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# PERSECUTION OF THE ROHINGYA MUSLIMS:

## IS GENOCIDE OCCURRING IN MYANMAR'S RAKHINE STATE?

### A LEGAL ANALYSIS



**ALLARD K. LOWENSTEIN**  
**INTERNATIONAL HUMAN RIGHTS CLINIC,**  
**YALE LAW SCHOOL**

PREPARED FOR  
FORTIFY RIGHTS



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## **LIST OF ABBREVIATIONS**

<b>ICJ</b>	International Court of Justice
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>ICTY</b>	International Criminal Tribunal for the Former Yugoslavia
<b>IDP</b>	Internally Displaced Persons
<b>ILC</b>	International Law Commission
<b>ILO</b>	International Labor Organization
<b>MSF</b>	Médecins Sans Frontières (Doctors Without Borders)
<b>NaSaKa</b>	Nay-Sat Kut-kwey ye (Myanmar border security force)
<b>NLD</b>	National League for Democracy
<b>RNDP</b>	Rakhine Nationalities Development Party
<b>SLORC</b>	State Law and Order Restoration Council
<b>U.N.</b>	United Nations
<b>UNHCR</b>	U.N. High Commissioner for Refugees

# I. SUMMARY

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This legal analysis considers whether the ongoing attacks on and persecution of the Rohingya Muslim population in Myanmar constitute genocide, as defined by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). The paper begins with a detailed, historical account of the human rights situation of Rohingya since Myanmar's independence. It then uses the Genocide Convention's definition of genocide to analyze the treatment of Rohingya. This analysis does not conclude definitively whether genocide is occurring. Such a conclusion would require a full and independent investigation by an appropriately authorized institution with investigatory powers and provisions for the accused to respond to allegations. However, assuming that the information to which the Lowenstein Clinic has had access is credible and comprehensive and accurately reflects the Rohingyas' situation, the paper finds strong evidence that genocide is being committed against Rohingya.

The Genocide Convention,<sup>1</sup> which was adopted by the General Assembly of the United Nations in 1948 and entered into force in 1951, declares that genocide is a crime under international law. It imposes affirmative legal obligations on states to prevent genocide from occurring and to punish perpetrators of genocide. The proscription of the crime of genocide, as defined by the Convention, has become an unequivocal part of customary international law.<sup>2</sup> Furthermore, it is a *jus cogens* norm,<sup>3</sup> a principle binding on all states even if they have not consented to the obligation by ratifying the Convention.

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1 Convention on the Prevention and Punishment of the Crime of Genocide, adopted Dec. 9, 1948, 78 U.N.T.S. 277 (1951) [Genocide Convention].

2 Prosecutor v. Goran Jelusic, Case No. ICTY-IT-95-10-T, Judgment, para. 60 (Dec. 14, 1999) (“[T]he Convention has become one of the most widely accepted international instruments relating to human rights. There can be absolutely no doubt that its provisions fall under customary international law as, moreover, noted by the International Court of Justice as early as 1951. The Court went even further and placed the crime on the level of *jus cogens* because of its extreme gravity.”). Customary international law is commonly defined as the law of the international community that “results from a general and consistent practice of states followed by them from a sense of legal obligation.” Restatement (Third) of Foreign Relations Law § 1987 (2)102). The governing statute for the International Court of Justice (ICJ) includes customary international law, or “international custom, as evidence of a general practice of law,” as one of the types of law that the Court is to apply. Statute for the International Court of Justice, June 33, 1945, 26 U.N.T.S. 933, art. 1)38)(b). The ICJ has further explained that for a rule of customary international law to arise, “[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence that this practice is rendered obligatory by the existence of a rule of law requiring it.” North Sea Continental Shelf (Ger. v. Den., Ger. v. Neth.), 1969 I.C.J. 3, para. 44 (Feb. 20).

3 The Vienna Convention on the Law of Treaties defines a *jus cogens* norm as one that is “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.” Vienna Convention on the Law of Treaties, adopted May 23, 1969, 1155 U.N.T.S. 331, art. 53 [Vienna Convention].

Article II of the Genocide Convention defines genocide as: [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.

Under this definition, the crime of genocide consists of three essential elements: the existence of a protected group, the commission of one or more prohibited acts, and the requisite intent. Thus, to analyze whether genocide has been, or is being, committed, one must consider:

1. Whether the victims constitute a group under the Convention;
2. Whether the acts perpetrated are among those enumerated in the Convention's definition; and
3. Whether these acts were carried out with intent to destroy the group, in whole or in part.

As the Genocide Convention recognizes, "genocide is a crime . . . contrary to the spirit and aims of the United Nations and condemned by the civilized world."<sup>4</sup> Genocide is not a term to be used lightly. Genocide is the ultimate denial of the right to existence of an entire group of human beings. As such, it is the quintessential human rights crime because it denies its victims' very humanity. The Genocide Convention imposes affirmative, binding obligations upon all state parties to the Genocide Convention to prevent and punish the crime. As a result, some states are reluctant to employ the term. Yet the gravity of the crime and the irrevocability of its result require states and other actors to consider and investigate seriously allegations of its existence.

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<sup>4</sup> Genocide Convention, *see above* note 1, Preamble.



The Rohingya are a Muslim minority group in Rakhine State, which occupies the western coast of Myanmar. An estimated one million Rohingya live in Rakhine State, primarily in the northern townships.<sup>5</sup> Since the government passed the 1982 Citizenship Act, Rohingya have been denied equal access to citizenship. Rohingya have also been subjected to grave human rights abuses at the hands of the Myanmar authorities, security forces, police, and local Rakhines (the Buddhist majority population in Rakhine State). These actors have perpetrated violence against Rohingya, claiming thousands of lives. Hundreds more Rohingya have been the victims of torture, arbitrary detention, rape, and other forms of serious physical and mental harm. Whether confined to the three townships in northern Rakhine State or to one of dozens of internally displaced persons camps throughout the state, Rohingya have been deprived of freedom of movement and access to food, clean drinking water, sanitation, medical care, work opportunities, and education.

This legal analysis assesses whether the abuses of Rohingya Muslims' human rights in Myanmar's Rakhine State amount to genocide. Part I presents a detailed historical account of the situation of the Rohingya since Myanmar's independence. Part II applies the law of genocide to the treatment of Rohingya in Rakhine State. This Part considers three questions: First, do Rohingya constitute a protected group under the definition of genocide? Second, do the acts perpetrated against Rohingya fall into the categories enumerated in the Genocide Convention? Third, does the requisite "intent to destroy" Rohingya exist? This analysis concludes that Rohingya constitute a protected group and that the group has suffered enumerated acts. Although the analysis does not support a definitive answer to the third question, the information the Lowenstein Clinic has considered, assuming it is credible and comprehensive and accurately reflects the situation of the Rohingya in Myanmar, provides a strong foundation from which to infer genocidal intent by security forces, government officials, local Rakhine, and others. Thus, this paper finds persuasive evidence that the crime of genocide has been committed against Rohingya Muslims. The legal analysis highlights the urgent need for a full and independent investigation and heightened protection for Rohingya Muslims in Myanmar's Rakhine State.

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5 Estimates vary and the most recent government census, conducted in 2014, excluded Rohingya from the count. Rakhine Inquiry Commission, *The Republic of the Union of Myanmar, Final Report of Inquiry Commission on Sectarian Violence in Rakhine State*, pp. 3, 78 (July 8, 2013) [Rakhine Commission Report] (citing 968,218 Muslims in Rakhine State). See also Jason Szep & Andrew Marshall, "Myanmar Minister Backs Two-Child Policy for Rohingya Minority," *Reuters* (June 11, 2013), <http://www.reuters.com/article/2013/06/11/us-myanmar-rohingya-idUSBRE95A04B20130611> (quoting Myanmar's Minister of Immigration and Population Khin Yi as stating 1.08 million Rohingya live in Rakhine State).

## II. METHODOLOGY

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Fortify Rights, a human rights organization based in Southeast Asia, asked the Lowenstein Clinic to provide an objective legal analysis, under the law of genocide, of the human rights abuses Rohingya have suffered. Fortify Rights is an independent, nonprofit organization that works to end and remedy human rights abuses. The organization investigates human rights violations and strengthens responses to abuses through training and collaborative support for human rights defenders. Fortify Rights provided the Lowenstein Clinic with research and documentation that it conducted over a three-year period in Myanmar, Thailand, and Malaysia, including eyewitness and survivor testimonies and internal Myanmar government documents.

The Lowenstein Clinic began the analysis by conducting an extensive literature review. The authors examined existing scholarship, newspaper articles, U.N. reports, U.S. State Department Country Reports on Human Rights Practices, and human rights organizations' reports on the Rohingya. The authors also examined and analyzed a variety of primary sources, including testimonies from Rohingya, internal Myanmar government documents, and anti-Rohingya propaganda flyers produced by Rakhine monks and politicians.

Although the Lowenstein Clinic reviewed a wide array of primary sources, it did not undertake an independent, factual investigation. The authors applied the definition of genocide, as set out in the Genocide Convention and interpreted by courts and experts, to the factual account of Rohingyas' situation in Myanmar, assembled from the various sources, to determine whether the situation meets each element of the definition.

# III. HISTORY OF HUMAN RIGHTS ABUSES AGAINST ROHINGYA IN MYANMAR

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The Rohingya are a predominantly Muslim minority group in Rakhine State, Myanmar. Rakhine State, formerly known as Arakan, is located on the western coast of Myanmar. It borders Bangladesh to the northwest, the Bay of Bengal bounds it to the west, and a mountain range to the east divides Rakhine from the rest of Myanmar. An estimated one million Rohingya live in Rakhine State.<sup>6</sup> Rohingya account for most of the population in the three northernmost townships, Maungdaw, Buthidaung, and Rathedaung.<sup>7</sup> Myanmar, as a whole, has considerable ethnic diversity. Barmans, also referred to as Burmans, are Myanmar's dominant and majority ethnic group, but a number of ethnic minority groups constitute forty percent of the Myanmar population.<sup>8</sup> Myanmar's ethnic diversity does not entail religious heterogeneity. A majority of the population in Myanmar is Buddhist, with smaller religious minority populations.<sup>9</sup>

## A. Rohingya Under Military Rule: From Myanmar's Independence Through 2011

Civil war, turmoil, and conflict marked the sixty years following Myanmar's independence from Great Britain in 1948.<sup>10</sup> Several regimes ruled the nation in rapid succession. After a coup in 1962, led by General Ne Win, the military instituted an authoritarian government and banned all opposition parties. Growing economic instability and widespread protests over military rule eventually triggered the "8888 Uprising," so named because nationwide pro-democracy protests reached a particularly high level on August 8, 1988. The government killed thousands of people during these demonstrations and imposed martial law supervised

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6 Rakhine Commission Report, *see above* note 5.

7 Rohingya were excluded from the United Nations-supported 2014 national census, so reliable data is not available.

8 Ethnic minorities in Myanmar are widely cited as comprising 40 percent of the population. Despite the recent 2014 national census, the Government has not yet released information collected on the ethnic and religious breakdown within the country. *See* Fiona MacGregor, "Census Ethnicity Data Release Delayed Until After Election," *Myanmar Times* (Aug. 4, 2014), <http://www.mmmtimes.com/index.php/national-news/11263-census-ethnicity-data-release-delayed-until-after-election.html>.

9 John F. May & Thomas R. Brooke, *Deciphering the Demography of Myanmar*, Population Reference Bureau (Sept. 2014), <http://www.prb.org/Publications/Articles/2014/myanmar-demography.aspx>.

10 At the time, Myanmar was called Burma. The military regime, the State Law and Order Restoration Council, renamed Burma "Myanmar" in 1989. Banyan, "What's In A Name? Myanmar," *The Economist* (May 21, 2013), <http://www.economist.com/blogs/banyan/2013/05/what-s-name-myanmar>.

by a temporary council, the State Law and Order Restoration Council (SLORC).<sup>11</sup> Under international and domestic pressure, the SLORC in 1989 agreed to allow political parties and hold a multiparty democratic election.<sup>12</sup> In the 1990 election, the National League for Democracy (NLD), a party in opposition to the military, won a landslide victory. However, the military declined to turn over power to the NLD and remained in effective control. The military government formally annulled the NLD's election win twenty years later in 2010.<sup>13</sup> The military imprisoned NLD leaders, including Aung San Suu Kyi, the Nobel Prize-winning advocate for democratic rule in Myanmar.<sup>14</sup> Throughout military rule, the national and local governments enacted increasingly repressive laws against Rohingya, as detailed below.

## 1. DENIAL OF CITIZENSHIP

Efforts to deprive Rohingya of citizenship began shortly after Myanmar's independence. The 1948 Union Citizenship Act defined Myanmar citizenship and identified specific ethnicities—the “indigenous races of Burma”—that were allowed to gain citizenship.<sup>15</sup> The list did not include Rohingya.<sup>16</sup> The Union Citizenship Act allowed people whose families had lived for two generations in Myanmar to apply for identity cards. Initially, the government provided many Rohingya with citizenship or identification cards under this provision. However, after the military coup in 1962, the government began giving documentation to fewer and fewer Rohingya children, refusing to recognize fully new generations of the Rohingya population.<sup>17</sup>

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11 See Christina Fink, *Living Silence: Burma Under Military Rule* p. 56 (2001); Bertil Lintner, *Burma in Revolt: Opium and Insurgency Since 1948* (1999); David Steinberg, *Burma: The State of Myanmar* p. 2 (2001); Philippa Fogarty, “Was Burma’s 1988 Uprising Worth It?” *BBC News* (Aug. 6, 2008), <http://news.bbc.co.uk/2/hi/asia-pacific/7543347.stm>; “Myanmar Profile – Timeline,” *BBC News* (Aug. 19, 2015), <http://www.bbc.com/news/world-asia-pacific-12992883>.

12 Fink, *Living Silence*, see above note 11, p. 65; Lintner, *Burma in Revolt*, see above note 11, p. 382; Derek Tonkin, “The 1990 Elections in Myanmar: Broken Promises or a Failure of Communication?” *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* v. 29, pp. 33, 34 (2007).

13 “Burma’s Leaders Annul Suu Kyi’s 1990 Poll Win,” *BBC News* (Mar. 11, 2010), <http://news.bbc.co.uk/2/hi/asia-pacific/8561354.stm>; Constitution of the Union of Burma, Chapter II, para. 11(i) (1947).

14 Fink, *Living Silence*, see above note 11, pp. 10, 63, 78, 93, 94, 111; Lintner, *Burma in Revolt*, see above note 11, pp. 375, 384, 406.

15 Constitution of the Union of Burma, Chapter II, para. 11(i) (1947).

16 *Ibid.*

17 Irish Centre for Human Rights, *Crimes Against Humanity in Western Burma: The Situation of the Rohingyas*, p. 95 (2010), [http://burmaactionireland.org/images/uploads/ICHR\\_Rohingya\\_Report\\_2010.pdf](http://burmaactionireland.org/images/uploads/ICHR_Rohingya_Report_2010.pdf).

In 1974, Myanmar began requiring all citizens to obtain National Registration Cards but allowed Rohingya to obtain only Foreign Registration Cards. Because many schools and employers did not recognize these cards, Rohingya faced limited educational and job opportunities.<sup>18</sup>

In 1982, General Ne Win instituted a new citizenship law that prohibited Rohingya from obtaining equal access to full Myanmar citizenship, effectively rendering a majority of Rohingya stateless.<sup>19</sup> Under the Citizenship Law, in order to be a citizen, a person had to provide proof that his or her family had lived in Myanmar since before 1948. Many Rohingya lack records of their family's historical residence.<sup>20</sup> After the law was passed, the government withheld identity cards from Rohingya.<sup>21</sup> Naturalization under the law also requires fluency in one of Myanmar's national languages.<sup>22</sup> Rohingya speak the "Rohingya" dialect and, with limited access to education, they have had little opportunity to learn a nationally recognized language.<sup>23</sup> General Ne Win justified the Citizenship Law on national security grounds, stating, "[L]eniency on humanitarian ground[s] cannot be such as to endanger ourselves. We can leniently give [ethnic minorities] the right to live in this country and to carry on a livelihood in the legitimate way. But we will have to leave them out in matters involving the affairs of the country and the destiny of the State."<sup>24</sup>

The consequences of the 1982 Citizenship Law have affected Rohingya since its enactment. Because many Rohingya are stateless, most do not have standing in Myanmar courts and

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18 Human Rights Watch, *Burma: The Rohingya Muslims: Ending a Cycle of Exodus?*, p. 29 (Sept. 1996), <http://www.hrw.org/reports/pdfs/b/burma/burma969.pdf>.

19 U.N. Human Rights Council, U.N. Special Rapporteur on Burma, Tomas Ojea Quintana, *Progress Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, U.N. Doc No. A/HRC/13/48, paras. 87, 88 (Mar. 10, 2010), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-48.pdf>; Irish Centre, *Crimes Against Humanity*, see above note 17, p. 26; Fortify Rights, Interview #82, Penang, Malaysia (Sept. 2014); Fortify Rights, Interview #95, Sittwe, Rakhine State, Myanmar (Mar. 2015); Fortify Rights, Interview #98, Sittwe, Rakhine State, Myanmar (Mar. 2015).

20 Human Rights Watch, *"All You Can Do Is Pray": Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State* p. 112 (Apr. 22, 2013), <https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims>; International Federation of Human Rights Leagues (FIDH), *Burma: Repression, Discrimination and Ethnic Cleansing in Arakan* p. 18 (Apr. 2000), <https://www.fidh.org/IMG/pdf/arakbirm.pdf>.

21 "The Rohingyas who had obtained an identity card (National Registration Card, NRC) after 1948, were forced to hand it back in order to be issued with new document under the new law. Yet, a great many of them did not receive anything in return, nor did they get their former cards back." FIDH, *Burma*, see above note 20.

22 Burma Citizenship Law § 44; Human Rights Watch, *All You Can Do Is Pray*, see above note 20, p. 11; Irish Centre for Human Rights, *Crimes Against Humanity*, see above note 17, p. 96.

23 Human Rights Watch, *"The Government Could Have Stopped This": Sectarian Violence and Ensuing Abuses in Burma's Arakan State*, p. 46 (July 31, 2012), <https://www.hrw.org/report/2012/07/31/government-could-have-stopped/sectarian-violence-and-ensuing-abuses-burmas-arakan>; Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples - Myanmar/Burma: Muslims and Rohingya* (2008), <http://www.refworld.org/docid/49749cdcc.html>.

24 Translation of the Citizenship Law Speech by General Ne Win (Oct. 9, 1982) (on file with Fortify Rights).

have limited access to economic opportunities, education, and property ownership.<sup>25</sup> Myanmar officials have routinely denied the existence of the Rohingya ethnicity. For instance, Myanmar's Minister for Foreign Affairs Ohn Gyaw stated in 1992, "[H]istorically, there has never been a 'Rohingya' race in Myanmar." He described the Rohingya as "illegal immigrants."<sup>26</sup>

## 2. FORCED DISPLACEMENT

In 1978, the military began Operation *Naga Min*, or "Dragon King," to find and take action against persons the military junta deemed to be illegal immigrants.<sup>27</sup> This operation targeted Rohingya in Rakhine State; the government claimed Rohingya were foreigners rather than an ethnic minority of Myanmar. The military abused, raped, and murdered many Rohingya.<sup>28</sup> As a result, more than 200,000 Rohingya fled across the border into Bangladesh.<sup>29</sup> To deter Rohingya refugees from entering Bangladesh, the Bangladeshi government withheld food and humanitarian aid from the refugee camps. More than 12,000 refugees died of starvation.<sup>30</sup> Following international condemnation, Myanmar's General Ne Win repatriated many of these refugees, but they continued to face persecution within Myanmar.<sup>31</sup> Rohingya refugees continued to flood into Bangladesh over the next twenty years, with periodic attempts by the Bangladeshi government to expel them forcibly, including as recently as 2010.<sup>32</sup>

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25 Irish Centre for Human Rights, *Crimes Against Humanity*, see above note 17, p. 97. Under the Transfer of Immovable Property Restriction Law, no foreigners can own land or immovable property in Myanmar. Transfer of Immovable Property Restriction Act (1987).

26 Human Rights Watch, *Burma: The Rohingya Muslims*, see above note 18, p. 9.

27 On October 16, 1977, the Myanmar Ministry for Home and Religious Affairs stated that operation *Naga Min* (Dragon King) was designed to "scrutinize each individual living in the State, designating citizens and foreigners in accordance with the law and taking actions against foreigners who have filtered into the country illegally." Human Rights Watch, *Burma: The Rohingya Muslims*, see above note 18, p. 12; see also Human Rights Watch, *All You Can Do Is Pray*, see above note 20, p. 138.

28 Irish Centre for Human Rights, *Crimes Against Humanity*, see above note 17, p. 91; Martin Smith, *Burma: Insurgency and the Politics of Ethnicity*, p. 241 (2d ed. 1999).

29 Human Rights Watch, *All You Can Do Is Pray*, see above note 20, p. 139.

30 *Ibid.*

31 Irish Centre for Human Rights, *Crimes Against Humanity*, see above note 17, p. 6; Human Rights Watch, *All You Can Do Is Pray*, see above note 20, p. 139.

32 The non-governmental organization Physicians for Human Rights reported that Bangladeshi security forces beat and forcibly expelled Rohingya refugees in 2010. The government also blocked humanitarian aid to the 30,000 refugees in the Kutupalong refugee camp in Bangladesh and arrested any refugees who left the camp to seek food, effectively trapping them in the camps to die of starvation or illness. Physicians for Human Rights, *Stateless and Starving: Persecuted Rohingya Flee Burma and Starve in Bangladesh*, pp. 9-11 (Mar. 2010), [https://s3.amazonaws.com/PHR\\_Reports/stateless-and-starving.pdf](https://s3.amazonaws.com/PHR_Reports/stateless-and-starving.pdf).

For decades, Rohingya have also fled Myanmar to neighboring countries by boat. Exploitative human traffickers facilitate these journeys.<sup>33</sup> The sea crossings are dangerous and fraught with the risk of drowning or being stranded. At least 6,000 Rohingya men and boys are estimated to have attempted the journey by sea to Malaysia via Thailand during 2008 and 2009.<sup>34</sup> In 2010, Thailand towed the boats of Rohingya refugees back to sea, reportedly leaving hundreds of people, including entire families, to die.<sup>35</sup>

The Myanmar government has confiscated Rohingya lands, causing more Rohingya to become internally displaced or to flee the country.<sup>36</sup> By law, the Myanmar government owns all land in the country, and only citizens have the right to use and enjoy their land.<sup>37</sup> As a result of their statelessness, Rohingya have no legal rights to the land on which they live and work, leaving them vulnerable to land confiscation by the government. The U.N. Special Rapporteur on the Situation of Human Rights in Myanmar noted that the government has confiscated lands to divide populations that might oppose the government, as well as to take advantage of natural resources on the land.<sup>38</sup>

From 1995 to 2010, the government of Myanmar reportedly forced Rohingya to relocate within the country. A 1995 U.N. report stated that the government notified Rohingya from various regions that they had to leave their villages in a week and that they could not take their property with them.<sup>39</sup> One Rohingya refugee, interviewed in 2009, reported that Rakhine village leaders expelled Rohingya to reduce tensions between Rohingya and Rakhine within villages.<sup>40</sup> These internal displacements and forced population transfers have further concentrated Rohingya in northern Rakhine State.

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33 United States Senate Committee on Foreign Relations, *Trafficking and Extortion of Burmese Migrants in Malaysia and Southern Thailand*, S. Prt-111-18 (Apr. 3, 2009).

34 Human Rights Watch, *Perilous Plight: Burma's Rohingya Take to the Seas*, p. 4 (May 26, 2009), <https://www.hrw.org/report/2009/05/26/perilous-plight/burmas-rohingya-take-seas>.

35 Irish Centre for Human Rights, *Crimes Against Humanity*, see above note 17, p. 15. Malaysia and Bangladesh are the primary destinations for Rohingya refugees within the region. Rohingya refugee communities also exist in Saudi Arabia, Pakistan, India, Thailand, Indonesia, and other locations. Human Rights Watch, *Perilous Plight*, see above note 34, p. 8; United Nations High Commissioner for Refugees (UNHCR), *States of Denial: A Review of UNHCR's Response to the Protracted Situation of Stateless Rohingya Refugees in Bangladesh* (Dec. 2011), para. 15.

36 Irish Centre for Human Rights, *Crimes Against Humanity*, see above note 17, pp. 11, 89.

37 FIDH, *Burma*, see above note 20, p. 25.

38 U.N. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro*, U.N. Doc. A/HRC/4/14 (2007), para. 61; see also Irish Centre for Human Rights, see above note 17, p. 89.

39 U.N. Commission on Human Rights, *Report on the Situation of Human Rights in Myanmar, Prepared by the Special Rapporteur, Mr. Yozo Yokota, in Accordance with Commission Resolution 1994/85*, UN Doc. E/CN.4/1995/65 (1995), para. 118.

40 Irish Centre for Human Rights, *Crimes Against Humanity*, see above note 17, p. 102.

Starting in 1990, the Myanmar government ordered the building of “model villages,” into which legally recognized Myanmar ethnic groups could move.<sup>41</sup> The government commissioned more than 40 model villages to be built in Rakhine State between 1990 and 2010, mostly in areas with large Rohingya populations.<sup>42</sup> The government forced Rohingya to help build these model villages. It also confiscated land on which Rohingya were living and working for the construction.<sup>43</sup> Rakhine Buddhists subsequently moved into these model villages.

### 3. FORCED LABOR

The Nay-Sat Kut-kwey ye (NaSaKa), a security force consisting of police, military, intelligence, customs officers, and riot police, operated in Rakhine State until 2013 under the control of the Ministry for Border Affairs.<sup>44</sup> The NaSaKa forced Rohingya either to pay a weekly fee to avoid work – a fee that many Rohingya cannot afford – or to perform manual labor such as construction work, agricultural work, portering, or serving as guards.<sup>45</sup> The Myanmar Army and local police also forced Rohingya into labor.<sup>46</sup> In 2008, the U.N. Special Rapporteur reported allegations that Rohingya had been killed for refusal to perform forced labor.<sup>47</sup> Rohingya reported that the Myanmar Army and NaSaKa beat forced laborers.<sup>48</sup>

The Myanmar Army and NaSaKa have forced males as young as ten years old into manual labor.<sup>49</sup> The Irish Centre for Human Rights reported that one man or boy in each Rohingya household works one to two days a month, on average, just on portering tasks.<sup>50</sup> In 2009, government authorities ordered most Rohingya households in rural areas to send a family

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41 FIDH, *Burma*, see above note 20, p. 22.

42 Irish Centre for Human Rights, *Crimes Against Humanity*, see above note 17, p. 100.

43 *Ibid.*, p. 44.

44 Andrew Selth, “Myanmar’s Police Forces: Coercion, Continuity and Change,” *Contemporary Southeast Asia: A Journal of International and Strategic Affairs* v. 34, p. 49 (2012).

45 Irish Centre for Human Rights, *Crimes Against Humanity*, see above note 17, pp. 41, 49.

46 Fortify Rights, Interview #05, Kuala Lumpur, Malaysia (Aug. 10, 2014); Fortify Rights, Interview #82, Penang, Malaysia (Sept. 16, 2014).

47 U.N. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro*, U.N. Doc. A/HRC/7/18 (2008), para. 60.

48 Fortify Rights, Interview #04, Kuala Lumpur, Malaysia (Aug. 10, 2014) (“I left [Myanmar in November 2013] because of the forced labor. Within one week I would have to work for the military for four days and sometimes five days. That’s why I decided to leave the country. I worked on road building and on military settlements. Sometimes the military would come to the village and arrest us to work for them. Sometimes they would give an order to the village administration, telling them how many people they needed. Sometimes it was for NaSaka and sometimes for the Army. We cannot say ‘no.’ If we say no, they’d beat us. Once I tried to refuse and I was beaten. That was one year before I left. Three people [soldiers] beat me.”).

49 Irish Centre for Human Rights, *Crimes Against Humanity*, see above note 17, pp. 41-42; Fortify Rights, Interview #74, Puchong, Malaysia (Sept. 27, 2014).

50 Irish Centre for Human Rights, *Crimes Against Humanity*, see above note 17, p. 42.



member one or two times a week to serve as a village night guard.<sup>51</sup> Poor families faced difficulty supporting themselves financially, as authorities force household members to spend their time working for them without compensation.<sup>52</sup>

Throughout the 1990s, the government denied that it used any form of forced labor. In 2004, a Myanmar court sentenced three people to death on a charge of high treason, because, in part, they had contacted the International Labor Organization (ILO) to report forced labor.<sup>53</sup> On appeal, the Supreme Court of Myanmar commuted the sentences but did not clarify whether it was illegal for people to speak to the ILO.<sup>54</sup>

#### 4. RELIGIOUS PERSECUTION

The Myanmar government has participated in racial and religious persecution of Rohingya. In 2002, Human Rights Watch reported that the government issued military orders demanding that unauthorized mosques be destroyed.<sup>55</sup> The government has closed mosques and Islamic schools and used them as government administrative offices.<sup>56</sup> The government has also prohibited Muslims from repairing or renovating mosques.<sup>57</sup> In 2001, mobs attacked at least 28 mosques and religious schools. State security not only did nothing to stop the attacks, but also participated in the destruction.<sup>58</sup>

#### 5. MARRIAGE RESTRICTIONS AND POPULATION CONTROL

In the 1990s, Myanmar passed a law that required all people in Rakhine State to gain permission before obtaining marriage licenses. This law was enforced only against the Muslim populations of the area. The Border Region Immigration Control Headquarters and the Township Peace and Development Council of Maungdaw issued population control policies in 1993 and 2005, respectively, that state that the Rohingya population is reproducing faster than the

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51 *Ibid.*, p. 45.

52 *Ibid.*, p. 50.

53 *Ibid.*, p. 38; International Labour Office (ILO), *Developments Concerning the Question of the Observance by the Government of Myanmar of the Forced Labour*, GB.291/5/1 (Nov. 2004).

54 ILO, *Developments Concerning Observance of Forced Labour*, see above note 53, p. 1.

55 Human Rights Watch, *Crackdown on Burmese Muslims*, p. 11 (July 2002), [https://www.hrw.org/legacy/backgrounder/asia/burmese\\_muslims.pdf](https://www.hrw.org/legacy/backgrounder/asia/burmese_muslims.pdf); Human Rights Watch, *Burma: Rape, Forced Labor and Religious Persecution in Northern Arakan*, p. 17 (1992), <http://www.hrw.org/reports/pdfs/b/burma/burma925.pdf>.

56 FIDH, *Burma*, see above note 20, p. 26.

57 *Ibid.*

58 Human Rights Watch, *All You Can Do is Pray*, see above note 20, p. 142; Human Rights Watch, *Crackdown on Burmese Muslims*, see above note 55, p. 11.

“international standards” of population increase.<sup>59</sup> The authorities have offered no evidence to support these assertions.<sup>60</sup>

To obtain marriage licenses, men and women must adhere to rules that conflict with Rohingya religious beliefs.<sup>61</sup> The rules require that men shave their beards for their license photographs. Similarly, the rules prohibit women from wearing religious head and face coverings.<sup>62</sup> The NaSaKa have reportedly touched Rohingya women to determine if they are pregnant.<sup>63</sup> Authorities have required Rohingya women to take pregnancy tests before issuing marriage permits.<sup>64</sup> The NaSaKa, at various points in the marriage-license process, have also demanded bribes that can total more than the equivalent of three months’ salary.<sup>65</sup>

Some couples have continued to marry under Islamic law, as was the practice before the 1990s legislation, but they risk arrest if the authorities find out.<sup>66</sup> People who cohabit but are not legally married and even people who are in romantic relationships but not living under the same roof are also at risk of arrest.<sup>67</sup>

Since at least 2005, the government has allowed some Rohingya couples to obtain marriage licenses only if they agree to have no more than two children.<sup>68</sup> Women in legal marriages who have more than two children and women who have children out of wedlock are subject to possible prison sentences of up to ten years.<sup>69</sup> State-level authorities in Rakhine State issued a policy document in 2008 titled “Population Control Activities,” specifying how law enforcement officials in Rakhine State should force people to “use pills, injections and condoms for birth control at every [NaSaKa] regional clinic, township hospitals, and their own regional hospitals.”<sup>70</sup> This policy order shows the government’s

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59 Fortify Rights, *Policies of Persecution: Ending Abusive State Policies Against Rohingya Muslims in Myanmar*, pp. 19-20, 36 (Feb. 2014), [http://www.fortifyrights.org/downloads/Policies\\_of\\_Persecution\\_Feb\\_25\\_Fortify\\_Rights.pdf](http://www.fortifyrights.org/downloads/Policies_of_Persecution_Feb_25_Fortify_Rights.pdf).

60 *Ibid.*

61 *Ibid.*, p. 30.

62 *Ibid.*

63 Irish Centre for Human Rights, *Crimes Against Humanity*, see above note 17, p. 127.

64 Fortify Rights, *Policies of Persecution*, see above note 59, p. 24.

65 Irish Centre for Human Rights, *Crimes Against Humanity*, see above note 17, pp. 127-28; Fortify Rights, *Policies of Persecution*, see above note 59, p. 31.

66 Myanmar Penal Code § 188.

67 Irish Centre for Human Rights, *Crimes Against Humanity*, see above note 17, pp. 125-31; Fortify Rights, *Policies of Persecution*, see above note 59, p. 31.

68 Fortify Rights, *Policies of Persecution*, see above note 59, p. 24.

69 *Ibid.*, p. 28.

70 *Ibid.*, p. 29.

efforts to restrict Rohingyas from having families and to prevent Rohingya births, regardless of whether the couple is legally married.

## B. Thein Sein's Administration

On February 4, 2011, the Myanmar Parliament appointed Thein Sein as President. Thein Sein was a former general and served as the military junta's prime minister from October 2007 until he took office as president. At the time of the election, the Burmese public largely regarded Thein Sein as a career military bureaucrat with close ties to Than Shwe, the senior general who had headed the military junta since 1992.<sup>71</sup> Because the outgoing military regime openly manipulated the 2010 parliamentary elections, observers expected the military to retain effective control of the new civilian government.<sup>72</sup>

Following the new government's formation, President Thein Sein pushed to enact a series of democratic reforms. The new government passed a law that opened registration to political opposition parties.<sup>73</sup> It also released more than 500 political prisoners in October 2011 and January 2012<sup>74</sup> and relaxed state censorship of the media.<sup>75</sup> At the same time, however, the new government continued to commit severe human rights abuses against ethnic minorities.<sup>76</sup>

Under the previous military junta and the new Thein Sein administration, Rohingya suffered discrimination and severe human rights abuses, including killings, forced labor, sexual violence, denial of citizenship, displacement, and restrictions on movement, marriage, and religion. Although initially developed under military governance, these policies and acts of violence have continued into the Thein Sein administration.

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71 Thomas Fuller, "Parliament Picks Insider as President," *N.Y. Times* (Feb. 4, 2011), <http://www.nytimes.com/2011/02/05/world/asia/05myanmar.html>.

72 Priscilla Clapp, United States Institute of Peace, *Myanmar: Anatomy of a Political Transition*, Special Report No. 369, p. 2 (Apr. 2015), <http://www.usip.org/sites/default/files/SR369-Myanmar-Anatomy-of-a-Political-Transition.pdf>.

73 United States Department of State, Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2011: Burma*, p. 25, <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dlid=186263#sthash.yL8W1ZL0.dpuf>.

74 Testimony by Kurt M. Campbell, United States Assistant Secretary of State, Bureau of East Asian and Pacific Affairs, Statement Before the House Committee on Foreign Affairs Subcommittee on Asia and the Pacific, U.S. Policy Toward Burma (Apr. 25, 2012).

75 United States Department of State, *Country Reports: Burma (2011)*, see above note 73, p.16.

76 In Kachin State, the human rights situation greatly deteriorated during the new government's democratic transition. The Kachin people are predominantly a Christian ethnic minority. Since a ceasefire agreement between the Myanmar Army and the Kachin Independence Army broke down in June 2011, ongoing fighting has occurred in Kachin State and northern Shan State with the Myanmar Army attacking Kachin civilians. Fortify Rights, *"I Thought They Would Kill Me": Ending Wartime Torture in North Myanmar*, pp. 27-28 (June 2014), [http://www.fortifyrights.org/downloads/Fortify%20Rights\\_Myanmar\\_9\\_June\\_2014.pdf](http://www.fortifyrights.org/downloads/Fortify%20Rights_Myanmar_9_June_2014.pdf).

## 1. ARBITRARY DETENTION

Under Thein Sein's administration, state security forces, including the NaSaKa, have arbitrarily arrested and detained Rohingya.<sup>77</sup> Rohingya have reported that soldiers have come into their village to make indiscriminate arrests.<sup>78</sup> For example, Human Rights Watch documented that the NaSaKa detained between 2,000 and 2,500 Rohingya in 2011 for actions such as repairing homes without permission.<sup>79</sup> One Rohingya woman reported that soldiers arrested her family and neighbors for refusing to self-identify as "Bengali" on their census forms.<sup>80</sup> State security forces have often refused to release Rohingya until ransoms were paid to local authorities.<sup>81</sup>

## 2. FORCED LABOR

In 2011, President Thein Sein urged the Myanmar Parliament to strengthen national legislation prohibiting forced labor. On March 16, 2012, the Myanmar government signed a Memorandum of Understanding with the ILO to adopt a joint action plan to eliminate forced labor in Myanmar by 2015.<sup>82</sup> Following the implementation of this plan, in 2013, the ILO reported that although forced labor by both military and civilians declined in the country as a whole, incidents of forced labor in Kachin and Rakhine States remained constant.<sup>83</sup>

Forced labor has continued to be practiced widely and systematically in Rakhine State.<sup>84</sup> State security forces have conscripted Rohingya for forced labor, including sentry duty, road maintenance, and "camp related tasks."<sup>85</sup> From January to June 2014, more than 6,000 Rohingya adults and more than 2,000 Rohingya children were forced to work for the Myanmar authorities in northern Rakhine State.<sup>86</sup> A Rohingya now living in Malaysia reported, "Since I was very young and attending school the police [and soldiers] would take me for forced labor. This is

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77 The Arakan Project, *Forced Labour Still Prevails: An Overview of Forced Labour Practices in North Arakan, Burma*, p. 2 (May 30, 2012), [http://www.burmalibrary.org/docs13/AP-Forced\\_Labour\\_prevails.pdf](http://www.burmalibrary.org/docs13/AP-Forced_Labour_prevails.pdf).

78 *Ibid.*, pp. 11, 13.

79 Human Rights Watch, *The Government Could Have Stopped This*, see above note 23, p. 16.

80 Fortify Rights, Confidential Research and Report, p. 12.

81 The Arakan Project, *Forced Labour Still Prevails*, see above note 77, p. 2.

82 Testimony by Kurt M. Campbell, U.S. Policy Toward Burma, see above note 74.

83 ILO Liaison Office in Myanmar, *Report on ILO Activities in Myanmar*, GB.320/INS/6(Rev.) (Feb. 20, 2014), para. 20.

84 Aubrey Belford & Soe Zeya Tun, "Forced Labor Shows Back-Breaking Lack of Reform in Myanmar Military," *Reuters* (July 2, 2015), <http://www.reuters.com/article/2015/07/02/us-myanmar-rohingya-forcedlabour-idUSKCN0PC2L720150702>.

85 Human Rights Watch, *All You Can Do Is Pray*, see above note 20, p. 63.

86 Internal U.N. Document on Forced Labor (Jan. 2014 - June 2014) (on file with Fortify Rights).

still happening in Myanmar.”<sup>87</sup> Ninety-eight percent of these incidents of forced labor were perpetrated by the Myanmar Army.<sup>88</sup> In its 2015 report to the U.N. Human Rights Council for Myanmar’s Universal Periodic Review, Fortify Rights alleged that since 2012, the Myanmar Army and other security forces have used forced labor from several thousand Rohingya in Northern Rakhine State, including children.<sup>89</sup>

### 3. SEXUAL VIOLENCE

The Myanmar Army, NaSaKa, Myanmar Police Force, and Rakhine villagers have raped and sexually assaulted Rohingya women and girls.<sup>90</sup> They have often attacked women when the women were taken for forced labor or when their male relatives were taken for labor and could not protect them.<sup>91</sup> One Rohingya woman reported that a NaSaKa member raped her in front of her child while she was on coerced guard duty.<sup>92</sup> Military groups have also raped women in retaliation for others in their households not fulfilling their forced labor duties.<sup>93</sup> Since the 1990s, the Myanmar Army has held Muslim women in Rakhine State as sex slaves.<sup>94</sup> Rohingya have described instances when soldiers detained Rohingya women for weeks on military bases, where they were raped and abused.<sup>95</sup> Some women have died as a result of gang rapes.<sup>96</sup>

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87 Fortify Rights, Confidential Research and Report, *see above* note 80, p. 15.

88 *Ibid.*

89 Fortify Rights, *Submission to the United Nations Universal Periodic Review: Myanmar, 23<sup>rd</sup> Session, November 2015* (Mar. 21, 2015), [http://www.fortifyrights.org/downloads/FR\\_UPR%20Submission\\_September\\_2015.pdf](http://www.fortifyrights.org/downloads/FR_UPR%20Submission_September_2015.pdf).

90 Human Rights Watch, *All You Can Do Is Pray*, *see above* note 20, pp. 16, 143; Human Rights Watch, *The Government Could Have Stopped This*, *see above* note 23, p. 30.

91 Irish Centre for Human Rights, *Crimes Against Humanity*, *see above* note 17, p. 74.

92 *Ibid.* (citing a Bangladeshi’s testimony collected by the organization); U.N. Commission on Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, U.N. Doc. E/CN.4/1993/37 (1993), para. 77 (reporting that women have been raped in front of their family members).

93 Irish Centre for Human Rights, *Crimes Against Humanity*, *see above* note 17, p. 74.

94 U.N. Commission on Human Rights, *Report of the Special Rapporteur (1993)*, *see above* note 92, para. 77.

95 Fortify Rights, Confidential Research and Report, *see above* note 80, pp. 12-13.

96 U.N. Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Yakin Ertürk*, U.N. Doc. E/CN.4/2006/61/Add.1 (2006), para. 118.

Rohingya women have fled Myanmar for fear of being raped by state security forces.<sup>97</sup> The military has beaten and tortured victims of sexual violence and others who have reported sexual assaults.<sup>98</sup> The perpetrators have not been punished for these abuses.<sup>99</sup>

#### 4. RESTRICTIONS ON FREEDOM OF MOVEMENT

The government of Myanmar imposes strict restrictions on the freedom of movement of Rohingya.<sup>100</sup> For the purposes of authorizing travel within Myanmar, the government still considers Rohingya to be foreigners. Accordingly, in theory, Rohingya must abide by the 1940 Foreigners Act, which requires a person to have a license with his or her picture and name on it in order to move freely about the country.<sup>101</sup> Many Rohingya lack the money to pay for the processing fees and bribes required to obtain such licenses.<sup>102</sup> In practice, however, authorities impose severe restrictions on movement for all Rohingya in Rakhine State, regardless of what identification documents they have in their possession.<sup>103</sup>

National and regional authorities have instituted additional requirements specific to Rohingya. Regional Order No. 1/2009 requires Rohingya to give authorities a week's notice before traveling within Rakhine State.<sup>104</sup> In practice approval is rarely given and comes with a price that few Rohingya can readily afford. Rohingya who can afford to pay the requisite fees and bribes must seek permission to travel between townships by submitting an application called "Form

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97 One nineteen-year-old Rohingya woman said: "Sometimes the soldiers come to our village and enter our homes. If they find young women in the home, they will take them to their bases. Some women are detained for one month before they are released. I heard about this happening to 10 women from my village. The soldiers touched and tortured the women. Three of them never came back. I heard that their bodies were thrown into the sea. The other women who were released said that the soldiers forced them to have sex and hurt them. These women were around 19-22 years old and one of them lived close to my house. I was always worried that something like this would happen to me. I couldn't stay in my village because the military is always coming and arresting people." Fortify Rights Interview #77, Kuala Lumpur, Malaysia (Sept. 2014).

98 U.N. Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women*, see above note 96, para. 123.

99 U.N. Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women - Myanmar*, U.N. Doc. CEDAW/C/MMR/CO/3 (2008), para. 24.

100 Fortify Rights, Interview #05, Kuala Lumpur, Malaysia (Aug. 2014); Fortify Rights, Interview #28, Bassara Village, Sittwe, Rakhine State, Myanmar (Oct. 2013); Fortify Rights, Interview #74, Puchong, Malaysia (Sept. 2014); Fortify Rights, Interview #77, Kuala Lumpur, Malaysia (Sept. 2014); Fortify Rights, Interview #81, Penang, Malaysia (Sept. 2014); Fortify Rights, Interview #92, Sittwe, Rakhine State, Myanmar (Mar. 2015); Fortify Rights, Interview #93, Sittwe, Rakhine State, Myanmar (Mar. 2015); Fortify Rights, Interview #95, Sittwe, Rakhine State, Myanmar (Mar. 2015).

101 Myanmar Foreigners Act §§ 10, 12 (1864).

102 Irish Centre for Human Rights, *Crimes Against Humanity*, see above note 17, p. 99.

103 See, for example, Fortify Rights, Interviews #123-136, Rakhine State, Myanmar (2013-2015).

104 Confidential U.N. Internal Memorandum (Apr. 2013) (on file with Fortify Rights); Fortify Rights, *Policies of Persecution*, see above note 59, p. 33.

Four.”<sup>105</sup> They also must register with immigration authorities upon their arrival in a new township.<sup>106</sup> Failure to notify immigration authorities is a crime.<sup>107</sup> Throughout 2011 and 2012, the government continued to restrict Rohingyas’ travel by requiring them to obtain permission to travel outside of their home villages. On July 31, 2012, Myanmar’s Minister of Home Affairs Lieutenant-General Ko Ko stated to Parliament that the NaSaKa “is tightening the regulations [against Rohingya] in order to handle travelling . . . of Bengalis under the law.”<sup>108</sup> Rohingya can informally obtain permission to travel to Yangon by transferring payment of up to 1.5 million Myanmar Kyats (\$1,167 USD)—an impossibly high sum for average Rohingya—to a “middle-man,” who, in turn, pays authorities.<sup>109</sup> In these cases, Rohingya are given a negotiable but brief timeframe to be in Yangon before they are required to return to Rakhine State.<sup>110</sup>

## 5. MARRIAGE RESTRICTIONS AND POPULATION CONTROL

The Thein Sein government has continued to enforce policies to control the Rohingya population, including restrictions on the freedom of movement, marriage, childbirth, and other aspects of daily life in Rakhine. The International Crisis Group reported that many ethnic Rakhine and government officials feared that a growing population of Muslims would usurp the Buddhist majority population’s political and economic power.<sup>111</sup> In September 2011, Minister of Defense Lieutenant-General Hla Min expressed the government’s perceived fear of Rohingya population increase, proclaiming in Parliament that the Rohingya population was becoming “denser” and that “the [Rohingya] birthrate outnumbers the international standard at a breakneck speed.”<sup>112</sup> A military training presentation entitled “Fear of Extinction of Race” expressed fear of the Muslim population eclipsing the Buddhist population in Myanmar.<sup>113</sup> One of the slides in the presentation states, “Bengali Muslims . . . infiltrate the people to propagate their religion. Their population increases by way of mass illegal immigration.

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105 See also Fortify Rights, Interviews with Rohingya, Kaman, Rakhine, and members of the Myanmar Police Force (2013-2015).

106 Fortify Rights, *Policies of Persecution*, see above note 59, p. 33.

107 *Ibid.*

108 *Ibid.*, p. 20.

109 See, for example, Fortify Rights, Interview #126, Sittwe, Rakhine State (Aug. 18, 2015).

110 *Ibid.*

111 International Crisis Group, *Myanmar: The Politics of the Rakhine State*, p. 15 (Oct. 22, 2014), [http://www.crisisgroup.org/~media/Files/asia/south-east-asia/burma-myanmar/261-myanmar-the-politics-of-rakhine-state.pdf](http://www.crisisgroup.org/~/media/Files/asia/south-east-asia/burma-myanmar/261-myanmar-the-politics-of-rakhine-state.pdf).

112 Fortify Rights, *Policies of Persecution*, see above note 59, p. 20.

113 Lecture by Bo Toe Naing, Nyi Pyi Taw Divisional Military Headquarters, “Fear of Extinction of Race” (Oct. 26, 2012) (on file with Al Jazeera Investigative Unit).

Their population increases in Yangon, Mandalay and other cities as well.”<sup>114</sup> Population control measures imposed by the government included a two-child-only policy for Rohingya in Maungdaw and Buthidaung Townships, where most Rohingya live.

The two-child policy has led women to abort fetuses if they already have two children or if they are not legally married.<sup>115</sup> Because abortion is illegal in Myanmar, women engage in unsafe abortions.<sup>116</sup> Women who have had such abortions have fallen seriously ill.<sup>117</sup> Some women who chose not to abort have gone to Bangladesh to give birth and then have left the children there to avoid repercussions from the NaSaKa authorities when they return to Myanmar.<sup>118</sup> These instances reflect the realization of the government’s goals to deter Rohingya births and reduce the Rohingya population.

### C. 2012 Unrest in Rakhine State

In 2012, tensions in Rakhine State reached a boiling point. On May 28, Thida Htwe, a 27-year-old Rakhine Buddhist woman, was robbed, allegedly raped, and murdered in Ramri Township. Locals accused three Muslim men, and authorities promptly arrested them. Local Rakhine activists produced a pamphlet detailing the crime, alleging that Rohingya Muslims were to blame and calling for retribution. Local Rakhine individuals distributed the pamphlet throughout the state.<sup>119</sup> Anonymous Internet users circulated photos of Thida Htwe’s body on the Internet, spreading the call for retribution against Muslims throughout Myanmar.<sup>120</sup> Government newspapers used the term “Muslim Kala,”<sup>121</sup> a derogatory term for South Asians, to describe all Muslims in the country.<sup>122</sup>

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114 *Ibid.*

115 Fortify Rights, *Policies of Persecution*, see above note 59, p. 28.

116 *Ibid.*

117 *Ibid.*

118 *Ibid.*

119 Human Rights Watch, *The Government Could Have Stopped This*, see above note 23, p. 18.

120 Rakhine Commission Report, see above note 5, p. 8.

121 Kala, kalar, and kular are used interchangeably. The government’s Rakhine Commission Report offers the following clarification: “The Bamar (Burmese) traditionally used the term Kala or Kula for all foreigners from the west of the country; the British were originally known as Kala Hpyu (white kala). More recently, in modern day conversation, the Myanmar people employ the term Kala for all peoples originating from the Indian subcontinent (usually India, Bangladesh and Pakistan).” *Ibid.*, p. 9, fn. 7.

122 *Ibid.*



On June 3, in retaliation for Thida Htwe's murder, a mob of three hundred Rakhine surrounded a bus carrying Muslim travelers at a government checkpoint in Toungop. The mob forced ten Muslims off the bus and beat them to death.<sup>123</sup> Hundreds of people, including nearby police and army soldiers, witnessed the attack. Police and soldiers did not intervene.<sup>124</sup> Three days later, President Thein Sein announced that a government committee would investigate the "organized lawless and anarchic acts" in Rakhine State.<sup>125</sup>

Violence rapidly spread across Rakhine State. On June 8, Rohingya in Maungdaw rioted after Friday prayers, destroying Rakhine property and killing at least seven Rakhine.<sup>126</sup> A Rohingya politician and activist called the riots a response to security forces killing Rohingya.<sup>127</sup> The riots and violence spread to Sittwe Township, where Rakhine and Rohingya clashed, with killings and arson attacks on homes and businesses by both Rohingya and Rakhine. State security forces did not intervene to stop the violence or protect either side and even participated in violence against Muslims.<sup>128</sup> Buddhist nationalists protested against Rohingya throughout the province and the country during this time. On June 10, six hundred protesters gathered at the Shwedagon Pagoda in Yangon and demanded the removal of "Bengalis" from Myanmar.<sup>129</sup>

On June 10, President Thein Sein declared a state of emergency in Rakhine State, authorizing the military to take over the administrative functions of the area. He also imposed a dawn-to-dusk curfew and banned public gatherings of more than five people in Sittwe, Maungdaw, Buthidaung, and Rathedaung Townships.<sup>130</sup> However, the violence continued. Human Rights Watch reported that both Rakhine and Rohingya mobs attacked homes, shops, and houses of worship.<sup>131</sup> The riots displaced more than 100,000 Rohingya and Rakhine, forcing them to live in makeshift camps.<sup>132</sup>

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123 "Four Killed as Rohingya Muslims Riot in Myanmar: Government," *Reuters* (June 8, 2012), <http://www.reuters.com/article/2012/06/08/us-myanmar-violence-idUSBRE85714E20120608>.

124 Human Rights Watch, *The Government Could Have Stopped This*, see above note 23, p. 20.

125 *Reuters*, "Rohingya Muslims Riot," see above note 123.

126 Human Rights Watch, *All You Can Do Is Pray*, see above note 20, p. 21; see also Associated Press, "Deadly Riots Raise Muslim-Buddhist Tensions in Myanmar," *N.Y. Times* (June 9, 2012), <http://www.nytimes.com/2012/06/10/world/asia/7-die-in-sectarian-riots-in-myanmar.html>.

127 *Reuters*, "Rohingya Muslims Riot," see above note 123.

128 Associated Press, "Burma Ethnic Violence Escalates As Villagers Flee," *The Guardian* (June 12, 2012), <http://www.theguardian.com/world/2012/jun/12/burma-ethnic-violence-escalates>.

129 Kyaw Kyaw Aung & Parameswaran Ponnudurai, "Emergency Declared in Rakhine," *Radio Free Asia* (June 10, 2012), <http://www.rfa.org/english/news/myanmar/emergency-06102012151543.html>.

130 "Emergency In Myanmar State Following Riots," *Al Jazeera* (June 11, 2012), <http://www.aljazeera.com/news/asia-pacific/2012/06/2012610144345611570.html>.

131 Human Rights Watch, *The Government Could Have Stopped This*, see above note 23, p. 18.

132 *Ibid.*, p. 19.

The emergency rule expanded the presence of the Myanmar Army and other security forces in Rakhine State. Human Rights Watch reported that riot police and paramilitary forces joined Rakhine groups in attacking Rohingya communities.<sup>133</sup> Under the pretext of searching for criminal suspects, the army, local police, and NaSaKa border-guard forces performed massive sweeps and used indiscriminate force in areas heavily populated by Rohingya communities.<sup>134</sup> Government forces also arbitrarily arrested hundreds of Rohingya men and boys, held them incommunicado, and mistreated them.<sup>135</sup> The United Nations also documented more than one hundred credible allegations of security forces raping women in Muslim communities in Rakhine State.<sup>136</sup> In some instances, Rakhine civilians raped Rohingya women. Members of the community who tried to report rape risked arrest.<sup>137</sup> When Maungdaw community elders reported to NaSaKa officials that the NaSaKa had raped two young girls, the NaSaKa detained the elders for three days and refused to release them until the community paid bribes.<sup>138</sup>

Local Rakhine severely restricted Rohingyas' freedom of movement. For example, in Myebon, one of Rakhine State's seventeen townships, Muslims reported that Rakhine blocked them from public spaces, the township's single jetty, and their fishing boats, hospitals, and schools.<sup>139</sup> Some Muslims remained in hiding, fearing that local Rakhine would attack them if they ventured out in public.<sup>140</sup> In some towns, Rakhine mobs forced Muslims out of their homes, leaving entire neighborhoods empty or razed.<sup>141</sup> By August, the United Nations High Commissioner for Refugees estimated that the violence in the Sittwe and Maungdaw Districts had displaced 80,000 people.<sup>142</sup>

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133 *Ibid.*, pp. 1-2, 20.

134 *Ibid.*, p. 3.

135 Human Rights Watch, *Burma: Government Forces Targeting Rohingya Muslims* (June 31, 2012), <https://www.hrw.org/news/2012/07/31/burma-government-forces-targeting-rohingya-muslims>; Amnesty International, *Abuse Against Myanmar's Rohingya Erodes Recent Progress* (July 19, 2012), <http://www.amnestyusa.org/news/press-releases/abuse-against-myanmar-s-rohingya-erodes-recent-progress>.

136 Unpublished Internal U.N. Myanmar Report, p. 2 (April 2013) (on file with Fortify Rights).

137 *Ibid.*, pp. 24-25.

138 *Ibid.*, p. 25.

139 *Ibid.*, p. 11.

140 Human Rights Watch, *The Government Could Have Stopped This*, see above note 23, p. 3.

141 "Muslim Homes Razed in Burma's Rakhine State - Report," *BBC News* (Aug. 14, 2012), <http://www.bbc.com/news/world-asia-19263926>.

142 *Ibid.*

Government policies formalized the displacement of Rohingya. Muslims whose homes were destroyed in the violence were allowed to live only in designated internally displaced persons' (IDP) camps. In some cases, the government attempted to transfer displaced Muslims from Sittwe to Rathedaung Township in northern Rakhine State. The government refused to register those who did not relocate, thereby denying them food assistance.<sup>143</sup>

The Rakhine Nationalities Development Party (RNDP),<sup>144</sup> founded in 2010 by Rakhine nationalists,<sup>145</sup> was one of the most influential groups in the spread of anti-Rohingya violence, particularly during and after 2012. Since its founding, the RNDP has been politically powerful within Rakhine State. As of October 2015, its current iteration, the Arakan National Party, holds 18 of the 35 elected seats in the state parliament and, since the November 2010 elections, 16 of the 664 seats in the national parliament.<sup>146</sup> Although the party claims to be secular, it has formed close ties with the local order of Buddhist clergy in Rakhine State.<sup>147</sup> In response to the 2012 violence, the RNDP released a statement declaring that the “Bengali population causes threats for the whole Rakhine people and other ethnic groups based on [the] current situation.” The statement also demanded that the government relocate displaced “non-Myanmar Bengali nationals” away from Rakhine neighborhoods and, eventually, out of Myanmar entirely.<sup>148</sup>

Buddhist monks played an active role in perpetuating vehement anti-Rohingya and anti-Muslim rhetoric. The “969 Movement,” an anti-Muslim nationalist movement represented most prominently by the monk Ashin Wirathu, has expressed the view that Muslims are attempting to take over Myanmar and that Buddhists must band together to get rid of the Muslim threat. Wirathu—currently representing Ma Ba Tha (Committee for the Protection of Nationality and Religion), a more politically powerful iteration of the 969 Movement—has called Muslims “snakes” and “mad dogs”<sup>149</sup> and espoused beliefs such as: “If you buy a good from a Muslim shop, your money just doesn't stop there .... [M]oney will eventually be used against

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143 Unpublished Internal U.N. Myanmar Report, *see above* note 136, p. 12.

144 In 2014, the RNDP merged with the Arakan League for Democracy party, which boycotted the 2010 elections but re-registered in 2012. Currently, both parties are known collectively as the Arakan National Party, which continues to gain political momentum in Rakhine State. Myanmar Times, *Election Parties* (Sept. 2, 2015) <http://www.mmmtimes.com/index.php/election-2015/parties.html>.

145 Human Rights Watch, *Burma: End 'Ethnic Cleansing' of Rohingya Muslims* (Apr. 22, 2013), <https://www.hrw.org/news/2013/04/22/burma-end-ethnic-cleansing-rohingya-muslims>.

146 Myanmar Times, *Election Parties*, *see above* note 144.

147 Andrew Buncome, “Homeless and Helpless: The Rohingya Muslims of the Rakhine State,” *The Independent* (Dec. 5, 2012), <http://www.independent.co.uk/news/world/asia/homeless-and-helpless-the-rohingya-muslims-of-rakhine-state-8386822.html>.

148 Rakhine Nationalities Development Party, “RNDP Post-Conflict Declaration Related to Relocation” (June 26, 2012) (on file with Fortify Rights).

149 Shashank Bengali, “Monk Dubbed ‘Buddhist Bin Laden’ Targets Myanmar’s Persecuted Muslims,” *Los Angeles Times* (May 24, 2015), <http://www.latimes.com/world/asia/la-fg-ff-myanmar-monk-20150524-story.html>.

you to destroy your race and religion. That money will be used to get a Buddhist-Burmese woman and she will very soon be coerced or even forced to convert to Islam.”<sup>150</sup> He has also said, “[O]nce [Muslims] become overly populous, they will overwhelm us and take over our country and make it an evil Islamic nation.”<sup>151</sup>

Local Rakhine Buddhist monks have also distributed pamphlets urging Rakhine citizens to isolate Rohingya economically and socially.<sup>152</sup> On July 5, 2012, Buddhist monks representing local religious groups throughout Rathedaung Township, known as the Rakhine *Sangha*, gathered to formulate a consistent response to the ongoing conflict.<sup>153</sup> The monks distributed a “12 Point Statement” pamphlet declaring that Rohingya were engaging in a “Rakhine Ethnic Cleansing Program.”<sup>154</sup> To ensure that Rakhine people would “stay away from bad Bengali (Kalar),” the monks recommended prohibitions against employing Rohingya, engaging in sales with Rohingya, and carrying Rohingya on boats, ferries, and motorbikes. They also called for the withdrawal of NGOs that were supporting Rohingya.<sup>155</sup> The Arakanese Youth Monks’ Association released a similar statement prohibiting local Rakhine from trading and communicating with “Kalars.”<sup>156</sup> The Mrauk Oo Monks’ Association also emailed their membership, calling for the Rakhine not to “sell any goods to Bengali, hire Bengali as workers, provide any food to Bengalis and have any dealings with them as they are cruel by nature.”<sup>157</sup>

In June 2012, three members of Myanmar’s National Human Rights Commission traveled to Rakhine State to examine the situation. On July 11, the Commission released its findings. The report did not mention any government abuses or the ongoing persecution of Rohingya. Rather, the report concluded that contributions from the Myanmar government, NGOs, and the United Nations met the basic needs of food, clothing, shelter, and

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150 Alex Bookbinder, “969: The Strange Numerological Basis for Burma’s Religious Violence,” *The Atlantic* (Apr. 9, 2013), <http://www.theatlantic.com/international/archive/2013/04/969-the-strange-numerological-basis-for-burmas-religious-violence/274816>.

151 *Ibid.*

152 Monks’ Association, 12 Statements Agreed and Decided by the Meeting of Monks from the Various Groups from Rathedaung Township (July 5, 2012) (on file with Fortify Rights) [12 Point Statement].

153 *Ibid.*

154 *Ibid.*

155 *Ibid.*

156 Arakanese Youth Monks’ Association, “Proclamation to All Arakanese Nationals” (July 2012) (on file with Fortify Rights).

157 Mrauk Oo Monks’ Association, E-Mail Message to Membership (July 9, 2012) (on file with Fortify Rights). The e-mail message also claimed that “Rakhine people must understand that Bengalis wants to destroy the land of Rakhine, are eating Rakhine rice but plan to exterminate Rakhine people and use their money to buy weapons to kill Rakhine people.”

healthcare in Rakhine State.<sup>158</sup> On July 12, 2012, President Thein Sein asked the UNHCR to place all Rohingya in UNHCR refugee camps or send them abroad. President Thein Sein said, “The solution to this problem is that they can be settled in refugee camps managed by UNHCR, and UNHCR provides for them. If there are countries that would accept them, they could be sent there.”<sup>159</sup> He also declared, “We will take care of our own ethnic nationalities, but Rohingyas who came to Burma [Myanmar] illegally are not of our ethnic nationalities and we cannot accept them here.”<sup>160</sup>

Rakhine groups enthusiastically endorsed President Thein Sein’s statements. The All Rakhine Refugee Committee, a Rakhine nationalist group, commended President Thein Sein’s statement, declaring, “We stand behind our President and we wholeheartedly support his clear statement and his firm standing on illegal Bengali Muslims during the meeting with the head of UNHCR.”<sup>161</sup> Buddhist monks throughout the country rallied in support of President Thein Sein’s proposal. One monk declared that the protests were to “let the world know that the Rohingyas are not among Myanmar’s ethnic groups at all.”<sup>162</sup>

Government and Rakhine sentiment also turned against aid workers in the area for allegedly showing favoritism towards the Rohingya. Several Rakhine groups also expressed distrust of aid workers for showing sympathy for internally displaced Rohingya.<sup>163</sup> The All Rakhine Refugee Committee declared that it would refuse any U.N. or NGO aid.<sup>164</sup> The Rakhine population also threatened and intimidated humanitarian aid workers.<sup>165</sup> A pamphlet distributed throughout the province described the various U.N. and aid agencies as conspiring against the Rakhine people. The pamphlet threatened violence against all Rakhines who cooperated with the U.N. and international NGOs, declaring, “We recognize all of those, who are directly or indirectly working for the development of Kalars, as traitors and thereby our enemy.”<sup>166</sup>

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158 The Myanmar National Human Rights Commission, “Statement No. (4/2012) of Myanmar National Human Rights Commission concerning incidents in Rakhine State in June 2012,” *The New Light of Myanmar* (July 11, 2012), [http://www.burmalibrary.org/docs14/NHRC-Rakhine\\_Statement-NLM2012-07-11.pdf](http://www.burmalibrary.org/docs14/NHRC-Rakhine_Statement-NLM2012-07-11.pdf).

159 Rachel Vandenbrink, “Call To Put Rohingya in Refugee Camps,” *Radio Free Asia* (June 12, 2012), <http://www.rfa.org/english/news/rohingya-07122012185242.html>.

160 *Ibid.*

161 All Rakhine Refugee Committee, Pamphlet (July 14, 2012) (on file with Fortify Rights).

162 “Monks Stage Anti-Rohingya March in Myanmar,” *Al Jazeera* (Sept. 2, 2012), <http://www.aljazeera.com/news/asia-pacific/2012/09/201292175339684455.html>.

163 All Rakhine Refugee Committee, *see above* note 161, para. 3.

164 *Ibid.*, para. 4.

165 Human Rights Watch, *The Government Could Have Stopped This*, *see above* note 23, p. 44.

166 The undated pamphlet is entitled, “Beware! NGOs that came here to assist Bengali Kular,” and is signed by a group identifying itself as Wuntharnu Ethnic People. “Beware” Pamphlet (Undated) (on file with Fortify Rights).

Another pamphlet alleged, “A Holland and French NGO is importing arms for [Kalars] to occupy Rakhine State.”<sup>167</sup> In July 2012, government forces arrested ten aid workers, including employees of the United Nations and the Nobel Peace Prize Laureate organization Médecins Sans Frontières (Doctors Without Borders), for inciting riots.<sup>168</sup>

By September 2012, 65,000-70,000 Rohingya were staying in makeshift relief camps after fleeing their homes as a result of the violence.<sup>169</sup> According to the Rakhine Commission Report, Rakhine citizens protested the government proposal for permanent housing for internally displaced Rohingya even though the costs for the construction of housing were offset by foreign donors’ contributions.<sup>170</sup> Rakhines also insisted that permanent houses could not be built for Rohingya until the government reviewed the citizenship status of any Rohingya who was to receive such housing to confirm that they met the requirements under the 1982 Citizenship Laws.<sup>171</sup>

The Myanmar government endorsed a policy of segregation between Muslims and Buddhists, claiming such measures were necessary to maintain peace between the two groups.<sup>172</sup> Police guarded Muslim neighborhoods, preventing Rohingya from leaving their residential areas. A journalist described the limited residential areas and IDP camps as “ghetto-like quarters heavily guarded by the police and the army.”<sup>173</sup> Fortify Rights has claimed Buddhist villagers played a role in enforcing the segregation by beating and abusing any Rohingya who attempted to leave their camps and living quarters.<sup>174</sup> Some Rohingya reported that police officers demanded bribes if they caught Rohingya in Rakhine areas without a permit.<sup>175</sup> The

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167 *Ibid.*

168 “Myanmar Brings Charges Against Detained U.N. Staff,” *Reuters* (July 13, 2012), <http://uk.reuters.com/article/2012/07/13/uk-un-myanmar-detentions-idUKBRE86C0P320120713>.

169 “About 75,000 Rohingyas in Myanmar Camps: Refugee International,” *The Hindu* (Sept. 29, 2012), <http://www.thehindu.com/news/international/about-75000-rohingyas-in-myanmar-camps-refugee-international/article3948606.ece>.

170 Turkey offered to construct 5,000 homes. Rakhine Commission Report, *see above* note 5, p. 40.

171 *Ibid.*

172 Jason Motlagh, “These Aren’t Refugee Camps, They’re Concentration Camps, and People Are Dying in Them,” *Time* (June 17, 2014) <http://time.com/2888864/rohingya-myanmar-burma-camps-sittwe/>.

173 Carlos Sardina Galache, “Fledgling Reforms in Myanmar Marred by Ethnic Clashes,” *The Globe and Mail* (Sept. 16, 2012), <http://www.theglobeandmail.com/news/world/fledgling-reforms-in-myanmar-marred-by-ethnic-clashes/article4548541>.

174 Jason Szep & Andrew R.C. Marshall, “Special Report- Witnesses Tell of Organized Killings of Myanmar Muslims,” *Reuters* (Nov. 12, 2012), <http://in.reuters.com/article/2012/11/12/myanmar-fighting-muslims-rakhine-idINDEE8AB00I20121112>.

175 Fortify Rights, Interview #54, Kuala Lumpur, Malaysia (Sept. 27, 2014); Fortify Rights, Interview #58, Kuala Lumpur, Malaysia (Sept. 28, 2014).

policy of segregation cut Rohingya off from medical clinics and schools.<sup>176</sup> Rohingya were unable to buy rice and other supplies from outside their residential confines.

On October 21, violence broke out in Min Bya Township. Officials said clashes between Rakhine and Rohingya left three people dead and 400 homes, a monastery, and a mosque burned to the ground.<sup>177</sup> The violence spread north to other townships, including Mrak Oo, Myebon, Rathedaung, and Kyaukp-yu Townships.<sup>178</sup> Young Rakhine men rushed to these cities, armed with crude weapons, to take part in the violence against Rohingya in the area.<sup>179</sup> Violence quickly spread throughout the state. On October 25, Human Rights Watch released before-and-after pictures of the town of Kyaukpyu, revealing wide-scale arson in Muslim residential areas.<sup>180</sup> The *New York Times* described the leveling of the town as an apparent “methodical and premeditated arson.”<sup>181</sup> The town was predominantly ethnic Kaman Muslim. Human Rights Watch reported damage to property, including 633 buildings and 178 houseboats and floating barges, in an area of more than 35 acres.<sup>182</sup> A resident of Kyaukpyu described the chaos in the town: “Rakhine were burning the properties and houses and the police opened fire on the people and killed people so I ran away. The Rakhine were killing the people on one side and on another side the police were killing the people.”<sup>183</sup> Other residents reported police forces indiscriminately firing at Muslim villagers.<sup>184</sup>

In the wake of the Human Rights Watch photographs and report and other NGOs’ calls for action, President Thein Sein acknowledged the wide-scale violence in Rakhine. On October 26, 2012, a government spokesman estimated the death toll at 112; within hours, the state

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176 Todd Pitman, “Divided Town Challenges Myanmar’s Democracy Hopes,” *The Jakarta Post* (Oct. 1, 2012), <http://www.thejakartapost.com/news/2012/10/01/divided-town-challenges-myanmars-democracy-hopes.html>.

177 Gianluca Mezzofiore, “Burma Unrest Between Buddhists and Rohingya Muslims Erupts Again,” *International Business Times* (Oct. 23, 2012), <http://www.ibtimes.co.uk/buddhists-rohingya-muslims-explodes-again-myanmar-397324>.

178 Human Rights Watch, *Burma: New Violence in Arakan State* (Oct. 26, 2012), <http://www.hrw.org/news/2012/10/26/burma-new-violence-arakan-state>.

179 Banyan, “Killings in Myanmar - War Among the Pagodas,” *The Economist* (Oct. 24, 2012), <http://www.economist.com/blogs/banyan/2012/10/killings-myanmars-rakhine-state>.

180 Human Rights Watch, *Damage Assessment Summary for Kyaukpyu* (Oct. 25, 2012), [http://www.hrw.org/sites/default/files/related\\_material/2012\\_Burma\\_Satimage.pdf](http://www.hrw.org/sites/default/files/related_material/2012_Burma_Satimage.pdf).

181 Mark McDonald, “As Violence Continues, Rohingya Find Few Defenders in Myanmar,” *New York Times* (Oct. 31, 2012), <http://rendezvous.blogs.nytimes.com/2012/10/31/as-violence-continues-rohingya-find-few-defenders-in-myanmar>.

182 Human Rights Watch, *Burma: New Violence in Arakan State*, see above note 178.

183 Fortify Rights, Interview #07 (Aug. 11, 2014).

184 Fortify Rights, Interview #03 (Aug. 11, 2014); Fortify Rights, Interview #09 (Aug. 11, 2014).

media reduced this number to 67 killed between October 21 and 25.<sup>185</sup> Human Rights Watch estimated the death toll to be much higher.<sup>186</sup>

Unlike the sporadic riots in June, the arson and violent attacks in October occurred in a wider spread, apparently coordinated fashion across the state. Similar events occurred elsewhere in Rakhine State.<sup>187</sup> In one village in Mrauk U, military personnel, including the NaSaKa and Lon Htin (the state-run riot police), called a meeting with Rohingya, telling them to accept that they were Bengali and did not belong in Rakhine State. The villagers refused. Twenty days later, the village was burned down.<sup>188</sup> Rohingya have reported that Lon Htin and Buddhists set multiple villages on fire at the same time in various locations throughout the state.<sup>189</sup> Rohingya have reported seeing Lon Htin and Buddhists surrounding Buddhist homes with fire engines to extinguish any fires that spread, while letting Rohingya homes burn.<sup>190</sup> Rohingya described security forces shooting and killing Rohingya who tried to extinguish fires.<sup>191</sup>

Rohingya have reported that the Lon Htin, NaSaKa, Myanmar Army, and Myanmar Police Force were directly involved in violent attacks against them.<sup>192</sup> Rohingya reported that they were powerless to stop attacks from Rakhine citizens; when they tried to defend themselves against Rakhine, Lon Htin police and the military opened fire with live ammunition, killing men, women, and children.<sup>193</sup> One Rohingya recalled seeing “all kinds of ranking personnel”

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185 Peter Beaumont, “Burma’s Leader Admits Deadly Attacks on Muslims,” *The Guardian* (Oct. 27, 2012), <http://www.theguardian.com/world/2012/oct/27/burma-wave-anti-muslim-violence>.

186 Human Rights Watch, *Burma: New Violence in Arakan State*, see above note 178.

187 The October 2012 violence reflects a pattern of alleged government involvement in anti-Muslim violence. In March 2013, orchestrated attacks against Muslims erupted in four townships in the Mandalay Region and eight townships in the Pegu Region. The attacks displaced more than 12,000 Muslims. Although, the Myanmar government has denied state involvement in the violence, an anonymous military intelligence officer has reported that undercover military officers played key roles in inciting violence and attacks in the town of Meikhtila in Mandalay Region. Additionally, human rights organizations have reported that police led Muslims through Buddhist mobs and did nothing to intervene while the mobs attacked Muslims. In May 2013, a Myanmar court jailed six Muslims for murder and other crimes during the Meikhtila clashes, while no Buddhists were jailed. Thomas H. Andrews & Daniel Sullivan, *Marching to Genocide in Burma*, p. 4 (2014), <http://endgenocide.org/wp-content/uploads/2014/03/marching-to-genocide-in-burma.pdf>; Al Jazeera Investigative Unit, Interview with Former Military Intelligence Officer; Physicians for Human Rights, *Massacre in Central Burma*, p. 13-15 (May 2013), [https://s3.amazonaws.com/PHR\\_Reports/Burma-Meiktila-Massacre-Report-May-2013.pdf](https://s3.amazonaws.com/PHR_Reports/Burma-Meiktila-Massacre-Report-May-2013.pdf); “Myanmar Profile – Timeline,” *BBC News* (Aug. 19, 2015), <http://m.bbc.com/news/world-asia-pacific-12992883>.

188 Fortify Rights, Interview #58, Kuala Lumpur, Malaysia (Sept. 28, 2014).

189 Al Jazeera Investigative Unit, Interview, Abdul Munaf, p. 2; Fortify Rights, Interview #17, Kuantan, Malaysia (Aug. 13, 2014).

190 Al Jazeera Investigative Unit, Interview, Abdul Munaf, p. 2.

191 For example, see Fortify Rights Interview #30, Yangon, Myanmar (Oct. 28, 2013).

192 For example, see Fortify Rights, Interview #09, Kuala Lumpur, Malaysia (Aug. 11, 2014); Fortify Rights, Interview #03, Kuala Lumpur, Malaysia (Aug. 11, 2014).

193 Fortify Rights, Interview #26; Fortify Rights, Interview #27.



amongst the attackers, from one-star soldiers to majors.<sup>194</sup> Another described the police coming to Sittwe Hospital and telling the medical personnel to kill the Rohingya.<sup>195</sup> Rohingya have reported that the military gathered the dead bodies to take them away in trucks<sup>196</sup> or set the dead bodies on fire.<sup>197</sup>

Myanmar military training materials from the time reflect vehement anti-Rohingya sentiment. Leaked military documents refer to Rohingya as “kowitz kalars,” a pejorative term commonly used toward Rohingya.<sup>198</sup> A military PowerPoint presentation describes “Bengali Muslims” as a threat who seek to infiltrate the Burmese people to propagate Islam, increase their population through illegal immigration, and expand their presence in cities outside of Rakhine State.<sup>199</sup>

Activists reported that the Myanmar government was complicit in the violence and involved in forcibly removing Rohingya people from Rakhine State. Police reportedly gave Rohingya deadlines to leave their homes.<sup>200</sup> However, Rohingya had nowhere to go. Boats full of hundreds of Rohingya and other ethnic Muslim groups attempted to flee their besieged villages. Neighboring countries refused to allow them entry. Bangladeshi authorities turned away boats carrying, in total, more than 800 asylum-seeking Rohingya.<sup>201</sup> Myanmar government forces reportedly blocked 3,000 Rohingya from reaching Sittwe by boat<sup>202</sup> and fired weapons toward them to force them back.<sup>203</sup> Eight people on boats that were denied access to Sittwe died from dehydration or starvation.<sup>204</sup> Military forces, armed with guns and swords, also

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194 Al Jazeera Investigative Unit, Interview, Abdul Munaf.

195 Fortify Rights, Interview #09, Kuala Lumpur, Malaysia (Aug. 11, 2014).

196 Fortify Rights, Interview #03, Kuala Lumpur, Malaysia (Aug. 11, 2014).

197 Fortify Rights, Interview #78, Kuala Lumpur, Malaysia (Sept. 28, 2014).

198 Nyi Pyi Taw Divisional Military Headquarters, Presentation Translation, p. 4 (Oct. 26, 2012) (on file with Al Jazeera Investigative Unit) [Military Headquarters Presentation].

199 *Ibid.*, p. 5.

200 Fortify Rights, Interview #03, Kuala Lumpur, Malaysia (Aug. 11, 2014); Fortify Rights, Interview #19, Kuantan, Malaysia (Aug. 13, 2014); Fortify Rights, Interview #43, Thailand (Sept. 17, 2014).

201 Dan Morrison, “Bangladesh’s Right of Refusal,” *N.Y. Times* (June 19, 2012), [http://latitude.blogs.nytimes.com/2012/06/19/bangladeshs-refusal-to-take-in-rohingyas-from-myanmar/?\\_r=0](http://latitude.blogs.nytimes.com/2012/06/19/bangladeshs-refusal-to-take-in-rohingyas-from-myanmar/?_r=0); Victoria Nuland, Spokesperson, United States Department of State, Daily Press Briefing (June 13, 2012), <http://www.state.gov/r/pa/prs/dpb/2012/06/192255.htm#BANGLADESH> (describing U.S. government’s urging of Bangladeshi government to accept Rohingya).

202 Peter Beaumont, “Burma’s Leader Admits Deadly Attacks on Muslims,” *see above* note 185.

203 Fortify Rights, Interview #03, Kuala Lumpur, Malaysia (Aug. 11, 2014).

204 Dean Nelson, “Rohingya Campaigners Accuse Burma of Failing to Stop Deaths,” *The Telegraph* (Oct. 26, 2012), <http://www.telegraph.co.uk/news/worldnews/asia/burmamyanmar/9636161/Rohingya-campaigners-accuse-Burma-of-failing-to-stop-deaths.html>.

lined the roads to direct Rohingya along certain paths.<sup>205</sup> Other Rohingya hid in the mountains to hide from government forces and Rakhine mobs.

The June and October violence left entire townships nearly devoid of Muslim residents.<sup>206</sup> According to official statistics, more than 35,000 Muslims fled their homes as a result of the October violence.<sup>207</sup> Thousands of Rohingya ended up in tented villages in Rakhine State surrounded by barbed wire and military checkpoints.<sup>208</sup> To temporarily leave the camps, Rohingya have to obtain permission from the security police in the area and pay significant fees to be accompanied by police officers to town. In addition to security forces confining Rohingya to specific living areas, police checkpoints on the roads throughout Rakhine State ensure that Rohingya cannot travel without prior authorization.<sup>209</sup> Directives to control Rohingya movement were issued by government officials. For instance, on October 24, 2012, the district administrator of the town of Sandoway [Thandwe] issued a statement declaring that all passenger vehicles traveling from Sandoway to the towns of Taunggyi, Goa, and Yangon be “strictly controlled to ensure that no Muslim is onboard.”<sup>210</sup>

Military personnel have forced Rohingya from the IDP camps to undertake treacherous ocean journeys out of the country. Rohingya refugees now living in third countries have reported that the NaSaKa and Lon Htin rounded them up from IDP camps and took them to a pier near a NaSaKa camp. The NaSaKa told them that, as “Kalars,” they were not allowed to live in Rakhine State. The NaSaKa directed Rohingya onto a boat, killing resisters, and towed them out to sea.<sup>211</sup> The security forces reportedly told them: “This is not your place and not your country. [These are] not your belongings. Go wherever you want to go. Do not live here.”<sup>212</sup> Refugees reported that Burmese naval ships had surrounded their boats at sea and directed them to Thai waters.<sup>213</sup>

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205 Al Jazeera Investigative Unit, Interview, Abdul Munaf.

206 Jason Szep & Andrew R.C. Marshall, “Special Report,” *see above* note 174.

207 *Ibid.*

208 Andrew Buncome, “Homeless and Helpless,” *see above* note 147.

209 Al Jazeera Investigative Unit, Interview, Abdul Munaf; Graeme Wood, “A Countryside of Concentration Camps: Burma Could Be the Site of the World’s Next Genocide,” *New Republic* (Jan. 21, 2014), <http://www.newrepublic.com/article/116241/burma-2014-countryside-concentration-camps>.

210 Letter from the District Administrator of Sandoway (Oct. 24, 2012) (on file with Al Jazeera Investigative Unit).

211 Al Jazeera Investigative Unit, Interview, Abdul Munaf, p. 6; Al Jazeera Investigative Unit, Interview, Halima Hatu, pp. 1-2.

212 Al Jazeera Investigative Unit, Interview, Abdul Munaf, p. 15.

213 *Ibid.*, p. 7; Al Jazeera Investigative Unit, Interview, Halima Hatu, p. 4.

UNHCR has reported that more than 130,000 Rohingya departed from northern Rakhine State and the Bangladesh border between January 2012 and 2014.<sup>214</sup> This number does not include the many more Rohingya fleeing from the IDP camps and from areas directly affected by the violence in 2012.

## D. The Continued Plight of the Rohingya : 2013 – Present

The outbreaks of violence in 2012 and Myanmar’s discriminatory policies toward the Rohingya have left the Rohingya community stateless and facing systematic abuse.

### 1. CONDITIONS IN INTERNALLY DISPLACED PERSON (IDP) CAMPS

In the aftermath of the 2012 violence, the Myanmar government neither allowed nor facilitated the return of the Rohingya to their homes, leaving many Rohingya trapped in closed, guarded, and poorly equipped camps<sup>215</sup> or isolated in remote villages where they lack access to adequate means of subsistence and to humanitarian aid agencies.<sup>216</sup> The military has stated that it was forcing the Rohingya to stay in the camps for “their own security.”<sup>217</sup> As of November 2013, an estimated 140,000 Rohingya were living in dozens of IDP camps in Rakhine State.<sup>218</sup>

The conditions in the IDP camps in Rakhine State constitute a humanitarian crisis. After touring the camps, the U.N. Under Secretary General for Humanitarian Affairs declared, “I have seen many camps during my time as the (U.N. emergency relief coordinator), but the conditions in this camp rank among the worst.”<sup>219</sup> The IDP camps are overcrowded and Rohingya inhabiting them face severe restrictions on freedom of movement and lack access to basic

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214 U.N. High Commissioner for Refugees, Regional Office for Southeast Asia, *Irregular Maritime Movements in Southeast Asia—2014* (Apr. 2015), <http://storybuilder.jumpstart.ge/en/unhcr-imm>.

215 Human Rights Watch, *World Report 2014: Burma* (Jan. 2014), <http://www.hrw.org/world-report-%5Bscheduler-publish-yyyy%5D/world-report-2014-burma>.

216 U.N. Office for the Coordination of Humanitarian Affairs (UNOCHA), *Humanitarian Bulletin: Myanmar*, p. 3 (June 2013), <http://reliefweb.int/sites/reliefweb.int/files/resources/Myanmar%20Humanitarian%20Bulletin%20June%202013.pdf>.

217 Jonah Fisher, “Burma’s Displaced Rohingya Suffer as Aid Blocked,” *BBC News* (Dec. 13, 2012), <http://www.bbc.com/news/world-asia-pacific-20694414>.

218 U.N. Office for the Coordination of Humanitarian Affairs (UNOCHA), *Myanmar: Internal Displacement in Rakhine State As of November 30, 2013*, [http://reliefweb.int/sites/reliefweb.int/files/resources/IDPMap\\_OCHA\\_MMR\\_0131\\_Rakhine\\_IDP\\_locations\\_A3\\_30Nov2013.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/IDPMap_OCHA_MMR_0131_Rakhine_IDP_locations_A3_30Nov2013.pdf); Rushanara Ali, “Burma’s Rohingya People: 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>; “The Plight of the Rohingya,” United States Holocaust Memorial Museum, <http://www.ushmm.org/confront-genocide/cases/burma> (“These efforts, however, included a registration drive that required Rohingya to identify themselves as ‘Bengali,’ which many viewed as forcing them to accede to illegal status.”).

219 “U.N. Humanitarian Chief Says Conditions Dire for Some Refugees from Myanmar Ethnic Strife,” *Associated Press* (Sept. 12, 2012) <http://www.unhcr.org/cgi-bin/texis/vtx/refdaily?pass=52fc6fbd5&id=50c58b225>.

resources, including sources of income, food, education, and life-saving medicine and care.<sup>220</sup> Further exacerbating the problem, several IDP camps are located in low-lying areas that are vulnerable to flooding during the rainy season. Many camps lack adequate latrines, drinking water, waste facilities, and sanitation and are surrounded by streams of sewage water.<sup>221</sup>

Rohingya living in IDP camps face chronic food shortages. The state government has routinely rejected requests of displaced Rohingya for food rations. One Rohingya man living in an IDP camp conjectured that the government rejected their requests in retaliation for the 2012 violence.<sup>222</sup> Rohingya with their names on the official list for food rations have reportedly not received food rations.<sup>223</sup> Danish Refugee Council reports from 2014 chronicled a persistent lack of food rations; food prices increasing more than fifty percent within a week; lack of water, with the rich buying water at exorbitant prices and the poor drinking sea water; lack of clean, working latrines; lack of medical care; and problems persisting week after week without resolution.<sup>224</sup> Similarly, Save the Children's IDP Daily Status Updates from the same period documented lack of food, water, and medical care. Save the Children has documented the government's failure to provide rations; on one day, it delivered 900 bags of rice instead of the 3,900 bags needed, with 12 bags half empty on arrival.<sup>225</sup> The organization reported that some Rohingya resorted to eating glue.<sup>226</sup>

The Myanmar Army and Rakhine citizens prevent humanitarian aid from reaching the camps. Moreover, because humanitarian workers' access to these camps is severely restricted, Rohingyas' ability to secure life-saving medical resources is limited.<sup>227</sup> Rohingyas have stated that the lack of access to healthcare during pregnancy is an attempt to prevent births, and many have reported cases of otherwise-avoidable maternal mortality.<sup>228</sup> Transportation to healthcare facilities outside the camps is limited and prohibitively expensive. In contrast,

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220 For example, *see*, Thomas H. Andrews & Daniel Sullivan, *Marching to Genocide in Burma*, *see above* note 187, p. 2.

221 Rakhine Commission Report, *see above* note 5, pp. 41, 54; "Burma Camp for Rohingyas 'Dire' – Valerie Amos," *BBC News* (Dec. 5, 2012), <http://www.bbc.com/news/world-asia-20615778>.

222 Unpublished Internal U.N. Myanmar Report, *see above* note 136, p. 17.

223 Al Jazeera Investigative Unit, Interview, Nurul Hakim; Al Jazeera Investigative Unit, Interview, Red Bearded Man, p. 1.

224 Danish Refugee Council, Daily Record of Information from DRC Program Locations in Rakhine (Apr. 2014) (on file with Al Jazeera Investigative Unit).

225 Save the Children, Daily Status Update (Key Rakhine Operational Areas) (Apr. 8, 2014) (on file with Al Jazeera Investigative Unit).

226 Save the Children, Daily Status Update (Key Rakhine Operational Areas) (Apr. 1, 2014) (on file with Al Jazeera Investigative Unit).

227 Human Rights Watch, *Burma: Rohingya Muslims Face Humanitarian Crisis* (Mar. 26, 2013), <http://www.hrw.org/news/2013/03/26/burma-rohingya-muslims-face-humanitarian-crisis>.

228 Unpublished Internal U.N. Myanmar Report, *see above* note 136, p. 20.

camps for displaced Rakhine Buddhists have working sanitation and regular delivery of food and medical supplies.<sup>229</sup>

Most Rohingya have become jobless as a result of the Myanmar government's policies and local Rakhine citizens' practices. Restrictions on freedom of movement have contributed to the inability of Rohingya to secure work, severely limiting their ability to gain a livelihood. The Myanmar government has confiscated non-citizen Rohingyas' land, denying them the right to engage in agriculture.<sup>230</sup> Many Rakhine landowners have ended their agreements with Rohingya to allow them to rent and work Rakhine-owned land. Since Rohingya lack national identification cards, they cannot trade or work outside Rakhine State.<sup>231</sup>

In late February 2014, the Myanmar government forced Médecins Sans Frontières (MSF), or Doctors Without Borders, to cease all operations in Rakhine State after the organization spoke publicly about treating Rohingya survivors of a violent attack in Maungdaw Township in January 2014.<sup>232</sup> The organization was "by far the biggest health provider in the northern part of Rakhine," where it provided vital medical treatment for 500,000 people—mostly Rohingya—in addition to the 200,000 Rohingya in the IDP camps and surrounding areas.<sup>233</sup> MSF's long standing medical programs in Rakhine state, such as its malaria treatment program which treated 1.2 million people since 2004, were halted.<sup>234</sup> Without the assistance of this organization, the Rohingya population suffered an increasing number of deaths.<sup>235</sup> Moreover, the withdrawal of 500 MSF staff meant a decrease in the number of potential outside witnesses to the violence in Rakhine State. Other NGOs active in Myanmar received repeated threats.<sup>236</sup> Under international pressure, the Myanmar government allowed MSF to resume limited operations in January 2015.<sup>237</sup>

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229 "Burma Camp for Rohingyas 'Dire' – Valerie Amos," *BBC News*, see above note 221.

230 "Myanmar Government Confiscates Rohingyas' Agricultural Lands for Rakhines," *Rohingya Eye* (July 2, 2014), <http://www.rvisiontv.com/myanmar-govt-confiscate-rohingyas-agricultural-lands-rakhines/>.

231 See discussion above in Part III.A.; see also Rakhine Commission Report, see above note 5, pp. 29-31.

232 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-cess-operations-20140228,0,2115340.story>.

233 Jane Perlez, "Ban on Doctors' Group Imperils Muslim Minority in Myanmar," *N.Y. Times* (Mar. 13, 2014), <http://www.nytimes.com/2014/03/14/world/asia/myanmar-bans-doctors-without-borders.html>; *ibid.*

234 Médecins Sans Frontières (MSF), *Myanmar: MSF Restarts Basic Medical Activities in Parts of Myanmar's Rakhine State After Nine-month Absence* (Jan. 20, 2015), <http://www.msf.org/article/myanmar-msf-restarts-basic-medical-activities-parts-myanmar%E2%80%99s-rakhine-state-after-nine-month>.

235 Perlez, "Ban on Doctors' Group," see above note 233.

236 Myanmar: Minutes of the Area Security Management Team Meeting (June 6, 2014) (on file with Al Jazeera Investigative Unit) (describing widespread threats of physical harm against international staff members and landlords renting to NGOs).

237 Wilson Dizard, "Doctors Without Borders Resume Work in Myanmar After Government Shutdown," *Al Jazeera America* (Jan. 21, 2015), <http://america.aljazeera.com/articles/2015/1/21/rohingya-muslims.html>.

The UNHCR has estimated that to escape these conditions, 150,000 Rohingya have fled northern Rakhine State since 2012 to neighboring Thailand, Malaysia, and Bangladesh, where many have become victims of human trafficking.<sup>238</sup> The flood of refugees out of Myanmar reached a crisis point in the summer of 2015, with tens of thousands of Rohingya fleeing Myanmar from 2014 to 2015, many of them undertaking dangerous journeys by sea.<sup>239</sup> A Rohingya man from Sittwe, living in Yangon, asserted:

The plan of the government is to finish our people, to kill our people, but they cannot kill us all by the bullet. But what they can do is deny food and medicine, and if the people don't die, they will leave the country. The government has used a different option to kill the people.<sup>240</sup>

Meanwhile, despite the accumulation of evidence indicating policies and practices that have resulted in the killing of hundreds of Rohingya and the flight of tens of thousands more, Mr. Win Myaing, the official spokesperson of the Rakhine State government, denied allegations of ethnic cleansing in Myanmar, stating in 2013, "How can it be ethnic cleansing? They [the Rohingya] are not an ethnic group."<sup>241</sup>

## 2. DISCRIMINATORY LAWS AND GOVERNMENT PRACTICES AGAINST ROHINGYA

Senior national government officials have used discriminatory language regarding the Rohingya "threat" that echoes the incendiary language of Buddhist monks and local Rakhine. In October 2013, the former Speaker of the House, Thura Shwe Mann, sent to President Thein Sein a body of documents "for the consideration of the development of Rakhine State."

In the documents, obtained by Fortify Rights, local officials testified that Rohingya had "sneaked" over the border from Bangladesh into Rakhine State, were armed, were connected to international terrorist organizations, and were planning to occupy Rakhine State.<sup>242</sup> The submission also declared that "Bengalis whose population are increasing due to the marriage and having the children unsystematic ways which are not suitable with

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238 United to End Genocide, *Burma Backgrounder* (July 10, 2015), <http://endgenocide.org/conflict-areas/burma-backgrounder>.

239 Eleanor Albert, *The Rohingya Migrant Crisis*, Council on Foreign Relations (June 17, 2015), <http://www.cfr.org/burmamyanmar/rohingya-migrant-crisis/p36651>.

240 Fortify Rights, Interview #02, Kuala Lumpur, Malaysia (Aug. 10, 2014) .

241 Jason Szep, "Special Report - In Myanmar, Apartheid Tactics Against Minority Muslims," *Reuters* (May 15, 2013), <http://www.reuters.com/article/2013/05/15/us-myanmar-rohingya-specialreport-idUSBRE94E00020130515>.

242 Director General Kyaw Soe, Submission on the Development of Rakhine State (Oct. 15, 2013) (on file with Al Jazeera Investigative Unit).

the cultural norms of human beings.”<sup>243</sup> The submission asserted a view of Rohingya as intruders and of Rakhine as “the people who will protect the country’s sovereignty all the time by sacrificing their lives.”<sup>244</sup>

In 2014, a year and a half after the government’s Rakhine Investigative Committee issued its recommendations, a draft of the government’s response leaked to the media.<sup>245</sup> The draft did not discuss returning Rohingya in IDP camps to their homes. Instead, it outlined a plan to relocate the Rohingya from IDP camps to permanent resettlement zones at unspecified locations around the state. The draft also outlined plans for a citizenship assessment of Rohingya based on the discriminatory 1982 Citizenship Law that stripped Rohingya of their citizenship. The new “nationality verification process” would register “Bengalis” and allow those who accepted the label to go through the assessment process. Rohingya who refused the label “Bengali” would be denied any consideration for citizenship and placed in “temporary camps” for an indefinite period of time. Human Rights Watch called the plan “a blueprint for permanent segregation and statelessness that appears designed to... force them [the Rohingya] to flee the country.”<sup>246</sup>

The leaked draft triggered protests from Rakhine groups, who objected to any Rohingya receiving consideration for citizenship, and from Rohingya, who objected to the requirement to register as Bengalis.<sup>247</sup> In a January 2015 statement, Chief Minister U Maung Maung Ohn blamed Rohingya for the delay in resettling Rohingya according to the draft plan, saying that “[t]heir claim for a name that the state does not accept has stopped the verification citizenship process. As a result, we can see there is no progress. Previously we planned to finish the verification and then move on to resettlement.”<sup>248</sup>

The Myanmar national government has begun enshrining discriminatory local policies into national law. Many of the early regulations on Rohingya marriages and births were local. For instance, many Rohingya-populated areas throughout Rakhine State have two-child limits

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243 *Ibid.*, p. 7.

244 *Ibid.*, p. 21.

245 Human Rights Watch, *Burma: Government Plan Would Segregate Rohingya* (Oct. 3, 2014), <http://www.hrw.org/news/2014/10/03/burma-government-plan-would-segregate-rohingya>.

246 *Ibid.*

247 Lisa Min Mang, “Action Plan Being ‘Reviewed’: Government,” *Myanmar Times* (Jan. 9, 2015), <http://www.mmtimes.com/index.php/national-news/12754-rakhine-action-plan-in-line-for-amendments.html>.

248 *Ibid.*

they apply exclusively to Rohingya families that have been reaffirmed in recent years.<sup>249</sup> In 2015, the Myanmar national parliament extended these laws to the country as a whole. The national parliament passed, and President Thein Sein signed, a series of “Race and Religion Protection Laws.” One of the laws authorizes local authorities to force women to have a gap of 36 months between births. The law does not explicitly mention the Rohingya but states that local authorities can enforce the law selectively, taking into account “a high number of migrants in the area, a high population growth rate and a high birth rate”—all descriptions that politicians and activists have applied to the Rohingya.<sup>250</sup> Buddhist monk Ashin Wirathu explained that the bill “could stop the Bengalis that call themselves Rohingya, who are trying to seize control.”<sup>251</sup>

The laws also regulate the religious practice and conversion of Muslims in the country.<sup>252</sup> The legislation places restrictions on people planning to change religions. Conversions are overseen by local boards, which have the power to reject an application to convert. The legislation also places restrictions on interfaith marriages that apply only to Myanmar Buddhist women eighteen years old or older who seek to marry non-Buddhist men. The law permits township officials to publicly display an interfaith couple’s application for marriage for two weeks and permits objections to the marriage to be taken to local court.<sup>253</sup> The legislation package also includes a Monogamy Bill that imposes sanctions on those who cohabit with more than one person or practice polygamy. Because polygamy was already outlawed in Myanmar, this bill, taken together with the other “Race and Religion Protection Laws,” was clearly directed towards Muslims, some of whom practice polygamy.<sup>254</sup>

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249 For example, on May 20, 2013, government authorities in the Maungdaw District imposed a two-child limit exclusively on Rohingya families—the policy, however, had been in place for years prior in Rohingya-populated areas throughout Rakhine State. On May 26, the Rakhine State spokesperson, Mr. Win Myaing, confirmed that local authorities had reaffirmed the 2005 regulation limiting the number of children for Rohingya Muslims in Buthidaung and Maungdaw Townships in Northern Rakhine State. Jason Szep & Andrew Marshall, “Myanmar Minister Backs Two-Child Policy for Rohingya Minority,” *see above* note 5.

250 Sara Perria, “Burma’s Birth Control Law Exposes Buddhist Fear of Muslim Minority,” *The Guardian* (May 24, 2015), <http://www.theguardian.com/world/2015/may/25/burmas-birth-control-law-exposes-buddhist-fear-of-muslim-minority>.

251 *Ibid.*

252 Amnesty International and International Commission of Jurists, *Myanmar: Parliament Must Reject Discriminatory ‘Race and Religion’ Laws* (March 3, 2015), <https://www.amnesty.org/en/documents/asa16/1107/2015/en>; Human Rights Watch, *Burma: Discriminatory Laws Could Stoke Communal Tensions* (Aug. 23, 2015), <https://www.hrw.org/news/2015/08/23/burma-discriminatory-laws-could-stoke-communal-tensions>.

253 Human Rights Watch, *Burma: Reject Discriminatory Marriage Bill* (July 9, 2015), <https://www.hrw.org/news/2015/07/09/burma-reject-discriminatory-marriage-bill>.

254 *Ibid.*



As violence against the Rohingya continues, with continued military involvement, government investigations have resulted in denial, not protection of Rohingya. For example, on January 9, 2014, local Rakhine killed eight Rohingya men in the village of Du Char Yar Tan. Following the incident, local reports maintained that Rohingya residents kidnapped and killed a local police sergeant. Four days later, the local police did not intervene when Buddhists used swords, knives, and sticks to attack Rohingya, killing many people.<sup>255</sup> On January 14, local officials ordered Lon Htin to arrest all male Rohingya, including children over the age of ten, in surrounding areas.<sup>256</sup> A Rohingya in Du Char Yar Tan at the time reported seeing military forces kill several Rohingya, confiscate their belongings, and loot homes.<sup>257</sup> Following this violence, MSF reported that it had treated at least 22 patients with stab and gunshot wounds. MSF believed all patients were victims of the Buddhist violence.<sup>258</sup> A U.N. Office of the High Commissioner of Human Rights report found that at least 40 people were killed.<sup>259</sup> According to Fortify Rights, riot police started rounding up all male Rohingya, including children, in the surrounding areas after the killings.<sup>260</sup> Hundreds of people fled Du Char Yar Tan for Bangladesh, Thailand, and Malaysia.<sup>261</sup> Meanwhile, the Myanmar government's Human Rights Commission continued to insist that there was "no solid evidence" of any attacks in Du Char Yar Tan.<sup>262</sup>

The Myanmar government has refused journalists access to IDP camps,<sup>263</sup> while using state-run media to deny any evidence of violence as the "false reports of foreign news agencies."<sup>264</sup> On March 27, 2014, the Editor in Chief of the Myanmar Times issued an internal memo directing that no stories run concerning the Rohingya or "ongoing issues" in Rakhine without his

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255 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>; see also 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>.

256 Fortify Rights, *Press Release: Myanmar: End Mass Arrests of Muslim Men and Boys in Rakhine State, Protect At-Risk Communities* (Jan. 23, 2014), <http://www.fortifyrights.org/publication-20140123.html>.

257 Fortify Rights, Interview #81, Penang, Malaysia (Sept. 15, 2014).

258 "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-investgate-rohingya-deaths-violence>.

259 Human Rights Watch, *World Report 2015: Burma* (Jan. 2015) <https://www.hrw.org/world-report/2015/country-chapters/burma>.

260 *Ibid.*

261 Fortify Rights, Interviews with Rohingya in Thailand and Malaysia (2014-2015).

262 Gemima Harvey, "Myanmar: The Worsening Plight of the Rohingya," *The Diplomat* (Mar. 19, 2014), <http://thediplomat.com/2014/03/myanmar-the-worsening-plight-of-the-rohingya>.

263 Human Rights Watch, *World Report: Burma*, see above note 259; Fortify Rights, *Press Release: Myanmar: End Mass Arrests of Muslim Men and Boys in Rakhine State, Protect At-Risk Communities*, see above note 256.

264 "Deaths of Women, Children in Rakhine State are False Reports of Foreign News Agencies," *New Light of Myanmar* (Jan. 25, 2014), <http://www.networkmyanmar.org/images/stories/PDF16/NLM-Extract-250114.pdf>.

direct approval or risk “placing our heads on the block.” He traced the decision to “a considerable amount of pressure from different quarters over this sensitive issue,” specifying, “I am surrounded by a number of forces from the president’s office downwards . . . .”<sup>265</sup>

In 2015, the Rohingya refugee crisis brought increasing international pressure on Myanmar to account for its treatment of Rohingya. Major Zaw Htay, the director of President Thein Sein’s office, responded that Myanmar would “not accept the allegations by some that Myanmar is the source of the problem.” Zaw Htay threatened that Myanmar officials would not attend a regional meeting hosted by Thailand “if ‘Rohingya’ is mentioned on the invitation.”<sup>266</sup>

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265 Editor in Chief, Myanmar Times, Memorandum (Mar. 27, 2014) (on file with Al Jazeera Investigative Unit).

266 “Myanmar Deflects Blame for Rohingya Migrant Crisis,” *Al Jazeera* (May 17, 2015), <http://www.aljazeera.com/news/2015/05/myanmar-deflects-blame-rohingya-migrant-crisis-150516223643074.html>.

# IV. APPLICATION OF THE LAW OF GENOCIDE TO THE CASE OF THE ROHINGYA

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## A. Introduction to the Law of Genocide

Raphael Lemkin, a Polish scholar and jurist, first coined the term “genocide” during the Second World War.<sup>267</sup> The term merges the Greek word *genos*, meaning race, nation, or tribe, and the Latin word *caedere*, meaning to kill. Lemkin used the term to describe the crime of destroying a group of people.<sup>268</sup> On December 9, 1948, the United Nations adopted the International Convention on the Prevention and Punishment of the Crime of Genocide.

The Convention proscribes the commission of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide.<sup>269</sup> It makes genocide, whether committed in times of peace or war, a crime under international law. It also requires states “to prevent and to punish” the crime of genocide.<sup>270</sup> The Convention defines genocide as any of five categories of enumerated acts committed with the intent to destroy a national, ethnical, racial, or religious group.<sup>271</sup> The enumerated acts are:

- 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.

The definition thus has three elements: the “group” element, the “act” element, and the “intent” element. All must be proved to establish that genocide has occurred.

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<sup>267</sup> Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (1944).

<sup>268</sup> *Ibid.*

<sup>269</sup> Genocide Convention, *see above* note 1, art. III.

<sup>270</sup> *Ibid.*, art. I.

<sup>271</sup> *Ibid.*, art. II.

The Genocide Convention's definition of the crime has been repeated and affirmed in subsequent international legal instruments and the opinions of various international courts and tribunals. For example, the definition appears in the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Statute of the International Criminal Tribunal for Rwanda (ICTR), and the Rome Statute that established the International Criminal Court.<sup>272</sup> The definition has become part of customary international law and a *jus cogens* norm<sup>273</sup> (*jus cogens* norms are "principles which are recognized by civilized nations as binding on States, even without any conventional obligation").<sup>274</sup> The Genocide Convention obligates states to punish persons who commit genocide, "whether they are constitutionally responsible rulers, public officials or private individuals."<sup>275</sup>

## B. The "Group" Element of the Crime of Genocide

Although the Genocide Convention lists four distinct bases for constituting a group —nationality, ethnicity, race, and religion—the issue of *who* is subject to the Convention's protection was not and is not clear-cut. When Raphael Lemkin coined the term genocide, he was primarily concerned with the destruction of a "nation or an ethnic group."<sup>276</sup> His writings refer to "national minorities" and to "ethnic, racial, and religious" minorities as examples of the sorts of groups that would fall within the ambit of national minorities.<sup>277</sup> The drafters of the Genocide Convention chose the term "groups," out of fear that the term "national minorities" would not cover circumstances in which an elite minority group persecuted a majority. The four enumerated categories do not define precise boundaries. Rather, they overlap and "help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection."<sup>278</sup>

### 1. NATIONAL, ETHNICAL, RACIAL, OR RELIGIOUS GROUP

International tribunals have defined national, ethnical, racial, and religious groups in a variety of ways. As this section details, the tribunals have acknowledged the difficulty of differenti-

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272 Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (May 25, 1993), annex, art. 4(2); Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994), annex, art. 2(2); Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, art. 6.

273 For a definition of *jus cogens*, see above note 3.

274 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), I.C.J. Reports 16, p. 21 (May 28, 1951).

275 Genocide Convention, see above note 1, arts. IV, V.

276 Lemkin, *Axis Rule*, see above note 267, p. 79.

277 William A. Schabas, *Genocide in International Law: The Crime of Crimes*, pp. 119-21 (2d ed. 2009).

278 *Ibid.*, p. 129.

ating the four enumerated categories and determining the relevant protected group.<sup>279</sup> This section will discuss each category of group in the order listed in the Convention.

Within the context of the 1948 Genocide Convention and the writings of Raphael Lemkin, the term “national group” refers to groups that identify with an established nation state,<sup>280</sup> as well as national minorities with shared, distinct historical and cultural links. These links can be racial, ethnical, or religious.<sup>281</sup> The ICTR has defined a national group as “a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.”<sup>282</sup> Alternatively, scholars have argued that “national” may also refer to a sociological or ethnological definition of origin, rather than a definition tied to citizenship.<sup>283</sup> The definition of nationality in the context of the Genocide Convention should not be confused with the strict territorial definition of nationality that is used by states to determine citizenship. Rather, nationality for purposes of establishing that genocide has occurred is concerned with the “meaning of membership in a certain nation in the sense of race.”<sup>284</sup> William Schabas, a prominent scholar on the law of genocide, has warned that overly technical definitions of “nationality” risk excluding the vulnerable minority groups that Lemkin intended to be covered by the Genocide Convention.<sup>285</sup>

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279 Tribunals have adopted two approaches to defining the character of a group. The objective approach considers group membership to be stable: Individuals are members of the group automatically and irreversibly by virtue of being born into it. The subjective approach, on the other hand, relies on a sense of belonging, taking into account whether members perceive themselves—or perpetrators perceive them—as belonging to the group. Other tribunals have adopted a combination of the two approaches. Agnieszka Szpak, “National, Ethnic, Racial, and Religious Groups Protected Against Genocide and the Jurisprudence of the ad hoc International Criminal Tribunals,” *European Journal of International Law* v. 23, pp. 155-173 (2012). Key cases in the ad hoc tribunals have applied the subjective approach. See, for example, *Prosecutor v. Krstic*, Case No. ICTY-IT-98-33, Judgment, paras. 556-57 (Aug. 2, 2001) (“To attempt to differentiate each of the named groups on the basis of scientifically objective criteria would thus be inconsistent with the object and purpose of the Convention . . . . A group’s cultural, religious, ethnical, or national characteristics must be identified within the socio-historic context which it inhabits.”)(comparing the objective and subjective approaches); *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, para. 65 (June 7, 2001) (finding that, for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept.) (discussing the merits of a subjective approach).

280 See Matthew Lippman, “The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later,” *Arizona Journal of International & Comparative Law* v. 15, pp. 415, 456.

281 Schabas, *Genocide in International Law*, see above note 277, p. 120.

282 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, para. 512 (Sept. 2, 1998).

283 Schabas, *Genocide in International Law*, see above note 277, pp. 116-17; U.N. Economic & Social Council, *Study of the Question of the Prevention and Punishment of the Crime of Genocide, Progress Report by Mr. Nicodeme Ruhashyankiko, Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/L.583 (June 25, 1973), paras. 56-61; U.N. Economic & Social Council, *Study of the Question of the Prevention and Punishment of the Crime of Genocide, Study Prepared by Mr. Nicodeme Ruhashyankiko, Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/416 (July 4, 1978), paras. 59-64. See also International Convention on the Elimination of All Forms of Racial Discrimination, adopted Dec. 21, 1965, 660 U.N.T.S. 195.

284 Robert Jennings & Arthur Watts, *Oppenheim’s International Law*, v. II, p. 857 (9th ed. 1996).

285 Schabas, *Genocide in International Law*, see above note 277, p. 118.

Finding that a population constitutes an ethnical group, in its narrow meaning, requires a common language or a common culture.<sup>286</sup> However, a Trial Chamber of the ICTR has expanded upon the definition of an ethnical group to include a group “which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).”<sup>287</sup> For example, the ICTR determined that Tutsis were an ethnical group largely because government-issued, official identity cards labeled them as such.<sup>288</sup> In the *Akayesu* case, the ICTR noted that an ethnical group can be based on self-identification. The Tribunal quoted an expert witness who opined, “The primary criterion for [defining] an ethnic group is the sense of belonging to that ethnic group. It is a sense which can shift over time.”<sup>289</sup> Tribunals have commonly defined ethnical group by taking into account contemporary usage in popular language and social sciences.<sup>290</sup>

In 1948, English dictionaries defined “racial group” as largely understood to be synonymous with national, ethnical, and religious groups.<sup>291</sup> International jurists have struggled with how to adapt the 1948 notion of “racial group” to contemporary notions of race and biological descent. Like the concept of ethnicity, notions of race have changed over time. Race is also a social construct and differs from society to society. The concept of racial group can be defined both objectively and subjectively. The objective test for finding a group to be a “racial group” for genocide purposes requires a determination that the relevant group is distinguished from others by hereditary physical traits frequently identified with geographic areas, regardless of linguistic, cultural, national or religious factors.<sup>292</sup> The subjective test for determining that a “racial group” exists considers the perpetrators’ perceptions of the victimized group.<sup>293</sup> This definition of racial group is consistent with the definition of racial discrimination in the International Convention on the Elimination of All Forms of Racial Discrimination, which takes into account “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.”<sup>294</sup> This definition encompasses even non-hereditary distinctions. According to Schabas, some scholars and legal practitioners have also advocated examining racial and

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286 *Akayesu*, *see above* note 282, para. 513.

287 *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment, para. 98 (May 21, 1999).

288 *Ibid.*, paras. 522-30.

289 *Akayesu*, *see above* note 282, para. 172.

290 Schabas, *Genocide in International Law*, *see above* note 277, p. 146.

291 *Ibid.*, p. 140.

292 *Akayesu*, *see above* note 282, at para. 514.

293 *Kayishema and Ruzindana*, *see above* note 287, para. 98.

294 International Convention on the Elimination of All Forms of Racial Discrimination, adopted Dec. 21, 1965, 660 U.N.T.S. 195, art. 1(1).

ethnic groups together, citing the difficulty of distinguishing between the two.<sup>295</sup> As is the case with ethnicity, international jurists define race by examining popular usage, social science, and modern law.

The final category of group listed in the Genocide Convention is religious groups. The ICTR has defined a religious group as including “denomination or mode of worship of a group sharing common beliefs.”<sup>296</sup> United States law has defined religious group in the context of genocide analysis as “a set of individuals whose identity as such is distinctive in terms of common religious creed, beliefs, doctrines, practices, or rituals.”<sup>297</sup>

Although the ICTR in the *Akayesu* case examined the four enumerated groups as unique and separate parts,<sup>298</sup> the history, language, and context of the Genocide Convention strongly suggest that the group element is best analyzed holistically. The four categories overlap and help define each other, including within their scope a wide range of groups, all of which are covered by the Convention.<sup>299</sup> A claim of genocide does not require that a group meet specifically one of the four categories set forth in the Convention. Rather, it is sufficient to prove that the group fits within the four corners delineated by these criteria.<sup>300</sup> This approach has extended the application of genocide to cover groups, including tribal groups, without determining whether they are subsumed within one particular category—national, racial, ethnic or religious.<sup>301</sup> The ICTY has supported the holistic interpretation of the group element, holding:

National, ethnic, racial or religious groups are not clearly defined in the Convention or elsewhere. In contrast, the preparatory work on the Convention and the work conducted by international bodies in relation to the protection of minorities show that the concepts of protected groups and national minorities partially overlap and are on occasion synonymous . . . . The preparatory work of the Convention shows that setting out such a list was designed more to describe a single phenomenon, roughly corresponding to what was recog-

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295 Schabas, *Genocide in International Law*, see above note 277, p. 146.

296 Kayishema and Ruzindana, see above note 287, para. 98.

297 Genocide Implementation Act, 18 U.S.C. § 1093(7).

298 *Akayesu*, see above note 282.

299 Schabas, *Genocide in International Law*, see above note 277, pp. 111, 129.

300 *Ibid.*, pp. 112, 130.

301 For example, the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind determined that tribal groups should be protected by the Convention. General Assembly, *Report of the International Law Commission on the Work of Its Forty-Eighth Session (6 May - 26 June 1996)*, U.N. Doc. A/51/10 (1996), p. 45.

nized, before the second world war, as “national minorities,” rather than to refer to several distinct prototypes of human groups.<sup>302</sup>

In light of the case law, history, and goals of the Genocide Convention, this paper will not attempt to parse and analyze the four group elements separately. Rather, the legal analysis will examine the pertinent characteristics of a group to determine whether the Rohingya constitute a protected group under the Genocide Convention.

## 2. ROHINGYA AS AN ENUMERATED GROUP

From the holistic perspective intended by the Genocide Convention’s drafters, Rohingya fit squarely within the ambit of protection established by the “corner posts” of the four enumerated groups. Rohingya characteristics and history indicate they constitute a national, ethnical, racial, or religious group under the Genocide Convention.

The history of the Rohingya people suggests that they make up a distinctive group under the Convention’s definition of genocide. Although Myanmar officials contest the historic presence of Rohingya in the country, historians trace the presence of Rohingya in the present Rakhine State to as early as the ninth century.<sup>303</sup> The first English-language reference in writing to the name “Rohingya” appeared in a 1799 British colonial ethnography listing “the Mohammedans, who have long settled in Arakan [modern Rakhine State], and who call themselves Rooinga, or natives of Arakan.”<sup>304</sup> During the Second World War, Rohingya sided with the British against the invading Japanese, with whom Rakhine Buddhists were allied.<sup>305</sup> The history of the Rohingya, going back as early as the ninth century and up to as recently as the mid-twentieth century, indicates that the group shares distinctive historical links and thus likely falls within the national group category of the Genocide Convention.

Moreover, Rohingya share a distinctive language, further supporting their classification as an ethnical group. Rohingya speak a language called Rohingya or Ruáingga. The language itself is distinctive from other languages spoken in Rakhine State and Myanmar. Rohingya are the only group that speaks the Rohingya language. Rohingyas’ distinctive language supports the conclusion that they form an ethnical group protected by the Genocide Convention.

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302 Prosecutor v. Krstic, *see above* note 279, paras. 555-56 (Aug. 2, 2001).

303 Moshe Yegar, *The Muslims of Burma: A Study of a Minority Group*, p. 2 (1972).

304 Francis Buchanan, “A Comparative Vocabulary of Some of the Languages Spoken in the Burma Empire,” *Asiatic Researches* v. 5, p. 219 (1799), reprinted in *SOAS Bulletin of Burma* v. 1, p. 55 (Michael Charney, ed., 2003), <http://eprints.soas.ac.uk/8050/>.

305 Human Rights Watch, *All You Can Do Is Pray*, *see above* note 20, p. 15.



Rohingya may also form a protected group on the basis of their religion. Rohingya are largely Muslim. The Myanmar government and local Rakhine have consistently espoused anti-Muslim sentiment. This sentiment is visible in the rhetoric of government officials and prominent members of society, in leaked government documents, and in testimonies from survivors of the atrocities occurring in Rakhine State. For example, a military training PowerPoint presentation obtained by Al-Jazeera warns the Myanmar military of the risks of an increase in the Muslim population.<sup>306</sup> Monks in Rakhine State and throughout the country have also played a key role in creating a climate that has fueled discrimination and violence by Buddhist citizens against Muslims. The prominent monk Wirathau has said that Muslims in Myanmar are orchestrating a “master plan” to turn Myanmar into a Muslim country. He has characterized Muslims as like “jackal[s],” intent on destroying Buddhists.<sup>307</sup> Some monks have alleged that the Myanmar government has propped up Wirathau and actively encouraged him to espouse anti-Muslim sentiment among monks and his followers.<sup>308</sup> Anti-Muslim rhetoric appears to be rampant in Myanmar at all levels of society. The religion of the Rohingya plays a role in their persecution. However, because there are other Muslim groups in Myanmar that are also the subject of discrimination, although not the same level of abuse and atrocities, religion alone does not form the basis of Rohingyas’ persecution. Nevertheless, in this context, religion is a relevant part of Rohingyas’ identity as a distinct group.

International tribunals have held that a group can be determined to be a protected group because the persecutor treats them as such. In *Akayesu*, the ICTR Trial Chamber found that the Tutsi were a group protected by the Genocide Convention because, although they did not strictly meet the ethnical requirement of having their own language or culture distinct from the rest of the Rwandan population, they were a “stable and permanent group and were identified as such by all.”<sup>309</sup> This subjective approach to group classification is consistent with the goal of the Genocide Convention. The crime of genocide fundamentally derives from the perpetrator’s desire to destroy a group. Thus, the perpetrator’s conception of a group forms a key part of a tribunal’s analysis. Tribunals have necessarily examined whether the perpetrator viewed the persecuted group as a distinctive group.

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306 Military Headquarters Presentation, *see above* note 198.

307 Jonah Fisher, “Anti-Muslim Monk Stokes Burmese Religious Tensions,” *BBC News* (Aug. 29, 2013), <http://www.bbc.com/news/world-asia-23846632>.

308 Al Jazeera Investigative Unit, Interview with Monk B, Tha Kha Na, Ven Pannasiha.

309 *Akayesu*, *see above* note 282, paras. 122-24.

The Myanmar government and Rakhines treat Rohingya as a distinctive group. The government does not refer to Rohingya by their name, because doing so would confirm that they are an ethnic group native to Myanmar. Instead, they refer to them as Bengali, in order to emphasize the government's contention that Rohingya are recent and illegal immigrants to the country.<sup>310</sup> The United Nations-supported 2014 national census did not include the category of Rohingya,<sup>311</sup> and Rohingya were ultimately prevented from participating in the census.<sup>312</sup> Vijay Nambiar, Special Adviser on Myanmar to the U.N. Secretary-General, said that Rohingya in Rakhine State were excluded because of "a demand of many local people to self-identify as Rohingya, a demand not conceded by the authorities."<sup>313</sup> In Myanmar, Bengali is a term exclusively applied to Rohingya. The non-acknowledgement of Rohingya and the characterization of them as "Bengali" shows that the government treats them as a distinctive group. Local Rakhine officials and monks also deny that Rohingya are an ethnicity, yet they have established policies that have specifically targeted Rohingya. For example, the Rakhine National Development Party plan and the Rathedaung Monks' 12 Point Statement both espoused the belief that Rohingya are "illegal immigrants" and "kalar." These plans to physically, economically, and socially isolate the "kalar" were specifically targeted toward the Rohingya in Rakhine State. Thus, even though the government and Rakhine actors do not acknowledge the term "Rohingya," their use of the term "Bengali" to refer to all and only Rohingya lends support to the conclusion that they view Rohingya as a distinctive group.

### 3. CONCLUSION ON THE "GROUP" ELEMENT

Examined holistically, Rohingya constitute a group under the Genocide Convention. They share a common history, culture, and language. Additionally, the persecutors view them as a distinctive group and target them on the basis of this group identity.

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310 Submission on the Development of Rakhine State, *see above* note 242, p. 4 ("Using the illegal migrants, some Bengali educated people who reached different countries created a new name 'Rohingya' for themselves and they encroach upon our history of Arakan, Rakhine land and the sovereignty of Rakhine and Myanmar."); Human Rights Watch, *All You Can Do Is Pray*, *see above* note 20, p. 110; Human Rights Watch, *The Government Could Have Stopped This*, *see above* note 23, p. 45.

311 Human Rights Watch, *All You Can Do Is Pray*, *see above* note 20, p. 115.

312 Timothy McLaughlin, "Myanmar Releases Census Data, but Excluded Rohingya Minority," *Reuters* (May 29, 2015), <http://in.reuters.com/article/2015/05/29/asia-migrants-myanmar-idINL3N0YK2ZW20150529>; Human Rights, *All You Can Do Is Pray*, *see above* note 20, p. 115.

313 McLaughlin, "Myanmar Releases Census Data," *see above* note 312.

## C. The “Acts” Element of the Crime of Genocide

### 1. KILLING MEMBERS OF THE GROUP

The Genocide Convention identifies the killing of members of the group as a prohibited genocidal act. The ICTR has interpreted the act of killing to require two elements: (1) that the victim is dead and (2) that the death resulted from an unlawful act or omission by the accused.<sup>314</sup> The ICTR has also held that establishing criminal liability for genocide by the act of killing members of a group requires showing that “(1) the perpetrator intentionally killed one or more members of the group, without the necessity of premeditation; and (2) such victim or victims belonged to the targeted ethnical, racial, national, or religious group.”<sup>315</sup> The ICTY has interpreted “killing” to need no further explanation, only that the act was intentional, although not necessarily premeditated.<sup>316</sup>

State security forces’ involvement in massacres of Rohingya satisfies the requirements for finding the commission of the prohibited act of killing members of a protected group. Many Rohingya refugees, as well as U.N. agencies, independent experts, and human rights organizations, have reported that the Myanmar Army, NaSaKa, and the Myanmar Police Force were involved in the use of lethal violence against Rohingya in Rakhine State. Witnesses have reported state forces joining in local killings and massacres of Rohingya; this has included such forces shooting and killing Rohingya rather than intervening to protect them.

State security forces’ failures to stop, investigate, or punish local violence against Rohingya also violate the Genocide Convention. The national government has maintained that local Rakhine bear responsibility for Rohingya deaths in “communal violence.” Local Rakhine have undeniably killed Rohingya on many occasions since 2012.<sup>317</sup> However, failure to prevent extrajudicial violence is an act of omission, and such acts, can, like acts of commission, violate the Genocide Convention. The ICTY and the ICTR have found both acts and omissions to be grounds for responsibility for killing in violation of the Genocide Convention.<sup>318</sup> Many witnesses have reported the Myanmar Army, Police, and NaSaKa standing by while local Rakhine attack and kill Rohingya. Human Rights Watch has described several massacres of Rohingya in different regions of Rakhine State as highly “organized,” with state awareness of

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314 Akayesu, *see above* note 282, para. 589.

315 Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgment and Sentence, para. 319 (May 15, 2003).

316 Prosecutor v. Stakić, Case No. ICTY-IT-97-24-T, Judgment, para. 515 (July 31, 2003).

317 *See above* Part III.C, III.D.

318 Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgment and Sentence, para. 40(1) (Sept. 4, 1998); Prosecutor v. Kovacevic and Drljaca, Case No. ICTY-IT-96-24, Indictment, para. 9 (Mar. 13, 1997); *see also* Schabas, *Genocide in International Law*, *see above* note 277, p. 156 (discussing the omission).

the impending violence and failure to hold perpetrators accountable.<sup>319</sup> Attacks in different villages occurred nearly simultaneously; the attackers were well armed; and state security forces both watched and participated in the killings of Rohingya. After the killings, state security forces disposed of Rohingya bodies in ways that hindered investigations.<sup>320</sup> Although the 2012 violence in Rakhine State killed Rohingya primarily, state authorities have prosecuted almost exclusively Rohingya, not Rakhine, for the violence.

The government's violent actions, as well as its inaction in quelling locally perpetrated violence, fit within the act category of "killing members of the group."

## 2. CAUSING SERIOUS BODILY OR MENTAL HARM TO MEMBERS OF THE GROUP

The Genocide Convention's second prohibited act is causing serious bodily or mental harm to members of the group. The ICTR defined "serious bodily or mental harm" as "acts of torture, be they bodily or mental, inhumane or degrading treatment, [or] persecution."<sup>321</sup> Another Trial Chamber of the ICTR has defined the act of serious bodily or mental harm as "harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs [sic] or senses."<sup>322</sup> Although the Genocide Convention does not enumerate specific prohibited acts causing harm, the ICTR and ICTY have found a number of non-fatal acts, including torture, rape, deportation, and cruel treatment, to fit within this category.<sup>323</sup>

Instances of torture of Rohingya constitute acts of serious bodily and mental harm within the meaning of these definitions. The Myanmar Army has beaten and tortured Rohingya men and women.<sup>324</sup> Rohingya experienced waves of large-scale violence in the late 1970s, the early 1990s, 2001, and 2012, and each wave has involved torture by the NaSaKa, the Myanmar Army,

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319 Human Rights Watch, *All You Can Do Is Pray*, see above note 20, p. 125.

320 *Ibid.*

321 Akayesu, see above note 282, para. 504.

322 Kayishema and Ruzindana, see above note 287, para. 109.

323 See, for example, Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment and Sentence, para. 502 (Apr. 28, 2005) ("Serious bodily harm is any serious physical injury to the victim, such as torture and sexual violence. This injury need not necessarily be irreparable. Similarly, serious mental harm can be construed as some type of impairment of mental faculties or harm that causes serious injury to the mental state of the victim."); Prosecutor v. Karadzic and Mladic, Case Nos. ICTY-IT-95-5-R61, ICTY-IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, para. 93 (July 11, 1996) ("[T]he causing of serious bodily or mental harm to the member or members of the group or groups occurred through inhumane treatment, torture, rape and deportation"). See also International Criminal Court, Elements of Crimes, entered into force Sept. 9, 2002, ICCASP/1/3, fn. 3 ("[An act causing serious bodily or mental harm] may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.").

324 See above Parts II.C & II.G; see also U.N. Commission on Human Rights, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Yakin Ertürk*, U.N. Doc. E/CN.4/2006/61/Add.1 (Mar. 27, 2006), paras. 118-26.

and Myanmar Police Force.<sup>325</sup> Government authorities have also used torture as a means to erase Rohingya identity. The Sentinel Project for Genocide Prevention (an international non-governmental organization) reported that the NaSaKa beat and tortured Rohingya until they agreed to register as Bengali.<sup>326</sup> The Sentinel Project also reported that the NaSaKa and the Myanmar Army have a long history of war crimes, including rape and torture. The torture of the Rohingya meets the legal standard for the prohibited act of “causing serious bodily or mental harm.”

Acts of sexual assault and rape by the NaSaKa, Myanmar Army, and Myanmar Police Force against Rohingya women also constitute acts of “serious bodily or mental harm.” Sexual assault and rape cause both physical trauma and mental harm. The ICTR has compared rape to torture, saying, “[L]ike torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity.”<sup>327</sup> Rohingya have reported the NaSaKa, the Myanmar Army, and the Myanmar Police Force raping Rohingya women while detaining them on military bases, while supervising their forced labor, as punishment for failure of family members to perform forced labor, and in their homes. The attacks against Rohingya women conform to the ICTY and ICTR’s definitions of rape as an act “causing serious bodily or mental harm.”

### 3. DELIBERATELY INFLECTING ON THE GROUP CONDITIONS OF LIFE CALCULATED TO BRING ABOUT ITS PHYSICAL DESTRUCTION IN WHOLE OR IN PART

The Genocide Convention’s third prohibited act is “deliberately inflicting conditions of life calculated to destroy the group in whole or in part.”<sup>328</sup> In *Akayesu*, the ICTR held that this provision should be interpreted to consist of “methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction,”<sup>329</sup> that is, acts that would lead to the slow death of the victims or the

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325 Human Rights Watch, *Burma: Rohingya Muslims: Ending a Cycle of Exodus?*, p. 12 (Sept. 1996), <http://www.hrw.org/reports/pdfs/b/burma/burma969.pdf>; The Equal Rights Trust, *Burning Homes, Sinking Lives: A Situation Report On the Violence Against Stateless Rohingya in Myanmar and Their Refoulement From Bangladesh* (June 2012), <http://www.equalrightstrust.org/ertdocumentbank/The%20Equal%20Rights%20Trust%20-%20Burning%20Homes%20Sinking%20Lives.pdf>; Human Rights Watch, *All You Can Do Is Pray*, see above note 20, p. 53.

326 See, for example, The Sentinel Project, *Burma Risk Assessment*, pp. 13, 28-29 (Sept. 2013), <https://thesentinelproject.org/wp-content/uploads/2013/09/Risk-Assessment-Burma-September-2013.pdf>.

327 *Akayesu*, see above note 282, para. 597.

328 The prohibited act of deliberately inflicting conditions of life calculated to bring about the destruction of a group does not require evidence of actual destruction. Whether the perpetrators succeed in destroying the group, even in part, is immaterial. See *Attorney-General of the Government of Israel v. Eichmann*, 36 ILR 5 (District Court, Jerusalem), p. 340 (1968).

329 *Akayesu*, see above note 282, para. 505.

group. These methods can also involve “subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.”<sup>330</sup> Thus, acts inflicting conditions of life calculated to destroy the group in whole or in part can include acts of forcing people’s labor,<sup>331</sup> the “deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.”<sup>332</sup>

The expulsion of Rohingya from their homes into internally displaced persons (IDP) camps or out of the country and the subsequent denial of medical care, sanitation, food, and paid labor opportunities constitute inflicting conditions of life calculated to bring about Rohingyas’ destruction as a group. Violence and arson in Rakhine State have destroyed Rohingya homes and entire neighborhoods. Local Rakhine citizens perpetrated some of the destruction, but many Rohingya reported military personnel and police officers either watching or actively participating in setting Rohingya homes on fire or physically stopping Rohingya from extinguishing the fires.

Many of these Rohingya could not return to their neighborhoods for fear of being run out by Rakhine mobs or government forces. Rohingya reported that after the destruction of Rohingya homes, the Myanmar Army, the Myanmar Police Force, and NaSaKa lined the roads to direct them from their destroyed neighborhoods toward IDP camps. The government also refused to register displaced Rohingya as eligible for food supplies from U.N. and humanitarian agencies until the Rohingya relocated to the camps.

Journalists and human rights organizations have described the IDP camps where at least 140,000 Rohingya reside as unlivable ghettos.<sup>333</sup> Government forces highly regulate access to IDP camps around Sittwe.<sup>334</sup> Daily IDP camp reports from the Danish Refugee Council and Save the Children have recorded regular government failure to deliver adequate food rations to the

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330 *Ibid.*, para. 506.

331 Prosecutor v. Stakic, Case No. ICTY IT-97-24-T, Judgment, para. 517 (July 31, 2003) (including “excessive work or physical exertion” under the act).

332 International Criminal Court, *Elements of Crimes*, entered into force Sept. 9, 2002, ICC-ASP/1/3, p. 114.

333 Francis Wade, “Burma’s Rohingya Are Now Being Forced to Live in Squid Ghetts Watched by Guards,” *Time* (Feb. 4, 2014), <http://time.com/3982/rohingya-ghettos-of-burma>; Emanuel Stoakes, “Burma’s Rohingya Ghetts Broke My Heart,” *Vice* (Apr. 23, 2013), <http://www.vice.com/read/visiting-burmas-muslim-ghettos>.

334 European Commission on Humanitarian Aid and Civil Protection, *The Rohingya Crisis*, p. 2 (Apr. 2015), [http://ec.europa.eu/echo/files/aid/countries/factsheets/rohingya\\_en.pdf](http://ec.europa.eu/echo/files/aid/countries/factsheets/rohingya_en.pdf).

camps, lack of water, and lack of sanitation and medical care.<sup>335</sup> Myanmar security forces have prevented Rohingya from leaving the IDP camps to seek jobs, food, or medical assistance. In some remote camps, Rakhine civilians, with informal authority from the army and police, have prevented Rohingya from leaving the camps. Rohingya within these camps do not have access to the lands on which they traditionally lived and worked. Since 2012, many Rakhine employers have ended agreements with Rohingya to rent and work Rakhine land. Without access to their traditional land and employment opportunities or outside paid work, Rohingya have been unable to buy the necessary food or water to supplement their rations.

Rohingya living in northern Rakhine State who were not displaced by the violence in 2012 also suffer from conditions of life calculated to bring about their destruction. Rohingya in northern Rakhine State are not afforded freedom of movement. As a result, Rohingya must live and work within their villages, many of which lack sufficient food, clean drinking water, sanitation, and medical services. The conditions of life in northern Rakhine State thus parallel those in the IDP camps and are, in some cases, worse.

In northern Rakhine State, Myanmar security forces, including the NaSaKa, have deliberately inflicted conditions of life calculated to destroy Rohingya by forcing them into unpaid labor. The International Labour Organization (ILO) Convention Concerning Forced or Compulsory Labor (ILO Convention 29) defines forced labor as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”<sup>336</sup> The ILO definition distinguishes forced labor from substandard working conditions and low wages: Forced labor requires “menace of penalty” and “involuntariness.” In other words, the workers at issue must have been coerced to do work that they would not otherwise have performed.<sup>337</sup>

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335 Danish Refugee Council, Daily Record of Information from DRC Program Locations in Rakhine (Apr. 2014) (on file with Al Jazeera Investigative Unit); Save the Children, Daily Status Update (Key Rakhine Operational Areas) (Apr. 8, 2014) (on file with Al Jazeera Investigative Unit); Save the Children, Daily Status Update (Key Rakhine Operational Areas) (Apr. 1, 2014) (on file with Al Jazeera Investigative Unit).

336 Convention Concerning Forced or Compulsory Labor, adopted June 28, 1930, 39 U.N.T.S. 55, art. 2(1).

337 Joanna G. Sylwester, “Comment: Fishers of Men: The Neglected Effects of Environmental Depletion on Labor Trafficking in the Thai Fishing Industry,” *Pacific Rim Law and Policy Journal* v. 23, p. 423 (2014).

Since June 2012, the United Nations and its partner organizations have documented the NaSaKa and Myanmar security forces coercing Rohingya into sentry duty, portering, road maintenance, and other forms of manual labor and infrastructure-related work.<sup>338</sup> According to the U.S. State Department, Myanmar security forces have coerced Rohingya men and boys into labor through physical threats, intimidation, and violence.<sup>339</sup> Rohingya in northern Rakhine State have reported that Myanmar security forces engaged in an ongoing and widespread practice of forcing Rohingya to labor on their behalf.<sup>340</sup> The Myanmar security forces' practice of forcibly conscripting Rohingya constitutes the imposition of excessive work, one of the recognized conditions of life calculated to bring about its physical destruction in whole or in part.<sup>341</sup>

Whether in IDP camps or in northern Rakhine State, Rohingya face conditions of life, inflicted by Myanmar security forces and by local Rakhine officials and citizens, that are calculated to destroy them.

#### **4. IMPOSING MEASURES INTENDED TO PREVENT BIRTHS WITHIN THE GROUP**

Imposing measures intended to prevent births within the protected group constitutes another proscribed act of genocide under the Genocide Convention. In *Akayesu*, the ICTR specified that measures intended to prevent births include “forced birth control, separation of the sexes and prohibition of marriages.”<sup>342</sup> Qualifying measures can be “mental” as well as physical. The ICTR stated that “rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.”<sup>343</sup> The Convention does not require a determination that the measures to prevent births be “calculated” to bring about the destruction of the group in whole or in part; as long as the measures are intended to prevent births, they can be found to be ancillary to the genocidal plan.<sup>344</sup>

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338 See above Parts III.A, III.B.

339 United States Department of State, *Trafficking in Persons Report: Burma* (2014), <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226691.htm>.

340 Aubrey Belford & Soe Zeya Tun, “Forced Labor Shows Back-Breaking Lack of Reform in Myanmar Military,” *Reuters* (July 2, 2015), <http://www.reuters.com/article/2015/07/02/us-myanmar-rohingya-forcedlabour-idUSKCN0PC2L720150702>.

341 Stakic, see above note 331, para. 517.

342 Akayesu, see above note 282, para. 507.

343 *Ibid.*

344 Schabas, *Genocide in International Law*, see above note 277, p. 201.



The Myanmar government has imposed two types of measures designed to prevent Rohingya births: restrictions on Rohingya marriages and restrictions, applied only to Rohingya, on the number of children a family may have. Myanmar requires Rohingya to get state permission to marry. Rohingya couples must pay fees, and, often, bribes to obtain this permission. Many Rohingya cannot afford these fees. Getting permission to marry also requires Rohingya to violate tenets of their faith: Men must submit photos without beards and women, photos without their hijabs. Rohingya who cohabit without a marriage license may be arrested, with a possible punishment of ten years' imprisonment.

Since 2005, to be allowed to marry, Rohingya must agree to have no more than two children. Violations of the two-child policy can also result in ten-year prison sentences. Local authorities have adopted policies to force Rohingya women in hospitals to use pills and injections for birth control. At a September 2012 gathering, local leaders in Rakhine State adopted a resolution “[t]o lay down a rule to be controlled [sic] the birth rate of the Muslim Bengali community living in Arakan [Rakhine State].” In May 2015, Myanmar’s national government passed new restrictions on Rohingya marriages and births as part of a series of Protection of Race and Religion Protection Laws. The new legislation allowing the government to require a 36-month gap between births does not explicitly name the Rohingya. However, it lists the factors that lead to imposing a birth gap as “a high number of migrants in the area, a high population growth rate and a high birth rate,” all factors that leaders in Myanmar and Rakhine use to describe the Rohingya.

## **5. CONCLUSION ON THE “ACTS” ELEMENT**

Article II of the Genocide Convention explicitly sets forth several categories of conduct that comprise the “act” element of the crime of genocide. Each of the enumerated acts can be committed by commission or omission. Based on the evidence examined by the Lowenstein Clinic, the Myanmar government, military, police, and security forces have engaged in conduct that falls within the categories that the Convention specifies as constituting the “act” element of genocide. These actors have killed Rohingya, caused serious bodily and mental harm to Rohingya, deliberately inflicted conditions of life calculated to bring about the physical destruction of Rohingya, and imposed measures intended to prevent births of Rohingya. Substantial and consistent evidence suggests that the abuses against Rohingya fulfill the “act” element of the crime of genocide.

## D. The “Intent” Element of the Crime of Genocide

To be found guilty of the crime of genocide, perpetrators must not only have committed the proscribed acts; they must have had an intent to destroy, in whole or in part, a protected group.<sup>345</sup> Under the Genocide Convention, the intent must be specific; that is, it cannot be just a general intent to murder. To establish responsibility for genocide, in other words, the perpetrators must have performed one or more prohibited acts with an intent to destroy a group of people protected under the terms set out in the definition of the crime of genocide.

Tribunals have grappled with establishing the legal standard for genocidal intent. Unlike the Nazi regime, very few perpetrators of mass atrocities have left written reports or plans stating their intentions to eradicate enumerated groups. International tribunals have concluded that a perpetrator’s intent can be inferred through an examination of the totality of circumstances surrounding the commission of prohibited acts.<sup>346</sup> The Genocide Convention and the case law established by the ad hoc international criminal tribunals require a fact-driven inquiry to determine whether the element of specific intent to commit genocide has been met. The ICTY has held:

As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.<sup>347</sup>

Tribunals have found intent to commit genocide through evidence of a state plan or policy, a racist climate in public opinion, public speeches, and private meetings.<sup>348</sup> Tribunals have also found that the massive scale of prohibited acts against a protected group could itself demonstrate an intent to destroy a group.

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<sup>345</sup> Akayesu, *see above* note 282, para. 498 (“Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”).

<sup>346</sup> *Ibid.*, para. 523.

<sup>347</sup> Prosecutor v. Jelisić, Case No. ICTY IT-94-10-A, Judgment, para. 47 (July 5, 2001).

<sup>348</sup> Akayesu, *see above* note 282, para. 555; Prosecutor v. Niyitegeka, Case No. ICTR-96-14-T, para. 427 (May 16, 2003); Kayishema and Ruzindana, *see above* note 287, paras. 292-313, 531-40.

In *Akayesu*, the ICTR inferred intent from: “the general context of the perpetration of other culpable acts systematically directed against that same group, whether . . . committed by the same offender or by others”; “the scale of atrocities committed”; “the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups”; “the general political doctrine which gave rise to the acts”; “the repetition of destructive and discriminatory acts”; and “the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group—acts which are not in themselves covered by the list . . . but which are committed as part of the same pattern of conduct.”<sup>349</sup>

Similarly, in *Kayishema and Ruzindana*, the Trial Chamber of the ICTR found “the use of derogatory language toward members of the targeted group” a relevant indicator of intent.<sup>350</sup> These factors must not be understood to be a comprehensive or definitive list of required evidence of intent. The factors listed by the ICTR provide guidance for determining whether intent can be inferred. A finding of genocide does not require all identified factors for showing intent to be present, and, depending on the assessment of facts, a finding of any of these factors, alone or in a variety of combinations, can be sufficient to prove intent.

Viewed in light of the current law of genocide, including not only the Genocide Convention itself, but also its authoritative interpretation by the ad hoc international criminal tribunals, the evidence available supports a conclusion that the Myanmar government and local actors have acted with the intent to commit genocide against Rohingya Muslims in Rakhine State. This finding, while tentative without a thorough investigation, is based on evidence of pervasive, derogatory rhetoric against Muslims and specifically Rohingya Muslims; evidence that Rohingya are specifically targeted because of their group identity; government policies of birth and marriage restrictions directed toward Rohingya; government policies depriving Rohingya of necessary aid and resources; and evidence of the mass scale of atrocities perpetrated against Rohingya. Taken together, this evidence strongly suggests that the Myanmar government has acted with the requisite intent to have committed genocide.

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349 *Akayesu*, see above note 282, paras. 523-24.

350 Other relevant indicators included “the number of group members affected”; “the physical targeting of the group or their property”; “the weapons employed and the extent of bodily injury”; “the methodical way of planning”; “the systematic manner of killing”; and “the relative proportionate scale of the actual or attempted destruction of a group.” *Kayishema and Ruzindana*, see above note 287, paras. 93, 527.

## 1. ANTI-ROHINGYA AND ANTI-MUSLIM RHETORIC

High-ranking government officials, military officers, Buddhist monks, and local Rakhine have fostered and perpetuated anti-Rohingya sentiment.<sup>351</sup> Their rhetoric has dehumanized Rohingya, created a climate of ethnic hatred, and fueled violence targeted against the group. This anti-Rohingya climate, and the government's role in fostering it, constitutes a relevant factor for determining that the government of Myanmar and other actors perpetrated prohibited acts against Rohingya with genocidal intent.

Discriminatory and incendiary comments about Muslims and Rohingya are widespread in Myanmar. These comments spread the belief that Rohingya are an existential threat to Myanmar and should be removed from Rakhine State. Analyzing the scale and number of genocidal acts in the context of the larger public discourse about Rohingya strongly suggests that the acts of the Myanmar government and local Rakhine actors have likely been perpetrated with the intent to destroy the Rohingya group.

## 2. EVIDENCE INDICATING INTENT TO INFLICT CONDITIONS OF LIFE ON ROHINGYA CALCULATED TO BRING ABOUT THEIR PHYSICAL DESTRUCTION

Documents and the actions of the government and local parties attest to plans to restrict the growth of the Rohingya population and inflict conditions of life calculated to bring about the physical destruction of the Rohingya.

While Rohingya have been victims of human rights abuse in Rakhine State for several decades, the year 2012 marked a new level of violence and abuse toward Rohingya. Local monks encouraged policies that, if fully enacted, would result in the destruction of the Rohingya group. For example, the Rathedaung Monks' 12 Point Statement prevented Rohingya from supporting themselves and their families, using common forms of transportation to obtain much-needed medical and food supplies, and enlisting the help of aid organizations.<sup>352</sup> As a result of this plan, Rohingya were left with few means of survival.

In September 2012, a group of monks met in Rathedaung to formulate a set of resolutions regarding dealings with Rohingya. The group agreed to impose rules "control[ing] the birth rate of the Muslim Bengali community living in Arakan [Rakhine]," "remove some Bengali villages," and monitor "UN and INGOs activities in Rakhine State."<sup>353</sup> Buddhist monks formu-

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351 See above Part III.C, III.D.

352 Rathedaung Monks, 12 Point Statement, see above note 152.

353 Resolutions, Objections and Proposals Adopted at the Public Meeting Held in Rathedaung, Rakhine State (Sept. 29 - Oct. 5, 2012) (on file with Al Jazeera Investigative Unit).

lated these plans in response to their alleged fear that Rohingya were taking over Myanmar, like a “Banyan tree swallowing up the stupa . . . living on Rakhine land, drinking Rakhine water and taking refuge in the shadows of Rakhine, [] attempting to destroy the Rakhine race.”<sup>354</sup> The monks’ call for the imposition of harsh conditions of life, combined with rhetoric inciting fear of Rohingya, provides strong evidence of an intent to destroy the Rohingya group.

Local Buddhist leaders also discouraged humanitarian aid from reaching Rohingya. In October 2012, the All-Arakanese Monks Solidarity Conference declared its opposition to all NGOs “that are not under the U.N. and not in the interest of local population.”<sup>355</sup> In Rakhine State, a pamphlet was distributed that listed the NGOs operating in the state, warned Rakhine citizens to beware of NGOs, and labelled anyone “working for the development of Kalars as traitors and thereby our enemy.”<sup>356</sup> The deliberate blocking of humanitarian assistance to Rohingya, particularly considered alongside persistent anti-Rohingya propaganda, evinces an intent to destroy the group. To purposefully prevent humanitarian aid from reaching Rohingya living in dire circumstances in IDP camps and isolated villages is to seek their destruction.

The government’s actions and inactions toward displaced Rohingya demonstrate a practice of creating conditions intended to bring about the Rohingyas’ destruction. The government has pursued a policy of preventing displaced Rohingya from returning to their homes. These Rohingya are forced to live in designated IDP camps. As discussed above, the conditions in the IDP camp are dire. Rohingya are confined to the camps and are unable to leave freely to obtain necessary medical care, jobs, and food. Also, the government restricts the provision of food and humanitarian aid to these camps. The situation in the IDP camps has been worsening and increasing numbers of Rohingya have been dying from malnutrition, disease, and further violence. An unreleased U.N. Report also stated, “Inability to access healthcare [in IDP camps] is a direct cause of the very high incidence of maternal mortality and child mortality among Rohingya families.”<sup>357</sup> By placing Rohingya in IDP camps, preventing them access to food, medical supplies and healthcare, and opportunities to gain a livelihood, the government has pursued a policy that would likely result in the destruction of the Rohingyas’ group.

Many Rohingya have found life in IDP camps so unbearable that they have fled Myanmar by boat. Rohingya have resorted to human trafficking and life-threatening conditions on boats to escape the IDP camps. Government actors are reported to have forced at least some Rohingya

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354 Young Monks Association Sittwe (received July 2012) (on file with Fortify Rights).

355 Conclusions from the All-Arakanese Monks’ Solidarity Conference, Held at Dakaung Monastery, Sittwe (Oct. 18, 2012) (on file with Fortify Rights).

356 Wuntharnu Ethnic People, “Beware” Pamphlet, *see above* note 166.

357 Internal United Nations Correspondence (Apr. 2013) (on file with Fortify Rights).

to board these boats and, in some cases, dragged boats out to international waters.<sup>358</sup> The journey to neighboring countries by boat is treacherous and carries a real risk of drowning or being stranded at sea or, if they survive the journey, facing harsh treatment at the hands of human traffickers.<sup>359</sup> The state's willingness to push Rohingya out to sea, where they face a severe risk of death, indicates the state's intent to inflict conditions of life likely to result in the Rohingyas' destruction.

The policies and actions of the Myanmar government and local Rakhine actors have predictably resulted in the destruction in part of the Rohingya group. To meet the intent requirement, it is enough that perpetrators knew that their acts would likely result in the destruction of the group in whole or in part.<sup>360</sup> Explaining the knowledge requirement, the ICTR stated, "The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group."<sup>361</sup> Rohingyas' unbearable living conditions are well documented and well publicized. The predictable outcome of forced segregation, prevention of mobility, starvation, and the cutting off of health care, medical supplies, and humanitarian assistance, is death. By placing Rohingya in IDP camps and pursuing policies that have economically, socially, and politically isolated Rohingya, the Myanmar government and local actors have the requisite knowledge that their actions would likely lead to the Rohingyas' destruction in whole or in part.

### 3. MASS SCALE OF ACTS TARGETING ROHINGYA

The mass scale of the atrocities perpetrated specifically against Rohingya also provides strong evidence that the Myanmar government has acted with genocidal intent toward the group. Throughout the 2012 violence, local villagers, NaSaKa, police, and military targeted Rohingya. Although the Rakhine State is majority Buddhist, Rohingya were the victims of the bulk of the violence.

Moreover, the sheer numbers of Rohingya affected by violence and abuses perpetrated by Myanmar security forces and local Buddhist citizens support the finding of genocidal intent. In *Jelsic*, the ICTY Trial Chamber held that to find genocidal intent, the intention to destroy

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358 Fortify Rights, Press Release, *Myanmar: Authorities Complicit in Rohingya Trafficking, Smuggling* (Nov. 7, 2014), <http://www.fortifyrights.org/publication-20141107.html>.

359 Human Rights Watch, *Southeast Asia: Accounts from Rohingya Boat People* (May 27, 2015), <https://www.hrw.org/news/2015/05/27/southeast-asia-accounts-rohingya-boat-people>.

360 Prosecutor v. Kristic, Case No. ICTY-IT-98-33, Judgment, paras. 569 (Aug. 2, 2001) (finding it persuasive that the defendant "consciously desired" the destruction of the group or "knew his acts were destroying" the group).

361 Akayesu, *see above* note 282, para. 519.

must target a substantial part of the group.<sup>362</sup> Tribunals have, appropriately, not specified what number or percentage is required to satisfy the “substantial part” requirement. Nevertheless, the violence against Rohingya has reached a scale that is consistent with a conclusion that a substantial part of the group has been targeted. Before 2012, there were an estimated 1.08 million Rohingya living in the Rakhine State. Casualty recording in Myanmar’s Rakhine State has been inhibited by travel restrictions imposed by the Myanmar government, restrictions on freedom of movement in the state, and the disposal of bodies by Myanmar authorities, in some cases into mass graves that have not been exhumed. Large numbers of eyewitnesses and victims of attacks have fled, which has also inhibited casualty recording. During the 2012 violence, the Myanmar Army, Myanmar Police Force, NaSaKa, and Rakhine citizens killed several hundred Rohingya men, women, and children in targeted attacks, according to U.N. data<sup>363</sup> and information provided by human rights organizations, none of which are complete. In some villages, assailants hacked dozens of children to death and threw their bodies into fires.<sup>364</sup> Further, uncounted deaths have resulted from avoidable deprivation of health care and humanitarian aid in IDP camps and in communities of non-displaced Rohingya.<sup>365</sup> Since the 2012 violence, more than 160,000 Rohingya men, women, and children are estimated to have fled Myanmar.<sup>366</sup> An unknown number of these asylum seekers have died on the journey, both at sea and at the hands of transnational criminal syndicates engaged in human trafficking. Amnesty International estimates that thousands of Rohingya may have died at sea in 2015 alone.<sup>367</sup> Hundreds, if not more than one thousand, Rohingya may have been buried in mass graves in Thailand

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362 Prosecutor v. Jelusic, *see above* note 2, para. 82; *see also* Prosecutor v. Krstic, *see above* note 279, para. 634 (“[A]n intent to destroy only part of the group must nevertheless concern a substantial part thereof, either numerically or qualitatively.”).

363 Internal Unpublished U.N. Report (April 2013) (on file with Fortify Rights).

364 For instance, on October 23, 2012, in Yan Thei village, Mrauk Oo Township, Rakhine State, an estimated 70 Rohingya were killed in a day-long massacre. This included 28 children who were hacked to death, 13 of them under the age of 5. Human Rights Watch, *End ‘Ethnic Cleansing’ of Rohingya Muslims*, *see above* note 145.

365 U.N. High Commissioner for Refugees, Myanmar Information Management Unit, et al., *Myanmar: Rakhine, CCCM Dashboard* (Oct. 1, 2015), <http://reliefweb.int/report/myanmar/myanmar-rakhine-cccm-dashboard-1-oct-2015>.

366 UNHCR has stated that more than 130,000 Rohingya departed the Myanmar-Bangladesh border area from January 2012 to 2014, and 31,000 in the first half of 2015. *See* U.N. High Commissioner for Refugees Regional Office for Southeast Asia, *Irregular Maritime Movements in Southeast Asia—2014* (April 2015), <http://story-builder.jumpstart.ge/en/unhcr-imm>; U.N. High Commissioner for Refugees, *Mixed Maritime Movements* (April - June 2015), <http://www.unhcr.org/53f1c5fc9.pdf>.

367 Amnesty International, *Southeast Asia: Persecuted Rohingya Refugees From Myanmar Suffer Horrific Abuses at Sea* (Oct. 21, 2015), <https://www.amnesty.org/en/latest/news/2015/10/southeast-asia-persecuted-rohingya-refugees-from-myanmar-suffer-horrific-abuses-at-sea/>; Steve Herman, “Rights Group: Thousands of Rohingya May Have Perished At Sea This Year,” *Voice of America* (Oct. 21, 2015), <http://www.voanews.com/content/rights-group-thousands-rohingya-perished-sea/3016384.html>.

and Malaysia.<sup>368</sup> Moreover, there are, according to the government of Bangladesh, between 300,000 and 500,000 stateless Rohingya in Bangladesh most of whom fled from Myanmar or were born stateless in Bangladesh.<sup>369</sup> The Myanmar government has certainly been aware of Bangladesh's denial of adequate aid to Rohingya. The massive scale of the persecution, attacks, killing, and intentional displacement of Rohingya demonstrates intent to destroy the group, in whole or in part.

#### 4. CONCLUSION ON THE "INTENT" ELEMENT

Although it is difficult to conclude that any single act or set of acts against the Rohingya has constituted genocide, there can be little doubt that Rohingya constitute a group under the definition of genocide and that the systematic pattern of acts targeting Rohingya for harm has led to the destruction of a substantial part of the group. The inevitability of this result was obvious, and the Myanmar government has not taken measures to prevent or stop these destructive acts. This pattern of actions and inactions—of acts and omissions—in the context of widespread anti-Rohingya rhetoric, including from official government sources, along with policies that have clearly created conditions of life calculated to bring about Rohingyas' destruction, tend to show the intent required for finding genocide. Intent must not be confused with motive. When determining whether genocide has occurred, international tribunals have distinguished between motive and intent. In cases of genocide, motive, or "the reason why the accused sought to destroy the victim group[,] has no bearing on guilt."<sup>370</sup> For example, the International Commission of Inquiry on Darfur has distinguished between requisite intent and motive. In its report, the Commission stated:

Of course, this special intent must not be confused with motive, namely the particular reason that may induce a person to engage in criminal conduct. For instance, in the case of genocide a person intending to murder a set of persons belonging to a protected group, with the specific intent of destroying the group (in whole or in part), may be motivated, for example, by the desire to appropriate the goods belonging to that group or set of persons, or by the urge to take revenge for prior attacks by members of that groups, or by the desire to please his superiors who despise that group. From the viewpoint of criminal law, what

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368 Emanuel Stoakes, "Thailand Human Trafficking Death Toll Far Greater Than Feared, Claims Rights Group," *The Guardian* (May 6, 2015), <http://www.theguardian.com/global-development/2015/may/06/thailand-human-trafficking-mass-grave-burma-rohingya-people>.

369 U.N. High Commissioner for Refugees, *Bangladesh Factsheet* (Aug. 2015), <http://www.unhcr.org/50001ae09.pdf>.

370 *Prosecutor v. Stakic*, Case No. ICTY-IT-97-24-T, Judgment, para. 45 (July 31, 2003); *see also Jelusic*, *see above* note 2, para. 49 (noting the "irrelevance" of motive to criminal intent); *Prosecutor v. Tadic*, Case No.: ICTY-IT-95-1-A, Judgment, para. 269 (July 15, 1999); *Kayishema and Ruzindana*, *see above* note 287, para. 161.



matters is not the motive, but rather whether or not there exists the requisite special intent to destroy a group.<sup>371</sup>

A perpetrator may be motivated by any number of unrelated goals, such as political or economic gains, tactical military concerns, or desire for a piece of land, yet still fulfill the Genocide Convention's intent requirement.<sup>372</sup> In Myanmar, the government and local Rakhine actors may have a variety of motives for their actions, including territorial desire and racial hatred. However, if their actions—including forcibly displacing Rohingya to the dire circumstances of IDP camps and pushing them out to sea to face dangerous and often lethal journeys—intentionally or knowingly bring about the destruction of a substantial part of the Rohingya population, these actors may be found to have acted with the intent to commit genocide.

The available evidence demonstrating official and other widespread anti-Rohingya rhetoric, acts that have inflicted conditions of life on Rohingya that have contributed to their physical destruction, and a large scale of discriminatory and violent acts targeting Rohingya, taken together, support a conclusion that the Myanmar government has acted with the intent required for a finding of genocide against the Rohingya.<sup>373</sup>

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371 International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the U.N. Secretary-General Pursuant to S.C. Res. 1564*, para. 493 (Sept. 18, 2004).

372 “[The Genocide Convention] does not prohibit a conviction for genocide in a case in which the perpetrator was also driven by other motivations that are legally irrelevant in this context.” *Niyitegeka v. Prosecutor*, Case No. ICTR-96-14-A, Judgment, para. 49 (July 9, 2004).

373 See Jane Perlez, “Ban on Doctors’ Group Imperils Muslim Minority in Myanmar,” *see above* note 233; “Burma Camp for Rohingyas ‘Dire’ – Valerie Amos,” *BBC News*, *see above* note 221.

## V. STATE RESPONSIBILITY FOR THE CRIME OF GENOCIDE

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Under the Genocide Convention, a state itself may be responsible for committing any of the punishable acts enumerated in Article III:

- a) Genocide;
- b) Conspiracy to commit genocide;
- c) Direct and public incitement to commit genocide;
- d) Attempt to commit genocide;
- e) Complicity in genocide.

A state may also be responsible for any of these punishable acts committed by its state organs or by non-state actors who are under the direction and control of the state. The state of Myanmar may be responsible for acts committed against the Rohingya by the security forces, including the Myanmar Army, Myanmar Police Force, and NaSaKa.

Furthermore, the state of Myanmar may be responsible under the Convention for failing to prevent genocide from occurring within its borders. Article I of the Convention obligates states to prevent genocide and, if states fail to do so, to punish individual perpetrators. The International Court of Justice (ICJ) has held that a state has a duty to take all measures within its capacity to prevent genocidal acts.<sup>374</sup> Therefore, even if the state is not directly responsible for committing genocide, it may nevertheless be responsible for failing to prevent genocide. If genocide has been committed against the Rohingya, the state of Myanmar may be responsible for failing to prevent it.

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<sup>374</sup> Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007 I.C.J. 43, paras. 165, 431 (Feb. 26) [Bosnia v. Serbia].

## A. State Responsibility for Acts of State Organs

The state of Myanmar may be held responsible for acts of genocide committed against Rohingya by security forces. States are responsible for acts of genocide committed by its state organs. According to the International Law Commission (ILC), state organs include “any person or entity which has that status in accordance with the internal law of the State.”<sup>375</sup> Customary international law on state responsibility, codified in the ILC’s Draft Articles on State Responsibility for Internationally Wrongful Acts, specifies that the conduct of a state organ is attributable to the state. Thus, a state is responsible if the actions of a state organ constitute prohibited conduct, such as genocide.<sup>376</sup>

The Myanmar Army, the Myanmar Police Force, and the NaSaKa (when it existed) are components of Myanmar’s security forces, so these entities are (or were) state organs. Since the 1962 military coup, Myanmar’s Army, called the Tatmadaw, has been the “primary coercive arm of Myanmar’s central government.”<sup>377</sup> According to Human Rights Watch, the NaSaKa, comprised of customs, immigration, military, and police personnel, had “law enforcement, military, and administrative authority in the predominantly Muslim townships” of northern Rakhine State.<sup>378</sup> President Thein Sein unilaterally dissolved the NaSaKa in 2013, demonstrating the central government’s control over the NaSaKa. Since the Myanmar Army, the Myanmar Police force, and the NaSaKa are state organs, their acts are attributable to the state of Myanmar.

The United Nations and human rights organizations have reported that members of the NaSaKa, in particular, have committed atrocities against Rohingya. On March 6, 2013, the U.N. Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, urged the Myanmar national government to investigate and hold accountable the NaSaKa for committing human rights abuses against Rohingya.<sup>379</sup> He stated that he had “received allegations of the most serious of human rights violations involving NaSaKa, particularly against the local Rohingya population, including extrajudicial killings, arbitrary

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375 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-Third Session, U.N. Doc. A/56/10, art. IV (2001) [Articles on State Responsibility].

376 *Ibid.*, p. 202.

377 Andrew Selth, “Myanmar’s Police,” *see above* note 44, pp. 53-54.

378 Human Rights Watch, *The Government Could Have Stopped This*, *see above* note 23, p. 16.

379 U.N. Office of the High Commission for Human Rights, *Myanmar: UN Expert Greets Abolition of Notorious Border Security Force in Rakhine State and Calls for Accountability* (June 16, 2013), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13542&>.

arrest and detention, and torture in detention.”<sup>380</sup> His report to the Human Rights Council stated:

Throughout his mandate, the Special Rapporteur has received a large number of allegations of human rights violations committed by Nasaka. In view of the ongoing seriousness of these allegations, particularly against the Muslim community during the recent violence, he urges the Government to fundamentally reform this border security force and, in the meantime, suspend all of Nasaka’s operations in Rakhine State.<sup>381</sup>

The state is responsible, under Article I of the Genocide Convention, for punishing perpetrators of genocide. Thus, Myanmar is directly responsible for the conduct of the NaSaKa and for failing to punish members of the NaSaKa who have committed acts of genocide.

## **B. State Responsibility for Acts of Non-State Actors**

States may be held liable for the acts of genocide committed by non-state actors. According to the ILC, the conduct of non-state actors may be attributed to the state “if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”<sup>382</sup> In *Bosnia v. Serbia*, the International Court of Justice held that non-state actors must “lack autonomy” and be “completely dependent” on the state in order for the state to be responsible.<sup>383</sup> The standard is high for proving that non-state actors such as local Rakhine and local monks are under sufficient direction or control of the state. Nevertheless, the state of Myanmar has a duty to prevent genocide and punish all perpetrators and can be found responsible for failing to prevent genocide even if non-state actors’ relevant conduct cannot be attributed directly to the state.

## **C. State Duty to Prevent Genocide**

The state of Myanmar has a duty to prevent genocide from occurring within its borders. Customary international law and Article I of the Genocide Convention obligate states to prevent genocide. Article I provides: “The Contracting Parties confirm that genocide, whether commit-

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380 *Ibid.*

381 Special Rapporteur on the Situation of Human Rights in Myanmar, *U.N. Report of the U.N. Special Rapporteur on the Situation of Human Rights in Myanmar*, Tomás Ojea Quintana, U.N. Doc. A/HRC/22/58, para. 54 (Mar. 6, 2013), [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.58\\_AUV.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.58_AUV.pdf).

382 ILC, Articles on State Responsibility, *see above* note 375, art. 8.

383 *Bosnia v. Serbia*, *see above* note 374, para. 431.

ted in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”<sup>384</sup> Thus, states have an obligation to implement suitable measures to prevent genocide.<sup>385</sup> The International Court of Justice has held that state responsibility to prevent genocide comes into play when the state at issue fails to take all measures within its power to prevent genocidal acts.<sup>386</sup> The Court also declared that a state’s obligation to prevent genocide arises when the State “learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.”<sup>387</sup>

The International Court of Justice distinguished the concept of state responsibility to prevent genocide from the crime of complicity in genocide established by Article III of the Genocide Convention.<sup>388</sup> Complicity entails aiding or assisting perpetrators with the specific knowledge that the perpetrators are committing genocide or are likely to commit genocide.<sup>389</sup> To be complicit in genocide, a state must know that it is assisting actors who have the requisite intent. In contrast, a breach of the duty to prevent genocide results from a state failing to act and requires only the “serious danger that the acts of genocide would be committed.”<sup>390</sup> The state of Myanmar may be responsible for failing to prevent genocide, and government actors may be complicit in genocide if they knowingly assisted individuals committing acts of genocide.

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384 Genocide Convention, *see above* note 1, art. I.

385 *Bosnia v. Serbia*, *see above* note 374, paras. 165, 431.

386 *Ibid.*, para. 430.

387 *Ibid.*, para. 431.

388 *Ibid.*, para. 432.

389 *Ibid.*, para. 419.

390 *Ibid.*, para. 432.

## VI. CONCLUSION AND RECOMMENDATION

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The Rohingya Muslims in Myanmar's Rakhine State have suffered serious and persistent human rights abuses. Myanmar authorities, security forces, police, and local Rakhine actors have engaged in widespread violence, acts of torture, arbitrary detention, rape, and other crimes causing serious physical and mental harm. The scale of these atrocities has increased precipitously since 2012. In the wake of the conflicts in 2012, the majority of Myanmar's Rohingya have been confined to villages in northern Rakhine State or internally displaced persons camps. The conditions in both northern Rakhine State and the IDP camps are dire: Rohingya lack freedom of movement, access to food, clean drinking water, sanitation, medical care, work opportunities, and education. They live in conditions that appear to have been calculated to bring about their destruction. The acts committed against the Rohingya, individually and collectively, meet the criteria for finding acts enumerated in the Genocide Convention and have been perpetrated against a protected group.

Whether the acts committed against Rohingya constitute genocide turns on the question of whether they were committed with the requisite intent to destroy, in whole or in part, the Rohingya group. Since few perpetrators of genocide express their intent in discoverable records, intent must be inferred from the totality of the perpetrators' acts, including the context in which they were committed. There is strong evidence to justify such an inference of intent to destroy the Rohingya. This paper, therefore, finds strong evidence that the abuses against the Rohingya satisfy the three elements of genocide: that Rohingya are a group as contemplated by the Genocide Convention; that genocidal acts have been committed against Rohingya; and that such acts have been committed with the intent to destroy the Rohingya, in whole or in part. If a full and impartial investigation by an independent international authority substantiates and augments the evidence available to the Lowenstein Clinic for its analysis of the situation of the Rohingya, such a commission would likely conclude that genocide has been or is being committed against the Rohingya Muslims in Myanmar's Rakhine State.

In light of this conclusion, the United Nations should adopt a resolution to establish a commission of inquiry on the human rights situation in Rakhine State, Myanmar. Previous commissions of inquiry have been established by various U.N. bodies and actors.<sup>391</sup> However, in the current circumstances, the Human Rights Council would be an ideal body

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<sup>391</sup> Commissions of inquiry have been established by the Security Council, the General Assembly, the Human Rights Council, its predecessor, the Commission on Human Rights, the Secretary-General, and the High Commissioner for Human Rights. U.N. Office of the High Commissioner for Human Rights, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law*, p. 2 (2015), [http://www.ohchr.org/Documents/Publications/CoI\\_Guidance\\_and\\_Practice.pdf](http://www.ohchr.org/Documents/Publications/CoI_Guidance_and_Practice.pdf).

for establishing such a commission. The mandate of the Human Rights Council includes addressing “situations of violations of human rights, including gross and systematic violations” and “making recommendations thereon.”<sup>392</sup>

The Human Rights Council should adopt a resolution that mandates the commission of inquiry to conduct an urgent, comprehensive, and independent investigation of the widespread and systematic abuses committed against Rohingya. The commission should be tasked with establishing the facts and circumstances that, taken as a whole, may indicate that genocide has occurred or is occurring. The mandate should further task the commission, where possible, with identifying the perpetrators responsible for such crimes. Establishing the commission will allow for a thorough, independent investigation into the human rights situation in Rakhine State. The commission would have the institutional capacity and authority to gather the information needed to determine whether genocide has been committed against the Rohingya, particularly whether the element of intent has been satisfied. It would also have the authority to respond to and recommend institutional action to prevent further acts of genocide.

The commission should endeavor to complete four main tasks: 1) investigate reports of violations, by all parties, of international human rights and international criminal law in Rakhine State; 2) determine whether or not acts of genocide have occurred; 3) identify the perpetrators of violations of international human rights and international criminal law in Rakhine State; and 4) suggest means of ensuring that perpetrators are held accountable. Although the commission should evaluate all events relevant to the human rights situation in Rakhine State, including human rights violations against Rakhine citizens, it should focus on the incidents that have occurred since the start of the unrest in Rakhine State in June 2012. To fulfill its four main tasks, the commission should hold hearings, interview victims, survivors, and other witnesses, and gather information from a wide array of sources. Professional investigators and analysts should support the commission in its investigation. The commission should then report its findings to the Human Rights Council within a specified and urgent timeframe. An independent commission of inquiry, with the legitimacy conferred by a U.N. mandate and adequate power to investigate, can determine authoritatively whether human rights violations against Rohingya in Rakhine State constitute genocide.

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<sup>392</sup> U.N. General Assembly, *Resolution Establishing U.N. Human Rights Council*, U.N. Doc. A/RES/60/251 (Mar. 15, 2006), para. 3.



**Muslim-owned homes and businesses burn, Narzi Quarter, Sittwe, June 2012. State security forces opened fire and killed Rohingya who attempted to extinguish fires, according to Fortify Rights. Targeted arson attacks, in some cases in pre-dawn raids, left more than 140,000 Rohingya homeless.**

© Private 2012



**Myanmar police patrol areas around Sittwe, Rakhine State, during the 2012 violence. Police and army killed hundreds of Rohingya men, women, and children in June and October 2012; many were buried in mass graves. © Private 2012**





An officer in the Myanmar Police Force aims his weapon at street-level during violence in Sittwe, Rakhine State, June 2012. Despite evidence of widespread killings, the government has denied any wrongdoing. No soldiers or police have been held accountable for killings or other abuses. © Private 2012

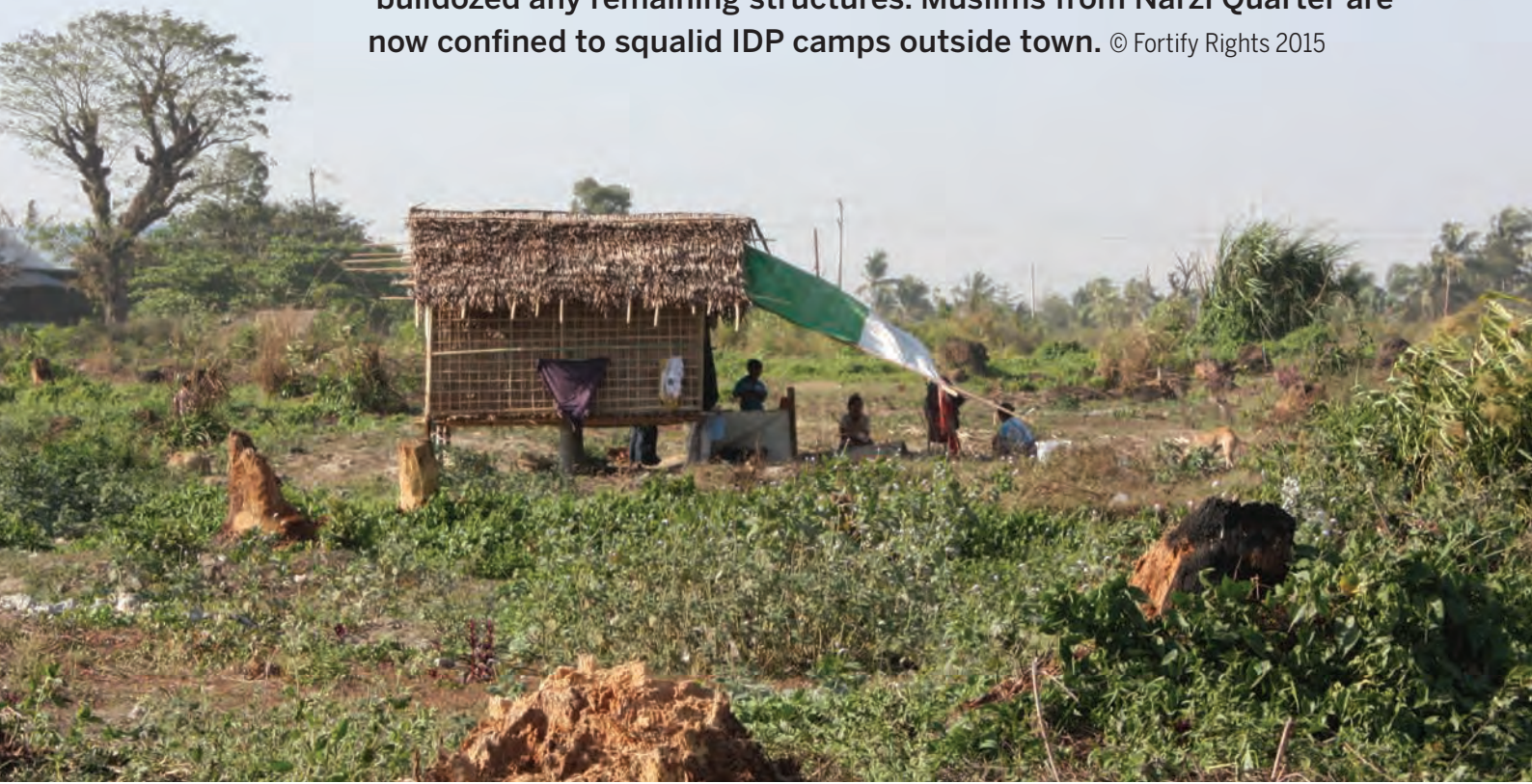


The aftermath of targeted anti-Rohingya attacks, Sittwe Township, 2012. In June and October 2012, Rohingya villages were burned to the ground in 13 of 17 townships in Rakhine State. Myanmar authorities bulldozed homes that remained standing, and dozens of mosques. © Private 2012

**Rohingya residents of Narzi Quarter, Sittwe Township, flee toward IDP camps from which the government does not permit them to leave. © Private 2012**




**A lone Rakhine Buddhist family in Narzi Quarter, the former economic center of Sittwe, previously home to 10,000 Muslims. Rakhine citizens and state security forces razed Narzi in 2012, and the government bulldozed any remaining structures. Muslims from Narzi Quarter are now confined to squalid IDP camps outside town. © Fortify Rights 2015**




**A makeshift seaside camp of Rohingya, Sittwe Township, Myanmar, 2015. Thousands of displaced Rohingya are estimated to be “unregistered” by the government and thus receive no humanitarian aid. © Steve Gumaer/PRAD 2015**



A photograph showing two young boys walking along a dirt path in an IDP camp. The path is littered with trash and runs alongside a raised earthen embankment. In the background, there are several makeshift tents and structures, some with tarps, situated under the shade of palm trees. The ground is dry and dusty, and the overall environment appears to be a makeshift settlement.

Two Rohingya boys walk alongside an IDP camp located along Myanmar's western shore in Sittwe Township. Annual cyclones ravage the coastline of Rakhine State, putting these ill-equipped camps at grave risk. © Fortify Rights 2015

A close-up photograph of a hand holding a white identification card. The card is resting on a dark, textured wooden surface. The card has a small blue square in the top left corner and contains text in both Burmese and English. The text is somewhat blurry but appears to be official documentation.

A Rohingya man shows Fortify Rights his “white card”—the only identification most Rohingya have, Tandoli Village, 2015. President Thein Sein revoked Rohingya white cards in 2015, denying them the right to vote in upcoming elections. The Government of Myanmar is coercing Rohingya to disavow their ethnic identity and identify as “Bengali” in exchange for new cards that confer no rights. © Fortify Rights 2015.

**A lone Rohingya woman stands in the rain in a squalid camp for the displaced, Rakhine State, 2015. During heavy rains from August to October, water levels rise within the camps. © Steve Gumaer/PRAD 2015**



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