in data privacy and national security. Within the final months of 2020, the Trump administration declared its intent to ban viral video and messaging applications, TikTok and WeChat, from the United States on the basis that the “Chinese Communist Party (CCP) ha[d] demonstrated the means and motives to use these apps to threaten the national security, foreign policy, and the economy of the U.S.”<sup>32</sup> The Biden administration subsequently revoked the Trump administration’s outright ban; however, the Biden administration will continue monitoring how Chinese apps collect and process American data.<sup>33</sup> As such, regardless of whether the allegations made by the Trump administration were grounded in substantive intelligence findings, the underlying concern of how these social media applications “collec[t] vast swaths of data from users, including network activity, location data, and browsing and search histories”<sup>34</sup> underscores the pervasive and unprecedented reach social media commands as well as the inherent dangers they can impose.

### *1. Facebook’s Global Dominance Demands Greater Responsibility than What is Currently Required*

Despite the ubiquitous use of social media around the world, few companies, if any, rival the original technology titans that started it all. In the first quarter of 2020, Facebook boasted a monthly estimate of 2.85 billion *active* users and remains the largest social media company in the world.<sup>35</sup> The majority of Facebook users are outside the United States.<sup>36</sup> Nine out of the top twenty countries with the largest base of Facebook users outside the United States are classified by the United Nations and World Health Organization as “low-income” and “lower-middle-income” countries based on their gross domestic

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<sup>32</sup> Press Release, Office of the Sec’y, U.S. Dep’t of Commerce, Commerce Department Prohibits WeChat and TikTok Transactions to Protect the National Security of the United States (Sept. 18, 2020), <https://content.govdelivery.com/accounts/USDOC/bulletins/2a14c6c>.

<sup>33</sup> Matt O’Brien, Eric Tucker & Tali Arbel, *US Drops Trump Order Targeting TikTok, Plans Its Own Review*, ASSOCIATED PRESS (June 9, 2021), <https://abcnews.go.com/Business/wireStory/white-house-drops-trump-orders-ban-tiktok-wechat-78172937>.

<sup>34</sup> Office of the Sec’y, U.S. Dep’t of Commerce, *supra* note 32.

<sup>35</sup> *Number of Monthly Active Facebook Users Worldwide as of 2nd Quarter 2020*, STATISTA (Aug. 10, 2020), <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide> (last visited Feb. 5, 2020).

<sup>36</sup> *Leading Countries Based on Facebook Audience Size as of July 2020*, STATISTA (July 24, 2020) [hereinafter *Leading Countries*], <https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users> (last visited Feb. 5, 2020).

product.<sup>37</sup> These countries are politically less stable or governed by relatively young democracies, and are more inclined to upheaval, oligarchic rule, and corruption.<sup>38</sup> The fact that a global, democratic platform predicated on free discourse is accessed in countries under nascent democratic regimes places Facebook in an unusually influential position few nations or international organizations hold.<sup>39</sup>

Beyond its ethical and moral obligations, it is equally important to note how Facebook's obligations are intrinsically linked to its bottom line. At the end of the second fiscal quarter of 2020, Facebook reported an estimated revenue of \$18.69 billion dollars.<sup>40</sup> In the midst of a global pandemic and economic recession, Facebook has continued to not only generate a profit, but also increase its annual revenue by 21.6% thanks to its global market.<sup>41</sup>

As of February 2020, Myanmar is the nineteenth-largest country of users outside the United States.<sup>42</sup> With an estimated population of roughly 54.8 million people,<sup>43</sup> almost half of Myanmar's population uses Facebook.<sup>44</sup> Following the targeted attacks against the Rohingya people over the past decade, what has Facebook done to ensure similar acts do not persist in Myanmar or anywhere else in the world? While this Comment does not directly evaluate issues of corporate accountability within the context of criminal liability for genocidal acts, these questions are undoubtedly relevant in understanding the global ramifications of Facebook's policies.

## 2. *Facebook's Content-Moderation Problem: Break Fast, Fix Slow*

After starting out in a garage of a one-story ranch-style home in the sleepy suburb of Palo Alto in 2004, Facebook founder, Mark Zuckerberg, often credits

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<sup>37</sup> U.N. Dep't of Econ. & Soc. Affairs, World Economic Situation and Prospects 168 (2019), [https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2019\\_BOOK-ANNEX-en.pdf](https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2019_BOOK-ANNEX-en.pdf).

<sup>38</sup> See *Freedom Score of Countries and Territories*, FREEDOM HOUSE, <https://freedomhouse.org/countries/freedom-world/scores> (last visited Oct. 26, 2020).

<sup>39</sup> Mark Zuckerberg, *Bringing the World Closer Together*, FACEBOOK (June 22, 2017), <https://www.facebook.com/notes/mark-zuckerberg/bringing-the-world-closer-together/10154944663901634>.

<sup>40</sup> *FB Revenue EPS*, NASDAQ, <https://www.nasdaq.com/market-activity/stocks/fb/revenue-eps> (last visited Oct. 26, 2020); *Facebook Revenue 2009-2020 | FB*, MACROTRENDS, <https://www.macrotrends.net/stocks/charts/FB/facebook/revenue> (last visited Oct. 26, 2020).

<sup>41</sup> *Id.*

<sup>42</sup> *Leading Countries*, *supra* note 36.

<sup>43</sup> *Myanmar Population 2020*, WORLD POPULATION REV., <https://worldpopulationreview.com/countries/myanmar-population> (last visited Oct. 26, 2020).

<sup>44</sup> Twenty-seven million accounts exist in Myanmar. *Leading Countries*, *supra* note 36. This is assuming each person only has one account. The relative proportion remains significant even if some duplicates exist.

the company's meteoric rise to its mentality to "move fast and break things."<sup>45</sup> Prioritizing speed, disruptive innovation, and creativity, three years would pass before Facebook began to consider moderating content on its platform.<sup>46</sup> The initial guidelines spanned one page and were often quipped into one sentence: "If something makes you feel bad in your gut, take it down."<sup>47</sup> Typical of most tech startups, Facebook's first head of content policy was an internal hire who had two years of work experience out of college.<sup>48</sup> He and a team of twelve other recent college graduates were tasked to update the page-long guidelines into a more foundational framework (now the "Community Standards") to which content moderators still refer to determine when to flag, but not remove, content considered "disturbing."<sup>49</sup> Facebook's earliest content moderators, and first head of the content policy team, have since left the company to lead similar teams at Pinterest and Airbnb respectively.<sup>50</sup> Facebook has also expanded its content-moderation team internationally,<sup>51</sup> and has increasingly incorporated automated content-moderation tools based on machine learning and artificial intelligence to address the ramping surplus of reviewable content worldwide.<sup>52</sup> On one hand, the internal standards for content moderation appear to "comprise an ever-changing wiki[.]"<sup>53</sup> However, the substantive content of the "Community Standards" has essentially remained the same since its inception in the early 2000s.<sup>54</sup> Considering the lack of more substantive changes in its content policies, Facebook unsurprisingly has continued to face widespread

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<sup>45</sup> Samantha Murphy, *Facebook Changes Its 'Move Fast and Break Things' Motto*, MASHABLE (Apr. 30, 2014), <https://mashable.com/2014/04/30/facebooks-new-mantra-move-fast-with-stability>.

<sup>46</sup> Andrew Marantz, *Why Facebook Can't Fix Itself*, NEW YORKER (Oct. 12, 2020), <https://www.newyorker.com/magazine/2020/10/19/why-facebook-cant-fix-itself>.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*; Steven Levy, *The Guy Who Wrote Facebook's Content Rules Says Its Politician Hate Speech Exemption Is 'Cowardice'*, WIRED (Sept. 30, 2019), <https://www.wired.com/story/facebook-content-standards-politicians-exemption-dave-willner>; Dave Willner, LINKEDIN, <https://www.linkedin.com/in/davewillner> (last visited Oct. 27, 2020).

<sup>49</sup> Marantz, *supra* note 46.

<sup>50</sup> *Id.*

<sup>51</sup> Casey Newton, *Bodies in Seats*, VERGE (June 19, 2019), <https://www.theverge.com/2019/6/19/18681845/facebook-moderator-interviews-video-trauma-ptsd-cognizant-tampa>.

<sup>52</sup> Svea Windwehr & Jillian C. York, *Facebook's Most Recent Transparency Report Demonstrates the Pitfalls of Automated Content Moderation*, ELEC. FRONTIER FOUND. (Oct. 8, 2020), <https://www.eff.org/deeplinks/2020/10/facebooks-most-recent-transparency-report-demonstrates-pitfalls-automated-content>.

<sup>53</sup> Marantz, *supra* note 46.

<sup>54</sup> *Id.* ("As far as I can tell, the bulk of the document I wrote hasn't changed all that much, surprisingly," Dave Willner told me. "But they've made some big carve-outs that are just absolute nonsense. There's no perfect approach to content moderation, but they could at least try to look less transparently craven and incoherent.")

scrutiny for failing to enforce clearer and more consistent standards in moderating content.<sup>55</sup>

In December 2017, a Facebook employee flagged a *Guardian* article about Britain First to determine whether the company needed to ban the group after YouTube and Twitter announced they were banning the “hate group” from their platforms.<sup>56</sup> The public policy director of the trust and safety team acknowledged “Britain First share[d] many of the common tenets of alt-right groups, e.g., ultra-nationalism,”<sup>57</sup> but ultimately concluded Facebook did not consider Britain First a hate organization and would leave its content alone until further notice. A Muslim Facebook employee replied that the leader of the group had recently been convicted of hate crimes against British Muslims and asked how this could have been overlooked.<sup>58</sup> Before leadership from the content-moderating teams responded or took further action in the upcoming weeks, Darren Osborne, a British white supremacist, was convicted of murder after driving a van into a London mosque, killing one man and injuring nine others.<sup>59</sup> The judge ruled the incident “a terrorist act” and concluded Osborne had been “*rapidly radicalized* over the Internet” after reviewing evidence of Osborne following Britain First and its leaders on social media.<sup>60</sup> Six weeks following Osborne’s conviction and almost three months after its employees initially inquired about banning Britain First, Facebook finally banned the group and its leader.<sup>61</sup> It is unclear based on the timeline and facts alone to definitively determine whether Osborne would not have been so “rapidly radicalized,” had Facebook acted sooner in banning Britain First from its platform. In the end, the judge determined Osborne had been deeply influenced by multiple sources, including a BBC miniseries, and did not specify which social media outlets Osborne had used to follow Britain First and its leaders.<sup>62</sup> Nevertheless, the internal exchanges of Facebook employees and lack of timely action from leadership illustrate the ultimate fallacy in Facebook’s *ad hoc* approach to moderating sensitive content. It would be one thing had this been an isolated incident and not resulted in actual harm. However, as this Comment will later discuss in the case of Myanmar, these events are not uncommon and

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<sup>55</sup> *See id.*

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

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (emphasis added) (citing *R. v. Darren Osborne* [2018] Woolwich Crown Court [7b] (sentencing remarks) (UK)).

<sup>61</sup> *Id.*; Alex Hern & Kevin Rawlinson, *Facebook Bans Britain First and Its Leaders*, *GUARDIAN* (Mar. 14, 2018), <https://www.theguardian.com/world/2018/mar/14/facebook-bans-britain-first-and-its-leaders>.

<sup>62</sup> Marantz, *supra* note 46.

unfortunately have the capability of inflicting devastating harm on hundreds of thousands of innocent people when left unchecked. What is perhaps most troubling is that Facebook continues to overlook its failures and instead maintains a relatively conservative and reactive approach to reviewing incendiary content.

In October 2020 for example, Mark Zuckerberg announced the platform would now ban claims purporting to deny the existence of the Holocaust under its newly updated hate speech policy.<sup>63</sup> In justifying this reversal of Facebook's previous policy in maintaining diverse forms of free expression at all costs, Zuckerberg explained his "thinking ha[d] evolved [after reviewing] data showing an increase in anti-Semitic violence . . ."<sup>64</sup> In light of mounting public pressure to take more aggressive stances against hate speech and other incendiary content,<sup>65</sup> Facebook has struggled to balance the competing interests of maintaining a neutral, passive forum for free speech while also minimizing harm caused by inciteful speech and misinformation.<sup>66</sup> Public reception of Zuckerberg's about-face remained mixed. Some advocacy groups praised the company for finally listening to their requests to take down Holocaust denial,<sup>67</sup> while others insisted more issues in addition to the Holocaust needed to be banned under the company's hate speech policy.<sup>68</sup>

While Facebook has continued to spend billions of dollars on its content-moderation operations,<sup>69</sup> including paying out a \$52 million settlement to former content moderators who developed PTSD as a result of inadequate psychological support and mismanagement,<sup>70</sup> these two occasions alone

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<sup>63</sup> Mark Zuckerberg (/zuck), FACEBOOK (Oct. 12, 2020, 10:05 AM), <https://www.facebook.com/zuck/posts/10112455086578451>.

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

<sup>65</sup> Shannon Bond, *Over 400 Advertisers Hit Pause on Facebook, Threatening \$70 Billion Juggernaut*, NAT'L PUB. RADIO (July 1, 2020), <https://www.npr.org/2020/07/01/885853634/big-brands-abandon-facebook-threatening-to-derail-a-70b-advertising-juggernaut>.

<sup>66</sup> See Shannon Bond, *Facebook Bans Holocaust Denial, Reversing Earlier Policy*, NAT'L PUB. RADIO (Oct. 12, 2020), [https://www.npr.org/2020/10/12/923002012/facebook-bans-holocaust-denial-reversing-earlier-policy?utm\\_term=nprnews&utm\\_campaign=npr&utm\\_source=facebook.com&utm\\_medium=social&fbclid=IwAR2N0tXvj9\\_RYLNT4TV8fyAU0ZMA9Onqa0cjeaeqB5ZBZUDY18faGe0WgU](https://www.npr.org/2020/10/12/923002012/facebook-bans-holocaust-denial-reversing-earlier-policy?utm_term=nprnews&utm_campaign=npr&utm_source=facebook.com&utm_medium=social&fbclid=IwAR2N0tXvj9_RYLNT4TV8fyAU0ZMA9Onqa0cjeaeqB5ZBZUDY18faGe0WgU); Marantz, *supra* note 46.

<sup>67</sup> See Claims Conference (@ClaimsCon), TWITTER (Oct. 12, 2020, 11:01 AM), <https://twitter.com/ClaimsCon/status/1315668929600253952> ("Survivors spoke! Facebook listened").

<sup>68</sup> As of October 2020, the top three comments receiving more than 500 likes and eliciting more than fifty replies hoped to see other genocides included, as well as hate speech and violent threats in countries such as Azerbaijan, Armenia, and India. Zuckerberg, *supra* note 63.

<sup>69</sup> Marantz, *supra* note 46.

<sup>70</sup> Casey Newton, *Facebook Will Pay \$52 Million in Settlement with Moderators Who Developed PTSD on the Job*, VERGE (May 12, 2020), <https://www.theverge.com/2020/5/12/21255870/facebook-content-moderator-settlement-scola-ptsd-mental-health>.

illustrate how Facebook has fallen short of fulfilling its original mission to “move fast and break things.”<sup>71</sup> More importantly, Facebook has fundamentally failed to gain control and accept ownership of the problem. This could not be clearer than by what transpired in Myanmar throughout 2011 to 2017 and how Facebook responded.

*B. What Happened in Myanmar: the Rohingya Crisis in the Making of Democracy*

In 2017, Muslim insurgents of the Arakan Rohingya Salvation Army attacked thirty police posts and government army bases.<sup>72</sup> In response, Burmese military officials conducted “clearance operations” in the northern state of Rakhine the next day, resulting in hundreds of thousands of Rohingya people fleeing to neighboring Bangladesh.<sup>73</sup> Within the first month of the campaign initiated by armed government troops and buttressed by local civilian mobs, at least 6700 Rohingya civilians died, including 730 children, and 288 villages were destroyed.<sup>74</sup> In the wake of the initial attacks, the U.N. Human Rights High Commissioner decried the military operation as a “textbook example of ethnic cleansing” and the Rohingya minority became known as “one of, if not the, most discriminated people of the world” according to the U.N. Secretary-General Antonio Guterres.<sup>75</sup>

*1. Events Leading Up to the 2017 Military Crackdown in Rakhine: Facebook—Panacea or Pandora’s Box?*

Historically viewed as illegal immigrants originating from Bangladesh starting in the 1970s, the Rohingya people have long been denied basic rights of citizenship and freedom of movement in Myanmar.<sup>76</sup> They have been systemically discriminated to such an extent that the Buddhist-majority government refused to recognize their existence and excluded them from the country’s census in 2014.<sup>77</sup> Even before Burmese military officials instigated

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<sup>71</sup> Murphy, *supra* note 45.

<sup>72</sup> “Textbook Example of Ethnic Cleansing”: A Timeline of the Rohingya Crisis, REUTERS (Aug. 21, 2020) [hereinafter *Textbook Example*], <https://thewire.in/world/textbook-example-of-ethnic-cleansing-a-timeline-of-the-rohingya-crisis>.

<sup>73</sup> See generally Myanmar Rohingya: What You Need to Know About the Crisis, BBC (Jan. 23, 2020) [hereinafter *What You Need to Know*], <https://www.bbc.com/news/world-asia-41566561> (providing overview of key events of the Rohingya Genocide).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

their deadly crackdown against what should have been limited to Rohingya “militants” in 2017, thousands of civilians had already begun to flee in preceding years due to persistent and targeted abuse stemming from rising Burmese nationalism and deep-seated anti-Muslim sentiment.<sup>78</sup>

Starting in 2010, violence between Muslims and Buddhists began to flare dangerously as government restrictions on speech, internet access, and mobile networks lessened dramatically—seemingly overnight—and fueled a maelstrom of misinformation mainly against Rohingya Muslims.<sup>79</sup> Inflammatory photos on Instagram captioned with false claims of Muslims aiding British colonial authorities against Burmese independence activists in the 1940s, as well as graphic posts with incendiary hashtags accusing local Muslim men of raping Buddhist women, are just a few examples of misinformation that went viral across the newly-open country in the early 2010s.<sup>80</sup>

In 2011, with a total population of around 51 million people, less than one percent of the country had access to the internet and only 1.3 million people were mobile subscribers.<sup>81</sup> In the last decade, twenty-five percent of the population gained access to the internet and ninety percent obtained mobile phones, increasing the number of mobile subscribers to 49 million. In a poll, thirty-eight percent of respondents stated they had preferred reading news on Facebook over state-run newspapers.<sup>82</sup> As the country’s telecommunications sector rapidly opened its public markets to foreign investment—including telecom providers, smartphone manufacturers, and internet service providers like Google and Facebook<sup>83</sup>—during this time, it is no coincidence that the viral proliferation of misinformation systematically disseminated by Burmese military officials coincided with waves of violence across the country. In 2012, almost 200 people were killed and 140,000 were displaced as anti-Muslim riots precipitating from online rumors and falsified stories rippled across the country.<sup>84</sup> In 2013, violence reached central Myanmar and coalesced onto a small town where a brutal killing

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<sup>78</sup> *Id.*

<sup>79</sup> Timothy McLaughlin, *How Facebook’s Rise Fueled Chaos and Confusion in Myanmar*, WIRED (July 6, 2020), <https://www.wired.com/story/how-facebooks-rise-fueled-chaos-and-confusion-in-myanmar>.

<sup>80</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>.

<sup>81</sup> *Population, Total—Myanmar*, WORLD BANK GROUP [WBG], <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=MM> (last visited Sept. 3, 2021); McLaughlin, *supra* note 79.

<sup>82</sup> McLaughlin, *supra* note 79.

<sup>83</sup> *Id.*

<sup>84</sup> *The Dark Side of Transition: Violence Against Muslims in Myanmar*, INT’L CRISIS GRP. (Oct. 1, 2013), <https://www.crisisgroup.org/asia/south-east-asia/myanmar/dark-side-transition-violence-against-muslims-myanmar>.

of a Buddhist monk over a dispute in a local shop resulted in two days of riots and left forty-four dead, including twenty Muslim students and several teachers.<sup>85</sup> In 2014, hundreds swarmed into a tea stand in Myanmar's second-largest city, Mandalay, after false rumors of a Muslim tea shop owner raping a female Buddhist employee circulated on Facebook.<sup>86</sup> The ensuing violence from the Mandalay tea shop riots continued to spread to the country's capital more than 170 miles away, leading concerned officials and foreign correspondents to alert Facebook about shutting down the site, at least temporarily, until the violence subsided.<sup>87</sup>

Despite ongoing talks with Facebook's Director of Policy in the Asia-Pacific Region and Global Director of Communications at the company's headquarters in Silicon Valley, it would take another fourteen months before the company instituted Burmese user guidelines to oversee online conduct and content belonging to over 18 million users in Myanmar.<sup>88</sup> Meanwhile, Facebook only had one Burmese speaker, based in Dublin, Ireland, to review content that potentially violated these community standards.<sup>89</sup> Consistent with its previous responses to Burmese officials, as well as later incidents including the internal warning about Britain First in 2017, Facebook failed to adequately address the rapidly escalating situation precipitating from the Mandalay riots in a timely and comprehensive manner. Instead, Facebook remained painstakingly reactive, mired in bureaucratic handwringing that permitted the unchecked spread of fake accounts and viral misinformation for years.

## 2. *What Happened After: Response from the International Community*

Following the initial reports of the 2017 military crackdown in Rakhine, investigative reports from journalists and international human rights organizations began sourcing evidence from Facebook as well as obtaining satellite images to alert relevant international bodies of potential signs of genocide and crimes against humanity.<sup>90</sup> After establishing the Independent International Fact-Finding Mission on Myanmar (IIFMM) in 2017, the UNHRC concluded the following year that the Myanmar military had carried

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<sup>85</sup> *Id.*

<sup>86</sup> Shwe Aung, *False Rape Claim Cause Riots, Says Ministry*, DVB (July 21, 2014), <http://www.dvb.no/news/false-rape-claim-caused-riots-says-ministry-burma-myanmar/42617>.

<sup>87</sup> McLaughlin, *supra* note 79.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See Mozur, *supra* note 80; Kevin Roose, *Forget Washington. Facebook's Problems Abroad Are Far More Disturbing*, N.Y. TIMES (Oct. 29, 2017), <https://www.nytimes.com/2017/10/29/business/facebook-misinformation-abroad.html>.

out mass killings and rapes with “genocidal intent.”<sup>91</sup> The report estimated more than 10,000 people had been killed and hundreds of thousands remained displaced, but conceded an exact number of casualties was not likely to be calculable.<sup>92</sup> In 2019, the IFFMM reaffirmed its previous finding that “Myanmar incurs State responsibility under the prohibition against genocide” and welcomed the Gambia to file suit against Myanmar before the ICJ.<sup>93</sup>

a. *Gambia v. Myanmar (Application of the Convention on the Prevention and Punishment of the Crime of Genocide)*

On behalf of dozens of other Muslim nations, the Muslim-majority Republic of the Gambia filed suit against Myanmar under Genocide Convention, to which both are parties and thus subject to the jurisdiction of the ICJ.<sup>94</sup> In its suit, the Gambia “s[ought] to hold Myanmar accountable under international law for commission of the crime of genocide against the Rohingya people . . . and to obtain an order from the ICJ that Myanmar, *inter alia*, cease and desist from further acts of genocide against the Rohingya.”<sup>95</sup> Specifically, the Gambia asserted Myanmar violated Article II of the Genocide Convention, which prohibits killing, causing serious bodily and mental harm, inflicting conditions that are calculated to bring about physical destruction, and imposing measures to prevent births—with the intent to destroy the Rohingya, in whole or in part.<sup>96</sup> On January 23, 2020, the ICJ unanimously (17–0) granted the Gambia’s request to order Myanmar to “take all measures within its power to prevent the commission of all acts of genocide against the Rohingya people.”<sup>97</sup> In Fall 2020, Canada and the Netherlands also released a joint statement indicating their intentions to intervene in the ongoing ICJ proceeding with the Gambia against Myanmar out of an “obligation to support” the Genocide Convention, because genocides “are of concern to all of humanity.”<sup>98</sup>

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<sup>91</sup> Human Rights Council, Rep. of the Detailed Findings of the Indep. Int’l Fact-Finding Mission on Myan., U.N. DOC. A/HRC/39/64, at 14 (Sept. 12, 2018), [https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A\\_HRC\\_39\\_64.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf); see Evelyn Douek, *Facebook’s Role in the Genocide in Myanmar: New Reporting Complicates the Narrative*, LAWFARE (Oct. 22, 2018), <https://www.lawfareblog.com/facebook-role-genocide-myanmar-new-reporting-complicates-narrative>.

<sup>92</sup> See Douek, *supra* note 91.

<sup>93</sup> ICJ Order, *supra* note 17, at 9.

<sup>94</sup> Memorandum of Law in Support of the Republic of Gam.’s Application for Order to Take Discovery Pursuant to 28 U.S.C. § 1782 at 1, *Gambia v. Facebook, Inc.*, (D.D.C. filed June 8, 2020) (No. 1:20-mc-00036-JEB) [hereinafter Memorandum].

<sup>95</sup> *Id.*

<sup>96</sup> See ICJ Order, *supra* note 17, at ¶ 12(a).

<sup>97</sup> ICJ Order, *supra* note 17, at ¶¶ 71–76.

<sup>98</sup> Joint Statement of Canada and the Kingdom of the Netherlands Regarding Intention to Intervene in the *Gambia v. Myanmar* case at the International Court of Justice (Sept. 2, 2020) <https://www.government.nl/>

*b. International Condemnation Over Facebook's Implication: Bearing the "Hallmarks of Genocide"*<sup>99</sup>

During its interim investigations of potential genocide in Myanmar in early 2018, the chairman of the U.N. Independent Fact-Finding Mission (IFFM) presented damning conclusions regarding Facebook's "determining role" in Myanmar:

[Social media] has . . . substantively contributed to the level of acrimony and dissension and conflict . . . within the public. Hate speech is certainly of course a part of that. As far as the Myanmar situation is concerned, social media is Facebook, and Facebook is social media.<sup>100</sup>

The U.N. Myanmar Investigator and Special Rapporteur echoed these findings after reviewing over 600 interviews with victims and witnesses, as well as satellite images and videos, reiterating "[e]verything is done through Facebook in Myanmar . . . I'm afraid that Facebook has now turned into a beast . . . ."<sup>101</sup>

The UNHRC published its Fact-Finding Mission (FFM) report in late 2018 finding Facebook had a "significant role" in disseminating hate speech and inciting acts of violence against Rohingya civilians. Since then, a considerable amount of scholarship has been devoted to studying Facebook's legal obligations in curbing efforts to incite genocide in countries especially prone to human rights violations and authoritarian control.<sup>102</sup> In fact, some scholars have questioned whether Facebook should face criminal liability helping incite violence against the Rohingya people and repeatedly failing to take more proactive and consistent measures in moderating content before and after the FFM report.<sup>103</sup> While questions of attributing criminal liability for Facebook's

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documents/diplomatic-statements/2020/09/02/joint-statement-of-canada-and-the-kingdom-of-the-netherlands-regarding-intention-to-intervene-in-the-gambia-v.-myanmar-case-at-the-international-court-of-justice.

<sup>99</sup> McLaughlin, *supra* note 79.

<sup>100</sup> Tom Miles, *U.N. Investigators Cite Facebook Role in Myanmar Crisis*, REUTERS (Mar. 12, 2018) (quotations omitted), <https://uk.reuters.com/article/us-myanmar-rohingya-facebook/u-n-investigators-cite-facebook-role-in-myanmar-crisis-idUKKCN1GO2PN>.

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

<sup>102</sup> See, e.g., Jenny Domino, *Regulation of Social Media: Crime as Cognitive Constraint: Facebook's Role in Myanmar's Incitement Landscape and the Promise of International Tort Liability*, 51 CASE W. RES. J. INT'L L. 143 (2020) (exploring criminal liability for Facebook's role in inciting violence in Myanmar); David Sloss, *Regulation of Social Media: Section 230 and the Duty to Prevent Mass Atrocities*, 51 CASE W. RES. J. INT'L L. 199 (2020) (outlining regulatory limitations and potential civil liability for internet companies complicit in genocide, war crimes, or crimes against humanity). See generally Douek, *supra* note 91 (analyzing Facebook's direct role in inciting violence following news reports on systemic use for spreading misinformation).

<sup>103</sup> See, e.g., Neema Hakim, Comment, *How Social Media Companies Could Be Complicit in Incitement to Genocide*, 21 CHI. J. INT'L L. 83, 106–07 (2020) (arguing corporate and intentional criminal liability can be

role in the Rohingya genocide are outside the scope of this Comment, it is worth considering the extent of Facebook's legal obligations relating to the Rohingya genocide.

*c. Facebook's Proverbial Balancing Act: Safeguarding Freedom of Expression and Privacy Versus Regulating Speech*

Leading up to the initial findings of the FFM in 2018, Facebook faced a collective front of public scrutiny from the press,<sup>104</sup> human rights organizations,<sup>105</sup> and governments<sup>106</sup> over its profound mishandling of the spread of misinformation during the Rohingya genocide.<sup>107</sup> Just a few days prior to the release of the FFM, Facebook's Chief Operating Officer, Sheryl Sandberg, unexpectedly conceded before the U.S. Senate Intelligence Committee that the company not only had a moral, but also a *legal* obligation to take down accounts that incited violence in Myanmar.<sup>108</sup> Once the FFM report was published, the U.N.-commissioned IFFM concluded Facebook's efforts to stem further escalations were "slow and ineffective," and ultimately directed the company to undergo an independent audit to further investigate the extent the social media posts incited violence and increased hostilities toward the Rohingya Muslims in Myanmar.<sup>109</sup> In response, the company launched the Facebook Oversight Board a month later, self-described as an "appellate review system for user content [that would independently] make content-moderation policy recommendations to Facebook."<sup>110</sup>

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imposed on executives as well as responsible employees); Yue, *supra* note 25, at 835 (positing Facebook could face criminal liability given numerous warnings of platform misuse from civil society organizations).

<sup>104</sup> Mozur, *supra* note 80.

<sup>105</sup> Myanmar: UN Fact-Finding Mission Releases its Full Account of Massive Violations by Military in Rakhine, Kachin and Shan States, HUM. RTS. COUNCIL (Sept. 18, 2018), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=23575&LangID=E>.

<sup>106</sup> See Evelyn Douek, *Senate Hearing on Social Media and Foreign Influence Operations: Progress, but There's a Long Way to Go*, LAWFARE (Sept. 6, 2018), <https://www.lawfareblog.com/senate-hearing-social-media-and-foreign-influence-operations-progress-theres-long-way-go>.

<sup>107</sup> See, e.g., Alastair Jamieson, *U.N. Says Facebook 'Slow' to Respond to Myanmar 'Genocide' Against Rohingya*, NBC NEWS (Aug. 27, 2018), <https://www.nbcnews.com/news/world/u-n-says-facebook-slow-respond-myanmar-genocide-against-rohingya> (reporting on UN findings Facebook's delayed response in removing several key military officials from its platform "slow and ineffective"); see also Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2447–48 (2020) (noting how public controversies including Facebook's implication in Myanmar crisis precipitated creation of Oversight Board).

<sup>108</sup> See Douek, *supra* note 106.

<sup>109</sup> See Douek, *supra* note 91.

<sup>110</sup> Klonick, *supra* note 107.

Despite these initial efforts to streamline its content-moderation policies to become more transparent and democratic, concurrent concerns of data privacy have hindered independent third parties from holding Facebook fully accountable. Specifically, in the wake of the Cambridge Analytica scandal uncovering how Facebook data collection policies had been compromised, Facebook began limiting third-party access to its platform searches in an effort to curb future security breaches and bolster public confidence.<sup>111</sup> This included disabling a popular feature called Graph Search, which previously allowed users to find public content not easily searchable through general keyword queries.<sup>112</sup> For non-governmental organizations with modest resources, features like Graph Search were indispensable tools in their advocacy efforts and independent investigations.<sup>113</sup> In fact, international watchdogs and advocacy organizations specifically relied on Graph Search to find implicating videos of a wanted Libyan war criminal conducting extrajudicial executions.<sup>114</sup> These videos were later used to secure an arrest warrant—the ICC’s first arrest warrant based on social media content.<sup>115</sup> More importantly, human rights organizations used Graph Search to find posts linking Myanmar military groups to crimes against humanity and acts of genocide against the Rohingya minority from 2011 to 2017.<sup>116</sup> Now without warning, war-crime investigators and human rights organizations found themselves severely restricted in their investigatory capabilities.<sup>117</sup>

At the same time, the social media giant had implemented changes signaling new efforts to prevent further violence in Myanmar.<sup>118</sup> In particular, the

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<sup>111</sup> Craig Silverman, *Journalists Are Criticizing Facebook for Its Data Collection. At the Same Time, They Often Use It to Their Advantage*, BUZZFEED (Apr. 11, 2018), <https://www.buzzfeednews.com/article/craigsilverman/facebook-cambridge-analytica-journalism-data-criticism-osint>.

<sup>112</sup> Craig Silverman, *Facebook Turned Off Search Features Used to Catch War Criminals, Child Predators, and Other Bad Actors*, BUZZFEED (June 10, 2019), <https://www.buzzfeednews.com/article/craigsilverman/facebook-graph-search-war-crimes>.

<sup>113</sup> Sam Dubberley, *How Facebook’s Sudden Change Hinders Human Rights Investigators*, AMNESTY INT’L (June 17, 2019), <https://www.amnesty.org/en/latest/news/2019/06/how-facebooks-sudden-change-hinders-human-rights-investigations>.

<sup>114</sup> *Id.*; see also *Libya: Special Forces Commander Apparently Filmed Committing Extrajudicial Executions Must Be Handed Over to the ICC*, AMNESTY INT’L (Jan. 25, 2018), <https://www.amnesty.org/en/latest/news/2018/01/libya-special-forces-commander-apparently-filmed-committing-extrajudicial-executions-must-be-handed-over-to-the-icc>.

<sup>115</sup> Emma Irving, *And so It Begins... Social Media Evidence in an ICC Arrest Warrant*, OPINIO JURIS (Aug. 17, 2017), <https://opiniojuris.org/2017/08/17/and-so-it-begins-social-media-evidence-in-an-icc-arrest-warrant>.

<sup>116</sup> Dubberley, *supra* note 113.

<sup>117</sup> Shu, *supra* note 22.

<sup>118</sup> See Sara Su, *Update on Myanmar*, FACEBOOK (Aug. 15, 2018), <https://newsroom.fb.com/news/2018/08/update-on-myanmar>.

company recently created a dedicated taskforce of engineers and product managers to work on issues specific to Myanmar, such as updating its coding bases to identify and decipher various Burmese languages and font styles, as well as increasing the number of Burmese content moderators to over 100 language experts.<sup>119</sup> Despite these announced changes, at least one press outlet and human rights organization identified thousands of posts, photos, and videos maligning Rohingya minorities that remained viewable online the same day Facebook announced their updated policies targeting the Myanmar crisis.<sup>120</sup> Despite these proposed internal changes, it is unclear how sustainable and effective this country-specific model will be in the long-term. Imminent threats of genocide, ethnic cleansing, and other crimes against humanity fueled by hate speech will inevitably arise in other areas of the world.

## II. LEGAL ISSUES ARISING FROM *GAMBIA V. FACEBOOK*

### A. *The Essential Role Technology Companies Play in International Discovery and the Significance of Gambia v. Facebook*

While foreign requests for data disclosure will only increase in the evolving arena of privacy law in the United States, international discovery remains firmly rooted in statutory analysis. Within the last two decades, governments and law enforcement agencies around the world have increasingly relied on tech companies to provide user information for ongoing criminal investigations.<sup>121</sup> However, there remains relatively little case law on issues arising from states demanding data from tech companies, let alone within the context of genocide investigations.

Generally speaking, disputes over data disclosure are usually resolved privately between the requesting governments and in-house legal teams responding to the requests. Due to the ongoing nature of their investigations, government officials require confidentiality and secure lengthy, and often indefinite, non-disclosure orders to accompany their legal process.<sup>122</sup> Similarly,

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<sup>119</sup> *See id.*

<sup>120</sup> Steve Stecklow, *Why Facebook Is Losing the War on Hate Speech in Myanmar*, REUTERS (Aug. 15, 2018, 3:00 PM), <https://www.reuters.com/investigates/special-report/myanmar-facebook-hate> (“[M]ore than 1,000 examples Reuters found of posts, comments, images and videos attacking the Rohingya or other Myanmar Muslims that were on Facebook as of last week. . . . collected by Reuters and the Human Rights Center at UC Berkeley School of Law – includes material that’s been up on Facebook for as long as six years.”).

<sup>121</sup> Hill, *supra* note 18.

<sup>122</sup> *See, e.g.*, DROPBOX, TRANSPARENCY REPORT, <http://www.dropbox.com/transparency/reports> (last visited Oct. 26, 2020) (“33.7% of the search warrants we received [from July through December 2019] were accompanied by court orders for non-disclosure of indefinite duration. These gag orders may prevent

technology companies prefer to take the path of least resistance when handling sensitive requests for user information by (1) denying overly broad requests whenever possible; (2) disclosing non-content information, such as basic subscriber information when compelled; and (3) requiring greater particularity for more detailed content.<sup>123</sup> In the end, these industry practices are meant to act as important safeguards against unwarranted government interference with the user's inherent right to privacy.<sup>124</sup> In rare instances where parties are unable to resolve data-disclosure disputes behind closed doors and proceed to litigation, courts still employ wide discretion when determining whether to grant disclosure under 28 U.S.C. § 1782.<sup>125</sup> Due to shifting notions of privacy and wide-ranging implications that may arise in these high-profile cases, courts have historically been reluctant to establish blanket, per se rules. However, this case-by-case analysis also subjects parties to unpredictable statutory interpretations around international data disclosure.

In addition to the general considerations for compulsory data disclosures, courts have begun to consider questions of direct causality in cases involving genocide.<sup>126</sup> U.N. War Crimes Tribunals for Rwanda and Nuremberg have historically identified speech as a prominent factor in fomenting mass atrocities and genocide.<sup>127</sup> However, scholars have yet to agree on how hate speech and propaganda can directly trigger these escalations.<sup>128</sup> The recent advent of social media being wielded as an effective tool for authoritarian governments and military officials as seen in Myanmar further complicates these questions of causality in international law. However, as one scholar notes, Myanmar could be the “first social-media fueled ethnic cleansing.”<sup>129</sup> Moreover, the extensive

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us from ever notifying 33% of the affected Dropbox users identified in search warrants we received of the fact that law enforcement requested their information.”).

<sup>123</sup> See, e.g., *id.* (“Government data requests should be limited in the information they seek and narrowly tailored to specific people and legitimate investigations. We’ll resist blanket and overly broad requests.”).

<sup>124</sup> See, e.g., *id.*

<sup>125</sup> See *infra* Part II.C.1; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 260–61 (2004) (“Nor does § 1782(a)’s legislative history suggest that Congress intended to impose a blanket foreign-discoverability rule on the provision of assistance under § 1782(a). The Senate Report observes in this regard that § 1782(a) “leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable.”).

<sup>126</sup> Richard Ashby Wilson, *Inciting Genocide with Words*, 36 MICH. J. INT’L L. 277, 280–81 (2015), <http://www.mjilonline.org/wordpress/wp-content/uploads/2015/06/Wilson.pdf>.

<sup>127</sup> See *id.* at 278–79.

<sup>128</sup> See Jonathan L. Maynard & Susan Benesch, *Dangerous Speech and Dangerous Ideology: An Integrated Model for Monitoring and Prevention*, GENOCIDE STUD. & PREVENTION 70, 70–71 (2016), <https://scholarcommons.usf.edu/cgi/viewcontent.cgi?article=1317&context=gsp>.

<sup>129</sup> Zeynep Tufekci (@zeynep), TWITTER (July 22, 2013), <https://twitter.com/zeynep/status/359368606166958080>; see Douek, *supra* note 91.

findings of the FFM reports on the 2017 attacks in Northern Myanmar have indicated that there is “no doubt that the prevalence of hate speech in Myanmar significantly contributed to increased tension and a climate in which individuals and groups may become more receptive to incitement and calls for violence . . . [such that the] role of social media is significant.”<sup>130</sup>

Focusing on *Gambia v. Facebook* allows for a timely analysis of these overarching ambiguities in international data disclosure. More importantly, a case analysis of *Gambia v. Facebook* narrows the discussion to cases of genocide, in which enforcing international humanitarian law can be a more compelling government interest when weighed against the usual interests in upholding user privacy and free speech and minimizing burdens of disclosure. This holds especially true as courts begin to consider the evidentiary power of social media content.

For instance, in 2017, the ICC issued its first arrest warrant based on evidence found on social media.<sup>131</sup> Signaling the court’s willingness to consider “open-source” evidence, this arrest warrant opens up the range of evidence available for discovery and has wide-ranging implications for potential witnesses, victims, and perpetrators around the world.<sup>132</sup> The sheer proliferation of content available on social media in various forms of video, photo, and text can 1) provide the court a clearer picture of the circumstances surrounding the alleged offenses;<sup>133</sup> 2) lower the evidentiary burden of locating content that is widely accessible to the public and posted on prominent social media platforms; and 3) help establish more direct causal connections to those responsible, especially given the increasing practice of perpetrators taking credit or directly uploading content for propaganda purposes.<sup>134</sup> The implications for the Gambia’s case against Myanmar are even greater as the Gambia seeks to review social media posts uploaded by key military officials and organizations allegedly responsible for mass atrocities against an entire ethnic group over a near span of a decade.<sup>135</sup>

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<sup>130</sup> See Douek, *supra* note 91.

<sup>131</sup> Irving, *supra* note 115.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* (indicating charge of murder based on seven videos showing defendant shooting and ordering others to execute individuals).

<sup>134</sup> *Id.*

<sup>135</sup> Memorandum, *supra* note 94, at 18–20.

*B. Facebook Should Be Compelled to Disclose the Requested Information  
Due to the Exigent Conditions of the Rohingya Crisis*

Despite heightened international scrutiny in the wake of the 2017 military purge and U.N. findings, the Burmese government has consistently denied carrying out genocide, admitting only to possible “war crimes, serious human rights violations, and violations of domestic law.”<sup>136</sup> Leading the defense, Nobel Peace Prize laureate and former human rights activist Aung San Suu Kyi categorically denied allegations of genocide while appearing before the ICJ this past December.<sup>137</sup>

Meanwhile, ongoing armed conflict between the Myanmar military and minority factions under the Arakan Army continues to exacerbate instability for the remaining 500,000 Rohingya civilians caught in the crossfire,<sup>138</sup> as well as diminishes any prospects of returning home for the 730,000 displaced Rohingya refugees in neighboring Bangladesh.<sup>139</sup> As the Burmese government proceeds to reinstate “clearance operations” and imposes selective internet shutdowns or restrictions on vulnerable minority communities, the ICJ and humanitarian organizations have repeatedly urged for greater access to, and attention on, the strife-filled Rakhine and Chin states.<sup>140</sup> In an effort to stem the crisis, the ICJ enjoined Myanmar in early 2020 to take emergency measures in preventing further acts of genocide against the Rohingya people and preserve relevant evidence for the IFFM.<sup>141</sup> In response, the Myanmar Government issued directives to its regional and state governments to follow suit by halting “hate speech”<sup>142</sup> and preserving evidence and property in northern Rakhine, Kachin, and Shan states.<sup>143</sup> However, the Independent Commission of Enquiry

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<sup>136</sup> *Myanmar Panel: Security Forces Likely Committed War Crimes*, ASSOCIATED PRESS NEWS (Jan. 20, 2020), <https://apnews.com/article/9809bbcaef8031c80271b69da3bdf45f>.

<sup>137</sup> *Id.*

<sup>138</sup> See *UNHCR Concerned at Mounting Civilian Casualties and Displacement in Western Myanmar*, U.N. HIGH COMM’R FOR REFUGEES (Mar. 27, 2020), <https://www.unhcr.org/news/briefing/2020/3/5e7dbca44/unhcr-concerned-mounting-civilian-casualties-displacement-western-myanmar.html> (reporting on thousands of civilians displaced due to armed conflict and government-imposed “clearance operations”); *Myanmar Begins Probe of WHO Staff Killing in Rakhine Amid Skepticism*, RADIO FREE ASIA (May 14, 2020), <https://www.rfa.org/english/news/myanmar/investigative-committee-05142020194103.html> (investigating death of WHO staff member after vehicle bearing WHO logo and transporting COVID-19 test samples came under fire).

<sup>139</sup> *Myanmar: “Possible War Crimes and Crimes Against Humanity Ongoing in Rakhine and Chin States” – UN Special Rapporteur Yanghee Lee*, U.N. HUM. RTS. OFF. HIGH COMM’R (Apr. 29, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25838&LangID=E>.

<sup>140</sup> *Atrocity Alert No. 275: Myanmar (Burma), Libya and Cameroon*, GLOB. CTR. FOR RESP. TO PROTECT, (Oct. 20, 2021), <https://www.globalr2p.org/publications/atrocity-alert-no-275>.

<sup>141</sup> See *Domino*, *supra* note 102.

<sup>142</sup> President Directive No. 3/2020 (Apr. 20, 2020) (Myan.).

<sup>143</sup> President Directive No. 2/2020 (Apr. 8, 2020) (Myan.).

established by the Myanmar Government to investigate human rights violations in Rakhine has limited fact-finding capabilities and can be partial toward the government.<sup>144</sup> In light of the recent coup staged by the Myanmar military, it is highly unlikely the Commission will continue investigating human rights violations in Rakhine.

While Myanmar persists in a purgatory state of crisis, Bangladesh is now overextended with over 740,000 Rohingya taking refuge within its borders.<sup>145</sup> Due to overwhelming demand and limited resources, Bangladesh announced last year it would no longer accept more refugees and would instead work with Myanmar to repatriate those willing to return.<sup>146</sup> Bangladesh attempted to submit a repatriation bid with the U.N. refugee agency in 2019, but the bid eventually failed after no refugee volunteered to return to Myanmar.<sup>147</sup> Instead, more Rohingya Muslims continue to flee Myanmar. In April 2020, Bangladesh rescued 396 Rohingya caught at sea after their boat failed to land in Malaysia, leaving thirty-two dead.<sup>148</sup> Soon after, the U.N. Envoy to Myanmar reported the Myanmar Government continued to commit war crimes in Rakhine.<sup>149</sup> At the same time, the IFFM issued stern warnings in its most recent report insisting the conditions for the remaining Rohingya people in Myanmar were as dire as they were during the ethnic purges of 2016 and 2017.<sup>150</sup> Without further international assistance and intervention, it is clear the Rohingya minority faces extreme risks of “killings, rapes and gang rapes, torture, forced displacement and other grave rights violations” by the Burmese military.<sup>151</sup> Based on these conditions alone, Facebook should be compelled to disclose the requested information due to the exigent conditions of the ongoing Rohingya crisis.

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<sup>144</sup> *Myanmar’s Government-Commissioned Inquiry Still Cannot Deliver Justice or Accountability*, INT’L COMM’N JURISTS (Mar. 11, 2019), <https://www.icj.org/myanmars-government-commissioned-inquiry-still-cannot-deliver-justice-or-accountability>.

<sup>145</sup> *Rohingya Crisis: Bangladesh Will No Longer Take in Myanmar Refugees*, BBC (Mar. 1, 2019), <https://www.bbc.com/news/world-asia-47412704>.

<sup>146</sup> *Id.*

<sup>147</sup> *Textbook Example*, *supra* note 72.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Myanmar’s Rohingya Persecuted, Living Under Threat of Genocide, UN Experts Say*, U.N. HUM. RTS. OFF. HIGH COMM’R (Sept. 16, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24991>.

<sup>151</sup> *What You Need to Know*, *supra* note 73.

C. *Under the Existing Frameworks on Foreign Data Disclosure, the Gambia Should Succeed in Its Suit Against Facebook*

1. *28 U.S.C. § 1782 Discovery—Assistance to Foreign and International Tribunals and to Litigants Before Such Tribunals*

Under 28 U.S.C. § 1782, parties to foreign proceedings may obtain relevant discovery from a person or entity that “resides or is found” in the United States, as courts “may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal[.]”<sup>152</sup> Courts have thus permitted such assistance to foreign proceedings if the following statutory requirements are met: (1) the person from whom discovery is sought must “reside” or be “found” in the district; (2) discovery must be for use in a “proceeding in a foreign or international tribunal”; and (3) the applicant must be an “interested person[.]”<sup>153</sup>

If these statutory requirements are met, district courts may authorize disclosure, but are not required to do so,<sup>154</sup> especially when disclosure may conflict with U.S. law.<sup>155</sup> Thus, even when threshold requirements are met, courts have wide discretion to grant discovery in light of the twin aims of the statute: (1) providing efficient means of assistance to participants in international litigation, and (2) encouraging foreign countries by example to provide similar means of assistance to U.S. courts.<sup>156</sup> The U.S. Supreme Court has found *Intel* factors relevant when considering whether to exercise its discretion, but has not mandated lower courts to weigh them or “articulate[d] a formula for their consideration.”<sup>157</sup> The *Intel* factors are:

(a) whether the “person from whom discovery is sought is a participant in the foreign proceeding[;]”

(b) “the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal court judicial assistance[;]”

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<sup>152</sup> 28 U.S.C. § 1782.

<sup>153</sup> *Id.*; Robert W. Gaffey, *Developments in U.S. Law Regarding a More Liberal Approach to Discovery Requests Made by Foreign Litigants Under 28 U.S.C. § 1782*, JONES DAY (Apr. 2009), <https://www.jonesday.com/en/insights/2009/04/developments-in-us-law-regarding-a-more-liberal-approach-to-discovery-requests-made-by-foreign-litigants-under-28-usc--1782>.

<sup>154</sup> *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255 (2004).

<sup>155</sup> *Rainsy v. Facebook*, 311 F. Supp. 3d 1101, 1114 (N.D. Cal. 2018).

<sup>156</sup> *Id.* at 252.

<sup>157</sup> *Hulley Enters. v. Baker Botts LLP*, No. 17-1466 (BAH), 2017 U.S. Dist. LEXIS 142969, at \*9 (D.D.C. Aug. 18, 2017).

(c) whether the request “conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States[;]” and

(d) whether the request is “unduly intrusive or burdensome[.]”<sup>158</sup>

2. *The Gambia’s Application Should Satisfy the Statutory Requirements of § 1782 as the Intel Discretionary Factors Mostly Weigh in Favor of Disclosure*

It is undisputed the Gambia’s application satisfies the statutory requirements of § 1782: (1) Facebook is found in the District of Columbia and is thus subject to the jurisdiction of the U.S. District Court for the District of Columbia; (2) the ICJ proceedings are obviously before an international tribunal; and (3) the Gambia is an interested party as the litigant in the ICJ proceedings against Myanmar.<sup>159</sup> In addition to facially satisfying the statutory requirements of § 1782, the discretionary *Intel* factors mostly weigh in favor of disclosure.<sup>160</sup>

First, Facebook is not a participant in the ICJ proceedings between the Gambia and Myanmar.<sup>161</sup> Thus, the need for § 1782 is readily apparent because the Gambia is unable to obtain the requested information directly through the international proceeding.<sup>162</sup> Second, there is no evidence to suggest the ICJ would fail to make use of the requested material, thereby allowing the substantial efforts incurred in producing the material to go to waste.<sup>163</sup> In the absence of evidence that the ICJ would object to the Gambia discovering the information sought, or that the ICJ objects more generally to the judicial assistance of U.S. federal courts, the District Court should find that this factor weighs in favor of disclosure.<sup>164</sup> Third, the Gambia’s discovery request to Facebook does not attempt to circumvent any foreign proof-gathering restrictions. Facebook argues the Gambia should seek alternative means of requesting subscriber data such as following the MLAT process.<sup>165</sup> However, this is not a viable alternative as the

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<sup>158</sup> *Intel Corp.*, 542 U.S. at 264–65.

<sup>159</sup> Memorandum, *supra* note 94, at 18–20.

<sup>160</sup> *Id.* at 21.

<sup>161</sup> *Id.* at 22.

<sup>162</sup> *See In re Varian Med. Sys.*, 2016 U.S. Dist. LEXIS 38911, at \*8.

<sup>163</sup> *See id.* at \*4.

<sup>164</sup> *Cf. Schmitz v. Bernstein*, 376 F.3d 79, 84–85 (2d Cir. 2004) (affirming denial of § 1782 request where German government expressly objected to the information sought due to concerns it would jeopardize an ongoing German criminal investigation, as well as German sovereign rights).

<sup>165</sup> Respondent’s Opposition to Petition’s Application at 1, 9, *Gambia v. Facebook, Inc.*, (2020) 1:20-mc-00036-JEB-DAR [hereinafter Facebook’s Opposition].

Gambia and United States do not have an existing bilateral agreement, nor can they afford the time and resources to negotiate and ratify a bilateral agreement under these exigent circumstances. Lastly, the Gambia insists the information requested in its application is relevant and narrowly tailored, and thus not unduly intrusive or burdensome for Facebook to produce.<sup>166</sup>

Facebook contends the Gambia's application ultimately fails to satisfy this last requirement. Specifically, Facebook argues the scope of the requested content and communications are "overbroad and disproportionate to the potential relevance and utility of any resulting information."<sup>167</sup> In particular, Facebook claims the Gambia's request for "[a]ll documents and communications produced, drafted, posted, or published by" pages, groups, and individual accounts belonging to various military officials and organizations could result in thousands of accounts and extend back a decade or more.<sup>168</sup>

To determine whether a discovery request is unduly intrusive or burdensome, courts have previously referenced Federal Rules of Civil Procedure 26(b)(1) as the applicable standard in evaluating whether the applicant has satisfied its burden in establishing a "narrowly-tailored request,"<sup>169</sup> which is "'proportional' considering 'the issues at stake in the action . . . the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.'"<sup>170</sup> Here, the Gambia's application seeks to obtain "discovery that would assist it in presenting its case at the ICJ, namely by obtaining additional evidence of the genocidal intent of Myanmar's officials and representatives, and the abuses of media platforms by Myanmar state actors to further their acts of genocide against the Rohingya."<sup>171</sup> As such, the application identifies specific state officials and organizations that have previously been linked to coordinated attacks.<sup>172</sup> Moreover, multiple investigatory bodies have established that Burmese military officials began to systematically orchestrate hate speech campaigns to incite violence and genocidal acts against the Rohingya minority as early as 2011.<sup>173</sup> Thus, Facebook's contention that the requested content could potentially date back a

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<sup>166</sup> Memorandum, *supra* note 94, at 2.

<sup>167</sup> Facebook's Opposition, *supra* note 165, at 10.

<sup>168</sup> *Id.* at 3.

<sup>169</sup> *In re* Application of Nokia Corp., 2013 WL 6073457, at \*3 (N.D. Cal. Nov. 8, 2013); *In re* Cathode Ray Tube Antitrust Litig., 2013 WL 183944, at \*4 (N.D. Cal. Jan. 17, 2013).

<sup>170</sup> MetaLab Design, Ltd. v. Zozi Int'l, Inc., 2018 U.S. Dist. LEXIS 5448 at \*4; *In re* Hoteles City Express, 2018 U.S. Dist. LEXIS 117444 at \*3.

<sup>171</sup> Facebook's Opposition, *supra* note 165, at 24.

<sup>172</sup> *Id.*

<sup>173</sup> Human Rights Council, *supra* note 91, at 14.

decade or more appears to support the Gambia's claim its application is relevant to the purpose of its investigation. Lastly, the associated burden and expense from the proposed discovery of thousands of accounts outweigh the likely benefit of providing substantive evidence in implicating the identified military officials and organizations for Gambia's case against Myanmar.

Alternatively, Facebook asserts the Gambia's application "raises serious foreign policy and international comity concerns" that caution against disclosure.<sup>174</sup> In particular, Facebook argues the disclosure of "the personal communications of senior Myanmar officials and their connections with various other individuals, entities, or groups, without following established policies for a foreign government to seek such information from entities like Facebook" would establish an untenable precedent.<sup>175</sup> Interestingly, it cites *In re Letters Rogatory from the Tokyo District Prosecutor's Office* as an example in which the U.S. Court of Appeals for the Ninth Circuit quashed a discovery request due to comity concerns.<sup>176</sup> There, the court held that compelling the Tokyo District Prosecutor's Office to produce evidence raised significant concerns of international comity because it would "risk sending a message of disrespect for Japanese laws and procedures."<sup>177</sup> By analogizing itself to the Tokyo District Prosecutor's Office, Facebook attempts to elevate its standing as a private corporate entity to that of a government law enforcement agency. In some ways, Facebook wields significant influence over the public and enforces its own code of conduct online with its Community Standards. However, disregarding foreign national laws and procedures arguably implicates much higher stakes than undermining a corporation's terms of service.

As to foreign affairs and international parity, the court may want to consider whether quashing a discovery request to further prevent the commission of genocide would actually diminish international perception of the United States' commitment to human rights. Currently, the United States holds an unreliable record on international human rights.<sup>178</sup> Despite leading the historic movement for a universal human rights system in the early twentieth century, creating the Universal Declaration of Human Rights, and participating in adjudicating the

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<sup>174</sup> Facebook's Opposition, *supra* note 165, at 12.

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

<sup>176</sup> *Id.*

<sup>177</sup> *In re Letters Rogatory from the Tokyo Dist. Prosecutor's Office*, 16 F.3d 1016, 1021 (9th Cir. 1994).

<sup>178</sup> See, e.g., *UN Issues Scathing Assessment of US Human Rights Record*, ACLU (May 15, 2015), <https://www.aclu.org/blog/human-rights/human-rights-and-criminal-justice/un-issues-scathing-assessment-us-human-rights> (enumerating tangible solutions US could implement in longstanding human rights abuses such as halting detention of immigrant families and children; addressing police brutality and excessive use of force; ending racial profiling of minorities and immigrants).

Nuremberg Trials after World War II, the United States has since failed to commit to numerous international human rights agreements, including the Rome Statute of the ICC that oversees trials for individuals accused of genocide, war crimes, and crimes against humanity.<sup>179</sup> In light of its unreliable record of committing to international treaties upholding human rights protections, the United States may actually benefit from taking a stauncher stance in upholding international humanitarian law over its national priorities.

3. *The Court Should Rule in Favor of Disclosure Because Disclosure Is Not Likely to Violate 18 U.S.C. § 2702—Stored Communications Act*

Under the Electronic Communications Privacy Act, which implicates Fourth Amendment protections against unreasonable searches and seizures of digitally stored information, Congress enacted the Stored Communications Act (SCA).<sup>180</sup> Specifically, SCA § 2702 addresses voluntary and compelled disclosure of “stored wire and electronic communications and transactional records” held by third-party internet service providers.<sup>181</sup> Absent a statutory exception, § 2702 prohibits remote computing service providers from disclosing content and other communications pursuant to a civil subpoena.<sup>182</sup> Courts have established Facebook falls within the meaning of an electronic communications or remote computing service provider under the SCA, and therefore is not generally permitted and cannot be compelled to respond to civil subpoenas that seek production of records.<sup>183</sup> SCA §§ 2702 (b)–(c) provide narrow exemptions under which a provider may disclose communications, including instances when the *provider* believes in good faith an “emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency.”<sup>184</sup> As discussed in Part I, the situation for the Rohingya people in Myanmar remains exigent despite the ICJ’s orders to enjoin the Burmese government from conducting further genocidal acts.<sup>185</sup> However, unless Facebook is willing to recognize the current

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<sup>179</sup> *Human Rights & the U.S.*, ADVOCATES FOR HUM. RTS., [https://web.archive.org/web/20201031233917/https://www.theadvocatesforhumanrights.org/human\\_rights\\_and\\_the\\_united\\_states](https://web.archive.org/web/20201031233917/https://www.theadvocatesforhumanrights.org/human_rights_and_the_united_states) (last visited Oct. 26, 2020).

<sup>180</sup> See Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1212 (2004).

<sup>181</sup> *Id.* § 2701.

<sup>182</sup> *Id.* § 2702(a).

<sup>183</sup> *In re Facebook, Inc.*, 923 F. Supp. 2d 1204, 1206 (N.D. Cal. 2012) (quashing subpoena issued pursuant to 28 U.S.C. § 1782 because “civil subpoenas may not compel production of records from providers like Facebook”).

<sup>184</sup> 18 U.S.C. § 2702(b)(8).

<sup>185</sup> See generally Domino, *supra* note 102 (noting lack of permanent, robust civic institutions that can

circumstances in Myanmar as an “emergency involving danger of death or serious physical injury,” § 2702 will not allow disclosure under § 1782.<sup>186</sup> In its motion to dismiss the Gambia’s application, Facebook indicated it did not believe the relevant statute applied “even where those account holders are foreign governments and high-ranking foreign officials accused of genocide.”<sup>187</sup> Thus, without any applicable exception, disclosure pursuant to a § 1782 request could be deemed inappropriate under § 2702, unless the Gambia can show that a compelling case of exigency exists and the disclosure of the requested communications would directly address the imminent risk of death or serious bodily harm. In light of the current state of emergency imposed on the country by the Myanmar government and the ensuing violence, the future of the Rohingya minority is less certain than ever. Disclosure of the requested information relating to specific military officials and organizations could help Facebook preemptively take down accounts and prevent concerted efforts to incite further violence against protestors and minorities alike.

### CONCLUSION

In light of these considerable procedural hurdles and delays in ongoing investigations, international disclosure laws should be amended to address narrow exceptions involving crimes against humanity and genocide. As the world has become more interconnected and reliant on communicating through social media networks,<sup>188</sup> evidence of crimes is now more readily available in seemingly infinite forms of online posts, photos, and videos. At the same time, foreign investigatory bodies and governments continue to encounter mounting challenges to accessing these vital sources of information as American tech companies rely on outdated discovery measures.<sup>189</sup> Specifically, the MLAT process is widely acknowledged as a necessary but cumbersome system that involves extensive bilateral negotiations and even more lengthy processing times once parties are able to submit and respond to foreign requests for digitally stored information.<sup>190</sup> In addition to these procedural delays, which can average two to three years, compliance from the responding party can vary and result in

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adequately address civilian concerns and prosecute criminally responsible authorities, as well as ongoing armed conflict, and COVID outbreak preventing safe return of displaced individuals); *What You Need to Know*, *supra* note 73 (outlining detailed timeline of past and current conditions precipitating and precluding safe voluntary return to Myanmar).

<sup>186</sup> 18 U.S.C. § 2702.

<sup>187</sup> Facebook’s Opposition, *supra* note 165, at 6.

<sup>188</sup> Klonick, *supra* note 107, at 2496–97.

<sup>189</sup> Hill, *supra* note 18, at 5.

<sup>190</sup> *Id.*

only partial disclosure or outright rejection. In particular, requesting parties often fail to provide the requisite detail and specificity responding parties need to adequately identify pertinent information.<sup>191</sup> In the context of social media cases, requesting parties may not fully comprehend the technical capabilities and complexities surrounding data storage and retention. Thus, these requesting parties fail to adequately specify the different types of information they seek and simply ask for all available information associated with an individual.

To tackle these procedural obstacles, various foreign countries, including Brazil and India, have started to launch alternative means that can circumvent the MLAT process, such as imposing exorbitant taxes on non-compliant tech companies. On one hand, governments should refrain from resorting to retaliatory measures that will inevitably threaten existing business relations with private corporate entities. On the other hand, governments should continue pursuing less costly and aggressive measures by reforming existing bilateral agreements to become better suited for the digital age.<sup>192</sup> In addition to increasing MLAT funding to reduce the backlog of legal process served on the United States from foreign governments,<sup>193</sup> MLAT processes should expedite high-priority cases invoking exigent and sensitive circumstances, such as national security or genocide. Alternatively, governments could consider establishing a secondary pipeline for these cases and uniform standards to ensure requesting parties receive the necessary information, while respecting industry-wide interpretations of appropriate data requests.<sup>194</sup>

In addition to the procedural setbacks the Gambia faced in its discovery case against Facebook, and to a broader extent Myanmar, the dispute between the Gambia and Facebook also highlights broader themes that remain on the horizon for international discovery. Specifically, foreign states and associated government actors will continue to face considerable hurdles in compelling American tech companies to disclose content under the existing regulatory schemes. Unless governments meaningfully coordinate with each other, as well as with non-governmental organizations such as civic society groups dedicated to online platform regulation, tech companies will continue to exert enormous influence and autonomy over their platforms and circumvent regulatory oversight.<sup>195</sup>

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<sup>191</sup> *Id.* at 2.

<sup>192</sup> *Id.* at 1.

<sup>193</sup> *Id.* at 4.

<sup>194</sup> *Id.* at 5.

<sup>195</sup> See Klonick, *supra* note 107, at 2446–47.

Currently, American tech companies operate extensively outside the United States in regions prone to political instability, authoritarian governance, and human rights abuse risks. Under their laissez-faire approach to content moderation, these American companies risk becoming “absentee landlord[s]”<sup>196</sup>—detached from the daily realities on the ground and unable to effectively mobilize in the face of mass crimes of atrocity.<sup>197</sup> As seen in the case of Myanmar, Facebook only began to implement significant changes *six years* into the ongoing crisis.<sup>198</sup> This was only after the international press, intergovernmental organizations, human rights advocacy groups, and users around the world mounted a concerted campaign demanding greater accountability, transparency, and action following alarming reports of ethnic violence against the Rohingya Muslims.<sup>199</sup> Despite *years* of tell-tale signs and *explicit* warnings of rampant abuses on its platforms, Facebook has continually failed to address these issues. The international community cannot expect tech behemoths like Facebook to become more agile and transparent when they only continue to expand their global influence. Facebook did not respond to the Rohingya Genocide out of a sense of moral or even legal obligation. Instead, the company reacted to assuage public outcry and prevent further damage to its reputation as a democratic, value-driven platform. In essence, Facebook only wanted to sustain user engagement and ultimately, its bottom-line.<sup>200</sup>

While corporate entities are entitled and certainly expected to prioritize their business initiatives, global social media companies like Facebook hold positions of influence and enjoy relative immunity from government interference. Therefore, they should be independently checked by more permanent and sustainable mechanisms rooted within the law. Passively relying on tech companies to preserve goodwill and act in line with their purported democratic principles is fundamentally flawed, naïve, and dangerously inefficient.<sup>201</sup>

Admittedly, Facebook has taken promising steps to develop a more robust infrastructure of regulating hate speech on its platform starting with the Facebook Oversight Board, the “Facebook Supreme Court” that will review and

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<sup>196</sup> Matthew Ingram, *In Some Countries, Fake News on Facebook Is a Matter of Life and Death*, COLUM. JOURNALISM REV. (Nov. 21, 2017), <https://www.cjr.org/analysis/facebook-rohingya-myanmar-fake-news.php>.

<sup>197</sup> See Klonick, *supra* note 107, at 2448; Douek, *supra* note 91, at 3.

<sup>198</sup> For example, staffing more Burmese language experts on its content-moderation teams or coordinating more extensively with local non-governmental agencies. See generally Su, *supra* note 118 (publishing Facebook’s official findings on how it failed to adequately respond and what changes have been implemented since 2018).

<sup>199</sup> *Id.* at 3; Stecklow, *supra* note 120, at 9; Ingram, *supra* note 196.

<sup>200</sup> See Klonick, *supra* note 107, at 2448.

<sup>201</sup> See *id.*

issue decisions on the pressing and challenging content-moderation issues.<sup>202</sup> Since Mr. Zuckerberg first announced Facebook’s plans to establish the Oversight Board in the latter half of 2018, the independent board experiment has remained in the planning stages of constructing bylaws and nominating appointees with no committed timeline in sight.<sup>203</sup> Recognizing that “Facebook should not make so many important decisions about free expression and safety on [its] own[]” is a vital first step.<sup>204</sup> Unfortunately, this has come at the horrific expense of hundreds of thousands of Rohingya Muslims.<sup>205</sup>

As such, other tech companies should consider investing in sustainable, independent review systems that can act as credible checks and balances against corporate inertia and decision-making blind spots. In particular, social media companies that are effectively gatekeepers of free expression, like Twitter and YouTube,<sup>206</sup> should consider the structure of the Facebook Oversight Board. The Oversight Board is funded through its trust, ensuring financial independence while the Board strives to be entirely self-governed.<sup>207</sup> Whether other social media companies emulate the Facebook Oversight Board, its pseudo-adjudicatory process of reviewing appeals and publishing decisions on takedown requests, and other content-moderation policies remains up for debate.<sup>208</sup>

However, appointing constitutional lawyers, policy wonks, and human rights experts to a board of trustees is not enough and should not act as a panacea to resist government intervention entirely. The scalability and efficacy of the Facebook Oversight Board remain untested. One scholar estimates the Board is unlikely to keep up with the sheer number of high priority cases based on its

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<sup>202</sup> *Id.* at 2449–50; Evelyn Douek, *Verified Accountability: Self-Regulation of Content Moderation as an Answer to the Special Problems of Speech Regulation*, LAWFARE (Sept. 18, 2019, 1:47 PM), <https://www.lawfareblog.com/verified-accountability-self-regulation-content-moderation-answer-special-problems-speech-0>.

<sup>203</sup> Evelyn Douek, *Facebook’s Oversight Board Bylaws: For Once, Moving Slowly*, LAWFARE (Jan. 28, 2020, 4:15 PM), <https://www.lawfareblog.com/facebook-oversight-board-bylaws-once-moving-slowly>; Klonick, *supra* note 107, at 2489 n.395.

<sup>204</sup> Klonick, *supra* note 107, at 2450.

<sup>205</sup> *See id.*

<sup>206</sup> Human Rights Council, Rep. of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association 2, U.N. Doc. A/HRC/41/41 (May 17, 2019), <https://undocs.org/A/HRC/41/41> (“Facebook, Twitter and YouTube have become the gatekeepers to people’s ability to enjoy the rights of peaceful assembly and of association . . .”).

<sup>207</sup> Klonick, *supra* note 107, at 2488.

<sup>208</sup> Klonick, *supra* note 107, at 2493. *Cf.* Vanessa Pappas, *Introducing the TikTok Content Advisory Council*, TIKTOK (Mar. 18, 2020), <https://newsroom.tiktok.com/en-us/introducing-the-tiktok-content-advisory-council> (announcing internal advisory council led by George Washington Law School Professor Dawn Nunziato, who specializes in content regulation and free speech, and composed of “industry leaders” in “technology, policy, and health and wellness”).

current set-up: To review even one percent of appeals, forty board members would have to review roughly 1700 cases a day with a ninety day turnaround time.<sup>209</sup> Even if the Oversight Board manages to issue judgment-like decisions on how Facebook should proceed with sensitive content appeals, whether these decisions establish industry standards remains uncertain. Instead, as more companies adopt self-regulatory advisory councils and review boards, inconsistent practices across different platforms may arise.<sup>210</sup> In light of these nascent developments, courts are unlikely to reference these decisions as anything more than persuasive if and when disputes over international data disclosure continue to increase in the near future.<sup>211</sup> Thus, with this current gap in establishing a sustainable infrastructure of self-regulation and content reporting among American tech companies, governments are at a critical juncture to reform existing evidence-gathering procedures. For now, the international community should take note of the United States District Court's decision mandating Facebook disclose deleted content requested by the Gambia as a promising next step. With the Myanmar military back in power, Facebook must act before it is too late.

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<sup>209</sup> Klonick, *supra* note 107, at 2490 (“In the second and third quarters of 2019, 30.8 million pieces of content remained down even after appeal. . . . Even if just one percent of those cases were appealed . . . [t]his is a daunting number of cases to process by a Selection Committee that forms a subset of an eleven-to-forty-person Board, even with staff support. Meaningfully processing the volume of cases submitted will be challenging—especially given the timeline of ninety days from filing to decision on appeal.”).

<sup>210</sup> *E.g.*, Pappas, *supra* note 208.

<sup>211</sup> Klonick, *supra* note 107, at 2495.

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