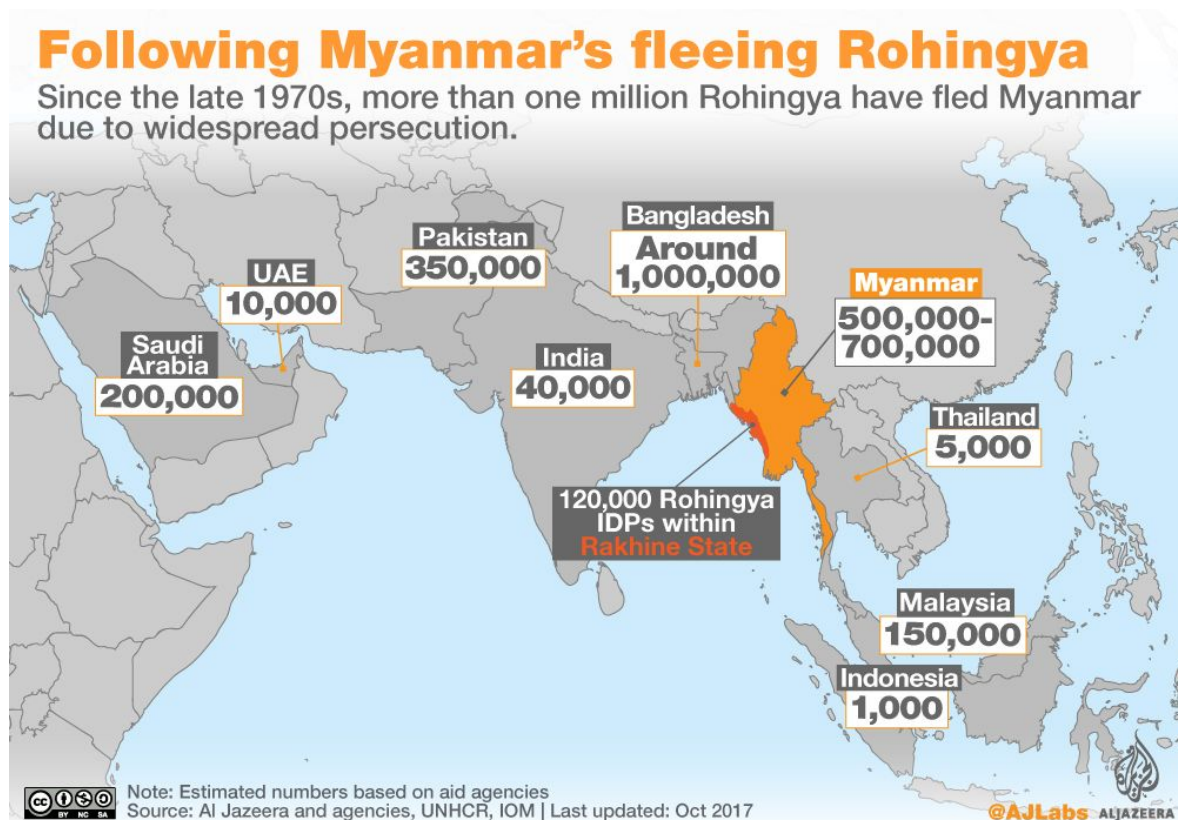


## The Rohingya crisis in Myanmar's Rakhine state: the final deathblow to the 'Responsibility to Protect' principle?

An analysis about the absence of the 'Responsibility to Protect' principle in relation to the Rohingya humanitarian crisis in Myanmar's Rakhine State.



<sup>1</sup> Infographic depicting the flow of Rohingya refugees throughout all of Asia.

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<sup>1</sup> Al Jazeera, *Rohingya crisis explained in maps* (version October 28th, 2017)

<https://www.aljazeera.com/indepth/interactive/2017/09/rohingya-crisis-explained-maps-170910140906580.html>  
(accessed on March 27th, 2018).

## Introduction

The Rohingya, a muslim minority population from Myanmar's Rakhine province, is often being called 'the world's most persecuted minority' or the largest stateless community in the world.<sup>2</sup> Since August 2017, more than 671.000 Rohingya refugees fled to neighboring Bangladesh after widespread violence ensued against their community.<sup>3</sup> International media and non-governmental organizations (NGOs) are increasingly portraying the government of Myanmar, its military and its security apparatus as being too passive in preventing further escalation or even of instigating the current prejudice, violence, rape, torture and expulsion of the Rohingya community themselves.

Even the United Nations (UN), which is generally conservative in using strong terms, is implicitly and explicitly referring to the events in Rakhine as 'ethnic cleansing' or even 'genocide'. For example, Zeid Ra'ad al-Husseini, the UN Human Rights Chief, said in September 2017 that "the situation seems a textbook example of ethnic cleansing".<sup>4</sup> By December 2017, he asked the question: "Can anyone rule out that elements of genocide may be present?"<sup>5</sup> He added that "ultimately, this is a legal determination only a competent court can make".<sup>6</sup> Furthermore, António Guterres, the UN Secretary-General, called the situation in Myanmar "a humanitarian and human rights nightmare".<sup>7</sup>

The purpose of this thesis is to research and explain why, despite international condemnation for the humanitarian crisis in Rakhine, the UN adopted principle of Responsibility to Protect (R2P) is not being implemented in the Rakhine case. This approach implies that, because of the existing conditions in Rakhine, there are at least some valid grounds on which the applicability of R2P to this case could be discussed or considered. To justify the methodology of this approach, the introduction will first provide a brief history of key events relating to the Rohingya and the origin of the current crisis. After that, the core principles and criteria of R2P will be discussed. Having provided this introduction, a literature review will be given which aims to account for the sources used in this thesis. The aim of chapter I is to identify the main arguments used by normative opponents of R2P. Chapter II focuses on the arguments of (perceived) normative proponents of the R2P principle. These two chapters are thus intended to analyse the general historiographical debate about R2P,

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<sup>2</sup> Ibidem.

<sup>3</sup> Human Rights Watch, *Rohingya Crisis* (version 2018) <https://www.hrw.org/tag/rohingya-crisis> (accessed on March 27th, 2018).

<sup>4</sup> UN News, *UN human rights chief points to 'textbook example of ethnic cleansing' in Myanmar* (version September 11th, 2017), <https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar> (accessed on March 27th, 2018).

<sup>5</sup> UN News, *UN rights chief calls for probe into attacks against Rohingya, says genocide 'cannot be ruled out'* (version December 5th, 2017), <https://news.un.org/en/story/2017/12/638322-un-rights-chief-calls-probe-attacks-against-rohingya-says-genocide-cannot-be> (accessed on March 27th, 2018).

<sup>6</sup> OHCHR, *Myanmar: UN human rights chief calls for international criminal investigation of perpetrators of violence against Rohingya* (version December 5th, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22488&LangID=E> (accessed on February 24th, 2018).

<sup>7</sup> UN News, *Rohingya refugee crisis a 'human rights nightmare,' UN chief tells Security Council* (version September 28th, 2017), <https://news.un.org/en/story/2017/09/567402-rohingya-refugee-crisis-human-rights-nightmare-un-chief-tells-security-council> (accessed on March 27th, 2018).

while the third chapter will specifically focus on Myanmar's Rakhine case. The aim of the final chapter is to analyse the contextual dilemmas that normative proponents of R2P face, which obstructs the effective implementation of R2P in Myanmar. These three dilemmas are formulated in the international, domestic and judicial context. The general aim of this thesis is not to provide concrete solutions for the humanitarian crisis in Rakhine, but rather to provide understanding and clarification for the challenges which are generally undermining the effective implementation of R2P, by using the example of the Rohingya crisis in Myanmar.

The Rohingya in Myanmar have faced political, economical and judicial discrimination for decades. After Myanmar's independence from the United Kingdom in 1948, the new country enjoyed a brief period of civilian government. In this period, the Rohingya were still able to receive citizenship and identification cards from the government. However, in 1962 general Ne Win staged a coup and turned the country into an authoritarian military dictatorship. The result was that citizenship grants and receiving passports became much more difficult for Rohingya.<sup>8</sup>

In 1982 Ne Win announced a new discriminatory citizenship law which effectively banned Rohingya from obtaining the Myanmar nationality.<sup>9</sup> Both during and after the military rule from 1962 to 2011, there have been countless cases of Rohingya being forced to work, displaced, trafficked to neighboring countries, religiously persecuted or their marriage opportunities being restricted.<sup>10</sup> In recent years, the marginalization of Rohingya within Myanmar society led to new waves of violence between the muslim Rohingya minority and the Buddhist Rakhine majority. In 2012, a Rakhine Buddhist woman was allegedly raped and murdered by a Rohingya man, sparking massive mob violence which displaced tens of thousands of people.<sup>11</sup>

And in October 2016, insurgents from the Arakan Rohingya Salvation Army attacked three police border outposts, killing nine policemen and four soldiers.<sup>12</sup> This led to a military crackdown campaign of Rohingyas in Rakhine state, sparking an even larger wave of people fleeing the country or becoming internally displaced. Between October 2016 and July 2017, more than 87.000 Rohingyas fled to Bangladesh.<sup>13</sup> On August 25th 2017, a second incident in which Rohingya insurgents killed security officers, led to an unprecedented military crackdown on Rohingyas. Mass killings, torture, mass-rape of Rohingya women and the burning of villages have been commonplace since August 25th. More than 350 Rohingya villages have been partially or completely destroyed.<sup>14</sup> According to Doctors Without

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<sup>8</sup> Allard K. Lowenstein, International Human Rights Clinic, Yale Law School (prepared for Fortify Rights), *Persecution of the Rohingya muslims: is genocide occurring in Myanmar's Rakhine state? A legal analysis* (version October 2015), [http://www.fortifyrights.org/downloads/Yale\\_Persecution\\_of\\_the\\_Rohingya\\_October\\_2015.pdf](http://www.fortifyrights.org/downloads/Yale_Persecution_of_the_Rohingya_October_2015.pdf) (accessed on April 6th, 2018), 6

<sup>9</sup> Ibidem, 7.

<sup>10</sup> Ibidem, 11.

<sup>11</sup> Ibidem, 20.

<sup>12</sup> Al Jazeera, *Myanmar army forces hundreds of Rohingya from homes*, (version October 24th, 2016) <http://www.aljazeera.com/news/2016/10/myanmar-army-forces-hundreds-rohingya-homes-161024164823817.html> (accessed on March 27th, 2018).

<sup>13</sup> International Organization for Migration, *Bangladesh: Needs and Population Monitoring*, (version July 2017), [https://reliefweb.int/sites/reliefweb.int/files/resources/170814\\_NPM\\_RIV\\_Final.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/170814_NPM_RIV_Final.pdf) (accessed on March 27th, 2018).

<sup>14</sup> Human Rights Watch, *Burma: 40 Rohingya Villages Burned Since October* (version December 17th, 2017) <https://www.hrw.org/news/2017/12/17/burma-40-rohingya-villages-burned-october> (accessed on March 27th, 2018).

Borders, more than 6700 Rohingyas have been killed between August and October 2017 alone.<sup>15</sup>

Having explained the core of the humanitarian crisis in Rakhine, the UN endorsement of R2P will now be described. In 2001, the International Commission on Intervention and State Sovereignty (ICISS) published a report about their findings on the conceptualization of the R2P principle. In 2005, most core principles formulated in this report were endorsed at the UN 60th Anniversary World Summit in September 2005. The written formulation of the R2P core principles can be traced to paragraph 138 and 139. Paragraph 138 states that “each individual State has the Responsibility to Protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.

Paragraph 139 emphasizes that “the international community, through the UN, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity”.<sup>16</sup>

The UN endorsement of R2P is both groundbreaking and controversial, more specifically because it operates in the grey area between legality (the UN Charter) and the highly contested and intrinsically moral notion of human rights.

In this final part of this introduction, the choice for the term ‘Myanmar’ needs to be discussed. The name ‘Myanmar’ instead of Burma has been in use since the military regime changed the country’s name in 1989. Although the use of ‘Myanmar’ used to be a symbol for the country’s military dictatorship, it is now more commonly accepted. This thesis applies the term ‘Myanmar’ strictly for the purpose of consistency in the arguments made and does not necessarily reflect any personal opinion of the author.

## Literature review

The framework for this thesis is comprised of many different qualitative sources: UN documents and news articles, books written by academics, United States government institutions, NGOs, scientific journals and a wide range of qualitative media outlets. It is the author’s judgement that although these sources inevitably have their strengths and weaknesses, the wide range of sources used balances potential bias out to a workable level.

For transparency’s sake, some examples of potential vulnerabilities in the sources will be pointed out. First, NGOs such as Human Rights Watch are humanitarian activists, which inherently makes them more inclined towards favoring human rights above state sovereignty. Second, the sources of the United States government are useful but obviously emphasize the American perspective on Myanmar. Third, Gareth Evans’ book is potentially

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<sup>15</sup> NRC, ‘De Rohingya waren doelwit in Birma: 6.700 doden in één maand’ (version December 13th, 2017) <https://www.nrc.nl/nieuws/2017/12/13/de-rohingya-waren-doelwit-in-birma-6700-doden-in-een-maand-a1584862> (accessed on March 27th, 2018).

<sup>16</sup> UN General Assembly, *2005 World Summit Outcome*, (version October 24th, 2005), 60th session, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/60/1](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/1) (accessed on March 27th, 2018), 30.

bias because Evans is one of the architects of R2P, which makes it more likely that he disproportionately emphasizes the benefits of the principle. Finally, Al Jazeera is owned and funded by the Qatar government thus representing their point of view, making it vulnerable to bias.

Nonetheless, readers that are interested in further delving into this topic are encouraged to read useful sources such as Gareth Evans *The Responsibility to Protect - Ending Mass Atrocity Crimes Once and for All* (2009), the Yale Law school's *Persecution of the Rohingya muslims: is genocide occurring in Myanmar's Rakhine state? A legal analysis* and to research Al Jazeera's website archive on the Rohingya crisis.

## Chapter I: Opponents of Responsibility to Protect

The aim of the first chapter is to identify the possible arguments of normative opponents of R2P and to describe their perspective of R2P on the historiographic debate. Three main arguments used by opponents of R2P will be discussed, including the countries and relevant organisations that use them. The relevant actors of this discussion that are normative opponents of R2P include China, Russia, India and the Association of Southeast Asian Nations (ASEAN, of which Myanmar is a member state).

The discussion around the R2P principle essentially concerns a friction between human rights and state sovereignty. This friction results in a predictable first argument being used most frequently by opponents of R2P, which is that the concept is a direct assault on the principle of state sovereignty. According to these actors, this constitutes a violation of the UN Charter. Thus, the first argument against R2P is primarily a legal one.

The principle of state sovereignty has a long history, dating back to 1648 when the Treaty of Westphalia was signed.<sup>17</sup> The main principle of state sovereignty is that each state has the sole right to rule within its own territory, without foreign interference in its domestic affairs. Crucial to sovereignty is also the acknowledgement by other states that a particular state has the right of independence and non-interference.<sup>18</sup> The recognition that state sovereignty forms the basis of international relations has also been embedded in the UN Charter Article 2.1, which states that all its members enjoy the same level of sovereign equality. Additionally, Article 2.7 of the Charter prohibits the UN as an international organization itself from interfering in the domestic affairs of its own members.<sup>19</sup> Despite these codifications in the Charter, the once unchallenged dominance of the sovereignty principle has continuously been challenged in the post-Cold War era, as will become clear in the second argument.

Another striking example of a legal argument which opponents of R2P can refer to is the nature of the ASEAN declaration of Human Rights. While the document stresses the universal need for human rights, article 8 emphasizes that human rights are subjected to certain limitations as determined by national law and article 9 stresses that the principle of “non-confrontation” should always be upheld.<sup>20</sup> This example shows that human rights can be discussed in a context where any sort of limitation on state sovereignty is rejected.

The second argument against R2P is that the violation of sovereignty is not only illegal, but also morally unjustifiable. To further explain this point of view, its essential to first briefly describe the developments in international relations that led to the weakening of the sovereignty principle. After the Second World War, intra-state wars replaced inter-state wars as the primary form of conflict. The dynamics of the Cold War ensured that, even though some governments lacked proper legitimacy or *de facto* control within their own territory, both the Soviet-Union and the United States would actively try to support or install either a communist or capitalist regime that served their interests, thus providing these respective

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<sup>17</sup> A. Hehir, *Humanitarian intervention, an introduction*. (London 2013), 50.

<sup>18</sup> Ibidem, 51.

<sup>19</sup> Ibidem, 52.

<sup>20</sup> ASEAN, *ASEAN Human rights declaration* (version February 2013) [http://www.asean.org/storage/images/ASEAN\\_RTK\\_2014/6\\_AHRD\\_Booklet.pdf](http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf) (accessed on April 28th, 2018), 5.



governments with enough resources to maintain control within the country.<sup>21</sup>

After the Cold War these dynamics disappeared, resulting in these fragile governments no longer being able to rely on the support of Moscow or Washington. This drastically increased the number of worldwide intra-state conflicts, which in turn created more weak and failed states. The emerging intra-state conflicts were increasingly being seen as a threat to international stability and peace, especially by Western countries. This opened the way for several humanitarian interventions in the 1990's (both with and without consent from the Security Council), such as Operation Provide Comfort in Northern Iraq, and the 1999 NATO intervention in Kosovo. Such interventions were also legitimized by the growing trend that states were responsible for providing basic human rights for their citizens, and that failure to uphold this criterium justified external sanctions and even military intervention.

This trend was also reflected during the 1993 World Conference on Human Rights, in which all UN members adopted the Vienna Declaration and Programme of Action. It declared that "the promotion and protection of human rights is a matter of priority for the international community".<sup>22</sup> In fact, the controversy surrounding the 'illegal but legitimate' NATO intervention in Kosovo was the direct catalyst for evolving the discussion around sovereignty and human rights to a new level.<sup>23</sup> This led to the establishment of the ICISS in 2001, followed by the official endorsement of R2P during the UN World Summit in 2005.

It should be noted that even though many UN member states supported this trend of a more prominent role for human rights in international relations, it would be misleading to suggest that all member states supported this trend with equal enthusiasm. All countries and organisations relevant to Myanmar's case -- China, Russia, India and ASEAN -- have a much more skeptical attitude towards this trend of lessened state sovereignty for the sake of human rights. Their moral argument is that protecting human rights is no excuse for violating state sovereignty. This derives from their normative position that citizens within a sovereign state should be free to determine their own political system, regardless of the implications this system has for the human rights situation within that country. In other words, they believe that the principle of state sovereignty is not bound to criteria and should be applied unconditionally.

Another moral argument against weakened sovereignty is the belief that when human rights criteria are applied as a condition for sovereignty, the result will be a hierarchy of states.<sup>24</sup> For example, the 133 states which comprise the G-77 have argued that certain parts of the R2P principle, especially the narrow focus on human rights, are designed to advance the interests of Western nations. This disapproving attitude towards Western countries preaching human rights has historical roots in the colonial period of the 19th and 20th century. The G-77 countries see this preaching as Western hypocrisy because, during colonial times, their countrymen were not given the human rights that Western nations nowadays preach.<sup>25</sup>

The first two set of arguments consisted of legal and moral/normative ones while the third set of arguments are of a more political nature. The third argument against R2P is that sovereignty, not intervention, promotes order and stability in the international system. This argument is used twofold. First, cases where Western countries are engaged in

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<sup>21</sup> A. Hehir, *Humanitarian intervention, an introduction*. (London 2013), 56.

<sup>22</sup> Ibidem, 60.

<sup>23</sup> Ibidem, 123.

<sup>24</sup> Ibidem, 62.

<sup>25</sup> Ibidem, 135.

humanitarian intervention are being equated to the use of R2P. This lack of distinction between humanitarian intervention and R2P can especially be used in the case of Operation Iraqi Freedom.

In March 2003, a coalition led by the United States and the United Kingdom invaded Iraq under the pretext that Saddam Hussein was secretly developing and stockpiling weapons of mass destruction (WMD).<sup>26</sup> Most importantly, the 'Coalition of the Willing' bypassed the UN Security Council with its decision to invade Iraq. On top of that, no WMD were ever found. This severely discredited the legitimacy of the invasion and polarized the discussion on humanitarian intervention.<sup>27</sup> The following rise of Al Qaeda and subsequent rise of the Islamic State (IS) in Iraq paved the way for an easy argument against humanitarian intervention because the intervention contributed to the destabilization of Iraq and nearby regions such as Syria. However, the fact remains that there are indeed important distinctions between a humanitarian intervention and R2P. Operation Iraqi Freedom was clearly no case of R2P. First, because the R2P principle emphasizes that military intervention is only a last resort. And second, any action covered by the R2P principle has to be approved by the Security Council, which is not the case with Iraq.<sup>28</sup>

The second part of this argument is that even situations which are more obviously a case of R2P, such as the 2011 intervention in Libya, also contribute to disorder and destabilization of the international system. Speaking about the NATO intervention in Libya, the UN Secretary General, Ban Ki-moon, declared that "by now it should be clear to all that the R2P has arrived".<sup>29</sup> After the escalation of protests and the violence used by the Libyan government, the UN Security Council passed resolution 1970. The Security Council invoked Chapter VII and acted accordingly, freezing the foreign assets of Libyan officials, enforcing a travel ban, imposing an arms embargo and referred the case to the International Criminal Court (ICC) in The Hague. After judging this resolution to be insufficient, the Security Council authorized Resolution 1973, thereby imposing a no-fly zone above Libya.<sup>30</sup>

In the ensuing months, the NATO led Operation Unified Protector proved a military success. Following the death of Libyan leader Colonel Gaddafi, a new regime called the Transnational National Council took power.<sup>31</sup> The establishment of this new government did not bring stability. In the following years, Libya slipped into a state of chaos and civil war in which multiple self proclaimed governments, rebel factions and terrorist organizations (for example IS) were competing for power.<sup>32</sup> The Libyan case clearly presents the opponents of R2P with an example of why the principle is flawed. This is especially the case because Russia and China did not want regime change in Libya. Despite their strong objections, regime change in Libya happened nevertheless.

Concluding chapter one, opponents of R2P use various legal, moral and political arguments which support their point of view on the role of R2P and human rights within the sovereignty debate. The legal argument is that R2P is in violation of the UN Charter. The moral argument is that R2P is just a cover-up for humanitarian intervention in order to advance the neo-colonialist interests of Western nations. Finally, the political argument is

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<sup>26</sup> Ibidem, 249.

<sup>27</sup> Ibidem, 255.

<sup>28</sup> Ibidem, 128.

<sup>29</sup> Ibidem, 297.

<sup>30</sup> Ibidem, 291.

<sup>31</sup> Ibidem, 293.

<sup>32</sup> BBC, *Why is Libya so lawless?* (version May 25th, 2017) <http://www.bbc.com/news/world-africa-24472322> (accessed on April 10th, 2018).



that even cases like Libya, which had an UN supported legal foundation, resulted in the destabilization of the country, thereby creating an unwanted hierarchy of states.

## Chapter II: Proponents of Responsibility to Protect

The second chapter aims to identify the (possible) arguments of normative proponents of R2P and to describe their perspective on the historiographic debate around this topic. The key proponents of R2P are the United States, United Kingdom and France. Two important remarks on these proponents will now be made.

First, it should be noted that when references to these countries are being made in this context, it is not implied that unanimous political support for R2P exists in these countries, but rather that a significant enough part of the (progressive) elites in these countries do support the principle, thus providing sufficient reasons to categorize these countries as proponents of R2P.

And second, this categorization is further problematized because the United States has at times taken an ambiguous position regarding R2P. For example, John Bolton, former United States ambassador to the UN, sent a letter to the President of the General Assembly prior to the UN World Summit in 2005. Bolton suggested a modification to the concept version of the World Summit document regarding R2P, stressing that “the charter has never been interpreted as creating a legal obligation for Security Council members to support enforcement action in various cases involving serious breaches of international peace”.<sup>33</sup> However, in other instances, the United States appeared more committed to adhering to the R2P principle.

In March 2011, president Obama held a speech in which he tried to legitimize American and NATO intervention in Libya. Strikingly, Obama frequently used the word ‘responsibility’ and essentially formulated reasons for American involvement in Libya that narrowly correspond with the basic principles of R2P: “Ten days ago, having tried to end the violence without using force, the international community offered Gadhafi a final chance to stop his campaign of killing, or face the consequences”.<sup>34</sup> This example shows that the attitude of influential American politicians regarding R2P can vary widely, based on criteria like which administration is in power.

The general conviction of R2P proponents is that the state is responsible for the well-being of its citizens and that failure to meet this requirements can lead to economic, legal or diplomatic sanctions and in extreme cases even military intervention.<sup>35</sup> In other words, state sovereignty is conditional, depending the level of human rights which exist in that specific country.<sup>36</sup>

This chapter consists of two main arguments used by proponents of R2P. The first argument considers the legal perspective while the second argument is based on a moral perspective. Proponents of R2P argue that it’s legally backed by various UN articles and therefore legal and legitimate. The argument that R2P weakens state sovereignty can thus be countered because both the UN Charter and the UN World Summit Outcome document

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<sup>33</sup> A. Hehir, *Humanitarian intervention, an introduction*. (London 2013), 163.

<sup>34</sup> National Public Radio, *Obama’s Speech On Libya: ‘A Responsibility To Act’* (version March 28th, 2011) <https://www.npr.org/2011/03/28/134935452/obamas-speech-on-libya-a-responsibility-to-act> (accessed on April 19th, 2018).

<sup>35</sup> A. Hehir, *Humanitarian intervention, an introduction*. (London 2013), 66.

<sup>36</sup> Ibidem, 78.

explicitly stress the primary role of state sovereignty and the necessity of Security Council approval before any action under the R2P umbrella is legal. For example, the first sentence of article 138 in the World Summit Outcome document emphasizes the primary role of the state: "Each individual State has the R2P its populations from genocide, war crimes, ethnic cleansing and crimes against humanity."<sup>37</sup>

Article 139 stresses the indispensable role of the Security Council and the role of the Charter, especially Chapter VII. Additionally, article 139 states that collective action can only happen on a "case-by-case basis and in cooperation with relevant regional organizations"<sup>38</sup>. Most importantly, the first sentence of the article stresses noncoercive means to achieve these goals: "The international community, through the UN, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity".<sup>39</sup>

The second set of arguments in favor of R2P are moral arguments. The first moral argument is based on the notion that the broad criteria on which R2P is based make it a legitimate principle. Proponents of R2P argue that the principle is legitimate because it helps solve the structural problems that a country faces by emphasizing conflict prevention instead of reaction. The prevention toolbox described by Evans identifies certain measures to prevent conflict, such as political, economic, constitutional and security related measures, which are further split into so-called 'structural' and 'direct' measures. For example, a structural economic measure would be to support economic development in a country while a direct economic measure would be to threaten a country with economic sanctions.<sup>40</sup>

And while conflict prevention is certainly the most important element of R2P, proponents of R2P argue that in cases where conflict prevention is unsuccessful, the ICISS has also formulated numerous criteria for R2P related action which can be applied to all other stages of a conflict. The ICISS formulated criteria for the 'reaction' stage<sup>41</sup>, the 'rebuilding' stage<sup>42</sup> and criteria of legitimacy for the use of force.<sup>43</sup> In short, proponents of R2P argue that the criteria to which R2P is bound are all-encompassing, thus making the principle legitimate.

A second moral argument in favor of R2P concerns the Security Councils supposed lack of legitimacy. Proponents argue that the Security Council cannot be the exclusive arbitrator in extreme cases of human rights violations. This moral argument is based on the premise that, in cases where the Security Council does not respond adequately to gross human rights violations, the international community does not only have the right but also the duty to act without Security Council consent.<sup>44</sup>

Proponents of this argument undermine the legitimacy of the Security Council for two reasons. The first argument is that within the Security Council only five state actors wield veto power, which inherently makes it depended on the sole compliance of these few state

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<sup>37</sup> UN General Assembly, *2005 World Summit Outcome*, (version October 24th, 2005), 60th session, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/60/1](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/1) (accessed on April 19th, 2018), 30.

<sup>38</sup> UN General Assembly, *2005 World Summit Outcome*, (version October 24th, 2005), 60th session, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/60/1](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/1) (accessed on April 19th, 2018), 30.

<sup>39</sup> Ibidem, 30.

<sup>40</sup> G. Evans, *The Responsibility to Protect - Ending Mass Atrocity Crimes Once and for All* (2009), 87.

<sup>41</sup> Ibidem, 107.

<sup>42</sup> Ibidem, 150.

<sup>43</sup> Ibidem, 141.

<sup>44</sup> A. Hehir, *Humanitarian intervention, an introduction*. (London 2013), 152.

actors. And second, they see the current composition of the Security Council as an outdated, unrepresentative system which dates back to the immediate aftermath of the Second World War, therefore not representing the contemporary international state system. This unrepresentative system is thus responsible for the extent to which the five permanent Security Council members disproportionately prioritize geopolitical interests over moral and legal considerations.<sup>45</sup>

The last moral argument for proponents of R2P is based on cases where genocide happened and the international community did not respond sufficiently. The precise argument here is that if the R2P principle would have been in place during the timeframe in which the genocide unfolded, the genocide would have been largely or completely prevented. This 'what if?' argument is used most frequently in relation to the Rwandan genocide.

The Rwandan genocide unfolded when militias of the Rwandan Hutu ethnic majority began with the mass killing of ethnic minority Tutsis. In three months time, from April to June 1994, between 500.000 and 1.000.000 Tutsis were killed.<sup>46</sup> Many critics blame certain countries (Belgium, France, United States) and the UN for not preventing the Rwandan genocide, arguing that the lack of political will and resources explain their passive attitude.<sup>47</sup> Proponents of R2P can thus argue that the emphasize of conflict prevention, which is the main criteria for R2P, would prevent such genocides from ever happening again. Unsurprisingly, the Rwandan genocide had a huge impact on the human rights debate. Its significance is demonstrated by the 2001 ICISS report opening statement: " We want no more Rwanda's ".<sup>48</sup> Thus, the relevancy of the Rwandan genocide to the R2P debate is twofold. First, it provides proponents of R2P with a strong emotional example of a moral argument. Second, it was arguably one of the key human rights disasters that sparked a quest for new ways to prevent future genocides, thereby directly contributing to the rise of the R2P principle.

Concluding Chapter II, the main findings of this chapter are that several legal and moral arguments play an important role for proponents in the R2P debate. The strongest legal argument is that R2P helps prevent conflict, while simultaneously respecting the UN Charter and ensuring that sovereignty is only compromised as a last resort. The strongest moral arguments are that the criteria to which R2P is bound are all-encompassing and thus effective, and that 'what if?' scenarios like the Rwandan genocide can only be prevented with the implementation of R2P. Finally, some radical proponents of R2P even dispute the legitimacy of the Security Council, arguing that in cases where the Security Council neglects to protect human rights, the international community has the duty to act without legal consent from the UN.

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<sup>45</sup> Ibidem, 153.

<sup>46</sup> Ibidem 204.

<sup>47</sup> Ibidem, 218.

<sup>48</sup> Ibidem, 216.

### Chapter III: Case study of Myanmar's Rakhine state

The aim of this third chapter is to analyse why the R2P principle has specifically not been implemented with regard to the humanitarian crisis in Myanmar's Rakhine state. Therefore, this chapter marks the distinction between the debate and a case study of R2P. Having analysed the historiographic and political debate of R2P in the previous chapters, the next step is to analyse the arguments from both the opponents and proponents of R2P which are specific to this case.

Three overall existing dilemma's are key in understanding and explaining the dynamics which account for the current lack of international response to the humanitarian crisis in Rakhine. These three dilemma's are formulated as the international context, Myanmar's domestic context and the judicial context. The dilemma's cover the economic, political and legal arguments relevant to Myanmar's case.

The first dilemma covered in this chapter is the international context. In order to validate the argued positions of all international state actors in relation to the Rakhine crisis, the analysis of a UN General Assembly meeting on the situation of human rights in Myanmar from November 2017 is much revealing.

During the meeting, the General Assembly was asked to vote on a draft resolution, initiated by Saudi Arabia, which addressed the deteriorating human rights situation in Myanmar by "underscoring the need for a peaceful solution and to acknowledge the legitimate rights of Muslims in Myanmar" and "calling for an end to all violence against the Rohingya and for humanitarian organizations to be granted access to the region".<sup>49</sup> The most notable findings are that only muslim majority ASEAN countries voted in favor of the draft resolution, while all other ASEAN members either abstained or voted against the resolution. Also notable is that India abstained from voting. Perhaps less surprising are the votes of the permanent Security Council members. The United States, United Kingdom and France voted in favor of the resolution while China and Russia voted against it.<sup>50</sup> There are multiple international context related reasons why R2P has not been implemented in Myanmar.

First, both China and Russia veto human rights related resolutions on the grounds that the humanitarian crisis in Rakhine is of a domestic character and therefore is not a threat to international peace and security.<sup>51</sup> This thesis argues that this stance is motivated by political and economic motives. China has both deep economic and political ties with Myanmar. Chinese corporations engage in large investments of Myanmar's hydropower, oil, natural gas and mining industry. Overall global investment in these industries constituted around 90% of the total foreign direct investment in Myanmar in 2007, which shows Myanmar's

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<sup>49</sup> UN General Assembly, *Third Committee Approves 16 Drafts with Friction Exposed in Contentious Votes on Glorification of Nazism, Cultural Diversity, Right to Development* (version November 16th, 2017), <https://www.un.org/press/en/2017/gashc4221.doc.htm> (accessed on April 28th, 2018).

<sup>50</sup> UN General Assembly, *Third Committee resolution: 72nd session, Situation of Human Rights in Myanmar voting sheet*, (version November 16th, 2017), [http://www.un.org/en/ga/third/72/docs/voting\\_sheets/L.48.pdf](http://www.un.org/en/ga/third/72/docs/voting_sheets/L.48.pdf) (accessed on April 28th, 2018).

<sup>51</sup> S. Parnini, *The Crisis of the Rohingya as a Muslim Minority in Myanmar and Bilateral Relations with Bangladesh*, *Journal of Muslim Minority Affairs*, (2013), Vol. 33, No. 2, 291.

enormous dependence on resource extraction industries.<sup>52</sup>

Additionally, China plays a crucial role in Myanmar's illegal jade smuggle. The total value of Myanmar's jade industry was estimated at around 31 billion USD in 2014, which accounts for around 50% of Myanmar's GDP. Chinese import statistics from 2014 show that the country imported at least 12.3 billion USD in 2014, which accounts for more than one third of Myanmar's gemstone exports. However, since most gemstones are illegally smuggled across the border to China, the real figure could be much higher.<sup>53</sup> Therefore, a country like China, which is by far the largest investor in Myanmar's economy, has major economic and political leverage over Myanmar, whose economy is limited to natural resource exploitation. Finally, China annually provides Myanmar with billions of dollars of condition-free loans and military armaments, thereby further strengthening its economic and political dominance over the country.<sup>54</sup>

Russia's stance is primarily motivated by economic motives. Although Russia is not engaged in large infrastructural and natural resource related projects in Myanmar, the country does sell large quantities of weapons to Myanmar. For example, Russia exported almost 3000 missiles, 100 artillery pieces and 64 aircraft to Myanmar between 1990 and 2016.<sup>55</sup> On top of that, in January 2018, the Russian ministry of defence announced that the country will sell six Sukhoi Su-30 fighters to Myanmar.<sup>56</sup>

Second, India is neither a vocal supporter nor an vocal opponent of any R2P related action in Myanmar. India's ambiguous position is evident by its choice to abstain during votes on the issue. This thesis argues that India is ambiguous because it wants to avoid an uncomfortable position by taking a clear position, thereby ensuring its continued pursuance of its economic interests in Myanmar while simultaneously taking into account the unpopularity of Rohingya refugees in Myanmar. India has extensive economic ties with Myanmar. Unlike China and Russia, India's share in the total weapon export to Myanmar is of a limited scale.<sup>57</sup>

India's economic interest in Myanmar are not so much driven by weapon exports but rather by resource extraction. India is among the top three investors in Myanmar's energy sector (along with China and South Korea). This conjunction is embodied by the cooperation between Indian multinational corporations and the state-owned Myanmar Oil and Gas

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<sup>52</sup> Earth Rights International, *The Burma-China Pipelines: Human Rights Violations, Applicable Law, and Revenue Secrecy*, (version March 2011), <https://www.earthrights.org/sites/default/files/documents/the-burma-china-pipelines.pdf> (accessed on March 1th, 2018), 1.

<sup>53</sup> Al Jazeera, *Is Myanmar's jade business driving ethnic tensions?* (version September 19th, 2017) <https://www.aljazeera.com/programmes/countingthecost/2017/09/myanmar-jade-business-driving-ethnic-tensions-170918123952524.html> (accessed on April 29th, 2018).

<sup>54</sup> Earth Rights International, *The Burma-China Pipelines: Human Rights Violations, Applicable Law, and Revenue Secrecy*, (version March 2011), <https://www.earthrights.org/sites/default/files/documents/the-burma-china-pipelines.pdf> (accessed on April 29th, 2018), 2.

<sup>55</sup> Al Jazeera, *Who is selling weapons to Myanmar?* (version September 16th, 2017) <https://www.aljazeera.com/indepth/interactive/2017/09/selling-myanmar-military-weapons-170914151902162.html> (accessed on April 29th, 2018).

<sup>56</sup> AIN online, *Russia To Supply Su-30 Fighters to Myanmar*, (version January 25th, 2018), <https://www.ainonline.com/aviation-news/defense/2018-01-25/russia-supply-su-30-fighters-myanmar> (accessed on April 29th, 2018).

<sup>57</sup> Al Jazeera, *Who is selling weapons to Myanmar?* (version September 16th, 2017) <https://www.aljazeera.com/indepth/interactive/2017/09/selling-myanmar-military-weapons-170914151902162.html> (accessed on April 29th, 2018).

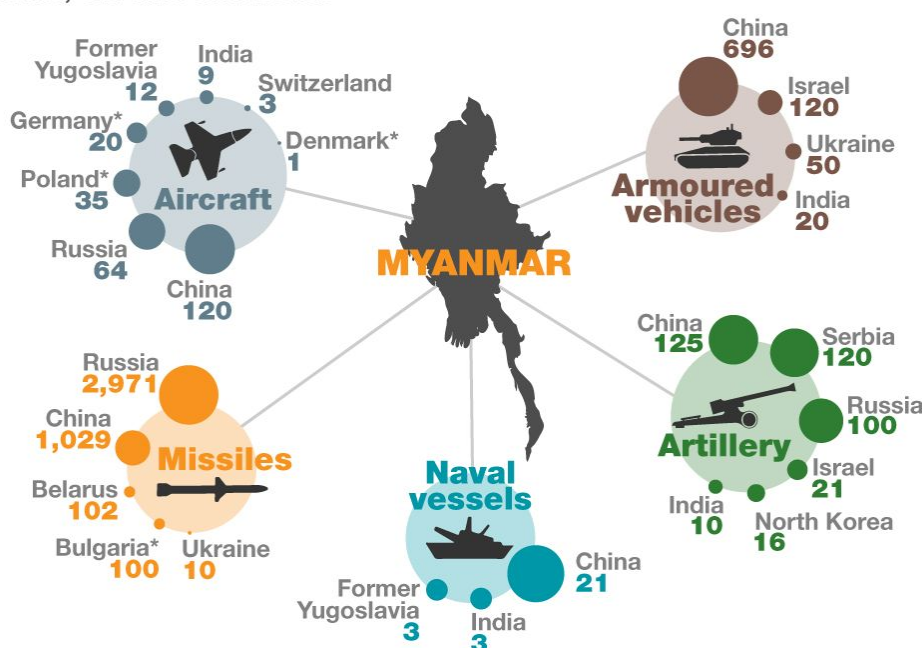


enterprise.<sup>58</sup> Furthermore, Indian agreements on aid, trade and counterinsurgency expertise have also strengthened the relationship between Myanmar and India.<sup>59</sup>

Another reason for India's ambiguous position may be the growing anti-muslim sentiment in the country. In August 2017, India's government announced its intent to deport 40.000 Rohingya refugees back to Myanmar. The arguments used by the government are that the Rohingya are illegal immigrants and that India did not sign the UN Refugee Convention. India is therefore not legally obliged to host the Rohingya refugees. On top of that, India has witnessed multiple anti-Rohingya protests in 2017, including protests which were sparked by India's ruling Bharatiya Janata Party.<sup>60</sup>

## Myanmar arms trade 1990-2016: Who sold what?

Most of Myanmar's military imports come from China, Russia, Israel, Ukraine and India.



\*Traded before the European Union's arms embargo on Myanmar or only traded non-combat aircraft/equipment.



Source: Stockholm International Peace Research Institute  
Icons: Noun Project | Creative Stall, Iyikon, Robert A. Di Ieso, Sandy Priyasa



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<sup>61</sup> Arms exports to Myanmar between 1990 and 2016.

<sup>58</sup> Earth Rights International, *The Burma-China Pipelines: Human Rights Violations, Applicable Law, and Revenue Secrecy*, (version March 2011), <https://www.earthrights.org/sites/default/files/documents/the-burma-china-pipelines.pdf> (accessed on April 29th, 2018), 1.

<sup>59</sup> Wikileaks, *Congressional Research Service: Burma-U.S. relations*, (version February 2nd, 2009) <https://file.wikileaks.org/file/crs/RL33479.pdf> (accessed on April 29th, 2018).

<sup>60</sup> Al Jazeera, *India plans to deport thousands of Rohingya refugees* (version August 14th, 2017) <https://www.aljazeera.com/news/2017/08/india-plans-deport-thousands-rohingya-refugees-170814110027809.html> (accessed on April 29th, 2018).

<sup>61</sup> Al Jazeera, *Who is selling weapons to Myanmar?* (version September 16th, 2017) <https://www.aljazeera.com/indepth/interactive/2017/09/selling-myanmar-military-weapons-170914151902162.html> (accessed on April 29th, 2018).

Finally, although all three western members of the Security Council, France, the United Kingdom and the United States are generally considered normative proponents of R2P, these countries also have their political, economic and pragmatic reasons for not pursuing the R2P principle in Myanmar. The political and economic ties between the United States and the EU in relation to Myanmar have improved significantly since the Myanmar military government officially transferred power to a civilian government in late 2010. In the following years, a series of reforms marked the first small steps in the direction of democracy. For example, hundreds of political prisoners were released, democracy advocate Aung San Suu Kyi's house arrest was lifted and a ceasefire agreement with several ethnic minority rebel groups was reached.<sup>62</sup>

In response to these democratic reforms, both the EU and United States took several actions in encouragement of these reforms. In December 2010, Hillary Clinton, then United States Secretary of State, made a visit to Aung San Suu Kyi and also met with Myanmar president Thein Sein. Clinton offered to strengthen the relationship between the United States and Myanmar on the condition that the country would continue its path of democratization. After the first free parliamentary elections since decades took place in April 2012, the United States and EU responded by lifting most sanctions on Myanmar. In April 2013 the EU lifted all sanctions with the exception of arms sales.<sup>63</sup> The United States followed suit by terminating all sanctions in October 2016.<sup>64</sup>

In light of these improved relations, both the United States and the EU are, despite the humanitarian crisis in Rakhine, either unable or unwilling to pursue R2P related action in Myanmar. The continuation of improved relations with Myanmar are prioritized above acting accordingly to the R2P principle. This thesis identifies four possible explanations for this stance of the United States and the EU. First, more access to Myanmar's abundant resources is in their economic interest. Second, they possibly argue that new sanctions will not work effectively since Myanmar's economy is heavily dependent on China, India and other Asian countries, none of which support any kind of economic sanctions. Third, in the geopolitical context, the United States is currently engaged in a policy of improving relations with Asian countries that neighbour China, as part of a China containment policy. For example, in June 2017, the United States announced a plan for a 1.42 billion USD arms deal with Taiwan.<sup>65</sup> And in March 2018, a United States aircraft carrier made a historic port call to the Vietnamese port of Da Nang, which was a clear message to China.<sup>66</sup> Reintroducing economic sanctions, or pressing for any sort of R2P related action would surely anger the government of Myanmar and would therefore be inconsistent with the United States policy of China containment. Fourth, the United States and EU are probably not interested in pursuing R2P action for Myanmar because they know that Security Council approval is a requirement, a requirement which they know is extremely unlikely to be met in the near future. They can

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<sup>62</sup> BBC, *Timeline: Reforms in Myanmar* (version July 8th, 2015), <http://www.bbc.com/news/world-asia-16546688> (accessed on April 29th, 2018).

<sup>63</sup> BBC, *Timeline: Reforms in Myanmar* (version July 8th, 2015), <http://www.bbc.com/news/world-asia-16546688> (accessed on April 29th, 2018).

<sup>64</sup> U.S. Department of the Treasury, *Treasury implements termination of Burma Sanctions Program*, (version October 7th, 2016) <https://www.treasury.gov/press-center/press-releases/Pages/jl0569.aspx> (accessed on April 29th, 2018).

<sup>65</sup> Reuters, *U.S. plans to sell Taiwan about \$1.42 billion in arms* (version June 29th, 2017) <https://www.reuters.com/article/us-usa-taiwan-arms-idUSKBN19K2XQ> (accessed on April 29th, 2018).

<sup>66</sup> New York Times, *U.S. Aircraft Carrier Arrives in Vietnam, With a Message for China* (version March 4th, 2018) <https://www.nytimes.com/2018/03/04/world/asia/carl-vinson-vietnam.html> (accessed on April 29th, 2018).

argue that China and Russia would not vote in favor of the earlier mentioned human rights draft resolution of November 2017, let alone a far-reaching Security Council resolution like universal economic sanctions, ICC referral or military intervention.

Though it should be noted that the United States and France have made several critical remarks on the humanitarian crisis in Rakhine. For example, United States president Trump urged the UN Security Council to take “strong and swift action” in order to stop the violence in Rakhine state. A few days later, French president Macron even described the situation as “genocide”.<sup>67</sup> And in November 2017, United States Secretary of State Rex Tillerson labeled the campaign against Rohingya as “ethnic cleansing” and threatened Myanmar with targeted economic sanctions.<sup>68</sup>

However, despite these strong words, little action has taken place. In December 2017, the United States decided to place sanctions on just one individual, Maung Maung Soe, a Burmese general who allegedly plays a key role in the human right abuses against the Rohingya.<sup>69</sup> This leads to the conclusion that, despite the use of rhetorics, all major international state actors, the United States and EU included, have their own set of unique (geo)political and economic motives for not pursuing R2P in Myanmar.

The second dilemma of this chapter covers Myanmar’s domestic context. The argument here is that a set of characteristics that are specific to Myanmar’s domestic situation can help explain why the international community has not pursued R2P action in Myanmar. The first argument is that R2P would further weaken the already fragile process of democratization in Myanmar.

In 2008 the military junta of Myanmar responded to increased international pressure with a promise to write a new constitution. Although a new constitution was written, the role of the military within the new constitution was still strongly present in multiple ways. First, the army still had the privilege of managing three key ministerial posts: Home Affairs, Border Affairs and Defence.<sup>70</sup> Furthermore, the military has increased its effort to place recently retired military officials to several civilian-run ministerial posts, such as the ministries of Education and Health.<sup>71</sup> On top of that, the military has the right to hold on to 25% of the seats in parliament. Changes to the constitution require a majority of more than 75% of all the votes, which essentially means that the constitution of Myanmar can only be changed with consent of the military. In order to further secure the status-quo of the constitution, Min Aung Hlaing, the current commander-in-chief of the Myanmar Armed Forces, replaced the younger military officers in the parliament with older and more experienced ones.<sup>72</sup>

Finally, Aung San Suu Kyi has specifically been targeted by a provision in the new 2008

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<sup>67</sup> Al Jazeera, *Trump urges 'strong and swift' UN action for Rohingya* (version September 21th, 2017) <https://www.aljazeera.com/news/2017/09/trump-urges-strong-swift-action-rohingya-170921013304717.html> (accessed on February 25th, 2018).

<sup>68</sup> NRC, *Tillerson: geweld tegen Rohingya is etnische zuivering* (version November 22th, 2017) <https://www.nrc.nl/nieuws/2017/11/22/tillerson-geweld-tegen-rohingya-is-etnische-zuivering-a1582185> (accessed on April 29th, 2018).

<sup>69</sup> BBC, *Rohingya crisis: Myanmar general hit by US sanctions* (version December 21th, 2018) <http://www.bbc.com/news/world-asia-42447510> (accessed on May 10th, 2018).

<sup>70</sup> NRC, *Deze Birmese generaal vindt dat hij gewoon zijn plicht doet* (version September 17th, 2017) <https://www.nrc.nl/nieuws/2017/09/17/deze-birmese-generaal-vindt-dat-hij-gewoon-zijn-plicht-doet-13045154-a1573751> (accessed on May 10th, 2018).

<sup>71</sup> Foreign Policy, *Burma's Militarized Ministries* (version November 15th, 2015) <http://foreignpolicy.com/2015/11/15/burmas-militarized-ministries/> (accessed on May 10th, 2018).

<sup>72</sup> NRC, *Deze Birmese generaal vindt dat hij gewoon zijn plicht doet* (version September 17th, 2017) <https://www.nrc.nl/nieuws/2017/09/17/deze-birmese-generaal-vindt-dat-hij-gewoon-zijn-plicht-doet-13045154-a1573751> (accessed on May 10th, 2018).

constitution which is widely regarded as being designed in order to prevent her from becoming president. Article 59 (f) of the constitution states that “Qualifications of the President and Vice-Presidents are as follows: shall he himself, one of the parents, the spouse, one of the legitimate children or their spouses not owe allegiance to a foreign power, not be subject of a foreign power or citizen of a foreign country”.<sup>73</sup> Suu Kyi was married and had children with a British citizen<sup>74</sup>, thus not fulfilling the requirements for becoming president as stated in article 59 (f).

Suu Kyi did however manage to partially overcome these restrictions by becoming state counselor. This role was especially designed for Suu Kyi by her political allies, which consequently succeeded in helping Suu Kyi wield power and authority equal to that of presidential office, thereby bypassing the 2008 constitution.<sup>75</sup>

Nevertheless, these examples clearly show a hierarchy of power in which the Myanmar military has the *de facto* power. Thus, any R2P related action directed towards Myanmar would provide the military with the opportunity to reverse the little democratic progress that has been made, a development which is unwanted, especially by proponents of R2P.

The second argument which complicates R2P action in Myanmar is the unpopularity of the Rohingya among other Myanmar people. This hatred is largely sparked by a propaganda campaign initiated by the army, radical Buddhist monks and the attitude of the civilian government. The monk faction which is accused of agitating the tensions between Buddhists and Rohingya is called the Ma Ba Tha. They are an ultranationalist Buddhist group that depicts Myanmar as being under existential threat by muslims.<sup>76</sup> The spiritual leader of the movement is Ashin Wirathu, a man who got international media coverage after being put on the cover of Times Magazine, the accompanying title stating “the face of Buddhist terror”.<sup>77</sup>

The army also plays a role in fueling the tensions between Buddhists and the Rohingya. For example, the earlier mentioned army general, Min Aung Hlaing, said in a speech that the Rohingya “do not have any characteristics or culture in common with the ethnicities of Myanmar” and that the tensions in Rakhine were “fueled because the Bengalis demanded citizenship”.<sup>78</sup> These comments do not only imply that the Rohingya are regarded as a separate ethnicity, but also that they are illegal immigrants from ‘Bengali’, a reference to Bangladesh, and therefore have no legal right to be in Myanmar.

Another important factor contributing to the anti-Rohingya sentiment in Myanmar are the large quantities of fake news stories on Facebook. Myanmar has a history of strict censorship which was in place during the military dictatorship from 1962 until 2011. The government monopoly on telecommunications was not lifted until 2013. This suddenly made

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<sup>73</sup> Burma Library, *Constitution of the Republic of the Union of Myanmar (2008)* (version 2008) [http://www.burmalibrary.org/docs5/Myanmar\\_Constitution-2008-en.pdf](http://www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf) (accessed on May 10th, 2018), 19-20.

<sup>74</sup> BBC, *Aung San Suu Kyi: 'I have personal regrets'* (version September 23th, 2012) <http://www.bbc.com/news/magazine-19667956> (accessed on May 10th, 2018).

<sup>75</sup> The Washington Post, *Burma creates far-reaching 'state counselor' post for Aung San Suu Kyi* (version April 5th, 2016) [https://www.washingtonpost.com/news/worldviews/wp/2016/04/05/burma-creates-far-reaching-state-counselor-post-for-aung-san-suu-kyi/?noredirect=on&utm\\_term=.fd48ccb16076](https://www.washingtonpost.com/news/worldviews/wp/2016/04/05/burma-creates-far-reaching-state-counselor-post-for-aung-san-suu-kyi/?noredirect=on&utm_term=.fd48ccb16076) (accessed on May 11th, 2018).

<sup>76</sup> *The Guardian*, *'We must protect our country': extremist Buddhists target Mandalay's Muslims* (version May 8th, 2017) <https://www.theguardian.com/cities/2017/may/08/buddhist-extremists-anti-muslim-mandalay-ma-ba-tha> (accessed on May 10th, 2018).

<sup>77</sup> Times Magazine, *The Face of Buddhist Terror* (version July 1th, 2013) <https://content.time.com/time/covers/asia/0.16641.20130701.00.html> (accessed on May 10th, 2018).

<sup>78</sup> Reuters, *U.N. chief 'shocked' by top Myanmar general's comments on Rohingya*, (version March 27th, 2018) <https://www.reuters.com/article/us-myanmar-rohingya-un/u-n-chief-shocked-by-top-myanmar-generals-comments-on-rohingya-idUSKBN1H31VK> (accessed on May 10th, 2018).



mobile phone usage widely accessible to the general population. The Facebook application usually came pre-installed on their newly acquired mobile phones.<sup>79</sup> The widespread distrust in traditional state-owned media, combined with the sudden access to Facebook made the application a popular media alternative for most Myanmar citizens. Although most citizens now have access to Facebook, that does not necessarily translate into independent internet research being conducted. On the contrary, according to the Think Tank Linneasia, only 21% of the Myanmar population has ever conducted independent research on the internet.<sup>80</sup>

Thus, it can be argued that the distrust of Myanmar people in traditional media, the sudden access to the Facebook application and the lacking use of other internet based sources make the general population heavily dependent on the Facebook application as a source for news and therefore susceptible to fake news. As will be evidenced by a Facebook statement of state counselor Aung San Suu Kyi, vast quantities of fake news are being posted on Facebook with regard to the Rohingya.<sup>81</sup>

Finally, the most important reason why the Rohingya are hated in Myanmar derives from the response of the Aung San Suu Kyi led civilian government to the humanitarian crisis in Rakhine. Unlike the army, Aung San Suu Kyi and the ruling National League for Democracy (NLD) do enjoy credibility among Myanmar citizens because they have been fighting for democracy since the 1988 uprising. In September 2017 Aung San Suu Kyi posted a comment on her Facebook profile in which she accused Turkey's deputy prime minister of posting fake photographs on Twitter depicting dead Rohingya. "That kind of fake information (...) was simply the tip of a huge iceberg of misinformation calculated to create a lot of problems between different communities and with the aim of promoting the interest of the terrorists".<sup>82</sup> Therefore, Suu Kyi not only implies that international news coverage on the Rohingya is full of fake news stories, but also that the actions of the Myanmar security apparatus are legitimate because it is targeted against terrorists. On top of that, Suu Kyi herself used the term 'Bengali' to describe the Rohingya<sup>83</sup> and even instructed her spokesman not to use the term Rohingya in conversations with foreign governments: "We won't use the term Rohingya because Rohingya are not recognized as among the 135 official ethnic groups".<sup>84</sup>

The consequent propaganda campaign by the Myanmar civilian government, the army and religiously influential groups like the Ma Ba Tha have contributed to a highly polarized

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<sup>79</sup> NRC, 'Wat VN zeggen over de Rohingya, kan nepnieuws zijn' (version February 20th, 2018)

<sup>79</sup> <https://www.nrc.nl/nieuws/2018/02/20/wat-de-vn-zeggen-over-de-rohingya-kan-nepnieuws-zijn-denkt-de-birnees-a1592906> (accessed on February 25th, 2018).

<sup>80</sup> NRC, 'Wat VN zeggen over de Rohingya, kan nepnieuws zijn' (version February 20th, 2018)

<sup>80</sup> <https://www.nrc.nl/nieuws/2018/02/20/wat-de-vn-zeggen-over-de-rohingya-kan-nepnieuws-zijn-denkt-de-birnees-a1592906> (accessed on February 25th, 2018).

<sup>81</sup> The Guardian, *Aung San Suu Kyi says 'terrorists' are misinforming world about Myanmar violence* (version September 6th, 2017)

<sup>81</sup> <https://www.theguardian.com/world/2017/sep/06/aung-san-suu-kyi-blames-terrorists-for-misinformation-about-myanmar-violence> (accessed on May 11th, 2018).

<sup>82</sup> The Guardian, *Aung San Suu Kyi says 'terrorists' are misinforming world about Myanmar violence* (version September 6th, 2017)

<sup>82</sup> <https://www.theguardian.com/world/2017/sep/06/aung-san-suu-kyi-blames-terrorists-for-misinformation-about-myanmar-violence> (accessed on May 11th, 2018).

<sup>83</sup> NRC, 'Het kookpunt van de Rohingya in Birma is bereikt' (version August 27th, 2017)

<sup>83</sup> <https://www.nrc.nl/nieuws/2017/08/27/situatie-rohingyas-op-kookpunt-12692559-a1571234> (accessed on May 11th, 2018).

<sup>84</sup> New York Times, *Aung San Suu Kyi Asks U.S. Not to Refer to 'Rohingya'* (version May 6th, 2016)

<sup>84</sup> <https://www.nytimes.com/2016/05/07/world/asia/myanmar-rohingya-aung-san-suu-kyi.html> (accessed on May 11th, 2018).

situation in which the Rohingya are regarded as illegal refugees from Bangladesh who later turned into violent Islamic terrorists, thereby posing an existential threat to the country.

Concluding the domestic context dilemma, the domestic political situation in Myanmar makes any type of R2P action problematic. The political system which derives from the 2008 constitution inherently gives the military extensive power, arguably to a degree in which they could be considered a state within a state. Their influential role within Myanmar politics make any R2P related action difficult to implement because it would almost certainly reverse or undo the fragile democratization process in Myanmar. On top of that, the widespread unpopularity of the Rohingya in Myanmar contribute to Aung San Suu Kyi and the NLD not being interested in any R2P related action taking place in Myanmar. Not only are they afraid to lose the little political influence that they currently wield, but encouraging R2P action would also be political suicide in a country where the Rohingya are considered outcasts.

The third and final dilemma covered in this chapter is the judicial context in which R2P is embedded in relation to Myanmar. The argument here is twofold. First, ICC referral is a crucial but problematic element of R2P in the context of prosecuting perpetrators of genocide. Myanmar is not a signatory to the 1998 Rome Statute. This means that Myanmar nationals are outside the jurisdiction of the ICC.<sup>85</sup> Therefore, neither the Myanmar government nor signatories to the Rome Statute can investigate or refer Myanmar nationals within the ICC legal framework. The only body that has the legal right to refer Myanmar nationals to the ICC is the Security Council.<sup>86</sup>

ICC referral through the Security Council seems unlikely for two reasons. On a political level, its permanent members have opposing interests with regards to the possible prosecution of Myanmar nationals. On a judicial level, the dependency on the Security Council for referring cases to the ICC with regard to prosecuting Myanmar nationals is also problematic. This is problematic because the legitimacy of the ICC itself is questioned by three of the five permanent Security Council members: the United States, Russia and China. China is not a signatory to the Rome Statute and therefore does not recognize its jurisdiction. Although both the United States and Russia became signatories to the Rome Statute in 2000, neither government has ratified the treaty. Therefore, neither the Russian nor United States government is legally obliged to accept ICC authority.<sup>87</sup> Moreover, both Russia and the United States have made it clear that they do not intend to ratify the Rome Statute in the future.<sup>88</sup> Furthermore, Russia withdrew its signature from the Rome Statute in November 2016, thereby eliminating any possible future ratification of the treaty.<sup>89</sup>

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<sup>85</sup> International Criminal Court, *The States Parties to the Rome Statute* (version 2018) [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (accessed on May 11th, 2018).

<sup>86</sup> International Criminal Court, *Understanding the International Criminal Court* (version 2018) <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (accessed on May 11th, 2018), 17.

<sup>87</sup> International Criminal Court, *The States Parties to the Rome Statute* (version 2018) [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (accessed on May 11th, 2018).

<sup>88</sup> American Society of International Law, *American Society of International Law, U.S. Announces Intent Not to Ratify International Criminal Court Treaty* (version May 11th, 2002) <https://www.asil.org/insights/volume/7/issue/7/us-announces-intent-not-ratify-international-criminal-court-treaty> (accessed on May 10th, 2018).

<sup>89</sup> The Guardian, *Russia withdraws signature from international criminal court statute* (version November 16th, 2016) <https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute> (accessed on May 11th, 2018).



The second argument which explains the judicial complexity around R2P in Myanmar is the difficulty of proving that a genocide potentially happened in Rakhine state. The first reason why this is difficult to prove is that the Myanmar government does not allow the UN, NGOs and journalists to conduct independent research in Rakhine. The lack of humanitarian and media access to Rakhine state has been confirmed by the Advisory Commission on Rakhine State report. This commission was headed by Kofi Annan in cooperation with the Myanmar State Counsellor Office and provided suggestions to solve the problems in Rakhine. According to the report, the vast majority of international staff from NGOs and Intergovernmental Organizations were not allowed to visit areas affected by the conflict.<sup>90</sup> Furthermore, the report stated that media access had been “highly restricted” since October 2016.<sup>91</sup> Ironically, the August 25 attack on the police posts, which sparked the mass exodus of Rohingya, began just two days after the report was handed over to the Myanmar government.

The findings of the Rakhine Commission are supported by numerous examples. For instance, Yanghee Lee, the UN special rapporteur on human rights, was denied access to some locations in Northern Rakhine during her trip in early 2017. According to the Myanmar government, this was due to security concerns. Lee was further obstructed by the fact that she was not allowed to interact freely with the locals in the muslim villages that she visited. Lee was only allowed to speak with pre-approved government selected individuals.<sup>92</sup> On top of that, Lee was completely barred from entering Myanmar in December 2017 and any cooperation was withdrawn for the duration of her term in office.<sup>93</sup>

In 2014, Doctors Without Borders was banned from Myanmar for spreading “Rohingya bias”.<sup>94</sup> Although this ban was temporary, it clearly shows that NGOs operating in Myanmar can be expelled at any moment. Finally, the limited media access is exemplified by the arrest of two Reuters journalists last December. The duo claim that they are victim of a government set-up. The journalists claim to have met with police officers in Yangon who then handed them some documents. After the documents were handed over, they were subsequently arrested and detained with charges of illegally obtaining the documents. The Reuters journalists, both of whom reported on the Rohingya crisis, are still in prison awaiting trial.<sup>95</sup>

The second reason why it is difficult to prove genocide is the fact that the Myanmar government is destroying potential evidence of genocide. In December 2017, the Myanmar government started using bulldozers to remove the remains of the empty villages. These are the same villages which the Myanmar military allegedly pillaged and burned in the aftermath of the August 2017 incident. Between December 2017 and February 2018, at least 28 former

<sup>90</sup> Rakhine Commission, *Final Report of the Advisory Commission on Rakhine State* (version August 2017) [http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport\\_Eng.pdf](http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf) (accessed on May 12th, 2018), 38.

<sup>91</sup> Rakhine Commission, *Final Report of the Advisory Commission on Rakhine State* (version August 2017) [http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport\\_Eng.pdf](http://www.rakhinecommission.org/app/uploads/2017/08/FinalReport_Eng.pdf) (accessed on May 12th, 2018), 39.

<sup>92</sup> Al Jazeera, *UN's Yanghee Lee denied access to Rohingya villages* (version January 15th, 2017) <https://www.aljazeera.com/news/2017/01/yanghee-lee-denied-access-rohingya-villages-170115074431631.html> (accessed on May 12th, 2018).

<sup>93</sup> Al Jazeera, *Myanmar bars UN human rights envoy Yanghee Lee* (version December 20th, 2017) <https://www.aljazeera.com/news/2017/12/myanmar-bars-human-rights-envoy-yanghee-lee-171220145600876.html> (accessed on May 12th, 2018).

<sup>94</sup> CNN, *Medecins Sans Frontieres banned in Myanmar state for alleged 'Rohingya bias'* (version March 4th, 2014) <https://edition.cnn.com/2014/03/03/world/asia/myanmar-rakhine-doctors-without-borders/index.html> (accessed on May 12th, 2018).

<sup>95</sup> Reuters, *Reuters reporters arrested under Myanmar Secrets Act denied bail* (version February 1th, 2018) <https://www.reuters.com/article/us-myanmar-journalists/reuters-reporters-arrested-under-myanmar-secrets-act-denied-bail-idUSKBN1FK3C2> (accessed on May 12th, 2018).

muslim villages have been bulldozed.<sup>96</sup>

Concluding the judicial dilemma, any future prosecution of Myanmar nationals on the basis of genocide seems very unlikely. The Security Council is the only body that has the legal authority to refer Myanmar nationals to the ICC. The Security Council is not only internally divided on the question of how the Rohingya crisis should be handled, but also on the legitimate nature of the ICC itself. On top of that, the lack of UN, NGOs and media access in combination with the bulldozing of former Rohingya villages severely complicate the process of gathering evidence which could potentially lead to charges of genocide.

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<sup>96</sup> The Guardian, *'Everything is gone': satellite images in Myanmar show dozens of Rohingya villages bulldozed* (version February 24th, 2018) <https://www.theguardian.com/world/2018/feb/24/myanmar-rohingya-villages-bulldozed-satellite-images> (accessed on May 13th, 2018).

## Conclusion

The purpose of this thesis was to research and explain why the international community has not acted upon the R2P principle in Myanmar's Rakhine state. It has become clear that there are many different factors that contribute to answering this question. These factors stretch from opposing moral and legal arguments in a wider debate about the role of human rights versus sovereignty, the inherent inflexible nature of the UN Security Council, the lack of political will, geopolitical rivalry, competing economic interests, the domestic political structure of Myanmar and the lacking effectiveness of international law.

The ongoing debate around R2P and its role within the human rights versus sovereignty spectrum is currently favoured towards the proponents of traditional sovereignty. This development is mainly caused by the fiascos in Iraq and Libya. Although R2P does not necessarily favor military intervention, the comparison with humanitarian intervention is made easily and thus becomes highly exploitable by proponents of traditional sovereignty. Therefore, principles like R2P that break with the traditional view of sovereignty are currently somewhat overshadowed in an atmosphere of cynicism.

This attitude is not only embodied by the response of the international community to the crisis in Rakhine, but also to other ongoing conflicts around the world. The Syrian civil war has been going on since 2011 and has already killed more than 400.000 people, internally displaced more than 6 million people and caused more than 5.6 million people to flee Syria.<sup>97</sup> It seems that, not large numbers of civilian casualties, but only the use of chemical weapons trigger an external response. This is shown by recent airstrikes of the United States, France, and the United Kingdom in response to the chemical weapons attack in Ghouta.<sup>98</sup> Here again, it becomes painfully clear how divided the Security Council is. Both China and Russia did not participate in the missile strikes.

Furthermore, this thesis argues that Myanmar's case is further proof that the applicability of R2P principle has failed to the utmost extent in preventing or resolving ongoing conflicts. Whether it be the opposing moral, ideological and legal stances in the R2P debate, the opposing geopolitical and economic interests of key state actors, the complex nature of Myanmar's domestic politics or the lacking institutional power of the ICC, all these arguments point towards disabilities in the applicability of the R2P principle in both Myanmar and elsewhere.

Although all factors mentioned above contribute to this conclusion, the division within the Security Council is arguably the most important reason why R2P is ultimately flawed. This is the case because only the Security Council has the mandate to authorize R2P based action. Article 139 of the World Summit Outcome Document clearly stipulates the necessity of authorization through the Security Council.<sup>99</sup> The all-encompassing role of the Security Council in this matter means that economic sanctions, ICC referral, military intervention or

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<sup>97</sup> CNN, *Syrian Civil War Fast Facts* (version May 3th, 2018) <https://edition.cnn.com/2013/08/27/world/meast/syria-civil-war-fast-facts/index.html> (accessed on May 13th, 2018).

<sup>98</sup> CNN, *Syrian Civil War Fast Facts* (version May 3th, 2018) <https://edition.cnn.com/2013/08/27/world/meast/syria-civil-war-fast-facts/index.html> (accessed on May 13th, 2018).

<sup>99</sup> UN General Assembly, *2005 World Summit Outcome*, (version October 24th, 2005), 60th session, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/60/1](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/1) (accessed on May 13th, 2018), 30.

any other R2P related action is impossible without its blessing. Therefore, it can be concluded that the main reason why the international community did not apply the principle of R2P in Myanmar's Rakhine state is because the Security Council is internally divided by a wide range of moral, geopolitical, economic and legal issues.

This conclusion has severe implications for the current debate in the human rights versus sovereignty debate. The conclusion that R2P has no future essentially means that the human rights versus sovereignty debate is currently stalled. This is understandable since the stakes are high and seeking a compromise on such a topic is difficult to reach. Furthermore, there is an inevitable dichotomy between human rights and sovereignty. For example, you either respect a certain human right or you do not. You either decide to intervene militarily or you do not. There seems to be little space for compromise on such controversial topics.

However, the failure of R2P can also be seen in a light where it is part of a failed experiment during a transition period. Because although the R2P principle cannot be implemented properly, the ideas involving human rights and sovereignty have changed drastically over the last few decades. The notion of sovereignty is more than ever individualized. Therefore, a violation of an individual's human rights is more than ever considered as a breach of sovereignty. With this perspective in mind, it seems reasonable to argue that, although currently stalled, the human rights versus sovereignty debate will continue to evolve in the future, regardless of the present flaws of the R2P.

This thesis concludes with a suggestion for a follow-up study. The conclusion of this thesis was that R2P cannot be implemented effectively, mainly because of the existing structures within the Security Council. This leads to a suggestion for future research which focuses on the question whether effective implementation of human rights enforcement is possible in a Security Council excluding setting. And if this proves impossible, what kind of institutional reforms would the Security Council have to make in order to make human rights enforcement more effective? Researching such issues may eventually contribute to the establishment of better alternatives for the current failing principle of R2P, thereby saving human lives in the future.

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