

# Unpacking the Presumed Statelessness of Rohingyas<sup>1</sup>

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## Abstract

The decades-old Rohingya problem, which has affected Myanmar and other Southeast Asia countries, has long been defined in terms of forced migration, statelessness and humanitarian crisis. As the problems involving Rohingya refugees, forced migrants and internally displaced persons are commonly believed to have stemmed from the highly discriminatory 1982 *Citizenship Law*, international advocacy has focused on amending or repealing it as the ultimate solution. Despite its several discriminatory provisions, this paper argues that the real problem primarily lies in lack of its implementation and the Rohingya's arbitrary deprivation of the right to nationality and citizenship documentation by successive Myanmar governments.

*Keywords:* Statelessness; Rohingya; 1982 Citizenship Law; Rakhine; Myanmar

## INTRODUCTION

I visited a hugely popular “Build-A-Bear” toyshop in Canberra in March 2015, where children interactively assembled and customized their own toys by choosing from different types of

stuffed toys such as teddy bears. Once assembled, the toys were given birth certificates, evidence of the importance of birth registration in the modern world. However, in today's world, millions of children are born without any documents. Due to their lack of birth certificates, it is highly likely that many of those children will remain undocumented into their teenage and adult years and never have access to several human rights. Most important is their right to nationality, which is often termed 'the right to have rights' (Weissbrodt and Collins 2006).

This article critically examines the case of the statelessness of the Rohingya<sup>2</sup> people. Their Myanmar citizenship status is among the most disputed issues within and beyond Myanmar—a country that has undergone significant political, social, economic and cultural transformations and dealt with a myriad of related challenges in recent years. As a major displacement and refugee issue since the late 1970s through the 2000s, Rohingya statelessness again came to the front as a politically volatile issue after violence broke out between Rakhine Buddhists and Rohingya and non-Rohingya Muslims in Rakhine State in 2012. The violent events precipitated mass internal displacement that disproportionately affected Rohingya and non-Rohingya Muslims. A humanitarian crisis has ensued since involving around 140,000 Muslim IDPs who are still confined to camps, and whose rights to freedom of movement, as well as access to education and health care, have been largely curtailed. The situation remains unresolved at the time of writing, some five years after the initial violent events.

The international community repeatedly called upon the Myanmar government to allow the violence-stricken and internally displaced Muslims back to their original homes (e.g. Special Rapporteur on the Situation of Human Rights in Myanmar 2016; UNGA 16 November 2012; UNGA 12 November 2013; UNGA 15 April 2014; UNGA 23 Mar 2015). The government's response has been that Muslims in the camps must undergo citizenship scrutiny before they are

allowed back to their original communities. As outlined in the draft Rakhine State Action Plan (n.d.) leaked in 2014 during the previous U Thein Sein administration (2011-2016), several stringent requirements such as forced ‘Bengalization’ of all the Rohingya,<sup>3</sup> both IDPs and non-IDPs, and an ambitious multi-layered and multi-agency scrutiny project involving horizontal and vertical sections of the government machinery and representatives of the Rakhine Buddhist community were consequently imposed on the displaced Muslim population in order for them to be able to prove their citizenship and legal residence status in Myanmar. All of these efforts on the part of the Myanmar government, encouraged and assisted by the international community, did not produce any substantial results.

To repeat, it has been about five years since the first round of violence, yet most of the displaced Muslims are still confined to camps across Rakhine State. That the Myanmar government—both the previous and present ones—requires Muslim IDPs to prove their citizenship and legal residence reinforces international opinion that the root cause of the so-called Rohingya problem lies in the law. This perspective has existed at least since the 1990s. A natural consequence of such an understanding is that the international community, especially the human rights advocacy network first represented by the United Nations, Amnesty International, and Human Rights Watch who have been increasingly joined in recent years by several other organizations such as Equal Rights Trust and Fortify Rights, has repeatedly demanded successive Myanmar governments over the last five years to repeal and/or amend the 1982 law so that citizenship rights of the Rohingya are immediately recognized and protected (Human Rights Watch 2015; UN Press Release 2 April 2007).

These well-intentioned international human rights discourses and advocacy campaigns have led to a hardening of the Government of Myanmar’s attitude that the international

community has been unfair towards their country and attempts to interfere in Myanmar's sovereignty or internal affairs (Kyaw Hsu Mon 2013; Slodkowski and Nichols 2016). Also, the Myanmar people—most of whom only learned about the statelessness of the Rohingya in the aftermath of sectarian violence in 2012—have developed a perspective that the Rohingya may not become citizens of Myanmar under the 1982 law because many, if not most, Rohingya illegally entered Myanmar in recent decades. A detailed discussion of two controversial debates is admittedly omitted here. The first debate is on whether the Rohingya are genuinely Myanmar or from Myanmar or when they came to migrate to Myanmar. As the article will show below, the real problem is not when the Rohingya came to Myanmar. For how long they have lived in Myanmar is debatable; however, it is a fact that they were once citizens of Myanmar until the First Exodus occurred in 1978. The second debate is the naming controversy on whether Rohingya is an acceptable ethnonym. This debate does not lead anywhere and just further complicates the problem. Therefore, this paper focuses more on how the Rohingya have been left out from becoming documented citizens by successive governments.

This article will dispute both the dominant perspective held by the international community—that the 1982 law is the root cause—and the position of the Myanmar government and citizenry—that many Rohingya are not eligible for Myanmar citizenship under the 1982 law. Although it is accepted that the 1982 law has several discriminatory provisions that violate international human rights standards, in this article I argue that the root cause of the chronic statelessness of the Rohingya lies more in the intentional failure of implementation of the law to citizenize or naturalize the Rohingya... I, therefore, highlight the fact that successive governments have intentionally left out the Rohingya from becoming citizens even under the discriminatory law. It is highly significant because the U Thein Sein and Daw Aung San Suu Kyi

governments have repeatedly said that the Rohingya must undergo special citizenship scrutiny without admitting that the problem of the Rohingya has been as a result of deliberate decisions by previous governments since the 1990s not to citizenize or naturalize them.

In order to support this argument, this article adopts a process tracing research method to uncover the causes of the statelessness of the Rohingya. By tracing the process, this provides an analysis of legal policy texts, supported by analysis of events, and offer a nuanced analysis of the de jure and de facto aspects of the citizenship legislation and practice that have largely led to the Rohingya problem. Process tracing simply means tracing back to the origin of a problem and trying to understand context in which the problem originated and causes. Therefore, Alexander L. George and Andrew Bennett (2005:6) define process tracing as an attempt “to trace the links between possible causes and observed outcomes.” Likewise, David Collier (2011:823) argues that the method “can contribute decisively both to describing political and social phenomena and to evaluating causal claims.” By adopting it, I will describe the context in which the statelessness of the Rohingya occurred in the first place and trace the causes.

It first reviews the existing academic writing and policy suggestions relating to statelessness of the Rohingya problem. Most, if not all, of which take it for granted that the root cause is the 1982 law and its assumed de jure impact. Then it traces back decades to when the Rohingya ‘problem’ first occurred in the late 1970s, at the time to a new citizenship law was being contemplated and drafted in the late 1970s and early 1980s and eventually passed in 1982. In doing so, I examine how the existing law has not been implemented in the case of the Rohingya. This paper draws upon primary resources in Burmese on nuanced textual and contextual details that are not yet available in the predominantly English-language literature on

the Rohingya produced by human rights-focused research and advocacy. Therefore, this article aims to make a significant contribution to the existing literature on the Rohingya.

### ARE THE ROHINGYA *DE JURE* STATELESS?

Before discussing how the Rohingya have been made undocumented, the more dominant perspective—that the Rohingya are *de jure* stateless—will be discussed in this section. *De jure* statelessness is simply understood as a phenomenon that occurs when a person or group of people is not recognized as a citizen or citizens by citizenship legislation of any country in the world, as defined in the 1954 United Nations Convention relating to the Status of Stateless Persons. The main academic and policy argument in the past decades is that the Rohingya are not recognised as citizens of Myanmar because of the discriminatory 1982 law (for example, Parnini 2013; Zawacki 2013). Consequently and understandably, the policy advice provided to tackle the problem has consistently been the amendment or repeal of the law. Although the situation of the Rohingya has been among the most discussed refugee and statelessness issues in the past decades, there is not much academic research focusing on how successive governments have intentionally and gradually made the Rohingya undocumented. The focus has been on the text of the law and its assumed impact on the Rohingya without explaining which particular section or sections of the law have caused the problem. Instead, there is a disproportionately large body of policy literature mainly produced by international and regional human rights organizations such as Amnesty International, Human Rights Watch, The Arakan Project, Equal Rights Trust, and Fortify Rights, as well as by successive UN special rapporteurs on the situation of human rights in Myanmar. All of those reports tend to take a legal approach so understandably provide the amendment or repeal of the 1982 law as the main solution. For example, a Euro Burma Office briefing paper (2009: 3) claims that “[U]ntil the 1982 Citizenship Law is changed, the status of

Arakan Muslims [often used to refer to the Rohingya] will remain in limbo.” Similarly, Grundy-Warr and Wong (1997:88) argue: “Without a thorough amendment of Burma’s citizenship laws there seems to be little hope of lasting peace and security for the Muslims of Arakan.” This view, apparently held by the above-cited writings, has been widely echoed in academia and policy recommendations.

It is a fact that the 1982 law has several discriminatory provisions (Nyi Nyi Kyaw 2015) which seem to have targeted or affected the Rohingya. It is also a fact that the law was promulgated in 1982 when Burma was a closed socialist and economic nationalist state under one party rule. As such, it has several problematic provisions when read from the contemporary perspective of international human rights law. However, this perspective is problematic because focusing on the provisions themselves has resulted in overlooking the facts and figures of the trajectory of the decades-long statelessness of the Rohingya since at least the late 1970s. It is not implied here that the existing literature has not highlighted nuances behind the Rohingya problem beyond the 1982 law. For example, Chris Lewa (2003) has pointed to other important reasons of ethnicity, demography, discrimination and exclusion. Also, David Mathieson (2009) argues that racism, nationalism, and national security are possible reasons. A Human Rights Watch report also makes a broad argument: “Burma’s treatment of its Muslim minority [including the Rohingya] has generally been characterized by exclusion, neglect and scapegoating” (2009: 6). Likewise, Martin Smith (1997) highlights ethnic communalism and religious difference as causes. A few more recent studies (for example, Pugh 2013) seem to have taken a more experience-based perspective claiming that the 1982 law is not the only cause.

What is missing in the literature is a documentation of how the Rohingya have come to arrive at this stage since at least the late 1970s when the first Rohingya exodus occurred. A

detailed study of the different types of identity documentation given to, or withheld from, the Rohingya, and why the respective governments of Myanmar gave them, is still missing. The relation between those different types of identity documents to the almost totally undocumented status of the Rohingya in the present day is also yet to be discussed. This paper will trace this history of documentation of the Rohingya as follows.

### FIRST ROHINGYA EXODUS

Although it gained independence from the British in 1948, independent Burma did not have at that time demarcated borders with China and Pakistan. Independent Burma also inherited intense colonial xenophobia of the twentieth century which mainly affected Chinese and Indians. Also, socialist and economically nationalist Ne Win incessantly invoked in the 1960s and 1970s economic and social dominance of Indians (and Chinese as well) in colonial and post-colonial Burma to explain the economic woes of the country (Mya Maung 1991). Taking power in a 1962 coup, Ne Win launched an extensive nationalization project resulting in an exodus of hundreds of thousand Indians from Burma (Chakravarti 1971; Holmes 1961; Silverstein 1966).

Against this backdrop, government officials and others in Burma in the 1960s and 1970s were of the strongly held opinion that colonial-era Indian and Chinese migrants were among the main reasons behind the plight of the Burmese people. Worse still, the Revolutionary Council (RC) (1962-74)/Burma Socialist Programme Party (BSPP) (1974-88) government and the people of Burma argued that many aliens from China and East Pakistan (later Bangladesh) had continued to encroach upon Burma even after independence and into the 1970s. This resulted in a nationwide immigration and residence check, an operation known in Burmese as *Na-Ga-Min*

(Dragon King). This widely-promoted immigration operation of the late 1970s occurred in different parts of the country, particularly those areas bordering neighboring countries.

*Na-Ga-Min* aimed to classify (and register) each and every resident of Burma into citizens and aliens. Before it was initialized, most people in Burma did not have any citizenship cards. They only had National Registration Cards (NRCs) given to them after they were registered under the *Residents of Burma Registration Act* (1949) and *Residents of Burma Registration Rules* (1951). A special two-piece article on *Na-Ga-Min* in the Working People's Daily (Burmese version) stated the details and rationale of *Na-Ga-Min*, and claimed that possession of NRCs denoted that card-holders were merely residents of Burma, not citizens (Sein Aye Tun 1978a). It also argued that many aliens were wrongly registered and given NRCs although they were supposed to be registered and given foreigner registration cards (FRCs) under the *Registration of Foreigners Act* (1940) and its *Registration of Foreigners Rules* (1948). Therefore, the engineers of *Na-Ga-Min* apparently pre-judged that there were many aliens in possession of NRCs prior to its launch.

*Na-Ga-Min* was planned by the then Ministry of Home and Religious Affairs, submitted to the cabinet on 16 November 1976 and approved. A pilot project, called *Wa-Tha-Oo* (Early Rain), was conducted in May and June 1977 in Shan State (Taunggyi and Minesat) and in December in Shan State (Nam Kham, Muse, and Kutkhaing). It was also tested in various other sites – twenty one townships, the Central Train Station and the ports in Rangoon Division; Mupon and Muttama train stations, airports, ports, and bus stations in Mon State; ports, airports, and bus stations in Kayin State; bus stations, train stations, and ports in Pegu Division; Pantaung

and Taungup roads; ports and airports in Sittwe; Thandwe-Taungup roads; and Sittwe-Thandwe waterways (Sein Aye Tun 1978a).

Then, *Na-Ga-Min* was carried out in February 1978 in Kachin State (Banmaw and Myitkyina), and then in Rakhine State (Sittwe and Buthidaung). While peaceful in Sittwe, the implementation in Buthidaung in March turned problematic when many Rohingyas fled. The government claimed that there were three main causes of the exodus: fear of the check; being undocumented; and rumors spread by destructive elements among Muslims, which tried to denigrate the project (Sein Aye Tun 1978a). The second piece on *Na-Ga-Min* states the rationality behind the operation, i.e. to root out aliens and migrants. It asserted:

As all know, our country was once a free guest house. Aliens had infiltrated and settled even before the war broke out. It has been the case from colonial times to nowadays.

Many

Chinese from eastern and northeastern borders and aliens from western borders illegally infiltrated.<sup>4</sup> (Sein Aye Tun 1978b, 5)

Despite those initial strong claims of existence of aliens and illegal cross-border migrants, Sein Aye Tun (1978b) stated that *Na-Ga-Min* only found 52 such people in Kachin State, 1,025 in Sittwe, and 594 in Buthidaung, totaling less than 2,000 people. Likewise, another article in the state newspaper stated that only 230 illegal Bengalis from Chittagong were found in the whole Maungdaw township, which is most populated in terms of the Rohingya population with *Na-Ga-Min* being run in thirteen sites (*Working People's Daily (Burmese)* 24 May 1978). U Than, an immigration official in Rakhine State involved in *Na-Ga-Min* and repatriations in the state, wrote

that the operation was carried out in Sittwe (11 February), Buthidaung (17 March – 4 May), and Maungdaw (8 May – 5 June). But the check only found 349 persons in Sittwe and 228 persons across both Buthidaung and Maungdaw who had illegally entered Rakhine State (U Than 1984). Likewise, a special press conference was held in late May 1978 in Rangoon (now Yangon) for international and local media, after a tour to Buthidaung and Maungdaw. Various government officials categorically rejected all the allegations of targeting Rohingyas alone by *Na-Ga-Min*, of religious persecution, of shooting of those who fled, and so on. Instead, they argued that those Muslims (35,596 from Buthidaung and 65,452 from Maungdaw as of 27 May) only fled due to fears of their undocumented status, consequent legal action, and rumors, even going so far as to allege that some burned down their houses before they ran. Moreover, the officials said that action was only taken against 2,296 people during the whole *Na-Ga-Min* period across Burma, which was implemented not only in Rakhine State but also in Chin State, Sagaing Division, Kachin State and Mandalay Division (*Working People's Daily (Burmese)* 31 May 1978). While these figures differ slightly, it is important that *Na-Ga-Min* did not find thousands or tens of thousands of *illegal* Bengalis in Rakhine State as the BSPP government claimed prior to, during, and even after the operation.

Amidst allegations that those who fled were illegal Bengali Muslims, the Burmese government negotiated with Bangladesh. U Tin Ohn, then Deputy Minister for Foreign Affairs, met the representatives of the Bangladeshi government from 7 to 9 July 1978 and reached an agreement in which Burma would repatriate those Muslims from Burma stranded in Bangladesh in three steps from August (*Working People's Daily (Burmese)* 12 July 1978). The repatriation plan called *Hin-Tha* (Swan) Operation was announced on 31 July and implemented from 31

August 1978 to 29 December 1979 (U Than 1984). Although the Burmese authorities contended that only 156,630 Muslims had fled, their Bangladesh counterparts responded that 189,733 had arrived. Out of them 186,968 Muslims had been successfully repatriated by the end of *Hin-Tha* in late December 1979, according to Burmese government statistics (U Than 1984). Therefore, from the Burmese Government's perspective, an additional 30,338 Muslims were repatriated. The Final Report of the Inquiry Commission on Sectarian Violence in Rakhine State notes: "Many in Myanmar felt the issues surrounding the Campaign set a harsher tone for the country's future relationship with Bangladesh" (2013, 6).

There are two important and noteworthy facts about the first exodus and consequent repatriation. The first fact is that despite the difference in numbers of refugees claimed by Burma and by Bangladesh, Burma received back almost all of those who had fled. It means that they could prove legal residence and citizenship. Although the Burmese authorities initially claimed that those Muslims who held NRCs were not necessarily citizens, they had to accept them during the repatriation.

The second fact is more important because it could effectively reject the official claim that NRCs constitute insufficient proof of Burmese citizenship. At the time of the first exodus and repatriation, the *Union Citizenship Act* (1948) was in operation. There was another act in operation at the time of independence, namely the *Union Citizenship (Election) Act*, for those people of alien ancestry who would like to elect Burmese citizenship. Despite existence of those two acts, the Anti-Fascist People's Freedom League (AFPFL) government only issued 8,496 citizenship certificates from 4 January 1948 to 30 April 1957 and the RC government issued

12,937 from 1 June 1957 to 6 February 1959. Therefore, in the 21 years following independence, only 21,433 citizenship certificates were issued, meaning that almost all of the people of Burma in the 1950s did not have any citizenship certificates issued under the *Union Citizenship Act* or *Union Citizenship (Election) Act*. Moreover, a National Registration Department was formed under the Ministry of Home Affairs in 1951 to implement the *Residents of Burma Registration Rules*. From 1952 to November 1958 the Department registered 4,100,000 people. Registration was expedited by the Revolutionary Council at a rate of registration of about two million people per month. By February 1960 the government claimed that 18 million people had been registered (Government of the Union of Burma 1960). The population of Burma in 1961 was estimated at 22.7 million (M Ismael Khin Maung 1986; Myat Thein 2004). Therefore, by the end of 1960, all the residents of Burma had been registered and given their NRCs.

Although NRCs are not, in a strict legal sense, citizenship certificates, the *Residents of Burma Registration Act* and its *Rules* only aim at registration of residents who are not foreigners. For foreigners or aliens, there were separate *Registration of Foreigners Act* and its *Rules*. Also, Rule 33 of the *Residents of Burma Registration Rules* clearly states that Rules 29 and 31 alone apply to foreigners, both of which are concerned with procedure. Therefore, most, if not all, of the Rohingya in Rakhine State in the late 1970s had NRCs, which are sufficient evidence of their citizenship.

A very important citizenship and identity documentation policy shift had been awaiting those Rohingyas who had fled and those who had remained in Rakhine State. It was the

nationwide campaign, starting in the late 1970s and led by BSPP, to draft a new citizenship law, passed into law in October 1982. The 1982 law effectively creates four classes of citizens:

- “*mwe-ya-pa naing-ngan-tha* (literally meaning “born citizen”) or citizenship by birth accorded to descendants of *taing-yintha*;
- *eh-naing-ngan-tha* (literally meaning “guest citizen”) or associated citizenship given to those non-*taing-yin-tha* people who applied for citizenship under the Union Citizenship Act;
- *naing-ngan-tha pyu-kwin-ya-thu* (literally meaning “one who is allowed to be naturalized”) or naturalized citizenship given to those non-*taing-yin-tha* people who had been in the country anterior to 1948 but could prove that they had failed to apply for citizenship under the Union Citizenship Act; and
- *naing-ngan-tha* or citizenship given to those who had already been citizens in 1982; those born of parents both of whom are citizens; those born of parents one of whom is a citizen and the other an associate citizen or a naturalized citizen; those born of parents one of whom is a citizen or an associate citizen or a naturalized citizen and the other born of both parents who are associate citizens; those born of parents one of whom is a citizen or an associate citizen or a naturalized citizen and the other born of both parents who are naturalized citizens; and those born of parents one of whom is a citizen or an associate citizen or a naturalized citizen and the other born of parents one of whom is an associate citizen and the other a naturalized citizen”

(Nyi Nyi Kyaw 2015, 55).

It is important to also note that the law was not actually implemented in the 1980s, due to the increasingly critical political, social and economic problems that the country was facing. Therefore, the Rohingya, like their non-Rohingya counterparts in Rakhine State and elsewhere, continued to hold their NRCs. The *Na-Ga-Min* officials reportedly confiscated several cards during the immigration check, however.

## SECOND ROHINGYA EXODUS

History repeats. Amidst unprecedented popular protests in 1987 and 1988 against the socio-economic decline of socialist Burma under the BSPP regime, the military took power in a coup on 18 September 1988 and ruled the country by decree, forming the State Law and Order Restoration Council (SLORC). After it took power, the military government initiated an enormous nationwide militarization project, especially in ethnic minority areas on the borderlands, including Rakhine State. The militarization led to the second exodus. It started in Rakhine State in late 1989 in Sittwe and spread to Maungdaw and Buthidaung in October 1990.

Although the militarization affected both Rakhine and Rohingya communities, the latter disproportionately suffered several serious human rights violations, which included religious persecution, population displacement and/or transfer, forced labor (portering, etc.), ill-treatment, rape, extrajudicial executions, deliberate killing of fleeing Rohingyas, individual killing, and incarceration (Amnesty International 1992; Asia Watch 1992; Mirante 1991). Rohingya refugees started fleeing to Bangladesh in March 1991 and the exodus significantly increased at the end of the year, reaching the rate of daily arrivals of 5,000 to 6,000 in February and March in 1992. The number of registered refugees reached 263,291 in late May (UNHCR 1992).

Despite strong-worded and racist statements and articles printed in the Myanmar government-owned newspapers that mostly rejected the existence and legality of Rohingyas, Myanmar and Bangladesh signed a memorandum of understanding on 28 April 1992 and planned for repatriation in May with no UNHRC involvement. The first stage of repatriation was stalled and it only started in September 1992. It was criticized as being forced repatriation by international human rights organizations (Human Rights Watch 1996; Lambrecht 1995). The UNHCR walked out of the registration process in December because refugees were being forced by Bangladesh authorities to return. UNHCR signed agreements with Bangladesh and Myanmar in May 1993 and November 1993 respectively. About 50,000 refugees had already been sent back home by November. As of February 1995, 155,000 Rohingyas had been sent home (Lambrecht 1995).

Amidst allegations by the international human rights network largely represented by Amnesty International and Human Rights Watch of refoulement (the breaking of a principle that requires that refugees' safety on their return home is ensured before their repatriation by the all parties involved—the sending state (Bangladesh), the receiving state (Burma) and UNHCR) in return of Rohingyas to Rakhine State (Amnesty International 2004; Human Rights Watch 1996), UNHCR signed two more memoranda of understanding (MOUs) with Bangladesh in 1994 and 1995 to ensure the secure return of refugees to Myanmar. By 1997, some 230,000 had already been repatriated, albeit with controversy.

The repatriation eventually stalled in 2005 when Myanmar did not extend the deadline for repatriation. Resumption was planned for 2009 but was again delayed. Approximately 9,000 refugees did not participate in the repatriation. At a 31 August 2014 meeting between the foreign

ministries of the two countries, an agreement was reached that 2,115 Rohingya refugees, who had been cleared by the Myanmar side for repatriation in 2005, would be double-checked and repatriated (Ko Htwe 2014; McLaughlin and Ei Ei Toe Lwin 2014). According to UNHCR, as of September 2014 Bangladesh still hosted 32,355 recognized refugees in two camps (Kutupalong camp and Nayapara camp) and another 200,000-500,000 unregistered Rohingyas primarily in Cox's Bazar (UNHCR 2014). According to another UNHCR publication in December 2011, another 22,000 and 14,000 unrecognized Rohingya refugees lived in two makeshift camps; one near the Kutupalong camp and another in Leda, seven kilometers from Nayapara camp, respectively (Kiragu, Rosi, and Morris 2011).

In terms of citizenship and documentation of the Rohingya, another important milestone was laid in 1989 when SLORC started exchanging NRCs with color-coded citizenship scrutiny cards (CSCs) across the country under the 1982 law. Pink cards are issued to citizens by birth (indigenous citizens) and other non-indigenous citizens, blue cards to associate citizens, green cards to naturalized citizens, and white cards (different from white cards issued to the Rohingya from the 1990s) to foreigners. Most importantly, the Rohingya were left out from this documentation project although most, if not all, of them held NRCs until the late 1980s.

#### THE WHITE CARD

In response to ongoing international criticism of the lack of, and its advocacy for, permanent identity documentation of the Rohingya, the SLORC government implemented another documentation project. It was to give only temporary identity cards, known as White Cards, to the Rohingya from 1995 onwards. It was contrary to the process elsewhere in the country which started in 1989 and exchanged the NRCs with CSCs. In other words, Rohingyas who remained in Myanmar and who returned from Bangladesh again found themselves in legal limbo. However,

despite their undecided documentation status, SLORC allowed the Rohingya suffrage in the 1990 general election, as well as the right to establish political parties (Fortify Rights 2014). The Rohingya also voted in the 2008 constitutional referendum and 2010 general elections (Fortify Rights 2014). The cards could also be used to travel from village to village within Rakhine State or elsewhere with official permission from Border Area Immigration Headquarters (BIHQ) based in Rakhine State, known in Myanmar as *Na-Sa-Ka*. Although the documentation status of the Rohingya was only known within Rakhine State throughout the 1990s and 2000s, it emerged as one of the most controversial issues in Myanmar in the aftermath of sectarian violence between Rakhine Buddhists and Rohingya and non-Rohingya Muslims in 2012.

There were 734,453 White Card holders as of January 2014, according to U Maung Maung Than, then director-general of the Department of Immigration and National Registration (Han Ni Oo 2014). It was also estimated that 850,000 White Cards were in circulation, this time by the Amyotha Hluttaw (Upper House) Bill Committee in March 2014 (Amyotha Hluttaw Proceedings 2014). However, the total number of White Cards as of 23 December 2014 was 590,016 and most of the card-holders are in Rakhine State, according to then Immigration and Population Minister Khin Yi (Han Ni Oo 2014). It means that only around half of the Rohingya held White Cards. The rest, which include young children, remained undocumented as of 2014. The legality of the White Card as claimed by the Myanmar government is imperative here.

Due to increasingly heated public debates on the nature of the White Card, Khin Yi frequently asserted that the temporary certificates are given to those who are of dubious origin or

whose citizenship is yet to be processed, without specifying the reasons why (Nyein Nyein and Kyaw Kha 2015). According to him, the cards were issued under Section 13 (1) (c) of the *Residents of Burma Registration Rules* which allows such issuance under a general or special order for purposes specified by the Chief National Registrar. In other words, the cards were legally issued and the Rohingya were of undecided origin. Again, Khin Yi's claim must be scrutinized here. The White Card is defined by Section 2 of the *Residents of Burma Registration Rules* as a document issued in place of a registration card, i.e. NRC, for proof of identity for a specified period of time. It does not state anything about dubious origin. Moreover, Sub-Section 13 (3) states that on issuance the cards must have a valid date. Despite that fact, the Ministry of Immigration and Population allowed the use of the cards for twenty years from 1995 (when they were first issued) to 2015 (when they expired).

Sub-Section 13 (5) also asks the cardholders to return the cards once they receive permanent ones. More importantly, as stated above, both the *Residents of Burma Registration Act and its Rules* are not intended for registering non-citizens or foreigners. This, together with the fact that Rohingyas once held NRCs, are sufficient evidence that the Rohingyas are eligible for Myanmar citizenship and they have been intentionally and arbitrarily deprived of their right to nationality and citizenship documentation by the Ministry of Immigration and Population for decades.

Interestingly, despite repeated claims by Khin Yi and other immigration officials that the Rohingyas were yet to become citizens, the *Political Parties Registration Law* (State Peace and

Development Council Law 2/2010), the *Pyithu Hluttaw Election Law* (State Peace and Development Council Law 3/2010), the *Amyotha Hluttaw Election Law* (State Peace and Development Council Law 4/2010), the *Region Hluttaw or State Hluttaw Election Law* (State Peace and Development Council Law No. 5/2010) allowed White Card holders to establish and join political parties and to vote in elections, together with citizens, associate citizens, and naturalized citizens.

The right of White Card holders to participate in politics led to public outcries by Rakhine and Buddhist nationalists between 2013 and 2015, and heated questions were raised about the legality of the Rohingya and their rights to establish and join political parties and vote in the elections (Pyone Moet Moet Zin, Win Naung Toe and Myo Thant Khine, 2015; Shwe Aung 2015). Perhaps influenced by the half-truths promulgated by Khin Yi and other government officials, Myanmar public opinion held that the Rohingya were yet to become citizens, and that the State Peace and Development Council (SPDC) had issued temporary White Cards in 2008 in order to buy the Rohingya's votes in the 2010 general election. As such, the Rohingya should not be permitted to vote or form political parties. Public outcry and organised campaigns resulted in the end of the story of the White Card.

To trace the story, the Second Amendment to the Political Parties Registration Law (Pyidaungsu Hluttaw Law 38/2014) enacted by the Union parliament in September 2014 states that White Card holders may neither establish political parties nor join them. An order issued by President U Thein Sein on 11 February 2015 stated that the cards shall expire on 31 March 2015 (a long overdue task) and be returned by 31 May. A decision made by the Constitutional

Tribunal of the Union of Myanmar on 16 February also stated that allowing White Card holders to vote was unconstitutional. All of these resulted in the further undocumentedness of the Rohingya.

#### RAKHINE VIOLENCE OF 2012 AND ITS IMPACT UPON THE ROHINGYA

A watershed moment broke out in Rakhine State in May and June in 2012. It originated from the rape and murder case of a Rakhine Buddhist woman from Kyauknimaw in Yanbye Township by three Muslims from a nearby village on 28 May. Outrage spread as graphic pictures of the crime circulated online, and pamphlets were distributed in Taungup by extremists (Inquiry Commission on Sectarian Violence in Rakhine State 2013). The result was the vigilante killing of 10 non-Rohingya Muslims on a bus to Yangon by a 300-strong Buddhist vigilante mob on 3 June in Taungup. It spread to northern Rakhine State and resulted in an arson attack by Rohingyas on Rakhine homes and businesses in Maungdaw on 8 June. The conflict spread like fire to other parts of Rakhine, including Rathedaung, Kyauktaw, Pauktaw, Sittwe, Mrauk-U, Kyaukphyu and Yanbye, where Rakhines retaliated against Muslims. The result was wide-scale sectarian violence, unprecedented in the history of Rakhine State since independence. In October, another round of serious communal violence broke out in Minbya, Kyaukpyu, Myebon, Mrauk-U, and Rathedaung, sparked by burning of a Muslim village in Paik-The quarter of Minbya by Rakhines on 21 October (Inquiry Commission on Sectarian Violence in Rakhine State 2013).

The 2012 violent conflicts were a different but more serious chapter in terms of legality in the story of the Rohingya. The immediate results of the two rounds of sectarian violence were: loss of lives of 192 Rakhine and Rohingya/non-Rohingya Muslims (58 Rakhines and 134 Muslims), injuries of 265 people (148 Rakhines and 117 Muslims), destruction of 8,614 houses

(1192 Rakhine-owned houses and 7,422 Muslim-owned houses) and destruction of 120 businesses (45 Rakhine-owned businesses and 75 Muslim-owned businesses), according to the Final Report of the President-appointed Inquiry Commission on Sectarian Violence in Rakhine (Inquiry Commission on Sectarian Violence in Rakhine State 2013, 20). However, the Final Report also contains data of loss of lives and properties as claimed by the two communities: 128 dead and 169 injured (Rakhines) and 219 dead and 242 injured (Muslims) (Inquiry Commission on Sectarian Violence in Rakhine State 2013, 22). This time Rohingyas did not flee from Rakhine State en masse but the approximately 140,000 Rohingyas displaced during the two waves of riots have been confined to camps as IDPs since 2012, as of September 2014. In contrast, only 3,500 Rakhines were displaced as of November 2012 (Inquiry Commission on Sectarian Violence in Rakhine State 2013, 28). However, a gradual fleeing of Rohingyas has been occurring since 2012 and the total number leaving the country reportedly reached 86,000 in June 2014, according to an UNHCR estimate (UNHCR 2014), which may be called a third exodus.

As of July 2013, 64 percent of Rakhine IDPs had been provided new shelter according to the Final Report (Inquiry Commission on Sectarian Violence in Rakhine State 2013, 40). There were 1,738 Rakhine IDPs to be rehoused as of September 2014 according to the most recent data, contained in Rakhine State Action Plan (n.d. p. 7), a draft plan which was not finalized during the U Thein Sein administration (2011-16). It means half of the Rakhine IDPs have been resettled since displacement in 2012. On the part of Muslim IDPs, most of whom are Rohingyas, not a single one of them has been returned back to their original communities/locations. As of September 2014, 138,724 Muslim IDPs awaited resettlement (Rakhine State Action Plan n.d., 7).

Whether this violence was spontaneous or premeditated, or inter-communal or one-sided, is debatable and depends on interpretation of the researcher(s) (Inquiry Commission on Sectarian Violence in Rakhine State 2013; Min Zin 2015; Nyi Nyi Kyaw 2016). What is equally relevant, however, is the fact that the violence and its consequent protracted IDP situation have led to an unprecedented deterioration of the legal and social status of Rohingyas in Myanmar. Repeated demands by the government and Rakhines that Muslim IDPs first undergo special citizenship scrutiny before they are resettled have led to a protracted IDP situation. Worse, according to the leaked Rakhine Action Plan, all Muslims in Rakhine, including 860,000 Muslims in their own homes, will also be required to undergo scrutiny and register as ‘Bengali’. All of these controversial policies, contained in the draft Rakhine State Action Plan, have a deadline of October 2016, and their implementation may take several years. If implemented, a further deterioration of the status of Muslims in Rakhine is to be expected. As of May 2016, the Rakhine State Action Plan, which has never been finalized, is effectively stalled and none of the milestones laid out on the plan for its implementation, including registration of all Muslims in Rakhine State, scrutiny of their citizenship and/or residence, and proper identity documentation of Muslims, have been reached. This is additional strong evidence of implementation or lack thereof of the 1982 citizenship law in the case of the Rohingya.

## CONCLUSION

This paper has argued that the statelessness of the Rohingya lies not only in the discriminatory 1982 law but in its implementation or lack thereof and that much more emphasis needs to be placed on the implementation of the non-discriminatory provisions as well as the 1982 law as a whole. The statelessness of the Rohingya is better understood as a plight that has been largely caused by de facto nuances and complexities surrounding the citizenization and naturalization of

the Rohingya. It is reminded again that the 1982 law—however discriminatory its textual provisions are according to international human rights standards—should not be regarded as the *sole* cause of the Rohingya problem. By tracing and analyzing different types of citizenship and identity documentation issued to the Rohingya in Myanmar since independence in 1948, it has been argued that policies and practices of successive Myanmar governments since the late 1970s have caused the now chronic statelessness of the Rohingya, the resolution of which looks dubious in the near future. Legally speaking, the statelessness of the Rohingya is more *de facto* than *de jure* since the real cause is lack of implementation of the 1982 law and of recognition of citizenship of the Rohingya. Gradual degradation of the documented status of the Rohingya has been traced back decades. The role of various citizenship and identity documentation policies and practices by the Myanmar governments targeting the Rohingya has been highlighted.

Although the Rohingya were eligible for Myanmar citizenship and were recognized as citizens, they have been treated by successive governments of the country as stateless. Although various governments were the main agents behind the statelessness of the Rohingya, in recent years several new non-governmental actors have entered the scene and argued that the Rohingya are not eligible citizens of Myanmar. Several questions regarding the legal and cultural belonging of Muslims (Nyi Nyi Kyaw 2015), and of the Rohingya in particular, have been raised by nationalist Buddhist monks led by *Ma Ba Tha* (Organization for the Protection of Race and Religion) and by wider Myanmar society as well. All of these social and political dynamics have placed bigger hurdles for the Rohingya to be recognized as Myanmar citizens and enjoy their nationality rights and protection.

Now, the new government led by the National League for Democracy (NLD) chaired by Daw Aung San Suu Kyi, which won in a landslide in the general elections held in November 2015, is in power and faces several issues it seeks to solve rapidly. Due to the complexity of the Rohingya issue itself, and the strong emotions it naturally creates among the Myanmar public, the NLD seemed unwilling to tackle the issue during the first hundred days of its rules. However, the NLD formed on 30 May 2016 a special committee headed by State Counselor Daw Aung San Suu Kyi and composed of 26 government officials. The committee still has a long way to go, necessitating strong, sustainable action on the part of the government at least into the near future.

## **Notes**

<sup>1</sup> This paper heavily draws upon the PhD thesis I submitted to the University of New South Wales in 2015. It is admitted that several old and new dynamics have been added to the Rohingya issue since the time of writing it in 2016, which cannot be covered here.

<sup>2</sup> The name ‘Rohingya’ and its legitimacy as an accepted ethnonym has added another contested layer to the issue, which is already a highly contentious one. Whereas the Myanmar government and people have contended that they do not accept ‘Rohingya’ as an ethnonym and they are Bengalis, the position of the international community has maintained that Rohingyas have a right to self-identification. This paper does not aim to delve into the naming controversy. It uses Rohingya because it is a commonly known name.

<sup>3</sup> In response to the use of ‘Rohingya’ in a statement on capsizing of a boat in which more than twenty people lost their lives issued by the US Embassy on 20 April 2016, Buddhist nationalists launched nationwide protests and the Ministry of Foreign Affairs now headed by Daw Aung San Suu Kyi requested the US Embassy to refrain from using ‘Rohingya’. Buddhist nationalists

demanded that those so-called Rohingya Muslims be called 'Bengalis'. All of these could be seen as evidence of forced Bengalization of the Rohingya.

<sup>4</sup> My translation of Burmese original.

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