


6-1-1994

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### Recommended Citation

Thomas K. Ragland, *Burma's Rohingyas in Crisis: Protection of "Humanitarian" Refugees under International Law*, 14 B.C. Third World L.J. 301 (1994), <http://lawdigitalcommons.bc.edu/twlj/vol14/iss2/4>

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# BURMA'S ROHINGYAS IN CRISIS: PROTECTION OF "HUMANITARIAN" REFUGEES UNDER INTERNATIONAL LAW

THOMAS K. RAGLAND\*

## I. INTRODUCTION

Since late 1991, large numbers of Muslims have fled their homes in Burma's northwestern Arakan state<sup>1</sup> seeking refuge in neighboring Bangladesh. Striving to escape widespread murder, rape, torture, forced labor, and ethnic and religious persecution at the hands of the Burmese military, over 220,000 refugees, known as Rohingyas,<sup>2</sup> now reside in makeshift camps along the border.<sup>3</sup> Conditions in the camps have steadily worsened: as more refugees have arrived, the Bangladeshi government has withheld food rations, slowed the construction of shelter, and imposed other restrictive measures to compel the refugees to return to Burma.<sup>4</sup> Many refugees have even been beaten, raped, and robbed by local police.<sup>5</sup> In addition, the Rohingyas—particularly the

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<sup>1</sup> "Burma" is the official name of the country under the 1947 constitution. After seizing power in a coup d'état in 1988, a military junta changed the name to Myanmar. "Myanmar" is a contraction of the name "Myanmar naing-ngan," which in the Burmese language means "nation of the swift and strong people." U Kyaw Min, *Brutality in Burma*, L.A. TIMES, Feb. 25, 1992, at B6. This Note refers to the country as Burma rather than as Myanmar as a refusal to acknowledge the actions of an illegitimate government. The junta continues to commit innumerable human rights violations, to defy the results of the 1990 elections, and to inflict extreme suffering on the Burmese people. See generally AMNESTY INTERNATIONAL, MYANMAR: HUMAN RIGHTS DEVELOPMENTS JULY TO DECEMBER 1993 (1994) [hereinafter HUMAN RIGHTS DEVELOPMENTS]. The name Burma is used to show solidarity with all those struggling for democracy and freedom in Burma.

<sup>2</sup> For a description of the Rohingyas, see *infra* note 25 and accompanying text.

<sup>3</sup> See generally ASIA WATCH, ABUSE OF BURMESE REFUGEES FROM ARAKAN (1993) [hereinafter ABUSE OF BURMESE REFUGEES]; ASIA WATCH, BURMA: RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION IN NORTHERN ARAKAN (1992) [hereinafter RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION]. The number of refugees currently in the camps has decreased from a high of over 300,000 before repatriations began in early 1992. See Angelo Ribeiro, Special Rapporteur, U.N. Commission on Human Rights, *Report on Religious Intolerance and Discrimination* (Jan. 6, 1993), in NATIONAL COALITION GOVERNMENT OF THE UNION OF BURMA, DEMOCRACY AND POLITICS IN BURMA 350-61 (1993) [hereinafter DEMOCRACY AND POLITICS IN BURMA].

<sup>4</sup> U.S. COMMITTEE FOR REFUGEES, BANGLADESH'S ABOUT-FACE PUTS BURMESE REFUGEES AT RISK 1 (1992) [hereinafter BANGLADESH'S ABOUT-FACE].

<sup>5</sup> ABUSE OF BURMESE REFUGEES, *supra* note 3, at 7-15.

children—suffer increasingly from a high death rate, a variety of health problems, and widespread malnutrition.<sup>6</sup> Since December 1991, more than two thousand refugees have died in the camps.<sup>7</sup>

In early 1992, the Burmese and Bangladeshi governments, with the involvement of the United Nations High Commissioner for Refugees (UNHCR), agreed on a plan to allow the return of some Muslims to Arakan.<sup>8</sup> Enforcement of the agreement, however, immediately encountered difficulties. The UNHCR and the international community rejected Burma's terms,<sup>9</sup> which not only limited reentry to those refugees who the government deemed "genuine citizens," but also did not guarantee that international groups would be allowed to monitor the repatriation process.<sup>10</sup>

Fearful of further abuses by the Burmese military, refugees in the camps have vigorously resisted being returned to Arakan.<sup>11</sup> Consequently, the repatriation process has slowed, although formal talks between the Burmese and Bangladeshi governments have continued.<sup>12</sup> In the meantime, Bangladesh has tightened security in the camps, arrested or killed many who have protested the repatriation plan, compiled lists of refugees' names, and taken other steps to expedite the Rohingyas' departure.<sup>13</sup> In November 1993, Burmese officials finally agreed to provide the UNHCR access to Rohingyas who are repatriated from Bangladesh and to allow international monitoring of the human rights situation in Arakan.<sup>14</sup> Those refugees who return,

<sup>6</sup> BANGLADESH'S ABOUT-FACE, *supra* note 4, at 1.

<sup>7</sup> BURMA ACTION GROUP U.K., BURMA AND THE UNITED NATIONS: A PROPOSAL FOR CONSTRUCTIVE INVOLVEMENT 10 (1992) [hereinafter PROPOSAL FOR CONSTRUCTIVE INVOLVEMENT].

<sup>8</sup> The repatriation agreement, signed by the Foreign Ministers of Burma and Bangladesh on April 28, 1992, stipulated that refugees would be returned beginning May 15, 1992. *Joint Statements by the Foreign Ministers of Bangladesh and Myanmar Issued at the Conclusion of the Official Visit of the Myanmar Foreign Minister to Bangladesh* (Apr. 28, 1992) [hereinafter *Joint Statements*], in DEMOCRACY AND POLITICS IN BURMA, *supra* note 3, at 309–12, 313–15; ASIA WATCH, CHANGES IN BURMA? 7 (1992); BURMA UPDATE, ROHINGYA REPATRIATION 5 (1992); U.S. COMMITTEE FOR REFUGEES, BANGLADESH AND BURMA AGREE ON REPATRIATION OF BURMESE REFUGEES: U.S. COMMITTEE FOR REFUGEES URGES CAUTION 1 (1992) [hereinafter USCR URGES CAUTION].

<sup>9</sup> Asian nations with large Muslim populations, such as Malaysia, Indonesia, Singapore, and Brunei, were particularly critical of the repatriation plan. See, e.g., Press Statement of Dr. Hamid Algadid, Secretary-General of the Organization of the Islamic Conference, *The Situation of the Muslims in Burma* (undated), in DEMOCRACY AND POLITICS IN BURMA, *supra* note 3, at 313.

<sup>10</sup> CHANGES IN BURMA?, *supra* note 8, at 8; Sylvana Foa, *Memorandum from Chief Spokeswoman of the U.N. High Commissioner for Refugees* (May 8, 1992), in DEMOCRACY AND POLITICS IN BURMA, *supra* note 3, at 312–13.

<sup>11</sup> See CHANGES IN BURMA?, *supra* note 8, at 9–10; see also Nadeem Qadir, *Six People Die in Fresh Clashes as Burma Refugees Take Up Arms*, NATION (Bangkok), July 17, 1992, at A1.

<sup>12</sup> BURMA UPDATE, *supra* note 8, at 5.

<sup>13</sup> CHANGES IN BURMA?, *supra* note 8, at 9–12; ABUSE OF BURMESE REFUGEES, *supra* note 3, at 7–15.

<sup>14</sup> HUMAN RIGHTS DEVELOPMENTS, *supra* note 1, at 12.

however, face an uncertain future, including the risk of renewed abuses at the hands of the *tatmadaw*, Burma's 300,000-strong army.<sup>15</sup>

Human rights violations are widespread in Burma.<sup>16</sup> For nearly six years, the nation has been ruled by a military junta known as the State Law and Order Restoration Council (SLORC). In 1988, following the nationwide peaceful pro-democracy demonstrations that brought down the country's long-standing military dictator, the SLORC seized power in a coup and violently crushed popular opposition.<sup>17</sup> The resulting massacre left thousands dead and hundreds of thousands either imprisoned or displaced.<sup>18</sup> A large number of student activists fled to mountainous regions along the Thai-Burma border.<sup>19</sup>

In multiparty elections held by the SLORC in May 1990, the opposition National League for Democracy (NLD) won more than eighty percent of the electorate. The NLD accomplished this despite the government's restrictions on organizing and campaigning, its intimidation of opposition candidates, and its refusal to permit key opposition leaders to run.<sup>20</sup> During the past four years, however, the SLORC has refused to honor the results of the election.<sup>21</sup> Instead of transferring power to the democratically elected representatives, the junta has arrested, tortured, or executed nearly all of them.<sup>22</sup> In addition, the SLORC has escalated the civil war between government forces and various ethnic insurgency groups that has been ongoing for the

<sup>15</sup> See, e.g., Yozo Yokota, Special Rapporteur, U.N. Commission on Human Rights, *Report on the Situation of Human Rights in Myanmar* (Feb. 17, 1993), in DEMOCRACY AND POLITICS IN BURMA, *supra* note 3, at 373-74, 383-85.

<sup>16</sup> See generally AMNESTY INTERNATIONAL, BURMA (MYANMAR): PRISONERS OF CONSCIENCE IN MYANMAR—A CHRONICLE OF DEVELOPMENTS SINCE SEPTEMBER 1988 (1989) [hereinafter PRISONERS OF CONSCIENCE].

<sup>17</sup> See generally *id.*; BERTIL LINTNER, OUTRAGE: BURMA'S STRUGGLE FOR DEMOCRACY (1989).

<sup>18</sup> PRISONERS OF CONSCIENCE, *supra* note 16, at 4, 13; BURMA TODAY: LAND OF HOPE AND TERROR 17 (Eric Kolvig ed., 1991) [hereinafter BURMA TODAY].

<sup>19</sup> See LINTNER, *supra* note 17, at 196-215. Other students traveled to India, where many have sought temporary refuge or permanent asylum. U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 1992, at 33 (1992) [hereinafter WORLD REFUGEE SURVEY].

<sup>20</sup> ASIA WATCH, HUMAN RIGHTS IN BURMA (MYANMAR) IN 1991, at 1-2 (1992) [hereinafter HUMAN RIGHTS IN BURMA]. The most famous Burmese opposition leader, Daw Aung San Suu Kyi, who formed the National League for Democracy, was awarded the Nobel Peace Prize in absentia on October 14, 1991. AUNG SAN SUU KYI, FREEDOM FROM FEAR AND OTHER WRITINGS 222, 236-37 (1991).

<sup>21</sup> U Sein Win, *Preface* to DEMOCRACY AND POLITICS IN BURMA, *supra* note 3, at V.

<sup>22</sup> *Id.* A small group of elected representatives escaped to the border of Thailand, and on December 18, 1990 established, in exile, the opposition National Coalition Government of the Union of Burma (NCGUB). *Id.* The primary objectives of the NCGUB are (1) to remove the SLORC military regime; (2) to call for a national convention of all elected officials, members of the Democratic Alliance of Burma (the umbrella organization of most nationalities), and students and monks in the liberated area; and (3) to work toward the establishment of a genuine democracy in Burma. *Id.* at VI.

past forty years.<sup>23</sup> From pro-democracy students in the cities to ethnic armies in the hills, Burma's military dictators have sought to destroy all sources of resistance to their rule. In 1991, the SLORC's oppressive campaign reached those in the westernmost region of the country, the Muslim Rohingyas of Arakan.<sup>24</sup> The current refugee emergency in Bangladesh is a result of the atrocities committed by the army against this population.

This Note argues that the Rohingyas in Bangladesh have the right, under established principles of international refugee law, human rights law, and humanitarian law, not to return to Burma until hostilities have ceased and their safety can be guaranteed. Part II recounts the history of the ethnic and religious oppression that has been inflicted upon Muslims in the Arakan region, and details the specific human rights abuses this group has suffered at the hands of the Burmese military. Part III explains the current crisis faced by the Rohingyas, and describes the roles played by the two nations directly involved and by members of the international community. Part IV examines the obligations of the Burmese and Bangladeshi governments under international legal norms, and concludes that both states are in violation of fundamental principles of refugee, human rights, and humanitarian law. Finally, Part V offers recommendations for addressing the Rohingya crisis that go beyond a mere enunciation of the obligations imposed by international law.

## II. THE ROHINGYAS OF ARAKAN STATE

Situated along Burma's western coastline on the Bay of Bengal, Arakan state borders Bangladesh at its northern tip. The population of Rohingyas, one of several Muslim groups in Arakan,<sup>25</sup> is estimated to be at least 1.4 million in a province with a total population of approximately 3–3.5 million.<sup>26</sup> The Rohingyas are ethnically and cul-

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<sup>23</sup> See generally MARTIN SMITH, *BURMA: INSURGENCY AND THE POLITICS OF ETHNICITY* (1991).

<sup>24</sup> See RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 5–6.

<sup>25</sup> There are three different classes of Muslim people in Arakan: the Kamal, the Arakanese Muslim, and the Rohingya. Most or all of the refugees currently in Bangladesh are Rohingyas. Interview with U Kyaw La, Chairman of the Muslim Liberation Organization of Burma, in New York, N.Y. (Oct. 29, 1992).

<sup>26</sup> Although this figure includes many Rohingyas living in exile, primarily in Bangladesh, it has not been adjusted for deaths resulting from the SLORC's military campaign against the Rohingyas that was intensified in March 1991. RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 2; SMITH, *supra* note 23, at 30. The total population of Burma is estimated to be between 39.4 and 42 million. AMNESTY INTERNATIONAL, MYANMAR at i (1990); SMITH, *supra* note 23, at 29.

turally unlike the country's majority Burman ethnic group<sup>27</sup> (which the SLORC consists of almost exclusively) and the majority of Arakanese. Like their neighbors in Bangladesh, the Rohingyas speak Bengali, rather than either Burmese or the Rakhine language, which is a dialect of Burmese.<sup>28</sup> In addition, they are Muslims, unlike the majority of Burma's populace<sup>29</sup> and unlike most Arakanese, who are Theravada Buddhists.<sup>30</sup> The Rohingyas, therefore, are an ethnic, linguistic, and religious minority both within Burma and within their own province.

These differences have led to such a degree of persecution in the past that the Rohingyas have been called Asia's "new Palestinians."<sup>31</sup> The most infamous case of government oppression in recent years occurred from 1978 to 1979, when the Burmese military began its *Naga Min* (Operation Dragon King) campaign of murder, rape, and torture against the Rohingya community. This campaign produced a massive exodus of refugees across the Naaf River into neighboring Bangladesh.<sup>32</sup>

Arakan historically has been one of Burma's many areas of unrest, dating back (in modern times) to the period following the Second World War. As Britain grudgingly relinquished control over its former colony,<sup>33</sup> the country's various ethnic nationalities struggled to stake their claims in the newly independent land. As in other regions, rebellion erupted in Arakan: Rakhine nationalists campaigned for autonomous statehood within Burma, while a Muslim-led faction of the same separatist movement pressed to establish an Islamic "frontier state" in the northern part of the province.<sup>34</sup> Attempts to split the region never succeeded, however, and Burma's eventual 1947 Constitution failed to address either Rakhine demands for independent statehood or Muslim pleas for a separate Islamic province.<sup>35</sup> The disparate groups in the

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<sup>27</sup> Burmans constitute 71.3% of the country's population. Josef Silverstein, *Has the World Forgotten Burma?*, 13 CULTURAL SURVIVAL QUARTERLY, No. 4, at 2, 2 (1989).

<sup>28</sup> RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 2.

<sup>29</sup> Approximately 85% of Burma's people are Theravada Buddhists. BURMA TODAY, *supra* note 18, at 3.

<sup>30</sup> SMITH, *supra* note 23, at 30.

<sup>31</sup> *Id.* at 241.

<sup>32</sup> WORLD REFUGEE SURVEY, *supra* note 19, at 94-95. For a thorough discussion of events during this period, see *infra* notes 46-53 and accompanying text.

<sup>33</sup> Burma gained independence from Britain on January 4, 1948. JOSEF SILVERSTEIN, BURMA: MILITARY RULE AND THE POLITICS OF STAGNATION 21 (1977).

<sup>34</sup> RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 2; SMITH, *supra* note 23, at 82.

<sup>35</sup> SMITH, *supra* note 23, at 80-82. Burma's 1947 constitution provided for the following composition of ethnic minority representatives in the *Pyithu Hluttaw* (People's Congress):

Of the 125 seats in the Chamber of Nationalities—

(a) twenty-five seats shall be filled by representatives from the Shan State;

(b) twelve seats shall be filled by representatives from the Kachin State;

Arakan region, therefore, had no representation in the fledgling Burman-dominated government.<sup>36</sup>

In the years that followed, Muslim factions in Arakan continued to press, albeit unsuccessfully, for the establishment of an independent state. In the mid-1960s, the province was devastated economically following a coup d'état in Rangoon led by General Ne Win, and many Arakanese (Muslim and Buddhist alike) left the poverty-stricken region for the more prosperous areas of the country.<sup>37</sup> The Muslims who remained lived in constant fear of government persecution. Their status as legitimate residents was questioned by government authorities, and those who lacked proof of Burmese citizenship faced uncertainty over their right to remain lawfully in Burma.<sup>38</sup>

When a census conducted by the Ne Win government from 1963 to 1964 revealed the effects of widespread emigration from Arakan to other parts of Burma, officials responded by prohibiting any travel by Muslim Arakanese east of Akyab District (situated in the northern part of the state adjacent to the Bangladesh border).<sup>39</sup> The government barred Muslims from travel even between villages within a single township.<sup>40</sup> To add to the inter-ethnic tension, the government charged the Rakhines with the task of enforcing the new restrictions, thus breeding further distrust and animosity between Muslims and Buddhists in the province.<sup>41</sup>

Soon after, the government began to designate the Rohingyas, whom many Burmese had regarded for years as only slightly better than foreigners,<sup>42</sup> as illegal immigrants. Officials claimed that the Rohingyas had crossed the border from Bangladesh unlawfully, and that they were troublemakers who did not belong in Burma.<sup>43</sup> In the 1970s, the Rohingya Patriotic Front (RPF) and other opposition groups (in-

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(c) eight seats shall be filled by representatives from the Special Division of Chins;

(d) three seats shall be filled by representatives from Kayah State;

(e) fifteen seats shall be filled by representatives from the Karen State;

(f) sixty-two seats shall be filled by representatives from the remaining territories of the Union of Burma.

BURMA CONST. ch. XIV, 2d sched., § 87 (1947).

<sup>36</sup> SMITH, *supra* note 23, at 83.

<sup>37</sup> RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 3.

<sup>38</sup> SMITH, *supra* note 23, at 219.

<sup>39</sup> RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 3.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* Historically, the Rohingyas and Rakhines have referred to one another demeaningly as Buddhist-*Magh* (bandit) or Muslim-*Kala* (foreigner), revealing the deeply ingrained ethnic prejudices that separate the two groups. SMITH, *supra* note 23, at 241.

<sup>42</sup> See Yokota, *supra* note 15, at 383-85.

<sup>43</sup> RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 2.

cluding the rival Arakan Rohingya Islamic Front) formed in response to government oppression. Dedicated to the *mujahid* movement,<sup>44</sup> the RPF was capable of providing weapons to several hundred devoted Muslim villagers living along the Naaf River, with open support from Bangladesh.<sup>45</sup> The Rohingyas were unprepared, however, to confront a military campaign mounted by the Burmese government.

In 1978, the Burmese army began a major offensive, referred to as *Ye The Ha*, against opposition groups in Arakan, including all Rak-hine organizations (such as the Arakan Communist Party) as well as the Rohingya *mujahidin*.<sup>46</sup> The army followed this offensive with the *Naga Min* operation: a campaign of murder, rape, and torture targeted specifically at the Muslim population, and designed to drive the "foreigners" out of Burma and "back to" Bangladesh. The army burned villages, destroyed mosques, and herded people into fenced stockades.<sup>47</sup> In April 1978, thousands began fleeing the province, and by mid-July more than 200,000 refugees were packed into ramshackle camps on the Bangladeshi side of the Naaf River. The Bangladeshi government did not allow any foreign diplomats or journalists to visit the UNHCR-supervised camps.<sup>48</sup>

Poor, overcrowded, and ill equipped to handle the huge influx of refugees, Bangladesh decided that the Rohingyas must return to Burma. In July, despite vigorous opposition from within the camps, the Burmese government agreed on a repatriation scheme in order to avoid an armed conflict with Bangladeshi troops.<sup>49</sup> The Rohingyas, however, refused to leave. In response, Bangladeshi officials cut food supplies to the camps in an effort to persuade the refugees to go back home "voluntarily."<sup>50</sup> With no provisions, the weakest Rohingyas began to starve. By December 1978, more than 10,000 refugees, 7000 of whom were children, had died.<sup>51</sup> The UNHCR, which maintained over-

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<sup>44</sup> A *mujahid* is, literally, a Muslim fighter in an Islamic holy war. SMITH, *supra* note 23, at ix.

<sup>45</sup> *Id.* at 219, 241.

<sup>46</sup> RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 4. *Ye The Ha* consists of a "four cuts" strategy that Burmese military forces have used against rebel organizations throughout the country since 1962: the army attempts to cut off an insurgency group's food, funds, intelligence, and recruits. *Id.*; PROPOSAL FOR CONSTRUCTIVE INVOLVEMENT, *supra* note 7, at 7.

<sup>47</sup> PROPOSAL FOR CONSTRUCTIVE INVOLVEMENT, *supra* note 7, at 7; SMITH, *supra* note 23, at 241.

<sup>48</sup> RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 4.

<sup>49</sup> *Id.*

<sup>50</sup> BANGLADESH'S ABOUT-FACE, *supra* note 4, at 1; RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 4.

<sup>51</sup> BANGLADESH'S ABOUT-FACE, *supra* note 4, at 1.



all responsibility for the relief effort, failed to challenge the Bangladeshi government's coercive repatriation policy.<sup>52</sup> Faced with suffering and death in the camps, the refugees finally began returning to Burma. By the end of 1979, nearly all surviving Rohingyas were back in Arakan.<sup>53</sup>

### III. THE CURRENT REFUGEE CRISIS

The situation in Arakan and along the Bangladeshi border today is strikingly similar to the situation that existed in 1978. Widespread religious persecution and the flagrant abuse of human rights has forced the current generation of Rohingyas to flee their homes and again seek protection in refugee camps on the opposite side of the Naaf River.<sup>54</sup> The outcome of the crisis has not yet been determined, however, and efforts should be made now to avoid a repeat of the disaster that occurred fifteen years ago.

In national elections on May 27, 1990, residents of Arakan (and other states throughout Burma) voted overwhelmingly in favor of opposition candidates, rejecting the military-backed National Unity Party.<sup>55</sup> Following this widespread show of defiance, the army's campaign against ethnic minorities, which had intensified in 1989, grew into a "routine of concerted brutality" against the Rohingyas.<sup>56</sup> By 1990, military forces effectively governed most of Arakan.<sup>57</sup> The abuses most frequently perpetrated against Rohingyas by the Burmese army include forced labor and portering, rape, torture, religious persecution, confiscation of food supplies, and summary execution.<sup>58</sup>

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<sup>52</sup> RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 4.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 6-21.

<sup>55</sup> The Arakanese elected representatives from three parties: the National League for Democracy (NLD), the Arakan League for Democracy, and the National Democratic Party for Human Rights. *Id.* at 5. The NLD, formed by Daw Aung San Suu Kyi in September 1988, won 72% of the 13 million votes cast, and 392 of the 485 legislative seats at stake in the National Assembly. AUNG SAN SUU KYI, *supra* note 20, at 267-68, 301. After Aung San Suu Kyi publicly criticized Ne Win, patriarch of Burma's military forces, however, the SLORC forced her to withdraw from the race for prime minister. The government has held her under house arrest in Rangoon since July 20, 1989. *Id.* at 309-17.

<sup>56</sup> RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 5; HUMAN RIGHTS IN BURMA, *supra* note 20, at 4.

<sup>57</sup> HUMAN RIGHTS IN BURMA, *supra* note 20, at 4.

<sup>58</sup> U.S. COMMITTEE FOR REFUGEES, SOARING NUMBER OF BURMESE (ROHINGYA) REFUGEES IN BANGLADESH HAMPERS EFFORTS TO PROVIDE RELIEF 1 (1992) [hereinafter SOARING NUMBER]; RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 5; Yokota, *supra* note 15, at 375-76, 383-85.

In interviews with human rights and humanitarian relief groups conducted in the refugee camps in Bangladesh, nearly all the Rohingya men reported having been repeatedly forced by soldiers to leave their homes, for days or weeks at a time, to work for the military.<sup>59</sup> These interviews revealed that the Burmese army forces many Rohingyas to build roads, dig canals, or work on similar projects, while others must carry heavy loads of food, ammunition, and supplies. Porters also must often walk ahead of the troops to act as "human mine sweepers."<sup>60</sup> Conditions are extremely harsh, as the soldiers provide little or no food and water, and beat those who work too slowly or fail to maintain pace. Laborers regularly die from starvation, fever, beatings, or exploding mines. The soldiers shoot and leave behind on the trail those who cannot work or fail to carry their burdens.<sup>61</sup>

While the men are away, or often even when they are in the village, Burmese troops routinely and brutally rape Rohingya women and girls.<sup>62</sup> The women must endure repeated rapes and beatings by a succession of soldiers, either in their homes or at military camps where the army often takes them in large groups. Many women die (usually by bleeding to death), whereas others are simply killed outright. Those who survive will likely be raped again.<sup>63</sup>

Religious persecution against the Muslim Rohingyas has increased drastically since 1990. The Burmese army has locked up and destroyed mosques and Islamic schools (usually using forced Muslim laborers), beaten Rohingyas at prayer, prohibited most religious activity, and arrested and tortured teachers and students of Islam.<sup>64</sup> Soldiers have seized Rohingya homes and moved non-Muslim Burmese into the appropriated houses. The army has even taken agricultural lands to use as housing project sites for newly arrived Buddhist residents.<sup>65</sup>

The SLORC began to insist, as previous officials had, that the Rohingyas were not Burmese citizens, but aliens who had crossed into

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<sup>59</sup> See RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 6–21; Ribeiro, *supra* note 3, at 350–58. Interviews of newly arrived refugees took place in March of 1992 in five of the nine refugee camps that existed in Bangladesh at the time. *Id.*

<sup>60</sup> RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 6–21; Ribeiro, *supra* note 3, at 350–58.

<sup>61</sup> See generally RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 11–15; HUMAN RIGHTS IN BURMA, *supra* note 20, at 4; SOARING NUMBER, *supra* note 58, at 1–2.

<sup>62</sup> RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 6–11; Ribeiro, *supra* note 3, at 353–58.

<sup>63</sup> See generally RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 6–11; SOARING NUMBER, *supra* note 58, at 2.

<sup>64</sup> RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 5, 15–20.

<sup>65</sup> *Id.*

the province illegally from Bangladesh.<sup>66</sup> Identity cards issued to Muslims, without which they were forbidden to travel, designated them as "foreigners."<sup>67</sup> In many cases, Burmese soldiers ordered Rohingyas to produce their identity cards and other citizenship materials, and then confiscated or destroyed the documents before their eyes.<sup>68</sup> Numerous refugees have reported being told by the army that they were "Bangladeshis," and should "go home."<sup>69</sup> The government campaign has been directed toward displacing the Muslims from their homes, taking their property, destroying their resistance, denying their proof of citizenship, and then forcing them out of the country. The sheer numbers of Rohingyas who have fled from Arakan attest to the success of the SLORC's policy.

In the Cox's Bazaar district of Bangladesh, conditions in the fifteen camps that hold Rohingyas have steadily grown worse. When the refugees first began to arrive in 1990, the Bangladeshi government welcomed them, offered them support, and requested international cooperation to provide them with emergency assistance.<sup>70</sup> As Rohingyas continued to arrive, however, sometimes by the thousands each day, officials attempted to reach an agreement with the SLORC that would provide for expedited repatriation. Faced with domestic pressures, limited resources, and scrutiny in the international media, Bangladesh's government became increasingly unwilling to care for the growing tide of refugees.<sup>71</sup> Finally, in February 1992, Bangladeshi officials appealed to the international community for aid, and invited the UNHCR to assess the situation and to try to stop the influx of Rohingyas.<sup>72</sup>

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<sup>66</sup> See Yokota, *supra* note 15, at 368–70. Ohn Gyaw, Burma's Minister of Foreign Affairs, has insisted that "it is a rubbish thing that people have left Myanmar. These people who are in the refugee camps in Bangladesh are perhaps from Dhaka, but not one single person has left Burma." *Id.* at 369.

A Burmese citizenship law passed by Ne Win's Burma Socialist Program Party (BSPP) in 1982 provides full citizenship only to those able to prove that ancestors of both parents were living in Burma prior to the Anglo-Burmese War of 1824. RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 3. Approximately 10% of the country's population cannot satisfy this requirement, and the law regards such people as third-class citizens at best. *Id.* The BSPP enacted the law, in place of a less restrictive 1947 statute, following the return of Rohingyas from Bangladesh in 1978. Designed to isolate Muslim, Chinese, and Indian people, the law denies them the right to hold national party positions, to attend institutes of higher education, or to serve in the military or police forces. *Id.*; PROPOSAL FOR CONSTRUCTIVE INVOLVEMENT, *supra* note 7, at 5 n.11.

<sup>67</sup> See RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 4.

<sup>68</sup> *Id.* at 6.

<sup>69</sup> *Id.* at 15–20; *Historical Facts about Rohingyas*, NEW NATION (Dhaka), Apr. 23, 1992, at A6.

<sup>70</sup> BANGLADESH'S ABOUT-FACE, *supra* note 4, at 1.

<sup>71</sup> *Id.*; SOARING NUMBER, *supra* note 58, at 2.

<sup>72</sup> SOARING NUMBER, *supra* note 58, at 2.

On March 24, 1992, U.N. Secretary-General Boutros Boutros-Ghali issued a press release stating that the "tragic situation" in Burma, if not urgently addressed, would "threaten the stability of the region and increase human suffering."<sup>73</sup> In early April, Boutros-Ghali dispatched Ambassador Jan Eliasson, Under Secretary-General for Humanitarian Affairs, to Bangladesh and Burma in an attempt to obtain a negotiated settlement of the refugee crisis.<sup>74</sup> On April 28, 1992, with the assistance of Ambassador Eliasson, the Burmese foreign minister and his counterpart from Bangladesh signed an agreement providing for repatriation of the refugees.<sup>75</sup> The plan called for the "safe and voluntary" return of 5000 persons a day over a period of six months.<sup>76</sup> Bangladesh offered to assist Burmese officials by registering Rohingyas in the camps and determining who among them carried "evidence of residence" in Burma.<sup>77</sup> Burmese officials, however, agreed to admit only those individuals who could give "bona fide evidence of their residence in Myanmar" through official government documentation.<sup>78</sup> The SLORC also refused to allow monitoring by the UNHCR of the refugees' safety once they were back inside Burma.<sup>79</sup>

The UNHCR immediately withdrew its support for the agreement,<sup>80</sup> and the international community demanded that repatriations not begin until U.N. observers could ensure the refugees' "safe and voluntary" return.<sup>81</sup> Rohingyas inside the camps responded immediately by protesting the repatriation plan, but the demonstrations ended when Bangladeshi troops fired on a group of about 2000 refugees,

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<sup>73</sup> Press Release, *U.N. Secretary-General Calls for International Support to UNHCR to Help Bangladesh Cope with Refugee Flow; Asks Myanmar to Rectify Causes of Tragic Situation* (Mar. 6, 1992), in *DEMOCRACY AND POLITICS IN BURMA*, *supra* note 3, at 305.

<sup>74</sup> PROPOSAL FOR CONSTRUCTIVE INVOLVEMENT, *supra* note 7, at 15; U.N. Emergency Relief Coordinator, *Press Briefing Concerning Refugees in the Region of Burma* (Apr. 16, 1992), in *DEMOCRACY AND POLITICS IN BURMA*, *supra* note 3, at 307-09. The Rohingya situation is an important issue for the United Nations, as it is the first case to be addressed by the new post of Humanitarian Affairs. PROPOSAL FOR CONSTRUCTIVE INVOLVEMENT, *supra* note 7, at 15.

<sup>75</sup> The SLORC agreed to "take all necessary measures that would halt the outflow of Myanmar residents to Bangladesh and encourage those who had left Myanmar to return voluntarily and safely to their homes." *Joint Statements*, *supra* note 8, at 310-11.

<sup>76</sup> *Id.* at 311; PROPOSAL FOR CONSTRUCTIVE INVOLVEMENT, *supra* note 7, at 15.

<sup>77</sup> PROPOSAL FOR CONSTRUCTIVE INVOLVEMENT, *supra* note 7, at 15.

<sup>78</sup> *Joint Statements*, *supra* note 8, at 311. Among those permitted to return were refugees "carrying Myanmar Citizenship Identity Cards/National Registration Cards; those able to present any other documents issued by relevant Myanmar authorities; and all those persons able to furnish evidence of their residence of Myanmar, such as addresses or any other relevant particulars." *Id.*

<sup>79</sup> USCR URGES CAUTION, *supra* note 8, at 1.

<sup>80</sup> See Foa, *supra* note 10, at 312-13; CHANGES IN BURMA?, *supra* note 8, at 8-9.

<sup>81</sup> USCR URGES CAUTION, *supra* note 8, at 1-2; Press Release, U.S. Department of State, *Statement on Burmese Rohingya Refugees in Bangladesh* (Dec. 24, 1992), at 1.

killing one and injuring twenty.<sup>82</sup> The Burmese and Bangladeshi governments quickly suspended the planned repatriations indefinitely.<sup>83</sup>

In the months that followed, Rohingyas in the camps continued to oppose Bangladesh's efforts to accelerate the repatriation process.<sup>84</sup> Many refugees reportedly took up arms, and violent clashes between residents and government officials occurred inside several camps.<sup>85</sup> At the same time, Bangladesh imposed further restrictive measures to suppress opposition and to encourage the Rohingyas to leave the country.<sup>86</sup> In Burma, reports of atrocities in Arakan continued, and the SLORC repeated its unwillingness to allow UNHCR involvement in the repatriation process.<sup>87</sup>

On September 22, 1992, Bangladesh began secretly returning Rohingyas to Arakan.<sup>88</sup> Many Rohingyas reportedly refused to return to Burma unless the SLORC agreed to allow United Nations monitors to supervise the repatriation and resettlement process, and further conflicts between Bangladeshi police and residents of the camps ensued.<sup>89</sup> The UNHCR announced on December 23, 1992 that Bangla-

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<sup>82</sup> CHANGES IN BURMA?, *supra* note 8, at 9.

<sup>83</sup> *Id.* at 8-9.

<sup>84</sup> For example, on July 14, 1992, police reportedly fired into the crowd after refugees hit them with rocks in an attempt to stop a head count in the camp. Up to six refugees were killed. Qadir, *supra* note 11, at A1. On August 17, 1992, police again opened fire at a meeting between refugees and government officials, reportedly killing up to 10 refugees. CHANGES IN BURMA?, *supra* note 8, at 9.

<sup>85</sup> Insurgency groups from within Burma, such as the Rohingya Solidarity Organization and the Arakan Rohingya Islamic Front, reportedly supplied the refugees with weapons. *Id.* at 9; *Burma Militants Attack Refugee Camp Officials*, NATION (Bangkok), Sept. 1, 1992, at A1.

<sup>86</sup> Bangladesh has assigned armed police to "provide security" at the camps, erected barbed wire barriers, reduced daily food rations, slowed construction of shelter, blocked plans to improve sanitation (and thus prevent the spread of disease), and denied additional humanitarian groups permission to join the relief effort. Qadir, *supra* note 11, at A1; CHANGES IN BURMA?, *supra* note 8, at 9; BANGLADESH'S ABOUT-FACE, *supra* note 4, at 1. Bangladeshi Prime Minister Begum Khaleda Zia told the U.S. Department of State in September 1992 that her country wanted "an early and safe return of the refugees," but indicated that "it [would] not be possible for us to sustain the burden of refugees for a long time." Press Release, Asia Watch (Dec. 30, 1992), at 2 [hereinafter Asia Watch Press Release].

<sup>87</sup> CHANGES IN BURMA?, *supra* note 8, at 11.

<sup>88</sup> Asia Watch Press Release, *supra* note 86, at 1-2. The UNHCR reported that Bangladesh repatriated nearly 1000 Rohingyas on November 25, 1992, some of them involuntarily. *Id.*

<sup>89</sup> On December 6, 1992, hundreds of police stormed a camp, seized more than 6000 weapons, and arrested 14 Burmese Muslim rebels who the police deemed "terrorists." *Bangladeshi Police Raid Burmese Refugee Camp*, Reuters, Dec. 6, 1992, available in LEXIS, Nexis Library, Reuter File. Refugees contradicted the police allegations, stating that "camp officials wanted . . . volunteers for repatriation. But [the refugees] refused, saying nobody wants to return. That's why the police arrested them." *Burmese Muslim Refugees Suspicious of Repatriation*, UPI, Dec. 7, 1992, available in LEXIS, Nexis Library, UPI File. Interviewees also reported that most of the refugees repatriated so far had either been bribed or forced to return. *Id.* Rohingyas in the camps have

desh had returned more than 4000 persons to Burma, thereby violating the Bangladeshi authorities' pledge of "strict adherence to the principle of voluntary repatriation."<sup>90</sup> In addition, the UNHCR stopped screening refugees because Bangladesh denied agency personnel free access to the camps to conduct confidential interviews.<sup>91</sup>

On January 20, 1993, Bangladesh temporarily suspended repatriations and began negotiating with Sadako Ogata, U.N. High Commissioner for Refugees, to reestablish UNHCR participation in the repatriation proceedings.<sup>92</sup> Prior to the hiatus, Bangladesh had returned more than 17,000 Rohingyas to Arakan, at least some of them involuntarily.<sup>93</sup> Nine days later, Bangladeshi and UNHCR officials reached an agreement on renewed United Nations supervision of repatriation efforts, which resumed on February 1.<sup>94</sup> Bangladesh's foreign minister declared that "[a]ll hindrances and misunderstandings on the refugee problems have been removed," and reaffirmed "the sincerity of Bangladesh and its firm policy toward voluntary repatriation."<sup>95</sup> The UNHCR pledged full cooperation with the repatriation process.<sup>96</sup> Burma's dictators, however, persistently refused to permit the UNHCR or any other group to monitor the repatriation and resettlement of Rohingyas in Arakan.<sup>97</sup>

In May 1993, High Commissioner Ogata executed a formal Memorandum of Understanding with Bangladeshi officials, which included an agreement on the safe and voluntary return of Rohingyas to Burma, UNHCR access to the camps in Bangladesh, and international assis-

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complained that Bangladeshi police threaten them if they attempt to voice their fear to UNHCR personnel of being forcibly returned. Camp officials have denied the allegations. *Id.*

<sup>90</sup> Press Release, United Nations, *Bangladesh Urged to Halt Coerced Returns*, REF/1006 (Dec. 23, 1992) [hereinafter *Bangladesh Urged*].

<sup>91</sup> *Id.* Denial of access violates the April 28, 1992 agreement between Burma and Bangladesh, which provided for UNHCR involvement in the repatriation process. Asia Watch Press Release, *supra* note 86, at 1; *Joint Statements*, *supra* note 8, at 311.

<sup>92</sup> A Bangladeshi official announced that "[w]e have agreed in principle to take a breather until January 25. By that time we hope to bring the UNHCR back into the repatriation process." *Bangladesh Says Eager to Settle Row with UNHCR*, Reuters, Jan. 20, 1993, available in LEXIS, Nexis Library, Reuter File. Foreign Minister Mustafizur Rahman added: "How . . . the refugees could be sent home in a shortest possible time is our main concern." *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Rohingya Repatriation Resumes*, NATION (Bangkok), Feb. 1, 1993, at A4. Bangladesh returned a group of 981 refugees to Burma on February 1, 1993, bringing the total number of returnees to 18,120, according to officials of the UNHCR. *Refugees Return to Burma*, BANGKOK POST, Feb. 1, 1993, at A3.

<sup>95</sup> *Bangladesh Repatriation to Continue*, NATION (Bangkok), Feb. 5, 1993, at A4.

<sup>96</sup> *UNHCR Team to Visit Burmese Refugees*, BANGKOK POST, Feb. 5, 1993, at A3.

<sup>97</sup> Asia Watch Press Release, *supra* note 86, at 1.

tance to returnees.<sup>98</sup> On November 5, 1993, a UNHCR representative signed a Memorandum of Understanding with the SLORC, guaranteeing the United Nations agency access to those refugees who return to Arakan.<sup>99</sup> Although this agreement represents an important step in securing safe repatriation and resettlement for the refugees, the international community must maintain a vigilant watch over the SLORC's activities in Arakan. As historical events have illustrated, the Rohingyas are a target for abuse by the dictators in Rangoon.

#### IV. PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW

Like all other nations, Burma and Bangladesh are legally obligated to respect and safeguard the fundamental human rights of persons within their borders, regardless of whether they are citizens or refugees.<sup>100</sup> This Note now examines applicable principles of international refugee, human rights, and humanitarian law, both as stipulated by treaty and as established under customary international law.

Although discussion of the law relating to refugees is broken down into four seemingly distinct categories—refugee law, human rights law, humanitarian law, and customary international law—this division is utilized almost exclusively for purposes of analysis. In addressing international refugee issues, it is essential to recognize the need for integration of the various sources of law in this area. Refugee organizations, human rights groups, state governments, and international agencies should draw from all available sources to accomplish the goals of refugee protection, temporary asylum, voluntary repatriation and resettlement, or permanent asylum in a third country. The refugee and human rights divisions of the United Nations have acknowledged this need for greater integration.<sup>101</sup> The High Commissioner for Refugees recently declared that “a refugee movement is a grave human rights issue, . . . [and] human rights institutions and organizations should be utilized more actively and effectively by States, as well as by concerned

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<sup>98</sup> *Memorandum of Understanding Between the Government of the People's Republic of Bangladesh and the Office of the United Nations High Commissioner for Refugees* (May 1993) [hereinafter *Memorandum of Understanding*], in *DEMOCRACY AND POLITICS IN BURMA*, *supra* note 3, at 412–15.

<sup>99</sup> The memorandum provides that the “UNHCR will be given access to all returnees; that the returnees will be issued with the appropriate identification papers and that the returnees will enjoy the same freedom of movement as all other nationals.” *HUMAN RIGHTS DEVELOPMENTS*, *supra* note 1, at 12.

<sup>100</sup> See *infra* notes 133–57 and accompanying text.

<sup>101</sup> See generally *LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE HUMAN RIGHTS OF REFUGEES AND DISPLACED PERSONS: PROTECTIONS AFFORDED REFUGEES, ASYLUM SEEKERS AND DISPLACED PERSONS UNDER INTERNATIONAL HUMAN RIGHTS, HUMANITARIAN AND REFUGEE LAW 3–5* (1991) [hereinafter *PROTECTIONS AFFORDED REFUGEES*].

refugee organizations to address the human rights concerns in refugee situations."<sup>102</sup>

### A. *Refugee Law*

To resolve the refugee crisis that existed in Europe after World War II, international refugee law was designed to identify persons fleeing persecution in their homeland and to provide them with the protection of the world community.<sup>103</sup> Over the nearly half-century since the international community first addressed the problems of refugees, many different nations have executed numerous agreements, to the extent that modern refugee law represents the "codification in treaty form of international norms governing the status and protection of refugees."<sup>104</sup>

The most far-reaching instruments to address the plight and defense of refugees are the 1951 Convention Relating to the Status of Refugees (the Refugee Convention) and its 1967 Protocol (the Refugee Protocol).<sup>105</sup> Founded on the principle of *nonrefoulement*,<sup>106</sup> international refugee conventions focus on protecting refugees from forcible return to a place—usually the region or state they fled—where they would likely face further harm or persecution.<sup>107</sup> Although the law is applied somewhat differently in individual cases than in mass involuntary movements,<sup>108</sup> principles relating to individual refugees offer a logical point of departure for this inquiry.

#### 1. "Convention" Refugees and "Humanitarian" Refugees

A "refugee" is defined in the Refugee Convention and Refugee Protocol as any person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a

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<sup>102</sup> *Note on International Protection to General Assembly*, U.N. High Commissioner for Refugees, Executive Committee of the High Commissioner's Programme, 41st Sess., at 8–9, U.N. Doc. A/AC.96/750 (1990).

<sup>103</sup> See Ved P. Nanda, *Refugee Law and Policy*, in *REFUGEE LAW AND POLICY: INTERNATIONAL AND U.S. RESPONSES* 3 (Ved P. Nanda ed., 1989) [hereinafter *REFUGEE LAW AND POLICY*].

<sup>104</sup> *PROTECTIONS AFFORDED REFUGEES*, *supra* note 101, at 2.

<sup>105</sup> Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter *Refugee Convention*]; Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter *Refugee Protocol*]; see EDWARD LAWSON, *ENCYCLOPEDIA OF HUMAN RIGHTS* 294 (1991).

<sup>106</sup> *Nonrefoulement* is a technical term, derived from Article 33 of the Refugee Convention, for protection against return to a country "where [the refugee's] life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." THOMAS A. ALEINIKOFF & DAVID A. MARTIN, *IMMIGRATION: PROCESS AND POLICY* 704 (2d ed. 1991).

<sup>107</sup> *PROTECTIONS AFFORDED REFUGEES*, *supra* note 101, at 3.

<sup>108</sup> This issue is discussed further at *infra* notes 183–212 and accompanying text.



particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country . . . ."<sup>109</sup> The evolution of refugee law reflects, to a limited degree, the changing reality of refugee crises throughout the world. Since the 1940s, when the international community developed the early legal approaches to address individual cases of persecution, international treaties and national policies have acknowledged the unique problems caused by mass involuntary movements of people striving to escape armed conflict or general human rights abuses. Traditional laws and strategies were particularly ill suited to address the growing problem of large-scale influxes of refugees seeking protection and temporary asylum.<sup>110</sup> Such refugees worldwide now outnumber those who meet the individualized persecution definition, so-called "Convention" refugees.<sup>111</sup>

The Refugee Convention of 1951 authorized and directed the Office of the UNHCR to seek, with the cooperation of involved states, international protection for refugees and permanent solutions to their problems.<sup>112</sup> Since its inception in 1950,<sup>113</sup> however, the UNHCR's role has evolved and expanded. Beyond requiring merely that protection be provided to those able to demonstrate, on a case-by-case basis, that

<sup>109</sup> Refugee Convention, *supra* note 105, art. 1; Refugee Protocol, *supra* note 105, art. 1; *see also* LAWSON, *supra* note 105, at 1277.

<sup>110</sup> *See, e.g.,* Nanda, *supra* note 103, at 9. As originally drafted, refugee law "fails to provide adequate protection to those individuals and especially to those groups who do not meet the persecution standard [of the Refugee Convention], but flee serious instability, disturbances, or armed conflicts and are unable or unwilling to return to their country of origin." *Id.*

<sup>111</sup> *Id.* As former High Commissioner Jean-Pierre Hocke commented in 1986, "[t]he vast majority of today's refugees and asylum seekers do not always correspond to the formal definition of a refugee provided for in the 1951 convention." LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE UNHCR AT 40: REFUGEE PROTECTION AT THE CROSSROADS 53 (1991) [hereinafter UNHCR AT 40]; *see also* Kay Hailbronner, *Nonrefoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, in THE NEW ASYLUM SEEKERS: REFUGEE LAW IN THE 1980s, at 123 (David A. Martin ed., 1988) [hereinafter NEW ASYLUM SEEKERS].

<sup>112</sup> The preamble of the Refugee Convention provides that "the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner . . . ." Refugee Convention, *supra* note 105, pmbl.

The Refugee Protocol requires that states "undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . [including providing the Office with information concerning] (a) the condition of refugees; (b) the implementation of the present Protocol; (c) laws, regulations and decrees which are . . . in force relating to refugees." Refugee Protocol, *supra* note 105, art. 2.

<sup>113</sup> Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428, U.N. GAOR, 5th Sess., Annex, Supp. No. 20, at 46, U.N. Doc. A/1775 (1950) [hereinafter UNHCR Statute].

they meet the "well-founded fear of persecution" standard, the UNHCR's mandate now includes protection for mass migrations of people fleeing war or widespread human rights abuses at home.<sup>114</sup> Persons meeting this description have come to be called "humanitarian refugees" or "temporary asylum seekers," as distinguished from so-called "Convention" refugees who satisfy the individualized refugee definition.<sup>115</sup> Because the Rohingyas in Bangladesh are properly characterized as humanitarian refugees, or seekers of temporary asylum, this analysis will concentrate on the legal protections applicable to such refugees.

The UNHCR is authorized to provide relief, absent a determination of individual refugee status, if a host country invites representatives of the agency to assist a particular refugee population.<sup>116</sup> Nations party to the Refugee Protocol may also refer disputes concerning either the interpretation or application of the Convention and the Protocol to the International Court of Justice.<sup>117</sup>

In addition to defining who is a "refugee," the Refugee Convention stipulates that countries must safeguard the basic human rights of refugees within their control, without discrimination by race, religion, or national origin.<sup>118</sup> The rights most of concern to humanitarian refugees and temporary asylum-seekers relate to religious freedom,<sup>119</sup> property,<sup>120</sup> freedom of association,<sup>121</sup> welfare,<sup>122</sup> administrative assis-

<sup>114</sup> Refugees within the High Commissioner's jurisdiction include "persons who have fled their home country due to armed conflicts, internal turmoil and situations involving gross and systematic violations of human rights." *Note on International Protection*, U.N. High Commissioner for Refugees, Executive Committee of the High Commissioner's Programme, 36th Sess., para. 6, U.N. Doc. A/AC.96/660 (1985); see also Guy S. Goodwin-Gill, *Nonrefoulement and the New Asylum Seekers*, in *NEW ASYLUM SEEKERS*, *supra* note 111, at 103-21; UNHCR AT 40, *supra* note 111, at 52-56.

<sup>115</sup> See Hailbronner, *supra* note 111, at 123-58. Civilians fleeing generalized violence triggered by internal armed conflict, and who desire temporary refuge in a third country, are legally distinct from those seeking permanent asylum in a foreign state. *Id.*; see also Joan F. Hartman, *The Principle and Practice of Temporary Refuge: A Customary Norm Protecting Civilians Fleeing Internal Armed Conflict*, in *NEW ASYLUM SEEKERS*, *supra* note 111, at 87-101.

<sup>116</sup> Jeffrey Dillman, *International Refugee and Asylum Law*, 34 *How. L.J.* 50, 53-54 (1991). The UNHCR is authorized not only to provide temporary protection and assistance, but also to grant refugee status "without an individual determination as to whether each person [meets] the refugee definition." *Id.*

<sup>117</sup> Refugee Protocol, *supra* note 105, art. 4; PROTECTIONS AFFORDED REFUGEES, *supra* note 101, at 9.

<sup>118</sup> Refugee Convention, *supra* note 105, arts. 1, 3; see also LAWSON, *supra* note 105, at 294.

<sup>119</sup> Refugee Convention, *supra* note 105, art. 4.

<sup>120</sup> *Id.* arts. 13-17.

<sup>121</sup> *Id.* art. 15.

<sup>122</sup> *Id.* arts. 20-24 (providing for rationing of scarce products, housing, public education, and public relief).

tance,<sup>123</sup> and freedom of movement.<sup>124</sup> The UNHCR's primary duty is to provide international protection and material assistance to refugees.<sup>125</sup> To accomplish these goals, the UNHCR is required by statute to promote refugee admission, assist in voluntary repatriation efforts, supervise the application of international refugee conventions, and promote any other measures designed to better the refugees' situation or reduce the number in need of protection.<sup>126</sup>

## 2. *Nonrefoulement* in the Refugee Convention

The most important provision of the Refugee Convention is Article 33(1),<sup>127</sup> which provides that "[n]o Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."<sup>128</sup> While this definition of *nonrefoulement* articulates an extremely important guarantee, it suffers from two basic shortcomings. First, Article 33 is binding only on signatories to the Refugee Convention and Protocol. Second, the article fails to grant a specific right to asylum from persecution.<sup>129</sup> Neither Burma nor Bangladesh has signed the Refugee Convention or Refugee Protocol.<sup>130</sup> A legally binding guarantee of asylum is critical for the majority of

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<sup>123</sup> *Id.* art. 25.

<sup>124</sup> *Id.* art. 26.

<sup>125</sup> Nanda, *supra* note 103, at 3-19.

<sup>126</sup> UNHCR Statute, *supra* note 113, ch. II, para. 8.

<sup>127</sup> As one commentator has declared, "[i]t may be safely submitted that Article 33 of the 1951 Convention has played a principal part in the development of the principle of *non-refoulement* and that, as such, it constitutes the most important part of international refugee law." GUNNEL STENBERG, *NON-EXPULSION AND NON-REFOULEMENT* 268 (1989).

<sup>128</sup> Refugee Convention, *supra* note 105, art. 33(1).

<sup>129</sup> Western countries that participated in the drafting of the Refugee Convention explicitly rejected a right to asylum, even though such protection was already included in the Universal Declaration of Human Rights. WORLD REFUGEE SURVEY, *supra* note 19, at 15. Article 14 of the Universal Declaration of Human Rights provides: "Everyone has the right to seek and enjoy in other countries asylum from persecution." Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948). An effort by the United Nations in 1977 to correct the omission, by drafting an internationally binding convention on the right to asylum, failed. WORLD REFUGEE SURVEY, *supra* note 19, at 15.

<sup>130</sup> *Id.* at 108. Under norms of customary international law, however, refugees who arrive in states not party to the Refugee Convention or Refugee Protocol deserve the same protections extended to those who arrive in signatory countries. See *infra* notes 165-212 and accompanying text.

today's refugees who, like the Rohingyas, have been forced to flee armed conflict or widespread human rights abuses.

To meet the demands of a broader class of modern refugees, the principle of *nonrefoulement*—like the definition of who is a “refugee”—has been expanded by state practice beyond the limits of Article 33.<sup>131</sup> Persons fleeing internal strife who have been denied protection by their own government, so-called “humanitarian” refugees, have a right not to be returned to their country of origin for as long as hostilities continue and their personal safety is at risk.<sup>132</sup>

### B. Human Rights Law

Emphasizing the “inherent dignity” and “equal and inalienable rights” of all people, and urging “promotion of universal respect for . . . human rights and fundamental freedoms,”<sup>133</sup> international human rights law expands on the limited protections available to temporary asylum seekers under traditional refugee law. Whereas refugee law, as codified, is narrow in scope and focuses on individual cases of persecution and abuse, the tenets of human rights law are broadly drafted and very aspirational.<sup>134</sup> Human rights law applies to all persons, including refugees, seekers of temporary asylum, and displaced persons.<sup>135</sup>

The United Nations Charter provides the primary legal source for many subsequent human rights conventions and agreements,<sup>136</sup> and it is the principal international document that both Burma and Bangladesh have signed.<sup>137</sup> The Charter requires member countries to work individually and jointly to promote higher living standards, solutions

<sup>131</sup> See *infra* notes 186–97 and accompanying text.

<sup>132</sup> Hailbronner, *supra* note 111, at 105. Additionally, many commentators have argued for expansion of *nonrefoulement* under international human rights or humanitarian guidelines, maintaining that the concept can now be considered a norm of customary international law. This is discussed in further detail at *infra* notes 165–212 and accompanying text.

<sup>133</sup> Universal Declaration of Human Rights, *supra* note 129, pmbl.

<sup>134</sup> See, e.g., Universal Declaration of Human Rights, *supra* note 129.

<sup>135</sup> PROTECTIONS AFFORDED REFUGEES, *supra* note 101, at 2.

<sup>136</sup> U.N. CHARTER arts. 68–72. Article 68 of the Charter, for example, provides that “[t]he Economic and Social Council shall set up commissions . . . for the promotion of human rights . . . .” *Id.* art. 68.

<sup>137</sup> Upon joining the United Nations, both countries signed the U.N. Charter, thereby undertaking to uphold and promote its obligatory provisions. Burma signed the Charter and became a member of the United Nations on April 19, 1948. Bangladesh signed and gained membership on September 17, 1974. M.J. BOWMAN & D.J. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS 113–14 (1984) & 130 (Supp. 1992). Under Article 4, signatories must formally pledge to abide by the Charter’s requirements. U.N. CHARTER art. 4.

to international humanitarian problems, and universal respect for human rights, without discrimination on account of race, sex, language, or religion.<sup>138</sup>

The principal document in this area of law is the Universal Declaration of Human Rights, "a common standard of achievement for all peoples and all nations," which sets forth many of the basic canons of international law.<sup>139</sup> The significance of the Universal Declaration for refugees, asylum seekers, and displaced persons "lies in the fact that it aims at unconditional guarantees in contrast to the limited or conditional guarantees under refugee or humanitarian law."<sup>140</sup> The statutes and policies of any single sovereignty, therefore, cannot restrict human rights laws applicable to refugees.<sup>141</sup> In addition, the Universal Declaration recognizes a broader general right to asylum than the one set forth in the Refugee Convention and Refugee Protocol.<sup>142</sup> Unfortunately, the instrument is neither a constitutional document nor a legally binding treaty, and—absent state cooperation and compliance—its principles lack legal effect.<sup>143</sup> Although member states have

<sup>138</sup> U.N. CHARTER arts. 55–56. Article 56 provides that "[a]ll members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." *Id.* art. 56; see also Karen Parker, *The Rights of Refugees under International Humanitarian Law*, in REFUGEE LAW AND POLICY, *supra* note 103, at 33, 34.

<sup>139</sup> Universal Declaration of Human Rights, *supra* note 129.

<sup>140</sup> PROTECTIONS AFFORDED REFUGEES, *supra* note 101, at 12. Several provisions of the Universal Declaration apply to refugees in general, and are relevant to the Rohingyas' situation in particular:

*Article 1.* All human beings are born free and equal in dignity and rights;

*Article 3.* Everyone has the right to life, liberty and security of person;

*Article 5.* No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;

*Article 13.2.* Everyone has the right to leave any country, including his own, and to return to his country;

*Article 14.1.* Everyone has the right to seek and to enjoy in other countries asylum from persecution;

*Article 17.* Everyone has the right to own property . . . . No one shall be arbitrarily deprived of his property;

*Article 18.* Everyone has the right to freedom of thought, conscience and religion . . . [and] to manifest his religion or belief in teaching, practice, worship and observance.

Universal Declaration, *supra* note 129.

<sup>141</sup> PROTECTIONS AFFORDED REFUGEES, *supra* note 101, at 12.

<sup>142</sup> Article 14 of the Universal Declaration provides that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." Universal Declaration, *supra* note 129, art. 14(1). In contrast, the right to asylum in the Refugee Convention and Refugee Protocol is restricted to those individuals persecuted on the grounds of race, religion, nationality, or membership of a particular social group or political opinion. Refugee Convention, *supra* note 105, art. 33; Refugee Protocol, *supra* note 105.

<sup>143</sup> See PROTECTIONS AFFORDED REFUGEES, *supra* note 101, at 13–14.

pledged to work toward achievement of the document's aspirational goals simply by joining the United Nations,<sup>144</sup> the lack of enforcement power greatly decreases the Universal Declaration's value in an actual refugee crisis.

The United Nations adopted two other instruments in 1966 to effectuate the Universal Declaration's aspirational recommendations: the International Covenant on Civil and Political Rights<sup>145</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>146</sup> States that are party to the Covenants are legally bound by each document's terms, including the provisions relating to refugee protection.<sup>147</sup>

Both Burma and Bangladesh have signed the U.N. Charter,<sup>148</sup> thereby pledging to achieve "the promotion of universal respect for and observance of human rights and fundamental freedoms" as set forth in the Universal Declaration of Human Rights.<sup>149</sup> Neither state, however, has signed the two Conventions that further detail the Universal Declaration's principles.<sup>150</sup> Nonetheless, SLORC officials have admitted the existence of their obligations under the Charter and the Universal Declaration more than once.<sup>151</sup>

Several other international documents contain terms that pertain to the rights of refugees, such as the Convention on the Elimination of All Forms of Discrimination Against Women (1979),<sup>152</sup> the Conven-

<sup>144</sup> See Rudy Guyon, *Violent Repression in Burma: Human Rights and the Global Response*, 10 UCLA PAC. BASIN L.J. 409, 430 (1992).

<sup>145</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966). Among other safeguards, the Covenant on Civil and Political Rights prohibits unlawful expulsion; and guarantees ethnic, religious, and linguistic minorities the right to enjoy their own culture, practice their own religion, and use their own language. *Id.* arts. 13, 27.

<sup>146</sup> International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966). The Covenant on Economic, Social and Cultural Rights grants, inter alia, the right to work, to enjoy an adequate standard of living, and to take part in the cultural life of a community. *Id.* arts. 6, 11, 15.

<sup>147</sup> LAWSON, *supra* note 105, at 957.

<sup>148</sup> See *supra* note 137.

<sup>149</sup> Universal Declaration of Human Rights, *supra* note 129, pmbl.

<sup>150</sup> BOWMAN & HARRIS, *supra* note 137, at 303-05 (1984) & 181-82 (Supp. 1992).

<sup>151</sup> According to the SLORC, Burma has "no quarrel with the principle of genuine respect for human rights, within the general guidelines set by the Charter of the United Nations and the Universal Declaration of Human Rights." Statement of U Aung Thant, Observer for Burma, U.N. ESCOR, Hum. Rts. Comm., 45th Sess., 47th mtg. at 2, U.N. Doc. E/CN.4/1989/SR.47 (1989); see also Guyon, *supra* note 144, at 430; Press Release No. 1/93, Permanent Mission of the Union of Myanmar to the U.N., *Address by the National Convention Convening Commission Chairman Maj.-Gen. Myo Nyunt on Opening Day of the National Convention* (Jan. 11, 1993).

<sup>152</sup> Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/RES/34/180 (1979) [hereinafter CEDAW].

tion Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984),<sup>153</sup> the Body of Principles for the Protection of All Persons Under Any Form of Detention (1988),<sup>154</sup> and the Convention on the Rights of the Child (1989).<sup>155</sup> In 1991, under pressure from the United Nations Children's Fund (UNICEF), Burma signed and ratified the Convention on the Rights of the Child.<sup>156</sup> Neither SLORC leaders nor Bangladeshi authorities, however, have signed most of these international treaties.<sup>157</sup>

### C. Humanitarian Law

Humanitarian agreements, such as the Geneva Conventions of 1949<sup>158</sup> and the Protocols Additional to the Geneva Conventions,<sup>159</sup> primarily shield civilian noncombatants who have been displaced by armed conflict.<sup>160</sup> The Geneva Conventions provide widely accepted rules prohibiting violence to physical and mental well-being, torture,

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<sup>153</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. E/Cn.4/1984/72 (1984), *entered into force* June 26, 1987 [hereinafter Torture Convention].

<sup>154</sup> Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, G.A. Res. 173, U.N. GAOR, 43d Sess., U.N. Doc. A/RES/43/173 (1988).

<sup>155</sup> Convention on the Rights of the Child, G.A. Res. 25, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/25, *opened for signature* Nov. 20, 1989.

<sup>156</sup> Burma signed the Convention on July 15, 1991. BOWMAN & HARRIS, *supra* note 137, at 82-84 (Supp. 1992). Bangladesh signed the Convention on August 3, 1990. *Id.* The Convention includes a provision committing governments to monitor progress toward full application of the Convention's principles, and to report back to the United Nations on progress toward, inter alia, special protection of children worldwide and improvement of children's situation worldwide through development and education in conditions of peace and security. PROPOSAL FOR CONSTRUCTIVE INVOLVEMENT, *supra* note 7, at 14; LAWSON, *supra* note 105, at 287.

<sup>157</sup> Neither Burma nor Bangladesh has signed the Refugee Convention or Refugee Protocol. BOWMAN & HARRIS, *supra* note 137, at 171-72, 306-07 (1984) & 144-45, 182 (Supp. 1992). Bangladesh signed CEDAW on November 6, 1984; Burma is not a party to CEDAW. *Id.* at 448-49 (1984) & 244 (Supp. 1992). Neither country has signed the Torture Convention. *Id.* at 82-84 (Supp. 1992). Whether they have signed these instruments or not, the governments of Burma and Bangladesh are obligated under principles of customary international law to protect citizens and noncitizens alike from murder, torture, degrading treatment or punishment, arbitrary detention, and racial discrimination. *See infra* notes 165-212 and accompanying text.

<sup>158</sup> Conventions for the Protection of War Victims Concerning: I. Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field; II. Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; III. Treatment of Prisoners of War; and IV. Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 31 [hereinafter Geneva Conventions of 1949].

<sup>159</sup> Protocol I, Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts; Protocol II, Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, U.N. Doc. A/32/144, Annexes I and II (1977), *entered into force* Dec. 7, 1978.

<sup>160</sup> PROTECTIONS AFFORDED REFUGEES, *supra* note 101, at 3.

mutilation or other cruel treatment, murder, and outrages against personal dignity such as rape or indecent assault.<sup>161</sup> In addition, civilian noncombatants have a legal right to humanitarian assistance,<sup>162</sup> as well as a humanitarian right of *nonrefoulement* and its corresponding guarantee of temporary asylum.<sup>163</sup> Burma has signed the Geneva Conventions, albeit without the two important protocols relating to the protection of victims of international and internal armed conflicts.<sup>164</sup>

#### D. Customary International Law

Treaty law, although extensive, fails to address many issues of concern to the international community, such as the protection of persons in refugee-type situations who do not satisfy the Refugee Convention's individualized persecution definition.<sup>165</sup> Additionally, many states are not party to the various existing agreements, including those that pertain to human rights. The governments of Burma and Bangladesh have not signed most of the instruments relating to refugee, human rights, and humanitarian principles.<sup>166</sup> In order to locate legal protections for refugees in states not party to the international conventions of refugee, human rights, and humanitarian law, our inquiry must turn to relevant provisions of customary international law.

Custom is often called upon to fill the gaps that exist in codified international law, "supplementing treaty rules and having the potential to reach out more generally to regulate parties in their international

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<sup>161</sup> See Article 3 of the Conventions, which has been ratified by all but two states. Geneva Conventions of 1949, *supra* note 158, art. 3; PROTECTIONS AFFORDED REFUGEES, *supra* note 101, at 9.

<sup>162</sup> The right to humanitarian assistance is mentioned repeatedly in the Geneva Conventions. Geneva Conventions of 1949, *supra* note 158; Parker, *supra* note 138, at 37.

<sup>163</sup> Article 45 of the Fourth Geneva Convention prohibits countries that have received persons fleeing armed conflict from sending the refugees back while fighting continues. Fourth Geneva Convention of 1949, *supra* note 158, art. 45. "[P]eople have a right to temporary refuge until the situation in their country of origin changes. In the case of war refugees, change means the cessation of hostilities." Parker, *supra* note 138, at 38.

The Geneva Conventions of 1949, along with the Genocide Convention of 1948, "are considered today as the core of the contemporary humanitarian law of war in force." G.I.A.D. Draper, *The Development of International Humanitarian Law*, in HENRI DUNANT INSTITUTE, UNESCO, INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 6, 6 (1988).

<sup>164</sup> PROPOSAL FOR CONSTRUCTIVE INVOLVEMENT, *supra* note 7, at 17.

<sup>165</sup> There are more than 16 million refugees in the world today. WORLD REFUGEE SURVEY, *supra* note 19, at 33. The majority fail to meet the Refugee Convention's individualized persecution definition, and are variously referred to as "humanitarian" refugees, seekers of temporary asylum, or displaced persons. *Id.* at 32-34. Such individuals are not protected under codified refugee law, even if the country to which they have fled is a signatory to international refugee conventions. Hailbronner, *supra* note 111, at 123.

<sup>166</sup> See *supra* note 157 and accompanying text.



relations.”<sup>167</sup> According to the Statute of the International Court of Justice, customary international law is the general practice of states accepted as law,<sup>168</sup> and “embodies those general and consistent state practices which states follow from a sense of legal obligation.”<sup>169</sup> This obligation derives from the expectations of individuals who reside within the many disparate nations that make up the international community, and is manifested as a dynamic process that produces an ever-changing body of legal principles.<sup>170</sup> Although regarded as a secondary source of international law, after established treaty rules, custom is more generally applicable to state practices than are the international agreements executed by government or party officials.<sup>171</sup>

Customary international law arises from patterns of practice or behavior among states and patterns of shared legal expectations—*opinio juris*. The latter derives from the expectations of all “human-kind,” not merely from the practices of “official State elites.”<sup>172</sup> Moreover, the patterns of expectation that are the source of *opinio juris* need not enjoy universal consent, but “need only be generally shared in the international community.”<sup>173</sup> Whereas countries that have not signed international conventions can legitimately claim not to be bound by the instruments’ terms, all states are required to comply with the dictates of customary international law.<sup>174</sup>

Certain elements of customary international law do not rest upon either shared patterns of behavior or generally accepted legal expectations, but are recognized as *jus cogens*.<sup>175</sup> *Jus cogens*, or “compelling law,” is “a sort of international law that, once ensconced, cannot be displaced by states, either in their treaties or in their practice.”<sup>176</sup> In

<sup>167</sup> Mark W. Janis, *AN INTRODUCTION TO INTERNATIONAL LAW* 36 (1988).

<sup>168</sup> Statute of the International Court of Justice, art. 38(1)(b). *Done at San Francisco*, June 26, 1945 (*entered into force* Oct. 24, 1945) [hereinafter ICJ Statute].

<sup>169</sup> Guyon, *supra* note 144, at 433–34.

<sup>170</sup> See Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT’L L. 59, 59–62 (1990).

<sup>171</sup> See JANIS, *supra* note 167, at 36–37. The Statute of the International Court of Justice ranks international custom second, after international agreements, “as evidence of a general practice accepted as law.” ICJ Statute, *supra* note 168, art. 38(1)(b); JANIS, *supra* note 167, at 36.

<sup>172</sup> Paust, *supra* note 170, at 61. Paust maintains that “[t]he expectations of all human beings (‘mankind,’ ‘the world,’ ‘the people’) are not only relevant but they also provide the ultimate criterial referent” for *opinio juris*. *Id.* at 62.

<sup>173</sup> *Id.* at 63.

<sup>174</sup> Notwithstanding this requirement, “any state indicating dissent during development” of a rule of customary international law is not bound by that rule. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 reporters’ note 12 (1987) [hereinafter RESTATEMENT].

<sup>175</sup> *Jus cogens* is comprised of peremptory norms of international law, which prevail in any conflict of international law or agreements. *Id.* § 102 cmt. k.

<sup>176</sup> JANIS, *supra* note 167, at 53–54.

the area of human rights, the law has identified a number of specific principles as *jus cogens*, peremptory norms of conduct from which no deviation is allowed. Hence, a nation may be held to be in breach of inviolable standards of customary international law if it practices, encourages, or condones: "(a) genocide; (b) slavery or slave trade; (c) the murder or causing the disappearance of individuals; (d) torture or other cruel, inhuman, or degrading treatment or punishment; (e) prolonged arbitrary detention; or (f) systematic racial discrimination."<sup>177</sup> These fundamental violations of individual physical integrity are legally prohibited even if sanctioned by international agreements or by a country's positive law.<sup>178</sup>

Whereas the practices listed in (a) through (f) are, by definition, "gross" violations of human rights even if committed singly or infrequently, various other acts breach customary law if perpetrated regularly and in accordance with state policy. Thus, a country also violates international law if it practices, encourages, or condones "(g) a consistent pattern of gross violations of internationally recognized human rights."<sup>179</sup> Among the abuses deemed "gross" if carried out as part of a consistent pattern are systematic harassment, invasions of the privacy of the home, denial of the right to return to one's country, mass uprooting of a country's population, denial of freedom of conscience and religion, and invidious racial or religious discrimination.<sup>180</sup> Burma's military junta has systematically committed each of these violations in army operations directed against the Rohingyas of Arakan.<sup>181</sup>

#### E. Nonrefoulement and Temporary Refuge

The body of customary international law relating to refugees, temporary asylum seekers, and displaced persons derives from a combination of the international agreements and United Nations conventions discussed above, the general practice and behavior of states, and the shared legal expectations of all people, including refugees and

<sup>177</sup> RESTATEMENT, *supra* note 174, § 702(a)–(f).

<sup>178</sup> See Lawrence M. Friedman, Note, "The United States-China Act of 1991" and Customary International Law, 13 B.C. THIRD WORLD L.J. 257, 264 (1993). One commentator has noted that the reporters of the Restatement, in compiling this list of fundamentally protected human rights, have "selected only those rights, as recognized in the Universal Declaration of Human Rights, 'whose status as customary law is generally accepted . . . and whose scope and content are generally agreed.'" Richard B. Lillich, *The Customary International Law of Human Rights in the Revised Restatement*, 89 AM. SOC'Y INT'L L. PROC. 84, 85 (1985).

<sup>179</sup> RESTATEMENT, *supra* note 174, § 702(g) cmt. m. "Consistent pattern of gross violations" generally refers to violations of those rights that are universally accepted and that no government would admit to violating as state policy. *Id.* § 702 reporters' note 10.

<sup>180</sup> *Id.* § 702 cmt. m.

<sup>181</sup> See generally RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3.

persons in refugee-type situations.<sup>182</sup> Principal among the relevant customary laws are the right of *nonrefoulement* and the right of temporary refuge. Commentators generally agree that *nonrefoulement* is presently considered a peremptory norm of customary international law,<sup>183</sup> and that temporary refuge is an emerging norm.<sup>184</sup> Commentators disagree, however, about whether state practice is sufficiently uniform to establish principles of *nonrefoulement* and temporary refuge applicable to *all* persons in refugee-type situations, including those "who seek shelter from conditions of general armed violence or natural disaster," but who fail to meet the Refugee Convention's individualized persecution definition.<sup>185</sup> The two customary law norms are considered below.

### 1. *Nonrefoulement* under Customary Law

According to the High Commissioner for Refugees, "[t]he most fundamental of protection principles and the first of refugee rights is

<sup>182</sup> See Paust, *supra* note 170, at 72-77; PROTECTIONS AFFORDED REFUGEES, *supra* note 101, at 18-20.

<sup>183</sup> A "peremptory" norm is a norm that is "absolute; conclusive; positive; not admitting of question, delay, or reconsideration." BLACK'S LAW DICTIONARY 1295 (4th ed. 1968); see *Note on International Protection*, U.N. High Commissioner for Refugees, Executive Committee of the High Commissioner's Programme, 36th Sess., paras. 17, 24, U.N. Doc. A/AC.96/660 (1985) [hereinafter *1985 Note on International Protection*] ("The fundamental principle of *non-refoulement* . . . is an overriding legal principle having a normative character independent of international instruments . . . . Apart from being embodied in a large number of international treaties and declarations, the principle is today considered as part of general international law."); GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 73, 97 (1983) ("State practice in cases of mass influx . . . offers some support for the idea that *non-refoulement* applies . . . to the frequently large groups of persons who do not in fact enjoy the protection of the government of their country of origin . . . . The evidence relating to the meaning and scope of *non-refoulement* . . . amply supports the conclusion that today the principle forms part of general international law."); LAWYERS COMMITTEE FOR HUMAN RIGHTS, *UNCERTAIN HAVEN: REFUGEE PROTECTION ON THE FORTIETH ANNIVERSARY OF THE 1951 UNITED NATIONS REFUGEE CONVENTION* 24 n.34 (1991) [hereinafter *UNCERTAIN HAVEN*] ("The principle of non-refoulement is now considered a norm of customary international law binding even on those states which are not parties to the international conventions.").

<sup>184</sup> See Deborah Perluss & Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT'L L. 551, 558 (1986) ("Countries generally provide safe refuge and protection to fleeing civilian victims of internal armed conflict on at least a temporary basis either until the states determine the civilians to be refugees in the strict sense, or until some other permanent means of assuring their security is arranged."); Hartman, *supra* note 115, at 87-94 ("the norm of temporary refuge . . . has become a binding rule of international law").

<sup>185</sup> Hailbronner, *supra* note 111, at 123, 124, 128-29 ("A universal norm of *nonrefoulement* is unlikely to crystallize in the near future because states fear losing control of their borders. The reality of state interests militates against complete coverage for humanitarian refugees."). But see Hartman, *supra* note 115, at 87-88 (discussing temporary refuge in relation to the formally codified norm of *nonrefoulement*); Parker, *supra* note 138, at 37-39 (arguing that refugees are entitled to full respect of the principle of *nonrefoulement* even though they may not be entitled to political asylum).

that of *non-refoulement* . . . . [T]his principle is today considered as part of general international law."<sup>186</sup> The right of *nonrefoulement*, derived from conventional and customary international law,<sup>187</sup> provides protection for those whose lives or freedom would be threatened if they returned to their homeland.<sup>188</sup> State practice since the inception of formal refugee protections in 1951, embodied in the Refugee Convention, provides "persuasive evidence of the concretization of [this] customary rule."<sup>189</sup> Moreover, the practice of bodies such as the U.N. General Assembly and the UNHCR—organizations that regularly endorse *nonrefoulement* as a customary norm—has "tended to be adopted by consensus" in the international community.<sup>190</sup>

Expansion of the rule beyond Article 33 of the Refugee Convention embraces a larger class of "humanitarian" refugees: persons not receiving protection from the government of their own nation who have sought temporary asylum in a third country.<sup>191</sup> Certain conditions trigger this broader principle of *nonrefoulement* and the protection it entails. Thus, a state may not return foreigners to a country known to produce refugees or possess a record of persistent human rights abuses, nor to a country engaged in civil war or internal disruption, unless such forcible return can be justified by conditions in the returnees' home country.<sup>192</sup> The existence of a plan for involuntary repatriation therefore places on the returning state the burden of dispelling concerns that the refugees will suffer abuse or persecution upon their return.<sup>193</sup>

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<sup>186</sup> *Report of the United Nations High Commissioner for Refugees*, 40th Sess., para. 24, U.N. Doc. A/43/12 (1985).

<sup>187</sup> Article 33 of the Refugee Convention is the primary conventional source of *nonrefoulement*. See *supra* notes 103–32 and accompanying text.

<sup>188</sup> See Goodwin-Gill, *supra* note 114, at 105.

<sup>189</sup> GOODWIN-GILL, *supra* note 183, at 98.

<sup>190</sup> *Id.* In a 1985 report, the UNHCR indicated that despite some "worrisome and noteworthy" exceptions, "most States continued to adhere to the principle of *non-refoulement*." 1985 *Note on International Protection*, *supra* note 183, para. 25.

<sup>191</sup> Goodwin-Gill, *supra* note 114, at 105; see also Hartman, *supra* note 115, at 87–88. Hartman contends that the modern principle of *nonrefoulement* is not so much an expansion of codified refugee law (such as, Article 33 of the Refugee Convention) as it is "a norm of customary humanitarian law." Hartman, *supra* note 115, at 87. But see Hailbronner, *supra* note 111, at 123–24. Hailbronner argues that an examination of state practice refutes the idea that *nonrefoulement* has developed into a norm of customary international law protecting all temporary asylum seekers. Rather, Hailbronner claims, *nonrefoulement* in actual practice "protects [only] a limited number of humanitarian refugees." *Id.* at 124.

<sup>192</sup> Goodwin-Gill, *supra* note 114, at 105. In general, refugees should "be allowed to remain [in a third country] while the conditions producing their flight persist." *Id.* at 109.

<sup>193</sup> *Id.* Obligations drawn from conventional and customary international law "enjoin any action on the part of a state which returns or has the effect of returning refugees to territories where their lives or freedom may be threatened." *Id.* at 106.

Additionally, there exists under human rights law the freedom not to be returned to a nation with a record of widespread or egregious human rights abuse.<sup>194</sup> This right of *nonrefoulement* differs from the norm derived from refugee law, however, as it is based on protection from torture rather than on freedom from persecution due to race, religion, nationality, membership in a particular social group, or political opinion.<sup>195</sup> "When torture is alleged under human rights law, the right of *non-refoulement* arises when the country of origin tortures or is a gross violator of human rights."<sup>196</sup> Because Burma under the SLORC fits this definition,<sup>197</sup> international human rights principles protect the Rohingyas against forced expulsion from Bangladesh.

## 2. Temporary Refuge Under Customary Law

Closely related to the principle of *nonrefoulement* is the right of temporary refuge, an important concept for the majority of present-day refugees who, although they seek protection from internal strife until conditions improve at home, do not intend to remain permanently in a third country.<sup>198</sup> Like *nonrefoulement*, temporary refuge entails a ban on forced repatriation.<sup>199</sup> Although the two concepts are often equated,<sup>200</sup> temporary refuge is properly characterized *not* as an expansion of modern refugee doctrine, but as a norm derived from customary humanitarian law.<sup>201</sup> As such, the right of temporary refuge applies to persons suffering as a consequence of ongoing armed conflict in their country of origin. Persons seeking temporary refuge generally are not themselves the targets of persecution or the victims of an intentional failure to provide protection; rather, they are innocents who *in fact* cannot rely on the government for their safety.<sup>202</sup>

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<sup>194</sup> See Parker, *supra* note 138, at 35.

<sup>195</sup> *Id.* at 35.

<sup>196</sup> *Id.*

<sup>197</sup> See generally RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3.

<sup>198</sup> Perluss & Hartman, *supra* note 184, at 554.

<sup>199</sup> "The customary norm of temporary refuge prohibits a state from forcibly repatriating foreign nationals who [have] fled generalized violence and other threats to their lives and security caused by internal armed conflict within their own state." *Id.*

<sup>200</sup> The UNHCR, for example, has "recently begun to speak of temporary refuge as a component included within the customary principle of *nonrefoulement* . . ." Hartman, *supra* note 115, at 88.

<sup>201</sup> *Id.* at 87. Temporary refuge is "premised on a basic notion of humanitarian law: civilians are entitled to an international standard of protection because their state, distracted by its conflict, is unable to provide them with *de facto* protection." *Id.* at 88.

<sup>202</sup> See *id.* at 87-88.

Under the customary norm of temporary refuge, unlike the traditional concept of permanent asylum, the international community does not require those fleeing conflict to prove persecution or intentional neglect by their government to receive protection.<sup>203</sup> A grant of temporary asylum merely acknowledges a state's inability to safeguard its inhabitants, without assigning blame to the government of the refugees' country of origin.<sup>204</sup> The ban on forced repatriation continues until the armed conflict at home ends and the country of origin can guarantee the security of its nationals.<sup>205</sup> In practice, the UNHCR routinely merges this evolving norm of temporary asylum with the ingrained concept of *nonrefoulement*, and treats persons who seek protection under conditions relevant to either principle as "refugees."<sup>206</sup>

The level of treatment prescribed in United Nations policy statements is not so clearly generous. Although repeatedly emphasizing the "absolute nature of [a] prohibition on forced repatriation of civilian war victims,"<sup>207</sup> the UNHCR has also indicated that seekers of temporary refuge do not necessarily enjoy the full range of protections provided under the Refugee Convention and Refugee Protocol.<sup>208</sup> For example, whereas the UNHCR maintains that "detention [of refugees] should normally be avoided," the agency does not regard freedom of movement to be an inviolable guarantee.<sup>209</sup> Particularly in "situations of large-scale influx," the government of the country to which asylum seekers have fled may detain them on a variety of grounds.<sup>210</sup> Nonetheless, the conditions of detention must meet certain internationally

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<sup>203</sup> See Perluss & Hartman, *supra* note 184, at 599.

<sup>204</sup> *Id.* at 597-98.

<sup>205</sup> *Id.* at 554.

<sup>206</sup> See Hartman, *supra* note 115, at 88.

<sup>207</sup> *Id.* at 89. A recent UNHCR report even refers to the prohibition as a peremptory norm, a rule of jus cogens. *Report of the United Nations High Commissioner for Refugees*, 40th Sess., para. 22, U.N. Doc. E/1985/62 (1985).

<sup>208</sup> See *Report of the Executive Committee of the High Commissioner's Programme*, 36th Sess., para. 6, U.N. Doc. A/AC.96/660 (1985).

<sup>209</sup> Refugee Convention, *supra* note 105, art. 26.

<sup>210</sup> *Detention of Refugees and Asylum-Seekers*, U.N. High Commissioner for Refugees, Executive Committee of the High Commissioner's Programme, U.N. GAOR, 41st Sess., Supp. No. 12A, U.N. Doc. A/41/12/Add.1 (1986). The UNHCR has determined that valid grounds for detaining refugees include:

to verify identity; to determine the elements on which the claim to refugee status or asylum was based; to deal with cases where refugees or asylum-seekers had destroyed their travel and/or identification documents or had used fraudulent documents in order to mislead the authorities of the State in which they intended to claim asylum; or to protect national security or public order . . . .

*Id.*

recognized minimum standards.<sup>211</sup> According to one commentator, the practice of states indicates that seekers of temporary refuge are, at a minimum, entitled to physical space in which to live, an opportunity to receive assistance from humanitarian relief groups or the international community, and, most importantly, protection from forcible repatriation.<sup>212</sup>

## V. RECOMMENDATIONS

Burma and Bangladesh are engaged in a political struggle, in which they have subordinated their obligations under international law to concerns of sovereignty, economic stability, domestic security, and—in the case of the SLORC—a brazen desire for power and material gain.<sup>213</sup> The Rohingyas, meanwhile, are victims, of both their own nation's dictators and the military and police officials in their host country. The government of Bangladesh is unlikely to comply voluntarily with the full range of its obligations under international law,<sup>214</sup> and Burma's military junta has demonstrated little willingness to act in accordance with even the most basic international standards of conduct.<sup>215</sup> The United Nations and the international community must therefore devise means of bringing the force of law to bear in order to prevent a disastrous outcome of the current Rohingya refugee crisis.

Since forcibly seizing power in September 1988, the SLORC has repeatedly shown its disregard for the demands of international law,<sup>216</sup>

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<sup>211</sup> The UNHCR has reported with concern "that many refugees and asylum-seekers had to spend considerable periods in detention, sometimes exceeding one year, with no possibility of judicial or administrative review of the detention measure . . . ." *1985 Note on International Protection*, *supra* note 183, para. 28.

<sup>212</sup> Hartman, *supra* note 115, at 91–92, 108–09.

<sup>213</sup> See, e.g., BURMA TODAY, *supra* note 18, at 4, 6 (estimating that Burma devotes at least 50% of its gross national product to military spending).

[The] SLORC has used the money raised through foreign investment and the drug trade solely for its own survival. Improving the living standards of the Burmese people and rebuilding the country's moribund economy have been largely ignored by the ruling clique, and they have used the money instead for personal enrichment and a large build-up of personnel and weapons in the military.

*Id.* at 27.

<sup>214</sup> See ABUSE OF BURMESE REFUGEES, *supra* note 3, at 6–7 (reporting denial of Bangladeshi authorities that Rohingyas in the camps had been systematically abused and tortured by security forces, and their insistence that conditions in Arakan were sufficiently improved such that "any continuing refugee concerns about returning were not legitimate."); see also *Memorandum of Understanding*, *supra* note 98, at 412–15.

<sup>215</sup> See *supra* notes 148–64 and accompanying text.

<sup>216</sup> Senior General Saw Maung, former SLORC Chairman, has articulated the junta's approach to human rights: "[I]f anyone wants to enjoy the human rights they have in the U.S., England, or India, provided that country accepts, I will permit them to leave. But in Burma, I

acting only in the narrow financial and political interests of its elite military leaders. The U.S. Department of State has characterized Burma's human rights record under SLORC rule as "among the world's worst," and its government as "among the most repressive."<sup>217</sup> Moreover, official government statements indicate that the junta is growing increasingly obstinate in its resistance to pressure from the world community.<sup>218</sup>

Although they cannot justly be compared to the military dictators in Rangoon, Bangladeshi officials have acted out of self-interest as well, endeavoring primarily to rid themselves of the problems created by the SLORC's repressive activities in Burma. Bangladesh has agreed to repatriate only those refugees who volunteer to return to Burma,<sup>219</sup> and

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can only grant human rights suitable for the Burmese people." PROPOSAL FOR CONSTRUCTIVE INVOLVEMENT, *supra* note 7, at 4. U Kyaw Min, Burma's permanent representative to the United Nations, characterized a 1992 Commission for Human Rights resolution that contained allegations of SLORC responsibility for torture, extrajudicial executions, and other flagrant human rights abuses as "totally one-sided and unjust, highly intrusive, and interventionist . . . In a word it is irrelevant . . . the government of Myanmar [Burma] disassociates itself from the Commission's decision." *Id.* at 19.

<sup>217</sup> BURMA TODAY, *supra* note 18, at 32 (quoting statement issued by U.S. Department of State).

<sup>218</sup> See Asia Watch Press Release, *supra* note 86, at 1. General Saw Maung, articulating the junta's position on the release of political detainees and the transfer of power to elected representatives, has declared, "I am not a person who can accept proposals such as resolving issues through political means." BURMA TODAY, *supra* note 18, at 49. In a statement issued by the Burmese Ministry of Foreign Affairs, the SLORC responded to reports concerning extensive abuse of the Rohingyas' human rights and the ensuing flight of refugees from Arakan:

Recently foreign broadcasting stations . . . have carried exaggerated and fabricated reports that a large number of Myanmar Muslims have fled to Bangladesh due to the repression by Myanmar authorities of Muslims in the Rakhine [Arakan] State . . . . Moreover, attempts are being made to discredit the Myanmar Naing-Ngan using the so-called "Rohingya" problems . . . . [The SLORC] has strictly adhered to norms and principles of international practice. The Tatmadaw [Burmese Army], with its noble tradition, does not torture or commit brutal acts against the people and has always scrupulously avoided sets [sic] of religious oppression.

Press Statement, Ministry of Foreign Affairs of the Union of Myanmar, *Freedom of Worship Flourishes in Myanmar Naing-Ngan, Attempts to Sow Discord Between Myanmar Naing-Ngan and Bangladesh Will Fail* (Feb. 21, 1992), in DEMOCRACY AND POLITICS IN BURMA, *supra* note 3, at 302-03.

<sup>219</sup> A Memorandum of Understanding signed by the Bangladeshi government and the UNHCR provides that:

[Bangladesh and the UNHCR] shall cooperate with each other to ensure safe and voluntary repatriation of Myanmar refugees who opt to return under existing conditions . . . on the basis of their (refugees) own judgement of the situation in their country . . . . The two sides shall cooperate with each other to prevent any attempt by any side to interfere with the exercise of freedom of option by the refugees.

*Memorandum of Understanding*, *supra* note 98, at 413.



has earned credibility by actively pursuing United Nations involvement in the proceedings.<sup>220</sup> Since 1992, however, Bangladesh has forced thousands of refugees back across the border to Arakan,<sup>221</sup> and government authorities have repeatedly insisted on the rapid repatriation of all Rohingyas within the nation's territory.<sup>222</sup> Denying allegations made by the UNHCR and human rights groups that authorities have returned refugees against their will, Bangladeshi officials have claimed that the Rohingyas "have nothing to fear because conditions in Burma [have] improved."<sup>223</sup> Nevertheless, truly "safe and voluntary" repatriation cannot occur until the United Nations establishes international monitors inside Burma to ensure that the rights of returnees are not violated.<sup>224</sup>

The obligations imposed by international law are simply not adequate to protect the Rohingyas from abuse at the hands of Bangladeshi police in the refugee camps; from forcible repatriation to Arakan; and from continued rape, murder, religious persecution, and generalized violation of their human rights after they return to Burma. This Part recommends various measures that could be taken to persuade the Burmese and Bangladeshi governments to provide the refugees with the protection and assistance required under international law. Although their legal responsibilities are clear and unavoidable, "international law does not amount to much without some procedure to enforce it."<sup>225</sup> Devising an enforcement strategy necessitates moving outside the realm of law to a consideration of solutions attainable via humanitarian assistance and diplomatic intervention.

The international community, through the leadership of the UNHCR and other multilateral organizations, should pursue three goals with respect to Burmese refugees in Bangladesh. First, Bangladeshi officials must guarantee the Rohingyas' safety in the camps, and must utilize available humanitarian assistance to provide the refugees with adequate basic services: food, shelter, sanitation, and medical care.<sup>226</sup> United Nations monitors should ensure that Bangladeshi au-

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<sup>220</sup> See DEMOCRACY AND POLITICS IN BURMA, *supra* note 3, at 17-18.

<sup>221</sup> See *Bangladesh Urged*, *supra* note 90 (reporting the involuntary repatriation of more than 4000 Burmese refugees); see also U.S. Department of State Press Release, *supra* note 81 ("The U.S. government deplores the use of coercion by the government of Bangladesh . . . [and] calls upon the government of Bangladesh to refrain from coerced repatriation . . .").

<sup>222</sup> Asia Watch Press Release, *supra* note 86, at 1.

<sup>223</sup> *Id.* at 1-2.

<sup>224</sup> See HUMAN RIGHTS DEVELOPMENTS, *supra* note 1, at 12.

<sup>225</sup> Mark W. Janis, Book Review, 4 CONN. J. INT'L L. 767, 768 (1989) (reviewing CHRISTINE D. GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW (1987)).

<sup>226</sup> According to the UNHCR, scabies afflict 75% of refugees in the camps because of the

thorities stop the beatings, rapes, and extortion of Rohingyas that local police have perpetrated.<sup>227</sup> In addition, UNHCR personnel should keep track of humanitarian aid shipments that arrive in Bangladesh, and confirm that the supplies actually reach the Rohingyas in the camps. Second, UNHCR personnel should monitor the actual repatriation process to ensure that refugees who have expressed the desire to remain in Bangladesh are not returned against their will.<sup>228</sup> The UNHCR should resume confidential screening of individual refugees, and compile lists of all persons seeking to leave the camps and resettle in Burma. For all who do wish to return home, Bangladesh should provide safe repatriation to Arakan.<sup>229</sup>

Third, the UNHCR and other international organizations should assist in the resettlement of returnees inside Arakan, including delivering basic services and monitoring the activities of Burmese military forces in the region.<sup>230</sup> In order to achieve these three goals, the United Nations and involved members of the international community must simultaneously pursue two distinct courses of action—one humanitarian, and the other diplomatic.

#### A. Humanitarian Assistance

On the humanitarian side, the UNHCR is the organization best suited to monitor the activities of Burmese and Bangladeshi officials, to ensure that repatriation of the Rohingyas is truly "safe and voluntary," and to negotiate a lasting scheme for the refugees' resettlement in Arakan or permanent asylum in a third country. UNHCR officials have been on-site in Bangladesh since March 1992, assisting in the construction and administration of camps, distributing donations from relief organizations, and conducting informal interviews with the refugees.<sup>231</sup> The UNHCR should continue these efforts, including formal screening of refugees in the camps.

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poor quality of rice available and the lack of dairy products and leafy vegetables in their diets; more than 22,000 refugees have inadequate shelter; heavy rains during the monsoon season damage many sanitary facilities (although the ratio of latrines has increased to one for every 20 persons); and the health situation is not expected to change. U.N. High Commissioner for Refugees, *Information Sheet on Myanmar/Bangladesh Refugee Situation* (June 3, 1993) [hereinafter *UNHCR Information Sheet*], in *DEMOCRACY AND POLITICS IN BURMA*, *supra* note 3, at 418.

<sup>227</sup> See *ABUSE OF BURMESE REFUGEES*, *supra* note 3, at 7–15.

<sup>228</sup> *Id.* at 413–14.

<sup>229</sup> See *Memorandum of Understanding*, *supra* note 98, at 412–15.

<sup>230</sup> *Id.* at 414. The UNHCR plans to begin operations in Arakan to provide assistance to returnees in early 1994. *HUMAN RIGHTS DEVELOPMENTS*, *supra* note 1, at 12.

<sup>231</sup> *PROPOSAL FOR CONSTRUCTIVE INVOLVEMENT*, *supra* note 7, at 13. In response to the Bangladeshi government's request for help, the UNHCR introduced a \$27.3 million program of

In order to improve the screening process, the UNHCR should train personnel conducting refugee interviews to identify those individuals who meet the requirements for permanent asylum in third countries,<sup>232</sup> should provide counseling for seekers of asylum, and should provide legal assistance to asylum seekers who wish to appeal repatriation decisions made by Bangladeshi officials.<sup>233</sup> Recognizing that "a fair status determination process is the key to the legitimacy" of any scheme involving refugee screening, provision of asylum, or repatriation, the UNHCR should formulate a plan of action for the Rohingyas that "sets forth the elements of refugee status determination as well as the requirements for implementation which are to ensure fair screening."<sup>234</sup>

The UNHCR should also diligently monitor the Rohingyas' return and resettlement in Arakan,<sup>235</sup> and international relief agencies should establish programs to help refugees rebuild their lives in Burma.<sup>236</sup> In addition to UNHCR presence in the area, the United Nations should pressure the SLORC to provide access to returnees inside Burma to an international human rights monitoring team formed under the mandate of the Special Rapporteur of the U.N. Commission on Human Rights.<sup>237</sup> Unless such steps can be implemented, "those Burmese Muslims returning from Bangladesh, thousands of whom had been

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refugee assistance. *Id.* The UNHCR's proposed budget for 1993 included approximately \$19.6 million for its operations in Bangladesh, and an additional \$15 million for assistance of Burmese refugees. *UNHCR Information Sheet*, *supra* note 226, at 418.

<sup>232</sup> Evidence of individual persecution, gained from refugee interviews, would entitle those Rohingyas who satisfy the formal "refugee" definition to the full range of protections available under the Refugee Convention and Refugee Protocol. *See supra* notes 103-32 and accompanying text. As human rights lawyers have recognized, "[a] screening procedure that does not accurately determine refugee status runs a risk of returning refugees who fear persecution in violation of the principle of non-refoulement." *UNCERTAIN HAVEN*, *supra* note 183, at 24.

<sup>233</sup> *Id.* at 20-21.

<sup>234</sup> *Id.* at 19.

<sup>235</sup> The Memorandum of Understanding signed by the SLORC and the UNHCR on November 5, 1993 provides that the "UNHCR will be given access to all returnees; that the returnees will be issued with the appropriate identification papers and that the returnees will enjoy the same freedom of movement as all other nationals." *HUMAN RIGHTS DEVELOPMENTS*, *supra* note 1, at 12.

<sup>236</sup> Along with the UNHCR, the U.N. Food Programme plans to provide assistance in Arakan beginning in early 1994. *Id.* Oxfam and other nongovernmental organizations are currently aiding the Bangladeshi government's efforts in the camps. *UNHCR Information Sheet*, *supra* note 226, at 418.

<sup>237</sup> *See Yokota*, *supra* note 15, at 402-03. According to the Special Rapporteur, such a team would "operate with an integrated human rights/humanitarian approach with consideration for the refugee and repatriation issues . . . [and] be composed of independent experts and selected representatives of the specialized agencies with expertise in the relevant areas." *Id.* at 403.

detained by the *tatmadaw* before fleeing the country, would be particularly at risk of a reoccurrence of human rights violations . . . ."<sup>238</sup>

### B. Diplomatic Intervention

On the diplomatic front, Ambassador Jan Eliasson, U.N. Under Secretary-General for Humanitarian Affairs, is well situated to arrange and facilitate talks between the governments of Burma and Bangladesh. The repatriation agreement signed on April 28, 1992 by Bangladeshi officials and SLORC leaders<sup>239</sup> resulted largely from Eliasson's efforts.<sup>240</sup> The SLORC's recent decision to grant the UNHCR access to returnees inside Burma<sup>241</sup> offers some hope that the junta will respond to continuing pressure from the world community.<sup>242</sup> In addition to continuing diplomatic negotiations with the governments of both countries, Eliasson should convince the General Assembly to extend his mandate<sup>243</sup> to include supervision of emergency relief efforts across the border to persons inside Burma.<sup>244</sup> Such an expanded role would likely receive support not only from Western nations, but also from nations in the region<sup>245</sup> that have protested the SLORC's persecution of the Rohingyas in the past.<sup>246</sup>

## VI. CONCLUSION

It is important to recognize that international legal principles such as *nonrefoulement* and temporary refuge provide nothing more than interim solutions to a much larger and more difficult set of problems. The United Nations, the international community, and international

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<sup>238</sup> HUMAN RIGHTS DEVELOPMENTS, *supra* note 1, at 12.

<sup>239</sup> *Joint Statements*, *supra* note 8, at 309-15.

<sup>240</sup> Telephone Interview with Linda Hazou, Office of the U.N. Under Secretary-General for Humanitarian Affairs (Mar. 4, 1993). Ms. Hazou indicated that, although repatriations have continued despite the lack of formal involvement of either the UNHCR or Ambassador Eliasson, informal discussions are ongoing between the two United Nations bodies and the governments of both Bangladesh and Burma.

<sup>241</sup> HUMAN RIGHTS DEVELOPMENTS, *supra* note 1, at 12.

<sup>242</sup> The SLORC shows little willingness, however, to ease its grip on power or to improve the overall human rights climate in the country. Interview with U Bo Hla Tint, Minister for Foreign Affairs, National Coalition Government of the Union of Burma, in Washington, D.C. (Feb. 24, 1994); see Yokota, *supra* note 15, at 365-403.

<sup>243</sup> At present, Ambassador Eliasson's mandate is primarily to coordinate aid. PROPOSAL FOR CONSTRUCTIVE INVOLVEMENT, *supra* note 7, at 15.

<sup>244</sup> See *id.* at 18.

<sup>245</sup> Malaysia, Indonesia, Singapore, Brunei, the Philippines, and Pakistan have all expressed concern about the plight of the Rohingyas, and have urged the SLORC to agree on a peaceful solution to the crisis. RAPE, FORCED LABOR AND RELIGIOUS PERSECUTION, *supra* note 3, at 23.

<sup>246</sup> *Id.* at 16.

law obligates all affected states to work toward alleviating the *causes* of mass refugee migrations, be they overt human rights abuses or merely intolerably dangerous living conditions.<sup>247</sup> Beyond working to compel the SLORC to discontinue its gross and persistent violation of the Burmese people's human rights, the United Nations and the international community should work to remove the military regime from power and to replace it with a democratically elected government.<sup>248</sup> Solving the underlying animosities and conflicts that produce mass refugee populations would eliminate the need for permanent or temporary third country asylum altogether.

The world's refugee situation is not hopeful, with more than sixteen million persons currently displaced from their countries of origin—unable, or simply too afraid, to return home.<sup>249</sup> Nevertheless, by pursuing all available means to secure international protection, humanitarian assistance, and voluntary return or resettlement, today's refugees—including the Rohingyas of Arakan—may become tomorrow's recognized and respected national citizens.

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<sup>247</sup> See *supra* notes 165–81 and accompanying text.

<sup>248</sup> The National Coalition Government of the Union of Burma recommends that concerned nations take the following actions:

Champion Burmese democracy at the UN by moving the issue from the humanitarian and human rights level to the political level. Push for Security Council sanctions and action, including unseating the SLORC at the UN, the removal of LDC [less developed country] status, and the suspension of UNDP and UNDCP programmes in Burma until political prisoners are released and political power is transferred. A UN sponsored nation-wide ceasefire, peace talks, and a transition to multi-party democracy would be ideal.

U Sein Win, Prime Minister, National Coalition Government of the Union of Burma, *Statement on Humanitarian and Political Action Concerning Burma* (undated), in DEMOCRACY AND POLITICS IN BURMA, *supra* note 3, at 279.

<sup>249</sup> WORLD REFUGEE SURVEY, *supra* note 19, at 32–33.