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# Defining Myanmar's "Rohingya Problem"

by Benjamin Zawacki\*

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Much has been written either empathetically or as a challenge of Myanmar's "Rohingya problem." Between June and November 2012, the Rohingya bore the brunt of communal violence, human rights violations, and an urgent humanitarian situation in Rakhine State, and still face an uncertain future.

A great deal of rhetoric has attended these accounts—by officials and citizens of Myanmar, Rohingya organizations, journalists, human rights groups, and others—essentially attaching labels to the situation. And while there have been a number of thoughtful attempts to define or even explain the Rohingya problem in historical or political terms, they have been largely drowned out by emotive outbursts and media-friendly sound bites.

This is not only unfortunate, it is also consequential, for as was seen in 2012, rhetoric can influence both the way in which a crisis plays out as well as in how it is responded to. In other words, *how* we talk about what it is we are talking about matters. What do we *mean* when we talk about the "Rohingya problem"?

In proffering a modest definition of Myanmar's "Rohingya problem"—one almost entirely of its own making—three distinct but related areas of law and fact warrant particular examination: 1) nationality and discrimination, which focuses exclusively on Myanmar; 2) statelessness and displacement, which implicates Myanmar's neighbors as well; and 3) the doctrine of the Responsibility to Protect, which draws into the discussion the role of the international community.

These three areas demonstrate that although the root causes of the "Rohingya problem" are within Myanmar, their effects are felt regionally and are of relevance even further afield. They are thus progressively causal, and they imply where efforts toward solutions should be directed and prioritized.

## NATIONALITY AND DISCRIMINATION

The violent events of 2012, as well as those of 1978, 1992, 2001, and 2009, can be attributed to systemic discrimination against the Rohingya in Myanmar. That is, to a political, social, and economic *system*—manifested in law, policy, and practice—designed to discriminate against this ethnic and religious minority. This system makes such direct violence against the Rohingya far more possible and likely than it would be otherwise. Further,

in the eyes of the Myanmar authorities at least—as evidenced by the lack of legal accountability for civilians and officials alike—discrimination also makes the violence and violations somehow justifiable. *This* is the Rohingya problem boiled down to its most basic element.

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In 1978's "Dragon King" operation, the Myanmar army committed widespread killings and rapes of Rohingya civilians, and they carried out the destruction of mosques and other religious persecution. These events resulted in the exodus of an estimated 200,000 Rohingya to neighboring Bangladesh. Another campaign of forced labor, summary executions, torture, and rape in 1992 led to a similar number of Rohingyas fleeing across the border. In February 2001, communal

violence between the Muslim and Buddhist populations in Sittwe resulted in an unknown number of people killed and Muslim property destroyed.<sup>1</sup> In late 2008 and early 2009, Thai authorities pushed back onto the high seas several boats—lacking adequate food, water, and fuel—of Rohingyas in the Andaman Sea.<sup>2</sup>

All of these events have similar, separate equivalents in countries in which systemic discrimination does not take place. Yet in Myanmar such discrimination provides the violence with a ready-made antecedent, expressly approved by the state. Indeed to varying degrees, the seminal events noted above were simply exacerbations of this underlying discrimination: alarming episodic symptoms of a chronic legal, political, and economic illness. It would overstate the causality to assert that if Myanmar had never put its system of discrimination against the Rohingya into place, then these events would not have occurred. Eliminating it now, however, is urgently required for a future of sustainable peace in Rakhine State. Equally important, it is imperative under human rights law.

The system's anchor is the 1982 Citizenship Law, which in both design and implementation effectively denies the right to a nationality to the Rohingya population. It supersedes all previous citizenship regimes in Myanmar.<sup>3</sup> The 1982 Citizenship Law creates three classes of citizens—full, associate, and naturalized—none of which has been conferred on most Rohingyas.

Myanmar reserves full citizenship for those whose ancestors settled in the country before the year 1823 or who are members of one of Myanmar's more than 130 recognized national ethnic groups, which do not include the Rohingya. Associate citizens are those who both are eligible and have applied for citizenship under a previous 1948 law. This requires an awareness of the law that few Rohingyas possess and a level of proof that even fewer

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are able to provide. Access to naturalized citizenship is similarly, available only for those who resided in Myanmar on or before 1948. With all three classes, the Central Body has the discretion to deny citizenship even when the criteria are met.<sup>4</sup>

The 1982 Citizenship Law's discriminatory effects are also extremely consequential. The main effect is that the Rohingya, most of whom lack citizenship in Myanmar, have been rendered stateless, both unable to avail themselves of the protection of the state and—as has been the case for decades—subject to policies and practices that constitute violations of their human rights and fundamental freedoms. These include restrictions on movement; forced labor; land confiscation, forced eviction, and destruction of houses; extortion and arbitrary taxation; and restrictions on marriage, employment, health care, and education.<sup>5</sup> Although not limited to Rohingyas, these restrictions are not imposed in the same manner and to the same degree on Buddhists or other Muslims in Rakhine State, or on other ethnic minorities across the country.

This is systemic discrimination: laws, policies, and practices, though designed and carried out by people, are ultimately part of or attributable to a system that ensures discrimination even in the absence of discriminatory individuals.

It is unlawful. As a member of the United Nations, Myanmar is legally obliged to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion,” as declared in Articles 55 and 56 of the UN Charter.

The Universal Declaration of Human Rights—though not a binding document—provides in Article 15 that “everyone has the right to a nationality.” Article 2 holds that everyone is entitled to all the rights in the Declaration “without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” So significant is this anti-discrimination language that it can be found in five more international human rights documents, including the Convention on the Rights of the Child (CRC)<sup>6</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>7</sup>

Myanmar has ratified both of these documents, making their provisions binding on the state. According to Amnesty International, it is a violation “to be deprived of one’s rights because of a characteristic that one cannot change—such as one’s race or ethnic origin—or because of a characteristic that is so central to one’s being that one should not be forced to change it, such as religion.”<sup>8</sup>

In addition, Article 7 of the CRC provides for the right of a child to a nationality, “in particular where the child would otherwise be stateless.” It is clear that Myanmar, as a State Party to this treaty, is in violation of its international legal obligations pertaining to the right of Rohingya children to a nationality.

Myanmar should substantially amend the 1982 Citizenship Law or repeal and redraft it, such that the Rohingyas are

indisputably made citizens. Rohingyas born in Myanmar who would otherwise be stateless should be granted citizenship, as should those who are not born there but are able to establish a genuine and effective link to the country. Myanmar should also eliminate its policies and practices that discriminate against the Rohingya on the grounds of ethnicity and/or religion.

More than any other single step, dismantling its system of discrimination would bring Myanmar’s Rohingya problem closer to a solution.

## STATELESSNESS AND DISPLACEMENT

Because Myanmar’s Rohingyas have been deprived of a nationality, they are rendered stateless. The human rights effects of this both for Rohingyas inside Myanmar and those living abroad as refugees are substantial.

Inside Myanmar, a kind of circularity exists whereby systemic discrimination renders the Rohingya stateless, while their status as a stateless population acts as validation for further discrimination and persecution by the state and its citizens. Because of this, access to a nationality is commonly known as “the right to have rights.”<sup>9</sup> This description, however, is only correct in fact but not as a matter of law; all human rights belonging to citizens also belong to stateless persons.

Immigration law may legitimately distinguish between those with and those without a nationality. But just as states’ authority to confer nationality is restrained

by a prohibition on denial based on ethnicity or religion, they likewise cannot apply immigration law at the expense of basic human rights and fundamental freedoms. Similarly, although human rights law allows for the conditional suspension of certain rights during emergencies, it does not permit—as was the case during the state of emergency declared in northern Rakhine State in June 2012<sup>10</sup>—derogation from the right to life (among other rights).

There are two international treaties on statelessness, neither of which Myanmar has signed or ratified. At first glance, the Convention Relating to the Status of Stateless Persons would seem to be the more relevant to the Rohingya, for it pertains to the treatment of *de jure* stateless persons. A *de jure* stateless person is one “who is not considered as a national by any state under the operation of its law.”<sup>11</sup> Both its Preamble and Article 3 contain non-discrimination clauses, while other provisions provide protections in respect to religion, property, employment, education, public assistance, and social security,<sup>12</sup> all implicating the situation of the Rohingyas in Myanmar.

Yet, it is far from clear that the Convention would even apply to the Rohingya in Myanmar, as it applies only to stateless persons deemed to be legally residing in the country at issue. Applicability would thus turn on whether, by virtue of the 1982 Citizenship Law, the Rohingyas are deemed by Myanmar *not* to be legally residing in its territory, or whether other actions by the authorities since 1982 indicate or confer legal residency.<sup>13</sup>

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Courtesy United Nations Development Programme

Rohingya were permitted in 1990 to form political parties and vote in multiparty elections. Myanmar accepted some 250,000 repatriated Rohingya refugees from Bangladesh in 1992 and in 1994 began issuing Temporary Resident Cards to some of them (although the country also ceased issuing birth certificates to Rohingya babies the same year). Rohingyas were permitted to vote in both the 2008 Constitutional referendum and the 2010 national elections, for which they were also granted a form of temporary identification card. As Myanmar does for all residents, the authorities have maintained lists of Rohingya families for several decades.

If the 1982 Citizenship Law renders the Rohingya illegal residents, then the Convention Relating to the Status of Stateless Persons reflects and actually contributes to the circularity in Myanmar described above. It effectively “scores an own goal” by allowing states—through the very discrimination it was designed to contest—to opt out of adhering to its provisions. If the authorities do consider the Rohingya as legally residing in Myanmar, however, then the Convention would apply, and Myanmar should be urged to ratify and implement it.<sup>14</sup>

The Convention on the Reduction of Statelessness, in contrast, is of indisputable relevance to Myanmar’s Rohingyas, as it obligates States Parties to prevent, reduce, and avoid statelessness through taking certain positive measures, especially by granting “its nationality to a person born in its territory who would otherwise be stateless.”<sup>15</sup> This Convention should thus be the focus of increased advocacy as a solution to the problem.

At least hundreds of thousands of Rohingyas have been physically displaced over the past 25 years, both internally and outside of Myanmar. Although hardly an exhaustive list, the five seminal events noted above, in 1978, 1992, 2001, 2009, and 2012, all featured or resulted in such displacement. Internally, not only has communal violence displaced Rohingyas, but state policy, practice, and participation—including in either instigating or failing to stop communal violence—have accounted for internal displacement as well. At least 115,000 Rohingyas are still in camps away from their homes in the wake of last year’s clashes.<sup>16</sup> State authorities have forcibly or arbitrarily transferred Rohingyas over the years through militarization

of northern Rakhine State, land confiscation, evictions from homes and homesteads, and the construction of model villages.<sup>17</sup>

The UN Guiding Principles on Internally Displaced Persons, with its focus on rights and non-discrimination, should form the basis of the Myanmar government’s treatment of these internally displaced Rohingyas, but clearly this has not been the case. Although non-binding, the Principles contemplate all those internally displaced, including stateless persons.

It is believed that more Rohingyas live outside Myanmar than the estimated 800,000 who live inside the country,<sup>18</sup> creating an involuntary diaspora through two and a half decades of both overt forced deportation and removal by state authorities, as well as the communal violence state policy has facilitated. These people are not simply refugees—a difficult enough status to cope with—but stateless persons outside their territory of habitual and historical residence.

This status does not change the root causes of the Rohingya problem, but it does extend the focus beyond Myanmar alone and onto its immediate and regional neighbors. Saudi Arabia is thought to host 500,000 Rohingyas.<sup>19</sup> In Bangladesh, the country that has and continues to host the largest number of recognized and unrecognized Rohingya refugees, 29,000 live in official camps, while another 200,000 live in makeshift settlements or amidst the local border population.<sup>20</sup> Smaller populations reside in Malaysia, Thailand, Indonesia, and India. October each year marks the start of the annual six-month sailing season, wherein Rohingyas flee persecution in Myanmar via smugglers on boats that are often unseaworthy.<sup>21</sup>

None of these countries fully respects the Rohingyas’ right to seek and enjoy asylum or the right to not be sent back to a country in which they have a well-founded fear of persecution on grounds of (among others) ethnicity or religion. Known as *non-refoulement*, this principle makes irrelevant the fact that the countries mentioned are not States Parties to the UN Convention on the Status of Refugees.<sup>22</sup> The prohibition against involuntary return of asylum-seekers and refugees is a matter of customary international law, meaning that it applies regardless of a nation’s treaty status.

Instead, citing immigration concerns, economic incentives or constraints, or questionable claims of national security<sup>23</sup> all of these countries have resorted to detention, forced repatriation, the deprivation of basic necessities on the high seas, informal deportation to traffickers, and/or direct participation in trafficking. The human rights and humanitarian records of Bangladesh and Thailand in particular have long been notably poor in relation to the Rohingya.<sup>24</sup> As such, they are in breach of their international legal obligations pertaining to asylum-seekers and refugees.

Further, none of the countries directly affected by the Rohingyas’ displacement is a party to the Convention on the Status of Stateless Persons. While, as explained above, this Convention possibly acts against its own interests in Myanmar, it is notably appropriate to its regional neighbors.<sup>25</sup> Unable to avail themselves of the diplomatic or consular protection of Myanmar, the Rohingyas’ stateless status places them in the same position everywhere, whereby their “right to have rights” is seen by the authorities as lacking. It simply compounds the precariousness of their situation.

Along with ending systemic discrimination in Myanmar, a solution to the Rohingya problem would be significantly advanced if Myanmar and its regional neighbors abided by the human rights provisions pertaining to stateless persons and refugees.

### THE RESPONSIBILITY TO PROTECT

The doctrine of the Responsibility to Protect, agreed upon by the UN General Assembly in the 2005 World Summit Outcome Document, has three main pillars: 1) the state carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement; 2) the international community has a responsibility to encourage and assist states in fulfilling this responsibility; and 3) the international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a state is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.<sup>26</sup>

This doctrine applies to the situation of the Rohingyas in Myanmar if one or more of the four expressed crimes is being or has been committed against them, and if Myanmar is “manifestly failing” to protect them.

As there is no armed conflict in Rakhine State, war crimes are clearly not at issue. Genocide, however, was claimed on dozens of other occasions during the latter half of 2012, mostly by journalists, commentators, and Rohingya activists, but also by the Organization of Islamic Cooperation (OIC) in November.<sup>27</sup>

International law defines genocide as acts “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”<sup>28</sup> Such acts are listed as killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group.<sup>29</sup>

The most credible use of the term in relation to Myanmar came from Professor William Schabas, who from 2009-2011 was a member of the International Association of Genocide Scholars. In an *Al-Jazeera* documentary entitled “The Hidden Genocide” that first aired on December 9, 2012, he stated:

[I]n the case of the Rohingya we’re moving into a zone where the word can be used. When you see measures preventing births, trying to deny the identity of a people, hoping to see that they really are eventually—that they no longer exist—denying their history, denying the legitimacy of their right to live where they live, these are all warning signs that mean that it’s not frivolous to envisage the use of the term genocide.<sup>30</sup>

Interestingly, Schabas is also the author of a 2010 report titled *Crimes against Humanity in Western Burma: The Situation of the Rohingyas*, in which he concluded that “[u]nder the circumstances, it does not seem useful at this stage to pursue an analysis that necessarily depends on an expansive approach to the definition of genocide.”<sup>31</sup> He explained that international tribunals and other bodies have been unwilling to interpret the scope of genocide beyond “the intentional physical destruction of a group,”<sup>32</sup> and so clearly implied that such intentional physical destruction of the Rohingya as a group was not taking place. While not ruling out the technical charge of genocide based on a “simplistic analysis of the factual findings” of the report, Schabas steered clear of assessing the Rohingya situation through the application of the genocide definition.<sup>33</sup>

Have the circumstances and factual findings since 2010 changed such that at this stage an argument would be persuasive that an intentional physical destruction of the Rohingya is underway in Myanmar? Schabas’s remarks on *Al-Jazeera* are essentially consistent with his 2010 report, as most of what he notes is not necessarily aimed at physically destroying the Rohingya as a group, and even the communal violence of 2012 and the government’s response—which he does not address—do not clearly implicate such an expansive definition of genocide.

Rather, what the Rohingyas have experienced for decades recalls Schabas’s conclusion in 2010: crimes against humanity. A crime against humanity is defined in the Rome Statute of the International Criminal Court as “any of the following acts when committed as part of a 1) widespread or systematic 2) attack directed against any 3) civilian population, 4) with knowledge of the attack”.<sup>34</sup> Schabas added that it is necessary that the perpetrator act pursuant to or in furtherance of a state or organizational policy.<sup>35</sup>

Among the eleven acts listed in the Rome Statute, nine are of varying relevance to the Rohingya in Myanmar: murder; forcible deportation or transfer of a population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, or religious grounds; enforced disappearance of persons; the crime of apartheid; and other inhumane acts of a similar character intentionally causing great suffering or serious injury.<sup>36</sup>

Schabas argued that “the Rohingyas are the *prima facie* victims of the crime against humanity of persecution,”<sup>37</sup> consisting of “the severe deprivation of fundamental rights on discriminatory grounds.”<sup>38</sup> The analysis is not dissimilar to discrimination discussed above, though placed squarely within the five elements that constitute a crime against humanity. Schabas also accurately asserted that the government of Myanmar has perpetrated the forcible transfer of the Rohingya population, via expulsion or other coercive acts.

He stopped short, however, of concluding that this crime against humanity also constitutes ethnic cleansing and it is here that his overall argument—accurate enough in 2010—is incomplete in view of the events of 2012. Ethnic cleansing is “rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area.”<sup>39</sup> It is distinct from genocide in its intent—to remove rather than destroy the group. Schabas stated: “Since at least 1978, the SPDC<sup>40</sup> have persistently tampered with the ethnic make-up of the region. However, it cannot be said with any degree of certainty that the intent behind such actions is to ethnically cleanse North Arakan State.”<sup>41</sup> This would no longer seem to be the case.

Action by ethnic Rakhine Buddhists and inaction by the authorities—both aided and abetted by years of persecutory policy and recent statements by officials—strongly suggest that what is being prosecuted in Rakhine State is an effort to remove the Rohingya from the area. President Thein Sein himself set the tone in July when he stated that the Rohingya could not and would not be accepted as either citizens or residents of Myanmar, and he asked the UN High Commissioner for Refugees (UNHCR) to consider placing them in camps outside of the country and resettling them to others.<sup>42</sup> That is, he wanted them removed from Myanmar.

It is true that both he and other officials have moderated that position to some extent since.<sup>43</sup> In August, the President pledged to open more schools for Rohingya.<sup>44</sup> In September the Minister of Immigration stated that the Rohingya have the right to apply for citizenship,<sup>45</sup> and the Vice President pointedly called for increased economic development for “both sides” in Rakhine State.<sup>46</sup> In November the Foreign Minister pledged to return the displaced in Rakhine State to their homes as soon as possible.<sup>47</sup> That month the President wrote a letter to the UN Secretary-General promising unspecified rights for the Rohingyas.<sup>48</sup>

Despite these words, however, the actions, developments, and facts on the ground still support the conclusion that ethnic cleansing<sup>49</sup> is underway in Rakhine State. Proceeding chronologically and merging relevant official actions and statements with those of relevant non-state actors,<sup>50</sup> in August the Rakhine Nationalities Development Party’s (RNDP) Dr. Aye Maung reportedly urged rice sellers to refuse Rohingya buyers and said that Rakhine State should “be like Israel.”<sup>51</sup> In a review of the situation prepared for Parliament that month, President Thein Sein reportedly stated that ethnic Rakhines were targeting and terrorizing the Rohingya population, and that Rakhines could not accept Rohingyas as citizens or residents of Myanmar.<sup>52</sup> In September, groups of monks in Mandalay demonstrated for several days urging the removal or internment of the Rohingya in Myanmar.<sup>53</sup> The U.S. deputy national security advisor noted this problem and stated, “In Burma, preferential treatment for Buddhists and prejudice against ethnic South Asians, particularly ethnic Rohingya Muslims, fuels tensions between the Buddhist majority and Christian and Muslim minorities.”<sup>54</sup>

By mid-September, an estimated 76,000 persons in Rakhine State were living in camps. Most were Rohingyas, unable to work, go to school, buy goods either inside or outside the camps, or even leave them without fear of being beaten by ethnic Rakhines or detained by the authorities. Farther south, thousands

of Rohingyas had fled the state capital of Sittwe, where their homes, shops, and mosques were destroyed like those of their compatriots elsewhere.<sup>55</sup> According to Border Affairs Minister Lt. Gen. Thein Htay, the city reportedly consisted of “lines that cannot be crossed.”<sup>56</sup> However, in what was described as their largest ever public gathering, ethnic Rakhines in Sittwe “laid out an ultra-nationalist manifesto approving, among other things . . . the formation of armed militias, . . . removal of Rohingya villages, and the reclamation of land that had been ‘lost’ to [the Rakhines].”<sup>57</sup> They also came out against plans to reunite their community with the Rohingya.<sup>58</sup>

In October, a week before the second outbreak of violence on October 21, hundreds of ethnic Rakhines, including monks, demonstrated for several days in support of relocating the residents of the Aung Mingalar part of Sittwe, an almost entirely Muslim area.<sup>59</sup> Human Rights Watch observed, “Segregation has become the status quo.”<sup>60</sup> In the midst of the violence, several hundred Buddhists reportedly demonstrated in Sittwe in support of a ten-point document circulated by the All-Arakanese Monks’ Solidarity Conference, calling for the targeting of Rohingya sympathizers as national traitors, and the expulsion of Rohingyas from Myanmar.<sup>61</sup> Most Rohingya neighborhoods, including unburned buildings, were bulldozed in the days following the violence.<sup>62</sup> Further, as the government admitted that the violence against the Rohingya was instigated and organized, rather than spontaneous,<sup>63</sup> the *New York Times* reported that anti-Islamic pamphlets appeared in Rakhine State.<sup>64</sup>

By November—when the number of displaced persons reached roughly 115,000 and consisted almost entirely of Rohingyas<sup>65</sup>—the situation was most accurately described by *The Economist*:

[I]ts main contours are clear: a vicious and bloody campaign of ethnic cleansing by (the Rakhines that is intended to drive Rohingyas out. Rakhine politicians say frankly) (that the only alternative to mass deportation is a Burmese form of apartheid, in which more Rohingyas are corralled into squalid, semi-permanent internal-refugee camps.<sup>66</sup>

That month, Buddhist groups reportedly prevented doctors and aid workers from delivering medical assistance to camps of Rohingyas, and distributed pamphlets threatening them against continuing their work in Sittwe.<sup>67</sup> *Reuters* reported that military sources said the second wave of attacks against the Rohingya—resulting in several more villages completely destroyed or cleansed—were planned and orchestrated by Rakhine nationalists tied to the RNDP (which denied official involvement).<sup>68</sup> Echoing the title of an August 2012 Human Rights Watch report produced after the initial violence (*The Government Could Have Stopped This*), a member of the National Democratic Party for Development, said “There were [threats of violence] ahead of the riots—we knew Kyaukphyu was going to burn and repeatedly warned concerned government authorities about it but they kept on saying ‘we got it’ and then the town was burnt down.”<sup>69</sup> A government self-survey of ethnicity in Rakhine State did not contain the option of “Rohingya,” with those refusing to choose “Bengali” reportedly designated as such against their will or excluded altogether—in both cases potentially making them “illegal.”<sup>70</sup>

December saw vehement official denials of the *Al-Jazeera* documentary's conclusions, noted above, though the report's findings were revealing. A Burmese academic stated that Rakhine State is "our ancestral land, we cannot share that land, you know, for any aliens or immigrants."<sup>71</sup> He also said that "no Muslim, no Bengali living in that town [of Taungoo] because the town people, town folk, do not allow any Bengali people to come here."<sup>72</sup> A Sittwe-based monk not only repeated this statement but reasoned it is why ethnic Rakhine Buddhists killed ten Muslims there in early June, setting off the initial communal violence: "They felt insulted and were furious when ten Muslims dared to pass through the town."<sup>73</sup>

*Al-Jazeera* displayed a July 2012 statement by the RNDP's Dr. Aye Maung that "Bengali people should be relocated to suitable places . . . in order not to reside or mix with Rakhines."<sup>74</sup> And it stated that in the Aung Mye Thar section of Sittwe, the Rohingyas "are fenced in and cannot leave."<sup>75</sup>

By the end of 2012, hundreds of Rohingya villages or settlements had been destroyed, tens of thousands of homes razed, and at least 115,000 Rohingyas displaced in camps or "ghettos" in Myanmar, across the Bangladesh border, or further afield on boats.<sup>76</sup> According to the International Crisis Group, "There have been indications that the local authorities . . . might invoke colonial-era legislation that empowers them to reclaim areas damaged by fire as state-owned land."<sup>77</sup> Officials stated that the segregation was temporary for the safety of the Rohingyas and intended to prevent further violence, which was doubtless true in July when the process began. That organized violence had broken out again in October, however, and that the segregation had only increased, exposed the weakness of the statement in fact if not intent. Indeed, the most convincing indication that ethnic cleansing—the forcible removal—of the Rohingya in Rakhine State is underway is that so many have in fact been removed from their homes, neighborhoods, cities, and country.<sup>78</sup>

Certain lawmakers in Indonesia, Egypt, Saudi Arabia, and Japan referred to the situation in Rakhine State as ethnic cleansing in August and September. The Organization of Islamic Cooperation "expressed disappointment over the failure of the international community to take action,"<sup>79</sup> and Saudi Arabia urged the "international community to take up its responsibilities by providing needed protection."<sup>80</sup> The formal doctrine of the Responsibility to Protect, however, gained no appreciable traction among policy-makers.<sup>81</sup>

In November, the UN General Assembly (within which the Responsibility to Protect originated) adopted a resolution

regarding Myanmar that expressed its "serious concern" about the situation in Rakhine State.<sup>82</sup> It also called for government action in relation to "arbitrarily detained persons," the "return of individuals to their original communities," the "restitution of property," and a "policy of integration . . . and peaceful coexistence."<sup>83</sup> Although the government "accepted" the General Assembly's calls, it undermined its approval by protesting the use of the word "Rohingya" in the resolution.<sup>84</sup>

The General Assembly did not formally invoke the Responsibility to Protect. Possible reasons include that it did not judge the situation in Rakhine State to constitute crimes

against humanity and/or ethnic cleansing that it deemed that Myanmar itself was exercising its primary responsibility to protect its citizens, or that it assessed that the notoriously difficult political hurdles attending the doctrine's successful invocation made it a non-starter. Only the third possibility is valid: ethnic cleansing is taking place in Myanmar, and as Myanmar is "manifestly failing to protect its populations,

the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations<sup>85</sup> . . ."

The Rohingya problem has been referred to and described in different ways, and certainly it is more than a matter of nationality and discrimination, statelessness and displacement, and the Responsibility to Protect. Yet the initial two areas have assumed particular factual and legal significance over the past three decades, as persecution of the Rohingya within Myanmar and its effects regionally have continued unabated. The third area—not unrelated to the others—should assume equal importance and attention, but thus far it has not. All three issues are progressive in their application to the Rohingya: persecutory discrimination and statelessness includes and leads to forcible displacement, which combined constitute crimes against humanity and ethnic cleansing and implicate the Responsibility to Protect.

Primary responsibility rests with the Myanmar government to protect those whose right to a nationality the country has long denied, but its regional neighbors have legal and humanitarian obligations of their own *vis-à-vis* the Rohingya, as does the international community. The Rohingya problem begins at home—and could well end there with enough political will. Failing that, as has been the case since June 2012 if not decades, regional countries and the wider world should act to address the displacement and statelessness, and to stop the violence and violations.

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## Primary responsibility rests with the Myanmar government to protect those whose right to a nationality the country has long denied, but its regional neighbors have legal and humanitarian obligations[.]

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### Endnotes

<sup>1</sup> See, e.g., AMNESTY INTERNATIONAL, MYANMAR: THE ROHINGYA MINORITY: FUNDAMENTAL RIGHTS DENIED (2004).

<sup>2</sup> See, e.g., HUMAN RIGHTS WATCH, PERILOUS PLIGHT: BURMA'S ROHINGYA TAKE TO THE SEAS (2009).

<sup>3</sup> These existed in 1947, 1948, and 1971.

<sup>4</sup> See *Burma Citizenship Law* [Myanmar] (Oct. 15, 1982), <http://www.unhcr.org/refworld/docid/3ae6b4f71b.html>, (last visited Nov. 13, 2012).

- <sup>5</sup> See, e.g., AMNESTY INTERNATIONAL *supra* note 1; THE EQUAL RIGHTS TRUST, BURNING HOMES, SINKING LIVES: A SITUATION REPORT ON VIOLENCE AGAINST STATELESS ROHINGYA IN MYANMAR AND THEIR REFOULEMENT FROM BANGLADESH (2012); HUMAN RIGHTS WATCH, “THE GOVERNMENT COULD HAVE STOPPED THIS”: SECTARIAN VIOLENCE AND ENSUING ABUSES IN BURMA’S ARAKAN STATE (2012).
- <sup>6</sup> Myanmar ratified the treaty on July 15, 1991.
- <sup>7</sup> Myanmar ratified the treaty on July 22, 1997.
- <sup>8</sup> AMNESTY INTERNATIONAL, *supra* note 1.
- <sup>9</sup> THE EQUAL RIGHTS TRUST, *supra* note 2.
- <sup>10</sup> See HUMAN RIGHTS WATCH, “*supra* note 2, at 24–27.
- <sup>11</sup> United Nations Convention relating to the Status of Stateless Persons art. 1(1), Sept. 28, 1954, 360 U.N.T.S. 117. See also UN High Commissioner for Refugees, *Guidelines on Statelessness No. 1: The definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*, ¶¶ 35-37, U.N. Doc. HCR/GS/12/01 (Feb. 20, 2012).
- <sup>12</sup> See United Nations Convention relating to the Status of Stateless Persons art. 4, 13, 22, 23, 24, Sept. 28, 1954, 360 U.N.T.S. 117.
- <sup>13</sup> See UN High Commissioner for Refugees, *Guidelines on Statelessness No. 1: The definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*, ¶¶ 35-37, U.N. Doc. HCR/GS/12/01 (Feb. 20, 2012).
- <sup>14</sup> See UN High Commissioner for Refugees, *Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level*, U.N. Doc. HCR/GS/12/03 (July 17, 2012).
- <sup>15</sup> United Nations Convention on the Reduction of Statelessness, art. 1, Aug. 30, 1954, 989 U.N.T.S. 175.
- <sup>16</sup> See U.N. Central Emergency Response Fund, *CERF Provides US \$5.3 million for conflict-affected people in Myanmar*, Nov. 26, 2012 available at <http://www.unocha.org/cerf/cerf-worldwide/where-we-work/mmr-2012> Myan.: Displacement in Rakhine State, U.N. Office for the Coordination of Humanitarian Affairs, Situation Rep. No. 9, Oct. 5, 2012. (Myan. Situation Rep. No.5, Oct. 5, 2012).
- <sup>17</sup> See, e.g., Crimes against Humanity in Western Burma: The Situation of the Rohingya, Irish Centre for Human Rights, Nat’l. Univ. of Ir., Galway, 2010.
- <sup>18</sup> See, THE EQUAL RIGHTS TRUST, *supra* note 2, at 28; U.N. High Commissioner for Refugees, Myan. Fact Sheet (September 2012) available at <http://www.equalrightstrust.org/ertdocumentbank/UNRAVELLING%20ANOMALY%20small%20file.pdf>.
- <sup>19</sup> See Imtiaz Ahmed, *Globalization, Low-Intensity Conflict & Protracted Statelessness/Refugeehood: The Plight of the Rohingyas*, in THE MAZE OF FEAR: SEC. & MIGRATION AFTER 9/11, 186 (John Tirman ed., 2004).
- <sup>20</sup> See U.N. High Commissioner for Refugees, Country Operations Bangl. (Oct. 2012), <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e487546&submit=GO>.
- <sup>21</sup> See HUMAN RIGHTS WATCH *Ad Hoc and Inadequate: Thailand’s Treatment of Refugees and Asylum Seekers*, 75-79 (2012). According to the Arakan Project, the 2012-2013 season has seen has seen more than 20,000 Rohingyas leave Myanmar on boats.
- <sup>22</sup> See *Convention Relating to Status of Refugees*, art. 33(1), Apr. 24, 1954, 189 U.N.T.S. 150.
- <sup>23</sup> See *id.*, art. 33(2).
- <sup>24</sup> In February 2013, Human Rights Watch accused the Thai Navy of opening fire at a boat of Rohingyas, killing two. See e.g. THE EQUAL RIGHTS TRUST, *supra* note 2.
- <sup>25</sup> See U.N. High Commissioner for Refugees, *Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level*, HCR/GS/12/03 (July 2012), <http://www.unhcr.org/refworld/docid/5005520f2.html>.
- <sup>26</sup> See Office of the Special Adviser on the Prevention of Genocide, *The Responsibility to Protect*, <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml>.
- <sup>27</sup> See *Stop Rohingya Genocide: OIC*, ON ISLAM NOV. 17, 2012, <http://www.onislam.net/english/news/asia-pacific/460041-stop-rohingya-genocide-oic.html>.
- <sup>28</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, art. II, Dec. 9, 1948, 78 U.N.T.S. 1021.
- <sup>29</sup> See *id.*
- <sup>30</sup> *The Hidden Genocide*, AL JAZEERA, Dec. 9, 2012, <http://www.aljazeera.com/programmes/aljazeerainvestigates/2012/12/2012125122215836351.html>.
- <sup>31</sup> IRISH CENTRE FOR HUMAN RIGHTS, CRIMES AGAINST HUMANITY IN WESTERN BURMA: THE SITUATION OF THE ROHINGYAS 29-30 (2010).
- <sup>32</sup> *Id.* at 29.
- <sup>33</sup> *Id.*
- <sup>34</sup> *Rome Statute of the International Court*, art. 7, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF/183/9 (July 17, 1998).
- <sup>35</sup> IRISH CENTRE FOR HUMAN RIGHTS, *supra* note 31, at 31–32.
- <sup>36</sup> *Rome Statute*, *supra* note 34.
- <sup>37</sup> IRISH CENTER FOR HUMAN RIGHTS, *supra* note 31, at 137.
- <sup>38</sup> *Id.* at 138.
- <sup>39</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment)*, para. 190, Feb. 26, 2007.
- <sup>40</sup> State Peace and Restoration Council, Myanmar’s governing body at the time.
- <sup>41</sup> IRISH CENTRE FOR HUMAN RIGHTS, *supra* note 17, at 112.
- <sup>42</sup> See DEMOCRATIC VOICE OF BURMA, GOV’T WILL NOT RECOGNISE ROHINGYA: THEIN SEIN, JULY 12, 2012.
- <sup>43</sup> The government established of a 27-member commission to investigate the initial outbreak of violence; assigned the same task to the National Human Rights Commission; initiated a second investigation into the second outbreak of violence in October; ordered that weapons be turned into the authorities; rebuked the RNDP’s nationalist language; and pledged to bring perpetrators of the violence to justice. However, the Foreign Minister denied in August both human rights violence and a “policy of abuse” against the Rohingya, and in September, Rakhine State’s Attorney-General denied religious persecution of the Rohingya.
- <sup>44</sup> See Michael Lipin, *Burma’s President to open schools for Muslims*, VOICE OF AMERICA Aug. 14, 2012.
- <sup>45</sup> See, *Rohingyas ‘have the right’ to apply for Burmese citizenship: minister*, MIZZIMA NEWS, Sept. 13, 2012.
- <sup>46</sup> *Burma’s vice president calls for development in Rakhine State*, MIZZIMA NEWS Sept. 24, 2012.
- <sup>47</sup> See, *Government to resettle refugees in Arakan state: Burmese FM*, AGENCE-FRANCE PRESSE, Nov. 6, 2012.
- <sup>48</sup> See, *Myanmar’s president says he’ll consider new rights for Rohingya minority ahead of Obama visit*, ASSOCIATED PRESS, Nov. 19, 2012.
- <sup>49</sup> On August 3, 2012, *Agence-France Presse* quoted Indonesian protesters outside the Myanmar Embassy in Jakarta expressing anger at “Muslim cleansing” in Rakhine State. While the issues of the Rohingyas’ ethnicity and religion (also a minority in Myanmar, where an overwhelming majority of the population is Buddhist) have become conflated since June 2012, this author believes that religious persecution of the Rohingyas is part and parcel of, and therefore subsumed by, their persecution on ethnic grounds.
- <sup>50</sup> While the author visited Myanmar twice in late 2012 and spoke with a number of Rohingyas from Rakhine State, most of the factual information in this Section has not been independently confirmed.

- <sup>51</sup> See Aye, Nai, *Thein Sein meets with Arakan leaders*, DEMOCRATIC VOICE OF BURMA, Aug. 10, 2012.
- <sup>52</sup> See Agence-France Presse, *Politicians and monks kindle hate*, Aug. 2012.
- <sup>53</sup> See, *Monks in Myanmar rally to show support for president's anti-Rohingya plan*, ASSOC. PRESS Sept. 4, 2012.
- <sup>54</sup> See Lalit K. Jha, *Burmese government fosters religious intolerance: US official*, THE IRRAWADDY, Sept. 13, 2012.
- <sup>55</sup> Interview with Matthew Smith, Asia Researcher, Human Rights Watch, in Kuala Lumpur, Malaysia (Sept. 18, 2012).
- <sup>56</sup> See Todd Pitman, *Divided town challenges Myanmar's democracy hopes*, ASSOC. PRESS, Oct. 1, 2012.
- <sup>57</sup> See Int'l Crisis Grp., *Myanmar: Storm Clouds on the Horizon*, Asian Report No. 238, 2 (2012).
- <sup>58</sup> See *id.*
- <sup>59</sup> See Amelie Bottollier-Depois, *Muslims trapped in ghetto of fear in Myanmar city*, AGENCE-FRANCE PRESSE, Oct. 19, 2012.
- <sup>60</sup> See Carey L. Biron, *Myanmar's Rohingyas Face 'Permanent Segregation', Activists Warn*, INTER PRESS SERVICE, October 9, 2012.
- <sup>61</sup> See Hanna Hindstrom, *Monk group calls on locals to target 'Rohingya sympathizers'*, DEMOCRATIC VOICE OF BURMA, Oct. 23, 2012.
- <sup>62</sup> See INT'L CRISIS GRP., *supra* note 58 at 5.
- <sup>63</sup> See INT'L CRISIS GRP., *supra* note 58; *Myanmar Says it Has Evidence Communal Violence was Organized by Groups and Individuals*, ASSOC. PRESS, Oct. 31, 2012.
- <sup>64</sup> See Mark McDonald, *As Violence Continues, Rohingya Find Few Defenders in Myanmar*, N.Y. TIMES, Oct. 31, 2012.
- <sup>65</sup> Interview with Matthew Smith, Asia Researcher, Human Rights Watch, Urbana-Champaign, IL, (Oct. 15, 2012).
- <sup>66</sup> *Ethnic Cleansing in Myanmar: No Place Like Home*, THE ECONOMIST, Nov. 1, 2012.
- <sup>67</sup> See Thomas Fuller, *Threats Hinder Aid Myanmar, Doctors Without Borders Says*, N.Y. TIMES, Nov. 5, 2012.
- <sup>68</sup> Jason Szep and Andrew R.C. Marshall, *Witnesses Tell of Organized Killings of Myanmar Muslims*, REUTERS, Nov. 12, 2012.
- <sup>69</sup> *Group Says Death Toll in Arakan Higher than Government Figures*, DEMOCRATIC VOICE OF BURMA, Nov. 13, 2012.
- <sup>70</sup> See, *Rohingya Refuse to Register as 'Bengali'*, THE IRRAWADDY, Nov. 13, 2012.
- <sup>71</sup> AL JAZEERA, *supra* note 30.
- <sup>72</sup> *Id.*
- <sup>73</sup> *Id.*
- <sup>74</sup> *Id.*
- <sup>75</sup> *Id.*
- <sup>76</sup> In what was widely seen as a dramatic underestimate, Myanmar authorities claimed that 167 people died during the 2012 violence in Rakhine State.
- <sup>77</sup> INT'L CRISIS GRP., *supra* note 58, at 5.
- <sup>78</sup> In February 2013, Myanmar's Immigration and Population Minister denied the existence of the Rohingya during a Parliamentary session.
- <sup>79</sup> See, *OIC piles on Myanmar pressure*, BANGKOK POST, Aug. 7, 2012.
- <sup>80</sup> See, *Saudi accuses Burma of 'ethnic cleansing'*, AGENCE-FRANCE PRESSE Aug. 8, 2012.
- <sup>81</sup> Through the end of 2012, the OIC and the UN Secretary-General's Special Advisor on Myanmar twice visited the country, as did the Turkish Foreign Minister, a special envoy from Indonesia, and the U.S. Ambassador, also visited the area.
- <sup>82</sup> 67/233, ¶ 15, U.N. Doc. A/RES/67/233 (Dec. 24, 2012).
- <sup>83</sup> *Id.*
- <sup>84</sup> *UN General Assembly voices concern for Myanmar's Muslims*, REUTERS, Dec. 25, 2012.
- <sup>85</sup> See Office of the Special Adviser on the Prevention of Genocide, *The Responsibility to Protect*, <http://www.un.org/preventgenocide/adviser/responsibility.shtml>.