

SPECIFIC INSTANCE UNDER THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES SUBMITTED TO THE REPUBLIC OF IRELAND NATIONAL CONTACT POINT (“NCP”) FOR THE OECD GUIDELINES

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1. Introduction

This specific instance outlines breaches of the OECD Guidelines for Multinational Enterprises by Meta Platform, Inc., (hereafter “Facebook”) that contributed to the commission of widespread atrocities and human rights violations in Myanmar’s Rakhine state that resulted in the displacement of approximately 750,000 Rohingya into Cox’s Bazar in Bangladesh in 2017. The specific instance is directed at the Irish NCP against Facebook for the actions of its Irish subsidiary ‘Facebook Ireland Limited’, which is responsible for Facebook’s global operations outside of the United States and Canada, and where policies related to their Myanmar operations are made and implemented.

As is well-documented by numerous human rights bodies, including the United Nations Independent International Fact Finding Mission on Myanmar (“IIFMM”), military operations conducted by the Burmese military in 2017 forcibly displaced 750,000 Rohingya into neighbouring Bangladesh, and were accompanied by numerous other egregious human rights abuses. The military used Facebook to incite violence, which resulted in numerous human rights violations suffered by the Rohingya, including: the right to be free from torture and inhumane and degrading treatment, and their rights to life, housing, food and education as guaranteed by the Universal Declaration of Human Rights (“UDHR”). The IIFMM concluded that Facebook’s role in spreading the hate speech that fuelled the violence in Rakhine state in 2017 was ‘significant.’ Facebook itself acknowledged that it did not do enough to prevent its platform from being used to incite violence.

Despite Facebook’s acknowledgment that it did not do enough to prevent the violence, it has never provided any form of remediation to the Rohingya victims for the human rights violations to which it contributed. Representatives of the Rohingya community, including individuals within the sixteen people submitting this complaint, have made modest requests for Facebook to fund education facilities in Cox’s Bazar, which Facebook has rejected. In the latest communication, and after Rohingya communities spent three-months developing a proposal, Facebook responded that they do not directly engage in ‘philanthropic activities’ and that while it does partner on some initiatives, these ‘generally have to have a more direct link to [Facebook’s] products, internet literacy or digital empowerment.’ The Complainants reject the notion that Facebook providing educational facilities amounts to ‘philanthropic activity’ but is rather a remedy which is owed by Facebook to the Rohingya as provided for under the United Nations Guiding Principles on Business and Human Rights (“UNGPs”) and the OECD Guidelines.

As an organisation that qualifies as a multinational enterprise under the OECD Guidelines, Facebook should be held to the standards of the OECD Guidelines. The Complainants submit that Facebook is in breach of the Guidelines because it: 1) failed to conduct adequate due diligence for its business operations in Myanmar; 2) contributed to human rights violations suffered by the Rohingya in 2017 through its acts and omissions; 3) did not have a policy commitment to respect internationally recognised human rights as at 2017, and has since issued one that is inadequate; and 4) failed to provide a remedy despite contributing to the human rights violations in question.

2. Criteria for making an initial assessment

The Complainants respectfully submit that the issues raised in this complaint are *bona fide* and relevant to the implementation of the OECD Guidelines. The following sections address the criteria that the NCP should consider when making an initial statement.¹

2.1. Identity of the party concerned and its interest in the matter

2.1.1. *The MNE: Facebook (Meta Platforms, Inc.)*

The OECD Guidelines are applicable to Facebook. The Guidelines state that a precise definition of multinational enterprises (MNE) is not required for their purpose. Further, the Guidelines are applicable to all entities in the MNE (parent company and/or local enterprises).²

Facebook is a MNE as it engages in a profit-making business that serves users globally. Facebook's commercial activities have made it one of the most profitable MNEs in the world. Its global profit margin in 2017 was further increased through availing of separate corporate structures in Ireland. In 2017, Facebook was the 4th most profitable tech company in the world, with a market value estimated at \$407.3 Billion.³ As at 2020, it had 2.8 billion users, and an annual net income of 29.15 billion USD.⁴ Facebook's net global income in 2017 was 15.934 billion USD.⁵

Under Facebook's corporate structure, while its headquarters are located in the United States, its subsidiary in Ireland is responsible for global operations,⁶ including in Myanmar. Facebook Ireland Limited was incorporated on 10 June 2008. Its office is located in 4 Grand Canal Square, Grand Canal Harbour, Dublin, 2 Ireland. It is contactable at the following telephone number: 353-16-5054-34800.⁷

Facebook Ireland offers online social media and networking services, and serves clients worldwide.⁸ According to Facebook's website, its Dublin office serves as its international

¹ *OECD Guidelines for Multinational Enterprises*, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, I. Commentary on the Procedural Guidance for NCPs, Initial Assessment, p 82-83, para 25.

² *OECD Guidelines for Multinational Enterprises*, p 17, viewed 30 June 2021, <<https://www.oecd.org/daf/inv/mne/48004323.pdf>>. [accessed 24 April 2021]

³ OnlineSearch.net, 'Top 10 biggest tech companies in the world as of 2017 and their market values', 13 July 2017, viewed 28 May 2021, <<https://medium.com/@onlinesearchnet/top-10-biggest-tech-companies-in-the-world-as-of-2017-and-their-market-values-1af16609f858>>. [28 May 2021]

⁴ Statista, 'Facebook's revenue and net income from 2007 to 2020', viewed 30 June 2021, <<https://www.statista.com/statistics/277229/facebooks-annual-revenue-and-net-income/>>. [accessed 24 April 2021]

⁵ Ibid.

⁶ 'Facebook to Establish **International** (emphasis added) Headquarters in Dublin, Ireland, October 2', 2 October 2008' <https://about.fb.com/news/2008/10/facebook-to-establish-international-headquarters-in-dublin-ireland> [accessed 12 October 2021]; 'Case C-18-18, Eva Glawischnig-Piesczek v. Facebook, Opinion of Advocate General Szpunar' 4 June 2019, para 77' <<https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62018CC0018>>. [accessed 12 October 2021]

⁷ Facebook Ireland Ltd Bloomberg page, *Bloomberg*, viewed 28 May 2021, <<https://www.bloomberg.com/profile/company/0531606D:ID>>. [accessed 24 April 2021]

⁸ Ibid.

headquarters and the centre of Facebook’s international operations.⁹ Facebook’s Myanmar company, Facebook International Services (Myanmar), lists Ireland as the Principal Place of Business in Jurisdiction of Incorporation.¹⁰ Further, data relating to Facebook’s users in Myanmar is stored and controlled in Ireland.¹¹ Facebook Ireland is also responsible for implementing key aspects of Facebook’s policy. At the time of the 2017 operations against the Rohingya, the Myanmar military’s Facebook accounts were contractually located in the Dublin offices of Facebook Ireland.¹²

Key decisions with respect to Facebook’s content moderation are made by its Irish subsidiary. Information regarding the policies and practices of Facebook’s content moderation, or content review, were provided to Ireland’s Oireachtas in August 2018. Two senior managers in Ireland – Niamh Sweeney, the head of public policy, and Siobhán Cumiskey, the head of content policy – told deputies that while content review policies were formulated in the USA and India, decisions with regards specific content were dealt with in Ireland. Niamh Sweeney said: “*Anything that is escalated from our content reviewers, which might be unclear as to how it should be treated, is dealt with by Ms. Cumiskey’s team.*” Both the content reviewers and Siobhán Cumiskey were based in Ireland.¹³ Facebook’s moderators for Burmese content were located in Dublin. A former content moderator from the Dublin office recently sued Facebook before Irish courts for lasting psychological trauma he endured from reviewing images relating to the 2017 operations.¹⁴

Further, there is evidence to suggest that aspects of Facebook’s policy regarding community standards, as well as for bullying and harassment, are made at its Dublin office. Facebook when engaging Civil Society over policy reform has been put in contact with employees at Facebook’s

⁹ Facebook to Establish International Headquarters in Dublin, Ireland, October 2, 2 October 2008 <https://about.fb.com/news/2008/10/facebook-to-establish-international-headquarters-in-dublin-ireland> [accessed 12 October 2021]

¹⁰ Facebook International Services (Myanmar) Company Profile, <https://myco.dica.gov.mm/Corp/EntityProfile.aspx?id=2eb398b1-d6CC> (Note that this is no longer available, but VAI have a copy which we can provide as an attachment.)

¹¹ Facebook’s Privacy Policy Myanmar, available here <https://my-mm.facebook.com/about/privacy/update> [translated as: “*How do we process and transfer data as part of our global service? In line with this policy, we are sharing information within Facebook companies, both internally and externally, and globally, as well as globally. The information controlled by **Facebook Ireland** [emphasis added] may be transferred or broadcast outside of the United States or other countries where you reside for purposes set forth in this policy.*” “*If you have any query in regards to this policy, you may reach us as given below.. **Facebook Ireland Limited, 4 Grand Canal Square, Grand Canal Harbour, Dublin 2, Ireland***” [accessed 14 October 2021, and translated by a native Burmese speaker]

¹² Edward McGarr, ‘Ireland’s role in the Myanmar atrocities’, *McGarr Solicitors*, 2 September 2018, viewed 25 May 2021, <<https://www.mcgarrsolicitors.ie/2018/09/02/irelands-role-in-the-myanmar-atrocities/>>. [accessed 25 May 2021]

¹³ Titled: Moderation of Violent and Harmful Content on the Facebook Platform: Discussion, available on [Oireachtas website \[accessed on 29 November 2021\]](#)

¹⁴ Chris Gray, ‘I saw horrors posted on Facebook daily...and it nearly destroyed me’: Man hired to moderate content – including beheadings, graphic sex and even child murder – says more MUST be done to block harrowing uploads’, *Daily Mail*, 21 June 2020, viewed 15 May 2021, <<https://www.dailymail.co.uk/news/article-8441799/Man-hired-moderate-Facebook-content-says-block-harrowing-uploads.html>>. [accessed 29 September 2021]; Nick Wiggins and Damien Carrick, ‘Chris sorted through the ‘blood and gore’ on social media. Now he’s suing Facebook over PTSD’, *ABC News*, 26 February 2020, viewed 30 June 2021, see also same story reported in ABC: <<https://www.abc.net.au/news/2020-02-26/ex-facebook-moderator-suing-company-over-ptsd/11972364>>. [accessed 29 September 2021]

Dublin office.¹⁵ A Global Market specialist at Facebook’s Dublin office wrote that he “*led policy changes to Facebook’s Community Standards to better protect our users.*”¹⁶

Facebook has in the past used additional holding companies in Ireland. These were subsequently shut down as a result of a lawsuit by the US Internal Revenue Services that alleged Facebook used these holding companies to avoid payment of more than 9 billion USD in tax owed to the US government.¹⁷ In 2018, Facebook International holding company 1, incorporated in Ireland, recorded revenue of 30 billion USD, which was more than half of Facebook’s total global turnover of 56 billion.¹⁸ The same holding company recorded pre-tax profits of 13 billion USD in 2017, the year in which the operations against the Rohingya took place.¹⁹

2.1.2. Identity of the notifier

This complaint is being filed on behalf of sixteen victims of the 2017 clearance operations in Myanmar, who represent six community-based organisations in Cox’s Bazar refugee camp in Bangladesh, as well as youth and women leaders.

- Mohamed Nowkim is a Technician at the Arakan Rohingya Society for Peace and Human Rights (ARSPH), and a human rights activist in the camp. ARSPH is the largest camp-based civil society organisation in Cox’s Bazar refugee camp, which has a presence in all the camps, and representation amongst youth communities, women and elders.
- Mr Abdu Rohim is the Vice Chair of ARSPH.
- Mr Mohammed Jubayer is the Secretary of ARSPH.
- Mr Roshie Dullah is the Logistics Officer of ARSPH.
- Mr Mohammed Shoaibe is a teacher in ARSPH.
- Mr Mohammed Ayas is a teacher in ARSPH.
- Mr Mohamed Samin is a teacher in ARSPH.
- Ms Yasmin Ara is the founder of Rohingya Women Development Forum.
- Ms Omme Salma is a women’s leader within the camp.
- Ms Shaykotura is a women’s leader within the camp.
- Mr Mohamed Sadekis a teacher in ARSPH.
- Mr Yarsor Arfat is the co-founder of Rohingya Student Unity Rights.
- Ms Chekufa Ra is the founder of Rohingya Women Empowerment and Advocacy Network.
- Mr Mohamed Shah is a youth leader in the camp.
- Mr Junide is a youth leader in the camp.
- Mr Sayedollah is a youth leader in the camp.

¹⁵ These communications are confidential but can be provided upon request.

¹⁷ Julia Kollwe, ‘Facebook to close Irish holding companies at centre of tax dispute’, *The Guardian*, 28 December 2020, viewed 28 May 2021, <<https://www.theguardian.com/technology/2020/dec/27/facebook-to-close-controversial-irish-holding-companies>>. [accessed 24 April 2021]

¹⁸ Ibid.

¹⁹ Paul O’Donoghue, ‘Irish Facebook Branch Pays 1 per cent Global Tax’, *The Irish Times*, 24 December 2019, <<https://www.thetimes.co.uk/article/irish-facebook-branch-pays-1-per-cent-tax-02ztgstdq>> [accessed 29 November 2021]

Victim Advocates International (VAI) is providing technical assistance to the groups in notifying the complaint. VAI is a membership organisation for victims of serious international crimes, including war crimes, crimes against humanity, and genocide. VAI has obtained powers-of-attorney from each of these Complainants, and has Memorandums of Understanding (MOUs) with each of the groups they represent. Together, these groups represent thousands of Rohingya within the camps in Cox's Bazar Bangladesh. This complaint is the result of a culmination of efforts by the complainant groups to directly engage Facebook in negotiations, which Facebook ultimately rejected.

Please direct all correspondence to:

- Clare Brown, Deputy Director (Victim Advocates International, c.brown@victimadvocatesinternational.org).

2.2. Whether the issue is material and substantiated

The facts underlying this specific instance relate to human rights violations suffered by the Complainants when on the 24th and 25th of August 2017, the Burmese military (“the Tatmadaw”) together with local police and other actors launched a ‘clearance operation’ in Myanmar’s Rakhine state resulting in the deportation of 750,000 Rohingya into neighbouring Bangladesh. The IIFFMM concluded that the 2017 operations gave rise to numerous human rights violations guaranteed under the UN Charter, through the UDHR, as well as treaties to which Myanmar was a state party. The rights violations were as follows:

- the right to life – it is conservatively estimated that 10,000 Rohingya were killed during the operations.²⁰
- the right to security of the person, and the right to be protected from torture and ill-treatment – endemic rapes and sexual violence against women, girls, men and boys, giving rise to these violations.²¹
- the right to liberty and security of the person which were violated as a result of the arbitrary arrests and enforced disappearances of the Rohingya.²²
- the rights to adequate housing, food, and the right to highest attainable physical and mental health that resulted from the obliteration of their homes and villages, and concomitant violence – it is estimated that 750,000 Rohingya were displaced as a result of the operations.²³

The IIFFMM found the role of social media to be “significant”, noting that “*Facebook has been a useful instrument for those seeking to spread hate, in a context where, for most users, Facebook is the Internet.*” They concluded that Facebook posts and messages had led to real-world discrimination and violence, and that the response by Facebook had been “*slow and ineffective.*”²⁴ The 2017 operations were the culmination of decades of persecution and state

²⁰ Report of the Independent International Fact-Finding Mission on Myanmar (“IIFFMM”) (A/HRC/39/64), para 1275, viewed 30 June 2021, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_CRP.2.pdf>. [accessed 29 September 2021]

²¹ Ibid., para 1276.

²² Ibid., para 1277.

²³ Ibid., paras 1278-1282.

²⁴ Ibid., para 1351.

sanctioned violence meted out against the Rohingya by the Tatmadaw.²⁵ These operations built on other violent attacks against the Rohingya, including in 2016, when at least 1,500 Rohingya homes were destroyed and more than 69,000 Rohingya were displaced into Bangladesh.²⁶

The Complainants allege that Facebook's actions and omissions in the lead up to the 2017 clearance operations contravenes Facebook's responsibilities under the OECD Guidelines in four key respects.

2.2.1. Failure to carry out due diligence

Chapter II General Policy (A)(10): Enterprises should carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts [...], and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.

Chapter IV Human Rights (5): Enterprises should carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.

The Commentary on the Guidelines states: “For the purposes of the Guidelines, due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems.”²⁷

Actual impacts are impacts that have already occurred. Potential impacts are human rights impacts and adverse effects that might happen in the future. Companies are expected to address their actual adverse impacts through remediation and their potential adverse impacts through prevention or mitigation.²⁸

Due diligence is risk-based, meaning the measures that a company takes to address potential and actual adverse impacts should be commensurate to the severity and likelihood of the adverse impact to the rights holders.²⁹

²⁵ See 1982 Law which stripped the vast majority of Rohingya of their citizenship, *Burma Citizenship Law 1982*, arts 1-8, viewed 12 May 2021, <<https://www.refworld.org/docid/3ae6b4f71b.html>>; ‘III. Discrimination in Arakan’, *Human Rights Watch*, <<https://www.hrw.org/reports/2000/burma/burm005-02.htm#:~:text=Provisions%20in%20the%201982%20law.three%20types%20of%20Burmese%20citizenship.>>> [accessed 12 May 2021]; Andrew Selth, ‘The Rohingya crisis and Myanmar’s military responses’, *Lowy Institute*, 24 November 2017, <<https://www.lowyinstitute.org/the-interpretor/rohingyas-and-politico-military-strategies>>. [accessed 15 May 2021], Rohingya were subjected to violent attacks in 1978, 1991-1992, and again in 2016, see Rohingya refugee crisis’, *United Nations Office for the Coordination of Humanitarian Affairs*, <<https://www.unocha.org/rohingya-refugee-crisis>>. [accessed 15 May 2021]

²⁶ Human Rights Watch, ‘Burma: Security forces raped Rohingya women, girls’, 6 February 2017, <<https://www.hrw.org/news/2017/02/06/burma-security-forces-raped-rohingya-women-girls>>. [accessed 28 May 2021]; Andrew Selth, ‘Myanmar’s armed forces and the Rohingya crisis’, 17 August 2018, <<https://www.usip.org/publications/2018/08/myanmars-armed-forces-and-rohingya-crisis>>. [accessed 15 May 2021].

²⁷ OECD Guidelines, Commentary on Chapter II General Policies at para 14.

²⁸ Ibid.

²⁹ OECD Due Diligence Guidelines for Responsible Business Conduct, p 17.

Where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.³⁰

a. Failure to identify potential adverse human rights impacts

Facebook's popularity in Myanmar grew upon the deregulation of Myanmar's Telecommunications sector in 2013, after decades of oppressive military rule.³¹ The Complainants are not aware of any due diligence Facebook conducted prior to entering the telecommunications market in Myanmar. The only due-diligence conducted by Facebook of which the Complainants are aware is a Human Rights Impact Assessment ("HRIA") it commissioned after the 2017 operations and the publication of the IIFFMM Report in October 2018.

The Complainants contend that had a baseline assessment – such as that contained in the HRIA – been conducted, Facebook would have identified clear human rights risks that could be exacerbated by its product and services. Myanmar has a well-documented history of brutal militarised oppression of dissenters and political opponents, as well as state-sanctioned persecution and violence meted out against numerous ethnic minorities, including the Rohingya.

The persecution of ethnic minorities at the hands of the Tatmadaw was well documented by United Nations human rights bodies and civil society organisations since as early as the 1980s. In 1982, the Myanmar Government stripped the vast majority Rohingya of their citizenship status through a particularly stringent citizenship test.³² Rohingya people experienced 'violent attacks in 1978, 1991-1992, and again in 2016.'³³

Further, as highlighted by the IIFFMM, the domestic legal framework in Myanmar was characterised by a series of problematic laws which were used to silence activists, opposition leaders, and civil society actors.³⁴ A baseline assessment would have identified how the Tatmadaw used oppressive legislation to control the information landscape, and the risks of the social media platform being used as a further tool of suppression.³⁵

As stated in a report conducted by the Carr Centre for Human Rights Policy at Harvard Law School:

³⁰ OECD Guidelines, Commentary on Chapter II General Policies at para 19.

³¹ See Mark Latanero and Aaina Agarwal Carr Centre Discussion Paper, 'Human Rights Impact Assessment for AI: Learning from Facebook's Failure in Myanmar' "Carr Report", March 19 2021, p 5; see also, Steve Stecklow, 'Why Facebook is losing the war on hate speech in Myanmar', *Reuters*, 15 August 2018, <<https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/>>. [accessed 1 August 2018]

³² *Burma Citizenship Law 1982*, arts 1-8, viewed 12 May 2021, <<https://www.refworld.org/docid/3ae6b4f71b.html>>; 'III. Discrimination in Arakan', *Human Rights Watch*, <<https://www.hrw.org/reports/2000/burma/burm005-02.htm#:~:text=Provisions%20in%20the%201982%20law.three%20types%20of%20Burmese%20citizenship.>>> [accessed 12 May 2021]; Andrew Selth, 'The Rohingya crisis and Myanmar's military responses', *Lowy Institute*, 24 November 2017, <<https://www.lowyinstitute.org/the-interpretor/rohingyas-and-politico-military-strategies>>. [accessed 15 May 2021]

³³ 'Rohingya refugee crisis', *United Nations Office for the Coordination of Humanitarian Affairs*, <<https://www.unocha.org/rohingya-refugee-crisis>>. [accessed 15 May 2021]

³⁴ IIFFMM, paras 1294 to 1295, cited in Carr Report p 6.

³⁵ See Mark Latanero and Aaina Agarwal Carr Centre Discussion Paper, 'Human Rights Impact Assessment for AI: Learning from Facebook's Failure in Myanmar', March 19 2021, p 6.

“Given the potential harms, Facebook conducting business as usual in such a hot spot amounts to reckless social experimentation on a national scale by a US-based technology company, which had neither expertise nor physical presence in Myanmar. A baseline assessment would have determined that Facebook’s company mantra, “move fast and break things,” could exacerbate human rights risks, and that both its AI products and business strategy should be re-examined for the Myanmar market. If a company determined nonetheless to move forward in a human rights hot spot, subsequent reports confirming the risks would be sufficient evidence to support pausing and redirecting the company’s approach on human rights grounds.”³⁶

b. Failure to account for actual adverse impacts, and to prevent and mitigate additional potential adverse impacts

Not only did Facebook fail to conduct a baseline assessment to identify potential adverse human rights impacts of its services, it failed to prevent and mitigate additional adverse human rights impacts and account for actual ones as soon as they were brought to its attention. Facebook’s platform had previously been used to incite violence against the Rohingya and Muslims in the years leading up to the operations in 2012, 2014, and 2016. The IFFMM points to widely disseminated posts from early in 2012 alleging that a group of Rohingya men murdered a Buddhist woman to have contributed to violence in Rakhine state, as well as similar posts alleging the rape of a Buddhist women by Muslims to have led to riots in 2014.³⁷ Facebook was used to disseminate hate speech in the context of the 2016 operations, which resulted in the destruction of at least 1,500 Rohingya homes, as well as the forced displacement of more than 69,000 Rohingya into Bangladesh.³⁸ According to *The Guardian*, digital researcher and analyst Raymond Serrato examined about 15,000 Facebook posts from supporters of the hard-line nationalist Ma Ba Tha group. The earliest posts dated from June 2016 (before the October 2016 operations) and spiked on 24 and 25 August 2017 when the operations happened. The analysis showed that activity within the anti-Rohingya group, which had 55,000 members, “exploded [during this time period,] with posts registering a 200% increase in interactions.”³⁹

During these years preceding the clearance operations, activists and Burmese civil society warned Facebook about how its platform was being used to disseminate hate speech and disinformation against the Rohingya. From 2013-2015, activists and film-makers met with Facebook officials on this issue, even speaking directly to Facebook’s vice president of communications and public policy in 2014, and delivering a talk at Facebook’s headquarters

³⁶ Ibid, p 6.

³⁷ IFFMM, para 744, para 1347.

³⁸ Human Rights Watch, ‘Burma: Security forces raped Rohingya women, girls’, 6 February 2017, <<https://www.hrw.org/news/2017/02/06/burma-security-forces-raped-rohingya-women-girls>>. [accessed 28 May 2021]; Andrew Selth, ‘Myanmar’s armed forces and the Rohingya crisis’, 17 August 2018, <<https://www.usip.org/publications/2018/08/myanmars-armed-forces-and-rohingya-crisis>>. [accessed 15 May 2021].

³⁹ Raymond Serrato, in Libby Hogan and Michael Safi, ‘Revealed: Facebook hate speech exploded in Myanmar during Rohingya crisis’, *The Guardian*, 2 April 2018, <<https://www.theguardian.com/world/2018/apr/03/revealed-facebook-hate-speech-exploded-in-myanmar-during-rohingya-crisis>>. [accessed 15 May 2021]

which was attended by more than a dozen Facebook employees in 2015.⁴⁰ Civil society leaders communicated these issues to Facebook officials at length between 2015 and 2017, also visiting Facebook’s headquarters.⁴¹ These conversations took place with Facebook at the same time when Genocide Watch, in 2015, warned that Myanmar was at high risk of an outbreak of genocide against the Rohingya.⁴²

Despite Facebook being made aware of actual adverse impacts of its product, it failed to account for them, or put in place measures to prevent and mitigate potential adverse impacts in the future. Conversely, Facebook actively went about pursuing more aggressive business practices to widen their market share by introducing the “Free Basics” and “Facebook Flex” initiatives. These initiatives are discussed in more detail in the next section dedicated to Facebook’s contribution to adverse human rights impacts.

With respect to leverage, the HRIA commissioned by Facebook erroneously found that “Facebook’s leverage is significantly curtailed by the historical, political, and conflict-based local context that is often the root cause of security risks.”⁴³ Due diligence requirements are not lessened or eliminated by virtue of the conflict-based local context in which the business operations are taking place. This would enable corporations to absolve themselves of any due diligence obligations when operating in totalitarian states. Rather it is the historical, political and conflict-based local context that meant that the risk for operating in Myanmar was greater, and thus required enhanced due diligence. This is even more so given the well-documented history of persecution of the Rohingya at the hands of the Tatmadaw, and thus the increased likelihood of incendiary hate-speech being amplified by Facebook’s algorithmic processes. The OECD Due Diligence Guidance for Responsible Business Conduct reflects this by recommending that MNEs gather information to understand the high-level risks of adverse impacts related to the sector, including *inter alia*, conflict.⁴⁴

In addition, the HRIA fails to extend Facebook’s due diligence requirements as encompassing a review of the data-mining and algorithmic aspects of its business model as a whole. As Amnesty International notes, Facebook’s business model that “depends on invasive data-driven operations amounting to mass corporate surveillance must find ways to transition to a rights-respecting business model” which requires “human rights due diligence policies and processes to address the systemic and widespread human rights impacts of their business models as a whole.”⁴⁵

⁴⁰ Steve Stecklow, ‘Why Facebook is losing the war on hate speech in Myanmar’, *Reuters*, 15 August 2018, viewed 1 August 2018, <<https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/>>. See Mark Latanero and Aaina Agarwal Carr Centre Discussion Paper, ‘Human Rights Impact Assessment for AI: Learning from Facebook’s Failure in Myanmar’, March 19 2021, p 6.

⁴¹ Ibid.

⁴² Christina Szurlej, ‘A 2015 genocide warning: Applying Stanton’s 10 stages to the Rohingya of Myanmar’, *Genocide Watch*, 12 December 2019, <<https://www.genocidewatch.com/single-post/2019/12/11/a-2015-genocide-warning-applying-stantons-10-stages-to-the-rohingya-of-myanmar>>. [accessed 28 May 2021]

⁴³ Business for Social Responsibility, ‘Human Rights Impact Assessment’, October 2018, p 35, <https://fbnewsroomus.files.wordpress.com/2018/11/bsr-facebook-myanmar-hria_final.pdf> [accessed 28 May 2021].

⁴⁴ OECD Due Diligence Guidance for Responsible Business Conduct, p 25.

⁴⁵ Amnesty International Report, *Surveillance Giants: How the Business Model of Google and Facebook Threatens Human Rights*, 21 November 2019, p 26, <<https://www.amnesty.org/en/documents/document/?indexNumber=pol30%2F1404%2F2019&language=en>>. [accessed 28 May 2021]

2.2.2. Facebook contributed to adverse human rights impacts as a result of its business operations, and acts and omissions in Myanmar

Chapter IV Human Rights (2): Enterprises should, within the context of their own activities avoid causing or contributing to adverse human rights impacts and address such impacts when it occurs.

The Commentary on the Guidelines define activities as including both actions and omissions.⁴⁶

A company *contributes* to an adverse impact if its activities, in combination with the activities of other actors, cause an impact, or if the activities of the company cause, facilitate or incentivise another actor to cause an adverse impact.⁴⁷

The Commentary on the Guidelines states that: “Where an enterprise contributes or may contribute to such impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.”⁴⁸

Facebook’s omissions contributed to the human rights violations, namely by allowing hate-speech to flourish on the platform – with content at times remaining online or years – and for its failure to adequately moderate content, or hire moderators that were attuned to Burmese language or culture.

There are many examples of hate speech against the Rohingya on Facebook. A Reuters investigative report released in 2018 chronicles over 1,000 of them, and demonstrates instances where government officials and other actors had posts that incited hatred of the Rohingya and called for their elimination, from as early as 2012, with some posts remaining online for 6 years.⁴⁹ The IFFMM found that given low digital and social media literacy in Myanmar, its use by the government contributed to users’ perception of Facebook as a reliable source of information.⁵⁰ It was not just ordinary users who posted hateful rhetoric against the Rohingya, but members of the Tatmadaw also. In early September 2017 as the operations were still underway, the most senior member of the Tatmadaw, General Min Aung Hlaing, posted the following:

“We openly declare that “absolutely, our country has no Rohingya race””.⁵¹; and

⁴⁶ OECD Guidelines, Commentary on Human Rights, para 42.

⁴⁷ Ibid., para 14.

⁴⁸ Ibid., para 42.

⁴⁹ Reuters, ‘Inside Facebook’s Myanmar operation Hatebook’, 15 August 2018, <www.reuters.com/investigates/special-report/myanmar-facebook-hate/>. [accessed 29 September 2021]

⁵⁰ IFFMM, para 1345.

⁵¹ Senior General Min Aung Hlaing Facebook quote, from Penny Green, Thomas McManus, and Alicia de la Cour Venning, *Genocide Achieved, Genocide Continues: Myanmar’s Annihilation of the Rohingya* (International State Crime Initiative, 2018), 13, from Senior General Min Aung Hlaing Facebook Page, <<https://www.facebook.com/seniorgeneralminaunghlaing/posts/1698274643540350>>. [accessed 13 November 2017]. The post went up on the 1 September 2017

‘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.’⁵²

The IIFFMM notes that Facebook failed to respond to complaints that its platform was being used to incite violence in the years leading up to the operation, and that its content moderation was inadequate. As demonstrated in the section dedicated to due diligence above, numerous actors warned Facebook of how its platform was being used to fan the flames of hatred against the Rohingya from 2013 to 2017. In 2018, a group of local civil society organisations in Myanmar wrote an open-letter in response to Facebook’s CEO, Mark Zuckerberg’s, claims that there were effective systems in place in Myanmar noting “*an over-reliance on third parties, a lack of a proper mechanism for emergency escalation, a reticence to engage local stakeholders around systemic solutions and a lack of transparency.*” The letter further went on to say this specific case “*epitomizes the kind of issues that have been rife on Facebook in Myanmar for more than 4 years* [emphasis added] *and the inadequate response from Facebook.*”⁵³ The IIFFMM further noted the lack of content moderators attuned to Burmese language and culture as contributing to the adverse human rights impact, and highlighted its own experience of Facebook’s slow and ineffective response when it reported a threat placed on a human rights defender for cooperating with the mission.⁵⁴

It was not just Facebook’s omissions which contributed to the violence, but their actions too. The violence committed against the Rohingya, and the human rights they have been denied as a result, were facilitated by Facebook’s business model. In July 2016, Facebook and Myanmar Post and Telecommunications jointly launched ‘Free Basics’ and ‘Facebook Flex’- phone-based versions of the Facebook platform that can be accessed without mobile data.⁵⁵ This had the effect of drastically increasing the number of Facebook users in Myanmar, from 10 million in mid-2016⁵⁶ to 20 million two years later.⁵⁷ While Facebook presents these initiatives as philanthropic in nature, there is evidence that they are geared towards maximising users so as to provide Facebook with opportunities on mining data from individuals for the purposes of targeted advertising. A recent UN report delivered at the United Nations Conference on Trade and Development found that “*more local data would mean opportunities for providing better targeted advertising*”⁵⁸ and that with “*Facebook’s Free Basics, traffic is effectively channelled*

⁵² Senior General Min Aung Hlaing Facebook quote 2, from Penny Green, Thomas McManus, and Alicia de la Cour Venning, *Genocide Achieved, Genocide Continues: Myanmar’s Annihilation of the Rohingya* (International State Crime Initiative, 2018), 13, from Senior General Min Aung Hlaing Facebook Page, <<https://www.facebook.com/seniorgeneralminaugnhlaing/posts/1698274643540350>>. [accessed 13 November 2017]

⁵³ Myanmar Open Letter to Mark Zuckerberg, viewed 28 May 2021, <<https://www.documentcloud.org/documents/4432469-Myanmar-Open-%20Letter-to-Mark-Zuckerberg.html>>. [accessed 28 May 2021]

⁵⁴ IIFFMM, 1351.

⁵⁵ Ibid., para 1344.

⁵⁶ Catherine Trautwein, ‘Facebook racks up 10m Myanmar users’, *Myanmar Times*, 13 June 2016, viewed 1 July 2021 <<https://www.mmtimes.com/business/technology/20816-facebook-racks-up-10m-myanmar-users.html>>. [accessed 1 July 2021]

⁵⁷ Jon Russel, ‘Facebook still isn’t taking Myanmar seriously’, *Tech Crunch*, 6 November 2018, viewed 1 July 2021, <<https://techcrunch.com/2018/11/06/facebook-still-isnt-taking-myanmar-seriously/>>. [accessed 1 July 2021]

⁵⁸ United Nations Conference on Trade and Development, Digital Economy Report 2019, September 2019, <https://unctad.org/en/PublicationsLibrary/der2019_en.pdf>, p 90 cited in Amnesty International Report, Surveillance Giants: How the Business Model of Google and Facebook Threatens Human Rights, 21 November

from a portal, reflecting the reliance of Facebook's business model on a more closed platform."⁵⁹ Amnesty International concluded that Free Basics appears to be an onramp for increasing mining data in the Global South.⁶⁰ Facebook ended the launch of Free Basics in September 2017,⁶¹ just after the operations had occurred and when the vast majority of Rohingya had already been displaced to Bangladesh, and the hate speech and incitement had already been disseminated throughout Myanmar.

At the same time that Facebook was increasing the number of users, and mining their data, it was actively hosting paid advertisements from the Tatmadaw, the direct perpetrators of the operations. Facebook hosted Tatmadaw-linked pages on its platform from at least before July 2017⁶² to as late as August 2018⁶³ and Tatmadaw-linked commercial advertising, as late as February 2021.⁶⁴

Moreover, the negative impacts of the hate-speech were further exacerbated by the algorithmic systems employed by Facebook. In relation to the use of algorithms, a recent Amnesty report found:

*"[T]he use of algorithms to curate social media content and encourage people to remain on the platform can result in Google and Facebook actively promoting or amplifying abusive, discriminatory or hateful content. The platforms recommend and promote new content based on opaque algorithmic processes to determine what will best engage users. Because people are more likely to click on sensationalist or incendiary material, the so-called 'recommendation engines' of these platforms can send their users down what some have called a 'rabbit hole' of toxic content."*⁶⁵

2019, p 13, viewed 30 June 2021,

<https://www.amnesty.org/en/documents/document/?indexNumber=pol30%2F1404%2F2019&language=en>.

[accessed 28 May 2021]

⁵⁹ Ibid., p 91.

⁶⁰ Amnesty International Report, Surveillance Giants: How the Business Model of Google and Facebook Threatens Human Rights, 21 November 2019, p 13, viewed 30 June 2021, p 13.

⁶¹ Taylor Hatmaker, 'Facebook's Free Basics program ended quietly in Myanmar quietly last year', *Tech Crunch*, 02 May 2018, viewed 30 June 2018 <<https://techcrunch.com/2018/05/01/facebook-free-basics-ending-myanmar-internet>
[org/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAFCDhG9oOI_bziSL0CZkfouMWoeaWtFaGh5DfCY4y_yapcoq-M6wrcyvB60yi-uMxBZ_9DTZ1aUmrUUKILSIvoTf9onxTkq0bxDnuFOVn4lmMg-SFnRo9oNb2O4kKJ23AEEiAUMTX1H235QQbdA45FIXK1jSty2ba53WqyQyZPq](https://www.guccounter.com/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAFCDhG9oOI_bziSL0CZkfouMWoeaWtFaGh5DfCY4y_yapcoq-M6wrcyvB60yi-uMxBZ_9DTZ1aUmrUUKILSIvoTf9onxTkq0bxDnuFOVn4lmMg-SFnRo9oNb2O4kKJ23AEEiAUMTX1H235QQbdA45FIXK1jSty2ba53WqyQyZPq)>. [accessed 30 Jun 2018]

⁶² Reuters, 'Myanmar army Facebook posts covering key period of offensive 'hidden'', *The Irrawaddy*, 27 September 2017, <<https://www.irrawaddy.com/news/burma/myanmar-army-facebook-posts-covering-key-period-offensive-hidden.html>>. [accessed 25 May 2021]

⁶³ Hadas Gold, 'Facebook bans Myanmar military chief and says it was 'to slow' to act', *CNN*, 27 August 2018, <<https://money.cnn.com/2018/08/27/technology/myanmar-army-facebook/index.html>>. [accessed 25 May 2021]

⁶⁴ Reuters staff, 'Facebook takes down main page of Myanmar military', Reuters, 21 February 2021, viewed 27 May 2021, <<https://www.reuters.com/article/us-myanmar-politics-facebook-idUSKBN2AL029>>; Rahul Sachitanand, 'Facebook bans Myanmar military and ads from military-linked companies', Campaign Asia, 25 February 2021, <<https://www.campaignasia.com/article/facebook-bans-myanmar-military-and-ads-from-military-linked-companies/467977>> [accessed 27 May 2021]

⁶⁵ Amnesty International Report, Surveillance Giants: How the Business Model of Google and Facebook Threatens Human Rights, 21 November 2019, p 13, viewed 30 June 2021, p 34.

In this context, the Tatmadaw and members of the Buddhist majority in Myanmar used Facebook to disseminate “news” to promote disinformation and hate speech about the Rohingya as part of an ethnic cleansing campaign. The incendiary nature of the disinformation promoted more engagement by members of the Buddhist majority, which inspired acts of violence to be committed against the Rohingya.

Following the violence, Facebook commissioned the organisation Business for Social Responsibility to undertake a human rights impact assessment (“HRIA”) of the company’s presence in Myanmar. The report found that *“the Facebook platform in Myanmar is being used by bad actors to spread hate speech, incite violence, and coordinate harm”* and that *“Facebook has become a useful platform for those seeking to incite violence and cause offline harm.”*⁶⁶ The HRIA also erroneously, and without any explanation, concluded that Facebook’s services were “linked” to human rights abuses in Myanmar, stating *“itself does not cause or contribute to these risks via its own action – rather Facebook is directly linked to them via the actions of users on its platform that violate Facebook’s Community Standards.”*⁶⁷ This finding is unsubstantiated in the HRIA, and ignores Facebook’s actions and omissions that resulted in the human rights impact.

For each of the rights violations it examined, the HRIA concluded that Facebook did not contribute to these violations but rather was *“directly linked to them via the actions of users on its platform.”* The Assessment contained no further analysis of the distinction between ‘contribution’ and ‘linkage.’ Indeed, the approach from the outset of the HRIA appeared to be that social media platforms cannot contribute to human rights impacts where those impacts occur as a result of content posted by users. The opening section of the report simply stated:

*“It is important to note that internet companies will often be linked to human rights impacts that they do not cause or contribute to. For example, internet companies may be linked to hate speech, child sexual abuse material, and hacking that takes place over their platforms, even though they do not cause or contribute to these adverse human rights impacts themselves. When a company is linked to human rights impacts, the UNGPs expect companies to take action, though the nature of the action will be very different than had the company caused or contributed to these impacts.”*⁶⁸

The HRIA thus oversimplified the situation by collapsing ‘contribution’ into causation. Clearly, an MNE can contribute to an impact which it does not cause. The threshold for contribution must therefore be lower than that for causation. The OECD Due Diligence Guidance for Responsible Business Conduct, which explains aspects of the Guidelines, provides helpful clarity on this point.⁶⁹ The OECD explains that:

*An enterprise “contributes to” an impact if its activities, in combination with the activities of other entities cause the impact, or if the activities of the enterprise cause, **facilitate** or incentivise another entity to cause an adverse impact.*

⁶⁶ Business For Social Responsibility (October 2018) ‘Human Rights Impact Assessment’, <https://fbnewsroomus.files.wordpress.com/2018/11/bsr-facebook-myanmar-hria_final.pdf>. [viewed 30 June 2021]

⁶⁷ ‘Human Rights Impact Assessment’, p 35, <https://fbnewsroomus.files.wordpress.com/2018/11/bsr-facebook-myanmar-hria_final.pdf>. [viewed 30 June 2021]

⁶⁸ Ibid., p 7.

⁶⁹ OECD Due Diligence Guidance for Responsible Business Conduct, Q29.

Contribution must be substantial, meaning that it does not include minor or trivial contributions.

Facebook facilitated the Tatmadaw to cause an adverse impact through the inter-related aspects of its business model in Myanmar. The “Free Basics” and “Facebook Flex” initiatives were geared at maximising the number of Facebook users in Myanmar in the shortest period of time possible, for the purposes of mining individual data for targeted advertising. At the same time, Facebook was actively hosting targeted advertisements from the Tatmadaw, as well as hosting Tatmadaw officials who were using their channels to disseminate news and false information about the Rohingya. The algorithmic systems employed by Facebook resulted in the most incendiary and hateful speech receiving the most engagement, leading to the human rights impacts described above. These actions were further exacerbated by Facebook’s omissions in failing to take down harmful content, its wholly inadequate moderation policy as at 2017, as well as its failure to effectively implement its own community standards.

The Due Diligence Guidance also lists the following factors with respect to establishing the existence of ‘contribution’ to adverse impacts by an MNE:⁷⁰

- The degree to which the activity increased the risk of the impact occurring.
- The extent to which an enterprise could or should have known about the adverse impact or potential for adverse impact, i.e., the degree of foreseeability.
- The degree to which any of enterprise’s activities actually mitigated the adverse impact or decreased the risk of the impact occurring.

None of these factors were considered in the HRIA. The application of the factors to this case provides further support for the conclusion that Facebook *contributed to* the human rights impacts.

- Facebook’s omissions in failing to adequately moderate content and allowing hate-speech to flourish on its platform – coupled with the algorithms and aggressive business practices it employed – significantly increased the risk of the impact occurring and drastically accelerated its materialisation.
- Facebook knew of these adverse impacts as its platform had been used previously to incite hatred against the Rohingya, and had been explicitly warned on numerous occasions of this fact.
- Facebook did nothing to actually mitigate the risks of the adverse impact occurring, and in fact increased the risk of the impact occurring through the its introduction of the ‘Free Basics’ and ‘Facebook Flex’ initiatives.

As John Ruggie, the author of the UNGPs, stated specifically in regards to Facebook:

“When can we say that a company like Facebook is ‘contributing to’ human rights harm? Isn’t it simply a platform on which others can share views? Unwittingly getting even severely consequential cases wrong once or twice is one thing. But persistent refusal to substantially change what the company does

⁷⁰ Ibid.

to reduce its role in others' promotion of social strife and violence makes the attribution of 'contribution' inescapable."⁷¹

That Facebook's actions and omissions contributed to the human rights impact is further evidenced by the language employed by the IIFFMM in regards to Facebook's involvement. Specifically:

*"The Mission has no doubt that the prevalence of hate speech in Myanmar significantly contributed to increased tension and a climate in which individuals and groups may become more receptive to incitement and calls for violence. This also applies to hate speech on Facebook."*⁷²

Moreover, the language is at odds with a second HRIA commissioned by Facebook after allegations that its platform was used to incite violence against Muslims in Sri Lanka in similar circumstances as with the Rohingya. Article One's assessment was that the Facebook platform contributed to spreading rumours and hate speech, which may have led to "offline" violence.⁷³

As Facebook's actions and omissions contributed to these adverse human rights impacts, Facebook had a duty to cease, prevent and remedy the violation.

2.2.3. Inadequate human rights policy commitment

Chapter IV Human Rights (4): Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations, have a policy commitment to respect human rights.

As at 2017, Facebook did not have a comprehensive human rights policy. Facebook had made a limited human rights commitment to the rights of privacy and freedom of expression through participation in the Global Network Initiative (GNI). Facebook did and still does have Community Standards with sections on hate speech, and violence, according to which Facebook will remove any content that contravenes the standards. As demonstrated by the civil society letter sent to Facebook in 2018 and the experience of the IIFFMM, Facebook had ineffective and slow mechanisms to effectively implement its own community standards.

In 2021, Facebook adopted a human rights policy.⁷⁴ The policy outlines Facebook's commitments to human rights and sets out 5 approaches set out in the UNGPs it uses to implement these commitments, including: (1) applying human rights policies; (2) conducting human rights due diligence and disclosure; (3) providing access to remedy; (4) maintaining oversight, governance, and accountability; and (5) protecting human rights defenders.⁷⁵ The policy also establishes a grievance mechanism in the form of an Oversight Board.⁷⁶ This policy

⁷¹ John G. Ruggie, "Facebook in the Rest of the World," John F. Kennedy School of Government, Harvard University, November 15, cited in Carr Report p 9.

⁷² IIFFMM, para 1354.

⁷³ 'Assessing the human rights impact of the Facebook platform in Sri Lanka', p 4, <<https://about.fb.com/wp-content/uploads/2020/05/Sri-Lanka-HRIA-Executive-Summary-v82.pdf>>. [accessed 28 May 2021]

⁷⁴ 'Facebook's Corporate Human Rights Policy' <https://about.fb.com/wp-content/uploads/2021/03/Facebooks-Corporate-Human-Rights-Policy.pdf> [accessed 11 October 2021]

⁷⁵ Ibid., p 2.

⁷⁶ Ibid., p 5

has several shortcomings, and is wholly inadequate to address the human rights impacts to which Facebook contributed in 2017.

First, Facebook did not adequately consult with members of the Rohingya community when developing its policy. Facebook says that its human rights policy was formed in consultation with rights holders and stakeholders.⁷⁷ The Complainants are unaware of any attempts to consult with any Rohingya group within Cox's Bazar camp when Facebook was formulating its policy. Given the publicity over Facebook's role in the 2017 operations, which resulted in the commissioning of HRIA, and informed its policy, members of the Rohingya ought to have been amongst the first groups consulted. This is especially the case given Facebook has stated that it pays "*particular attention to the rights and needs of users from groups or populations that may be at heightened risk of becoming vulnerable or marginalised*" and that when identifying such groups, they undertake "*meaningful engagement to hear their hopes and concerns.*"⁷⁸

Second, the human rights policy stated that it identified and prioritised the most salient human rights issues. Facebook's policy identifies freedom of expression as the most salient of human rights, and does not appear to have prioritised the human rights of groups impacted by disinformation and hate-speech used on its platform as is evidenced by the limited mandate of the oversight board which Facebook established as an independent grievance mechanism.

Facebook's new human rights policy establishes an independent oversight board with a "*mandate to protect freedom of expression and other human rights by making independent decisions about emblematic pieces of content it selects from among those submitted to it for appeal, and by issuing advisory opinions on Facebook's content policies.*"⁷⁹ As stated in the BSR Report on the Facebook Oversight Board, the Oversight Board's scope at present "*does not include Facebook algorithms or changes to the visibility of a piece of content, such as its promotion or de-prioritization in the News Feed.*"⁸⁰ The policy goes on to state that the Oversight Board is intended to increase access to remedy for Facebook and Instagram Users.⁸¹ This policy places sole emphasis on content moderation, without addressing the other human rights impacts cause by the data-driven and algorithmic nature of its business model. A corollary of this policy is that the right to a remedy is narrowly construed to content removal, or having decisions relating to content removal reviewed.

Content moderation is only one aspect of the human rights impacts of Facebook's business model. The policy does not consider broader human rights impacts of its business model, including the processes of data-mining as well as the algorithmic processes employed. Given the decades of systematic oppression and persecution of the Rohingya and other ethnic minorities at the hands of the Tatmadaw, the algorithmic systems employed by Facebook's business model only serve to exacerbate pre-existing prejudices. While better content moderation may have mitigated some of the human rights impacts suffered by the Rohingya as a result of the 2017 operations, it is unlikely that it would have mitigated all of them. As noted

⁷⁷ Ibid. (Our Commitments).

⁷⁸ Ibid.

⁷⁹ Ibid (03, Providing Remedies for Human Rights Impacts).

⁸⁰ Business For Social Responsibility (December 2019) 'Human Rights Review: Facebook Oversight Board' <https://www.bsr.org/reports/BSR_Facebook_Oversight_Board.pdf>. [viewed 11 October 2021], p 20.

⁸¹ Facebook's Corporate Human Rights Policy' <https://about.fb.com/wp-content/uploads/2021/03/Facebooks-Corporate-Human-Rights-Policy.pdf> [accessed 11 October 2021] (03, Providing Remedies for Human Rights Impacts).

in the BSR report on Facebook's Oversight Board, "*one piece of content may not violate the Community Standards in isolation, it might result in significant adverse impact when taken in combination with a large volume of similar content and promoted via the News Feed algorithm.*"⁸²

Moreover, content removal does nothing to remedy the adverse human rights impacts suffered by the Rohingya, and to which Facebook contributed. The Oversight Board has no mandate to issue remedies in the form of rehabilitation or financial contribution. At present, the remedy which Facebook envisages only applies to Facebook's users who have had a piece of content taken down. It does not envisage remedies for victims of human rights violations spurred on by hate-speech and disinformation disseminated across Facebook's platform.

2.2.4. Facebook's failure to provide for or co-operate in remediation

Chapter IV. Human Rights (2): Enterprises should, within the context of their own activities avoid causing or contributing to adverse human rights impacts and address such impacts when it occurs.

Chapter IV. Human Rights (6) Enterprises should provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.

The OECD Due Diligence Guidance for Responsible Business Conduct recommends that the type of remedy or combination of remedy that is appropriate will depend on the nature and extent of the adverse impact and may include apologies, restitution or rehabilitation, such as *inter alia* the establishment of compensation funds for victims and educational programmes.⁸³

The appropriateness of educational facilities as a remedy was considered in the *Aloeboetoe* case at the Inter-American Court of Human Rights, where the facts concerned members of Suriname's armed forces killing seven persons associated with a village.⁸⁴ The Court ordered the reopening and staffing of the village's school and medical dispensary, in addition to monetary compensation for pecuniary and non-pecuniary damages. The Court justified this decision with the argument that although compensation was in part to secure education for the victim's minor children, this was impossible without having an adequate infrastructure available to offer the desired education.⁸⁵ The court further held that the State had failed to provide village with basic education services.⁸⁶ This case demonstrates the appropriateness of education facilities as remedies that are both rehabilitative and restitutive.

Despite Facebook's actions and omissions, it has not taken any meaningful steps to remediate the harms to which it contributed. Representatives of the Rohingya groups who sent the open letter to the human rights chief at Facebook, Miranda Sissons, in June last year had a phone call with her in August, in which they explained that one of the most difficult aspects of their

⁸² Business For Social Responsibility (December 2019) 'Human Rights Review: Facebook Oversight Board' <https://www.bsr.org/reports/BSR_Facebook_Oversight_Board.pdf>. [viewed 11 October 2021], p 20.

⁸³ OECD Due Diligence Guidance for Responsible Business Conduct, p34.

⁸⁴ *Aloeboetoe et al v Suriname*, Inter-American Court of Human Rights, Judgment of September 10 1993, paras 5, 82, <https://www.corteidh.or.cr/docs/casos/articulos/seriec_15_ing.pdf>. [accessed 1 July 2021]

⁸⁵ *Ibid.*, paras 81-96.

⁸⁶ *Ibid.*, paras 8, 81-85, 96.

displacement into Bangladesh is that children are unable to attend high-school. They asked Facebook to fund an education project in the refugee camp in Cox's Bazar. Ms. Sissons informed the groups that if a proposal was sent to Facebook describing the logistics of such a project and requesting funding, she would send this to the relevant people for consideration.⁸⁷

After this phone call, and a further three months of developing a comprehensive proposal, a concept note for a camp-based education project was sent to Facebook. The note was prepared by a prominent academic institution in Bangladesh. It proposed a million-dollar project through which educated refugees from the camp would be given materials, training, and support to teach younger and less educated members of their community. Many Rohingya groups were involved in the design of the activities described in the concept note, and many of their members were eager to take on teaching roles as part of the project. Its submission was accompanied by a letter requesting that Facebook support the project, signed by 21 community-based groups within the camp.⁸⁸

Facebook refused the request on 10 February 2021. In her email rejecting the proposal, Ms. Sissons explained that Facebook does not directly engage in 'philanthropic activities,' and that while it does partner on some initiatives, these "*generally have a more direct link to [Facebook] products, internet literacy or digital empowerment.*"⁸⁹

The HRIA commissioned in response to the 2017 operations focuses on "*content moderation*" as a remedy, which is further reflected by Facebook's 2021 human rights policy. Again, this finding ignores that Facebook's actions and omissions contributed to the human rights violations above, and Facebook's duty to provide a remedy for those who suffered adverse human rights impacts. Content moderation, a forward-looking action, does not do anything to remedy the immense physical and emotional harm already suffered by the Rohingya, nor does it do anything to address the deprivation of basic necessities such as educational facilities to which the Rohingya are now subjected thanks to Facebook's contribution to the Tatmadaw's cleansing campaign.

The remedy that Facebook owes to the Rohingya ought to be commensurate to its contribution to the human rights impacts. The million-dollar education project previously requested by members of the Rohingya community was a modest one, especially in light of Facebook's profit margin that year. Moreover, Facebook has called any requests "philanthropy," as opposed to remediation and has explicitly said that any such philanthropy ought to have some link to its products or services, such as internet literacy or digital empowerment. Internet literacy is no substitute for an actual education. Further, internet literacy and the inability of internet users in Myanmar to verify content was seen by human rights organisations and the IIFMM as a driving factor behind the 2017 operations. While pursuing greater internet literacy so that populations can verify content is a laudable goal, it is not an appropriate remedy considering the extent of human rights violations suffered by the Rohingya in 2017.

⁸⁷ A compilation of the communication between Ms Sissons and the Rohingya groups can be found at 'Rohingya victim groups ask Facebook to provide them support, following its role in the violence against them', *Victim Advocates International*, 10 July 2020, <<https://www.victimadvocatesinternational.org/letter-to-facebook-human-rights-head-miranda-sissons-from-rohingya-refugee-groups/>>. [accessed 29 September 2021]

⁸⁸ This letter was confidential due to some of the Rohingya organisations concerns about being named publicly, for security reasons. However, a copy of it may be provided confidentially on request.

⁸⁹ Email can be provided confidentially on request.

2.3. Whether there appears to be a link between the enterprise's activities and the issue raised in this specific instance

The Complainants submit that there is a clear link between human rights violations suffered by the Rohingya and the alleged contraventions of the OECD Guidelines (as outlined in section 2.2 of this complaint.)

2.4. The relevance of applicable law and procedures, including court rulings

The OECD Guidelines and the UNGPS are the most authoritative international standards on responsible business conduct and human rights due diligence.

2.5. How similar issues have been, or are being, treated in other domestic or international proceedings

VAI is currently representing some of the clients listed in this complaint before ongoing proceedings at the International Criminal Court, as well as universal jurisdiction proceedings in Argentina. These are not parallel proceedings as none of these courts will make legal determinations as to Facebook's responsibility for the 2017 crimes, which fall outside the jurisdiction of these courts. Moreover, jurisdiction is limited to crimes against humanity or genocide, not the violations of the OECD Guidelines which form the basis of this complaint.

On the 6th December 2021, a number of US-based Rohingya filed a class action lawsuit against Facebook in California for the role the platform played in violence committed against the Rohingya since Facebook's entry into the telecommunications market in Myanmar. On the same day, a UK-based law firm issued a notice of their intention to file a lawsuit against Facebook before UK courts. The Complainants submit that consideration of the OECD complaint will not prejudice these lawsuits in any way, given questions of Californian and English and Welsh Tort law that are at issue in these cases, and which are materially distinct from the provisions in the Guidelines. Moreover, these domestic legal proceedings are also generally constrained as to the types of remedies available. These constraints leave room for an Irish-NCP-mediated settlement to provide a settlement that is more tailored to the specific requirements of the Rohingya children and students who are at present denied education in Cox's Bazar Refugee camps, and whose educational needs cannot afford to wait the duration of lengthy legal proceedings.

2.6. Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines

Consideration of the complaint by the Irish NCP would greatly contribute to the purposes and effectiveness of the OECD Guidelines. Facilitated dialogue by the NCP between the parties to the complaint, with the aim of ensuring Facebook's business operations comply with the principles and standards of the OECD Guidelines, would be especially useful for the resolution of the issues in this complaint.

The Complainants request the Irish NCP offer its good offices to resolve the disputes with the Respondent consequent to their failure to comply with the OECD Guidelines.

The Complainants have undertaken efforts to engage Facebook through direct negotiations. These efforts have not resulted in remediation, or an offer of remediation that the communities deemed to be acceptable. Education around internet literacy or digital empowerment is not a replacement for an actual education, which the Rohingya have been deprived as a result of human rights violations that were facilitated by the actions and omissions of Facebook. While Facebook's profits continued to soar throughout 2017, approximately 750,000 Rohingya were deprived of basic necessities such as education, housing and healthcare a situation which persists until this day.

If the NCP decides that the issues raised merit further examination and offers it good offices, the Complainants would seek the following outcomes through this process:

1. Facebook divest from a portion of its 2017 profits – certainly those from Myanmar - and provide remediation to the Rohingya in the form of educational facilities, or other facilities suitable to ameliorate their living conditions within the camps.
2. Facebook conducts due-diligence around the adverse human rights impacts of the data-mining and algorithmic aspects of its business model as a whole.
3. Facebook amends its human rights policy and the mandate of its Oversight Board to explicitly include remediation beyond content removal (such as rehabilitation or financial compensation) where it contributes to human rights violations.
4. Facebook create a community advisory board with representatives from the Rohingya and other vulnerable users around the world, to be consulted over the development of a new human rights policy.

The Complainants feel that Facebook has shown previous interest in engagement with them, but has not carried through. This is regrettable given common ground between the parties, especially around issues such as education and knowledge sharing. Moreover, Facebook has in the past described its remediation efforts for what happened in Myanmar as “*some of the most important work being done at Facebook... The weight of this work, and its impact on the people of Myanmar, is felt across the company.*”⁹⁰

The Complainants believe that with the support and guidance of the Irish NCP, the parties can forget conversations of blame, and instead find constructive solutions to meet the serious needs of the communities suffering as a result of the violence.

We therefore request that the Irish NCP investigate this complaint and make specific recommendations to bring Facebook into compliance with the OECD Guidelines with respect to this case.

3. Conclusion and Recommendations

In conclusion, the Complainants contend that Facebook breached its obligations under the OECD Guidelines in four respects: (1) its inadequate human rights due diligence; (2) its actions and omissions that contributed to the human rights violations suffered by the Rohingya as a result of the 2017 operations; (3) its non-existent human rights policy at the time of the

⁹⁰ *The Gambia v Facebook, Inc*, In re Application Pursuant to 28 U.S.C. § 1782 [22 September 2021] p 32.

operations, and the inadequacy of the one it has since adopted; and (4) its failure to provide the Rohingya with a remedy.

If Facebook declines the NCP's offer of good offices, or alternatively if good offices between the parties fail to reach a mutually agreeable solution, the Complainants encourage the NCP conduct its own fact-finding (potentially involving a third-party examination of the issues raised) and/or develop Terms-of-Reference for a fact-finding report in dialogue with the parties to the complaint. In any case, the Complainants respectfully request that the NCP issue a public statement, including a determination on Facebook's compliance with the OECD Guidelines and recommendations for Facebook to ensure it acts responsibly in the future.