

THE SLOW-BURNING GENOCIDE OF MYANMAR'S ROHINGYA

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Abstract: Since 1978, the Rohingya, a Muslim minority of Western Burma, have been subject to a state-sponsored process of destruction. The Rohingya have deep historical roots in the borderlands of Rakhine State, Myanmar, and were recognized officially both as citizens and as an ethnic group by three successive governments of post-independence Burma. In 1978, General Ne Win's socialist military dictatorship launched the first large-scale campaign against the Rohingya in Rakhine State with the intent first of expelling them en masse from Western Burma and subsequently legalizing the systematic erasure of Rohingya group identity and legitimizing their physical destruction. This on-going process has continued to the present day under the civilian-military rule of President Thein Sein's government. Since 2012, the Rohingya have been subject to renewed waves of hate campaigns and accompanying violence, killings and ostracization that aim both to destroy the Rohingya and to permanently remove them from their ancestral homes in Rakhine State.

Findings from the authors' three-year research on the plight of the Rohingya lead us to conclude that Rohingya have been subject to a process of slow-burning genocide over the past thirty-five years. The destruction of the Rohingya is carried out both by civilian populations backed by the state and perpetrated directly by state actors and state institutions. Both the State in Burma and the local community have committed four out of five acts of genocide as spelled out by the 1948 Convention on the Punishment and Prevention of the Crime of Genocide. Despite growing evidence of genocide, the international community has so far avoided calling this large scale human suffering genocide because no powerful member states of the UN Security Council have any appetite to forego their commercial and strategic interests in Burma to address the slow-burning Rohingya genocide.

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I. INTRODUCTION

“What can we do, Brother, they (the Rohingya) are too many? We can’t kill them all.” Ex-Brigadier General, formerly stationed in Arakan or Rakhine State, and Ambassador to Brunei, Fall, 2012.¹

“How can it be ethnic cleansing? They are not an ethnic group.” Mr. Win Myaing, the official spokesperson of the Rakhine State Government, May 15, 2013.²

“We do not have the term ‘Rohingya.’” Myanmar President Thein Sein, Chatham House, London, July 17, 2013.³

“There are elements of genocide in Rakhine with respect to Rohingya The possibility of a genocide needs to be discussed. I myself do not use the term genocide for strategic reasons.” Tomás Ojéa Quintana, United Nations Special Rapporteur for Human Rights, London Conference on Decades of State-Sponsored Destruction of Myanmar’s Rohingya, April 28, 2014.⁴

Over the past thirty-five years, the State in Myanmar has intentionally formulated, pursued, and executed national and state-level plans aimed at destroying the Rohingya people in Western Myanmar.⁵ This destruction has been state-sponsored, legalized, and initiated by a frontal assault on the identity, culture, social foundation, and history of the Rohingya who are a people with a distinct ethnic culture. They are a borderland people whose ancestral roots and cultural ties lie along the post-colonial borders of today’s Myanmar, a former British colony until its

¹ Interview with Thet Oo Maung, Ex-Brigadier Gen. and Ambassador to Brunei, in Brunei (Aug. 2012).

² Jason Szep, *Special Report - In Myanmar, Apartheid Tactics Against Minority Muslims*, REUTERS, May 15, 2013, <http://mobile.reuters.com/article/topNews/idUSBRE94E00020130515?i=3&irpc=932>. Mr Win Myaing is a Buddhist Rakhine official spokesperson of Rakhine State Government. *Id.*

³ Mark Inkey, *Thein Sein Talks at Chatham House*, NEW MANDALA, July 17, 2013, <http://asiapacific.anu.edu.au/newmandala/2013/07/17/thein-sein-talks-at-chatham-house/>.

⁴ Maung Zarni, *Press Release: United Nations Expert Says There Are “Elements of Genocide” Against Myanmar’s Rohingya*, ZARNI’S BLOG (Apr. 28, 2014), <http://www.maungzarni.net/2014/04/press-release-united-nations-expert.html#sthash.AFAEnbbr.dpuf> (last visited May 24, 2014).

⁵ David Mepham, *Dispatches: Burma – “Excuse Me, Mr. President . . .”*, HUM. RTS. WATCH, July 19, 2013, <http://www.hrw.org/news/2013/07/19/excuse-me-mr-president>.

independence in 1948, and Bangladesh, formerly East Pakistan, which gained its independence from Pakistan in 1971. Their identity as an ethno-linguistic group was recognized under successive Burmese regimes after independence in 1948 and was systematically erased by the increasingly anti-Muslim military-controlled governments since 1962.⁶ In Myanmar's state media, official policy documents, and school textbooks, the Rohingya are referred to as Bengali, a racist local reference, and are portrayed as illegal economic migrants from the colonial time, who are a 'threat to national security, a portrayal that the bulk of the Burmese have accepted as a fact over the past five decades. In contrast, the international community continues to recognize the Rohingya as an ethnic group.⁷ The State and the predominantly Buddhist society have collaborated with the intent to de-indigenize, illegalize, dehumanize, and destroy a people whose ancestral home is in Myanmar. The evidence of the intent to destroy the Rohingya people over the past thirty-five years through assaults on their identity, killings during multiple pogroms, physical and mental harm, deliberate infliction of conditions of life designed to bring about the group's destruction, and measures to prevent births, lead the authors to conclude that Myanmar's Rohingya are the victims of genocide carried out jointly by the central political state and anti-Muslim ultra-nationalists among the Buddhist Rakhine peoples.

Rohingya is an ethno-religious term meaning Muslim people whose ancestral home is Arakan or Rakhine in Myanmar.⁸ To date, the total number of Rohingya in Rakhine State are estimated at over one million, the majority of whom live in three townships of North Rakhine State, and

⁶ For an on-line selection of fully authenticated ID cards and other proofs of the Rohingya existence, identity and citizenship in Burma or Myanmar, see Maung Zarni, *The Official Evidence of the Rohingya Ethnic ID and Citizenship which the Burmese Ethno- and Genocidists Don't Want You to See*, ZARNI'S BLOG, <http://www.maungzarni.net/2012/08/the-official-evidence-of-rohingya.html>.

⁷ For instance, international visitors to the country—including the veteran anti-apartheid campaigner of South Africa Desmond Tutu, U.S. President Barack Obama, Britain's Speaker of the House of Commons John Bercow and so on—have all referred to the Rohingya as "Rohingya." As a matter of fact, in his public lecture at Rangoon University on August 1, 2012, MP John Bercow stated emphatically that to call the Rohingya "Bengali" is mentally "hurtful" to the Rohingya and amounts to "racism." For Bercow's lecture see Shwe Maung, *Q&A-Speaker of The House of Commons in Yangon*, YOUTUBE (Aug. 2, 2013), https://www.youtube.com/watch?v=zUNI_ngFAqI. For the transcript of President Obama's speech at Rangoon University, see Barack Obama, U.S. President, Remarks by President Obama at the University of Yangon (Nov. 19, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/11/19/remarks-president-obama-university-yangon>.

⁸ Michael W. Charney, *Buddhism in Arakan: Theories and Historiography of the Religious Basis of Ethnonyms*, KALABAN PRESS NETWORK, July 8, 2007, <http://www.kaladanpress.org/index.php/scholar-column-mainmenu-36/58-arakan-historical-seminar/718-buddhism-in-arakantheories-and-historiography-of-the-religious-basis-of-ethnonyms>.

the vast majority of whom are stateless.⁹ Since the violence of 2012, over 140,000 people remain displaced in seventy-six camps and camp-like settings across Rakhine State, the bulk of which are Rohingya and other Muslim minorities from Rakhine State.¹⁰ Roughly 36,000 Rohingya and other Muslims in communities across Rakhine State are considered by the United Nations (“UN”) to be acutely vulnerable and in need of urgent humanitarian assistance.¹¹

Genocide is defined by Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.¹²

The authors frame the Rohingya genocide in Myanmar, within the first four acts of this definition, with a focus on the intention of both the State and the non-state actors in society to bring about the destruction of the Rohingya as an ethno-religious group.

This article characterizes the human rights abuses against the Rohingya as a slow-burning genocide—that is, one that has taken place over the past thirty-five years and continues today via similar processes

⁹ Jason Szep & Andrew R.C. Marshall, *Myanmar Minister Backs Two-child Policy For Rohingya Minority*, REUTERS, Jun. 11, 2013, <http://www.reuters.com/article/2013/06/11/us-myanmar-rohingya-idUSBRE95A04B20130611>.

¹⁰ UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (“UNOCHA”), HUMANITARIAN BULLETIN: MYANMAR 3, 4 (June 2013), available at <http://reliefweb.int/sites/reliefweb.int/files/resources/Myanmar%20Humanitarian%20Bulletin%20June%202013.pdf> [hereinafter UNOCHA]. The reason that the word “Rohingya” is not used in such documents is that the Rohingya have not been allowed to register by government under the term “Rohingya.” See *id.* The UN uses the terms “displaced persons” or “Muslim” in such public documents so as to circumvent the Myanmar government’s position that there are no Rohingya and so facilitate access to these populations. See Interview with U.N. and International Nongovernmental Organization (“INGO”) staff (confidential). Some of the Muslims displaced since 2012 identify as Kaman Muslim, which is a Muslim minority from Rakhine state that has had better access to Burmese citizenship. UNOCHA, *supra*, at 3, 4.

¹¹ UNOCHA, *supra* note 10, at 3.

¹² Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III) A, U.N. Doc. A/RES/260(III) (Dec. 9, 1948), available at http://www.oas.org/dil/1948_Convention_on_the_Prevention_and_Punishment_of_the_Crime_of_Genocide.pdf.

and instruments of terror and destruction. The State has adopted policies and plans designed to cause harm and destruction to the Rohingya in Western Myanmar since the first large scale campaign to illegalize and terrorize the Rohingya in February 1978.¹³ Mass killings in the context of Pol Pot's Cambodia or Rwanda have taken place within short time frames.¹⁴ However, in the case of the Rohingya in Myanmar, the centrally planned large-scale death and destruction of the Rohingya people has been achieved over a long-term time frame of several decades.

During the fifty-year period of military rule, Rohingya areas were largely inaccessible to the media and researchers due to the system of security grids that contained the Rohingya and restricted outsiders' access to the populations.¹⁵ Consequently, the past abuses of the Rohingya have been misconstrued as a situation short of intentional destruction of the group.¹⁶ There is a growing body of evidence that the Myanmar Government at the highest level has subjected the Rohingya to systematic abuses and persecution as a matter of state policy. Much of the persecutorial state policies and practices have recently come to light since the pogroms aimed at the Rohingya and other non-Rohingya Muslim minorities spread across Rakhine State in June and October of 2012. In close collaboration with organized local Rakhine racists, Myanmar state security forces have been found to be involved in Rohingya deaths, destruction, mass displacement, and forced migration.¹⁷

Analyses of abuses against the Rohingya have largely fallen into two broad analytical categories. The first category views the recent waves of

¹³ Martin Smith, *The Muslim "Rohingya" of Burma* (2005) (unpublished manuscript) (on file with the authors).

¹⁴ *Genocide in Rwanda*, UNITED HUM. RTS. COUNCIL, http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm (last visited May 21, 2014). On the mass atrocities in Cambodia, see *Cambodia Profile: A Chronology of Key Events*, BBC NEWS ASIA, Sep. 24, 2013, <http://www.bbc.co.uk/news/world-asia-pacific-13006828>

¹⁵ Interviews with long-time human rights researchers specializing in Rohingya persecution, in London, Kuala Lumpur, and Bangkok (2012-13).

¹⁶ For instance, a legal report by a former Amnesty International researcher on Myanmar does not acknowledge an intention to destroy the group, in whole or in part. See BENJAMIN ZAWACKI, *DEFINING MYANMAR'S "ROHINGYA PROBLEM"* 18 (2013), available at <http://www.wcl.american.edu/hrbrief/20/3/zawacki.pdf>.

¹⁷ See, e.g., HUMAN RIGHTS WATCH, *ALL YOU CAN DO IS PRAY: CRIMES AGAINST HUMANITY AND ETHNIC CLEANSING OF ROHINGYA MUSLIMS IN BURMA'S ARAKAN STATE* 53 (Apr. 2013), available at http://www.hrw.org/sites/default/files/reports/burma0413webwcover_0.pdf; PHYSICIANS FOR HUMAN RIGHTS, *PATTERNS OF ANTI-MUSLIM VIOLENCE: A CALL FOR ACCOUNTABILITY AND PREVENTION* 29 (Aug. 2013), available at http://www.hrw.org/sites/default/files/reports/burma0413_FullForWeb.pdf. For the most recent killing and violence against the Rohingya where the UN has documented the collaboration between state security forces and local Rakhine extremists, see Jane Perlez, *Rise in Bigotry Fuels Massacre Inside Myanmar*, N.Y. TIMES, Mar. 1, 2014, http://www.nytimes.com/2014/03/02/world/asia/rise-in-bigotry-fuels-massacre-inside-myanmar.html?_r=0.

violence outside of the historical context as communal violence¹⁸ and as the dark side of transition,¹⁹ largely describing the events as an intolerant and spontaneous societal reaction to the Rohingya.²⁰ Such views claim that this communal or sectarian violence is a result of the political and economic openings that have occurred in Myanmar since 2010, which are compounded by government and institutional incompetence and an inability to contain violence.²¹ Far from reflecting the reality on the ground, such analysis is a result of political and diplomatic expediency in which the economic and political interests of the military/civilian government in Myanmar and the economic and geo-political strategic interests of foreign governments that benefit from openings in Myanmar marry to solidify a discourse of “communal violence.”²² The framing of the Rohingya genocide as “communal violence,” in effect, exempts the Myanmar State from responsibility and blame for the destruction of the Rohingya people. In contrast, the historical continuity of the abuses and strategies used to harm the Rohingya show that the processes are, to a large extent, the result of the pre-existing and continuing military and power structures, rather than simply the product of recent changes in the formal political processes. These processes and strategies have been facilitated and orchestrated by state actors and implemented by a mixture of state and non-state actors. This continuity underlines the intent of state and non-state actors to bring about the destruction of the Rohingya and thus reinforces the argument that the Rohingya are victims of genocide.

¹⁸ For an analysis of the problematic term “communal violence,” see Rachel Wagley, *In Burma, There is No “Communal Violence”*, FOREIGN POL’Y J. (Nov. 25, 2013), <http://www.foreignpolicyjournal.com/2013/11/25/in-burma-there-is-no-communal-violence/>.

¹⁹ See, e.g., INT’L CRISIS GRP., ASIA REPORT N ° 251, THE DARK SIDE OF TRANSITION: VIOLENCE AGAINST MUSLIMS IN MYANMAR (Oct. 1, 2013).

²⁰ For an analysis of the problematic term “communal violence” see, Wagley, *supra* note 18.

²¹ See, e.g., INT’L CRISIS GRP., *supra* note 19. The International Crisis Group ignores the elephant in the room, namely the Myanmar military and its leaders. As a matter of fact, the Brussels-based influential NGO even awarded Myanmar President Thein Sein, formerly fifth-ranking general, its ‘In pursuit of Peace’ Award for 2012. In contrast to the view that the violence in Rakhine State in particular and the anti-Muslim violence in Myanmar in general, are primarily ‘communal’ or ‘horizontal’, the May 19, 2014 news report on the Voice of America Burmese Service confirmed our findings that Myanmar’s government and its senior most leaders back and are directly linked to the anti-Muslim religious hatred which in turn is used to justify mass violence against Muslim Rohingya. See Ingyin Myaing and U Sithu Aung Myint, *Who is behind ‘the defence of Buddhist faith and race’?* NEWS, THE VOICE OF AMERICA BURMESE PROGRAM (May 19, 2014), <http://burmese.voanews.com/content/who-are-backing-up-for-ma-ba-tha-group-/1917229.html>. For the same link between anti-Rohingya racist attacks and popular hatred towards Rohingya (and Myanmar’s other Muslims) see Malik, Kenan, *Op-Ed: Myanmar’s Buddhist Bigots*, N.Y. TIMES, May 19, 2014, <http://www.nytimes.com/2014/05/20/opinion/malik-myanmars-buddhist-bigots.html>.

²² See Glenn Kessler, *How Much Has the United States Been ‘Standing Up Against’ Atrocities in Burma?*, WASH. POST, Dec. 31, 2013, <http://www.washingtonpost.com/blogs/fact-checker/wp/2013/12/31/how-much-has-the-united-states-been-standing-up-against-atrocities-in-burma/>.

The second analysis views the State and security forces as central actors in the recent violence, actively participating in violence and abuses against the Rohingya, standing by while the violence and abuses against the Rohingya took place in full purview of state actors,²³ and/or facilitating processes of impunity for the perpetrators of violence and abuses against the Rohingya.²⁴ Such analysis—most significantly the in-depth Human Rights Watch's report of 2013—has placed the abuses within the frameworks of crimes against humanity and ethnic cleansing.²⁵ Crimes against humanity are defined as eleven acts committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”²⁶ Crimes against humanity frameworks are complimentary to readings of genocide, but do not go so far as to include aspects of intent to destroy a given people, either in part or in whole.²⁷ While we do not dispute that the abuses against the Rohingya can be read and analyzed as crimes against humanity and ethnic cleansing,²⁸ this article goes a step further to argue that the abuses against the Rohingya, in both the contemporary and historical contexts, constitute an intention to destroy the Rohingya as an ethno-religious group and thus constitute genocide. The authors' analysis connects the dots that relate to intent to destroy, not simply documenting this thirty-five year process of destruction, but also shedding light on the ways in which the military-controlled state in Myanmar operates.

²³ See, e.g., THE EQUAL RIGHTS TRUST, BURNING HOMES, SINKING LIVES: A SITUATION REPORT ON THE VIOLENCE AGAINST ROHINGYA IN MYANMAR AND THEIR *REFOULEMENT* FROM BANGLADESH (June 2012); HUMAN RIGHTS WATCH, THE GOVERNMENT COULD HAVE STOPPED THIS: SECTARIAN VIOLENCE AND THE ENSUING ABUSES IN BURMA'S ARAKAN STATE (Aug. 2013), available at http://www.hrw.org/sites/default/files/reports/burma0812webwcover_0.pdf.

²⁴ See Agence France-Presse, *Myanmar Accused of Ethnic Cleansing by Human Rights Watch Dog*, THE RAW STORY, Apr. 22, 2013, <http://www.rawstory.com/rs/2013/04/22/myanmar-accused-of-ethnic-cleansing-by-human-rights-watchdog/>.

²⁵ HUMAN RIGHTS WATCH, *supra* note 17.

²⁶ Rome Statute of International Criminal Court art. 7, 2187 U.N.T.S. 90, available at http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

²⁷ *Id.* at art. 6-7.

²⁸ Ethnic-cleansing is not formally defined as an international crime, but means “rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area,” thus the emphasis is on removal rather than destruction of a group. ZAWACKI, *supra* note 16, at 22 (citing Application of Convention on Prevention and Punishment of Crime of Genocide (Bosnia and Herzegovina v. Serb. and Montenegro), Judgment, 2007 I.C.J. 43, ¶ 190 (Feb. 26, 2007)). Moves toward the homogeneity of Buddhist Rakhine areas in Rakhine State are well documented. See, e.g., HUMAN RIGHTS WATCH, BURMA: NEW VIOLENCE IN ARAKAN STATE, SATELLITE IMAGERY SHOWS WIDE-SPREAD DESTRUCTION OF ROHINGYA HOMES, PROPERTY (2012), available at <http://www.hrw.org/news/2012/10/26/burma-new-violence-arakan-state>. This article argues that systematic abuses against the Rohingya have aimed not only to remove the Rohingya from land in Rakhine State, but also to destroy the Rohingya as a group. *Id.*

Part II provides the historical context within which the genocide takes place. First, the authors establish the Rohingyas' long history in Rakhine State to provide the setting against which the authors later describe the erasure of the Rohingyas' history and identity as part of a State process. Second, the authors examine how anti-Rohingya racism has been deliberately encoded in the law and policy framework that relates to stateless Rohingya in Myanmar.

Part III lays out the mechanisms of the slow-burning genocide. The first of these mechanisms described in Section A, namely violence, forced migration, and illegalization, tracks three of the acts of genocide laid out in the 1948 Genocide Convention: a) killing, b) causing serious bodily and mental harm, and c) deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part. The second mechanism of marriage and birth restrictions, described in Section B, tracks a fourth act of genocide, d) imposing measures intended to prevent births within the group. Section C discusses the third mechanism, whereby deliberate destruction of the social foundations of the Rohingya as an ethno-religious group inflicts by a different means the fourth act of genocide, creating conditions of life calculated to bring about the group's physical destruction. The last mechanisms, discussed in Section D, demonstrates the state's intent to destroy the Rohingya through the erasure of their legal and ethnic identity.

In Part IV, we discuss the implications of genocide by placing the term genocide and how it relates to the Rohingya in Myanmar in a domestic and international political context, considering what role legal pragmatism and diplomatic expediency relating to international strategic interests play in the international acceptance of the concept of genocide in Myanmar. Finally, in Part V, the authors conclude by arguing that the rise in violence and discrimination against the Rohingya in Rakhine State is a continuation of the military structures and policies—as opposed to an inevitable, if unfortunate, part of Myanmar's much-lauded transition to democracy—that have been implemented with the purpose of destroying the Rohingya as a people. What Burma's Muslim Rohingya have experienced since the first State-organized 'immigration' campaign in February of 1978 falls within the acts spelled out in the Genocide Convention. While this research draws on the growing body of documentary evidence relating to abuses against the Rohingya, the authors also draw on their first-hand research conducted over three years working with and interviewing the Rohingyas in Rangoon as well as Rohingya refugees and established members of the Rohingya diaspora in countries

including Bangladesh, Malaysia, Thailand, the United Kingdom, the United States, and continental Europe.

II. HISTORICAL CONTEXT OF THE ROHINGYA GENOCIDE

In Myanmar, the popularly held belief is that Rakhine State has been home to an indigenous and largely stable population of Rakhine Buddhists who have been under threat demographically and economically in recent years from immigrant Bengalis, a racial term imposed on the Rohingya.²⁹ In fact, Rakhine State history is one of social, economic, and demographic interdependence with Bengal, with influences from elsewhere in India, Persia, and the Arabic world.³⁰ Section A challenges the popularly held notions of Rakhine history and establishes the long and rich history of the Rohingya in Rakhine State. Section B describes how anti-Rohingya racism was encoded in law, beginning in 1962. This history provides the background for the act of genocide described in Part III.

A. *The Rohingya Had an Established and Recognized Ethnic Identity and Presence in Rakhine State Prior to the Beginning of Military Rule in Burma in 1962*

Rakhine is the ancestral home of the Rohingya.³¹ Ultra-nationalist Rakhine Buddhists vehemently reject this view, framing the Rohingyas as illegal immigrants who migrated from East Bengal during the British rule of Burma and/or after Burma and Pakistan's independence in 1948 and 1947, respectively.³² Official Myanmar state histories and law support this view, which claim there are no Rohingyas in the history of Myanmar,³³ and exclude the Rohingya from the list of 135 state-recognized ethnic groups of Myanmar that is enshrined in the citizenship law and the constitution.³⁴

²⁹ This view was initially generated by the State in Burma under the Burma Socialist Programme Party Government of ex-General Ne Win in the late 1970's. It has since become part of the popular discourse, so much so that even a BBC Burmese editor found it unnecessary to problematize it in a half-hour discussion on BBC Radio Four, the British equivalent of the US National Public Radio. See *Beyond Belief: Violence and Buddhism*, BBC RADIO FOUR, Aug 19, 2013, <http://www.bbc.co.uk/programmes/b038c0f6>.

³⁰ For a full account, see MOSHE YEGAR, *THE MUSLIMS OF BURMA: A STUDY OF A MINORITY GROUP* (1972).

³¹ *Id.* at 25 (citing Ba Tha, *Rowengyees in Arakan*, VII *GUARDIAN MONTHLY* 33-36 (1960)).

³² AYE CHAN & U SHW ZAN, *INFLUX VIRUS – THE ILLEGAL MUSLIMS IN ARAKAN* (2005).

³³ *Interview with the Commander of Western Command, Rakhine State*, THE MYANMAR HERALD, (May 16, 2014) (Burmese language).

³⁴ The list of 135 "national races" was published in LT-COL HLA MIN, *MINISTRY OF DEFENCE, UNION OF MYAN., POLITICAL SITUATION OF MYANMAR AND ITS ROLE IN THE REGION*, 95-99 (2001).

According to the Rakhine nationalist narratives, the term Rohingya was created in the 1950s to promote the political demands of the Bengalis in Myanmar.³⁵

In fact, there are clear references to the Rohingya, whose faith was identified as Islam, residing in Rakhine State before independence and even before the colonial period. In 1799, before the British colonization of Burma, Francis Buchanan, in his study of languages, recorded three dialects derived from India: “The first is that spoken by the Mohammedans, who have long settled in Arakan, and who call themselves Rooinga, or natives of Arakan.”³⁶ Additionally, the Paton report of 1826, written when the British moved into Rakhine State, estimated that sixty percent of the population was “Mugh,” or Rakhine, and thirty percent was “Mussalman,” or Muslim.³⁷ (Muslims of Arakan or Rakhine State and Rohingya in this context, as in later contexts, are overlapping categories). Muslims of Rakhine State (or Rakhine Muslims), with the fluidity typical of ethnic and religious identity formation,³⁸ have identified as Rohingya to some degree for centuries.³⁹ The Rohingya ethnic identity has become

³⁵ See, e.g., Daw Saw Khin Tint, President of Rakhine Women’s Association, Speech (Dec. 22, 2012) (transcript on file with the authors) (“A Muslim called Abdu Gava used a brand new term ‘Rohingya’ in 1951 and created a brand new nationality ‘Rohingya’ in Arakan. So called Rohingya who had been created thus have presented to the world saying ‘We Rohingyas, have lived in Arakan for about 1000 years – prior to these present Arakanese people. So Arakan is our land. Arakanese are our nationality.’”).

³⁶ Francis Buchanan, *A Comparative Vocabulary of Some of the Languages Spoken In the Burma Empire*, 5 ASIATIC RES. 219 (1799), reprinted in 1 SCH. ORIENTAL AFR. STUD. BULL. BURMA RES. 40, 55 (2003). See also HENRY GLASSFORD BELL, AN ACCOUNT OF THE BURMAN EMPIRE COMPILED FROM THE WORKS OF COLONEL SYMES, MAJOR CANNING, CAPTAIN COX, DR. LEYDEN, DR. BUCHANAN, ETC. 66 (1852) (“[T]he Mohommedans who have been long settled in the country, call themselves Rooinga, or natives of Arracan.”).

³⁷ CHARLES PATON, A SHORT REPORT ON ARAKAN 36 (Apr. 26, 1826). Paton was the first British colonial administrator with the rank of sub-Commissioner of Arakan. His report which included demographic data, customs, military affairs, etc. seems to have eventually reached the British Prime Minister’s office at 10 Downing Street, London in June 1826. (Photostats copy on file with the authors). It should be noted that Rakhine State at this time was largely depopulated, since many local populations—both Buddhist and Muslim—had fled to the Chittagong region during the period of brutal colonial Burmese rule in Rakhine State. Many of those who had fled returned soon after the British took control of Rakhine State. The figures relate to “Arracan and its dependencies Ramree, Cheduba and Sandaway.” The report uses the term “Mugh” and “Mussalman” to refer to the Rakhine Buddhist populations and the Rakhine Muslim populations respectively. These terms were later contested by local populations and are today considered derogatory in Myanmar. See Interview with A.F.K. Jilani, Rohingya Scholar, in Kuala Lumpur, Malaysia (May 2013); Interview with Abdul Hamid Bin Musa Ali, President, Rohingya Society in Malaysia, in Kuala Lumpur, Malaysia (Dec. 2012).

³⁸ On the fluidity of ethnic identity see the pioneering work of Edmund Leach. See EDMUND LEACH, POLITICAL SYSTEMS OF HIGHLAND BURMA: A STUDY OF KACHIN SOCIAL STRUCTURE (1954). See also F. K. LEHMAN, THE STRUCTURE OF CHIN SOCIETY: A TRIBAL PEOPLE OF BURMA ADAPTED TO A NON-WESTERN CIVILIZATION (1963); JAMES C. SCOTT, THE ART OF NOT BEING GOVERNED: AN ANARCHIST HISTORY OF UPLAND SOUTHEAST ASIA (2009).

³⁹ See Buchanan, *supra* note 36; BELL, *supra* note 36, at 66.

more salient in post-independence Myanmar, where national belonging and minority representation has been defined primarily through race and ethnicity.⁴⁰

The Rakhine region of western Burma borders the sub-continent of India, notably East Bengal (later East Pakistan after the partition of India in 1947 and, since 1971, the independent nation-state of Bangladesh), and is divided from the rest of Myanmar by high mountains known as the Yoma or Arakan Range.⁴¹ The Rakhine region has a long coastal stretch along the Bay of Bengal, which merges into the Indian Ocean.⁴² Because of this geography, the region as a whole has a unique history vis-à-vis the landlocked central political systems of ancient Burmese Buddhists, and has a history of interdependence with Bengal, which was a natural source of cultural, economic, and labor exchange.⁴³ Thus, to claim that Rakhine was only home only to Buddhist populations in centuries past is ahistorical.

Today's Rohingya draw their ancestral and cultural roots and heritage from the multi-ethnic Muslim people who populated this coastal state. During the centuries prior to British colonial rule in the Arakan region in the 1820s, Arakan's administrative and political borders fluctuated based on the throne's waxing and waning ability to control subject populations and un-demarcated territories.⁴⁴ The Arakan coastal region was populated by a thriving multi-ethnic and multi-faith people, both transitory commercial communities and more permanent residents—including Armenians, Portuguese, Dutch, Persians, Arabs, as well as populations who are known in today's Myanmar as Chin.⁴⁵ In those days, not only were the territorial boundaries fluid, but so too were ethnic identity formations.⁴⁶ Ethnicity in this part of the old Arakan was not a

⁴⁰ Interview with Rohingya activist (name withheld), in Yangon (June 2013) (Burma).

⁴¹ M. ISMAEL KHIN MAUNG, *THE POPULATION OF BURMA: AN ANALYSIS OF THE 1973 CENSUS* 3 (1986) (including a map of Burma and adjacent countries).

⁴² *Id.*

⁴³ Pamela Gutman, *Between India and Southeast Asia-Arakan, Burmas Forgotten Kingdom, ARAKAN KOTAWCHAY* (Dec. 28, 2008), <http://arakankotawchay.blogspot.com/2011/06/between-india-and-southeast-asia-arakan.html> (last visited Jan. 10, 2014).

⁴⁴ VICTOR B. LIEBERMAN, *STRANGE PARALLELS: SOUTHEAST ASIA IN GLOBAL CONTEXT*, c. 800-1830 (2003).

⁴⁵ Aung Aung Hlaing, *The Coexistence of Orthogenetic and Heterogenetic City Cultures at Ancient Mrauk-U*, 2 *SCHOLAR RES. DEV. J.* 119 (2011). See also, Abu Anin, *Towards Understanding Arakan History (Part I): A Study on the Issue of Ethnicity in Arakan, Myanmar*, MERHROM Ch. 1 (Mar. 4, 2009), <https://merhrom.wordpress.com/2009/03/04/towards-understanding-arakan-history-part-i/> (last visited May 20, 2014).

⁴⁶ Michael Charney, *Crisis and Reformation in a Maritime Kingdom of Southeast Asia: Forces of Instability and Political Disintegration in Western Burma (Arakan) 1603-1701*, 41(2) *J. ECON. SOC. HIST. ORIENT* 185 (1998).

settled subject.⁴⁷ Thus, the Muslims of Rakhine region over the centuries have had many terms by which to identify themselves, including the terms Rakhine Muslim, Arakan Muslim, and Rohingya, the last of which has become more prominent in recent times.⁴⁸

As the dominant majority group in Arakan, the Rakhine Buddhists⁴⁹ today have largely defined their own ethnic identity and those they consider outsiders or others as something set in stone, claiming that the Rakhine region is only for Rakhine Buddhists.⁵⁰ Strongly dismissing the borderland people of Rohingya as alien invaders on the purely Buddhist Rakhine soil, Mr. Aye Maung, the influential Rakhine Member of the Parliament and Chairman of the Rakhine Nationalities Development Party (RNDP), spelled out his party's vision of the Rakhine state thus: "We need to rebuild the Rakhine State only for the Rakhine who alone are the indigenous on the soil."⁵¹ Thus, they overlook the long history of the Rohingya in the Rakhine region and claim that Rohingya is a recently invented ethnicity because the term was not included in British surveys during the colonial era.⁵² According to our in-depth interviews with Rohingya refugees, émigrés, and residents inside and outside Burma, those from whom the Rohingya are descended were included in multiple other categories. In fact, many Rakhine Buddhists also lived between East Bengal and Rakhine State themselves,⁵³ and many of their descendants live in modern day Bangladesh with full Bangladeshi citizenship rights,⁵⁴ demonstrating that the populations in this region straddled the modern borders.

⁴⁷ See, e.g., F. K. Lehman, *Ethnic Categories in Burma and the Theory of Social Systems*, in *SOUTHEAST ASIAN TRIBES, MINORITIES, AND NATIONS* 105-07, 111-11 (Peter Kunstadter ed., 1967); LEACH, *supra* note 38.

⁴⁸ Habib Sadiqui, *Muslim Identity and Demography in Arakan: Part 3. The Muslim Factor in Arakan*, HABIB SADIQUI (Oct. 9, 2011), <http://drhabibsiddiqui.blogspot.com/2011/10/muslim-factor-in-arakan-burma.html> (last visited 10 Jan. 2014).

⁴⁹ The term Rakhine today has largely come to mean Buddhist with ancestral roots in Rakhine or Arakan. In the past, it may have had a broader meaning used for the general populations of the Rakhine region. See Charney, *supra* note 8.

⁵⁰ See Interview with Dr. Aye Maung, RNDP Chair and MP, 3 *Venue News* (June 14, 2012) (on file with the authors).

⁵¹ *Id.*

⁵² KEI NEMOTO, *THE ROHINGYA ISSUE: A THORNY ISSUE BETWEEN BURMA (MYANMAR) AND BANGLADESH*, particularly pp.7-12, available at http://www.burmalibrary.org/docs14/Kei_Nemoto-Rohingya.pdf.

⁵³ Abid Bahar, *Burmese Invasion of Arakan and the Rise of Non-Bengali Settlements in Bangladesh*, BURMA TIMES, Jan. 31, 2013, <http://burmatimes.net/burmese-invasion-of-arakan-and-the-rise-of-non-bengali-settlements-in-bangladesh/>. See also various Burmese language works by Burma's preeminent historian, the late Professor Than Tun from Mandalay University.

⁵⁴ Interviews with Rohingyas who have lived in Bangladesh before emigrating on to third countries on Bangladeshi passports, in London and Kuala Lumpur (2012).

Migrations from Bengal into Rakhine before the inception of border control are used to claim that the Rohingya are Bengalis who arrived in the British era⁵⁵ and should be expelled from Burma.⁵⁶ In 1824, the Rakhine region changed hands when the British crushed the Burmese troops over a territorial dispute near Rakhine and annexed the two coastal regions of pre-colonial Burma, namely Rakhine and Tenassarim, as a province of British India.⁵⁷ The wet-rice agricultural economy in British colonial Rakhine boomed as the direct result of the British efforts to realize the commercial potential of the fertile Rakhine land and extremely favorable monsoon rainfall.⁵⁸ Rakhine in turn became an economic magnet attracting waves of migrant and seasonal workers from all directions, including Burmese and Mon farmers and laborers, both migratory and seasonal, from other parts of feudal Burma, including Rangoon⁵⁹ and upper Burma, as well as from neighboring India.⁶⁰

Rohingya is not simply a self-referential group identity, but an official group and ethnic identity recognized by the post-independence state. In the early years of Myanmar's independence, the Rohingya were recognized as a legitimate ethnic group that deserved a homeland in Burma.⁶¹ In 1954, Prime Minister U Nu highlighted the Rohingya Muslim political loyalty to the predominantly Buddhist country in his radio address to the nation.⁶² This speech is significant in its use of the term Rohingya, a term that the State today refuses to use,⁶³ and also in highlighting the role of the Rohingya in the newly independent nation. Following Burma's independence, under the premiership of U Nu, a special administrative

⁵⁵ Inkey, *supra* note 3.

⁵⁶ Francis Khoo Thwe, *Buddhist Monks Back President Thein Sein's Move to Expel Rohingyas*, ASIANNEWS.IT, Sept. 4, 2012, <http://www.asianews.it/news-en/Buddhist-monks-back-President-Thein-Sein%E2%80%99s-move-to-expel-Rohingyas-25723.html>.

⁵⁷ ANGLO-BURMESE WARS, ENCYCLOPEDIA BRITANNICA ONLINE, <http://global.britannica.com/EBchecked/topic/24993/Anglo-Burmese-Wars> (last visited Jan. 10, 2014).

⁵⁸ JOHN CHRISTIAN, *MODERN BURMA: A SURVEY OF POLITICAL AND ECONOMIC DEVELOPMENT* Ch. VII (1942).

⁵⁹ Rangoon, the old capital of Burma, with its thriving commercial class, was sixty percent Indian throughout the British colonial rule. The Burmese nationalists did not consider Rangoon the Burmese center. See AUNG GYI, *I AM AN UPPER BURMA MAN AND OTHER ESSAYS* (Yangon, Myanmar, 2012). This volume is a collection of Burmese language biographical essays written by a well-known nationalist leader the late ex-Brigadier Aung Gyi.

⁶⁰ J. RUSSELL ANDRUS, *BURMESE ECONOMIC LIFE* 14-16 (1947).

⁶¹ *Transcript of Speech by Deputy Commander-in-Chief Brigadier General Aung Gyi*, MYANMAR AHLIN NEWSPAPER, July 8, 1961, at 5-6.

⁶² Prime Minister U Nu, *Lessons from the Religious Conflict for the State in Myanmar* (radio address to the nation) (Sept. 25, 1954) (transcript on file with the authors).

⁶³ During the question and answer following his speech at the Chatham House, London, the Myanmar President officially denied the existence of not just the Rohingya as a group, but as a term. See Inkey, *supra* note 3. In his own words: "We don't have the term 'Rohingya.'" *Id.*

zone called May Yu was established in the 1950s, incorporating a large part of what is now North Rakhine State (Buthidaung, Maungdaw, and parts of Rathedaung) in which the majority of the inhabitants were Rohingya.⁶⁴ The creation of this district, administered separately from the rest of Rakhine State by the central state, is significant recognition of both the identity and rights of the Rohingya in independent Burma. Among the stated objectives of the May Yu administrative region was to “strive for peace with Pakistan,” which at that time incorporated today’s Bangladesh, by establishing an official homeland for the Muslims of the northern areas of Rakhine State and recognizing that the Rohingya were part of a population that straddled both sides of the Myanmar-East Pakistan border.⁶⁵

Brigadier Aung Gyi, one of the senior deputies of General Ne Win, was emphatic about the indigenous nature of the Rohingya people when he officially explained the nature of borderlands people in 1961:

On the west, May Yu district borders with Pakistan. As is the case with all borderlands communities, there are Muslims on both sides of the borders. Those who are on Pakistan’s side are known as Pakistani while the Muslims on our Burmese side of the borders are referred to as ‘Rohingya.’ Here I must stress that this is not a case where one single race splits itself into two communities in two different neighbouring countries. If you look at the Sino-Burmese border region, you will see this kind of phenomenon, namely ‘adjacent people’. To give you a concrete example, take Lisu of Kachin state, or La-wa (or Wa) and E-kaw of the same Kachin State by the Chinese borderlands. They all straddle on both sides of the borders. Likewise, the Shan can be found on the Chinese side as well as in Thailand – and they are known as ‘Tai’ or ‘Dai’ over there... They speak similar language and they have a common religion.⁶⁶

⁶⁴ Myanmar’s official encyclopedia (in the Burmese language) published by the Government Printing House in 1964, during the early years of General Ne Win’s Revolutionary Council, described the populations in these townships as seventy-five percent Rohingya—it is notable that the term Rohingya was used, not Bengali—while the rest was made up of other ethnic groups including the Chin, Myii, Kaman, Rakhine, and so on. THE UNION OF BURMA, MYANMAR ENCYCLOPEDIA 90 (1964). The Western Command regional commander, not provincial civil administration made up of Rakhine locals, was directly in charge of May Yu District Affairs.

⁶⁵ *Transcript of Speech by Deputy Commander-in-Chief Brigadier General Aung Gyi, supra* note 61, at 5-6.

⁶⁶ *Id.*

As Brigadier Aung Gyi correctly stressed, in all post-colonial nation-states, ethno-linguistic communities straddle the borders of newly independent nations.⁶⁷

The process of erasing the Rohingyas' identity and rights as well as physically destroying them began in the first decades of military rule under General Ne Win and continues to the present day. Part B discusses the history of the Rohingya's legal standing as an ethnic group during the period of military rule until today. The broader history vis-à-vis the state during this period is defined as part of the genocidal processes in Section III.

B. Anti-Rohingya Racism Becomes Encoded in Law and Policy in Post-1962 Independent Myanmar via the Citizenship Law

This section describes Myanmar's post-colonial nation-building project and the wider national milieu within which anti-Rohingya racism was encoded in law and policy during the General Ne Win era, beginning in 1962. Anti-Rohingya and anti-Muslim policy advisers and intellectuals from nationalist Rakhine groups successfully sought to eliminate the Rohingya from the demographic map of citizenship through the 1982 Citizenship Act. Such racism continues to maintain and propagate the law and policy framework that relates directly to the destruction of the Rohingya.⁶⁸

Following the declaration of independence in 1948, Myanmar was left with the daunting task of building a nation-state from the remnants of a post-conflict (World War II) territory that had never existed as a politically cohesive, centrally administered, multi-ethnic unit with a settled national identity. The British had administered the combined territories of upper and lower Burma as "Burma Proper" and the country's various borderlands, "Frontier Areas," from separate administrative homes in Calcutta and London, respectively.⁶⁹ The place-making and claim-staking processes that ensued as part of this nation-building process cemented a rigid framework for understanding Myanmar's considerable ethnic diversity.

One of the key issues in establishing the foundations of belonging and citizenship of the new Myanmar was how to deal with the considerable

⁶⁷ *Id.*

⁶⁸ *An Historian looks at Rohingya: An interview with Dr Aye Kyaw*, THE IRRAWADDY, (Oct. 7, 2009), http://www2.irrawaddy.org/article.php?art_id=16946&page=1.

⁶⁹ MAUNG MAUNG, BURMA IN THE FAMILY OF NATIONS 69-70 (1957).

migration from colonial South Asia to colonial Burma during the British period, a significant proportion of which occurred between 1824 and 1935 in light of growing anti-Indian racism.⁷⁰ Following the economic depression of the 1930s and the oppressive measures taken against local Burmese⁷¹ uprisings in Burma by the British and their largely Indian security forces and administration, resentment against the British and Indians was at a high in the new Myanmar state.⁷² Further, under Britain's colonial rule (1824-1948), the Burmese experienced colonial economic exploitation as two-layered: the British occupied the top of the colonial hierarchy, socially, economically, and politically; the Indians (and to a lesser extent Chinese) dominated the middle layer; and finally the Burmese, especially tradition-bound Buddhists, were at the bottom.⁷³ Anti-foreign, most specifically anti-Indian and anti-Chinese, racism developed as a historical and societal reaction to this sordid state of Burmese affairs.⁷⁴

Against this backdrop, the idea of belonging based on affiliation to the national races gained traction over notions that favored residence or birth within the territory. General Ne Win harnessed these racialized and anti-colonialist notions to solidify his power structures,⁷⁵ and were set in stone in the Citizenship Act that was drafted in 1982. As then military dictator, Ne Win noted in a speech regarding the drafting process of this law:

We, the natives or Burmese nationals, were unable to shape our own destiny. We were subjected to the manipulations of others from 1824 to 4 January 1948. Let us now look back at the conditions that prevailed at the time we regained

⁷⁰ NEMOTO, *supra* note 52.

⁷¹ Burmese in this context is used to denote the local populations of Burma irrespective of ethnicity.

⁷² RIOT INQUIRY COMMITTEE, INTERIM REPORT OF THE RIOT INQUIRY COMMITTEE (Rangoon 1939).

⁷³ For one of the best studies on the subject of colonial policy and practice, see JOHN S. FURNIVALL, *COLONIAL POLICY AND PRACTICE: A COMPARATIVE STUDY OF BURMA AND THE NETHERLANDS INDIA* (1948).

⁷⁴ For thorough Burmese and English language analyses on the roots of popular Burmese racism, see Thein Pe Myint, *The Battle Between the Indians and the Bama/Burmese*, in *COMMUNISM AND WE THE BURMESE* 158-180 (Thein Pe Myint ed., 3d ed. 1967). This Burmese language essay was first published as a newspaper article in 1935, five years after the first large-scale race riot between the Indians and the Burmese during the colonial era. For an English language inquiry exploring the history and causes of popular Burmese resentment and racism, see RIOT INQUIRY COMMITTEE, *supra* note 72.

⁷⁵ Ne Win, *Translation of the Speech by General Ne Win*, *THE WORKING PEOPLE'S DAILY*, (Oct. 9, 1982) (translating General Ne Win, President, Address at President's House (Oct. 8, 1982)), <http://www.scribd.com/doc/162589794/Ne-Win-s-Speech-1982-Citizenship-Law>.

independence on 4 January 1948. We then find that the people in our country comprised of true nationals, guests, issues from unions between nationals and guests or mixed bloods, and issues from unions between guests and guests This became a problem after independence. The problem was how to clarify the position of guests and mixed bloods. When the problem was tackled, two laws emerged [the Union Citizenship Act of 1948 and Union Citizenship Election Acts of 1948].⁷⁶

It is clear from this statement that the Citizen Act of 1982 was founded primarily on the popular notion of indigenous races (or *Taiyintha* in Burmese, meaning original children of the soil) in order to harness anti-colonial sentiment in post-independence Myanmar.

The law draws on a list of 135 ethnic groups, which excludes some minority groups such as the Rohingya.⁷⁷ Members of the 135 ethnic groups are automatically eligible for full citizenship in Myanmar.⁷⁸ Individuals who are not members of these groups must acquire nationality through different application procedures, which have excessively high criteria, and are largely insurmountable for the Rohingya.⁷⁹ These acquired nationalities, most relevantly naturalized citizen, come with a different set of rights, and it can take two generations for naturalized citizenship to be translated into full citizenship.⁸⁰

Using the language of national security, Chairman Ne Win made clear in 1982 that *tayoke* (Chinese) and *kalars* (the local racist term for dark-skinned people of Indian origin or Muslims) cannot be entrusted with any important positions in Myanmar's officialdom, including the bureaucracy and armed forces.⁸¹ As Ne Win unequivocally put it, all guests and mixed bloods were in Myanmar due to the legacy of British colonial rule.⁸² According to the 1982 Citizenship Act and this speech,

⁷⁶ *Id.* For an analysis that traces the institutionalization anti-foreign racism by the military leaders see Maung Zarni, *Military Roots of Racism in Myanmar*, ASIA TIMES, Sep. 13, 2013, http://www.atimes.com/atimes/Southeast_Asia/SEA-01-030913.html.

⁷⁷ Burma Citizenship Law (Pyithu Hluttaw Law), Oct. 15, 1982, No. 4 (Myan.) [hereinafter 1982 Citizenship Act], available at <http://www.ibiblio.org/obl/docs/Citizenship%20Law.htm>.

⁷⁸ *Id.*

⁷⁹ Chris Lewa, *North Arakan: An Open Prison for the Rohingya in Burma*, 32 FORCED MIGRATION REV. 11 (2009).

⁸⁰ For the three categories of citizenship—full citizenship, associate citizenship and naturalized citizenship, see 1982 Citizenship Act, *supra* note 77.

⁸¹ Ne Win, *supra* note 75.

⁸² *Id.*

those who came after the first Anglo-Burmese war of 1824 were not granted citizenship rights or state protections, even if they had settled in the country for over a century.⁸³ Permanent residency was more cause for suspicion than grounds for receiving full-citizenship, according to Ne Win's speech:

[T]heir penchant for making money by all means and knowing this, how could we trust them in our organizations that decide the destiny of our country? . . . We will therefore not give them full citizenship and full rights. Nevertheless, we will extend them rights to a certain extent. We will give them the right to earn according to their work and live a decent life. No more.⁸⁴

This quotation illustrates the racist basis for the Citizenship Act.

Racism was widespread and colonially rooted, especially toward the dark-skinned, hard-working races who, according to stereo-types of the time manned the British colonial administration, possessed entrepreneurial skills, sided with the British colonizers, married local Buddhist women, and procreated impure bloods.⁸⁵ Military leaders and their civilian technocratic advisers, who were no less racist, combined Myanmar's historically-rooted popular racism and the State's official racist policies and practices in mutually beneficial arrangements. Popular racism and the state's racially grounded policies and law became mutually reinforcing. The Rohingya, as the largest Muslim minority in Myanmar and with linguistic and cultural affiliations with populations in Chittagong in Bangladesh,⁸⁶ became the primary victims of this law despite the fact that many of them had resided in Myanmar for centuries with roots going back to the pre-colonial era.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ RIOT INQUIRY COMMITTEE, *supra* note 72. As the aforementioned report made it clear, one of the oldest sources of very strong anti-Muslim resentment amongst the majority local Buddhist populations is Islam's insistence on the conversion of non-Muslims, both men and women, before a marriage with all the spousal rights and protections could be accepted. Both the Burmese lay public and the culturally influential Buddhist Order over the past 100 years have generally, if not always actively, opposed Burmese Buddhists, especially women, marrying Muslim men complying with Islam's demand for conversion upon marriage. Military leaders and their civilian technocratic advisers, who were no less racist, married Myanmar's historically rooted popular racism and the State's official racist policies and practices in mutually beneficial arrangements.

⁸⁶ Noteworthy is the fact that the linguistic affinity between Burma's Rohingya and the Bengladeshi in Chittagong region of Bangladesh does not extend beyond Chittagong. Chittagong itself was formerly an integral part of the old Arakan Kingdom, which the Burmese eventually annexed in 1785. Interview with a Rohingya businessman originally from Maung Daw, a Rohingya enclave, in Kuala Lumpur (Dec. 23, 2013) (Malaysia).

The passage of the 1982 Citizenship Act was the culmination of state-sponsored acts that had already assaulted the Rohingya's citizenship rights. Upon independence from Britain and before the enactment of this Citizenship Law, the Rohingya enjoyed full citizenship. Prior to the first decades of independence, many Rohingya were entitled to automatic citizenship,⁸⁷ though they were not required to be documented.⁸⁸ A Rohingya was entitled to citizenship if he or she had one grandparent considered a member of a national race of Burma or if two grandparents had made Burma their permanent home.⁸⁹ Many Rohingya were also issued National Registration Cards ("NRCs"), one of the clearest indications of their entitlement to be citizens, and their former status as Myanmar citizens.⁹⁰ Additionally, the Rohingya were not yet specifically excluded from the "indigenous races of Burma,"⁹¹ which were defined loosely as "the Arakanese, Burmese, Chin, Kachin, Karen, Kayah, Mon, or Shan race and such racial groups as has settled in any of the territories included within the Union as their permanent home from a period anterior to 1823 A.D."⁹² These races, which were not defined further, did not expressly include or exclude the Rohingya, as they could have been considered "Arakanese" Muslim or another "such racial group."⁹³

After the military came to power in 1962, a variety of vigorous nationalist measures were adopted, leading to several major exoduses of people of Indian and Chinese ancestries.⁹⁴ For instance, the radical nationalization measures instituted in 1964⁹⁵ pauperized hundreds of

⁸⁷ The Union Citizenship Act, 1948 art. 3(1), 4(2) (Myan.).

⁸⁸ The Residents of Burma Registration Act, 1949, (on file with authors) which required residents to register was not implemented until after 1958. See Interview with A.F.K. Jilani, *supra* note 37. In fact, the National Registration Cards issued by the government to all citizens including the Rohingya did not mention either race or religion of the holder. *Id.*

⁸⁹ The Union Citizenship Act, 1948 (Myan.); The Union Citizenship Regulations, 1949 (Myan.).

⁹⁰ Residents of Burma Registration Rules, 1951 art. 33, 34 (unofficial translation), http://www.burmalibrary.org/docs12/Residents_of_Burma_Registration_Rules-1951.pdf.

⁹¹ The Union Citizenship Act, 1948 art. 3(1) (Myan.).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ For an overview of the migration of the people of Indian origin, see *Myanmar*, MINISTRY OF OVERSEAS INDIAN AFFAIRS, REPUBLIC OF INDIA 2-3, available at <http://moia.gov.in/pdf/Myanmar.pdf>. On the subject of Chinese migration to and from Burma, see *Overseas Chinese in Myanmar*, CHINATOWNOLOGY, http://www.chinatownology.com/overseas_chinese_burma.html (last visited May 24, 2014).

⁹⁵ For a brief discussion of the impact on the country's Indo-Burmese and Indian population of General Ne Win's racially motivated economic nationalization, see Thin Thin Aung & Soe Myint, *India-Burma Relations*, in CHALLENGES TO DEMOCRATIZATION IN BURMA 87 (2001), available at http://www.idea.int/asia_pacific/burma/upload/chap4.pdf.

thousands of Burmese of Indian ancestry and Indians, triggering a wave of Indian out-migration.⁹⁶

The move toward denying the Rohingya their rights as citizens of Burma began at the onset of military rule. The first large-scale operation in 1978 sought to separate nationals from non-nationals and formally severed the Rohingya from their citizenship rights.⁹⁷ In the run-up to Operation Nagamin in 1978, many of the Rohingya had their NRCs taken from them by state actors and the documents were never replaced.⁹⁸ The operation descended into large-scale violence and around 200,000 Rohingya fled to Bangladesh.⁹⁹ However, a bilateral agreement between Bangladesh and Burma forced the Burmese government to accept the repatriation of the Rohingya.¹⁰⁰

The 1982 Citizenship Act was promulgated in response to both the Rohingya repatriations¹⁰¹ and the failure of diplomatic efforts with the Islamic countries.¹⁰² Only then were the eight broad national races broken down into 135 ethnic groups that excluded the Rohingya and other smaller minority groups in Myanmar.¹⁰³ The omission of the Rohingya during the process of drafting this law was spelled out by Dr. Aye Kyaw,¹⁰⁴ a prominent Rakhine nationalist historian who was part of the drafting committee:

In 1978, while under the Burma Socialist Programme Party rule, me, Dr. Maung Maung [the late President and the chief legal adviser to General Ne Win], and U San Thar Aung¹⁰⁵ discussed a law on ethnic nationality . . . in the State Council

⁹⁶ MARTIN SMITH, *BURMA: INSURGENCY AND THE POLITICS OF ETHNICITY* 98 (1991).

⁹⁷ See *supra*, Part III.A.1.

⁹⁸ See Interview with A.F.K. Jilani, *supra* note 37.

⁹⁹ Smith, *supra* note 13.

¹⁰⁰ See Interview with A.F.K. Jilani, *supra* note 37.

¹⁰¹ EQUAL RIGHTS TRUST, *UNRAVELLING ANOMALY 59* (2010), available at <http://www.equalrightstrust.org/ertdocumentbank/UNRAVELLING%20ANOMALY%20small%20file.pdf>.

¹⁰² See Interview with A.F.K. Jilani, *supra* note 37.

¹⁰³ Chris Lewa, *North Arakan: An open prison for the Rohingya in Burma*, FORCED MIGRATION REVIEW, <http://www.fmreview.org/FMRpdfs/FMR32/11-13.pdf> p11.

¹⁰⁴ The late Aye Kyaw was a good friend of one of the authors. He was extremely tradition-bound, ultra-nationalistic, and conservative.

¹⁰⁵ U San Thar Aung was a Rakhine nationalist who held the Director-General post in the Higher Education Department of the Ministry of Education in the 1980's. Dr. Maung Maung, originally a young military officer with the Burma Independence Army, was a London Lincoln Inn-trained barrister who became Ne Win's chief legal counsel. The Burmese co-author of this paper knew his family quite well. Like Maung Maung himself, two of his sons served in Ne Win's army while his daughter worked as an intelligence agent attached to the Ministry of Foreign Affairs. They are known for their unquestioning loyalty to General Ne Win and his family.

office . . . I suggested [using a survey from] the year of 1824, a turning point in Burmese history when the British annexed lower Burma. Dr. Maung Maung agreed on that date, and we drafted a law that people living in Burma during 1824 were recognized as ethnic nationalities. We found no such word as Rohingya in that survey.¹⁰⁶

From this statement, one can see that the discussion and decisions to legally define the ethnic groups of Burma took place in the aftermath of the mass exodus of Rohingya into Bangladesh in 1978. Further, two Rakhine nationalists and General Ne Win's legal counsel discussed and decided upon the omission of the Rohingya from citizenship rights based on one survey by the British colonialist—surveys which were extremely problematic. The fact that the British census and other official records did not include the category Rohingya says more about the short-comings of British pre-World War II social-science methodologies and political and economic power relations during the British colonial period than they do about the history of Rohingya identity.¹⁰⁷

The 1982 Citizenship Act does not comply with international standards or Myanmar's international legal obligations in several areas, the most relevant of which is that the 1982 Citizenship Act discriminates on the grounds of race.¹⁰⁸ There has been international pressure to review or reform the 1982 Citizenship Act so as to base the acquisition of nationality on non-discriminatory criteria. This reform would involve modifying the racial components of the law and respecting self-identification.¹⁰⁹ However, the Myanmar government has been uncompromising on its decision to maintain the existing race-coded law, which government officials claim is widely supported by public opinion.¹¹⁰ In fact, the

¹⁰⁶ *An Historian looks at Rohingya: An interview with Dr Aye Kyaw, supra* note 68.

¹⁰⁷ Anthony Irwin, a British Army Liaison Officer, noted: "(The Musulman Arakanese) are generally known as Bengalis or Chittagonians, . . . They resemble the Arab in name, in dress and in habit . . . As a race they have been here for over two hundred years . . . They are living in a hostile country and have been for hundreds of years, and yet survive. They are perhaps to be compared with the Jews. A nation within a nation." ANTHONY IRWIN, *BURMESE OUTPOST* (1945).

¹⁰⁸ See, e.g., Burma Campaign UK, *Burma's Treatment of Rohingya and International Law*, BURMA BRIEFING at 4, Apr. 2013, available at http://www.burmacampaign.org.uk/images/uploads/Rohingya_and_International_Law.pdf.

¹⁰⁹ See *Joint Statement One Year After the Violence Began: Civil Society Organizations Deeply Concerned by Human Rights and Humanitarian Situation of Stateless Rohingya*, EQUAL RIGHTS TRUST (June 2013), <http://www.equalrightstrust.org/ertdocumentbank/Joint%20Ngon%20Statement%20on%20Rohingya%20-%20June%202013.pdf> (last visited May 24, 2014).

¹¹⁰ In Foreign Minister Wunna Maung Lwin's statement on September 13, 2013, to the UN Human Rights Council in Geneva, he stated, "It is necessary to understand the general sentiment of the people of Myanmar. While they are ready, and as it has been the case, to accept those who meet the criteria of the

racialization of the citizenship law, and the exclusion of the Rohingya enabled the specifically anti-Rohingya State (via the tight control that the State maintained over information and media) to widely instill in the Burmese population a rather virulent strain of twofold racism that is both anti-Muslim and anti-immigration. Further, presidential rhetoric notwithstanding,¹¹¹ there has been scant evidence that the government is actually moving toward a more inclusive definition of the national ethnic groups.¹¹²

The Burmese military state's encoding of anti-Indian racism in the body of its laws and policies, with roots in the colonial political economy of race relations,¹¹³ is a crucial mechanism through which the deliberate infliction of violence and physical destruction on the Rohingya is legalized and ideologically justified. It is within this broader nexus of anti-Indian and anti-Muslim racism, and the Islamophobic state that effectively mobilized empirically false anti-immigration rhetoric against the Rohingya

1982 Citizenship Law as citizens, they do not accept the term 'Rohingya' which has never existed in the country's history." Statement by H.E. U Wunna Maung Lwin, Union Minister for Foreign Affairs of the Republic of the Union of Myanmar, at the 24th Session of the UN Human Rights Council (Sept. 13, 2013), available at http://myanmargeneva.org/pressrelease/fm%20statement%20at%20HRC_13.pdf. Maung Lwin's most recent denial that the Rohingya are an ethnic people of Myanmar merely echoed a similar official stance made 20 years ago by the then Minister of Foreign Affairs U Ohn Gyaw. In a Foreign Ministry press release dated February 26, 1992, Ohn Gyaw stated, "Historically, there has never been a 'Rohingya' race in Myanmar Since the first Anglo-Myanmar War in 1824, people of Muslim faith from the adjacent country illegally entered Myanmar *Naing-Ngan*, particularly Rakhine State. Being illegal immigrants they do not hold immigration papers like other nationals of the country." Press Release, Ministry of Foreign Affairs of the Union of Myanmar. (Feb. 26, 1992). See also, Comm'n on Human Rights, *Report on the Situation of Human Rights in Myanmar, Prepared by Mr. Yozo Yokota, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1992/58 ¶ 41*, U.N. Doc. E/CN.4/1993/37 (Feb. 17, 1993).

¹¹¹ Daniel Greenland, *U Thein Sein's Vision For 'Inclusive National Identity'*, MYANMAR TIMES, May 22, 2013, <http://www.mmmtimes.com/index.php/national-news/6851-u-thein-sein-s-vision-for-inclusive-national-identity.html>.

¹¹² As a matter of fact, not only has Myanmar government failed to live up to its official rhetoric of moving towards a more inclusive society it is found to have ordered a recent wave of mass arrests of the Rohingya males above the age of ten in the Rohingya enclave named "Du Che Ra Dan." See Press Release, Fortify Rights, Myanmar: End Mass Arrests of Muslim Men and Boys in Rakhine State, Protect At-Risk Communities (Jan. 23, 2014), (available at <http://www.fortifyrights.org/publications.html>.) Quite the contrary, the Myanmar government attempted to cover up the recent massacre of the Rohingya, including women and children, involving government police and other security units. Gerry Mullany, *Report on Unrest Is at Odds With Account of Myanmar*, N.Y. TIMES (Jan. 24, 2014), <http://www.nytimes.com/2014/01/25/world/asia/un-says-muslims-were-massacred-in-tense-myanmar-region.html>. On the past failure of Myanmar's reformist, quasi-civilian government, see Matthew Smith, *Burma Lets the Rohingya Burn*, WALL ST. J., Apr. 7, 2012, <http://online.wsj.com/news/articles/SB10000872396390443792604577574731526546706>.

¹¹³ For a grounded analysis of the state-society interface in the production of Islamophobia and the violence against the Rohingya, see Maung Zarni, *Buddhist Nationalism in Burma: Institutionalized Racism Against the Rohingya Muslims Led Burma to Genocide*, TRICYCLE (2013), <http://www.tricycle.com/feature/buddhist-nationalism-burma>.

that this slow-burning process of Rohingya genocide needs to be situated.¹¹⁴

III. THE MECHANISMS OF SLOW-BURNING ROHINGYA GENOCIDE

This section examines four mechanisms through which genocidal acts against the Rohingya, with the intent to destroy the Rohingya as a group, in whole or in part, both physically and mentally, have been carried out. First, the section discusses acts such as violence, forced migration, and illegalization. Second, it takes a close look at the imposition of marriage and birth restrictions as population control measures intended to prevent the births of the new Rohingya. Third, the discussion focuses on the ways in which the Burmese state attempts to deliberately destroy the social foundations of the Rohingya as an ethno-religious and national group, thereby inflicting on the Rohingya conditions of life calculated to bring about the group's physical destruction. Fourth and finally, the section examines the state's decades-long efforts to intentionally destroy the Rohingya as a group through the erasure of their identity and history.

A. *Violence, Forced Migration, and Illegalization Constitute Intent to Destroy the Rohingya*

This section places violence, killing, forced migration, and illegalization in the context of the first three of the acts of genocide as defined in the 1948 Genocide Convention, namely intent to destroy the Rohingya through a) killing Rohingya people; b) causing serious bodily and mental harm to the Rohingya; and c) deliberately inflicting conditions of life calculated to bring about the physical destruction of the Rohingya. All three of these acts have been utilized against the Rohingya by the State and State-backed actors, most specifically ultra-nationalist local Buddhist Rakhine, since at least Operation Nagamin in 1978. Since it came to power in 1962, the military government of Burma has become increasingly xenophobic. Specifically, it turned anti-Muslim in its outlook and anti-Rohingya in Rakhine state.¹¹⁵ In the Rakhine state, the central government's policies assumed a decidedly anti-Muslim character. There the central authorities resorted to the simultaneous use of the three above-mentioned genocidal acts in order to permanently remove the Rohingya from Myanmar territory and to destroy the Rohingya in Myanmar. Violent

¹¹⁴ *Id.*

¹¹⁵ In-depth interviews with a group of Burmese army veterans with non-Buddhist backgrounds, in US, UK, and ASEAN region (1995-2012).

attempts to force the Rohingya from Rakhine lands into Bangladesh have not succeeded because the exoduses in 1978 and in the early 1990s were each followed by large-scale forced repatriations of Rohingya.¹¹⁶ Thus, inside Myanmar, killings and violence against the Rohingya and the simultaneous illegalization of the Rohingya, have had a dual purpose—both to effectuate the removal of the Rohingya from Rakhine and Myanmar (that forced migration failed to do) and to destroy the Rohingya as a group.

Recent history has led to a state of affairs in which 800,000 Rohingya have been pushed into three townships of North Rakhine State, which are subject to a different set of restrictive policies than the rest of Rakhine State.¹¹⁷ Additionally, since the 2012 violence, approximately 140,000 Rohingya (who were either directly displaced by the violence or were subject to forced relocation by security forces under the rubric of protecting them from violence) have been contained in closed camps for Internally Displaced Persons (“IDP”) camps and subject to a whole set of restrictions that do not apply to the rest of the population of Rakhine State.¹¹⁸ These IDP camps and camp-like settings are fast becoming sites of protracted displacement and permanent segregation.¹¹⁹ In the IDPs where the Rohingya have been ghettoised, they experience disproportionately more poverty, under-development, restrictive and discriminatory policies, and human rights abuses.¹²⁰ Additionally, within these areas in which the Rohingya are contained, on-going attempts to control marriages and prevent births demonstrate the intention to destroy the Rohingya.¹²¹ Thus, the forced migration and forced population transfer of Rohingya results in ghettoization which intends to inflict group conditions of life that are calculated to bring about the groups destruction and cause serious bodily and mental harm on the group.

This section considers how the processes of violence, forced migration, and the legitimization of those processes through the illegalization of the Rohingya since the 1970s has been used in a long-running, slow-burning campaign to destroy the Rohingya as a group.

¹¹⁶ See *supra*, Part III.A.

¹¹⁷ Interview with a group of Rohingya who were born and lived in this highly concentrated Rohingya community, in Kuala Lumpur and, via email, Rangoon.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Interviews with two former UN staff, in Kuala Lumpur (Malaysia) and, via email, Sittwe, Rakhine (2013).

¹²¹ *Id.*

1. *1978: The First Wave of Violence, Killings, Forced Migration and Illegalization*

Forced expulsion of Rohingya populations has occurred on a large-scale since the 1970s. At the end of 1977, the military junta launched an Operation known as *Nagamin* (“Operation Dragon King”) with the purpose of “designating citizens and foreigners in accordance with the law and taking actions against foreigners who have filtered into the country illegally.”¹²² Operation *Nagamin* reached Rakhine State in February 1978.¹²³ Under this policy, many Rohingya were falsely accused of being illegal immigrants from Bangladesh and were detained and tortured. Rohingyas in Rakhine State had their official documentation taken away by inter-agency teams of inspectors.¹²⁴ The operation degenerated into a widespread campaign of terror and violence against the Rohingya by hostile local populations and the State.¹²⁵ News of this treatment spread and over 200,000 panic-stricken Rohingya fled the country into the newly independent neighboring Bangladesh.¹²⁶ This process of violence, terror, and forced migration of Rohingya was the first wave of ethnic cleansing and a clear indication of the intent to destroy the Rohingya. The processes of illegalization and ghettoization of the Rohingya that followed Operation *Nagamin* further aimed to impose conditions of life on the Rohingya that would cause serious bodily and mental harm and destroy the Rohingya as a group.

Forced repatriation of the Rohingya who fled to Bangladesh followed the exodus under a bilateral agreement between the governments of Bangladesh and Burma.¹²⁷ To ensure repatriation, Bangladesh used coercive tactics and withheld food rations,¹²⁸ leading to the death of 12,000 refugees between June 1, 1978, and March 31, 1979.¹²⁹ Recently, Myanmar claimed that only 143,900 people had fled the country as part of Operation *Nagamin* while Bangladesh claimed the number to be

¹²² HUMAN RIGHTS WATCH, BURMA: ROHINGYA MUSLIMS: ENDING A CYCLE OF EXODUS? 12 (Sept. 1996) (quoting Statement by the Ministry for Home and Religious Affairs (Nov. 16, 1977)).

¹²³ William Mattern, *Refugees: Burma's Brand of Apartheid*, 101 FAR E. ECON. REV. 31 (1978).

¹²⁴ See Interview with A.F.K. Jilani, *supra* note 37.

¹²⁵ Smith, *supra* note 13.

¹²⁶ *Id.*

¹²⁷ C.R. ABRAR, REPATRIATION OF ROHINGYA REFUGEES, (1995), available at <http://www.burmalibrary.org/docs/Abrar-repatriation.htm>.

¹²⁸ ALAN C. LINDQUIST, UNITED NATIONS HIGH COMM'R FOR REFUGEES, REPORT ON THE 1978-1979 BANGLADESH REFUGEE RELIEF OPERATION (June 1979).

¹²⁹ *Id.*

252,000.¹³⁰ In all, 187,250 Rohingya were forcibly returned to Burma.¹³¹ This discrepancy in numbers arose due to the manipulation of figures as the states involved attempted to disown the Rohingya.¹³² It further fed into the popular perception in Myanmar of illegal infiltration by Bengalis, as the population of Myanmar was led to believe that it was not Rohingya that returned to Myanmar, but illegal Bengali immigrants who arrived as evidenced by the discrepancy in figures.¹³³

Since the devastating impact of the events of 1978-79 to the present day, current forced evictions of the Rohingya from Myanmar are in full knowledge that the conditions and journeys outside the country may threaten many lives. As such, forced migration is more than simply the removal of the Rohingya from the land, but is part of a deliberate process of destruction of the Rohingya people.

2. *The 1980s: Illegalization and Conditions Imposed on the Rohingya are Calculated to Bring About Their Destruction and Cause Physical and Mental Harm*

The 1982 Citizenship Act stripped the Rohingya of their nationality and led to the creation of the security-legal framework built around their statelessness. The fact that the Rohingya populations are found in recognizably Rohingya pockets (albeit alongside non-Rohingya local communities such as the Buddhist Rakhines) primarily in the northernmost districts of the state, and to a lesser extent throughout the Rakhine state, facilitated the state's plan to turn these targeted communities into security grids. Using the 1982 Citizenship Act, which strips a large percentage of the Rohingya of their citizenship status, that is, rendering the population illegal,¹³⁴ the state was able to place and enforce draconian restrictions on

¹³⁰ These numbers are based on Bangladesh and Myanmar government statistics cited in C.R. ABRAR, *supra* note 127. See also, THE GOV'T OF THE REPUBLIC OF THE UNION OF MYANMAR, RAKHINE INQUIRY COMMISSION REPORT (Apr. 29, 2013) (in Burmese) (on file with the author). The original Burmese version was released on April 29, 2013 and the English version was released only in August 2013. Both versions are on file with the authors.

¹³¹ Based on Bangladesh and Myanmar government statistics cited in C.R. ABRAR, *supra* note 127. See also, THE GOV'T OF THE REPUBLIC OF THE UNION OF MYANMAR, *supra* note 130. The original Burmese version was released on April 29, 2013 and the English version was released only in August 2013. Both versions are on file with the authors.

¹³² C.R. ABRAR, *supra* note 127.

¹³³ *Id.*

¹³⁴ According to the Immigration Minister and ex-police chief Khin Yi, out of a total of 1.33 million Rohingya, only 40,000 of them hold Myanmar citizenship or are considered legally present. See Szep & Marshall, *supra* note 9.

the everyday lives of Rohingya through these security grids.¹³⁵ The United Nations considers the Rohingya “one of the most persecuted groups in the world;” they are the only ethnic group in Burma who are barred from having more than two children, and subject to arbitrary mass arrests and chronic waves of massacres.¹³⁶

The 1982 Citizenship Act is not simply a legal mechanism through which the Rohingya experience systematic and legalized discrimination; rather it is the “anchor”¹³⁷ that holds in place the discriminatory legal framework designed to severely cripple the Rohingya as a group by falsely deemed illegals and non-citizens. These draconian locally-implemented policies include travel restrictions (e.g., restricting travel without permission to neighboring village tracts, restricting all travel beyond the three townships of North Rakhine State), restrictions on marriages and cohabitation, and restrictions on access to education and healthcare.¹³⁸ This legal framework has served to impoverish the population and leave them vulnerable to systematic and wide-spread extortion, abuse, and exploitation.¹³⁹ The lack of legal protection for non-citizens, together with the implementation of local policies and a dysfunctional judicial system, deemed to have failed even minimalist models of the rule of law,¹⁴⁰ govern the lives of the Rohingya in North Rakhine State, rendering everyday activities illegal and thus allowing free-reign for extortion, abuse, impunity, and wide-spread human rights abuses.¹⁴¹ For instance, the country lacks any guarantee of fundamental rights and freedoms, displays extremely weak administrative enforcement of regulations, and does not allow sufficient nongovernmental checks on power.¹⁴² The set of discriminatory laws that deny the Rohingya their fundamental rights has also served over the past decades to destroy the social foundations of the Rohingya ethnic group, legitimizing and actively encouraging

¹³⁵ Interviews with the three members of the Rakhine Violence Inquiry Commission, by phone and face-to-face in Kuala Lumpur, Malaysia (Fall 2012).

¹³⁶ Associated Press in Yangon, *UN Urges Burma to Investigate Rohingya Deaths After Latest Violence*, THE GUARDIAN, Jan. 24, 2014, <http://www.theguardian.com/world/2014/jan/24/un-burma-investigate-rohingya-deaths-violence>.

¹³⁷ ZAWACKI, *supra* note 16.

¹³⁸ Lewa, *supra* note 79.

¹³⁹ See, e.g., AMNESTY INT’L, MYANMAR: THE ROHINGYA MINORITY: FUNDAMENTAL RIGHTS DENIED 27 (May 2004), available at <http://amnesty.org/en/library/asset/ASA16/005/2004/en/9e8bb8db-d5d5-11dd-bb24-1fb85fe8fa05/asa160052004en.pdf>.

¹⁴⁰ Nick Cheesman, *Thin Rule of Law or Un-Rule of Law in Myanmar?*, 82 PAC. AFF. 597 (2009).

¹⁴¹ Lewa, *supra* note 79, at 12.

¹⁴² Andrew D. Kaspar, *Burma Fares Poorly in Global Rule of Law Gauge*, THE IRRAWADDY, Mar. 6, 2014, <http://www.irrawaddy.org/burma/burma-fares-poorly-global-rule-law-gauge.html>.

discrimination and abuses against the Rohingya by both civilians and state actors, such as the security forces.

The 1982 Citizenship Act serves as the state's legal and ideological foundation¹⁴³ on which all forms of violence, execution, restrictions, and human rights crimes are justified and committed with state impunity if carried out horizontally by the local ultra-nationalist Rakhine Buddhists. In light of the on-the-ground link between the legalized removal of citizenship from the Rohingya¹⁴⁴ and the implementation of a permanent set of draconian laws and policies—as opposed to periodic “anti-immigration” operations—amount to the infliction on the Rohingya of conditions of life designed to bring about serious bodily and mental harm and to destroy the group in whole or in part. As such, the illegalization of the Rohingya in Myanmar is an indication of the intent of the State to both remove the Rohingya permanently from their homeland and to destroy the Rohingya as a group.

3. *The 1990s and 2000s: Continuing Abuses and the Role of the NaSaKa Security Forces in Causing Serious Bodily and Mental Harm to the Rohingya with the Intent to Destroy them as a Group*

The Rohingya have experienced additional waves of large-scale violence and forced migration since the late 1970s, including between May 1991 and March 1992,¹⁴⁵ in 2001,¹⁴⁶ and again in 2012.¹⁴⁷ Each of these examples of large-scale violence has taken place against on-going daily experiences of human rights abuses, including arbitrary arrests and execution, enforced disappearances, torture, and rape.¹⁴⁸

In the 1980s and 1990s, nation-wide unrest triggered by decades of repressive military rule, the failure of economic policies and resultant hardships, and the regime's refusal to stand by the results of the 1990 elections in which NLD won a landslide victory, led to a continuous tightening of already harsh measures to control dissent across Myanmar.¹⁴⁹ Against this backdrop, the junta increased the military presence along the

¹⁴³ ZAWACKI, *supra* note 16, at 18-19.

¹⁴⁴ *See supra*, Part II.B.

¹⁴⁵ HUMAN RIGHTS WATCH, *supra* note 122; U.S. COMMITTEE FOR REFUGEES, REPORT ON THE ROHINGYA REPATRI, THE RETURN OF THE ROHINGYA REFUGEES TO BURMA: VOLUNTARY REPATRIATION OR REFOULEMENT? 14 (March 1995).

¹⁴⁶ HUMAN RIGHTS WATCH, *supra* note 17, at 16.

¹⁴⁷ *See* EQUAL RIGHTS TRUST, *supra* note 23.

¹⁴⁸ *Id.* at 12.

¹⁴⁹ Jayshree Bajoria, *Understanding Myanmar*, COUNCIL ON FOREIGN RELATIONS (Jun. 21, 2013), <http://www.cfr.org/human-rights/understanding-myanmar/p14385> (last visited Jan. 10, 2014).

border with Bangladesh and in all the border areas of Myanmar in an attempt to sever dissidents from external support and shore up the borders.¹⁵⁰ With the build-up came increased demands for land and labor, resulting in land confiscations, forced evictions, forced labor, as well as torture and rape perpetrated by the security forces (“NaSaKa”).¹⁵¹ While these abuses occurred extensively elsewhere in minority areas and affected many populations of Myanmar, including the Rakhine Buddhists, they disproportionately affected the Rohingya, whose legal and social status made them easy targets, especially since the military and local civilian population already subjected them to discrimination and abuse.¹⁵²

The State-sponsored abuses that the NaSaKa perpetuated indicate the intent to destroy the Rohingya. The establishment of the NaSaKa as a military border force in 1992 as part of the militarization of Myanmar's border areas came hand in hand with the imposition of severe physical movement and marriage restrictions, increased extortion, and abuse.¹⁵³ The abuses resulting from the establishment and role of the NaSaKa, caused another acute outflow of some 250,000 Rohingya, about thirty percent of the total Rohingya population of North Arakan, who left for Bangladesh in 1992 and 1993.¹⁵⁴ Figures indicating the scale of the killings and abuses by the *NaSaKa* are not available due to the lack of documentation. Despite this lack, several factors indicate that the severe bodily and mental harms suffered by the Rohingya during the early 1990s occurred with the intent to destroy the Rohingya. These severe abuses included “razed villages, mass rapes and extrajudicial killings.”¹⁵⁵ The NUI Galway report used the evidence collected elsewhere in Myanmar's ethnic minority areas on summary and arbitrary executions and killings as

¹⁵⁰ IRISH CENTRE FOR HUMAN RIGHTS, NAT'L UNIV. OF IR. AT GALWAY, *CRIMES AGAINST HUMANITY IN WESTERN BURMA: THE SITUATION OF THE ROHINGYA* 92 (2010), <http://www.nuigalway.ie/media/intranet/Crimes-Against-Humanit-in-Western-Burma.pdf>; HUMAN RIGHTS WATCH, *supra* note 122.

¹⁵¹ IRISH CENTRE FOR HUMAN RIGHTS, *supra* note 150.

¹⁵² The anti-Rohingya sentiment was widespread among the dominant Buddhist Rakhine or Arakanese and they were typically mistreated by local security units in Western Burma even before the State launched its official large-scale campaign in 1978 to terrorize the Rohingya and drive them out of Western Burma. See *The Oppression of Rakhine Muslims (i.e., Rohingya)*, 5 LIGHT OF THE WORLD 54 (1957). This Burmese language article describes the mistreatment of the Rohingya nationalities at the hands of the local Rakhine authorities while the former looked the other way when Rakhine Buddhists from across the then East Pakistan to come and settle in Western Burma. *Id.*

¹⁵³ EQUAL RIGHTS TRUST, *supra*, note 101, at 96.

¹⁵⁴ *Id.*

¹⁵⁵ Francis Wade, *Abolishing Burma's Feared Border Force: PR or Reform?*, ASIAN CORRESPONDENT (July 15, 2013), <http://asiancorrespondent.com/110670/abolishing-burmas-feared-border-force-pr-or-reform/>.

part of forced labour practices to estimate the severity of these abuses.¹⁵⁶ However, the Rohingya have suffered disproportionately to other ethnic minorities in terms of forced labour and associated abuses including killing, forced disappearances, arbitrary arrests, and associated human rights abuses.¹⁵⁷ According to the NUI Galway researchers:

During the course of the field investigation for this Report, a number of accounts were provided of incidents in which agencies of the SPDC [State Peace and Development Council, the then ruling military council], usually the NaSaKa [or the inter-agency security and intelligence division under direct control of the Military], were allegedly responsible for the discriminate killing of Rohingya residents in North Arakan State. Examples ranged from deaths resulting from the use of live ammunition to disperse gatherings of Rohingyas to individual accounts of family members being beaten to death while performing forced labour....[Despite being unable to verify the information] it is nevertheless obvious from all sources that discriminate killings are taking place in North Arakan State. They may be referred to as discriminate simply because the vast majority of reported incidents flowing out of Arakan State (for example, as highlighted by HRDU [Human Rights Documentation Unit]) overwhelmingly involve Rohingya victims.¹⁵⁸

The state backing of the abuses through the establishment of the NaSaKa, the law and policy framework that institutionalised the discriminatory nature of the abuses, and the disproportionate manner in which the Rohingya experienced the abuses indicate intent to destroy.¹⁵⁹

In 1994, after the United Nations High Commission on Refugees (“UNHCR”) was granted access to North Rakhine State, mass repatriations of some 236,000 Rohingya took place, even though there had not been significant improvement in the human rights situation.¹⁶⁰ The repatriations

¹⁵⁶ IRISH CENTRE FOR HUMAN RIGHTS, *supra* note 150.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 124.

¹⁵⁹ The New Republic uses the term “concentration camps” in a recent article about the plight of the Rohingya (*vis-à-vis* other oppressed minorities in Burma), indicating the severity of the Rohingya situation. See Graeme Wood, *A Countryside of Concentration Camps*, NEW REPUBLIC, Jan. 21, 2014, <http://www.newrepublic.com/article/116241/burma-2014-countryside-concentration-camps>.

¹⁶⁰ HUMAN RIGHTS WATCH, *supra* note 122.

were involuntary and Bangladesh security forces used excessive force to make Rohingya return.¹⁶¹ Neither the Rakhine Burmese population nor the Myanmar government considered the returnees to be citizens, and the popular conflation of Rohingyas with illegal Bengali immigrants was further entrenched by returnees having spent time outside the country. The then-Minister for Foreign Affairs, U Ohn Gyaw, stated to the UN Special Rapporteur in December 1992: “it is a rubbish thing that people have left Myanmar. These people who are in the refugee camps in Bangladesh are perhaps from Dhaka, but not one single person has left Burma.”¹⁶² This statement is a blatant denial of the Rohingya’s existence and rights in Myanmar, and part and parcel of the processes of ethnic cleansing and destruction of the Rohingya as a group through denial of their rights and identity.

The decades that followed saw a steady and significant outflow of Rohingya from Rakhine State suffering from the same abuses that they had suffered in the early 1990s. In Bangladesh, only the refugees who were in the UNHCR-administered camps prior to the repatriations of the 1990s are allowed to be registered and reside within the camps today—this number is around 29,000.¹⁶³ A further 200,000 to 300,000 people reside in make-shift sites outside the official camps, many of whom were forcibly repatriated to Myanmar in the 1990s, and made their way back to Bangladesh at some point.¹⁶⁴ This population has no access to protection or humanitarian aid and lives in squalid and dangerous conditions on the margins of society.¹⁶⁵ They are unable to return to Myanmar as they have been deleted from household family lists by state security forces and local administrators and would be subject to arrest as illegal immigrants on their return.¹⁶⁶ Their dire existence in Bangladesh is a testament to the fact that their existence is only possible outside of Myanmar.

Again in 2001 and 2002, different waves of violence against the Rohingya occurred. Mobs made up of local Rakhine Buddhists violently

¹⁶¹ *Id.*

¹⁶² U.N. Comm’n on Human Rights, *supra* note 110.

¹⁶³ Interviews with a UN official, and local NGO staffers Cox Bazaar, in Bangladesh (Spring 2010).

¹⁶⁴ U.N. High Comm’r for Refugees Policy Dev. & Evaluation Serv., *States of Denial: A Review of UNHCR’s Response to the Protracted Situation of Stateless Rohingya Refugees in Bangladesh*, 2, PDES/2011/13 (Dec. 2011) (by Esther Kiragu, Angela Li Rosi & Tim Morris) available at <http://www.unhcr.org/4ee754c19.html>.

¹⁶⁵ PHYSICIANS FOR HUMAN RIGHTS, STATELESS AND STARVING, PERSECUTED ROHINGYA FLEE BURMA AND STARVE IN BANGLADESH (Mar. 2010), https://s3.amazonaws.com/PHR_Reports/stateless-and-starving.pdf.

¹⁶⁶ Interviews with a Group of Rohingya Refugees and Expatriates, in Kuala Lumpur, Malaysia (2013).

attacked the Rohingya in places like Sittwe, the capital of Rakhine State. A total of twenty-eight mosques and Madrasas were destroyed and an unknown number of Rohingya were killed.¹⁶⁷ The government's security forces did nothing to protect the Rohingya and in many instances they took part in the violence against them,¹⁶⁸ indicating that the state was deliberately inflicting conditions of violence and insecurity on the Rohingya that were calculated to bring about their destruction. In interpreting the behavior of the State, it is extremely important to understand that all actions of political and societal significance are, with no exception, carried out either by direct orders from the highest level of the (military) leadership or with a tacit approval on the part of the senior-most leadership.¹⁶⁹ Either way, all perpetrators of violence against the Rohingya have enjoyed impunity since the first large scale campaign of violence against the Rohingya began in 1978, which speaks volumes about the instrumental role the state and its leaderships have played in the destruction of the Rohingya and creation of life-destroying conditions for these people as a group.¹⁷⁰

4. *The 2012 Pogroms: Civilian-military Violence, Denial of Aid, Social and Economic Boycotts, and Hate Campaigns are Designed to Kill, Cause Serious Bodily and Mental Harm, and Deliberately Inflict Conditions of Life Calculated to Destroy the Rohingya*

Throughout the 1990s and 2000s, the military played a central role in perpetrating and encouraging violence and abuses against the Rohingya with the intent to both remove them from Myanmar and to inflict serious harm and conditions of life on them with the intent to destroy them. In 2010, political and economic reforms brought a nominally civilian government to power under ex-general President Thein Sein.¹⁷¹ The opening of societal space and the emerging media freedoms that came with these reforms changed the dynamics, but not the nature of the destruction of the Rohingya. Post-2010, state-based propaganda continued and was

¹⁶⁷ HUMAN RIGHTS WATCH, *supra* note 17.

¹⁶⁸ *Id.*

¹⁶⁹ *See* (Burmese Language) Interviews with ex-General Khin Nyunt, Chief of the Directorate of Defense Services Intelligence (1988-2004) and Prime Minister (2003-04), a book-length series of interviews with the formerly third ranking and powerful general, Rangoon, Nov. 2013.

¹⁷⁰ Maung Zarni, *Religious Violence and the Role of the State*, in MYANMAR IN TRANSITION: POLITY, PEOPLE AND PROCESSES 83, 83-91 (Kerstin Duell ed., 2013), available at <http://www.kas.de/politikdialog-asien/en/publications/36387/>.

¹⁷¹ *Profile: Burma President Thein Sein*, BBC (Oct. 12, 2012), <http://www.bbc.co.uk/news/world-asia-pacific-12358204>.

complemented by wide-spread popular hate campaigns and organized and state-backed violence against the Rohingya by Rakhine Buddhist mobs that escalated in 2012.¹⁷² The events that occurred in 2012 were the first abuses against the Rohingya that human rights organizations were able to effectively document based on findings and interviews inside Rakhine State.¹⁷³ The 2012 violence saw a mixture of state authorities, civilian mobs, and local populations killing and engaging in the mass physical destruction of Rohingya (and other Muslim people, properties, and communities)—effectively enacting pogroms against the Rohingya.¹⁷⁴

While the government of Myanmar, some UN agencies, and some of the international community continue to label the violence as communal and sectarian, the body of evidence collected from human rights organisations shows that the State and its security forces played a vital role in the physical destruction of Rohingya people, properties, and communities during the 2012 violence.¹⁷⁵ Beyond simply implicating the State in this destruction, the role of the security forces in the violence, together with the institutionalization of discrimination and abuse against the Rohingya, indicates that the killings, violence, and hate campaigns were planned, organized, and perpetrated with the purpose of both driving out the Rohingya and destroying them. The fact that state security forces both engaged with and allowed the violence and hate campaigns to happen, indicates a deliberate intention to create conditions of life calculated to bring about the destruction of the Rohingya.

While the government of Myanmar places the numbers killed by the violence in 2012 at 192,¹⁷⁶ these numbers are highly disputed and it is

¹⁷² HUMAN RIGHTS WATCH, *supra* note 17.

¹⁷³ Interview with a prominent human rights researcher in Kuala Lumpur, Malaysia, Fall 2013. In terms of the substance of popular hate speech in Myanmar it is decidedly Muslim-phobic. There is a widespread fear that the country's Muslims who make up an estimated four to five percent of the country's total are waging a jihad against the Buddhist population estimated at eighty to ninety percent of the total population. The jihad is aimed at turning the predominantly Buddhist Myanmar into an Islamic country. Further, the demonization of the country's Muslims often involves painting them as an extension of radical Islamic organizations such as the Taliban or Al Qaeda. Both the leading anti-Muslim Buddhist monks and Myanmar President's spokespersons have been found to have used these narratives publicly—in their Burmese language Facebook postings, which appear to be timed with erupting violence against the Rohingya and the Muslims. The hate-speech materials used for the article are on file with the authors. Some on-line hate-speech (in English translation) can be viewed at <http://www.maungzarni.net/> (last visited Mar. 10, 2014).

¹⁷⁴ *Burma: The Plight of the Rohingya*, U.S. HOLOCAUST MEM'L MUSEUM, <http://www.ushmm.org/confront-genocide/cases/burma> (last visited Jan. 10, 2014). See also, Samantha Michaels, *Burma Govt Accused of Ethnic Cleansing Against Rohingya Muslims*, THE IRRAWADDY (Apr. 22, 2013), <http://www.irrawaddy.org/rohingya/burma-govt-accused-of-ethnic-cleansing-against-rohingya-muslims.html>.

¹⁷⁵ *Id.*

¹⁷⁶ THE GOV'T OF THE REPUBLIC OF THE UNION OF MYANMAR, *supra* note 130, at 20.

likely that they grossly under-estimate the number of people killed.¹⁷⁷ Human Rights Watch (“HRW”) documented four mass graves related to the violence of 2012 and villagers reported being forced to dig mass graves.¹⁷⁸ HRW found that in one village alone, in Mrauk-U district, at least 70 Rohingya were killed in a massacre.¹⁷⁹ In addition to the killings, whole villages and communities were razed and destroyed.¹⁸⁰ Satellite images of the destruction clearly show that whole Muslim areas were completely destroyed while Buddhist areas were left relatively untouched.¹⁸¹

The pogroms were systematic and widespread. HRW described the attacks as:

...organized, incited, and committed by local Arakanese [Rakhine]¹⁸² political party operatives, the Buddhist monkhood, and ordinary Arakanese, at times directly supported by state security forces. Rohingya men, women, and children were killed, some were buried in mass graves, and their villages and neighborhoods were razed. While the state security forces in some instances intervened to prevent violence and protect fleeing Muslims, more frequently they stood aside during attacks or directly supported the assailants, committing killings and other abuses. In the months since the violence, the Burmese government of President Thein Sein has taken no serious steps to hold accountable those responsible or to prevent future outbreaks of violence.¹⁸³

In many cases, State security forces were aware of the attacks before they took place.¹⁸⁴ In some cases, Rohingya were forcibly evicted from their homes and placed in IDP camps by security forces. The alleged justification for these evictions was protection from supposedly coming

¹⁷⁷ See, e.g., *Inside Burma's Forbidden Camps*, CHANNEL 4 NEWS (Aug. 14, 2012), <http://www.channel4.com/news/inside-burmas-forbidden-camps>.

¹⁷⁸ HUMAN RIGHTS WATCH, *supra* note 17, at 7.

¹⁷⁹ See HUMAN RIGHTS WATCH, *supra* note 28.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Arakanese is an adjective denoting the people or language of Arakan. We use it interchangeably with Rakhine.

¹⁸³ HUMAN RIGHTS WATCH, *supra* note 17, at 4.

¹⁸⁴ Interview with U Nyunt Maung Shein and U Tin Maung Than, two Muslim members of the Presidential Inquiry Commission on the Sectarian Violence in Rakhine, in Kuala Lumpur, Malaysia (April 2013).

violence. In other cases, Rohingya were disarmed ahead of violent attacks, leaving them defenseless.¹⁸⁵

Since 2012, violence, fuelled by systems of impunity, targeted at Muslim communities has been on-going in Rakhine State and has spread to other areas of the country, targeting Muslim communities.¹⁸⁶ In September 2013, the UN Special Rapporteur raised the issue of impunity in relation to Rohingya violence in Rakhine State, noting:

In view of the consistent and credible reports of widespread and systematic human rights violations carried out by security forces that the Special Rapporteur has received, he remains concerned that the perpetrators of such violations have not been held to account. This culture of impunity is particularly troubling given the vulnerability and marginalization of the members of the Rohingya community owing to their lack of legal status in the country.¹⁸⁷

The State's refusal to address the issues of impunity in relation to the Rohingya in Rakhine State, even on the urging of the international community and human rights bodies,¹⁸⁸ creates conditions within which the central state allows the serious bodily and mental harm inflicted on the Rohingya to continue and to spread, with the effect of condoning and directly contributing to the physical destruction of the Rohingya people.

¹⁸⁵ *Id.* See also, *Burma: End "Ethnic Cleansing" of Rohingya Muslims*, HUMAN RIGHTS WATCH (Apr. 22, 2013), <http://www.hrw.org/news/2013/04/22/burma-end-ethnic-cleansing-rohingya-muslims>.

¹⁸⁶ For example, violence spread to Thandwe, Rakhine State in October 2013. A crowd of over 1000 Rakhine surrounded a Muslim village, killing at least seven, including a ninety-four year-old woman; destroying three mosques and 112 homes; and displacing almost 500 people. See Shibani Mahtani & Myo Myo, *Myanmar Town Locked Down After Violence; President Continues Trip*, WALL ST. J. (Oct. 2, 2013), <http://online.wsj.com/news/articles/SB10001424052702304906704579110653637143812>.

¹⁸⁷ U.N. Secretary-General, *Situation of Human Rights in Myanmar*, 12, U.N. Doc. A/68/397 (Sept. 23, 2013), available at reliefweb.int/sites/reliefweb.int/files/resources/A-68-397_SR_report_September_2013_1.pdf.

¹⁸⁸ For instance, as recent as December 30, 2013, the European Union, the United States, Turkey, and Switzerland registered publicly their "deep concerns" about the "inhumane environment" for the Rohingya internally displaced persons ("IDPs") and the Myanmar government's unfulfilled promises to take "effective actions" to rectify the "dire humanitarian situations." See *Myebon Joint Mission Statement from the Embassies of Switzerland, the Republic of Turkey, the United States of America, and the European Union*, RELIEFWEB (Dec. 30, 2013), <http://reliefweb.int/report/myanmar/myebon-joint-mission-statement-december-2013> (last visited May 24, 2014). Although the official statement of concern is specific to the situation of the IDPs at a camp named Myebon in Rakhine State, there is a pervasive concern among all the external players including U.N. agencies and human rights research organizations, according to our findings.

Notwithstanding the scale of the killings, elements of the attacks and killings indicate that these acts of violence were part of a process intended to destroy the Rohingya people both as individuals and as a group, as well as drive them from their lands. For example, the attacks were accompanied by anti-Rohingya campaigns implemented by local political parties, the Buddhist Sangha (“Order”), the security forces, and local populations.¹⁸⁹ The campaigns did not simply spread anti-Rohingya hatred, but included a series of targeted boycotts by Buddhists against trading, helping, working with, or fraternizing with Muslims.¹⁹⁰ In some cases, Rakhine Buddhists accused of trading or helping Rohingya were publically humiliated and paraded around in public wearing “traitor” signs.¹⁹¹ These campaigns aimed to socially and economically ostracize Muslims¹⁹² and put them in famine-like situations.¹⁹³ The combination of sustained tactics indicates that the violence was not simply spontaneous or sporadic, and neither was it simply intercommunal or sectarian as has been characterized by the media, foreign governments, and the U.N.¹⁹⁴ Such boycotts accompanied by the violent pogroms are designed to inflict conditions of life on Rohingya communities calculated to bring about their physical destruction through dangerous and famine-like conditions.

Additionally, there were organized protests against the delivery of humanitarian aid to Rohingya in emergency situations and Myanmar government attempted to cut off aid completely to the Rohingya.¹⁹⁵ Security forces arrested humanitarian workers, including U.N. workers¹⁹⁶

¹⁸⁹ See HUMAN RIGHTS WATCH, *supra* note 17, at 6-8. See also, personal communications with three members of Myanmar’s official Rakhine Violence Inquiry Commission, including U Nyunt Maung Shein, U Tin Maung Than and Zargana, (2012 and 2013).

¹⁹⁰ Interview with the Rohingya from Sittwe, in Kuala Lumpur, Malaysia (Dec. 2013).

¹⁹¹ *Id.*

¹⁹² U.N. Secretary-General, *supra* note 187.

¹⁹³ Even those housed in the camps covered by humanitarian aid agencies are suffering from acute malnutrition. According to the revised Rakhine Response Plan, published in August 2013, acute malnutrition rates in the camps around Sittwe remain at 14.4% with further deterioration expected in rural camps. See U.N. Office for the Coordination of Humanitarian Affairs, *Rakhine Response Plan (Myanmar) July 2012–December 2013*, 12, RELIEFNET, http://reliefweb.int/sites/reliefweb.int/files/resources/Snapshot_Rakrhine_UNOCHA_12_Aug2013.pdf.

¹⁹⁴ For a typical false characterization of this state-sponsored and state-backed violence, see INT’L CRISIS GRP, *supra* note 19 (examining the instrumental role of the State in Burma in the violence and killings of the Rohingya).

¹⁹⁵ Jane Perlez, *Death Stalks Muslims as Myanmar Cuts Off Aid*, N.Y. TIMES, May 2, 2014, http://www.nytimes.com/2014/05/03/world/asia/death-stalks-muslims-as-myanmar-cuts-off-aid.html?_r=0.

¹⁹⁶ Press Release, U.N. Office of the High Comm’r for Human Rights, Statement of the Special Rapporteur on the Situation of Human Rights in Myan. (Aug. 4 2012), *available at* <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12405&LangID=E>.

and threatened others with violence.¹⁹⁷ A Medecins Sans Frontier (“MSF”), or Doctors Without Borders, as they are known in the United States, press statement noted:

Due to the fear staff have as a result of sustained intimidation and threats against MSF workers by some members of the Rakhine community, doctors and other essential personnel are too scared to work in Rakhine State, and thus MSF faces a shortage in staff, a gap that is still not being filled by the government or other organizations.¹⁹⁸

State security forces have not effectively dealt with these threats to local staff and agencies assisting the Rohingya. In fact, bureaucratic barriers relating to the displaced Rohingya population at both the central and local levels prevented, and continue to prevent, humanitarian workers from accessing vulnerable communities in urgent need of humanitarian relief.¹⁹⁹ Campaigns, protests, and boycotts against the delivery of life-saving humanitarian aid for the Rohingya are also designed to physically destroy the Rohingya through the denial of food, water, and healthcare. In a significant development, in late February 2014, Myanmar government forced the Doctors Without Borders, which had been treating tens of thousands of individuals in Rakhine state, but primarily the Rohingya, displaced by the waves of violence and put in camps, to cease all operations in Myanmar.²⁰⁰

The combined tactics of killings, violence, destruction of property and communities, accompanied by social and economic boycotts and hate campaigns against the Rohingya, are perceived by Rohingya communities both at home and in exile, as concerted state-backed attempts to destroy the Rohingya or drive them from their lands in Rakhine State.²⁰¹ The Rohingya are, in effect, given a stark choice between starvation, death, or

¹⁹⁷ *The Ongoing Humanitarian Emergency in Myanmar's Rakhine State*, DOCTORS WITHOUT BORDERS (Feb. 6, 2013), <http://www.doctorswithoutborders.org/article/ongoing-humanitarian-emergency-myanmars-rakhine-state?id=6624&cat=field-news>.

¹⁹⁸ *Id.*

¹⁹⁹ U.N. Office for the Coordination of Humanitarian Affairs, *supra* note 193, at 13.

²⁰⁰ Alexandra Zavis, *Myanmar Orders Doctors Without Borders to Cease Operations*, L.A. TIMES, Feb. 28, 2014, <http://www.latimes.com/world/worldnow/la-fg-wn-myanmar-orders-doctors-without-borders-to-cease-operations-20140228,0,2115340.story>.

²⁰¹ Interviews with Rohingya communities leaders working with new refugee arrivals in Malaysia including Interview with Abdul Hamid Bin Musa Ali, *supra* note 37.

leaving their lands in Rakhine State.²⁰² One Rohingya man from Min Bya explained the situation as follows:

Since the first week in June, things changed. There was a total ban on movement for us. The Rakhine came with the authorities and surrounded our village. We cannot go out from the village and I cannot get any income to support my family. If we go out from the village the Rakhine chase us. There are cases where our Rohingya people left the village to find fish or vegetables – they have been killed. There are seven men that were killed from my village in this way. Since June all the police were changed in our area. They changed the battalion. They also sent a lot of extra police. They do not protect us. One Rohingya man was shot by the police when he was getting in his canoe to try to get something. They shot him in the head. His family went to pick up the body. . . There was not enough food. People could not get medical treatment because the only medical care is in the nearby town and we were not allowed to go to town. Several people died in my village because there was no treatment. They died from starvation. Look at my body. Look how thin I am. You can see how much I suffer from hunger.²⁰³

Another Rohingya from a village in Maungdaw, North Rakhine State, described the situation six months on from the outbreak of violence in 2012:

I am married and I have 5 children. For our livelihoods, our family would cultivate paddy and other things, and we also kept cattle. Our income from our farm was enough to support our family before the violence began this year in June. Since June, there was a boycott on trading and interacting with Rohingya and our movements are so restricted. We cannot even go out to our farmland to cultivate our crops and get food. Everybody in my house is crying for assistance. They are so hungry. They cannot eat every day. They try to make

²⁰² Interviews with Rohingya communities leaders working with new refugee arrivals in Malaysia including Interview with Abdul Hamid Bin Musa Ali, *supra* note 37.

²⁰³ Interview by the author for Equal Rights Trust with Rohingya (December 2012).

the stock of rice they have last for as long as possible, so everybody in the house just eats once in two days.²⁰⁴

Such accounts indicate that the intention is not only to remove the Rohingya from their land, but also to destroy them by denying access to food and basic services.

According to the Article 2(c) of the Genocide Convention of 1948, deliberately inflicting conditions of life calculated to bring about physical destruction is one of the five acts of genocide. The three specific readings of the aforementioned Article in the context of various international tribunals, namely Yugoslavia and Rwanda, may shed further light on the need for precisions when it comes to charges of genocide. Among these past international readings directly relevant to Myanmar's persecution of the Rohingya are:

1. "[T]he expression deliberately inflicting on the group conditions of life calculated to bring about its physical destructions in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction."²⁰⁵
2. "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' under subparagraph (c) does not require proof of a result. The acts envisaged by this sub-paragraph include, but are not limited to, methods of destruction apart from direct killings such as subjecting the group to a subsistence diet, systematic expulsion from homes and denial of the right to medical services. Also included is the creation of circumstances that would lead to a slow death, such as lack of proper housing, clothing and hygiene or excessive work or physical exertion."²⁰⁶

²⁰⁴ *Id.*

²⁰⁵ Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 505 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), <http://www.refworld.org/docid/40278fbb4.html>.

²⁰⁶ Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, Judgment, ¶ 507 (Int'l Crim. Trib. for Former Yugoslavia July 31, 2003), <http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf> (quoted in an internal brief specifically written for and circulated among the panel of judges at the Permanent People's Tribunal on Sri Lanka (<http://ptsrilanka.org/>), Germany, Dec 2013. See the memo here: <http://www.maungzarni.net/2014/01/elements-of-genocide-foundational.html>).

3. “Therefore the conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part.”²⁰⁷

Indeed the evidence presented so far indicates that the widespread nature, the systematic pattern and types of persecution of the Rohingya by Myanmar amounts to genocide.

5. *Post-2012 Pogrom Displacement: Ghettoization through IDP Camps Perpetuates Apartheid Arrangement of Rohingya’s Existence in Myanmar*

Forced displacement of the Rohingya is designed to permanently ghettoize them by segregating them and applying a whole set of policies and conditions of life that only apply to them and other Muslims contained in certain geographical areas. Segregation and discriminatory laws, policies, and conditions of life that have been applied to the Rohingya in the townships of North Rakhine State over the past two decades can be considered ghettoization. In addition, the discriminatory conditions and restrictions that Rohingya face when forcibly transferred off their land into camps for IDP camps are also best described as ghettoization, particularly as it is fast becoming a situation of protracted segregation and displacement. These camps for the internally displaced have been used to legalize and legitimize a system of apartheid based on ghettoization.

According to the United Nations Office for the Coordination of Humanitarian Affairs (“UNOCHA”), in Rakhine state, 140,000 people—the bulk of whom are Rohingya—have been displaced in the two waves of mass violence in June and October 2012.²⁰⁸ Many of them have been segregated in closed and guarded camps across Rakhine State.²⁰⁹ While many of the Rakhine who were displaced by the violence in 2012 have been able to return to their villages, the government has not allowed, much

²⁰⁷ Prosecutor v. Clement Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, Judgment (Reasons), ¶ 116 (Int’l Crim. Trib. for Rwanda May 21, 1999).

²⁰⁸ Conversations between the authors and international humanitarian staff based in Myanmar (names and organizations withheld).

²⁰⁹ Rushanara Ali, *Burma’s Rohingya: A Story of Segregation and Desperation*, THE GUARDIAN, June 3, 2013, <http://www.theguardian.com/global-development/poverty-matters/2013/jun/03/burma-rohingya-segregation>.

less facilitated, the return of the Rohingya to their homes.²¹⁰ The fear among many of the humanitarian staff working in the area is that if the Rohingya are not returned soon—at least within the next year, of which they have little hope—segregation will become permanent.²¹¹ In September 2013, the Sentinel Project noted:

The proliferation of internally displaced persons camps in Rakhine state (also known as Arakan) and sealed-off ghettos within urban areas may constitute genocide by isolation, starvation, and deprivation of the necessities of life if done with the intent to destroy the group. Historically, not all genocides have been committed solely through mass killing, and if the Rohingya continue to be systematically purged from towns, villages, and cities throughout Rakhine and Burma in general, and if the IDP camps continue to be deprived of aid, the intent of genocide will appear more certain.²¹²

While this statement establishes the relevance of the issues of ghettoization and apartheid to Rohingya genocide, the Sentinel Project does not take into account that this process has been on-going since 1978. Following Operation Nagamin, international journalists²¹³ who covered Myanmar's systematic persecution of the Rohingya began to use the word apartheid for those Rohingya who survived the first wave of expulsion.²¹⁴ Thirty years later, South Africa's icon of anti-apartheid, Rev. Desmond Tutu described the Rohingya's conditions as apartheid while in Rangoon.²¹⁵ The increasingly permanent nature of this segregation, or apartheid, has become a major concern for the UN.²¹⁶ This concern was officially reported by the Special Rapporteur on the Human Rights Situation in Myanmar in his report to the UN Secretary General (and to the General Assembly) in September 2013.²¹⁷

²¹⁰ *Id.*

²¹¹ Conversations between the authors and international humanitarian staff based in Myanmar (names and organizations withheld).

²¹² *Burma Risk Assessment*, THE SENTINEL PROJECT FOR GENOCIDE PREVENTION (Sept. 2013), <http://thesentinelproject.org/wp-content/uploads/Risk-Assessment-Burma-September-2013.pdf>.

²¹³ Mattern, *supra* note 123, at 31.

²¹⁴ *Id.*

²¹⁵ *Tutu Says Burma Must Avoid 'New Apartheid'*, THE IRRAWADDY (Feb 27, 2013), <http://www.irrawaddy.org/human-rights/tutu-says-burma-must-avoid-new-apartheid.html>.

²¹⁶ Special Rapporteur, *Situation of human rights in Myanmar*, U.N. Doc. A/68/397 (Sept. 23, 2013) (by Tomás Ojea Quintana).

²¹⁷ *Id.*

6. *Post-2012 Pogroms: Flight from Myanmar by Sea Results in Violence and Death to Rohingya*

The situation in Rakhine State has led not only to internal displacement, but also to a new exodus of Rohingya. Bangladesh responded by sealing their borders and limiting access to aid the Rohingya refugees.²¹⁸ In the years prior to 2007, the Rohingya mainly left Rakhine and Bangladesh for Southeast Asia during the “sailing season” when the seas were safer.²¹⁹ Increased desperation, larger vessels, and the facilitation of departures by security forces in Myanmar, which enable people to leave in broad daylight, have seen greater and greater numbers leaving.²²⁰ Since June 2012, the reasons commonly given for departure are fears of continued violence, loss of livelihoods through targeted anti-Rohingya and anti-Muslim boycotts, loss of properties, threat of violence, arbitrary arrest, and extortion.²²¹

Between June 2012 and May 2013, approximately 34,000 to 35,000 Rohingya are believed to have taken to the sea—increasing from approximately 9,000 in 2011.²²² The numbers are expected to grow further when the next sailing season begins.²²³ In the past, the vast majority of “boat people” were male.²²⁴ Now whole families, including women, children and the elderly, are leaving.²²⁵ In most cases, their lack of citizenship makes returning nearly impossible, changing temporary displacement into permanent displacement. During anti-Rohingya immigration campaigns (for instance, the King Dragon Operation in 1978), Myanmar authorities struck whole Rohingya families off the official

²¹⁸ *The Human Rights of Stateless Rohingya in Bangladesh*, EQUAL RIGHTS TRUST, (Oct. 9, 2012), http://www.equalrightstrust.org/ertdocumentbank/ERT-UPR_Bangladesh_2012.pdf (last visited May 24, 2014).

²¹⁹ Interviews with a group of Rohingya and Karmin Muslim boat refugees, in Kuala Lumpur, Malaysia (Dec. 2012). [hereinafter Interviews with Researchers on Boat departures and arrivals].

²²⁰ To get a sense of the flows of Rohingya boat landings and routes, see *Rohingya Asylum Seekers: Flows and Boat Landings in 2013*, HUMANITARIAN INFO. UNIT, U.S. STATE DEP'T, <http://reliefweb.int/sites/reliefweb.int/files/resources/Rohingya%20Asylum%20Seekers%20Flows%20%26%20Boat%20Landings%20in%202013%20as%20of%2011%20Mar%202013.pdf> (last visited May 24, 2014).

²²¹ Interviews with researchers on boat departures and arrivals, *supra* note 219.

²²² *The Rohingya Exodus from Myanmar*, REUTERS, July 17, 2013, [hereinafter *The Rohingya Exodus*], http://www.trust.org/spotlight/the-Rohingya-exodus-from-myanmar/?tab=infographic_

²²³ Interviews with Researchers on Boat departures and Arrivals, *supra* note 219.

²²⁴ *Id.*

²²⁵ Interviews with Rohingya leaders including, interview with Abdul Hamid Bin Musa Ali, *supra* note 37.

registry of households, instantly making Rohingya illegals.²²⁶ Without legal residency by birth in the country, the Rohingya risk imprisonment or face threats of arrest and imprisonment. Their illegality in turn makes them extremely vulnerable to extortion and abuse at the hands of the security forces.²²⁷ Also, from a State perspective, formal bilateral deportation arrangements are impossible, as Myanmar does not recognize the Rohingya as their nationals, as indicated by their statelessness.²²⁸

When the Rohingya are pushed from their land in Rakhine State and out of the country, they are often pushed into life-threatening situations, whereby destruction of the Rohingya people occurs even as they flee. Over the past year, the number of news reports about the sinking of boats carrying the fleeing Rohingya in the Andaman Sea off the Burmese coastline has risen, indicating that the outward journey across high seas and the country's territorial water is fraught with fatal dangers.²²⁹ As recently as November 2013, only eight out of an estimated seventy to eighty Rohingya fleeing toward the neighboring Bangladesh survived when their boat fell apart several hours after it set sail.²³⁰ According to the UN, "[a]t least 500 people were believed to have died on boats in 2012 alone."²³¹

Those people who have survived the journeys recount unsafe and over-crowded conditions on the boats, deaths on board, running out of petrol and/or food, losing their way, and violence.²³² In some cases, officials knowingly push Rohingya into life threatening situations. For example, one Rohingya newly arrived in Malaysia described his experiences encountering a Burmese navy vessel during a journey that later resulted in the death of twelve Rohingya passengers from dehydration.²³³

²²⁶ Interviews with U Ba Sein, a well-known London-based Rohingya blogger, who lived through and took pictures of the first wave of official anti-Rohingya campaign in Maung Daw, Rakhine State, Myanmar in Feb. 1978, London (April 2014).

²²⁷ Interviews with Rohingya in Bangladesh and Malaysia (2010, 2012, and 2013).

²²⁸ For a discussion of how states themselves produce the idea and reality of statelessness, watch the televised London School of Economics, particularly Maung Zarni's intervention on the Rohingya statelessness. Democratic Voice of Burma, *London School of Economics*, YOUTUBE (June 19, 2012), http://www.youtube.com/watch?v=j5myaBEV9Wk&feature=player_embedded.

²²⁹ Courtney Subramanian, *Boat Carrying Muslim Rohingya Sinks off Burma Coast: Minority group likely fleeing persecution*, TIME (Nov. 3, 2013), <http://world.time.com/2013/11/03/boat-carrying-muslim-rohingya-sinks-off-myanmar-coast/>. For the most recent coverage, see EDITORIAL, *How Thailand is contributing to the misery of Burma's persecuted Rohingya*, WASH. POST (May 16, 2014), http://www.washingtonpost.com/opinions/how-thailand-is-contributing-to-the-misery-of-burmas-persecuted-rohingya/2014/05/15/c4c5dd16-dad0-11e3-8009-71de85b9c527_story.html.

²³⁰ Subramanian, *supra* note 229.

²³¹ *The Rohingya Exodus*, *supra*, note 222.

²³² Interviews with the then newly arrived Rohingya boat people, in Kuala Lumpur (Dec. 2012).

²³³ *Id.*

After running out of petrol, food, and water, they were sighted by a navy patrol:

They yelled at us and they scolded us. They told us to come aboard the navy boat two or three at a time. They told us to lie down flat on our stomachs with our face to the floor. They beat each of us as we lay down. We all got five lashes. Some among us could speak Burmese fluently. But those who spoke Burmese got extra lashes. They shouted, ‘Why do you speak Burmese? You are not Burmese.’ Then we were told to get back on our own boat. They gave us no food. No water and no fuel. The navy boat towed our boat for 10 hours into the open sea. They confiscated our anchor. When they untied our boat, they told us Thailand is in that direction.²³⁴

This experience demonstrates that even as Rohingya refugees flee, they are being pushed into situations that security forces knowingly understand may result in death or serious harm.

The growing body of evidence on killing and violence against Rohingya populations in Rakhine State suggests that the intent is not simply to remove the Rohingya from land in Rakhine State, but also to destroy the Rohingya people through killing members of the group, causing serious bodily or mental harm to members of the group, and deliberately inflicting on the group conditions to bring about its physical destruction. Further, illegalization of the Rohingya through a combination of forced eviction from Myanmar, deliberately enacted legal frameworks that relate only to the Rohingya, and state discourse designed to destroy their ethnic-religious identity, serves to facilitate state-sponsored and locally-perpetrated destruction and violence against them. In a series of Burmese language interviews that were published in November 2013, ex-General Khin Nyunt, who served as the head of the powerful Directorate of Defense Services Intelligence (DDSA) from 1988 till 2004, admitted that the country’s leadership has organized networks of non-state actors to “do dirty jobs” such as launching a violent mob ambush against the opposition leader Aung San Suu Kyi and her motorcade in 2003.²³⁵ These networks are not part of any formal state security forces.²³⁶ In the case of the violent attacks against the Rohingya, a typical pattern of attacks involves

²³⁴ *Id.*

²³⁵ See Interviews with ex-General Khin Nyunt, *supra* note 169.

²³⁶ *Id.*

coordination between the government security troops and local extremists among local Rakhines's violent attacks against a given Rohingya community.²³⁷

*B. Imposed Marriage and Birth Restrictions are Discriminatory
Population Control Measures Intended to Prevent Rohingya Births*

The state in Myanmar has not only denied Rohingya both their group identity and their birth right to citizenship, but also singled them out for policies and measures expressly designed to control birth and restrict marriages, solely on the basis of their ethnicity. Through various decrees and orders, Myanmar government has made attempts to control the Rohingya population in the townships of North Rakhine State through severe restrictions on Rohingya marriages, births, and movement. In his Wall Street Journal opinion editorial, Matthew Smith, a well-known human rights researcher wrote:

“[M]y organization, Fortify Rights, recently published leaked government documents revealing abusive population control measures against Rohingya Muslims. This and other evidence demonstrates that state and central government authorities are responsible for denying Rohingya fundamental human rights by limiting their freedom of movement, marriage and childbirth, among other aspects of daily life, in northern Rakhine State.²³⁸

According to the Rome Statute of the International Criminal Court, which entered into force on July 1, 2002, forced population control through the prevention of births of new group members is unequivocally a genocidal act.²³⁹ The policies to prevent births are implemented within the

²³⁷ Phone interviews with Zarganar, the country's most famous political comedian and a member of the 27-member Rakhine Violence Inquiry Commission (Sep.-Dec. 2012).

²³⁸ Matthew Smith, *Burma's Ethnic Persecution is State Policy*, WALL ST. J. (Mar. 13, 2014), <http://www.fortifyrights.org/commentary-20140313.html>. We, the two co-authors examined some of the same leaked documents and concluded that the evidence of Myanmar's genocidal intent too strong not to make the case for genocide. However, Smith chose not to argue genocide not because the intent could not be established, but “because as a start-up human rights NGO Fortify Rights would not be able to survive the repercussions” of making a strong case for Rohingya genocide. Personal communications with Matthew Smith, London (Apr 19, 2014).

²³⁹ Rome Statute of the International Criminal Court, Jul. 1, 2002, 2187 U.N.T.C 3, *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf. Article 6, Part II. Jurisdictions, Admissibility and Applicability reads thus:

context of a system of security grids that have arisen around the geographical pockets that contain and segregate the Rohingya from the rest of the population. Over the years, the Rohingya have been pushed into pockets of Rohingya majority areas in North Rakhine State where their movement is severely restricted and their daily activities controlled by a large presence of security forces that control the Rohingya population through the implementation and threat of implementation of policies that apply to the Rohingya as non-nationals in specific geographical areas.²⁴⁰ These policies include immigration laws that are applied to those who move or spend time outside of their households and villages and policies that directly aim to prevent Rohingya births.²⁴¹ The marriage and birth restrictions within this context of tight population control fits the fourth delineating act of genocide, “imposing measures intended to prevent births within the group.”²⁴²

Since 1994, local orders applying only to the Rohingya in North Rakhine State have required people to apply for official permission from the local authorities to marry.²⁴³ Permission is generally only granted on the payment of large bribes, and getting permission can take several years.²⁴⁴ Within the security grids, the Rohingya are subject to high levels of surveillance, forced labor, extortion and abuse, which together with discriminatory laws, control the daily lives of the population.²⁴⁵ This system of security grids includes regular and unannounced house calls by

For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Id.

²⁴⁰ Numerous interviews with the Rohingya refugees, expatriates and activists in the United Kingdom, Germany, Malaysia, Thailand and the United States (2010-2013).

²⁴¹ *Id.*

²⁴² Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 12.

²⁴³ IRISH CENTRE FOR HUMAN RIGHTS, *supra* note 150, at 125-26.

²⁴⁴ The typical sum for a bribe securing official marriage license is between \$500-\$1,000, a year’s worth of earnings even for the urban Buddhist poor who can freely move about and make a living. Wakkar Uddin, *Myanmar Muslim Association of the USA*, GENOCIDE PREVENTION CONVENTION, Los Angeles, California (Jun. 4, 2012) (on file with the author). Professor of Plant Sciences at Penn State University, Dr Uddin is General Secretary of the Arakan Rohingya Union, an official political NGO recognized as representative of Rohingya by the Organization of the Islamic Cooperation (OIC).

²⁴⁵ This is a key finding of the report by the Irish Centre for Human Rights. See IRISH CENTRE FOR HUMAN RIGHTS, *supra* note 150.

security forces and/or military civilian teams to check the household list against the people staying in the house at any given time.²⁴⁶ This system of security grids enables the State to tightly control the Rohingya population by the enforcement, threat of enforcement, and extortion via existing policies relating to the marriage, birth, and movement restrictions on the Rohingya. Prison sentences of four to five years have been imposed on Rohingya men who cohabit or have sexual relations outside marriage.²⁴⁷ The widespread practice of population control through the security grids and severe restrictions relating marriage, births, and movement has led countless couples to flee to Bangladesh to avoid extortion and abuse.²⁴⁸

Security forces also ensure that Rohingya who have fled North Rakhine State are struck off the household list, which is essentially an official government list of family members in a household, thus rendering them unable to return legally to their homes and neighborhoods.²⁴⁹ Families that have people additional to their household list staying in their homes, including additional children or marriage partners, are subject to arrest for unauthorized marriage, extortion, and abuse.²⁵⁰ If anyone on the household list is missing from the household, they may be struck off the list if large bribes are not paid, making it impossible for that household member to return to his/her home because of the risk of arrest as an illegal migrant and other charges or further extortion and abuse.²⁵¹

Couples have to sign forms when they obtain marriage permission stating they will not have more than two children.²⁵² From 2005 onwards, as part of the strict requirements for obtaining permission to marry, Rohingya in Maungdaw and Buthidaung have been required to sign a declaration limiting the number of children they will have.²⁵³ This number

²⁴⁶ Interviews with the Rohingyas in Rangoon, Myanmar, London, UK, and Kuala Lumpur, Malaysia (2012-2013).

²⁴⁷ The Arakan Project, *Issues To Be Raised Concerning the Situation Of Stateless Rohingya Children In Myanmar (Burma)*, Submission to the Committee on The Rights Of The Child, For the Examination of the combined 3rd and 4th periodic State Party Reports, CRC/C/MMR/3-4 Jan. 2012 (Myanmar), available at <http://www.burma.library.org/docs12/AP-CRCMyanmar-12-01.pdf>.

²⁴⁸ Interviews with Rohingya refugees and immigrants, London, UK, Los Angeles, U.S., Kuala Lumpur, Malaysia, Bangkok, Thailand (2010-2013).

²⁴⁹ Interviews with the Rohingya businessmen from Rangoon and Sittwe (or Akyab), Kuala Lumpur, Malaysia (Dec. 2013).

²⁵⁰ Interviews with Rohingya refugees and immigrants, London, UK, Los Angeles, U.S., Kuala Lumpur, Malaysia, Bangkok, Thailand (2010-2013).

²⁵¹ *Id.*

²⁵² Interviews with Rohingya refugees, Kuala Lumpur, Malaysia (2012-2013). See also, Szep & Marshall, *supra* note 9.

²⁵³ Myanmar Border Affairs and Control Headquarters (or NaSaKa), *Detailed Procedures for Bengali Population Control, Regional Directive #1/2005*, Kyi kan Pyin Nasaka Station, Maung

was three in 2005, and was reduced to two in 2007.²⁵⁴ The birth of an additional child means that the mother can be prosecuted under Section 188 of the Penal Code for disobeying orders from a civil servant, which carries a prison sentence of up to six months.²⁵⁵ In addition, the restrictions relating to marriages and births have resulted in high numbers of maternal deaths due to fear of accessing limited available health care, and illegal abortions performed without health professionals.²⁵⁶ Coupled with Myanmar's policy of not allowing international organizations to train Rohingya women as midwives and nurses,²⁵⁷ restrictions of movement compound these maternal health problems since in emergencies women are often unable to obtain permission to access hospitals and life-saving services.²⁵⁸

Additional children often remain unregistered—contributing to the estimated 60,000 unregistered Rohingya children²⁵⁹—and are not recorded on the family lists. Thus, these additional children open the door to increased extortion of the family.²⁶⁰ Furthermore, unregistered children cannot apply for identification documents and are not eligible to attend school, apply for travel or marriage, or access other rights.²⁶¹

The policies relating to the Rohingya make explicit the State's intention to control the birth rate of the Rohingya, establishing the Myanmar State's intent to destroy the Rohingya. On January 31, 1993, the NaSaKa issued a two-page directive, to the local Rakhine civil administration to strictly enforce the state's policy to restrict the growth of the Rohingya population.²⁶² The directive claims the population growth among the predominantly Rohingya in the region poses a future threat to peace and public order.²⁶³ The directive described the newborns in this region as members of a class of future criminals.²⁶⁴ Again in 2005, the

DawTownship, Nov. 2, 2008 (on file with the authors) [hereinafter *Detailed Procedures for Bengali Population Control*].

²⁵⁴ Chris Lewa, *Two-child policy in Myanmar will increase bloodshed*, CNN (Jun. 6, 2013), <http://edition.cnn.com/2013/06/06/opinion/myanmar-two-child-policy-opinion/>.

²⁵⁵ *Id.*

²⁵⁶ The Arakan Project, *supra* note 247.

²⁵⁷ Since the first wave of anti-Rohingya 'immigration' campaign in 1978, the Rohingya have not been allowed to train or work as teachers, medical workers, etc. Interviews with the older generation of Rohingya professionals in Kuala Lumpur, Malaysia, Bangkok, Thailand, New York, U.S., and London, UK (2010-2013). *See also*, Associated Press in Yangon, *supra* note 136.

²⁵⁸ Lewa, *supra* note 254.

²⁵⁹ THE GOV'T OF THE REPUBLIC OF THE UNION OF MYANMAR, *supra* note 130, at 67.

²⁶⁰ Lewa, *supra* note 254.

²⁶¹ *Id.*

²⁶² *See Detailed Procedures for Bengali Population Control*, *supra* note 253.

²⁶³ *Id.*

²⁶⁴ *Id.*

same Nasaka Regional Headquarters based in Maungdaw township issued a set of detailed orders²⁶⁵ under the official title “Detailed Procedures for Bengali Population Control,” to the local administrative units listing specific measures designed to control the rate of population growth.²⁶⁶ These orders criminalized parents who did not have prior marriage license for the birth of newborns and co-habitation outside of marriage, punishing men with more than one wife with up to seven years’ imprisonment, and involuntary birth control measures.²⁶⁷

There has been a rise in popular support for population control following the report from the government-appointed Commission of Inquiry on the Rakhine State violence in 2012.²⁶⁸ This popular support is evidenced by wide-spread support in the domestic and social media²⁶⁹ as well as in political speeches; for example, a Burmese language Voice of America interview went viral in May 2013 with one of the members of the Rakhine Commission of Inquiry, Dr. Yin Yin Nwe, in which she called for birth control measures targeting only Rohingya populations.²⁷⁰

The restrictions on marriage and births of Rohingya children in North Rakhine State since the early 1990s in the security grid of the three townships of North Rakhine State fall very clearly within the act of genocide “imposing measures intended to prevent births within the group.” The intent to destroy the Rohingya people through these draconian measures is spelled out in the directives issued by the NaSaKa that state: “population control needs to be adopted in order to restrict the growth of these Bengali. Other additional necessary restrictions and limits ought to be adopted as pre-emptive means of population control.”²⁷¹ The report portrayed the Rohingya population as a future threat to national security

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ THE GOV'T OF THE REPUBLIC OF THE UNION OF MYANMAR, *supra* note 130. The original Burmese version was released on Apr. 29, 2013 and the English version was released in August 2013. (Both versions on file with the authors).

²⁶⁹ Thomas Fuller, *Internet Unshackled, Burmese Aim Venom at Ethnic Minority*, N.Y. TIMES (Jun. 15, 2013), http://www.nytimes.com/2012/06/16/world/asia/new-freedom-in-myanmar-lets-burmese-air-venom-toward-rohingya-muslim-group.html?_r=0.

²⁷⁰ Voice of America Burmese Service, *Interview with Dr. Yin Yin Nwe*, YOUTUBE (May 13, 2013) <http://www.youtube.com/watch?v=d6tldlb1YmI> (last visited May 24, 2014). Dr. Yin Yin Nwe is a Cambridge-trained geologist, ex-daughter-in-law of the late General Ne Win, former head of UNICEF in China, and a member of the Presidential Inquiry Commission on the Sectarian Violence in Rakhine State, Myanmar.

²⁷¹ *Report of the sentiments of the Rakhine Tai-Yin-Tha (Children of the soil, indigenous people) in Maungdaw district*, RAKHINE NATIONAL DEFENCE AND PROTECTION ORGANIZATION, (Oct. 9, 1988) (On file with the authors). This is a 30-page Burmese language report sent to the then Head of State Senior General Saw Maung.

and even characterized Rohingya children as a future criminal class.²⁷² The discriminatory manner in which these policies have only been applied to the Rohingya and the inaccurate state discourse that claims a Bengali population explosion,²⁷³ demonstrate intent to destroy the Rohingya people. These policies have also served to cause serious bodily and mental harm to the Rohingya people.

C. *Deliberate Destruction of the Social Foundations of the Rohingya as an Ethno-Religious Group Inflicts on the Rohingya Conditions of Life Calculated to Bring About the Group's Physical Destruction*

Over the past three decades, the social foundations of the Rohingya people as a group have been eroded with each wave of repression. Economic dispossession, physical displacement, restriction of movements, the targeted persecution of intellectuals and professionals with ties to the community at large who wield communal influence, among other tactics, are part and parcel of the State's attempt to destroy the social anchor or foundation of the Rohingya community. This attempt is part and parcel of the destruction, physical and otherwise, of the Rohingya.

Like all other ethnic communities, the Rohingya community has been stratified along economic, class, and political lines.²⁷⁴ Gradually, the existing class of educated Rohingya, which during the country's early independence period (1948-1958) included parliamentary secretaries, cabinet ministers, members of the parliament, well-to-do merchants, scholars, writers, artists, broadcasters, journalists and so on, vanished, while the new generation of Rohingya were denied citizenship and any opportunities to study medicine, engineering, and other tertiary/university level subjects considered professional subjects as opposed to arts or pure sciences.²⁷⁵ Recently, Rohingya community leaders or educated persons have been systematically targeted for arrest and prosecution. The most high profile arrests since the violence of 2012 are medical doctor Tun Aung, age sixty-five, and retired lawyer Kyaw Hla Maung age seventy-six, who remain in Sittwe prison under falsified charges.²⁷⁶ Despite

²⁷² *Id.*

²⁷³ Voice of America Burmese Service, *supra* note 270.

²⁷⁴ Interviews with a group of Rohingya businessmen and professionals, Kuala Lumpur, Malaysia and London, UK (2011-13).

²⁷⁵ Interviews with a group of educated Rohingya residents and students, Kuala Lumpur, Malaysia (Apr.-Aug., 2013).

²⁷⁶ See Urgent Action Network, *Dr Tun Aung: jailed by the Burmese authorities for trying to help*, AMNESTY INTERNATIONAL UK/BLOGS (Jun. 6, 2013, 5:18 PM), <http://www2.amnesty.org.uk/blogs/urgent-action-network/dr-tun-aung-jailed-burmese-authorities-trying-help>; *see also*

international campaigning by Amnesty International and repeated requests by the U.N. and international governments for their release, they remain behind bars while Myanmar makes a show of releasing other political prisoners in other parts of the country.²⁷⁷

Additionally, several thousand Rohingya men are also held behind bars across Arakan State, most arbitrarily arrested in the wake of the violence of 2012.²⁷⁸ One interviewee from Buthidaung, North Rakhine State said about the events that followed the June 2012 violence:

In my village twenty-five men were arrested. It was about two weeks after the start of the violence. They were taken away. We don't know where they are. The military or the paramilitary took them. That time it was not the police [that arrested them]. Those people were either youths or they were our educated people. Eight of us decided to leave after that. We felt afraid.²⁷⁹

Another interviewee from Maungdaw explained:

After the clashes, the NaSaKa would come all the time to our village tract looking for boys and young men. They would look for any male who was over eleven years old. They would come in the middle of the night, and we would have to run away. Sometimes they would arrest the boys and men and take them away. No one knows where they took them, or how many are alive or dead. More than thirty people are gone from my area. We all feel that they have probably been killed. Before the clashes the NaSaKa would come to our houses sometimes and then they would always ask, "who has gone to another country," and they would harass the family that way if someone is gone. But since the clashes, it is different. They

Sushetha Gopallawa, *Myanmar: Release human rights activist Kyaw Hla Aung*, REFUGEES INTERNATIONAL BLOG, (August 12, 2013), <http://refugeesinternational.org/blog/myanmar-release-rohingya-human-rights-activist> (last visited May 24, 2014).

²⁷⁷ *Myanmar: Arrests continue amid promise to release all prisoners of conscience*, AMNESTY INTERNATIONAL, (July 17 2013), <http://www.amnesty.org/en/news/myanmar-arrests-continue-amid-promise-release-all-prisoners-conscience-2013-07-17> (last visited May 8, 2013).

²⁷⁸ Interviews by author for Equal Rights Trust with Rohingya boat refugees, Kuala Lumpur, Malaysia (Dec. 2012). See also Lawi Weng and Paul Vriez, *More than 70 Rohingyas handed lengthy prison sentences*, THE IRRAWADDY (Aug. 30 2013), http://www.irrawaddy.org/z_arakan/more-than-70-rohingyas-handed-lengthy-prison-sentences.html.

²⁷⁹ Interview conducted by author for Equal Rights Trust, Kuala Lumpur, Malaysia (Dec. 2012).

come and look for the young males and they arrest them and take them away. Even my two young cousins were arrested. They are aged around eleven and twelve years old. The NaSaKa come to their home at eleven PM at night and took them away. We do not know where they are.²⁸⁰

By contrast, few Rakhine Buddhists, if any, have been imprisoned.²⁸¹

The impact on Rohingya families of having a male member behind bars is an important factor in the erosion of Rohingya social fabric. North Rakhine State is home to a large number of female-headed households that often struggle to meet the household's economic needs.²⁸² They remain subject to arbitrary taxations and the extraction of forced labor, including from boys and old males.²⁸³ Women in female-headed households also become vulnerable to further abuse, including widespread sexual violence.²⁸⁴

More than three decades of systematic repression has all but destroyed the Rohingya community, spiritually, educationally, economically, and has been detrimental to their health and well-being.²⁸⁵ The UN has identified a total of three pockets of food poor—near famine situations—in Burma and Rakhine State is one of them.²⁸⁶ Of the fourteen states and divisions that make up Myanmar's administrative totality, Arakan or Rakhine state is the thirteenth poorest.²⁸⁷ In a country where even fully fledged citizens suffer from widespread poverty, lack of social safety nets, state protection, and welfare services,²⁸⁸ the Rohingya—

²⁸⁰ Interview by author for Equal Rights Trust, Kuala Lumpur, Malaysia (Dec. 2012).

²⁸¹ Out of a total of 1,835 arrested in connection with the mass violence in Rakhine, only 246 are Rakhine—and the rest are Rohingya. GRUM, *Rakhine Inquiry Report*, REPUBLIC OF THE UNION OF MYANMAR (Apr. 2013), http://www.burmalibrary.org/docs15/Rakhine_Commission_Report-en-red.pdf (last visited May 24, 2014).

²⁸² For the Examination of the combined second and third periodic State Party Reports, see The Arakan Project, *Submission to the Committee on the Elimination of Discrimination Against Women (CEDAW)*, CEDAW/C/MMR/3, (Oct. 2008) (Myanmar).

²⁸³ IRISH CENTRE FOR HUMAN RIGHTS, *supra* note 150, at 46-47.

²⁸⁴ *Id.* at 61-73.

²⁸⁵ Interviews with Kyaw Min, former (Rohingya) MP-elect, Rangoon via email (Sep.-Oct. 2013).

²⁸⁶ The other two pockets are in eastern and southeastern border regions of Burma. See, *Myanmar: Overview*, WORLD FOOD PROGRAMME, <http://www.wfp.org/countries/myanmar/overview> (last visited Jan. 7, 2013).

²⁸⁷ THE GOV'T OF THE REPUBLIC OF THE UNION OF MYANMAR, *supra* note 130, at 58.

²⁸⁸ *Myanmar Overview*, WORLD BANK, (April 2013), <http://www.worldbank.org/en/country/myanmar/overview> (last visited Feb. 3, 2014); See also, *The Crisis in Burma*, THE INTERNATIONAL COALITION FOR THE RESPONSIBILITY TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-burma> (last visited Feb. 3, 2014); *Myanmar Profile*, BBC, (Jul. 16, 2013), <http://www.bbc.co.uk/news/world-asia-pacific-12990563>.

stripped of their citizenship and subject to economic and social boycotts by the population at large—naturally became the most vulnerable.

A cursory glance at the development statistics identifies the extremity of their hardships, in addition to, and as the direct result of, official discrimination, persecution, repression, labor exploitation, and violence at the hands of the state officials and organizations. For instance, according to U.N. reports cited by the Rakhine Inquiry Commission, the doctor-patient ratio in the Rohingya areas, formerly May Yu District, are 1 to 75,000 in Maungdaw and 1 to 83,000 in Buthidaung as compared with Myanmar's national ratio of 1 to 375 and the state's ratio in the capital city of Sittwe 1 to 681.²⁸⁹ The infant mortality rate of the Rohingya is almost twice Myanmar's national average.²⁹⁰ For over thirty years, Rohingya students, as a matter of state educational policies which categorize them as 'foreigners,' who are not permitted to study medicine, veterinary science, engineering, and other professional subjects.²⁹¹ Meanwhile, hardly any Burmese doctors choose to work in deeply impoverished areas such as the Rohingya areas.²⁹²

Additionally, the overwhelming majority of Rohingya who have been rendered stateless by the 1982 Citizenship Act²⁹³ are not allowed to work in the civil service and are thus reliant on teachers from outside of the Rohingya community.²⁹⁴ In the wake of the 2012 violence, many schools have not re-opened in Rohingya areas, as teachers no longer feel safe.²⁹⁵ Three decades after the initial denial of their citizenship and ethnic identity, the once thriving Rohingya society that produced parliamentarians, technocrats, and successful business men, now has an eighty percent illiteracy rate among adults, with higher rates for women.²⁹⁶ More than sixty percent of children aged between five and seventeen have never been enrolled in school.²⁹⁷

²⁸⁹ *Myanmar Overview*, WORLD BANK, (April 2013) <http://www.worldbank.org/en/country/myanmar/overview> (last visited Feb. 3, 2014).

²⁹⁰ *Id.*

²⁹¹ Interviews with a group of Rohingya professionals, Kuala Lumpur, Malaysia and London, UK (2012-2013).

²⁹² *The Ongoing Humanitarian Emergency in Myanmar's Rakhine State*, *supra* note 197.

²⁹³ According to the official government estimate, only 40,000 out of Myanmar's 1.33 million Rohingya are recognized as citizens. See Szep & Marshall, *supra* note 9.

²⁹⁴ Telephone interview with Tun Khin, President, Burmese Rohingya Organization UK, London, UK (October 2013). Tun Khin's grandfather, a Rohingya, was a member of the parliament during the pre-military parliamentary government of PM U Nu in the 1950s.

²⁹⁵ U.N. Office for the Coordination of Humanitarian Affairs, *supra* note 193 at 21.

²⁹⁶ The Arakan Project, *supra* note 247.

²⁹⁷ The Arakan Project, *supra* note 247.

Through various informal and official practices, the state in Myanmar has effectively destroyed the social foundations of a Rohingya society, deprived the Rohingya people of capable community leaders, and excluded new generations of Rohingya from whatever is left of social, public, and educational services. Over the past thirty years since the 1982 Citizenship Act came into effect, the pattern of attempts to inflict physical destruction of the Rohingya strongly suggests that the Rohingya have been subject to a process of genocide designed to “inflict on the group conditions of life calculated to bring about its physical destruction in whole or in part.”²⁹⁸

D. Intent to Destroy the Rohingya Through Erasure of Their Identity and History

Genocide requires that the delineated acts occur with an “intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”²⁹⁹ This section examines how the denial and erasure of the Rohingyas’ identity and history has been carried out as a matter of policy by the State in Burma over the past thirty years. The denial of identity, or the “bengalization” of the Rohingya, is a sign of genocide in Myanmar as it sets the stage for the dehumanization of the group and strips them of group rights and protection, and their demonization.³⁰⁰ Section 1 describes the State’s initial plans to destroy the Rohingya while Section 2 discusses the importance of the Inquiry Commission on Violence, and Section 3 describes the forced denial of Rohingya identity. The processes by which this destruction has happened, alongside the erosion of Rohingyas’ citizenship rights, indicates the State’s intent to destroy the Rohingya as a people. In addition, it is this erasure of identity and history that facilitates the mobilization of violence, hatred, and killing of the Rohingya.

²⁹⁸ Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 12.

²⁹⁹ *Id.*

³⁰⁰ See *The Hidden Genocide*, AL JAZEERA, Dec. 9, 2012, <http://www.aljazeera.com/programmes/aljazeerainvestigates/2012/12/2012125122215836351.html>. See also, *Burma*, SENTINEL PROJECT FOR GENOCIDE PREVENTION (2013), <http://thesentinelproject.org/situations-of-concern-2/burma-soc/> (last visited May 20, 2014).

1. *The State Officially Erases Rohingya Identity Beginning in 1962 and Continuing to the Present Day, Demonstrating Its Intent to Destroy the Rohingya and Complicity in their Destruction*

The reversal in recognizing the Rohingya as an ethnic group in official discourse between the early independence years and the 1982 Citizenship Act came about as a direct result of the proactive push from the ultra-nationalist Rakhine intellectuals in Ne Win's government. Members of the drafting committee for the 1982 Citizenship Law used the notion of fixed and externally defined ethnic categories to map out a list that, drawing on colonial records, retrospectively fixed the races and ethnic groups of Myanmar in stone.³⁰¹ The late Rakhine ultra-nationalist historian Dr. Aye Kyaw, a proactive member of the 1982 Citizenship Act drafting committee under the direct patronage of General Ne Win, made it clear that the Rakhine ultra-nationalists were determined to reclaim the Arakan for Buddhist Arakanese only, under the philosophical/ideological banner *Tai-yin-tha*, or the "original indigenous peoples."³⁰² Furthermore, in contrast to the more loosely defined pre-colonial era "national races" in the citizenship laws of 1947, the committee fixed the ethnic groups that existed before 1824, ignoring the fact that the borderlands such as Northern Rakhine in those days were neither clearly demarcated nor effectively administered by any political power, feudal, or colonial nation.³⁰³ Capturing the essence of borderlands, the Bengali economist and philosopher Amartya Sen³⁰⁴ perceptively remarked, "Burma came to the Rohingya, not the other way around."

Burmese leadership continued to confirm the structure of the 1982 Citizenship Act and deny the Rohingya as a distinct ethnic people through systematic and blatant erasure of group's identity. Successive military governments since General Ne Win's Socialist Programme Party government staunchly maintain that the Rohingya as an ethnic people never existed.³⁰⁵ This denial continues today. During a question and

³⁰¹ See *supra* Part II.B.

³⁰² See Dr. Aye Kyaw, YOUTUBE (May 2, 2012), <http://www.youtube.com/watch?v=Hdyfe-kCvJU> (last visited Sept. 25, 2013) (showing Rakhine ultra-nationalist historian Dr. Aye Kyaw espousing 'pure' Buddhist Rakhine nationalism).

³⁰³ For a brief but superb overview of Burma's censuses with a focus on the 1973 Census, see M. ISMAEL KHIN MAUNG, *supra* note 41. This paper dissected the categorization of races and ethnic groups in Burma's censuses.

³⁰⁴ Amartya Sen, Columbia University, Roundtable: Burma in Transition: Minorities, Human Rights and Democratic Process, New York (Sept. 14, 2012). One of the authors was a discussant at the roundtable.

³⁰⁵ Inkey, *supra* note 3.

answer session at the Royal Institute of International Affairs (Chatham House) in London on July 15, 2013, President Thein Sein, when asked whether his government was ever going to restore full citizenship rights to the Rohingyas, denied the existence of the Rohingya in Burma: “We do not have the term ‘Rohingya’ [in Myanmar].”³⁰⁶ The Myanmar President is not alone in his denial of the Rohingyas’ existence as a term or an ethnic group; this official position on the Rohingya extends throughout the State. In a Burmese language press briefing on the subject of Myanmar’s 2014 Census held in Rangoon in September 2013, the Minister of Immigration and former police chief ex-Brigadier Khin Yi was emphatic that no ethnic and cultural group will be recognized as a distinct national ethnic group except the ‘135 national races’ who were officially recognized by the 1982 Citizenship Act.³⁰⁷

Further, this state view is both echoed and informed by prominent Rakhine and Myanmar academics, including those that are educated overseas. In Aye Chan’s essay “Who are the Rohingyas?” which appeared in the ultra-nationalist publication *Piccima Zone Magazine*, the leading Rakhine scholar writes:

It is obvious that the term ‘Rohingyas’ was created in 1950s by the educated Chittagonian descendants from Mayu Frontier area [present day Buthidaung and Maungdaw Districts] and that *it cannot be found in any historical source materials in any language till then (emphasis added)*. The creators of that term might be of the second or third generations of the Bengali immigrants from... Bangladesh.³⁰⁸

This erasure of history and the denial of identity in official discourses and historical accounts should be understood as part of the broader ethnic-cleansing process of the Rohingya and others:

...their [Rakhine historians’] criticism [of Rohingya history and identity] is not historical, logical and authentic, but only

³⁰⁶ *Id.* See also, Comm’n on Human Rights, *supra* note 110, at ¶ 41.

³⁰⁷ *Myanmar Prepares for First Census in Three Decades*, RADIO FREE ASIA (Sept. 19, 2013), <http://www.rfa.org/english/news/myanmar/census-09192013150846.html>. For a critical and historical view of censuses in Burma, see Soni Trivedi, *Myanmar’s census a crucial democracy test*, THE HINDU, (Nov. 27, 2012), <http://www.thehindu.com/todays-paper/tp-opinion/myanmars-census-a-crucial-democracy-test/article4138674.ece>.

³⁰⁸ Aye Chan, *Who are the Rohingyas?*, PICCIMA ZONE MAGAZINE, Feb. 2010, Vol.1, at 266 (emphasis added).

chauvinistic in nature, racist in tendency. These are blending of truth with false wishes and communal hatred intended to strip off Rohingya's political and citizenship rights in Myanmar...These writers try to take the mask of Rakhine nationalists and invite all Buddhist people in Myanmar to join them in the ethnic cleansing of Rohingya people.³⁰⁹

In the case of the Rohingya, the past indeed belongs to those who control the present.

The erasure of Rohingya from official histories in Myanmar has been achieved through the mobilizing of popular and inaccurate assumptions about ethnic identity formation. In Myanmar society today, there is a general assumption that Rakhine Buddhist identity is one that has existed largely unchanged from before recorded history,³¹⁰ and that Myanmar and her ethnic groups have been in existence with only brief intervals of colonial interruption.³¹¹ The Rohingya identity, in contrast, is assumed to be entirely instrumental or politically motivated, devoid of any history in Myanmar, despite the fact that they have been and are the people of the borderlands.³¹² The emphasis on defining nationality on racial terms in Myanmar, including in the 1982 Citizenship Act, has led a large proportion of the non-Rohingya population to feel that shifting one's identity between "Arakanese or Rakhine Muslim" and the more ethnically ascribed term "Rohingya," both of which can be valid at any one given time, somehow reflects dishonesty or malicious intent.³¹³ This

³⁰⁹ Kyaw Min, *Rohingya History: Reality, Devoid of Myth 1* (May 2012) (unpublished manuscript) (on file with the authors).

³¹⁰ See Maung Zarni, *Confronting the Demons*, THE IRRAWADDY (Oct. 17, 2009), http://www2.irrawaddy.org/opinion_story.php?art_id=17011.

³¹¹ *Id.* For a critical analysis of ideological developments in historical Burma, see Zar Ni Knowledge, *Control and Power: The Politics of Education in Burma under Military Rule (1962-88)* (1988) (Unpublished PhD Dissertation, University of Wisconsin at Madison). The notion of historical continuity and peaceful co-habitation of all indigenous races is one of the most popular myths widely shared among the Burmese public.

³¹² The pioneering works of Leach and others such as Lehman and Scott, have changed the way ethnic identity formation in Myanmar and around the world is understood, by focusing on the fluidity of its nature, and deconstructing the ethnic categories that have been designated, often through inaccurate records from the colonial era. Specifically, see SCOTT, *supra* note 38; LEHMAN, *supra* note 38; LEACH, *supra* note 38. The works on ethnicity by Scott and Lehman were built on Leach's seminal work on ethnic identity as a result of fluid political choices made by members of a given ethnic group.

³¹³ Based on the authors' examination of the Burmese language on-line and print media the popular discourses as reflected in the mass media, is littered with news stories and quotes that demonstrate this categorically negative perception of the word Rohingya. Also, our findings have been corroborated by the interviews with three religiously and ethnically diverse groups of Burmese trainees at the multiculturalist workshops organized and conducted by the Burmese co-author in the months of January and May, Bangkok, 2013, and again in Kuala Lumpur, Nov. 2013. See *Hate Speech of Burmese*

understanding is reflected in the Rakhine Commission Report on the recent violence, which firmly laid the blame with the Rohingya:

[S]hould the Bengalis continue to insist they should be called Rohingya, the majority in the country will not accept this and there could be further unrest. The indigenous Rakhine can be expected to have an intense reaction. Thus, Bengalis now pushing to use the term Rohingya are surely fanning the flames of sectarian violence.³¹⁴

While most of the international community recognizes the right of individuals to self-identify,³¹⁵ Myanmar has denied this right through the way citizenship and belonging is defined.

2. *Denial of the Rohingya Identity By Inquiry Commission on Violence in Rakhine State Indicates Intent to Destroy the Rohingya and Complicity in their Destruction*

Myanmar's presidentially appointed Inquiry Commission on the Violence in Rakhine State has also played a crucial role in the State's continuing attempts to erase the Rohingya history and identity.³¹⁶ On President Thein Sein's orders, the commission was formed in August 2012 to investigate the causes of the violence in Rakhine State.³¹⁷ It also served to distract from the growing calls for an independent international inquiry.³¹⁸

In the hands of the commission's social scientists,³¹⁹ the Rohingya were called Bengali throughout the report, additionally othering them by

Buddhist Monk against Myanmar Muslim, YOUTUBE (Mar. 26, 2013). <http://www.youtube.com/watch?v=vDI9MvpRiSE>. See also, Steven Kiersons, *The Colonial Origins of Hate Speech in Burma*, THE SENTINEL PROJECT (Oct. 28, 2013), <http://thesentinelproject.org/the-colonial-origins-of-hate-speech-in-burma/> (last visited Feb. 3, 2014).

³¹⁴ THE GOV'T OF THE REPUBLIC OF THE UNION OF MYANMAR, *supra* note 130, at 56.

³¹⁵ *Who are the Indigenous Peoples?*, INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, <http://www.iwgia.org/culture-and-identity/identification-of-indigenous-peoples> (last visited Dec. 5, 2013).

³¹⁶ For the first thorough critique of the Inquiry Commission's misconduct during the inquiry process and the substance of its original Burmese language report, see Maung Zarni, *Myanmar Whitewashes Ethnic Cleansing*, ASIA TIMES, May 1, 2013, http://www.atimes.com/atimes/Southeast_Asia/SEA-03-010513.html.

³¹⁷ *Myanmar Sets Up Internal Probe of Sectarian Unrest*, THE IRRAWADDY, Aug. 18, 2012, <http://www.irrawaddy.org/burma/burma-sets-up-internal-probe-of-sectarian-unrest.html>.

³¹⁸ *Id.*

³¹⁹ Out of its original twenty-seven members, at least one third of them are Western educated Burmese including social scientists who received their advanced trainings, including PhDs, at Cornell, Cambridge and Harvard. In fact, Drs. Myo Myint and Kyaw Yin Hlaing, the presidential inquiry

dichotomising them against the Tai-Yin-Tha or so-called indigenous groups.³²⁰ Since the first meeting, the Rakhine commissioners objected to the use of the word Rohingya in the discussion.³²¹ At the same time, some of the Burmese human rights advocates threatened to walk out of meetings if anyone evoked the principle of universal human rights in relation to the Rohingya.³²² Rohingya presence in Rakhine State prior to Myanmar's independence was ignored.

In addition, the recognition of the Rohingya in official discourse and their citizenship rights in the 1950s and 1960s were skipped in the report's historical section.³²³ This omission was not due to a lack of archival records or oral histories of both the Rohingya and state officials who lived through those crucial decades, especially since the Burmese language report stated clearly that the commissioners poured over relevant materials held in Myanmar's national archives as well as in "big research universities" overseas.³²⁴ Instead, the commission highlighted the anti-Rohingya Rakhine nationalist version of history, which denies that the Rohingya ever existed.³²⁵ Further, the Commissioners chose not to problematize the well-documented role of the State in the violence against the Rohingya, which began with the brutal immigration campaign of 1978.³²⁶

While the President appointed half a dozen Rakhine ultra-nationalists, the Commission was noted for its conspicuous absence of Rohingya representatives.³²⁷ Out of the six non-Rohingya Muslims drawn from the country's five different national Islamic organizations, the two Commission members who questioned the integrity of the inquiry process

Commission's Chair and Secretary respectively, earned their doctorates in political science and history under the supervision of Benedict O. G. Anderson at Cornell whose seminal work on nationalism and nation-states argues that national identities are nothing more than products of collective imaginations. It is curious that these highly trained Burmese scholars have gone along with the State that stripped off the Rohingya's group identity as a matter of policy.

³²⁰ THE GOV'T OF THE REPUBLIC OF THE UNION OF MYANMAR, *supra* note 130.

³²¹ Interview with U Nyunt Maung Shein & U Tin Maung Than, *supra* note 184. Telephone interviews with Zaganar, a Buddhist commissioner on the same commission and the country's most prominent political comedian, (Dec. 2012, Apr. 2013).

³²² Telephone and face-to-face interviews with two Muslim commissioners and one prominent Buddhist commissioner of the Myanmar Inquiry Commission on the Conflicts in Rakhine, in Kuala Lumpur, Malaysia, Oslo, Norway, and Bangkok, Thailand (Nov. 2012- Apr. 2013).

³²³ THE GOV'T OF THE REPUBLIC OF THE UNION OF MYANMAR, *supra* note 130.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ Mattern, *supra* note 123, at 31.

³²⁷ The best known among them was veterinarian Aye Kyaw who is a Rakhine Member of the Parliament in Naypyidaw. He chairs the Rakhine Nationality Development Party and openly expresses his desire to copy Israel's model of reclaiming "Rakhine land for pure Rakhine Buddhists."

were dismissed by the president.³²⁸ One was detained for a short period for going public about what he called a “fraudulent investigation.”³²⁹ The commission’s official act of denying the Rohingya identity is all the more shocking considering the commission’s ethnic diversity, including representatives from the ethnic Kachin, Chin, Karen, Shan, and other communities that have experienced oppression from state authorities.³³⁰

The process of erasing the Rohingya identity and eroding their rights has not yet finished. Within the next two years, the census of 2014³³¹ and the national elections of 2015 are potential pressure points in the long struggle for the Rohingya to have their identity and their rights recognized in Myanmar. It is notable, however, that in the views of some, the process of erasing the Rohingya ethnic identity has already been completed. In May 2013, Rakhine State spokesman Win Myaing summed up this crucial and hitherto widely overlooked link between the erasure of Rohingya identity and the genocide: “How can it be ethnic cleansing? They are not an ethnic group.”³³²

3. *The State Causes Serious Bodily and Mental Harm to Rohingya by Forced Denial of their Ethnic Identity and Confirms Intent to Destroy*

Article 2 of the Convention on the Punishment and Prevention of the Crime of Genocide specifically includes “causing serious bodily or mental harm to members of the group.”³³³ Rohingya experience the attempts to destroy their identity in everyday forms as both physical and symbolic

³²⁸ Interview with U Nyunt Maung Shein & U Tin Maung Than, *supra* note 184. U Nyunt Maung Shein and U Tin Maung Than were the two commissioners expelled from the Inquiry Commission.

³²⁹ Interviews with both ex-Commissioners, Kuala Lumpur, Malaysia (April 2013). The two Myanmar Muslim commissioners who were sacked from the Commission are U Nyunt Maung Shein and U Tin Maung Than. Tin Maung Than was briefly detained by the Police Special Branch on the grounds that he broke the commission’s rules barring the members from talking to the press during the inquiry. In contrast, the Buddhist commissioners who routinely made media comments on the status and proceedings of the inquiry were left untouched.

³³⁰ *Briefing: Myanmar’s ethnic problems*, UN OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (Mar. 29, 2012), <http://www.irinnews.org/report/95195/briefing-myanmar-s-ethnic-problems>. See also, Medha Chaturvedi, *Myanmar’s Ethnic Divide: The Parallel Struggle*, SPECIAL REPORT, INSTITUTE OF PEACE AND CONFLICT STUDIES (2013), <http://www.ipcs.org/special-report/myanmar/myanmars-ethnic-divide-the-parallel-struggle-131.html>.

³³¹ *Wary of Official Census, Burma’s Ethnic Minorities Count Their Own*, THE IRRAWADDY, Dec. 4, 2013, <http://www.irrawaddy.org/burma/wary-official-census-burmas-ethnic-minorities-count.html>.

³³² Szep, *supra* note 3.

³³³ U.N. Convention on the Punishment and Prevention of the Crime of Genocide, Art. 2. Dec. 9, 1948.

violence that cause them physical and mental harm.³³⁴ Individually and as a group, Rohingya are routinely forced to identify as Bengali and are accused of being foreigners by the state, including when they face arbitrary arrest or encounter security forces.³³⁵ The Sentinel Project noted,

Attempts to Bengalize the Rohingya have recurred several times with reports that victims are tortured and beaten until they sign papers indicating they are Bengali. In another incident, between 20 and 23 June 2013, 34 people were forcibly registered by the authorities in a village near the border town of Maung Daw.³³⁶

Rohingya genocide involves the destruction of a culture and identity of a target group closely linked with the physical and mental harm and destruction of the group. Additionally, the erasure and destruction of the group identity is designed to deal a blow to its collective psyche or mental well-being. Preliminary research on the link between the state policy of identity destruction and the mental harm to the group indicates mental harm directly arises from the destruction and erasure of the group's identity.³³⁷ The official denial of the Rohingya's existence and rights in Myanmar is part and parcel of the processes of the destruction of the Rohingya as a group.

The Rohingya are forced to officially deny their identity in multiple contexts. The Rohingya in the three townships of North Rakhine State—Maungdaw, Buthidaung and Rathedaung—in addition to unannounced house calls by security personnel,³³⁸ are subject to yearly verification processes whereby armed teams of security personnel and civilian authorities check the household members against the family list.³³⁹ As part of this regular on-going process, the Rohingya in North Rakhine State are

³³⁴ Interviews with Rohingya refugees and/or immigrants, Bangladesh, Malaysia, Thailand, UK, and U.S., (2010-2013).

³³⁵ *Id.*

³³⁶ Jérôme, *Escalating anti-Rohingya Persecution, 2013*, THE SENTINEL PROJECT, (Sep. 10, 2013) <http://thesentinelproject.org/launch-of-a-new-visualization-of-the-escalating-persecution-of-the-rohingya-muslim-minority-in-burma/>.

³³⁷ Interviews with Rohingya refugees and/or immigrants, Bangladesh, Malaysia, Thailand, UK, and U.S. (2010-2013). *See also*, personal communication with Arthur Kleinman, a noted medical anthropologist in the Department of Global Health and Social Medicine and professor of psychiatry at Harvard Medical School, Cambridge (Nov. 19, 2013).

³³⁸ *See infra*, Part III.D.3.

³³⁹ Interviews with a group of Rohingya businessmen who frequently travel from Rangoon to Kuala Lumpur, Kuala Lumpur, Malaysia (Sept.–Nov. 2013).

forced to register as Bengali.³⁴⁰ In 2013, this process of registration as Bengali was extended to the violence-hit areas elsewhere in Rakhine State, under two pretexts. For the international audience, the pretext was to reissue documents that had been destroyed by the violence and destruction; for the local audience the pretext was to identify illegals, under the same justification as Operation Nagamin in 1978.³⁴¹ The registration teams were met by groups, including women and children, protesting at being registered as Bengali.³⁴² Security forces dealt with the protesters harshly.³⁴³ Additionally, the government has made many failed attempts to register the IDPs in the camps that have become home to over 140,000 people since June 2012.³⁴⁴ As Reuters noted: “For Fukan Ahmed and other Rohingya leaders, it (registration as Bengali) sent a chilling message: If they want to be resettled (back to their homes), they must deny their identity.”³⁴⁵ While the camps’ populations need to be registered for humanitarian and protection reasons,³⁴⁶ this is also viewed by some Rohingya as part of the Bengalization process.³⁴⁷

Rohingya refugees in Kuala Lumpur, Malaysia, consistently recounted incidents of violence suffered at the hands of Burmese authorities each time they identified themselves as Rohingya.³⁴⁸ Whether they were picked up on the street of a major Arakan city like Sittwe, or intercepted off the Burmese coast by the Burmese Navy, Rohingyas from different generations said the Burmese security officials typically ask them about their race or ethnic group.³⁴⁹ Use of the word Rohingya would trigger physical and racial abuse.³⁵⁰ One Rohingya interviewee, for example, recounted his experience in the hands of the Burmese security officials in 1991 as a teenage student in Sittwe as part of Operation *Shwe*

³⁴⁰ *Burma Risk Assessment*, *supra* note 212.

³⁴¹ Confidential interviews with UN officials.

³⁴² *Id.*

³⁴³ See *Why Myanmar's Rohingya are forced to say they are Bengali*, CHRISTIAN SCIENCE MONITOR, June 2, 2013, [http://www.csmonitor.com/World/Asia-Pacific/2013/0602/Why-Myanmar-s-Rohingya-are-forced-to-say-they-are-Bengali/\(page\)/2](http://www.csmonitor.com/World/Asia-Pacific/2013/0602/Why-Myanmar-s-Rohingya-are-forced-to-say-they-are-Bengali/(page)/2).

³⁴⁴ Anonymous interview with UNHCR staff.

³⁴⁵ Szep, *supra* note 3.

³⁴⁶ *Myanmar: Minority Rights are non-negotiable*, REFUGEES INTERNATIONAL (May 29, 2013), <http://refugeesinternational.org/policy/field-report/myanmar-protecting-minority-rights-non-negotiable> (last visited Oct. 23, 2013).

³⁴⁷ Interviews with Rohingya rights advocates via email, Yangon, Burma, London, UK, and New York, U.S. (2013).

³⁴⁸ Interviews with Rohingya, Kuala Lumpur, Malaysia (2011-2013).

³⁴⁹ Numerous interviews with the Rohingya refugees and legal residents in Kuala Lumpur, including fresh arrivals from Burma as well as the established Rohingya professionals, Kuala Lumpur, Malaysia (2011-2013).

³⁵⁰ See *Why Myanmar's Rohingya are forced to say they are Bengali*, *supra* note 343.

Pyi Thar (or Operation Prosperous and Peaceful Nation).³⁵¹ Like many other Rohingya teenagers and adults, he was brought to a local police Special Branch station where he was put in a holding cell.³⁵² The Special Branch agents asked him, 'What is your name?', followed by 'What is your ethnic group?'³⁵³ When he answered he was a Rohingya, they punched him in the face and head, while angrily shouting at him, "you mother-fucker. You aren't Rohingya. You are Bengali. Say, I am Bengali."³⁵⁴ According to his account, he finally cried and said, "I don't know what to say. My parents told me we are Rohingya. So, I told you I am Rohingya. But, please stop hurting and write down any name you want for my face."³⁵⁵

Another interviewee related his experience of being a Rohingya trying to travel to Yangon in 1993,

I tried to leave my village once before in 1993. I tried to go to Yangon. But I was caught and sent to prison for more than 10 years because I was trying to leave. I was sentenced to 8 years hard labor. They accused me of being from Bangladesh. When I told them that I was Rohingya, they forced me to write that I was Bengali. After 8 years in Maungdaw, I was sent to Sittwe prison for 2 years. I was laboring with shackles around my ankles. Look at the scars they left there. My family could only visit me one time in one year when I was in prison because they had no income to make the trip. In Maungdaw, I was beaten more than 10 times per day. My whole body sustained intense pain. My back, my ribs, my arms, all over. They beat me anywhere for no reason. If I worked hard, they still beat me.³⁵⁶

This account clearly shows not only how Rohingya are forced to register as Bengali, but also how the Rohingya as non-citizens have been criminalized simply for attempting to travel within the country and are subjected to violence.

³⁵¹ Interview with the Rohingya resident Ko Shwe Maung, Kuala Lumpur, Malaysia (May 2013) (translated by author).

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ Interview with 55 year old Rohingya man from Southern Rakhine, Kuala Lumpur, Malaysia (Dec. 2012).

The erasure of Rohingya history and identity in Myanmar is firstly an instrument of genocide because it lays the foundation on which destruction and abuse has occurred by invalidating their existence and their group identity. The illegalization of the Rohingya's existence and the destruction of their group identity have paved the way for widespread hate-speech against the Rohingya, which accompanies the anti-Rohingya and anti-Muslim violence.³⁵⁷ It was the alarming rates of hate-speech in Myanmar together with the State's failure to stop the spread of this hate-speech that accompanied the pogroms of 2012.³⁵⁸ This progression led the U.N. Special Rapporteur to remark in March 2013,

The Government must take immediate action to stop the violence from spreading to other parts of the country and undermining the reform process. This includes stemming campaigns of discrimination and hate speech which are fueling racist and, in particular, anti-Muslim feeling in the country. And it involves holding to account those responsible for acts of violence and destruction against religious and ethnic minorities.³⁵⁹

This hate-speech and denial of history and identity is part of the dehumanization and stigmatization of the Rohingya. For example, a popular book co-authored by prominent Rakhine historian Dr. Aye Chan that discusses the non-existence of the "so-called Rohingya"³⁶⁰ is titled "Influx virus: The Illegal Muslims of Arakan."³⁶¹ Equating the Rohingya to disease very clearly falls into the process of dehumanization that is described in Gregory Stanton's "8-stages of genocide."³⁶² Stanton writes:

[O]ne group denies the humanity of the other group. Members of it are equated with animals, vermin, insects or diseases.

³⁵⁷ The holocaust museum recently drew attention to the issue of hate speech against the Rohingya. See *Holocaust Museum Bears Witness to the Plight of the Rohingya*, OPEN SOCIETY INSTITUTE (Nov 6 2013), <http://www.opensocietyfoundations.org/voices/holocaust-museum-bears-witness-plaint-burmas-rohingya>.

³⁵⁸ Sai Latt, *A Jingoist Media Foments Violence in Burma's Arakan state*, ASIA SENTINEL, Oct. 30 2013, <http://www.asiasentinel.com/society/a-jingoist-media-foments-violence-in-burmas-arakan-state/>.

³⁵⁹ Press Release UNOHCHR, Religious violence in Myanmar, the consequences of Government inaction in tackling prejudice and discrimination (March 23, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13205&LangID=>.

³⁶⁰ AYE CHAN & U SHW ZAN, *supra* note 32, at 1.

³⁶¹ *Id.*

³⁶² George Stanton, *The 8-stages of genocide*, GENOCIDE WATCH (1998), <http://www.genocide-watch.org/aboutgenocide/8stagesofgenocide.html>.

Dehumanization overcomes the normal human revulsion against murder. At this stage, hate propaganda in print and on hate radios is used to vilify the victim group.³⁶³

This hate propaganda has clearly been seen in printed pamphlets distributed in Rakhine State and in the hate-speech on social media and Myanmar's domestic media.

The official and popular acts of erasure of the Rohingya ethnic identity clearly indicate the intent to destroy the very foundations upon which the Rohingya people as a group exist. These acts of erasure legitimize and encourage hate-speech and the dehumanization of the Rohingya, which is used to vilify the Rohingya victims and justify the violence against and destruction of the Rohingya. Additionally, the erasure and denial of identity is experienced by the Rohingya as violence in multiple forms, including at the hands of state authorities when they are physically forced to register as "Bengali" and civilian populations in the targeted anti-Rohingya boycotts and campaigns of violence. This violence results in serious bodily and mental harm to the Rohingya.

IV. IMPLICATIONS AND IMPORTANCE OF NAMING THE ABUSES AGAINST THE ROHINGYA "GENOCIDE"

With the sole exception of the Organization of Islamic Cooperation ("OIC"),³⁶⁴ representing fifty-seven Muslim countries, the international community has shied away from calling the Rohingya abuses of the past thirty-five years genocide.³⁶⁵ There seems to be no appetite among the world's major powers for ending the immense sufferings of the estimated 1.3 million Rohingya of Western Burma. As an ethnic group, the Rohingya have been subjected to Myanmar's intentional policies and practices designed to inflict conditions of life so unbearable that thousands have preferred to risk life at high seas or face unseen risks at the hands of human traffickers than remain in semi-concentration camps and inhuman

³⁶³ *Id.*

³⁶⁴ *Stop Rohingya Genocide: OIC*, ONISLAM, Nov. 17, 2012, <http://www.onislam.net/english/news/asia-pacific/460041-stop-rohingya-genocide-oic.html>.

³⁶⁵ Even the U.S. Holocaust Memorial Museum and the New York-based Human Rights Watch, the two leading organizations that are most sympathetic to the plight of the Rohingya and advocating for the restoration of citizenship status to the 1.3 million Rohingya in Myanmar have fallen short of calling the still un-folding process of Rohingya genocide a genocide, opting to call it ethnic cleansing. *See, e.g., Burma*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/confront-genocide/cases/burma> (last visited Jan. 10, 2014). Western officials, on the other hand, strongly oppose the use of the term genocide in discussing the Rohingya issue. Interviews with several human rights researchers, specializing in human rights in Myanmar, Kuala Lumpur and Bangkok, (Apr.–Dec. 2013).

security grids on Myanmar's soil. Whatever the motivations and justifications, the apparent failures of the global governance system to help end the Rohingya genocide by framing the Rohingya perspective using appropriate international legal instruments requires scrutiny. Part A demonstrates that States avoid labeling the Rohingya abuses "genocide" for political reasons and Part B describes the importance of invoking the term, while Part C calls for U.N. action.

A. *International Actors and States Avoid the Label "Genocide" for Political Purposes*

International academics and prosecutors are not hopeful about getting the international justice system activated so that the Rohingya may continue to exist as a people in peace.³⁶⁶ They are not alone. International human rights researchers have not used the term 'genocide,' as it would trigger a storm of debates where legalese would overwhelm the substance of the Rohingya persecution.³⁶⁷ Further, human rights reports using the words crimes against humanity or ethnic cleansing, or highlighting the role that the central State has played in the so-called communal violence in Rakhine State, have been received with open hostility by diplomatic missions in Myanmar.³⁶⁸ Even Aung San Suu Kyi, a global icon and Myanmar opposition leader who had until recently been viewed as a defender of human rights,³⁶⁹ reportedly rejected the use of the term ethnic cleansing³⁷⁰ in referring to the plight of the Rohingya.

The opening up of Myanmar has seen the removal of sanctions, increasing investment, and increasing military ties in line with the West's

³⁶⁶ Interviews with Stephen Heder, London University School of Oriental and African Studies, and Andrew Cayley, International Tribunal, Phnom Penh (Sept. 2013). In a recent conversation with a specialist on the history of the Khmer Rouge, one of the authors was told that until and unless a credible practitioner in the field of international human rights law pronounces the plight of the Rohingya as genocide, no amount of academic publications in the fields of genocide studies or of law and policy, nor of human rights reports will hold tangible results. Likewise, the last international co-prosecutor, Andrew Cayley, who resigned from Cambodia's U.N.-co-sponsored International Tribunal, also cautioned against using the term genocide to characterize the thirty-five year-old process of the Rohingya persecution on the basis that Myanmar's democracy icon Aung San Suu Kyi is reportedly 'not keen on retribution against the country's ruling military leadership and desirous of reconciliation with them.'

³⁶⁷ Interviews with human rights researchers, Thailand, (May 2013) (names withheld).

³⁶⁸ Personal experience and communications with a range of human rights activists.

³⁶⁹ Emanuel Stoakes, *Aung San Suu Kyi is turning a blind eye to human rights in the name of politics*, THE GUARDIAN, Nov. 26, 2013, <http://www.theguardian.com/commentisfree/2013/nov/27/aung-san-suu-kyi-is-turning-a-blind-eye-to-human-rights-in-the-name-of-politics>.

³⁷⁰ Hanna Hindstrom, *Suu Kyi rejects allegations of ethnic cleansing in Burma*, DEMOCRATIC VOICE OF BURMA (Oct. 24, 2013), <http://www.dvb.no/news/suu-kyi-rejects-allegations-of-ethnic-cleansing-in-burma-myanmar/33848>.

economic and geo-strategic plans.³⁷¹ Washington's new policy of engagement in its new foreign policy equation, namely the Asian Pivot or rebalancing, has come under close scrutiny³⁷² as the Burmese government continues to commit atrocities against the Rohingya and does nothing to stop popular hate speech and acts against the Muslims of Burma. Any condemnation of violence in Rakhine State by Western governments has been overshadowed by praise for the wider reform process in Myanmar and attempts to unconditionally embrace the quasi-civilian government of that country.³⁷³

In this context, President Thein Sein has been hailed as the "only liberal voice,"³⁷⁴ in Myanmar and a reformer,³⁷⁵ despite the President's comments to UNHCR in July 2012. The world has already forgotten that Thein Sein himself officially suggested to the U.N. immediately after the first recent wave of violence against the Rohingya that the "only solution" to the troubles in Rakhine State was either to send stateless Rohingya to third countries or to contain them in UNHCR-administered camps.³⁷⁶ Further, it was the Burmese President who defended publicly the notorious Islamophobic hate-preacher, Buddhist monk Wirathu, as a "son of Lord Buddha" with a message of loving kindness.³⁷⁷ The portrayal of the state as incompetent or slow in reeling back ultra-nationalists in the face of communal violence is diplomatically expedient, but does not absolve the Burmese leadership of its fundamental responsibility to protect the people under its national jurisdictions.

³⁷¹ See Natalie Brinham, *The Conveniently forgotten human rights of the Rohingya*, FORCED MIGRATION REVIEW 41 (Dec. 2012).

³⁷² See, e.g., Joshua Kurlantzick, *The Moral and Strategic Blindspot in Obama's Pivot to Asia*, NEW REPUBLIC, Nov. 20, 2012, <http://www.newrepublic.com/article/110332/moral-and-strategic-blindspot-obamas-pivot-asia>.

³⁷³ See Brinham, *supra* note 371.

³⁷⁴ E-mail from Derrick Mitchell, Ambassador to the United States in Yangon (on file with author).

³⁷⁵ President Thein Sein was awarded ICG's "In Pursuit of Peace" award in 2012.

³⁷⁶ See *UNHCR seeks true community reconciliation in Rakhine State*, MYANMAR TIMES (Jul. 16, 2012), www.mmmtimes.com/2012/news/635/news63506.html. Third country is used in that context in general discussion of his comments to mean sending Rohingya to refugee receiving countries in the west).

³⁷⁷ See Hanna Hindstrom, *Burma president backs anti-Muslim 'hate preacher' Wirathu*, DEMOCRATIC VOICE OF BURMA (June 24 2013), <http://www.dvb.no/news/politics-news/burma-president-backs-anti-muslim-%E2%80%98hate-preacher%E2%80%99-wirathu/28955>; Andrew R.C. Marshall, *Special Report: Myanmar gives official blessing to anti-Muslim monks*, REUTERS (June 27, 2013), <http://www.reuters.com/article/2013/06/27/us-myanmar-969-specialreportidUSBRE95Q04720130627>.

B. *The History of Abuses and the Political Consequences Require Acknowledging the Current Genocide Against the Rohingya*

The overwhelming conclusion among experts on the Rohingya persecution in Myanmar is that making a case for genocide of the Rohingya is a non-starter, pragmatically speaking.³⁷⁸ However, even the pragmatic attempt to argue the case of the Rohingya as crimes against humanity have for all intents and purposes have not been heard by the governments and leaders who are most influential within the UN-led world order.³⁷⁹ Human Rights Watch offers the best explanation for international inaction: “because [the Rohingya] have no constituency in the West and come from a strategic backwater, no one wants them (and no one is prepared to help end their decades of persecution) even though the world is well aware of their predicament.”³⁸⁰ Despite this, based on the evidence, and drawing on the UN Convention on Genocide, the authors argue that the Rohingya have been victims of a slow-burning genocide since 1978.

A crimes against humanity designation is not sufficient to characterize the intent to destroy at the root of the abuses against the Rohingya. While the crimes against humanity framework³⁸¹ is applicable in the abuse of other minority groups in Myanmar over the years, the violence against the Rohingya has a unique aspect, in that it aims to prevent the Rohingya from existing and is not simply comprised of systematic attacks with the intent to cause harm.

³⁷⁸ For instance, Matthew Smith, one of the most prominent experts on the Rohingya persecution and the author of Human Rights Watch’s reports on the Rohingya killings in 2012, would choose to stay clear of making, even remotely, any suggestion that a decade of Myanmar’s systematic policy of population, birth, and marriage control with the Rohingya as the sole targeted ethnic group, may be assessed against the Genocide Convention of 1948. Forced birth control on the basis of a group’s ethnic and other identities is considered an act of genocide. See Press Release, Fortify Rights, Myanmar: Abolish abusive restrictions and practices against Rohingya Muslims: Leaked Documents Implicate Government Actors in Crimes Against Humanity, (Feb. 25, 2014), available at <http://www.fortifyrights.org/publication-20140225.html>. Another expert is Benjamin Zawacki, who has consistently opted to stay away from any arguments that may trigger a debate as to the Rohingya are, empirically speaking, subject to a genocide. See ZAWACKI, *supra* note 16.

³⁷⁹ Authors’ personal communications with some key in-country senior diplomats based in Rangoon, officials and politicians from governments and international organizations including the United States, UN agencies, ASEAN, EU, and the Organization of Islamic Conference or Cooperation since the two bouts of mass violence against the Rohingya took place in June and October 2012.

³⁸⁰ *Perilous Plight: Burma’s Rohingya take to the sea*, HUMAN RIGHTS WATCH (May 26, 2009), <http://www.hrw.org/reports/2009/05/26/perilous-plight-0>.

³⁸¹ See, e.g., *Life under the Junta: the Evidence of Crimes against Humanity in Burma’s Chin State*, PHYSICIANS FOR HUMAN RIGHTS (Jan. 2011), http://www.jhsph.edu/research/centers-and-institutes/center-for-public-health-and-human-rights/pdf/Burma_Chin_exec_summ_19Jan11.pdf. See also, *Harvard report calls for Burma inquiry*, WORLDLY BOSTON (May 21, 2009), http://www.boston.com/news/world/worldly_boston/2009/05/harvard_report_calls_for_burma.html.

Other scholars have acknowledged the possibility of potential genocide in the case of the Rohingya. The authors are convinced by the evidence that genocide is demonstrable. Genocide scholar William Schabas,³⁸² who was also one of the first to argue in 2010 the case for crimes against humanity in the context of the Rohingya in Western Myanmar, cautiously stated:

In the case of the Rohingya we're moving into a zone where the word can be used. When you see measures preventing births, trying to deny the identity of a people, hoping to see that they really are eventually—that they no longer exist—denying their history, denying the legitimacy of their right to live where they live, these are all warning signs that mean that it's not frivolous to envisage the use of the term genocide.³⁸³

Professor Schabas is correct that there is the intent to destroy, which is in and of itself punishable by the Genocide Convention, but the authors' research has shown that slow-burning genocide has been practiced over the past thirty-five years. The very limited openings in Myanmar only now have allowed observers and human rights monitors to peak into the physically, mentally, and socially devastated world of the Rohingya, making it difficult to comprehend the extent of the destruction they have already experienced. In fact, the Rohingya have suffered to a greater or lesser degree under similar policies, pogroms and military/civilian campaigns since 1978.

C. *Definition of Genocide Requires Action by the United Nations*

Within the current interstate system reorganized by the U.N., no mass atrocities take place in a vacuum. Here, the role and importance of the U. N. ought to be noted. As the world's leading organization of global governance, the UN's practices and policies towards the plight of the Rohingya need to be scrutinized.

Beyond engaging in the humanitarian affairs regarding the Rohingya and calling on the Government of Myanmar to recognize them

³⁸² For Schabas' expert report on the Rohingya, see IRISH CENTRE FOR HUMAN RIGHTS, *supra* note 150.

³⁸³ *The Hidden Genocide*, AL JAZEERA (Dec. 9, 2012), <http://www.aljazeera.com/programmes/aljazeerainvestigates/2012/12/2012125122215836351.html>.

as Myanmar citizens, the UN is not doing enough.³⁸⁴ It should thoroughly evaluate the role its agencies have played over the years in Myanmar with specific regard to the crisis for the Rohingya. The UNHCR, whose global mandate covers the protection of stateless persons as well as refugees and internally displaced persons,³⁸⁵ set up operations in North Rakhine State in 1992, initially to oversee the forced repatriations of the Rohingya from Bangladesh.³⁸⁶ Despite their continual presence in North Rakhine State and monitoring of the situation there for over twenty years, the UNHCR has remained virtually silent as to the human rights abuses to which the Rohingya have been subjected.³⁸⁷ Other agencies, the World Food Program for instance, are fully cognizant of the severity of the state sponsored and directed persecution of the Rohingya. In private, officials acknowledged the persecution that Rohingya have been experiencing amounts to a genocide.³⁸⁸

The UN should have a public review of the language its agencies use to describe the Rohingya crisis. Language such as communal violence which suggests the violence is horizontal, or pandering to the Government's refusal to use words such as Rohingya or stateless, serves to further legitimize the role of the State in the violence and divert the international community's attention away from the severity of the situation. Finally, the UN should lead the efforts to establish a U.N.-led Inquiry Commission whose task would be to examine the root causes of the Rohingya plight over the years, including establishing the roles of both the state actors and non-state actors.

³⁸⁴ *Burma Rejects UN Resolution on Rohingya Muslims*, RUETERS, Nov. 21, 2013, <http://www.voanews.com/content/reu-burma-rejects-un-resolution-on-rohingya-muslims/1794749.html>.

³⁸⁵ Augusta Conchiglia, *UNHCR's Evolving Mandate*, LE MONDE (Jun. 2012), <http://mondediplo.com/2012/06/15unhcr>.

³⁸⁶ C.R. ABRAR, *supra* note 127. (The author is a Professor in the Department of International Relations, University of Dhaka, and Coordinator, Refugee and Migratory Movements Research Unit).

³⁸⁷ A famed western critic of international humanitarianism, David Reiff, has published a well-researched study documenting the gross ineffectiveness, inadequacies, and even complicity of UN-led humanitarian organizations including the UNHCR. Although Reiff's study did not include the UNHCR's operations in Myanmar, our own in-depth interviews with the Rohingya refugees, former humanitarian staff in Myanmar, and other NGO workers with first-hand knowledge of UNHCR's Myanmar operations in Rohingya areas support Reiff's unflattering observations about the UNHCR and UN-led humanitarianism. See DAVID REIFF, *A BED FOR THE NIGHT: HUMANITARIANISM IN CRISIS* (2002).

³⁸⁸ Personal communications with former UN local staffers, Kuala Lumpur, Malaysia (face to face) and Rangoon, Burma (via email) (2012-2013).

V. CONCLUSION

“The world is watching and does nothing to end the sufferings of the Rohingya. This is much like what happened in Cambodia and Rwanda. The world stands by. It keeps on watching, watching, watching . . .” states Terith Chy, Khmer Criminologist, (Genocide) Documentation Center of Cambodia.³⁸⁹

The authors have concentrated this discussion on Burma’s slow-burning state-led process of deliberate destruction of the Rohingya as a population since 1978. Of the five acts of genocide spelled out clearly in the 1948 Convention on the Punishment and Prevention of the Crime of Genocide, four of these acts of genocide have been committed against the Rohingya in Western Myanmar in this harrowing process of the past thirty-five years. The ruling Burmese, both the Buddhist society and the Buddhist state, have committed the first four acts, including intentional killing, harm to body and mind of the victims as a group, inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and preventing births, as defined by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide as punishable acts of genocide. In examining a situation that has been as dire and desperate as the Rohingya’s, neither geopolitical considerations nor the paralysis of the international justice system and global governance in dealing effectively with any mass atrocities around the world should prevent scholars from calling a genocide by its real name.

There is one great irony in sixty years of scholarly and legal debates about cases to be recognized as genocide. Irrespective of how lawyers, scholars, diplomats, and politicians may finally decide to characterize the plight of the Rohingya, one thing is certain: the nearly one million Rohingya trapped inside their own homeland, sandwiched between the predominantly Buddhist Myanmar and Muslim Bangladesh, will continue to be subject to unspeakable atrocities and systematic rights abuses from which thousands of Rohingya have been trying to escape.³⁹⁰ Recognizing

³⁸⁹ Personal communication, on file with the authors, (Nov. 14, 2013).

³⁹⁰ As the authors were putting the finishing touches to this paper the United States Holocaust Memorial Museum in Washington just issued an official statement on the plight of the Rohingya signaling the magnitude and urgency of the situation. In a statement issued by USHMM, former US Secretary of Homeland Security Michael Chertoff, who now chairs the Committee on Conscience of the US Centre for the Prevention of Genocide, was quoted as saying: “The Museum welcomes recent commitments by the Burmese government to assure the security and rights of all people in Burma and calls upon the international community to assist Burma in protecting its populations from crimes against humanity and ethnic cleansing.” *See Statement on the Situation of the Rohingya In Burma*, UNITED

the mass atrocities experienced by one-million plus Rohingya and committed by both state and non-state actors in Myanmar over the past thirty-five years as a slow-burning genocide would be a step towards ending it. The least the world can do is to call genocide what it is: genocide.³⁹¹

STATES HOLOCAUST MEMORIAL MUSEUM (Sept. 24, 2013), <http://www.ushmm.org/confront-genocide/preventing-genocide-blog/genocide-prevention-blog/new-blog-post>.

³⁹¹ When the co-authors embarked on this collaborative research project some 3 years ago, we were unsure of the nature of Myanmar's acts of discrimination and persecution of more than 1 million Rohingya. But as of the completion of the authors' final review, not only the two co-authors, but an increasing number of credible voices within the global civil society, have realized that Myanmar is committing genocide, albeit a slow burning one, against ethnic Rohingya. See Tin Soe, *33 organizations and 33 Global Citizens call to end Rohingya genocide*, KALADAN PRESS, Apr. 2014, <http://www.kaladanpress.org/index.php/news/360-news2014/april-2014/4506-33-organizations-and-33-global-citizens-call-to-end-rohingya-genocide.html>. For the text of the Call, see *Call to End Rohingya Genocide*, MAUNGZARNI.NET (Apr. 19, 2014) <http://www.maungzarni.net/2014/04/call-to-end-rohingya-genocide-with.html>.