Responding to Atrocities in Myanmar after the February 2021 Coup: Options for ASEAN beyond Normative and Structural Constraints

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Abstract

This article unpacks the normative and structural challenges facing the Association of Southeast Asian Nations (ASEAN) in responding to and preventing atrocity crimes, focusing on Myanmar. It argues that ASEAN has been ineffective in dealing with the atrocities occurring in Myanmar, particularly after the 2021 coup, due to its adherence to its traditional norms and the "ASEAN Way". However, faced with the defiance of the junta in Myanmar, ASEAN leaders may be forced to move away from

its non-interference principle, and should in fact consider difficult options such as suspension of Myanmar membership in the organisation. By adopting the principle of non-indifference and holding the Myanmar military accountable for its continuing atrocities against civilians, ASEAN could strengthen its credibility not just before the international community but, more importantly, among the people of Myanmar who are no longer willing to tolerate a return to military rule and impunity by security forces.

Keywords

ASEAN – atrocity crimes – democratic transition – regional governance – Myanmar coup – Responsibility to Protect (R2P) – institutional norms

1 Introduction

This article examines the limitations of the Association of Southeast Asian Nations (ASEAN) in the context of preventing atrocity crimes in the region based on the principle of responsibility to protect (R2P) and using Myanmar as a case in point. Certainly, ASEAN has been ineffective in responding to the atrocities committed by the military since 2012. While ASEAN did reach an agreement with the junta after the 2021 coup called the Five-Point Consensus, there appears to be little to date by way of implementation. The lack of progress on ending the atrocities in Myanmar has undermined ASEAN’s credibility in the international community, and importantly, among the people of Myanmar who continue to suffer from military impunity. Over the last two years since the coup, ASEAN’s consensus has not been implemented given the Myanmar

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1 The Five-Point Consensus was reached by ASEAN leaders and Myanmar junta chief Min Aung Hlaing during the Jakarta meeting in April 2021. The five points are: (1) immediate cessation of violence in Myanmar and for all parties to exercise utmost restraint; (2) constructive dialogue among all parties concerned to seek a peaceful solution in the interests of the people; (3) appointment of a special envoy of the ASEAN Chair to facilitate the dialogue process, with the assistance of the ASEAN Secretary-General; (4) ASEAN shall provide humanitarian assistance through the ASEAN Coordinating Centre for Humanitarian Assistance on disaster management (AHA Centre); and (5) the special envoy and delegation shall visit Myanmar to meet with all parties concerned. See ‘Chairman’s Statement on the ASEAN Leaders’ Meeting’, Jakarta, Indonesia, April 24, 2021, ASEAN, https://asean.org/wp-content/uploads/Chairmans-Statement-on-ALM-Five-Point-Consensus-24-April-2021-FINAL-a-1.pdf, accessed September 30, 2022.
junta chief’s intransigence even as the past three chairs of the organisation struggled to make the role of the special envoy more effective in dealing with the Myanmar crisis.

Accordingly, with respect to R2P and the prevention of atrocities, ASEAN as an institution has been hamstrung by certain normative and structural constraints. It is unlikely the organisation will invoke the norm in responding the crisis in Myanmar. This is despite the ASEAN Charter being aligned with key elements of R2P, including the protection of human rights, the rule of law, and democratic good governance. The crisis in Myanmar, and the ASEAN response to it, has brought the limitations into sharp relief. The Myanmar example has shown how ASEAN’s well-documented norms of non-interference and “ASEAN Way” decision making by consensus may stand in the way of progress on R2P concerns in member countries. It has also exposed the lack of mechanisms within ASEAN to ensure accountability or allow the imposition of sanctions to deal with errant members.

The next sections take a close look at the constraints faced by ASEAN, and the implications for its response to the Myanmar situation, and more broadly, for the advancement of the R2P principle within the region. It begins with an overview of ASEAN and R2P, specifically the efforts in mainstreaming R2P in the region. It then focuses on the challenges of R2P implementation in the context of dealing with Myanmar as a member state of the organisation, with suggestions for strategies that ASEAN could consider in dealing with the Myanmar crisis. Thereafter, a discussion of what the case of Myanmar suggests in terms of mainstreaming R2P within ASEAN is presented.

2 ASEAN and the Responsibility to Protect: an Overview

The R2P principle, adopted in 2005 by all member states of the United Nations (UN), highlights the responsibility of states to protect their populations from atrocity crimes, including their incitement. ASEAN has not formally adopted the language of R2P in its Charter and other formal agreements and declarations. Unlike the African Union, which has provisions in its Convention on how to respond to atrocity crimes, specifically, article 4(h), the ASEAN Charter does not have any similar provisions.

Yet, the risk of atrocities facing the region cannot be ignored. This is because most ASEAN member states are multi-ethnic societies, with some still facing violent armed rebellions and communal conflicts, ethnic tensions, or other forms of human insecurity. Specifically, they face several factors rooted in their human security problems that could increase risk of atrocity crimes.
even some have experienced such crimes in the past, notably Cambodia under the genocidal reign of the Khmer Rouge. In Indonesia, Suharto’s New Order resulted in millions of people being killed. Ongoing atrocities are also being committed by the military in Myanmar, and under the recent Duterte administration in the Philippines, where state security agents have allegedly committed crimes against humanity as they targeted unarmed civilians on the pretext of protecting internal stability and pursuing the war on drugs, respectively. Given these issues, R2P should resonate well in the region.

However, there is still some discomfort among ASEAN members about R2P even while they recognise the principle’s relevance, especially in preventing mass atrocities. ASEAN remains divided about R2P as some members deem that Pillar 3 (timely and decisive action by the international community if states manifestly fail in their primary responsibility to protect vulnerable populations from atrocity crimes) of the principle violates the group’s traditional norms of non-interference and sovereignty.

Nonetheless, since 2009, six ASEAN members have participated in UN Informal Interactive Dialogues on R2P, including Myanmar. They specifically supported Pillars 1 (prevention) and 2 (capacity building) of the norm but remained wary of Pillar 3, especially in the aftermath of the Libyan crisis in 2011. Some have supported the adoption of the principle in the formal agenda of the UN General Assembly since 2018, and even voted in favour of UN resolutions on Myanmar since 2017 that condemned the atrocities committed by the Myanmar military against the Rohingya people and other ethnic minorities. Three members – Brunei Darussalam, Indonesia, and Malaysia – supported the case filed against Myanmar in 2019 by The Gambia, on behalf of the Organisation of Islamic Cooperation (OIC), for violating the 1948 Genocide Convention. Following the February 2021 coup in Myanmar, five ASEAN members – Indonesia, Malaysia, the Philippines, Singapore, and Vietnam – supported the UN General Assembly resolution condemning the violent attacks on unarmed civilians by the military and calling for a stop to the sale of weapons to the junta.

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2 The six ASEAN members are Indonesia, Malaysia, Myanmar, the Philippines, Singapore, and Thailand.

3 ASEAN members that supported responsibility to protect (R2P) resolutions in the United Nations (UN) General Assembly in 2018, 2019, 2020, and 2021 include Brunei Darussalam, Indonesia, Malaysia, and Singapore. It is significant to note that the Philippines prior to the February 2021 coup in Myanmar abstained or voted “no” to these resolutions. However, it strongly supported resolutions condemning the coup and atrocities in the country in June 2021.

4 Brunei Darussalam, Indonesia, and Malaysia supported UN General Assembly resolutions on Myanmar in 2017 and 2019.
It is also significant that two ASEAN members, Cambodia and the Philippines, became state parties to the Rome Treaty that created the International Criminal Court (ICC), although Manila decided to withdraw from the treaty in 2019 after cases were filed by human rights advocates against President Duterte over alleged crimes against humanity in relation to his government’s war against drugs. In June 2021, the ICC’s office of the prosecutor requested that the court’s pre-trial chamber authorise a formal investigation into the drug war killings in the Philippines as it had found a reasonable basis for the allegations of atrocity crimes by state authorities. Meanwhile, Bangladesh filed a case at the ICC against Myanmar in 2018 in relation to the Myanmar military’s “clearing operations” targeted at militants linked to the Arakan Rohingya Salvation Army (ARSA), which led to over 6,000 civilian deaths and the massive exodus of Rohingya refugees into Cox’s Bazar since August 2017. The ICC’s pre-trial chamber subsequently authorised a formal investigation into the atrocity crimes committed by Myanmar’s security forces against the Rohingya people that led to the massive, forced displacement into Bangladesh.

3 Mainstreaming R2P and Atrocities Prevention in ASEAN

Despite some reservations about R2P within ASEAN, the principle is generally considered to be consistent with the organisation’s normative principles. In 2014, a high-level advisory panel headed by former ASEAN Secretary-General (and also former Thai Foreign Minister) Dr Surin Pitsuwan presented a report at the annual UN Informal Interactive Dialogue on R2P in New York. The report stressed the importance of mainstreaming the R2P principle in Southeast Asia.

The panel argued that (1) the ultimate objective of the principle, protection against atrocity crimes, is consistent with and integral to the overall goals of the ASEAN Community; (2) the norms and objectives of R2P are not alien to ASEAN; (3) ASEAN already has mechanisms to implement R2P; (4) the commitment to R2P made by all UN member states, including ASEAN, is compatible with international law; and (5) as a leading regional organisation, ASEAN has worked with the UN in promoting international peace and security.5

Accordingly, the panel made a number of recommendations for promoting R2P in the region, including (1) raising public awareness about the norm;

(2) developing regional capacity for early warning through existing mechanisms and institutions of ASEAN; (3) incorporating the prevention of the four atrocity crimes (genocide, war crimes, crimes against humanity, ethnic cleansing) in the agenda of the ASEAN Inter-Governmental Commission on Human Rights (AICHR); and (4) supporting relevant civil society efforts to promote human rights protection and advance the norms and principles of atrocity prevention. Public seminars were held in several Southeast Asian capitals to promote awareness of these recommendations, but the recommendations were not adopted by ASEAN.

3.1 ASEAN Human Protection Principles

Notwithstanding the absence of R2P and relevant provisions in the ASEAN Charter, elements of the principle are contained in the Charter and other relevant documents and agreements. For example, the ASEAN Charter recognises, among others, “the importance of respect for fundamental freedoms”, “the promotion and protection of human rights”, “upholding the United Nations Charter and international law, including international humanitarian law”, and “respect for different cultures, languages and religions of peoples of ASEAN”.

Further, human protection principles have been incorporated in relevant documents, such as the blueprints for the ASEAN Community pertaining to the political and security and social and cultural communities. Such principles are also found in the terms of reference of various ASEAN mechanisms, including AICHR, the ASEAN Commission on the Promotion and Protection of Women and Children (ACWC) and the ASEAN Institute for Peace and Reconciliation (AIPR).

It is evident then that human protection norms (human rights protection, tolerance of and respect for diversity, protection of women and children, and protection of migrant workers, among others) have long been incorporated in the vision, objectives, and long-term goals of ASEAN. This suggests, as Rizal Sukma argues in his paper on the ASEAN Political and Security Community, that while there are certain constraints to the adoption of R2P in Southeast Asia,
there are also a number of opportunities for the principle to be mainstreamed within ASEAN.9

In recent years, the emergence of violent extremism and intolerance as a regional security concern amid ongoing internal conflicts has been duly recognised by ASEAN leaders and provided impetus for a focus on prevention. In 2017, ASEAN adopted two significant documents recognising the importance of human protection principles related to atrocity prevention and R2P, namely, the ASEAN Declaration on Culture of Prevention for a Peaceful, Inclusive, Resilient, Healthy and Harmonious Society,10 and the Joint Statement on Women, Peace and Security in ASEAN.11 The ASEAN Declaration on Culture of Prevention specifically recognises the importance of:

1) understanding the root causes and consequences of violent extremism and other forms of violence and deviant behaviours at individual, organisational and institutional levels through risk assessment, research, forecast, early warning and other evidence-based methods; 2) adopting a mindset change from a reactive to a preventive approach; 3) inculcating shared values such as peace, harmony, intercultural understanding, the rule of law, good governance, respect, trust, tolerance, inclusiveness, moderation, social responsibility, and diversity; and 4) developing effective upstream preventive policies and initiatives such as transformative social protection, public information, responsible use of media, as well as strengthening the existing values-based education in schools and institutions.12

Following the adoption of these two declarations, a number of activities have been organised by various ASEAN mechanisms, including regional conferences and seminars that affirm the importance of inter-faith dialogue, the role of

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12 ASEAN, ‘ASEAN Declaration on Culture of Prevention; ASEAN, Joint Statement on Promoting Women’. 
women in peacebuilding and conflict prevention, and countering violent extremism.  

3.3 Non-interference and the ASEAN Way

Despite the presence of relevant human protection principles in the ASEAN Charter and other documents, a major obstacle to the organisation’s effectiveness in dealing with atrocity crimes in the region is the adherence of ASEAN members to the norm of non-interference and the so-called ASEAN Way of decision making. Certain norms are deeply embedded in ASEAN’s diplomatic culture, in particular, the protection of territorial integrity, sovereignty, and non-interference in the domestic affairs of member states. More important, the ASEAN Way, which is anchored on consultation and consensus, is still the operative principle when it comes to dealing with human protection issues, such as human rights, refugees, trafficking of persons, migrants, etc. While this ensures a cohesive stance, it also means that ASEAN’s response to regional concerns is often constrained by consensus that is primarily based on the lowest common denominator. To some extent, the ASEAN Way also gives each member state the right to veto any discussion of issues that may be prejudicial to its national interest, especially when it concerns domestic political problems such as human rights protection or internal conflicts. Indeed, ASEAN’s unity has been tested on issues related to political and humanitarian crises in Myanmar and the conflict in southern Thailand, for example.

Another factor that constrains ASEAN’s capacity to respond effectively to atrocity crimes happening in member states is the lack of provisions in its Charter for sanctions against non-compliant member states. Compared to the African Union, which can suspend member states and intervene without their consent in responding to atrocity crimes, ASEAN has no established sanctions mechanism for suspending or expelling members that violate its Charter.


In addition, existing mechanisms, such as AICHR and ACWC, are constrained under their terms of reference from pursuing protection of human rights among member states, such as discussing and conducting investigations of human rights violations occurring in the region. Also, representatives to AICHR, ACWC, and AIPR are predominantly from the government sector (e.g., diplomats or retired diplomats), though there are some from academia or civil society groups with experience in human rights advocacy; women, peace and security; and peacebuilding. It is significant to note also that only five of the 10 ASEAN member states have national human rights institutions, although not all adhere to the Paris Principle of autonomy. Currently, there are no formal mechanisms for national human rights institutions and other domestic mechanisms to interact regularly with AICHR, ACWC, or AIPR.

4 ASEAN and R2P: the Case of Myanmar

ASEAN’s engagement with Myanmar since 1997, when it was admitted into the grouping, has been primarily about human rights protection of those resisting military rule in the country. This includes expression of serious concern over the house arrest of Aung San Suu Kyi in the 1990s to the military’s violent crackdown on Buddhist-led protests in 2007, the humanitarian crisis in the aftermath of Cyclone Nargis in 2008, and the protection of Rohingyas in Rakhine since 2012.

Under the National League for Democracy (NLD) government that took over in 2016, the communal conflict in Rakhine remained unresolved, and, from August 2017, ASEAN was again forced to respond – notwithstanding the grouping’s non-interference principle – to increasing international pressure on Myanmar over the atrocities committed by the Myanmar military against the Rohingya people and the problem of repatriating refugees who fled Rakhine into Bangladesh. Following the coup of February 2021 and the subsequent violent crackdown by the junta against unarmed civilians, ASEAN was put in the spotlight again as it struggled to respond to the atrocities happening in the

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16 For a discussion of developments in Rakhine since 2012 and how ASEAN responded to the situation, see Noel M. Morada, ‘ASEAN and Human Protection in Myanmar: From Non-Interference to Non-Indifference?’, in Hunt and Morada (eds.), Regionalism and Human Protection: Reflections from Africa and Southeast Asia, pp. 98–122.
country even as the Myanmar military remained defiant and uncooperative in implementing the Five-Point Consensus agreed upon by ASEAN leaders and Myanmar junta chief Min Aung Hlaing during a meeting in Jakarta in April 2021.

4.1 **Constructive Engagement**

While ASEAN’s non-interference principle is enshrined in its Charter, it by no means prevents the organisation from collectively expressing serious concerns over the internal affairs of member states, especially when they have negative spill over effects on regional peace and security as well as the grouping’s reputation. This has especially been the case with Myanmar. Since becoming a member state in 1997, it has tested ASEAN’s policy of pursuing “constructive engagement” while upholding its traditional norms. In fact, constructive engagement has been the mantra of ASEAN not only in justifying its decision to admit Myanmar as a member but also in parrying Western pressures for the grouping to impose sanctions, particularly in response to human rights violations under the military junta, and before that, the quasi-civilian government of the Union Solidarity and Development Party (USDP) and the NLD government (2016–2021).17

To some extent, constructive engagement is a strategy used by ASEAN to skirt around its non-interference principle by using backdoor diplomacy, persuasion, and other non-confrontational means to encourage a member to respond more positively to the grouping’s concerns, especially if it affects the organisation’s reputation vis-à-vis the international community. In the case of Myanmar, ASEAN utilised this approach in various contexts. It persuaded the military junta to pass on the chairmanship of ASEAN in 2006 following pressures from its Western dialogue partners about the human rights violations in the country. ASEAN employed backdoor diplomacy as international pressure again mounted against Myanmar following the junta’s violent crackdown on the Buddhist-led protests in 2007, the humanitarian crisis in the wake of Cyclone Nargis in 2008, and the eruption of communal violence in Rakhine 2012.

Until the Myanmar military’s clearing operations in Rakhine against ARSA militants in August 2017, ASEAN simply accommodated Myanmar’s position, under the USDP as well as NLD governments, that the communal violence in Rakhine was an internal matter. ASEAN even recognised Myanmar’s position that efforts were being made to restore peace and stability, even as it asserted

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17 For more on ASEAN’s “constructive engagement” with Myanmar, see Lee Jones, ‘ASEAN’s Albatross: ASEAN’s Burma Policy, from Constructive Engagement to Critical Disengagement’, *Asian Security*, vol. 4, no. 3, 2008, pp. 271–293, DOI: 10.1080/14799850802306484.
that it would ensure that the perpetrators of the violence and human rights violations would be punished. In August 2012, ASEAN foreign ministers jointly issued a statement concerning the developments in Rakhine that vaguely referred to “incidents” in May and June 2012 but which did not even use the term “Rohingya” to refer to the Muslim community in that state nor the violence committed against them.\(^\text{18}\) The statement also acknowledged the steps being taken by the government of Myanmar in cooperation with UN agencies to address the humanitarian needs of “affected persons and communities” even as ASEAN expressed its readiness to help Myanmar address the crisis. The short statement ended in a non-confrontational tone but with a subtle message that encouraged Myanmar to continue with its commitment to the democratisation process, including the “promotion of national solidarity and harmony among communities” in the country.

ASEAN’s constructive engagement with Myanmar on the Rakhine crisis was given a boost after the NLD government took over in 2016. Indeed, there was an expectation within ASEAN that there was a better chance of ending the communal conflict in Rakhine after Suu Kyi formed the Rakhine Advisory Commission. Headed by former UN Secretary General Kofi Annan, the Commission was tasked with coming up with recommendations that would address the root causes of the Rakhine crisis, including ending the persecution and statelessness of the Rohingya people. ASEAN strongly supported the creation of the Commission amid initial resistance from the Myanmar military, and encouraged the NLD government to ensure that the recommendations would be fully implemented.\(^\text{19}\) ASEAN also promised to assist Myanmar in implementing the Commission’s recommendations.

However, following the clearing operations in 2017 that led large numbers of Rohingyas to flee to Bangladesh, ASEAN’s constructive engagement with Myanmar seemed to have reached its limits, and unprecedented cracks appeared in the much-vaunted ASEAN Way of consensus decision making. Malaysia bolted from ASEAN’s joint statement issued in September 2017 by the Philippines as ASEAN Chair, which it criticised for failing to mention the atrocities committed by the Myanmar military against the Rohingya.


4.2 Accountability for Atrocity Crimes in Myanmar

In the face of sustained international outrage and calls for accountability over the persecution of the Rohingyas, ASEAN has taken a more candid stance toward Myanmar. In its Chairman’s Statements during the Leaders’ Summit in Singapore in 2018 and in Bangkok in 2019, ASEAN underscored the importance of bringing the perpetrators of human rights violations in Rakhine to justice. Specifically, ASEAN encouraged Myanmar to ensure that the Independent Commission of Enquiry conducted its investigation impartially and objectively and that those who were found to have committed such crimes are punished. ASEAN also called on the NLD government to ensure the safe, voluntary, and dignified repatriation of “displaced” persons from Bangladesh (avoiding the use of “Rohingya”).

Within the organisation, Malaysia also continued with its public criticisms of Myanmar, particularly its failure to cooperate with the UN in allowing the Independent International Fact-Finding Mission on Myanmar (IIFMM) to conduct its investigation inside the country. No less than then Prime Minister Mahathir Mohammad, who came back to power in 2018, expressed his disappointment with Suu Kyi, with whom his government has “lost faith.” His foreign minister also insisted that the perpetrators of the atrocities must be brought to justice and that Myanmar should also grant citizenship to the Rohingyas as guarantee for their safe repatriation from Bangladesh.


21 Based on interviews conducted by the author with key informants in the region, Myanmar apparently wanted to include the creation of the Independent Commission of Enquiry in the Chairman’s Statement during the Singapore summit of leaders in 2018 to convince the grouping and the international community that it is taking steps to address accountability for human rights violations. However, some members insisted on adding the phrase “impartial and objective investigation” to ensure that there is no interference by the government or the military in Independent Commission of Enquiry’s probe in Rakhine.

22 The inclusion of repatriation of “displaced person” was apparently based on increasing frustration over Myanmar’s lack of progress in implementing bilateral agreements with the UN and Bangladesh.


However, ASEAN did not collectively express support for international efforts—whether through the UN or other existing mechanisms—to pursue accountability for the crimes committed against the Rohingyas after the August 2017 ARSA attacks. For example, it neither endorsed the creation of the IFFMM by the UN Human Rights Council nor responded to the findings released in three separate reports in 2018 and 2019. ASEAN also did not collectively express support for the cases filed against Myanmar, in the ICC by Bangladesh and the ICJ by The Gambia. Even so, individual ASEAN members were free to support these international efforts to seek justice for the Rohingyas. Three ASEAN members—Brunei, Indonesia, and Malaysia—are members of the OIC and supported the ICJ case filed by The Gambia on behalf of the OIC.

Meanwhile, ASEAN formally recognised the Independent Commission of Enquiry (ICOE) created by the NLD government, which the group presumably hoped would be able to address the issue of accountability for the atrocities in Rakhine. Even though the Commission’s findings and recommendations will be pursued primarily within the context of Myanmar’s Constitution and national laws, ASEAN, as noted earlier, made known its expectation that the investigation should be carried out impartially and objectively. This became even more important for ASEAN after the IFFMM released its reports in 2018 and 2019, and after human rights advocates in the region and elsewhere expressed doubts about the impartiality of the ICOE following statements made by its panel chair in August 2018 that it would not blame or “point fingers” at anyone.

On 21 January 2020, a few days before the ICJ released its preliminary ruling on the case filed by The Gambia, the ICOE submitted its final report to the NLD government. The report concluded that “war crimes, serious human rights violations, and violations of domestic laws” took place during security operations in Rakhine following the August 2017 ARSA attacks. However, it also stated that the evidence accumulated during its investigation could not conclusively support the allegation that there was genocidal intent on the part of security forces when they carried out the clearing operations in Rakhine.

25 See ASEAN, ‘Chairman’s Statement of the 33rd ASEAN Summit’; ASEAN, ‘Chairman’s Statement of the 34th ASEAN Summit’.
Neither ASEAN as an organisation nor its individual member states issued any statement with regard to this report or the preliminary ruling of the ICJ.

Indeed, without any sanctions provision in the ASEAN Charter or accountability mechanisms in ASEAN, the grouping could only rely on Myanmar’s domestic efforts and willingness (despite the limitations and institutional weaknesses) to respond to regional and international concerns about justice for the Rohingyas, which meant that Myanmar could do so on its own terms and within the exercise of its sovereignty.

There is also a tacit acknowledgement in the region that without Myanmar’s consent and cooperation, regional and international efforts to seek accountability for the atrocities in Rakhine would be difficult, even if not necessarily bound to fail in the long run. Although Myanmar took on the so-called democratic transition since 2010 under the USDP and the NLD governments, this transition was constrained by the 2008 Constitution drafted by the military where it remained above the law and operated independently of the civilian government particularly in managing ethnic armed conflicts and communal tensions in the country. Accordingly, the military could also intervene any time as provided for under the Constitution’s emergency powers, which could undermine Myanmar’s democratisation process. The NLD’s attempts to curb the military’s power through constitutional amendments failed as military representatives and their allied political parties blocked its proposals.

Some members of ASEAN were also sympathetic to Suu Kyi’s predicament in dealing with the Rohingya issue: on the one hand, she needed to respond to international and regional pressure to respond to the atrocities in Rakhine; on the other, she had to avoid alienating herself from her domestic constituency composed of predominantly Buddhist supporters who remain prejudiced against the Rohingyas.28

Thus, ASEAN as a group did not focus on the issue of accountability as the core of its regional response to the Rohingya crisis. Instead, the matter was left

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to international mechanisms, where Myanmar, as a member of the UN and a party to the 1948 Genocide Convention, could defend itself and face appropriate sanctions.\textsuperscript{29} This allowed ASEAN to focus more on humanitarian assistance and capacity building. It extended assistance through the ASEAN Coordinating Centre for Humanitarian Assistance on disaster management (AHA Centre), and provided for the basic needs of the internally displaced communities in Rakhine and the repatriation of refugees who had fled to Bangladesh. It is significant to note as well that, even in the context of providing humanitarian assistance, Myanmar had insisted that ASEAN should not in any way link it to political issues, such as human rights protection and the grant of citizenship to the Rohingya, even as it sought to limit engagement on these issues with the AHA Centre. Myanmar wanted ASEAN to consider the Rakhine crisis primarily as a humanitarian problem rather than a human rights one.\textsuperscript{30}

4.3 ASEAN and Post-Coup Myanmar

Following the February 2021 coup, atrocity crimes increased significantly in Myanmar as the junta cracked down on protesters throughout the country. For two and half years since then, the military forces increasingly committed atrocity crimes against civilians amid mounting armed resistance to the State Administrative Council (SAC) and its growing pariah status in ASEAN. As of 10 August 2023, close to 4,000 civilians protesting the coup have been killed by military forces, over 24,000 have been arrested and 19,700 are in detention, and more than 7,000 are serving sentences. There are 105 death row prisoners.\textsuperscript{31} The junta executed four pro-democracy activists on 25 July 2022 despite appeals for a stay from ASEAN and human rights advocates in the region.\textsuperscript{32} Prior to the executions, the junta had vowed in June 2022 that there will be “no mercy” for activists who had been sentenced to hang, even branding them “terrorists”.\textsuperscript{33} More anti-coup activists on death row are likely to be executed as junta leader

\textsuperscript{29} Based on an interview with a Thai foreign ministry official, Bangkok, 17 December 2019.
\textsuperscript{30} Based on an interview with an Indonesian AICHR representative, 8 January 2020.
\textsuperscript{31} Assistance Association for Political Prisoners (Burma), Infographic, 9 August 2023, https://www.facebook.com/burmapoliticalprisoners, accessed 11 August 2023.
Min Aung Hlaing continues to ignore pleas from ASEAN and the UN to adhere to the Five-Point Consensus.

Accordingly, the Myanmar military has relied primarily on air power to attack the central states and regions, particularly Sagaing, Kachin, and Kayah, where strong civilian armed resistance to the coup has persisted. Hundreds of homes in villages have been hit by air strikes and arson attacks by military forces battling the combined ethnic armed group and civilian resistance forces. On the other side, the National Unity Government (NUG) and ethnic armed organisations have claimed that they have been inflicting more military casualties as armed resistance forces mounted more attacks on military bases and soldiers across the country. In Karen state, the Karen National Union (KNU) reported that over 2,500 Myanmar soldiers were killed in 2022 by its armed wing. The Kachin Independence Army (KIA) and the People's Defence Force (PDF), the armed wing of the NUG, reportedly seized two military bases in Kachin state in a raid of camps believed to be home to the Shanni Nationalities Army (SNA), an ethnic Lisu militia allied with the junta.

Meanwhile, the UN Special Rapporteur on Human Rights in Myanmar reported in June 2022 that the military’s attacks on civilian populations have resulted in more than 250,000 children displaced since the coup in February 2021. This adds to the roughly 130,000 children in protracted displacement in the country and the over 500,000 child refugees in neighbouring countries. The junta has also detained over 1,400 children and tortured at least 142 of them since the coup began. It is estimated that over 30,000 could die of preventable deaths in 2022 alone due to lack of routine immunisation even as over 7 million children remained out of school.

The continuing atrocities by the military has also worsened the humanitarian crisis in the country. As of 15 July 2023, the UN reported that there are now an

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estimated 1.9 million internally displaced persons across the country, of which 1.6 million were displaced by clashes and insecurity since the February 2021 coup. Over 320,000 IDPs in the country were already displaced in Myanmar prior to the coup mainly in Rakhine, Kachin, Chin, and Shan states. About 70,000 civilian properties have been destroyed since the coup due to continuing aerial strikes by the junta against civilian targets in central Myanmar.38

In the early months after the February 2021 coup, anti-junta protesters in Myanmar invoked the R2P principle and called on the international community to protect unarmed civilians from atrocities being committed by security forces. While the UN Security Council and ASEAN expressed concerns about the killings and the violent crackdown by the junta, they failed to condemn the coup. Brunei Darussalam, the ASEAN Chair, issued a statement invoking the principles of the ASEAN Charter related to human rights protection and respect for the will of the people. Four representatives of AICHR from Indonesia, Malaysia, Singapore, and Thailand also issued a statement echoing the same principles.

However, despite appeals by ASEAN leaders for the junta to stop the killings and release all political prisoners, the junta remains uncooperative on ensuring the smooth implementation of the Five-Point Consensus. In fact, Min Aung Hlaing has stressed that he regards the Five-Point Consensus as merely recommendations that would be considered by the State Administrative Council once political stability is restored throughout the country. It remains uncertain whether the junta will cooperate with the Special Envoy appointed by ASEAN to visit Myanmar and meet with representatives of various political groups, including detained NLD leaders, supporters of the Civil Disobedience Movement (CDM), ethnic armed organisations, and representatives of the NUG. The NUG and other civil society groups in Myanmar have expressed frustration over ASEAN’s inability to hold Min Aung Hlaing accountable for the atrocities being committed by the Military or to support international efforts to impose sanctions against the junta, including an embargo on weapons sale to the military.

The humanitarian crisis in Myanmar in the aftermath of the coup has been exacerbated by the pandemic. Some detainees have reportedly died due to COVID-19; also, the military has banned the sale of the limited supply of oxygen directly to civilians. The military regime has also arrested some doctors who have been working underground, as part of the junta’s strategy of denying

medical services to anti-coup protesters who have been injured or have fallen ill due to COVID-19. Since the coup, about 40 percent of Myanmar’s population have plunged into poverty, according to the World Bank in July 2022. This could only further aggravate the humanitarian crisis in the country and reverse the little progress Myanmar has achieved over the past decade in poverty reduction. Access to and delivery of humanitarian aid in the country continues to be limited as the junta remains defiant of regional and international calls for an end to violence against civilians and for a peaceful settlement of the political crisis in the country.

4.4 ASEAN’s Ineffective Response to the Myanmar Crisis

The Five Point Consensus has been the main pillar of ASEAN’s diplomacy on the Myanmar crisis since the February 2021 coup. However, its implementation faces enormous challenges as the junta chief remains defiant and uncooperative with the regional bloc. Over the last two years, the three chairs of ASEAN – Brunei Darussalam, Cambodia, and Indonesia – have been unsuccessful in persuading the military chief to comply with the consensus, including allowing the special envoys of ASEAN to meet with Aung Saan Suu Kyi and other detained NLD leaders. Coordination of diplomatic efforts between ASEAN and the UN in dealing with the Myanmar crisis also faced obstacles as Min Aung Hlaing resisted requests for the UN special envoy to meet with the NLD leader and allow delivery of humanitarian assistance to affected communities since the coup. Within ASEAN, the question of whether its special envoy should be acting on behalf of the chair or the organisation is a matter that remains disputed. When Indonesia took over ASEAN’s chairmanship in 2023, it pressed for appointing a special envoy who will act on behalf of the organisation and do away with revolving appointments co-terminus with the ASEAN Chair. Jakarta also initiated opening the offices of the special envoy in Myanmar and in the ASEAN Secretariat.

Despite claims by Indonesia as ASEAN Chair in 2023 that it has conducted more than 100 engagements with various stakeholders and parties in Myanmar, there is no clear indication that a breakthrough is in sight for peace and stability to return in the country. In fact, the regional consensus is apparently being undermined by separate initiatives led by Thailand and India who were acting in their own national interests as frontline states in engaging the junta to seek an end to the conflict. Both convened a series of track 1.5 meetings

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in Bangkok and New Delhi, which included representatives from the junta’s SAC but was not participated in by some ASEAN members. Jakarta expressed disappointment over these initiatives and asserted that ASEAN’s consensus must be upheld by all members and partners.

The continuing impunity of the military raises serious questions about its commitment to ASEAN’s people-centred principles and the organisation’s goal of building a “community of caring societies”. It must be recalled that the military under former Prime Minister Khin Nyunt had announced in 2003 a seven-step roadmap to restoring democracy that is supposed to bring about a transition to civilian rule in Myanmar. The 2021 coup has effectively undermined that precarious democratic transition, particularly with the junta inflicting violence on unarmed civilians protesting the return of military rule.

5 Mainstreaming R2P in Southeast Asia: Lessons from the Myanmar Crisis

Mainstreaming R2P and prevention of atrocities requires an appreciation of the factors that could serve as catalysts for atrocities. Atrocity crimes do not happen overnight, and no society is immune from them. It is therefore important for the various stakeholders in the region to know and understand the relevant risk factors, and be able to manage the risks by building the capacity to prevent such crimes from happening.

The UN Framework of Analysis for Atrocity Crimes serves as a useful reference in this regard, and could help in mainstreaming the R2P principle in the agenda of ASEAN, specifically in the context of the work of AICHR, ACWC, and AIPR. The framework identifies common as well as specific risk factors relevant to three atrocity crimes covered by R2P, namely, genocide, crimes against humanity, and war crimes. Further, for each of the risk factors, the framework lists relevant indicators that could be monitored by state and non-state actors.

Among the risk factors in Myanmar even before the February 2021 are:
- Unresolved armed conflicts between the military and ethnic armed groups, which are rooted in majority–minority relations and continuing impunity by the Military

– Economic and social inequality, poverty, and lack of access to basic services such as health and education
– Discriminatory policies against minority groups, including lack of adequate protection for ethnic and religious minorities and denial of citizenship
– Weak institutions that fail to ensure access to justice, remedy for violations of basic human rights, and rule of law especially for minority and other vulnerable groups
– Inadequate protection for exercising freedom of religion and belief, freedom of expression and speech, and press (media) freedom
– Inadequate protection against hate speech and incitement for minority groups and other vulnerable populations
– Lack of independent and impartial institutions that can conduct investigations related to human rights violations, abuse of power, and corruption, and promote accountability among officials in government and the security sector.

Managing the above risk factors, along with other risks relevant to other member states, means that ASEAN would need to work with stakeholders in the region on building the capacity to promote awareness about these risks and identify strategies for managing them. For example, ASEAN may promote inter-faith dialogue among various communities; engage religious leaders in combating hate speech and incitement; and involve women in creating platforms and crafting policies for conflict prevention and peacebuilding. Education and training should be an important pillar in promoting awareness and building capacity for atrocities prevention, with a focus on human rights protection, protection of women and children in armed conflicts, and transitional justice. Developing early warning and early response mechanisms based on homegrown knowledge of the risk factors should also be pursued by member states as part of their respective national action plans in support of ASEAN’s efforts to promote a Culture of Prevention for a Peaceful, Inclusive, Resilient, Healthy and Harmonious Society.

5.1 Beyond the ASEAN Five-Point Consensus: Options for ASEAN

The ongoing crisis in Myanmar raises important questions about the limitations of the military-led democratic transition in a multi-ethnic society, which faces enormous challenges in its efforts at nation-state building. The challenges include: (1) the persistence of over 21 ethnic armed rebellions; (2) the low level of trust between the majority Buddhist Burmese population and the minority ethnic and religious communities; and (3) the low level of trust in the military as an institution because of its long history of atrocity crimes and its culture of impunity.
Moreover, civilian – military relations in Myanmar prior to the February 2021 coup had been seriously strained when the NLD government attempted, with no success, to push for political reforms that would amend the military-drafted constitution. Specifically, the military resisted efforts to make it subject to civilian authority, with greater transparency, accountability, and adherence to the rule of law. Such resistance stems primarily from the military’s fundamental mindset that it is the only coherent institution that could save the country from disintegration even as it also wants to protect its strategic, economic, business, and political interests. Thus, the junta in Myanmar is unlikely to cave in to domestic and international pressures without any security guarantees or concessions that will ensure the protection of its institutional interests. This also explains why it remains defiant of ASEAN’s efforts to push the junta to implement the Five-Point Consensus that the coup leader initially agreed to in April 2021.

What then are the options for ASEAN in dealing with Myanmar, specifically in responding to the post-coup humanitarian crisis in the country? Beyond the Five-Point Consensus, ASEAN may consider putting more pressure on the junta to comply with the relevant principles of the ASEAN Charter, put an end to violence in the country, and hold the junta accountable for the atrocities being committed by its security forces against civilians. The options include:

(1) indefinite suspension of Myanmar’s membership and participation in all meetings of the regional bloc.
(2) openly engaging with democratic forces in the country, including the NUG and the ethnic armed organisations, with a view to recognising their legitimacy as representatives of the people of Myanmar in ASEAN and the UN.
(3) supporting international efforts to hold the junta accountable for continuing atrocities in the country, including the filing of additional criminal charges in international criminal tribunals, and the instituting of international sanctions, such as a ban on weapons sales and economic engagement.

For quite some time, ASEAN diplomacy tried to strike a balance between its traditional norms, accountability principles, and its strategic interests in dealing with Myanmar as the organisation faced mounting pressure from the international community.41 ASEAN assumed that its constructive engagement

41 For a discussion of ASEAN’s diplomacy toward Myanmar especially in the aftermath of the Rakhine crisis since 2017, see Morada, ‘ASEAN and the Rakhine Crisis’, pp. 131–157.
and backdoor diplomacy would work, just like what happened in 2008 in the aftermath of Cyclone Nargis,\(^{42}\) and put an end to the Rakhine crisis. Supporting the precarious, military-led democratic transition in the country was also a good excuse for ASEAN to avoid pushing too hard to ensure accountability.

However, the aftermath of the February 2021 coup, particularly the violent response of the junta to those opposed to the return of military rule, has changed that calculus. ASEAN’s credibility has clearly been put on the line as it fails to respond effectively to the crisis in Myanmar. It is therefore critical for ASEAN to recognise the will of the Myanmar people and support their calls to end the violence and human rights violations committed by security forces. Instead of reasserting ASEAN’s traditional norm of non-interference, which is consistently invoked by the junta in Myanmar, it is now time to invoke the principle of non-indifference and uphold ASEAN’s people-oriented principles that give priority to human rights protection, rule of law, and democratic good governance.

### 6 Conclusion

The intransigence of the junta in Myanmar in the face of efforts by ASEAN to deal with the post-coup crisis in the country has created a credibility dilemma for ASEAN. That the military-installed State Administrative Council remains defiant amid continuing, widespread protests by civilians and international condemnation indicates that ASEAN will face difficulties in implementing the Five-Point Consensus reached between ASEAN leaders and the junta chief in April 2021. Therefore, ASEAN should consider adopting hard measures that would put more pressure on the junta to agree to a political settlement of the crisis, such as engaging with the shadow government and other democratic forces in the country. ASEAN should also resolve the issue of the role, scope, and mandate of the special envoy. Specifically, as Indonesia has proposed, the special envoy should have a longer term of appointment instead of a revolving term for each of the ASEAN chair. ASEAN should also have a clear set of goals

\(^{42}\) In 2008, ASEAN employed backdoor diplomacy amid international outrage over the refusal of the junta in Myanmar to accept international aid following the devastation caused by Cyclone Nargis. At the time, France as a permanent member of the UN Security Council, invoked the R2P for the world body to take collective action against the junta. Then ASEAN Secretary-General Dr Surin Pitsuwan worked hard to convince the Myanmar military to allow international humanitarian assistance to be coursed through the regional organisation, which ultimately resulted in the delivery of aid to the vulnerable populations in the country.
and milestones with regard to compliance of the Myanmar junta to the Five Point Consensus.

The deepening humanitarian crisis in Myanmar since the coup is such that ASEAN cannot anymore afford to tolerate the junta's continuing suppression of its political opposition. It is therefore critical for ASEAN to support the Myanmar people, who continue to resist a return to military rule, as they call for an end to the violence and military impunity.

Given that ASEAN's norm of non-interference has been used as a crutch by the junta to avoid tackling the question of accountability for the atrocity crimes occurring in the country, the principle of non-indifference needs to be given more attention by ASEAN. Despite its discomfort to the principle of R2P, the regional organisation should invoke relevant principles that align with the R2P norm, such as comprehensive security, human security, and human rights protection. The notion of non-indifference is already integral to the principles of the people-oriented ASEAN Charter, which give priority to human rights protection, rule of law, and democratic good governance. Without an end to violence in the country, the crisis could well transform into a protracted war like that in Syria and undermine regional peace and stability as it could exacerbate further transnational crimes such as illegal drug and human trafficking.