

THE TROUBLE OF PROVING “GENOCIDAL INTENT”:
THE MODERN ROHINGYA CRISIS IN HISTORICAL
AND POLITICAL CONTEXT

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On the heels of the Holocaust, the then-nascent United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide—its first-ever international human rights treaty. As such, the Convention is arguably the most sacred text in modern international law—but also the most disregarded. The reasons for this indifference are largely political, yet typically explained away under the guise of law: governments routinely argue that it is impossible to know whether mass atrocities were intentional, as is required in the legal definition of genocide. The present Rohingya crisis, for which ample evidence of genocidal intent has emerged, provides a clear example of this blatant disregard for international law. As one of the worst genocides in the past century continues to unfold in Myanmar, nearly all states sit on their hands.

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I. THE BIRTH OF GENOCIDE: LEMKIN'S LEGAL AND POLITICAL LEGACY

A. *Inventing a Word When No Other Will Do*

In the wake of the Holocaust, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide (Convention)—perhaps the most sacred text in modern international law.¹ The Convention was the first human rights treaty adopted by the newly-formed body, addressing conduct considered, to this day, the “crime of all crimes.”² Widely signed and ratified,³ the Convention rapidly attained the status of customary international law and, arguably, of *jus cogens*,⁴ thereby cementing genocide as the most heinous of all possible crimes in the minds of international lawyers and laypeople alike and, in the words of the UN Economic and Social Council, the “gravest violation of

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

2. NICOLE RAFTER, *THE CRIME OF ALL CRIMES: TOWARD A CRIMINOLOGY OF GENOCIDE* (2016).

3. To date, 150 of 193 U.N. member states have signed, ratified, or acceded to the Convention. Although a higher number of states have signed or acceded to other international human rights and criminal law treaties, scholars attribute this phenomenon to various factors bearing little relation to the Convention's position in the hierarchy of international human rights law. Such influences include potential overshadowing of the Convention by subsequent early human rights treaties as well as diverse socio-political factors faced by various would-be signatories. See generally Karen E. Smith, *Acculturation and the acceptance of the Genocide Convention*, 48 *COOPERATION & CONFLICT* 358–377 (examining at length the extent to which “material costs and benefits, the logic of appropriateness, and acculturation” have played a role in states' willingness to accept the Convention, with particular emphasis on the cases of Ireland, the United Kingdom, and the United States). For a current list of states party to the Convention, see *Convention on the Prevention and Punishment of the Crime of Genocide: Status*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en (last visited Feb. 20, 2019).

4. See Manuel J. Ventura, *The Prevention of Genocide as a Jus Cogens Norm? A Formula for Lawful Humanitarian Intervention*, in *SHIELDING HUMANITY: ESSAYS IN INTERNATIONAL LAW IN HONOR OF JUDGE ABDUL G. KOROMA* 289–351 (Charles C. Jalloh & Olufemi Elias eds., 2015) (explaining the non-derogable nature of rights set out in the Convention on Genocide).

human rights it is possible to commit.”⁵

Notwithstanding the Convention’s notoriety, the origin of the word genocide is largely unknown and typically taken for granted. While many people possess at least some passing familiarity with the term genocide and its meaning, few know of its rather peculiar origins and specific implications.⁶ Indeed, contrary to what scholars and laypeople alike might readily presume, the word is in fact a recent and deliberate invention, and thus unusual in its speedy entry into both legal and common parlance. The first recorded use of the term was in 1944, when Polish-Jewish lawyer Raphael Lemkin penned a complete chapter on genocide in his book *AXIS RULE IN OCCUPIED EUROPE*.⁷

Lemkin’s longstanding fascination with the subject and, specifically, his interest in giving name to the crime now called genocide, stemmed in large part from his own experiences. During his lifetime, Lemkin bore witness to the Armenian Genocide (1914–1923) and the massacre of Assyrians in Iraq (1933) from afar. The mass atrocities in both regions disturbed him deeply, particularly as he found no legal framework forbidding such “crimes of barbarity,” as he initially referred to them.⁸ In the 1940s, Lemkin went on to watch the Holocaust unfold, devastating his own ethno-religious community and homeland, resulting in the annihilation of approximately 90% of Poland’s Jews.⁹ German-occupied Poland was

5. Benjamin Whitaker (Special Rapporteur for the Sub-Commission on Prevention of Discrimination of Minorities), *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. Doc. E/CN.4/Sub.2/1986.6 (July 2, 1985); see also Fred K. Nkusi, *Genocide: Never Again is Possible, But it’s Everyone’s Responsibility*, *NEW TIMES* (Apr. 11, 2016), <https://www.newtimes.co.rw/section/read/198864> (“Today, genocide is known as the ultimate crime and the gravest violation of human rights it is possible to commit.”).

6. “Genocide” has been translated into at least 80 languages, including 15 of the most commonly spoken languages. *The Word “Genocide” Translated or Defined in 80 Languages*, PREVENT GENOCIDE INT’L, <http://www.preventgenocide.org/genocide/languages.htm> (last visited Dec. 30, 2018).

7. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79–95 (1944).

8. *Id.* at 91; see generally, Steven Kiersons, *The Crime of Barbarity I*, SENTINEL PROJECT (Aug. 15, 2013), <https://thesentinelproject.org/2013/08/15/the-crime-of-barbarity/> (citing Lemkin’s early use of the phrase “crimes of barbarity” to describe what would later become the crime of genocide).

9. Edna Friedberg, *The Truth About Poland’s Role in the Holocaust*, ATLANTIC

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the last and most lethal site of the “final solution of the Jewish question.”¹⁰ Troubled further by the immense and seemingly indescribable scope of this “crime against humanity itself,”¹¹ Lemkin became devoted to finding the words to truly encapsulate such vile and calculated evil:¹² the deliberate, systematic attempt to annihilate an entire population. Ultimately, Lemkin felt that no existing word could adequately capture the crime’s abhorrent scope and thus landed on a word of his own creation: combining the Greek noun *genos* (race or tribe) with the Latin suffix *-cide* (killing).¹³ With the horrors of the Holocaust still fresh in their minds, the term rapidly gained traction among government officials, academics, and others.

B. *Defining and Criminalizing Genocide in Legal Terms*

Lacking, as Lemkin had, any better way to describe horrors like those of the Holocaust, the world latched on to the term *genocide*. With Lemkin devoted to its proliferation, general use of the term would burgeon over just a few short years.¹⁴ Still, genocide had yet to

(Feb. 6, 2018), <https://www.theatlantic.com/international/archive/2018/02/poland-holocaust-death-camps/552455/> (“By the end of the war, 3 million Polish Jews—90 percent of the prewar population—had been murdered by the Germans and their collaborators of various nationalities, one of the highest percentages in Europe.”); Michael Ignatieff, *The Unsung Hero Who Coined the Term “Genocide”*, NEW REPUBLIC (Sept. 22, 2013), <https://newrepublic.com/article/114424/raphael-lemkin-unsung-hero-who-coined-genocide> (“Forty-nine members of Lemkin’s family, including his mother and father, were rounded up in eastern Poland and gassed in Treblinka in 1943.”) (last visited Feb. 20, 2019).

10. *E.g.*, Wannsee Conference, *Wannsee Protocol* (Jan. 20, 1942), <http://holocaust.umd.umich.edu/news/uploads/WannseeProtocols.pdf> (the phrase “final solution” is repeated 13 times throughout the Wannsee Protocol, while “final solution of the Jewish question” is repeated six times).

11. ALAIN DESTESXE, *RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY* 3 (1995) (observing that Lemkin was the first to set forth the theory that the crime of genocide could not be described by existing laws of war, but rather required a separate definition, as “this was ‘not only a crime against the rules of war, but a crime against humanity itself’”).

12. Ignatieff, *supra* note 9 (“Lemkin’s campaign to promote the convention became an all-consuming obsession: he left adjunct posts at Yale and New York University, neglected himself, forgot to pay his rent, was evicted, went without food while spending all his days lobbying, cajoling, and brow-beating diplomats, politicians, public figures, and newspapermen about genocide.”).

13. LEMKIN, *supra* note 7, at 79.

14. A mere two years passed between Lemkin’s introduction of the term in 1944 and the adoption of the Genocide Resolution in 1946, and another two before the adoption of the Convention in 1948; all the while, Lemkin continued his tireless

be given a precise legal definition and weight. Certainly, the general public understood genocide had something to do with the intentional annihilation of an entire group of people, yet many questions remained. For instance, would genocide encompass any other acts beyond killings and if so, which acts? Further, what types of groups would the term contemplate? While these questions had yet to be tackled, international momentum propelled Lemkin's work as he began lobbying for a formal legal definition and international criminalization of genocide.¹⁵

Lemkin worked first and foremost to ensure genocide would find a home in the lexicon of the new world government. During the U.N. General Assembly's first-ever session in 1946, U.N. Resolution 96 (I) (the Resolution) affirmed for the first time that "genocide is a crime under international law" and declared "[t]he punishment of the crime of genocide . . . a matter of international concern."¹⁶ Relying largely on Lemkin's work, the Resolution also defined the crime in broad strokes: "[g]enocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings" and specifically referenced the persecution of "*racial, religious, political* and other groups."¹⁷ The Resolution further emphasized the crime's dire implications, as well as the critical reasoning behind what would soon become the binding Genocide Convention: "[s]uch denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to the moral law and to the spirit and aims of the United Nations."¹⁸

The Resolution thus marked an important first step in defining genocide. However, as a mere resolution, it did not bind states, nor did it provide a robust legal definition of the crime. As the international community continued to learn the extent of the horrors of the Holocaust, then-extant states joined together to commit that such atrocities would never again occur under the watch of the new world government.¹⁹ At the time, they meant it: the UN swiftly made

work and lobbying on its behalf. *See* Ignatieff, *supra* note 9.

15. *Id.*

16. G.A. Res. 96(I), The Crime of Genocide (Dec. 11, 1946).

17. *Id.* (emphasis added).

18. *Id.*

19. Convention, *supra* note 1.

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prevention and punishment of such mass atrocities among its first and top priorities.²⁰ In line with Lemkin's aspirations, the Convention defined and criminalized genocide under binding international law. In its final form, the Convention specifically defined "genocide" as encompassing three key elements. Genocide, the Convention reads, comprises "[1] any of the following *acts committed* [2] with the *intent* to destroy, in whole or in part, [3] a national, ethnical, racial or religious *group*."²¹ Clarifying further, the Convention stipulated five genocidal acts:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.²²

While the Convention ultimately removed the preceding Resolution's protections for political groups, the General Assembly generally succeeded in giving true legal weight to the newborn crime. With the most noble of intentions, the international community thus sought explicitly to "liberate mankind from such an odious scourge"—a task for which they presciently recognized "international co-operation [would be] required."²³ Tragically, however, the collective trauma and outrage wrought by the Holocaust subsided nearly as quickly as it had mounted.

C. *A Short Memory: Ignorance is Bliss in the "Age of Genocide"*²⁴

Although the Convention remains among the most revered texts in international law, it became one of the most disregarded in an astonishingly short time span. In a few decades, a vast majority of

20. Ignatieff, *supra* note 9.

21. Convention, *supra* note 1, art. II (emphasis added).

22. *Id.*

23. *Id.*, pmb1.

24. See SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE (2002) (referring generally to the latter half of the twentieth century as the "Age of Genocide").

states, many of whom once vigorously supported the Convention, prioritized their own socio-political considerations over preventing and punishing those responsible for genocides that clearly met the Convention's legal criteria. Government officials engaged in mind-boggling linguistic backflips to avoid even a mere utterance of "genocide" in public.²⁵ Since states had "undertake[n] to prevent and punish" the crime of genocide, states feared that if they used the term, they would be bound by the Convention's text.²⁶ Accordingly, many states routinely employed clever, markedly less forceful turns of phrase. During the Rwandan Genocide, for instance, the Clinton Administration instructed its spokespeople to publicly state only that "acts of genocide *may* have occurred," fearing that "so stark a label [as genocide] could inflame public calls for action the Administration is unwilling to take."²⁷ Indeed, over the past several decades, the United States, other governments, and even the United Nations have similarly sought to downplay the severity of ongoing genocides, describing them as "ethnic cleansing," "war crimes," and "crimes against humanity"—acts that do not explicitly require state or multilateral intervention.²⁸

25. Douglas Jehl, *Officials Told to Avoid Calling Rwanda Killings 'Genocide'*, N.Y. TIMES (June 10, 1994), <https://www.nytimes.com/1994/06/10/world/officials-told-to-avoid-calling-rwanda-killings-genocide.html>.

26. Convention, *supra* note 1, art. I.

27. Jehl, *supra* note 25 (emphasis added). *See also* Interview by Camilla Siazon with Katie Cronin-Furman, *The Rohingya Crisis and the Meaning of Genocide*, COUNCIL ON FOREIGN RELATIONS (May 8, 2018), <https://www.cfr.org/interview/rohingya-crisis-and-meaning-genocide> ("If we look back to Rwanda in 1994, we saw members of the Clinton administration in the United States trying really hard to avoid using the term genocide, because they thought if they called it genocide then they would have to do something. It is something that we have seen again and again: this idea that if it is genocide then we have to act, so let's not name it as such.").

28. "War crimes" and "crimes against humanity" may both incur individual criminal responsibility under international law, conferring jurisdiction on the International Criminal Court, yet in no way require state or multilateral intervention. "Ethnic cleansing" is not recognized as an independent crime under international law. *War Crimes*, UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <http://www.un.org/en/genocideprevention/war-crimes.html> (last visited Dec. 30, 2018); *Crimes against Humanity*, UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <http://www.un.org/en/genocideprevention/crimes-against-humanity.html> (last visited Dec. 30, 2018); *Ethnic Cleansing*, UNITED NATIONS OFFICE ON GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <http://www.un.org/en/genocideprevention/ethnic-cleansing.html> (last visited Dec.

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Absurd and dismissive as these linguistic evasions may be, the reasoning of states and multilateral institutions has never been difficult to spot. In the minds of world leaders and diplomats, the Convention's language implies that any government or institution that publicly recognizes an ongoing genocide becomes legally and morally obligated "to prevent and to punish."²⁹ In cases where states had little to gain by intervening—the case with respect to the vast majority of both past and ongoing genocides—few wished to become embroiled in crises that seemed a world away and irrelevant to their own interests.³⁰ Further, some states fear that intervention may create legal precedent that could endanger their Westphalian sovereignty as enshrined in the U.N. Founding Charter, in turn opening *themselves* up to intervention and perceived violations of sovereignty.³¹ Such an opening could allow for future prosecution of their own "constitutionally responsible rulers, public officials or private individuals"—a frightful prospect for individuals in positions of power who could become subject to prosecution.³²

Since the Holocaust, the wolves have guarded the lambs in tacit, pack-like formation. Those states best positioned to prevent or halt genocide in accordance with their treaty obligations—and in particular, those with permanent veto seats on the Security Council—instead jointly refrain from intervention in both word and deed. When asked to explain their inaction in legal terms, in the face of

30, 2018).

29. Convention, *supra* note 1, art. I.

30. See, e.g., Jehl, *supra* note 25 ("[The] Administration . . . has become deeply wary of new entanglements abroad, particularly in cases like Rwanda, a landlocked African country to which the United States has no historic ties. Without oil or other resources as a rationale, the case for military intervention would have to be based on whether ending the killing is worth the cost in American lives and dollars.").

31. U.N. Charter, ch. I, art. 2(1); see also *Treaty of Westphalia* (Oct. 24, 1648), <https://is.muni.cz/el/1423/podzim2008/MVZ430/um/Treaty-of-Westphalia.pdf>; see, e.g., Louis Charbonneau, *Russia U.N. Veto on Syria Aimed at Crushing West's Crusade*, REUTERS, Feb. 8, 2012, <https://www.reuters.com/article/us-un-russia/russia-u-n-veto-on-syria-aimed-at-crushing-west-s-crusade-idUSTRE8170BK20120208> ("Moscow and Beijing did not hide their disdain for an idea they equate with violating states' sovereignty, which the United Nations was founded to protect."); Siazon & Cronin-Furman, *supra* note 27 ("There is also the fact that Myanmar has the support of China, so any intervention against the Burmese government's will would be very difficult to accomplish. The [UN] Security Council is not going to get China's support to intervene if Myanmar doesn't want them there, so that is a major hurdle.").

32. Convention, *supra* note 1, art. IV.

irrefutable evidence that acts of genocide have indeed occurred,³³ most states continue to skirt their obligations, typically pointing toward the element of genocide that is most difficult to prove—genocidal intent.³⁴ Though a longstanding practice, in modern history this phenomenon is perhaps nowhere better exemplified than in the case of the Rohingya genocide.

II. THE ROHINGYA CRISIS: GENOCIDAL INTENT AS THE ULTIMATE POLITICAL PAWN

The legal definition of the crime of genocide, with three clearly articulated elements, is surprisingly straightforward to comprehend. Demonstrating the first two elements is typically easy. The third element is routinely the most challenging for international lawyers and human rights advocates to prove. This is exemplified by global treatment of the ongoing Rohingya crisis.

A. *The Genocidal Act: No Arguments Here*

As a threshold matter, in order to prove genocide, the perpetrator, be it an individual or conspiratorial group, must commit at least one of the five genocidal acts enumerated in the Convention. The first of these acts is *prima facie* the most egregious and thus notable and newsworthy: “[k]illing members of the group.”³⁵ Consequently, the vast majority of genocides do not garner consideration as such in the international press or by states until a relatively large number of killings take place, typically in the form of large-scale massacres.³⁶ In reality, however, most genocides actually begin with at least one or more of the other, seemingly lesser genocidal acts.

In the case at hand, for instance, states did not begin to take serious note of Myanmar’s discriminatory policies and ruthless

33. See generally POWER, *supra* note 24 (detailing widespread and repeated reluctance on the part of government officials to acknowledge evidence of genocidal intent in the context of numerous genocides spanning the late twentieth century).

34. *Id.*

35. Convention, *supra* note 1, art. II.

36. See Jehl, *supra* note 25 (explaining that in the case of genocide, “[d]iplomacy is not famous for haste or blunt truths,” discussing the slow international response to the Cambodian and Rwandan genocides). See also POWER, *supra* note 24 (detailing various cases of states’ reluctance to acknowledge ongoing genocides on the basis of legally relevant factors beyond mass killings).

treatment of the Rohingya until September 2017. At that time, the nation's most brutal crackdown up to that point resulted in tens of thousands of Rohingya deaths³⁷ and flooded Bangladesh with over 700,000 additional Rohingya refugees.³⁸ However, both before and after the 2017 massacre, the Rohingya have long suffered both under military (Tatmadaw) rule and recent quasi-democratic rule. Indeed, four of the five genocidal acts outlined in the Convention were, and continue to be perpetrated against Myanmar's Rohingya,³⁹ with national, regional, and local authorities adopting systematic policies and practices that wear down Rohingyas living in Myanmar, including the 600,000 who remain there today.⁴⁰

The most egregious violations are the periodic Rohingya clearance operations, starting with 1978's "King Dragon Operation" and continuing to more recent pogroms, such as those in 1991, 2012, and 2016.⁴¹ Yet routine and arbitrary acts of harassment, extortion, physical and sexual assault, arrest, indefinite detention, and internment, also unquestionably "[cause] serious bodily or mental

37. Pinpointing the precise death toll remains difficult, with estimates varying widely. Groups like Médecins Sans Frontières have estimated at least 10,000 people were killed, while TIME has extrapolated that at least 43,000 parents may have been killed. See James Bennet, *Rohingya Death Toll Likely Above 10,000, MSF Says Amid Exodus*, ABC (Dec. 14, 2017), <https://www.abc.net.au/news/2017-12-14/rohingya-death-toll-in-the-thousands-says-msf/9260552>; Laignee Barron, *More than 43,000 Rohingya Parents May Be Missing, Experts Fear They Are Dead*, TIME (Mar. 8, 2018), <http://time.com/5187292/rohingya-crisis-missing-parents-refugees-bangladesh/>.

38. *Rohingya Emergency*, UNITED NATIONS HIGH COMM'R FOR REFUGEES, <http://www.unhcr.org/en-us/rohingya-emergency.html> (last updated Aug. 15, 2018). These 723,000 refugees are in addition to hundreds of thousands of Rohingya who had fled violence in Myanmar since the early 1990s, bringing the Rohingya population in Bangladesh to over one million. Cox's Bazar has thus effectively become the largest refugee camp in the world today. Charlotte Bellis, *Rohingya Surviving in 'The World's Largest Refugee Camp'*, AL JAZEERA ENGLISH (June 20, 2018), <https://www.aljazeera.com/news/2018/06/rohingyas-surviving-the-worlds-largest-refugee-camp-180620140117850.html>.

39. Human Rights Council, Rep. of the Independent International Fact-Finding Mission on Myanmar, ¶ 84, U.N. Doc. A/HRC/39/64 (2018) [hereinafter U.N. Human Rights Council Myanmar Report].

40. Jon Emont & Myo Myo, *Rohingya Muslims Who Remain in Myanmar Struggle to Survive*, WALL ST. J. (Aug. 8, 2018), <https://www.wsj.com/articles/rohingya-muslims-who-remain-in-myanmar-struggle-to-survive-1533720603>.

41. Maung Zarni & Natalie Brinham, *Waves of Genocidal Terror Against Rohingyas by Myanmar and the Resultant Exodus Since 1978*, MIDDLE E. INST. (Nov. 14, 2017), <http://www.mei.edu/publications/waves-genocidal-terror-against-rohingyas-myanmar-and-resultant-exodus-1978>.

harm to members of the group.”⁴² Further, by legally barring Rohingya families from having more than two children, authorities *prima facie* “impos[ed] measures intended to prevent births within the group.”⁴³ Imposing regulations confining Rohingyas to their own townships and villages, authorities also effectively prevent the Rohingya from such basic livelihood activities as attending school, engaging in commerce, and obtaining professional employment.⁴⁴ Furthermore, the authorities also prevent them from procuring food, water, sanitation, and health services.⁴⁵ In doing so, the Tatmadaw have “[d]eliberately inflict[ed] . . . conditions of life calculated to bring about [the group’s] physical destruction.”⁴⁶

Put more simply, and recalling once again that only *one* of five acts must be committed to meet genocide’s legal threshold, it would be nearly impossible even for Myanmar—let alone other governments and observers—to deny that such acts had occurred. In pursuit of their respective interests, both Myanmar and foreign states

42. Convention, *supra* note 1, art. II(b); *see also* Zarni & Brinham, *supra* note 41 (discussing acts of violence against Rohingya communities).

43. Convention, *supra* note 1, art II(d); *see* Chris Lewa, *Two-child Policy in Myanmar Will Increase Bloodshed*, CNN (June 6, 2013, 2:19 AM), <https://www.cnn.com/2013/06/06/opinion/myanmar-two-child-policy-opinion/index.html> (last modified June 6, 2013) (addressing the introduction of a new government policy barring Myanmar’s Rohingya population from bearing more than two children per couple).

44. Syed S. Mahmood et al., *The Rohingya People of Myanmar: Health, Human Rights, and Identity*, 389 LANCET 1841, 1845 (2017); *see also* “Caged Without a Roof”: *Apartheid in Myanmar’s Rakhine State*, AMNESTY INT’L (2017), <https://www.amnestyusa.org/wp-content/uploads/2017/11/Caged-without-a-Roof-Apartheid-in-Myanmar-Rakhine-State-FINAL.pdf> (last visited Feb. 22, 2019).

45. *Id.* In at least one additional case, authorities and locals even went so far as to fence in an entire village for forty-five days in advance of the 2017 attacks, depriving them of food and forcing them to subsist on nothing but leaves, with two villagers ultimately dying of starvation. Ashley S. Kinseth, *Were the Rohingya Massacres Pre-planned?*, DHAKA TRIBUNE (July 12, 2018), <https://www.dhakatribune.com/magazine/2018/07/12/was-the-rohingya-massacres-pre-planned> [hereinafter Kinseth, *Were the Rohingya Massacres Pre-planned?*].

46. Convention, *supra* note 1, art. II(c); *see* Ashley S. Kinseth, *What’s Happening in Myanmar is Genocide*, AL JAZEERA ENGLISH (Oct. 18, 2017), <https://www.aljazeera.com/indepth/opinion/happening-myanmar-genocide-171016114145271.html>; Ashley S. Kinseth, *Rohingya Statelessness in Myanmar and Avenues for Reform*, 12–15 (Jan. 21, 2014) (unpublished manuscript), https://www.slideshare.net/slideshow/embed_code/key/MER1aPILie8Q5G [hereinafter Kinseth, *Rohingya Statelessness*].

would focus their denials on other elements of the crime in order to, in Myanmar's case, evade accusations of genocide and potential foreign intervention, and in case of the rest of the world, to evade pressure to *recognize* Myanmar's genocide, lest they be called upon to intervene.

B. *The Group: Myanmar Stands Alone*

When making the legal case for genocide, demonstrating the existence of an impacted “national, ethnical, racial or religious group” is not typically challenging. For instance, it was clear that European Jews and Rwanda's Tutsis suffered the brunt of mass atrocities on the basis of their respective group identities.⁴⁷ Consequently, locating records of either genocidal regimes or the international community addressing the element of the existence of a group typically proves to be a challenging task. Myanmar, however, represents one of very few exceptions to this general rule, as the Tatmadaw have worked for decades to rewrite history and characterize the Rohingya minority not as a legitimate national “ethnic group,”⁴⁸ but rather as a horde of outsiders and illegal migrants posing a threat to the very fabric of Myanmar society—thereby solidifying their own popularity in the minds of Myanmar's citizenry at the expense of Rohingya identity.⁴⁹

47. One key exception may be the Cambodian Genocide, where it is more difficult to make the case that a “national, ethnical, racial or religious group,” G.A. Res. 96(I), *supra* note 16, was the object of persecution, even though certain types of individuals, such as the educated and political groups were targeted. Nonetheless, and perhaps given the gravity of the crimes, the term “genocide” is typically freely used by Cambodians and outsiders alike to describe the Khmer Rouge atrocities. When called on to provide a legal basis for this label, proponents have typically focused on the disproportionate death toll inflicted on Cambodia's ethnic Vietnamese and Chan Muslims. See B.B., *When Does a Massacre Become a Genocide?*, ECONOMIST (Sept. 17, 2010), <https://www.economist.com/banyan/2010/09/17/when-does-a-massacre-become-a-genocide>.

48. Sai Wansai, *Clarifying Myanmar's Complex Ethnic Makeup*, ASIA TIMES (Dec. 7, 2017), <https://www.asiatimes.com/2017/12/opinion/myanmars-controversial-135-ethnicity-count-needs-clarity/> (last visited Feb. 22, 2019) (exploring the complex historical backdrop against which the notion of Myanmar's modern “135 ethnic groups” or “national races”—membership in which has become key to citizenship—emerged).

49. Richard C. Paddock, *For Myanmar's Army, Ethnic Bloodletting is Key to Power and Riches*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/2018/01/27/world/asia/myanmar-military-ethnic-cleansing.html> (characterizing the Tatmadaw as “a force the casts itself as the champion of the country's ethnic Bamar Buddhist majority,” and one that has “kept

Yet despite the Tatmadaw's efforts to erase Rohingya ethnic-group identity, there is ample evidence of Rohingyas' long and rich history in Myanmar's Northern Rakhine State.⁵⁰ Not only have the Rohingya long self-identified as a distinct ethnic group, but the government itself recognized them as such just decades ago. Upon independence in 1948, the nascent Burmese government granted *de facto* citizenship to 144 recognized national "ethnic races"—among them the Rohingya.⁵¹ At the time, various prominent figures emphasized the importance of Rohingya inclusion, explicitly identifying the group by name. In 1946, for instance, General Aung San, the late father of Aung San Suu Kyi and an enduringly beloved figure in Myanmar, assured full rights and privileges to the Rohingya, whom he recognized as a "native people."⁵² Burma's first President Sao Shwe Thaik famously pronounced that "[i]f the Rohingyas are not indigenous, nor am I."⁵³ As late as 1954, Burma's first Prime Minister U Nu also stated: "[the Rohingya] are our national brethren. . . . They are on the same par in the status of nationality with [recognized indigenous races like] Kachin, Kayah, Karen, Mon, Rakhine, Shan. They are one of the ethnic races of Burma"—a sentiment that, at the time, was met with little to no resistance.⁵⁴

Despite Burma's founding fathers' best intentions, in 1974 a *coup*

Bamar nationalism as its central value."); see also Richard C. Paddock, *Myanmar General's Purge of Rohingya Lifts His Popular Support*, N.Y. TIMES (Nov. 26, 2017), <https://www.nytimes.com/2017/11/26/world/asia/myanmar-rohingya-min-aung-hlaing.html>.

50. See Keith A. Leitch, *Decoding the Past: The Rohingya Origin Enigma 3* (Apr. 2014) (unpublished manuscript) http://www.academia.edu/6591213/Decoding_the_Past_The_Rohingya_Origin_Enigma ("[I]t cannot be denied that a large number of Muslims have resided in [Rakhine State] for hundreds of years.").

51. Nurul Islam, *Rohingya Tangled in Burma Citizenship Politics*, KALADAN NEWS (May 30, 2012), <http://www.kaladanpress.org/feature-mainmenu-28/45-kaladan-news/3669-rohingya-tangled-in-burma-citizenship-politics>.

52. Kinseth, *Rohingya Statelessness*, *supra* note 46, at 18.

53. Habib Siddiqui, *Bias and Prejudice Die Hard*, ASIAN TRIBUNE (Oct. 23, 2016), <http://asiantribune.com/node/89630> (quoting General Aung San: "I give (offer) you a blank cheque. We will live together and die together. Demand what you want. I will do my best to fulfill them. If native people are divided, it will be difficult to achieve independence for Burma.").

54. Nurul Islam, *Rohingya and Nationality Status in Myanmar*, in *CITIZENSHIP IN MYANMAR: WAYS OF BEING IN AND FROM BURMA* (Ashley South & Marie Lall eds., 2018) (quoting a radio address given by Prime Minister U Nu on September 25, 1954).

d'état led by General Ne Win led to a new Constitution that functionally reduced the number of recognized national races from 144 to 135, a subset shortlisted by Ne Win himself and approved by the new military regime.⁵⁵ In the subsequent decades, officials made “repeated reference [to] the refined list of national races as the authoritative guide to Burmese citizenship despite the fact that the new list was nowhere formally enshrined in law, nor did it comport with earlier interpretations of the Citizenship Act [which remained in effect].”⁵⁶

The divisive rhetoric launched by the military regime in 1972 burgeoned and continues to thrive in modern Myanmar, with the government’s military arm relying on such perceived threats to safeguard their power amidst democratization.⁵⁷ The Tatmadaw’s domestic propaganda machine has proven wildly successful in fomenting Buddhist-nationalist sentiment and marshaling public opinion against Rohingyas, capitalizing on mounting global Islamophobia and recasting them as “illegal Bengalis,” “terrorists,” and “kalar”—a Myanmarese racial slur for darker-skinned immigrants and Muslims.⁵⁸ While Myanmar continually refuses Rohingya citizenship, it has offered to provide National Verification Cards to those who are willing to admit that they are illegal migrants and in turn be listed on their cards as Bengali.⁵⁹ These cards are domestic identity documents that carry little legal weight. While the program is

55. CONSTITUTION OF THE UNION OF BURMA Jan. 3, 1974. The Constitution makes 19 references to Burma’s “national races.”

56. Kinseth, Rohingya Statelessness, *supra* note 46, at 21.

57. Such rhetoric has been exacerbated by the prominence of Facebook across Myanmar, where a majority of rural users view Facebook as their sole news source, and with some believing that Facebook *is* the internet. Facebook has thus provided fertile breeding ground for the proliferation of hate speech and false news. See Ashley S. Kinseth, *Genocide in the Modern Era: Social Media and the Proliferation of Hate Speech in Myanmar*, TEA CIRCLE OXFORD (May 10, 2018), <https://teacircleoxford.com/2018/05/10/genocide-in-the-modern-era-social-media-and-the-proliferation-of-hate-speech-in-myanmar/> [hereinafter Kinseth, *Genocide in the Modern Era*].

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

59. Ruma Paul & Simon Lewis, *Myanmar Officials Try to Convince Rohingyas to Return, Accept ID Cards*, REUTERS, Oct. 31, 2018, <https://www.reuters.com/article/us-myanmar-rohingya/myanmar-officials-try-to-convince-rohingya-to-return-accept-id-cards-idUSKCN1N51JW>.

a key sticking point in ongoing repatriation discussions between Bangladesh, Myanmar, and the U.N., few Rohingyas have accepted the long-standing offer.⁶⁰

Indeed, many Myanmar officials and other prominent figures apparently make no effort to conceal their anti-Muslim and colorist stances, openly rejecting earlier notions of an inclusive Burma and emphasizing instead the perceived need to cement Myanmar's identity as a light-skinned, Buddhist nation. One politician, for instance, told the *ECONOMIST* that Rohingyas were working to "Islamise [Myanmar] through their terrible birth rate,"⁶¹ while another spokesman falsely reported that the Rohingya birth rate is *ten times* that of the Rakhine Buddhists.⁶² Yet another official took a blatantly colorist stance, publicly stating in 2009:

In reality, Rohingya are neither "Myanmar People" nor Myanmar's ethnic group. You will see in the photos that their complexion is "dark brown". The complexion of Myanmar people is fair and soft, good looking as well. (My complexion is a typical genuine one of a Myanmar gentleman and you will accept that how handsome [I am. . . . They are ugly as ogres.])⁶³

While Myanmar's anti-Rohingya propaganda has succeeded domestically, it has been largely ineffectual on the international stage. Despite the government's continued efforts, Myanmar stands almost entirely alone in its denial of the group's existence. The international community recognizes the Rohingya as a distinct *ethnic* group, and as a group protected under the Genocide Convention. Many also point to persecution of the Rohingya on the basis of their *religious* and *racial*

60. *Id.*

61. *Unforgiving History: Why Buddhists and Muslims in Rakhine State in Myanmar are at Each Others' Throats*, *ECONOMIST* (Nov. 3, 2012), <https://www.economist.com/news/asia/21565638-why-buddhists-and-muslims-rakhine-state-myanmar-are-each-others-throats-unforgiving>.

62. *2-child Limit in Robingya Towns*, *HINDU* (May 26, 2013), <https://www.thehindu.com/todays-paper/2child-limit-in-rohingya-towns/article4752431.ece>; see, e.g., Patrick Winn, *Do 'Rapidly Breeding' Robingya Muslims Really Threaten Myanmar's Buddhist Identity?*, *GLOBALPOST* (Oct. 14, 2013), <https://www.pri.org/stories/2013-10-14/do-rapidly-breeding-rohingya-muslims-really-threaten-myanmars-buddhist-identity>.

63. CHRIS LEWA, *ARAKAN PROJECT, ISSUES TO BE RAISED CONCERNING THE SITUATION OF STATELESS ROHINGYA CHILDREN IN MYANMAR (BURMA)* 4 (2012).

identities.⁶⁴ In light of these considerations, Myanmar's efforts to persuade the international community of the Rohingya's non-existence as an ethnic group appear at best futile, and at worst, self-defeating with regard to other aspects of group identity and protections under the Genocide Convention. Even if the international community appeased Myanmar by rejecting the Rohingya as an ethnic group—an action that the international community has shown no interest in taking—it would remain virtually impossible to deny decades of discrimination. As both religious and racial minorities, Myanmar's Muslims and darker-skinned inhabitants have suffered discrimination and mass atrocities at wildly disproportional rates.⁶⁵

C. *Genocidal Intent: The World Pleads Ignorance*

Neither Myanmar nor other states and institutions can skirt their international obligations by denying the existence of a “national, ethnical, racial or religious group” against whom numerous genocidal acts have been committed.⁶⁶ However, members of the international community continually justify their inaction with the Convention's third, and most amorphous, element: genocidal “intent.”⁶⁷ States have raised this issue time and time again in the decades since the

64. As Muslims in a majority-Buddhist nation, minority Rohingyas are not only discriminated against on the basis of religion, but further because of their appearance (race), as Rohingyas tend to have darker skin in a society where lighter complexions are highly valued. *See, e.g.*, ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC, YALE LAW SCH., PERSECUTION OF THE ROHINGYA MUSLIMS: IS GENOCIDE OCCURRING IN MYANMAR'S RAKHINE STATE? A LEGAL ANALYSIS 42–44 (Oct. 2015) (observing that both religion and “race” as a social and aesthetic construct have played key roles in establishing Rohingyas as a “group” for the purposes of, and in accordance with the intent of, the Convention).

65. Indeed, perhaps the only form of group recognized by the Genocide Convention that the Rohingya do not constitute—or even wish to constitute—is a *national* group per se, as most Rohingya also identify Myanmar's Northern Rakhine State as their ancestral homeland. Despite their heinous treatment at the hands of the Government, most Rohingya continue to consider themselves Burmese by nationality. In fact, alongside demands for justice, the most oft-repeated demand from Rohingya refugees is the “protected return to [a] protected homeland”: a desire to return to their home in Myanmar and to live their lives in peace, as they once did. *See The Berlin Call for Rohingyas' Protected Return to Protected Homeland in Myanmar*, EUROPEAN ROHINGYA COUNCIL (Feb. 26, 2018), <http://www.theerc.net/2018/02/the-berlin-call-for-rohingyas-protected-return-to-protected-homeland-in-myanmar.html>.

66. Convention, *supra* note 1, art. II.

67. *Id.*

entry into force of the Convention.⁶⁸ It is difficult to prove that individuals and/or states possess the requisite *mens rea* to destroy a group through its genocidal acts. As with other crimes, knowing and proving that which is in the mind of an alleged criminal is challenging, and is complicated further by the existence of multiple alleged *génocidaires* and co-conspirators.

In actuality, evidence of genocidal intent frequently abounds, and this is increasingly true with modern communications and surveillance technology. During the Holocaust and the Cambodian Genocide, for instance, conspirators and perpetrators kept meticulous notes regarding their genocidal objectives.⁶⁹ In Rwanda, outside actors intercepted real-time radio broadcasts with clear calls to eliminate the Tutsi population.⁷⁰ Indeed, as technology evolves and access to information becomes increasingly instantaneous, and with *génocidaires* often openly stating their genocidal intentions on the permanent public record through recorded speeches, Facebook posts, or other mediums, it is increasingly difficult for states to claim ignorance of genocidal intent.⁷¹

With regard to the Rohingya Genocide, evidence of genocidal intent has increased immensely over the past year. As discussed above, numerous officials historically made no secret of their dreams of a Rohingya-free Myanmar.⁷² According to Myanmar officials, the

68. POWER, *supra* note 24.

69. Charles Hawley, *Germany Agrees to Open Holocaust Archive*, SPIEGEL ONLINE (Apr. 19, 2006), <http://www.spiegel.de/international/fifty-million-nazi-documents-germany-agrees-to-open-holocaust-archive-a-411983.html> (addressing meticulous Nazi record-keeping practices and announcing the decision to declassify 30 to 50 million Holocaust-era documents) (last visited Feb. 22, 2019); Seth Mydans, *Cambodian Killers' Careful Records Used Against Them*, N.Y. TIMES (June 7, 1996), <https://www.nytimes.com/1996/06/07/world/cambodian-killers-careful-records-used-against-them.html> (detailing the extent of Khmer Rouge recordkeeping practices during the Cambodian Genocide) (last visited Feb. 22, 2019).

70. Samantha Power, *Bystanders to Genocide*, ATLANTIC (Sept. 2001), <https://www.theatlantic.com/magazine/archive/2001/09/bystanders-to-genocide/304571/> (detailing evidence that the United States and other governments were well aware of hate speech propagation via radio and had even considered radio jamming as a means of slowing the carnage, and further observing that “Radio Mille Collines broadcast names, addresses, and even license-plate numbers. Killers often carried a machete in one hand and a transistor radio in the other.”).

71. Kinseth, *Genocide in the Modern Era*, *supra* note 57.

72. See, e.g., Kinseth, *Rohingya Statelessness*, *supra* note 46, at 8–10 (highlighting instances of anti-Rohingya public statements made by prominent government and

crackdown was merely a defensive response. Government accounts and widespread domestic rumors asserted that it was the Rohingya themselves who razed their own villages and crops, butchered their brethren, doctored photos to garner sympathy, and somehow crafted eerily similar, gut-wrenching tales of widespread gang rapes, summary executions, and the slaughter of children and infants.⁷³

Of course, such seemingly irrational narratives are *prima facie* difficult to swallow—and if anything, likely do more to indirectly persuade international observers of *Myanmar's* guilt, arguably speaking to the nation's well-oiled propaganda machine, which stood at the ready to spin the Rohingya Crisis in its own favor. Yet more significantly in legal terms, numerous independent observers have gathered overwhelming evidence and testimony demonstrating that far from merely reacting to a perceived threat, Myanmar in fact meticulously plotted and coordinated its assault on the Rohingya. According to these observers, Myanmar devised a campaign orchestrated well in advance of August 25, 2017 with an eye to eradicating Rohingyas within the nation.⁷⁴ Indeed, evidence of Myanmar's genocidal intent is so ample that it would be impossible to discuss all such reports here, and this analysis thus focuses on a handful of key reports and pieces of evidence.

Among these, REUTERS provided one of the most detailed accounts of the military's advance preparations.⁷⁵ Perhaps most notably, the journalists obtained evidence that as of August 10, 2017, the national military had already deployed two of its most infamously ruthless national infantry divisions across Rohingyas' ancestral homelands. These infantry divisions included hundreds of "battle-hardened soldiers" who had already garnered notoriety for their

religious figures as well as instances of past military-led Rohingya clearance operations).

73. *Burmese Attempt to Show Rohingya Torched Their Own Homes Unveiled as 'Fake News'*, STAR (Sept. 11, 2017), <https://www.thestar.com/news/world/2017/09/11/burmese-attempt-to-show-rohingya-torched-their-own-homes-unveiled-as-fake-news.html>.

74. See Ashley S. Kinseth, *Did the Myanmar Military Plan its Ethnic Cleansing of the Rohingya in Advance?*, WASH. POST (Aug. 25, 2018), https://www.washingtonpost.com/news/democracy-post/wp/2018/08/25/did-the-myanmar-military-plan-its-ethnic-cleansing-of-the-rohingya-in-advance/?utm_term=.53d2571ac8cb.

75. Simon Lewis et al., *Special Report—The Shock Troops Who Expelled the Rohingya from Myanmar*, REUTERS, June 26, 2018, <https://uk.reuters.com/article/uk-myanmar-rohingya-battalions/special-report-the-shock-troops-who-expelled-the-rohingya-from-myanmar-idUKKBN1JM1YA> [hereinafter Reuters Special Report].

“brutal counter-insurgency campaigns against [Myanmar’s] many ethnic minorities.”⁷⁶ Arriving more than two weeks before August 25, the dramatic influx of “heavily armed combat troops with a long history of human rights abuses” stoked fear and tension across the already-volatile region.⁷⁷

Independent observations widely corroborate such reports. Both foreign and local residents reported that in early-to-mid August, they noted a highly unusual influx of national military personnel. At the same time, foreign workers observed a massive spike in fear among the region’s already-on-edge Rohingya population, with many villagers “scattered and in hiding” as they awaited rumored attacks.⁷⁸ One foreign worker further reported watching on August 19 as a truckload of landmines arriving in Maungdaw town—soon to become the very epicenter of the atrocities.⁷⁹ The early arrival of landmines stands out as a key marker of genocidal intent because such weapons are designed to block movement in an abhorrently indiscriminate manner and disproportionately impact civilians, with a destructive capacities that can span decades. “This could not have been—as Aung San Suu Kyi would have it—a move calculated to ensure ‘peace, stability and security.’”⁸⁰

Meanwhile, officers and officials of all ranks continued to make no secret of their plans for the Rohingya. While en route to Northern Rakhine State, for instance, one young lieutenant engaged in a Facebook back-and-forth that appeared to clarify his mission in the region—or at the very least, his own plans for the Rohingya:

“In our plane, we got to eat cake,” read the Aug. 10 post.
“Are you going to eat Bengali meat?” commented a friend. . . .
“Whatever, man,” replied the lieutenant.
“Crush the kalar, buddy,” urged another friend.
“Will do,” [the lieutenant] replied.⁸¹

76. *Id.*

77. *Id.*

78. Kinseth, *Were the Rohingya Massacres Pre-planned?*, *supra* note 45.

79. *Landmines*, LANDMINE & CLUSTER MUNITION MONITOR, <http://www.themonitor.org/en-gb/the-issues/landmines.aspx> (outlining various problematic aspects in the use of antipersonell landmines, including their ability to lie dormant for decades and to indiscriminately kill and injure civilians) (last visited Feb. 22, 2019).

80. Kinseth, *Were the Rohingya Massacres Pre-planned?*, *supra* note 45.

81. Reuters Special Report, *supra* note 75.

Not long after, on September 1 in the midst of the clearance operations, Myanmar military chief Min Aung Hlaing went on the record referring to the “Bengali problem” as “a long-standing one which has become an unfinished job”—one that, it seemed, that he intended to complete.⁸²

In terms of widespread ground-level preparations, the human rights organization Fortify Rights also unearthed ample evidence highlighting the astonishing extent of Myanmar’s genocidal plans. Their investigation found that well in advance of August 25, 2017, the Tatmadaw had in fact actively trained and armed Rakhine Buddhist civilians to assist in their campaign, while simultaneously confiscating from Rohingyas even the most basic and necessary household and livelihood tools, including any “sharp and blunt objects” that might be used in self-defense.⁸³ The investigators further found that Myanmar had blocked critical humanitarian aid to Rohingyas and had also already planted landmines across the region, likely to target fleeing civilians.⁸⁴

These and other findings strongly support the case that Myanmar was actively preparing for its 2017 clearance operation. In contrast to smaller pogroms of years past, the 2017 operation effectively decimated the nation’s Rohingya population. From the top brass down to low-ranking military personnel, and from national to local officials, evidence of such genocidal intent abounds. Unlike past genocidal acts where demonstrating genocidal intent proved particularly challenging, especially in cases where clear evidence emerged largely only *after* the genocide in question was complete, the Rohingya Genocide presents some of the clearest and most immediate evidence of intent ever seen with respect to an *ongoing* genocide. Confronted with such overwhelming evidentiary support and in the face of a crisis that continues to affect over 1.6 million people, states’ continuing insistence on arguing otherwise is unconscionable.

82. *Rohingya Muslims Flee as More than 2,6000 Houses Burned in Myanmar’s Rakhine*, REUTERS, Sept. 2, 2017, <https://www.reuters.com/article/us-myanmar-rohingya/rohingya-muslims-flee-as-more-than-2600-houses-burned-in-myanmars-rakhine-idUSKCN1BD083>.

83. FORTIFY RIGHTS, THEY GAVE THEM LONG SWORDS 41 (July 2018), https://www.fortifyrights.org/downloads/Fortify_Rights_Long_Swords_July_2018.pdf.

84. *See id.* at 46.

III. CONCLUSION

Despite the noble aims of the Convention, it has become routinely disregarded, as states and multilateral bodies circumvent their international legal obligations even in the most objectively clear cases of genocide due to a lack of genocidal intent. Although members of the international community continue relying on this tenuous argument, technology and near-instantaneous communications continue to make such denials increasingly difficult to maintain. Perhaps no crisis better demonstrates this evolving reality than the ongoing Rohingya Genocide, for which countless pieces of evidence of genocidal intent have come to light, and in which social media continues to play a massive role.

At the time of this writing, only one nation, Canada, has formally acknowledged the Rohingya Genocide as such.⁸⁵ And while the UN Human Rights Council has also adopted a Report endorsing use of the term genocide, also noting that “[t]he critical element of the crime is ‘genocidal intent,’”⁸⁶ its findings—while potentially persuasive—are binding neither on states nor on the UN Security Council. The Security Council possesses the sole authority to take meaningful international action. Only the Security Council could establish a peacekeeping mission or refer the situation in Myanmar to the International Criminal Court, both of which currently are unlikely prospects.

The current situation of Rohingya both in Bangladesh and Myanmar is dire. Unless more states explicitly acknowledge the Rohingya Genocide as such, the likelihood of securing the level of international cooperation needed to accomplish the much-sought “Protected Return to Protected Homeland” remains low.⁸⁷ Yet as international lawyers and rights activists continue to press governments and chip away at feeble legal arguments, the chances for

85. *Canada Accuses Myanmar of Genocide Against Rohingya*, GUARDIAN (Sept. 20, 2018), <https://www.theguardian.com/world/2018/sep/21/canada-accuses-myanmar-of-genocide-against-rohingya>.

86. U.N. Human Rights Council Myanmar Report, *supra* note 39, ¶ 84–87.

87. *See, e.g.*, Michelle Nichols, *Rohingya Refugees tearfully plead for U.N. Security Council Help*, REUTERS, Apr. 29, 2018, <https://www.reuters.com/article/us-myanmar-rohingya-un/rohingya-refugees-tearfully-plead-for-u-n-security-council-help-idUSKBN1I00JZ> (referencing Rohingya pleas for a “protected return to protected homeland,” a slogan that has gained traction among activists and refugees since the late 2017 crisis).

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impactful international action improve. These actors must work not only to maintain public awareness of the ongoing genocide and the need for continued humanitarian support, but also to emphasize the vital importance of dismantling legally anemic intent-based arguments in their advocacy work.