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Preventing Atrocity Crimes in Myanmar: A Case Study in the Responsibility to Protect

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Abstract

The responsibility to protect is a norm which advances the idea that sovereignty is not just a right but also a responsibility, one derived from a state's commitment to protect its populations from four core crimes. In this thesis I ask whether the norm is applicable to the protracted civil war in Myanmar. Although the human rights violations committed in the civil war can be considered war crimes or crimes against humanity, they have occurred at such low intensity that they do not trigger R2P if the norm is understood as a *rallying cry* to extinguish large-scale crimes. However, if understood as an *enduring political agreement*, an R2P approach would focus on capacity-building of the Myanmar government and the international community to prevent atrocity crimes from occurring in the first place. The success of R2P will depend largely on the political will of the leaders in Myanmar, ASEAN, and China.

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I. Introduction

In 2005 the concept of the Responsibility to Protect (R2P) was unanimously adopted by the largest gathering of Heads of State in history at the United Nations World Summit.¹ It was a watershed moment for the prevention of atrocity crimes. The new norm would make it very difficult for states to hide behind the veil of sovereignty in order to commit mass violence against their populations. R2P advanced the idea that sovereignty was not only a right but also a responsibility, one derived from a state's commitment to protect its populations from four core crimes. But should the host state fail to do so, then that responsibility would transfer to the international community. In turn, the international community would have the responsibility to respond, through the United Nations, using appropriate means to protect the populations at risk of the core crimes.

In this thesis I ask whether this emerging norm is applicable to the protracted civil war in Myanmar.² Much of the current literature cites the ending of conscience-shocking atrocities—such as those in Rwanda and the former Yugoslavia—as the rationale for the invocation of the R2P. Accordingly, this narrative focuses on R2P's utility as a rallying cry for the international community to respond, with force if necessary, to imminent humanitarian situations where the sovereign government has failed in its responsibility to

¹ *World Summit Outcome: Resolution / Adopted by the General Assembly, 24 October 2005, A/RES/60/1*, (24 October 2005): Paragraph 138-139.

² In 1989, the military government changed the name of the country from Burma to Myanmar, its capital from Rangoon to Yangon, and its major river from Irrawaddy to Ayeyarwady. Although *Burma* and *Myanmar* have both been used in the vernacular to refer to the country since independence in 1948, the renaming of the country gave rise to political divisions in the international community over how the country should be called. For linguistic simplicity and without any political affiliation, both naming conventions will be used in this paper.

protect its population. The Myanmar case does not fit neatly within this narrative. No such large-scale atrocity event has ever occurred. Rather, it is a case of chronic, systematic human rights abuse in the context of a low-intensity civil war. Whether this is an R2P situation will depend on states' understanding of the norm and also on the nature of the crimes committed in Myanmar. In this case study, I unravel the on-going battle over the meaning of R2P to conceive of a way in which it applies to the protracted conflict in Myanmar. I also review United Nations documents to determine whether UN actors consider the human rights crimes committed in Myanmar a core crime and therefore within the scope of R2P. With the conceptual issues addressed, I then develop a broad-based R2P agenda for Myanmar and conclude with a discussion on the political challenges of implementing that agenda.

According to Alex Bellamy, various actors have interpreted R2P to have two different meanings: as “an enduring political commitment accompanied by a policy in need of implementation” and as “a rallying cry to generate the political will needed to mobilize decisive force”.³ I argue that the *rallying cry* interpretation of R2P is not compatible with the Myanmar case. While UN documents suggest that the crimes committed can be considered either war crimes or crimes against humanity according to the Rome Statute,⁴ they have not occurred at the scale which would normally be considered applicable to R2P. Yet hundreds of thousands of people have been killed and many more displaced,

³ Alex J. Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds* (New York, NY: Routledge, 2011), 246.

⁴ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS (entered into force 1 July 2002).

tortured and raped over the six decades of conflict. What the Myanmar case reveals is that a large-scale threshold does not have to be broken for an atrocity crime to occur. By understanding R2P as a *rallying cry* we are left with a norm that condemns mass killing over a short period of time while condoning the same crimes if spread out over a longer period. This undermines the moral foundations of R2P.

I argue that the protracted conflict in Myanmar can be better approached by interpreting R2P as “an enduring political commitment accompanied by a policy in need of implementation”.⁵ This approach focuses on the prevention of atrocity crimes by building capacity in the host state while also improving the ability of the international community to respond within the current normative framework. As such, this approach is better suited to deal with the specific dynamics of the Myanmar context. The Myanmar government has shown a genuine desire to end the civil war but so far has lacked the capacity to succeed. The international community can assist the government in fulfilling its responsibility to protect by being more coordinated and less politicized in its engagement with Myanmar. If we interpret R2P as “an enduring political commitment accompanied by a policy in need of implementation”⁶ then we must identify and implement that policy agenda. The broad-based agenda developed in this thesis contains non-coercive measures that range from structural prevention to post-conflict rebuilding while omitting coercive responses such as sanctions and military intervention. The R2P umbrella adds value by generating a *deep* response tailored to needs of the Myanmar context. It does this by pulling together disparate initiatives, increasing international

⁵ Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds*, 64-65

⁶ *Ibid*, 64-65.

attention on the peace process, and focusing the international community on a clear objective. The ultimate goal is not only to end the civil war but to prevent future atrocity crimes from occurring in the first place.

For the agenda to be implemented there must be political will. Although the R2P agenda proposed would not necessitate a Security Council vote, it would still require political will to marshal the necessary resources to develop and implement that agenda. More importantly, because it is not a situation where the responsibility to protect has been transferred to the international community, success will require domestic political leadership that is genuinely committed to implementing the agenda. I argue that the Myanmar government would respond with different levels of receptivity to the R2P measures outlined here because of the leaders' traditional focus on security.⁷ The leadership remains sensitive to calls for international intervention and is cautious regarding who they engage with. On the regional front, it is unlikely that ASEAN would take a leadership role in an R2P situation in Myanmar. However, ASEAN would not obstruct an attempt to implement R2P if there was significant pressure from outside the region. Furthermore, ASEAN could play a role in securing host state consent and implementation of the measures. On both the regional and international level, China's support would be crucial for the success of R2P. China has a long history of intervention in Myanmar and much to gain from a stable border. However, it is unlikely China would play a leadership role in invoking R2P in Myanmar and would likely defer to ASEAN for any such initiative. Its position on R2P would be influenced by a set of context specific

⁷ Andrew Selth, "Burma and the Threat of Invasion: Regime Fantasy Or Strategic Reality?" *Griffith Asia Institute Regional Outlook* No.17 (2008).

factors such as border security and energy security. At the moment Beijing's primary concern is to protect existing investment in light of the recent reforms.⁸

Methodology and Outline

This thesis was inspired by extensive personal travel in Southeast Asia. In Thailand I noticed a large number of street people and domestic workers "from Burma" who did not appear to be Burman. Many were in fact ethnic minorities who had fled fighting in their country. The plight of refugees was even more apparent in the lawless Chinese border town of Ruili where girls from ethnic groups serve Chinese tourists in the sex trade. In eastern Myanmar I witnessed first-hand a group of prisoners, chained at the ankles, working in a field. Thus I developed an interest in the Myanmar civil war and the international community's policies towards Myanmar. The responsibility to protect appeared to be a natural framework to address the situation but upon further research only one short article was found on the applicability of R2P on the civil war.⁹ As a former refugee from Southeast Asia I empathize with the victims of the war, and have approached this case study with the conviction that sovereignty can not be a shield for governments to inflict violence on their populations.

In conducting this analysis I focused on primary sources from the United Nations and UN-related bodies. For research on human rights crimes I concentrated on the reports

⁸ Y. Sun, "China and the Changing Myanmar," *Journal of Current Southeast Asian Affairs* 31, no. 4 (2012), 51-77.

⁹ See Paulo Sergio Pinheiro and Meghan Barron, "Burma (Myanmar)," in *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in our Time*, eds. Jared Genser and Irwin Cotler (New York, NY: Oxford University Press, 2012), 260-278.

made to the Human Rights Council by Special Rapporteurs on the Situation of Human Rights in Myanmar. Special Rapporteurs are independent experts assigned by the Human Rights Council to investigate the most serious of human rights violations around the world. The Special Rapporteurs for Myanmar are: Mr. Tomás Ojea Quintana, since May 2008; Mr. Paulo Sergio Pinheiro, December 2000 - April 2008; Mr. Rajsoomer Lallah, 1996-2000 (resigned on 02/11/2000); and Mr. Yozo Yokota, 1992-1996. Although various UN bodies have been documenting the human rights situation in Myanmar since 1992, I have cited only crimes committed since 2002 when the Rome Statute became effective. I have excluded gray literature and publications associated with the Free Burma movement. I have found the information associated with the Free Burma movement overly biased, concerned more with serving the interests of the Burma's government in exile than with the human rights situation in the country.¹⁰ For similar reasons I have also excluded reports from Amnesty International, Human Rights Watch, and other similar reports. Nonetheless, select gray literature—such as reports from the International Crisis Group—was used because of the difficulty in accessing reliable information from some of the most isolated regions in the world. Since I concentrate only on crimes committed in the context of the civil war, the geographic focus is on the periphery of the country. Crimes committed in the context of political oppression, such as those committed during the 1988 uprising and the Saffron Revolution, are not within the scope of this study. For R2P-related concepts I relied on primary United Nations sources such as the World Summit Outcome Document and the 2009 report *Implementing the Responsibility to*

¹⁰ See Morten B. Pedersen, *Promoting Human Rights in Burma : A Critique of Western Sanctions Policy* (Lanham, Md: Rowman & Littlefield Publishers, 2008), 297 for an in-depth analysis on how UN bodies have been influenced by lobbying by the Free Burma movement.

Protect.¹¹ The latter document guided the development of the R2P agenda in section IV. For the conceptual analysis of R2P I reviewed secondary sources, concentrating on some of the most influential writers of norm and R2P literature. The work of Alex Bellamy serves as the starting point for the development of a conceptual framework to understand the Myanmar situation.

This thesis is broken down into five sections. The first section deals with the normative architecture of the responsibility to protect. I begin this section with a brief discussion of the theory of norms including the norm life cycle.¹² Using the norm life cycle as the theoretical foundation, I outline the historical development of R2P's associated norms: sovereignty, non-intervention and human rights. The section concludes with a description of the conceptual development of the responsibility to protect norm. Section II provides the contextual background. I seek to explain the connection between Myanmar's two main conflicts: the Burmese struggle for democracy; and the civil war between the many ethnic minority groups on the periphery and the Burman-dominated government at the centre of the country. This is explained through an overview of Myanmar's contemporary history, the international response to it, and the civil war. The third section tackles the conceptual challenge of applying R2P on the Myanmar case. I begin by determining whether the crimes committed in the civil war constitute one of the four core crimes of genocide, ethnic cleansing, war crimes, or crimes against humanity. I then proceed to examine the different meanings of R2P using the work of Alex Bellamy, who advances

¹¹ UN General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary-General*, A/63/677, (12 January 2009).

¹² Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998), 887-917.

the notion that there are two different and incompatible interpretations of R2P. I then analyze the Myanmar case using both of these approaches. The fourth section builds on this conceptual work by developing an R2P agenda for the civil war in Myanmar. The agenda consists of four inter-related strategies with multiple R2P measures under each strategy. The final section asks whether there is political will to implement this agenda. Here I look at the political implications of R2P for the Myanmar government, ASEAN, and China.

II. Understanding the Normative Architecture of the Responsibility to Protect

The responsibility to protect has been given many labels: a principle, a concept, a framework, a norm, and an emerging norm. Even amongst advocates there is a lack of consensus over what it is, when it is triggered and how it is operationalized. This section puts this uncertainty into a broader theoretical understanding of norms. It situates the uncertainty in the context of a norm life cycle which seeks to explain how norms emerge, influence behaviour, and eventually fade away. The section also unpacks the responsibility to protect and places it into a broader historical perspective. In doing so I show that R2P is not one but multiple interwoven norms such as sovereignty, non-intervention, and human rights. The section concludes with a brief review of the conceptual development of the responsibility to protect.

A. Norms and the Norm Life Cycle

Norms are commonly understood as standards of appropriate behavior for actors with a given identity.¹³ Norms are inter-subjective understandings and collective expectations of how an individual, organization or state ought to act in a given situation. These expectations of conduct, in turn, influence whether these actors will adhere to a particular norm. In the context of state behaviour, norms can be understood as “generalized standards of conduct that delineate the scope of a state’s entitlements, the extent of its obligations, and the range of its jurisdiction”.¹⁴ Perhaps the most straight-forward definition of an international norm is “normal state practices.” Put another way, one can identify a norm when one says that *as a rule* states engage in a particular practice.¹⁵ There are two types of norms: regulative and constitutive. Regulative norms prescribe, proscribe and order behaviour. They set standards of appropriate conduct for actors of a given identity and, in this sense, constrain or enable choice when actors are given alternative policy options. The norm of non-interference constrains the behaviour of nations in ASEAN, for example. Constitutive norms define and create new actors, interests, or categories of action. The norm of sovereignty, for example, defines what a state is.¹⁶

¹³ Peter J. Katzenstein, *The Culture of National Security: Norms and Identity in World Politics* (New York, NY: Columbia University Press, 1996), 5.

¹⁴ Robert Axelrod, "An Evolutionary Approach to Norms," *American Political Science Review* 80 (1986), 1095-1111.

¹⁵ Jance E. Thomson, "Norms in International Relations: A Conceptual Analysis," *International Journal of Group Tensions* 23, no. 1 (1993), 67-83.

¹⁶ W. Andy Knight, "The Development of the Responsibility to Protect – from Evolving Norm to Practice," *Global Responsibility to Protect* 3 (2011), 3-36.

When a new norm is initially adopted it is often vague and can mean different things to different actors.¹⁷ Since its evaluative characteristic is not sharp, some actors may adopt the norm because the imprecision makes it difficult to discern whether the actor is compliant or not. As a result, actors can appear to adopt and comply with contradictory norms. This study is a case in point. Myanmar officially endorsed the responsibility to protect in 2005.¹⁸ But despite ample UN documentation¹⁹ acknowledging the commission of atrocity crimes by the Myanmar government, it is difficult to determine whether it has complied with the norm, or not. Although the vagueness of the norm may maximize adoption amongst a community of actors, the lack of clear-cut compliance or disobedience can bring forth a battle over the norm itself.²⁰ Through this battle the meanings of norms change, and may even lead to a restoration of the situation before the adoption of the norm. The emergence, adoption and subsequent battle over the meanings of norms can be examined within what Martha Finnemore and Catherine Sikkink refer to as a norm life cycle.

Finnemore and Sikkink conceived of a three-stage process to explain the emergence of norms, the process through which norms influence behaviour, and whether norms will be relevant and under what conditions. This was subsequently adapted into a five-stage process by W. Andy Knight²¹ who infused it with the understanding that norms change as

¹⁷ Kees Van Kersbergen and Bertjan Verbeek, "The Politics of International Norms: Subsidiarity and the Imperfect Competence Regime of the European Union," *European Journal of International Relations* 13 (2007), 221.

¹⁸ *World Summit Outcome: Resolution / Adopted by the General Assembly, 24 October 2005, A/RES/60/1*, (24 October 2005)

¹⁹ See section IV A: Is it a core crime.

²⁰ *Ibid.*, 221.

²¹ W. Andy Knight, "The Development of the Responsibility to Protect – from Evolving Norm to Practice," *Global Responsibility to Protect* 3 (2011), 3-36.

they proceed through the life cycle, and that the battle over their meanings and relevance is an integral part of the life of a norm. The five stages are:

1. The Conception Stage — The emergence of a new norm is aided by a ‘norm entrepreneur’ who calls attention to an issue that needs to be addressed or a situation that needs to be changed. Norm entrepreneurs engage in ‘norm advocacy’ in order to persuade others of the need for the new norm to bring about that change. Whether their motivation is altruistic or based on self-interest, norm entrepreneurs must possess powerful methods of persuasion in order to compel others to buy into the new norm.
2. The Normative Contestation or Normative Fit Stage — Since new norms arise from a dissatisfaction with the current state of affairs and with an old norm, it follows that the new norm emerges into a contested space. During this stage “a new norm either clashes with an existing and more dominant norm, or when the decision is made to attach the new norm to an existing one due to its potential ‘adjacency’.”²² As Finnemore and Sikkink pointed out, norms are continuous rather than dichotomous entities.²³ Therefore multiple and often apparently contradictory norms can exist in the same space at the same time, with those opposing norms commanding different levels of agreement amongst actors.²⁴ The vagueness of the emerging norm during this stage allows actors to adhere to both

²² Knight, *The Development of the Responsibility to Protect – from Evolving Norm to Practice*, 3-36.

²³ Jeffrey W. Legro, "Which Norms Matter? Revisiting the Failure of Internationalism," *International Organization* 51, no. 1 (1997), 31-63.

²⁴ *Ibid.*

- contradictory norms at the same time. During this stage the norm sharpens or dulls, and the actor reconciles or maintains its behaviour.
3. The Diffusion/Cascading Stage — The threshold between stages two and three is referred to as a tipping point. This occurs when norm entrepreneurs have successfully compelled a critical mass of actors to adhere to an emerging norm. The norm then cascades to other actors and attains widespread acceptance. Finnemore and Sikkink hypothesized that tipping rarely occurs before at least one-third of the states in the system adopt a norm. Moreover, which states buy in is important. In other words, there must be support from states whose absence or resistance would prevent attainment of the norm's goals. Once the tipping point has been reached, the cascading of the norm spreads through a complex process of international socialization where supporters are encouraged to adopt the norm and detractors are shamed into doing so.²⁵
 4. The Internalization and Institutionalization Stage — Once the norm has reached this stage it is so widely accepted that it is 'taken-for-granted'. That is, norms are so internalized that conformity to the norm is not questioned. "Actors begin to conform to the new norm in a routinised, reflexive, and almost non-reflective, manner."²⁶ Norms become internalized through various channels such as codification, institutionalization, and universal adherence. Professionals are also effective channels for norm internalization as members are trained in not only skills but values.

²⁵ Finnemore and Sikkink, *International Norm Dynamics and Political Change*, 902.

²⁶ Knight, *The Development of the Responsibility to Protect – from Evolving Norm to Practice*, 3-36.

5. The Resistance, Accommodation, or Dissolution Stage — In Finnemore and Sikkink's model there are only three places to situate a norm: norm emergence, norm cascade and norm internalization. Knight added this final stage to acknowledge that even robust, established norms will one day be challenged by an emerging norm. When that happens the established norm will need to be reconciled to accommodate for the emerging norm, or the established norm can weaken and possibly fade away altogether.

B. Sovereignty, Non-Intervention and Human Rights

To fully understand the responsibility to protect it is necessary to take a longer historical perspective and examine other norms that R2P speaks to. Specifically, these are the norms of sovereignty, non-intervention, and human rights. Sovereignty, or the modern system of sovereign nation-states, can be traced back to the Treaties of Westphalia in 1648. With the signing of the treaties the norm of sovereignty became bound to independent, territorially-defined states. This meant that states would not be subject to a higher authority nor would they be subject to intervention from other states. Sovereignty, then, became bound to the notion of non-intervention.

The emergence of sovereignty after the Treaties of Westphalia did not immediately or completely replace the *right to conquest*, one of the prevailing norms in Europe at that time.²⁷ In their case studies on the German annexation of Alsace-Lorraine, North Korea's invasion of South Korea, the Iraqi invasion of Kuwait and other conflicts, Sandholtz and

²⁷ Wayne Sandholtz and Kendall Stiles, *International Norms and Cycles of Change* (New York, New York: Oxford University Press, 2009), 55.

Stiles show the gradual decline of the *right to conquest* as it became delegitimized by the new norms of self-determination and territorial integrity. With each successive case of intervention for conquest, the international response against the aggressor became stronger, thus solidifying the norm of sovereignty and guaranteeing states their most basic right: the right to exist within their own borders.

Although the norm of sovereignty strengthened over this time, intervention as a practice remained steadfast.²⁸ However, *why* states intervene, *how* the intervention is conducted, and *who* they intervene for have all changed over the last two hundred years. The rationales given for intervention today are very different than those given two centuries ago and, conversely, past reasons for intervention have long disappeared.²⁹ Until the early part of the nineteenth century, for example, it was acceptable practise for states to militarily intervene in another country to enforce contracts and collect debts owed to their nationals.³⁰ In terms of *how* intervention is conducted, Finnemore argues that humanitarian military intervention today must be multilateral in order to be considered legitimate.³¹ Whereas states in the nineteenth century invoked humanitarian justifications even when intervention was unilateral, this practise has mostly stopped in the twentieth and twenty-first centuries. Multilateralism legitimates intervention because it reassures other states about the interveners' intentions. It also forces the interveners to obtain consent from differently motivated states.³² Finnemore's final observation is that for

²⁸ Martha Finnemore, *The Purpose of Intervention: Changing Beliefs about the use of Force* (Ithaca, New York: Cornell University Press, 2003), 9.

²⁹ *Ibid.*, 141.

³⁰ *Ibid.*, 141.

³¹ *Ibid.*, 74 *Ibid.*, 74.

³² Michael W. Doyle, "The Ethics of Multilateralism," *Theoria: A Journal of Social and Political Theory* April (2006), 38-42.

whom interventions are conducted has changed over the centuries. Prior to the twentieth century, nearly all instances of military intervention to protect people other than the intervener's own nationals involved protection of Christians from the Ottoman Turks.³³ Since World War II, nearly all interventions have been for non-Christians and non-Europeans: Khmers in Cambodia, Bosnian Muslims, Kurds in Iraq, and Albanian Muslims in Kosovo are all examples.

The signing of the Treaties of Westphalia weakened the *right to conquest* and greatly reduced state-to-state conflict. However, the Treaties also facilitated the emergence of new norms—non-intervention and sovereignty—which provided states with protection from outside interference even if the actions of the state were inhumane and indefensible. In other words, states were able to hide behind the norm of sovereignty in order to kill their own populations. The Turkish massacre of Armenians, Stalin's killing of Ukrainians, and the Nazi slaughter of Jews are just a few horrific examples. It was not until the end of World War II that the absolute nature of sovereignty was challenged by a growing humanitarian and human rights movement.

The rapid expansion of universal human rights norms post-WWII is evidenced by the many declarations and laws passed at the international level. Before the Nuremberg trials and the indictment of German leaders for crimes against humanity, there was no recognition of crimes against humanity in international law.³⁴ The Nuremberg trials set

³³ Finnemore, *The Purpose of Intervention: Changing Beliefs about the use of Force*, 58

³⁴ Richard J. Goldstone, "The Role of the International Criminal Court" in *Mass Atrocity Crimes: Preventing Future Outrages*, ed. Robert I. Rotberg, Washington, D.C.: World Peace Foundation, 2010), 55-56.

the stage for the International Law Commission, which codified legal proposals related to serious international criminal activity.³⁵ In 1948 the UN passed the Universal Declaration of Human Rights which recognized the universality of individual and human rights. Soon after, the UN adopted the *Convention on the Prevention and Punishment of the Crime of Genocide*, which made the act of genocide a crime under international law, no matter if it is committed in times of peace or war.³⁶ These resolutions offered a direct challenge to the notion of sovereign states. From then on, states were required to meet certain international standards, all of which involved reining in their unfettered authority. Correspondingly, the adoption of these principles and laws also put a responsibility on the international community for their enforcement.³⁷ Over the next few decades a vast number of human rights agreements signed by UN members obliged governments not only to protect their populations but also to require them to be open to scrutiny by the international community if they do not. It is now widely understood, and almost taken-for-granted, that states open themselves up to criticism, condemnation, and other measures if they do not fulfil their human rights obligations.³⁸

In response to the events in Serbia and Rwanda in the 1990s, the United Nations Security Council used Chapter VII of the UN Charter to establish the International Criminal Tribunal for Yugoslavia³⁹ and the International Criminal Tribunal for Rwanda.⁴⁰ These

³⁵ Knight, *The Development of the Responsibility to Protect – from Evolving Norm to Practice*, 3-36.

³⁶ UN General Assembly, *Prevention and punishment of the crime of genocide*, 9 December 1948, A/RES/260.

³⁷ Francis M. Deng, "From 'Sovereignty as Responsibility' to the 'Responsibility to Protect'," *Global Responsibility to Protect* 2, no. 4 (10, 2010), 357-358.

³⁸ *Ibid.*, 360.

³⁹ UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*, 25 May 1993 (as Amended on 17 May 2002), (25 May 1993).

two tribunals were ad hoc and limited in scope; however, they set in motion the creation of a judicial mechanism which would become a deterrent for atrocity crimes. In 1998 States adopted the Rome Statute of the International Criminal Court.⁴¹ This permanent International Criminal Court is more enduring and acts as a complement to national criminal jurisdictions. Equally important, the Rome Statute consolidated much of the existing international criminal laws including all four of core crimes relevant to R2P: genocide, crimes against humanity, war crimes, and ethnic cleansing. Indeed, the codification of these crimes in the international legal system is an important piece in the overall architecture of the R2P norm.

C. The Conceptual Development of the Responsibility to Protect

In the 1990s the ending of the Cold War and easing of superpower structures unleashed a wave of conscience-shocking atrocities such as those that occurred in the former Yugoslavia. During this period, the Security Council authorized military interventions based on humanitarian justifications often without consent of the host state. Although the UN was responding to grave threats to vulnerable populations, the notions of *right to intervene* and *humanitarian intervention* remained conceptually problematic: “it loads the dice in favour of intervention before the argument has even begun, by labeling and delegitimizing dissent as anti-humanitarian.”⁴² A debate raged between those who argued for humanitarian intervention—the notion that there is a ‘right to intervene’ in a country against the will of its government in order to alleviate suffering—and those who favoured

⁴⁰ UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as Last Amended on 13 October 2006)*, (8 November 1994).

⁴¹ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS (entered into force 1 July 2002).

⁴² Ramesh Thakur, Andrew F. Cooper and J. English, eds., *International Commissions and the Power of Ideas*, 15 March 2006), 184.

the preservation of traditional notions of sovereignty and non-intervention. The choice facing the world was best illustrated by UN Secretary General Kofi Annan:

“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 affect every precept of our common humanity?”⁴³

This moral quandary was wrestled with by the International Commission on Intervention and State Sovereignty (ICISS) in their report *Responsibility to Protect*.⁴⁴ Released in 2000, the report built on the earlier work of Francis Deng and Roberta Cohen, who conceived of sovereignty as responsibility.⁴⁵ Rather than focus on the rights of the intervener, the commission turned its attention to the notion of protection and to the responsibility of all states to protect vulnerable populations. The ICISS reframed the debate by binding the rights associated with state sovereignty with the obligations of a state to protect its population. The ICISS argued that a state’s sovereignty entailed a responsibility to protect populations from atrocity crimes such as genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility belongs first and foremost with states themselves, but should these states prove unwilling or unable to fulfill this obligation, then that responsibility shifts to the international community. The ICISS report outlined the international community’s responsibility to prevent, to react,

⁴³ *United Nations Millennium Declaration, Resolution Adopted by the General Assembly, A/RES/55/2*, (18 September 2000) .

⁴⁴ International Commission on Intervention and State Sovereignty and International Development Research Centre, *The Responsibility to Protect* (Ottawa, Ont: International Development Research Centre, 2001).

⁴⁵ Roberta Cohen and Francis M. Deng, eds., *Masses in Flight: The Global Crisis of Internal Displacement* (Washington, DC: Brookings Institute, 1998).

and to rebuild using a continuum of measures that included military intervention as a last resort. In 2005 the Responsibility to Protect was adopted unanimously at the World Summit by the largest gathering of Heads of State in history,⁴⁶ a watershed moment for the prevention of atrocity crimes. Paragraphs 138 and 139 of the World Summit Outcome Document outline the responsibility to protect as follows:

138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. 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 protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be

⁴⁶ UN General Assembly, *2005 World Summit Outcome : Resolution / Adopted by the General Assembly, 24 October 2005, A/RES/60/1*, Paragraph 138-139

inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

R2P Since the World Summit in 2005—The commitment to R2P was reaffirmed in Security Council resolution 1674 several months after the World Summit.⁴⁷ Nonetheless, there was much backsliding by countries that had already adopted R2P in 2005. One of the chief objections was that R2P would be a ‘Trojan Horse’ for developed countries to pursue a neo-colonial agenda. Some countries even argued that paragraphs 138 and 139 did not imply a commitment to R2P itself, but rather a commitment to further consider it. Resistance to R2P was aided by general confusion and disagreement over the meaning, nature and scope of R2P. Some called it a norm or emerging norm, others a principle, concept, or framework. There was confusion over how R2P would be triggered and who would authorize and implement it. Despite these setbacks the norm has made tremendous strides in a few short years. R2P is now firmly on the international diplomatic agenda. Not only has it been discussed in various diplomatic forums within the United Nations

⁴⁷ *Security Council Resolution 1674 (2006), S/RES/1674 (2006), (28 April 2006).*

system, but also in regional associations and in the mainstream media. Research centres and other groups committed to advancing the norm have been established around the world. There is no shortage of research and researchers engaged in this topic.

In terms of actual cases, there has been little consistency in why R2P has or hasn't been invoked. It was invoked in Kenya as part of Kofi Annan's diplomatic strategy to stem the ethnic violence that erupted after the 2008 election.⁴⁸ For the crisis in Darfur, the Security Council referred to R2P for the first time in a resolution condemning the mass killing that had left 250,000 dead and displaced over two million people.⁴⁹ The second time the UNSC referred to R2P was in Resolution 1970 in response to the imminent crisis in Libya.⁵⁰ In Sri Lanka, R2P was hotly debated but never appeared on the Security Council agenda despite apparent evidence of the state's failure to protect populations.⁵¹ In Georgia, R2P was invoked by Russia to justify unilateral intervention when there was no evidence of a Georgian failure to protect its population from atrocity crimes.⁵² In the aftermath of Cyclone Nargis in Myanmar, France invoked R2P for the purpose of forcibly delivering humanitarian aid.⁵³ In Iraq and Afghanistan, civilian casualties have

⁴⁸ Ban Ki-moon, *Statement Attributable to the Spokesperson for the Secretary-General on the Situation in Kenya*, [2 January 2008].

⁴⁹ UN Security Council, *Resolution 1706 (2006) Reports of the Secretary-General on the Sudan, S/RES/1706 (2006)*, (31 August 2006).

⁵⁰ UN Security Council, *Resolution 1970 (2011), S/RES/1970 (2011)*, (26 February 2011).

⁵¹ Damien Kingsbury, *Sri Lanka and the Responsibility to Protect: Politics, Ethnicity and Genocide* (New York, NY: Routledge, 2012), 183.

⁵² UN General Assembly, *Delegates Weigh Legal Merits of Responsibility to Protect Concept as General Assembly Concludes Debate, GA/10850*, (28 July 2009).

⁵³ See Joanna Harrington, "R2P and Natural Disasters," in *The Routledge Handbook of the Responsibility to Protect*, eds. W. Andy Knight and Frazer Egerton (New York, NY: Routledge, 2012).

risen up to the level of war crimes and crimes against humanity, yet there has been little discussion of these conflicts through the lens of R2P.⁵⁴

Implementing the responsibility to protect—In 2009 the Secretary General Ban Ki-moon released the report *Implementing the Responsibility to Protect*.⁵⁵ The report set about to clarify paragraphs 138 and 139 of the WSOD. His approach can be characterized as narrow and deep. Narrow in the sense that the norm applies to four core crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity. These crimes are already codified in existing international law.⁵⁶ The approach is deep in that it can involve a whole range of tools available in the UN Charter: the preventive measures in Chapter VI, the reactive measures in Chapter VII, and the sub-regional arrangements under Chapter VIII. In essence, Ban grounded R2P in pre-existing state obligations to prevent and punish genocide and other atrocity crimes. Similarly, the mechanisms he brought forth for implementation were already in international law. Authority to enact these mechanisms would ultimately sit with the United Nations Security Council. Equally important, the Secretary General developed a conceptual framework for R2P based on three non-sequential, equally-important pillars. Pillar one is the responsibility of each state to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. The second pillar is a commitment by the international community to assist states to fulfill that responsibility including “assisting those which are under stress,

⁵⁴ Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds*, 64-65.

⁵⁵ UN General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary-General*, A/63/677, (12 January 2009).

⁵⁶ The responsibility of states to protect their populations from core crimes is embedded in existing international law. The responsibility of states to protect populations beyond their borders, however, is not legally binding. The International Law Commission and the International Criminal Court have begun to give shape to the legal duties of states to protect populations beyond their borders in recent cases such as *Bosnia v Serbia* in 2007.

before crises and conflicts break out”.⁵⁷ The third and most contentious pillar recognizes a commitment by the international community to take timely and decisive action should those states manifestly fail to live up to their responsibilities in pillar one. This action would be taken on a case-by-case basis through the Security Council in accordance with the UN Charter, and would include Chapter VII should peaceful means be inadequate. Ban’s approach emphasized prevention and was closer in line to what was agreed to in 2005, allowing it to achieve a broad consensus at the July 2009 General Assembly debate. Despite the efforts of the President of the General Assembly to convince the member states to take a critical stance against R2P, speaker after speaker from different regions around the world voiced their support for R2P and Ban’s approach. Of ninety-four speakers only four wished to renegotiate the terms of the 2005 agreement.⁵⁸

⁵⁷ Ibid.

⁵⁸ ICRtoP, *Report on the General Assembly Plenary Debate on the Responsibility to Protect*, [15 September 2009]).

III. Understanding the Myanmar Conundrum

There are two main conflicts in Myanmar. The first is the Burmese people's struggle for democracy as symbolized by the defiance of Aung San Suu Ky and the National League for Democracy in the face of decades of oppression. This conflict can be characterized as a struggle against authoritarian rule. The demands of the Burmese people include democracy, freedom of expression, and a free press. It is not an ethnic conflict as both sides consist primarily of people who are Burman and Buddhist. The second major conflict is between the many religiously and ethnically diverse minority groups on the periphery of the country and the Burman Buddhist government at the centre. The demands of the ethnic groups vary, but generally it is about greater autonomy or concessions from the central government. This protracted civil war is not about an end to dictatorship since many of the ethnically-controlled areas are themselves ruled in an authoritarian manner. The two conflicts are inextricably linked; but for the purposes of this case study I am concerned primarily with the protracted civil war and the atrocity crimes committed in that context. In this section I will provide some background to explain these linkages.

A. A Brief History

Myanmar's population is diverse. One-third of its population is made up of ethnic minority groups who traditionally inhabit the periphery of the country bordering Thailand, China, India and Bangladesh. These minority groups often share greater

kinship ties with those living in neighbouring countries than with the majority of Burmans (Bamar) inhabiting the lowlands. Although these ethnic divisions existed long before the arrival of the British, the divisions were institutionalized under colonial rule through the ‘divide and conquer’ strategy. *Burma Proper*, the lowland area inhabited by Burmans, and the *Frontier Areas* of the ethnic minorities were administered under different systems. This system increased the autonomy of ethnic minorities and limited their interaction with the majority Burmans.⁵⁹ These ethnic divisions would get worse during the country’s struggle for independence when the ethnic groups such as the Kachin, Chin, Naga, and the Karen sided with the British while the Burman army supported the invading Japanese army.

In 1947 the British agreed to independence for Burma. In February of that year, Aung San, leader of the interim government of Burma at the time, met with the leaders of the Shan, Kachin and Chin at the Panglong Conference to discuss the formation of the Union of Burma. The agreement forged at the meeting offered full administrative autonomy for the Frontier Areas, as well as revenue sharing between the central government and the Frontier Areas.⁶⁰ The agreement also envisioned the creation of a Kachin State.

Unfortunately not all the ethnic groups were involved in the conference. Furthermore, different groups were offered different deals, and some groups were highly critical of the process. Five months later Aung San was assassinated. The dreams of the Panglong Conference not only died with him but were fought over for the next six decades.

⁵⁹ Donald M. Seekins, *Historical Dictionary of Burma (Myanmar)* (Lanham, Md: Scarecrow Press, 2006), 17-18.

⁶⁰ Myanmar. *Panglong Agreement*, (1947): available at http://en.wikipedia.org/wiki/File:Panglong_Agreement.png .

Myanmar gained independence from the British in 1948. Violence was widespread during its first decade as ethnic minorities and communist groups contested the institutions of the Burman-dominated central government. From 1958-62 an attempt at constitutional government failed, thus creating space for the Tatmadaw (armed forces) to become involved in governance. Led by General Ne Win, the military overthrew the civilian government in 1962 and ruled until 1988. This period was shaped by the *Burmese Way to Socialism*, a program of xenophobic and nationalistic policies that withdrew the country into self-imposed isolation.⁶¹ These policies also proved disastrous for the once-prosperous economy, prompting the United Nations to designate Myanmar a Least Developed Country in 1987.

Anger with the regime's economic mismanagement finally boiled over in the summer of 1988 when hundreds of thousands of demonstrators demanded an end to totalitarian rule. Galvanized by the appearance of Aung San Suu Kyi, daughter of national hero Aung San, the demonstrations grew larger. All hopes were quickly dashed, however, with the emergence of the State Law and Order Restoration Council (SLORC).⁶² This younger generation of hard-line generals seized power from Ne Win and violently crushed the demonstrations. Faced with an ailing economy and lack of legitimacy, the new regime quickly implemented market reforms, a more outward-looking foreign policy, and plans

⁶¹ Renaud Egreteau and Larry Jagan, *Back to the Old Habits: Isolation Or the Self-Preservation of Burma's Military Regime*, Vol. No. 8 (Bangkok, Thailand: IRASEC- Research Institute on Contemporary Southeast Asia, 2008), 14-16.

⁶² The ruling military government changed its name to the State Peace and Development Council (SPDC) in 1997. This was viewed mainly as a cosmetic change as no shifts in policy followed. In this case study both SLORC and SPDC are used.

for multi-party elections in 1990. Despite being under house arrest, Suu Kyi and her party, the National League for Democracy (NLD), took 60% of the votes and 80% of the seats in the election. The SLORC refused to hand over power and insisted that a new constitution had to be drafted before transition of power could take place.⁶³ Over the next two decades the government would engage in the seven-step *roadmap to democracy* which eventually resulted in the 2008 constitution and 2010 election. Critics called the election a sham to entrench military rule, citing the 2008 Constitution which guarantees that 25% of national, regional and local parliamentary seats be dedicated to the military.⁶⁴ Indeed 89% percent of the seats in the legislature are now held by people who are affiliated with the former government.

Since taking office in March 2011, President Thein Sein has implemented a reform agenda that has been nothing short of remarkable. One of his first moves was to facilitate political reconciliation.⁶⁵ The amendment of election laws allowed Suu Kyi and the NLD to run in a by-election which resulted in the NLD becoming the largest opposition party in the country. The government also invited political exiles to return from overseas. Since the formation of the new government, six amnesties have been granted and more than 730 prisoners of conscience have been released, many of whom were student leaders during the 1988 uprisings.⁶⁶ New laws have eased censorship of domestic print media and the internet. News sites run by political exiles and the government's harshest critics are

⁶³ Members of the NLD subsequently formed the National Coalition Government of the Union of Myanmar (NCGUB), a government-in-exile headquartered in Washington, DC, and engaged in lobbying Western governments and institutions.

⁶⁴ Myanmar, "Constitution of the Union of the Republic of Myanmar (English Version)," 2010: available at <http://www.scribd.com/doc/7694880/Myanmar-Constitution-2008-English-version>.

⁶⁵ Thein Sein, *President U Thein Sein Delivers Inaugural Address to Pyidaungsu Hluttaw*, [31 March 2011]).

⁶⁶ *Situation of Human Rights in Myanmar: Note by the Secretary-General, A/66/365*, (16 September 2011).

now accessible for the first time.⁶⁷ The government has also worked with international organizations to align domestic laws with international standards. In June 2012 the government signed an action plan to end the recruitment of child soldiers, and in July it adopted a joint strategy with the International Labour Organization to eliminate all forms of forced labour by 2015.⁶⁸ Finally, the new government has also made significant changes to the governance structure. Decision making has been decentralized through the creation of new bodies and institutions such as the National Defence and Security Council and the Supreme State Council.⁶⁹ The Myanmar Human Rights Commission was established to investigate human rights abuses. Overall UN observers have noticed an increased openness amongst the population to discuss human rights issues and debate the direction, pace and scope of reforms.⁷⁰ Many other reforms are still in progress.

B. International Response

As noted above there are two main conflicts in Myanmar: the Burmese people's struggle for democracy, and the civil war between the ethnically diverse minority groups on the periphery of the country and the central government. Since 1988 Western governments have tended to treat these two conflicts as one.⁷¹ This is due to the successful lobbying of the Free Burma movement, a transnational network of advocacy groups associated with many student leaders from the 1988 uprising and exiled NLD members after the 1990 election. Although many of the human rights violations occurred in the context of the

⁶⁷ Thomas Fuller, "Chief Censor in Myanmar Caps His Red Pen," *New York Times* 21 September 2012.

⁶⁸ *Situation of Human Rights in Myanmar: Note by the Secretary-General, A/67/383*, (25 September 2012).

⁶⁹ *Situation of Human Rights in Myanmar: Note by the Secretary-General, A/66/365*, (16 September 2011).

⁷⁰ *Situation of Human Rights in Myanmar : Note / by the Secretary-General, A/67/383*, (25 September 2012).

⁷¹ Pedersen, *Promoting Human Rights in Burma : A Critique of Western Sanctions Policy*, 50.

civil war, the Free Burma movement used all violations in the country to frame their political struggle as a moral struggle and to call for the removal of the military government.⁷² As a result Western strategy from 1988 to 2010 centered on the promotion of democracy through isolation. This has meant not only the denial of trade, investment, and international legitimacy, but also the denial of nearly all international assistance normally offered to the least developed countries in the world for poverty alleviation, peace building, and other humanitarian concerns. The US used their influence to advance this agenda through international organizations such as the IMF, the World Bank and UNDP. US assistance to the UNDP, for example, could not be given to the Myanmar government; it could only be given to NGOs, and only after consultation with leaders of the NLD.⁷³ In 2009 the Obama Administration reviewed its Myanmar policy and announced that the US would retain existing trade, investment and targeted financial sanctions, but would add high-level diplomatic engagement.⁷⁴ This was followed up by the much-publicized visit by Secretary of State Hillary Clinton in 2011 and then by Obama himself the following year. In 2012 the US, EU, Norway and Australia announced the easing of some sanctions against Myanmar. International organizations such as the ILO, the Executive Board of the United Nations Development Bank, the World Bank and the IMF are now also providing assistance.⁷⁵

⁷² Ibid, 50.

⁷³ United States. *US Foreign Affairs and Reform and Restructuring Act of 1998, Section 1106*, (1998) .

⁷⁴ United States Senate Foreign Relations Committee. *U.S. Policy Toward Burma, Statement before the Subcommittee on East Asian and Pacific Affairs Senate Foreign Relations Committee; Washington, DC*, 30 September 2009.

⁷⁵ As reported in *Situation of Human Rights in Myanmar : Note by the Secretary-General, A/67/383*.

While Western governments have tried to isolate Myanmar over the past two decades, its regional neighbours have opted to increase political and economic ties. In 1997 Myanmar joined the Association of Southeast Asian Nations (ASEAN). Its members adopted a policy of *constructive engagement*, a combination of quiet diplomacy and economic and political integration with Myanmar.⁷⁶ China has a very complex relationship with Myanmar. Beijing is Myanmar's most important ally, providing military, economic and diplomatic assistance. It is largely because of this support that Myanmar has been able to withstand Western sanctions. But China's unofficial engagement with the ethnic minority groups along the border complicates their bilateral relationship. The relationships between ASEAN and China will be explored in depth later in the paper.

C. The Civil War: a complex history

While the West focuses on the Burmese struggle for democracy, the much larger civil war goes into its sixth decade. The history of this war is very complex with dozens of groups forming, splitting, re-uniting, forming alliances, splitting again, and switching sides over the course of sixty years. In the mid-2000s there were an estimated twenty substantial insurgent groups with roughly 40,000 soldiers.⁷⁷ The demands of the rebel groups vary. Most groups no longer seek separation from Myanmar, but still desire some form of autonomy from the central government. Generally their main grievances are a lack of influence over the political process, lack of economic and social development in

⁷⁶ Jürgen Haacke, *Myanmar's Foreign Policy : Domestic Influences and International Implications* (Abingdon, Oxon; New York: Routledge for the International Institute for Strategic Studies, 2006), 42.

⁷⁷ Pedersen, *Promoting Human Rights in Burma : A Critique of Western Sanctions Policy*, 45-66.

their geographic areas, and repression of their ethnic and religious identity.⁷⁸ The amount of power of the ethnic groups also varies. Some groups, like the Karen, control de facto states in the border region complete with administration, schools, hospitals, independent foreign relations, and large armies. Other groups are restricted to small pockets of territory in the hills with just a few hundred armed defenders. Revenue for groups is primarily generated through the extraction of natural resources, taxing of local populations, and the control of border trade with neighbouring countries.⁷⁹ Because the central government controls much of the legal trade, insurgent groups have little choice but to engage in black market activities. Finally there are groups that could be better characterized as heavily armed criminal organizations with no real nationalistic desire. Groups such as these controlled the opium trade in the 1960s and the meta-amphetamine market today.

The rebellion by these groups began immediately after Myanmar gained independence in 1948. Widespread fighting occurred across the country including in the lowland areas. In the 1960s the Tatmadaw responded with the brutal *Four Cuts* counterinsurgency campaign which cut off the supply of food, funds, intelligence and recruits from local villages to armed rebels. The campaign resulted in widespread human rights crimes: forced relocation of whole villages, the recruitment of child soldiers, the systematic use of rape, torture, detention of prisoners of conscience, forced labour, and numerous other

⁷⁸ Morten B. Pedersen, "Burma's Ethnic Minorities," *Critical Asian Studies* 40, no. 1 (Mar., 2008), 45-66.; Tom Kramer, *Neither War nor Peace: The Future of Cease-Fire Agreements in Burma* (Amsterdam, Netherlands: Transnational Institute, [July 2009]).

⁷⁹ Ibid.

crimes.⁸⁰ In addition, the campaign pushed the groups away from the centre of the country and into the hills of the border areas. Over the years since neither side has been able to gain the upper hand in the war. The central army, though large in number, has never been strong enough to overtake the insurgents in their strongholds. On the other side, the rebel groups were never able to organize and mount a concerted attack.

Several other factors have contributed to the longevity of the conflicts. First, the natural resources in the border areas have given both sides a reason and a means to continue fighting.⁸¹ Over the decades both insurgent groups and the Tatmadaw have fought for and exploited the abundance of teak, gems, and opium in the border areas.⁸² The natural resources are primarily located in the rugged mountains and thick jungle—an ideal environment for waging a guerrilla war. On the other side of the international border and out of reach of the Tatmadaw, kin gives the insurgent armies an escape route and sanctuary when attacked. It is from these international sources where a consistent supply of arms (stockpiles from WWII and the Vietnam War) reached the insurgent groups.

In addition, the support of the insurgent groups by China has undoubtedly sustained the civil war. Throughout the 1960s and 1970s China supported the Communist Party of Burma (CPB) as part of Beijing's practice of supporting communist movements in Southeast Asia.⁸³ Beijing offered these ethnic Chinese groups training, supplies,

⁸⁰ Smith, *Burma: Insurgency and the Politics of Ethnicity*.

⁸¹ Paul Collier, Natural Resources, Development and Conflict: Channels of Causation and Policy Interventions, in *Economic Integration and Social Responsibility*, ed. François Bourguignon, Pierre Jacquet, Boris Pleskovič, 2003).

⁸² Martin Smith, *State of Strife: The Dynamics of Ethnic Conflict in Burma* (Singapore: Institute of Southeast Asian Studies, 2007).

⁸³ *ibid*

infrastructure support, advice, and medical assistance in order to overthrow the Ne Win regime.⁸⁴ It is with Chinese support that some groups such as the Kokang have been able to build the de facto states that exist today. In 1988 China switched its recognition from the CPB to the central government. Since then China's approach for securing its border has been to allow the formation of buffer zones or de facto mini-states between itself and Myanmar.⁸⁵ These buffer zones are controlled by remnants of the CPB which Beijing no longer officially supports, but still does business with through the southern province of Yunnan.⁸⁶ As the lifeline for the black market through Yunnan, the survival of the ethnic groups largely depends on China's willingness to continue doing business with them. Lintner and Black argue that Beijing and Kunming avoid weakening the ethnic groups because such a development might invite Myanmar's military to launch an offensive against them, which could result in spill-over effects into China.⁸⁷ This strategy was reasonably sound until 2009 when the Tatmadaw launched an offensive into Kokang territory without first consulting Beijing. The subsequent refugee flow into Yunnan was a major problem for China and forced Beijing to reassess its buffer zone strategy.⁸⁸ On Myanmar's eastern border, Thailand has engaged in a similar buffer zone strategy. These buffer zones, however, are on the Thai side of the border and provide a sanctuary and staging ground for ethnic insurgents.⁸⁹ There are approximately 120,000 refugees living

⁸⁴ Martin Smith, *Burma: Insurgency and the Politics of Ethnicity* (London; Atlantic Highlands, N.J., USA: Zed Books, 1991), 492.

⁸⁵ Jurgen Haacke, *Myanmar's Foreign Policy: Domestic Influences and International Implications*, 121.

⁸⁶ Bertil Lintner and Michael Black, *Merchants of Madness: The Methamphetamine Explosion in the Golden Triangle* (Chiang Mai: Silkworm Books) 2009.

⁸⁷ *ibid*

⁸⁸ International Crisis Group, *China's Myanmar Strategy: Elections, Ethnic Politics and Economics* (Beijing/Jakarta/Brussels:[2010]).

⁸⁹ Haacke and International Institute for Strategic Studies, *Myanmar's Foreign Policy : Domestic Influences and International Implications*, 46.

in twenty-eight camps in the ‘buffer zone’.⁹⁰ Insurgent groups have separate bases within the ‘buffer zone’, but use the refugee camps as a source for recruits, food, and medicine. Faced with this situation, the Myanmar military has launched cross-border attacks on the insurgents in northern Thailand.

In the early 1990s the SPDC negotiated ceasefire agreements with 17 out of 37 insurgent groups. Under the agreements the SPDC allowed the insurgent groups to retain their weapons and engage in economic activities free of interference. In exchange, the insurgent groups (subsequently called ceasefire groups) recognized the sovereignty of Myanmar, the SPDC’s right to rule, and vowed not to cooperate with other groups. The specifics of the agreements vary depending on the group and the time the agreement was signed. The agreements were truces and economic arrangements, not peace agreements. As such, the groups have been able to generate revenue and begin to repair a society scarred by decades of war and isolation. Notably, fighting and human rights violations have decreased in ceasefire areas. The ceasefire agreements were able to reduce war but ultimately unable to bring lasting peace.

Since the 2010 elections there has been a renewed effort on the part of the government to reach out to the insurgent groups. This began with newly-elected President Thein who, in his inaugural speech, took a more conciliatory position with respect to the civil war than any of his predecessors.⁹¹ He followed up the rhetoric with an invitation to the armed

⁹⁰ This figure does not include the 100,000 illegal workers living in western Thailand. See International Crisis Group, "Myanmar: Aid to the Border Areas," *ICG Asia Report*, no. No. 82 (2004), 9.

⁹¹ Thein Sein, *President U Thein Sein Delivers Inaugural Address to Pyidaungsu Hluttaw*, (31 March 2011).

groups for peace talks. At the time of writing this had resulted in the signing of eleven preliminary ceasefire agreements. In August 2011 the government established the Committee for the Eternal Stability and Peace in the Union of Myanmar which will serve as the mediator between the government and the armed groups. The government's stated goal is to bring the ethnic groups into the political process.⁹² Ethnic groups are now represented in the national, regional and state legislatures, but many groups remain outside of this process altogether.

⁹² *Situation of Human Rights in Myanmar: Note by the Secretary-General, A/66/365*, 16 September 2011 at 8.

IV. Conceptual Challenges

Is R2P applicable to Myanmar? The answer to this question depends on the nature of the conflict in Myanmar as well as our understanding of R2P. While there is no agreement over the precise meaning of R2P, there appears to be an emerging consensus on its scope. The first part of this section will take a closer look at the human rights violations in the country and ask whether they constitute one or more of the four core crimes. I argue that there are three categories of human rights violations that can be characterized as either a war crime or a crime against humanity as outlined in the Rome Statute. Furthermore, there is evidence that the crimes have been committed in a widespread and systematic manner. With the nature of the crimes clarified, I then turn my attention to the battle over the meaning of R2P.

Alex Bellamy points out that since it was adopted in 2005, R2P has been interpreted by different actors to have two different functions. The first understanding of R2P is as “an enduring political commitment in need of implementation”.⁹³ This understanding is based on a plain text reading of the WSOD and puts the focus on pillars one and two. In this sense, the question “Is R2P applicable to Myanmar?” is the wrong question to ask because the responsibility to protect populations from atrocity crimes does not arise and then fade away. It is always applicable. A second group of actors refers to R2P as *a label that can be attached to a crisis in order to generate the political will and consensus to mobilize decisive force*. They see the value of R2P as a *rallying cry*. This understanding is more aligned with the ICISS perspective and puts the focus clearly on pillar three. Seen

⁹³ Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds*.

in this way, the question “Is R2P applicable to Myanmar?” is indeed the right question to ask. The answer to that question will then depend largely on context and whether events of mass violence trigger R2P. I then analyze the Myanmar case using both understandings of R2P. I argue that Myanmar only makes sense as an R2P case if R2P is conceived as “an enduring political commitment in need of implementation.”⁹⁴

Furthermore, the enduring political commitment approach is preferred because it is what heads of state agreed to in 2005 and it would garner greater compliance from the international community.

A. Is It a Core Crime?

The responsibility to protect is meant to prevent the most heinous of human rights atrocities: genocide, ethnic cleansing, war crimes, and crimes against humanity. Despite challenges of accessing reliable information, there is ample evidence that the government of Myanmar—in both incarnations as a military dictatorship and the current military-backed civilian government—has committed grave offenses against its population in the context of a low-intensity civil war. Various UN organs, agencies, subsidiary bodies, committees, and special procedures have documented and/or commented on serious human rights violations in Myanmar including the Commission on Human Rights, the Human Rights Council, the Special Rapporteurs on the Situation of Human Rights in Myanmar, the International Labour Organization, the Committee on the Elimination of Discrimination Against Women, and the General Assembly.⁹⁵ The Rome Statute of the

⁹⁴ Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds*, 64-65.

⁹⁵ An attempt at bringing the issue to the Security Council was blocked by China and Russia.

International Criminal Court will be used as a baseline for measurement because it is a widely ratified treaty.⁹⁶

Article 7 of the Rome Statute of the International Criminal Court defines *crimes against humanity* as any of a list of prohibited acts such as murder, enslavement, torture, rape, deportation or forcible transfer of population, and persecution against any identifiable population.⁹⁷ In order for these acts to rise up to the level of crimes against humanity, they must be committed as part of a widespread and systematic attack against an identifiable civilian population with the knowledge of the attack by the perpetrator.

Article 8 defines *War crimes* as any acts such as willful killing, torture, forced labour and other prohibited acts directed intentionally against the civilians not taking direct part in hostilities.⁹⁸ Articles 8.2(c) and 8.2(e) specifically cover violations committed in the context of an internal conflict. Unlike crimes against humanity, war crimes can be individual acts and need not be part of a larger pattern of attack. In some instances offenses can be considered both crimes against humanity and war crimes.⁹⁹ Of the many crimes listed in articles 7 and 8, the most relevant ones for building an argument for R2P are: forcible transfer of population, murder and torture, and rape and sexual violence.

Forcible Transfer of Populations as part of a widespread and systematic attack –

According to article 7 of the Rome Statute, "deportation or forcible transfer of

⁹⁶ Myanmar is not a party to the Rome Statute.

⁹⁷ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS (entered into force 1 July 2002) Article 7.

⁹⁸ *Ibid.* Article 8.

⁹⁹ Paulo Sergio Pinheiro and Meghan Barron, "Burma (Myanmar)," in *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in our Time*, eds. Jared Genser and Irwin Cotler (New York, NY: Oxford University Press, 2012), 260-278.

population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.¹⁰⁰ From 1996 to 2007, roughly 3600 villages were destroyed or forcibly relocated by the military, mostly in ethnic minority areas.¹⁰¹ As a result, over one million people were displaced during this time. Since the 2010 election, reports indicate continued forced relocation in Eastern Myanmar as a result of renewed hostilities between the military and the Shan State Army-North.¹⁰² The practice of forced displacement has occurred in the context of the Tatmadaw's "counter-insurgency" campaign, or Four Cuts Policy, which is a deliberate strategy to cut off support from local populations to the armed groups.¹⁰³ Rural populations are moved from their villages to Tatmadaw-controlled areas, given no compensation or material assistance, and are shot on sight should they return.¹⁰⁴ Successive Special Rapporteurs have noted that forced displacement has been a widespread practice and part of a deliberate strategy.¹⁰⁵ The consistent and abundant evidence collected by UN actors since 1992 suggests that the central military's practice of forced displacement constitutes either crimes against humanity (article 7(1)(d)) or war crimes (article 8(2)(e)) as mandated by the Rome Statute.

¹⁰⁰ Ibid. Article 7.

¹⁰¹ Pinheiro and Barron, *Burma (Myanmar)*, 272.

¹⁰² UN General Assembly, *Situation of Human Rights in Myanmar : Note / by the Secretary-General*, A/66/365.

¹⁰³ UN General Assembly, *Situation of Human Rights in Myanmar : Note by the Secretary-General*, A/57/290,[09 August 2002].; *UN General Assembly: Report of the Special Rapporteur on Extrajudicial, Summary Or Arbitrary Executions*, A/60/251, (15 March 2006) .

¹⁰⁴ UN General Assembly, *Situation of Human Rights in Myanmar : Note by the Secretary-General*, A/57/290, 17.

¹⁰⁵ UN Economic and Social Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, Paulo Sérgio Pinheiro E/CN.4/2006/34,[7 February 2006].; UN General Assembly, *Situation of Human Rights in Myanmar : Note by the Secretary-General*, A/61/369,[21 September 2006].

Murder and torture within the context of a widespread and systematic attack—Since 1992 successive Special Rapporteurs have documented extrajudicial killing and torture committed by the Tatmadaw in the context of the civil war. Like forced displacement, these practices are used as a deliberate strategy by the military to instill fear in civilian populations and to discourage support for armed resistance.¹⁰⁶ Moreover, Special Rapporteur Pinheiro reported that this policy was “widespread and systematic”, citing the military’s deliberate shoot on sight policy in ethnic minority areas in Eastern Myanmar.¹⁰⁷ Quintana concurred in 2008 when he suggested that the acts were not examples of individual misconduct by middle-or low-ranking officers, but were the result of a culture of impunity.¹⁰⁸ Extrajudicial killings and torture have not been investigated and those responsible have not been prosecuted within Myanmar.¹⁰⁹ Despite the efforts of the new government to bring lasting peace, reports of murder and torture continue. In June 2011, the UN reported extrajudicial killings against civilian populations especially in Kachin, Shan and Kayin States. In September 2012, the Special Rapporteur reported to the General Assembly the continuation of serious human rights violations committed in relation to the conflict, including attacks against civilian populations, extrajudicial killings, sexual violence, internal displacement and torture.¹¹⁰ The ample evidence collected by UN actors suggests that murder and torture constitute either crimes against humanity (article 7(1)(f)) or war crimes (article 8(2)(c)(i)).

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ UN General Assembly, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Paulo Sérgio Pinheiro, A/HRC/7/18*, [7 March 2008].

¹⁰⁹ Ibid.

¹¹⁰ UN General Assembly, *Situation of Human Rights in Myanmar : Note / by the Secretary-General, A/67/383*.

Rape and Sexual violence within the context of a widespread and systematic attack–

UN actors have been reporting rape and sexual violence as a crime committed in the context of the civil war since 1992. Between 1996 and 2001 there were 625 reports of rape in Shan State.¹¹¹ This figure is likely much lower than the reality as many women do not report incidents of sexual violence.¹¹² Of these 625 cases 83% were committed by Tatmadaw soldiers and 61% of the incidents were gang-rapes.¹¹³ Like forced displacement and extrajudicial killing, sexual violence is used as a weapon of war. In 2006 the Special Rapporteur noted that the practice of rape and sexual violence is a widespread and systematic tactic of the military to punish civilian women and girls for their support of armed insurgent groups.¹¹⁴ He reported that he was not aware of any initiatives by the Myanmar government to investigate these crimes and that they were permitted within a culture of impunity. Since the 2010 election sexual violence has continued. In Kachin State, 18 women and girls were allegedly gang-raped by army soldiers as part of the renewed hostilities between the military and KIO. Of those 18 victims, four were subsequently killed.¹¹⁵ The evidence collected by UN actors suggests that sexual violence constitutes crimes against humanity (article 7(1)(g)) or war crimes (article 8(2)(e)(vi)) as stated in the Rome Statute.

¹¹¹ UN General Assembly, *Situation of Human Rights in Myanmar : Note by the Secretary-General*, A/61/369, para 30.

¹¹² Ibid.

¹¹³ UN General Assembly, *Torture and Other Cruel, Inhuman Or Degrading Treatment Or Punishment- Report of the Special Rapporteur, Manfred Nowak, E/CN.4/2006/6/Add.1*, [21 March 2006].

¹¹⁴ UN General Assembly, *Situation of Human Rights in Myanmar : Note by the Secretary-General*, A/61/369.

¹¹⁵ UN General Assembly, *Situation of Human Rights in Myanmar : Note / by the Secretary-General*, A/66/365.

It is clear that the United Nations has been aware of the grave human rights situation in Myanmar since at least 1992. The evidence collected by UN actors suggests that the violations constitute either crimes against humanity or war crimes as prohibited by the Rome Statute. But do these offenses add up to an R2P situation? The bar is set quite high for an R2P situation. According to Gareth Evans, one of the commissioners of the ICISS, R2P situations:

*must be seen only as those actually or potentially involving large-scale killing, ethnic cleansing or other similar mass atrocity crimes — situations where these crimes are either occurring or appear to be imminent, or which are capable of deteriorating to this extent in the absence of preventive action — and which should engage the attention of the international community simply because of their particularly conscience-shocking character.*¹¹⁶

The atrocity crimes outlined here have occurred at such a low intensity that it cannot be compared to a situation like Rwanda or Srebrenica. Evans would likely argue that R2P should not be too indiscriminately applied to an internal conflict such as Myanmar. But how can a norm intended to halt humanity's worst crimes turn its back on a situation like Myanmar's internal conflict?

B. The Battle Over Meaning

The work of Alex Bellamy serves as a starting point for my discussion on whether and how R2P could apply to Myanmar. Bellamy argues that different actors use R2P to mean

¹¹⁶ Gareth Evans, *The Limits of State Sovereignty: The Responsibility to Protect in the 21st Century*, Eighth Neelam Tiruchelvam Memorial Lecture, 29 July 2007.

different things in different contexts.¹¹⁷ Specifically, he points out that R2P has been interpreted to have two functions. The first understanding of *R2P is an enduring political commitment accompanied by a policy in need of implementation*. This is the way R2P is interpreted by the Secretary-General and states. This understanding of R2P is based on a plain text reading of the WSOD and makes two general propositions. First, pillar one—the host state’s responsibility to protect populations from mass atrocities is “universal and enduring.”¹¹⁸ That is, it always applies. Discussions of *whether* R2P applies to a certain situation such as Syria or Myanmar are in fact posing the wrong question because the responsibility to protect doesn’t arise and fade away with time or context. The proper question, according to Bellamy, is not whether it applies but how it is best exercised. The second proposition Bellamy makes is “that as a universal and enduring commitment, RtoP gives rise to a comprehensive policy agenda that needs to be identified, articulated and implemented.”¹¹⁹ The result of this approach would be a broad-based agenda focused on upstream prevention through capacity building and international cooperation, without diminishing the importance of pillar three.¹²⁰ The focus, however, is clearly on pillars one and two.

The second understanding of R2P *is a label that can be attached to a crisis in order to generate the political will and consensus to mobilize decisive force*.¹²¹ It functions as a *rallying cry*. It is in this manner that activists and states frame R2P for situations like Darfur and Syria. In these situations, these actors are asking whether R2P can elevate the

¹¹⁷ Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds*, 80.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

situation above normal politics and generate the political will to mobilize international force capable of addressing an exceptional, conscience-shocking event. In the initial days after Cyclone Nargis, for example, the French Foreign Minister unsuccessfully and unconvincingly invoked R2P in an effort to garner international support to forcibly deliver aid to cyclone victims when it appeared that *normal* censure would not be effective.¹²² Unlike the *enduring political commitment* approach, this understanding frames R2P in terms of its applicability to a situation as opposed to how best to implement it. Confusion arises because actors use both approaches. For example, former UN Human Rights Rapporteur Sergio Pinheiro concluded that R2P was not applicable to Myanmar even after he found ample evidence of human rights atrocities being committed in a widespread and systematic manner by the Myanmar government. By saying this, he is unwittingly claiming that the government of Myanmar is not responsible for protecting its population from atrocity crimes, which is not what he means. What Pinheiro means is that it is unlikely enough political will could be generated to mobilize international force to address the situation in Myanmar. Furthermore, R2P would not bring lasting peace to the people of Myanmar given that the domestic political situation was not conducive to R2P at the time of his statement.

The dilemma of comprehensiveness¹²³—The two understandings of R2P outlined above are not complementary. As Eli Stamnes writes “[t]he fact that it [R2P] is supposed to be flagged in connection to the extreme, extraordinary, not-to-be-ignored cases is what gives

¹²² See Joanna Harrington, "R2P and Natural Disasters," in *The Routledge Handbook of the Responsibility to Protect*, eds. W. Andy Knight and Frazer Egerton (New York, NY: Routledge, 2012).

¹²³ Edward C. Luck, "Prevention: Theory and Practice," in *From Reaction to Conflict Prevention: Opportunities for the UN System*, eds. Fen Osler Hampson and David Malone (Boulder, CO: Lynne Rienner, 2001), 256.

it added value compared to already existing international legal obligations and instruments. So, if it were to be flagged in connection to the whole plethora of activities associated with preventive R2P action, it could lose its exclusive character.”¹²⁴ Moreover, host countries on the receiving end of preventive measures would be more reluctant to give consent if they thought those measures could open the door to possible military intervention. In other words, the R2P toolbox is not big enough for both upstream measures such as the promotion of good governance, and more robust measures such as military deployment and military intervention. Proponents of the *rallying cry* view would argue that while measures aimed at root causes may reduce conflict in general, putting them under the R2P umbrella diminishes its value as a rallying cry for when it really counts. Therefore prevention should be limited to cases where mass atrocities are imminent and should exclude longer term preventive measures.¹²⁵ R2P could become meaningless if it is everything to everyone.¹²⁶

Proponents of the *rallying cry* view point to another problem with upstream prevention measures. The further upstream we go, the more difficult it is to find evidence that those measures have an impact on the potential for genocide or mass atrocities. How do poverty alleviation measures, for example, specifically reduce the likelihood of genocide? Moreover, “there is no universal agreement over the precise causes of deadly conflict.”¹²⁷ Nonetheless, there is recognition that there is a connection between armed conflict and

¹²⁴ Eli Starnes, "Speaking RtoP and the Prevention of Mass Atrocities," *Global Responsibility to Protect* 1, no. 1 (2009), 75-77.

¹²⁵ Gareth Evans, “The Responsibility to Protect in International Affairs: Where to From Here?” (keynote lecture at the Australian Catholic University, Melbourne, November 27, 2009).

¹²⁶ Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, 87.

¹²⁷ International Commission on Intervention and State Sovereignty and International Development Research Centre, *The Responsibility to Protect*, 22.

root causes such as poverty, political repression, and uneven distribution of resources. There is also strong empirical evidence to show an association between armed conflict—and in particular civil war—and atrocity crimes.¹²⁸ Most episodes of mass killing occur in the context of armed conflict and/or civil war. Eliminating armed conflict may not be sufficient to halt all mass atrocities, but because armed conflict is clearly implicated in most cases, doing so would be an effective way to prevent mass atrocities.¹²⁹ Bellamy takes this line of reasoning further. For example, he argues that one of the preconditions for civil war is economic stagnation. Therefore an upstream prevention measure which improves the economic health of a country would decrease the risk of civil war and thus reduce the risk of genocide.¹³⁰

Proponents of the *enduring political commitment* approach would argue that by using R2P as a means to put out fires runs counter to the moral foundation of the norm. If we use R2P in this manner, people unnecessarily die in the window between the time R2P is invoked and when the measures take effect. This problem becomes amplified if the measures chosen are not immediately effective or not implemented in a timely manner. The Myanmar case takes this moral argument further to show that an atrocity crime can occur even if R2P is never triggered. If the responsibility to protect is to be true to its moral foundations, then it must have as its goal the prevention of mass atrocity crimes in the first place. A second selling point for prevention is its political value.¹³¹ Using non-

¹²⁸ Lawrence Woocher, "The Responsibility to Prevent: Toward a Strategy," in *The Routledge Handbook of the Responsibility to Protect*, eds. W. Andy Knight and Frazer Egerton (New York, NY: Routledge, 2012), 30.

¹²⁹ *Ibid.*, 30-32.

¹³⁰ Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds*, 93-108.

¹³¹ Woocher, *The Responsibility to Prevent: Toward a Strategy*, 22.

coercive measures to prevent atrocity crimes before they start is politically more appealing than the contentious debate over humanitarian intervention. This certainly applies to Myanmar where there may be no appetite for humanitarian intervention after the failure of attaching R2P to Cyclone Nargis. Third, the cost of military intervention is far greater than that of conflict prevention. The geostrategic location of Myanmar at the nexus of South Asia, China and Southeast Asia, and on the shores of one of the busiest trade routes in the world, makes the cost of military intervention even more pronounced.

The source of divergence—The divergence in views over the meaning of R2P has its roots in the norm’s two foundational documents: the WSOD and the ICISS report. If we examine the WSOD, we see that member states made a clear commitment to prevention and capacity building. Of the seven sentences in paragraphs 138 and 139, only one deals with an international response under Chapter VII.¹³² This was echoed by the Secretary General in his 2009 report. Pillar one outlines the state’s own responsibility to prevent atrocity crimes. Pillar two deals with the ways in which the international community can assist the host state to build capacity to prevent atrocity crimes. The third pillar involves the international community’s responsibility to respond in a timely and decisive manner, but even then there are steps and conditions before Chapter VII measures are implemented. The intent for pillar three is for it to be an ongoing and generic responsibility that utilizes peaceful measures in Chapter VI and VIII of the UN Charter.¹³³ Two conditions need to be met for this to escalate. Should a) peaceful means be inadequate and b) national authorities manifestly fail to protect their populations, then

¹³² Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds*, 246.

¹³³ UN General Assembly, *Implementing the Responsibility to Protect : Report of the Secretary-General*, A/63/677.

it may be appropriate to take a range of peaceful and non-peaceful measures, including Chapter VII, through the Security Council.

If we examine the ICISS document we see a very different vision of R2P. The ICISS presented the R2P as a spectrum of three inter-related responsibilities: to prevent, to react, and to rebuild. The commission stated that “[p]revention is the single most important dimension of the responsibility to protect,”¹³⁴ but the clear focus of the report was on the responsibility to react “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.”¹³⁵ The responsibility to react is the most sophisticated and well-thought-out of the three sections, receiving as much real estate in the report as the other two combined. A just cause threshold for military intervention was established to be “large scale loss of life or large scale ethnic cleansing,” actual or apprehended. The commission also set out five other criteria for military intervention: right authority, right intention, last resort, proportional means and reasonable prospects. Once intervention had occurred, the intervener’s final responsibility was to provide “full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.”¹³⁶

¹³⁴ International Commission on Intervention and State Sovereignty and International Development Research Centre, *The Responsibility to Protect*.

¹³⁵ *Ibid.*, XI.

¹³⁶ *Ibid.*, XI.

There are some key differences between the ICISS report and paragraphs 138/139 in the WSOD. In the lead up to the World Summit, some of the ICISS's recommendations were dropped in order to appease states that opposed the concept. A major change occurred to the threshold which marked the transference of the host country's responsibility to the international community. In the ICISS document this threshold involved large scale loss of life or large scale ethnic cleansing, while the WSOD stipulated this to occur when a sovereign government 'manifestly failed' its obligation to protect its population, a much higher threshold. The final draft of the WSOD also did not include a central feature of the ICISS report—the precautionary principles which served as guidelines for military intervention. Finally, the WSOD did not feature the code of conduct for the use of the veto in R2P situations, as well as the entire commitment to rebuild war-torn societies. Overall, there was a substantial shift in focus from military intervention in the ICISS report to prevention in the WSOD. The difference between the two visions of R2P is reflected in the difference between these two documents. And because the two understandings of R2P outlined here are largely incompatible, “analysts, activist and advocates need to make a decision about which vision of RtoP they want to pursue.”¹³⁷

The two approaches in the context of the norm life cycle— After consultations with States, the UN Secretary-General has taken efforts to present the responsibility to protect as three non-sequential, equally important pillars. The two approaches outlined here show that in practice different actors favor different pillars. The *rallying cry* approach clearly favours pillar three while the *enduring political commitment* approach focuses on pillars one and two. As discussed in the previous section, the responsibility to protect is not just

¹³⁷ Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds*, 82.

one norm; it is a collection of different norms each with its own degree of compliance. If we look at the first pillar—the host country’s responsibility not to kill its own population—we see that much of what a country can or can’t do is already codified in international law. Furthermore, it is now widely accepted that it is both morally and legally wrong for governments to kill their own populations.¹³⁸ The codification of atrocity crimes in international law has set a standard of behaviour that constrains the actions of states and has outlined repercussions should states fail to abide by those standards. In the context of the norm life cycle, pillar one responsibilities fall somewhere between the cascading stage and the internalization stage. It is not yet widely accepted that it is “taken-for-granted,” for if that were the case then host countries would habitually turn away when faced with the possibility of genocide. Nonetheless it is safe to say that the majority of states comply to this norm to some degree and recognize there could be consequences if they do not. This is less clear for pillars two and three.

Pillars two and three are more accurately situated in the normative contestation stage. They are arguably not at the point where they set a shared standard of behaviour that constrains the actions of states. The codification of human rights laws has put the onus on the international community to enforce them,¹³⁹ but how the international community assists host states and responds to atrocity crimes are not well defined. That is, states can agree that something must be done to address a situation, but how it is done, when it kicks in, and who is responsible for what is imprecise at best. The Secretary-General did

¹³⁸ Alex J. Bellamy and Paul D. Williams, *Understanding Peacekeeping*, Second ed. (Cambridge: Polity Press, 2010), 84.

¹³⁹ Deng, *From 'Sovereignty as Responsibility' to the 'Responsibility to Protect'*, 357-358.

outline some general ways that the international community can assist,¹⁴⁰ but there is no consequence should states ignore these measures. In other words, the vagueness of pillar two (and three) makes it possible for states to rhetorically support R2P without actually reconciling their behaviour. As a result, it is difficult to encourage states to adopt the norm and equally difficult to shame states when they do not.

C. Myanmar and R2P: Rallying Cry or Enduring Political Commitment?

Rallying Cry—Would attaching the R2P label to the Myanmar civil war generate the political will necessary to mobilize decisive international force? It is unlikely for two reasons. When commentators understand R2P in these terms, the corresponding narrative usually equates an R2P situation to involve large scale loss of life like in Rwanda and Srebrenica. According to Gareth Evans, R2P is not suited to deal with chronic rights abuses [such as Myanmar] which are not characterized by large-scale violence.¹⁴¹ The scale of the conflict in Myanmar is simply not at those levels—at least not when we look for an episode or event of violence. Indeed the killing in Myanmar has come steadily over a sixty-year period and never in a single large scale event. In his seminal piece *Burma: Insurgency and the Politics of Ethnicity*, historian Martin Smith estimates an average of approximately 10,000 deaths per year since independence.¹⁴² That would total roughly 640,000 deaths if we extend that estimate to present day. Of course this does not take into

¹⁴⁰ UN General Assembly, *Implementing the Responsibility to Protect : Report of the Secretary-General, A/63/677*.

¹⁴¹ Evans, *the Limits of State Sovereignty: The Responsibility to Protect in the 21st Century, Eighth Neelam Tiruchelvam Memorial Lecture*.

¹⁴² Smith, *Burma: Insurgency and the Politics of Ethnicity*, 492.

account the millions who have been displaced, injured, tortured, and raped. The Myanmar case demonstrates that it is problematic to wait for a single episode or event to serve as a threshold for R2P. What it shows is that the large scale threshold does not have to be broken for an atrocity crime to occur. By understanding R2P in terms of pillar 3, we are thus left with a norm that condemns mass killing over a short period of time, while condoning the same crimes if spread out over a longer period. This runs counter to the moral basis of the responsibility to protect.

A second reason why attaching the R2P label would not generate the political will necessary to mobilize decisive force relates to the current domestic and international political climate. For decades Myanmar was on the receiving end of some of the harshest sanctions in the world for its poor human rights record. It was diplomatically isolated and had few friends outside of the region. Since the 2010 elections the country has undergone tremendous reforms including an effort to improve its human rights record. As noted above, the military-backed civilian government has released prisoners of conscience, made a commitment to cease recruiting child soldiers, eased censorship of the press, and made a sincere effort to negotiate a lasting peace to the civil war. In turn the international community has responded favorably. The US, EU and other countries have eased sanctions and increased diplomatic contact with the Thein Sein government. International organizations and NGOs are racing to do work in the country.¹⁴³ In this environment it would simply be out of step with the current political climate to try to secure political support for decisive force to resolve Myanmar's human rights problems.

¹⁴³ International Crisis Group, *Myanmar: The Politics of Economic Reform* (Beijing/Jakarta/Brussels: ,[27 July 2012]).

Enduring political commitment—According to Bellamy, if we understand R2P as an *enduring political commitment* then the question is not whether it applies but how it is best exercised. But since the norm is not fully internalized, a more immediate question may be, “What is preventing the host state and the international community from fulfilling its responsibility to protect?” The answers to these questions are a lack of capacity and a lack of coordination and focus, respectively. In this context the *enduring political commitment* approach is better suited to deal with the specific dynamics of the Myanmar case. It focuses on the prevention of atrocity crimes through building capacity in the host state while also improving the ability of the international community to respond within the current normative framework.

Myanmar adopted the responsibility to protect in 2005 at the World Summit and reaffirmed its support in 2009 during the General Assembly debate. As I have shown, its human rights record since the adoption of R2P has been less than stellar. I argue that what is preventing the current government from fulfilling its responsibility to protect is a lack of capacity to end the civil war once and for all. Since the 2010 election the government has signaled a sincere intention to bringing about lasting peace. In his inaugural speech, newly-elected President Thein took a more conciliatory position on the civil war than his predecessors.¹⁴⁴ The President followed up on this rhetoric with several significant initiatives. He reached out to the ethnic groups and invited them to negotiate

¹⁴⁴ Sein, *President U Thein Sein Delivers Inaugural Address to Pyidaungsu Hluttaw*.

ceasefire agreements with their respective regional governments.¹⁴⁵ His government then established a Peacemaking Central Committee in May 2012 with the purpose of streamlining the process of negotiations with ethnic groups.¹⁴⁶ He assigned one of his closest advisors, former General U Aung Min, to lead negotiations. The appointment of a close advisor was significant since ethnic leaders were not convinced that the new leadership would follow through on decisions made at the regional level.¹⁴⁷ The new government also established the Myanmar National Human Rights Commission with a view of promoting and safeguarding fundamental rights of citizens described in the Constitution.¹⁴⁸ It is still too soon to assess the effectiveness of these initiatives, but all the signs suggest a genuine willingness of the Myanmar government to bring about sustainable peace.

While ending the civil war has been made a national priority, one must keep in mind that this is just one of the many priorities for the country. Decades of mismanagement have crippled the economy. The many economic problems include poor public financial management, underdeveloped legal and regulatory frameworks, corruption, inflation, monetary instability, poor infrastructure, arbitrary tax policies, and many other issues. Sanctions over the last two decades have encouraged the government to withdraw from public services such as health and education, both of which need drastic reform. Changes are also needed and planned for the judicial system and political system. This immense

¹⁴⁵ International Crisis Group, *Myanmar: A New Peace Initiative* (Beijing/Jakarta/Brussels: ,[30 November 2011]).

¹⁴⁶ UN General Assembly, *Situation of Human Rights in Myanmar : Note / by the Secretary-General*, A/67/383

¹⁴⁷ International Crisis Group, *Myanmar: A New Peace Initiative*.

¹⁴⁸ UN General Assembly, *Situation of Human Rights in Myanmar : Note / by the Secretary-General*, A/67/383, 78.

reform agenda is then magnified by the lack of capacity of the country's leaders and the influx of international aid. Senior leaders were reportedly attending twenty meetings a day in 2012.¹⁴⁹ There is also shortage of qualified public administrators to lead the process and mid-level workers to implement the plans. As a result, decisions are made on an ad-hoc basis without any clear direction. This lack of capacity acts as a brake on the reform process and could endanger the peace process.

The government's lack of capacity to end the civil war is complicated by various political and non-political actors who have a stake in maintaining the current instability in the border area.¹⁵⁰ These actors—Tatmadaw soldiers, government officials, leaders of ethnic groups, and Chinese and Thai businessmen—profit from the black market. In 1987 it was estimated that 40% of the country's gross national product was based on activity in the black market.¹⁵¹ Today non-government sanctioned logging, mining, gambling, drug manufacturing, gun running, and human trafficking remain lucrative businesses. Chinese and Thai companies that extract resources out of the region would not necessarily benefit from a change in the business landscape. Ethnic leaders who profit personally from these deals with foreign companies may complicate the peace negotiations. Corrupt government and military officials from the Union of Myanmar Economic Holdings Ltd. (UMEHL), a military owned business and Myanmar's largest firm, also benefit from the status quo. Day to day operations of the UMEHL have been delegated to regional military commanders, giving them political, military, and economic power over the

¹⁴⁹ International Crisis Group, *Reform in Myanmar: One Year on* (Beijing/Jakarta/Brussels: ,[11 April 2012]).

¹⁵⁰ Kramer, *Neither War nor Peace: The Future of Cease-Fire Agreements in Burma*.

¹⁵¹ Smith, *State of Strife: The Dynamics of Ethnic Conflict in Burma*, 19.

regions they oversee. By taking advantage of rent-seeking opportunities, they have amassed enormous amounts of power and wealth.¹⁵²

The *enduring political commitment* applies to the international community. Paragraph 138 of the WSOD states that “the international community should, as appropriate, encourage and help States, to exercise this [pillar one] responsibility.” What has prevented the international community from fulfilling its responsibility is a lack of coordination and focus in its approach towards Myanmar. Put another way, international policy towards Myanmar has been fractured and highly politicized. ASEAN, China, India, Japan, and countries from the West have all developed their own policies for Myanmar, none of which has a specific focus on ending the civil war. The politicized nature of the international response to Myanmar has been discussed above so it will not be repeated here. However, one final note regarding the international community’s response is that the need for coordination and focus is now greater than ever. From a dearth of international assistance only three years ago, there is now an outpouring of support from the international community, with over 100 official aid agencies and international NGOs rushing into the country to help with the reforms.¹⁵³

¹⁵² Mary Callahan, “Of kyay-zu and kyet-su: the military in 2006” in Monique Skidmore and Trevor Wilson, *Myanmar : The State, Community and the Environment* (Canberra: Asia Pacific Press, 2007), 44-45.

¹⁵³ Lex Rieffel and James Fox, "Are Aid Donors Repeating Mistakes in Myanmar?" Brookings Institute.

IV. Operational Challenges

In this section I will expand on our understanding of R2P as *an enduring political commitment accompanied by a policy in need of implementation*. If we understand R2P in this way then the question is not whether R2P applies but how best to exercise it.

Furthermore, as Bellamy has suggested: “as a universal and enduring commitment, RtoP gives rise to a comprehensive policy agenda that needs to be identified, articulated and implemented.”¹⁵⁴ A second and more immediate question is: “what prevents R2P from being fulfilled?” The question helps guide the development of that agenda. The broad-based agenda identified below emphasizes the importance of international cooperation to assist the Myanmar government to build capacity. It contains non-coercive measures which range from structural prevention to post-conflict rebuilding while omitting coercive responses such as sanctions and military intervention. The R2P umbrella adds value by generating a *deep* response tailored to the unique characteristics of the Myanmar context. It accomplishes this by pulling together disparate initiatives, increasing international attention on ending atrocity crimes, and focusing the international community on a clear goal. For example, it would bring together work that is already being done in refugee repatriation and economic development, and give that work a common focus. The R2P umbrella also supplements the government’s current efforts by increasing international attention on the peace process and by adding long term measures that address the underlying attitudes that drive the ethnic tension. For example, the building of indigenous capacity in conflict resolution can assist in both ending current

¹⁵⁴ Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds*, 80.

conflicts and preventing future disputes from escalating. The ultimate goal of R2P is not only to end the civil war but to prevent future conflict from occurring in the first place.

The complexity of the relationship between the ethnic groups and the central government is a major challenge for the development of this policy agenda. As noted above, dozens of insurgent groups have formed and dissolved over the years. They have joined forces, split up, and signed and broken agreements with the central military. They are different sizes, have different demands, and have for the most part signed different ceasefire agreements that reflect their position against the central military. In many respects the civil war is not one but many conflicts, each one with its own particular dynamic. If we look at these conflicts through the lens of R2P measures, we can identify situations which would most adequately be addressed with different tools along the R2P spectrum. For example, many ethnic minority areas emerged from decades of war with their infrastructure and socio-economic systems shattered. Under ceasefire agreements they are still armed. These areas would require rebuilding measures to ensure they do not slip back into conflict. There are other areas at peace and under the central military's control, but years of government neglect have resulted in extreme poverty.¹⁵⁵ These areas may require more upstream measures such as poverty alleviation. Then there are other areas that are currently in the midst of fighting. Direct prevention measures such as mediation can be implemented to prevent these conflicts from escalating and spreading to other regions. The complexity of these relationships creates a practical implementation problem. It would be unrealistic to assume that each of the thirty-some odd situations could be resolved with the same response, but it may also be impractical to implement

¹⁵⁵ Kramer, *Neither War nor Peace: The Future of Cease-Fire Agreements in Burma*, July 2009.

specific measures for each one. The four inter-related strategies outlined below seek to strike a balance in this context. Multiple R2P measures are suggested to achieve each strategy.

A. Strategy: Convert conflict situations and ceasefire agreements to lasting peace agreements

R2P Measures: capacity building in conflict resolution, mediation

There have been many improvements at the local level since the signing of ceasefire agreements in the early 1990s. There has been greater security for the general population and opportunity for people to engage in economic activity. Deep mistrust still exists but conflict and human rights violations have declined in most areas.¹⁵⁶ The ceasefire situation is preferable to war, but still far from peace. The most obvious failure with the ceasefire agreements is that a lasting political solution has never emerged. Part of the responsibility for this failure lies with the international community which did not recognize the significance of these agreements as a point of leverage for negotiating a lasting peace. The international community should now assist the Myanmar government to build capacity in conflict resolution and to mediate with the minority groups to convert conflict and ceasefire situations into peace deals.

Since the election the government has advanced a three-step plan as a framework to negotiate with minority groups:

¹⁵⁶ Ibid.

1. Agree on a ceasefire between the armed group and the respective regional government to establish trust and build confidence;
2. Engage in broader discussions between the ethnic group and the national government to address socio-economic, cultural and political concerns; and
3. Engage representatives of all groups to pursue a lasting political agreement including constitutional change to give greater autonomy, provisions for greater resource sharing, and future integration/demobilization of armed groups.¹⁵⁷

Negotiations with most groups have never gotten further than step one. Discussions on step two have proceeded with ten groups and have yielded a few promising results.¹⁵⁸

Using this roadmap, the government's Union Peacemaking Central Committee negotiated a 27-point agreement with the Chin National Front in December 2012. The agreement opened the door for the inclusion of the minority Chin language in primary schools, the granting of licenses for Chin language media, and the establishment of a Chin human rights committee to report on violations in their territory. Negotiations between the central government and the ethnic groups have never reached the third step which addresses power and resource sharing, contentious issues first dealt with in the 1947 Panglong Agreement. Such a change will likely require amendments to the 2008 Constitution. Not all ethnic groups are on side with this process. The United Nationalities Federal Council, the latest coalition representing eleven ethnic groups, is advancing its own peace accord process which emphasizes the importance of forming a united ethnic

¹⁵⁷ Sein, *President U Thein Sein Delivers Inaugural Address to Pyidaungsu Hluttaw*.

¹⁵⁸ *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Report by Tomás Ojea Quintana, A/HRC/22/58*, [6 March 2013].

voice before negotiating with the government.¹⁵⁹ The government aims to finalize ceasefire agreements by the end of 2013 and political agreements with all armed ethnic groups by 2015.

In this context the international community can assist Myanmar in its responsibility to protect by building capacity in indigenous mediation and conflict resolution. Through training in best practices, a peace infrastructure can be built to facilitate the current peace process and also address future disputes over land, resources, religion, ethnicity or leadership succession before they lead to conflict.¹⁶⁰ This peace infrastructure is vital because contentious issues have been resolved through armed conflict over the last six decades. It should include mechanisms for inclusive and participatory dialogue for ethnic minority groups.¹⁶¹ This will be an accommodation for the government as ethnic groups have not historically been part of the political process. One of the first forms of the emerging peace infrastructure in Myanmar is the Union Peacemaking Central Committee.¹⁶² Established in 2012, the mandate of this committee is to consolidate ceasefire agreements into peace agreements and to engage in post-ceasefire needs. Using funding from the Peace Donor Group (Norway, Australia, the United Kingdom, the European Union, the United Nations, and the World Bank) it has established the Myanmar Peace Centre (MPC).¹⁶³ The aim of the MPC is to assist the Union Peacemaking Central Committee and its operational units to implement the peace

¹⁵⁹ Lt General N-Ban La, *Letter of UNFC Chairman to President, U Thein Sein*, (28 September 2012).

¹⁶⁰ UN General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary-General*, A/63/677, (12 January 2009) at 20.

¹⁶¹ *Ibid.*

¹⁶² *Situation of Human Rights in Myanmar: Note by the Secretary-General*, A/67/383, (25 September 2012).

¹⁶³ Burma News International, "Myanmar Peace Monitor," <http://www.mmpeacemonitor.org/> (accessed 04/07/2013).

process. It coordinates peace initiatives, acts as a one-stop service centre for international governments and organizations, and serves as a platform for stakeholders to meet and negotiate. The role for the international community is limited to providing advice to the MPC, which then feeds up to a working committee and subsequently up to the Peacemaking Central Committee. The international community should leverage this and continue building capacity in the peace infrastructure by supporting and building on these early initiatives.

International mediation is another important component of the R2P umbrella. The government's peace plan does not include a role for international mediators or third party assistance aside from the advice and funding provided to the MPC. Ethnic groups, on the other hand, have called for neutral international observers to monitor meetings and ensure the government follows through on the terms of the agreements.¹⁶⁴ International mediation is important in Myanmar because of deep mistrust on both sides, especially of the central government by the ethnic groups. Some ethnic leaders have even refused to meet with the government because they have been afraid for their own safety.¹⁶⁵ Furthermore, because agreements have historically been broken, international mediators can hold the parties accountable. If international mediation does occur it will be challenged by the complex relationships between ethnic groups and the central government. There were about a dozen government-labeled insurgent groups which are officially in active conflict with the Tatmadaw before the 2010 election.¹⁶⁶ Some of these insurgent groups are offshoots of ceasefire groups and control at most a few hundred

¹⁶⁴ La, *Letter of UNFC Chairman to President, U Thein Sein*.

¹⁶⁵ International Crisis Group, *China's Myanmar Strategy: Elections, Ethnic Politics and Economics*, 1-20.

¹⁶⁶ Pedersen, *Burma's Ethnic Minorities*, 45-66.

soldiers along the western or eastern border. There are officially 17 government-recognized ceasefire groups but the actual number may be higher.¹⁶⁷ The ceasefire agreements vary greatly from group to group, and reflect their differences in size and power. Larger ceasefire groups have their own government administration and public services. Some smaller groups have essentially surrendered and resettled on government-sponsored land with their armed forces now acting as militia groups for the central government. As Steinberg argues, the sheer number of ethnic groups, their complex relationship with the regime, and the stage where they are at in their rebellion “precludes simple, standard approaches to mediation that may have occurred in other countries.”¹⁶⁸ From a practical perspective, mediating and negotiating peace deals will require much work as there is no unified voice representing ‘ethnic minority groups’. This would require either the creation of a unified voice—which is unlikely—or mediation on a case-by-case basis.

The PRC will need to be a central actor in an R2P response and especially in the mediation of peace agreements. As will be discussed in the following section, China has much to gain from a stable border with Myanmar. Beijing also has leverage over many of the minority groups and some influence over Naypyidaw. Despite claims that Beijing does not interfere with the domestic affairs of Myanmar, China has consistently played an integral role as facilitator and guarantor between insurgent groups and the central government. For example, in the run up to the 2010 election China served as an

¹⁶⁷ Ibid., 50.

¹⁶⁸ David I. Steinberg, *Burma/Myanmar: What Everyone Needs to Know* (New York: Oxford University Press, 2010), 110.

intermediary in communications between ethnic groups and Naypyidaw.¹⁶⁹ Concerns from the leaders of the Wa and Kachin were actually sent to Naypyidaw through Beijing. Chinese mediators have also brought confrontation parties together by guaranteeing the safety of ethnic leaders in an environment of distrust.¹⁷⁰ And in January 2013 China played an integral role in negotiating a truce between the KIA and central military after months of heavy fighting.¹⁷¹ This breakthrough came as a result of numerous high level visits by Chinese officials to Naypyidaw and a final negotiation in Yunnan involving leaders from other ethnic groups. At these negotiations, China signaled that it would be interested in staying involved in these talks.

The goal of this strategy is to find a lasting political solution. On the surface the position of both sides appears entrenched, but on further analysis there is room for negotiation and opportunity for the international community to assist. Since the 1962 coup, successive governments have been concerned with the threat of secession by ethnic minority groups. Ne Win's coup was in fact motivated by a desire to keep the Union together.¹⁷² The idea of a federalist state was rejected outright by Ne Win and then again by the SLORC/SPDC during the Seven Step Roadmap.¹⁷³ Policies of the SLORC/SPDC were driven by Three Main National Causes: national sovereignty, national solidarity, and territorial integrity, none of which provided any room for an independent or even autonomous ethnic

¹⁶⁹ International Crisis Group, "China's Myanmar Dilemma," *Crisis Group Asia Report*, no. No. 177 (2009), 1-47.

¹⁷⁰ International Crisis Group, *China's Myanmar Strategy: Elections, Ethnic Politics and Economics*, 1-20.

¹⁷¹ Gwen Robinson, "China Helps Broker Myanmar Peace Talks," *Financial Times*, 2013.

¹⁷² Martin Smith, *Burma (Myanmar): The Time for Change* (Minority Rights Group International, 2002), 196.

¹⁷³ International Crisis Group, *Myanmar: A New Peace Initiative*.

minority area.¹⁷⁴ What the central government fears is that greater autonomy will eventually lead to secession. On closer inspection, however, one can see that what the government fears is not the same as what the ethnic leaders want. The term ‘federalism’ has become synonymous with vague aspirations of the ethnic groups or ill-defined fears of the central government.¹⁷⁵ At the time of writing, none of the ethnic minority groups were actually seeking independence. Instead most now favour a federalist policy with autonomy for the ethnic state within a federal union.¹⁷⁶ Few groups have been able to define exactly what this future federal state would look like. A key part of the mediation process will involve helping both sides find common ground, including building capacity among minority leadership to define the vision for the future and to prepare for these negotiations.

B. Strategy: Rebuild post-conflict areas and stop the cycle of violence

R2P measures: disarmament, demobilization, reintegration; repatriation of refugees and IDPs

Disarmament, demobilization and reintegration—The future of the ethnic armies is an issue that will need to be addressed in order to find a lasting political solution. Until now the government has dealt with this in the only way it knows how: through aggression and force. In 2009 the central government attempted to take control of the ethnic armies through an ultimatum backed by military force. The government ordered the minority

¹⁷⁴ Myanmar, *Constitution of the Union of the Republic of Myanmar (English Version)*, 214.

¹⁷⁵ International Crisis Group, *Myanmar: A New Peace Initiative*.

¹⁷⁶ *Ibid.*

groups to transform their armed forces into a Border Guard Force (BGF) under the command of the central military.¹⁷⁷ Each unit would consist of 326 members, 30 of which would be from the central military, as well as one of three majors in command of the unit. Each member of the BGF would draw a salary at the same level as members of the Tatmadaw. The ultimatum was soundly rejected by all but one minority group. As pressure mounted, ceasefire and non-ceasefire groups formed alliances against the central government. Some groups began active recruitment and prepared to fight. Subsequently the Tatmadaw launched an assault into Kokang territory in the north of the country, sending 30,000 refugees across the Chinese border. Beyond the humanitarian crisis it sparked, the Border Guard Force initiative severely hurt trust with the ethnic leaders. The problem with this scheme was that it offered very little in return for the disarming of the ethnic groups. The groups' key demands were not addressed alongside disarmament. Furthermore, the ethnic groups were not part of the plan's development and had no ownership of it. Heading into the latest round of peace negotiations, the government has not advanced any specific plan for disarmament, demobilization and reintegration.

The international community can assist in this context by offering its experience in designing and implementing DDR programs. It can help create the basic political and security pre-conditions needed for DDR to be effective,¹⁷⁸ as well as implement the program. The details of such a DDR program are well beyond the scope of this paper, but a few context-specific issues should be noted. From the perspective of the minority groups, there are some key issues which need to be addressed before they would consider

¹⁷⁷ Kramer, *Neither War nor Peace: The Future of Cease-Fire Agreements in Burma*.

¹⁷⁸ *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict*, A/63/881-S/2009/304 (11 June 2009).

disarming. First, ever since independence, military power has meant economic power. The armed forces retained by the groups have enabled them to retain control over natural resources in their territories and the distribution channels into neighbouring countries. The armed forces guarantee a livelihood for their population and any discussion of disarmament would need to address resource sharing. Second, the armed forces protect their culture and identity from what they perceive as a program of Burmanization by the central government. Over the years the central government has tried to suppress minority culture and identity after it has taken over minority territory. This is accomplished through discriminatory language and religious policies including forced conversion to Buddhism.¹⁷⁹ Finally, there is the issue of trust, or lack of it. From the perspective of the minority groups, the central government has offered nothing but empty promises over the years. From the pre-independence Panglong Agreement to the recent ceasefire agreements, the central government has consistently made and broken deals. In order to put down their arms, the minority groups will need to trust that the political alternative is not only reliable but more effective than armed resistance as a means of protecting and promoting their interests.

If there is disarmament, demobilization, and reintegration on the ethnic minority side of the conflict, the central government will need to determine what to do with Tatmadaw forces stationed in the conflict areas. This is a key piece of the puzzle as Tatmadaw soldiers in conflict areas usually have some sort of predatory relationship with the local population.¹⁸⁰ The larger issue is what to do with the military if a political solution to the

¹⁷⁹ *Situation of Human Rights in Myanmar: Note by the Secretary-General, A/67/383*, para 55.

¹⁸⁰ International Crisis Group, *Myanmar: A New Peace Initiative*.

civil war becomes viable. DDR for the Tatmadaw will be a challenge because Myanmar has become one of the most militarized states in the world.¹⁸¹ The military is the largest in Southeast Asia and accounts for 51% of the government's budget.¹⁸² It is also the most dominant institution in the country with vast economic holdings and interests in most aspects of life. For young people, joining the military can be defined as a career choice. The military can offer what other career choices cannot—upward mobility.¹⁸³ As the government proceeds with its reform agenda it will eventually need to make hard choices about its massive military institution. Military reform has not been a priority area for the Sein government. With that said, there has been some progress on the issue of child soldiers. In 2012 Myanmar endorsed an action plan which sought to end the recruitment of child soldiers.¹⁸⁴

Refugees and Internally Displaced Persons (IDPs)—One of the highest R2P priorities should be the safe return and reintegration of refugees and internally displaced persons. After all, these are some of the primary victims of the civil war. According to UNHCR there were 414,626 refugees, 24,033 asylum seekers and 339,200 internally displaced persons as of January 2012. About 151,000 of those refugees are living in nine camps along the Thai-Burmese border.¹⁸⁵ In September 2012, after a meeting with Naypyidaw,

¹⁸¹ Smith, *State of Strife: The Dynamics of Ethnic Conflict in Burma*, 20.

¹⁸² Sean Turnell, *Known Knowns, New Knowns, and Known Unknowns: Capital Formation and Burma's Economy in 2011, Paper Presented to 2011 Myanmar/Burma Update Conference, Australian National University*, [2011].

¹⁸³ Smith, *State of Strife: The Dynamics of Ethnic Conflict in Burma*, 20.

¹⁸⁴ United Nations News Centre, "UN and Myanmar Sign Plan to Prevent Child Recruitment in Armed Forces," (27 June 2012).

¹⁸⁵ United Nations High Commission for Refugees, "2013 UNHCR Country Operations Profile - Myanmar," UNHCR, available at: <http://www.unhcr.org/pages/49e4877d6.html> (accessed 04/07, 2013).

Thailand announced that refugees in these camps could be repatriated within one year.¹⁸⁶ Key issues for their return include the clearing of land mines along the border, access to temporary shelters along the way, and employment opportunities upon return. The Myanmar government has pledged to provide food, shelter, and farming opportunities for returnees for one year. While this is a step in the right direction, the international community can help Myanmar build its capacity to support returning refugees beyond providing the logistics of safe return and the minimal support needed during the first year.¹⁸⁷ It is vital that the repatriation process preserves the dignity of returning refugees in order to end the cycle of violence.

For the internally displaced, the challenges above are compounded by the remoteness of the affected areas. Especially in the far north along the Chinese border, a lack of roads and infrastructure and a shortage of aid groups able to deliver services pose practical problems. These issues, along with the appropriate security, economic, social and legal conditions for the return of IDPs and refugees should be negotiated as part of the peace agreements. At the time of writing there were fewer plans for the return of IDPs than there were for refugees. Moreover, the work of repatriating refugees and IDPs is not connected to any of the peace processes that have been advanced thus far. Putting repatriation under an R2P umbrella would link the two and give repatriation the attention that it deserves. The international community can assist the Myanmar government to adopt the Guiding Principles on Internal Displacement as the standard for the safe return

¹⁸⁶ Saw Yan Naing, "Refugees could Go Back within One Year: Thailand," *The Irrawaddy*, 14 September 2012.

¹⁸⁷ Roberta Cohen, "Reconciling R2P and IDP Protection," in *Protecting the Displaced: Deepening the Responsibility to Protect*, eds. Sara E. Davies and Luke Glanville, Brill Academic Publishers, 2010.

of IDPs.¹⁸⁸ The Guiding Principles are based on existing international humanitarian and human rights law and are meant to guide governments and other actors in providing assistance and protection to IDPs. The government should also be encouraged to incorporate the Guiding Principles into law to ensure that the practice of forced displacement is not utilized in the future. Providing protection and assistance to IDPs should be a natural fit for an R2P response in Myanmar, given that the conceptual framework of sovereignty as responsibility that has emerged from the work of Francis Deng and Roberta Cohen on the protection of IDPs.

C. Strategy: Change thinking in the military and general population

R2P Measures: military-to-military training, legal sector reform, education for tolerance, building of civil society

Successive special rapporteurs have noted that human rights violations are widespread and systematic in Myanmar, and further that the abuses occur in a culture of impunity. As far back as 1998, Special Rapporteur Rajsoomer reported that: “These violations have been so numerous and consistent over the past years as to suggest that they are not simply isolated or the acts of individual misbehaviour by middle- and lower-rank officers but are rather the result of policy at the highest level, entailing political and legal responsibility.”¹⁸⁹ An objective of R2P measures should be the promotion of the principle of discernment among military personnel. A change in thinking is required. Acts which were previously accepted and even encouraged are no longer legally or morally

¹⁸⁸ UN Economic and Social Council (ECOSOC), *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2 (22 July 1998).

¹⁸⁹ *Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Myanmar*, A/53/364 (10 September 1998).

acceptable. This thinking needs to be encouraged at all levels, from former generals who now hold seats in parliament to the rank and file on the front lines. While there appears to be some change in thinking at the highest levels since the election, there is no guarantee that this shift is occurring on the front lines.

An R2P measure which could spark this change in thinking is military-to-military training. It is important to remember that the military will remain the dominant force in Myanmar for years to come. As such, the international community should engage and not isolate the military if it wants to address the culture of impunity. So far the military has supported the reforms of the civilian government, but will maintain this position only as long as its survival is not threatened.¹⁹⁰ The military needs to understand that it is not threatened in the new context and that it actually has something to gain. The resumption of military-to-military engagement would be a power signal from the rest of the world in this regard.¹⁹¹ The engagement could promote the principle of discernment through training in human rights law, international humanitarian law, and other appropriate topics.¹⁹²

Underlying the conflict is a general attitude and practice of discrimination against ethnic minorities. The discrimination manifests in policies which prevent the teaching of minority languages at schools and facilitate coerced conversion to Buddhism.¹⁹³ Under the new Constitution there are provisions which guarantee freedom of religion (article

¹⁹⁰ Steinberg, *Burma/Myanmar: What Everyone Needs to Know*, 162.

¹⁹¹ International Crisis Group, *Reform in Myanmar: One Year on*, 14.

¹⁹² Ibid.

¹⁹³ *Situation of Human Rights in Myanmar : Note / by the Secretary-General, A/67/383*, para 55.

34), equal rights under the law (article 347), and equality regardless of race, birth, religion, official position, status, culture, sex and wealth (article 348).¹⁹⁴ Despite these provisions, domestic laws and policies have yet to catch up and some discriminatory practices have not yet changed.¹⁹⁵ The international community can support the government in its recent efforts to reform the legal and judicial system. In particular it can assist the government to review existing laws and ensure that they comply with international human rights standards and pass new laws which promote human rights and the rule of law.¹⁹⁶ In addition to legal sector reform, the underlying attitude of discrimination can be addressed through education reform. A long term program to promote tolerance and respect may be necessary to address the deep resentment and hatred in the general population. There are also opportunities for the international community to address the underlying discrimination by building capacity in the civil society sector. For many years there were few community groups besides local Buddhist organizations.¹⁹⁷ Recent political reforms and the subsequent influx of international aid have provided the space and resources for the establishment of new NGOs. An R2P response could involve the development of civil society groups which promote diversity and inclusiveness. Moving forward, the challenge for Myanmar is to integrate the diversity of its population without seeing this as a threat to the Union. This cannot happen overnight and will require upstream measures.

¹⁹⁴ Myanmar, *Constitution of the Union of the Republic of Myanmar (English Version)*, 214

¹⁹⁵ *Situation of Human Rights in Myanmar: Note by the Secretary-General, A/66/365*, para 6 .

¹⁹⁶ After winning a seat in the by-election, Aung San Suu Kyi was appointed to chair a new parliamentary committee on the rule of law and tranquility.

¹⁹⁷ David I. Steinberg, *A Void in Myanmar: Civil Society in Burma, Paper Presented the Conference "Strengthening Civil Society in Burma: Possibilities and Dilemmas for International NGO's* (Amsterdam: Transnational Institute (4 December 1997).

D. Strategy: Convert ceasefire/war economies to peace economies

R2P measures: targeted economic assistance, capacity building

As history has shown, armed conflict and economics in Myanmar are intertwined. The ceasefire agreements in the early 1990s gave the leaders of the armed groups control of the natural resources in their areas. The absence of fighting allowed the groups to take on large-scale economic projects. In Kachin State, for example, large-scale infrastructure projects such as hydroelectric dams and roads were started. Chinese companies built the roads connecting the Kachin capital of Myitkyina with larger towns and the Chinese border.¹⁹⁸ In exchange, the Chinese company received concessions to extract timber to export to Yunnan. To varying degrees this business model is repeated across other conflict areas: concessions are given to Thai or Chinese companies, natural resources (minerals, timber, hydropower, etc.) are extracted and exported, serious environmental damage occurs, and the profit is redirected back into maintaining the armed forces or for the leaders' personal gain.¹⁹⁹ The ceasefire economy is based on an exploitative model that offers little economic benefit to the average person. To succeed the peace process will need to offer an alternative economic model.

In this context the international community can assist through economic assistance. In the short term, economic assistance can be used as a direct preventive measure to build trust and confidence in the peace process. The Myanmar Peace Support Initiative (MPSI),²⁰⁰

¹⁹⁸ Kramer, *Neither War nor Peace: The Future of Cease-Fire Agreements in Burma*, 24.

¹⁹⁹ International Crisis Group, *Myanmar: The Politics of Economic Reform*, 16.

²⁰⁰ Government of Norway, "Myanmar Peace Support Initiative," http://www.emb-norway.or.th/News_and_events/MPSI/ (accessed 04/07, 2013).

established in 2012 by Norway, is the first group to use economic assistance to this end. The MPSI provides immediate economic assistance to armed groups that agree to a ceasefire. These projects include short-term relief and immediate livelihood support to populations that have been inaccessible to aid for many years. In the process MPSI creates dialogue with ethnic leaders and builds capacity in local communities, civil society, and government authorities for the eventual transition to a peace economy. The MPSI, however, is just one organization supporting numerous ceasefire negotiations. Implemented under an R2P umbrella, such an initiative could receive greater resource allocation and therefore offer greater incentive for more ethnic groups to choose peace.

In the long term, economic assistance such as poverty alleviation programs can be used to elevate the overall socio-economic situation of the population living in conflict areas. These measures would address the root economic causes of conflict. According to the Secretary General, chronic underdevelopment does not in itself cause ethnic conflict but it does intensify competition for resources and reduce the chances that tensions are resolved peacefully.²⁰¹ The same argument could be made for providing economic assistance to the general population of Myanmar. That is, improving the socio-economic situation of the population outside the conflict areas will lessen the pressure on the central government to compete for resources in the border region. The most recent survey found that 26% of the population lives in absolute poverty.²⁰² The situation becomes progressively worse the further we travel from the centre of the country.

²⁰¹ UN General Assembly, *Implementing the Responsibility to Protect: Report of the Secretary-General*, A/63/677.

²⁰² United Nations Development Programme, *Integrated Household Living Conditions Assessment (IHLCA) Survey*, Yangon:(2009-2010).

Under an R2P umbrella, economic assistance should be used judiciously. The intent of economic assistance is to alleviate poverty but if used incorrectly it can also fuel ethnic tensions or widen current inequities between the majority and minority populations. For instance, land grabbing has become an emerging problem.²⁰³ As foreign investment laws are relaxed and investment trickles in, there is an incentive for the government to expropriate land for development by foreign firms. In the process populations become displaced. Economic assistance should also be conditional and serve as a lever to remind government leaders that there is an economic and corresponding reputational price to pay if they resort to violence. The international community should be wary of corruption and/or aid money funneled into military spending. Constant allegations of corruption have included an unaccounted \$5 billion in 2009 which was reportedly funneled into offshore accounts or military funding.²⁰⁴ These and other problems will likely arise as a product of Myanmar's transformation and should not discourage the international community to continue offering assistance.

²⁰³ Asian Legal Resource Centre, *Myanmar at Risk of Land-Grabbing Epidemic, Statement Submitted to the Twentieth Session of the Human Rights Council* (6 June 2012).

²⁰⁴ Asia Society, "Current Realities and Future Possibilities in Burma/Myanmar: Asia Society Task Force Report," (March 2010).

V. Political Challenges

Lack of political will is a major obstacle to mobilization for the purposes of humanitarian action.²⁰⁵ Although the R2P agenda outlined here would not necessitate a Security Council vote, it will still require political will at the international level to develop the agenda and marshal the necessary resources to implement it. Furthermore, since the norm has not been fully internalized and pillar two is not habitual, there will be a need for leadership to persuade member states that Myanmar is an R2P situation. Even more importantly, because it is not a situation where the responsibility to protect has transferred to the international community, success will require domestic political leadership that is genuinely committed to implementing the agenda. In this section I will examine the domestic and international setting, and assess the political challenges of implementing pillars one and two. I argue that the Myanmar government would respond with different levels of receptivity to the R2P measures outlined here because of the leaders' traditional security-focused mindset. The leadership remains sensitive to calls for international intervention and cautious regarding who they engage with on sensitive issues. On the regional front, ASEAN has become increasingly involved in Myanmar's domestic affairs despite factors that keep it bound to traditional notions of non-interference. I argue that it is unlikely that ASEAN would take a leadership role in an R2P situation in Myanmar, but that they would not obstruct it either if there was significant pressure from outside the region. Furthermore, ASEAN could play a role in

²⁰⁵ See Tom Keating, "Mobilising the Troops: Generating the Political Will to Act," in *The Routledge Handbook of the Responsibility to Protect*, eds. W. Andy Knight and Frazer Egerton (New York, NY: Routledge, 2012).

securing host-state consent and implementation of the measures. China has a long history of intervention in Myanmar and much to gain from a stable border. I argue that it is unlikely China would play a leadership role in invoking R2P in Myanmar and would defer to ASEAN for any such initiative. Its position on R2P would be influenced by a set of context-specific factors such as border security and energy security. At the moment its primary concern is to protect existing investment in light of the recent reforms.

A. The host state's commitment to the responsibility to protect

In the oft-cited success story of R2P in Kenya, Ban Ki-moon characterized the post-election clashes as an R2P situation and took political and diplomatic steps to remedy the situation.²⁰⁶ He supported Kofi Annan's envoy, the involvement of the African Union, and the political pressure exerted by Western governments. One of the reasons for success in the Kenyan case is that the government accepted and even welcomed regional and international intervention. Thus far in this paper I have argued that the new Myanmar government lacks capacity but is genuinely committed to ending the civil war. But to what extent would the leadership welcome international assistance to make it happen?

The senior leadership in the current government were schooled and indoctrinated during the Ne Win era and will likely share aspects of the xenophobic and nationalistic world view of the previous governments.²⁰⁷ Their paranoia about outsiders is not entirely

²⁰⁶ United Nations, Secretary General's Office, *Statement Attributable to the Spokesperson for the Secretary-General on the Situation in Kenya* (2 January 2008).

²⁰⁷ Pedersen, *Promoting Human Rights in Burma : A Critique of Western Sanctions Policy*, 83.

unwarranted. The leaders joined the military during a time when the country experienced incursions from the Chinese Kuomintang, meddling by the CIA, and foreign interference in the civil war. Until recently their beliefs about the outside world have been confirmed by aggressive and relentless rhetoric from the West calling for regime change. The nationalistic tendencies manifest in their genuine belief that the military is the sole actor able and responsible for building and keeping the Union of Myanmar together. This explains the desire of the military to control all aspects of life in Myanmar, including the political, economic, and social spheres. Given their nationalistic and xenophobic world view, it is not surprising that after two decades of harsh sanctions and isolation the military leadership did not bow to international pressure. On the contrary, Western sanctions merely confirmed the leadership's world view and gave them strength to become even more entrenched. Advocates of R2P need be sensitive to this military mindset even if the current leaders have cast off their military uniforms.

One of the characteristics of this military mindset is a sensitivity to calls for international intervention. This was evident in the government's response to offers of international aid after Cyclone Nargis leveled the Irrawaddy Delta and left over 135,000 dead and 1.5 million displaced.²⁰⁸ The international community was quick to offer relief but was frustrated by the government's reluctance to permit entry of foreign aid workers and supplies. In response French Foreign Minister Bernard Kouchner called on the international community to invoke R2P in an attempt to forcibly deliver aid to those affected, arguing that a failure to help a population in a humanitarian disaster was

²⁰⁸ Jürgen Haacke, "Myanmar, the Responsibility to Protect, and the Need for Practical Assistance," *Global Responsibility to Protect* 1, no. 2 (2009), 156.

tantamount to a failure to protect it from an atrocity crime. For the military leaders, the presence of a large number of foreign aid workers represented a security threat. Foreign workers and international media had the potential to expose the population to ‘alien cultural influences’ which could lead to political unrest. State-run media even suggested that the relief was a ploy for the US to invade and take control over its oil reserves.²⁰⁹ It did not help to have American, British and French ships waiting in the harbour. In the end the Secretary General and ASEAN used diplomacy to get the Myanmar government to acquiesce.²¹⁰ Importantly, it was reported that R2P rhetoric did play a role in the generals’ decision to finally allow the joint UN-ASEAN effort to deliver humanitarian assistance on its soil.²¹¹

A similar lesson can be drawn from the government’s response to calls for international involvement to remedy ethnic violence in Rakhine State. In June 2012 violence erupted between Buddhist and Muslim groups in Rakhine State. The bloody clashes that month displaced 60,000 people, most of whom who were Rohingya. The roughly 800,000 Muslim Rohingya in Myanmar are considered illegal immigrants from Bangladesh and are subject to much discrimination from the government and other ethnic groups. As international media began reporting on the violence and calls mounted for international intervention to stop violence against the Rohingya, the President issued a sharp rebuttal reaffirming that the incidents were “sectarian conflicts which are purely internal affairs of

²⁰⁹ Andrew Selth, "Even Paranoids have Enemies: Cyclone Nargis and Myanmar's Fears of Invasion," *Contemporary Southeast Asia* 30, no. 3 (Dec, 2008), 24-25.

²¹⁰ Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds*, 58.

²¹¹ Haacke, *Myanmar, the Responsibility to Protect, and the Need for Practical Assistance*, 156-182.

a sovereign state.”²¹² He went on to state that the government would not welcome any attempt to politicize and internationalize the issue. If R2P is to be successful in Myanmar the international community needs to be more considerate of the country’s military history and frame R2P measures in terms of capacity building and cooperation rather than intervention.

Since 2010 Myanmar has dramatically increased its engagement with international actors on domestic issues, but it has done so cautiously. On the one hand the government is welcoming international assistance for many of its reforms. The World Bank has confirmed funding for infrastructure and community development programs, and will help the government manage its budget and public finances.²¹³ The Asian Development Bank, after a thirty-year hiatus, will focus its aid on improved public finance, trade, investment, small and medium-sized enterprises, and financial sector development.²¹⁴ The ADB will also provide funding to grow Myanmar’s civil society sector. There is also cooperation with the UN on human rights and humanitarian issues. The country’s new Human Rights Commission is working closely with the Office of the High Commissioner for Human Rights to undertake a series of institution-building activities.²¹⁵ The UNHCR is actively working with the displaced populations resulting from both the recent fighting

²¹² Thein Sein, *Statement regarding Recent Incidents in Rakhine State* (Naypyidaw:, [21 August 2012]).

²¹³ World Bank, "World Bank Group to Support Myanmar’s Plan to Improve People’s Access to Electricity, News Release," available at: <http://www.worldbank.org/en/news/press-release/2013/02/05/World-Bank-Group-to-Support-Myanmar-8217-s-Plan-to-Improve-People-8217-s-Access-to-Electricity> (accessed 04/07, 2013).

²¹⁴ Asian Development Bank, "ADB Returns to Myanmar with First Re-Engagement Assistance, Press Release," available at: <http://www.adb.org/news/adb-returns-myanmar-first-re-engagement-assistance?ref=countries/myanmar/news> [accessed 7 April 2013] (accessed 07 April, 2013).

²¹⁵ *Situation of Human Rights in Myanmar: Note by the Secretary-General, A/67/383*, 78.

in Kachin State as well as the Rohingya in Rakhine State.²¹⁶ On the other hand, in certain situations the government appears to be more cautious in their international engagement. As noted earlier the government's peace process only includes an advisory and a funding role for the international community. Officially it does not allow for international mediators but when it appeared that the government was unable to mediate an end to the fighting with the KIA in 2012-13, it permitted China to serve as mediator. In the case of Cyclone Nargis, the government preferred working with regional actors over Western countries to implement the aid effort. The government rebuffed offers of aid from the US, France and UK and in the end chose to work with its ASEAN partners. The implication for R2P in Myanmar is that *who* implements the measures is as important as *what* is implemented.

From this brief analysis one can hypothesize about the government's level of receptivity to the R2P measures outlined above. A number of the R2P measures proposed building on programs that the Myanmar government is already undertaking in conjunction with international actors. Refugee repatriation, civil society development, and especially economic assistance would likely be well-received. On the other hand there are a number of proposed measures which may prove sensitive to the military-minded government. Given the legacy of the government's emphasis on national security, the government will most likely want to handle negotiations with the ethnic groups on their own. The government's peace plan clearly envisions negotiating a political solution, including the disarming of the ethnic groups, without the introduction of an external party and certainly not an armed external party. Of the R2P measures outlined above the government would

²¹⁶ United Nations High Commission for Refugees, *2013 UNHCR Country Operations Profile - Myanmar*.

be least receptive to international involvement in DDR and the mediation of ceasefire and peace agreements. For the same security-related reason, it would likely balk at military-to-military training to change the thinking of its members. A primary objective of the roadmap to democracy was to entrench the military within the fabric of the country in order to protect the Union, and thus the government would be reluctant at this point to introduce new ideas which could endanger that. This is not to say that the government could not be persuaded to accept these measures. The following section on China will in part address this question.

B. ASEAN's policy towards Myanmar

Southeast Asia has traditionally adhered to a strict interpretation of non-interference. ASEAN nations show “respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States” and “non-interference in the internal affairs of ASEAN Member States.”²¹⁷ The inclusion of Myanmar into the organization has challenged its principle of non-interference. Initially ASEAN justified its inclusion of Myanmar in 1997 based on its policy of *constructive engagement*. In the context of increasing Western sanctions against Myanmar, ASEAN argued that by promoting trade, diplomatic, and economic ties with the military regime, ASEAN would be able to spur socioeconomic progress and the growth of a middle class.²¹⁸ Myanmar's admission into the regional bloc sparked discussions about how to address cross-border issues. Then-deputy Prime Minister of Malaysia Anwar Ibrahim proposed *constructive*

²¹⁷ *ASEAN Charter*, (2007).

²¹⁸ Stephen McCarthy, "Burma and ASEAN: Estranged Bedfellows," *Asian Survey* 46, no. 6 (2008), 917.

intervention as a way to address cross-border issues such as drug and human smuggling, and refugee flows.²¹⁹ Thai Foreign Minister Surin Pitsuwan followed with a proposal for *flexible engagement* after the Democratic Karen Buddhist Army, one of the Tatmadaw's proxy armies, raided a Karen refugee camp on Thai soil. Flexible engagement would allow members to discuss and comment on one another's domestic issues when there were cross-border implications. This was soon replaced by *enhanced interaction*, an approach which allowed members to comment on each other's domestic policies but where ASEAN itself would not. In hindsight none of these approaches were successful at spurring socioeconomic progress or growth in Myanmar's middle class. Nor were they successful in addressing the unexpressed goal of resolving the country's human rights situation.

ASEAN is grounded in non-interference by its foundational documents such as the Bangkok Declaration²²⁰ and the more recent ASEAN Charter.²²¹ These core documents codify the principle of non-interference as well as the principle of consensus decision-making. This makes it difficult for the bloc to come to a common position on any one issue. Furthermore, the differently motivated political makeup of its members makes a common position even more elusive. In the context of pressuring Myanmar on its human rights, members such as Laos, Vietnam and Cambodia have been less motivated than Singapore and Malaysia. ASEAN countries are also careful not to tread too far in criticizing Myanmar about the ethnic conflict out of fear of inciting condemnation of their own domestic conflicts. Philippines, Thailand and Indonesia are all embroiled in

²¹⁹ Ibid., 917.

²²⁰ ASEAN, Bangkok Declaration (8 August 1967)

²²¹ ASEAN, ASEAN Charter (2007).

conflicts with minority groups within their own borders. In fact Thailand threatened to leave ASEAN if the issue of the insurgency in the Muslim south was brought to the ASEAN agenda.²²² Members also remain acutely aware of their original motivation to accept Myanmar's membership. That is, Myanmar was accepted into ASEAN to reduce Chinese influence in the region and thus members are careful not to criticize Myanmar to the point where it leaves.²²³

On the other hand ASEAN has steadily pushed the limits of what its members consider to be non-interference when it comes to its policy on Myanmar. In 2003 a military-sponsored mob attacked Aung San Suu Kyi's motorcade in what became known as the Depayin Incident. A number of her supporters were killed and Suu Kyi herself was arrested and eventually put under house arrest. Occurring shortly after Suu Kyi was critical of the government for refusing to start serious political dialogue, the incident sparked a strong reaction from outside the region. The EU responded by issuing a travel ban on SPDC leaders, Japan froze financial aid, and the Bush Administration passed the Burmese Freedom and Democracy Act, the harshest measures to date. ASEAN members felt that the SPDC's actions were an embarrassment and damaged the credibility of the organization.²²⁴ ASEAN responded by issuing a joint statement calling for the release of Suu Kyi, the first time its members had taken a collective position against another member since Vietnam's occupation of Cambodia. The next critical period for ASEAN occurred in 2005 in the run up to Myanmar's turn as Chair the following year. The EU

²²² Jürgen Haacke, "The Myanmar Imbroglia and ASEAN: Heading Towards the 2010 Elections," *International Affairs* 86, no. 1 (2010), 168.

²²³ *Ibid.*, 168.

²²⁴ McCarthy, *Burma and ASEAN: Estranged Bedfellows*, 920.

and US threatened to boycott any ASEAN meetings chaired by Myanmar. Subsequently Malaysia, Singapore and Indonesia voiced their concern with a Myanmar chairmanship. In the end ASEAN chose not to force Myanmar to step down, but noted that Myanmar's chairmanship would severely hurt the reputation of the grouping. Shortly thereafter Myanmar announced that it would forfeit its turn as chair in order to concentrate on domestic issues.²²⁵

In 2008, after the SPDC refused entry of aid post-Cyclone Nargis, ASEAN would again push the limits of non-interference. Following Kouchner's invocation of R2P, Vietnam and Indonesia argued at the Security Council that the norm did not apply to humanitarian disasters. Their position on the norm notwithstanding, ASEAN members took the initiative to persuade the SPDC to allow delivery of aid for victims and then implemented the program in collaboration with the UN. Initially the SPDC only permitted a small Emergency Rapid Assessment Team to enter the country and assess the situation. The team found the situation to be at risk of escalation due to disease and malnutrition, and recommended that ASEAN lead a larger humanitarian effort for the victims. Member countries exerted pressure on Myanmar and eventually persuaded the SPDC to allow an ASEAN-UN effort into the country. Although the response was slow, ASEAN's experience with Cyclone Nargis was an important marker in terms of their changing interpretation of non-interference. The event showed that not only was Myanmar

²²⁵ Association of Southeast Asian Nations, *Statement by the ASEAN Foreign Ministers Vientiane*, [25 July 2005]).

expected to allow humanitarian aid, but ASEAN had a role in persuading the government to do so.²²⁶

In both these cases—the Depayin Incident and Cyclone Nargis—ASEAN showed that its policy of non-interference was flexible and could be influenced by pressure from outside the region. Moreover, in these events ASEAN only acted when actors outside the region did so first. In the context of this case study, it is unlikely that ASEAN or any of its members would take the lead in implementing R2P, especially now that there appears to be progress in Myanmar. But if pressed to play a role ASEAN could be influential in securing host consent as well as in implementing the measures. There are in fact a number of initiatives already occurring between Myanmar and ASEAN nations that could fall under the umbrella of the measures outlined above. Although there is no official role for ASEAN in the government's peace process, ASEAN representatives have met with the Myanmar Peace Center to discuss the recently launched ASEAN Institute for Peace and Reconciliation. This institute, as well as the ASEAN Intergovernmental Commission on Human Rights and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children, could play a valuable role in capacity building. In addition to cooperating with the association, Myanmar has begun to learn directly from other ASEAN members. Members of the Myanmar Peacemaking Work Committee met with representatives from the Filipino and Indonesian governments to discuss their countries' experiences with their own insurgencies.

²²⁶ Alex J. Bellamy and Catherine Drummond, "Southeast Asia: Between Non-Interference and Sovereignty as Responsibility," in *The Routledge Handbook of the Responsibility to Protect*, eds. W. Andy Knight and Frazer Egerton, (2012), 252.

C. China's Myanmar Policy

Beijing did not object when R2P was adopted by consensus at the World Summit, but it has never been completely at ease with pillar three. Since 2005 China has sought to divorce R2P from the non-consensual use of force rather than to obstruct its development at the UN.²²⁷ It remains supportive of pillars one and two. Beijing's position on R2P can be characterized as cautious,²²⁸ and it would be particularly cautious if faced with such a scenario on its southern border. For R2P in Myanmar to be successful, Beijing would need to play a leadership role in rallying the international community and marshalling the necessary resources to implement the broad-based conflict prevention agenda outlined here. This section examines China's approach to Myanmar and some of the key issues China would face in such a scenario.

China has been Myanmar's strongest economic, military and diplomatic backer over the last two decades. Chinese foreign investment has been behind much of the infrastructure development in Myanmar during this time. Militarily, China helped the Tatmadaw begin a massive military expansion and modernization program in the 1990s. This allowed the Tatmadaw to increase personnel from 180,000 in 1988 to 400,000 in the mid-1990s, with it leveling off at around 300,000 in 2006.²²⁹ China's support skewed the ongoing civil war in favour of the central government. Diplomatically China has been Myanmar's biggest ally in international forums. Beijing protects Myanmar's sovereignty and

²²⁷ Sarah Teitt, "The Responsibility to Protect and China's Peacekeeping Policy," *International Peacekeeping* 18, no. 3 (2011), 298-312.

²²⁸ Sarah Teitt, "Assessing Polemics, Principles and Practices: China and the Responsibility to Protect," *Global Responsibility to Protect* 1, no. 2 (2009), 208-236.

²²⁹ Callahan, Mary, "Of kyay-zu and kyet-su: the military in 2006," 36.

independence by arguing against country-specific UN resolutions and instead, encourages the international community to assist Myanmar so that it can resolve humanitarian issues independently.²³⁰ In 2007 China even issued its first non-Taiwan related veto in order to block a United Nations Security Council draft resolution condemning the human rights situation in Myanmar.²³¹ Together with Russia, Qatar and Congo, China argued that the human rights issues being brought forward were the domestic affairs of Myanmar and that they did not constitute a threat to regional or international peace and security.²³²

Although Beijing formally advances a more traditional conception of sovereignty and non-intervention in its policy towards Myanmar, it has in fact adopted a less ideological, more pragmatic approach to dealing with its southern neighbour. Its seemingly unswerving support for Myanmar is qualified by Myanmar's ability to make progress in national reconciliation, economic development and social harmony.²³³ In its 2007 UNSC veto, China qualified its decision by voicing concern for the political, economic and social issues in the country, and its support of a process of inclusive dialogue and national reconciliation.²³⁴ China then applauded the efforts of ASEAN in offering constructive recommendations to resolving the issues in Myanmar and urged and even *expected* the Myanmar government to consider these suggestions. What is noteworthy about China's defense of Myanmar sovereignty is that it is qualified by an insistence that Myanmar cooperate with other parties including the UN, ASEAN and domestic actors in a process

²³⁰ Haacke and International Institute for Strategic Studies, *Myanmar's Foreign Policy : Domestic Influences and International Implications*, 31.

²³² UN Security Council, "United Kingdom of Great Britain and Northern Ireland and United States of America: Draft Resolution", S/2007/14, January 12, 2007.

²³³ Stephanie Kleine-Ahlbrandt and Andrew Small, "China's New Dictatorship Diplomacy: Is Beijing Parting with Pariahs?" *Foreign Affairs* January/February (2008).

²³⁴ UN Security Council, Draft Resolution, S/PV.5619, 12 January 2007.

of inclusive dialogue and national reconciliation. Furthermore, China's position on Myanmar depends largely on the position of ASEAN. In deferring to ASEAN, Beijing is able to take some pressure off itself and put the responsibility on the regional organization. Moreover, by deferring to ASEAN, China shows that it is respectful of Myanmar's sovereignty, a position that it has been keen to portray in order to allay fears of an aggressive China.²³⁵ In any international effort to resolve a humanitarian crisis in Myanmar—such as in the aftermath of Cyclone Nargis—China is likely to want ASEAN to take the lead or, at the very minimum, show strong support.

The pragmatic approach China takes toward Myanmar is driven largely by a set of context-specific factors such as border security, strategic interests and economic interests. China's national security is identified with, among other things, protecting its borders.²³⁶ Beyond the refugee spill-over resulting from conflict, China must also deal with the social problems emanating from the region's illicit activities: narcotics, HIV, human trafficking and gambling. China is also concerned with maintaining access to the Andaman Sea through Myanmar. Dubbed "the Malacca Dilemma", China's current concern is with the vulnerability inherent in shipping 80% of its oil through the Malacca Straits, a narrow waterway that is prone to piracy and which, in the event of a war, could be cut off fairly easily. As a result China has built a pipeline from the Myanmar port of Kyaukphyu to the Yunnan capital of Kunming. Chinese tankers ship oil from the Middle East and Africa to Myanmar where it is then transported to Kunming via the pipeline,

²³⁵ Joshua Kurlantzick, "China's Charm Offensive in Southeast Asia," *Current History* 105, no. 692 (Sept, 2006), 270-276.

²³⁶ Xiaolin Guo, "Towards Resolution: China in the Myanmar Issue," *Silk Road Paper*, no. March (2007). Marc Lanteigne, *Chinese Foreign Policy: An Introduction* (New York, NY: Routledge, 2009), 163.

thereby bypassing the vulnerable Straits. Finally, China is keen to protect its vast economic interests. Lead by Yunnan, trade and investment with Myanmar has flourished since the early 1990s. By 2004 total investment from China equaled \$64 billion, roughly 15% of Burma's foreign investment.²³⁷ Myanmar is China's largest trading partner among ASEAN countries, while trade with China represents 17% of Burma's total trade, far greater than any other Asian country.²³⁸ Economic collaboration between the two countries is concentrated in mining, oil and gas, and infrastructure development.

Beijing has shown that it can be influenced by international pressure to intervene in Myanmar, but that its influence over Naypyidaw is constrained. In August 2007 Myanmar's revered community of Buddhist monks led the Saffron Revolution, consisting of large but peaceful demonstrations to protest rising fuel costs. International pressure mounted on China to exert its influence to restore peace in Myanmar after the military responded with force that killed many civilians including monks.²³⁹ Beijing responded with several diplomatic overtures in response to international pressure. China's Foreign Ministry called on the Myanmar government to resume domestic stability and promote national reconciliation, and to advance the process of democratization suited to the national realities of Myanmar²⁴⁰— a call to continue work on the country's roadmap to democracy. At the UN, China even supported a Security Council statement deploring the use of violence against peaceful protesters.²⁴¹ Similar to the events surrounding the

²³⁷ Guo, *Towards Resolution: China in the Myanmar Issue*, 55

²³⁸ Wayne Bert, "Burma, China and the USA," *Pacific Affairs* 77, no. 2 (0601), 265.

²³⁹ Lucia Kubosova, "Call for EU to Boycott China Olympics Over Burma," EU Observers, <http://euobserver.com/24/24865>.

²⁴⁰ People's Republic of China. Press release of the Ministry of Foreign Affairs available at <http://www.fmprc.gov.cn/eng/wjb/zzjg/yzs/gjlb/2747/2749/t363133.htm>.

²⁴¹ United Nations Security Council, Presidential Statements, S/PRST/2007/37, 11 October 2007.

Security Council veto, what is noteworthy about China's response to the Saffron Revolution was that China gave in when pressured to respond. However, Beijing's ability to influence Myanmar is often limited by the actions of local actors in Yunnan. While Beijing's objectives are stability and maintaining good bilateral relations with Naypyidaw, Kunming is more concerned about economic development and often proceeds in business dealings without consent from Beijing.²⁴² Beijing and Naypyidaw, for example, have signed official agreements to tackle illegal logging and to protect the sensitive jungle areas in northern Myanmar. Despite the bans, Chinese logging companies continue to truck out timber from northern Myanmar with the cooperation of local ethnic groups. Yunnan business people deal directly with the minority groups and both central governments are left out altogether, sometimes causing friction between the two capitals.

Some key points can be drawn from this brief analysis. First, it is unlikely that China would take a leadership role in rallying the international community and marshalling the necessary resources to implement R2P in Myanmar. As it did in a number of humanitarian situations, Beijing would defer to ASEAN and follow ASEAN's lead. Furthermore, Beijing does not want to appear aggressive in the region and as such, would likely object to R2P without Naypyidaw's consent. However, Beijing could play a role in securing host state consent. Although China has formally advanced a traditional conception of sovereignty and non-interference, whether it supports R2P in Myanmar would likely be subservient to context-specific factors such as border stability, energy security, and economic interests. At the moment China's main concern is the preservation

²⁴² International Crisis Group, *China's Myanmar Dilemma*, page 25.

of its existing investments in light of their waning influence amidst Myanmar's political transformation.

VI. Conclusion

In this thesis I have shown that the human rights crimes committed in Myanmar fall within R2P's scope, in particular, war crimes and crimes against humanity. But because these crimes have occurred at such low intensity they do not trigger R2P if the norm is understood as a *rallying cry* to extinguish imminent large-scale crimes. This approach undermines the moral foundations of the norm because it condemns mass violence over a short period of time while ignoring the same crimes if committed over a longer period. If understood as an *enduring political agreement*, an R2P approach would focus on building the capacity of the government to prevent atrocity crimes and the international community's ability to respond within the current normative framework. The agenda outlined here aims to accomplish that, and in doing so provides a deep response tailored to the dynamics of the local context. It contains measures that range from long-term prevention to direction prevention to rebuilding. Success of these measures will depend largely on political will, in particular the domestic government, ASEAN, and China.

In 2014 Myanmar will take its turn as Chair of ASEAN, a symbol of the country's return to the international stage. By the end of that year the government is scheduled to have made significant progress in negotiating peace agreements with ethnic minority groups. It is certain that progress will be made. The government has made a sincere attempt at

establishing the institutions and the processes to make this a reality. These efforts are being supported by foreign donors, albeit in limited capacities. And war-weary ethnic groups appear open to the government's conciliatory approach. But many significant issues stand in the way: resource sharing, disarmament-demobilization-reintegration, constitutional amendments, and the government's lack of capacity to implement reforms including the peace process. The question then is how much progress will be made and will it be lasting? Furthermore, if the government of Myanmar is trying to fulfill its responsibility to protect, how can the international community best assist?

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