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States' Compliance to Human Rights Regimes: The Case of Myanmar

David Sebastián Vásquez León

Andrés González, Ph.D., Director de Tesis

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David Sebastián Vásquez León

Andrés González, Ph.D.
Director de Tesis _____

Juan Carlos Donoso, Ph. D.
Miembro del Comité de Tesis _____

Carmen Fernández S., Ph. D.
Miembro del Comité de Tesis
Decana del Colegio de Ciencias Sociales y Humanidades _____

Quito, mayo de 2014

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Nombre: David Sebastián Vásquez León

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DEDICATORIA

A mi madre y mi padre, por su ejemplo.

AGRADECIMIENTOS

A mi familia, por su cariño.

A mis amigos, por su motivación y paciencia.

Al Dr. Andrés González, por grandiosas oportunidades.

RESUMEN

Este trabajo de titulación discute cómo la solidez de regímenes de derechos humanos influye en su cumplimiento por parte de los Estados. Elabora una discusión teórica sobre 'cumplimiento' analizando conceptos como 'obligación', 'precisión' y 'delegación' al establecer regímenes. Además examina por qué la naturaleza de los regímenes de derechos humanos representa un desafío para la soberanía estatal. El caso de estudio analizado en este trabajo es la Comisión Intergubernamental de Derechos Humanos de ASEAN (AICHR, por sus siglas en inglés) y sus perspectivas de acción en contra de violaciones a los derechos humanos de la comunidad Rohingya en Myanmar. El análisis muestra que la falta de precisión en su base legal y un excesivo respeto a normas culturales relacionadas al concepto de 'no-intervención' dinamitan la capacidad de la Comisión para promover y proteger los derechos de los Rohingya.

ABSTRACT

This dissertation paper discusses how the solidity of human rights regimes influences State's compliance. It elaborates a theoretical discussion on 'compliance' by discussing concepts as 'obligation', 'precision' and 'delegation' when establishing regimes. It further examines why the nature of human rights regimes represent a challenge for State's sovereignty. The analyzed case study in which the dissertation paper focuses on is the ASEAN Intergovernmental Commission on Human Rights (AICHR) and its prospects for acting against human rights violations to which the Rohingya community is subject in Myanmar. The analysis shows that lack of precision in its legal basis and excessive regard to cultural norms related to the concept of 'non-interference' undermine the Commission's capacity to effectively promote the respect of the rights of the Rohingya.

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INTRODUCTION

The effective enforcement of rules within a regime depends on several factors. These include a precise definition of norms as well as solid structures which ensure compliance to the regime. The interactions of States within a regime, however, can be altered by each State's self-interest, as the provisions of the regime may obstruct the normal exercise of its sovereignty. In the field of human rights, international human rights treaties can be perceived as intrusive and threatening, as they demand the State's effort towards the immediate addressing of a particular violation. The balance between sovereignty and responsibility towards human rights is, according to some authors, more swiftly decided when norms, as mentioned before, are strong enough to ensure compliance. However, weaker structures of human rights institutions and systems are more likely to fail to guarantee the respect of human rights norms. In this dissertation paper, the prospects of successful promotion and protection of human rights of an institution will be assessed in order to determine its efficacy when addressing a pressing issue.

The International Crisis Group (2013) describes that violence against the Muslim Rohingya minority and Muslims in Myanmar, which became evident with international media coverage since 2012, is not a new phenomenon. Discomfort against them dates back to the colonial period, when large groups of Indians came to Myanmar as different kinds of labor, including not only Hindus but also people belonging to other religions (International Crisis Group, 2013, p. 2). Many of these immigrants became 'moneylenders', the main source of credit in the rice-growing areas and are remembered to be "hated figures", especially during the Great Depression, when borrowers were unable to pay lending money back and were foreclosed by the moneylenders (International Crisis Group, 2013, p. 2).

Yegar (1972) argues that intermarriage between Indian Muslims men and Burmese Buddhist women became widespread after the enactment of the *1938 Buddhist Women Special Marriage and Succession Bill* (Yegar, 1972, p. 33). However, this was one of the triggers of tensions between the two communities, as there was a "rise of Burmese nationalism […] accompanied by a certain religious and cultural revival" (Yegar, 1972, p. 35). What Yegar recalls as Zebardees, the offspring of the mixture between Indian Muslims and Burmese Buddhists, were seen as a semi-foreign community, were immediately rejected by the same nationalist feeling as Indian immigrants were (Yegar, 1972, p. 35).

Riots and skirmishes over working places and jobs, and because of Burman nationalism, became extremely violent in the 1930s, when hundreds of Indians and Indian Muslims were killed in several parts of the country (International Crisis Group, 2013, p. 2). According to Yegar, who cites the 1931 census of British Burma, there were 130.524 Muslims in the regions of Maungdaw and Buthidaung, in Arakan State (Yegar, 1972, p. 95). Violence in the following years forced the Arakanese Muslims to group, resort to arms and demand an exclusively Muslim State. However, the rule of Gen. Ne Win starting in 1962, which started a ruthless government in the country that would last for decades, extinguished any possibility in this regard and forced Rohingya activists and armed movements to go underground (Chan, 2005, p. 36). "When elections were held under the 1974 Constitution the Bengali Muslims from the Mayu Frontier Area were denied the right to elect their representatives to the "Pyithu Hlut-taw" (People's Congress)" (Chan, 2005, p. 36).

Conditions for the Rohingya community were definitively worsened when a Citizenship Law was enacted in 1982. Although the Burmese government argued that the

Law derived from the necessity to tackle irregular and illegal immigration up to 1978 (Rakhine Inquiry Commission, 2013, p. 5), the Law "allowed only the ethnic groups who had lived in Burma before the First Anglo-Burmese War began in 1824 as the citizens of the country. By this law those Muslims had been treated as aliens in the land they have inhabited for more than a century" (Chan, 2005, p. 36). Since then, the Rohingya have been "stripped of equal access to citizenship" and rendered stateless (Landis, 2014, p. 16). It is estimated that, currently, only 40.000 Rohingya have citizenship (Landis, 2014, p. 16). In 1992, the ruling State and Law Order and Restoration Council, the name under which the central Government in Myanmar functioned, manifested its unwillingness to recognize the Rohingya as citizens:

> "Although there are 135 national races living in Myanmar today, the so called the Rohingya people is not one of them. Historically, there has never been a Rohinger race in Myanmar. People of Muslim faith from the adjacent country illegally entered into Myanmar Naingan particular the Rakhine State." (Zan, 2005, p. 8)

Several decades passed by and the citizenship issue of the Rohingya received no solution. Although the government in Myanmar has put democratic reforms in place since 2010, to lift the country from a decades-long isolation, the pressure from international actors regarding ongoing human rights violations in its territory seems insufficient. For now, "There are no discernable changes underway to create such a pathway [for Rohingya citizenship] let alone provide equal access to full citizenship rights for Rohingya" (Landis, 2014, p. 16).

According to the Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, there are some advances in Myanmar in regards to human rights that contrast with the lack of progress in the situation in Rakhine State

(United Nations, 2014, p. 11). The right to life of the Muslim population is threatened by several prohibitions and restrictions. In the capital of Rakhine State, Sittwe, Aung Mingalar remains as the last neighborhood were Muslim people live, described by Quintana as a ghetto. According to his report, there is a decrease in the population which is evident after eight months since the Rapporteur's last visit. "Residents are still prevented from leaving the quarter by armed guards and wire fencing, and are reliant on food being delivered from a nearby market" (United Nations, 2014, p. 11). Furthermore, medical assistance is highly limited, as there is only one medical assistant for all 4.735 residents in the guard. The Report describes this situation as a "microcosm" of what is currently happening in several internally displaced persons (IDP) camps in Rakhine State, where the right to freedom of movement and the right to education are restricted and where places of worship are violated (United Nations, 2014, p. 11).

There are documents which suggest the discomfort of the government with an alleged increase in the population of the Rohingya. Government officials argue there is an "extremely rapid growth rate of the Bengali [Rohingya] population in Rakhine State" which contributes to instability, "fear and insecurity amongst the Rakhine people". In their opinion, "the growth was not only due to high birth rates, but also to a steady increase of illegal immigration from neighboring Bangladesh" (Landis, 2014, p. 20). The measures to counter the birth of new babies in the detention camps where Rohingya are forced to live cause violations as "enforced birth control, coercive limits on childbirth, restrictions on marriage and private relationships, and restrictions on movement", all contained and explained in a report entitled Regional Order 1/2005 (Landis, 2014, p. 22). It is necessary to further note that these policies are believed to have been in force for already nine years (Landis, 2014, p. 24). Furthermore, the National Census being carried out this month

excludes those who identify themselves as Rohingya from the national registry, protracting the citizenship conflict the Rohingya are going through.

The organism entitled to guarantee the promotion of human rights within the territory of ASEAN is the ASEAN Intergovernmental Commission on Human Rights (AICHR), created in 2009 with several limitations. Its 'Intergovernmental' character keeps it accountable to governments and hinders its independence (Petcharamesree, 2013, p. 50). However, surely the main limitation the AICHR relies in the provisions of the Terms of Reference (TOC), a document that monitors the AICHR functioning and defines its actions. The TOC grants the AICHR consultative functions but do not grant it monitoring or investigative capacities, necessary for a comprehensive promotion and defense of human rights and a characteristic of the Regional Human Rights Systems in the Americas and Europe (ASEAN Intergovernmental Commission on Human Rights, 2009).

The lack of coercive capacities of AICHR – and the limited political willingness of Members of ASEAN as Myanmar to respect and adhere themselves to international human rights instruments– prevents any change with the human rights violations based on identity that Rohingya are suffering. Therefore, this dissertation paper poses the following research question: "Are weak enforcing capacities of human rights regimes effective in order for states to comply with international human rights norms? The hypothesis the dissertation paper develops is "human rights regimes' weak enforcement capacities are not effective when coercing States to comply with international human rights norms".

LITERATURE REVIEW

For the development of this dissertation paper, several terms have to be understood and defined during this section.

Compliance with regimes

To understand state compliance international human rights regimes, we must firstly revise relevant literature concerning regime theory. Kratochwil and Ruggie (1986) give a widely accepted definition of "regime", as "governing arrangements constructed by states to coordinate their expectations and organize aspects of international behavior in various issue-areas" (Kratochwil & Ruggie, 1986, p. 759). The authors add that regimes are shaped and composed by normative elements, state practice, and are structured with organizational roles (Kratochwil & Ruggie, 1986, p. 759). Koh (1998) defines regimes as "governing arrangements in which certain governing norms, rules, and decision-making procedures come to predominate because the nations in their long- term self-interests have calculated that they should follow a presumption favoring compliance with such rules" (Koh, 1999, p. 1397).

Obligation is defined by Keohane and Abott (2000) as one of the core components of the concept of Legalization (Abott & Keohane, 2000, p. 17). Firstly, Legalization is "a particular form of institutionalization" defined in terms of "key characteristics of rules and procedures" composed by the elements of Obligation, Precision and Delegation (Abott & Keohane, 2000, p. 17). Obligation is, then, defined as when "states or other actors are bound by a rule or commitment or by a set of rules or commitments in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well" (Abott & Keohane,

2000, p. 17). Obligations are shaped by precision or ambiguousness and this defines the degree of compliance to international norms and the effectiveness of normative mechanisms. Keohane and Abott define ‘Precision’ as how “rules unambiguously define the conduct they require, authorize or proscribe” (Abott & Keohane, 2000, p. 17). For our analysis, the AICHR is recognized as the main actor –besides States themselves– which can help solve the situation of the Rohingya. Keohane and Abott define this role as Delegation, or how “third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules (Abott & Keohane, 2000, p. 17).

These authors mention that obligations to which States are subject in regimes can fluctuate between the extreme of binding and non-binding. And, in some cases not surprisingly, its actors the ones which utilize techniques to define how obligations fluctuate. According to the authors, there are weaknesses regarding the effectiveness of regimes and this creates “surprising contrasts between form and substance”, as “it is widely accepted that states expect some formally binding “political treaties” not to be observed if interests or circumstances change” (Abott & Keohane, 2000, p. 17). In benefits of States, treaties can be composed of ambiguous wording, to avoid or “circumscribe their obligatory force”. Contingent obligations is another resources that states utilize in order to –unintentionally– weaken the strength of their obligations, as they are encouraged to take stapes to obtain an outcome, as gradually reducing gas emissions, but by providing them the chance to consider "their specific national and regional development priorities, objectives, and circumstances" (Abott & Keohane, 2000, p. 17). Commitments enshrined in ambiguously-worded treaties can include hortatory commitments, which “encourage” or

"exhort" countries to comply with provisions. As well, they can include escape clauses, which make the compliance process far more complex (Abott & Keohane, 2000, p. 17).

Ambiguous is avoided through the introduction of precise standards. This term, precision, is defined by Abott and Keohane (2000) as a process of "narrowing the scope for reasonable interpretation", implying "not just that each rule in the set is unambiguous, but that the rules are related to one another in a non-contradictory way, creating a framework within which case-by-case interpretation can be coherently carried out (Abott & Keohane, 2000, p. 29). They define precise norms as "highly elaborated or dense, detailing conditions of application, spelling out required or proscribed behavior in numerous situations" (Abott & Keohane, 2000, p. 29). From these definitions we can deduce that the cohesiveness and solidity of norms within any regime ensure their effectiveness.

The explanations of state obedience to regimes and, more specifically, to international legal norms, Koh finds several explanations basing on international relations theory. He finds that Relists believe in obedience based on power (Koh, 1999, p. 1396), this is, "the production, in and through social relations, of effects that shape the capacities of actors to determine their circumstances and fate" (Duvall & Barnett, 2005, p. 42). Along with power, realists recognize the uncertainty that the belonging to a regime can cause in composing Members. Mearsheimer argues that "states fear each other [and] can never be certain about the intentions of other states". That is how cheating cam become a tactic of defense regardless of the normative framework of a regime, "as intentions can change quickly" and there is low possibility of determining and preventing them (Mearsheimer, 1995, p. 10).

Following the rational choice precepts, Koh argues that nations may put prevalence on their self-interest rather than choosing randomly global rules to follow. Thus they will choose those that represent more precisely their interests (Duvall & Barnett, 2005, p. 42). This rational-choice view is coherent with the arguments of Linton (2009), who argues that "international human rights agreements are only enforced when they serve the political purposes of enforcing states". For authoritarian regimes that avoid enforcement, however, entering treaties can mean political survival. Through this process, they can "relieve the pressures from fellow states, from influential supranational political entities, from their communities" and non-state actors as non-governmental organizations (NGOs) (Linton, 2008, p. 442). According to Linton, the regional context in which States find themselves can exercise an influential role regarding how international norms are enforced through the primacy of economic and political interdependence. These elements "generate greater external pressure on countries to exhibit a commitment to human rights norms" (Linton, 2008, p. 442).

We can thus deduce that certain States, especially authoritarian regimes which constantly violate human rights, regard international human rights treaties as coercive and challenging, and may be exceptionally willing to ratify them in times of crisis or as a way to attract international aid from foreign donors (Linton, 2008, p. 452). Linton, precisely, considers the nature of human rights treaties as "intrusive" and describe them as "the most highly reserved category of treaties" (Linton, 2008, p. 452). For states fitting in that description, reservations have been created as a mechanism to ensure participation in international treaties. This, however, usually hinder the scope, effectiveness and coercive character of treaties (Linton, 2008, p. 452).

Sovereignty

At this point, it is appropriate to consider the analysis of the balance between sovereignty and human rights. Pauly and Grande mention that sovereignty is part of the structure of Max Weber's 'modern state', and coexists with territoriality, rational legitimacy and bureaucratic institutionalization (Pauly & Grande, 2007, p. 8). Both authors mention the two levels that define sovereignty: the internal aspect, dealing with the "state's autonomy from society", and the external level, dealing with the "state's independence from other states" (Pauly & Grande, 2007, p. 11). They argue that, although both levels develop separately, they remain interdependent.

Although Pauly and Grande write that "sovereignty concentrates legitimate coercive powers within a society in the hands of public authorities", hindering the participation of individuals and organizations in this "coercion process", they both recognize the gradual strengthening of international regimes and organizations in the last decades, reflected in the emergence of new policy-making and decision-making regimes, the consolidation of new ways of interstate cooperation and the progressive importance of private and non-state actors and their interaction with public actors (Pauly & Grande, 2007, p. 15).

To Clunan (2009), "human rights are seen as a critical challenge to state sovereignty, as they challenge its central premise of the state as the ultimate legal and political authority in world politics" (Clunan, 2009, p. 7). This author exposes two ways in which human rights have challenged state sovereignty. Firstly, the universality of certain human rights challenges the notion of absolute internal state sovereignty and increases accountability. Clunan calls this "contingent sovereignty", or the responsibility sovereignty entails in regards to a country's treatment of its population. Second, the role of individuals

has changed in time, allowing them to act and confront states through a legal personality (Clunan, 2009, p. 9). This creates momentum in which, through the participation of civil society and non-state actors, compliance with treaties and their enforcement can become tighter.

Enforcement, as argued by Koh (1998), can occur through a horizontal process and a vertical process. In the horizontal process, the main enforcers of human rights law have been nation-states, "interacting with one another on an interstate, government-to-government level" (Koh, 1999, p. 1408). With the development of regional institutions, especially regional human rights systems, other actors became integrated in this process and participated, as several U.N. organizations, the Human Rights Commission or the Human Rights Committee (Koh, 1999, p. 1408). However, Clunan argues that the mechanism for enforcement in this horizontal process remained lenient and ineffective. On the other hand, the vertical process benefited from transnational exchanges and came to include several actors as enforcing agents such as public figures, "transnational norm entrepreneurs" and international organizations (Koh, 1999, p. 1409).

Rohingya vs. Bengali

It is necessary to define who the Rogingya is and which the problem with their citizenship issue is. However, as will be explained throughout this work, the historical origin of this people is still debated.

Rakhine State, bordering Bangladesh, is majorly composed by the Rohingya Muslims and the Rakhine Buddhist –the latter being the one recognized by the government. There are currently diverging views regarding the origin of the Rohingya people in today's Rakhine State, the former territory of Arakan, which today borders

Bangladesh. Siddiqui (2008) states, firstly, that the term 'Rohingya' derives from the ancient name of Arakan, 'Rohang'. He further recognizes several influxes of Muslims to the territory which today is Myanmar. He writes that "the first Muslims to settle the Arakan were Arabs under the leadership of Muhammad ibn Hanafiya in the late 7th century" (Siddiqui, 2008). He argues the second influx of Muslims in today's Rakhine State occurred as ships were wrecked in the Ramree Island during the twenty years of Mahataing Sandya's reign since 788 AD.

The crews of the wrecked ships were composed by Moor Arab Muslims who were "sent to Arakan proper and settled in villages" (Siddiqui, 2008). Siddiqui adds that subsequent ethnic groups mixed with these Muslims as they started to move into the territory (Siddiqui, 2008), and these mixtures characterize today's Rohingya, which are "Muslims by religion with distinct culture and civilization of its own" (Siddiqui, 2008).

On the other hand, authors like Aye Chan (2005) question the antiquity of the term Rohingya and argues it is actually a term coined in the 1950s, with no historical evidence in any language before then (Chan, 2005, p. 18). Although he recognizes the existence of a Muslim community in Arakan before the State was ceded to British India in 1826 (Chan, 2005, p. 18), he claims that "the creators of the term might have been from the second or third generations of the Bengali immigrants from the Chittagong District", in today's Bangladesh (Chan, 2005, p. 18). Contradicting the facts exposed by Siddiqui (2008), U Shwe Zan (2005) dismisses the possibility of a conquest of "Mohammedan" –Muslims– citizens of Arakan but acknowledges the presence of them at some points in history. Firstly, the author recognizes Muslim arrivals during the 8th century, after Arabs, Moors and Persians shipwrecked in the coast. Another influx occurred in AD 1428, when followers of the Sultan of Gaur were allowed to settle around the Laungret area, in today's

Rakhine. The third moment U Shwe Zan mentions is the end of the expeditions of King Min Bin to some Bengal provinces, in today's Bangladesh (Zan, 2005, p. 9). He returned with prisoners and allowed them to settle in the area around the city of Mrauk-U (Zan, 2005, p. 9).

Most of the historical accounts support Zan's argument about the role Britain had in the demographics of the region after the first Anglo-Burmese war in 1824 and the annexation of Arakan to British India in 1826 (Seekings, 2006, p. 71). Establishing an open-door policy for foreign workers in Arakan State was conceived at a moment when exploiting and harvesting the resources of Rakhine land became a priority for the British, as agricultural laborers were scarce (Zan, 2005, p. 10). At first, foreign labor used to return home but started to settle in townships as "Maungdaw, Buthidaung, Rathedaung and Sittwe". Chan (2005) mentions that during the colonial rule the Chittagonian immigrants (in reference to the city of Chittagong, in Bangladesh) became the largest ethnic group in the Mayu Frontier, an area that composes today's Rakhine State, near the Mayu River (Chan, 2005, p. 25). Cheng (1968) argues that immigration from India was assisted and unassisted by the British Government (Cheng, 1968).

"India was populated by millions of people who were unemployed or underemployed. The British Government turned its attention to this vas reservoir of labor and decided to intervene actively to promote the migration of people, preferably cultivators, from India to Burma for it was thought to be of mutual advantage to relieve the congestion of the more densely populated and poverty-stricken districts of India, especially in times of famine, and to introduce new crops, new methods of cultivation and the much needed population into Burma" (Cheng, 1968, p. 118).

Cheng (1968) adds that almost all of the Indian immigrants under this scheme had the intention to earn as much money they could in Burma and return home, challenging the plans of the Indian and Burmese Administrations, which wished to "bring some relief to the densely-populated districts of India" (the former) and set up Indian agricultural colonies in Lower Burma (the latter) (Cheng, 1968, p. 119). However, the assisted immigration, which brought altogether 8.500 Indians inside today's Myanmar (Cheng, 1968, p. 120), was eclipsed by the flow of immigrants which entered unassisted, in a ratio of 15.000 per year in average during the 1870's (Cheng, 1968, p. 120).

Zan (2005) argues that immigration (he calls it 'infiltration') of Bengali Muslims continued in the 1930s, occupying several posts in the Government services (Zan, 2005, p. 12). As clashes developed in Arakan State since the 1930s (International Crisis Group, 2013, p. 3), the controversy about the citizenship of the Rohingya continued during the 20th century. Today, the term 'Bengali' is used by the government implying they are illegal immigrants, in spite of the facts that hundreds argue they have lived in Myanmar for generations (Mooney, 2014). This is one of the main controversy points regarding the 2014 Myanmar National Census, which prohibits the term Rohingya for being used, excluding from the registries all those who define themselves as Rohingya. This perpetuates the denial of the existence of the Rohingya community in Myanmar and reproduces the human rights violations based on identity which currently are going on (Mooney, 2014).

METHODOLOGY

For the development of this dissertation paper, I will use three variables. The independent variable will be the effectiveness of the enforcing capacities of human rights regimes, illustrated with the ASEAN Intergovernmental Commission on Human Rights (AICHR).

The dependent variable will be states' compliance with the norms of this kind of regimes, illustrated with the human rights violations suffered by the Rohingya community in Myanmar and their future prospects. In order to analyze it, we must first recall that, as authors have argued throughout this paper, unambiguous and precise treaty provisions ensure regime effectiveness. In order to achieve state compliance to international treaties and regimes, hard laws are necessary (Hafner-Burton, 2005, p. 594). For our analysis, we will take into account the treaty ratifications and the international legal obligations of Myanmar, as well as its Constitution, entered into force in 2008. As well, the impact of some democratic reforms introduced by Myanmar since 2010 will be analyzed. This will be done in order to foresee the prospects for the improvement of the human rights conditions of the Rohingya community in Myanmar.

As a control variable, I will utilize the concept of sovereignty and cultural values opposed to universalism, illustrated by cultural norms and conceptions to which several Asian countries hold and which shape ASEAN's interstate interactions, expressed in their preference for economic, social and cultural rights over civil and political rights. These values are known as 'Asian values'.

ANALYSIS

As the overarching institution within ASEAN in charge of the promotion of human rights, the AICHR still faces several limitations. As it was mentioned before, the document which regulates the functioning of ASEAN, the ASEAN Charter came into force in December 2008 (Petcharamesree, 2013, p. 50). The inclusion of the concepts "fundamental freedoms" and "human rights" in the Charter's body initially represented a "turning point", as it seemed that the organization was finally considering a more comprehensive application of universal human rights standards through the Charter's regulative capacities rather than just nominally recognizing the importance of both concepts, as it had done before. However, a lack of precision in the wording of the article hindered the creation of a solid mechanism of protection and promotion of human rights. Article 14 of the Charter states that:

1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body [the AICHR].
2. This ASEAN human rights body [the AICHR] shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.

In line with Petcharamesree, the creation of a 'body' represented a gridlock in the advancements towards a solid mechanism for the promotion and protection of human rights. The designation as a 'body' lacked specificity, but it became a Commission in 2009, for its inauguration. Another problem is that the Commission, by being intergovernmental, is kept accountable to the governments which send representatives to it (Petcharamesree, 2013, p. 50). In the case of Myanmar, its representative is Mr. Kyaw Tint Swe, the former military junta's permanent representative to the United Nations, a career diplomat who

constantly denied the junta's human rights violations and described them as mere "misinformation campaigns", including the Depayin massacre in 2003 (Asian Forum for Human Rights and Development, 2013, p. 3). Kyaw Tint Swe is currently the vice-chair of Myanmar's National Human Rights Commission, an organism which has been repeatedly criticized of not abiding by the Paris Principles (Asian Forum for Human Rights and Development, 2013, p. 4).

Among its functions, the AICHR is entitled to submit human rights thematic studies and reports on its activities to ASEAN Foreign Ministers Meetings (ASEAN Intergovernmental Commission on Human Rights, 2009). As it remains accountable to governments, its work and its independence is likely to suffer from political pressure and be hindered by political interest. This is already evident in how AICHR meetings are held in total secrecy, excluding civil society actors. According to a report on the first three years of functioning of the AICHR, the Commission "did not announce or publish in advance the agenda of any of their various official meetings and other activities held in 2012 (Asian Forum for Human Rights and Development, 2013, p. 7).

Another shortcoming of the AICHR, which goes in line with the previous commentary, is the Commission's subjection to its Terms of Reference (TOC). This document, which describes the whole functioning of the AICHR, allows the Commission to exercise consultative functions but it forbids monitoring or investigative endeavors (ASEAN Intergovernmental Commission on Human Rights, 2009). There are already cases waiting to be investigated, as the forced disappearance of Laotian development activist Sombath Somphone, which has not produced any result (Human Rights Watch, 2013).

However, there are more pressing issues that come into question with our analysis objectives. The AICHR adoption and acceptance of principles enshrined in the ASEAN Human Rights Declaration is concerning as they emphasize the respect for sovereignty for States and the recognition of specific circumstances in which compliance to international norms is considered. It is pertinent to mention that the Declaration, beyond being too lenient and protective of issues regarding sovereignty and non-interference, was composed by governments' appointed delegates (Petcharamesree, 2013, p. 52). This is, maybe, one of the main critiques points when analyzing regime effectiveness: the lack of solid principles and the lack of transparency and independence.

As well, the AICHR lacks any coercive mechanism for the adherence of Member States' to international human rights instruments. Among its mandates and functions, the AICHR promotes the Members' cooperation to implement the instruments to which they are Parties and, in a clear display of its limited role, it does not go beyond encouraging them to adhere themselves to new human rights instruments (ASEAN Intergovernmental Commission on Human Rights, 2009).

There is no information available on how the AICHR efforts to encourage ASEAN Member States to consider acceding to and ratifying international human rights instruments. The Asian Forum for Human Rights and Development published that information regarding three activities for this end were not published and there is no evidence of results. The activities included "completing a stocktaking of existing human rights instruments acceded and ratified by ASEAN Member States"; "identifying priority for accession and ratification of international human rights instruments for ASEAN Member States"; "On request of the ASEAN Member State concerned, providing necessary assistance to facilitate the accession and ratification of international human

rights instruments (Asian Forum for Human Rights and Development, 2013, p. 22). If this kind of efforts are underfunded and remain unknown to civil society they are likely to fail. As we see in Table 1, Myanmar has not signed or ratified any document of the International Bill of Human Rights besides the Universal Declaration of Human Rights. With the enforcing capacities of the AICHR, this situation will not change (University of Minnesota Human Rights Library).

TABLE 1			
Title	**Signature**	**Ratification**	**Accession**
International Covenant on Economic, Social and Cultural Rights	-	-	-
International Covenant on Civil and Political Rights	-	-	-
Optional Protocol to the International Covenant on Civil and Political Rights	-	-	-
Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty	-	-	-

Table 1: Retrieved from the University of Minnesota Human Rights Library

It must be accordingly added that international treaty ratification goes hand in hand with coherent domestic policies. However, the legal scenario in Myanmar is challenging to any reform to occur. Pedersen (2010) argues that the military maintains a dominant role in politics, directly receiving 25% of seats in parliament for serving military officers and controlling the National Defence and Security Council. The military, which remains autonomous and "subject to neither executive, legislative nor judicial civilian authority", could suppress democratic rights at any moment, providing that laws are enacted for "Union security, prevalence of law and order" (Pedersen, 2010). Although Constitution reforms have been analyzed to, among other things, allow "any citizen" to become president, in reference to nobel laurate Aung San Suu Kyi, no reform is mentioned in regards to citizenship issues or the *1982 Citizenship Law* in force. The Constitution, in its

Chapter VIII, grants ‘citizens’ several benefits and rights, as equal rights without discrimination, equal rights and access before the law, liberty to reside upon free decision among others (Amnesty International). However, this Chapter manipulates the concept of citizen and ensures it keeps the status quo. It establishes:

1. All persons who have either one of the following requirements are citizens of the Union of Myanmar:

(a) All persons born of parents both of whom are nationals of the Union of Myanmar.

(b) Persons who are vested with citizenship according to the existing laws on the date this Constitution comes into force.

2. Citizenship, naturalization and revocation of citizenship shall be as prescribed by the law (Amnesty International).

In regards to other institutions promoting or protecting human rights within the scope of ASEAN, neither the ASEAN Intergovernmental Commission on the Protection of the Rights of Women and Children (ACWC) nor the ASEAN Committee on the Implementation of the ASEAN Declaration of the Protection of the Rights of Migrant Workers have monitoring or investigation powers (Petcharamesree, 2013, p. 50). They are expected to promote –and not to protect– human rights, regardless of their nature (Petcharamesree, 2013, p. 50).

As it was mentioned before, Article 14 of the Charter faced obstacles, mainly the lack of evident political willingness of ASEAN Members for embracing both concepts and, rather, balancing them with the principle of non-interference in their internal affairs. This is enshrined in the Charter’s second Article, “Principles”:

> 2.2. ASEAN and its Member States shall act in accordance with the following Principles:
>
> (a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;
>
> (e) non-interference in the internal affairs of ASEAN Member States;
>
> (f) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion; (Association of Southeast Asian Nations, 2008)

Petcharamesree claims that "ASEAN views human rights as an internal affair" (Petcharamesree, 2013, p. 55), rejecting the idea of universality and, instead, promoting diversity over international human rights standards and practices with those of each country (Petcharamesree, 2013, p. 56). Authors as Freeman explain this as a kind of rebellion against the West, as a way of canalizing resentments against colonial and neocolonial domination (Freeman, 2005, p. 46). Furthermore, Petcharamesree argues that some countries in this region prioritize the achievement of economic, social and cultural rights in contrast to their efforts regarding civic and political rights (Petcharamesree, 2013, p. 56).

This is one of the components of what is known as the 'Asian values' argument, which explains the view of some Asian governments in regards to their promotion of human rights. One of its main proponents, Singapore, promoted prioritizing "responsibility of the individual to the society and the role of the family" and the duties to the community over the benefits of individual rights, granting prevalence to the Asian concept of 'familiarity' against the 'individuality' of the West (International Bar Association Human Rights Institute, 2008, p. 17). Furthermore, "cooperation is purportedly preferred over

coercion and trust in the authority and dominance of state leaders is expected" (International Bar Association Human Rights Institute, 2008, p. 17). In 2008, Singapore claimed:

> 'It is best to conceive of rights as those norms and values that enable societies to progress and individuals to have opportunities to develop their potential to the best of their abilities. In Singapore, our growth and prosperity over the years have, through judicious planning, careful management and sound investments, translated into progress in Singaporeans' well-being in terms of life expectancy, adult literacy rate, prevalence of criminality, and access to clean water, sanitation and health services. The Singapore Government remains committed to ensuring a high degree of peace, freedom, prosperity and personal security for all Singaporeans. The Government also pays special attention to the protection and welfare of vulnerable or special groups' (International Bar Association Human Rights Institute, 2008, p. 17).

Petcharamesree adds that several ASEAN governments would prefer sacrificing the individual freedoms for the sake of the whole population, that "individual rights must give way to the demands of national security and economic growth" (Petcharamesree, 2013, p. 56). This is one of the supports of the 'Asian values' argument: it justifies the precedence of economic, social and cultural rights over civic and political ones under certain circumstances to "enable economic growth and social cohesion (International Bar Association Human Rights Institute, 2008, p. 17). Katanyuu (2006) supports these definitions and explains that the principle of non-interference in the region was motivated by interstate conflicts between the Association Members' as well as by subversive groups promoting destabilization or secession (Katanyuu, 2006, p. 827). The case of Myanmar is

illustrative, as the country is ethnically multi-diverse with around 135 recognized ethnic groups which have south autonomy since independence and which have protracted an ethnic conflict against the central government (Smith, 2007, p. 8).

The principle, explained by Katanyuu, has established three codes of conduct for intergovernmental relations within ASEAN. It firstly discourages Member States from criticizing or encroaching themselves in the internal affairs of their peer Members (Katanyuu, 2006, p. 826). This aspect can, clearly, undermine the activities and capacities of the AICHR, as all negotiations between ASEAN Members are developed following non-confrontational and consensual negotiations, this is, no measurable pressure can be exercised. It also promotes the commitment amongst Member States to avoid granting a safe haven to subversive groups trying to destabilize the neighboring country (Katanyuu, 2006, p. 826). Finally, it promotes the commitment amongst Members not to give assistance to external powers which could affect or threaten neighboring countries –which was particularly important during the Cold War (Katanyuu, 2006, p. 826). This principle, it so seems, still remains one of the cornerstones of the interstate functioning of ASEAN and, consequently, would challenge the efforts of a well-versed human rights commission towards the protection of human rights in the region.

It is pertinent to mention that some authors consider that the debate over Asian values has finally been closed. Pföstl (2008), for instance, recalls how challenging had Myanmar been before its turn to hold the chairmanship of ASEAN in 2006, prompting discussion about its expulsion from the Association. In this regard, the author claims that "the structural conflict between Asian identity and human rights, such as prospected by the original Asian values debate, has been in some way overcome and transformed" (Pföstl, 2008, p. 46). Pföstl explanation to their decline is the desire of countries in the region to

rebuild their post-colonial collective identity and, for this end, respecting human rights and protecting democracy became necessary ” (Pföstl, 2008, p. 46).

On the other hand, however, there is the conviction that the analysis of Asian values, as a specific expression of cultural relativism, is still valid. Brunn and Jacobsen (2003) focus on the content of the Bangkok Declaration on human rights, whose ambivalent wording embraces the notion that some human rights are universal while preaches the importance of sovereignty and the historical, cultural and religious background of Members which abide by it (Jacobsen & Brunn, 2003). Two of the principles enshrined in the body of the declaration illustrate this point:

> 5. Emphasize the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure.
>
> 8. Recognize 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.

Although it was drafted in 1993, amid the enthusiasm produced by the Vienna Declaration and Program of Action of the same year, the ASEAN Charter and the human rights system of the organization base their provisions for the respect and promotion on human rights directly on the same principles. The ‘Asian values’ argument is an issue that pertains to the Asian continent; however, the notion and debate of sovereignty against collectively established values remains pertinent.

CONCLUSION

The plight of the Rohingya today relies on the unwillingness of the government of Myanmar to reform the *1982 Citizenship Law*. When it entered into force, its provisions provided citizenship to who had lived in Myanmar before the First Aglo-Burmese War in 1824. Since then, the Rohingya have remained stateless and face serious human rights violations which are based on the identity they hold: if they describe themselves as Rohingyas, for example, they will not be included in the 2014 Myanmar´s National Census registries, as the term is not considered to be a legal community in the country. Instead, they are portrayed as Bengalis, which collaborates with the government's argument of the illegality of the term 'Rohingya' and does not solve the problem but just accentuates it. It has been reported, as well, that many Rohingya have described themselves as Bengalis because of the implications and risks that would entail (Mooney, 2014).

It is already known that the human rights violations which this community is suffering threaten basic human rights as life and access to health. Media report the situation in IDP camps where Rohingya remain interned has become a humanitarian emergency, as humanitarian aid organizations have been denied access or ransacked and forced to leave the country. Not only has the government participated in this campaign, which has restricted the operations of such organizations as Doctors Without Borders, but also local Buddhist officials, which embrace a fervent nationalist sentiment, the same sentiment responsible for violence documented in the past. For now, the violations of human rights of the Rohingya are not limited to the cut off of humanitarian aid, which allows one doctor to several thousands of Rohingya. Freedom of movement and residence is also restricted, as "tight security prevents people from leaving, even to work" (Perlez, 2014). As well, discomfort amongst government officials regarding the birth rate of the

Rohingya community prompted the introduction of a Two-Child Policy, which is in force and affects the Rohingya rights to family and life (Perlez, 2014).

As was discussed before, violence against the Rohingya is not a new phenomenon. Historical accounts differ on the exact time when Muslims arrived to what is now Myanmar. Accounts agree on the fact that the opening of the Suez Canal simplified and developed trade, bringing merchants and ships to the Bay of Bengal. Accounts as that of Cheng (1968) document the dynamism of the rice trade, a product which was abundant in today's Myanmar but lacked the labor. As shipwrecks in the coast brought new men and women to the coast, immigration sponsored by the British government from India into British Burma brought large inflows of labor –especially illegal labor. As immigrants occupied job posts, tensions arose and a nationalist sentiment became rife, fueled by the desires of independence. The accounts mentioned in this dissertation paper put emphasis on the violence perpetrated in the 1930s, years before independence, when discontent over Buddhist and Muslim intermarriage became evident, although new normative allowed it.

Violence during the following years forced Rohingya activism to go underground or flee to neighboring countries, particularly due to government-sponsored violence campaigns. The official argument, which motivated the adoption of the *1982 Citizenship Law*, was the need for regulation and combat of illegal immigration. However, the consequences of such policy, which has endured for decades, are still visible now.

The role of regional organizations, of contributing to the solution of internal conflicts in their Members' territories, depends on several factors. It must be remembered, however, that authors as Pauly and Grande recognize the emergence of international organization as an important aspect to bear in mind, as it has become an important modus of decision- and policy-making, beyond the reach of individual States.

As was analyzed, regimes may pose challenges to the sovereignty of States. A regime, defined by Kratochwil and Ruggie (1986) as "governing arrangements constructed by states to coordinate their expectations and organize aspects of international behavior in various issue-areas", find stability when compliance with rules and predictable behaviors can be ensured. Furthermore, Abott and Keohane argue that aspects as obligation, precision and delegation, play a fundamental role when defining a regime's solidity and compose the concept of 'Legalization'. Obligation, defined as "States's or other actors commitment with set of rules or commitments in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law", is defined by written norms contained in constitutive documents. When norms and regulations are more precise, as Abott and Keohane argue, obligations will be respected and the regime's stability may be guaranteed. The control and monitoring functions within a regime according to Abott and Keohane, is developed by a third party, what the authors call 'delegation'. It seems simple.

However, the nature of human rights obligations is considered to be intrusive by authors as Clunan. As they have increased the accountability of governments to the international community, based on the universality of several human rights, they pose an obstacle to a country's free policy exercise. As well, the activism of individuals and their holding of legal personality further ensure Clunan's 'contingent sovereignty', or the responsibility sovereignty entails in regards to a country's treatment of its population.

The coercive reach of treaties can be, however, circumscribed or undermined through several techniques, which are mentioned by Abott and Keohane. These include ambiguous wording, escape clauses, ignoring treaties if circumstances change, hortatory commitments and contingent obligations. The last one of these techniques is the main

reason why the institution analyzed in the case study of this dissertation paper shows poor prospects of effectiveness regarding the promotion and protection of human rights.

As was assessed, The ASEAN Intergovernmental Commission on Human Rights, which is entitled by its Guidelines to promote and protect human rights within the ASEAN region, lacks the capacities a solid and effective regime needs in order to enforce compliance with norms, in this case, international human rights treaties. As its character is Intergovernmental, its independence is undermined and it is subject to experience political pressures. For instance, the Commission's budget is controlled so that it does not receive funding from sources which are not ASEAN Members, to ensure it does not develop a parallel agenda. As well, in the case of Myanmar, the Representative appointed to the Commission guards links to the extinct military junta's poor human rights records.

However, most importantly, it is necessary to mention that the AICHR is limited by the ambiguous and modest wording of its Terms of Reference (TOC), which prevents the Commission from developing any monitoring or investigative efforts. An example, which has been denounced by human rights organizations, is the forced disappearance of Laotian development activist Sombath Somphone years ago, which has not received any solution to the moment. Furthermore, the AICHR guards excessive relation with provisions enshrined in the ASEAN Human Rights Declaration and the Bangkok Declaration of 1993, which emphasize the "respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights as an instrument of political pressure", as well as giving primacy to "national and regional particularities and various historical, cultural and religious backgrounds", though recognizing the universality of human rights.

The respect of such principles as sovereignty and nations' values is reflected in an argument that, for some authors, has been overcome and is obsolete but that, for others, is the clear representation of cultural relativism, excluding the universality of some human rights. Asian values, which were originated as a rebellious response to the West "colonial or neo-colonial" interpretation of human rights, promote the "responsibility of the individual to the society and the role of the family" and the duties to the community over the benefits of individual rights, granting prevalence to the Asian concept of 'familiarity' against the 'individuality' of the West. As well, it justifies the precedence of economic, social and cultural rights over civic and political ones under certain circumstances to "enable economic growth and social cohesion".

This being explained, the prospects of action of the ASEAN Intergovernmental Commission on Human Rights towards the promotion of the rights of the Rohingya in Myanmar sees grim in the near future. Until the Commission does not embrace international human rights standards with unambiguous procedures, its capacities will remain limited. In this regards, prospects for further analysis relies in evidence collected by authors as Hafner-Burton and Tsutsui, which argue that authoritarian governments which commit to international human rights law are still likely to perpetuate human rights violations (Hafner-Burton & Tsutsui, 2007). This challenges the aspects exposed in this dissertation paper but represents an opportunity to reassess the success prospects of international human rights regimes.

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