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Elusive Justice: The Rohingya Chronic Crisis and the Responsibility to Protect

BY SUMANGALA BHATTACHARYA*

INTRODUCTION

The international community is in agreement that the situation of the Rohingyas, a Muslim minority residing principally in the Rakhine region of Burma/Myanmar's Arakan state,¹ shows ample evidence of ethnic cleansing and genocide. In August 2018, the United Nations issued a report calling for the prosecution of Burma/Myanmar's top-ranking military leaders for genocide and war crimes.² Since August 2017, an estimated 650,000 Rohingya have fled to Bangladesh from Myanmar.³ Satellite imagery has captured sites of recently charred villages.⁴ Numerous credible reports by human rights groups and

* I wish to extend my thanks to Prof. Marisa Cianciarulo, Doy and Dee Henley Chair in Law, of the Chapman University Dale E. Fowler School of Law, for her guidance on this project, and to this journal's impressively efficient editorial team.

1. The military junta changed the country's name from Burma to Myanmar in 1989, after a brutal military campaign that killed thousands in suppressing a pro-democracy movement. The United Nations has recognized the name Myanmar, but the two names continue to be used by different ethnic groups internally. Some argue Myanmar lacks legitimacy since it was imposed by the military government, especially because the country continues its brutal treatment of minority populations. I have chosen to use the form Burma/Myanmar throughout this essay to respect both the traditional and official versions of the name. See Matt Schiavenza, *President Obama Is In Burma – Or Is It Myanmar?*, ATLANTIC (Nov. 13, 2014), <https://www.theatlantic.com/international/archive/2014/11/president-obama-is-in-burma-or-is-it-myanmar/382751/>.

2. Human Rights Council, Rep. on the Independent International Fact-Finding Mission on Myanmar, U.N. Doc A/HRC/39/64 (Sept. 12, 2018) [hereinafter Human Rights Council, U.N. Doc A/HRC/39/64].

3. U.N. Office of High Comm'n for Refugees [UNHCR], UNHCR Distributes Aid to Rohingya Refugees Ahead of Bangladesh Winter (Dec. 15, 2017), <http://www.unhcr.org/en-us/news/briefing/2017/12/5a3399624/unhcr-distributes-aid-rohingya-refugees-ahead-bangladesh-winter.html> [hereinafter UNHCR Distributes Aid to Rohingya].

4. Annie Gowen, *"Textbook example of ethnic cleansing": 370,000 Rohingyas flood Bangladesh as crisis worsens*, WASH. POST (Sep. 12, 2017), <https://www.washingtonpost.com/world/textbook-example-of-ethnic-cleansing—370000-rohingyas-flood-bangladesh-as-crisis-worsens/>.

refugees attest to the widespread arson, rape, torture, and killings of Rohingyas by Buddhist vigilantes and the Burmese/Myanmar military.⁵ In November 2017, then-U.S. Secretary of State, Rex Tillerson, stated that “it is clear that the situation . . . constitutes ethnic cleansing” by Myanmar’s military forces and vigilantes who have carried out “horrendous atrocities.”⁶ Tillerson’s comments echo the September 2017 assessment of Zeid Ra’ad al-Husseini, the United Nations Human Rights High Commissioner for Refugees (“UNHCR”) chief, which described the situation as “a textbook example of ethnic cleansing.”⁷ In December 2017, the situation had escalated to the point that an estimated 626,000 Rohingyas had fled Myanmar into Bangladesh, with the number continuing to grow into 2018.⁸ In February 2018, Yanghee Lee, the United Nations special envoy on human rights in Myanmar, declared that the situation bears “the hallmarks of a genocide.”⁹ Commenting on reports that what appeared to be mass graves were being bulldozed, the UNHCR chief observed that such actions showed “a deliberate attempt by authorities to destroy evidence of potential international crimes, including possible crimes against humanity.”¹⁰

Violence against the Rohingyas is nothing new. Since the 1970s, periodic waves of state and vigilante violence against the community have led to large-scale displacements of people.¹¹ The internal displacements of Rohingyas and massive refugee exoduses by land and sea have become a chronic crisis in the region. Some scholars have characterized the Rohingya situation as a “slow burning genocide . . . that has taken place over the past thirty-five years.”¹² Human rights agencies agree. In April 2014, speaking at a conference held in London

5. *Id.*

6. Press Release, Rex W. Tillerson, Sec’y of State, U.S. Dep’t of State, Efforts to Address Burma’s Rakhine State Crisis (Nov. 22, 2017), <https://www.state.gov/secretary/20172018tillerson/remarks/2017/11/275848.htm>.

7. Gowen, *supra* note 4.

8. UNHCR, Human Rights Council Opens Special Session on the Situation of Human Rights of the Rohingya and Other Minorities in Rakhine State in Myanmar (Dec. 5, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22491&LangID=E> [hereinafter UNHCR, Human Rights Council Opens Special Session].

9. Associated Press, *U.N. official says Rohingya Crisis has ‘hallmarks of genocide’*, USA TODAY (Feb. 1, 2018, 3:02 AM), <https://www.usatoday.com/story/news/world/2018/02/01/u-n-official-rohingya-crisis-has-hallmarks-genocide/1085763001/>.

10. Stephanie Nebehay & Simon Lewis, *‘Acts of genocide’ suspected against Rohingya in Myanmar: U.N.*, REUTERS (Mar. 7, 2018, 2:01 AM), <https://www.reuters.com/article/us-myanmar-rohingya-rights/acts-of-genocide-suspected-against-rohingya-in-myanmar>.

11. Maung Zarni & Alice Cowley, *The Slow-Burning Genocide of Myanmar’s Rohingyas*, 23 PAC. RIM L. & POL’Y J. 683, 683 (2014).

12. *Id.*

entitled, “Decades of State-Sponsored Destruction of Myanmar’s Rohingya,” Tomas Ojéa Quintana, the United Nations Special Rapporteur for Human Rights, stated that the situation of the Rohingyas showed “elements of genocide.”¹³

By 2014, the crisis had been ongoing for decades. In 1978-79, a major military offensive by Burma/Myanmar to curb opposition groups in the Arakan state, followed by a campaign of human rights abuses targeting the Muslim population, led approximately 200,000 Rohingyas to flee across the border to Bangladesh.¹⁴ In 1991, the military again engaged in a campaign of violence and various human rights abuses in the wake of national elections in which the residents of the Arakan state (and other parts of the country) overwhelmingly rejected the military-backed National Unity Party, causing 250,000 Rohingyas to flee into Bangladesh.¹⁵ In 2012-13, a massive wave of sectarian violence forced over 140,000 Rohingyas into squalid camps for internally displaced persons and over 80,000 Rohingyas fled to neighboring countries.¹⁶ The continued plight of the Rohingyas briefly drew international attention and outrage in 2015, when news reports emerged that thousands of Rohingyas were stranded in international waters in rickety boats, without sufficient food or water, as they attempted to flee Burma/Myanmar’s apartheid-like conditions.¹⁷ The current crisis is merely the most recent in a continuum of crises suffered by the Rohingya people for decades.

The current crisis cannot be understood in isolation from its historical context. The Rohingya people have been subjected for decades to policies of discrimination, socio-economic repression, and assaults on cultural identity.¹⁸ In 1982, the government of Burma/Myanmar passed a law that effectively stripped Rohingyas of

13. Muang Zarni, *Press Release: United Nations expert says there are “elements of genocide” against Myanmar’s Rohingya*, ROHINGYA BLOGGER (Apr. 28, 2014), <http://www.rohingyablogger.com/2014/04/press-release-united-nations-expert.html>.

14. KAZI FAHMIDA FARZANA, *MEMORIES OF BURMESE ROHINGYA REFUGEES: CONTESTED IDENTITY AND BELONGING* 49–50 (2017).

15. *Id.* at 53.

16. Human Rights Watch, *All You Can Do is Pray: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State* 4–6 (Apr. 22, 2013), <https://www.refworld.org/docid/518230524.html>; Krishnadev Calamur, *The Misunderstood Roots of Burma’s Rohingya Crisis*, ATLANTIC, (Sept. 25, 2017), <https://www.theatlantic.com/international/archive/2017/09/rohingyas-burma/540513/>.

17. *See generally* Matt Sciaevanza, *Asia’s Looming Refugee Disaster*, ATLANTIC (May 17, 2015), <https://www.theatlantic.com/international/archive/2015/05/asias-looming-refugee-disaster/393482/>.

18. Zarni & Cowley, *supra* note 11, at 685.

citizenship.¹⁹ Additionally, Rohingyas residing in Burma/Myanmar, even those who have lived there for generations, are deemed to be illegal aliens.²⁰ Deprived of nationality and even of the legal right to reside in their homeland, the Rohingyas have become a stateless people.

These legislative measures express official governmental sanction of the climate of widespread discrimination and hostility against Rohingyas promoted by the Buddhist majority culture against the Muslim ethnic minority. This discriminatory climate has made the Rohingyas susceptible to periodic waves of violence, resulting in internal displacement and flight by land and sea to neighboring countries.²¹ Burma/Myanmar's policies have inevitably created conditions of structural violence, which is the systematic deprivation of basic necessities that arise from economic, political, social, and cultural exclusion.²² The United Nations Secretary General ("UNSG"), António Guterres, has observed that any political solution to the crisis must address the root causes of "protracted statelessness and its associated discrimination."²³ A resolution of the current situation must account for the physical violence that has occurred since August 2017 and resolve the underlying structural violence that made the atrocities possible.

Despite the global consensus on the chronic Rohingya crisis, the international community has been slow to take actions to protect the Rohingyas. Even as the crisis intensified since 2012, the United States and other nations have developed an engagement policy for strategic and financial ties with Burma/Myanmar.²⁴ Continued engagement with Burma/Myanmar by the U.S. and other world powers conveys the impression that the international community tacitly accepts the suffering of the Rohingyas as an acceptable price for nudging Burma/Myanmar further along in the process of democratization and international

19. *Id.* at 697.

20. *Id.* at 685.

21. *Id.* at 686.

22. Lindsey N. Kingston & Saheli Datta, *Strengthening the Norms of Global Responsibility: Structural Violence in Relation to Internal Displacement and Statelessness*, 4 GLOBAL RESP. TO PROTECT 475 (2012).

23. Press Release, Security Council, Amid "Humanitarian and Human Rights Nightmare" in Myanmar, Secretary-General Urges Full Access for Aid, Safe Return of Displaced Rohingya, End to Military Operations, U.N. Press Release SC/13012 (Sept 28, 2017) [hereinafter Press Release, Security Council, Amid "Humanitarian and Human Rights Nightmare"], <https://www.un.org/press/en/2017/sc13012.doc.htm>.

24. Michael Fuchs & Brian Harding, *A New Start for the U.S.-Burma Relationship*, THE HILL (Apr. 1, 2016), <http://www.thehill.com/blogs/congress-blog/foreign-policy/274873-a-new-start-for-the-us-burma-relationship>.

engagement.²⁵ However, the state's transition to democracy and global openness cannot take priority over establishing durable, rights-respecting national policies that safeguard all of Burma/Myanmar's people. The international community must not yield to the country's violations of established international human rights norms.

This paper argues that an invocation of the Responsibility to Protect ("RtoP") doctrine is essential for resolving the chronic Rohingya crisis. The RtoP doctrine, which was endorsed at the United Nations World Summit in 2005, expresses an international commitment to a collective global responsibility to ensure that a state fulfills its responsibility to protect its populations from mass atrocities.²⁶ RtoP is narrowly delineated to cover only four specific crimes: "genocide, war crimes, ethnic cleansing[,] and crimes against humanity."²⁷ As a framework with shared international expectations of conduct bolstered by the prospect of collective state action, the doctrine can create a coherent strategy for building lasting solutions to the Rohingya chronic crisis, instead of measures that respond to periodic humanitarian crises as they occur.

Although not legally binding, RtoP offers the best chance for appropriate and effective solutions in the Rohingya chronic crisis. As I discuss below, other international law instruments relating to refugees and human rights are inapplicable or inadequate. While the implementation of RtoP has been imperfect and inconsistent, the doctrine provides a legal framework for putting into practice the aspirations of the international community to protect vulnerable people from mass-scale atrocities.²⁸ In supporting a "right of humanitarian assistance," the RtoP doctrine balances respect for state sovereignty with international norms that regard as unacceptable systematic and large-scale violations of human rights.²⁹ When a state is shown to be "manifestly failing" to protect its populations from atrocity crimes, RtoP pledges the international community to intervene.³⁰ The intervention involves a wide range of diplomatic and peaceful options,

25. Angshuman Chowdhury, *What Tillerson's Myanmar Visit Means*, THE DIPLOMAT (Nov. 22 2017), <https://thediplomat.com/2017/11/what-tillersons-myanmar-visit-means/>.

26. See generally G.A. Res. 60/1, 2005 World Summit Outcome (Oct. 24, 2005).

27. *Id.* at 30.

28. *Ethical Inquiry: March 2015*, BRANDEIS UNIV.: INT'L CTR. FOR ETHICS, JUSTICE & PUB. LIFE, <https://www.brandeis.edu/ethics/ethicalinquiry/2015/March.html> (last visited Feb. 2, 2019).

29. See generally INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT, at XI (2001), <http://responsibilitytoprotect.org/ICISS%20Report.pdf>.

30. G.A. Res. 60/1, *supra* note 26, at 30.

with coercive strategies to be used only as a last resort.³¹ Significantly, the RtoP doctrine does not limit coverage only to the citizens of a state but to all its “populations,” whether nationals or deemed to be aliens.³²

The RtoP doctrine can be applied to the three main dimensions of the Rohingya chronic crisis: the immense humanitarian challenge caused by the influx of Rohingya refugees into Bangladesh; the culture of discrimination against the Rohingyas in Myanmar/Burma; and the long-term constitutional status of the Rohingyas in Myanmar/Burma. While the humanitarian refugee crisis is of immediate urgency, the other two dimensions speak to the structural violence that undergirds the periodic outbreak of atrocities.

RtoP is necessary to enable Bangladesh to cope with the massive refugee influx. The scale of the refugee crisis in Bangladesh requires a coordinated international response to build appropriate infrastructure for hosting refugees while the terms of return are negotiated with Myanmar/Burma. Without the capacity to absorb refugees into the country, Bangladesh may feel compelled to negotiate with Burma/Myanmar for the return of Rohingyas even in the absence of adequate guarantees of their safety. Second, RtoP can generate an international mandate for Myanmar/Burma to halt the anti-Rohingya violence, and to hold the perpetrators accountable. While a U.N. peacekeeping force would ideally oversee the cessation of hostilities, diplomatic efforts are even more urgently needed to incentivize the government of Myanmar/Burma to act decisively to halt the violence. Diplomatic intervention can also assuage Burma/Myanmar's allegations about militant Rohingya separatism by bringing both sides to the table to negotiate a lasting solution.³³ Third, RtoP can apply preventive diplomacy to broker a solution to the question of the Rohingyas' citizenship, which has served as a pretext for the periodic spikes in violence.

The broad coverage of RtoP, which obligates a state to protect all people in its territory regardless of nationality or residency status, ensures that the issue of the Rohingyas' contested constitutional status within Burma/Myanmar is irrelevant. Any forceful intervention, including sanctions or military intervention, will require authorization

31. *Id.* at 22; INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 29, at IX.

32. G.A. Res. 60/1, *supra* note 26, at 30.

33. *See* Calamur, *supra* note 16.

from the United Nations Security Council (“UNSC”).³⁴ However, RtoP encourages the deployment of a broad range of peaceful options, such as diplomatic, economic, political, and humanitarian measures.³⁵ Talks and aid, combined with political pressures related to trade and travel, could offer sufficient incentives to Myanmar/Burma to take action. In arriving at a lasting solution to the Rohingya crisis, non-forceful diplomatic options may be especially productive since the root causes of the conflict are ethnic tensions and Burma/Myanmar’s denial of citizenship to the Rohingyas.³⁶ The Rohingya chronic crisis requires the international community to be actively involved in the process of resolution. The peaceful measures drawn from the diplomatic toolkit available under RtoP are needed to promote Burma/Myanmar’s move towards durable solutions that align with international norms.

The invocation of an RtoP framework will also have a protective function in the future, eliminating the factors that enable the repeated cycles of violence and displacement. By showing that the world is watching, RtoP can fulfill its aim of prompting the country to take appropriate protective measures. Part I of this paper discusses why RtoP is preferable for this situation compared to other relevant international human rights instruments, even those that are legally binding. Part II outlines the development of the RtoP doctrine as an international norm. Part III provides a brief background to the evolution of the Rohingya crisis. Part IV considers how the RtoP framework can address the Rohingya chronic crisis in order to arrive at a lasting peaceful resolution.

I. APPLICABILITY OF OTHER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Although not legally binding international law, RtoP offers the best chance of crafting appropriate and effective solutions for the multidimensional complexities of the Rohingya chronic crisis. Unlike other international human rights related instruments, RtoP brings to bear collective international responsibility in holding states responsible for failing to protect all their populations from mass atrocities.³⁷ The Rohingya chronic crisis calls for a robust response targeting all aspects

34. U.N. Secretary-General, *Implementing the Responsibility to Protect*, at 25, U.N. DOC. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing the Responsibility to Protect*].

35. G.A. Res. 60/1, *supra* note 26, at 30.

36. See Press Release, Security Council, Amid “Humanitarian and Human Rights Nightmare”, *supra* note 23.

37. G.A. Res. 60/1, *supra* note 26, at 30.

of the evolving situation, including the humanitarian emergency and its root causes. Legal protections are not enough without real-world implementation of such protections. Legal protections alone will not benefit the Rohingyas living in internal displacement camps in Burma/Myanmar or in prolonged refugee status in Bangladesh. Humanitarian assistance alone cannot reach the underlying causes of the displacement of civilians or protect civilians directly targeted by violence.³⁸ International protection for the vulnerable women, men, and children fleeing mass atrocities in Burma/Myanmar must link legal obligations to practical mechanisms for delivering assistance. By offering a legal framework for collective international action, RtoP can bridge the divide between legal and practical protections for Rohingyas in circumstances that amount to ethnic cleansing and genocide.

The international human rights regime, founded on the principles of the “inherent dignity and . . . equal and inalienable rights of all [persons]” is enshrined in the U.N. Charter and the Universal Declaration of Human Rights (“UDHR”).³⁹ Formulated as aspirational “soft law,” the UDHR is a declaratory document and not legally binding on states.⁴⁰ The provisions of the UDHR have been complemented by the subsequent development of a body of legally binding covenants, treaties, and customary international law.⁴¹ National and regional human rights laws have also expanded the normative reach of the UDHR by affirming its principles.⁴² Nevertheless, the international human rights regime is limited in its reach because treaties apply only to signatory states and typically have weak enforcement mechanisms.⁴³ The U.N. Charter adheres to the principle of non-intervention in domestic affairs of member states, requiring Chapter VII authorization from the UNSC for international actions proposed in instances of human rights violations.⁴⁴ Despite the normative influence of the Charter and the UDHR, the lack of enforcement power reduces their impact in actual crises that involve direct and structural violence against civilians.⁴⁵

38. Phil Orchard, *The Perils of Humanitarianism: Refugee and IDP Protection in Situations of Regime-Induced Displacement*, 29 REFUGEE STUD. Q. 38, 41 (2010).

39. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 1 (Dec. 10, 1948).

40. GLOB. CITIZENSHIP COMM'N, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS IN THE 21ST CENTURY: A LIVING DOCUMENT IN A CHANGING WORLD 34 (Gordon Brown ed., 2016).

41. *Id.*

42. *Id.*

43. Yvonne Dutton, *Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms*, 34 U. PA. J. INT'L L. 1, 5 (2012).

44. U.N. Charter art. 2, ¶¶ 4, 7.

45. GLOB. CITIZENSHIP COMM'N, *supra* note 40, at 34.

Legally binding international treaties are the cornerstones of the international human rights regime.⁴⁶ The binding nature of these instruments and the formalized process for state ratification are believed to contribute to their effectiveness in protecting human rights.⁴⁷ The U.N. General Assembly adopts and opens treaties for signatures, and treaties come into force after receiving a requisite number of signatures and ratifications.⁴⁸ A formal international ratification indicates a state's commitment to be legally bound by the treaty.⁴⁹ States become parties to a treaty by signing the treaty or acceding to it (the process by which states become a party to a treaty they did not originally sign).⁵⁰ The national laws and constitutional provisions of states control whether a state may be able to ratify a treaty based on the will of a chief executive or if the state needs to seek authorization from legislative bodies.⁵¹

Notwithstanding these formal mechanisms for treaty ratification, most international human rights treaties lack strong enforcement mechanisms, which reduces their effectiveness in actual crises.⁵² Treaties rely on compliance monitoring by human rights bodies and voluntary periodic reporting by states that are parties to the treaty.⁵³ Human rights monitoring bodies rely on the political will of signatory states and do not have powers of enforcement, such as sanctions.⁵⁴ Signatory states that fail to comply with the terms of a treaty can generally escape any punitive actions, and states that have not signed a treaty are not bound by its terms.⁵⁵ The process by which international human rights law is enforced has been described as a “transnational legal process,” which involves “institutional *interaction* whereby global norms of international human rights law are debated, *interpreted*, and ultimately *internalized* by domestic legal systems.”⁵⁶ The long *durée* of such a process makes the legal protections of treaties less relevant to crisis situations involving direct violence against civilians and

46. See generally U.N. OFF. OF LEGAL AFF., TREATY HANDBOOK, at 5–11, U.N. Sales No. E.12.V.1 (2012).

47. *Id.* at 9.

48. See generally *id.*

49. *Id.* at 9.

50. *Id.*

51. *Id.*

52. Harold Honju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1398 (1999).

53. UNHCR, Human Rights Bodies, https://www.ohchr.org/en/hrbodies/pages/humanrights_bodies.aspx (last visited Nov. 18 2018).

54. Dinah Shelton, *Enforcement and Remedies*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 664, 664 (Scott Sheeran & Nigel Radley eds., 2013).

55. See generally U.N. OFF. OF LEGAL AFF., *supra* note 46, at 5–10.

56. Koh, *supra* note 52, at 1399.

peripherally relevant in addressing the underlying structural violence in such situations.⁵⁷

The combination of an ongoing humanitarian emergency with long-term structural violence in the Rohingya chronic crisis makes the legally binding instruments of international human rights régime less effective than RtoP. The most relevant of these instruments is the U.N. Convention Relating to the Status of Refugees of 1951 (“Refugee Convention”) and its 1967 Protocol (“Refugee Protocol”).⁵⁸ The Refugee Convention and Protocol define a refugee as “someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion, is outside the country of nationality, and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country”⁵⁹ If the Rohingyas can show that they are fleeing persecution based on one or more of the five protected grounds, they would qualify for refugee status under the Refugee Convention.⁶⁰ Such recognition would confer a range of protections, including the right to freedom of movement and the right to work.⁶¹ The Rohingyas who are recognized as refugees would also have a fundamental human right to seek asylum.⁶²

However, neither Bangladesh nor Burma/Myanmar are signatories to the Refugee Convention and the Refugee Protocol.⁶³ While Bangladesh has received Rohingyas fleeing from Burma/Myanmar for decades, the absence of a national legal framework for refugees has resulted in varying standards of treatment.⁶⁴ During the 1991-92 crisis, the Government of Bangladesh granted by executive order *prima facie*

57. See generally *id.* at 1408–16.

58. Protocol Relating to the Status of Refugees art. 1, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967) [hereinafter Refugee Protocol]. For the text of the treaties and their status, see U.N. Treaty Collection, Chapter V: Refugees and Stateless Persons, <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY> (last visited Oct. 14, 2018) [hereinafter U.N. Treaty Collection, Chapter V].

59. Convention Relating to the Status of Refugees art. 1, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]; see also Refugee Protocol, *supra* note 58, art. 1; U.N. Treaty Collection, Chapter V, *supra* note 58.

60. Refugee Convention, *supra* note 59, art. 3.

61. Refugee Protocol, *supra* note 58; Refugee Convention, *supra* note 59.

62. *Id.*

63. *Id.*; see generally UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol (Apr. 2015) (providing data as of April 2015).

64. Nour Mohammad, *Refugee Protection Under the Constitution of Bangladesh: A Brief Overview*, 39 REFUGEE WATCH 141, 154 (2012).

recognition to Rohingya refugees who entered prior to a cut-off date, but many thousands of refugees who missed the cut-off date remained in Bangladesh in informal liminal status as illegal immigrants.⁶⁵ In the current 2017-18 crisis, Bangladesh has resisted calls from the UNHCR to grant Rohingyas who have fled from Burma/Myanmar refugee status because of concerns that such a move will make repatriation efforts difficult.⁶⁶ Additionally, Bangladesh lacks the legal and logistical framework to process and adjudicate asylum claims, especially given the scale of the crisis. As of January 2018, the Bangladesh government has completed biometric registrations of over one million Rohingyas who will receive national ID cards.⁶⁷

Due to the irregular legal status of the Rohingya refugees, UNHCR standards for refugees have been difficult to implement in Bangladesh. Most Rohingyas in Bangladesh lack rights, access to humanitarian assistance, and pathways to social and economic integration.⁶⁸ If invited by Bangladesh, the UNHCR would be allowed to extend its protections to individuals even without a determination of one's refugee status.⁶⁹ Since 1991, Bangladesh has partnered with the UNHCR to provide assistance to the Rohingya refugees.⁷⁰ Although Bangladesh extends some constitutional and statutory protections to refugees, it has not enacted any national legislation relating to refugees or asylum.⁷¹ Refugees are considered foreigners under the Foreigners Act of 1946 with residential status granted at the discretion of local district administrators.⁷² Customary international law requires even states that have neither signed the Refugee Convention nor the Refugee Protocol,

65. Samuel Cheung, *Migration Control and the Solutions Impasse in South and Southeast Asia: Implications from the Rohingya Experience*, 25 J. REFUGEE STUD. 50, 52 (2012).

66. Sheikh Shahariar Zaman, *Bangladesh Govt Reluctant to Grant Refugee Status to Rohingya*, DHAKA TR. (Sept. 27, 2017, 11:31 AM), <https://www.dhakatribune.com/bangladesh/2017/09/26/bangladesh-govt-reluctant-grant-refugee-status-rohingya/>.

67. Tarek Mahmud, *Over one million Rohingyas get biometric registration*, DHAKA TR. (Jan. 18, 2018, 2:35 AM), <https://www.dhakatribune.com/bangladesh/2018/01/18/one-million-rohingyas-get-biometric-registration>.

68. See generally Pia Prytz Phiri, *Rohingyas and Refugee Status in Bangladesh*, FORCED MIGRATION REV., no. 30, Apr. 2008, at 34, https://www.fmreview.org/sites/fmr/files/FMR_downloads/en/burma/phiri.pdf (stating that the current situation in Bangladesh is simply untenable and refugees still lack freedom of movement, the right to work, and right to education).

69. Jeffrey Dillman, *International Refugee and Asylum Law*, 34 HOW. L.J. 51, 53 (1991).

70. Phiri, *supra* note 68, at 34.

71. See generally Mohammad, *supra* note 64, at 148-50.

72. *Id.* at 153.

to obey the principle of *non-refoulement*.⁷³ This principle gives a person classified as a refugee the right not to be returned to a place where his life or freedom would be threatened.⁷⁴ Bangladesh is bound by the principle of *non-refoulement* under customary international law and as a signatory to several international human rights treaties that embed the principle in their terms.⁷⁵ However, Rohingyas and humanitarian agencies have voiced concerns about expedited negotiations between Bangladesh and Burma/Myanmar for the repatriation of Rohingyas before their safety can be assured and before the root causes of the conflict are addressed.⁷⁶

Other instruments of international human rights are also not effective in the Rohingya chronic crisis. Bangladesh and Burma/Myanmar have both signed the United Nations Charter,⁷⁷ and are thus subject to the “soft law” principles of the UDHR. However, the Charter has no enforcement mechanisms. Six legally binding core treaties structure the international human rights régime complementing the UDHR: the International Covenant on Civil and Political Rights (“ICCPR”), opened in 1966; International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), opened in 1966; International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), opened in 1966; Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), opened in 1980; Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (“CAT”), opened in 1984; and Convention on the Rights of the Child (“CRC”), opened in 1989.⁷⁸ Bangladesh is a

73. UNHCR, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, at 7 (Jan. 26, 2017), <https://www.unhcr.org/4d9486929.pdf>.

74. The principle of non-refoulement, guaranteed by Article 33(1) of the Refugee Convention, provides that “[n]o Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers or 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.” Refugee Convention, *supra* note 59, art. 33(1).

75. UNHCR, *supra* note 73, at 7.

76. Human Rights Watch, *Burma: Rohingya Return Deal Bad for Refugees* (Dec. 11, 2017), <https://www.hrw.org/news/2017/12/11/burma-rohingya-return-deal-bad-refugees>.

77. See U.N. Treaty Collection, Chapter I: Charter of the United Nations and the Statute of the International Court of Justice, <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY> (last visited Oct. 14, 2018); UNHCR, Status of Ratifications Interactive Dashboard, <http://indicators.ohchr.org> (last visited Oct. 14, 2018) (on the left side of the page use the scroll bar and select the country profile for “Bangladesh” and “Myanmar” from the menu).

78. *Core International Human Rights Instruments*, UNFPA, <https://www.unfpa.org/resources/core-international-human-rights-instruments> (last visited Jan. 9, 2019).

signatory to the ICCPR, ICESCR, CEDAW, CAT, and CRC.⁷⁹ Myanmar has signed the ICESCR and the CEDAW.⁸⁰ Although conferring legal obligations on signatory states, these treaties rely largely on “soft law” enforcement mechanisms of periodic self-reporting, monitoring by committees of experts, and voluntary compliance by states.⁸¹ The treaties can promote compliance with international human rights norms, but they have no power to ensure that states improve their domestic human rights practices.⁸² While non-signatories do not need to comply with treaty provisions, the enforcement mechanisms, even for signatory states, do not provide adequate protections for civilians directly impacted by violence.⁸³

The International Criminal Court (“ICC”), established by the Rome Statute in 1998 and entered into force in 2002, does provide a robust enforcement mechanism through individual criminal prosecution in cases of genocides, war crimes, crimes against humanity, and crimes of aggression.⁸⁴ However, the court’s jurisdiction extends only to member states and applies only when certain criteria are satisfied.⁸⁵ While Bangladesh has ratified the ICC, Burma/Myanmar is not a signatory.⁸⁶

Since the statelessness of the Rohingya people is a significant contributor to the crisis, two international treaties on statelessness are worthy of mention.⁸⁷ The Convention Relating to the Status of Stateless Persons, pertaining to the situation of *de jure* stateless individuals, i.e., individuals who are not considered to be nationals under any state law, contains provisions for nondiscrimination and a range of rights protections.⁸⁸ The Convention on the Reduction of Statelessness requires parties to reduce statelessness through the positive step of

79. UNHCR, *supra* note 77 (on the left side of the page use the scroll bar to select the country profile for “Bangladesh” from the menu).

80. *Id.* (on the left side of the page use the scroll bar to select the country profile for “Myanmar” from the menu).

81. *See generally* Dutton, *supra* note 43, at 24-25.

82. *Id.* at 28.

83. *Id.* at 1.

84. *See generally* U.N. Treaty Collection, Chapter XVIII: Penal Matters: Rome Statute of the International Criminal Court, <https://www.treaties.un.org/pages/ViewDetails.aspx?src=IND> (last visited Oct. 14, 2018) [hereinafter U.N. Treaty Collection, Chapter XVIII].

85. Dutton, *supra* note 43, at 14.

86. U.N. Treaty Collection, Chapter XVIII, *supra* note 63.

87. Press Release, Security Council, Amid “Humanitarian and Human Rights Nightmare”, *supra* note 23.

88. Convention Relating to the Status of Stateless Persons art. 1–7, *adopted* Sept. 28, 1954, 360 U.N.T.S. 117 (entered into force June 6, 1960) [hereinafter Convention on Status of Stateless Persons].

granting nationality to individuals born within state boundaries, who might otherwise be stateless.⁸⁹ While both treaties include important provisions that would have protected the Rohingyas, Burma/Myanmar has not ratified either of them.⁹⁰

International human rights laws build acceptance of humanitarian norms over time. Although legally binding on states that are signatories, the “soft law” enforcement mechanisms reduce the effectiveness of these laws in actual crises. Additionally, the treaties are generally only applicable to states that have ratified them, except in the rare instances in which specific provisions have attained the status of customary international law. Unlike these instruments, RtoP imposes a duty on states to protect their populations and recognizes a humanitarian imperative to intervene through diplomatic efforts, backed up by the threat of force when states fail to protect civilians from mass atrocities.⁹¹ Driven by the principle that sovereignty is responsibility, RtoP bypasses the need for seeking the consent of the offending state for humanitarian assistance.⁹² This proactive foundation makes the doctrine a powerful tool for generating robust solutions in an actual crisis.

II. THE DEVELOPMENT OF RTO P FROM CONCEPT TO EMERGING NORM

RtoP developed in response to repeated post-Cold War failures of individual states to protect vulnerable people from mass-scale massacres and atrocities.⁹³ The genocides in Rwanda and Srebrenica in the 1990s, among other atrocities, prompted expressions of a collective abhorrence for the horrors of mass-scale violence.⁹⁴ In his Millennium Report to the United Nations General Assembly, Secretary General Kofi Annan introduced the idea that humanitarian intervention was called for in response to “gross and systematic violations of human rights that

89. Convention on the Reduction of Statelessness art. 1, *adopted* Aug. 30, 1961, 989 U.N.T.S. 175 (entered into force Dec. 13, 1975) [hereinafter Convention on the Reduction of Statelessness].

90. See U.N. Treaty Collection, Chapter V, *supra* note 58 (showing that Burma/Myanmar is not a “Participant”); *Rohingya Crisis: From India to Malaysia, refugees face hardship under uncertainty*, THE NATIONAL, <https://www.thenational.ae/world/asia/cohingya-crisis-from-india-to-malaysia-refugees-face-hardship-and-uncertainty-1.628032> (last updated Sept. 13, 2017).

91. G.A. Res. 60/1, *supra* note 26.

92. Rachel Gerber, *Peacekeeping and the Responsibility to Protect*, STANLEY FOUND. (May 2012), <https://www.stanleyfoundation.org/resources.cfm?id=485>.

93. U.N. Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century*, U.N. Doc. A/54/2000 (Mar. 2000), http://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf.

94. *Id.*; see also Roberta Cohen, *From Sovereign Responsibility to RtoP*, in ROUTLEDGE HANDBOOK OF THE RESPONSIBILITY TO PROTECT, *supra* note 54, at 7.

offend every precept of our common humanity.”⁹⁵ The international community sought a shared standard that expressed the consensus that states that perpetrated atrocities on ordinary persons or allowed non-state actors to do so could no longer rely on the concept of sovereignty to elude the state’s responsibility to protect its people.⁹⁶

In response to the call for an articulation of these widespread sentiments, the Canadian government established the International Commission on Intervention and State Sovereignty (“ICISS”), which subsequently published the report entitled *Responsibility to Protect* in 2001.⁹⁷ The ICISS report found that a state bore the primary responsibility to protect its people, but when a state is unwilling or unable to protect its people from suffering serious harm, the responsibility shifted to the international community.⁹⁸ The report observed that changing world conditions, brought about by the end of the Cold War and the growing economic interdependence of globalization, had laid out the groundwork for multilateral cooperation.⁹⁹ These changing world conditions allow for humanitarian military intervention when a state fails in its responsibility of providing human security.¹⁰⁰ The report identified six criteria that could justify military intervention: right authority, just cause, right intention, last resort, proportional means, and reasonable prospects.¹⁰¹ The concept of a collective international responsibility to protect was endorsed in the *Report of the High Level Panel on Threats, Challenges, and Change in the 21st Century* and subsequently in the 2005 report of Secretary General Kofi Annan.¹⁰²

In 2005, the World Summit nearly unanimously adopted RtoP in a narrowed formulation of the ICISS concept. The RtoP doctrine was enshrined in paragraphs 138 and 139 of the *World Summit Outcome* document.¹⁰³ Drawing on existing legal responsibilities of states, Paragraph 138 identifies the state as bearing the primary responsibility

95. *Id.*

96. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 29, at 8.

97. *Id.*

98. *Id.* at 8.

99. *Id.* at 2, 6.

100. *Id.* at 32.

101. *Id.*

102. See U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, U.N. Doc. A/59/2005/Add.3 (Mar. 21, 2005); U.N. Secretary-General, *Forward to Rep. of the Sec’y-General’s High-Level Panel on Threats, Challenges and Changes, A More Secure World: Our Shared Responsibility*, at vii, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter U.N. Secretary-General, *Forward*].

103. G.A. Res. 60/1, *supra* note 26, at 30.

of protecting its populations from genocide, war crimes, crimes against humanity, and ethnic cleansing.¹⁰⁴ Paragraph 139 offers the central innovation of the doctrine in its assertion of a collective responsibility of the international community for the protection of vulnerable civilian populations.¹⁰⁵ Paragraph 139 states that when a state “manifestly fails” in its primary responsibility of protecting its people from extreme violence in the four listed crimes, the responsibility shifts to the international community to use “appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter” to undertake “collective action in a timely and decisive manner.”¹⁰⁶ Shortly after the World Summit Outcome Document was published, the UNSC issued a resolution explicitly reaffirming the goals of RtoP.¹⁰⁷ Paragraph 139 recognizes the centrality of the Security Council to RtoP and does not sanction any collective action without U.N. authorization.

As articulated by U.N. Secretary General Ban Ki-Moon in his 2009 report, *Implementing the Responsibility to Protect*, the implementation of the RtoP doctrine rests on a three-pillar approach: (1) the protection responsibilities of the state, (2) international assistance and capacity-building, and (3) timely and decisive response.¹⁰⁸ The first pillar holds that states have a responsibility to protect their own populations from the four atrocity crimes specifically enumerated in the 2005 statement of the RtoP doctrine: genocide, war crimes, crimes against humanity, and ethnic cleansing.¹⁰⁹ The second pillar holds that the international community has a responsibility to assist states in fulfilling their obligation to protect their populations.¹¹⁰ The third pillar calls for an intervention by the international community once a state has manifestly failed to uphold its protection obligations.¹¹¹ RtoP can include the full range of powers, including military action, as sanctioned under Chapter VI to Chapter VIII of the UNSC.¹¹² However, RtoP encourages the deployment of civilian expertise and resources, with the use of force reserved as a measure of last resort.¹¹³

104. *Id.*

105. *Id.*

106. *Id.*

107. *See* S.C. Res. 1674, ¶ 4 (Apr. 28, 2006).

108. *Implementing the Responsibility to Protect*, *supra* note 34, at 2.

109. *Id.* at 8; *see also* G.A. Res. 60/1, *supra* note 26, ¶ 138, at 31.

110. *Implementing the Responsibility to Protect*, *supra* note 34, at 15.

111. *Id.* at 22.

112. *Id.* at 22, 25.

113. *Id.* at 18.

Following the U.N. Secretary General's 2009 report, United Nations member states conducted an informal two-day debate in July, 2009.¹¹⁴ A General Assembly consensus resolution in September 2009 reaffirmed member states' commitment to the principles, taking note of the Secretary General's report.¹¹⁵ In subsequent annual reports, the UNSG has continued to develop elements of the RtoP framework, including the need to develop early warning systems, the role of regional and sub-regional organizations, the criteria for timely and decisive action, different forms of international assistance, implementation strategies, and a commitment to accountability.¹¹⁶ In addition to the Secretary General's annual reports, RtoP has also been referenced by the General Assembly in nearly sixty-five resolutions and by the Human Rights Council in thirty resolutions.¹¹⁷ Although the levels of success vary, the doctrine has been implemented in multiple country-specific crises, including crises in Cote D'Ivoire, Mali, Congo, Sudan, South Sudan, Central African Republic, and Libya, among others.¹¹⁸

RtoP has also been contested on various grounds. As a legal concept, RtoP has been generally welcomed for a paradigmatic shift of the understanding of sovereignty from the rights of territorial integrity and non-intervention towards the collective responsibility to protect civilians from mass atrocities.¹¹⁹ However, opponents of the doctrine point to its potential as a new form of humanitarian interventionism and its spotty track record of implementation. For some opponents of the doctrine, RtoP is an extension of colonial values into the postcolonial world order.¹²⁰ Critics from the global South accuse RtoP of imposing a Westernized ethnocentric notion of "good governance" in ways that facilitate neo-imperialist ventures.¹²¹ Such critics express apprehensions that RtoP could be used as a "Trojan horse" for self-interested

114. *Key Developments on the Responsibility to Protect at the United Nations from 2005-2017*, INT'L COALITION FOR RESP. TO PROTECT, <http://www.responsibilitytoprotect.org/index.php/about-rtop/the-un-and-rtop> (last visited Oct. 14, 2018).

115. G.A. Res. 63/308, ¶ 1 (Sept. 14, 2009).

116. *Key Developments on the Responsibility to Protect at the United Nations from 2005-2017*, *supra* note 114.

117. *About R2P*, GLOBAL CTR. FOR RESP. TO PROTECT, http://www.globalr2p.org/about_r2p (last visited Oct. 14, 2018).

118. Jared Genser, *The United Nations Security Council's Implementation of The Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement*, 18 CHI. J. INT'L L. 420, 421 (2018).

119. *See id.* at 423.

120. Siddharth Mallavarapu, *Colonialism and the Responsibility to Protect in THEORISING THE RESPONSIBILITY TO PROTECT* 305, 310 (Ramesh Thakur & William Maley, eds., 2015).

121. *Id.* at 309-10.

interventions in the developing world in the name of humanitarianism.¹²² However, these concerns seem to have been assuaged over the years. RtoP has gained cautious support in recent years from China, India, Nigeria, Argentina, and other states that had previously opposed RtoP as a repackaging of imperialist humanitarian interventionism.¹²³

Even strong proponents of RtoP acknowledge that it has been exercised selectively or with imperfect results. There were glaring failures to apply the doctrine in a number of crises involving mass atrocities from 2005 to 2011, such as the massacres in Darfur, South Sudan, and Sri Lanka.¹²⁴ However, observers argue that since 2011, a number of mass atrocities and genocides have indeed generated coordinated responses from the international community even if RtoP was not explicitly invoked—the Rohingya chronic crisis being an exception.¹²⁵ Proponents of the doctrine point out that the coordinated international response to these crises upheld the principles of the doctrine without necessarily doing so under formal invocation.¹²⁶ International responses in recent years show that a “collective international response” in the face of genocide and mass atrocities has become ““the norm.””¹²⁷

In the Libyan crisis in 2011-12, the UNSC embraced a full RtoP engagement, authorizing a NATO-led military intervention and post-conflict efforts.¹²⁸ The subsequent instability and violence in Libya, which resulted in a lingering United Nations presence, generated considerable controversy about the invocation of RtoP as a precursor to regime change and nation building.¹²⁹ The NATO-led mission was sharply criticized by a number of countries for mission creep and the use of disproportionate force.¹³⁰ However, the Libyan delegation expressed unequivocal support for the decision during the 2012 General

122. See Alex Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq*, 19 ETHICS & INT'L AFF. 31, 39 (2005).

123. Alex Bellamy, *Responsibility to Protect Turns Ten*, 29 ETHICS & INT'L AFF. 161, 161–62 (2015) [hereinafter Bellamy, *Responsibility to Protect Turns Ten*].

124. *Id.* at 165.

125. *Id.*

126. *Id.*

127. *Id.* at 166.

128. See S. C. Res. 2009 (Sept. 16, 2011); S.C. Res. 1973 (Mar. 7, 2011).

129. See David Rieff, *R2P, R.I.P.*, N.Y. TIMES: OPINION (Nov. 7, 2011), <https://www.nytimes.com/2011/11/08/opinion/r2p-rip.html>.

130. Geir Ulfstein & Hege Christiansen, *The Legality of the NATO Bombings in Libya*, 62 INT'L & COMP. L. Q. 159, 169–71 (2013).

Assembly informal debate on RtoP.¹³¹ Selective exercise of the RtoP doctrine remains a problem, as there has not been significant international intervention in crises that should have triggered RtoP after the Libyan intervention. Notably, the Rohingya chronic situation is among these unresolved situations.

The legal status of RtoP is still evolving. The eighth informal debate on the doctrine, which followed the Secretary General's ninth report on RtoP, showed that there was broad consensus on the principles of RtoP even as a number of states called for more to be done "to bridge the gap between [the] near universal commitment towards the prevention of atrocity crimes and the current state of implementation of these commitments."¹³² RtoP appears to have achieved general acceptance as an international norm.¹³³ However, in the absence of consistent implementation, the doctrine cannot be claimed to have attained the status of customary international law, which derives from the general law of nations rather than formal treaties or agreements and requires international practice and belief in the binding nature of the custom.¹³⁴

Despite the language of collective responsibility, RtoP does not impose any new legal obligations on states to intervene in a mass atrocity crisis.¹³⁵ Instead, the doctrine consolidates and systematizes established practices of international human rights related law so the international community *can* intervene in crises of mass atrocities.¹³⁶ Regardless of whether the doctrine itself is explicitly invoked, RtoP legitimizes collective action for the protection of civilians when conscience-shocking mass atrocities occur. As Alex Bellamy argues, "[t]he fact that relevant international actors do not always directly invoke R[to]P is not evidence of its absence, any more than its

131. GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, "TIMELY AND DECISIVE RESPONSE" SUMMARY OF THE INFORMAL INTERACTIVE DIALOGUE OF THE U.N. GENERAL ASSEMBLY ON THE RESPONSIBILITY TO PROTECT HELD ON 5 SEPTEMBER 2012 [hereinafter GCRP, SEPT. 5, 2012 SUMMARY], http://www.globalr2p.org/media/files/r2p_unga_dialogue_2012.pdf.

132. *Id.*

133. Melissa Labonte, *R2P's Status As a Norm*, in THE OXFORD HANDBOOK OF THE RESPONSIBILITY TO PROTECT 1, 2–3 (Alex J. Bellamy and Tim Dunne, eds., 2016).

134. Michael P. Scharf, *Accelerated Formation of Customary International Law*, 20 ILSA J. INT'L & COMP. L. 305, 309–11 (2014).

135. Anne Orford, *From Promise to Practice – The Legal Significance of the Responsibility to Protect Concept*, 3 GLOBAL RESP. TO PROTECT 400, 402 (2011).

136. *Id.* at 419–21.

invocation means that it was the only cause to generate a particular outcome.”¹³⁷

Although RtoP has gained widespread acceptance as a set of shared expectations, the doctrine’s implementation in practice remains a fertile ground for critique. While the use of coercive measures, especially forceful interventions, remains highly controversial, states have expressed a strong consensus regarding the prevention of mass atrocity crimes.¹³⁸ The Secretary General has called for moral and political accountability for the implementation of RtoP and “synergy across the UN” to prevent mass atrocities.¹³⁹ After a study of country-specific RtoP invocations, Jared Genser identified three conditions the existence of which correlate with successful UNSC implementation of RtoP: (1) the government of the perpetrator state must be willing or persuaded to accept UNSC assistance, (2) regional organizations must cooperate with the UNSC, and (3) the UNSC must have the capacity to respond to the situation.¹⁴⁰ An additional precondition is that the permanent members must withhold their veto power.¹⁴¹ The strengthening of international human rights institutions can do much to ensure that the three conditions exist when a mass atrocity crisis requires RtoP intervention. Additionally, internal agreements can persuade permanent members to voluntarily restrain the exercise of their veto powers to block collective action.¹⁴² While the RtoP doctrine is not a legally binding instrument, it can harness existing norms to prevent and intervene in a mass atrocity crisis.

III. ROHINGYA CHRONIC CRISIS

The present Rohingya crisis is part of a chronic cycle of refugee crises precipitated by Burma/Myanmar’s long-standing discriminatory policies against the Rohingya people. Approximately 800,000 Rohingya live in the troubled Rakhine State of Burma/Myanmar, with another 500,000 living in other parts of the country.¹⁴³ As of December 2017,

137. Alex J. Bellamy and Tim Dunne, *R2P in Theory and Practice*, in THE OXFORD HANDBOOK OF THE RESPONSIBILITY TO PROTECT, *supra* note 133, at 3, 10.

138. GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, SUMMARY OF THE INFORMAL INTERACTIVE DIALOGUE OF THE U.N. GENERAL ASSEMBLY ON THE RESPONSIBILITY TO PROTECT, 6 SEPTEMBER 2017, at 3 [hereinafter GCRP, SEPT. 6, 2017 SUMMARY], <http://www.globalr2p.org/media/files/2017-summary-of-unga-r2p-interactive-dialogue.pdf>.

139. *Id.*

140. Genser, *supra* note 118, at 425.

141. *Id.*

142. *Id.* at 432-33.

143. FARZANA, *supra* note 14, at 2.

over 620,000 of Myanmar's Rohingyas have fled to Bangladesh, most of them from the Rakhine State.¹⁴⁴ The number of Rohingya refugees since August 2017 alone has outpaced the total number of migrants attempting to enter Europe via the Mediterranean in 2016.¹⁴⁵ The Rohingya crisis needs a permanent solution instead of reactive, crisis-driven fixes. It calls for the framework of RtoP to assist Burma/Myanmar in keeping the peace and in building peace through mediation, diplomacy, and other international political pressures.

As UNSC António Guterres noted, Rohingyas have long suffered from “[prolonged] statelessness and its associated discrimination.”¹⁴⁶ The roots of the crisis lie in the complex relationship between the Rohingyas, an ethnic Muslim group based in the Rakhine region, and the dominant Buddhist state. Burma/Myanmar is an ethnically diverse country, with over 100 distinct ethnic groups.¹⁴⁷ Ethnic Burmans, mostly Buddhists, represent about two-thirds of the population.¹⁴⁸ Rohingyas possess a distinct language and culture, and claim descent from Arab and Persian traders who settled in the region in the Eighth Century.¹⁴⁹

The Burma/Myanmar government does not accept that the Rohingyas are a distinct ethnic group.¹⁵⁰ According to the Burma/Myanmar government, the Rohingyas are Bengalis who entered Burma/Myanmar as laborers in the nineteenth- and early twentieth-centuries when the region was a province of India under British rule, or more recently as illegal immigrants following Bangladesh's war of independence from Pakistan in 1971.¹⁵¹ The state's classification of the Rohingyas as Bengalis has a political impact on the constitutional status of the individuals who identify as ethnic Rohingyas.

After Burma/Myanmar gained independence from British rule in 1948, the state was plagued by armed conflicts among various ethnic groups.¹⁵² In 1962, a military coup led by General Ne Win overthrew the fledgling parliamentary democracy in what was represented as an

144. UNHCR, Human Rights Council Opens Special Session, *supra* note 8.

145. Niall McCarty, *The Grim Scale of the Rohingya Crisis*, STATISTA (Sep. 21, 2017), <https://www.statista.com/chart/11185/the-grim-scale-of-the-rohingya-crisis/>.

146. Press Release, Security Council, Amid “Humanitarian and Human Rights Nightmare”, *supra* note 23.

147. *See generally* FARZANA, *supra* note 14, at 58.

148. *Id.* at 49.

149. *Id.* at 42.

150. Adam Taylor, *How Burma's Rohingya crisis went from bad to worse*, WASH. POST, (Sep. 6, 2017), <https://www.washingtonpost.com/news/worldviews/wp/2017/09/06/how-burmas-rohingya-crisis-went-from-bad-to-worse/>.

151. *Id.*

152. FARZANA, *supra* note 14, at 47–48.

attempt to restore order to the internal political chaos.¹⁵³ A new socialist Constitution was instituted in 1974, and the country entered a period of isolationism.¹⁵⁴ The 1974 Constitution enabled the military government to implement a range of initiatives aimed at creating national unity, suppressing counter insurgencies, and establishing Buddhism as the official state religion.¹⁵⁵

The military government viewed ethnic diversity as unacceptable to Burma/Myanmar's modern political identity. As part of its postcolonial nation-building program, the military government followed a program of forced assimilation of the different ethnic groups into a homogeneous Burmese identity, with no recognition of any symbols of minority identities.¹⁵⁶ The military government's policies of "Burmanisation" led to the development of an ethno-racial Buddhist nationalism that viewed all of Burma/Myanmar's Muslim ethnicities as second-class citizens and debased foreigners.¹⁵⁷

Burma/Myanmar's discriminatory policies towards the Rohingya since the 1970s have created what many regard as "a chronic refugee crisis."¹⁵⁸ Burma/Myanmar withdrew recognition of Rohingyas as citizens, effectively denying them civil service or military jobs.¹⁵⁹ The Emergency Immigration Act of 1974, ostensibly enacted to curb illegal immigration from neighboring India, Bangladesh, and China, required all Burmese/Myanmar citizens to carry national registration certificates.¹⁶⁰ However, the Act designated Rohingyas as holders of foreign registration cards.¹⁶¹ Many Rohingyas refused the foreign registration cards in order to assert their right to be counted as citizens of Burma/Myanmar, but this action meant they were left without state identification.¹⁶²

In 1977, during another ostensible crackdown on illegal immigration, the military instituted the Naga Min (Dragon King)

153. *Id.*

154. Beina Xu and Eleanor Albert, *Understanding Myanmar*, COUNCIL ON FOREIGN RELATIONS (Mar. 25, 2016), <https://www.cfr.org/backgrounder/understanding-myanmar>.

155. FARZANA, *supra* note 14, at 49–50.

156. FARZANA, *supra* note 14, at 69–70.

157. *See generally* FRANCIS WADE, *MYANMAR'S ENEMY WITHIN: BUDDHIST VIOLENCE AND THE MAKING OF A MUSLIM "OTHER"* (2017).

158. Engy Abdelkader, *The Rohingya Muslims in Myanmar: Past, Present, and Future*, 15 OR. REV. INT'L L. 393, 395 (2013).

159. Human Rights Watch, *Burma: The Rohingya Muslims: Ending a Cycle of Exodus?*, C809 (Sept. 1, 1996), <https://www.hrw.org/legacy/summaries/s.burma969.html>.

160. *Id.*

161. *Id.*

162. *Id.*

program to verify and register individuals' identity cards and citizenship documents.¹⁶³ In the Rakhine State, the program degenerated into violent attacks against Rohingyas led by the army and local Buddhist residents.¹⁶⁴ The Naga Min operation resulted in massive numbers of internally displaced people, with approximately 200,000 Rohingyas fleeing to Bangladesh as refugees.¹⁶⁵ Initially, Burma/Myanmar denied responsibility for these displacements and claimed that the government had no obligations towards anyone who crossed the border into Bangladesh.¹⁶⁶ However, two years later, the government signed a bilateral agreement for the forced repatriation of the Rohingya refugees.¹⁶⁷ In the interim, Bangladesh engaged in a campaign of violence, accompanied by a reduction of food aid provided to the refugees, to create conditions intended to force the refugees to turn back.¹⁶⁸ Around 12,000 Rohingyas starved to death in the Bangladesh refugee camps.¹⁶⁹

In 1991-92, yet another crisis followed a similar trajectory. After eruptions of post-election violence, more than 250,000 Rohingyas fled to Bangladesh to escape abuses and repressive state policies.¹⁷⁰ Like the earlier 1977-78 crisis, a bilateral agreement led to many refugees being forcibly repatriated.¹⁷¹ Eventually, the UNHCR established a limited field presence promoting voluntary returns in 1994.¹⁷² However, as Human Rights Watch notes, the situation was far from resolved, because new arrivals continued even as the UNHCR lauded its repatriation efforts.¹⁷³ Although the arrival of new refugees suggested that country conditions did not offer adequate guarantees of safety, the UNHCR labeled the new arrivals as economic migrants and continued to push for voluntary repatriation.¹⁷⁴ Additionally, the repatriation of Rohingya refugees to Burma/Myanmar in both 1978 and 1996 was tainted by reports of excessive force used by the security forces of both Bangladesh and Burma/Myanmar, and the Rohingyas who returned were granted only limited rights to employment, residence, marriage,

163. FARZANA, *supra* note 14, at 49–50.

164. Human Rights Watch, *supra* note 159.

165. FARZANA, *supra* note 14, at 49–50.

166. *Id.*

167. Abdelkader, *supra* note 158, at 395.

168. *Id.*

169. Human Rights Watch, *supra* note 159.

170. *Id.* at 10.

171. *Id.* at 15.

172. *Id.* at 5.

173. *Id.* at 3.

174. *Id.*

and freedom of movement within the country.¹⁷⁵ Severe governmental restrictions on movement, employment, education, and healthcare constrained the Rohingyas to live under dehumanizing conditions that suggested a system of apartheid.¹⁷⁶

The outbreak of sectarian violence in 2012-13 between ethnic Arakanese Buddhists and Rohingyas precipitated yet another crisis.¹⁷⁷ The clashes resulted in the destruction of thousands of homes and many mosques and left about 200 dead.¹⁷⁸ Burmese/Myanmar security forces refused to protect the Rohingyas and even joined in the violence against them.¹⁷⁹ The violence forced “at least 125,000 Rohingya and other Muslims, and a small number of Arakanese” into inadequate camps for internally displaced persons.¹⁸⁰ The government obstructed humanitarian access to the affected areas and did nothing to bring the perpetrators to justice.¹⁸¹ In 2012, 140,000 individuals were internally displaced while another 86,000 fled to neighboring countries.¹⁸²

The present crisis which started in August 2017 is a continuation of a recurrent pattern of Burma/Myanmar’s marginalization, abuse, and periodic violent expulsions of the Rohingyas. Not surprisingly, a Rohingya separatist group has emerged.¹⁸³ On August 25, 2017, the Arakan Rohingya Salvation Army (“ARSA”), a militant Rohingya group, launched a coordinated attack on dozens of police stations and an army base, killing twelve security officers.¹⁸⁴ The military’s counterinsurgency campaign deployed disproportionate violence in response.¹⁸⁵ In the weeks that followed, entire villages were set on fire

175. Abdelkader, *supra* note 158, at 395–396.

176. *Myanmar: Rohingya Trapped in Dehumanizing Apartheid Regime*, AMNESTY INT’L (Nov. 20, 2017), <https://www.amnestyusa.org/reports/myanmar-rohingya-trapped-in-dehumanizing-apartheid-regime/>.

177. Eliane Coates, *Sectarian Violence Involving Rohingya in Myanmar: Historical Roots and Modern Trigger*, MIDDLE EASTERN INST. (Aug. 4, 2014), <http://www.mei.edu/publications/sectarian-violence-involving-rohingya-myanmar-historical-roots-and-modern-triggers>.

178. *Why is there communal violence in Myanmar?*, BBC NEWS (July 3, 2014), <http://www.bbc.com/news/world-asia-18395788>.

179. Human Rights Watch, *supra* note 16, at 7.

180. *Id.* at 4-6.

181. Abdelkader, *supra* note 158, at 397.

182. Lindsey N. Kingston, *Protecting the world’s most persecuted: the responsibility to protect and Burma’s Rohingya Minority*, 19 INT’L J.HUM. RIGHTS 1163, 1169 (2015).

183. *See Myanmar: what sparked latest violence in Rakhine?*, BBC NEWS (Sept. 16, 2017), <https://www.bbc.com/news/world-asia-41082689>.

184. FORTIFY RIGHTS, “THEY TRIED TO KILL US ALL”: ATROCITY CRIMES AGAINST ROHINGYA MUSLIMS IN RAKHINE STATE, MYANMAR 1 (2017), <https://www.usmmm.org/m/pdfs/201711-atrocity-crimes-rohingya-muslims.pdf>.

185. *Id.* at 5.

and satellite data show entire villages burned to the ground.¹⁸⁶ The Burmese/Myanmar military and Buddhist vigilantes engaged in mass killings, arson, rape, torture, and other atrocities perpetrated on the civilian Rohingya population in retaliation for the attacks on the security outposts.¹⁸⁷ Numerous credible reports have emerged demonstrating that Burma's/Myanmar's military waged a systematic campaign of gang rapes of Rohingya women and girls.¹⁸⁸ The Burmese/Myanmar government's actions have attempted to impose collective punishment on innocent civilians in what United Nations and relief agency observers described as ethnic cleansing or genocide.¹⁸⁹

The discrimination and violence the Rohingyas suffered is tied to their constitutional status within Burma/Myanmar as stateless persons.¹⁹⁰ Following the massive forced repatriation of Rohingyas from Bangladesh after the 1978 Naga Min operation, the Burma/Myanmar government enacted the Burma Citizenship Act in 1982. While the preceding Union Citizenship Act of 1948 conferred equal rights on all citizens, the 1982 law established an exclusionary and stratified regime of rights based on ethnicity and descent.¹⁹¹ Anyone deemed a foreigner has virtually no pathway to citizenship under this regime. The Burma Citizenship Act repealed the Union Citizenship Act of 1948, which conferred *de facto* citizenship on Rohingyas.¹⁹² Nearly a million Rohingyas were effectively rendered stateless by the 1982 law, which classified them as resident foreigners or illegal immigrants.¹⁹³

The Burma Citizenship Act divided individuals into four categories, with each group assigned a color-coded Citizenship Scrutiny

186. *Satellite Data Indicates Burnings in Rakhine State*, HUMAN RTS. WATCH (August 29, 2017), <https://www.hrw.org/news/2017/08/29/burma-satellite-data-indicate-burnings-rakhine-state>.

187. FORTIFY RIGHTS, *supra* note 184, at 1.

188. Rick Gladstone, *Rohingya Were Raped Systematically by Myanmar's Military*, *Report Says*, N.Y. TIMES (Nov. 16, 2017), <https://www.nytimes.com/2017/11/16/world/asia/myanmar-rohingya-rapes.html>.

189. *See generally* Gowen, *supra* note 4.

190. Press Release, Security Council, Amid "Humanitarian and Human Rights Nightmare", *supra* note 23.

191. *See* Mohammad Mahbubul Haque, *Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma*, 37 J. MUSLIM MINORITY AFF. 454, 458 (2017).

192. Navine Murshid, *Why is Burma Driving Out the Rohingya—and Not Its Other Despised Minorities?*, WASH. POST (Nov. 9, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/09/why-is-burmas-military-driving-out-the-rohingya-and-not-its-other-despised-minority-groups/>; *see* Haque, *supra* note 191, at 458.

193. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, BURMA 2016 HUMAN RIGHTS REPORT (2016) [hereinafter BURMA 2016 HUMAN RIGHTS REPORTS], <https://www.state.gov/documents/organization/265536.pdf>; Murshid, *supra* note 192. *See generally* Human Rights Watch, *supra* note 16.

Card: “citizens,” “associate citizens,” “naturalized citizens,” and “resident foreigners.”¹⁹⁴ Individuals who belonged to one of the recognized “national races” or whose ancestors had settled in Burma/Myanmar prior to 1823 were categorized as “citizens.”¹⁹⁵ Citizenship by birth is available only to a person whose birth parents are full citizens.¹⁹⁶ However, Rohingyas were not included in the list of 135 indigenous groups that qualified for full citizenship.¹⁹⁷ A child born to one or more Rohingya parents was therefore not eligible for citizenship by birth.

The second category of “associate citizens” recognizes individuals who did not belong to one of the recognized indigenous groups and who have one grandfather or pre-1823 ancestor who was a foreigner.¹⁹⁸ The category also covers individuals who had applied for citizenship under the Union Citizenship Act of 1948, prior to the enactment of the Burma Citizenship Act.¹⁹⁹ Again, most Rohingyas were unable to satisfy the requirements for “associate citizenship” status since few had officially applied for citizenship under the 1948 law.²⁰⁰ Additionally, the window of opportunity to apply for “associate citizen” status lasted for only one year after the passage of the 1982 law, and many eligible Rohingyas missed the deadline.²⁰¹ Furthermore, Rohingya leaders contended that they should be granted full citizenship status since they were previously recognized as one of the indigenous groups.²⁰² “Associate citizenship” is contingent on the discretion of a “Central Body,” operating under the President’s office, which has unlimited power to revoke an individual’s “associate citizen” status for “disaffection or disloyalty to the state” or “moral turpitude.”²⁰³

The third category of “naturalized citizens” covers non-nationals who are not members of one of the 135 recognized indigenous groups, and who could provide “conclusive evidence” that they or their parents had settled in Burma/Myanmar prior to 1948, provided these individuals also satisfied eligibility criteria, such as fluency in a national language, being over 18 years old, possessing a good moral character, and being

194. Murshid, *supra* note 192.

195. *Id.*

196. Haque, *supra* note 191, at 457.

197. FARZANA, *supra* note 14, at 50–52.

198. Haque, *supra* note 191, at 457.

199. FARZANA, *supra* note 14, at 50–52.

200. Haque, *supra* note 191, at 457.

201. *Id.*

202. *Id.*

203. *Id.*

of sound mind.²⁰⁴ This third category also covers individuals who have a parent that holds one of the three types of Burmese/Myanmar citizenship.²⁰⁵ Although Rohingyas could qualify for “naturalized citizen” status, many Rohingya leaders protested that Rohingyas should not have to apply for this status, since they already enjoyed citizenship status under the 1948 Union Citizenship law.²⁰⁶ The fourth category of “resident foreigners” have no citizenship rights and are not allowed to enroll in higher education, move freely within the country, or hold public office.²⁰⁷ Most Rohingyas belong to this last category, because they could not provide the necessary documentation to satisfy the “conclusive evidence” requirement for either “associate citizen” or “naturalized citizen” status.²⁰⁸ Due to the repeated displacements, violence, and structural inequities, many Rohingyas had lost all of their possessions, including official documentation.²⁰⁹ Additionally, as rural people, most Rohingyas lacked documentation because of their poverty, lack of property ownership, and their custom of home births.²¹⁰

The Burma Citizenship Law effectively stripped the Rohingya of citizenship and transformed them into a stateless people, not recognized as citizens in the country where they lived. By delisting the Rohingya in the list of recognized indigenous group within the descent-based citizenship framework (*jus sanguinis*) of the Burma Citizenship Act, the government ensured that individuals of Rohingya descent had no path to citizenship regardless of how long they had resided in the country.²¹¹ The Rohingyas were thereby deprived of essential civil, social, and political rights granted to citizens. Burma/Myanmar is not alone among states in “increasingly bestowing, denying, or retracting citizenship as a political weapon” so as to ration the distribution of rights and privileges.²¹² Statelessness has been directly linked to a range of human rights abuses, including vulnerability to displacement, human trafficking, and child labor, among others.²¹³ These problems of human rights abuses intensify when a state deploys the denial of citizenship as

204. FARZANA, *supra* note 14, at 50–52.

205. *Id.*

206. Haque, *supra* note 191, at 457.

207. Murshid, *supra* note 192.

208. FARZANA, *supra* note 14, at 50–52.

209. Human Rights Watch, *supra* note 16, at 111–114.

210. *Id.*

211. *See generally* Haque, *supra* note 191, at 466–67.

212. James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 ETHICS & INT’L AFF. 321, 322 (2006).

213. Jay Milbrandt, *Stateless*, 20 CARDOZO J. INT’L & COMP. L., 75, 92–93 (2011).

an instrument of racial and ethnic discrimination to delegitimize minorities,²¹⁴ as Burma/Myanmar has done with the Rohingyas.

The Rohingya chronic crisis has regional and geopolitical repercussions. In addition to the drastic impact on Bangladesh, the main host country bearing the brunt of the Rohingya refugee influx, India, Indonesia, Malaysia, and Thailand are also variously impacted.²¹⁵ Furthermore, the broader Muslim world may become entangled in the crisis if refugees become radicalized. Burma/Myanmar has been broadly censured by the international community.²¹⁶ Resolving the chronic crisis requires international oversight from world actors who can bring moral leadership to the complexities of the situation. With the RtoP framework, the immediate emergency and long-term underlying problems can be addressed to develop a lasting solution for the recurrent cycles of violence and chronic refugee crisis.

IV. RTO P APPLICATION

The Rohingya chronic crisis calls for the robust and coordinated international response that an invocation of RtoP can generate. Conditions show the existence of the three criteria that, according to Genser, have characterized successful RtoP actions: the UNSC has the capacity to respond to the crisis, Myanmar's government is showing willingness to cooperate with the UNSC, and regional countries are willing to engage with the UNSC's efforts.²¹⁷ RtoP will enable the international community to implement a long-term strategy that not only addresses the current human rights catastrophe but also remedies the underlying causes that lead to periodic human rights catastrophes.

Although stopping short of an explicit invocation of RtoP, the UNSC has engaged actively with the situation. In prior Rohingya crises, the evidence of mass atrocities was speculative, making any RtoP action a risky proposition. However, the evidence of ethnic cleansing in the

214. Goldston, *supra* note 212, at 327–28.

215. See Rohingya Crisis: From India to Malaysia, refugees face hardship and uncertainty, THE NATIONAL (Sept. 13, 2017), <http://www.thenational.ae/world/asia/rohingya-crisis-from-india-to-malaysia-refugees-face-hardship-and-uncertainty-1.628032>.

216. Editorial, 'Never Again,' Holocaust Museum Tells Burmese Leader, N.Y. TIMES (Mar. 11, 2018), <https://www.nytimes.com/2018/03/11/opinion/aung-san-su-kyi-holocaust-myanmar.html>; Nayma Qayum, *There's a Massive Humanitarian Crisis in Bangladesh's Rohingya Refugee Camps*, WASH. POST (Oct. 12, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/12/theres-a-massive-humanitarian-crisis-in-bangladeshs-rohingya-refugee-camps/>.

217. Patrick Wintour, *Aung San Suu Kyi Seeks New Relationship with UN over Rohingya Crisis*, THE GUARDIAN (Apr. 28, 2018, 12:00 AM), <https://www.theguardian.com/world/2018/apr/28/aung-san-su-kyi-un-relationship-rohingya-crisis>.

current crisis is overwhelming,²¹⁸ and the situation may also meet the elements of genocide.²¹⁹ Ethnic cleansing and genocide are both triggers for an RtoP invocation. In November 2017, the UNSC issued a presidential statement strongly condemning Burma/Myanmar for the violence and the limited humanitarian access to affected regions.²²⁰ In April 2018, an UNSC delegation visiting the main refugee camps in Cox's Bazaar expressed strong dismay at the stories of suffering they heard from refugees.²²¹ Also, in April 2018, the UNSC delegation visited the Rakhine state, calling for Burma/Myanmar to conform to international standards for the safe and dignified repatriation of the Rohingya refugees.²²² The delegation also asked Burma/Myanmar to work with the United Nations and international community and to hold perpetrators of atrocities accountable.²²³

Although Burma/Myanmar continues its blanket denials of any wrongdoing, the government's position on working with the UNSC shows indications of progress.²²⁴ The UNSC delegation met with Burma/Myanmar's leader, State Counsellor Aung San Suu Kyi, and the military commander-in-chief, General Min Aung Hlaing.²²⁵ In April 2018, Bangladesh and the UNHCR signed a memorandum of understanding regarding the safe and voluntary repatriation of the Rohingyas to Burma/Myanmar.²²⁶ The memorandum asked that the

218. See generally Stephanie Nebehay & Simon Lewis, 'Acts of Genocide' Suspected Against Rohingya in Myanmar: U.N., REUTERS (Mar. 7, 2018, 2:01 AM), <https://www.reuters.com/article/us-myanmar-rohingya-rights/acts-of-genocide-suspected-against-rohingya-in-myanmar-un-idUSKCN1GJ163>; UN Human Rights Chief Points to 'Textbook Example of Ethnic Cleansing' in Myanmar, UN NEWS (Sept. 11, 2018), <https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar>.

219. U.N. Secretary-General, *Report of the Secretary-General on Conflict-Related Sexual Violence*, U.N. DOC. S/2018/250 (Mar. 23, 2018).

220. See generally UN Security Council Calls on Myanmar to End Excessive Military Force in Rakhine State, UN NEWS (Nov. 7, 2018), <https://news.un.org/en/story/2017/11/570082-un-security-council-calls-myanmar-end-excessive-military-force-rakhine-state>.

221. UN Security Council Delegation Seeks Rohingya's Safe Return, U.S. NEWS (May 1, 2018, 11:35 PM), <https://www.usnews.com/news/world/articles/2018-05-01/un-security-council-delegation-visiting-northern-rakhine>.

222. *Id.*

223. *Id.*

224. See generally Oliver Holmes, *Myanmar Tells UN: "There Is No Ethnic Cleansing and No Genocide" of Rohingya*, THE GUARDIAN (Sep. 29, 2017, 12:58 AM), <https://www.theguardian.com/world/2017/sep/29/myanmar-un-ethnic-cleansing-genocide-rohingya>; Wintour, *supra* note 217.

225. UN Security Council Delegation Seeks Rohingya's Safe Return, *supra* note 221.

226. Press Release, UNHCR, Bangladesh and UNHCR Agree on Voluntary Returns Framework for When Refugees Decide Conditions Are Right, U.N. Press Release (Apr. 13, 2018) [hereinafter Press Release, UNHCR], <http://www.unhcr.org/en-us/news/press/2018/4/5ad061d54/bangladesh-unhcr-agree-voluntary-returns-framework-refugees-decide-conditions.html>.

Burma/Myanmar government provide access to United Nations humanitarian relief agencies to the Rakhine state.²²⁷ Aung San Suu Kyi has agreed to allow United Nations development and human rights organizations to enter Burma/Myanmar to build the appropriate conditions in Rakhine for the return of the refugees.²²⁸

The Association of Southeast Asian Nations (“ASEAN”), a regional organization of ten member states, has maintained silence on the Rohingya crisis.²²⁹ ASEAN is deeply committed to non-intervention in the internal affairs of members.²³⁰ However, several ASEAN members have been outspoken in their criticism of Burma/Myanmar’s actions. For example, during the March 2018 Australia-ASEAN summit, the Prime Minister of Malaysia publicly reproached Burma/Myanmar for its treatment of the Rohingyas and called for a “just and durable solution.”²³¹ Indonesia and Singapore have also expressed criticism.²³² Despite ASEAN’s public silence, a number of the regional powers and ASEAN members have shown a willingness to cooperate with a U.N.-led effort to address the situation.²³³ Additionally, ASEAN and the United Nations Office for the Coordination of Humanitarian Affairs (“OCHA”) have signed an interoperability brief delineating areas of collaboration regarding instances of humanitarian relief, which would provide a blueprint for a cooperative effort.²³⁴ Additionally, Aung San Suu Kyi has explicitly requested assistance from ASEAN in a closed-door meeting of the organization, thereby easing the path for cooperation with United Nations and relief agencies.²³⁵

227. *Id.*

228. Wintour, *supra* note 217.

229. *ASEAN Leaders Address Myanmar’s Rohingya Crisis, but Refuse to Point Finger at Aung San Suu Kyi*, SOUTH CHINA MORNING POST (Mar. 18, 2018, 10:15 PM), <http://www.scmp.com/news/asia/southeast-asia/article/2137712/asean-leaders-address-myanmars-rohingya-crisis-refuse-point>.

230. Ben Doherty, *Aung San Suu Kyi asks Australia and Asean for help with Rohingya crisis*, THE GUARDIAN (Mar. 18, 2018), <https://www.theguardian.com/world/2018/mar/18/aung-san-suu-kyi-asks-australia-and-asean-for-help-with-rohingya-crisis>.

231. Stephen Dziedzic, *ASEAN: Malaysian PM condemns inaction of Aung San Suu Kyi over Rohingya ‘suffering’*, ABC NEWS (Mar. 17, 2018, 5:30pm), <https://www.abc.net.au/news/2018-03-18/asean-malaysia-pm-confronts-aung-san-suu-kyi/9560112>.

232. *Id.*; Fransiska Nangoy, *Indonesian envoy to urge Myanmar to halt violence against Rohingya Muslims*, REUTERS (Sep. 3, 2017, 2:25 AM), <https://www.reuters.com/article/us-myanmar-rohingya-indonesia/indonesian-envoy-to-urge-myanmar-to-halt-violence-against-rohingya-muslims-idUSKCN1BE0HS>.

233. Doherty, *supra* note 230.

234. *ASEAN-OCHA Interoperability Brief*, RELIEFWEB (Jan. 10, 2018), <https://reliefweb.int/report/world/asean-ocha-interoperability-brief>.

235. Doherty, *supra* note 230.

The conditions are now opportune for UNSC to call for RtoP diplomatic and peacekeeping intervention in the Rohingya crisis. The doctrine offers promising opportunities for building a durable solution that addresses both the current situation and the long-term inequities that fuel periodic violence. The international community should pursue four objectives.

Humanitarian refugee crisis in Bangladesh. The refugee crisis in Bangladesh poses immense humanitarian and logistical challenges. Bangladesh is hosting over one million Rohingyas displaced from Burma/Myanmar.²³⁶ Most of the refugees are living in makeshift shelters in the highly congested Cox's Bazaar area, without sufficient food, cooking fuel, and cooking utensils.²³⁷ Adequate sanitation facilities and healthcare are also urgently needed to combat outbreaks of communicable diseases.²³⁸ The start of the rainy season has brought additional dangers of flooding and landslides.²³⁹ Although a small country about the size of Iowa, with a 163 million population of its own, Bangladesh has shown great compassion in accepting the Rohingya exodus from Burma/Myanmar.²⁴⁰ Prime Minister Sheikh Hasina stated that while Bangladesh accepts the humanitarian responsibility to shelter the refugees, the influx has placed “massive socioeconomic, environmental, and demographic pressure” on her country.²⁴¹ Bangladesh and the UNHCR must coordinate relief efforts, which must include relocation to higher ground during the monsoon season, to manage the refugee encampments.

In addition to managing the day-to-day operations of the refugee camps, the international community must assist Bangladesh in devising long-term plans for the refugees, because repatriation seems unlikely to occur soon. Bangladesh has provided sanctuary to displaced Rohingyas for nearly twenty years.²⁴² However, Bangladesh is not a party to the

236. Mahmud, *supra* note 67.

237. Food & Agric. Org. of the U.N., Briefing Note: Bangladesh Rohingya Refugee Crisis, at 1 (Mar. 2018), <http://www.fao.org/3/i8776en/I8776EN.pdf>; *see also* Qayum, *supra* note 216.

238. *Dangers persist for nearly a million Rohingya refugees in Bangladesh: WHO*, UN NEWS (May 8, 2018), <https://news.un.org/en/story/2018/05/1009112>.

239. Michael Safi, “Lives will be lost”: 700,000 Rohingya face cyclone season under tarpaulin, THE GUARDIAN (Apr. 27, 2018), <https://www.theguardian.com/world/2018/apr/27/rohingya-refugees-cyclone-monsoon-season-bangladesh-myanmar>.

240. Sadanand Dhume, *Bangladesh and Rohingya Refugees*, WALL ST. J. (Oct. 3, 2017), <https://www.wsj.com/articles/bangladesh-shows-compassion-1506358442>.

241. PM Hasina: Rohingya Presence Creating Enormous Socioeconomic Pressure, DHAKA TR. (Jan. 29, 2018), <http://www.dhakatribune.com/bangladesh/2018/01/29/pm-hasina-rohingya-socioeconomic-pressure/>.

242. Abul Hasnat Milton et al., *Trapped in Statelessness: Rohingya Refugees in Bangladesh*, 14 INT'L J. ENTL. REV. & PUB. HEALTH 942, 944–46 (2017).

1951 Convention Relating to the Status of Refugees or to the 1967 Protocol, and thus is not bound by the Convention's prohibition against *non-refoulement*.²⁴³ Only approximately 33,000 of the one million displaced Rohingyas currently in Bangladesh have been registered as refugees.²⁴⁴ Without official recognition as refugees, the vast majority of displaced Rohingyas do not have the right to seek asylum conferred under international refugee law. The international community must meet the funding needs required to enable the U.N. and other humanitarian aid agencies to scale up relief efforts. In addition, the international community should entertain economic development and education plans that enable the refugees to lead a dignified life while awaiting repatriation.

Repatriation and long-term solutions. The international community must have oversight of any repatriation process to ensure that returns are voluntary and safe. The most immediate task is to guarantee that the violence has stopped. In November 2017, Bangladesh and Burma/Myanmar signed a repatriation agreement to start repatriation in January 2018.²⁴⁵ The agreement drew considerable criticism from human rights groups because it contained no guarantees of safe conditions.²⁴⁶ It was also unclear whether the Rohingyas would be allowed to return to their former homes or if Burma/Myanmar intended to detain them indefinitely in camps.²⁴⁷ Since 2012, approximately 120,000 Rohingya continue to be detained in Burma/Myanmar in squalid conditions in camps for internally displaced people.²⁴⁸

In March 2018, Myanmar agreed to the UNHCR initiative on repatriation, but progress on the details has been slow.²⁴⁹ In April 2018, Bangladesh and the UNHCR signed an agreement laying out the framework for safe, voluntary, and dignified repatriation.²⁵⁰ However,

243. Refugee Protocol, *supra* note 58; Refugee Convention, *supra* note 59.

244. Tripti Lahiri, *Bangladesh, one of the world's poorest countries, has taken in more than half a million Rohingya refugees*, QUARTZ (Sept. 12, 2017), <https://qz.com/1074858/bangladesh-has-taken-in-more-than-half-a-million-rohingya-refugees/>.

245. Hannah Beech, *Will the Rohingya Ever Return Home?*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/world/asia/rohingya-myanmar-bangladesh.html>.

246. Feliz Solomon, *Myanmar's Crisis, Bangladesh's Burden: Among the Rohingya Refugees Waiting for A Miracle*, TIME (Nov. 23, 2017), <http://time.com/5031342/bangladesh-myanmar-rohingya-refugee-crisis/>.

247. Beech, *supra* note 245.

248. *Id.*

249. Nabban Haque, *Myanmar agrees to UNHCR initiative for Rohingya repatriation*, DHAKA TR. (Mar. 29, 2018), <https://www.dhakatribune.com/bangladesh/foreign-affairs/2018/03/29/myanmar-board-unhcr-initiative-rohingya-repatriation/>.

250. Press Release, UNHCR, *supra* note 226.

the U.N. does not believe that current conditions in Burma/Myanmar are conducive to the return of the Rohingyas, and the Rohingyas have stated that they will not agree to return unless Burma/Myanmar recognizes their legal rights to security, citizenship, and basic rights.²⁵¹

International pressure on and oversight of the repatriation process is crucial for ensuring that Rohingya refugees are secure from further violence upon return and that they are not further victimized by prolonged incarceration in camps for internally displaced persons. The international community must insist that Burma/Myanmar provide access to UNHCR monitors who can assess the conditions. Additionally, the existing camps for internally displaced persons should be dismantled, and the individuals living in them should be resettled permanently. Returning Rohingyas should be placed in or near where they lived before, not in temporary camps.

Accountability for human rights abuses, including conflict-related sexual violence. Accountability is essential for reconciliation. A lasting peace will require communities to confront the truth of the traumatic events and create a process of reconciliation. A process of reconciliation will require accountability for all forms of violence against civilians. Accountability is especially important for victims of mass rapes and sexual violence used as instruments of ethnic cleansing. Rohingya women and girls have been subjected to horrific acts of sexual violence by vigilantes acting in concert with Burmese/Myanmar military to force the populations to leave permanently.²⁵² The Secretary General has called on the Burma/Myanmar government to prosecute suspected perpetrators of sexual violence and to permit “unfettered access” to human rights monitors and aid providers.²⁵³

The UNSC must refer the atrocities to the ICC, which has recognized rape as a war crime since 2016. Although Burma/Myanmar is not a signatory to the ICC, a prosecution will signal that the international community will not tolerate rape as a weapon of ethnic cleansing. The ICC prosecutor has already asked the court whether it can take jurisdiction because of the presence of refugees in the territory

251. *Id.*

252. *Many Rohingya subjected to ‘brutal sexual assault’ by Myanmar forces—UN*, THE GUARDIAN (Apr. 14, 2018, 11:59 PM), <https://www.theguardian.com/world/2018/apr/15/many-rohingya-subjected-to-brutal-sexual-assault-by-myanmar-forces-un>.

253. *Report of the Secretary-General on Conflict-Related Sexual Violence*, *supra* note 219, ¶ 55–60.

of Bangladesh, a signatory to the ICC.²⁵⁴ Human rights monitors must be allowed access to Burma/Myanmar and so must special factfinders appointed for gathering evidence for sexual violence.

The international community must assist the government of Bangladesh in providing victims of sexual violence in the refugee camps with psychological and medical care, including comprehensive medical care related to pregnancies, sexually transmitted diseases, fistulas, and other rape-related physical conditions. Rape survivors and other women and girls should be encouraged to meet in designated safe spaces to talk, build community, and share support. Women and girls should be provided opportunities for literacy and job skills trainings. Measures should be taken to ensure the safety of women and girls in the camps.

Structural Violence. The Rohingya chronic crisis requires a long-term plan for eliminating structural discrimination. The Kofi Annan Advisory Commission on Rakhine State was formed in September 2016. The Advisory Commission is an independent commission chaired by former U.N. Secretary-General Kofi Annan and comprised of a coterie of international leaders. The Annan Commission submitted its Final Report in August 2017,²⁵⁵ around the time that violence erupted yet again. The international community must pressure Burma/Myanmar to adopt the recommendations in the Report for comprehensive reform of citizenship, rights, and anti-discrimination laws.

CONCLUSION

Global public opinion against a state's failure to protect its citizens can be effective in getting the state to do the right thing. The RtoP doctrine's combination of public shaming with muscular international diplomacy can move states towards the international norms of human rights. As Jennifer Welsh observes, the real value of the RtoP doctrine may lie in the institution of "a duty of conduct," requiring the international community to stand witness to atrocities and to deliberate

254. See *War crimes prosecutor seeks jurisdiction over Rohingya deportations*, REUTERS (Apr. 9, 2018, 1:34 PM), <https://www.reuters.com/article/us-icct-rohingya/war-crimes-prosecutor-seeks-jurisdiction-over-rohingya-deportations-idUSKBN1HG30J>.

255. See generally ADVISORY COMM'N ON THE RAKHINE STATE, TOWARDS A PEACEFUL, FAIR AND PROSPEROUS FUTURE FOR THE PEOPLE OF RAKHINE: FINAL REPORT OF THE ADVISORY COMMISSION ON RAKHINE STATE (2017), http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf.

on potential responses by different actors.²⁵⁶ As a nation emerging into the global economy after a half century of isolation, Burma/Myanmar's government is sensitive to potential trade partners urging it to safeguard the rights of the Rohingyas by resolving the statelessness and citizenship issues. The World Bank and other investment partners view the country as one of the fastest growing economies in East Asia and are eager to engage with the country.²⁵⁷ However, mounting global disapprobation of Burma/Myanmar's conduct towards the Rohingyas can damage the country's profile.²⁵⁸ The price for Burma/Myanmar to enter into the international community should be that it respect the international norm of protecting the country's populations from atrocities. Diplomatic efforts harnessed by the RtoP framework can incentivize Burma/Myanmar to build a stable and secure state that will attract global investment and tourism.

256. See Jennifer Welsh, *Responsibility to Protect at Ten: Glass Half Empty or Half Full?*, 51 Int'l Spectator 1, 3 (2016); *The World Bank in Myanmar, Overview*, WORLD BANK, <http://www.worldbank.org/en/country/myanmar/overview> (last visited Jan. 9, 2019).

257. See generally Kelsey Ziomek, *Is A Global Market In Myanmar Emerging?*, BORGEN MAG. (Aug. 24, 2013), <http://www.borgenmagazine.com/myanmar-global-market-emerging/>.

258. Editorial, *supra* note 216.