



Universiteit
Leiden
The Netherlands

Crimes Against Humanity in Western Burma: The Situation of the Rohingyas

Powderly, J.C.; Schabas, W.A.; Prud'homme, N.

Citation

Powderly, J. C., Schabas, W. A., & Prud'homme, N. (2010). *Crimes Against Humanity in Western Burma: The Situation of the Rohingyas*. Galway: Irish Centre for Human Rights/Irish Department of Foreign Affairs. Retrieved from <https://hdl.handle.net/1887/39767>

Version: Not Applicable (or Unknown)

License: [Leiden University Non-exclusive license](#)

Downloaded from: <https://hdl.handle.net/1887/39767>

Note: To cite this publication please use the final published version (if applicable).

Crimes against Humanity in Western Burma: The Situation of the Rohingyas



Irish Centre for Human Rights
2010

Crimes against Humanity in Western Burma: The Situation of the Rohingyas

**Irish Centre for Human Rights
2010**

Table of Contents

CHAPTER I: EXECUTIVE SUMMARY	8
CHAPTER II: INTRODUCTION	14
A. Background of the Report.....	15
1. Context and Framework of the Report	15
2. Methodology and Objectives of the Report.....	17
B. Background on the Rohingyas	20
1. Terms Used and Administrative Structures	20
2. Brief Historical Background to the Rohingyas	22
CHAPTER III: LEGAL FRAMEWORK.....	28
A. Introduction – Why Adopt a Crimes against Humanity Framework?	29
B. The General Requirements of Article 7 of the Rome Statute	31
CHAPTER IV: ENSLAVEMENT - FORCED LABOUR	36
A. Factual Findings	37
1. The Exaction of Forced Labour in Burma	37
2. The Exaction of Forced Labour in North Arakan State	40
2.1 The Nature of the Labour	41
2.2 Forcible Nature of the Work and Treatment of Individuals.....	48
B. The Applicable Law: Forced Labour as an International Crime Bearing Individual Criminal Responsibility.....	51
1. Forced Labour as an International Crime Bearing Individual Criminal Responsibility.....	51
2. Forced Labour as Enslavement: Jurisprudence in Brief.....	56
C. Preliminary Conclusions	59
CHAPTER V: RAPE AND SEXUAL VIOLENCE	61
A. Factual Findings	62
1. Rape and Sexual Violence in Burma	62
1.1 Reports of Rape and Sexual Violence against Women and Girls.....	62
1.2 Access to Justice and Responses to Cases of Rape and Sexual Violence	67
2. Rape and Sexual Violence in North Arakan State	69
2.1 Root Causes of Rape and Sexual Violence against Rohingya Girls and Women	70
2.2 Reports of Rape and Sexual Violence against Rohingya Girls and Women	73
B. Prohibition of Rape and Sexual Violence under International Criminal Law and its Application to the Rohingyas in North Arakan State	77
1. Development of the Legal Parameters of Rape and Sexual Violence by the ad hoc Tribunals	77
2. Prohibition under the Rome Statute and its Application to the Situation of the Rohingyas.....	78
C. Preliminary Conclusions	80

CHAPTER VI: DEPORTATION AND FORCIBLE TRANSFER OF POPULATION.85

A. Factual Findings	86
1. Forced Displacement in Burma	86
2. The Forced Displacement of the Rohingyas	90
2.1 Forced Displacement of the Rohingyas: 1978 to 1992	91
2.2 The Root Causes of the Forced Displacement of the Rohingyas	93
B. The Prohibition of Forced Displacement under International Criminal and Human Rights Law	102
1. Deportation or Forcible Transfer of Population under Article 7(1)(d) of the Rome Statute: Does a prima facie Case Exist with Respect to the Rohingyas?.....	103
1.1 Scope of the Offence under Article 7(1)(d) as Derived from Existing Jurisprudence	103
1.2 Why the Displacement of the Rohingyas is not Permissible under International Law	106
2. The Link with “Ethnic Cleansing”	110
C. Preliminary Conclusions	112

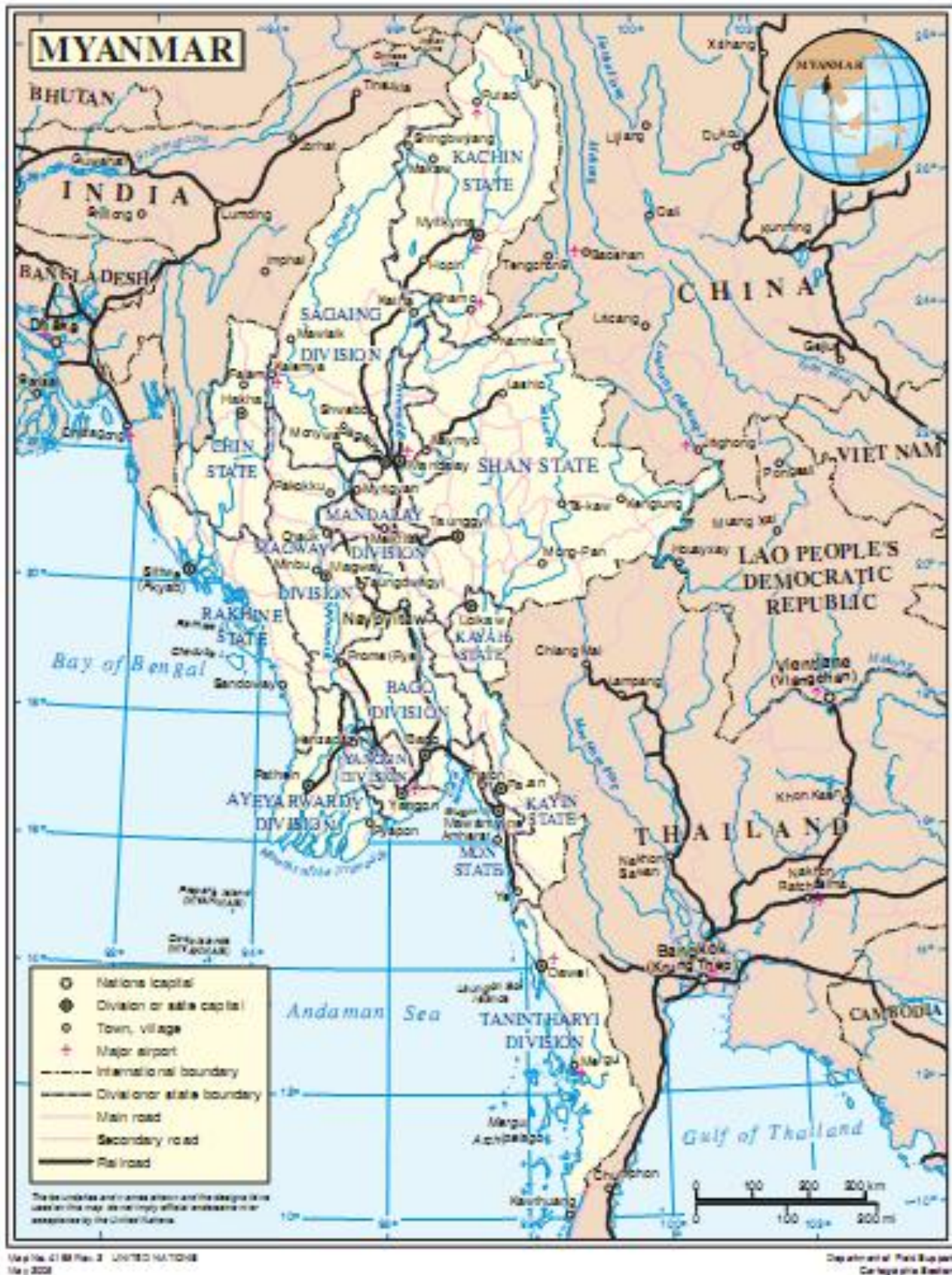
CHAPTER VII: PERSECUTION 114

A. Factual Findings	115
1. The Fundamentally Discriminatory Basis of Documented Violations: Placing Forced Labour, Rape and Forcible Transfer in a Persecutory Context.....	115
2. Arbitrary Detention, Torture, Murder and Other Inhumane Acts as Enumerated under Article 7 of the Rome Statute.....	116
2.1 Arbitrary Detention or other Severe Deprivations of Physical Liberty in North Arakan	118
2.2 Torture and other Forms of Inhuman or Degrading Treatment or Punishment.....	122
2.3 Murder	123
3. Other Acts Constituting the Discriminatory Denial of Fundamental Rights Falling within the Scope of Article 7(i)(h) of the Rome Statute.....	125
3.1 Marriage Restrictions Imposed on the Rohingyas	125
3.2 Denial of Freedom of Religion	132
3.3 The Imposition of Arbitrary and Extortionate Taxation	133
B. The Applicable Law with Respect to the Crime against Humanity of Persecution: The Denial of Fundamental Rights on Inherently Discriminatory Grounds	136
1. What Constitutes a Persecutory Act for the Purpose of Article 7(1)(h) of the Rome Statute?	137
2. Applying the Facts to the Law: Does the Situation of the Rohingyas Constitute Persecution?	140
C. Preliminary Conclusions	143

CHAPTER VIII: CONCLUSIONS AND RECOMMENDATIONS 145

Conclusions	146
Recommendations.....	151

Maps



Source: <http://www.un.org/Depts/Cartographic/map/profile/myanmar.pdf>



Abbreviations

AI	Amnesty International
ARIF	Arakan Rohingya Islamic Front
ARNO	Arakan Rohingya National Organisation
ASEAN	Association of South East Asian Nations
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
CRC	Convention on the Rights of the Child
DPDC	District Peace and Development Council
FIDH	Fédération Internationale des Ligues des Droits de l'Homme
HRW	Human Rights Watch
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHR	Irish Centre for Human Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILO	International Labour Organisation
NaSaKa	Nat-Sat Kut-Kwey Ye (Burmese Border Security Force)
NaTaLa	Ministry for Development of Border Areas and National Races
NCGUB	National Coalition Government of the Union of Burma
NLD	National League for Democracy
NRC	National Registration Card
RI	Refugees International
RSO	Rohingya Solidarity Organization
SCSL	Special Court for Sierra Leone
SLORC	State Law and Order Restoration Council
SPDC	State Peace and Development Council
TPDC	Township Peace and Development Council
TRC	Temporary Registration Card
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNTS	United Nations Treaty Series
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
VPDC	Village Peace and Development Council

Chapter I: Executive Summary

I. EXECUTIVE SUMMARY

The plight of the Rohingyas has become better known since the start of 2009, in particular because of world-wide media coverage of the case of the so-called “boat people”, consisting of hundreds of Rohingyas who attempted to reach Thailand by boat and were subsequently mistreated there. Despite this new interest in the Rohingya community, very little work has been done to examine the root causes behind their continuous suffering. The Rohingyas are a Muslim minority group residing in North Arakan State in Western Burma. It is estimated that there are approximately 800,000 Rohingyas in Arakan State, and many hundreds of thousands of Rohingya refugees in other countries. There are disputes over the historical records, and whether the Rohingyas are an indigenous group or whether in fact they began entering Burma in the late 19th century. Even the very name ‘Rohingya’ has been disputed. Whatever position is taken on these questions, it is undeniable that the Rohingyas exist, and have done so for decades, as a significant minority group in North Arakan State. For many years, the Rohingyas have been enduring human rights abuses. These violations are on-going and in urgent need of attention and redress.

Irish Aid provided funding for independent research to be conducted by the Irish Centre for Human Rights on the situation of the Rohingyas. The content and views expressed in the resulting Report by the Irish Centre for Human Rights are entirely those of the authors. This Report is based on a fact-finding mission to the region, including Burma, as well as on extensive open-source research, and confidential meetings with organisations working in the region. Much of the most important information came from the many interviews conducted with Rohingya individuals in and around refugee camps in Bangladesh, where they were able to speak more freely than they can in Burma itself about the violations they had endured and which had caused them to flee their homes.

The Report examines the situation of the Rohingyas through the lens of crimes against humanity. The Rome Statute of the International Criminal Court and international criminal law jurisprudence, especially that of the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda, are used to provide detailed and clear legal foundations for the examination. As becomes evident in the individual chapters, there is a strong *prima facie* case for determining that crimes against humanity are being committed against the Rohingyas of North Arakan State in Burma.

Summary of findings

Forced Labour

The prohibition of forced labour constitutes a norm of customary international law. The violation of this prohibition may qualify as an internationally wrongful act giving rise to State responsibility and, in addition, falls within the definitional boundaries of the crime of enslavement under the Rome Statute, thereby giving rise to individual criminal responsibility.

The imposition of forced labour on the civilian population in Burma has been documented over many years. For more than a decade, it has been monitored closely by

the International Labour Organisation. As is the case throughout Burma, the pervasiveness of forced labour varies throughout the territory of North Arakan State. The Rohingyas of North Arakan State are one of the groups who suffer most from the exaction of forced labour. Their location on the Burma-Bangladesh border where there is a strong military presence, as well as the establishment of the Nay-Sat Kut-kwey Ye (NaSaKa), have resulted in an even greater burden for the Rohingyas, as the security forces became a main user of forced labour in Burma.

Numerous so-called “model villages” have also been built in high numbers in North Arakan State and the authorities have used Rohingyas, and no other group, to do the work. There is constant and ever-increasing discrimination against the Rohingyas; a situation resulting in increased forced labour. As examined and described in the Report, forced labour is exacted from the Rohingya population in several forms. These include portering, building maintenance and construction, forced cultivation and agricultural labour, construction and repair of basic infrastructure, and guard or sentry duty.

Individuals so engaged have the possibility of buying their way out of these various forms of labour by providing weekly compensation, but they may not simply reject forced labour requests. Failure to provide the number of days of labour ordered for each household leads to harassment, beatings, killings and other abuses such as the retributive abuse of family members.

The research and analysis in this Report strongly suggest that the crime of enslavement, as provided for in the Rome Statute, is currently being committed against the Rohingya population of North Arakan State.

Deportation and Forcible Transfer

Forced displacement of individuals, whether across borders or within a State, may give rise to the offences of deportation or forcible transfer of population, as well as constituting a violation of freedom of movement. In certain circumstances it may also be referred to as ethnic cleansing. Deportation and forcible transfer are addressed in the Rome Statute, and their understanding is further developed through existing jurisprudence.

Forced displacement is a well-recognised phenomenon in Burma generally. The displacement of the Rohingyas has a long history, with over 200,000 individuals fleeing across the border to Bangladesh in 1978, and a larger number again in 1991-1992. A steady stream of Rohingya refugees into Bangladesh, and other destinations, continues to this day.

At the heart of this displacement – and indeed at the heart of many of the other violations documented in this Report – is the enduring condition of Rohingya statelessness and the refusal of the State Peace and Development Council (SPDC) to acknowledge and regularize Rohingya citizenship. The Rohingyas have experienced difficulties in obtaining citizenship since the early days of Burmese independence. The laws and policies, in particular the 1982 Citizenship Law, are at the heart of a discriminatory system which leaves the Rohingya ethnic minority without citizenship and subsequently vulnerable to a myriad of violations, including forced displacement.

Their movement is severely restricted and subjected to a strict licensing system. The construction of model villages and of military installations as a result of the heightened militarization of North Arakan State, has involved land confiscation and has further led to the increased displacement of the Rohingyas. In addition, numerous cases of the wholesale forced relocation/eviction of Rohingya villages have been documented since the early 1990s. The manner in which this has occurred is arbitrary, violent and at times fatal, and is a clear example of the crime of forcible transfer of populations. Generally, this forced displacement has been caused by the creation of intolerable and coercive conditions, culminating in Rohingyas fleeing across the border to Bangladesh or being displaced from their homes while remaining within the region.

This Report indicates that these acts may be widespread and systematic and, *prima facie*, amount to the commission of the crimes against humanity of deportation and forcible transfer of population. With this information at hand, further investigation by an internationally mandated body will also need to assess whether the circumstances point to a policy of ethnic cleansing.

Rape and Sexual Violence

Recent decades have seen increased attention to international crimes involving rape and sexual violence. This is evidenced in the jurisprudence of international criminal tribunals, and in the Statute of the International Criminal Court. Rape and other forms of sexual violence can, under the Rome Statute, be grounds for prosecution for crimes against humanity.

Reports from a wide variety of non-governmental organisations and United Nations bodies and representatives include a common view that rape and sexual violence is an endemic problem in Burma, especially for ethnic minority women and girls. Authorities regularly fail to effectively investigate alleged cases of rape, which leads to the inability of those affected to obtain redress for violations. Victims, their families, and witnesses of rape and sexual violence have reported being threatened, intimidated and physically abused because of their allegations. The research conducted for this Report, including confidential meetings and interviews of Rohingya refugees in Bangladesh, includes troubling allegations of rape and sexual violence in North Arakan State. The root causes of this type of abuse are numerous. Some are common throughout Burma, while others are particularly apparent in North Arakan State. Burma is a male-dominated society where women and girls hold traditional roles and generally do not enjoy equal status with men. Rohingya society is also very conservative. In this context, Rohingya women and girls are vulnerable to gender-based discrimination, which can lead to sexual violence and rape.

The significant military presence in North Arakan State seems to be a prominent cause of the prevalence of rape and sexual violence. In addition to gender-based discrimination and the militarisation of North Arakan State, the perpetration of sexual violence crimes and rapes against Rohingya girls and women frequently appears to be linked to racial discrimination. It appears that Rohingya women and girls in North Arakan State have been victims of rape and sexual violence, frequently at the hands of soldiers and NaSaKa members. Testimonies gathered for this Report include cases in which multiple female members of families – sisters, mothers and daughters – were all

raped or sexually attacked. The rapes and sexual violence carried out by the military, NaSaKa forces, and sometimes the police, appear to go beyond isolated, random, and individual circumstances. The regularity of their occurrence, the context in which they occur – e.g. during forced labour or in military bases - and the impunity of the perpetrators, all invite the conclusion that these acts, together with the other offences committed against the Rohingyas, provide *prima facie* evidence of crimes against humanity under the Rome Statute.

Persecution

The above violations do not occur in isolation. For example, rape and sexual violence occur during forced labour or when women are left alone because the men have been taken for labour. Moreover, these violations appear to be directed in particular against the Rohingya minority, as part of a general discriminatory approach. Consequently, there arises a concern that the Rohingya minority are victims of the offence of persecution. Under the Rome Statute, “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’.

In addition to the above detailed offences, a number of other violations appear to be committed against the Rohingyas. Arbitrary detention is a frequent occurrence, often accompanied by extortion and demands for bribes. The research and interviews conducted for this Report also reveal that these detentions are often found to be in connection with the Rohingyas’ non-citizen status and the obstacles derived from it, such as, for example, the travel permit system. As such, these detentions appear to target the Rohingya minority in a discriminatory manner. Similar concerns are raised with regard to murder, torture, and other ill-treatment. Whilst the Burmese regime has been criticised for the prevalence of impunity for these violations throughout Burma, once again, in North Arakan State, the Rohingyas appear to be singled out for such abuse on account of their ethnic minority status.

Other acts also contribute to the apparent persecution of Rohingyas. One of the less-recognised violations concerns the severe marriage restrictions imposed on the Rohingya minority. These marriage restrictions are an insidious violation of human rights with far-reaching and grave consequences. The field mission conducted for this Report has revealed that the current marriage restrictions and the severe consequences for non-compliance are amongst the main reasons why Rohingyas flee North Arakan State. The restrictions prevent families from living together and result in unregistered children growing up as individuals with no social and legal status. Extortion and detention are often associated with the marriage restrictions. The Rohingya minority are also exposed to widespread restrictions on their freedom of religion, including obstacles with respect to the maintenance of mosques and schools, which has a further detrimental impact on their right to education.

The many violations documented throughout this Report are clearly intertwined. Linking them is the fact that their commission is widespread and systematic and committed with discriminatory intent, i.e. because of the ethnic, racial and religious make-up of the Rohingya community. Each category of violation is linked to the discriminatory policies of the SPDC. From forced labour and rape to forcible

displacement and marriage restrictions, the Rohingyas are targeted for abuse on account of their minority status. In the absence of the most basic freedoms, resulting in destitution and frequently death, hundreds of thousands of Rohingyas have been left with no option but to flee their homes for the relative safety of neighbouring States. Taken together and in context, the offences committed against the Rohingya minority appear to present a case for the crime against humanity of persecution.

Conclusions

This Report finds that there is a reliable body of evidence pointing to acts constituting a widespread or systematic attack against the Rohingya civilian population in North Arakan State. These appear to satisfy the requirements under international criminal law for the perpetration of crimes against humanity. After being hounded for decades, it is time that adequate attention be given to the plight of the Rohingyas. The root causes of the situation of the Rohingyas must be further assessed, as failure to do so will undoubtedly lead to a bleak future for this ethnic minority group. People committing, allowing, aiding and abetting these crimes must be held accountable. The international community has a responsibility to protect the Rohingyas, to respond to the allegations of crimes against humanity, and to ensure that violations and impunity do not persist for another generation.

Chapter II: Introduction

II. Introduction

The Rohingyas are a Muslim minority group residing in the Arakan State in Burma. Arakan State is located on the western coast of Burma; it shares its border with the Chin State to the north, and to the east with the Magway, Bago and Ayeyarwady Divisions. A range of mountains on the northeast physically separates the Arakan State from the rest of Burma. Arakan is also bordered by the Bay of Bengal to the west and by Bangladesh (Chittagong Division) to the northwest. The Naf River, a long estuary of around only two kilometres width separates the Cox's Bazar District of Bangladesh (on the western bank of the river) from Arakan (on the eastern side). It is estimated that there are 800,000 Rohingyas in Arakan, constituting 25% of the population. The Rohingyas reside mainly in North Arakan State (in the townships of Buthidaung, Maungdaw and Rathedaung) and comprise 80% of the population there. A large number of Rohingyas live outside Burma, including over 200,000 in Bangladesh.

A. Background of the Report

1. Context and Framework of the Report

The project leading to this Report was initiated at a time when the plight of the Rohingyas in North Arakan State was not well known and had been overlooked for years, despite allegations of serious human rights violations. During the first months of this project, the story of the Rohingya “boat people” surfaced in the media. This story concerned over a thousand Rohingyas who had fled Burma by boat, as has been frequent practice in recent years following the rainy season when the sea becomes more navigable. It was reported that hundreds of the Rohingyas had been towed back out to sea by Thai authorities and left to die, while others were detained in Thailand. This created a new interest, placing the situation of this ethnic group on the agenda of the international community. Much of the attention and the condemnations, however, were short-lived and focused on the treatment of the Rohingya “boat people” by Thailand, rather than on the root causes of the situation in Burma itself. At the beginning of 2010, Bangladeshi law enforcement agencies have been pushing back unregistered Rohingyas into Burma and arresting others for immigration offences.¹ This

¹ C. Lewa, The Arakan Project, ‘Unregistered Rohingya Refugees in Bangladesh: Crackdown, Forced Displacement and Hunger’ (2010), available at <http://www.burmalibrary.org/docs08/Bangladesh-Crackdown.pdf>; Physicians for Human Rights, ‘Stateless and Starving: Persecuted Rohingya Flee Burma and Starve in Bangladesh’ (2010), available at <http://physiciansforhumanrights.org/library/documents/reports/stateless-and-starving.pdf> at 6; MSF, ‘Violent Crackdown Fuels Humanitarian Crisis for Unrecognised Rohingya Refugees Bangladesh’ (2010),

also was the object of some media attention. It is within this context that the present Report was written, at a time when awareness has been raised and interest created. Nevertheless, still more needs to be done to provide an in-depth examination of the human rights violations of the Rohingyas by the Burmese authorities.

Irish Aid provided funding for independent research to be conducted by the Irish Centre for Human Rights on the situation of the Rohingyas. The content and views expressed in the resulting Report by the Irish Centre for Human Rights are entirely those of the authors. The project leading to this Report was established to research and examine the situation of the Rohingyas in the North Arakan State in Western Burma, with an aim to a better understanding of the reasons behind their continuous flight. In establishing the Rohingya project, the Irish Centre for Human Rights set out to: (i) examine the root causes behind the flight of the Rohingyas, (ii) assess the human rights violations committed against the group in North Arakan, (iii) establish whether the violations could be said to amount to international crimes. In light of this it was agreed at the outset that the Report would focus on the situation of the Rohingyas in North Arakan State and not those in the countries of refuge, even if treatment of the latter can sometimes also amount to human rights violations. It was decided that the examination of the situation of the Rohingyas would not only be based upon extensive research, but also on a fact-finding mission with the participation of a professional criminal investigator, meetings with organisations on the ground and interviews with Rohingya victims and witnesses of human rights abuses. This field component was added to ensure that the Report would be based on first-hand investigation and include new information.

The material gathered for the Report identified a wide range of human rights violations against the Rohingyas in North Arakan State and provided a prime example of the long-acknowledged indivisibility of all human rights. The material clearly documented violations of the civil and political rights of the Rohingyas, including violations of: the right to life, the prohibition of torture, prohibition of forced or compulsory labour, due process rights, freedom of movement, the right to marry and found a family, and freedom of religion. The information also confirmed that violations of economic, social and cultural rights were on-going. They include violations of the right to work and to enjoy just and favourable conditions of work, the right to education, and the right to adequate standards of living, including adequate food. The examination of this situation clearly showed that the deprivation of one type of right was commonly affecting the others. The myriad of violations also appeared to be occurring in a context of racism and general discrimination against the Rohingyas. The research and fact-finding mission indicated that discrimination (including statelessness and denial of citizenship) was in actual fact a cross-cutting issue at the basis of most violations.

The facts examined clearly showed that human rights violations are committed against the Rohingyas, and that the cases documented were not isolated acts. The preliminary findings indicated that these violations are part of a protracted situation involving policies of discrimination and persecution against this group. In comparison

with violations occurring elsewhere in Burma, many of the abuses appeared to be more prominent in the case of the Rohingyas in North Arakan State. Many additional violations were specific to the Rohingyas. During the meetings conducted as part of this Report, it was stated more than once by individuals working for international organisations, that the level of abuse against the Rohingyas is amongst the worst they have seen in relation to all their international experience, not only in Burma. With this body of reliable material indicating that the Rohingya minority endure a daily life of gross and systematic human rights violations, the Irish Centre for Human Rights elected to examine the situation of the Rohingyas through the lens of crimes against humanity.

The totality of the abuses suffered by the Rohingya minority cannot be encapsulated in a single report. Nonetheless, in the following chapters of this Report, a number of the issues, identified through the research and fact-finding mission as being amongst the worst that this group has to endure, are examined. In addition to providing a short background on the Rohingyas (Ch. II) and presenting the legal framework for this study (Ch. III), the Report addresses the following issues: Enslavement and forced labour (Ch. IV), rape and sexual violence (Ch. V), deportation and forcible transfer of population (Ch. VI), and persecution, including the above-mentioned acts as well as torture, murder, arbitrary detention, the imposition of arbitrary taxation and extortion, marriage restrictions and the denial of freedom of religion (Ch. VII). Many of the abuses and issues raised with regard to other minorities and in Burma generally are relevant to the situation of the Rohingyas. Accordingly, each chapter includes a presentation of the facts, a discussion concerning the situation of the Rohingyas, and this is placed within the context of Burma as a whole. A legal section provides an explanation of the applicable international law, and a legal analysis of the factual findings provides an assessment of whether these circumstances point to the perpetration of acts enumerated in the Statute of the International Criminal Court, and could be said to amount to crimes against humanity. The conclusions consider the overall situation, and examine whether there are enough grounds to assert that crimes against humanity are currently being committed against the Rohingyas in North Arakan State.

2. Methodology and Objectives of the Report

The idea for the project leading to this Report stems from an initiative by Guy Horton, a human rights activist who has long been associated with Burma. This project was undertaken with the aim of investigating and providing an assessment of the human rights situation of the Rohingyas in North Arakan State. To implement its mandate the Irish Centre for Human Rights established a research unit composed of Prof. William Schabas (Director of the Irish Centre for Human Rights), Ms. Nancie Prudhomme (Project Manager and Researcher), and Mr. Joseph Powderly (Project Researcher). The research unit also carried out consultancies with a number of external experts. The Report was built around preliminary meetings, extensive open-source research, and on a four-week fact-finding mission in Burma, Thailand and Bangladesh.

The open-source research was carried out by the project researchers under the supervision of Prof. Schabas. The research examined and analysed existing material on the situation of the Rohingyas, ranging from historical information on their background, through to reports by the few international and non-governmental bodies that had occasion to address this issue. To gain further information that was not in the public

domain, numerous confidential meetings were held with individuals from several organisations working on the ground in North Arakan State. In addition to further first-hand insight from those in a position to know, these meetings also provided the researchers of this Report access to confidential documentation, further supporting the findings. Many of the sources used cannot therefore be exposed by name in this Report, for fear of reprisal or of jeopardising their work. All confidential information is, however, recorded and can be verified. All the research, meetings, and documentation provided a clear picture of the situation. However, the strongest – and most troubling – information came, as expected, from the multitude of testimonies gathered from individual members of the Rohingya minority.

During the first phase of the project, meetings were organised in London at the Law Department at Middlesex University, a project affiliate. The first meeting took place at the end of 2008. The following persons participated in the meeting: Project researchers from the Irish Centre for Human Rights, representatives of Middlesex University, Guy Horton, Chris Lewa (Rohingya expert and Coordinator of The Arakan Project), and Ben Rogers (East Asia Team Leader, Christian Solidarity Worldwide). A subsequent meeting took place at the beginning of 2009 and included the participation of: Nurul Islam (President of the Arakan Rohingya National Organization (ARNO)), several members of the Rohingya community, the Irish Centre for Human Rights' researchers, and Middlesex University affiliates. The meeting with these experts provided invaluable knowledge on the situation of the Rohingyas and filled potential gaps in the open-source research. These consultations also supplied essential information for the organisation of the fact-finding mission and allowed the researchers to assess their preliminary findings.

A four week fact-finding mission was carried out in Thailand, Burma and Bangladesh by the project's researchers, both of whom are international lawyers specialising in human rights, humanitarian law, and international criminal law, and who have also undertaken specialised training in investigation of international crimes. For the period of the mission in Bangladesh they were joined by Mr. John Ralston, Executive Director of the Institute for International Criminal Investigations and former Chief of Investigations at the International Criminal Tribunal for the former Yugoslavia and for the UN Independent Commission of Inquiry for Darfur. Mr. Ralston led the mission in Bangladesh, the longest part of the overall mission, during which most of the interviews were conducted and testimonies gathered. The fact-finding mission conducted over 70 interviews with victims, witnesses and other individuals in possession of relevant information on the situation of the Rohingyas in North Arakan State.

The fact-finding mission was undertaken under a number of constraints, most notable being the geographical remoteness of North Arakan State and the fact that the Burmese authorities have blocked access to the area. Most foreigners are not given official permission to visit North Arakan State and only few international non-governmental organisations and UN bodies have a field presence there. Most if not all organisations officially have a humanitarian, as opposed to a monitoring, mandate and they all work under the constant scrutiny of the Burmese authorities. International organisations are generally unable to publicly discuss the situation and provide details of on-going human rights violations or international crimes for fear that they would no longer be allowed access to the region or country, which would both jeopardise their

mission and deprive the population of much-needed assistance. The situation for local organisations is similar and, in actual fact, the publication of highly controversial material would not only compromise their work but could also be extremely dangerous for the individuals involved. These obstacles presented challenges for the gathering of information, and the work for the Report had to be planned appropriately and with caution.

The mission in Thailand included meetings with international non-governmental organisations, the participation at a round table discussion addressing the push-back at sea of the Rohingya “boat people”, as well as work sessions with Chris Lewa, the main international Rohingya expert and Coordinator of the Arakan Project. The second phase of the mission was in Burma. Due to the restrictions, it was not possible to conduct the research in North Arakan State itself. Instead, the mission focused on holding confidential meetings in Rangoon (Yangon) and gathering further information from individuals working with, and on issues related to, the situation of the Rohingyas. The meetings in Burma did not include the participation of local workers, so as not to place them at the very real risk of harsh reprisal. The bulk of the fact-finding mission was in Bangladesh. It included meetings with representatives of international and regional organisations, and with human rights and humanitarian workers. Interviews were also conducted with leaders of the Rohingya community in Bangladesh, with representatives of Kaladan Press, and a representative of the Rakhine community.

The interviews with refugees and asylum seekers conducted in Bangladesh constituted the main component of the fact-finding mission; they provided a wealth of further information and evidence of the severe abuses these individuals have suffered. Hundreds of thousands of Rohingyas have fled to Bangladesh in past decades, and many thousands are living there in a variety of formal refugee and makeshift camps. The Rohingyas interviewed came mainly from four locations. These were the Kutupalong and Nayapara refugee camps (two official camps in Cox’s Bazar District, managed by the Bangladeshi government, and which together house 28,000 refugees). The third location was the makeshift camp surrounding the Kutupalong official camp, where an estimated 20,000 unregistered Rohingyas are now living without basic amenities. The fourth location was the Leda settlement, where Rohingyas from the Teknaf squatter camp were relocated with the support of the European Commission. By travelling to these locations, it was possible to have access to Rohingya communities who were in turn able to speak with less fear of reprisal than those in Burma.

The Report was written on the basis of this body of material and under the supervision of Prof. William Schabas, author of several authoritative books in the area of international criminal law and an acknowledged international authority in the field. The objectives of this Report are many: Firstly, while a number of humanitarian organisations have detailed knowledge of the human rights violations committed against the Rohingyas, this material often remains unpublished. The organisations working on the ground are unable to publicise their information for fear of jeopardising their ability to work in Burma. This Report hopes to place the plight of the Rohingyas in plain sight and expose the egregious violations they endure on a daily basis, so that ignorance of their situation cannot be an excuse for inaction by the international community. Secondly, some of the organisations seeking to provide humanitarian assistance to the Rohingyas in Burma, Bangladesh, and elsewhere often do not have the legal expertise or resources to undertake an assessment of the wide range of issues and

violations committed against the Rohingyas. Yet, these organisations need such an assessment as they cannot raise and allocate resources for their work with this group without evidence of the need for it. This Report attempts to provide such detailed information and a better understanding of the situation of the Rohingyas. Thirdly, governments require objective and independent analysis of the circumstances behind the on-going Rohingya flight, in order to inform their relevant policies. This ranges from foreign policy issues in their dealings with Burma, to domestic policy with regard to the acceptance and resettlement of Rohingya refugees. This Report seeks to provide such analysis and assist governments in making these decisions. Finally, and most importantly, this Report hopes to alert the international community to the desperate situation of the Rohingyas and the international crimes being committed against them, and to spark action to address what is currently a situation of total impunity.²

While this Report focuses on the Rohingyas in North Arakan State, other recent reports and studies have highlighted a wide range of disconcerting patterns of violations throughout Burma,³ all of which are unlikely to be resolved if left to the Burmese authorities. This Report hopes to complement these other initiatives, as it is only through concerted and joint action by the international community that these abuses are likely to be brought to an end, that the victims receive redress, and those responsible be held accountable.

B. Background on the Rohingyas

1. Terms Used and Administrative Structures

Burma or Myanmar? Arakan or Rakhine State?

In the wake of the 1988 student uprising, the State Law and Order Restoration Council [SLORC] (as it was called then), established the Commission of Inquiry into the True Naming of Myanmar which led directly to the adoption of the Adaptation of Expressions Law. This law stated that:

The expression “Union of Burma” and the expression “Burma”, “Burman” or “Burmese” contained in existing laws enacted in the English language shall be substituted by the expression “Union of Myanmar” and “Myanmar” respectively.⁴

² For earlier reports which provide an overview of the situation of human rights of the Rohingyas in North Arakan State, see Amnesty International (AI), ‘Myanmar. The Rohingya Minority: Fundamental Rights Denied’, ASA 16/005/2004 (May 2004); International Federation of Human Rights (FIDH), ‘Burma: Repression, Discrimination and Ethnic Cleansing in Arakan’, April 2000, No. 290/2.

³ See for instance International Human Rights Clinic at Harvard Law School, ‘Crimes in Burma’ (2009), available at <http://www.law.harvard.edu/programs/hrp/documents/Crimes-in-Burma.pdf>; FIDH, ALTSEAN-Burma and Burma Lawyers’ Council, ‘International Crimes Committed in Burma: The Urgent Need for a Commission of Inquiry’ (2009), available at <http://www.fidh.org/IMG/pdf/bu08.pdf>; Amnesty International, ‘Crimes against Humanity in Eastern Myanmar’ (2008), available at <http://www.amnesty.org/en/library/info/ASA16/011/2008/en>; Oxford Pro Bono Publico, ‘Justice in Burma’ (2008), available at <http://www2.law.ox.ac.uk/opbp/OPBP%20-%20PILPG%20Burma%20Report%20April%2008.pdf>.

⁴ Permanent Committee on Geographical Names, *An Introduction to the Toponymy of Burma*, (October 2007), at 5, available at <http://www.pcn.org.uk/Burma%200907.pdf>.

The move by SLORC to effectively reconstruct the identity of the nation within the international community was a manifestation of their drive to prove their domestic dominance. The name change applied to all major English terms for ‘any state, division, townships zone, township, town, ward, village tract or village, or the name of any river, stream, forest, mountain or island’.⁵ SLORC argued that the use of the word “Burma” corresponded to “Bama” which only referred to the majority ethnic group. The use of “Myanma” – which in reality is simply the literary form of the spoken word “Bama” – would, in their view, be more representative of the ethnic diversity of the country. The name change has naturally been the subject of significant controversy. It was almost immediately accepted by the United Nations; however, a number of states including the USA, the United Kingdom and Ireland have refused to acknowledge the change and continue to refer to the State as “Burma”. In justifying this position, the United States Department of State has consistently commented that ‘some members of the democratic opposition and other political activists do not recognize the name change and continue to use the name “Burma”. Out of support for the democratic opposition, the U.S. Government likewise uses “Burma”.’⁶ The UK Government has similarly stated that ‘Britain’s policy is to refer to Burma rather than “Myanmar”’. The current regime changed the name to “Myanmar” in 1989. Burma’s democracy movement prefers the form “Burma” because they do not accept the legitimacy of the unelected military regime and thus their right to change the official name of the country.’⁷ This Report supports this position and will refer to all place names in their pre-1989 form. Similarly, the official name of Arakan State is Rakhine State but the term commonly used by the Rohingya community remains “Arakan”, and is accordingly employed in this Report.

Rohingya – A Disputed Term of Reference

Reference to the Muslims of North Arakan as “the Rohingyas” continues to be a somewhat contentious issue in Burma. Arakan was formerly known as Rohang/Roshang/Raham. The Rohingya name identifies the Muslims of Arakan as natives of Rohang or of Arakan. Hence, “Rohingya” is synonymous with “Arakanese” or “Rakhine”. The ethnic majority Rakhine fundamentally reject any suggestion that the Rohingyas should be considered an ethnic group with *bona fide* historical roots in the region; indeed, the Rakhines contend that they only encountered the word “Rohingya” in the 1950s during the time of the Mujihid movement. A similar view is held by the Arakanese Muslims resident outside of Maungdaw, Buthidaung and Rathedaung townships, who did not support the independence and irredentist claims made by the Rohingyas on a number of occasions since Burmese Independence in 1948. The Rohingya community reject the argument that the term “Rohingya” was invented in the 1950s and contend that this is an ancient term that was used much before the Burmese Independence.⁸ However, it is clear that the Muslims resident in North Arakan who

⁵ Quoted in M.W. Charney, *A History of Modern Burma*, (Cambridge. Cambridge University Press, 2009) at 172-173.

⁶ United States Department of State, Bureau of East Asian and Pacific Affairs, ‘Background Note: Burma’, available at <http://www.state.gov/r/pa/ei/bgn/35910.htm>.

⁷ Foreign & Commonwealth Office, ‘Burma: Country Information’, available at, <http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/country-profile/asia-oceania/burma/>.

⁸ In support of this argument see for instance F. Buchanan, ‘A Comparative Vocabulary of some of the Languages Spoken in the Burma Empire’, (1799) 5 *Asiatic Researches* 219, reprinted in (2003) 1 *SOAS Bulletin of Burma Research*, available at <http://web.soas.ac.uk/burma/Comparative%20Vocabulary.PDF>

prefer to be designated “Rohingya” as opposed to “Burmese Muslim” have developed a culture and language (a mixture of Chittagonian, Burmese, Hindi and English) which is absolutely unique to the region.¹ It is felt that the term “Rohingya” is a legitimate identifier for this group and will be used throughout this Report.

Administrative Structures

It is necessary at the outset to give some idea of the nature of the administrative structure within North Arakan State (and applying to Burma generally). The current regime has referred to itself as the State Peace and Development Council, or SPDC, since 1997. The administrative structure in place is intended to insure that the SPDC is present at all levels of Burmese society. The chief SPDC official in Arakan is the Western Commander who has responsibility over all military and general administrative issues in the State. The administrative structure fans out below him in the following way: (i) District Peace and Development Council (DPDC) which controls Arakan’s four main districts – Sittwe, Maungdaw, Kyaukphyu and Thandwe; (ii) Town Peace and Development Council (TPDC) which oversees the 17 townships within the four districts; and finally (iii) the Village Peace and Development Council (VPDC) which administers each of the village tracts that make up the townships. In terms of military structures, Arakan is formally divided into three regions, Southern Arakan, Kyauktaw and Maungdaw-Buthidaung-Rathedaung.

2. Brief Historical Background to the Rohingyas

In order to fully understand the intractable nature of the situation of the Rohingyas of North Arakan State, it is essential to get a sense of the historical and contemporary social and political context in which their narrative is located. Burma has a rich ethnic minority population with the country’s seven states taking their names (as altered in 1989) from their respective ethnic populations, i.e. Shan, Kachin, Chin, Kayin, Kayah, Mon, and Rakhine. These states predominately occupy the border regions with the central plains – home to the majority Burman people – being separated into seven Divisions. Ethnic minority populations account for roughly 30% of the Burmese population, with the Burman occupying the majority position. The Rohingyas are overwhelmingly concentrated in the three North Arakan townships of Maungdaw, Buthidaung and Rathedaung. It is impossible to cite a definitive figure in terms of their number, but it is believed that roughly 800,000 Rohingyas are resident in these three townships. The inter-generational presence of the “Rohingyas” (a disputed and essentially self-identifying term which has been discussed above) in North Arakan State has been consistently denied by successive Burmese regimes. The Rohingyas themselves state that they are an indigenous Burmese ethnic group descended from the first Muslim inhabitants of Arakan who arrived in or around the 9th century. According to Moshe Yegar, whose works have been considered authoritative for some time, the arrival of the Rohingyas in Arakan was precipitated by the development of trade routes through the Bay of Bengal and the Andaman Sea.⁹

at 43. This article first published in 1799 uses the term Rohingya (Rovingaw) indicating that ‘[t]he Mahommedans [Muslims] settled at Arakan, call the country Rovingaw’.

⁹ M.Yegar, *Between Integration and Secession: The Muslim Communities of the Southern Philippines, Southern Thailand, and Western Burma/Myanmar* (Maryland. Lexington Books, 2002) at 19.

Arakan sits on a line dividing Islamic and Buddhist Asia. The Rohingyas reflect this geographic reality and are an ethnic mix of Bengalis, Persians, Moghuls, Turks and Pathans. The majority ethnic group in Arakan is the Buddhist Rakhine. In this respect Martin Smith has commented that:

[I]t is important to stress...that Arakan itself is an ethnic minority state and that the problems of this territory are not simply internal problems between local Muslims and Buddhists but also between Arakanese Buddhists, known as Rakhines, and the central government in Rangoon.¹⁰

Questions surrounding the historical presence of Muslims in Arakan lie at the heart of the present situation of the Rohingyas, to the extent that two diametrically opposed versions of the region's history have emerged. Smith points out that, 'after decades of isolation, the whole crisis is overshadowed by a complete absence of reliable anthropological or social field research, which means that different sides continue to circulate – or even invent – very different versions of the same people's histories'.¹¹ This Report will not attempt to categorically reconcile these competing histories, but rather the primary objective of this section is to provide a basic, accepted introduction to the Rohingyas as a minority group within Arakan State.

Successive Burmese regimes have refused to recognize the Rohingyas as an ethnic minority in North Arakan. In 1992, the then Minister for Foreign Affairs U Ohn Gyaw declared:

In actual fact, although there are 135 national races in Myanmar today, the so-called Rohingya people are not one of them. Historically, there has never been a "Rohingya" race in Myanmar...Since the first Anglo-Myanmar War in 1824, people of Muslim faith from the adjacent country illegally entered Myanmar Naing-Ngan, particularly Rakhine State. Being illegal immigrants they do not hold immigration papers like other nationals of the country.¹²

However, this statement and others like it, utterly distort verifiable historical fact. Generations of Rohingyas cannot simply be labelled illegal economic migrants. Arakan was an independent kingdom until it was conquered by the Burmese King Bodawpaya in 1784, and at times up to that point had also occupied southern parts of modern Bangladesh.¹³ There were evidently strong ties, both economic and military, between the Kingdom of Arakan and its Bengali neighbour. Yegar states that, '[f]rom the middle of the sixteenth until the middle of the eighteenth centuries, Muslims served in the Burmese army, generally in the king's guard, and as riflemen'.¹⁴ The Rohingyas also attach great importance to the reign of the Arakan King Naramaikhla, who in tribute to the support he received from the Bengali King Ahmed Shah of Gaur, ordered that he and

¹⁰ M. Smith, 'The Muslim "Rohingyas" of Burma', Paper delivered at Conference of Burma Centrum Nederland, 11 December 1995, at 2 (on file with authors).

¹¹ *Ibid.*, at 1.

¹² Press Release of Minister for Foreign Affairs, U Ohn Gyaw, 21 February 1992.

¹³ C. Lewa, 'The Rohingya: Forced Migration and Statelessness', Paper submitted to the Centre of Refugee Studies, Jadavpur University, Calcutta, February 2001 (on file with authors).

¹⁴ Yegar, *Between Integration and Secession: The Muslim Communities of the Southern Philippines, Southern Thailand, and Western Burma/Myanmar*, *supra* note 9 at 20.

his successors adopt Muslim honorifics.¹⁵ During this period there were significant population flows between Chittagong and Arakan. However, with the annexation of Arakan by the Burmese King Bodawpaya in 1784, the Muslim influence on the administration of the region was significantly reduced. Having been deposed by Bodawpaya, the Arakanese King Thamada fled to British-controlled Bengal and pleaded for assistance. In the ensuing years, a protracted armed conflict along the Bengal/Arakan border eventually precipitated the first Anglo-Burman War of 1824-25. With the signing of the Yandabo Treaty in 1826, Arakan formally fell under the control of the British, giving rise to a massive wave of Bengali (Indian) immigration into Arakan. The statement of former Foreign Minister Gyaw quoted above is indicative of the importance that the present (and indeed past) regimes have placed on the 1824 war. As far as they are concerned, this conflict would open the gates to British colonial domination and is the only reason the Rohingyas are present in Arakan today. As Smith states:

[T]he date of 1824-25 and British colonization have become embedded in the Burmese government's mind with regards to the Muslim question and the historic rights of Muslims to residency in Arakan. That there were Muslim inhabitants in Arakan before 1824 is not in dispute; the argument is over their ethnicity and numbers – and the starting point of the present troubles must therefore be dated to the advent of British rule.¹⁶

The large-scale influx of Indians into Arakan in the years of British rule led to significant tension, and frequently violence, between ethnic communities.¹⁷ Flash-points in this communal tension were frequent – anti-Indian riots broke out in 1930-31 and 1938 – and often resulted in loss of life. Throughout the Japanese occupation of Burma during World War II, the Rohingyas remained loyal to the British, who promised to reward them with their own independent Muslim State, and they were thus seen as standing in the way of the Burmese independence movement, led by General Aung San, who had struck an independence deal with the Japanese.¹⁸ During the Japanese occupation which lasted from 1942-1945, it is estimated that up to 500,000 Indians and Muslims fled Burma for the relative safety of British controlled territory:

Some were clearly following in the footsteps of the British government, but others allege that they were brutally chased out by nationalists of Aung San's Burma Independence Army. Thousands are reported to have died of starvation, disease or during sporadic military attacks in one of the darkest but least reported incidents in modern Burmese history.¹⁹

In the years following the war, the Rohingya leadership expressed both independence and irredentist aspirations and went as far as to appeal to the President of the newly

¹⁵ M. Smith, 'The Muslim "Rohingyas" of Burma', Paper delivered at Conference of Burma Centrum Nederland, 11 December 1995, at 3 (on file with authors).

¹⁶ *Ibid.*, at 4.

¹⁷ The FIDH has commented that '[u]nder British rule, the population of Arakan increased from less than 100,000 inhabitants to more than one million, as a result of a deliberate policy of relocating Muslim and Hindu Indians in the East. This large-scale arrival of Indians led to the first communitarian tensions, worsened by the economic recession'. FIDH, *supra* note 2 at 5.

¹⁸ For an excellent overview of the independence struggle see generally, M. Smith, *Burma: Insurgency and the Politics of Ethnicity*, (London: Zed Books, 2nd edn., 1999) at Part I.

¹⁹ Smith, 'The Muslim "Rohingyas" of Burma', *supra* note 10, at 5.

established State of Pakistan for incorporation into East Pakistan. Smith comments that, 'this move more than any other...determined the present-day governmental attitude towards the Rohingyas: they had threatened Burma's territorial integrity on the eve of independence and could never be trusted again'.²⁰ It also forms the basis of the frequent claims that the Rohingyas are simply foreigners or "Kala" intending on seceding from the Union of Burma.

Burma successfully gained independence in 1948, but this only gave rise to increased political violence throughout ethnic minority regions of the State which continue to rage to the present day. The British Government did not follow through on its purported promise to establish an independent Muslim State in the territory of North Arakan, resulting in the establishment of a Mujahid movement which demanded autonomy within the Union of Burma. During the democratic era spanning from independence in 1948 to General Ne Win's military coup in 1962, the position and status of the Rohingyas gradually improved. In 1961, the U Nu government signed a series of ceasefire agreements with Mujahid groups and created the Mayu Frontier Administration Area (MFA) covering the Maungdaw, Buthidaung and Western Rathedaung districts. The MFA was controlled directly from Rangoon and offered a certain amount of autonomy to Rohingya-dominated areas. However, with General Ne Win's successful *coup d'état* in 1962 and the imposition of the "Burmese Way to Socialism", the MFA was dissolved and the oppression of the Rohingyas was reignited in earnest:

Under General Ne Win, human rights abuses and the coercion of the civilian population – including forced labour and forced relocations – became almost routine in many ethnic minority regions of the country, especially under a draconian military operation known as the "Four Cuts", which was similar in intent to the strategic hamlet operation of the USA in Vietnam. Significantly, it has been the use of such brutal tactics as these in Arakan that many Muslim leaders claim has been the main cause of the dramatic flight of several thousand Muslim inhabitants from Burma on two different occasions in the past twenty years.²¹

The 1974 Constitution granted Arakan statehood within the Union of Burma. However, in a conscious policy decision, Arakan was given the official title of Rakhine State. In 1977 Ne Win instigated Operation Nagamin ("King Dragon"), whose aim was to 'scrutinize each individual living in the State, designating citizens and foreigners in accordance with the law and taking actions against foreigners who have filtered into the country illegally'.²² While the operation was purportedly nationwide, in Arakan it acted as a vehicle for the commission of extreme violence against the Rohingyas. As outlined in considerable detail in chapter VI below on the crime against humanity of deportation or forcible transfer of population, Operation Nagamin led to the mass exodus of some 200,000 Rohingyas across the Burma-Bangladesh border.²³ By the end of 1979,

²⁰ Smith, *Burma: Insurgency and the Politics of Ethnicity*, *supra* note 18 at 41.

²¹ Smith, 'The Muslim "Rohingyas" of Burma', *supra* note 10 at 8. For an in-depth study of the history of the Rohingya to 1962 see, M. Yegar, *The Muslims of Burma: A Study of a Minority Group*, (Wiesbaden. Otto Harrassowitz, 1972).

²² Statement by the Ministry for Home and Religious Affairs, 16 November 1977, quoted in Human Rights Watch (HRW), 'The Rohingya Muslims: Ending a Cycle of Exodus', September 1996, Vol.8 No. 8(c) at 11.

²³ See Chapter VI (Deportation or Forcible Transfer of Population).

following an international outcry, the majority of those who had fled had returned; however, the conditions on the ground would continue to deteriorate.

In 1982, Ne Win passed the now notorious Citizenship Law (also examined in detail in chapter VI), which effectively made it impossible for the Rohingyas to be recognized as full Burmese citizens, placing them in the relative legal limbo that is statelessness. Following the democracy uprisings of 1988, Ne Win gave way to the so-called State Law and Order Restoration Council or SLORC, controlled by Senior General Than Shwe. The express objective of SLORC was supposedly to get the country into a state of readiness for democratic elections to be held in 1990. Interestingly, the Rohingyas, despite the majority not having full citizenship were allowed to both run and vote in these now infamous elections. However, in July 1990 SLORC declared that a national government to be led by Daw Aung San Suu Kyi's National League for Democracy Party (NLD) would not take office, and instead a constituent assembly would be formed in order to draft a new constitution under which fresh elections could take place.

The refusal of SLORC to hand over power to the democratically elected NLD government unsurprisingly provoked country-wide protests. The SLORC needed a diversion: they chose the Rohingyas.²⁴ North Arakan State was rapidly militarized for the alleged aim of both quelling the Rohingya insurgency movement – which consisted for the most part of a few hundred guerilla fighters operating under the banner of either the Rohingya Solidarity Organization (RSO) or the Arakan Rohingya Islamic Front (ARIF) – and securing the Burma-Bangladesh border.

In 1992, the Nay-Sat Kut-kwey Ye (NaSaKa) was established. The NaSaKa is a border security force consisting of members of the police, Military Intelligence, the internal security or riot police (known as Lon Htein), customs officials, and the Immigration and Manpower Department.²⁵ It operates in North Arakan State, and, as will become clear from the factual findings of this Report, it is the primary perpetrator of crimes against the Rohingyas. The rapid increase in the military presence in North Arakan gave rise to an intensification of oppressive tactics against the Rohingyas. The situation was such as to precipitate a second mass exodus across the Burma-Bangladesh border. As is discussed in chapter VI below, between May 1991 and March 1992 approximately 270,000 Rohingyas sought refuge in the Cox's Bazar region of Bangladesh. The United Nations High Commissioner for Refugees (UNHCR) established a series of camps to address the needs of fleeing Rohingyas. By 1996, a large proportion had been repatriated to North Arakan²⁶ and the UNHCR continued to maintain only two camps – the Nayapara and Kutupalong camps – which together contain approximately 28,000 Rohingya refugees.

²⁴ B. Lintner, 'Diversionary Tactics: Anti-Muslim campaign seen as effort to rally Burmans', *Far Eastern Economic Review*, 29 August 1991. See also, FIDH, 'Burma: Repression, Discrimination and Ethnic Cleansing in Arakan', *supra* note 17 at 6; HRW, 'The Rohingya Muslims: Ending a Cycle of Exodus', *supra* note 22 at 12.

²⁵ AI, *supra* note 2 at 5.

²⁶ For an in-depth examination of controversies surrounding the repatriation process see: FIDH, 'Burma: Repression, Discrimination and Ethnic Cleansing in Arakan', *supra* note 17; and HRW, 'The Rohingya Muslims: Ending a Cycle of Exodus', *supra* note 22.

In the intervening years the military presence has been maintained and possibly intensified in North Arakan State. In 1997, SLORC reconstituted itself as the State Peace and Development Council, or SPDC. Following the events of 11 September 2001, the SPDC publicly supported the United States' "War on Terror" and have since then used this as an excuse to continue to implement their strategy of ethnic oppression in North Arakan.²⁷

There has not been a mass exodus of Rohingyas from Arakan on remotely the same scale as that of 1991-1992. As is explored in chapter VI, part of the function of the NaSaKa is to ensure that such an exodus, which would attract the attention of the international community, does not happen. Instead, the NaSaKa oversees the more gradual movement of refugees from North Arakan across the Naf River and into the Cox's Bazar region of Bangladesh. At present it is thought that somewhere in the region of 200,000 unregistered Rohingya refugees are currently located in the Cox's Bazar region of Bangladesh, with additional numbers in Pakistan, Saudi Arabia, Malaysia, Thailand, Indonesia, the United Arab Emirates, and Japan. Finally, it is worth noting that many Rohingyas were granted temporary registration cards and permitted to vote in the widely discredited referendum on the new Burmese Constitution that was held in the immediate aftermath of Cyclone Nargis in May 2008.

The objective of the foregoing was not to present an exhaustive history of the Rohingyas of North Arakan State, but rather to give a sense of the historical context in which the acts documented in this Report reside.

²⁷ See, A. Selth, 'Burma's Muslims and the War on Terror', (2004) 27 *Studies in Conflict & Terrorism* 107.

Chapter III: Legal Framework

III. LEGAL FRAMEWORK

A. Introduction – Why Adopt a Crimes against Humanity Framework?

The decision to locate the conduct documented in this Report within the legal framework of crimes against humanity, as derived from Article 7 of the Rome Statute of the International Criminal Court, was reached following consideration of all alternative legal regimes. At the outset four alternate frameworks appeared to be potentially applicable to the situation of the Rohingyas, namely: war crimes, crimes against humanity, genocide [all three of which fall under the umbrella of international criminal law], and obligations arising out of international human rights law. Looking briefly at each of these options, the nature of the acts committed against the Rohingyas most appropriately falls within the ambit of crimes against humanity.

War Crimes

Despite the fact that the vast majority of documented acts are committed by various State security agencies (including the Burmese Army/Tatmadaw), there is absolutely no indication of the existence of a protracted armed conflict in North Arakan State that would trigger the application of law of armed conflict. The SPDC [and SLORC before them] have consistently attempted to legitimize the dense militarization of North Arakan State on the basis of what they believe to be a terrorist Islamic insurgency. However, while in the 1980s and 1990s there were sporadic “insurgent acts” principally carried out by the Rohingya Solidarity Organization [RSO], there is absolutely no evidence to suggest that such acts are ongoing or even come close to constituting an armed conflict.¹ A law of armed conflict/war crimes framework is therefore not applicable to the situation.

Genocide

The universally accepted definition of genocide under Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide states that ‘genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’.² On the basis of a simplistic analysis of the factual findings of this Report, it may be possible to put forward an argument to the effect that the SPDC are actively engaged in perpetrating genocide against the Rohingyas. Indeed, a number of exiled Rohingya political groups have been attempting to propose a similar argument since the 1990s.³ Recent case law suggests an unwillingness of international tribunals and other bodies to interpret the scope of genocide as going beyond the intentional physical destruction of a group.⁴ Under the

¹ M. Smith, ‘The Muslim “Rohingyas” of Burma’, Paper delivered at Conference of Burma Centrum Nederland, 11 December 1995 (on file with authors).

² Convention on the Prevention and Punishment of the Crime of Genocide, (1948), *entered into force* 12 January 1951, 78 UNTS 277 at article 2.

³ ‘Joint Statement of Arakan Rohingya National Organization (ARNO) and Burmese Rohingya Organization UK (BROUK)’, issued in London on 26 January 2009 – referring to ‘slow-burning genocide’ (on file with authors).

⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 26 February 2007.

circumstances, it does not seem useful at this stage to pursue an analysis that necessarily depends on an expansive approach to the definition of genocide.

International Human Rights Law

All of the acts documented in this Report constitute gross violations of international human rights law. As a body of law, it certainly applies to the situation of the Rohingyas, and while linked in certain respects to crimes against humanity it must be considered a separate and distinct body of law. Human rights violations, when gross and systematic, rather than isolated or individual, often correspond to crimes against humanity; however, individuals may be prosecuted for crimes against humanity, and must be shown to have knowledge and intent, whereas human rights violations are addressed from the standpoint of State responsibility. Burma has a regrettable, if unsurprising record when it comes to ratifying international human rights instruments. It is not a party to either the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights. The most notable exceptions to this pattern of avoidance are its ratification of the Convention on the Rights of the Child, and the Convention on the Elimination of All Forms of Discrimination against Women. Burma is naturally subject to recognized norms of customary international law, and this will be relevant in 2011 when it will be subject to the Universal Periodic Review mechanism of the Human Rights Council. Indeed, many of the findings in this Report with respect to crimes against humanity will be relevant to that process.

Applying the crimes against humanity framework to the situation of the Rohingyas of North Arakan State is dependent on establishing the presence of the core general or contextual requirements (also sometimes referred to as '*chapeau*') of this category of international criminal conduct. With over six decades of jurisprudence to draw on, it can be said that the general definitional boundaries of crimes against humanity are well-established: A crime against humanity is distinguished from an ordinary crime by the fact that it consists, by its very nature, of certain enumerated acts (Article 7 of the Rome Statute provides for murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, rape and sexual violence, persecution, enforced disappearance, apartheid, or other inhumane acts) committed as part of a 'widespread or systematic attack directed against any civilian population'.⁵ This presence of a 'widespread or systematic attack directed against any civilian population' constitutes at a basic level the general requirement for crimes against humanity, which, as Guénaél Mettraux points out, 'must be seen as a whole' and within the 'necessary context in which the acts of the accused must be inscribed'.⁶

⁵ See *inter alia*: *Prosecutor v. Kunarac et al.*, (Appeal Judgment) IT-96-23-T & IT-96-23/1-T (12 June 2002) at para. 85; *Prosecutor v. Blaškić*, (Trial Judgment) IT-95-14-T (3 March 2000) at para. 199; *Prosecutor v. Tadić*, (Appeal Judgment) IT-94-1-A (15 July 1999) at para. 248; *Prosecutor v. Akayesu*, (Trial Judgment) ICTR-96-4-T (2 September 1998) at para. 577; *Prosecutor v. Kayishema & Ruzindana*, (Trial Judgment) ICTR-95-1-T (21 May 1999) at para. 123; *Prosecutor v. Lukić & Lukić*, (Trial Judgment) IT098-32/1-T (20 July 2009) at para. 872.

⁶ G. Mettraux, *International Crimes and the ad hoc Tribunals* (Oxford. Oxford University Press, 2005) at 155. See also M. McAuliffe de Guzman, 'The Road from Rome: The Developing Law of Crimes against Humanity', (2000) 22 *Human Rights Quarterly* 335 at 337 - The *chapeau* of crimes against humanity serves two primary functions. First, it establishes a jurisdictional regime under which crimes of a

The primary objective of this chapter is to lay the foundations for the application of the crimes against humanity framework, as enumerated in Article 7 of the Rome Statute, to the situation of the Rohingyas. In considering the requirement that there must exist a 'widespread or systematic attack directed against a civilian population', the following section provides a brief explanation of the constituent elements of this criteria, while also resolving any difficulties that might be presented with respect to the relevance of the crimes against humanity framework vis-à-vis the acts perpetrated in North Arakan State.

B. The General Requirements of Article 7 of the Rome Statute

Determining the general requirements for crimes against humanity was one of the most hotly debated issues during the drafting of the Rome Statute of the International Criminal Court.⁷ However, the wording decided upon in Article 7(1) is quite straightforward, and relatively uncontroversial. It reads:

For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.⁸

On the face of it, there are five prerequisites (four contextual and one mental element) for the applicability of crimes against humanity:⁹

- (i) There must be an attack.
- (ii) The acts of the perpetrator must be part of the attack.
- (iii) The attack must be directed against any civilian population.
- (iv) The attack must be widespread or systematic.
- (v) The perpetrator must have knowledge of the wider context of the attack.

To this we can add an additional requirement for the applicability of Article 7(1), included in Article 7(2)(a) and reiterated in the Elements of Crimes drafted by the States Parties and used interpretational aid to the Rome Statute,¹⁰ namely that the

particular gravity – crimes that are either widespread or systematic – become the concern of the international community as a whole. Second, the mental element in the *chapeau* elevates the culpability of the individual accused from that associated with an ordinary crime under domestic law to that of an international crime.

⁷ For instance, some states argued that crimes against humanity could only be committed during times of armed conflict (as provided for in the Statute of the Yugoslavia Tribunal), and others (albeit only a few) contending that they must be committed on discriminatory grounds (as provided for in the Statute of the Rwanda Tribunal). See D. Robinson, 'The Elements for Crimes against Humanity', in R.S. Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (New York: Transnational Publishers, 2001) at 57-65.

⁸ Rome Statute of the International Criminal Court (1998), UN Doc. A/CONF.183/9, entered into force 1 July 2002, 2187 UNTS 90, [hereinafter Rome Statute] at art. 7(1).

⁹ *Kunarac et al.* Appeal Judgment, *supra* note 5, at para. 85. These prerequisites have been reiterated on several occasions such as in *Prosecutor v. Naletilić et al.*, (Trial Judgment) IT-98-34-T (31 March 2003) at para. 233.

¹⁰ The Final Act of the Diplomatic Conference at Rome provided for the establishment of a Preparatory Commission to oversee, *inter alia*, the drafting of the Elements of Crimes [hereinafter referred to as the Elements] and the Rules of Procedure and Evidence of the Court, both of which were subsequently

perpetrator acted ‘pursuant to or in furtherance of a State or organizational policy to commit such [an] attack’.¹¹ Using relevant case-law, the following subsections will unpack the most relevant of these prerequisites¹² in order to get to the core of the general requirements for crimes against humanity, while also highlighting any issues relevant to our analysis of the Rohingyas. Since requirement (v) above relates to the intent of the individual perpetrator and is thus beyond the scope of this study it is not necessary to consider it in the present context.

(i) There must be an attack

As mentioned above, the elaborative provision of Article 7(2)(a) states that for the purpose of Article 7(1):

“[a]ttack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.¹³

The Elements of Crimes document, in seeking to provide further clarification, adds that the attack ‘need not constitute a military attack’.¹⁴ Both the Yugoslav and Rwanda Tribunals have stressed that an “attack” for the definitional purposes of crimes against humanity is ‘not limited to [the] use of armed force, but rather encompasses any mistreatment of the civilian population’.¹⁵ As far as the Yugoslav Tribunal was concerned in the *Kunarac* case, ‘an “attack” in the context of a crime against humanity can be defined as a course of conduct involving the commission of acts of violence’.¹⁶ This interpretation of “attack” as a course of conduct – involving the commission of singular or multiple enumerated acts – not necessarily taking place in the context of a military operation or exclusively in times of armed conflict is clearly supported by the terms of Articles 7(1) and 7(2)(a), and more importantly is reflective of customary international law on the subject.¹⁷ To be clear, there is absolutely no requirement that there be a nexus or link between the alleged crimes against humanity and an armed conflict. Therefore, in the context of this Report the non-existence of a state of armed conflict in North Arakan State is in no sense a bar to the applicability of the crimes against humanity framework. Of particular importance to certain aspects of the factual findings of this Report is that the “attack” need not involve the commission of acts of violence as such.¹⁸

adopted by the Assembly of States Parties and appended to the Rome Statute. The Elements are intended to act as a consultative, clarifying document which essentially aid the Court in arriving at the appropriate interpretation of the crimes falling within the jurisdiction of the Statute.

¹¹ Elements of Crimes, Doc. ICC-ASP/1/3, at 5.

¹² Since it is beyond the scope of this report to deal with alleged individual perpetrators it is unnecessary to examine in any great detail the *mens rea* or mental element of the offence.

¹³ Rome Statute, *supra* note 8 at art. 7(2)(a).

¹⁴ Elements of Crimes, *supra* note 11.

¹⁵ G. Boas et al. (eds.) *International Criminal Law Practitioner Library – Volume II – Elements of Crimes Under International Law* (Cambridge: Cambridge University Press, 2008) at 42.

¹⁶ *Prosecutor v. Kunarac et al.*, (Trial Judgment) IT-96-23-T & IT-96-23/1-T at para. 415.

¹⁷ *Prosecutor v. Tadić*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) at para. 141: ‘It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict.’

¹⁸ See *Akayesu*. Trial Judgment, *supra* note 5 at para. 581.

(ii) The acts of the perpetrator must be part of the attack

There must be a link between the alleged acts and the attack on the civilian population. The Yugoslav Trial Chamber summed up this requirement in a number of judgments, including the *Naletilić* trial judgment, where it stated that, '[t]he acts of the accused must not be isolated but form part of the attack... [t]his means that the act, by its nature or consequence, must objectively be part of the attack'.¹⁹ Applying this to the situation in North Arakan State, we see that there must be some link between the documented conduct and the widespread or systematic attack on the Rohingya population. Criminal conduct, such as, random murders or torture, carried out by individual members of the army, NaSaKa or the police, will only rise to the level of crimes against humanity if it can be reasonably linked to the broader 'attack' on the civilian population. The issue of a link between the individual conduct and the attack will arise in the course of specific prosecutions directed against individual suspects.

(iii) The attack must be directed against any civilian population

In order for the acts to constitute crimes against humanity they must be 'directed against any civilian population'. The requirement that the civilian population be the primary object of the attack goes to the very heart of crimes against humanity.²⁰ The inclusion of the noun "population", does not imply that the attack be directed at the entirety of a territory as such, but rather acts as a safeguard against the prosecution of single or isolated acts. In this respect, the Rwanda Tribunal in the *Baglishema* case held that the term "civilian population" should be interpreted as implying the commission of crimes of a collective nature.²¹ The inclusion of the pronoun 'any' has been interpreted to mean that crimes against humanity may be committed against civilians, irrespective of their nationality or their possible status as stateless persons,²² a principle which, as will be shown, is of particular importance to the situation of the Rohingyas.

The meaning of "civilian" has been interpreted to mean anybody who is not a combatant at the time of commission of the relevant acts.²³ The population in question must be predominantly civilian, meaning that the attack must be clearly directed against the civilian population, notwithstanding the possible presence of combatants.²⁴ As William Schabas points out, 'the concept of "civilian population" should be construed liberally, in order to promote the principles underlying the prohibition of crimes against humanity, which are to safeguard human values and protect human dignity'.²⁵ There is absolutely no doubt that the Rohingya population of the three principle townships

¹⁹ *Naletilić et al.* Trial Judgment, *supra* note 9 at para. 234. See *Tadić*. Appeal Judgment, *supra* note 5 at para. 271.

²⁰ For guidance on how to identify that an attack has in fact been directed against a civilian population see: *Kunarac et al.* Appeal Judgment, *supra* note 5 at para. 91.

²¹ *Prosecutor v. Baglishema*, (Trial Judgment) ICTR-95-1A-T (7 June 2001) at para. 80.

²² *Prosecutor v. Tadić*, (Trial Judgment) IT-94-1-T (7 May 1997) at para. 635.

²³ See Common Article 3 to the Geneva Conventions of 1949 and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), entered into force 7 December 1978, 1125 UNTS 3 at art. 50.

²⁴ *Prosecutor v. Blagojević et al.*, (Trial Judgment) IT-02-60-T (17 January 2005) at para.552.

²⁵ W. A. Schabas, *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda and Sierra Leone* (Cambridge. Cambridge University Press, 2006) at 191.

where the documented conduct is focused (Maungdaw, Bauthidaung and Rathedaung) is overwhelmingly civilian.

(iv) The attack must be widespread or systematic

Crimes against humanity are distinguishable from ordinary crimes by the fact that they are committed on a “widespread or systematic” basis. In effect, this is the threshold test for crimes against humanity. This requirement is disjunctive, and operates so as to exclude the commission of isolated acts. In terms of individual meanings, “widespread” refers to the scale of the acts or the number of victims,²⁶ while “systematic” refers to a pattern or methodical plan.²⁷ Unsurprisingly, both criteria have tended to overlap in the jurisprudence.²⁸ A number of factors must be taken into consideration in assessing whether an attack is widespread or systematic. In this regard, the Yugoslav Appeals Chamber in *Kunarac* stated that:

The assessment of what constitutes a “widespread” or “systematic” attack is essentially a relative exercise in that it depends upon the civilian population which, allegedly, was being attacked. A Trial Chamber must therefore “first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic”. The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements...²⁹

This Report clearly establishes that the documented acts have been perpetrated against the Rohingyas on both a widespread and systematic basis, with reason to believe that they form part of a broader State policy or plan for the commission of such acts.

(v) There must be a State or organizational policy to commit such [an] attack

The Elements of Crimes document provides that, ‘[i]t is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population’.³⁰ It has been suggested that the inclusion of the existence of an organizational policy is intended to refer to non-State actors or private individuals who exercise *de facto* power.³¹ In this way the provision reflects the fact that individuals with no formal link to a State entity can commit crimes under international law.³² On the face of it, it may appear to be quite a restrictive

²⁶ *Akayesu*, Trial Judgment, *supra* note 5 at para. 580: ‘The concept of “widespread” may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.’

²⁷ *Tadić*, Trial Judgment, *supra* note 22 at para. 648; *Kunarac et al.* Appeal Judgment, *supra* note 5 at para. 94: ‘the phrase “systematic” refers to “the organised nature of the acts of violence and the improbability of their random occurrence”.’

²⁸ Mettraux, *International Crimes and the ad hoc Tribunals*, *supra* note 6 at 171. The judgment in *Kunarac* found that the attack was only systematic: *Kunarac et al.* Trial Judgment, *supra* note 16 at para. 578.

²⁹ *Kunarac et al.*, Appeal Judgment, *supra* note 5 at para.95.

³⁰ Elements of Crimes, *supra* note 11 at 5.

³¹ O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn. Baden-Baden. C.H. Beck Hart Nomos München Oxford, 2008) at 236-237.

³² *Ibid.*

requirement; however, establishing the existence of a widespread or systematic attack implies an element of planning or policy.³³ Its inclusion in Article 7 certainly does not have a restrictive effect on the applicability on crimes against humanity. Unsurprisingly, the conclusions of this Report with respect to the possible existence of a specific State policy or plan for the commission of crimes against humanity in the territory of North Arakan State are not based on hard documentary evidence – such evidence being impossible to obtain – but on the testimonies of victims, and on the basis of overwhelming circumstantial evidence.

Naturally, it is not within the scope of this Report to make a factual determination as to the presence of each of the general requirements of crimes against humanity. The objective of the following chapters, which deal with the commission of prohibited acts falling within the ambit of Article 7 of the Rome Statute, is to examine whether crimes against humanity are *prima facie* taking place in Arakan State based on field research and secondary material of authoritative bodies, institutions and individuals.

³³ See D. Robinson, ‘“Crimes against Humanity” at the Rome Conference’, (1999) 93 *American Journal of International Law* 43 at 48-49. However, the inclusion of the adverb “actively” in the Elements of Crimes appears to add a further restrictive dimension to the requirement and is intended to ensure that a policy or plan cannot be inferred from the mere inaction of the State or organization. See Elements of Crimes, *supra* note 11 at 5, footnote 6.

Chapter IV:

Enslavement–Forced Labour

I was required to provide labour usually for a total of one month per year. During this time I would do whatever the authorities asked, the gathering of firewood; the construction of a shrimp/prawn culture embankment, etc. One time I was taken to do forced labour for 26 days. The forced labour was 46 miles from my home and I had to sleep in the open along with 200 other people. 300 people from my village were involved in this work, the construction of a two-mile long shrimp culture embankment. We were not given food or water; they were expecting us to supply this. We dug a well to have easy access to water. Beatings were commonplace during this work. Some beating resulted in serious injury such as broken arms and legs. No medical assistance was provided. After 26 days of working on the project I escaped and during the next two nights I made my way back home; hiding during the day and walking at night. Some time after my return NaSaKa caught up with me and forced me to pay 200,000 kyats in compensation. To pay for this I had to sell my livestock.

Rohingya refugee, Bangladesh

I left Myanmar five months ago. I worked on the Maungdaw to Buthidaung road. I had to do forced labour together with some neighbours. The authorities asked us to do the labour. If we said no, we would be subjected to hostilities. I was required to do forced labour four times per month, six to eight days per month. I worked on road construction and had to complete a certain length of road each day. When I did not complete the required work I would have to go to the authorities and compensate them for the work I did not finish, for example by giving 40 gallons of kerosene. I had to walk 12 miles to do the forced labour. It took me one and an half hours and I had to run to get there on time. If I didn't reach the work place on time I was beaten; I was beaten three or four times because of that. One time I was beaten so severely that I had to have an operation on my back. Every day I was beaten with a stick when I was working on the road.

Rohingya refugee, Bangladesh

IV. ENSLAVEMENT – FORCED LABOUR

A. Factual Findings

1. The Exaction of Forced Labour in Burma

The imposition of forced labour on the civilian population in Burma has been documented for many years, and monitored closely by the International Labour Organisation (ILO) for more than a decade. In 1996, following a complaint against Burma lodged under the ILO Constitution,¹ the organization established a Commission of Inquiry to examine Burma's observance of the 1930 Forced Labour Convention.² That inquiry led to the publication of a comprehensive report detailing the full extent of the exaction of forced labour in the country. The report noted Burma's 'flagrant and persistent failure to comply with the Convention' and stated that:

[T]he obligation...to suppress the use of forced or compulsory labour is violated in Myanmar in national law...as well as in actual practice in a widespread and systematic manner, with total disregard for the human dignity, safety and health and basic needs of the people of Myanmar.³

The concluding observations of the Inquiry unequivocally highlighted the scale of the exaction of forced labour in Burma, the human rights abuses committed and the almost complete impunity of the perpetrators.⁴ These findings remain relevant today and illustrate the fact that forced labour is a continuing reality in contemporary Burma.

Since the publication of the report of the Commission of Inquiry, the ILO has been closely monitoring Burma's observance of the 1930 Forced Labour Convention and has sought to develop a number of mechanisms that may effectively address the situation. In 2000, the ILO Governing Body adopted a resolution condemning the ongoing systematic use of forced labour and the lack of an adequate follow-up to the concluding observations of the Inquiry.⁵ Amongst other things, the resolution requested that Burma's conduct be discussed at dedicated sessions of the International Labour Conference.⁶ These sessions have been held every year since then. The 2000 resolution has had a significant impact and has resulted in the adoption of a number of

¹ Complaint of non-observance pursuant to article 26, Constitution of the International Labour Organisation, available at <http://www.ilo.org/public/english/bureau/leg/amend/constitution.pdf>.

² ILO Forced Labour Convention (No. 29) (1930), entered into force 1 May 1932, 29 UNTS 55 [hereinafter Forced Labour Convention 1930].

³ ILO, 'Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No.29)', GB.273/MYANMAR3 (1998) [hereinafter ILO Commission of Inquiry] at para. 536.

⁴ *Ibid.*, at paras. 541-543.

⁵ ILO International Labour Conference, 'Measures recommended by the Governing Body under article 33 of the Constitution – Implementation of recommendations contained in the report of the Commission of Inquiry entitled Forced Labour in Myanmar (Burma)', (2000), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc88/pr-4.htm#III>, see especially III. B.

⁶ ILO International Labour Conference, 'Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar', (2000), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc88/resolutions.htm#I> [hereafter ILO 2000 Resolution].

encouraging initiatives by the SPDC, including ‘the issuance of orders prohibiting forced labour; an end to large-scale imposition of forced labour on national infrastructure projects; [and] the unprecedented visit of a ILO High-Level Team in 2001 to carry out an objective assessment of the realities of forced labour’.⁷ These developments were followed in 2002 by an agreement between the SPDC and the ILO on the appointment of a Liaison Officer in Rangoon.⁸

In 2004, there was a significant political shift in Burma and progress towards the eradication of forced labour appeared to come to a halt. Three individuals were sentenced to death for high treason for allegedly contacting the ILO about being subjected to forced labour, a number of ILO interlocutors were removed from their posts, and there were ‘death threats [issued] against the Liaison Officer, as well as...the implementation of a policy to prosecute those involved in making “false allegations” of forced labour’.⁹ This breakdown in cooperation was more generally accompanied by an explicit denial of the forced labour problem and a return to a position comparable to the period before the Commission of Inquiry. Responding to this diplomatic shift, the ILO recommended that further action be taken with respect to the non-observance of the Forced Labour Convention. The Governing Body demanded the establishment of a formal complaint mechanism which would be capable of dealing with allegations of forced labour, and examined the possibility of utilising other international mechanisms to respond to this clearly endemic problem. From an early stage, the ILO Governing Body assessed the possibility of recommending that the situation be referred to the International Criminal Court (ICC), noting that “‘crimes against humanity” appear most relevant in relation to the exaction of forced or compulsory labour in Myanmar’.¹⁰ The ILO ‘made relevant documentation available to the Prosecutor of the [International Criminal] Court.’¹¹ The Governing Body also considered the idea of requesting an advisory opinion from the International Court of Justice on a specific legal question relevant to the exaction of forced labour in Burma¹² but deferred this proposal

⁷ ILO International Labour Conference, ‘Review of further action that could be taken by the ILO in accordance with its Constitution in order to: (i) effectively secure Myanmar’s compliance with the recommendations of the Commission of Inquiry; and (ii) ensure that no action is taken against complainants or their representatives’, (2006), *available at* <http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/pr-2.pdf> at para. 16.

⁸ ILO Governing Body, ‘Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)’, GB.283/5/3 (2002), *available at* <http://www.ilo.org/public/english/standards/relm/gb/docs/gb283/pdf/gb-5-3.pdf>, Appendix.

⁹ ILO International Labour Conference, *supra* note 7 at para. 17. See also UN Human Rights Council, ‘Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana’, UN Doc. A/HRC/4/14 (2007) at para. 45.

¹⁰ ILO Governing Body, ‘Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)’, GB.297/8/2 (2006), *available at* <http://www.ilo.org/public/english/standards/relm/gb/docs/gb297/pdf/gb-8-2.pdf> at para. 20.

¹¹ ILO International Labour Conference, ‘Report of the Committee on the Application of Standards, Special sitting to examine developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29) Part Three (Rev.)’, (2009), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_108330.pdf at 41.

¹² ILO Governing Body, ‘Conclusions on item GB.297/8: Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)’, *available at* <http://www.ilo.org/public/english/standards/relm/gb/docs/gb297/pdf/gb-8-conclusions.pdf>. See also ILO Governing Body, *supra* note 10.

following an agreement with the SPDC on the establishment of a formal complaint mechanism.¹³

For a trial period in 2007, the ILO established a forced labour complaint mechanism, which was overseen by the ILO Officer in Rangoon.¹⁴ Following the renewal of the Special Agreement between the ILO and the SPDC, the ILO officer in Rangoon will continue to receive and assess complaints until February 2011.¹⁵ At present, the ILO Governing Body continues to monitor the exaction of forced labour in Burma. The Committee of Experts on the Application of Conventions and Recommendations on the Observance of the Forced Labour Convention is examining the more specific question of whether the SPDC is 'issuing specific and concrete instructions to the civilian and military authorities; ensuring that the prohibition of forced labour is given wide publicity; providing for the budgeting of adequate means for the replacement of forced or unpaid labour; and ensuring the enforcement of the prohibition of forced labour'.¹⁶ In terms of further progress towards eradication, ILO assessment and awareness missions have been allowed in Burma in recent years and complaints of forced labour have been lodged to the ILO office in Rangoon. The extent of public knowledge of the complaint mechanisms, however, remains very limited and access to the ILO Liaison Office is almost impossible for individuals not resident in Rangoon.¹⁷ Violations of the prohibition of forced labour are also not punished under the Penal Code¹⁸ and continue with almost complete impunity.¹⁹ At present, the ILO Committee of Experts 'remains unable to ascertain that clear instructions have been effectively conveyed to all civil authorities and military units, and that *bona fide* effect has been given to the orders'.²⁰ Finally, at the legislative level, the new Burmese Constitution includes a provision on the prohibition of forced labour 'which may be interpreted in such a way as to allow a generalized exaction of forced labour from the population'.²¹

¹³ ILO Governing Body, 'Conclusions on item GB.298/5: Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)', available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_091296.pdf.

¹⁴ ILO Governing Body, 'Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)', GB.298/5/1 (2007), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_gb_298_5_1_en.pdf. For information on the functioning of the complaint mechanism see also GB.298/5/1(Add.2)(2007), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_gb_298_5_1_add2_en.pdf.

¹⁵ ILO, 'An Agreement for Extension to the Supplementary Understanding (2009)', available at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-yangon/documents/legaldocument/wcms_106133.pdf; ILO, 'An Agreement for Extension to the Supplementary Understanding (2010)', available at http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-yangon/documents/legaldocument/wcms_124530.pdf.

¹⁶ ILO International Labour Conference, *supra* note 11 at 41.

¹⁷ *Ibid.*, at 15-16.

¹⁸ Penal Code, India Act XLV. 1860 (1 May 1861), available at <http://www.blc-burma.org/html/myanmar%20penal%20code/mpc.html>.

¹⁹ ILO International Labour Conference, *supra* note 11 at 16.

²⁰ *Ibid.*, at 18.

²¹ *Ibid.*, at 19. Constitution of the Republic of the Union of Myanmar (2008), available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/79572/85698/F1127243646/MMR79572.pdf>, chap. VIII, at art. 359 which reads: 'The State prohibits any form of forced labour except hard labour as a

2. The Exaction of Forced Labour in North Arakan State

As is the case throughout Burma, the pervasiveness of forced labour varies greatly across the territory of North Arakan State and its exaction is often dependent on a number of factors.²² For example, some forms of forced labour in Burma are seasonal and others perennial. Additionally, demand for forced labour may differ according to the requirements of the locality (such as the need for improved transportation infrastructures) or following the wishes and impulses of regional commanders. In the past, the political climate has had a significant impact on the exaction of forced labour. For instance, it was reported that for a number of months in 2004 the exaction of forced labour in North Arakan State decreased as a result of the temporary dismantlement of the NaSaKa.²³ Similarly in 2008, in the period preceding the constitutional referendum, a decrease in the imposition of some forms of forced labour (and in human rights abuses generally) was reported.²⁴ It is also reported that the presence of international organizations or scheduled visits of diplomats often result in a temporary alleviation of the exaction of forced labour.

It is clear that there are a number of factors that contribute to the exaction of forced labour in Burma. As explained by the Special Rapporteur on the Situation of Human Rights in Myanmar, the existence of a military presence in an area has a clear impact on forced labour and significantly increases the practice:

The military rely on local labour and other resources as the result of the incapacity of the Government to deliver any form of support for their activities (the self-reliance policy). The Special Rapporteur has received many allegations of villagers being severely punished outside the framework of the law because they refused to perform forced labour and of the unlawful appropriation of their land, livestock, harvest and other property. While Myanmar has increased the number of its battalions nationwide since 1988, the implementation of self-reliance policies by the local military during the past decade has contributed to undermining the rule of law and damaging the livelihoods of local communities.²⁵

Put simply, compelled or encouraged by the policy of self-sufficiency, forced labour is exacted throughout Burma by the military as a means of providing sustenance to its members. Generally, forced labour in Burma is more pervasive in border areas, in areas inhabited by ethnic minorities, and in all regions with a heavy military presence.²⁶

punishment for crime duly convicted and duties assigned thereupon by the State in accord with the law in the interests of the people.'

²² Irish Centre for Human Rights, Bangladesh Fact-Finding Mission 2009, testimonies: F26-A-6; F26-A-7; F26-A-8; F26-A-11; M26-B-3; M26-C-2; M26-B-4; M26-C-1; M26-C-2; F26-C-5; M26-C-7; M26-C-8; M27-A-1; F27-A-1; F27-A-3; F27-A-6; F27-A-7; F27-A-8; M27-B-1; M27-B-2; M27-C-1; M27-C-2; M27-C-4; M27-C-5; M28-A-3; F28-A-1; F1-A-2; F1-A-4; M1-B-2; M1-B-5; M-2-A-1; F2-A-1; F2-B-2; M2-B-3 (on file with authors) [hereinafter Bangladesh testimonies].

²³ C. Lewa, The Arakan Project, 'Back to the Bad Old Days!: Renewed Exaction of Forced Labour in Northern Arakan State, Burma' (2005) (on file with authors).

²⁴ C. Lewa, The Arakan Project, 'No end to Forced Labour!: Forced Labour Practices in Northern Arakan State, Burma' (October 2006-May 2007) (on file with authors).

²⁵ UN Human Rights Council *supra* note 9, at para. 48.

²⁶ UN Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro', UN Doc. A/HRC/7/18 (2008), at para. 33.

The Rohingyas of North Arakan State suffer disproportionately from the exaction of forced labour. There are many issues underlying such pervasiveness. Despite not being recognized as such by the SPDC, the Rohingyas are an ethnic minority group. They are also located on the Burma-Bangladesh border where there is a strong military presence which creates a greater demand for forced labour. The establishment of the NaSaKa and its presence in North Arakan State has placed an even greater burden on the Rohingyas as the security forces have become the main users of forced labour. A considerable number of “model villages” have also been built in North Arakan State and the authorities have used Rohingyas, and no other group, to do the work in that region. Discrimination against the Rohingyas is constant and ever-increasing in North Arakan State, a situation resulting in increased forced labour. This situation was recognized by Special Rapporteur on the Situation of Human Rights in Myanmar, who stated that:

In western Myanmar, the Muslim minority has long been discriminated against, and is denied citizenship under the 1982 Citizenship Law. Muslim minority asylum-seekers continue to flee to Bangladesh. They are subject to serious abuses, especially forced labour (e.g. construction of roads, bridges, model villages and military facilities, camp maintenance, portering) and arbitrary taxation.²⁷

As a result of these various factors, many akin to the situation in the rest of Burma, the practice of forced labour in North Arakan has become one of the most pervasive in the country, with the Rohingyas specifically targeted to provide labour.

2.1 The Nature of the Labour

Forced labour takes many forms in Burma. In his 2009 report to the Human Rights Council, the Special Rapporteur on the Situation of Human Rights in Myanmar affirmed that ‘[t]here have been numerous and frequent reports of civilians being forced to serve as porters and guides for the military, to build and maintain roads, to construct military camps and to work on infrastructure projects’.²⁸ As will be examined in more detail in this section, the Rohingyas of North Arakan State appear to be mainly forced into five types of labour: portering; maintenance and construction work for the military, NaSaKa and the police; cultivation and agriculture; construction and repairs of infrastructure; and guard or sentry duty.

Portering

The findings of the field mission undertaken for the purposes of this Report give a sense of the extent and nature of the portering activities that the Rohingyas are regularly required to undertake. Typically, portering will involve carrying goods, supplies and equipment for the military, NaSaKa and, albeit less frequently, for the police.²⁹ Porters

²⁷ UN Human Rights Council, *supra* note 9, at para. 59. See also UN Human Rights Council, *ibid.*, at para. 78.

²⁸ UN Human Rights Council, ‘Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana’, UN Doc. A/HRC/10/19 (2009), at para. 65. See generally on the practice of forced labour in Burma, ILO Commission of Inquiry, *supra* note 3; National Coalition Government of the Union of Burma, *Burma Human Rights Yearbook 2007* (2008), available at <http://www.ncgub.net/BHRY/2007/>, chap. 5.

²⁹ Bangladesh testimonies, *supra* note 22: F26-A-6; F26-A-8; F26-A-11; M26-C-2; M27-A-1; F27-A-6; F27-A-7; F27-A-8; F1-A-2; M1-B-2; M2-A-1; F2-B-2; M2-B-3. See generally on the issue of portering in Burma

are usually forced to carry very heavy loads, ranging from 16 to 40 kilograms.³⁰ Civilians forced to porter are almost always exclusively male, with frequent reports of boys as young as ten years old being engaged in portering duties.³¹ The length of time Rohingyas are forced to work as porters varies greatly: from one day for some to several months for others. At present, one man or boy in each household in North Arakan State is forced to work as a porter for an average of one to two days per month. The NaSaKa, the military, and the police do not consult one another before requesting porters or other forced labour. This practice regularly leads to cases where individuals are forced into portering for the different authorities, one after the other in a very short period of time.³²

The demand for portering (or “loading” as it is often referred to) depends on a number of factors and will fluctuate on the basis of, amongst other things, the area, the military activity, the individuals in command, the seasons, as well the political situation. Improvements to the road infrastructure in North Arakan have altered the demand for this type of forced labour in recent years. Currently, Rohingyas are recruited as porters mainly when transportation is problematic, in places where the road system is not developed or in areas rendered inaccessible because of the rainy or dry seasons.³³ The use of porters is most prevalent in secluded and more isolated hill areas, and even more so in border areas and in villages close to military facilities. Accordingly, in North Arakan State it is the Rohingyas from North Maungdaw and North Buthidaung townships who suffer most from this form of forced labour.³⁴

The means used to gather porters and the average duration of labour appears to have varied over recent years. As noted by the National Coalition Government of the Union of Burma:

Whereas previously civilian porters were forced to work by a battalion for several weeks on end, it is now more likely that a column of soldiers will pass through a village and demand “emergency porters” to carry goods to the next village where they will be released if other porters can be secured. SPDC soldiers typically show up in a given village and demand porters to carry rations and ammunition. Alternatively, they send order documents to the village head, who must then take responsibility to arrange the stated number of labourers.³⁵

In the past, specific written orders for the recruitment of porters were issued and these appear to have followed a rigid structure, passing through different chains of command depending on the type of portering work required.³⁶ Following this method of recruitment, VPDC Chairmen received requests for porters and were almost always

and North Rakhine State, ILO Commission of Inquiry Myanmar, *supra* note 3, Part IV, chap. 12, at paras. 300-350.

³⁰ NCGUB, *supra* note 28, at 189; ILO Commission of Inquiry Myanmar, *ibid.*, Part IV, chap. 12, at para. 314.

³¹ Bangladesh testimonies, *supra* note 22: F26-A-6; F27-A-6.

³² ILO Commission of Inquiry Myanmar, *supra* note 3, Part IV, chap. 12, at para. 341.

³³ National Coalition Government of the Union of Burma, *Burma Human Rights Yearbook 2006*, available at <http://www.ncgub.net/BHRY/2006/>, at 28.

³⁴ Lewa, The Arakan Project (2005), *supra* note 23; C. Lewa, The Arakan Project, ‘No end to Forced Labour!: Forced Labour Practices in Northern Arakan State, Burma’ (October 2006-May 2007) (on file with authors); Lewa, The Arakan Project (October 2006-May 2007), *supra* note 24.

³⁵ See for instance, NCGUB, *supra* note 28, at 189.

³⁶ ILO Commission of Inquiry Myanmar, *supra* note 3, at paras. 302, 304.

responsible for gathering the specified number of villagers. At present, orders for the recruitment of porters seem to be most frequently verbal, implemented with and without the involvement of VPDC Chairmen. Villagers are regularly forced to comply with these orders without prior arrangement. This parallel method of recruitment is much less formal and often involves the members of NaSaKa, the military or the police directly. These authorities simply recruit porters by taking (and effectively detaining) villagers from the side of the road and in public places such as markets, or alternatively by surrounding houses (sometimes in the middle of the night) and obliging men and boys to accompany them for portering duties.

The working conditions of porters can be extremely difficult. As explained by the ILO, the loads involved are:

[U]sually carried in woven cane or bamboo baskets, with straps across the shoulders and an additional strap across the forehead. When excessive loads were carried for prolonged periods, the straps of the basket and the basket itself dug into the flesh of the shoulders and back, causing serious injuries and sometimes exposing the bone. Injuries to the feet were also common.³⁷

Rohingyas taken for portering are usually not informed of the duration of the labour. Villagers taken from outside their house are often required to go with the authorities immediately and are not given the chance to inform their families of the fact that they are leaving for portering. Amongst the refugees and asylum seekers interviewed for this Report, almost one in four have either been forced to be porters and/or have directly witnessed this type of practice being enforced against Rohingyas of North Arakan State. The tasks imposed upon these individuals have included pulling boats in places where rivers were too shallow during the dry season, loading-work in the forest and the jungle, soil levelling, carrying ammunition boxes, carrying whatever is requested during patrol, as well as portering of water, food rations, rice, other goods, bags and belongings of members of the NaSaKa and the military.³⁸ Porters are also used for carrying material such as bricks and miscellaneous supplies needed for other types of forced labour.³⁹

Construction and Repair of Infrastructure

The exaction of Rohingya forced labour for the construction and repair of infrastructures shares many of the characteristics of portering examined in the previous sub-section. Men and boys are randomly recruited for this work without notice and often for an unspecified number of days. Demand for this type of labour and workload will vary depending on the need for it in the region, the season, and the infrastructural projects pursued by the authorities. Forced labour has, for instance, been utilized in Burma for the construction of roads, bridges, railways, canals, schools and hotels. Since 2008, three types of construction appear to have specifically affected the Rohingyas in North Arakan State: the repair of bridges, the repair and construction work on the road between Buthidaung and Maungdaw, and the construction of model villages.⁴⁰

³⁷ *Ibid.*, para. 314.

³⁸ Bangladesh testimonies, *supra* note 22: F26-A-6; F26-A-8; F26-A-11; M26-C-2; F26-C5; M27-A-1; F27A-6; F27-A-7; F27-A-8; F1-A-2; M1-B-2; M2-A-1; F2-B-2; M2-B-3.

³⁹ Lewa, *The Arakan Project* (2005), *supra* note 23.

⁴⁰ Lewa, *The Arakan Project* (October 2006-May 2007), *supra* note 24.

During the rainy season in 2008 the road between Buthidaung and Maungdaw was damaged. Forced labour was exacted in order to repair this road and hundreds of Rohingyas were forced to work over a period of one month. These workers included children as young as ten years old. Individuals were forced to work on these repairs for six to ten days at a time. The work included the removal of mud, followed by the construction work for which Rohingyas had to collect and carry the material by hand. Each worker was assigned a part of the road and was required to complete a certain section every day. Workers who failed to complete the work allocated had to compensate for the shortfall, for example by handing over forty gallons of kerosene.⁴¹

Model villages are locally known as *NaTaLa* (translated this is the acronym for the Ministry for Development of Border Areas and National Races) villages. Since 1990 over forty villages have been established, housing over ten thousand settlers. These settlers are mainly Burman Buddhists. These villages were constructed in accordance with the SPDC's drive towards the transfer of individuals and families from urban to border areas, with the supposed intention of diversifying and developing these remote regions.⁴² The model villages' programme is supervised by the Ministry for Development of Border Areas and National Races and implemented by NaSaKa in North Arakan State. The construction of model villages impacts on the Rohingyas in two ways: (i) They necessitate the confiscation and reallocation of land and (ii) Their construction involves the widespread exaction of forced labour. For example, recently an order was issued for the creation of a model village to be located a few kilometres from the town of Maungdaw. The construction of this *NaTaLa* village started in 2005 and was further expanded at the beginning of 2008 to accommodate an additional one hundred families. Between two and three hundred Rohingyas, from ten nearby villages, were forced to level the soil, bake the bricks and undertake other tasks to build houses, a school and a pagoda for this model village.⁴³

Maintenance and Building Work for the Military, NaSaKa and Police

The Rohingyas in North Arakan State are regularly forced to undertake maintenance and building work for the NaSaKa, the military and sometimes also for the police. This forced labour involves all types of work needed on a daily basis to maintain the camps and barracks of the different authorities. Testimonies collected during the field investigation suggest that males, including boys, are most affected by this practice. While forced labour is much less prevalent amongst Rohingya women, some of them have been and continue to be subjected to this type of forced labour, especially with respect to cooking and cleaning tasks.⁴⁴

The number of individuals exposed to this type of forced labour is generally higher in areas where there is a more intensified military or NaSaKa presence. Some commanders are known to demand that more workers be recruited in order to carry out a wider range of tasks, frequently for their own personal profit. Unlike portering, the amount of work exacted by NaSaKa, the military and the police for maintenance and building generally does not depend on the season, on the political situation or

⁴¹ Bangladesh testimonies, *supra* note 22: M26-B-4.

⁴² Document FL-08 (on file with authors).

⁴³ Lewa, The Arakan Project (October 2006-May 2007), *supra* note 24; Document FL-08, *ibid*.

⁴⁴ Bangladesh testimonies, *supra* note 22.

remoteness of the region. Rather, civilians in North Arakan State are forced to work and undertake these maintenance and building tasks on a year-round basis. Reports gathered during the field investigation indicate that every camp and barracks in North Arakan State is almost exclusively maintained and serviced through the use of daily forced labour.⁴⁵ Rohingyas are mainly recruited for this type of work by their VPDC Chairmen. Following requests from the NaSaKa, military or police, VPDC Chairmen designate a set number of labourers who will be provided to the given authority in each village. Sometimes labourers are also recruited more spontaneously. One interviewee, for instance, explained that he had been stopped at one specific outpost and forced to refill the water supply and cut the grass for NaSaKa for half a day several times.⁴⁶

Our fact-finding mission revealed that when engaged in this form of labour, Rohingyas are compelled amongst other things to build, repair, paint and clean houses, barracks, camps and outposts; maintain gardens, fetch water, wash clothes, cook, cut bamboo, clear roads, bake bricks, collect firewood, and do other work such as repairing and building fences for the NaSaKa, the military and the police. The construction work typically involves such tasks as digging and levelling of soil. In addition to providing labour, Rohingyas are regularly forced to provide the materials required for the repairs and building work such as bamboo, wood and gravel. When they are unable to provide the requested material, individuals are forced to provide financial compensation (or compensation in labour) to the given authority.⁴⁷ Recent reports assert that Rohingyas located near Kyin Kan Pyin are forced to maintain a golf course near the NaSaKa headquarters in that area. This work is said to require as much as 30 villagers per day.⁴⁸

Guard or Sentry Duty Work

Rohingyas are forced to act as sentries or guards on a perennial basis in North Arakan State. Most households in rural areas have to provide one individual for sentry duty one to two nights a week and sometimes also during the day. Sentries are mainly sent to guard posts at the entrance of their villages, particular roads, or NaSaKa camps. Sentries are instructed to watch and report all movement from nightfall to morning. The authorities claim that sentry duty is needed for the protection of villages. There has not, however, been any active rebel group, criminal gang or insurgency activity for many years in North Arakan State. Documentary research and testimonies suggest that sentry duty is used as a means for extortion and harassment of the Rohingyas.⁴⁹

Despite being physically less demanding, refugees and asylum seekers interviewed explained that sentry duty is amongst the most dreaded type of forced labour because it is commonly accompanied by extortion and physical abuse. Members of the police and army regularly patrol and verify whether the sentries are awake during their shift by silently approaching their posts. If the sentries do not react and

⁴⁵ Lewa, The Arakan Project (October 2006-May 2007), *supra* note 24.

⁴⁶ Bangladesh testimonies, *supra* note 22: M2-A-1.

⁴⁷ *Ibid*: M27-A-1; F27-A-1; M27-B-1; M27-C-2; M27-C-5; M2-A-1; M2-B-3.

⁴⁸ C. Lewa, The Arakan Project, 'Forced Labour in Full Swing!: Forced Labour Practices in Northern Arakan State, Burma' (May- August 2005) (on file with authors).

⁴⁹ *Ibid*.; C. Lewa, The Arakan Project, 'No Rest from Forced Labour!: Forced Labour Practices in Northern Arakan State, Burma' (December 2005-May 2006) (on file with authors); Lewa, The Arakan Project (October 2006-May 2007), *supra* note 24; Bangladesh testimonies, *supra* note 22: F27-3; F2-B-2.

immediately ask who is coming, they are accused of being asleep on duty and physically punished, fined or compelled to provide several days of additional forced labour. If the sentries react and ask who is approaching, they are blamed for not doing their work properly and punished for not recognizing the authority on patrol. Sentry or guard work is mainly carried out by men. Some women interviewed have, however, indicated that they have been forced to do this work when their husbands or sons were absent or unable to fulfil this duty.⁵⁰

Forced Cultivation and Agricultural Labouring

Forced cultivation and agricultural labouring is commonly imposed on the Rohingyas in North Arakan State. This type of forced labour takes place within the wider context of the functioning of the agricultural sector in Burma. For several decades now, the SPDC, through different legislation and decrees, has acquired ownership of the country's land with farmers only permitted to lease the land. As Hudson-Rod and Htay have noted:

The current regime in Burma pursues limited market economic reform with no pretence of democratic political, social reforms. Control of land and property has been central to state authority in Burma since independence and many laws concerning property rights in land have been passed. There is lack of ownership rights, no right to transfer and lease, buy and sell, or right to use land for growing crops of one's preference.⁵¹

Various legislative enactments and executive decrees dictate that land must be used productively and be in line with SPDC policies. As a result, civilians are extremely vulnerable to land confiscation if they do not exactly follow the regime's instructions in relation to cultivation or provision of crops. It is within this system that the exaction of this type of forced labour takes place in Burma. Forced labour in this sector appears to take three forms: civilians can be forced to cultivate the land of the army and of the NaSaKa; they can be forced to give part (variable quotas) of their own harvest to the authorities; and they can be compelled to use their land or part of their land to cultivate specific crops as requested by the authorities. The exaction of this type of forced labour is directly linked to executive policies, specifically the self-sufficiency policy and various agriculture development schemes.⁵²

Over the years, the SPDC has promoted several national development schemes which have generated a significant amount of forced labour in Burma. These special cultivation projects include the cultivation of various crops, such as rice, sunflowers, jatropha (physic nuts), rubber, as well as shrimp farming. Amongst these, the cultivation of physic nuts, rubber and the double cropping of rice have particularly affected the Rohingyas in recent years. In 2005, Senior General Than Shwe launched a physic nut development project aimed at developing and producing an alternative fuel source. He announced that a number of States and Divisions would have 'to put 500,000 acres under the physic nut plants each within three years totalling seven million acres during

⁵⁰ Bangladesh testimonies, *supra* note 22: F27-3.

⁵¹ N. Hudson-Rodd and S. Htay, *Arbitrary Confiscation of Farmers' Land by the State Peace and Development Council (SPDC) Military Regime in Burma* (2008), available at http://burmalibrary.org/docs4/Arbitrary_confiscation-ncgub.pdf at 80.

⁵² See Chapter VI (Deportation or Forcible Transfer of Population).

the period [sic].⁵³ As quoted in the *New Light of Myanmar*, Senior General Than Shwe asserted that:

Farmer[s] will no longer need to buy diesel for their tractors and vehicles if they grow such a profitable crop. So, physic nut plants should be grown on vacant lands, and on the areas where no other crops thrive for environmental conservation, raising the income of local people, and contributing towards fulfilling [the] future fuel requirement...Now, thanks to the visionary [sic] of the Head of State, farmers can enjoy fruitful results directly. I would therefore like to exhort farmers to grow physic nut on a commercial scale for their brighter future.⁵⁴

In implementing this national development project, civilians were forced to prepare the land, establish physic nuts nurseries,⁵⁵ and ordered to plant physic nuts around their houses, on roadsides and gardens, and/or on their farmland. In addition, the authorities also regularly compelled individuals to purchase the plants or seeds, sometimes on credit.

The Rohingyas have been more directly affected by the planting of *jatropha* since 2008 after orders for its large-scale cultivation were issued to Village Chairmen in North Arakan State. Reports indicate that since the middle of 2008, the exaction of forced labour to cultivate physic nuts has been increasingly affecting the whole of North Arakan and that the practice is currently most prevalent in South Maungdaw.⁵⁶ In parallel with the physic nuts scheme, the promotion of the double cropping of rice also appears to have adversely affected the Rohingyas and has fostered the exaction of forced labour in North Arakan State. Traditionally, crops were grown once a year outside the dry season; at present, the SPDC is promoting the cultivation of rice also in the dry season to double the yearly production of rice. This policy of double-cropping of rice, together with the self-sufficiency policy by which the army and NaSaKa must provide their own food, contributes to the practice of forced labour and places an enormous burden on the Rohingyas. In practice, the authorities are forcing Rohingyas to cultivate the land of the army and the NaSaKa and/or are compelling villages to provide rice quotas.

As with almost all types of forced labour in North Arakan State, forced cultivation affects every Rohingya households. Male family members are the primary victims with boys often sent to work instead of their fathers or grandfathers. Reports indicate that every household has to provide one to two days of forced labour per week. Recruitment for this type of forced labour runs through the Village Chairmen as is commonly the case with the other forms of forced labour discussed. Simply put, forced labour in the agricultural sector involves all the tasks associated with the cultivation of land:

Agricultural development schemes launched by the SPDC throughout the country, including the summer paddy program have several elements: development of irrigation systems such as dams and canals, introduction of high

⁵³ N. Tun Shein, 'Physic nut oil, source of farmers' income', *The New Light of Myanmar* (15 January 2006), available at <http://burmalibrary.org/docs2/NLM2006-01-15.pdf> at 6.

⁵⁴ N. Tun Shein, *ibid.*, at 7.

⁵⁵ Lewa, *The Arakan Project* (December 2005-May 2006), *supra* note 49.

⁵⁶ C. Lewa, *The Arakan Project*, 'Update on Forced Labour Practices in North Arakan' (May-August 2008) (on file with authors).

yielding hot-season rice strains, and use of new fertilizers, pesticides, and machinery to cope with the technical complications of the new crop. These tactics have created two new burdens for farmers. The first is the labour needed to build roads, small dams, and irrigation ditches. State-directed, uncompensated labour is common practice in Burma. Farmers who work on these development projects have less time to tend their crops or other subsistence activities. Secondly, the chemical ingredients of the summer rice program are not distributed free to poor farmers, but are sold to them. Farmers who do not buy the necessary materials cannot participate in the program; their unproductive land, officially designated for double cropping, is reassigned to a more able household...Farmers who could not meet the required quota had to pay the market price in cash for the shortfall to the authorities. In some places flood prevented cultivation. There were some areas where crops failed...the three times they were cultivated. These cultivators not only wasted their efforts and suffered losses but also because of their ability to fulfil their quota were arrested by the hundreds.⁵⁷

In North Arakan State, as elsewhere in Burma, the harmful effects of forced labour and policies implemented in the agricultural sector go beyond physical work; they also impoverish the soil and have a long-term impact on the livelihood of civilians.

2.2 Forcible Nature of the Work and Treatment of Individuals

In the 1990s the Burmese regime was constantly stating that there was no exaction of forced labour in Burma. In 1993, in response to the ILO Committee established to examine Burma's alleged non-observance of the 1930 Forced Labour Convention, the regime asserted that:

The allegation [of the use of forced labour for the construction of railways, roads and bridges] is false and is based on fabrications by people who wish to denigrate the image of the Myanmar authorities and those persons who do not understand the tradition and culture of the Myanmar people. In Myanmar, voluntary contribution of labour to build shrines and religious temples, roads, bridges and clearing of obstruction on pathways is a tradition which goes back to thousands of years. It is a common belief that the contribution of labour is a noble deed and that the merit attained from it contributes to a better personal well-being and spiritual strength. ...In Myanmar history, there has never been "slave labour". Since the times of the Myanmar kings, many dams, irrigation work, lakes, etc. were built with labour contributed by all the people from the area. Accordingly, those who accuse the Myanmar authorities of using forced labour patently reveal their ignorance of the Myanmar tradition and culture.⁵⁸

At present, Burma officially acknowledges that the practice of forced labour exists in the country. The regime, however, still frequently qualifies some cases of forced labour as voluntary work.

⁵⁷ N. Hudson-Rodd, M. Nyunt, S. Thamain Tun and S. Htay, 'The Impact of the Confiscation of Land, Labor, Capital Assets and Forced Relocation in Burma by the Military Regime' (2003), available at http://www.burmalibrary.org/docs/land_confiscation1-20.pdf at 12.

⁵⁸ ILO Governing Body, 'Report of the Committee set up to consider the representation made by the International Confederation of Free Trade Unions under article 24 of the ILO Constitution alleging non-observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)', GB.261/13/7 (1993), available at <http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&document=51&chapter=16&query=Myanmar%40ref&highlight=&querytype=bool&context=0> at paras. 20-21.

Recently, *The New Light of Myanmar* published an article discussing briefly the issue of forced labour in Burma. The article illustrated how the practice is still justified as being voluntary work for the betterment of society:

Our country has a very long tradition that local people work together for development of own wards and villages. In western countries also, if a road is blocked by snow, each house removes the snow on the road in front of it with a sense of duty. But some people, who are in no mood to repair the roads they will take and say that such work is the concern of the government alone, are lodging complaints, claiming the government is violating human rights. They say that is forced labour. Well, if so, in their countries, young men are conscripted into army whether they want to join army or not, when they come of age. Then, they are sent to Iraq and Afghanistan for military purpose. None of them is willing to be sent there, but they are sent under the law. If that is not human right violation, and if the citizens are duty-bound to serve military duties at risk to life, why don't the people have responsibilities for giving voluntary service in the interest of their wards and villages?[sic]⁵⁹

The authorities regularly label the practice of forced labour as voluntary work or service when recruiting workers. Rohingyas who are requested to undertake forced labour are accordingly told that the work is of a voluntary nature and, under the threat of reprisal, directly instructed to indicate to foreigners that they are volunteers working of their own free will.

Clearly, the work discussed in the previous sections in North Arakan State is not of a voluntary nature but rather forced or compulsory labour imposed upon the Rohingyas. Rohingyas can avoid forced labour, but only if they are willing to provide so-called "financial compensation". Given the weekly demand for forced labour on every household, avoiding forced labour is very costly but is often possible for those who can afford to pay these bribes. According to one refugee who recently left Burma, avoiding portering would be the most expensive and would cost 2,000 kyats per week.⁶⁰ The cost for avoiding forced labour is not fixed, and varies depending on the type of work and oftentimes on the individuals collecting the money. Refusal to answer forced labour requests is not an option without financial compensation and often leads to beatings, killings and other abuses such as, for example, the retributive beating of a family member. As recently reported to the General Assembly:

The Special Rapporteur has received allegations that villagers have been severely punished because they refused to perform forced labour or have been subject to unlawful appropriation of their land, livestock, harvest and other property.⁶¹

Needless to say Rohingyas are only very rarely compensated for the work they provide. Of the refugees and asylum seekers interviewed during the field investigation, none had been paid for their maintenance and building work or for the portering they were forced to do. With respect to the construction of houses or barracks for the military, payment is often promised but almost never provided.⁶² Over the course of the last

⁵⁹ M. De Doh, 'Disease is curable with right medicine', *The New Light of Myanmar* (28 July 2009), available at <http://www.burmalibrary.org/docs07/NLM2009-07-28.pdf> at 8.

⁶⁰ Bangladesh testimonies, *supra* note 22: F2-B-2.

⁶¹ UN Human Rights Council, *supra* note 26, at para. 60.

⁶² Bangladesh testimonies, *supra* note 22: M27-A-1.

number of years, Rohingyas have on occasion been remunerated (below the prevailing rate of pay) for construction work, including that carried out on model villages. Reports indicate that payment occurs more commonly in areas visited by international organisations.⁶³ The conditions in which the Rohingyas are compelled to undertake their tasks can be extremely difficult, with food, water and shelter usually not being provided. Rather, individuals are expected to bring their own supplies, even when the work extends over several days.⁶⁴

Individuals are regularly mistreated while undertaking portering work. Porters who slow down, ask for a break, or collapse from exhaustion, are routinely beaten. Refugees and asylum seekers interviewed for this Report confirmed that they had suffered mistreatment, including being beaten with sticks and gun butts, or being kicked, and stabbed in the chest with a bayonet.⁶⁵ Porters have also been killed and left sick or unconscious on the side of the road when they could no longer perform their work.⁶⁶ Beatings seem to also regularly occur when Rohingyas are forced to do building and maintenance work for NaSaKa, the military or police.⁶⁷ Physical abuses of Rohingyas are in actual fact frequent for all types of forced labour in North Arakan State. In the agricultural sector, failure to provide forced labour more often than not leads to the imposition of fines or the confiscation of land. In relation to guard or security duty, several Rohingyas interviewed indicated that while on duty they are often (wrongfully) accused of being asleep and are accordingly punished: the sentries are either beaten, asked for a fine in cash or livestock, or they are compelled to compensate with several extra days of forced labour.⁶⁸ Women are particularly at risk when undertaking forced labour, with rape and other forms of sexual violence being common.⁶⁹

Taking into consideration the physical conditions, mistreatment, and the cumulative effect of the practice, forced labour has severe repercussions. Documents and the testimonies gathered by the Irish Centre for Human Rights show that Rohingyas commonly come back sick from their work, especially when working as porters or involved in construction of infrastructure. Some individuals never come back, having been killed or because of death following injuries during forced labour. In addition to the physical harm done to the Rohingyas during forced labour duties, this practice also seriously affects their livelihoods. The combined requests for forced labour can lead to single households being compelled to provide several days of forced labour per week. For the poorer members of the population, weekly forced labour makes it impossible to provide food and meet the basic needs of their families. Moreover, random recruitment does not allow time to organize alternative arrangements to continue with daily work and ensure the livelihood and safety of families. Finally, the conditions under which forced labour is exacted, as well as the cumulative effects of the practice, severely affect the mental health of many of the Rohingyas.

⁶³ Lewa, The Arakan Project (October 2006-May 2007), *supra* note 34.

⁶⁴ For more details see ILO Commission of Inquiry Myanmar, *supra* note 3, at paras. 315-317 which described these conditions.

⁶⁵ Bangladesh testimonies, *supra* note 22: F-26-A-8; F-26-C-5; F1-A-2; M2-B-3.

⁶⁶ *Ibid*: F26-A-8. See also NCGUB, *supra* note 28, at 189.

⁶⁷ Bangladesh testimonies, *ibid*: M27-C-2; M27-C-5; M2-A-1; M2-B-3.

⁶⁸ Bangladesh testimonies, *ibid*: F27-3; F2-B-2.

⁶⁹ See Chapter V (Rape and Sexual Violence).

B. The Applicable Law: Forced Labour as an International Crime Bearing Individual Criminal Responsibility

With the factual findings on the exaction of forced labour in North Arakan State now established, the task of the following section is to place these findings within the appropriate international criminal framework. The origins of the prohibition of forced labour are, perhaps unsurprisingly, entwined with the development of the absolute prohibition of slavery and practices similar to slavery.⁷⁰ Indeed, a fluid conception of slavery and practices similar to slavery has proved to be a fruitful instrument in the context of the global anti-slavery movement.⁷¹ It is essential (in the context of the Rohingyas) to ascertain the parameters of the definitions of slavery (and practices similar to slavery and forced labour) in accordance with the Rome Statute's jurisdiction over the crimes of enslavement and sexual slavery.

1. Forced Labour as an International Crime Bearing Individual Criminal Responsibility

International law instruments that prohibit forced labour act as valuable interpretative aids when determining its outline as a potential international criminal act. Looking to public international law first, it is clear from the provisions of the 1926 Slavery Convention, the 1930 Forced Labour Convention and the 1950 Abolition of Forced Labour Convention, that the exaction of forced labour (outside of the recognized exceptions) is both a national and an international crime which may bear individual criminal responsibility.⁷² These instruments acted as a backdrop for, and exerted some influence on, the drafting of the crime against humanity provision on enslavement in Article 7(1)(c) of the Rome Statute and are hence worth briefly considering.

Article 1(1) of the 1926 Slavery Convention states that, '[s]lavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.⁷³ The central component of the definition of slavery is therefore, the exercise of 'any or all of the powers attaching to the right of ownership'. What exactly constitute powers attaching to the right of ownership is regrettably not made explicit. However, Jean Allain's interpretation of the term is highly persuasive:

⁷⁰ See for example, K. Bales and P.T. Robbins, '“No One Shall be Held in Slavery or Servitude”: A Critical Analysis of International Slavery Agreements and Concepts of Slavery', (2001) 2 *Human Rights Review* 18; A. Yasmine Rassam, 'Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law', (1999) 39 *Virginia Journal of International Law* 303.

⁷¹ See A.T. Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway', (2009) 49 *Virginia Journal of International Law* 789 at 799; and S. Miers, *Slavery in the Twentieth Century: The Evolution of a Global Problem* (Boston. Rowman & Littlefield Publishers, 2003) at 453.

⁷² Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention (1926), *entered into force* 9 March 1927, 60 LNTS 253 [Slavery Convention 1926] at art. 5(3); Forced Labour Convention 1930, *supra* note 2 at art. 25; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, (1956) *entered into force* 30 April 1957, 226 UNTS 3 [Supplementary Slavery Convention] at Preamble. For an examination of the criteria for the recognition of conduct as an international crime see: M.C. Bassiouni, 'The Penal Characteristics of Conventional International Criminal Law', (1983) 15 *Case Western Reserve Journal of International Law* 27.

⁷³ *Ibid.*, Slavery Convention 1926 at art. 1(1).

[E]xercising the “powers attaching to the right of ownership” should be understood as meaning that the enslavement of a person does not mean the possession of a legal right of ownership over the individual (such a claim could find no remedy in modern day law) *but the powers attached to such rights* but for the fact that ownership is illegal. To use an analogy, the powers attached to the right of ownership are the powers that manifest themselves say, when two drug dealers have a dispute over a kilo of heroin. Neither can have their claim dealt with in a court of law, but one or the other will exercise the powers attached to the right of ownership, for example, possession; thus what would amount to a right of ownership but for the fact that it is illegal to own, or possess, heroin.⁷⁴

However, it is not entirely clear whether forced labour is subsumed within this definition. Some clarification is offered by Article 5 of the Slavery Convention which states that:

The High Contracting Parties recognize that recourse to compulsory or forced labour may have grave consequences and undertake, each in respect of the territories placed under its sovereignty, jurisdiction, protection, suzerainty or tutelage, to undertake all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.⁷⁵

The Convention was therefore concerned not with the outright prohibition of forced labour as such, but rather with ensuring that situations in which forced labour takes place do not degenerate into a slavery-like situation.⁷⁶

The task of ‘progressively’⁷⁷ putting an end to the exaction of forced labour was assumed by the ILO and resulted in the almost immediate adoption in 1930 of the Forced Labour Convention, to which, as was stated earlier, Burma is a State party. The prevailing definition of forced labour is derived from Article 2(1): ‘[A]ll work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.⁷⁸ The obligation to both desist and positively act with respect to the eradication of the use of forced labour is tempered by the permissible exceptions to its use. In this respect, the prohibition of recourse to forced labour for public purposes is not absolute. Article 2(2) provides that forced or compulsory labour may be exacted by public authorities in the context of: (i) compulsory military service; (ii) work or services forming part of an individual’s normal civil obligations; (iii) prison labour; (iv) work or services necessary in cases of

⁷⁴ J. Allain, ‘The Definition of “Slavery” in General International Law and the Crime of Enslavement within the Rome Statute’, Paper presented at the Guest Lecture Series of the Office of the Prosecutor of the International Criminal Court (26 April 2007), available at http://www.icc-cpi.int/NR/rdonlyres/069658BB-FDBD-4EDD-8414-543ECB1FA9DC/0/ICCOTP20070426Allain_en.pdf at 13. See also United Nations Economic and Social Council, Slavery, the Slave Trade, and other forms of Servitude, ‘Report of the Secretary-General’, UN Doc. E/2357 (1953) at 28, quoted in J. Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention* (The Hague: Martinus Nijhoff Publishers, 2008) at 13.

⁷⁵ Slavery Convention 1926, *supra* note 72 at art. 5, para. 1.

⁷⁶ See M.C. Bassiouni, ‘Enslavement as an International Crime’, (1991) 23 *New York University Journal of International Law and Politics* 445 at 468: ‘The implication of article 5 is that forced labour is not identical in its invidiousness to slavery; the latter is completely unacceptable, while the former is merely undesirable’.

⁷⁷ Slavery Convention 1926, *supra* note 72 at art. 5, sub-para. 2.

⁷⁸ Forced Labour Convention 1930, *supra* note 2 at art. 2(1).

emergency; and (v) communal services of benefit to the community in question.⁷⁹ The exaction of forced labour in any circumstances falling outside of these specific exceptions is expressly prohibited. To this end, states are required to ensure that all laws or other statutory instruments instituting impermissible forced or compulsory labour are repealed, and that subsequent legislation introduced ensure that forced or compulsory labour is ‘punishable as a penal offence’ and that ‘the penalties imposed by law are really adequate and are strictly enforced’.⁸⁰ As was noted in Section A above, the SPDC have for many years attempted to brush off accusations of the widespread and systematic exaction of forced labour by declaring that unpaid labour is offered on a voluntary basis. It is clear that the forms and conditions of forced labour documented above do not in any sense conform to the limited permissible exceptions under the 1930 Convention. The exaction of forced labour in North Arakan State, and throughout Burma generally, has two dual roles: (i) To sustain, maintain and construct the infrastructure of the central authorities and their agencies; and (ii) To expose ethnic minority groups to extreme hardship and oppression. As such it is contrary to international law.

The relevant provisions of the 1926 and 1930 Conventions are significantly supplemented by a number of universal and regional human rights instruments. The natural starting point in this regard is Article 4 of the Universal Declaration of Human Rights (UDHR) which provides that ‘[n]o one shall be held in slavery or servitude’ and that ‘slavery and the slave trade shall be prohibited in all their forms’.⁸¹ However, it is clear from the *travaux préparatoires* of the UDHR that Article 4 was implicitly intended to cover such institutions and practices as ‘traffic in women, involuntary servitude and forced labour’.⁸² Articles 8(1) and 8(2) of the 1966 International Covenant on Civil and Political Rights (ICCPR), similarly prohibit slavery, the slave trade and servitude,⁸³ but with the addition of a provision addressing forced labour. Article 8(3)(a) states that ‘[n]o one shall be required to perform forced or compulsory labour’⁸⁴. Articles 8(3)(b) and 8(3)(c)(i)-(iv) set out the permissible exceptions to the prohibition, which are essentially a reiteration of those mentioned in Article 2(2) of the 1930 Forced Labour

⁷⁹ *Ibid.*, at art. 2(2).

⁸⁰ *Ibid.*, at art. 25. This requirement is reinforced by article 5(3) of the Slavery Convention 1926 which mandates that ‘the responsibility for any recourse to... forced labour shall rest with the competent central authorities of the territory concerned’.

⁸¹ Universal Declaration of Human Rights, *adopted* 10 December 1948, GA Res. 217A, UN GAOR, UN Doc. A/810 (1948) at art. 4 [emphasis added].

⁸² ‘Report of the Working Group on the Declaration of the Second Session of the Commission on Human Rights’, UN Doc. E/CN.4/57 (1947) at 8 [emphasis added].

⁸³ International Covenant on Civil and Political Rights, (1966), *entered into force* 23 March 1976, 999 UNTS 171 [hereinafter ICCPR] at arts. 8(1) and (2). While the Covenant does not offer a definition of servitude Nowak states that, ‘[t]he *travaux préparatoires* show that an effort was made to limit the term “slavery”, whereas the term “servitude” was to be applicable to all conceivable forms of dominance and degradation of human beings by human beings’. M. Nowak, UN Covenant on Civil and Political Rights: CCPR Commentary (Kehl. N.P. Engel Verlag, 2005) at 199.

⁸⁴ *Ibid.*, art. 8(3). Again the Covenant fails to advance a definition of forced or compulsory labour. However, Nowak is of the opinion that, ‘[i]n light of the historical background, the relatively far-reaching exceptions dictate that the expression “forced or compulsory labour” be understood broadly’. Nowak, *ibid.*, at 201-202. Article 8(3) is complemented by articles 6 (right to free choice of employment) and 7 (favourable conditions of work) of the International Covenant on Economic, Social and Cultural Rights [International Covenant on Economic, Social and Cultural Rights, (1966) *entered into force* 3 January 1976, 993 UNTS 3].

Convention.⁸⁵ These provisions confirm that outside of the permissible exceptions, the prohibition of forced labour is a norm of customary international law. The significance of its designation as such is that states have an obligation to eradicate its use regardless of whether or not they are parties to the instruments cited. This is especially important in the present context, since, of the instruments discussed Burma is a party only to the Slavery Convention 1926 and Forced Labour Convention 1930.

While it is beyond doubt that the prohibition of forced labour has a firm basis in customary international law and international law treaties, the exact parameters of its possible prosecution at the international level are in need of some clarification. Forced labour as an international crime is most typically discussed alongside slavery and slavery-related practices as either a war crime or a crime against humanity.⁸⁶ In the absence of an ongoing armed conflict in the North Arakan State this Report naturally focuses on the crimes against humanity framework pertaining to the Rome Statute of the International Criminal Court.

Article 7(1)(c) of the Rome Statute provides that:

For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:...

(c) *Enslavement*⁸⁷

Article 7(2)(c), elaborating on the definitional boundaries of the offence, states:

“Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.⁸⁸

This definition is clearly influenced by the definition found in Article 1(1) of the 1926 Slavery Convention. The Elements of Crimes document⁸⁹ which act as an interpretative aid to the Rome Statute give some indication of the potential scope of Article 7(1)(c) stating:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending

⁸⁵ Largely identical wording is to be found in article 6 of the American Convention on Human Rights and article 4 of the European Convention on Human Rights: American Convention on Human Rights, (1969), *entered into force* 18 July 1978, 1144 UNTS 123 [hereinafter ACHR] at art. 6. Article 6(1) includes the express prohibition of trafficking in women. Convention for the Protection of Human Rights and Fundamental Freedoms, (1950), *entered into force* 3 September 1953, 213 UNTS 222 [hereinafter ECHR] at art. 4.

⁸⁶ Bassiouni, *supra* note 76 at 448.

⁸⁷ Rome Statute of the International Criminal Court (1998), UN Doc. A/CONF.183/9, *entered into force* 1 July 2002, 2187 UNTS 90, [hereinafter Rome Statute] at art. 7(1)(c).

⁸⁸ *Ibid.*, at art. 7(2)(c).

⁸⁹ The Final Act of the Diplomatic Conference at Rome provided for the establishment of a Preparatory Commission to oversee *inter alia*, the drafting of the Elements of Crimes and the Rules of Procedure and Evidence, both of which were subsequently adopted by the Assembly of States Parties.

or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.

2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.⁹⁰

The understanding of powers attaching to the right of ownership in Element 1 above appears quite restrictive, referring in large measure to traditional notions of chattel slavery. However, it is particularly notable for the inclusion of the phrase 'or by imposing on them a similar deprivation of liberty', which at first view is rather ambiguous but for the clarification provided in an accompanying footnote which cites *inter alia* the exaction of forced labour and imposition of servile status as examples of such deprivation of liberty.⁹¹

The exaction of forced labour, therefore, may constitute a form of deprivation of liberty associated with the exercise of *any or all* of the powers attaching to the right of ownership. Thus, provided the general requirements for crimes against humanity as outlined in Article 7(1) are satisfied (i.e. a widespread or systematic attack directed against any civilian population),⁹² the exaction of forced labour alone – that is to say, in the absence of the exercise of any of the other powers attaching to the right of ownership – may constitute the crime against humanity of enslavement. This interpretation appears to take into account the evolution of the definition of slavery away from historical notions of chattel slavery towards situations of *de facto* slavery. Christopher Hall has commented that '[g]iven the history of the struggle over more than two centuries to abolish slavery, slavery-like practices and forced labour, it is logical to assume that the drafters wished the Court to have jurisdiction over other slavery-like practices such as serfdom and debt bondage, as well as related practices, such as forced or compulsory labour, as crimes against humanity'.⁹³ On a practical level, it is far from certain that the bench of the International Criminal Court will view the issue in such a clear-cut manner. The fact of the matter is that, as Darryl Robinson has said, Article 7(1)(c) is somewhat 'convoluted and inelegant'.⁹⁴

In determining the customary law content of the crime of enslavement under the Rome Statute, the Court will have recourse to the not insignificant body of jurisprudence which has evolved through the case-law of the International Military Tribunal at Nuremberg (IMT), the International Military Tribunal for the Far East

⁹⁰ Elements of Crimes, Doc. ICC-ASP/1/3, at 6.

⁹¹ Bassiouni, *supra* note 76 at 6, footnote 11.

⁹² For a thorough examination of the general requirements for crimes against humanity, see Chapter III (Legal Framework) at 28 ss.

⁹³ C.K. Hall, 'Article 7(1)(c) – Enslavement', in O. Triffterer (ed.) *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden. Nomos Verlagsgesellschaft, 1999) at 134. See also, W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford. Oxford University Press, 2010) at 160-163.

⁹⁴ D. Robinson, 'The Elements of Crimes against Humanity', in R.S. Lee *et al.* (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Oxford. Oxford University Press, 2001) at 85.

(“Tokyo Tribunal”), Control Council Law No. 10 (“Control Council cases”), and the International Criminal Tribunal for the former Yugoslavia (“Yugoslav Tribunal”).

2. Forced Labour as Enslavement: Jurisprudence in Brief

Enslavement was originally acknowledged as a potential crime against humanity in Article 6(c) of the Charter of the IMT (“the Charter”),⁹⁵ with deportation to forced labour being recognized as a war crime under Article 6(b).⁹⁶ However, while the final judgment of the IMT refers to enslavement and forced labour (or ‘slave labour’ as it was labelled) in relation to thirteen defendants, it fails to distil a concrete definition of the offence.⁹⁷ A number of the Control Council cases contained crimes against humanity charges relating to enslavement and deportation to forced labour.⁹⁸ The jurisprudence reaffirms the IMT’s implied finding that the exaction of forced labour is a definite indication of the crime of enslavement.⁹⁹ However, the fact remains that these judgments do not give a concrete account of the parameters or customary elements of the crime of enslavement. Regrettably, the Judgment of the Tokyo Tribunal does not provide any further enlightenment. In a similar vein to the IMT Charter, Article 5(c) of the Charter of the Tokyo Tribunal provides for the crime against humanity of enslavement,¹⁰⁰ with a number of related charges included in the indictment.¹⁰¹ However, while convictions were handed down for specific instances of enslavement and deportation to forced labour (most notably relating to the construction of the Burma-Siam railway), no examination of the definitional boundaries of these offences was forthcoming.

The Yugoslav Tribunal was required to fill in these definitional and elemental blanks in the *Kunarac* and *Krnjelac* cases. While the *Kunarac* case was primarily concerned with sexual slavery and related issues, both the Trial and Appeals Chambers nevertheless have had reason to interpret the customary international legal parameters

⁹⁵ ‘Charter of the International Military Tribunal (IMT),’ in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), *entered into force* 8 August 1945, 82 UNTS 280 [Charter of the IMT] at art. 6(c).

⁹⁶ *Ibid.*, at art. 6(b).

⁹⁷ International Military Tribunal (Nuremberg), Judgment and Sentences, (1 October 1946) reprinted in 41 *American Journal of International Law* 172 at 309-311. The result was that, with the exception of Baldur Von Schirach (who was convicted on Count Four alone), it is not clear which defendants were convicted of deportation to forced labour and which for enslavement. Von Schirach was convicted of crimes against humanity for his role in both the exaction of forced labour from the Viennese Jewish community, and in their deportation to concentration camps in Eastern Europe. This appears to imply that the Tribunal considered that the exaction of forced labour may constitute the crime of enslavement.

⁹⁸ See: *United States v. Krauch et al.*, US Military Tribunal sitting at Nuremberg, Judgment of 29 July 1948, TWC VIII, 1081-210; *United States v. Milch et al.*, US Military Tribunal sitting at Nuremberg, Judgment of 17 April 1947, TWC II, 773-878; *United States v. Flick et al.*, US Military Tribunal sitting at Nuremberg, Judgment of 22 December 1947, TWC VI, 1187-223.

⁹⁹ *United States v. Pohl et al.*, US Tribunal sitting at Nuremberg, Judgment of 3 November 1947, TWC V, 958-1163: ‘Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings and other barbarous acts, but the admitted fact of slavery – *compulsory uncompensated labour* – would still remain’.

¹⁰⁰ Charter of the International Military Tribunal for the Far East (26 April 1946), reprinted in N. Boister & R. Cryer (eds.) *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press, 2008) at 8.

¹⁰¹ *Ibid.*, at 32-33. Counts 53-55.

of enslavement. In doing so both the Trial and Appeals Chambers have had recourse to the instruments and case-law referred to above, with the notable addition of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind which stated that enslavement was to be defined as:

[E]stablishing or maintaining over persons a status of slavery, servitude or *forced labour* contrary to well-established and widely-recognized standards of international law.¹⁰²

Adducing the requisite physical (*actus reus*) and mental (*mens rea*) elements of the offence, the Trial Chamber found that ‘the *actus reus* of the violation is the exercise of any or all of the powers attaching to *right of ownership* over a person. The *mens rea* of the violation consists in the intentional exercise of such powers’.¹⁰³ The Chamber went on to say that:

This definition...may be broader than the traditional and sometimes apparently distinct definitions of either: slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law. This is evidenced in particular by the various cases from the Second World War referred to above, which have included forced or compulsory labour under enslavement as a crime against humanity.¹⁰⁴

This definition is certainly broader, but also enormously beneficial from the perspective of the international criminal classification of forced labour. The Chamber clearly goes to considerable lengths to eradicate any ambiguity surrounding the position of forced labour within the enslavement framework. Forced labour is an indication of the presence of the crime of enslavement. Other indications of enslavement identified by the Trial Chamber include:

Elements of control and ownership; the restriction or control of an individual’s autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator. *The consent or free will of the victim is absent...*Further indications of enslavement include exploitation; *the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking*.¹⁰⁵ [Emphasis added]

As should be clear from the findings of Section A above, the majority of these indicators from control of individual autonomy to exploitation, are identifiable in the situation of the Rohingyas.

¹⁰² Report of the International Law Commission on the work of its forty-eighth session, 6 May-25 July 1996, GA, Supplement No. 10 (A/51/10) at 93 [emphasis added]. Quoted in *Prosecutor v. Kunarac et al.*, (Trial Judgment) IT-96-23-T & IT-96-23/1-T (22 February 2001) at para. 537 [emphasis added].

¹⁰³ *Ibid.*, *Kunarac et al.* Trial Judgment at para. 540 [emphasis added].

¹⁰⁴ *Ibid.*, at para. 541. The *Kunarac* definition was supported by the Trial Chamber of the Special Court for Sierra Leone in its judgment on the RUF case – see, *Prosecutor v. Sesay et al.*, (Trial Judgment) SCSL-04-15-T (2 March 2009) at para. 160. The factual circumstances of the exaction of forced labour in this case have some resonance [even if occurring in an armed conflict scenario] in the current context, see paras. 1215-1218, 1220, 1223, 1321-1327, 1479 [forced farming]. See also, *Prosecutor v. Sesay et al.*, (Appeal Judgment) SCSL-04-15-A (26 October 2009) at para. 93.

¹⁰⁵ *Ibid.*, at para. 542. See also *Sesay et al.*, *ibid.*, at para. 199.

The *Kunarac* trial judgment, while seminal,¹⁰⁶ was not without its elemental shortcomings. These were in large measure addressed by the Appeals Chamber in its judgment on the case some 14 months later. For instance, the Trial Chamber's reference to the 'right of ownership'¹⁰⁷ was subject to scrutiny:

The Appeals Chamber will however observe that the law does not know of a "right of ownership over a person". Article 1(1) of the 1926 Slavery Convention speaks more guardedly "of a person over whom any or all of the powers attaching to the right ownership are exercised". That language is to be preferred.¹⁰⁸

The Appeals Chamber endorsed the definition of the physical and mental elements of the offence, and stated that the Trial Chamber's definition was not too broad and was in fact reflective of customary international law.¹⁰⁹

That the exaction of forced labour fell within the definitional embrace of enslavement was positively endorsed further in the *Krnojelac* case. In its judgment, the Trial Chamber endorsed *Kunarac's* finding that enslavement constituted a crime under customary international law.¹¹⁰ The Chamber reiterated that forced labour, when operating outside of the permissible exceptions under international humanitarian and human rights law, is an established indicator of enslavement.¹¹¹

The adoption of the Rome Statute in July 1998 predates by some three to four years the Yugoslav Tribunal's seminal enslavement judgments in *Kunarac* and *Krnojelac*, so it is not surprising that in the absence of concrete judicial interpretation of the offence, the drafters of Article 7(1)(c) and the accompanying Elements settled on a 'convoluted and inelegant' formulation.¹¹² On the face of it, the position of forced labour within the terms of Article 7(1)(c) rests on uncertain ground; however, the prevailing jurisprudence clearly establishes that from a customary international law perspective, forced labour is a definite component of the crime of enslavement. Furthermore, forced labour, should the factual circumstances dictate, may be classified under other inhumane acts, and should discriminatory intent be present may constitute persecution.

¹⁰⁶ Both *Kunarac* and *Kovač* were convicted of the crime against humanity of enslavement. In finding *Kovač* guilty the Chamber stated that in detaining a number of Bosnian Muslim women in his apartment in Foča, *Kovač*: 'had complete control over their movements, privacy and labour. He made them cook for him, serve him and do the household chores for him. He subjected them to degrading treatments, including beatings and other humiliating treatments...For all practical purposes, he possessed them, owned them and had complete control over their fate, and he treated them as his property.' *Ibid.*, at para. 780-781

¹⁰⁷ *Ibid.*, at para. 539.

¹⁰⁸ *Prosecutor v. Kunarac et al.*, (Appeal Judgment) IT-96-23-T & IT-96-23/1-T (12 June 2002) at para. 118.

¹⁰⁹ *Ibid.*, at para. 124.

¹¹⁰ *Prosecutor v. Krnojelac*, (Trial Judgment) IT-97-25-T (15 March 2002) at para. 353.

¹¹¹ *Ibid.*, at para. 359-360.

¹¹² Robinson, *supra* note 94 at 85.

C. Preliminary Conclusions

The analysis provided in this chapter follows in-depth documentary and field research and strongly suggests that the crime of enslavement, as provided for in Article 7(1)(c) of the Rome Statute, is currently being committed against the Rohingya population of North Arakan State. The commission of the crime of enslavement is indicated by the exaction of both widespread and systematic forced labour against the civilian Rohingya population.

As shown in the preceding sections, forced labour is exacted from the Rohingya population in several forms, including portering, building maintenance and construction, forced cultivation and agricultural labour, construction and repair of basic infrastructure, and guard or sentry duty. Individuals so engaged have the possibility of buying their way out of these various forms of labour by providing weekly compensation; it is not simply a case of merely rejecting forced labour requests. Failure to provide the number of days of labour ordered for each household leads to harassment, beatings, killings and other abuses such as the retributive abuse of family members. Rohingyas in North Arakan State fulfil the various forced labour duties requested under coercion and constant threat of reprisal and mistreatment. The labour imposed on the Rohingyas in North Arakan State clearly falls under the definition of ‘forced or compulsory labour’ as provided for in Article 2(1) of the Forced Labour Convention of 1930.¹¹³ For the majority of Rohingyas interviewed in Bangladesh, it appears that before fleeing Burma, forced labour had become part of their daily life and was accepted as a burden they could not change, avoid or alleviate.

As has been documented, Rohingya households are either requested by their Village Chairmen to “volunteer” family members for compulsory labour, or alternatively are recruited, without prior notice, in public places or at their place of residence, sometimes in the middle of the night. The authorities responsible for overseeing forced labour in North Arakan State have complete control over the movements of Rohingyas when these are engaged in compulsory labour. The working environment is often harsh and intimidating. It is common knowledge that to challenge the nature of the labour, to refuse to comply or to rest due to exhaustion or injury will lead to physical abuse, the imposition of fines or extra days of labour. The environment, coercion, and threat of punishment are clear deterrents to escape or non-compliance and ensure complete submission.

The examples of forced labour documented in this chapter do not represent isolated cases thereof. Rather, documentary research and interviews conducted for the purpose of this Report indicate that forced labour is widespread in North Arakan State. The majority of refugees and asylum seekers interviewed had been either forced to provide the type of labour discussed or had directly witnessed this type of practice being enforced against other Rohingyas.¹¹⁴

¹¹³ Forced Labour Convention 1930, *supra* note 2 at art. 2.

¹¹⁴ Bangladesh testimonies, *supra* note 22.

Forced labour has been systematically exacted from the Rohingyas for at least the last two decades.¹¹⁵ The SPDC's self-sufficiency policy implemented for the army and NaSaKa appears to have actively promoted or encouraged the practice of forced labour. The implementation of different national development projects and the launching of various construction projects without financial support from the SPDC budget suggest that the regime either accepts or instigates forced labour on its territory. These details point to the conclusion that the exaction of forced labour is, *prima facie* at least, a specific policy of the SPDC. No genuine steps have been made towards the eradication of forced labour. A recent ILO report highlighting Burma's lack of compliance with the prohibition of forced labour, states the following:

None of the recommendations of the Commission of Inquiry had yet been implemented, and the exaction of forced labour continued to be widespread, particularly by the army. Any instructions to cease the practice of utilizing forced labour appeared to have been disregarded regularly and with impunity.¹¹⁶

The SPDC appears to have clear knowledge of the practice as well as the extent of the exaction of forced labour in Burma, yet it clearly accepts and fosters impunity. As noted by the Special Rapporteur on the Situation of Human Rights in Myanmar:

Major obstacles to the elimination of forced labour include the apparent lack of political will to seriously address the problem or to develop acceptable alternatives, and the continued impunity of the Government officials and army officers responsible. Another problem is the lack of public information on, and awareness of, the Government's orders, which prohibit the use of forced labour and the mechanisms which exist to seek redress.¹¹⁷

In the specific case of the Rohingyas, the restrictions imposed on their freedom of movement means that this group does not have access to the ILO complaint mechanism and *de facto* has no effective means of redress for the crime of enslavement committed against them.

This analysis strongly indicates that the crime against humanity of enslavement is currently being perpetrated against Rohingyas in North Arakan State. Further inquiry should accordingly follow to prove the commission of these acts by individuals under the framework of international criminal law, with a view to engaging individual criminal responsibility.

¹¹⁵ See generally ILO Commission of Inquiry Myanmar, *supra* note 3.

¹¹⁶ ILO International Labour Conference, *supra* note 11 at 35.

¹¹⁷ UN Human Rights Council, *supra* note 26 at para. 33.

Chapter V:

Rape and Sexual Violence

"A man from NaSaKa came to my house. He kicked the door and told me I had to go and work as a sentry instead of my husband. I had to go immediately with my young child and without food. Later in the evening while I was at my post someone else from NaSaKa came. He told me 'your husband is not there, I will stay with you; I want to live with you'. That night the man raped me in the shed in front of my boy.

We (women) feel at peace in Bangladesh. There is no food and some problems, but there is no rape, we have peace"

Rohingya woman, 26 years-old, Bangladesh

V. RAPE AND SEXUAL VIOLENCE

A. Factual Findings

1. Rape and Sexual Violence in Burma

1.1 Reports of Rape and Sexual Violence against Women and Girls

The perpetration of rape and sexual violence against women and girls in Burma has been documented for years by local organisations as well as the international community. Since the 1990s several Special Rapporteurs have through their mandates repeatedly noted that sexual violence is pervasive in Burma and that rapes are committed throughout the country, including against Rohingya women and girls in North Arakan State.¹ Since 2002 the situation of women and girls in Burma has become better known; the nature and gravity of sexual violence in the country have been laid out by the Shan Human Rights Foundation and Shan Women's Action Network in a publication named *Licence to Rape*.² The two local organisations examined and provided details on '173 incidents of rape and other forms of sexual violence, involving 625 girls and women, committed by Burmese army troops in Shan State, mostly between 1996 and 2001.'³ The *Licence to Rape* report has been recognized by local and international non-governmental organisations as well as by United Nations bodies as providing a credible account of those cases, and an accurate analysis of the scourge of rape and sexual violence in the Shan State. The report asserts that:

the Burmese military regime is allowing its troops systematically and on a widespread scale to commit rape with impunity in order to terrorize and subjugate the ethnic peoples of Shan State. The report illustrates there is a strong case that war crimes and crimes against humanity, in the form of sexual violence, have occurred and continue to occur in Shan State.⁴

The report, which remains a key document on the issue, generated a great deal of attention at the international level and seemingly started a local movement into the examination of rapes and sexual violence crimes in the whole of Burma.

A number of reports written by Burmese organisations since 2002 have examined the perpetration of rape and sexual violence against women and girls in Mon State, Chin State, Karen State as well as against other ethnic minorities in the country.⁵

¹ See for instance UN Commission on Human Rights, 'Report on the Situation of Human Rights in Myanmar, prepared by Mr. Yozo Yokota, Special Rapporteur of the Commission on Human Rights, in accordance with Commission Resolution 1992/58', UN Doc. E/CN.4/1993/37 (1993) at paras. 77, 111, 137; Commission on Human Rights, 'Report submitted by Mr. Angelo Vidal d'Almeida Ribeiro, Special Rapporteur appointed in accordance with Commission on Human Rights Resolution 1986/20 of 10 March 1986', UN Doc. E/CN.4/1993/62 (1993) at para. 45.

² Shan Human Rights Foundation and Shan Women's Action Network, 'Licence to Rape: The Burmese Military Regime's Use of Sexual Violence in the ongoing War in Shan State' (2002), available at <http://www.shanwomen.org/pdf/Licence%20to%20Rape%20B.pdf>.

³ *Ibid.*, at 1.

⁴ *Ibid.*

⁵ Woman and Child Rights Project in collaboration with Human Rights Foundation of Monland, 'Catwalk to the Barracks: Conscription of Women for Sexual Slavery and other Practices of Sexual Violence by Troops of the Burmese Military Regime in Mon areas' (2005), available at

These publications reported, amongst other things, the alleged perpetration by military troops of the following: 125 cases of rape in Karen State between 1988-2004,⁶ 37 cases of rape in Mon State between 1995-2004,⁷ 38 cases of rape in Chin State between 1989-2006,⁸ 26 cases of rapes across Burma between 2002-2004.⁹ As highlighted in a shadow report regarding Burma's latest periodic report to the Committee on the Elimination of Discrimination against Women, together with the cases detailed in *Licence to Rape*, the various studies presented by organisations in Burma have documented 399 cases of rape in the country, some involving gang-rape, with a total of 875 girls and women becoming victims of rape across Burma between 1988-2006.¹⁰ In parallel with the material provided by these local organisations, the international organisation Refugees International (RI) also examined the problem of sexual violence and rape in Burma, and produced a report based on research and a field mission to the country. Refugees International more specifically considered the situation of Karen, Karenni, Mon, Shan and Tavoyan women and girls. The report noted that 'RI sought to examine the extent of the use of rape against a variety of Burma's ethnic nationalities and determine if the abuses were widespread and/or systematic.'¹¹ Refugee International reported 43 cases of rape or attempted rape against women and girls from the groups mentioned and concluded that:

Widespread rape is committed with impunity, both by officers and lower ranking soldiers. Officers committed the majority of rapes documented here in which the rank of the perpetrator was known. The culture of impunity contributes to the military atmosphere in which rape is permissible.¹²

The reports by the various local organisations in different parts of Burma and by Refugee International have provided vital information for future inquiries into the situation of women and girls in the country. These documents detail the situation in some specific areas of Burma, they identify perpetrators, the location of rapes, and the crimes committed. The documents further indicate that rape and sexual violence are widespread and that this scourge is especially endemic amongst ethnic minority groups.

http://www.burmalibrary.org/docs3/Catwalk_to_the_Barracks.htm; Karen Women's Organization, 'Shattering Silences: Karen Women speak out about the Burmese Military Regime's Use of Rape as a Strategy of War in Karen State' (2004), available at http://www.womenofburma.org/Report/Shattering_Silences.pdf; Karen Women's Organization, 'State of Terror: The ongoing Rape, Murder, Torture and Forced Labour Suffered by Women Living under the Burmese Military Regime in Karen State' (2007), available at <http://www.karenwomen.org/Reports/state%20of%20terror%20report.pdf>; Women's League of Chinland, 'Unsafe State: State-sanctioned Sexual Violence against Chin Women in Burma' (2007), available at <http://www.chinwomen.org/images/publications/documents/UnsafeState.pdf>; Women's League of Burma, 'System of Impunity: Nationwide Patterns of Sexual Violence by the Military Regime's Army and Authorities in Burma' (2004), available at http://www.womenofburma.org/Report/SYSTEM_OF_IMPUNITY.pdf; Women of Burma, 'CEDAW Shadow Report: In the Shadow of the Junta' (2008), available at <http://www.womenofburma.org/Report/IntheShadow-Junta-CEDAW2008.pdf>, at 51-66.

⁶ Karen Women's Organization, 'Shattering Silences', *ibid*.

⁷ Woman and Child Rights Project in collaboration with Human Rights Foundation of Monland, 'Catwalk to the Barracks', *supra* note 5.

⁸ Women's League of Chinland, 'Unsafe State', *supra* note 5.

⁹ Women's League of Burma, 'System of Impunity', *supra* note 5 at 27-30.

¹⁰ Women of Burma, 'CEDAW Shadow Report', *supra* note 5 at 56.

¹¹ Refugee International, 'No Safe Place: Burma's Army and the Rape of Ethnic Women' (2003) available at <http://www.unhcr.org/refworld/docid/47a6eb9a0.html> at 9.

¹² *Ibid*.

Since 2002, different bodies and representatives of the United Nations have followed up on the alleged cases of rapes and sexual violence reported in the *Licence to Rape* report, acknowledging the gravity of this problem in Burma. In 2002 the Special Rapporteur on Violence against Women looked into the allegations of rape and sexual violence in the Shan State; she met with the authors and researchers of the *Licence to Rape* report and also personally conducted interviews with victims and witnesses of rape and sexual crimes.¹³ The Special Rapporteur gathered testimonies of '16 rape incidents, involving 25 women (19 Shan, 1 Akha, 1 Palaung and 4 Kayin women)... There were eight cases in which a victim had been raped by more than one soldier.'¹⁴ Subsequently, United Nations special procedures have continued to pay particular attention to the problem of women and girls as regard to sexual violence and rape in Shan State as well as throughout Burma. In 2006, the UN Independent Expert on Minority Issues together with several Special Rapporteurs (including the Special Rapporteur on Torture and the Special Rapporteur on Violence against Women) jointly 'sent an urgent appeal concerning widespread and systematic violence against women and girls in Myanmar.'¹⁵ The joint urgent appeal to the Burmese government indicated that:

According to information received, in all states in Myanmar, both in conflict areas and in ceasefire areas, Government forces subject women and girls to multiple forms of violence including abduction, forced marriage, rape, including gang rape, mutilation, suffocation, scalding, murder, sexual slavery and other forms of sexual violence. These acts are reportedly often committed by commanding officers, or with their acquiescence. In many cases, women and girls are subjected to violence by soldiers, especially sexual violence, as 'punishment' for allegedly supporting ethnic armed groups. Women and girls are in these cases reported to have been detained and repeatedly raped by the soldiers, sometimes leading to their death.¹⁶

In addition to reiterating this urgent appeal made to Burma, the 2006 report of the Special Rapporteur on Violence against Women discussed the cases of rape reported by the *Licence to Rape* report as well as additional cases of alleged rapes and sexual harassment perpetrated by army soldiers in barracks in the Mon State in 2004.¹⁷

In 2007, the Special Rapporteur on Torture, the Special Rapporteur on Violence against Women, and the Chairperson-Rapporteur of the Working Group on Arbitrary Detention lodged another urgent appeal to Burma.¹⁸ The urgent appeal addressed specifically cases of the gang-rapes by army officers of four girls aged between 14 and 16.¹⁹ The urgent appeal further informed the Burmese government that:

¹³ UN General Assembly, 'Interim Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Myanmar', UN Doc. A/58/219 (2003) at para. 41.

¹⁴ *Ibid.*, at para. 58.

¹⁵ UN Commission on Human Rights, 'Report of the Special Rapporteur on violence against Women, its causes and consequences, Yakin Ertürk', UN Doc. E/CN.4/2006/61/Add.1 (2006) at para. 118.

¹⁶ *Ibid.*, at para. 118.

¹⁷ *Ibid.*, at paras. 118, 120.

¹⁸ UN Human Rights Council, 'Report of the Special Rapporteur on Violence against Women, its causes and consequences, Yakin Ertürk, Addendum, Communications to and from Governments' UN Doc. A/HRC/7/6/Add.1 (2008) at paras. 287-294.

¹⁹ *Ibid.*, at para. 287.

Army officials gave money to the girls and their parents to persuade them not to report their case to the police. However, in late February, the incident was reported by an independent news agency. After the information was released, the four girls were immediately arrested and are now detained at Putao Prison, Kachin state.²⁰

In her 2008 report the Special Rapporteur on Violence against Women indicates that she:

regrets not having received any reply to her communications sent in 2007 and reiterates her interest in receiving a reply from the Government in regard to all allegations submitted, particularly given the alleged widespread sexual violence and exploitation against women and girls.²¹

The information provided by the Special Rapporteurs on Violence against Women and on torture also mentioned that the '[m]ilitary forces continue to commit rape in several regions, including Karen/Kayin, Mon, Shan and Chin'²² and reported cases of rape and sexual violence in these regions.²³ The Special Rapporteur on Torture also indicated that '[t]he soldiers committing rape employ extreme violence, sometimes torturing and murdering their victims.'²⁴

In addition to the United Nations thematic Special Rapporteurs, the Special Rapporteur on the Situation of Human Rights in Myanmar, the Secretary General, the General Assembly, as well as the UN Committee on the Elimination of Discrimination against Women, have specifically addressed the problem of rape and sexual violence in Burma. At the end of 2008 the Committee on the Elimination of Discrimination against Women provided their concluding observations on Burma's combined second and third periodic reports. Therein, the Committee acknowledged progress made by Burma to create bodies where complaints of gender-based discrimination can be discussed²⁵ and also welcomed 'the establishment and ongoing activities of several agencies and

²⁰ UN Human Rights Council, 'Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Addendum, Summary of information, including individual cases, transmitted to Governments and replies received UN Doc. A/HRC/7/3/Add.1 (2008) at 158. See also UN Human Rights Council, Report of the Special Rapporteur on Violence against Women (2008), *supra* note 18, at paras. 287-289.

²¹ UN Human Rights Council, Report of the Special Rapporteur on Violence against Women (2008), *supra* note 18 at 294.

²² UN Human Rights Council, Report of the Special Rapporteur on Torture (2008), *supra* note 20 at para. 160; See also UN Human Rights Council, Report of the Special Rapporteur on Violence against Women (2008), *supra* note 18 at para. 292.

²³ UN Human Rights Council, Report of the Special Rapporteur on Torture (2008), *supra* note 20 at para. 160; See also UN Human Rights Council, Report of the Special Rapporteur on Violence against Women (2008), *supra* note 18, at para. 292. See also UN Human Rights Council, 'Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Addendum, Summary of information, including individual cases, transmitted to Governments and replies received', UN Doc. E/CN.4/2006/6/Add.1 (2006) at para. 166.

²⁴ UN Human Rights Council, Report of the Special Rapporteur on Torture (2008), *supra* note 20 at para. 160; See also UN Human Rights Council, Report of the Special Rapporteur on Violence against Women (2008), *supra* note 18 at para. 292.

²⁵ UN Committee on the Elimination of Discrimination against Women, 'Concluding observations of the Committee on the Elimination of Discrimination against Women - Myanmar', UN Doc. CEDAW/C/MMR/CO/3 (2008) at para. 14.

organizations focused on women's rights'.²⁶ The members of the Committee, however, ultimately stated the following in their Concluding Observations:

The Committee expresses its deep concern at the high prevalence of sexual and other forms of violence, including rape, perpetrated by members of the armed forces against rural ethnic women, including Shan, Mon, Karen, Palaung and Chin women. The Committee is also concerned at the apparent impunity of the perpetrators of such violence — although a few cases have been prosecuted — and at reports of threats against and intimidation and punishment of the victims. The Committee regrets the lack of information on mechanisms and remedies available to victims of sexual violence as well as measures to bring perpetrators to justice.²⁷

The Special Rapporteur on the Situation of Human Rights in Myanmar acknowledged the gravity of the problem referring to the 'high number of allegations of sexual violence against women and girls'.²⁸ A few months before the review of Burma's periodic report by the Committee on the Elimination of Discrimination against Women took place, Mr. Pinheiro noted that the Burmese Government 'will benefit from the expertise of Committee members in view of the widespread sexual violence against women and girls reported in the country.'²⁹

In its latest resolution on the situation of human rights in Burma the UN General Assembly requested that the Burmese Government take urgent measures to halt human rights violations, including 'rape and other forms of sexual violence persistently carried out by members of the armed forces, and the targeting of persons belonging to particular ethnic groups'.³⁰ The UN Secretary-General appeared to follow a similar line of thought in a report following a Security Council Resolution on Women and Peace and Security; therein he affirmed that:

In Myanmar, recent concern has been expressed at discrimination against the minority Muslim population of Northern Rakhine State and their vulnerability to sexual violence, as well as the high prevalence of sexual violence perpetrated against rural women from the Shan, Mon, Karen, Palaung and Chin ethnic groups by members of the armed forces and at the apparent impunity of the perpetrators.³¹

In the last decade, reports from Burmese non-governmental organisations, international non-governmental organisations as well as United Nations bodies and representatives have provided a wide range of material and important resources on the situation of women and girls in Burma. These various reports have led to a common view that rape and sexual violence is an endemic problem in Burma, especially for ethnic minority women and girls.

²⁶ *Ibid.*, at para. 4. This includes the Myanmar National Committee for Women's Affairs, the Myanmar National Working Committee for Women's Affairs and the Myanmar Women's Affairs Federation.

²⁷ *Ibid.*, at para. 24.

²⁸ UN Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro', UN Doc. A/HRC/7/18 (2008) at para. 87.

²⁹ *Ibid.*, at para. 55.

³⁰ UN General Assembly, 'Situation of Human Rights in Myanmar', UN Doc. A/RES/245 (2009) at para. 4(k).

³¹ UN Security Council, 'Report of the Secretary-General pursuant to Security Council Resolution 1820 (2008)', UN Doc. S/2009/362 at para. 15.

1.2 Access to Justice and Responses to Cases of Rape and Sexual Violence

A familiarity with the issues of access to justice and the response of Burmese authorities to complaints of rape and sexual violence is essential for an understanding of the context in which these crimes are committed in Burma. Under international law and following domestic legislation, the Burmese authorities have an obligation to investigate violations such as rape, to prosecute alleged perpetrators, and to punish them if found guilty. These steps are essential if the problem of sexual violence and rapes in Burma is to be tackled effectively. At present, many obstacles exist for victims of sexual violence who wish to access justice and successfully seek accountability for these crimes in Burma. These interconnected obstacles include the failure of authorities to effectively investigate cases, the failure to prosecute and punish perpetrators, and the failure of women and witnesses to formally report violations.

One of the obstacles to accountability in cases of rape and sexual assault in Burma is the victims' reluctance to complain and officially report the crimes. This obstacle is quite common in cases of rapes and sexual crimes. This is understandable if one takes into consideration the nature of the crime and the stigma attached to it, especially in a traditional society such as Burma. Women in Burma, especially ethnic minority women and girls including the Rohingyas, are unwilling, discouraged, or prevented from seeking redress. As noted by Refugees International:

The military's use of rape to control both eastern and western Burma has been documented for at least fifty years. Despite the longevity of this brutal practice, talk about rape has never been acceptable. Such discussion among Burma's ethnic women is considered taboo and is usually conducted in hushed tones and with lowered heads. For women to acknowledge that they have been raped is to declare openly that they are "unclean," and to face possible discrimination at the hands of their family and community members who hold them responsible. For men to acknowledge it is to admit they have been unable to protect their wives, mothers and daughters. For communities to discuss it is to confront the pain, shame, and impotence of people under siege by their own country's army.³²

Given that the reporting of violations can be considered to be a source of shame for the women and their families and is furthermore likely to jeopardise their future possibility to lead a normal life in society, they often choose not to report. As noted by the Secretary-General, this is particularly problematic for the well-being of women who have been victims of rape and sexual violence:

This is contributing to double victimization, first for having been sexually violated and second for having to bear the fear, shame and stigma that surrounds sexual violence, and to a culture of silence that essentially impedes victims' access to justice and remedy, and allows impunity to persist.³³

In Burma, including in North Arakan State, authorities regularly fail to effectively investigate alleged cases of rape. Some cases collapse due to outright decisions not to investigate them. On the other hand, investigations are rendered ineffective as a result of insufficient inquiry, inadequate gathering of information or evidence by officials. This

³² Refugees International, *No Safe Place*, *supra* note 11 at 22.

³³ UN Security Council, Report of the Secretary-General pursuant to Resolution 1820, *supra* note 31 at para. 19.

necessarily leads to an inability to obtain redress for violations. As noted by the UN Secretary-General, in Burma 'the effective administration of justice is hampered not only by a lack of capacity, but also by the fact that some justice officials do not give serious consideration to reports of sexual violence.'³⁴ In reply to complaints of rape and sexual violence the authorities will reportedly either dismiss testimonies on the basis that they are false or fabricated; indicate that they cannot find the perpetrator (or perpetrators); or more generally just not actively search to find missing information that could lead to charges and accountability. This failure to investigate has been documented, for instance, in relation to the alleged cases of rape reported in *Licence to rape*.³⁵ In response to two cases it was reported that 'the officer accused was [...] immediately transferred to another unit.'³⁶ Regarding a further eleven cases the report indicated that 'the SPDC officers registered the complaint, but did nothing further. In nine cases, the SPDC officers arranged for a "line-up" of as many as 80 soldiers in order for the victim to identify the rapist, but deliberately left the rapist out of the line.'³⁷

In addition to these problems of access to justice and of obtaining a thorough investigation, victims, their families, and witnesses of rape and sexual violence, have reported being threatened, intimidated and physically abused because of their allegations. Victims and witnesses have also faced charges for attempting to denounce these violations. In the course of the interviews conducted with Rohingya refugees and asylum seekers one individual recounted that a man was imprisoned for informing the authorities of the rape of his cousin,³⁸ and another refugee stated that people deliberately remain silent about rapes occurring in North Arakan State because individuals who complain would be sentenced to 13 years in prison.³⁹ In Shan State, it has been reported that:

Following the lack of positive identification, in one case the headman who had made the complaint was beaten unconscious and detained until the family of the rape victim paid 2,000 kyat for his release. In two other cases, the victim herself was imprisoned and up to 20,000 kyat had to be paid for her release. In another case the headman and his deputy were imprisoned until 5,500 kyat could be paid for their release. In three other cases, the complainants were not imprisoned but had to pay fines of up to 30,000 kyat for defaming the military.⁴⁰

Retaliation for attempts by individuals to bring charges of rape is reported to be frequent. Responses to complaints appear to escalate from threats to intimidation, fines, imprisonment, beatings and killings. The Special Rapporteur on Violence against Women summed up the situation by stating that:

³⁴ *Ibid.*, at para. 23.

³⁵ For information on the position of the SPDC on the investigation of these cases, see UN Committee on the Elimination of Discrimination against Women, 'Combined second and third periodic reports of States parties, Myanmar', UN Doc. CEDAW/C/MMR/3 (2007) at para. 59.

³⁶ Shan Human Rights Foundation and Shan Women's Action Network, 'Licence to Rape', *supra* note 2 at 13.

³⁷ Shan Human Rights Foundation and Shan Women's Action Network, *ibid.*

³⁸ Irish Centre for Human Rights, Bangladesh Fact-finding Mission 2009, testimony M26-C-7 (on file with authors) [thereafter Bangladesh testimonies].

³⁹ *Ibid.*, testimony M1-B-2.

⁴⁰ Shan Human Rights Foundation and Shan Women's Action Network, 'Licence to Rape', *supra* note 2 at 13.

In most cases, especially when the perpetrators are Government officials, victims do not lodge complaints to the authorities on any acts of violence committed against them, for fear of retaliation by the perpetrators. In many instances, those that do complain are invariably instructed to accept meagre compensation under the threat that if they do not retract their complaint, they would be subjected to more violence. Alternatively, they are arbitrarily arrested and detained until they withdraw their complaints. Sometimes the families of the victim are threatened as a means of exerting pressure on the victim. On one occasion, a community leader who reported a rape of one of his villagers was beaten and tortured to death by the military. It is also reported that medical personnel who treat a rape victim are reluctant to take any action with the authorities out of fear of possible reprisals against them. As a result of this, victims are entirely discouraged from making complaints; investigations are as a result rarely initiated and perpetrators are seldom brought to justice. The existence of such a widespread culture of impunity exacerbates the magnitude of violence against women and girls in Myanmar.⁴¹

The fear of retaliation for seeking redress, combined with the failure of and lack of trust in the justice process, commonly protects perpetrators of rape and sexual violence and leads to impunity. In turn, this reality fosters the idea that for some, the commission of rape and sexual assault is acceptable. As put forward by the Special Rapporteur on the Situation of Human Rights in Myanmar: 'The failure to investigate, prosecute and punish those responsible for rape and sexual violence has contributed to an environment conducive to the perpetuation of those acts against women and girls in Myanmar.'⁴²

2. Rape and Sexual Violence in North Arakan State

To this day, no study on rape and sexual violence equivalent to those already referred to regarding some regions in Burma has been published in relation to the Rohingya women and girls of North Arakan State. An explanation for this can be found in the same reasons why there has been comparatively very little material published on the general human rights situation of the Rohingyas in Burma. These reasons include the geographical remoteness of North Arakan State, as well as the fact that the Burmese authorities have blocked access to North Arakan State and deny permission to most foreigners to visit that area. In addition to this, international non-governmental organisations and UN bodies which have field presence in North Arakan State have been under the constant scrutiny of the Burmese authorities for years. These institutions have little or no possibility of publicly discussing the on-going human rights violations or international crimes as to do so could jeopardise their work in North Arakan and indeed in the entire country. The situation for local organisations is similar, with the additional danger that publication of controversial material, such as information dealing with the perpetration of rapes by army officers, could put the lives of employees at risk. Despite these obstacles and the difficulties inherent in examining this sensitive topic, sufficient material has been gathered through open-source research, confidential

⁴¹ UN Commission on Human Rights, Report of the Special Rapporteur on Violence against Women (2006), *supra* note 15 at para. 123. See also UN Human Rights Council, Report of the Special Rapporteur on Torture (2006), *supra* note 23 para. 166.

⁴² UN Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar (2008), *supra* note 28 at para. 87. See also UN General Assembly, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar', UN Doc. A/61/369 (2006) at para. 30; UN Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro', UN Doc. A/HRC/4/14 (2007), at para. 41.

meetings and interviews conducted with Rohingya refugees and asylum seekers in Bangladesh, to support allegations of rape and sexual violence in North Arakan State. The present section examines this material. It analyses some of the apparent causes behind the perpetration of rape and sexual violence in North Arakan State, as well as the factors which exacerbate this situation and it also provides individual accounts of rape and sexual violence against Rohingya women and girls.

2.1 Root Causes of Rape and Sexual Violence against Rohingya Girls and Women

Some of the apparent causes leading to the perpetration of rape and sexual violence in North Arakan State are analogous to the reasons behind the commission of these crimes in the rest of Burma, and are, in many ways, similar to the situation of women and girls in other countries, especially in conflict and post-conflict states or countries led by a military junta. Gender-based discrimination, group-based discrimination and the militarisation of Burma appear to be three contributing factors to the scourge of sexual violence and the numbers of alleged rapes in North Arakan State.

Burma is a male-dominated society where women and girls hold traditional roles and generally do not enjoy equal status with men. Illustrating this, the Committee on the Elimination of Discrimination against Women indicated in its concluding observations that:

[T]he Committee is concerned about the persistence of adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life, especially within some ethnic groups. The Committee is concerned that such customs and practices perpetuate discrimination against women and girls, as reflected in their disadvantageous and unequal status in many areas, including in public life and decision-making and in marriage and family relations, and the persistence of violence against women [...].⁴³

The link and interconnectedness, in some societies, between the status of women, discrimination against women or gender-based discrimination,⁴⁴ and the existence of sexual violence, including the perpetration of rape, has long been discussed. The UN Secretary-General, for instance, acknowledged this link by affirming that '[i]n many countries around the world, sexual violence continues to be deeply entrenched in inequalities and discrimination against women, and patriarchal structures.'⁴⁵

⁴³ UN CEDAW, Concluding Observations (2008), *supra* note 25 at para. 20. See also para. 44. For more details on the situation of women in Burma, see National Coalition Government of the Union of Burma, *Burma Human Rights Yearbook 2008*, available at <http://www.ncgub.net/NCGUB/mediagallery/downloadc516.pdf?mid=20091123192152709> at Chapter 17.0

⁴⁴ Convention on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46, art. 1 defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

⁴⁵ UN Security Council, Report of the Secretary-General pursuant to Resolution 1820, *supra* note 31 at para. 19.

This reality is all the more true for North Arakan State where it has been acknowledged that 'women and girls are particularly vulnerable and marginalized.'⁴⁶ Rohingya society is a very conservative and traditional society where a female is expected to get married at a very young age, have many children and raise them, cook, clean, take care of her husband, and be subservient. The combination of State and society restrictions led the Committee on the Elimination of Discrimination against Women to state the following:

The Committee expresses its deep concern at reports that Muslim women and girls in northern Rakhine State endure multiple restrictions and forms of discrimination which have an impact on all aspects of their lives, including severe restrictions on their freedom of movement; restricted access to medical care, food and adequate housing; forced labour; and restrictions on marriages and pregnancies. The Committee is also concerned that the population in northern Rakhine State, in addition to being subject to policies imposed by the authorities, maintains highly conservative traditions and a restrictive interpretation of religious norms, which contribute to the suppression of women's and girls' rights.⁴⁷

The traditional role of Rohingya women and girls, the fact that they rarely hold public positions in their society and cannot freely exercise their rights, make them vulnerable to gender-based discrimination which regularly leads to sexual violence and rape. For all these reasons, discrimination of women in Burma and in North Arakan in particular appears to be one of the root causes of rape and sexual violence.

As in the case of forced labour, the military presence has a great impact in North Arakan State and appears to be one of the causes of the prevalence of rape and sexual violence. Generally, it is well-known that militarisation and military presence in a country can have a significant impact on women. The Special Rapporteur on Violence against Women explains that 'militarist cultures often reinforce dominant cultural paradigms that discriminate against women.'⁴⁸ In addition to militarization reinforcing the discriminatory culture against women, research in many countries has shown that especially in conflict and post-conflict countries, there exists a strong correlation between the number of troops and an increase in rape and sexual violence. The situation in North Arakan is no different. In actual fact, as will be explored in more detail in the next section, members of the armed forces and NaSaKa appear to be the main perpetrators of rape and sexual violence in North Arakan State. The Women's League of Burma stated in their Shadow Report to the Committee on the Elimination of Discrimination against Women that:

[S]ystematic militarization and prioritization of military expenditure, including capacity-building of military personnel, has reinforced the existing patriarchal system. Today, the military presence pervades every village, town and city, and every branch and level of the governing infrastructure. [...]

We, women of Burma, therefore reiterate that there can be no advancement of the lives of women and girls in Burma, and no protection and promotion of their rights while the military and its proxy organizations remain in power. There is

⁴⁶ UN CEDAW, Concluding Observations (2008), *supra* note 25 at para. 22.

⁴⁷ *Ibid.*, at paras. 42-43.

⁴⁸ UN Human Rights Council, 'Report of the Special Rapporteur on Violence against Women, its causes and consequences, Yakin Ertürk', UN Doc. A/HRC/4/34 (2007) at 63.

an urgent need for genuine political change, to put an end to the militarized culture inside Burma.⁴⁹

Clearly, the continuous increasing militarisation of North Arakan State and the presence of NaSaKa makes Rohingya women especially vulnerable to rape and sexual violence and is one of the root causes for the persistence of this plight.

Finally, in addition to gender-based discrimination and the militarisation of North Arakan State, the perpetration of crimes of sexual violence and rape against Rohingya girls and women appears to be most frequently linked to racial discrimination.⁵⁰ Discrimination against the Rohingyas, which in many cases leads to their persecution (as discussed further in chapter VII), takes many forms in North Arakan. The Special Rapporteur on the Situation of Human Rights in Myanmar explains that:

[I]n the Northern Rakhine State (Arakan), the Sunni Muslim returnees are subjected to political, economic, religious and social repression by the Authorities. [...] They are subject to systematic discrimination and abuse, which, according to various sources, have worsened, especially with regard to the restriction of movement, arbitrary taxation, forced labour, confiscation, forced eviction and arbitrary arrest (including harassment and violence by police forces, death in custody and sexual violence). In addition, people are often harassed (house searches, confiscation of assets) or beaten by police forces, mainly during controls or at checkpoints. Cases of rape of young women and children, perpetrated by different police forces, have been reported.⁵¹

Discrimination directed against the Rohingyas has many facets, and racial discrimination in that region appears, in some cases, to result ultimately in sexual violence and rapes. Implying that discrimination can lead to sexual violence, the Secretary-General indicated that: 'recent concern has been expressed at discrimination against the minority Muslim population of North Arakan State and their vulnerability to sexual violence...'⁵² While this alone does not indicate that a State policy promoting repression of Rohingya women through rape and sexual assault exists, it is clear that the discrimination against the Rohingyas and the repression of the group by the authorities creates an atmosphere where abuse of the Rohingyas appears acceptable. In turn, discrimination against the Rohingyas is clearly a root cause or factor contributing to the scourge of rape and sexual violence against Rohingya women.

As with the exaction of forced labour (discussed above), the infliction of rape and sexual violence on women and the gravity of these acts are exacerbated by the fact that North Arakan State is a poor area with heavy militarisation and NaSaKa presence. This

⁴⁹ Women of Burma, *CEDAW Shadow Report*, supra note 5 at 82.

⁵⁰ International Convention on the Elimination of All Forms of Racial Discrimination, GA Res. 2106 (XX), Annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc. A/6014 (1966), 660 UNTS 195, art. 1 defines racial discrimination as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

⁵¹ UN Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar(2008), supra note 28 at para. 78.

⁵² UN Security Council, Report of the Secretary-General pursuant to Resolution 1820, supra note 31 at para. 15.

is further compounded by the fact that Rohingya females are especially vulnerable due to severe discrimination based on their low status in society, and even more so because they belong to an ethnic group that suffers from racism and persecution as well as being *de facto* stateless. These elements, together with the fact that victims are almost invariably unable to seek redress, produce and foster optimal conditions for the perpetration of sexual crimes and result in many victims of rape and sexual violence in North Arakan State.

2.2 Reports of Rape and Sexual Violence against Rohingya Girls and Women

On the basis of the research, confidential meetings and refugee interviews⁵³ conducted in the preparation of this Report, the situation of Rohingya women and girls in North Arakan State with regard to the infliction of rape and sexual violence appears to have similarities to that of other ethnic minority women and girls in Burma. The perpetration of rapes and sexual violence against Rohingya women and girls has been discussed for two decades now. For instance, the first Special Rapporteur on the Human Rights Situation in Myanmar noted in a 1993 report that:

Information received from over 30 interviews with Myanmar Muslim women from Rakhine state and other women from areas of armed conflict indicated that a large number of rapes by entire groups of Myanmar military had been taking place. Many women provided testimony that women in villages relocated by the army were rounded up and taken to military barracks where they were continually raped. In other circumstances, women have allegedly been taken by the military when the husband, or other male in the family, had fled at the approach of the army. Often, the "pretty" or young ones were raped immediately in front of family members and then taken away. Women who had returned to their villages stated that some of the women among them had died as a result of the continual rapes. Two female health workers interviewed by the Special Rapporteur reported that in their clinic, women with rape wounds had been admitted and had later died from bleeding or subsequent infection.⁵⁴

The Special Rapporteur further indicated that some '[w]omen from the Rakhine state were allegedly brought to army barracks and kept there for raping', and that he also 'received information that some women being forced to relocate were raped in front of their families'.⁵⁵ Material gathered for this Report shows that sexual violence and rapes are currently still inflicted on Rohingya women and girls. The circumstances, perpetrators and the impact of these acts on the alleged victims also appear analogous to the reports emerging in and since the 1990s.

The circumstances of the reported incidents are varied. The Arakan Project, in a submission to the Committee on the Elimination of Discrimination against Women, stated that:

⁵³ Bangladesh testimonies on rape and sexual violence, *supra* note 38: F26-A-5; F26-A-10; F2-A-1; F27-A-9; M27-C-5; F27-A-2; F28-A-1; M26-B-4; M27-C-1; M26-C-7; F27-A-3; F1-A-2; F27-A-8; M1-B-2; M26-C-7.

⁵⁴ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Myanmar(1993), *supra* note 1 at para. 77.

⁵⁵ *Ibid.*, at para. 111.

Female headed-households are particularly vulnerable to sexual abuses, including rape. Women and teenage girls are also at risk when left alone at home while their husbands forcibly work as sentries or are absent. NaSaKa patrols routinely enter homes at night searching for unlawfully married couples or unregistered guests. Girls have also been raped while collecting firewood.⁵⁶

Documentary and field research indicates that Rohingya women and girls in North Arakan State, as other women and girls in other parts of the country, are particularly vulnerable and at risk of becoming victims during forced labour and when men are absent. All types of forced labour appear to put women and girls at risk of rape or sexual violence. During the course of undertaking perennial forced labour such as maintenance tasks (e.g. cleaning and cooking) there is daily contact with soldiers or NaSaKa forces which puts the women and girls in a vulnerable position. The time spent working in barracks or bases, for instance, puts them at great risk of becoming victims. Sentry duties, while only done occasionally by Rohingya women, also appear to be particularly dangerous due to the remoteness of certain posts, the fact that this forced labour often takes place at night in dark places and is supervised by NaSaKa. Amongst the refugees interviewed in Bangladesh, one woman recounted how she was raped during sentry duty. The woman reported that her husband had fled the country and that NaSaKa started to harass her soon after this. She indicated that two years after her husband left the country NaSaKa told her she would have to now fulfil her husband's guard duties. She worked as a guard eight times. The second time, she was taken to do forced labour in the evening while she was doing household work and cooking food for her young child. NaSaKa came to the house and kicked the front door, and she had to go to the NaSaKa shed with her young child immediately and without food. During her duty she fell asleep and was woken up by a member of NaSaKa. He told her 'your husband is not here, I will stay with you. I want to live with you.' She tried to call out for help but there was no one around. The NaSaKa member raped her in front of her young child. The refugee concluded her testimony by saying: 'We feel peace here [in Bangladesh]. There is no food and some problems, but there is no rape, we have peace.'⁵⁷

Rapes are reported to occur more frequently when men are absent from their homes, for instance while they are carrying out forced labour, or having fled their villages upon hearing information that troops were on their way to gather men for labour, or simply because they are working in the fields. In some cases husbands have allegedly also been taken away by NaSaKa, the military officers or the police, to specifically enable members of these organisations to rape the wives. In the absence of the men (husband, son or father) women and girls have been raped and been victims of attempted rapes, during the day or at night in their own houses while taking their baths, cooking dinner or simply during routine checks when NaSaKa are patrolling to verify family lists and ensure that they are no unregistered individuals present in the houses. Women have also reportedly been raped as a direct punishment for the alleged membership of their sons or husbands in insurgent groups or for their failure to fulfil tasks. Rapes and sexual crimes also occur at checkpoints and in the fields. Living in

⁵⁶ The Arakan Project, *Issues to be Raised Concerning the Situation of Stateless Rohingya Women in Myanmar (Burma): Submission to the Committee on the Elimination of Discrimination against Women (CEDAW)* (2008), available at http://www.burmalibrary.org/docs6/CEDAW_Myanmar_AP_Submission-Final-Web.pdf at 3.

⁵⁷ Irish Centre for Human Rights, Bangladesh testimonies, *supra* note 38, testimony F27-A-3.

certain areas, such as near military or NaSaKa camps or barracks, appears to put women at particular risk. While certain factors do appear to make the situation for women and girls worse, the reality appears to be that there is really little that Rohingyas can do to ensure that no rapes and/or other sexual assaults are committed. It has been reported that being beautiful, being in the bath during patrols, undertaking forced labour duties for a certain army unit or commander on a given day, or stopping at a given check point at a certain time, might all lead to a woman or girl becoming a victim. In other words, it simply suffices for a Rohingya female to be in the wrong place at the wrong time to become a victim. Unfortunately all women and girls seem vulnerable. As noted in a shadow report discussing the rapes of ethnic women in Burma: 'women are raped during their normal, daily activities. The message sent is that [they] are at risk every day, and that it is impossible to avoid the circumstances under which the rape might occur.'⁵⁸

The total number of rapes reported by the refugees interviewed in Bangladesh is difficult to assess. Some of the men and women interviewed did not specifically mention that they had been raped or had witnessed rape but only implicitly indicated so, saying for instance that soldiers or NaSaKa members "disturbed" the women. Some women also indicated that another woman or girl had been victim of rape but it appears from the interviews that the females giving the testimonies in question have in actual fact been raped themselves. In many cases the environment of the interview (with more than one of persons present) prevented the alleged victims or witnesses from providing detailed accounts of rapes or attempted rapes. That being said, one out of four interviews documented the perpetration of rape or attempted rape and sexual assault on Rohingya women and girls in North Arakan State. These included several interviews which documented multiple cases. In one case a woman indicated being rape many times over several years. The woman interviewed also indicated that the rapes stopped when one of her daughters became grown up and the soldiers started to abuse the daughter instead.⁵⁹ Another woman who had five sisters recounted that she had been victim of attempted rape herself, had witnessed the attempted rape of one of her sisters, the rape of her other sister, and the gang-rape of another sister. She further explained that she attempted to get help from individuals in charge of the village but was told that the NaSaKa forces 'will do it again because they tried to rape you and your sister and couldn't. We can't save you, you have to go outside the country, they will come again for you, it's your fault, you and your sisters are beautiful.'⁶⁰

The cases documented by the Irish Centre for this report had all reportedly been committed by members of the army and NaSaKa. The Arakan Project has also recently undertaken preliminary research on the situation of rape in North Arakan State. The Arakan Project documented through field reports some 'rape cases by state authorities in three main circumstances: 1) women in detention, in particular in NaSaKa camps, 2) women without husbands at home during house checks at night and 3) women and girls

⁵⁸ Women's League of Burma in collaboration with the Women's Affair Division of the National Coalition Government of the Union of Burma, *Women in and from Conflict Areas of Burma: A Shadow Report to the Beijing Plus Five* (2000) available at http://www.womenofburma.org/Report/B5_report.pdf at 31.

⁵⁹ Bangladesh testimonies, *supra* note 38, testimony F1-A-2.

⁶⁰ Bangladesh testimonies, *supra* note 38, testimony F27-A-8.

collecting firewood or working in the fields.’⁶¹ In several of the cases documented by The Arakan Project VPDC Chairmen appeared to have been involved in the perpetration of rape, together with one or more members of the NaSaKa or the army. The research undertaken by The Arakan Project indicates that rape by State agents appear to be occurring more than occasionally.⁶²

The Rohingya refugees interviewed for this Report who spoke about sexual intercourse with members of the military or NaSaKa clearly indicated that this was non-consensual sex with most accounts specifically referring to rape or attempted rapes. Refugee International indicated in its report that:

In many of the incidents documented, the women were not only raped, but were also physically tortured in other ways, including being beaten, suffocated by having plastic put over their head, and having their breasts cut off. In the following ex-ample, the woman was beaten unconscious and raped, and her pregnant sister murdered.⁶³

The Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment explained that in Burma generally ‘[t]he soldiers committing rape employ extreme violence, sometimes torturing and murdering their victims.’⁶⁴ This information is consistent with testimonies gathered for this Report: brutality appears to be commonly associated with, or accompanies, rapes. Women have reportedly been raped or sexually assaulted in public or in front of their husbands and children as well as other members of their family. The incidents documented for this report indicate that sex is forced upon Rohingya women and girls by the army and NaSaKa forces, and that these acts take place under threats, coercion, and violence. Women are oftentimes beaten if they resist rape but also during rape or attempted rape. Husbands and other men who try to save the victims are also frequently beaten. As a result of their injuries, women have also died following rape.

In some cases soldiers and NaSaKa members appear to be committing rape to assert their control and show power over the Rohingya community. The impact on the physical and mental health of the victims is disastrous. Whether it is a goal or rather a result of their actions, the perpetration of sexual abuse and rape by the military and NaSaKa in North Arakan State has humiliated, intimidated, and persecuted the victims, their families and the entire Rohingya community. The abuses and the repercussions these have on the victims continue to this day.

⁶¹ C. Lewa, The Arakan Project, ‘Preliminary Research on Rape Incidence in North Arakan State’ (2010) (on file with authors).

⁶² *Ibid.*

⁶³ Refugee International, *No Safe Place*, *supra* note 11 at 9.

⁶⁴ UN Human Rights Council, Report of the Special Rapporteur on Torture (2008), *supra* note 20 at 160.

B. Prohibition of Rape and Sexual Violence under International Criminal Law and its Application to the Rohingyas in North Arakan State

1. Development of the Legal Parameters of Rape and Sexual Violence by the *ad hoc* Tribunals

The prosecution of rape under international law is relatively new. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda developed the international definition⁶⁵ of rape and sexual violence in their jurisprudence, and prosecuted these acts as war crimes, genocide and crimes against humanity.

The International Criminal Tribunal for Rwanda defined the crime of rape in the *Akayesu* case 'as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.'⁶⁶ The Tribunal included a broad physical element for the offence, indicating that 'the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts':⁶⁷

Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity[...].⁶⁸

Following this, the coercive nature of the circumstances of rape, as opposed to the non-consent of the victim, became a key component of the offence.

The definition of rape was further developed by the International Criminal Tribunal for the former Yugoslavia which introduced a number of mechanical aspects and elements relating to the victim's lack of consent. The Trial Chamber in the *Kunarac* case stated that:

[T]he *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.⁶⁹

⁶⁵ *Prosecutor v. Akayesu*, (Trial Judgment) ICTR-96-4-T (2 September 1998) at para. 596 - 'Considering the extent to which rape constitute[s] crimes against humanity, pursuant to article 3(g) of the Statute, the Chamber must define rape, as there is no commonly accepted definition of this term in international law.' See also, *Prosecutor v. Delalić et al.*, (Trial Judgment) IT-96-21-T (16 November 1998) at para. 478 - 'Although the prohibition on rape [sic] under international humanitarian law is readily apparent, there is no convention or other international instrument containing a definition of the term itself.'

⁶⁶ *Prosecutor v. Akayesu*, (Trial Judgment) ICTR-96-4-T (2 September 1998) at para. 598.

⁶⁷ *Akayesu*, *ibid.*, at para. 597.

⁶⁸ *Ibid.*

⁶⁹ *Prosecutor v. Kunarac et al.*, (Trial Judgment) IT-96-23-T & IT-96-23/1-T (22 February 2001) at para. 460. See also *Prosecutor v. Furundžija*, (Trial Judgment) IT-95-17/1-T (10 December 1998).

The *Kunarac* case confirms that the definition of rape is gender-neutral, and that penetration and the absence of consent are elements of rape. The Rwanda Appeals Chamber later addressed the manner in which consent may be proven and states in the *Gacumbitsi* case that: 'The [p]rosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible'.⁷⁰

In addition to developing the definition of rape under international criminal law, the judges at the International Tribunal for Rwanda and the International Tribunal for the former Yugoslavia also discussed, in the *Akayesu* and the *Furundžija* judgements respectively, the meaning of sexual violence. The definition of sexual violence advanced in *Akayesu* simply states that the offence encompasses 'any act of a sexual nature which is committed on a person under circumstances which are coercive';⁷¹ however, '[s]exual violence is not limited to [the] physical invasion of the human body and may include acts which do not involve penetration or even physical contact'.⁷² This was fleshed out somewhat in *Furundžija*:

International criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity.⁷³

The jurisprudence of the *ad hoc* Tribunals has clarified the specific elements of rape and sexual violence under international law. Article 7(1)(g) of the Rome Statute was greatly influenced by this jurisprudence.

2. Prohibition under the Rome Statute and its Application to the Situation of the Rohingya

Article 7(1)(g) of the Rome Statute include, as crimes against humanity, the acts of '[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity'.⁷⁴ It provides for the prosecution of a whole range of conduct which targets the sexual autonomy of the individual. The factual findings of this chapter primarily relate to two modes of conduct, namely, rape and sexual violence ('any other form of sexual violence of comparable gravity').

For an act to be considered rape as a crime against humanity under the Rome Statute, it is required that:

⁷⁰ *Prosecutor v. Gacumbitsi*, (Appeal Judgment) ICTR-01-64-A (7 July 2006) at para. 155. See also, *Prosecutor v. Muvunyi*, (Trial Judgment) ICTR-00-55A-T (12 September 2006) at para. 521: 'Lack of consent therefore continues to be an important ingredient of rape as a crime against humanity. The fact that unwanted sexual activity takes place under coercive or forceful circumstances may provide evidence of lack of consent on the part of the victim'.

⁷¹ *Akayesu* (Trial Judgment), *supra* note 69 at para. 598.

⁷² *Ibid.*, at para. 688.

⁷³ *Furundžija* (Trial Judgment), *supra* note 69 at para. 186.

⁷⁴ Rome Statute of the International Criminal Court (1998), U.N. Doc. A/CONF.183/9, entered into force 1 July 2002, 2187 UNTS 90, [hereinafter Rome Statute] at art. 7(1)(g).

1. The perpetrator invaded the body of a person by conduct resulting in penetration however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable or giving genuine consent.⁷⁵

These elements reflect the essential definitional principles developed in the jurisprudence of the Yugoslav and Rwanda Tribunals.

The testimonies of refugees and asylum seekers interviewed in Bangladesh for this Report documented the rapes of several women and girls in North Arakan State. Women indicated that they had themselves been raped: some many times and by several soldiers or NaSaKa members. Other refugees and asylum seekers reported that they had been direct witnesses of rape. These alleged victims and witnesses explicitly used the term rape in their testimonies, understood by these individuals as the penetration of the vagina of the victim by the penis of the perpetrator. No alleged cases of men being raped have been documented for this Report. Research further indicates that unsafe abortions are regularly performed in North Arakan State following rapes. Hence, cases examined in this Report clearly document that Rohingya women and girls have been victim of acts involving the physical invasion of their body.

The rapes documented for this Report have all been committed by soldiers and NaSaKa forces, all State actors. Testimonies indicated that soldiers and NaSaKa forces have entered the houses of the alleged victims by force, for instance by kicking open the door of the house. Some of the alleged perpetrators were armed or in groups of several soldiers or NaSaKa forces while performing compulsory house checks. The perpetrators regularly committed rape while the Rohingya men were absent. Reports have also indicated that women and girls had been raped in barracks and camps. Clearly, these acts have been committed by force, coercion or by threat of force or coercion. Alleged victims and witnesses explained that they could not do anything to avoid these rapes, as they were taken by force and afraid for their lives. The research, confidential meetings, and interviews conducted for this Report all point to psychological oppression and physical violence being a common feature of the reported rapes. Victims are for instance raped in front of their families and regularly beaten (beatings that sometimes lead to death), while witnesses attempting to rescue victims are also frequently abused.

The other prohibited act relevant to the situation of the Rohingyas under Article 7(1)(g) of the Rome Statute is 'any other form of sexual violence of comparable gravity'. In this chapter grave acts of a sexual nature other than rape have been referred to, and have included attempted rapes, sexual assault, sexual violence and grave acts of a sexual nature. In order to constitute sexual violence under the Rome Statute, it is required that:

⁷⁵ Elements of Crimes, Doc. ICC-ASP/1/3, at 8.

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1(g), of the Statute.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.⁷⁶

As previously noted 'any other form of sexual violence of comparable gravity' includes conduct that targets the sexual autonomy of the individual but does not need to involve any physical contact. Reports of attempted rapes, sexual assault, sexual violence and grave acts of a sexual nature perpetrated against Rohingya women and girls in North Arakan State previously examined, appear to meet the criteria elaborated in the Elements of Crimes. Clearly, the environment in which the reported rapes and the other acts mentioned were committed is the same. These acts are perpetrated by force or threat of force or coercion. These acts are committed by the same perpetrators who have the same power and instil the same fear amongst the population. Hence, it is argued that the prohibited acts of 'any other form of sexual violence of comparable gravity' under the Rome Statute are committed in North Arakan State.

This analysis finds that there is sufficient material to establish that acts of rape and sexual violence (as defined in the Elements of Crimes) are committed against the Rohingyas in North Arakan State. The following section will examine whether these acts are perpetrated within the context necessary to constitute crimes against humanity under the Rome Statute of the International Criminal Court.

C. Preliminary Conclusions

Sexual intercourse and grave acts of a sexual nature, meeting the definition of the prohibited acts of rape and sexual violence under the Rome Statute, are being forced on women and girls by military and NaSaKa in Burma. Using documentary and field research this section examines whether these crimes are perpetrated by the military and NaSaKa forces, in North Arakan State and in Burma generally, as part of a widespread or systematic attack against the civilian population, thereby constituting crimes against humanity under Article 7(1) of the Rome Statute.

In addition to the problems inherent in gathering evidence of human rights violations, the documentation of rape and sexual violence crimes is particularly difficult in North Arakan State and in Burma as a whole. The trauma caused by these violations and more specifically the stigma attached to these crimes, especially in traditional societies, create obstacles for an analysis of the scope of abuse and perpetration of rape and sexual violence by State actors. As explained by the Special Rapporteur on Violence against Women:

⁷⁶ Elements of Crimes, *ibid.*, at 10.

When rape is perceived as a crime against honour or morality, shame commonly ensues for the victim, who is often viewed by the community as 'dirty' or 'spoiled'. Consequently, many women will neither report nor discuss the violence that has been perpetrated against them. The nature of rape and the silence that tends to surround it makes it a particularly difficult human rights violation to investigate.⁷⁷

Whilst it has been a challenge, this situation has not constituted a total impediment to gathering evidence, and cases of rape and grave acts of a sexual nature have nevertheless been documented in North Arakan State and in the rest of Burma. During interviews conducted for this Report, refugees have documented the perpetration of rape or attempted rape and sexual assault against Rohingya women and girls in North Arakan State. Several interviews provide information on multiple cases. Reports from non-governmental organisations and from different United Nations bodies have documented additional cases, and confidential meetings with organisations and human rights workers also confirmed the occurrence of these acts in North Arakan State. In the rest of Burma, as discussed in section 1 of this chapter over 875 incidents of rape have been documented in various reports and studies. Given that women do not commonly report or discuss the crimes committed against them, and considering the difficulty in accessing justice, these numbers of reported rape and acts of grave sexual violence are believed to represent only a fraction of the number of actual cases.⁷⁸ Hence there appears to be no reason to doubt the existence of multiple commissions of rape and grave acts of sexual violence in Burma.

The sum of elements, i.e. the prevalence of acts of rape and acts of sexual violence, the regularity of their occurrence and the circumstances in which they occur suggests that these crimes are not perpetrated randomly by deviant individuals. Rather, there appear to be similarities common to these documented rapes and sexual assaults. For instance, these violations have frequently occurred at military or NaSaKa bases and barracks, during forced labour, during other acts of an official capacity such as house searches and at checkpoints, as well as while women are in detention. These crimes are also regularly perpetrated openly, for instance in front of family members. Since the beginning of the 1990s it has been repeatedly submitted that women and girls from ethnic minority groups are specifically targeted as victims of rape and sexual abuse. Some organisations have suggested that the perpetration of rape and sexual violence against ethnic minority groups are in actual fact a government policy and strategy. For example, the organisation Women of Burma stated in their last Shadow report to the Committee on the Elimination of Discrimination against Women that:

⁷⁷ UN Human Rights Council, 'Report of the Special Rapporteur on Violence against Women, its causes and consequences, Yakin Ertürk: Addendum: 15 Years of the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences (1994-2009) - A Critical Review', UN Doc. A/HRC/11/6/Add.5 (2009) at 45.

⁷⁸ See for instance joint allegation letter sent to Burmese Government by the Special Rapporteur on Violence against Women; the independent expert on minority issues; the Special Rapporteur on the sale of children, child prostitution and child pornography; the Special Rapporteur on the Situation of Human Rights in Myanmar, the Special Rapporteur on trafficking and the Special Rapporteur on Torture: UN Human Rights Council, Report of the Special Rapporteur on Violence against Women (2008), *supra* note 18 at para. 293.

Rape and sexual violence committed by state actors – SPDC armed forces and authorities - are occurring throughout Burma. The majority of incidents take place in the ethnic states which have been most impacted by the regime's policies of military expansion. Sexual violence is being used by the regime as an integral part of its strategy to subjugate the ethnic peoples, and establish control over their lands and resources. It serves multiple purposes: terrorizing local communities into submission; flaunting the power of the dominant troops over the enemy's women; humiliating and demoralizing ethnic resistance forces and also serving as a "reward" to its troops for fighting.⁷⁹

While it is still difficult at present with the information at hand to reach the conclusion that the SPDC actively promotes, directly aids and explicitly encourages the perpetration of rapes and sexual assaults (including specifically on Rohingyas), there appears to be a certain pattern to these crimes and it is clear that rape and sexual abuse of women and girls from ethnic minority groups by State actors are persistent throughout Burma.

A number of reports from Burmese non-governmental organisations, international non-governmental organisations as well as United Nations bodies have reached the conclusion that multiple acts of rape and sexual assaults are being committed by State actors in Burma and that these acts, directed against civilian women and girls, are widespread or systematic. In fact, there appears to be a clear consensus in the international community and within civil society in Burma that the conduct of the State actors (from the army and NaSaKa forces), involving the multiple commission of rape and sexual acts of comparable gravity, is widespread or systematic.⁸⁰ Burmese leaders have known about the conduct of its troops and the commission of multiple rapes and sexual abuses by soldiers in Burma, and also specifically in North Arakan State,⁸¹ for decades now. Documented cases of rape and sexual abuse by State actors have been brought to the attention of the Burmese leaders. Letters of allegation and urgent appeals have also been sent by United Nations bodies to the Burmese regime and discussed at officials meetings. SPDC representatives have also discussed and responded to specific allegations of rape and sexual violence, including allegations made in reports such as *Licence to Rape*. In its combined second and third periodic report to the Committee on the Elimination of Discrimination against Women the SPDC stated that, after investigations, out of 175 documented cases only two cases had been found true.⁸² Prior to this statement the Permanent Representative of Myanmar to the United Nations indicated in a letter to the UN Secretary-General that:

⁷⁹ Women of Burma, *CEDAW Shadow Report*, supra note 5 at 55. See also Refugee International, *No Safe Place*, supra note 11 at 9.

⁸⁰ See for instance, Shan Human Rights Foundation and Shan Women's Action Network, *ibid.*, at 1; Refugee International, *No Safe Place*, supra note 11 at 9; UN Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar(2008), supra note 28 at 87. UN Commission on Human Rights, Report of the Special Rapporteur on Violence against Women (2006), supra note 15 at para. 118. UN Human Rights Council, Report of the Special Rapporteur on Violence against Women (2008), supra note 18, at para. 294.

⁸¹ See UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Myanmar(1993), supra note 1 at para. 77; UN Security Council, Report of the Secretary-General pursuant to Resolution 1820, supra note 31 at para. 15.

⁸² See UN CEDAW, Periodic reports, Myanmar (2007), supra note 35 at para. 59: 'With regard to the allegations that army soldiers have committed 175 rape cases in the southern, eastern and northern parts of Shan State made in the report entitled "Licence to Rape" published by The Shan Human Rights Foundation (SHRF) and the Shan Woman's Action Network (SWAN), thorough investigations were made.

Myanmar categorically rejects the unfounded allegations of sexual violence levelled against its armed forces. The Myanmar military has been falsely accused of gang rape based on fallacious reports issued by the expatriate Shan Women's Action Network (SWAN), the Shan Human Rights Foundation (SHRF) and Kareni Human Rights (KHRG).

To support this statement and dismiss the veracity of reports of abuses documented by these organisations the SPDC's Permanent representative further indicated that two of these organisations 'have associations with insurgent armed groups'⁸³.

The wide range of documentation readily available on the issue of rape and sexual violence in Burma, coupled with the official statements and responses on these issues indicate clearly that the SPDC has knowledge of the allegation of multiple rapes and sexual violence by their troops. As discussed in section 1.2, the inadequate response to the alleged perpetration of these violations (including retaliation for attempting to seek redress) promotes the idea that the multiple commission of rapes and other grave acts of a sexual nature is acceptable. As put forward by the former Special Rapporteur on the Situation of Human Rights in Myanmar: 'The failure to investigate, prosecute and punish those responsible for rape and sexual violence has contributed to an environment conducive to the perpetuation of those acts against women and girls in Myanmar.'⁸⁴ This situation has guaranteed and continues to commonly guarantee the impunity of perpetrators. Non-governmental organisations and United Nations bodies have repeatedly discussed the culture of impunity as regards to rapes and other grave acts of a sexual nature in Burma and noted how this necessarily exacerbates the situation. These institutions have further noted the lack of mechanisms for redress and remedies available to victims, and the absence of information about serious government initiative to address this problem.⁸⁵ The failure of the Burmese leaders to take action cultivates the notion that commission of rape and sexual assault is acceptable. In actual fact this inertia implicitly encourages and supports *de facto* the conduct of the military and of NaSaKa forces.

This analysis indicates that there is *prima facie* evidence of crimes against humanity pursuant to Article 7(1)(g) of the Rome Statute, and that the rape and sexual

Under the guidance of the Chairperson of the Anti-Trafficking in Persons Working Committee, Deputy Minister of the Ministry of Home Affairs, 10 task forces, each comprising officials from the Myanmar Police Force, the Department of Immigration and National Registration and the Social Welfare Department, conducted field investigations and found out that 38 cases were old cases, 135 cases were unreal and only two cases were true. The two perpetrators, an army officer and one other rank, in the two cases were prosecuted and given ten-year sentence each and dismissed from the Army.'

⁸³ Permanent Representative of Myanmar to the United Nations, 'Letter from the addressed to the Secretary-General to be circulated at the General Assembly' (2007), *available at* <http://www.un.int/wcm/content/site/myanmar/cache/offonce/pid/2669> at para 46.

⁸⁴ UN Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar(2008), *supra* note 28, at para. 87. See also UN General Assembly, Report of the Special Rapporteur Myanmar (2006), *supra* note 42 at para. 30; UN Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar(2007), *supra* note 42 at para. 41.

⁸⁵ UN Commission on Human Rights, Report of the Special Rapporteur on Violence against Women (2006), *supra* note 15; UN CEDAW, Concluding observations (2008), *supra* note 25 at para. 24. UN Security Council, Report of the Secretary-General pursuant to Resolution 1820, *supra* note 31 at para. 26; UN Human Rights Council, Report of the Special Rapporteur on Violence against Women (2008), *supra* note 18.

violence acts perpetrated by the military and NaSaKa forces in Burma as a whole could on their own constitute a widespread or systematic attack against the civilian population. As regards to the situation in North Arakan State specifically, the existing body of material appears too limited to reach firm conclusions that acts of rape and other forms of sexual violence against the Rohingya population are widespread or systematic. It is clear, however, that Rohingya women and girls are raped and sexually assaulted by State actors in North Arakan State, and that these acts do not appear to be isolated and random but have commonalities. This suggests that further investigation could indeed lead to the conclusion that the offences of rape and sexual violence committed against women and girls in North Arakan State constitute a widespread or systematic attack directed against the Rohingya population, i.e. a crime against humanity.

Chapter VI: Deportation and Forcible Transfer of Population

VI. DEPORTATION OR FORCIBLE TRANSFER OF POPULATION – ETHNIC CLEANSING?

Introduction

Thus far this Report has examined, within the crimes against humanity framework, acts which from a general human rights perspective constitute gross violations of the collective human dignity of the Rohingya population of North Arakan State (i.e. the exaction of forced labour and the perpetration of rape, sexual violence). However, the chapters adducing the factual circumstances of these violations have deliberately avoided addressing in any great detail questions relating to: (i) the underlying intent behind the commission of these acts, a question which essentially explores the rationale behind the targeting of the Rohingya population; and (ii) the net results of this concerted course of conduct. This chapter, in looking at possible commission of the crimes of deportation and/or forcible transfer of large sections of the Rohingya population, will have an opportunity to touch on these issues in more detail (a similar but broader opportunity is afforded by the following chapter relating to the possible commission of the crime of persecution). The prospect of identifying a situation in which the deliberate forcible displacement¹ of the Rohingya population is, at least on the face of it, the ultimate goal of the SPDC is very grave indeed and certainly has the effect of conjuring up images of ethnic cleansing practices that have been characteristic of the worst abuses of modern history. Section A looks at the prevalence of forced displacement in Burma generally, before moving on to consider the history of Rohingya displacement specifically. This is followed by an examination of the main catalysts for displacement in North Arakan State, namely, the denial of citizenship, restrictions on freedom of movement, and the policies of land confiscation, militarization and forced relocation/eviction. Section B discusses these factual findings in the context of the applicable international criminal and international human rights law, while Section C offers some preliminary conclusions.

A. Factual Findings

1. Forced Displacement in Burma

Successive Special Rapporteurs on the Situation of Human Rights in Myanmar, along with the United Nations General Assembly, have consistently highlighted the dire incidences of forcible transfer throughout the territory of Burma and have repeatedly called on the SPDC to recognize the severity of the situation and to create conditions conducive to the voluntary return and full reintegration of displaced persons.² As

¹ Forcible displacement is a general term referring collectively to deportation and forcible transfer of populations. See Rome Statute of the International Criminal Court (1998), UN Doc. A/CONF.183/9, entered into force 1 July 2002, 2187 UNTS 90, [hereinafter Rome Statute] at art. 7(2)(d).

²² See generally: 'Situation of Human Rights in Myanmar', UN Doc. A/RES/63/245 (2009) at para. 4(I): '*Strongly calls upon the Government of Myanmar... (I) To end the systematic forced displacement of large numbers of persons within the country and the violence contributing to refugee flows into neighbouring countries...*'; repeated in 'Situation of Human Rights in Myanmar', UN Doc. A/RES/62/222 (2008) at para. 4(h); 'Situation of Human Rights in Myanmar', UN Doc. A/RES/61/232 (2007) at para. 3(d): '*Strongly calls upon the Government of Myanmar... To provide the necessary protection and assistance to internally displaced persons, in cooperation with the international community*'; 'Situation of Human Rights in

reported by Special Rapporteur Pinheiro: '[i]n many ethnic minority-populated areas, repeated incidents of forced displacement – interspersed with occasional periods of relative stability – have been a fact of life for generations'.³ This reflects the fact that the overwhelming majority of victims of forced displacement are typically members of ethnic minority groups resident in turbulent, conflict-prone border territories.⁴ In the most recent statistical forecast by the office of the United Nations High Commissioner for Refugees (UNHCR), by January 2010 there will be an estimated 410,000 displaced persons within Myanmar.⁵ Despite existing statistical projections (which in all likelihood represent conservative estimates), and the very obvious situation on the ground, the Burmese Government flatly rejects any suggestion that there are a large number of displaced persons within its territory and refuses to allow United Nations agencies and other humanitarian actors to intervene.⁶ To this end, the Permanent Representative of the SPDC to the United Nations has commented that, 'as Myanmar is not a country in armed conflict, we reject the assertion of the presence of a large number of internally displaced persons'.⁷

The obvious catalysts in this widespread displacement are the sporadic military campaigns instigated by Burmese armed forces in ethnic areas whose express purpose is to undermine the functional capacity of ethnic insurgency groups. Such attacks have a disproportionate effect on civilian populations and have been viewed 'by various observers to [constitute] a concerted policy aimed at denying people their livelihoods and food or forcing them to risk their lives when they attempt to return to their villages after having been forcibly evicted'.⁸ The methodology utilized by the Burmese Army or *Tatmadaw* to trigger the forcible displacement of a population usually involves the complete destruction and land-mining of villages, making return either impossible or too unsafe to contemplate.⁹ Amnesty International has reported that frequently the inhabitants of villages attacked in this fashion are issued with "relocation orders" which

Myanmar', UN Doc. A/RES/56/231 (2002) at paras. 18-19: '18. *Deplores* the...dispossession of land and property, which deprives those persons of all means of subsistence and results in large-scale displacement of persons and flows of refugees to neighbouring countries, with negative effects for those countries, and an increasing number of internally displaced persons'; repeated in 'Situation of Human Rights in Myanmar', UN Doc. A/RES/55/112 (2001) at paras. 14-15; 'Situation of Human Rights in Myanmar', UN Doc. A/RES/54/186 (2000) at para. 16; General Assembly, 'Situation of Human Rights in Myanmar: Note by the Secretary-General – Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana', UN Doc. A/63/341 (2008) at paras. 55-59; Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro', UN Doc. A/HRC/4/14 (2007) at para. 60.

³ Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro', *ibid.*, at para. 60.

⁴ *Ibid.*, at para. 54.

⁵ UNHCR, '2010-11 UNHCR Planning Figures for Myanmar', available at <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e4877d6>.

⁶ Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro', *supra* note 3 at para. 54. See also, National Coalition Government of the Union of Burma, *Burma Human Rights Yearbook 2008* (2009), available at <http://www.burmalibrary.org/show.php?cat=392&lo=d&sl=0>.

⁷ U. Nyunt Maung Shein, Permanent Representative to Geneva, UN Human Rights Council, 27 September 2006, a webcast of this intervention is available at <http://www.un.org/webcast/unhrc/archive.asp?go=060927>.

⁸ Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro', *supra* note 3 at para. 56.

⁹ Amnesty International (AI), 'Crimes against Humanity in Eastern Myanmar', ASA 16/011/2008 at 28.

dictate that they must take up residence in fenced settlements known as “relocation sites”. Such orders are usually issued orally (by either members of the armed forces or by VPDC chairmen on their behalf) and at short notice, leaving individuals little or no option but to abandon all property.¹⁰ Individuals who refuse to comply with such orders and who opt instead to flee to other villages or across borders into neighbouring States, are then deemed legitimate military targets.¹¹ Conditions within relocation sites are extreme with inadequate supplies of food and drinking water.¹² The establishment of relocation sites is consistent with the Burmese Government’s long-stated “Four Cuts” policy, which aims to undermine the capacity of ethnic armed opposition/independence groups such as the Karen National Union, Kachin Independence Organization, and the Wa Army to access recruits, information, supplies and finances.¹³ The “Four Cuts” policy was originally drawn up by General Ne Win in the mid-1960s and was seen as a tried and tested means of wrenching back control of insurgent-controlled territories.¹⁴ However, since 1996 it has been implemented with far greater zeal and has been accompanied by the dense militarization of ethnic border regions. According to the Special Rapporteur on the Situation of Human Rights in Myanmar, Sérgio Pinheiro, since 1995, ‘the Army has approximately doubled the number of battalions deployed across eastern [Burma]’.¹⁵ While over the course of the past 20 years the Burmese Government

¹⁰ Human Rights Watch (HRW), “‘They Came and Destroyed Our Village Again’: The Plight of Internally Displaced Persons in Karen State” (2005), *available at* <http://www.hrw.org/en/reports/2005/06/09/they-came-and-destroyed-our-village-again-0> at 45: ‘However, relocation orders are more likely to be issued verbally, often at a meeting of village headmen. Villagers are usually given between zero and seven days warning to leave their homes. Sometimes they are told to move to a designated relocation site, but villagers are not told where to go, just to vacate their homes’.

¹¹ Commission on Human Rights, ‘Report on the situation of human rights in Myanmar, prepared by Mr. Yozo Yokota, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1992/58’, UN Doc. E/CN.4/1993/37 (1993) at para. 74: ‘In a number of cases reported to the Special Rapporteur, civilians were executed when they either refuse to relocate upon orders or when they attempted to escape to avoid relocation’. In his report the Special Rapporteur speaks about actual relocation orders that he himself examined. See also, General Assembly, ‘Situation of human rights in Myanmar – Note by the Secretary-General’, UN Doc. A/49/594 (1994) at para. 25.

¹² HRW, ‘They Came and Destroyed Our Village Again’, *supra* note 10 at 48-50. See also: General Assembly, ‘Situation of human rights in Myanmar – Note by the Secretary General’, UN Doc. A/55/359 (2000) at para. 54; Commission on Human Rights, ‘Report of the Special Rapporteur, Mr. Rajsoomer Lallah, submitted in accordance with Commission on Human Rights resolution 1998/63’, UN Doc. E/CN.4/1999/35 (1999) at paras. 64-66; Commission on Human Rights, ‘Report of the Special Rapporteur, Mr. Rajsoomer Lallah, submitted in accordance with Commission on Human Rights resolution 1996/80’, UN Doc. E/CN.4/1997/64 (1997) at paras. 72 and 89.

¹³ Thailand Burma Border Consortium (TBBC), ‘Protracted Displacement and Militarisation in Eastern Burma’ (2009), *available at* <http://www.burmalibrary.org/show.php?cat=392&lo=d&sl=0>. See also, M. Green and D. Mitchell, ‘Asia’s Forgotten Crisis: A New Approach to Burma’, (2007) 86 *Foreign Affairs* 147 at 149: ‘Since 1996, when the Burmese army launched its “four cuts” strategy against armed rebels – an effort to cut off their access to food, funds, intelligence, and recruits among the population – 2,500 villages have been destroyed and over one million people, mostly Karen and Shan minorities, have been displaced’.

¹⁴ See, M. Smith, *Burma: Insurgency and the Politics of Ethnicity*, (London. Zed Books, 2nd edn., 1999) at 258-262.

¹⁵ Human Rights Council, ‘Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro’, *supra* note 3 at para. 54.

have reportedly concluded ceasefire agreements with some 17 ethnic insurgency groups, such agreements are fragile and sporadic outbreaks of violence are common.¹⁶

Aside from the outright destruction and land-mining of villages which gives rise to displacement of populations, the SPDC have for many years implemented a large-scale and effectively arbitrary policy of land confiscation throughout the country.¹⁷ Commenting on the policy, Pinheiro has stated that:

These confiscations appear to have several aims, including relocating civilian populations deemed to be sympathetic to the armed opposition; anchoring a military presence in disputed areas through the deployment or support of new Army battalions; opening the way for infrastructure development projects...; the extraction of natural resources, notably offshore gas; and providing various interest groups, including the military and foreign groups, with business opportunities.¹⁸

The authorities have attempted to give land confiscation orders a veneer of legitimacy by relying on pre-existing legislation such as the Land Nationalization Act of 1953. This Act, inspired by the ideology of the “Burmese Way to Socialism”, was intended to both confer land ownership on the State while simultaneously providing farmers with certain cultivation rights.¹⁹ However, since 1962 such rights have rarely been enjoyed by ethnic minority communities. Articles 18 and 19 of the 1974 Constitution significantly reinforced the 1953 Act. The relevant sections are as follows:

Article 18. The State –

(a) Is the ultimate owner of all natural resources above and below the ground, above and beneath the waters and in the atmosphere, *and also of all the lands*;

Article 19.

*The State shall nationalize the means of production within the land. Suitable enterprises shall be owned and operated by co-operatives.*²⁰

Article 37 of the 2008 Constitution appears to make some concession towards respect for property rights; however, in reality all lands remain in the hands of the State.²¹ Consequentially, land is routinely requisitioned by the authorities under the guise of infrastructural and developmental necessity (i.e. for the construction of roads, mines, irrigation systems, and the extraction of natural resources, etc), or, more typically, under the pretext of military necessity, which takes the form of the

¹⁶ See for instance, S. Yan Naing, ‘Burmese Ceasefire Breaks Down’, *The Irrawaddy*, (28 August 2009), available at http://www.irrawaddy.org/highlight.php?art_id=16658&page=1.

¹⁷ Human Rights Council, ‘Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro’, *supra* note 3 at para. 61.

¹⁸ *Ibid.*

¹⁹ N. Hudson Rodd et al., ‘The Impact of the Confiscation of Land, Labour, Capital Assets and Forced Relocation in Burma by the Military Regime’, (National Council of the Union of Burma and Federation of Trade Unions Burma, 2004), available at http://burmalibrary.org/docs/land_confiscation-contents.htm.

²⁰ Constitution of the Socialist Republic of the Union of Burma (1974) at arts. 18 and 19, available at <http://www.thailawforum.com/database1/constmyanmar.html> [emphasis added].

²¹ Constitution of the Republic of the Union of Myanmar (2008), available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/79572/85698/F1127243646/MMR79572.pdf> art. 37

construction of garrisons and the cultivation of land for the purpose of sustaining a military presence in the area. Confiscation orders may be accompanied by direct relocation orders issued by the military or civil authorities. In the eastern regions of the country the ultimate goal of confiscation orders is to ensure the separation of armed groups from civilian populations.²² Land confiscations are also, for instance, accompanied by beatings, rape and sexual violence, torture, as well as forced labour (residents of confiscated land are frequently forced to work the land on behalf of the military or to assist in infrastructural projects).²³ Irrespective of the stated rationale, the implicit intent behind confiscation orders is to displace and subjugate ethnic populations with a view to quelling the potential for ethnic insurgency.²⁴ Forced displacement is clearly used as a tactic of containment.

There is no doubt that the issuing of arbitrary confiscation orders is entirely contrary to international law. In regions inhabited by ethnic minorities, where there may be situations of ongoing armed conflict, it is evident that the displacement of civilian populations and their transfer to so-called “relocation sites” does not comport with the requirements for the lawful removal of civilians as laid out in Article 17(1) of Additional Protocol II to the Geneva Conventions of 1949. It may thereby constitute war crimes as enumerated in Article 8(2)(e)(viii) of the Rome Statute,²⁵ and presents a *prima facie* case for the commission of the crime against humanity of forcible transfer of populations. It would appear from the foregoing that in Burma generally, forced displacement is closely associated with the suppression of ethnic insurgency and is used as a means of reinforcing authoritarian repression. Whether this conclusion applies to the specific situation of the Rohingyas will be examined in the following sections.

2. The Forced Displacement of the Rohingyas

The circumstances of the forced displacement of the Rohingyas differ significantly from those of other ethnic groups such as the Karen, Kachin, Mon or Wa. Most fundamental is the fact that there is no evidence to indicate the existence of an ongoing armed conflict in the region. While there is a significant history of insurgency based at various times on an assortment of claims of self-determination (ranging from federal autonomy to nationalism and irredentism), since the mid-1990s these claims within North Arakan

²² Human Rights Council, ‘Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro’, *supra* note 3 at para. 56: ‘In addition to the heightened risks posed by the widespread availability of small arms and light weapons and anti-personnel mines, killing terrorizing or displacement of civilians is often part of a deliberate strategy to separate ethnic armed groups from their civilian populations’.

²³ *Ibid.*

²⁴ Human Rights Council, ‘Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro’, UN Doc. A/HRC/18 (2008) at paras. 71-72: ‘The causes of population movements within Myanmar (internal migration) and beyond its borders (external migration) are closely linked to the serious and systematic abuses of basic rights, and are therefore considered to be a form of forced migration...This situation is in connection with the widespread practice of land confiscation throughout the country, which is seemingly aimed at anchoring military control, especially in ethnic areas. It has led to forced evictions, relocations and resettlements, forced migration and internal displacement’.

²⁵ Rome Statute, *supra* note 1 at art. 8(2)(e)(viii) – ‘Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand’.

State have been largely dormant if not extinct.²⁶ However, the SPDC have consistently stated that the militarization of the area, with the attendant enforcement of the “Four Cuts” policy, is necessary in order to quell “Islamic terrorists” operating along the Burma-Bangladesh border. However, such statements camouflage the intent of the SPDC to fundamentally alter the ethnic make-up of North Arakan State.

2.1 Forced Displacement of the Rohingyas: 1978 to 1992

An examination of the substantive incidences of deportation or forcible transfer of the Rohingyas begins most appropriately with a look at the events of February to May 1978. As noted in the introduction to this Report, the history of Rohingya repression stretches back to the pre-independence years of the 20th Century. However, with respect to evidence of the perpetration of the crime of deportation or forcible transfer, the first mass exodus of Rohingyas that attracted the attention of the international community, is that of their mass-movement from North Arakan state across the border into the newly independent State of Bangladesh in 1978. This represents the point at which the Rohingyas became the target for the perpetration of widespread *and* systematic gross violations of human rights. In February 1978, General Ne Win instituted the “Nagamin” (or “King Dragon”) campaign whose stated objective was to ‘scrutinize each individual living in the State, designating citizens and foreigners in accordance with the law and taking actions against foreigners who have filtered into the country illegally’.²⁷ The defining characteristic of the campaign was the level of violence that accompanied it.²⁸ As Martin Smith points out, ‘whether it was really intended as a proper survey operation never became clear because the Nagamin census quickly got out of hand amidst widespread reports of army brutality, including rape, murder and the destruction of Muslim mosques’.²⁹ The net result of the campaign was the displacement, over the Bangladeshi border (and specifically into the Cox’s Bazar region), of over 220,000 Rohingyas.³⁰

The exact factual details of the 1978 exodus remain largely unclear; however, it seems reasonable to conclude that over 220,000 individuals are unlikely to flee their homes *en masse* unless significant coercive circumstances prevail. In responding to the exodus, the Burmese Government suggested that those who fled were in fact ‘illegal Bengali immigrants who had crossed into Burma as part of a general expansion in the Bengali population in this region’.³¹ They further alleged that the violence was

²⁶ See, M. Yegar, *Between Integration and Secession: The Muslim Communities of the Southern Philippines, Southern Thailand, and Western Burma/Myanmar*, (Maryland. Lexington Books, 2002) at 19-67.

²⁷ Human Rights Watch (HRW), ‘The Rohingya Muslims: Ending a Cycle of Exodus’ (1996), available at <http://www.hrw.org/en/reports/1996/09/01/rohingya-muslims-ending-cycle-exodus> at 11. See also, M. Smith, ‘The Muslim “Rohingyas” of Burma’, Paper delivered at Conference of Burma Centrum Nederland (11 December 1995), (on file with authors). At around the same time as the initiation of the Nagamin campaign, Operation “Ye The Ha” was instigated in order to ‘flush out insurgent forces [which were active at the time] and their sympathizers.’

²⁸ Clive Christie comes to the somewhat controversial conclusion that the manner in which the Nagamin campaign was implemented, its ‘undiscriminating brutality’, has given rise to suspicions that a ‘*de facto* process of ethnic cleansing’ was/is taking place. C. J. Christie, *A Modern History of Southeast Asia: Decolonization, Nationalism and Separatism* (London. I.B. Tauris, 1996) at 171.

²⁹ Smith, *supra* note 27 at 9.

³⁰ See, Yegar, *supra* note 26 at 55.

³¹ Smith, *supra* note 27 at 9.

instigated by “armed bands of Bengalis”, “rampaging Bengali mobs” and “wild Muslim extremists”.³² Reactions to complaints registered by the Bangladeshi Government (which viewed the exodus as the ‘expulsion by force of “thousands of Burmese Muslim citizens”’³³) were based on a similar policy of denial of responsibility. When repatriation was eventually agreed to in July 1979, the Ne Win Government entered the caveat that only those in possession of a National Registration Card would be permitted to return to Burma while conceding that not all refugees had this documentation. Nevertheless, with the assistance of UNHCR, by the end of 1979 the majority of Rohingyas had returned to Arakan State.³⁴ On their return however, many would find their land occupied by Buddhist Rakhine settlers.

Moving forward to the second mass exodus of Rohingyas to Bangladesh, which occurred between May 1991 and March 1992, we have concrete first-hand evidence to draw upon in coming to a determination of the requisite status of the acts under international criminal law. This evidence is based on our 2009 field mission to the region (including Burma itself). During the period of May 1991 to March 1992, somewhere in the region of 250,000 Rohingyas spilled across the Burma-Bangladesh border into the vicinity of Cox’s Bazar. The circumstances facing Rohingya refugees on entering Bangladesh and the response of the Bangladeshi Government and UNHCR have been outlined in the introduction to this Report.³⁵ However, in order to reach a conclusion that the exodus was in fact the net result of the commission of widespread *and* systematic deportation and forcible transfer, it is necessary to look at the stated reasons behind the flight.

During the course of our field mission, numerous testimonies were gathered from Rohingya refugees who have been resident in the Kutupalong official refugee camp in Bangladesh since the time of the exodus that took place in the early nineties. It is apparent from these testimonies that while there was no official Nagamin-type campaign in place in 1992, similar levels of violence and brutality were present. Numerous interviewees cited *inter alia* the gross exaction of forced labour, arbitrary land confiscations, restrictions on freedom of movement, and widespread rape and torture as the primary reasons for their flight. As in 1978, the circumstances on the ground in North Arakan State left large portions of the population with no option but to flee. Why the Burmese regime (which at the time was referred to as the State Law and Order Restoration Council or SLORC) chose to come down so hard on the Rohingyas has been the subject of some debate. Bertil Lintner and Human Rights Watch have suggested that in the wake of the 1990 General Election (in which the Rohingyas were surprisingly given the right to vote) and the effective denial of the result by the SLORC the ‘government needed a scapegoat, a distraction and [a] common enemy to unite a disillusioned and angry populace. They chose the Rohingyas’.³⁶ It has also been

³² Smith, *supra* note 14.

³³ See, Yegar, *supra* note 26 at 56.

³⁴ C.R. Abrar, ‘Repatriation of Rohingya Refugees’ (Dhaka. Refugee and Migratory Movements Research Unit, 1996), available at <http://www.burmalibrary.org/docs/Abrar-repatriation.htm>: ‘The [repatriation operation] commenced on 31st August 1978 and ended on 29th December 1979 and involved repatriation of a total of 187,250 refugees...’.

³⁵ See Chapter II (Introduction).

³⁶ HRW, *supra* note 27 at 12 citing B. Lintner, ‘Diversionary Tactics: Anti-Muslim campaign seen as effort to rally Burmans’, *Far Eastern Economic Review* (29 August 1991).

suggested that the SLORC was intending on securing control of the border region with Bangladesh (a move that is perhaps unsurprising given the tensions created between the two States as a result of the 1978 exodus), and quelling the activities of the two primary Rohingya insurgent groups nominally active at the time: the Arakan Rohingya Islamic Front (ARIF) and the Rohingya Solidarity Organization (RSO).³⁷ This initiative led to the eventual establishment of the now notorious NaSaKa border administration force.³⁸ Indeed, the activities of the ARIF and the RSO provided SLORC with the perfect excuse to implement the “Four Cuts” policy that had been so effective in other ethnic regions.³⁹ As mentioned above, militarization is central to the “Four Cuts” policy and with it come widespread human rights abuses as well as heightened displacement.

At around this time (i.e. circa. 1990/1991) SLORC instigated the policy of so-called “model village” construction which involves the confiscation of land and the transferring of individuals and families from urban areas (predominantly in central Burma) to border regions.⁴⁰ Officially the construction of “model villages” was intended to diversify and develop remote border areas; however, this appears to be a thin veil for the deliberate fragmentation of ethnic populations.

Since 1992, there has not been an exodus on remotely the same mass scale. However, under the watchful eye of the NaSaKa, there has been a steady stream of refugees entering Bangladesh, to the extent that it is now estimated that there are approximately 200,000 unregistered Rohingyas resident in the Cox’s Bazar region.⁴¹ The current state of forced displacement will be examined in more detail below; however, it is important to first take note, in specific policy terms, of the catalysts that have facilitated or driven the deportation and forcible transfer of the Rohingyas.

2.2 The Root Causes of the Forced Displacement of the Rohingyas

Denial of Citizenship: The 1982 Citizenship Law

Central to each violation documented in this Report is the enduring nature of Rohingya statelessness. The refusal of the Burmese regime to acknowledge and regularize Burmese citizenship for the Rohingyas profoundly illustrates the level of cross-generational discrimination that has been waged against this ethnic minority. All repression flows from the denial of citizenship. The Burmese regime’s unwavering position that the Rohingya population is nothing more than a small community of

³⁷ See Yegar, *supra* note 26 at 56.

³⁸ See, International Federation of Human Rights (FIDH), ‘Burma: Repression, Discrimination and Ethnic Cleansing in Arakan’ (2000), available at <http://www.fidh.org/IMG/pdf/arakbirm.pdf> at 7: ‘The Nasaka (acronym for Nay-Sat Kut-kwey Ye) was set up in 1992, soon after the Rohingya exodus. In charge of immigration, customs and more generally of frontier issues, the Nasaka has ruled for seven years of nine sectors along the Bangladeshi frontier (eight around Maungdaw and one around Buthidaung). Made up of several government bodies (police, military intelligence, Lon Htein (anti-riot forces) and customs), the Nasaka plays a very important role in local political, social and economic issues... According to testimonies given by Maungdaw and Buthidaung villagers, the Nasaka acts as an absolute ruler over the Rohingya population and has committed most of the abuses since 1992’.

³⁹ HRW, *supra* note 27 at 12.

⁴⁰ Document FL-08 (on file with authors).

⁴¹ Christian Solidarity Worldwide (CSW), ‘Burma: Visit to the Bangladesh-Burma Border: 26-31 August 2008’, available at <http://dynamic.csw.org.uk/article.asp?t=report&id=100> at 11.

economic migrants leeching Burmese resources is intended to act as a cover for the systematic forcible displacement of this minority group. The right of every person to a nationality is enshrined in Article 15 of the Universal Declaration of Human Rights⁴² which also speaks of the concurrent right not to be arbitrarily deprived of nationality. Similar provisions are found in other instruments to which Burma is a State Party, including the Convention on the Rights of the Child⁴³, and the Convention on the Elimination of All Forms of Discrimination against Women⁴⁴. When citizenship is given its full meaning in a democratic society, nationals of states are empowered with the ability to exercise their full civil, political, economic and social rights, while also benefiting from the protection of the State both domestically and internationally. For these reasons the right to nationality has often been referred to as the ‘right to have rights’.⁴⁵ While this notion may have some validity domestically at a mechanistic/implementation level, it is in no sense representative of fundamental principles of international human rights which naturally recognize the condition of being human as the only requirement necessary for the bestowal of rights.⁴⁶ Expressed more succinctly: just because the Rohingyas are denied citizenship does not mean they do not have human rights. Nevertheless, the SPDC frequently justifies its denial of fundamental human rights to the Rohingyas on the basis of their “illegal status”.

The Rohingyas have experienced difficulties in obtaining citizenship since the early days of Burmese independence. Article 11(i) of the 1947 Constitution provides that ‘every person, both of whose parents belong to any of the indigenous races of Myanmar [Burma]’,⁴⁷ shall be a citizen of the Union. Not recognized as one of the “indigenous races” (even though at that time the exact meaning of the term had not yet been set down in law) the Rohingyas had to rely on Article 11(iv) of the Constitution which provided that citizenship may be granted to:

Every person who was born in any of the territories which at the time of his birth was included within His Britannic Majesty’s dominions and who has resided in any of the territories included within the Union for a period of not less than eight years in the ten years immediately preceding the 1st January 1942 and who intends to reside permanently therein and who signifies his election of citizenship of the Union in the manner and within the time prescribed by law.⁴⁸

⁴² Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810 (1948), [hereinafter CRC] art. 15.

⁴³ Convention on the Rights of the Child, (1989), *entered into force* 2 September 1990, 1577 UNTS 3 [hereinafter CRC] at art. 7.

⁴⁴ Convention on the Elimination of All Forms of Discrimination against Women, (1979), *entered into force* 3 September 1981, 1249 UNTS 13 [hereinafter CEDAW] at art. 9. Relevant provisions of instruments of which Burma is not a party include: International Covenant on Civil and Political Rights, (1966), *entered into force* 23 March 1976, 999 UNTS 171 [hereinafter ICCPR] at arts.12 and 24; Convention on the Reduction of Statelessness, (1961), *entered into force* 13 December 1975, 989 UNTS 175; and Convention Relating to the Status of Stateless Persons, (1951), *entered into force* 6 June 1960, 360 UNTS 117.

⁴⁵ *Perez v. Brownell*, 356 US 44, at 64 (dissenting opinion of Warren, C.J.)

⁴⁶ See generally, D. Weissbrodt and C. Collins, ‘The Human Rights of Stateless Persons’, (2006) 28 *Human Rights Quarterly* 245.

⁴⁷ Constitution of The Union of Burma 1947 at art. 11(i), available at <http://www.blc-burma.org/html/Constitution/1947.html>.

⁴⁸ *Ibid.*, at art. 11(iv).

There was, therefore, definite scope for citizenship for the Rohingyas under the 1947 Constitution. However, Article 11(iv) was soon supplemented by the 1948 Union Citizenship Act ('the 1948 Act') which sought to limit the ability of pre-independence immigrants to gain naturalized status. Article 3(1) of the 1948 Act defined the indigenous races of Burma as 'the Arakanese, Burmese, Chin, Kachin, Karen, Kayah, Mon or Shan race and such racial groups as has settled in any of the territories included within the Union as their permanent home from a period anterior to 1823 A.D.'. ⁴⁹ There was no express recognition of the Rohingyas and no explanation was provided as to the meaning of 'racial groups'. The reference to 1823, the year prior to the First Anglo-Burman War, which resulted in the colonization of Arakan/Rakhine State, is an explicit illustration of the determination of the immediate post-independence Burmese Government to exclude Indo-Asian groups from benefitting from group status in the aftermath of colonialism. However, Article 4(2) provided further that '[a]ny person descended from ancestors who for two generations at least have all made any of the territories included within the Union their permanent home and whose parents and himself were born in any of such territories shall be deemed to be a citizen of the Union'. In order to reduce the continued flow of Indian immigrants into Burma, all residents in Burma were required to apply for registration within one year of the law and were given identity cards. ⁵⁰ Many Rohingyas registered, obtained citizenship under Article 4(2), received National Registration Cards (NRCs), and were able to participate in the democratic era between 1950 and 1962. The 1948 Act required parents to register their children once they reached the age of ten years, but following the coup d'état in 1962 fewer and fewer Rohingya children were recognized and provided with the appropriate documentation. ⁵¹ The relevant authorities simply refused to accept the growth of the Rohingya population.

The 1974 Constitution (which replaced the 1947 instrument) changed little with respect to the criteria for the granting of citizenship, so in this sense the 1948 Act remained in force until the entry into effect of the 1982 Burma [subsequently "Myanmar"] Citizenship Law ("the 1982 Law"). It is no coincidence that the 1982 Law was promulgated in the immediate aftermath of the fallout from the Nagamin campaign. Human Rights Watch have commented that, '[b]oth the timing and content of the 1982 law indicate that it was deliberately targeted at the Rohingyas, while also discriminating against other Asian immigrants who had entered the country during the British colonial period'. ⁵² As explained by Amnesty International in their report of the Rohingya minority, the 1982 Law ⁵³ provides for three forms of citizenship, each with its own identity card:

'1. **Full citizenship** [pink card] is granted (sec. 3) to "Nationals such as the Kachin, Kayah, Karen, Chin, Burman, Mon, Rakhine or Shan and ethnic groups as have settled in any of the territories included within the State as their permanent home from a period anterior to 1185 B.E., 1823 A.D." Although this definition appears on its face to be flexible ("such as"), sec. 4 grants the Council

⁴⁹Union Citizenship Act, 1948 at art. 3(1), available at http://www.burmalibrary.org/docs/UNION_CITIZENSHIP_ACT-1948.htm.

⁵⁰ FIDH, *supra* note 38 at 18.

⁵¹ Human Rights Watch, *supra* note 27 at 26.

⁵² *Ibid.*

⁵³ The full text of the law is available at <http://www.unhcr.org/refworld/country..NATLEGBOD..MMR..3ae6b4f71b.0.html>.

of State practically unfettered powers to decide “whether any ethnic group is national or not.” Under sec. 5, “Every national and every person born of parents, both of whom are nationals are citizens by birth.” In addition, under sec. 6 “A person who is already a citizen on the date this Law comes into force is a citizen.” Children born abroad to parents belonging to specified combinations of citizenship categories are also citizens (sec. 7).⁵⁴

‘2. **Associate citizenship** [blue card] is granted, under certain conditions, to persons who had applied for citizenship under the 1948 (sec. 23) law and their children, and whose application was ongoing at the time of promulgation. Under sec. 30(c), (c) an associate citizen would “be entitled to enjoy the rights of a citizen under the laws of the State, with the exception of the rights stipulated from time to time by, the Council of State.” This grants the government a virtually unlimited discretion to deprive such persons of their rights as citizens. The “Central Body” also enjoys wide discretion to revoke “associate citizenship” on grounds that include “disaffection or disloyalty to the state” or “moral turpitude” where a sentence has been imposed of a minimum of one year imprisonment or a fine of one thousand kyats (sec. 35).⁵⁵

‘3. **Naturalised citizenship** [green card] may be granted to non-nationals such as members of ethnic groups not recognised as indigenous races, which would include the Rohingyas. Sec. 42 stipulates “Persons who have entered and resided in the State anterior to 4th January, 1948, and their offspring born within the State may, if they have not yet applied under the union Citizenship Act, 1948, apply for naturalized citizenship to the Central Body, furnishing conclusive evidence.” Persons with parents belonging to specified combinations of naturalised citizens, associate citizens and foreigners may also apply (sec. 43). Other criteria apply to all applicants for naturalized citizenship; they must be over 18, able to speak a national language well, of good character, and of sound mind, (sec. 44). As in the case of associated citizens, the Central Body is at liberty to determine which right naturalised citizens may or may not enjoy (sec. 53), and has wide discretion to deprive “naturalised citizens” of their status, including for being disloyal, or for “moral turpitude” (sec. 58).⁵⁶

The exclusion of the Rohingyas from the list of recognized “national races” means that unless the Council of State alters the list the Rohingyas cannot become “full” citizens. The requirement that all applications for associate citizenship be lodged within one year of the law coming into force (i.e. October 1983) eliminates it as a viable option, leaving naturalized citizenship as the only option for the Rohingyas. However, both associate and naturalized citizenship are determined on the basis of documentary evidence of ancestral or parental residency. Very few Rohingyas have access to such documentation. Furthermore, the requirement under Section 44 that applicants for naturalization ‘must be able to speak well one of the national languages’,⁵⁷ is an obvious stumbling block for the Rohingyas who speak their own dialect and have only very restricted access to education through which additional language skills could be obtained. Section 6 of the 1982 Law provides that individuals who obtained citizenship under the 1948 Act would retain their citizenship status. This suggests that those

⁵⁴ Amnesty International (AI), ‘Myanmar, The Rohingya Minority: Fundamental Rights Denied’ (2004), available at <http://www.amnesty.org/en/library/asset/ASA16/005/2004/en/9e8bb8db-d5d5-11dd-bb24-1fb85fe8fa05/asa160052004en.pdf> at 36.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, at 37.

⁵⁷ Myanmar Citizenship Law 1982 – *Pyithu Hluttaw* Law No. 4, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b4f71b> at section 44.

Rohingyas who registered and received National Registration Cards under the 1948 Act should continue to hold citizenship. While on paper this would seem a reasonable interpretation, in practice the Burmese regime had no intention of extending citizenship to the Rohingyas: 'Those Rohingyas who had the old National Registration Cards...were ordered to turn in their cards when they made an application for citizenship under the new law: many of them complained that they had received neither new documents nor the old ones back'.⁵⁸

Since 1995, the Burmese Immigration and Manpower Department (IMPD) has been issuing the Rohingyas with Temporary Registration Certificates (TRC) as a result of pressure from UNHCR and the Bangladeshi Government. TRCs are usually only issued to citizens between ten and twelve years of age, to citizens who have lost their National Registration Cards, or to those citizens whose National Registration Cards have become illegible. However, as of 2008 the situation is that out of a total eligible population of 480,000 (i.e. Rohingyas aged ten years and above) only 350,000 individuals have been issued with TRCs.⁵⁹ The TRCs include a photograph, signature and thumb-print of the holder as well as name, father's name, holder's date of birth, address and occupation. There is also a field on the card relating to "race" in which the authorities generally write "Bengali" or "Muslim". While TRCs have traditionally only been issued to citizens, the TRCs issued to the Rohingyas are clearly marked 'not evidence of citizenship'.⁶⁰ While the TRCs are doubtless a step in the right direction, in reality they have done very little to improve the situation of the Rohingyas, who are still considered foreigners and remain *de facto* stateless.⁶¹

The refusal to grant citizenship allows the SPDC to effectively deny or curtail the ability of the Rohingyas to exercise their basic human rights. For instance, as foreigners or stateless persons the Rohingyas, *inter alia*, are permitted neither to vote in nor stand for election (as per the 1989 Parliamentary Election Law⁶²),⁶³ are subject to severe restrictions on freedom of movement (see below), have only limited access to education services, have extreme difficulty obtaining work or starting a business, and are subject to limitations on ownership of property. Importantly, non-citizen status removes any legal standing they might have before Burmese courts. It is impossible, based on the foregoing, to avoid the conclusion that the 1982 Law deliberately discriminates against the Rohingya population of North Arakan State. As far as the SPDC is concerned the Rohingyas have no right to be in the country, and they have no qualms about stating so publically. In recent months, the official English language newspaper of the SPDC, *The New Light of Myanmar*, has run such headlines as: 'Rohinja [sic] not included in national races of Myanmar'.⁶⁴ In a letter addressed to the Consular Corps based in Hong Kong, Ye

⁵⁸ HRW, *supra* note 27 at 27.

⁵⁹ Document FL-10 (on file with authors).

⁶⁰ FIDH, *supra* note 38 at 19.

⁶¹ Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro', *supra* note 24 at para. 79.

⁶² The text of the law is available at http://burmalibrary.org/docs/pyithu_hluttaw_election_law.htm.

⁶³ Although curiously the Burmese regime permitted the Rohingya to vote in the 1990 General Election and in the 2008 Constitutional Referendum. However the ability to vote on these occasions was on the basis of self-interest as opposed to a regularized status.

⁶⁴ 'Rohinja [sic] not included in national races of Myanmar', *The New Light of Myanmar* (29 January 2009).

Myint Aung of the Myanmar Consulate responded to the international outcry in relation to the flight of the Rohingya “boat people”⁶⁵ by stating that:

In reality, Rohingya are neither “Myanmar People” nor Myanmar’s ethnic group. You will see in the photos that their complexion is “dark brown”. The complexion of Myanmar people is fair and soft, good looking as well. (My complexion is a typical genuine one of a Myanmar gentlemen and you will accept that how handsome your colleague Mr. Ye is). It is quite different from what you have seen and read in the papers (they are as ugly as ogres).⁶⁶

As has been consistently demonstrated throughout this Report (and specifically addressed in chapter V on the crime against humanity of persecution), the acts and policies (both implicit and explicit) perpetrated against the Rohingyas are fundamentally based on ethnic, racial and religious discrimination. The 1982 Law’s deliberate targeting of the Rohingyas is the most explicit representation of this discrimination. Such a conclusion finds ample support in the findings of successive Special Rapporteurs on the Situation of Human Rights in Myanmar and the United Nations General Assembly, who have repeatedly called on the Burmese Government to, ‘[r]epeal discriminatory legislation and avoid discrimination practices particularly in Northern Rakhine State, where a large part of the Muslim community has been deprived of citizenship and movement for many years’.⁶⁷

The citizenship issue is central to any resolution of the situation of the Rohingyas. As it currently stands, the position of the Rohingyas as stateless directly precipitates their forcible displacement from and within North Arakan State; it was central to their mass displacement in 1992 and continues to be the primary factor leading to their flight from the territory.

This Section opened by stating that all violations flow from the denial of citizenship and this is particularly true with respect to the commission of the crimes against humanity of deportation and forcible transfer. The most obvious violations to examine are those which directly give rise to forcible displacement: restrictions on freedom of movement, land confiscation, and forced relocation/eviction.

Restrictions on Freedom of Movement

The classification of the Rohingyas as non-citizens has a profound impact on their ability to move freely within North Arakan State and the interior of Burma generally. Despite the fact that they are not officially recognised as foreigners, the SPDC subject

⁶⁵ See Chapter II (Introduction).

⁶⁶ Consulate General of the Union of Myanmar, Hong Kong, ‘Letter of the, to All Heads of Mission, Consular Corps, Hong Kong and Macau SAR’, (9 February 2009), available at <http://asiapacific.anu.edu.au/newmandala/wp-content/uploads/2009/02/the-consul-generals-letter.pdf>.

⁶⁷ See for example: ‘Situation of Human Rights in Myanmar: Note by the Secretary-General – Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana’, *supra* note 1 at para. 101(a); Human Rights Council, ‘Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro’, *supra* note 24 at para. 78; Human Rights Council, ‘Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro’, *supra* note 3 at para. 59.

the Rohingyas to the requirements provided by the 1864 Foreigners Act (amended in 1940) for all their movement within Burma. The Act provides for a strict licensing system:

Section 10: No foreigner shall travel in or pass through any part of the Union of Burma in which all the provisions of this act are for the time being in force without a license.

Section 12: Every such license shall state the name of the person to whom the license is granted, the nation to which he belongs, the district or districts through which he is authorized to pass or the limits within which he is authorized to travel, and the period if any during which the license is intended to have effect.⁶⁸

The net effect of the Act is that Rohingyas who wish to travel from one village to another, or from township to township, or indeed to any part of the country must apply to the relevant authority (be it the VPDC, TPDC, or SPDC) for a license or permit. The procedure for obtaining a license is often expensive – both in terms of application fees and the bribe required – and can take up to two months to be processed with no guarantee of a positive outcome.⁶⁹ It appears practically impossible to secure a license to leave Arakan State unless the individual is willing to pay an extortionate sum of money.⁷⁰ The strict control of movement makes it extremely difficult if not almost impossible for Rohingyas to conduct trade between villages and townships which has resulted in situations of extreme poverty.⁷¹ The authorities therefore exercise tight control over Rohingya patterns of movement. The establishment of the NaSaKa in 1992 ensured that there would not be another mass exodus of Rohingyas from Arakan State along the lines of those that were witnessed and condemned by the international community in 1978 and 1992. Existing literature suggests that the very object and purpose of the NaSaKa is to administer the unofficially sanctioned policy of widespread and systematic human rights violations against the Rohingyas while also closely regulating the flow of Rohingyas attempting to flee across the border into Bangladesh. This policy conceals the fact that since the 1990s, tens of thousands of Rohingyas have fled Burma (with over 200,000 Rohingyas now in Bangladesh) in what can only be described as an ‘invisible exodus’.⁷²

Land Confiscation: Militarization and Construction of “Model Villages” in Arakan State

The policies and legislation that give rise to increased militarization and to the construction of model villages throughout Burma generally is outlined above. However, on examining these policies with respect to the Rohingyas specifically, it is evident that compared with Buddhist Rakhines they are disproportionately affected by their implementation. The construction of model villages throughout Burma is linked to the

⁶⁸ Myanmar [Burma] Foreigners Act 1864 (12 February 1864) at Sections 10 and 12, available at <http://www.unhcr.org/refworld/country,,NATLEGBOD,,MMR,,3ae6b54c4,0.html>.

⁶⁹ FIDH, *supra* note 38 at 19.

⁷⁰ FIDH, *ibid.* For more details on the restriction of movement of the Rohingya community see also Amnesty International (AI), *supra* note 54 at 13ss.

⁷¹ See generally: IDEA International Institute and IHLCA Project Technical Unit, ‘Integrated Household living Conditions Survey in Myanmar: Poverty Profile’, (June, 2007).

⁷² See FIDH, *supra* note 38 at 21.

“Four Cuts” policy discussed earlier; the rationale is to populate ethnic insurgent populations with Burman communities. In some quarters this practice has been referred to variously as colonization or more radically “Burmanization”, which aims to bring about the ethno-homogenization of the entire population of Burma in terms of language, religion and wider cultural practices.⁷³

Since 1990, over 40 model villages have been constructed in the North Arakan Townships of Maungdaw, Buthidaung and Ruthidaung.⁷⁴ Each model village is planned so as to accommodate 100 families with each family being allocated a three-acre plot of land. Therefore since 1990, over 12,000 acres (or close to 20 square miles) of land have been allocated for the construction of model village settlements. Land for the construction of these villages is usually obtained via recourse to the 1953 Land Nationalization Act referred to above. The Act allows local authorities to demand that the land be used for a specific purpose, such as for example the cultivation of commercial crops, or rice quotas; should the occupier of the land fail to comply with such demands the authorities will feel that it is within their rights to confiscate the land.⁷⁵ Once the order for the construction of a model village is made, the VPDC Chairman will begin confiscating land, often citing arbitrary reasons or by simply stating that their right to occupy the land has been rescinded.⁷⁶ Confiscations are not subject to any formal procedures meaning that there is no right of appeal. The confiscated land will then be distributed amongst the “model villagers”. The Rohingyas are often forced to provide labour and materials for the actual construction of the model villages.⁷⁷ Model villages are usually structurally superior to pre-existing Rohingya homes and are wired for electricity which is practically unheard of outside of the townships of Maungdaw, Buthidaung and Ruthidaung. Rohingya forced labour is also used to construct pagodas and schools to be utilized by the model village families.

A typical inhabitant of a model village is an urban-dwelling Burman from Rangoon or Mandalay who has been relocated to the region. It has been suggested that a sizeable proportion of model villagers have themselves in fact been forcibly relocated to the region as a result of alleged criminal activity or destitution.⁷⁸ Many have no agricultural skills and it is common for the Rohingyas to lease confiscated land back off the model villagers. It is worth noting that on many occasions model villagers have been

⁷³ Burmanization professes that all the ethnic minorities of Burma are in fact simply subsets of a unified Burman identity. It's origins can be traced to pre-independence. See: R.A. Holmes, 'Burmese Domestic Policy: The Politics of Burmanization', (1967) 7 *Asian Survey* 188; B. Matthews, 'Religious Minorities in Myanmar: Hints of a Shadow', (1995) 4 *Contemporary South Asia* 287.

⁷⁴ Document FL-08, *supra* note 40.

⁷⁵ FIDH, *supra* note 38 at 21. See also Document FL-08, *supra* note 40; N. Hudson Rodd et al., *supra* note 19 at 11-13.

⁷⁶ Document FL-08, *ibid*.

⁷⁷ FIDH, *supra* note 38 at 23. See Chapter IV (Enslavement – Forced Labour).

⁷⁸ *Ibid*: 'Some of the settlers are allegedly former criminals to whom three land acres per family were given...[I]nformation gathered in the Burmese capital showed that the Yangon District Development Council (YDDC) had planned to relocate 50,000 inhabitants of the shantytown area outlying Lanthaya in order to build a new residential zone. These destitute city dwellers, who had already been forced to flee Rangoon in 1992 during the cleansing operation for the year of tourism in 1996, will now have the possibility of settling in...Arakan'.

known to flee the settlements. However, it is not known where they go or whether they are subsequently punished.⁷⁹

The heightened militarization of North Arakan State since 1994 has resulted in significant land confiscations deemed necessary for the construction and upkeep of the NaSaKa and the army. As with model villages, displaced Rohingyas are frequently forced to construct military installations or to cultivate their own land for the exclusive benefit of the military.⁸⁰

The net result of increased model villages - and garrison construction is the heightened displacement of the Rohingyas. Communities have been pushed further north towards the outer limits of Maungdaw and Buthidaung. According to FIDH:

As an essential element of the governmental policy of the colonization and militarization of North Arakan, forced relocations are diverse and mainly serve three purposes: to “clean” Arakan of its Rohingya population and concentrate it in the northern part of the districts of Maungdaw and Buthidaung; to increase the presence of Buddhist settlers, in order to “reconquer” the region through model villages; to contain the Rohingya population with increased military presence...Muslim villages outside the far North are becoming rare. Most of the Rohingyas who lived in the Kyauktaw, Mrauk-U or Minbya districts have been forcibly displaced to the North...⁸¹

While denial of citizenship facilitates forced displacement, land confiscation is but one of the modes of its physical implementation, the other is out-and-out forced relocation/eviction.

Specific Forced Relocation/Eviction

Numerous cases of the wholesale forced relocation/eviction of Rohingya villages have been documented since the early 1990s. In his report to the United Nations Commission on Human Rights in January 1995, Special Rapporteur Yokota gave some examples based on reliable sources:

[O]n 9 July 1994, some 80 persons are said to have been forced to leave Kyeintali village in southern Rakhine State; they were forced to leave on very short notice and were not allowed to bring any property with them. In another example, about 1,500 persons were said to have been forced to leave their homes in Nga-let village in Min-pya township in northern Rakhine State on 13 July 1994; these persons are said to have been rounded up by the military and put on seven boats. In July 1994, in Rakhine State, a Muslim community composed of 250 households was allegedly forced to move from their native village of Ngla, in Minbya township, to Mang Daw township. In a third example, another Muslim community composed of 250 households was reportedly forced to move from their village of Kawalong, Myauk U township, to be relocated in Mand Daw on 4 October 1994.⁸²

⁷⁹ Document FL-08, *supra* note 40.

⁸⁰ FIDH, *supra* note 38 at 23. See relevant sections of Chapter IV (Enforcement – Forced Labour).

⁸¹ FIDH, *ibid.*, at 24.

⁸² Commission on Human Rights, ‘Report on the situation of human rights in Myanmar, prepared by the Special Rapporteur, Mr. Yozo Yokota, in accordance with Commission resolution 1994/85’, UN Doc. E/CN.4/1995/65 (1995) at para. 118. Yokota also alluded to ‘resettlement policies’ in his report to the Commission on Human Rights, ‘Report on the situation of human rights in Myanmar, prepared by Mr.

Some 13 years after Yokota's report the practice of forced relocation/eviction appears to remain prevalent in North Arakan State. One refugee interviewed for this Report recounted the details surrounding the forced relocation of his entire village (Kyat-Minbyar, located near Sittwe) to Maungdaw and Buthidaung. According to this refugee, the relocation process was systematic: all families were given one week's notice of their removal from the village along with instructions not to sell or transport property. They were informed that they would be moving to newly constructed dwellings. When an explanation for their removal was sought, the District Officer of the VPDC simply stated that, following recent skirmishes with local Rakhines, it was deemed desirable for the Rohingya minority to be relocated to Maungdaw and Buthidaung. One week later, NaSaKa and local police loaded approximately 200 Rohingya families without possessions onto a ferry boat. They remained on the boat for over 24 hours without food or water, and without permission to stand or talk. Any disobedience was met with extreme violence. The Rohingya refugee stated that there were at least two fatalities over the course of that 24 hour period. After the villagers were ordered to disembark they were immediately loaded on to waiting military vehicles and transported to villages around Maungdaw and Buthidaung. They were informed by local authorities that they would be provided with homes and jobs in due course; such assurances turned out to be of little worth.⁸³ This account is consistent with other accounts of forced relocation which were obtained during the field mission and which have occurred at an alarming frequency throughout Burma since 1962.⁸⁴ The process is arbitrary, violent, and at times fatal. It is evident that forced displacement is ongoing in North Arakan State, and that these accounts are not simply historical, but may be representative of contemporary realities. They are also textbook examples of the crime of forcible transfer of populations.

B. The Prohibition of Forced Displacement under International Criminal and Human Rights Law

This section examines the factual findings in the context of the prohibition of forced displacement under the applicable international criminal and international human rights law. Whether a *prima facie* case can be made that specific acts, such as those outlined in the above testimony or campaigns such as the Nagamin or the "Four Cuts" policy, constitute the crime against humanity of deportation or forcible transfer of populations is dependent on the establishment of certain criteria enshrined in Article 7(1)(d) of the Rome Statute.

Like the majority of acts for which individual criminal responsibility is attached under international criminal law, the prohibition of forced displacement has been subject to significant development since its original appearance under Article 6(b) (formulated as the war crime of 'ill-treatment or deportation to slave labour') and 6(c)

Yozo Yokota, Special Rapporteur of the Commission on Human Rights, in accordance with Commission resolution 1992/58', UN Doc. E/CN.4/1993/37 at 133.

⁸³ Irish Centre for Human Rights, Bangladesh Fact-Finding Mission 2009, testimonies: M1-B-4 (on file with authors) [hereinafter Bangladesh testimonies].

⁸⁴ See generally, TBBC, 'Protracted Displacement', *supra* note 13.

(as the crime against humanity of deportation) of the Charter of the IMT.⁸⁵ It is worth noting that prior to its inclusion in the IMT Charter, there was no express mention of the prohibition of forced displacement in pre-existing international instruments (humanitarian or otherwise).⁸⁶

The development of the offence was significantly accelerated by the jurisprudence of the Yugoslav Tribunal. It is worth noting that prior to the establishment of the Yugoslav Tribunal and the resulting judicial creativity, there was no express acknowledgement (other than in *obiter dicta* statements) of the distinction to be made between the offences of deportation and the forcible transfer of populations. The exact nature of the distinction was mentioned in the introduction to this chapter and will be dealt with in greater detail below. With the drafting of Article 7(1)(d) of the Rome Statute,⁸⁷ forcible transfer of population was expressly recognized as a crime against humanity.

1. Deportation or Forcible Transfer of Population under Article 7(1)(d) of the Rome Statute: Does a prima facie Case Exist with Respect to the Rohingyas?

1.1 Scope of the Offence under Article 7(1)(d) as Derived from Existing Jurisprudence

The disjunctive inclusion of forcible transfer of populations in Article 7(1)(d) is merely representative of the common distinction which has been made between the two forms of the offence in the jurisprudence of the Yugoslav Tribunal and is consistent with customary international law standards.⁸⁸ The difference between the offences essentially boils down to whether or not the victim has been forced across an international border:

⁸⁵ 'Charter of the International Military Tribunal (IMT),' in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), *entered into force* 8 August 1945, 82 UNTS 280 [Charter of the IMT] at art. 6(b) and 6(c). Count 3] of the IMT Indictment was formulated in the following way: 'In certain occupied territories purportedly annexed to Germany the defendants methodically and pursuant to [a specific] plan endeavoured to assimilate these territories politically, culturally, socially and economically into the German Reich. They endeavoured to obliterate the former national character of these territories. In pursuance of these plans, the defendants forcibly deported inhabitants who were predominantly non-German and replaced them [with] thousands of German colonists.' Similar provisions are to be found in: The Charter of the International Military Tribunal for the Far East (26 April 1946), reprinted in N. Boister and R. Cryer (eds.) *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford: Oxford University Press, 2008) at 8, art. 5(c); and Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December 1945, (1946) 3 *Official Gazette Control for Germany* 50-55 at art. II(1)(c).

⁸⁶ With respect to its position as a war crime neither the 1899, nor the 1907 Hague Regulations contain an express provision. Commenting on this, to say the least, surprising omission Georg Schwarzenberger argued that at the time of the drafting of the Regulations, 'to raise the issue of the illegality of deportation of the population of occupied territories was considered unnecessary; the illegality was taken for granted', see G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict* (London: Stevens, 1968) at 227, quoted in J.M. Henckaerts, *Mass Expulsion in Modern International Law and Practice* (The Hague: Martinus Nijhoff Publishers, 1995) at 152.

⁸⁷ Rome Statute, *supra* note 25 at Art 7(1)(d).

⁸⁸ See Roy S. Lee et al., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (New York: Transnational Publishers, 2001) at 86-88.

Both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State.⁸⁹

In other words, deportation refers to the forced removal of people from one country to another, while forcible transfer of population refers to the compulsory movement of people from one area to another *within the same State*.⁹⁰ In the present context therefore, the mass displacement of Rohingyas across the Burma-Bangladesh border would potentially fall under the offence of deportation, while the displacement of Rohingyas within North Arakan State (as precipitated by land confiscations and forced relocations/evictions, etc.) points to the possible commission of forcible transfer.

Despite the basic distinction between deportation and forcible transfer, the elements of both offences are for all intents and purposes the same.⁹¹ As the Trial Chamber of the Yugoslav Tribunal stated in the *Simić* case, ‘the legal values protected by deportation and forcible transfer are the right of the victim to stay in his or her community and the right not to be deprived of his or her property by being forcibly displaced to another location’.⁹² Both offences therefore protect the same “values”.⁹³ This contention was supported by the trial judgment in the *Krstić* case where it was acknowledged that ‘any forced displacement is by definition a traumatic experience which involves abandoning one’s home, losing property and being displaced under duress to another location’.⁹⁴

In terms of basic common underlying elements, it is settled that the common material element (*actus reus*) of the offences under Article 7(1)(d) is: (i) the displacement of persons by expulsion or other coercive acts, (ii) without grounds permitted under international law, (iii) from an area in which they are lawfully present.⁹⁵ To this we can add a general mental element (*mens rea*) requirement of

⁸⁹ *Prosecutor v. Krstić*, (Trial Judgment) IT-98-33-T (2 August 2001) at para. 521.

⁹⁰ See, G. Mettraux, ‘Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda’, (2002) 43 *Harvard International Law Journal* 237 at 287-288: ‘Deportation may be distinguished from “forcible transfer”, as the former presumes movement *beyond* the state borders, and the latter relates to displacements *within* a state’ [emphasis in the original]. See also: *Prosecutor v. Krnojelac*, (Trial Judgment) IT-97-25-T (15 March 2002) at 474; and *Prosecutor v. Stakić*, (Appeal Judgment) IT-97-24-A (22 March 2006) at paras. 278, 317.

⁹¹ C.K. Hall, ‘Article 7(1)(d) – Deportation or Forcible Transfer of Population’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (München. C.H. Beck/Hart/Nomos, 2edn. 2008) at 194-195.

⁹² *Prosecutor v. Simić et al.*, (Trial Judgment) IT-95-9-T (17 October 2003) at para. 130.

⁹³ *Prosecutor v. Milošević*, (Decision on Motion of Judgment of Acquittal) IT-02-54-T (16 June 2004) at para. 69. See *Simić et al.*, Trial Judgment, *ibid.*, at para. 123, ‘Accordingly, the Trial is satisfied that deportation and forcible transfer share the same substantial elements apart from deportation requiring that a national border must be crossed.’

⁹⁴ *Krstić*, Trial Judgment, *supra* note 89 at para. 523. See *Simić et al.*, Trial Judgment, *supra* note 92 at para. 123.

⁹⁵ G. Boas et al., *International Criminal Law Practitioner Library: Volume II – Elements of Crimes under International Law* (Cambridge. Cambridge University Press, 2008) at 69

intent to deport or forcibly transfer the victim.⁹⁶ These criteria are largely replicated in Article 7(2)(d), which simply states that:

‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.⁹⁷

Further guidance as to the full scope of Article 7(1)(d) is provided by the relevant sections of the Elements of Crimes document which is annexed to the Statute. While essentially reiterating the above underlying criteria, the Elements of Crimes does clarify the meaning to be given to the term “forced” or “forcibly”. The document states:

[T]he term “forcibly” is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person, or by taking advantage of a coercive environment.⁹⁸

This definition was adopted in full by the Trial Chamber in the *Simić* case, which added that ‘the essential element is that the displacement be involuntary in nature’, and that ‘the relevant persons had no real choice’. In other words, a civilian is involuntarily displaced if he is ‘not faced with a genuine choice as to whether to leave or to remain in the area...an apparent consent induced by force or threat of force should not be considered to be real consent’.⁹⁹

Considering the factual findings outlined above, it seems clear that the NaSaKa, the army and other organs of the SPDC use a combination of both direct physical force¹⁰⁰ and coercion manifested as fear of violence,¹⁰¹ duress and psychological oppression¹⁰² to effect the deportation *and* forcible transfer of the Rohingya population of North Arakan State. Since at least 1978, successive regimes¹⁰³ have actively sought to alter the ethnic makeup of Rohingya communities through a combination of enhanced militarization, land confiscations, forced relocations/evictions and the construction of model villages. The persistent refusal to recognize the citizenship of the Rohingyas has precipitated widespread and gross human rights violations that have left hundreds of thousands of civilians with no genuine option but to flee the territory and thousands more in a state of complete repression. For the purpose of the Rome Statute, the general

⁹⁶ *Simić et al.*, Trial Judgment, *supra* note 92 at para. 124: ‘Upon the basis of the foregoing, the following common elements need to be ascertained for a finding that an act of deportation or forcible transfer has occurred; (i) the unlawful character of the displacement; (ii) the area where the person displaced lawfully resided and the destination to which the person was displaced; and (iii) the intent of the perpetrator to deport or forcibly transfer the victim.

⁹⁷ Rome Statute, *supra* note 1 at Art 7(2)(d).

⁹⁸ Elements of Crimes, Doc. ICC-ASP/1/3, at 7, footnote 12.

⁹⁹ *Simić et al.*, Trial Judgment, *supra* note 92 at para. 125.

¹⁰⁰ Especially visible in instances of direct, physical, forced relocation such as that documented by Bangladesh testimonies, *supra* note 83: M1-B-4.

¹⁰¹ Seen for example in the threat that those refusing to comply with relocation orders will be deemed legitimate military targets – Chapter VI (Deportation or Forcible Transfer of Population).

¹⁰² Most evident in the relentless denial of fundamental human rights such as the right to a nationality and freedom of movement – Chapter VI (Deportation or Forcible Transfer of Population).

¹⁰³ I.e. Burma Social Programme Party (1962-1988), the SLORC (1988-1997) and the SPDC (1997-present).

requirements for crimes against humanity appear to have been met. The “attack” (understood as the commission of multiple prohibited acts) against the Rohingyas has been relentless since 1978. That civilian populations have been the objects of that attack is undisputable. The acts documented are clearly not isolated incidences of criminality, but rather appear to be part of a widespread *and* systematic attack against this ethnic group. The physical element of both deportation and forcible transfer are established – the Rohingyas are lawfully present in North Arakan State, their displacement has been effected by coercive means and cannot be justified under the permissible exceptions to such actions clearly laid out in international law.

The pattern of criminality stretches back to 1978 with the implementation of the Nagamin campaign and continues today in the guise of the “Four Cuts” policy. Whether these policies are potentially illustrative of the Burmese regime’s intent to ethnically cleanse/homogenize North Arakan State will be given some attention in below. However, it can be said with considerable conviction that the evidence indicates, *prima facie*, that the crimes against humanity of deportation *and* forcible transfer are being committed against the Rohingyas.

The following sections examine the factual findings further in light of supporting international human rights law, while also giving some thought to the value in, and possibility of, labelling the impugned acts and policies as part of a wider strategy of ethnic cleansing.

1.2 Why the Displacement of the Rohingyas is not Permissible under International Law

The allusion in Article 7(2)(d) of the Rome Statute to ‘grounds permitted under international law’, refers to the fact that international law does allow limited scope for the deportation of aliens from the territory of a State.¹⁰⁴ In looking at incidences of lawful displacement of populations, the Yugoslav Tribunal has typically focused on Article 49 of Geneva Convention IV Relative to the Protection of Civilians¹⁰⁵ and Article 17(1) of Additional Protocol II to the Geneva Conventions of 1949¹⁰⁶ which provide for the permissible removal/evacuation of civilian populations during periods of armed conflict for reasons of civilian security or military necessity. With such permissible

¹⁰⁴ A similar requirement was included in Article 18(g) of the 1996 Draft Code of Crimes against the Peace and Security of Mankind which spoke of ‘arbitrary deportation or forcible transfer of population’. The Commentary annexed to the Draft Code clarified what was meant by the adjective ‘arbitrary’ in this context: ‘The term “arbitrary” is used to exclude the acts when committed for legitimate reasons, such as public health or well being, in a manner consistent with international law.’ *Draft Code of Crimes Against the Peace and Security of Mankind with Commentaries*, Yearbook of the International Law Commission, 1996, volume II, Part Two at 49.

¹⁰⁵ Geneva Convention relative to the Protection of Civilian Persons in Time of War, *entered into force* 21 October 1950, 75 UNTS 287 at arts. 49, para. 2: ‘Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons do demand...Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area have ceased’. See *Stakić*, Appeal Judgment, *supra* note 90 at para. 300.

¹⁰⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims on Non-International Armed Conflicts (Protocol II), *entered into force* 7 December 1978, 1125 UNTS 609, at art. 17: ‘1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand...’

grounds comes the requirement that persons so evacuated must be ‘transferred back to their homes as soon as the hostilities in the area in question have ceased’.¹⁰⁷ Naturally, these exceptions are only applicable in the context of an armed conflict. While the SPDC may publically state that the militarization of North Arakan State is necessary in order to quell an “Islamic insurgency”, this Report has not found evidence to suggest that the region is either embroiled in a protracted armed conflict or that there is any prospect of a sustained rebellion from organizations such as the RSO.¹⁰⁸ The absence of an armed conflict therefore negates the possibility of the displacement of the Rohingya population falling within the permissible exceptions to such conduct established under the international law of armed conflict. The law of armed conflict simply does not apply in this context.

Turning instead to the relevant provisions of international human rights law, it is evident that States are, in most cases, prohibited from deporting nationals, and from deporting aliens in an arbitrary fashion. Not unsurprisingly, the tenor of this prohibition applies in large measure to the forcible transfer of populations and is inherent in the right to freedom of movement and the selection of a place of residence. In terms of concrete provisions an obvious starting point is Article 12 of the International Covenant on Civil and Political Rights (‘ICCPR’) which states¹⁰⁹:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.¹¹⁰

Paragraph 12(3) lays out the scope of permissible restrictions which may be placed on freedom of movement:

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.¹¹¹

While on the face of it the wording of Article 12(3) could be interpreted in a manner such as to justify practically all restrictions on movement, including in certain circumstances deliberate displacement, it is clear from the case-law of the United Nations Human Rights Committee that any interference with the rights derived from

¹⁰⁷ *Prosecutor v. Brđanin*, (Trial Judgment) IT-99-36-T (1 September 2004) at para. 556.

¹⁰⁸ The SPDC, in denying the presence of displaced populations, have themselves stated that ‘Myanmar is not a country in armed conflict’. U. Nyunt Maung Shein, Permanent Representative to Geneva, UN Human Rights Council, 27 September 2006, quoted by AI ‘Crimes against Humanity in Eastern Myanmar’, *supra* note 9 at 28.

¹⁰⁹ This is not to exclude the relevance of articles 13 and 17 of the UDHR, *supra* note 42: Art. 13: ‘1. Everyone has the right to freedom of movement and residence within the borders of each State. 2. Everyone has the right to leave any country, including his own, and return to his country.’ Art. 17: ‘Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property.’

¹¹⁰ ICCPR, *supra* note 44 at art. 12(1) and (2).

¹¹¹ *Ibid.*, at art. 12(3).

Article 12 must be compatible with the broad requirements of a democratic society.¹¹² To this end, General Comment 27 of the United Nations Human Rights Committee, which focuses on Article 12, further provides that:

Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.¹¹³

The wording of Article 12(3) is mirrored in the provisions of a number of regional human rights instruments such as Article 2 and 3 of Protocol 4 to the European Convention on Human Rights¹¹⁴, Article 22(3) of the American Convention on Human Rights¹¹⁵ and Article 12(2) of the African Charter on Human and Peoples' Rights.¹¹⁶ While these provisions relate to the displacement of nationals of a State, similar provisions are in place to protect against the arbitrary displacement of aliens. For instance, Article 13 of the International Covenant on Civil and Political Rights makes clear that a lawful alien may only be expelled from a State in accordance with law and shall, 'except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed' by a competent body.¹¹⁷ However, since the Rohingyas have not, *per se*, been formally and physically expelled from the territory – the SPDC preferring instead to rely on the establishment of an environment so coercive as to make flight the only option – Article 13 is not especially useful in the present context.

While Article 12(3) of the ICCPR addresses the circumstances under which a State may restrict a national's right to move freely within a territory and to leave that territory altogether, Article 12(4) provides for the correlative right to return to one's own country.¹¹⁸ It implies an absolute prohibition of enforced population transfers or mass expulsions of populations. General Comment 27¹¹⁹ maintains that the reference in Article 12(4) to 'his own country' is not limited to nationality in a formal sense:

¹¹² See generally, M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl. N.P. Engel Verlag, 2005) at 270-282.

¹¹³ 'General Comment No.27', UN Doc. CCPR/C/21/Rev.1/Add. 9, (1999) at para. 7.

¹¹⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, (1950), *entered into force* 3 September 1953, 213 UNTS 222 [hereinafter ECHR] at art. 4. Article 3 states: '1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.'

¹¹⁵ American Convention on Human Rights, (1969), *entered into force* 18 July 1978, 1144 UNTS 123 [hereinafter ACHR] at art. 22(3).

¹¹⁶ African Charter on Human and Peoples' Rights, *entered into force* 21 October 1986, OAU Doc. CAB/LEG/67/3 rev.5, at art. 12(2).

¹¹⁷ ICCPR, *supra* note 44 at art. 13. See also, ECHR Protocol 4, art. 4 which simply states, 'Collective expulsion of aliens is prohibited.' See also, ECHR Protocol 7, art. 1 and ACHR, *supra* note 115 at art. 22(9).

¹¹⁸ ICCPR, *supra* note 44 at art. 12(4) - '[n]o one shall be arbitrarily deprived of the right to enter his own country'.

¹¹⁹ The Human Rights Committee lays down its interpretation of the provisions of the ICCPR in what are called General Comments, which amount to concise explanatory memorandums, but are in effect subsidiary sources of law.

...it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of a national of a country who has been stripped of their nationality in violation of international law.¹²⁰

The fact that the Rohingyas have been persistently denied citizenship rights under Burmese law does not mean that they can automatically be considered to be unlawfully present within the territory of Burma, and that they, as a result of this denial, cannot benefit from the right to freedom of movement enshrined in Article 12(1). Despite protest to the contrary, the SPDC are in flagrant breach of Article 12 in its entirety: despite being lawfully present within the territory, the Rohingyas are denied freedom of movement by the complex travel licensing system in place; they are not “free” to leave the country but do so under coercion; and finally, the restrictions imposed on their freedom of movement are arbitrary and in no sense compatible with Article 12(3).

The permissible restrictions outlined in Article 12(3) apply equally to freedom of movement within a territory and should be viewed as protecting against the arbitrary internal displacement of persons. A better understanding of States’ minimum obligations in this respect is provided by the *Guiding Principles on Internal Displacement*. Principle 6 clearly sets out the applicable legal standards and is an especially useful tool. Paragraph 1 sets out the basic parameters of protection:¹²¹

1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.

The right is therefore not dependent on nationality, or lawful presence, but simply on “habitual residence”. Paragraph 2 gets into some specifics with respect to the scope of the prohibition. When applied to the policies pursued by the SPDC in North Arakan State (and in other ethnic minority regions) the results are distressing.

2. The prohibition of arbitrary displacement includes displacement:
 - (a) When it is based on policies of apartheid, “ethnic cleansing” or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population.

The fundamental objective of the SPDC in implementing its “Four Cuts” policy is to affect the ethnic, religious and racial make-up of certain regions. Add to this the regime of land confiscations, model village construction and forced relocations/evictions and it is difficult to come away with any other conclusion other than that ethnic cleansing is being perpetrated (this will be addressed in further detail in sub-Section (iii) below).

- (b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand.

¹²⁰ General Comment No.27, *supra* note 113 at para. 20.

¹²¹ Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2 (1998) at principle 6. Principles 7 and 8 define the protections that must be put in place in situations of lawful displacement. See also, W. Kalin, ‘Guiding Principles on Internal Displacement: Annotations’, (2000) 32 *Studies in Transnational Legal Policy* 1.

This has been discussed in detail above – international humanitarian law does not supply the SPDC with an escape clause.

- (c) In cases of large-scale development projects, which are not justified by compelling and overriding public interests.

The construction of garrisons, model villages and supporting infrastructure on confiscated civilian property can hardly be described as being in the public interest.

- (d) In cases of disasters, unless the safety and health of those affected requires their evacuation.

- (e) When it is used as a collective punishment.

Compared to the level of displacement caused by Cyclone Nargis throughout Lower Burma in May 2008, the Rohingyas and North Arakan State generally have emerged relatively unscathed from natural disasters. With respect to collective punishment, while SLORC extracted heavy reprisals following an RSO offensive in 1994,¹²² the stated rationale for the displacement of Rohingyas has not revolved around collective punishment as such.¹²³

The international legal standards guiding permissible displacement are therefore strict and not easily circumvented. The deliberate displacement of the Rohingyas finds no justification under international human rights law, it is contrary to the ICCPR, the Universal Declaration of Human Rights and the minimum standards laid down in the *Guiding Principles on Internal Displacement*. Whether it should be argued that it amounts to wholesale ethnic cleansing is another matter entirely.

2. The Link with “Ethnic Cleansing”

In examining any potential case of widespread and/or systematic deportation or forcible transfer of population, the spectre of ethnic cleansing inevitably looms large: it is the elephant in the room so to speak.¹²⁴ Before commenting on the wisdom of applying such a label to the situation of the Rohingyas, it is first important to get a clear idea of the development and international legal value of the term “ethnic cleansing”.

In the *Simić* case before the Yugoslav Tribunal, the Trial Chamber made the largely isolated remark that, ‘both deportation and forcible transfer are closely linked to the concept of “ethnic cleansing”’.¹²⁵ In terms of the specific application of the term, it has typically been ‘used to describe the policies...pursued by the various parties to the Yugoslav conflict aimed at creating ethnically homogenous territories’,¹²⁶ and despite its absence from the Genocide Convention of 1948, the term has frequently been referred

¹²² Smith, *supra* note 27.

¹²³ Guiding Principles on Internal Displacement, *supra* note 121.

¹²⁴ For an overview of ethnic cleansing see generally, W. A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge: Cambridge University Press, 2edn. 2009) at 221-234.

¹²⁵ *Simić et al.*, Trial Judgment, *supra* note 92 at para. 130.

¹²⁶ Schabas, *supra* note 124 at 221.

to as a form of, or euphemism for, genocide.¹²⁷ However, it is now generally accepted that there is no basis for the inclusion of ethnic cleansing as a form of prohibited conduct under Article II of the Genocide Convention. As the Trial Chamber in the *Stakić* case held, 'a clear distinction must be drawn between physical destruction and mere dissolution of a group'.¹²⁸

Until recently the definition of the term was the subject of significant debate; however, the judgment of the International Court of Justice (ICJ) in *Bosnia and Herzegovina v. Serbia and Montenegro* case appears to have settled the issue.¹²⁹ Here the ICJ adopted the definition originally proposed in 1992 by the Security Council's Commission of Experts on violations of humanitarian law during the Yugoslav conflict, which states: "ethnic cleansing" means rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area'. This definition reaffirms the apparent consensus that the substantive difference between ethnic cleansing and genocide is the intent underlying the act: ethnic cleansing seeks to simply remove the group (by means of forced displacement), while genocide is intent on destroying the group in whole or in part.¹³⁰ There are numerous examples of incidences of ethnic cleansing spread throughout the jurisprudence of the Yugoslav Tribunal. The *Brđanin* case is a textbook example and it is worth looking at a couple of the relevant paragraphs of the Trial Judgment in order to get a sense of what is entailed in an act of ethnic cleansing:

The Trial Chamber is satisfied beyond reasonable doubt both that the expulsions and forcible removals were systematic throughout the [Autonomous Region of Krijina], in which and from where tens of thousands of Bosnian Muslims and Bosnian Croats were permanently displaced, and that this mass forcible displacement was intended to ensure the ethnic cleansing of the region. These people were left with no option but to escape. Those who were not expelled and did not manage to escape were subjected to intolerable living conditions imposed by Bosnian Serb authorities, and which made it impossible for them to continue living there and then to seek permission to leave. Bosnian Muslims and Bosnian Croats were subjected to movement restrictions, as well as perilous living conditions; they were required to pledge their loyalty to the Bosnian Serb authorities and, in at least one case, to wear white armbands. They were dismissed from their jobs and stripped of their health insurance. Campaigns of intimidation specifically targeting Bosnian Muslims and Bosnian Croats were

¹²⁷ See: D. Petrovic, 'Ethnic Cleansing – An Attempt at Methodology', (1994) 5 *European Journal of International Law* 342; and L.L. Bruun, 'Beyond the 1948 Convention – Emerging Principles of Genocide in Customary International Law', (1993) 17 *Maryland Journal of International Law and Trade* 193.

¹²⁸ *Prosecutor v. Stakić*, (Trial Judgment) IT-97-24-T (31 July 2003) at para. 519. That is not to say that should the requisite intent to destroy the group be present that a situation of ethnic cleansing could not be said to rise to the level of an act of genocide – see *Brđanin*, Trial Judgment, *supra* note 107 at para. 977.

¹²⁹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, (Judgment) 26, February 2007 at para. 190.

¹³⁰ The ICJ explained the distinction in the following manner: 'Neither the intent, as a matter of policy, to render the area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is "to destroy, in whole or in part" a particular group, and deportation or displacement of members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement'. *Ibid.*, at para. 190.

undertaken...This process of “ethnic cleansing” was sometimes camouflaged as a process of resettlement of populations.¹³¹

It is difficult not to notice certain factual similarities linking the *Brđanin* case and the situation of the Rohingyas outlined in this chapter. However, attaching the label of “ethnic cleansing” is of more benefit from an advocacy perspective than from an international criminal law perspective. In fact, it is worth noting that the term does not appear anywhere in the Rome Statute or in the Elements of Crimes. Describing a situation as ethnic cleansing conjures up images of the worst excesses of modern history. There is no doubt that the Rohingyas are the victims of gross and systematic human rights violations, but whether attaching the essentially emotive and legally questionable term “ethnic cleansing” to their plight will necessarily result in greater awareness is questionable. Based on the evidence available, there is certainly a *prima facie* case of deportation and forcible transfer. Since at least 1978, the SPDC have persistently tampered with the ethnic make-up of the region. However, it cannot be said with any degree of certainty that the intent behind such actions is to ethnically cleanse North Arakan State. Further investigations by competent bodies may very well reveal that it is the intent, but such a conclusion is beyond the scope of this Report.

C. Preliminary Conclusions

This chapter has illustrated that generations of Rohingyas have endured repeated incidences of systematic forced displacement, which most dramatically manifested themselves in periods of mass exodus from North Arakan State in 1978 and again in 1992. At the core of this forced displacement has been the persistent refusal of successive Burmese regimes to recognize Rohingya citizenship. With the passing of the inherently and deliberately discriminatory 1982 Citizenship Law, the Rohingyas were reduced to a stateless status. One of the most startling consequences of this is that since 1994, newborn Rohingyas have not been provided with birth certificates or any other form of documentation, creating a situation whereby, as far the Burmese legal system is concerned, they do not exist. The wholesale denial of citizenship has been used as a tool by which to bring about intolerably coercive conditions which have left large numbers of Rohingya civilians with no option but to flee their homes. Aside from the creation of a coercive environment the SPDC have also used actual physical force to remove whole Rohingya communities and forcibly relocate them in the northernmost portions of the region (i.e. on the northern outskirts of Maungdaw and Buthidaung townships). Such relocations are violent and frequently result in fatalities. The Land Nationalization Act of 1953 has been used as an excuse to arbitrarily confiscate Rohingya land for the use of the military or for the construction of so-called model villages. The heightened militarization of the region since 1994, most visibly illustrated by the establishment of the now notorious NaSaKa border administration force is indicative of the SPDC's determination to fully control and dominate all aspects of Rohingya society. The construction of model villages, a practice common to a number of Burmese States, is a particularly troubling example of apparent attempts to physically alter the ethnic make-up of North Arakan State. Official statements to the effect that such projects are in the interests of societal diversity conceal the true intent which is to quell dissent and disrupt ethnic unity.

¹³¹ *Brđanin*, Trial Judgment, *supra* note 107 at paras. 551-552.

In the *Simić* case the Trial Chamber of the Yugoslav Tribunal stated that a civilian is involuntarily displaced if he or she is 'not faced with a genuine choice as to whether to leave or to remain in the area'.¹³² This is certainly the case with respect to the many thousands of Rohingyas who, having fled North Arakan State with the acquiescence of the NaSaKa, now find themselves in the precarious position of being non-registered refugees in the Cox's Bazar region of Bangladesh. These individuals are not economic migrants but rather *prima facie* victims of the crime against humanity of deportation. Likewise the thousands who have been forced from their land but who remain in the region are not "foreigners" without standing under Burmese law, but individuals collectively and arbitrarily denied citizenship and are *prima facie* victims of forcible transfer. As discussed above, the authors of this Report believe that with further investigation a solid case pointing to the widespread and systematic commission of the crimes against humanity of deportation and forcible transfer of population would be made. Whether the situation in fact amounts to ethnic cleansing is a conclusion to be reached by an institution enjoying the unconditional support of the international community.

¹³² *Simić et al.*, Trial Judgment, *supra* note 92 at para. 125.

Chapter VII: Persecution

Letter to All Heads of Missions and Consular
Corps in Hong Kong and Macau SAR,
9 February 2009

"In reality Rohingya are neither "Myanmar People" nor Myanmar's ethnic group. You will see in the photos that their complexion is "dark brown". The complexion of Myanmar people is fair and soft good looking as well. (My complexion is a typical genuine one of a Myanmar gentleman and you will accept that how handsome your colleague Mr. Ye is.) It is quite different from what you have seen and read in the papers. (They are as ugly as ogres.)"

*Ye Myint Aung
Consul-General of Myanmar in Hong Kong*

VII. PERSECUTION

Introduction

Thus far, the acts committed against the Rohingyas, all of which clearly violate the most basic norms of international human rights and international criminal law, have been largely considered in isolation, i.e., outside of a wider cumulative context. While this Report has documented individual patterns of conduct within the crimes against humanity framework, up to this point it has avoided assigning a catch-all label which may be used to describe the nature of the acts committed against the Rohingyas. This chapter, in adopting a cumulative analysis of the foregoing chapters, addresses whether or not the policies and actions of the SPDC with respect to the Rohingyas amount to the crime against humanity of persecution. The identification of a persecutory scenario (as per international criminal law), as we shall see, is dependent on a number of factors, the most crucial of which is the existence of specific discriminatory intent. In this respect it is important to bear in mind the wording of Article 7(2)(g) of the Rome Statute, which states that persecution ‘means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’.¹ Therefore the conduct documented in this Report may be considered persecutory if it can be shown that the Rohingyas were targeted on inherently discriminatory grounds. The addition of the discriminatory intent requirement sets persecution aside from the other categories of crimes against humanity.²

Section A of this chapter very briefly places the findings of the foregoing chapters within the context of the crime against humanity of persecution and will in addition consider the following categories of alleged conduct under this contextual heading: (i) arbitrary detention and other forms of severe deprivation of physical liberty, (ii) torture, (iii) murder, and (iv) other inhumane acts. Section B provides an outline of the applicable law with respect to each of the sub-sections and also of the general persecutory framework. Section C offers some conclusions relating to the existence of a *prima facie* case for the crime of persecution.

A. Factual Findings

1. The Fundamentally Discriminatory Basis of Documented Violations: Placing Forced Labour, Rape and Forcible Transfer in a Persecutory Context

The purpose of this short section is not to needlessly restate the factual findings of previous chapters on forced labour, rape and sexual violence, and forcible displacement, which are based upon the Irish Centre for Human Rights’ field mission and a range of other sources, but rather to reiterate the more significant point that the Rohingyas are the target for such treatment as a consequence of their ethnic, racial and religious make-up. The conclusions of the foregoing chapters should clearly confirm this.

¹ Rome Statute of the International Criminal Court (1998), U.N. Doc. A/CONF.183/9, entered into force 1 July 2002, 2187 UNTS 90, [hereinafter Rome Statute] at art. 7(2)(g).

² *Prosecution v. Kupreškić et al.*, (IT-95-16-T) Trial Judgment (14 January 2000) at para.636.

In chapter IV, forced labour was examined in the context both of its prevalence throughout Burma generally and then specifically with respect to the extent to which the Rohingyas are exposed to it in North Arakan State. The factual findings reveal that while the use of forced labour is a specific (if unexpressed) policy of the SPDC, its exaction in North Arakan State disproportionately affects the Rohingyas. This is apparent when the number of Rohingya victims of forced labour is compared with the number of Buddhist Rakhine victims as a percentage of population. The findings of the chapter can only be interpreted as a clear illustration of the discriminatory targeting of Rohingyas. The denial of the right of citizenship as documented in chapter 5 (deportation and forcible transfer) is both the principal embodiment of discrimination against the Rohingyas and the main catalyst for broader violations of Article 7 of the Rome Statute. As discussed at length in chapter VI, Rohingya statelessness is precipitated by ethnic, racial and religious discrimination. Their effective status as non-citizens provides the SPDC with the perfect excuse to deny fundamental rights such as freedom of movement, freedom of expression, as well as access to healthcare, education and a decent standard of living. It has been shown that the level of discrimination is such that day-to-day living conditions are made intolerable, to the extent that, over the course of the past 30 years, hundreds of thousands of Rohingyas have been left with no option but to seek refuge in nearby Bangladesh. The *prima facie* discriminatory intent with which these acts have been pursued, coupled with their widespread and systematic nature, points to the commission of the crime against humanity of persecution.

The following section examines some additional violations of fundamental rights that have not been considered elsewhere in this Report. The gravity of these violations is such that, in and of themselves, they reach the threshold of internationally criminal persecutory conduct.

2. Arbitrary Detention, Torture, Murder and Other Inhumane Acts as Enumerated under Article 7 of the Rome Statute

At the outset, it is reasonable to suggest that this subsection's express focus on four categories of what in normal parlance might be referred to as extreme conduct is a little excessive and all-embracing. However, the simple fact of the matter is that it is rare that any one such act will be perpetrated in isolation. All are enumerated acts which – provided the general requirements for the offence are fulfilled – may constitute crimes against humanity under Article 7 of the Rome Statute, and with the additional presence of discriminatory intent may amount to the crime against humanity of persecution.³

For a regrettably long time, acts of arbitrary detention, torture and other forms of ill-treatment have been acknowledged as a common occurrence in the day-to-day lives of ethnic minorities in Burma.⁴ In this respect Amnesty International has gone as far as to declare that:

³ Rome Statute, *supra* note 1 at arts. 7(1)(a) [Murder], 7(1)(e) [Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law], 7(1)(g) [Torture], and 7(1)(k) [Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health].

⁴ Amnesty International (AI), 'Myanmar: The Institution of Torture', ASA 16/24/00 (December 2000) at 1.

Torture and ill-treatment have become institutionalized in Myanmar. Patterns of torture have remained the same, although the time and place vary. Torture occurs throughout the country and has been reported for over four decades. Members of the security forces continue to use torture as a means of extracting information; to punish political prisoners and members of ethnic minorities; and as a means of instilling fear in anyone critical of the military government.⁵

Instances of torture or cruel and inhuman treatment will typically occur while an individual is being detained by a branch of the Burmese security services or is in a forced labour scenario. All too frequently such instances will lead directly to the death of the victim.⁶ Examples of such eventualities with respect to members of the Rohingya community have been documented for almost two decades now. In his report of December 1992, former Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Bacre Waly Ndiaye, highlighted the Rohingya experience:

Several reports concerned gross human rights violations committed by the Myanmar security forces against Muslims in Rakhine (Arakan) State, also referred to as Rohingyas, in what was described as a general pattern of repression against religious or ethnic minority groups. Numerous extrajudicial, summary or arbitrary executions were said to take place in the context of forced labour. Members of minority groups are reportedly taken for porter duty by the military, either as punishment for suspected involvement with armed insurgencies or simply at random. While on duty, they are said to be subjected to severe ill-treatment including deprivation of food, water and sleep, beating with bamboo sticks and rifle butts, kicking with heavy boots, burning with cigarettes or slashing with bayonets. When as a consequence of hard work under such conditions, they fall ill or become too weak to work they are reportedly killed by the military or simply left to die. The Special Rapporteur also received reports about deaths in military custody due to torture and ill-treatment.⁷

Indeed, such details have been a common feature of the reports of successive Special Rapporteurs on the Situation of Human Rights in Myanmar:

For the last six years, the Special Rapporteur has received numerous reports concerning arbitrary arrests without warrants, incommunicado detention, torture or ill-treatment in pre-trial detention, deaths in custody and very poor conditions of detention without access to adequate food and medical treatment. He has also received reports of defendants who have been denied the right to legal counsel and reports of political trials often being held in camera...The Special Rapporteur has received many allegations of villagers being severely punished outside the framework of the law because they refused to perform forced labour ...⁸

⁵ *Ibid.*

⁶ See, General Assembly, 'Situation of Human Rights in Myanmar – Note by the Secretary-General – Interim Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Yozo Yokota', UN Doc. A/49/594 (1994) at 6: 'Many other similar situations include allegations of such severe torture that the victims died as a result'.

⁷ Commission on Human Rights, 'Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur, Mr Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Resolution 1992/72', UN Doc. E/CN.4/1993/46 (1992) at para. 432.

⁸ Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro', UN Doc. A/HRC/4/14 (2007) at paras. 48 and 50.

For almost twenty years, the United Nations General Assembly has urged ‘the Government of Myanmar to ensure full respect for...the rights of persons belonging to ethnic and religious minorities, and to put an end...to the practices of torture, disappearances and summary executions’.⁹ Despite these repeated appeals such modes of conduct continue to be perpetrated with almost complete impunity, ultimately resulting in the accelerated erosion or deterioration of fundamental standards of human rights across Burma. The objective of this sub-section is to provide a general account of the widespread *and* systematic commission of acts of this nature in North Arakan State as gleaned from the field mission, while also establishing a *prima facie* case that the Rohingyas are the specific and discriminatory target for such conduct.

2.1 Arbitrary Detention or other Severe Deprivations of Physical Liberty in North Arakan State

It should be evident at this stage that gross human rights violations are to some degree committed against all communities of North Arakan State, which, aside from the Rohingyas, are comprised *inter alia* of Buddhist Rakhines, Muslim Rakhines – as distinct from Rohingyas – and Hindu Rakhines. However, the objective of this chapter (and indeed of this Report more generally) is to illustrate that the SPDC specifically targets the Rohingyas for abuse because of their ethnic, racial and religious status/make-up.

Since 1962, the Burmese Government has developed a large and complex maze of legislation which is followed or disregarded on an arbitrary basis.¹⁰ The objective of the SPDC (and SLORC before them) is to be in a position to strictly monitor and control the day-to-day activities of ordinary individuals, thereby reifying a situation of complete State-sponsored oppression. In effect the criminal justice system is used as a powerful weapon of discrimination.¹¹ While the authorities may wish to give the appearance of what might be described as a rule of law framework, in truth it is clear to all observers that this is a sham. The stark reality is that throughout Burma individuals continue to be arrested on the basis of the personal whim of authority figures, which can at times be

⁹ ‘Situation of Human Rights in Myanmar’ UN Doc. A/RES/ 50/194 (1996) at para. 11. See also: ‘Situation in Myanmar’, UN Doc. A/RES/47/144 (1993) at para. 6; ‘Situation of Human Rights in Myanmar’, UN Doc. A/RES/48/150 (1994) at para. 7; ‘Situation of Human Rights in Myanmar’, UN Doc. A/RES/49/197 (1995) at para. 11; ‘Situation of Human Rights in Myanmar’, UN Doc. A/RES/50/194 (1996) at para. 11; ‘Situation of Human Rights in Myanmar’, UN Doc. A/RES/51/117 (1997) at para. 11; ‘Situation of Human Rights in Myanmar’, UN Doc. A/RES/52/137 (1998) at para. 12; ‘Situation of Human Rights in Myanmar’, UN Doc. A/RES/53/162 (1999) at para. 10; ‘Situation of Human Rights in Myanmar’, UN Doc. A/RES/55/112 (2001) at para. 14; ‘Situation of Human Rights in Myanmar’, UN Doc. A/RES/56/231 (2002) at para. 4; ‘Situation of Human Rights in Myanmar’, UN Doc. A/RES/60/233 (2006) at para. 2(a); ‘Situation of Human Rights in Myanmar’, UN Doc. A/RES/61/232 (2007) at para. 2(a); ‘Situation of Human Rights in Myanmar’, UN Doc. A/RES/63/245 (2009) at para. 2(a).

¹⁰ See generally, Amnesty International (AI), ‘Myanmar: Travesties of Justice – Continued Misuse of the Legal System’, ASA 16/29/2005. In March 2009, Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana ‘recommended that the Government of Myanmar start reviewing and amending domestic laws that limit fundamental rights and contravene...international human rights standards’ - Human Rights Council, ‘Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana’, UN Doc. A/HRC/10/19 (2009) at paras. 89-90.

¹¹ Document G-01 (on file with authors). A confidential source has documented a number of cases in North Arakan State where a number of individuals were sentenced to long prison sentences for minor crimes or non-crimes, such as unauthorized marriage or illicit relationships.

linked to situations of personal retribution.¹² Such instances have been documented and investigated by the United Nations Working Group on Arbitrary Detention ('the Working Group'). In its submission to the United Nations Human Rights Council in 2007, the Working Group presented its findings in relation to the conviction and detention of National League for Democracy (NLD) member Su Su Nway.¹³ In 2005, Su Su Nway successfully sued the local authorities in Htan Manaing Village, Kawmoo Township, Rangoon Division for their forced labour practices. Needless to say, this was the first time such a case was brought to court and won by a plaintiff. In the immediate aftermath of this action, Su Su Nway was severely harassed by local authorities, and within three months of the judgment was arrested and convicted of besmearing the reputation of the village authorities pursuant to Articles 506 and 294B of the Myanmar Penal Code. She was sentenced to 18 months imprisonment.¹⁴ The Working Group found that the conviction was essentially politically motivated: '[T]he criminal offences [charged] against Ms. Su Su Nway – besmearing the reputation of, and swearing at the authorities – are, in the absence of any convincing argument by the Government to the contrary, indicative of the intention of the Government to unduly restrict the freedom of opinion and expression of someone who dared to take an action against the authorities of the State'.¹⁵ Su Su Nway is but one of an estimated 2,100 prisoners of conscience detained throughout Burma.¹⁶

Unsurprisingly, prominent members of the NLD are amongst the most obvious targets for arbitrary detention; however such action extends to all those attempting to oppose the SPDC by whatever means.¹⁷ Politically active Rohingyas are certainly no exception. For example, in 2005, Amnesty International reported the arrest of U Kyaw Min, a member of the Rohingya-controlled National Democratic Party for Human Rights who was elected MP for Bauthidaung in the 1990 national elections. Following a trial held in secret, he was sentenced to 47 years' imprisonment for allegedly attempting to fabricate citizenship documentation. Shortly after his conviction U Kyaw Min's wife, two daughters and son were arrested and sentenced to 17 years' imprisonment, presumably on similar charges.¹⁸ It is clear that the NaSaKa and police forces operating in North Arakan State utilize the non-citizenship status of the Rohingyas as a basis for arbitrary detention. As outlined in the previous chapter on deportation and forcible transfer, the Rohingyas' non-citizens status is exploited by the local authorities as a means of placing significant constraints (through the imposition of a strict travel permit regime) on their

¹² National Coalition Government of the Union of Burma (NCGUB), *Burma Human Rights Yearbook 2008* (2009), available at

<http://www.ncgub.net/NCGUB/mediagallery/downloadc516.pdf?mid=20091123192152709>, at 35.

¹³ Human Rights Council, 'Opinions adopted by the Working Group on Arbitrary Detention', UN Doc. A/HRC/4/40/Add.1 (2007) at 50-51.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, at 51. Some four years after her conviction Su Su Nway remains incarcerated.

¹⁶ Amnesty International (AI), 'Daw Aung San Suu Kyi and Myanmar's Political Prisoners', Appeal for Action, 27 July 2009, available at <http://www.amnesty.org/en/appeals-for-action/daw-aung-san-suukyi-and-myanmars-political-prisoners>. See also, Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana', *supra* note 10 at para. 21.

¹⁷ See AI, *supra* note 10 at 14.

¹⁸ *Ibid.*, at 14. See also, Free Burma's Political Prisoners Now, 'Political Prisoner Profile – U Kyaw Min' (30 December 2009) available at www.fbppn.net/wp-content/uploads/.../Kyaw-Min-MP-30-Dec-2009.pdf. For examples of other Rohingya civil society figures that have been detained in recent years see, NCGUB, *supra* note 12 at 54.

freedom of movement. There are numerous documented incidents of Rohingyas being detained for travelling without the permits specified in Sections 10 and 12 of the 1864 Foreigners Act (amended in 1940).¹⁹ The authorities frequently detain or charge Rohingyas who have travelled without authorization under Section 5(j) of the 1950 Emergency Provisions Act which states that:

Whoever does anything with any of the following intent; that is to say:
(j) to affect the morality or conduct of the public or a group of people in a way that would undermine the security of the Union or the restoration of law and order....[will be liable for criminal prosecution].²⁰

The invocation of this particular legislation suggests that the SPDC believes that the free movement of Rohingyas within North Arakan State constitutes a genuine threat to national security. On this particular matter Amnesty International has commented that

The 1950 Emergency Provisions Act, section 5(j) does not use precise criteria to determine what constitutes a threat to national security. Amnesty International is concerned that, in the court judgments it has seen, sentences have been handed down solely on the basis of travelling without a permit, and that this would not constitute an adequate justification to condemn individuals on the basis that their actions threaten state security...Amnesty International believes that Rohingyas imprisoned solely for travelling without official permission are being punished in a discriminatory and arbitrary fashion.²¹

The arbitrary detention of Rohingyas political activists is merely the tip of the iceberg. While the detention of potentially disruptive voices is, on the basis of its undoubtedly systematic nature, an inherently political act and on the face of it may be pursued as an explicit policy of central government, the vast majority of cases of arbitrary detention in North Arakan State are in fact opportunist, with issues of motive boiling down to systematic ethnic, racial and religious discrimination. The extent and modality of arbitrary detention in North Arakan State is such that it may be described as having reached industrial proportions in so far as there is a definite pattern to the way in which typical instances of arbitrary arrest and detention will play out.

It is evident from the interviews conducted during the field mission that arbitrary arrest and detention in North Arakan State is as much about extortion as it is about imprisonment. It is not unusual for a Rohingya male to be repeatedly arrested on fabricated charges such as forgery of citizenship application documents, travelling without an appropriate permit, being married without permission, or failure to comply with a forced labour order, only for those charges to be dropped on payment of a bribe to the detaining authority.²² Indeed, numerous situations were recorded during the field

¹⁹ See Chapter VI (Deportation or Forcible Transfer of Population).

²⁰ Emergency Provisions Act [Burma Act 17], (9 March 1950) at Section 5(j). Text available at http://www.burmalibrary.org/docs6/Section_5_of_the_Emergency_Provisions_Act-en.pdf. Further detention also take place when Rohingyas visit Bangladesh and come back to Burma without the appropriate documentation or permission. These individuals are detained following Section 13 of the Burma Immigration Act. The Arakan Project indicates that this provision is usually only applied in Burma on groups such as political activists, but systematically on the Rohingya minority group. See C. Lewa, The Arakan Project (Document P-02, on file with authors).

²¹ AI, *supra* note 10 at 18.

²² Irish Centre for Human Rights, Bangladesh Fact-Finding Mission 2009, testimonies [hereinafter Bangladesh testimonies]: M27-B-1 [Payment of bribe for marriage permission]; M1-B-2 [Imprisonment

mission in which individual Rohingyas were simply arrested at random and held by the NaSaKa *without* grounds of any sort, based on false accusations or fabricated evidence, until release was secured by the payment of a bribe. Such detentions are arbitrary in the true meaning of the word and have the effect of instilling a sense in the Rohingya community that they may be arrested and detained at any time.

The industrial character of arbitrary arrest and detention is enhanced by the fact that the security forces (be they NaSaKa, police or the army) are not the only players in the system. In many instances there exists a third tier, occupied by “independent” brokers who operate outside of the security infrastructure and are usually Rohingyas who may be in positions of authority (such as VPDC Chairmen). They offer a “service” to both the detainer and the (potential) detainee, facilitating both the extraction and payment of bribes.²³ Brokers often assume an informant role, relaying to the NaSaKa the potentially exploitable activities of the local population. Should the NaSaKa choose to act on this information, the broker will approach the individual(s) in question and inform them that unless they pay a predetermined sum of money to the authorities they will be arrested with a view to subsequent prosecution. In many cases the accused will agree to pay the bribe through the broker, plus a fee to the broker for his service. By doing so, they are essentially paying a fee for their liberty and in order to stay the inevitable infliction of violence on their person. The security forces profit by obtaining guaranteed bribes with a minimum of effort. In other instances, the individuals themselves will approach the broker with a view to negotiating a bribe on their behalf, be it to avoid a period of forced labour or to obtain a travel permit or marriage permission etc. Brokers are figures of hate within their community.²⁴ However, it is not difficult to see how the industrial extraction of bribes significantly supplements the net earnings of the security forces and of the brokers prepared to take on this position. The bribe system will be returned to below when examined in the context of arbitrary taxation.

It is worth emphasizing once again that this Report does not wish to suggest that it is only the Rohingyas who are the victims of this system in North Arakan State. However, it is argued that the Rohingyas are singled out for more extreme treatment. Looking at the nature of the charges brought, the legislation cited, and the sheer volume of cases (based on results other than those arising from the field mission), it is clear that the Rohingyas are specially targeted for arbitrary arrest and detention on the basis of their non-citizenship status, which itself is the result of ethnic, racial and religious discrimination. In short, there would appear to be clear grounds for concluding that this constitutes evidence of discriminatory intent, an essential element of the crime against humanity of persecution.

for failure to provide labour and marriage permission regime]; M1-B-3 [Imprisonment for possession of “illegal” identity papers]; M26-C-1 [Imprisonment for failure to comply with forced labour order]. All of these examples involved the payment of bribes.

²³ *Ibid.*, at M2-B-3.

²⁴ *Ibid.*

2.2 Infliction of Torture and other Forms of Inhuman or Degrading Treatment or Punishment on the Rohingyas

The conditions of detention and the general treatment of detained Rohingyas is an issue of significant concern. Such concern is also of particular relevance within the context of the exaction of forced labour.²⁵ The use of torture and other forms of extreme violence which in many instances result in the death of the victim is an all-too-frequent occurrence in North Arakan State. The absence of any semblance of the rule of law has established a culture of complete impunity which extends across Burma. Former Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahangir, commented in 1999 with respect to Burma that she was 'deeply dismayed by the large number of allegations of the violation of the right to life by State actors which she continues to receive', and found '*the impunity enjoyed by these persons most abhorrent*'.²⁶ She also noted that 'many of the deaths reported occurred owing to alleged portering, forced relocations, and violence against women'.²⁷

This Section opened with the declaration that the torture and infliction of inhuman treatment or punishment on ordinary civilians is a widespread and systematic daily reality throughout Burma. The field investigation undertaken by the Irish Centre for Human Rights clearly illustrates that this statement holds firmly with regard to the specific situation of the Rohingyas. Indeed, few interviews failed to include an account of treatment which, from an international criminal and international human rights law perspective, *prima facie* amounts to torture or other inhuman or degrading treatment or punishment. For example a Rohingya woman interviewed recounted how her father was detained for questioning after challenging a VPDC land confiscation order and was subjected to extreme torture which took the form of having boiling water poured over his face and down his nostrils.²⁸ The woman also explained that her father subsequently died from his injuries.²⁹ Similar accounts are alarmingly common, as are instances of random beatings while in detention³⁰, during periods of forced labour³¹, or simply when encountering members of the security forces on a day-to-day basis.³² It is important also to bear in mind the particular exposure of female detainees to rape and other forms of sexual violence as outlined in chapter V.³³ The Rohingyas are clearly targeted for such violence and abuse on account of their ethnic minority status.

²⁵ See Chapter IV (Enlavement – Forced Labour).

²⁶ Commission on Human Rights, 'Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights Resolution 1998/68', UN Doc. E/CN.4/1999/39/Add.1 at para. 168 [emphasis added].

²⁷ *Ibid.*

²⁸ Bangladesh testimonies, *supra* note 22: M26-C-6.

²⁹ *Ibid.*

³⁰ *Ibid.*, M2-B-3.

³¹ See Chapter IV (Enslavement – Forced Labour).

³² Bangladesh testimonies, *supra* note 22: M1-B-4. See also, Amnesty International (AI), 'Union of Myanmar (Burma) – Human Rights Violations against Muslims in the Rakhine (Arakan) State', ASA 16/06/92 at 15: 'Muslims are ill-treated if they attempted to protest when the security forces attacked other Muslims, if they objected on their own behalf, if they were suspected of opposing the SLORC, and sometimes for no apparent reason at all'.

³³ See also, Amnesty International (AI), 'Myanmar: Torture of Ethnic Minority Women', ASA 16/017/2001.

The prevalence of torture, general violence and mistreatment must also be considered in light of the actual physical conditions of detention. For many years, Amnesty International and the International Committee of the Red Cross have highlighted the grossly substandard condition of Burma's prisons.³⁴ Aside from the common failure of prison authorities to provide adequate food, water or medical facilities, detainees will often be held incommunicado for long periods (which may be accompanied by shackling) or will be forced into extremely overcrowded cells which lack bedding of any kind.³⁵ In chapter IV, the conditions under which forced labour is typically exacted were examined in some detail. Prolonged periods of forced labour (i.e. for several days in a row) in which individuals are separated from their homes and families constitute situations of *de facto* detention. It is in such circumstances that the vast majority of Rohingya victims encounter torture, inhuman or degrading treatment or punishment, taking the various forms of rape, sexual assault, and common assault.³⁶ Other ethnic groups in North Arakan State do not appear to experience such conditions on remotely the same scale as the Rohingyas. Each chapter of this Report has illustrated the fact that the Rohingyas are systematically targeted on the basis of their ethnic, racial and religious status. As the previous sub-section on arbitrary detention has shown, the denial of citizenship to the Rohingyas provides the local authorities (be they NaSaKa, army or police) with a ready-made strategy for oppression. Their employment of torture and inhuman or degrading treatment or punishment is a central component of an overall policy of deliberate persecution.

2.3 Murder

It is beyond the scope of this Report to pronounce on individual cases of murder or unlawful death. However, it is sufficient to say that successive United Nations Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions, as well as successive Special Rapporteurs on the Situation of Human Rights in Myanmar, have highlighted the extent to which individual civilians are arbitrarily or unlawfully deprived of their lives at the hands of the State.³⁷ In its 2008 annual report on human rights in Burma, the

³⁴ See International Committee of the Red Cross (ICRC), 'Annual Report 2008: Myanmar' (2009), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/annual-report-2008-myanmar!OpenDocument>. It should be noted that the ICRC have been denied access to Burma's prisons since 2005; Amnesty International (AI), 'Myanmar: The Administration of Justice – Grave and Abiding Concerns', ASA 16/001/2004; and AI, *supra* note 10. For an alternative excellent examination of Burma's prison system see: Assistance Association for Political Prisoners (Burma), 'The Darkness We See: Torture in Burma's Interrogation Centres and Prisons' (2005), available at <http://www.aappb.org/>.

³⁵ See United States of America, Department of State, Bureau of Democracy, Human Rights, and Labour, '2008 Human Rights Report: Burma', available at <http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119035.htm>: 'Prison and labor camp conditions generally were harsh and life threatening...Food, clothing, and medical supplies reportedly were scarce in prisons. There were reports that authorities in some prisons forced prisoners to pay for food. Bedding often was inadequate, sometimes consisting of a single mat on the floor...HIV/AIDS infection rate in prisons reportedly were high due to communal use of syringes and sexual abuse of other prisoners.'

³⁶ See Chapter IV (Enslavement – Forced Labour).

³⁷ Human Rights Council, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Addendum – Summary of Cases Transmitted to Government and Replies Received', UN Doc. A/HRC/8/3/Add.1 (2008) at 281-283; Commission on Human Rights, 'Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights Resolution 1998/68', UN Doc. E/CN.4/1999/39/Add.1 at paras. 164-168; Commission on Human Rights, 'Extrajudicial, Summary or Arbitrary Executions: Report

United States Department of State noted that '[t]here were numerous reports that the government or its agents committed arbitrary or unlawful killings. The Government did not punish officials responsible for the deaths. In particular there were reports of extrajudicial killings and custodial deaths'.³⁸ During the course of the field investigation for this Report, a number of accounts were provided of incidents in which agencies of the SPDC, usually the NaSaKa, were allegedly responsible for the *discriminate* killing of Rohingya resident in North Arakan State. Examples ranged from deaths resulting from the use of live ammunition to disperse gatherings of Rohingyas,³⁹ to individual accounts of family members being beaten to death while performing forced labour.⁴⁰ The *2008 Burma Human Rights Yearbook*, published by the Human Rights Documentation Unit (HRDU) of the National Coalition Government of the Union of Burma (essentially representing the exiled NLD government), documents many specific cases of the alleged unlawful killing of Rohingyas.⁴¹ These cases are predominantly based on incidents reported by such online Burma news agencies as *Kaladan Press*, *Narinjara News* (both of whom focus on the situation in Arakan State), and *Mizzima News*, which rely on sources within Burma and reports from those who have recently fled the country.⁴² While the exact details of these incidents are necessarily circumspect (given the difficulties encountered in the gathering of concrete facts), it is nevertheless obvious from all sources that discriminate killings are taking place in North Arakan State. They may be referred to as discriminate simply because the vast majority of reported incidents flowing out of Arakan State (for example, as highlighted by the HRDU) overwhelmingly involve Rohingya victims.

The numbers of unlawful deaths in North Arakan State (which at times appear to amount to extrajudicial, summary or arbitrary executions) are an inevitable consequence of the ever increasing military presence in the region.⁴³ Unsurprisingly, the SPDC either denies any involvement in the unlawful killing of civilians, or seeks to justify such actions on the basis of the "Four Cuts" policy, i.e., as being necessary for the quelling of ethnic violence and unrest, carried out in the context of an armed conflict. However, as with the instigation of acts of deportation or forcible transfer, such defences (if they can be so described) do not apply to contemporary North Arakan where organized armed resistance has been virtually non-existent since the mid-1990s. In this respect the HRDU has commented that:

[D]uring 2008, as in previous years, Arakan State continued to endure widespread militarization in spite of the absence of any armed conflict or enemies on the nation's borders. Rather, the sole occupation of the military is

by the Special Rapporteur, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights Res. 1994/82', UN Doc. E/CN.4/1995/61; Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana', *supra* note 10 at paras. 96-97.

³⁸ United States of America, Department of State, *supra* note 35. The report then immediately comments on the alleged death in custody of Rohingya, Zawmir Uddin: 'On February 21st, police in Akyab, Rakhine State, severely beat Zawmir Uddin, a Rohingya who subsequently died in police custody'.

³⁹ Bangladesh testimonies, *supra* note 22: M26-C-3.

⁴⁰ *Ibid.*, M26-C- 5; M26-C-8

⁴¹ NCGUB, *supra* note 12 at 131-134.

⁴² See *Kaladan Press* at: <http://www.kaladanpress.org/v3/index.php>; *Narinjara News* at <http://www.narinjara.com/index.asp>; and *Mizzima News* (which deals with Burma generally) at: <http://www.mizzima.com/>.

⁴³ See Chapter VI (Deportation or Forcible Transfer of Population) for a more detailed account of regional militarization.

the ongoing repression of the Muslim Rohingya ethnic minority group. Throughout the year, this repression has resulted in numerous cases with the death of the victim at the hands of the SPDC...Within Arakan State, the Rohingya are confined to selected areas [i.e. North Arakan State] designated for Rohingya settlement and their movement beyond, and even within, these areas is tightly controlled by the SPDC. When caught outside of the areas which have been designated for their settlement, often regardless of whether or not they hold the correct documentation permitting them to travel, many Rohingya are shot on sight while trading, searching for food or moving between villages. Meanwhile, the Rohingya also face additional restrictions simply because of their differing religious beliefs. For example, in one instance which took place on 31 May 2008, two unidentified Rohingya villagers were shot and killed without cause or provocation by NaSaKa personnel in a bamboo forest near the Bangladesh-Burma border. After the shooting the SPDC army soldiers then took the bodies and cremated them; in direct contravention of Muslim burial rites.⁴⁴

It is almost impossible to positively verify the factual circumstances of these reports which are often based on anonymous hearsay accounts; however, their number is an obvious cause for concern and demands further investigative attention. Impunity for such acts is the order of the day across Burma. The absence of accountability and the overall lawlessness (with respect to the treatment of ethnic minorities) afforded to the various agencies of the SPDC gives rise to a factual void. We are aware of the fact that ethnic minorities, and the Rohingyas specifically, are the victims of unlawful killings, however, reliable data in terms of numbers is impossible to obtain. That said, it is evident that unlawful deaths is an inevitable consequence of the SPDC's determination to disjoin the Rohingya community in North Arakan State. The implementation of the "Four Cuts" and related policies in Arakan has almost inevitably resulted in the intentional use of lethal force against civilian Rohingyas. Such force is deliberate, discriminatory, and must be viewed as a constituent element in the commission of the crime of persecution.

3. Other Acts Constituting the Discriminatory Denial of Fundamental Rights Falling within the Scope of Article 7(i)(h) of the Rome Statute

As will be explored in more detail in Section B below, unenumerated conduct (i.e. conduct not falling directly under any of the provisions of Article 7 of the Rome Statute – murder, extermination, enslavement, deportation etc.) will be considered within the ambit of the crime against humanity of persecution provided it involves the widespread or systematic denial of a fundamental right on discriminatory grounds. In principle, the acts in question must be of comparable gravity to enumerated acts under Article 7. The following considers three issues which, it is submitted, rise to the level of persecution, namely: restrictions on the right to marry [which has been largely neglected in the literature to date], denial of freedom of religion, and the imposition of arbitrary taxation in violation of the right to an adequate standard of living.

3.1 Marriage Restrictions Imposed on the Rohingyas

The Universal Declaration of Human Rights provides that: 'Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to

⁴⁴ NCGUB, *supra* note 12 at 122 and 124.

found a family.’⁴⁵ In North Arakan State, the SPDC infringes upon and intentionally deprives the Rohingyas of this right in a discriminatory manner, by imposing restrictions and requiring that they obtain permission before marrying. Moreover, severe punishments for not respecting these restrictions are imposed on the Rohingyas. The impact of the marriage restrictions is often less well understood than other violations but constitutes an insidious violation of human rights with far-reaching and grave consequences. The field mission conducted for this Report has in fact revealed that the current marriage restrictions and the severe consequences for non-compliance are amongst the main reasons why Rohingyas flee North Arakan State.⁴⁶

In Burma, areas such as marriage, divorce and inheritance, are almost exclusively regulated by customary law. With the exception of mixed marriages, which are regulated by special laws,⁴⁷ marriages in Burma accordingly follow local traditions and customs and should be valid without further official registration or legal requirements.⁴⁸ To be accepted as validly married, Buddhist and non-Buddhist couples in Burma need to meet the requirements laid out in their own traditions. Basically, Buddhist couples mainly need to consensually cohabit together and to have reached a certain age to be accepted as lawfully married.⁴⁹ This long-standing tradition is based on the perspective that ‘regardless of the means by which a young couple are brought together, the marriage ties are social’,⁵⁰ and that open cohabitation is sufficient to symbolise and form a marriage in Burma. Hindu couples must perform marriages following old Hindu law; Christians follow their own customs including getting married in church; Muslims should marry following Islamic law. According to Islamic law, Muslim weddings do not need official registration to be valid. The wedding (*nikah*) ceremony is a private, contractual affair with no official presence necessary.

Until 1990, the Rohingyas could marry following their own tradition under Islamic law with no need for further procedure or requirements, as was the convention for all groups in Burma. In practice, this is no longer the case. The situation has changed drastically for the Rohingyas since the 1990s, as the authorities issued a Local Order

⁴⁵ Universal Declaration of Human Rights (10 December 1948) GA Res 217A (III), UN Doc A/810, 71, [hereinafter UDHR] at art. 16 (1).

⁴⁶ Bangladesh testimonies on marriage restrictions, *supra* note 22: M27-A-1; F27-A-1; F27-A-5; F27-A-6; F28-A-1; F1-A-4; M2-A-1; F2-A-1; F2-B2; M26-B-4; M7-B-1; M1-B-2; M2-B-3; M27-C-1; M27-C-3; M27-C-4; M27-C-5.

⁴⁷ See for instance Myanmar Women's Affairs Federation, ‘Rights of Myanmar Women Endowed by Myanmar Customs and Traditions’, available at www.mwaf.org.mm/Activities/Paper%20Read/Eng8.pdf at 5; SPDC, ‘Supreme Court clarifies racial inter-marriage’, available at http://www.myanmar.gov.mm/myanmartimes/no29/supreme_court.htm; B. Bellak, *Gathering Strength: Women from Burma on their Rights* (Chiangmai, Images Asia, 2002), available at http://www.burmalibrary.org/docs/Gathering_Strength.htm at 238.

⁴⁸ ‘Combined second and third periodic reports of States parties, Myanmar’, UN Doc. CEDAW/C/MMR/3 (2007) at para. 69, 190; Bellak, *ibid*, at 238-239; SPDC, *ibid*. In practice, Buddhist couples in urban areas are more frequently choosing to get married by court officials. In rural areas, however, this practice is rather rare. As noted by Bellak, at 239: ‘Village headmen and quarter heads are empowered to register marriages, but in many areas there is no written documentation.’ Regarding marriages in urban areas see Ba Saing and Wai Phyo Myint, ‘No Glitz, no Glamour in Court Marriages’ *Myanmar Times* (7-13 June 2004), available at <http://www.myanmar.gov.mm/myanmartimes/no219/MyanmarTimes11-219/036.htm>.

⁴⁹ Myanmar Women's Affairs Federation, *supra* note 47 at 4.

⁵⁰ Sein Tu, ‘Myanmar Marriage’, available at <http://www.myanmar.gov.mm/Perspective/persp1998/3-98/mar3-98.htm>.

compelling individuals in North Arakan State to seek and obtain permission prior to getting married. While the Local Order did not indicate that the rule should apply only to Rohingyas, the directive was issued to manage Muslim marriages, monitor or restrict population growth in North Arakan State, and prevent anticipated problems such as scarcity of land and resources which were perceived to be linked with the birth rate of the Rohingyas. The Local Order was not backed up by any statutory act and was never publicly distributed. In practice, the Order has only been implemented with respect to the Muslims in North Arakan State and not any other ethnic groups.⁵¹

Information gathered by organisations since 1994, and by the fact-finding mission undertaken for this Report, document the requirements included in the Order and the procedure that must be met by Rohingyas to obtain marriage authorizations.⁵² To seek marriage permission, Rohingyas must first open a file at their VPDC. This is done through payment of a fee accompanied by the submission of a number of documents. The application must include (for instance) a statement indicating that the couple will not have more than two children, and a promise that the boy or man will not take more than one wife.⁵³ To apply for marriage authorization, a couple is also required to provide photos. In recent years, Rohingya girls have been forced to show their entire face and boys to be clean-shaven when taking these pictures, both of which are inappropriate practices in their culture.

Once the requirements have been met by the couple and the marriage authorization file has been opened by the VPDC, the couple (often together with their parents) submit their application in person to the local Sector Commander's office of the NaSaKa. Harassment and abuses frequently take place at this stage, and couples are humiliated. Women are asked to remove their *hijab* or headscarf, and sometimes to show or let NaSaKa officers touch their stomachs to verify that they are not pregnant. Further physical abuses, sometimes including ones of a sexual nature, can also take place.⁵⁴ The fact-finding mission showed that abuses and arrests of family members, especially fathers, are also common when the application is submitted to NaSaKa.⁵⁵ While the procedure to seek marriage permission is officially said to be free, the field mission confirmed that the application process is difficult and very costly. One refugee stated that after paying a requested fee of 200,000 kyats for applying for the

⁵¹ C. Lewa, The Arakan Project, 'North Arakan: An Open Prison for the Rohingya in Burma' *Forced Migration Review* (April 2009), available at <http://www.fmreview.org/FMRpdfs/FMR32/FMR32.pdf> at 12; C. Lewa, The Arakan Project (Document MR-01, on file with authors); Document MR-02 (on file with authors).

⁵² Bangladesh testimonies on marriage restrictions, *supra* note 46; Lewa, The Arakan Project (Document MR-01), *ibid.*; Document MR-02, *ibid.*; National Coalition Government of the Union of Burma, *Burma Human Rights Yearbook 2007* (2008), available at <http://www.ncgub.net/NCGUB/BHRY/2007/pdf/YB2007.pdf> at 382, 698, 728; NCGUB, *Burma Human Rights Yearbook 2008*, *supra* note 12 at 544.

⁵³ This requirement of monogamy is particularly interesting given that Rohingya do practice polygamy, that polygamy is permitted in Burma under Buddhist Customary law, but does not find wide support in the Buddhist society. See for instance Myanmar Women's Affairs Federation, *supra* note 49 at 5; Bellak, *supra* note 47 at 243-244.

⁵⁴ Bangladesh testimonies, *supra* note 22: F28-A-1.

⁵⁵ *Ibid.*, M27-A-1. For instance, one of the refugee interviewed in Bangladesh explained that he was beaten and detained for 15 days after submitting a marriage application for his son. NaSaKa objected to the potential marriage, and questioned the father on the reasons why his son wanted to marry a girl from a richer family.

permission, the NaSaKa in Buthidaung made him sign a declaration professing that he did not pay anything for the process.⁵⁶ Others have been told that if asked, to declare that the money was given voluntarily. It has been reported and confirmed by the field mission that the cost of the whole process can be anywhere between 30,000 and 450,000 kyats. Some individuals were also forced to give five gallons of petrol and one cow.⁵⁷ With a daily wage of 1500 kyats and the high level of poverty and unemployment in North Arakan State, this cost represents a minimum of three months' salary. In fact, the cost of the process often exceeds what Rohingya couples can pay and due to this, families commonly enter into debt to try to obtain marriage authorization.⁵⁸ The fee is not fixed and Rohingyas are repeatedly asked for bribes by different officers of the VPDC and NaSaKa. Amongst the refugees interviewed for this Report, the parents of one particular man explained that NaSaKa refused to give the permission to marry because girl's family was wealthier than the man's.⁵⁹ Many couples were refused permission on the basis that they could not meet payment requests. This situation is a great burden for the Rohingya community and contributes to poverty. Because of these obstacles many Rohingyas are unable to marry.⁶⁰ This and the fact that the financial burden has pushed families to flee Burma were confirmed by the fact-finding mission.

NaSaKa is in charge of implementing the Local Order, dispensing marriage authorizations, and punishing Rohingyas who get married without. In some areas, marriage authorizations are processed and can be obtained within a few weeks. In others, it can take more than a year, sometimes several years. The waiting periods indicated by the refugees interviewed ranged from six months to three years. In 2005, for instance, not a single marriage authorisation was issued for almost half a year.⁶¹ The authorities appear to have a yearly quota of marriage authorizations and some reports have specified that NaSaKa authorizes only three Rohingya marriages per village every year.⁶² The implementation of the Local Order is very inconsistent and can often depend on which NaSaKa officers are on duty when a given couple go to the Sector Commander Office to submit their application. Rohingyas are constantly victims of extortion on the basis of the Local Order.

⁵⁶ *Ibid.*, M2-B-3.

⁵⁷ Bangladesh testimonies on marriage restrictions, *supra* note 46; Lewa, The Arakan Project (Document MR-01), *supra* note 51; Document MR-02, *supra* note 51; Amnesty International (AI), 'Myanmar, The Rohingya Minority: Fundamental Rights Denied' (2004), available at <http://www.amnesty.org/en/library/asset/ASA16/005/2004/en/9e8bb8db-d5d5-11dd-bb24-1fb85fe8fa05/asa160052004en.pdf> at 30.

⁵⁸ NCGUB, *supra* note 12 at 838.

⁵⁹ Bangladesh testimonies, *supra* note 22, testimonies M27-A-1; F27-A-1.

⁶⁰ AI, *supra* note 57 at 30.

⁶¹ C. Lewa, The Arakan Project, 'Issues to be Raised concerning the Situation of Stateless Rohingya Women in Myanmar (Burma): Submission to the Committee on the Elimination of Discrimination against Women (CEDAW)' (2008), available at http://www.burmalibrary.org/docs6/CEDAW_Myanmar_AP_Submission-Final-Web.pdf at 5; Lewa, *supra* note 51 at 12; C. Lewa, The Arakan Project, 'Northern Arakan/Rakhine State: a Chronic Emergency', available at <http://www.eias.org/conferences/2006/burma290306/lewa.pdf> at 1.

⁶² United States Commission on International Religious Freedom, *Annual Report*, available at <http://www.uscifr.gov/images/AR2009/final%20ar2009%20with%20cover.pdf> at 18; NCGUB, *Burma Human Rights Yearbook 2008*, *supra* note 12 at 922; NCGUB, *Burma Human Rights Yearbook 2007*, *supra* note 52 at 382; AI, *supra* note 57 at 30.

With the high cost, humiliation, length of time and frequent failure to obtain marriage permission, some couples get married under Islamic law before obtaining the official authorization. Sometimes marriages are even performed with the knowledge of the VPDC or NaSaKa officers, who will turn a blind eye in exchange for regular bribes. When caught, couples who are “illegally” married are often requested to give money to the officials instead of being officially charged for violating the Local Order.⁶³ The same system of bribes is also applied when couples or family members are arrested during the submission of applications. In addition to infringing upon the right to marry and found a family, the marriage restrictions imposed on the Rohingyas have many other detrimental consequences. Difficulties in getting marriage permission, or marriage without such authorization, also lead to unsafe abortions, and the “illegal” birth of unregistered children. With pregnancy being the obvious proof of sexual intercourse, abortions are very frequent for Rohingya couples married without authorization, and for those validly married but with more than two children. In Burma, abortion is illegal and punishable under Section 312 of the Penal Code⁶⁴ by fines and up to seven years in prison. As a result, the marriage restrictions often lead to women having repeated and unsafe abortions.⁶⁵ Women frequently self-induce miscarriages, or pay an “abortionist” to perform abortions. Many techniques are used, for instance: home-made herbal remedies, the stick technique (which involves the insertion of sticks of different sizes in the vagina and uterus), massaging or pushing, pressing and hitting the stomach and uterus.⁶⁶ Unsafe abortions cause reproductive health- and general physical problems for women. Abortions constitute one of the major causes of maternal deaths.⁶⁷

Giving birth without a valid marriage certificate, in violation of the Local Order, can lead to further problems for Rohingya parents and children. As explained by Chris Lewa, to avoid punishment for having children in these circumstances and being charged for marrying without permission, some couples ‘have registered a newborn child with another legally married couple, sometimes their own parents. Some have gone to deliver secretly in Bangladesh, abandoning their baby there.’⁶⁸ Reports indicate that to curtail this practice and ensure that parents do not register their children with other families, NaSaKa has requested that Rohingya women go to their camps at various stages of their pregnancy as well as with the baby after birth. Parents who do not have official marriage permission who choose to keep their babies are unable to register their children. There are reportedly thousands of Rohingya children in North Arakan State who are not registered because of the marriage restrictions imposed on their parents. The immediate consequence of this is that children will not be on any family list, and will need to be hidden in the paddy fields or elsewhere when inspections take place, to avoid punishment.⁶⁹ These children are likely to be specifically targeted and

⁶³ NCGUB, *supra* note 52 at 810.

⁶⁴ Penal Code, India Act XLV. 1860 (1 May 1861), available at <http://www.blc-burma.org/html/myanmar%20penal%20code/mpc.html>.

⁶⁵ Lewa, The Arakan Project, *supra* note 61 at 4; NCGUB, *supra* note 52 at 796.

⁶⁶ See more generally on methods used to perform abortions in Burma C. Maung & S. Belton, *Working our Way Back Home: Fertility and Pregnancy Loss on the Thai-Burma Border* (Mae Sot, Mae Tao Clinic, 2005), available at <http://www.burmalibrary.org/docs3/OurWay.pdf> at 42-48.

⁶⁷ *Ibid.*, at 3; NCGUB, *Burma Human Rights Yearbook 2008*, *supra* note 12 at 796; ‘Report of the Committee on the Elimination of Discrimination against Women’, Myanmar Initial Report, UN Doc. Supplement No. 38 (A/55/38) (2000) at para. 129.

⁶⁸ Lewa, The Arakan Project, *supra* note 61 at 4.

⁶⁹ NCGUB, *supra* note 12 at 698.

end up as victims of abuses from the various Burmese authorities throughout their lives. For Burmese authorities these individuals will be nonpersons, individuals with no social or legal status. These children will grow up with the inability to claim any rights: they will have constant problems accessing education or health care. Later in life, they will have no possibility of getting travel permits or marriage permission. Generally, the Rohingya children born outside of valid marriage according to the Local Order will be even more vulnerable to violence and unable to seek redress.

The Local Order is a discriminatory policy and tool used by the different levels of authority to extort money from the Rohingyas. The Local Order is implemented strictly and also appears to be freely interpreted by NaSaKa. Rohingyas reported being coerced or arrested for disregard of the Local Order on the basis that they had intimate or sexual contact, or that they were simply visiting a house in which there was an unmarried individual of the opposite sex.⁷⁰ In September 2008, for instance, a Rohingya woman was arrested by NaSaKa for ‘allegedly having a love-affair, without having permission to do so from the authorities’.⁷¹ Young unmarried boys and girls who meet are always at risk of being accused of violating the Order. NaSaKa rely on a group of informers who report non-compliant behaviour. The VPDC Chairmen must also keep a list of couples cohabiting without marriage authorization, and of couples with children beyond the permitted number of two. Hence, Rohingyas will be punished after finding themselves on these lists, following routine checks of the family lists, or sometimes after simply being denounced by neighbours for miscellaneous reasons. It has been reported that at other times special checks will be arranged, seemingly for profit, specifically targeting unauthorized married couples. The Local Order compelling Rohingyas to obtain permission before marrying does not provide any details regarding punishment or penalties, and does not lay down the possible consequences for failing to obey the directives. In practice, failure to comply leads to harsh punishment, including detention and imprisonment.

Two provisions of the Penal Code⁷² are often used to prosecute Rohingyas for non-compliance with the Local Order. Following Section 493 of the Penal Code, Rohingya men are accused of living with women and making them falsely believe that they are lawfully married. The provision reads:

Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him, and to cohabit or have sexual inter-course with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.⁷³

Rohingya men in North Arakan State are commonly prosecuted under this provision for violating the Local Order and marrying under Islamic law without official authorization. The prison sentence usually given for cohabitation with an “unauthorized wife” appears to be on average four to five years, but many Rohingyas are given the maximum sentence of ten years.⁷⁴ Following the second provision Rohingyas are usually

⁷⁰ *Ibid.*; Bangladesh testimonies, *supra* note 22: M1-B-2.

⁷¹ NCGUB, *supra* note 12 at 810.

⁷² Penal Code, *supra* note 64.

⁷³ *Ibid.*, Chapter XX ‘Offences Relating to Marriage’, s. 493.

⁷⁴ Lewa, The Arakan Project (Document MR-01), *supra* note 51; Document MR-02, *supra* note 51

prosecuted and detained for the maximum time of six months, on the basis of disobeying ‘an order promulgated by a public servant’.⁷⁵ Reports indicate that there are dozens of Rohingyas in each village in North Arakan State who are or have been imprisoned for unauthorized marriages. In fact, it has been advanced that in one of the prisons in North Arakan State, Rohingya convicts serving time for prosecutions relating to the Local Order account for almost half of the inmates.⁷⁶ Imprisonment can sometimes be avoided in exchange for bribes. Many Rohingyas have in fact been brought to prison on the basis of the Local Order and kept there, without being formally charged, until they paid substantial bribes to be released.

In recent years, a small number of individuals sentenced to prison for behaviour that was considered to be non-compliant with the Local Order have successfully appealed their sentences. Cases of deceitful cohabitation were overturned on the basis of criminal procedures⁷⁷ and the initiation of criminal prosecutions without any complaints from the supposedly aggrieved women (in this case Rohingya women cohabiting with their husbands following marriages under Islamic law but without official permission).⁷⁸ In practice, many Rohingyas cannot afford legal representation and as a result have no choice but to serve their sentences. In other cases where appeals have been lodged, Courts did not overturn the decisions related to the marriage authorization Order, but merely reduced the sentences by half. While the decisions of the Supreme Court are evidently an encouraging step towards correcting the violations of the right to marry and found a family, in reality these decisions have not thus far had a significant impact on the Rohingya community. In other words, although the Courts have reduced and overturned some sentences, the predicaments created by the Local Order have not been tackled, and the legality and underlying problems of this directive remained unexamined.

As noted at the beginning of this section, the right to marry and found a family is protected under international human rights law. In Burma, Buddhists and other ethnic groups can marry following their own customs, religious or secular, as marriage is considered a private affair, with no need for official endorsement. The situation is completely different for the Rohingyas. The Local Order on marriage authorization constitutes a discriminatory policy, and its implementation is an act of persecution constituting intentional and severe deprivation of fundamental rights of Rohingyas. This violation has been recognized as such by the international community, including United Nations bodies which called on Burma ‘to lift the orders concerning marriage authorization and restriction of pregnancy’.⁷⁹ In North Arakan State the Burmese authorities infringe upon the right to marry and intentionally deprive the Rohingyas of this right in a discriminatory manner. As noted by Chris Lewa: ‘This discriminatory order and its predatory application are deliberately imposed to control the birth rate

⁷⁵ Penal Code, *supra* note 64, Chapter X ‘Contempts of the Lawful Authority of Public Servants’, s. 188

⁷⁶ Document MR-02, *supra* note 51.

⁷⁷ Code of Criminal Procedure (1898), available at http://www.blc-burma.org/html/Criminal%20Procedure%20Code/cpc_index.html, s. 198. ‘Situation of Human Rights in Myanmar, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar’, UN Doc. A/64/318 (2009) at para. 75.

⁷⁸ *Ibid.*, para. 76.

⁷⁹ ‘Concluding observations of the Committee on the Elimination of Discrimination against Women - Myanmar’, UN Doc. CEDAW/C/MMR/CO/3 (2008) at para. 43.

and to limit expansion of the Rohingya population.’⁸⁰ With the Local Order being exclusively applied in relation to the Rohingyas, it is clear that the limitations on the right to marry and found a family are imposed on the basis of their race or religion. This persecutory act does not only constitute an international crime, but, as revealed by the fact-finding mission, also contributes to poverty, the decline of the Rohingya community, and its exodus to Bangladesh. Rohingya society is very conservative and the marriage restrictions imposed necessarily represent a grave problem for the group. Interviews show that amongst all the violations committed against them, the marriage restrictions are one of the main factors in the Rohingyas’ decision to flee their country. Because of these restrictions, Rohingya boys and girls and their parents see no future for the young people in North Arakan State. As a result, families now frequently choose to send their sons and daughters to Bangladesh once these have reached the age of puberty. That is, of course, if they do not decide to cross the border as entire family units and face what is for many, an undoubtedly difficult future.

3.2 Denial of Freedom of Religion

A prominent manifestation of discrimination against the Rohingyas is the widespread restrictions on their freedom of religion (an issue that is obviously closely linked to the foregoing discussion on marriage restrictions). Such restrictions are a central pillar in the SPDC’s decades-long drive to ethnically, culturally, and religiously homogenize the minority regions of the Union, a policy otherwise known as Burmanization.⁸¹ While the SPDC does not expressly prohibit the practice of Islam in North Arakan State,⁸² for many years it has prohibited the construction and maintenance of mosques and in some instances has forced communities to destroy them and build pagodas in their place. Commenting on this issue, the FIDH recounted the testimony of one refugee who stated:

Numerous mosques and Koranic schools have been destroyed. Others are simply closed off. It is strictly forbidden to build new ones – even renovating or repairing a mosque is forbidden nowadays. The government also confiscated mosques and madrasas to make administrative building of them [sic]. The government is changing the topography of the North by building pagodas and monasteries all over the hills. The land is ours, but now the visitor may think it belongs to the Buddhists.⁸³

This account finds support in the recent concerns of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir:

⁸⁰ Lewa, *The Arakan Project*, *supra* note 61 at 4.

⁸¹ See discussion in Chapter VI (Deportation or Forcible Transfer of Population).

⁸² Indeed, article 362 of the 2008 Constitution states that, ‘[t]he Union also recognizes Christianity, Islam, Hinduism and Animism as the religions existing in the Union at the day of the coming into operation of this Constitution’.

⁸³ International Federation of Human Rights (FIDH), ‘Burma: Repression, Discrimination and Ethnic Cleansing in Arakan’ (2000), available at <http://www.fidh.org/IMG/pdf/arakbirm.pdf> at 26. See also C. Lewa, *The Arakan Project*, ‘Testimony to the United States Commission on International Religious Freedom’ (2007), available at http://www.uscirf.gov/index.php?option=com_content&task=view&id=2147; NCGUB, *Burma: Human Rights Yearbook 2006* (2007), available at <http://www.ncgub.net/NCGUB/BHRY/2006/pdf/yearbook2006.pdf> at 534.

Muslims claim that they are not allowed to build new mosques and to extend or repair existing mosques and madrassas. As a result, many mosques are left in a state of dilapidation. In certain places, the land of the mosque was confiscated by the authorities such as in Sittwe [capital of Rakhine State] where a Buddha museum was built on the land of the mosque. Furthermore, under the 1982 Citizenship Law, the Rohingyas were denied Myanmar citizenship, which has curtailed the full exercise of their civil, political, economic, social and cultural rights and led to various discriminatory practices... Rohingya couples need to obtain a permission to marry and, if they get married only in a religious way, which is not considered as an official marriage, they can be imprisoned. These measures are only reportedly imposed [on] Rohingya Muslims and only in North Arakan [Rakhine]. According to two new regulations from October 2005, Muslim men, with the exception of religious leaders, must shave their beard to be allowed to marry and couples need to sign a declaration they won't have more than two children.⁸⁴

Aside from the obvious effects that the closure of mosques and madrasas has on the ability of the community to worship, it has much broader societal repercussions, particularly from the perspective of the right to marry and form a family. At a practical level, this also impacts on access to primary education which, given the fact that many Rohingyas are not permitted to attend VPDC schools, is frequently provided by local religious leaders.

The active promotion of Theravada Buddhism is central to the SPDC's strategy for the suppression of ethnic insurgency. As documented in chapter VI on deportation and forcible transfer, large portions of Rohingya-occupied land have been confiscated for the construction of model villages, which not only involves the resettling of ethnic Burman in the region, but also gives rise to the deliberate construction of Buddhist pagodas. The intention behind this seems to be to lead to the dispersal and dilution of Rohingya communities. Several Rohingya refugees and asylum seekers referred to the widespread denial of their freedom of religion as the primary reason for their flight to Bangladesh.⁸⁵ As a conservative Muslim group, major aspects of Rohingya life – such as birth, death, marriage and education – are dominated by religious orthodoxy. Restrictions on freedom of religion therefore have an enormous impact on the life of the Rohingyas. The restrictions are unjustified, discriminatory and are a constituent element in the systematic persecution of the Rohingyas.

3.3 The Imposition of Arbitrary and Extortionate Taxation

Significant barriers obstruct regular domestic income-generation in North Arakan State. Perhaps the most persistent and by all accounts damaging obstacle is the constant imposition by local agents of the SPDC (predominantly the NaSaKa and the VPDC leadership) of a regime of arbitrary taxation. However, while it is worth noting that such regimes are a common feature throughout Burma (most especially in ethnic minority regions), it is evident that in the context of North Arakan State, the imposition of

⁸⁴ Human Rights Council, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir – Addendum: Summary of Cases Transmitted to Governments and Replies Received', UN Doc. A/HRC/7/10/Add.1 (2008), at paras. 181-182. See also, Commission on Human Rights, 'Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir – Addendum: Summary of Cases Transmitted to Governments and Replies Received', UN Doc. E/CN.4/2005/61/Add.1 (2005), at para. 173.

⁸⁵ Bangladesh testimonies, *supra* note 22: M26-C-1, M26-C-8, M27-C-1, M27-C-4.

arbitrary and extortionate taxes has a disproportionately and systematically more serious impact on Rohingya families.⁸⁶ The imposition of this regime is inextricably linked with the centralized funding structure – or more accurately the lack thereof – of the army, NaSaKa and police. The majority of expenses accrued by them must be covered by funds independently generated (i.e. independently of public funding) by the regional command. As is so often the case in discussions on Burma, the rule of law plays no role in terms of the means and methods adopted for the generation of local authority funds. The industrial extraction of bribes in the context of situations of arbitrary detention has been discussed above, and has been revealed as a source of considerable income for the local agencies of the SPDC. However, the primary objective of this subsection is to focus on the more systematic extraction of arbitrary and crippling taxes from each and every Rohingya family.

The most immediate impact of this taxation is on the productive- and income-generating capacity of the entire community. In its 2000 report on Burma, the FIDH stated:

In Northern Arakan [Rakhine], the economy has been appropriated by the authorities, particularly by the military and the NaSaKa. It benefits a small, privileged part of the population at the expense of a destitute population...Far from benefiting from the slight shift to a market economy, the population...faces an increasingly controlled and corrupt economic system which allows no improvement in the general standard of living...[T]he Rohingyas as well as many Arakanese are voluntarily maintained in chronic under-development as a means of political domination...All sectors – from production to transport and sale – of an economic system based on agriculture, and to a lesser degree on fishing, are severely taxed. Formal taxes, to which numerous informal ones have been added since 1992, are nothing less but a genuine racketeering of the population [sic].⁸⁷

At a basic and rather simplistic level, the survival of a community is dependent on its ability to feed itself. As noted previously, the majority of Rohingya households consist of landless casual labourers, with only 30% of the population having access to agricultural land of which the overwhelming majority is used as rice paddy.⁸⁸ Securing sufficient nutrition is therefore a year-round problem, especially during the rainy season (July-October), when opportunities for regular employment are scarce. Food security is dependent on four factors: access to agricultural land, the capacity of producers to be able to provide enough food for the population, the stability of the market, and crucially, the purchasing power of the individual.⁸⁹ It is clear that the SPDC has complete control over each of these factors.

As noted in chapter VI on deportation and forcible transfer, the 1953 Land Nationalization Act has been used as a tool to eradicate private ownership of land across Burma; all land is effectively in the hands of the State.⁹⁰ Thus, the 30% of the

⁸⁶ Document P-01 (on file with authors).

⁸⁷ FIDH, *supra* note 83 at 32.

⁸⁸ Document P-01 (on file with authors).

⁸⁹ *Ibid.*

⁹⁰ See also article 37(a) of the 2008, Constitution of the Union of Myanmar, *available at* <http://www.burmalibrary.org/show.php?cat=1140> : ‘The Union: (a) is the ultimate owner of all lands and natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union’.

population of North Arakan State with access to agricultural land do not have any title rights as such and may, at any time, be forced from the land. Aside from the ever-present prospect of land confiscation, Rohingya farmers can expect to be ordered to hand over or sell a high percentage of their paddy yield to agents of the SPDC. When the produce is purchased by SPDC's agents, the price paid is only a fraction of the actual market price and essentially amounts to a "rice tax". This "tax" regime is not uniquely imposed on the Rohingyas and is a common fact of life across Burma. However, in Arakan State, rice tax is calculated as a percentage of the land acreage available as opposed to the yield of the land.⁹¹ With respect to this calculation method, Human Rights Watch commented that it has a particularly discriminatory impact on the Rohingyas, 'who for the most part have access to only the poorest quality land where yields are much less than for [sic] good land'.⁹² This system was formally implemented by the SPDC as an official rice procurement policy. The abolishment of this system (commonly known as the "rice tax") took place in 2003 when the SPDC announced that '[s]tarting coming year the government will not buy paddy directly from farmers, and adopt the new rice trading policy ensuring free trade of the crop...'⁹³ In practice, however, the army still take rice from the Rohingyas just as they did before. Refugees and asylum seekers spoke of a situation in recent years, particularly 2008, where the crop was ravaged by a cyclone in the region, and the total yield did not cover the amount of rice requested. The situation required topping-up with rice purchased at market. Needless to say, such a scenario has led to not only a significant increase in the market price of rice (it has been estimated that the price of rice has risen 75% since 2007)⁹⁴ resulting in the poorest and most vulnerable being unable to purchase their staple foodstuff, but also to very serious shortages of supply leading to out-and-out malnutrition. Large quantities of Arakan rice is being exported to Bangladesh by the SPDC, despite the fact that almost 50% of the population have a deficient diet and a high percentage of children are experiencing moderate to acute malnutrition.⁹⁵ Ultimately, the rice tax is either: (i) used to feed the various agencies of the SPDC (particularly the army and NaSaKa), (ii) released on to the market at inflated prices, or (iii) processed for export.

Rice is not the only product that is heavily and arbitrarily taxed. Virtually all spheres of life are taxed. Other seasonal crops such as chilli peppers, onions and pulses may be randomly taxed by local authorities. The Rohingyas can expect to be taxed for (i) harvesting wood or bamboo, (ii) failing to correctly register livestock (birth, death, sale or purchase must be reported), and (iii) fishing (the catch, nets and boats are all heavily taxed). All of the above activities, from paddy farming to fishing, require the individual to obtain a specific license for that purpose, a process which may itself require the payment of hefty application fees and bribes. The extraction of these taxes is, again, entirely arbitrary and varies from village tract to village tract, apparently on the whim of local authority figures. Payment is non-negotiable and severe penalties follow any

⁹¹ Human Rights Watch (HRW), 'The Rohingya Muslims: Ending a Cycle of Exodus', September 1996, Vol.8 No. 8(c) at 71.

⁹² *Ibid.*

⁹³ 'State Ends Direct Purchase of Paddy, Adopts New Rice Trading Policy Ensuring Free Trade Starting Coming Year', *The New Light of Myanmar* (24 April 2003), available at http://www.myanmar.gov.mm/NLM-2003/enlm/apr24_h2.html.

⁹⁴ Document P-01, *supra* note 88.

⁹⁵ *Ibid.*

refusal or inability to pay. It is clear that the extraction of arbitrary taxes serves two dual functions, namely: (i) to act as the bread basket for the NaSaKa and the army, and (ii) to create and maintain intolerable living conditions for the local Rohingya community. This tax regime, coupled with the extreme restrictions placed on freedom of movement,⁹⁶ ensures the continuous depreciation of day-to-day living standards for the Rohingyas. The effect is impoverishment, starvation and frequently death. Given the conditions on the ground, it is unsurprising that thousands of Rohingyas have been left with no option but to flee. The imposition of taxes on almost all activities is arbitrary, destructive, and most definitely, discriminatory. It leads to the denial of fundamental rights and is thereby an instrument of persecution.

B. The Applicable Law with Respect to the Crime against Humanity of Persecution: The Denial of Fundamental Rights on Inherently Discriminatory Grounds

The objective of the foregoing section was not only to document prohibited acts otherwise unaddressed in the Report, but to present them in way that clearly establishes that they are being perpetrated on the basis of ethnic, racial and religious discrimination and consequently fall within the perimeters of Article 7(1)(h) of the Rome Statute which provides for:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.⁹⁷

As mentioned in the introduction to this chapter, Article 7(2)(g) clarifies this provision further by stating that persecution ‘means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’.⁹⁸ It is therefore a crime of specific intent, the only crime against humanity with such a requirement.

It is worth noting at the outset that persecution, like murder, extermination, enslavement, deportation, and other inhumane acts, was expressly provided for in the Charters of the International Military Tribunal at Nuremberg (IMT) and the International Military Tribunal for the Far East at Tokyo (IMTFE)⁹⁹. Indeed, the formulation of the offence in each of these instruments has been the subject of much scholarly debate. The virtually identical wording of Article 6(c) of the IMT Charter and Article 5(c) of the IMTFE Charter created two distinct categories of crimes against humanity: those of the “murder type” such as murder, extermination, and deportation,

⁹⁶ See Chapter VI (Deportation or Forcible Transfer of Population).

⁹⁷ Rome Statute, *supra* note 1 at art. 7(1)(h).

⁹⁸ *Ibid.*, at art. 7(2)(g).

⁹⁹ ‘Charter of the International Military Tribunal (IMT),’ in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), *entered into force* 8 August 1945, 82 UNTS 280 [Charter of the IMT] at art. 6(c); The Charter of the International Military Tribunal for the Far East (26 April 1946), reprinted in N. Boister and R. Cryer (eds.) *Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments* (Oxford. Oxford University Press, 2008) at 8, art. 5(c).

and those of the “persecutory type” which were considered acts perpetrated on specifically discriminatory grounds. The use of the disjunctive preposition “or” in the provisions clearly established this typological distinction:

Crimes Against Humanity: namely, murder, extermination, enslavement, deportation...*or* persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹⁰⁰

However, while the Nuremberg judgment entered convictions for this mode of conduct it did not elaborate in any rigorous or substantive way on its specific elements as a punishable offence. For example, the IMT judgment stated that ‘the persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal’¹⁰¹, but as the *Kupreškić* trial judgment noted, ‘none of the courts [operating in an immediate post-World War II context] endeavoured to define persecution’.¹⁰² It was not until the trial judgment in the *Tadić* case at the Yugoslav Tribunal that a workable definition was actually elaborated upon. The purpose of this section is to provide some insight into the meaning and mechanics of the Article 7(1)(h) of the Rome Statute with a view to solidifying the ultimate conclusion of this chapter that the Rohingyas are the *prima facie* victims of the crime against humanity of persecution. The following sub-sections will focus on what exactly constitutes a persecutory act.

1. What Constitutes a Persecutory Act for the Purpose of Article 7(1)(h) of the Rome Statute?

As is so often the case, it is simply impossible to fully appreciate the boundaries of an offence under international criminal law without recourse to the jurisprudence of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda. As noted above, the crime against humanity of persecution may have a faultless pedigree but its mechanics as an offence were largely a mystery until broached by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case. Drawing on the work of M. Cherif Bassiouni and Antonio Cassese, the Trial Chamber concluded that:

[I]t is evident that what is necessary is some form of discrimination that is intended to be and results in an infringement of an individual’s fundamental rights...this discrimination must be on specific grounds. Because the “persecution type” is separate from the “murder type” of crimes against humanity it is not necessary to have a separate act of an inhumane nature to constitute persecution; the discrimination itself makes the act inhumane.¹⁰³

The approach of the Trial Chamber to the question of what exactly constitutes a persecutory act was merely to comment that such acts may ‘take numerous forms, so long as the common element of discrimination in regard to the enjoyment of a basic or

¹⁰⁰ Charter of the IMT, *ibid.*, at art. 6(c).

¹⁰¹ International Military Tribunal (Nuremberg), Judgment and Sentences, (1 October 1946) reprinted in 41 *American Journal of International Law* 172 at 247.

¹⁰² *Kupreškić et al.*, Trial Judgment, *supra* note 2 at para. 598.

¹⁰³ *Prosecutor v. Tadić* (Trial Judgment) IT-94-1-T (7 May 1997) at para. 697.

fundamental right is present'.¹⁰⁴ As a mode of prohibited conduct it 'encompasses a variety of acts, including, *inter alia*, those of a physical, economic or judicial nature, that violate an individual's right to the equal enjoyment of his basic rights'.¹⁰⁵ In its judgment three years later in the *Kupreškić* case the Trial Chamber stated further:

Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights...[and] is commonly used to describe a series of acts rather than a single act. Acts of persecution will usually form part of a policy or at least of a patterned practice...[D]iscriminatory acts charged as persecution must not be considered in isolation...but examined in their context and weighed for their cumulative effect.¹⁰⁶

The Chamber refused to identify which rights constitute fundamental rights for the purposes of persecution saying that, '[t]he interests of justice would not be served by so doing, as the explicit inclusion of particular fundamental rights could be interpreted as the implicit exclusion of other rights'.¹⁰⁷ However, it made clear that alleged persecutory acts, if unenumerated, must reach the same level of gravity as the other acts prohibited as crimes against humanity under the Statute.¹⁰⁸ In this regard William Schabas has commented that, '[p]ersecution is very similar to the cognate concept of gross and systematic violations of human rights. It consists of the severe deprivation of fundamental rights on discriminatory grounds'.¹⁰⁹

For several years conflicting decisions emerged from the Yugoslav Tribunal as the original *Tadić* formulation was subjected to close scrutiny. Of particular concern was whether the physical element of the offence of persecution required that the alleged conduct discriminate in fact, i.e., that the actual intent of the perpetrator to discriminate must directly lead to a discriminatory result. The matter appears to have been settled by the definition adopted by the Trial Chamber in the *Krnojelac* judgment (subsequently endorsed by the Appeals Chamber) which provided that 'The crime of persecution consists of an act or omission which...discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law'.¹¹⁰ The Trial Chamber went on to reiterate that the requisite *mens rea* standard required that the acts be 'carried out deliberately with the intention to discriminate on one of the listed grounds'.¹¹¹

Despite the current state of the Yugoslav and Rwanda Tribunals' jurisprudence, the text of Article 7(1)(h) of the Rome Statute is distinguishable in a number of important respects. First, the specified discriminatory grounds are significantly expanded to include national, ethnic, gender or 'other grounds that are universally recognized as impermissible under international law', in addition to the political, racial and religious categories traditionally identified in the jurisprudence. This expansion is

¹⁰⁴ *Ibid.*, para. 707.

¹⁰⁵ *Ibid.*, para. 710.

¹⁰⁶ *Kupreškić et al.*, Trial Judgment, *supra* note 2 at para. 615.

¹⁰⁷ *Ibid.*, at para. 623.

¹⁰⁸ *Ibid.*, at para. 621.

¹⁰⁹ W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford. Oxford University Press, 2010) at 175.

¹¹⁰ *Prosecutor v. Krnojelac*, (Trial Judgment) IT-97-25-T (15 March 2002) at para. 431; see also *Prosecutor v. Krnojelac*, (Appeal Judgment) IT-97-25-A (17 September 2003) at para. 185.

¹¹¹ *Ibid.*, *Krnojelac*, Appeal Judgment, at para. 185.

to be welcomed and indeed is more in keeping with the scope of the anti-discrimination provisions of established international human rights instruments such as for example, Article 2 of the Universal Declaration of Human Rights¹¹², Article 2(1) of the International Covenant on Civil and Political Rights¹¹³, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights¹¹⁴, and Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination.¹¹⁵ However, this distinction is not particularly important where the Rohingyas are concerned, because persecution is based upon the most traditional of grounds.

Second, Article 7(1)(h) requires that the alleged acts have a connection with ‘any act referred to in Article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court’.¹¹⁶ This would appear, on the face of it, to place significant constraints on the scope of the conduct that may fall within the ambit of persecutory acts and is analogous with the Nuremberg standard necessitating that a crime against humanity be committed ‘in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated’.¹¹⁷ The connection requirement, seems to reject the Yugoslav and Rwanda tribunals’ desire to extend the scope of international criminal justice to acts not necessarily enumerated in their constituent Statutes, but nonetheless of such gravity as to warrant prosecution as persecutory acts. As Judge Pocar has commented, ‘[o]nce again, policies of discrimination not specifically linked to war crimes, genocide, or other crimes against humanity might go unpunished’.¹¹⁸ However, it is important to note that the Trial Chamber in the *Kupreškić* case found that ‘although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law’.¹¹⁹ This may be explained by the fact that Article 7(1)(h) was drafted prior to the emergence of most of the *ad hoc* Tribunal case-law discussed here. To date the International Criminal Court has not had an opportunity to consider the matter and it is possible, if not probable, that the jurisprudence of the *ad hoc* Tribunals will prove authoritative. Indeed, this chapter proceeds on the basis that unenumerated conduct may be considered persecutory provided it is of comparable gravity to other enumerated conduct under Article 7 and is committed with discriminatory intent. Third, and finally, it is worth recalling that as per the general requirements for crimes against humanity as outlined in chapter III, the alleged acts of persecution must be committed pursuant to or in furtherance of a State or organizational policy. These requirements are all very well, but they don’t necessarily

¹¹² UDHR, *supra* note 45 at art. 2 – ‘Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...’.

¹¹³ International Covenant on Civil and Political Rights, (1966), *entered into force* 23 March 1976, 999 UNTS 171 [hereinafter ICCPR] at art. 2(1).

¹¹⁴ International Covenant on Economic, Social and Cultural Rights, (1966), *entered into force* 3 January 1976, 993 UNTS 3 [hereinafter ICESCR] at art. 2(2).

¹¹⁵ International Convention on the Elimination of All Forms of Racial Discrimination, (1966), *entered into force* 4 January 1969, 660 UNTS 195 [hereinafter ICERD] at art. 1(1).

¹¹⁶ Elements of Crimes, Doc. ICC-ASP/1/3 at 11.

¹¹⁷ Charter of the IMT, *supra* note 99 at art. 6(c).

¹¹⁸ F. Pocar, ‘Persecution as a Crime Under International Criminal Law’, (2008) 2 *Journal of National Security Law & Policy* 354 at 364.

¹¹⁹ *Kupreškić et al.*, *supra* note 2 at para. 580.

bring us any closer to an understanding of the phrase, 'severe deprivation of fundamental rights contrary to international law'.¹²⁰

Returning to the case-law once again for guidance it is clear that the modes of conduct recognized as potentially constituting persecution may be separated into three categories:

- (i) Discriminatory acts causing physical or mental harm such as murder, extermination, starvation, enslavement, deportation, forcible transfer, torture, rape, physical violence not constituting torture, cruel and inhumane treatment or subjection to inhumane conditions, constant humiliation and degradation.¹²¹
- (ii) Discriminatory infringements on freedom such as unlawful arrest, detention, imprisonment or confinement, restrictions on freedom of movement, exclusion from certain professions, forced labour, restrictions on family life, denial or arbitrary revocation of citizenship, registration of members of a group etc.¹²²
- (iii) Offences against property for discriminatory purposes. Such acts may include seizure of assets, confiscation or destruction of private dwellings, businesses, religious buildings, cultural or symbolic buildings or means of subsistence.¹²³

There appears therefore to be a significant range of conduct that may fall within the parameters of persecution provided the requisite and crucial intent to discriminate is established. Indeed, the factual findings of this Report refer extensively to each of these three categories of conduct. The following section will place the factual findings of Section A within this legal framework in order to pronounce on the existence of a *prima facie* case for the commission of the crime against humanity of persecution against the Rohingyas of North Arakan State.

2. Applying the Facts to the Law: Does the Situation of the Rohingyas Constitute Persecution?

From the outset, the factual findings of this chapter placed special attention on the inherently discriminatory nature of the reported acts. The factual findings may be subdivided into enumerated prohibited conduct and unenumerated conduct of such gravity as to qualify as persecution. Section A placed the findings of previous chapters in a persecutory context, i.e. established that the documented conduct, namely, forced labour, rape and sexual violence, and forcible displacement was pursued with discriminatory intent. Section A also looked at four categories of conduct thus far undocumented: arbitrary detention, torture, murder and other acts constituting the

¹²⁰ Rome Statute, *supra* note 1 at art. 7(2)(g).

¹²¹ See C.K. Hall, 'Article 7(1)(h) – Persecution', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, (München. C.H. Beck – Hart – Nomos, 2edn. 2008) at 258-260.

¹²² *Ibid.*, at 260-261.

¹²³ *Ibid.*, at 261.

denial of fundamental rights. The following briefly looks at the applicable law with respect to these categories of conduct.

The first category of conduct examined was arbitrary detention, or to give it its equivalent wording under Article 7(1)(e) of the Rome Statute: 'Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law'.¹²⁴ The Elements of Crimes offers some guidance as to the meaning of this provision stating that the physical element of the offence requires that, '[t]he perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty'.¹²⁵ It continues that '[t]he gravity of the conduct', must be such, 'that it was in violation of fundamental rules of international law'.¹²⁶ Naturally such acts must be shown to have been either widespread or systematic, and in order to be considered under the rubric of persecution must have been committed on discriminatory grounds. Freedom from arbitrary detention (meaning outside of due process of law according with international standards) is a central tenet of international human rights law, and finds its most comprehensive formulation in Article 9 of the ICCPR. Article 9(1) states:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with sure procedures as are established by law.¹²⁷

The factual findings point to an abundance of evidence illustrating the widespread *and* systematic arbitrary detention of members of the Rohingya community throughout North Arakan State. The continuous denial of citizenship to the Rohingyas on the basis of ethnic discrimination exposes them to the worst excesses of the SPDC's repressive policies; systematic arbitrary detention is but one manifestation. The arbitrary detention of the Rohingyas is so prevalent as to be considered to have reached industrial levels, with arrest and detention being as much about extortion and the erosion of economic sustainability as it is about infliction of violence and abuse. While other ethnic minorities resident in North Arakan State are also victim of such treatment, this Report concludes that the Rohingyas are disproportionately targeted for such treatment on the basis of their ethnic, racial and religious make-up. The nature of the discrimination is such that the SPDC's continuous recourse to arbitrary detention must be considered persecutory in fact.

The persecutory regime of arbitrary detention appears to act as a forum for the perpetration of other prohibited acts such as torture and murder. Torture as a crime against humanity is provided for in Article 7(1)(f) of the Rome Statute. Article 7(2)(e) defines it as 'the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused'.¹²⁸ It is worth noting that in elaborating on the boundaries of the offence the Elements of Crimes states that in referring to torture, '[i]t is understood that no specific purpose need be proved'.¹²⁹ Without delving into any of the controversies surrounding this definition it

¹²⁴ Rome Statute, *supra* note 1 at art. 7(1)(e).

¹²⁵ Elements of Crimes, *supra* note 116 at 7.

¹²⁶ *Ibid.*

¹²⁷ ICCPR, *supra* note 113 at art. 9(1).

¹²⁸ Rome Statute, *supra* note 1 at art. 7(2)(e).

¹²⁹ Elements of Crimes, *supra* note 116 at 8, footnote 14.

is sufficient to say that the express omission of a purpose requirement and the inclusion of a control requirement set this definition aside from both the jurisprudence of the *ad hoc* tribunals and from the Convention on Torture.¹³⁰ Bearing in mind the findings of the field investigation and the comments of successive Special Rapporteurs on Torture, Extrajudicial, Summary or Arbitrary Executions and on the Human Rights Situation in Myanmar that have been referred to, there appears to exist a strong *prima facie* case that the Rohingyas are the targets for torture and other forms of inhuman or degrading treatment or punishment (which fall under the category of other inhumane acts under Article 7(1)(k)) on account of their ethnic, racial and religious status. Such practices are widespread *and* systematic and constitute persecution. The same may be said of instances of murder as documented in Section A above. The definition of murder under Article 7(1)(a) is as per its common meaning in domestic criminal law with the addition of the general requirements for crimes against humanity. Such acts rise to the level of persecution on account of their discriminatory nature.

Turning to the unenumerated acts rising to the level of persecution as outlined in Section A(3), it is clear that each category of conduct (marriage restrictions, denial or freedom of religion and the imposition of arbitrary taxation) is firmly prohibited under international law (including and/or international human rights and international criminal law). Looking first at the regime of marriage restrictions, Article 17 of the ICCPR provides that '[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, or correspondence, nor to unlawful attacks on his honour and reputation'.¹³¹ Article 23(2) recognizes the 'right of men and women of marriageable age to marry and to found a family'.¹³² This provision builds on Article 16(1) of the Universal Declaration of Human Rights which states that: 'Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family'.¹³³ Aside from its prohibition under international human rights law there is precedent for placing policies restricting marriage within an international criminal framework. The judgment of the International Military Tribunal at Nuremberg in discussing the persecution of the Jews refers to the series of discriminatory Nazi laws which placed significant restrictions 'on their family life and their rights of citizenship'.¹³⁴ A further example, is the *RuSHA* case – a post-World War II Control Council No. 10 case before the United States Military Tribunal at Nuremberg – which charged the accused with genocide [as it then was] as a crime against humanity implemented, *inter alia*, by '[p]reventing marriages and hampering reproduction of enemy nationals'.¹³⁵ With the drafting of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 the imposition of measures 'intended to prevent births within the group', was included as a specific means of genocide under

¹³⁰ See for example, *Prosecutor v. Furundžija*, (Trial Judgment) IT-95-17/1-T (10 December 1998); *Prosecutor v. Kunarac et al.*, (Trial Judgment) IT-96-23-T & IT-96-23/1-T; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1984), *entered into force* 26 June 1987, 1465 UNTS 112 at art. 1.

¹³¹ ICCPR, *supra* note 113 at art. 17.

¹³² *Ibid.*, at art. 23(2).

¹³³ UDHR, *supra* note 45 at art. 16 (1).

¹³⁴ International Military Tribunal (Nuremberg), Judgment and Sentences, (1 October 1946) reprinted in 41 *American Journal of International Law* 172 at 244.

¹³⁵ *United States of America v. Greifelt et al.*, (Judgment) U.S. Military Tribunal, Nuremberg (10 October 1947) in 13 *Law Reports of Trials of War Criminals* 1 at 3.

Article 2(d).¹³⁶ While not explicit, this provision could also be interpreted as including restrictions on marriage. Given the link between the crime against humanity of persecution and the crime of genocide, 'in that acts that may begin as persecution of a minority group may lead, in their most extreme manifestation, to a plan for the intentional destruction of the group',¹³⁷ it seems possible to argue that the imposition of significant and deliberately discriminatory restrictions on the marriage rights of Rohingyas constitutes persecution under Article 7(1)(h) of the Rome Statute. The inclusion of freedom to marry and form a family under the Universal Declaration and the ICCPR confirms its status as a fundamental right. It is evident from the factual findings above that restrictions placed on the exercise of this right are having a profound impact on the stability of the Rohingya community. It is posited that the effect and discriminatory nature of this conduct is of sufficient gravity to qualify as persecution.

With respect to the other conduct considered, namely, denial of freedom of religion and the imposition of extortionate taxation, there is a similarly sound basis in international law. Article 18 of the ICCPR states that everyone shall have the right to freedom of thought, conscience and religion.¹³⁸ Article 6 of the International Covenant on Economic, Cultural and Social Rights [ICESCR] acknowledges the right to work¹³⁹, while Article 7 recognizes the right of everyone to the enjoyment of just and favourable conditions of work.¹⁴⁰ Article 11 provides for the right of everyone to an adequate standard of living for himself and his family.¹⁴¹ These provisions were essentially inspired by the terms of the Universal Declaration of Human Rights and constitute fundamental tenets of international human rights law. The subjection of the Rohingyas to regimes/policies of arbitrary taxation and denial of freedom of religion on account of their ethnic, racial and religious status constitutes clearly prohibited conduct. Their effect is to contribute significantly to the erosion of day-to-day living conditions in North Arakan State which ultimately leave large portions of the community with no option but to flee the territory. The gravity threshold for persecution is therefore satisfied.

C. Preliminary Conclusions

The primary objective of this chapter was to consider the findings of this Report within a broader cumulative context, namely, under the banner of the crime against humanity of persecution. As succinctly put by Article 7(2)(g) of the Rome Statute; 'Persecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity'.¹⁴² This sentence, more perhaps than any other, accurately sums up the situation of the Rohingyas of North Arakan State. It is essential that we view the case for the commission of the crime against humanity of persecution as an expression of the overall findings of this Report.

¹³⁶ Convention on the Prevention and Punishment of the Crime of Genocide, (1948), *entered into force* 12 January 1951, 78 UNTS 277 at article 2(d).

¹³⁷ Schabas, *supra* note 109 at 175.

¹³⁸ *Ibid.*, at art. 18.

¹³⁹ ICESCR, *supra* note 114 at art. 6.

¹⁴⁰ *Ibid.*, at art. 7.

¹⁴¹ *Ibid.*, at art. 11.

¹⁴² Rome Statute, *supra* note 1 at art. 7(2)(g).

Each chapter up to this point has examined the acts, or more appropriately, crimes, committed against the Rohingyas in relative isolation. However, the common and by now very obvious element linking each mode of conduct is the fact that their commission is widespread *and* systematic *and* committed with discriminatory intent, i.e., because of the ethnic, racial and religious make-up of the Rohingyas. Each category of violation is linked to the discriminatory policies of the SPDC. From forced labour and rape to forcible displacement and extortionate taxation the Rohingyas are targeted for abuse on account of their minority status. The persecutory acts may be divided into three categories: (i) Acts causing physical or mental harm; (ii) Acts or omissions infringing individual and collective freedoms; and (iii) Acts or omissions leading to the destruction or confiscation of property. The net result is the complete erosion of basic norms of international human rights law and the removal of Rohingya dignity. In the absence of the most basic freedoms, resulting in destitution and frequently death, hundreds of thousands of Rohingyas have been left with no option but to flee their homes for the relative safety of neighbouring states. There is no single critical issue precipitating the ongoing exodus of Rohingyas from North Arakan State; the causes are cumulative and on the basis of the findings of this chapter, ultimately persecutory.

Chapter VIII: Conclusions and Recommendations

CONCLUSIONS

For decades now, the Rohingya minority group has endured grave human rights violations in North Arakan State. Hundreds of thousands have fled across the border to Bangladesh towards harsh conditions of life, or left by boat to other destinations with many losing their lives in the process. Every day, more Rohingya men, women and children are leaving Burma, fleeing the human rights abuses in the hope of finding peace and security elsewhere. This flight is often concealed; it is an on-going invisible exodus taking place under the watch of NaSaKa, which constantly ensures that the Rohingya community trickles away slowly across the border and not through another visible mass exodus that would trigger the reaction of the international community. The situation of the Rohingyas has been overlooked for years. Although accounts of the Rohingya “boat people” pushed back at sea by the Thai authorities in 2009 attracted world-wide attention, the Rohingyas’ plight and the root causes of their situation, however, still remain under-examined. This Report has attempted to identify and discuss some of these root causes.

The Report has examined the abuses and violations of human rights against the Rohingyas through the framework of crimes against humanity, as defined in the Rome Statute of the International Criminal Court. It has considered whether the violations committed in North Arakan State can be labelled as crimes against humanity, a category of crimes so grave that it prompts global concern, triggering obligations upon other States as well as the responsibility of the international community. The Report has analysed separately whether the apparent cases of enslavement, rape and sexual violence, deportation or forcible transfer of population, and persecution may constitute crimes against humanity. The Report establishes that all of these acts are occurring on a scale that may indicate the commission of this type of crime. In practice, to firmly establish that crimes against humanity are indeed committed against the Rohingyas in North Arakan State, it is not necessary that each of these acts individually constitutes a crime against humanity. Rather, the finding of crimes against humanity may be based upon a collective assessment of the acts. On the basis of the research, confidential meetings and interviews conducted with refugees and asylum seekers, it is submitted that there exists substantial material to support the conclusion that crimes against humanity are currently being committed against the Rohingya minority group in North Arakan State.

According to the Rome Statute of the International Criminal Court, crimes against humanity consist of specific punishable acts that are ‘committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’. The factual findings and legal analysis provided in this Report indicate that there is an attack against a civilian population in North Arakan State. The Rohingya victims of enslavement, rape and other enumerated acts are clearly civilians. While the SPDC has reiterated that there exists an insurgency and Islamic terrorism in North Arakan State, research, confidential meetings and interviews conducted during the fact-finding mission all lead to a rejection of the SPDC contention. They show that there has been no significant active rebel group, insurgency or armed conflict in North Arakan State for many years now. In the context of crimes against humanity an attack can be simply defined as ‘a course of conduct involving the multiple commission of acts’ enumerated in the Rome Statute. This Report found that there undoubtedly exists such

a course of conduct. These acts entail enslavement, rape and sexual violence, deportation and forcible transfer of population and persecution (including the above-mentioned acts as well as torture, murder, arbitrary detention, denial of freedom of religion, the imposition of arbitrary taxation, extortion, and marriage restrictions). These acts or crimes do not represent isolated incidents or acts perpetrated randomly by one or a few deviant individuals. Instead, they are clearly linked to a broader context, an attack or course of conduct against the Rohingya population.

To constitute crimes against humanity, an attack or course of conduct against the Rohingya population in North Arakan State must be widespread or systematic. A number of organisations, including United Nations bodies, have asserted that widespread and systematic violations are indeed committed against Rohingyas in North Arakan State. In the framework of crimes against humanity, 'widespread' generally refers to the scale of the acts or number of victims,¹ and the term 'systematic' to a pattern or methodical plan, of violations that are organized in some ways and unlikely to be occurring randomly.² These disjunctive requirements are often examined together and have tended to overlap in the international criminal jurisprudence. The international criminal tribunals have identified a number of factors that may be taken into consideration in assessing whether an attack is widespread or systematic, including '[t]he consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes'.³

The participation of State agents in the multiple commission of enumerated acts, and the facts that these crimes are often committed on the basis of direct or implicit SPDC policies strongly suggests that the acts are widespread or systematic. The crimes documented and discussed in this Report have been committed almost exclusively by soldiers, NaSaKa and police officers. These acts appear to have been perpetrated most of the time during duties, and regularly at State facilities. Documented rapes and sexual assaults have for instance frequently occurred at military or NaSaKa bases and barracks, during forced labour, during house searches and at checkpoints, as well as while women were detained. Other acts were perpetrated as a result of the implementation of SPDC's policies. Deportation and forcible transfer of population have commonly occurred following relocation orders. Infringement upon the right to marry by State agents is based upon a Local Order imposing restrictions on Rohingya marriages in North Arakan State. The self-reliance policy or policy of self-sufficiency implemented by the SPDC has compelled or encouraged the exaction of forced labour by the military as a means of providing sustenance to its members. The establishment of different national development projects and the launching of various construction projects, without adequate financial support from the SPDC budget, clearly produced forced labour in North Arakan State. Above all, the exclusion of the Rohingyas from the official national races in the 1982 Citizenship Law (which includes 135 ethnic groups), the denial of citizenship and refusal to legalise their status is the catalyst for virtually all human rights violations committed against the Rohingyas. This statelessness has allowed the

¹ *Prosecutor v. Akayesu*, (Trial Judgment) ICTR-96-4-T (2 September 1998) at para. 580.

² *Prosecutor v. Tadić*, (Trial Judgment) IT-94-1-T (7 May 1997) at para. 648; *Prosecutor v. Kunarac et al.*, (Appeal Judgment) IT-96-23-T & IT-96-23/1-T (12 June 2002) at para.94.

³ *Kunarac et al.*, *ibid.*, at para. 95.

SPDC and its agents to effectively deny or curtail the ability of the Rohingyas to exercise their basic human rights. It is the basis for most of the acts examined in this Report and a myriad of other human rights violations. Lacking legal status, Rohingyas are in effect given two real choices: to leave or to endure persistent abuse.

The research and the fact-finding mission undertaken for this Report indicate that the violations committed by different State actors against Rohingyas have commonalities and some identifiable patterns. To start with, Rohingyas are for instance recruited in the same manner to do forced labour, with each household forced to “volunteer” a family member to work for the same number of days. Accounts of rape and sexual assault by State actors also appear to have some similarities, for example commonly taking place during house checks. Interviews and research suggest that some human rights abuses can sometimes be avoided or alleviated, but only under a specific condition or circumstance - the provision of bribes. The violence inflicted by State actors in response to non-compliance of Rohingyas to requests, or non-submissiveness to abuses, appears to be another common feature of the conduct of perpetrators. Failure to provide the number of days of labour ordered for each household, resistance or attempts at assisting someone who is raped or otherwise mistreated, defying forced relocation or trying to seek redress for persecutory acts have all led to harassment, threats, beatings, killings and other mistreatment such as the retributive abuse of family members. There is a pattern of violence in the course of conduct, or attack, against Rohingyas in North Arakan State and the impact on the physical and mental health of the victims is disastrous. The means and methods used certainly suggest that State actors, specifically army and NaSaKa members, appear to be committing acts in order to assert control and show power over the Rohingya community. Whether it is a goal or rather a result of their actions, the perpetration of abuses, means and methods used by the military and NaSaKa in North Arakan State has caused, and continues to cause humiliation intimidation, and persecution of the victims, their families and the entire Rohingya community.

This Report found that the attack or course of conduct of State agents mentioned continues to affect a large number of Rohingya victims in North Arakan State. The Report found that the Rohingya minority group is specifically targeted, and that there are within this group multiple victims of crimes enumerated in the Rome Statute. From amongst the refugees and asylum seekers interviewed for this Report, at least half provided evidence of enslavement. These accounts have shown that every family must provide forced labour every week. While documenting cases of rape and sexual violence is always challenging due to the trauma and stigma attached to these abuses, approximately one in four of the individuals interviewed during the fact-finding mission had been victims or direct witnesses of rape or attempted rape and sexual assault against Rohingya women and girls in North Arakan State. Several interviews indicated that certain women and girls had been raped multiple times. It is clearly apparent that all women and Rohingya girls and women are at serious risk of becoming victims of such crimes. Examination of the crime of deportation and forcible transfer of population show that Rohingyas have been forcibly displaced on a massive scale at different times over the last decades. At present there are 200,000 unregistered Rohingyas in Bangladesh and numerous Rohingyas internally displaced in Burma. While it is impossible to know if all these individuals were deported or forcibly displaced, it is clear that a large number had to leave due to confiscation of land, forced eviction and

relocations, or on the backdrop of the denial of citizenship and a myriad of associated other human rights abuses. A significant number of Rohingyas continue to be victims of persecutory acts in North Arakan State. Whether it is torture, murder, or infringement of their freedom of religion, acts of persecution affect the whole population. In sum, there exists a body of credible material sufficient to conclude that there are a large number of acts enumerated in the Rome Statute committed against the Rohingyas; these acts are most certainly not isolated but affect virtually every Rohingya household in North Arakan State. Reports from non-governmental and international organisations including United Nations bodies support the findings of the fact-finding mission. Confidential meetings with individuals working with the Rohingyas have also confirmed the factual findings. Indeed, some have provided the opinion that the situation of the Rohingyas in North Arakan State is on a par with many of the worst human rights abuses they have seen worldwide.

Since the 1990s non-governmental organisations, international institutions and United Nations bodies have documented violations committed against the Rohingyas in North Arakan State. The UN Special Rapporteur on the Situation of Human Rights in Myanmar recently asserted:

[I]n the Northern Rakhine State (Arakan), the Sunni Muslim returnees are subjected to political, economic, religious and social repression by the authorities. The total number of Muslim residents/stateless (Rohingyas) is estimated by non-governmental sources at 728,000. They have been denied citizenship under the 1982 citizenship law, which renders them de facto stateless. They are subject to systematic discrimination and abuse, which, according to various sources, have worsened, especially with regard to the restriction of movement, arbitrary taxation, forced labour, confiscation, forced eviction and arbitrary arrest (including harassment and violence by police forces, death in custody and sexual violence). In addition, people are often harassed (house searches, confiscation of assets) or beaten by police forces, mainly during controls or at checkpoints. Cases of rape of young women and children, perpetrated by different police forces, have been reported.⁴

The wide range of documentation readily available on the issues, coupled with the numerous Burmese official statements and responses, indicates that the SPDC has clear knowledge of the allegations of multiple rapes and sexual violence, the frequent exaction of forced labour, the deportation and forcible transfer of population, as well as acts of persecution committed by its agents. Yet, the SPDC fosters impunity, undermines the Rohingya victims and shields the perpetrators. As examined in the Report, the SPDC has taken no genuine steps to adequately implement international recommendations and concluding observations. The SPDC failed to establish mechanisms that would provide redress and remedies to Rohingya victims. Failure of the authorities to effectively investigate and prosecute crimes committed against Rohingyas is common. In practice, victims who attempt to seek redress are oftentimes threatened or subjected to retaliation. The failure of the Burmese leaders to respond to the commission of crimes against Rohingyas cultivates the notion that this is acceptable, and that as far as the treatment or mistreatment of Rohingyas is concerned, State actors have *carte blanche*. The SPDC not only has knowledge of the multiple commissions of enumerated

⁴ UN Human Rights Council, 'Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro', UN Doc. A/HRC/7/18 (2008), at para. 78.

acts by State actors against Rohingyas but produces and fosters optimal conditions for the perpetration of these crimes in North Arakan State. Impunity is contributing to the plight of the Rohingyas and reveals that the SPDC actively promotes or encourages, directly or implicitly, such a course of conduct or attack.

In conclusion, this Report finds that there is a reliable body of evidence of acts constituting a widespread or systematic attack against the Rohingya civilian population in North Arakan State. These appear to satisfy the requirements under international law and confirm the perpetration of crimes against humanity. Immediate action must be taken by the international community to respond to the situation. The remoteness of and lack of access to North Arakan State, and the efforts of the SPDC to label the Rohingyas as a group of economic migrants not belonging to Burma, should not shadow the reality of the suffering of the Rohingyas. After being hounded for decades, it is time that adequate attention is given to the plight of the Rohingyas. The attention of the international community thus far appears to have been short-lived, often following incidents such as the “boat people”. The root causes of the situation of the Rohingyas must be further assessed, as failure to do so will undoubtedly lead to a bleak future for this ethnic minority group. People committing, allowing, aiding and abetting these crimes must be held accountable. The international community has a responsibility to protect the Rohingyas, to respond to the allegations of crimes against humanity and ensure that violations and impunity do not persist for another generation.

RECOMMENDATIONS

The findings in this Report are based on a fact-finding mission and on extensive research, supported by numerous reports of UN bodies and other organisations. These findings raise serious concerns that crimes against humanity have been committed against members of the Rohingya minority group in the North Arakan State of Burma. For the suffering of the Rohingya community to be brought to an end, swift and effective action is necessary. Accordingly, the following recommendations are called for:

To the State Peace and Development Council (SPDC)

- The SPDC must immediately end the persecution of the Rohingya minority and the violation of their most basic human rights. All policies and practices amounting to enslavement, restrictions on movement, forced labour, deportation, forcible transfer of population, land confiscation, rape and sexual violence, marriage restrictions, arbitrary detention, murder, torture and other ill-treatment, discrimination, and other violations as outlined in this Report and beyond, must be brought to an end without delay.
- The SPDC must ensure independent, impartial and effective investigations into all cases of abuse, and hold those responsible accountable.
- The SPDC must repeal all laws identified as forming the basis of discriminatory policies against the Rohingya minority. In particular, the SPDC must put an end to the statelessness of the Rohingya minority, and ensure its ability to live free and equal lives as full citizens of Burma.
- The SPDC must abide by its obligations under international human rights law, international criminal law, and international labour law.
- The SPDC must ensure that all members of the Rohingya minority who have suffered abuse and violation of their rights, including the large numbers who have fled Burma, are given full and free access to effective mechanisms of justice and redress.
- The SPDC must act in full cooperation and give unhindered access to all UN bodies entrusted with promoting and protecting human rights, and to any future Commissions of Inquiry or similar bodies mandated by the UN to investigate the situation in North Arakan State and the rest of Burma.
- The SPDC must provide the victims of violations with reparation, in accordance with the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (as adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005). This includes

Restitution, Compensation, Rehabilitation, Satisfaction, and Guarantees of non-repetition.

To the UN Special Rapporteur on the Situation of Human Rights in Myanmar

- The Special Rapporteur should continue to advocate the establishment of a UN Commission of Inquiry with a specific fact-finding mandate to address the question of international crimes (UN Doc. A/HRC/13/48).

To the UN Security Council

- The Security Council should establish a Commission of Inquiry to investigate and collect further evidence on the perpetration of crimes against humanity in North Arakan State. Moreover, as raised throughout this Report, there is strong foundation to believe that further crimes are being committed throughout other areas of Burma, and the Commission of Inquiry must have a broad mandate to investigate all allegations of international crimes committed in the country.
- Should the Commission of Inquiry confirm a *prima facie* case of crimes against humanity, the Security Council should refer the case to the International Criminal Court, pursuant to Article 13(b) of the Rome Statute.
- While an investigation and referral to the International Criminal Court can assist in ending the violations and holding those responsible accountable, there will remain a need to assist the members of the Rohingya minority who have fled or were forced to leave Burma. An International Commission should be established to oversee and ensure their safe return to Burma. Many of the Rohingyas have lost their homes, and the Commission must ensure that the SPDC provides them with homes and the possibility to live their lives free from fear of further persecution. As part of this process, the Commission must ensure that legal obstacles and harmful practices, such as those identified in this Report, are ended. All this must take place within the framework and protections guaranteed by international human rights law.

To the UN Human Rights Council

- The Special Procedures within the UN human rights system have already raised serious concerns over the situation in Burma, including in North Arakan State. This is true of the Special Rapporteur on the Situation of Human Rights in Myanmar, and of Thematic Rapporteurs. The Human Rights Council must now, on the basis of all the existing evidence and material, shift its efforts to urging the Security Council to initiate a Commission of Inquiry.
- In the eventuality where the Security Council is unable to reach a decision on the establishment of a Commission of Inquiry, the Human Rights Council should

establish a UN Fact-Finding Mission with the mandate to investigate all international law violations committed against the Rohingyas in North Arakan State, as well as against other groups in the rest of Burma.

To the International Labour Organization (ILO)

- The ILO should continue its examination and scrutiny of all the labour-related violations in Burma. This must include the apparent exaction of forced labour from the Rohingya community in North Arakan State. In the absence of swift satisfactory changes, the ILO should revive its previously discussed options of recommending referral of the case to the International Criminal Court, and requesting an Advisory Opinion from the International Court of Justice on the issue of forced labour in Burma.

To the Association of Southeast Asian Nations (ASEAN)

- Member States of ASEAN must use their ties and influence within the ASEAN framework to urge the SPDC to desist from the persecution of the Rohingya minority, and fulfil its obligations as laid out in the above recommendations.

To all States

- States must use their positions within the UN system to support the establishment of a Security Council mandated Commission of Inquiry or, alternatively, to support a Fact-Finding Mission established by the Human Rights Council.
- States with diplomatic and trade ties with Burma, must use their influence to urge the SPDC to desist from the persecution of the Rohingya minority.
- States who recognise their competence to do so should exercise universal jurisdiction to hold accountable those responsible for committing crimes against humanity in North Arakan State and the rest of Burma.



IRISH CENTRE FOR HUMAN RIGHTS

Promoting human rights through teaching, research and advocacy

**Irish Centre for Human Rights
National University of Ireland, Galway
www.nuigalway.ie/human_rights
Email: humanrights@nuigalway.ie
Phone: + 353 (0)91 493609**