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“ASEAN and the ‘Responsibility to Protect’: A Study of an Ambivalent Relationship”

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A Thesis submitted for the degree of Doctor of Philosophy

City University London

The City Law School

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Abstract

Traditionally the international community has been unable to provide effective responses to mass atrocity crises occurring all over the world. The ‘Responsibility to Protect’ (R2P) has emerged in the last decade or so as a principle that could guide States’ efforts to prevent and respond to humanitarian crises. However, R2P today is still perceived differently in different parts of the world and it remains to be established whether it can successfully achieve its goals. This thesis seeks to examine the way in which R2P has been approached and understood within the Association of Southeast Asian Nations (ASEAN). In particular, it will explore ASEAN and ASEAN States’ *conceptual* and *practical* engagement with R2P, paying special attention to the 1999 East Timor crisis and the present Rohingya crisis. The thesis will consider whether the emergence of R2P has had any impact on the action of ASEAN and ASEAN States. At a broader level, the thesis also engages with the question of regional approaches to international law by providing some insights into the Southeast Asian approach to this particular area of international law. The thesis covers, and has dealt with, events that have happened up until the 3rd of May 2021. As English is not my first language, the thesis has been proofread by a third party who has made no contribution to the intellectual content of the thesis.

List of abbreviations

AHRD	ASEAN Human Rights Declaration
AICHR	ASEAN Intergovernmental Commission on Human Right
AMM	ASEAN Foreign Ministers' Meeting
APODETI	Timorese Democratic People's Union
APSC	ASEAN Political-Security Community
ARSA	Arakan Rohingya Salvation Army
ASDT	Timorese Social Democratic Association
ASEAN	Association of the Southeast Asia Nation
EU	European Union
FRY	Federal Republic of Yugoslavia
FRETILIN	Revolutionary Front for Independent East Timor
GA	United Nations General Assembly
HI	Humanitarian Intervention
HRW	Human Rights Watch
ICJ	International Court of Justice
ICISS	International Commission on Intervention and State Sovereignty
INTERFET	International Force East Timor
KLA	Kosovo Liberation Army
NATO	North Atlantic Treaty Organisation
P-5	Permanent Members of the Security Council
RP	Responsible Protection
RPF	Rwandan Patriotic Front
RwP	Responsibility while Protecting
R2P	Responsibility to Protect
SC	United Nations Security Council
TAC	Treaty of Amity and Cooperation
TNI	Tentara Nasional Indonesia
UDHR	Universal Declaration of Human Rights
UDT	Democratic Union of Timor
UN	United Nations

UNAMIR	United Nations Assistance Mission for Rwanda
UNPROFOR	United Nations Protection Force
VAP	Vientiane Action Programme
ZOPFAN	Declaration on a Zone of Peace, Freedom and Neutrality

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Chapter 1

Introduction

1.1 The Context

Prior to the Cold War, the issue of human rights played a very limited role in both international law and relations. Traditionally, as Antonio Cassese had stated, ‘individuals were mere ‘appendices’ of the State to which they belonged, simple pawns in its hands, to be used, protected or sacrificed according to what State interests dictated’.¹ That began to change with the end of the Cold War. The post-Cold War era has brought several fundamental changes into the international community as we see today. Due to globalisation, the world has become economically and socially intertwined, closer than ever before, which means that events in one part of the world can have profound implications for another.² Furthermore, individual States are no longer the only influential actors in the international community given the steady rise of international and regional organisations which began after World War II. In this changing setting, one of the main novelties brought by the end of the Cold War was the international community’s growing concern with human rights, crucially facilitated by the collapse of the Soviet Union and the parallel rise of liberal democracies. Among other things, the latter sought to advance on the international plane ‘the notion of equal autonomy of and respect for the individual’ in which they firmly believe.³ The perception of state sovereignty was inevitably affected by this new focus on individuals and their rights. Pre-Cold War, sovereignty was understood in the traditional Westphalian concept, which entails that:

¹ Antonio Cassese, *International Law* (Oxford University Press, 2nd edition, 2005) p. 376.

² Aidan Hehir, *Humanitarian Intervention: An Introduction* (Palgrave Macmillan, 2010) p. 5.

³ David P. Forsythe, *Human Rights in International Relations* (Cambridge University Press, 3rd edition, 2012) p. 22.

‘the State is sovereign in that it must answer to no higher authority in the international sphere. It alone defines and protects the right of individuals and groups’⁴

However, the growing concern with the human rights of individuals living within States tore apart the veil that had been used traditionally to protect the rigid concept of Westphalian sovereignty.⁵ As the concept of absolute sovereignty continued to erode, States no longer had free rein over the treatment of their people. The standards enshrined in the Universal Declaration of Human Rights began to acquire new emphasis and value.

Another parallel development that occurred in the past few decades is the increase in intra-state conflicts that have gradually come to outnumber the more traditional inter-state wars.⁶ The international community was, and continues to be, not very well equipped to deal with this type of conflict because the relevant provisions of the central legal instrument of the United Nations (UN), namely the UN Charter, are only responsive to inter-state conflicts.⁷ Quite importantly, intra-state conflicts tend to lead to mass atrocity situations affecting and displacing the civilian population. According to a recent Report of the UN Secretary-General, in 2014 the numbers of deaths caused by atrocity crimes exceeded 100,000, its highest level since 1994 due to the increased targeting of civilians.⁸ The report also highlighted that atrocity crimes contributed significantly to the global crisis of forced displacement, with 21.3 million refugees and more than 40.8 million internally displaced persons counted as of 2016.⁹ Given these numbers, the

⁴ Robert Gilpin, *War and Change in World Politics* (Cambridge University Press, 1981) p. 17.

⁵ Antonio Cassese, *International Law* (Oxford University Press, 2nd edition, 2005) p. 375.

⁶ Christine Gray, *International Law and the Use of Force* (Oxford University Press, 3rd edition, 2008) p. 7; and Harold A. Young, ‘Intrastate Conflicts: Refocus on the Intractable’ (MPSA, 12 September 2017) <<https://blog.mpsanet.org/2017/09/12/intrastate-conflicts-refocus-on-the-intractable/>> accessed on 18 March 2021.

⁷ Marc Weller, *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) p. 19.

⁸ Report of the Secretary-General “Mobilizing collective action: the next decade for the responsibility to protect” (2016) A/70/999-S/2016/620, pp. 3-4.

⁹ Ibid.

ability of the international community to respond effectively to atrocity crimes becomes extremely important.

In the early and mid-1990s, the international community failed to respond to the well-known humanitarian crises in Rwanda and Srebrenica. In 1994, the international community failed to protect innocent civilians during the Rwandan civil war, which resulted in the ‘one hundred days of genocide’ of the Tutsi population.¹⁰ Sadly, the same can be said about the genocide in Srebrenica. In 1995, the world saw the genocide of more than 8000 Bosniaks by the Bosnian Serb army.¹¹ By contrast, the international community took action in relation to the humanitarian crisis which erupted in Kosovo in the late 1990s. On this occasion, the North Atlantic Treaty Organisation (NATO) launched an unprecedented bombing campaign to protect the Kosovar Albanians against the armed forces of the Federal Republic of Yugoslavia (FRY).¹² With the United Nations Security Council (SC) gridlocked, several failed rounds of negotiations and the atrocities on the ground escalating to ethnic cleansing, NATO commenced Operation Allied Force, which ultimately brought an end to the conflict. But was this military intervention legal? To answer this question one must refer to the concept of humanitarian intervention.

For this thesis, humanitarian intervention is understood as ‘the threat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave

¹⁰ The civil war was between the Hutu-led government and the Rwandan Patriotic Front (RPF). Officially, the war was supposed to end once both parties had signed the Arusha Accords in which they agreed to a power-sharing political structure. In reality, as soon as the Accords were signed, the Hutu extremists began their genocidal campaign to scupper the implementation of the Accords. The death toll ranges was around 800,000 in addition to 250,000-500,000 rapes of the Tutsis; see, Aidan Hehir, *Humanitarian Intervention: An Introduction* (Palgrave Macmillan, 2010) pp. 181-183; and ‘Rwanda genocide: 100 days of slaughter’ (BBC, 4 April 2009) < <https://www.bbc.co.uk/news/world-africa-26875506> > accessed on 18 March 2021.

¹¹ During the Bosnian War in 1993, Srebrenica was declared as a ‘safe area’ through the SC Resolution 824, which was supposed to mean that the town was under the protection of the United Nations Protection Force; see, The United Nations Security Council Resolutions 824, S/RES/824; and Cedric Ryngaert and Nico Schrijver, ‘Lessons Learned from the Srebrenica Massacre: From UN Peacekeeping Reform to Legal Responsibility’ [2015] 62 *Netherlands International Law Review*, p. 219.

¹² The Independent International Commission on Kosovo, ‘The Kosovo Report: Conflict, International Response, Lessons Learned’ [2000] pp. 70-72.

violations of the fundamental human rights of individual other than its own citizens, without the permission of the state within whose territory force is applied'.¹³ Put simply, in international law there is no legal basis for humanitarian intervention. Indeed, this concept is riddled with both legal and political controversies. Legally, it conflicts with two important provisions of the Charter of the UN, namely Article 2(4) and 2(7). Article 2(4) states that 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state'.¹⁴ Article 2(7), instead, states that 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially in the domestic jurisdiction of any state'.¹⁵ Politically, a key concern surrounding humanitarian intervention is that it cannot be guaranteed that interventions of these kinds would always be led exclusively by humanitarian motives. Thus, intervenors could claim a right to carry out an intervention on humanitarian grounds, while, in reality, through this intervention they could be pursuing their own self-interests or, even, an imperialistic agenda.¹⁶ Another difficult question is who should have the right to intervene in humanitarian crises in another State?¹⁷ Individual States? Or groups of States only, possibly under the auspices of a regional organisation?

The importance of each of these questions became apparent in relation to the NATO intervention in Kosovo. Legally speaking, the NATO military intervention was widely seen as illegal since it was in direct violation of the UN Charter, notably Articles 2(4) and 2(7) that were mentioned above. As argued by Nigel White, not only did NATO violate the two Articles of the UN Charter, but the organisation also stepped outside the parameters of the Charter when

¹³ J. L. Holzgrefe and Robert Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (Cambridge University Press, 2005) p. 18.

¹⁴ The United Nations Charter, Article 2(4).

¹⁵ Ibid, Article 2(7).

¹⁶ Jennifer M. Welsh, *Humanitarian Intervention and International Relations* (Oxford University Press, 2003) p. 58.

¹⁷ Aidan Hehir, *Humanitarian Intervention: An Introduction* (Palgrave Macmillan, 2010) p. 135.

it failed to secure an authorisation from the SC.¹⁸ On the other hand, several authors, including Bruno Simma and Antonio Cassese, acknowledged the illegal character of the intervention but also referred to it as *legitimate*, since it was aimed at halting mass atrocities at a time when no other viable alternative was considered available.¹⁹ The legal and political debates surrounding the NATO intervention left the international community facing a fundamental question: if Operation Allied Force represents a violation of international law, are we supposed to just stand by and watch another Rwanda and Srebrenica? The essence of this dilemma was perfectly captured by the words of former Secretary-General of the UN, Kofi Annan:

‘... if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica- to gross and systematic violations of human rights that offend every precept of our common humanity?’²⁰

This dilemma revealed powerfully the need for a different approach to responding to mass atrocities. In particular, the criticisms moved against NATO’s intervention paved the way to a shift from an individual right to intervene – represented by the classic concept of humanitarian intervention - to a collective responsibility to protect, a new idea reflected in the concept of ‘Responsibility to Protect’ (R2P).²¹ R2P was first envisioned as a concept in the Report of the International Commission on Intervention and State Sovereignty (ICISS).²² R2P was revolutionary in the way in which it re-characterised ‘the right to intervene’ as a ‘responsibility

¹⁸ N.D White, ‘The Legality of Bombing in the Name of Humanity’ [2000] 5:1 *Journal of Conflict and Security Law*, p. 32.

¹⁹ Antonio Cassese, ‘Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’ [1999] 10:1 *European Journal of International Law*, p. 25; and Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ [1999] 10:1 *European Journal of International Law*, p. 12; see also The Independent International Commission on Kosovo, ‘The Kosovo Report: Conflict, International Response, Lessons Learned’ [2000] p. 4.

²⁰ ‘We the Peoples – The Role of the United Nations in the 21st Century’ (2000), Millennium Report of the Secretary-General, p. 48, <https://www.un.org/en/events/pastevents/pdfs/We_The_Peoples.pdf> accessed on 14 April 2021.

²¹ The concept of ‘Responsibility to Protect’ will be analysed in detail in Chapter 2.

²² ‘The Responsibility to Protect’ [2001] The International Commission on Intervention and State Sovereignty.

to protect'. Conceptually, the issue was no longer about the 'right' of any State to intervene but, rather, the 'responsibility' of all States to protect their own populations from mass atrocities.²³ Furthermore, sovereignty could no longer be used as a shield to protect States' actions; instead, the concept of sovereignty would carry with it a primary responsibility of States to protect their peoples from atrocities. In the words of the International Commission on Intervention and State Sovereignty:

'State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect'²⁴

The introduction of this new perception of sovereignty departs from the traditional Westphalian way of thinking. In this way, R2P transformed both the concept of sovereignty and the concept of non-intervention, that is, a corollary principle of sovereignty. Rather than seeing intervention as an illegal interference into the domestic affairs of a sovereign State, R2P redefined it as sharing or overtaking the responsibility of a State to protect its people from mass atrocities when the State is unable or unwilling to do so.

As will be discussed in the next chapter, in an effort to simplify the core concepts of R2P, in 2009 the then UN Secretary-General, Ban Ki-moon, published a report outlining the three-pillar structure of R2P.²⁵ Pillar I outlines the primary responsibility of States in protecting their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.²⁶ Pillar II outlines the responsibility that the international community has in encouraging and assisting

²³ Ramesh Thakur and William Maley, *Theorising the Responsibility to Protect* (Cambridge University Press 2015) p. 21.

²⁴ 'The Responsibility to Protect' [2001] The International Commission on Intervention and State Sovereignty, XI.

²⁵ United Nations General Assembly (2009), 'Implementing the responsibility to protect', A/63/677.

²⁶ *Ibid.*, pp. 10-14.

States in meeting their Pillar I responsibilities.²⁷ Finally, Pillar III outlines the responsibility of the international community, through the UN, to respond collectively to humanitarian crises in a timely and decisive manner.²⁸

This thesis accepts that R2P promises to provide a better response to humanitarian crises than humanitarian intervention does. Unlike the concept humanitarian intervention, R2P's principles are legally in accordance with the UN Charter. As mentioned above, R2P has reconciled the traditional concept of sovereignty and responsibility. Of course, sovereignty should be respected but only if the State is upholding its primary responsibility to protect its people. In a situation where the State is either unable or unwilling to do so, its sovereignty is then forfeited to the international community and is no longer protected by the UN Charter, namely Article 2(7). So, if an intervention occurs, it will not be in violation of the UN Charter since it would be as a result of the international community (with authorisation from the SC) taking over its responsibility to protect people from the State in question. Furthermore, because R2P operates within the UN Charter framework, it is politically more acceptable.

For these reasons, this thesis suggests that efforts should be made to further promote R2P as a key guiding principle of international action in situations of mass atrocities. However, R2P cannot be said, today, to have become very well established in international law. Conceptually, the fundamental idea of R2P is generally accepted by the international community. By contrast, the precise meaning and scope of R2P, as well as how it should be applied in practice, remain a subject of debate among States. This is not surprising given the implications that any attempt to redefine the principles of sovereignty and non-intervention can have on international law and affairs. This thesis recognises the potential of R2P to provide a more structured and effective answer to mass atrocities (in addition to the need to provide such answers), but also

²⁷ Ibid., pp. 15-21.

²⁸ Ibid., pp. 22-27.

takes note of the ongoing disagreement among States as to its exact meaning and scope. Accordingly, this thesis posits that it is extremely important to examine the nature and degree of this ‘disagreement’, and that, doing so, could in turn contribute to promote a more shared understanding of R2P. In particular, this thesis will focus on the approach to R2P taken in one particular region of the world, that is, Southeast Asia. Specifically, it will consider the relationship between R2P and the Association of Southeast Asian Nations (ASEAN). There are four fundamental reasons as to why I have chosen to examine ASEAN’s approach to R2P. Firstly, ASEAN is becoming an increasingly important actor in international affairs and has arguably been the most successful regional organisation among developing countries.²⁹ ASEAN has become a worldwide trading hub with partnerships with the European Union (EU), China, Japan, South Korea and India.³⁰ Although without any official partnership, ASEAN is also the United States’ (US) fourth largest trading partners.³¹ Unsurprisingly, ASEAN’s growing economic and political importance has been recognized by great powers such as the US and China.³² A recent article in the *Economist* pointed out that there is competition between the US and China over hegemony of the region since the combined economies of the Southeast Asia countries would be the fourth biggest in the world and the region is home to 700 million

²⁹ Stephen Aris and Andreas Wenger, *Regional Organisations and Security: Conceptions and Practices* (Routledge, 2014) p. 81.

³⁰ European Commission, ‘Association of Southeast Asian Nations (ASEAN) (European Commission, updated 5 May 2020) < https://ec.europa.eu/trade/policy/countries-and-regions/regions/asean/index_en.htm> accessed on 10 January 2021; and Elaine Kurtenbach, ‘ASEAN, China, Other Partners Sign World’s Biggest Trade Pact’ (The Diplomat, 16 November 2020) < <https://thediplomat.com/2020/11/asean-china-other-partners-sign-worlds-biggest-trade-pact/>> accessed on 10 January 2021.

³¹ Office of the United States Trade Representatives, ‘Association of the Southeast Asian Nations (ASEAN)’ < <https://ustr.gov/countries-regions/southeast-asia-pacific/association-southeast-asian-nations-asean>> accessed on 10 January 2021.

³² In his statement, former president of the United States, Barack Obama recognised the significance of ASEAN in its role in pursuing regional peace and prosperity as well as being an international trade partner. Chinese President Xi Jinping acknowledged ASEAN as an essential trading partner and announced that China has made its relationship with ASEAN a priority; see, Remarks by President Obama at opening Session of US-ASEAN Summit (15 February 2016) < <https://obamawhitehouse.archives.gov/the-press-office/2016/02/15/remarks-president-obama-opening-session-us-asean-summit>> accessed 7 December 2020; and Laura Zhou ‘‘Let’s build a digital Silk Road’: Xi Jinping looks to cement China’s ties with ASEAN’ (South China Morning Post, 27 November 2020) <<https://www.scmp.com/news/china/diplomacy/article/3111612/lets-build-digital-silk-road-president-xi-promises-ways-china>> accessed 7 December 2020.

people – more than the EU, Latin America or Middle East combined.³³ Going forward, Southeast Asia will become an even more important region of the world, making it all the more important to look at how international norms are seen, interpreted and implemented in this part of the globe.³⁴ Secondly, ASEAN has traditionally taken a very conservative approach to the principles of sovereignty and non-intervention. As will be explained in Chapter 3, ASEAN States had a long history of colonialism which contributed to reinforce their commitment to a Westphalian type of sovereignty.³⁵ Indeed, since its creation, ASEAN has repeatedly reiterated its firm support for the concepts of sovereignty and non-interference.³⁶ Evidently, this conservative position is at odds with the fundamental principles of R2P that were discussed earlier, making it particularly interesting to examine the extent of the relevant clash between these two approaches to sovereignty. Thirdly, ASEAN is made up of quite a diverse group of States. Although, as mentioned above, these States have taken a conservative approach to the principles of sovereignty and non-intervention, the degree of conservatism varies greatly amongst them. For example, Myanmar, the Philippines, Malaysia, Cambodia, Laos, Singapore and Vietnam are parties to the Convention on the Prevention and Punishment of the Crime of Genocide (1948), while Indonesia, Thailand and Brunei are not.³⁷ Furthermore, among ASEAN States only Cambodia and the Philippines are parties to the Rome Statute of the

³³ The Economist, ‘The battle for China’s backyard’ (The Economist, 27 February 2021) <<https://www.economist.com/leaders/2021/02/27/the-rivalry-between-america-and-china-will-hinge-on-south-east-asia>> accessed on 15 March 2021.

³⁴ Ryan Zhang ‘Beating the Odds: How ASEAN Helped Southeast Asia Succeed’ (Harvard Political Review, 15 March 2020) <<https://harvardpolitics.com/asean-beats-the-odds/>> accessed 7 December 2020.

³⁵ Shaun Narine, ‘State Sovereignty, political legitimacy and regional institutionalism in the Asia-Pacific’ [2004] 17:3 *The Pacific Review*, p. 426.

³⁶ The Bangkok Declaration (1967), p. 1; The Declaration on a Zone of Peace, Freedom and Neutrality, Kuala Lumpur (1971); The Treaty of Amity and Cooperation (1976), Article 2 and The ASEAN Charter (2007).

³⁷ Lina A. Alexandra, ‘The Incipient Development of ASEAN: A Chance for Mutual Learning’ [2013] *Instituto Affari Internazionali*, pp. 65; see also International Committee of the Red Cross, ‘Convention on the Prevention and Punishment of the Crime of Genocide’ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=357#panelReservation> accessed 15 March 2021.

International Criminal Court.³⁸ Fourthly, and on a more personal level, I come from Cambodia, which is one of ASEAN States. Therefore, I have a personal attachment to this region of the world and I am particularly interested in exploring ASEAN's position on a vital question such as that of atrocity crimes.

1.2 The Research Questions and the Theoretical Framework of the Thesis

The central research question of this thesis is 'how does ASEAN approach R2P?' This central question is then divided into two sub-sections, namely what ASEAN conceptual approach to R2P is, and how has ASEAN practically engaged with R2P. A broader question that is indirectly addressed by this thesis is that of the implications of regional approaches to international law. This is a growing area of interest under international law which sets, broadly, the theoretical framework of this thesis. The assumption of 'universal' international law suggests that the latter is 'universal', that is to say, that principles of international law are perceived in the same way all over the world.³⁹ In reality, international laws are approached in different ways by different States in different regions of the world in a way that better suits their preferences.⁴⁰ This is especially so now that the world order is no longer based on a unipolar structure but, rather, a multipolar one with power diffusing among several States.⁴¹ Following this new distribution of geopolitical power, non-Western States such as Russia, China, India, Brazil and South Africa have become more assertive powers.⁴² With their

³⁸ International Criminal Court, 'Signatories of the Rome Statute' <<https://internationalcrimcourtnashie.weebly.com/signatories-of-the-rome-statute.html>> accessed on 15 March 2021.

³⁹ Paul B. Stephan, 'Symmetry and Selectivity: What Happens in International Law When the World Changes' [2009] 10:1 *Chicago Journal of International Law*, p. 102.

⁴⁰ William W. Burke-White, 'Power Shifts in International Law: Structural Realignment and Substantive Pluralism' [2015] 56:1 *Harvard International Law Journal*, p. 44.

⁴¹ Paul B. Stephan, 'Symmetry and Selectivity: What Happens in International Law When the World Changes' [2009] 10:1 *Chicago Journal of International Law*, p. 115.

⁴² Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017) p. 14.

increased importance and relevance on the international stage, these non-Western States, collectively and individually, are making themselves heard and seeking to impose their views and interpretations of international law in the international community to challenge the status quo of Eurocentrism.⁴³ Eastern States have also become more assertive in offering their own interpretations of international law in order to prevent history from repeating itself.⁴⁴ Notably, China has been a champion in the Southeast Asia region for representing an alternative interpretation of international law that, in accordance with ASEAN States' preferences, places the highest importance on the principles of sovereignty and non-intervention.⁴⁵

Against this background, regional approaches to international law originated as a specific methodology within the umbrella of contemporary comparative international law with the aim of identifying, analysing and explaining differences and similarities between the approaches taken by different actors on questions of international law.⁴⁶ Important authors have contributed to the rise of this approach to the study of international law, including Anthea Roberts⁴⁷, William Burke-White⁴⁸, Xue Hanquin⁴⁹, Lauri Malksoo⁵⁰, Onuma Yasuaki⁵¹, B.S.

⁴³ Ibid; and Wim Muller, 'China: an Illiberal, Non-Western States in a West-centric, Liberal Order?' [2014] *Baltic Yearbook of International Law*, pp. 3-4.

⁴⁴ Lauri Mälksoo, 'Russia and China Challenge the Western Hegemony in the Interpretation of International Law' (Blog of the European Journal of International Law, 15 July 2016) <<https://www.ejiltalk.org/russia-and-china-challenge-the-western-hegemony-in-the-interpretation-of-international-law/>> accessed on 11 May 2021.

⁴⁵ Ibid; and Wim Muller, 'China: an Illiberal, Non-Western States in a West-centric, Liberal Order?' [2014] *Baltic Yearbook of International Law*, pp. 6 and 9-10.

⁴⁶ Anthea Roberts and et al, *Comparative International Law* (Oxford University Press, 2018) p. 162; and Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017) p. 21.

⁴⁷ Anthea Roberts and et al, *Comparative International Law* (Oxford University Press, 2018) and Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017).

⁴⁸ William W. Burke-White, 'Power Shifts in International Law: Structural Realignment and Substantive Pluralism' [2015] 56:1 *Harvard International Law Journal*.

⁴⁹ Xue Hanquin, *Chinese Contemporary Perspectives on International Law* (Brill Nijhoff, 2012).

⁵⁰ Lauri Malksoo, *Russian Approaches to International Law* (Oxford University Press, 2015); and Lauri Malksoo, 'Civilizational Diversity as Challenge to the (False) Universality of International Law' [2019] 9 *Asian Journal of International Law*.

⁵¹ Onuma Yasuaki, *International Law in a Transcivilizational World* (Cambridge University Press, 2017); and Onuma Yasuaki, *A Transcivilization Perspective on International Law* (Hague Academy of International Law, 2010).

Chimni⁵² and Congyan Cai⁵³. In light of the changes in the geopolitical order mentioned above, these authors have suggested that different interpretations of international law must be taken into account instead of simply taking for granted the universal validity of Western interpretations. This approach to international law is, therefore, better suited to provide a genuine universal representation of international law that is based on worldwide views rather than just on the view representative of one region of the world. Seen from this perspective, considering and examining regional approaches to questions of international law actually enriches rather than weakens the universality of international law.

In accordance with this approach, this thesis specifically chooses to focus on the approach to R2P of one particular region of the world, namely Southeast Asia. As discussed in the thesis, this means that it is particularly important to examine how this region of the world approaches the principles of international law that are of vital for the interpretation and implementation of R2P, namely State sovereignty, non-interference, use of force and human rights. The gaps between how Western and ASEAN States interpret these principles are noteworthy. For example, while Western States have gradually moved away from the Westphalian concept of sovereignty, Eastern States have been wary of this change of perspective. These differences are particularly acute regarding humanitarian crisis. For example, referring to NATO's intervention in Kosovo, it was the threat of veto by Russia and China that prevented the US, the UK, and France from obtaining a Security Council authorisation to intervene militarily. In these situations, regional approaches to humanitarian crises can, therefore, vary substantially. Despite this, the importance of regional organisations in responding to mass atrocities and implementing R2P has been acknowledged by the ICISS Report, the World Summit Outcome

⁵² B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Cambridge University Press, 2017) and B.S. Chimni, 'Third World Approaches to International Law: A Manifesto' [2006] 8:3 *International Community Review*.

⁵³ Congyan Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (Oxford University Press, 2019); and Congyan Cai, 'New Great Powers and International Law in the 21st Century' [2013] 24:3 *European Journal of International Law*.

Document (2005) and the Report of the Secretary-General ‘The role of regional and subregional arrangements in implementing the responsibility to protect’ (2011).⁵⁴ In fact, some have also suggested that regional actors could be better suited than international actors in implementing R2P.⁵⁵ This is so for four reasons. Firstly, given that mass atrocities are a threat to the peace, security, stability and economy of a region, States within that region are more willing to act being the most affected ones.⁵⁶ Secondly, the Security Council does not always have the political will to respond to mass atrocities as will be discussed in the Rwanda and Srebrenica crises in the next chapter.⁵⁷ Thirdly, regional actors would generally be more welcomed by local parties because of their intimate knowledge of the cultural, political, social and geographical terrain.⁵⁸ Finally, non-Western States would always see an intervention led by Western States as a form of neo-colonial imperialism.⁵⁹ For all these reasons, my thesis seeks to examine ASEAN and ASEAN States’ approaches to R2P also with a view to highlighting the differences with the West and in the hope of fostering a stronger genuine universal approach to the relevant principles of international law.

In terms of research methods, for this thesis I have carried out a traditional desk-based research. As part of this effort, in addition to consulting traditional secondary sources, I have made extensive use of primary sources. Examples of primary sources used in the thesis include resolutions of the Security Council and the General Assembly, as well as ASEAN declarations

⁵⁴ ‘The Responsibility to Protect’ [2001] The International Commission on Intervention and State Sovereignty, pp. 22 and 26; Report of the Secretary-General “The role of regional and subregional arrangements in implementing the responsibility to protect” (2011), A/65/877-S/2011/393, pp. 2-3; and The United Nations, ‘The 2005 World Summit: High-Level Panel Plenary Meeting of the 60th session of the UN General Assembly’ (UN Headquarter, New York, 14-16th September 2005) <http://www.un.org/en/events/pastevents/worldsummit_2005.shtml> accessed 15 March 2021.

⁵⁵ Bolarinwa Adediran, ‘Implementing R2P: Towards a Regional Solution?’ [2017] 9 *Global Responsibility to Protect*, p. 461.

⁵⁶ *Ibid.*, p. 468.

⁵⁷ *Ibid.*, pp. 469-470.

⁵⁸ *Ibid.*, p. 472.

⁵⁹ *Ibid.*, p. 474.

and official documents. I have also researched extensively the official statements made by ASEAN States in various international and regional fora. In addition, newspaper articles have also been used to provide crucial factual information. In the course of writing this thesis, I have also benefited from occasional informal discussions with a former Cambodian diplomat working for ASEAN to better understand the inner workings of the organisation. These discussions have helped me to gain a better understanding of ASEANs working methods as well as engagements with the principles of sovereignty and non-interference. Finally, in writing this thesis, taking into account my background as both an international relations (undergraduate degree) and international law (master degree) student, I have employed an interdisciplinary approach drawing from both international law and international relations scholarship.

1.3 Originality

A number of works have examined, to various extents, some of the issues that are addressed in this thesis. These works can be divided into three main categories: first, works focused on R2P; second, works centred on ASEAN as a regional organisation; and third, works discussing, in broad terms, ASEAN and its members' relationship with R2P. As to the first category, Alex J. Bellamy and Tim Dunne's *The Oxford Handbook of the Responsibility to Protect* is a key resource in the area. This *Handbook* analyses the background and emergence of R2P, as well as its status in international law.⁶⁰ Also belonging to the first category, Ramesh Thakur and William Maley's *Theorising the Responsibility to Protect* provides an overview of the core tenets of R2P and the evolution of this principle from a concept to an actionable norm.⁶¹ Furthermore, Thakur and Maley also analyse where exactly R2P fits into international law,

⁶⁰ Alex J. Bellamy and Tim Dunne, *The Oxford Handbook of the Responsibility to Protect* (first edition 2006, Oxford University Press 2016).

⁶¹ Ramesh Thakur and William Maley, *Theorising the Responsibility to Protect* (Cambridge University Press 2015).

whether the doctrine of R2P is an innately Western idea and how R2P represents colonialism to non-Western States. Alex J Bellamy's *The Responsibility to Protect: A Defense* is another seminal work in the field of R2P studies.⁶² This book promotes R2P as an international norm contrasting the argument that sees it as a new form of neo-imperialism. While all very important in the literature on R2P, none of these books consider the question of regional, let alone ASEAN, approaches to this principle.

The second category of works relevant for this thesis are those works which focus on ASEAN, especially in the context of regional security. Joseph Chunyong Liow and Ralf Emmers' *Order and Security in Southeast Asia: Essays in memory of Michael Leifer* provides a detailed discussion of the regional order in Southeast Asia before and after the Cold War.⁶³ This work also considers the role and importance of norms in ASEAN and whether ASEAN behaves like a security community with a collective regional identity. Amitav Acharya's *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* is another important work in the area. It looks at the emergence and evolution of the concept of the 'ASEAN Way' while also explaining the inner workings and attitude of ASEAN as a regional organisation.⁶⁴ Finally, Kishore Mahbubani and Jeffery Sng's work *The ASEAN Miracle: A Catalyst for Peace* provides an intimate insight into the factors behind ASEAN's regional peace and ASEAN's relationship with the five great powers in the international community today (US, EU, China, India and Japan).⁶⁵ While all these works are extremely valuable in providing an insight into Southeast Asia's regional order and security, none of them considers the question of ASEAN and humanitarian crises, generally, or ASEAN and R2P, specifically.

⁶² Alex J. Bellamy, *The Responsibility to Protect: A Defense* (Oxford University Press, 2015).

⁶³ Joseph Chunyong Liow and Ralf Emmers, *Order and Security in Southeast Asia: Essays in memory of Michael Leifer* (Routledge, 2006).

⁶⁴ Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (3rd edition, Routledge, 2014).

⁶⁵ Kishore Mahbubani and Jeffery Sng, *The ASEAN Miracle: A Catalyst for Peace* (NUS Press, 2017).

Lee Jones' *ASEAN, Sovereignty and Intervention in Southeast Asia* differs from the previously mentioned books in that it is specifically centred on the questions of sovereignty and intervention, namely two vital questions for this thesis.⁶⁶ While Jones provides an excellent examination of ASEAN's visions of sovereignty and non-interference, he does not include R2P in his thorough analysis.

Finally, the third category of works relevant for this thesis are those works which have touched specifically on the relationship between ASEAN and R2P. One of the key resources in the field is Yang Razali Kassim's *The Geopolitics of Intervention: Asia and the Responsibility to Protect*.⁶⁷ This book is generally interested in providing a non-Western account of R2P. Kassim in fact explores how Asian States such as China, India and Japan approach R2P. Only one chapter of the book is dedicated to ASEAN. An individual chapter on ASEAN and R2P is also included in one of the collections mentioned above, namely Bellamy and Dunne's *Handbook*.⁶⁸ As such, the limited scope of these two studies does not allow for an in-depth analysis of ASEAN and its members' conceptual and practical engagements with a complex principle such as R2P, nor targeted investigations of case-studies. The same is true of three valuable articles written on this topic, namely Alex J. Bellamy and Catherine Drummond's '*The responsibility to protect in Southeast Asia: between non-interference and sovereignty as responsibility*', Alex J. Bellamy and Sara E. Davies' '*The Responsibility to Protect in the Asia-Pacific Region*', and Alex J. Bellamy and Mark Beeson's '*The Responsibility to Protect in Southeast Asia: Can ASEAN Reconcile Humanitarianism and Sovereignty?*'.⁶⁹ While useful in outlining some of the key issues surrounding the question of ASEAN and R2P, none of these works provides a

⁶⁶ Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan, 2012).

⁶⁷ Yang Razali Kassim, *The Geopolitics of Intervention: Asia and the Responsibility to Protect* (Springer, 2014).

⁶⁸ Alex J. Bellamy and Tim Dunne, *The Oxford Handbook of the Responsibility to Protect* (first edition 2006, Oxford University Press, 2016) Chapter 20.

⁶⁹ Alex J. Bellamy & Catherine Drummond, 'The responsibility to protect in Southeast Asia: between non-interference and sovereignty as responsibility' [2011] 24:2 *The Pacific Review*; Alex J. Bellamy and Sara E. Davies, 'The Responsibility To Protect in the Asia-Pacific Region' [2009] 40:6 *Security Dialogue*; and Alex J. Bellamy and Mark Beeson, 'The Responsibility to Protect in Southeast Asia: Can ASEAN Reconcile Humanitarianism and Sovereignty?' [2010] 6:3 *Asian Security*.

comprehensive study of the relationship between ASEAN and all its individual members with the three Pillars of R2P. In addition, none of these works offers a combined analysis of the conceptual and practical engagement of the former with R2P.

In light of the above, there is still an important gap in the literature on ASEAN and R2P. This thesis seeks to fill this gap by providing an original examination of ASEAN's relationship with the three Pillars of R2P, both conceptually and practically.

1.4 Thesis Outline

This thesis will be structured as follows. Chapter 2 will discuss the emergence of R2P in international law. The chapter will start with the examination of the International Commission on Intervention and State Sovereignty's report 'The Responsibility to Protect'. Following on that, it will explore the gradual move of R2P from the political to the legal space starting with its institutionalisation at the UN 2005 World Summit. This chapter will also seek to highlight both the conceptual and practical controversies associated with R2P.

Chapter 3 will introduce ASEAN as the regional organisation placed at the centre of this thesis. The chapter will, first, offer an overview of ASEAN's history, institutional structure and decision making-mechanisms. Crucially, this chapter will also discuss the key principles guiding the conduct of the organisation in international relations.

After having provided an overview of ASEAN in Chapter 3, the thesis will turn to analyse, in Chapter 4, how ASEAN approaches R2P conceptually. This chapter will consider both ASEAN and ASEAN States' positions on the three Pillars of R2P. Special attention will be paid to individual States' engagement with the discussions held during the General Assembly Informal Interactive Dialogues on R2P that took place between 2009 and 2017. These are meetings

where individual members of the UN discussed their positions and opinions on R2P seeking to identify the flaws and challenges faced by R2P. Accordingly, this chapter will divide ASEAN States on the basis of their level of support for R2P, describing them as either wary supporters, R2P-neutrals or opposers.

The second part of the thesis, composed of Chapters 5 and 6, will focus on ASEAN's practical responses to two humanitarian crises. Chapter 5 will analyse ASEAN's position during a humanitarian crisis which occurred before the formal emergence of R2P in international law, namely the 1999 East Timor crisis. ASEAN and its member States' reactions will be analysed in detail, while also considering the reaction of the international community. Chapter 6, instead, will focus on ASEAN and ASEAN States' response to a very recent mass atrocity situation, namely the Rohingya crisis in Myanmar. Crucially, and in contrast with the previous case-study, this humanitarian crisis occurred after the emergence of R2P in international law. Considering the broad support, at the conceptual level, of ASEAN States for R2P, it will be interesting to see whether this conceptual support would ultimately translated into action, or, if a similar behaviour to the one seen in the case of East Timor ended up characterising also ASEAN's response towards Myanmar.

Chapter 7 will draw some final conclusions as to ASEAN's overall approach to R2P and as to how this region's stance on R2P could affect the future development of this concept as a guiding principle of international law.

Chapter 2

The Emergence of R2P in International Law

2.1 Introduction

This chapter will focus on the emergence of the principle of responsibility to protect. Its aim is to provide, at the beginning of the thesis, an overview of the current meaning and status of responsibility to protect in international law. The chapter will first offer a discussion of the failures of the international community to respond to the humanitarian crises in Rwanda and Srebrenica in the mid-1990s and, then, an analysis of the North Atlantic Treaty Organisation's controversial Operation Allied Force in Kosovo in 1999. Following on this, this chapter will discuss the origins of the responsibility to protect, which was first developed, in 2001, by the International Commission on Intervention and State Sovereignty in an effort to define a new guiding principle that could provide a valid answer to the problem of mass atrocities. After that, the chapter will provide an overview of the gradual move of the responsibility to protect from the political to the legal space, a move that culminated in the adoption of the 2005 World Summit Outcome Document. The second part of the chapter will look at how the responsibility to protect has been thus far implemented on the ground. To date, the two conflict situations which have been most heatedly debated in connection with the responsibility to protect are those which started to occur in Libya and Syria in 2011. Finally, this chapter will draw some conclusions as to the conceptual and practical problems that still hinder the full development and implementation of the responsibility to protect as an efficient principle in the battle against mass atrocities.

2.2 Rwanda, Srebrenica and Kosovo

As briefly mentioned in Chapter 1, in the mid-1990s, the international community faced, and failed to respond to, two mass atrocity situations. The first one, which occurred in Rwanda in 1994, relates to the genocide of the Tutsi population.⁷⁰ This genocide took place in the context of an intra-state conflict which had officially started in 1990 as a result of a deep-seated historical animosity between the two main ethnic groups in Rwanda, namely the Hutu and the Tutsi.⁷¹ Prior to the colonisation of the country at the hands of Belgium, the distinction between the Hutus and Tutsis was not deeply embedded in the society.⁷² The situation then worsened in 1959, when the Hutus rebelled and overthrew the Belgian-backed Tutsi regime.⁷³ Following this change, thousands of Tutsis fled to Uganda and formed the Rwandan Patriotic Front (RPF).⁷⁴ Once the fighting started, the international community became involved and engaged in extensive mediation efforts to try to bring the violence to an end. These efforts resulted in the Arusha Accords/Peace Agreement, which aimed at establishing a new power-sharing political structure between the Hutu-led Rwandan Government and the Tutsis' RPF.⁷⁵ As part of the agreement and through the United Nations Security Council (SC) Resolution 872 of 1993, the United Nations (UN) established the UN Assistance Mission for Rwanda (UNAMIR) to monitor the ceasefire agreement and implement other conditions of the Accords.⁷⁶ The Hutu extremists were angered by the Accords and began a genocidal campaign against the Tutsi, because, as René Lamarchand put it, 'the wanton killing of Tutsi civilians... became the

⁷⁰ Aidan Hehir, *Humanitarian Intervention: An Introduction* (Palgrave Macmillan, 2010) pp. 181-183.

⁷¹ Ibid., p. 180.

⁷² The Belgian administration introduced ethnic identity cards and privileged the Tutsis over the Hutus systematically, which then created more tension between the two ethnic groups; see, *ibid.*

⁷³ Ibid., pp. 180-181

⁷⁴ The RPF aimed to protect the Tutsis refugees in Uganda and to take power again in Rwanda by invading northern Rwanda, which sparked the civil war; see, *ibid.*

⁷⁵ Ibid.

⁷⁶ United Nations Security Council Resolution 872 (1993), S/RES/872, p. 2.

quickest and most “rational” way of eliminating all basis for compromise with the RPF’.⁷⁷ By the time the Accords were signed, the Hutu extremists had already established an effective organisational structure to implement their political plan of genocide.⁷⁸ Just before the Hutus initiated their genocidal campaign, the UN peacekeepers warned that extreme violence was very much likely to happen, but this warning was ignored.⁷⁹ Once the genocidal campaign started, the role of the UNAMIR had been reduced to being mere bystanders since it was not authorised to intervene militarily since it was not mandated under Chapter VII of the UN Charter.⁸⁰

The second humanitarian crisis that revealed the incapacity of the international community to respond to mass atrocities was described by the former UN Secretary-General Kofi Annan as ‘the worst [massacre] on European soil since the Second World War’.⁸¹ This is the genocide that occurred in Srebrenica (Bosnia and Herzegovina) in July 1995. The violence in Bosnia-Herzegovina had erupted when the latter sought independence from the former Federal Republic of Yugoslavia (FRY) in 1991 along with Croatia and Slovenia.⁸² During the ensuing civil war, the Muslim population of Bosnia-Herzegovina were particularly targeted and

⁷⁷ Hate messages and encouragements to eliminate the Tutsis were broadcasted through radio stations, which led to the total of 800,000 of the Tutsi population and even moderate Hutus were killed; see, Nicolas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, 2000) p. 212; and BBC, ‘Rwandan Genocide: 100 days of slaughter’ (BBC, 7 April 2014) <<http://www.bbc.co.uk/news/world-africa-26875506>> accessed on 14 December 2020

⁷⁸ Nicolas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press, 2000) p. 212.

⁷⁹ Noticeably Major-General Roméo Dallaire of the UNAMIR requested permission to seize weapon caches and deploy more troops; see, Aidan Hehir, *Humanitarian Intervention: An Introduction* (Palgrave MacMillan, 2010) p. 190.

⁸⁰ The only extent of the UN Chapter VII powers authorised for the UNAMIR was the imposition of arms embargo on Rwanda even though the Security Council referred to ‘the killings of members of an ethnic group with the intention of destroying such a group in whole or in part’, which is punishable under international criminal law in SC Resolution 918 (1994); see, SC Resolution 918 (1994), S/RES/918; and Aidan Hehir, *Humanitarian Intervention: An Introduction* (Palgrave Macmillan, 2010) p. 188.

⁸¹ ‘Secretary-General’s message to ceremony marking the 10th anniversary of the Srebrenica massacre (delivered by Mark Malloch Brown, Chef de Cabinet)’ (The United Nations Secretary General, 11 July 2005) <<https://www.un.org/sg/en/content/sg/statement/2005-07-11/secretary-generals-message-ceremony-marking-10th-anniversary>> accessed on 20 January 2021.

⁸² Leann Long, ‘The Srebrenica Massacre’ [2006] 15:2 *The Forensic Examiner*, p. 43; for this section of the Chapter, I chose to specifically focus on the atrocities in Srebrenica alone. However, I would like to point out that this does not mean that other human rights violations and international crimes/atrocities elsewhere are less significant.

subjected to torture, rape, murder, beatings, forced displacement and destruction of property and cultural objects as part of the FRY and other Serbian paramilitary group's ethnic cleansing campaign.⁸³ Those who were able to, would flee to the closest designated UN 'safe areas/zones' that were supposedly protected by the United Nations Protection Force (UNPROFOR).⁸⁴ Ironically, these so-called safe zones were not at all safe since the UN forces were ill equipped and outnumbered compared to the Bosnian Serb army.⁸⁵ So, declaring Srebrenica a 'safe zone' did not deter the latter from increasing their attacks which, in their view, were aimed at fighting terrorist activities from within the area.⁸⁶ Along with the increased attacks, there were numerous more indications that the Bosnian Serb's offensive campaign had started to escalate, including restrictions to food and medical supplies as well as restrictions of the peacekeepers' access to weapons in preparation for the main campaign of the full takeover of Srebrenica.⁸⁷ Despite indications that atrocities would be committed in Srebrenica, the SC did not take decisive action.⁸⁸ In the end, more than 8000 Muslim men and boys were killed, an atrocity crime which the International Court of Justice (ICJ) has defined as genocide.⁸⁹

What, then, did the UN do to prevent these two instances of genocide from occurring? Why had no one provided adequate protection to innocent civilians in the name of humanitarianism? From a legal perspective, these are not simple questions to answer. The concept of

⁸³ Those who was able to, would flee to the closest designated UN 'safe area/zone' that were supposedly protected by the United Nations Protection Force (UNPROFOR); see, Human Rights Watch, 'The Fall of Srebrenica and the Failure of UN Peacekeeping' [1995] 7:13 *Human Rights Watch*, p. 6.

⁸⁴ The UNPROFOR was established through the SC Resolution 743 (1992), and it was mandated to protect the 'safe areas' from armed attack or any other hostile actions. Srebrenica was designated as a 'safe zone' through SC Resolution 824 (1993); see, The United Nations Security Council Resolution 743, S/RES/743 (1992), 819, S/RES/819 (1993) and 824, S/RES/ 824(1993); and Human Rights Watch, 'The Fall of Srebrenica and the Failure of UN Peacekeeping' [1995] 7:13 *Human Rights Watch*, p. 10.

⁸⁵ Human Rights Watch, 'The Fall of Srebrenica and the Failure of UN Peacekeeping' [1995] 7:13 *Human Rights Watch*, pp. 10-11.

⁸⁶ Ibid.

⁸⁷ Ibid, pp. 11-18.

⁸⁸ Once the campaign started, the UNPROFOR requested for air support from NATO, which was denied due to the Serb army's threat of attack of other UN compound in the region and once it was approved, it was too late, the atrocities had already happened; see, Human Rights Watch, 'The Fall of Srebrenica and the Failure of UN Peacekeeping' [1995] 7: 13 *Human Rights Watch*, pp. 11-18.

⁸⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgement, I.C.J. Reports 2007, para 297.

humanitarian intervention (HI) is one of the most controversial subjects in international law. As briefly mentioned in Chapter 1, there is no legal basis in international law for humanitarian intervention. Legally, this concept conflicts with two crucial provisions of the UN Charter, namely article 2(4) and 2(7).⁹⁰ Politically, a notable concern of humanitarian intervention is around the issue of motives. Humanitarian interventions can easily be abused by powerful States by masking a self-serving agenda.⁹¹ Another area of concern is who should have the right to intervene in humanitarian crises in another State: should it be individual States? Or regional organisations?

2.2.1 Humanitarian Intervention in Action

Contrary to the cases of Rwanda and Srebrenica, a military intervention was launched to protect the Albanian population of Kosovo in 1999. In 1989, President Slobodan Milosević of the FRY, moved by his vision of ‘One Serbia’, repealed the autonomy of Kosovo. Following this change, Milosević also started implementing discriminatory laws in Kosovo favouring the Serbs while oppressing the native Kosovar Albanians.⁹² As a result of this form of oppression, the Albanians created the Kosovo Liberation Army (KLA) with the objective of liberating Kosovo from Serbian occupation.⁹³ Once military activities started to increase from both sides,

⁹⁰ Article 2(4) states that ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state’. Article 2(7), instead, states that ‘Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially in the domestic jurisdiction of any state; see The United Nations Charter, Article 2(4) and 2(7).

⁹¹ Jennifer M. Welsh, *Humanitarian Intervention and International Relations* (Oxford University Press, 2003) p. 58; and Aidan Hehir, *Humanitarian Intervention: An Introduction* (Palgrave Macmillan, 2010) p. 155.

⁹² The new strict segregation policies started to dismiss the Albanians from their posts and positions in the state school system and other organisations where it basically amounted to ‘an apartheid in Kosovo’, see The Independent International Commission on Kosovo, ‘The Kosovo Report: Conflict, International Response, Lessons Learned’ [2000] p. 49; and Elez Biberaj, ‘Kosovo: The Balkan Powderkeg’ [1993] *Conflict Studies*, p. 258.

⁹³ Klejda Mulaj, ‘Resisting an Oppressive Regime: The Case of Kosovo Liberation Army’ [2008] 31:12 *Studies in Conflict and Terrorism*, p. 1109.

the situation gained the attention of the international community.⁹⁴ The UN, through the SC, sought to mediate in order to put an end to the conflict.⁹⁵ However, these efforts did not produce the desired outcome. As negotiations between the FRY and the Kosovar Albanians broke down, atrocities escalated to the level of ethnic cleansing and the SC was gridlocked due to China and Russia threatening to veto any resolution that would authorise the use of force against the FRY.⁹⁶ At that point, a regional organisation, the North Atlantic Treaty Organisation (NATO), launched a military operation, Operations Allied Force, to put an end to the conflict.⁹⁷ NATO's bombing campaign began on 24 March 1999 and it did not receive the authorisation of the SC. This intervention had a significant impact on international law debates concerning humanitarian intervention.⁹⁸ NATO was in direct violation of Article 2(4) of the UN Charter, which explicitly states that 'All members shall refrain in their international relations from the threat or use of force'.⁹⁹ The UN Charter only provides two legal exceptions to Article 2(4): self-defence, which did not apply in the case of Operation Allied Force, and use of force authorised by the SC. As noted above, however, this authorisation did not occur.¹⁰⁰ A simple legal analysis would, therefore, point to the illegality of Operation Allied Force. That

⁹⁴ Around the same time, the Bosnian war came to an end with the signing of the Dayton Peace Accords in 1995. The agreement might have put an end to the Bosnian war, but it had only enflamed the Albanians seeing as their reasonably peaceful civil resistance against the Serbs had been ignored. As a result of this, the KLA decided to change its tactics by escalating the violence aimed towards the Serbs in an effort to stop the systemic oppression opposed on them; see Aidan Hehir, *Humanitarian Intervention: An Introduction* (Palgrave Macmillan, 2010) p. 203.

⁹⁵ At the same time, with the SC being 'gridlocked' without any actionable resolutions, they were still able to pass four resolutions officially to condemn this situation. SC Resolutions 1160 (1998), 1199 (1998), 1203 (1998), 1239 (1999) and 1244 (1999) all expressed grave concerns over the humanitarian catastrophe as a result of the conflict, condemned all acts of violence against the civilian populations. These resolutions also imposed an arms embargo and economic sanctions on the FRY and demanded the end of all hostilities; see SC Resolutions 1160 (1998), S/RES/1160, 1199 (1998), S/RES/1199, 1203 (1998), S/RES/1203, 1239 (1999), S/RES/1239 and 1244 (1999), S/RES/1244.

⁹⁶ The Independent International Commission on Kosovo, 'The Kosovo Report: Conflict, International Response, Lessons Learned' [2000] p. 142.

⁹⁷ Ibid., pp. 92-93; and Aidan Hehir, *Humanitarian Intervention: An Introduction* (Palgrave Macmillan, 2010) pp. 207-208.

⁹⁸ MA. Arden Salihu, 'NATO Intervention in Kosovo in light of Security Council Actions and International Law' [2013] 3:2 *ILIRIA International Review*, p. 292.

⁹⁹ United Nations Charter, Article 2(4).

¹⁰⁰ Christopher Greenwood, 'International Law and the NATO Intervention in Kosovo' [2000] 49:4 *International and Comparative Law Quarterly*, pp. 926-927.

said, according to many, including Judge Bruno Simma and Antonio Cassese, while NATO intervention was, strictly speaking, illegal, it was also legitimate, a thesis which was also subscribed by the Independent International Commission on Kosovo.¹⁰¹ After all, one could argue, one of the purposes of the UN is the promotion of human rights and, therefore, situations where systematic and grave human right violations occur require intervention.¹⁰² This is especially true if one considers that NATO's bombing campaign was a last resort action taken after all diplomatic avenues and efforts had previously failed.¹⁰³ Thus, supporters of humanitarian intervention saw the NATO operation in Kosovo as a welcome indication that 'we are indeed entering the third age of human rights evolution: the era of enforcement'.¹⁰⁴

The failure to act in relation to Rwanda and Srebrenica, on the one hand, and the legally controversial and problematic NATO operation in Kosovo, on the other, revealed the need for a different approach to mass atrocities in international law. Protecting innocent civilians must be a priority of the international community. At the same time, any action aimed at protecting people must respect the normative framework of the UN Charter. The ensuing debate paved the way for the emergence of the principle of the responsibility to protect.

2.3 The International Commission on Intervention and State Sovereignty

As a result of the events in Rwanda, Bosnia and Kosovo that were discussed previously, in 2000 the Canadian government decided to set up a commission to consider how the

¹⁰¹ The Independent International Commission on Kosovo, 'The Kosovo Report: Conflict, International Response, Lessons Learned' [2000] p. 4; Antonio Cassese, 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' [1999] 10:1 *European Journal of International Law*, p. 25; and Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects' [1999] 10:1 *European Journal of International Law*, p. 12.

¹⁰² Christopher Greenwood, 'International Law and the NATO Intervention in Kosovo' [2000] 49:4 *International and Comparative Law Quarterly*, pp. 926-927.

¹⁰³ The Independent International Commission on Kosovo, 'The Kosovo Report: Conflict, International Response, Lessons Learned' [2000] p. 4.

¹⁰⁴ Aidan Hehir, *Humanitarian Intervention: An Introduction* (Palgrave MacMillan, 2010) p. 211.

international community should respond to mass atrocity situations.¹⁰⁵ The following year, the International Commission on Intervention and State Sovereignty (ICISS) produced a report that encouraged States to reconceptualise the idea of sovereignty as a responsibility to protect and promote their own and other people's welfare and basic rights.¹⁰⁶ According to Gareth Evans, Ramesh Thakur and William Maley, this idea of 'sovereignty as responsibility' represents one of the most important developments and breakthroughs in international politics in our time.¹⁰⁷

Instead of the traditional concept of Westphalian sovereignty which gave States complete authority over their domestic affairs, the ICISS highlighted that the responsibility towards their citizens should be States' first priority.¹⁰⁸ In cases where a State is either unable or unwilling to protect its own citizens, then there should be 'a residual responsibility for other states to take up the slack'.¹⁰⁹ Crucially, this residual responsibility is not placed on States individually but, rather, as members of the international community. Therefore, if mass human right violations occur and the State concerned fails to stop them, it becomes the responsibility of the international community to intervene for protection purposes.¹¹⁰ The report of the ICISS also elaborated on the conditions that would justify an intervention. First, when there is 'large-scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation'.¹¹¹ Second,

¹⁰⁵ Ramesh Thakur and William Maley, *Theorising the Responsibility to Protect* (Cambridge University Press, 2015) p. 19.

¹⁰⁶ *Ibid.*, pp. 13–14.

¹⁰⁷ *Ibid.*, p. 3.

¹⁰⁸ *Ibid.*, pp. 7–8.

¹⁰⁹ Alex J. Bellamy and Tim Dunne, *The Oxford Handbook of the Responsibility to Protect* (first edition 2006, Oxford University Press, 2016) p. 87.

¹¹⁰ Saulius Katuoka and Agne Cepinskyte, 'Response to Large-Scale Atrocities: Humanitarian Intervention and the Responsibility to Protect' [2010] 3 *Jurisprudencija*, p. 166.

¹¹¹ 'The Responsibility to Protect' [2001] The International Commission on Intervention and State Sovereignty, p. 32.

when there is ‘large-scale “ethnic cleansing,” actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape’.¹¹²

While innovative in many respects, the ICISS left a number of questions unanswered, in particular the question of the ‘right authority’. By noting that the Security Council has the ‘primary’ – rather than exclusive - responsibility under the UN Charter to authorise military action in the context of peace and security matters, the Commission left open the possibility for action without the authorisation of the Security Council. In an event where the SC is blocked or simply unable to come to an agreement in a crisis, the ICISS stated that Article 11 of the UN Charter gives the United Nations General Assembly (GA) a fallback responsibility with regards to the maintenance of international peace and security.¹¹³ However, the GA’s power is limited to only making recommendations and not binding decisions. Nevertheless, the Report noted that even in the absence of an authorisation from the Council, if an intervention is to take place with the backing of two-thirds vote in the GA then it can be legitimately justified with powerful moral and political support.¹¹⁴ More worryingly, this approach would also potentially validate the idea of humanitarian intervention carried out unilaterally by States that was discussed earlier in this chapter.¹¹⁵

At the time of the publication of the ICISS report, R2P was merely an idea for the international community to consider. Many issues remained to be discussed and more light needed to be shed on the meaning of this new concept. All these steps would be soon taken as part of a process of ‘legalisation’ of R2P, as will be discussed in the next section.

¹¹² Ibid.

¹¹³ Ibid., p. 48.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

2.4 The Gradual Recognition of R2P in International Law

An important moment in the evolution of R2P happened in 2004, when the then Secretary-General of the UN, Kofi Annan, formally endorsed the concept in the report '*A More Secure World: Our Shared Responsibility*'. In particular, he expressly referred to:

‘the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorising military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of humanitarian law which sovereign governments have proved powerless or unwilling to prevent’¹¹⁶

This endorsement reflects upon the very fundamental concepts found in the ICISS report on R2P, which states that sovereignty entails duties and responsibility to defend people, whether they are domestic or abroad.¹¹⁷ Furthermore, the 2004 report made a reference to the responsibility of all actors in the international community to protect every person in the face of mass human right violations.¹¹⁸

While the UN Secretary-General’s endorsement of R2P was certainly a positive progress and a sign of its early development, it did not carry any significant legal value. Indeed, it could perhaps be better described as an indication of an important political commitment to support R2P. A year after the publication of this report, however, R2P was endorsed in a considerably more important document agreed by and supported by more than 170 States, that is, the 2005 World Summit Outcome. According to scholars such as Gareth Evans, the critical link between the ICISS report and the outcome of the World Summit was the real birth of R2P.¹¹⁹ The 2005

¹¹⁶ High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (New York: United Nations 2004), A/59/565, para 203.

¹¹⁷ Alex J. Bellamy and Tim Dunne, *The Oxford Handbook of the Responsibility to Protect* (first edition 2006, Oxford University Press, 2016) p. 65.

¹¹⁸ Carsten Stahn, ‘Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?’ [2007] 101:1 *The American Journal of International Law*, p. 105.

¹¹⁹ Ramesh Thakur and William Maley, *Theorising the Responsibility to Protect* (Cambridge University Press, 2015) p. 23.

World Summit was a once-in-a-generation opportunity where the vast majority of the world's heads of States and governments made decisions on areas of development, security, human rights and reform that would further the aims and objectives of the UN overall.¹²⁰ The Outcome document was adopted by the General Assembly in September 2005. Two paragraphs of the Summit Outcome Document deal specifically with the principle of the responsibility to protect, namely paragraphs 138 and 139. The former affirms that:

‘Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability’¹²¹

The key part of Paragraph 139, instead, affirms that:

‘The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity’¹²²

¹²⁰ The United Nations, ‘The 2005 World Summit: High-Level Panel Plenary Meeting of the 60th session of the UN General Assembly’ (UN Headquarter, New York, 14-16th September 2005) <http://www.un.org/en/events/pastevents/worldsummit_2005.shtml> accessed 20 January 2021.

¹²¹ United Nations General Assembly, *2005 World Summit Outcome*, resolution adopted by the General Assembly, 24 October 2005, A/RES/60/1, para 138.

¹²² Ibid, para 139.

There are obvious connections between the Outcome Document and the ICISS report that was discussed in the previous section. For example, the wording in Paragraph 138 is similar to Section 4.20 of the ICISS report which refers to the types of conscience-shocking situations that would trigger the implementation of R2P typically includes large scale acts of ethnic cleansings, war crimes, crimes against humanity and genocide.¹²³ Paragraph 139, instead, is related to Section 8.28 of the 2001 report which refers to the responsibility of the international community to react if and when the four crimes are being committed.¹²⁴ However, despite embracing several aspects of the ICISS report, the World Summit Outcome introduced some fundamental changes.

First, the just cause threshold identified by ICISS, which, as noted before, referred to concepts such as large-scale loss of life, failed State situations, and large-scale acts of ethnic cleansing, was deemed too broad. By contrast, although there are similarities in the language, the Summit adopted a more restrictive version of the just cause, limiting R2P to only the case of four specific crimes: genocide, war crimes, crime against humanity and ethnic cleansing. Another important change regards the question of ‘right authority’. As noted before, the ICISS had affirmed, quite vaguely, that the SC should be the ‘preferred’ body to authorise any use of force for humanitarian purposes. Consequently, it left open the possibility that individual States could act in the absence of a Security Council resolution.¹²⁵ Crucially, as it is made clear by paragraph 139, the Summit Outcome recognised the Security Council as the only ‘right authority’. First, the international community must act through the SC; and, second, any form of intervention must be authorised by the latter. In doing so, the Outcome Document created a more limited version of R2P, perhaps also hoping that doing so would ensure its more effective application in the future. In fact, it has been argued that the variant of R2P endorsed by the

¹²³ ‘The Responsibility to Protect’ [2001] The International Commission on Intervention and State Sovereignty, Section 4.20, p. 33.

¹²⁴ Ibid., Section 8.28, p. 74.

¹²⁵ Ibid, p. XII.

Summit Outcome not only is a limited one but also one which does not add anything new to the existing UN Charter framework. This is so because the doctrine of R2P is not as revolutionary as it appears since it actually does not alter any of the legal instruments and powers of the international community, specifically the SC.¹²⁶ In accordance to Chapter VII of the UN Charter, the Council is empowered to implement both coercive and non-coercive measures in response to a threat to international peace and security. And since the definition of the concept of ‘threat to peace’ is interpreted widely, the Council has always been able to authorise coercive measures in response to intrastate conflicts and/or humanitarian crises.¹²⁷ Indeed, some critics of R2P, namely Stephen P. Marks and Nicholas Cooper, went even further to state that not only R2P is not as revolutionary as it appears to be, but its doctrine actually mirrors the doctrine of humanitarian intervention and that it was just merely ‘old wine in a new bottle’.¹²⁸ James Pattison echoed this view by stating that although R2P is more politically acceptable since it involves more than just military intervention, it still included a coercive element that reminds humanitarian intervention.¹²⁹

A final point that needs to be made in relation to the central role of the SC is that the international community are prepared, through the Council, ‘to take collective action, in a time and decisive manner’ on a *case-by-case basis*. This clause gives the Council, specifically the permanent five members of the Council (P-5), a large room to manoeuvre when it comes to implementing R2P, which means that any decision taken or lack thereof would be completely under the Council’s discretion.¹³⁰ This is problematic since political calculations inevitably informs the action of the permanent members of the Security Council. According to Alex J.

¹²⁶ Mauro Barelli, ‘Preventing and Responding to Atrocity Crimes: China, Sovereignty and the Responsibility to Protect’ [2018] 23:2 *Journal of Conflict & Security Law*, p. 191.

¹²⁷ Ibid.

¹²⁸ Stephen P. Marks & Nicholas Cooper, ‘The Responsibility to Protect: Watershed or Old Wine in a New Bottle?’ [2010] 2:1 *Jindal Global Law Review*, p. 115.

¹²⁹ James Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford University Press, 2010) pp. 250-251.

¹³⁰ Mauro Barelli, ‘Preventing and Responding to Atrocity Crimes: China, Sovereignty and the Responsibility to Protect’ [2018] 23:2 *Journal of Conflict & Security Law*, p. 187.

Bellamy, this will result in the Security Council acting inconsistently and unpredictably, as will be highlighted in the analysis of the Libyan and Syrian crises developed in section 2.5.1 and 2.5.2 below.¹³¹

2.4.1 Towards the Three-Pillar Structure of R2P

The second turning point in the legal evolution of R2P was reached following the 2009 report of the then UN Secretary-General, Ban Ki Moon, ‘Implementing the Responsibility to Protect’. The significance of this report is that it outlined, for the first time, a clear three-pillar structure for the principle of the responsibility to protect. Pillar I refers to the responsibility of each State to protect its population against crimes against humanity, war crimes, ethnic cleansing and genocide.¹³² Pillar II refers to the responsibility of the international community to assist States in meeting their duty to protect.¹³³ Finally, Pillar III refers to the responsibility that member states of the UN have to respond collectively to crises in a timely and decisive manner through the Security Council.¹³⁴ This includes a range of tools such as peaceful measures under Chapter VI of the UN Charter as well as more coercive measures available under Chapter VII of the Charter.¹³⁵ In the context of Pillar III, the 2009 report also suggested that the P-5 should refrain from using their vetoes carelessly, adding that they should decide in good faith before reacting to situations where there is a mass humanitarian catastrophe.¹³⁶ With regard to Pillar III, former Secretary-General Ban Ki Moon also suggested that the UN should make efforts to strengthen

¹³¹ Alex J. Bellamy and Tim Dunne, *The Oxford Handbook of the Responsibility to Protect* (first edition 2006, Oxford University Press, 2016) pp. 262-264.

¹³² United Nations General Assembly (2009), ‘Implementing the responsibility to protect’, A/63/677, pp. 10-14.

¹³³ *Ibid.*, pp. 15-21.

¹³⁴ *Ibid.*, pp. 22-27.

¹³⁵ *Ibid.*

¹³⁶ Alex J. Bellamy, ‘The Three Pillars of the Responsibility to Protect’ < <http://www.cries.org/wp-content/uploads/2015/09/006-bellamy.pdf> > accessed 20 January 2021, p. 49.

its relationship with regional and sub-regional organisations in order to facilitate rapid cooperation.¹³⁷

In terms of implementation, the report did not suggest that the three Pillars have to be implemented in a sequential order. The report stated that ‘there is no set sequence to be followed from one Pillar to another, nor it is assumed that one is more important than another’.¹³⁸ As explained by James Pattison, the possibility to go straight to implementing Pillar III measures without first exhausting Pillar II measures is particularly important in situations where atrocities have already reached a high level of severity.¹³⁹

On the other hand, as argued by Jennifer M. Welsh, the three Pillars should, theoretically, be triggered in a sequential order.¹⁴⁰ However, Welsh acknowledges that, in practice, there is no rule against moving straight to the implementation of Pillar III without first exhausting Pillar II. This could create an opportunity for hasty attitudes towards the mobilisation of military force, which is problematic since the utilisation of military force should only be invoked as a last resort after all avenues have been exhausted. Since there are no set rules in regard to the implementation of the Pillars of R2P as of yet, it is problematic to fully advance R2P as an international norm to responds to mass atrocities.

2.5 The Implementation of R2P

After having outlined the meaning of R2P as currently formulated in international law, the second part of the chapter will now turn to the phase of implementation of this principle. Before

¹³⁷ Ibid.

¹³⁸ United Nations General Assembly (2009), ‘Implementing the responsibility to protect’, A/63/677, p. 2.

¹³⁹ James Pattison, ‘The Ethics of ‘Responsibility While Protecting’: BRAZIL, The Responsibility to Protect, And Guidelines for Humanitarian Intervention’ [2013] *Human Rights and Welfare Working Paper 71*, p. 7.

¹⁴⁰ Alexander Betts and Phil Orchard, *Implementation and World Politics: How International Norms Change Practice*, (Oxford University Press, 2014) p. 133.

discussing the way in which R2P was implemented in the context of what have become, thus far, the two most notable conflict situations in which R2P was brought up, that is, Libya and Syria, it is important to highlight how UN bodies such as the Security Council, the General Assembly and the UN Human Rights Council have all regularly called on this principle in their resolutions.

Since the 2005 World Outcome Summit, the SC has invoked R2P in more than 80 resolutions regarding crises in Central African Republic, Côte d'Ivoire, Democratic Republic of the Congo, Liberia, Libya, Mali, Somalia, South Sudan, Syria, and Yemen.¹⁴¹ Besides this, the Council has also invoked R2P in thematic resolutions concerning the prevention of genocide, armed conflict and the restrictions of the trade of small arms and weapons.¹⁴² At the same time, R2P has also been invoked by the UN Human Rights Council in more than 50 resolutions and by the GA in 13 resolutions.¹⁴³ On top of this, since 2009, the GA has been hosting Informal Interactive Dialogues on the Responsibility to Protect as a venue for States to discuss their positions and opinions on R2P, aimed at identifying the flaws and challenges that R2P faces in both practical and conceptual terms.¹⁴⁴ Since 2018, these annual informal dialogues have been formalised and officially included in the General Assembly's agendas.¹⁴⁵

With this level of recognition and practice it is safe to say that R2P's role as a guiding principle in the international community has been cemented. Gareth Evans shares this sentiment that R2P has become an important guiding principle in the international community and claims that the best evidence is the annual debates in the General Assembly even in the aftermath of the controversial Libyan intervention, which I will discuss next.¹⁴⁶ According to Evans, although

¹⁴¹ 'What is R2P?' Global Centre for the Responsibility to Protect, < <https://www.globalr2p.org/what-is-r2p/>> accessed on 20 January 2021.

¹⁴² Ibid.

¹⁴³ Ibid.

¹⁴⁴ United Nations Office on Genocide Prevention and the Responsibility to Protect, < <https://www.un.org/en/genocideprevention/general-assembly.shtml>> accessed on 20 January 2021.

¹⁴⁵ Ibid.

¹⁴⁶ Alex J. Bellamy and Tim Dunne, *The Oxford Handbook of the Responsibility to Protect* (first edition 2006, Oxford University Press, 2016) p. 914.

there is no general consensus when it comes to the scope and implementation of Pillar III, no State disagrees with the fact that a sovereign State has the primary responsibility to protect its own people and that the international community has a responsibility to assist it to do so.¹⁴⁷ Evan further stated that there will always be disagreement as to what form of action should be taken in different cases, but the basic principles of R2P are agreed upon and not under threat.¹⁴⁸ Alex J. Bellamy echoed Evans' view that R2P has reshaped international affairs.¹⁴⁹ Bellamy further stated that R2P is, albeit slowly and imperfectly, facilitating fundamental changes to the values, identities and interests of States and societies. Bellamy also agreed that although there are disagreements over the implementation of R2P in regard to Pillar III, the fundamentals of the concept are not under threat.

R2P supporters often stress that, after having been formally introduced in the realm of international law in 2005, R2P was successfully implemented for the first time in 2011 in Libya, where the Arab Spring had enflamed many people to take action.¹⁵⁰ Like its neighbouring countries, before the upheaval of the 'Arab Spring', Libya had a rather fragile civil society that was ruled under the authoritarian government of Colonel Muammar Gaddafi.¹⁵¹ Under Gaddafi's regime, the people of Libya were subjected to oppressive policies, many of which violated basic human rights. This had created a rather dangerous disjunction between his regime and the people.¹⁵² According to the International Crisis Group, Libya was 'a large pressure cooker ready to explode'.¹⁵³ The Arab Spring reached Libya when anti-

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Alex J. Bellamy, *The Responsibility to Protect: A Defense* (Oxford University Press, 2015) p. 72.

¹⁵⁰ Elvin Aghayev, 'Analysis and background of the "Arab Spring" in Libya' (The Independent International Political Research Center 20 August 2014) <<http://www.iiprc.org/analysis-and-background-of-the--arab-spring--in-libya.html>> accessed on 15 January 2017.

¹⁵¹ Eric Goldstein, 'Before the Arab Spring, the Unseen Thaw' (Human Rights Watch 2012) <<https://www.hrw.org/node/259729>> accessed on 20 January 2021.

¹⁵² Aidan Hehir and Robert Murray, *Libya: The Responsibility to Protect and the Future of Humanitarian Intervention* (Palgrave Macmillan, 2013) p. 3.

¹⁵³ Ibid., p. 4.

government protests started in the eastern Libya city of Benghazi on 15 February 2011. This then escalated to a countrywide uprising.¹⁵⁴ The forces of Colonel Gaddafi responded to the uprising by deploying lethal force and attacking the demonstrators, causing the death of at least more than 100 civilians.¹⁵⁵ The disproportionate use of force by the government quickly turned a series of demonstrations into an insurrection. From this point on, the violence escalated, and fierce repression continued. Against this background, claims were made by various non-government organisations such as Human Rights Watch, that the regime was violating international human rights law by deliberately targeting and killing demonstrators and innocent bystanders.¹⁵⁶

Under these circumstances, the SC adopted Resolution 1970 condemning the violence and the use of force against civilians by government forces.¹⁵⁷ Importantly, the resolution also called upon the Libyan authorities to uphold their responsibility to protect their population.¹⁵⁸ The resolution also referred Libya to the International Criminal Court (ICC) recognizing that the atrocities committed in the country could amount to crimes against humanity.¹⁵⁹ In an effort to try and pressure the regime to halt their violations, the Council further placed an arms embargo, travel ban, asset freeze on Gaddafi's inner circle, who were responsible for the crimes committed against civilians.¹⁶⁰ In R2P terms, this resolution has implemented measures of

¹⁵⁴ Alex J. Bellamy and Tim Dunne, *The Oxford Handbook of the Responsibility to Protect* (first edition 2006, Oxford University Press, 2016) p. 769.

¹⁵⁵ Jo Adetunji, Peter Beaumont and Martin Chulov, 'Libya protests: More than 100 killed as army fires on unarmed demonstrators' (The Guardian, 20 February 2011) <<https://www.theguardian.com/world/2011/feb/20/libya-protests-benghazi-muammar-gaddafi>> accessed on 20 January 2021.

¹⁵⁶ Human Rights Watch, 'Libya: Governments Should Demand End to Unlawful Killings' (20 February 2011) <<https://www.hrw.org/news/2011/02/20/libya-governments-should-demand-end-unlawful-killings>> accessed on 18 January 2021.

¹⁵⁷ United Nations Security Council Resolution 1970 (2011), S/RES/1970, pp. 1–3.

¹⁵⁸ Ibid., p. 2.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid., pp. 3-5 and 8-10.

Pillar III. However, Gaddafi's regime rejected the conditions and demands set out in Resolution 1970 and even refused to allow humanitarian aid convoys into various besieged towns.¹⁶¹

Weeks after the passage of Resolution 1970, while the violence between Gaddafi's forces and the protestors turned rebels continued, the options for the next decisive action were being weighed and according to Tim Dunne and Katherine Gelber, the centre of the debate in the international community centred on 'the responsibility to protect competing with other normative claims, such as the presumption against the use of force and the reluctance to interfere in the domestic jurisdiction of a member state'.¹⁶² Ultimately, since all efforts had failed and all non-coercive measures had been exhausted, the principles of non-use of force and non-intervention gave way to R2P action through the passage of Security Council Resolution 1973.¹⁶³ This resolution represents the first time that the SC has authorised the use of force for humanitarian purposes against a functioning State.¹⁶⁴ Resolution 1973 recalled the demands made in Resolution 1970 and further called upon the Libyan authorities to acknowledge their responsibility to protect their population and enter an overall immediate ceasefire.¹⁶⁵ Most importantly, in Paragraph 4, the Council authorised member States in cooperation with the Secretary-General to 'take all necessary measures' to protect the civilian population mandated under Chapter VII of the UN Charter.¹⁶⁶

Resolution 1973 passed with ten votes in favour.¹⁶⁷ Even though there were no votes against, it is noteworthy that there were five abstentions, namely Brazil, China, Russia, Germany and

¹⁶¹ Paul D. Williams and Alex J. Bellamy, 'Principles, Politics and Prudence: Libya, the Responsibility to Protect, and the Use of Military Force' [2012] 18:3 *Global Governance*, p. 278.

¹⁶² Tim Dunne and Katharine Gelber, 'Arguing Matters: The Responsibility to Protect and the Case of Libya' [2014] 6 *Global Responsibility to Protect*, p. 339.

¹⁶³ Alex J. Bellamy, 'Libya and the Responsibility to Protect: The Exception and the Norm' [2011] 25:3 *Ethics and International Affairs*, p. 265.

¹⁶⁴ *Ibid.*, p. 263.

¹⁶⁵ United Nations Security Council 1973 (2011), S/RES/1973, pp. 1-2.

¹⁶⁶ *Ibid.*, p. 3.

¹⁶⁷ Those who voted in favour included Bosnia and Herzegovina, the United Kingdom, Colombia, France, Gabon, Lebanon, the United States, Portugal, Nigeria and South Africa. China, Russia, Brazil, Germany and India had abstained; see, SC Resolution 1973 (2011) voting summary, < <https://digitallibrary.un.org/record/699784?ln=en> > accessed on 29 April 2021.

India.¹⁶⁸ These five states were very careful not to condone the actions of the Libyan authorities.¹⁶⁹ However, they did not want to set a bold precedent for the use of military force for humanitarian purposes.¹⁷⁰ For example, China abstained in the vote despite acknowledging that it was ‘deeply concerned by the continuing deteriorating of the situation in Libya’.¹⁷¹ This should not come as a surprise, since China has always been an avid supporter of the strict interpretation of State sovereignty and has been sceptical of the implementation of Pillar III since the UN first adopted the concepts of R2P in 2005.¹⁷² However, given that the gravity of the situation it considered these to be special circumstances calling for an abstention.¹⁷³

At first glance, the intervention in Libya was a textbook case of how R2P should work. Peaceful measures had failed to produce the expected results; Libyan authorities level of violence against civilians had reached the threshold of crimes against humanity; hence, since Libya failed to protect its population from atrocity crimes, the responsibility to protect was passed on to the international community.¹⁷⁴

2.5.1 Implementing Resolution 1973

¹⁶⁸ Ibid.

¹⁶⁹ Paul D. Williams and Alex J. Bellamy, ‘Principles, Politics and Prudence: Libya, the Responsibility to Protect, and the Use of Military Force’ [2012] 18:3 *Global Governance*, p. 281.

¹⁷⁰ Ibid.

¹⁷¹ Statement by the H.E. Ambassador Li BaoDong, Permanent Representative of China to the United Nations, at the Security Council Meeting on the Situation in Libya (Permanent Mission of the People’s Republic of China to the UN (17 March 2011) <
<http://chnun.chinamission.org.cn/eng/chinaandun/securitycouncil/regionalhotspots/africa/t824183.htm> >
 accessed on 20 January 2021.

¹⁷² Mauro Barelli, ‘Preventing and Responding to Atrocity Crimes: China, Sovereignty and the Responsibility to Protect’ [2018] 23:2 *Journal of Conflict & Security Law*, pp. 190-191.

¹⁷³ Statement by the H.E. Ambassador Li BaoDong, Permanent Representative of China to the United Nations, at the Security Council Meeting on the Situation in Libya (Permanent Mission of the People’s Republic of China to the UN (17 March 2011) <
<http://chnun.chinamission.org.cn/eng/chinaandun/securitycouncil/regionalhotspots/africa/t824183.htm> >
 accessed on 20 January 2021.

¹⁷⁴ Tim Dunne and Katharine Gelber, ‘Arguing Matters: The Responsibility to Protect and the Case of Libya’ [2014] 6 *Global Responsibility to Protect*, p. 327.

The implementation of Resolution 1973 was not without controversies. The intervention authorised by the SC was led by NATO, whose airstrikes targeted Gaddafi's military capacity to attack civilians. Initially, it seemed that the NATO-led coalition was following the mandate of Resolution 1973. However, as the crisis went on, the coalition was accused of going beyond it. In particular, it was accused of overstressing the term 'all necessary measures' to support a hidden motive, notably regime change.¹⁷⁵ For example, it emerged that, despite the arms embargo placed under Resolution 1970, several states such as France were supplying weapons to the rebels.¹⁷⁶ Furthermore, NATO's operation also targeted Gaddafi's retreating forces and his hometown (Sirte), even though there were no threats to civilians present in that location.¹⁷⁷ Finally, rather than pursuing a ceasefire towards the end of the conflict, the NATO-backed rebels furthered their campaign to overthrow Gaddafi's regime, which ultimately led to his death. Seen from this perspective, the intervention in Libya appears more like an example of how R2P could be abused instead of, as noted before, a textbook example for R2P. In particular, the fact that the Western States involved in the operation ended up siding with rebels against Gaddafi signals an important potential problem with R2P. This is a problem that was mentioned earlier in this chapter in the context of a discussion of humanitarian intervention, namely the problem of the motives behind an intervention. If the NATO-led coalition failed to prioritise the protection of civilians, as mandated by Resolution 1973, and, instead, pursued regime change, questions arise as to the geopolitical dynamics affecting the implementation of this principle.¹⁷⁸ Hence, to what extent can R2P be really said to represent a better response to atrocity crimes than humanitarian intervention does?

¹⁷⁵ Alex J. Bellamy and Tim Dunne, *The Oxford Handbook of the Responsibility to Protect* (first edition 2006, Oxford University Press, 2016) pp. 772-773.

¹⁷⁶ Richard Spencer, 'France supplying weapons to Libyan rebels' (The Telegraph, 29 June 2011) <<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8606541/France-supplying-weapons-to-Libyan-rebels.html>> accessed on 20 January 2021.

¹⁷⁷ Aidan Hehir and Robert Murray, *Libya: The Responsibility to Protect and the Future of Humanitarian Intervention* (Palgrave Macmillan, 2013) p. 197.

¹⁷⁸ Alex J. Bellamy and Tim Dunne, *The Oxford Handbook of the Responsibility to Protect* (first edition 2006, Oxford University Press, 2016) p. 772.

2.5.2 Syria

The other conflict situation which, like Libya, attracted the attention of R2P commentators is the conflict that erupted in Syria in March 2011. The uprising in Syria started like the uprisings in Libya, Egypt and Tunisia: non-violent anti-government demonstrators gathered as the wave of the Arab Spring swept through.¹⁷⁹ Just like Libya, the months that followed witnessed a rapid escalation of violence between the forces of President Bashar al-Assad and his oppositions. At the beginning, civilians were peacefully protesting against political oppression, poverty, unemployment, inequality, bureaucratic corruption, restrictions on freedom of speech and the excessive use of martial law.¹⁸⁰ The turning point occurred when 15 teenagers were caught painting anti-government graffiti on the walls of their school. They were then arrested and when they were released there were signs of torture and mistreatment, which further enraged vast sectors of the Syrian population.¹⁸¹ Following this event, increasing numbers of people took to the streets in what then turned into a countrywide call for the overthrow of President Assad's regime.¹⁸² Assad responded by using force against the demonstrators prompting the latter to take up arms against the regime.¹⁸³ The violence escalated in the weeks and months that followed.¹⁸⁴ Several months after the start of the conflict, the Independent International Commission Inquiry on the Syrian Arab Republic, appointed by the UN Human Rights Council

¹⁷⁹ Ibid., p. 896.

¹⁸⁰ Ibid.

¹⁸¹ Joe Sterling, 'Daraa: The spark that lit the Syrian flame' (CNN, 1 March 2012) <<http://edition.cnn.com/2012/03/01/world/meast/syria-crisis-beginnings/>> accessed on 18 January 2021.

¹⁸² Alex J. Bellamy and Tim Dunne, *The Oxford Handbook of the Responsibility to Protect* (first edition 2006, Oxford University Press 2016) p. 897.

¹⁸³ Lucy Rodgers, David Gritten, James Offers and Patrick Asare, 'Syria: The story of conflict' (BBC, 11 March 2016) <<http://www.bbc.co.uk/news/world-middle-east-26116868>> accessed on 18 January 2021.

¹⁸⁴ Frank Gardner, 'Syria blasts signal dangerous escalation of violence' (BBC, 10 May 2012) <<http://www.bbc.co.uk/news/world-middle-east-18023668>> accessed on 18 January 2021.

in March 2011, concluded that crimes against humanity had been committed at the hands of government forces, including excessive use of force, extrajudicial executions, violations of children's rights, and sexual torture and violence.¹⁸⁵

In theory, the situation in Syria should have been another 'textbook' example for the concept of R2P, following the precedent of Libya.¹⁸⁶ Instead, the international community's response to this crisis was very different. The SC was deadlocked due to the divisions between the P-5. Some members of the SC, including the United Kingdom, France, Germany, and Portugal, put forward a draft resolution which called on the Syrian government to acknowledge their responsibility to protect its population and strongly condemned the systematic gross violations of human rights and the use of force aimed at the Syrian civilian population.¹⁸⁷ However, and despite not seeking to authorise any decisive action against the Syrian government, Russia and China opposed this resolution, threatening to veto it if it was put on the Council's agenda.¹⁸⁸ Russia explained that any draft resolution that would eventually authorise any sanction against Syria could 'be part of a hidden agenda aimed at once again instituting regime change', further referring to the intervention in Libya.¹⁸⁹ For similar reasons, two further draft resolutions were again vetoed by China and Russia, whose explanations of vote hinted to their fear of regime change.¹⁹⁰

¹⁸⁵ The United Nations Human Rights Council, 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' [2011], A/HRC/S-17/2/Add.1, pp. 16-19.

¹⁸⁶ Saira Mohamed, 'Syria, The United Nations, and the Responsibility to Protect' [2012] 106 *American Society for International Law Proceedings*, p. 225.

¹⁸⁷ Draft United Nations Security Council Resolution, S/2011/612, <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Syria%20S2011%20612.pdf>> accessed on 18 January 2021.

¹⁸⁸ Jess Gifkins, 'The UN Security Council Divided: Syria in Crisis' [2012] 4 *Global Responsibility to Protect*, p. 382.

¹⁸⁹ *Ibid.*, p. 383.

¹⁹⁰ United Nations Security Council, 'Security Council Fails to Adopt Two of the Draft Resolutions on Syria, Despite Appeals for Action Preventing Impending Humanitarian Catastrophe in Aleppo' (The United Nations, 8 October 2016) <<https://www.un.org/press/en/2016/sc12545.doc.htm>> accessed on 20 January 2021.

It is clear that Western members of the SC saw this conflict as a violent repression of civilians, human right violations and excessive use of force by the Assad's regime.¹⁹¹ By contrast, Russia saw the Assad's government as a victim of terrorism and violence. According to this narrative, violence was not used against civilians but rather to suppress a violent insurgency of criminals and terrorists.¹⁹² It is also clear that Russia and China sought to prevent another instance of regime change following the events in Libya.¹⁹³ Their objection to impose any type of sanctions, including economic sanctions, on Syria fully revealed that politics will play a significant role in decision-making related to R2P action.¹⁹⁴

2.6 Two Alternative Variants of R2P: Brazil's 'Responsibility While Protecting' and China's 'Responsible Protection'

This section will present an overview of two variants of R2P that have been put forward by two individual States, namely Brazil and China. The fact that these two States suggested their own concepts of the responsibility to protect indicates two things: first, the existence of criticisms and contestations of R2P as originally formulated and, second, the fact that, despite the events in Libya and Syria, the international community felt that R2P should not be put aside but rather amended.¹⁹⁵

¹⁹¹ Jess Gifkins, 'The UN Security Council Divided: Syria in Crisis' [2012] 4 *Global Responsibility to Protect*, p. 389.

¹⁹² Ibid, p. 390.

¹⁹³ Jaime A. FlorCruz, 'Russia, China and partners call for non-intervention in Syria and Iran' (CNN, 7 June 2012) < <http://edition.cnn.com/2012/06/07/world/asia/china-russia-syria/> > accessed 20 January 2021.

¹⁹⁴ Alex J. Bellamy and Tim Dunne, *The Oxford Handbook of the Responsibility to Protect* (first edition 2006, Oxford University Press, 2016) p. 904.

¹⁹⁵ Cristina G. Stefan, 'On Non-Western Norm Shapers: Brazil and the Responsibility While Protecting' [2016] 2:1 *European Journal of International Security*, p. 89.

Following the events in Libya, Bellamy noted that ‘parts of Latin America remained cautious and unconvinced’ of the use of this principle.¹⁹⁶ In this context, in November 2011, the Brazil’s Foreign Minister, Antonio Patriota, drafted a document entitled ‘*Responsibility While Protecting: Elements for the Development and Promotion of a Concept*’ with a view to establishing safeguards regarding the implementation of R2P that would avoid another misuse of the principle like in Libya.¹⁹⁷ The concept of Responsibility while Protecting (RwP) draws on three basic elements of Brazil’s foreign policy practice. First, Brazil’s scepticism towards the use of force as a way to resolve threats to international peace and security.¹⁹⁸ Second, Brazil’s commitment to multilateralism in the sense of working with and within formal institutions such as the UN to tackle crisis situations.¹⁹⁹ And, third, Brazil’s belief of the importance of upholding the principle of sovereign equality among States.²⁰⁰

Brazil’s concept of RwP presents two main elements. First, RwP proposes to arrange the three Pillars of R2P in a sequential order so that they would ‘follow a strict line of political subordination and chronological sequencing’.²⁰¹ In particular, the use of force must be the absolute last resort and should only be used when all other non-coercive measures have been exhausted.²⁰² As was discussed earlier in section 2.4.1, however, Ban Ki-moon had explained that all three Pillars of R2P bear equal importance and ‘all three must be ready to be utilized at any point, as there is no set sequence for moving from one to another’.²⁰³ Secondly, RwP

¹⁹⁶ Oliver Stuenkel and Marcos Tourinho, ‘Regulating intervention: Brazil and the Responsibility to Protect’ [2014] 14:4 *Conflict, Security & Development*, p. 387.

¹⁹⁷ Kai Michael Kenkel and Cristina G. Stefan, ‘Brazil and the Responsibility While Protecting Initiative: Norms and the Timing of Diplomatic Support’ [2016] 22. *Global Governance*, p. 42.

¹⁹⁸ Oliver Stuenkel and Marcos Tourinho, ‘Regulating intervention: Brazil and the Responsibility to Protect’ [2014] 14:4 *Conflict, Security & Development*, p. 380.

¹⁹⁹ *Ibid.*, p. 381.

²⁰⁰ *Ibid.*

²⁰¹ General Assembly Sixty-sixth Session (2011), ‘Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary -General’ A/66/551.

²⁰² Kai Michael Kenkel and Cristina G. Stefan, ‘Brazil and the Responsibility While Protecting Initiative: Norms and the Timing of Diplomatic Support’ [2016] 22. *Global Governance*, p. 49.

²⁰³ United Nations General Assembly (2009), ‘Implementing the responsibility to protect’, A/63/677, p. 9.

demands a closer and more proactive oversight of the operations by the SC.²⁰⁴ In this sense, the Security Council would be expected to closely monitor the implementation of its mandates so that the actors actually executing them do not misuse or abuse their powers, as NATO did in Libya.

The second State which put forward its own interpretation of R2P is China, which, as was noted earlier in this chapter, has traditionally been known for its strict observation of the principles of state sovereignty and non-interference.²⁰⁵ Consequently, there is a clash between many of China's most closely held principles of foreign policy and the fundamental tenets of R2P. Nevertheless, China did not fully oppose the idea of R2P. The Responsible Protection (RP) concept, which has not been *explicitly* endorsed by the Chinese government, originally appeared in March 2012 in a newspaper article written by Ruan Zongze, the vice-president of the China Institute of International Studies (CIIS). Since the latter is the official think-tank for the China's Ministry of Foreign Affairs, it is generally accepted that China has semi-officially approved RP.²⁰⁶ Not surprisingly, China's RP is mostly concerned with Pillar III, seeking to tighten the scope in which this Pillar is implemented in order to avoid any potential abuse. To this end, RP affirms six main elements. First, the object of any R2P intervention must be to rescue the people of the target country, while also ensuring peace and stability in the relevant region.²⁰⁷ Second, 'the legitimacy of the "protection" executors must be established'.²⁰⁸ This element represents RP's version of the Just War criteria of 'right authority'. In this regard, RP confirms China's long-standing belief that only the SC should have authority to authorise the

²⁰⁴ Kai Michael Kenkel and Cristina G. Stefan, 'Brazil and the Responsibility While Protecting Initiative: Norms and the Timing of Diplomatic Support' [2016] 22. *Global Governance*, p. 49.

²⁰⁵ Mauro Barelli, 'Preventing and Responding to Atrocity Crimes: China, Sovereignty and the Responsibility to Protect' [2018] 23:2 *Journal of Conflict & Security Law*, p. 178.

²⁰⁶ Andrew Garwood-Gowers, 'China's "Responsible Protection" Concept: Reinterpreting the Responsibility to Protect (R2P) and Military Intervention for Humanitarian Purposes' [2016] 6 *Asian Journal of International Law*, p. 91.

²⁰⁷ Ruan Zhongze, 'Responsible Protection: Building a Safer World' [2012] 34 *China International Studies*, p. 38

²⁰⁸ *Ibid.*

use of force in international relations.²⁰⁹ The third element of RP suggests, like the Brazil's RWP, that all non-coercive and diplomatic means must have been exhausted before the use of force can be considered as a last resort.²¹⁰ The fourth element affirms that the purpose of any efforts to protect must be clearly defined. This aims to ensure that interventions are not being misused to pursue other strategic objectives, such as regime change.²¹¹ The fifth element of the RP states that the 'protector', namely the SC, should also be responsible for the post-intervention phase, where there will be a need to reconstruct the target state's society.²¹² The sixth element of RP suggests that the 'United Nations should establish mechanisms of supervision, outcome evaluations and post factum accountability to ensure the means, process, scope and results of "protection"'.²¹³ This element calls for greater accountability and supervision of those 'protecting' under the UN flag to make sure that they are carrying out their missions in accordance to the SC civilian protection mandates.²¹⁴

It is interesting to see that RwP and RP make similar demands. First of all, as Gareth Evans noted, both ideas do not aim to undermine R2P and should, instead, be viewed as efforts 'to assume co-ownership of it'.²¹⁵ Generally, they both show concern with the possibility of an extensive use of force under the name of R2P. Thus, both RwP and RP stress the important role of the SC, including in a post-intervention stage. Brazil's and China's engagement with R2P are testament to the fact that, despite the negative events in Libya and Syria, R2P is still regarded as a potentially valuable principle in the fight against humanitarian crisis. As it will be shown in Chapter 4, the type of concerns highlighted by Brazil and China are shared by a number of ASEAN States.

²⁰⁹ Andrew Garwood-Gowers, 'China's "Responsible Protection" Concept: Reinterpreting the Responsibility to Protect (R2P) and Military Intervention for Humanitarian Purposes' [2016] 6 *Asian Journal of International Law*, p. 106.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*, pp. 107-108.

²¹² *Ibid.*, p. 108.

²¹³ *Ibid.*, p. 109.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*, p. 92.

2.7 Conclusions

This chapter has suggested that R2P has come a long way since its creation in the 2001 report of the ICISS. It gained an official place as part of international law through the endorsement of the 2005 World Summit Outcome, and, later, was further articulated in a 2009 report by the then UN Secretary-General which formally introduced the three pillar-structure of R2P. This chapter has highlighted that the variant of R2P that has been legally validated at the international level is quite limited in scope. First, R2P can only be invoked in cases of ‘genocide, ethnic cleansing, war crimes and crimes against humanity’. Second, action can only be taken when States are manifestly failing to protect their populations. Third, any actor who wish to intervene in carrying out the international community’s duty to protect must receive UN Security Council authorisation. This means that, in many respects, R2P has not added anything substantial to the existing UN Charter’s legal framework.

Despite the above, according to this thesis R2P promises, in theory, to remedy to a number of legal and political problems that have traditionally affected the concept of humanitarian intervention. However, the analysis of the implementation phase of R2P conducted in the second part of the chapter has highlighted that important complications remain with regard to both the meaning and applicability of this principle. For example, although Libya was initially seen as a textbook case of R2P successfully working in practice, NATO overstretched the relevant UN mandate and ended up facilitating the overthrow of Gaddafi. In this sense, the Libyan intervention highlighted how R2P can be abused to mask the intervenor’s ulterior motives such as the pursuit of regime change. The crisis in Syria similarly proved that R2P faces many challenges when it comes to implementation. Russia’s and China’s refusal to

support any strong action against Assad showed that politics plays a significant role in decision-making processes concerning R2P, even when severe humanitarian crises unfold and despite States' broad commitment towards action exemplified in the 2005 Summit Outcome Document.

Some positive notes come from the direct engagement with R2P of some individual States. As discussed in this chapter, Brazil and China have introduced their own variants of R2P. Brazil's R2P proposes to, firstly, implement the three Pillars of R2P in a strict sequential order.²¹⁶ Secondly, it emphasises that the use of force must be the absolute last resort. And, thirdly, it demands the SC to closely monitor its R2P operations in order to prevent abuses of UN mandates. China's concept of RP is equally concerned with the implementation of Pillar III. RP puts emphasis on the intention and legitimacy of those intervening while stressing that the use of force must be the last resort and calling for enhanced accountability of the Security Council during the post-intervention phase.

While uncertainties continue to characterise R2P, the thesis takes the view that the latter has now come to represent a crucial principle in guiding the international community's efforts to tackle humanitarian crises. Given their prominent role in the SC, the position of the P-5 will be key for the further development of R2P. This calls for further investigations of great powers' approach to R2P. At the same time, given the global applicability of the principle, and its connection with regional conflict situations, it is also important to take a broader look at the way in which other States and regional organisations around the world approach R2P. With this in mind, the next chapter will introduce the Association of Southeast Asian Nations before the thesis will move on to examine the way in which this regional organisation approaches R2P both conceptually and practically.

²¹⁶ General Assembly Sixty-sixth Session (2011), 'Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General' A/66/551.

Chapter 3

The Association of the Southeast Asian Nations

3.1 Introduction

This chapter will introduce the Association of the Southeast Asian Nations (ASEAN) as the chosen regional organisation at the centre of this thesis. As mentioned in Chapter 1, I have chosen to focus on ASEAN's position on the Responsibility to Protect for several reasons. Firstly, ASEAN is becoming an increasingly important actor in the international community. With important economic ties and partnerships with the United States (US), China, Japan, India and the European Union (EU), ASEAN has significantly increased its geopolitical relevance.²¹⁷ Secondly, as will be discussed in this chapter, ASEAN and its members are known for taking a very conservative approach to the principles of sovereignty and non-intervention. Evidently, this stance is at odds with the fundamental concepts of Responsibility to Protect (R2P) that were discussed in the previous chapter. Therefore, it becomes particularly interesting to study this clash. In order to do so, it is necessary to first consider ASEAN's history, institutional structure and decision-making processes.

The first part of this chapter will focus on the origins of ASEAN, its institutional structure as well as its decision-making mechanisms. Central to the organisation's *modus operandi* is the so-called 'ASEAN Way', which will be thoroughly discussed in the second part of the chapter. In essence, the ASEAN Way principles include State sovereignty, non-interference, the

²¹⁷ European Commission, 'Association of Southeast Asian Nations (ASEAN)' (European Commission, updated 5 May 2020) < https://ec.europa.eu/trade/policy/countries-and-regions/regions/asean/index_en.htm > accessed 28 January 2021; Elaine Kurtenbach, 'ASEAN, China, Other Partners Sign World's Biggest Trade Pact' (The Diplomat, 16 November 2020) < <https://thediplomat.com/2020/11/asean-china-other-partners-sign-worlds-biggest-trade-pact/> > accessed 28 January 2021

prohibition of the use of force in external relations and consensus decision-making. Ultimately, the analysis in this chapter will show that ASEAN lacks the capacity to act independently from its individual members due to its strict adherence to the ASEAN WAY principles. In the context of this discussion, the last section of this chapter will also analyse a more specific question, namely ASEAN's approach towards the issue of human rights.

3.2 ASEAN: Origins and Evolution

ASEAN was established on 8 August 1967, after the so-called confrontation, or 'Konfrontasi', that occurred in the period 1963-1966 between Malaysia and Indonesia. The Konfrontasi was a conflict that stemmed from Indonesia opposing the creation of the Federation of Malaysia (consisting of Malaya, Sabah, Sarawak and Singapore) in 1963.²¹⁸ The then President of Indonesia, Sukarno, led an aggressive anti-colonial and nationalist government backed by the Indonesian Communist Party (PKI).²¹⁹ In 1963, he announced a *ganyang Malaysia* or 'Crush Malaysia' campaign, which amounted to a form of guerrilla warfare through the borders of Malaysia.²²⁰ This conflict persisted up until Sukarno was ousted by a coup led by his former general, Muhammad Suharto in 1965.²²¹

Sukarno claimed that he did not object to the creation of the Federation as such, but rather, to the fact that the former colonial master, that is, Great Britain, would continue to meddle in the internal and external affairs of the newly created State.²²² In reality, things were different. As suggested by many authors, Sukarno's opposition to the formation of the Federation of

²¹⁸ Budiawan, 'How do Indonesians remember *Konfrontasi*? Indonesia-Malaysia relations and the popular memory of "Confrontation" after the fall of Suharto' [2017] 18:3 *Inter-Asia Cultural Studies*, p. 367.

²¹⁹ Ibid.

²²⁰ John Subritzky, 'Britain, Konfrontasi, and the end of empire in Southeast Asia, 1961-1965' [2000] 28:3 *The Journal of Imperial and Commonwealth History*, pp. 213-214.

²²¹ Ibid., p. 224.

²²² Budiawan, 'How do Indonesians remember *Konfrontasi*? Indonesia-Malaysia relations and the popular memory of "Confrontation" after the fall of Suharto' [2017] 18:3 *Inter-Asia Cultural Studies*, p. 367.

Malaysia was motivated by his own geopolitical ambitions of uniting Malaya, Sabah, Sarawak and Singapore under Indonesian rule.²²³

Suharto, who had been secretly negotiating peace with Malaysia behind Sukarno's back, officially abandoned the policy of Konfrontasi in 1966. Once Suharto had formally installed himself as president, his new government declared a 'New Order' in Indonesia and abandoned Sukarno's agenda, refocused the country's efforts towards restoring economic stability and growth while at the same time, contextually, adopting an anti-communist policy.²²⁴ With this new policy, Suharto vowed to destroy the remnants of the PKI.²²⁵

At the same time, the governments of Thailand, Singapore, Malaysia and the Philippines also faced internal communist insurgencies. Malaysia was dealing with the Malayan Communist Party, Thailand with the Communist Party of Thailand, the Philippines with the Hukbalahap and, lastly, Singapore with the communist factions within the People's Action Party.²²⁶ Against this background, these five States met at the Bangkok Conference on the 8 August 1967 with a view to create a platform in which they could promote regional economic, social, political and cultural growth. The platform would also aim at protecting regional peace and stability, on the one hand, and defeating the threat of communism, on the other.²²⁷ This platform took the form of the Association of Southeast Asian States. That the pursuit for stability and fear of communism were at the core of the project of establishing ASEAN is clear from the words of the then Prime Minister of Singapore, Lee Kuan Yew, who, while talking about the negotiations, noted that:

²²³ Greg Poulgrain, *The Genesis of Konfrontasi: Malaysia, Brunei, Indonesia 1945-1965* (C. Hurst & Co. Publishers, 1998) p. 142.

²²⁴ Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan, 2012) pp. 44-45.

²²⁵ Ibid., p. 46.

²²⁶ Ibid., p. 45.

²²⁷ Mohamad Faisol Keling, et al, 'The Development of ASEAN from Historical Approach' [2011] 7:7 *Asian Social Science*, p. 172.

“The unspoken objective was to gain strength through solidarity ahead of the power vacuum that would come with an impending British and later a possible US withdrawal ... We had a common enemy – the communist threat in guerrilla insurgencies ... We needed stability and growth to counter and deny the communists the social and economic conditions for revolutions ... We were banding together ... for political objectives, stability and security’²²⁸

These sentiments were reflected in the formal outcome of the conference, that is, the Bangkok Declaration of 1967 which identified the following central aims for ASEAN: to accelerate economic growth, social progress and cultural development in the region, on the one hand, and to promote regional peace and stability, on the other.²²⁹

The Bangkok Declaration also established ASEAN’s four key structural components in order for the organisation to pursue the aforementioned goals. First, the ASEAN Ministerial Meeting, which consists of the Special Meetings of Foreign Ministers that may be convened as required.²³⁰ Second, a Standing Committee which would carry out the work of the Organisation in between the Foreign Ministers Meeting.²³¹ Third, a combination of Ad-Hoc and Permanent Committees consisting of official specialists on specific subjects/issues.²³² And, fourth, a National Secretariat in each member State working as a reference point for the Organisation and tasked with assisting the Special Meetings of the Foreign Ministers and the Standing Committee.²³³

At the time of its creation ASEAN was a rather informal organisation. Rodolfo C. Severino, the then Secretary General of the Organisation, once noted that ASEAN was created to foster cooperation among member States ‘through informal understandings that impose[d] no legally

²²⁸ Quoted in Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan, 2012) p. 46.

²²⁹ The ASEAN Declaration (Bangkok Declaration) (1967).

²³⁰ Ibid.

²³¹ Ibid.

²³² Ibid.

²³³ Ibid.

binding obligations'.²³⁴ Indeed, he continued, the Bangkok Declaration 'was a mere declaration of two pages setting forth the ends and means of the organisation'.²³⁵ Furthermore, Severino explained that the cautious and slow beginning of ASEAN was understandable since the five founding members still harboured historical animosities and suspicions towards one another, including, for example, tension related to the Konfrontasi and a territorial dispute between the Philippines and Malaysia.²³⁶

Under those circumstances, it required not only time but faith in one another for the members to see past the deeply embedded historical legacies to commit themselves to the common objectives of ASEAN. Given the above, it is not surprising that it took almost a decade for ASEAN to convene its first ever summit, in 1976. On that occasion, the member States concluded that it was essential to move to higher levels of cooperation in the political, economic, and social fields, and, with that in mind, agreed to sign two fundamental documents in the ASEAN architecture, namely the Declaration of ASEAN Concord and the Treaty of Amity and Cooperation in Southeast Asia (TAC).²³⁷ The former aimed to promote peace, progress, prosperity and the welfare of the peoples of the member States by consolidating earlier achievements and further expanding cooperation in the economic, social, cultural and political fields.²³⁸ In this regard, the Declaration of ASEAN Concord established five programmes of action, namely political, economic, social, cultural and security.²³⁹ In the political sphere, it established that the meeting of the heads of governments of member States should be held as and when necessary, and that member States would strengthen their political

²³⁴ Address by Rodolfo C. Severino, Secretary-General of the Association of Southeast Asia Nations, at the International Law Conference on ASEAN Legal Systems and Regional Integration (2001), 'The ASEAN Way and the Rule of Law', <https://asean.org/?static_post=the-asean-way-and-the-rule-of-law>.

²³⁵ Ibid.

²³⁶ Ibid, and; Hiro Katsumata, 'Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the "ASEAN Way"' [2003] 25:1 *Contemporary Southeast Asia*, p. 114.

²³⁷ Joint Communique The First ASEAN Heads of Government Meeting Bali, 23-24 February 1976, https://asean.org/?static_post=joint-communique-the-first-asean-heads-of-government-meeting-bali-23-24-february-1976.

²³⁸ The Declaration of ASEAN Concord, Bali (1976).

²³⁹ Ibid.

solidarity by promoting the harmonisation of views, coordinating actions and where possible and desired, taking common actions.²⁴⁰ Lastly, this Declaration established the ASEAN Secretariat with the role of providing greater efficiency in the coordination of ASEAN organs and the implementation of ASEAN projects and activities.²⁴¹

The second fundamental instrument adopted at the 1976 summit was the TAC. This Treaty, which, according to Lee Jones, represents the touchstone of the ‘ASEAN Way’, aimed to promote regional peace, stability, amity and cooperation in the region with a view to contributing to foster the organisation’s strength, solidarity and closer relationships.²⁴² In order to reach these goals, the TAC set out the fundamental principles that would guide inter-state relations amongst its signatories: mutual respect for each other’s independence, sovereignty, equality, territorial integrity, and national identity; freedom from external interference, subversion or coercion; renunciation of the threat or use of force; and peaceful settlement of disputes.²⁴³ As stated by Hiro Katsumata, the importance of these principles cannot be overstated since they set out the fundamentals of the ‘ASEAN Way’, which will be discussed in detail in the next section.²⁴⁴ Furthermore, what makes this treaty particularly significant is that, in addition to providing the code of conduct for its signatories, it enshrined it into legally binding norms rather than just political ones.²⁴⁵ It is also worth noting that some authors have highlighted the broader implications of the TAC beyond ASEAN. Anja Jetschke, for example, affirmed that the TAC has become the centre piece of regional security framework in the wider East Asia region.²⁴⁶ Since then, the principles of the TAC have been continually reaffirmed in

²⁴⁰ Ibid.

²⁴¹ ‘ASEAN Secretariat’, <https://asean.org/asean/asean-secretariat/>, accessed on 3 May 2021.

²⁴² The Treaty of Amity and Cooperation in Southeast Asia (1976), Article 1; and Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan, 2012) p. 54.

²⁴³ The Treaty of Amity and Cooperation in Southeast Asia (1976), Article 2.

²⁴⁴ Hiro Katsumata, ‘Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the “ASEAN Way”’ [2003] 25:1 *Contemporary Southeast Asia*, p. 106.

²⁴⁵ Kei Koga, ‘Institutional transformation of ASEAN: ZOPFAN, TAC, and the Bali Concord I in 1968-1976’ [2014] 27:5 *The Pacific Review*, p. 732.

²⁴⁶ Stephen Aris and Andreas Wenger, ‘Regional Organisations and Security: Conceptions and Practices’ (Routledge, 2014) pp. 84-85.

every ASEAN summit and every ASEAN Foreign Minister's Meetings.²⁴⁷ For example, on the 40th anniversary of the adoption of the TAC, the ASEAN Foreign Ministers released a joint statement emphasising how the TAC had served as a foundation for an integrated, peaceful and stable ASEAN community.²⁴⁸ The statement also underscored the continuing relevance and importance of the principles of the TAC in guiding inter-States relations.²⁴⁹

The next important step in the process of enhancing the cooperation and efficiency of the Association was taken during the 9th ASEAN Summit in 2003. On that occasion, the members of ASEAN adopted the Declaration of Concord II (Bali Concord II), which sought to further promote regional cooperation by creating three communities: the ASEAN Security Community, the ASEAN Economic Community, and the ASEAN Socio-Cultural Community.²⁵⁰ The establishment of these communities made the organisational structure of ASEAN more precise and meant that any particular issue would now be delegated to the committee most relevant and suitable to tackle it. In particular, the ASEAN Political-Security Community (APSC) was envisaged to further promote cooperation in the crucial field of security with a view to ensuring that the people of ASEAN would live together in a harmonious and democratic environment.²⁵¹ For the purposes of this thesis, it is especially important to note that the APSC was given conflict prevention and conflict resolution tasks in order to achieve the aforementioned objectives. However, the APSC fully adheres to the set of shared norms and values included in

²⁴⁷ Chairman's Statement of the 37th ASEAN Summit (2020) para 43, < <https://asean.org/storage/43-Chairmans-Statement-of-37th-ASEAN-Summit-FINAL.pdf> > accessed on 30 April 2021; 30th ASEAN Summit (2017) para 18, < https://asean.org/wp-content/uploads/2017/04/Chair-Statement-of-30th-ASEAN-Summit_FINAL.pdf > accessed on 30 April 2021; and Joint Communiqué of the 51st ASEAN Foreign Minister's Meeting (2018) para 16, < <https://asean.org/wp-content/uploads/2018/08/51st-AMM-Joint-Communique-Final.pdf> > accessed on 30 April 2021. For further statements and communiqué reaffirming the TAC, see <https://asean.org/asean/asean-structure/asean-summit/#99eddc04cd6d2f250>; and <https://asean.org/asean-political-security-community/asean-foreign-ministers-meeting-amm/>.

²⁴⁸ ASEAN Foreign Ministers' Statement on the Occasion of the 40th Anniversary of the Treaty of Amity and Cooperation in Southeast Asia (TAC) (2016), <https://asean.org/wp-content/uploads/2016/07/Statement-of-the-40th-Anniversary-of-the-TAC-ADOPTED.pdf> accessed on 30 April 2021.

²⁴⁹ *Ibid.*

²⁵⁰ Press Statement by the Chairperson of the 9th ASEAN Summit and the 7th + 3 Summit (2003), < https://asean.org/?static_post=press-statement-by-the-chairperson-of-the-9th-asean-summit-and-the-7th-asean-3-summit-bali-indonesia-7-october-2003 > accessed on 30 April 2021.

²⁵¹ ASEAN Political-Security Community Blueprint (2009), Section II.

the TAC that were discussed above, e.g. renunciation of the threat and use of force, respect for state sovereignty and non-interference.²⁵² Therefore, not surprisingly, the APSC has always lacked the capacity to coordinate the foreign or defence policies of the member States which, instead, continue to enjoy their (sovereign) right to pursue individual foreign policies.²⁵³ It is also worth mentioning that ASEAN Foreign Minister's Meetings (AMM) take place under the APSC umbrella. The AMM are responsible for the political-security cooperation and external relations in ASEAN.²⁵⁴ These meetings produce ASEAN collective statements (once and if agreed by all members) in response to security and/or political issues, which will be highly relevant in the analyses of Chapter 5 and 6 focusing on ASEAN's position on the East Timor and Rohingya crises.

3.2.1 The ASEAN Charter

As noted by Severino, despite representing important steps in the institutional history of ASEAN, the Bangkok Declaration and the TAC combined had simply envisioned to create an association for regional cooperation.²⁵⁵ It was the ASEAN Charter, adopted in 2007 through the 13th ASEAN Summit, that changed the nature of the organisation.²⁵⁶ To begin with, by conferring upon ASEAN 'legal personality' as an 'intergovernmental organization', the Charter

²⁵² Ibid., II (10).

²⁵³ Jean-Claude Piris and Walter Woon, *Towards a Rules-Based Community: An ASEAN Legal Service* (Cambridge University Press, 2015) p. 43.

²⁵⁴ ASEAN Foreign Ministers' Meeting, <<https://asean.org/asean-political-security-community/asean-foreign-ministers-meeting-amm/>>.

²⁵⁵ Address by Rodolfo C. Severino, Secretary-General of the Association of Southeast Asia Nations, at the International Law Conference on ASEAN Legal Systems and Regional Integration (2001), 'The ASEAN Way and the Rule of Law', <https://asean.org/?static_post=the-asean-way-and-the-rule-of-law>.

²⁵⁶ Chairman's Statement of the 13th ASEAN Summit, "One ASEAN at the Heart of Dynamic Asia", Singapore (2007), <https://asean.org/?static_post=chairman-s-statement-of-the-13th-asean-summit-one-asean-at-the-heart-of-dynamic-asia-singapore-20-november-2007> accessed on 30 April 2021.

signalled a crucial evolution from the initial voluntary nature of ASEAN.²⁵⁷ On top of bestowing ASEAN with a legal personality, the ASEAN Charter aimed at evolving ASEAN into a more rules-based organisation. In fact, according to a document produced by the European Parliament Directorate-General for External Policies, one could say that the Charter elevated ASEAN's standing to the structural levels typical of the EU.²⁵⁸ In addition, the Charter reiterated ASEAN's purposes of maintaining and enhancing regional peace, security, resilience and prosperity, thus mirroring the Bangkok Declaration.²⁵⁹ It also codified all of ASEAN's existing norms, rules and values as previously enunciated under the TAC: renunciation of the threat and use of force, respect for sovereignty, non-interference into the internal affairs of member States and reliance on peaceful settlement of disputes.²⁶⁰

Furthermore, the Charter formally codified ASEAN's existing organisational structure, placing the ASEAN Summit as the supreme policy-making body tasked with providing policy guidance and making decisions on key issues pertaining to the objectives of ASEAN.²⁶¹ As affirmed in Article 7 of the Charter, the Summit comprises of ASEAN members' heads of States and is held twice a year. Headed by the Secretary-General, the ASEAN Summit provides guidance and takes into considerations key issues with the goals of pursuing the organisational goals which span over the areas of economic, social, political and security. Put simply, the Summit is on top of the chain of command of ASEAN. For example, in a situation of humanitarian crisis, this body would be pivotal. According to Article 7 of the ASEAN Charter, the Summit has the power to provide policy guidance and address emergency situations on issues affecting ASEAN and its members.²⁶² Thus, as will be discussed in Chapter 6, through the 32nd ASEAN

²⁵⁷ The ASEAN Charter (2007), Article 3.

²⁵⁸ 'ASEAN: Integration, Internal Dynamics and External Relations' [2013] European Parliament Directorate-General For External Policies, < [https://www.europarl.europa.eu/RegData/etudes/note/join/2013/433713/EXPO-AFET_NT\(2013\)433713_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/note/join/2013/433713/EXPO-AFET_NT(2013)433713_EN.pdf)>, p. 4.

²⁵⁹ The ASEAN Charter (2007), Article 1.

²⁶⁰ *Ibid.*, Article 2.

²⁶¹ *Ibid.*, Article 7.

²⁶² The ASEAN Charter (2007), Article 7.

Summit in 2018, ASEAN expressed concern and urged Myanmar to foster reconciliation with the Rohingya.²⁶³ Furthermore, in the case of a serious breach of the Charter or non-compliance, the matter shall be referred to the Summit for decision.²⁶⁴

However, while the Summit might have ‘soft’ diplomatic powers, it lacks the power to enforce its recommendations.²⁶⁵ As highlighted by Daniel Seah, this serves the purpose of safeguarding the members’ sovereignty by allowing them to conduct their affairs and relations as they see fit.²⁶⁶ Interestingly, proposals were initially made to strengthen the role of the Summit. For example, the Eminent Persons Group that was tasked with the drafting of the Charter had recommended that the Summit should have the authority to impose sanctions on its members in the event of serious violations of ASEAN’s principles and obligations.²⁶⁷ However, that proposal was met with strong opposition and was ultimately rejected. In a similar way, proposals were made by the Eminent Persons Group to introduce a provision in the ASEAN Charter allowing the organisation to expel its members in the event of a serious breach of ASEAN obligations.²⁶⁸ As with the case of sanctions, however, this proposal was ultimately set aside.

In dealing with the organisation’s *modus operandi*, Article 21 of the Charter reiterated the principle whereby decision-making shall be based on consultation and consensus.²⁶⁹ Consensus is a form of decision-making which contrasts significantly with the majority rule and, more generally, with the use of any formalised procedure such as voting.²⁷⁰ Consensus is defined as

²⁶³ The Chairman’s Statement of the 32nd ASEAN Summit (2018) para 17, <<https://asean.org/wp-content/uploads/2018/04/Chairmans-Statement-of-the-32nd-ASEAN-Summit.pdf>> accessed on 30 April 2021.

²⁶⁴ The ASEAN Charter (2007), Article 20.

²⁶⁵ Amitav Acharya, ‘A regional security community in Southeast Asia?’ [1995] 18:3 *The Journal of Strategic Studies*, p. 186.

²⁶⁶ Daniel Seah. I, ‘The ASEAN Charter’ [2009] 58 *International and Comparative Law Quarterly*, p. 202.

²⁶⁷ Walter Woon, ‘The ASEAN Charter Ten Years On’ [2017] 39:2 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, p. 248.

²⁶⁸ *Ibid.*

²⁶⁹ The ASEAN Charter (2007), Article 21.

²⁷⁰ Martha E. Gentry, ‘Consensus as a Form of Decision-Making’ [1982] 9:2 *Journal of Sociology and Social Welfare*, p. 233.

a decision made by all members of a group, thus representing the maximum area of common acceptance.²⁷¹ The consensus system ensures an agreement that is acceptable to all and helps achieve the ‘universality or near universality’ within a group.²⁷² Interestingly, while drafting the ASEAN Charter, the Eminent Persons Group had called for a more effective form of decision-making.²⁷³ Although it agreed that decisions should be made through the process of consensus and consultation as a general rule, the Eminent Persons Group suggested that, in situations where consensus could not be achieved, decisions should be taken through voting either on the basis of a simple majority, two-thirds or three-quarter majority.²⁷⁴ This proposal, however, was rejected.

This typology of decision-making seems most appropriate for ASEAN. Like in the case of the Summit discussed above, this broad commitment to consensus decision-making seeks to protect members’ individual interests and sovereignty, while rejecting the voting mechanisms that typically lie at the core of Western-style institutions and governance.²⁷⁵ The choice of consensus decision-making was inspired by the Malay practice of *mushawarah* (consultation) and *mufakat* (consensus).²⁷⁶ This practice was used by Malay leaders to manage personal relations with other political chiefs in order to avoid resorting to the use of force.²⁷⁷ *Mushawarah* only takes place amongst friends and neighbours and it involves extensive discussions whereby participants are expected to adjust their views to a certain level in order to reach *mufakat* or a compromise and to ensure that the majority does not coercively impose their will on the minority.²⁷⁸ According to Severino, this non-confrontational approach is particularly important in a region

²⁷¹ Ibid., p. 234.

²⁷² Louis B. Sohn, ‘Introduction: United Nations Decision-Making: Confrontation or Consensus?’ [1974] 15:3 *Harvard International Law Journal*, p. 445.

²⁷³ Report of the Eminent Persons Group (EPG) on the ASEAN Charter (2006), p. 41.

²⁷⁴ Ibid.

²⁷⁵ Helen E. S. Nesadurai, ‘The Association of Southeast Asian Nations (ASEAN)’ [2008] 13:2 *New Political Economy*, p. 228.

²⁷⁶ Atena S. Feraru, ‘ASEAN Decision-Making Process: Before and After the ASEAN Charter’ [2015] 4:1 *Asian Development Policy Review*, p. 29.

²⁷⁷ Ibid.

²⁷⁸ Ibid.

characterised by a high diversity of views and interests, so that decisions can only be made at 'a pace comfortable for all'.²⁷⁹

However, all this means that an ASEAN official decision can only be made in the absence of opposition by any member States.²⁸⁰ It is not difficult to appreciate the negative consequences of this approach. As noted by Noel M. Morada, the system of consensus ends up even preventing sensitive issues from being brought forward for discussion.²⁸¹ Morada cited the examples of Thailand and Myanmar successfully preventing the discussion of, respectively, an escalation of violence in southern Thailand in 2015 and the crackdown against the Buddhist monks in 2007.²⁸² This, Morada noted, proves how the allegiance to consensus decision-making makes the ASEAN Charter's people-centred principles inferior to the principle of State sovereignty.²⁸³ Ultimately, to Morada, the ASEAN Charter 'is one step forward and thirty-nine steps back' and it has further cemented ASEAN as a state-centric organisation.²⁸⁴ Thus, as also aptly noted by Yi-Hung Chiou, despite the important changes introduced by the Charter, ASEAN remained as an organisation which is fundamentally meant to serve its members' national interests.²⁸⁵

Despite the limits inherent in consensus decision-making, the Charter marked a crucial departure from ASEAN's earlier and timid approaches to the questions of democracy and human rights. Article 1(7) of the Charter, in particular, affirms that one of the purposes of ASEAN is 'to strengthen democracy, enhance good governance and the rule of law, and to protect and promote human rights and fundamental freedoms, with due regards to the rights and

²⁷⁹ Ibid.

²⁸⁰ Yi-hung Chiou, 'Unravelling the Logic of ASEAN's Decision-Making: Theoretical Analysis and Case Eminent Persons Group (EPG) that was tasked with the drafting of the Charter Examination' [2010] 2:3 *Asian Politics & Policy*, p. 379.

²⁸¹ Noel M. Morada, 'The ASEAN Charter and the Promotion of R2P in Southeast Asia: Challenges and Constraints' [2009] 1 *Global Responsibility to Protect*, p. 198.

²⁸² Ibid.

²⁸³ Ibid.

²⁸⁴ Ibid., p. 206.

²⁸⁵ Yi-hung Chiou, 'Unravelling the Logic of ASEAN's Decision-Making: Theoretical Analysis and Case Examination' [2010] 2:3 *Asian Politics & Policy*, p. 375.

responsibility of the member states'.²⁸⁶ In conformity with this specific purpose, the Charter also states that ASEAN would establish an ASEAN human rights body, which will be analysed in detail in section 3.4.1 below.²⁸⁷

3.3 The 'ASEAN Way'

As Helen Nesadurai argued, the Charter's most important achievement is its contribution to the institutionalisation and codification of the ASEAN Way principles into the organisation.²⁸⁸ As it is clear from earlier discussions, ASEAN subscribes to a *modus operandi* which fully respects national sovereignty and the principle of non-interference in States' internal affairs. This key feature of the organisation is typically referred to as the ASEAN Way. According to Nesadurai, historical experiences help to explain the importance of the ASEAN Way for ASEAN States. In particular, colonialism, first, and interference by the United States, the Soviet Union and China during and post the Cold War, later, created into ASEAN States a clear preference for systems and mechanisms aimed at defending one's sovereignty and independence.²⁸⁹ Without denying the importance of these historical events, Amitav Acharya has explained that the origins of the ASEAN Way are also to be found in the cultural sphere. Thus, the very idea of cooperation based on an interpersonal system of consultation rather than through inflexible institutionalised procedures is thought, in the region, to better promote progress while working towards mutual goals.²⁹⁰ This point is well reflected in the words of Carlos Romulo, former Foreign Secretary of the Philippines, who once noted that, in the region,

²⁸⁶ The ASEAN Charter (2007), Article 1 (7).

²⁸⁷ Ibid.

²⁸⁸ Helen E. S. Nesadurai, 'The Association of Southeast Asian Nations (ASEAN)' [2008] 13:2 *New Political Economy*, p. 226.

²⁸⁹ Ibid., p. 228.

²⁹⁰ Amitav Acharya, 'Culture, security, multilateralism: The 'ASEAN Way' and regional order' [1998] 19:1 *Contemporary Security Studies*, pp. 58-59.

‘we often find that private talks over breakfast prove more important than formal meetings’.²⁹¹ For this reason, as was noted in the previous section, ASEAN’s decision-making processes feature a high degree of informal and non-confrontational discussions aimed at reaching consensus.²⁹² As suggested by Yi-hung Chiou, this non-confrontational bargaining style - as opposed to the adversarial majority voting style of the West – has the merit of encouraging cooperation and solidarity while, at the same time, lessening disagreement.²⁹³ As was noted above, however, this means that ASEAN would hardly take any decision that could undermine its members’ sovereignty and/or interests.²⁹⁴

3.3.1 The Guiding Principles

The key principles informing the ‘ASEAN Way’, as enshrined in the ASEAN Charter, are: non-interference, consensus-based decision-making, national and regional resilience, respect for the national sovereignty, the renunciation of the threat or use of force, and peaceful settlement of disputes.²⁹⁵

²⁹¹ Ibid., p. 58.

²⁹² Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (Routledge, 3rd edition, 2014) p. 63.

²⁹³ Yi-hung Chiou, ‘Unravelling the Logic of ASEAN’s Decision-Making: Theoretical Analysis and Case Examination’ [2010] 2:3 *Asian Politics & Policy*, p. 375.

²⁹⁴ Ibid.

²⁹⁵ The ASEAN Charter (2007), Article 2.

3.3.2 The Principles of Sovereignty and Non-Interference

It is clear from what has been discussed so far in this chapter that the principle of sovereignty lies at the centre of the ASEAN Way. Indeed, sovereignty is linked with all the other principles defining the ASEAN Way, starting with the principle of consensus in decision-making. In the words of ASEAN former Secretary-General, Phan Wannamethee, the latter represents ‘a safety device to assure member states that their national interests will not be compromised, and nothing can be done against their will’.²⁹⁶ ASEAN is of course not unique in giving prominence to the principle of sovereignty. As is well known, the UN Charter is based on the principle of the sovereign equality of States.²⁹⁷ However, there are differences in how States interpret sovereignty today. In particular, Western States no longer adhere to what, in their view, is an outdated interpretation of the principle. As former UN Secretary General Kofi Annan once put it, ‘state sovereignty, in its most basic sense is being redefined...by the forces of globalisation and international cooperation’ leading to a significant erosion of its meaning.²⁹⁸ ASEAN States, however, do not agree with this progressive take. According to Shaun Narine, ASEAN States’ experience of colonialism and other forms of external interference has created a strong commitment to protecting their sovereignty.²⁹⁹ Indeed, with the exception of Thailand, all nine members of ASEAN have been colonised at one point in their history: France colonised Cambodia, Vietnam and Laos; Britain colonised Brunei, Malaysia, Myanmar and Singapore; the United States colonised the Philippines; and the Netherlands colonised Indonesia.

²⁹⁶ Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (Routledge, 3rd edition, 2014) p. 67.

²⁹⁷ The United Nations Charter, Article 2(1).

²⁹⁸ Kofi Annan, ‘Two Concepts of Sovereignty’ (United Nations Secretary-General – via the Economist, 18 September 1999) < <https://www.un.org/sg/en/content/sg/articles/1999-09-18/two-concepts-sovereignty> > accessed on 3 May 2021.

²⁹⁹ Shaun Narine, ‘State Sovereignty, political legitimacy and regional institutionalism in the Asia-Pacific’ [2004] 17:3 *The Pacific Review*, p. 426.

Furthermore, during the Cold War, the United States and the Soviet Union sought to gain important allies in the region, which became more unstable and volatile as a consequence.³⁰⁰ For the above reasons, the expression ‘Westphalian sovereignty is’ often used in the context of ASEAN. As explained by Robert Gilpin, Westphalian sovereignty posits that the State ‘must answer to no higher authority in the international sphere ...[and it] alone defines and protects the right of individuals and groups’.³⁰¹ References to this commitment to a strong version of sovereignty abound in ASEAN documents. For example, the Bangkok Declaration affirms that no actions or activities are ‘to be used directly or indirectly to subvert national independence and freedom of states’.³⁰² The Declaration on a Zone of Peace, Freedom and Neutrality (ZOPFAN), which was adopted by ASEAN in 1971, establishes that the organisation is ‘inspired by the worthy aims and objectives of the UN, in particular by the principles of the respect for sovereignty and territorial integrity of all states’.³⁰³ The 1976 TAC, which was discussed in section 3.2 above, reaffirms the respect for sovereignty as a crucial pillar of the organisation. In particular, Article 2 of the TAC requires the contracting parties to be guided by ‘mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations’.³⁰⁴ The ASEAN Charter, as discussed in section 3.2.1 above, is also fully aligned with this trend proclaiming the fundamental importance of ‘the principles of sovereignty, equality, territorial integrity, non-interference, consensus and unity diversity’.³⁰⁵ In the ASEAN architecture, the corollary of sovereignty is the principle of non-interference. The centrality of this principle in the ASEAN structure was well captured by Amitav Acharya, who once described it as ‘the single most important principle underpinning ASEAN

³⁰⁰ Yukiko Nishikawa, ‘The “ASEAN Way” and Asian Regional Security’, [2007] 35:1 *Politics and Policy*, p. 45.

³⁰¹ Robert Gilpin, *War and Change in World Politics* (Cambridge University Press, 1981) p. 17.

³⁰² The Bangkok Declaration (1967), p. 1.

³⁰³ The Declaration on a Zone of Peace, Freedom and Neutrality, Kuala Lumpur (1971).

³⁰⁴ The Treaty of Amity and Cooperation (1976), Article 2.

³⁰⁵ The ASEAN Charter (2007), Preamble.

regionalism’.³⁰⁶ The reasons for the strong endorsement of this principle mirror those behind the commitment to sovereignty highlighted before, that is to say, a combination of colonial history and experiences of various other forms of interference.³⁰⁷

It is important, at this point, to clarify that the principle of non-interference endorsed by ASEAN should not be confused with the principle of ‘non-intervention’ recognised in international law.³⁰⁸ Although these two terms are sometimes used interchangeably, ASEAN formally refers to the principle of ‘non-interference’, which, as will be discussed, has a much broader meaning than non-intervention. The latter is a firmly established principle of international law which has been affirmed, expressly or implicitly, in multiple international instruments and treaties.³⁰⁹ For example, Eric Corthay has noted that, although the UN Charter does not explicitly stipulate an obligation for members to refrain from intervening in the internal affairs of other States, several provisions refer implicitly to the existence of a right of States to be free from external intervention. In particular, Corthay referred to Articles 2(1), 2(4) and 55 of the Charter.³¹⁰ More importantly, the principle of non-intervention has been expressly affirmed in several Resolutions of the UN General Assembly (GA), notably GA Resolution 2131 (1965), GA Resolution 2625 (1970) and GA resolution 36/103 (1981).³¹¹ Furthermore, the International Court of Justice (ICJ) in its judgement of *Nicaragua V. United States of America*, noted that ‘the principle of non-intervention involves the right of every sovereign

³⁰⁶ Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (Routledge, 3rd edition, 2014) p. 56.

³⁰⁷ Robin Ramcharan, ‘ASEAN and Non-Interference: A Principle Maintained’ [2000] 22:1 *Contemporary Southeast Asia*, p. 65. See also, Lauren Dunn, et al, ‘Western interventionism versus East Asian non-interference: competing ‘global’ norms in the Asian century’ [2010] 23:3 *The Pacific Review*, p. 297; and Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (Routledge, 3rd edition, 2014) p. 56.

³⁰⁸ Eric Corthay, ‘The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention’ [2015] 17:2 *Asian-Pacific Law & Policy Journal*, p. 3 (Footnote).

³⁰⁹ *Ibid.*, p. 9.

³¹⁰ United Nations Charter, Article 2(1), 2(4) and 55.

³¹¹ United Nations General Assembly Resolutions 2131(1965) A/RES/2131 (XX), 2625 (1970) A/RES/2625 (XXV) and 36/103 (1981) A/RES/36/103.

State to conduct its affairs without outside interference’ and ‘considers that [this] is part and parcel of customary international law’.³¹²

While the principle of non-intervention represents a central principle of international law, to define its actual meaning is not an easy task. As Corthay correctly pointed out, the principle of non-intervention does not prevent all forms of inter-state interactions.³¹³ Endorsing this position, Russell Buchan and Nicholas Tsagourias highlighted that the two key elements that define (illegal) intervention in international law are coercion and sovereignty.³¹⁴ In the words of the ICJ:

‘A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State Sovereignty to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongly when it uses methods of coercion in regard in such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention is particularly obvious in the case of an intervention which uses force’³¹⁵

To amount to an illegal intervention, then, the action of a State must display a coercive element (which does not necessarily need to be armed force) and be aimed at interfering with a matter falling within the sovereign domain of another State.³¹⁶

The concept of non-interference endorsed by ASEAN, by contrast, has a much more expansive scope.³¹⁷ The key difference between non-intervention, as affirmed in international law, and

³¹² *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. United States of America)* (1986), Merits, Judgement, I.C.J. Report, para. 202.

³¹³ Eric Corthay, ‘The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention’ [2015] 17:2 *Asian-Pacific Law & Policy Journal*, p. 14.

³¹⁴ Russell Buchan and Nicholas Tsagourias, ‘The Crisis in Crimea and the Principle of Non-Intervention’ [2017] 19(2-3) *International Community Law Review*, p. 8.

³¹⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. United States of America)* (1986), Merits, Judgement, I.C.J. Report, para. 205.

³¹⁶ Eric Corthay, ‘The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention’ [2015] 17:2 *Asian-Pacific Law & Policy Journal*, p. 14.

³¹⁷ Linjun Wu, ‘East Asia and The Principle of Non-Intervention: Policies and Practices’ [2000] 5:160 *Maryland Series in Contemporary Asian Studies*, p. 13.

non-interference, as articulated by ASEAN, lies in the fact that the principle of non-interference does not require the presence of coercion as a defining element. Criticising and making recommendations on matters in which States, using ICJ language, should be able to decide freely and without any attempt to coerce would, therefore, amount to a violation of the principle of non-interference while not qualifying as unlawful intervention in international law.³¹⁸ Thus, as explained by Linjun WU, non-interference within ASEAN would include, for example, the prohibition of criticising the actions of other governments towards their own people.³¹⁹ This, as emphasised by Acharya, means that ASEAN will always hesitate to criticise members' governments in the event of human rights violations.³²⁰

Cultural considerations, like in the case of consensus decision-making, often feature as an additional explanation for ASEAN's commitment to a strictly policy of non-interference. According to Nesadurai, for example, ASEAN leaders have recognised that their commitment to this principle is key given that so many diverse States have to work together on common problems.³²¹ In a similar way, Severino noted that 'with such a complex mixture of race, tribes, religions and cultures transcending national boundaries, and sensitivity of certain aspects of history, Southeast Asia countries are extraordinarily wary of the very possibility of interference by neighbours in one's internal affairs'.³²² Indeed, some have emphatically referred to the disastrous consequences that would follow from a regional failure to comply with the principle of non-interference: 'To abandon this time-honoured principle', noted by former Malaysia

318 Hitoshi Nasu, 'Revisiting the Principle of Non-Intervention: A Structural Principle of International Law or a Political Obstacle to Regional Security in Asia?' [2013] 3 *Asian Journal of International Law*, p. 29.

319 Although ASEAN as an organisation has never actually specified its strict interpretations of the practice of non-interference, this is how it has been perceived through analyses of the Association and its members' practices; see, Linjun Wu, 'East Asia and The Principle of Non-Intervention: Policies and Practices' [2000] 5:160 *Maryland Series in Contemporary Asian Studies*, p. 13.

320 Eric Corthay, 'The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention' [2015] 17:2 *Asian-Pacific Law & Policy Journal*, p. 14.

321 Helen E. S. Nesadurai, 'The Association of Southeast Asian Nations (ASEAN)' [2008] 13:2 *New Political Economy*, p. 229.

322 Eric Corthay, 'The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention' [2015] 17:2 *Asian-Pacific Law & Policy Journal*, pp. 6-7.

foreign minister Abdullah Ahmad Badawi, ‘would set us on the path towards eventual disintegration’.³²³

Given the importance of non-interference in the region, it is not surprising that ASEAN instruments contain numerous references to this crucial principle. For example, the Bangkok Declaration affirms Member States’ determination ‘to ensure their stability and security from external interference in any form or manifestation’.³²⁴ The operative paragraphs of ZOPFAN refer to the right of every state to lead its national existence free from outside interference in its internal affairs.³²⁵ Likewise, Article 2 of the TAC explicitly refers to the right of every State to be free from external interference, subversion or coercion.³²⁶ On its part, the ASEAN Charter affirms the importance of the right of each member State to lead its national existence free from external interference in its internal affairs.³²⁷

3.3.3 The Prohibition of the Threat and Use of Force

As was explained before, aside from aiming at regional prosperity politically, socially and economically, the establishment of ASEAN was also the product of the original members’ desire to prevent conflict and tensions in the region, especially after the Konfrontasi.³²⁸ Thus, along with its commitment to sovereignty and non-interference, ASEAN confers considerable relevance on the prohibition of the threat and use of force in international relations. ASEAN has made its commitment to this prohibition through its main declarations and treaties. The

³²³ Stephen Powell, ‘ASEAN debate on democracy, human rights hot up’ (Reuters, 26 July 1998) <<https://www.burmalibrary.org/reg.burma/archives/199807/msg00594.html>> accessed 17 February 2021.

³²⁴ Linjun Wu, ‘East Asia and The Principle of Non-Intervention: Policies and Practices’ [2000] 5:160 *Maryland Series in Contemporary Asian Studies*, p. 4.

³²⁵ The Declaration on a Zone of Peace, Freedom and Neutrality, Kuala Lumpur (1971).

³²⁶ The Treaty of Amity and Cooperation (1976), Article 2.

³²⁷ The ASEAN Charter (2007), Article 2(a)(e) and (f).

³²⁸ Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (Routledge, 3rd edition, 2014) p. 46.

ZOPFAN affirmed, among other things, the Association's commitment to refrain from the threat or use of force in the internal affairs of states.³²⁹ Article 2 of the TAC acknowledges the importance of settling disputes by peaceful means while renouncing coercive methods.³³⁰ Likewise, Article 2(c) of the ASEAN Charter refers to ASEAN and its members' vow to reject any action involving the threat or use of force, while committing, through Article 2(d), to the peaceful settlement of disputes.³³¹

The prohibition of the threat and use of force is of course one of the most important legal principles, enshrined in the UN Charter, that govern the relations between States. Article 2(4) of the UN Charter, in particular, affirms that 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, in any other manner inconsistent with the Purposes of the United Nations'.³³² In *Nicaragua v. United States of America*, the ICJ also confirmed that actions involving the use of force against another State are in breach of customary international law.³³³

The UN Charter, however, contains two exceptions to Article 2(4). The first one relates to the right of every State to self-defence (Article 51). The second, and more important one for the purposes of this thesis, refers to the ability of the United Nations Security Council (SC) to authorise the use of force in order to restore peace and security should non-coercive means prove to be ineffective.³³⁴ This ability finds its legal basis in Chapter VII of the Charter, and, more generally, in the fact that the SC has the primary responsibility for the maintenance of international peace and security.³³⁵ An example which was discussed in some details in section

³²⁹ The Declaration on a Zone of Peace, Freedom and Neutrality, Kuala Lumpur (1971).

³³⁰ The Treaty of Amity and Cooperation (1976), Article 2 (d) (e).

³³¹ The ASEAN Charter (2007), Article 2 (c) and (d).

³³² The United Nations Charter, Article 2(4).

³³³ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. United States of America)* (1986), Merits, Judgement, I.C.J. Report, para. 209 (4).

³³⁴ The United Nations Charter, Chapter VII, Article 42.

³³⁵ *Ibid.*, Chapter VII.

2.5 of Chapter 2 is represented by the authorisation of the SC to use force in order to protect the civilian population in Libya through Resolution 1973 of 2011.

When it comes to regional organisations, a similar balance is sometimes struck. For example, the Constitutive Act of the African Union (AU) prohibits ‘the use of force or threat to use force among Member States of the Union’.³³⁶ Yet, in another passage it recognises ‘the right of the Union to intervene in a Member State pursuant to a decision of the Assembly [of Heads of State and Government] in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity’.³³⁷ In contrast to both the UN and the AU, ASEAN subscribes to an absolute prohibition of armed intervention, notably a circumstance which will inevitably inform its approach towards the type of conflict situations that lie at the centre of this thesis.

3.4 ASEAN and Human Rights

The final part of this chapter will focus on the specific question of human rights within the ASEAN architecture. As mentioned earlier, all States in the Southeast Asia region, with the exception of Thailand, suffered from colonial rule and exploitation. As noted by Ian Neary, this means that, following the process of decolonisation, they focused primarily, as newly created entities, on the need to stabilise their political and economic structures as noted through the adoption of the Declaration of ASEAN Concord (1976), TAC (1976), ZOPFAN (1971) and the Declaration of Concord II (2003), which was discussed in the earlier sections.³³⁸ Under those circumstances, there was little appetite to invest time and efforts in the creation of a human rights apparatus, hence, there were no mention of human rights in any of the

³³⁶ Constitutive Act of the African Union (2000), Article 4 (f).

³³⁷ Ibid., Article 4 (h).

³³⁸ Saadia M. Pekkanen and et al, *The Oxford Handbook of the International Relations of Asia* (Oxford University Press, 2014) p. 594.

aforementioned foundational Declarations.³³⁹ In a sense, then, Southeast Asia States chose to prioritise their political stability and economic development over the protection and promotion of human rights.³⁴⁰ This lack of enthusiasm for human rights did not change over time. As was discussed in Chapter 1, Western States and especially the US' post-Cold War aggressive promotion of liberal values and practices through international human rights was resented by the governments of Southeast Asia.³⁴¹ The latter subscribe to a realist approach to human rights, which sees them as a form of 'unfortunate and sentimental intrusion into the real stuff of international relations- interstate power calculations'.³⁴² That said, ASEAN would later reverse, at least in part, its earlier negative attitudes towards human rights, making several important advancements over the span of 20 years. This evolution is well reflected in the adoption of the 1993 Bangkok Declaration, the 2004 Vientiane Action Programme, and the 2012 Human Rights Declaration.

3.4.1 The 1993 Bangkok Declaration on Human Rights

Given that the idea of human rights was seen, at best, as purely a Western idea, and, at worst, as an instrument to advance Western imperialism, it is not surprising that, for years, no ASEAN's declaration or treaty included a reference to human rights.³⁴³ This dramatically changed in 1993, when the Bangkok Declaration on Human Rights was established to provide

³³⁹ Ibid., p. 595.

³⁴⁰ Shaun Narine, 'Human Rights Norms and the Evolution of ASEAN: Moving without Moving in a Changing Regional Environment' [2012] 34:3 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, p. 366.

³⁴¹ Saadia M. Pekkanen and et al, *The Oxford Handbook of the International Relations of Asia* (Oxford University Press, 2014) p. 598.

³⁴² David P. Forsythe, *Human Rights in International Relations* (Cambridge University Press, 2000) p. 48.

³⁴³ Shaun Narine, 'Human Rights Norms and the Evolution of ASEAN: Moving without Moving in a Changing Regional Environment' [2012] 34:3 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, p. 368.

an alternative narrative and understanding of human rights than the one offered by the West.³⁴⁴ The adoption of the Bangkok Declaration marked the first time when ASEAN took an explicit stance on the issue of human rights.³⁴⁵ In 1993, the world's leaders gathered for the Vienna World Conference to celebrate the 45th anniversary of the adoption of the 1948 Universal Declaration of Human Rights (UDHR). The Vienna Conference was designed to renew the international community's commitment to the protection and promotion of the UDHR.³⁴⁶ At the end of this conference, the States involved adopted the Vienna Declaration and Programme of Action which reaffirmed their commitments and obligations to protect and promote fundamental human rights in accordance with the UN Charter.³⁴⁷

ASEAN States were among the attendees of this conference. Rather than uncritically subscribing to the conference's conclusions, they expressed their concerns about Western States' emphasis on political and civil rights.³⁴⁸ Two ASEAN leaders, in particular, Lee Kuan Yew of Singapore and Mahathir Mohamad of Malaysia, called for a 'regional' approach to human rights. In their own words, 'human rights must be protected and promoted with due regard for specific cultural, social, economic and political circumstances.'³⁴⁹ Lee and Mahathir sought to promote an Asian approach to human rights based on the concept of 'Asian Values', an effort which is believed to have further distanced Asian social and political cultures from the West.³⁵⁰ According to Lee and Mahathir, Western values are incompatible with Asian values which, first, tend to prioritise community/family over individuals and, second, place more importance on stability and development over democracy. As stated by Mahathir, 'for

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ Ibid., pp. 367-368.

³⁴⁷ The Vienna Declaration and Action Programme (1993) I.

³⁴⁸ Shaun Narine, 'Human Rights Norms and the Evolution of ASEAN: Moving without Moving in a Changing Regional Environment' [2012] 34:3 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, p. 368.

³⁴⁹ Ibid.

³⁵⁰ Maznah Mohamad, 'Towards a Human Rights Regime in Southeast Asia: Charting the Course of State Commitment' [2002] 24:2 *Contemporary Southeast Asia*, p. 233.

Asians, the community, the majority comes first. The individual and minority must have their rights but not at the unreasonable expense of the majority'.³⁵¹ Lee furthered this position by saying that Asians must reject Western individualism and, instead, focus on promoting traditional intra-family relationships values.³⁵² Furthermore, Lee and Mahathir argued that the need for development and stability in Asian societies were more important than the need for democracy. On top of this, they argued that democracy is often used by the West to disguise a plan to keep Asian countries subservient to the West, politically and economically.³⁵³ Lee and Mahathir also argued that democracy does not always lead to development and stability. As stated by Lee, 'A country must first have economic development, then democracy may follow. With a few exceptions, democracy has not brought good governance to new developing countries. Democracy has not led to development because the governments did not establish stability and discipline necessary for development'.³⁵⁴

The ideas promoted by Lee and Mahathir were formally articulated during a meeting in 1993 with other ASEAN's heads of states in Bangkok, leading to the adoption of the Bangkok Governmental Human Rights Declaration (Bangkok Declaration 1993).³⁵⁵ The latter recognised that:

'while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds'.³⁵⁶

³⁵¹ Mohd Azizuddin Mohd Sani, 'Mahathir Mohamad as a Cultural Relativist: Mahathirism on Human Rights' [2008] *Universiti Utara Malaysia*, p. 8.

³⁵² Michael D. Barr, 'Lee Kuan Yew and the other "Asian values" debates' [2000] 24:3 *Asian Studies Review*, p. 319.

³⁵³ *Ibid.*, p. 314.

³⁵⁴ *Ibid.*, p. 324.

³⁵⁵ Shaun Narine, 'Human Rights Norms and the Evolution of ASEAN: Moving without Moving in a Changing Regional Environment' [2012] 34:3 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, p. 368.

³⁵⁶ The Bangkok Governmental Human Rights Declaration (Bangkok Declaration 1993), para 8.

This passage reflects ASEAN States' hostility towards the idea of 'universal' human rights, which, as was noted earlier, was perceived as a tool of Western neo-imperialist agendas.³⁵⁷ It is clear from the above discussion that the adoption of this Declaration was not meant to signal any genuine intention by ASEAN to advance the cause of human rights in the region. Rather, as illustrated by Maznah Mohamad, the main objective of the Declaration was to give a more formal platform to ASEAN State's reservations and doubts towards the issue of the universality of human rights.³⁵⁸ In line with this observation, no further notable development concerning human rights occurred within the organisation until 2004, that is, when the Vientiane Action Programme (VAP) was adopted. What is remarkable about the VAP is the fact that, in addition to including detailed plans for security, economic and socio-cultural development, it made an explicit commitment to promoting human rights.³⁵⁹ The VAP pledged to establish a network to promote education and public awareness on human rights and establish an ASEAN instrument on the protection and promotion of the rights of migrant workers, women and children.³⁶⁰

Authors like Mathew Davies have noted that, upon closer examination, the human rights clauses contained in the VAP are quite bland as they mainly tend to focus on raising awareness.³⁶¹ At the same time, once they are put in the context of ASEAN's history, the provisions of the VAP become considerably more important.³⁶² Indeed, Yongwook Ryu and Maria Ortuoste have noted that the VAP represents the first concrete step that ASEAN ever took towards the promotion of human rights, notably one step which would later inform the

³⁵⁷ Maznah Mohamad, 'Towards a Human Rights Regime in Southeast Asia: Charting the Course of State Commitment' [2002] 24:2 *Contemporary Southeast Asia*, p. 236.

³⁵⁸ *Ibid.*

³⁵⁹ The Vientiane Action Programme (2004), Section 1.1 (ii).

³⁶⁰ *Ibid.*, Section 1.1.14.

³⁶¹ Mathew Davies, 'Explaining the Vientiane Action Programme: ASEAN and the institutionalisation of human rights' [2013] 26:4 *The Pacific Review*, p. 387.

³⁶² *Ibid.*, p. 388.

drafting of the ASEAN Intergovernmental Commission on Human Rights and the ASEAN Human Rights Declaration.³⁶³

3.4.2 The ASEAN Intergovernmental Commission on Human Rights

As discussed in section 3.2.1, the 2007 ASEAN Charter formalised ASEAN's commitment to establish a regional human rights body entrusted to promote and protect human rights and fundamental freedoms.³⁶⁴ These references to human rights in the ASEAN Charter created some tension among member States. In the words of Ambassador Tommy Koh, the Singaporean member of the High-Level Task Force called to draft the ASEAN Charter, 'there was no issue that took up more of our time, no issue as controversial and which divided the ASEAN family so deeply as human rights'.³⁶⁵ This division was particularly acute in relation to the nature and structure of the human rights body which would be created within the organisation.

According to James Munro, the negotiations on the creation of this new human rights body divided ASEAN members into two sharp camps, with only Singapore Thailand and Brunei choosing not to take any decisive position on the matter.³⁶⁶ On the one hand, the liberal camp consisting of Indonesia, the Philippines and Malaysia wanted not only to establish this human rights body but also to give it 'teeth' in order to increase the costs of non-compliance. They did not want this mechanism to simply have promotional powers but also strong powers such as that of imposing sanctions.³⁶⁷ Indonesia, in particular, lobbied for the inclusion of provisions

³⁶³ Yongwook Ryu and Maria Ortuoste, 'Democratization, regional integration, and human rights: the case of the ASEAN intergovernmental commission on human rights' [2014] 27:3 *The Pacific Review*, p. 360.

³⁶⁴ The ASEAN Charter (2007), Article 14.

³⁶⁵ James Munro, 'Why States Create International Human Rights Mechanisms: The ASEAN Intergovernmental Commission on Human Rights and Democratic Lock-in Theory' [2009] 10:1 *Asia-Pacific Journal on Human Rights and The Law*, p. 5.

³⁶⁶ *Ibid.*, p. 13.

³⁶⁷ *Ibid.*, pp. 13-14.

allowing not only sanctions but also the expulsion from the organisation in the event of serious breaches of a State's obligations.³⁶⁸ On the other hand, the conservative camp consisting of Cambodia, Laos, Myanmar and Vietnam raised concerns about the creation of such human rights body, pointing to the perils of intrusive measures.³⁶⁹ Myanmar, in particular, worked to prevent not only the proposed creation of a human rights mechanism but also the very inclusion of any reference to human rights and democracy in the Charter.³⁷⁰ Eventually the two camps reached a compromise which consisted in the creation of the ASEAN Intergovernmental Commission on Human Right (AICHR), which, as will be explained, is far from representing an autonomous regional watchdog with 'sharp teeth' and would act only as an advisory body.³⁷¹ The AICHR as an intergovernmental human rights body has a number of important weaknesses. Firstly, being a consultative body, it only has the power to advise and promote human rights. Secondly, although it is expected to uphold international human rights standards as set out in the UDHR and the Vienna Declaration and Programme of Action, the AICHR Terms of Reference (TOR) mirrors the 1993 Bangkok Declaration in referring to the promotion of human rights within specific national and regional contexts, thus taking into account the relevant historical, cultural and religious backgrounds.³⁷² As noted by Hsien-Li Tan, this means that the AICHR must grant member States such a wide margin of appreciation to effectively end up protecting them from potential interferences concerning their human rights.³⁷³ Thirdly, as established by the TOR, the members of the AICHR are appointed by the Heads of States

³⁶⁸ Ibid., p. 13.

³⁶⁹ Ibid., p. 15.

³⁷⁰ Ibid., p. 14.

³⁷¹ James Munro, 'Why States Create International Human Rights Mechanisms: The ASEAN Intergovernmental Commission on Human Rights and Democratic Lock-in Theory' [2009] 10:1 *Asia-Pacific Journal on Human Rights and The Law*, p. 16; see also, John Ciorciari, 'Institutionalizing Human Rights in Southeast Asia' [2012] 34:3 *Human Rights Quarterly*, p. 713.

³⁷² The Bangkok Governmental Human Rights Declaration (Bangkok Declaration 1993), Para 8; and ASEAN Intergovernmental Commission on Human Rights (Terms of Reference) (2009), Section 1.

³⁷³ Hsien-Li Tan, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia* (Cambridge University Press, 2011) p. 158.

and consist of mostly current or former government officials.³⁷⁴ This circumstance confers on the body a highly political nature and contributes to impair its independence. Fourthly, as noted by Narine, the decision-making process of the AICHR mirrors the consensual approach embedded in the ASEAN Way.³⁷⁵ This means that the AICHR will not be able to advise or promote human rights in the absence of consensus among its members. It follows, as Amnesty International had warned, that each State could potentially be able to prevent any undesired action by the AICHR.³⁷⁶ For all these reasons, authors like Yvonne Xin Wang have emphatically labelled the AICHR as ‘the world’s most toothless human rights body’.³⁷⁷

3.4.3 ASEAN Human Rights Declaration

One of the mandates of the AICHR was to develop an ASEAN Human Rights Declaration. With this in mind, the AICHR created a Drafting Group in order to complete this task. In their drafting process, the Drafting Group had to uphold international human rights standards and at the same time take into account the different cultural, political, social and religious backgrounds within the region.³⁷⁸ As it happened during the negotiation for the creation of the AICHR, this drafting process once again divided ASEAN members into two distinct camps. The liberal camp (Thailand, Brunei, Singapore, Indonesia, Malaysia and the Philippines) lobbied for a progressive declaration that would embrace universal human rights standards,

³⁷⁴ ASEAN Intergovernmental Commission on Human Rights (Terms of Reference) (2009), Section 5.2.

³⁷⁵ Shaun Narine, ‘Human Rights Norms and the Evolution of ASEAN: Moving without Moving in a Changing Regional Environment’ [2012] 34:3 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, p. 375.

³⁷⁶ Ibid.

³⁷⁷ Yvonne Xin Wang, ‘Contextualizing Universal Human Rights: An Integrated Human Rights Framework for ASEAN’ [2015] 25 *Duke Journal of Comparative & International Law*, p. 392.

³⁷⁸ Gerard Clarke, ‘The Evolving ASEAN Human Rights System: The ASEAN Human Rights Declaration of 2012’ [2012] 11:1 *Northwestern Journal of Human Rights*, p. 15.

while the conservative camp (Cambodia, Myanmar, Laos and Vietnam) opposed such a course of action.³⁷⁹ After extensive consultations a compromised agreement was reached in 2012, when the ASEAN Human Rights Declarations (ADHR) was adopted.³⁸⁰

The ADHR begins by reaffirming ASEAN and its members' commitment to the principles and purposes of the ASEAN Charter, the UN Charter, the UDHR and the Vienna Declaration and Programme of Action.³⁸¹ The ADHR has drawn most of its provisions from the aforementioned international instruments. The first set of articles affirm the rights to freedom of discrimination against race, sex, gender, language, religion, political opinion, culture and economic status.³⁸² In terms of civil and political rights, the ADHR affirms that every person has the right to freedom of opinion and expression, to vote, to a fair and public trial, to seek asylum in another State, to personal liberty and security and to be free from slavery and torture.³⁸³ In terms of economic, social and cultural rights, the ADHR affirms that every person has the right to join/form trade unions, to an adequate standard of living, to the highest standard of physical, mental and reproductive health, to education and to be free from economic and social exploitation.³⁸⁴ The ADHR also affirms that 'the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds'.³⁸⁵

³⁷⁹ Ibid., pp. 15 and 17-18.

³⁸⁰ Ibid., p. 19; see also; Chairman's Statement of the 21st ASEAN Summit (2012) para 5, <<https://www.asean.org/wp-content/uploads/images/documents/Chairman's%20Statement%20of%20the%2021st%20ASEAN%20Summit.pdf>> accessed on 30 April 2021.

³⁸¹ The ASEAN Human Rights Declaration (2012), Preamble.

³⁸² Ibid., Article 1-9; Universal Declaration of Human Rights (1948) Article 2; and European Convention on Human Rights (1953) Article 14.

³⁸³ The ASEAN Human Rights Declaration (2012), Article 11-25.

³⁸⁴ Ibid., Article 26-34.

³⁸⁵ Ibid., Article 7.

Nicholas Doyle argued that the AHDR can be seen as a significant development in Southeast Asia considering the region's historical aversion to the issue of human rights.³⁸⁶ For example, he claimed that the AHRD at least recognises certain human rights norms and formally endorsed them in writing.³⁸⁷ Mathew Davies similarly noted that the creation of the AHDR is an important development considering, the exclusion of human rights provisions in all of ASEAN's previous instruments.³⁸⁸ Despite these positive elements, the Declaration displays important weaknesses. To begin with, although the AHRD has drawn most of its provisions from the UN Charter, UDHR and the European Convention on Human Rights, these rights must still be interpreted and applied in the light of the specific regional and national contexts. This, inevitably, opens the possibility that human rights violations could be tolerated under the pretext of national/regional peculiarities. Furthermore, the AHRD is more of a declaratory document given its non-legally binding nature.³⁸⁹ It follows that the soft nature of the AHRD, combined with a toothless ACIHR, cannot challenge the sanctity of the principles of sovereignty and non-interference embedded in the ASEAN architecture.³⁹⁰

The fact that the AHRD and the AICHR have little prospect of making a difference on the ground sheds light on ASEAN's lack of genuine commitment to the promotion and protection of human rights in the region. Indeed, it has been argued that the reasons for the creation of this human rights system in ASEAN are twofold. Firstly, there was a need to enhance the organisation's legitimacy. Authors like Hiro Katsumata have explained that the global

³⁸⁶ Nicholas Doyle, 'The ASEAN Human Rights Declaration and the Implications of Recent Southeast Asian Initiatives in Human Rights Institution-Building and Standard-Setting' [2014] 63 *International and Comparative Law Quarterly*, p. 81.

³⁸⁷ Ibid.

³⁸⁸ Mathew Davies, 'The ASEAN Synthesis: Human Rights, Non-Intervention, and the ASEAN Human Rights Declaration' [2013] 14:2 *Georgetown Journal of International Affairs*, p. 54.

³⁸⁹ Nicholas Doyle, 'The ASEAN Human Rights Declaration and the Implications of Recent Southeast Asian Initiatives in Human Rights Institution-Building and Standard-Setting' [2014] 63 *International and Comparative Law Quarterly*, p. 98.

³⁹⁰ Shaun Narine, 'Human Rights Norms and the Evolution of ASEAN: Moving without Moving in a Changing Regional Environment' [2012] 34:3 *Contemporary Southeast Asia: A Journal of International and Strategic Affairs*, p. 375.

community defines human rights as an element of legitimacy.³⁹¹ It follows that, by establishing the AICHR and the AHRD, ASEAN becomes a more credible and legitimate institution in the eyes of the international community.³⁹² Secondly, there was a need to deflect external criticism in relation to human rights. As explained by Munro, by relying on their own human rights bodies and instruments, ASEAN States would be able to avoid external criticisms of their human rights records by deferring the issue to their own, and more government-friendly, regional mechanisms.³⁹³

A final important point should be made in relation to the AICHR and atrocity crimes. As recognised by the 2005 World Summit Outcome, regional human rights institutions can play an important role in preventing atrocity crimes.³⁹⁴ Early monitoring and reporting activities can be vital in this context. On the one hand, they can direct relevant actors towards engaging in prevention and mediation efforts; on the other, they can assist in and/or persuade the relevant governments to improve their human rights records, especially in light of the advantaged deriving from the regional proximity.³⁹⁵ It is evident that if the AICHR were to play any significant role in the battle against atrocity crimes, it would need to be granted full authority to investigate and report on serious human rights violations in ASEAN member States.

³⁹¹ Hiro Katsumata, 'ASEAN and Human Rights: resisting Western pressure or emulating the West' [2009] 22:5 *The Pacific Review*, p. 625.

³⁹² Ibid.

³⁹³ James Munro, 'Why States Create International Human Rights Mechanisms: The ASEAN Intergovernmental Commission on Human Rights and Democratic Lock-in Theory' [2009] 10:1 *Asia-Pacific Journal on Human Rights and The Law*, p. 24.

³⁹⁴ Brooke Coe, 'Regional Human Rights Institutions and R2P: The Role of State Monitoring in Atrocity Prevention' [2017] 9:3 *Global Responsibility to Protect*, pp. 297-298.

³⁹⁵ Ibid.

3.5 Conclusion

ASEAN has come a long way since its creation in 1967. It has evolved into a strong regional organisation whose member States cooperate in security, economic, and cultural issues and, to a limited extent, human rights. Although ASEAN initially started with a weak and informal organisational structure, it gradually evolved with the adoption of the Declaration of ASEAN Concord (1976) which expanded regional cooperation in the economic, social, cultural and political fields.³⁹⁶ The same year, ASEAN adopted a binding treaty regulating the way in which internal and external relations should be conducted, namely the Treaty of Amity and Cooperation in Southeast Asia, which referred to principles such as the principle of mutual respect for each other's independence, sovereignty, equality, and territorial integrity. Another important step was taken to further enhance the efficiency and cooperation of the Association through the adoption of the Declaration of Concord II (Bali Concord II) in 2003. Among other things, this Declaration created the ASEAN Security Community, the ASEAN Economic Community, and the ASEAN Socio-Cultural Community, marking a significant improvement in the organisational structure of the organisation.³⁹⁷ The most important step in the evolution of ASEAN is represented by the adoption of the ASEAN Charter in 2007. The latter transformed ASEAN into a more rules-based organisation with legal personality and codified the fundamental principles of the ASEAN Way.³⁹⁸

The 'ASEAN Way' underpins the *modus operandi* of ASEAN. It consists of three main principles: first, respect for State sovereignty; second, non-interference in the internal affairs of States; and third, the prohibition of the use or threat of force. All ten members of ASEAN fully embrace these principles and consider the 'ASEAN Way' crucial for the functioning of

³⁹⁶ The Declaration of ASEAN Concord, Bali (1976).

³⁹⁷ Press Statement by the Chairperson of the 9th ASEAN Summit and the 7th + 3 Summit (2003), <https://asean.org/?static_post=press-statement-by-the-chairperson-of-the-9th-asean-summit-and-the-7th-asean-3-summit-bali-indonesia-7-october-2003> accessed on 30 April 2021.

³⁹⁸ The ASEAN Charter (2007), Preamble and Article 3.

the organisation. The principles of the 'ASEAN Way' have been deeply embedded into ASEAN's institutional structure through various treaties and declarations, both binding and non-binding such as, for example, the Zone of Peace, Freedom and Neutrality, the Treaty of Amity and Cooperation and the ASEAN Charter. Another important component of the ASEAN Way consists of the consensus decision-making to which ASEAN has fully subscribed. The need to reach consensus before any decision characterises the organisation while also limiting its scope of action. This *modus operandi* has been carefully chosen in order to protect the sovereignty and the national interests of each member State. Inevitably, then, ASEAN lacks the capacity to really act independently from its members.

This chapter has also addressed the question of human rights within ASEAN. For historical and cultural reasons, human rights did not originally feature on the agenda of ASEAN. Things began to change in the early 1990s when ASEAN States adopted the 1993 Bangkok Declaration stressing the importance of Asian Values in interpreting and applying 'universal' human rights standards. This Declaration did not genuinely aim at enhancing the position of human rights in ASEAN. Yet, it marked the beginning of a gradual process that would culminate in the creation of the ASEAN Intergovernmental Commission on Human Rights and the adoption of the ASEAN Human Rights Declaration. This, however, does not mean that ASEAN has committed to effectively promoting and protecting human rights within the region. As discussed in this Chapter, the AICHR is only a consultative body which lacks the power to monitor, investigate, and criticise, let alone impose sanctions. On its part, the ADHR accepts that human rights must be interpreted and implemented in accordance with the different political, social and religious backgrounds within the region. On top of this, the ADHR is not legally binding. With a weak AICHR and a non-binding AHDR, the sanctity of sovereignty of member States remains protected and embedded in the framework of ASEAN.

The features of ASEAN discussed in this Chapter will need to be taken into account in the analyses carried out in the subsequent chapters, especially Chapter 5 and 6, in order to provide a realistic assessment of the organisation's capacity/potential to accommodate and promote the application of the principles of R2P in the region. After this chapter's discussion of ASEAN's history, institutional structure, and *modus operandi*, the next chapter will analyse ASEAN and ASEAN States' conceptual engagement with the three Pillars of R2P before the thesis will turn to examine the case-studies in Chapters 5 and 6.

Chapter 4

The Association of the Southeast Asian Nations and the ‘Responsibility to Protect’

4.1 Introduction

The previous chapter analysed the background of the Association of the Southeast Asian Nation (ASEAN), the way in which it operates, its decision-making mechanisms and the principles that it enshrines, known as the ‘ASEAN Way’. Special attention was paid to ASEAN’s interpretations of sovereignty, non-interference, non-use of force and human rights. Chapter 2 developed a general analysis of the Responsibility to Protect (R2P), including its origins, meaning and current status in international law. This chapter now brings the analyses from those two chapters together with the aim of examining ASEAN and ASEAN States’ approaches to R2P.

In particular, this chapter focuses on the conceptual engagement with R2P within ASEAN. As mentioned in the previous chapter, unlike other regional organisations such as the European Union, ASEAN does not speak with one voice when it comes to issues regarding international law, especially on issues that may be in tension with the principles of sovereignty and non-intervention, as is the case with R2P. Given ASEAN’s inability, as discussed in Chapter 3, to deliberate by majority and speak with one voice, the core of this chapter’s investigation will be on ASEAN States. In particular, I will be examining their individual statements that pertain to the three Pillars of R2P. While a variety of fora and statements will be considered, special attention will be paid to individual members’ participation in the United Nations General Assembly (GA) informal meetings concerning R2P. Since 2009, the GA has conducted annual

informal interactive dialogues on R2P in regard to the three Pillars, which have since been formalised to a formal debate in 2018. Generally, these are meetings where individual members of the United Nations (UN) discuss their positions and opinions on R2P and are aimed at identifying the flaws and challenges that R2P faces in both practical and conceptual terms. I will therefore focus my analysis on ASEAN States' governmental statements made during these dialogues. These dialogues are focused on different issues of R2P each year which have included: timely and decisive response (2012), State responsibility and prevention (2013), international assistance and the responsibility to protect (2014), a vital and enduring commitment: implementing the responsibility to protect (2015), mobilizing collective action (2016) and implementing the responsibility to protect: accountability for prevention (2017). Before proceeding, it is important to specify the way in which this examination will be carried out. A number of scholars have used different models in order to distinguish States on the basis of their level of support, or lack thereof, for R2P. For example, Professor Bellamy categorised States as R2P-engaged, Fence-sitters and Opponents.³⁹⁹ According to him, R2P-engaged States are those that vocally support and continued to contribute to the discussion on the R2P after the 2005 World Summit; Fence-sitters are States that acquiesced to the 2005 Outcome Document and have remained largely silent on issues regarding R2P since; finally, Opponents States are those that have outright opposed and criticised all aspects of R2P.⁴⁰⁰ Another model has been put forward by Jonas Claes, who has distinguished between States that are R2P Advocates, Critics and Rejectionists.⁴⁰¹ For Claes, the Advocates are those States that support all three Pillars of R2P.⁴⁰² The Critics are those who agree with Pillar I and II but stay wary in

³⁹⁹ Alex J. Bellamy and Sara E. Davies, 'The Responsibility To Protect in the Asia-Pacific Region' [2009] 40: 6 *Security Dialogue*, p. 551.

⁴⁰⁰ Ibid.

⁴⁰¹ Jonas Claes, 'Protecting Civilians from Mass Atrocities: Meeting the Challenge of R2P Rejectionism' [2012] 4 *Global Responsibility to Protect*, pp. 70 and 72.

⁴⁰² Ibid., p. 70; In relations, another model has also been put forward by Patrick Quinton-Brown, who differentiated among Cautious Supporters and Rejectionists where cautious supporters are States that have agreed to principle of R2P but remain sceptical in regard to its implementation and scope, while Rejectionist States offers

regard to Pillar III despite accepting that the United Nations Security Council (SC) should take action to protect populations from atrocity crimes.⁴⁰³ Rejectionist States outright oppose the very idea and principles of R2P.⁴⁰⁴

For this chapter, I will be using three labels to categorise ASEAN States as either Wary Supporters, R2P-neutrals or Opposers. These three labels fit better with the reality of ASEAN States' position on R2P. To rely specifically on Bellamy or Claes' categorisation would be inaccurate because, as will be shown, doing so would falsely suggest that some ASEAN States display high levels of support for R2P ('R2P-engaged' and 'advocates', respectively). As will be shown throughout this chapter, some ASEAN States, while not always enthusiastically supporting Pillar I and II of R2P, remain sceptical of Pillar III, and cannot therefore be qualified as being R2P-engaged or R2P advocates. Instead, I will refer to them as wary supporters (resembling Bellamy and Claes' categories of 'fence sitters' and 'critics'). R2P-neutral States, instead, are those that have neither denied nor publicly supported R2P, having had almost no public engagement with this issue at all. Lastly, I will label States that object R2P altogether as Opposers (resembling Bellamy and Claes' category of 'rejectionists'). As will be analysed later in this chapter, an Opposer rejects the core ideas underpinning R2P due to its unwavering commitment to a narrow interpretation of State sovereignty and non-interference.

4.2 ASEAN

Chapter 3 has clarified that ASEAN operates on a consensus basis to ensure the highest respect for its members' sovereignty. Accordingly, in order for an ASEAN representative to present

no support for R2P at all; See Patrick Quinton-Brown, 'Mapping Dissent: The Responsibility to Protect and Its State Critics' [2013] 5 *Global Responsibility to Protect*, p. 264.

⁴⁰³ Jonas Claes, 'Protecting Civilians from Mass Atrocities: Meeting the Challenge of R2P Rejectionism' [2012] 4 *Global Responsibility to Protect*, p. 72.

⁴⁰⁴ Ibid., p. 70.

the collective view of ASEAN on a given issue while engaging with external parties, he/she would need to be mandated to do so by all member States and the latter would need to agree in advance on that view. It follows that, not surprisingly, no ASEAN collective statement can be found in any of the GA meetings mentioned in the introduction to this chapter. No statement issued by key bodies such as the ASEAN Summit or the ASEAN Foreign Ministers' Meetings directly referenced to R2P either, including in 2005, the year when the very important 2005 World Summit Outcome was adopted.

On the other hand, since 2000 ASEAN has worked closely with the UN and officially obtained an observer status in the GA in 2006.⁴⁰⁵ The partnership between these two organisations focuses on cooperation through the ASEAN communities: political-security, economic and socio-cultural.⁴⁰⁶ Through the political-security cooperation, the ASEAN-UN partnership aims to promote regional and international peace and security through various programmes of ASEAN-UN regional dialogues and trainings in peace-making and preventive diplomacy.⁴⁰⁷ This partnership also aims to strengthen collaboration in peacekeeping and post-conflict peace-building. This is worth mentioning given that, as discussed in Chapter 2, peacekeeping operations represent one possible instrument for implementing the Pillar II of R2P. As of 2021, a total of 4,868 military and police personnel from 7 ASEAN States have been deployed to 10 UN peacekeeping operations.⁴⁰⁸ While representing a potentially significant development, this should not be taken as an indirect form of support for R2P as such, given the lack of any express engagement with the issue.

⁴⁰⁵ Overview of ASEAN-United Nations Relations (2021) < <https://asean.org/storage/Overview-of-ASEAN-UN-Cooperation-as-of-20-Jan-2021.pdf> > accessed on 11 March 2021.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid., p. 2.

⁴⁰⁸ Ibid.

In light of ASEAN's lack of engagement with R2P, in order to examine the way in which this principle has been welcomed, or resisted, within the organisation is necessary to focus on the individual positions of each member State

4.3 Indonesia

Indonesia was one of the original founding members of ASEAN alongside Thailand, Singapore, Malaysia and the Philippines. With the largest economy in the region and a commitment to cooperation, Indonesia has proven to have significant influence upon the direction that ASEAN has taken to the present day.⁴⁰⁹ In terms of its position on R2P, Indonesia should be categorised as a wary supporter. It has endorsed the fundamentals of R2P, including Pillars I and II, but stays cautious when it comes to the actual implementation of the principle, especially in regard to Pillar III.

Indonesia endorsed the 2005 World Summit Outcome that brought R2P into the realm of international law but demonstrated to have reservations about this principle on several occasions. For example, at the GA 60th session, it called for the need to reach a large consensus on R2P, while also noting that the use of force should only be considered when all other means have failed.⁴¹⁰ At the 2006 GA Plenary Session on the Prevention of armed conflict, Ambassador Adiyatwidi Adiwoso voiced out Indonesian's concerns in unequivocal terms:

‘the concept of the responsibility to protect should be approached very carefully, taking into account the sovereignty and the equality of all States. My delegation opposes the threatening of people, groups, or countries by others, and sees that as a counterproductive measure. While we realise that sanctions may be required in some exceptional circumstances, we believe that extreme care should be exercised in that regard’⁴¹¹

⁴⁰⁹ Pattharapong Rattanasevee, ‘Leadership in ASEAN: The Role of Indonesia Considered’ [2014] 22:2 *Asian Journal of Political Science*, pp. 120-121.

⁴¹⁰ United Nations General Assembly (2005), Sixtieth Session, 7th Plenary Meeting, A/60/PV.7, p. 5.

⁴¹¹ United Nations General Assembly (2006), ‘Prevention of armed conflict’, A/60/PV.98, p. 19.

This statement shows that Indonesia did not oppose the concept of R2P altogether; rather, it raised doubts with regard to its actual implementation, especially in terms of its impact on State sovereignty. This concern was once again voiced out after the Secretary-General's 'Implementing the responsibility to protect' report was published in 2009 as a follow up to the 2005 World Summit Outcome. A statement given at that time by Ambassador Dr. R.M Marty M. Natalegawa, affirmed that Indonesia is not in disagreement with the three Pillars of R2P, while also specifying that Pillar III is just one of the options available in the most extreme cases and that, crucially, this Pillar includes also non-coercive and non-violent responses.⁴¹² Again, on the occasion of the 2014 GA Informal Interactive Dialogue on the Report of the Secretary-General on 'Fulfilling our collective responsibility: international assistance and the responsibility to protect', and the 2015 GA Informal Interactive Dialogue on the Responsibility to Protect: 'A vital and enduring commitment: Implementing the responsibility to protect', Indonesia declared a general support for R2P, specifically Pillars I and II, while also affirming that regional organisations should play a more important role in strengthening the responsibility. Instead, it never mentioned Pillar III.⁴¹³

Finally, a statement made by Hasan Wirajuda, the then Foreign Minister of Indonesia, on the occasion of the 2nd Roundtable Discussion on human rights in ASEAN, is worth reading here:

⁴¹² Statement by H.E. Dr. R. M Marty M. Natalegawa Ambassador, Permanent Representative of the Republic of Indonesia to the United Nations General Assembly (2009) "Integrated and coordinated implementation of and follow-up to the outcomes of the major United Nations conferences and summits in the economic, social and related field" (Agenda 44); and, "Follow-up to the outcome of the Millennium Summit" (Agenda 107) < http://indonesiamission-ny.org/menu_kiri/k2_special_political/k2Statement/ga072309.html > accessed on 8 March 2021.

⁴¹³ Statement by the Deputy Permanent Representative of the Republic of Indonesia to the United Nations at the Informal Interactive Dialogue on the Report of the Secretary-General on "Fulfilling our collective responsibility: international assistance and the responsibility to protect" (2014) < <http://s156658.gridserver.com/media/files/indonesia-2.pdf> > accessed on 8 March 2021; and Statement by H.E. Mr. Muhammad Anshor Chargé d'affaires ad interim Permanent Mission of the Republic of Indonesia to the United Nations at the United Nations General Assembly informal interactive dialogue on the Responsibility to Protect: "A vital and enduring commitment: Implementing the responsibility to protect," (2015) < <https://www.globalr2p.org/resources/statement-by-indonesia-at-the-2015-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/> > accessed on 8 March 2021.

‘When gross violations of human rights take place in a member country, invariably we shy away from discussing it in ASEAN meetings in deference to the principle of non-interference in the internal affairs of states. But in today’s world, gross violations of human rights are no longer a purely domestic matter. They are also a matter of international concern... Thus, if ASEAN members still feel that an incidence of gross violations of human rights is too sensitive an issue for open discussion in a meeting, then the logical alternative is to have it addressed within the neutral premises of a regional commission. To ignore it is no longer an option’⁴¹⁴

This shows that Indonesia is willing to gradually step away from the narrow understanding of non-interference cherished by ASEAN, supporting the position that gross violations of human rights are a matter of international, and indeed, regional concern. Without mentioning R2P, this seems to provide strong support for the fundamentals of the principle included in Pillar I and II.

From these official statements, it can be said that Indonesia has endorsed the fundamental ideas behind R2P, namely that a sovereign State has the responsibility to protect its people from crimes against humanity, war crimes, ethnic cleansings and genocide (Pillar I), and that the international community should assist States in fulfilling that responsibility (Pillar II). With regard to Pillar III, however, Indonesia has shown signs of hesitation. While it has not openly disagreed with the possibility of coercive measures being taken under that Pillar, it has clearly indicated its preference for alternative non-coercive methods available under Chapter VI of the UN Charter.

⁴¹⁴ Ibid.

4.4 Thailand

Thailand has always been among the most progressive ASEAN members. In fact, it sought to introduce (unsuccessfully) a more flexible notion of non-interference within the region.⁴¹⁵ The idea of ‘flexible engagement’ was promoted by Thailand’s former Foreign Minister and later ASEAN’s Secretary General, Surin Pitsuwan, who argued that the principle of non-interference should be modified to allow ASEAN members express their opinions in a constructive manner on issues that are transnational in nature.⁴¹⁶ Pitsuwan further emphasised that ‘when a matter of domestic concern poses a threat to regional stability, a dose of peer pressure or friendly advice at the right time can be helpful’.⁴¹⁷ It is also worth noting that Pitsuwan was a member of the International Commission on Intervention and State Sovereignty (ICISS) Advisory Board, namely the Board which originally came up with the concept that state sovereignty implies responsibility to protect the population from atrocity crimes and that this responsibility would be passed on to the international community if the State is unable or unwilling to do so.⁴¹⁸ Furthermore, as will be further discussed in Chapter 5, between 1999-2000, Thailand was the largest contributor of personnel for the International Force East Timor (INTERFET) amongst ASEAN States. INTERFET was led by the Australian military into East Timor during the violent crisis with Indonesia following a referendum for the secession of East Timor.⁴¹⁹

In light of the above considerations, one would expect Thailand to be supportive of R2P. Indeed, on the occasion of the 2005 Summit Outcome, Thai Foreign Affairs Minister, Dr Kantathi Suphamongkhon, stated that his government saw ‘merit in the idea of collective

⁴¹⁵ Alex J. Bellamy & Catherine Drummond, ‘The responsibility to protect in Southeast Asia: between non-interference and sovereignty as responsibility’ [2011] 24:2 *The Pacific Review*, p. 187.

⁴¹⁶ Robin Ramcharan, ‘ASEAN and Non-Interference: A Principle Maintained’ [2000] 22:1 *Contemporary Southeast Asia*, p. 75-76.

⁴¹⁷ Eric Corthay, ‘The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention’ [2015] 17:2 *Asian-Pacific Law & Policy Journal*, p. 16.

⁴¹⁸ Report of the International Commission on Intervention and State Sovereignty, ‘The Responsibility to Protect’ [2001] XI and p. 82.

⁴¹⁹ Alan Dupont, ‘ASEAN’s Response to the East Timor Crisis’ [2000] 54:2 *Australian Journal of International Affairs*, p. 167.

responsibility to protect people from genocide, war crimes, ethnic cleansing and crimes against humanity'.⁴²⁰ However, since 2005, Thailand has stayed silent on the three Pillars of R2P. This can be due to Thailand's own internal political instabilities since the 2006 military coup which ousted the former Prime Minister Thaksin Shinawatra.⁴²¹ Since then, Thailand has been under military rule and as a result of this it has shifted Thailand's position on R2P to one of 'neutrality'.⁴²²

However, at the 2013 GA 'Informal Interactive Dialogue on Responsibility of States to Protect: State Responsibility and Prevention', Thailand's seemed to have reverted into its original position of wary supporter. Through this dialogue, Thailand's representative stated, firstly, that Thailand shares the view that States have the primary responsibility to protect their people from mass atrocities (Pillar I).⁴²³ Furthermore, he also highlighted Thailand's support for Pillar II. However, there was no mention of Pillar III in this statement, which instead placed emphasis on prevention rather than reaction.

In 2015, 2016 and 2017, Thailand made very similar statements at the GA Informal Interactive Dialogues on R2P. In all the relevant statements, Thailand reaffirmed, in particular, its support for the basic tenets of R2P Pillar I and II.⁴²⁴ Its view on Pillar III, however, was different. In

⁴²⁰ Statement by H.E. Dr Kantathi Suphamongkhon at the General Debate of the 60th Session of the UN General Assembly (2005) < <https://www.un.org/webcast/ga/60/statements/thai050918eng.pdf>> Accessed on 9 March 2021.

⁴²¹ Peter Walker, 'Thai military claims control after coup' (The Guardian, 19 September 2006) < <https://www.theguardian.com/world/2006/sep/19/thailand>> accessed on 9 March 2021.

⁴²² Hannah Ellis-Petersen, 'Thailand military-backed PM voted after junta created loose coalition' (The Guardian, 5 June 2019) < <https://www.theguardian.com/world/2019/jun/05/thailand-military-backed-pm-prayuth-choo-cha-voted-in-after-junta-creates-loose-coalition>> accessed on 9 March 2021.

⁴²³ Statement by His Excellency Mr. Chayapan Bamrungphon, Ambassador and Deputy Permanent Representative of Thailand to the United Nations, Thailand's Intervention at the Informal Interactive Dialogue on the Subject of "Responsibility to Protect: State Responsibility and Prevention" (2013) p. 1, < <http://s156658.gridserver.com/resources/500>> accessed 20 September 2019.

⁴²⁴ Thailand's Statement at the United Nations General Assembly Informal Interactive Dialogue on the Responsibility to Protect: "A vital and enduring commitment: Implementing the responsibility to protect" (2015) < <https://www.globalr2p.org/resources/statement-by-thailand-at-the-2015-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed 9 March 2021; "Mobilizing Collective Action: The Next Decade of Responsibility to Protect" (2016) <<https://www.globalr2p.org/resources/statement-by-thailand-at-the-2016-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed 9 March 2021; and "Implementing the Responsibility to Protect: Accountability for Prevention" (2017) < <https://www.globalr2p.org/resources/statement-by-thailand-at-the-2017-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed 9 March 2021.

its 2015 statement, Thailand pointed out that there are diverse views regarding the implementation of Pillar III, referring, in particular, to the suspicions surrounding the potential of unilateral military intervention without the SC authorisation.⁴²⁵ It accordingly noted that, while there had already been several extensive discussions on Pillar I and II, the international community had barely touched the topic of Pillar III, which, crucially, is the centre of R2P controversies.⁴²⁶ With this in mind, Thailand further encouraged the international community to have more open and in-depth discussions on Pillar III in order to develop clear and acceptable guidelines for its future implementation.⁴²⁷ The 2016 statement hinted also at the importance of interpreting R2P as a preventive tool rather than a political one to be used to pursue regime change, while re-affirming Thailand's earlier concerns with the lack of clarity surrounding Pillar III, especially in relation to the criteria that would trigger it and the procedures that should be followed subsequently.⁴²⁸ Thailand ended this statement by emphasising the need to guard against unilateral interventions.⁴²⁹ Similar concerns were raised in 2017, when Thailand stated that the international community has failed to stop heinous crimes as a result of Pillar III being misused and misinterpreted (while the statement did not make a direct reference, it was mostly hinted at the 2011 NATO intervention in Libya that was discussed in Chapter 2), and emphasised, once again, the importance of preventive action.⁴³⁰ From the above discussion, it is clear that Thailand does not reject the ideas and principles underpinning R2P. However, despite having repeatedly voiced out its support for Pillar I and

⁴²⁵ Ibid., (2015).

⁴²⁶ Ibid.

⁴²⁷ Ibid.

⁴²⁸ Thailand's Statement at the United Nations General Assembly Informal Interactive Dialogue on the Responsibility to Protect: "Mobilizing Collective Action: The Next Decade of Responsibility to Protect" (2016) <<https://www.globalr2p.org/resources/statement-by-thailand-at-the-2016-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed 9 March 2021

⁴²⁹ Ibid.

⁴³⁰ Thailand's Statement at the United Nations General Assembly Informal Interactive Dialogue on the Responsibility to Protect: "Implementing the Responsibility to Protect: Accountability for Prevention" (2017) <<https://www.globalr2p.org/resources/statement-by-thailand-at-the-2017-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed 9 March 2021.

II, Thailand remains very cautious in regard to Pillar III, preferring preventive action over coercive responses. Accordingly, Thailand can be categorised as a wary supporter of R2P.

4.5 Malaysia

As was explained in Chapter 3, ASEAN was created after the insecurities and suspicions surrounding the Konfrontasi between Indonesia and the newly independent State of Malaysia. As a result of its unsteady independence in the first few years that resulted from external interferences infringing on its sovereignty, Malaysia has been suspicious of any concept that could be used as a ‘trojan horse’ by external actors to interfere in its domestic affairs. In light of this, one would expect Malaysia to be a strong opponent of R2P. Nevertheless, Malaysia has not objected to R2P as such. Instead, it has voiced support for Pillar I and II, while raising doubts and concerns about the scope and implementation of Pillar III.

Malaysia’s position during the NATO intervention in Kosovo in 1999 is reflective of its overall stance. The Kosovo crisis and resulting in NATO intervention were influential in the creation of R2P. However, as discussed in Chapter 2, this intervention was criticised as it was without SC authorisation, hence constituting a direct violation of the UN Charter. During NATO’s bombing campaign, in 1999, Russia submitted a draft resolution to the Security Council that demanded the cessation of the use of force and condemned NATO’s actions as threats to international peace and security.⁴³¹ Between 1999-2000, Malaysia was one of the non-permanent members of the SC and voted against the adoption of this resolution. While affirming that the use of force should always be the last resort and sanctioned by the SC, Malaysia accepted that, because of the excessive and wholly disproportionate use of force by

⁴³¹ The United Nations Security Council Press Release, ‘Security Council Rejects Demand for Cessation of Use of Force Against Federal Republic of Yugoslavia’ (26 March 1999) SC/6659.

the Serbian authorities resulting in humanitarian catastrophe ‘such a tragic situation required an appropriate and prompt action by the world community’.⁴³²

In the same year as the NATO intervention in Kosovo, there was also the East Timor crisis that had resulted in the creation of INTERFET, authorised by the SC and led by the Australian army with the consent of the Indonesian government. This case study will be presented in detail in the next chapter but here it is crucial to note that with the SC’s authorisation and Indonesia’s consent, Malaysia had also contributed personnel to this peacekeeping mission.⁴³³

Turning to Malaysia’s position on R2P at the 2005 World Summit, it is important to note Former Prime Minister Abdullah Ahmad Badawi’s statement:

‘I am aware of the growing consensus towards accepting that the existing provisions of the United Nations Charter regarding the use of force are sufficient to address the full range of security threats; that the only issue remaining is how to ensure that the use of force is applied only as instrument of last resort. Undoubtedly, this is a priority issue especially as it is connected to the question of responsibility to protect civilian populations from crimes against humanity. However, any intervention must give due recognition to Charter principles pertaining to sovereignty, territorial integrity and non-interference. While the Security Council would appropriately be the body to take decisions on these matters, it is Malaysia’s view that provisions must also be made for the General Assembly to have an oversight role in this crucial matter of the use of force to deal with threats to international security’⁴³⁴

Prime Minister Badawi did not object the fundamentals of R2P but expressed concerns and suspicions about the potential to resort to force and the implications for the principles of non-interference, sovereignty and territorial integrity. Furthermore, Badawi clearly demanded that the GA should also have a role in R2P situations.⁴³⁵ Similar concerns were raised during the

⁴³² Ibid.

⁴³³ Alan Dupont, ‘ASEAN’s Response to the East Timor Crisis’ [2000] 54:2 *Australian Journal of International Affairs*, p. 167.

⁴³⁴ Statement by the Honourable Abdullah Ahmad Badawi, Prime Minister of Malaysia and Head of the Malaysian Delegation to the High-Level Plenary Meeting of the 60th Session of the United Nations General Assembly (2005) p. 2, <<https://www.un.org/webcast/summit2005/statements/malaysia050914eng.pdf>> accessed on 9 March 2021.

⁴³⁵ Ibid.

2012 GA Informal Interactive Dialogue on the ‘Responsibility to Protect: Timely and Decisive Response’. In its statement, the Malaysian representative expressed the need for a chronological sequencing of the three Pillars of R2P to ensure that all measures must be tried first and that the decision to use force must be truly a last resort.⁴³⁶ This is worth mentioning because this chronological model was rejected, as discussed in Chapter 2, by Secretary-General Ban Ki-Moon’s 2009 Report on ‘Implementing the Responsibility to Protect’. In that report, the Secretary-General insisted that all Pillars are of the same significant value and there is no set sequence to be followed.⁴³⁷ Furthermore, through this statement, Malaysia again raised the issue of selectivity and how *realpolitik* comes into play through the SC’s decisions especially when it comes to the implementation of Pillar III.⁴³⁸ Moreover, Malaysia also emphasised the role of regional organisations in assisting States in meeting their R2P commitment since they would have a more intimate understanding of the histories and cultures of the relevant States.⁴³⁹ With these concerns, Malaysia suggested that the international community should be cautious in the implementation of R2P and that more discussions would be needed regarding its parameters, content and framework.⁴⁴⁰

Malaysia reiterated its position at the 2014 GA Interactive Dialogue on ‘Fulfilling our Responsibility: International Assistance and the Responsibility to Protect’. Through this session, Malaysia emphasised the importance of Pillar II and how crucial international

⁴³⁶ Statement by H.E. Ambassador Hussein Haniff, Permanent Representative of Malaysia to the United Nations General Assembly Informal Interactive Dialogue on Responsibility to Protect: “Responsibility to Protect: Timely and Decisive Response (2012) < <https://www.globalr2p.org/resources/statement-by-malaysia-at-the-2012-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed on 9 March 2021.

⁴³⁷ United Nations General Assembly (2009), ‘Implementing the responsibility to protect’ Report of the Secretary-General, A/63/677, p. 9.

⁴³⁸ Statement by H.E. Ambassador Hussein Haniff, Permanent Representative of Malaysia to the United Nations General Assembly Informal Interactive Dialogue on Responsibility to Protect: “Responsibility to Protect: Timely and Decisive Response (2012) < <https://www.globalr2p.org/resources/statement-by-malaysia-at-the-2012-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed on 9 March 2021.

⁴³⁹ Ibid.

⁴⁴⁰ Ibid.

assistance would be when it comes to the responsibility to protect civilians from atrocity crimes.⁴⁴¹ It did not reject the concept of R2P, nor did it dispute the SC's power under the UN Charter to authorise military intervention in humanitarian crises but emphasised that Malaysia holds the principle of sovereignty above all else and that consent of a sovereign State should remain paramount when it comes to external international assistance.⁴⁴² This, of course clashes with Pillar III of R2P whereby the SC could authorise the use of force without the consent of the target state if there has been a threat to international peace and security.⁴⁴³ Malaysia ended this statement affirming that R2P still requires more in-depth and comprehensive discussions in order to enable the international community to clearly define its understandings, implementations and effects on the external and internal dimensions of States.⁴⁴⁴

Malaysia's statement during the 2015 GA Interactive Dialogue on the Responsibility of Protect: 'A vital and enduring commitment: Implementing the responsibility to protect' shed further light on its position.⁴⁴⁵ It pointed out that the failure to act in a timely manner to prevent atrocities has undermined the concept of R2P.⁴⁴⁶ Malaysia further emphasised the importance of non-military measures to respond and prevent escalations of atrocity crimes such as fact-finding missions, mediation and public advocacy by international officials.⁴⁴⁷

Overall, Malaysia can be categorised as a wary supporter. It accepts the concept of 'sovereignty as responsibility' as well as the idea of the international community's responsibility in assisting

⁴⁴¹ Statement by H.E. Ambassador Hussein Haniff, Permanent Representative of Malaysia to the United Nations General Assembly informal interactive dialogue on the Responsibility to Protect: 'Fulfilling our Responsibility: International Assistance and the Responsibility to Protect' (2014) <<https://www.globalr2p.org/resources/statement-by-malaysia-at-the-2014-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed on 4 March 2021.

⁴⁴² Ibid.

⁴⁴³ United Nations General Assembly (2009), 'Implementing the responsibility to protect' Report of the Secretary-General, A/63/677, p. 22.

⁴⁴⁴ Ibid.

⁴⁴⁵ Malaysia's Statement at the United Nations General Assembly Informal Interactive Dialogue on the Responsibility to Protect: "A vital and enduring commitment: Implementing the responsibility to protect" (2015) <<https://www.globalr2p.org/resources/statement-by-malaysia-at-the-2015-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed 10 March 2021.

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid.

States in meeting their R2P duties. However, Malaysia takes a very cautious approach to Pillar III. It notes that the use of force must be an absolute last resort measure and warns against the risks of bias and selectivity in the implementation phase. On top of all that, it is telling that Malaysia has offered a very strong endorsement of the principle of sovereignty in the context of discussions on R2P.

4.6 Singapore

Singapore is another member of ASEAN who I would categorise as a wary supporter of R2P. Like Malaysia, the Philippines and Thailand, Singapore contributed personnel to the INTERFET during the East Timor crisis of 1999, showing its willingness to participate in peacekeeping operations under the authorisation of the SC and accepted by the host State.⁴⁴⁸ Singapore has since publicly endorsed the concept of ‘sovereignty as responsibility’ and has even called on the permanent five members of the Security Council (P-5) to refrain from using their veto-power in relation to humanitarian crises.⁴⁴⁹

Singapore is also the only ASEAN State that joined the ‘Group of Friends of the Responsibility to Protect’, established by Canada in order to facilitate and encourage dialogues on the workings of R2P at the UN.⁴⁵⁰ An important aspect of this Group’s lobbying efforts is that it promotes a full-scale implementation of R2P, including Pillar III. In 2016, the ‘Group’ expressed its support for Paragraphs 138 and 139 of the World Summit Outcome.⁴⁵¹ In 2019,

⁴⁴⁸ Alan Dupont, ‘ASEAN’s Response to the East Timor Crisis’ [2000] 54:2 *Australian Journal of International Affairs*, p. 167.

⁴⁴⁹ Alex J. Bellamy and Sara E. Davies, ‘The Responsibility To Protect in the Asia-Pacific Region’ [2009] 40:6 *Security Dialogue*, p. 558.

⁴⁵⁰ ‘The Responsibility to Protect in Southeast Asia’ [2009] The Asia-Pacific Centre for the Responsibility to Protect, p. 47.

⁴⁵¹ Statement by the Group of Friends of the Responsibility to Protect in Geneva at the Informal Interactive Dialogue with the Under-Secretary-General Mr. Adama Dieng, Special Adviser to the Secretary-General on the Prevention of Genocide (2016) < <https://www.globalr2p.org/resources/statement-delivered-on-behalf-of-the-group-of-friends-of-r2p-at-the-31st-session-of-the-human-rights-council-1/> > accessed on 10 March 2021.

during the 41st session of the Human Rights Council, the Group reiterated its support for Pillar I and II but also stressed the importance of acting in a timely manner in accordance with the UN Charter once the warning signs and risk factors have been identified.⁴⁵²

While it may be assumed that all members of the Group support all Pillars of R2P, this is not necessarily the case, as reflected in Singapore's statements. In fact, Singapore remains rather cautious when it comes to Pillar III. In 2009, during the GA Informal Interactive Dialogue, Singapore issued a statement to make its position on R2P clear.⁴⁵³ Differently to other ASEAN members, Singapore stated that the corollary to sovereignty is national responsibility and that States should view R2P as an ally of state Sovereignty and not as an adversary.⁴⁵⁴ However, Singapore also showed its lack of trust in the SC as the key organ in implementing R2P, and especially Pillar III. For example, it called on the SC to disregard political biases and agendas in order to act in a timely manner.⁴⁵⁵ In order to lessen these controversies, it suggested that the GA should play a bigger role with respect to R2P since it offers more legitimacy due to its inclusive representation of the international community.⁴⁵⁶ Thus, while Singapore is not against the actual implementation of Pillar III, it remains sceptical about the political dynamics affecting the SC decision-making process.

These concerns were again repeated through the GA's Informal Interactive Dialogue on the Responsibility to Protect in 2012, 2015 and 2016.⁴⁵⁷ First, Singapore referred to a general

⁴⁵² Statement delivered on behalf of the Group of Friends of R2P on Item 2 at the 41st session of the Human Rights Council (2019) <<https://www.globalr2p.org/resources/statement-delivered-on-behalf-of-the-group-of-friends-of-r2p-in-geneva-on-item-2-at-the-41st-session-of-the-human-rights-council/>> accessed on 10 March 2021.

⁴⁵³ Statement by Ambassador Vanu Gopala Menon, Permanent Representative of Singapore to the United Nations at the General Assembly Interactive Dialogue on the Responsibility to Protect (2009), <<http://s156658.gridserver.com/media/files/singapore-2009-r2p-debate.pdf>> accessed on 10 March 2021.

⁴⁵⁴ Ibid.

⁴⁵⁵ Ibid.

⁴⁵⁶ Ibid.

⁴⁵⁷ Singapore's Statement at the United Nations at the General Assembly Interactive Dialogue on the Responsibility to Protect: 'Responsibility to Protect: Timely and Decisive Response' (2012) <<https://www.globalr2p.org/resources/statement-by-singapore-at-the-2012-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed on 10 March 2021; "A vital and enduring commitment: Implementing the responsibility to protect" (2015) <<https://www.globalr2p.org/resources/statement-by-singapore-at-the-2015-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed on 24 April 2021; and "Mobilizing Collective

consensus among the international community on Pillars I and II, while noting a lack of agreement on Pillar III.⁴⁵⁸ More specifically, Singapore noted that the real controversy is not about the non-coercive measures of Pillar III but rather the use of armed force to respond to atrocity crimes situations.⁴⁵⁹ Second, Singapore once again raised its concerns with regards to the dynamics of the SC, noting that R2P could only work if the P-5 abandoned their vetoes, political biases, and double-standards.⁴⁶⁰

Despite its concerns regarding Pillar III, generally, and the role of the SC in the implementation of this Pillar, specifically, Singapore is among the most supportive States within the region. It is also telling that Singapore never alluded to the importance of the principles of non-interference and sovereignty, while fully welcoming the concept of sovereignty as responsibility.

4.7 The Philippines

The Philippines is another member of ASEAN who I would categorise as a wary supporter of R2P, publicly supporting Pillar I and II of R2P but at the same time avoiding any direct reference to Pillar III and emphasising the importance of State sovereignty. Before analysing the Philippines' position on R2P, it is important to emphasise that during the East Timor crisis, the Philippines was the second largest personnel contributor within ASEAN after Thailand to

Action: The Next Decade of Responsibility to Protect" (2016) <<https://www.globalr2p.org/resources/statement-by-singapore-at-the-2016-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed on 24 April 2021.

⁴⁵⁸ Ibid.

⁴⁵⁹ Ibid.

⁴⁶⁰ Ibid.

the INTERFET.⁴⁶¹ This showed that the Philippines were willing to assume collective responsibility for the region's security problems.⁴⁶²

In 2004, a year before adoption of the World Summit Outcome, the Philippines was one of the ten non-permanent members of the Security Council. At the time, the crisis that engrossed the SC was the Darfur conflict that resulted in a mass humanitarian crisis. At the SC the Philippines affirmed that:

‘Sovereignty also entails the responsibility of a State to protect its people. If it is unable or unwilling to do so, the international community has the responsibility to help that State achieve such capacity and such will and, in extreme necessity, to assume responsibility itself’⁴⁶³

Although it did not refer to it, the language in this statement reflected the one used in the ICISS Report which, as discussed in Chapter 2, brought for the first time the issue of R2P into the international law realm.⁴⁶⁴ However, since the formal adoption of R2P in the 2005 World Summit Outcome, the Philippines has lessened its support for R2P. In 2016, Rodrigo Duterte was elected as president. The fact that Duterte is known to be a loyal supporter of the ‘ASEAN Way’ had an inevitable impact on the country's position on R2P.⁴⁶⁵

Through the 2014 Annual GA Interactive Dialogue on the Responsibility to Protect ‘Fulfilling our collective responsibility: International assistance and the responsibility to protect’, the Philippines reiterated its support for Pillar I, but also emphasised the ‘sacrosanct’ nature of state sovereignty, referring to it as the building block of international law and relations’.⁴⁶⁶

⁴⁶¹ Alan Dupont, ‘ASEAN's Response to the East Timor Crisis’ [2000] 54:2 Australian Journal of International Affairs, pp. 167-168.

⁴⁶² Ibid.

⁴⁶³ The United Nations Security Council Provisional 5040th meeting (2004) S/PV.5040, p. 12.

⁴⁶⁴ Report of the International Commission on Intervention and State Sovereignty, ‘The Responsibility to Protect’ [2001] XI.

⁴⁶⁵ Regine Cabato, ‘Duterte highlights ASEAN principle of non-interference’ (CNN Philippines, 29 April 2017) < <http://nine.cnnphilippines.com/news/2017/04/29/Duterte-ASEAN-speech-non-interference.html> > accessed on 10 March 2021.

⁴⁶⁶ The Philippines' Statement at United Nations General Assembly interactive dialogue on the Responsibility to Protect: “Fulfilling our collective responsibility: International assistance and the responsibility to protect” (2014)

The same position was taken during the 2015 ‘A vital and enduring commitment: Implementing the responsibility to protect’ and the 2017 ‘Implementing the Responsibility to Protect: Accountability for Prevention’ of the GA Interactive Dialogue on the Responsibility to Protect. The Philippines reiterated its support for Pillar I but at the same time confirmed its commitment to the principle of State sovereignty.⁴⁶⁷ In 2015, it also made a reference to Pillar II, specifically in regard to regional institutions and their role in assisting States to fulfil their Pillar I duties.⁴⁶⁸ It is also interesting to note that, in 2017, the Philippines mirrored Singapore’s concerns with regard to the intentions of the P-5 at the SC. Thus, it called on the latter to be impartial in their decision-making and avoid using the veto for political/personal motives.⁴⁶⁹ As a wary supporter, the Philippines has, therefore, endorsed Pillar I and II of R2P but has remained cautious in regard to the scope and implementation of Pillar III.

4.8 Vietnam

Vietnam is another State that can be categorised as a wary supporter of R2P. Vietnam has typically shown a general endorsement of the fundamental concepts of Pillars I and II. For example, in 2008, during a Security Council meeting focused on the protection of civilians in armed conflicts, it stated that:

< <https://www.globalr2p.org/resources/statement-by-the-philippines-at-the-2014-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed 4 March 2021.

⁴⁶⁷ The Philippines’ Statement at United Nations General Assembly interactive dialogue on the Responsibility to Protect: “A vital and enduring commitment: Implementing the responsibility to protect” (2015) < <https://www.globalr2p.org/resources/statement-by-the-philippines-at-the-2015-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed 4 March 2021.; and “Implementing the Responsibility to Protect: Accountability for Prevention” (2017) < <https://www.globalr2p.org/resources/statement-by-the-philippines-at-the-2017-un-general-assembly-informal-interactive-dialogue-on-the-responsibility-to-protect/>> accessed 4 March 2021.

⁴⁶⁸ Ibid., (2015).

⁴⁶⁹ Ibid., (2017).

‘it is States that bear primary responsibility to protect their own civilians and to deal with violence against civilians as well as violations of international humanitarian law. In order to help States fulfil their responsibilities, the United Nations can help improve their national capacity, provide technical assistance and work with them to conduct other awareness-raising activities, for instance through training courses’⁴⁷⁰

Echoing this position, Vietnam issued a statement at the 2009 GA’s Plenary Meeting on the Responsibility to Protect affirming that ‘the responsibility to protect, first and foremost, is a matter of State responsibility’.⁴⁷¹ Furthermore, Vietnam also emphasised the critical role that the international community plays when it comes to their responsibility to assist States in meeting their Pillar I commitments.⁴⁷² And rather than ignoring references to Pillar III, Vietnam stated that the latter ‘requires clear and rational definition to avoid its possible confinement to coercive military force as the only alternative’, thereby steering the emphasis towards the non-coercive measures.⁴⁷³ This was reminiscent of earlier times when, at various UN fora, Vietnam made its commitment to the principles of state sovereignty and non-interference very clear. In 2004, for example, in response to former Secretary-General Kofi Annan endorsement of R2P in the report ‘In larger freedom: towards development, security and human rights for all’, Vietnam expressly stressed the importance of upholding the principles of territorial integrity, non-interference, national sovereignty and peaceful settlements of disputes.⁴⁷⁴ Also in the 2009 statement, Vietnam highlighted the same concerns that, as noted above, were raised by Singapore and the Philippines, that is, a general mistrust towards the ability of the P-5 to make decisions on Pillar III scenarios without selectivity and

⁴⁷⁰ The United Nations Security Council 5898th Meeting (2008) S/PV.5898, p. 14.

⁴⁷¹ Statement by H.E. Ambassador Bui The Giang, Deputy Permanent Representative of Viet Nam, at the GA’s Plenary Meeting on Responsibility to Protect, (2009), < <http://s156658.gridserver.com/media/files/vietnam-2009-r2p-debate.pdf>> accessed on 10 March 2021.

⁴⁷² Ibid.

⁴⁷³ Ibid.

⁴⁷⁴ The United Nations General Assembly 89th Plenary Meeting (2005) A/59/PV.89, pp. 21-22.

double standards.⁴⁷⁵ Vietnam's overall support for the first two Pillars was also confirmed during the 2012 GA Interactive Dialogue on Responsibility to Protect 'Responsibility to Protect: Timely and Decisive Response'.⁴⁷⁶ Importantly, on that occasion it also made clear its determination to participate in any future discussions on R2P with a view to reaching a common ground and moved from 'words to deeds'.⁴⁷⁷

4.9 Cambodia

Cambodia had an unstable and violent history like Malaysia and Myanmar did. The genocidal Khmer Rouge regime, which followed years of civil wars and coups, was brought to an end by a Vietnamese military intervention in 1979. It is interesting to note that the current Prime Minister, Hun Sen, who has served as the prime minister of Cambodia since 1985, and his party, the Cambodian People's Party, which came to power after the Vietnamese intervention, welcomed the latter rather than regarding it as aggression or an act infringing on Cambodia's sovereignty.⁴⁷⁸ Despite this, Cambodia took a rather neutral approach to R2P when the principle first emerged internationally. At the time of the adoption of the 2005 World Summit Outcome, for example, it expressed support for that document but did not make any reference to R2P.⁴⁷⁹ Subsequently, it remained largely silent on the matter. Indeed, Cambodia did not

⁴⁷⁵ Statement by H.E. Ambassador Bui The Giang, Deputy Permanent Representative of Viet Nam, at the GA's Plenary Meeting on Responsibility to Protect, (2009), < <http://s156658.gridserver.com/media/files/vietnam-2009-r2p-debate.pdf>> accessed on 10 March 2021.

⁴⁷⁶ Statement by Ambassador Pham Vinh Quang, Deputy Permanent Representative of the Socialist Republic of Vietnam at the United Nations General Assembly interactive dialogue on Responsibility to Protect: "Responsibility to Protect: Timely and Decisive Response" (2012), < <https://www.globalr2p.org/wp-content/uploads/2020/07/2012-IID-Viet-Nam.pdf>> accessed on 10 March 2021.

⁴⁷⁷ Alex J. Bellamy and Sara E. Davies, 'The Responsibility To Protect in the Asia-Pacific Region' [2009] 40: 6 *Security Dialogue*, p. 562.

⁴⁷⁸ Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford University Press Reprinted 2010) p. 90.

⁴⁷⁹ The United Nations General Assembly Sixtieth Meeting, 22nd Plenary Meeting (2005) A/60/PV.22, p. 17.

participate in any of the GA informal interactive dialogues on R2P that have been mentioned so far.

This neutral stance, however, changed in 2015 where Hun Sen publicly endorsed the fundamental concepts of R2P on the occasion of an international conference on the theme of R2P which took place in Phnom Penh. The conference marked the 10th anniversary of the adoption of the World Summit Outcome and focused on the interpretation and implementation of R2P. At this conference opening address, Hun Sen solemnly affirmed, for the first time, Cambodia's commitment to R2P.⁴⁸⁰ Furthermore, he added that while the UN Charter affirms the centrality of State sovereignty, 'it is also important to acknowledge that the exercise of sovereign rights carries with it certain obligations or responsibilities' and that 'R2P should be viewed as deepening the meaning of sovereignty in that it underscores the importance of states taking seriously their primary responsibility to protect their people against [atrocities crimes]'.⁴⁸¹ Endorsing also Pillar II of R2P, Hun Sen referred to the importance of both international and regional institutions in assisting States fulfil their Pillar I responsibility.⁴⁸²

All considered, despite the lack of participation in UN fora concerning the conceptualisation of R2P, it can be said that the 2015 official endorsement of the principle makes Cambodia a wary supporter. The lack of any express reference to Pillar III is indicative of its reluctance to endorse the coercive dimension of R2P.

⁴⁸⁰ Detailed conference report on "The Responsibility to Protect at 10: Progress, Challenges and Opportunities in the Asia Pacific" (2015), p. 9, <https://r2pasiapacific.org/files/2823/r2p_at_10_conference_detailedreport.pdf> accessed on 23 April 2021.

⁴⁸¹ Ibid.

⁴⁸² Ibid., p. 10.

4.10 Laos

Being one of ASEAN's States with the lowest GDP per capita alongside Cambodia and Brunei, Laos has been traditionally preoccupied with the need to alleviate poverty, which is deemed to be the biggest threat to the State.⁴⁸³ Accordingly, Laos has on past occasions used UN fora to call for international assistance to meet the challenges it faces as one of the least developed countries in the world such as poverty, reducing child and maternal mortality, malnutrition, access to education and healthcare.⁴⁸⁴ Laos also endorsed the 2005 World Summit Outcome, but did not make any specific reference to R2P.⁴⁸⁵ Crucially, Laos has not participated in any of the UN dialogues and meetings concerning R2P that have been considered in this chapter, notwithstanding, as seen so far, the large participation of other ASEAN States. For this reason, it seems appropriate to categorise Laos as a neutral State.

4.11 Brunei

Brunei's closest act that could be read as a form of support for R2P came in 2007, when its Foreign Affairs and Trade Minister endorsed the Commonwealth *Kampala Communique*, a document which was produced following a meeting of the Commonwealth Heads of Governments and which included a strong reference to R2P.⁴⁸⁶ More specifically, the

⁴⁸³ 'The Responsibility to Protect in Southeast Asia' [2009] The Asia-Pacific Centre for the Responsibility to Protect, p. 30.

⁴⁸⁴ Statement by H.E. Dr. Khamlien Pholsena, Vice Minister of Planning and Investment of the Lao People's Democratic Republic at the Annual Ministerial Meeting on Least Developed Countries (LDCs) (2016) <https://www.un.int/lao/sites/www.un.int/files/Lao/final_statment_ldcs.pdf> accessed 4 March 2021; and Statement by H.E. Dr Khiane Phansourivong, Permanent Representative of the Lao People's Democratic Republic to the United Nations at the Third Committee of the 73rd Session of the United Nations General Assembly, Agenda item 28 (2018) <https://www.un.int/lao/sites/www.un.int/files/Lao/statement_by_h.e._dr._khiane_phansourivong.pdf> accessed 4 March 2021.

⁴⁸⁵ The United Nations General Assembly 12th Plenary Meeting (2007) A/62/PV.12, p. 9.

⁴⁸⁶ Commonwealth Heads of Government Meeting, The Kampala Communiqué (2007) para 5, <http://www.create-rpc.org/pdf_documents/Kampala_Communique.pdf> accessed on 3 May 2021.

signatories of the Communiqué affirmed that the responsibility to protect populations from atrocity crimes is a fundamental Commonwealth value, and reiterated their commitment to work together to ensure that R2P is carried out by the international community in accordance with the UN Charter.⁴⁸⁷ This, however, is the only position taken by Brunei on the matter, as it chose, like Laos, not to participate in any of the UN activities concerning R2P that have been discussed in this chapter. For all these reasons, Brunei should be considered as an R2P-neutral State.

4.12 Myanmar

Myanmar, which will be the focus of a case-study in Chapter 6, as an opposer of R2P, has been remarkably vocal in its unwavering support for the principles of sovereignty and non-interference. For example, on the occasion of the 2005 adoption of the World Summit Outcome at the GA, Myanmar made the following statement:

‘While the United Nations must be reformed, its sacrosanct principles of national sovereignty, territorial integrity, equality, non-interference in internal affairs, settlement of disputes by peaceful means and non-use of force or threat of use of force should remain inviolate. These are the guiding principles that have withstood the test of time and are as relevant and valid today as on the day they were adopted’⁴⁸⁸

In 2014, Myanmar took part in the GA Dialogue on R2P ‘Fulfilling our collective responsibility: International assistance and the responsibility to protect’. Talking about the

⁴⁸⁷ Ibid.

⁴⁸⁸ Statement by His Excellency U Nyan Win, Minister for Foreign Affairs and Chairman of the Delegation of the Union of Myanmar at the High-Level Plenary Meeting of the 60th Session of the United Nations General Assembly (2005), p. 2, < <https://www.un.org/webcast/summit2005/statements16/mya050916eng.pdf> > accessed on 10 March 2021.

international community's duty to provide international assistance to States, Myanmar put emphasis on one specific aspect, namely the fact that this international assistance should only be provided at the request, and with the consent, of the State concerned.⁴⁸⁹ More importantly, Myanmar expressed a firm rejection of Pillar III, further noting that intervening military in another sovereign State may well aggravate rather than solving a humanitarian crisis.⁴⁹⁰ Furthermore, it raised the issue of great powers' motives and agendas behind R2P mandates.⁴⁹¹ A similar objection to the coercive dimension of R2P came in 2015 during the GA Informal Dialogue on R2P: 'A vital and enduring commitment: Implementing the responsibility to protect'. On that occasion, Myanmar affirmed that using force under the R2P umbrella would pose two problems: first, it would undermine the fundamental principles of the UN Charter; second, it would create the risk of misuses or abuses.⁴⁹² This statement further raised doubts as to how and who would decide when R2P should be applied, hinting at Myanmar's distrust in the Security Council.⁴⁹³

Not surprisingly, Myanmar's negative attitudes towards R2P have increased since its (mis)treatment of the Rohingya fell under the international spotlight. In 2017, Myanmar took part in the GA interactive dialogue on 'Implementing the Responsibility to Protect: Accountability for Prevention'. Its representative used that platform to emphasise that R2P can too easily be used to pursue political agendas, adding that Myanmar was not intent on, and does not have any intention to commit genocide or ethnic cleansing against any group.⁴⁹⁴ In the latest development in Myanmar, on 1 February 2021, the Junta seized power from the National

⁴⁸⁹ Statement by His Excellency Mr. Kyaw Tin, Permanent Representative of the Republic of the Union of Myanmar to the United Nations General Assembly Informal Interactive Dialogue on the Responsibility to Protect: 'Fulfilling our collective responsibility: International assistance and the responsibility to protect' (2014) <<http://statements.unmeetings.org/media2/4493842/myanmar.pdf>> accessed on 10 March 2021.

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

⁴⁹² Ibid.

⁴⁹³ Ibid.

⁴⁹⁴ Statement by Myanmar at the United Nations General Assembly Informal Interactive Dialogue on the Responsibility to Protect "Implementing the Responsibility to Protect: Accountability for Prevention" (2017) <<http://s156658.gridserver.com/media/files/2017-iid-myanmar.pdf>> accessed 10 March 2021.

League for Democracy and detained president Win Myint, Aung Sung Suu Kyi and other democratically elected officials in the context of a military coup.⁴⁹⁵ In response to this, the people of Myanmar have gathered to protest nationwide to call for democracy in which the Junta has responded lethally leading to the deaths of more than 700 protestors as of 13 April.⁴⁹⁶ As discussed above, in its 2014 Statement at the GA informal interactive dialogue, Myanmar is not against the assistance of the international community, per se, but, it must be with consent of the recipient State.⁴⁹⁷ As such, on 24 April, Myanmar agreed to join the ASEAN emergency summit (Pillar II) to discuss the situation after calls from several ASEAN States (Indonesia, Singapore and Malaysia). The summit has reached consensus on five points for the Junta to address the situation (which will be discussed in detailed in Chapter 6).

4.13 Conclusion

This chapter has examined ASEAN and ASEAN States' conceptual engagement with R2P with a view to identifying the degree of support that the principle enjoys within the organisation. While ASEAN, by virtue of its history, nature and *modus operandi*, has not taken any collective stance on R2P, the analysis developed in the chapter has suggested that its member States are mostly characterised by a cautious support for R2P. As many as seven States, in facts, can be categorised as wary supporters of R2P, namely Indonesia, Singapore, the Philippines, Malaysia, Thailand, Vietnam and Cambodia. In line with my definition of 'wary supporters',

⁴⁹⁵ 'Myanmar coup: Aung Sung Suu Kyi detailed as military seizes control' (BBC, 1 February 2021) < <https://www.bbc.co.uk/news/world-asia-55882489>> accessed on 10 March 2021.

⁴⁹⁶ 'Myanmar coup: The people shot dead since the protests began' (BBC, 13 April 2021) < <https://www.bbc.co.uk/news/world-asia-56636345>> accessed on 1 May 2021.

⁴⁹⁷ Statement by His Excellency Mr. Kyaw Tin, Permanent Representative of the Republic of the Union of Myanmar to the United Nations General Assembly Informal Interactive Dialogue on the Responsibility to Protect: 'Fulfilling our collective responsibility: International assistance and the responsibility to protect' (2014) < <http://statements.unmeetings.org/media2/4493842/myanmar.pdf>> accessed on 1 May 2021.

these States have generally, albeit not enthusiastically, endorsed the fundamental ideas underpinning R2P, and have shown various degrees of support for Pillars I and II, while remaining more reluctant to embrace the basics of Pillar III.

There are of course differences and nuances between these States. For example, Indonesia, Thailand and Singapore have been more progressive than others. Indonesia have publicly stated that the principle of non-interference should not be used as a shield when it comes to humanitarian crises, as the latter represent an issue of international rather than domestic concern.⁴⁹⁸ Similarly, Thailand, brought forward the concept of ‘Flexible Engagement’ in order to promote interaction among ASEAN States with regard to conflict situations.⁴⁹⁹ Singapore has also taken a rather bold position, suggesting that R2P should not be seen as an enemy but rather as an ally of State sovereignty.⁵⁰⁰

The chapter has also shown that a common concern among wary supporters relates the role that the Security Council plays in relation to the implementation of R2P, specifically in regard to Pillar III. Thus, Vietnam, the Philippines, Malaysia and Singapore have all called for the P-5 to avoid selectivity and political bias in their decision-making in order to limit the potential abuse of R2P. As a potential solution to this problem, Singapore and Malaysia advocated the recognition of a bigger role to the General Assembly, which, by virtue of its inclusivity and legitimacy, could guarantee a better chance of implementing R2P more objectively. A final important point should be made with respect to wary supporter States. In connection with their acceptance of Pillar II assistance, they have highlighted the importance of regional as opposed

⁴⁹⁸ ‘The Responsibility to Protect in Southeast Asia’ [2009] The Asia-Pacific Centre for the Responsibility to Protect, p. 21.

⁴⁹⁹ Robin Ramcharan, ‘ASEAN and Non-Interference: A Principle Maintained’ [2000] 22:1 *Contemporary Southeast Asia*, pp. 75-76.

⁵⁰⁰ Statement by Ambassador Vanu Gopala Menon, Permanent Representative of Singapore to the United Nations at the General Assembly Interactive Dialogue on the Responsibility to Protect (2009), <<http://s156658.gridserver.com/media/files/singapore-2009-r2p-debate.pdf>> accessed on 10 March 2021.

to international assistance. This was particularly evident in the case of Indonesia, Malaysia and the Philippines.

While a clear majority of ASEAN States have shown positive, if cautious, attitudes towards R2P, this chapter has highlighted that two ASEAN States, namely Laos and Brunei, are better categorised as R2P-neutral. This is so because they have not directly engaged with, let alone shown evidence of support for, R2P during various UN meetings focused on the topic. At the same time, the lack of direct participation means that they did not get a chance to express a dissent about R2P either. Lastly, this chapter has identified one ASEAN State as an outright opposer of R2P, that is, Myanmar. Myanmar has rejected R2P publicly multiple times by claiming that R2P has no basis in international law and clashes with the fundamental principles of the UN Charter and international law.

One common feature seems to apply to all ASEAN States, namely their reluctance to accept the coercive dimension of Pillar III, which, as explained in Chapter 2, does not only include military force but also other non-consensual measures such as sanctions and referrals to the International Criminal Court. This reluctance to accept non-consensual measures is well-established in the ASEAN architecture. As discussed in Chapter 3, no ASEAN institution has the power to impose sanctions on member States. More generally, the history and status of ASEAN States as well as their traditional endorsement of the principles underpinning the ASEAN way, namely sovereignty, non-interference and non-use of force, explain the lack of support for Pillar III measures. It is important to point out that although none of ASEAN States endorse Pillar III of R2P, they do not actually object to Chapter VII powers of the Security Council as such. Rather, they are wary of attempts to expand the interpretation of ‘threat to international peace and security’ under Chapter VII. As mentioned throughout this chapter, most ASEAN States already distrust the SC in implementing R2P and if humanitarian concerns are included within the scope of ‘international threat to peace and security’, this could

potentially be abused to warrant unlawful and illegitimate interferences and interventions into the domestic affairs of sovereign States. ASEAN States' wariness is not completely unfounded as shown by the example of misuse of Chapter VII powers in the Libya Intervention in 2011 (as discussed in Chapter 2).

Having completed the analyses of ASEAN and ASEAN States' conceptual engagement with R2P, the next chapters will look at how the latter have acted practically when they faced two humanitarian crises: the first one in East Timor in 1999, which occurred before the formal introduction of R2P in the realm of international law; and the second one, more recently, in Myanmar, at a time when R2P could have guided ASEAN response.

Chapter 5

ASEAN and The East Timor Crisis

5.1 Introduction

Chapter 4 analysed the Association of Southeast Asian Nations (ASEAN) and its States' *conceptual* engagement with the responsibility to protect (R2P). Building on that discussion, this chapter and the next will examine ASEAN and ASEAN States' *practical* engagement with two humanitarian crises that have occurred in the region. This chapter, in particular, will focus on the 1999 East Timor crisis. Since the latter occurred before the adoption of the 2005 World Summit Outcome, this chapter will enquire into how ASEAN and ASEAN States responded to a humanitarian crisis before the formal emergence of R2P in the realm of international law. This response will then be compared, in the next chapter, with their reaction, post-R2P emergence, to the current crisis in the Rakhine State of Myanmar. This will determine, among other things, whether those ASEAN States that conceptually endorsed at least some Pillars of R2P since 2015 have turned words into action.

This chapter is divided into five sections. The first section will introduce the background of the East Timor crisis. The second section will analyse the events that led to the crucial 5 May Agreement in 1999 whereby Portugal, Indonesia and the United Nations (UN) agreed to hold a referendum to decide the fate of the East Timorese. Then, the third section will discuss the creation of the United Nations Mission in East Timor. The fourth section will analyse the events before and after the referendum, including the establishment of a UN peacekeeping mission, the International Force East Timor. The fifth and final section will draw some conclusions as to the practical response of ASEAN and its members to the Timorese humanitarian crisis. The

analysis developed in this chapter will make extensive use of primary sources such as official statements made at both international and regional fora, positions taken at the UN Security Council (SC) and voting patterns at the UN General Assembly (GA).

5.2 Background of the Crisis

Before East Timor came under Indonesian rule in 1976, it was colonised by Portugal in the sixteenth century. The country was known as Portuguese Timor until Portugal abandoned the colony in 1974.⁵⁰¹ Portugal only initiated decolonising East Timor as a result of the Carnation Revolution, in which the left-wing Portuguese army staged a coup to overthrow the authoritarian Estado Novo regime.⁵⁰² Because Portugal rushed to rid itself of the burden of East Timor, there was no official handover of the administration to a local government. Lisbon's abandonment of its colony created a power vacuum, which resulted in the establishment of three political parties in this territory, each with different agendas as to what they hoped for the future of East Timor. The political parties consisted of the Democratic Union of Timor (UDT), the Timorese Social Democratic Association (ASDT), which would later be renamed as the Revolutionary Front for Independent East Timor (FRETILIN), and the Timorese Democratic People's Union (APODETI).⁵⁰³ FRETILIN worked towards full independence, UDT preferred a type of 'progressive autonomy' with continued Portuguese presence, and APODETI, which,

⁵⁰¹ Christime Chinkin, 'East Timor: A Failure of Decolonisation' [1999] 20 *Australia Year of Book of International Law*, p. 37.

⁵⁰² G.V.C Naidu, 'The East Timor Crisis' [1999] 23:9 *Strategic Analysis*, p. 1468.

⁵⁰³ Ibid, p. 1469.

as will be discussed below, had been created by Indonesia's State intelligence agency, sought to promote the integration of East Timor with Indonesia.⁵⁰⁴

Immediately after Portugal started to reduce its presence in East Timor, Indonesia appeared to be publicly supportive of the East Timorese' right to self-determination. Adam Malik, the then Foreign Affairs Minister of Indonesia, stated that 'independence was the right of every nation with no exception for the people of Timor' and that Indonesia had no territorial ambitions and promised good relations with whomever would govern this territory after its independence.⁵⁰⁵ But the reality of Indonesia's position was rather different to what Malik had stated, especially once FRETILIN and UDT formed an alliance with the goal of negotiating with Portugal to create a transitional government that would ultimately lead to full independence.⁵⁰⁶

An independent East Timor posed a security problem to Indonesia because it could potentially become a hub for communism in the region. Over 90% of the population supported the alliance between the two pro-independence parties, FRETILIN and UDT.⁵⁰⁷ FRETILIN, in particular, was feared by Indonesia because it had launched a new communist-like manifesto to 'revolutionise the social and economic structures of colonial inspiration in a general struggle against poverty, illiteracy and economic and political oppression'.⁵⁰⁸ This did not sit well with Suharto, the then Indonesian President, who led an anti-communist regime and was very preoccupied about the region's stability, especially after the United States (US) started to withdraw from Vietnam.⁵⁰⁹ A communist State in the region, especially if adjacent to the Indonesian province of West Timor, would have encouraged other local communist

⁵⁰⁴ Jill Joliffe, *East Timor: Nationalism and Colonialism* (St Lucia: University of Queensland Press, 1978) p. 79; and Roger S. Clark, 'Decolonization of East Timor and the United Nations Norms on Self-Determination and Aggression' [1980] 7:2 *The Yale Journal of World Public Order*, p. 5.

⁵⁰⁵ Jill Joliffe, *East Timor: Nationalism and Colonialism* (St Lucia: University of Queensland Press, 1978) p. 66.

⁵⁰⁶ Roger S. Clark, 'Decolonization of East Timor and the United Nations Norms on Self-Determination and Aggression' [1980] 7:2 *The Yale Journal of World Public Order*, p. 6.

⁵⁰⁷ Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan, 2012) p. 61

⁵⁰⁸ *Ibid.*, pp. 61-62.

⁵⁰⁹ Brad Simpson, 'Illegally and Beautifully', *The United States, the Indonesian Invasion of East Timor and the International Community, 1974-1976* [2005] 5:3 *Cold War History*, p. 283.

movements to rise up.⁵¹⁰ Consequently, while professing support for the East Timorese's right to self-determination, Indonesia actually worked against it. In particular, the Indonesian army engaged in Operasi Komodo, which was a covert operation within East Timorese political quarters aimed at building support for integration with Indonesia. This operation was conducted, initially, through propaganda and, later, through terror and military attacks.⁵¹¹ One goal of this operation consisted, as mentioned earlier, in the creation of a pro-Indonesia political party, APODETI.⁵¹² However, as APODETI failed to attract sufficient support among the population (about 5 percent), the agents of Operasi Komodo used other tactics, including a smear campaign across both West and East Timor warning that the latter had been infiltrated by Chinese, Vietnamese, and Soviet communist forces and that FRETILIN was riddled with Maoists.⁵¹³ At the same time, the Indonesian agents infiltrated in East Timor succeeded in persuading the leadership of the UDT to terminate their alliance with communist-controlled FRETILIN.⁵¹⁴ Instead of allying with APODETI, however, the UDT staged a pre-emptive coup in an attempt to preserve Timor's future independence.⁵¹⁵ They asked FRETILIN moderates to expel the leftists from their party and work together to pursue independence with the aid of the US.⁵¹⁶ FRETILIN, instead, not only rejected the offer but also recruited local forces to fight back against the UDT-led coup. As a result, civil war broke out in 1975.⁵¹⁷

By that time, the majority of the Portuguese military had already left East Timor and the remaining sided with FRETILIN.⁵¹⁸ Consequently, by September of that year, FRETILIN had taken control of most part of the country, restored order and declared the independence of the

⁵¹⁰ Ibid, pp. 285-286.

⁵¹¹ Ibid.

⁵¹² Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan, 2012) p. 61.

⁵¹³ Ibid., p. 62.

⁵¹⁴ Ibid., pp. 62-63; see also Jill Jolliffe, *East Timor: Nationalism and Colonialism* (St Lucia: University of Queensland Press, 1978) pp. 84 and 96.

⁵¹⁵ Ibid.

⁵¹⁶ Ibid.

⁵¹⁷ Ibid.

⁵¹⁸ Roger S. Clark, 'Decolonization of East Timor and the United Nations Norms on Self-Determination and Aggression' [1980] 7:2 *The Yale Journal of World Public Order*, pp. 7-8

‘Democratic Republic of East Timor’.⁵¹⁹ Indonesia, however, continued to falsely broadcast that East Timor was still locked in a violent civil war with an overflowing number of refugees fleeing to the Indonesian West Timor, a circumstance which was used as an indication that the crisis in East Timor was also threatening Indonesia’s security and stability.⁵²⁰ The fact that FRETILIN’s declaration of independence was supported by communist States such as China, the Union of Soviet Socialist Republics, Vietnam, Cambodia, North Korea and Laos further increased Suharto’s concerns about the spread of communism close to Indonesian borders.⁵²¹ In his own words:

‘Indonesia has no territorial ambitions, we are concerned only about the security, tranquillity, and peace of Asia and the Southern Hemisphere...FRETILIN has declared its independence unilaterally...Portugal, however, is unable to control the situation. If this continues it will prolong the suffering of the refugees and increase the instability in the area... they [UDT and FRETILIN] are infected the same as is the Portuguese army with communism’⁵²²

As tension escalated, on 7 December 1975 Indonesia commenced a full-scale invasion of East Timor. By 17 July 1976, it successfully annexed East Timor as its 27th province.⁵²³ Indonesia justified its invasion on multiple, if weak, grounds. For example, it invoked Article 51 of the UN Charter, stating that the armed intervention was in response to unprovoked attacks by FRETILIN forces into its borders.⁵²⁴ It also claimed that it had intervened following an

⁵¹⁹ Ibid.

⁵²⁰ Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan, 2012) p. 64.

⁵²¹ Katsumi Ishizuka, *The History of Peace-building in East Timor: The Issues of International Intervention* (Foundation Books, 2010) p. 14.

⁵²² Quoted in Deborah Mayersen and Annie Pohlman, *Genocide and Mass Atrocities in Asia: Legacies and prevention* (Routledge, 2013) p. 107.

⁵²³ Roger S. Clark, ‘Decolonization of East Timor and the United Nations Norms on Self-Determination and Aggression’ [1980] 7:2 *Yale Journal of World Public Order*, p. 10.

⁵²⁴ Roger S. Clark, ‘East Timor and International Law’ [1984] 2 *Mennesker og Rettigheter*, p. 33.

invitation from an East Timorese authority.⁵²⁵ Further claims were made with regard to the non-viability of East Timor as an independent country, presenting the intervention as an attempt to benevolently absorb East Timor's burden.⁵²⁶ Following Indonesia's intervention, the East Timorese were subjected to widespread violations of human rights, including extrajudicial execution, arbitrary detention, torture and rape, on a level that, according to some accounts, constituted crimes against humanity.⁵²⁷ At the same time, the Indonesian armed force also committed war crimes, including widespread of destruction and appropriation to properties, cruel treatments and tortures, taking hostages and executions of civilians.⁵²⁸ According to some estimates, in the two months following the commencement of the invasion as many as 60,000 East Timorese were killed.⁵²⁹

5.3 The Initial Reaction of the International Community

Before looking at how ASEAN responded to Indonesia's forced annexation of East Timor and mistreatment of East Timorese, it is useful to examine the reaction of the international community, as this will provide a sense of the gravity of the situation. To begin with, the Security Council convened a meeting on 15th of December 1975 after it was notified by Portugal of Indonesia's invasion.⁵³⁰ During this meeting, the Indonesian delegation justified

⁵²⁵ The invitation, however, came from the 'Popular Representative Assembly' set up by Indonesia; see Brad Simpson, 'Illegally and Beautifully', *The United States, the Indonesian Invasion of East Timor and the International Community, 1974-1976* [2005] 5:3 *Cold War History*, p. 302.

⁵²⁶ A Publication of the United Nations Department of Political Affairs, Trusteeship and Decolonization: Issue on East Timor [1976] Vol.1, No.7, p. 14; and Jamsheed Marker, *East Timor: A Memoir of the Negotiations for Independence* (London: McFarland, 2003) p. 31.

⁵²⁷ Amnesty International, 'East Timor: Demand for Justice' (1999), ASA/21/191/1999, p. 4.

⁵²⁸ *Ibid.*, pp. 15-16.

⁵²⁹ Ben Saul, 'Was the Conflict in East Timor 'Genocide' and Why does it Matter?' [2001] 2:2 *Melbourne Journal of International Law*, p. 510.

⁵³⁰ United Nations Security Council (1975), 1864th Meeting, S/PV.1864, para 1, < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/500/47/PDF/NL750047.pdf?OpenElement> accessed on 25 March 2021.

the intervention on the grounds mentioned earlier, namely self-defence, intervention by invitation, and economic non-viability.⁵³¹ References were also made to the importance of preserving the stability of the whole region of Southeast Asia.⁵³² However, all these claims were rejected by the Security Council which, through Resolution 384, recognised the East Timorese's right to self-determination and called on all States to respect the territorial integrity of East Timor.⁵³³ Furthermore, Resolution 384 expressed concern over the loss of lives, condemned Indonesia's military intervention, demanded it to withdraw its troops and invited Portugal to resume its role as the administering power.⁵³⁴

On 22 of April 1976, before Indonesia's official annexation of East Timor, the Security Council passed another Resolution, i.e., Resolution 389, which reiterated most of the findings and demands of Resolution 384.⁵³⁵ However, one notable difference is that Resolution 389 did not expressly condemn Indonesia's use of force. The language was watered down from 'deploring the intervention of the armed forces of Indonesia in East Timor' to 'call[ing] upon the Government of Indonesia to withdraw without further delay all its forces from the territory', which is noticeably more friendly.⁵³⁶ These were the only two Resolutions passed by the SC in regard to this issue. After Resolution 389, the majority of the international community seemed to have accepted the fact that Indonesia's control of East Timor was necessary to maintain peace and stability.⁵³⁷ Consequently, East Timor would not again be on the SC's agenda for another 23 years.

The UN General Assembly too addressed the question of East Timor. First, on 12 December 1975, it passed Resolution 3485 which echoed SC Resolution 384 discussed above.⁵³⁸ In

⁵³¹ Ibid, para 69.

⁵³² Ibid.

⁵³³ The United Nations Security Council Resolution 384, S/RES/384 (1975).

⁵³⁴ Ibid.

⁵³⁵ The United Nations Security Council Resolution 389, S/RES/389 (1976).

⁵³⁶ The United Nations Security Council Resolution 384, S/RES/384 (1975) and 389, S/RES/389 (1976).

⁵³⁷ Richard Burchill, 'The ICJ Decision in the Case Concerning East Timor: The Illegal Use of Force Validated' [1997] 2 *Journal of Conflict and Security Law*, p. 2.

⁵³⁸ The United Nations General Assembly Resolution 3485 (XXX) (1975), A/RES/3485 (XXX).

December of the following year, the GA passed Resolution 31/53 reaffirming the inalienable right of the people of East Timor to self-determination and independence, and deploring Indonesia's refusal to comply with the provisions of GA Resolution 3485 as well as SC Resolutions 384 and 389.⁵³⁹ The voting on these two Resolutions by ASEAN states will be analysed in section 5.3.2 below. After these two pronouncements, the GA continued to adopt similar resolutions until 1982.

5.3.1 The Initial Reaction of ASEAN

In order to understand fully ASEAN's position in this crisis, it is important to take into account the history and nature of ASEAN. As discussed in Chapter 3, in the mid-1960s, Indonesia, Thailand, Malaysia, Singapore and the Philippines were all facing internal communist insurgencies. Against this background, these five States met in 1967 and agreed to create a platform which could be used to promote regional economic growth and stability, while at the same time defeating the threat of communism.⁵⁴⁰ During the first decade of ASEAN's existence, its members were mainly intent in learning how to work with one another towards achieving the common objectives of ASEAN.⁵⁴¹ As discussed in Chapter 3, it was only ten years later, in February of 1976, that ASEAN States adopted the legally-binding Treaty of

⁵³⁹ The United Nations General Assembly Resolution 31/53 (1976), A/RES/31/53.

⁵⁴⁰ Mohamad Faisol Keling, et al, 'The Development of ASEAN from Historical Approach' [2011] 7:7 *Asian Social Science*, p. 172.

⁵⁴¹ Address by Rodolfo C. Severino, Secretary-General of the Association of Southeast Asia Nations, at the International Law Conference on ASEAN Legal Systems and Regional Integration (2001), 'The ASEAN Way and the Rule of Law', https://asean.org/?static_post=the-asean-way-and-the-rule-of-law accessed on 28 March 2021.

Amity and Cooperation in Southeast Asia (TAC).⁵⁴² It is important to note that this happened shortly after Indonesia's invasion of East Timor.

The TAC essentially set out the fundamentals of the 'ASEAN Way', which, as discussed in Chapter 3, include mutual respect for each other's sovereignty, equality, territorial integrity, and national identity; freedom from external interference, subversion or coercion; renunciation of the threat or use of force; peaceful settlement of disputes and consensus decision-making.⁵⁴³ Having just signed a treaty which incorporated important State-centric principles within the ASEAN structure, it was unlikely that ASEAN States would take decisive action interfering in a member's internal affairs even though this member State had just violated the sovereignty of East Timor and essentially violated the principles of the ASEAN Way. In the name of unity and solidarity with its biggest founding member, ASEAN chose to ignore this fact.

As a result of this, ASEAN's collective response to the invasion of East Timor was very limited. In essence, the only relevant action was taken in 1976 when the ninth ASEAN Ministerial Meeting issued a Joint Communiqué concerning broadly with the organisation's political-security cooperation and external relations.⁵⁴⁴ The statement, carefully crafted to avoid offending Indonesia, is important because it showed ASEAN general acceptance of the justifications provided by Indonesia for taking control of East Timor.⁵⁴⁵ For example, for the sake of regional peace and security, the communiqué urged the UN to accept the assurances from Indonesia and the Provisional Government of East Timor that they would cooperate with the international community.⁵⁴⁶ In particular, ASEAN accepted the validity of Indonesia's claim to have intervened following the invitation of the 'Popular Representative Assembly',

⁵⁴² Joint Communiqué The First ASEAN Heads of Government Meeting Bali, 23-24 February 1976, https://asean.org/?static_post=joint-communique-the-first-asean-heads-of-government-meeting-bali-23-24-february-1976 accessed on 1 May 2021.

⁵⁴³ The Treaty of Amity and Cooperation in Southeast Asia (1976), Article 2.

⁵⁴⁴ Joint Communiqué of the Ninth ASEAN Ministerial Meeting (1976), para 23, <https://asean.org/?static_post=joint-communique-of-the-ninth-asean-ministerial-meeting-manila-24-26-june-1976> accessed on 1 May 2021.

⁵⁴⁵ Ibid.

⁵⁴⁶ Ibid.

without questioning whether the latter could lawfully represent the view of the people of East Timor. In doing so, the joint communique ignored the condemnation of Indonesia's military intervention included in SC Resolution 384 and the acts committed by the Indonesian armed forces that, according to various reports, amounted to crimes against humanity and war crimes. Finally, it is also telling that the ASEAN Summit, which, as discussed in Chapter 3, is the supreme body within the organisation, did not make any pronouncement on the crisis.

5.3.2 The Initial Reactions of ASEAN States

At the time, ASEAN consisted of Indonesia, Malaysia, the Philippines, Thailand and Singapore. In line with the ASEAN joint communique mentioned in the previous section, Malaysia, the Philippines, and Thailand showed solid support for Indonesia. In doing so, these States were mainly motivated by the fear that a communist East Timor would endanger the security of the region. In an attempt to sway the international community opinion on Indonesia and develop an alternative narrative, Malaysia, Thailand and the Philippines co-sponsored two draft resolutions which were introduced at the 30th session of the General Assembly in 1975.⁵⁴⁷ These two draft resolutions neither condemned nor referred to the use of force by Indonesia. In fact, they omitted any reference to the role played by Indonesia in the crisis.⁵⁴⁸ Furthermore, they downplayed the relevance of the declaration of independence issued by FRETILIN, suggesting that East Timorese were profoundly divided over their future. During the relevant

⁵⁴⁷ United Nations General Assembly (1975), 30th Session, 4th Committee, Trusteeship (including Non-Self-Governing Territories), 2180th Meeting, A/C.4/SR.2180, para 17-19, < <https://digitallibrary.un.org/record/1286696?ln=en>> accessed on 25 March 2021; and United Nations General Assembly (1975), 30th Session, Agenda item 88, 'Question of Territories under Portuguese Administration', Report of the Fourth Committee, A/10426, para 13, < <https://digitallibrary.un.org/record/1325687>> accessed on 26 March 2021.

⁵⁴⁸ Ibid.

discussions, the Philippines also referred to the need to prevent a ‘power vacuum’ in East Timor which ‘would threaten peace in the region’, and asserted that Indonesia had been invited by the East Timorese to intervene to their help.⁵⁴⁹ In place of these two drafts, the GA adopted Resolution 3485 by a vote of 69 to 11 with 38 abstentions. Thailand, Malaysia and the Philippines were amongst the 11 States that voted against.⁵⁵⁰ Contrary to the draft resolutions supported by the three ASEAN States, GA resolution 3485 reaffirmed the right of the East Timorese to self-determination and strongly deplored the military intervention by the armed forces of Indonesia.⁵⁵¹ This resolution also called upon Indonesia to desist further violation of the territorial integrity of Portuguese Timor and withdraw its forces. Finally, it urged the SC to take urgent actions.⁵⁵²

It is important to note that Thailand, Malaysia and the Philippines also subsequently voted against GA Resolution 31/53 which echoed Resolution 3485 in reaffirming the right of the East Timorese to self-determination and condemning Indonesia for its military intervention.⁵⁵³ Furthermore, this resolution also rejected the claim that East Timor had been annexed to Indonesia since the East Timorese were not given a chance to exercise their right to self-determination.⁵⁵⁴

Thailand also tried, unsuccessfully, to amend the text of GA Resolution 3485 mentioned above. In particular, it sought to introduce a reference to the need to consult Indonesia in order to find

⁵⁴⁹ The United Nations General Assembly (1975), 30th Session, 4th Committee, Trusteeship (including Non-Self-Governing Territories) 2188th Meeting, A/C.4/SR.2188, para 8-10, <<https://digitallibrary.un.org/record/1314879?ln=en>> accessed on 26 March 2021.

⁵⁵⁰ United Nations General Assembly (1975), 30th Session, 4th Committee, Trusteeship (including Non-Self-Governing Territories) 2188th Meeting, A/C.4/SR.2188, p. 412, <<https://digitallibrary.un.org/record/1314879?ln=en>> accessed on 26 March 2021.

⁵⁵¹ The United Nations General Assembly Resolution 3485 (XXX) (1975), A/RES/3485 (XXX).

⁵⁵² Ibid.

⁵⁵³ The United Nations General Assembly Resolution 31/53 (1976), A/RES/31/53; and United Nations General Assembly Voting Summary (1976), <<https://digitallibrary.un.org/record/649327?ln=en>> accessed on 25 March 2021.

⁵⁵⁴ The United Nations General Assembly Resolution 31/53 (1976), A/RES/31/53.

a suitable solution to the crisis.⁵⁵⁵ Further support to Indonesia was showed by Malaysia at a SC meeting convened on 15th of December 1975 to discuss the situation of East Timor. In its statement, Malaysia asserted that Indonesia had intervened following the invitation of the East Timorese and blamed FRETILIN and Portugal for the ‘lawlessness’ and violence.⁵⁵⁶

The only other ASEAN member State at the time, Singapore, was initially hesitant to show support for Indonesia. For example, while, as noted before, Malaysia, the Philippines and Thailand voted against GA Resolutions 3485 and 31/53, Singapore decided to abstain.⁵⁵⁷ Singapore feared that Indonesia’s forcible take-over of East Timor would set a bad precedent in the region, potentially encouraging future hostile regimes to take aggressive actions against a small State.⁵⁵⁸ Tan Boon Seng, the then Singapore’s Deputy Secretary of Ministry of Foreign Affairs, on 6 January 1976 affirmed that Indonesia should understand that Singapore was not prepared to automatically support its foreign policy at every sudden twists and turns.⁵⁵⁹ Needless to say, Indonesia resented Singapore’s hesitation, especially following its decision to abstain on GA Resolutions 3485 and 31/53.⁵⁶⁰ In retaliation, Indonesia sought to boycott Singaporean initiatives within ASEAN by rejecting the country’s promotion on the ASEAN Free Trade Area and excluding it from security and intelligence briefings.⁵⁶¹ As a result, Singapore gradually re-adjusted its position. From 1977 onwards, it started to vote against all GA Resolutions concerning East Timor that were critical of Indonesia.⁵⁶²

⁵⁵⁵ United Nations General Assembly (1975), 30th Session, 4th Committee, Trusteeship (including Non-Self-Governing Territories) 2187th Meeting, A/C.4/SR.2187, para 19, < <https://digitallibrary.un.org/record/1315886?ln=en>> accessed on 1 April 2021.

⁵⁵⁶ United Nations Security Council (1975), 1864th Meeting, S/PV.1864, para 152, < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/500/47/PDF/NL750047.pdf?OpenElement>> accessed on 26 March 2021.

⁵⁵⁷ United Nations General Assembly Voting Summary, <https://digitallibrary.un.org/record/650109?ln=en>; (1975) and <https://digitallibrary.un.org/record/649327?ln=en> (1976) accessed on 25 March 2021.

⁵⁵⁸ Laura Southgate, *ASEAN Resistance to Sovereignty Violation: Interests, Balancing and the Role of the Vanguard State* (Bristol University Press, 2019) p. 55.

⁵⁵⁹ Ibid.

⁵⁶⁰ Ibid., pp. 55-56.

⁵⁶¹ Ibid.

⁵⁶² Ibid.

In sum, one could say that ASEAN and ASEAN States chose to ignore the widespread human rights violations suffered by the East Timorese and instead chose to support Indonesia in the name of the Association's unity and solidarity and with a view to preserving regional cooperation, peace and stability.⁵⁶³

5.4 The 5 May Agreement

Western powers were not too concerned about the situation of East Timor because they largely shared Indonesia's ambition to combat communism. Accordingly, following Indonesia's annexation of East Timor, the issue had promptly vanished from the Security Council's radar. After absorbing East Timor as part of its territory, however, Indonesia governed the province violently, ultimately leading to civil unrest. One incident that stood out the most and caught the attention of Western audience was the Santa Cruz massacre that occurred in 1991. On 12 November 1991, a group of pro-independence East Timorese marched in the Santa Cruz cemetery. It was reported that a scuffle took place between small numbers of demonstrators and security forces, which led to two soldiers being stabbed.⁵⁶⁴ When the security forces reinforcements arrived, they opened fire and killed between 75-200 demonstrators.⁵⁶⁵

What was significant about this incident is the fact that it was caught on camera, thus widely exposing the brutality of the Indonesian troops.⁵⁶⁶ Consequently, many Western States reversed

⁵⁶³ Hiro Katsumata, 'Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the "ASEAN Way"' [2003] 25:1 *Contemporary Southeast Asia*, p. 114.

⁵⁶⁴ Human Rights Watch: Asia Watch, 'East Timor: The November 12 Massacre and its Aftermath' [1991] 3:26 *Human Rights Watch*, p. 2, <<https://www.hrw.org/legacy/reports/pdfs/i/indonesia/indonesi911.pdf>> accessed on 2 May 2021.

⁵⁶⁵ *Ibid.*, pp. 2-4.

⁵⁶⁶ Ali Alatas, *The Pebble in the Shoe: The Diplomatic Struggle for East Timor* (2006, Jakarta: Aksara Karunia) p. 239; and Katsumi Ishizuka, *The History of Peace-building in East Timor: The Issues of International Intervention* (Foundation Books, 2010) p. 23.

their initial neutral position, a change of approach which was also facilitated by the fact that, by then, the fight against communism had been won.⁵⁶⁷ For example, the Parliamentary Assembly for the Council of Europe condemned Indonesia's violent actions and demanded that it to withdraw its troops from East Timor allowing the people of East Timor to exercise their right to self-determination. The Assembly also called for 'an arms embargo to Indonesia and suspension of all military support for Indonesia.'⁵⁶⁸ The US Congress started to reduce its military aid to Indonesia and spearheaded action at the United Nations Commission of Human Rights to appoint a special rapporteur to 'assist in the resolution of the East Timorese conflict in pursuit of the right of self-determination by the East Timorese people'.⁵⁶⁹

Although these forms of external criticism placed some pressure on Indonesia, Suharto was still confident in his ability to maintain the control of East Timor. In 1997, however, the stock markets crashed across Southeast Asia, resulting in the depreciation of the Indonesian currency by 50 percent.⁵⁷⁰ This depreciation, along with mounting debts and rising unemployment resulted in widespread riots across Indonesia, ultimately leading to the resignation of Suharto and the appointment of B.J Habibie as new president in 1998.⁵⁷¹ When Habibie came into power, he inherited his predecessor's problem of a discredited regime that was in a fiscal crisis. Consequently, Indonesia's economy was entirely dependent on external Western donors. To secure foreign aid, Habibie was forced to make significant changes with regard to, among others, democracy and human rights issues.

Inevitably, this new circumstance brought the issue of East Timor back into the spotlight. Amidst the precarious political and financial climate, Habibie was unwilling to commit more

⁵⁶⁷ Katsumi Ishizuka, *The History of Peace-building in East Timor: The Issues of International Intervention* (2010, Foundation Books) p. 25.

⁵⁶⁸ Human Rights Watch: Asia Watch, 'East Timor: The November 12 Massacre and its Aftermath' [1991] 3:26 *Human Rights Watch*, p. 16, <<https://www.hrw.org/legacy/reports/pdfs/i/indonesia/indonesi911.pdf>> accessed on 2 May 2021.

⁵⁶⁹ *Ibid*, p. 17.

⁵⁷⁰ Katsumi Ishizuka, *The History of Peace-building in East Timor: The Issues of International Intervention* (2010, Foundation Books) p. 27.

⁵⁷¹ *Ibid*.

resources to East Timor, which began to be regarded as a burden. Accordingly, he began to negotiate with the UN and Portugal to broker a deal.⁵⁷² At first, in 1998 Habibie decided to offer East Timor only one option, namely a ‘special status’ within Indonesia which would give East Timor control over its own administration with the exception of defence and foreign policy.⁵⁷³ This proposal was rejected by the leaders of the resistance, who instead called for a referendum supervised by the UN.⁵⁷⁴ Then finally on the 5 May 1999, Indonesia and Portugal signed an agreement, witnessed by the UN Secretary Kofi Annan, to hold a referendum on the status of East Timor.⁵⁷⁵ The referendum question read as follows:

‘Do you accept the proposed special autonomy for East Timor within the Unitary State of the Republic of Indonesia? Or, do you reject the proposed special autonomy for East Timor, leading to East Timor’s separation from Indonesia?’⁵⁷⁶

Article 5 of this agreement stated that if the East Timorese voted for special autonomy, then the Indonesian government would implement the appropriate constitutional framework for East Timor. By contrast, if the East Timorese voted against this proposed autonomy, then the Indonesian government would terminate its control over East Timor and restore its status to that in place before the annexation of 1976.⁵⁷⁷

On 7 May 1999, the Security Council endorsed the terms of this agreement through Resolution 1236 and expressed its intention to establish a UN mission to assist in arranging the referendum.⁵⁷⁸ Following this, on 11 June, the SC adopted Resolution 1246 to officially

⁵⁷² Ibid., p. 28.

⁵⁷³ Ibid., p. 29.

⁵⁷⁴ ‘Resistance leader rejects East Timor offer’ (The BBC, 9 June 1998) <http://news.bbc.co.uk/1/hi/events/indonesia/latest_news/109595.stm> accessed on 22 March 2021.

⁵⁷⁵ The United Nations General Assembly, Report of the Secretary-General, ‘Question of East Timor’ (1999) S/1999/513.

⁵⁷⁶ Ibid, Annex II, B.

⁵⁷⁷ Ibid., Article 6.

⁵⁷⁸ The United Nations Security Council Resolution 1236 (1999), S/RES/1236.

establish the United Nations Mission in East Timor (UNAMET) to organise and conduct the popular consultation set for 8 August 1999.⁵⁷⁹

According to the UN-backed agreement, the Indonesian government, rather than UNAMET, carried the responsibility to maintain peace and security in preparation for the referendum.⁵⁸⁰ Thus, UNAMET's police officers only acted in an advisory capacity to the Indonesian Police, while UNAMET's military liaison officers were only authorised to merely maintain contact with the Indonesian armed forces.⁵⁸¹ Although this was not ideal, the UN saw this as a time-limited offer from Habibie. In particular, given that Indonesia's political climate was rather unstable, and a general election was approaching, this opportunity could be rescinded by the next leader.⁵⁸²

Despite the intense activities occurring at the international level, it is telling that ASEAN remained passive and silent. For example, there was no official reaction from any of the key ASEAN bodies during the negotiation phase or even after the Agreement was reached and subsequently endorsed by the SC. Two months after the 5 May Agreement was signed, on 24-25 July 1999, ASEAN held its annual foreign minister meeting (AMM). In the joint communiqué, ASEAN foreign ministers applauded its members' effort and progress in their regional economic and political cooperation.⁵⁸³ The foreign ministers also emphasised the importance of the TAC (as discussed above and in detail in Chapter 3) and its continued relevance as the basic framework for governing inter-state relations and maintaining regional peace and stability.⁵⁸⁴ It is also important that the foreign ministers expressed their concern

⁵⁷⁹ The United Nations Security Council Resolution 1246 (1999), S/RES/1246.

⁵⁸⁰ The United Nations General Assembly, Report of the Secretary-General, 'Question of East Timor' (1999), S/1999/513, Article 3.

⁵⁸¹ The United Nations Security Council Resolution 1246 (1999), S/RES/1246.

⁵⁸² Jennifer M. Welsh, *Humanitarian Intervention and International Relations* (Oxford University Press, 2003) p. 149.

⁵⁸³ Joint Communiqué of the 32nd ASEAN Ministerial Meeting (1999), < https://asean.org/?static_post=joint-communicue-the-32nd-asean-ministerial-meeting-amm-singapore-23-24-july-1999 > accessed on 3 April 2021.

⁵⁸⁴ Ibid., para 20.

about the humanitarian crisis occurring in Kosovo but did not refer at all to the situation in East Timor.⁵⁸⁵

Following this, ASEAN held its 3rd Informal Summit (the only one held in 1999) on 28 November. The Chairman's statement affirmed, generally, that the heads of ASEAN governments had a useful exchange of views on the current regional security and political developments.⁵⁸⁶ However, the statement did not specify which issues the members had discussed.

By contrast, in their individual capacities, Thailand, the Philippines, Malaysia and Singapore were actively involved in the negotiations. For example, Thailand provided its embassy in Lisbon for the Indonesian diplomats to negotiate with Portugal the modalities of the referendum.⁵⁸⁷ Furthermore, all four States joined the UN's 'Friends of the Secretary-General' group to convince Indonesia to accept the negotiation for the future of East Timor.⁵⁸⁸ Most importantly, all four States contributed to the personnel of UNAMET once it was established.⁵⁸⁹ It is important to note, however, that the conduct of ASEAN States did not equate to acts of intervention into Indonesia's internal affairs. In fact, as discussed earlier, Habibie had agreed to the course of action proposed by the UN, including the sending of a UN mission.

By this time, another five States had joined ASEAN, namely Cambodia, Laos, Brunei, Myanmar and Vietnam. None of these States, however, got directly involved in the negotiations for the 5 May Agreement, or contributed to UNAMET. Taking a rather neutral position, they did not object to these developments either.

⁵⁸⁵ Ibid., para 41.

⁵⁸⁶ Chairman's Press Statement on ASEAN 3rd Informal Summit (1999), para 5, <https://asean.org/?static_post=chairman-s-press-statement-on-asean-3rd-informal-summit-manila-philippines-28-november-1999> accessed on 4 April 2021.

⁵⁸⁷ Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan, 2012) p. 158.

⁵⁸⁸ Ibid.

⁵⁸⁹ Ian Martin Vice President and Alexander Mayer-Rieckh, 'The United Nations and East Timor: from self-determination to state-building' [2005] 12:1 *International Peacekeeping*, p. 130.

5.5 The Referendum

On the surface, it seemed that the situation in East Timor was gradually moving towards a positive and agreed solution. However, in the months leading up to the referendum there had been major obstacles for UNAMET to carry out its mandate. As mentioned earlier, the endorsement of the 5 May Agreement by the SC was rushed due to the fact that it was probably a time-limited opportunity because of Indonesia's internal political climate. Therefore, the SC unusually agreed to confer the responsibility to maintain peace and security in East Timor in preparation for the referendum solely on Indonesia, leaving an advisory role only to the officers of UNAMET.⁵⁹⁰ This would not have been a problem had the Indonesian armed forces, Tentara Nasional Indonesia (TNI), acted in good faith. Instead, the decision by Habibie to offer the choice of independence in the Agreement was seen by the TNI General Wiranto as a weak move by a civilian president who did not possess a wholehearted commitment to the maintenance of Indonesia's unity.⁵⁹¹ General Wiranto had an entirely different view of East Timor: while Habibie saw the referendum as an opportunity to save the country from the economic crisis, Wiranto saw it as a potential loss to Indonesia's territorial integrity.⁵⁹² Consequently, the TNI started to train and arm a pro-Jakarta militia on the ground, and subsequently launched a campaign of fear and intimidation in East Timor.⁵⁹³ Ian Martin, who was then head of UNAMET, had raised concerns about the violence perpetrated by the TNI, claiming that this affected the ability of UNAMET officers to implement the mandate of the

⁵⁹⁰ The United Nations Security Council Resolution 1246 (1999), S/RES/1246.

⁵⁹¹ Kirsten E. Schulze, 'The East Timor Referendum Crisis and Its Impact on Indonesian Politics' [2001] 24:1 *Studies in Conflict and Terrorism*, p. 78.

⁵⁹² *Ibid.*, p. 79.

⁵⁹³ Geoffrey Robinson, 'People's war: militias in East Timor and Indonesia' [2001] 9:3 *South East Asia Research*, p. 275.

mission.⁵⁹⁴ Therefore, Martin advised the UN Secretary-General to postpone the referendum. Annan agreed that this delay was necessary. Accordingly, the mandate of UNAMET was extended by SC Resolution 1257.⁵⁹⁵

Despite an intensification of the violence in the weeks leading up to the referendum, 451,792 people out of approximately 823,386 registered to vote and there was 98.9 percent turnout on the day itself.⁵⁹⁶ 21.5 percent voted for autonomy, while 78.5 percent voted for independence.⁵⁹⁷ This, in theory, should have ended the unsettled status of East Timor, leading to its independence. Instead, the aftermath of the referendum was the worst-case scenario possible: once Annan announced the result, mass violence was unleashed across the territory, primarily targeting the pro-independence faction.⁵⁹⁸

5.6 The Post-Referendum Crisis: Reactions from the International Community

A few days after announcing the result of the referendum, Annan held a press conference in which he described the situation in East Timor as descending into anarchy. He further stated that Indonesia had failed in its responsibility to maintain peace and security in East Timor, in violation of the terms of the 5 May Agreement.⁵⁹⁹ Annan also noted that TNI had failed to prevent the anti-independence militia from attacking UNAMET officers and its compound. In his view, Indonesia was either unable or unwilling to take effective steps to restore order.⁶⁰⁰

⁵⁹⁴ Jennifer M. Welsh, *Humanitarian Intervention and International Relations* (Oxford University Press, 2003) pp. 148-149.

⁵⁹⁵ The United Nations Security Council Resolution 1257 (1999); and Letter from the Secretary-General Addressed to the President of the Security Council (1999) S/1999/830.

⁵⁹⁶ The United Nations Press Release (1999), 'People of East Timor Reject Proposed Special Autonomy, Express Wish to Begin Transition to Independence, Secretary-General Informs Security Council', SG/SM/7119.

⁵⁹⁷ Ibid.

⁵⁹⁸ John Aglionby and John Gittings, 'Timor vote sparks brutal militia attack' (The Guardian, 5 September 1999) < <https://www.theguardian.com/world/1999/sep/05/indonesia.easttimor1> > accessed on 22 March 2021.

⁵⁹⁹ The United Nations Press Release (1999), Transcript of Press Conference of Secretary-General Kofi Annan at Headquarters, SG/SM/7124.

⁶⁰⁰ Ibid.

For this reason, Annan urged Habibie to accept the deployment of a UN peacekeeping mission and that if Habibie refused to do so then the TNI could not escape responsibility for crime against humanity.⁶⁰¹

On an important side note, during this press conference, Annan was asked if this situation could lead to another Kosovo. Annan answered that in this case the most concerned States were focused on putting collective pressure on Indonesia to consent to a peacekeeping force rather than contemplating military intervention.⁶⁰² This was reflected in the action taken by the SC, which sent a mission to Jakarta and Dili tasked with assessing the actual accounts of what was happening on the grounds through the UNAMET officers and to urge the Indonesian government to follow through with their 5 May Agreement by ensuring security in order to uphold the result of the referendum.⁶⁰³ This mission confirmed that there was a large gap between how Habibie presented the situation and what was actually happening. Habibie and General Wiranto had insisted that Indonesian armed forces could restore peace and security and outright rejected the possibility of international assistance.⁶⁰⁴ Accordingly, Habibie rejected any form of foreign military presence and said, ‘that would send the wrong signal to Indonesians regarding the military and risk the Balkanization of Indonesia’.⁶⁰⁵ Wiranto was even firmer stating that the pro-Indonesians were already angered by the presence of UNAMET and the introduction of external troops would only further increase the level of violence.⁶⁰⁶ Wiranto thought that a declaration of martial law would allow his forces to stabilise the situation.⁶⁰⁷ UNAMET officers portrayed a very different situation.⁶⁰⁸ They concluded that violence of that magnitude could not have happened without the backing of the TNI.⁶⁰⁹ Most

⁶⁰¹ Ibid.

⁶⁰² Ibid.

⁶⁰³ Report of the Security Council Mission to Jakarta and Dili, 8-12 September 1999(S/1999/976) p. 1.

⁶⁰⁴ Ibid., p. 3.

⁶⁰⁵ Ibid.

⁶⁰⁶ Ibid.

⁶⁰⁷ Ibid.

⁶⁰⁸ Ibid., p. 5.

⁶⁰⁹ Ibid., p. 6.

importantly, they concluded that there was strong prima facie evidence of abuses of international humanitarian law, as well as of widespread destruction, forced displacement and executions that amounted to crimes against humanity.⁶¹⁰ Because it was clear that Indonesia would not be able to carry out its responsibility agreed upon in the 5 May Agreement, this mission emphasised the need for an international force mandated by the UN. That atrocity crimes had been committed was further confirmed by other sources. For example, a report commissioned by the UN Office of the High Commissioner for Human Rights estimated that after the referendum 900 people were unlawfully killed and at least 400,000 fled their homes under extreme duress.⁶¹¹ Tragically, the East Timorese that did not flee quick enough were subjected to ‘extra-judicial killings, torture and ill-treatment, and sexual violence.’⁶¹²

Given the gravity of the situation, a number of States in the region had already expressed their willingness to participate in an international peacekeeping force. These States included not only Australia (who offered to lead the mission) and New Zealand, but also the Philippines and Malaysia.⁶¹³ This is important in R2P terms because it means that these two ASEAN countries were willing to help Indonesia to meet its responsibilities towards its population. At the same time, pressure was mounting on Habibie from the US government and international financial institutions. At first, the Bill Clinton’s administration approached this issue carefully by only insisting that the Habibie government should honour its commitments under the 5 May agreement.⁶¹⁴ The US’ position changed once Australia announced that it was willing to lead an international force in East Timor. Clinton then started to demand more insistently that

⁶¹⁰ Ibid., pp. 11-10.

⁶¹¹ Geoffrey Robinson, ‘East Timor 1999: Crimes against Humanity’: A Report commissioned by the United Nations Office of the High Commissioner for Human Rights (2003), pp. 6 and 52.

⁶¹² Ibid., pp. 32-35.

⁶¹³ The United Nations Press Release (1999), Transcript of Press Conference of Secretary-General Kofi Annan at Headquarters, SG/SM/7124.

⁶¹⁴ Marianne Jago, ‘InterFet: An Account of Intervention with Consent in East Timor’ [2010] 17:3 *International Peacekeeping*, p. 384.

Indonesia must ‘invite the international community to assist in restoring security’.⁶¹⁵ As the previous efforts proved to no avail, Clinton then moved to cut ties with Indonesia in terms of military aid programmes, special forces training programmes and financial assistance.⁶¹⁶ This prompted a response from both the International Monetary Fund and the World Bank, which coordinated a suspension of pending funds to Indonesia to increase pressure on the government. These moves were particularly effective because, as mentioned earlier, at that time Indonesia was affected by the Asian financial crisis, having experienced a significant devaluation of its currency. This meant that the Indonesia’s economy was heavily reliant on foreign assistance. Indonesia’s position started to change with the mounting pressures from Clinton and the international financial community.⁶¹⁷ However, although Habibie began to realise that agreeing to a peacekeeping force would be inevitable, he was still strongly opposed to Australia leading the mission since he was suspicious of the motives of the latter.⁶¹⁸ The then Thai Foreign Minister, Surin Pitsuwan, was instrumental in convincing Habibie that none of the ASEAN States alone had the capability to lead the multinational force, and that, under the circumstances, Australia was the State best prepared and most willing to do so.⁶¹⁹ Habibie then tasked Pitsuwan with rallying for contributions from individual ASEAN’s States. Even though none of them could lead the peacekeeping mission, Indonesia wanted a strong ASEAN presence in the latter in an attempt to minimise the central role that Australia would play in the mission.⁶²⁰ In fact, Wiranto is reported to have asked Surin to secure ‘overwhelming ASEAN

⁶¹⁵ ‘THE FATE OF EAST TIMOR; In Clinton’s Words: East Timor, Waco, Clemency Offer, and Other Issue’ (The New York Times, September 10, 1999) < <https://www.nytimes.com/1999/09/10/world/fate-east-timor-clinton-s-words-east-timor-waco-clemency-offer-other-issues.html>> accessed on 22 March 2021.

⁶¹⁶ Steven Mufson and Bradley Graham, ‘U.S. and IMF Move to Isolate Indonesia’ (Washington Post, September 10, 1999) < <https://www.washingtonpost.com/wp-srv/inatl/daily/sept99/ustimor10.htm?>> accessed on 22 March 2021.

⁶¹⁷ Ibid., p. 383.

⁶¹⁸ Ian Martin Vice President and Alexander Mayer-Rieckh, ‘The United Nations and East Timor: from self-determination to state-building’ [2005] 12:1 *International Peacekeeping*, p. 132.

⁶¹⁹ Alan Ryan, ‘Primary Responsibilities and Primary Risks’ Australian Defence Force Participation International Force East Timor’ [2000] 304 *Land Warfare Studies Centre*, p. 47.

⁶²⁰ Shaun Narine, ‘Humanitarian Intervention and the Question of Sovereignty: The Case of ASEAN’ [2005] 4:3-4 *Perspectives on Global Development and Technology*, p. 479.

forces' as part of an international mission to East Timor.⁶²¹ Hoping that this plan would work, on 12 September, Habibie informed Annan of Indonesia's readiness to accept an international peacekeeping force.⁶²² The next section will examine how ASEAN States responded to the post-referendum violence and how they contributed to persuade Habibie to consent to a UN peacekeeping force.

5.6.1 Reactions from ASEAN and ASEAN States

At that time, Thailand was arguably the most liberal among ASEAN States. Its government had a plan to lift the country 'to a higher ground of international morality, responsibility and credibility'.⁶²³ For example, Pitsuwan wanted to soften the principles of the ASEAN Way, especially the principle of non-interference. In 1997, he stated that it was time 'that ASEAN's cherished principle of non-intervention be modified to allow it to play a constructive role in preventing or resolving domestic issues with regional implications'.⁶²⁴ In line with this idea, in 1998 Pitsuwan proposed to other ASEAN members the concept of 'flexible engagement' which was also discussed in Chapter 4.⁶²⁵ Despite some support from the Philippines, this proposal was ultimately rejected. Nevertheless, it can be said that the concept of 'flexible engagement' informed Thailand's approach to the East Timor crisis. Pitsuwan was concerned that ASEAN would risk becoming irrelevant should it do nothing when faced by a crisis of such magnitude. If ASEAN States really wanted the region to be free from external interferences, he thought it

⁶²¹ Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan, 2012) p. 162.

⁶²² Report of the Security Council Mission to Jakarta and Dili, 8-12 September, S/1999/976, p. 4.

⁶²³ Jürgen Haacke, 'ASEAN's diplomatic and security culture: a constructivist assessment' [2003] 3 *International Relations of the Asia-Pacific Volume*, p. 68.

⁶²⁴ Amitav Acharya, *Whose Ideas Matter? Agency and Power in Asian Regionalism* (Cornell University Press, 2011) p. 127.

⁶²⁵ Eric Corthay, 'The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention' [2015] 17:2 *Asian-Pacific Law & Policy Journal*, p. 16.

was time to ‘put ... words into actions’.⁶²⁶ With respect to providing international assistance to Indonesia, Pitsuwan further noted that ASEAN States’ contribution to the UN peacekeeping mission would also benefit ASEAN.⁶²⁷ That said, Thailand’s engagement with the crisis was not really guided by humanitarian concerns, nor was it aimed at stopping atrocity crimes in East Timor; rather, it was aimed at supporting a ‘friend in need’.⁶²⁸ In fact, it is important to stress that Thailand never criticised Habibie or the TNI.

Like Thailand, Malaysia was one of the first countries to offer to contribute to the UN peacekeeping force, even before Habibie had consented to it.⁶²⁹ At first, Mohamad Mahathir, the then Prime Minister of Malaysia, criticised the West for having placed too much pressure on Habibie to offer the referendum to the East Timorese when Indonesia was already coping with a change in leadership, was in the process of changing its system to a democracy and was facing a serious financial crisis.⁶³⁰ However, once the violence massively escalated after the referendum, Malaysia became worried of the spill-over effect that this could have on the whole region, including the large number of refugees who had already started to flee to its territory.⁶³¹ This is what motivated Malaysia’s involvement in the crisis, and not a genuine concern about war crimes and crimes against humanity occurring in East Timor. In trying to persuade Habibie to accept UN peacekeeping, Malaysia made references to the shared values underpinning ASEAN by claiming that, as neighbours, ASEAN States understand each other better.⁶³² Although Malaysia recognised that none of the ASEAN members had the capability to lead the

⁶²⁶ Jürgen Haacke, ‘ASEAN’s diplomatic and security culture: a constructivist assessment’ [2003] 3 *International Relations of the Asia-Pacific* Volume, p. 67.

⁶²⁷ Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan, 2012) p. 170.

⁶²⁸ *Ibid.*, p. 169.

⁶²⁹ The United Nations Press Release (1999), Transcript of Press Conference of Secretary-General Kofi Annan at Headquarters, SG/SM/7124.

⁶³⁰ ‘Press Conference by Prime Minister of Malaysia’ (United Nations Press Release, 29 September 1999) <<https://www.un.org/press/en/1999/19990929.malaysia.doc.html>> accessed on 30 March 2021.

⁶³¹ Lee Jones, ‘ASEAN’s unchanged melody? The theory and practice of ‘non-interference’ in Southeast Asia’ [2010] 23:4 *The Pacific Review*, p. 493.

⁶³² Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan, 2012) p. 176.

UN force, it agreed that the latter should at least have ‘a large ASEAN presence’.⁶³³ As stated by the Malaysian Deputy Prime Minister at the time, Abullah Ahmad Badawi,

‘We don’t wish to see any country appointing itself the protector or leader for this region. Asian countries are capable of looking after the region themselves and cherish peace for the region more than others’⁶³⁴

The next country to consider is the Philippines. As mentioned earlier, when Pitsuwan introduced the concept of ‘flexible engagement’ to ASEAN, all other members rejected it with the exception of the Philippines.⁶³⁵ The latter found the concept to be constructive in that it would allow neighbours to approach situations of local crisis without being accused of interfering with another country’s internal affairs. That said, just like Thailand, the Philippines were not prepared to go further than that by, for example, calling for a more relaxed interpretation of the principle of State sovereignty. This can be seen, for example, in the position taken by the Philippines during a meeting of the Security Council focusing on East Timor at the time when it acted as an elected member of that body. On that occasion, the Philippines commended the effort of the Indonesian government to make the 5 May agreement happen, while it never criticised Indonesia for the violence in East Timor.⁶³⁶ Thus, the Philippines stated, vaguely, that it was ‘important that the violent groups and individuals who continue to sow terror and mayhem in the territory be stopped immediately’.⁶³⁷ Manila did offer contributions to the UN peacekeeping mission even before Habibti had consented to it.

⁶³³ Ibid.

⁶³⁴ Quoted in Jürgen Haacke, ‘ASEAN’s diplomatic and security culture: a constructivist assessment’ [2003] 3 *International Relations of the Asia-Pacific Volume*, p. 70.

⁶³⁵ Eric Corthay, ‘The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention’ [2015] 17:2 *Asian-Pacific Law & Policy Journal*, p. 16.

⁶³⁶ United Nations Security Council (1999), 4043rd Meeting ‘The situation in East Timor’, S/PV.4043, p. 20.

⁶³⁷ Ibid.

However, it saw this as a friendly and peaceful offer aimed at assisting rather than punishing Indonesia.⁶³⁸

The internal political climate in the Philippines must also be taken into account in order to better understand its position. At the time, Manila was constrained by its own battle with separatist movements in Mindanao. In particular, the insurgency movement in Mindanao had resumed its fight for independence and demanded the UN organise a referendum as it did in East Timor.⁶³⁹ Given that Suharto had supported Manila's efforts in suppressing this separatist movement, Manila felt that it should equally support Indonesia with regard to the situation in East Timor.⁶⁴⁰

As it happened in the aftermath of the invasion, Singapore was the only ASEAN State which was hesitant to publicly declare its support for Indonesia in the post-referendum phase. Singapore's scepticism was mainly driven by the concerns that the crisis in East Timor would have 'spill-over' effects on the region and, most importantly, on Singapore's economy.⁶⁴¹ At that time, Singapore was still recovering from the Asian financial crisis of 1997, and this recovery depended on the maintenance of regional stability. Immediately after the violence, during a special meeting of the Security Council on East Timor, Singapore pointed out that Indonesia's decision to hold the referendum in East Timor had been premature since it was done without having obtained a national consensus on the matter.⁶⁴² Singapore might have been referring to the fact that the TNI was not on board with the decision to grant the East Timorese the referendum. Furthermore, Singapore indirectly called out the TNI's involvement by stating that 'the rogue elements in the army and police said to be among those responsible for the

⁶³⁸ The United Nations Press Release (1999), Transcript of Press Conference of Secretary-General Kofi Annan at Headquarters, SG/SM/7124.

⁶³⁹ Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan, 2012) p. 172.

⁶⁴⁰ Ibid.

⁶⁴¹ Ibid., p. 174.

⁶⁴² United Nations Security Council (1999), 4043rd Meeting 'The situation in East Timor', S/PV.4043 (Resumption), p. 20.

violence must be stopped'.⁶⁴³ It also called for the result of the popular consultation to be respected. At the same time, Singapore reminded the international community that the East Timor crisis fell under Indonesia's sovereignty and that any international efforts to contribute to restore order should obtain both Indonesia's consent and SC's authorisation.⁶⁴⁴ In a sense, then, Singapore's position was quite ambiguous. While being critical of Jakarta, it called for the respect of Indonesia's sovereignty. To add to this complex position, Singapore refrained from demanding a large ASEAN contribution to the UN peacekeeping mission. According to its then UN Ambassador, ASEAN as an organisation lacked the practical capabilities required to restore order in East Timor.⁶⁴⁵ As such, since Indonesia personally asked for individual contributions from ASEAN States, Singapore could not ignore it so blatantly, as showed in its contributions of personnel in the peacekeeping force below. When the UN peacekeeping mission was established, the ASEAN presence was significant. On September 1999, SC Resolution 1264 established the International Force East Timor (INTERFET) under Chapter VII of the UN Charter.⁶⁴⁶ Out of the total 9900 personnel in INTERFET, Thailand provided 1580 personnel, both military and civilian, followed by the Philippines with 600 civilian personnel, Singapore with 254 military and civilian staff, and finally Malaysia with 30 civilian personnel.⁶⁴⁷

Finally, the response to the post-referendum crisis from Cambodia, Laos, Myanmar, Vietnam and Brunei can be examined collectively given that each of these States showed strong solidarity to Indonesia, which derived from the concern about setting a dangerous precedent in the region by allowing foreign intervention to tame a local internal conflict.⁶⁴⁸ For example,

⁶⁴³ Ibid.

⁶⁴⁴ Ibid.

⁶⁴⁵ Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan, 2012) p. 174.

⁶⁴⁶ The United Nations Security Council Resolution 1264 (1999), S/RES/1264, p. 2.

⁶⁴⁷ Laura Southgate, *ASEAN Resistance to Sovereignty Violation: Interests, Balancing and the Role of the Vanguard State* (Bristol University Press, 2019) p. 145.

⁶⁴⁸ Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (Palgrave Macmillan, 2012) p. 166.

during the 4043rd Meeting of the SC, Vietnam called on all parties to respect the 5 May Agreement and applauded the Indonesian government for its efforts to restore peace and security in East Timor.⁶⁴⁹ It also stressed that the deployment of a multinational force needed to have the consent of the Indonesian government and Security Council's approval.⁶⁵⁰ Although Vietnam declined the request to contribute to the UN peacekeeping force, it did not do so due to a lack of will. Instead, Vietnam referred more generally to its lack of experience in sending military personnel to UN peacekeeping missions.⁶⁵¹

The position of Cambodia can also be discerned by its statements at the SC 4043rd meeting mentioned above. After noting that it was already undergoing a complex process of transition and change, it commended Indonesia for its decision to give the East Timorese a referendum.⁶⁵² Furthermore, in a rather non-offensive way, Cambodia urged the Indonesian authorities to take steps to halt the violence and achieve the implementation of the 5 May Agreement in conjunction with the UN.⁶⁵³ As to the peacekeeping force, Cambodia declined any involvement by referring to its internal poverty and weaknesses.⁶⁵⁴

Like Cambodia, Laos commended Indonesia on agreeing to hold the referendum and for its efforts to face up to its 5 May Agreement commitments through the SC 4043rd meeting.⁶⁵⁵ Laos stated that in these difficult circumstances, Indonesia had done its best to resolve the situation.⁶⁵⁶ Laos ended its statement by suggesting that the international community should

⁶⁴⁹ United Nations Security Council (1999), 4043rd Meeting 'The situation in East Timor', S/PV.4043 (Resumption), p. 17.

⁶⁵⁰ Ibid.

⁶⁵¹ Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (2012, Palgrave Macmillan) p. 167.

⁶⁵² United Nations Security Council (1999), 4043rd Meeting 'The situation in East Timor', S/PV.4043 (Resumption), p. 5.

⁶⁵³ Ibid.

⁶⁵⁴ Lee Jones, *ASEAN, Sovereignty and Intervention in Southeast Asia* (2012, Palgrave Macmillan) p. 168.

⁶⁵⁵ United Nations Security Council (1999), 4043rd Meeting 'The situation in East Timor', S/PV.4043 (Resumption), p. 9.

⁶⁵⁶ Ibid.

let Indonesia shoulder its responsibilities and that any other initiatives going forward to resolve this problem would require the consent of Indonesia.⁶⁵⁷

On 13 September 1999, a spokesman for the Myanmar government noted that this crisis should not set a precedent for allowing external intervention into a State's internal affairs.⁶⁵⁸ Myanmar also pointed out that ASEAN had not taken any coordinated decision as to whether ASEAN States should contribute to a UN peacekeeping force into East Timor.⁶⁵⁹ As the decision to do so had been taken individually by some States, Myanmar did not feel under any obligation to contribute. This attitude can also be seen as Myanmar's Junta sympathising with Indonesia as it has faced many criticisms and condemnations from the international community in the past for it to hold a democratic national election.⁶⁶⁰

Brunei did not formally comment on the crisis, nor did it take any public action worthy of mention.

It is clear from this discussion that ASEAN States largely acted in solidarity with Indonesia. While individual responses were nuanced, all States refrained from taking an antagonist approach towards Indonesia. At the same time, their general support for and willingness to contribute to a consensual UN peacekeeping mission can be said to have contributed to Habibie's decision to give his consent to this external form of (non-coercive) intervention.⁶⁶¹ While this suggests that some States were willing to provide international assistance to Indonesia, there is very little to suggest that they were motivated by humanitarian concerns. Instead, they were mainly concerned about the spill-over effects of the crisis and its effects on regional stability.

⁶⁵⁷ Ibid.

⁶⁵⁸ 'Myanmar Solidarity with Indonesia "Brothers"' (AFP, 13 September 1999) <<https://www.burmalibrary.org/reg.burma/archives/199909/msg00559.html>> accessed on 30 March 2021.

⁶⁵⁹ Ibid.

⁶⁶⁰ Moe Gyo, 'East Timor and Burmese Democracy' [1999] 7:8 *The Irrawaddy*, <https://www2.irrawaddy.com/article.php?art_id=1653&page=1> accessed on 30 March 2021.

⁶⁶¹ Report of the Security Council Mission to Jakarta and Dili, 8-12 September, S/1999/976, p. 4.

5.7 Conclusion

The analysis developed in this chapter has shown that during the East Timor crisis ASEAN did not take any substantive action. The only exception was a Joint Communiqué issued by ASEAN Foreign Ministers' Meeting in June 1976 that, rather than criticising it, effectively accepted Indonesia's weak justifications for the invasion of East Timor. In the name of solidarity with its biggest founding member, ASEAN conveniently chose to ignore the humanitarian dimension of the crisis. ASEAN's silence becomes even more problematic when one considers that both the SC and GA had condemned Indonesia and that a Security Council mission to East Timor had reported that war crimes and crimes against humanity had been committed by the TNI and/or TNI-sponsored militia against the East Timorese.

At the time of the invasion, ASEAN was composed of only 5 members: Indonesia, Thailand, the Philippines, Malaysia, and Singapore. With the exception of Singapore, which initially showed some discomfort in openly supporting the Indonesian conduct, all of ASEAN States stood in solidarity with Indonesia. When the crisis entered a different stage, namely the escalation of violence after the 30 August 1999 referendum leading to accusations of atrocity crimes these States were again careful not to criticise Indonesia. However, when Annan called for Habibie to consent to an international peacekeeping force, Thailand, Malaysia, Singapore and the Philippines urged Indonesia to accept a UN mission. In addition, they all offered to contribute to this international peacekeeping force. These efforts, however, were hardly motivated by humanitarian considerations. Firstly, these States were mainly concerned about the spill-over effects of this crisis on the region's stability. Second, their offers to take part in the UN mission followed a request by Indonesia to have a large ASEAN presence in the

peacekeeping force. They were not, therefore, acting on the basis of a commitment to values such as human protection, nor were they willing to impose external views on Indonesia.

The responses of the other members that joined ASEAN at a later stage were quite different. Cambodia, Laos, Myanmar, Vietnam and Brunei were less interested than the other ASEAN States in playing a more direct role in this crisis, mainly due to geographical reasons. Thus, these five States refrained not only from condemning Indonesia but also from urging it to consent to a peacekeeping mission.

The analysis developed in this chapter has shown how ASEAN and ASEAN States responded to a humanitarian crisis before the introduction of R2P in the realm of international law. The next chapter will examine the current Rohingya crisis in Myanmar with a view to establishing whether ASEAN States' cautious endorsement of R2P since 2005 has had any effect on their approach to atrocity crimes situations.

Chapter 6

ASEAN and the Rohingya Crisis

6.1 Introduction

This chapter will analyse the Association of Southeast Asian Nations (ASEAN) and its States' response to Myanmar's violent crackdown on the Rohingya minority living in Rakhine State from 2016 onwards. What has often been referred to as the 'Rohingya crisis' has a deep-rooted historical background with various violent episodes occurring for over half a century.⁶⁶² This crisis resembles the concept of 'intractable conflict', that is, a conflict perceived as being about essential goals, for example territory, self-determination, or religious freedom, which are fundamental for a group's survival and existence.⁶⁶³ Because these goals are typically in direct contradiction with another group's ambitions, intractable conflicts tend to result in a large loss of lives and destruction. The numbers of the Rohingya crisis are in line with this description. According to the 2018 report of the independent fact-finding mission on Myanmar established by the UN Human Rights Council, the estimated number of deaths, until then, was over 10,000.⁶⁶⁴ In addition, it has been estimated that, as of the summer of 2019, 740,000 Rohingya refugees had reached Bangladesh, 95,644 Thailand, 170,460 Malaysia and 800 Indonesia.⁶⁶⁵

⁶⁶² Multiple articles both academics and non-academics have referred to this situation as the Rohingya crisis, including by Jobair Alam, 'The Current Rohingya Crisis in Myanmar in Historical Perspective' [2019] 39:1 *Journal of Muslim Minority Affairs*; Eleanor Albert and Lindsay Maizland, 'The Rohingya Crisis' (Council on Foreign Relations, 23 January 2020) < <https://www.cfr.org/backgrounder/rohingya-crisis> > accessed on 3 May 2021; and Reuters, < <https://www.reuters.com/article/us-myanmar-rohingya-timeline-idUSKBN25H03Y> > accessed on 7 April 2021. Anthony Ware & Costas Laoutides, 'Myanmar's 'Rohingya' Conflict: Misconceptions and Complexity' [2019] 50:1 *Asian Affairs*, p. 72.

⁶⁶³ Daniel Bar-Tal, *Intractable Conflicts: Socio-Psychological Foundations and Dynamics* (2013, Cambridge University Press) p. 37.

⁶⁶⁴ Report of the international independent fact-finding mission on Myanmar (2018) A/HRC/39/64, (IV) 4(a).

⁶⁶⁵ Adam Bemma, 'Rohingya refugee voices amplify across Southeast Asia' (The Jakarta Post, 8 July 2019) < <https://www.thejakartapost.com/life/2019/07/08/rohingya-refugee-voices-amplify-across-southeast-asia.html> > accessed 5 June 2020.

As will be discussed in this Chapter, the UN fact-finding mission on Myanmar concluded that genocide, crimes against humanity and war crimes have been committed in Rakhine State.⁶⁶⁶

Contrary to the case of East Timor, this humanitarian crisis unfolded after the emergence of R2P in the realm of international law. As discussed in Chapter 2, the commission of any of the three crimes mentioned above could in principle trigger a responsibility to protect (R2P) response by the international community. This is particularly important considering that, as shown in Chapter 4, the majority of ASEAN States have conceptually endorsed, if cautiously, Pillar I and II of R2P. Pillar II, in particular, requires the intervention of the international community to assist a State which is failing in its responsibility to protect its population. In this context, an organisation like ASEAN could play a relevant role in providing external assistance.

With all this in mind, this chapter will examine whether, and if so, how, ASEAN, collectively, and ASEAN States, individually, took any concrete action aimed at protecting the Rohingya inspired by the principles underpinning R2P. The chapter is divided into five sections. The first section will introduce the historical background of the Rohingya humanitarian crisis. The second section will discuss, more specifically, the events of the current crisis starting from the 2016 wave of violence. The third section will examine the international community's reaction to this crisis, while the fourth section will focus on the response of ASEAN and ASEAN States. The last section of the chapter will draw some final conclusions.

⁶⁶⁶ United Nations Human Rights Council, 'Report of the international independent fact-finding mission on Myanmar' (2018) A/HRC/39/64, Section VI.

6.2 Background of the Crisis

The Rohingya is a Muslim ethnic group who predominantly resides in Rakhine State, which is located on the Western coast of Myanmar. The Rohingya consider themselves as indigenous to Rakhine State, and date their presence there to ancient times. According to Anthony Ware and Costas Laoutides, the arrival of the Rohingya in Rakhine preceded the arrival of the ethnic Rakhine and the British between the sixth and fourteenth centuries in various waves.⁶⁶⁷ However, the Burmese majority and the ethnic Rakhine (both Buddhists) argue that the arrival of the Muslim population only came during the colonial era, starting from 1862 when Myanmar became part of British India, thus highlighting a first (temporal) level of complexity surrounding this crisis.⁶⁶⁸ Under colonial rule, there was an increase of migration into Myanmar consisting of traders, labours and entrepreneurs, who were mostly Chinese, Indians (Hindus and Muslims).⁶⁶⁹ This was encouraged by the British.⁶⁷⁰ Furthermore, to their convenience, the British employed the policy of Divide and Rule that divided the governance of Myanmar into two: the Ministerial Burma (inhabited by the Burmese Buddhist majority and ruled by the British) and the Peripheral Regions (inhabited mostly by the Muslim minorities and ruled by their own chosen leaders).⁶⁷¹ This preferential treatment for the Muslim minorities over the Buddhists majorities (Burmese and ethnic Rakhine) fuelled the mistrust and hatred from the latter.⁶⁷² The Buddhists felt threatened by the Muslim minorities by the fact that they had to compete for economic resources and territory. This environment persisted until the arrival of the Japanese troops in 1942 during World War II, which only exacerbated the existing tensions.

⁶⁶⁷ Anthony Ware & Costas Laoutides, *Myanmar's 'Rohingya Conflict'* (Hurst & Company, 2018) pp. 78-79.

⁶⁶⁸ Jobair Alam, 'The Current Rohingya Crisis in Myanmar in Historical Perspective' [2019] 39:1 *Journal of Muslim Minority Affairs*, p. 3.

⁶⁶⁹ Martin Smith, 'The Muslim Rohingya of Burma' [1995] Conference Paper at the Burma Centrum Netherlands, p. 5, < <http://www.netipr.org/policy/downloads/19951211-Rohingyas-of-Burma-by-Martin-Smith.pdf> > accessed on 2 April 2021.

⁶⁷⁰ Jobair Alam, 'The Current Rohingya Crisis in Myanmar in Historical Perspective' [2019] 39:1 *Journal of Muslim Minority Affairs*, p. 3.

⁶⁷¹ These Muslim minorities included the Rohingya and Indian Muslims.

⁶⁷² Jobair Alam, 'The Current Rohingya Crisis in Myanmar in Historical Perspective' [2019] 39:1 *Journal of Muslim Minority Affairs*, p. 6.

The Burmese Buddhist majority took this opportunity to join forces with the Japanese to push the British out of Myanmar, while the Rohingya Muslims remained loyal to the British.⁶⁷³ The British mobilised the Rohingya volunteers, mostly for intelligence and guerrilla operations, with the promise that they would be given a form of partial independence or a ‘Muslim national area’ free from Burmese rule.⁶⁷⁴ The fact that the Rohingya cooperated with the British, however, was seen by the Buddhists as a form of betrayal.⁶⁷⁵ Three years after, the Burmese switched side to join forces with the British in exchange for early independence.⁶⁷⁶ Once the British made this separate alliance with the Burmese, they swiftly abandoned their original promise to the Rohingya. This led to a short revolt by the Rohingya, who petitioned to include the northern Rakhine State into what was then East Pakistan (today’s Bangladesh).⁶⁷⁷ Since the Buddhists had already seen the Rohingya’s initial cooperation with the British as a betrayal, this further attempt to secede from Myanmar and join Bangladesh made things worse. According to the Buddhist majority, this attempt to join another country proved that the Rohingya was not a *taing-yin-tha* (which translates as being indigenous to the territory) because a *taing-yin-tha* would never attempt to secede from the motherland.⁶⁷⁸ This perspective carries a considerable significance to our understanding of the crisis because it would be later used as reasoning behind the institutional discrimination against the Rohingya.

6.2.1 Myanmar Independence

⁶⁷³ Anthony Ware & Costas Laoutides, *Myanmar’s ‘Rohingya Conflict’* (Hurst & Company, 2018), p. 14.

⁶⁷⁴ A.F.K Jilani, *A Cultural History of Rohingya* (Dhaka: Ahmed Jilani, 2001) p. 89.

⁶⁷⁵ Ibid.

⁶⁷⁶ Jobair Alam, ‘The Current Rohingya Crisis in Myanmar in Historical Perspective’ [2019] 39:1 *Journal of Muslim Minority Affairs*, p. 5.

⁶⁷⁷ Anthony Ware & Costas Laoutides, *Myanmar’s ‘Rohingya Conflict’* (Hurst & Company, 2018), p. 101

⁶⁷⁸ Ibid, pp. 94 and 101.

In 1948, Myanmar was officially declared as an independent sovereign State free from colonial rule (then known as the Union of Burma). Under U Nu, the first Prime Minister of Myanmar, the Rohingya enjoyed political inclusion and were recognised as a *taing-yin-tha*. For example, in the first Constituent Assembly Elections in 1947, the Rohingya were allowed to vote.⁶⁷⁹ Furthermore, while the first Constitution of Myanmar, which was written under British rule in 1947, did not explicitly mention the Rohingya by name, it set out a framework that allowed the Rohingya to qualify as citizens. In particular, Section 11(iii) of the constitution stated that every person born or of parents who had been alive during the commencement of this constitution would be recognised as a citizen of the Union.⁶⁸⁰ Furthermore, Section 11(iv) stated that:

‘Every person who was born in any of the territories which at the time of his birth was included within His Majesty’s dominions and who has resided in any of the territories included within the Union for a period of not less than eight years in the ten years immediately preceding the date of the commencement of this constitution or immediately preceding the 1st January 1942 and who intends to reside permanently’⁶⁸¹

More importantly, Myanmar did not institutionally differentiate between an indigenous race or a citizen given that Section 10 of the Constitution established only one type of citizenship throughout the Union.⁶⁸² Against this institutional background, it is telling that, in 1954, U Nu referred to the Rohingya by name in a public speech stating that ‘The people living in Buthidaung and Maungdaw Townships are Rohingya, ethnic of Burma’.⁶⁸³

⁶⁷⁹ Jobair Alam, ‘The Current Rohingya Crisis in Myanmar in Historical Perspective’ [2019] 39:1 *Journal of Muslim Minority Affairs*, p. 8.

⁶⁸⁰ The Constitution of the Union of Burma, 1947, Chapter II, Section 11 (iii), <<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/79573/85699/F1436085708/MMR79573.pdf>> accessed on 3 May 2021.

⁶⁸¹ Ibid, Section 11 (iv).

⁶⁸² Ibid, Section 10.

⁶⁸³ Jobair Alam, ‘The Current Rohingya Crisis in Myanmar in Historical Perspective’ [2019] 39:1 *Journal of Muslim Minority Affairs*, p. 8; and refer to the footnote in the article.

6.2.2 The 1962 Coup

Unfortunately, hopes for further political inclusion of the Rohingya proved to be short-lived. The Burmese Socialist Programme led by General Ne Win, which took power following a coup on 2 March 1962, had a very different vision for Myanmar, namely one inspired by the idea of ‘Burman Unity’.⁶⁸⁴ According to the latter, all the diverse ethnic groups of Myanmar may be different in culture, language or traditions but are in essence members of a single family of races with a common historical origin.⁶⁸⁵ Under Ne Win, the definition of *taing-yin-tha* had also changed to include only those who had permanently settled in Myanmar before the British arrived.⁶⁸⁶ Ne Win further securitised and politicised the concept of *taing-yin-tha*, demonising all those groups which were not regarded as indigenous, especially the Muslims.⁶⁸⁷ Ne Win capitalised on the fact that, as discussed above, Muslims joined forces with the British against the Burmese during World War II and had attempted to secede from Myanmar. At the same time, he conveniently ignored the fact that there are differences in the Muslims minorities and that the Rohingya, specifically, had been in Rakhine State for centuries before the British had arrived. He argued that, because all Muslims migration only began during the colonial era, they could not be considered as *taing-yin-tha*.⁶⁸⁸ Instead, they were categorised as Bengali (considered as illegal immigrants from Bangladesh), posing a threat to Myanmar’s security and sovereignty.⁶⁸⁹

As a result of this mindset, Ne Win started to pursue a ruthless policy of exclusion and discrimination against the Rohingya. He began with the nationalisation of businesses across

⁶⁸⁴ Anthony Ware & Costas Laoutides, *Myanmar’s ‘Rohingya Conflict’* (Hurst & Company, 2018) p. 103; and Nick Cheesman, ‘How in Myanmar “National Races” Came to Surpass Citizenship and exclude Rohingya’ [2017] 47:3 *Journal of Contemporary Asia*, p. 466.

⁶⁸⁵ Ibid., p. 118; and Ibid., p. 465.

⁶⁸⁶ Anthony Ware & Costas Laoutides, *Myanmar’s ‘Rohingya Conflict’* (Hurst & Company, 2018) p. 22.

⁶⁸⁷ Nick Cheesman, ‘How in Myanmar “National Races” Came to Surpass Citizenship and exclude Rohingya’ [2017] 47:3 *Journal of Contemporary Asia*, p. 467

⁶⁸⁸ Anthony Ware & Costas Laoutides, *Myanmar’s ‘Rohingya Conflict’* (Hurst & Company, 2018) p. 124.

⁶⁸⁹ Ibid., p. 125; and Eleanor Albert and Lindsay Maizland, ‘The Rohingya Crisis’ (Council on Foreign Relations, 23 January 2020) < <https://www.cfr.org/backgrounder/rohingya-crisis> > accessed on 3 May 2021.

the whole economy, which aimed at marginalising the non-*taing-yin-tha*, including all Chinese, Indians, and Muslims.⁶⁹⁰ Then, in 1978, the Tatmadaw, that is, the Burmese army, launched a violent widescale census operation known as Operation Nagamin, which was intended to clear out all illegal immigrants.⁶⁹¹ Those involved in this operation were initially meant to simply check for individuals' documents but eventually engaged in violent acts such as rape, torture, and murder, as well as in the destruction of mosques, homes, and properties.⁶⁹² This operation failed to recognise the fact that the Rohingya, as a Muslim minority, had been in Rakhine State before the British arrival. Instead, the Tatmadaw treated them as illegal immigrants.

Gradually, restrictive policies were introduced to make it harder for the Rohingya to join any civil service, and to prevent them from joining the armed forces.⁶⁹³ The final step of this campaign consisted of the passing of the 1982 Citizenship Law, which is still in force today. According to this Law, there are three categories of citizenship in Myanmar: full citizenship, associate citizenship and naturalised citizenship. Under this law, the power to grant any type of citizenship is given to the 'Central Body', which is composed of the Ministers of Home Affairs, Defence and Foreign Affairs, all enjoying complete discretion over the process.⁶⁹⁴ First, to qualify as a full citizen, a person needs to be of an ethnicity recognised as *taing-yin-tha*, that is to say, belonging to an ethnic group who has settled in Myanmar from a period anterior to '1185 B.E., 1823 A.D' as their permanent home.⁶⁹⁵ This singles out the Rohingya from constitutional recognition because after 1962 the State has refused to acknowledge the Rohingya's presence in Rakhine State before the arrival of the British. Secondly, associate

⁶⁹⁰ Anthony Ware & Costas Laoutides, *Myanmar's 'Rohingya Conflict'* (Hurst & Company, 2018) p. 16.

⁶⁹¹ Martin Smith, 'The Muslim Rohingya of Burma' [1995] Conference Paper at the Burma Centrum Netherlands, pp. 9-10 < <http://www.netipr.org/policy/downloads/19951211-Rohingyas-of-Burma-by-Martin-Smith.pdf>> accessed on 2 April 2021.

⁶⁹² Ibid.

⁶⁹³ Jobair Alam, 'The Current Rohingya Crisis in Myanmar in Historical Perspective' [2019] 39:1 *Journal of Muslim Minority Affairs*, pp. 8-9.

⁶⁹⁴ Burma Citizenship Law (1982), Chapter VI, < <https://www.refworld.org/docid/3ae6b4f71b.html>> accessed 5 May 2021.

⁶⁹⁵ Ibid., Chapter II, Section 3.

citizenship is recognized to those who had applied for citizenship under the 1948 Union Citizenship Act or have an ongoing application.⁶⁹⁶ According to Amnesty International, when the 1948 Union Citizenship Act was passed, most of the Rohingya were either unaware of this Act or did not understand the significance of it. Their failure to apply for citizenship under this Act made them ineligible to later apply for associate citizenship under the 1982 Law.⁶⁹⁷ The few who sought to apply for associate citizenship faced other challenges, such as, for example, the inability to provide original ID documents due to the latter having been destroyed during the census Operation Nagamin that was mentioned above.⁶⁹⁸

Finally, the criteria that one must meet in order to obtain naturalised citizenship include: (1) being able to speak well one of the national languages, (2) be of good character, and (3) be of sound mind.⁶⁹⁹ These provisions are quite vague. For example, the law does not provide any information as to what would constitute a good character or a sound mind. As a result of this, the Central Body mentioned above has been entrusted to confer citizenship certificates enjoys full discretion in determining who meets or does not meet those criteria.⁷⁰⁰ Another problem related to this route for obtaining citizenship is that it would imply that the Rohingya are foreigners, whereas prior to 1962 they were recognised as *taing-yin-tha*.⁷⁰¹ Put simply, the legal framework set up by the Citizenship law prevents the Rohingya from being recognised as citizens as well as *taing-yin-tha*, thereby rendering them stateless.

Since the days of Ne Win's rule, the Rohingya's predicament has only continued to worsen. As a result of years of pent-up animosity and distrust between the Rohingya and the Buddhists,

⁶⁹⁶ Ibid., Chapter III.

⁶⁹⁷ Amnesty International, 'Myanmar: The Rohingya Minority: Fundamental Rights Denied' (2004) ASA 16/005/2004, p. 9, < <https://www.amnesty.org/download/Documents/92000/asa160052004en.pdf>> accessed on 8 April 2021.

⁶⁹⁸ Md. Mahbubul Haque, 'Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma' [2017] 37:4 *Journal of Muslim Minority Affairs*, p. 458.

⁶⁹⁹ Burma Citizenship Law (1982), Chapter IV, Section 44 < <http://un-act.org/publication/view/myanmars-citizenship-law-1982/>> accessed 15 May 2020.

⁷⁰⁰ Md. Mahbubul Haque, 'Rohingya Ethnic Muslim Minority and the 1982 Citizenship Law in Burma' [2017] 37:4 *Journal of Muslim Minority Affairs*, p. 458.

⁷⁰¹ Ibid.

a large wave of violence broke out in Rakhine State in 2012. Although this 2012 wave is not the focus of this chapter, it would later lead to the main events of the 2016, and, for this reason, it will be briefly discussed below.

6.2.3 The 2012 Violence

According to Human Rights Watch, this wave of violence began on 28 May 2012 with the rape and murder of Thida Htwe, an ethnic Rakhine woman, in Ramri in southern Rakhine State, allegedly committed by three Muslim men.⁷⁰² The State media and the ethnic Rakhines were quick to demonise the ‘Bengali’ (Rohingya) for this heinous crime, which sparked the long-simmering communal tension between the two ethnic groups.⁷⁰³ In the following days, the level of violence steadily intensified. A Rakhine mob attacked and killed 10 Rohingya men, (who had no connection to the murder and rape of Thida Htwe) travelling by bus in a nearby town of Toungup.⁷⁰⁴ In retaliation, thousands of Rohingya rioted, destroyed properties and killed an unknown number of ethnic Rakhine.⁷⁰⁵ The violence then quickly spread across Rakhine State, forcing President Thein Sein to declare a state of emergency. Crucially, the Tatmadaw was instructed to deploy troops to towns under curfew, but not before 98 people had been killed, 123 injured and 5,338 homes had been destroyed.⁷⁰⁶ In these statistics, the number of Rohingya

⁷⁰² Human Rights Watch, “‘The Government Could Have Stopped This’: Sectarian Violence and Ensuing Abuses in Burma’s Arakan State’ [2012] p. 18.

⁷⁰³ ‘Bengali’ is used by the Burmese majority as a derogatory term to refer to the Rohingya as illegal immigrants; see Flavia Krause-Jackson and Daniel Ten Kate, ‘Myanmar Rape-Murder Sparks Outrage Over Abuse of Muslims’ (Bloomberg, 31 August 2012) < <https://www.bloomberg.com/news/articles/2012-08-31/myanmar-rape-murder-sparks-outrage-over-abuse-of-muslims>> accessed on 2 April 2021; and Shafiur Rahman, ‘Myanmar’s ‘Rohingya’ vs ‘Bengali’ Hate Speech Debate (The Diplomat, 21 December 2019) < <https://thediplomat.com/2019/12/myanmars-rohingya-vs-bengali-hate-speech-debate/>> accessed on 2 April 2021.

⁷⁰⁴ Human Rights Watch, “‘The Government Could Have Stopped This’: Sectarian Violence and Ensuing Abuses in Burma’s Arakan State’ [2012] p. 18.

⁷⁰⁵ ‘Final Report of Inquiry Commission on Sectarian Violence in Rakhine State’ [8 July 2013] Republic Of the Union of Myanmar, p. 9, <https://www.burmalibrary.org/docs15/Rakhine_Commission_Report-en-red.pdf> accessed on 3 May 2021.

⁷⁰⁶ Ibid., p. 19.

killed and injured, as well as Rohingya's homes destroyed were a lot higher than in the ethnic Rakhine community.⁷⁰⁷ The deployment of the Tatmadaw was supposed to keep order but, according to Human Rights Watch, it ended up favouring the ethnic Rakhine, for example standing by or joining in when the latter burned down Rohingya's homes.⁷⁰⁸

6.3 The 2016 Wave of Violence

According to some estimates, in September 2015 the number of internally displaced persons, across 68 camps, was 143,514, most of whom were Rohingya.⁷⁰⁹ The latter had to live under dire conditions without proper shelters and adequate health care and with limited access to food and clean water.⁷¹⁰ At the same time, those in Rakhine State faced an even worse reality, as, in addition to poor living conditions, they also experienced arbitrary arrests, extrajudicial killings, as well as physical and sexual assaults.⁷¹¹

Against this background, on 9 October 2016, several hundred local armed Muslim men launched simultaneous attacks on three Border Guard Police (BGP) posts in Maungdaw and Rathedaung townships, located near the north-western border with Bangladesh.⁷¹² These attacks were claimed by the Arakan Rohingya Salvation Army (ARSA), which had been

⁷⁰⁷ Ibid., p. 20; With 66 deaths, 72 injured and 4188 homes destroyed in the Rohingya community comparing to 32 deaths, 51 injured and 1150 homes destroyed in the ethnic Rakhine community.

⁷⁰⁸ Also, through this wave of atrocities, Thein Sein's government refused to acknowledge the Rohingya as *taing-yin-tha*; see Human Rights Watch, 'Burma: Government Forces Targeting Rohingya Muslims' (Human Rights Watch, 31 July 2012) <<https://www.hrw.org/news/2012/07/31/burma-government-forces-targeting-rohingya-muslims>> accessed on 17 April 2021.

⁷⁰⁹ 'Disenfranchisement and Desperation in Myanmar's Rakhine State: Drivers of a Regional Crisis' (ASEAN Parliamentarians for Human Rights, October 2015) pp. 3 and 7, <https://reliefweb.int/sites/reliefweb.int/files/resources/APHR_Rakhine-State-Report.pdf> accessed on 2 April 2021.

⁷¹⁰ Ibid., pp. 14-15.

⁷¹¹ Ibid., p. 7.

⁷¹² 'Myanmar: A New Muslim Insurgency in Rakhine State' [2016] 283 *International Crisis Group, Asia Group Report*, p. 6.

created to fight for Rohingya freedom against the government's discrimination and persecution.⁷¹³ According to an International Crisis Group report, these attacks resulted in the deaths of nine police officers and eight attackers. At the same time, the rest made off with 62 firearms and more than 10000 rounds of ammunition.⁷¹⁴ The clashes between the ARSA and the BGP lasted until the 12 October, when ARSA launched a violent campaign to take over the north-western State.⁷¹⁵ ARSA claimed responsibility for many violent attacks through a series of videos that called for other Rohingya to join the Jihad to liberate northern Rakhine State, while also appealing for foreign support, weapons and fighters.⁷¹⁶ The videos explicitly stated that ARSA's objectives were to stop the persecution of the Rohingya and secure their rights and greater freedom as citizens of Myanmar and not to impose Sharia law onto others.⁷¹⁷

In response to these violent attacks and challenges to the unity of Myanmar, the Tatmadaw along with the BGP launched a major counter-operation aimed at recovering the looted weapons and arrest those involved in the attacks.⁷¹⁸ To achieve its goal, the Tatmadaw engaged in clearance operations that quickly descended into chaos with the burning of properties, shooting suspects on sight, seizures, destruction of food stocks, and rape of women and girls.⁷¹⁹ It is estimated that between 9 October and 2 December, over 20.000 Rohingya fled to Bangladesh to escape these atrocities.⁷²⁰ At the same time, the Tatmadaw started to arm and encourage the establishment of a non-Muslim local militia.⁷²¹ The conflict further escalated following a series of attacks using improvised explosive device on government forces in the

⁷¹³ Ibid., p. 14.

⁷¹⁴ Ibid., p. 6.

⁷¹⁵ Anthony Ware & Costas Laoutides, *Myanmar's 'Rohingya Conflict'* (2018, Hurst & Company) p. 50.

⁷¹⁶ Ibid.

⁷¹⁷ 'Myanmar: A New Muslim Insurgency in Rakhine State' [2016] 283 *International Crisis Group, Asia Group Report*, p. 14.

⁷¹⁸ Ibid., p. 6.

⁷¹⁹ Ibid.

⁷²⁰ Adam Withnall, 'Burma: 21,000 Rohingya Muslims Flee to Bangladesh amid 'attempted genocide'' (The Independent, 6 December 2016) <<https://www.independent.co.uk/news/world/asia/burma-21000-rohingya-muslims-flee-bangladesh-attempted-genocide-a7458091.html>> accessed on 2 April 2021.

⁷²¹ 'Myanmar: A New Muslim Insurgency in Rakhine State' [2016] 283 *International Crisis Group, Asia Group Report*, p. 8.

area. In response, the Tatmadaw deployed more ground troops and started using attack helicopters.⁷²² The Tatmadaw claimed that it was conducting lawful military operations against Islamic terrorist groups.⁷²³ The same position would be taken later by State Counsellor Aung San Suu Kyi when she represented Myanmar before the International Court of Justice (ICJ). In that context, she affirmed that the accusations of ‘inter-communal violence’ had been exaggerated and mis-constructed, and that the Tatmadaw had only acted to neutralise a terrorist threat against Myanmar.⁷²⁴

However, news stories of mass killings, rape, destruction of food and water sources, and villages continued to emerge.⁷²⁵ The 2018 report of the Independent International Fact-Finding Mission on Myanmar set up by the UN Human Rights Council was unambiguous in this regard. Based on the information gathered, this mission found that ‘crimes including murder, imprisonment, enforced disappearance, torture, rape, sexual slavery and other forms of sexual violence, persecution and enslavement’ had been committed by the Tatmadaw as part of widespread and systematic attacks on the Rohingya civilian population.⁷²⁶ Crucially, the fact-finding mission concluded that war crimes and crimes against humanity had been committed in Rakhine State and that there were sufficient evidence and information to warrant the prosecution of Tatmadaw senior officials for the crime of genocide too.⁷²⁷ All this clearly

⁷²² Ibid, p. 10.

⁷²³ Statement by Statement by Ambassador U Hau Do Suan, Permanent Representative of Myanmar to the United Nations at the United Nations High-level Conference of Heads of Counter-Terrorism Agencies of Member States (28-29 June 2018) <<https://www.un.org/counterterrorism/ctitf/sites/www.un.org.counterterrorism.ctitf/files/S2-Myanmar.pdf>> accessed on 18 March 2021.

⁷²⁴ Marlise Simons and Hannah Beech, ‘Aung San Suu Kyi Defends Myanmar Against Rohingya Genocide Accusations’ (The New York Times, 23 January 2020) <<https://www.nytimes.com/2019/12/11/world/asia/aung-san-suu-kyi-rohingya-myanmar-genocide-hague.html>> accessed on 18 March 2021.

⁷²⁵ ‘Hundreds of Rohingyas’ killed in Myanmar Crackdown’ (Al Jazeera, 3 February 2017) <<https://www.aljazeera.com/news/2017/02/rohingyas-killed-myanmar-crackdown-170203101817841.html>> accessed on 18 March 2021.

⁷²⁶ United Nations Human Rights Council, ‘Report of the international independent fact-finding mission on Myanmar’ (2018) A/HRC/39/64, Section VI.

⁷²⁷ Ibid.

suggests that a mass atrocity situation had materialised and that a R2P response should have been conceived.

6.4 The Reactions of the International Community

This section will examine the reaction of the international community to this crisis. While special attention will be paid to the actions taken by a number of UN bodies, the response of the Organisation of Islamic Cooperation will also be considered. This will provide a useful context within which to discuss, later, the positions taken by ASEAN and ASEAN States.

The first UN body that will be discussed is the Human Rights Council. As mentioned earlier, the Council set up, through resolution 34/22 of 24 March 2017, a Fact-Finding Mission with the task of establishing the facts and circumstances of the alleged human rights violations by the military and security forces in Rakhine State.⁷²⁸ In a subsequent resolution, passed in December 2017, the Council expressed concern over the reports of systematic mass human rights violations carried out by the Myanmar security forces, further noting that these atrocities were likely to constitute crimes against humanity.⁷²⁹ It is important to highlight that, although these two resolutions did not directly invoke R2P, they did use R2P language by stressing that States have the primary responsibility for the respect and protection of human rights and by calling upon both international and regional actors to assist Myanmar.⁷³⁰

Further evidence of the international concern surrounding this crisis comes from the action taken by the United Nations General Assembly (GA). In response to the 2016 violence, the GA adopted three Resolutions: 72/248 (24 December 2017), 73/264 (22 December 2018) and 74/246 (27 December 2019). These resolutions condemned the ARSA attacks on the BGP posts

⁷²⁸ The United Nations Human Rights Council Resolution 34/22 (2017), A/HRC/RES/34/22, p. 11.

⁷²⁹ The United Nations Human Rights Council Resolution S-27/1 (2017), A/HRC/RES/ S-27/1, p. 2.

⁷³⁰ The United Nations Human Rights Council Resolution 34/22 (2017), A/HRC/RES/34/22, p. 2; and The United Nations Human Rights Council Resolution S-27/1 (2017), A/HRC/RES/ S-27/1, p. 1.

and expressed concern about the scale of abuses and discrimination in Rakhine State, calling for the end of the military operations.⁷³¹ Furthermore, the GA echoed the Human Rights Council's concern for the Rohingya's statelessness due to the enactment of the 1982 Citizenship Law (discussed above) and also urged the Myanmar government to implement the recommendations of the Advisory Commission on Rakhine State.⁷³² The GA also condemned the human rights violations set out in the report of the UN Fact-Finding Mission that was mentioned before.⁷³³ Finally, the GA encouraged the international community, including ASEAN, to provide assistance to Myanmar in the fulfilment of its international human rights commitments.⁷³⁴

Compared to those of the Human Rights Council and the General Assembly, the response of the UN Security Council (SC) was quite timid. Three months after the second phase of violence, on 6 November 2017, the SC released a presidential statement, instead of a resolution, condemning the ARSA's attacks on the BGP posts and expressing grave concern over the reports of human rights violations and abuses taking place in the Rakhine State.⁷³⁵ While condemning the violence, the SC reaffirmed its commitment to the sovereignty, political independence and territorial integrity of Myanmar. Furthermore, using typical R2P Pillar I language, the SC stressed 'the primary responsibility of the Government of Myanmar to protect its population including through respect for the rule of law and respect, promotion and protection of human rights'.⁷³⁶ In addition, the SC also called upon the government to take all necessary measures to counter incitement to violence or hatred, and restore peace and inter-communal harmony through peaceful dialogue.⁷³⁷

⁷³¹ The United Nations General Assembly Resolution 72/248 (2017), A/RES/72/248, pp. 2-3.

⁷³² Ibid., pp. 1(n) and 3.

⁷³³ The United Nations General Assembly Resolution 73/264 (2018), A/RES/73/264, pp. 2 and 4.

⁷³⁴ The United Nations General Assembly Resolution 74/246 (2019), A/RES/74/246, p. 8.

⁷³⁵ Statement by the President of the Security Council (2017) S/PRST/2017/22, <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_prst_2017_22.pdf> accessed on 18 March 2021.

⁷³⁶ Ibid.

⁷³⁷ Ibid.

The fact that the Security Council released a presidential statement rather than passing a resolution is *per se* very important. This means that the five permanent members of the Council (P-5) could not agree on the text of a resolution. In fact, it was reported that China and Russia consistently blocked any attempt to pass a resolution that would condemn Myanmar.⁷³⁸ Myanmar's protection at the SC comes to a large extent from its special relationship with China. Following the imposition of international sanctions against Myanmar in the 1980s, China became the Tatmadaw's primary supplier of military hardware, and, in return, Myanmar started to supply China with raw materials for the Chinese market.⁷³⁹ This was not the first time that Beijing, which promotes a rigid interpretation of the principles of sovereignty and non-intervention, protected Myanmar at the Security Council.⁷⁴⁰ The position of China matters because although the latter is not a member of ASEAN, it does have a special relationship with this regional organisation and has strong links with individual member States.⁷⁴¹ As a regional great power, therefore, China can contribute to shape the approach of ASEAN States to questions concerning human protection, sovereignty and non-intervention.

6.4.1. The Organisation of Islamic Cooperation

The Organisation of Islamic Cooperation (OIC) is the second-largest international organisation after the UN. It is made up of 57 Muslim States and aims to protect the interests of Muslims

⁷³⁸ 'China, Russia block U.N council concern about Myanmar violence' (Reuters, 17 March 2017) < <https://www.reuters.com/article/us-myanmar-rohingya-un-idUSKBN16O2J6>> accessed on 2 April 2021.

⁷³⁹ Tin Maung Maung Than, 'MYANMAR AND CHINA: A Special Relationship?' [2003] *Southeast Asian Affairs*, pp. 198-200.

⁷⁴⁰ Mauro Barelli, 'Preventing and Responding to Atrocity Crimes: China, Sovereignty and the Responsibility to Protect' [2018] 23:2 *Journal of Conflict & Security Law*, pp. 177 and 197.

⁷⁴¹ Among other things, China became a signatory of the Treaty of Amity and Cooperation in Southeast Asia (TAC) in 2003; 'Accession to the Treaty of Amity and Cooperation in Southeast Asia by China' (ASEAN, 1 October 2003) < <https://asean.org/accession-to-the-treaty-of-amity-and-cooperation-in-southeast-asia-by-china/>> accessed on 8 April 2021.

all over the world.⁷⁴² Because of its large membership that spans over four continents, the OIC can be a powerful player in the international arena. For this thesis, the position of the OIC towards the Rohingya crisis is particularly relevant because three ASEAN States are also members of the OIC, namely Indonesia, Malaysia and Brunei.

The OIC has been very critical of the Myanmar government. For example, in September 2017, it released a declaration expressing deep concern over the systematic brutal acts perpetrated by the security forces in Rakhine State, claiming that the situation had reached the level of ethnic cleansing.⁷⁴³ The Declaration called upon the Myanmar government to stop all violence against the Rohingya and to stop the ‘continuous attempts to obliterate their Islamic culture and identity’.⁷⁴⁴ The Declaration also requested that its members consider restricting economic relations and suspending trade agreements with Myanmar until the government ensures the safe return of the IDPs and refugees, and ceased violence and persecution against the Rohingya.⁷⁴⁵

Subsequent resolutions adopted in 2018 welcomed the UN Human Rights Council’s decision to constitute a fact-finding mission and criticised Myanmar’s lack of cooperation with this mission.⁷⁴⁶ Furthermore, the OIC backed one of its members, The Gambia, in lodging an

⁷⁴² Organisation of Islamic Cooperation, < https://www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en > accessed on 2 April 2021.

⁷⁴³ Organisation of Islamic Cooperation, Declaration of the Contact Group on Rohingya Muslims of Myanmar (2017) Section 2, < https://www.oic-oci.org/upload/documents/acm_2017_rohingya_rep_en.pdf > accessed on 2 April 2021; and Organisation of Islamic Cooperation Resolutions on Muslim Communities and Muslim Minorities in the Non-OIC Member States Adopted to the 45th Session of the Council of Foreign Ministers (2018) Resolution No.4/45-MM, p. 14.

⁷⁴⁴ Organisation of Islamic Cooperation, Declaration of the Contact Group on Rohingya Muslims of Myanmar (2017) Section 5, < https://www.oic-oci.org/upload/documents/acm_2017_rohingya_rep_en.pdf > accessed on 2 April 2021.

⁷⁴⁵ Ibid., Section 21.

⁷⁴⁶ The Organisation of Islamic Cooperation Resolutions on Muslim Communities and Muslim Minorities in the Non-OIC Member States Adopted to the 45th Session of the Council of Foreign Ministers (2018) Resolution No.4/45-MM, p. 15.

application with the ICJ against Myanmar for violations of the Genocide Convention (which is a form of measure of Pillar III of R2P).⁷⁴⁷

6.5 The Reaction of ASEAN

The first part of this chapter has highlighted several important points. First, a humanitarian crisis unfolded in Rakhine State. Second, Myanmar was accused by various parties, including UN organs, of having committed atrocity crimes. Third, various international bodies highlighted the gravity of the situation and called for international action, including action by ASEAN.⁷⁴⁸ That said, as discussed before, the United Nations was not in a position to take effective R2P action. Due to internal dynamics, the Security Council could not take steps under Pillar III, while Myanmar's refusal to receive international support made Pillar II measures unviable. As was discussed in Chapter 1, under these circumstances regional organisations could play an important role in addressing atrocity crimes situations. Accordingly, this section will examine ASEAN's response to the crisis.

To begin with, ASEAN's response to the 2012 violence was quite timid. For example, both a foreign ministers' statement issued on 17 August and a chairman's statement following the 21st ASEAN Summit on 18 November affirmed ASEAN's support for the democratisation process taking place in Myanmar, and expressed ASEAN's readiness, upon the request of the latter, to

⁷⁴⁷ 'Questions and Answers on Gambia's Genocide Case Against Myanmar before the International Court of Justice' (Human Rights Watch, 5 December 2019) < <https://www.hrw.org/news/2019/12/05/questions-and-answers-gambias-genocide-case-against-myanmar-international-court> > accessed on 18 March 2021.

⁷⁴⁸ For example, the 2018 Report of the Independent International Fact-Finding Mission on Myanmar urged ASEAN to develop strategies to ensure the accountabilities for perpetrators of the crimes committed amongst other suggestions; see United Nations Human Rights Council, Report of the international independent fact-finding mission on Myanmar (2018) A/HRC/39/64, Section IX (115).

provide humanitarian assistance in Rakhine State.⁷⁴⁹ Crucially, these pronouncements did not make any reference to the persecution of the Rohingya, nor did they call upon the Myanmar government to stop the ongoing violence. More importantly, pleasing the Myanmar government, they did not use the term ‘Rohingya’.

As discussed above, the 2012 wave of violence was less severe compared to the 2016 wave. However, ASEAN’s overall approach to the crisis did not change following the escalation of violence and human rights violations. The 30th ASEAN Summit, which took place in April 2017, was the first to be held after the eruption of violence in late-2016. Remarkably, the chairman’s statement did not refer to the situation in Rakhine State at all. The only indirect reference that was made to the crisis was expressed in the following terms:

‘We reaffirmed our commitment to addressing the irregular movement of persons in the region. We reiterated the need to explore the establishment of a Task Force to respond to crisis and emergency situations rising from irregular movement of persons in Southeast Asia’⁷⁵⁰

However, the cause of these ‘irregular movements of persons’ was not mentioned. It is telling, instead, that the statement reaffirmed the principles of the Treaty of Amity and Cooperation in Southeast Asia (TAC), namely mutual respect for State sovereignty, non-interference, and non-use or threat of force that govern inter-state relations in the region.⁷⁵¹ This early failure to address the humanitarian crisis was not an isolated one. On future occasions, ASEAN

⁷⁴⁹ ‘Statement of ASEAN Foreign Ministers on the Recent Developments in the Rakhine State, Myanmar’ (2012) <<https://www.asean.org/wp-content/uploads/images/archive/documents/Statement%20of%20ASEAN%20FM%20on%20Recent%20Developments%20in%20the%20Rakhine%20State.pdf>> accessed on 2 April 2021; and Chairman’s Statement of the 21st ASEAN Summit (2012) para 55, <<https://www.asean.org/wp-content/uploads/images/documents/Chairman's%20Statement%20of%20the%2021st%20ASEAN%20Summit.pdf>> accessed on 2 April 2021.

⁷⁵⁰ Chairman’s Statement of the 30th ASEAN Summit (2017) para 30, <https://asean.org/wp-content/uploads/2017/04/Chairman-Statement-of-30th-ASEAN-Summit_FINAL.pdf> accessed on 2 April 2021.

⁷⁵¹ Ibid., para 18 and 19.

continued to avoid referring to the situation in Rakhine State as a humanitarian crisis and calling upon Myanmar to duly protect its population.⁷⁵²

Things, however, changed following the launch of the Tatmadaw's clearing operations in response to the ARSA's attack in August 2017. After meeting with the members' foreign ministers on 24 September 2017, ASEAN's chairman released a statement on the situation in Rakhine State. This was the first time in ASEAN history that a chairman's statement explicitly addressed a member's internal affairs. Although this was in some respect a significant development, a closer look at the language used in the statement tells a different story. The statement, for example, did not refer to the Rohingya by name. It raised concerns about the recent developments in Rakhine State, condemning the attacks against the Myanmar security forces and all other acts of violence that resulted in the loss of lives, destruction of properties and displacement of people.⁷⁵³ Furthermore, it referred to the situation in Rakhine State as a complex inter-communal issue with deep historical roots, urging all parties to avoid actions that would worsen the situation on the ground.⁷⁵⁴ Finally, the statement affirmed ASEAN's support to the government's efforts to bring peace and stability in Rakhine State.⁷⁵⁵ The same position was expressed in the official statements which followed the two 2018 Summits,⁷⁵⁶ the

⁷⁵² For example, on 5 August 2017, the Joint Communique of the 50th ASEAN Foreign Ministers' Meeting (AMM), simply referred to a commitment to address the 'influx of irregular movement of persons in Southeast Asia' without actually discussing the atrocities in Rakhine State; see Joint Communique of the 50th ASEAN Foreign Ministers' Meeting, "Partnering for Change, Engaging the World", Para 34, < https://asean.org/storage/2017/08/Joint-Communique-of-the-50th-AMM_FINAL.pdf> accessed on 17 April 2021.

⁷⁵³ ASEAN Chairman's Statement on the Humanitarian Situation in Rakhine State (2017) < <https://asean.org/wp-content/uploads/2017/09/1.ASEAN-Chairmans-Statement-on-the-Rakhine.pdf> > accessed on 2 April 2021.

⁷⁵⁴ Ibid.

⁷⁵⁵ Ibid.

⁷⁵⁶ Chairman's Statement of the 32nd ASEAN Summit (2018), para 17, < <https://asean.org/wp-content/uploads/2018/04/Chairmans-Statement-of-the-32nd-ASEAN-Summit.pdf>> accessed on 2 April 2021; and Chairman's Statement of the 33rd ASEAN Summit (2018) para 37, < https://asean.org/storage/2018/11/33rd_ASEAN_Summit_Chairman_s_Statement_Final.pdf> accessed on 2 April 2021.

two 2019 Summits,⁷⁵⁷ and the two 2020 Summits.⁷⁵⁸ The Joint Communiqué released on the occasion of ASEAN Foreign Ministers' Meetings (AMM) in 2018,⁷⁵⁹ 2019,⁷⁶⁰ and 2020⁷⁶¹ reaffirmed the same points.

In essence, ASEAN did not show any humanitarian concern about the situation of the Rohingya. It did not use any R2P-based language and did not take any concrete action aimed at addressing the crisis. These official pronouncements could have at least acknowledged Myanmar's primary responsibility to protect its population given that, as discussed in Chapter 4, all ASEAN States had endorsed the Pillar I of R2P back in 2005. Furthermore, although the references to ASEAN's commitment to support the government's effort to bring peace and stability in Rakhine State resembled the language typical of Pillar II, these promises seemed more like a friendly encouragement rather than a concrete commitment to assist.

6.6 The Reactions of ASEAN States

The following section will provide an analysis of individual States' responses to this humanitarian crisis. As will be shown, there are important differences in the way in which ASEAN States approached this crisis.

⁷⁵⁷ Chairman's Statement of the 34th ASEAN Summit (2019), para 43, < https://asean.org/storage/2019/06/Final_Chairs-Statement-of-the-34th-ASEAN-Summit-rev.pdf> accessed on 2 April 2021; and Chairman's Statement of the 35th ASEAN Summit (2019), para 37-38, < <https://asean.org/storage/2019/11/Chairs-Statement-of-the-35th-ASEAN-Summit-FINAL.pdf>> accessed on 2 April 2021.

⁷⁵⁸ Chairman's Statement on the 36th ASEAN Summit (2020), para 54, < <https://asean.org/storage/2020/06/Chairman-Statement-of-the-36th-ASEAN-Summit-FINAL.pdf>> accessed on 4 April 2021; and Chairman's Statement on the 37th ASEAN Summit (2020), para 75, < <https://asean.org/storage/43-Chairmans-Statement-of-37th-ASEAN-Summit-FINAL.pdf>> accessed on 4 April 2021.

⁷⁵⁹ Joint Communiqué of the 51st ASEAN Foreign Ministers' Meeting (2018) para 56, < <https://asean.org/wp-content/uploads/2018/08/51st-AMM-Joint-Communique-Final.pdf>> accessed on 2 April 2021.

⁷⁶⁰ Joint Communiqué of the 52nd ASEAN Foreign Ministers' Meeting (2019), para 63-64, < <https://asean.org/storage/2019/07/CIRCULATE-Joint-Communique-of-the-52nd-AMM-FINAL.pdf>> accessed on 4 April 2021.

⁷⁶¹ Joint Communiqué of the 53rd ASEAN Foreign Ministers Meeting (2020), para 78-79, < <https://asean.org/storage/2020/09/FINAL-Joint-Communique-of-the-53rd-AMM.pdf>> accessed on 4 April 2021.

6.6.1 Malaysia

Out of all ASEAN members, Malaysia has been the most critical of Myanmar. Malaysia was among the first countries to react to the plight of the Rohingya. Soon after the Tatmadaw's clearance operations had commenced, Prime Minister Najib Razak publicly accused Aung Sung Suu Kyi of inaction and called for the UN to stop the ongoing *genocide*.⁷⁶² It is important to note that Najib described the situation as genocide well before the publication of the 2018 Report of the Independent International Fact-finding Mission on Myanmar. He also sought to promote a sort of ASEAN intervention by stressing that when grave humanitarian crises occur ASEAN must set aside its principle of non-interference and uphold its commitment, enshrined in the ASEAN Charter, to ensure the protection of human rights.⁷⁶³ This was the first time that an ASEAN State called for this type of intervention in the internal affairs of another member States without the consent of the latter. Not surprisingly, Myanmar accused Najib of violating ASEAN's rule of non-interference and considered lodging an official complaint with ASEAN for this infringement.⁷⁶⁴

Malaysia's involvement in the crisis did not wane over time. On 19 January 2017, it hosted an extraordinary session of the Council of Foreign Ministers of the Organization of Islamic Cooperation on the situation of the Rohingya. The resolution passed on that occasion urged the Myanmar's government to prevent the worsening of the crisis and expressed concern about the human rights violations faced by the Rohingya.⁷⁶⁵ During another meeting of the OIC, Malaysia's Minister of Foreign Affairs condemned the 'disproportionate response' by

⁷⁶² 'Malaysian PM urges world to act against 'genocide' of Myanmar's Rohingya' (The Guardian, 4 December 2016) < <https://www.theguardian.com/world/2016/dec/04/malaysia-pm-urges-world-to-act-against-genocide-of-myanmar-rohingya>> accessed on 4 April 2021.

⁷⁶³ Ibid.

⁷⁶⁴ Praveen Menon, 'Malaysia PM opens thorny debate in accusing Myanmar of genocide' (Reuters, 9 December 2016) < <https://www.reuters.com/article/us-myanmar-rohingya-malaysia/malaysia-pm-opens-thorny-debate-in-accusing-myanmar-of-genocide-idUSKBN13Y0IY>> accessed on 4 April 2021.

⁷⁶⁵ Organization of Islamic Cooperation, Resolution on the Situation of the Rohingya Muslim Minority in Myanmar Present to the Extraordinary Session of the OIC Council of Foreign Ministers on the Situation of the Rohingya Muslim in Myanmar (2017), < <https://www.oic-oci.org/docdown/?docID=574&refID=64>> accessed on 18 March 2021.

Myanmar and called for the immediate stop of all military operations.⁷⁶⁶ It also called for the perpetrators of crimes against humanity to be held accountable and for the international community to save the Rohingya.⁷⁶⁷ Malaysia also supported the OIC's decision to back The Gambia's application against Myanmar before the ICJ for violations of the Genocide Convention. It is, therefore, clear that Malaysia used the Organization of Islamic Cooperation as an international platform to advocate for collective action to stop the relevant atrocities and hold the perpetrators to justice.

Malaysia took another unprecedented step when, in September 2017, it distanced itself from an ASEAN chairman's statement on the situation in Rakhine.⁷⁶⁸ According to Malaysia, the statement misrepresented the reality of the situation and failed to incorporate its concerns about the clearance operations. Hence, for Malaysia the statement was not based on consensus and should have not been issued.⁷⁶⁹ Malaysia also maintained a very critical position of Myanmar at the UN. In particular, it voted for GA Resolutions 72/248, 73/264 and 74/246, which condemned Myanmar for its clearance operations and referred to widespread atrocities being committed against the Rohingya.⁷⁷⁰ A very strong statement was made at the 74th Session of the GA, on 25 September 2019. On that occasion, Prime Minister Mahathir Mohamad accused Myanmar of genocide and called upon the international community to urgently take action given Myanmar's unwillingness to protect the Rohingya.⁷⁷¹

⁷⁶⁶ Statement by the Malaysian Minister of Foreign Affairs at the OIC Contact Group on the Rohingya Muslim Minority in Myanmar (19 September 2017) < https://www.kln.gov.my/web/nam_windhoek/news-from-mission/-/blogs/statement-by-the-minister-of-foreign-affairs-at-the-oic-contact-group-on-the-rohingya-muslim-minority-in-myanmar-new-york-19-september-2017 > accessed on 18 March 2021.

⁷⁶⁷ Ibid.

⁷⁶⁸ 'Malaysia's dissent on Myanmar statement reveals cracks in ASEAN façade' (Reuters, 25 September 2017) < <https://www.reuters.com/article/us-myanmar-rohingya-malaysia-idUSKCN1C0124> > accessed on 4 April 2021.

⁷⁶⁹ Ibid.

⁷⁷⁰ The United Nations General Assembly Voting Record on Resolution 72/248 (2017) < <https://digitallibrary.un.org/record/1470211?ln=en> > accessed on 4 April 2021; Resolution 73/264 (2018) < <https://digitallibrary.un.org/record/1657120?ln=en> > accessed on 4 April 2021; and Resolution 74/246 (2019) < <https://digitallibrary.un.org/record/3841021?ln=en> > accessed on 4 April 2021.

⁷⁷¹ "Genocide": Malaysian PM Mahathir urges international community to act on Rohingya issue' (Channel News Asia, 25 September 2019) < <https://www.channelnewsasia.com/news/asia/malaysia-mahathir-rohingya-urges-world-to-act-united-nations-11940210> > accessed on 18 March 2021.

Overall, while no express reference to R2P was made, it can be said that Malaysia has called for R2P action. The references to atrocity crimes, genocide, and the failure of Myanmar to protect the Rohingya as well as the call for international action clearly resemble R2P language. Malaysia was described in Chapter 4 as a wary supporter of R2P, having endorsed Pillar I and II without hesitation while remaining more cautious with regard to the implementation and scope of Pillar III.⁷⁷² In this case, however, it would seem that Malaysia was also prepared to back coercive action against Myanmar.

6.6.2 Indonesia

Indonesia is another predominantly Muslim ASEAN State. Given the influx of Rohingya refugees into its territory, it was in Indonesia's best interest to help resolve this issue. On 4 August 2012, in response to that year's eruption of violence against the Rohingya, Indonesian President Susilo Bambang Yudhoyono asked Myanmar's President Thein Sein in a letter to solve the deadly conflict quickly and to stop the attacks on the Rohingya.⁷⁷³ On top of this, Yudhoyono also called upon Myanmar to accept international observers to review the situation in Rakhine State and ended the letter by offering Indonesia's assistance in solving this conflict.⁷⁷⁴

On 3 September 2017, immediately after the escalation of violence, President Joko Widodo stressed the need to act instead of merely making statements of condemnation. He further affirmed Indonesia's commitment to help resolve this humanitarian crisis in conjunction with

⁷⁷² Refer to Chapter 4 for a detailed analysis on Malaysia's position on R2P.

⁷⁷³ 'Indonesia Calls for Independent Probe' (The Irrawaddy, 7 August 2012) <<https://www.irrawaddy.com/news/burma/indonesia-calls-for-independent-rohingya-probe.html>> accessed on 24 April 2021.

⁷⁷⁴ Ibid.

the international community.⁷⁷⁵ Right after this statement, Widodo sent his Minister of Foreign Affairs to meet with Aung San Suu Kyi to present a proposal from the Indonesian government called 4+1 Formula to address the crisis.⁷⁷⁶ There are four elements in the Formula: ‘stability and security, maximum self-restraint and refrain from violence, protection for everyone in Rakhine State regardless of ethnicities and religions, and the importance of open access for humanitarian aids’.⁷⁷⁷ In an effort to assist Myanmar, Indonesia also launched the Indonesian Humanitarian Alliance for Myanmar to provide aids in terms of education, health care and relief in Rakhine State.⁷⁷⁸

As a member of the Organization of Islamic Cooperation, Indonesia has not been as vocally critical of Myanmar as Malaysia. At the same time, although it did not distance itself from the strong official positions taken by the OIC, Indonesia did use its position as a member of this organisation to urge the members of the Muslim community and the international community to constructively engage with Myanmar in order to address the root causes of the violence against the Rohingya community.⁷⁷⁹

Within the UN, Indonesia voted in favour of UN Human Rights Council Resolution S-27/1 and GA Resolutions 72/248, 73/264 and 74/246, which, among other things, condemned Myanmar’s military operations and called for the Myanmar government to remedy the Rohingya’s statelessness.⁷⁸⁰ Furthermore, in January 2019 Indonesia joined the Security

⁷⁷⁵ ‘Indonesian minister to raise Rohingya plight with Suu Kyi’ (AP News, 3 September 2017) <<https://apnews.com/article/e9c79d7ae7ce4e7ab102dedf8e26e4ae>> accessed on 4 April 2021.

⁷⁷⁶ ‘Foreign Affairs Minister Meets with Aung San Suu Kyi to Discuss Rakhine Humanitarian Crisis’ (Cabinet Secretariat of the Republic of Indonesia, 4 September 2017) <<https://setkab.go.id/en/foreign-affairs-minister-meets-with-aung-san-suu-kyi-to-discuss-rakhine-humanitarian-crisis/>> accessed on 23 April 2021.

⁷⁷⁷ Ibid.

⁷⁷⁸ Ibid.

⁷⁷⁹ Sheany, ‘Indonesia Urges OIC, International Community, to Address Myanmar Conflict’ (Jakarta Globe, 11 September 2017) <<https://jakartaglobe.id/news/indonesia-urges-oic-international-community-address-myanmar-conflict/>> accessed on 24 April 2021.

⁷⁸⁰ The United Nations General Assembly Voting Record on UNHRC Resolution S-27/1 (2017), p. 6; GA Resolution 72/248 (2017) <<https://digitallibrary.un.org/record/1470211?ln=en>> accessed on 4 April 2021; Resolution 73/264 (2018) <<https://digitallibrary.un.org/record/1657120?ln=en>> accessed on 4 April 2021; and Resolution 74/246 (2019) <<https://digitallibrary.un.org/record/3841021?ln=en>> accessed on 4 April 2021.

Council as a non-permanent member.⁷⁸¹ Interestingly, Indonesia had announced that its main priorities in the Council would include creating a ‘global ecosystem of peace and stability by advancing peacekeeping and peacebuilding, promoting greater engagement and synergy between the council and regional organisations in conflict prevention, and ensuring synergy between sustaining peace and global development’.⁷⁸² In spite of these aspirations, there was not much that Indonesia could do as a member of the Council, given that, as noted earlier, this body was effectively prevented from taking any concrete action against Myanmar due to the opposition of China and Russia.

All considered, Indonesia was critical of Myanmar without being as vocal as Malaysia was. According to Mohamad Rosyidin, it can be said that Jakarta employed ‘quiet diplomacy’ as opposed to the West and Malaysia’s preference for ‘megaphone diplomacy’.⁷⁸³ This approach can have some merits. According to Rosyidin, by focusing on humanitarian assistance instead of condemning and calling for punishment, Indonesia sought to provide an effective solution to protect civilians during a humanitarian crisis, facilitated by the fact that Myanmar would treat Jakarta as a friend and not an enemy.⁷⁸⁴

6.6.3 Brunei

Brunei is another predominantly Muslim ASEAN country. It was certainly less vocal than Malaysia and did not get as involved as Indonesia. However, contrary to many ASEAN States,

⁷⁸¹ Anbar Jayadi, ‘With a seat on the UN Security Council, what can key ASEAN member Indonesia do to solve the Rohingya crisis?’ (The Conversation, 24 September 2018) <<https://theconversation.com/with-a-seat-on-the-un-security-council-what-can-key-asean-member-indonesia-do-to-solve-the-rohingya-crisis-102915>> accessed on 18 March 2021.

⁷⁸² Dio Herdiawan Tobing, ‘Will Indonesia bring the Rohingya issue to UN Security Council? Jakarta Post Contributor’ (The Strait Times, 25 June 2018) <<https://www.straitstimes.com/asia/se-asia/will-indonesia-bring-the-rohingya-issue-to-un-security-council-jakarta-post-contributor>> accessed on 18 March 2021.

⁷⁸³ Mohamad Rosyidin, ‘Reconciling State’s Sovereignty with Global Norms: Indonesia’s Quiet Diplomacy in Myanmar and the Feasibility of the Implementation of Responsibility to Protect (R2P) in Southeast Asia’ [2020] 12:1 (Special Issue) *Global Responsibility to Protect*, p. 31.

⁷⁸⁴ Ibid., p. 34.

it still voted in favour of GA Resolutions 72/248, 73/264 and 74/246, which, as noted before, condemned the human rights violations committed by the Tatmadaw as part of its clearance operations and urged Myanmar to remedy the Rohingya's statelessness.⁷⁸⁵ In addition, Brunei is a member of the Organisation of Islamic Cooperation. Despite not taking any direct action, it did not distance itself from the pronouncements discussed above that were critical of Myanmar.

6.6.4 Singapore

Due to geographic reasons, Singapore did not receive any refugees in its territory and was not directly affected by the humanitarian crisis. Its position, accordingly, was quite neutral. On 8 September 2017, for example, it issued the following statement:

‘The situation in Rakhine State is a complex inter-communal issue with deep historical roots. All the parties involved must avoid actions that will further worsen the situation on the ground and work together to foster viable and long-term solutions, so that the affected communities can rebuild their lives’⁷⁸⁶

This statement clearly echoed the content of the ASEAN Chairman's statement adopted on 24 September 2017 that was discussed earlier.⁷⁸⁷ It did not refer to the Rohingya specifically, nor did it refer to the situation as a humanitarian crisis but rather as an inter-communal issue. Singapore also stated that it was prepared to work with Myanmar in its efforts to restore peace

⁷⁸⁵ The United Nations General Assembly Voting Record on Resolution 72/248 (2017) <<https://digitallibrary.un.org/record/1470211?ln=en>> accessed on 4 April 2021; Resolution 73/264 (2018) <<https://digitallibrary.un.org/record/1657120?ln=en>> accessed on 4 April 2021; and Resolution 74/246 (2019) <<https://digitallibrary.un.org/record/3841021?ln=en>> accessed on 4 April 2021.

⁷⁸⁶ ‘Singapore urges calm from all sides in Myanmar conflict, offers to work with ASEAN to provide humanitarian aid’ (The Straits Times, 8 September 2017) <<https://www.straitstimes.com/singapore/singapore-says-ready-to-work-with-myanmar-to-restore-peace-and-stability-in-rakhine-state>> accessed on 18 March 2021.

⁷⁸⁷ ASEAN Chairman's Statement on the Humanitarian Situation in Rakhine State (2017) <<https://asean.org/wp-content/uploads/2017/09/1.ASEAN-Chairmans-Statement-on-the-Rakhine.pdf>> accessed on 2 April 2021.

and stability, and to provide humanitarian assistance in accordance with the principles of the ASEAN Charter.⁷⁸⁸ Following on this statement, on 19 October 2017, Singapore pledged \$100,000 through the ASEAN Humanitarian Assistance centre to help the humanitarian efforts in Rakhine State.⁷⁸⁹ It is also important to note that Singapore abstained on GA Resolutions 72/248, 73/264 and 74/246 that condemned the clearance operations by the Tatmadaw.⁷⁹⁰

6.6.5 Thailand

Since 2014, Thailand has been run by a military dictatorship under General Prayut Chan-ocha and has been embroiled in political unrest erasing the democratic legacy of its famed foreign minister, Surin Pitsuwan. Consequently, Thailand has been largely preoccupied with repressing its own people's call for democracy.⁷⁹¹ This seems to have had an effect on its position on the Rohingya crisis.

After the 2017 escalation of violence in Rakhine State, on 1 October, Thailand's foreign ministry stated that it was closely following the situation in Rakhine and would provide aid to the governments of Myanmar and Bangladesh (where Rohingya refugees mostly fled to).⁷⁹² Thailand placed great emphasis on the importance of providing humanitarian support to a

⁷⁸⁸ 'Singapore urges calm from all sides in Myanmar conflict, offers to work with ASEAN to provide humanitarian aid' (The Straits Times, 8 September 2017) < <https://www.straitstimes.com/singapore/singapore-says-ready-to-work-with-myanmar-to-restore-peace-and-stability-in-rakhine-state>> accessed on 18 March 2021.

⁷⁸⁹ Lydia Lam, 'Singapore pledges \$100,000 in humanitarian aid to help in Myanmar's Rakhine crisis' (The Straits Times, 19 October 2017) < <https://www.straitstimes.com/singapore/singapore-pledges-100000-in-humanitarian-aid-to-help-in-myanmars-rakhine-crisis>> accessed on 18 March 2021.

⁷⁹⁰ The United Nations General Assembly Voting Record on Resolution 72/248 (2017) <<https://digitallibrary.un.org/record/1470211?ln=en>> accessed on 4 April 2021; Resolution 73/264 (2018) <<https://digitallibrary.un.org/record/1657120?ln=en>> accessed on 4 April 2021; and Resolution 74/246 (2019) <<https://digitallibrary.un.org/record/3841021?ln=en>> accessed on 4 April 2021.

⁷⁹¹ 'Thailand 'run against dictatorship' draws thousands' (The BBC, 12 January 2020) < <https://www.bbc.co.uk/news/world-asia-51082419>> accessed on 18 March 2021.

⁷⁹² 'Thailand says closely watching Myanmar crisis, ready to provide aid' (Reuters, 1 October 2017) <<https://www.reuters.com/article/us-thailand-myanmar-rohingya/thailand-says-closely-watching-myanmar-crisis-ready-to-provide-aid-idUSKCN1C60XN>> accessed on 18 March 2021.

fellow member, as it did during the East Timor crisis in 1999.⁷⁹³ Other than that, it had minimal direct involvement in the crisis, preferring to side with ASEAN collective (and weak) response.⁷⁹⁴ In accordance with this position, it is telling that Thailand abstained on GA Resolutions 72/248, 73/264 and 74/246, choosing not to join in with Malaysia, Indonesia and Brunei in condemning the clearance operations.⁷⁹⁵

6.6.6 Cambodia

Cambodia has been a supporter of Myanmar amidst international pressure and criticism. Cambodia's Prime Minister, Hun Sen, once stated that he opposed any attempt to internationalise the Rohingya crisis, which, instead, should be regarded as being part of Myanmar's domestic affairs.⁷⁹⁶ Hun Sen also referred to the ASEAN Charter, which forbids members from interfering in each other's internal affairs.⁷⁹⁷ In line with this pro-Myanmar stance, Cambodia voted against GA Resolutions 72/248, 73/264 and 74/246, choosing not to condemn the clearance operations against the Rohingya.⁷⁹⁸ Cambodia's defence of Myanmar could also be explained by additional factors other than a simple compliance with ASEAN traditional principles. In particular, its position could be motivated by an interest to increase

⁷⁹³ Refer to chapter 5 for a detailed analysis on the East Timor Crisis.

⁷⁹⁴ 'Thailand says closely watching Myanmar crisis, ready to provide aid' (Reuters, 1 October 2017) <<https://www.reuters.com/article/us-thailand-myanmar-rohingya/thailand-says-closely-watching-myanmar-crisis-ready-to-provide-aid-idUSKCN1C60XN>> accessed on 18 March 2021.

⁷⁹⁵ The United Nations General Assembly Voting Record on Resolution 72/248 (2017) <<https://digitallibrary.un.org/record/1470211?ln=en>> accessed on 4 April 2021; Resolution 73/264 (2018) <<https://digitallibrary.un.org/record/1657120?ln=en>> accessed on 4 April 2021; and Resolution 74/246 (2019) <<https://digitallibrary.un.org/record/3841021?ln=en>> accessed on 4 April 2021.

⁷⁹⁶ Sao Phal Niseiy, 'Cambodia's Prime Minister is Wrong about Myanmar's Rohingya Issue' (The Diplomat, 9 February 2017) < <https://thediplomat.com/2017/02/cambodias-prime-minister-is-wrong-about-myanmars-rohingya-issue/>> accessed on 18 March 2021.

⁷⁹⁷ Ibid.

⁷⁹⁸ The United Nations General Assembly Voting Record on Resolution 72/248 (2017) <<https://digitallibrary.un.org/record/1470211?ln=en>> accessed on 4 April 2021; Resolution 73/264 (2018) <<https://digitallibrary.un.org/record/1657120?ln=en>> accessed on 4 April 2021; and Resolution 74/246 (2019) <<https://digitallibrary.un.org/record/3841021?ln=en>> accessed on 4 April 2021.

economic cooperation with the country. In a meeting with the Myanmar ambassador, Hun Sen stated that Cambodia supports Myanmar's efforts to repatriate the Rohingya refugees from Bangladesh.⁷⁹⁹ Additionally, in the meeting, Hun Sen also discussed the strengthening of relationships between the two nations in terms of trade and tourism, which was welcomed by the Myanmar ambassador.⁸⁰⁰ In chapter 4, Cambodia was described as a wary supporter of R2P. In fact, Hun Sen once even stated that 'R2P should be viewed as deepening the meaning of sovereignty in that it underscores the importance of states taking seriously their primary responsibility to protect their people against genocide, war crimes, crimes against humanity and ethnic cleansing'.⁸⁰¹ However, from its position on this crisis, Cambodia showed a lack of a serious commitment to the implementation of R2P.

6.6.7 Laos, Vietnam and The Philippines

Laos expressed its solidarity with Myanmar by voting against GA Resolutions 72/248, 73/264 and 74/246.⁸⁰² Other than that, it has remained largely silent about the situation. This seems in line with its description, in Chapter 4, as an R2P neutral State. Vietnam was labelled, in Chapter 4, as a wary supporter of R2P because it supports the fundamental concepts of Pillar I and II but rejects Pillar III. However, its stance on this crisis suggests that it lacks a genuine commitment to the implementation of R2P altogether. For example, it voted against GA

⁷⁹⁹ Khuon Narim, 'Cambodia, Myanmar discuss Rohingya refugees' (Khmer Times, 11 September 2019) <<https://www.khmertimeskh.com/642106/cambodia-myanmar-discuss-rohingya-refugees/>> accessed on 18 March 2021.

⁸⁰⁰ Ibid.

⁸⁰¹ Detailed conference report on "The Responsibility to Protect at 10: Progress, Challenges and Opportunities in the Asia Pacific" (2015), p. 9, <https://r2pasiapacific.org/files/2823/r2p_at_10_conference_detailedreport.pdf> accessed on 3 May 2021.

⁸⁰² The United Nations General Assembly Voting Record on Resolution 72/248 (2017) <<https://digitallibrary.un.org/record/1470211?ln=en>> accessed on 4 April 2021; Resolution 73/264 (2018) <<https://digitallibrary.un.org/record/1657120?ln=en>> accessed on 4 April 2021; and Resolution 74/246 (2019) <<https://digitallibrary.un.org/record/3841021?ln=en>> accessed on 4 April 2021.

Resolutions 72/248, 73/264 and 74/246.⁸⁰³ Between 2020-2021, Vietnam acted as a non-permanent member of the Security Council. On 4 February 2020, the SC held a meeting to discuss the provisional measures issued by the ICJ on Myanmar.⁸⁰⁴ Vietnam sided with China to prevent the Council from reaching consensus on a potential statement.⁸⁰⁵

Finally, the President of the Philippines, Rodrigo Duterte, had initially referred to the Rohingya situation as genocide and announced that the Philippines was ready to provide sanctuary for the victims.⁸⁰⁶ However, Duterte quickly retracted this statement and issued an apology to Aung Sung Suu Kyi, 'I will apologise to you, but if you have noticed my statement was almost a satire... I am not ready to intervene in your [internal affairs]'.⁸⁰⁷ Duterte clarified that he was speaking against the European Countries that had accused Myanmar of rampant human rights violations but did little to actually help the Rohingya.⁸⁰⁸ To show solidarity with Myanmar, The Philippines voted against GA Resolutions 72/248, 73/264 and 74/246 and the UN Human Rights Council Resolution S-27/1, choosing not to support the international condemnation of the clearance operations by the Tatmadaw.⁸⁰⁹

⁸⁰³ Ibid.

⁸⁰⁴ 'UN fails to take action on order against Myanmar on Rohingya' (Aljazeera, 5 February 2020) <<https://www.aljazeera.com/news/2020/2/5/un-fails-to-take-action-on-order-against-myanmar-on-rohingya>> accessed on 5 April 2021.

⁸⁰⁵ Ibid.

⁸⁰⁶ 'Philippines' Duterte cites 'genocide' in Myanmar, says will take refugee' (The Straits time, 5 April 2018) <<https://www.straitstimes.com/asia/se-asia/philippines-duterte-cites-genocide-in-myanmar-says-will-take-refugees>> accessed on 18 March 2021.

⁸⁰⁷ 'Philippines' Duterte apologizes to Suu Kyi for Myanmar 'genocide' remark' (Reuters, 13 April 2018) <<https://www.reuters.com/article/us-philippines-duterte-myanmar-idUSKBN1HK0HJ>> accessed on 17 April 2021.

⁸⁰⁸ Ibid.

⁸⁰⁹ The United Nations General Assembly Voting Record on UNHRC Resolution S-27/1 (2017), p. 6; GA Resolution 72/248 (2017) <<https://digitallibrary.un.org/record/1470211?ln=en>> accessed on 4 April 2021; Resolution 73/264 (2018) <<https://digitallibrary.un.org/record/1657120?ln=en>> accessed on 4 April 2021; and Resolution 74/246 (2019) <<https://digitallibrary.un.org/record/3841021?ln=en>> accessed on 4 April 2021.

6.7 The February 2021 Coup

This section takes into account the events that happened up to the 3rd of May 2021.

In the most recent development in Myanmar, on 1 February 2021, the Junta headed by General Min Aung Hlaing arrested President Win Myint, the *de facto* head of State Aung San Suu Kyi and their associates in a military coup.⁸¹⁰ General Hlaing defended the military actions by stating that there were irregularities in the national election in November 2020 and promised to hold new elections to achieve a ‘true and disciplined democracy.’⁸¹¹ Since then, there has been a series of nationwide protests against the Junta calling for democracy. The Junta responded with forceful measures including the use of live ammunitions, which has resulted in the deaths of more than 700 protestors as of 13 April 2021.⁸¹² The fact that General Hlaing is acting as the head of government is important for this thesis because he is among those named in the 2018 report of the UN Fact-Finding Mission as responsible for crimes against humanity, war crimes and genocide committed against the Rohingya.⁸¹³ This means that any hopes for the current government to cooperate with the international community to solve the Rohingya crisis is minimal.

According to Gareth Evans, the current situation in Myanmar must be treated as an R2P case since it resembles the early days of the one-sided violent repression of peaceful dissents that occurred in Libya and Syria.⁸¹⁴ In particular, Evans noted that the Tatmadaw is guilty of crimes against humanity. According to him, coercive measures of Pillar III other than military force

⁸¹⁰ ‘Myanmar coup: Aung San Suu Kyi detained as military seizes control’ (BBC, 1 February 2021) < <https://www.bbc.co.uk/news/world-asia-55882489>> accessed on 4 April 2021.

⁸¹¹ ‘Myanmar coup leader defends action amid mass protests’ (BBC, 8 February 2021) < <https://www.bbc.co.uk/news/world-asia-55975746>> accessed on 5 April 2021.

⁸¹² ‘Myanmar coup: The people shot dead since the protests began’ (BBC, 13 April 2021) < <https://www.bbc.co.uk/news/world-asia-56636345>> accessed on 17 April 2021.

⁸¹³ United Nations Human Rights Council, ‘Report of the international independent fact-finding mission on Myanmar’ (2018) A/HRC/39/64, Section VII (92).

⁸¹⁴ Gareth Evans, ‘The Responsibility to Protect the People of Myanmar’ (Australian Institute of International Affairs, 8 April 2021) < <https://www.internationalaffairs.org.au/australianoutlook/the-responsibility-to-protect-the-people-of-myanmar/>> accessed on 10 April 2021.

should be employed, including, for example, arms embargos, sanctions and criminal prosecutions.⁸¹⁵

The Security Council in a presidential statement highlighted that this development has the potential to exacerbate the existing challenges in Rakhine State, while also condemning the violence against peaceful protestors and calling upon the military to exercise its utmost restraint.⁸¹⁶ Since then, Myanmar has also been subjected to a new wave of international condemnation from individual States such as the US, the UK, Japan and Australia.⁸¹⁷

ASEAN expressed its initial concerns about the situation on 2 March through its informal Foreign Minister's Meeting (IAMM), calling on all parties to refrain from instigating further violence and working towards a peaceful solution.⁸¹⁸ However, the IAMM statement did not condemn the Junta for the coup and the arrest of President Myint, Aung San Suu Kyi and their associates. More importantly, the IAMM did not refer to the use of lethal force by the Junta against pro-democracy protestors.

On 24 of April, however, in an unprecedented mediation effort, ASEAN held an emergency summit to discuss the situation in Myanmar. For the first time in its history, ASEAN has employed the power of Article 7 of the ASEAN Charter that states that ASEAN summits can be convened in order to address emergency situations affecting ASEAN and its members.⁸¹⁹ In the following Chairman's statement, ASEAN expressed its deep concern for the escalation of

⁸¹⁵ Ibid. For a similar view, see Simon Adams, 'Myanmar's deadly coup and the responsibility to protect' (Global Centre for the Responsibility to Protect, 25 March 2021) < <https://www.globalr2p.org/publications/myanmars-deadly-coup-and-the-responsibility-to-protect/>> accessed on 10 April 2021.

⁸¹⁶ Statement by the President of Security Council (2021), S/PRST/2021/5, < https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_prst_2021_5.pdf> accessed on 5 April 2021.

⁸¹⁷ 'Global condemnation follows bloodiest day since Myanmar coup' (Bangkok Post, 28 March 2021) <<https://www.bangkokpost.com/world/2090927/global-condemnation-follows-bloodiest-day-since-myanmar-coup>> accessed on 5 April 2021.

⁸¹⁸ Chair's Statement on the Informal Ministerial Meeting (IAMM) (2021) < <http://www.asean2021.bn/Theme/news/iamm-02.03.21.aspx>> accessed on 4 April 2021.

⁸¹⁹ The ASEAN Charter (2007), Article 7.

violence in Myanmar and presented its “Five-Point Consensus”.⁸²⁰ According to these five points, (1) all parties should immediately halt any violence; (2) all parties concerned shall commence constructive dialogue to seek a peaceful solution; (3) a special ASEAN envoy shall facilitate mediation of the dialogue process.; (4) ASEAN shall provide humanitarian assistance; (5) the special ASEAN envoy shall visit Myanmar to meet with all parties concerned.⁸²¹ In addition, the statement underscored the importance of Myanmar’s effort in addressing the situation in Rakhine State.

A closer examination of the language used suggests that the “Five-Point Consensus” has been carefully crafted not to criticise or infringe upon the sovereignty of Myanmar. First, the statement and the consensus reached did not condemn the violent power grab by the Junta.⁸²² Second, the imperative word used was *shall* and not *must*, which acts more as a suggestion rather than a demand for the Junta to follow the consensus points. Third, the consensus did not explicitly call upon the Junta to stop violating human rights of the people but rather called upon ‘all parties’ to exercise restraint when in reality the events have showed a one-sided violence against the civilian population. Lastly, since the “Five-Point Consensus” did not demand a strict timeline from the Junta to implement the suggestions, it is entirely dependent on General Hlaing when and if he sees fit to do so. As for the references made to the situation in Rakhine State, the chairman’s statement still did not refer to the Rohingya by name in an attempt not to antagonise the Junta.

As for individual State efforts, Indonesia has been spearheading the regional effort to address the situation diplomatically. Immediately after the coup, President Joko Widodo along with Malaysian Prime Minister Muhyiddin Yassin led the call for a special IAMM to discuss the

⁸²⁰ Chairman’s Statement on the ASEAN Leaders’ Meeting (2021) pp. 3-4, < <https://asean.org/storage/Chairmans-Statement-on-ALM-Five-Point-Consensus-24-April-2021-FINAL-a-1.pdf>> accessed on 26 April 2021.

⁸²¹ Ibid., p. 4.

⁸²² ‘ASEAN demands ‘immediate cessation of violence’ in Myanmar’ (Aljazeera, 24 April 2021) < <https://www.aljazeera.com/news/2021/4/24/myanmar-coup-leader-in-jakarta-for-southeast-asian-summit>> accessed on 26 April 2021.

matter.⁸²³ However, there were no response until the 2nd of March when ASEAN held an IAMM (as discussed above). During the IAMM, Indonesia did not directly condemn the Junta but stated that ‘the wish and goodwill of ASEAN to help will be unable to be carried out if Myanmar doesn’t open its door to ASEAN’.⁸²⁴ Indonesia added that there should be no foreign intervention, but that ASEAN should be ready to help Myanmar in any way.⁸²⁵ Indonesia was also decisive in calling for an emergency ASEAN summit on the situation.⁸²⁶ During the latter, it affirmed that the situation in Myanmar is unacceptable and that violence must stop immediately.⁸²⁷

During the IAMM, Malaysia called for the release of President Myint, Aung San Suu Kyi and their associates and encouraged dialogue between the parties concerned.⁸²⁸ On 20 March, Muhyiddin also said that the use of lethal force against unarmed civilians was unacceptable and this ‘deplorable situation must stop immediately’.⁸²⁹ Muhyiddin further stated that Malaysia along with the ASEAN community cannot afford to see a fellow member and neighbour be so destabilised at the hands of a selected few for their own interests.⁸³⁰ This statement is the strongest view adopted by an ASEAN member against General Hlaing so far.

⁸²³ ‘Indonesia, Malaysia seeking ASEAN meeting on Myanmar after coup’ (Bangkok Post, 5 February 2021) < <https://www.bangkokpost.com/world/2063259/indonesia-malaysia-seeking-asean-meeting-on-myanmar-after-coup> > accessed on 4 April 2021.

⁸²⁴ Sebastian Strangio, ‘ASEAN Foreign Ministers Meet to Discuss Myanmar Crisis’ (The Diplomat, 3 March 2021) < <https://thediplomat.com/2021/03/asean-foreign-ministers-meet-to-discuss-myanmar-crisis/> > accessed on 4 April 2021.

⁸²⁵ Sebastian Strangio, ‘Singapore Joins Calls for Emergency ASEAN Summit on Myanmar’ (The Diplomat, 26 March 2021) < <https://thediplomat.com/2021/03/singapore-joins-calls-for-emergency-asean-summit-on-myanmar/> > accessed on 5 April 2021.

⁸²⁶ ‘Malaysia PM backs Indonesia’s call for ASEAN summit on Myanmar’ (Bangkok Post, 20 March 2021) < <https://www.bangkokpost.com/world/2086847/malaysia-pm-backs-indonesias-call-for-asean-summit-on-myanmar> > accessed on 4 April 2021.

⁸²⁷ Niniek Karmini, ‘ASEAN leaders tell Myanmar coup general to end killings’ (AP News, 25 April 2021) < <https://apnews.com/article/aung-san-suu-kyi-global-trade-indonesia-myanmar-singapore-2959338f61cbe0b0b7c6dd7599ee6e2c> > accessed on 26 April 2021.

⁸²⁸ Sebastian Strangio, ‘ASEAN Foreign Ministers Meet to Discuss Myanmar Crisis’ (The Diplomat, 3 March 2021) < <https://thediplomat.com/2021/03/asean-foreign-ministers-meet-to-discuss-myanmar-crisis/> > accessed on 4 April 2021.

⁸²⁹ ‘Malaysia PM backs Indonesia’s call for ASEAN summit on Myanmar’ (Bangkok Post, 20 March 2021) < <https://www.bangkokpost.com/world/2086847/malaysia-pm-backs-indonesias-call-for-asean-summit-on-myanmar> > accessed on 4 April 2021.

⁸³⁰ Ibid.

At the emergency summit, Muhyiddin affirmed that ASEAN's policy of non-interference should not lead to inaction if a domestic situation such as this 'jeopardizes security, and stability of ASEAN and the wider region'.⁸³¹

Singapore's Prime Minister, Lee Hsein Loong, on 3 March stated that the use of lethal force against civilians and unarmed demonstrators is unacceptable and is disastrous internationally and domestically.⁸³² Singapore had joined Brunei, Indonesia and Malaysia in calling for ASEAN to hold an emergency summit to discuss this situation.⁸³³ Singapore's Foreign Minister Vivian Balakrishnan stated, like Indonesia did, that there should be no foreign intervention, but that ASEAN should stand ready to help in any way.⁸³⁴ During the emergency summit, Lee agreed with the "Five-point Consensus" but added that the Junta should also release President Win Myint and Aung San Suu Kyi.⁸³⁵ Lee further stated that during the summit, General Hlaing did not oppose to ASEAN playing a constructive role and would consider the points that were raised.⁸³⁶

As the current ASEAN chair, Brunei said that it welcomed and was working with Malaysia and Indonesia to prepare for the emergency summit to discuss the situation.⁸³⁷ Brunei has not released any other statement on the matter. Thailand, in contrast to Malaysia and Singapore, has merely expressed its grave concern over the situation but has not condemned the coup nor

⁸³¹ Ibid.

⁸³² Sebastian Strangio, 'ASEAN Foreign Ministers Meet to Discuss Myanmar Crisis' (The Diplomat, 3 March 2021) < <https://thediplomat.com/2021/03/asean-foreign-ministers-meet-to-discuss-myanmar-crisis/> > accessed on 4 April 2021.

⁸³³ Sebastian Strangio, 'Singapore Joins Calls for Emergency ASEAN Summit on Myanmar' (The Diplomat, 26 March 2021) < <https://thediplomat.com/2021/03/singapore-joins-calls-for-emergency-asean-summit-on-myanmar/> > accessed on 5 April 2021.

⁸³⁴ Ibid.

⁸³⁵ 'ASEAN demands 'immediate cessation of violence' in Myanmar' (Aljazeera, 24 April 2021) < <https://www.aljazeera.com/news/2021/4/24/myanmar-coup-leader-in-jakarta-for-southeast-asian-summit> > accessed on 26 April 2021.

⁸³⁶ 'Myanmar: Army general behind coup 'agrees violence must stop' after regional leaders summit' (Sky News, 24 April 2021) < <https://news.sky.com/story/general-behind-myanmar-coup-agrees-violence-must-stop-after-regional-leaders-summit-12285766> > accessed on 26 April 2021.

⁸³⁷ 'Brunei Calls for ASEAN Meeting to Discuss Myanmar Situation' (VOA News, 5 April 2021) < <https://www.voanews.com/east-asia-pacific/brunei-calls-asean-meeting-discuss-myanmar-situation> > accessed on 5 April 2021.

the use of lethal force against pro-democracy protestors.⁸³⁸ This is understandable since Prime Minister Prayut Chanocha himself came into power by a coup in 2014. Not surprisingly, within days of the coup in Myanmar, Prayut had voiced his support for General Hlaing's quest for 'democracy'.⁸³⁹

Immediately after the coup, Hun Sen said that this situation falls within the internal affairs of Myanmar and that Cambodia does not interfere with the latter.⁸⁴⁰ This could be due to Hun Sen sympathising with General Hlaing since Hun Sen himself seized power from his elected coalition partners in a coup in 1997.⁸⁴¹

Vietnam, currently a member of the Security Council, joined China and Russia in working towards preventing the imposition of measures against Myanmar.⁸⁴² Furthermore, on 9 April, while addressing the Arria Formula meeting on Myanmar at the SC, Ambassador Dang Dinh Quy stated that the international community should make constructive contributions to help Myanmar stop all violence and promote an environment where constructive dialogue and reconciliation between the parties can take place.⁸⁴³

The Philippines has supported Myanmar even after the recent coup. In a statement to the UN Human Rights Council, it not only affirmed its support for Myanmar's progress towards democracy but also praised the role of the military in preserving the country's territorial integrity and national security.⁸⁴⁴ Furthermore, the Philippines strongly emphasised the

⁸³⁸ Kay Johnson and Panarat Thepgumpanat, 'Analysis: Myanmar's neighbour Thailand unlikely to toughen stance on coup' (Reuters, 2 April 2021) < <https://www.reuters.com/article/us-myanmar-politics-thailand-analysis-idUSKBN2BP0LN>> accessed on 5 April 2021.

⁸³⁹ Ibid.

⁸⁴⁰ 'Cambodia Leader Hun Sen Terms Myanmar Coup "Internal Affairs"' (VOA Cambodia, 1 February 2021) < <https://www.voacambodia.com/a/cambodian-leader-hun-sen-terms-myanmar-coup-internal-affairs-5759503.html>> accessed on 5 April 2021.

⁸⁴¹ Ibid.

⁸⁴² Michelle Nichols, 'U.N. Security Council wrestles with threat of action over Myanmar coup' (Reuters, 10 March 2021) < <https://www.reuters.com/article/us-myanmar-politics-un-idUSKBN2B209S>> accessed on 5 April 2021.

⁸⁴³ 'Vietnam calls on world community to help Myanmar prevent violence' (VN Explorer, 10 April 2021) < <https://vnexplorer.net/vietnam-calls-on-world-community-to-help-myanmar-prevent-violence-a2021146179.html>> accessed on 10 April 2021.

⁸⁴⁴ The Philippine's Statement for the Special Session of the Human Rights Council on the Human Rights Implications of the Crisis in Myanmar (2021) < <https://dfa.gov.ph/dfa-news/statements-and->

primacy of national efforts towards democratic reforms as opposed to external efforts aimed at imposing a solution on a country. The Philippines ended its statement by reaffirming its support for the sovereignty and territorial integrity of Myanmar.⁸⁴⁵

In sum, the ASEAN States that have been more critical of Myanmar's actions against the Rohingya, namely Indonesia, Malaysia, Brunei and Singapore, are also the ones that have been more active in criticising the coup and the violence against civilians. By contrast, those that had defended Myanmar from the accusation of atrocity crimes against the Rohingya, namely Cambodia, Thailand, Vietnam and the Philippines, are now supporting General Hlaing. ASEAN, on its part, has reached an important agreement on the "Five-point Consensus" which lists the steps for the Junta to take in order to resolve the crisis. However, although this represents an important development, a closer examination of the language used has revealed that it has been carefully crafted to avoid forceful language against the Junta.

6.8 Conclusion

During the Rohingya crisis, ASEAN stood in solidarity with Myanmar. It avoided interfering in Myanmar's internal affairs and in no way did it attempt to violate Myanmar's sovereignty. Even after the UN Fact-Finding Mission concluded that crimes against humanity, war crimes and genocide had been committed against the Rohingya, ASEAN remained largely supportive of Myanmar's handling of the crisis. Furthermore, it is telling that ASEAN accepted Myanmar's government practice of referring to the Rohingya as Bengali or as the Muslim minority in Rakhine State. Through its Summits, Meetings of Foreign Ministers and chairman's statements, ASEAN offered its assistance to Myanmar, however, these appeared to be weak

[advisoriesupdate/28619-philippine-statement-for-the-special-session-of-the-human-rights-council-on-the-human-rights-implications-of-the-crisis-in-myanmar-12-february-2021](#)> accessed on 5 April 2021.

⁸⁴⁵ Ibid.

promises lacking a genuine commitment to human protection. Strong, concrete forms of assistance were not considered, and no pressure was placed on Myanmar to accept or request external help.

This chapter also suggested that those ASEAN countries that were not directly affected by the spill-over effect of the Rohingya crisis and/or were mainly preoccupied with their own internal problems, e.g. Thailand, Singapore, Cambodia, the Philippines and Laos, essentially supported the very weak approach chosen by ASEAN. Although, as discussed in Chapter 4, these States (with the exception of Laos) have conceptually endorsed Pillar I and II of R2P, when faced with an atrocity crimes situation they ignored it and, instead, chose to act in solidarity with a fellow ASEAN member. This shows that their endorsements of R2P was merely political and that they are not willing to act on it.

By contrast, two ASEAN countries, namely Indonesia and Malaysia, took a much stronger stance on the crisis than ASEAN and other ASEAN States did. Although Indonesia chose a softer diplomatic route in its efforts to resolve this crisis, it referred, albeit indirectly to all three Pillars of R2P. It acknowledged that Myanmar had failed its Pillar I responsibilities; it has employed measures of Pillar II to assist Myanmar, but, at the same time, it warned that Pillar II tactics might not be sufficient; and called for action from the international community to help resolve this crisis. However, it did not specify what type of measure was needed.

The ASEAN State that acted the most unconventionally is Malaysia. Never before in ASEAN's history, had a member spoken and acted so strongly against another. Not only has Malaysia spoken out harshly against Myanmar's government, but it also actively called for decisive action against the perpetrators of the crimes against the Rohingya. Although it did not specifically refer to R2P, Malaysia has condemned Myanmar for failing its Pillar I responsibilities and acknowledged that while ASEAN and the UN offered their assistance (Pillar II), Myanmar has been unwilling to accept it. As a result, Malaysia has called for the

international community to take action without actually using the words of R2P, although it did not specify what type of action it had in mind. This is extraordinary compared to its attitude during the East Timor crisis, where it repeatedly gave diplomatic support to Indonesia and only joined INTERFET after Indonesia had given its consent to the deployment of the force. Overall, the analysis in this chapter has suggested that R2P has not guided the way in which ASEAN and ASEAN States approached this humanitarian crisis.

Chapter 7

Conclusions

The humanitarian crises in Rwanda and Bosnia-Herzegovina represent two pertinent examples of intra-state conflicts leading to mass atrocity situations that shocked the international community. Today, there is a growing need to find the most appropriate response to these types of mass atrocities. Humanitarian intervention cannot represent the answer to these humanitarian crises. Legally, humanitarian intervention conflicts with two important provisions of the UN Charter, namely Article 2(4) and 2 (7), which prohibit, respectively, the use of force and intervention in the domestic affairs of a sovereign State. Politically, the vulnerability of humanitarian intervention lies in the fact that it can hide ‘imperialistic’ agendas. The controversial nature of humanitarian intervention was confirmed in the late 1990s when the North Atlantic Treaty Organisation (NATO) intervened against the Federal Republic of Yugoslavia to stop the atrocities committed against the Kosovar Albanians. The Independent International Commission on Kosovo famously defined this intervention as legitimate and yet illegal under international law.

The international community’s failure to protect innocent civilians in Rwanda and Bosnia-Herzegovina, on the one hand, and the controversial NATO intervention in Kosovo, on the other, revealed the urgent need for a different approach to mass atrocities in international law. The new approach emerged around the concept of the Responsibility to Protect (R2P). R2P was introduced as a political idea in 2001 by the International Commission on Intervention and State Sovereignty, which promoted a new interpretation of State sovereignty as responsibility to protect one’s population. In 2005, R2P was brought in the realm of international law by means of its inclusion in the United Nations World Summit Outcome.

Later, an influential report of the UN Secretary-General formally defined the three-pillar structure of R2P. Pillar I refers to the responsibility of States to protect their populations against genocide, war crimes, crime against humanity and ethnic cleansing. Pillar II refers to the responsibility of the international community to assist States in meeting their Pillar I duties. Finally, Pillar III refers to the responsibility of the international community, through the UN, to provide a decisive response to atrocity crimes situations should a State manifestly fail to protect its own population. The recent conflicts in Libya and Syria have highlighted a number of problems related to the interpretation and implementation of R2P. In Libya, NATO went beyond the mandate of Security Council Resolution 1973, contributing to the overthrow of Gaddafi instead of focusing exclusively on the protection of civilians. In the case of Syria, the Security Council has been gridlocked due to geopolitical interests, preventing the invocation of R2P despite the gravity of the situation. Today, the precise meaning, scope and implementation of R2P remain a subject of debate.

Other than through the UN, States can also cooperate through regional organisations to implement R2P. As discussed in Chapter 1 and briefly in Chapter 3, regional organisations can even be better suited than international ones to implement R2P measures. However, while regional organisations may offer an important avenue to tackle atrocity crimes situations, they may also further the problem of the lack of a universally agreed concept of R2P. Looking at R2P from a regional perspective may also contribute to highlight the increasing importance of regional approaches to international law. As discussed in Chapter 1, international law is not as ‘international’ as it seems, given that different rules are being interpreted differently in different regions of the world.

This thesis has sought to contribute to the existing literature on R2P by looking precisely at the latter from the perspective of a regional organisation, that is, the Association of Southeast Asian Nation (ASEAN). There are important reasons explaining the focus on this regional

organisation. The organisation's growing significance in the international system is one: ASEAN has become a worldwide trading hub with official partnerships with the European Union, China, Japan, South Korea, and India and with an unofficial partnership with the United States. The combined economies of Southeast Asia countries are equivalent to the fourth biggest economy in the world, and the region is home to more than 700 million people, that is, more than the population of the European Union and the Middle East combined. On top of its increasing economic importance, Southeast Asia's geography is also of great importance due to its access to both the Indian and Pacific oceans. Since ASEAN States are becoming more important politically and economically, it is also important to note that their perspectives may challenge the usually dominant narratives of international law developed by Western States. As discussed in Chapter 3, ASEAN operates under a specific set of rules and principles known as the 'ASEAN Way'. These include the highest respect for State sovereignty, strict adherence to the principle of non-interference, prohibition of the use of force in international relations and consensus decision-making. ASEAN has gradually developed into a rules-based organisation with legal personality. It now includes an Intergovernmental Commission on Human Rights and has adopted a Human Rights Declaration to promote and protect human rights in the region. Despite looking promising, however, Chapter 3 has suggested that these developments have not remedied ASEAN's main weaknesses, that is, the incapacity to operate independently from member States and an overly strict interpretation of the principle of non-interference. Evidently, these conservative attitudes are at odds with the central idea of R2P, which prioritises human rights over State sovereignty.

As noted before, a key element of the ASEAN Way is consensus decision-making, which ensures that ASEAN does not make any decision that is not supported by all its members. As there is no consensus amongst ASEAN States on R2P, ASEAN as a collective organisation has not taken any direct position on this principle. However, Chapter 4 has shown that, as part of

their individual conduct, the vast majority of ASEAN States have supported R2P as a valuable guiding principle in international law in relation to humanitarian crises.

To understand the level of support that ASEAN States have for R2P, Chapter 4 analysed their official statements made during the UN General Assembly informal interactive dialogues on R2P held between 2012-2017. The chapter suggested that the conceptual endorsement of R2P varies amongst ASEAN members. Seven States can be described as Wary Supporters (Indonesia, Thailand, Malaysia, Singapore, the Philippines, Vietnam and Cambodia), two States can be described as R2P-neutral (Brunei and Laos) and one State can be described as Opposer (Myanmar). Wary Supporters tend to support Pillar I and II but remain sceptical of Pillar III. R2P-neutral States have neither rejected nor publicly supported any R2P Pillar. An Opposer State objects to R2P altogether.

Although Indonesia, Thailand, Malaysia, Singapore, the Philippines, Vietnam and Cambodia have endorsed Pillars I and II, none of them showed support for Pillar III. The fundamental reason for this hesitance is the fact that Pillar III clashes with the principles of the ASEAN Way that were mentioned earlier. In particular, Pillar III includes coercive measures such as sanctions, embargoes and ultimately military intervention which are taken without the consent of the State in question. This clashes with the principle of ‘Westphalian Sovereignty’ which, sitting at the centre of the ASEAN Way, affirms that States answer to no higher authority and have the prerogative to define and protect the rights of their people.⁸⁴⁶ As discussed in Chapter 3, ASEAN States have embedded instruments into ASEAN’s institutional architecture in order to protect their sovereignty since the organisation was formed in 1967. These instruments include the Bangkok Declaration, the Declaration on a Zone of Peace, Freedom and Neutrality, the Treaty of Amity and Cooperation, and ASEAN Charter. These instruments have created an

⁸⁴⁶ Robert Gilpin, *War and Change in World Politics* (Cambridge University Press, 1981) p. 17.

institutional framework to ensure that nothing can be done to infringe and/or interfere against a member's sovereignty and internal affairs.

Another central principle of the ASEAN Way which is incompatible with Pillar III is the principle of non-interference. ASEAN's perception of the concept of non-interference goes beyond the international law principle of non-intervention. As discussed in Chapter 3, in international law an intervention would only be deemed as illegal if there is a coercive element attached to it. Instead, the concept of non-interference adopted by ASEAN does not require the presence of coercion as a defining element. Thus, merely criticising a State would amount to a violation of the principle of non-interference while not qualifying as unlawful intervention in international law. It follows from the above that the implementation of the coercive measures of Pillar III would undoubtedly sabotage the beloved tenets of the ASEAN Way. The fact that Pillar III measures are not taken by individual States but are adopted by the Security Council collectively does not change things. The examination in Chapter 4 has also showed that ASEAN States mistrusts the Security Council, considering it unable to fairly implement R2P. On the other hand, Pillar I and II have received more support because they can be more easily reconciled with the ASEAN Way. ASEAN States have generally agreed that they have the primary responsibility to protect their population from atrocity crimes. The majority of them have also accepted the role that international and regional organisations can play in assisting States to meet their Pillar I responsibilities. Pillar II measures can range from preventive diplomacy and mediation dialogues to fact-finding missions and peacekeeping operations. Thus, the crucial feature of Pillar II is its consensual nature, which requires mutual commitment and active partnership from the State in question. Furthermore, three ASEAN States (Indonesia, Malaysia and the Philippines) have explicitly expressed their preference for regional instead of international forms of assistance, as they feel more comfortable cooperating with a regional actor which has a more intimate understanding of the histories and cultures of

the relevant State. However, although Indonesia, Thailand, Malaysia, Singapore, the Philippines, Vietnam and Cambodia have showed general support for Pillars I and II of R2P, it would be inaccurate to say that they did so enthusiastically.

It is also interesting to note that there are important similarities between ASEAN wary supporter States and China's approaches to R2P. As discussed in Chapter 2, China introduced its own variant of R2P called 'Responsible Protection'. Both ASEAN wary supporter States and China do not reject Pillar I and II but are hesitant to endorse Pillar III. China also adheres to the principles of the 'ASEAN Way', especially the strict interpretations of the principles of sovereignty and non-interference. The fact that these ASEAN values are shared by a great power like China contributes to challenge Western interpretation of R2P.

The second part of the thesis has tested the effects of this general regional endorsement of R2P on both ASEAN and ASEAN States' practical position on atrocity crimes situations by focusing on two case-studies, the 1999 East Timor crisis, which happened before the endorsement of R2P, and the recent Rohingya crisis in Myanmar, which happened after that. At the time of the East Timor crisis, the debates surrounding the need to do something to prevent and stop atrocity crimes had already reached a peak following NATO's intervention in Kosovo. Furthermore, the atrocities committed in East Timor after the 1999 referendum had reached the level of crimes against humanity and war crimes. Had R2P existed, it would have certainly been invoked by some parties. The crisis was triggered by the UN's mandated referendum for the East Timorese to choose between special autonomy within Indonesia or full independence. Once it was announced that the East Timorese had chosen full independence, mass atrocities were committed by pro-Indonesia militia sponsored by the Indonesian armed forces against pro-independence parties. The analysis in Chapter 5 has showed that ASEAN stood in solidarity with Indonesia. When Indonesia invaded East Timor in 1975, ASEAN

accepted Jakarta's justification for its action. Despite the intense activities at the international level about the possibility of holding a referendum, ASEAN did not refer to this situation and instead reaffirmed its commitment to the ASEAN Way.⁸⁴⁷ Once the violence had escalated to the level of crimes against humanity, ASEAN still remained silent. In the same way, when later talks began about establishing a peacekeeping mission in East Timor, ASEAN did not urge Indonesia to consent to it and did not attempt to offer assistance or to promote any solution to the crisis.

The response by ASEAN States was different. While Myanmar did not make any reference to Indonesia's duties, Cambodia, Laos, Vietnam, and Brunei recognised that it was Indonesia's primary responsibility to halt the atrocities committed against the East Timorese. Yet, they called for Indonesia's sovereignty to be respected by the international community. While these four States did not offer direct assistance to Jakarta, they explicitly stated that initiatives taken to resolve the crisis had to have the full consent of the Indonesian government. Thailand, Malaysia, Singapore and the Philippines did not criticise Indonesia for the events in East Timor nor did they make any reference to the fact that atrocity crimes had been committed. However, when pressure began to mount on Jakarta to accept a UN peacekeeping mission, they urged Indonesia to consent to UN assistance. As Indonesia did not have strong allies in the Security Council that could halt this course of action, it was essentially coerced into consenting to the peacekeeping mission. However, it was not Thailand, Malaysia, Singapore and the Philippines that exercised decisive pressure, which instead came from the US, the World Bank and the International Monetary Fund. It can be said that the four ASEAN States acted in a non-confrontational way in order to respect Indonesia's sovereignty. Once the International Force East Timor was established, Thailand, Malaysia, Singapore and the Philippines sent a

⁸⁴⁷ Joint Communiqué of the 32nd ASEAN Ministerial Meeting (1999), < https://asean.org/?static_post=joint-communicue-the-32nd-asean-ministerial-meeting-amm-singapore-23-24-july-1999> accessed on 22 April 2021.

significant number of personnel to the mission. However, it would be inaccurate to say that they were motivated by humanitarian concerns related to the widespread human rights violations against the East Timorese. Instead, they were more concerned about regional stability and limiting external interferences into the region.

The more recent Rohingya crisis in Myanmar, analysed in Chapter 6, confirmed much of ASEAN and ASEAN States' hesitation towards the principles underpinning R2P. This crisis reached its peak in 2016/2017 when the Tatmadaw launched military operations against the Rohingya allegedly in response to the violent terrorist attacks by the Arakan Rohingya Salvation Army. According to the 2018 Report of the Independent International Fact-Finding Mission on Myanmar set up by the UN Human Rights Council, in conducting these military operations the Tatmadaw committed war crimes, crimes against humanity and genocide. As it happened with respect to East Timor, ASEAN took no direct position on the crisis. Various ASEAN Summits and ASEAN Foreign Ministers' Meetings statements between 2017-2020 supported Myanmar's efforts to bring peace and stability to Rakhine State without referring to the atrocity crimes that the Tatmadaw had committed against the Rohingya.

The analysis of Chapter 6 showed that the introduction of R2P has not impacted ASEAN behaviour, despite the support for the principle showed by many ASEAN States. ASEAN's response to the Rohingya crisis mirrored its response to the East Timor crisis in that ASEAN essentially showed solidarity to both Indonesia and Myanmar. ASEAN did not show any humanitarian concern over the atrocities committed against the Rohingya, it did not use any R2P-based language and did not take any concrete action on the matter.

There is, however, one difference between ASEAN's reaction to the two crises that needs to be highlighted, namely the fact that in 2017 the ASEAN's Chairman released a statement on

the situation in Rakhine State.⁸⁴⁸ This was the first time that ASEAN released a statement addressing specifically a member's internal affairs. However, as discussed in Chapter 6, this statement misrepresented the reality. First, in an attempt to appease the Myanmar government, it did not refer to the Rohingya by name. Second, the statement referred to the situation as a 'complex inter-communal issue' rather than a victim-aggressor situation. On paper, this could be seen as the beginning of ASEAN's attempt to respond to a humanitarian crisis. However, in reality, this statement is rather meaningless since it lacks the power to force Myanmar to halt the atrocities and solve the root causes of the crisis.

On the other hand, individual responses from ASEAN States varied dramatically. Although Chapter 4 suggested that the majority of ASEAN States have conceptually endorsed the fundamentals of R2P, Chapter 6 has showed that these oral commitments did not actually translate into action. Thailand, Singapore, the Philippines, Laos, Vietnam and Cambodia have been supportive of Myanmar, as they did with Indonesia during the East Timor crisis. They echoed ASEAN Chairman's statement (mentioned above) by referring to the situation as 'a complex inter-communal issue'; they repeatedly stated that this 'issue' falls within Myanmar's internal affairs; and called for the international community to respect the sovereignty of the latter. Cambodia, the Philippines, Vietnam and Laos also voted against a number of UN General Assembly resolutions condemning the Tatmadaw. Thailand and Singapore, instead, abstained. The Philippines also expressed a preference for regional assistance in situations of crisis. However, it did not take any initiative to get ASEAN involved in this crisis. It can, therefore, be concluded that these six States were not willing to challenge the sovereignty of Myanmar and did not apply the basic principles of R2P. This clashes with their position on R2P discussed in Chapter 4, where Thailand, Singapore, the Philippines, Vietnam and

⁸⁴⁸ ASEAN Chairman's Statement on the Humanitarian Situation in Rakhine State (2017) < <https://asean.org/wp-content/uploads/2017/09/1.ASEAN-Chairmans-Statement-on-the-Rakhine.pdf> > accessed on 18 April 2021.

Cambodia were described as wary supporters of the principle.⁸⁴⁹ One possible explanation for this gap is that they showed support for R2P in order to increase their international legitimacy. In addition, they may have sought to show support for consensual forms of external assistance (Pillar II) in order to weaken the importance of coercive measures (Pillar III), and, ultimately, protect their sovereignty.

Brunei, Indonesia and Malaysia responded quite differently from the six States mentioned above. While Brunei did not take a vocal position, it still voted in favour of the UN General Assembly resolutions condemning the Tatmadaw. This is also important considering that during the East Timor crisis Brunei remained rather neutral. Indonesia and Malaysia, instead, were more vocal. Indonesia criticised Myanmar's treatment of the Rohingya. In doing so, however, it chose to employ what can be described as a policy of 'quite diplomacy'. It voted for the UN General Assembly resolutions condemning the Tatmadaw but at the same time it did not expressly condemn Myanmar. This could be due to two reasons. First, Indonesia might have had some sympathy for Myanmar since it found itself in a similar situation facing public international condemnation over the East Timor crisis. Second, throughout the East Timor crisis Myanmar did not condemn Indonesia and called for respect of its sovereignty. It is important to note that in its efforts to resolve this crisis, Indonesia did implement measures of Pillar II but without explicitly invoking the doctrine of R2P. As discussed in Chapter 6, right after the violence escalated in 2017, the Indonesian foreign minister met with Aung San Suu Kyi personally to offer Indonesia's assistance to resolve the crisis. In its effort, Indonesia also presented Myanmar with a proposal (4+1 Formula) with steps to take in order to stop and address the crisis. Indonesia also launched the Indonesian Humanitarian Assistance for Myanmar programme to provide aids to Rakhine State.

⁸⁴⁹ Laos was defined as R2P neutral.

The one ASEAN State that stands out the most in its reaction to the Rohingya crisis is Malaysia. Malaysia is the only ASEAN State to have referred to this situation as genocide. In an unprecedented move, it also called upon the international community to urgently take action given Myanmar's unwillingness to halt the atrocities. This was the first time in ASEAN history that a member called openly for some form of external intervention in the internal affair of another member. Again, in an unconventional move, Malaysia publicly distanced itself from the 2017 ASEAN Chairman's statement on Rakhine State mentioned above. This reaction of Malaysia drastically departs from its reaction to the East Timor crisis. While Malaysia was one of the first State within ASEAN to urge Indonesia to consent to a peacekeeping mission and was willing to offer personnel contribution, it was done in a friendly way without infringing upon Indonesia's sovereignty. Malaysia was willing to assist, but its motivation was to preserve regional peace, stability and to protect the ASEAN Way. However, although Malaysia has been extremely critical of Myanmar in this crisis and has urged ASEAN to resolve this crisis, unlike Indonesia, Malaysia has not provided concrete solutions or assistance in halting the atrocities against the Rohingya.

The combined examination of ASEAN and ASEAN States' responses to the East Timor and Rohingya crises highlighted a number of important points. First, through both crises, ASEAN has abided by the principles of the ASEAN Way, respecting its members' sovereignty and refraining from interfering in their internal affairs. This means that, although the majority of ASEAN States have endorsed Pillar I and II of R2P, this has not had an influence on ASEAN collective behaviour. The fact that ASEAN States have different positions on the specific meaning of R2P makes it even more difficult for ASEAN to respond to atrocity crimes in R2P terms.

Second, in terms of individual members, the endorsement of Pillar I and II of R2P by Thailand, Singapore, the Philippines, Vietnam and Cambodia did not translate into action in the Rohingya

crisis. As discussed in Chapter 5, Thailand, Singapore, and the Philippines had urged Indonesia to accept UN assistance during the East Timor crisis. However, since Myanmar has opposed any form of external interference, these three States have respected its sovereignty, thereby fully upholding the principles of the ASEAN WAY over those of R2P.

Third, Indonesia and Malaysia applied, contrary to the States mentioned above, the principles of R2P in the Rohingya crisis, albeit without explicitly referring to R2P. For example, Indonesia implemented Pillar II by offering its assistance to Myanmar and making a concrete proposal to address the crisis. Malaysia called for intervention by the international community given Myanmar's unwillingness to protect its population. However, one crucial element that needs to be taken into account here is that it is of no coincidence that the predominantly Muslim States within ASEAN are the ones who were most critical of Myanmar. This would explain why, for example, Malaysia did not respond so vehemently to the East Timor crisis. These inconsistencies in responding to atrocity crimes based on who the victims are pose a great challenge to the foundations of R2P. This is so because the implementation of the latter is meant to be impartial and not selective. The examination in Chapter 6 has also showed that personal relationships between States also plays a big role in engagements in atrocity situations. As stated above, the motive behind Indonesia's 'quiet diplomacy' most likely stemmed from Indonesia's personal history with Myanmar, namely the fact that the latter respected Indonesia's sovereignty and did not interfere at all in its internal affairs at the time of the East Timor crisis.

As discussed in the last section of Chapter 6, the Myanmar Junta in February 2021 seized control through a coup from the democratically elected officials. In response to this, citizens rallied to protest nationwide calling for democracy. The Junta has responded with forceful

measures that, at the time of writing, have resulted in the deaths of more than 700 protestors.⁸⁵⁰ ASEAN responded through an informal Foreign Minister's Meeting expressing its concern for the situation. However, it did not refer to the human rights violations committed by the Junta.⁸⁵¹ More recently, in an unprecedented mediation effort, ASEAN held an emergency summit in order to discuss the situation and reached an agreement on the "Five-point Consensus".⁸⁵² This proposal calls for the immediate cessation of violence and for dialogue and established a special ASEAN envoy to facilitate mediation. It also establishes that ASEAN will provide humanitarian assistance to Myanmar. At first glance, it would seem that, by doing the above, ASEAN has softened its position on the principle of non-interference in the internal affairs of States and has applied R2P Pillar II measures. A closer examination, however, paints a different picture. First, Myanmar agreed to call the ASEAN emergency summit. Second, the "Five-point Consensus" only represents a step towards the right direction on paper. ASEAN has carefully crafted the language used in the proposal to ensure that it does not infringe upon Myanmar's sovereignty. Also, this proposal lacks enforcement power. In fact, while Myanmar verbally agreed to the proposal, military abuses have continued all around the country.⁸⁵³ It could be argued, then, that Myanmar has agreed to these ASEAN mediation efforts to protect itself from harsher external interferences from the West, making itself appear to be cooperating with ASEAN in resolving the crisis. Also, it should not be forgotten that several ASEAN States, namely Thailand, Vietnam, Cambodia, Laos and the Philippines, individually are still supporting the Junta. Only Indonesia, Malaysia and Singapore have publicly deplored the lethal

⁸⁵⁰ 'Myanmar coup: The people shot dead since the protests began' (BBC, 13 April 2021) < <https://www.bbc.co.uk/news/world-asia-56636345>> accessed on 23 April 2021.

⁸⁵¹ Chair's Statement on the Informal Ministerial Meeting (IAMM) (2021) < <http://www.asean2021.bn/Theme/news/iamm-02.03.21.aspx>> accessed on 23 April 2021.

⁸⁵² Chairman's Statement on the ASEAN Leaders' Meeting (2021) pp. 3-4, < <https://asean.org/storage/Chairmans-Statement-on-ALM-Five-Point-Consensus-24-April-2021-FINAL-a-1.pdf>> accessed on 26 April 2021.

⁸⁵³ 'Despite ASEAN consensus, military abuses continue around the country' (Myanmar now, 30 April 2021) < <https://www.myanmar-now.org/en/news/despite-asean-consensus-military-abuses-continue-around-the-country>> accessed on 3 May 2021.

force used against civilian population. These three States have been proactive in calling on the Junta to resolve this crisis peacefully and were the ones that called for the emergency ASEAN Summit to address this issue. The motivations behind the effort from Indonesia, Malaysia and Singapore could be linked with an effort to protect the region from external international interference. Any action by ASEAN no matter how timid, could deter criticism and prevent additional interference from the international community. It also seems that Malaysia was more critical of the Junta's conduct against the Rohingya than it has been of the Junta's violent response to the civilians protesting on the streets.

Overall, this thesis has showed that the practical commitment to R2P in Southeast Asia is weak. First, ASEAN has no capacity to act independently from its members. Any collective position must mirror a collective agreement among members. Second, even after the introduction of R2P and several ASEAN States' *conceptual* endorsement of the principle, when faced with an actual atrocity situation ASEAN States have not *practically* engaged with R2P. In the Rohingya crisis, the vast majority of ASEAN States, (with the exception of Malaysia) mirrored their reaction to the East Timor crisis, showing unwillingness to go against the principles of the ASEAN Way and to challenge the sovereignty of Myanmar.

A number of factors that generally shape ASEAN States' approach to R2P can be singled out here. The first factor, as discussed in Chapter 2, is the history of ASEAN States, which, in turn, contributes to explain the creation of ASEAN and its commitment to the ASEAN Way. All ASEAN States (with the exception of Thailand) had been colonised by Western powers at one point in their histories. After becoming independent, these States have been understandably concerned about protecting their independence, leading to the adoption of a predominantly realist stance on issues of sovereignty, non-interference, and human rights. This realist stance

is reflected in the way in which ASEAN States approach R2P. In particular, they reject Pillar III because of its non-consensual nature, since the measures taken under this Pillar would infringe upon the sovereignty of the affected States. A related theme is ASEAN States' lingering fear of neo-colonialism. Thus, when faced with atrocity crimes situations in the region, ASEAN States are very wary of Western States' interferences to avoid new forms of colonialism.

The second factor that contribute to shape ASEAN States' approach to R2P is culture. ASEAN States prefer methods of quiet and non-confrontational diplomacy over more coercive forms of intervention, including the use or threat of force. Since the creation of ASEAN, ASEAN States have unanimously agreed upon a specific working culture amongst its members. This applies also to decision-making in that ASEAN States prefer consensus style over the Western's formal rigid voting style. This was purposely implemented into the ASEAN culture in order to protect members' sovereignty and ensure that no action interfering with members' internal affairs could be taken.

The third factor that contributes to shape ASEAN States' approach to R2P is the concept of national interest. Speaking in realist terms, a sovereign State would only adopt a foreign policy that fits with its national ambitions and interests, be they economic, political, or military. The same applies to R2P scenarios. ASEAN States will tend to engage with R2P when and if doing so aligns with their interests. For example, the majority of ASEAN States have conceptually endorsed Pillar I and II because this would, among other things, increase their perceived legitimacy within the international community. At the same time, rejecting Pillar III is in line with ASEAN States' commitment to protect their sovereignty.

The fourth factor that affects how ASEAN States approach R2P is their individual relationship with the State in whose territory atrocity crimes are committed. Thus, if a given State has a close relationship with a State that is currently dealing with a mass atrocities crisis (even if the

State in question is the perpetrator), the former is more likely to tread carefully and ensure that it does not act in any way that could be seen as disrespectful or infringing on the sovereignty of the latter. On the other hand, the lack of a close relationship between two States would allow one State to be more vocal and direct in dealing with the situation in the other State. This might also, on occasion, lead to calls for coercive measures under Pillar III in light of special circumstances (e.g. the case of Malaysia and Myanmar).

The fifth factor that contributes to shape ASEAN States' approach to R2P is a State's relationships with the P-5 of the United Nations Security Council. Pillar III measures need to be authorised by the Security Council. As such, the P-5 hold significant power when it comes to implementing the coercive dimension of R2P. As a result of this, individual relationships between ASEAN States and the P-5 are important, especially when the State in question is the perpetrator of mass atrocities. If a State has a good relationship with any members of the P-5, it can essentially be shielded from all forms of Pillar III measures mandated by the Security Council. On the other hand, if the State in question does not, then it does not have the luxury of being protected from any form of coercive measures. In particular, for this region and ASEAN States, the crucial P-5 actor is China. As China shares a similar culture and set of preferences in the realm of international law, it holds significant influence in the region. As such, before approaching a R2P situation in another member State, most of ASEAN States will most likely take into account China's stance on the issue before responding.

All considered, ASEAN's approach to R2P is rather conservative. This is not surprising. The idea of R2P implies that sovereignty can no longer protect States which are unable or unwilling to protect their populations from mass atrocities. As such, R2P opens up the concrete possibility of eroding the principle of State sovereignty. Yet, ASEAN States abide by the ASEAN Way precisely because it places high value on the principle of sovereignty and protects the region from external interference. To these concerns one should also add that ASEAN States' fear that

R2P interventions could be used by Western States to pursue imperialistic agendas, as confirmed by the 2011 NATO's intervention in Libya. This conservative approach to R2P, however, is neither the only nor the best way to protect the region from external interference because a lack of regional action is likely to lead to external action. Thus, it is my opinion that ASEAN should take a more active role in the implementation of R2P. This is especially true with regards to Pillar II. As discussed in the thesis, the idea of promoting a more flexible approach to sovereignty and non-interference in the context of atrocity crimes is not new in the region. In 1999, Thailand sought to introduce the concept of 'Flexible Engagement' within ASEAN by encouraging ASEAN and ASEAN States to openly discuss matters related to humanitarian crises that are both transnational and can have a spill-over effect in the region. Thailand suggested that when faced with matters that could pose as a threat to regional security, the rigid interpretation of the concept of non-interference should be relaxed and that other member States should be welcomed to express their opinions if the matter affects them without being accused of interfering in another member's internal affairs. If this approach were adopted by other ASEAN States, harsher forms of external interference into the region could be prevented. However, until some foundational changes are made to ASEAN's structure (in terms of institutional framework, *modus operandi* and guiding principles), its potential to take R2P-action is far-fetched.

As discussed in Chapter 2, R2P has also a preventive dimension. Since ASEAN has not been capable/willing to take action in response to mass atrocities, one could wonder whether it could play a more significant role in relation to early prevention. As highlighted in Chapter 3, regional human rights mechanisms can contribute to the latter by means of early monitoring and reporting activities before a crisis escalates. While ASEAN has an Intergovernmental Commission on Human Right, the latter lacks the ability to act independently from ASEAN States. In order for this Commission to play a constructive role in preventing atrocities from

occurring in the region, it should be given independent capacity to monitor and report on member States' activities. Furthermore, for its recommendations to be taken seriously, it should have the power to impose sanctions and/or suspend members in the event of grave violations and non-compliance.

More important changes, by contrast, could be seen in the future within individual States. The Rohingya crisis showed that Indonesia have implemented Pillar II measures even if it did not expressly invoke them, while Malaysia was even prepared to support coercive forms of intervention. The recent coup showed that Indonesia, Malaysia and Singapore have been actively willing to assist Myanmar in resolving the crisis, thereby showing again an indirect endorsement and implementation of Pillar II of R2P. However, as already noted above, these States' progressive actions cannot be said to be exclusively inspired by R2P ideals.

At a broader level, this thesis has also highlighted that the gap between how the West and the East approach the concepts of sovereignty and non-intervention is not set to narrow in the near future. The fact that China shares the values underpinning the ASEAN Way, for example, strengthens the challenge posed by this region to the Western understanding of R2P. This, in turn, will have important effects on the present and the future of R2P as a guiding principle in international law. Ultimately, given their growing political and economic importance, ASEAN States' reluctance to fully endorse and apply the ideas underpinning R2P in real atrocity crime situations represents an important obstacle for the full acceptance of R2P as a guiding principle in international law to respond to mass atrocities.

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