WHAT LEGAL MEASURES SHOULD ASEAN APPLY TO HELP THE ROHINGYA?

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ABSTRACT

Human rights are inherent in all individuals, regardless their nationality. Based on this notion, this paper discusses the protection of human rights among the Rohingya, a group of Muslims which has been based in Myanmar for a long time. In theory, the Rohingya's individual rights should be respected; however, in reality this does not happen, as they are considered stateless under the Burma Citizenship Law of 1982. As a result of this, they have over recent years suffered human rights abuses. Because veto powers at the United Nations Security Council often prevent human rights interventions proceeding, in this paper the Rohingya issue will be discussed from a regional or Association of Southeast Asian Nations (ASEAN) perspective, while referring to international law. The authors question two points. The first is the status of the Rohingya as ASEAN people, as examined through provisions in the Charter of the Association of Southeast Asian Nations (the ASEAN Charter). The other question relates to how ASEAN might protect the Rohingya's human rights in the future. To answer these questions thoroughly, the study compares the principles of non-interference, as enshrined in both Article 2(4) of the ASEAN Charter and Article 4(h) of the Constitutive Act of the African Union. The latter legal instrument, unlike the ASEAN Charter, opens the door for interventions to take place in very serious situations. However, the principle of non-interference is considered a cornerstone of the ASEAN way, and so is a difficult principle to challenge. Moreover, the mandates given by the ASEAN Inter-governmental Commission on Human Rights (AICHR) are limited. This paper explores another way in which the Rohingya might be protected; a concept known as the responsibility to protect (RtoP). This norm has been adopted by all the ASEAN member states; therefore, the authors recommend that ASEAN apply the RtoP principle to protect the human rights of the Rohingya.

Key words: Rohingya, ASEAN, ASEAN Peoples, Principle of non-interference, Responsibility to Protect

1 Introduction

One of the purposes of the Association of Southeast Asian Nations (ASEAN) is to promote and protect human rights. However, its role in the case of the Rohingya in Myanmar has been limited thus far because they, as stateless, have suffered human rights abuses. This paper aims to uphold their human rights. It focuses only on the potential solution to this human rights issue within the ASEAN context, meaning it does not address solutions at the national and global levels. The paper is divided into five parts. After this introduction, the second part discusses the Rohingya in more detail, in order to understand their situation and the problems they face. Then, in the third part, the paper claims that the obstacles to ASEAN resolving this issue are created by two key points, (i) the principle of non-interference, and (ii) a lack of power within the ASEAN Intergovernmental Commission on Human Rights (AICHR). In the fourth section, the paper suggests further possible solutions to the problem by exploring and analyzing the right of intervention and the Responsibility to Protect Principle (RtoP), and in the last section presents the authors' conclusion.

2 The Rohingya: Their persecution and status

This section discusses the Rohingya, the persecution they suffer and their status in Myanmar and ASEAN.

2.1 The Rohingya and problems related to the Burma Citizenship Law of 1982

The Rohingya are part of a Muslim ethnic group who have been living for many generations in Rakhine State (formerly known as Arakan State), in the western part of Myanmar. Where the Rohingya come from has been a controversial issue over a long period in Myanmar. It is widely accepted by the Government of Myanmar (GOM) that the Rohingya are Bengali Muslims originally from Bangladesh, and the GOM also claims the group is living unlawfully within Myanmar's territory.[1]

Due to the GOM's stance, in 1982 it passed the Burma Citizenship Law, in which only eight national races are recognized as Burmese citizens.[2] The Rohingya are not one of these eight national groups, in fact, in the law they are branded as "foreigners".[3]

[1] Nehginpao Kipgen, (2013). Conflict in Rakhine State in Myanmar: Rohingya Muslims' Conundrum. *Journal of Muslim Minority Affairs*, 33, .4.
[2] Burma Citizenship Law of 1982 art. 3: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b4f71b> (accessed 19 October 2014).
[3] *Ibid.* art. 2(e) "Foreigner" means a person who is not a citizen or an associate citizen or a naturalized citizen.

As a result, they have not been considered Burmese citizens since the enactment of this law, leading to their systematic and arbitrary mistreatment, often carried out in a discriminating manner. The Rohingya's movements are limited, as is their right to lead a normal life and their access to government services such as health and education. They are also subject to forced labor and persecution.[4] Their situation in Myanmar became worse over the period June 2012 to October 2013, during which time violence broke out between the majority Arakanese Buddhists and the Rohingya Muslims in Rakhine State, leading to the loss of over one hundred lives, and with at least 125,000 Rohingya, together with other Muslims, becoming internally displaced persons. Many of them ended up staying in overcrowded camps with inadequate food, shelter and sanitation facilities.[5]

The impact of the Burma Citizenship Law of 1982 and the Rakhine State riots was not only limited to the national sphere. Firstly, the term "stateless person" under Article 1(1) of the 1954 Convention relating to the Status of Stateless Person (the UN Convention 1954) refers to "a person who is not considered as a national by any state under the operation of its law".[6] The conclusions of the Prato Expert Meeting on Article 1(1) of the UN Convention 1954 further explain this definition, saying that an individual can become stateless if the state to which the person has a factual attachment will not grant him or her nationality.[7] This definition is recognized as customary international law; therefore, it binds Myanmar whether or not it has signed or ratified the UN Convention of 1954.[8] In the Rohingya situation, it is clear that the Rohingya are *de jure* stateless. Secondly, the mass killing of Rohingya amounts to a crime against humanity, one carried out as part of what international law would consider an ethnic cleansing campaign.[9] According to the Rome Statute of the International Criminal Court (ICC) Article 7, a crime against humanity includes murder, torture and persecution committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of said attack. In this case, it should be noted that Myanmar is not a party to the ICC, but the Rome Statute is considered to reflect customary international law. For these reasons, those groups who commit violence against the Rohingya in Myanmar may be responsible under the ICC.[10] Moreover, according to a Human Rights Watch Report, the pattern of gross violations in Myanmar could amount to "ethnic cleansing" as well. Although this term is not officially defined under international law, it was defined by a UN Commission of Experts as, a "purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas. This purpose [is] the occupation of territory to the exclusion of the purged group or groups"[11]

2.2 ASEAN Peoples

As detailed in the above section, the Rohingya are not considered to be of Burmese nationality. Based on ASEAN integration, this section questions whether they can claim to be ASEAN peoples. The ASEAN Charter mentions 'peoples of ASEAN' in a number of provisions, but it is silent on the specific terminology.[12] A legal instrument of a similar nature in Africa, namely the Constitutive Act of the African Union (Constitutive Act) contains a term similar to that found in the ASEAN Charter: "peoples of Africa", though there is no definition given.[13] A different approach is taken by the European Union (EU), where citizenship of the Union is established quite clearly. Article 20 (1) of the Treaty on the Functioning of the European Union, and Article 2 (1) of Directive 2004/58/EC, both define the meaning of an EU citizen as any person having the nationality of a member state.[14] Therefore, if the Rohingya case were situated within an EU member state, the Rohingya would not be considered EU citizens, as they do not have nationality. Although the ASEAN Charter does not define the term "ASEAN peoples", it is highly likely that it excludes stateless people. The Preamble of the ASEAN Charter, which refers to "the peoples of the member states of the ASEAN", implies that to be considered an ASEAN person, one must be a national in one of the ASEAN member states. Hence, the Rohingya are not entitled to be, nor can they claim to be ASEAN peoples, even though the group has been living in an ASEAN member state for generations.

3 Barriers to resolving the Rohingya issue within ASEAN

In the previous section, this paper showed that the Rohingya are classified as stateless, and also may not be classified as ASEAN peoples. However, this does not mean that they are not protected under the ASEAN regime. Human rights protection has always

[4] United Nations Human Rights Council, *Report of the independent expert on minority issues, Gay McDougall*, 28 February 2008, A/HRC/7/23: <http://www.refworld.org/docid/47d685ea2.html> (accessed 9 February 2015).
[5] Human Rights Watch, (2013) *All you can do is pray: Crimes against humanity and ethnic cleansing of Rohingya Muslims in Burma's Arakan State:* <http://www.hrw.org/sites/default/files/reports/burma0413webwcover_0.pdf> (accessed 19 October 2014).
[6] Convention relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force 22 April 1954.
[7] Open Society Foundations, (2011) *De Jure Statelessness in the real world: Applying the Prato Summary Conclusions:* <http://www.opensocietyfoundations.org/sites/default/files/prato-statelessness-20110303.pdf> (accessed 19 October 2014) at 4.
[8] United Nations High Commissioner for Refugees, *Expert Meeting :The concept of Stateless Persons under International Law Summary Conclusion.* Meeting held in Prato, Italy, 27-28 May 2010: <http://www.unhcr.org/4cb2fe326.html> (accessed 19 October 2014).
[9] Human Rights Watch, *supra* note 5 at 53.
[10] *Rome Statute of the International Criminal Court.* A/Conf.189/9 17 July 1998, entered into force 1 July 2002.
[11] Human Rights Watch, *supra* note 5 at 124.
[12] Association of Southeast Asian Nations (ASEAN), *Charter of the Association of Southeast Asian Nations*, 20 November 2007. (ASEAN Charter) art. 1(4), (10), (11), (12), art. 2 (l).
[13] Organization of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000, (Constitutive Act) art. 3(a).
[14] European Union, *Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union*, Official Journal C 326 , 26 October 2012. art 20; European Union, *Corrigendum to Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC*, Official Journal L 158 of 30 April 2004 art 2 (1).

been of importance to the ASEAN community, for it is one of the reasons ASEAN was formed in the first place.[15] Moreover, over the last decade, ASEAN has developed and adopted a number of human rights instruments and other organs responsible for protecting human rights. These include: 1. The ASEAN Human Rights Declaration (AHRD), 2. The Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community (2009-2015), 3. The ASEAN Charter, 4. Establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR), and 5. The ASEAN Intergovernmental Commission on the Promotion and Protection of the Rights of Women and Children. Collectively, the above documents are referred to as the "ASEAN human rights architecture".[16] The AHRD clearly mentions that the protection of human rights is applicable to every person, meaning every individual regardless of their nationality. Accordingly, the Rohingya should have their human rights protected under ASEAN law.

However, there are some drawbacks worth mentioning in terms of being able to protect the Rohingya's human rights under ASEAN law. The first is the principle of non-interference as enshrined in the ASEAN Charter, and the second is the functioning of the AICHR.

3.1 Principle of non-interference under the ASEAN way

The 'ASEAN way' refers to practices unique to the ASEAN organization, those which aim to prevent organizational change. The principle of non-interference is one such practice.[17] The principle of non-interference is enshrined under Article 2(e) of the ASEAN Charter, and this prevents member states from intervening in each other's internal affairs. In other words, member states recognize each other's sovereignty and so do not interfere in this. The reason this principle has been adopted is due to the region's history prior to the establishment of ASEAN in 1967. ASEAN was founded after decolonization had already taken place in most of its member nations, and the principle of non-interference matched well with the situation that existed at that time; when most nations wished to focus on domestic issues and avoid having their internal affairs interfered with by external parties.[18]

This principle is also mentioned in the UN Charter, and is recognized as customary international law.[19] However, in the UN Charter there is an exception to this principle contained in Chapter VII, concerning actions associated with threats to the peace, breaches of the peace and act of aggression. Nothing similar is found in the ASEAN Charter.

One author has shown how ASEAN member states often used to interfere in each other's internal affairs, particularly during the Cold War period.[20] Some current ASEAN member states have in the past intervened in the internal affairs of other Southeast Asian countries, namely Thailand in Myanmar during the 1960s, Indonesia in East Timor in 1975, and Vietnam in Cambodia in 1978.[21] However, it should be mentioned that at that time, Myanmar, East Timor and Cambodia were not ASEAN member states. [22] Therefore, the concept of non-interference did not apply during these interventions. In other words, since ASEAN was founded, member states have not intervened in other member states' internal affairs. Accordingly, the principle of non-interference among member states is strictly adhered to.

The role of individual ASEAN member states in helping to restore peace in other countries is normally carried out under the umbrella of the UN, due to this principle of non-interference. As part of the United Nations Transitional Administration set up in East Timor between 1999 and 2000, four ASEAN members – Malaysia, the Philippines, Singapore and Thailand – provided troops and civilian police. However, it should be mentioned that East Timor is not and never has been a member of ASEAN.

The ASEAN Charter itself respects the national sovereignty of other member states[23]; however, this principle of non-interference without any doubt leads to states ignoring human rights violations at the domestic level in other member state territories, and this is particularly the case with the Rohingya in Myanmar.

3.2 AICHR

The idea of having a regional human rights body emerged as part of ASEAN's official agenda in 1993; however, it took almost 16 years before a human rights body known as the ASEAN Intergovernmental Commission on Human Rights (AICHR) was set up. The AICHR is a judicial mechanism created under Article 14 of the ASEAN Charter. Its main mandate is to promote human

[15] ASEAN Charter, *supra* note 12 Preamble (9), art. 1(7), art 2(i).
[16] Sriprapha Petcharamesree,. (2013). The ASEAN Human Rights Architecture: Its Development and Challenges. *The Equal Rights Review* 11. at 1-2.
[17] Lee Leviter, (2010). The ASEAN Charter. ASEAN Failure or member failure? *New York University Journal of International Law and Politics* 43 at 161.
[18] Catherine Drummond, (2009). Non-interference and the Responsibility to Protect: Canvassing the Relationship between Sovereignty and Humanity in Southeast Asia. *Dialogue*, 7:2 at 5.
[19] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, art. 2(7); International Court of Justice. (1986) *Militarv and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Merits, Judgment. I.C.J. Reports 1986 at paras 19, 202.
[20] Lee Jones, ASEAN and the norm of non-interference in Southeast Asia: A quest for social order, March 2009 Nuffield College Politics Group Working Paper: http://www.nuffield.ox.ac.uk/politics/papers/2009/Jones.March2009.pdf at 17-21.
[21] *Ibid.* at 3-4.
[22] Lee Jones, (2009). *ASEAN and the norm of non-interference in Southeast Asia: A quest for social order*. Nuffield College Politics Group Working Paper: <http://www.nuffield.ox.ac.uk/politics/papers/2009/Jones.March2009.pdf> (accessed 19 October 2014) at 18.
[23] ASEAN Charter, *supra* note 12 art. 2(e) and (k).

rights rather protect it, as stated in Article 1.4 and Article 1.6 of its Term of Reference (TOR).[24] Moreover, under Article 6.1 of the TOR, decision-making under AICHR should be based on consultation and consensus. Unsurprisingly, the AICHR has long been criticized for being "toothless", "window dressing" and even a "lame duck", for its inability to cope with disputes among ASEAN countries.[25]

The lack of an independent judicial institution is one of the main obstacles to the development of human rights in ASEAN, in contrast to Europe, which has the European Court of Human Rights, and the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, which serve as the best regional examples to illustrate this issue.

The European Court of Human Rights was established by the European Convention of Human Rights (ECHR) in order to review state and individual complaints. Article 33 therein contains the details of an inter-state complaints procedure, and although this procedure is rarely used, it has considerable symbolic significance, as it enhances EU human rights protection capacity. Furthermore, Article 34 describes the procedure to follow in the case of individual complaints.

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights were established through the American Charter on Human Rights (ACHR). The primary duty of these institutions is to examine individual petitions against any American government. Once a case is considered admissible, the Commission is allowed to conduct an on-site investigation.[26] Sometimes, the Commission attempts to bring-about a friendly settlement between the complainant and the government involved. However, in most cases, the complainant and government do not reach a friendly settlement, so in cases where the Commission finds that the government has violated human rights under ACHR, it will recommend measures to rectify the situation. Another function of the Commission is to refer cases to the Inter-American Court, subject to the acceptance of jurisdiction by the country in question[27]. The Inter-American Court of Human Rights has jurisdiction over cases in which individual human rights protected by the ACHR are violated. [28]

As seen from the best practice related to other regional human rights courts, the Southeast Asian Court of Human Rights (SEACHR) is an interesting case in terms of advancing the protection of human rights among the ASEAN member states. It should be noted that when the Organization of African Unity (OAU) decided to adopt the Constitutive Act and transformed itself from the OAU to the African Union (AU), it also established an African Court of Justice in order to resolve any controversial and disputed regional economic and political integration issues. It was not possible to create the SEACHR through political statements or regional conferences alone; therefore, the SEACHR needed to be set-up using a separate treaty. The establishment of the SEACHR should be separated from ASEAN for several reasons. First, there is always a likelihood that ASEAN as a whole will not accept the findings of the court, based on questions over its authority. Second, if the SEACHR had been set-up under ASEAN, Timor Leste would have been unable to participate. Lastly, the principle of consultation and consensus under Article 20 of the ASEAN Charter means member states can only make positive decisions having been through consultation and achieving consensus. Such an approach may weaken a legal mechanism and produce an ineffective court.[29]

Unfortunately, at present the only regional mechanism in ASEAN able to handle the Rohingya case is the AICHR; however, the Rohingya case cannot be resolved by the AICHR, in the context of the 'ASEAN way', whereby ASEAN member states avoid discussing controversial regional issues. Furthermore, ASEAN is not a supranational organization like the EU, leading to a lack of enforcement when member states violate international human rights obligations.

4 Other possible solutions

The Rohingya problem has been neglected by ASEAN due to the principle of non-interference and the limited functioning of the AICHR. Therefore, in this section this paper will explore other options aimed at mitigating the Rohingya's human rights violation problem.

4.1 ASEAN Peoples

In the 1990s, a number of African countries experienced conflicts, such as Somalia from April 1992 to March 1995, and Rwanda from October 1993 to March 1996. These conflicts revealed the fact that in Africa, the actions of Western countries and UN Security Council jurisdiction could not function to restore peace, and to this day these conflicts are still regarded as a black page in the history of UN and international peacekeeping.[30]

When negotiating the Constitutive Act, representatives of the African states did not forget to take these tragedies into account, and the result of this is that an exception exists to the rule of not intervening in a member state's internal affairs. The Constitutive Act recognizes that member states are equal in terms of their own sovereignty; however, at the same time, Article 4(h) and

[24] Terms of Reference of ASEAN Intergovernmental Commission on Human Rights at 1.4 and 1.6.
[25] John D. Ciorciari, (2012). Institutionalizing Human Rights in Southeast Asia. *Human Rights Quarterly*, 34:3 <http://muse.jhu.edu/journals/human_rights_quarterly/v034/34.3.ciorciari.pdf> (accessed 6 February 2015).
[26] Inter-American Commission on Human Rights, *Rules of Procedure of the Inter-American Commission on Human Rights*, art 39.
[27] *Ibid.* art 45.
[28] Jo Pasqualucci, (2014). Americas in Moeckli, Daniel and et al. *International Human Rights Law*. UK: Oxford University Press at 402-404.
[29] Hao Duy Phanpp. (2009) A Blueprint For Southeast Asian Court of Human Rights. *Asian-Pacific Law & Policy Journal*, 10:2, 385 at 391-392.
[30] W.J.M. van Genugten, (2008). UN Peacekeeping in Africa and good governance: Challenges and prospects. *Potchefstroom Electronic Journal* 2: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066964> (accessed 1 February 2015) at 26.

Article 4(j) of the Constitutive Act contain rights of intervention. These articles align with the words of Nelson Mandela, who in 1998 said:

> *"…we must all accept that we cannot abuse the concept of national sovereignty to deny the rest of the Continent the right and duty to intervene when, behind those sovereign boundaries, people are being slaughtered to protect tyranny."*[31]

The member states of the AU shifted the perspective on sovereignty from it being seen as a right, to a responsibility. As a result, the AU has the right to intervene when aiming to save people from crimes against humanity,[32] and such interventions may include military force in response to humanitarian concerns. In addition, this article aligns with an African saying, that you 'do not fold your arms and just look on when your neighbor's house is on fire.'[33]

Nevertheless, the AU cannot intervene in member state affairs in every situation, nor arbitrarily. The reason for intervention has to be genuinely humanitarian in nature, not borne out of self-interest.[34] These situations include grave circumstances such as war crimes, genocide and crimes against humanity,[35] all serious international crimes subject to universal jurisdiction. In spite of there being no definition of these grave circumstances in the Constitutive Act, they have been defined internationally, including in the Rome Statute and the statutes of the international criminal tribunals held in relation to the former Yugoslavia, and Rwanda.[36] The possible problem is the criteria used to constitute genocide or grave circumstances, because these terms can be both subjectively and politically construed.[37]

Decisions within the AU on interventions can be initiated either by member states or by the Assembly. Member states are entitled to request intervention subject to a decision of the Assembly. The Assembly's decision is by consensus or, failing that, based on a two-thirds majority among member states eligible to vote.[38]

Several interventions have been conducted by the AU, with the results having been mixed owing to the AU's limitations on financial, logistical and political matters.[39] Instances of intervention include a March 2008 invasion of Anjouan and a 2003 intervention in Burundi, both of which were successful. In contrast, the limitations of such interventions were highlighted by the AU peacekeeping presence in Somalia during 2007, when the number of troops sent was fewer than had been promised.[40]

One noteworthy point is on the relationship between the AU and the UN Security Council. Under international customary law, the use of force is prohibited. However, the UN Security Council, under Chapter VII of the UN Charter, has the primary responsibility to decide when and if it is legitimate to use force. The Constitutive Act places the responsibility to protect – in the case of any act which can amount to a war crime, a crime against humanity or genocide – on the AU instead of the UN Security Council. However, Article 53 (1) of the UN Charter requires that any enforcement action by a regional body should obtain authorization from the UN Security Council first, and the AU is a regional organization. Also, under Article 103 therein, the obligations under the UN Charter prevail over obligations contained within any other international agreements. Thus, the concern here is whether the AU needs to seek authorization from the UN Security Council. It should be noted that the UN Charter is silent on the time period required to ask for authorization. When the North Atlantic Treaty Organization (NATO) intervened in Kosovo in 1999, it had not obtained any authorization, but legitimized its operation on the grounds of a genocide breach under the Geneva Conventions.[41] Ambassador Sam Ibok, Director of the Peace and Security Department at the AU, stated that this peace keeping operation could be conducted without seeking authorization from the UN Security Council.[42] In addition, the UN Security Council has never criticized an intervention to have taken place without its authorization.[43]

If the Rohingya case were under the auspices of the AU, the result would have almost certainly been different by now, for based on the right of intervention the AU would have been able to take action; as the Rohingya case undoubtedly meets the AU criteria on crimes against humanity.

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[31] Mandela, Nelson, (1998). *Speech addressed to the Summit Meeting of Heads of State and Government of the Organization for African Unity (OAU, Ouagadougou – Burkina Faso 8 June 1998*: <http://www.mandela.gov.za/mandela_speeches/1998/980608_oau.htm> (accessed 1 February 2015).
[32] Dan Kuwali, (2009). The end of humanitarian intervention: Evaluation of the African Union's right of intervention. *African Journal on Conflict Resolution* 9:1. At 41 and 47.
[33] Ben Kioka, (2003). The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention, *IRRC* 85at 820.
[34] Dan Kuwali, *supra* note 32 at 43
[35] Constitutive Act of the African Union art 4(h).
[36] Ntombizozoku Dyani-Mhango." Reflections on the African Union's Right to intervene" *Brooklyn Journal of International law.* pp. 13 available from: <http://www.academia.edu/2555823/Reflections_on_the_African_Unions_Right_to_Intervene> (accessed 12 December 2014.)
[37] Dan Kuwali, *supra* note 32 at 53
[38] Constitutive Act, *supra* note 13 art 7(1).
[39] Ben Kioka, *supra* note 33 at 822; Council on Foreign Relations, *The African Union*: <http://www.cfr.org/africa-sub-saharan/african-union/p11616> (accessed 1 February 2015).
[40] Council on Foreign Relations, *ibid.*
[41] Ben Kioka, *supra* note 33 at 821.
[42] Ademola Abass, (2004) *Regional Organisations and the Development of Collective Security beyond chapter VIII of the UN Charter*, UK: Hart Publishing at 166.
[43] Ben Kioka, *supra* note 33 at 821.

4.2 The responsibility to protect principle (RtoP)

The foundation to legally conduct a humanitarian intervention in another state is one of the most debated issues in international law, due to the principle of the sovereign equality of states. In 2000, the UN Secretary-General Kofi Annan pointed out that:

> *".. 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 very precept of our common humanity?"*[44]

This statement implies that humanitarian intervention is acceptable in order to protect gross violations of human rights. The Responsibility to Protect Principle (RtoP) which binds sovereign states, can be applied when the legitimate goal of a state intervention is to protect individuals' human rights. The RtoP includes a concept about the responsibility of other states to react against a state that fails to protect its population.[45]

The RtoP is comprised of two basic principles. The first one is that state sovereignty implies responsibility, and as a consequence, the primary responsibility for protection of the people in a state lies with the state itself. The other principle is that if people are suffering from serious harm as a result of civil war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.[46]

The RtoP has been addressed in numerous international instruments, including UN General Assembly Resolutions 63/308 and 60/1, and paragraphs 138-139 of the World Summit Outcome Document.[47] The two resolutions reaffirm that governments and heads of state have the responsibility to protect their populations from genocide, war crimes, crimes against humanity and ethnic cleansing. These are deemed to be gross and systematic violations of the most fundamental human rights to life, physical integrity, security and freedom from violence.[48]

These protections are based on three pillars according to paragraphs 138-139 of the World Summit Outcome Document. The first pillar is that states are responsible for protecting their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This obligation is part of customary international law.[49] The term "ethnic cleansing" does not appear in Article 4(h) of the Constitutive Act; thus, it can be said that the RtoP is a step forward in terms of international security and human rights norms. The second pillar places a responsibility on the international community to assist states in achieving their RtoP obligations. The third pillar states that the international community, through the UN, should play a crucial role in helping to protect civilians from the above mentioned crimes. Peaceful means are recommended as the first option; however, if these are not adequate and the national authorities fail to protect their civilians from such crimes, paragraph 139 allows the taking of collective action through the UN Security Council.[50]

A presentation given by UN Secretary-General Ban Ki-moon to the UN General Assembly mentioned that regional arrangements are one of the key instruments in helping to implement the RtoP principle,[51] constituting the second and third pillars. These arrangements can assist member states, can be used in conjunction with other regional agreements, and can be used to facilitate cooperation with the UN itself.[52]

The right of intervention under the Constitutive Act is an unprecedented illustration of a regional approach to the RtoP principle.[53] In the case of ASEAN, the group has never made any official statement on its position regarding the RtoP principle;[54] nevertheless, this does not imply that ASEAN rejects it. As a matter of fact, none of the ASEAN member states has condemned the principle; Indonesia, Philippines, Thailand, Vietnam and Myanmar have even voiced their support for it.[55] Despite not being clearly mentioned in any official ASEAN statement, Drummond also notes that the three pillars of RtoP are reflected in the ASEAN Political-Security Blueprint.[56]

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[44] International Commission on Intervention and State Sovereignty, (2001). *The responsibility to protect"*: <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (accessed 3 February 2015).
[45] Dan Kuwali, *supra* note 32 at 49.
[46] International Commission on Intervention and State Sovereignty, *supra* note 44 at XI.
[47] United Nations General Assembly, *The responsibility to protect*, Res/63/308, 7 October 2009; United Nations General Assembly, *2005 World Summit Outcome*, Res/60/1, 24 October 2005.
[48] Catherine Drummond, (2010). *The ASEAN Intergovernmental Commission on Human Rights (AICHR) and the Responsibility to Protect: Development and Potential*: <http://www.r2pasiapacific.org/docs/R2P%20Reports/AICHR%20and%20R2P_Report%20No_1%202010.pdf> (accessed 1 February 2015) at 8.
[49] United Nations General Assembly, *Implementing the responsibility to protect: Report of the Secretary-General*, A/63/677 12 January 2009.
[50] *Ibid.* at 22.
[51] Catherine Drummond, *supra* note 48 at 7.
[52] Catherine Drummond, *supra* note 48 at 8.
[53] Catherine Drummond, *supra* note 18 at 15.
[54] Catherine Drummond, (2011). *The ASEAN Intergovernmental Commission on Human Rights (AICHR) and the Responsibility to Protect: Opportunities and Constraints*: <http://www.r2pasiapacific.org/docs/R2P%20Reports/AICHR%20and%20R2P%20Report%20No%202%20FINAL%202011.pdf> (accessed 1 February 2015) at 27.
[55] Alex J. Bellamy and Mark Beeson, (2010). The responsible to protect in Southeast Asia: Can ASEAN reconcile humanitarian and sovereignty? *Asian Security*: <http://responsibilitytoprotect.org/ASEAN%20RtoP%20report.pdf> (accessed 1 February 2015) at 267-269; United Nations General Assembly, *Agenda item 57 (continued)*, A/63/PV.97, 23 July 2009. at 8 and 11-12; United Nations General Assembly, *Agenda items 44 and 107 (continued)*, A/63/PV.98, 24 July 2009 at 28.
[56] Catherine Drummond, *supra* note 54 at 27.

In the Rohingya case, the RtoP obliges the international community to protect this ethnic Muslim group from all crimes, including ethnic cleansing. According to the International Coalition for the Responsibility to Protect (ICRtoP), there are several measures that exist to address this problem; for example, 23 General Assembly resolutions since 1991, the Security Council's resolution 1612 in 2005, and 22 Human Rights Council resolutions.[57]

4.3 Analysis of the possible solutions

This section analyzes the possible ways to address the Rohingya issue within ASEAN, since human rights protection is one of the group's duties.

First, the concept of sovereignty should be shifted, as evidenced by the stance taken by the AU as well as adoption of the RtoP principle in an international context. Instead of viewing state sovereignty as a privilege, each state and ASEAN should consider it their responsibility to protect individuals.

Once this concept had been changed, it would lead to the next question: How do you translate this concept into policy or practice? There are two possible channels to address the Rohingya issue, as proposed in the previous section; the right of intervention detailed in the Constitutive Act, and the RtoP principle. The first route involves following Article 4(h) and Article 4(j) of the Constitutive Act. According to Article 4(h), all AU member states give their consent to the AU to be able to resolve tense situations in relation to war crimes, genocide and crimes against humanity, through the decisions of the AU Assembly. Thus, regional intervention can be conducted without having to seek authorization from the UN Security Council. This means the action taken is likely to be rapid. In addition, the AU has an outstanding dispute settlement mechanism. If ASEAN follows in the AU's footsteps, an amendment to the ASEAN Charter; inserting the right of intervention, would be needed. However, this would be explicitly contradictory to the ASEAN way, as mentioned previously. Moreover, the ASEAN Charter amendment process is slow due to red-tape. Another factor which might hold such an amendment back is the fact that ASEAN member states do not often experience tragedies as serious as those which occur within the AU. Therefore, it would be hard to convince ASEAN members of the necessity for this change to be introduced. The second option is to adhere to the RtoP principle within ASEAN. The authors view this as the best solution, because ASEAN member states could not object to this principle at the international level. Regionally, adherence to the RtoP principle is supported by the UN, and this UN support might help implement the principle within ASEAN, without the need to amend the ASEAN Charter. As an intergovernmental commission on human rights, AICHR's activities under the TOR should be in line with the RtoP principle. Also, the AICHR could play a role in promoting the RtoP among member states. However, this does not mean that this option is without flaws. The main concern would be regarding the budget. The AU's inadequate budget and resources in relation to interventions should be used as a case study on what can happen in such cases. The next issue is the role of the AICHR. As discussed earlier, it has a limited function, making it difficult for the AICHR to play an active role in protecting human rights, especially in the Rohingya case. Therefore, the RtoP principle would have to be applied by ASEAN itself.

5 Conclusion

The Rohingya problem remains unresolved, and any solution needs to come, not only from the GOM, but also from regional human rights mechanisms such as ASEAN. Even though no legal instrument recognizing the Rohingya as nationals of one country exists, the fact that they have been settled in Myanmar for several generations is undeniable. The Burma Citizenship Law of 1982 labels them as foreigners and accordingly as stateless. However, the condition of being stateless does not allow a legal entity to deprive a group of people of their human rights. Actually, the Rohingya should be considered human beings whose rights need protecting. As a result, the authors suggest that ASEAN, as a regional organization, should play an active and important role in terms of human rights protection for the Rohingya. The AHRD emphasizes that the protection of human rights should be applied to every person, and the AICHR is one such human rights protection mechanism. However, in reality the AICHR is barely able to function since its main task is to promote human rights only. Furthermore, there is no complaints mechanism which allows any individual or state to lodge an application. For this reason, it is no surprise that the AICHR is sometimes referred to as a "lame duck" or as "toothless". As a result, and in order to manage human rights issues effectively in the region, the Southeast Asia Court of Human Rights (SEACHR) should be established and utilized more effectively.

The best examples of how judicial organs can help guarantee and protect human rights are the European Court of Human Rights and the Inter-American Court of Human Rights. Another barrier in ASEAN is the non-interference principle, as it means that ASEAN is unable to protect the human rights of individuals staying within its member states' territories. The Rohingya issue is a good example of the application of this non-interference principle.

Unlike Article 4(h) of the AU Constitutive Act, which gives the Assembly the right to intervene; to save people from gross human rights violations, it would not be possible to add a similar right to the ASEAN Charter, because of the 'ASEAN way'. Another possibility would be to apply the RtoP principle, because it is recognized by all the ASEAN member states. The core idea of the RtoP principle clearly encompasses ethnic cleansing as a type of crime, for which the international community has a responsibility to protect against. Not only would this be a progressive move from an international security and human rights point of view, but could also be applied effectively in the Rohingya case.

[57] International Coalition for the responsibility to protect, *Q&A The responsibility to protect and Burma*: <http://responsibilitytoprotect.org/FINAL%20At%20a%20Glance%20Burma(1).pdf> (accessed 1 February 2015).

In sum, the RtoP principle can be the feasible solution for protecting the Rohingya's right. ASEAN is able to apply this principle through AICHR mechanism. In order to apply this principle effectively, an establishment of the human rights tribunal is a recommendation.

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