ARTICLE

"A New Law on Earth" Hannah Arendt and the Vision for a Positive Legal Framework to Guarantee the Right to Have Rights

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"We became aware of the existence of a right to have rights…and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation…. Only with a completely organized humanity could the loss of home and political status become identical with expulsion from humanity all together." –Hannah Arendt

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I. INTRODUCTION

In the summer of 1950, Hannah Arendt issued a challenge. Writing from a place "still in grief and sorrow,"[1] she argued that the horrors of the First and Second World Wars revealed "that human dignity needs a new guarantee which can be found only in a new political principle, in a new law on earth, whose validity this time must comprehend the whole of humanity . . . ."[2]

For the law on earth had failed. It had not protected the whole of humanity. The preceding decade had brought about some of the greatest horrors in human history. Whole new categories of international crimes had to be created to respond to this destruction and depravity—crimes against humanity and the crime of genocide.

Arendt was writing at a time when world leaders aspired to create a "new law on earth." New institutions emerged to replace the ones that had failed. The Universal Declaration of Human Rights proclaimed "the equal and inalienable rights of all members of the human family"[3] and the first human rights convention was passed "in order to liberate mankind from [the] odious scourge" of genocide.[4]

Arendt does not explicitly outline her vision for a "new law on earth." However, her vision is tied to her articulation of the existence of a "right to have rights."[5] A careful reading of her reflections on the Rights of Man, human rights, and international law reveals she envisioned a conception of international law different from previous expressions governing relations between states. A law that comprehends the whole of humanity includes rights that are guaranteed and enforceable, in which the individual has rights that "transcend[] his various rights as a citizen."[6] In Arendt's view, rights must be more than hortatory, and when one finds oneself without the protection of a particular nation, rights must be realized through more than charity or they are not rights at all. Moreover, Arendt believed that natural law only achieves its political reality through positive law, and thus that individuals whose rights were articulated only through natural law and left without a legal personality were "politically irrelevant."[7]

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1 HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM xxiii (1976).

2 *Id.* at ix (concluding that "while its power must remain strictly limited, rooted in and controlled by newly defined territorial entities").

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

4 G.A. Res. 260 (III) A, Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948).

5 ARENDT, ORIGINS, *supra* note 1, at 296; Hannah Arendt, *The Rights of Man: What Are They?*, 3 MOD. REV. 24, 30 (1949) [hereinafter Arendt, *Rights of Man*].

6 Arendt, *Rights of Man*, *supra* note 5, at 37.

7 HANNAH ARENDT, ON REVOLUTION 97 (Penguin Books 1977) (2006) [hereinafter ARENDT, ON REVOLUTION].

In this Article, I argue for an interpretation of Arendt's conception of the right to have rights that envisions the creation of an enforceable right, enshrined in positive international law, in which human rights can be realized separate and apart from the rights of citizens. This right would guarantee the legal personality of the individual under international law (thereby strengthening the individual as a subject of international law) and take the form of a procedural right to the restoration of substantive human rights that have been stripped or violated. In order for this right to be realized, adjudicatory bodies with enforcement mechanisms must be created. It is only when the right to have rights is guaranteed that the loss of a nationality will no longer result in the loss of all rights, and with it, the loss of belonging to the political community of mankind.

While much progress has been made in the development of an international legal system in which human rights are articulated and defined through conventions and judicial opinions, and while mechanisms have been created for individuals in some instances to articulate when their rights have been violated and obtain some measure of redress, international human rights has failed to achieve Arendt's objective of a truly enforceable right to have rights. This failure raises questions about the efficacy, and thus the nature, of public international law more broadly.

The situation of the Rohingya is a tragic case study of the extreme deprivation of human rights that can result in the absence of an enforceable right to have rights. While efforts are underway to understand and collect evidence of potential violations of international criminal law and there is hope for some measure of international accountability,[8] the Rohingya remain rightless. Enduring the same losses as articulated by Arendt, they have lost their home in Myanmar, and they are unable to create for themselves a distinct place anywhere else in the world. The Rohingya have lost government protection, without legal status in any country. From these losses flows further persecution as they find themselves outside of the family of nations. The risk of genocide is ever-present for those within the boundaries of Myanmar. Those who have fled exist in a state of perpetual deprivation, possessing little more than the "abstract nakedness of being human."[9]

That the international legal system has neither a mechanism to prevent millions of people from being forced out of the political community nor an avenue through which they may rejoin the community demonstrates that we have failed to create a law on earth for all of humanity. It reveals a persistent gap between the law and compliance by states, an absence of mechanisms

8 *See* Independent Investigative Mechanism for Myanmar, U.N. HUMAN RIGHTS COUNCIL, https://iimm.un.org (last visited June 27, 2021).

9 ARENDT, ORIGINS, *supra* note 1, at 299; Arendt, *Rights of Man*, *supra* note 5, at 31.

through which individuals can realize their rights separate and apart from accountability for violators of those rights, and weaknesses in our institutions for enforcing the law as written. Only through addressing these structural inadequacies will we ever ensure the "right to have rights."

Part II of this Article examines the origins of Arendt's phrase "a right to have rights" and the primary interpretations of the phrase; it also offers an alternative interpretation grounded in positive law. Part III outlines the international legal framework that has evolved following the publication of *The Origins of Totalitarianism* to evaluate the extent to which Arendt's skepticism towards declarations of human rights may have been assuaged, or if the current international legal framework falls short of providing for a legally enforceable right to have rights. Part IV examines how this framework applies in practice through the illustration of the Rohingya as a case study in contemporary rightlessness. Part V begins to outline the vision for a new law on earth to guarantee a right to have rights that is reflective of an Arendtian vision grounded in positive law.

II. HANNAH ARENDT AND THE RIGHT TO HAVE RIGHTS

Hannah Arendt contributed one of the most enduring and insightful examinations of the paradox of human rights in *The Origins of Totalitarianism*. Written at the dawn of the modern human rights era when much of the international human rights framework had yet to be codified, Arendt observed that the mass denationalizations of the Second World War "brought an end to [the] illusion" that rights are inalienable and universal.[10]

Scholars have offered alternative interpretations of the meaning of her enduring phrase, "the right to have rights." Generally, they fall into one of two broad categories: articulating a moral Kantian right to belong to a political community or articulating the need for a right to citizenship of a sovereign state. However, these interpretations overlook Arendt's belief that rights must be guaranteed through positive law and not mere charity. According to Arendt, human rights must be distinct from the rights of citizens, and even if human rights retain a foundation in natural law, they must be realized through positive law in order to achieve their political reality.

A. The Loss of All Rights

In Chapter 9 of *The Origins of Totalitarianism*, "The Decline of the Nation State and the End of the Rights of Man," Arendt reflected on what happened when masses of humanity lacked positive law through which to

10 ARENDT, ORIGINS, *supra* note 1, at 276.

realize their rights separate and apart from their rights as citizens. A new category of humanity emerged: the stateless.[11] Deprived of all rights, the stateless fell outside the pale of the law, as without membership in a nation-state, there was no law through which to find protection. As Arendt observed, "[o]nce they had left their homeland they remained homeless, once they had left their state they became stateless; once they had been deprived of their human rights they were rightless, the scum of the earth."[12]

According to Arendt, the rightless suffered two main losses from which their deprivation flowed. First was the "loss of their homes" or the place in which they had "established for themselves a distinct place in the world."[13] The unprecedented loss was the inability to create a new place of belonging. Once rightless, they were "thrown out of the family of nations altogether."[14] The only solution for those deprived of their home was an internment camp, which became "the routine solution for the problem of domicile of the 'displaced persons.'"[15]

The second loss was the "loss of government protection," and with it the "loss of legal status in . . . all countries."[16] Too great in number to be offered political asylum, they were excluded from legal protection anywhere.

It does not necessarily follow that statelessness must lead to rightlessness. As Arendt observed, the Rights of Man "were supposed to be independent of citizenship and nationality."[17] They were "supposedly inalienable."[18] That statelessness led to rightlessness revealed a fundamental flaw in systems of government that were thought to be based on a foundation of natural law and the Rights of Man.

Arendt argued that the original sin was embedded in the establishment of the modern nation-state.[19] When the rights of man ceased to exist outside any national government structure and became tied to notions of

11 *Id.* at 276-77.
12 *Id.* at 267.
13 *Id.* at 293.
14 *Id.* at 294.
15 *Id.* at 279.
16 *Id.* at 294.
17 *Id.* at 293.
18 *Id.* at 230.
19 Her perspective on the impact of the nation-state system on the prospect for minorities to obtain protection remained consistent. Later, Arendt would write of her disapproval of the reinforcement of national homogeneity in the "restoration of national states" following the end of World War II, noting "the time when the United Nations would be in a position to assess the true relationship between the various nationalities of east-central Europe, and the national requirements of majorities and minorities alike, has passed into history. This time, indeed, the United Nations may even claim that they did not fail, for the simple reason that they did not so much as try." Hannah Arendt, *Nationalities and National Minorities by Oscar I. Janowsky*, 8 JEWISH SOC. STUD. 204 (1945) (internal citations omitted).

sovereignty, there was nothing to distinguish them from the rights of citizens.[20]

> The secret conflict between state and nation came to light at the very birth of the modern nation-state, when the French Revolution combined the declaration of the Rights of Man with the demand for national sovereignty. The same essential rights were at once claimed as the inalienable heritage of all human beings *and* as the specific heritage of specific nations, the same notion was at once declared to be subject to laws, which supposedly would flow from the Rights of Man *and* sovereign, that is, bound by no universal law and acknowledging nothing superior to itself. The practical outcome of this contradiction was that from then on human rights were protected and enforced only as national rights . . . .[21]

From this flawed beginning, Arendt traced the failed attempts to provide protection for those that found themselves outside the pale of the law—the stateless and the minorities.

The end of the First World War saw the collapse of the Austro-Hungarian and Ottoman Empires. New states emerged from the partitioned territory. For ethnic, linguistic, and religious minorities living within the boundaries of newly formed states following the end of World War I, states that did not "express their traditions, history and unity—their 'national soul,'"[22] a "law of exception" was created through the Minority Treaties.[23]

In Arendt's view, the structure of the Minority Treaties reinforced the idea that human rights were tied to national rights as "the nationally frustrated population was firmly convinced—as was everybody else—that true freedom, true emancipation, and true popular sovereignty could be attained only with full national emancipation, that people without their own national government were deprived of human rights."[24]

The Minority Treaties were created as a system of protection for the 20-30 million people who found themselves in a geographic territory in which their nationality, race, or religion differed from the majority in the newly

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20 ARENDT, ORIGINS, *supra* note 1 at 230. Arendt had previously written that the subsuming of the nation within the state created "confusion" as between the Rights of Men and the rights of citizens, noting "while the state as a legal institution has declared and must protect the rights of men, its identification with the nation implied the identification of the national and the citizen and thereby resulted in the confusion of the Rights of Men with the rights of nationals or with national rights." Hannah Arendt, *The Nation*, 8 REV. OF POL. 139 (1946).

21 ARENDT, ORIGINS, *supra* note 1, at 230.

22 David Luban, *The Romance of the Nation-State*, 9 PHIL. & PUB. AFFS. 392 (1980) (citing HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM, rev. ed. 230-31 (New York: Meridian, 1958).

23 ARENDT, ORIGINS, *supra* note 1, at 269.

24 *Id.* at 272.

created nation-states.[25] The first treaty that was executed was the Polish Minority Treaty, signed on June 28, 1919, and served as a model for subsequent agreements.[26] Treaties were signed by Yugoslavia, Czechoslovakia, Romania, Greece, Austria, Bulgaria, Hungary, and Turkey[27] and minority clauses applied to Albania, Estonia, Finland, Latvia, Lithuania, and Iraq.[28]

The Minority Treaties did not create a system of universal rights, nor did they create a procedure by which an individual could effectively petition for a restoration of their rights or a redress of wrongs. As one author evaluating the treaties observed, "[s]ubstantive law is of little value without the framework of a procedural system to provide enforcement. The Minority Treaties themselves contained no code of procedure for handling disputes."[29] Under the procedure created by the Council of the League of Nations, petitions could only be brought by Members of the Council of the League of Nations, were to have the "character of information," and were not to "affect[] in any way the legal position of the states concerned."[30] Once there was a decision, there were no rules of enforcement.[31]

The Minority Treaties were also not universally applied; rather, they were a condition imposed upon smaller states by the Principal Allied and Associated Powers.[32] These countries, along with Germany, Italy, Belgium, Denmark, and France, were exempted from the obligations imposed by the treaties.[33] According to Arendt, the Minority Treaties were not designed to preserve the language and traditions of the minorities for an eventual expression of self-determination, but were designed to assure the

25 MARGARET MACMILLAN, PARIS 1919: SIX MONTHS THAT CHANGED THE WORLD 486 (2003) ("In Europe alone, 30 million people were left in states where they were an ethnic minority…"); Jacob Robinson, Oscar Karbach, Max M. Laserson, Nehemiah Robinson & Marc Vichniak, *Were the Minorities Treaties a Failure?*, 16 J. MOD. HIST. 35 (1943) [hereinafter Robinson et al., *Minority Treaties*] (noting that 20-25 million people in Central and Eastern Europe fell within the category of "minority").

26 Carole Fink, *The League of Nations and the Minorities Question*, 157 WORLD AFFS. 197, 198 (1995) [hereinafter Fink, *Minorities Question*].

27 *Id.* at 204.

28 Robinson et al., *Minority Treaties*, *supra* note 25, at 35-36.

29 *Id.* at 85.

30 Julius Stone, *Procedure Under the Minorities Treaties*, 26 AM. J. INT'L L. 502, 507 (1932).

31 Robinson et al., *Minority Treaties*, *supra* note 25, at 107; Fink, *Minorities Question*, *supra* note 26, at 204.

32 Blanche E. C. Dugdale & Wyndham A. Bewes, *The Working of the Minority Treaties*, 5 J. BRIT. INST. INT'L AFFS. 79, 82 (1926) ("But the fact remains that the smaller States resented a supervision from which the Great Powers had exempted themselves. The discrimination was resisted as a greater infringement of the precious principle of sovereignty than any provisions in the guarantees themselves . . . . The small States averred that they would willingly have accepted general regulations applying equally to every country.").

33 Carole Fink, *Defender of Minorities: Germany in the League of Nations*, 1926-1933, 5 CENT. EUR. HIST. 330 (1972).

assimilation of the minorities into the majority population of the nation state or prepare for their liquidation.[34]

Those nations that were exempted from the obligations of the Minority Treaties as a condition on their entrance into the League of Nations were, according to Arendt, those that had constitutions founded upon the Rights of Man.[35] Thus, an agreement requiring "temporary enforcement of human rights" was deemed not necessary for those states.[36] There was supposedly no need for any "additional law" to protect the rights of minorities within their borders. As Arendt noted, "[t]he arrival of the stateless people brought an end to this illusion."[37]

Millions of displaced persons became stateless when they found themselves outside their home country and denationalized.[38] Mass denationalization was a new phenomenon, protected in part by the principle of international law that "sovereignty is nowhere more absolute than in matters of 'emigration, naturalization, nationality, and expulsion.'"[39] What the arrival of the stateless revealed was the unenforceability of the Rights of Man. "The Rights of Man, supposedly inalienable, proved to be unenforceable—even in countries whose constitutions were based upon them—whenever people appeared who were no longer citizens of any sovereign state."[40]

According to Arendt, the concept of human rights broke down with the emergence of the stateless as it revealed human rights were dependent upon the retention of national rights.[41] Instead of having legally enforceable rights, the stateless were dependent upon charity to protect even their right to life. The language of "rights" lost all meaning. In Arendt's view, this revealed the crucial importance of the "right to have rights," a right that Arendt was the first to identify as such.

> We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost

34 ARENDT, ORIGINS, *supra* note 1, at 273; *see also* PHILIPPE SANDS, EAST WEST STREET: ON THE ORIGINS OF "GENOCIDE" AND "CRIMES AGAINST HUMANITY" 29 (2016), for a discussion on how the Minority Treaties impacted one family.

35 Arendt's description of the distinction between nations required to submit to a Minority Treaty and those not is admittedly Eurocentric. *See* ARENDT, ORIGINS, *supra* note 1, at 276.

36 *Id.*

37 *Id.*

38 *Id.* at 277. Arendt notes here that "[t]he problem of statelessness became prominent after the Great War," detailing mass denationalizations of Germans Jews, Russians, and Armenians.

39 *Id.* at 278 (quoting Lawrence Preuss*, La Dénationalisation impose pour des motifs politiques*, *in* 4 REVUE INTERNATIONAL FRANÇAISE DU DROIT DE GENS (1937)).

40 *Id.* at 293.

41 Arendt, *Rights of Man*, *supra* note 5, at 31.

and could not regain these rights because of the new global political situation.[42]

B. Deciphering the Meaning of a Right to Have Rights

Scholars of Arendt have offered a multitude of interpretations of the meaning of the right to have rights.[43] Arendt's work is complex and layered, lending itself to this diversity of perspectives.[44] However, many political scientists and philosophers who read Arendt's work overlook her emphasis on positive law and enforceable rights. Their interpretation of a right to have rights focuses on other aspects of her political philosophy, rather than her critique of the law. Even legal scholars who approach her writings do so from within the current framework of international law, rather than imagining what a right to have rights could be if our legal framework could overcome her critiques.

The differences in interpretations lie in how to understand the meaning of the first "right" in the phrase. Interpretations of the right to have rights generally fall into one of two broad categories. In the first category are those that interpret the right as a moral Kantian right to belong to a political community. In the second category are those that interpret the right as a right to citizenship of a sovereign state, with corresponding access to the rights of citizens. As the scholarship on Arendt is too expansive to be comprehensively reviewed here, I offer illustrative examples representative of each interpretive approach.

Diverting from these two predominant interpretations, I propose an alternative reading to the meaning of a right to have rights. I argue for an interpretation of Arendt in which the first "right" is an enforceable right guaranteed through positive international law to access human rights that

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42 *Id.* at 296-97.

43 *See, e.g.*, SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS 56 (2004); STEPHANIE DEGOOYER, ALTASAIR HUNT, LIDA MAXWELL & SAMUEL MOYN, THE RIGHT TO HAVE RIGHTS (2018); AYTEN GÜNDOĞDU, RIGHTLESSNESS IN AN AGE OF RIGHTS: HANNAH ARENDT AND THE CONTEMPORARY STRUGGLES OF MIGRANTS (2015); Werner Hamacher, *The Right to Have Rights (Four-and-a-Half Remarks)*, 103 S. ATLANTIC Q. 343 (2004); Stefan Heuser, *Is There a Right to Have Rights? The Case of the Right of Asylum*, 11 ETHICAL THEORY & MORAL PRAC. 3 (2008) [hereinafter Heuser]; Katherine Howard, *The 'Right to have Rights' 65 Years Later: Justice Beyond Humanitarianism, Politics Beyond Sovereignty*, 10 GLOBAL JUST.: THEORY PRAC. RHETORIC 79 (2017); Myres S. McDougal, Harold D. Lasswell & Lung-Chu Chen, *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 YALE L.J. 900, 959 (1974); Christoph Menke, *The "Aporias of Human Rights" and the "One Human Right": Regarding the Coherence of Hannah Arendt's Argument*, 74 SOC. RES. 739 (2007); Frank I. Michelman, *Parsing "A Right to Have Rights,"* 3 CONSTELLATIONS 200, 201 (1996); Jacques Rancière, *Who is the Subject of the Rights of Man?* 103 S. ATLANTIC Q. 297 (2004); Jan Maximilian Robitzsch, *The Genesis of Hannah Arendt's Conception of Human Rights*, 57 S. J. PHIL. 240 (2019).

44 The varied interpretations of a right to have rights is a result of Arendt avoiding giving "direct solutions or clear answers for what to do [about problems of global justice]." Serena Parekh, *Hannah Arendt and Global Justice*, 8/9 PHIL. COMPASS 771, 778 (2013).

are separate and apart from the rights of citizens.[45] For only when the right to have rights is guaranteed will the loss of a nationality no longer result in the loss of all rights. This interpretation is aligned with Arendt's perspective that human rights are illusory unless guaranteed through positive law and that they should apply when nationality and citizenship rights fail.[46]

There is circularity in Arendt's proposition. Is the right to have rights the ultimate right? Or is there a never-ending continuum of rights extending out, each one guaranteeing the next – a right to a right to have rights, and so forth? As I propose later, viewing the first "right" in the phrase as an enforceable procedural right providing access to substantive rights in part avoids the circularity problem. Viewing the first right as a procedural right aligns with the interpretation provided by Stephanie DeGooyer, who saw the first "right" in a "right to have rights" as "a kind of 'super right'" or "less a right that can be possessed than a means by which to possess a right."[47] The same can be said of Frank Michelman's interpretation, who has described the first "right" as "an *acquisition* right" and the "rights" at the end of the phrase "*object* rights."[48] Viewing the first "right" as different in character from the so-called "object rights" rings true in other contexts as well. In the context of civil rights, Robin West has called a "right to a right" a "multilayered right."[49]

The first broad category of interpretation is that which views the right to have rights as a moral right. Seyla Benhabib argues that the right to have rights is ultimately a moral right. She breaks apart the phrase, examining the first "right" separate from the second half of the phrase "to have rights." In her view, the first "'right' evokes *a moral imperative*" in the Kantian sense to belong to a human group. She limits the second half of the phrase as having a "*juridico-civil usage*" that is built upon the moral imperative to belonging. As Benhabib explains, in her view the right to have rights is "a *moral claim to membership* and *a certain form of treatment compatible with the claim to membership*."[50] However, by looking at the first "right" as lacking juridical character, Behabib fails to offer a solution to the paradox that Arendt presents. Rights

45 Jan Maximilian Robitzsch similarly focuses on positive rights in his interpretation of "a right to have rights." However, he seems to stop short of defining the first right as positive, concluding that a right to have rights is "a basic right to be a bearer of positive legal rights," without defining what he means by "a basic right." *See* Robitzsch, *supra* note 43 at 240; *see also* Cristoph Menke, *The "Aporias of Human Rights" and the "One Human Right": Regarding the Coherence of Hannah Arendt's Argument*, 74 SOC. RES. 739 (2007).

46 *See* Hannah Arendt, Statelessness (Apr. 22, 1955) (transcript available at https://memory.loc.gov/cgi-bin/ampage?collId=mharendt&fileName=05/052290/052290page.db&recNum=0&itemLink=/ammem/arendthtml/mharendtFolderP05.html&linkText=7) [hereinafter Arendt, Statelessness Lecture].

47 DEGOOYER ET AL., *supra* note 43, at 21.

48 Michelman, *supra* note 43, at 201 (emphasis in the original).

49 ROBIN WEST, CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION 150 (2019).

50 BENHABIB, *supra* note 43, at 56 (emphasis in the original).

that are not legal rights but based on morality are enforceable only through the sanctions of conscience and social disapproval are not rights at all.

Frank Michelman suggests a potential interpretation similar to that which Benhabib offers, that Arendt's "right to have rights" might be understood as a "universal abstract human moral right of state membership" that is "analogous to the Kantian moral law of freedom."[51] But he ultimately concludes that "this is not the best or most interesting way to read Arendt on the topic of the right to have rights."[52] And any reliance on morality or the human condition as a grounding to the right to have rights "would…fight against the text's loud cautions against reliance on ideas of natural, abstract human rights."[53] He ultimately concludes that Arendt, by saying that "the right of every individual to belong to humanity, should be guaranteed by humanity itself," is "pointing to an irreparable groundlessness of rights."[54] I believe this conclusion takes Arendt's perspective on rights too far from skepticism to nihilism. For she did not seem to be convinced that rights were irredeemably groundless, but that the inability to access rights when deprived of a nationality revealed a weakness in the international organization of states.[55]

Stephanie DeGooyer, in a recent book co-written with Samuel Moyn, Alastair Hunt, and Lida Maxwell that examines the right to have rights by breaking the phrase down even further (the right; to have; rights; of whom?), takes a similarly fatalistic tone. In the chapter examining the beginning of the phrase, "the right," DeGooyer argues that to Arendt, the right to have rights is "an already-lost right," or a "lost cause."[56] But, like Michelman, this takes Arendt's skepticism regarding the ability of the human rights frameworks as it existed then to *ever* be able to guarantee a right to have rights a bit too far.

On the opposite end of the spectrum are those that argue that the right to have rights is a right to a nationality or a right to citizenship. This is in line with Arendt's focus on the plight of the rightless: the stateless who had lost their nationality, the refugee who lacked an effective nationality, or the minority that found himself without a nationality. However, interpreting the right to have rights as a right to a nationality does not solve the paradox that

51 Michelman, *supra* note 43, at 203.

52 *Id.*

53 *Id.* at 206.

54 *Id.* at 207.

55 *See* Jeffrey C. Isaac, *Hannah Arendt on Human Rights and the Limits of Exposure, or Why Noam Chomsky is Wrong about the Meaning of Kosovo,* 69 SOC. RES. 505, 511 (2002) (Isaac similarly concludes that while Arendt is critical of failed efforts to enshrine and protect human rights, she is not disparaging of the idea of human rights itself, noting "while Arendt surely calls into question conventional understandings of human rights, and identifies the practical failings of human rights declarations and those who appeal to them, she does not herself disparage human rights discourse . . . ").

56 DEGOOYER ET AL., *supra* note 43, at 37-38.

Arendt presents of the need for a protection of rights for those stripped of their citizenship. Furthermore, most interpretations along these lines fail to grasp that if the right to have rights is nothing more than a right to citizenship, this necessitates an acknowledgement of the failure of human rights to serve its purpose. That is, a failure to guarantee rights to all of humanity separate and apart from the rights of citizens, something Arendt understood and articulated well.

This is not to say that viewing citizenship or an effective nationality as a threshold right to the acquisition of other rights is wrong. It is a logical conclusion given the primacy of state sovereignty in our current legal structure. But it does not resolve Arendt's criticism that human rights, if dependent upon recognition by a sovereign state, are not inalienable.

The U.S. Supreme Court jurisprudence has recognized the centrality of citizenship in accessing other rights while using Arendt's turn of phrase. In 1958, Chief Justice Earl Warren wrote in his dissenting opinion in *Perez v. Brownell*, a case that found that a U.S. citizen who voted in a foreign election and left the country to avoid the draft lost his citizenship, that "[c]itizenship *is* man's basic right for it is nothing less than the right to have rights."[57] In *Trop v. Dulles*, a decision issued on the same day for a case that ruled that denationalization as a form of punishment for a crime violated the Eight Amendment's prohibition against cruel and unusual punishment, Chief Justice Warren wrote that a person who is rendered stateless "has lost the right to have rights."[58] He believed that denationalization as a punishment "strips the citizen of his status in the national and international political community."[59]

Writing in 1974, Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen concluded that under the existing international structure of nation-states, "the right to nationality remains in essence 'the right to have rights.'"[60] They specify that nationality is the right to have rights within the state and it is the "right to have protection in rights" internationally.[61] Without a state to offer protection, a stateless person finds his rights curtailed and unable to participate effectively in any state.[62]

57 Perez v. Brownell, 356 U.S. 44, 64-65 (1958) (Warren, C.J., dissenting) (emphasis added). *See also* MIRA L. SIEGELBERG, STATELESSNESS: A MODERN HISTORY 26 (2020) (discussing some of the Supreme Court's earlier decisions on citizenship, including pondering the possibility of a person lacking citizenship of any country).

58 Trop v. Dulles, 356 U.S. 86, 102 (1958).

59 *Id.*

60 McDougal et al., *supra* note 43, at 959.

61 *Id.* at 960.

62 *Id.*

These arguments establish that a right to a nationality or the right to citizenship is a "gateway right."[63] However, defining a "right to have rights" as a right to a nationality, and the right to a nationality as a sort-of super right above other human rights only reinforces Arendt's perspective that part of the failure of human rights is a failure to distinguish between human rights and the rights of citizens. As Samuel Moyn has pointed out, Arendt could have called the right to have rights the right to citizenship, but she did not.[64]

Others advance a similar argument to the right to have rights as a right to a nationality, but see it a step removed from a right to a nationality. Stefan Heuser argues that right to have rights is "a subjective right of asylum" that would differentiate between categories of refugees, with the right of asylum focused on reinstating civil rights for political refugees.[65] But this leaves a category of rightless persons who are unable to fulfill the requirements for a subjective right to asylum.[66] There is no indication that Arendt would have believed that a right to have rights was anything less than universal or less than a right that should be guaranteed.

To discern the meaning of "the right to have rights," one must look to Arendt's work that preceded *Origins*, her thoughts on positive law expressed

63 *See* UN EXPERT WELCOMES UK COURT OF APPEAL DECISION IN SHAMIMA BEGUM CASE, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26107&LangID=E (last visited July 16, 2020) (containing a recent statement by Fionnuala D. Ní Aoláian, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, noting that "[c]itizenship is a gateway right, which enables and supports the right to have other rights, and without it individuals are profoundly vulnerable to harm.").

64 DEGOOYER ET AL., *supra* note 43, at 59. This is certainly true of her phrasing in *The Origins of Totalitarianism*. There is some evidence that her thinking evolved on this point, as indicated in notes she wrote for a 1955 lecture on Statelessness where she seemed to indicate that she believed the right to have rights was guaranteed through citizenship. But, as will be explained below, this evolution is tied to her disillusionment with failed efforts to secure for humanity legally enforceable rights separate and apart from the rights of citizens.

65 Heuser, *supra* note 43, at 3.

66 This was exactly Arendt's point about the emergence of stateless persons. *See* Christian Volk, *The Decline of Order: Hannah Arendt and the Paradoxes of the Nation-State*, *in* POLITICS IN DARK TIMES 172, 189 (Seyla Benhabib ed., 2010) (noting the stateless and refugee crises that emerged in the interwar years described by Arendt included a large population that did not qualify for asylum as previously conceived, leaving large numbers of people without protection. "Although the 'right of asylum' had become increasingly insignificant due to interstate treaties in the nineteenth century, Arendt points out the right of asylum immediately regained its political relevance with emergence of the refugees in the twentieth century. Now the tragedy was that the modern refugees could not provide evidence that they had committed any of the required offenses. They were what a refugee should never be: absolutely innocent."). This remains true under our current refugee regime as there are millions of people who might find themselves outside of the pale of the law, unable to qualify for asylum under international law as they do not have a "well-founded fear" of persecution on account of one of the five convention grounds.

in the book, as well as her writing and thoughts on human rights and international law following its publication.[67]

"The Decline of the Nation State and the End of the Rights of Man" knits together two previously published essays, "The Stateless People," published on April 1, 1945, five weeks before VE Day; and "The Rights of Man: What are They?" published in 1949. Many of the ideas that appear in the chapter in *Origins* are completely intact in these earlier essays, ready to be reused word for word. However, there are a number of significant substantive changes that reveal a potential evolution in Arendt's thinking. These changes demonstrate Arendt's disillusionment with efforts to establish a new international legal system as it failed to establish mechanisms to guarantee human rights through law, rather than mere charity. Also, Arendt made clear elsewhere in *Origins* that natural law only becomes a "political reality" through the codification in positive law. This reveals that Arendt's disillusionment was not with the law as such, but rather with the failure to guarantee human rights through positive law.

The most significant difference between "The Stateless People" and Arendt's later writings is that in the earlier essay she had not yet lost all faith in the inalienable nature of the rights of man. In examining the plight of the stateless before the end of the Second World War, she viewed it as essential that "real thought were given to the future status of the millions of souls in Europe now threatened with lawlessness of every sort just because they are stateless" and the need to "restor[e] to them the inalienable rights of man."[68] As it was, the stateless not only existed outside of the law as "no internationally guaranteed law" applied to them, their mere existence "constantly provoke[d] breaches of internationally guaranteed laws and treaties."[69] This state of lawlessness, both as it applied to stateless persons and to international law required resolution and restoration to rights existing outside of the law that Arendt was not yet ready to dismiss as merely illusory.

In this same essay, Arendt explores a theme she returns to on several occasions, that things that were considered "rights" were not guaranteed, but protected only by chance through charity or humanitarianism. This was explored by noting that the ancient right of asylum broke down with the emergence of the nation state, as realizing the right to asylum "conflicts with the international rights of the state" as it "violates the sovereignty each national state guarantees internationally to the other."[70] The right to asylum

67 *Compare with* SIEGELBERG, *supra* note 57, at 184-92 (viewing Arendt's perspective not as one that saw a failure to enshrine these protections through law, but rather a "criticism of interwar legal idealism.").

68 Hannah Arendt, *The Stateless People*, 8 CONTEMP. JEWISH REC. 153 (1945) [hereinafter Arendt, *Stateless People*].

69 *Id.* at 149.

70 *Id.* at 139.

was no longer guaranteed by law. Instead, by the Second World War, Arendt noted that "the right of asylum ha[d] acquired a peculiarly half-humanitarian, half-sentimental after-taste savoring of some remnant of bygone times – or of a radical challenge to the future."[71]

This last phrase, "a radical challenge to the future," hints at an optimism for a future where rights *could* be guaranteed, while acknowledging the need for a radical transformation of the international order in order to guarantee asylum as a legal right.[72] What Arendt was observing at the time was not a transformation towards a greater guarantee of rights, but a turn away from rights that had previously been guaranteed, or at least presumed, to great uncertainty. The "ancient right" of asylum was revealed to be illusory and citizenship was not "immutable."[73]

By the time Arendt wrote "The Rights of Man: What are They?" in 1949, she no longer viewed human rights as inalienable as she may still have believed when writing "The Stateless People." Instead, she used language later deployed in *Origins*, that human rights were "a right of exception for those who had nothing better to fall back upon."[74]

It was in this essay that she first articulated the idea of "a right to have rights." She explained here as she later would in *Origins* that a right to have rights is "a right to belong to some kind of organized community."[75]

In the context of a right to have rights, Arendt explored themes that she would return to in *Origins*: that human rights do not exist merely on the basis of being human, that the conception of human rights broke down with the emergence of people who had lost all rights, and that attempts to articulate human rights failed to distinguish them from the rights of citizens.

However, this essay still retained a shred of optimism that she expressed in "The Stateless People." She wrote that "[t]he concept of human rights can become meaningful again if it is redefined in the light of present experiences and circumstances."[76] Here she explained that there is "one right that does not spring 'from within the nation' and which needs more than national guarantees: it is the right of every human being to membership in a political community."[77]

What is the political community that she was describing here? I argue it is not the political community of a state, but rather what she describes as "mankind as *one* political entity,"[78] where responsibility for members of the

71 *Id.*

72 This sense of optimism tempered by realism is reflective of Arendt's view that "reckless optimism and reckless despair" can be harmful. *See* ARENDT, ORIGINS, *supra* note 1, at vii.

73 Arendt, *Stateless People*, *supra* note 68, at 147.

74 ARENDT, ORIGINS, *supra* note 1, at 293; *see also* Arendt, *Rights of Man*, *supra* note 5, at 24.

75 Arendt, *Rights of Man*, *supra* note 5, at 30.

76 *Id.* at 34.

77 *Id.*

78 *Id.* at 36.

community extended beyond individual nations to "the sphere of international life."[79]

Arendt closed the essay by arguing the "one human right," is the "right to belong to a political community."[80] In other words, the "one human right" was "the right to have rights." She finished with a powerful argument for its enforceability. "This human right, like all other rights, can exist only through *mutual agreement and guarantee*. Transcending the rights of the citizen – being the right of men to citizenship – this right is the only one that can and can only be guaranteed by the comity of nations."[81]

This final thought – the guarantee of the right to have rights through mutual agreement – was not included in "The Decline of the Nation State and the End of the Rights of Man." This does not indicate an abandonment of the value of enforceable rights, as Arendt repeatedly dismisses notions that rights can be protected through charity. Rather, I suggest the omission might reflect her increasing disappointment with international efforts to enshrine and protect human rights through enforceable law. Indeed, she returns to the idea of "mutual agreements" in 1955 in *Men in Dark Times*, saying "a framework of universal mutual agreements" among nations was the only way to guarantee the newly emerged "fragile unity [of mankind]."[82]

As mentioned earlier, Arendt introduces the concept of a right to have rights in *The Origins of Totalitarianism* using nearly identical language from her prior essay "The Rights of Man: What are They?"

> We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation.[83]

Arendt argues that something much more fundamental is at stake than the rights of citizens when one is cast out of and deprived of "a place in the world." Later, she describes the right to have rights as "the right of every individual to belong to humanity."[84] The alternative use of "organized community" and "humanity" seems to indicate that she does not have "state" in mind when describing an "organized community."[85] She believes that this right to belong to humanity "should be guaranteed by humanity

79 *Id.* at 35.

80 *Id.* at 37.

81 *Id.* (emphasis added).

82 Hannah Arendt, *Karl Jaspers: Citizen of the World*, *in* MEN IN DARK TIMES 81, 93 (1955) [hereinafter Arendt, MEN IN DARK TIMES].

83 ARENDT, ORIGINS, *supra* note 1, at 296-97.

84 *Id.* at 298.

85 *Id.* at 297.

itself."[86] Although she has lost the use of the words "mutual agreement," she has retained the word "guarantee," indicating a belief that some positive legal force should be coupled with the right to belong to humanity.[87]

The idea that Arendt viewed the law as central to the guarantee of rights is reflected in her perspective on the Rights of Man. That the Rights of Man lacked a legal backing, in Arendt's mind, undermined their very effectiveness. She noted that they "never became law but led a somewhat shadowy existence as an appeal in individual exceptional cases for which normal legal institutions did not suffice."[88]

The idea that Arendt envisioned a legally enforceable right is also reflected in her criticism of charity as a substitute for a legal guarantee of rights.[89] In examining efforts by the French Ligue des Droits de L'Homme to respond to the refugee crises in the interwar years, she notes they were poorly equipped to handle the massive expansion of the refugee population beyond a small number of the politically persecuted.[90] Their efforts failed to protect the rights of the refugees, and, in her mind, that failure actually undermined human rights. "When the Rights of Man became the object of an especially inefficient charity organization, the concept of human rights naturally was discredited a little more."[91]

This perspective is especially clear when Arendt distinguishes between life that is protected through charity, versus life that is protected as of right. "But neither physical safety – being fed by some state or private welfare agency – nor freedom of opinion changes in the least their fundamental situation of rightlessness. The prolongation of their lives is due to charity and not to right, for no law exists which could force the nations to feed them."[92]

Arendt notes that human rights are something that must be created and that they do not exist on the basis of our being human. Man can create law for the protection of rights, as man-made law is the only source to guarantee them. "Equality, in contrast to all that is involved in mere existence, is not

86 *Id.* at 298.

87 *Id.*; Arendt, RIGHTS OF MAN, *supra* note 5, at 30.

88 *Id.* at 280-81.

89 *But see* DEGOOYER ET AL., *supra* note 43, at 60. Samuel Moyn claims that "it has emerged that Arendt's framing of *the right* to have rights *as a right* was likely an incidental artifact of her presumed audience in the relevant part of her text. Further, her framing of the fact that you get *rights* from that prior right looks like it might have been unimportant too, or even at cross purposes with other tendencies in her outlook. Or if it was not, then it came so heavily freighted with qualifications and objections that the overall phrase seems likelier to confuse or distract."

90 ARENDT, ORIGINS, *supra* note 1, at 281 n.27.

91 *Id.*

92 *Id.* at 296. Arendt's perspective on charity is also reflected in notes to a 1955 speech on Statelessness. There she stated that the right to asylum broke down in part because "[c]harity is no right, charity should come after justice is done. . . . [T]o throw them into the lap of charity organizations meant practically: they are completely rightless: No right to live in the sense no business to be on earth." Arendt, Statelessness Lecture.

given us, but is the result of human organization insofar as it is guided by the principle of justice. We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights."[93]

Some of the strongest support for the claim that Arendt envisioned positive law to enshrine a right to have rights comes from the final chapter of *The Origins of Totalitarianism*, "Ideology and Terror."[94] There she explains that positive law is necessary for the realization of natural law.

> By lawful government we understand a body politic in which positive laws are needed to translate and realize the immutable *ius natural* or the eternal commandments of God into standards of right and wrong. Only in these standards, in the body of positive laws of each country, do the *ius natural* or the Commandments of God achieve their political reality.[95]

In this passage and in others, Arendt describes positive law as an intermediary between natural law, which is more permanent and serves as a "source of authority for positive law," and the "rapidly changing actions of men."[96] Positive law, while "changing and changeable…possessed a relative permanence."[97] In explaining key features of totalitarian regimes, Arendt criticized their exclusive reliance on natural law as "a higher form of legitimacy" than positive law, and their disregard of positive law as a means of "do[ing] away with petty legality."[98]

Arendt viewed positive law as a necessary stabilizing factor in an unstable word.[99] According to Arendt, positive law established by constitutional governments creates boundaries through which freedom may be realized.[100] The essence of totalitarianism is to defy the law and to "raze the boundaries of man-made law."[101]

Arendt's belief that rights must be protected through positive law is also reflected in *On Revolution*. There, she criticized the French Revolution for stripping individuals of their legal personality through the articulation of the Rights of Man as natural rights, rendering them "politically irrelevant

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93 ARENDT, ORIGINS, *supra* note 1, at 301.

94 *Id.* at 460.

95 *Id.* at 464; Jan Klabbers has interpreted this phrase as signifying Arendt's "insistence that the only law valid among humans, without denying the possible existence of natural law, would be positive law . . . ." *See* Jan Klabbers, *Possible Islands of Predictability: The Legal Thought of Hannah Arendt*, 20 LEIDEN J. INT'L L. 1, 11 (2007).

96 ARENDT, ORIGINS, *supra* note 1, at 463.

97 *Id.*

98 *Id.* at 462.

99 *Id.* at 463.

100 *Id.* at 465-66.

101 *Id.* at 461, 465.

being[s]."[102] Rather than accomplishing the purported goals of liberation and equality, it "left all inhabitants equally without the protecting mask of a legal personality."[103]

This is not to say that Arendt thought that positive law was the exclusive solution for the protection of rights. As she noted in a 1945 article, "political and historical realities" should not be overlooked "for the sake of written treaties and agreements."[104]

Once we connect Arendt's thoughts on positive law as the means through which natural law becomes a "political reality" with her belief that human rights were illusory when appearing only through the natural law framework of the Rights of Man, it becomes clear that for Arendt, the means through which human rights can become a "political reality" is through positive law. While natural law can and should provide a philosophical underpinning for human rights, positive law is needed to "translate and realize" natural law into "standards of right and wrong."[105] The articulation of positive laws, in contrast to the "lawlessness of tyranny," is characteristic of a "lawful government."[106] When conceptualizing this at the international level, while there is no "constitutional government" for the world, there is nevertheless some positive law, and it operates, as Arendt had hoped, as a feature in the organization of humanity that upholds the rule of law. It is reflective of what Arendt believed to be characteristic lawful governments.

I advocate for an interpretation of the meaning of a "right to have rights" that joins these threads of Arendt's thinking. As Arendt's primary concern that the denationalized and rightless were cast out of humanity altogether, it is central to the realization of the right to have rights that it guarantees the right of every individual to belong to humanity. Humanity cannot simply be defined as a collection of traditional nation-states, but rather as a community of shared responsibility.[107] As a right to have rights is the vehicle through which an individual realizes their human rights, the right must be guaranteed by law and not mere charity. In order for human rights to have any meaning, they must be *more* than natural rights. Natural rights do not "achieve their political reality" until they are realized through

102 ARENDT, ON REVOLUTION, *supra* note 7, at 97.

103 *Id.* at 98.

104 Arendt, *Nationalities and National Minorities*, *supra* note 19, at 205. This failure to consider the political ramifications of legal solutions seemed to color Arendt's perspective on the attempts to draft a new bill of human rights. "Even worse was that all societies formed for the protection of the rights of man, all attempts to arrive at a new bill of human rights were sponsored by marginal figures – by a few international jurists *without political experience* or professional philanthropists supported by the uncertain sentiments of professional idealists." ARENDT, ORIGINS, *supra* note 1, at 292 (emphasis added).

105 ARENDT, ORIGINS, *supra* note 1, at 464.

106 *Id.*

107 As Arendt explained, "men must assume responsibility for all crimes committed by men," and all of mankind share a "common responsibility" to each other. *Id.* at 235-36.

positive law. The right to have rights must itself be enshrined in positive law.

In arguing for a right to have rights, Arendt is looking for a solution to "the deprivation of all legality."[108] It is curious that many scholars examining the paradox that Arendt presents do not turn to the law for potential solutions and that they reject the notion that the law can play a role in resolving the challenge Arendt issues.[109] What Arendt searches for is an expansion of legal rights to guarantee other rights long believed to be inalienable, but proved illusory without the protection of law. As will be examined below, there are real barriers to finding a solution in the law, particularly on the international plane, but this does not mean that the law is powerless in this equation. The solution must, therefore, involve the restoration of legal personhood through the law. I argue that this must be done through international law, separate and apart from legal personhood granted by the state.

C. Arendt on the Failure of International Law to Guarantee a Right to Have Rights

To Arendt, the lack of enforceability of rights, and the need for a threshold "right to have rights," revealed a fundamental flaw in the organization of states and our international legal system built around relationships between states.[110] The ability of any individual to realize their rights remained dependent upon the power and action of sovereign states, and international law was restrained in achieving with it could with respect to human rights due to sovereignty.[111] But to Arendt, "the right to have rights, or the right of every individual to belong to humanity, *should be guaranteed by humanity itself*."[112] Any system relying solely on the guarantee of sovereign states was bound to fall short of guaranteeing a "right to have rights."

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108 *Id.* at 295.

109 *But see* ALISON KESBY, THE RIGHT TO HAVE RIGHTS: CITIZENSHIP, HUMANITY, AND INTERNATIONAL LAW 147 (2012) (arguing that using a right to have rights as a way of advancing positive law would "stunt[] the very emancipation which is sought" by the phrase. In her view, "[t]he contribution of the right to have rights is that of a call to embed its own delegitimating gesture within the law, against the law, opening the law to a recognition of its own exclusions.").

110 Bridget Cotter, *Arendt and "The Right to Have Rights," in* HANNAH ARENDT AND INTERNATIONAL RELATIONS 104 (2005) (arguing that one of the "four main weaknesses of the international system" identified by Arendt was that "the system is unable or reluctant to enforce human rights because of the principle of state sovereignty").

111 Writing in 1955 in notes for a speech on Statelessness, Arendt's expression in her opinion on the failure of human rights to function as they should but did not due to sovereignty was clear. "Obviously [human rights] should apply when nationality and citizen rights do not function Yet, the opposite was true: Even the most elementary human rights function only as citizen-rights. No international body can supplant because of sovereignty." Arendt, Statelessness Lecture.

112 ARENDT, ORIGINS, *supra* note 1, at 298 (emphasis added).

As Arendt was writing at the dawn of the human rights era, it is reasonable to inquire whether the modern system of international law and human rights created the new law on earth to guarantee the rights of the whole of humanity. Arendt answered her own question posed in *The Origins of Totalitarianism* in the negative. Based on her later writings, she remained skeptical about the ability of individual rights to be guaranteed by humanity itself even in the face of the further development of international law.[113] Her skepticism was rooted in her perspective on the shortcomings of sovereignty, and in her mind, she doubted that any system based on the nation state as initially conceived in the fifteenth and sixteenth century would lead to a system in which the right to have rights could be guaranteed.[114]

It appears that Arendt initially retained some belief that the horrors of the Second World War might inspire a transformation in international law. This seems to be what she was alluding to when calling for a "new law on earth" in the Preface to the First edition of *Origins*. This optimism seemed to fade with the passage of time and the failure of the international community to radically alter the international legal landscape or find a way to guarantee human rights separate and apart from the rights of citizens.

In "The Rights of Man: What are They?" Arendt still had a sense of optimism for the possibility of international law to protect rights other than the rights of citizens or to redress wrongs separate and apart from agreements governing the conduct of sovereign nations. In referring to crimes against humanity as defined by Justice Jackson at the Nuremberg Trials, she calls this development in the law "the first and most important notion of international law" that "transcends its present sphere."[115] Crimes against humanity reflected "the emergence of mankind as *one* political entity."[116] She argues that these crimes — crimes against humanity and the placement of those deprived of rights in concentration camps —"could and should become the subject of action that would not have to respect the rights and rules of sovereignty."[117]

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113 *But see* Seyla Benhabib, *International Law and Human Plurality in the Shadow of Totalitarianism*, *in* HANNAH ARENDT AND THE LAW 194 (Marco Goldoni & Christopher McCorkindale, eds., 2012) (arguing Arendt had a "change of heart" and there was an "evolution of Arendt's thought from skepticism towards international law and human rights in the 1950s toward a cautious confirmation of their role in shaping politics among nations in the 1960s").

114 *See* Douglas Klusmeyer, *Hannah Arendt's Critical Realism*, *in* HANNAH ARENDT AND INTERNATIONAL RELATIONS 117 (2005).

115 Arendt, *Rights of Man*, *supra* note 5, at 36.

116 *Id.*

117 *Id.* at 37; *see also* HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1968) 61-62 [hereinafter LAUTERPACHT, INTERNATIONAL LAW] (Lauterpacht, writing contemporaneously to Arendt in a book first published in 1950, echoed the sentiment that the elaboration of crimes against humanity was reflective of a potential transformation of international law. "[T]he express enactment of crimes against humanity must be regarded as an indirect recognition of

But even in this essay, Arendt expressed skepticism about attempts to protect human rights through the drafting of what became the Universal Declaration of Human Rights. Arendt noted that all attempts seemed unable to separate human rights from national rights. "From the standpoint of theory, recent attempts to frame a new bill of human rights have demonstrated that no one seems able to define with any assurance what these general human rights, as distinguished from the rights of citizens, really are."[118]

This framing was largely intact in *The Origins of Totalitarianism*:

> [O]ne must add the confusion created by the many recent attempts to frame a new bill of human rights, which have demonstrated that no one seems able to define with any assurance what these general human rights, as distinguished from the rights of citizens, really are.[119]

In answering whether the right to have rights could be guaranteed by humanity itself, Arendt answered that under the current conception of international law, this seemed unlikely.

> It is by no means certain whether this is possible. For, contrary to the best-intentioned humanitarian attempts to obtain new declarations of human rights from international organizations, it should be understood that this idea transcends the present sphere of international law which still operates in terms of reciprocal agreements and treaties between sovereign states; and, for the time being, a sphere that is above the nations does not exist.[120]

Even though Arendt expressed skepticism on efforts to secure human rights through positive law, she still believed international law was central to the solution.[121] In the Epilogue to *Eichmann in Jerusalem*,

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fundamental rights of human personality independent of the law of the State and enforceable by international law."). *But see Draft Articles on Prevention and Punishment of Crimes Against Humanity*, [2019] 2/2 Y.B. Int'l L. Comm'n __ (This sort of radical transformation of sovereignty or reimagining of the legal personality of the individual to see redress of wrongs through international dispute settlement is not contemplated in the Draft Articles. Rather, the dispute settlement clauses in Article 15 are centered on the resolution of disputes between states regarding the interpretation or application of the draft articles.).

118 Arendt, *Rights of Man*, *supra* note 5, at 26.

119 ARENDT, ORIGINS, *supra* note 1, at 293; *see also* Arendt, *Rights of Man*, *supra* note 5, at 26.

120 ARENDT, ORIGINS, *supra* note 1, at 298.

121 Seyla Benhabib has written that Arendt's reflections on international law in *Eichmann in Jerusalem* reflect a "change of heart" or an "evolution" in "thought from skepticism toward international law and human rights in the 1950s toward a cautious confirmation of their role in shaping politics among nations in the 1960s." SEYLA BENHABIB, *International Law and Human Plurality in the Shadow of Totalitarianism: Hannah Arendt and Raphael Lemkin*, *in* POLITICS IN DARK TIMES 222 (2010). I see more consistency in Arendt's thought. I would argue that skepticism that was expressed in the 1950s was

published in 1963, Arendt wrote that international law was essential to the prevention of the crime of genocide.

> If genocide is an actual possibility of the future, then no people on earth – least of all, of course, the Jewish people, in Israel or elsewhere – can feel reasonably sure of its continued existence without the help and the protection of international law.[122]

Arendt believed that the Eichmann trial could have been a step towards the yet unfinished international law project, still lacking a robust articulation of positive laws.[123]

Arendt described this belief in the need for and value of positive law in other contemporaneous writings. In *On Revolution*, written in 1963, Arendt wrote about the articulation of individual rights, framing them as human rights, noting that any expression of human rights that was not incorporated into positive law was ineffectual.

> In our context, we do not need to insist on the perplexities inherent in the very concept of human rights nor on the sad inefficacy of all declarations, proclamations, or enumerations of *human rights that were not immediately incorporated into positive law*, the law of the land, and applied to those who happened to live there. The trouble with these rights has always been that they could not but be less than the rights of nationals, and that they were invoked only as a last resort by those who had lost their normal rights as citizens.[124]

The challenge for any articulation of human rights is to provide a guarantee for those that find themselves without the protection of a nation-state, for without which there is danger they will be cast out of humanity all together. Throughout her writing, Arendt advocated for the protection of human rights, or a right to have rights, through positive law. As she alluded to in her expression of a new law on earth, this would require a complete transformation of international law to create a sphere above nations that did not exist.[125] As will be described below, while there has been progress in the expansion of the international legal framework to protect human rights and redress wrongs in the elaboration of norms of international criminal law, we have yet to guarantee a right to have rights as a legally enforceable right.

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due to the failure of the international community to articulate a framework for human rights separate and apart from the rights of citizens in a manner that was legally enforceable, or overcome traditional notions of sovereignty. So it wasn't skepticism in the law itself that she later changed her mind about, but rather outlining the centrality of the law that was illuminated through the Eichmann trial.

122 HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 273 (2006) [hereinafter ARENDT, EICHMANN].

123 *Id.* at 273-74.

124 ARENDT, ON REVOLUTION, *supra* note 7, at 140 (emphasis added).

125 ARENDT, ORIGINS, *supra* note 1, at 298.

III. THE DEVELOPMENT OF INTERNATIONAL LAW AND HUMAN RIGHTS

Hannah Arendt wrote *The Origins of Totalitarianism* at the dawn of the human rights era. At the time of publication, only the Universal Declaration of Human Rights and the Genocide Convention had been adopted in the nascent modern human rights regime. While other human rights instruments were drafted and open for signature late in Arendt's life, the vast majority of the international human rights legal framework came into force following Arendt's death.

Given Arendt's disillusionment with the articulation of human rights as they appeared in the early manifestations of the human rights regime, it is worth examining the developments in the international legal framework to discern the extent to which human rights have been incorporated into positive law, and if this codification has resulted in the realization of the right to have rights. That is, when stripped of all rights as conferred by a national government due to statelessness or lack of an effective nationality, does an individual otherwise have a pathway or an enforceable right to have rights that are separate and apart from the rights of citizens? Or does the international legal framework retain gaps in protection that lead to the mass status of rightlessness that Arendt wrote about in *Origins*.

Human rights were incorporated in the Charter of the United Nations.[126] However, at its inception, questions remained as to how the United Nations would take up the charge to promote and respect human rights. The Economic and Social Council established the Commission on Human Rights in 1946 to fulfill the vision of Article 68 of the Charter.[127] A Draft Declaration on Fundamental Human Rights and Freedoms was considered by the Third Committee and referred to the Economic and Social Council for consideration by the Commission on Human Rights in preparation to draft an International Bill of Rights.[128] While there were proponents of a legally binding instrument or the establishment of an international tribunal for the protection and human rights and the creation of enforcement mechanisms, these projects were separated from work on a

126 Samuel Moyn has described the inclusion of human rights in the Charter of the United Nations as "reduced to embellishment." SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 181 (2010). *But see* Myres S. McDougal & Gertrude C. K. Leighton, *The Rights of Man in the World Community: Constitutional Illusions versus Rational Action*, 59 Yale L. J. 60, 60 (1949) (arguing that human rights "too often thought to be at the periphery of the purposes of the United Nations, represents in fact the main core of rational objectives….of the United Nations.").

127 U.N. Charter art. 68 ("The Economic and Social Council shall set up commissions in economic and social field and for the promotion of human rights and such other commissions as may be required for the performance of its functions.").

128 U.N. Doc. A/RES/43 (Dec. 11, 1946).

non-binding declaration that could pass more quickly and would not require the consent of states.[129]

The Universal Declaration of Human Rights was adopted by the General Assembly on December 10, 1948.[130] Although today many provisions are considered to be reflective of principles of customary international law,[131] at the time it was adopted, it was not considered to impose binding legal obligations on UN member states.[132] Furthermore, while Article 8 enshrined the "right to an effective remedy" at the national level for violations of rights granted under national law, the Declaration contained no right to a remedy for violations of the obligations outlined therein, an oversight that even one of its authors considered to be an "important omission."[133] Hersch Lauterpacht was famously critical of the Declaration as it was non-binding, it articulated rights without imposing

129 MARY ANN GLENDON, A WORLD MADE NEW 84-88 (2001); M. GLEN JOHNSON AND JANUSZ SYMONIDES, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A HISTORY OF ITS CREATION AND IMPLEMENTATION 1948-1998 34-36 (1998).

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

131 *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of Judge Ammoun, 1971 I.C.J. ¶ 6 (June 21) (describing the Universal Declaration of Human Rights as a codification of custom); John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, *in* HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 29 (B.G. Ramcharan ed., 3d ed. 1979) ("The thesis … is that, in addition to their admitted moral and political authority, the justiciable provisions of the Declaration, including certainly, those enunciated in articles two to twenty-one inclusive, have now acquired the force of law as part of the customary law of nations.").

132 "In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation." Eleanor Roosevelt Papers Project, *Statement to the United Nations' General Assembly on the Universal Declaration of Human Rights (Dec. 9, 1948)*, GW Columbian College of Arts and Sciences, https://erpapers.columbian.gwu.edu/statement-united-nations-general-assembly-universal-declaration-human-rights-1948.

133 Humphrey, *supra* note 131, at 27 ("There were some important omissions including the failure to include any article on the protection of minorities and to recognize any right of petition even at the national level—a right so fundamental that it is recognized even by some authoritarian countries—let alone by the United Nations."). Hersch Lauterpacht also bemoaned the absence of the right of petition, noting "[t]here is a further element of incongruity in the fact that, on account of the objections raised largely by reference to the exclusive jurisdiction of States, the Declaration, which is a document claiming moral authority, contains no reference to the right of petition—though a special resolution of the General Assembly safeguarded in this respect, somewhat inconclusively, the possibility of giving effect to what it described as an 'essential human right.'" LAUTERPACHT, INTERNATIONAL LAW, *supra* note 117, at 423-24. The article, A/C.3/306 (Oct. 25, 1948), considered by the Commission on Human Rights on the right of petition read: "[e]veryone has the right, either individually or in association with others, to petition or to communicate with the public authorities of the State of which he is a national or in which he resides, or with the United Nations." An alternative framing was proposed by France that read: "[e]veryone has the right, either individually or in association with others, to petition or to communicate with the public authorities of the State of which he is a national or in which he resides. He also has the right to petition or to communicate with the competent organs of the United Nations in matters relating to human rights."

corresponding obligations on states, and lacked provisions for remedies of violations.[134]

At the time the Declaration was adopted, the General Assembly requested that the Commission on Human Rights continue its plan of work on an International Bill of Human Rights that was envisioned to include the Declaration, a Covenant on Human Rights, and implementation measures.[135] The Human Rights Commission initially considered a draft for a "Convention on Human Rights" in 1947, before its name was changed to the Covenant on Human Rights.[136] The Covenant was bifurcated into two separate documents, one to address civil and political rights and the other economic, social, and cultural rights. The Commission on Human Rights presented drafts of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) to the UN General Assembly in 1954. It took twelve more years before the ICCPR and the ICESCR were adopted on December 16, 1966 and another ten years before they entered into force on March 23, 1976 and January 3, 1976, respectively.[137]

The ICCPR contained measures of implementation, namely the establishment of a Human Rights Committee, which would oversee the implementation of the Covenant, including review of reports submitted by States Parties, but included no individual right of petition. The only disputes envisioned pursuant to the Convention were those brought by a state party against another state party in the form of a "communication."[138] Even the Optional Protocol to the ICCPR, adopted simultaneously with the Covenant, only provides for the submission of written communications by individuals for "consideration" by the Committee, and only by individuals subject to the jurisdiction of a state party to the Optional Protocol.[139] The ICESCR contained no provision for communications brought by individuals or State Parties,[140] but rather provided for both in the Optional

134 LAUTERPACHT, INTERNATIONAL LAW, *supra* note 117, at 394-428.

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

136 HURST HANNUM ET AL., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 80-82 (4th ed. 2006).

137 *Id.*

138 G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR].

139 G.A. Res. 2200A (XXI), Optional Protocol to the International Covenant on Civil and Political Rights (Dec. 16, 1966). *But see* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 344 (1997) (noting that in considering communications under the Optional Protocol, the Human Rights Committee "is behaving more and more like a judicial arbiter of human rights disputes, even when granted only limited powers by states parties.").

140 G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) [hereinafter ICESCR].

Protocol.[141] The structure of the Covenants and Optional Protocols means that those individuals who are not subject to the jurisdiction of a state party to one of the Optional Protocols are without means to even submit written communications to this limited non-judicial forum and those that are subject to the jurisdiction of a state party that recognizes the competence of the Human Rights Committee can only submit "communications" that result in non-binding decisions.[142]

Subsequent human rights conventions have included complaint mechanisms in the text of the convention or an optional protocol similar to that provided under the ICCPR and ICESCR. Individuals may bring complaints in the form of communications or petitions alleging violations of convention rights by a state party that recognizes the competence of the relevant Committee of a human rights convention.[143] However, the relevant committees have very little power, if any, to enforce their decisions on complaints.[144]

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141 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. A/63/435 (Dec. 10, 2008).

142 As of January 2021, there are 116 State Parties to the Optional Protocol of the ICCPR. Many of the State Parties to both Optional Protocols have made Declarations or Reservations limiting the competence of the committee to hear individual communications. Most of the declarations and reservations to the Optional Protocol of the ICCPR limit the jurisdiction *ratione temporis* of the Committee to the date after which the Optional Protocol entered into force, or limit the Committee to hearing those communications which are not otherwise subject to another procedure of international investigation or settlement. *See* Optional Protocol to the International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. A/63/435 (Dec. 10, 2008).

143 G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 22 (Dec. 10, 1984) (allowing states parties to make a declaration that it recognizes the competence of the Committee Against Torture to consider communications from individuals subject to the jurisdiction of the state party); G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination art. 14 (Dec. 21, 1965) (allowing States Parties to make a declaration accepting the competence of the Committee on the Elimination of Racial Discrimination); Optional Protocol to the Convention (Oct. 6, 1999), https://www.ohchr.org/en/professionalinterest/pages/opcedaw.aspx (last visited Aug. 12, 2021), provides for a procedure for the Committee on the Elimination of Discrimination against Women to receive complaints from individuals within the jurisdiction of States Parties to the Optional Protocol; Optional Protocol to the Convention on the Rights of Persons with Disabilities (Dec. 13, 2006), https://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx (last visited Aug. 12, 2021), a procedure for the Committee on the Rights of Persons with Disabilities to hear complaints of individuals subject to the jurisdiction of States Parties to the Optional Protocol; *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, U.N. Doc. A/RES/66/138 (Dec. 19, 2011), provides for a communications procedure which allows individuals subject to the jurisdiction of States Parties to the Option Protocol to bring complaints alleging violations of the Convention on the Rights of the Child or one of the two substantive optional protocols; Article 31 of the International Convention for the Protection of All Persons from Enforced Disappearance, 2716 U.N.T.S. 3 (Dec. 23, 2010), allows States Parties to make a declaration pursuant to article 31 accepting the competence of the Committee on Enforced Disappearance to hear complaints brought by individuals subject to their jurisdiction.

144 For example, in a recent follow-up report on decisions on communications, the Committee Against Torture noted that a state had not implemented the committee's decision. The only consequences to the state's inaction were that the Committee would "keep the follow-up dialogue

While human rights treaties generally also have monitoring mechanisms that rely on the self-reporting of States,[145] and the Universal Periodic Review Process requires UN member states to report on their fulfillment of their human rights obligations,[146] these mechanisms, in and of themselves, do not result in the restoration of individual rights. While some scholars, such as Pammela Quinn, have argued that the constellation of reporting and monitoring mechanisms, when utilized by or integrated with adjudicative bodies such as the regional human rights courts, can strengthen human rights enforcement,[147] this does not necessarily mean that in and of themselves they create an enforceable right to have rights, even if they might lead to progress in terms of State compliance with their human rights obligations.

The broadest mechanism for considering individual complaints was developed under the 1503 procedure, named after the resolution of the Economic and Social Council in 1970[148] and amended in 2000.[149] There are no geographic limitations, but individuals can only bring complains related to a "consistent pattern of gross and reliably attested violations of human rights."[150] Other than in rare circumstances, the complaint procedure is entirely confidential, including any resolution with the offending state. The strictest measures available to the Human Rights Council are to appoint an independent expert or "[t]o recommend to OHCHR to provide technical cooperation, capacity-building assistance or advisory services to the State concerned."[151]

Outside of the human rights conventions, the Special Procedures of the Human Rights Council provides that independent human rights experts may send communications to States regarding allegations of human rights violations, but may only *request* clarifications or request the State take action to "stop a violation, investigate it, bring to justice those responsible and

ongoing," and "publish the lack of implementation of the above decision in its annual report." U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Comm. Against Torture, U.N. Doc. CAT/C/68/3, ¶ 10 (June 19, 2020).

145 Cosette D. Creamer & Beth A. Simmons, *The Proof is in the Process: Self-Reporting Under International Human Rights Treaties*, 114 AM. J. INT'L L. 1, 6 (2020).

146 Human Rights Council Res. 5/1, U.N. Doc. A/RES/5/1, ¶¶ 4, 5, 15 (June 18, 2007).

147 *See* Pammela Quinn Saunders, *The Integrated Enforcement of Human Rights,* 45 N.Y.U. J. INT'L L. & POL. 97, 109, 115, 125, 171 (2012).

148 *The 1503 Procedure of the Commission on Human Rights*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, https://www.ohchr.org/EN/HRBodies/Petitions/Pages/1503Procedure.aspx (last visited Aug. 12, 2021).

149 Economic and Social Council, U.N. Doc. E/RES/2000/3, ¶¶ 7-8 (June 16, 2000).

150 *Id.* at ¶ 2.

151 Institution-building of the United Nations Human Rights Council, Human Rights Council, U.N. Doc. A/RES/5/1, ¶ 109(e) (June 18, 2007).

make sure that remedies are available to the victim(s) or their families."[152] There are no mechanisms to enforce these procedures.

The international conventions that most directly address the deprivation of rights that Arendt described in *Origins* are the 1951 Convention on the Status of Refugees and its 1967 Protocol, the 1954 Convention relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness. Article 38 of the Refugee Convention, Article 4 of the 1967 Protocol, Article 34 of the Convention Relating to the Status of Stateless Persons, and Article 14 of the Convention on the Reduction of Statelessness all contain compromissory clauses for state parties to submit disputes relating to the interpretation and application of the respective conventions to the International Court of Justice.[153] However, state parties to these conventions have never submitted complaints pursuant to the relevant dispute mechanisms to the ICJ. Furthermore, there is no path for individual recourse under these conventions as they lack any other enforcement mechanism that would be available to individuals. Thus, if an individual is denied the ability to acquire a nationality or is discriminatorily deprived of a nationality in contravention of the obligations of a state party to the Convention on the Reduction of Statelessness, there is no right to a remedy at all, much less one that would restore the person's nationality and grant them access to the rights of citizens. Without enforceable rights provided through the human rights conventions, individuals who are stateless exist in a state of perilousness, potentially without access to the rights of citizens or of human rights.

Even the United Nations High Commissioner for Refugees (UNHCR), the UN agency that is supposed to be the guardian of the Refugee Convention and Statelessness Conventions, engages with states in such a way that undermines the rights of refugees.[154] As of 2019, UNHCR reports

152 *What Are Communications?*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, https://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx (last visited Aug. 12, 2021).

153 Convention Relating to the Status of Refugees art. 38, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees art. 4, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267; Convention on the Reduction of Statelessness art. 14, Aug. 30, 1961, 989 U.N.T.S. 175; Convention Relating to the Status of Stateless Persons art. 34, Sept. 28, 1954, 360 U.N.T.S. 117.

154 For example, Kenya is a state party to the Refugee Convention. Following a massive influx of refugees in the 1990s and 2000s, it instituted an "encampment policy" that, among other things, severely limits refugees' freedom of movement and right to work as afforded them under the Convention. *Refugee Law and Policy: Kenya*, LIBRARY OF CONGRESS, https://www.loc.gov/law/help/refugee-law/kenya.php (last visited Aug. 12, 2021). The result is a large concentration of refugees in camps in remote areas, including the Dadaab refugee complex, which currently has a refugee population of over 200,000 people. *Dadaab Refugee Complex*, UNHCR: THE UN REFUGEE AGENCY, https://www.unhcr.org/ke/dadaab-refugee-complex (last visited Aug. 12, 2021). Kenya's refugee population is jointly managed by Kenya and the UNHCR. *Refugee Law and Policy: Kenya*, LIBRARY OF CONGRESS, https://www.loc.gov/law/help/refugee-law/kenya.php (last visited Aug. 12, 2021). As outlined by Elizabeth Campbell, Jeff Crisp, and Esther Kiragu, the "UNHCR generally

that nearly 16 million people are living in protracted refugee situations.[155] In a practice often referred to as "refugee warehousing," refugees live in settlements or camps, often for decades.[156] In many situations, refugees are not afforded their rights to freedom of movement or to work as contained in the Convention.[157] Rather, they remain dependent upon humanitarian assistance – or charity – from the very agency meant to oversee the implementation of the Convention protecting their rights.[158] There is very little to distinguish this practice from the internment camps for displaced persons as described by Arendt in *Origins*.

Beyond human rights conventions and conventions addressing the status of refugees and stateless persons are the various human rights monitoring mechanisms, fact-finding missions, and independent international investigative mechanisms. While these mechanisms have been established to gather facts and promote accountability,[159] and are increasingly being used to engage in investigations with an eye towards gathering evidence that can later be used in international criminal prosecutions,[160] they are not designed to restore individual rights *per se*, nor do they create any individual procedural rights.

More robust in terms of international adjudication are international criminal tribunals and special courts established to bring accountability for violations of international criminal law. While important mechanisms for international accountability, they are not designed to restore the rights of individuals, nor do they create a legally enforceable right to have rights.[161]

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acceded to the Kenyan government's encampment policy. While the organisation was able to negotiate some exceptions to that rule, UNHCR generally advised refugees approaching the Branch Office in Nairobi that they should report to and reside in Dadaab or Kakuma." Elizabeth Campbell et al., *Navigating Nairobi: A Review of Implementation of UNHCR's Urban Refugee Policy in Kenya's Capital City*, at 8, U.N. Doc. PDES/2011/01 (2011) [hereinafter *Navigating Nairobi*].

155 *Protracted Refugee Situations Explained*, USA FOR UNHCR, https://www.unrefugees.org/news/protracted-refugee-situations-explained/ (last visited Aug. 12, 2021).

156 *See, e.g.*, Lives in Storage: Refugee Warehousing and the Overlooked Humanitarian Crisis, U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS (Dec. 2019).

157 *See, e.g.*, *Navigating Nairobi*, supra note 154.

158 *See Framework for Durable Solutions for Refugees and Persons of Concern*, UNHCR GENEVA: CORE GROUP ON DURABLE SOLUTIONS (May 2003), *https://www.unhcr.org/en-us/partners/partners/3f1408764/framework-durable-solutions-refugees-persons-concern.html* (last visited Aug. 12, 2021).

159 Zachary D. Kaufman, *The Prospects, Problems and Proliferation of Recent UN Investigations of International Law Violations,* 16 J. INT'L CRIM. JUST. 93, 112 (2018) (noting that even though recent investigations are designed to promote accountability, they "raise significant questions about achieving that goal amidst rampant human rights abuses . . . International lawyers, atrocity crime survivors and other observers thus await answers before assessing whether these investigations will truly promote justice.").

160 David Mandel-Anthony, *Hardwiring Accountability for Mass Atrocities*, 11 DREXEL L. REV. 903, 910, 968 (2019).

161 James Silk distinguishes between the purpose of human rights protection versus human rights enforcement. According to Silk, human rights protection "means defending or guarding individuals or

In fact, some, such as Professor James Silk, have argued that the focus on individual responsibility for human rights violations and the perpetration of international crimes can undermine human rights protection.[162]

The lack of a legally enforceable right to have rights is due to several structural weaknesses in the international legal system. As outlined in the illustrative examples above, this includes a lack of adjudicative bodies to resolve disputes regarding individuals who have been stripped of their rights, a lack of standing for individuals before the adjudicatory bodies that do exist, and lack of mechanisms to enforce human rights norms or decisions by treaty bodies or international courts and tribunals. At the international level, there is no single adjudicative body that grants individuals standing to petition for a restoration of their rights with mechanisms to enforce a decision against a state. Depending on the treaty regime, there may be one or more elements present, but not all three.[163] Paul Kahn attributes this to a mismatch between substantive rights articulated in human rights treaties and the international institutions created that reflect the reality of state power.[164] In order for there to be a legally enforceable right to have rights, the institutions created must match the substantive law protecting human rights.

The lack of enforcement for human rights norms has in itself created barriers to the realization of rights. Oona Hathaway, in an expansive study that found that ratification of human rights treaties was not correlated with human rights compliance, found that "because human rights treaties are generally only minimally monitored and enforced, there is little incentive for ratifying countries to make the costly changes in actual policy that would be necessary to meet their treaty commitments."[165]

This is not to say that our existing human rights framework has no value. Even human rights declarations or treaties that lack adjudicatory bodies,

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peoples from violation . . . stopping or preventing abuses" whereas human rights enforcement "means bringing about obedience by relevant actors to human rights norms." It is "retrospective" in nature and "responds to violations after they occur by imposing criminal sanctions on perpetrators." James Silk, *International Criminal Justice and the Protection of Human Rights: The Rule of Law or the Hubris of Law?*, 39 YALE J. INT'L L. ONLINE 94, 96 (2014).

162 *Id.* at 102 (arguing that "the ability to hold individual perpetrators of human rights violations criminally liable, is likely to discourage international protective action by shifting attention away from states and other institutions of power").

163 For example, as outlined above, the treaty regimes governing the rights of refugees and stateless persons gives the ICJ jurisdiction to adjudicate disputes between states concerning the interpretation and application of the relevant Convention, but individuals do not have standing to bring a petition and the ICJ does not have enforcement mechanisms to ensure compliance with their decisions.

164 Paul W. Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1, 10 (2000).

165 Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002). *But see* JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW 202 (2005) (arguing that binding treaties have little effect on whether or not States comply with human rights obligations, rather, States are motivated by self-interest).

treaties without an individual right to standing, weak enforcement mechanisms, or enforcement mechanisms that are not designed to ensure the realization of rights can advance the law and be used as powerful advocacy tools.[166] For example, even though the case against Myanmar before the ICJ described below may not result in the restoration of the right to citizenship for the Rohingya or the restoration of their human rights, the recognition that they are a "protected group" under the Genocide Convention is intrinsically valuable to those who have been fighting to have their rights recognized.[167]

While the international human rights legal framework is far more robust than when *The Origins of Totalitarianism* was published, or even compared to its status at the time of Arendt's death, what is lacking in the current framework are mechanisms that recognize the legal personality of the individual through a procedural right to have rights, the adjudicatory bodies to hear individual petitions, and enforcement mechanisms to ensure compliance. The means of creating such a right is explored in more depth in Section IV below.

IV. A CONTEMPORARY CASE OF RIGHTLESSNESS: THE ROHINGYA OF MYANMAR

Notwithstanding significant developments in international law since *The Origins of Totalitarianism* was initially published, there remain substantial populations around the world that exist in a state of rightlessness, living in conditions not dissimilar to what Arendt initially described. UNHCR reports that among their populations of concern, there are at least 26 million refugees globally and 4.2 million stateless persons residing in 94 countries around the world.[168] One of the largest stateless populations in the world are the Rohingya, a Muslim minority group who have primarily resided in Rakhine State in Myanmar.

This section will analyze the situation of rightlessness experienced by the Rohingya. It will explore the causes of the deprivation of nationality and human rights, detail efforts towards international accountability for atrocities committed against the Rohingya, and analyze why these accountability mechanisms are unlikely to resolve their state of rightlessness.

166 As Cassel beautifully put it, "[w]hat pulls human rights forward is not a series of separate, parallel cords, but a 'rope' of multiple interwoven strands. Remove one strand, and the entire rope is weakened. International human rights law is a strand woven throughout the length of the rope." Douglass Cassel, *Does International Human Rights Law Make a Difference?*, 2 CHI. J. INT'L L. 121, 123 (2001).

167 Stephanie van den Berg & Ruma Paul, *World Court Orders Myanmar to Protect Rohingya from Acts of Genocide*, REUTERS (Jan. 22, 2020), https://www.reuters.com/article/us-myanmar-rohingya-world-court/world-court-orders-myanmar-to-protect-rohingya-from-acts-of-genocide-idUSKBN1ZM00H.

168 UNHCR, Refugee Data Finder (June 18, 2021), https://www.unhcr.org/refugee-statistics/ (noting that "[t]he true global figure is estimated to be significantly higher").

What is made clear by a detailed examination of the situation of the Rohingya is that a more radical transformation of international law is needed to address situations of rightlessness.

Shortly before Arendt published her observations on the "right to have rights," Myanmar[169] gained its independence from British colonial rule in 1948.[170] Written into its 1947 Constitution was a conception of citizenship granted to members of the "indigenous races" of Myanmar.[171] Excluded were the Rohingya, a Muslim minority living in western Myanmar in the Rakhine State.[172] While it was possible for the Rohingya to obtain citizenship by demonstrating residency, subsequent laws made it increasingly difficult for the Rohingya to access citizenship, such as the 1948 Citizenship Act, which limited the pathway to citizenship to those who could demonstrate that their family had been present in the territory for two generations.[173]

Referred to as the most marginalized minority,[174] the Rohingya have faced decades of violence and persecution. Violent military crackdowns against the Rohingya occurred during the 50 years of authoritarian rule that began after the military *coup d'état* led by General Ne Win in 1962[175] and continued after the dissolution of military rule in 2011. The Rohingya were made effectively stateless by Myanmar's 1982 Citizenship Law.[176]

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169 At the time of independence, the country was known as the Union of Burma. In 1989, the military junta changed the name of the country to the Union of Myanmar, a name that was recognized by the United Nations in June of that same year. The name change has been objected to by the pro-democracy movement, including by Aung San Suu Kyi, who disagreed with the unilateral change of name without consulting the citizens of the country. The U.S. government official policy is to use Burma so as to avoid lending legitimacy to the regime. *See* Max Fisher, *Why it's such a big deal that Obama said 'Myanmar' rather than Burma,* WASH. POST (Nov. 19, 2012, 12:09 PM), https://www.washingtonpost.com/news/worldviews/wp/2012/11/19/why-its-such-a-big-deal-that-obama-said-myanmar-rather-than-burma/. This paper will use "Myanmar" for simplicity and because it is the name recognized and utilized by the United Nations.

170 *See* Nehginpao Kipgen, *Political Change in Burma: Transition from Democracy to Military Dictatorship (1948-62*), 46 ECON. & POL. WKLY. 48 (2011) (discussing the transition to independence and the early years of post-colonial rule).

171 The Constitution of the Union of Burma Sept. 24, 1947, ch. II, art. 11.

172 Katherine Southwick, *Preventing Mass Atrocities Against the Stateless Rohingya in Myanmar: A Call for Solutions*, 68 J. INT'L AFFS. 137, 139 (2015*); see also* UNHCR Policy Development and Evaluation Service (PDES), States of denial: A review of UNHCR's response to the protracted situation of stateless Rohingya refugees in Bangladesh, ¶13, PDES/2011/13 (Dec. 2011).

173 *The Rohingya Muslims: Ending a Cycle of Exodus?*, HUMAN RIGHTS WATCH 25 (Sept. 1996) https://reliefweb.int/sites/reliefweb.int/files/resources/burma969.pdf.

174 Kipgen, *supra* note 170, at 48; United States Holocaust Memorial Museum, United States Holocaust Memorial Museum Issues Statement on the Situation of the Rohingya in Burma (Sept. 24, 2013), https://www.ushmm.org/information/press/press-releases/statement-by-the-united-states-holocaust-memorial-museum-on-the-situation-o#.

175 YOSHIHIRO NAKANISHI, STRONG SOLDIERS, FAILED REVOLUTION: THE STATE AND MILITARY IN BURMA, 1962-88, at 8 (2013); *see also* AZEEM IBRAHIM, THE ROHINGYAS: INSIDE MYANMAR'S HIDDEN GENOCIDE 47-53 (2016).

176 UNHCR Policy Development and Evaluation Service (PDES), *supra* note 172, at ¶ 13; Natalie Brinham, *The Conveniently Forgotten Human Rights of the Rohingya*, 41 FORCED MIGRATION REV. 40, 40 (2012).

Discriminatory laws and policies proliferated, governing every aspect of Rohingya life. These laws include restricting their right to marry and have children, restricting their freedom of movement,[177] subjecting them to forced labor,[178] confiscating property and prohibiting them from owning land, and segregating them from the general population.[179] In addition, the Rohingya have been victims of violence, including sexual and gender-based violence, arbitrary arrest and detention, summary execution, and enforced disappearance.[180] The Government of Myanmar refuses to even use the word "Rohingya" in describing the minority, erasing their very existence.[181]

What follows is a brief accounting of the more extreme periods of violence and persecution against the Rohingya, key episodes inhibiting their access to citizenship, and details of discriminatory laws. Episodes of terror executed by the *tatmadaw*, or the armed forces of Myanmar, occurred during the five decades of military rule.[182] The military crackdowns did not end with the so-called democratic transition. Rather, the persecution of the Rohingya has only increased since 2010, leaving them vulnerable to ethnic cleansing and even genocide.[183] Myanmar has not widely acceded to international treaties, but it is a party to human rights conventions that impose obligations

177 Special Rapporteur for the situation in Myanmar, *Situation of Human Rights in Myanmar*, ¶ 107, U.N. Doc. E/CN.4/1997/64 (Feb. 6, 1997) ("[S]evere, unreasonable and, in the case of the Muslim Rakhine population, racially based restrictions are placed on travel inside the country and abroad. On the matter of internal deportations and forced relocations, the Special Rapporteur concludes that the Government's policy violates freedom of movement and residence and, in some cases, constitutes discriminatory practices based on ethnic considerations."); *Myanmar: Ongoing Human Rights Violations Against Rohingya*, FORTIFY RIGHTS (Dec. 7, 2019), https://www.fortifyrights.org/mya-inv-2019-12-07/.

178 In 1997, the Special Rapporteur of the Commission on Human Rights, Rajsoomer Lallah, outlined concerns regarding forced labor of the Rohingya population that contributed to the mass exodus in early 1992, and led to a smaller migration in 1997 of approximately 5,000 to 25,000 Rohingya. The Muslim population in northern Rakhine state was required to provide at least 7 to 10 days of compulsory forced physical labor a month without pay. Special Rapporteur of the Commission on Human Rights, *Interim Report on the Situation of Human Rights in Myanmar*, ¶¶ 110-13, U.N. Doc. A/52/484 (Oct. 16, 1997).

179 UNHCR Policy Development and Evaluation Service (PDES), *supra* note 172, at ¶ 13; Special Rapporteur for the situation in Myanmar, *supra* note 178, at ¶ 86; Peter Gelling & Thomas Fuller, *Burmese Refugees Rescued at Sea*, N.Y. TIMES (Feb. 3, 2009), https://www.nytimes.com/2009/02/03/world/asia/03iht-04indo.19890112.html?searchResultPosition=6.

180 U.N. High Commissioner for Human Rights, *Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar*, ¶¶ 32-35, U.N. Doc. A/HRC/32/18 (June 29, 2016).

181 *The Rohingya Muslims: Ending a Cycle of Exodus?*, *supra* note 173, at 9; Marlise Simons and Hannah Beech, *Aung San Suu Kyi Defends Myanmar Against Rohingya Genocide Accusations*, N.Y. TIMES (Dec. 11, 2019), https://www.nytimes.com/2019/12/11/world/asia/aung-san-suu-kyi-rohingya-myanmar-genocide-hague.html; Anealla Safdar and Usaid Siddiqui, *ICJ Speech: Suu Kyi Fails to Use "Rohingya" to Describe Minority*, AL JAZEERA (Dec. 13, 2019), https://www.aljazeera.com/news/2019/12/13/icj-speech-suu-kyi-fails-to-use-rohingya-to-describe-minority.

182 U.N. High Commissioner for Human Rights, *supra* note 180, at ¶¶ 56-57.

183 *Myanmar: Ongoing Human Rights Violations Against Rohingya*, supra note 177.

on the state to protect the rights of its population, including the Rohingya.[184] Condemnations from the international community in response to Myanmar's flagrant disregard of these obligations have done little, if anything, to protect the Rohingya. Even if they can avoid the fate of becoming victims of the gravest of international crimes, there is little chance the Rohingya will find a resolution for their state of rightlessness, a sobering indictment of the limitations of international law and human rights.

A. A History of Persecution: From Independence to Genocide

The persecution of the Rohingya by the state of Myanmar dates back to independence. From the birth of the new nation, efforts were made to expel the Rohingya, leading to one of the first mass flows of refugees out of the new country.[185] Although many Rohingya might have qualified for citizenship under the Constitution and the 1948 Citizenship Act, the restrictions on their movement were so severe that many were unable to make the application for citizenship or even obtain identification or residency cards.[186]

The next and more widely documented episode of massive forced migration of the Rohingya to neighboring states occurred in the late 1970s. In 1977-788, the military conducted a registration effort called operation "Dragon King."[187] According to a statement made at the time by the Ministry for Home and Religious Affairs, the operation was meant 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."[188] The operation was not limited to registration, and led to brutal violence perpetrated by the *tatmadaw* against the Rohingya, including widespread killing and rapes and destruction of mosques by the military.[189] Estimates of the number of Rohingya who fled Myanmar to Bangladesh in the aftermath of the attack range between 200,000-300,000 people.[190] Repatriation was arranged between Bangladesh

184 U.N. High Commissioner for Human Rights, *supra* note 180, at ¶¶ 15-17.

185 Special Rapporteur of the Commission on Human Rights, *Report on the Situation of Human Rights in Myanmar,* ¶ 132, U.N. Doc. E/CN.4/1993/37 (Feb. 17, 1993).

186 *Id.* at ¶¶ 129-30.

187 *The Rohingya Muslims: Ending a Cycle of Exodus?*, supra note 173.

188 *Id.* at 11.

189 Benjamin Zawacki, *Defining Myanmar's "Rohingya Problem,"* 20 HUM. RTS. BRIEF 18, 18 (2013).

190 Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No. ICC-01/19, Request for authorization of an investigation pursuant to article 15, ¶ 54, (July 4, 2019); UNHCR Policy Development and Evaluation Service (PDES), *supra* note 172, at ¶¶ 1, 7; Edward A. Gargan, *Even Bleak Bangladesh is a Haven to Muslims Fleeing the Burmese Army*, N.Y. TIMES (Feb. 7, 1992), https://www.nytimes.com/1992/02/07/world/even-bleak-bangladesh-is-a-haven-to-muslims-fleeing-the-burmese-arm.html (noting "a Burmese pogrom against the Rohingyas drove 300,000 into exile in Bangladesh"); Paul Lewis, *U.N. Sending Envoy to Aid Burmese Refugees*, N.Y. TIMES (Mar. 19,

and Myanmar, but return was limited to 200,000, and those who did return did not necessarily do so voluntarily.[191] Efforts to induce return led to death by starvation of over 12,000 Rohingya refugees.[192]

The registration effort was followed shortly after by the drafting of a Citizenship Law that was passed in 1982 and made the Rohingya effectively stateless. The 1982 Citizenship Law created three classes of citizens: citizens, associate citizens, and naturalized citizens.[193] Under the 1982 citizenship law, only those who could demonstrate their ancestors were present in Myanmar prior to the first British annexation in 1823[194] and are members of one of 135 "national races"[195] (*taingyintha*)[196] could claim full citizenship.[197] The Rohingya do not appear among the 135 national races and thus are excluded from full citizenship.

Rohingya could conceivably qualify for associate citizenship or naturalized citizenship, but even these pathways are largely closed to the Rohingya.[198] Even if successful in obtaining citizenship, associate and naturalized citizens do not have the same rights as full citizens.[199] Furthermore, associate and naturalized citizenship can be revoked, and those who have their citizenship revoked are barred from applying again.[200]

A decade after the Citizenship Act passed, the Rohingya were again victim to widespread violence leading to another round of mass exodus.[201] In 1991-92, the *tatmadow* engaged in a campaign of torture, rape, murder, forced evictions, and destruction of mosques and schools.[202] It was called Operation Pyatya, "a Burmese word meaning to create a peaceful land in

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1992), https://www.nytimes.com/1992/03/19/world/un-sending-envoy-to-aid-burmese-refugees.html.

191 *The Rohingya Muslims: Ending a Cycle of Exodus?*, supra note 173, at 21 n.47.

192 *Id.* at 3.

193 Special Rapporteur of the Commission on Human Rights, *supra* note 185, at ¶ 189.

194 Special Rapporteur of the Commission on Human Rights, *Interim Report on the Situation of Human Rights in Myanmar*, ¶ 121, U.N. Doc. A/52/484 (Oct. 16, 1997); Ian Holliday, *Addressing Myanmar's Citizenship Crisis*, 44 J. CONTEMP. ASIA 404, 409 (2014).

195 Special Rapporteur of the Commission on Human Rights, *supra* note 185, at ¶ 121; Igor Milić, *Rohingya as Homines Sacri: The Statelessness Conundrum*, 1/3 BROLLY. J. SOC. SCI. 84 (2018).

196 See Nick Cheesman, *How in Myanmar "National Races" Came to Surpass Citizenship and Exclude Rohingya*, 47 J. CONTEMP. ASIA 461 (2017), for a discussion of the genealogy of the term "taingyintha," and its evolution in Myanmar law.

197 Holliday, *supra* note 194, at 409.

198 Special Rapporteur of the Commission on Human Rights, *supra* note 185, at ¶¶ 122-23.

199 U.N. High Commissioner for Human Rights, *supra* note 180, at ¶ 19.

200 Special Rapporteur of the Commission on Human Rights, *supra* note 185, at ¶ 126.

201 The exodus occurred within a few years of a military crackdown against students, workers, and monks demonstrating for democracy; the detention of Daw Aung San Suu Kyi; and the failed transition of power to the opposition party following a general election in May of 1990. *See* Special Rapporteur on the Situation of Human Rights in Myanmar*, Report on the situation of human rights in Myanmar*, ¶¶ 7-10, U.N. Doc. E/CN.4/1994/57 (Feb. 16, 1994).

202 Gargan, *supra* note 190; Lewis*, supra* note 190; Opinion, *Friends of the Slorc*, N.Y. TIMES (Dec. 2, 1993), https://www.nytimes.com/1993/12/02/opinion/friends-of-the-slorc.html.

Myanmar," and it was meant to rid the country of the Rohingya.[203] More than 250,000 Rohingya again fled Myanmar following the violence.[204] At the time, those fleeing reported that the army forcibly confiscated their identity papers.[205] Under Myanmar law, those lacking identity papers face greater obstacles in proving their identity and length of residency in order to demonstrate they qualify for citizenship.[206]

Those who sought refuge in Bangladesh did not wish to return as they feared they would be victims of forced relocation, rape, kidnapping, and forced labor. Despite these fears, they were not permitted to stay in Bangladesh. As acknowledged by UNHCR, "premature or coercive repatriation" to Myanmar took place following the exodus of Rohingya to Bangladesh in 1991-1992.[207] Those that returned encountered additional abuses.[208]

Many had hoped that a transition from military to civilian rule that began in 2011 would bring about necessary reforms for a reduction in the persecution against the Rohingya.[209] However, this confidence proved misplaced.[210] President Thein Sein continued to deny the Rohingya were a distinct group, referring to them instead as "Bengalis."[211]

Many of the discriminatory laws put in place following the beginning of the transition away from military rule negatively impacted the Rohingyas' family life. In 2010, the Special Rapporteur reported that, unlike others in Myanmar, the Rohingya were required to apply for papers in order to get

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203 Gargan, *supra* note 190. Other sources have listed the name of the operation as "Pyi Thaya." *See* Samuel Cheung*, Migration Control and the Solutions Impasse in South and Southeast Asia: Implications from the Rohingya Experience*, 25 J. REFUGEE STUDS. 50 (2011).

204 G.A. Res. 47/144, preamble (Mar. 1, 1993) (expressing concern at "the almost 265,000 Myanmar Rohingya refugees in Bangladesh"); *see also* UNHCR Policy Development and Evaluation Service (PDES), *supra* note 173, at ¶¶ 1, 7.

205 Lewis*, supra* note 190.

206 *The Rohingya Muslims: Ending a Cycle of Exodus?*, supra note 173, at 25-26.

207 UNHCR Policy Development and Evaluation Service (PDES), *supra* note 172, at ¶ 21; *see also The Rohingya Muslims: Ending a Cycle of Exodus?*, *supra* note 173, at 20-22.

208 For example, in 1994, Rohingya women returning to Myanmar from Bangladesh were injected with Depro-Nova, a contraceptive that lasts for three years. The injection was inadequately explained to the women and their husbands. *See The Rohingya Muslims: Ending a Cycle of Exodus?*, *supra* note 173, at 15.

209 *See* Melissa Stewart, *Development in the International Field: "Rotting of the Flower": Persecution of the Rohingya Threatens Myanmar's Democratic Transition & Further Imperils the Right to a Nationality*, 27 GEO. IMMIGR. L.J. 437 (2013); IBRAHIM, *supra* note 175, at 53, 80.

210 *See id.*; *see also* Holliday, *supra* note 194, at 418 ("[T]he reform process launched in earnest in 2011 has often seen as hardening, not softening, of ethnic and religious identities."); Jane Perlez, *Myanmar Policy's Message to Muslims: Get Out*, N.Y. TIMES (Nov. 6, 2014), https://www.nytimes.com/2014/11/07/world/asia/rohingya-myanmar-rakhine-state-thailand-malaysia.html.

211 Karin Roberts, *Rohingya Refugees from Myanmar Have Been Persecuted for Decades*, N.Y. TIMES (May 12, 2015), https://www.nytimes.com/2015/05/13/world/asia/myanmar-rohingya-refugees-rakhine-burma.html.

married.[212] The process could take several years and was prohibitively expensive for the Rohingya. Failure to comply with the requirements to apply for papers in order to marry resulted in arrest and a prison sentence up to five years.[213] Laws were passed that limited the Rohingya to no more than two children[214] and those children are not issued certificates upon their birth.[215] When couples have more than two children, those children are placed on a "black list" and are not included on official household lists.[216]

In 2012, violence broke out in Rakhine state in the aftermath of the alleged rape and murder of a Buddhist woman. Rohingya Muslims were blamed for the crime. In response, ten Muslims were taken from a bus and beaten in June of that year. Rohingya responded to the murders, and this further escalated attacks in Rohingya neighborhoods.[217] Although described by the government of Myanmar as "intercommunal violence," the UN IIFFM has called this "inaccurate." Instead, the Fact-Finding mission said the violence was the result of a coordinated campaign of hate against the Rohingya.[218]

The violence continued in October of 2012 and again saw a resurgence in the spring of 2013. Thousands of buildings were destroyed, and although sources vary in the figures offered, it is estimated that as many as 1,000 Rohingya were killed. According to the UN IIFFM, "Myanmar security forces were at least complicit, often failing to intervene to stop the violence, or actively participated."[219] Between October of 2012 and April of 2013, approximately 20,000 Rohingya fled Myanmar by boat.[220] In the aftermath

212 Special Rapporteur on the Situation of Human Rights in Myanmar, Progress Report, ¶ 89, U.N Doc. A/HR/13/48 (Mar 10, 2010).

213 *Id.*

214 Holliday, *supra* note 194, at 409.

215 U.N. High Commissioner for Human Rights, *supra* note 180, at ¶ 44; Special Rapporteur on the Situation of Human Rights in Myanmar, *supra* note 213, at ¶ 88.

216 U.N. High Commissioner for Human Rights, *supra* note 180, at ¶ 44.

217 Stewart, *supra* note 209, at 437.

218 "A campaign of hate and dehumanization of the Rohingya had been under way for months, and escalated after 8 June 2012, led by the Rakhine Nationalities Development Party (RNDP), various Rakhine organizations, radical Buddhist monk organizations, and several officials and influential figures. It was spread through anti-Rohingya or anti-Muslim publications, public statements, rallies and the boycott of Muslim shops. The Rohingya were labeled 'illegal immigrants' and 'terrorists,' and portrayed as an existential threat that might 'swallow other races' with their 'incontrollable birth rates.' In November 2012, the RNDP, in *Toe Thet Yay*, an official publication, cited Hitler, arguing that 'inhuman acts' were sometimes necessary to 'maintain a race.'" U.N. Human Rights Council, *Report of the independent international fact-finding mission on Myanmar*, ¶ 25, U.N. Doc. A/HRC/39/64 (Sept. 12, 2018).

219 *Id.* at ¶ 26.

220 Stewart, *supra* note 209, at 439.

of the violence, President Thein Sein called on UNHCR to facilitate the relocation of Rohingya abroad or to take care of them in refugee camps.[221]

According to the United Nations, the violence in 2012 "marked a turning point."[222] The restrictions on the Rohingya only increased.[223] Over 100,000 Rohingya lived in camps for the internally displaced, but Myanmar restricted access for humanitarian organizations.[224] Gatherings of more than five people were prohibited, Rohingya could not stay the night outside their village without a departure certificate, and a curfew was imposed.[225]

In 2014, Myanmar conducted its first census in 30 years.[226] The Rohingya were prohibited from identifying as Rohingya.[227] Instead, Myanmar demanded that the Rohingya demonstrate their family had lived in the country for more than 60 years or be placed in an IDP camp.[228] The government of Myanmar intended to deport those who could not prove their residence or refused to be classified as "Bengali." Myanmar solicited the help of UNHCR for the planned mass expulsion, a request that was rebuffed.[229]

The most recent and most severe incidence of violence against the Rohingya began in 2017. In late August of that year, The Arakan Rohingya Salvation Army attacked 30 Myanmar police posts.[230] The response by the *tatmadaw* was "immediate, brutal, and grossly disproportionate."[231]

The entire Rohingya population was targeted in what was termed by the Government of Myanmar as "clearance operations."[232] Hundreds of villages were targeted,[233] and there were reports of massacres of men and boys.[234]

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221 *Persecution of the Rohingya Muslims: Is Genocide Occurring in Myanmar's Rakhine State?*, FORTIFY RIGHTS 23 (2015), https://www.fortifyrights.org/downloads/Yale_Persecution_of_the_Rohingya_October_2015.pdf.

222 U.N. Human Rights Council, *supra* note 218, at ¶ 27.

223 U.N. High Commissioner for Human Rights, *supra* note 180, at ¶ 28.

224 Stewart, *supra* note 209, at 438.

225 U.N. High Commissioner for Human Rights, *supra* note 180, at ¶¶ 28-31.

226 *Id.* at ¶ 4.

227 *Id.*

228 Perlez, *supra* note 210.

229 *Id.*

230 U.N. Secretary General, *Report of the Secretary-General on Children and Armed Conflict in Myanmar*, ¶ 2, U.N. Doc. S/2018/956 (Oct. 29, 2018) [hereinafter U.N. Secretary General, *Report on Children and Armed Conflict*].

231 U.N. Human Rights Council, *supra* note 218, at ¶ 33.

232 *Id.*

233 *Id.*

234 The Secretary General recounted details of a massacre perpetrated by the Tatmadow against the Rohingya community on August 27, 2017, in Buthidaung Township:

> Men and boys were taken from houses. They had their hands tied and were forced to lie down on the ground. Witnesses saw the men and boys being killed one by one. At least 28 boys between the ages of 8 and 17 years were killed. Some of the bodies were taken to military trucks while others were buried in a field. Two witnesses estimated that approximately 200 people had been killed during the incident . . .

Children were shot and killed as they tried to flee.[235] Others were injured or killed by landmines that were placed in a known crossing point used by Rohingya between Myanmar and Bangladesh.[236] There were widespread reports of sexual violence against men, women, and girls, including gang rapes,[237] rapes using knives and sticks,[238] and the rape of a girl as young as 10 years old.[239] There were also reports of sexual slavery. Many were forced into burning buildings or locked inside their houses that were then set fire.

The UN fact-finding mission concluded that the attacks appeared to be pre-planned. Estimates of 10,000 dead are considered "conservative."[240] Up to 750,000 Rohingya fled as a result of the violence. The abandoned villages were destroyed and government infrastructure projects were planned and are underway on what was formerly Rohingya land.[241]

There is little prospect that the displaced can return to their homes safely. While the Government has, in principle, made a commitment to Rohingya repatriation, nothing indicates to date that this will be in a manner that ensures respect for human rights, which is essential for a safe, dignified and sustainable return of those displaced. The root causes of the exodus, including State-sanctioned oppression and an exclusionary and divisive rhetoric, continue unabated. The military forces that perpetuated gross human rights violations with impunity would be responsible for ensuring the security of returnees.[242] Given the recent military coup, the prospect of a safe return for the Rohingya seems exceedingly remote.[243]

> Soldiers separated [Rohingya villagers] on the beach into groups and shot all the men, killing the majority. Groups of women and girls were then taken by soldiers to houses that had not yet been burned. A group of six women and girls, including the witness, was taken to a house where they were all raped by soldiers. When the soldiers left the house, they closed the windows and locked the doors and then set fire to the house.

U.N. Secretary General, *Report on Children and Armed Conflict*, *supra* note 230, at ¶¶ 15-26.

235 *Id.* ¶ 16.

236 Associated Press, *Myanmar Accused of Planting Landmines in Path of Fleeing Rohingya*, THE GUARDIAN (Sept. 10, 2017), https://www.theguardian.com/world/2017/sep/10/myanmar-accused-of-planting-landmines-in-path-of-fleeing-rohingya.

237 "[A] woman reported witnessing her 14-year-old daughter being gang-raped by two Tatmadaw soldiers, identified by their uniforms, while at least 10 other soldiers stood around and witnessed the incident. She reported that the incident lasted approximately four hours. Afterwards, her daughter was shot in the head and killed in front of her." U.N. Secretary-General*, Report on Children and Armed Conflict*, *supra* note 230, ¶ 25.

238 U.N. Human Rights Council, Report of the Independent International Fact-Finding Mission on Myanmar, ¶ 38, U.N. Doc. A/HRC/39/64 (Sept. 12, 2018).

239 U.N. Secretary General, *Report on Children and Armed Conflict*, *supra* note 230, ¶ 21.

240 U.N. Human Rights Council, *supra* note 238, ¶ 36.

241 *Id.* ¶ 50.

242 *Id.* ¶ 51.

243 Hannah Beech, *Myanmar's Leader, Daw Aung San Suu Kyi, is Detained Amid Coup*, N.Y. TIMES (Jan. 31, 2021), https://www.nytimes.com/2021/01/31/world/asia/myanmar-coup-aung-san-suu-kyi.html.

This most recent round of violence against the Rohingya is the culmination of decades of persecution. The targeted killing and deliberate destruction of villages has led some to conclude that the Rohingya are at risk of genocide. Yet it took this gravest of human rights violations for the international community to effectively mobilize on behalf of the Rohingya.

B. Failed Efforts at Accountability and Rights Realization for the Rohingya

The denial of the Rohingya's most basic human rights has been known for decades.[244] Various bodies of the United Nations have responded through resolutions,[245] the appointment of special rapporteurs, and the offering of good offices.[246] However, no response by the international community, including reference to Myanmar's obligations under international law, has resulted in the realization of the Rohingya's basic rights, provided them to a pathway to citizenship, or even protected them from the gravest of international crimes. Rather, as the previous section demonstrated, the violence and discrimination against this stateless and marginalized minority community only worsened as the years progressed. Until confronted with the undeniable risk of genocide, the response of the international community has been weak,[247] and none of the responses have resulted in a permanent solution to the Rohingya's status of rightlessness or provided protection from the risk of genocide.

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244 Human rights violations committed by Myanmar are not limited to the Rohingya, but they remain the focus of this paper.

245 *See, e.g.*, G.A. Res. 52/137, preamble (Mar. 3, 1998) ("Gravely concerned at the continuing violations of human rights in Myanmar . . . ."); G.A. Res. 50/194, preamble (Mar. 11, 1996) ("Also gravely concerned, however, at the continued violations of human rights in Myanmar . . . .and the imposition of oppressive measures directed in particular at ethnic and religious minorities . . . Noting [] that the human rights situation in Myanmar has resulted in flows of refugees to neighbouring countries, thus creating problems for the countries concerned."); G.A. Res. 49/197, preamble, ¶ 18 (Mar. 9, 1995) ("Gravely concerned [] at the continued violations of human rights in Myanmar . . . and the imposition of oppressive measures directed in particular at ethnic and religious minorities, Noting that the human rights situation in Myanmar has consequently resulted in flows of refugees to neighbouring countries, thus creating problems for the countries concerned . . . Encourages the Government of Myanmar to create the necessary conditions to ensure an end to the flows of refugees to neighbouring countries and to facilitate their speedy repatriation and their full reintegration, in conditions of safety and dignity."); G.A. Res. 47/144, preamble, ¶¶ 3, 12 (Mar. 1, 1993) (expressing "grave[] concern" about the "continued seriousness of the human rights situation in Myanmar" and "call[ing] upon the Government of Myanmar to create the necessary conditions to ensure an end to the flows of refugees to neighbouring countries and to facilitate their speedy repatriation and to cooperate fully with the relevant United Nations organs on this matter . . . ."); G.A. Res. 46/132, preamble (Dec. 17, 1991) ("Noting with concern substantive available information indicating a grave human rights situation in Myanmar . . . .").

246 Gert Rosenthal (Member of Advisory Group of Experts on the Review of Peacebuilding Architecture), *A Brief and Independent Inquiry into the Involvement of the United Nations in Myanmar from 2010 to 2018*, at 10 (May 29, 2019), https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/Myanmar%20Report%20-%20May%202019.pdf.

247 Southwick, *supra* note 172, at 138.

As a member state of the United Nations,[248] Myanmar has obligations under the Charter of the United Nations[249] and the Universal Declaration of Human Rights as customary international law.[250] Myanmar has not widely acceded to international treaties, but is a state party to some conventions imposing human rights obligations on the state. Myanmar has ratified key International Labour Organization conventions, including the Forced Labor Convention in 1955.[251] It acceded to the Genocide Convention in 1956,[252] the Convention on the Rights of the Child in 1991,[253] the Convention on the Elimination of All Forms of Discrimination against Women in 1997,[254] the Convention on the Rights of Persons with Disabilities in 2011,[255] and the International Covenant on Economic, Social and Cultural Rights in 2017.[256] It is not, however, a party to the Refugee Convention or its 1967 Protocol or to either of the Statelessness Conventions, but it has obligations to refugees under customary international law.[257] In addition to its international obligations, Myanmar law as written provides some protection to the Rohingya. For example, the Myanmar Constitution prohibits targeting minorities.[258]

By ratifying these human rights treaties, Myanmar took on what are meant to be binding human rights obligations. These obligations include

248 S.C. Res. 45, ¶ 3 (Apr. 10, 1948).

249 This includes provisions under Articles 55 and 56 of the Charter, "to take joint and separate action in cooperation with the Organization for the achievement of . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion." U.N. Charter art. 55, ¶ 4, art. 56.

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

251 Int'l Labour Org. [ILO], *Ratifications of CO29—Forced Labour Convention, 1930 (No. 29)* (Mar. 4, 1955), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312174:NO.

252 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en.

253 Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en.

254 Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en.

255 Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

256 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en.

257 For example, *non-refoulement* is considered a customary international law norm. *See* Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, ¶ 4, U.N. Doc. HCR/MMSP/2001/09 (Dec. 13, 2001), http://www.unhcr.org/419c74d64.pdf.

258 *Genocide Threat for Myanmar's Rohingya Greater than Ever, Investigators Warn Human Rights Council*, U.N. NEWS (Sept. 16, 2019), https://news.un.org/en/story/2019/09/1046442.

that every child shall be registered and has the right to acquire a nationality,[259] and that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.[260] Myanmar fails to live up to these obligations, and the international community has failed to hold it to account despite decades of monitoring, investigations, and hortatory statements.

The Special Rapporteur on the situation of human rights in Myanmar was established in 1992[261] and its mandate has been extended annually every year since.[262] One of the primary purposes articulated by the Commission on Human Rights in appointing a Special Rapporteur was concern regarding refugee flows to Bangladesh and other neighboring countries and to address an "absence of guarantees for the physical integrity and well-being of returnees."[263]

The office of Special Rapporteur has several times over the two and a half decades of its mandate drawn attention to deficiencies in Myanmar's citizenship law as written and in its discriminatory application. In 1996, the Special Rapporteur issued his fourth report on the situation on human rights in Myanmar. His report noted that most of the Rohingyas "are not entitled to citizenship under the existing naturalization regulations and most of them are not even registered as so-called foreign residents, as is the case with foreigners/stateless persons living in other parts of Myanmar."[264] He stated that Myanmar was obligated as a state party to the Convention on the Rights of the Child "to afford nationality to every child born on its territory, in particular where the child would otherwise be stateless."[265]

Other UN bodies have made statements regarding Myanmar's non-compliance with international law with respect to its citizenship laws and the statelessness of the Rohingya. In 1997, the Committee on the Rights of the Child expressed its concern that the 1982 Citizenship Act created different categories of citizenship and recommended that it be repealed.[266]

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259 Convention on the Rights of the Child art. 7, Nov. 20, 1989, 1577 U.N.T.S. 3.

260 *Id.* at art. 37.

261 U.N. Comm'n on Human Rights, *Situation of Human Rights in Myanmar*, ¶ 3, U.N. Doc. 1992/58 (Mar. 3, 1992).

262 Kaufman, *supra* note 159, at 97; OFF. OF THE HIGH COMM'R FOR HUMAN RIGHTS, Special Rapporteur on the Situation of Human Rights in Myanmar (2020), https://www.ohchr.org/en/hrbodies/sp/countriesmandates/mm/pages/srmyanmar.aspx (last visited Aug. 12, 2021).

263 U.N. Comm'n. on Human Rights, *Situation of Human Rights in Myanmar*, U.N. Doc. 1993/73, preamble (Mar. 10, 1993).

264 His report referred to "the Muslim population in Rakhine State," referring to the Rohingya without explicitly naming them. Yozo Yokota (Special Rapporteur of the Commission on Human Rights), *Report on the Situation of Human Rights in Myanmar*, ¶¶ 161-64, U.N. Doc. E/CN.4/1996/65 (Feb. 5, 1996).

265 *Id.* ¶ 163.

266 Concluding Observations of the Committee on the Rights of the Child: Myanmar, ¶¶ 14, 28, U.N. Doc. CRC/C/15/Add.69 (Jan. 24, 1997).

However, none of these efforts to call attention to the discriminatory application of the 1982 Citizenship Act or urging of Myanmar to live up to its obligations under human rights conventions to which it is a party has resulted in changes to the law or the realization of rights for the Rohingya.

In 2010, the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana, noted he was "deeply concerned about the systemic and endemic discrimination faced" by the Rohingya.[267] He said that the discrimination "leads to basic and fundamental human rights being denied" to the Rohingya.[268] This continued scrutiny on the failure to protect the most basic rights of the Rohingya did not prevent further discrimination, forced labor, or violent crackdowns against the marginalized community.

Concern has not been limited to the Rohingyas' lack of access to citizenship and inability to realize basic human rights. Even prior to the violence of 2017 that led to the filing of the case at the ICJ and the opening of an investigation at the ICC, scholars, human rights organizations, States, and even UN bodies characterized the violence and discrimination against the Rohingya as crimes against humanity,[269] ethnic cleansing,[270] and even genocide.[271]

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267 Tomás Ojea Quintana (Special Rapporteur on the Situation of Human Rights in Myanmar), *Progress Report*, ¶ 86, U.N. Doc. A/HRC/13/48 (Mar. 10, 2010).

268 *Id.*

269 Irish Ctr. for Human Rights, Crimes Against Humanity in Western Burma: The Situation of the Rohingyas, 146 (2010), http://burmaactionireland.org/images/uploads/ICHR_Rohingya_Report_2010.pdf ("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 conclusions that crimes against humanity are currently being committed against the Rohingya minority group in North Arakan State."); *see also* Nicholas Kristof, *Myanmar's Peace Prize Winner and Crimes Against Humanity*, N.Y. TIMES (Jan. 9, 2016), https://www.nytimes.com/2016/01/10/opinion/sunday/myanmars-peace-prize-winner-and-crimes-against-humanity.html (reporting on the existence of a "confidential United Nations report to the Security Council" which concluded the violence against the Rohingya "may constitute 'crimes against humanity under international criminal law'").

270 HUMAN RIGHTS WATCH, "ALL YOU CAN DO IS PRAY:" CRIMES AGAINST HUMANITY AND ETHNIC CLEANSING OF ROHINGYA MUSLIMS IN BURMA'S ARAKAN STATE 11 (Apr. 2013), https://www.refworld.org/docid/518230524.html ("The criminal acts committed against the Rohingya and Kaman Muslim communities in Arakan State beginning in June 2012 amount to crimes against humanity carried out as part of a campaign of ethnic cleansing."); *Repression, Discrimination and Ethnic Cleansing in Arakan*, INT'L FED'N FOR HUMAN RIGHTS (Apr. 7, 2000), https://www.fidh.org/en/region/asia/burma/REPRESSION-DISCRIMINATION-AND (characterizing the deprivation of human rights, violence, and forced displacement of the Rohingya as "ethnic cleansing"); Roseann Gerin & Min Thein Aung, *Malaysia Calls on ASEAN to Review Myanmar's Membership over Rohingya Crisis*, RADIO FREE ASIA (Nov. 30, 2016), https://www.refworld.org/docid/5848124510.html (In 2016, Malaysia demanded that ASEAN review the membership of Myanmar over the treatment of the Rohingya, stating "[t]he principle of noninterference is void when there is large-scale ethnic cleansing in an ASEAN member state."); United States Holocaust Memorial Museum, *supra* note 174 (concluding that the treatment of the Rohingya, "combined with statements by government, political, and religious figures indicate that the Rohingya are being subjected to ethnic cleansing").

271 Southwick, *supra* note 172, at 143.

In 2013, William Schabas,[272] renowned scholar of international law and expert on the crime of genocide, gave an interview in which he raised concerns that the Rohingya were at risk of being victims of the crime of genocide.

> When you see measures preventing births, trying to deny the identity of the people, hoping to see that they really are eventually, that they no longer exist; denying their history, denying the legitimacy of their right to live where they live, these are all warning signs that mean it's not frivolous to envisage the use of the term genocide.[273]

The Special Adviser of the Secretary-General on the Prevention of Genocide on the situation in Myanmar also raised concerns about the risk of serious consequences for the Rohingya. In a statement in March of 2013, he said that failing to address the root causes of the violence between Buddhists and the Muslim Rohingya "can have serious future consequences which the international community has solemnly promised to prevent."[274]

In April 2014, the UN Special Rapporteur on the Situation of Human Rights in Myanmar, Thomás Ojéa Quinta, in an address to the Human

272 Professor Schabas is now notoriously representing Myanmar in *The Gambia v. Myanmar*, the case before the ICJ brought pursuant to the Genocide Convention. *See* Anthony Deutsch, *Myanmar's Lawyer to Critics on Genocide Case: Everyone Has Right to Defense*, REUTERS (Dec. 12, 2019), https://www.reuters.com/article/us-myanmar-rohingya-profile-schabas/myanmars-lawyer-to-critics-on-genocide-case-everyone-has-right-to-defense-idUSKBN1YH02J.

273 Al Jazeera Investigative Unit, *The Hidden Genocide*, AL JAZEERA (Jan. 16, 2013, 06:06 AM), https://www.aljazeera.com/programmes/aljazeerainvestigates/2012/12/201212512221583635l.html. Professor Schabas also gave an interview with Fortify Rights in which he said there may be "an arguable case that genocide is taking place in the situation like that confronting the Rohingyas in [Myanmar]. And it's also important to point out that even if we're not in the context of genocide that's underway, that many of the acts that surround what's going on are warning signs of genocide, are precursors, if you want . . . . It's important not to abuse the term and not to use it unnecessarily. But I don't think that there's much difficulty in asserting that in the case of the Rohingya, that we're moving into a zone where the word can be used even if . . . we have insufficient evidence now to reach any firm conclusion." *Myanmar: Previously Unpublished Interview with Myanmar Government Lawyer Details International Crimes Against Rohingya*, FORTIFY RIGHTS (Mar. 6, 2020), https://www.fortifyrights.org/mya-inv-2020-03-06/. Professor Schabas is currently counsel to Myanmar in *The Gambia v. Myanmar*, defending the state against accusations that it has failed to uphold its obligations under the Genocide Convention. ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC, YALE LAW SCHOOL, PERSECUTION OF THE ROHINGYA MUSLIMS: IS GENOCIDE OCCURRING IN MYANMAR'S RAKHINE STATE? A LEGAL ANALYSIS 70 (2015) ("The acts committed against the Rohingya, individually and collectively, meet the criteria for finding acts enumerated in the Genocide Convention and have been perpetrated against a protected group . . . . This paper, therefore, finds strong evidence that the abuses against the Rohingya satisfy the three elements of genocide: that Rohingya are a group as contemplated by the Genocide Convention; that genocidal acts have been committed against Rohingya; and that such acts have been committed with the intent to destroy the Rohingya, in whole or in part.").

274 Press Release, United Nations, Statement of the Special Adviser of the Secretary-General on the Prevention of Genocide on the Situation in Myanmar (Mar. 25, 2013), https://www.un.org/en/genocideprevention/documents/media/statements/2013/English/2013-03-25-Statement%20on%20Myanmar%20-%2025%20March%202013.pdf.

Rights Council, said that he had concluded "that the pattern of widespread and systematic human rights violations in the Rakhine State may constitute crimes against humanity as defined under the Rome Statute of the International Criminal Court."[275] In a separate interview, he stated, "There are elements of genocide in Rakhine with respect to Rohingyas . . . The possibility of genocide needs to be discussed. I myself do not use the term genocide for strategic reasons."[276]

In 2015, the Human Rights Council adopted a resolution on the "Situation of human rights of Rohingya Muslims and other minorities in Myanmar."[277] The Council "[c]ondemn[ed] the systematic gross violations of human rights and abuses committed in Rakhine State, in particular against Rohingya Muslims," and called upon the Government of Myanmar to protect the human rights of the Rohingya, "ensure accountability and to end impunity for all violations of human rights" against the Rohingya, and to grant the Rohingya full citizenship rights.[278]

The resolution also called on the UN High Commissioner for Human Rights to report on the human rights violations against the Rohingya. In his report mere months before the start of the most severe episode of violence against the Rohingya, the High Commissioner foreshadowed the coming harm, warning that a politician in Myanmar had encouraged a crowd to "kill and bury" all Rohingya.[279] He concluded that "[t]he human rights situation of the Rohingya and other minorities in Myanmar is a cause of utmost concern. The scope and patterns of violations and abuses reported cannot be ignored; systematic and systemic discrimination and policies of exclusion and marginalization are all too often at the root of future conflicts."[280]

But his report, like all other reports and statements by High Commissioners and Special Rapporteurs, lacked even a reference to an enforcement mechanism for Myanmar's human rights violations or method of ensuring the government made the recommended reforms and abolished discriminatory laws. Under the section titled "Implementation," it merely stated: "The High Commissioner recommends that the Human Rights Council follow closely the implementation of the above-mentioned recommendations, and encourage the Government to make meaningful progress in this regard."[281]

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275 Tomás Ojea Quintana (Special Rapporteur on the Situation of Human Rights in Myanmar), *Report to the Human Rights Council*, ¶ 51, U.N. Doc. A/HRC/25/64 (Apr. 2, 2014).

276 Southwick, *supra* note 172, at 144.

277 Human Rights Council Res. 29/21, U.N. Doc. A/HRC/RES/29/21 (July 22, 2015).

278 *Id.* ¶¶ 1, 2, 5, 9.

279 Rep. of the U.N. High Comm'r for Human Rights, *Situation of Human Rights of Rohingya Muslims and Other Minorities in Myanmar*, ¶ 22, U.N. Doc. A/HRC/32/18 (June 29, 2016).

280 *Id.* ¶ 65.

281 *Id.* ¶ 81.

It was clear to the international community that the Rohingya were living in a state of rightlessness, deprived of any ability to acquire a nationality for decades. It was hard to deny that they had been victims of ethnic cleansing and potentially crimes against humanity. Many raised alarms that this marginalized community were at risk of genocide. Despite the entire modern human rights regime being established in response to the Holocaust and to prevent a repeat of the horrors of large-scale displacement, statelessness, and genocide, nothing prevented the Rohingya from falling victim to this fate.

According to a recent statement by Andrew Gilmour, the Former Assistant Secretary-General for Human Rights and Head of the Office of the High Commissioner for Human Rights in New York, prior to the outbreak of violence in 2017, there were "deep divisions . . . within the U.N. system . . . on tactics" on how to address what he called "relatively minor, at that point, violations against the Rohingya."[282] The question was, "should one call out the government for the continued harassment and discrimination" or should the focus remain on development.[283] According to Gilmour, there were those that did not believe it was the role of the United Nations to call out the government. "All the signals were there. In retrospect, it is very clear that the human rights people were right . . . decades of systematic discrimination against the Rohingya" would lead to additional violations.[284] But many did not want to believe it would reach the level of severity it eventually did in 2017. According to Gilmour, the divisions over what tactics should be used "paralyzed the U.N. system."[285]

C. Every Arrow in the Quiver

The violence in 2017 could not be ignored. Divisions over condemnation of the government versus a focus on development were no longer possible. In response to the dramatic escalation of violence against the Rohingya and forced displacement of a significant portion of the population, the international community had to respond. In response, it has unleashed every arrow in its quiver that can be used for international accountability. But even this may not be sufficient, as it is unlikely to resolve the fundamental situation of rightlessness of the Rohingya. This is because the international legal system lacks enforceable mechanisms through which individuals can realize their human rights.

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282 Global Centre for the Responsibility to Protect (@GCR2P), TWITTER (July 24, 2020, 1:00 PM), https://twitter.com/GCR2P/status/1286707717952770048.

283 *Id.*

284 *Id.*

285 *Id.*

The divisions and hesitancy to condemn the Government of Myanmar, as described by Mr. Gilmour, were still somewhat present in the initial responses by the United Nations to the violence. In November of 2017,[286] the President of the Security Council issued a statement on the situation in Myanmar.[287] While condemning the widespread violence in Rakhine State, including the killing of Rohingya men, women, and children, he reaffirmed the Security Council's "commitment to the sovereignty, political independence, [and] territorial integrity" of Myanmar and stressed the Council's "support to the Government of Myanmar."[288] It reinforced the principle of sovereign responsibility, noting that it is "the primary responsibility of the Government of Myanmar to protect its population including through respect for the rule of law and the respect, promotion and protection of human rights."[289]

On July 4, 2017, the UN Human Rights Council established the Independent International Fact-Finding Mission on Myanmar (IIFFMM).[290] Using a "reasonable grounds to conclude" standard of proof, the IIFFMM found that Myanmar incurred "state responsibility under the prohibition against genocide and crimes against humanity, as well as for other violations of international human rights law and international humanitarian law."[291] In its final report to the Human Rights Council, the IIFFMM said its investigations led to a finding that "the circumstances and context of the 'clearance operations' against the Rohingya that began on 25 August 2017 gave rise to an inference of genocidal intent, and that those attacks were pre-planned and reflected a well-developed and State endorsed policy aimed at the Rohingya."[292]

The mandate of the IIFFMM ended in September of 2019.[293] All information was transferred to the more recently formed Independent Investigative Mechanism for Myanmar (IIMM).[294] Established by the Human Rights Council through Resolution 39/2 on September 27, 2018, the IIMM was established "to collect, consolidate, preserve and analyze

286 As Nadira Kourt recently noted, to date, this has been the "only formal response of the Security Council to the genocide against the Rohingya." Nadira Kourt, *The Rohingya Genocide and the ICJ: The Role of the International Community*, JUST SECURITY (July 28, 2020), https://www.justsecurity.org/71552/the-rohingya-genocide-and-the-icj-the-role-of-the-international-community/.

287 S.C. Pres. Statement 2017/22 (Nov. 6, 2017).

288 *Id.* ¶ 4.

289 *Id.* ¶ 5.

290 Human Rights Council Res. 34/22, ¶ 11, U.N. Doc. A/HRC/RES/34/22 (Apr. 3, 2017).

291 Report of the Independent International Fact-Finding Mission on Myanmar, ¶¶ 18-19, U.N. Doc. A/HRC/42/50 (Aug. 8, 2019).

292 *Id.* ¶ 23.

293 United Nations Human Rights Council, Independent International Fact-Finding Mission on Myanmar (2019), https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx (last visited Aug. 23, 2021).

294 *Id.*

evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011" to be used in criminal proceedings at the national or international level.[295]

Responses to the persecution and violence against the Rohingya have also involved the activation of international dispute mechanisms at the highest levels.

On September 6, 2018, the Pre-Trial Chamber I of the International Criminal Court ruled that the ICC may exercise jurisdiction over the deportation of the Rohingya to Bangladesh. Despite Myanmar not being a state party to the Rome Statute, the Court ruled it had jurisdiction given that an element of the crime against humanity of forcible transfer of a population and deportation was committed on the territory of Bangladesh, which is a state party. Shortly after, on September 18, 2018, the Prosecutor of the International Criminal Court, Fatou Bensouda, announced an opening of a Preliminary Examination concerning the alleged deportation of Rohingya to Bangladesh.[296] Since then, the Prosecutor has requested to open an investigation, which the Pre-Trial Chamber II authorized on November 14, 2019.

The matter before the ICC is somewhat unique given its investigation of elements of crimes that began within the territory of a state that is not a state party. While an important step towards accountability for the alleged crimes against humanity, it does not and will not cover the entirety of the atrocities perpetrated against the Rohingya. In order for the whole matter to be examined, including acts that occurred within the territory of Myanmar that did not extend into Bangladesh, the Security Council would have to refer the situation to the ICC, which it has so far failed to do and seems unlikely to ever do.[297]

In another innovative matter before an international tribunal, Myanmar is being brought to account for its crimes before the International Court of Justice in a case brought pursuant to the Genocide Convention by The Gambia on behalf of the Organization of Islamic Cooperation, an inter-governmental organization with 57 member states. It is the first case brought pursuant to Article IX by a Contracting Party to the Convention that has not been directly affected by any of the acts alleged.

On January 23, 2020, the Court entered an order for Provisional Measures, ordering Myanmar to "take all measures within its power to prevent" the crime of genocide against the Rohingya, a "protected group

295 Human Rights Council Res. 39/2, ¶ 22, U.N. Doc. A/HRC/RES/39/2 (Oct. 3, 2018).

296 Fatou Bensouda (ICC Prosecutor), *Statement on Opening a Preliminary Examination Concerning the Alleged Deportation of the Rohingya People from Myanmar to Bangladesh*, INT'L CRIM. CT. (Sept. 18, 2018), https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya.

297 *See* JENNIFER TRAHAN, EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES (2020).

within the meaning of Article II of the Genocide Convention."[298] The Court found that it had prima facie jurisdiction to hear the case, and that The Gambia had prima facie standing to submit the dispute, noting that "all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity" given that the obligations under the Convention are obligations *erga omnes partes*.[299]

One of the unique aspects of the order was that the ICJ required Myanmar to submit interim reports every six months beginning four months from the date of the Order "on all measures taken to give effect to the order."[300] Although the Court noted that its "'orders on provisional measures under Article 41 [of the Statute] have binding effect' and thus create international legal obligations" for Myanmar, the reporting requirements seemed to be a tacit acknowledgement of prior failures of states to follow "binding" orders in cases brought pursuant to the Genocide Convention.[301]

A vast array of accountability measures have been deployed against Myanmar in response to the human rights violations against the Rohingya. As the next section will explain, none of these accountability measures have changed the Rohingya's state of rightlessness, as they are not designed to do so. Despite these limitations, a recent investigation conducted by *The New*

298 Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. v. Myan.), 2020 I.C.J. 4, ¶ 52 (Jan. 23, 2020).

299 *Id.* ¶¶ 41-42. Myanmar submitted two reports on its compliance with the order on provisional measures prior to the February 1, 2021 military coup. The military junta has since reorganized its legal team in the case and enacted a genocide law. *Myanmar Junta Reorganizes Legal Team for ICJ Rohingya Genocide Case*, THE IRRAWADDY (June 24, 2021), https://www.irrawaddy.com/news/burma/myanmar-junta-reorganizes-legal-team-for-icj-rohingya-genocide-case.html; *Myanmar Junta Enacts Genocide Law*, THE IRRAWADDY (Aug. 26, 2021), https://www.irrawaddy.com/news/burma/myanmar-junta-enacts-genocide-law.html.

300 Application of Convention on Prevention and Punishment of Crime of Genocide (Gam. v. Myan.), 2020 I.C.J. 4, ¶ 82 (Jan. 23, 2020).

301 In the last case brought pursuant to the Genocide Convention, *Bosnia and Herzegovina v. Serbia and Montenegro*, the ICJ entered an order for provisional measures in April of 1993 and a second order requiring the "immediate and effective implementation" of those measures in September of that same year. *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro): Overview of the Case*, INT'L CT. OF JUST., https://www.icj-cij.org/en/case/91. Less than two years later, over 8,000 Bosnians, mostly men and boys, were massacred in Srebrenica in direct violation of the Convention and the "binding obligations" of the Order on Provisional Measures. Stephen Engelberg, Tim Weiner, Raymond Bonner & Jane Perlez, *Srebenica: The Days of Slaughter*, N.Y. TIMES (Oct. 29, 1995), https://timesmachine.nytimes.com/timesmachine/1995/10/29/098710.html?pageNumber=1. Since the order on provisional measures was issued in *The Gambia v. Myanmar*, the ICJ announced the adoption of a new procedure for each case in which provisional measures are ordered. In such cases, the court would appoint three judges to monitor the implementation of the provisional measures. Press Release, International Court of Justice, Adoption of a New Article 11 of the Resolution Concerning the Internal Judicial Practice of the Court, on Procedures for Monitoring the Implementation of Provisional Measures Indicated by the Court (Dec. 21, 2020), https://www.icj-cij.org/public/files/press-releases/0/000-20201221-PRE-01-00-EN.pdf.

Humanitarian revealed a lack of understanding by the Rohingya about the limitations of the power of the ICJ or the ICC to effectuate change in their lives.[302] Interviews with Rohingya revealed a mistaken belief among some that the courts had the power to grant them citizenship, guarantee their rights, or offer protection in order for them to safely return to Myanmar.[303]

As explained by the Office of the Prosecutor for the ICC, even if a measure of justice and accountability can be reached by the ICC and the ICJ, this will not change the status of rightlessness for the Rohingya:

> Justice is an important expectation, but it cannot do everything for the Rohingya people. It cannot bring back loved ones lost to the violence. It will not directly affect how they live in the camps. It will not have an impact on their current situation . . . .[O]ur aim is to make sure that . . . those whom our evidence shows bear the greatest responsibility for the crimes, face justice.[304]

D. Limited Prospect to Resolve the Status of Rightlessness of the Rohingya

While much of the world's attention is on the various accountability mechanisms to bring to justice the perpetrators of grave international crimes, the Rohingya remain in a state of rightlessness. The realization of their human rights—to life, to health, freedom of movement—have largely been ignored.[305] While the prevention of genocide is a worthy and necessary goal, it is not sufficient if human rights are to live up to their promise and to ensure the guarantee of the right to have rights.

Less than a half a million Rohingya remain in Myanmar.[306] Those that remain live in much the same conditions as Arendt described in *Origins,* living outside the pale of the law in a state of rightlessness, relegated to internment camps. As of 2017, only 4,000 Rohingya living in Rakhine State

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302 Verena Hölzl, *Three Years After Rohingya Exodus, Mismatched Expectations of Justice*, THE NEW HUMANITARIAN (Aug. 24, 2020), https://www.thenewhumanitarian.org/news-feature/2020/08/24/Bangladesh-Myanmar-Rohingya-international-justice.

303 *Id.* This perspective is also reflected in a recent ICC report. Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19, Pre-Trial Chamber III, ¶ 14 (June 28, 2019) ("[I]t was equally clear that there is massive confusion and that the overwhelming majority of people have very little information and understanding, if any, of these various justice initiatives and, importantly, their different mandates and functions.").

304 Off. of the Prosecutor of the Int'l Crim. Ct., Statement Delivered at the Press Conference in Dhaka, Bangladesh, INT'L CRIM. CT. (Feb. 4, 2020), https://www.icc-cpi.int/Pages/item.aspx?name=20200204-otp-statement.

305 Brinham, *supra* note 176, at 40.

306 FORTIFY RIGHTS, "TOOLS OF GENOCIDE:" NATIONAL VERIFICATION CARDS AND THE DENIAL OF CITIZENSHIP OF ROHINGYA MUSLIMS IN MYANMAR 31 (2019), https://www.fortifyrights.org/mya-bgd-rep-2019-09-03/ (recording 495,000 Rohingya in Myanmar based on communication with a U.N. official).

were citizens or naturalized citizens.[307] More than 129,000 Rohingya continue to live in Internally Displaced Persons camps.[308] Even if they do not live in an IDP camp, there are severe restrictions on their freedom of movement.[309] For example, in 2018, approximately thirty Rohingya were arrested and sentenced to prison for leaving Rakhine State.[310] Rohingya are not permitted to work or seek medical care without restrictions.[311] Although the level of mass migration is not at the levels of 2017, many continue to flee on boats, often being stuck at sea for weeks on end.[312]

More Rohingya are now residing outside Myanmar than within its borders. There are currently one million Rohingya refugees living in refugee camps in Cox Bazar in southeastern Bangladesh. Some Rohingya have been living in camps in this area for over thirty years,[313] with the numbers fluctuating following various mass exodus from Myanmar or repatriation. One resident described the living conditions of one of the camps as "not fit for a human."[314]

While Bangladesh is currently allowing some humanitarian assistance to the Rohingya, this was not always the case. Bangladesh has in the past refused boats of Rohingya, pushing boats back out to sea,[315] and has prevented the delivery of humanitarian assistance to Rohingya refugees living in refugee camps.[316] Bangladesh did not allow the UN High Commissioner for Refugees to register Rohingya refugees for decades.[317] Currently, Rohingya do not have access to education, are not permitted to work, do not have freedom of movement, and face obstacles

307 Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, Case No. ICC-01/19, Request for Authorization of an Investigation Pursuant to Article 15, ¶ 51 (July 4, 2019).

308 U.N. Secretary-General, *Report on Children and Armed Conflict*, *supra* note 230, ¶ 3.

309 *Id.* ¶¶ 3-4.

310 Yanghee Lee (Special Rapporteur on the Situation of Human Rights in Myanmar), *Statement to the General Assembly*, OFF. OF HIGH COMM'R FOR HUM. RTS. (Oct. 22, 2018), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25192&LangID=E.

311 U.N. Secretary-General, *Report on Children and Armed Conflict*, *supra* note 230, ¶ 4.

312 In 2009, a group of 200 Rohingya were rescued after spending almost three weeks at sea following being towed out into the ocean by Thai military authorities. *See* Gelling & Fuller, *supra* note 179.

313 Southwick, *supra* note 172, at 141.

314 Rebecca Ratcliffe et al., *'Not Fit for a Human': Coronavirus in Cox's Bazar Refugee Camps*, THE GUARDIAN (June 29, 2020), https://www.theguardian.com/world/ng-interactive/2020/jun/29/not-fit-for-a-human-coronavirus-in-coxs-bazar-refugee-camps?CMP=share_btn_tw.

315 Equal Rights Trust, Burning Homes, Sinking Lives: A Situation Report on Violence Against Stateless Rohingya in Myanmar and Their Refoulement from Bangladesh 18 (June 2012), https://www.refworld.org/docid/5034fadb2.html.

316 Brinham, *supra* note 176, at 41.

317 An article from 2010 noted that the government of Bangladesh had not allowed the U.N. High Commissioner for Refugees to register new Rohingya arrivals since 1993. *See* Seth Mydans, *Burmese Refugees Persecuted in Bangladesh*, N.Y. TIMES (Feb. 20, 2010), https://www.nytimes.com/2010/02/21/world/asia/21bangladesh.html.

communicating with the outside world as there is an internet black-out in the refugee camps.[318]

Recently, Bangladesh has begun to relocate Rohingya refugees to an island in the Bay of Bengal, which was described by Phil Robertson of Human Rights Watch as "a de facto prison island. It's like the Rohingya Alcatraz."[319] Representatives from the United Nations and human rights groups have not been permitted to visit the island and there are concerns that the relocation is not voluntary, but rather is forced.[320] As of December 2020, Bangladesh had relocated more than 3,000 Rohingya to the island[321] but has plans to relocate up to 100,000.[322]

Despite these conditions in Bangladesh, very few Rohingya have chosen to return to Myanmar as the government has not agreed to their conditions for return. According to the UN Secretary General, in order for the Rohingya to be able to safely and voluntarily return, "[f]ull and unfettered humanitarian access is needed for all humanitarian actors to provide assistance and protection services to people in need in northern Rakhine State."[323] This has not happened,[324] and the conditions on the ground make it unsafe for the Rohingya to return.[325]

The Rohingya remain at risk of genocide. According to Marzuki Darusman, the head of the UN Independent International Fact-Finding Mission on Myanmar, the government of Myanmar is failing in its obligation to prevent and punish the crime of genocide. As he stated in a speech to the

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318 *"Are We Not Human?:" Denial of Education for Rohingya Refugee Children in Bangladesh*, HUM. RTS. WATCH (Dec. 3, 2019), https://www.hrw.org/report/2019/12/03/are-we-not-human/denial-education-rohingya-refugee-children-bangladesh; *Bangladesh: Clampdown on Rohingya Refugees*, HUM. RTS. WATCH (Sept. 7, 2019), hrw.org/news/2019/09/07/bangladesh-clampdown-rohingya-refugees.

319 Jaclyn Diaz, *Bangladesh Begins Moving Displaced Rohingya Muslims to Island*, NPR (Dec. 4, 20205:27 AM), https://www.npr.org/2020/12/04/942761822/bangladesh-begins-moving-displaced-rohingya-muslims-to-island.

320 Hannah Beech, *From Crowded Camps to a Remote Island, Rohingya Refugees Move Again*, N.Y. TIMES (Dec. 8, 2020), https://www.nytimes.com/2020/12/04/world/asia/rohingya-bangladesh-island-camps.html; Rick Noack, *Bangladesh Begins Relocating Rohingya Refugees to Remote Island, Despite Human Rights Concerns*, WASH. POST (Dec. 4, 2020, 12:07 PM), https://www.washingtonpost.com/world/2020/12/04/rohingya-bangladesh-refugees-island-bhasan-char/.

321 Mohammed Ponir Hossain, *More Rohingya Sent to Bangladesh Island, with Hopes for Future, Ducks, Chickens*, REUTERS (Dec. 28, 2020, 10:00 PM), https://www.reuters.com/article/us-bangladesh-rohingya/more-rohingya-sent-to-bangladesh-island-with-hopes-for-future-ducks-chickens-idUSKBN29309T.

322 Beech, *supra* note 320.

323 U.N. Secretary-General, *Report on Children and Armed Conflict*, *supra* note 230, ¶ 5.

324 Chrinstine Schraner-Burgener (Special Envoy), *Security Council Briefing on Myanmar*, U.N. POL. AND PEACEBUILDING AFFS. (Feb. 28, 2019), https://dppa.un.org/en/print/security-council-briefing-myanmar-special-envoy-christine-schraner-burgener.

325 Yanghee Lee, *supra* note 310.

General Assembly in October of 2019, "the human rights catastrophe in Myanmar has not ended."[326]

The Rohingya's statelessness is not the root cause of their rightlessness, but a reflection of their persecution.[327] Yet their status of rightlessness has left them outside of the pale of the law and perpetuated and intensified their persecution. Even if there might be found some measure of accountability for the atrocities committed by Myanmar, these measures fall short of ensuring the realization of the Rohingya's basic human rights.

V. A NEW LAW ON EARTH

At the end of World War II, there was an opportunity for the creation of a "new law on earth" to address the atrocities of the war and of Holocaust. It was a time in which states came together in order to reaffirm a commitment to the international legal order and human rights at just the moment in which natural rights alone had been proven unfounded.[328] However, as the previous section on the Rohingya lays bare, we failed to create a new law on earth that would guarantee a right to have rights and prevent the recurrence of masses living outside the pale of the law in a state of rightlessness.

Arendt's vision for a new law on earth was not fully articulated. This is not surprising for, as David Luban has noted, she did not write extensively on the law, and what ideas she did express were "casual and undeveloped."[329] However, one can glean ideas through various writings about what she might have envisioned for "a new law on earth." Arendt rejected the notion that the answer was to create a single world government.[330] Although she admitted it

326 U.N. Independent International Fact-Finding Mission on Myanmar Calls on U.N. Member States to Remain Vigilant in the Face of the Continued Threat of Genocide, OFF. OF HIGH COMM'R FOR HUM. RTS. (Oct. 23, 2019), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25197&LangID=E.

327 *But see* Southwick, *supra* note 172, at 142 ("The Rohingya's statelessness and their lack of acceptance in Myanmar are at the root of the minority's plight. Statelessness and the perception that they do not belong have been used to rationalize various forms of marginalization and the denial of rights, services, and identity.").

328 *See* MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 80 (2001) ("The Universal Declaration set out to reestablish the idea of human rights at the precise historical moment in which they had been shown to have had no foundation whatever in natural human attributes.").

329 David Luban, *Hannah Arendt as a Theorist of International Criminal Law*, 11 INT'L CRIM. L. REV. 621, n.1 (2011). *See also* Christian Volk, *From Nomos to Lex*: *Hannah Arendt on Law, Politics, and Order*, 23 LEIDEN J. INT'L L. 759 (2010) (noting that Arendt's "engagement with law seems not to be systematic but rather episodic and sporadic"); Klabbers, *supra* note 95, at 2 (noting Arendt's "thoughts on law have always remained more sketchy . . ."); Florian Hoffman, *Facing the Abyss: International Law Before the Political*, *in* HANNAH ARENDT AND THE LAW 188 (2012) ("Arendt's refusal to present her thought as a system has left ample room for a plurality of interpretations.").

330 Arendt rejected the notion of a world government in several writings, including *The Origins of Totalitarianism.* ARENDT, ORIGINS, *supra* note 1, at 142, 420. Writing in 1955, Arendt explained, "[n]o matter what form a world government with centralized power over the whole globe might assume, the very notion of one sovereign force ruling the whole earth, holding the monopoly of all means of

was "indeed within the realm of possibility," as she explained in *Origins*, when all of humanity is organized into a single governing polity, there is nothing stopping humanity from deciding to "liquidate certain parts thereof."[331] In her view, a world government risked replicating the totalitarian structures that had emerged from the nation-state system.[332] As she wrote in 1955, "the abolishment of a plurality of sovereign states would harbor its own peculiar dangers."[333] Thus, she did not propose a solution to create a governing state to encompass all of humanity, as it would just replicate the ability of states to cast out their citizens, but on a global scale.[334]

Arendt explained her preferred solution in an interview published at the end of *Crises of the Republic*. She believed more was needed than a "founding of a new international court that would function better than the one at The Hague, or a new League of Nations."[335] Rather, she believed what was needed was a "new concept of the state" that would be more of a "council-state . . . to which the principle of sovereignty would be wholly alien" and "power would be constituted horizontally and not vertically."[336] Even when articulating this vision, Arendt admitted that the chances of this vision being realized were "[v]ery slight, if at all" without a revolution.[337] This builds upon a previous idea briefly expressed in *Men in Dark Times*, in which she believed that a "fragile unity [of mankind]" that had been achieved through interconnectedness facilitated by technology could "be guaranteed only within a framework of universal mutual agreements, which eventually would lead into a world-wide federated structure."[338]

Arendt's notion of a new state, or a council system, is an idea unlikely to be realized. Nor is it clear how a legally binding and enforceable right to have rights would be realized in a "council-state" system. Some might argue it would be more productive to examine alternative visions for international law that strengthen the enforceability of rights, including the creation of an enforceable right to have rights, within our current conceptions of territorial sovereignty.[339]

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violence, unchecked and uncontrolled by other sovereign powers, is not only a forbidding nightmare of tyranny, it would be the end of all political life as we know it." ARENDT, MEN IN DARK TIMES, *supra* note 82, at 81.

331 ARENDT, ORIGINS, *supra* note 1, at 298.

332 *See* David Luban, *Arendt on the Crime of Crimes*, 28 RATIO JURIS 307, 319 (2015).

333 ARENDT, MEN IN DARK TIMES, *supra* note 82, at 94.

334 As she described in *Men in Dark Times* written in 1955, "[t]he establishment of one sovereign world state, far from being the prerequisite for world citizenship, would be the end of all citizenship." *Id.* at 82.

335 HANNAH ARENDT, CRISES OF THE REPUBLIC 230 (1972) [hereinafter ARENDT, CRISES].

336 *Id.* at 233.

337 *Id.*

338 ARENDT, MEN IN DARK TIMES, *supra* note 82, at 93.

339 *See* Austen L. Parrish, *Rehabilitating Territoriality in Human Rights*, 32 CARDOZO L. REV. 1099 (2011).

One less radical vision for a new law on earth might come from Arendt's reflections on rights deprivation under the law, traditionally conceived as a punishment meted out for the commission of a crime, and the need for a transformative approach given the emergence of the rightless.

> Jurists are so used to thinking of law in terms of punishment, which indeed always deprives us of certain rights, that they may find it even more difficult than a layman to recognize that the deprivation of legality, i.e., of all rights, no longer has a connection with specific crimes. In our times, absolute rightlessness is the punishment for absolute innocence.[340]

What Arendt is illuminating is that the traditional conceptions of the law were inadequate to address the emergent state of rightlessness resulting not from the commission of a crime, but as a result of no particular action whatsoever. One might imagine a more affirmative approach through positive law for the protection of rights prior to their deprivation or for a restoration of rights once lost.

There is a parallel to her critique in how our current international legal framework is structured. One might argue that international criminal law is stronger in terms of its enforceability compared to international human rights law, perhaps as a reflection of the law's historical focus on punishment that Arendt illuminated. Often, when there is a violation of human rights or a deprivation of rights, international lawyers look first to accountability. While not to be overlooked and a critical step in obtaining justice for victims, legal interventions for the rightless or those whose rights have been violated should not stop there. Even if it is not possible to achieve full restitution, the rightless should not remain in such a state even if a measure of accountability has been obtained.

A. Historical Proposals for Alternative Visions of Enforcement Mechanisms in International Law and Human Rights

Is it possible to envision a version of international law that allows for an enforceable right to have rights? International law, like all law, is not static.[341] Our assumptions about its structure are often based in repetition of these same assumptions.[342] The creation of human rights law without enforcement

340 ARENDT, ORIGINS, *supra* note 1, at 295.

341 LASSA OPPENHEIM, THE FUTURE OF INTERNATIONAL LAW 3 (1921) ("Every epoch of history produces alike that mode of legal development which it needs and that theoretical basis therefor which corresponds to its own interpretation of the nature of things.").

342 H. L. A. HART, THE CONCEPT OF LAW 224 (1994) ("[T]hese theories fail completely to explain how it is known that states '*can*' only be bound by self-imposed obligations, or why this view of their sovereignty should be accepted, in advance of any examination of the actual character of international law. Is there anything more to support it besides the fact that it has often been repeated?").

mechanisms was not inevitable or required by law. Rather, it is the result of determinations made at key junctures in the creation of the modern international legal framework.[343] There may have been powerful incentives for these outcomes,[344] but that does not mean they were preordained. Indeed, there is a rich history of international jurists who have advocated for greater enforceability in international law more broadly, and international human rights law specifically. To this end, it is useful to consider alternative proposals for human rights law as envisioned by those writing contemporaneously to Arendt's call for a right to have rights.

Efforts to create individual procedural rights in international law pre-date the modern human rights era. Arendt was critical of the Minority Treaties for creating a law of exception. As contemporary sources noted, the treaties failed largely due to their lack of enforcement mechanisms and the reluctance on the part of states to comply, with states eventually withdrawing entirely.[345] Prior to the execution of the Minority Treaties, there was movement to create an individual right of petition. This included advocacy by Jewish and other minorities.[346] Although there were visions from some corners to increase the role of the individual—as a subject of international law—through the creation of the Minority Treaties, this was not the ultimate result.

Writing in 1944, Hersch Lauterpacht argued powerfully for the preservation of the rights of man through the enactment of positive law.[347] In a compact volume that included a proposal for *An International Bill of the Rights of Man*, Lauterpacht outlined his vision for a bill to be adopted by the United Nations. In the preambular paragraphs, he called for "the sanctity of human personality" to be "protected by the universal law of mankind through international enactment, supervision and enforcement."[348] The bill called for

343 As Suzanne Katzenstien described in her article, *In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century*, "[i]t takes a rare confluence of forces to facilitate international judicialization." There she outlines key moments in history, including failed attempts, to create international courts and tribunals, including efforts towards the creation of a World Court of Human Rights. 55 HARV. INT'L L.J. 151 (2014).

344 As Judith Shklar noted regarding the lack of enforcement mechanisms in international law, "most world law theorists conceded, regretfully, that arbitral institutions and the generally less legalistic and flexible approach of the United Nations system must be accepted as an unavoidable concession to political necessity." JUDITH SHKLAR, LEGALISM 133 (1964).

345 Robinson et al., *Minority Treaties*, *supra* note 25, at 107 ("No rules for the enforcement of duly reached decisions were established by the Council. As a result successful petitioners often did not reap the harvest of their victory.").

346 Fink, *Minorities Question*, *supra* note 26, at 201.

347 HERSCH LAUTERPACHT, AN INTERNATIONAL BILL OF THE RIGHTS OF MAN 3 (1945) ("The law of nature and natural rights can never be a true substitute for the positive enactments of the law of the society of States.").

348 *Id.* at 69.

domestic implementation and enforcement of its provisions,[349] as well as the creation of a "High Commission for the supervision of the observance of the International Bill of the Rights of Man."[350] The Commission would submit reports to the "Council of the United Nations," which would "be the supreme agency for securing the observance of the International Bill of the Rights of Man."[351] Under Article 19 of Lauterpacht's draft, he provided for a right of individuals to petition the High Commission. This right was to be "in sharp contrast with the position which obtained under the system of protection of minorities where petitions were merely in the nature of information supplied to the Minorities Section of the Secretariat of the League."[352] Finally, Lauterpacht envisioned that the Council "shall take or order such political, economic, or military action as may be deemed necessary to protect the rights of man," if a state persisted in violating rights following a determination of three-fourths of the member states of the Council.[353]

There was strong advocacy for a binding convention on human rights in the earliest days of the United Nations, as well as calls for a world court of human rights[354] to enforce a binding international bill of rights.[355] The preference of the United States and other countries was to work on a non-binding declaration and consider any enforcement mechanisms after a text was drafted.[356]

There were also different versions considered by the Human Rights Commission during the drafting process for the Universal Declaration of Human Rights. The "Humphrey Draft" included a principle "[t]hat man is a citizen both of his State and of the world."[357] The Third Committee Draft included reference to positive law, saying "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and

349 Under Article 15, "[e]very State shall, by appropriate constitutional means, adopt Part I of this International Bill of the Rights of Man as part of its domestic law and constitution. The effect of such adoption shall be to abrogate any existing statute or any other rule of law inconsistent with these Articles of the International Bill of the Rights of Man. They shall not be abrogated or modified, by legislative action or otherwise, save in pursuance of international agreement or authorization."

Article 17 requires that "[i]n every State the highest judicial tribunal of the State or a special Constitutional Court of Liberties shall have jurisdiction to pronounce judgment upon the conformity of legislative, judicial or executive action with the provisions of Part I of this International Bill of the Rights of Man." *Id.* at 72-73.

350 *Id.* at 73.

351 *Id.* at 74.

352 *Id.* at 201.

353 *Id.* at 74.

354 Commission on Human Rights Drafting Committee, Australia: Draft Proposals for an International Court of Human Rights, E/CN.4/AC.1/27 (May 10, 1948).

355 *U.N. Blocks Court for Human Rights: Australia Leads Fight in Group for Tribunal—Population Commission Meets Today*, N.Y. TIMES (Feb 6, 1947), https://timesmachine.nytimes.com/timesmachine/1947/02/06/issue.html.

356 *Id.*

357 MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 271 (2002).

oppression, that human rights should be protected by the rule of law."[358] Even after the Universal Declaration was adopted, there were still calls to "create legally binding norms" and establish "a machinery of international enforcement."[359]

The mechanisms that were created to monitor compliance with international human rights treaties vary significantly from the vision of those advocating for a binding human rights instrument with strong enforcement mechanisms. As explained in Section II above, the initial articulation of universal human rights in the aftermath of World War II was not through a binding treaty, but rather through the non-binding Universal Declaration of Human Rights. In the binding treaties that were concluded in the proceeding years, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, the monitoring mechanisms created can best be described as "quasi-legal," falling short of a legal instrument that offers enforcement and the protection against rightlessness.[360]

In more recent years, there have been efforts to create a unified standing treaty body to reform the human rights treaty body system that has different methods of oversight and mechanisms to monitor compliance with the respective treaties.[361] There have also been renewed efforts on proposals for an international tribunal for human rights, or a world court for human

358 *Id.* at 300.

359 Josef L. Kunz, *The United Nations Declaration of Human Rights*, 43 AM. J. INT'L L. 316, 318 (1949).

360 *See* HANNUM ET AL., INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 649 (6th ed. 2018). Descriptions of the procedures for bringing complaints of violations of the provisions of human rights treaties are available through the United Nations Office of the High Commissioner for Human Rights. *See* OFF. OF HIGH COMM'R FOR HUM. RTS., Human Rights Bodies—Complaints Procedures, https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#individualcomm (last visited Aug. 12, 2021) [hereinafter Human Rights Bodies—Complaints Procedures].

361 In 2006, the Secretariat of the High Commissioner for Human Rights issued a report recommending a unified standing treaty body to reform the diffuse and often disjointed system that had developed over the decades. "The treaty body system has developed ad hoc and it does not function as an integrated and indivisible framework for human rights protection. This has weakened its overall impact. The existence of seven treaty bodies acting independently to monitor implementation of obligations based on the Universal Declaration of Human Rights, raises the possibility of diverging interpretations which may result in uncertainty with respect to key human rights concepts and standards, which threatens a holistic, comprehensive and cross-cutting interpretation of human rights provisions. A lack of coordination and collaboration among the treaty bodies may result in conflicting jurisprudence." U.N. Secretariat, Concept Paper on the High Commissioner's Proposal for a Unified Standing Treaty Body, HRI/MC/2006/2 ¶ 23 (March 22, 2006) [hereinafter U.N. Concept Paper].

rights.[362] More often than not, proposals to establish a world court for human rights have been deemed impractical and unrealistic.[363]

As the world trends away from multilateral engagement and towards more nationalism and isolation, prospects for a global solution to rightlessness seem even further out of reach. In some ways, this makes the need more urgent, as those who find themselves in a situation of rightlessness are less likely to find a solution. The challenge is whether we will choose to guarantee to ourselves, on a universal basis for all humanity, mutually equal rights. It is within the power of humanity to solve situations of rightlessness if we care to create the legal institutions to guarantee and protect rights.

B. Guaranteeing a Right to Have Rights

There can be no right to have rights if individuals have no means through which to realize their human rights. As Hersch Lauterpacht wrote in 1950, "There are no rights unless accompanied by remedies."[364] In the realm of international law, it would be easy to suggest that the rights and remedies belong to states, the primary subjects of international law. But as Lauterpacht wrote in 1946,

> The individual is the ultimate unit of all law, international and municipal, in the double sense that the obligations of international law are ultimately addressed to him and that the development, the

362 *See, e.g.*, JULIA KOZMAN, MANFRED NOWAK, & MARTIN SCHEININ, A WORLD COURT OF HUMAN RIGHTS—CONSOLIDATED STATUTE AND COMMENTARY (2010) [hereinafter KOZMAN, WORLD COURT]; Jesse Kirkpatrick, *A Modest Proposal: A Global Court of Human Rights*, 13 J. HUM. RTS. 230, 242 (2014) (advocating for a Global Court of Human Rights with "the right to individual petition under a streamlined, clear, and widely accessible set of processes" modeled after procedures at the European Court of Human Rights and the American Convention on Human Rights); Manfred Nowak, *The Need for a World Court of Human Rights*, 7 HUM. RTS. L. REV. 251, 258-59 (2007) (arguing for the creation of a World Court of Human Rights as it "would provide a major contribution to ensuring the right of victims of human rights violations to an effective remedy and to an adequate reparation for the harms suffered").

363 KOZMAN ET AL., *supra* note 362; *see, e.g.*, Philip Alston, *Against a World Court for Human Rights*, 28 ETHICS & INT'L AFFS. 197, 211 (2014) ("The central problem with the WCHR proposal is not its economic or political feasibility or its pie-in-the-sky idealism. It is that by giving such prominence to a court, the proposal vastly overstates the role that can and should be played by judicial mechanisms, downplays the immense groundwork that needs to be undertaken before such a mechanism could be helpful, sets up a straw man to be attacked by those who thrive on exaggerating the threat posed by giving greater prominence to human rights instruments at the international level, and distracts from far more pressing and important issues."); Stefan Trechsel, *A World Court for Human Rights?*, 1 NW. U. J. INT'L HUM. RTS. 3 (2004) ("Realistically speaking, the creation of a world court for human rights is, at the present time, neither desirable, nor necessary, nor probable.").

364 LAUTERPACHT, INTERNATIONAL LAW, *supra* note 117, at 421; *see also* Robinson et al., *Minority Treaties*, *supra* note 25, at 85 (On the failure of the Minority Treaties to guarantee rights to protected minorities, Robinson writes that "[s]ubstantive law is of little value without the framework of a procedural system to provide enforcement.").

> well-being, and the dignity of the individual human being are a matter of direct concern to international law.[365]

What would it look like to have a right to have rights guaranteed through positive law? To protect the rights of individuals separate and apart from the rights of citizens? While the description of a comprehensive legal solution to guarantee a right to have rights is outside of the scope of this article, the aim of this section is to begin to sketch out what a solution might look like and its key characteristics. I argue that the key to a *right* to have rights is the recognition of the legal personality of the individual on the international plane through the creation of a procedural right to realize substantive human rights. But in order to give effect to a procedural right to realize substantive human rights, there must be corresponding adjudicative bodies and enforcement mechanisms.

One might imagine an enforceable right to have rights to include an individual right to petition an adjudicative body, with mechanisms for appropriate sanctions for states that do not implement the orders of the tribunal or court.[366] A potential solution could be a new treaty that would encompass all previously adopted human rights instruments, adding a layer of enforceability to previously consented to obligations.[367] This could be a universal protocol that provides an individual right to redress. It could be fashioned similar to the Optional Protocol to the International Covenant on Civil and Political Rights, but instead of a Committee, it would establish an adjudicative body to consider contentious disputes between individuals and states. This sort of solution is particularly important for treaties which outline the rights of individuals, such as the Refugee Convention and the Statelessness Conventions, but that limit their dispute mechanisms to the settlement of disputes between states. The right of standing could be for individuals or for the collective enforcement of individual rights,[368] a procedure that would be

365 Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 27 (1946).

366 This mechanism would need to be stronger than existing mechanisms to submit "communications" that states may respond to. Human Rights Bodies—Complaints Procedures, *supra* note 360.

367 A similar solution was considered in the proposal for a unified treaty body system, including a suggestion for "an overarching amending procedural protocol." U.N. Concept Paper, *supra* note 361, at ¶ 64.

368 *See* G.A. Res. 60/147, 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, ¶ 13 (Mar. 21, 2005) ("In addition to individual access to justice, States should endeavor to develop procedures to allow *groups* of victims to present claims for reparation and to receive reparation, as appropriate.") (emphasis added); *see also* INTERNATIONAL COMMISSION OF JURISTS, THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS (2018) ("While the collective enforcement of individual rights is a substantive right of the group, collective enforcement procedures are a procedural right, a right of standing. Collective enforcement allows certain individuals, groups or organizations to bring a claim on behalf of a number of individuals. This may be a defined or undefined number of individuals . . . . While international treaties are silent

appropriate in situations like the Rohingya, in which the deprivation of rights is similar for a large group and individual adjudication is not practicable.

But even this solution falls short of guaranteeing universal rights for all of humanity, as it simply adds a layer of enforcement onto human rights treaties, with a patchwork of rights to be guaranteed based on which states had consented to the treaties. The challenge that must be addressed is how to ensure the realization of rights for those individuals who fall outside the pale of the law of any sovereign state, such as the stateless, or those that lack the effective protection of a state, such as refugees who have not been granted asylum in any country. Furthermore, a solution that is based on existing human rights treaties and limited to creating an enforcement mechanism applicable to nationals or those residing within the territory of state parties to those conventions leaves a significant portion of humanity outside of its protection.

The creation of a right to have rights must be enshrined in positive international law. The effective realization of a right to have rights should address both losses that Arendt identified, namely the loss of a home and an existence relegated outside of the "family of nations" and the loss of legal status and government protection anywhere in the world.[369] This must include a creation and protection of legal personhood at the international level for all individuals, including the stateless and those who are nationals or residents of states that are not state parties to international human rights treaties. Most importantly, it would provide an adjudicative body and enforcement mechanism for the effective realization of human rights.

Given the current reality in which, in the words of Louis Henkin, "[s]overeign states accept international human rights standards, if they wish to, when they wish to, to the extent they wish to" and "submit to monitoring, to judgment by international human rights courts and commissions, if they wish, to the extent they wish,"[370] a more radical reimagining of sovereignty and the role of the individual in international law needs to take place in order for the right to have rights to be realized. To accomplish this, notions of sovereignty would need to encompass and grow beyond our current conception of "sovereignty as responsibility."[371] It must include sovereignty as responsibility to respect, protect, and fulfill the rights of its citizens, but also embody Arendt's conception of mankind as a single political entity and

on these procedures, they have been recognized by the Inter-American Commission and Court of Human Rights and the African Commission on Human and Peoples' Rights, both of which have accepted complaints presented on behalf of an undefined number of persons.").

369 ARENDT, ORIGINS, *supra* note 1, at 294.

370 Louis Henkin, *That S Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 5 (1999).

371 FRANCIS M. DENG, SADIKIEL KIMARO, TERRENCE LYONS, DONALD ROTHCHILD & I. WILLIAM ZARTMAN, SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA (1996).

humanity as a community of shared responsibility.[372] This responsibility should extend to guarantee the right to have rights, and not simply for sovereign states to provide humanitarian assistance to citizens of other nations, and would be distinct from notions of intervention under the doctrine of responsibility to protect. Guaranteeing a right to have rights through positive law would be accomplished through the creation of a legal forum at the international level that would be open to individuals, regardless of their nationality or lack of nationality in the case of stateless persons. Although pathways to pursue granting or restoration of citizenship should be considered in the creation of this right, the right to have rights is not simply a right to a nationality.

Scholars have proposed broader notions of sovereignty as responsibility. For example, David Luban has suggested there is a "responsibility to humanity," which he has abbreviated as "R2H" as distinct from "R2P," which he defines as "the responsibility to cooperate transnationally to manage threats to peace."[373] Eyal Benvenisti has proposed a conception of sovereignty with sovereigns as "trustees of humanity" in which states "assume certain underlying obligations toward strangers situated beyond national boundaries and also take foreigner's interests seriously into account even absent specific treaty obligations."[374] Evan Criddle and Evan Fox-Decent have suggested that sovereignty ought to be reframed with states as fiduciaries of humanity.[375] Their conception of a fiduciary approach would give individuals fleeing human rights abuses a universal right of refuge and a right to independent review of denials of asylum.[376] These proposals do not suggest completely doing away with traditional notions of sovereignty, but rather suggest a reimagining of sovereignty, while acknowledging the somewhat utopian nature of their ideas.

These are the sorts of ambitious proposals that would be necessary to realize a right to have rights and take Arendt's vision to its logical conclusion. Her skepticism of our ability to realize human rights separate and apart from the rights of citizens came from a recognition that "a sphere that is above the nations does not exist."[377] The creation of a "new law on earth" would necessitate a reimagining of sovereignty or a creation of law that transcends traditional notions of sovereignty.

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372 ARENDT, ORIGINS, *supra* note 1, at 463.

373 David Luban, *R2H and the Prospects for Peace: An Essay on Sovereign Responsibilities*, 38 BERKELEY J. INT'L L. 185 (2021).

374 Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295, 297 (2013).

375 EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY (2016).

376 *Id.* at 244.

377 ARENDT, ORIGINS, *supra* note 1, at 298.

A new law on earth would enshrine the right to have rights in positive international law and be applicable to all of humanity. It would expand the place of the individual as a subject of international law. It would create international institutions, primarily adjudicatory bodies and enforcement mechanisms, that match the substantive provisions of human rights. If human rights are to be truly universal and guaranteed through law and not mere charity, they must be legally enforceable.

For the Rohingya, a stateless population who are supposed to be holders of rights yet find that they remain persistently out of reach, the creation of an enforceable right to have rights would enable them to petition for their own rights on their own behalf. It would remove the current barriers that exist in international law that restrict complaint mechanisms to individuals residing in the territory of state parties to the applicable international human rights treaties or cases brought by sovereign states that require both states to have consented to jurisdiction, resources, and the decision to exercise political capital on behalf of others.

VI. CONCLUSION

The great challenge of human rights is the contrast between the claim that they are the "inalienable rights of members of the human family"[378] and the inability for these rights to be realized for all of humanity. Hannah Arendt's observations on the dangers of relying on rights through natural law alone, rather than enshrined through positive law, still resonate despite the proliferation of international declarations and treaties. As she observed, the articulation of human rights that are not separate and apart from the rights of citizens and not incorporated into positive law are not effective. Without positive law, human rights cannot achieve their "political reality."

The plight of the Rohingya illustrates in painful relief the failure of international law to guarantee rights to all. It reveals a persistent gap in the international protection of human rights. For if the restoration of rights for the Rohingya is still illusive despite the activation of an array of accountability mechanisms under international law, this demonstrates the positive international law we have created has thus far failed to guarantee a right to have rights.

To guarantee a right to have rights, we must create an enforceable right, enshrined in positive international law, in which human rights can be realized separate and apart from the rights of citizens. For only when the right to have rights is guaranteed will the loss of a nationality no longer result in the loss of all rights, and with it, the loss of belonging to the political community of mankind.

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

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