PWPM 2020, Vol. XVIII
REVIEW OF INTERNATIONAL, EUROPEAN AND COMPARATIVE LAW
PROBLEMY WSPÓŁCZESNEGO PRAWA MIĘDZYNARODOWEGO, EUROPEJSKIEGO I PORÓWNAWCZEGO
ISSN 1730-4504

ARTICLES / ARTYKUŁY

DOI: 10.26106/1tmm-x027

Facebook in Myanmar: the challenges and promises of applying the United Nations Guiding Principles on Business and Human Rights to a social media company

Maciej Gajos
PhD Candidate at the Department of International and European Law
at the Faculty of Law, Administration and Economics at the University of Wroclaw
ORCID: 0000-0002-9183-0709, e-mail: maciej.gajos@uwr.edu.pl

1. Introduction

Facebook Inc., an American social media corporation based in California, whose net income for 2019 amounted to $18,485 billion[1] and whose number of users exceeds the population of any state,[2] has emerged as a major global force to be reckoned with. In recent years its business model has raised some grave concerns as it has come to the attention of the public that it may potentially jeopardize the protection of human rights, what became particularly evident in the Cambridge Analytica

[1] Macrotrends, *Facebook Net Income 2009-2020*, https://www.macrotrends.net/stocks/charts/FB/facebook/net-income, accessed 10 October 2020.

[2] Statista, *Number of monthly active Facebook users worldwide as of 2nd quarter 2020*, https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/, accessed 10 October 2020.

scandal.[3] This article concerns another notorious case wherein Facebook played a rather controversial role: the Rohingya genocide in Myanmar, where the platform has been extensively used for fomenting hate speech conducive to the catastrophic human rights crisis.[4] The key question that will be addressed is whether Facebook has done enough to identify, prevent, and mitigate the adverse human rights impacts of its conduct. The United Nations Guiding Principles on Business and Human Rights of 2011 (hereinafter: the UNGPs) provide that business enterprises should carry out human rights due diligence,[5] but what is urgently needed is some clarification as to what this rule actually entails, how is it related to a parallel due diligence of states, and finally what consequences, if any, can a failure to comply with this standard lead to? The goal of this article is to examine whether international law at its current stage of development offers any paths for holding Facebook accountable for the adverse human rights impacts of its activities in Myanmar.

Let us begin with a brief overview of what exactly happened in Myanmar, casting light on some of the crucial facts concerning the conduct of Facebook (Section 1). The following sections will be dedicated to determining how does the given state of facts translate into appropriate legal norms. First of all, the question of how Facebook should be treated in international law, or in other words, the problem of its legal personality, will be addressed, considering especially how the uncertainty surrounding it is tackled by the UNGPs (Section 2). Afterwards, I will seek relevant substantial human rights norms that could serve as a benchmark for evaluating the conduct of Facebook in Myanmar, focusing mostly on the specific provisions of the International Covenant on Civil and Political Rights (Section 3). Finally, I would like to offer an analysis of the human rights due diligence standard that is prescribed by the United Nations Guiding Principles, above all trying to demonstrate how it corresponds with Facebook's activities in Myanmar, how it interplays with the concept of the due diligence expected of states, and what it means precisely in terms of responsibility (Section 4).

---

3 O. Bowcott, A. Hern, *Facebook and Cambridge Analytica face class action lawsuit*, The Guardian, 10 April 2018, https://www.theguardian.com/news/2018/apr/10/cambridge-analytica-and-facebook-face-class-action-lawsuit, accessed 10 October 2020.

4 A. Stevenson, *Facebook Admits It Was Used to Incite Violence in Myanmar*, The New York Times, 6 November 2018, https://www.nytimes.com/2018/11/06/technology/myanmar-facebook.html, accessed 11 October 2020.

5 United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework 2011.

2. The situation in Myanmar and the involvement of Facebook

Delving into the background of the crisis, we must begin by stressing that the Rohingya are a stateless Muslim minority in Myanmar, a predominantly Buddhist state.[6] Before the outset of what the United Nations High Commissioner for Human Rights described as the "textbook example of ethnic cleansing," about 1 million Rohingyas resided in Rakhine State in the country's north-west.[7] Despite living in the same region for generations, for decades they have been oppressed by the government who refused to officially recognize them as citizens and treated them as illegal immigrants with no cultural, social, or religious ties to Myanmar.[8] That act of *othering* Rohingya is well displayed by the practice of referring to them as "Bengali" — migrants from Bangladesh who do not belong in Myanmar.[9] The International Fact-Finding Mission on Myanmar (IIFFMM), established by the United Nations Human Rights Council in March 2017, in its informative report published in September 2018 revealed "consistent patterns of serious human rights violations and abuses in Kachin, Rakhine and Shan States, in addition to serious violations of international humanitarian law" that were "principally committed by the Myanmar security forces, particularly the military".[10] When an insurgent Rohingya group — ARSA (Arakan Rohingya Salvation Army) launched an attack on a military base and security force outposts across northern Rakhine State on 25 August 2017, trying to draw global attention to the problem of the systemic discrimination of their people, they were met with a response by security forces that the IIFFMM calls "immediate, brutal and grossly disproportionate".[11] A report published by the Amnesty International in May 2019 recounts the horrors of military's response: arbitrary arrests, torture, extrajudicial executions, enforced disappearances, looting, confiscation of property, ransacking of houses, forced labor, sexual violence, and restrictions

6 UNHCR, https://www.unhcr.org/rohingya-emergency.html, accessed 12 October 2020.

7 *Myanmar Rohingya: What you need to know about the crisis*, BBC News, 23 January 2020, https://www.bbc.com/news/world-asia-41566561, accessed 12 October 2020.

8 G. Canal, *Meet the Most Persecuted Minority in the World: Rohingya Muslims*, Global Citizen, 10 February 2017, https://www.globalcitizen.org/en/content/recognizing-the-rohingya-and-their-horrifying-pers/, accessed 13 October 2020.

9 C. Fink, *Dangerous Speech, Anti-Muslim Violence, and Facebook in Myanmar*, Columbia SIPA Journal of International Affairs, 17 September 2018, https://jia.sipa.columbia.edu/dangerous-speech-anti-muslim-violence-and-facebook-myanmar, accessed 11 October 2020.

10 Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, A/HRC/39/64, 12 September 2018, p. 1.

11 Human Rights Council, *Report of the independent international…*, op. cit., p. 8.

in access to medical treatment.[12] What followed was the largest forced human exodus in recent history: as of July 31, 2019, according to information collected by the United Nations Refugee Agency, over 742,000 Rohingya fled to Bangladesh since violence erupted in Rakhine State.[13] Even though the humanitarian disaster was triggered by the specific events that occurred in August 2017, if we take into account the long history of discrimination and exclusionary policies, it would be appropriate to consider this horrific fallout to be a disaster long in the making.

The aforementioned report of the IIFFMM emphasizes very strongly the role of social media in the crisis.[14] In Myanmar "Internet" and "Facebook" are in fact interchangeable terms: for a large majority of people in Myanmar, Facebook, as the only big player in the market supporting Burmese text, became synonymous with the Internet.[15] The investigators of the IIFFMM, while presenting the partial results in March 2018, blamed Facebook directly: M. Darusman, the chairman of the fact-finding mission, said that "Facebook substantively contributed to the level of acrimony and dissension and conflict (...) within the public"; the Special Rapporteur Y. Lee adding that the platform has "turned into a beast".[16] An investigation carried out by *Reuters* in August 2018 revealed more than 1,000 examples of posts, comments and pornographic images attacking the Rohingya on Facebook — that were still available on the website, even though four months earlier M. Zuckerberg, the company's founder and CEO, in his testimony before the U.S. Senate pledged to take action.[17] The language used in those posts is violent and utterly dehumanizing: Rohingya are referred to as dogs, maggots, and rapists; there are calls to exterminate them.[18] It needs to be highlighted that these posts were not created by "typical" Facebook users, but were an integral part of an operation conducted by the Myanmar military itself: as P. Mozur writes, "the campaign (...) included hundreds of military personnel who created troll accounts and news and celebrity pages on

[12] Amnesty International, *Myanmar: "No One Can Protect Us": War Crimes and Abuses in Myanmar's Rakhine State*, 29 May 2019, https://www.amnesty.org/en/documents/asa16/0417/2019/en/, accessed 9 October 2020.

[13] UNHCR, https://www.unhcr.org/rohingya-emergency.html, accessed 12 October 2020.

[14] Human Rights Council, *Report of the independent international...*, op. cit., p. 14.

[15] A. Subedar, *The country where Facebook posts whipped up hate*, BBC, 12 September 2019, https://www.bbc.com/news/blogs-trending-45449938, accessed 9 October 2020.

[16] *Myanmar: UN blames Facebook for spreading hatred of Rohingya*, The Guardian, 13 March 2018, https://www.theguardian.com/technology/2018/mar/13/myanmar-un-blames-facebook-for-spreading-hatred-of-rohingya, accessed 10 October 2020.

[17] S. Stecklow, *Inside Facebook's Myanmar operation. Hatebook. A Reuters Special Report*, Reuters, 15 August 2018, https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/, accessed 7 October 2020.

[18] Ibid.

Facebook and then flooded them with incendiary comments and posts timed for peak viewership".[19] Furthermore, the platform has been accused of a bias against Rohingya bloggers who claim that Facebook was very quick to suspend or close their accounts whenever they published content criticizing the military or including graphic photographs documenting the military's human rights abuses, while it displayed far more indulgence towards ultranationalists.[20]

Considering this broad outline of the problem, let us confront the question of how international law, and mainly UNGPs, rises up to the challenge of holding Facebook accountable for contributing to adverse human rights impacts.

3. The status of Facebook in international law

When we consider the status of Facebook Inc. in international law, we are inevitably confronted with a fundamental question that arises in the doctrine nowadays: how should we treat business enterprises under international law? Numerous scholars who are involved in this debate passionately defend opposite positions on whether it is possible to recognize them as possessing international personality.[21] The semantic difference between subjects of international law and international personality is a subtle one but it is important to be aware of it: subjects of international law could be defined as entities which possess international personality, while an international personality is the quality of the subjects: their capability of possessing international rights and/or duties (sometimes the term "international legal capacity" is used interchangeably with "international personality").[22]

Traditionally, international law has been considered a state-centric system: for a long time states have commonly been recognized as its only subjects (and states remain its original subjects), however a major development came with the advisory opinion of the International Court of Justice of 1949 (hereinafter: ICJ).[23] When determining whether the United Nations could have been considered an international

[19] P. Mozur, *A Genocide Incited on Facebook, With Posts From Myanmar's Military*, The New York Times, 15 October 2018, https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html, accessed 8 October 2020.

[20] C. Fink, *Dangerous Speech, Anti-Muslim…*, op. cit.

[21] See: J .E. Alvarez, *Are Corporations "Subjects" of International Law?*, Santa Clara Journal of International Law 2011, vol. 1.

[22] C. Walter, *Subjects of International Law*, Max Planck Encyclopedia of International Law, Oxford Public International Law, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1476, accessed 19 October 2020, para. 1-27.

[23] Ibid., p. 174.

legal person, and therefore whether it would be entitled to bring a claim for reparations against the government (*de iure or de facto*) responsible for having inflicted damage to its officers, the ICJ examined the purposes and principles indicated in the Charter of the United Nations, and came to the conclusion that, in order to be able to achieve them, the United Nations as international organization must have been attributed legal personality.[24] It declared that the UN was an international person because it was "a subject of international law (...) capable of possessing international rights and duties, and maintaining those rights by bringing international claims".[25] Not only did the Hague Tribunal demonstrate a possibility of admitting into the club of international persons actors other than solely states, but it also observed that scope of such personality might vary, as it noted with regard to the United Nations: "that is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same of a State".[26]

Questions of recognizing business enterprises as possessing international personality are currently being raised in the context of globalization and dynamic economic and technological evolution. As P. T. Muchlinski notes, "more recently, new sets of claims have arisen relating to the accountability and liability of corporations for acts that may infringe international law".[27] Numerous calls are raised to reject the formalistic approach and not to turn a blind eye to the reality that for quite some time business enterprises, mostly multinational corporations, have been "major international law actors and have exerted considerable influence in the making of rules governing trade, investment, antitrust, intellectual property, and telecommunications".[28] Thus it might seem that attributing international personality to business enterprises would simply be a recognition of the state of facts ("we can draw international personhood from the fact that corporations are already treated as persons; we can imply additional rights and obligations because they already have some").[29] Examining social media companies specifically, S. Benesch emphasizes the vast scope of functions performed by them, including even some limited

[24] Ibid., p. 178.

[25] *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion: I.C.J. Reports 1949, p. 178.

[26] Ibid., p. 179.

[27] P. T. Muchlinski, *Corporations in International Law*, Max Planck Encyclopedia of International Law, Oxford Public International Law, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1513?rskey=81gC7n&result=1&prd=OPIL, accessed 19 October 2020, para. 5.

[28] J .E. Alvarez, *Are Corporations "Subjects"*..., op. cit., p. 5.

[29] Ibid., p. 7.

state functions.[30] She makes an interesting, if not too far-reaching point about the ways in which social media enterprises are involved in acts of governance, recalling for instance that political figures and state institutions communicate and provide services through social media; underscoring also the fact that those platforms have become the essential sphere for public discourse. Benesch writes that "when platforms are used for exchanging information that is vital for civic life, the owners and staff of the platforms influence the political, cultural, and economic development of entire societies".[31] A similar opinion is shared by H. Farrell, M. Levi and T. O'Reilly who claim that "Facebook is so powerful in its own domain that it is, indeed, like a sovereign state", adding that "it can upend the business models of companies that depend on it, or completely change the ways its individual users relate to each other — without them even realizing what has happened".[32]

Taking those circumstances into account, it seems that any efforts to deny the existence of a pluralism of actors in international law should be considered anachronistic, yet scholars have not achieved a clear consensus on the current status of business enterprises so far. Actually, simply recognizing their international personality might actually not be conducive to greater accountability. Some experts, such as J. E. Alvarez, have voiced grave concerns about such attempts: recalling the International Law Commission's (ILC) draft articles on the responsibility of international organizations of 2011 (hereinafter: DARIO), he argues that they are illustrative of how efforts to treat subjects of international law as equivalent to each other can be based on false premises and produce flawed results (he calls DARIO "a misguided effort").[33] A similar criticism of DARIO echoes in the works of A. Pellet, who blames this project for failing to address the principle of specialty ("which, combined with the doctrine of implied powers, is one of the main pillars of the global status of international organizations")[34] and for introducing overly abstract rules in terms of compensation;[35] Pellet also acknowledges the plausibility of the scenario

30 S. Benesch, *But Facebook's Not a Country: How to Interpret Human Rights Law for Social Media Companies*, Yale Journal on Regulation Online Bulletin 2020, p. 93.

31 Ibid.

32 H. Farrell, M. Levi, T. O'Reilly, *Mark Zuckerberg runs a nation-state, and he's the king*, Vox, 10 April 2018, https://www.vox.com/the-big-idea/2018/4/9/17214752/zuckerberg-facebook-power-regulation-data-privacy-control-political-theory-data-breach-king, accessed 21 October 2020.

33 J.E. Alvarez, *Are Corporations "Subjects"*..., op. cit., p. 33-34.

34 A. Pellet, *International Organizations are Definitely Not States. Cursory Remarks on the ILC Articles on the Responsibility of InternatIonal Organization*s, in: M. Ragazzi, *Responsibility of International Organizations. Essays in Memory of Sir Ian Brownlie*, Martinus Nijhoff Publishers, Leiden 2013, p. 46.

35 Ibidem, p. 49-53.

wherein "due to the rather mixed reception they have received and their own weaknesses—one being the consequence of the other— [DARIO] are already 'dead at birth'".[36] When it comes to the international responsibility of different subjects, it turns out that a "one size fits all" approach might be ineffective; doctrinal reflections on the issue of the attribution of international personality therefore pose a risk of overshadowing the pragmatic problem of how to guarantee that human rights are respected and victims of potential abuses can effectively seek remedy.

All things considered, so far we have mainly witnessed the adoption of soft law instruments in this area, such as the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (2011), the International Labour Organization (ILO) Tripartite Declaration of Principles on Multinational Enterprises and Social Policy (2006), and finally the UN Guiding Principles on Business and Human Rights (the UNGPs) mentioned expressly in the title of this article.[37] Guiding Principles were drafted by the Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises, professor J. G. Ruggie, and adopted unanimously by the Human Rights Council in 2011.[38] Z. Ra'ad Al Hussein, the UN High Commissioner for Human Rights, described the UNGPs as "the global authoritative standard, providing a blueprint for the steps all states and businesses should take to uphold human rights".[39]

The approach chosen by Ruggie shies away from offering a straightforward answer with regard to the issue of international personality of business enterprises. Instead, the Guiding Principles propose to distinguish between the state duty to protect against human rights abuses by third parties, including business enterprises, and corporate responsibility to respect human rights. Such a dichotomy does not result in the creation of new legal obligations, but the UNGPs still possess some normative force as Ruggie argues: "they derive [it] through the recognition of social expectations by states and other key actors, including business itself".[40] Accordingly, the responsibility to respect human rights of business enterprises cannot be considered completely inconsequential in the normative sphere, even though the impact

[36] Ibidem, p. 53.

[37] P. T. Muchlinski, *Corporations in International Law*, op. cit., para. 15.

[38] J. G. Ruggie, *The Social Construction of the UN Guiding Principles on Business & Human Rights*, Faculty Research Working Paper Series 2017, p. 3.

[39] Z. Ra'ad Al Hussein, *Ethical pursuit of prosperity*, The Law Society Gazette, 23 March 2015, https://www.lawgazette.co.uk/commentary-and-opinion/ethical-pursuit-of-prosperity/5047796.article, accessed: 20 October 2020.

[40] J. G. Ruggie, *Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises*, in: C. Rodríguez-Garavito, *Business and Human Rights. Beyond the End of the Beginning*, Cambridge University Press, Cambridge 2017, p. 49.

of this concept might be rather indirect and more nuanced — as we will see in the following sections of this article — than that of legal obligations *sensu stricto*.

As provided by Rule 11 of the UNGPs, business enterprises should respect human rights, which is further explained as meaning that they should avoid infringing on the human rights of others and should address the adverse human rights impacts with which they are involved. The commentary accompanying Rule 11 emphasizes the independence of such responsibility from States' duties, as well as it distinguishes it from simple compliance with relevant national laws and regulations in the area of human rights. The responsibility comes down to, as the commentary further elaborates, addressing adverse human rights impacts at distinct stages, which are prevention, mitigation, and remediation.[41] An appropriate response is determined by whether the adverse human rights impacts in question are potential or actual, the former calling for prevention or mitigation, while the latter — are a subject for remediation.[42] We can place the relevant duties within a certain timeline: what shall be done before an impact occurs (either to avert or assuage it), and what shall be done afterwards if in the lack of a preventive action or its failure an adverse impact is in fact produced.

4. Relevant human rights norms

Having established that Facebook was expected to respect human rights, let us determine which norms we should refer to in order to adequately evaluate its conduct. Rule 12 establishes the scope of human rights that business enterprises are expected to respect, stipulating that they must be internationally recognized and must encompass at minimum those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. The list is not exhaustive; the commentary to Rule 12 adds that "depending on circumstances, business enterprises may need to consider additional standards"; for instance, they might have to refer to standards designated for special protection of particularly vulnerable groups, such as indigenous people, minorities, children, or persons with disabilities.[43] The relevance of the already existing human rights principles that are derived from those various sources *vis-à-vis* activities of social media companies is emphasized by D. Kaye, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, who

41 United Nations Guiding Principles..., op. cit., p. 13.
42 Ibid., p. 18.
43 Ibid., p. 14.

in his report on content regulation calls companies to "recognize that the authoritative global standard for ensuring freedom of expression on their platforms is human rights law".[44] Kaye stresses that "human rights law gives companies the tools to articulate and develop policies and processes that respect democratic norms and counter authoritarian demands".[45]

Searching for the sources of human rights norms that would be the most appropriate in the context of Facebook's conduct in Myanmar, let us first and foremost refer to the International Bill of Rights which, as the commentary to Rule 12 points out, consists of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.[46] Two provisions of the International Covenant on Civil and Political Rights (hereinafter: ICCPR) of 1966 would be crucial in the context of Facebook's involvement in Myanmar: Article 19 and Article 20.[47]

Article 19 concerns freedom of opinion and expression, while Article 20 prohibits any propaganda for war, as well as any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence. A detailed and thought-provoking analysis of how social media companies should apply those rules is presented by Benesch, who rightly notices that there is a pressing need to illuminate the proper meaning of those provisions.[48] Their direct addressees are states: those are states who are obliged to guarantee freedom of opinion and expression; those are states who can — or should — put limitations on it in some situations. Some degree of unsuitability apparently reveals itself when we consider rules pertaining to restrictions that might be imposed on freedom of speech: each restriction must be provided by law and intended as necessary to protect one of five legitimate interests, which are national security, public order, public health, morals, and the rights and reputations of others. As Benesch remarks, social media companies cannot produce law as such, however, she subsequently refers to the Human Rights Committee's General comment No. 34 to Article 19, demonstrating that the possibility to treat platforms' rules as law once they meet certain conditions cannot be ruled out; those conditions being: the norms must be sufficiently precise

44 D. Kaye, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, 6 April 2018, p. 20.

45 Ibid.

46 Ibid., p. 14.

47 The United Nations General Assembly, *International Covenant on Civil and Political Rights,* Treaty Series 1966, Vol. 999, p. 171.

48 S. Benesch, *But Facebook's Not a Country*..., op. cit.

so as to enable an individual to regulate his or her conduct accordingly and must be made accessible to the public.[49] Furthermore, it would be unreasonable to assume that social media companies would adopt measures to protect national security (a function exclusively attributed to states);[50] nevertheless, we can easily imagine them imposing restrictions on other permissible grounds: Benesch mentions for instance that even when we consider the protection of public health, seemingly rather remote from functions usually performed by social media companies, we would have to realize that in fact those companies have recently taken some major steps to limit the spread of false information concerning the novel coronavirus.[51]

When it comes to Article 20, it needs to be underscored that it remains closely tied to Article 19: they "are compatible with and complement each other"; limitations on the basis of Article 20 must comply with Article 19, however in that case a specific action on the part of states is prescribed: they have to implement prohibitions of propaganda for war and hate speech in their legal systems.[52] Once again, this provision is concerned mostly with the position of states and does not address the conduct of business enterprises. Nonetheless, what should actually be explored is not whether it is possible to derive hard legal obligations from those articles that would be binding on social media companies; the question is how they can and how they should align their policies and operations with international human rights standards.

Respecting human rights, such as those enshrined in Articles 19 and 20 of the ICCPR, and condoning hate speech are naturally mutually exclusive conducts. Facebook in its Community Standards strongly rejects hate speech which it defines as "a direct attack on people based on what we call protected characteristics — race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, and serious disease or disability," an attack being "violent or dehumanizing speech, harmful stereotypes, statements of inferiority, or calls for exclusion or segregation". In international law there is not any universally accepted definition of hate speech: for example, the United Nations Strategy and Plan of Action on Hate Speech refers to it as "any kind of communication in speech, writing or behaviour, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, colour, descent, gender or other identity

---

[49] Human Rights Committee's General comment No. 34 to Article 19, p. 6; S. Benesch, *But Facebook's Not a Country…*, op. cit., p. 103.

[50] S. Benesch, *But Facebook's Not a Country…*, op. cit., p. 102.

[51] Ibid., p. 107.

[52] Human Rights Committee's General comment…, op. cit., p. 12-13.

factor".[53] What is prohibited is not hate speech as such though, but only hate speech that reaches the threshold of incitement.[54] Incitement is yet another concept that lacks a clear definition: T. Mendel claims that it is important to demonstrate a specific intent, but the intent is not sufficient; he recalls that "international courts have looked at a number of factors when assessing whether incitement is present, focusing on the nexus between the statements and the proscribed result, and issues such as causation and context".[55]

Despite some doubts as to the precise meaning of "hate speech" in international law, the case of Myanmar cannot be considered controversial. C. Fink describes how ultranationalists in Myanmar "framed Muslims as posing both a personal threats to the Buddhist majority nations" through unjustified claims about their high birthrates, increasing economic influence, and alleged plans to take over the country; she mentions images of ISIS brutality shared to prove that all Muslims are potential terrorists; refers to "dehumanizing language" as a "hallmark of dangerous speech".[56] Moreover, she observes that the Anti-Muslim narratives have been subsequently adopted by state media and state officials who have continued to spread them.[57] The context of that rhetoric would be an ongoing systemic discrimination of Rohingya (as described in Section 1); the consequences: the waves of offline violence that swept Rakhine State. The intent seems aptly captured by words of Commander-in-Chief, Senior General Min Aung Hlaing, who wrote in a Facebook post published on 2 September 2018, that "the Bengali problem was a long-standing one which has become an unfinished job despite the efforts of the previous governments to solve it. The government in office is taking great care in solving the problem".[58] The guidance provided by Article 20 is unambiguous in this context: Facebook is responsible for preventing, mitigating, and remediating for the dissemination of the exact virulent narratives that has extensively been published on the platform. To ascertain what precisely such a responsibility entails, we have to examine the process of human rights due diligence prescribed by the UNGPs.

---

53 *United Nations Strategy and Plan of Action on Hate Speech* 2019, https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf, accessed 22 October 2020, p. 2.

54 Ibid.

55 T. Mendel, *Hate Speech Rules Under International Law*, Centre for Law and Democracy 2010, http://www.law-democracy.org/wp-content/uploads/2010/07/10.02.hate-speech.Macedonia-book.pdf, accessed 22 October 2020, p. 5-6.

56 C. Fink, *Dangerous Speech, Anti-Muslim...*, p. 44-45.

57 Ibid., p. 3.

58 Human Rights Council, *Report of the independent international...*, op. cit., p. 8.

5. The due diligence standard

One of the core elements of business responsibility as envisioned in the UNGPs is human rights due diligence. According to Rule 17, in order to identify, prevent, mitigate, and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence; it is further explained that the process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Rule 17 contains some additional requirements regarding the due diligence process, namely providing that human rights due diligence:

(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.[59]

5.1. The precise content of the due diligence standard

Rule 17 merits a thorough analysis as it turned out to generate some major controversies. J. Bonnitcha and R. McCorquodale engaged in a quite heated discussion with Ruggie: they criticized the UNGPs for using the term "due diligence" inconsistently.[60] In their view, the Guiding Principles tend to blend two different concepts of due diligence without properly acknowledging this and therefore failing to provide a necessary roadmap as to how the term shall actually be construed.

Admittedly, the actual content of the concept of due diligence varies depending on the specific context. As Bonnitcha and McCorquodale rightly point out, in a business context due diligence would involve a risk management process, wherein considerations of potential legal liabilities are at most only one of the factors to be taken into account when making business decisions ("the risk of legal liability is simply another commercial consideration to be identified and managed in the context of a particular transaction").[61] Meanwhile, in the field of human rights, due diligence should be understood as a standard of conduct required to discharge an

[59] United Nations Guiding Principles..., op. cit., p. 17-19.
[60] J. Bonnitcha, R. McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, The European Journal of International Law 2017, Vol. 28, no. 3, p. 908.
[61] Ibid., p. 901.

obligation.[62] Bonnitcha and McCorquodale argue that it could lead to confusion by further encouraging "the incorrect view that implementing due diligence processes is sufficient to discharge businesses' responsibility to respect human rights".[63] Furthermore, they claim that the lack of distinction between two concepts creates some serious obstacles when it comes to determining an existence of an actual breach of businesses' responsibility to respect human rights;[64] or to put it in other terms: there might be doubts as to what processes should be carried out exactly by business enterprises to consider their conduct a sufficient fulfillment of their responsibility and when will they be expected to provide remedy.

In response to the criticism, J. G. Ruggie and J. F. Sherman, III distance themselves from specific concepts of due diligence invoked by Bonnitcha and McCorquodale.[65] As to the model of commercial risk management, they make the point that human rights due diligence under Rule 17 of the UNGPs goes beyond strictly transactional analysis, citing commentary to Rule 18 which defines the purpose of the process as "understand[ing] the specific impacts on specific people, given a specific context of operations".[66] Ruggie and Sherman argue that, even though their goal was to keep the UNGPs informed by related practices and literature, the Guiding Principles offer their own scheme of human rights due diligence, "as any international instrument is entitled to do".[67]

5.2. Facebook in Myanmar — a failure to carry out due diligence

In the context of what has been already said about the due diligence standard, the question posed in the introduction should be recalled: can the measures undertaken by Facebook in order to identify, prevent and mitigate adverse human rights impacts of its activities in Myanmar be considered sufficient? How can we evaluate its conduct from the perspective of the due diligence standard provided by the UNGPs?

Reuters revealed that Facebook had dedicated very insignificant resources to responding to hate speech in Myanmar for years: in early 2015 it had employed only two persons who could speak Burmese and in August 2018 (at the moment when the IFFMM report was being finalized) it had not had a single employee based in Myanmar; monitoring of Burmese content had been outsourced to an external

62 Ibid., p. 902.
63 Ibid., p. 910.
64 Ibid.
65 J.G. Ruggie, J.F. Sherman, III, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, The European Journal of International Law 2017, Vol. 28, no. 3, p. 924.
66 Ibid.
67 Ibid.

company in Kuala Lumpur.[68] Facebook relied excessively on a technological approach and it can be argued that searches for keywords performed by artificial intelligence are "too crude", since contexts and subtexts tend to elude those programs.[69]

Only after the United Nations investigators condemned the Myanmar military for carrying out mass killings and other violent acts committed with genocidal intent, and its indifference was met with widespread criticism, did Facebook remove accounts of military officials and organizations, including the commander-in-chief of the Myanmar military, Senior General Min Aung Hlaing.[70] Furthermore, the company commissioned a report from Business Social Responsibility (BSR), a global nonprofit organization, to assess the human rights impacts of its activities in Myanmar.[71] There is an acknowledgement of wrongdoing — an admission of failing to take precautionary measures that would have prevented the platform from being employed to incite real-life violence. Even so, some extenuating circumstances are invoked: the authors of the report mention complexity of the political and social situation in Myanmar: a population lacking internet literacy, ethnic and religious tensions, legal framework not reflecting the rule of law, etc.[72] Not questioning the validity of this argument, one can still wonder if the report does not fall short of recognizing the actual scope of Facebook's responsibility. A. Stevenson from *The New York Times* denounces the report for not "looking closely at how Facebook employees missed a crescendo of posts and misinformation that helped to fuel modern ethnic cleansing in Myanmar".[73] The report is in fact rather future-oriented: focusing less on examining what happened, it is dedicated mostly to designating five areas of recommendations, such as governance and accountability at Facebook (human rights policies, formalized governance structure); community standards enforcement by Facebook (building a cross-functional team familiar with the local context); engagement, trust, and transparency ("publishing a local, Myanmar-specific version of Facebook's Community Standards Enforcement Report and supporting international mechanisms created to investigate violations of international human

68 S. Stecklow, *Inside Facebook's Myanmar operation…*, op. cit.

69 Ibid.

70 A. Slodkowski, *Facebook bans Myanmar army chief, others in unprecedented move*, Reuters, 27 August 2018, https://www.reuters.com/article/us-myanmar-facebook-idUSKCN1LC0R7, accessed 20 October 2020.

71 D. Allison-Hope, *Our Human Rights Impact Assessment of Facebook in Myanmar,* Business Social Responsibility, 5 November 2018, https://www.bsr.org/en/our-insights/blog-view/facebook-in-myanmar-human-rights-impact-assessment, accessed 21 October 2020.

72 BSR, *Human Rights Impact Assessment: Facebook in Myanmar*, October 2018, https://fbnewsroomus.files.wordpress.com/2018/11/bsr-facebook-myanmar-hria_final.pdf, accessed 21 October 2020.

73 A. Stevenson, *Facebook Admits It Was…*, op. cit.

rights"); system-wide change ("advocacy efforts aimed at policy, legal, and regulatory reform and continued investment in efforts to increase digital literacy and counter hate speech"); risk mitigation and opportunity enhancement.[74]

Accounting for addressing the adverse human rights impact is another aspect of due diligence mentioned in Rule 17. Even in light of the most recent developments, the sincerity of Facebook's promise to be "a force for good" in Myanmar might not be found to be convincing: when the Gambia in June 2020, as the state which initiated proceedings against Myanmar before the ICJ, filed an application in the U.S. federal court wherein it sought information from Facebook that might be relevant to the case, the company urged the court to reject the request, calling it "extraordinarily broad," and "unduly intrusive or burdensome".[75]

All things considered, it cannot be overemphasized that a breach of responsibility under the Guiding Principles does not translate into a breach of a legal norm. This is adequately captured by the words of Ruggie and Sherman who claim that "this responsibility is neither based on nor analogizes from state-based law (...). It serves to meet a company's social license to operate, not its legal license; it exists 'over and above' all applicable legal requirements, and it applies irrespective of what states do or do not do".[76]

5.3. From recommended to mandatory due diligence

Nevertheless, one might still wonder if there is a possibility that a corresponding norm of international law exists, even in an early stage of development, identical or almost identical in its content, deriving its binding force from some other source. The potential normative impact of the UNGPs has already been signaled in the Section 2. Ruggie expresses his conviction that "as the business and human rights agenda continues to evolve, further legalization is an inevitable and necessary component of future development".[77] Today we can witness his predictions coming true: numerous states have already enacted statutes prescribing mandatory human rights due diligence.[78] Let us refer briefly to some examples from the relevant state practice

[74] D. Alison-Hope, *Our Human Rights Impact...*, op. cit.

[75] M. Smith, *Facebook Wanted to Be a Force for Good in Myanmar. Now It Is Rejecting a Request to Help With a Genocide Investigation*, TIME, 18 August 2020, https://time.com/5880118/myanmar-rohingya-genocide-facebook-gambia/, accessed 25 October 2020.

[76] J. G. Ruggie, J. F. Sherman, III, *The Concept of 'Due Diligence'...* op. cit., 923-924.

[77] J. G. Ruggie, *Hierarchy or Ecosystem? Regulating...*, op. cit., p. 55.

[78] O. Martin-Ortega, C. Methven O'Brien, *Mandatory Human Rights Due Diligence: options of monitoring, enforcing and remedy under the future EU legislation*, EJIL Talk, 1 September 2020, https://www.ejiltalk.org/mandatory-human-rights-due-diligence-options-of-monitoring-enforcing-and-remedy-under-the-future-eu-legislation/, accessed 24 October 2020.

of how mandatory human rights due diligence is implemented into domestic legal systems — naturally, none of those examples affects the legal situation of Facebook on its own, the question is rather whether as a whole do they add up to something that would engender its responsibility in international law.

For instance, the UK Modern Slavery Act of 2015, hailed as "the first of its kind in Europe, and one of the first in the world",[79] addresses explicitly the issue of transparency in supply chains. Article 54 provides that a commercial organization which supplies goods or services, and has a total turnover of not less than an amount prescribed by regulations made by the Secretary of State, must prepare a slavery and human trafficking statement for each financial year of the organization (Sections 1-2). Such a statement is a statement of the steps the organization has taken during the financial year to ensure that slavery and human trafficking is not taking place (i) in any of its supply chains, (ii) in any part of its own business (Section 4). The following rules regulate the precise content of the statement, which may include, i.a., information about the organisation's structure, its business and its supply chains; its policies in relation to slavery and human trafficking; its due diligence processes in relation to slavery and human trafficking in its business and supply chains (Section 5). What is particularly important is that those duties are enforceable: the Secretary of State is entitled to initiate civil proceedings in the High Court, seeking an injunction for an organization that has failed to issue the statement (Section 11).[80] It must be noted that the effectiveness of the UK Modern Slavery Act has been questioned: the practice of companies submitting vague and generic statements has provoked calls for further reforms of the act.[81] Furthermore, we have to realize that it does not introduce any revolutionary changes: G. LeBaron and A. Rühmkorf remark that "rather than imposing new standards onto companies, or requiring companies to report on a standardized set of indicators, transparency legislation seeks to encourage companies to strengthen the private governance mechanisms such as codes of conduct and auditing and their commercial power to transform supplier behaviour"; they argue that such a regulation "has a high degree of hybridity, insofar

[79] *Historic law to end Modern Slavery passed*, GOV.UK News Story, 26 March 2015, https://www.gov.uk/government/news/historic-law-to-end-modern-slavery-passed, accessed 23 October 2020.

[80] Modern Slavery Act 2015, https://www.legislation.gov.uk/ukpga/2015/30/contents/enacted, accessed 25 October 2020.

[81] K. Steiner-Dicks, *'We know most global companies have modern slavery in their supply chains'*, Reuters Events, 6 August 2019, https://www.reutersevents.com/sustainability/we-know-most-global-companies-have-modern-slavery-their-supply-chains#.XUxEml4Jm-o.twitter, accessed 23.10.2020.

as it reinforces private governance tools rather than creating new public standards or enforcement mechanisms".[82]

Another example from state practice could be the French Law on Due Diligence adopted in February 2017.[83] In the recent expert briefing requested by the European Parliament's Subcommittee on Human Rights (DROI) the UK Modern Slavery Act and the French Law on Due Diligence are juxtaposed as illustrative of two distinct regulatory models: while the UK law represents a reporting (transparency) model, the French law is an example of the due diligence model.[84]

C. Lavite describes it as "furthering the ambition (...) to achieve more than an elaborated communication exercise," since the companies are not only expected to report but also must implement and monitor the efficiency of their so-called vigilance plans.[85] The regulations apply to companies incorporated or registered in France for two consecutive fiscal years that either employ at least 5,000 people themselves and through their French subsidiaries, or employ at least 10,000 people themselves and through their subsidiaries located in France and abroad.[86] The duty of care has three dimensions, as S. Cossart, J. Chaplier, and T. Beau De Lomenie explain: elaboration, disclosure, and effective implementation of a vigilance plan.[87] Just like in the case of the British legislation, there are detailed rules listing what such a plan shall include: generally, it shall contain measures of vigilance that are reasonable to adequately identify risks and to prevent serious violations of human rights and fundamental liberties, harms the health and safety of people, as well as the environment that results from activities carried out by business enterprises, directly or through their subsidiaries.[88] Such measures encompass, i.a., a mapping of

82 G. LeBaron, *Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance*, Global Policy 2017, Vol. 8, Supplement 3, p. 20.

83 S. Cossart, J. Chaplier, T. Beau De Lomenie, *The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All*, Business and Human Rights Journal 2017, Vol. 2, p. 317.

84 Directorate-General for External Policies. Policy Department, *Human Rights Due Diligence Legislation – Options for the EU*, Briefings requested by the DROI subcommittee 2020, p. 11-12.

85 C. Lavite, *The French Loi de Vigilance: Prospects and Limitations of a Pioneer Mandatory Corporate Due Diligence*, Verfassungsblog On Matters Constitutional, 16 June 2020, https://verfassungsblog.de/the-french-loi-de-vigilance-prospects-and-limitations-of-a-pioneer-mandatory-corporate-due-diligence/, accessed 24 October 2020.

86 S. Cossart, J. Chaplier, T. Beau De Lomenie, *The French Law on Duty...*, op. cit., p. 320.

87 Ibid.

88 LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000034290626/, accessed 27 October 2020.

risks that serves to identify, analyze and rank them, as well as procedures evaluating the situation of subsidiaries, subcontractors, and suppliers with whom a business enterprise maintains commercial relations. In terms of implementation, however, as Lavite argues, little guidance is offered and the obligation seems to echo soft law standards.[89] When it comes to enforcement, if a company does not fulfill those requirements, any party can formally notify the company to comply with its duties; if three months after issuance of such a notification the business enterprise does not comply, an injunction of a competent judge can be sought (it is possible to impose a periodic penalty upon the enterprise).[90] After all, similarly to the UK Modern Slavery Act, the French Law has brought rather underwhelming results in reality: French multinational corporations "have not responded to the exercise well enough", as C. Barbière observes, citing a report by a group of NGOs, while the French government was rather restrained in enforcing compliance.[91]

This trend is not solely noticeable on the national level, as there are ongoing discussions about the EU corporate due diligence legislation. In April 2020 the EU Commissioner for Justice, D. Reynders, stated his commitment to a legislative initiative on mandatory human rights and environmental due diligence obligations for EU companies in 2021.[92] The work is in progress: in September 2020 the Committee on Legal Affairs of the European Parliament published a draft report with recommendations to the Commission on corporate due diligence and corporate accountability that contained a text of a proposed directive, which is largely based on the UNGPs.[93] The announced legislation has already received support from such stakeholders as business corporations (including Adidas, Nestlé, and Aldi)[94] as well as the organizations of civil society (among them: Amnesty International, European Coalition for Corporate Justice and Oxfam).[95]

89 C. Lavite, *The French Loi de Vigilance…*, op. cit.

90 Ibid.

91 C. Barbière, *France's 'Rana Plaza' law delivers few results*, EURACTIV, 25 February 2019, https://www.euractiv.com/section/development-policy/news/french-law-on-multinationals-responsibility-for-workers-abroad-achieves-few-results/, accessed 24 October 2020.

92 O. Martin-Ortega, C. Methven O'Brien, *Mandatory Human Rights…*, op. cit.

93 Committee on Legal Affairs, European Parliament, *DRAFT REPORT with recommendations to the Commission on corporate due diligence and corporate accountability*, 11 September 2020, https://www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf, accessed 24 October 2020.

94 *Support for EU framework on mandatory human rights and environmental due diligence*, 2 September 2020, https://media.business-humanrights.org/media/documents/EU_Business_Statement_Mandatory_Due_Diligence_02092020.pdf, accessed 24 October 2020.

95 *An EU mandatory due diligence legislation to promote businesses' respect for human rights and the environment*, September 2020, https://www.amnesty.org/download/Documents/IOR6029592020ENGLISH.PDF, accessed 24 October 2020.

Could those legislative developments affect the position of Facebook when it comes to its activities in Myanmar? The convergence of responsibility and duty in international law cannot be considered improbable — not within a more distant time horizon at least. Hypothetically, one could imagine that the development of a new norm of international custom is taking place right now: international custom being one of the sources of international law, defined in Article 38 of the Statute of the ICJ as evidence of a general practice accepted as law.[96] The UNGPs, as a soft law instrument, could be perceived as a precursor for hard law — there is a commonly shared belief that states habituated to nonbinding norms might accept them over time as international custom, just like it happened in the case of the Universal Declaration of Human Rights.[97] The practice of states described above could play in this context a dual role. Firstly, as noted by K. Wolfke, since "the national law of a State or group of States can not only serve as a model to the other States, but it can also initiate international practice, and thus lead to the formation of an international custom",[98] it could be considered a factor in the formation of a potential international custom. On the other hand, national legislation might serve as evidence of an international custom already existing: according to Wolfke, the International Law Commission often relies on it in the codification of some branches of international law ("In then draft-schemes, the rapporteurs of the Commission make full use of all possible material, including national legislation, for ascertaining the content of customary rules of international law. Moreover, the Commission takes account of this legislation indirectly, when States base on their legislation their opinions of the drafts of the Commission").[99] The practice must meet certain criteria: as the ICJ pointed out in the Columbian-Peruvian Asylum case, it shall be "constant and uniform",[100] or, to cite its judgment in the North Continental Shelf case, "extensive and virtually uniform".[101] Even though international law does not impose any requirements as to minimum duration of the practice,[102] it still seems far too early to assume that the national legislation regarding mandatory human rights due diligence is demonstrative of a practice that is uniform (or virtually uniform) and constant — and there still remains an issue of the subjective element of a custom (*opinio iuris*

[96] United Nations, *Statute of the International Court of Justice*, 18 April 1946, https://www.refworld.org/docid/3deb4b9c0.html, accessed 26 October 2020.

[97] L.R. Helfer, I.B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, Michigan Journal of International Law 2016, Vol 37, Issue 4, p. 602.

[98] K. Wolfke, *Custom in Present International Law*, Zakład Narodowy im. Ossolińskich – Wydawnictwo, Wrocław 1964, p. 80-81.

[99] Ibid., p. 147.

[100] *Colombian-Peruvian asylum case*, Judgment, I.C.J. Reports 1950, p. 276.

[101] *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, para. 74.

[102] Ibid, para. 73.

sive necessitatis) that would have to be demonstrated separately, even though such a proof could rely on national legislation as well.[103]

Yet even if national legislation leads to the formation of an international custom, another hurdle would have to be overcome: could we consider Facebook bound by it as traditionally the international custom binds only states? In the draft conclusions on identification of customary international law presented by the International Law Commission in 2018, the dominant narrative places states in the spotlight: Conclusion 4, which concerns the requirement of practice as a constitutive element of international custom, underlines that the requirement refers primarily to the practice of States, while "conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law;" it might barely serve some function when it comes to assessing the practice of States.[104] Once again, the question is hypothetical but the prospect of the development of norms of customary international law that would be binding on business enterprises such as Facebook is not entirely unrealistic. There is already a precedent for that in international humanitarian law: we have to realize that customary rules in that area are binding on non-state actors, even though they do not participate in their formation.[105] This is expressly confirmed by the International Committee of the Red Cross in its research on customary international humanitarian law.[106] What we are currently witnessing is a process extended over time and it must be accepted that besides from fueling speculations about how institutions and rules are going to evolve in a more distant future, at its current stage this potential transformation of "soft" due diligence into a legal obligation is not relevant for holding Facebook accountable for its activities in Myanmar.

5.4. When you seek responsibility, you have to turn back to a state

In March 2019 Zuckerberg published an opinion in *The Washington Post*, calling governments to take action: he wrote, "I believe we need a more active role for governments and regulators. By updating the rules for the Internet, we can preserve what's best about it — the freedom for people to express themselves and for entrepreneurs to build new things — while also protecting society from broader

[103] International Law Commission, *Report of the International Law Commission Seventieth session (30 April–1 June and 2 July–10 August 2018)*, p. 139-140.

[104] Ibid., p. 130.

[105] J.-M. Henckaerts, *Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law*, Collegium 2003, No. 27, p. 128.

[106] ICRC, *Customary international humanitarian law: questions & answers*, 15 August 2005, https://www.icrc.org/en/doc/resources/documents/misc/customary-law-q-and-a-150805.htm, accessed 26 October 2020.

harms".[107] Ultimately, the case of Facebook in Myanmar proves that, within the framework established by the UNGPs, legal responsibility can only be achieved through states; states remain in fact "alpha and omega".

The most fundamental principle is voiced in Rule 1 of the Guiding Principles, according to which states must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This duty is therefore imposed upon states within territories of which abuses occur or those which have jurisdiction over given business enterprises. In the case in question two jurisdictional links could be established *prima facie*: one, territorial — tying activities of Facebook to Myanmar (which, unless the political situation changes dramatically, cannot be expected to display any willingness toward pursuing Facebook's responsibility for participating in genocide);[108] the other one based on its act of incorporation: Facebook is an American company, registered in Menlo Park, California.[109] The length of this article does not permit to delve deeper into details of the issue of who has jurisdiction over Facebook, even though it is worth to be aware that in a few cases courts in states other than the United States decided that they had jurisdiction to rule a case against Facebook (for instance, in France or Austria).[110] Extraterritorial application of human rights obligation of states is yet another controversial and, as noted by D. Augenstein and D. Kinley, "underexplored" subject.[111] In the commentary to the Guiding Principles we can read that "at present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or

[107] M. Zuckerberg, *The Internet needs new rules. Let's start in these four areas*, The Washington Post, 30 March 2019, https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html, accessed 26 October 2020.

[108] See: Human Rights Council, *About a "near complete absence of accountability at the domestic level" in Myanmar: Report of the independent international fact-finding mission on Myanmar*, Human Rights Council Forty-second session, 9-27 September 2019, https://undocs.org/en/A/HRC/42/50, accessed 28 October 2020.

[109] United States Securities and Exchange Commission Washington, D.C. 20549 Form S-1 Registration statement, https://www.sec.gov/Archives/edgar/data/1326801/000119312512034517/d287954ds1.htm, accessed 27 October 2020.

[110] European Digital Rights (EDRi), *The tales of Facebook's jurisdiction: Nudes, Cookies and Schrems*, European Digital Rights (EDRi) Blog, 24 February 2016, https://edri.org/our-work/the-tales-of-facebooks-jurisdiction-nudes-cookies-and-schrems/, accessed 27 October 2020.

[111] D. Augenstein, D. Kinley, *When Human Rights 'Responsibilities' become 'Duties': The Extra-Territorial Obligations of States that Bind Corporations*, Sydney Law School Research Paper 2012, No. 12/71, p. 3.

jurisdiction".[112] The authors of the UNGPs are reluctant to engage in the debate on extraterritoriality; they even introduce a distinction between "direct extraterritorial jurisdiction" and "domestic measures with extraterritorial implications", seemingly, as Augenstein and Kinley write, with "purpose of mitigating concerns that the extra-territorial regulation of business activities may interfere with the sovereign territorial rights of other states".[113] On the one hand, it may seem that absence of rules "that address the parameters for states' obligations to regulate the activities of companies domiciled in their jurisdiction, registered under their laws, with administration and significant business operations in their territory" in the UNGPs is a dangerous misstep.[114] However, this approach, even if overly cautious, turns out to quite aptly reflect the reality that the reach of jurisdiction depends on the state of facts in a specific case: valuable opinion on that matter has been presented by the UN Human Rights Committee that declared: "States Parties are required (...) to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party".[115] In consequence, with the tools we are equipped with at this moment, in order to determine the basis of jurisdiction in the meaning of Rule 1 of the UNGP we have to carry out the test of *de facto* control.

What is clear is that states must protect against human rights abuses within their jurisdiction (which should be determined on the basis of facts in a given case) — and the commentary to the Guiding Principles defines this duty as a standard of conduct, explaining that states are not *per se* responsible for human rights abuses by private actors.[116] Such a formulation of this duty is pragmatic in that it significantly limits state responsibility to cases where "it is proven that the state has failed to take all reasonable and appropriate measures to prevent, investigate and redress the human rights violation".[117]

---

112 UNGP, p. 3-4.

113 D. Augenstein, D. Kinley, *When Human Rights ‚Responsibilities'…*, op. cit., p. 9.

114 D. Cerquiera, A. Montgomery, *Extraterritorial obligations: a missing component of the UN Guiding Principles that should be addressed in a binding treaty on business and human rights,* Justicia en las Américas, Blog de la Fundación para el Debido Proceso, 8 February 2018, https://dplfblog.com/2018/02/08/extraterritorial-obligations-a-missing-component-of-the-un-guiding-principles-that-should-be-addressed-in-a-binding-treaty-on-business-and-human-rights/, accessed 27 October 2020.

115 Human Rights Committee, *General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, para. 10.

116 United Nations Guiding Principles..., op. cit., p. 3.

117 D. Augenstein, D. Kinley, *When Human Rights 'Responsibilities'…*, op. cit., p. 20.

Once again we are dealing with the due diligence standard, though this time with another of its varieties: the due diligence of states. It is worth noticing that the Draft articles of responsibility of states for internationally wrongful acts (hereinafter: ARSIWA) do not refer to this concept at all.[118] A. Nollkaemper and I. Plakokefalos argue that the ICJ, even though it has dealt with it several times, has never specified precisely what a duty of prevention actually implies — at least not until its judgment in the Pulp Mills case,[119] when the ICJ has elaborated on this principle, defining a due diligence obligation as "an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party".[120] Due diligence of a state is dependent on the fact of exercising some degree of effective control, "whether legally or illegally, over the territory, from inside or outside its borders",[121] while at the same time the stricter criteria of the attribution of conduct of private actors to the state have not been fulfilled.[122] Attribution of the conduct of Facebook to the United States under Article 8 of ARSIWA[123] is clearly off the table, yet it is not difficult to imagine that the USA, as the state where Facebook is incorporated, is exerting some substantial degree of control and has a certain regulatory power over it, therefore the due diligence requirement would apply to it.

Bonnitcha and McQuordale write that "relevant factors in determining whether a state's conduct in a particular fact scenario has met the standard of due diligence include the degree of the risk of harm and the resources, both economic and technological, available to the state".[124] The commentary to Rule 1 provides that states "should consider full range of permissible preventative and remedial measures,

[118] International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* 2001.

[119] A. Gattini, *Breach of International Obligations*, in: A. Nollkaemper, I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law. An Appraisal of the State of the Art*, Cambridge University Press, Cambridge 2014, p. 44-45.

[120] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, para. 197

[121] V. Lanovoy, *Complicity in Internationally Wrongful Act*, in: A. Nollkaemper, I. Plakokefalos (eds.), *Principles of Shared Responsibility in International Law. An Appraisal of the State of the Art*, Cambridge University Press, Cambridge 2014, p. 146.

[122] J. Bonnitcha, R. McCorquodale, *The Concept of 'Due Diligence'...*, op. cit., p. 906.

[123] Article 8 of the ARSIWA: *Conduct directed or controlled by a State The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.*

[124] J. Bonnitcha, R. McCorquodale, *The Concept of 'Due Diligence'...*, op. cit., p. 906.

including policies, legislations, regulations and adjudication".[125] Which of those measures is the USA employing with regard to Facebook? *The New York Times* reported in October 2020 that the Federal Trade Commission was "moving closer to a decision about filing an antitrust lawsuit against Facebook for its market power in social networking"; at the same time conducting an investigation of incidents of privacy violations, including its role in the Cambridge Analytica scandal.[126] The U.S. Congress has not adopted so far any Internet-specific regulation that would adequately respond to the current challenges, while Facebook remains shielded from liability for content posted by its users by Section 230 of the Communications Decency Act of 1996.[127] This immunity extends to hate speech; Facebook cannot be held liable for not removing it — actually, both Republicans and Democrats agree that this law needs to be amended, but have different views as to "why" and "how", and so far no meaningful steps have been taken.[128]

In consequence, it could be argued that the passivity of the American legislator who has permitted Facebook to act in virtually a legal vacuum for so long, is equal to a failure to comply with the states' due diligence standard. The USA could have imposed on Facebook a legal obligation to carry out mandatory human rights due diligence which it could have enforced through domestic measures with extraterritorial implications; but there was not such regulation in 2018 and it has not been introduced until now; in terms of offering potential remedies to the Rohingya victims, the Section 230 definitely cuts off the path to litigation — the Section 230 which the Congress is, once again, capable of eliminating. Within the framework established by the UNGPs such an omission, non-performance of any substantial action, either to prevent abuse or to provide remediation, could be considered a violation of the state duty to protect human rights.

6. Conclusion

Any extreme position on the relevance of the UNGPs to adverse human rights impacts produced by Facebook in Myanmar would be unjustified and impossible

[125] United Nations Guiding Principles..., op. cit., p. 3.

[126] C. Kang, *F.T.C. Decision on Pursuing Facebook Antitrust Case Is Said to Be Near*, The New York Times, 22 October 2020, https://www.nytimes.com/2020/10/22/technology/facebook-antitrust-ftc.html, accessed 27 October 2020.

[127] 47 U.S. Code § 230 - Protection for private blocking and screening of offensive material, https://www.law.cornell.edu/uscode/text/47/230, accessed 27 October 2020.

[128] D. Wakabayashi, *Legal Shield for Social Media Is Targeted by Trump*, The New York Times, 28 May 2020, https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html, accessed 27 October 2020.

to defend: condemning them as useless would be an obvious exaggeration; hailing them as a perfect solution to the problem would be demonstrative of a blissful ignorance. Promises and limitations of the Guiding Principles are encoded in their DNA: it is crucial to remember that this soft law instrument "sought to capture the essence of the emerging diffusions of governance among an emerging constellation of distinct political organizations only one group of which are nation-states" and attempted to "establish a framework within which these (...) groups might harmonize their interactions (...) in the service of a singular objective, the safeguarding of the human rights of individuals and communities against deprivations proceeding from economic activity".[129] Regulation is not only achieved through law, but through policy as well — policy "as a means of extending beyond the constraints of law in the face of its irrelevance in areas where state may engage in activity but within which the traditional mechanisms of law prove inadequate".[130]

The framework of the Guiding Principles can undoubtedly be applied to the conduct of Facebook in Myanmar: it is possible because they "move beyond 'the conceptual shackles' of traditional international human rights law,"[131] and permit to circumvent doctrinal dilemma concerning attribution of international personality. The principles, by referring to internationally recognized human rights, lead us to the International Covenant on Civil and Political Rights with its guarantees of freedom of speech and the prohibition of propaganda for war and hate speech, thus confirming that Facebook is in no way exempt from responsibility to respect those rules, and — even though the authors of the ICCPR designated them with states in mind — they can still inform and shape the behavior of a business enterprise. The due diligence process, prescribed by Rule 17, might still need some clarifications and further studies, yet it still is a standard against which Facebook's actions can be judged and it offers grounds to definitely conclude that the social media giant has failed to do what had been expected of it. It can reasonably be assumed that if Facebook had earnestly carried out human rights due diligence and fully complied with human rights principles, it might have prepared a timely and effective response to ban the violence-inciting content. This is a clear manifestation of the approach chosen by Ruggie in drafting the Guiding Principles which he calls "principled pragmatism" and which is based on the view of international law "as a tool for collective problem solving, not an end in itself".[132] The UNGPs however do not

[129] L. C. Backer, *Governance polycentrism or regulated self-regulation*, in: K. Blome, A. Fischer-Lescano, H. Frank and others (eds.), *Contestested Regime Collisions. Norm Fragmentation in World Society*, Cambridge University Press, Cambridge 2016, p. 202.

[130] Ibid., p. 203.

[131] J. G. Ruggie, J. F. Sherman, III, *The Concept of 'Due Diligence'...,* op. cit., p. 926.

[132] J. G. Ruggie, *Hierarchy or Ecosystem? Regulating...*, op. cit., p. 59.

offer any paths to holding Facebook accountable in the strict meaning of this term for its failure to carry out due diligence — without legal duty there cannot be legal consequences. Notwithstanding this fact, it is crucial to stay alert of developments in this area: national legislation on mandatory human rights diligence might trigger the formation of new norms of international customs, and responsibility could at some point transform into a duty; yet — to put it bluntly — we are not there yet.

The temptation to speak in the language of legal obligations still persists: in international law, within the framework of the UNGPs, legal responsibility remains however reserved to states. States have a duty to protect human rights and to provide victims of abuses with remedies. If we want to point the finger at a subject of international law whose responsibility could fit into the traditional mold, that must be none other than a state. A discussion about regulating social media companies is already taking place in the United States — it might be worthwhile to put it in the context of states' duty of due diligence in international law and consider whether the current lack of regulation does not imply a violation of an obligation.

Summary

The article concerns the role of Facebook in human rights abuses in Myanmar and seeks to examine how its actions can be addressed within the framework provided by the United Nations Guiding Principles on Business and Human Rights (the UNGPs).

Beginning with the uncertainty surrounding the status of corporations in international law, the article emphasizes the distinction between the duty of states to protect human rights and the responsibility of business enterprises to respect human rights. Subsequently, it proceeds to indicate specific international human rights norms that could have guided the conduct of Facebook and that it was expected to respect: Articles 19 and 20 of the International Covenant on Civil and Political Rights. Next, it provides an analysis of human rights due diligence standard, prescribed by the UNGPs, demonstrating how it could have been applied in the given state of facts and how Facebook has failed to meet it. It is also argued that mandatory human rights due diligence, though gradually being implemented in numerous domestic legal systems, has not yet transformed into an obligation of international law that would be binding on business enterprises.

Finally, the article highlights the position of states as the main actors in international law — at its current stage of development — that are bound by a different due diligence standard that is specific to them. It concludes with a thesis that if states fail to discharge their proper duties to regulate activities of companies operating within their jurisdiction and to provide victims of human rights abuses with an access to remedy, they can incur international legal responsibility.

Key words: Due diligence, human rights, Facebook, Myanmar

Facebook w Mjanmie: trudności i możliwości związane z zastosowaniem wytycznych onz dotyczących biznesu i praw człowieka wobec serwisu społecznościowego
Streszczenie

Artykuł dotyczy roli, jaką Facebook odegrał w naruszeniach praw człowieka na terytorium Mjanmy; jego celem jest ustalenie, w jaki sposób jego postępowanie nadaje się do ocenienia na gruncie Wytycznych ONZ dotyczących biznesu i praw człowieka.

Zaczynając od niejasnego statusu korporacji w prawie międzynarodowym, artykuł eksponuje rozróżnienie pomiędzy zobowiązaniem państw do ochrony praw człowieka, a odpowiedzialnością przedsiębiorstw za ich poszanowanie. Następnie wskazuje konkretne międzynarodowe normy praw człowieka, którymi Facebook powinien był się kierować i których respektowania należało od niego wymagać: mianowicie, art. 19 oraz 20 Międzynarodowego Paktu Praw Obywatelskich i Politycznych. Artykuł przedstawia analizę zalecanego przez Wytyczne standardu należytej staranności, demonstrując, w jaki sposób mógłby on zostać odniesiony do stanu faktycznego w sprawie oraz wskazując uchybienia po stronie Facebooka w zakresie jego realizacji. Zaznacza się przy tym, że obligatoryjna należyta staranność w obszarze praw człowieka, aczkolwiek stopniowo implementowana do krajowych ustawodawstw poszczególnych państw, nie przekształciła się na chwilę obecną w zobowiązanie, które mogłoby być dla przedsiębiorstw wiążące na gruncie prawa międzynarodowego.

Ostatecznie artykuł podkreśla znaczenie państw jako kluczowych aktorów — biorąc pod uwagę obecny etap rozwoju prawa międzynarodowego — zobowiązanych do przestrzegania im właściwego standardu należytej staranności. W razie niewywiązania się ze swoich zobowiązań w zakresie przyjęcia regulacji dotyczących działalności korporacji objętych ich jurysdykcją, jak również zapewnienia dostępu do środków naprawczych ofiarom naruszeń, poniosą one odpowiedzialność międzynarodowoprawną.

Słowa kluczowe: Należyta staranność, prawa człowieka, Facebook, Mjanma