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Responsibility to Protect and International Law

The Case of the Rohingya

JURM02 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

Supervisor: Jessica Almqvist

Semester of graduation: Period 1 Fall 2020

Contents

Summary

The Rohingya, a Muslim minority group in Myanmar have been subject to discrimination and repression for many decades. Since 2012, the violence in Myanmar has escalated to mass atrocity crimes, arguably amounting to genocide. The alleged crimes have gained attention in the international community and especially in the field of international human rights law. This thesis makes a critical examination of questions related to the international responsibility for the grave crimes committed against the Rohingya minority in Myanmar. I will analyze what is the responsibility of the international community and what legal avenues and tools the international community may use to hold the perpetrators responsible to account and end the violence in Myanmar. One of the questions I am specifically considering is the Responsibility to Protect principle, introduced by the International Commission on Intervention and State Sovereignty in 2001. The thesis focuses on how this principle is related to basic principles of international law and also how international legal responsibility – both state responsibility and criminal responsibility - can be determined through the engagement of judicial organs. The thesis also analyzes legal limitations on the role of judicial organs. There are three legal proceedings occurring at the same time, yet no perpetrators have been held accountable and no state has been held responsible so far. The thesis seeks to point out the disconnect between the purpose of R2P, and what can actually be done in practice to implement such a principle. The disconnect is due to several factors. One is the contradicting nature of R2P considering some legal principles, such as the principles of sovereignty and non-intervention. Implementation is also difficult due to the political environment of the UN, jurisdictional limits facing the courts and the failure of Myanmar to cooperate, making it hard to gather enough evidence to build a solid case. These factors make it more difficult for the judicial organs to end violence and deliver justice to the victims of the crimes allegedly committed.

Sammanfattning

Rohingya-muslimerna i Myanmar har utsatts för diskriminering och förtryck i många decennier. Sedan 2012 har våldet i Myanmar eskalerat till vad många menar är folkmord. De påstådda brotten har fått uppmärksamhet i det internationella samfundet och särskilt inom området internationella mänskliga rättigheter. Examensarbetet gör en kritisk granskning av frågor relaterade till det internationella ansvaret för de allvarliga brott som begåtts mot Rohingya-minoriteten i Myanmar. Jag kommer att analysera om, och i så fall, vem som har ett ansvar för att skydda minoriteten och vilka rättsliga metoder och verktyg det internationella samfundet kan använda för att hålla gärningsmännen ansvariga för våldet i Myanmar. Ett av de verktyg jag undersöker är Responsibility to Protect (skyldigheten att skydda eller R2P), som introducerades av the International Commission on Intervention and State Sovereignty 2001. Examensarbetet fokuserar på hur denna princip relaterar till grundläggande principer i internationell rätt, såsom statssuveränitet och icke-intervention och även hur internationellt rättsligt ansvar - både statsansvar och straffrättsligt ansvar - kan bestämmas genom involvering av rättsliga organ. Examensarbetet analyserar också de rättsliga begränsningarna för de nämnda organen. Det pågår tre rättsprocesser samtidigt, men inga förövare har hållits ansvariga hittills. Examensarbetet syftar till att påpeka skillnaden mellan syftet med R2P och vad som faktiskt kan göras i praktiken för att implementera en sådan princip. Problemet att implementera principen beror på flera faktorer. En faktor är motsägelsen mellan R2P och vissa rättsliga principer, principerna om statssuveränitet och icke-intervention. Implementeringen är också svår på grund av FN:s politiska klimat, jurisdiktionsbegränsningar och Myanmars ovilja att samarbeta. Dessa faktorer gör det svårare för de rättsliga organen att samla tillräckliga bevis, stoppa våldet och skipa rättvisa.

Preface

I would like to express my gratitude to my friends and family for their support not only during this last semester, but also throughout the last five years.

An especially big ‘thank you’ to my supervisor Jessica Almqvist, who continuously inspired and helped me with this thesis.

Alice Ribbenvik
Lund, 6 January 2021

Abbreviations

AA	Arakan Army
ARSA	The Arakan Rohingya Salvation Army
ARSIWA	Articles for State Responsibility for Internationally Wrongful Acts
BROUK	Burmese Rohingya Organisation United Kingdom
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IIFFMM or FFM	Independent International Fact-Finding Mission on Myanmar
ILC	The International Law Commission
NGO	Non-Governmental Organization
NLD	The National League for Democracy Government
OHCHR	Office of the United Nations High Commissioner for Human Rights
OIC	Organization of Islamic Cooperation
R2P	Responsibility to Protect
UN	United Nations
UN Charter	Charter of the United Nations
UNSC	United Nations Security Council
USCIRF	United States Commission of International Religious Freedom

1 Introduction

1.1 Subject background

The Rohingya Muslims is a vulnerable, persecuted group from the Rakhine State in Myanmar. The UN Secretary General describes the Rohingya as "one of, if not the, most discriminated people in the world".[1] For many decades, the ethnic group has been subject to discrimination and repression. Since 2012, the violence in Myanmar has escalated to mass atrocity crimes, arguably amounting to genocide. Many Rohingya left Myanmar after the "clearance operations" that took place primarily in 2017. The mass exodus from Myanmar led almost one million Rohingya refugees to flee to the neighbor country Bangladesh. The Rohingya remaining in Myanmar face ethnic cleansing and other crimes against humanity to this day. The Rohingya are not considered a minority group in Myanmar, cannot hold citizenship or vote. Since 2017, almost 24 000 Rohingya have been killed by government forces, more than 34 000 Rohingya have been thrown into fires, 114 000 have been beaten, 18 000 women and girls have been raped by Myanmar army and police, 115 000 Rohingya homes have been burned down and additionally 113 000 more households vandalized.[2]

When situations like these occur, there is a responsibility for the international community to act and protect the persecuted people. This responsibility is referred to as "The Responsibility to Protect" (hereafter R2P), which is a relatively new principle that was established from the 2005 World Summit.[3] The norm was first introduced in a report by the

[1] Guterres, António, Opening remarks at press encounter with President of the World Bank, Jim Yong Kim, available at: https://www.un.org/sg/en/content/sg/speeches/2018-07-02/remarks-press-encounter-world-bank-president-jim-kim.
[2] Habib, Mohshin & Jubb, Christine & Ahmad, Salahuddin & Rahman, Masudur & Pallard, Henri. *Forced Migration of Rohingya: An Untold Experience*, SSRN Electronic Journal, 2018.
[3] UN General Assembly, *2005 World Summit Outcome: resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, available at: https://www.refworld.org/docid/44168a910.html, para. 138-139.

International Commission on Intervention and State Sovereignty from 2001 (hereafter ICISS report).[4] The principle has thereafter been endorsed in several international instruments, such as the World Summit Outcome 2005. The norm is built on the idea that sovereign states have a responsibility to protect their own citizens from mass atrocity crimes, and when they are not willing or unable to do so, a broader community of states have a responsibility to act.[5]

When it comes to the Rohingya crisis, some actions have been taken by the international legal community. The most important ones are by international judicial organs. There are currently three legal proceedings occurring at the same time, one case before the International Criminal Court (ICC), one before the International Court of Justice (ICJ), and one in an Argentine national criminal court. Legal actors, political actors and institutions worldwide are trying to hold the perpetrators responsible for their crimes and stop the violence against the Rohingya. However, as the findings in this thesis indicate, these efforts have so far had little effect and the conflict as well as the grave crimes committed against this minority group is ongoing.

1.2 Purpose

The purpose of this thesis is to make a critical examination of questions related to the international responsibility for the grave crimes committed against the Rohingya minority in Myanmar. I will analyze if, and in that case, who has a responsibility to protect the Rohingya and what legal avenues and tools the international community may use to hold the perpetrators responsible to account and end the violence in Myanmar. One of the questions I am specifically considering is the R2P principle. The

[4] UN General Assembly, *Implementing the responsibility to protect: report of the Secretary-General*, 12 January 2009, A/63/677, available at: https://www.refworld.org/docid/4989924d2.html. (hereafter ICISS Report).
[5] Ibid. p. VIII.

thesis focuses on how this principle is related to basic principles of international law and also how international legal responsibility – both state responsibility and criminal responsibility – can be determined through the engagement of judicial actors or organs. I will also analyze legal limitations on the role of judicial organs, such as those related to jurisdiction that make it more difficult for these organs to end violence and deliver justice to the victims of the crimes allegedly committed.

1.3 Research questions

The main research questions examined in this thesis are:

- Does the international community have a responsibility to protect the Rohingya and, if so, how does this responsibility relate to international law?
- How can the international community meet the responsibility to protect in the case of Rohingya? What are the avenues, tools and actors available?
- Are the actions taken by international judicial organs sufficient to meet the responsibility of the international community to protect the Rohingya and thus meet the responsibility to protect?

1.4 Scope and delimitations

The thesis is primarily focusing on the legal opportunities and legal limitations faced by the international community in assuming its responsibility to protect the Rohingya from the grave crimes they are suffering.

While it is a highly relevant and connected issue, the thesis will not provide a detailed account of the legal situation and status of the Rohingya in

Bangladesh. Therefore, it will not focus on related questions revolving around migration law, statelessness, refugee status or repatriation issues. It will only mention the situation of the group in Bangladesh briefly (see section 2.3).

The analysis is an attempt at answering the main research questions related to legal opportunities and limitations of the international community in efforts to implement the R2P. The thesis will research legal avenues for implementing this principle and the role of judicial organs in determining the responsibility of the perpetrators of the crimes. At the same time, there are many possible routes of action, including armed intervention and sanctions, to implement this principle. Moreover, there are many possible actors of the international community, including regional organizations, such as the European Union, that could seek to implement this principle. However, these actions and actors will not be the primary focus of this study.

While the oppression of the Rohingya has been occurring for many decades, the thesis will focus on the more recent attacks of the Rohingya, primarily the violence suffered by this group from 2012 and which escalated in 2017. The analysis will focus on grave crimes, so-called mass atrocity crimes (genocide, crimes against humanity and war crimes), and the crimes that are the object of the legal proceedings before the ICC and the ICJ (genocide). Many other violations of the human rights of the Rohingya have occurred, such as in relation to the deprivation of their citizenship, among other alleged violations, but will not be further discussed in the thesis.

1.5 Methodology

The thesis uses several methods to find, examine and analyze material and answer the research questions. These include doctrinal legal method; action in law method; interdisciplinary method and critical legal analysis.

The doctrinal legal method[6] is used when analyzing applicable international law. It means I am using the legal sources found in Article 38 of the Statute of the ICJ: treaties, customary international law, supplementary sources like doctrine (academic publications), principles and case law. Doctrine can be defined as a "synthesis of rules, principles, norms, interpretive guidelines and values", which explains, makes coherent, or justifies a segment of the law as a part of the larger system of law." The doctrinal legal method can be defined as 'research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments." According to the Council of Australian Law Deans "doctrinal research, at its best, involves rigorous analysis and creative synthesis, the making of connections between seemingly disparate doctrinal strands, and the challenge of extracting general principles from an inchoate mass of primary materials." [7] This method is used primarily in the initial chapters of the thesis.

When specifically looking at the judicial actors and their tools I have relied on the method "law-in action", which can be seen as a version of the Action Research in Law method. This method conducts observational, causal-comparative, and correctional research. P. Ishwara Bhat, the author of the book "Ideas and Methods of Legal Research" states that "unlike other research types, action research does not stop with explanation of finding and analysis of state of affairs. Its inclination to redress grievances and empower by involving the community's participation speaks about the dynamic role of action research."[8] Greenwood and Levin mean that the research method

[6] I will not be using the term legal dogmatic method, after reading Claes Sandgrens words about why the wording dogmatic is somewhat dated and misleading. He means it would be more realistic and clarifying if the word analytic instead of dogmatic would be used, such as "legal analysis" or "traditional legal analysis". For further reasoning behind this, see Sandgrens article: Sandgren, Claes, *Är rättsdogmatiken dogmatisk?*, Tidskrift for Rettsvitenskap, 04/05, 2005, p. 649.
[7] Bhat, P., Idea and Methods of Legal Research, Oxford University Press, 2020, available at: https://oxford.universitypressscholarship.com/view/10.1093/oso/9780199493098.001.0001/oso-9780199493098, p. 145.
[8] Ibid. p. 532.

“calls for positive action to remedy the deficiencies in the existing system or ‘improving a social situation’.”[9]

Additionally, since I focus on the implementation or non-implementation of the R2P principle in a particular case, part of my research is interdisciplinary. Because the principle is not considered a legal principle, but rather a moral or political principle, the research extends to questions that are not purely legal. My research tries to clarify not only what the principle means and requires, but also how it relates to basic legal principles of international law.

Lastly, in the later chapters of the thesis I criticize the lack of full implementation of the principle of R2P due to legal constraints. I then use a method which could be considered as critical legal analysis.

1.6 Material

The material used in this thesis is mostly legal sources found in Article 38 of the Statute of the ICJ. These include

> ”international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”[10]

[9] Ibid. p. 533.
[10] Art. 38, United Nations, *Statute of the International Court of Justice*, 18 April 1946, available at: https://www.refworld.org/docid/3deb4b9c0.html.

The thesis also relies on the reports made by factfinding missions conducted by international organizations, such as the United Nations, but also by NGOs. These sources, together with case law, includes the majority of the material used in the thesis. In this thesis I refer to and use the works of multiple authors and scholars. Principal authors in the field of international law who have contributed to academic work that are included in this thesis are Samantha Besson, José E. Alvarez, Stephen Krasner, Cecilia Jacob, Martin Mennecke and Gareth Evans. The thesis refers to several reports and legal instruments, but the ICISS report is mentioned more often. While the report is not representing entirely the final formulation of the R2P in the 2005 World Summit Outcome and what looks like today in all aspects due to be consistent with existing legal frameworks, it was the first report to articulate the principle of R2P. It represents many of the values of R2P that established the foundation of the principle and which live on today. I therefore think there is value in using this report as frequently as I do in this thesis, to understand the background of the principle, but also remind the reader of the purpose and value of R2P for those who developed it.

1.7 Previous research

There has been significant research in the area of the implementation of responsibility to protect. Most research has focused on the relationship between R2P and international law, and less is focused on the role of judicial actors in the implementation of R2P. This is most likely due to the fact that the judicial organs of this thesis, international courts, do not in theory practice protection, but rather deliver justice. However, the ICJ and its ability to order provisional measures can serve as an example of a way of protecting the Rohingya. The work of the courts can also contribute to one of the elements of R2P, rebuilding society after a conflict and establishing basic institutions of justice. Therefore, I am further researching the link between the judicial organs and R2P.

More research has been conducted on humanitarian intervention in modern conflicts. These topics have been discussed in the academic literature in the field of international law. There has also been previous research and discussion regarding not only the role of the international courts, such as ICC and ICJ, but also the pending court cases regarding the Rohingya situation. However, research on R2P tends to focus on armed interventions and other measures such as sanctions used by political actors, such as the United Nations Security Council (hereafter UNSC), to end situations of mass atrocities. This thesis looks instead at the possible use of judicial organs in the implementation of R2P. Moreover, recent developments in the relevant cases before the ICJ and the ICC as well as before the Argentine court, make it important to conduct further research.

1.8 Structure

The first chapter is an introduction to the subject-matter of this study. In this chapter, I formulate my research questions and clarify the purpose, scope and delimitations of the thesis. I also explain the method and material used in the thesis as well as previous research on the topic.

The second chapter provides a background to the conflict and violence experienced by the Rohingya. In it, I explain the history of the Rohingya to give the reader basic knowledge about the ethnic group in focus and the geographical area its members reside in. The basics of the conflict will also be explained, including the actors of the conflict. Topics addressed include the situation for the Rohingya still living in Myanmar, attacks against the Rohingya, counterattacks made by armed groups of the Rohingya, as well as internment camps and confinement. Lastly, there is a short subsection about the Rohingya situation in Bangladesh. This subsection is included so the reader can understand the full scope of the conflict.

The third chapter of the thesis describes principles applicable to international responses to the conflict, both legal and political principles. The principles analyzed in this chapter include those related to human rights, the principle of non-intervention and lastly the more political principle of the R2P. The aim is to examine the relationship between these principles.

The fourth chapter discusses the legal avenues, tools and actors of R2P. These include for example the UNSC and judicial organs such as international courts. The chapter also discusses the multiplication of actors. The actors relevant in this chapter are the actors who have either jurisdiction over the alleged crimes against the Rohingya, or have a role in the protection of the minority group.

The fifth chapter directs attention to and analyzes the ongoing legal proceedings concerning legal responsibility for the alleged mass atrocity crimes. Of main interest are the developments in the cases before the ICC, the ICJ and the Argentine national criminal court.

The sixth chapter contains a critical analysis and discussion of the role of and limits of legal avenues and judicial actors in assuming the responsibility to protect in the case of the Rohingya. In this section the thesis will discuss some of the reasons why I believe there is a challenge implementing R2P, such as the principle of sovereignty and non-intervention, political factors and actors and lack of jurisdiction and the difficulty of gathering evidence.

The seventh chapter contains my conclusions on the previous chapter.

2 The Rohingya

2.1 History

There has been Muslim influence in the Arakan region (now Rakhine state) since the fifteenth century. The Arakan kingdom flourished for many centuries, but was conquered by the mostly Buddhist Burmese in 1784. Shortly after, the British empire conquered the area through the First Anglo-Burmese war 1824-6. Burma (now Myanmar)[11] was under British rule until it claimed independence in 1948. Since then, the Rakhine state has been a place of separatism and conflict due to the historic and mostly religious differences.[12] Many of the neighboring countries like India and Bangladesh have been connected to each other and Myanmar in different ways, and shared a past before borders divided them into separate countries. Migration between the countries is not unusual historically seen, and it is easy to understand why the Rohingya started to migrate to Bangladesh after the persecution started.[13] In modern time there has been several exoduses from the Rakhine state to the neighboring countries, but primarily to Bangladesh due to conflict in the area.[14]

[11] In this thesis I will use the name Myanmar, and not Burma, after the name change in 1989. The name change has been recognized by the majority of UN states, but been subject to controversy.
[12] Ware, A., & Laoutides, C. Complexities, Misconceptions, and Context, in *Myanmar's 'Rohingya' Conflict*, (Oxford University Press, 2018), available at: https://oxford.universitypressscholarship.com/view/10.1093/oso/9780190928865.001.0001/oso-9780190928865-chapter-001, p. 27.
[13] Chowdhory N., Mohanty B, Contextualizing Citizenship, Nationalism and Refugeehood of Rohingya: An Introduction, in *Citizenship, Nationalism and Refugeehood of Rohingyas in Southern Asia*, (Springer Singapore, 2020) available at: https://doi.org/10.1007/978-981-15-2168-3_1, p. 2.
[14] Ware, A., & Laoutides, C. The Rohingya 'Origin' Narrative, in *Myanmar's 'Rohingya' Conflict,* (Oxford University Press, 2018), p. 100-103.

2.2 Conflict background

The Rohingya is one of the most persecuted minority communities in the world.[15] The one million plus community is a Muslim ethnic minority, mainly living in the Rakhine State (formerly Arakan region) in northwestern Myanmar (formerly known as Burma), without citizenship. They are by many considered stateless due to their lack of citizenship in Myanmar[16], While grave violations of Rohingya rights have been documented by the UN since 1992, the conflict has escalated in the last decade.[17]

It is important to mention that the conflict is complex multi-polar, where many different actors are involved. First, we have the Rohingya, who are looking to be recognized as citizens, entitled to basic human rights without being persecuted for their religion. Second, we have Rakhine, Buddhist locals in the area, wanting autonomy over the region, politically struggling with both the Rohingya and the state. Within the Rohingya and the local Rakhine there are insurgent armed militant groups, like ARSA (Arakan Rohingya Salvation Army) and AA (Arakan Army), both fighting the state and military, and sometimes each other. Third, there is the Tatmadaw, the Myanmar military, seeing any claims to autonomy in regions like the Rakhine State as a threat to the national sovereignty of Myanmar. The military controls the security ministries, which control the police, defense and border regions. Fourth, there is the NLD Myanmar government, who is in a constant power struggle with the Tatmadaw military, especially in the region of Rakhine, since the NLD Myanmar government does not control the security forces in that region.[18] These actors have all clashed with each

[15] Chowdhory, Nasreen & Mohanty, Biswajit, (2020). p. 1.
[16] However, the concept of statelessness can be a discussion of its own. For a more detailed analysis, see, for example: https://www.refugeesinternational.org/reports/2019/6/3/wenbsphave-anbspstate-confronting-the-statelessness-of-the-rohingya-peoplenbsp and https://odihpn.org/magazine/statelessness-identity-rohingya-refugee-crisis/.
[17] Khoo, R. *Justice for the Rohingya: three roads to accountability*, 21 November, 2019, available at: https://voelkerrechtsblog.org/articles/justice-for-the-rohingya-three-roads-to-accountability/.
[18] Ware, A., & Laoutides, C. Complexities, Misconceptions, and Context, in *Myanmar's 'Rohingya' Conflict*, (Oxford University Press, 2018), p. 20-21.

other, sometimes together with another actor, but sometimes independently of another actor. This means there has been reported cases of armed Rohingya groups being violent towards the Rakhine or the Tatmadaw, as well as local Rakhine forces in conflict with the government security forces or Tatmadaw. While the Rohingya have been persecuted for a long time and has been mostly marginalized by the different actors, they have also used violent means to defend themselves against the crimes committed against them.[19]

One might attribute the start of the modern tension between the Rohingya and the Myanmar government to the 1982 Citizenship Law. This legal regime determines what groups are considered to be "national races" and therefore are entitled to citizenship and the rights belonging to the citizenship. There are 135 "national races" in Myanmar, but the Rohingya are amongst the groups whose members are not considered to be citizens. The mentioned law rendered a large part of the Myanmar population stateless.[20] Together with other laws often called "Protection of Race and Religion" laws, the Rohingya has been put under further harsh strict limitations when it comes to religious freedom, reproductive rights, marital rights[21] and ownership rights.[22] This systematic persecution over generations of Rohingya put the minority group in an already fragile state, when Buddhist nationalist together with the military began targeting the Rohingya Muslims through a hate campaign leading to an eruption of violence in 2012[23] when coordinated attacks against the minority began.[24] Phrases, such as: "The earth will not swallow a race to extinction but another race will," were spoken by the Ministry of Immigration and

[19] Ibid. 18, 20-21.
[20] Khoo, R., *Justice for the Rohingya: three roads to accountability*.
[21] Global Centre for the Responsibility to Protect, Myanmar (Burma), 15 November 2019, at https://www.globalr2p.org/countries/myanmar-burma/.
[22] Ware, A., & Laoutides, C. Complexities, Misconceptions, and Context, in *Myanmar's 'Rohingya' Conflict*, (Oxford University Press, 2018), p. 24.
[23] Human Rights Watch, *An open prison without end – Myanmar's Mass Detention of Rohingya in Rakhine State,* 4 October 2020, available at: https://www.hrw.org/report/2020/10/08/open-prison-without-end/myanmars-mass-detention-rohingya-rakhine-state, p. 1.
[24] Ibid. 2.

Population, and Rohingya identity cards were declared invalid and replaced with ID cards with more restrictions.[25]

2.2.1. Attacks

The previous oppression of the Rohingya, together with the mentioned 2012 attacks laid the groundwork for more organized military crackdowns.[26] In 2016, Myanmar security forces began "clearance operations" with the intention to clear out Muslim terrorists in the Rakhine State. These operations have been documented by the UN to, among other things, include mass murders, sexual violence, torture, burning of property and belongings.[27] Around a year later, a second wave of violence hit.[28] Members of the Tatmadaw burned hundreds of Rohingya villages, killed at least 10 000 Rohingya, raped women and children, according to the UN Fact Finding Mission.[29] The Tatmadaw targeted a larger geographical area in the northern Rakhine state, causing over 700 000 Rohingya to flee across the Myanmar border to Bangladesh.[30]

The Tatmadaw attacks were triggered as a response to coordinated armed attacks by the militant Muslim group ARSA. The attacks by this army were directed against thirty police posts and a military base. As a result, ARSA was declared terrorists by the government, causing the military to counterattack the Rohingya community, causing tremendous suffering and a massive refugee crisis.

The attacks by the military and government of Myanmar have been highly condemned internationally since the beginning of the conflict. Several reports have made allegations of genocide, ethnic cleansing and crimes

[25] Ibid. 1.
[26] Ibid. 3.
[27] Khoo, R., *Justice for the Rohingya: three roads to accountability*.
[28] Human Rights Watch, *An open prison without end,* 4 October 2020, p. 3.
[29] Amnesty International, *Let Us Speak For Our Rights: Human Rights Situation of Rohingya Refugees in Bangladesh*, 15 September 2020, available at: https://www.amnesty.org/en/documents/asa13/2884/2020/en/, p. 20.
[30] Human Rights Watch, *An open prison without end,* 4 October 2020, p. 3.

against humanity. As early as 2015, the media, global leaders, NGO's and academics have condemned the attacks against the Rohingya, declaring that the situation is nothing less than a genocide.[31] A UN report from 2017 found the actions taken by Tatmadaw military as "very likely commission of crimes against humanity."[32] Some other early condemnations include the United Nations Commissioner for Human Rights, Zeid bin Ra'ad alHussein stating already in 2017 that "Myanmar's treatment of the Rohingya appears to be a textbook example of ethnic cleansing",[33] Pope Francis condemning the "violent persecution of the Rohingya" and US Secretary of State at the time, Rex Tillerson, declaring that the situation clearly constituted ethnic cleansing. Zeid bin Ra'ad said that the violence in Rakhine State alongside Congo, Yemen and Syria was 'the most prolific slaughterhouses of humans in recent times'[34] and urged the UN to investigate the perpetrators of the violence against the Rohingya.

There has been an armed conflict in the Rakhine State since 2018, between the Tatmadaw and the AA.[35] The AA is an ethnic Rakhine group seeking autonomy and independence from Myanmar. Because of this armed conflict, Myanmar security forces have therefore isolated parts of the Rakhine state, limiting access to food and supplies, detaining civilians. Michelle Bachelet, the UN High Commissioner for Human Rights, as well as Amnesty International has stated that the attacks on civilians in Rakhine State could amount to war crimes and crimes against humanity.[36]

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[31] Ware, A., & Laoutides, C. Complexities, Misconceptions, and Context, in *Myanmar's 'Rohingya' Conflict*, (Oxford University Press, 2018), p. 8.
[32] UN Office of the High Commissioner for Human Rights (OHCHR), *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016* , 3 February 2017, available at: https://www.refworld.org/docid/5899cc374.html.
[33] Westcott & Smith, *Rohingya violence a 'textbook example of ethnic cleansing,' UN rights chief says,* CNN, 11 September 2017, available at: https://edition.cnn.com/2017/09/11/asia/rohingya-un-ethnic-cleansing/index.html.
[34] UN Office of the High Commissioner for Human Rights (OHCHR), *Opening Statement by Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights : Geneva,* 26 February 2018, available at: https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=22702&LangID=E.
[35] The Easter Link Team, *ARSA-ARAKAN ARMY Step Up Joint Operations*, The Eastern Link, 10 July 2020, available at: https://theeasternlink.com/arsa-arakan-army-step-up-joint-operations/.
[36] Human Rights Watch, *An open prison without end,* 4 October 2020.

2.2.2. Internment camps

The estimated 600 000 Rohingya who remain in Rakhine state are living under poor conditions, and many are displaced within their own territory. According to one estimation, 90 000 people are displaced in Rakhine State and neighboring Chin State due to the conflict.[37] The remaining members of the Rohingya have been severely restricted in their movement, persecuted by the government, cut off from access to food, health care, sanitation, employment and education. Somewhere between 100 000 and 130 000 Rohingyas have been confined to camps, like open air detention centers, since the beginning of the conflict.[38]

The confinement, segregation and persecution has been ongoing for eight years, without a legitimate rationale from the Myanmar government. What started as violent attacks, have turned into a system of oppression, over successive Myanmar governments, built to last.[39]

There has been significant international condemnation of the attacks against the Rohingya that possibly amount to war crimes and crimes against humanity as well as the current refugee crisis, but there has been less attention on the situation of the Rohingya who are left in Rakhine State, many of them detained by the government and Tatmadaw.[40]

2.3 Bangladesh

To fully understand the extremely difficult situation of the Rohingya as a group, it is important to also mention the conditions many of its members are currently living under in the neighboring county Bangladesh. After a

[37] Human Rights Watch, *An open prison without end,* 4 October 2020.
[38] Human Rights Watch, Tag: Rohingya, available at: https://www.hrw.org/tag/rohingya, and Global Centre for the Responsibility to Protect, Myanmar (Burma), 15 November 2019, and Human Rights Watch, *An open prison without end,* 4 October 2020, p. 2.
[39] Human Rights Watch, *An open prison without end,* 4 October 2020, p. 4.
[40] Ibid. 3.

mass exodus continuing throughout the years since the beginning of the conflict, it is now estimated that there are about 900 000 Rohingyas residing in Bangladeshi refugee camps.[41] More than 100 Rohingya refugees have been extrajudicially executed between August 2017 and July 2020, according to a Bangladeshi human rights organization.[42]

As late as December 2020, the Bangladeshi government has started to forcefully ship Rohingya refugees to Bashan Char, a remote island in the Bengal Bay. This action has also been condemned by the internationally community.[43]

[41] UNHCR Bangladesh, Operational Update External, 1-31 October 2020 (#57), 12 November 2020, available at: https://data2.unhcr.org/en/documents/details/82926 and Human Rights Watch, Tag: Rohingya.
[42] Amnesty International, *Let Us Speak For Our Rights: Human Rights Situation of Rohingya Refugees in Bangladesh*, p. 22.
[43] Amnesty International, *Bangladesh: Halt relocation of Rohingya refugees to remote island*, 3 December 2020, available at: https://www.amnesty.org/en/latest/news/2020/12/bangladesh-halt-relocation-of-rohingya-refugees-to-remote-island/ and Alam, Julhas, *Bangladesh begins relocation Rohingya refugees to island*, The Associated Press, 3 December 2020, available at; https://apnews.com/article/bangladesh-myanmar-united-nations-bay-of-bengal-de4d186a86919429733cfb4c9d88b897.

3 Responsibility to Protect (R2P) and international law

To understand how the situation of the Rohingya relates to the R2P principle and especially the role of the international community in assuming responsibility to protect the Rohingya minority from grave crime, I will in this chapter explain and clarify the principle. Additionally, I will explain the relationship between the R2P principle and legal principles of international law. While the R2P principle is by many considered be a political principle, it still is related to basic legal principles of international law as this chapter seeks to describe. As the analysis in this chapter will explain, the status of the R2P principle is contested and the principles can be contradicting in nature. The principles I will explain are state sovereignty and non-intervention, and how they relate to human rights. I argue that these principles are not only related to R2P, but can constrain the actions taken in the name of R2P.

3.1 Basic principles of international law

3.1.1. State sovereignty

The Westphalian concept of sovereignty, which will be developed further in this section, signifies the "legal identity of a state in international law" which provides not only stability, but also order and predictability in international relations.[44] Samantha Besson writes that sovereignty is "a pivotal principle of modern international law" underlying many other principles of international law. Since the principle of sovereignty is "law-based and hence defined and constructed through international law" it can

[44] ICISS Report, para. 2.7.

be somewhat difficult to determine how exactly the principle should be understood and applied in international law.[45] However, sovereignty should not be seen as simply a functional principle, but also "a recognition of their (states and peoples) equal worth and dignity, a protection of their unique identities and their national freedom, and an affirmation of their right to shape and determine their own destiny" as quoted from the ICISS report.[46]

The principle of state sovereignty is established in the UN Charter's Article 2.1. State sovereignty is an old concept in the history of law and has defined public international law for centuries. In broad terms, the principle means supreme authority within a territory[47] and it is related to the principle of equal sovereignty amongst states. Many scholars and authors have different opinions on what sovereignty means and how it should be defined. The more traditional approach is to distinguish between domestic sovereignty and legal international sovereignty.[48] Stephen Krasner defines sovereignty in two more ways. According to him:

> "domestic sovereignty refers to the organization of public authority within a state and to the level of the effective control exercised by those holding authority; "interdependence sovereignty", refers to the ability of public authorities to control transborder movements; and "international legal sovereignty" refers to the mutual recognition of states or other entities and Westphalian sovereignty, referring to the

[45] Besson, Samantha, Sovereignty, International Law and Democracy, *European Journal of International Law*, Volume 22, Issue 2, pp. 373-387, 2011, available at: https://doi.org/10.1093/ejil/chr029, para. 150.
[46] ICISS Report, para. 1.32.
[47] Besson, Samantha, Sovereignty, International Law and Democracy, para. 1.
[48] Fabri, Hélène Ruiz, "Human Rights and State Sovereignty: Have the Boundaries been Significantly Redrawn?" In *Human Rights, Intervention, and the Use of Force*, by Alston, Philip, and Euan Macdonald, eds, Oxford University Press, 2008. Oxford Scholarship Online, 2009, available at: https://oxford-universitypressscholarship-com.ludwig.lub.lu.se/view/10.1093/acprof:oso/97801995527101.0001/acprof-9780199552719-chapter-2.

> exclusion of external actors from domestic authority configurations."[49]

The principle of non-intervention will be further discussed in section 3.1.3, but will be briefly mentioned here in relation to the Westphalian sovereignty. The principle of non-intervention is closest to the Westphalian definition. Since the Westphalian sovereignty is violated when an external actor, voluntarily or coercively infiltrates or influences the domestic authority it is relevant when it comes to R2P. According to Krasner, the rule of non-intervention is always violated through coercion or imposition, and this is key to sovereign statehood.[50] In the ICISS report from 2001, sovereignty is discussed in a modern setting in relation to the principle of responsibility to protect. It is stated that the world at the time (2001) was "marked by overwhelming inequalities of power and resources" and its undeniable the world is facing the same problems today. It is evident that the conditions and terms under which sovereignty is exercised have changed since the concepts of sovereignty and intervention was introduced to international law. Since then, many new actors have emerged trying to define their own identity and authority, and at the same time, many new constraints of sovereignty have been introduced due to evolving international law. More is required today of a sovereign state, for example when it comes to human rights and the way a state treats their own people within its sovereign walls.[51]

The report identifies sovereignty as the best and sometimes only line of defense for many states. Krasner quotes Robert Jackson when underlining this inequality:

> "The *grundnorm* of such a political arrangement (sovereign statehood) is the basic prohibition against foreign intervention which simultaneously imposes a duty of forbearance and

[49] Krasner, Stephen D. *Sovereignty: Organized Hypocrisy*, Princeton University Press, 1999, p. 9.
[50] Krasner, Stephen D. *Sovereignty: Organized Hypocrisy* p. 20.
[51] ICISS Report, para. 1.33.

> confers a right of independence on all statesmen. Since states are profoundly unequal in power the rule of non-intervention is obviously far more constraining for powerful states and far more liberating for weak states".[52]

The development of international human rights obligations may compromise sovereignty. Some conventions on human rights pose limits on the rights of the sovereign and can be seen by some states as inconsistent with the Westphalian notion of sovereignty. In some cases, states have consented to the limits by agreeing to obligations, but in some cases, states become bound by the limits without agreeing. This is usually seen with human rights obligations in international customary law, when less powerful states become obliged to follow the rules without agreeing. Krasner points out that human rights is an example of a "long standing tension between autonomy and international attempts to regulate relations between rulers and ruled."[53]

3.1.2. Promotion of human rights

State sovereignty and human rights are tightly connected with each other. Sovereignty not only implies that the state has a certain authority as mentioned in the previous section, but also a responsibility. State sovereignty does not mean unlimited power for the state to act however it wants against the people within its jurisdiction.[54] The Commission behind the R2P report did not hear any claims contradicting this fact when it consulted the states worldwide. It should therefore be acknowledged, according to the ICISS, that there is in fact a responsibility for states to respect the dignity and basic rights of the people within their jurisdiction. Being recognized as sovereign state gives the state a right to protect its

[52] Krasner, Stephen D. *Sovereignty: Organized Hypocrisy* p. 21 and p. 25.
[53] Ibid. p. 126.
[54] ICISS Report, para. 1.35.

territory, but also a responsibility to internally protect the people who live within its jurisdiction. This responsibility entails safekeeping of the lives of their citizens and promotion of their welfare, but also be held responsible for actions taken against the people within the state. Sovereignty should be understood as embracing all parts of the concept, both respecting the sovereignty of other states, but also respecting its own people.

The state is responsible for respecting and protecting human rights and ensure that the human rights norms and rules are being upheld within its jurisdiction. The concept of human rights has grown as the discourse of both sovereignty, human rights and human security has evolved in international law.[55] An effective legitimate sovereign state who follows rules of international law will also draw benefit most from not only things like international trade, international relations and technology, but will also most likely respect human rights. States who are confident in their sovereignty and place in the world, who are able to rely on internal peace and a strong civilian society will more likely achieve a "cohesive and peaceful international system" when it comes to human security.[56]

It can be discussed whether state sovereignty is in tension with human rights or not. They are without a doubt connected, but scholars and authors have different opinions on this fact. Besson means that stating that the two are in tension could be misleading as "international sovereignty protects a collective entity of individuals—a people—and not individual human beings per se".[57] She means that sovereignty protects democratic autonomy, and this should be kept separate from international human rights. The autonomy of the state's external affairs is justified, but human rights are an internal, domestic issue. Besson makes the case that the tension between sovereignty and human rights are similar to the relationship between popular sovereignty and domestic human rights, only differing in the fact that one is international and one domestic. She therefore believes that the tension

[55] Ibid. para. 2.15.
[56] Ibid. para. 1.34.
[57] Besson, Samantha, Sovereignty, International Law and Democracy, para. 130.

between the two should be resolved in the domestic context where there is a mutual relationship between democracy and human rights.[58] The two cannot be disassociated or be seen as incompatible with the values they are meant to pursue.[59]

3.1.3. The principle of non-intervention

The principle of non-intervention was articulated in the 1760's by Wolff and Vattel: "To interfere in the government of another, in whatever way indeed that may be done is opposed to the natural liberty of nations in its actions",[60] Krasner writes that "weaker states have always been the strongest supporters of the rule of nonintervention." [61] While the principle has been challenged several times since it was introduced. In the latter part of the twentieth century the principle was commonly endorsed in international agreements and conventions. As mentioned earlier on, intervention violates the Westphalian sovereignty, but also the legal sovereignty. Intervention by invitation, when the national authority "voluntarily compromises the domestic autonomy of his or her own polity", violates only the Westphalian sovereignty. Krasner writes that "free choices are never inconsistent with international legal sovereignty".[62]

In short, a vital part of any state's sovereignty is the responsibility, or obligation to respect another state's sovereignty as well. This principle is established in Article 2.7 of the UN Charter: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." The mentioned chapter indicates the actions

[58] Ibid. para. 132.
[59] Ibid. para. 133.
[60] Quoted in Krasner, Stephen D. *Sovereignty: Organized Hypocrisy*, p. 21.
[61] Ibid. p. 121.
[62] Ibid. p. 22.

the UNSC may take if there is a threat to the peace, breaches of the peace or acts of aggression, including economic sanctions and the use of force. Within the territorial borders of a state, the State exercises exclusive and total jurisdiction and other states have the corresponding responsibility not to intervene in the internal affairs of the sovereign state. When or if this corresponding responsibility, or duty, is breached, such as an armed attack, the sovereign state has a right to defend itself against intervention in its domestic affairs.[63]

When there are human rights violations on a massive scale in a sovereign state, humanitarian intervention is an option for the UNSC. It should only be carried out as a last resort, and if the violation is of such character it can only be stopped by humanitarian intervention. Since it involves the use of force, only the UNSC can authorize or order the intervention provided they follow the regulations in chapter VII of the UN Charter, as mentioned earlier. It can be argued that when a state does not respect human rights within its territory and violates the responsibility to protect its own people, it forfeits the right to sovereignty in that sense. This because other states would then have the right to intervene, or now commonly replaced with the responsibility to protect. However, it is a challenge to find the balance between when the responsibility to protect kicks in, so to speak, versus the state sovereignty being upheld. At what point exactly does a violation trigger the right to intervene? Two principles, the principle of non-intervention and the responsibility to protect, seem to contradict each other and makes this balance difficult to determine.[64]

[63] ICISS Report, para. 2.8.
[64] Besson, Samantha, Sovereignty, International Law and Democracy, para. 136.

3.2 Implementing the R2P

Secretary-General Kofi Annan reflected upon "the prospects for human security and intervention in the next century" at the 54th session of the UN General Assembly in 1999. A year later he asked:

> "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?"[65]

The answer was found in the ICISS report "The Responsibility to Protect". In the report from 2001, the commission focused on a *responsibility*, rather than a *right* to protect. Further, the term *protection* would be used, instead of *intervention*. The term changed from "the right to intervene", to "responsibility to protect". While this change of not seem like a big difference, it created a practical structure of how it could be implemented changed the politics and conversation around the topic.[66] This conversation would eventually lead to the principle of R2P being endorsed at the 2005 World Summit, unanimously by the UN General Assembly.

It is also worth noting that at first, the 2005 World Summit did not accept this claim due to it deviating from UN Charter rules, but when it was agreed upon that UNSC authorization would be required, it made the provision more consistent with existing international rules. Initially, before the 2005 World Summit, the ICISS report mentioned there are possible alternatives to UNSC authorization. One alternative was authorizing regional organizations to intervene. The other was military support from the General Assembly in

[65] Kofi Annan presenting his Millennium Report "We The Peoples- The Role of the United Nations in the 21st Century" to the General Assembly, 2000. Quote also on p. 48 of the report available at: https://www.un.org/en/events/pastevents/we_the_peoples.shtml.
[66] Evans, Gareth, foreword in, Jacob, Cecilia, and Mennecke, Martin, *Implementing the Responsibility to Protect : A Future Agenda*. Global Politics and the Responsibility to Protect, Routledge, 2020, p. xix.

an Emergency Special Session under the "Uniting for Peace" procedures. These procedures were created with the intention to address the situation when the UNSC fails to exercise its responsibility to uphold international peace and security, because of the lack of unanimity of a permanent member.[67] It would provide a high degree of legitimacy for an intervention if the General Assembly would be in favor of military action with an overwhelming majority, and perhaps influence the UNSC to take action. In practice, it would be difficult to reach such a situation due to the two-thirds majority it would require reaching such a decision. In the political environment of the UN, it is unlikely.[68] However, returning to the 2005 World Summit Outcome, in paragraph 139 there was no indication that the international community had considered changing the rule that the UNSC must authorize the use of force regulated in Article 42 of the UN Charter, in Chapter VII. To the contrary, it states that:

> "The international community, through the United Nations, 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,**" **(Emphasis added).**

The principle is seen as built on three pillars, fully formulated in 2009, through a report by the UN Secretary General; Implementing the Responsibility to Protect.[69] The pillars are;

[67] ICISS Report, para. 6.29.
[68] Ibid. para. 6.30.
[69] UN General Assembly, *Implementing the responsibility to protect: report of the Secretary-General*, 12 January 2009, A/63/677.

> "The responsibility of a state to its own people not to either commit such mass atrocity crimes or allow them to occur (Pillar One); the responsibility of other states to assist those lacking the capacity to protect (Pillar Two); and the responsibility of the international community to respond with "timely and decisive action" – including ultimately with coercive military force if that is authorized by the security council – if a state is "manifestly failing" to meet its protection responsibilities (Pillar Three)."[70]

The co-chair of the ICISS Gareth Evans writes that the intention behind the R2P concept was to change the way policymakers were thinking and acting around mass atrocity crimes happening behind the protection of sovereignty walls. The concept was not meant to undermine old legal principles, or to create new ones, but rather to change habits of international response to crimes of this sort.[71]

It is important to remember that the ICISS report does not reflect all aspects of international law in force or opinions from the international community on R2P, but rather the view of the UN Secretary General. The document was well received by some, but also heavily critiqued by many. The most common critique was related to how large of a role the UNSC plays in the implementation of the principle. Because authorization from the UNSC is needed to intervene, many were afraid the veto power from the permanent members would make it difficult or even impossible to ever authorize the use of the principle.[72] Other important documents include the Secretary General's High-level Panel on Threats, Challenges and Change report titled "A more secure world: our shared responsibility" from 2004[73] and the UN

[70] Ibid.
[71] Ibid.
[72] Murthy, C.S.R. & Kurtz, Gerrit, International Responsibility as Solidarity: The Impact of the World Summit Negotiations on the R2P Trajectory, Global Society, 2016, 30:1, 38-53, available at: https://www.tandfonline.com/doi/full/10.1080/13600826.2015.1094451.
[73] UN General Assembly, *A more secure world: our shared responsibility Report of the High-level Panel on Threats, Challenges and Change*, 2 December 2004, A/59/565 available at: http://undocs.org/A/59/565.

Secretary General in Larger Freedom report[74], both published before the 2005 Summit. However, some points worth bringing up from the ICISS report include the basic principles of R2P, like state sovereignty and the notion of when a state is unwilling or unable to protect its people the principle of non-intervention yields to the international responsibility to protect. The report also includes what foundations the principle is based on, for example, the responsibility of the UNSC under Article 24 of the UN Charter and legal obligations under human rights and human protection declarations, covenants and treaties, international humanitarian law and national law. Two important points made in the report is the elements of the responsibility built on three steps:

A. "The responsibility to **prevent**: to address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk";
B. "The responsibility to **react**: to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecution, and in extreme cases military intervention"; and
C. "The responsibility to **rebuild**: to provide, particularly after a military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert."

Finally, the report also points out the order in which the responsibilities should be prioritized. Prevention is the most important dimension, and prevention options should always be exhausted before intervention is considered. Prevention and reaction should always involve less intrusive and coercive measures.[75]

[74] UN General Assembly, *In larger freedom : towards development, security and human rights for all: report of the Secretary-General*, 21 March 2005, A/59/2005, available at: http://undocs.org/A/59/2005.

[75] ICISS Report, p. XI.

In the academic literature, the question whether the principle has binding force or not is discussed. Some consider the principle to be customary international law, but this is not an established fact. Besson means that the "exact scope of its divergence from the current legal regime of humanitarian intervention also remains to be established." With this she also questions if the responsibility to protect implies a duty to intervene for other states and the international community.[76]

Since R2P was established, the norm has made progress in terms of its implementation. R2P have received strong international support and is mentioned in the most important decision-making circles, establishing the norm further in the international community. Several resolutions and presidential statements passed by the UNSC and other UN bodies have mentioned R2P and in 2017 and 2018 the General Assembly voted to make the principle a formal item on its agenda.[77]

Evans describes how the success or implementation of R2P has worked against four benchmarks: "Its role as a normative force, a catalyst for institutional change, and a framework for both prevention and effective reaction". According to Evans, normatively, R2P has become very accepted as a concept and almost completely displaced the previous concept of humanitarian intervention. He argues that the evidence for R2P being a political, if not legal, norm can be found in the debates and resolutions of the General Assembly since 2009. The mentioning and referencing to R2P is suggesting less dissent in relation to the 2005 resolution. Institutionally, the response to R2P has changed drastically, with over fifty states and intergovernmental organizations hiring officials working with the implementation of R2P.[78] Together with, for example, civilian response capability, military strategies adapting to R2P and doctrine changes, the

[76] Besson, Samantha, Sovereignty, International Law and Democracy, para. 137.
[77] Jacob, Cecilia, and Mennecke, Martin, *Implementing the Responsibility to Protect : A Future Agenda*. Global Politics and the Responsibility to Protect, Routledge, 2020, p. 1.
[78] Evans in ibid. xix.

principle and implementation can be seen institutionally. Preventively, the principle of R2P has had success in some cases, stopping reoccurrence of conflict in West African cases of Sierra Leone, Guinea, Liberia and Côte d'Ivoire, Kyrgyzstan after 2010 and Kenya in 2008. Finally, reactively, Evans means that the record has been mixed, with some successes as previously mentioned, but also serious failures. Failures include Syria, Sri Lanka, and most recently the case of Myanmar.[79]

While the discussion and references to R2P have grown and evolved, so have the violent conflicts subjecting people to mass atrocity crimes and horrible suffering. In 2015, the highest level of violent conflict and fatalities since the Cold War was recorded.[80] Jacob and Mennecke means that this is the paradox of R2P implementation. They write that the international community is having a hard time translating the "normative commitments on human protection into tangible delivery on its core responsibilities to uphold human rights and protect civilians from mass atrocities."[81]

3.3 Is R2P a legal principle?

There is a serious debate in the international community, including among scholars, academics and officials whether R2P could or should be considered a legal obligation or legal principle or not. Some academics and policy advisers have argued that R2P should be seen as a legal norm that "provides a basis for coercive interference in domestic affairs of states that are unable or unwilling to protect their populations from genocide or mass atrocities." Alicia Bannon means that "the Summit agreement strengthens the legal justification for limited forms of unilateral and regional action-including military action-if the United Nations fails to act to protect

[79] Ibid. xx.
[80] Ibid. (quoting Melander, Petterson and Themner, 2016) p. 1.
[81] Ibid. p. 1.

populations from genocide and other atrocities."[82] Stephen John Stedman argues that Kofi Annan's agenda and R2P, "a new norm, the responsibility to protect, to legalize humanitarian intervention;"[83]

One author argues that to see R2P as a legal principle can be problematic. José Alvarez writes that many international lawyers worship at the shrine of the Articles of State Responsibility for Internationally Wrongful Acts (ARSIWA).[84] These articles, adopted by the International Law Commission (ILC) in 2001, create a framework of rules on state responsibility. The rules basically establish that a state is responsible when it commits an internationally wrongful act (Art. 1). Further, the articles describe what should be considered a wrongful act, and to whom the wrongful act can be attributed (Art. 2).[85] Alvarez means that according to these rules, all international legal persons therefore are legally responsible not only when they commit a wrongful act, but also when they fail to act when actions are demanded by international law.[86] He continues by asking if there is such a thing as a responsibility to protect. In that case, the legal mind assumes that not assuming this responsibility to act is itself an internationally wrongful act. It demands legal liability not only from the legal person that committed the wrongful act, but also from other legal persons that are not reacting to the wrongful act.[87]

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[82] Bannon, Alicia L., *The Responsibility To Protect: The U.N. World Summit and the Question of Unilateralism*, 115 Yale Law Journal, 2006. Available at: https://digitalcommons.law.yale.edu/ylj/vol115/iss5/6, p. 1158.
[83] Stedman, Stephen John, UN transformation in an era of soft balancing, *International Affairs*, Volume 83, Issue 5, September 2007, available at: https://doi.org/10.1111/j.1468-2346.2007.00663.x, p. 933.
[84] Alvarez, Jose E., The Schizophrenias of R2P, in Alston, Philip, and Euan MacDonald, *Human Rights, Intervention, and the Use of Force,* Oxford University Press, 2008, available at: https://search.ebscohost.com/login.aspx?direct=true&db=cat07147a&AN=lub.5752295&site=eds-live&scope=site, p. 281.
[85] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: https://www.refworld.org/docid/3ddb8f804.html, Art. 1-2.
[86] Alvarez, Jose E., The Schizophrenias of R2P, p. 281-282.
[87] Ibid. p. 282.

Alvarez claims that R2P has helped to inspire ILC experts who drafted the provisions on legal responsibility for international organizations. Organizations like the UN or other local organizations should according to these provisions and R2P therefore possibly be responsible for remaining passive to mass atrocity crimes. Some provisions from the ILC suggest that the UN should have been legally responsible for the genocide in Rwanda. Alvarez however means this claim is "absolutely premature and not likely to be affirmed by state practice". He means there are "innumerable, obvious difficulties" with trying to establish R2P as a legal norm in this way. If the aim is to find the UN responsible, what does that mean? Is it the organization as a whole, with all its members? Only the members of the UNSC? Or perhaps only the P-5 whose votes were the most essential when deciding whether to intervene or not?[88] According to Alvarez, using R2P as a legal responsibility of the UN compromises the idea of legal responsibility of states. He describes the problem with states being absolved from their responsibilities when they act in unison by abusing the laws just because they act collectively.[89] Finally, he means that there is too much difficulty in practice to bring about this doctrinal change of the principle. In particular, it would not be possible to overcome the political negotiations it would require overcoming the difficulties.

Susan Breau holds a similar view when it comes to the unclarities that exist in the legal doctrine. She writes that mandatory language is nowhere to be found in paragraphs 138 and 139 of the World Summit Outcome dedicated to "Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity".[90] For example, the document mentions that R2P is to be exercised on a "case-to-case basis", resulting in an unclear legal doctrine according to Breau. On the other hand, she believes that the resolution does establish the principle unequivocally, i.e.,

[88] Ibid.
[89] Ibid. p. 283.
[90] UN General Assembly, *2005 World Summit Outcome: resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, available at: https://www.refworld.org/docid/44168a910.html, para. 138-139.

that there is responsibility for the international community. She means that the proclamation of this principle in this document opens up for the opportunity for clarification by practice. Indeed, this has already happened to some extent, by changing how the UN system works, for example by abolishing the Human Rights Commission and replacing it with the Human Rights Council to improve the international supervision of human rights protection by states around the world.[91]

While R2P is not a legal principle, it is not devoid of legal character. R2P can perhaps be seen as soft law, that is defined and influenced by existing legal principles. Also, some parts of the principle can be seen as legal rather than political in character.[92] Some measures relating to the pillar concerning prevention have been recognized in the UN Charter, including mediation, arbitration and adjudication (Article 33). While mediation is a political measure, the other two are legal measures for conflict resolution. However, both types of measures heavily rely on the willingness of both parties of the conflict or dispute accepting that they will be used. The measures can be difficult to apply when one party does not agree or if the state has not given its consent since it contradicts state sovereignty.[93]

The reactive measures of R2P, relate mostly to military intervention. In the ICISS report there are six criteria for when a military intervention can be authorized. However, these criteria are debated in politics and academic literature.[94] The six criteria that the ICISS report mentions as being important to meet when making a decision about a military intervention are: right authority, just cause, right intention, last resort, proportional means and reasonable prospects.[95] These criteria are closely tied with basic legal principles of non-intervention and state sovereignty. While these criteria and

[91] Breau, Susan Carolyn, *The responsibility to protect in international law: an emerging paradigm shift*, Routledge, 2016, p. 25.
[92] Halt, Brad, The Legal Character of R2P and the UN Charter, E-International Relations, 8 August 2012, available at: https://www.e-ir.info/pdf/25163.
[93] ICISS Report, para. 3.28.
[94] Ibid. para. 4.14.
[95] Ibid. para. 4.15.

principles are in line of the basic function of law, to constrain, in this case, military intervention. R2P is on the other hand a way of mandating this type of action. The functions of the principles are contrasting, as one side constrains, and one side mandates. Rebuilding efforts is the final phase of the R2P principle, is also closely tied with the basic function of law, in this case constraining action but also respecting state consent to receive and accept international peacebuilding efforts. This can be seen as a reinforcement of state sovereignty. R2P is heavily focused on this final step of the process, and law imposes certain conditions to be met in order for the peacebuilding efforts to be taken.

4 Legal avenues, tools and judicial actors of R2P

Following a discussion of the meaning and nature of R2P and how this principle relates to established legal principles of international law, this chapter focuses on the question of the avenues and actors for implementing the goals of this principle. I will first briefly look at political mechanisms and actors. Then I will look at legal avenues and judicial organs that the international community may use to assume its responsibility to protect when states are unable or unwilling to protect their own populations.

4.1 Political measures and actors

When R2P was established the UNSC was considered to be the best and most appropriate organ to enforce the goal of protecting populations from mass atrocity crimes. The UNSC has the unique authority to launch a militarily intervention for human protection purposes, which correlates with the third pillar of R2P. According to the ICISS report, the task or goal should not be to find alternative authorities to the UNSC, but rather to strengthen this organ and make it better equipped to work with R2P.[96]

However, the UNSC has repeatedly been criticized for its lack of action, and for not using R2P in its work. As the ICISS report mentions and as discussed in section 3.2 of this thesis, if the UNSC fails to use its responsibility to protect, "concerned states may not rule out other means to meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby."[97]

[96] ICISS Report, p. XII.
[97] ICISS Report, p. XIII.

4.1.1 The UNSC and Libya

There is one instance where R2P was invoked by the UNSC to justify the use of force to protect people from mass atrocity crimes: the humanitarian intervention in Libya in 2011. It is be considered as the first "full-blown test" of the R2P.[98] During what is called the Arab Spring in 2011, many uprisings erupted across the Arab world. In Libya, Gaddafi deployed forces that carried out a massacre in Benghazi. The international community turned its attention to Libya and demanded action. The UNSC therefore authorized an armed intervention to protect the civilians of Libya. The intervention was largely led by NATO. This was the first time the UNSC actually invoked the principles of R2P to authorize a humanitarian intervention. Previously, R2P had only been invoked to point out individual state responsibility to protect.[99]

While the UNSC reacted in this case, the intervention has been criticized. The intervention appeared as a textbook case of how the UNSC should intervene according to the R2P principle, but many factors complicated the intervention and the desired effect of the intervention. Claims have been made that the nature of the intervention, the lack of support after the intervention and then the lack of action by the UNSC in Syria led to the "death knell" for the R2P principle.[100] The intervention failed to meet several of the criteria for military intervention, the principles of just cause, right intention, last resort and last, the three responsibilities to prevent, react and rebuild. Because of this, Giselle Lopez means that the problems of R2P were highlighted "as it does not explicitly account for the role of political interests in humanitarian interventions and their implications for the

[98] International: The lessons of Libya: responsibility to protect, *The Economist, Vol. 399, Iss. 8734, pp. 67-68,* 21 May 2011, available at: https://www.economist.com/international/2011/05/19/the-lessons-of-libya.
[99] Kuperman, Alan. J., A Model Humanitarian Intervention? *International Security*, *38*(1), pp. 105–136. https://doi-org.proxy.library.ucsb.edu:9443/10.1162/ISEC_a_00126, p. 105.
[100] Lopez, Giselle, "Responsibility to Protect at a Crossroads: The Crisis in Libya", in Chase, Anthony, (ed.), *Transatlantic Perspectives on Diplomacy and Diversity* (New York: Humanity in Action Press, 2015), available at: https://www.humanityinaction.org/knowledge_detail/responsibility-to-protect-at-a-crossroads-the-crisis-in-libya/, pp. 119–138.

inconsistent application of decisions to intervene, the nature of the military operations and support for the postwar transition."[101] David Rieff holds a similar opinion, namely that the intervention was not used as a last resort and that NATO played a too big part in the intervention. As he put it:

> "When R2P supporters advocated the doctrine before the UN in the middle of the last decade, they emphasized its nonmilitary aspects and insisted that the use of force would be a rare last resort. Yet in Libya force almost immediately followed the ultimatums issued to Qaddafi; for all intents and purposes, R2P was NATO-ized. As a result, everywhere outside Western Europe and North America, R2P is losing what little ethical credibility it ever commanded."[102]

The intervention in Libya showed that the UNSC, regional organizations and individual states were able to react with unprecedented efficiency but failed to show that the same actors could fulfill the need for rebuilding efforts. Gareth Evans points out that the prevent and rebuilding dimensions of the principle

> "have been much neglected in the traditional humanitarian intervention debate, and bringing them back to center stage, to rank in priority alongside reaction, makes reaction itself… more palatable."[103]

Lopez points out that the intervention by the UNSC was unprecedented and gave R2P a new meaning. Even though the intervention was criticized and was lacking in some respects, many claim thousands more civilians would

[101] Ibid.
[102] Rieff, David, R2P, RIP, New York Times, 7 November 2011, available at: https://www.nytimes.com/2011/11/08/opinion/r2p-rip.html.
[103] Evans, Gareth. "The Responsibility to Protect: Rethinking Humanitarian Intervention." *Proceedings of the Annual Meeting (American Society of International Law)* 98, 2004, pp. 78-89, available at: http://www.jstor.org/stable/25659900, p. 83.

have been killed if it had not been for the intervention.[104] Lopez further means that the use of R2P has turned into "the responsibility to react" rather than its three-fold responsibility to also prevent and rebuild. She means that the other two elements have been diminished and that in order for R2P to work in a conflict, the state needs a post-conflict transition.[105]

4.2 Multiplication of actors

New actors play an important part in the implementation of R2P and the goal of protecting populations from mass atrocity crimes in situations where their governments fail to protect them. These actors bring a valuable contribution to the international community in terms of experiences, opinions and perspectives. Compared to when the UN and the UNSC was founded, or even compared to when the concept of R2P was introduced to the international community, there are many new states in the international arena. From 51 UN members in 1945, to 193 in 2020, and several more states are participating in the drafting and adoption of various resolutions referring to the R2P.[106]

In the area of human rights and human security, there is significant growth in the number of actors and mechanisms since R2P was proclaimed in 2005. Some examples include international courts like the ICC and specialist tribunals, mentioned in previous chapters, and the Office of the United Nations High Commissioner for Human Rights (OHCHR).[107] There have been many new non-state actors emerging, like NGOs, media institutions, and academic institutions.[108] Additionally, some already established institutions have grown and become more active over the years, like International Federation of Red Cross and Red Crescent Societies, the High

[104] Lopez, Giselle, "Responsibility to Protect at a Crossroads: The Crisis in Libya".
[105] Ibid.
[106] ICISS Report, para. 1.13.
[107] Ibid. para. 1.14.
[108] Ibid. para. 1.15.

Commissioner for Refugees and the ICRC.[109] They all have an important purpose to fill when it comes to investigating grave crimes, educating and pushing leaders and states to take their responsibility in situations like the one the Rohingya are facing. Not to forget are national and international terror groups, rebel movements and various other armed non-state actors.[110]

The growth of these types of actors and the growth of intra-state conflicts force the international community to deal with more situations where R2P might be applicable. What used to be international armed conflicts have since the end of the Cold War, mostly shifted into non-international, intra-state armed conflicts, multiplying in the 1960's. Some estimates show that roughly 90% of conflict casualties in the wars of the early 20th century, were combatants. At the end of the century, these casualties were nearly 90% civilians.[111] This process was given momentum partly by the collapse of colonialism and created modern conflicts such as "state-based conflicts," "non-state-based armed conflicts" and "one-sided violence."[112] The intra-state conflicts and the rise of non-state armed actors have pressured the international community to step up further, to protect populations, and especially civilians being harmed in internal conflicts where a state itself is unable or unwilling to protect them. This development reinvigorates the debate about humanitarian intervention, or the responsibility to protect.[113]

A challenge resulting from the multiplication of actors, including the introduction of new actors, is to create consistent international responses. Media attention on various conflicts depend on interests from the international community. While some conflicts receive massive media

[109] Ibid. para. 1.14.
[110] Ibid. para. 1.15.
[111] Wood, R., Intrastate Conflict and Civilian Victimization, Oxford Research Encyclopedia of Politics. Ed, 2016, available at: https://doi.org/10.1093/acrefore/9780190228637.013.29, summary.
[112] Bosetti, L. and von Einsiedel, S., Intrastate-Based Armed Conflicts: Overview of gloval and regional trends (1990-2013), United Nations University Centre for Policy Research, February 2015, available at: https://cpr.unu.edu/intrastate-based-armed-conflicts-overview-of-global-and-regional-trends-1990-2013.html, p. 2.
[113] ICISS Report, para. 1.15.

attention, some are quickly forgotten or neglected. The international community will be affected by how the conflict is portrayed and covered in media, and will possibly act differently depending on the degree of media attention a particular situation attains. On the other hand, it is difficult to remain consistent and make fair judgments about what situations warrant international responses, when the conflicts are not only many in number, but also of such different character.[114]

4.3 Legal avenues, tools and judicial actors

Imposing criminal sanctions for atrocity crimes has become a relatively significant tool for the international community when reacting to atrocity crimes in conflict and post-conflict situations. Such sanctions are seen as having preventive effect. Threatening to, or applying, criminal sanctions against a potential perpetrator of atrocity crimes, could potentially deter them from committing the crime, if the perpetrator fears the risks of the sanctions being applied. They can also be used to give reparations to the victims of these crimes.

The state is always responsible for investigating and prosecuting atrocity crimes taking place within its jurisdiction. There is a default responsibility to protect the people in the state. However, it is argued in the ICISS report that there is a residual responsibility for the broader community of states. The responsibility should be activated when a state is unable or unwilling to take its responsibility to protect its people. It can also be activated when the state itself is the perpetrator of the crimes, like Myanmar is. When the situation arises, the community of states must support the populations under threat.[115]

[114] Ibid. para. 1.15.
[115] Ibid. para. 2.31.

In situations where the state is unable or unwilling to protect its populations, including by imposing criminal sanctions for atrocity crimes, according to R2P, the international community should assume its responsibility to protect. This has been done in different ways. Great examples of the use of criminal sanctions by the international community are the international criminal tribunals handling war crimes and other atrocity crimes after a specific conflict, like the conflicts in former Yugoslavia, Rwanda and Sierra Leone.[116] Another important example is the ICC which is a permanent international court with jurisdiction over atrocity crimes (genocide, war crimes and crimes against humanity).

The ICJ should be mentioned as a judicial organ with jurisdiction in situations involving mass atrocity crimes. While the court does not have criminal jurisdiction, it settles disputes between states that concern the commission of violations of international human rights and humanitarian law, including the Genocide Convention for the Prevention and Punishment of Genocide (1948). In this context, it will be engaged in situations involving grave crimes as well as oblige states to prosecute atrocity crimes, such as genocide, if they have failed to do so.

Another group of judicial actors that can step in are foreign national courts, exercising universal jurisdiction in relation to atrocity crimes. This avenue is established in the Geneva Conventions and their Additional Protocols, the UN Convention Against Torture (CAT) and other international legal instruments.[117] Relevant to this thesis is the role that Argentina has incorporated the principle of universal jurisdiction into its domestic law.[118]

[116] Ibid. para. 3.29.
[117] ICRC, Customary IHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter44_rule157.
[118] Khin, Tun, Universal Jurisdiction, the International Criminal Court, and the Rohingya Genocide, Opinio Juris, 23 November 2020, available at: https://opiniojuris.org/2020/10/23/universal-jurisdiction-the-international-criminal-court-and-the-rohingya-genocide/.

Universal jurisdiction refers to the idea that a national court can prosecute individuals who committed serious crimes against international law, crimes that harm the international community even if the crimes were not committed on the territory of the state (territorial jurisdiction) and even if there is no other special connection between the crimes and the state exercising jurisdiction, such as the nationality of the perpetrator or the victim. Any person accused of crime grave enough to be seen as crimes that come within universal jurisdiction, like genocide and crimes against humanity.[119] The crimes in question must be seen as grave enough to be seen as a matter of international public interest, justifying or requiring all states to act.[120] The jurisdiction is generally applied when other bases for exercising criminal jurisdiction, such as territorial jurisdiction, fails.[121] To exercise universal jurisdiction, the nationality of the perpetrator or victim, or the place where the crime was committed does not matter.[122]

Universal jurisdiction is recognized under customary international law and many countries have given their own national courts this jurisdiction to handle cases involving atrocity crimes.[123] There are two different types of universal jurisdiction, mandatory and permissive. The mandatory universal jurisdiction implies that states are obliged to investigate, and permissive means states have a choice to investigate or not. Legislative universal jurisdiction means that national law will be enacted, and adjudicative universal jurisdiction handles the actual investigation and trial of the alleged offender.[124]

Since World War II more than 15 countries have used universal jurisdiction to investigate and prosecute grave crimes. For the purpose of this thesis, worth noting is that Argentina has invoked the principle previously, when

[119] ICISS Report, para. 3.31.
[120] ICRC, Universal jurisdiction over war crimes, 03/2020, available at: https://www.icrc.org/en/document/universal-jurisdiction-over-war-crimes-factsheet.
[121] IJRC, Webpage, Universal Jurisdiction, available at: https://ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/.
[122] ICRC, Universal jurisdiction over war crimes, 03/2020.
[123] ICISS Report, para. 3.31.
[124] ICRC, Universal jurisdiction over war crimes, 03/2020.

trying cases related to Franco-era crimes in Spain and Falun Gong in China.[125] There have been a few universal jurisdiction cases that have attracted attention, for example the General Pinochet extradition case in the UK to Spain and the conviction in a Belgian court with Rwandan nuns.[126]

4.4 Relationship between R2P and ICC

The ICJ and national courts are important actors in terms of implementing R2P, but I believe the establishment of the ICC through the 1998 Rome Statute, is an especially important legal mechanism for implementing the R2P. Compared to the Nuremberg Tribunal, the ICC is welcomed as a measure to avoid "victor's justice". The ICC has jurisdiction over a wide range of crimes, such as war crimes, mass atrocity crimes and crimes against humanity, but the court also gives greater details on what the crimes entail. Some crimes, like the prohibition on the enlistment of child soldiers have been introduced for the first time in the Rome Statute.[127]

While they are not formally linked, the ICC and the R2P have mutual goals and purposes.[128] They can be viewed as two sides of the same coin, with similar tasks to perform. They were also developed at around the same time, both wanting to prevent atrocity crimes after the international community had failed to do so. The two are both born out of a perspective of liberal cosmopolitism but have different ways of achieving the objective of protecting the individual's rights. The ICC upholds individual accountability, while R2P focuses on state responsibility. Both of the mechanisms are triggered when a state "is 'unable or unwilling' (in the case of the ICC) or 'manifestly failing' (in the case of R2P)". Together, they are

[125] Khin, Tun, Universal Jurisdiction, the International Criminal Court, and the Rohingya Genocide.
[126] ICISS Report, para. 1.26.
[127] Ibid. para. 3.30.
[128] Ainley, K, The Responsibility to Protect and the International Criminal Court: counteracting the crisis, International Affairs, 91: 37-54, 2015, available at: https://doi.org/10.1111/1468-2346.12185, p. 37.

meant to "temper international politics and to end impunity".[129] With the drafting of the ICISS report in 2001, and the entering into force of the 1998 Rome Statute in 2002, the discourse around the responsibility of the international community started to challenge international politics based on state sovereignty.[130]

The ICC and the R2P norm in general face a difficult challenge to circumvent state power in order to protect populations within state territory and have been criticized for the lack of achievement in terms of actually helping civilians targeted in civil wars. Such are the situations in Sri Lanka and Syria, where hundreds of thousands of non-combatants have been killed in civil war in the last decade or so. According to Ainley, while the support for R2P and ICC has grown gradually throughout the years, the UNSC and its members of "have failed to bring about meaningful action either to protect those under threat or to prosecute those who have committed atrocities." Ainley further means that the ICC and R2P is in a crisis "and the failure of the international community to act according to their principles in the face of suffering on such a scale suggests that they are, at best, in need of substantial reform."[131]

While the ICC and R2P have similar goals they are working towards, they have significant differences when it comes to their working mechanisms. The nature of their identities also varies. The ICC have a more legal or judicial nature, while the principle of R2P is more political. The R2P norm has a more preventative role, and the ICC is a more of a punishing mechanism.[132]

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[129] Saba, A. & Akbarzadeh, S., The ICC and R2P: Complementary or Contradictory?, International Peacekeeping, 2020, available at: DOI: 10.1080/13533312.2020.1740057.
[130] Ainley, K, The Responsibility to Protect and the International Criminal Court: counteracting the crisis, p. 37.
[131] Ainley, K, The Responsibility to Protect and the International Criminal Court: counteracting the crisis, p. 38.
[132] Saba, A. & Akbarzadeh, S., The ICC and R2P: Complementary or Contradictory?

Officials from the UN and the ICC often call for more interaction between the ICC and R2P, because of their mutual goals. If the ICC can use the R2P toolkit, both of them could evolve and prevent mass atrocity crimes. Through greater interaction, they could reinforce each other. Ban Ki-moon, the former UN Secretary-General, often talked about the complementary nature of the two, and believed the ICC to be "an essential tool for implementing the responsibility to protect".[133] ICC officials agree with the Secretary General. Chief Prosecutor Fatou Bensouda means that as the

> "legal arm of the responsibility to protect … the Court should be seen as a tool in the R2P toolbox – strengthening the correlation and the interaction between both is what I think we should be concerned more with in order to maximize effectively the protection which we will give to civilians".[134]

Some argue that the ICC should increase its interaction with the non-military measures of R2P and not engage with the third pillar of R2P.[135]

[133] UN General Assembly, *Implementing the responsibility to protect : report of the Secretary-General*, 12 January 2009, A/63/677, p. 29.
[134] Adams, Simon, The Responsibility to protect at 10, E- International Relations, 29 March 2015, available at: https://www.globalr2p.org/publications/the-responsibility-to-protect-at-10/ and Saba, A. & Akbarzadeh, S., The ICC and R2P: Complementary or Contradictory?
[135] Like the critique of the UNSCs action in Libya.

5 Rohingya case in the courts

5.1 Current legal proceedings

There are a few current legal actions being taken against the mass atrocity crimes allegedly committed against the Rohingya in Myanmar. They are all trying to determine the responsibility for the crimes committed against the Rohingya. The crimes have been identified by the Independent International Fact-Finding Mission on Myanmar (IIFFMM or FFM hereafter), mandated by the OHCHR, as well as other fact-finding missions. The ongoing legal proceedings are currently: (1) the ICJ, (2) the ICC and (3) the criminal courts in Argentina. This chapter will provide an account of the court cases.

5.2 International Court of Justice

5.2.1. Background

The ICJ is the judicial organ of the UN and was established in 1945. It settles legal disputes between states and provides advisory opinions on legal matters. It does not conduct criminal investigations or prosecutions, but the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") through Article IX provides the ICJ with jurisdiction to handle matters of interpretation, application and fulfillment of the Genocide Convention, including questions of responsibility.[136]

With respect to the case The Gambia v. Myanmar it is important to know that both countries have ratified the mentioned Convention, which means

[136] USCIRF, Lavery, Kirsten & Atkins, Harrison, The Path Towards Justice: Accountability for International Crimes Against the Rohingya of Burma, available at: https://www.uscirf.gov/sites/default/files/2020%20Factsheet%20-%20Burma_0.pdf.

both countries have an obligation to not only prevent, but also punish genocide. While Myanmar have lodged reservations to Article VI and VIII of the Convention, but not Article IX as mentioned above, as parties to the Convention, both countries are obliged to follow the Convention, including Article IX, mentioning that any disputes between states parties to the Genocide Convention shall be resolved by the ICJ.[137]

5.2.2. The initiation of the proceedings

The Gambia initiated legal proceedings against Myanmar on November 11th, 2019, alleging that Myanmar is violating the Genocide Convention. The Gambia used the findings of the FFM to base its claim that Myanmar is committing, failing to prevent and failing to punish genocide. Additionally, the lawsuit alleges that Myanmar is failing to pass domestic legislation to enact the Genocide Convention.[138] The case was brought to the court by only the Gambia, even though the other 56 members of the Organization of Islamic Cooperation (OIC) supported the submission. The Maldives have recently declared it would join the Gambia in the lawsuit, and Canada and the Netherlands have in a joint statement expressed their intention to intervene in the case.[139]

The Gambia filed the case under Article IX of the Genocide Convention that states that any state party to the Convention may bring a case before the ICJ.[140] The Gambia is not only a state party to the Convention but has a personal connection to the case. The Justice Minister Abubacarr Tambadou spent over a decade prosecuting cases after the Rwandan genocide, and saw

[137] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order, 23 January 2020, p. 6.
[138] USCIRF, Lavery, Kirsten & Atkins, Harrison, The Path Towards Justice: Accountability for International Crimes Against the Rohingya of Burma.
[139] Kawser, Ahmed, Incidental Proceedings Likely to Follow in the Gambia v. Myanmar, Opinio Juris, 16 October 2020, available at: https://opiniojuris.org/2020/10/16/incidental-proceedings-likely-to-follow-in-the-gambia-v-myanmar/.
[140] USCIRF, Lavery, Kirsten & Atkins, Harrison, The Path Towards Justice: Accountability for International Crimes Against the Rohingya of Burma.

similarities in the situation for Rohingya refugees in Cox's Bazar in Bangladesh.[141]

The lawsuit includes several charges and might take years to properly be handled in the ICJ, and therefore, since the situation is ongoing, the Gambia requested the ICJ to rule on provisional measures.

5.2.3. Decision on provisional measures

On 23 January 2020, around two months after the initiation of the proceedings, the ICJ ordered provisional measures in the case of the Gambia v. Myanmar. The order meant that the Gambia had sufficiently showed that the ICJ had authority and had *prima facie* jurisdiction to adjudicate the dispute and order provisional measures as well as "there is a real and imminent risk of irreparable prejudice to the rights of the Rohingya." As prima facie evidence, the ICJ considered the FFM report as previously mentioned, as well as reviewed the countries' arguments and determined that provisional measures were justified.[142]

The Myanmar legal team argued that the ICJ has no jurisdiction in the case, because of Myanmar's reservations made against Articles VI and VIII of the Genocide Convention. Myanmar also made the argument that the Gambia is not affected *per se* by the Rohingya situation, and that the Gambia has been put up to the claim by the OIC. Moreover, the ICJ had never tried a case on the exact same legal basis, where the claim is made from a state not only distant from the conflict, but also geographically very distant, and the claim was made solely on the grounds that the state itself had an obligation owed under the Genocide Convention *erga omnes partes.*

[141] Ross, Aron, With Memories of Rwanda: The Gambian minister taking on Suu Kyi, 5 December 2019, available at: https://www.reuters.com/article/us-myanmar-rohingya-world-court-gambia/with-memories-of-rwanda-the-gambian-minister-taking-on-suu-kyi-idUSKBN1Y91HA and USCIRF, Lavery, Kirsten & Atkins, Harrison, The Path Towards Justice: Accountability for International Crimes Against the Rohingya of Burma.
[142] Ibid. and ICJ, Order, 23 January 2020.

The Myanmar argument was however dismissed by the Court which held that the Gambia has indeed legal standing. In support of its finding, the Court referred to its judgment in the Belgium v. Senegal case[143], even though this case was under a separate treaty (CAT) and not the Genocide Convention.[144] In the Belgium v. Senegal case, Belgium also asserted that it was specifically affected and injured by the case.

Two other relevant cases brought before the ICJ on similar terms are the Bosnian Genocide case (Bosnia v. Serbia and Montenegro) and Croatia v. Serbia. In both these cases, where the parties were neighboring countries, as they shared physical borders and a history of conflict. This seemed to support the argument made by Myanmar. However, it was found by the ICJ that the Gambia, even though it is not party to the actual conflict of dispute, was allowed to initiate a legal proceeding.[145] In the words of the court:

> "It follows that *any State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party* with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end."[146]

Shannon Raj Singh writes in an Opinio Juris article that the ICJ brought a former technical term of art to life by using and clarifying the concept of *erga omnes partes*. With this case, it is held that even a distant, "unaffected" state party may raise a claim, taking the concept to "its logical extreme". According to Raj Singh this indicated that obligations arising under the

[143] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, p. 422.
[144] Raj Singh, Shannon, Standing on "Shared Values": The ICJ's Myanmar Decision and its Implications for Atrocity Prevention, Opinio Juris, 29 January 2020, available at: http://opiniojuris.org/2020/01/29/standing-on-shared-values-the-icjs-myanmar-decision-and-its-implications-for-atrocity-prevention/.
[145] Raj Singh, Shannon, Standing on "Shared Values".
[146] Ibid.

Genocide Convention allows a both geographically, but also from an interest perspective, distant country to assert genocide.[147] This argument is supported by the Court's own words that all parties to the Convention have a "common interest" in preventing genocide, and that any state party can bring suit over the failure to live up to the Convention.[148]

The Gambia asked for six provisional measures in its application and at the hearings. These measures are meant to prevent any further harm during the pending litigations.[149] The ICJ accepted all but two of these measures. According to its order, granted unanimously by the ICJ, Myanmar must:

> "-refrain from acts of genocide against the Rohingya;
> -ensure that the military and other groups subject to its control refrain from genocide or related acts;
> -prevent the destruction and ensure the preservation of evidence related to the alleged genocide; and
> -submit a report in 4 months on the steps taken to implement the provisional measures and then submit a report every 6 months."[150]

The two measures not granted concerned not aggravating the dispute, and granting access to UN investigative mechanisms. According to the ICJ, "in the circumstances of the present case, and in view of the specific provisional measures it has decided to take, the Court does not deem it necessary to indicate an additional measure relating to the non-aggravation of the dispute between the Parties"[151] and, in regard to the investigative measure, "the Court does not consider that its indication is necessary in the circumstances of the case".[152]

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[147] Ibid.
[148] USCIRF, Lavery, Kirsten & Atkins, Harrison, The Path Towards Justice: Accountability for International Crimes Against the Rohingya of Burma.
[149] Ibid.
[150] Ibid. and ICJ, Order, 23 January 2020, p. 86.
[151] Ibid. p. 83.
[152] Ibid. p. 63.

Two judges expressed their separate opinions, and one filed a declaration, even if all supported the provisional measures. Judge Xue held a separate opinion on the matter of comparing the present case to Belgium v. Senegal and believed the Court's reasoning was flawed using this court case that he believed to be completely different than the present case.[153]Judge Xue also had serious reservations with regard to the plausibility of the case under the Genocide Convention, and also means that the evidence submitted to the court shows an appalling situation of human rights violations, but not genocide.[154] Also Judge Kress believes the Court has applied a low plausibility standard with respect to the question of genocidal intent.[155] These opinions indicate that the requirement of genocidal intent might become difficult to meet in future proceedings. Lastly, Judge Cançado Trindade is not focused on the issue of plausibility, but rather on the need to direct attention to human vulnerability.[156]

Another issue that could hold future importance in the case is that the ICJ found that the Rohingya "appear to constitute a protected group within the meaning of Article II of the Genocide Convention."[157] This statement could change as the legal proceedings continue, but it is of significance since Myanmar does not even recognize the Rohingya as a distinct minority.[158]

[153] Separate Opinion of Vice-President Xue on ICJ order 23 January 2020, available at: https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-01-EN.pdf.
[154] Separate Opinion of Vice-President Xue.
[155] Declaration of Judge Kress on ICJ order 23 January 2020, available at: https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-03-EN.pdf.
[156] Separate opinion of Judge Cancado Trindade on ICJ order 23 January 2020, available at: https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-02-EN.pdf.
[157] ICJ, Order, 23 January 2020, p. 52.
[158] USCIRF, Lavery, Kirsten & Atkins, Harrison, The Path Towards Justice: Accountability for International Crimes Against the Rohingya of Burma.

5.2.4. Myanmar's reaction to lawsuit, provisional measures and decision

To date, Myanmar has not accepted the allegations of genocide. During the hearings concerning the provisional measures, State Counsellor Aung San Suu Kyi appeared at the hearings representing Myanmar. She claimed that the claim did not show genocidal intent by the Myanmar government, and that the claim therefore could not fall under the Genocide Convention.[159] Throughout her statements during the hearings, she failed to use the term "Rohingya" and only mentioned "Muslims in the Rakhine state".[160] Following the decision on the provisional measures, the Myanmar Ministry of Foreign Affairs declared in a statement that no genocide had taken place in the Rakhine State and the ICJ decision was not based on actual merits.[161]

The Gambia was supposed to submit its Memorial on July 23rd 2020, but due to Covid-19 this time limit was extended. On October 23rd, the Gambia filed a Memorial that was over 500 pages long, including over 5000 pages of material supporting their claim. The Memorial is not available to the public for the duration of the pending trial.[162] Myanmar must now submit a counter-Memorial in response to the Gambia's accusations. Before the extension of time due to Covid-19, the deadline would have been January 23rd 2021, but is now July 23rd 2021.

Myanmar has reported back to the ICJ as requested by the ICJ in its decision regarding provisional measures. One report was submitted in May 2020,[163]

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[159] Ibid.
[160] Ibid.
[161] Myanmar Rohingya: Government rejects ICJ ruling, BBC, 23 January 2020, available at: https://www.bbc.com/news/world-asia-51229796.
[162] The Gambia v. Myanmar proceeding on the merits, UNB, 30 October 2020, available at: https://unb.com.bd/category/bangladesh/the-gambia-v-myanmar-proceeding-on-the-merits/59736.
[163] Myanmar submits first report on Rohingya to UN's top court, Al Jazeera, 24 May 2020, available at: https://www.aljazeera.com/news/2020/5/24/myanmar-submits-first-report-on-rohingya-to-uns-top-court.

and the second report was submitted in November 2020.[164] They are not available to the public and can therefore not be commented in this thesis.

5.2.5. Next steps

Following the submission of memorials by the parties, the ICJ must determine whether it has jurisdiction to legally proceed to a full hearing on the presented merits and move forward with the case. The ICJ has to make a legal determination regarding state responsibility. Since the case is not of such character to prosecute state officials, the Court must rather ensure that Myanmar is living up to its obligations under the Genocide Convention.[165] It is unclear how long the Court will take to file its final decision in the Gambia v. Myanmar. The average duration from initial filing to final decision in ICJ cases is four years while some cases are significantly longer in duration. An example is the already mentioned case before the ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, that took 14 years to complete.[166] Compared with the ICC and domestic criminal justice, the Court also lacks investigative power, and must therefore rely on the material provided by the parties in the case.[167]

During the time of the proceedings, the Rohingya will most likely continue to suffer since the present situation is ongoing. The violence and human rights violations have not stopped as of this writing moment and further discrimination continues in Myanmar.[168] The recent Myanmar election has

[164] Anadolu Agency, Myanmar submits 2nd report on Rohingya genocide to UN's top court, Daily Sabah, 24 November 2020, available at: https://www.dailysabah.com/world/asia-pacific/myanmar-submits-2nd-report-on-rohingya-genocide-to-uns-top-court.
[165] USCIRF, Lavery, Kirsten & Atkins, Harrison, The Path Towards Justice: Accountability for International Crimes Against the Rohingya of Burma.
[166] Ibid.
[167] Ibid.
[168] Amnesty International, Myanmar: Villages burned, civilians injured and killed as Rakhine State conflict escalates, 12 October 2020, available at: https://www.amnesty.org/en/latest/news/2020/10/myanmar-villages-burned-civilians-injured-rakhine-state-conflict/ and Myanmar's genocide against Rohingya not over, says rights group, The Guardian, 23 November 2020, available at:

been heavily criticized since the Rohingya are not allowed to vote.[169] As of right now, Myanmar has been reported to not follow the ICJ order concerning provisional measures, and it is unclear if Myanmar will begin to follow the order until the final decision by the ICJ is made. It would not be historically unprecedented if the genocide would continue after the provisional order. The Srebrenica genocide occurred after the ICJ had ordered two provisional orders in the previously mentioned Bosnia and Herzegovina v. Serbia and Montenegro case. Myanmar must comply with ICJ orders, but this obligation is difficult to enforce, since the ICJ lacks enforcement mechanisms and the obligation becomes rather political.[170]

5.3 International Criminal Court

5.3.1. Background

As previously mentioned in section 4.4, the ICC was established in 1998 through the adoption of the Rome Statute. Its role is to investigate and prosecute individuals for international crimes, such as genocide, crimes against humanity or war crimes. One way to prosecute is when the UNSC refers the case in question to the Office of the Prosecutor, otherwise, the ICC only has jurisdiction when a crime has been committed on a certain territory or was committed by nationals of a state that has accepted the ICC jurisdiction. The ICC can only prosecute an individual when the state itself are incapable of or unwilling to prosecute the perpetrator. This follows from the complementary role that the ICC has in relation to national

https://www.theguardian.com/world/2020/nov/23/myanmar-is-still-committing-genocide-against-rohingya-says-rights-group.

[169] Md. Kamruzzaman, Rohingya frustrated over polarized elections in Myanmar, AA, 8 November 2020, available at: https://www.aa.com.tr/en/asia-pacific/rohingya-frustrated-over-polarized-elections-in-myanmar/2036467.

[170] USCIRF, K Lavery, Kirsten & Atkins, Harrison, The Path Towards Justice: Accountability for International Crimes Against the Rohingya of Burma.

jurisdictions.[171]

5.3.2. Myanmar and Bangladesh situation

The question of jurisdiction becomes interesting in this case, due to Bangladesh ratifying the Rome Statute in 2010, while Myanmar is not a signatory. On November 14th 2019, the ICC pre-trial chamber authorized its Prosecutor to conduct a limited investigation into the crimes committed against the Rohingya. However, the only crimes that could be investigated were the crimes under ICC jurisdiction, as well as crimes in the Rakhine State where one element must have occurred on Bangladeshi territory or another state party to the Statute. This is because the Court needs jurisdiction, and can only get it through either territorial jurisdiction, personal jurisdiction or jurisdiction through a UNSC referral.[172] While action by the UNSC has been called for, it has not happened.[173] It is unlikely that a referral would be agreed on by the UNSC, due to the veto power of some of the members, especially China with its strong political and economic ties to Myanmar.[174] Since the crimes have not been committed by a national of a state party to the Statute, the Prosecutor requested the opening of an investigation on the basis of Article 19(3) concerning territorial jurisdiction as mentioned above. She argued that Article 7(1)(d) of the Statute applies since the mass movement of the Rohingya amounts to deportation, which is a crime against humanity.[175] Further, the Prosecutor means that Article 12(2)(a) can be interpreted as the Court's jurisdiction can

[171] Ibid.
[172] Article 13 (b), UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid/3ae6b3a84.html.
[173] Human Rights Watch, Myanmar Events of 2019, available at: https://www.hrw.org/world-report/2020/country-chapters/myanmar-burma.
[174] Chatham House, Myanmar's Referral to the International Criminal Court: Five Things You Should Know, 10 September 2018, available at: https://medium.com/chatham-house/myanmars-referral-to-the-international-criminal-court-five-things-you-should-know-2cb5ea7d21b.
[175] ICC, President of the Pre-Trial Division, Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute, ICCRoC46(3)-01/18-1, 9 April 2018, available at: https://www.icc-cpi.int/CourtRecords/CR2018_02057.PDF.

be exercised in this case, and that it would be consistent with the legal framework of the Statute but also principles of international law.[176]

In August 2018, before the Pre-trial Chamber decision to authorize an investigation, Myanmar declined to give a formal response to the ICC over the decision to give jurisdiction and continue with an investigation. Instead, it issued a press release rejecting the Courts request and called for its dismissal.[177] In September 2018, another press released followed, stating that Myanmar "resolutely rejects the decision which is the result of faulty procedure and is of dubious legal merit."[178] However, in spite of this rejection, the Court decided to authorize the investigation.[179]

The authorization of this investigation is the first of its kind. The ICC has never before found jurisdiction for cross-border acts based on only one of the states affected being signatory to the Statute. The ICC found reasonable grounds for Myanmar military and other local actors having deported and persecuted Rohingya, which they argue qualify as crimes against humanity, and therefore falls under ICC jurisdiction. Prosecutor Bensouda reiterates in a statement after the request for jurisdiction was approved that:

> "While Myanmar is not a State Party of the ICC, Bangladesh is, and I welcome the Chamber's conclusion that "[t]he alleged deportation of civilians across the Myanmar-Bangladesh border, which involved victims crossing that border, clearly establishes a territorial link on the basis of the *actus reus* of

[176] Ibid.
[177] Government of the Republic of the Union of Myanmar
Ministry of the Office of the State Counsellor, Press Release, 9 August 2018, available at: https://www.president-office.gov.mm/en/?q=briefing-room/statements-and-releases/2018/08/09/id-8937.
[178] Republic of the Union of Myanmar, Office of the President, Press Release, 7 September 2018, available at: https://www.president-office.gov.mm/en/?q=briefing-room/news/2018/09/07/id-8986.
[179] ICC, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, available at: https://www.icc-cpi.int/CourtRecords/CR2019_06955.PDF, p. 58.

this crime"– that is, "the crossing into Bangladesh by the victims."[180]

The investigation is limited to the "clearance operations" as previously mentioned in section 1.1, in 2016 and 2017, but other crimes that are considered to be "sufficiently linked" with these acts.[181]

5.3.3. Next steps

The upcoming situation is interesting because Myanmar has not accepted the ICC jurisdiction and refuses to let ICC investigators to enter the country. The lack of cooperation will no doubt complicate the investigation. Myanmar government spokesperson Za Htaw has criticized the investigation saying that "the investigation over Myanmar by the ICC is not in accordance with international law".[182]

At the same time, the ICC Prosecutor will conduct the investigation as authorized by the Court. It is unclear how this situation will progress and what type of material and evidence the Prosecutor will be able to collect. Without the material, it will be difficult to build a criminal case against Myanmar officials. If sufficient evidence is gathered, the Prosecutor will be able to request a summons or arrest warrant. This will lead to a trial where the individual might be sentenced to prison, as well as the victims receiving reparations. According to USCIRFs Kirsten Lavery, International Legal Specialist, and Harrison Akins, Policy Analyst, it is highly unlikely that the UNSC will make a full referral of the Rohingya's situation in Rakhine State to the ICC, and without this referral, the ICC will be limited to not only the

[180] ICC, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following judicial authorisation to commence an investigation into the Situation in Bangladesh/Myanmar, 22 November 2019, available at: https://www.icc-cpi.int/Pages/item.aspx?name=20191122-otp-statement-bangladesh-myanmar.
[181] USCIRF, Lavery, Kirsten & Atkins, Harrison, The Path Towards Justice: Accountability for International Crimes Against the Rohingya of Burma.
[182] Myanmar rejects ICC probe into alleged crimes against Rohingya, Al Jazeera, 15 November 2019, available at: https://www.aljazeera.com/news/2019/11/15/myanmar-rejects-icc-probe-into-alleged-crimes-against-rohingya/.

cross-border crimes, but only crimes committed between 2016 to 2017.[183] Even if individuals would be sentenced to prison for this crime, the trial would not include all crimes, or the entirety of time the crimes have been committed.

Contributing to the unique character of this case is the pending universal jurisdiction court case in the Argentine courts, which will be discussed below. The Argentine has decided it will proceed with the case, and it will be the first time an ICC investigation is running parallel to a universal jurisdiction case on the same conflict or situation. Jurisdictional issues might arise, due to the similar nature of the two cases.[184]

5.4 Universal jurisdiction case

5.4.1. Background

On November 13th 2019, one day after the ICC authorized its investigation in the Myanmar case and two days after the Gambia v. Myanmar case was filed, the Burmese Rohingya Organisation UK (BROUK) filed a case under Argentine universal jurisdiction law, giving Argentinian courts jurisdiction over crimes in the ICC statute. It is a landmark case, trying Myanmar military and other officials under the principle of universal jurisdiction, previously mentioned in section 4.3. Like the ICC case, the Argentine case targets individual responsibility. Since the release of the 2018 Seminal report, the FFM urged Member states of the UN to bring universal jurisdiction cases in their own domestic courts "to investigate and prosecute alleged perpetrators of serious crimes under international law committed in

[183] USCIRF, Lavery, Kirsten & Atkins, Harrison, The Path Towards Justice: Accountability for International Crimes Against the Rohingya of Burma.
[184] Ibid.

Myanmar".[185] Based on the findings of the FFM, Myanmar officials have been named.[186]

This is the first universal jurisdiction case regarding the Rohingya. Together with the ICC case and ICJ case the Argentine case gained international media attention, for finally bringing some light and effort to resolving the conflict and bringing justice to the Rohingya.[187]

In December 2019, just a month after the claim had been filed, a Court of First Instance in Buenos Aires rejected the case on the grounds the case would overlap the ongoing ICC investigation. However, in May 2020, this decision was appealed and a federal Appeal Court overturned the decision, ruling it necessary to seek clarification from the ICC.[188] A diplomatic note was sent from the Argentine Ministry of Foreign Affairs to Prosecutor Bensouda's office, asking for additional information and clarification on the Prosecutors opinion whether the court cases would duplicate each other.[189]

5.4.2. Scope, crimes and jurisdiction

The Argentine case concerns crimes against humanity, but also genocide, and very heavily focuses on the importance of prosecuting the individuals for these crimes. The claim states that under the principle of jurisdiction the claim targets

> "the parties who may be criminally responsible for the crimes internationally designated as GENOCIDE and CRIMES

[185] Khin, Tun, Universal Jurisdiction, the International Criminal Court, and the Rohingya Genocide.
[186] USCIRF, Lavery, Kirsten & Atkins, Harrison, The Path Towards Justice: Accountability for International Crimes Against the Rohingya of Burma.
[187] Ibid.
[188] BROUK, Argentinean Judiciary Moves Closer to Opening Case Against Myanmar Over Rohingya Genocide, 1 June 2020, available at: https://www.brouk.org.uk/argentinean-judiciary-moves-closer-to-opening-case-against-myanmar-over-rohingya-genocide/.
[189] Khin, Tun, Universal Jurisdiction, the International Criminal Court, and the Rohingya Genocide.

> AGAINST HUMANITY, committed against the ROHINGYA community in the territory of Myanmar, as a minimum in the period spanning from the year 2012 to the year 2018."[190]

As we can see, the claim wishes to include the crime of genocide, and extend the scope of what the ICC is limited to include in its own prosecution. Because of the fact that the ICC is unable, due to its jurisdiction, to include crimes committed on Myanmar territory, BROUK wanted to seek justice for the Rohingya through including this crime that they argue has taken place on Myanmar territory.[191] The claim argues that there has been no judicial case in either Myanmar or by referral by the UNSC to "establish the truth of the events, and to identify and punish the persons responsible" and that "up to the present no national or international judicial jurisdiction exists for dealing with the case as regards the crimes committed in the territory of Myanmar."[192] Therefore, the claim suggests the law doctrine "forum non conveniens" is applicable to the complaint.[193]

BROUK has stated that the intention behind the case is not to derail or harm the ICC investigation, but instead complement it in order to bring justice to the Rohingya.[194]

Further, the conflict and Rohingya crisis is calling for national courts to act. All evidence gathered and handed over to the "Independent Investigation Mechanism" (an office created by the United Nations Human Rights Council) with the mandate to

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[190] BROUK Complaint file, 13 November 2019, available at: https://burmacampaign.org.uk/media/Complaint-File.pdf and the claim was made according to article 118 in fine of the Argentine National Constitution, Law 26,200, Rome Statute of the ICC, and section 236 and related sections of the Federal Criminal Procedural Code.
[191] BROUK Complaint file, 13 November 2019.
[192] Ibid.
[193] Ibid.
[194] Khin, Tun, Universal Jurisdiction, the International Criminal Court, and the Rohingya Genocide.

> "(i) to collect, consolidate, preserve and analyze evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011, and (ii) to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law".[195]

This suggests national courts have a strong incentive to sue the evidence gathered and facilitate the legal proceedings.

The claim calls for several Myanmar officials to be investigated. These include State Counsellor Aung San Suu Kyi, former Presidents Htin Kyaw (2016-2018) and Thein Sein (2011-2016), Army Commander-in-Chief Senior General Min Aung Hlaing. Additionally, the claim targets other religious, political leaders as well as business individuals who have been related to the violations against the Rohingya.[196]

5.4.3. Support and commentary

BROUK brought the case supported by other organizations and foundations, and is represented by Tomás Ojea Quintana, the former United Nations Special Rapporteur (SR) on human rights in Myanmar.[197] He was the SR from 2008 to 2014, a time where the violence against the Rohingya in Rakhine State emerged.[198] In a press statement, BROUK welcomed the

[195] BROUK Complaint file, 13 November 2019.
[196] Khin, Tun, Universal Jurisdiction, the International Criminal Court, and the Rohingya Genocide.
[197] Burma Campaign UK Welcomes New Universal Jurisdiction and ICJ Genocide Cases, 13 November 2019, available at: https://burmacampaign.org.uk/burma-campaign-uk-welcomes-new-universal-jurisdiction-and-icj-genocide-cases/.
[198]Human Rights Watch, *All You Can Do is Pray: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma's Arakan State*, 22 April 2013, available at:

ICJ Gambia v. Myanmar case, but critiqued the UNSC for not referring Myanmar to the ICC. BROUK wrote that because of the failure of the UNSC, "it is vital that other legal avenues are pursued to secure justice and accountability. They have a vital role to play in helping to erode the sense of impunity enjoyed by the Burmese military, and help prevent further atrocities."[199] Commenting on that only the Rohingya are in focus in the two legal cases (ICC and ICJ), it is important that all other ethnic groups violated by the Myanmar military, are also regarded, "the military must also be held accountable for these crimes, which is why a Security Council referral to the ICC or creation of an Ad Hoc Tribunal is essential."[200] Director of Burma Campaign UK, Mark Farmaner meant that "These legal cases will help put the military on notice that they cannot continue to evade justice and accountability for their crimes," and "The British government must now support the genocide case at the International Court of Justice", calling for national support.[201]

5.4.4. Next Steps

At this time, there is great need of clarification and information for the Argentine court to proceed. The Argentine court is waiting for more directions from the ICC. If the ICC gives more information, The Burma Committee means that there is little chance of duplication since the courts are dealing with different scopes due to their different jurisdictions.[202]

If the Argentine court decides to proceed with the case, the question of evidence would yet again be necessary, but also difficult. There is great

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https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims.

[199] Burma Campaign UK Welcomes New Universal Jurisdiction and ICJ Genocide Cases, 13 November 2019.

[200] Ibid.

[201] Ibid.

[202] Gemensamt uttalande från det Europeiska Burmanätverket 18 juni 2020, available at: https://burmakommitten.org/gemensamt-uttalande-fran-det-europeiska-burmanatverket-18-juni-2020%E2%80%8B/.

difficulty with gathering evidence in foreign jurisdictions who are not cooperating. USCIRF points out that issuing arrest warrant to extradite the defendants can be particularly hard.[203]

The European Burma Network welcomes the investigation and that it would "complement other international initiatives seeking accountability for crimes committed against the people of Burma, not duplicate them."[204] BROUK President Thun Kin agrees that the case would only complement the ICC case and highlights the importance of all crimes committed against the Rohingya are actually investigated. Since many of the crimes, like torture, enforced disappearances, murders, rapes and other violent acts have no cross-border element, the ICC cannot address those crimes within its scope of jurisdiction. Additionally, he stresses the need to include the crime of genocide in the criminal case, something the ICC is also unable to do. He means it is also important to bear in mind that the FFM has urged national courts to pursue cases under the principle of universal jurisdiction, especially since the UNSC is very unlikely to make a full referral of the situation due to China and Russia "are virtually guaranteed to veto such a resolution, if it ever was attempted". Lastly, Thun Kin means there is symbolic significance in the case, not only hope and justice for the Rohingya, but also as inspiration and motivation for other states to use similar legal tools within their own judiciaries.[205]

[203] USCIRF, Lavery, Kirsten & Atkins, Harrison, The Path Towards Justice: Accountability for International Crimes Against the Rohingya of Burma.
[204] Gemensamt uttalande från det Europeiska Burmanätverket 18 juni 2020.
[205] Khin, Tun, Universal Jurisdiction, the International Criminal Court, and the Rohingya Genocide.

6 Analysis

It is without a doubt that the Rohingya are still suffering great loss from the grave crimes committed against them in the past couple of years, following decades of harsh measures and discrimination. There have been no reparations and no justice for this minority group. To this day, the Rohingya are still being persecuted, still attacked, still held in concentration camp-like circumstances. They are not able to vote, not able to hold citizenship. As this thesis seeks to portray, there has been a global outcry to help the Rohingya, not only from states, but also NGOs, international organizations and individuals. There seems to be not only a *need*, but also a *willingness* to help the Rohingya and hold the perpetrators responsible for the grave crimes committed against the group to account. There have been efforts taken by the international community to assume responsibility to protect, with very little result. As indicated in the previous chapter of this thesis, there are three legal proceedings occurring at the same time, all with the same purpose, yet no perpetrators have been held accountable so far. Evident from the analysis realized in this thesis is that there is a disconnect between the purpose of R2P, and what can actually be done in practice to implement such a principle. This is due to the contradicting natures of some legal principles, such as sovereignty of states, and non-intervention, and the difficult practical dilemmas that arise for actors that try to protect the victims of grave crimes in situations like this one.

On the other hand, it is evident from the thesis that the concept of R2P has grown from a concept, a simple change of terminology (when the phrase changed from *right to intervene*, to *responsibility to protect* in the ICISS Report, see section 3.2), to what many would consider a well-established political principle, perhaps with a legal future, in a short time. From being mentioned in the ICISS report, to being mentioned and used in resolutions and other important international documents, I believe R2P has great

potential. However, as the thesis seeks to explain, the principle is perhaps not used in the correct way, or by the right actors.

The aim of this chapter is to critically analyze the efforts taken by the international community and judicial organs mentioned in this thesis. I will explain why there is a disconnect between the purpose of R2P, and what is actually done and can be done to protect the Rohingya. I have narrowed down my analysis to a few different considerations why I believe the disconnect has occurred, and why the international community and judicial organs has failed to help the Rohingya.

6.1 Sovereignty and non-intervention

The principle of sovereignty is a key principle in the situation in focus, the conflict in Myanmar. There is great purpose behind this fundamental principle, and there are several reasons behind its existence. I am not arguing that the principle of sovereignty should be simply disregarded or ignored. However, the principle makes the principle of R2P difficult to apply in a situation like Myanmar and the Rohingya. There is a balance to achieve between respecting a state's sovereignty and allowing a state who is unwilling and unable to protect its own population to continue with unlawful actions. In this case, I believe there is reason to intervene, not necessarily through military action, but through legal tools like the courts mentioned in this thesis. I do not think that military intervention is wise in this situation, considering the UNSC history in Libya, which was discussed in section 4.1.1 of this thesis. Libya proved to be a bad experience of what happens when the prevention part of R2P is skipped, and the intervention is not the last resort but still used. In the case of Libya, after the intervention, the rebuild aspect of R2P was also lacking. A similar situation could arise in the situation of Myanmar. A military intervention is not the single answer when thinking of applying R2P. It would also be illegal unless the UNSC authorizes the intervention. It has become normalized to talk about R2P in

terms of military intervention and the use of force, but when looking closer at the principle, it is evident that R2P includes more, and could potentially be used in other ways by other actors.

R2P is an important principle to live up to, if used correctly and possibly by more actors besides the UNSC. In any case, I believe the UNSC has not proved it is capable of using R2P in the way the ICISS report initially intended. It is a multi-level structured principle that requires a three-fold effort and not simply one of the measures like military intervention. It is essential that the principles of sovereignty and non-intervention are respected, and that a military intervention is only used as a last resort since the effect of a lacking intervention can have a prolonged negative effect on the population of the country, rather than the opposite. On the other hand, sovereignty comes not only with rights but also with responsibilities. A state must under all circumstances protect its own people, and a state that is unwilling or unable to do so, as Myanmar clearly is, has then forfeited its rights to territorial integrity in a way. The UNSC should make a full referral to the ICC to allow the court to do what it is intended to do. In a world where politics did not matter, and where the permanent members did not have veto power, there would be little reason for the UNSC to not make a full referral. However, this is not the case. I therefore believe this situation is one where the ICC is obliged to act, and could make a difference. The ICC, a legal actor established and able to challenge the sovereignty of a failing state, should have the mandate to act. However, it instantly runs in to jurisdictional issues considering that the UNSC has not made a full referral of the situation.[206]

[206] See footnote 172.

6.2 Limited jurisdiction and gathering evidence

As mentioned earlier on, at the moment, there are three separate court cases. In different ways, they are struggling to proceed with their cases. The recently mentioned ICC has had to be creative, and limit its scope of crimes due to its jurisdictional limitations. It is very difficult to see how the efforts made by its Prosecutor only amounting to the cross-border elements of the conflict. Like mentioned, the ICC is the legal arm of responsibility to protect. It is worrying that it is not able to reach far enough to bring peace and justice to the victims of this conflict. Credit is due to the creative efforts of Prosecutor Bensouda, but the limitations of her case must be a wakeup call to the international community. There are obvious flaws in the systems that work towards holding perpetrators responsible for the atrocity crimes committed. However, the case has made it before the ICC without a full referral from the UNSC[207], an investigation has been authorized, but the question of jurisdiction under Article 12(2)(a) of the Rome Statute is still controversial.

The Argentine case is an exercise of universal jurisdiction. After first being rejected by the court, the Myanmar has now been considered again. However, it is waiting for more information from the ICC. As the ICC is at a standstill, so is the Argentine court. This shows a flaw in the judicial systems holding perpetrators accountable, as the different judicial organs need to rely on each other and not being able to proceed independently. As mentioned, the Argentine court wants to make sure that there is enough duality to the two separate cases, and that the cases would complement each other rather than overlap. I agree with the BROUK president, saying that there is enough difference in the cases to proceed independently. I think that since the ICC lack jurisdiction to charge perpetrators with the crime of genocide, the Argentine case should be able to proceed. While the ICC can

[207] Ibid.

possibly prosecute the perpetrators with some atrocity crimes, it is extremely important that the crime of genocide is included in the charges.

Like the BROUK President argues, using specifically genocide has symbolic value. I also believe it has symbolic value for the Rohingya, but the crime of genocide must be included in one of the criminal cases. When there is a massive amount of evidence of genocidal intent, to me it is a textbook example of genocide. If all of the legal mechanisms we have in the world fail to hold perpetrators responsible for the appropriate crime, and instead have to use less grave criminal classifications it is an obviously faulty system. Even worse is that not a single individual has been charged with a single crime, not even a less grave one. It is understandable that cases like these take a long time, but it is surprising and worrisome to see how the Rohingya have been, and are still, suffering, several years after the atrocity crimes started. It should not be surprising that Myanmar is refusing to cooperate, and this should have been expected by the international community and judicial organs.

The Argentine court needs to receive the information from the ICC about the cases it will investigate and prosecute, and hopefully cover the gaps in jurisdiction. If the Argentine court proceeds, the next problem becomes evident, the issue of gathering evidence to build the criminal case. This is an issue that all of the courts are facing. When Myanmar is refusing to let investigators enter its territory and conduct their investigations, such as exhumations, there is a risk that not enough material can be gathered. Cases like these require a great amount of material to be able to prosecute some of the most important individuals in the state. This is also of great importance to the ICJ. Since the ICJ is not conducting its own investigations, it has to rely on the parties, in this case Gambia, to provide material in support of the allegations that genocide has taken place. As long as Myanmar is refusing to let investigators enter its territory, this will be a potential challenge that will be difficult to overcome. Continuing to speak about the ICJ, I have hope that this Court will decide that it does in fact have jurisdiction in this case. While

a similar case in terms of lacking geographical proximity (the Gambia and Myanmar) has not been tried before, I consider the wording of the Genocide Convention to be very clear, and that the Gambia and the supporting states have the right to bring the case before the court. Additionally, the judgments in previous ICJ cases, such as Belgium v Senegal and Croatia v. Serbia, support this understanding. Even though the first mentioned case was concerned with CAT and not the Genocide Convention, both cases found that a state could bring a case before the court about violations of the CAT and the Genocide Convention without being actually affected by the violations. The Court established *erga omnes partes*, which means that the Gambia should be able to bring the case and the Court should definitely have jurisdiction in the case. These cases clarified the concept of *erga omnes partes* and I believe that it paved the way for a case like the Gambia v. Myanmar. Taken together, these cases, and the Courts own words mentioning that all state parties have a common interest to prevent genocide, indicate that the Court will decide it has jurisdiction and proceed. Regarding the provisional measures not being lived up by Myanmar, there is little action that can be taken to enforce the provisional measures. The ICJ can decide on the measures, but do very little if the state in question, Myanmar, decides not to follow them. It is a bit of a waiting game when it comes to this case. While the UNSC has a right or possibility to act even in this case, according to Article 94(2) of the UN Charter, it is unlikely the UNSC will act in this case. Therefore, it can take several years to process a case like this one, especially when Myanmar is not cooperating to the fullest. The additional delay due to the covid-19 pandemic is certainly not helping. However, in my opinion, there is a great chance that the court will find that it has jurisdiction and hopefully hold Myanmar responsible for the genocide that has taken place. If not, it will become even more worrisome seeing how the judicial organs who are supposed to, and the only organs able to judge such cases, are unable to proceed.

6.3 Political actors

Political actors hold perhaps the largest influence on this conflict and determine the chances of ending the grave crimes committed against the Rohingya. If only looking towards to R2P principle, I think its future lies in the hands of individual states. With the current design, pointing simply to the UNSC to implement the principle, little action can be taken when the permanent members of this organ have the role and veto power that they currently hold. I think it is important to remember that there are steps and measures to be taken between what is being done now (currently nothing by the UNSC) and humanitarian intervention. I am not arguing for the UNSC to use R2P in the sense of reacting and intervening, but rather to make a full referral to the ICC. With this referral, all crimes, such as genocide, could be included in the criminal charges. However, as mentioned, there is no hope of this happening with China as a permanent member of the UNSC. This is a prime example of when politics get in the way of implementing the R2P. When the UNSC is the only authority to be able to order an intervention in a state or make a full referral to the ICC, it limits the use of the principle. However, the current international arrangement in which the UNSC is the sole organ that can authorize the use of coercive measures, such as armed intervention or sanctions is also balancing against the fact that it would be unreasonable to expand this power to other international organs since this power is massively interfering with the principle of state sovereignty.

7 Conclusion

The principle of R2P is a political principle with moral significance. It is however structured in such a manner that it could be considered a legal principle. Or at least, the values of R2P are encompassed in many other legal instruments. This thesis has considered how different judicial actors can assist in the implementation of the R2P, with the help of international law. The political nature of R2P makes it difficult to apply it in practice. Because of its close ties, and contradicting nature with basic legal principles of international law, it should be difficult to apply R2P in the Myanmar case, but not impossible. The various actors mentioned in this thesis all have a role to play, and it is evident that no actor can single handedly manage a situation like the one with the Rohingya by itself through the legal avenues currently existing.

The UNSC is constantly frozen to act due to political factors. The courts are limited in their jurisdictions, or capability of acting alone. The processing times for each case are long, but the courts cannot be rushed either. The courts also depend on each other to investigate, or to send information clarifying the legal situation. They must complement and help each other, with information that can serve as evidence or resolve issues of jurisdiction. A single state can hardly take on the weight and responsibility that the entire international community must assume in order to protect the Rohingya.

Referring back to ICC Prosecutor Bensouda, R2P can be compared to a toolbox (where for example the ICC is a tool).[208] The actors that can implement the R2P have tools to use, but perhaps not sharp enough. Perhaps the tools are not in the right hands. Perhaps they are not used correctly. Counting on solely the UNSC to implement R2P, and simply using tools, such as military intervention defeats the purpose of R2P in my opinion. I

[208] See footnote 135.

think the key to implementing the values of R2P and protecting the Rohingya is that multiple actors, both states and international organizations, focus not only on the military intervention aspect of R2P, but also use their influence to support other avenues like the legal proceedings taking place in three different courts across the world. The actors must also support each other in these situations. Canada, the Maldives and the Netherlands joining the Gambia in seeking to hold Myanmar responsible is a good example of this support. Since many of the problems the UNSC and courts are facing can be attributed to political factors, states must take responsibility and voice not only critique, but also give support in situations like these. If states are willing to implement the R2P in their national jurisdictions, and push for its implementation in international contexts, the principle can evolve further than its current state. Actors must be willing to put political pressure on each other, as well as continuing to push cases like the Gambia v. Myanmar. Universal jurisdiction is a powerful tool and a prime example of when the values of R2P are used in practice. States are encouraged to have their national courts pursue cases under universal jurisdiction, and many have granted their courts this type of jurisdiction, yet this is the first time the exercise of universal jurisdiction by a national court and an ICC case could possibly occur together, or at the same time. To me, this proves not only the willingness of the international community to protect the Rohingya, but also how the international community has different legal tools that it can use. This situation is unprecedented and could become a landmark case, or landmark cases, and prove the value of two judicial organs cooperating and helping to fill the jurisdictional gaps between one another.

Hopefully, the ICJ will decide that it has jurisdiction in the case and proceed to examine the allegations against Myanmar. Hopefully, the ICC will be able to conduct its investigation and gather enough evidence to hold the major perpetrators of the persecution of the Rohingya accountable for at least a small part of the actual atrocities committed. Hopefully, the Argentine court receives information that it complements the ICC case and can cover enough of the crimes the ICC is unable to investigate and

prosecute. There is a lot of hoping in this situation. One thing is certain, the crimes against the Rohingya must come to an end, and the perpetrators must be held accountable for their crimes. There is a world full of strong international actors with several legal tools and paths to justice to follow, but without the proper support of each other and the correct use of these tools, the situation of the Rohingya will not only continue, but the situation will repeat itself over and over again.

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