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The Rohingya Exodus: Who is the Subject of the Responsibility to Protect?

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Abstract

La responsabilità di proteggere (R2P), così come proposta da parte della Commissione internazionale sull'intervento e sulla sovranità dello Stato (ICISS) nel 2001, è stata dibattuta a lungo dal punto di vista sia teorico sia pratico. La controversa questione dell'intervento umanitario da cui la dottrina della R2P è emersa, nonché il sostenibile fallimento della medesima nel fornire una risposta soddisfacente sul campo nel caso libico del 2011 hanno ulteriormente complicato il futuro di un'autentica risposta lanciata per porre fine alle atrocità di massa. Tuttavia, una recente crisi ha nuovamente acceso il dibattito, perlomeno sull'applicabilità pratica della R2P: ovvero, l'esodo dei Rohingya birmani. La questione di chi potrebbe e dovrebbe intervenire riveste senz'altro enorme importanza. Nondimeno, ancor prima di confrontarsi sulla risposta più adeguata, si potrebbe sostenere che la dottrina presenta una lacuna teorica fondamentale che diventa particolarmente saliente nel caso del suddetto esodo, ossia l'apolidia dei Rohingya. A partire da tali osservazioni, si evince che la principale aporia della R2P è allo stesso tempo un punto di partenza per il suo modesto perfezionamento. Senza dimenticare che essa acquisisce lo stato della pietra miliare nell'evoluzione della sovranità statale solo in quanto rimane allo stesso tempo il portatore dell'imperfezione dello stesso concetto di sovranità in generale.

Parole chiave: R2P, Rohingya, Myanmar, apolidia, ASEAN

The responsibility to protect (R2P), as enshrined in the International Commission on Intervention and State Sovereignty (ICISS) 2001 proposal has long been discussed, both from a theoretical and a practical point of view. The controversial issue of the unilaterality of humanitarian intervention from which the R2P itself stems and the arguable failure of the doctrine to provide a satisfactory on-field answer to the Libyan challenge in 2011 have just compounded the future of a genuine proposal for ending mass atrocities. However, a new crisis has recently rekindled at least a debate on the practical applicability of the doctrine: namely, the Rohingya exodus from Myanmar's

Rakhine State. The question of who could and should intervene is certainly of paramount importance. Nevertheless, even before dealing with the most adequate and concrete response to the predicament in question, it can be argued that there is a fundamental theoretical shortcoming in the theory which becomes particularly evident with the aforementioned crisis: the question of the statelessness of the Rohingya. Drawing from such observations, this paper shows how the ostensibly main theoretical aporia of the R2P is at the same time the point of departure for its modest improvement. It thus both acquires a landmark status in the evolution of state sovereignty and becomes a bearer of the imperfection of the concept of sovereignty itself.

Keywords: R2P, Rohingya, Myanmar, statelessness, ASEAN

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Since International Commission on Intervention and State Sovereignty (ICISS) defined the responsibility to protect (R2P) in 2001, the doctrine has been constantly debated. With regard to unilateral humanitarian intervention of the 1990s, the R2P was envisaged as a legal way of reshaping state sovereignty through rethinking the traditional idea thereof and repudiating unconditionally the absolutist one (Bellamy, 2009:8-35).[1] The answer to this challenge was the idea of *sovereignty as responsibility* and the debate on sovereignty and human rights seemed to have reached its epilogue.

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[1] Elsewhere, Bellamy shows that Hobbes' idea was precisely the following one: under certain circumstances, sovereignty can even be lost. See Bellamy A. J. & Drummond, C. (2011). The responsibility to protect in Southeast Asia: between non-interference and sovereignty as responsibility. *The Pacific Review*, *24*(2), p. 181.

Yet, since the intervention in Libya (2011), the debate on both the theoretical background and the practical implications has been suddenly rekindled, notwithstanding the prior authorisation by the Security Council of the UN. A new challenge emerged: the possibility of *abuse* of mandates.

Today, the impression is that the doctrine has inherent limits, which are, arguably and quite paradoxically, also its strong points. This can be observed in the case of the Myanmar's Rohingya[2], as it befits perfectly the idea that the exodus of a *stateless* people represents the paradigm of the *excess* of responsibility, both a nodal point of the pervertibility of R2P and a starting point for its *unpretentious* and *self-critical* perfectibility.

The first part tries to reshape the theoretical framework of the R2P, the final aim being that of understanding where the R2P stems from as well as that of identifying its points of undecidability. The second part tackles the Rohingya crisis from both a social and historical perspective, whereas the last one points towards an unresolved and potentially unresolvable conundrum of the doctrine which the exodus in question has just exacerbated.

The Responsibility to Protect (R2P): Where are We Today?

Any Caveats?

In Kofi Annan's famous doubtful claim 'if humanitarian intervention is, indeed, an *unacceptable assault on sovereignty*, how *should* we respond to *a* Rwanda, to *a* Srebrenica - to gross and systematic violations of *human* rights that offend every precept of *our common* humanity?' (Annan, 2000:34)[3], a number of problematic points might have been consciously underlined and others potentially overlooked.

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[2] For the potential application of the R2P to this crisis see for instance Kingston, L. N. (2015). Protecting the world's most persecuted: the responsibility to protect and Burma's Rohingya minority. The International Journal of Human Rights, 19(8), 1163-1175; Trihartono, A. (2018). Myanmar's Worsening Rohingya Crisis: A Call for Responsibility to Protect and ASEAN's Response. In McLellan, B. (Ed.), Sustainable Future for Human Security (pp. 3-16). Singapore: Springer; Wu, D. I. (2010-2011). Recalcitrant Burma: R2P and ASEAN. The Dialectics: Journal of Leadership, Politics, and Society, 4, 56-63.

The country's two names, Burma and Myanmar (in use from 1989 on), will be used interchangeably and without prejudice.

3 Apart from the second emphasis which can be found in the original document, all the others are added.

The first one is the ostensibly '*unacceptable assault on sovereignty*': for, what is the need and the end of *stating* the unacceptability of the unacceptable? Doesn't unacceptability *per se* disappear the moment it enters the symbolic order *qua* language: is it thus appropriate to talk about a subject's *unacceptable* unacceptability to be adapted, to be rendered adequate? Is it proper at all to identify the international community with it, to exempt it from the status of yet another sovereignty and to incautiously individuate it as a pure source of rectification of an outer deviance, namely – gross violations of human rights? What is at stake here: a flawed State sovereignty, a defective humanitarian intervention, a faulty R2P or does *unacceptable* unacceptability simply stand for the very condition of possibility of an international community and its aforementioned responses?

No doubt probably highlights better the agony of more than half a million people which have recently fled Myanmar.

Speaking of '*our common* humanity' becomes thus equally simplistic and deterministic. Humanity, in other words, cannot help but be universal precisely to the extent that it is not (Rancière, 2010:62-76): there can be no responsibility without this paradox and aporia, without the cleavage and rupture within the universality of humanity itself. The point, then, is that the existence of *our common* humanity would structurally undermine the struggle for human rights, underscoring the superfluous enforcement of their fundamentality. However, this important passage has been overlooked by many. For instance, Ramesh Thakur and Albrecht Schnabel put their idea this way: "[h]umanitarian intervention must be collective, not unilateral. And it must be legitimate, not in violation of the agreed rules that comprise the foundations of world order". Yet, an immediate problem arises almost spontaneously: who are we intervening against, then, and in respect of what rules if not those whose *breach* makes one take the intervention into consideration? Yet, for Thakur and Schnabel, again, "[*i*]*nternational society* exists only to the extent that member states observe limits on their freedom of action in pursuing national interests and acknowledge the authority of these limits" (Thakur &

Schnabel, 2000:500-501). The underlying problem still remains, though: the one-direction approach to the question of international society itself. For, what such society can *exist* at all without observing, in turn, the national interests that it challenges, without recognising in its own ostensible unconditionality an always-already another sovereignty, indicative of the original flaw of sovereignty itself?

This first draft of an apparently superfluous theoretical framework turns out to be actually very important to analyse and understand both the 2017 Rohingya exodus from Myanmar and the vacillating or, at least, not completely resolute reaction of the international community: already in 2008, Gareth Evans placed Burma on the so-called R2P watch list, though explicitly excluding "coercive military intervention" and reaffirming the high threshold and the recourse to force only as a last resort. It is important to note that the reason why Burma was on the list had nothing to do with the cyclone that stroke the coast of the country in the same year (Evans, 2009:76).[4] Subsequently, the Global Centre for the Responsibility to Protect shed light on the situation which minorities were facing in the country and the terms used were rather accusatory: 'crimes against humanity', 'war crime', and 'ethnic cleansing', the Rohingya having been depicted as the most oppressed minority of what was a climate of general and growing persecution (GCR2P, 2010). Expectedly, the report was calling for the R2P, and such demands have become rather recurrent with time: for instance, as Benjamin Zawacki reports, the Organisation of Islamic Cooperation (OIC) pointed at elements of *genocide* in 2012 and along with Saudi Arabia called for international R2P as, allegedly, Myanmar had failed at fulfilling its own. Interestingly though, he also observes how none of the countries affected by the "Rohingya problem", Saudi Arabia comprised, *fully* respected the right to asylum of the Rohingya and *non refoulement*. They were not parties to the Convention on the Status of the Stateless Persons (Zawacki, 2013).

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[4] Regarding the then cyclone debate, for Evans, the extension of the R2P to natural catastrophes can be very counterproductive, diluting its impact where really needed.

Finally, as the voices advocating such a policy approach have reappeared recently, several important questions must be raised: what changed in the last decade, if anything at all? When does *one* become responsible *to* protect? And towards whom, who are the Rohingya at all?

Not until bearing these *caveats* in mind can we grasp the problem with the subject(s) invoked as entitled to intervene in Myanmar and the very subject(s) to be protected.

An Alternative Background

Contrary to a general conception which sees the responsibility to protect (R2P) as simply offering an enforced variety of interveners (ICISS, 2001:17)[5] within a precise legal framework, it could be argued that the R2P actually emerges as an evolution of the collapse and implosion of *subjectivity itself*: the attempt to raise the general accountability in operations previously known as humanitarian interventions (Bellamy, 2009:35-36)[6] has probably succeeded, but, as often pointed out, the problem of the *abuse* of intervention has yet to be solved. To make it plain, there has been a shift from an operation at the outskirts of law such as the *unilateral* humanitarian intervention to a perfectly legal one, the R2P, with one common element: the frequent mention of the possibility of *abuse* (Ercan, 2016:139-143)[7]. The R2P, apart from involving the customary law rules and the non-derogable component thereof (i. e. *jus cogens*) on the basis of which humanitarian intervention itself has been justified (Brownlie, 1974)[8],

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[5] See also Ki-moon, B. *Implementing the responsibility to protect*, A/63/677, 12 January 2009. In his report on the implementation of the R2P, the then Secretary General exhaustively described the three pillars thereof.

[6] It is interesting to remark that in embracing the idea of establishing a commission on the right to humanitarian intervention, the then Canada's Foreign Minister Lloyd Axworthy accepted at first the naming 'International Commission on *Humanitarian Intervention*'.

[7] For Ercan, this is the major challenge of the international community which should go towards a reform of the UN and the R2P2 which goes beyond the French Code of Conduct and the Brazilian Responsibility While Protecting (RWP) proposals.

[8] The idea is that crimes against humanity represent a violation of a basic human right, i. e. the right to life, part of both customary law and *jus* cogens. Brownlie claimed that humanitarian intervention could be used as an excuse and easily have ulterior motives. According to him, Hitler justified the 1938 intervention in Czechoslovakia as 'humanitarian'. Evans, on the contrary, writes that in the aftermath of a few humanitarian operations in Greece, Syria, Crete and the Balkans at the end of the 19th century some jurists claimed that humanitarian intervention was already a matter of international customary law. They were all justified as *humanitarian*.

involves the treaty law (Bellamy, 2009:73)[9], as well. The two operations thus share the allegedly *peremptory* non-written part of general international law (*jus cogens*), resulting, in case of violations thereof, in *erga omnes* moral obligations. Yet, following the initial reasoning, *jus cogens*, quite paradoxically, would entitle both *everyone* and *no one* to react in a more or less severe manner: it is no coincidence that states unwilling to do so have often questioned the very idea of shared morality and humanity, challenging for instance the *extent* of violations of the *jus cogens* itself (Honda, 2009:6).[10]

This raises a number of problems: first of all, does effectiveness necessarily arise from the explicit (treaty law) or implicit (customary law) lawfulness and legality of a conduct? Does the variety of interveners really reinforce state sovereignty, as often argued (A/RES/677, 2009:5), or does it actually undermine the concept of sovereignty itself (Derrida, 2005:87-88)? Is there really just one *jus cogens* or a plurality thereof? And finally, can a law, be it explicit or implicit, ever comprise and engulf the totality? In such case, what *law* would it amount to at all? Is it a coincidence that both humanitarian intervention and the R2P are senseless without the figure of the outlaw, of the *rogue* (*Ibid.* 78-79)[11], of the rough and failed state? In the case of humanitarian intervention in Kosovo, for instance, such was the perception of both the state failing to protect its *populations* and, subsequently, of the regional organisation which intervened unilaterally, that is without the prior consent of the Security Council of the UN. In the same way, the case of the application of the R2P doctrine to Libya involved the

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[9] Precisely, the idea within ICISS was to give to the UNSC *primary* (not *exclusive*) responsibility to react within the legal framework of the UN Charter. And yet, the doctrine could still be seen as an added value in that it is a 'habit former' even with the discretionary power of the Security Council of the UN. See A/RES/60/1, 24 October 2005, p. 30 and Bellamy, A. J. (2013). The Responsibility to Protect: Added value or hot air?. Cooperation and Conflict, 48(3), 333-357.
For Chandler, however, the R2P adds no value to "non-R2P response to international crisis situations where mass atrocities are occurring or seem possible". See Chandler, D. (2009). Unravelling the Paradox of the 'Responsibility to Protect'. Irish Studies in International Affairs, 20, 31.
[10] The then French Foreign Minister Bernard Kouchner's initiative for delivering aid to Myanmar without the consent of its authorities in the aftermath of the Cyclone Nargis that stroke the coast of the country in May 2008 met the resistance of not only China and Russia, but also Indonesia, Vietnam and South Africa. Moreover, Bellamy recalls that in 2007 South Africa, a well-known promoter of the R2P, supported Russia and China in defining the repression in Myanmar as an issue of domestic nature. See Bellamy, Responsibility to Protect, p. 79. See also Wu, Recalcitrant Burma, p. 57: "[...] during the 2007 pro-democracy protests, China and Russia vetoed the US-backed resolution criticizing Burma's deadly reaction to protesters".
[11] Derrida notes that "[…] in the French idiom, someone can do something that is 'voyou', without being a voyou […] The attribute 'voyou' can thus sometimes be applied to a subject that is not […] naturally, a voyou, a rogue. As such, it announces, prepares, and begins to justify some sanction".

disgust of both Gaddafi's regime, which failed at perceiving sovereignty as responsibility, that is, at exercising responsible sovereignty (Deng, 2009:357), and the international coalition, which clearly exceeded its mandate as defined by the Security Council in the resolution 1973.

But, let us first say what this is *not*: no attempt to identify with one of these positions should be suspected of. On the contrary, what emerges is the structural impossibility of *absolute* identification, undermined by what remains at the basis, namely the undecidability as the only *just* choice. In light of this reading, Annan's point from the *Millennium Report* is precisely the description of being in a cleft stick: if nobody had intervened in Kosovo on the behalf of the international community, the latter would still have been blamed. If the Security Council had not managed to adopt a resolution on Libya, it would still have faced a critique for its inactivity and ineffectiveness. Evidently enough, counterfactual thinking reveals to be of little help for envisaging, even *a posteriori*, *the* solution.

Accordingly, the current balance of power within the Security Council is, quite paradoxically, the personification of the most genuine and perfectly functional international community: very simple, it is entrapped and caught in what engenders it, in what has been called "dissensus" and seen as "the essence of politics" (Rancière, 2010:38)[12]. And yet, if it can be said that Annan recognised this *aporia* of the likelihood, if not inevitability, of dissatisfaction with both reaction and indifference, it is also true that he still remained loyal to the possibility of *achieving* a *perfect* solution and offering a *flawless* security mechanism (Bellamy, 2009:32).[13]

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[12] In Mouffe's words: "[...] there will always be competing interpretations of the principles of liberty and equality [...] The common good can never be actualised [...] Different discourses will indeed attempt to dominate the field of discursivity and to create 'nodal points', but they can only succeed in temporarily fixing the meaning of equality and liberty. To put it another way, while politics in a liberal democracy aims at creating a 'we', at constructing a political community, a fully inclusive political community can never be achieved since, as Schmitt tells us, in order to construct a 'we' it must be distinguished from a 'them' and that means establishing a frontier, defining an 'enemy'". See Mouffe, C. (1993). *The Return of the Political*. London & New York: Verso, p. 114.

[13] Annan's objective, as Bellamy puts it, is that of achieving a "collective conscience of humanity".

The imperfection of the doctrine (*Ibid.* 6)[14], then, actually stems from its own condition of possibility: it cannot be thought of anymore as being either adequate or unacceptable, but rather as being both *simultaneously*. In other words, the main problem of the responsibility to protect is *responsibility* itself: the inherent possibility of being *more* or *less* responsible and never simply *responsible*, the impossibility of being either responsible or irresponsible, but *both* at the same time.

As though there were a responsibility assuming a subject before the latter manages and accepts to assume *its own*.

The Rohingya Crisis, a Critical Context and Brand-New Regionalism

The Rohingya Crisis: What Went Wrong?

For all the ongoing debate on the origin of the Rohingya, on their historical co-existence with the Rakhine Buddhists, who are not to be confused with the Buddhist majority in Myanmar, namely the Bamar, one thing seems certain: the situation dramatically changed for the worse from the Second World War on. After a period in which citizenship was automatically assigned under the 1948 U Nu government's Union Citizenship Act which had no reference to ethnicity (Zarni & Cowley, 2014:18), all of a sudden the Rohingya have seen it denied, both politically and legally, since the military seized power in 1962. Ne Win's Operation Nagamin ("Dragon King") in 1978 and the 1982 Citizenship Act, which discriminates on the basis of ethnicity (Zawacki, 2013:18)[15], are the most telling examples of this wave of oppression. There has been a number of episodes of violence ever since: 1992, 2001, 2009, 2012 (*Ibid.* 20), to which the present-day crisis, probably the most ferocious one, must be added. The latter cul-

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[14] There are important implications with considering the R2P as a *concept*, *principle* and *norm*. For Bellamy, R2P is a principle, more than just a concept, and less than a norm. It is interesting to observe that in the August 2017 report of the Secretary General, the R2P is *officially* embraced as principle. See Guterres, A. (2017, August 10). *Implementing the responsibility to protect: accountability for* prevention. A/71/1016-S/2017/556, p. 2.

[15] See also *Burma Citizenship Law*, 15 October 1982, available at: http://refworld.org/docid/3ae6b4f71b.html, accessed 16 January 2018.

minated on 25 August 2017, when the Arakan Rohingya Salvation Army (ARSA), formerly Harakah al-Yaqin ("Faith Movement" (Saikia, 2017)[16], HaY), attacked police posts on the border with Bangladesh (ICG, 2017).[17] Simultaneously, Kofi Annan's Advisory Commission on Rakhine State (ACRS, 2017)[18], appointed a year before by Aung San Suu Kyi in order to explore the reignited violence in northern Rakhine State (NRS), was submitting its final report.

Given that the 2014 Myanmar Population and Housing Census (RUM, 2014), the first since 1983, made no reference to the Rohingya, the reliance on estimates says that around 85 percent of the population, or 624,000 people, fled to Bangladesh (ICG, 2017) in the aftermath of the attacks. The gravity of the situation was such that the Secretary General sent the first official letter to the Security Council since 1989: the international community, he wrote, has the responsibility to *prevent* further escalation of the crisis (*Ibid.*). A week later, the United Nations High Commissioner for Human Rights used the following words: "the situation *seems* a textbook example of *ethnic cleansing*" (OHCHR, 2017).[19] The Rohingya crisis being all about denominators, it is important to note the language used: as Gareth Evans points out, "[i]n contrast with [genocide, crimes against humanity and war crimes], 'ethnic cleansing' has no formal legal definition" (Evans, 2009:12-13). Even Pope Francis has been criticised for failing to utter the contested designation (The Guardian, 2017), whereas some time earlier the Security Council released an official *statement* on the situation in Myanmar, referring explicitly to "the Rohingya community" (SC/13055, 2017).

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[16] For Lintner, it is contradictory that an ethno-nationalistic group first originated as "faith movement" to eventually change its name only recently. According to ICG, the Rohingya crisis has attracted attention of the Muslim world like no other since Kosovo. See International Crisis Group (2017, December 7). Myanmar's Rohingya Crisis Enters a Dangerous New Phase. Asia Report No. 292. Retrieved from: https://www.crisisgroup.org/asia/south-east-asia/myanmar/292-myanmars-rohingya-crisis-enters-dangerous-new-phase, accessed 16 January 2018.

17 According to ICG report, some attacks involved the locals with farm tools and were initiated via WhatsApp audio message.

18 The Commission's final report called for the amendment of the 1982 Citizenship Law and required the lifting of the movement restrictions. Composed of six local and three international experts, the Commission was chaired by Kofi Annan. At Suu Kyi's request, no reference was made neither to Bengali nor to Rohingya, a neutral "Muslims" or "the Muslim community in Rakhine" being the appellatives used. In addition, it was pointed out that the denominative did not refer to the Kaman Muslims of Rakhine State.

19 The emphases are mine.

Eventually, in late November, Bangladesh and Myanmar reached an agreement on the future repatriation programme: 300 refugees per day for two years (The Independent, 2017).[20] However, the Myanmar authorities maintain a hard line on the reporting of the crisis, as witnessed by the arrest of two Reuters journalists who have recently been officially charged under the colonial Official Secrets Act (Reuters, 2017)[21] and the general humanitarian situation in the country to which only the International Committee of the Red Cross (ICRC), well-known for its principle of confidentiality, and the World Food Programme (WFP) have been granted full access (ICG, 2017). Such Myanmar's firm stance did not spare even the UN Special Rapporteur on the situation of human rights in Myanmar, Yanghee Lee, who was denied access to the country in late December (OHCHR, 2017).

Myanmar's (Pre-)Colonial Past: The Key to Unravelling the Crisis?

From a historical perspective, viewing the Rohingya crisis exclusively as a clash between the Buddhist majority and the Muslim minority or as a simple ethnic conflict may reveal to be overly reductive. For instance, one of the challenges of the Annan Commission was, *inter alia*, to deal with the "Rohingya problem" without referring explicitly to the 'Rohingya' and simultaneously avoiding to involve the Kaman Muslims of Rakhine State. As Frazer put it in the aftermath of the 2012 wave of oppression: "Not all parts of Myanmar have witnessed incidents of Muslim-Buddhist violence [...] the state of relations between Muslim and Buddhist communities in different areas is also very much a function of particular local factors" (Frazer, 2015: 84). The unsayable has eventually been reduced to the least common denominator, "Muslims" and "the Muslim community in Rakhine" being the identifiers used (Albert,

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[20] The programme had to start on 23 January, but was then postponed for logistical reasons and the general unpreparedness.
[21] The 1923 Burma Official Secrets Act, which undermines the supremacy of the 2008 Constitution, foresees up to 14 years of imprisonment for whoever approaches "prohibited place[s]". See also *Burma Official Secrets Act 1923*, available at: http://www.asianlii.org/mm/legis/code/bosa1923206/, accessed 20 January 2018. Burma gained independence in 1948 and has had three constitutions in its history, but the colonial laws still apply.

2018).[22] In addition, the recent clashes in Rakhine State between the Rakhine Buddhists and Myanmar's security forces are an indicator of how subtle the analysis must be, as otherwise the risk of understating the crisis rises (BBC, 2018).

As a matter of fact, a group of formerly and currently Myanmar-based academics has been constantly calling for extreme caution when tackling the Rohingya question. In Helen James' words: "Myanmar's border with Bangladesh has always been a sensitive region [...] It was cross-border disturbances in this region which became the *casus belli* precipitating the first Anglo-Burmese War in 1824" (James, 2006:120). And yet, according to Jacques P. Leider, the Buddhist-Muslim violence in Rakhine dates back to earlier than the pre-Anglo-Burmese War and thus pre-colonial period of Burma: a Muslim community in the area can be traced back to *at least* 15th century (Leider, 2013:70) and not until recently have these communities refused peaceful coexistence. On the contrary, "[they] lived side by side" (Leider, 2012:10).[23] It was only in the aftermath of the War that the British exploited the potential of the then Arakan which comprised the area of now Bangladeshi Chittagong and made the local population constantly move. Due to its geographical position whereby, to the east, it is separated from the Irrawaddy plain by the Chin Hills and Rakhine Mountains, while sharing, to the west, the Naf river with Bangladesh, "Arakan [...] looks back to a largely autonomous history in Burma's periphery" (Leider, 2008:412). In the aftermath of the Second World War, the community was faced with a dilemma: the choice was between joining Pakistan which became independent in 1947 or remaining in Burma which gained its independence a year later. From this perspective, it is clear that the decision taken called for *at least* some degree of assertiveness in claiming a set of rights, which were eventually recognised by the post-WWII democratic government. The peak of this pro-

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[22] See note 25. In Albert's words: "Though the etymological root of the word is disputed, the most widely accepted theory is that Rohang derives from the word 'Arakan' in the Rohingya dialect and ga or gya means 'from'. By identifying as Rohingya, the ethnic Muslim group asserts its ties to land that was once under the control of the Arakan Kingdom […]". Consequently, one of the pillars of the 1982 Citizenship Law was Tai-Yin-Tha, the concept of "children of the soil". See also Zarni & Cowley, The Slow-Burning Genocide, p. 697.
[23] See also Lintner, 'Rohingya refugee crisis'.

cess was the creation of an all-Muslim community in Arakan, the Mayu Frontier District which existed between 1961 and 1964 (Ghosh, 2016:161-162). Very roughly, this, along with the well-known history of persecution ever since, would be only the first layer of Rakhine State's explosive dynamicity.

The second one is where, paradoxically, proneness to conflict has been present for much more time, finding fertile ground in the interpretations of history, Buddha's teaching and even origin: in 1785 the Burmese troops were conquering the *Buddhist* kingdom of Arakan, an event which led to the (re)appropriation of the *sasana*, Buddha's *credo*, as well as of the important Mahamuni statue, eventually moved from Dhanyavati, today's Mrauk U in northern Rakhine State, to Amarapura, near Mandalay. This has led to "a transmutation of the status of the statue" and to "the Mahamuni's new 'life' in Upper Burma [which] greatly symbolized Arakan's integration into a larger Burmese environment" (Leider, 2008:413-419). This is why the conflict in northern Rakhine State is *at least* "triangular" as well as "first of all a cultural war to gain hegemony over the interpretation of history" (Leider, 2012:10-11).[24]

To sum up, the recent burmanisation of Rakhine could be seen as based on the consensus of a lesser evil: *id est*, the *ad hoc* creation of frenemies between the Rakhine Buddhists and the Myanmar government in response to the growing Muslim population and in an attempt to render the western borders of the country more secure. What might add oil to the fire in the near future and fold ultimately an already complex conflict depends essentially on the outcome of the repatriation programme which is very likely to either see a historically justified reluctance of the Rohingya to return to Myanmar[25]

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[24] Leider defines the conflict as "triangular, not binary, involving three parties: the central government, which is largely Burmese; Rakhaing Buddhists; and Muslims".
"At the local level in Rakhine State, *structural* problems related to the *unresolved* issue of the status of the Rohingya/Bengali Muslim population are *compounded* by difficulties at the level of *inter*-community relations". See Frazer, 'International Engagement on Buddhist-Muslim Relations in Myanmar', p. 83. The emphases are mine.
[25] As will be seen, repatriation was the preferred response of the international community in the past. Should the results it yielded be judged from this perspective, the repatriation of 1978 and 1992, both under the auspices of the UN Refugee Agency (UNHCR), clearly show that the approach must be diversified. For, if it is true that the international community had no voice in the bilateral agreement between Myanmar and Bangladesh, it is also true that the gravity of an already underestimated conflict is likely to be compounded by a factual indifference to what has historically proven to result in its protraction and the maintenance of a *status quo*.

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or a bifurcation of the latter group into an extremist minority reticent to dialogue (ANI, 2018; AFP, 2018)[26] and an ever *stateless* majority's frozen path towards welfare.

The Regional Security Framework and the R2P

According to Buzan and Wæver, however, the stakes are much higher: Burma is a typical *insulator*, having a status specific to the regional security complex theory (RSCT). The instability of the country would not thus stem from the regime's ethnocratic tendencies, but rather from this particular position at the edge of securitisation (Buzan & Waever, 2003:41). Others, such as Collins or Bellamy and Beeson, disagree with this view: Southeast Asian regimes are by definition ethnocratic given their colonial past with the sole Thailand spared by colonialism. Consequently, decolonisation, both Cold War and post-Cold War security might be seen as an initiative of the region to re-appropriate historical forces over which it used to have little control (Collins, 2000:55; Bellamy & Beeson, 2010:265-266). The prime example of this dynamics is the creation of the Association of Southeast Asian Nations (ASEAN) in 1967 and its subsequently jealously defended principle of non-interference in domestic affairs of its Member States. This attitude, the so-called ASEAN Way, has until recently stood for the organisation's frontline towards the external world. For Bellamy, the things changed with the Cyclone Nargis in 2008 when ASEAN managed to persuade the Myanmar authorities to receive aid from outside: "there were many significant 'firsts' for the region" (Bellamy & Beeson, 2010:274). Yet, the fact that the Nargis case has *prima facie* been seen as a borderline case for the R2P and then eventually labelled as falling out of its scope shows that ASEAN Member States are still more prone to support the first two pillars of a R2P-lite doctrine, namely their responsible sovereignty and, to a certain extent, foreign assistance in exercising it (Bellamy & Drummond, 2011:196).

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[26] Simultaneously, Bangladeshi army officials visited the refugee camps in order to get the ready lists of families to be repatriated. See Reuters (2018, January 20). Tensions mount in Rohingya camps ahead of planned relocation to Myanmar. Retrieved from: https://www.reuters.com/article/us-myanmar-rohingya-repatriation/tensions-mount-in-rohingya-camps-ahead-of-planned-relocation-to-myanmar-idUSKBN1FA0EJ, accessed 23 January 2018. These pieces of news had little echo in the media. A certain reticence to dialogue was *previously* recognised also by Annan's Commission. See ACRS, 'Towards a Peaceful, Fair and Prosperous Future', p. 15: "Muslim militants have allegedly killed a number of Muslim leaders, apparently in an attempt to undermine cooperation with the government".

Consequently, there appears to be much room for improvement when it comes to regional cooperation, which has recently been reinforced by the concepts of "flexible" and "constructive engagement" (Collins, 2000:134).[27]

Burma's first decade of democratisation and its *retour* in the concert of nations must thus be analysed even in light of the regional security complex which emerged as a consequence of a shared colonial past. It is even more so in the Burmese case as this new layer of meaning has ever since reserved and still, to some extent, reserves a special, quasi-*pariah* status to Myanmar: if it can be asserted that the country joined ASEAN as a shield for its human rights abuses (*Ibid.* 124), it may also be true that, paradoxically, it was the entrance of Myanmar which signed the opening of an era of major alignment of Southeast Asian countries with the rest of the world. Since the Cyclone Nargis, when aid offered by the ASEAN Tripartite Core Group eventually reached Myanmar more than a week after the natural disaster had occurred, the country's peers have constantly had their eye on the Burmese conduct. It might well be that the decision not to delay the 2008 constitutional referendum, which was held in the context of such a calamity (Honda, 2009:5)[28], resulted in the unusual disciplinary approach of Myanmar's fellow members. Two years later it "[...] was given an 'earful' from ASEAN foreign ministers, signalling the possibility of a break from ASEAN's traditional protocol of non-interference" (Wu, 2010-2011:56).[29] Interestingly, from a historical perspective, this burden of conditionality is nothing new for some and has important, comparable precedents: for instance, Jones reviews the idea of non-interference, proposing a profound re-reading of ASEAN's opportunistic behaviour. The reproach is the following: Julius Nyerere's invasion of Uganda in 1979, aimed at overthrowing Idi Amin, as well as the Soviet intervention in Afghanistan, met no disap-

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[27] See note 95.
[28] "[…] [A]ccording to the Associated Press, generals' names were scribbled onto boxes of foreign aid before being distributed".
[29] Wu speaks of "ASEAN's iron wall of sovereignty".

proval by the members of the association. Non-interference and the supremacy of sovereignty would thus amount to consensual opportunism rather than to a jealous defence of a *principle* (Jones, 2007).

In light of the current immobility and evasion of *responsibility* on the "Rohingya crisis" (Reuters, 2017), there seems to be no doubt about the incoherence in the defence of ASEAN's notorious golden rule and Jones' prophetic point on the matter.

The Statelessness of the Rohingya: A Conundrum for the R2P

The international community responses to the previous Rohingya flights consisted mainly in repatriations: in 1978, the UN Refugee Agency (UNHCR) assisted the process ostensibly *without* previous consultation with Dhaka on the identity of the refugees (Leider, 2013).[30] The 1978 wave of oppression is particular in that the movement restrictions in "an Islamic world then very much in motion" were far looser. "Those who moved to Pakistan [...] were 'really fortunate'". On the basis of the sole religious identification, many Rohingyas became Pakistanis, moving eventually to the Makkah region in Saudi Arabia through *umrah* (the minor pilgrimage). There they would remain, as a part of Saudi Arabia's Pakistani diaspora, which in the 1980s counted two million people. All but a million Rohingyas allegedly lived in Saudi Arabia in 2012 (Wong & Suan, 2012:81-84).

Even the following 1992 repatriation was carried out under the auspices of the UNHCR, "with the direct consent of the GOB [Government of Bangladesh]" (Parnini, 2012:287-288). Yet, this repatriation process took more than a decade and was officially concluded in 2005. *De facto*, though, the Kutupalong camp near Cox's Bazaar has still hosted some 35,000 people ever since (Vaulerin, 2017). This crisis was emblematic in that a new military border force was created, namely the *NaSaKa*. Meanwhile many restrictive policies, including the control of marriages, were imposed in the country. The following repatriation was thus allegedly *involuntary* with regard to

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[30] What followed is the notorious 1982 Citizenship Law which rendered the Rohingya officially and legally stateless. The 2018 relocation has at least the advantage of direct participation of the Bangladeshi in identifying the refugees. See also Reuters, Tension mount in Rohingya camps.

the first return of the Rohingya to Rakhine State in 1978. The UNHCR was granted access to Myanmar in 1994 (Zarni & Cowley, 2014:708-710), but this did not change the general dissatisfaction. Subsequently, the 2001 violence did not spare Sittwe's madrassas and mosques which were burned (*Ibid.* 711-712), whereas in the aftermath of the 2012 outbreak, the sea routes leading to Malaysia became very exploited. The palliative solution was the Inquiry Commission on the Violence in Rakhine State, appointed by the then president Thein Sein (*Ibid.* 738).[31]

The described past experiences are probably the most telling warnings of how superficial the present-day repatriation programme may result, notwithstanding the supervision of the UNHCR which has recently demanded access to Rakhine State (UNHCR, 2018). Accordingly, the operation within what can be *cautiously* labelled as the second pillar of the responsibility to protect urges for a much more serious approach. In Frazer's words:

> *If international discourse moves away from assessing categorical positions on the status of the "Rohingya" and takes a more problem-solving approach, it may help open a space for dialogue. This requires acknowledging and taking seriously the different perspectives on the issue, including those of the Buddhist nationalists (Frazer, 2015:85).*

This historical excursus was also necessary to comprehend the distinctiveness of the ongoing crisis, certainly the most serious one in the last twenty years: this time, the diacritical element is the redefinition of the concept of *sovereignty* to which the international community has assisted since the beginning of the century. This new concept, namely R2P, has been called for in the Myanmar case for at least a decade now, on account of a wide variety of reasons. Yet, the Secretary General's first official letter to the Security Council since 1989, dated 2 September 2017, bears important implications for the correct reading of the current situation: the international community, he wrote,

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[31] For the "boat people" crisis see p. 722, as well as Frazer, International Engagement on Buddhist-Muslim Relations in Myanmar, p. 82.

has the *responsibility* to *prevent* further escalation of the crisis.[32] Once again, the language used leads to interesting observations: whereas the responsibility to prevent was endorsed by ICISS as the most important aspect of R2P, Bellamy observes that it was given very little attention in the final report (Bellamy, 2009:64). However, Gareth Evans, who was the Co-Chair of the Commission, reaffirmed the supremacy of *prevention*, explaining that it constitutes the distinctiveness of the R2P vis-à-vis humanitarian intervention: "[...] R2P is about taking effective *preventive* action, and at the earliest possible stage" (Evans, 2009:56).[33] Precisely here lies the paradox of the R2P for Chandler: it is impossible to reconcile prevention, *a fortiori* the perpetrating State's primary prevention, as claimed by Evans, and atrocity crimes to which the field of application of the doctrine has been restrained (Chandler, 2009:32-33).

This paradox probably led to the implosion the Rohingya crisis: the outcome is the present-day blurred context of mixed responsibilities, the one to *protect* and to *rebuild*, with a shy reliance on the second pillar of the R2P (BBC, 2017; CNN, 2018).[34]

Nevertheless, a far bigger aporia lies in the *stateless* status of the Rohingya and has to do with an unexpectedly often neglected element of the R2P: do States and, when necessary, international community have to protect *citizens* or *populations*?[35] At first glance, the legal status of the former construct and the symbolism of the latter are self-sufficient in stressing the divide between themselves. Nevertheless, the interpretation of this ambiguity could be *at least* twofold: on the one hand, if the R2P stands for the responsibility to protect one's own *citizens*, it is shockingly clear that Myanmar[36]

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[32] See note 29.

[33] The emphasis is mine.

[34] In light of the discovery of Hindu mass graves, it is equally unlikely that the events will bring the label of genocide. See The Guardian (2017, October 12). Mystery surrounds deaths of Hindu villagers in Myanmar mass graves. Retrieved from: https://www.theguardian.com/global-development/2017/oct/12/myanmar-mass-graves-mystery-surrounds-deaths-of-hindu-villagers-dirty-tricks-rohingya, accessed 16 January 2018. As Evans puts it, "[..] not even the Cambodian slaughter [...] would qualify as genocide. And even if the population in question meets the criteria, the required element of intent is notoriously difficult to prove". See Evans, *The Responsibility to Protect*, p. 12.

[35] For *citizens*, see for instance ICISS, *The Responsibility to Protect*, p. VIII, p. 13, p. 15, p. 16, p. 19, p. 49, p. 75; Bellamy, *Responsibility to Protect*, p. 76; SG/SM/8125, 15 February 2002; For the use of word *population*, see for instance ICISS, p. XI, p. 39, p. 40; A/61/677, p. 8. The aim of this list is by no means to be exhaustive, but rather to provide evidence for the ambiguity.

[36] Article 348 of the 2008 Constitution says: "The Union shall not discriminate any *citizen* of [...] Myanmar, based on race, birth, religion, official position, status, culture, sex and wealth". The emphasis is mine.

could become exempted from protecting the Rohingya whom it has rendered stateless in an era of *absolutist* sovereignty. On the other hand, the apparent ambiguity could also be thought of as a way to reinforce the integrity and dignity of the *human* person.

Be that as it may, the figure of the *rogue* does not spare neither the concept of *citizenship* nor that of *population* through the biopolitical *silhouettes* of non-citizens and non-*human* beings, both haunting the ideal of *human* rights.

Consequently, to consider citizenship *per se* as the right to have rights boils it down to a yet another potentially void right, to the essence of right which coincides with the moment of collapse of *the rightitself*. And while the exposed circularity of autoimmune self-references cannot be avoided, reducing a conflict to sole legal aspects is certainly of no help.

Conclusion

In a time when new concepts of (*inter*)national sovereignty are proposed, and the old ones revised, it is important to highlight the idea that the quest for a *flawless* sovereignty *a priori* undermines its attainment. Counterintuitively, as was seen, it is this quest whence each and every sovereignty originates from, which bears serious implications and explains why the treatment reserved to the R2P in this contribution must *not* be understood as mere unravelling, debunking or negation of an obsolete concept to be discarded. Rather, the ultimate point of it lies in a *sovereign* consideration of the R2P as a necessarily yet another *faulty* sovereignty. On that account, neither international responsibility as a "contingent *sovereignty*" (Job, 2008:125)[37] can ever be exempted from this status: it is this idea of a *simultaneously* friendly and hostile subsidiarity that has recently endangered the R2P from *within* and vitalised the discussion about the responsibility *while* protecting (RWP)[38].

The analysis of the exodus in this sense (un)biases both the *subject* entitled to protect the Rohingya, specifically the *inter*national community, as well as the *subject*

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[37] The emphasis is mine.
[38] See note 10.

in need of protection, whose solidity is equally menaced from *within*, especially by the stateless status. Eventually, if this consideration leads to an aporetic situation, it is also where it has originally been directed: towards the paradox of being torn between intervention and non-intervention, neither choice being sufficiently *just*. The very doubt of the *rogue* State itself.

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