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# Responsibility to protect Rohingya Muslims in Myanmar

Obligation or possibility for the international community?

LAGF03 Essay in Legal Science

Bachelor Thesis, Master of Laws programme  
15 higher education credits

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Term: VT2018

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# Summary

The responsibility to protect is a controversial principle and has been ever since it was introduced by the International Commission on Intervention and State Sovereignty in 2001. Unanimously adopted by the United Nations member states in 2005 the principle seemed to be a new way of protecting humanitarian values. To protect the citizens of states when the states themselves are unwilling or unable to do so.

This study explores the meaning and use of responsibility to protect in regard to the situation for Rohingya Muslims in Myanmar (also known as Burma) and if the principle consists obligations for the international community. The study addresses the exposed situation for Rohingya Muslims in Myanmar and how it can be related to the principle. This have been proven to be problematic due to the fact that the responsibility to protect is soft-law and not legally binding for member states. The international community, through the UN, have been monitoring the situation for a long time and have called upon reactions.

In order to use the principle in the situation for Rohingya Muslims in Myanmar the international community must take the monitoring one step further and agree on how to intervene. To investigate whether the responsibility to protect can be used in the situation is not a legal obligation for the international community even though it can be seen as a moral obligation. The principle's applicability depends on if the international community decides to discuss it.

# Sammanfattning

Principen om skyldigheten att skydda är kontroversiell och har varit det sedan *International Commission on Intervention and State Sovereignty* introducerade principen. Principen antogs enhälligt av Förenta Nationernas medlemsstater 2005 och verkade vara ett nytt sätt att skydda medmänskliga värden. Principen om skyldigheten att skydda används för att skydda befolkningen inom stater där staterna själva är ovilliga eller oförmögna att göra detta.

Denna uppsats undersöker meningen och användningen av principen i relation till den rådande situationen för rohingyamuslimer i Myanmar (även kallat Burma) och ifall principen medför förpliktelser för det internationella samfundet. Detta visar sig vara problematiskt då principen inte är tvingande för medlemsstaterna i Förenta Nationerna. Det internationella samfundet har genom Förenta Nationerna övervakat och utrett situationen för rohingyamuslimer i Myanmar under en lång tid. De har även påkallat reaktioner.

För att kunna använda principen om skyldighet att skydda i situationen för rohingyamuslimer i Myanmar så måste det internationella samfundet ta sitt övervakande och utredande ett steg längre. De måste gemensamt bestämma om hur de ska intervensera. Att utreda ifall principen ska användas i situationen eller inte är inte en juridisk skyldighet för det internationella samfundet, det kan dock ses som en moralisk skyldighet. Om principen är tillämplig eller inte beror på om det internationella samfundet väljer att diskutera denna princip som en lösning och vad de kommer fram till i den diskussionen.

# Abbreviations

ICISS	International Commission on Intervention and State Sovereignty
R2P	Responsibility to Protect
SC	Security Council
UDHR	Universal Declaration of Human Rights
UN	United Nations

# 1 Introduction

## 1.1 Background

Right now, the Muslim minority Rohingya in Myanmar (also known as Burma) is subject to violations of human rights and needs help. For the time being, international statutory and voluntary organisations are working for solutions on the conflict in Myanmar.<sup>1</sup> There are land areas in Myanmar which are nearly impossible to regulate due to the conflict between state sovereignty and human rights.<sup>2</sup> States have a responsibility to protect their inhabitants<sup>3</sup> and when they fail to do so the international community (used to refer to a broad group of people and governments of the world) and the United Nations (UN) feel that the responsibility passes on to them. The need to protect humans from violations of human rights have resulted in several reports from the UN and one of them coined the expression “responsibility to protect” (R2P).<sup>4</sup>

External military intervention for human protection is controversial. Violations of human rights in Rwanda, Bosnia and Kosovo made people raise their voices. Kofi Annan, a former Secretary General of the UN, made complaints year 2000 to the international community regarding the reactions towards violations of human rights and the right to intervene. He questioned how the issues should be approached, since humanitarian intervention is an unacceptable assault on sovereignty. The Canadian Government responded by establishing the International Commission on Intervention and State Sovereignty (ICISS).<sup>5</sup> The ICISS wanted to create a wider understanding for the reconciling between human rights and states sovereignty. This resulted in the concept R2P which is practical protection for ordinary people, at risk

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<sup>1</sup> GA, A/72/382, *Situation of human rights in Myanmar\*\**, 2017, p. 3, p. 7.

<sup>2</sup> HRC, A/HRC/37/70, *Report of the Special Rapporteur on the situation of human rights in Myanmar\*\*\**, 2018, p. 2, p. 8.

<sup>3</sup> GA, A/RES/60/1, *2005 World Summit Outcome*, 2005, p. 30.

<sup>4</sup> Ibid. p. 30.

<sup>5</sup> ICISS, *The Responsibility To Protect*, 2001, p. VII.

for their lives, because their states are either unwilling or unable to help them.<sup>6</sup>

## 1.2 Purpose

The purpose of this study is to investigate if there is a legal obligation for the international community to intervene in Myanmar in order to protect the Rohingya Muslims.

## 1.3 Question

The two main questions of the study are:

- Is the doctrine of responsibility to protect applicable to the present situation for Rohingya Muslims in Myanmar?
- If such is the case, what obligations would the responsibility to protect doctrine imply for the international community in relation to the Rohingya Muslims in Myanmar?

## 1.4 Limitation

R2P constitutes a broad and comprehensive subject and limitations have been made in this study. The focus in this study will be on the responsibility for the international community to react. Therefore, not an investigation on the element to prevent, which is also a part of R2P. Neither a deeper research into what type of crime the Myanmar government might expose its population to. Instead focusing on obligations that the doctrine contains and investigating if it's applicable in the situation for Rohingya Muslims in Myanmar. This limitation has been done because an investigation of what type of crime Rohingyas are exposed to is a big topic and don't need to be

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<sup>6</sup> ICISS, *The Responsibility To Protect*, 2001, p. 11.

determined to answer my questions. Nevertheless a brief explanation of the different crimes will be presented in order to understand R2P.

## 1.5 Method and Material

In order to pursue the research questions and fulfil the purpose the R2P doctrine will be investigated from an international perspective. By using legal method in international law<sup>7</sup> international conventions; international custom; general principles; and judicial decisions at the highest level will be studied. These are stated in article 38(1) in the Statute of The International Court of Justice and constitute international law. The principle of R2P is described using these sources, focusing on international custom due to the fact that R2P is soft-law and therefore not legally binding.<sup>8</sup> International custom mainly involves opinion juris, a subjective obligation where a state accepts international custom as law<sup>9</sup> and international state custom. The application to the situation in Myanmar will be investigated through other international primary sources as UN resolutions and reports. I have also relied heavily upon secondary sources as the ICISS report which is fundamental to the R2P principle.

UN is an international organization made up of 193 member states and was founded in 1945.<sup>10</sup> The organization is widely recognized and the resolutions, reports and other UN documents that have been used in this study are discussed and created by many of the member states together. Therefore, the documents give different opinions and views of the situation in Myanmar and the use of R2P. UN is not a state and has an agenda of creating peace and security for everyone. It can be hard to transform that agenda to reality and to get deeper in how UN and the international

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<sup>7</sup> Cryer, 2011, p. 34 ff.

<sup>8</sup> "UN General Assembly", Association for the Prevention of Torture, <<https://apt.ch/en/un-general-assembly/>>, visited 2018-04-21.

<sup>9</sup> Linderfalk, 2012, p. 28f.

<sup>10</sup> "Overview", United Nations, <<http://www.un.org/en/sections/about-un/overview/>>, visited 2018-05-03.

community actually can intervene. Views from other persons, as professors of international law and Myanmar authorities are included in this study. In that way, an insight in opinions other than the ones from the organization, states and persons that adopted R2P is presented.

## **1.6 Outline**

The following chapter investigates the situation in Myanmar, with R2P in mind. The third chapter will explore the concept of R2P and the possible obligations for the international community. It starts with a background of international law and the established principles in the UN Charter which are connected to R2P. It's followed by a deeper investigation in R2P focusing on how R2P is formulated and how it can be and has been interpreted. Chapter four will analyse and discuss the subject matter of the study and answer the questions.

## 2 The situation in Myanmar

Myanmar (also known as Burma) is one of the most ethnically diverse countries in Asia. Eight major national ethnic groups are recognized in The Citizenship Law of 1982. These have been broken down into 135 recognized “national ethnic groups”. In Myanmar an estimated 90 per cent of the population are Buddhists, 4 per cent Muslims, 4 per cent Christians and under 2 per cents Hindus. Rohingya Muslims represent the largest group of Muslims in the country and the majority lives in Rakhine which is a part of Myanmar. They identify themselves as a distinct ethnic group with their own language and culture and claim connection to Rakhine state. Successive governments in Myanmar have rejected these claims and the Rohingya were not included in the list of recognized national ethnic groups. Most of them are stateless.<sup>11</sup>

The military seized power in Myanmar 1962 and thereafter ethnic minorities were progressively excluded from positions of authority and restrictions towards minority language and religious freedom were made. The military remained powerful through decades but in 2011 the government embarked on reforms which resulted in a civilian government. Although, the military still has 25 per cent of the seats in the Parliament and has veto on any constitutional amendment. The oppression against minorities has continued and in May 2015, 700 000 of the minority individuals in different communities were disenfranchised.<sup>12</sup> By withdrawing temporary identity certificates the stateless minorities in Rakhine couldn't confirm their legal residence in Myanmar. Before the election 2015, temporary certificate holders were prevented from participating in political life which violates the Universal Declaration of Human Rights (UDHR) article 21 stating free and equivalent voting in genuine elections.<sup>13</sup>

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<sup>11</sup> GA, A/HRC/32/18, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar\**, 2016, p. 2f.

<sup>12</sup> Ibid. p. 2f.

<sup>13</sup> Ibid. p.11.

There are long-standing conflicts between Rohingya Muslims (population of approximately 1 million) and Rakhine Buddhists (population of approximately 2 million) but also between each group on the one hand and the Bamar-majority-led central government on the other. Bamar Muslims are, unlike Rohingya, a recognized ethnic group in Myanmar. Many Rakhine Buddhists are viewing the Rohingya Muslims as illegal immigrants with no cultural, religious or social links to Myanmar.<sup>14</sup>

## **2.1 United Nations and Myanmar**

Myanmar is a party to key international treaties as Convention on the Prevention and Punishment of the Crime of Genocide and the Convention on Rights of the Child. The State is also a signatory to the International Covenant on Economic, Social and Cultural Rights which means that Myanmar authorities have to refrain from actions contrary to the object and purpose of the Covenant. Obligations under above mentioned treaties are complemented by customary international law and these include rights described in the UDHR. The Rohingya Muslims are frequently portrayed as a “threat to race and religion” and their vulnerability has increased since 2012. Extremists and ultra-nationalist Buddhist groups expose Rohingya and other Muslims to religious intolerance and encourage hatred that in certain cases have resulted in violence.<sup>15</sup>

Article 2 of the UDHR establishes that states shall protect human rights of all, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. In the Convention on the Rights of Child article 30 states that children have the right of belonging to minorities and to enjoy their own culture, profess and practise their own religion and to use their own language. Systematic violations of above mentioned rights have resulted in

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<sup>14</sup> A/HRC/32/18, 2016, p. 2f.

<sup>15</sup> Ibid, p. 3, p. 5.

irregular migration flows of Rohingya from Rakhine State to Thailand and Malaysia at the same time as irregular immigrants from Bangladesh.<sup>16</sup> A peak of 31 000 Rohingya and Bangladeshis are believed to have departed in the first half of 2015.<sup>17</sup>

## 2.1.1 Special Rapporteur

Every year, the UN examines and discusses the situation of human rights in Myanmar. In annual reports from the UN High Commissioner for Human Rights and of the Office of the High Commissioner and the Secretary-General, it can be read that the situation is debated and has been for years. In Resolution 1992/58 the Commission on Human Rights decided to nominate a Special Rapporteur to establish direct contacts with the government and people of Myanmar. The reason of this was to examine the situation of human rights within the country. The Commission urged the government of Myanmar to ensure free access for the Special Rapporteur to any person in the country who is appropriate to meet within his mandate.<sup>18</sup>

Since Resolution 1992/58 was adopted the Special Rapporteur has written a report of the situation in Myanmar every year and a drastic change can be seen in the different reports. In the report from 2013 the Special Rapporteur Tomás Ojea Quintana visited the Rakhine State where he met State authorities and community leaders. He expressed thanks to the government of Myanmar for its cooperation.<sup>19</sup> In December 2017 the Government of Myanmar denied the Special Rapporteur Yanghee Lee all access to the country which was a change in cooperation from earlier years, especially 2013. Since May 2016, the Government has not permitted international access to the non-government controlled areas and from December 2017 no access was permitted to Government controlled areas either.<sup>20</sup> In a report

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<sup>16</sup> A/HRC/32/18, 2016, p. 3.

<sup>17</sup> UNHCR, *Mixed Maritime Movements in South-East Asia*, 2015, p. 2.

<sup>18</sup> UNCHR, Resolution 1992/58, *Situation of Human rights in Myanmar*, 1992, p. 1f.

<sup>19</sup> HRC, A/HRC/22/58, *Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana\*\*\**, 2013, p. 3.

<sup>20</sup> A/HRC/37/70, 2018, p. 2, p. 8.

from the SC from September 2017, the president of the meeting, Mr. Alemu, expresses his deep concern regarding the fact that the UN and non-governmental partners are not granted immediate and safe access to all affected communities.<sup>21</sup> Other participants at the meeting expressed their views at the situation, United Kingdom's representative Mr. Allen said:

They can choose to end the violence, protect civilians and defend human rights. They can choose to allow humanitarian access, including by the United Nations. (...) But should they fail to do so, they will find themselves on the wrong side of history, and the Council must then be ready to take further action.<sup>22</sup>

Many of the participants brought up the attacks carried out against the Myanmar security forces and civilians in northern Rakhine state since 25<sup>th</sup> of August 2017. Arkan Rohingya Salvation Army launched attacks on an army base which cost 59 armed attackers lives along with 10 police officers, one immigration officer and one soldier.<sup>23</sup> Myanmar military and security forces responded with “clearance operations” and within the first two weeks 270 000 refugees fled to Bangladesh.<sup>24</sup> Reports, satellite images from non-government organizations, media and sources within Myanmar founded that security operations on heavy attacks continued until November 2017.<sup>25</sup> The high-commissioner for Human Rights, Zeid Ra'ad Al Hussein, has characterized these crimes as a “textbook case of ethnic cleansing” and expressed “we cannot ignore the massive violations of human rights that may constitute crimes against humanity”<sup>26</sup>. He called on the Government to

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<sup>21</sup> SC, S/PV.8060, 2017, p. 3.

<sup>22</sup> Ibid. p. 5.

<sup>23</sup> A/HRC/37/70, p. 10.

<sup>24</sup> “Bangladesh: Refugee camp capacity exhausted; thousands in makeshift shelters”, UNHCR, <<http://www.unhcr.org/news/briefing/2017/9/59b24a074/bangladesh-refugee-camp-capacity-exhausted-thousands-makeshift-shelters.html>>, published 2017-09-08, visited 2018-04-26

<sup>25</sup> A/HRC/37/70, p. 10.

<sup>26</sup> S/PV.8060, 2017, p. 12.

stop claiming that the Rohingya are “setting fire to their own homes” and accused them for denying reality.<sup>27</sup>

Several of the reports from the Special Rapporteurs include similar recommendations addressed to the Government of Myanmar.

Recommendations like develop programme of legislative reform to bring Myanmar’s legal system into line with international human rights, protect the rights of the entire population<sup>28</sup> and to ease the discriminatory restrictions on the freedom of movement of Muslim populations<sup>29</sup>. Yanghee Lee called for the urgent adoption of “a strongly worded resolution of the UN Security Council on the Myanmar crisis” in October 2017.<sup>30</sup>

## 2.1.2 Reactions from Myanmar

Myanmar’s state chancellor Aung San Suu Kyi is very well-published. She won the Nobel peace prize in 1991<sup>31</sup>. In an interview with BBC News, where she was asked about the situation for Rohingya Muslims within Myanmar, she denies ethnical cleansing. Suu Kyi meant that the expression “ethnical cleansing” is too strong and described the situation as “a lot of hostilities” and emphasises that Muslims are killing Muslims as well.<sup>32</sup>

Military matters are left to the army according to Myanmar’s constitution<sup>33</sup> and they have veto on any constitutional amendment. Suu Kyi underlines this as a problem because the army is to decide when they want to go in and

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<sup>27</sup> Zeid Ra'ad Al Hussein, ”Opening statement to the 36th session of the Human Rights Council”, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22044&LangID=E>>, visited 2018-04-27.

<sup>28</sup> A/HRC/37/70, p. 15.

<sup>29</sup> GA, A/HRC/25/64, *Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana\**, 2014, p. 20.

<sup>30</sup> ”Myanmar: UN Security Council must act on Rohingya crisis - UN expert”, <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22307&LangID=E>>, visited 2018-05-04.

<sup>31</sup> ”All Nobel Peace Prizes”, <[https://www.nobelprize.org/nobel\\_prizes/peace/laureates/](https://www.nobelprize.org/nobel_prizes/peace/laureates/)>, visited 2018-05-03.

<sup>32</sup> “How Aung San Suu Kyi sees the Rohingya crisis”, BBC News, <<http://www.bbc.com/news/world-asia-42824778>>, published 2018-01-28, visited 2018-05-04.

<sup>33</sup> Constitution of the Republic of the Union of Myanmar, Chapter 1 article 20(a).

fight and they are working for a change in the constitution on this matter.<sup>34</sup> Suu Kyi commented the heavy attacks that occurred in the second half of 2017 in a speech and said that the government since then have been making every effort to restore peace and stability and to promote harmony between the Muslim and the Rakhine communities. According to Suu Kyi there had been no clearance operations since 5<sup>th</sup> of September 2017.<sup>35</sup> Not in conformity with reports from non-governmental organizations in Myanmar.<sup>36</sup>

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<sup>34</sup> “How Aung San Suu Kyi sees the Rohingya crisis”, <<http://www.bbc.com/news/world-asia-42824778>>, published 2018-01-28, visited 2018-05-04.

<sup>35</sup> ”Aung San Suu Kyi 2017 FULL International Speech on the Violence in Myanmar”, <<https://www.youtube.com/watch?v=rcksU4G4Nzw>>, published 2017-09-19, visited 2018-05-08.

<sup>36</sup> See 2.1.1.

# 3 Responsibility to Protect

This chapter will explore the concept of R2P and the basic principles within international law. These principles need to be described in order to understand the doctrine of R2P.

## 3.1 State sovereignty

State sovereignty is established in the UN Charter article 2(1) and implies that all states are equally sovereign under international law. All states have the capacity to make authoritative decisions regarding resources and people within their territory. A corresponding obligation to respect every other state's sovereignty is a condition connected to state sovereignty. Article 2(7) of the UN Charter enshrines the norm of non-intervention. This means that every other state has a duty not to intervene in the internal affairs of a sovereign state. If states violate that duty, the victim state has the right to defend its territorial integrity and political independence.<sup>37</sup>

## 3.2 Human Rights

The line after the second World War was “never again” and the forming of UN Charter began. In the preamble of the UN Charter the member states reaffirm, among others, their belief in fundamental human rights and the dignity and worth of the human person. They commit to establish conditions under which justice and respect for the obligations developed in treaties and other sources can be maintained.<sup>38</sup> Myanmar adopted the Charter 1948, only two years after the first signing<sup>39</sup>. The UDHR from 1948 is the core document in the history of human rights and Myanmar was one of the first

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<sup>37</sup> ICISS, 2001, p. 7, p. 12.

<sup>38</sup> UN Charter, preamble.

<sup>39</sup> "United Nations Treaty Collection", [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=I-2&chapter=1&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-2&chapter=1&clang=en), visited 2018-04-11.

countries to sign the declaration. Later on, in 1966, two Covenants on civil-political and social-economic-cultural rights, establish the human rights norm as a fundamental principle of international relations. Together the Declaration and the Covenants opened up for a culture of peace rather than a culture of violence.<sup>40</sup>

### **3.3 Humanitarian Intervention**

Humanitarian intervention is when a state, or the international community, intervene another states territory without the consent of that state. The state being intervened is not able or not willing to protect its population.<sup>41</sup>

Humanitarian intervention is closely linked to R2P. The ICISS report is about the right to humanitarian intervention and if it's ever appropriate for states to take military action against another state with the purpose of protecting people at risk.<sup>42</sup>

### **3.4 The principle**

#### **3.4.1 Background**

In the ICISS report state sovereignty is re-characterized from a sovereignty to control to sovereignty as a responsibility. This implies that state authorities are responsible for their role of protecting the lives and safety of citizens, but it also suggests that the national political authorities are responsible for citizens both internally and to the international community through the UN. Through this way of interpreting state sovereignty, the agents of state are responsible for their actions, both commission and omission. This view of state sovereignty is strengthened by the increasing

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<sup>40</sup> "Myanmar's human rights record matter of 'grave concern,' says Ban", UN News, <<https://news.un.org/en/story/2009/07/305612-myanmars-human-rights-record-matter-grave-concern-says-ban>>, published 2009-07-04, visited 2018-04-11.

<sup>41</sup> Linderfalk, 2012, p. 205.

<sup>42</sup> ICISS, 2001, p. VII

impact of human right norms and international discussion of human security.<sup>43</sup>

Military intervention for protection of humans has been controversial both when it has happened but also when it has failed to happen. For some it has been an overdue internationalization of moral sense and for others it has been a breach of state sovereignty. The discussion became more intense after the Cold War and the question was if it's ever appropriate for states to take military actions against another state in order to protect people at risk. This together with NATO's intervention in Kosovo 1999, made without the approval of the SC, marked the start of change within humanitarian intervention. Kofi Annan made complaints and reached out for a solution on the problem of how to justify a humanitarian intervention when human rights are being violated. This led to the concept R2P that ICISS presented in their report 2001.<sup>44</sup>

### **3.4.2 The concept**

R2P is described as a principle used when human beings are subject to serious and irreparable harm. ICISS means that the principle can only be invoked when a large-scale loss of life or ethnic cleansing occurs to human beings or is likely to occur. This has been described as a change from the right for states to execute humanitarian intervention to an obligation for states to react. However, the sovereign state has the primary responsibility for protection of the people within the state. ICISS emphasises that the fundamental principle of non-intervention in cases described above has to give way to the R2P. Yet ICISS points out that the state has to be unable or unwilling to act or be the perpetrator themselves, in order for the external responsibility to actualize.<sup>45</sup>

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<sup>43</sup> ICISS, 2001, p. 13.

<sup>44</sup> Ibid. p. VII.

<sup>45</sup> Ibid. p. XI-XII.

### 3.4.3 Implementation of the principle

UN's former Secretary General Ban Ki-Moon presented the report *Implementing the responsibility to protect 2009* where he expressed his view on the principle. He concurs with the perception of the principle described in the General Assembly's *World Summit Outcome* which is the resolution where the member states adopted R2P. Resolutions adopted by the General Assembly are not legally binding for the member states<sup>46</sup> and are often referred to as "soft-law" standards which means that they are not legally binding.<sup>47</sup>

Specific parts of the ICISS report on formation of R2P were adopted unanimously on the World Summit. Consequently, each individual state has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity and the international community should encourage and help states in this matter. Further the international community, through the UN, also has the responsibility to use diplomatic means in accordance with chapter VI and VIII of the Charter. Means to help protect populations from above mentioned crimes. If necessary, they are prepared to take actions through the Security Council (SC) according with the Charter and chapter VII on a case-by-case basis. Chapter VII regulates the use of armed force and military measures.<sup>48</sup>

Ban Ki-Moon writes in his report that the Summit Outcome is anchored in already well-established principles of international law. States have obligations to protect its populations under conventional and customary international law. He underlines that R2P reinforces the legal obligations in conformity with the Charter.<sup>49</sup> Gareth Evans who was Co-Chair of the

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<sup>46</sup> "Generalförsamlingen", FN-förbundet UNA Sweden, <<https://fn.se/vi-gor/vi-utbildar-och-informerar/fn-info/fn-som-organisation/fn-systemet/huvudorgan/generalforsamlingen/>>, visited 2018-05-03.

<sup>47</sup> "UN General Assembly", Association for the Prevention of Torture, <<https://apt.ch/en/un-general-assembly/>>, visited 2018-04-27.

<sup>48</sup> A/RES/60/1, 2005, p. 30.

<sup>49</sup> SC, A/63/677, *Implementing the Responsibility to protect Report of the Secretary-General.*, 2009, p. 5.

ICISS agrees with Ban Ki-Moons opinion that R2P wasn't created to produce new rules in international relations. He means that R2P can be described in moral and political terms as a new international norm with a new standard of and guide to behaviour.<sup>50</sup>

### **3.4.4 Crimes listed in the principle**

Crimes against humanity occur when the offences listed in article 7 of the Statute of the International Criminal Court (Rome Statute) are committed in a widespread or systematic attack against a civilian population. Rape, torture and murder are examples of the listed crimes. Crimes against humanity has been considered a peremptory norm of international law according to the UN and applicable to all states, even though Myanmar is not a party to the Rome Statute.<sup>51</sup>

Genocide is defined in article 2(a) to (e) of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, which Myanmar is a party to. Genocide is defined as any of in the article listed acts committed with intent to destroy, in whole or in a part, a national, ethnical, racial or religious group. Killing members of the group, causing serious bodily or mental harm to members of the groups are two of the listed acts. Whether or not States have ratified the Genocide Convention, they are all bound because the principle is, according to the International Court of Justice, a crime prohibited under international law as general customary international law.<sup>52</sup> Ethnic cleansing has not been recognized as an independent crime under international law. It has been referred to while speaking of the violations of international humanitarian law committed in the territory of the former Yugoslavia. A definition can be found in its

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<sup>50</sup> Evans, 2016, p. 915.

<sup>51</sup> "Crimes Against Humanity", United Nations Office on Genocide Prevention and the Responsibility to Protect, <<http://www.un.org/en/genocideprevention/crimes-against-humanity.html>>, visited 2018-05-03.

<sup>52</sup> Ibid.

interim report as "... rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area."<sup>53</sup>

### 3.5 Security Council

The ICISS suggested in their report that regional organizations should have mandate to authorize military interventions, but the UN member states decided in the Summit Outcome that the SC is the only department with the mandate.<sup>54</sup> Discussion about whether the permanent members of the SC should be able to use their veto-power in cases of genocide, war crimes, ethnic cleansing and crimes against humanity was brought up before the World Summit.<sup>55</sup> The final Summit agreement regarding the veto-power, didn't result in a regulation in these situations and permanent members have a powerful negotiation tool and can vote against decisions of R2P.<sup>56</sup>

Diplomatic, humanitarian and other peaceful means (in accordance with chapter VI and VIII), are the first steps that R2P has to be exercised through. These measures shall, according to the formulation in the Summit Outcome, be channelled through the UN. Diana Amnéus, researcher and teacher in international law at Stockholm University, discusses R2P in her doctoral thesis. She means that for natural reasons it should be possible for individual states to undertake the humanitarian and peaceful measures when they are not in violation of international law. Amnéus interprets the formulation that states are "prepared" to take military actions (on a case-by-case basis in accordance with chapter VII) through the SC as it's not a duty. States may however use force to protect but it shall be achieved collectively through the SC. Therefore, she states that it's a legal right for the SC to protect by military means but not a legal obligation in all cases alike.<sup>57</sup>

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<sup>53</sup> SC, S/1994/674, 1994, p. 16.

<sup>54</sup> A/RES/60/1, 2005, p. 30.

<sup>55</sup> GA, A/59/HLPM/CRP.1i/Rev.2, *Revised draft outcome document of the High-level Plenary Meeting of the General Assembly of September 2005 submitted by the President of the General Assembly*, 2005, p. 29.

<sup>56</sup> Bannon, 2006, p.1160.

<sup>57</sup> Amnéus, 2008, p. 201 f.

It's controversial if approval from the SC should be required when decisions of R2P are made. Amnéus interpretation that mandate from the SC is required is the mainstream perception. Harold Hongju Koh, international law professor and scholar, doesn't share Amnéus opinion and is one of the opponents to the mandate of the SC. In his article *The War Powers And Humanitarian Intervention*, he refers to the Kosovo situation where NATO intervened without approval from the SC. He believes that "under certain highly constrained circumstances, a nation could lawfully use or threaten force for genuinely humanitarian purposes, even absent authorization by a U.N. Security Council resolution".<sup>58</sup> Furthermore Mr. Honju Koh underlines that international law accepts the repeated slaughter of thousands of civilians by prohibiting use of force outside the SC.<sup>59</sup>

### **3.6 Use of the principle**

As earlier mentioned resolutions adopted by the SC constitute soft-law and is not legally binding for the member states. However, soft-law documents can be important within international law. They can be proof of already existing law or affect opinio juris which is a subjective obligation were a state accepts international custom as law. This can result in new international custom which article 38 in the Statute of The International Court of Justice states as international law. Extensive acceptance of soft-law instruments can tend to legitimize behaviour and make the legality of opposing positions harder to sustain.<sup>60</sup>

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<sup>58</sup> Hongju Koh, 2016, p. 1006.

<sup>59</sup> Ibid, p. 1018.

<sup>60</sup> Evans, 2010, p. 122 f.

Different examples of R2P in practice can be found. In Resolution 1674 from 2006, the concept of R2P was referred to for the first time by the SC. Reaffirming that it's the parties to the conflict that bear the primary responsibility to ensure the protection of civilians.<sup>61</sup>

### **3.6.1 Libya**

In February 2011 the SC unanimously adopted Resolution 1970 due to the violence in Libya. Since Muammar al-Gaddafi began to rule in Libya, massive and systematic human rights violations had been reported. Protests against the regime in the beginning of 2011 were met with immediate violence resistance by the Gaddafi regime.<sup>62</sup> Violence against the civilian population was committed from the highest level of the Libyan government. The SC recalled “the Libyan authorities’ responsibility to protect its population”<sup>63</sup>. When the Gaddafi regime failed to comply with the SC demands in Resolution 1970 they authorized the use of force for humanitarian protection in another Resolution, 1973. This was made without consent of the concerned government which was the first time in history.<sup>64</sup> The SC underlined their responsibility for maintenance of peace and security under the UN Charter.<sup>65</sup> International community reacted “unusually rapid and robust”<sup>66</sup>, within the same month as the major protests started.<sup>67</sup> Even though the resolution allowing the use of force was adopted unanimously, disagreements existed. Russia and China abstained from the voting on Resolution 1973.<sup>68</sup>

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<sup>61</sup> Amnéus, 2008, p. 211.

<sup>62</sup> Payandeh, 2012, p. 372.

<sup>63</sup> SC, S/RES/1970 (2011), p. 2.

<sup>64</sup> Bellamy & Dunne, 2016, s. 10.

<sup>65</sup> SC, S/RES/1970 (2011), p. 2.

<sup>66</sup> Hehir & Murray, 2013, p. 3.

<sup>67</sup> SC, S/RES/1970, 2011, p. 1.

<sup>68</sup> SC, S/PV.6498, 2011, p. 8, p. 10.

### 3.6.2 Syria

Protests against the al-Assad regime began in February 2011. Protesters were attacked and subjected to brutal violence from the regime. As opposition towards the regime grew the violence from the government increased. Thousands of people were killed. Members of the SC reacted and many of the member states wanted to take actions against the Syrian government. Russia reacted differently and stated that the sovereignty of Syria had to be respected.<sup>69</sup>

In the end of May 2011, a draft resolution<sup>70</sup> was adopted by France, Germany, Portugal and the UK. It recalled the Syrian government's responsibility to protect its citizens and urged the government to cooperate with the Human Rights Council's investigative mission. The Syrian government refused. Five months after the draft resolution, a final draft was presented. China and Russia used their veto and the resolution was rejected. Attempts continued towards the use of military intervention in regard to R2P in Syria, but the SC has never reached an agreement.<sup>71</sup>

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<sup>69</sup> Zifcak, 2012, p. 73, p. 76.

<sup>70</sup> A/HRC/RES/S-16/1, 2011, p. 1.

<sup>71</sup> Zifcak, 2012, p. 75, p. 77.

## 4 Discussion and Analysis

Ever since R2P was coined and introduced it has been a term of discussion. R2P is based on internal and external responsibility and possibly obligations too. Individual states have the responsibility to protect its population from genocide, war crimes, ethnical cleansing and crimes against humanity. The international community has a responsibility through the UN to use diplomatic means and, if necessary, means through the SC. This can imply obligations for the international community. To be able to decide whether to use R2P for intervention or not, many decisions have to be made.

Considering the delimitation of this study, the specific crime Myanmar might expose the Rohingya Muslims to will not be investigated. Focus is on the possible obligations R2P can carry out for the international community. What has to be done to use R2P in this case is an investigation by the international community to see in what way R2P can be used in the Myanmar situation. That is the first step and whether it's an obligation for the international community to investigate the applicability of R2P is unclear. Adopting resolution on Special Rapporteur and constant visits to the country implies that the international community is required to investigate if R2P is applicable. On the other hand, the reports may not have R2P as underlying interest. The reason can be UN's general principle of peace and security or upholding UN treaties as UDHR. Yet, the investigations by the UN in Myanmar may lead to an obligation to react or at least to help the Myanmar Government to solve the problem. This because the international community have started the process towards a solution on the crisis in Myanmar and should therefore at least have a moral responsibility to fulfil the process. However, it mustn't imply that it's the R2P doctrine that has to be used.

Due to the fact that R2P constitutes soft-law it's impossible to implement in all cases of genocide, war crimes, ethnical cleansing and crimes against humanity. We haven't seen R2P carried out in practice many times and due to the fact that several states are against R2P in situations like Libya and Syria, it's hard to mark it as international custom in the present situation. Yet, parts of R2P have been repeated, as the investigation of human rights in Myanmar by the international community and voting in the SC of resolutions on R2P. Example of voting can be seen in the Syria case and example of investigation in reports from the UN, where they have brought up that they should protect the rights of all inhabitants and that the SC must be ready to take further action. These parts can perhaps be seen as steps towards considering R2P, in situations where the listed R2P crimes seems to occur, as international custom and therefore international law.

By adopting resolution on Special Rapporteur, who visits the country regularly and reports from the General Assembly of the situation, can be seen as the international community has fulfilled a part of the first step. Another part of the same step would be to respect the sovereignty of Myanmar and give them chances to solve the situation. State sovereignty is a fundamental principle that states take seriously, for example Russia and China using their veto in the Syrian conflict. The fact that most of Rohingya Muslims are stateless, subject to ostracize and violence by the government creates incentive for the international community to examine if crimes against humanity, genocide or ethnic cleansing occurs.

This case is different from Libya and Syria where R2P has been used or up for discussion. It means that the international community has a new dilemma and a new situation to choose side on. Since using R2P is to intervene either with diplomatic or military means it's a decision made above and without the Myanmar government's consent. If the government would start to protect their inhabitants, they would never end up in the situation were a resolution on R2P can be adopted against their will. R2P can perhaps imply, besides the responsibility to protect inhabitants, an

opposite side which is an obligation for the states voting in SC. This can be seen as an obligation not only to decide whether to intervene or not but also to make a statement in the conflict. This statement can be crucial to thousands of Rohingya Muslims and since opinions like Mr. Honju Koh's exist, states can be accused for accepting slaughter of civilians. The voting can be seen as an obligation, but states can always abstain from voting, like China and Russia did in the Libya case which speaks for the opposite. A vote for R2P in the Rohingya situation can harm the relation between the international community and Myanmar's government due to the fact that State Chancellor Suu Kyi doesn't share UN's view on the problem.

When R2P was used in Libya it happened quickly but Rohingya Muslims have been exposed for a long time. UN is no longer allowed to get into Myanmar and international community has stressed that this can be ethnical cleansing and crimes against humanity. The prohibition of access to the country can indicate on the use of R2P because it makes the situation more severe and inaccessible for the international community. Adopting a resolution on R2P with either diplomatic or military means can lead to access for the international community again. Or the prohibition will lead to awaiting with R2P from the international community because it can lead to infected relations with the Myanmar government.

Amnéus perception of "prepared" as an indicator that R2P is not a duty and that it's a legal right for the SC to protect by military means doesn't mention the diplomatic means. To be prepared to use military means to intervene through the SC leads to a voting in the SC as earlier mentioned. Yet the diplomatic and peaceful means are also stated in the R2P doctrine and could be applicable in the Myanmar case. Though it's hard to use diplomatic means while the international community is prohibited from access and even harder to help with diplomatic means when the Rohingya Muslims are victims of violence. The fact that R2P is soft-law and diplomatic means doesn't imply voting in the SC speaks for that it's not an obligation to use

them. Member states doesn't need to choose side as they have to when they vote and can easier avoid to react.

## 5 Conclusions

In summary, the study has provided strong evidence of the uncertainties that R2P contains. The fact that R2P is soft-law and lack of state custom intends that it doesn't come with obligations for the international community. This fact also implies that the principle's applicability to the situation depends on whether the international community discusses R2P as a solution or not. The reports and investigations that the UN have made in Myanmar suggests that it should be an obligation to investigate R2P, but there is no legal basis. Neither a legal basis to use diplomatic means through R2P even though the reports and investigations speaks for a moral obligation to take action with R2P.

Furthermore, consent is required in the SC to adopt a resolution on military means through R2P and the doctrine can therefore be used if the SC can agree on it. If the international community can agree on diplomatic means they don't need to vote in the SC. To force the member state to take actions through R2P is not an option because the principle doesn't imply that obligation.

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