

Faculty of Law

Master of International Human Rights and Humanitarian Law

Master Thesis

ASEAN's Approach to the Responsibility to Protect: Case Analysis of the Rohingya in Myanmar

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30 July 2023

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8 August 1945	Charter of the International Military Tribunal
9 December 1948	Convention on the Prevention and Punishment of the Crime of Genocide
12 August 1949	Geneva Convention I for the Amelioration of the Wounded, Sick, and Shipwrecked Members of Armed Forces in the Field
12 August 1949	Geneva Convention II for the Amelioration of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea
12 August 1949	Geneva Convention III relative to the Treatment of Prisoners of War
12 August 1949	Geneva Convention IV relative to the Protection of Civilians Persons in Time of War
4 April 1949	North Atlantic Treaty
4 May 1955	Treaty of Friendship, Co-operation and Mutual Assistance
3 January 1976	International Covenant on Economic, Social and Cultural Rights
24 February 1976	Treaty of Amity and Cooperation in Southeast Asia
8 August 1967	ASEAN Declaration
8 June 1977	I Protocol Additional to the Geneva Conventions of 12 August 1949, Concerning the Protection of Victims of International Armed Conflicts
8 June 1977	II Protocol Additional to the Geneva Conventions of 12 August 1949, Concerning the Protection of Victims on Non-International Armed Conflicts
27 January 1980	Vienna Convention on the Law of Treaties
3 September 1981	Convention on the Elimination of All Forms of Discrimination Against Women
26 June 1987	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
2 September 1990	Convention on the Rights of the Child
15 December 1995	Treaty on the Southeast Asia Nuclear Weapon-Free Zone
17 July 1998	Rome Statute of the International Criminal Court
20 November 2007	The Charter of the Association of Southeast Asian Nations

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International Criminal Tribunal for the Former Yugoslavia

ICTY, *Prosecutor v. Krstic*, Case No. IT-98-33-T, Trial Chamber Judgement, 2 August 2001

ICTY, *Prosecutor v. Popovic*, Case No. IT-05-88-T, Judgement, 10 June 2010

ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgement,7 May 1997

List of Abbreviations

ACSC/APF	ASEAN Civil Society Conference/ASEAN Peoples' Forum
ACWC	ASEAN Commission on the Protection of Women and Children
AEC	ASEAN Economic Community
AFC	Asian Financial Crisis (1997-1998)
AHA Centre	ASEAN Coordinating Centre for Humanitarian Assistance
AHRD	ASEAN Human Rights Declaration
AICHR	ASEAN Inter-Governmental Commission on Human Rights
AIPR	ASEAN Institute for Peace and Reconciliation
AMS	ASEAN member state
AMSs	ASEAN member states
Annan	United Nations Secretary-General Kofi Annan (1997-2006)
APHR	ASEAN Parliamentarians for Human Rights
APSC	ASEAN Political Security Community
ARF	ASEAN Regional Forum
ARSA	Arakan Rohingya Salvation Army
ASA	Association of Southeast Asia
ASCC	ASEAN Socio-Cultural Community
ASEAN	Association of Southeast Asian Nations
ASEAN HLAP	ASEAN High Level Advisory Panel
ASEAN HLTF	ASEAN High Level Task Force
AU	African Union
Aung	Aung San Suu Kyi
BRI	Belt and Road Initiative
CAH	Crimes against humanity
CSOs	Civil Society Organizations
ECtHR	European Court of Human Rights
EPG	Eminent Persons Group
EU	European Union
HLAP	High-Level Advisory Panel on the Responsibility to Protect in Southeast Asia
HLP	UN High-Level Panel on Threats, Challenges, and Change
HLTF	High-Level Task Force
IACHRs	Inter-American Court and Commission of Human Rights

ICISS	International Commission on Intervention and State Sovereignty
ICC	International Criminal Court
ICJ	International Court of Justice
ICoE	Independent Commission of Enquiry
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Persons
IDRC	International Development Research Centre
IGO	Intergovernmental organizations
IHL	International Humanitarian Law
IIFFMM	Independent International Fact-Finding Mission on Myanmar
IIMM	Independent Investigative Mechanism for Myanmar
ILC	International Law Commission
ILO	International Labour Organization
Ki-moon	Secretary-General of the United Nations Ban Ki-moon (2007-2016)
NATO	North Atlantic Treaty Organization
NLD	National League of Democracy
NRC	National Registration Card
PNI	Principle of Non-interference
NDSC	National Defense and Security Council
NLD	National League for Democracy (Myanmar)
OAU	Organization of African Unity
OIC	Organization of Islamic Cooperation
OHCHR	Office of the United Nations High Commissioner for Human Rights
RtoP	Responsibility to Protect
RP	Responsible Protection
RWP	Responsibility While Protecting
SCSL	Special Court for Sierra Leone
SLORC	State Law and Order Restoration Council (Myanmar)
SSR	Security Sector Reform
TAC	Treaty of Amity and Cooperation in Southeast Asia
UEHRD	Union Enterprise for Humanitarian Assistance, Resettlement and Development
UN	United Nations
UNDP	United Nations Development Programme

UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UNICEF	United Nations International Children's Emergency Fund
UNSC	United Nations Security Council
US	United States of America
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention in the Law of Treaties
WC	War Crimes
WWI	First World War
WWII	Second World War
WSOD	The 2005 World Summit Outcome Document

1. Introduction

1.1. Contextual background and objective

'Whilst this planet has gone cycling on according to the fixed law of gravity'[1], the human species discovered means to decrease the number of victims during the world's history of violence and enable a large portion of humankind to coexist in peace.[2] However, until today, humankind has also proven an enormous ability to tolerate vast brutalities and cruelties. From the emergence of civilization forward, forced displacements and exterminations of entire populaces, deliberate destructions of non-military property, large-scale indiscriminate killings, mass sexual violence, and torture have taken place. No part of the earth has not experienced one of those atrocities.[3]

During the centuries, earnest calls were made to cease atrocities and effectively protect civilians during war and peace. Ultimately after the horrors of WWII, when worldwide demands for 'never again' heightened, substantial efforts were made.[4] Significant achievements have built the base for human rights law evolution nationally and internationally. The Genocide Convention criminalized genocide.[5] Prohibiting genocide continued with the Geneva Conventions, and the Rome Statute criminalized crimes against humanity (CAH) and war crimes (WC).[6] Nonetheless, to the greatest extent of human history and until not long ago, humanity's reaction to the abominations of atrocity crimes was largely indifference, scepticism, or controversies over the protection of victims and the response to perpetrators. Perpetrators committed atrocities to achieve political aims. Unfortunately, in most instances, perpetrators were successful.[7]

The fate of the Rohingya population in Myanmar is one of those instances.[8] August 2017 saw the unfolding of one of the most serious human rights disasters of modern times. More than 750,000 Rohingya were forced to flee Myanmar after the country's military committed atrocities against them. At a time when Myanmar was opening up to the world, horrifying crimes against Rohingya were being committed. Yet

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[1] Darwin, 1859, p. 425.
[2] Pinker, 2012, p. 841.
[3] Nasu, 2009, p. 1.
[4] Mayersen, 2013, p. 177.
[5] Convention on the Prevention and Punishment of the Crime of Genocide [hereinafter *Genocide Convention*] (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 276; Bellamy, 2012, p. 928.
[6] *supra* note 176 at p. 16.
[7] Bellamy, 2012, p. 931.
[8] The author is aware of all other numerous conflicts between Myanmar (the Tatmadaw) and, inter alia, minorities in Chin, Karen, and Kachin states. However, the author focuses on the Rohingya minority's situation since their numbers of victims goes beyond the scope and the crimes committed against them constitute atrocity crimes, such as genocide and crimes against humanity.

it seems that the regional organization, Association of Southeast Asian Nations (ASEAN), has done little to prevent these. This dissertation strives to explore ASEAN engagement with the Responsibility to Protect (RtoP) in light of the Rohingya crisis.

This dissertation includes six chapters and a conclusion. Commencing with Chapter Two, RtoP's origins, contents and evolution are considered. Chapter three explores the dynamics of ASEAN's reaction to human rights abuses and humanitarian emergencies through scrutinizing its traditional norms and regionalism, and details ASEAN's understanding of RtoP. Chapter Four continues with a case study of Myanmar's Rohingya, including an assessment of ASEAN's response to the Rohingya crisis. Chapter Five places RtoP in a larger context. It examines the crisis by understanding the broader landscape pushing Myanmar to commit atrocities, applies RtoP, reflects on lessons learned and looks at RtoP's future prospects within ASEAN and globally. It concludes with a synoptic evaluation of RtoP's stance with regard to the Rohingya crisis and ASEAN.

1.2. Methodology

The chosen research question type is comparative legal and qualitative research. The author strives to evaluate RtoP, the Rohingya crisis and ASEAN's stance therein. Applying descriptive and explanatory methodologies are inevitable for the portrayal of RtoP, ASEAN's traditional norms and understanding of RtoP, describing factual background of the Rohingya crisis, future implications and developments.[9] The comparative law research methodology is employed to evaluate RtoP, national and regional laws and international legislation.[10] Particularly in chapter three and five an evaluative methodology is applied to access root causes, motives and lessons learned.

[9] Quint, 2017, p. 12; *See* also van Hoecke, 2011, pp. 10, 182.
[10] Curry-Sumner, Kristen, van der Linden-Smith, and Tigchelaar, 2010, p. 18.

2. Comprehending the responsibility to protect

2.1. The recurring hell of mass atrocities

Mass atrocities continue to constitute reoccurring manifestations in every hemisphere. The 1990s provide a sanguinary combination of atrocities.[11] In Africa, it was the Rwandan Genocide in 1994 when Hutu-controlled military and militias massacred 800,000 Tutsis within not even four months.[12] That exceeded even the kill rate of the Holocaust.[13] In other armed conflicts, millions died, such as in Burundi, Congo[14], Somalia,[15] Sudan, Sierra Leone,[16] and Liberia[17].[18] In Europe, the armed conflicts following the fall of Yugoslavia resulted in the death of around 250,000 people.[19] The Bosnian War climaxed in Srebrenica, with more than 8,000 murdered Bosnian Muslims.[20] Atrocities committed during the Kosovo conflict let the death toll rise to around 15,000.[21] In Asia, the Iraqi invasion of Kuwait caused the deaths of thousands.[22] East Timor's independence from Indonesia in 1999 was paired with deadly violence, with thousands of deaths.[23] Not to think of the many thousands killed during the civil wars in Afghanistan.[24]

Responses to atrocities developed and were commonly unhurried, diffident, and incoherent. Politicians oftentimes give the impression of facing the option to either hold off or declare war on those perpetrating atrocities and 'send in the Marines'[25] to engage in combat. The Rwandan Genocide showed that every so often, countries with great power are lacking the political will to interfere and cease bloodshed.[26] They disregard victims' interests, put their own first, and take the position of silent bystanders.[27] In the Kosovo case, states were determined to interfere or object to joint efforts.[28] Another way of responding to atrocities recently emerged, by which powerful states publicly

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[11] Weiss, 2012, p. 68; Hehir, 2012, p. 182.
[12] United Nations Security Council,1994, UN Doc S/1994/640, p. 2; United Nations Security Council, 1999, Annex, p. 3; Weiss, 2012, p. 69.
[13] Bellamy, 2009, p. 1.
[14] Democratic Republic of Congo.
[15] International Commission on Intervention and State Sovereignty, Weiss *et al.*, 2001, p. 94.
[16] *ibid.*, p. 105.
[17] *ibid.*, p. 84.
[18] Evans, 2008, pp. 25-27, 117; Weiss, 2012, pp. 49, 56, 68-69; Chesterman, 2002, pp. 140, 156.
[19] Kaufman, 2001, p. 170; Chesterman, 2002, p. 133.
[20] Bellamy, 2015, p. 20; Weiss, 2012, p. 94.
[21] Human Rights Watch, 2001, 'Under Orders', p. 121; Human Rights Data Analysis Group, 2014, p. 4.
[22] International Commission on Intervention and State Sovereignty, Weiss *et al.*, 2001, p. 86.
[23] *ibid.*, 115; Chesterman, 2002, p. 150; Weiss, 2012, p. 49.
[24] Weiss, 2012, p. 79.
[25] Council on Foreign Relations, Feinstein, 2007, p. 5.
[26] Weiss, 2012, pp. 4, 117.
[27] *ibid.*, pp. 94, 97.
[28] *ibid.*, pp. 117, 134; Chirot and McCauley, 2010, p. 174.

acknowledge the inherent importance of stopping those. Yet, they then struggle and do not manage to come up with something appropriate rather than poorly armed peace operations under inadequate mandates and dull political statements. The Congolese and Sundanese massacres exposed how slowly the international community reacted, lacking political will and unity.[29] Such combining generates reactions that are not coherent, effective, and prompt and puts civilians at permanent risk.[30]

At the beginning of the 21st century, no general proven and robust atrocity response system was established. The international community's failed responses to mass killings reached such tremendous magnitude that reconsiderations of the classical absolute and sacrosanct principle of sovereignty were required. This unalterable shielding, with which sovereignty equips states, has been shaken by the outrageous violence of the 20th century together with the enhancement of international frameworks of human rights and humanitarian law. Sovereignty continues to be the fundament for states to exist side-by-side, whereas the perception of their entitlements also entails obligations towards their people.

In the wake of the horrors of Srebrenica and Rwanda, Annan asked states to harmonize protecting the people's human rights and their desire for sovereignty. He questioned the following, "if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violations of human rights that offend every precept of our common humanity?"[31]. RtoP tries to constitute a response to that exact question.

2.2. The sovereignty-intervention impasse and the search for solutions

Post WWII, a virtual human rights standardizing haste erupted. Ambitions were grand and hopes were high. One believed that past atrocities finally buried the conception that no matter what happens within a state's territory, it is solely that state's business. This initial, ambitious shared mindset weakened within less than half a century since the UN's foundation. Several underlying determinants were operating.

2.2.1. The adherence to sovereignty

[29] Chirot and McCauley, 2010, pp. 49,151.
[30] *ibid.*, p. 124.
[31] United Nations Secretary-General, Annan, 2000, ST/DPI/2103, p. 48.

The adherence to sovereignty was decisive, especially as powerful UN members unshakably believed in 'ideas of Westphalian sovereignty'[32]. According to Brown, 'two principles of interstate relations codified in 1648 constitute the normative core of international law: (1) the government of each country is unequivocally sovereign within its territorial jurisdiction, and (2) countries shall not interfere in each other's domestic affairs.'[33] In 1945, states enshrined these in Article 2(7) of the UN Charter and focused on the issue of the use of force.[34] No special attention was paid to the issue of how to respond to states and how they treated their people.

The UN membership tripled until 1989 since many states gained independence.[35] This strengthened the classical perception of sovereignty since acceding states knew about their frangibility and had pride in their recent identity. Consequently, they upheld the principle of non-interference (PNI) to protect themselves from powerful international players' control and interests and to advance individual interests. This attitude of developing states, mostly ex-colonies, was utterly reasonable since their experiences manifested unscrupulous and unreliable behaviors of ex-colonizers.

2.2.2. The Cold War dynamics

The Cold War dynamics was also a determining component. It influenced the UN early on and numerously incapacitated the UN. Both global forces comprehended how to sustain cooperation with allies. They strongly hesitated to enforce restrictions on alliances that committed atrocities within their respective territories. Both superpowers were primarily unconcerned about atrocities committed inside the opposite blocs. Besides, the inescapable UNSC's veto system made any undertaking impossible. This complex combination of factors led to countless atrocities due to states directly perpetrating, being reluctant, or incapable of stepping in. Invariably, external forces made either ineffective acts or no attempts to counteract. Atrocities shaking the world's conscience were committed, among others, 'the Burundi killings' (1972),[36] massive killings of Burmese protestors (1988),[37] deadly demonstrations in China (1989),[38] extensive killings in

[32] Bauder and Mueller, 2023, p. 156.
[33] Brown, 1992, p. 74.
[34] Art. 2(7) of the Charter of the United Nations [hereinafter UN Charter] (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.
[35] United Nations, n.d..
[36] Lemarchand, 2008, p. 2.
[37] Burma was changed to Myanmar in 1989; Human Rights Watch, 2001, 'World Report of Human Rights Watch on Burma'.
[38] Amnesty International, 1989, p. 19.

Indonesia (1965-1966),[39] US's bloody massacre in Vietnam (1968),[40] employment of chemical weapons during 'the Iran-Iraq war'[41] (1980-1988), mass killings in Zimbabwe (1983-1987),[42] the 'Maya Genocide'[43] (1981-1983),[44] and Pinochet's administration (1976-1983)[45]. The quantity of military interventions was significantly high during the Cold War era, mostly alleged but only occasionally for actual humanitarian motives.

2.2.3. The 1990's

During the 1990s, frictions between initial moral concepts of international conventions and poor practical politics broke open. USSR's and Yugoslavia's disintegrations, the abolition of limitations imposed by Cold War superpowers, and the shaping of 'the post-Cold-War order'[46] conditioned recurring horrifying events.[47] PNI's traditional patterns were upheld. Many circumstances virtually screamed for military reactions.[48] The international community responded with UN-approved interventions, which were mainly deficient, unpredictable, or ineffective.[49] When non-UN actions were chosen, the international security regime's integrity posed doubts.[50] In total, military responses were ultimately forced upon perpetrating governments with valid humanitarian reasons.[51]

2.2.4. The global South and North

The 1990s bloody wars unprecedentedly unveiled all pivotal issues of humanitarian interventions. That decade passed by without any common settlement on resolutions. The reasons were the political battle lines between the global South and North. This 'North-South divide'[52] is a remainder of colonialism. UNGA debates turned into battlegrounds. The question of how to respond to conscience-shocking human rights situations constituting atrocities was paramount. States affiliated with the North adhered to the traditional humanitarian intervention definition, 'coercive military intervention for

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[39] Totten, 2004, p. 239.
[40] Gray and Brian, 2008, p. 7.
[41] Ali, 2001, p. 43, n. 1.
[42] Killander and Nyathi, 2015, p. 463.
[43] Foster, 2002, p. 84.
[44] Falla, 1994, p. 8.
[45] Human Rights Watch, 2001, 'Reluctant Partner', Chapter II, IX.
[46] United Nations Security Council, 1992, S/PV.3145, p. 36.
[47] Evans, 2006, p. 706; Bartrop, 2013, p. 124.
[48] Weiss, 2012, p. 134.
[49] *ibid.*, pp. 4, 94-95, 97, 134; Chirot and McCauley, 2010, pp. 173-176.
[50] Weiss, 2012, pp. 87, 97; Hehir, 2012, p. 201.
[51] *ibid.*, p. 173; International Commission on Intervention and State Sovereignty, Weiss *et al.*, 2001, p. 79.
[52] Starski and Kämmerer, 2016, p. 1.

humanitarian purposes'[53]. States from the South were single-minded in upholding the conventional PNI rigidly, even though they often admitted severe human rights breaches. They were not delighted or anxious to be urged to promote human rights principles and receive lectures from their ex-colonizers who refused to follow those standards while colonizing.[54]

During colonial predominance of umpteen areas, colonizers enforced their *jus publicum europaeum* upon native populations. It was the legal basis for the division of space inside and outside Europe, so-called 'colonial space'[55] being 'free of law and open to conquest'[56].[57] Inhabitants of colonial areas were viewed as 'half-civilized (barbaric) and wild peoples (savages)'[58]. That division led to a downright 'externalization of violence'[59] and long-lasting denials of individual and collective rights. The outcomes were devastating to the people and their cultures. Discourses on sovereignty validly caused doubts about possible implications for safeguarding national security and identity.[60] Basically, the issue with the humanitarian intervention concept was that it was intrinsically unilateral. The South's worries were in no way recognized.

2.2.5. Attempts for consensus building

Kouchner, Bettati,[61] and Blair[62] made important approaches in the 1990s discourse of the humanitarian intervention concept. Most progressive efforts were made by the UNDP,[63] Deng,[64] and Annan[65]. The UNDP's 'Human Development Report 1994'[66] attempted to bring closer the South's and North's views that were poles apart. It identified the necessity of combing both rather differing occupations, the South on food, shelter, education, and medicine, and the North on state security, borders, and institutions.

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[53] Evans, 2012, p. 377.
[54] Thakur, 2004, p. 197.
[55] Guezengar, 2020, p. 14.
[56] *ibid.*
[57] Schmitt, 2003, p. 11.
[58] *ibid.,* p. 234.
[59] Guezengar, 2020, p. 14.
[60] Mamdani, 2009, p. 274.
[61] For Bernard Kouchner's and Mario Bettati's right to intervene. *See* Allen and Styan, 2000, p. 828; Bettati and Kouchner, 1987, p. 300; Evans, 2012, p. 376.
[62] Blair, 1999; Atkins, 2006, p. 276; Blair, 2009, p. 5.
[63] United Nations Development Programme,1994.
[64] Deng *et al*, 1996, p. xvii.
[65] Annan, 1999, pp. 49-50.
[66] United Nations Development Programme, 1994.

The concerns around state security prevailed on the global agenda for decades.[67] The novel concept of *human security* altered that understanding.[68] The focus should be on people's lives, people-centred instead of state-centred.[69] States are guardians of the people's care. Individuals possess the highest value.[70] *Human security* implies protecting and enhancing fundamental freedoms and life-essential matters, therefore, human development. The 'Without peace, there may be no development. But without development, peace may be threatened'[71]-logic reached great resonance.[72] States began to realize that there were root causes underlying internal armed conflicts. Many were rooted in human security, such as poverty, access to justice, discrimination, and basic services. Human security articulated problems and generated collective involvement. However, it had no precise answer for ways of responding to atrocity circumstances.[73]

Deng's and his colleagues' work was more advanced and powerful.[74] During his office as UN Representative on IDPs,[75] he faced issues on sovereignty, non-interference, and atrocities in situ. IDP situations arise within internal armed conflicts and can be considered, together with the bare definition of IDPs,[76] as internal matters.[77] Concerned states were reluctant to work with external actors. Deng experienced such reluctance and retorted that 'the essence of being a sovereign country … is not just protection from outside interference - rather it's a matter of states having positive responsibilities for their own citizens' welfare'[78]. Thereby, he referred to the concept of *sovereignty as responsibility*,[79] 'sovereignty as a form of national responsibility towards one's … populations'[80]. States possess the 'primary responsibility of protecting'[81] their populations.[82] That implies that failing 'to do so should legitimize involvement of the international community'[83].

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[67] Paris, 2001, p. 89.
[68] United Nations Development Programme, 1994*,* p. 22.
[69] *ibid.,* p. 23; Janzekovic and Silander, 2013, p. 13.
[70] Waldron, 2006, p. 24.
[71] Evans, 2008, p. 35.
[72] For example, The concept of human security became the leading approach for the Canadian Foreign policy under Lloyd Axworthy during the 1990s. *See* also Axworthy, 2012, p. 8.
[73] Hubert, 2004, p. 351.
[74] Deng, 2010, p. 369.
[75] UN Representative of the Secretary-General on IDPs between 1992-2004.
[76] United Nations Commission on Human Rights, 1998, E/CN.4/1998/53/Add.2, Annex, para. 2.
[77] Goodwin-Gill and McAdam, 2007, p. 481.
[78] Personal communication between Francis Deng and Gareth Evans (2007-2008), *quoted from*, Evans, 2008, p. 36.
[79] Deng *et al.*, 1996, p. vii.
[80] Cohen, 2004, p. 459.
[81] United Nations Commission on Human Rights, 1998, E/CN.4/1998/53/Add.2, para. 4.
[82] Cohen and Deng, 1998, Masses in Flight: The Global Crisis of Internal Displacement, p. 275.
[83] Cohen and Deng, 1998, Exodus within Borders: The Uprooted Who Never Left Home, p. 14.

In 1999, Annan made conceptual efforts to align sovereignty and human rights. His notion of 'two sovereignties'[84] called for a common view of states' quintessential role towards their people.[85] Individual sovereignty, anchored in the UN Charter and international human rights law,[86] and state sovereignty needed to be reconsidered, as '[s]tates are now widely understood to be instruments at the service of their peoples, and not vice versa'[87]. His approach was not groundbreaking. It restated the deadlocked intervention-sovereignty discourse. Finally, in 2000, Annan got the ball rolling with his worrying question, as quoted earlier.[88] The long-anticipated real normative advance followed shortly thereafter through the ICISS's appointment, which brought RtoP into the debate.

2.2.6. RtoP as a norm, principle, or concept?

Different terminologies of principle, norm, and concept are used to refer to RtoP. Every term assigns RtoP a distinct status. It is crucial to explain which term is used in this dissertation. When describing RtoP as a concept, it is referred to as 'an abstract idea'[89], which suggests 'a possible norm or course of action … requiring further development … before it can be turned into shared expectations of appropriate behaviour or into a plan of action for institutional reform.'[90] Principles require basic propositions to build the foundations for beliefs that generate actions.[91] Identifying RtoP as a principle means that RtoP reached a certain level of common perception and enough consent exists for it to be a basis for action.[92] This dissertation uses the terms principle and concept. For the time between the ICISS report (2001) and the WSOD (2005), RtoP is regarded as a *concept*. States unanimously agreed on the WSOD, reflecting the direction RtoP would head for.[93] From 2005 onward, RtoP is described as a *principle* because it portrays states' agreement on RtoP's content and their undertaking to act accordingly.

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[84] Weiss, 2007, p. 7.
[85] Janzekovic and Silander, 2013, p. 50.
[86] *See*, for example, UN Charter, Preamble and Art.1(3).
[87] Annan, 1999, p. 49.
[88] United Nations Secretary-General, Annan, 2000, ST/DPI/2103, p. 48.
[89] Bellamy, 2009, p. 5.
[90] *ibid.*; *See*, for example, China's argument, United Nations Security Council, 2007, p. 17.
[91] Bellamy, 2009, p. 6.
[92] Janzekovic and Silander, 2013, p. 48.
[93] Evans, 2008, p. 47; United Nations Security Council, 2005, S/PV.5319, pp. 19, 30; United Nations Security Council, 2005, S/PV.5319, Resumption 1, p. 3.

Norms are 'collective understandings of the proper behavior'[94] of 'what ought to be done and what … not'[95].[96] Norms require conduct and include constituents of principle and concept. For these reasons, labelling RtoP as a norm demands a parallel, separate distinction. RtoP consists of several norms because differing expectations rest upon separate actors.[97] One set of norms is Pillar One, being the collective understanding of the expected treatment of states toward their populations. Human rights and humanitarian law mirror these expectations. Pillars Two and Three are another norm and concern the international community's expected reaction to atrocities.[98] The *Genocide* Case [99] reflects this by obliging states 'to employ all means reasonably available to them … to prevent genocide'[100]. '[N]o government now doubts the appropriateness of international involvement in crises where mass atrocities are committed'[101].

2.3. The birth of RtoP

2.3.1. The ICISS as a reconciler of sovereignty and intervention

Canada took the initiative to respond to Annan's question and founded the ICISS in September 2000.[102] The commission's experts were entrusted to reconcile sovereignty and humanitarian necessity using consulting opinions and discussing a 'range of questions - legal, moral, operational and political'[103]. The result was the ICISS report in 2001.[104] That report formulated the term *responsibility protect* and shifted the attention to safeguarding unprotected populations.[105] It emphasized that states are primarily responsible for protecting their populations from 'suffering serious harm'[106]. When states fail to fulfill their responsibility, the international community assumes that responsibility and must respond.

2.3.2. The main contributions of the ICISS report

[94] Legro,1997, p. 33.
[95] Sunstein, 1996, p. 914.
[96] A distinction is made here between emerging and embedded norms. *See*, for example, UN High-Level Panel on Threats, Challenges, and Change, 2004, para. 203.
[97] United Nations General Assembly, 2005, paras. 138-9; Evans, 2008, p. 52.
[98] Bellamy and Luck, 2018, p. 38.
[99] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgement) [2007] ICJ Rep 43, para. 430.
[100] Bellamy, 2015, p. 63.
[101] *ibid.*
[102] Grammatikas, 2014, p. 93.
[103] International Commission on Intervention and State Sovereignty, 2001, p. vii.
[104] *ibid.*; International Commission on Intervention and State Sovereignty, Weiss *et al.*, 2001.
[105] International Commission on Intervention and State Sovereignty, 2001, pp. xi, 1-108.
[106] *ibid.*, p. xi (1).

The report contributed significant conceptual gains to the sovereignty-intervention discourse. The most decisive was the alteration from the states' right to intervene for humanitarian purposes to their RtoP populations at severe risk. The perspective was on those needing supportive protection against mass killings, starvation, and rape.[107] If there was a right at stake, then it was the one of atrocity victims needing protection.[108] The rationale behind setting aside the humanitarian intervention language was that it was irredeemably associated with solely non-consensual military operations for 'human protection purposes'[109]. By employing RtoP's language, the ICISS anticipated establishing a new base for deadlocked oppositions to enable constructive engagements.

The second significant contribution connected with the previous and comprised a new perspective on sovereignty. According to the classical Westphalian regime, sovereignty, as in control, should be regarded as responsibility, thus leaning onto Deng's approach.[110] The states' right to sovereignty is thereby contingent on performing their duties to protect their populations.[111] States are purely trustees of a sovereignty, which essentially lies in their populations.[112] The primary RtoP their populations is on the states.[113] The secondary responsibility rests on the 'domestic authorities acting in partnership with external actors'[114]. Thirdly, when states are 'unwilling or unable'[115] to live up to their duties due to incapability or 'ill-will'[116], the international community holds the responsibility to act.[117] The following debates on RtoP concentrated mainly on international involvement. But all responsibilities are equally important. That was the decisive feature of the potential function of RtoP as a North-South discourse mediator.

Thirdly, the report clarified what RtoP meant for states and the international community. RtoP comprises 'three layers of responsibility'[118]: *preventing*, *reacting*, and *rebuilding* responsibilities.[119] The responsibility to *prevent* is fundamental and 'the single most important dimension of'[120] RtoP.[121] It involves preventive efforts made as early as

[107] Weiss, 2006, p. 744.
[108] Welsh, 2009, p. 2.
[109] International Commission on Intervention and State Sovereignty, 2001, p. 9.
[110] Evans, 2006, p. 708.
[111] Thakur, 2006, p. 255.
[112] Heywood, 2011, p. 326.
[113] International Commission on Intervention and State Sovereignty, 2001, p. 49.
[114] *ibid.*
[115] *ibid.*, pp. viii, 34.
[116] *ibid.*, p. 5.
[117] Weiss, 2012, p. 109; Bellamy, 2009, p. 55.
[118] Evans, 2008, p. 43.
[119] International Commission on Intervention and State Sovereignty, 2001, p. xi.
[120] *ibid.*
[121] Chataway, 2007, p. 194.

possible, implying support in various forms to concerned states to prevent atrocities from emerging. In the event of atrocities occurring, the responsibility to *react* requires responses varying from diplomatic dialogues to coercive measures.[122] Applying 'less intrusive and coercive measures … before the more intrusive and coercive'[123] is crucial. Past post-intervention situations were mostly 'insufficient … poorly managed … inadequate'[124]. The responsibility to *rebuild*, therefore, requires 'a genuine commitment to helping to build a durable peace [, and] promoting good governance and sustainable development'[125]. When considering an intervention, creating a post-intervention scheme is paramount to picture rebuilding society and avoiding conditions leading to repetition. True reconstruction is best provided through 'security, justice [and reconciliation,] and economic development'[126].

Lastly, the report approached the inescapable matter of the deployment of military force by determining guidelines. Under the legality requirement, the UNSC was uncontestably identified as possessing distinct legal authority for authorizing military actions.[127] Further improvements were suggested, for instance, avoiding veto deadlock situations.[128] The legitimacy criteria serve as a set of standards and consist of the subsequent: 'The just cause threshold'[129] requires a certain degree of harm. Only 'large scale loss of life … or … ethnic cleansing'[130] suffice. The military operations' motivation requires the aversion or cessation of human suffering.[131] The proportionality of intervention and reasonable non-military options must be considered.[132] The consequences of an intervention do better for people than non-intervention.[133]

The report experienced an uneasy start within the international policy discourse of the following years. After 9/11, the world was preoccupied with terrorism and 'potential threats to national security'[134].[135] National human rights situations receded into

[122] Brunnée and Toope, 2006, p. 124; Bain, 2010, p. 42.
[123] International Commission on Intervention and State Sovereignty, 2001, p. xi.
[124] *ibid.*, p. 39.
[125] *ibid.*
[126] *ibid.*, p. 40; *See*, for example, Bellamy, 2009, p. 59; Strauss, 2009, p. 99.
[127] *ibid.*, p. xii; Weiss, 2006, p. 743.
[128] International Commission on Intervention and State Sovereignty, 2001, p. xiii.
[129] Brown, 2008, p. 16.
[130] International Commission on Intervention and State Sovereignty, 2001, p. xii.
[131] *ibid.*
[132] *ibid.*
[133] *ibid.*
[134] Molier, 2006, p. 44; *See*, for example, The White House, Bush, 2002, Chapter III.
[135] Weiss, 2012, p. 138; MacFarlane, Thielking and Weiss, 2004, p. 977.

the background. Nevertheless, RtoP ultimately caught on and made it onto the UN's World Summit (Summit) agenda in 2005.[136]

2.4. The evolution of RtoP

2.4.1. Its first serious embracement

RtoP celebrated its first minor but profound acceptance in 2002, when the AU was established, replacing the OAU.[137] Unlike the OAU embracing the non-interference doctrine,[138] the AU shifted its emphasis on the doctrine of non-indifference, which clearly resonated with RtoP.[139] The AU was granted the right 'to intervene in a Member State'[140] in atrocity situations, and members '[t]he right … to request intervention from the Union in order to restore peace and security'[141].[142] Incorporating these RtoP alike rights and obligations reflects increasing consensus and feasibility of RtoP. AU reflected the general views of African states of their acceptance of RtoP. AU's acceptance greatly contributed to RtoP's evolution since it kind of pushed other states on the globe to accept RtoP. One could say that the AU put a Trojan horse in world, mirroring Africa's progressive approach. During the following three years, RtoP gained support in the academic sphere.[143]

Regarding BRICS's stance on RtoP, prior to the ICISS report, BRICS were wary of those advocating a principle of conditional sovereignty, meaning that the sovereignty of states depends on their will and ability to protect their people.[144] As earlier on elaborated, AU members pioneered Deng's 'sovereignty as responsibility'[145], which has not been a Western concept as such.[146] South Africa was the only BRICS, which actively promoted RtoP,[147] and encouraged other AU members to support RtoP.[148]

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[136] Council on Foreign Relations, Feinstein, 2007, p. 8.
[137] Bellamy, 2009, p. 78.
[138] Charter of the Organization of African Unity (entered into force 25 May 1963) 479 UNTS 39, Art. III (2).
[139] Kioko, 2003, p. 819; Sharpe, 2017, p. 11.
[140] Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3, Art. 4 (h); Protocol on Amendments to the Constitutive Act of the African Union (adopted 11 July 2003) *adds* to war crimes, genocide, and crimes against humanity under Art. 4 (h) 'a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council'.
[141] Constitutive Act of the African Union, Art. 4 (j).
[142] Chandler, 2009, p. 37.
[143] *See*, for example, Chandler, 2004, pp. 59-81; Alley, 2004, pp. 138-164.
[144] Elden, 2006, p. 15.
[145] Deng *et al.*, 1996, p. vii.
[146] Stuenkel, 2014, p. 9.
[147] Bellamy, 2011, 'Global Politics and the Responsibility to Protect: From Words to Deeds', p. 13.
[148] Landsberg, 2010, p. 443.

2.4.2. The preparatory work for the UN World Summit of 2005

The real advancement regarding the UN's official adoption of RtoP occurred at the Summit in 2005. The path for the meeting was paved by the ICISS report and a subsequent report of the HLP in 2004.[149] The HLP was established in 2003 'to provide a new framework'[150] for the UN on 'the concept of security'[151]. Its report was broader regarding substance and range, with many recommendations. Concerning RtoP, the HLP confirmed 'the emerging norm that there is a collective international'[152] RtoP. With its recommendation on RtoP, it crucially changed the course.[153] Up to that point, RtoP mainly made rounds in the academic space.[154] Now, RtoP entered the political sphere since it was placed on the negotiation table and required decisions to be made.

The HLP's RtoP recommendations entered the critical stage. They needed to be adopted by Annan's report before the Summit. At the beginning of 2005, his report was published.[155] He included the RtoP recommendations and urged 'that we must embrace the responsibility to protect, and … we must act on it'[156].[157] Emphasis was placed on the cardinal RtoP of states as *raison d'être* and the use of non-military methods. He directly leaned on the ICISS report and was valuable for staging the Summit's discourse.[158]

2.4.3. The World Summit Outcome Document

In September 2005, world leaders got together at the Summit.[159] Hopes were high that it would result in a substantial renewal of world politics and the UN system.[160] Annan described it as '[a] once-in-a-generation opportunity'[161]. The results were disappointing. Agreements were reached only on very few matters.[162] Strikingly, Annan's RtoP proposition withstood and was approved.[163] It eventually made it into the WSOD, precisely in paragraphs 138-139.[164] Whereas the wording of both paragraphs varies

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[149] International Commission on Intervention and State Sovereignty, 2001; UN High-Level Panel on Threats, Challenges, and Change, 2004.
[150] Odello, 2005, p. 231.
[151] *ibid.*
[152] UN High-Level Panel on Threats, Challenges, and Change, 2004, Annex 1, Recommendation 55, p. 106.
[153] Hannay, 2008, p. 245.
[154] Burke-White, 2012, p. 21.
[155] Eckhard, 2011, p. 100.
[156] United Nations Secretary-General, Annan, 2005, UN Doc A/59/2005, para. 135.
[157] Wheeler, 2005, p. 101; Bellamy, 2015, p. 5.
[158] Bellamy, 2009, p. 75.
[159] Wheeler and Bellamy, 2005, pp. 522-539.
[160] Schrijver, 2005, p. 271.
[161] United Nations Secretary-General, Annan, 2006, UN Doc A/60/692, para. 7.
[162] Eckhard, 2011, p. 100.
[163] Basaran, 2014, p. 205.
[164] United Nations General Assembly, 2005, UN Doc A/RES/60/1, paras. 138-140.

insignificantly compared to the ICISS, HLP, and Annan reports, the intrinsic fundamentals of RtoP stayed untouched.[165] Virtually unanimously, UN members agreed on the words of paragraphs 138-140.[166] Those became the official formulation of RtoP.

Understandably, the paragraphs start with 'each individual state['s]' [167] responsibility instead of the international community's responsibilities. Each state holds its RtoP 'its populations'[168]. Paragraphs 138-139 use the notion of population five times, reflecting who is at the heart of RtoP. Populations must be protected from the four atrocity crimes[169] of genocide, ethnic cleansing, WC and CAH.[170] Although the term *mass* is not a legal terminology, and many of these crimes can occur with few victims, it is utilized in this context. Past atrocities were perpetrated on massive scales with countless victims. The term reflects only RtoP's realities and motivations, whereas the ICISS's formulation of the suffering of 'serious harm'[171] is equivocal and broader.

2.4.4. RtoP's scope of content

The WSOD made a significant step limiting RtoP's application to the defined threshold of the four atrocity crimes, which define RtoP's scope.[172] It is RtoP's rationale to protect populations from these crimes.[173] However, the WSOD provided no precise definition of atrocity crimes. Existing legislations and jurisprudence identify the components of genocide, WC, and CAH. Genocide, considered 'as the gravest subset of crimes against humanity and war crimes'[174], was defined and proscribed by the Genocide Convention.[175]

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[165] Bellamy, 2006, pp. 167-169.
[166] Schrijver, 2006, p. 24.
[167] United Nations General Assembly, 2005, para. 138.
[168] *ibid.*
[169] The terms 'mass atrocities' and 'mass atrocity crimes' used in this dissertation serve as generic terms that encompass the four crimes of the RtoP concept of the WSOD; *See* also, Scheffer, 2006, pp. 237-238; United Nations Office of the Special Advisers on Genocide Prevention and the Responsibility to Protect, 2014, p. 1.
[170] United Nations General Assembly, 2005, para. 138.
[171] International Commission on Intervention and State Sovereignty, 2001, p. xi.
[172] Grammatikas, 2014, p. 95.
[173] Bain, 2010, p. 42.
[174] Chhabra and Zucker, 2012, p. 42.
[175] Genocide Convention, arts. 2-3; Scheffer, 2008, p. 320; *See* also Geneva Convention I for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces in the Field [hereinafter Geneva Convention I] (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention II for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea [hereinafter Geneva Convention II] (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention III relative to the Treatment of Prisoners of War [hereinafter Geneva Convention III] (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention IV relative to the Protection of Civilians Persons in Time of War [hereinafter Geneva Convention IV] (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (adopted 8 June 1977, entered into force 7 December 1978)1125 UNTS 609;

The ICC[176], ICTY[177], and ICTR[178] adopted that definition. In 1951, the ICJ advised that the Genocide Convention echoed customary international law[179] and had 'obligations *erga omnes*'[180]. In other words, it is 'binding on States, even without any conventional obligation'[181]. The *Genocide* Case[182] confirmed that view in more detail. The ICTY also emphasized that the Genocide Convention is *jus cogens*[183].

WC and CAH were incorporated into the IMT-Statute.[184] Shortly thereafter, the UNGA affirmed 'the principles of international law recognized by the'[185] IMT-Statute and instructed the ILC[186] to draft a 'codification' of the offenses of Art.6 of the IMT-Statue. The result of ILC's work was, among other things, the 'Draft statute of'[187] the ICC, which included atrocity crimes. War crimes are violations of the four Geneva Conventions[188] and customary IHL[189] and were codified in the Rome Statute[190]. Article 7 criminalize CAH, which are not incumbent upon an 'armed conflict requirement'[191].[192]

Ethnic cleansing is 'unlawful and unacceptable'[193] and has no distinct codification.[194] The UNSC defined it as 'rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area'[195]. It falls within the ambits of the other crimes.[196] It 'can be regarded, like genocide, as subsumed

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[176] Rome Statute of the International Criminal Court [hereinafter *Rome Statute*] (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art. 6.
[177] Statute of the International Criminal Tribunal for the Former Yugoslavia [hereinafter *ICTY Statute*], United Nations Security Council, 1993, UN Doc S/RES/827, art. 4.
[178] Statute of the International Criminal Tribunal for Rwanda [hereinafter *ICTR Statute*], United Nations Security Council, 1994, UN Doc S/RES/955, art. 2.
[179] *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda) (New Application: 2002) (Judgement) [2006] ICJ Rep 6, para. 64; *See* also, Strauss, 2009, p. 29.
[180] *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) (Judgement) [1970] ICJ Rep 3, paras. 33-34; *See* also, Chow, 2021, p. 481; Nirmal, 2015, p. 345.
[181] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, p. 23; *See* also, Arbour, 2008, p. 450.
[182] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgement) [2007] ICJ Rep 43, paras. 147, 185.
[183] *Prosecutor v. Vujadin Popovic* (Judgement) IT-05-88-T (10 June 2010), para. 807, n. 2910; *Prosecutor v. Radislav Krstic* (Trial Judgement), IT-98-33-T (2 August 2001), para. 541.
[184] Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (8 August 1945) 82 UNTS 280, art. 6 (b)-(c); *See*, Ferencz, 2003, p. 31.
[185] United Nations General Assembly, 1946, UN Doc A/RES/1/95.
[186] In 1946, the ILC was named 'Committee on the Codification of International Law' pursuant UN Doc A/RES/1/95 and replaced by the ILC in 1947 pursuant United Nations General Assembly, 1947, UN Doc A/RES/174(II).
[187] Draft Statute for an International Criminal Court (22 July 1994) 2 ILC 42, A/CN.4/SER.A/1994/Add.1 (Part 2)
[188] *supra* note 176 at p. 16.
[189] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), p. 257; Kirsch, 2002, p. xiii.
[190] Rome Statute, art. 8.
[191] *Prosecutor v. Dusko Tadić* (Appeal Judgement) IT-94-1-A, (15 July 1999), para. 249.
[192] Rome Statute, art. 7.
[193] United Nations Security Council, 1993, UN Doc S/RES/819, pp. 1-2; *See* also, Goodwin-Gill and McAdam, 2007, p. 108.
[194] United Nations Office on Genocide Prevention and the Responsibility to Protect, n.d..
[195] Commission of Experts,1992, para. 55.
[196] Pappe, 2006, p. 5; *See* also, Chhabra and Zucker, 2012, p. 38.

within the scope of both'[197]. It entails acts of WC, inter alia, killing of civilians, deportation, sexual violence, and torture,[198] are 'committed as part of a plan or policy'[199] directed against an 'ethnical group'[200] during armed conflicts. Ethnic cleansing correlates with genocide necessitating the 'intent to destroy, in whole or in part, a[n] … ethnical … group'[201]. CAH correspond since 'a widespread or systematic'[202] 'persecution against'[203] an ethnic group is prohibited. Identifying ethnic cleansing as a distinct crime under RtoP 'enable[s] the international community to address some situations based on their factual appearance rather than their qualifications.'[204] It must be noted that, as sometimes wrongly assumed, RtoP does not concern all human security aspects, such as natural distorts, terrorism, and political repression. RtoP's scope involves solely the four atrocity crimes.

RtoP's substantial evolution from 2001 until the Summit is evident in the following respects. Paragraph 140 emphasizes the link between genocide prevention and RtoP.[205] The WSOD replaced the words 'unwilling or unable'[206] with the clearer term 'manifestly failing'[207]. It aimed to focus on the potential need for RtoP measures while disregarding the motives of the concerned state. That meant the avoidance of ambivalent UNSC discussions on the state's intentions and simpler assessments of whether RtoP's steps were necessary. The focus on prevention, 'early warning capabilit[ies]'[208], and capacity-building of mutual assistance in paragraphs 138-139 was stronger than in previous reports. Another distinct development was the requirement for the use of force. UNSC's central role in all concerns was emphasized, especially its inevitable role in military enforcement actions,[209] whereas the ICISS report elaborated in detail on 'principles for military intervention'[210], and thus the possibility of unilateral military measures.[211] The UNSC members would have never endorsed decision-making

[197] Evans, 2008, pp. 12-13.
[198] Rome Statute, art. 8(2)(a)-(b).
[199] *ibid.*, art. 8(1).
[200] *ibid.*, art. 6.
[201] *ibid.*
[202] *ibid.*, art. 7(1).
[203] *ibid.*, art. 7(1)(h).
[204] Strauss, 2009, p. 36.
[205] United Nations General Assembly, 2005, para. 140.
[206] International Commission on Intervention and State Sovereignty, 2001, p. xi.
[207] United Nations General Assembly, 2005, para. 139.
[208] *ibid.*, para. 138.
[209] *ibid.*, para. 139; Evans, 2008, p. 48.
[210] International Commission on Intervention and State Sovereignty, 2001, p. xii.
[211] Weiss, 2007, Humanitarian Intervention: Ideas in Action, pp. 116-117.

regulations beyond the ones of the UN Charter.[212] The five permanent members shield against any authority, which might raise doubts about their veto power.

2.4.5. Paragraphs 138 and 139 under the magnifying glass

The WSOD is not an international treaty. Therefore, the VCLT is non-appliable for the interpretation of paragraphs 138-39.[213] Interpreting these paragraphs rests on existing rules of international law. Paragraph 138 commences with affirming and summarizing established international laws on prevention and punishment of atrocities.[214] International treaty law established individual criminal responsibility and incorporated the duty to prevent such crimes and the incitement to such crimes.[215] Paragraph 138 includes incitement and continues with the states' declaration accepting 'that responsibility and … [acting] in accordance with it.'[216] It reiterates what states already do when becoming parties to international treaties under *pacta sunt servanda*.[217] The last sentence of paragraph 138 tries to convert the prevention and punishment obligations of the concerned states into a positive responsibility of all states to support the former in the implementation of their obligations.[218] The international assistance possibilities, for instance, for the prosecution of atrocity crimes cannot go beyond the codified requirements[219].[220] Reference is made to other assistance possibilities. The spectrum of human security options is large. Prevention and international assistance move into the focus.

While international atrocity crime legislations aim at prevention and punishment, paragraph 139 claims that all states are obliged 'to use … peaceful means … to protect populations'[221]. Thus, the international community can be seen as a subsidiary

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[212] Welsh, 2004, pp. 176-88; *See*, for example, China's position, Davis, 2011, p. 277.
[213] Vienna Convention on the Law of Treaties [hereinafter Vienna Convention] (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts. 31-32.
[214] *See*, for example, Genocide Convention, art. 1; Geneva Conventions, *supra* note 176 at p. 16; customary international law on crimes against humanity, for example, *Prosecutor v. Dusko Tadić* (Judgement) IT-94-1-T, (7 May 1997), para. 577; *Prosecutor v. Akayesu* (Judgement) ICTR-96-4-T, (2 September 1998), para 495; *Prosecutor v. Kayishema and Ruzindana* (Judgement) ICTR-95-1-T, (21 May 1999), para. 88; Konderla, 2018, p. 289; Mettraux, 2002, p. 237.
[215] Rome Statute, art. 25; ICTY Statute, art. 7; ICTR Statute, art. 6.
[216] United Nations General Assembly, 2005, para. 138.
[217] Vienna Convention, art. 26.
[218] United Nations General Assembly, 2005, para. 138.
[219] *See*, for example, Geneva Convention I, arts. 49-54; Geneva Convention II, arts. 50-53; Geneva Convention III, arts. 82-88; Geneva Convention IV, arts. 45, 70, 121 and 131.
[220] Vienna Convention, art. 34.
[221] United Nations General Assembly, 2005, para. 139; Paragraph 139 refers here to collective actions that do not comprise the use of force. *See*, for example, UN Charter, arts. 32-38, 52-54.

complementary 'layer of prevention'[222]. The next phrase is worth mentioning. It requires these collective actions to be 'timely and decisive'[223]. Past experiences, for instance Srebrenica, Kosovo, Somalia, and Rwanda, reveal impromptu and post hoc collective actions.[224] Paragraph 139 ends with a rhetorical emphasis on the assistance of all states and prevention.

Some scholars made the accusation that the WSOD failed to provide a RtoP implementation system.[225] Such an assumption must be disclaimed. This would have been pure utopia. For the first time, all UNGA members agreed on a consensus. This was a genuine step forward within RtoP's evolution.[226]

2.4.6. The WSOD through the prism of law creation

The UNGA adopted the WSOD as a resolution, producing no legal obligations.[227] According to positive international law, RtoP encompassed in the WSOD does not constitute a new source of international law.[228] RtoP provisions are political UNGA representations restating legal principles and rules, which could lay the foundation for a novel legal obligation.[229] The WSOD reasserts established laws and customs on the prevention and prohibition of atrocity crimes.[230] Looking at the WSOD through the prism of the law creation process, it could suffice as an instance of *opinio juris* for RtoP components exceeding established rules of law. *Opinio juris* comprises political opinions indicating that states 'are conforming to what amounts to a legal obligation.'[231] However, for *opinio juris* to constitute a legal responsibility, it presupposes 'a [settled] practice'[232].[233] That is not yet the case regarding RtoP. In a nutshell, RtoP originated as a political notion and not as a legal one. RtoP was blatantly intended to rupture the 'political

[222] Burke-White, 2012, p. 25.
[223] United Nations General Assembly, 2005, para. 139.
[224] Thakur, 2006, pp. 60, 212, 244, 293; Wheeler, 2006, pp. 29-51; Bellamy, 2009, 55.
[225] *See*, for example, Burke-White, 2012, pp. 27-8.
[226] Thakur and Weiss, 2009, p. 39, Bellamy, 2009, pp. 91, 95
[227] UN Charter, arts. 10-14; Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, art. 38(1)(a); *See*, also, Garwood-Gowers, 2016, p. 95; Strauss, 2009, A Bird in the Hand is Worth Two in the Bush - On the Assumed Legal Nature of the Responsibility to Protect, p. 293.
[228] Kelsen, 1946, p. 114; Cohen, 1981, p. 147.
[229] Burke-White, 2012, p. 23.
[230] Arbour, 2008, pp. 450-451.
[231] *North Sea Continental Shelf* (Germany v. Denmark; Germany v. The Netherlands) (Judgement), para. 77.
[232] *ibid.*
[233] Strauss, 2009, p. 36.

battlefield'[234] of the 'North-South divide'[235]. The purpose was to generate prerequisites for consensual reactions to future atrocities but not to establish new liabilities.[236]

2.4.7. RtoP's steady endorsement post-2005

The following years witnessed RtoP's inclusion in policy debates and formal UN approvals. Since 2005, around 90 UNSC,[237] 32 UNGA, and 52 UNHRC resolutions referred to RtoP,[238] reflecting increasing political agreement. Six months after the Summit and thorough debates, Resolution 1674 'on the protection of civilians in armed conflict'[239] was unanimously adopted. It reaffirmed the WSOD's RtoP provisions,[240] and that the UNSC stands ready to take appropriate actions if needed.[241] It linked RtoP to UN efforts on civilian protection and was an important statement of support.[242] It was UNSC's first RtoP approval, which was significant. All permanent members made no use of their veto.[243]

What followed shortly thereafter, in 2009, was Secretary-General Ki-moon's report on RtoP's implementation, which strived 'to contribute to a continuing dialogue … on'[244] RtoP. He enthusiastically embraced RtoP and uncovered 'a three-pillar strategy'[245]. Pillar One rests on paragraph 138[246], and the second and third are based on paragraph 139.[247] The UNGA heavily discussed Ki-moon's report in the following months and finally endorsed it.[248] Subsequently, the UNGA unanimously adopted a resolution on RtoP, which acknowledged their commitment to the WSOD, endorsed RtoP's three pillars

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[234] Evans, 2008, p. 30.
[235] Deller, 2012, p. 64.
[236] Evans, 2012, p. 380.
[237] *See*, for example, in 2006, Resolution 1706 on Sudan emphasized RtoP's reference to the prior 1674 Resolution, and also stressed that Sudan holds the RtoP 'civilians under threat of physical violence'. In 2008, RtoP was cited as the reaction to the worrying events in Kenya; *See* also, United Nations Security Council, 2006, UN Doc S/RES/1706, preamble, paras. 2, 12(a); Breakey, *et al*., 2012, p. 36; Office of the Spokesperson for the UN Secretary-General, Okabe, 2008; Arbour, 2008, p. 449; International Crisis Group, 2008, p. 1; Evans, 2008, pp. 54, 106.
[238] Global Centre for the Responsibility to Protect, 2023.
[239] United Nations Security Council, 2006, UN Doc S/RES/1674, preamble.
[240] *ibid.*; para. 4.
[241] *ibid.*; para. 26; *See* also, Bellamy and Reike, 2010, pp. 267, 270.
[242] Bellamy, 2009, p. 133; Bellamy, 2015, p. 7; Janzekovic and Silander, 2013, p. 103.
[243] Burke-White, 2012, p. 30.
[244] United Nations General Assembly, 2009, UN Doc A/63/677, para. 2.
[245] *ibid.* p. 2.
[246] *ibid.* p. 10, para. 14.
[247] *ibid.* p. 15, paras. 28-9; p. 22, paras. 49-50.
[248] Pacific Forum CSIS, 2011, p. 4; Hehir, 2012, p. 51; Global Centre for the Responsibility to Protect, 2009, p. 5.

brought forward by Ki-moon[249], and decided 'to continue [their] consideration of'[250] RtoP.

2.5. The implementation and operationalizing of RtoP

RtoP identified the core role of domestic players in atrocity prevention. The primary RtoP is on states. Domestic prevention gets to the roots of matters, such as sovereignty, social and cultural life, and history. It is about the relationship between states and their populations. Risk factors and national resilience are decisive. The international community plays a secondary role. It can either encourage and assist states to realize their responsibilities or act 'as protector of last resort'[251] in case states are unable to protect their populations.

2.5.1. The three pillars of RtoP

To implement RtoP, Ki-moon introduced a three-pillar scheme. All pillars are equal and do not follow a sequence.[252] Precisely determining 'whether an activity falls exclusively under one or another of the three pillars'[253] is irrelevant. Pillar One purports that '[e]very state has the Responsibility to Protect its populations from the four mass atrocity crimes'[254], including their prevention. Pillar Two attributed to the international community the responsibility 'to assist States in meeting those obligations'[255] 'through international assistance and capacity building'[256]. In case 'a State is manifestly failing to provide such protection'[257], Pillar Three prescribes the international community 'the responsibility … to respond collectively in a timely and decisive manner'[258] 'through peaceful diplomatic and humanitarian means'[259] under Chapters VI-VIII of the UN Charter.[260] In clarifying RtoP's three central constituents and differing responsibilities, Ki-moon's strategy provides a useful conceptual instrument. The attentiveness is on the necessity for early measures, and long-term actions and measures for impending

[249] United Nations General Assembly, 2009, UN Doc A/RES/63/308, para. 1.
[250] *ibid.* para. 2.
[251] Bellamy and Luck, 2018, p. 113.
[252] United Nations General Assembly, 2009, UN Doc A/63/677, p. 2.
[253] United Nations General Assembly and Security Council, 2012, UN Doc A/66/874-S/2012/578, para. 12.
[254] Global Centre for the Responsibility to Protect, 2021; *See* also, United Nations General Assembly, 2009, UN Doc A/63/677, pp. 2, 8, para. 11(a).
[255] *ibid.* para. 11(b), pp. 2, 15-22.
[256] Barber, 2022, p. 157.
[257] United Nations General Assembly, 2009, UN Doc A/63/677, para. 11(c).
[258] *ibid.* para. 11(c), pp. 2, 22-28.
[259] Pacific Forum CSIS, 2011, p. 4.
[260] United Nations General Assembly, 2009, UN Doc A/63/677, paras. 49-50; Janzekovic and Silander, 2013, p. 66.

violence.[261] The strategy is a framework under which all prevention aspects and possible responses to emerging atrocity situations can be discussed.

Pillar One assumes that decisions for atrocity perpetration are possibly alterable through the creation of frameworks to positively manage differences and diversities and the modification of political and social conditions, to decrease the tolerance for atrocities. Atrocities are well 'saturated with agency'[262] and result from social conditions, policy, and history. '[A]atrocity crimes are processes, not singular events.'[263] To comprehend roles states have in fulfilling RtoP, risk factors and root causes, which could generate atrocities, are to be examined in chapter 5.1.

2.5.2. The responsibility to preventive action

The following paragraphs consider what constitutes 'appropriate and necessary means'[264] to prevent atrocities. It is essential to know that there is no single suitable approach for all factors and circumstances of a certain context.[265] Multiple complexities vary depending on states and their relations to their populations. Atrocity prevention has two stages, structural and operational strategies.[266] The lines in-between are rather indistinct, and commitment can vary between medium and long-term.

2.5.2.1. Structural prevention

Structural prevention aims to reduce risk factors for mass atrocities and address their root causes.[267] They take place 'pre-crisis'[268] and fall under Pillar One and Two. Those strategies involve political measures promoting good governance and 'membership in international organizations'[269]. Accomplishing good governance by supporting effective governments with separating powers is the centerpiece of durable prevention.[270] Failed governance was a driving factor in many conflicts. Long-standing corrupt elite-dominated governments, often combined with institutional breakdown and socio-economic decline, are breeding grounds for atrocities. Encouraging states to be involved in international

[261] Mayersen, 2010, p. 8.
[262] Clark, 2013, p. xxvii.
[263] United Nations General Assembly and Security Council, 2013, para. 15.
[264] United Nations General Assembly, 2005, para. 138.
[265] United Nations General Assembly and Security Council, 2013, para. 33.
[266] Mayersen, 2010, p. 9; Janzekovic and Silander, 2013, p. 66.
[267] Carnegie Commission on Preventing Deadly Conflict, 1997, pp. xxviii, 69.
[268] Mayersen, 2010, p. 9.
[269] Evans, 2008, p. 89.
[270] *ibid.* p. 88.

organizations and regional regimes decreases security threats and makes available institutional discourse settings. States are less isolated and more open to cooperation.

Constitutional measures include fortifying the rule of law and human rights, promoting 'fair constitutional structures'[271], and eradicating corruption. For people, feeling secure is linked with their trust 'that they live under fair constitutional structures [that are] not inherently hostile to their interests'[272]. Promoting and incorporating human rights on national and regional levels, especially minority rights, contribute to people's sense of security and shield against mass violence. Human rights promotion includes examining and verifying abuses and establishing domestic institutions to advocate, observe, and adjudicate breaches.[273] To have 'a strong and just society'[274] that does not tolerate mass violence, CSOs have essential roles to mobilize support from deep within society and promote 'political, economic, and legal empowerment'[275].[276] Their roles can be equated to that of a 'bulwark against the spread of violence'[277]. Underlying risks of atrocities are arbitrary exercise of power and abuse of the law. Impunity prevails. There is a fundamental necessity to foster the rule of law.[278] The non-arbitrariness of state power, equal applicability of law, and subordination of the state to the law are some of the basic requirements of the rule of law.[279] However, 'no single rule of law issue is more important than the eradication of corruption'[280]. Corruption impacts humanitarian aid and economic growth, leads to mistrust, and can accelerate internal conflicts.

Economic measures comprise assistance for economic development and stability, community peacebuilding[281], and encouraging education geared towards tolerance. Economic development is interrelated with 'peace and security and human rights'[282]. History showed that low wages, unemployment, and declining economies fueled resentment among groups.[283] Economic hardship preceded many genocides, for instance, the post-WWI economic crisis and Rwanda's economy in the 1980s.[284] Education

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[271] *ibid*. p. 95.
[272] *ibid*. p. 95.
[273] United Nations General Assembly, 1994; United Nations General Assembly and Security Council, 2013, paras. 49-50.
[274] Genocide Prevention Task Force, 2008, p. 48.
[275] *ibid.*
[276] Chirot and McCauley, 2010, p. 198.
[277] Genocide Prevention Task Force, 2008, p. 48; *See*, also, Breakey, *et al*., 2012, pp. 20-21.
[278] United Nations General Assembly, 2005, para. 11.
[279] Chesterman, 2008, p. 337.
[280] Evans, 2008, p. 98.
[281] *ibid.* p. 95.
[282] United Nations General Assembly, 2005, para. 9.
[283] Ballentine and Sherman, 2003, pp. 261-262, 280.
[284] Mayersen, 2010, p. 19; Carnegie Commission on Preventing Deadly Conflict, 1997, p. 45.

conveying tolerance is crucial in altering stereotypes, old generational hatred, and ethnocentric divisions.[285] These changes reduce the likelihood of mass atrocities.[286]

Security sector measures include the support of security sector reform (SSR) in RtoP concerned states. '[C]ompetent and democratized'[287] police, intelligence services, and military structures are essential to structural prevention, establishing trust between populations and their governments, supporting stability within, and enhancing good governance.[288] These are 'the most direct and effective means of removing the capacity to commit atrocities'[289]. Security forces that are not well-structured and disciplined increase tensity and create prosperous conditions for conflicts to flourish. The most significant SSR is changing a 'military to civilian-controlled government'[290]. Altering political and constitutional structures is a prerequisite in such case. However, for such transformation to succeed, respect for civilian authorities.

2.5.2.2. Operational prevention

Operational prevention focuses on preventing imminent or potentially escalating violence.[291] Measures are mainly employed once violence erupts. Measures range from diplomacy[292], mediation[293], negotiation between conflicting parties, economic and political sanctions,[294] arms embargoes,[295] aid conditionality,[296] positive economic inducements,[297] the use of media[298], relief for refugee and IDP situations to 'the threat of international criminal prosecution'[299]. Some measures can be employed across pillars.

Preventative diplomacy is pivotal to atrocity prevention and is among its most effective tools. The 'decline of civil war'[300] and 'international war'[301] can be attributed to 'the extraordinary upsurge of activism by the international community that has been

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[285] United Nations General Assembly and Security Council, 2013, para. 63.
[286] Hamburg, 2008, p. 159-177.
[287] Evans, 2008, p. 100.
[288] DCAF - Geneva Centre for Security Sector Governance, 2015, pp. 2, 6; International Crisis Group, 2015, p. 16.
[289] Mayersen, 2010, p. 22.
[290] Evans, 2008, p. 101.
[291] Carnegie Commission on Preventing Deadly Conflict, 1997, p. 39; United Nations General Assembly and Security Council, 2013, para. 31; McLoughlin, 2014, p. 11.
[292] *ibid.* pp. xxii, 48.
[293] United Nations General Assembly, 2009, UN Doc A/63/677, p. 20.
[294] Carnegie Commission on Preventing Deadly Conflict, 1997, p. 52.
[295] Evans, 2008, pp. 103-104.
[296] Carnegie Commission on Preventing Deadly Conflict, 1997, p. 57.
[297] *ibid.* p. 56.
[298] Mayersen, 2010, p. 30.
[299] Evans, 2008, p. 9.
[300] Human Security Center, 2005, p. 150.
[301] *ibid.* p. 148.

directed toward conflict prevention, peacemaking, and peacebuilding'[302]. 'A dramatic increase in preventive diplomacy'[303] has contributed massively. Another tool is political sanctions. Those keep ready, among other things, 'diplomatic isolation, suspension of organization membership, travel and asset restrictions on targeted persons'[304].

Economic incentives can be influential in promoting behavioural attitudes and can stimulate 'cooperation and goodwill'[305]. Whereas economic sanctions are more hostile since economic threats are inclined to produce resistance and fear, conveying the proposition of 'indifference or active hostility'[306]. Usually, they are employed under Pillar Three in cases of imminent or current genocide.[307] Their effectiveness is controversial since the success rate is only around 33%.[308] They 'do little to deter genocide'[309] and can even create 'a favourable climate for genocide'[310].

Financially sanctioning states, for instance, through denial of credit or freezing of assets, can be applied selectively and directed against certain persons[311]. Aid conditionality makes developmental aid provision a condition to the recipient state's commitment to a particular outcome.[312] Actions extend from ceasing human rights abuses to democratization processes.[313] Such measures are controversial since a positive result cannot be ensured for populations suffering under oppressive regimes.[314]

Media play a key role in evolving mass atrocities and their perpetration.[315] They can promote and restrain severe violence. Media were used to incite mass violence and disseminate propaganda in the instances of Rwanda[316] and WWII[317]. In the recent case of Myanmar, Facebook was used to incite hate and violence against Rohingya.[318]

Easing refugee or IDP crises reduces possibilities of mass atrocities fully emerging because 'timely responses…can increase stability…before the conflict spreads

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[302] *ibid.* p. 155.
[303] *ibid.* p. 153.
[304] Evans, 2008, p. 90; *See*, for example, the membership suspension of Nigeria, Abubakar, 2004, pp. 43-49, and Zimbabwe, Taylor, 2005, pp. 367-380
[305] *ibid.* p. 95.
[306] *ibid.*
[307] Lopez, 2013, p. 1; *See*, for example, the sanctions in Former Yugoslavia 1991 and Rwanda, Lopez, 2000, p. 67.
[308] Lopez, 2013, p. 2.
[309] Lopez, 2000, p. 68.
[310] *ibid.* p. 70.
[311] Wallensteen, Staibano and Eriksson, 2003, p. iii.
[312] Genocide Prevention Task Force, 2008, p. 43.
[313] *See*, for example, Rwandan President Habyarimana's reaction to the French President Mitterrand, Prunier, 1995, pp. 89-90.
[314] Evans, 2008, p. 93.
[315] Stanton, G. H., 2004, p. 214.
[316] Lemarchand, 1995, p. 11; *See*, for example, Melvern, 2006, p. 50.
[317] Bytwerk, 2005, pp. 51-2.
[318] Kampf, Kreye, Mascolo and Pfeifer, 2022, p. 11.

across borders'[319]. Over recent decades, a significant preventive mechanism developed, which 'should be seen as a tool in the R2P toolbox'[320]. Potential atrocity perpetrators are now aware of the genuine possibility of being brought in front of criminal ad-hoc tribunals or court and prosecuted. The establishment of the ICC, ICTY, ITCR, and SCCL proves that there are real prospects for international criminal persecution. Another legal tool is the prosecution under universal jurisdiction. Domestic courts can prosecute persons for crimes such as torture, genocide, WC, and CAH under the Geneva Conventions, the Torture Convention, and customary international law, regardless of any connection between the state, the accused individual, and the crime in question.[321] States must have adopted legislation to equip their courts with universal jurisdiction over relevant crimes.[322] The number of universal jurisdiction cases increased in recent years, such as the Belgian *Butare Four* case[323], the *Pinochet* case[324], and the *Habré* case [325]. Those prosecution means were important to let legal justice prevail over completed conflicts. For international criminal justice to constitute a threat to potential perpetrators, the conviction numbers are too little, and the impunity of perpetrators still prevails.

2.5.2. The responsibility to react: 'Late-Stage Direct Prevention'[326]

When prevention fails, conflicts break out, and atrocities take place or are about to happen, the responsibility to react becomes relevant. The concerned state is primarily responsible for ending or avoiding atrocious harm.[327] If the state fails to do so, the responsibility shifts to the international community to act appropriately. '[P]olitical, economic, legal, and security'[328] measures provide initial possible reactions. The deployment of military force becomes a real option when violence escalates to such a level that the perpetration of atrocities is, in fact, imminent. Politically, much can be done through diplomatic negotiation, mediations, and facilitations to defuse highly explosive

[319] Mayersen, 2010, p. 37.
[320] Fatou Bensouda quoted from Ainley, 2015, p. 44.
[321] United Nations General Assembly, 2018, Annex, p. 307; *supra* note 176 at p. 16; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter Torture Convention] (adopted 10 December 1984, entered into force 26 June 1987) 85 UNTS 1465; Amnesty International, 2012, p. 7.
[322] Amnesty International, 2012, pp. 2, 12-13.
[323] Reydams, 2003, p. 428.
[324] Davis, 2000, p. 4.
[325] Spiga, 2011, p. 6.
[326] Mayersen, 2010, p. 40.
[327] United Nations General Assembly, 2005, para. 138.
[328] Evans, 2008, p. 106.

situations.[329] To politically sanction states, such as withdrawing or rejecting diplomatic staff, military assistance, or membership in international organizations, is an available negotiating tool.

2.5.3.1. Peacekeeping missions

Available security measures are 'peacekeeping missions'[330], in which blue helmets, authorized by the UNSC and consent of all conflict parties required,[331] monitor, supervise, and review cease-fire agreements and peace processes.[332] Those traditional peacekeeping missions evolved during the Cold War and are beneficial in peace restoration processes.[333] Missions during that period mostly involved classical international armed conflicts. After the Cold War ended, the UN and the international community engaged more in internal conflicts. They faced new challenges - no well-defined armed forces, blurry ceasefire lines and ongoing violence. Peacekeeping missions were not operational to establish peace in ongoing conflicts without any agreements. Blue helmets could no longer be bystanders of atrocities as in Srebrenica and Rwanda. '[The UN] has often found itself unable to respond effectively to such challenges.'[334]

2.5.3.2. Peace enforcement missions

Chapter VII authorizes peace enforcement operations,[335] whereby the possible use of force is part of the mission to respond to violence against civilians and to defend UN peacekeepers and the specific mandate.[336] Maintaining peace and security and protecting civilians is paramount. Peacekeeping tasks can also range from facilitating political processes, supporting to re-establish the rule of law, and promoting human rights to assisting 'in the disarmament, demobilization and reintegration of combatants'[337].

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[329] *See*, for example, negotiations in Kenya in 2008, International Crisis Group, 2008, p. i-ii, 24; Dayton Peace Accords, International Crisis Group, 1999; Caplan, 2000, pp. 216-7; Macedonian crisis, International Crisis Group, 2001, p. 4; Sudan's Peace Agreement, International Crisis Group, 2006, p. 1.
[330] Carnegie Commission on Preventing Deadly Conflict, 1997, p. 63.
[331] UN Charter, Chapter VI.
[332] United Nations Department of Peacekeeping Operations and Department of Field Support, 2008, pp. 21-22; Heldt and Wallensteen, 2007, p. 10.
[333] Mayersen, 2010, p. 41; Fortna, 2003, p. 97.
[334] United Nations General Assembly and Security Council, 2000, p. *x*; *See* also, United Nations High-Level Panel on Threats, Challenges, and Change, 2004, p. 68.
[335] UN Charter, Chapter VII.
[336] United Nations General Assembly and Security Council, 2000, p. *x*; United Nations Department of Peacekeeping Operations and Department of Field Support, 2008, pp. 31, 34-35.
[337] United Nations Department of Peacekeeping Operations and Department of Field Support, 2008, p. 6.

Since 1999, most missions were Chapter VII-mandated.[338] They are described as 'coercive protection'[339], comprising the provision of 'protection for civilians backed by the threat or use of military force'[340]. Forms of coercive protection are no-fly zones and safe havens to rapidly protect civilians under threat.[341] For them to be effective, peacekeepers must be willing 'to apply full-scale coercive military force in their defense if … necessary'[342]. These measures satisfy the 'timely and decisive manner'[343] requirement of Pillar Three. A rather unconventional measure rarely addressed in the literature is 'the opening of borders'[344]. The fight across borders is 'a critical factor in limiting or averting mass killing'[345]. Peacekeeping missions can also be carried out under non-UN command structures under the UNSC authorization, such as regional organisations or NATO.[346]

Opting for the non-consensual use of coercive force to prevent atrocities in imminent grave danger, in other words, 'coercive military intervention for humanitarian purposes'[347], is only feasible under 'very narrowly defined circumstances'[348] and criteria.[349] This measure should not be confused with peace enforcement operations. Those are conducted under mandates for civilian protection with the fair expectancy that military force would generally be unnecessary. In comparison, military humanitarian interventions are primarily responsible for combating and stopping atrocities.

2.5.3.3. BRICS and Libya's transformative impact on RtoP

The non-consensual use of force in Libya was the first time a peace enforcement mission was authorized under RtoP by the UNSC to protect Libya's population from atrocities,[350] and was decisive for RtoP's development. In 2011, Gaddafi responded to peaceful

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[338] Holt and Berkman, 2006, fn. 7.
[339] *ibid.* p. 5.
[340] International Commission on Intervention and State Sovereignty, Weiss, T.G. *et al.*, 2001, p. 179.
[341] *ibid.*
[342] Evans, 2008, p. 126.
[343] United Nations General Assembly, 2009, UN Doc A/63/677, para. 11(c), pp. 2, 22-8.
[344] Mayersen, 2010, p. 42.
[345] Valentino, 2004, p. 249
[346] *See*, for example, African Union's mission in Sudan (AMIS), International Crisis Group, 2007, International Crisis Group, 2005; Operation Artemis and MONUC II by the EU in Congo, United Nations Security Council, 2003, paras, 1-4, International Crisis Group, 2004; NATO's missions of the International Security Assistance Force (ISAF) in Afghanistan and Kosovo Force mission (KFOR), Whitman and Wolff, 2012, p. 109, Weiss, 2012, p. 170.
[347] Evans, 2008, p. 56.
[348] *ibid.* p. 128.
[349] For the legality of the use of force, *see* UN Charter, Chapter VII; for the legitimacy criteria of the use of force: seriousness of harm, proper purpose, last resort, proportional means, and balance of consequences, *see* International Commission on Intervention and State Sovereignty, 2001, pp. xii, 35-7; UN High-Level Panel on Threats, Challenges, and Change, 2004, pp. 66-67, 106-107; United Nations Secretary-General, Annan, 2005, UN Doc A/59/2005, p. 33.
[350] Thakur, 2013, p. 69.

protests with killing hundreds.[351] The international community reacted and an UNSC resolution was passed invoking Libya's RtoP its population, deciding the referral to the ICC and imposing sanctions.[352] RtoP advocates regarded this as evidence that RtoP became an international principle which was being enforced.[353] However, Gaddafi ignored that resolution and planned a massive attack on Benghazi. The UNSC responded and invoked RtoP through Resolution 1973 authorizing 'all necessary measures ... to protect civilians'[354]. NATO organized a military coalition, acted immediately, prevented Benghazi's massacre, killed Gaddafi and defeated his forces.[355] Especially from the BRICS, heavy criticism followed for NATO having exceeded its mandate to protect civilians and transparently causing regime change.[356] BRICS objected to the change from a politically neutral civilian protection mission to support rebels and aiming for regime change.[357] The debates and distrust that the Libyan intervention has provoked have since then influenced and paralyzed the UNSC.[358] Syria and Rohingya have paid the price of NATO's 'slid from civilian protection into regime change by stealth'[359]. Libya was the only instance when RtoP was invoked at the UNSC to authorize the use of force. Meanwhile, RtoP was invoked in numerous resolutions. Rohingya's case provides evidence of the international community's reticence to use RtoP to lobby for military intervention.[360]

In Syria, beginning in 2011, Russia and China were unwilling to tolerate resolutions criticizing Syria since those could be stalking-horses for a 'Libya-like intervention aimed at regime change'[361] and made use of their veto power.[362] The international community felt strongly paralyzed of how to react to atrocities in Syria. However, for RtoP's evolution, Syria and the two major BRICS's states' vetoes were

[351] Rotmann, Kurtz, and Brockmeier, 2014, p. 368.
[352] United Nations Security Council, 2011, UN Doc S/RES/1970, paras. 4, 9-21.
[353] Rotmann, Kurtz, and Brockmeier, 2014, p. 368; *See* also Bellamy and Williams, 2011, pp. 828-829.
[354] United Nations Security Council, 2011, UN Doc S/RES/1973, para. 4; *See* also Adler-Nissen and Pouliot, 2014, p. 898.
[355] Thakur, 2013, p. 69.
[356] Evans, 2015, p .33.
[357] Thakur, 2013, p. 69.
[358] Helal, 2012, p. 230.
[359] Adams, 2016, p. 774.
[360] Wight and Cowper-Smith, 2022, p. 370.
[361] Stuenkel, 2014, p. 8.
[362] Paris, 2014, p. 587.

'clearly the exception, not the rule'[363]. Subsequent resolutions were voted in favor by all BRICS.[364]

From 2005 onwards, BRICS's stance on RtoP was skeptical, cautious and critical.[365] Western analysts saw the discussion on RtoP 'in the context of a pro-interventionist Global North and a pro-sovereignty Global South, together with the BRICS blocs'[366]. And that BRICS were of the opinion 'that colonialism and interventionism used responsibility to protect arguments'[367]. However, BRICS's approaches to RtoP are much more subtle and complex. BRICS supported RtoP in 2005 and many times afterwards. They are absolute supporters of Pillar One and Two and have been aligned with the West on most RtoP aspects.[368] There was no question on whether to prevent atrocities, however, 'rather *how* they should be prevented'[369]. This is where BRICS and the West strongly disagreed. BRICS are critical of Pillar Three and 'do not equate assuming responsibility to the use of force'[370].

Libya also wakened 'engagement on how to better implement'[371] RtoP. Some BRICS states came up with reinterpretations of RtoP. Brazil commenced to engage with RtoP and presented 'Responsibility While Protecting'[372] (RWP). RWP called for more serious consideration and planning of humanitarian intervention, including the subordination 'of humanitarian objectives to political consideration'[373] and urged to carefully examine consequences before intervening.[374] RWP supplemented RtoP's evolution and dominated diplomatic debates on RtoP. The post-Libya discussions started to gradual concentrate on the essentiality of prevention, instead of military intervention.[375]

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[363] Stuenkel, 2014, p. 21.
[364] For example, Yemen to protect its people, *See* United Nations Security Council, 2011, UN Doc S/RES/2014; Libya, *See* United Nations Security Council, 2011, UN Doc S/RES/2016; Burundi, *See* United Nations Security Council, 2011, UN Doc S/RES/2030; DRC, *See* United Nations Security Council, 2011, UN Doc S/RES/2021; Central African Republic, *See* United Nations Security Council, 2011, UN Doc S/RES/2031.
[365] Stuenkel, 2014, p. 10.
[366] Stuenkel, 2014, p. 11.
[367] *ibid.*, p. 11.
[368] For example, BRICS's reaction to Ki-moon's report (2009) was positive. In 2011, BRICS voted in favour of RtoP resolutions on conflicts in Guinea, Sudan, Côte d'Ivoire and Central African Republic. *See* also Orford, 2011, p. 401.
[369] Stuenkel, 2014, p. 13.
[370] *ibid.,* p. 24.
[371] Rotmann, Kurtz, and Brockmeier, 2014, p. 368.
[372] Stuenkel, 2014, p. 13.
[373] Cater and Malone, 2016, p. 290.
[374] *ibid.*; Brazil's proposal paper to the UNSC included four recommendations: Military force is the last resort and proportionate; increased accountability and monitoring by the UNSC to the intervention; the intervention causes less harm than it aims to prevent. *See* Adams, 2016, p. 774; Paris, 2014, p. 589.
[375] Adams, 2016, p. 774.

China's pragmatic approach, namely Responsible Protection (RP), offered valuable contributions to Pillar Three debates post-Libya. RP draws on RwP and the ICISS report and establishes six elements, offering a reinterpretation of Pillar Three. RP emphasizes criteria for appropriate military interventions and adequate supervising and monitoring of authorized actions 'to reduce the risk of R2P being used as a smokescreen for other strategic objectives such as regime change'[376]. China's and Brazil's initiatives show that emerging powers are increasingly willing to impose their normative preferences regarding global governance and sovereignty,[377] and reflect their concerns over RtoP's potential to be abused.

[376] Garwood-Gowers, 201, pp. 91-92.
[377] Tüzgen and Gök, 2022, p. 5.

3. Analysis of ASEAN's response to human protection issues

3.1. ASEAN regionalism

3.1.1. Regionalism in general

During recent studies on comparative regionalism, '[t]he concepts of regionalism and regionalization have entered the discussion'[378]. Söderbaum distinguishes regionalism as 'the *policy* and *project*, whereby state and non-state actors cooperate and coordinate strategy within a particular region or a type of world order.'[379] Regionalism is linked to a formal scheme, which usually leads to the founding of an institution. Whereas regionalization relates to 'the *process* of cooperation, integration, cohesion and identity creating a regional space'[380] that is 'issue-specific or general'[381]. In accordance with Fawcett, regionalization is not 'more than a concentration of activity - of trade, peoples, ideas, even conflict - at a regional level. This interaction may give rise to the formation of regions, and in turn to the emergence of regional actors, networks and organisations.'[382] Regionalism studies used to concentrate on European integration, which was regarded as a unique instance.[383] The recent focus of debates shifted to exogenous and endogenous perspectives, which focus on the intertwining of globalization and regionalization and where 'regionalization is shaped from within the region by a large number of different actors'[384].

3.1.2. ASEAN's geopolitical context

In essence, the region of Southeast Asia is composed of multiple ethnicities. Thailand must be taken as a separate case, but the remaining Southeast Asian states were administered by postcolonial states. Their independence was either attained through the granting of colonizing powers post-WWII or through military combats that fought for independence until the late 1970s. From time to time, the states in Southeast Asia experienced strong ethnic, religious and political tensions. Past and current conflicts and geopolitical fragilities reflect these tensions. The following is exemplary. The end of the Vietnam war in 1975 was followed by the aftermath of the Cambodian civil war after

[378] Söderbaum, 2009, p. 479.
[379] *ibid.*
[380] *ibid.*
[381] *ibid.*
[382] Fawcett, 2005, p. 25.
[383] Söderbaum, 2009, p. 481.
[384] *ibid.* p. 482.

1975. Cambodia witnessed 'the rise and fall of the notorious Khmer Rouge'[385] and the occupation of Vietnam for ten years after having ousted the Khmer Rouge in 1979. Until today, armed separatists and insurgent groups constantly impugn the state's legitimacy in some states, as in the instances of the insurgents in the Irian Jaya conflict[386] in Indonesia and the Moro conflict[387] in the Philippines and the decades of conflicts between ethnic separatists, insurgent groups and Myanmar's government[388].

3.1.3. The founding of the ASEAN

Different approaches aimed to explain the evolution of ASEAN regionalism and determinants have been assessed. Among other things, national vulnerabilities of Southeast Asian states were decisive. They had to find a way 'to deal with the insecurity of their region'[389]. That was indeed the case with ASEAN, which was created during the period of the cold war and after the Malaysia-Indonesia conflict. Five founding states, namely Thailand, the Philippines, Indonesia, Singapore, and Malaysia, signed the Bangkok Declaration (1967), establishing ASEAN[390] and replacing ASA.[391] Since then, ASEAN experienced the accession of Cambodia, Myanmar, Brunei, Laos, and Vietnam.[392]

Initially, ASEAN's founding focused on advancing stability within the region whilst strengthening the 'national resilience among its members'[393]. The focus was also on 'economic growth, social progress and cultural development … [and] regional peace and stability'[394]. However, above all, it was ASEAN's *raison d'être* to avert the spreading communism.[395] '[By] 1967, all aligned in an anti-communist direction for the first time.' Especially after the communist forces conquered South Vietnam (1975) and Cambodia's invasion by communist Vietnam (1978) and [396] of Laos (1975), communism posed for

[385] *ibid.*
[386] van der Kroef, 1978, p. 119.
[387] Gutierrez and Borras, 2004, p. 1.
[388] Sharma, 2014, p. 150.
[389] Emmerson, 2005, p. 2.
[390] The ASEAN Declaration [hereinafter Bangkok Declaration] (adopted 8 August 1967) 6 ILM 1233, p. 2; Coe, 2015, p. 280.
[391] Morada, 2019, p. 12.
[392] Corthay, 2016, p. 1.
[393] Morada, 2019, p. 9.
[394] Bangkok Declaration, p. 2.
[395] Söderbaum, 2009, p. 484; Acharya, 2001, p. 195; Jones, 2010, p. 485.
[396] Ayoob, 1995, p. 4.

ASEAN member states (AMSs) the foremost serious threat, internally as well as externally, and was the perennial concern.[397]

3.1.4. Understanding ASEAN regionalism

The Southeast Asian states[398] were 'not recognized as a region'[399] until 1943. Only then the colonizers first named the region Southeast Asia.[400] These states experienced substantial vulnerabilities during their decolonization and state-building processes, wars of independence and the international influence of the superpowers of the cold war during the 1950s-60s.[401] Therefore, these states have been obsessed 'with the notion of security'. ASEAN regionalism can be regarded as 'largely a post war phenomenon'[402]. Between the 1960s and 1970s, academic work examined regionalism in degrees of 'economic cohesiveness'[403], 'political cohesiveness'[404], 'social cohesiveness'[405], and 'organizational cohesiveness'[406]. In the course of ASEAN's membership[407] expansion between 1984 and 1999 and post-cold war, the research on ASEAN's regionalism also evolved. The focus was on specific matters relating to economic amalgamations, democratic regime types, and identity affiliations. Some research centred around the effects of external influences to understand ASEAN's regionalism. Emmerson, for instance, explored the consequences that the Asian Financial Crisis (AFC) and the international war on terror since 9/11 had on ASEAN.[408] Again, other research assessed how democratization developments in Thailand, the Philippines, and Indonesia,[409] which include, among others promoting democratic, liberal values[410] and human rights, influenced the traditional norms of ASEAN.[411]

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[397] Singh and Fook, 2021, pp. 2, 5, 7-8; Butwell, 1975, p. 223.
[398] In 1945, the states were Thailand, Burma, Sumatra, Malaya, Indonesia, South Vietnam and Cambodia.
[399] Keling, 2011, p. 171.
[400] *ibid.*
[401] Keling, 2011, p. 171.
[402] *ibid.*, p. 170; Singh, 1987, p. 61.
[403] Hurrell, 1995, p. 38, for example, trade patterns and economic complementarity.
[404] *ibid.,* for example regime type and ideology.
[405] *ibid.,* for example, ethnicity, language, race, religion, culture, history, and consciousness of common heritage.
[406] *ibid.,* for example, the existence of formal regional institutions.
[407] ASEAN Secretariat, n.d..
[408] Emmerson, 2005, pp. 6-10.
[409] Acharya, 2003, p. 376.
[410] *ibid.,* p. 379.
[411] *ibid.,* p. 376; Jones, 2009, 'Democratization and foreign policy in Southeast Asia', p. 388.

3.1.4.1. International society defined by pluralists and solidarists

According to Bull and the English School,[412] an international society is 'a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.'[413] To get a sufficient picture of ASEAN's regionalism, the solidaristic and pluralistic concepts of international society are explored.[414] These different schools of thought indicate how states determine the foundation for their cooperation. Both concepts coincide in that states within an international society have common 'agreed values, rules, and institutions'[415], but with regard to 'the normative content'[416] they vary.

From the pluralistic perspective, '[the] normative content of … an international society is limited to a mutual interest in the continued existence of the units comprising the society … manifested in the reciprocal recognition of state sovereignty and the norm of non-intervention.'[417] Pluralists assert that 'substantive … moral and political codes'[418] are ingrained in 'specific cultural contexts'[419]. It is, therefore, impossible to agree on matters 'such as human rights or redistributive justice'[420]. Those substantive matters are organized within national contexts and 'cannot be universal'[421] because they are culturally prejudiced. An international society is best understood as a 'creation of practical rules designed to manage interaction between'[422] states. Policies would only 'undermine international society's unwritten constitution'[423], which would increase the disorder within.

Solidarists are of the opinion that states within an international society make agreements on 'substantive … moral and political' standards and possess the 'moral agency to uphold those standards'[424]. According to Bull, in such international society states 'display a degree of solidarity in developing and enforcing international law'[425].

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[412] Buzan, 2001, pp. 471, 475.
[413] Bull, 2012, p. 13.
[414] Morada, 2019, p. 10.
[415] Bellamy, 2005, 'Introduction: International Society and the English School', p. 9.
[416] *ibid.,* p. 10.
[417] *ibid.*
[418] *ibid.*
[419] *ibid.*
[420] *ibid.*
[421] *ibid.*
[422] *ibid.*
[423] *ibid.*
[424] *ibid.; See* also, Linklater, 1998, pp. 166-167.
[425] Bellamy, 2005, 'Introduction: International Society and the English School', p. 10.

The use of force will only be approved if it serves the purpose of law enforcement. That can also encompass collective self-defence and the safeguarding of the 'moral purpose'[426] of an international society. Solidarists validate their conception with the increasing state practice of human rights protection and 'growing recognition of shared values and interests across a range of subject matters'[427].

3.1.4.2. ASEAN as 'a pluralist international society'[428]

An international society requires the existence of 'a group of states'[429]. ASEAN as a group of ten states pooled together as an association. That group needs to have 'certain common interests and common values'[430]. ASEAN is based on the mutual interest to defy communism and the 'common desire and collective will to live in a region of lasting peace, security and stability, sustained economic growth, shared prosperity and social progress'[431]. ASEAN's common values are 'respect, peace and security, prosperity, non-interference, consultation/dialogue, adherence to international law and rules of trade, democracy, freedom, promotion and protection of human rights, unity in diversity, inclusivity, and ASEAN centrality in conducting external relations.'[432] They contributed to the emergence of the 'ASEAN identity'[433]. AMSs formed an international society because they understand 'themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.'[434] Rules and principles define AMSs' relations.[435] ASEAN institutions consist of various sectoral bodies.[436]

'The normative content of … [a pluralist] international society is limited to a mutual interest in the continued existence of the units comprising the society … manifested in the reciprocal recognition of state sovereignty and the norm of non-intervention.'[437] ASEAN's normative content is composed of its traditional norms

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[426] *ibid.*
[427] *ibid.,* p. 11; *See* also, Morada, 2012, 'Europe and Southeast Asia', p. 89.
[428] Morada, 2019, p. 11.
[429] Bull, 2012, p. 13.
[430] *ibid.*
[431] The Charter of the Association of Southeast Asian Nations [hereinafter *ASEAN Charter*] (adopted 20 November 2007, entered into force 15 December 2008) 2624 UNTS 223, preamble; *See* also, *ibid.* arts. 1(1), (2) and (4).
[432] Farid, 2020, p. 14; *See* also ASEAN Charter, art. 2(2)(a)-(n).
[433] *ibid.*
[434] Bull, 2012, p. 13.
[435] Treaty of Amity and Cooperation in Southeast Asia [hereinafter TAC] (adopted 24 February 1976, entered into force 15 July 1976) 1025 UNTS 297, art. 2.
[436] ASEAN Secretariat, 2020.
[437] Bellamy, 2005, 'Introduction: International Society and the English School', p. 10.

emphasizing 'the reciprocal recognition of … sovereignty and … non-intervention.'[438] Sovereignty and non-interference are the heart of ASEAN and fiercely protected and upheld.[439] They are the elementary component of ASEAN's collective identity. It can be concluded that 'ASEAN is a pluralist international society'[440].

3.2. The normative foundations of ASEAN

3.2.1. ASEAN's neutrality policy

All international societies have been built on norms. Kratochwil defines norms as 'standards of behaviour defined in terms of rights and obligations'[441]. The main functions of norms are the prescription of behaviour. Norms contribute 'to coordinate expectations and decrease uncertainty, to influence decision making, and to legitimate [the] actions [of states]'[442]. It is helpful to resort to constructivism when examining ASEAN's traditional norms. The definition of norms by constructivists provides a more profound comprehension of norms since norms do not solely focus on prescribing and regulating behaviour but also centre on defining and forming identities.[443]

ASEAN's behaviour is rooted in the ingrained core principles of national sovereignty, non-interference and territorial integrity. Since its establishment, ASEAN has been devoted to protecting AMSs' sovereignty and constantly practising the non-interference of states' internal affairs. There were no armed conflicts between AMSs after joining ASEAN, and internal conflicts also decreased.[444] It may be argued but these principles brought about regional stability.[445] States could no longer meddle in each other's domestic matters nor support political uprisings.[446] Some scholars conclude that ASEAN is a rather successful regional organization.[447] Such achievement can be attributed to its cardinal principle, PNI, which even corroborated the establishment of ASEAN's identity. AMSs 'share an almost religious commitment to'[448] PNI. Instead of

[438] *ibid.*
[439] Jones, 2010, p. 479.
[440] Morada, 2019, p. 11.
[441] Kratochwil, 1989, p. 59.
[442] Acharya, 2001, p. 24.
[443] Katzenstein, 1996, p. 5; Finnemore, 1996, p. 129.
[444] Rüland, 2011, p. 104.
[445] Severino, 2006, p. 92; Acharya, 2001, p. 57.
[446] Narine, 2012, p. 155.
[447] Caballero-Anthony, 2022, p. 1.
[448] Jones, 2007, p. 523.

establishing a regional military alliance, the five founding states intended to create a normative framework founded on the PNI to guard against unsolicited external interference in the internal affairs of member states.[449] The intention of this protection against external interferences is the warranty for AMSs' sovereignty and independence.[450]

The reasons for the immense value of PNI for ASEAN lay within historical motivations. After WWII, global structures experienced massive changes. The power competition between two superpowers, namely the Soviet Union and the US, influenced and changed the international structure.[451] Establishing NATO[452] and the Warsaw Pact[453] manifested that.[454] The superpowers' tactics and their competition influenced states within Southeast Asia and posed continuously new demands. These states had to permanently adjust to guarantee their national security. Many Southeast Asian states were in the embryonic stage of state-building during the decolonization processes of the 1950s-60s.[455] These states lacked 'adequate stateness'[456], which made them 'acutely vulnerable to'[457] political instabilities, weak economies and ethnic conflicts, also described as an 'explosive amalgam of race, religion and culture'[458].[459]

AMSs also appreciate ASEAN because their commitment to PNI guarantees that inflaming issues of 'race, religion and culture'[460] are not subject to mutual controversies and no one tries to impose their individual values on the others. Those vulnerabilities explain ASEAN's creation.[461] Its adherence to its PNI policy prevents 'aggravation of domestic conflicts by foreign factors'[462]. ASEAN's deployment of sovereignty and PNI reflects that AMSs 'understood that if their fragile efforts at state-building were to be effective, they needed to cooperate with one another.'[463]

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[449] Keling, 2011, p. 172.
[450] *ibid*, p. 173.
[451] Balaam and Veseth, 1996, p. 419; Fox, 1944, p. 21.
[452] North Atlantic Treaty (adopted 4 April 1949, entered into force 24 August 1949) 34 UNTS 243.
[453] Treaty of Friendship, Co-operation and Mutual Assistance [hereinafter Warsaw Pact] (adopted 14 May 1955, entered into force 6 June 1955) 219 UNTS 3.
[454] Waltz, 1979, p. 169; Ayoob, 1995, p. 6.
[455] Keling, 2011, p. 171.
[456] Ayoob, 1995, p. 4.
[457] *ibid.*
[458] Corthay, 2016, p. 6.
[459] Acharya, 2001, p. 57; Jones, 2012, p. 39.
[460] Corthay, 2016, p. 7.
[461] *ibid.* p. 6.
[462] *ibid.*
[463] Narine, 2012, p. 155.

ASEAN maintains a policy of neutrality, and PNI became its *modus operandi*. PNI is enshrined in fundamental documents and has its initial roots in the Bangkok Declaration.[464] It accentuates ASEAN's primary responsibility to secure internal affairs to be free from 'external affairs'[465].[466] In the early years, it was essential to develop 'a basis of understanding and trust'[467] between its members. That basis was fundamental for its survival as a connected regional organization in its starting years.[468] Adherence to PNI was the key to that. PNI 'safeguarded ASEAN's common interests and formed the foundation upon which Member States have developed mutual trust and a *modus vivendi*.'[469]

The ZOPFAN Declaration further emphasized PNI.[470] Later, the TAC explicitly assured 'that the [member states'] sovereignty was guaranteed, and … no unwarranted intervention would occur in the event of any member states experiencing internal problems'[471].[472] It was observed that ASEAN's future rests on the people and their leaders, requiring unity within.[473] 'The concept of 'ASEAN unity' became the primary way of demonstrating their resilience in the face of external uncertainty and threat.'[474] PNI was further embedded in the SEANWFZ Treaty,[475] the Bali Agreement,[476] ultimately the ASEAN Charter[477], and repeated in numerous statements[478] by ASEAN officials.

3.2.1.1. Operational aspects of ASEAN's principle of non-interference

To understand ASEAN's PNI, clarifying its meaning is necessary. PNI 'is part and parcel of customary international law'[479] and enshrined in the UN Charter[480]. While the ICJ defines PNI as 'the right of every sovereign State to conduct its affairs without outside

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[464] Bangkok Declaration, p. 1.
[465] *ibid.*
[466] Ramcharan, 2000, p. 60; Ayoob, 1995, p. 62.
[467] Gyngell, 1982, p. 115.
[468] Acharya, 2001, p. 58.
[469] Heads of State/Government of ASEAN, 2006, p. 16, para. 28.
[470] Centre of International Law (n.d.), p. 1.
[471] Othman and Othman, 2010, p. 40.
[472] Treaty of Amity and Cooperation in Southeast Asia, art. 2 (c).
[473] Sisoulith, 2017, p. 114
[474] Gyngell, 1982, p. 116; *See* also, Treaty of Amity and Cooperation in Southeast Asia, art. 12.
[475] Protocol to the Treaty on the Southeast Asia nuclear weapon-Free Zone [hereinafter SEANWFZ Treaty] (adopted 15 December 1995, entered into force 27 March 1997) 1981 UNTS 129, art. 5.
[476] Declaration of ASEAN Concord II [hereinafter Bali Agreement] (adopted 7 October 2003) 43 ILM 18, preamble, (A)(3).
[477] ASEAN Charter, preamble, art. 2(2)(e).
[478] Wu, 2000, pp. 8-11.
[479] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) (Judgement) [hereinafter *Nicaragua case*] [1986] ICJ Rep 14, para. 202.
[480] UN Charter, art. 2(7).

interference'[481], ASEAN has not only adopted PNI 'as a behavioural norm'[482] but also adopted its distinct notion of the consequent PNI practices.[483] ASEAN has no definition of 'what it means by 'interference', regional practice … suggests that it was construed as a continuum of involvement in the domestic affairs of states … [ranging] from the mildest of political commentary through to coercive military intervention'[484]. PNI's operational obligations tolerate 'no public challenges, comments or criticisms of other regimes' legitimacy, domestic systems, conduct, policies, or style'[485]. Due to that broad interpretation, ASEAN's PNI policy serves as a system for preventing actions that could threaten political elites' power and thus disrupt national governments. Therefore, PNI is not only a norm, however, also a political tool.[486]

3.2.1.2. A pragmatic perspective on ASEAN's principle of non-interference

It should be clarified how this dissertation treats PNI. Theoretical traditions of scholars are first unfolded 'to explain the genesis, evolution and limitations of ASEAN regionalism'[487], the subsequent discussion aims to demonstrate the selective application of PNI and to understand its actual role. 'If it can be shown that ASEAN states have intervened in some areas and not others, 'non-interference' cannot simply be invoked to explain and justify inaction on a given issue. If non-interference operates selectively, then the basis of that selectivity is exposed as the proper object for'[488] examination. This basis is adopted herein since it genuinely approaches ASEAN's courses of action and attitude.

Almost all scholars agree that AMSs 'never, or hardly ever, intervene in [each other's] internal affairs'[489]. PNI serves as the reason for ASEAN's passivity in crises, ranging from containing 'communism and social unrest'[490] and the AFC to the situation in Myanmar.[491] While scholars nearly unanimously agree on the centrality of ASEAN's

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[481] *Nicaragua case*, para. 202.
[482] Molthof, 2012.
[483] Katsumata, 2003, p. 105.
[484] Bellamy and Drummond, 2011, p. 185.
[485] Jones, 2012, p. 4; *See* also, Antolik, 1990, p. 156; Acharya extended the behavioral demands to the following: (1) refraining from criticizing the actions of a member government towards its own people; (2) criticizing the actions of states which were deemed to have breached the non-interference principle; (3) denying recognition, sanctuary, or other forms of support to any rebel group seeking to destabilize or overthrow the government of a neighboring state; (4) providing political support and material assistance to member states in their campaign against subversive … activities, Acharya, 2001, p. 58.
[486] Nesadurai, 2009, p. 104; *See* also, Kipgen, 2022, p.102.
[487] Jones, 2012, p. 7.
[488] Jones, 2012, p. 8.
[489] Jones, 2010, p. 479.
[490] *ibid.* p. 497.
[491] *ibid.* pp. 479, 494, 497.

PNI policy in managing regional affairs, PNI has never been an 'absolute'[492] nor 'a neutral principle'[493].[494] ASEAN diplomats stated: 'we have been interfering mercilessly in each other's internal affairs for ages, from the very beginning'[495]. A former ASEAN Secretary-General insisted on pragmatically considering PNI's applications.[496] Jones further exemplifies, based on events[497], the inconsistent use of PNI.[498] The sovereignty regime developed by ASEAN and AMSs is rather 'a technology of power'[499]. The consequences and intentions of AMSs are strategic. AMSs legitimize their behaviour aligned with ruling elites[500] and their political and economic interests.[501]

Approaches were made to reconsider ASEAN's PNI policy. Pitsuwan stimulated 'flexible engagement', which was rejected since it could undermine sovereignty and thus risk regional stability.[502] What followed was the proposal for an 'enhanced interaction' policy, allowing individual AMS to speak about internal affairs unless they have regional impacts.[503] Bellamy highlights a change to the hitherto existing PNI application.[504]

3.2.2. The ASEAN Way

Unlike the EU members, which surrender a portion of national sovereignty to the EU as a supranational organization, ASEAN's decision-making process rests upon consensus and consultation, reinforcing AMSs' sovereignty. Rather than being a supranational institution, ASEAN was designed to serve as a platform for constructive dialogues. ASEAN's regionalism cherishes the conservation of AMSs' sovereignty.[505] ASEAN developed its diplomatic culture during the Cold War, consisting of consensus, informality and consultation, better known as the 'ASEAN way'.[506] The TAC is the normative framework for intra-member states relations, especially PNI, sovereignty,

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[492] Severino, 2006, p. 94.
[493] Jones, 2012, p. 39.
[494] Jones, 2010, p. 480; Jones, 2012, p. 2.
[495] Jones, 2010, p. 481; Jones, 2012, p. 5.
[496] Severino, 2006, p. 94.
[497] For instance, ASEAN's counter position towards Vietnam's intervention in Cambodia in the 1970s; in 1986 calling for peaceful resolution in the Philippines, Jones, 2010, p. 480, p. Jones, 2012, p. 5; Caballero-Anthony, 2005, pp. 212-13; ASEAN intervening in East Timor, Jones, 2012, p. 166; in 1997, setting entrance conditions for Cambodia, Jones, 2010, p. 481.
[498] Jones, 2010, pp. 479-480.
[499] Jones, 2012, p. 15.
[500] *ibid.* p. 480.
[501] Jones, 2012, pp. 8, 39.
[502] Jetschke and Rüland, 2009, p. 197; Jones, 2008, p. 275.
[503] Bellamy and Drummond, 2011, p. 187.
[504] *ibid.*
[505] Morada, 2012, 'Asia and the Pacific', p. 141.
[506] Morada, 2019, p. 13; Acharya, 2001, p. 36.

settling 'disputes by peaceful means'[507], and refraining from the use of force.[508] The 'ASEAN way' is 'a set of norms and principles that regulate relations among member states'[509].

ASEAN's operative decision-making principles, namely 'consensus and … least common dominator'[510], help to strengthen PNI and sovereignty. The 'ASEAN way' served as a powerful apparatus to manage the multitude of AMSs and their diverse social-cultural, economic, and political differences, enabling them to parley and reach agreements 'even if based only on the least common dominator'[511].[512] ASEAN's 'consensus decision-making'[513] safeguards domestic interests because every AMS possesses veto power. Each can veto issues which could mean interference in domestic affairs. The other principle safeguarding domestic interests is the 'least common dominator'[514], and can be invoked if an AMS is reluctant to immediately adopt any proposal, potentially undermining domestic interests. Documents phrase this principle as ASEAN moving 'at a pace comfortable to all'[515].

3.3. ASEAN and the RtoP

3.3.1. ASEAN's shift to a more people-centred regionalism

Until the mid-1990s, ASEAN regionalism was pre-eminently state-centric, upholding traditional norms. The AFC in 1997 and democratic changes in Thailand and Indonesia challenged this state-centred regionalism, demanding the mainstreaming of 'democracy, human rights … and rule of law'[516].[517] All these factors led to a review of ASEAN's *raison d'être* induced by 'political and economic'[518] instabilities. ASEAN underwent a 'norm building'[519] phase (1997-2007), contributing to 'ASEAN's push for transforming itself into a more people-centered … organization'[520]. This phase required balancing state-centred norms, namely integrity, PNI and sovereignty, and people-centred norms of

[507] TAC, art. 2 (d).
[508] *ibid.* art. 2; *See* also, Hernandez, 2016, p. 2; Acharya, 2001, p. 47.
[509] Caballero-Anthony, 2022, p. 5.
[510] Morada, 2012, 'Asia and the Pacific', p. 141.
[511] Morada, 2019, p. 13.
[512] Morada, 2012, 'Asia and the Pacific', p. 142.
[513] *ibid.*, p. 141.
[514] Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 136.
[515] ASEAN Regional Forum, para. 13, p. 5; ASEAN Secretariat, 2012, 'ASEAN Security Community Plan of Action'.
[516] Morada, 2019, p. 15.
[517] Morada, 2019, pp. 14-15; Morada, 2013, p. 147.
[518] *ibid.*
[519] *ibid.* p. 14.
[520] *ibid.*

human rights, security and development. In contrast to newer AMSs which hesitated to incorporate the people-oriented norms, possibly weakening traditional norms, the more senior and democratic AMSs were more inclined to include those.

That discomfort became clear during ASEAN's Charter drafting (2005-2008). The EPG[521] was created to outline the Charter 'and propose bold and innovative ideas'[522]. Its report[523] recommended 'alternative consensus decision-making, … sanctions … of erring members, and … a consultative body[524] composed of … civil societ[ies]'[525] and human rights groups. It 'included people-oriented recommendations that upheld the protection of human rights, international humanitarian law, prevention of genocide and mass atrocities covered by … RtoP…, rule of law, … good governance'[526]. Later, when the ASEAN HLTF[527] compiled the Charter, recommendations, such as sanctions and decision-making, were not adopted. Ultimately, the ASEAN Charter is a formalization of the traditional state-centred norms.

CSOs were disappointed since few recommendations on participatory regionalism were adopted, which would have produced more transparency and accountability.[528] However, since 2008, participatory regionalism has gradually evolved.[529] ASEAN appears to be more receptive to stakeholders and non-state actors becoming more involved in norm-shaping and norm-building. While consensus on the 'ASEAN Way' 'remains the norm'[530], the opportunities to engage with non-state actors increased, particularly through informality and consultations.[531] It is tempting to conclude from simply reviewing the relevant provisions of ASEAN's Charter that ASEAN is not ready to adopt emerging principles such as RtoP.[532] In particular, the state-centred norms, together with an absent-sanctionary system in place, do not promote accountability and transparency. However, since 2010, ASEAN has the AICHRs, its human rights body, in place.[533] At first, it had no mandate for formally receiving complaints of violations.[534] An

[521] Eminent Persons Group (EPG), established under the Kuala Lumpur Declaration; ASEAN Secretariat, 2005, 'Kuala Lumpur Declaration on the Establishment of the ASEAN Charter'.
[522] Morada, 2009, p. 187.
[523] ASEAN, 2006, pp. 16, 22, 29.
[524] *ibid.* pp. 22-3, Annex B.
[525] Morada, 2012, 'Asia and the Pacific', p. 143.
[526] *ibid.*
[527] ASEAN High Level Task Force (ASEAN HLTF).
[528] Morada, 2009, pp. 188-189.
[529] Morada, 2019, p. 15.
[530] *ibid.*
[531] *ibid.*
[532] Morada, 2009, p. 186.
[533] ASEAN Secretariat, 2010; ASEAN Charter, art. 14(2).
[534] Morada, 2009, p. 186; Human Rights in ASEAN, 2023.

informal complaint mechanism has developed. CSOs can submit 'informal complaints to the AICHR requesting it [to] respond to human rights violations'[535]. But ASEAN Charter and AICHR are not ASEAN in its entirety. ASEAN's community-building composition offers more opportunities to internalize RtoP within Southeast Asia, especially the APSC pillar.

3.3.2. ASEAN community-building as means of advancing RtoP

Since the Bali Agreement (2003), ASEAN has been absorbed with the realization of its community idea. The ASEAN Community comprises three pillars: AEC, ASCC and APSC.[536] In view of RtoP's promotion, the APSC is significant. The intention was 'to bring ASEAN's political and security cooperation to a higher plane to ensure that countries in the region live at peace with one another and with the world at large in a just, democratic and harmonious environment.'[537] The 2004 Action Plan[538] put the focus of the security-building community on 'political development, shaping and sharing of norms, conflict prevention … resolution, and post-conflict peace-building.'[539] In 2009, the APSC Blueprint was adopted, emphasising to 'promote political development in adherence to the principles of democracy, the rule of law and good governance, respect for and promotion and protection of human rights'[540], and to encourage 'a people-oriented

[535] Centre for Women, Peace and Security, 2016.
[536] *ibid.*; Morada, 2019, p. 15.
[537] Bali Agreement, *supra* note 476 at p. 38; *See* also, Morada, 2012, p. 144.
[538] ASEAN, 2004.
[539] Morada, 2012, 'Asia and the Pacific', p. 145; *See* also, The specific *political development* activities include '1) strengthening democratic institutions and popular participation; 2) promoting understanding and appreciation of political system, culture, and history of ASEAN member countries; 3) strengthening the rule of law and judiciary systems, legal infrastructure, and capacity-building; 4) promoting free flow of information among and within ASEAN member countries; 5) enhancing good governance in public and private sectors; 6) establishing a network among existing human rights mechanisms; 7) protecting vulnerable groups including women, children, people with disabilities, and migrant workers; and 8) promoting education and public awareness on human rights. In the area of *conflict prevention*, the Plan of Action identified specific activities that include: 1) strengthening confidence-building measures (e.g., utilizing civilian and military personnel in disaster relief operations); 2) strengthening preventive measures (e.g., ... early warning system based on existing mechanisms to prevent occurrence and escalation of conflict); and 3)strengthening ASEAN Regional Forum (ARF) process in support of the ASC (e.g., ... preventive diplomacy stage and beyond). It also identified activities under *conflict resolution*, ... 1) developing regional cooperation for maintenance of peace and stability; and 2) developing or supporting initiatives (e.g., promoting exchange and cooperation among ASEAN centers of excellence on peace, and conflict management and resolution studies; and considering the establishment of an ASEAN Institute for Peace and Reconciliation). ... in the area of *post-conflict peace-building*, ... activities include: 1) strengthening ASEAN humanitarian assistance ...; 2) developing cooperation in post-conflict in post-conflict reconstruction and rehabilitation in affected areas ...; 3) establishing a mechanism to mobilize necessary resources to facilitate post-conflict peace-building' *quoted* from Morada, 2012, 'Asia and the Pacific', p. 145.
[540] ASEAN Secretariat, 2009, p. 1.

ASEAN'[541] encouraging everyone 'regardless of gender, race, religion, language, or social and cultural background … to participate in ... the process of ASEAN integration'[542].

On this basis, this blueprint is the main framework for the promotion of internalizing RtoP within ASEAN. Even though the language of RtoP is not employed in both documents, the above-mentioned elements are cognate to the ones of RtoP. Especially conflict prevention[543] is paramount to RtoP's atrocity prevention since mass atrocities are mostly perpetrated during conflicts.[544] '[P]rinciples of democracy, the rule of law and good governance, respect for and promotion and protection of human rights'[545] are part of RtoP's structural prevention and centrepiece of durable atrocity prevention.[546] The 'post-conflict peace-building'[547] element resonates with the responsibility to rebuild.[548]

RtoP might broaden the APSC Blueprint by incorporating RtoP into the APSC framework and thus forming AMSs' atrocity prevention capabilities. ASEAN is aware of its multi-ethnicity and varieties of cultures and political systems and associated risk factors. The APSC documents, therefore, highlight 'tolerance, respect for diversity, equality'[549] and non-discrimination[550]. Adopting the APSC Blueprint would be the standard against which to measure advancements in norm-building, conflict prevention, and political progression. AMSs often demonstrate the willingness to acknowledge conceptual aspirations 'but [do] not undertake the function[s]'[551]. Non-state actors, such as CSOs advocating RtoP, human rights, and eventually a more participatory regionalism, can push states to enforce the APSC Blueprint.

The adoption of APSC documents happened parallel to the creation of the AICHR in 2009. Soon after, the launching of the ACWC[552] followed, then the AHRD[553] was

[541] *ibid.* p. 2.
[542] *ibid.* pp. 2-3.
[543] ASEAN, 2004, p. 4; ASEAN Secretariat, 2009, p. 8.
[544] International Commission on Intervention and State Sovereignty, 2001, p. xi; United Nations General Assembly, 2005, UN Doc A/RES/60/1, para. 138; Coe, 2017, p. 296.
[545] ASEAN Secretariat, 2009, p. 1.
[546] Evans, 2008, p. 88.
[547] ASEAN, 2004, p. 4.
[548] International Commission on Intervention and State Sovereignty, 2001, pp. xi, 39.
[549] ASEAN Secretariat, 2009, p. 2.
[550] *ibid.*
[551] Wicaksana, 2013, p. 54.
[552] ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). *See* ASEAN Secretariat, 'ASEAN Commission on the Promotion and Protection of the Rights of Women and Children'.
[553] ASEAN Human Rights Declaration (AHRD). *See* ASEAN Secretariat, 'ASEAN Human Rights Declaration'.

adopted, and the AIPR[554]. ASEAN commenced adopting 'the language of protection'[555] in the APSC, ASCC, AICHR, ACWC, and AIPR documents. That was an important milestone within ASEAN's community building. The wording 'protection of human rights'[556] was often used in the APSC Blueprint together with other protection principles, like 'peace, conflict management and … resolution'[557], '[p]romote inter-communal understanding'[558], 'peace-oriented values'[559] and upholding norms of international law[560]. All other above-mentioned documents identified human rights protection as the pivotal element of ASEAN's envisioned community, recognizing 'the rights and responsibilities of member states'[561] and emphasizing an 'inter-communal understanding'[562] and non-discrimination. The ACWC, AIPR and AICHR even prioritised all relevant principles and issues of human protection in their mandates.[563] Moreover, states' primary responsibility is to implement the mentioned principles, as required by the ASEAN Charter and both APSC and ASCC blueprints. The principle of states being responsible for embracing diversity, promoting human protection, and upholding international law is, therefore, no unfamiliar principle to ASEAN.[564] It was always a fixed component of ASEAN's community-building endeavours and the promotion of ASEAN regionalism.

As now illustrated, ASEAN regionalism in the 2000s focused on community-building. It is significant to indicate that only half of AMSs have domestic human rights bodies in place. That mirrors how important member states view human rights implementation on the domestic level. ASEAN documents incorporated principles of the rule of law, democracy, and human rights. However, these 'effectively remain aspirations rather than necessarily shared values'[565].

3.3.3. RtoP's stance within ASEAN

[554] ASEAN Institute for Peace and Reconciliation (AIPR). *See* for example, ASEAN Secretariat, 2009, p. 10.
[555] Morada, 2019, p. 16.
[556] ASEAN Secretariat, 2009, pp. 1, 5.
[557] *ibid.* p. 10.
[558] *ibid.* p. 12.
[559] *ibid.*
[560] ASEAN Charter, art. 2(2)(c).
[561] Morada, 2019, p. 18.
[562] *ibid.*, p. 17.
[563] *See*, for example, ASEAN Secretariat, 2009, 'Terms of Reference of ASEAN Intergovernmental Commission on Human Rights', paras. 1(2), 4(2).
[564] High-Level Advisory Panel on the Responsibility to Protect in Southeast Asia, 2014, pp. 2-3.
[565] Morada, 2019, p. 20.

ASEAN's perceptions of RtoP experienced numerous scholarly assessments, which eventually diffuse, contest, reject, or adopt RtoP in ASEAN.[566] AMSs publicly endorsed RtoP and concurrently showed opposite positions within their regional setting when responding to serious human rights violations. Two approaches developed, providing responses.

3.3.3.1. Positive interpretation

First, there is the approach of positive interpretation. The approach here is that, although influenced by regional cultures and politics, ASEAN as a regional organization and AMSs have considerably progressed in the promotion of RtoP.[567] Scholars propose that ASEAN's sacred PNI is currently undergoing a recalibration to allow the provision of support, concerns to be expressed, and restricted diplomacy to be exercised internationally in instances of humanitarian catastrophes.[568] A certain agonism[569] of norms is identifiable. AMSs' contesting of RtoP developed novel regional ways of protection.[570] These are worth recognizing as advances. ASEAN's shift to a more people-centred regionalism and its community building, reflect this advancing change.[571] That shift is best demonstrated in the creation of ASEAN's human rights institutions, namely the AIPR, AICHR and ACWC, and in ASEAN HLAP[572] activities.[573]

The following assessment from a positive interpretation serves as an exemplary review and concludes with ASEAN's adoption of RtoP. Implementing RtoP in Southeast Asia is enormously challenging, conditioned by particular concerns among AMSs. The main and most essential concern is that RtoP contradicts ASEAN's traditional norm of PNI. Several factors underlie this discomfort with RtoP. Firstly, all AMSs, apart from Thailand, share a colonial background.[574] Secondly, the unmeasurable importance and perpetuation of ASEAN's core principles of territorial integrity, non-interference and the ASEAN way.[575] Thirdly, AMSs bitterly experienced the meddling of great powers in national affairs and their unilateral actions when following certain foreign policy

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[566] Maulana and Newman, 2022, p. 38.
[567] Bellamy and Davies, 2009, p. 551.
[568] Bellamy and Beeson, 2010, p. 275.
[569] Fossen, 2008, p. 376.
[570] Maulana and Newman, 2022, p. 38.
[571] *See* chaps. 3.3.1. and 3.3.2.
[572] ASEAN High Level Advisory Panel (hereinafter *ASEAN HLAP*); *See*, for example, High-Level Advisory Panel on the Responsibility to Protect in Southeast Asia, 2014, pp. 1-2.
[573] Morada, 2019, p. 16.
[574] Wicaksana, 2013, p. 49; *See* also, Evans, 2008, p. 58.
[575] *See* chap. 3.2.; Howe, 2018, p. 84.

objectives.[576] Lastly, AMSs face ongoing challenges founded on nation-state building within the setting of multiethnic societies.[577]

On the other hand, based on the unanimous support of AMSs for paragraphs 138-40, also being UN member states, and their agreement on the primary responsibility of states to protect their populations against atrocities, one assumes AMSs also support RtoP.[578] Some AMSs were 'clearly supportive'[579] of RtoP's Pillar One and Two, especially as they participated in regular UNGA debates.[580] Other AMSs showed concerns about possible abuses of Pillar Three, particularly the use of force. However, 'the norms and objectives of [RtoP] are not alien to ASEAN'[581], as examined earlier on.[582] Protecting populations from atrocities, being RtoP's essence, 'is consistent with and integral to the overall goals of'[583] ASEAN. And 'ASEAN already has … mechanisms and instruments'[584] for RtoP's implementation in place, such as the AICHR, ACWC, TAC, ADHR, and the ASEAN Charter[585].[586] Moreover, during the last years, ASEAN saw the need to focus on prevention since extreme violence, internal conflicts, and intolerance emerged, and thus posed concerns on regional security. Two documents were adopted upholding certain principles of human rights relating to RtoP and atrocity prevention.[587] These documents resonated, and conferences were held.[588]

3.3.3.2. Too little evidence and timid contestation

The second approach purports that not much evidence exists to be able to properly claim that RtoP has been incorporated into ASEAN's practices or localized in ASEAN.[589] Capie ascertained that promoting RtoP within ASEAN has largely been driven and encouraged by outsiders[590].[591] Accordingly, the positive interpretation is a hopeful triumph and a positive optimism for scholars in their efforts to cultivate forward-looking changes.

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[576] Sukma, 2012, p. 136.
[577] Morada, 2013, p. 248.
[578] Maulana and Newman, 2022, p. 38.
[579] Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 133.
[580] Petcharamesree, 2016, p. 139.
[581] High-Level Advisory Panel on the Responsibility to Protect in Southeast Asia, 2014, p. 3.
[582] *See* chap. 3.3.2.
[583] High-Level Advisory Panel on the Responsibility to Protect in Southeast Asia, 2014, p. 2.
[584] *ibid.* p. 3.
[585] ASEAN Charter, preamble, art. 2(2)(i)-(k).
[586] *See* chap. 3.3.2.; Capie, 2012, p. 88.
[587] ASEAN Secretariat, 'ASEAN Declaration on Culture of Prevention', 2017, paras. 1-9; ASEAN Secretariat, 'Joint Statement', 2017.
[588] Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 133.
[589] *See*, for example, Petcharamesree, 2016, p. 133-157; Sukma, 2012, pp. 135-152; Capie, 2012, pp. 75-93.
[590] *See*, for example, networks led be the Asia Pacific Centre for the Responsibility to Protect.
[591] Capie, 2012, p. 82.

However, with hardly any evidence that it actually happens.[592] Whereas CSOs and outsiders have significantly promoted RtoP in ASEAN, AMSs keep hold of their sovereignty.

Instead of regarding sovereignty as a responsibility, they uphold it as their explicit and indispensable right.[593] Indonesia and Thailand, for instance, expressed their support for RtoP during conferences, however, their RtoP implementation will have to be institutionalized to a much greater extent across ASEAN before it can be judged favorably..[594] AMSs rather subdued responses to the Rohingya crisis exemplify this retention.

[592] *ibid.,* p. 89.
[593] Tan, 2011, pp. 201-217.
[594] Caballero-Anthony, 2012, p. 117.

4. Case study of Myanmar's Rohingya

4.1. The Rohingya's history of discrimination, segregation and persecution

Since gaining independence from the British in 1948, Myanmar has had its fair share of strife between the state and its people.[595] Myanmar is 'a pre-eminent example of a post-colonial state subsumed in what development analysis describes as a "conflict trap"'[596]. Faced with challenges, such as its colonial history and ethnic uprisings, Myanmar implemented state policies emphasizing territorial integrity, sovereignty and national unity, including Burman, Myanmar's major Buddhist ethnic group and excluding certain ethnic groups.[597] Ethnic minorities make up forty percent of Myanmar's population.[598] Myanmar's policies negatively affected the human security of Myanmar's most marginalized communities. These ethnic groups experienced intercommunal violence and internal armed conflicts within Myanmar.[599] That resulted in around 275,000[600] IDPs living in camps in Rakhine, Kachin, Kayin and Shan states.[601]

4.1.1. The Rohingya's ethnic identity and origins

Especially Rohingya, a Muslim ethnic group in Rakhine, have experienced decades of oppression, discrimination and violence, resulting in mass atrocities.[602] Rohingya and Rakhine's highly contested history[603] is pivotal to this violence. Subsequent administrations repudiated Rohingya's existence as one of the 135 recognized ethnic groups, claiming Rohingya are 'illegal migrants from Bangladesh'[604].[605] That is shared by much of Myanmar's society, referring to Rohingya[606] as 'Bengalis'[607]. Rohingya have lived for centuries in Buddhist-majority Myanmar.[608] Muslim 'traders, warriors and

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[595] Kipgen, 2022, p. 25.
[596] Smith, 2007, p. 3.
[597] Howe, 2019, p. 200.
[598] Lindblom, Marsh, Motala, and Munyan, 2015, p. 5.
[599] United Nations Office for the Coordination of Humanitarian Affairs, 2019, p. 36.
[600] *ibid.*
[601] For example, by the end of 2018 there were 129,000 IDPs in Rakhine state, 92,000 IDPs in Kachin state, 5,600 IDPs, Kayin state, 15,000 IDPs in Shan state. *See* Arraiza and Davies, 2020, p. 121.
[602] Amnesty International, 2018, p. 20; O'Brien and Hoffstaedter, 2020, p. 209.
[603] Kipgen, 2022, p. 84.
[604] *ibid.*
[605] Kipgen, 2014, pp. 235-236.
[606] 'Rohingya is an ethno-religious term meaning Muslim people whose ancestral home is Arakan or Rakhine in Myanmar.' *quoted from* Zarni and Cowley, 2014, p. 685.
[607] 'In Myanmar's state media, official policy documents, and school textbooks, the Rohingya are referred to as Bengali, a racist local reference, and are portrayed as illegal economic migrants from the colonial time, who are a 'threat to national security, a portrayal that the bulk of the Burmese have accepted as a fact over the past five decades.' *quoted from* Zarni and Cowley, 2014, p. 685.
[608] Kipgen, 2022, p. 84.

saints'[609] settled and resided in Rakhine since the 12th century.[610] An estimated 3.5 million Rohingya are scattered worldwide.[611] Before 2017, over one million Rohingya lived in Rakhine.[612]

Myanmar's history of invasions is important to understand the ongoing violence. In 1886, Britain annexed Burma[613] for the third time.[614] Burma consisted of Buddhist Burman and many ethnic minorities.[615] Britain's colonialization produced a Buddhist nationalism within Burma.[616] Britain's invasion generated negative byproducts, for instance, treating different groups preferentially based on loyalty towards the British.[617] The Japanese invasion disrupted this status quo and further entrenched division.[618] 'Karen, Karin and Rohingya remained'[619] British loyalists, while Burman sided with the Japanese.[620] Historic events contributed to this division, for instance, during the 1942-1943 massacres when Rakhine Buddhists fought with Japan and Rohingya with Britain.[621] Britain promised Rohingya in return for their loyalty autonomous areas in Rakhine.[622] That 'polarisation of the two communities … fostered a dangerous social landscape'[623] and paved the path for ongoing conflicts until today.

4.1.2. Their deprivation of citizenship

Rohingya possess no citizenship in Myanmar.[624] They have been effectively deprived of citizenship due to the 1982 Citizenship Law and other discriminatory policies. Not having citizenship had a cascading negative effect on their lives.[625] It allowed Myanmar to impose severe restrictions on their freedom of movement and kept them segregated.[626] It

[609] *ibid.*
[610] Al Jazeera Staff, 2018.
[611] Albert and Maizland, 2020.
[612] *ibid.*
[613] Burma was changed to Myanmar in 1989.
[614] Ibrahim, 2016, p. 26.
[615] Kipgen, 2022, p. 24.
[616] Mohajan, 2018, p. 20.
[617] Erameh and Ojakorotu, 2021, p. 55.
[618] Kipgen, 2022, p. 24.
[619] Erameh and Ojakorotu, 2021, p. 55.
[620] Barany, 2019, p. 4.
[621] Farris, 2017.
[622] Green, MacManus, de la Cour Venning, 2015, p. 48.
[623] *ibid.* p. 28.
[624] Amnesty International, 2018, p. 20.
[625] Amnesty International, 2017, p. 42.
[626] *ibid.*, pp. 42-58.

has heavily restricted access to education,[627] food,[628] employment opportunities,[629] health care,[630] land rights,[631] and reproductive[632] and marital[633] rights.

After 1948 Rohingya were granted citizenship[634] and recognized as a distinct ethnicity in the 1950s.[635] Ethnicity or religion was insignificant in obtaining Burmese citizenship under the 1949 Registration Act receiving NRCs.[636] Rohingya's identity as an ethnic group 'was systematically erased by the increasingly anti-Muslim military-controlled governments since 1962'[637]. The clearest examples of their oppression are the 1978 *Nagamin* Operation[638] and the citizenship law[639], discriminating based on ethnicity.[640] This law defines the 135 ethnic groups eligible for citizenship, excluding Rohingya as an ethnic group.[641] Many scholars concluded that the law deprived Rohingya of citizenship, rendering Rohingya *de jure* stateless.[642]

However, this conclusion ignores the law's substance and misunderstands the sort of government ruling Myanmar. Section 6 specifies that persons who possessed citizenship when the law took effect shall remain citizens.[643] During re-registration, Rohingya had to swap their NRCs with new 'pink cards'[644]. That resulted in registration officers refusing to re-register Rohingya, who instead received temporary registration cards.[645] Rohingya could apply for naturalized citizenship requiring adequate proof of long-standing residence before independence.[646] Most Rohingya lacked sufficient documentation and thus were unable to claim citizenship.[647] Rohingya are, therefore, *de facto* stateless.

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[627] *ibid.*, p. 66.
[628] *ibid.*, p. 77.
[629] *ibid.*, pp. 73-79.
[630] *ibid.*, p. 60.
[631] Centre for Policy Development, 2015, p. 18.
[632] Ibrahim and Nordin, 2015, p. 4; Wade, 2017, p. 95.
[633] Equal Rights Trust, 2016, p. 4; Adams, 2019, p. 438.
[634] Government of the Union of Burma, n.d..
[635] Song and Cook, 2014, p. 71; Equal Rights Trust, 2016, p. 2.
[636] Cheesman, 2015.
[637] Zarni and Cowley, 2014, p. 685.
[638] Equal Rights Trust, 2016, p. 3.
[639] Online Burma/Myanmar Library, 2019.
[640] Zawacki, 2013, p. 18.
[641] Equal Rights Trust, 2016, p. 2.
[642] *See*, for example, Erameh and Ojakorotu, 2021, p. 56; Ibrahim and Nordin, 2015, p. 4.
[643] Online Burma/Myanmar Library, 2019, 'Burma Citizenship Law of 1982', section 6.
[644] Cheesman, 2015.
[645] *ibid.*
[646] Online Burma/Myanmar Library, 2019, 'Burma Citizenship Law of 1982', section 42.
[647] Equal Rights Trust, 2016, p. 3.

4.1.3. Waves of violence in Rakhine State

Rohingya have been victims of phases of extreme violence and constant human rights violations, which 'made them the world's most persecuted minority'[648]. Since the 1970s, over 1.3 million Rohingya fled Myanmar.[649] In 1978, Burma enforced Operation *Nagamin* targeting Rohingya and waging 'brutalities and atrocities'[650] against them, which forced 200,000 Rohingya to flee to Bangladesh.[651] In 1979, most returned since Bangladesh forced them by reducing food rations.[652]

Between 1991-1992, Myanmar established the *NaSaKa* border force in Rakhine, which imposed several restrictions, such as freedom of movement[653] and marriage,[654] forced labour, [655] arbitrary detention[656] on Rohingya, and became victims of sexual violence[657]. Those acts, including killings and burning villages, forced 250,000 Rohingya to flee.[658] Most returned by 1996 after coercive repatriation processes by Bangladesh.[659]

In 2012, Rohingya's situation worsened, and violence erupted in waves between Rakhine Buddhists and Rohingya.[660] Rakhine Buddhists supported by Tatmadaw[661] targeted attacks against Rohingya.[662] Killing dozens and destroying thousands of houses,[663] resulted in 140,000 displaced Rohingya.[664] After 2012, human rights abuses against Rohingya continued and increased, for instance, arbitrary arrests, detention, ill-treatment, torture, forced labour, sexual abuse and extrajudicial killings.[665]

In October 2016, ARSA[666] attacked police outposts and killed nine policemen.[667] Myanmar categorized ARSA as terrorists.[668] Tatmadaw responded with clearance

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[648] United Nations Human Rights Council, 2023.
[649] *ibid.*; O'Brien and Hoffstaedter, 2020, p. 209.
[650] Scully and Trager, 1979, p. 153.
[651] Van Hear, 1998, p. 96; United Nations Human Rights Council, 2018, UN Doc A/HRC/39/CRP.2, para. 475.
[652] Amnesty International, 2018, p. 22.
[653] Wade, 2017, pp. 93-4.
[654] Equal Rights Trust, 2014, p. 10; Fortify Rights, 2014, p. 33; Lindblom, Marsh and Motala, 2015, pp. 16-17.
[655] Irish Centre for Human Rights, 2010, pp. 41-49.
[656] Human Rights Watch, 2012.
[657] Irish Centre for Human Rights, 2010, pp. 74-5; Amnesty International, 2018, p. 22.
[658] International Human Rights Clinic, 2009, p. 14.
[659] Human Rights Watch, 1996.
[660] Human Rights Watch, 2013, p. 47; Wade, 2017, p. 103.
[661] Since 1962, Myanmar's armed forces, namely the Tatmadaw, directly ruled from 1962 to 2011, indirectly from 2011 until 2021. Since the coup on 1 February 2021 the Tatmadaw has ruled again directly. *See* Barany, 2019, p. 8.
[662] Equal Rights Trust, 2016, p. 5; Human Rights Watch, 2012.
[663] United Nations Human Rights Council, 2018, UN Doc A/HRC/39/CRP.2, para. 628.
[664] United Nations Human Rights Council, 2016, UN Doc A/HRC/32/18, para. 10.
[665] *ibid.*, paras. 29-30.
[666] The Arakan Rohingya Solidarity Army (hereinafter *ARSA*), formerly known as Harakah al-Yaqin, are Rohingya insurgents and emerged after the 2012 violence, poorly armed and trained. *See* Freeman, 2017; United Nations Human Rights Council, 2018, UN Doc A/HRC/39/CRP.2, paras. 1011-1012.
[667] France-Presse, 2016.
[668] United Nations Human Rights Council, 2018, UN Doc A/HRC/39/CRP.2, para. 751.

operations which were brutal violence in the form of widespread and systematic 'unlawful killings, sexual violence, and the burning down of houses and entire villages of Rohingya'[669].[670] That violence produced about 87,000 refugees fleeing to Bangladesh.[671] Rohingya's humanitarian situation dramatically worsened since Myanmar was restricting humanitarian aid agencies.[672] Restrictive measures against Rohingya intensified, and the presence of security forces increased between 2016-2017.[673]

4.2. The Rohingya's mass exodus of 2017

4.2.1. The tragedy of 25 August 2017

What happened in 2017 was an unfolding of catastrophes that had long been brewing. It was the result of Rohingya's systematic oppression, disintegration and ongoing violence.[674] On August 25, 2017, ARSA attacked one military base and nearly thirty security posts across Rakhine, killing twelve guards.[675] ARSA described their attacks 'as "defensive actions"'[676], aiming at drawing 'international attention'[677] to Rohingya's suffering.

Tatmadaw responded immediately with exorbitant brutal and disproportionate violence 'to eliminate the "terrorist threat" posed by ARSA'[678]. Tatmadaw's clearance operations targeted Rohingya's entire population, committing 'human rights violations on a colossal scale'[679]: killing[680], injuring and raping thousands, including children.[681] According to UN estimates, some 742,00 Rohingya have been forced to take refuge in Bangladesh,[682] around 126,000 Rohingya became IDPs,[683] and thousands fled by sea,[684] since the escalating violence in 2017.[685] Eighty percent of Rohingya's population fled.[686]

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[669] Equal Rights Trust, 2016, p. 6.
[670] Amnesty International, 2016, pp. 8-9.
[671] Amnesty International, 2018, p. 22.
[672] Wade, 2017, pp. 209-210; United Nations World Food Programme, 2016, p. 2.
[673] United Nations Human Rights Council, 2018, UN Doc A/HRC/39/CRP.2, para. 1096.
[674] *ibid.*, para. 749.
[675] *ibid.*, para. 750; *See* also Adams, 2019, p. 439.
[676] Amnesty International, 2018, p. 22.
[677] United Nations Human Rights Council, 2018, UN Doc A/HRC/39/CRP.2, para. 1047.
[678] *ibid.*, para. 751.
[679] *ibid.*, para. 883.
[680] *ibid.*, para. 1008. The death toll of the 2017 clearance operations is impossible to determine but is estimated of more than 43,000 deaths of Rohingya. *See* also Adams, 2019, p. 441.
[681] *ibid.*, paras. 883, 920-941; Morada, 2018, p. 120.
[682] United Nations High Commissioner for Refugees, 2019.
[683] United Nations Human Rights Council, 2019, UN Doc A/HRC/42/CRP.5, p. 19.
[684] *ibid.*, p. 72.
[685] Smith and Williams, 2021, p. 159.
[686] Adams, 2019, p. 440.

The IIFFMM[687] concluded that the 2017 events are atrocity crimes under international law.[688] UN Human Rights Commissioner al-Hussein described them as a 'textbook example of ethnic cleansing'[689] having 'the hallmarks of genocide'[690].[691]

4.2.2. Developments post-2017

On 5 September 2017, Tatmadaw purported to have ceased its operations.[692] But Violence continued and destroyed 364 Rohingya villages.[693] In 2018, Tatmadaw erased all remnants of Rohingya's existence, bulldozing 55 destroyed villages and building military camps and non-Rohingya villages.[694] Today, around 600,000 Rohingya survive in IDP camps and unofficial housing schemes within Rakhine.[695] Their conditions experienced no change but worsened since root causes have not changed.[696] Rohingya 'live under genocidal policies in apartheid-like conditions'[697] and 'the threat of genocide continues'[698]. Myanmar's 2021-coup and ongoing repression inflicted further suffering on Rohingya. Chances of safe repatriation diminished since the coup was led by those responsible for atrocities.[699] Since the coup, Tatmadaw detained thousands of Rohingya for travelling without permission, tightened restrictions and blocked humanitarian aid.[700]

Bangladesh hosts nearly one million Rohingya.[701] Rohingya's living conditions in Bangladesh's refugee camps are dire, and the burden of hosting them is frustrating Bangladesh.[702] There were allegations of coercion in Bangladesh's return of Rohingya. To date, however, Bangladesh has complied with its obligation of *non-refoulement*.[703] Recent years saw two failed attempts to implement a workable repatriation plan.[704]

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[687] United Nations Human Rights Council Independent International Fact-Finding Mission on Myanmar (hereinafter *IIFFMM*).
[688] United Nations Human Rights Council, 2019, UN Doc A/HRC/42/CRP.5, p.72; Adams, 2019, p. 439.
[689] United Nations Office of the High Commissioner for Human Rights, 2017.
[690] United Nations Human Rights Council, 2018, UN Doc A/HRC/37/70, para. 65.
[691] Adams, 2019, p. 437.
[692] Morada, 2028, p. 119.
[693] Human Rights Watch, 2017.
[694] Human Rights Watch, 2018; Adams, 2019, p. 441.
[695] United Nations Human Rights Council, 2023; Human Rights Watch, 2023.
[696] Human Rights Watch, 2023.
[697] Asian Forum for Human Rights and Development, 2022, p. 1.
[698] Pramendorfer, 2020, p. 240.
[699] Asia Pacific Refugee Rights Network, 2022, p. 4; Barany, 2019, p. 11.
[700] Human Rights Watch, 2023.
[701] Kean, 2022.
[702] *ibid.*; Human Rights Watch, 2023.
[703] Human Rights Watch, 2023; Kean, 2022.
[704] For example, in 2018 and 2019. *See* Kean, 2022.

Currently, Myanmar and Bangladesh aim to realize a third repatriation project. Criticism is strong since Rohingya would 'face serious risks to their lives and liberty'[705].

4.3. Myanmar's response to the Rohingya Crisis

Since the 1960s, Myanmar has envisioned a Burman nation in which the Buddhist majority dominates all other ethnic groups. Particularly, Rohingya have no place in that nation.[706] Myanmar's policy, especially its citizenship law, resulted in over one million Rohingya migrating. From Myanmar's perspective, Myanmar is slowly achieving its vision. Myanmar claims to be implementing the latest repatriation plan, but Rohingya would live in detention camps, stateless and facing countless restrictions.[707] Myanmar's commitment is not genuine, being typical for Myanmar's response to the Rohingya crisis.

Myanmar's common reactions have been either denial, lies, indifference or remaining silent. Myanmar has always insisted on treating Rohingya as an internal affair and invoked PNI.[708] The 1978 and 1991-1992 exoduses were treated bilaterally with Bangladesh as immigration issues.[709] In the aftermath of the 2012 violence, Myanmar was indifferent and made no statement condemning the deadly violence.[710] Instead, Myanmar 'denied the severity of the violence and allegations of abuse'[711].

Myanmar came under increasing criticism for its weak stance on the crisis, particularly in 2016.[712] Aung needed to counteract and agreed to establish an advisory commission on Rakhine, headed by Annan.[713] The Commission was instructed not to investigate human rights abuses but to focus on humanitarian aid and conflict resolution.[714] Aung requested not to use the term Rohingya.[715] The Commission released its final report on 23 August 2017, calling to amend the citizenship law and lift movement restrictions.[716] One day later, violence inconceivably escalated.

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[705] United Nations Office of the High Commissioner for Human Rights, 2023.
[706] Minority Rights Group International, n.d..
[707] Human Rights Watch, 2023.
[708] Petcharamesree, 2016, p. 153.
[709] Thuzar, 2016, p. 27.
[710] Aung, n.d., p. 4.
[711] Human Rights Watch, 2013, p. 84.
[712] Minority Rights Group International, n.d..
[713] Kofi Annan Foundation, 2017, 'Advisory Commission on Rakhine State'; Mennecke and Stensrud, 2021, p. 118.
[714] Minority Rights Group International, n.d..
[715] Advisory Commission on Rakhine State, 2017, p. 12.
[716] *ibid.,* p. 27; Kofi Annan Foundation, 2017, 'Advisory Commission on Rakhine State: Final Report'.

4.4. Myanmar within ASEAN

4.4.1. ASEAN's constructive engagement policy towards Myanmar

To comprehend ASEAN's reaction to the Rohingya crisis, it is relevant to consider the relationship between ASEAN and Myanmar and how they engage with each other. The possible extension of Myanmar's membership raised concerns about ASEAN's traditional policy.[717] ASEAN was reticent since Western states and NGOs tried to influence ASEAN not to confer legitimacy to Myanmar's military government, namely SLORC[718], which rejected to accept NLD's[719] 'landslide victory'[720] in 1990.[721] Ultimately and notwithstanding all diplomatic efforts, ASEAN engaged with Myanmar, hoping human rights circumstances better. In spite of Myanmar's massive human rights violations[722] and numerous armed attacks against Thailand, Myanmar became an AMS (1997).[723]

However, ASEAN's PNI does not imply non-engagement. In recent years, ASEAN has applied a 'constructive engagement'[724] (CE) policy towards Myanmar. CE emerged during the Cold War attempting to realize strategically and economically important matters of ASEAN and 'displace the Cold War security framework'[725].[726] Their aim was the creation of trading structures within ASEAN to escape increasing communist powers.[727] Maintaining regional stability was more important to CE than a possible democratic regime transition in Myanmar regarding Myanmar's membership.[728] Regime change would rather be a step-by-step process in consensus with the politicians involved instead of sanctioning Myanmar,[729] according to CE.[730]

ASEAN's policy goal is to interact with Myanmar's elites while involving them and modifying Myanmar's views in small steps. Some AMSs advocated business investment in Myanmar.[731] The improvement of Myanmar's economy should then be

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[717] Kipgen, 2022, p. 102.
[718] State Law and Order Restoration Council (hereinafter *SLORC*); *See* also, Kipgen, 2022, p. 115.
[719] National League for Democracy (hereinafter *NLD*).
[720] Kipgen, 2022, p. 118.
[721] Morada, 2018, p. 99.
[722] For example, the massive killings of protestors in 1988. *See* Human Rights Watch, 2001, 'World Report of Human Rights Watch on Burma'; Kipgen, 2022, pp. 121-122.
[723] Kipgen, 2022, p. 103; Ramcharan, 2000, pp. 66-67; Rosyidin, 2020, p. 30.
[724] Jones, 2008, p. 273.
[725] Jones, 2008, p. 273.
[726] Bangkok Declaration, p. 2.
[727] *supra* note Chapter 3.1.3. at p. 32.
[728] Kipgen, 2022, p. 140.
[729] For example, US and EU sanctions. *See* Kipgen, 2022, pp. 91-97.
[730] Jones, 2008, p. 273.
[731] For example, Singapore, Thailand and Malaysia. *See,* Kipgen, p. 103; Jones, 2008, p. 273.

supported by this engagement. AMSs ostensibly share the same goals as Western states but with a different approach. ASEAN's eventual aim, like that of the West, was the encouragement of Myanmar 'to move gradually towards democracy and a market economy'[732], being Myanmar's and ASEAN's long-term interest.[733] Instead of isolating and treating Myanmar as an outcast, ASEAN aimed to realize the long-term 'idea of "One Southeast Asia" wherein all states … were part of ASEAN'[734]. ASEAN intended to strengthen its position towards major powers during uncertain security environments post-Cold War.[735]

After Myanmar's admission, ASEAN CE policy with its junta aimed at stimulating political changes, but the AFC and resulting instabilities undermined ASEAN's standing and coherence slightly. More authoritarian AMSs, such as Myanmar, now adhered to PNI even more.[736] Absent significant shifts within Myanmar following its admission frustrated Western states.[737] ASEAN claimed patience.[738] AMSs single-minded determination to proceed with ASEAN's 'back-door diplomacy'[739] with countless diplomatic undertakings with Myanmar sustained. In a sense, CE is ASEAN's strategy to bypass its PNI through 'back-door diplomacy'[740] to get Myanmar to react more favourably to ASEAN's concerns, particularly regarding ASEAN's standing with the international community.[741] Especially with Myanmar, ASEAN has utilised CE in various instances.[742]

4.4.2. ASEAN's behaviour to past crises in Myanmar

To understand ASEAN's reaction to the Rohingya crisis, it is decisive to understand its reactions to previous human rights and humanitarian cases in Myanmar since these shaped ASEAN's responses. After 2006, ASEAN's CE was initially directed at releasing Aung and reconciling Myanmar's junta and democratic forces, however, human rights

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[732] Jones, 2008, p. 273; *See*, also, Morada, 2018, p. 100.
[733] Kipgen, 2022, p. 103, Morada, 2018, p. 100.
[734] Morada, 2018, p. 100.
[735] *ibid.*
[736] Jones, 2008, p. 276.
[737] *ibid.,* p. 277.
[738] Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 138.
[739] Morada, 2018, p. 101; Morada, 2017.
[740] Morada, 2018, p. 101.
[741] Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 138.
[742] For example, ASEAN's persuasion of Myanmar's junta to agree to hand our ASEAN's hand over ASEAN's chairmanship in 2006. Pressure from ASEAN's Western interlocutors followed who were concerned about Myanmar's continuing human rights abuses. ASEAN's back-door diplomacy was also employed after the international pressured Myanmar's violent crackdown in 2007, during Cyclone Nargis in 2008, and during the violence in Rakhine in 2012. *See* also, Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 139.

issues increased in dimension, especially after violently suppressing Buddhist monk protests in 2007 and the Cyclone Nargis aftermath humanitarian crisis in 2008.[743] These instances gave cause for concern for Myanmar's attitude towards international human rights and humanitarian law standards but also exhibited ASEAN's restriction in taming Myanmar amid increasing international pressure.[744]

The Cyclone hit Myanmar's south in 2008, killed 84,500 people, and around 53,000 went missing.[745] Myanmar accepted ASEAN's aid immediately after, but banned international humanitarian assistance days later.[746] Myanmar worried that such aid, including foreign troops and aid workers, could be used as an excuse for Western intervention. International criticism was strong, ranging from accusations of transforming 'a natural disaster … into a man-made catastrophe'[747] to invoking RtoP to force Myanmar to permit aid[748]. ASEAN's backdoor diplomacy ultimately influenced Myanmar, and the aid's deadlock was lifted.[749] Eventual humanitarian assistance was well-coordinated between ASEAN, Myanmar and the UN.[750] ASEAN was an interlocutor between the international community and Myanmar. Because of ASEAN's diplomacy of persistent CE, ASEAN was able to respond effectively to a humanitarian crisis within an AMS whose government is regarded as a pariah by the international community.[751]

4.5. ASEAN's response to the Rohingya Crisis

4.5.1. Soft and quiet diplomatic approach

Almost all AMSs acknowledged the humanitarian issues related to Rohingya. Nonetheless, given the ASEAN way and ASEAN's way of doing diplomacy, it is better to deal with issues through ASEAN's machinery.[752] ASEAN's elites[753] assert to treat the crisis as a domestic concern, and thus leave the matter within Myanmar's jurisdiction.

[743] Evans, 2008, p. 65-8; BBC News, 2007.
[744] Morada, 2018, p. 104-106.
[745] International Federation of Red Cross And Red Crescent Societies, 2011.
[746] Morada, 2018, p. 108; Public Outreach and Civil Society Division, 2009, p. 10.
[747] BBC News, 2008.
[748] Mydans, 2008; A note must be made here: A natural disaster is *per se* not a RtoP case. However, it can turn into one if atrocity crimes are also perpetrated. For a closer elaboration on this case through the lens of RtoP. *See* Evans, 2008, pp. 65-66.
[749] Morada, 2018, p. 110.
[750] Public Outreach and Civil Society Division, 2009, pp. 10-11.
[751] Morada, 2018, p. 111.
[752] Maulana and Newman, 2022, p. 68.
[753] *ibid.*

These reactions best picture ASEAN's regimes protecting their populations, which must be interpreted within the framework of its traditional norms and the ASEAN way.[754]

Instead of invoking RtoP, Indonesia prefers 'the quiet diplomacy approach'[755] towards the Rohingya crisis, which most AMSs followed. Some 'democratic and semi-democratic'[756] AMSs maintain that they gathered 'experiences of managing [own] civil-military'[757] or 'ethno-nationalist'[758] conflicts and, thus, have 'a sense of a shared political history with Myanmar'[759]. Myanmar was in a democratisation process from 2011 until the 2021 *coup d'état*.[760] In that period, the violence escalation against Rohingya climaxed. AMSs aimed to establish 'a long-term relationship with Myanmar'[761], avoiding a 'more hard-line position'[762] and enabling 'political and humanitarian access'[763].[764]

AMSs have preferred to employ 'an 'open door' approach while 'building trust' and confidence with'[765] Myanmar, which was compatible with the ASEAN way.[766] The ASEAN way allowed for an open consultation with Myanmar. In return, Myanmar regarded ASEAN as an interlocutor of trust since Myanmar agreed to discuss and update ASEAN on the Rohingya crisis.[767] Commonly, these dialogues were unofficial and low-key. Myanmar being relatively open towards ASEAN stands in contrast to Myanmar's reluctance to talk with Western governments. Those used methods of naming-and-shaming that ran counter to ASEAN's approach.[768]

4.5.2. ASEAN and the Rohingya crisis: An in-depth analysis

4.5.2.1. Responding to atrocities between 2012 and 2016

The following sections look in more detail on how ASEAN responded to the Rohingya crisis. Before 2012, Rohingya were not much of an issue in ASEAN, except their constant emigration across the Indian Ocean since the 1990s, and criticism from NGOs for Thailand's failure to protect Rohingya who fled Myanmar and detaining them 'as illegal

[754] *supra* note Chapter 3.2. at p. 36.
[755] Smith and Williams, 2021, p. 158.
[756] *ibid.* p. 162.
[757] *ibid.* p. 161.
[758] *ibid.* p. 162.
[759] *ibid.* p. 161.
[760] Kipgen, 2022, pp. 1, 166; Ko Ko, 2018, p. 37.
[761] Smith and Williams, 2021, p. 162.
[762] *ibid.*
[763] *ibid.* p. 184.
[764] Fauzia, 2017, p. 230.
[765] *ibid.* p. 162.
[766] Bon and Wana, 2022, p. 3.
[767] *ibid.*
[768] *ibid.*

migrants … after their boats landed in Thai territory and were towed back to sea, adrift for several days'[769]. In 2012, communal violence in Rakhine exacerbated the mass flight of Rohingya refugees, forcing ASEAN to respond to this humanitarian crisis.[770] Regional and international NGOs and academics appealed at ASEAN to react. ASEAN foreign ministers issued a statement, voicing concern and offering humanitarian assistance upon Myanmar's request.[771] Myanmar refused, saying the Rakhine conflict was an internal matter.[772] At Myanmar's insistence, the statement omitted the word 'Rohingya'.

The issue remained contentious not only among AMSs but also NGOs and the UN.[773] Some AMSs, along with the international community, were deeply concerned.[774] Indonesia raised Rohingya's situation during an OIC meeting in 2012, calling Rohingya's persecution a CAH that contradicts Myanmar's 'recent efforts towards democracy'[775] and classifying '[a]ny act of discrimination on the basis of religion or ethnicity'[776] as unacceptable. After assuming the chair in 2014, Myanmar denied the Rohingya issue's inclusion in the meetings' agendas, invoking PNI.[777] When Myanmar hosted ACSC/APF meetings, it banned any discussion on Rohingya.[778] Whereas the UN and US increased pressure on Myanmar to take action to resolve the crisis and to fully resume humanitarian aid, ASEAN was mostly silent.[779]

Since 2012,[780] anti-Muslim sentiments have further spread across Myanmar, leading to more deadly riots against Muslims.[781] In 2014, one of many deadly violence between Buddhists and Muslims broke out in Mandalay.[782] For years, MaBaTha, an ultra-nationalist Buddhist faction, spread anti-Muslim rhetoric and instigated attacks against Muslim minorities throughout Myanmar.[783] During Myanmar's chairmanship, ASEAN

[769] Morada, 2018, p. 112; *See* also, MacKinnon and Sturcke, 2009.
[770] Green, MacManus, de la Cour Venning, 2015, p. 20.
[771] ASEAN Secretariat, 2012, 'Statement of ASEAN Foreign Ministers on the Recent Developments in the Rakhine State, Myanmar, Phnom Penh, Cambodia, 17 August 2012'; Petcharamesree, 2016, p. 152.
[772] *ibid.*
[773] Human Rights Watch, 2013, p. 11.
[774] Petcharamesree, 2016, p. 152.
[775] Kassim, 2012.
[776] *ibid.*
[777] Morada, 2018, p. 113; Kundu, 2015, p. 7.
[778] ASEAN Civil Society Conference/ASEAN Peoples' Forum (hereinafter *ACSC/APF*).
[779] Petcharamesree, 2016, p. 153.
[780] Amnesty International, 2018, p.12.
[781] Kyaw, 2016, pp. 183-84; For example, further deadly riots against Muslims took place in cities, such as Meiktila, Okkan, Lashio and Kanbalu in 2013, and Mandalay in 2014.
[782] Hume, 2014.
[783] McPherson, 2017.

made no statement on these events.[784] Compared to ASEAN's behaviour of earlier years, that is an evident contrast. ASEAN has always addressed Myanmar in summit statements in the years prior to Myanmar's chairmanship.[785] These statements reflected the other AMSs' views on Myanmar's political conditions. Neither in 2015 nor 2016 a formal statement on Myanmar was made.[786]

Nevertheless, the violence within Rakhine and other areas continued to be an important issue for ASEAN. Rohingya's situation deteriorated in 2015 when Myanmar announced that their temporary identity cards end in March 2015.[787] The result was an increased exodus, particularly in 2015. Countless Rohingya died in the Indian Ocean while fleeing by boat.[788] In May 2015, mass graves were discovered in border areas of neighbouring AMSs, evidence that Rohingya were victims of human trafficking.[789] This aggravated situation caused Malaysia's foreign minister to demand ASEAN to respond collectively and resolve the issue within ASEAN.[790] He stressed the crisis spilled over into AMSs and is, therefore, 'no longer ... Myanmar's internal issue'[791].

Some ASEAN foreign ministers reacted, condemning in a statement the 'smuggling and human trafficking'[792] reminding ASEAN to focus on 'root causes and other contributory factors'[793].[794] The word Rohingya was not used, nor was Myanmar pointed at.[795] Under ASEAN's CE policy towards Myanmar, it became ASEANs' practice not to apply Rohingya within statements to accommodate Myanmar.[796] In typical

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[784] For example, there is no mention of Myanmar's political situation in the summit statements of 2014. *See*, ASEAN Secretariat, 2014, 'Chairman's Statement of the 24th ASEAN Summit'; ASEAN Secretariat, 2014, 'Chairman's Statement of the 25th ASEAN Summit'; Morada, 2019 p. 19.
[785] For example, usually the summits statement included a paragraph on Myanmar, which was to be fond under regional and international issues. *See*, ASEAN Secretariat, 2005, 'Chairman's Statement of the 11th ASEAN Summit', para. 34; ASEAN Secretariat, 2006, 'Chairman's Statement of the Thirteenth ASEAN Regional Forum', paras, 19-20; ASEAN Secretariat, 2007, 'Chairman's Statement of the 13th ASEAN Summit', para. 16; ASEAN Secretariat, 2009, 'Chairman's Statement of the 14th ASEAN Summit', paras. 42-43; ASEAN Secretariat, 2009, 'Chairman's Statement of the 15th ASEAN Summit', para. 46; ASEAN Secretariat, 2010, 'Chairman's Statement of the 16th ASEAN Summit', para. 50; ASEAN Secretariat, 2011, 'Chair's Statement of the 18th ASEAN Summit', p. 23; ASEAN Secretariat, 2011, 'Chair's Statement of the 19th ASEAN Summit Bali', p. 39; ASEAN Secretariat, 2012, 'Chairman's Statement of the 20th ASEAN Summit', p. 11; ASEAN Secretariat, 2012, 'Chairman's Statement of the 21st ASEAN Summit', p. 1.
[786] For example, the following summit statements: ASEAN Secretariat, 2015, 'Chairman's Statement of the 26th ASEAN Summit'; ASEAN Secretariat, 2015, 'Chairman's Statement of the 27th ASEAN Summit'; ASEAN Secretariat, 2016, 'Chairman's Statement of the 28th and 29th ASEAN Summits'.
[787] Weng, 2015; Kipgen, 2022, p. 85
[788] Thom, 2016, pp. 46-7.
[789] Petcharamesree, 2016, p. 153; Human Rights Watch, 2015; Morada, 2018, p. 114; Yi, 2015.
[790] The Star, 2015.
[791] *ibid.*
[792] Reliefweb, 2015.
[793] *ibid.*
[794] For example, Malaysia and Indonesia consented to temporarily care for Rohingya refugees until their resettlement. *See*, Cochrane, 2015, 'Indonesia and Malaysia Agree to Care for Stranded Migrants'; Morada, 2018, p. 115.
[795] Suzuki, 2019, p. 170; Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 140.
[796] *ibid.* p. 120, fn. 68.

ASEAN fashion, the statement was worded in general terms, and the crisis was placed in a wider context of human trafficking and irregular migration, hampering to proper manage the crisis. Such a framing of the crisis does not do justice to the root causes of the crisis. Preeminently, the crisis was framed as a humanitarian matter instead of a human rights case. That meant that humanitarian actions were taken instead of RtoP measures.

A meeting of AMSs, UN agencies and other states followed discussing the ongoing humanitarian crisis of Rohingya fleeing Myanmar and related human trafficking in May 2015.[797] After diplomatic manoeuvres, Myanmar also participated. Previously Myanmar rejected any meeting referring to Rohingya.[798] The statement following the meeting recommended focusing on 'root causes and living conditions of at-risk communities in the areas of origin'[799].[800] It neither utilised the word Rohingya nor did it refer directly to Myanmar, where 'at-risk communities'[801] originate.

Shortly after, ASEAN adopted a declaration on irregular migration,[802] which refrained from mentioning Rohingya's plight. During its drafting, the three most impacted AMSs by Rohingya exodus, namely Thailand, Malaysia and Indonesia, deliberately avoided the terms Myanmar and Rohingya to accommodate Myanmar's position. By refusing to name and shame Myanmar, they hoped for Myanmar's cooperation and increased responsiveness to the humanitarian situation in Rakhine and ASEAN's concerns over spillover effects. This declaration is a prime example of ASEAN's CE.

It became apparent that the Rohingya crisis also affected other states. The crisis commenced to potentially pose a direct threat to AMSs because it threatened to undermine regional security and economic stability.[803] Politicians[804] of several AMSs, for instance, stepped up and could no longer look at the escalating crisis deedless. They turned to the 2015 ASEAN Chairman expressing 'concern [about] rising intolerance

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[797] Cochrane, 2015, 'In Reversal, Myanmar Agrees to Attend Meeting on Migrant Crisis'.
[798] *ibid.*
[799] Morada, 2018, p. 115; *See* also, Ministry of Foreign Affairs, Kingdom of Thailand, 2015.
[800] For example, these risk causes and living conditions would include 'capacity building of local communities, providing economic incentives that create more jobs, promoting trade and investment and development assistance to the at-risk areas, providing skills training, infrastructure development, enhancing a sense of security and belonging, promoting full respect for human rights and adequate access of people to basic rights and services such as housing, education and healthcare, with involvement of the private sector and relevant stakeholders, and in this regard, took note with appreciation humanitarian and development assistance offered by countries both inside and outside the region towards at-risk areas'. *See,* Ministry of Foreign Affairs, Kingdom of Thailand, 2015.
[801] Ministry of Foreign Affairs, Kingdom of Thailand, 2015; Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 140.
[802] ASEAN Secretariat, 2015, 'Kuala Lumpur Declaration on Irregular Movement of Persons in Southeast Asia'.
[803] Mizzima, 2015; ASEAN Parliamentarians for Human Rights, 2015, p. 15.
[804] For example, former Malaysian Foreign Minister Albar, former Malaysian Prime Minister Badawi, former Thai Foreign Minister Kasit Promiya, and former ASEAN Secretary General Surin Pitsuwan. *See* Morada, 2018, p. 116.

against religious and ethnic minorities in Myanmar'[805]. The APHR also raised their voices addressing 'ASEAN leaders must urgently respond to the escalating crisis for Rohingya Muslims and other vulnerable minorities in Myanmar'[806]. Further, ASEAN has 'the responsibility, both morally and under international law, to act to prevent atrocity crimes and crimes against humanity from taking place'[807].

4.5.2.2. Responding to atrocities from 2016 onwards

Although Aung's party won the 2015 elections, Rohingya's situation worsened.[808] The crisis entered a new phase of violence when 'militants sympathetic to the Rohingya'[809] attacked border police in Rakhine in October 2016.[810] Tatmadaw[811] then carried out clearance operations along border areas, increasing the number of Rohingya fleeing to Bangladesh.[812] International allegations accused Tatmadaw of committing atrocities.[813]

Myanmar responded by establishing the Independent ICoE[814] investigating those allegations.[815] Annan headed the ICoE which was mandated to develop proposals addressing root causes including granting citizenship. ASEAN hoped that the violence in Rakhine was more likely to better and was strongly supportive promising to assist Myanmar in the implementation of recommendations.[816] But, in early 2017, the ICoE concluded that no proof existed for allegations of genocide or widespread rape committed by Tatmadaw.[817] Soon after, an OHCHR report followed alleging rape against Rohingya.[818]

ASEAN, particularly Indonesia and Malaysia, responded more compelling to the increased violence in Rakhine. Demonstrations took place in Malaysia, Indonesia and Thailand against the prosecution and plight of Rohingya.[819] Malaysian Prime Minister

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[805] Human Rights Online Philippines, 2015.
[806] Mizzima, 2015; *See* also, ASEAN Parliamentarians for Human Rights, 2015, p. 15.
[807] Mizzima, 2015.
[808] For example, '[B]efore the National League for Democracy ... the 2015 election, Myanmar could be considered a 'severe' fragile state, governed by an entrenched military machine that centralizes power, enforces rigid control, projects an abrasive nationalism, wages war on its own people, commits widespread human rights abuses, fosters systemic corruption, enriches itself and its associates, and drastically curtails the life chances of the vast majority of its citizens.' Howe, 2022, p. 62; *See* also, Kipgen, 2022, p. xi; Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 137.
[809] Asia Pacific Centre for the Responsibility to Protect, 2017, p. 6.
[810] Barany, 2019, p. 5; Morada, 2018, p. 122.
[811] Constitution of the Republic of the Union of Myanmar (adopted 29 May 2008, entered into force 31 January 2011), arts. 337-344.
[812] Barany, 2019, p. 5.
[813] Minority Rights Group International, 2023; Barany, 2019, p. 5.
[814] Independent Commission of Enquiry (*hereinafter* ICoE).
[815] Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 140.
[816] *ibid.*, p. 141.
[817] Morada, 2018, p. 117.
[818] Office of the United Nations High Commissioner for Human Rights, 2017, pp. 20-24.
[819] Morada, 2018, p. 117.

'led a protest rally … against what he called a "genocide" of Myanmar's … Rohingya'[820]. Facing increasing pressure from the international community and AMSs, Aung had to react and call for a meeting with ASEAN's foreign ministers focusing on humanitarian aid for Rakhine.[821] Malaysia was highly concerned and suggested establishing 'an independent body of experts ... to investigate and corroborate official accounts of the Myanmar government on the situation in Rakhine'[822]. Myanmar and AMSs rejected that proposal. One month later, during an OIC meeting, Malaysia accused Myanmar of committing genocide against Rohingya and appealed to 'stop the killings, burning of houses, and violation of women and girls'[823].[824] OIC's delegation for Myanmar, being Malaysia's former foreign minister, turned to the UN to cease further escalating violence against Rohingya to circumvent genocide.[825] Indonesia sought CE with Myanmar, offering 'expertise in health, education and livelihood programmes, as well as capacity-building training for Myanmar's police'[826] during ASEAN's 30th Summit.

Despite all hopes, the violence against Rohingyas escalated in August 2017.[827] The Rohingya crisis has been a challenge for leaders of predominantly Muslim AMSs, especially Malaysia and Indonesia,[828] where public sentiment has been highly critical of Myanmar's treatment of the crisis and particularly vocal in demanding a strong response from their governments.[829] But ASEAN could not unanimously agree on the matter. In a statement, ASEAN 'condemned the attacks against Myanmar security forces … and all acts of violence'[830] resulting in civilians dying and expressed concern over Rakhine's humanitarian crisis.[831] Especially, Malaysia was critical of the statement for failing to mention Rohingya.[832] Despite ASEAN's absent consensus, other AMSs, including Thailand, Singapore and Indonesia, continued their engagement with Myanmar to support its response to the Rakhine conflict through humanitarian and bilateral assistance.[833]

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[820] Associated Press, 2016.
[821] Asia Pacific Centre for the Responsibility to Protect, 2017, p. 6.
[822] *ibid.*
[823] *ibid.*
[824] Roughneen and Robinson, 2017.
[825] Sipalan and Harris, 2017.
[826] Sheany, 2017.
[827] *See* also, *supra* note Chapter 4.1. at p. 48.
[828] Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 139; Ullah and Chattoraj, 2018, p. 557.
[829] Liow, 2018, p. 68.
[830] ASEAN Secretariat, 2017, 'ASEAN Chairman's statement on the humanitarian situation in Rakhine State', p. 1.
[831] Morada, 2018, p. 120.
[832] Liow, 2018, p. 68.
[833] Morada, 2018, p. 121; Reliefweb, 2017; AHA Centre, 2017, 'AHA Centre Facilitates Humanitarian Assistance between Singapore and Myanmar for Displaced Communities'; Ministry of Foreign Affairs Singapore, 2017.

Until August 2017, ASEAN simply echoed Myanmar's stance that the Rohingya crisis should be treated as an internal affair.[834] ASEAN acknowledged Myanmar's position that peace restoration and stability efforts were made. ASEAN also said it would ensure that those found guilty of violating human rights and perpetrating violence were to be punished.[835] After August 2017, ASEAN's CE policy on Myanmar reached its maximum, causing cracks within ASEAN's much-praised 'ASEAN Way'. In September 2017, Malaysia criticized the chair, namely Philippines' failure to mention Tatmadaw's atrocities in a joint ASEAN statement.[836]

In 2018, certain AMSs were increasingly vocal in voicing dissatisfaction with Myanmar's failure to hold those who committed atrocities against Rohingya accountable.[837] Upon Malaysian and Indonesian AICHR representatives requests and after the IIFFM released its report, AICHR met. However, no statement was issued upon Myanmar's insistence.[838] Malaysia criticized Myanmar's untenable attitude. Indonesia and Thailand continued to engage through bilateral aid and the AHA Centre[839].[840]

In 2019, ASEAN demanded that Myanmar and Bangladesh provide an apparent timeframe for repatriating Rohingya refugees.[841] Myanmar was urged to guarantee Rohingya's 'safe, dignified, and voluntary'[842] return. Malaysia indicated that repatriation implies the granting of citizenship.[843] ASEAN received criticism for prioritizing 'a hasty repatriation over ending abuses and providing justice for the Rohingya'[844].[845]

Summarizing ASEAN's responses and position to the Rohingya crisis in a nutshell: ASEAN has dealt with the crisis in numerous settings since 2012, however, for the most part ASEAN has adhered to the 'ASEAN way' of not criticizing and not interfering in Myanmar's domestic affairs. As a result, as of 2017, ASEAN has largely disregarded Myanmar's threats to the remaining Rohingya in Rakhine and has not supported efforts at investigating atrocities and pursing accountability.

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[834] *See*, for example, ASEAN Secretariat, 2012, 'Statement of ASEAN Foreign Ministers on the Recent Developments in the Rakhine State, Myanmar, Phnom Penh, Cambodia, 17 August 2012'. This statement made (1) vague references to 'incidents' in Rakhine in 2012; (2) omitted the term 'Rohingya'; (3) recognized the steps which Myanmar took in cooperation with the UN to address humanitarian necessities of 'affected persons and communities'.
[835] Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 139.
[836] Morada, 2020, p. 81.
[837] *ibid.*, p. 83.
[838] Septiari, 2018.
[839] *See* also, *supra* note Chapter 4.3.2. at 56.
[840] Morada, 2020, p. 82.
[841] ASEAN Secretariat, 2019, 'Chairman's Statement of the 34th ASEAN Summit', pp. 10-11.
[842] *ibid.*, p. 10.
[843] Agence France-Presse, 2019.
[844] Human Rights Watch, 2020.
[845] Howe, 2022, p. 75.

4.5.3. Reactions of ASEAN's human rights and humanitarian institutions

As previously concluded in chapter 3.3.2.,[846] RtoP advocates assert that notwithstanding ASEAN's aversion to implementing RtoP's language, ASEAN already exercises RtoP's central principle, to wit atrocity prevention.[847] Although the RtoP language is non-existent, some of RtoP components are included in ASEAN's documents.[848] Criticizing Myanmar in any way, as some AMSs did,[849] therefore indirectly supports and implicitly signifies RtoP.[850] Thus, an absent RtoP language does not imply an absent RtoP idea.[851] ASEAN RtoP supporters, encouraging these 'implicit signifiers'[852] of RtoP, emphasize the nexus between RtoP's frameworks and norms and the ones of ASEAN, and RtoP's key components of capacity-building and atrocity prevention. This nexus requires further consideration. ASEAN's institutional human rights mechanisms, namely the AHA Centre[853] and AICHR, are limited regarding the promotion of ASEAN's atrocity prevention with special attention to Rohingya.

4.5.3.1. AICHR's role in atrocity prevention and its response to the Rohingya crisis

AICHR has no power to carry out human rights monitoring and investigation within AMSs.[854] Instead of having human rights advocates, such as NGOs, in place, AICHR consists of AMSs representatives and thus 'lacks independence'[855].[856] It lacks authority to gather information, nor can it debate serious violations.[857] AICHR received criticism that it possesses no 'explicit mandate to perform a protection duty'[858]. Compared with 'other regional human rights bodies'[859], such as ECtHR[860] and IACHRs[861], AICHR fades as an actual tool for human rights promotion and enforcement.[862] It lacks essential possibilities to penalize human rights perpetrators in form of a court.[863]

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[846] *supra* note Chapter 3.3.2. at p. 43.
[847] Maulana and Newman, 2022, p. 68.
[848] Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 134.
[849] For example, Malaysia, Thailand, and Indonesia. *See* Doherty, 2018; CBS News, 2017; Muslimin, 2017.
[850] Dunne and Gelber, 2014, p. 339.
[851] *ibid.*
[852] *ibid.*
[853] ASEAN Coordinating Centre for Humanitarian Assistance (AHA Centre); AHA Centre, n.d.
[854] Petcharamesree, 2016, p. 147; Abraham and Fraser, 2021, p. 3; Arendshorst, 2009, p. 113.
[855] Saul, Mowbray, and Baghoonians, 2011, p. 27.
[856] Petcharamesree, 2016, p. 147; *See*, also, Maulana and Newman, 2022, p. 70.
[857] ASEAN Secretariat, 2009, 'Terms of Reference of ASEAN Intergovernmental Commission on Human Rights', para. 4; Coe, 2017, p. 316.
[858] Petcharamesree, 2016, p. 147.
[859] Arendshorst, 2009, p. 114.
[860] European Court of Human Rights (hereinafter *ECtHR*).
[861] Inter-American Court and Commission of Human Rights (hereinafter *IACHRs*).
[862] Coe, 2017, p. 315.
[863] *See*, for example, the objective of: The Working Group for an ASEAN Human Rights Mechanism, 2023.

However, AICHR could be expansive and creative in the way it defines its mandate and functions.[864] AICHR could steer AMSs 'to consider acceding to and ratifying international human rights instruments'[865]. AICHR could make way for obtaining 'information from [AMS] on the promotion and protection of human rights'[866]. AICHR could carry out studies on certain human rights within ASEAN,[867] which include 'systematic human rights violations'[868]. Or AICHR could establish 'an early warning mechanism for mass human rights violations and conflict'[869].[870] AICHR's hitherto work predominantly concentrated on promoting human rights and raising awareness.[871] Its representatives agree more easily on those activities than on investigating systematic violations.

Regarding the prevention and reduction of violence against Rohingya, AICHR's actions were very limited. It disregarded the human rights violations against Rohingya during meetings albeit those continue until today.[872] AICHR has focused on rather less contentious matters.[873] AICHR does not reconcile PNI with human rights protection. It works without an individual complaint procedure and a naming-and-shaming system,[874] and rather sustains ASEAN's traditional norms by highlighting the significance of the diverse historic backgrounds of AMSs.[875] 'It is designed to follow the 'ASEAN way': consultative, non-confrontational and respectful of sovereignty and non-interference.'[876] With its representatives who were unable to reach a consensus on Rohingya, AICHR could not even come up with a single position on the Rohingya crisis.[877]

AICHR's incapability to adequately react to Rohingya's fates mirrors the misguided thinking of ASEAN since AMSs defined the Rohingya crisis as a humanitarian

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[864] *ibid.*; Drummond, 2011, p. 21.
[865] ASEAN Secretariat, 2009, 'Terms of Reference of ASEAN Intergovernmental Commission on Human Rights', para. 4(5).
[866] *ibid.*, para. 4 (10).
[867] *ibid.* para. 4 (12).
[868] Petcharamesree, 2016, p. 147.
[869] Drummond, 2011, p. 28.
[870] In accordance with ASEAN Secretariat, 2009, 'Terms of Reference of ASEAN Intergovernmental Commission on Human Rights', para. 4(1).
[871] Coe, 2017, p. 315.
[872] For example, the Rohingya crisis is not mentioned in any of the previous annual AICHR reports, nor does AICHR website feature the Rohingya plight. *See*, ASEAN Secretariat, 'AICHR Annual Reports, Thematic Studies, and Activity Reports'.
[873] For example, trafficking in person, rights of migrant workers and persons with disabilities, environment and climate change, and protection of rights of convicted persons for death penalty. *See*, AICHR, 2018, p. 4; AICHR, 2022, p. 3.
[874] Saul, Mowbray, and Baghoonians, 2011, p. 27; Ginbar, 2010, p. 515.
[875] Petcharamesree, 2016, p. 147.
[876] Saul, Mowbray, and Baghoonians, 2011, p. 27
[877] Alexandra, 2022, p. 5.

rather than a human rights issue.[878] It has undoubtedly affected AICHR's ability to act as a regional human rights institution. As a result of ASEAN's focus on providing humanitarian aid rather than addressing the root causes of human rights abuses against Rohingya, the AHA Centre has been placed at the forefront.

In 2018, the Indonesian and Malaysian AICHR representatives jointly urged ASEAN to 'deal with the stark realities'[879] of the Rohingya crisis with 'a 'whole-of-ASEAN-approach''[880], in other words, with all AMSs pulling in the same direction, together with a proactive and cooperative will of Myanmar.[881] AICHR already sent proposals to ASEAN leaders. However, these have never provided a definite answer, evincing a fair policy on the Rohingya crisis.[882] In 2016, the Indonesian representative already demanded to revise PNI within ASEAN's Charter[883], which would empower ASEAN to deal with the situation of Rohingya.[884] During 2018, she urged to hold Myanmar 'accountable for genocides, war crimes and crimes against humanity'[885]. Considering all these instances, it is evident that AICHR was being marginalized. Moreover, the AICHR's failure to engage with other actors,[886] has shown that the AICHR needs to respond.

4.5.3.2. The AHA Centre's role

The AHA Centre has provided humanitarian assistance to Rohingya in Rakhine State.[887] Though predictions on AHA's potential roles in preventing mass atrocities would be premature. AHA is principally responsible for 'disaster management and emergency response'[888], especially post-natural disasters, through humanitarian aid. The AHA Centre 'perform[s] [r]isk [i]dentification, [e]arly [w]arning and [m]onitoring'[889] relating to natural disasters and not risk assessments of atrocities and human rights violations. Atrocity prevention presupposes systematically gathering data 'based on ... risk factors and indicators'[890]. Concerning Rohingya, its mandated area of responsibility is

[878] Alexandra, 2022, p. 5.
[879] Asian Human Rights Commission, 2018.
[880] *ibid.*
[881] *ibid.*; Collins and Soon, 2023, p. 22.
[882] Alexandra, 2022, p. 5.
[883] ASEAN Charter, art. 2(2)(e).
[884] ASIAN Forum for Human Rights and Development, 2016, p. 21.
[885] Septiari, 2018.
[886] For example, the Special Rapporteur on Myanmar and other international institutions.
[887] Kurniawan, 2017; AHA Centre, 2017, 'AHA Centre Delivers 80 Tons of Relief Materials to Rakhine State'.
[888] ASEAN, 2016, p. 4.
[889] AHA Centre, n.d., 'Disaster Information Management'; *See*, also, AHA Centre, 2011, art. 4.
[890] United Nations Office of the Special Advisers on Genocide Prevention and the Responsibility to Protect, 2014, p. 5

conditioned on Myanmar's cooperation and restricted to providing humanitarian aid during Rohingya's repatriation.[891] It was also mandated to conduct a survey on the needs within Rakhine regarding scheduled repatriations of Rohingya.[892] Its report failed to mention the atrocities and concerns Rohingya have when being repatriated.[893] If the AHA Centre wants to actively participate in atrocity prevention within ASEAN, its mandate must be amended, representing a mammoth task for AMSs for reasons of upholding PNI.

4.5.4. China as a key stakeholder within the region

Given China's massive regional and decisive veto power, considering its position on the Rohingya crisis is important. ASEAN's strategic interests, combined with China's growing influence in Myanmar, are of vital importance. ASEAN fears Myanmar could fully fall into China's arms and erode ASEAN's strategic interests within ASEAN.[894] Strategically, AMSs were well aware of the need not to overemphasize accountability. This was largely due to fears of Myanmar's total disengagement from ASEAN on the Rohingya crisis and of Myanmar being pushed closer to China in the face of its pariah status and growing threats of Western punitive measures.[895]

AMSs and China are very alike in the way PNI, sovereignty and 'informal or "backdoor" diplomacy'[896] are maintained.[897] China responded to the crisis overall consistently, labelling the crisis as Myanmar's internal issue[898] and emphasizing ASEAN's PNI.[899] International criticism of China's atrocities against the Uyghurs incentivises China to oppose any humanitarian intervention, avoiding setting an international precedent, especially when it oppresses ethnic and religious minorities like Rohingya.[900]

China's 'strategic, political and economic interests'[901] determine its position.[902] These include stabilising its more than 2,000-kilometer border[903] with Myanmar and seeking access to the Indian Ocean to advance imperialist economic ambitions with the

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[891] Thuzar, 2019, p. 6; *See*, also, AHA Centre, 2019, p. 2; Kliem, 2018, p. 4; Suzuki, 2019, p. 171.
[892] ASEAN Secretariat, 2019, 'Chairman's Statement of the 34th ASEAN Summit', p. 10.
[893] Asia-Pacific Centre for the Responsibility to Protect, 2019, p. 2.
[894] Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 132.
[895] *ibid*., p. 138.
[896] Morada, 2012, 'Asia and the Pacific', p. 138.
[897] *ibid.* p. 137.
[898] *ibid.* p. 276; Borger/ MacKinnon/ Black, 2007; Kipgen, 2022, p. 105
[899] Lambert, 2022; Chenyang and Fook, 2009, pp. 257-262
[900] *ibid.*; Morada, 2012, 'Asia and the Pacific', p. 137.
[901] Erameh and Ojakorotu, 2021, p. 65.
[902] Yhome, 2019, p. 6.
[903] Kipgen, 2022, p. 105.

BRI[904].[905] Myanmar is of essential need within the BRI because of its geographic location. China takes the position 'to maintain brotherly relations'[906] and diplomatically shielding Myanmar through its UNSC-veto on 'any form of intervention'[907].[908] China is Myanmar's biggest arms supplier.[909] In essence, the Chinese attitude is based on fears that Western states might internationally intervene and thus harm China's economic interests within Southeast Asia, in Myanmar in particular.[910]

[904] Abbreviation for Belt and Road Initiative (BRI).
[905] Erameh and Ojakorotu, 2021, p. 65; Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 148; Yhome, 2019, pp. 7, 17.
[906] Kipgen, 2022, p. 105; Wight and Cowper-Smith, 2022, p. 371.
[907] Erameh and Ojakorotu, 2021, p. 68.
[908] Yhome, 2019, p. 16; Kipgen, 2022, pp. 101, 105; Garwood-Gowers, 2016, p. 99; Howe, 2022, p. 69.
[909] Adams, 2019, p. 440.
[910] Erameh and Ojakorotu, 2021, p. 65.

5. Assessment of the case of Myanmar through the lens of RtoP

5.1. Understanding risk factors associated with atrocities against the Rohingya

RtoP's Pillar One is based on the premise that individual decisions to commit atrocities can be altered by modifying political and social environments to be less conducive to atrocities and by creating frameworks for managing differences positively.[911] Understanding governments' and other national institutions' roles in RtoP's implementations requires a sense of factors which may result in atrocities. Mass atrocities 'are processes, not singular events'[912] and 'rarely committed in the absence of … risk factors'[913]. Certain policies create structural possibilities for atrocity perpetration. Armed conflicts are not a prerequisite for atrocities, but past atrocities mostly occurred in intra-state armed conflicts, such as civil wars or ethnic conflicts.[914]

5.1.1. Root causes of the Rohingya crisis as an ethnic conflict

Ethnic tension characterizes the Rohingya crisis, which can be described as an ethnic conflict. The aim is to understand the conditions under which the ethnic conflict in Rakhine escalated to such violence.[915] Myanmar 'draws upon … ethnic myths and ancient hatreds'[916] against Rohingya. There are two theories on Rohingya's origin: (i) Rohingya being illegal Bangladeshi immigrants,[917] and (ii) Rohingya being Rakhine[918] natives with descendants from Persian and Arab traders and shipwrecked Muslims from *Ran-byi* Island[919]. '[A]ncient hatreds'[920] are to be understood as modern hatred since it is 'regenerated to suit current circumstances'[921]. Therefore, theories on Rohingya are 'modern revisions of older stories'[922], which could have historically been true or untrue.

Ethnic violence against Rohingya was waged based on three preconditions. Burmans feared Rohingya's autonomy over part of Rakhine,[923] had ethnic myths on Rohingya generating 'feelings of hostility … and the opportunity to act on them

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[911] Bellamy and Luck, 2018, p. 115; Evans, 2008, p. 81.
[912] United Nations General Assembly and Security Council, 2013, para. 15.
[913] *ibid.*, para. 16.
[914] Bellamy, 2011, p. 1; McLoughlin, 2014, p. 31.
[915] Toft, 2003, p. 3.
[916] McLoughlin, 2014, p. 33.
[917] Kipgen, 2022, p. 84.
[918] *Remark*: Arakan was renamed to Rakhine by Myanmar in 1989.
[919] Forster, 2011, pp. 63-64.
[920] Kaufman, 2001, p. 11.
[921] McLoughlin, 2014, p. 33.
[922] Kaufman, 2001, p. 11.
[923] 'The British and the defecting Burmese promised the Rohingya a separate region of northern Arakan' *quoted from* Zahed, 2021, p. 442; *See* also Thuzar, 2016, p. 26.

politically'[924] through Myanmar's military governments. The granting of autonomy to frontier people, including Rohingya, was also a fundamental principle of the 1947 Panglong agreement[925].[926]Additional to the ethnic mobilization against Rohingya, certain other risk factors are evident and dealt with next.

5.1.2. Underlying risk factors in Myanmar

5.1.2.1. Social division

Deep-seated divisions between groups on 'religious, ethnic or political'[927] grounds are manifest risk factors for atrocities.[928] Not the sole division is the trigger, rather, the ability to enforce collective differences is necessary to discriminate socially.[929] To gain independence and form a government, a unity of the countless ethnic groups and Burmans was necessary.[930] The Panglong agreement intended the creation of a federal government.[931] Soon after, ethnic groups realized Burman leaders would not keep their argument. Since 1958, Burma's policy aimed at assimilating ethnic groups into the Burman population and marginalizing Rohingya.[932] Identifying Rohingya as a separate group was essential in facilitating the newly formed military government in 1962,[933] Tatmadaw being the political elite, to establish its political agenda of persecuting Rohingya and expanding its power over them.[934]

The nexus between separating Rohingya from society and committing atrocities against them becomes particularly clear when Rohingya suffer discrimination.[935] Myanmar's state-led discrimination significantly indicates risk.[936] The 1982 citizenship law formed the legal basis for the discrimination, which throughout decades was further entrenched. This law made Rohingya *de facto* stateless, removing all citizenship rights.[937] It caused discrimination in several areas: political, economic and social.[938] Citizenship

[924] Kaufman, 2001, p. 12.
[925] Myanmar Law Library, n.d., para. 5.
[926] Kipgen, 2022, p. 26.
[927] McLoughlin, 2014, p. 51.
[928] Many scholars and institutions highlighted social division as a precursor to past genocides. *See,* for example, First Stage: Classification: Stanton, 2023; Minorities at Risk, 2009, p. 1; Fein, 1979, p. 4.
[929] McLoughlin, 2014, p. 51.
[930] Kipgen, 2022, p. 25.
[931] *ibid.*, p. 82.
[932] *ibid.*; Holliday, 2010, p. 121.
[933] Kipgen, 2022, p. 34; Kipgen, 2011, p. 53.
[934] Fein, 1979, p. 9.
[935] Harff, 2003, p. 67.
[936] Harff, 2012, p. 54.
[937] Zahed, 2021, p. 443.
[938] Kuper, 1981, p. 58; *See* a list of restrictions against Rohingya: Ullah and Chattoraj, 2018, p. 546.

has been at the heart of the crisis for Rohingya.[939] According to Stanton's second stage, namely symbolization[940], Rohingya's temporary registration cards include ethnic classification, being an indicator of increasing atrocity risk and easing the way for dehumanization[941].[942] The entrenched social division is especially dangerous, since Rohingya's vulnerability deepened, and so did Myanmar's vision.[943] Long-term human rights abuses and past atrocities against Rohingya bear great risks for future atrocities.[944] Myanmar implemented policies, particularly targeting Rohingya's rights.[945]

5.1.2.2. Economic weakness

Myanmar has the least developed status,[946] one of the world's largest informal economies[947], and is highly corrupt[948]. The junta mismanaged Myanmar into a weak economy.[949] Not Myanmar's overall wealth matters. Rohingya's relative economic position across other groups is crucial for atrocity risks.[950] Rakhine is Myanmar's poorest state.[951] Rohingya's poverty and low economic opportunities heightened atrocity risks.[952]

5.1.2.3. Abusive regime

The transition risks of Myanmar's regime types of 2011-2020 are generally underrated as risk indicators. Myanmar underwent a democratic transition (2011-2020). In 2011, the military rule shifted 'to a hybrid civil-military administration model'[953]. In 2015, Aung's party won and governed. That regime is best classified as an 'undemocratic state under military dominance'[954] with a 'ruling military'[955] and excessive power in the executive.[956] Since the 2021-coup, the call for civilian rule has been high.[957] Myanmar's military

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[939] Smith and Williams, 2021, p. 162; Stokke and Aung, 2020, p. 288.
[940] Stanton's second Stage (symbolization): Stanton, 2023.
[941] *ibid.*, Stanton's third Stage (dehumanization).
[942] McLoughlin, 2014, p. 53.
[943] Harff, 2003, p. 63; United Nations General Assembly and Security Council, 2013, para. 17; Jacob, 2015, p. 60.
[944] Office of the UN Special Adviser on the Prevention of Genocide, 2009, p. 1; United Nations, 2014, p. 11.
[945] For example, 1982: Citizenship Law; 2013: inter-faith and inter-ethnicity marriages were banned; 2014: Rohingya were excluded from a nationwide consensus; 23 May 2015: population Control Law; 26 August 2015: 'Buddhist Women Special Marriage Law'; 28 August 2015: Religious Conversions Law. *See* Montreal Holocaust Museum, 2019.
[946] United Nations, 2023; Kipgen, 2022, p. 41.
[947] Stokke, Vakulchuk and Øverland, 2018, p. 38.
[948] Transparency International, 2023, p. 3.
[949] Kipgen, 2022, p. 41.
[950] Bellamy and Luck, 2018, pp. 117-118.
[951] The Data Team, 2017.
[952] United Nations, 2014, p. 10; McLoughlin, 2014, p. 58.
[953] Ko Ko, 2018, p. 37.
[954] Ramcharan, 2016, p. 193.
[955] Croissant, Eschenauer and Kamerling, 2017, p. 408.
[956] This exact sentence has been quoted from the author's own assignment in the course IHL220A, p. 5. It should be noted that even though a 'civilian-led hybrid government' between 2015 and 2020 governed Myanmar, nothing changed for Rohingya. *See* Kipgen, 2022, p. xi.
[957] Al Jazeera, 2021.

dictatorship was changing, which opened Pandora's box.[958] When Tatmadaw started losing grip in 2011, the dangerous Buddhist nationalism was freed.[959] The extreme Buddhist-nationalist monk Wirathu considerably contributed to the hatred against Rohingya.[960] Discriminatory grounds already existed, but were reinforced after violence erupted in 2012 and deepened by adopting '[t]he four "Race and Religion" laws'[961] in 2015.[962]

Myanmar's limited democracy and limited rule of law raised atrocity risks. State-driven discrimination deprived Rohingya of opportunities and resulted in human rights violations and inequalities, marking Myanmar's 'regime as fundamentally abusive'[963]. Myanmar's role in enforcing its discriminatory policies is central to locating risks. Its regime character has been a significant signal for atrocities since Myanmar publicly demonized[964] Rohingya and stimulated the 'exclusionary ideology'[965].

Rohingya have been increasingly vulnerable to Myanmar's discriminatory actions and deprivations because Myanmar's abusive system ignores the rule of law and has no checks and balances system. Myanmar's limited rule of law is a risk factor.[966] Due to Myanmar's lacking impartial judiciary and denial of legal access for Rohingya,[967] Myanmar's regime enjoys entrenched impunity for violence against Rohingya.[968] That impunity and its exclusionary policy massively increased the threats to Rohingya's security and human rights.[969] Since Tatmadaw represents all levels of government, Myanmar possesses no impartial law enforcement to protect Rohingya. Heightened violence against Rohingya has thereby constantly increased. The incitement of violence against Rohingya necessitates impunity and a lack of the rule of law. Myanmar's 'widespread culture of impunity'[970] for past atrocities indicates the risk for future atrocities.[971]

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[958] Šimonović, 2021, p. 388.
[959] *ibid.*
[960] Kampf, Kreye, Mascolo and Pfeifer, 2022, p. 11.
[961] United Nations Human Rights Council, 2020, UN Doc A/HRC/43/18, para. 17.
[962] Šimonović, 2021, p. 388.
[963] McLoughlin, 2014, p. 55.
[964] For example, by calling Rohingya 'Kalar', which means black; *See* also, McPherson and Lone, 2022.
[965] Office of the UN Special Adviser on the Prevention of Genocide, 2009, p. 2.
[966] McLoughlin, 2014, p. 57; Morada, 2021, 'Myanmar', p. 434; Asia-Pacific Centre for the Responsibility to Protect, 2019.
[967] United Nations, 2014, p. 12.
[968] Smith, 2008, p. 85.
[969] McLoughlin, 2014, p. 57.
[970] Pinheiro and Barron, 2012, p. 278.
[971] Bellamy and Luck, 2018, p. 118; Verelst, 2021, pp. 300-301.

5.2. RtoP's application to the case of the Rohingya

5.2.1. Pillar One: Myanmar's Protection

With Myanmar's citizenship law, Rohingya have no citizenship status. From Myanmar's governance perspective, Myanmar could argue that Rohingya have no rights, and therefore Myanmar holds no responsibility.[972] Each state holds the RtoP 'its populations'[973] and not solely its citizens under the first pillar. In terms of governance, those in power are accountable to the people they govern.[974] Myanmar is obliged to take steps to prevent atrocities against Rohingya through mitigating risks and establishing resilience, and in case of violence outbreak to respond accordingly.[975] Whether the Rohingya crisis falls under RtoP's scope, determines the crisis' subject matter. The crisis encompasses alleged genocide and CAH, thus falling under RtoP's atrocity crimes.

Myanmar is the second weakest state within the region in terms of RtoP implementation.[976] Based on certain indicators, Myanmar unequivocally failed to protect its Rohingya population from atrocities and to decrease underlying risk factors. Tatmadaw has exacerbated these momentous risks through its practices and policies. These laws persist with providing inadequate or no legal protection for Rohingya.[977] Myanmar's laws serve for the entrenchment of discrimination. Generally speaking, Myanmar has a very weak record on human rights and the legal protection of vulnerable groups and Myanmar's national resilience to atrocities faces substantial challenges.[978]

RtoP focuses on avoiding atrocities and is concerned to develop Myanmar's 'architectures for atrocity prevention'[979]. Even though Myanmar established a National Human Rights Commission, it is not compliance with the Paris Principles.[980] It was a silent bystander to atrocities and was instrumentalized by Tatmadaw.[981] Regarding the criminalization of the incitement to commit atrocities, Myanmar ratified the Geneva Conventions[982] and Genocide Convention[983], but made no particular reference to the four

[972] Howe, 2022, p. 64.
[973] United Nations General Assembly, 2005, para. 138.
[974] Howe, 2012, pp. 354-355; *See* also Grammatikas, 2014, p. 103; Bellamy, 2015, p. 15.
[975] Pedersen, 2021, p. 360; *See* also United Nations General Assembly and Security Council, 2013, UN Doc A/67/929–S/2013/399, paras. 12-68; Adams, 2019, p. 440.
[976] Democratic People's Republic of Korea is the weakest state. *See* Asia-Pacific Centre for the Responsibility to Protect, 2019.
[977] Asia-Pacific Centre for the Responsibility to Protect, 2022.
[978] *ibid.*
[979] Bellamy, 2016, p. 194.
[980] Global Alliance of National Human Rights Institutions, 2023.
[981] Asian Forum for Human Rights and Development, 2023.
[982] Burma Link, 2014.
[983] United Nations Treaty Collection, 2023, p. 2.

atrocity crimes within its national legislation. Myanmar failed to prevent and investigate the 2012 atrocities against Rohingya perpetrated by Rakhine-Buddhists, police and Tatmadaw.[984] Those who actively perpetrated also obstructed possible investigations by disposing corpses in mass graves.[985] In addition, there is Myanmar's widespread structural impunity issue, which since 2008 has been legally embedded in Myanmar's constitution.[986] Article 445 equips state officials with immunity who perpetrated any violation.[987] Impunity and perpetration have continued until today.[988] The following paragraphs analyze structural obstacles of Myanmar's atrocity prevention.

5.2.1.1. Political will

Firstly, Tatmadaw and the military rule perceived Rohingya as a domestic security threat. Even when Aung was elected (2016), attempting to change deep-rooted policies of Rohingya's exclusion risked triggering military counter-reaction.[989] Secondly, her government had to be loyal to its Buddhist-majority voters, who regarded any steps around Rohingya as threats. Since 2012, Buddhist nationalism increased since numerous Buddhists joined the anti-Muslim MaBaTa[990].[991] Due to its political views powerful alliances with Tatmadaw emerged. No politicians could afford of being soft on Rohingya, risking voters and Tatmadaw's reaction.[992] Anti-Rohingya policies became popular for Aung's election campaigns prior-2016.[993] Summing up, Myanmar had no will to protect Rohingya.

5.2.1.2. Authority

Additional to the lacking political will, the elected governments (2011-2020) had no civilian authority to control security forces and Tatmadaw.[994] These enjoyed profound *de facto* and *de jure* autonomy.[995] Civilian governments were unable to supervise or influence operations in Rakhine, let alone pursuing accountability for abuses.

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[984] United Nations Human Rights Council, 2018, UN Doc A/HRC/39/CRP.2, paras. 724-48; Asia-Pacific Centre for the Responsibility to Protect, 2019; Mennecke and Stensrud, 2021, p. 123.
[985] Human Rights Watch, 2013, p. 15.
[986] Verelst, 2021, p. 297.
[987] Constitution of the Republic of the Union of Myanmar (adopted 29 May 2008, entered into force 31 January 2011), art. 445, which reads as follow, 'No proceeding shall be instituted against the said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties.'.
[988] Diamond, 2021, p. 379.
[989] Pedersen, 2021, p. 361.
[990] Association for the Protection of Race and Religion.
[991] Van Klinken and Aung, 2017, pp. 360-362.
[992] Rosenthal, 2019, p. 9.
[993] Stensrud, 2021, p. 219.
[994] Morada, 2021, 'Myanmar', p. 434.
[995] Pedersen, 2021, p. 363.

5.2.1.3. Weak state apparatus

Notwithstanding lacking political will and authority over Tatmadaw, the governments (2011-2020) inherited from the long-lasting military rule 'a deeply dysfunctional state apparatus'[996] suffering corruption and weak public services. In the Rohingya crisis, this institutional weakness was reflected in lacking resources for the implementation of Rakhine's UEHRD[997] flagship initiative, which had to basically rely on private sectors.

5.2.2. Pillar Two: Assistance of the international community

When a state faces difficulties in fulfilling its primary RtoP, a secondary responsibility lies with the international community by first assisting that state in fulfilling its obligations.[998] If such assistance fails, the international community needs to take 'timely and decisive'[999] measures.[1000] Assistance encompasses various 'soft measures'[1001], which include assisting the protection of populations,[1002] capacity-building,[1003] and encouragement[1004]. The above-described limitations under Pillar One placed an enormous burden of responsibility onto the international community. Policy options available to the international community have been severely reduced by the character of Myanmar's politics and limited to the theoretical extremes on RtoP's continuum.[1005]

Capacity-building measures are essentially doubtful due to the absence of Myanmar's necessary actions and Myanmar's absent requests for assistance to protect Rohingya.[1006] The focus is, therefore, on the potential for feasible encouragement. The question arises whether members of the international community have been able to convince Myanmar to do more for Rohingya's protection, for instance, through offering advice leading to re-examinations of options or private meetings urging Myanmar to fulfil its obligations.[1007] In Myanmar, there was always very limited room for outside advice. The reasons are Myanmar's distrust of foreign motivations, 'independence and self-

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[996] Pedersen, 2021, p. 364.
[997] Union Enterprise for Humanitarian Assistance, Resettlement and Development in Rakhine (hereinafter *UEHRD*). *See* Online Burma/Myanmar Library, 2018.
[998] Barber, 2022, p. 157.
[999] United Nations General Assembly, 2009, UN Doc A/63/677, para. 11(c), pp. 2, 22-28.
[1000] *See supra* note Chapter 2.5.1. at p. 21, for a detailed assessment.
[1001] For example, UN Charter, arts. 33-38, 52-54.
[1002] United Nations General Assembly and Security Council, 2014, UN Doc A/68/947-S/2014/449, paras. 59-69.
[1003] *ibid.* paras. 39-58.
[1004] *ibid.* paras. 29-38.
[1005] Pedersen, 2021, p. 367.
[1006] Pinheiro and Barron, 2012, p. 276.
[1007] For example, Myanmar ratified the Geneva Conventions (1992), Genocide Convention (1956), Convention on the Rights of the Child (1990), International Covenant on Economic, Social and Cultural Rights (2017), Convention on the Elimination of All Forms of Discrimination Against Women (1997).

reliance'[1008].[1009] Myanmar's troubled history with colonizers greatly affected its past and present, causing profound resistance against international influences. Its history generated certain perceptions reducing Myanmar's receptivity to foreign advice.[1010] Most common perceptions are that foreigners cannot understand Myanmar, and any criticism is regarded as an offence against its national pride.[1011] During the Rohingya crisis, Myanmar reached another peak of wariness towards foreigners. In the eyes of Myanmar and its public majority, the international community understood little about the crisis and underlying issues and was appointed by pro-Rohingya fractions.[1012]

There were two hopeful encounters. UN special advisor, Nambiar, was allowed to provide advice on Rohingya.[1013] Annan's advisory commission was allowed to suggest answers to the issues within Rakhine.[1014] Myanmar assured to the commission's recommendations 'full consideration'[1015]. Ultimately, both cases were empty rhetoric owing to the following reasons:[1016] Both were clear they would not monitor or report on human rights, due to Myanmar being extremely sensible to criticism. Both advisory initiatives failed because of lacking political will, civilian authority, and strong state apparatus.[1017] And Myanmar's conservatives vehemently condemned international involvement.[1018]

Since Tatmadaw's operations in Rakhine of 2016 Myanmar's and international community's relation further divided. Whereas the international community virtually solely criticized Tatmadaw, Aung's government responses were defensive and aggressive.[1019] Myanmar perceived critique as directly assaulting 'Myanmar as a nation'[1020]. Parallel thereof, Myanmar's grievance against Rohingya was sort of passed on international humanitarian organizations.[1021] Especially, UN personnel was affected, collectively representing the world's biggest human rights organization, and leading in

[1008] International Crisis Group, 2001, 'Myanmar: The Military Regime's View of the World', p. 9.
[1009] Rosenthal, 2019, p. 14.
[1010] Pedersen, 2021, p. 368.
[1011] *ibid.*
[1012] Lok-Dessallien, 2019, p. 35.
[1013] United Nations Secretary-General, 2016.
[1014] Mennecke and Stensrud, 2021, p. 118.
[1015] Mizzima, 2017, para. 3.
[1016] Šimonović, 2021, p. 390; Fortify Rights, 2017, pp. 18, 20.
[1017] *See supra* note Chapter 5.2.1.
[1018] Pedersen, 2021, p. 369.
[1019] *See*, for example, Reuters, 2016.
[1020] Pedersen, 2021, p. 370.
[1021] For example, After ARSA's attacks on 25 August 2017, Myanmar issued a statement alleging that international humanitarian organizations' personnel were collaborating with 'terrorists', namely ARSA. *See* Callaham, 2018, p. 249.

pursuing accountability for atrocities.[1022] However, experiences with ILO and UNICEF show that Myanmar also accepted international support on problematic matters.[1023] They demonstrate Myanmar's and Tatmadaw's political will to work with the international community, as long as both interests coincide. It is that degree of political will which has been absent in the Rohingya crisis. Myanmar showed greater willingness to receive support from regional states and ASEAN, such as China.[1024] These regional actors focused on providing humanitarian aid without addressing root causes.[1025] That approach encouraged Myanmar's perception that the Rohingya crisis is a communal issue to which economic development provides a solution.[1026]

5.2.3. Pillar Three: International intervention

States agreed that if a state is 'manifestly failing to protect their populations'[1027], the international community assumes responsibility and acts 'timely and decisive'[1028]. Available actions for international intervention range from fact-finding missions[1029] to legal prosecution[1030], sanctions[1031], mediation[1032] and military force[1033]. Since Pillar Two explored the possibilities for effective mediation and preventive diplomacy in Myanmar and the employment of military force is unimaginable due to China's and Russia's opposing veto powers blocking all attempts by the UNSC on crucial actions,[1034] other measures will be emphasized. These coercive measures include sanctions, legal proceedings, and reputation, raising a new conundrum. Could the international community at any point have been able to raise the costs for Myanmar to an extent that the real costs outweigh Myanmar's benefits of its atrocity perpetration, thus persuading Myanmar to change its atrocious behaviour and policies?[1035] For those advocating coercive measures, it is self-evident that enough pressure ultimately forces Myanmar to

[1022] For example, physically attacking personnel of international aid organizations. *See* Wight and Cowper-Smith, 2022, p. 361.
[1023] For example, Engagement with UNICEF to release child soldiers and the ILO to reduce forced labour. *See* Harkins, *et al.*, 2021, p. 3; Horsey, 2013, pp. 102-103; UNICEF Myanmar, 2019.
[1024] Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 149.
[1025] Petcharamesree, 2016, p. 152.
[1026] Pedersen, 2021, p. 371.
[1027] United Nations General Assembly, 2005, para. 139.
[1028] *ibid.*
[1029] United Nations General Assembly and Security Council, 2012, UN Doc A/66/874-S/2012/578, paras. 27, 34.
[1030] *ibid.*, para. 29.
[1031] *ibid.*, paras. 31, 41.
[1032] *ibid.*, para. 22.
[1033] *ibid.*, paras. 16, 32.
[1034] Šimonović, 2021, p. 389.
[1035] Pedersen, 2021, pp. 371-372.

give in.[1036] However, this assumption is inaccurate. Firstly, especially for international actors, it is problematic to affect Myanmar's prevailing identity politics through coercive measures. Its deep roots originate from Myanmar's culture and history and only change in Myanmar's pace.

Secondly, Myanmar's democratisation process (2011-2020) was complicated rather than facilitated by international pressure. Coercion is most effective when it strengthens moderates in the targeted state.[1037] The position of Myanmar's moderates, who were the ones with certain support for measures protecting Rohingya, was more likely weakened by pressure.[1038] The past showed that international coercive measures caused nationalistic backlashes and turned Myanmar's 'public against the West'[1039]. The issue arising from coercion in Myanmar's nationalistic setting is that Tatmadaw dominates when Myanmar is being attacked.

Thirdly, the psychological effect which coercion has on Myanmar. Publicly pressuring or criticizing Myanmar leads to denial and resistance.[1040] Myanmar refused cooperation with international actors and institutions and rejected accusations. These efforts were rejected and labelled as either unfair or illegitimate and access was denied. For instance, internationally, the UN rapporteur on Myanmar was denied entry in 2018.[1041] Furthermore, under the UNHRC's auspice, states created 'a quasi-prosecutorial mechanism'[1042], namely the IIFFMM,[1043] for the collection and processing of evidence for forthcoming legal proceedings.[1044] The IIFFMM presented its extensive report to the UNHRC, concluding 'violations undoubtedly amount to the gravest crimes under international law'[1045] and requested an ICC referral through the UNSC.[1046] China's perpetual threating veto deadlocked the UNSC. [1047] 'Widespread calls for actions'[1048] were loud enough. In 2019, the ICC authorized the opening of investigations for crimes

[1036] Kipgen, 2022, p. 93.
[1037] Pedersen, 2021, p. 373.
[1038] *ibid.*
[1039] Tha, 2018.
[1040] *See supra* note Chapter 5.2.2. at p. 28; Adams, 2019, p. 443.
[1041] Šimonović, 2021, p. 390.
[1042] Mennecke, 2021, p. 325.
[1043] The UNHRC established the Independent International Fact-Finding Mission on Myanmar (hereinafter *IIFFMM*) in 2017, establishing facts of alleged human rights violations by Tatmadaw and abuses in Myanmar. Its mandate ended in 2019 and handed over the evidence Independent Investigative Mechanism for Myanmar (hereinafter *IIMM*). The IIMM has gathered evidence of the most serious violations under international law and prepared files for criminal prosecution. *See* United Nations Human Rights Council, 2019, UN Doc A/HRC/42/66, paras. 57-60.
[1044] Pramendorfer, 2020, p. 241.
[1045] United Nations Human Rights Council, 2018, UN Doc A/HRC/39/64, para. 100.
[1046] *ibid.*, para. 105.
[1047] Russo, 2020, pp. 221-222.
[1048] *ibid.*, p. 223.

against humanity and investigations are ongoing.[1049] Myanmar is not party to the ICC and rejected its jurisdiction.[1050] Aung could have broken the vicious circle of impunity during her period of office, and either made a declaration to the ICC or accede to the Rome Statue.[1051] At the same time, The Gambia filed a case at the ICJ for Myanmar's failure 'to prevent or punish genocide against Rohingya'[1052].[1053] In 2020, provisional measures were ordered,[1054] and Myanmar objected to accusations in 2021.[1055] Other states further contributed to atrocity prevention and employed alternatives to ensure accountability outside RtoP's toolbox.[1056] Under the principle of universal jurisdiction, Argentina (2019) and Germany (2023) separately opened cases against Myanmar for atrocity crimes against Rohingya in their national judiciaries.[1057] Even in the face of sanctions several states imposed, Myanmar showed a proudly stubborn attitude.[1058] In Myanmar's eyes, no outsider is allowed to tell Myanmar how to behave in its own territory. This reaction is conditioned by Myanmar's historical sense of victimization, based on colonization, and Myanmar's embarrassment of a deeply nationalist state of having to submit to international pressure. In summary, publicly criticizing Myanmar makes pursued aims more unlikely.

Fourthly, Myanmar rather risks its international exclusion and reputation, than having to pay the costs of altering its apartheid-like policies and practices.[1059] As previous chapters elaborated, Myanmar has heavily sponsored the ensuring that Rohingya have been excluded from their national policy. Moreover, certain international and national factors also limit the costs associated with Myanmar's resistance to outside pressure. On the domestic level, Myanmar is a comparatively isolated nation but simultaneously also exceedingly self-sufficient and proud. Economically, sanctions are unlikely to significantly impact Myanmar. Past sanctions were unsuccessful since Myanmar could

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[1049] *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (Decision) [2019] ICC-01/19; International Criminal Court, 2019.
[1050] Akhavan, 2019, p. 328.
[1051] Rome Statute, arts. 12 (1) and (3).
[1052] Fortify Rights, 2022.
[1053] Myanmar ratified the Genocide Convention in 1956, and The Gambia acceded the Genocide Convention in 1978; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar) (Application Instituting Proceedings and Request for Provisional Measures) General List No 178 [2019] ICJ 1, paras. 2, 111.
[1054] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar) (Request for the Indication of Provisional Measures: Order) General List No 178 [2020] ICJ 3, paras. 5, 86; Howe 2022, p. 75.
[1055] Mennecke, 2021, p. 341.
[1056] Mennecke and Stensrud, 2021, p. 125.
[1057] For Argentina, *see* Burmese Rohingya Organisation UK, 2021; For Germany, *see* Fortify Rights, 2023.
[1058] Pedersen, 2021, p. 372; *See* Barber, 2022, p. 165; Asian Forum for Human Rights and Development, 2022, p. 2.
[1059] Adams, 2019, p. 443.

rely on other sources of economic income and investments, mostly from regional and neighbouring states.[1060] For instance, Myanmar increased its gas exports to Thailand, Singapore and China, and bypassed sanctions.[1061] From an international perspective, the possible feasibility of imposing sanctions is drastically diminished by the withholding of Myanmar's neighbouring states[1062] and its Asian trading partners[1063]. It is unrealistic that these states revoke their investments in Myanmar. Besides the main regional powers[1064] have commonly opposed coercive RtoP measures[1065],[1066] there is a big rivalry between these states involving great 'influence and access'[1067] to Myanmar.[1068]

As a final point, to protect Rohingya from violence of the 2017 magnitude or merely daily discrimination and violence, a type of international peacekeeping force is prerequisite. China has been fiercely opposing this move. For China, such international protection mission would directly threaten its 'geopolitical and economic interests'[1069] in Myanmar. Thus, such missions would need to be implemented without UNSC authorization.[1070] This, however, contradicts the agreed RtoP maxims.[1071]

5.3. Lessons Learned from the Rohingya crisis and RtoP's future in ASEAN

5.3.1. Lessons learned

When the situation for Rohingya dramatically aggravated in 2017, RtoP's logic demanded that the international community exercises its Pillar-Three-responsibilities enforcing the protection of Rohingya. However, it is here where RtoP reveals its vulnerability. The most decisive measures under Pillar Three, ICC referrals and military interventions require UNSC authorization. That was unrealistic in Myanmar's instance since any measures under Pillar Three would have been vetoed by China.[1072] Moreover, ASEAN, as a regional actor, could have exerted influence on Myanmar.[1073] But it could not overcome its PNI. As a result, effective Pillar-Three-measures protecting Rohingya

[1060] Morada, 2021, 'Myanmar', p. 461.
[1061] Ajmani, Joshi, Kishore, and Roy, 2018.
[1062] Thailand, India and China, *See* Morada, 2021, 'Myanmar', p. 461.
[1063] South Korea, Singapore and Japan, *See* Morada, 2021, 'Myanmar', p. 461.
[1064] China, Japan and India.
[1065] *See supra* note Chapter 2.5.3.3. at p. 28, for the stance on RtoP of some of these states.
[1066] Foot, 2016, p. 938.
[1067] Pedersen, 2021, p. 373.
[1068] Hong, 2014, p. 1.
[1069] Pedersen, 2021, p. 375.
[1070] *See* UN Charter, chap. vii.
[1071] United Nations General Assembly, 2005, UN Doc A/RES/60/1, para. 139.
[1072] Morada, 2018, p. 120.
[1073] Mennecke and Stensrud, 2021, p. 124.

from atrocities have never been possibly on the agenda. In lieu thereof, the focus has shifted to efforts to ensure accountability in the aftermath and the provision of humanitarian assistance. For RtoP, Myanmar is an enigma because RtoP's capability as the central atrocity prevention principle is reduced to a minimum by Myanmar's lack of political will and the fact that RtoP depends on the UNSC's veto system.[1074]

Indeed, the Rohingya crisis is among those cases that involve atrocity perpetration, however, no single UNSC resolution, apart from one presidential statement[1075], was passed addressing those crimes.[1076] The certainty that Russia and China veto any resolution authorizing the use of force encouraged Tatmadaw's treatment of Rohingya.[1077] China's unyielding diplomacy on Myanmar's behalf exposed the perennial issue of the UNSC being paralyzed and dysfunctional when one permanent member jeopardizes using its veto to guard against the atrocity perpetrating state's interests.[1078] The current cases of Myanmar, Syria and Yemen are all examples of this.[1079] They show that in practice when it comes to preventing or mitigating atrocities, RtoP, including its Pillar-Three-last-resort-option, does not have all the answers.[1080] The application of RtoP to the Rohingya crisis has intrinsic structural limits. These mirror the compromises which needed to be made when RtoP was adopted in 2005.

5.3.2. RtoP's future in general and in ASEAN

Critics announced the end of RtoP's era because of the combination of atrocities and lack of international intervention.[1081] The case of Myanmar undermines such claims. Committed RtoP states sought alternatives 'outside the regular [RtoP] toolbox'[1082], such as the IIMM's work, filing cases at ICC, ICJ and national courts, addressing Rohingya's plight. Myanmar's blatant violations have operated as a vehicle to advance RtoP as a principle. They have catalyzed innovative tools which led to RtoP's further institutionalization. RtoP's progress as a principle has not emerged purely linearly.[1083] RtoP sometimes faltered and may have reverted in the wake of Libya in 2011.[1084]

[1074] Illingworth, 2020, p. 386.
[1075] United Nations Security Council, 2017.
[1076] Mannan, 2017, p. 39.
[1077] Šimonović, 2021, p. 389; Howe, 2022, p. 68.
[1078] Adams, 2019, p. 444.
[1079] Thakur, 2013, p. 71.
[1080] Mennecke and Stensrud, 2021, p. 124.
[1081] Russo, 2020, p. 225; *See* also Mennecke and Stensrud, 2021, p. 124; Rieff, 2011.
[1082] Mennecke and Stensrud, 2021, p. 124.
[1083] Russo, 2020, p. 225.
[1084] Holmes, 2014, p. 143.

However, over the course of past years, a wider trend of RtoP's progression can be seen.[1085] Myanmar demonstrated that the international community has worked in the direction of upholding RtoP. A trend within RtoP might be seen where the move is towards accountability away from military intervention, reflecting the intervention type in which states showed more willingness for engagement. Legitimacy and effectiveness continue to be central issues for numerous states when intervening militarily, particularly in light of the aftermath of Libya.[1086]

For RtoP in ASEAN, in the context of the Rohingya crisis, it is improbable that ASEAN will adopt a more effective RtoP lens in its policy on handling Myanmar and the constituting crisis in short and medium term.[1087] Until there is a new leadership within ASEAN that is committed to RtoP and atrocity prevention to ensure security with the region, ASEAN's traditional norms will be the norm.[1088] A shift in mindset among AMSs of prioritizing human security, protecting vulnerable people and human rights over traditional norms is necessary for RtoP to progress in Myanmar and other parts of ASEAN.

[1085] Burke-White, 2012, p. 34.
[1086] Russo, 2020, p. 232.
[1087] Morada, 2021, 'ASEAN and the Rakhine Crisis', p. 157.
[1088] Petcharamesree, 2016, p. 155.

6. Conclusions

The world failed, and a 'never again'[1089] has taken place in Rakhine. Instead of blaming specific regional and international actors, a much more bitter reality may have to be faced. For the prevention of atrocity crimes, the Rohingya crisis has become a 'black hole'[1090]. As the analyses of the previous chapters indicate, there was nothing in RtoP's framework which could have probably brought about considerable changes for Rohingya. The enormous vulnerability of Rohingya to atrocities has its roots in fundamental factors: widespread discriminatory political ideology justifying deadly violence, violence against Rohingya normalized, and Myanmar's weak and insecure state apparatus. Nationally, at all events, Aung's government needed to do better for Rohingya's protection. But it's questionable whether the civilian government could have done much due to Myanmar's profound structural obstacles. Those include the powerful impact of Myanmar's identity politics, resisting power of Rakhine-Buddhists, Myanmar's ingrained weak state apparatus, and the lacking rule of law and thus civilian control of Tatmadaw.

Internationally, of course, the world could have done more. Eventually, the international community had little influence in the strong nationalist Myanmar, which is substantially an insular state determined to forge its own path to modernity.[1091] UNSC was unable to condemn atrocities and impose sanctions due to Russian and Chinese continuous support to Myanmar. Even in the case of the UNSC being able to enforce reforms, the lacking full cooperation with Myanmar poses major challenges.[1092]

Regionally, ASEAN's inability to sanction Myanmar and respond effectively to the Rohingya crisis remains. Its strategy is a difficult one, balancing three major issues, namely, ASEAN's adherence to PNI, its strategic interests in the face of China's rise in Myanmar, and seeking justice where ASEAN's accountability[1093] apparatus and sanctions are lacking.[1094] The ASEAN way being a main obstacle, needs to be defeated to enforce discipline onto Myanmar, which is not likely to occur.[1095] To sum up, the high atrocity risk and poor feasibility to effectively protect Rohingya under RtoP's three pillars precluded the possibility of RtoP to function in Myanmar.

[1089] Šimonović, 2021, p. 390.
[1090] Pedersen, 2021, p. 375.
[1091] *ibid.*
[1092] Morada, 2020, p. 84.
[1093] For example, AICHR's lacking judiciary mechanism.
[1094] Mennecke and Stensrud, 2021, p. 126.
[1095] Morada, 2020, p. 84.

In a short time, Southeast Asia has come a long way. Most strikingly, atrocity crimes have decreased rapidly and dramatically in the region over the past forty years.[1096] Although RtoP is strongly supported by several AMSs, scepticism still exists. In other words, 'it's early days yet for … RtoP. It has a long way to go before it becomes as entrenched as the Westphalian principle of inviolable state sovereignty.'[1097] The path of a principle is nonlinear, so is RtoP's evolution.

[1096] Bellamy, 2016, p. 180.
[1097] Kassim and Putra, 2010, p. 1; *See* also Petcharamesree, 2016, p. 142.

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