



2018

Myanmar's Democratic Transition: Opportunity for Transitional Justice to Address the Persecution of the Rohingya

Shatti Hoque

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/eilr>

Recommended Citation

Shatti Hoque, *Myanmar's Democratic Transition: Opportunity for Transitional Justice to Address the Persecution of the Rohingya*, 32 Emory Int'l L. Rev. 551 (2018).

Available at: <https://scholarlycommons.law.emory.edu/eilr/vol32/iss4/3>

This Comment is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory International Law Review by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

MYANMAR'S DEMOCRATIC TRANSITION: OPPORTUNITY FOR TRANSITIONAL JUSTICE TO ADDRESS THE PERSECUTION OF THE ROHINGYA

INTRODUCTION

Myanmar¹ elected the National League for Democracy into power in November 2015,² ushering in its first democratically elected government since 1962.³ The much-awaited political change produced an end to years of economic sanctions;⁴ the development of new international relations, particularly with the United States;⁵ and the hope that the former regime's human rights abuses will be adequately addressed and alleviated.⁶ Yet, the Rohingya, a stateless Muslim ethnic group residing in Rakhine State in western Myanmar⁷ and considered the world's most persecuted ethnic minority,⁸ continue to face violence that human rights groups say amounts to ethnic cleansing⁹ and crimes against humanity.¹⁰ The Rohingya that have not been

¹ This Comment uses Myanmar because it is what the country's government officially uses. In 1989, the ruling military junta changed the name of the country from Burma to Myanmar. Despite the official change, people within the country and abroad tend to use both names, sometimes choosing one over the other for political reasons. *Should You Say Myanmar or Burma?*, ECONOMIST (Dec. 20, 2016), <https://www.economist.com/blogs/economist-explains/2016/12/economist-explains-19>. For example, the U.S. State Department has long used Burma "out of support for the democratic opposition" and continues to use it on its website. Mark Memmott, *Why Burma? Why Myanmar? Why Both?*, NPR (Dec. 2, 2011), <https://www.npr.org/sections/thetwo-way/2011/12/02/143049567/why-burma-why-myanmar-why-both>; see also *U.S. Relations with Burma*, U.S. DEP'T STATE (Jan. 27, 2017), <https://www.state.gov/r/pa/ei/bgn/35910.htm>.

² Marina Koren, *A Historic Day in Burma*, THE ATLANTIC (Feb. 1, 2016), <http://www.theatlantic.com/international/archive/2016/02/burma-myanmar-parliament-session/458739/>.

³ *Id.*

⁴ Julie Hirschfield Davis, *Obama Pledges to Lift All Sanctions Against Myanmar*, N.Y. TIMES (Sept. 14, 2016), <http://www.nytimes.com/2016/09/15/world/asia/myanmar-obama.html>.

⁵ Grace Aranow, *President Obama and Aung San Suu Kyi Celebrate Progress in Burma*, THE WHITE HOUSE (Sept. 15, 2016), <https://www.whitehouse.gov/blog/2016/09/15/president-obama-and-daw-aung-san-suu-kyi-celebrate-burmese-progress>.

⁶ Stéphanie Giry, *For Myanmar's Leader, More Power, but More Expectations, Too*, N.Y. TIMES (Sept. 13, 2016), <http://www.nytimes.com/2016/09/14/world/asia/myanmar-aung-san-suu-kyi-sanctions.html>.

⁷ Anealla Safdar, *Who Are the Rohingya?*, AL JAZEERA (Oct. 28, 2015), <http://www.aljazeera.com/indepth/features/2015/10/rohingya-151024202611276.html>.

⁸ *The Rohingyas: The Most Persecuted People on Earth?*, ECONOMIST (June 13, 2015), <http://www.economist.com/news/asia/21654124-myanmars-muslim-minority-have-been-attacked-impunity-stripped-vote-and-driven>; see also *Who Are the Rohingya and What Is Happening in Myanmar?*, AMNESTY INT'L (Sept. 26, 2017), <https://www.amnesty.org.au/who-are-the-rohingya-refugees/>.

⁹ Megan Specia, *The Rohingya in Myanmar: How Years of Strife Grew into a Crisis*, N.Y. TIMES (Sept. 13, 2017), <https://www.nytimes.com/2017/09/13/world/asia/myanmar-rohingya-muslim.html>.

¹⁰ AMNESTY INT'L, "MY WORLD IS FINISHED" - ROHINGYA TARGETED IN CRIMES AGAINST HUMANITY IN MYANMAR 6 (2017), <https://www.amnestyusa.org/wp-content/uploads/2017/10/Amnesty-My-World-Is-Finished-Myanmar-18.10.20171.pdf> [hereinafter MY WORLD IS FINISHED].

forced to flee and remain in Myanmar continue to face discrimination and human rights violations, including, but not limited to, the continuous deprivation of citizenship, severe restrictions on their movement, limited access to life-saving health care, and denial of education and equal employment opportunities.¹¹

Aung San Suu Kyi, a member of the National League for Democracy and the de facto leader of Myanmar,¹² has been at the forefront of the international attention given to the Rohingya. One of her early actions as State Counsellor—a request to the U.S. ambassador to Myanmar not to use the term “Rohingya” to describe the persecuted Muslim community—aligned with the military regime’s refusal to acknowledge the term of identification and drew criticism from within the Rohingya community and abroad.¹³ Furthermore, violence has continued to plague the Rohingya notwithstanding Aung San Suu Kyi’s new leadership. In late August 2017, the Myanmar military launched an attack on the Rohingya population as a whole in northern Rakhine State, in response to an attack by the Arakan Rohingya Salvation Army on thirty security force outposts.¹⁴ The military “killed at least hundreds of Rohingya men, women, and children, raped and perpetrated other forms of sexual violence on Rohingya women and girls, and carried out organized and targeted burning of entire Rohingya villages.”¹⁵ As a result of the violence, over half a million refugees fled into neighboring Bangladesh over the course of only eight weeks.¹⁶

Long considered a widely respected international human rights icon, Aung San Suu Kyi’s response—or lack thereof—to the Rohingya crisis has dramatically tarnished her reputation.¹⁷ World leaders and human rights

¹¹ AMNESTY INT’L, ANNUAL REPORT: MYANMAR 2015/2016, <http://www.burmalibrary.org/docs21/AI-2016-02-23-AP-Myanmar.pdf> (last visited Feb. 16, 2018).

¹² *Profile: Aung San Suu Kyi*, BBC NEWS (Dec. 5, 2016), <http://www.bbc.com/news/world-asia-pacific-11685977>. Aung San Suu Kyi’s official title is State Counsellor, a position the National League for Democracy (NLD) specifically created for her to counteract a provision in Myanmar’s Constitution that bars those whose children have foreign citizenship from becoming president. Liam Cochrane, *Aung Saan Suu Kyi to Become ‘State Counsellor’ of Myanmar*, ABC NEWS (Apr. 5, 2016), <http://www.abc.net.au/news/2016-04-05/aung-san-suu-kyi-to-become-state-counsellor/7301994>.

¹³ Richard C. Paddock, *Aung San Suu Kyi Asks U.S. Not to Refer to ‘Rohingya’*, N.Y. TIMES (May 6, 2016), <http://www.nytimes.com/2016/05/07/world/asia/myanmar-rohingya-aung-san-suu-kyi.html>.

¹⁴ MY WORLD IS FINISHED, *supra* note 10, at 6.

¹⁵ *Id.*

¹⁶ Feliz Solomon, *The Rohingya Exodus Surges Again, with 20,000 More Arriving at the Bangladesh Border*, TIME (Oct. 17, 2017), <http://time.com/4985453/bangladesh-myanmar-rohingya-refugees/>.

¹⁷ *Critics Circle Aung San Suu Kyi Over Rohingya Crisis*, AL JAZEERA (Sept. 10, 2017), <http://www.aljazeera.com/news/2017/09/critics-circle-aung-san-suu-kyi-rohingya-crisis-170910090032580.html>.

advocates have criticized her inaction and refusal to condemn the state security forces' human rights abuses against the Rohingya.¹⁸

Despite the unpromising and violent start, Myanmar's democratization may provide an opportunity for substantial progress towards a solution to the Rohingya's statelessness and violent persecution. Much of the discourse surrounding the plight of the Rohingya has pointed to the role the former autocratic regime played in their diminished status, particularly since that regime passed the discriminatory 1982 Citizenship Law, which continues to bar the Rohingya from obtaining citizenship.¹⁹ According to the United Nations, "democracy provides the natural environment for the protection and effective realization of human rights."²⁰ Indeed, international observers have noted the link between the promotion of human rights and Aung San Suu Kyi and the National League for Democracy's new political leadership, with the Special Rapporteur of the Human Rights Council on the situation of human rights in Myanmar emphasizing that "the consolidation of democracy and the creation of a culture of respect for human rights is a complex undertaking requiring political will."²¹

Although the situation with the Rohingya in Myanmar implicates a multitude of international laws and principles,²² the crux of the issue is the refusal of Myanmar's government and society to recognize the Rohingya's history and identity. This refusal has contributed to the statelessness of the Rohingya.²³ The conferral of citizenship upon the Rohingya, through either the amendment or repeal of the 1982 Citizenship Law, is often advocated as a solution to the humanitarian crisis they face.²⁴ While citizenship may be the ultimate aim, it is not a realistic proximate aim, given the stubborn stance on the Rohingya's identity and status within Myanmar despite the recent

¹⁸ *Id.*

¹⁹ See, e.g., IRISH CTR. FOR HUMAN RIGHTS, CRIMES AGAINST HUMANITY IN WESTERN BURMA: THE SITUATION OF THE ROHINGYAS 26, 41, 93, 98 (2010), http://www.oxfordburmaalliance.org/uploads/9/1/8/4/9184764/rohingya_report_2010 [hereinafter CRIMES AGAINST HUMANITY IN WESTERN BURMA].

²⁰ *Democracy and Human Rights*, UNITED NATIONS: GLOBAL ISSUES, <http://www.un.org/en/sections/issues-depth/democracy/#DH> (last visited Feb. 16, 2018).

²¹ Yanghee Lee (Special Rapporteur of the Human Rights Council on the Situation of Human Rights in Myanmar), *Situation of Human Rights in Myanmar*, U.N. DOC A/71/361 (Aug. 29, 2016).

²² For an overview of some of the international legal issues the Rohingya crisis implicates, see generally, AMNESTY INT'L, MYANMAR 2016/2017, <https://www.amnesty.org/en/countries/asia-and-the-pacific/myanmar/report-myanmar/> (last visited Feb. 16, 2018).

²³ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 93.

²⁴ See Susan Cunningham, *Do Myanmar's Rohingya Really Need Citizenship Now?*, FORBES (July 4, 2015), <http://www.forbes.com/sites/susancunningham/2015/07/04/do-myanmars-rohingya-really-need-citizenship-now/#55cbfc68681c>.

democratic transition.²⁵ Further, citizenship may prove to be an insufficient solution that provides rights in name only.²⁶ Myanmar's democratic transition provides an opportunity for the implementation of transitional justice to address the underlying attitudes concerning the Rohingya, which have played a major role in their plight.²⁷ A truth commission and institutional reform, both models of transitional justice, are more realistic proximate aims to combat the systemic violence and human rights violations the Rohingya continue to suffer.²⁸

Part I of this Comment presents a background of the Rohingya. First, it overviews the other Muslim groups present in western Myanmar. Then it looks at the history of the Rohingya, surveying their initial arrival in Rakhine State, their mass immigration into the region during British colonial rule, their experiences under the military junta following Myanmar's independence, and their current plight. Part I also discusses the stateless position of the Rohingya and the systemic discrimination it has produced, primarily through examination of the 1982 Citizenship Law. Next, Part II analyzes whether an amendment to the 1982 Citizenship Law—as is advocated by many in the international community—is a likely and sufficient solution to the statelessness of the Rohingya. Finally, Part III discusses the possibility and mechanics of the implementation of a truth commission and institutional reform as potential remedies to the humanitarian crisis the Rohingya face.

I. THE POSITION OF THE ROHINGYA IN MYANMAR

A. *Overview of Muslim Groups in Myanmar*

It is important to distinguish between the various groups of Muslims in Rakhine State before delving into the historical background of the Rohingya—one such Muslim group. According to the most recent available census conducted by the Myanmar government in 2014, 87.9% of Myanmar's population is Buddhist and 4.3% is Muslim.²⁹ However, the census did not include the Rohingya population, so the actual percentage of Muslims in

²⁵ See, e.g., David Scott Mathieson, *The Lady and the Rohingya*, N.Y. TIMES (Jan. 16, 2017), <https://www.nytimes.com/2017/01/16/opinion/the-rohingya-the-ladys-problem-from-hell.html>.

²⁶ See *infra* Part II(B).

²⁷ Aileen Thomson, *Prospects for Justice in Myanmar: Does New Political Reality Offer Opportunities for Addressing Violations?*, INT'L CTR. TRANSITIONAL JUSTICE (Nov. 3, 2016), <https://www.ictj.org/publication/myanmar-justice-prospects-nld>.

²⁸ See *infra* Part III.

²⁹ *The World Factbook: Burma*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html> (last visited Feb. 16, 2018).

Myanmar is considered to be higher—estimated at around 4.61%.³⁰ This translates to 2.35 million Muslims out of a total population of 51 million.³¹

The oldest Muslim group in Myanmar is now known as the Burmese Muslims, although they used to be referred to as “Pathi” or “Zerbadee.”³² Burmese Muslims can trace their origins back to the eighth century, but most look to the thirteenth and fourteenth centuries, when their ancestors arrived in Myanmar as traders, court servants, or mercenaries.³³ Burmese Muslims are linguistically and culturally integrated into Burmese society.³⁴ The Kaman is a separate Muslim group that lives mostly in southern Rakhine State.³⁵ The Kaman are descendants of Muslims who immigrated from the Mughal Empire to Arakan in the seventeenth century.³⁶

The largest Muslim community in Myanmar is the Rohingya.³⁷ Most live in Rakhine State, but there is a sizeable population in what was once known as Rangoon, now Yangon, the former capital.³⁸ Broadly speaking, they are ethnically South Asian and speak a dialect of Bengali.³⁹ “Rohingya” is a controversial term of reference, partly due to the dispute over the history of the group’s presence in Myanmar.⁴⁰

B. *Historical Background of the Rohingya*

1. *Colonial Period*

Muslim settlers in western Myanmar, most of whom were seafarers and traders from the Middle East, first arrived as early as the eighth century in what was then the independent kingdom of Arakan, now called Rakhine State.⁴¹ During the sixteenth and seventeenth centuries, the Arakanese launched

³⁰ Kyaw Ye Lynn, *Census Data Shows Myanmar Muslim Population Has Fallen*, ANDALOU AGENCY (July 21, 2016), <http://aa.com.tr/en/asia-pacific/census-data-shows-myanmar-muslim-population-has-fallen/612764>.

³¹ *Id.*

³² Andrew Selth, *Burma’s Muslims: A Primer*, LOWY INST.: THE INTERPRETER (Mar. 27, 2013), <https://www.lowyinstitute.org/the-interpreter/burmas-muslims-primer>. See generally MOSHE YEGAR, *THE MUSLIMS OF BURMA: A STUDY OF A MINORITY GROUP* (1972).

³³ Selth, *supra* note 32.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See YEGAR, *supra* note 32, at 24.

³⁷ Selth, *supra* note 32.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *The Rohingyas: The Most Persecuted People on Earth?*, *supra* note 8.

⁴¹ *Id.* These Muslims are now referred to as Burmese Muslims. See Selth, *supra* note 32.

regular raids into neighboring Bengal and forcibly settled Bengali Muslim captives in Arakan, either selling them as slaves or coercing them to serve as soldiers in the king's army.⁴² The term "Rohingya" first appeared around then, translating to "inhabitant of Rohang," which was the early Muslim name for Arakan.⁴³

In 1785, the Burmese army conquered the kingdom of Arakan.⁴⁴ In 1825, the British took control of Burma, and hundreds of thousands of Muslim Bengalis, or "Chittagonians," as the British called them, traveled from Bengal to Arakan from 1825 until 1942.⁴⁵ In fact, by 1941, about a third of the population of Sittwe, the current capital city of Rakhine State, was recorded as coming from Chittagong or elsewhere in Bengal.⁴⁶ There was little tension between the Muslims and Arakanese up until this arrival of Muslims from Bengal, orchestrated and facilitated by the British.⁴⁷ The mass immigration of Muslims to Arakan changed things.⁴⁸ Although it boosted the colonial economy, local Arakanese bitterly resented the mass immigration because they believed their jobs and land were being taken over by people who are still referred to as "illegal immigrants" or just "Bengalis."⁴⁹

The hostility between the Muslim Rohingya and Buddhist Arakanese worsened during and after World War II.⁵⁰ The British armed some Muslims in the region to fight against the Arakanese, who largely sided with the Japanese.⁵¹ The hostility continued when, in 1947, the Rohingya formed an army and approached President Muhammad Ali Jinnah of the newly established Pakistan to ask him to incorporate northern Arakan, where the majority of the Rohingya lived, into East Pakistan (which is now Bangladesh).⁵² Their plea was rejected, and northern Rakhine State remained a

⁴² *The Rohingyas: The Most Persecuted People on Earth?*, *supra* note 8.

⁴³ *Id.*; see also U.S. DEP'T OF STATE, MYANMAR COUNTRY REPORT: INFORMATION ON ROHINGYA REFUGEES IN BURMA (2003), <https://www.justice.gov/sites/default/files/coir/legacy/2013/06/13/MMR00001.pdf> [hereinafter MYANMAR COUNTRY REPORT].

⁴⁴ *The Rohingyas: The Most Persecuted People on Earth?*, *supra* note 8.

⁴⁵ *Id.* "Chittagonians" refers to those who are from Chittagong, a region in southeastern Bangladesh bordering Myanmar. See generally *Bangladesh*, U.S. DEP'T OF STATE, <https://www.state.gov/p/sca/ci/bg/> (last visited Feb. 16, 2018).

⁴⁶ *The Rohingyas: The Most Persecuted People on Earth?*, *supra* note 8.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² MYANMAR COUNTRY REPORT, *supra* note 43. Many observers speculate the Buddhists in Rakhine State viewed the Rohingya's request to secede as a disloyal action that has, in part, led to the discrimination

part of Burma, which gained independence from the United Kingdom in 1948.⁵³

2. *Rohingya – A Disputed Term of Reference*

The Rohingya community's loyalty to the British during the war, and its desire for an independent state culminating in a Mujihid movement, formed the basis of the frequent claims that the Rohingya are simply foreigners, or "Kala," intent on seceding from the Union of Burma.⁵⁴ In fact, the ethnic majority in western Myanmar for whom the region is currently named after, the Rakhine,⁵⁵ fundamentally reject any suggestion that the Rohingya should be considered an ethnic group with bona fide historical roots in the region.⁵⁶ Instead, they contend that the word "Rohingya" arose in the 1950s during the time of the Mujihid movement.⁵⁷ The Rohingya also do not have support from the other Muslims residing in Rakhine State.⁵⁸

Despite the state's pervasive rejection of Rohingya history, a basis of justification for state-sanctioned discrimination against the Rohingya to this day, historians have found the term "Rohingya" documented in the region prior to the British Raj.⁵⁹ For example, "a 1799 study of languages spoken in the Burmese area divided the natives of Arakan state between 'Yakain' and 'Roonga.'"⁶⁰ Also, "the Classical Journal of 1811 distinguishes between the Rohingya and Rakhine as the main ethnic groups in the region."⁶¹ Furthermore, a German compendium of languages of the wider region mentions the existence of the Rohingya as an ethnic group and separate language in 1815.⁶²

they face in the present day. See MARTIN SMITH, *BURMA INSURGENCY AND THE POLITICS OF ETHNICITY* 96 (2d. ed. 1993).

⁵³ *The Rohingyas: The Most Persecuted People on Earth?*, *supra* note 8.

⁵⁴ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 25.

⁵⁵ The 1974 Burma Constitution granted Arakan statehood within the Union of Burma, and in a conscious policy decision, Arakan was given the official title of Rakhine State, reflecting the Rakhine majority. *Id.* at 91.

⁵⁶ *Id.* at 21.

⁵⁷ *Id.*

⁵⁸ *Id.* For a review of Muslim groups in Rakhine State, see *supra* Part I(A).

⁵⁹ Azeem Ibrahim, *War of Words: What's in the Name "Rohingya"?*, YALEGLOBAL ONLINE (June 16, 2016), <http://yaleglobal.yale.edu/content/war-words-whats-name-rohingya>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

3. *Following Myanmar's Independence*

Despite the history behind the Rohingya's presence in Myanmar, they have faced significant discrimination and repression based on claims that they are "illegal" since the former military regime came into power following a coup d'état in 1962. In February 1978, Myanmar's leader General Ne Win instituted the "Nagamin," or "King Dragon," campaign.⁶³ The campaign's stated objective was 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."⁶⁴ This may have been motivated by the influx of Bengali refugees into Rakhine State during and following the civil war, or War for Liberation, in Bangladesh during 1971.⁶⁵ Although the stated objective of the operation indicated it was intended as a proper survey of the residents of Myanmar,⁶⁶ in reality the Myanmar army committed widespread killings and rapes of Rohingya civilians, and they carried out the destruction of mosques and other acts of religious persecution.⁶⁷ These events resulted in the exodus of an estimated 200,000 Rohingya to neighboring Bangladesh.⁶⁸

In response to the exodus, the Myanmar government asserted that those who fled were "illegal Bengali immigrants who had crossed into Burma as part of a general expansion in the Bengali population in this region," while also blaming the extreme violence of the military campaign on the Rohingya, referring to them as "Bengalis" and "Muslims."⁶⁹ Despite their convictions about those who had fled, the Myanmar government engaged in bilateral negotiations with Bangladesh and agreed to repatriate close to 190,000 refugees to Rakhine State.⁷⁰ During the negotiations, the Bangladeshi authorities complained of the economic and social burden the presence of the Rohingya placed on the local community where they had settled.⁷¹ The United

⁶³ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 91. General Ne Win was the leader of the military coup that ousted Myanmar's democratically elected government following its independence from Britain, establishing a one-party, military-led state. See *Myanmar Profile – Timeline*, BBC NEWS (Mar. 30, 2016), <http://www.bbc.com/news/world-asia-pacific-12992883>.

⁶⁴ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 25.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 92; see also Benjamin Zawacki, *Defining Myanmar's "Rohingya Problem"*, 20 HUM. RTS. BRIEF 18, 18 (2012).

⁶⁸ Zawacki, *supra* note 67, at 18.

⁶⁹ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 92.

⁷⁰ *Id.*

⁷¹ See generally HUMAN RIGHTS WATCH, *BURMESE REFUGEES IN BANGLADESH: STILL NO DURABLE SOLUTION* (May 2000), <https://www.hrw.org/reports/2000/burma/index.htm>.

Nations also played a role in the repatriation program, suggesting that a flow of aid would be more readily accessible if the Myanmar government accepted the repatriation program.⁷² Initially, few refugees opted for repatriation but more did once the Bangladeshi government allowed camp conditions to deteriorate and restricted food rations.⁷³

Soon after, the Myanmar military passed the 1982 Citizenship Law, which did not recognize the Rohingya as one of Myanmar's over 130 official ethnic groups, officially rendering the ethnic minority stateless.⁷⁴ In 1992, there was another massive exodus of Rohingya to Bangladesh, with 260,000 Rohingya living in refugee camps in Cox's Bazar, Bangladesh.⁷⁵ Although there was no official military campaign like there was in 1978, the Myanmar government's policies nonetheless left large portions of the Rohingya with no option but to flee.⁷⁶ These policies included the "Four Cuts" policy: a militarized effort to undermine the capacity of ethnic armed opposition/independence groups.⁷⁷ Another policy was the construction of "model villages," which involved confiscating land and transferring individuals and families from urban areas (primarily in central Myanmar) to border regions like Rakhine State.⁷⁸ Model villages were newly constructed towns that were intended to diversify and develop remote border areas.⁷⁹ However, in the development and construction of these villages, the Rohingya faced gross exaction of forced labor, arbitrary land confiscations, and restrictions on freedom of movement.⁸⁰ Further, the Myanmar military's actions—including raping and murdering women, forcing men into press gangs, and destroying mosques and schools—led more than 45,000 Rohingya and other Muslims to flee to Bangladesh in just one month in 1992.⁸¹

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *The Rohingyas: The Most Persecuted People on Earth?*, *supra* note 8. The stateless status of the Rohingya is discussed *infra* Part I(D).

⁷⁵ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 88, 93.

⁷⁶ *Id.* at 91–92.

⁷⁷ The "Four Cuts" policy was originally drawn up by General Ne Win in the mid-1960s. *Id.* at 88.

⁷⁸ *Id.* at 93.

⁷⁹ *Id.* Each model village is planned to accommodate 100 families, with each family being allocated a three-acre plot of land. *Id.* at 100.

⁸⁰ *Id.* at 100–01, 105.

⁸¹ Edward A. Gargan, *Even Bleak Bangladesh Is a Haven to Muslims Fleeing the Burmese Army*, N.Y. TIMES (Feb. 7, 1992), <http://www.nytimes.com/1992/02/07/world/even-bleak-bangladesh-is-a-haven-to-muslims-fleeing-the-burmese-arm.html?pagewanted=all>.

Similar to the events of 1978, there was another repatriation program, though it was marred with problems.⁸² While the Bangladeshi government had initially sheltered the refugees in camps in the vicinity of Cox's Bazar in southeastern Bangladesh, it soon after announced it would not support local integration due to economic and social strains.⁸³ Accordingly, the governments of Myanmar and Bangladesh signed a bilateral Memorandum of Understanding (MOU) in 1992, with Myanmar agreeing to accept the return of all refugees who could establish a "bona fide residence" in Myanmar⁸⁴ and that the repatriation would be safe and voluntary.⁸⁵ However, the Bangladeshi government used force against, withheld rations from, imprisoned, and often beat or threatened to beat refugees who did not agree to return.⁸⁶ By 1993, when both countries signed an agreement with the United Nations High Commissioner for Refugees (UNHCR), nearly 50,000 refugees had been forcibly repatriated.⁸⁷

4. *Recent Plight of the Rohingya*

The Rohingya continue to face discrimination and violence, leading to smaller numbers finding refuge in various countries—including Malaysia and Indonesia—every year.⁸⁸ The other Muslims in Rakhine State who do not identify as Rohingya have also faced discrimination and violence in recent years. In 2001, there was communal violence between the general Muslim and Buddhist populations in Sittwe and Taungoo.⁸⁹ In Taungoo, 200 Muslims were killed, and multiple mosques and hundreds of buses were destroyed in a riot.⁹⁰ Buddhist monks, fueled by the recent destruction of Buddhist images in Bamiyan, Afghanistan, and the attacks on September 11, 2001, in the United States, had widely distributed inflammatory anti-Muslim pamphlets inciting hatred.⁹¹

⁸² MYANMAR COUNTRY REPORT, *supra* note 43.

⁸³ HUMAN RIGHTS WATCH, *supra* note 71.

⁸⁴ C.R. Abrar, *Repatriation of Rohingya Refugees*, Refugee and Migratory Movements Research Unit (1996), <http://www.burmalibrary.org/docs/Abrar-repatriation.htm> [<http://web.archive.org/web/20171010140549/http://www.burmalibrary.org/docs/Abrar-repatriation.htm>].

⁸⁵ MYANMAR COUNTRY REPORT, *supra* note 43.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ CRIMES AGAINST HUMANITY, *supra* note 19, at 27; MY WORLD IS FINISHED, *supra* note 10, at 101.

⁸⁹ Amrutha Gayathri, *Buddhist Mob Beats 10 Muslims to Death In Myanmar; Communal Violence Spreads*, INT'L BUS. TIMES (June 5, 2012), <http://www.ibtimes.com/buddhist-mob-beats-10-muslims-death-myanmar-communal-violence-spreads-701466>.

⁹⁰ *Id.*

⁹¹ *Id.* The anti-Muslim pamphlets were targeted at the Muslim minority in general. *Id.*

In 2012, following the rape and murder of an Arakanese woman by three Rohingya Muslim men, there were further concerns of a wider religious conflict between Buddhists and the general Muslim minority in Rakhine State.⁹² Hundreds of Arakanese Buddhists surrounded a bus carrying Muslim pilgrims, forced ten men off, and beat them to death.⁹³ These events caused riots to break out in a few townships in Rakhine State, leaving hundreds dead and damaging or destroying large amounts of property, including homes, mosques, and monasteries.⁹⁴ In addition to the Rohingya, Kaman Muslims also were targeted.⁹⁵ Around 120,000 people were displaced within Rakhine State.⁹⁶ Although Kaman Muslims were included in this population, the vast majority was Rohingya.⁹⁷ Then-President of Myanmar Thein Sein responded to the violent events and displacement by reiterating Myanmar's position on the Rohingya: they do not belong here.⁹⁸ He said:

We will take care of our own ethnic nationalities, but Rohingyas who came to Myanmar illegally are not of our ethnic nationalities and we cannot accept them here. 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.⁹⁹

In addition to the violence committed by the Buddhist population in Rakhine State, the Rohingya continue to face state-sanctioned violence from Myanmar's military, who often justify their actions as responses to attacks by the Arakan Rohingya Salvation Army. The Arakan Rohingya Salvation Army, formerly known as Harakah al-Yaqin,¹⁰⁰ is a Rohingya militant group financed by Rohingya émigrés in Saudi Arabia.¹⁰¹ In October 2016, Myanmar's military

⁹² Daniel Schearf, *Kaman Muslims Raise Concerns of Wider Conflict*, VOA NEWS (Nov. 29, 2012), <http://www.voanews.com/a/burmas-kaman-muslims-cite-religious-ethnic-conflict-in-rakhine-state/1555524.html>.

⁹³ Karen Pimentel Simbulan, *A Legal and Structural Analysis of the Violence in Rakhine State Against the Rohingya Muslims of Myanmar*, ACADEMIA http://www.academia.edu/6101564/Legal_and_Structural_Analysis_of_Violence_in_Rakhine_State_against_the_Rohingya_Muslims_of_Myanmar (last visited Feb. 16, 2018).

⁹⁴ *Id.*

⁹⁵ Schearf, *supra* note 92.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Simbulan, *supra* note 93.

⁹⁹ *Id.*

¹⁰⁰ *Myanmar: Who Are the Arakan Rohingya Salvation Army?*, BBC NEWS (Sept. 6, 2017), <http://www.bbc.com/news/world-asia-41160679>.

¹⁰¹ See Int'l Crisis Grp., *Myanmar: A New Muslim Insurgency in Rakhine State*, CRISIS GROUP (Dec. 15, 2016), <https://www.crisisgroup.org/asia/south-east-asia/myanmar/283-myanmar-new-muslim-insurgency-rakhine-state>.

initiated a four-month crackdown in the region after unknown assailants, believed to be Rohingya, killed police officers near the border with Bangladesh.¹⁰² Initially, there were reports that the lockdown confined many Rohingya to their homes, cutting off access to international relief agencies and making them more vulnerable to violence.¹⁰³

The military maintained that their actions are part of a counter-insurgency campaign in response to the attack.¹⁰⁴ But, while the Myanmar military initially went house to house seeking adult men, they proceeded to rape women and burn homes.¹⁰⁵ In fact, according to a U.N. report, members of Myanmar's Army and the police have killed hundreds of men, women, and children; gang-raped women and girls; and forced as many as 90,000 Rohingya to flee from their homes.¹⁰⁶ Despite hundreds of reports to the contrary,¹⁰⁷ Myanmar government officials said Rohingya forces set fire to their own houses and denied most charges of human rights abuses, with the exception of a police-sanctioned beating of a few dozen kneeling men that was captured on video.¹⁰⁸

Similar violence occurred in August and September 2017, after the Arakan Rohingya Salvation Army attacked thirty police outposts and an army base, killing twelve state officials.¹⁰⁹ In response, the Myanmar military carried out a scorched-earth campaign, burning down entire Rohingya villages and shooting people as they tried to flee, all under the guise of "clearance operations" to find militants.¹¹⁰ These operations were marked by widespread and systematic human rights violations, including unlawful killings, sexual violence, torture,

¹⁰² Nick Cumming-Bruce, *Rohingya Face 'Campaign of Terror' in Myanmar*, U.N. FINDS, N.Y. TIMES (Feb. 3, 2017), https://www.nytimes.com/2017/02/03/world/asia/rohingya-myanmar-un-report.html?_r=0.

¹⁰³ Mike Ives, *Calls Grow for Access to Western Myanmar in Face of Military Lockdown*, N.Y. TIMES (Oct. 27, 2016), <http://www.nytimes.com/2016/10/28/world/asia/myanmar-rohingya-rakhine-state.html>.

¹⁰⁴ Ellen Barry, *'There Are No Homes Left': Rohingya Tell of Rape, Fire and Death in Myanmar*, N.Y. TIMES (Jan. 10, 2017), <https://www.nytimes.com/2017/01/10/world/asia/rohingya-violence-myanmar.html>.

¹⁰⁵ *Id.*

¹⁰⁶ Cumming-Bruce, *supra* note 102.

¹⁰⁷ See Barry, *supra* note 104. Barry's article includes excerpts from interviews with Rohingya men and women who fled the violence in their villages and are now living in refugee camps. One woman, Mumtaz Begum, recounts how she and her daughter were beaten with bamboo clubs, her 10-year-old son was shot through the leg, her husband was killed, and her daughter was gang-raped by soldiers the following day. *Id.*

¹⁰⁸ *Id.*; see also Mike Ives, *Myanmar Holds Officers After Video Purports to Show Police Beating Rohingya*, N.Y. TIMES (Jan. 3, 2017), <https://www.nytimes.com/2017/01/03/world/asia/myanmar-video-police-brutality.html>.

¹⁰⁹ MY WORLD IS FINISHED, *supra* note 10, at 6.

¹¹⁰ *Scorched Earth Campaign in Rakhine*, AL JAZEERA (Sept. 15, 2017), <http://www.aljazeera.com/news/2017/09/myanmar-scorched-earth-tactics-rakhine-report-170914152129789.html>.

enforced disappearances, and arbitrary arrests.¹¹¹ The massive scale of the violence seemed to be designed to push the Rohingya population in northern Rakhine State out of the country and make it very hard for them to return.¹¹² As of October 2016, over 520,000 Rohingya have fled into Bangladesh, where they live in deplorable camps with very limited access to food, clean water, and health care.¹¹³

C. Systemic Discrimination Against the Rohingya

The violence targeted at the Rohingya for over thirty years can partly be attributed to a political, social, and economic system—manifested in law, policy, and practice—designed to discriminate against the Rohingya.¹¹⁴

One of the main sources of that political, social, and economic system is the refusal of the Burmese regime to acknowledge and grant Burmese citizenship for the Rohingya.¹¹⁵ Although the refusal continues into the present day, this was not always the case.¹¹⁶ The Rohingya had a definite scope for citizenship under the 1947 Constitution, which permitted those born and living in any of the territories of the former British regime for at least eight years during 1932–1942—and with the intention to remain there permanently—to obtain citizenship.¹¹⁷ However, this was then supplemented by the 1948 Union Citizenship Act, in which the Burmese government excluded the Rohingya from their list of indigenous races in Burma.¹¹⁸

The 1948 Union Citizenship Law was replaced by the 1982 Citizenship Law, which effectively denies the right to a nationality to the Rohingya population in both design and implementation.¹¹⁹ The 1982 Citizenship Law was promulgated in the immediate aftermath of the fallout of the Nagamin

¹¹¹ MY WORLD IS FINISHED, *supra* note 10, at 6. Survivors' accounts of the violence in Rakhine describe unimaginable horror: "Government soldiers stabbing babies, cutting off boys' heads, gang-raping girls, shooting 40-millimeter grenades into houses, burning entire families to death, and rounding up dozens of unarmed male villagers and summarily executing them." See Jeffrey Gettleman, *Rohingya Recount Atrocities: 'They Threw My Baby Into a Fire'*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/world/asia/rohingya-myanmar-atrocities.html>.

¹¹² MY WORLD IS FINISHED, *supra* note 10, at 6.

¹¹³ *More Than 300,000 Rohingya Refugee Children 'Outcast and Desperate,' UNICEF Says*, THE GUARDIAN (Oct. 19, 2017), <https://www.theguardian.com/world/2017/oct/20/300000-rohingya-refugee-children-outcast-and-desperate-says-unicef>.

¹¹⁴ Zawacki, *supra* note 67, at 18.

¹¹⁵ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 95.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Zawacki, *supra* note 67, at 18.

campaign.¹²⁰ Human rights advocates have suggested the law was deliberately targeted at the Rohingya, while also discriminating against other immigrants who had entered the country during the British colonial period.¹²¹

Like the 1948 Union Citizenship Law, the 1982 Citizenship Law also lists specific groups that are considered “nationals” and considers members of any other ethnic group Burmese citizens if they “have settled in any of the territories included within the State as their permanent home from a period anterior to 1185 B.E., 1823 A.D.”¹²² Although the law recognizes more than 130 national ethnic groups, it does not recognize the Rohingya.¹²³ One major difference between the 1948 Union Citizenship Law and the 1982 Citizenship Law is that the latter creates three classes of citizens—full, associate, and naturalized.¹²⁴

Full citizenship is “granted to nationals such as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period anterior to 1185 B.E., 1823 A.D.”¹²⁵ The exclusion of the Rohingya from the list of recognized national races means that unless the Council of State alters the list, the Rohingya cannot become full citizens.¹²⁶ Alternatively, associate citizenship is “granted under certain conditions, to persons who applied for citizenship under the 1948 law and their children, and whose application was ongoing at the time of promulgation.”¹²⁷ The majority of Rohingya cannot claim associate citizenship because the 1982 Citizenship Law limited associate citizenship to applications that were lodged within one year of the law’s coming into force.¹²⁸ Lastly, naturalized citizenship “may be granted to non-nationals such as members of ethnic groups not recognized as

¹²⁰ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 95. For a brief overview of the Nagamin campaign, see *supra* Part I(B)(3).

¹²¹ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 95.

¹²² Pyithu Hluttaw Law No. 4 of 1982.

¹²³ Zawacki, *supra* note 67, at 18. This remains the official position today. U Nyi Nyi, the Program Manager of the UNHCR Immigration and National Registration Project and former director of the Attorney General’s Office, wrote, “It is legally indisputable that the *Rohingya* are not and have never been a Myanmar ethnic group. For many years, however, *Muslims* have invaded illegally into northern Rakhine State.” U Nyi Nyi, *The Case Against Rohingya Citizenship*, MYAN. TIMES (Feb. 9, 2014), <http://www.mmtimes.com/index.php/opinion/9519-why-the-government-is-right-to-deny-rohingya-citizenship.html>.

¹²⁴ Pyithu Hluttaw Law No. 4 of 1982.

¹²⁵ *Id.*

¹²⁶ AMNESTY INT’L, MYANMAR: THE ROHINGYA MINORITY: FUNDAMENTAL RIGHTS DENIED 26 (2004), <https://www.amnesty.org/en/documents/ASA16/005/2004/en/>.

¹²⁷ Pyithu Hluttaw Law No. 4 of 1982.

¹²⁸ MYANMAR: THE ROHINGYA MINORITY: FUNDAMENTAL RIGHTS DENIED, *supra* note 126.

indigenous races,”¹²⁹ which include the Rohingya. Despite the availability of this pathway, very few Rohingya have access to the required documentary evidence of ancestral or parental residency.¹³⁰ Moreover, applicants for naturalization must be able to speak one of the national languages well.¹³¹ The Rohingya speak their own dialect, which is not recognized as a national language.¹³² Further, the Rohingya have restricted access to education through which additional language skills could be obtained.¹³³

Even Rohingya children who are born in Myanmar cannot hold citizenship.¹³⁴ In order for a child to attain Burmese citizenship, at least one parent must already hold one of the three types of Burmese citizenship, which is rare for the Rohingya.¹³⁵ A child can attempt to become a naturalized citizen once he or she becomes eighteen years old but would face the same obstacles as adults in meeting the other requirements—namely, the national language requirement.¹³⁶ Therefore, the vast majority of Rohingya do not fall under any class of citizenship of the 1982 Citizenship Law.

D. Stateless Status of the Rohingya Within Myanmar

As a result of the 1982 Citizenship Law, many Rohingya have been rendered stateless.¹³⁷ According to the UNHCR, the international legal definition of a stateless person is, “a person who is not considered as a national by any State under the operation of its law.”¹³⁸ The right to a nationality is considered essential to the realization of other fundamental human rights and has been described as the “right to have rights.”¹³⁹ However, holding a nationality is not a prerequisite to enjoying human rights.¹⁴⁰ Being human is the sole requirement entitling one to human rights, and the status of one’s

¹²⁹ Pyithu Hluttaw Law No. 4 of 1982.

¹³⁰ MYANMAR: THE ROHINGYA MINORITY: FUNDAMENTAL RIGHTS DENIED, *supra* note 126.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ HUMAN RIGHTS WATCH, *supra* note 71.

¹³⁵ *Id.*

¹³⁶ *Crimes Against Humanity in Western Burma*, *supra* note 19, at 96.

¹³⁷ *Id.*

¹³⁸ *Ending Statelessness*, UNHCR, <http://www.unhcr.org/en-us/stateless-people.html> (last visited Feb. 16, 2018). The definition comes from the 1954 Convention relating to the Status of Stateless Persons and has subsequently become a part of customary international law. See *Citizenship & Nationality*, INT’L JUST. RESOURCE CTR., <http://www.ijrcenter.org/thematic-research-guides/nationality-citizenship/> (last visited Feb. 16, 2018) [hereinafter *Citizenship & Nationality*].

¹³⁹ *Id.*

¹⁴⁰ David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 HUM. RTS. Q. 245, 249 (2006), http://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1416&context=faculty_articles.

nationality should play no role.¹⁴¹ Regardless, stateless persons are more vulnerable than others to the violation of their basic rights.¹⁴² Therefore, Myanmar's refusal to grant citizenship to the Rohingya can plausibly be characterized as a human rights violation because the denial of citizenship results in the denial of the rights gained from nationality.¹⁴³

The right to a nationality is addressed in a number of international instruments, including the International Covenant on Civil and Political Rights.¹⁴⁴ Article 24(3) states: "Every child has the right to acquire a nationality."¹⁴⁵ A child's right to a nationality is also recognized by the U.N. Convention on the Rights of the Child.¹⁴⁶ Article 7 of the U.N. Convention on the Rights of the Child states:

The child shall be registered immediately after birth and shall have the right to a name, the right to acquire a nationality . . . States Parties shall ensure implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.¹⁴⁷

Myanmar ratified the U.N. Convention on the Rights of the Child in 1991.¹⁴⁸

Despite the international recognition of a right to a nationality, the Myanmar government continues to deprive the Rohingya of that right.¹⁴⁹

¹⁴¹ *Id.*

¹⁴² Carol A. Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 INT'L J. REFUGEE L. 156, 159 (1998).

¹⁴³ *Id.*

¹⁴⁴ International Covenant on Civil and Political Rights, art. 24(3), Dec. 19, 1966, 993 U.N.T.S. 3.

¹⁴⁵ *Id.*

¹⁴⁶ Zawacki, *supra* note 67, at 19.

¹⁴⁷ Convention on the Rights of the Child, art. 7, Nov. 20, 1989, 1577 U.N.T.S. 3. It is important to note General Comment 17 to Art. 24(3) and its implications for the 1982 Citizenship Law:

[The provision] does not necessarily make it an obligation for States to give their nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law between legitimate children and children born out of wedlock or stateless parents or based on the nationality status of one or both of the parents.

See SARAH JOSEPH & MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY* 725 (3d. ed. 2013).

¹⁴⁸ HUMAN RIGHTS WATCH, *supra* note 71.

¹⁴⁹ *Burma: Amend Biased Citizenship Law*, HRW (Jan. 13, 2015), <https://www.hrw.org/news/2015/01/13/burma-amend-biased-citizenship-law>

Individuals, including children, who lack a nationality or an effective citizenship are “among the world’s most vulnerable to human rights violations.”¹⁵⁰ Accordingly, the UNHCR has noted that “stateless persons often live in precarious situations on the margin of society, frequently lacking identity documentation, and subject to discrimination.”¹⁵¹ That has been the case in Myanmar.¹⁵²

The Rohingya face restrictions set by the Myanmar government on movement, marriage, employment, health care, and education.¹⁵³ For example, the government reserves secondary education for citizens only, which means the vast majority of Rohingya do not have access to state-run schools beyond primary education.¹⁵⁴ Similarly, they are unable to obtain most civil service positions.¹⁵⁵

Because the Rohingya are stateless, they are viewed as foreigners and are under the jurisdiction of the 1864 Foreigners Act.¹⁵⁶ If the Rohingya wish to travel outside their village or township, they are required to seek and pay for official permission through a license.¹⁵⁷ These restrictions have tightened and permission is rarely given, so many Rohingya are virtually confined to their villages and townships and are unable to access medical services and employment.¹⁵⁸ Further, they are unable to conduct business between villages and townships, which has resulted in situations of extreme poverty.¹⁵⁹

The Rohingya have also faced issues with forced labor, land confiscation, forced eviction, and destruction of houses.¹⁶⁰ These “restrictions and conditions are not limited to the Rohingya, but they have not been imposed in the same manner or to the same degree on Buddhists or other Muslims in

¹⁵⁰ *Citizenship & Nationality*, *supra* note 138.

¹⁵¹ UNHCR, A YEAR IN CRISIS: GLOBAL TRENDS 2011 1, 29 (2011), <http://www.unhcr.org/4fd6f87f9.html>.

¹⁵² *See generally* CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19.

¹⁵³ Zawacki, *supra* note 67, at 19.

¹⁵⁴ RIANNE TEN VEEN, ISLAMIC HUMAN RIGHTS CAMPAIGN, MYANMAR’S MUSLIMS: THE OPPRESSED OF THE OPPRESSED 9 (2005), <http://www.ihr.org.uk/file/05OCTMyanmarPRroof.pdf>.

¹⁵⁵ *Id.*

¹⁵⁶ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 99.

¹⁵⁷ TEN VEEN, *supra* note 154. The procedure to obtain a license can take up to two months with no guarantee of a positive outcome. *See also* CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 99. It seems practically impossible to secure a license unless the individual is willing to pay a large sum of money. *Id.*

¹⁵⁸ TEN VEEN, *supra* note 154.

¹⁵⁹ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 99.

¹⁶⁰ Zawacki, *supra* note 67, at 19; *see also supra* Part I(B)(3).

Rakhine State, or on other ethnic minorities across the county.”¹⁶¹ Since 1990, the Myanmar government has constructed over forty model villages¹⁶² in the North Arakan Townships of Maungdaw, Buthidaung, and Ruthidaung—the cities where most Rohingya are located.¹⁶³ To construct these model villages, the Myanmar government often forcibly employed the Rohingya.¹⁶⁴ Additionally, the increased militarization of northern Rakhine State since 1994 has “resulted in significant land confiscations deemed necessary for the construction and upkeep of the border security force, or NaSaKa,¹⁶⁵ and the army.”¹⁶⁶ As was the case with model villages, the Myanmar government also forcibly employed the Rohingya to construct military installations.¹⁶⁷ Thus has been the “enduring nature of Rohingya statelessness.”¹⁶⁸

II. IS CITIZENSHIP THE ANSWER?

A. *Calls for the Conferral of Citizenship upon the Rohingya*

The international community, in response to the stateless status of the Rohingya and the ongoing campaigns of violence and ensuing refugee crisis, has pushed Myanmar to amend the 1982 Citizenship Law and grant citizenship to the Rohingya. In 2014, the U.N. General Assembly expressed serious concern about Myanmar’s treatment of the Rohingya and passed a resolution urging Myanmar to grant citizenship and equal rights to the minority.¹⁶⁹ Similarly, the United States rebuffed the resettlement of the Rohingya stranded on boats in a third country as a solution to the problem, instead saying that the solution is citizenship for the Rohingya in Rakhine State.¹⁷⁰ Countless legal

¹⁶¹ *Id.*

¹⁶² *See supra* Part I(B)(3).

¹⁶³ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 100.

¹⁶⁴ *Id.*

¹⁶⁵ NaSaKa is the abbreviated term for the Nay-Sat Kut-Kwey Ye, the border security force. Its purpose was to secure Myanmar’s border with Bangladesh and quell a Rohingya insurgency movement in the early 1990s. *See* Katherine G. Southwick, *Myanmar’s Democratic Transition: Peril or Promise for the Stateless Rohingya?*, 19 TILBURG L. R. 261, 265 (2014).

¹⁶⁶ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 101.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 93.

¹⁶⁹ Special Rapporteur, General Assembly, *Situation of Human Rights in Myanmar*, U.N. DOC A/RES/68/242 (Dec. 27, 2013); *UN Urges Myanmar to Give Rohingya “Full Citizenship,”* VOA NEWS (Dec. 30, 2014), <http://www.voanews.com/a/un-urges-myanmar-to-give-rohingya-full-citizenship/2578599.html>.

¹⁷⁰ *U.S. Official Urges Myanmar to Give Citizenship to Rohingya*, WALL ST. J. (June 1, 2015), <http://www.wsj.com/articles/u-s-official-urges-myanmar-to-give-citizenship-to-rohingya-1433160297>.

scholars, journalists, and human rights advocates have also made similar requests to the Myanmar government.¹⁷¹

B. A Viable Solution?

Despite the international recognition of a right to a nationality and the international community's call for the conferral of citizenship upon the Rohingya, the Myanmar authorities maintain it is within their national sovereignty to determine how citizenship is granted.¹⁷² Further, they claim there are no discriminatory features of the law; rather, the Rohingya simply do not conform to the provisions of naturalized citizenship because they cannot provide "strong and conclusive" evidence of their status.¹⁷³ The question about the historical presence of Muslims in Arakan has "produced two diametrically opposed versions of the region's history."¹⁷⁴ Many Rohingya assert they deserve indigenous status and, therefore, full citizenship because they have been in the region for centuries.¹⁷⁵ The majority of Burmese society, from the masses to the elite,¹⁷⁶ wholeheartedly disagrees and believes they are "illegal Bengalis."¹⁷⁷ For example, former President Thein Sein has said, "There are no Rohingya among the races. We only have Bengalis who were brought for farming."¹⁷⁸ Even the current de facto leader of Myanmar, Aung San Suu Kyi, has contributed to maintaining the status quo by declining to use the term "Rohingya" to describe the repressed minority.¹⁷⁹

Despite the fervent beliefs in the opposing versions, what is evident is that "the whole crisis is overshadowed by a complete absence of reliable

¹⁷¹ For legal scholars, see Zawacki, *supra* note 67, at 19. For journalists, see Peter Popham, *Burma Will Regret Shutting Its Eyes to the Fate of the Rohingya Boat People*, INDEPENDENT (May 29, 2015), <http://www.independent.co.uk/voices/comment/burma-will-regret-shutting-its-eyes-to-the-fate-of-the-rohingya-boat-people-10285673.html>.

¹⁷² U Nyi Nyi, *supra* note 123.

¹⁷³ *Id.*

¹⁷⁴ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 23.

¹⁷⁵ Cunningham, *supra* note 24.

¹⁷⁶ Anne Gearan, *Burma's Thein Sein Says Military 'Will Always Have a Special Place' in Government*, WASH. POST (May 19, 2013), https://www.washingtonpost.com/world/national-security/burmas-thein-sein-says-military-will-always-have-a-special-place-in-government/2013/05/19/253c300e-c0d4-11e2-8bd8-2788030e6b44_story.html.

¹⁷⁷ See CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 96. This assertion is often accompanied by racial commentary. For example, Ye Myint Aung of the Myanmar Consulate responded to international outcry over Rohingya boat people by saying, "In reality, Rohingya are neither 'Myanmar People' nor Myanmar's ethnic group. You will see in the photos that their complexion is 'dark brown.' The complexion of Myanmar people is fair and soft, good looking as well." *Id.*

¹⁷⁸ Gearan, *supra* note 176.

¹⁷⁹ Paddock, *supra* note 13.

anthropological or social field research, which means that different sides continue to circulate—or even invent—very different versions of the same people’s histories.”¹⁸⁰ Clearly, an “answer” to the question of the Rohingya’s identity, including whether the term itself is proper or not, will not provide an actual viable solution to the plight of nearly one million stateless people, hundreds of thousands of whom live in dire conditions in squalid camps.

Neither will a possible amendment of the 1982 Citizenship Law to relax its requirements for each of the classes of citizenship. Although it is an appealing solution to the international community, purely formal solutions might reduce the number of *stateless* persons but not the number of *unprotected* persons.¹⁸¹ It is highly unlikely that there will be an automatic end to the rampant racist and Islamophobic discrimination the Rohingya face¹⁸² simply because they receive naturalized citizenship. The grant of citizenship, without additional mechanisms to address the underlying attitudes about the Rohingya, “might lead to a shifting from statelessness ‘de jure’ to statelessness ‘de facto.’”¹⁸³ This is evidenced by the experience of the Kaman—a Muslim group that lives in southern Rakhine State and is legally recognized as a national ethnic group.¹⁸⁴ Most Kaman are full citizens but still face discrimination.¹⁸⁵ For example, members of the Kaman minority are referred to as Kular (dark-skinned), a slur often used to describe the Rohingya.¹⁸⁶ Further, the Kaman community also faces violence from the Buddhist majority.¹⁸⁷ It is to the advantage of the communities involved and the international community as a whole that nationality is not given in name only but is also effective.¹⁸⁸

¹⁸⁰ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 97 (quoting M. Smith, *The Muslim “Rohingyas” of Burma*, 2 Paper delivered at Conference of Burma Centrum Nederland (Dec. 11, 1995)).

¹⁸¹ Batchelor, *supra* note 142, at 177.

¹⁸² See generally CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19.

¹⁸³ *Id.* A de facto stateless person is generally defined as “a person unable to demonstrate that he/she is de jure stateless, yet he/she has no effective nationality and does not enjoy national protection.” See *Citizenship & Nationality*, *supra* note 138. De facto stateless persons technically have a nationality, but for a variety of reasons they do not enjoy the rights and protections persons holding their nationality normally enjoy. *Id.*

¹⁸⁴ Cunningham, *supra* note 24. For a brief overview of the Kaman, see *supra* Part I(A).

¹⁸⁵ Schearf, *supra* note 92.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*; see also *The Silence of the Muezzin*, ECONOMIST (Nov. 2, 2013), <http://www.economist.com/news/asia/21588948-rakhine-state-remains-seedbed-religious-and-ethnic-hatred-silence-muezzin>.

¹⁸⁸ Batchelor, *supra* note 142, at 180.

III. A MODEL OF TRANSITIONAL JUSTICE FIT FOR MYANMAR'S DEMOCRATIC TRANSITION

While citizenship may be an internationally desired ultimate aim, a more realistic proximate aim should be the establishment of a mechanism to address the majority Rakhine Buddhists' underlying fears of the Rohingya and their potential status as citizens, which have fueled the ethnic, racial, and religious discrimination they have faced.¹⁸⁹ The situation of the Rohingya has become an explosive political topic, implicating issues about national sovereignty, Buddhist nationalism, the fear of the spread of Islam and Islamic terrorism,¹⁹⁰ and the treatment of minorities within a minority state.¹⁹¹ These fears would not necessarily be addressed by an amendment to the 1982 Citizenship Law, which is unlikely in the current climate. Myanmar's political transition can provide an opportunity for the implementation of appropriate models of transitional justice to address the underlying issues that have led to the periodic violence seen in Rakhine State.

According to the International Center for Transitional Justice, transitional justice refers to the mechanisms that countries—particularly those emerging from periods of conflict and repression—can use to address large scale or systematic human rights violations.¹⁹² Although the aims of transitional justice vary according to the context, certain features are constant: “[T]he recognition of the dignity of individuals, the redress and acknowledgement of violations, and the aim to prevent such violations from happening again.”¹⁹³ An actual “transition” is not required to implement a transitional justice approach, so long as there is an opportunity to address massive violations.¹⁹⁴ An example of such an opportunity is when a new government replaces a repressive one; the new regime can introduce and support “different kinds of justice policies for

¹⁸⁹ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 98.

¹⁹⁰ Kyaw Ye Lynn, *Myanmar Nationalists Say UN Rakhine Probe Unwelcome*, ANDALOU AGENCY (June 11, 2016), <http://aa.com.tr/en/asia-pacific/myanmar-nationalists-say-un-rakhine-probe-unwelcome/679763>.

¹⁹¹ Cunningham, *supra* note 24.

¹⁹² *What is Transitional Justice?*, INT'L CTR. TRANSITIONAL JUSTICE, <https://www.ictj.org/about/transitional-justice> (last visited Feb. 16, 2018). The United Nations defines transitional justice as the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation. See U.N. Secretary-General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* 3 (Mar. 2010), https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf. [hereinafter *United Nations Approach to Transitional Justice*].

¹⁹³ *What is Transitional Justice?*, *supra* note 192.

¹⁹⁴ *Id.*

past atrocities”—as has been the case in Argentina, South Africa, Peru, and Tunisia, among others.¹⁹⁵

Aung San Suu Kyi’s new government provides an opportunity for both the national government and regional authorities in Myanmar to address the massive human rights violations the Rohingya have faced and continue to face. Prior to the majority victory of the National League for Democracy in November 2015, advocates of transitional justice recognized the value the approach could have if certain critical developments took place in Myanmar—namely peace, a new government, and constitutional reform.¹⁹⁶ While all of those developments have not yet been met, the shift from a former military regime to a new democratic government increases the potential value and success of the implementation of certain approaches to transitional justice.

In general, there are four approaches to transitional justice: criminal prosecutions, truth commissions, reparations programs, and institutional reform.¹⁹⁷ In Myanmar and, in particular, Rakhine State, truth commissions and institutional reform seem to be the appropriate initial methods of transitional justice. Reparations programs aim to compensate victims of systemic violations of human rights by providing them with an assortment of material and symbolic benefits.¹⁹⁸ They can be better implemented following truth commissions once the community has “processed which groups have been victimized and why.”¹⁹⁹ In Myanmar, criminal prosecutions may not be likely tools during the current democratic transition because, generally, “states emerging from years of conflict or repressive rule may be unable or unwilling” to conduct effective investigations and prosecutions of members of the former regime.²⁰⁰

A. *Truth Commission*

Truth commissions are “non-judicial or quasi-judicial investigative bodies, which map patterns of past violence, and unearth the causes and consequences.”²⁰¹ The core activities usually include collecting statements from victims and witnesses, conducting thematic research, organizing public

¹⁹⁵ *Id.*

¹⁹⁶ *See* Thomson, *supra* note 27.

¹⁹⁷ *What is Transitional Justice?*, *supra* note 192.

¹⁹⁸ *United Nations Approach to Transitional Justice*, *supra* note 192.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

hearings and other awareness programs, and publishing a final report outlining findings and recommendations.²⁰²

1. *Past and Present Commissions in Rakhine State*

In the past, Myanmar has established commissions in Rakhine State somewhat similar to the truth commissions identified above in order to understand communal violence and to find a solution for peace. In 2012, the national government formed the Rakhine Inquiry Commission.²⁰³ Its purpose was to “discover root causes of communal violence and provide recommendations for the prevention of recurrence of violence in the future and promotion of peaceful coexistence.”²⁰⁴ After conducting its investigation and analysis, the Commission concluded that the review of the Rohingyas’ citizenship was a priority and the government should not only apply existing national laws, but also adhere to international agreements, among other things.²⁰⁵ However, the Commission was criticized for not including a Rohingya representative and for using “Bengali” to refer to the Rohingya community.²⁰⁶ In fact, the Commission included a section in its report on why the term Rohingya is not accepted, pointing to the belief that the term is a recent invention and the minority population must be identified, above all, as Muslim.²⁰⁷

In addition to the Rakhine Inquiry Commission, former U.N. Secretary-General Kofi Annan was tasked with leading the Advisory Commission on Rakhine State, which was formed in August 2016.²⁰⁸ The Advisory Commission released its Final Report in August 2017,²⁰⁹ just hours before the Arakan Rohingya Salvation Army’s attack and the Myanmar military’s

²⁰² *Id.*

²⁰³ REPUBLIC OF THE UNION OF MYANMAR, FINAL REPORT OF INQUIRY COMMISSION ON SECTARIAN VIOLENCE IN RAKHINE STATE (2013), http://www.burmalibrary.org/docs15/Rakhine_Commission_Report-en-red.pdf [hereinafter FINAL REPORT]; see also Southwick, *supra* note 165, at 266.

²⁰⁴ FINAL REPORT, *supra* note 203.

²⁰⁵ Southwick, *supra* note 165, at 266–67.

²⁰⁶ *Id.* at 266.

²⁰⁷ FINAL REPORT, *supra* note 203.

²⁰⁸ David Brunnstrom, *In First UN Address as Leader, Aung San Suu Kyi Defends Efforts on Rohingyas*, HUFFINGTON POST (Sept. 21, 2016), http://www.huffingtonpost.com/entry/aung-san-suu-kyi-united-nations-rohingya_us_57e2e2b7e4b08d73b82f355f.

²⁰⁹ ADVISORY COMMISSION ON RAKHINE STATE, TOWARDS A PEACEFUL, FAIR AND PROSPEROUS FUTURE FOR THE PEOPLE OF RAKHINE, FINAL REPORT OF THE ADVISORY COMMISSION ON RAKHINE STATE (2017), http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf [hereinafter FINAL ADVISORY COMMISSION REPORT].

disproportionate response in northern Rakhine State.²¹⁰ Immediately, the Final Report addressed the issue with the term Rohingya, noting its use of “Muslim” to identify them over “Bengali” or “Rohingya” in order to keep in line with the request of the State Counsellor, Aung San Suu Kyi.²¹¹ After providing a historical overview of anti-central government and intercommunal tensions in Rakhine State, the Final Report listed the Advisory Commission’s main findings and recommendations in a number of areas.²¹² Notably, the Advisory Commission did not directly advocate granting the Rohingya citizenship but did recommend that the Myanmar government “set in motion a process to review the law,” which should “re-examine the current linkage between citizenship and ethnicity.”²¹³

Despite its review of and recommendations for the human rights issues that the Rohingya face, the Advisory Commission on Rakhine State has faced criticism similar to the Rakhine Inquiry Commission.²¹⁴ Primarily, the Advisory Commission on Rakhine State contained a panel of six members from Myanmar and three members from overseas but not a single Rohingya.²¹⁵ Another criticism is that the Advisory Commission’s mandate focuses broadly on development instead of taking an investigative approach to human rights violations.²¹⁶

2. Goals of the Truth Commission

In the implementation of a truth commission, Myanmar’s new government should aim to learn from the criticisms of previous commissions. The effectiveness of a truth commission is dependent upon two crucial factors: (1) “whether the commission is able to attract the attention of its constituents,” and

²¹⁰ MY WORLD IS FINISHED, *supra* note 10, at 6.

²¹¹ FINAL ADVISORY COMMISSION REPORT, *supra* note 209, at 12. Interestingly, another Muslim group, the Kaman, are referred to as “Kaman” and not “Muslims,” highlighting the tension with the ethnic identification of “Rohingya.” *Id.*

²¹² *Id.* at 31. The areas are economic and social development of Rakhine State citizenship; freedom of movement; internally displaced persons (IDPs); humanitarian access; media access; education; health; drugs; communal participation and representation; intercommunal cohesion; the security sector; access to justice; cultural development; border issues and the bilateral relationship with Bangladesh; and regional relations. *Id.* at 5.

²¹³ *Id.* at 32. The Advisory Commission also recommends that Myanmar “needs a status for those who reside in Myanmar without being citizens, . . . should clarify residency rights, and provide associated documentation.” *Id.* at 28.

²¹⁴ Mike Ives, *Kofi Annan, in Myanmar, Voices Concerns Over Reported Abuses of Rohingya*, N.Y. TIMES (Dec. 6, 2016), http://www.nytimes.com/2016/12/06/world/asia/kofi-annan-myanmar-rohingya.html?_r=0.

²¹⁵ *Id.*

²¹⁶ *Id.*

(2) “whether the commission is perceived as legitimate among members of the mass public.”²¹⁷ In achieving both of these aims, the truth commission should be based on national consultation, which the United Nations asserts is a critical element of a human rights-based approach to transitional justice.²¹⁸ An essential aspect of national consultation is public participation.²¹⁹ Effective outreach must address both specific groups affected by the particular mechanisms involved as well as the broader community.²²⁰ Accordingly, the truth commission should aim to include as many members of different ethnic groups as possible—in contrast to the Rakhine Inquiry Commission and the Advisory Commission on Rakhine State.

In fact, the findings in the Rakhine Inquiry Commission’s Final Report highlight the importance of public participation. According to this report, amongst the total 1,200 survey respondents, only twenty-five percent of the 600 Rakhine from northern Rakhine State reported having Bengali²²¹ acquaintances—but only for business dealings.²²² Similarly, the Bengalis living in the same region said that apart from the work sphere, they did not mix at all with the Rakhine in social, family, or leisure matters.²²³ The Rakhine Inquiry Commission also conducted a similar survey in southern Rakhine State, where there was more contact between the Rakhine and Rohingya and, therefore, less harsh words exchanged about either ethnic group.²²⁴ The Commission concluded: “The lack of contact between the Rakhine and the Bengalis in the north seems to have contributed to a lack of understanding between the two sides.”²²⁵ Crucial contact between the Rakhine and Rohingya—although obvious but still not officially and formally implemented—must be a major component of the truth commission.

Moreover, the national consultation process helps victims and other members of civil society develop local ownership of the resulting program.²²⁶ This is necessary because there are “concerns that international attention

²¹⁷ James L. Gibson, *On Legitimacy Theory and the Effectiveness of Truth Commissions*, 72 L. & CONTEMP. PROB. 123, 126 (2009).

²¹⁸ *United Nations Approach to Transitional Justice*, *supra* note 192.

²¹⁹ Public participation reveals the needs of communities affected by conflict or repressive rule, allowing States to craft an appropriate context-specific transitional justice program. *Id.*

²²⁰ *United Nations Approach to Transitional Justice*, *supra* note 192.

²²¹ The Final Report referred to the Rohingya as “Bengalis.” FINAL REPORT, *supra* note 203.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *United Nations Approach to Transitional Justice*, *supra* note 192.

directed at the Rohingya situation, meant to hold the government accountable, may have inadvertently played a role in exacerbating tensions between the Rohingya and Rakhine Buddhists.”²²⁷ For example, there were large demonstrations in Sittwe by Rakhine Buddhists protesting international misrepresentation of the local situation following the May 2015 humanitarian crisis.²²⁸ There have been many similar protests aimed at the international community—from media to international non-governmental organizations—often leading to increased violence and lack of access to international humanitarian aid in their aftermath.²²⁹ The Advisory Commission on Rakhine State, with a former U.N. Secretary-General in charge and the inclusion of foreign panelists,²³⁰ may continue to increase anti-international hostility. A truth commission led by local leaders from all ethnic groups and based on public participation of all voices in the community will allow the Rohingya and Rakhine Buddhists to voice their concerns about issues that ultimately affect them the most.

Local ownership of the truth commission is particularly important in the context of the debate over the term “Rohingya.” The debate, especially in the international community, has been elevated as a focal point of the humanitarian crisis in Rakhine State, with most observers in favor of using the term “Rohingya.”²³¹ As a result, Rakhine Buddhists, as well as other groups in Myanmar, feel misunderstood and besieged because they believe “the international community’s use of the term ‘Rohingya’ validates the narrative of ‘essentializing’ a Muslim identity in Rakhine State.”²³² There is widespread fear of a Muslim identity in Rakhine State, and anti-Muslim propaganda is frequently voiced in the national discourse.²³³ In a survey of 500 participants across seven cities in Myanmar, “85 percent cited fears of the country turning Islamic as the main reason for their dislike of Muslims.”²³⁴ These fears

²²⁷ Jasmine Chia, *The Truth About Myanmar’s Rohingya Issue*, THE DIPLOMAT (Mar. 5, 2016), <http://thediplomat.com/2016/03/the-truth-about-myanmars-rohingya-issue/>.

²²⁸ In May 2015, thousands of Rohingya refugees were stranded in boats on the sea after they were rejected entrance into Thailand. *Id.* Many international media outlets did not cover the protests by the Rakhine Buddhists. *Id.*; see also Mratt Kyaw Thu, *Anti-UN Posters Dropped from Rakhine State Protests*, MYANMAR TIMES (June 15, 2015), <http://www.mmtimes.com/index.php/national-news/15029-anti-un-banners-dropped-from-rakhine-state-protests.html>.

²²⁹ Chia, *supra* note 227.

²³⁰ Ives, *supra* note 214.

²³¹ Chia, *supra* note 227.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

culminate in the term “Rohingya,” which the Rakhine Inquiry Commission’s Final Report shows is divisive to the point of violence:

Should the Bengalis continue to insist they should be called Rohingya, the majority in the country will not accept this and there could be further unrest. The indigenous Rakhine can be expected to have an intense reaction. Thus, Bengalis now pushing to use the term Rohingya are surely fanning the flames of sectarian violence.²³⁵

Although the Final Report blames advocacy for the use of the term “Rohingya,” in reality it is a complicated mix of fear and discrimination against Muslims in Rakhine State that is a major cause of the periodic communal violence in the region.²³⁶

A primary function of the truth commission must be the appropriate investigation of those instances of violence. There may never be a definitive answer to the so-called “Rohingya” question.²³⁷ People who self-identify as Rohingya will continue to do so, while the majority who believe the term is a recent invention having no place in Myanmar will continue to push their stance. Instead, both communities must confront the reality of, as well as their responsibility for, the violence they periodically face. The previous commissions were not mandated to address the specific instances of violence that have been thoroughly documented by news media outlets and human rights groups, and instead opted to broadly condemn the violence in general.²³⁸ Without specifically addressing the violence by insurgent groups, vigilantes, and the Myanmar military in Rakhine State, the truth commission will fail in its most important task: To establish the truth and formally recognize the crimes and abuses that victims have endured.²³⁹

The tools a truth commission can use in its realization of this goal include public and private testimony from victims, witnesses, and experts.²⁴⁰ Additionally, the panelists of the commission should issue a comprehensive report of their findings to serve as a record of the truth. The report should also

²³⁵ The Final Report further states, “Whilst there are, at present, some issues that can be resolved through peaceful debate and negotiation, Bengali demands to be recognized as Rohingya will only be divisive, leading to more conflict, possibly with greater losses than before.” FINAL REPORT, *supra* note 203.

²³⁶ Chia, *supra* note 227.

²³⁷ CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19, at 96 (quoting M. Smith, *The Muslim “Rohingyas” of Burma*, 2 Paper delivered at Conference of Burma Centrum Nederland (Dec. 11, 1995)).

²³⁸ See FINAL ADVISORY COMMISSION REPORT, *supra* note 209, at 13.

²³⁹ *Truth Commissions*, INT’L CTR. TRANSITIONAL JUSTICE, <https://www.ictj.org/sites/default/files/ICTJ-Global-Truth-Commissions-2008-English.pdf> (last visited Feb. 16, 2018) [hereinafter *Truth Commissions*].

²⁴⁰ *Id.*

contain recommendations for use by the local Rakhine State government and the national government.²⁴¹ An ultimate aim of the truth commission is to contribute to the development of a rule-of-law culture that respects human rights and thereby raises the costs of future efforts to violate the human rights of the citizenry.²⁴² Achieving this aim is more likely when the truth commission includes comprehensive policies to hold perpetrators accountable, paving the way for systemic reform.²⁴³

3. *Likelihood of the Implementation of a Truth Commission*

It is important to consider the likelihood of the Myanmar government's implementation of a truth commission. The Advisory Commission on Rakhine State was already seen as an effort to assess the situation in Rakhine State.²⁴⁴ Furthermore, according to the International Center for Transitional Justice, it appears that Aung San Suu Kyi and her party do not believe transitional justice is necessary or desirable.²⁴⁵ From public comments and other reported discussions, it seems that Aung San Suu Kyi and other National League for Democracy leaders associate transitional justice with criminal prosecutions motivated by revenge.²⁴⁶ It is possible that leaders in Rakhine State, most of whom are Rakhine Buddhists, may hold similar views and be opposed to a truth commission, particularly one that includes Rohingya voices.

B. *Institutional Reform*

In addition to a truth commission, Myanmar's democratic transition provides an opportunity for institutional reform. Public institutions that helped to maintain and spread conflict or repressive rule "must be transformed into fair and efficient institutions that protect human rights and foster a culture of respect for the rule of law."²⁴⁷ The source of much of the systematic violence against the Rohingya in Rakhine State is Myanmar's military forces.²⁴⁸ There has been a start to institutional reform of the military forces. In August 2016, the deputy commander Lt. Gen. Mya Tun Oo of Myanmar Army's North Eastern Command publicly admitted that soldiers under his command killed

²⁴¹ *Id.*

²⁴² Gibson, *supra* note 217, at 126.

²⁴³ *Truth Commissions, supra* note 239.

²⁴⁴ Ives, *supra* note 214.

²⁴⁵ Thomson, *supra* note 27.

²⁴⁶ *Id.*

²⁴⁷ *United Nations Approach to Transitional Justice, supra* note 192. For the military's involvement in the current humanitarian crisis, see Cumming-Bruce, *supra* note 102.

²⁴⁸ See, e.g., CRIMES AGAINST HUMANITY IN WESTERN BURMA, *supra* note 19.

five local men during an interrogation in northern Shan State.²⁴⁹ There was a court martial with family members of the deceased present, during which soldiers confessed to the crime.²⁵⁰

Holding the military officers accountable for their illegal actions complements the investigative functions of the truth commission²⁵¹ and is a crucial step to reigning in the violence and instability in Rakhine State. Institutional reform should “incorporate comprehensive training programs for public officials and employees on applicable human rights standards,” in order to prevent the recurrence of future human rights violations.²⁵² However, the position of the Myanmar military as former rulers and their continuing domination challenges institutional reform, as highlighted by the violent military crackdown in Rakhine State in August 2017 and Aung San Suu Kyi’s persistent refusal to acknowledge or condemn the military’s role.²⁵³

CONCLUSION

The persecution of the Rohingya began with the former military regime, whose forces continue to dominate Rakhine State and are primarily responsible for the extreme violence and mass exodus of the Rohingya to neighboring Bangladesh in mid- to late-2017.²⁵⁴ Although Myanmar’s military retains a powerful place in the country’s government, Myanmar is undoubtedly undergoing a significant transition into democracy—most notably due to its first freely elected parliament and Aung San Suu Kyi’s de facto leadership. While the combination of old and new regimes has created a complex reality²⁵⁵ that imposes great challenges in addressing and alleviating the plight of the Rohingya, it also provides an opportunity for the implementation of transitional justice mechanisms—namely, a truth commission and institutional reform—to address massive human rights violations the Rohingya have faced in the past and continue to presently face.

However, implementing a truth commission and institutional reform does not guarantee societal transformation.²⁵⁶ Although the goal is the advancement

²⁴⁹ Thomson, *supra* note 27.

²⁵⁰ *Id.*

²⁵¹ *Truth Commissions, supra* note 239.

²⁵² *United Nations Approach to Transitional Justice, supra* note 192.

²⁵³ Cumming-Bruce, *supra* note 102; Elizabeth Dias, *Will the Rohingya Exodus Be Aung Saan Suu Kyi’s Fall From Grace?*, TIME (Sept. 21, 2017), <http://time.com/4951180/myanmars-shame-aung-san-suu-kyi/>.

²⁵⁴ *See generally* MY WORLD IS FINISHED, *supra* note 10.

²⁵⁵ Mathieson, *supra* note 25.

²⁵⁶ Gibson, *supra* note 217, at 126.

of political tolerance—a central component of democratic political culture and a necessary ingredient for coexistence—some view transitional justice as the product of social change rather than the cause of it.²⁵⁷ The revelation of the “truth” is not the only factor that will lead to change in the socio-economic conditions many Rohingya face, in part due to their lack of citizenship. While establishing a truth commission and institutional reform may ease the transition into some kind of citizenship for the Rohingya,²⁵⁸ actual change in their legal citizenship status and quality of life would require a larger shift in attitude and action from the Myanmar government. The democratic transition the country is undergoing—and the opportunities for transitional justice it provides—will hopefully serve as the desperately needed spark for that shift.

SHATTI HOQUE*

²⁵⁷ Gibson, *supra* note 217, at 126 (citing Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principles and Pragmatism in Strategies of International Justice*, 28 INTL. SECURITY 5, 31 (2013)).

²⁵⁸ *Truth Commissions*, *supra* note 239.

* Managing Editor, *Emory International Law Review*; J.D. Candidate, Emory University School of Law (2018); B.A., cum laude, New York University (2015). The author would like to thank Professor Michael J. Perry for his advice and guidance in writing this Comment. The author would also like to thank the Emory International Law Review Executive Board for their gracious help and input throughout the editing and publication process. Finally, the author would like to thank her parents, Qamrun Nisa and Mohammed Anwarul Hoque, and her brother, Mohammed Qamrul Hoque, for their continuous love and support.