

The Broken Promise of “Never Again”: Myanmar’s Genocide Analyzed Under the U.N. Genocide Convention and the International Criminal Tribunal for Rwanda’s Interpretation of the Convention

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“They burned my daughter alive. When we went back to the house, all we could see were the black parts of her skull. I feel like a terrible mother—I saved my own life but not that of my daughter.”¹

—Rohim Kadu, a Rohingya refugee

This Note examines the current genocide occurring in Myanmar. It looks at Myanmar’s cruel and inhumane treatment of the Rohingya community—a Muslim minority group in Myanmar with an initial population of one million. This Note proposes that Myanmar’s treatment of the Rohingya classifies as a genocide under the Convention on the Prevention and Punishment of the Crime of Genocide. Specifically, this Note retraces the evolution of persecution against the Rohingya community. Lastly, this Note studies Bangladesh’s response to the crisis since that is where most of the Rohingya seek refuge.

Part I of this Note defines genocide generally, using Cambodia and Rwanda’s genocides as illustrative examples. Part II examines genocide in Myanmar specifically. The first section of this Part provides a brief history of Myanmar, a description of the Rohingya community, and an explanation of the genocide’s development. The second section explores instances of hate speech perpetrated by military personnel, the state, and civilians that have contributed to the creation of a nationalist and hateful rhetoric toward Muslims in Myanmar. Specifically, the second section analyzes the rheto-

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1. Katie Arnold, *Rohima: Rohingya Refugees: Why I Fled*, CABLE NEWS NETWORK, <https://www.cnn.com/interactive/2017/09/world/myanmar-rohingya-refugee-stories/> [<https://perma.cc/B5UP-DHFK>] (last visited June 12, 2021).

ric promoted by nationalist Buddhist groups such as the 969 Movement, prominent Buddhist leader Ashin Wirathu, and the Organization for the Protection of Race and Religion (MaBaTha). These groups have spread hate speech toward Muslims and depict Islam as a threat to Buddhist and Burmese values. Finally, Part III of this Note analyzes the current problems facing the Rohingya community, focusing on Bangladesh's response and grant of refuge.

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Introduction

After the military crackdown in 2017, more than 730,000 Rohingya people fled brutal persecution in Myanmar.² Thousands of Rohingya women were raped, thousands of people were killed, more than 300 villages were desecrated and demolished, and the Rohingya are now a stateless people.³ Today, they are still denied citizenship and are unable to travel freely, practice their religion, access medical facilities, or receive an education.⁴ There is limited access for international journalists, international organizations, and the United Nations (U.N.) in Rakhine (a region where the majority of the Rohingya reside). As the mass exodus of the Rohingya takes place, boatloads of Rohingya people often drown on their

2. Hannah Beech, *Massacred at Home, in Misery Abroad, 730,000 Rohingya Are Mired in Hopelessness*, N.Y. TIMES (Aug. 22, 2019), <https://www.nytimes.com/2019/08/22/world/asia/rohingya-myanmar-repatriation.html> [https://perma.cc/HVB3-5Z5D].

3. HRW: *Rohingya Villages Razed Despite Denials from Myanmar Government*, DEUTSCHE WELLE (Nov. 21, 2016), <https://www.dw.com/en/hrw-rohingya-villages-razed-despite-denials-from-myanmar-government/a-36461743> [https://perma.cc/55CD-AUCH].

4. See *Myanmar: Rohingya Jailed for Traveling*, HUM. RTS. WATCH (Oct. 8, 2019, 9:45 PM), <https://www.hrw.org/news/2019/10/08/myanmar-rohingya-jailed-traveling> [https://perma.cc/UX2Z-WX8E].

search for refuge.⁵ It is alarming that despite the brutal treatment of the Rohingya, the world continues to ignore their plight.

The Rohingya survivors who escaped Myanmar and fled to Bangladesh report ghastly stories of gang rape, sexual assault, extrajudicial killings, vicious beatings, and other unspeakable atrocities they suffered in Myanmar.⁶ Satellite images lend credence and support to these horror stories; in fact, these images vividly depict Rohingya villages burning to the ground.⁷ Although various groups—such as the Burmese governmental authorities, the military, and Buddhist extremists—have persecuted the Rohingya for decades,⁸ since 2013, the unparalleled level of violence has been at an all-time high. Zeid Ra’ad Al Hussein, the United Nations High Commissioner for Human Rights, described the actions of the Burmese police and military as a “textbook example of ethnic cleansing.”⁹ Since 1962, the Burmese military has targeted Rohingya Muslims with extreme brutality while purposefully and steadily crafting a narrative against them.¹⁰ The government of Myanmar egregiously persecuted the Rohingya Muslims, stripped them of their citizenship, and made them stateless.¹¹

Today, as the Burmese government continues to destroy the Rohingya people, their lackluster leader Aung San Suu Kyi remains conspicuously absent from debate on the topic.

Once hailed as a bastion of democracy and human rights, Aung San Suu Kyi, the de facto leader of Myanmar, not only denies genocide but also refuses to recognize the Rohingya as an ethnic group.¹² Suu Kyi has been accused of “untruths and victim-blaming,” and is silent about the role of

5. See A.S.M Suza Uddin & Poppy McPherson, *Rohingya Survivors Tell of Misery and Death at Sea; Hundreds Still Adrift*, REUTERS (May 3, 2020, 1:22 PM), <https://www.reuters.com/article/us-health-coronavirus-rohingya/rohingya-survivors-tell-of-misery-and-death-at-sea-hundreds-still-adrift-idUSKBN22F0QA> [<https://perma.cc/8TPR-XYEP>].

6. See Beech, *supra* note 2.

7. See *id.*

8. See Krishnadev Calamur, *The Misunderstood Roots of Burma’s Rohingya Crisis*, ATLANTIC (Sept. 25, 2017), <https://www.theatlantic.com/international/archive/2017/09/rohingyas-burma/540513/> [<https://perma.cc/H9PF-QLS7>].

9. Annie Gowen, ‘Textbook Example of Ethnic Cleansing’: 370,000 Rohingyas Refugees Flee Myanmar as Crisis Worsens, NATIONAL POST (Sept. 13, 2017), <https://nationalpost.com/news/world/a-textbook-example-of-ethnic-cleansing-370000-rohingya-refugees-flee-myanmar-as-crisis-worsens> [<https://perma.cc/V6WN-RB32>]; see S.C. Res. 674, ¶ 130 (May 27, 1994) (According to a U.N. Commission of Experts, ethnic cleansing is defined as “a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas.”).

10. See Erin Blakemore, *Who Are the Rohingya People?*, NAT’L GEOGRAPHIC (Feb. 8, 2019), <https://www.nationalgeographic.com/culture/article/rohingya-people> [<https://perma.cc/EJ38-5L9L>].

11. See Calamur, *supra* note 8.

12. See Anealla Safdar & Usaid Siddiqui, *ICJ Speech, Suu Kyi Fails to Use ‘Rohingya’ to Describe Minority*, ALJAZEERA (Dec. 13, 2019), <https://www.aljazeera.com/news/2019/12/aung-san-suu-kyi-fails-word-rohingya-icj-speech-191212102606322.html> [<https://perma.cc/E476-NDGR>].

the Burmese security forces in causing the terror in Rakhine.¹³ Suu Kyi's response to the outrage has been insufficient and "[s]he is proving to be the wrong person at the wrong time for Myanmar."¹⁴ In response to international outcries over the situation in Myanmar, Suu Kyi commented that the world is dwelling on the wrong crisis; they should instead focus on the "economic deprivation, the balance of power between the government and the military, and armed conflicts with other ethnic groups" in Myanmar.¹⁵ The head of state's lack of interest in protecting the rights of the Rohingya speaks volumes about either her willful ignorance, or intention to sway international attention away from the systematic destruction of the Rohingya. The evidence points to the latter assumption. In fact, Suu Kyi now supports the same military that put her under house arrest multiple times and killed her father.¹⁶

Unsurprisingly, a report produced by the government of Myanmar regarding the Rohingya crisis denied any genocidal intent, causing "major disappointment" and failing to recognize the systemic violence against the Rohingya community, generally, as well as the sexual violence against Rohingya women and girls, specifically.¹⁷

13. Robin McDowell & Julhas Alam, *Under Fire over Rohingya, Suu Kyi Defends Myanmar Actions*, AP NEWS (Sept. 19, 2017), <https://apnews.com/af97b2c8a4db4f91941bfd67491a8eb0/Under-fire-over-Rohingya,-Suu-Kyi-defends-Myanmar-actions> [https://perma.cc/9RAE-GE23].

14. John Reed, *Hate Speech, Atrocities and Fake News: The Crisis of Democracy in Myanmar*, FIN. TIMES (Feb. 21, 2018), <https://www.ft.com/content/2003d54e-169a-11e8-9376-4a6390addb44> [https://perma.cc/95KW-YE8Y]; see *Transcript: Aung San Suu Kyi's Speech at the ICJ in Full*, ALJAZEERA (Dec. 12, 2019), <https://www.aljazeera.com/news/2019/12/transcript-aung-san-suu-kyi-speech-icj-full-191212085257384.html> [https://perma.cc/KT79-T6AB]. When questioned about the genocide before the International Court of Justice, Suu Kyi noted that she should refrain from commenting on this issue since there are ongoing criminal justice investigations, and it is not easy for army to recognize self-interest in their members. See *id.* She also questioned: "Can there be genocidal intent on the part of a state that actively investigates, prosecutes, and punishes soldiers and officers who are accused of wrongdoing?" *Id.*; see also *Myanmar: Government Rohingya Report Falls Short*, HUM. RTS. WATCH (Jan. 22, 2020, 1:32 PM), <https://www.hrw.org/news/2020/01/22/myanmar-government-rohingya-report-falls-short> [https://perma.cc/VE9P-H8VX]. Subsequently, the investigation resulted in a report which acknowledged that "some members of Myanmar's Defense Services and the Police Force intentionally killed or displaced civilians, mostly Muslims, during the internal armed conflict in northern Rakhine State in 2017." *Id.* It also reported "possible war crimes," "serious human rights violations," and mass killings of civilians by security forces in Tula Toli but suggested that these killings took place during the fighting between the Arakan Rohingya Salvation Army and the military. *Id.*

15. Reed, *supra* note 14.

16. See *id.*

17. See *Myanmar: Government Rohingya Report Falls Short*, *supra* note 14; Interview by Christiane Amanpour with Bill Richardson, Senior U.S. Diplomat, in London (Feb. 5, 2018). Richardson reports that Suu Kyi is in a power bubble, "did not want to listen to frank advice," and never used the word Rohingya. *Id.* In fact, she has also shut off reports of mass graves and mass killings. According to Richardson, Suu Kyi is not willing to speak out on the issue lest she lose the support of her followers during the reelection in 2020. *Id.* She has certainly changed from being the bastion of democracy and human rights that she once was and has now become a "politician." *Id.* In fact, she allegedly "exploded" when asked about releasing the Reuters journalists who were sent

This Note argues that the Burmese government’s actions amount to genocide, as defined in the United Nation’s Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). Under the Genocide Convention, there are two major elements required to meet the threshold of genocide: the mental element (*mens rea*), and the physical element (*actus reus*).¹⁸ The mental element, or *mens rea*, requires dual intent: a general intent to commit a crime, and a specific intent to destroy a protected group.¹⁹ The physical element, or *actus reus*, requires a harmful act by the perpetrator that is intended to destroy or diminish a particular group.²⁰ For instance, during World War II, the Nazi-led government of Germany intended to kill Jewish people, their specific intent was to destroy the Jewish race, and their *actus reus* in carrying out this specific intent involved murder, forced labor, euthanasia, starvation, medical experiments, and placing people in concentration camps and gas chambers.²¹

Unfortunately, the world has seen genocide occur a number of times within the past century. Promises of “never again” have been made and broken. The Nazis attempted to obliterate the Jewish people; the Hutus tried to wipe out the Tutsis; the Bosnian Serb forces killed more than 7,000 Bosnian Muslims; the Ottomans systematically murdered ethnic Armenians in Turkey; and now Myanmar is attempting to erase the Rohingya Muslims.²² The international community needs to wake up and interfere.

A recent judgment by the International Court of Justice ordered the government of Myanmar to “take all measures within its power” to safeguard the Rohingya people.²³ However, judgment is still pending on the issue of whether the atrocities in Myanmar constitute genocide under the Genocide Convention.²⁴ The judgment calls for interim measures pending a hearing.²⁵

to prison in Myanmar. *Id.* Richardson stressed that she was trying to brush the issue under the rug. *Id.*

18. See generally Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

19. *Id.* at art. 2.

20. *Id.*

21. Alan Taylor, *World War II: The Holocaust*, ATLANTIC (Oct. 16, 2011), <https://www.theatlantic.com/photo/2011/10/world-war-ii-the-holocaust/100170/> [https://perma.cc/YGE4-UUB9].

22. See Zach Beauchamp, *Rwanda’s Genocide—What Happened, Why It Happened, and How It Still Matters*, VOX (Apr. 10, 2014), <https://www.vox.com/2014/4/10/5590646/rwandan-genocide-anniversary> [https://perma.cc/6BKM-MMKS]; Nicholas Wood, *Bosnian Serbs Admit Responsibility for the Massacre of 7,000*, N.Y. TIMES (June 12, 2004), <https://www.nytimes.com/2004/06/12/world/bosnian-serbs-admit-responsibility-for-the-massacre-of-7000.html> [https://perma.cc/G6HW-6PS3]; John Kifner, *Armenian Genocide of 1915: An Overview*, N.Y. TIMES https://archive.nytimes.com/www.nytimes.com/ref/timestopics/topics_armeniangenocide.html?mcubz=3 [https://perma.cc/XKC4-TLVA] (last visited June 12, 2021).

23. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Request for the Indication of Provisional Measures (Gam. v. Myan.) 2020 I.C.J. 1 (Jan. 23).

24. See *id.*

25. See *id.*

In addition to arguing that Myanmar's actions constitute genocide under the Genocide Convention, this Note also assesses the occurrence of genocide in Myanmar through the interpretation of genocide by the International Criminal Tribunal of Rwanda in the case involving Jean-Paul Akayesu. Prior to that, it examines two other examples of genocide in Cambodia and Rwanda so to better illustrate what genocide entails, while juxtaposing the two instances with the situation in Myanmar.

I. Genocide in General

The term genocide was first coined in 1943 by Raphael Lemkin, a Jewish-Polish lawyer who witnessed the atrocities of the Holocaust.²⁶ The term genocide combines the Greek word *genos*, which means race or tribe, with the Latin word *cide*, which means to kill.²⁷ The United Nations first codified genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, also known as the Genocide Convention.²⁸ The following is Article 2 of the Convention:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:²⁹

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.³⁰

A. Mens Rea

The description of intent, "to destroy, in whole or in part, a national, ethnic, racial or religious group, as such," imposes a dual requirement: (1) general intent to commit a crime; and (2) specific intent to destroy or

26. *How Do You Define Genocide?*, BBC NEWS (Mar. 17, 2016), <https://www.bbc.com/news/world-11108059> [<https://perma.cc/ARZ7-5R9Z>].

27. *Id.*

28. See generally Genocide Convention, *supra* note 18.

29. This requires that genocide victims belong to a protected group. A victim is subject to genocide only in his capacity as a member of the protected group and not as an individual. See WILLIAM SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 134 (2d ed. 2009). According to the tribunal in the Rwandan case of *Prosecutor v. Akayesu*, a national group is one defined as a "collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties." *Id.* at 147. Moreover, an ethnic group is one whose "members share a common language or culture." *Id.* at 148. A religious group is one whose members share the same religion, denomination, or mode of worship." *Id.* at 140. According to the tribunal, the definition of racial group is "based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national, or religious factors." *Id.*

30. Genocide Convention *supra* note 18, at 280.

diminish a particular group.³¹ General intent is the intent to commit a particular act; for example, if one is charged with murder, they had the intent to kill.³² Specific intent adds another layer of motive: killing *in order to destroy a protected group*.³³ Thus, specific intent requires the performance of the actus reus in association with an intent that “goes beyond the mere performance of the act.”³⁴ Hence, the prosecution needs to prove intent beyond showing that the offender “meant to engage in the conduct, or meant to cause the consequence.”³⁵ For instance, if the offender killed a member of the Rohingya, the prosecutor will need to prove that the offender meant to engage in the conduct of killing, but also that the offender did so for the specific purpose of destroying the Rohingya community. If the prosecutor is unable to prove this specific intent, then there is no genocide (although the underlying actions could be classified as a crime or crimes against humanity under criminal law).³⁶ According to the ruling of the International Criminal Tribunal for Rwanda (ICTR) in the case of *Prosecutor v. Akayesu*, for a crime of genocide to be committed, “it is necessary that one of the acts listed under Article 2(2) of the Statute [or Article 2 of the Genocide Convention] be committed, [and] that the particular act be committed against a specifically targeted group, it being a national, ethnical, racial or religious group.”³⁷

31. *Id.* In general, the Genocide Convention is customary law, which means that all states are bound to it regardless of whether they have ratified it. Hence, all states will be subject to consequences if they violate the Convention. However, even though every state is bound by customary law, it is up to international organizations like the United Nations to take enforce it. But as this Note argues, although Myanmar violated customary law, international organizations are not taking the requisite actions to enforce the Genocide Convention. See David Shea Bettwy, *The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding Under Customary International Law?*, 2 NOTRE DAME J. INT’L & COMPAR. L. 167, 169 (2011).

32. See *General Intent Crimes vs. Specific Intent Crimes*, NOLO, <https://www.nolo.com/legal-encyclopedia/general-vs-specific-intent.html> [[<https://perma.cc/L5H3-N98G>] (last visited June 12, 2021)].

33. See *id.*

34. For instance, the intent to kill a person is supplemented with the specific intent to destroy the group to which the victim belongs. See ANDRE KLIP, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 2001-2002*, at 424 (Intersentia eds., 8th ed. 2015).

35. SCHABAS, *supra* note 29, at 257.

36. *Id.* Additionally, the “whole or in part” stipulation in the definition of genocide under the Genocide Convention entails that the threshold for genocide is met when the perpetrator of genocide eliminates a “significant” portion of the group. The whole group need not be eliminated. See *id.*

37. *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 499 (Sept. 2, 1998) [hereinafter *Akayesu Judgment*]. In *Akayesu*, Jean-Paul Akayesu was the Hutu mayor of a town in Rwanda at the time Tutsis were systematically attacked and killed. On September 2, 1998, the tribunal issued its first conviction for the crime of genocide. Akayesu was convicted of genocide and Crimes Against Humanity. Specifically, he was found guilty of genocide, direct and public incitement to commit genocide, and crimes against humanity (e.g., extermination, murder, torture, rape, and other inhumane acts). See generally *id.* The Chamber stated: “there was an intention to wipe out the Tutsi group in its entirety, since even newborn babies were not spared.” *Id.* ¶ 121. He had been responsible for maintaining law and order in Taba and that he had authority over the communal police. He had endorsed violence and even ordered the killings of Tutsis. See Press

In order to successfully prove intent, the proposed intent must be a “logical deduction that flows from [the] evidence of the material acts.”³⁸ If the accused party preceded the act with “genocidal declaration or speech, its content may assist in establishing the special intent.”³⁹ If genocidal declaration or speech is absent, the prosecution would rely on “the context of the crime, its massive scale and elements of its perpetration that suggest hatred of the group and a desire for its destruction.”⁴⁰ In the Rwandan *Akayesu* case, the tribunal decided that genocidal intent could be inferred from the *actus reus* of the accused, and particularly the “massive [and] systematic nature o[f] the[] atrocity.”⁴¹

B. Actus Reus

There are five acts that fulfill the *actus reus* requirement of genocide.⁴² For the first act—that of killing of members of a protected group—the Rwandan tribunal identified two material elements: (1) “the victim [must be] dead; [and (2)] the death [must have] resulted from an unlawful act or omission of the accused or a subordinate.”⁴³ In regards to the act of causing serious bodily or mental harm, the harm does not necessarily need to be permanent or irremediable.⁴⁴ Additionally, rape and sexual violence fall under the definition of bodily or mental harm under the Rwandan *Akayesu* case.⁴⁵

Under the second act of “[c]ausing serious bodily or mental harm to members of the group,”⁴⁶ although it is sensible to not require permanent or irremediable damage, there is confusion as to the severity of physical or mental harm that the victim must suffer in order for it to qualify as “serious . . . harm”⁴⁷ under the Convention. Furthermore, there is confusion as

Release, United Nations International Residual Mechanism for Criminal Tribunals, *Historic Judgement Finds Akayesu Guilty of Genocide*, (Sept. 2, 1998) (on file at <https://unictr.irmct.org/en/news/historic-judgement-finds-akayesu-guilty-genocide> [<https://perma.cc/NKT3-5E6Y>]). Akayesu was the mayor of the Taba commune in Rwanda and a Republican Democratic Movement politician. During the genocide, he supervised and encouraged the Hutus to kill and rape Tutsis. *Akayesu Judgment*, *supra* note 37, ¶ 12.

38. SCHABAS, *supra* note 29, at 264.

39. *Id.* at 265.

40. *Id.*

41. *Akayesu Judgment*, *supra* note 37, ¶ 478.

42. See Genocide Convention, *supra* note 18, at 280.

43. *Akayesu Judgment*, *supra* note 37, ¶ 589.

44. *Id.* ¶ 502.

45. See *Prosecutor v. Athanese Seromba*, Case No. ICTR-2001-66-A, Appeals Judgment, ¶ 46 (Mar. 12, 2008) [hereinafter *Athanese Seromba Appeals Judgment*] (“The quintessential examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs. Relatedly, serious mental harm include ‘more than minor or temporary impairment of mental faculties such as the infliction of strong fear or terror, intimidation or threat.’ Indeed, nearly all convictions for the causing of serious bodily or mental harm involve rapes or killings. To support a conviction for genocide, the bodily harm or the mental harm inflicted on members of a group must be of such a serious nature as to threaten its destruction in whole or in part.”).

46. Genocide Convention, *supra* note 18, at art. 2(b).

47. *Id.*

to what standard should be used to determine harm: are we to judge the level of harm subjectively caused to the victim, or do we use a reasonable person standard? Although the ICTR decided that the harm needs to be determined “on a case-by-case basis, using a commonsense approach,” it is unclear whether this determination advocated for the use of a reasonable person standard.⁴⁸ One argument in favor of the reasonable person standard is that it would prevent tribunals and courts from separately examining the harm suffered by each individual when analyzing the occurrence of genocide. Instead, the tribunal or court will analyze the harm inflicted upon the protected group as a whole. Whether or not one person felt the harm to a higher degree than the others does not matter. Therefore, because the intent to eliminate the entire protected group needs to be present to qualify as genocide, a reasonable person standard should be used to judge the degree of serious bodily or mental harm inflicted upon the protected group as a whole.

The third act of “deliberately inflicting on the group conditions of life calculated to” destroy the group⁴⁹ is defined as a method of destruction in “which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek[s] their physical destruction.”⁵⁰ The Rwandan tribunal opined that this act includes “subjecting a group of people to a subsistence diet, systematic exclusion from homes and the reduction of essential medical services below [the] minimum requirement.”⁵¹ For instance, when Armenians were expelled out of modern-day Turkey, the deprivation of fundamental human needs and the deportation from Turkey constituted an act of deliberately inflicting conditions of life calculated to destroy the Armenians.⁵² According to David Fromkin, “[t]hose who were not killed at once were driven through mountains and deserts without food, drink or shelter. Hundreds of thousands of Armenians eventually succumbed or were killed.”⁵³

According to the ICTR in the *Akayesu* case, the fourth act of “[i]mposing measures to prevent births within the [targeted] group,”⁵⁴ includes “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.”⁵⁵ For instance, during the Bosnian genocide, Serb soldiers raped a large number of Bosnian Muslim women and slowly starved some of them to death.⁵⁶ Many of the raped women either could not conceive, or conceived an entire genera-

48. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-I-T, Judgment, ¶ 108 (May 21, 1999) [hereinafter *Kayishema & Ruzindana Judgment*].

49. Genocide Convention, *supra* note 18, at art. 2(c).

50. *Akayesu Judgment*, *supra* note 37, ¶ 505.

51. *Id.* ¶ 506.

52. See Kifner, *supra* note 22.

53. *Id.*

54. Genocide Convention, *supra* note 18, at art. 2(d).

55. *Akayesu Judgment*, *supra* note 37, ¶ 507.

56. Andrew Anthony, *The Bosnian War Baby Still Searching for Answers, 20 Years on*, GUARDIAN (July 12, 2015), <https://www.theguardian.com/world/2015/jul/12/alenuhich-bosnia-war-baby> [https://perma.cc/BR4C-EZDM].

tion of children called “the Chetnik bastards” who were ostracized by both the Serbs and the Bosnians.⁵⁷ Just like one could deduce a policy to destroy the Tutsis from the actions and statements of the Hutus in Rwanda, one can deduce a policy and intent to destroy the Bosnian Muslims from the actions of the Serbs.⁵⁸

The fifth act of “forcibly transferring children”⁵⁹ has been treated as “biological genocide” by the International Law Commission.⁶⁰ According to the *Akayesu* case, this act includes “threats. . . which would lead to the forcible transfer of children from one group to another.”⁶¹ Thus, proof of children actually being transferred from one victim group to another is not necessary.⁶²

57. *Id.*

58. See *Akayesu* Judgment, *supra* note 37, ¶ 168.

59. Genocide Convention, *supra* note 18, at art. 2(e).

60. SCHABAS, *supra* at 29, at 216–17.

61. *Id.*

62. *Akayesu* Judgment, *supra* note 37, ¶ 509; see also Kayishema & Ruzindana Judgment, *supra* note 48, ¶ 118. Another credible source monitoring high-risk areas for genocide is Genocide Watch. As a civic and social organization, Genocide Watch aims “to predict, prevent, stop, and punish genocide and other forms of mass murder.” GENOCIDE WATCH, <http://genocidewatch.net/> [<https://perma.cc/LM35-CH28>]. In fact, Genocide Watch has classified the following ten structural levels to genocide: (1) classification, (2) symbolization, (3) discrimination, (4) dehumanization, (5) organization, (6) polarization, (7) preparation, (8) persecution, (9) extermination, and (10) denial. See Gregory H. Stanton, *The Ten Stages of Genocide*, GENOCIDE WATCH, <http://genocidewatch.net/genocide-2/8-stages-of-genocide/> [<https://perma.cc/UE7G-CWD8>] (last visited June 12, 2021). “Classification” is the act of categorizing people according to shared qualities or characteristics such as ethnicity, race, or religion. “Symbolization” occurs when symbols are assigned to classifications. *Id.* An example of a symbol assigned to a classification is the yellow star for Jews under Nazi rule. See *Jewish Badge*, U.S. HOLOCAUST MUSEUM, <https://www.ushmm.org/learn/timeline-of-events/1939-1941/jewish-badge-decreed> [<https://perma.cc/SVA9-6V2P>] (last visited June 12, 2021). “Discrimination” occurs when the “dominant group” uses exclusionary ideas, custom, and political power to deny civil rights, voting rights, or even citizenship to other groups. Stanton, *supra* note 62. “Dehumanization” takes place when the subjugated group members are equated with animals, filth, and impurity, and are treated as lesser beings. Members of the society are indoctrinated with notions of hate toward the submissive group through propaganda. *Id.* “Organization” is the informal or formal use of militias by the state to deny state responsibility for genocidal acts. *Id.* Decentralized and organized secret police systems—like the Gestapo, the official secret police of Nazi Germany—are used to spy on, torture, and murder people. See *Gestapo Nazi Political Police*, BRITANNICA (June 7, 2019, 5:05 PM), <https://www.britannica.com/topic/Gestapo> [<https://perma.cc/FMM4-6A2V>]. “Polarization” transpires when extremists spread “polarizing propaganda” through hate speech, laws, and policies. Stanton, *supra* note 62. Examples of laws and policies include prohibitions on intermarriages and stripping the targeted group of their fundamental civil rights and liberties (these fall under discrimination as well). “Preparation” takes place when leaders design the “Final Solution” to get rid of the targeted groups. *Id.* They use euphemisms to hide their intentions, for instance, by claiming that they are “purifying” their nation by destroying the targeted group. *Id.* “Persecution” consists of “extrajudicial killings, torture, and forced displacement.” *Id.* “Extermination” is the mass killing of victims, which can only be stopped with military intervention. *Id.* The last step of genocide—“denial”—involves the state building “mass graves, burn[ing] . . . bodies, try[ing] to cover up evidence and intimidat[ing] witnesses.” *Id.*

C. Genocide in Rwanda

In 1994, Rwandans belonging to the Hutu tribe killed about 800,000 Tutsi Rwandans in a span of a hundred days.⁶³ Initiated by Hutu nationalists in the capital of Kigali, genocide spread throughout Rwanda.⁶⁴

Prior to 1959, the minority population of Tutsis ruled over the majority population of Hutus in Rwanda.⁶⁵ In 1959, the Hutus overthrew the Tutsis, took control of the government, and the Tutsis fled to Uganda. A group of Tutsi exiles then formed a rebel group called the Rwandan Patriotic Front (RPF) which was commanded by Paul Kagame.⁶⁶ RPF overthrew the Hutu government so the Tutsis could return to their homeland. In June 1992, RPF announced a ceasefire and began negotiations with the Rwandan government.⁶⁷ After some attacks on the Tutsis, peace negotiations stopped briefly before resuming in Arusha, resulting in the Arusha Accords.⁶⁸ Once peace was negotiated, fighting in Rwanda dwindled.

On April 6th, 1994, a plane carrying the Rwandan President Juvenal Habyarimana and Burundi’s President Cyprien Ntaryamira was shot down over the capital city of Kigali.⁶⁹ This incident triggered mass killings of the Tutsis. The government and Hutu militias carefully prepared “lists of government opponents [that] were handed out to [the] militias” so the latter could hunt and kill government opponents (i.e., the Tutsis).⁷⁰ Men married to Tutsi women murdered their wives and neighbors killed one another.⁷¹ Since identification cards listed people’s ethnic groups, soldiers could easily identify the Tutsis.⁷² When soldiers encountered Tutsis, they viciously killed Tutsi men and kept Tutsi women as sex slaves.⁷³ This led to the deaths of approximately 800,000 Tutsis in Rwanda.⁷⁴

When the ICTR heard the *Akayesu* case and found Akayesu guilty on numerous counts, including fifteen counts of genocide, the court decided that the two elements of genocide, *actus reus* and *mens rea*, were met.⁷⁵ The court acknowledged that intent could be very difficult to ascertain, but it considered the following factors were relevant:

63. *Rwanda Genocide: 100 Days of Slaughter*, BBC NEWS (Apr. 4, 2019), <https://www.bbc.com/news/world-africa-26875506> [<https://perma.cc/YR5E-YMMT>].

64. *Id.*

65. *Id.*

66. Gatete Nyiringabo Ruhumuliza, *Kagame’s Rwanda Is Still Africa’s Most Inspiring Success Story*, ALJAZEERA (Oct. 21, 2019), <https://www.aljazeera.com/indepth/opinion/kagame-rwanda-africa-inspiring-success-story-191021095141166.html> [<https://perma.cc/YSZ6-87QS>].

67. See Emily Willard, *Rwanda: The Failure of the Arusha Peace Accords*, NAT’L SEC. ARCHIVE (May 21, 2014), <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB469/> [<https://perma.cc/W5C3-4U37>].

68. Arusha Accords were protocols signed by the Rwandan government and the RPF to end the Rwandan civil war. See *id.*

69. *Id.*; *Rwanda Genocide: 100 Days of Slaughter*, *supra* note 63.

70. *Rwanda Genocide: 100 Days of Slaughter*, *supra* note 63.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Akayesu* Judgement, *supra* note 37, ¶ 734.

[T]he scale and the general nature of the atrocities; the fact of deliberately or systematically targeting victims of a group, while excluding the members of other groups; the general political doctrine of the perpetrators of the crime; the repetition of discriminatory and destructive acts; speeches or projects preparing the ground for the massacres.⁷⁶ [block quote]

Thus, the court reasoned that Akayesu's intentions could be inferred from his "acts and utterances . . . or from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator or even by other perpetrators."⁷⁷ Here, the ICTR determined Akayesu's intent by analyzing his speeches, "calling, more or less explicitly for the commission of genocide," and his presiding over the Taba commune where Tutsi women were systematically raped and killed.⁷⁸ The court noted that it sufficed for the requirement of "whole or in part" under the Convention that the perpetrator had eliminated a significant part of the group.

This was the first time an international tribunal interpreted the Genocide Convention. Yet, the ICTR did not hold back, deducing clear intent to destroy the Tutsi group, and noting that "even newborn babies were not spared."⁷⁹ Akayesu's general intent to cause the killings and cause serious bodily and mental harm through rapes, along with his specific intent to specifically destroy the ethnic Tutsi group, were determined through his acts and utterances, as well as the context of systematic violence perpetrated against the Tutsis in Rwanda. Consequently, the ICTR decided that he was guilty of nine out of fifteen counts on which he had been charged in this indictment.⁸⁰ He was found guilty of genocide, direct and public incitement to commit genocide, and crimes against humanity.⁸¹ For the ICTR, It did not matter that there was a civil war between the Rwandan army and the RPF at the time of the genocide.⁸² In addition to armed militia, ordinary citizens also participated in the genocide.⁸³ Thus, the tribunal determined that although Akayesu had initially tried to stop the killing of Tutsis, he later stopped doing so and frequently used his power as a respected mayor to order such killings.⁸⁴ The tribunal also opined that Akayesu directly and publicly incited genocide by stating a derogatory reference understood to be a "call to kill the Tutsis in general" while addressing a crowd in Taba on April 19, 1994.⁸⁵ The tribunal also decided that

76. Guglielmo Verdirame, *The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals*, 49 INT'L & COMP. L.Q. 578, 585 (2000).

77. Akayesu Judgment, *supra* note 37, ¶ 728.

78. *Id.* ¶ 729.

79. *Id.* ¶ 121.

80. *Id.* at 293-94.

81. *Id.*

82. *Id.* ¶ 494 (stating that there is no requirement of conflict for the crime of genocide; the crime can occur during times of peace).

83. *Id.* ¶ 128.

84. *Id.* ¶¶ 704-05.

85. *Id.* ¶ 673.

sexual violence played a large role in the process of destroying the Tutsi tribe.

This case set a precedent for all genocide tribunals in the future. Its ruling and application of the Genocide Convention should guide courts in prosecuting the genocide occurring in Myanmar.

D. Genocide in Cambodia

A genocide in Cambodia took place during the Khmer Rouge regime under the leadership of the Marxist dictator Pol Pot from 1975 to 1979.⁸⁶ His regime killed more than two million people in Southeast Asia.⁸⁷ People were killed if they were deemed enemies of the regime and many of them died from malnutrition, overwork, or sickness.⁸⁸ The regime targeted Cham Muslims and ethnic Vietnamese communities in Cambodia as well.

In April 1975, the Communist group, known as Khmer Rouge, led by Pol Pot seized control over Cambodia and renamed the country Democratic Kampuchea.⁸⁹ Prior to this regime, the United States (U.S.) fought in the Vietnam War and bombed various parts of Cambodia.⁹⁰ During this period, Cambodia was under the monarchy of Prince Norodom Sihanouk.⁹¹ In 1970, a nationalist named Lon Nol led a military coup which ousted the ruling monarch, after which the Khmer Rouge joined forces with the deposed monarch and formed a political coalition.⁹² Since the monarch was popular in the cities, the Khmer Rouge regime was able to obtain support from many urban Cambodians.⁹³ Thus, a civil war began between the military that had led the coup, and the political coalition led by Khmer Rouge and Prince Norodom.⁹⁴ The latter won the civil war and gained control of Cambodia.⁹⁵ In 1975, the Khmer Rouge captured Phnom Penh, the capital city of Cambodia; exiled the reigning monarch, Prince Norodom; and gave Pol Pot control over Cambodia.⁹⁶

Pol Pot was impressed by the tribes in the northeastern parts of Cambodia who were self-sufficient and worked together with a community mindset.⁹⁷ He liked that they shared in the spoils of their labor, disparaged wealth and materials, and engaged in practices of subsistence farming.⁹⁸ The Khmer Rouge government was fascinated by this lifestyle and enacted policies guided by the belief that Cambodians had been corrupted

86. *Khmer Rouge*, HIST. (Sept. 12, 2017), <https://www.history.com/topics/cold-war/the-khmer-rouge> [<https://perma.cc/KX7G-FNM9>].

87. *See id.*

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

by exposure to Western ideals, which focused on wealth and materials.⁹⁹ Pol Pot persecuted the educated, doctors, lawyers, military, and police. People of faith, especially Christians, Buddhists, and Muslims, were targeted.¹⁰⁰ The regime placed people in collective living arrangements and created reeducation programs where people were forced into thinking that commune life was preferable.¹⁰¹ People who refused to engage in reeducation were killed or imprisoned.¹⁰²

Under the regime, people worked on collective farms, toiled as unpaid laborers, suffered from food shortages, and were sometimes separated from their families.¹⁰³ Additionally, factories and universities were shut down and many people even died from stepping on landmines that had been set up to prevent escape.¹⁰⁴ Eventually, in 1979, the Vietnamese invaded Cambodia, overthrew the Khmer Rouge regime, and established a pro-Vietnamese government.¹⁰⁵

During this regime, the Khmer Rouge killed over a million people, but until today, only two leaders of the regime have been convicted of genocide.¹⁰⁶ The Khmer Rouge Tribunal—also known as The Extraordinary Chambers in the Courts of Cambodia—was the international tribunal set up after an agreement between the United Nations and the Cambodian government in 2003.¹⁰⁷ Many leaders and countries throughout the international community hailed the tribunal as a failure for convicting only three people.¹⁰⁸ Amongst them were Pol Pot's right-hand person, Nuon Chea, and the head of state, Khieu Samphan, both of whom were convicted of genocide by eliminating Cham Muslims and ethnic Vietnamese communities.¹⁰⁹ Prior to the genocide convictions, Nuon Chea and Khieu Samphan were each serving a life sentence for crimes against humanity.¹¹⁰ During the brutal regime, between 100,000 to 500,000 Shia Muslims were killed,

99. See *id.*

100. See Paddy Dowling, *The Khmer Rouge Destroyed Education in Cambodia—Now the Country Is Fighting Back*, INDEPENDENT (Dec. 6, 2019), <https://www.independent.co.uk/arts-entertainment/photography/khmer-rouge-education-cambodia-ngo-pol-pot-a9233851.html> [https://perma.cc/4Q7E-RD3Z].

101. See *Cambodian Genocide*, WORLD WITHOUT GENOCIDE, <https://worldwithoutgenocide.org/genocides-and-conflicts/cambodia> [https://perma.cc/W9DQ-N3S7] (last visited June 12, 2021).

102. See *id.*

103. See *id.*

104. See *id.*

105. See *id.*

106. See *Khmer Rouge Leaders Found Guilty of Cambodia Genocide*, BBC NEWS (Nov. 16, 2018), <https://www.bbc.com/news/world-asia-46217896> [https://perma.cc/YM5X-ZPUE].

107. See *id.*

108. See Seth Mydans, *11 Years, \$300 Million and 3 Convictions. Was the Khmer Rouge Tribunal Worth It?*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/world/asia/cambodia-khmer-rouge-united-nations-tribunal.html> [https://perma.cc/8ZYX-BZDG].

109. See *id.*

110. See *id.*

forced to eat pork, and prohibited from using their traditional language.¹¹¹ Khmer soldiers would separate the Khmer and Cham people, and frequently, the Cham were rounded up and never seen again. The Khmer government often placed orders targeting the Muslim Cham group and one such order stated that “[t]he Cham nation no longer exist[ed] on Kampuchean [(Cambodian)] soil belonging to the Khmer. Accordingly, Cham nationality, language, customs and religious beliefs must be immediately abolished.”¹¹² Those who failed to obey this order would “suffer all the consequences for their acts of opposition to Angkar,” which was the Khmer Rouge’s high command.¹¹³ According to Farina So who heads the Cham Oral History project run by the Documentation Center of Cambodia, the regime did intend to wipe out the Cham and although it did perpetrate terror against other groups, the motives toward the Cham were clearly distinct from how the regime treated other peoples.¹¹⁴ Although the Khmer Rouge banned religion in general, it specifically destroyed Cham mosques, killed the grand Mufti, and branded the Chams as their enemy.¹¹⁵ In addition, the Khmer Rouge deported a large number of Vietnamese peoples and killed the 20,000 who remained.¹¹⁶ To illustrate how horrifyingly gruesome this was—and, how the government nevertheless advocated for these atrocious acts—one can look to Pol Pot, who reportedly said there was “not one seed” of Vietnamese to be found in Cambodia.¹¹⁷

The convictions of the two leaders of genocide were based on a general and specific intent to “destroy . . . in whole or in part,” the Vietnamese in Cambodia. Intent was inferred from the *actus reus* of killing Vietnamese people, killing those who tried to flee, and the targeting of Vietnamese children.¹¹⁸ Many testified at the tribunal that the Khmer Rouge killed children to destroy the bloodline.¹¹⁹ The state had also reportedly announced that they wanted to “exterminate the 50 million Vietnamese.”¹²⁰ The tribunal also found that Nuon Chea had an intent to destroy, in whole or in part, the Cham Muslims.¹²¹ The evidence of intent to target the Cham derives from the murder of the Muslims after a rebellion in 1975 and killings in areas like Wat Au Trakuon Pagoda in Kang Meas District, Central Zone, and at Trea Village in Krouch Chhmar District, East Zone.¹²² This

111. See Clothilde Le Coz, *The Question of Genocide and Cambodia’s Muslims*, AL-JAZEERA (Nov. 19, 2015), <https://www.aljazeera.com/news/2015/11/question-genocide-cambodia-muslims-151110072431950.html> [<https://perma.cc/6TGV-D33R>].

112. *Id.*

113. *Id.*

114. See *id.*

115. See *id.*

116. See *id.*

117. See *id.*

118. See CAITLIN McCAFFRIE & DANIEL MATTES, ANOTHER TRIAL: A REVIEW OF CASE 002/02: THE SECOND TRIAL OF NUON CHEA AND KHIEU SAMPHAN AT THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 17 (2018).

119. *Id.*

120. WILL PODMORE, BRITISH FOREIGN POLICY SINCE 1870, at 176 (Xlibris et al. eds., 2008).

121. See generally McCAFFRIE & MATTES, *supra* note 118.

122. *Id.* at 16.

violence was especially atrocious and targeted.

However, one may argue that the individuals running the Khmer Rouge reign did not commit genocide of the Cham and Vietnamese communities. Other religious and ethnic groups also suffered the same treatment as the Cham and the Vietnamese. Buddhists were maligned and driven into exile; about 25,000 monks were killed, and nearly every temple had been destroyed.¹²³ The state also obliterated churches while viciously slaughtering Cambodian Christians.¹²⁴ The Khmer Rouge also killed about 200,000 to 300,000 ethnic Chinese individuals in the country.¹²⁵ Hence, it is possible that the symbols denigrating the Cham and Vietnamese communities were different from those used to dehumanize the Khmer people, but the mass killings were not directed toward them for the purpose of wiping out or destroying the specific minority groups. It is possible that Pol Pot and his government intended to make the whole population suffer, and while formulating their strategy to do so, they decided to attack each ethnic group in different ways. Thus, the crucial question is whether the state attacking and targeting separate ethnic groups in distinct, yet brutal, ways falls under the definition of genocide under the Genocide Convention? Some scholars believe it does while others disagree.¹²⁶ Unlike Akayesu in the Rwandan case who targeted only the Tutsis, the Khmer Rouge government members did not solely target the Cham

123. See Bonnie Duncan, *Buddhism Survived the Khmer Rouge to Give Hope to Cambodia*, GEO. U.: BERKLEY CTR. (Dec. 9, 2011), <https://berkeleycenter.georgetown.edu/posts/buddhism-survived-the-khmer-rouge-to-give-hope-to-cambodia> [<https://perma.cc/5XQB-Z946>]; Philip Shenon, *Phnom Penh Journal; Lord Buddha Returns, with Artists His Soldiers*, N.Y. TIMES (Jan. 2, 1992), <https://www.nytimes.com/1992/01/02/world/phnom-penh-journal-lord-buddha-returns-with-artists-his-soldiers.html> [<https://perma.cc/F7H5-33MU>].

124. *Id.*

125. Kiernan Ben, *The Survival of Cambodia's Ethnic Minorities*, CULTURAL SURVIVAL, <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/survival-cambodias-ethnic-minorities> [<https://perma.cc/6BZ2-VVWM>] (last visited June 12, 2021).

126. The Khmer Rouge killed the educated and anyone who was found to oppose the Khmer Rouge regime. Since the vast majority of killers and the victims belonged to the same group—the Khmer people—the Khmer Rouge regime could not be charged with genocide for those killings. Similarly, Akayesu was acquitted of genocide on the killings of Hutus who sympathized with the Tutsis, since he himself was a Hutu. Therefore, he was only convicted of murdering Hutus, not of committing genocide against the Hutus. See generally Ambrus Monika, *Genocide and Discrimination: Lessons to be Learnt from Discrimination Law*, 25 LEIDEN J. INT'L L. 935, 943 (2012).

Akayesu . . . went to the house of Victim Y, a 69 year old [sic] Hutu woman, to interrogate her on the whereabouts of Alexia, the wife of Professor Ntereye. During the questioning which took place in the presence of Akayesu, the victim was hit and beaten several times. . . . Although the above acts constitute serious bodily and mental harm inflicted on the victim, the Chamber notes that *they were committed against a Hutu woman*. Consequently, they cannot constitute acts of genocide against the Tutsi group. [block quote]

Muslims and ethnic Vietnamese communities.¹²⁷ On the other hand, Myanmar is undoubtedly targeting the Rohingya Muslims.

II. Genocide in Myanmar

A. Brief History of Myanmar

Present-day Myanmar, formerly known as Burma, is marked by centuries-long political turmoil and chaos.

In 1885, Britain colonized Myanmar, which was subsequently occupied by Japan during World War II.¹²⁸ The British ended colonial rule in 1948 after the independence efforts of State General Aung San, who led the Anti-Fascist People's Freedom League.¹²⁹ Several decades later, General San's daughter, Aung San Suu Kyi, became Myanmar's leader.¹³⁰ After the assassination of her father by a rival politician, Aung San Suu Kyi watched her country descend into a dictatorship as the Socialist Programme Party took over and created a military-led state.¹³¹ However, while military rule controlled Myanmar, the opposition established the National Democratic Front and spurred guerilla-based insurgencies.¹³² Riots increased in 1987 when currency devaluation wiped out people's savings, catalyzing government protests.¹³³ The government responded with violence, murder, declarations of martial law, renaming Burma to Myanmar, and placing Suu Kyi—then-leader of the National League for Democracy (NLD)—under house arrest.¹³⁴

In 1990, Suu Kyi's party won the general election by a landslide, but the military ignored the results.¹³⁵ Seven years later, in 1995, she was released from house arrest.¹³⁶ However, in 2000, the military placed Suu Kyi under house arrest again, albeit after releasing 300 NLD members from prison.¹³⁷ Suu Kyi was again released in 2002.¹³⁸

In 2003, the military appointed Khin Nyunt as Prime Minister and he released more NLD members from house arrest and announced a roadmap to democracy.¹³⁹ Unfortunately, his mission to democracy failed, and he

Id. (emphasis in original) (quoting Akayesu Judgment, *supra* note 37, at 720–21).

127. However, no one can deny the morally reprehensible nature of the unspeakable crimes committed by leaders of the Khmer Rouge. There are other crimes besides genocide under which these were, or should have been, prosecuted.

128. *Myanmar Profile-Timeline*, BBC NEWS (Sept. 3, 2018), <https://www.bbc.com/news/world-asia-pacific-12992883> [<https://perma.cc/W3CE-HN6G>].

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* Importantly, in 1991, Suu Kyi was awarded the Nobel Peace Prize for her commitment to bringing change through peace. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

was eventually replaced by another leader.¹⁴⁰

In 2007, public unrest arose when fuel prices hiked, the military attacked peaceful protestors, and the government renewed Suu Kyi's house arrest.¹⁴¹ In 2015, she led the NLD to their "victory in Myanmar's first openly contested election in [twenty-five] years" and became the de facto leader as "state counselor" since she could not be President because of a "constitutional restriction barring candidates with foreign spouses or children."¹⁴²

B. Who Are the Rohingya?

The Rohingya are a Muslim ethnic group that have lived in Rakhine—an area at the Western edge of Myanmar bordering Bangladesh—for generations.¹⁴³ The group has its own distinct language and culture, and its origins in Myanmar can be traced back to the fifteenth century—a fact the government disputes.¹⁴⁴ There is evidence of ethnic Rohingya individuals living in Rakhine for "centuries, even before Islam arrived in the region at the end of the [eighth] century."¹⁴⁵ In the fifteenth century, the Rohingya language and culture began to dominate and spread outwards under the Mrauk U Dynasty, which happened to be Muslim.¹⁴⁶ After the Burmese Empire invaded the region, Muslim rule collapsed but the Rohingya continued to reside on their land.¹⁴⁷ When Burma was colonized by the British, the Rohingya also became British subjects.¹⁴⁸ During the Second World War, the Rohingya joined the British army and fought against the Japanese who had invaded Burma.¹⁴⁹ The Rohingya were promised independence from Burma by the British, but the deal was not fulfilled, so the Rohingya continued to live in Burma.¹⁵⁰ According to the Council on Foreign Relations, the group's name "Rohingya" came into common usage in the 1950s and the word "*Rohang* derives from the word 'Arakan,'" which used to be

140. *Id.*

141. *Id.*

142. Aung San Suu Kyi: Myanmar Democracy Icon Who Fell from Grace, BBC NEWS (Jan. 23, 2020), <https://www.bbc.com/news/world-asia-pacific-11685977> [<https://perma.cc/3SEP-FSQA>].

143. See *Who Are the Rohingya?*, ALJAZEERA (Apr. 18, 2020), <https://www.aljazeera.com/features/2018/4/18/who-are-the-rohingya> [<https://perma.cc/6TQ8-7CNN>].

144. See Eleanor Albert, *The Rohingya Crisis*, COUNCIL ON FOREIGN RELS. (Jan. 23, 2020), <https://www.cfr.org/background/rohingya-crisis> [<https://perma.cc/N27D-773X>].

145. *The Rohingya Origin Story: Two Narratives, One Conflict*, TANNEBAUM PROJECT 1, 1 (2017), <https://tanenbaum.org/wp-content/uploads/2017/11/Rohingya-Origin-Fact-Sheet.pdf> [<https://perma.cc/6TU4-CZ2Y>].

146. *Id.* at 1-2.

147. *Id.* at 2.

148. *Id.*

149. *Id.* at 3.

150. *Id.* at 2. This is very similar to the situation of the Kurds who are an ethnic group in Turkey and Iraq. Kurds were promised their independence multiple times, but they never received their nation. See Michale Safi, *The Kurd—A Bitter History of Betrayal*, GUARDIAN (Oct. 13, 2019, 3:00 PM), <https://www.theguardian.com/world/2019/oct/13/the-kurds-a-bitter-history-of-betrayal> [<https://perma.cc/WCE6-RN5P>].

the name of the Rakhine state where they predominately reside, and “gya means ‘from.’”¹⁵¹

Other sources claim that the Rohingya Muslims’ ancestors actually arrived into Myanmar in the nineteenth century from Chittagong, Bangladesh, and that they were originally known as the Chittagong Muslims.¹⁵² According to such sources, the term “Rohingya” came into common usage to describe the Chittagonian Muslims when the Japanese invaded Burma. Allegedly, after British rule in Rakhine collapsed, the Rohingya who sided with the British attacked pro-Japanese Buddhists in Maungdaw and Buthidaung.¹⁵³ This violence led to many people referring to the regions in Rakhine as “the Muslim north” and “the Buddhist south.”¹⁵⁴

Currently, the government of Myanmar denies the Rohingya community citizenship and has passed discriminatory laws, which has rendered them stateless.¹⁵⁵ Thus, the government of Myanmar views the Rohingya as immigrants who arrived from Bangladesh during British rule and believes that they should register themselves as Bengali.¹⁵⁶

C. Making of a Genocide

1. *Marginalizing Policies and Increasing Violence*

Myanmar has carried out the erasure of the Rohingya identity for more than thirty years.¹⁵⁷ By portraying the Rohingya as the “other,” and violently terrorizing them, the state has been successful in dehumanizing the whole community. The state marginalized the Rohingya by stripping them of citizenship; allowing the spread of hate speech targeting the Rohingya, sometimes spewing it themselves; and terrorizing Rohingya by inflicting violence and bloodshed, attacking unarmed and innocent people, burning villages, subjecting them to flagrant sexual violence, and isolating them from the rest of the world.¹⁵⁸ Thus, the state’s specific *actus reus* has undoubtedly highlighted their intent to destroy the Rohingya. For that reason, as previously mentioned, this Note argues that there is a clear case for genocide under the Genocide Convention.¹⁵⁹

When Burma achieved independence in 1948, the Rohingya had the

151. Albert, *supra* note at 144.

152. *See id.*

153. *See id.*

154. *See id.*

155. Sarah Gibbens, *Myanmar’s Rohingya Are in a Crisis—What You Need to Know*, NAT’L GEOGRAPHIC (Sept. 29, 2017), <https://www.nationalgeographic.com/news/2017/09/rohingya-refugee-crisis-myanmar-burma-spd/> [<https://perma.cc/JH9X-2ZUB>].

156. *World Directory of Minorities and Indigenous Peoples—Myanmar/Burma: Muslims and Rohingya*, MINORITY RTS. GRP. INT’L, <https://minorityrights.org/country/myanmarburma/> [<https://perma.cc/5MLU-ZHKB>] (last visited June 12, 2021).

157. *See id.*

158. Gibbens, *supra* note 155.

159. *See* Press Release, Norwegian Nobel Comm., The Nobel Peace Prize 1991 (Oct. 14, 1991) (on file at <https://www.nobelprize.org/prizes/peace/1991/press-release/> [<https://perma.cc/9QCJ-A6BP>]).

same citizenship and voting rights as other Burmese citizens.¹⁶⁰ In the 1960 election campaign, the political parties tried to gain the votes of Buddhists and Muslims alike. In fact, former Prime Minister U Nu assured the Muslims in Rakhine that their region would be granted the recognition of an “ethnic state” and would be made autonomous.¹⁶¹ Rakhine was eventually made a separate state, but the Muslim residents did not receive their promised autonomy. In 1971, during the war in East Pakistan, many Rohingya fled to Myanmar to seek refuge and although most of them returned home, some stayed in Rakhine.¹⁶² In 1962, the military junta supported nationalism, and in order to unite people against a common enemy, the junta began sidelining the Rohingya Muslims. By 1977, the ruling military junta was skeptical of Muslims and began Operation Dragon King.¹⁶³ The operation forced about 200,000 Rakhine Muslims to flee outside of Myanmar as they were targeted and considered “illegal.”¹⁶⁴ The military reportedly used violence and rape to drive them out and the Operation included “mass arrests, persecution and horrific violence.”¹⁶⁵ By 1978, about 170,000 Rohingya had reportedly repatriated to Burma and about 10,000 of those remaining in Bangladesh died after food rationing ceased.¹⁶⁶

In 1982, the government of Burma passed the Citizenship Act recognizing 135 ethnic groups in the country but deliberately excluding the Rohingya, who had a population of about one million, despite their longstanding presence in the country.¹⁶⁷ With that, the Rohingya became one of the largest groups of stateless people in the world.¹⁶⁸ The international community pressured Myanmar to review and reform the Act, but the government did not compromise on its decision and anti-Rohingya sentiment grew in the Burmese population.¹⁶⁹ This not only rendered the Rohingya presence in the country illegal, but according to the U.N., they were the only ethnic group in Burma “who [were] subject to arbitrary mass arrests and chronic waves of massacres.”¹⁷⁰ This Act encouraged policies restricting Rohingyas from traveling and laws prohibiting inter-marriages

160. See Christine Fair, *The Making of the Rohingya Genocide and Myanmar's Impunity*, 118 J. CONTEMP. WORLD AFFS. 149, 150 (2019).

161. *Id.* at 151.

162. *Id.*

163. Vox, *The “Ethnic Cleansing” of Myanmar’s Rohingya Muslims, Explained* YOUTUBE (Sept. 25, 2017), https://www.youtube.com/watch?v=04axDDRy_o [<https://perma.cc/ZHG6-9XG5>].

164. See Fair, *supra* note 160, at 151.

165. *TimeLine: A Visual History of the Rohingya Refugee Crisis*, DRS. WITHOUT BORDERS (Aug. 21, 2020), <https://www.doctorswithoutborders.org/what-we-do/news-stories/news/timeline-visual-history-rohingya-refugee-crisis> [<https://perma.cc/X3WL-68P9>] [hereinafter *Timeline*].

166. *Id.*

167. GENOCIDE WATCH, *supra* note 62.

168. See Fair, *supra* note 160, at 151.

169. See Maung Zarni & Alice Cowley, *The Slow Burning Genocide of Myanmar’s Rohingya*, 3 PAC. RIM L. & POL’Y J. 683, 685 (2014).

170. *Id.* at 706–707.

with members of the group.¹⁷¹ Doctor Aye Kyaw, a member of the 1982 Citizenship Acting Draft Committee, clarified that nationalists wanted to reclaim the area of Rakhine for Buddhist Arakanese under the ideology of “Tai-yin-that” or “the original indigenous races.”¹⁷²

In the 1980s and 1990s, under repressive military rule, the military junta increased its presence at its border with Bangladesh to prevent dissenters from receiving external support, highlighting an intent to prevent the Rohingya from escaping.¹⁷³ Security forces called “NaSaKa” perpetrated violence and abuses, such as torture and rape of the Rohingya.¹⁷⁴ In 1991, the Myanmar military launched another campaign called “Operation Clean and Beautiful Nation,” where the government once again targeted the Rohingya.¹⁷⁵ This time, about 250,000 Rohingya fled to Bangladesh.¹⁷⁶ Some of the state-sponsored violence included mass rapes, burning of homes, and severe violence.¹⁷⁷ Family members were beaten to death while doing forced labor.¹⁷⁸ This institutionalized behavior toward the Rohingya alludes to an intent to discriminate and destroy the Rohingya identity.

In 2001 and 2002, there were additional levels of violence directed against the Rohingya when Buddhists in Rakhine attacked Muslims in Sittwe, destroyed twenty-eight mosques, and murdered civilians.¹⁷⁹ Most of these attacks occurred with “direct orders from the highest level of (military) leadership or with a tacit approval on part of the senior-most leadership.”¹⁸⁰ Additionally, the perpetrators of such abhorrent violence have “enjoyed impunity” from any accountability, which highlights the significant role played by the government and state in tolerating such behavior.¹⁸¹ Although the government often did not directly carry out the violence, they encouraged it, much like Jean-Paul Akayesu in Rwanda who was charged with genocide.¹⁸² Although Jean-Paul Akayesu had not personally engaged in acts of violence, he had ordered and instigated acts of

171. See *id.* at 709.

172. Aye Kyaw.flv, YouTube (Mar. 10, 2012), <http://www.youtube.com/watch?v=hdyfe-kCvJU> [<https://perma.cc/G6T5-Z24F>] (showing Rakhine ultra-nationalist historian Dr. Aye Kyaw espousing “pure” Buddhist Rakhine nationalism); see also Zarni & Cowley, *supra* note at 169, at 737.

173. Zarni & Cowley, *supra* note 169, at 708. In the 1980s, there was an attempt to torture and eventually destroy the remaining Rohingya in Myanmar, the government stopped Rohingya at the borders to prevent them from escaping. But currently, as villages are razed and people are killed, the Rohingya find ways to flee Myanmar. It seems that the state changed its policy from keeping the Rohingya trapped in Myanmar so they could be tortured, to destroying their lives to the point where they are forced and hence “allowed” to flee. See *id.* at 710–11.

174. *Id.* at 711.

175. Gibbens, *supra* note at 155.

176. Zarni & Cowley, *supra* note 169, at 711.

177. *Id.*

178. *Id.* at 712.

179. *Id.* at 713–14.

180. *Id.* at 714.

181. *Id.*

182. See Akayesu Judgment, *supra* note 37, ¶ 12(b).

violence in Taba.¹⁸³ He was convicted of genocide by the Rwandan tribunal because of “public incitement” to commit genocide.¹⁸⁴ Similarly, the Burmese government’s propaganda and denial of the Rohingya identity aimed to erase the Rohingya community.

The full-fledged and consistent nature of violence toward the Rohingya erupted in 2012.¹⁸⁵ This chaos started when four Muslim men were accused of raping a Buddhist woman and riots erupted in western Rakhine.¹⁸⁶ This brutal rape led to Buddhist nationalists and security forces burning Rohingya homes and attacking and killing Muslims a bus.¹⁸⁷ By the end of the riots, around 100,000 people were displaced.¹⁸⁸ Violence against Muslims soon emerged in other parts of the country. In 2013, there was a jewelry store dispute that resulted in a Buddhist monk being killed by Muslims in Meiktila, which led to Buddhists burning Muslim homes, mosques, and schools.¹⁸⁹ According to a report by an independent commission established by President Thein Sein, there was extremism on both sides of the conflict, a lack of economic opportunity, and corruption.¹⁹⁰ This was misleading because the violence was arguably unequal and, with the Rohingya being those truly oppressed. Even if the Rohingya attacked Burmese Buddhists, these attacks were on a much smaller scale and were largely a response to the atrocities they had suffered at the hands of the Burmese Buddhists.

Since 2012, many people in Myanmar have perpetrated and committed targeted acts of full-fledged violence against the Rohingya. The international community, through the United Nations Special Rapporteur, has raised concerns about the lack of accountability for perpetrators of the violence.¹⁹¹ State inaction regarding such disproportionate and intense violence against the Rohingya highlights the state’s complicity in the acts of terrorism perpetrated against the marginalized group. Evidently, Burmese leaders are not taking action to stop violence toward the Rohingya because they want to obliterate the Rohingya community.

The Rohingya have been subjected to extensive restrictions on their personal freedoms. In May 2013, the government enacted a policy controlling the birth of Rohingya children that restricted Rohingya to having a

183. *Id.* ¶ 492.

184. *Id.*

185. See Fair, *supra* note 160, at 151.

186. *Id.*

187. See VICENews, *Myanmar’s Rohingya Genocide*, YOUTUBE (Feb. 14, 2020), <https://www.youtube.com/watch?v=ANHizRC6S8U&t=563s> [<https://perma.cc/V5UL-DG6G>].

188. See *Burma Violence, 20,000 Displaced in Rakhine State*, BBC NEWS (Oct. 28, 2012), <https://www.bbc.com/news/world-asia-20114326> [<https://perma.cc/46RT-MACL>].

189. Matthew J. Walton & Susan Hayward, *Contesting Buddhist Narratives: Democratization, Nationalism, and Communal Violence in Myanmar*, in 71 *POLICY STUDIES* 1, 7 (2014).

190. *Id.* at 8.

191. *Genocide Threat for Myanmar’s Rohingya Greater than Ever*, *Investigators Warn Human Rights Council*, U.N. NEWS (Sept. 16, 2019), <https://news.un.org/en/story/2019/09/1046442> [<https://perma.cc/TA9H-DCPE>].

maximum of two children.¹⁹² This is an example of a discriminatory and forced population control, especially since it was a policy restricted to Rohingya Muslims and this policy clearly established the government’s intent to destroy the lineage of the Rohingya. Unsurprisingly this policy was popular among the rest of the Burmese population.¹⁹³ Additionally, strict orders requiring Rohingya to apply for permission from governmental authorities to marry was another form of discriminatory behavior directed against them. Further, the Rohingya were not allowed to travel from one town to another without permission.¹⁹⁴ These restrictions are forms of institutionalized prejudice targeting the Rohingya community.

In addition to the acts of terrorism toward the Rohingya, false rumors often instigated violence toward the community. In 2014, a rumor of a Muslim man raping a Buddhist woman spread on social media and led to riots in Mandalay.¹⁹⁵ One Buddhist and one Muslim were killed, and Muslim homes and businesses were destroyed.¹⁹⁶ The rumor turned out to be false.¹⁹⁷ Although the authorities did investigate, they did not do much to intervene during the actual violence.¹⁹⁸ According to some analysts, this rumor was driven from “political motivations” as Suu Kyi’s NLD was about to arrive in the city to campaign for elections.¹⁹⁹ Additionally, according to the International Crisis Group, there were many instances of communal violence where the local police and security forces were either complicit or did not intervene to stop the violence toward Muslims.²⁰⁰ The organized nature of the riots was conspicuous in some instances and was indicative of preparation.²⁰¹

In 2016, a militant group called the Arakan Rohingya Salvation Army (ARSA) emerged as a response to the attacks on the Rohingya.²⁰² On August 25, 2017, the ARSA attacked more than thirty police posts in Rakhine and killed twelve state police officers.²⁰³ This led to severe and

192. Chris Lewa, *Two-Child Policy in Myanmar Will Increase Bloodshed*, CABLE NEWS NETWORK (June 6, 2013, 2:19 AM), <https://www.cnn.com/2013/06/06/opinion/myanmar-two-child-policy-opinion/index.html> [https://perma.cc/29PQ-RUCD].

193. Voice of America Burmese Service, *Interview with Dr. Yin Yin Nwe*, YOUTUBE (May 13, 2013), <http://www.youtube.com/watch?v=d6tldlb1YmI> [https://perma.cc/Z6CG-ND6Q] (explaining that Dr. Yin Yin Nwe is a geologist, and a member of the Presidential Inquiry Commission on the Sectarian Violence in Rakhine State, Myanmar).

194. *Id.*

195. *Myanmar: Five Jailed for Rumor that Led to Religious Riot*, ANADOLU AGENCY (Mar. 21, 2015), <https://www.aa.com.tr/en/world/myanmar-5-jailed-for-rumor-that-led-to-religious-riot/64866> [https://perma.cc/DM57-HUDB].

196. *See id.*

197. *See* Walton & Hayward, *supra* note 189, at 16.

198. *See* Alex Bookbinder, *Mandalay Riots Reveal Splintered Community*, *Complex Agendas*, ROHINGYA BLOGGER (July 8, 2014), <http://www.rohingyablogger.com/2014/07/mandalay-riots-reveal-splintered.html?zx=41fd29903c0379e7> [https://perma.cc/V6WV-9Q8X].

199. Walton & Hayward, *supra* note 189, at 8.

200. *Id.* at 9.

201. *Id.*

202. *Myanmar: What Sparked Latest Violence in Rakhine?*, BBC NEWS (Sept. 19, 2017), <https://www.bbc.com/news/world-asia-41082689> [https://perma.cc/7SDD-9S8B].

203. *Id.*

disproportionate retaliation by the state military and resulted in the current ethnic cleansing of the Rohingya in Myanmar.²⁰⁴ More than 410,000 Rohingya have escaped to Bangladesh since this incident and many of them have suffered and drowned on their way to safety.²⁰⁵ The ones remaining in Myanmar continued to suffer from egregious attacks. According to an interviewee from Maungdaw:

After the clashes, the NaSaKa would come all the time to our village tract looking for boys and young men. They would look for any male who was over eleven years old. They would come in the middle of the night, and we would have to run away. Sometimes they would arrest the boys and men and take them away. No one knows where they took them, or how many are alive or dead. More than thirty people are gone from my area. We all feel that they have probably been killed. Before the clashes the NaSaKa would come to our houses sometimes and then they would always ask, “who has gone to another country,” and they would harass the family that way if someone is gone. But since the clashes, it is different. They come and look for the young males and they arrest them and take them away. Even my two young cousins were arrested. They are aged around eleven and twelve years old. The NaSaKa come to their home at eleven . . . at night and took them away. We do not know where they are.²⁰⁶

This is just one example of the organized and targeted manner in which the military would kidnap Rohingya people from their homes and harass their families. According to other Rohingya Muslims, they would be stopped by Burmese security officials and asked about their race. Upon hearing the word Rohingya, the officials would hurl abuses or physically attack the Muslims.²⁰⁷ Since the attacks in 2012, Rohingya Muslims have been the subject of killings, abuses, arson, disappearances, sexual violence, restrictions on movement, abductions, harassment, regular threats via loudspeaker telling them to go to Bangladesh, bulldozing of villages, and trafficking of women and girls by Myanmar security forces.²⁰⁸ They have also been denied health care, education, and food. Additionally, the authorities arrested and imprisoned people for expressing their criticisms of the military or the government.²⁰⁹ Journalists and activists have also been prosecuted under Section 66(d) of the Telecommunications Act for criminal defamation.²¹⁰ Section 8(f) of the Privacy Act was also used to litigate against critics for defamation.²¹¹ Since the violence, there has been a “near media blackout” in the Rohingya state, although bloggers have been

204. *Id.*

205. *Id.*

206. Zarni & Cowley, *supra* note 169, at 733–34 (citations omitted).

207. See Jared Ferrie, *Why Myanmar's Rohingya Are Forced to Say They Are Bengali*, CHRISTIAN SCI. MONITOR (June 2, 2013), <https://www.csmonitor.com/World/Asia-Pacific/2013/0602/Why-Myanmar-s-Rohingya-are-forced-to-say-they-are-Bengali> [https://perma.cc/4VY9-V4ZF].

208. See *World Report 2019: Myanmar Events of 2018*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2019/country-chapters/burma> [https://perma.cc/EFU6-Z8QX] (last visited June 12, 2021).

209. See *id.*

210. *Id.*

211. *Id.*

able to sneak in videos and photos.²¹² People who were found to have snuck in videos of mass rapes and killings have disappeared and have most certainly been killed.²¹³ Overall, this kind of behavior is not only anti-democratic, but is also proof of the perpetrators’ genocidal intent.

2. *Hate Speech Targeting Rohingya Muslims and the State’s Role*

As the country undergoes a democratic transition, there is an alarming amount of hate speech in Myanmar.²¹⁴ The state has not only failed to stop the spread of vitriolic comments directed at Rohingya Muslims, but has even encouraged hateful rhetoric toward them.²¹⁵ There is also evidence of military officers spreading false rumors.²¹⁶ Besides military personnel, other groups that incite religious conflict and spew hate speech toward Muslims include the 969 Movement—led by Ashin Wirathu, one of the most prominent Buddhist monks fueling interreligious conflict and anti-Muslim sentiment—and the MaBaTha, which is the Organization for the Protection of Race and Religion.²¹⁷

Also known as the “Buddhist Terror” by Time Magazine, Ashin Wirathu is a Burmese Buddhist monk known for inciting violence against Muslims in Myanmar.²¹⁸ Matthew Walton and Susan Hayward state that Ashin Wirathu “spent nine years in jail . . . for inciting anti-Muslim riots in 2003.”²¹⁹ Even though only five percent of the Myanmar population is Muslim, he believes that Islam and the Rohingya are a threat to Buddhism. Thus, he spreads hate speech toward the Muslim community.²²⁰ He has generated support for expelling Rohingya Muslims out of the country, and has made unsubstantiated claims about them.²²¹ He is an influential monk who organizes over 2,500 monks at his monastery and has thousands of followers on his social media pages, such as Facebook and YouTube, where he regularly shares nationalistic monologues.²²² In 2014, his comments on his Facebook page instigated riots toward Muslims.²²³

212. VICENews, *supra* note 187.

213. *See id.*

214. *See* Walton & Hayward, *supra* note 189, at 41.

215. *See id.*

216. *See* Paul Mozur, *A Genocide Incited on Facebook, With Posts from Myanmar’s Military*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html> [<https://perma.cc/9G87-25QG>].

217. Walton & Hayward, *supra* note 189, at 20.

218. Hannah Beech, *The Face of Buddhist Terror*, TIME (July 1, 2013), <http://content.time.com/time/subscriber/article/0,33009,2146000,00.html> [<https://perma.cc/B3E4-QWAR>].

219. Walton & Hayward, *supra* note 189, at 13.

220. Marella Oppenheim, ‘It Only Takes One Terrorist’: the Buddhist Monk who Reviles Myanmar’s Muslims, GUARDIAN (May 12, 2017, 9:46 AM), <https://www.theguardian.com/global-development/2017/may/12/only-takes-one-terrorist-buddhist-monk-reviles-myanmar-muslims-rohingya-refugees-ashin-wirathu> [<https://perma.cc/CH3M-WUZG>].

221. *Id.*

222. Kate Hodal, *Buddhists Monk Uses Racism and Rumours to Spread Hatred in Burma*, GUARDIAN (Apr. 18, 2013, 7:08 AM), <https://www.theguardian.com/world/2013/apr/18/buddhist-monk-spreads-hatred-burma> [<https://perma.cc/7YAY-NN2P>].

223. *See id.*

He incites animosity against Muslims by claiming they, “target innocent young Burmese girls and rape them.”²²⁴ He has told *The Guardian* that “[w]e are being raped in every town, being sexually harassed in every town, being ganged up on and bullied in every town.”²²⁵ According to him, Islam is a problem because Muslims forcefully convert Buddhist women and kill people for failing to abide by Islamic guidelines.²²⁶ Wirathu is undoubtedly a leader with a large following of people who are easily influenced by his hateful sermons.

The government tolerates Wirathu because he voices numerous concerns about the Rohingya Muslims in ways that the government itself cannot directly do.²²⁷ For example, Wirathu reportedly said, “[y]ou can be full of kindness and love, but you cannot sleep next to a mad dog,” while referencing Muslims, and stated that he is “proud to be called a radical Buddhist.”²²⁸ In this way, Wirathu treads the line between free speech and incitement, takes advantage of free speech during a time when the country is transitioning into democracy, and taps into the “fragile and anxious” mindset of the Buddhist population.²²⁹ Additionally, Wirathu describes Muslims as those who “live in our land, drink our water, and are ungrateful to us,” and hence creates an “us versus them” theme and mindset.²³⁰ He also tells his followers that “[Muslims] will capture our country in the end,” which is why Burmese Buddhists need to be proactive in rooting the Rohingya out.²³¹ Wirathu’s speeches and sermons are at odds with Buddhist ideologies which are generally more peaceful.²³²

In 2012, as the conditions worsened in the Rakhine state, President Thein Sein reported to the U.N. High Commission for Refugees that it would be best to send about 800,000 Rohingya out of Myanmar.²³³ Toward the end of 2012, Wirathu spearheaded a rally of monks in support of the President’s suggestion to send the Rohingya out of the country and

224. *Id.*

225. *Id.*

226. *See id.*

227. Ashin Wirathu: Myanmar and Its Vitriolic Monk, BBC NEWS (Jan. 23, 2015), <https://www.bbc.com/news/world-asia-30930997> [<https://perma.cc/5TWU-WAGU>].

228. Thomas Fuller, *Extremism Rises Among Myanmar Buddhists*, N.Y. TIMES (June 20, 2013), <https://www.nytimes.com/2013/06/21/world/asia/extremism-rises-among-myanmar-buddhists-wary-of-muslim-minority.html> [<https://perma.cc/BWK8-2T85>].

229. *Id.*

230. *Id.*

231. Hodal, *supra* note 222.

232. One of Buddha’s sermons makes a powerful point to react peacefully even when one is brutally attacked: “Even if thieves carve you limb from limb with a double-handed saw, if you make your mind hostile you are not following my teaching.” *See Religions*, BBC NEWS (Nov. 23, 2009), <https://www.bbc.co.uk/religion/religions/buddhism/buddhistethics/war.shtml> [<https://perma.cc/55M9-TUDT>].

233. Nathan G. Thompson, *The 969 Movement and Burmese Anti-Muslim Nationalism Context*, BUDDHIST PEACE FELLOWSHIP (July 16, 2013), <http://www.buddhistpeacefellowship.org/the-969-movement-and-burmese-anti-muslim-nationalism-in-context/> [<https://perma.cc/WN3H-C9NE>]. The group’s rhetoric resembles that used by the Nazis in trying to rid Germany of Jews. Thus, the 969 Movement is clearly aimed at ridding Myanmar of Rohingya.

portrayed the Rohingya as a threat to the Burmese motherland.²³⁴ This is further evidence of specific intent to get rid of the Rohingya.

Wirathu also leads the 969 Movement, a nationwide nationalist association that propagates the view that Islam is the enemy of the Burmese way of life.²³⁵ Although it portrays itself as a “peaceful” organization, it calls upon the Burmese Buddhist population to boycott Muslim-owned businesses and goods.²³⁶ This movement even has support from “senior government officials, establishment monks and even some members of the opposition NLD party.”²³⁷ According to a former lieutenant in the army, there is nothing wrong with boycotting Muslim owned businesses.²³⁸ President Thein Sein also views the 969 Movement as a peaceful group, claiming that it “is just a symbol of peace” and that Wirathu is “a son of Lord Buddha.”²³⁹ Sadly, if powerful and educated government leaders support fringe groups like the 969 Movement and leaders like Ashin Wirathu, one cannot expect the masses to know better. The government’s acts and utterances calling for the removal of the Rohingya from Myanmar is further evidence of their specific intent to rid Myanmar of this ethnic and religious group.

The other group instigating targeted and centralized attacks on Muslims is the MaBaTha. It is made up of charismatic monks, nuns, and laypersons.²⁴⁰ This body has been associated with the nationalist narratives of protecting Buddhism and portraying Islam as a threat to the nation and to Buddhism.²⁴¹ Some of the monks belonging to this organization propagate vitriolic and anti-Muslim opinion and incite violence “in the name of protecting race and religion.”²⁴² This kind of Buddhist nationalism became more prominent after the political transition in 2012, which ended authoritarian control and supported freedom of expression. Muslims are described as a “cancer within” and many Buddhists believe that “a race does not face extinction by being swallowed into the earth, but from being swallowed up by another race,” which is not only an ancient Burmese proverb, but is also the slogan of Myanmar’s Immigration Ministry.²⁴³ Another Buddhist monk from the 969 Movement, Ashin Sada Ma,

234. See Oppenheim, *supra* note 220.

235. Thompson, *supra* note 233.

236. Andrew R.C. Marshall, *Special Report: Myanmar Gives Official Blessing to Anti-Muslim Monks*, REUTERS (June 26, 2013, 11:06 PM), <https://www.reuters.com/article/us-myanmar-969-specialreport/special-report-myanmar-gives-official-blessing-to-anti-muslim-monks-idUSBRE95Q04720130627> [<https://perma.cc/RR64-DKEF>].

237. *Id.*

238. See *id.*

239. *Id.*

240. See Int’l Crisis Gr., *Buddhism and State Power in Myanmar* 1 (Int’l Crisis Gr., Asia Report No.290, 2017).

241. See *id.*

242. *Id.* at ii.

243. *Id.* at 7. If the Immigration Ministry, the department of government that is supposed to welcome immigrants, openly disparages other races—that is, immigrants from backgrounds distinct from Buddhists—it is unsurprising that the state is attempting to get rid of non-Buddhist groups that have lived in Myanmar for centuries.

expressed that he “[feared] that some Bengali Muslims are terrorists and have a mission to Islamise” Myanmar.²⁴⁴ A journalist and member of the NLD, U Win Tin, reportedly said, “no one can deny that Muslims are usually extremists.”²⁴⁵ Democratic ideals should allow for people to express their views freely, but this type of vitriolic speech should be restricted.

The government’s complicity in the propagation of hatred toward Muslims is conspicuous. There has been outright denial of the existence of the Rohingya. For example, when President Thein Sein was asked about whether he was going to restore full citizenship rights to the Rohingya, he said: “We do not have the term Rohingya [in Myanmar].”²⁴⁶ Even the Minister of Immigration and former police chief Khin Yi said that the state did not intend to recognize anyone beyond the 135 national and ethnic groups that Myanmar officially recognizes.²⁴⁷ Win Myaing, the official spokesperson of the Rakhine State Government, has also stated: “How can [the violence] be ethnic cleansing? They are not an ethnic group,” once again reinforcing the denial of the Rohingya identity in Myanmar.²⁴⁸ None of this is to say that Buddhist nationalist organizations have not been criticized by certain groups, there have been Buddhist monks calling for coexistence with Muslims.²⁴⁹ However, they are often overpowered by nationalist fanatics like Wirathu who rile up the uneducated masses with hateful speeches.

Social media has been used as a tool by the military and nationalist groups. It is a news source for the Burmese population and contributes to the propagation of hate speech targeting the Rohingya.²⁵⁰ One such social media platform is Facebook, which activists in Myanmar have accused of being used to incite destruction.²⁵¹ In 2017, once the stories of “shoot-

244. Carlos Sardiña Galache, *Who Are the Monks Behind Burma’s ‘969’ Campaign?*, DEMOCRATIC VOICE OF BURMA (May 10, 2013), <http://english.dvb.no/news/features-news/the-monks-behind-burma-s-969-movement-2/28079> [<https://perma.cc/6ZE5-YUVL>].

245. *Monks, Journalists Decry Time Magazine’s Portrayal of U Wirathu as Buddhist Terrorist*, ELEVEN NEWS (June 21, 2013), <https://www.buddhistchannel.tv/index.php?id=70,11504,0,0,1,0#.Xslpiy2ZPOQ> [<https://perma.cc/D89Y-YHS8>].

246. Mark Inkey, *Thein Sein Talks at Chatham House*, NEW MANDALA (July 17, 2013), <http://asiapacific.anu.edu.au/newmandala/2013/07/17/thein-sein-talks-at-chatham-house/> [<https://perma.cc/DW7E-6SUG>].

247. Myo Zaw Ko, *Myanmar Prepares for First Census in Three Decades*, RADIO FREE ASIA (Sept. 19, 2013), <https://www.rfa.org/english/news/myanmar/census-09192013150846.html> [].

248. Jason Szep, *Special Report—In Myanmar, Apartheid Tactics Against Minority Muslims*, REUTERS (May 15, 2013, 8:01 PM), <http://mobile.reuters.com/article/topNews/idUSBRE94E00020130515?i=3&irpc=932> [<https://perma.cc/4MW6-YAYQ>]. The Genocide Convention requires proof that the target group is one of the protected groups. The Rohingya could qualify as either an ethnic or religious group. See discussion *infra* Section II.C.3.

249. See Walton & Hayward, *supra* note 189, at 31.

250. See Euan McKirdy, *Mark Zuckerberg Addresses Facebook Concerns of Myanmar Activists*, CABLE NEWS NETWORK (Apr. 10, 2018, 5:16 AM), <https://www.cnn.com/2018/04/10/asia/myanmar-facebook-groups-zuckerberg-reply-intl/index.html> [perma.cc/2NHJ-3V36].

251. See *id.*

ings, machete attacks, and rapes by security forces and civilians” broke, false news reports on the incident began to spread.²⁵² That same year, a few days before the anniversary of the September 11th attacks in New York, and about two weeks after ARSA’s ambush in Rakhine, two Facebook messages were distributed amongst the Burmese population claiming that Muslims were planning a jihad in Myanmar, and Buddhist extremists were going to attack South Asians in Myanmar.²⁵³ This led to riots in the towns of Magway and Taungdwingyi, and resulted in damage to Muslim houses, Muslim shops, and a mosque.²⁵⁴ These two false posts were clearly intended to incite violence. It was discovered that Myanmar military personnel posing as “fans of pop stars and national heroes” shared the two posts.²⁵⁵ In fact, these personnel are the “prime operatives behind a systematic campaign on Facebook that stretched back half a decade and that targeted the country’s mostly Muslim Rohingya minority group.”²⁵⁶ Furthermore, about 18 million Burmese Buddhists often “confuse the . . . social media platform with the [I]nternet.”²⁵⁷ According to sources who are to remain anonymous, there were “hundreds of military personnel who created troll accounts and news and celebrity pages on Facebook and then flooded them with incendiary comments and posts timed for peak viewership.”²⁵⁸ When the issue was raised to the Chief Executive Officer of Facebook Mark Zuckerberg, he said that Facebook was “rolling out improvements to . . . [the]reporting mechanism in Messenger to make it easier to find and simpler for people to report conversations,” such as the jihad-related posts.²⁵⁹ The company has also hired more Burmese language speakers and is attempting to introduce technological improvements to filter hate speech.²⁶⁰ However, these improvements have not prevented dangerous fake news from spreading. Powerful social media sites like Facebook need to filter out hate speech, search for inflammatory comments such as the ones made by charismatic Burmese monks and military leaders, and work with officials in Myanmar.

In addition, journalists have also suffered; two young reporters for Reuters, Wa Lone and Kyaw Soe Oo, were prosecuted under the Official Secrets Act and jailed for 500 days for having “illegally acquired information with the intention to share it with foreign media.”²⁶¹ It was later discovered that they had been working on a report of the killings of Rohingya

252. Reed, *supra* note 14.

253. Paul Mozur, *A Genocide Incited on Facebook, with Posts from Myanmar’s Military*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html> [<https://perma.cc/R95Y-94UN>].

254. Reed, *supra* note 14.

255. Mozur, *supra* note 253.

256. *Id.*

257. *Id.*

258. *Id.*

259. Kevin Roose & Paul Mozur, *Zuckerberg Was Called Out over Myanmar Violence. Here’s His Apology*, N.Y. TIMES (Apr. 9, 2018), <https://www.nytimes.com/2018/04/09/business/facebook-myanmar-zuckerberg.html> [<https://perma.cc/862Y-HYCN>].

260. *Id.*

261. Reed, *supra* note 14.

men in Inn Din.²⁶² Other journalists have faced hostile working environments, prosecutions under Article 66(d) of the Telecommunications Law, and difficulties in obtaining a visa; Jonathan Reed writes that he had to provide a detailed itinerary before entering the country and was forbidden to enter “restricted and operational areas.”²⁶³ A contributor to a News Group, Kyaw Lin, was stabbed in the back, and Esther Htusan, a Burmese journalist, received death threats when she reported suspected human rights abuses in the country.²⁶⁴ According to Reed, “one of [Htusan’s] reports seemed to suggest that Aung San Suu Kyi was saying illegal immigration caused terrorism.”²⁶⁵ The situation got even more dangerous after a well-known nationalist called Htusan a “bitch” who should be murdered if she “touches our leader.”²⁶⁶ Myanmar has been accused of promoting its own narrative “on its own terms—even when facts do [not] line up.”²⁶⁷ A country that jails journalists for investigating the government’s treatment toward a particular ethnic group is authoritarian, not democratic. Myanmar is using propaganda to justify its means.

Overall, perilous and hateful speech continues to spread in the country and patterns of hate speech, including dehumanization of the ethnic minority, have escalated over the decades. For example, a publication called *The Irawaddy*, which had been a credible source of news in Myanmar began to rapidly change once the military “clearance operations” against the Rohingya began.²⁶⁸ Previously, they recognized the plight of the Rohingya and were considered “a pillar of journalistic probity,” but with the transition to democracy, they shied away from recognizing the dangers the Rohingya faced, and started referring to them as “self-identifying Rohingya.”²⁶⁹ They tapped into the prevailing nationalist narrative, highlighting the burgeoning divide between the vulnerable Rohingya and the powerful state.

Although democratic governments must allow freedom of expression, they should be wary of hate speech targeting certain minority groups. In the case of Myanmar, since the military itself is involved in generating messages of hate toward a minority group resulting in instigation of violence, the international community needs to intervene. Just as the international community failed to respond to the atrocities of the Rwandan genocide, it is failing to put a stop to the Burmese genocide. The lackluster response of the international community, especially the U.N., highlights the low priority given to the issue, as well as the organization’s ineffectiveness and unwillingness to uphold its values. The parallels between this dark episode toward the Rohingya and numerous genocides in the past are shocking to the casual scholar and passive observer alike, and beckon more

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

attention toward this issue. Indeed, until the plight of the Rohingya is rightfully recognized and labeled as a genocide, it is distressing and conceivably likely that the atrocities toward the Rohingya will only increase.

3. *Genocide*

As of today, there has been a mass exodus of more than 900,000 Rohingya from Myanmar. According to Gambian Justice Minister Abubacarr Tambadou—who brought Aun San Suu Kyi to The Hague—the conditions at Cox Bazaar, the world’s largest refugee settlement, resembled those at the sites of the Rwandan genocide. “It was the same *modus operandi*, the process of dehumanization, calling them names—it bore all the hallmarks of genocide.”²⁷⁰

According to a report by the United Nations, Myanmar’s leaders must face genocide charges.²⁷¹ The U.N. found that there was genocidal intent behind the state’s response and has called for trials over the mass rapes and killings.²⁷² The reports concluded that the state has failed to prevent, investigate, and criminalize these genocidal acts.²⁷³ U.N. investigators also claim that they have a list of more than a hundred suspects behind the genocide.²⁷⁴ In March 2017, the U.N. Human Rights Council established the Independent International Fact-finding Mission on Myanmar (IIFMM) “to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses in Myanmar.”²⁷⁵ The organization investigated and handed over its evidence to the Independent Investigative of Mechanism for Myanmar (IIMM), which is a new mechanism that accepts pertinent materials from organizations and interested individuals.²⁷⁶ These bodies are not courts themselves but instead retain an investigatory role, therefore it is up to the international community to take action after receiving the evidence.²⁷⁷

According to findings by the IIFMM, the remaining 600,000 Rohingya in Myanmar were still at risk of genocide, and there were “genocidal acts” in the country’s 2017 “clearance operations” which resulted in the extrajudicial killings of thousands and the movement of 740,000 Rohingya

270. *Rohingya Crisis: The Gambian Who Took Aung San Suu Kyi to the World Court*, BBC NEWS (Jan. 23, 2020), <https://www.bbc.com/news/world-africa-51183521> [<https://perma.cc/VC95-392C>].

271. *See Myanmar Military Leaders Must Face Genocide Charges—UN Report*, U.N. NEWS (Aug. 27, 2018), <https://news.un.org/en/story/2018/08/1017802> [<https://perma.cc/S676-GL6K>].

272. *See* Human Rights Council Res. 39/2, U.N. Doc. A/HRC/42/50, at 6 (Aug. 8, 2019).

273. *See id.* at 19.

274. *See id.* at 5.

275. *Id.* at 3.

276. *See Independent International Fact-Finding Mission on Myanmar*, U.N. HUM. RTS. COUNCIL <https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx> [<https://perma.cc/EW5M-2BF2>] (last visited June 12, 2021).

277. *See* Aljazeera, *Has the World Failed Rohingya Muslims: Inside Story*, YOUTUBE (Sept. 17, 2019), <https://www.youtube.com/watch?v=FLFWq412d54&v1=EN> [<https://perma.cc/SG2D-PUGV>].

to Bangladesh.²⁷⁸ Senior General Min Aung Hlaing is the Commander in Chief of Myanmar's army, and according to a report by the fact-finding mission, he is one of the six generals who need to be held accountable for the atrocities that "undoubtedly amount to the gravest crimes under international law."²⁷⁹ The report delineates that the state has "falsely classified the Rohingya as "Bengali" immigrants from Bangladesh."²⁸⁰ There is genocidal intent shown by the widespread rhetoric of hate speech targeting the Rohingya Muslims, at "the level of organization indicating a plan for destruction; [through] the extreme scale and brutality of the violence."²⁸¹ The leaders of the country—including Suu Kyi—have unmistakably contributed to the genocide by failing to use their powerful positions in preventing these atrocities.

Apparently, Myanmar did not cooperate with this particular investigation by the U.N.'s fact-finding mission, and instead the investigation was based on 875 interviews with refugees and eyewitnesses compiled during field missions to Bangladesh and surrounding countries.²⁸² The panelists during the investigation also claimed that the U.N. Security Council should take the case to the International Criminal Court, or set up an international tribunal like the ones for Rwanda and the former Yugoslavia.²⁸³ The report also calls for accountability within the U.N. and urges the organization to "adequately address human rights concerns" with a sense of urgency.²⁸⁴ The U.N. Security Council needs to refer the matter to the International Criminal Court as soon as possible.

The West African nation of Gambia (with the support of the Organization of Islamic Cooperation) brought the case holding Myanmar accountable for its actions toward the Rohingya at the International Court of Justice.²⁸⁵ Gambia's legal team requested the International Court of Justice to condemn Myanmar for violating the Genocide Convention, but "[a] ruling on that question could be years away."²⁸⁶ Gambia then went ahead to ask for an immediate injunction on Myanmar to stop the violence being perpetrated against the Rohingya Muslims in the country.²⁸⁷ On January

278. Press Release, Hum. Rts. Council of the High Comm'r, Myanmar's Rohingya Persecuted, Living Under Threat of Genocide, UN Experts Say (Sept. 16, 2019) (on file at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24991&LangID=E> [<https://perma.cc/P22N-TF8N>]).

279. Nick Cumming-Bruce, *Myanmar Generals Should Face Genocide Charges over Rohingya*, U.N. Says, N.Y. TIMES (Aug. 27, 2018), <https://www.nytimes.com/2018/08/27/world/asia/myanmar-rohingya-genocide.html> [<https://perma.cc/VZ8Q-JU6B>].

280. Hannah Beech, *Across Myanmar, Denial of Ethnic Cleansing and Loathing of Rohingya*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/world/asia/myanmar-rohingya-ethnic-cleansing.html> [<https://perma.cc/4VS8-K6TG>].

281. Cumming-Bruce, *supra* note 279.

282. *See id.*

283. *See id.*

284. *Id.*

285. *See* Richard C. Paddock, *U.N. Court Orders Myanmar to Protect Rohingya Muslims*, N.Y. TIMES (Jan. 23, 2020), <https://www.nytimes.com/2020/01/23/world/asia/myanmar-rohingya-genocide.html> [<https://perma.cc/UC7T-BL7G>].

286. *Id.*

287. *See id.*

23, 2020, the court provided a judgment calling for interim measures that Myanmar must follow.²⁸⁸ Myanmar was ordered to protect the Rohingya and submit a report to the court on its progress.²⁸⁹ However, this ruling did not provide any specific instructions on what exactly Myanmar should do, and according to Anna Roberts, “the chances of Aung San Suu Kyi implementing this ruling will be zero unless significant international pressure is applied” because the International Court of Justice does not have enforcement power.²⁹⁰ In fact, Suu Kyi denied the allegations of genocide and claimed that no one should intervene with the state-sponsored investigation being carried out within Myanmar, which found that there was no genocidal intent.²⁹¹ That is, Suu Kyi wanted the court to drop the case.

Even the U.S. State Department has referred to the military’s actions as “ethnic cleansing” but has not outrightly recognized it as genocide.²⁹² On the other hand, the United States Holocaust Museum claims that there is “compelling evidence of genocide” in Myanmar and that officials should be held accountable.²⁹³

288. *Id.*

289. *See id.*; Myanmar: Government Rohingya Report Falls Short, *supra* note 17.

290. Paddock, *supra* note 285.

291. *See* Shoon Naing & Stephanie van den Berg, *Myanmar’s Suu Kyi Urges World Court to Drop Genocide Case*, REUTERS (Dec. 12, 2019), <https://www.reuters.com/article/us-myanmar-rohingya-world-court/myanmars-suu-kyi-urges-world-court-to-drop-genocide-case-idUSKBN1YG0QO> [https://perma.cc/YJ9K-KM89].

292. Max Jungreis, ‘Genocide’ Evidence in Case of Myanmar’s Rohingya Growing, VOA NEWS (Dec. 3, 2018), <https://www.voanews.com/east-asia/genocide-evidence-case-myanmars-rohingya-growing> [https://perma.cc/XY45-B963].

293. *Id.* Furthermore, the eight stages listed by Genocide Watch are undoubtedly present in Myanmar’s treatment of Muslims. Under the Citizenship Act, the Rohingya were classified as “the other,” while the mainstream Burmese population were referred to as “Bengali.” *See* Faine Greenwood, *The 8 Stages of Genocide Against Burma’s Rohingya*, U.N. DISPATCH (May 27, 2013), <https://www.undispatch.com/the-8-stages-of-genocide-against-burmas-rohingya/> [https://perma.cc/8VBS-A2YE]. The Rohingya were “dehumanized” by being forced to live in substandard conditions with numerous restrictions and a lack of access to proper medicine and educational services. Policies controlling the birth of Rohingya children were another form of forced population control of a minority group. The intensity of violence perpetrated against the Rohingya was “organized.” “Although many Rohingya have been victimized by angry mob justice and the like, the government has also been proven to be complicit in the violence, restricting their movements and ‘looking the other way’ during many of 2012’s most violent blood-baths.” *Id.* Longstanding policies of discrimination, disproportionate responses to ARSA’s actions, and curtailment of freedoms were systematic and organized by the state. “Polarization” is obvious through laws preventing inter-marriages between the Rohingya and other Burmese peoples. Policies like Operation Clean and Beautiful Country, the Citizenship Act, the spread of anti-Rohingya propaganda, “viral disinformation” linked to military accounts, and the Inter-Marriage Act contributed to this. *Id.* Additionally, the “preparation” stage (of the ten steps) is also present as the Rohingya are often herded into “ethnic enclaves,” denied aid and education, and separated from non-Muslims in increasingly desperate conditions. *Id.* The “extermination” stage is currently underway, as illustrated by the military-led attacks and systematic sexual violence. *Id.* The last stage, “denial,” became apparent when Aung San Suu Kyi took a stand at the International Court of Justice and denied any genocidal intent and also through the investigation report produced by the state. *Id.*; *see also* Naing & van den Berg, *supra* note 291.

There is further evidence of genocide in Myanmar under the Genocide Convention, which defines genocide in terms of acts of violence against national, ethnic, racial or religious groups. The Rohingya could be defined as either a protected religious group, being a Muslim minority in a predominantly Buddhist society, or a racial group since they are a different race than the majority of the Burmese population. The Genocide Convention identifies five different acts that constitute the *actus reus* of genocide: “[k]illing members of the group”; “[c]ausing serious bodily or mental harm to members of the group”; “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”; “[i]mposing measures intended to prevent births within the group”; and “[f]orcibly transferring children of the group to another group.”²⁹⁴ When inferring general and specific intent to commit the acts, it is imperative to consider factors such as “acts and utterances”; “the scale and the general nature of the atrocities”; and “the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator or even by other perpetrators.”²⁹⁵

Killings under the Convention require the general and specific intent to destroy the targeted group.²⁹⁶ If the state members’ utterances instigate the killings, the communication has to be the proximate cause of the killings.²⁹⁷ This means that the killings need not be carried out by the state members themselves. For instance, in the *Akayesu* case, the ICTR found intent to kill with the intent to destroy the Tutsis through the systematic manner in which the members of the Tutsi group were murdered; Akayesu’s “acts and utterances,” which caused other personnel to kill Tutsis; and testimony showing that “many wounded persons in the hospital . . . were all Tutsi . . . had sustained wounds inflicted with machetes to the face, the neck, and also to the ankle . . . to prevent them from fleeing.”²⁹⁸ Similarly, there is evidence of systematic killings especially directed toward members of the Rohingya in Myanmar. In 2016, the military forces started a major crackdown in response to ARSA’s attack on twelve police officers.²⁹⁹ Thousands of Rohingya fled to escape persecution, and about a thousand people were killed.³⁰⁰ This disproportionate killing of innocent members of the Rohingya indicates the military’s general intent to kill. Their specific intent to destroy the Rohingya can be inferred from the organized and targeted killings that took place after the

294. Genocide Convention *supra* note 18, at 280.

295. *Akayesu* Judgment, *supra*, note 37, ¶ 728.

296. See generally Genocide Convention, *supra* note 18.

297. Frederik Grünfeld & Anke Huijboom, *The Failure to Prevent Genocide in Rwanda: The Role of Bystanders*, in 23 INTERNATIONAL AND COMPARATIVE CRIMINAL LAW SERIES 25 (Int’l & Comp. Crim. Law Ser., M. Cherif Bassiouni ed. 2007).

298. *Akayesu* Judgment, *supra*, note 37, ¶ 115.

299. Myanmar: What Sparked Latest Violence in Rakhine?, BBC NEWS (Sept. 19, 2017), <https://www.bbc.com/news/world-asia-41082689> [<https://perma.cc/VDS5-DH5W>] (contradicting the military’s statement that only 400 people were killed).

300. *Id.*

incident in 2016, the hate speech toward Muslims on social media, the marginalization of the Rohingya through the Citizenship Act, Operation Dragon King, and targeted sexual violence against Muslim women and girls.³⁰¹ Additionally, even if the extrajudicial killings were not carried out by military members each time, the military and state members were aware of them and did nothing to intervene in the infighting.³⁰²

Furthermore, evidence of general and specific intent to destroy the Rohingya can be inferred from the serious bodily and mental harm caused to members of the group. The harm includes, “torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs.”³⁰³ According to the International Criminal Court, “serious bodily or mental harm,” “may include . . . sexual violence or inhuman or degrading treatment.”³⁰⁴ In order to support a conviction, such bodily or mental harm should be “of such serious nature as to threaten its destruction in whole or in part,” which is why threats during interrogation, rape, and sexual violence qualify.³⁰⁵ Additionally, the Genocide Convention does not require that the harms be permanent.³⁰⁶ In *Akayesu*, the mass rapes of women accounted for the serious bodily and mental harms inflicted on Tutsi women.³⁰⁷ Similarly, in the case of the Rohingya, mass rapes, and the abuses and torture repatriated Rohingyas suffered after Operation Clean and Beautiful are a few examples of the state inflicting bodily and mental harm on the Rohingya.³⁰⁸

Regarding the Rohingya, the intent to deliberately inflict conditions of life calculated to bring about its physical destruction in whole or in part was also present. In *Akayesu*, the tribunal was of the opinion that this act includes “subjecting a group of people to a subsistence diet, systematic exclusion from homes, and the reduction of essential medical services

301. See *Timeline*, *supra* note 165; Paddock, *supra* note 285.

302. See generally Gemima Harvey, *Myanmar: The Worsening Plight of the Rohingya*, DIPLOMAT (Mar. 19, 2014), <https://thediplomat.com/2014/03/myanmar-the-worsening-plight-of-the-rohingya/> [<https://perma.cc/X8AB-LZE3>] (describing how members of Doctors Without Borders discovered that there was a huge disparity in how the Myanmar government portrayed itself to the outside world and how conditions were on the ground. For instance, in 2012, there was a massacre in Du Char Tan village, which the government brazenly denied, despite the shocking discovery of about ten severed heads belonging to the Rohingya which were found “bobbing in a water tank.”)

303. Athanese Seromba Appeals Judgment, *supra* note 45, ¶ 46.

304. Preparatory Comm’n for the Int’l Crim. Ct., Report of the Preparatory Commission for the International Criminal Court, Part II: Finalized Draft Text of the Elements of Crimes, at 6n. 3, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000).

305. Prosecutor v. Kajelijeli, Case No. ICTR 98-44A-T, Judgment and Sentence, ¶ 814 (Dec. 1, 2003).

306. See *Akayesu* Judgment, *supra* note 37, ¶ 589; Kayishema & Ruzindana Judgment, *supra* note 48, ¶ 10; see also Prosecutor v. Muvunyi, Case No. ICTR 2000-55A-T, Judgment, ¶ 487 (Sept. 12, 2006) (noting that the crime of genocide’s requirement of serious bodily harm may include injuries that are not permanent or irremediable).

307. See Athanese Seromba Appeals Judgment, *supra* note 45, ¶ 46.

308. See Hannah Beech, *Massacred at Home, in Misery Abroad, 730,000 Rohingya Are Mired in Hopelessness*, N.Y. TIMES (Aug. 22, 2019), <https://www.nytimes.com/2019/08/22/world/asia/rohingya-myanmar-repatriation.html> [<https://perma.cc/3BLJ-XQ8J>].

below minimum requirement.”³⁰⁹ Here, the perpetrator does not immediately kill the members of the group, but eventually seeks their physical destruction.³¹⁰ By burning Rohingya homes and reducing access to medicine, food, education, and other amenities, the government intended to physically destroy the Rohingyas.

Policies intended to prevent births within the group include “sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.”³¹¹ In the Rwandan genocide, rape was another way to prevent the birth of a child from the mother’s ethnic group.³¹² In the case of the Rohingya, the mass rapes and policies such as the “two-child limit” serve as the *actus reus* for the crime of genocide.³¹³ The “two-child limit” policy was a deliberate choice by the state, illustrating its general intent to prevent births within the group. This policy, as well as others enforcing birth control and restricting inter-marriages targeted the Rohingya, providing evidence of the specific intent to prevent Rohingya births.³¹⁴

In summary, there is a strong case for genocide under the Genocide Convention under Article 2(a) through (d). There is clear and convincing evidence to establish that state authorities deliberately and systematically created an environment in which Rohingya Muslims were dehumanized and portrayed as people unworthy of human treatment. This is reminiscent of the Nazi dehumanization of Jews and the Hutu dehumanization of Tutsis. However, unlike the Nazi regime, which directly led the persecution against Jews, modern-day perpetrators of genocide, mindful of the international response to genocide, act less brazenly than the Nazis. Modern state functionaries avoid lead roles and instead act indirectly. After dehumanizing the targeted people, the state actors actively support non-state actors to perpetrate the crimes. It is time for the international community to pierce this veil and hold complicit state authorities fully accountable for the genocide, based on their support of the non-state actors’ genocidal practices. The Security Council must provide referrals to the International Criminal Court to prosecute the ongoing genocide.³¹⁵ Otherwise, the situation could end like that of Cambodia, where, after eleven years, the tribunal convicted only three men of the appalling crimes committed during the Khmer Rouge regime.

309. Akayesu Judgment, *supra* note 37, ¶ 506.

310. *See id.* ¶ 505.

311. *Id.* ¶ 507.

312. *See* Anthony, *supra* note 56.

313. *See* Lewa, *supra* note 192.

314. *See id.*

315. The U.N. Security Council no longer sets up special tribunals like it did for Yugoslavia and Rwanda. Now, the cases are referred to the International Criminal Court (for example Sudan and Libya). The ICC provides for referrals from the Security Council. *See generally* Claire Felter, *The Role of the International Criminal Court*, COUNCIL ON FOREIGN RELS. (May 30, 2019), <https://www.cfr.org/backgrounder/role-international-criminal-court> [<https://perma.cc/UEt6-H89U>].

III. Current Problems Facing the Rohingya

Today, the Rohingya community faces unimaginable hardships. More than 800,000 of them have fled the systematic violence in Myanmar to countries like Bangladesh, Malaysia, Indonesia, and Thailand.³¹⁶ The largest exodus of Rohingyas occurred in 2017 when more than 730,000 of them fled to Cox's Bazaar in Bangladesh.³¹⁷ Cox's Bazaar has now become one of the largest refugee camps around the world.³¹⁸ The Rohingya refugees are crammed together in small spaces, suffer from poor nutrition, and have compromised immune systems, which make them susceptible to contracting illnesses like COVID-19.³¹⁹ In April 2020, testing in the Cox Bazaar revealed that one person was infected with coronavirus, and there was a high chance of the disease spreading, especially since extended families of about ten to fifteen people live in cramped places and share bathrooms.³²⁰ Flattening the curve is a great challenge in such areas. Additionally, due to the shutting down of Internet services by Bangladeshi authorities, there is a lack of awareness amongst the group about the virus itself.³²¹ Other problems women in the community suffer include widespread sexual violence and sexual abuse by soldiers.³²²

Currently, as boats carrying Rohingya refugees arrive in Bangladesh, they are transferred to Bhasan Char, an area which is "dangerously flood-prone" and does not have health care services.³²³ The authorities claim they have quarantined 29 Rohingya refugees in this region to prevent them from spreading COVID-19 in the refugee camps.³²⁴ Authorities do not provide refugees access to international agencies prior to being sent through

316. 'No Other Conclusion,' *Ethnic Cleansing of Rohingyas in Myanmar Continues—Senior UN Rights Official*, U.N. HUM. RTS. COUNCIL (Mar. 6, 2018), <https://news.un.org/en/story/2018/03/1004232> [<https://perma.cc/RE89-59S2>]; Nikki Ostrand, *The Stateless Rohingya in Thailand*, CTR. FOR MIGRATION STUD., <https://cmsny.org/the-stateless-rohingya-in-thailand/> [<https://perma.cc/Q99T-HBMX>] (last visited June 12, 2021). Importantly, the remaining 600,000 Rohingya in Myanmar continue to suffer. There is scarce access from the international community into the area because it has been closed off from the rest of the world by the Burmese government. See Christian Caryl, *Opinion: One of the World's Most Vulnerable Groups Now Finds Itself Confronting Covid-19*, WASH. POST (Apr. 2, 2020), <https://www.washingtonpost.com/opinions/2020/04/02/first-genocide-now-coronavirus-will-we-finally-protect-rohingya/> [<https://perma.cc/5VXB-N7PW>].

317. See Beech, *supra* note 2.

318. See *id.*

319. See *Fives Challenges for the Rohingya in Bangladesh Amid Covid-19*, RELIEFWEB (May 7, 2020), <https://reliefweb.int/report/bangladesh/five-challenges-rohingya-bangladesh-amid-covid-19> [<https://perma.cc/G7MX-8P2U>].

320. See *id.*

321. See *id.*

322. See Beech, *supra* note 2.

323. Mohammed Jamjoom, *Rohingya Refugees Sent to 'Flood Prone' Island Off Bangladesh*, ALJAZEERA (May 6, 2020), <https://www.aljazeera.com/news/2020/05/rohingya-refugees-flood-prone-island-bangladesh-200506140521760.html> [<https://perma.cc/C4X3-ZSAV>].

324. See *Bangladesh: Rohingya Refugees in Risky COVID-19 Quarantine*, HUM. RTS. WATCH (May 5, 2020, 12:16 PM), <https://www.hrw.org/news/2020/05/05/bangladesh-rohingya-refugees-risky-covid-19-quarantine> [<https://perma.cc/TFW6-3MYC>].

Bhasan Charr.³²⁵ On April 15, 2020, the Bangladesh Coast Guard received one boat with 400 people out of which 100 had died before they were rescued.³²⁶ Two other boats remained stranded at sea with about 700 refugees on board.³²⁷ Often Rohingya refugees arriving in Bangladesh pay smugglers between 35,000 and 60,000 taka, or \$400 to \$700, to ensure that their relatives arrive safely to areas of refuge.³²⁸ According to Human Rights Watch, Bangladesh should not send refugees to Bhasan Char before coordinating with international agencies such as the United Nations and should provide humanitarian assistance to them.³²⁹

On April 23, 2020, the foreign minister of Bangladesh claimed that Bangladesh would refuse entry of additional refugees “because Bangladesh is always asked to take care of the responsibility of other countries.”³³⁰ According to the Asia Director at Human Rights Watch, “Bangladesh has shouldered a heavy burden as a result of the Myanmar military’s atrocity crimes, but this is no excuse to push boatloads of refugees out to sea to die.”³³¹ International law requires that public health measures in response to the pandemic must be “proportionate, nondiscriminatory, and based on available scientific evidence.”³³² Hence, countries like Bangladesh and Malaysia cannot justify turning away Rohingyas arriving on their shores.

Bangladesh has also played a role in persecuting the Rohingya by repatriating them back to Myanmar without their consent. In 2018, community members of Bangladesh had been frustrated with the influx of people seeking refuge and anti-Rohingya sentiment grew as the economy suffered.³³³ In the areas of refuge, there were registration centers run by the military where the Rohingya were asked to provide information and biometrics in order to receive aid, although many feared their information would be used to repatriate them.³³⁴ Unfortunately, this information was indeed used to repatriate them back to Myanmar.³³⁵ At one such center, when officials were asked if they were “misleading” people, they answered in the affirmative and claimed that it did not matter what the Rohingya people

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Bangladesh: Rohingya Refugees Stranded at Sea*, HUM. RTS. WATCH (Apr. 25, 2020, 12:00 AM), <https://www.hrw.org/news/2020/04/25/bangladesh-rohingya-refugees-stranded-sea> [<https://perma.cc/3TDW-LNCA>].

331. *Id.*

332. *Id.*

333. See Mayesha Alam, *How the Rohingya Crisis Is Affecting Bangladesh—and Why It Matters*, WASH. POST (Feb. 12, 2018, 7:00 AM), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/12/how-the-rohingya-crisis-is-affecting-bangladesh-and-why-it-matters/> [<https://perma.cc/8MV4-DLLN>].

334. See Elise Thomas, *Tagged, Tracked and in Danger: How the Rohingya Got Caught in the UN’s Risky Biometric Database*, WIRED (Mar. 12, 2018), <https://www.wired.co.uk/article/united-nations-refugees-biometric-database-rohingya-myanmar-bangladesh> [<https://perma.cc/VFG5-KHGH>].

335. See *id.*

thought.³³⁶ They said that they would use the information provided by the Rohingya to repatriate them back to Myanmar.³³⁷ Indeed, in February 2018, Bangladesh provided a list of Rohingya people to Myanmar and there was a repatriation agreement with Myanmar to return the Rohingya.³³⁸ The Bangladeshi authorities continued this despicable practice despite knowing the atrocities that awaited the Rohingya in Myanmar.³³⁹

Although Bangladesh has played a significant role in providing refuge to about 900,000 refugees, the refugees continue to suffer. Instead of placing the Rohingya in Bhasan Char and repatriating them, Bangladesh should allow the refugees to move beyond the refugee camps like Pakistan did with Afghan refugees in the 1970s.³⁴⁰ In the late 1970s, during the Soviet-Afghan war, over 4 million refugees arrived in Pakistan from Afghanistan.³⁴¹ Pakistan welcomed the Afghan refugees and allowed them to move beyond refugee camps and settle all over the country.³⁴² Despite the fact that Afghan refugees did not bring any skills, brought a different culture, and Pakistan suffered both economically and socially, Pakistan welcomed the refugees.³⁴³ Bangladesh should give the Rohingya the same opportunities, and other countries should join these efforts.

Conclusion

This Note argues that Myanmar's treatment of the Rohingya community constitutes genocide under the Genocide Convention of the United Nations. The International Criminal Tribunal of Rwanda's decision in *Prosecutor v. Akayesu* helped clarify the elements of the Genocide Convention and set a precedent for prosecuting states under the Convention.³⁴⁴ The Cambodian genocide is an example of a genocide where scholars disagree on whether the atrocities fall under the narrow definition of the Genocide Convention. The current genocide in Myanmar is more similar to the

336. Zara Rahman, *Irresponsible Data? The Risks of Registering the Rohingya*, NEW HUMANITARIAN (Oct. 23, 2017), <https://www.thenewhumanitarian.org/opinion/2017/10/23/irresponsible-data-risks-registering-rohingya> [https://perma.cc/CPS4-N7WX].

337. See Thomas, *supra* note 334.

338. See *Bangladesh Gives Myanmar List of Rohingya for Repatriation*, REF WORLD (Feb. 16, 2018), <https://www.refworld.org/docid/5a9428b0a.html> [https://perma.cc/7PBJ-WRRL].

339. See *id.*

340. *Refugee Protection and Assistance in Pakistan*, HUM. RTS. WATCH (Feb. 8, 2016), <https://www.hrw.org/reports/2002/pakistan/pakistan0202-06> [https://perma.cc/T725-57BM].

341. Sanaa Alimia, *Afghan Refugees in Pakistan*, BUNDESZENTRALE FÜR POLITISCHE BILDUNG (June 5, 2019), <https://www.bpb.de/gesellschaft/migration/laenderprofile/292271/afghan-refugees-in-pakistan?p=1%23bio0> [https://perma.cc/SN4X-EDFH].

342. See *id.*

343. See Jawad Falak, *Dissipating Concerns Related to the Afghan Refugee Issue*, CTR. FOR STRATEGIC & CONTEMP. RSCH. (June 30, 2017), <https://cscr.pk/explore/themes/politics-governance/dissipating-concerns-related-to-the-afghan-refugee-issue/> [https://perma.cc/5Y47-KBW2].

344. See Press Release, U.N. Rwanda International Criminal Tribunal Pronounces Guilty Verdict in Historic Genocide Trial (Sept. 2, 1998) (on file at <https://www.un.org/press/en/1998/19980902.afr94.html> [https://perma.cc/JYN9-B3EK]).

one in Rwanda where a particular group, the Tutsis, was destroyed.³⁴⁵ Under the Genocide Convention, Myanmar committed killings of the Rohingya, caused serious bodily and mental harm to them, deliberately inflicted conditions of life calculated to bring about the physical destruction of the Rohingya, and imposed measures to prevent births within the group with the intent to destroy the Rohingya community in Myanmar.³⁴⁶ This is unlike the situation in Cambodia where there was doubt about whether a particular group was targeted or if the Khmer Rouge's intent was to destroy all Cambodians, regardless of their national, ethnical, racial, or religious groups.³⁴⁷ In the case of Myanmar, the international community needs to openly condemn the actions of the state. Additionally, responsible individuals should be charged with genocide, including government officers, who should not be allowed to hide behind the defense that they were working for the state.³⁴⁸ The International Court of Justice should speedily review the actions of the Myanmar government, and the United Nations Security Council should refer the case to the International Criminal Court and keep its promise of "never again."

345. See Rita Franceschet, *Reflections on the Rwandan Genocide 25 Years Later: Have We Truly Learned the Lessons?*, GENEVA INT'L CTR. FOR JUST. (Apr. 6, 2019), <https://www.gicj.org/positions-opinions/gicj-positions-and-opinions/1561-rwanda-genocide-25-years-lessons-learned-2019> [https://perma.cc/RYX3-KGBY].

346. See Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar's Rohingya*, 23 PACIFIC RIM L. & POL'Y J. 681, 683 (2014).

347. See generally Liai Duong, *Racial Discrimination in the Cambodian Genocide* (Genocide Stud. Program, Working Paper No. 34, 2006).

348. See HENRI DECŒUR, *CONFRONTING THE SHADOW STATE* 5 (2018).