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

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3 Id.


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

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14 My World is Finished, supra note 10, at 6.
15 Id.
advocates have criticized her inaction and refusal to condemn the state security forces’ human rights abuses against the Rohingya.\textsuperscript{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.\textsuperscript{19} According to the United Nations, “democracy provides the natural environment for the protection and effective realization of human rights.”\textsuperscript{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.”\textsuperscript{21}

Although the situation with the Rohingya in Myanmar implicates a multitude of international laws and principles,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{18} Id.
\textsuperscript{23} CRIMES AGAINST HUMANITY IN WESTERN BURMA, supra note 19, at 93.
democratic transition. Further, citizenship may prove to be an insufficient solution that provides rights in name only. 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. 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.

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. However, the census did not include the Rohingya population, so the actual percentage of Muslims in

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26 See infra Part II(B).
28 See infra Part III.
Myanmar is considered to be higher—estimated at around 4.61%. This translates to 2.35 million Muslims out of a total population of 51 million.

The oldest Muslim group in Myanmar is now known as the Burmese Muslims, although they used to be referred to as “Pathi” or “Zerbadee.” 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. Burmese Muslims are linguistically and culturally integrated into Burmese society. The Kaman is a separate Muslim group that lives mostly in southern Rakhine State. The Kaman are descendants of Muslims who immigrated from the Mughal Empire to Arakan in the seventeenth century.

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

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. During the sixteenth and seventeenth centuries, the Arakanese launched

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31 Id.
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. The term “Rohingya” first appeared around then, translating to “inhabitant of Rohang,” which was the early Muslim name for Arakan.

In 1785, the Burmese army conquered the kingdom of Arakan. 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. 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. There was little tension between the Muslims and Arakanese up until this arrival of Muslims from Bengal, orchestrated and facilitated by the British. The mass immigration of Muslims to Arakan changed things. 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.”

The hostility between the Muslim Rohingya and Buddhist Arakanese worsened during and after World War II. The British armed some Muslims in the region to fight against the Arakanese, who largely sided with the Japanese. 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). Their plea was rejected, and northern Rakhine State remained a

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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/eoir/legacy/2013/06/13/ MMR00001.pdf [hereinafter MYANMAR COUNTRY REPORT].
44 The Rohingyas: The Most Persecuted People on Earth?, supra note 8.
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.\footnote{The Rohingyas: The Most Persecuted People on Earth?, supra note 8.}

\section{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.\footnote{CRIMES AGAINST HUMANITY IN WESTERN BURMA, supra note 19, at 25.} In fact, the ethnic majority in western Myanmar for whom the region is currently named after, the Rakhine,\footnote{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.} fundamentally reject any suggestion that the Rohingya should be considered an ethnic group with bona fide historical roots in the region.\footnote{Id. at 21.} Instead, they contend that the word “Rohingya” arose in the 1950s during the time of the Mujihid movement.\footnote{Id.} The Rohingya also do not have support from the other Muslims residing in Rakhine State.\footnote{For a review of Muslim groups in Rakhine State, see supra Part I(A).}

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.\footnote{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.} For example, “a 1799 study of languages spoken in the Burmese area divided the natives of Arakan state between ‘Yakain’ and ‘Rooinga.’”\footnote{Id.} Also, “the Classical Journal of 1811 distinguishes between the Rohingya and Rakhine as the main ethnic groups in the region.”\footnote{Id.} 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.\footnote{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. 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.” 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. Although the stated objective of the operation indicated it was intended as a proper survey of the residents of Myanmar, 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. These events resulted in the exodus of an estimated 200,000 Rohingya to neighboring Bangladesh.

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.” 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. 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. The United

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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.*

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.\textsuperscript{72} Initially, few refugees opted for repatriation but more did once the Bangladeshi government allowed camp conditions to deteriorate and restricted food rations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{76} These policies included the “Four Cuts” policy: a militarized effort to undermine the capacity of ethnic armed opposition/independence groups.\textsuperscript{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.\textsuperscript{78} Model villages were newly constructed towns that were intended to diversify and develop remote border areas.\textsuperscript{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.\textsuperscript{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.\textsuperscript{81}

\textsuperscript{72} Id.

\textsuperscript{73} Id.

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

\textsuperscript{75} Crimes Against Humanity in Western Burma, supra note 19, at 88, 93.

\textsuperscript{76} Id. at 91–92.

\textsuperscript{77} The “Four Cuts” policy was originally drawn up by General Ne Win in the mid-1960s. Id. at 88.

\textsuperscript{78} Id. at 93.

\textsuperscript{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.

\textsuperscript{80} Id. at 100–01, 105.

Similar to the events of 1978, there was another repatriation program, though it was marred with problems.\textsuperscript{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.\textsuperscript{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 Myanmar\textsuperscript{84} and that the repatriation would be safe and voluntary.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{89} In Taungoo, 200 Muslims were killed, and multiple mosques and hundreds of buses were destroyed in a riot.\textsuperscript{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.\textsuperscript{91}

\textsuperscript{82} MYANMAR COUNTRY REPORT, supra note 43.
\textsuperscript{83} HUMAN RIGHTS WATCH, supra note 71.
\textsuperscript{85} MYANMAR COUNTRY REPORT, supra note 43.
\textsuperscript{86} Id.
\textsuperscript{87} Id.
\textsuperscript{88} CRIMES AGAINST HUMANITY, supra note 19, at 27; MY WORLD IS FINISHED, supra note 10, at 101.
\textsuperscript{90} Id.
\textsuperscript{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.\footnote{Daniel Schearf, Kaman Muslims Raise Concerns of Wider Conflict, VOA NEWS (Nov. 29, 2012), http://www.voanews.com/a/burmases-kaman-muslims-cite-religious-ethnic-conflict-in-rakhine-state/1555524.html.} Hundreds of Arakanese Buddhists surrounded a bus carrying Muslim pilgrims, forced ten men off, and beat them to death.\footnote{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).} 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.\footnote{Id.} In addition to the Rohingya, Kaman Muslims also were targeted.\footnote{Id.} Around 120,000 people were displaced within Rakhine State.\footnote{Id.} Although Kaman Muslims were included in this population, the vast majority was Rohingya.\footnote{Id.} 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.\footnote{Id.} 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.\footnote{Id.}

initiated a four-month crackdown in the region after unknown assailants, believed to be Rohingya, killed police officers near the border with Bangladesh.\textsuperscript{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.\textsuperscript{103}

The military maintained that their actions are part of a counter-insurgency campaign in response to the attack.\textsuperscript{104} But, while the Myanmar military initially went house to house seeking adult men, they proceeded to rape women and burn homes.\textsuperscript{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.\textsuperscript{106} Despite hundreds of reports to the contrary,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{110} These operations were marked by widespread and systematic human rights violations, including unlawful killings, sexual violence, torture,
enforced disappearances, and arbitrary arrests. 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. 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.

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.

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. Although the refusal continues into the present day, this was not always the case. 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. 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.

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. The 1982 Citizenship Law was promulgated in the immediate aftermath of the fallout of the Nagamin

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


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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{122} Although the law recognizes more than 130 national ethnic groups, it does not recognize the Rohingya.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{128} Lastly, naturalized citizenship “may be granted to non-nationals such as members of ethnic groups not recognized as...

\textsuperscript{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).

\textsuperscript{121} CRIMES AGAINST HUMANITY IN WESTERN BURMA, supra note 19, at 95.

\textsuperscript{122} Pyithu Hluttaw Law No. 4 of 1982.

\textsuperscript{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.

\textsuperscript{124} Pyithu Hluttaw Law No. 4 of 1982.

\textsuperscript{125} Id.


\textsuperscript{127} Pyithu Hluttaw Law No. 4 of 1982.

\textsuperscript{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—including, 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

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¹²⁹ Pyithu Hluttaw Law No. 4 of 1982.
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.*
¹³⁹ *Id.*
nationality should play no role. Regardless, stateless persons are more vulnerable than others to the violation of their basic rights. 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.

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


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

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141 Id.


143 Id.


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.


148 Human Rights Watch, supra note 71.

Individuals, including children, who lack a nationality or an effective citizenship are “among the world’s most vulnerable to human rights violations.”\textsuperscript{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.”\textsuperscript{151} That has been the case in Myanmar.\textsuperscript{152}

The Rohingya face restrictions set by the Myanmar government on movement, marriage, employment, health care, and education.\textsuperscript{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.\textsuperscript{154} Similarly, they are unable to obtain most civil service positions.\textsuperscript{155}

Because the Rohingya are stateless, they are viewed as foreigners and are under the jurisdiction of the 1864 Foreigners Act.\textsuperscript{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.\textsuperscript{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.\textsuperscript{158} Further, they are unable to conduct business between villages and townships, which has resulted in situations of extreme poverty.\textsuperscript{159}

The Rohingya have also faced issues with forced labor, land confiscation, forced eviction, and destruction of houses.\textsuperscript{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

\textsuperscript{150} Citizenship & Nationality, supra note 138.
\textsuperscript{152} See generally Crimes Against Humanity in Western Burma, supra note 19.
\textsuperscript{153} Zawacki, supra note 67, at 19.
\textsuperscript{155} Id.
\textsuperscript{156} Crimes Against Humanity in Western Burma, supra note 19, at 99.
\textsuperscript{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.
\textsuperscript{158} Ten Veen, supra note 154.
\textsuperscript{159} Crimes Against Humanity in Western Burma, supra note 19, at 99.
\textsuperscript{160} Zawacki, supra note 67, at 19; see also supra Part I(B)(3).
Rakhine State, or on other ethnic minorities across the county.\textsuperscript{161} Since 1990, the Myanmar government has constructed over forty model villages\textsuperscript{162} in the North Arakan Townships of Maungdaw, Buthidaung, and Ruthidaung—the cities where most Rohingya are located.\textsuperscript{163} To construct these model villages, the Myanmar government often forcibly employed the Rohingya.\textsuperscript{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,\textsuperscript{165} and the army.”\textsuperscript{166} As was the case with model villages, the Myanmar government also forcibly employed the Rohingya to construct military installations.\textsuperscript{167} Thus has been the “enduring nature of Rohingya statelessness.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{170} Countless legal

\textsuperscript{161} Id.

\textsuperscript{162} See supra Part I(B)(3).

\textsuperscript{163} CRIMES AGAINST HUMANITY IN WESTERN BURMA, supra note 19, at 100.

\textsuperscript{164} Id.

\textsuperscript{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).

\textsuperscript{166} CRIMES AGAINST HUMANITY IN WESTERN BURMA, supra note 19, at 101.

\textsuperscript{167} Id.

\textsuperscript{168} Id. at 93.


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

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. 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. The question about the historical presence of Muslims in Arakan has “produced two diametrically opposed versions of the region’s history.” Many Rohingya assert they deserve indigenous status and, therefore, full citizenship because they have been in the region for centuries. The majority of Burmese society, from the masses to the elite, wholeheartedly disagrees and believes they are “illegal Bengalis.” For example, former President Thein Sein has said, “There are no Rohingya among the races. We only have Bengalis who were brought for farming.” 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.

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

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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.
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.” 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 face 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.” 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. For example, members of the Kaman minority are referred to as Kular (dark-skinned), a slur often used to describe the Rohingya. Further, the Kaman community also faces violence from the Buddhist majority. 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

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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.
184 Cunningham, supra note 24. For a brief overview of the Kaman, see supra Part I(A).
185 Schearf, supra note 92.
186 Id.
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.
191 Cunningham, supra note 24.
193 Id.
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 United Nations Approach to Transitional Justice, supra note 192.
¹⁹⁸ Id.
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.


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.

disproportionate response in northern Rakhine State. 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. 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. 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.”

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. 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. Another criticism is that the Advisory Commission’s mandate focuses broadly on development instead of taking an investigative approach to human rights violations.

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

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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
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.”

For example, there were large demonstrations in Sittwe by Rakhine Buddhists protesting international misrepresentation of the local situation following the May 2015 humanitarian crisis. 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. The Advisory Commission on Rakhine State, with a former U.N. Secretary-General in charge and the inclusion of foreign panelists, 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.” 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.” There is widespread fear of a Muslim identity in Rakhine State, and anti-Muslim propaganda is frequently voiced in the national discourse. 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.”


228 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 Id. 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.  

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.

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. 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. 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.

The tools a truth commission can use in its realization of this goal include public and private testimony from victims, witnesses, and experts. 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

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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.


240 Id.
contain recommendations for use by the local Rakhine State government and the national government. 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. Achieving this aim is more likely when the truth commission includes comprehensive policies to hold perpetrators accountable, paving the way for systemic reform.

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. 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. 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. 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.” The source of much of the systematic violence against the Rohingya in Rakhine State is Myanmar’s military forces. 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

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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 reality
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.
253 Cumming-Bruce, supra note 102; Elizabeth Dias, Will the Rohingya Exodus Be Aung Saan Suu Kyi’s
254 See generally My WORLD IS FINISHED, supra note 10.
255 Mathiason, 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.