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# The Dilemma of Non-Interference: Myanmar, Human Rights, and the ASEAN Charter

John Arendshorst\*

## I. INTRODUCTION

¶1 On July 21, 2008, Myanmar<sup>1</sup> ratified the Charter of the Association of South East Asian Nations (“ASEAN”), raising controversy among member nations because of its abysmal human rights record and its continued detention of opposition leader Aung San Suu Kyi.<sup>2</sup> The Charter, which is the first such document in the forty-one year history of ASEAN,<sup>3</sup> enumerates ASEAN purposes and principles and establishes formal rights and expectations of ASEAN members.<sup>4</sup> Certain provisions in the Charter, including the establishment of an ASEAN human rights body, are in direct conflict with the ongoing human rights violations committed by Myanmar’s ruling military junta. After a highly controversial process, ASEAN member countries agreed upon the terms for the human rights body stipulated in the charter, to be known as the Asian Intergovernmental Commission on Human Rights (AICHR), in July 2009. The AICHR will formally take effect during the ASEAN summit in October 2009.<sup>5</sup> However, no one is sure what effect, if any, the AICHR will have upon the situation in Myanmar.

¶2 This comment will explore how the actions of the junta affect ASEAN, outline the potential measures by which ASEAN and the nascent AICHR could address Myanmar’s actions, and recommend a course of action. First, this comment will lay out the reasons for the controversy, including Myanmar’s human rights record, and show how that record is viewed through various lenses of international law. Next, this comment will give background on ASEAN and the Charter and explore the Charter’s implications for interaction between ASEAN and Myanmar. Third, this comment will outline the various

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<sup>1</sup> The military Junta officially changed the English version of the country’s name from “Burma” to “Myanmar” in 1989. However, this renaming has proven to be politically controversial, since the decision to rename has not received legislative approval in Burma/Myanmar. The United States, Australia, Canada, and the United Kingdom, among other countries, continue to use the name “Burma,” since they do not recognize the legitimacy of the military government or its authority to rename the country. However, the United Nations and ASEAN both refer to the country as “Myanmar.” Since this comment is primarily concerned with the political dynamic between Burma/Myanmar and ASEAN, it will refer to the country as “Myanmar.”

<sup>2</sup> Dr. Surin Pitsuwan’s Remarks at the Ceremony for the Deposit of Myanmar’s Instrument of Ratification of the ASEAN Charter (July 21, 2008), *available at* <http://www.aseansec.org/21762.htm>.

<sup>3</sup> THE INSTITUTE OF SOUTHEAST ASIAN STUDIES, FRAMING THE ASEAN CHARTER: AN ISEAS PERSPECTIVE (Rodolfo C. Severino, ed., 2005), *available at* [http://www.iseas.edu.sg/Framing\\_ASEAN\\_Charter.pdf](http://www.iseas.edu.sg/Framing_ASEAN_Charter.pdf).

<sup>4</sup> The ASEAN Charter art. 5 (2008), *available at* <http://www.aseansec.org/publications/ASEAN-Charter.pdf>.

<sup>5</sup> See, e.g., *ASEAN to Launch Human Rights Body*, AL JAZEERA ENGLISH, July 20, 2009, <http://english.aljazeera.net/news/asia-pacific/2009/07/20097204241679480.html> (last visited Nov. 5, 2009).

ways ASEAN could respond to Myanmar's ongoing human rights violations. Finally, this comment will recommend a course of action based on the ongoing welfare of ASEAN, the interests of the people of Myanmar, and the effect of various options on other national and international organizations.

## II. BACKGROUND ON MYANMAR

¶3 Myanmar has suffered under the rule of its military for most of its independent political existence. Myanmar, then named Burma, became an independent republic on January 4, 1948, after the withdrawal of the British colonial government.<sup>6</sup> For fourteen years, representative democracy flourished in Burma, a time when the United Nations elected Burmese representative U Thant to become the first non-Westerner to head an international organization.<sup>7</sup> However, this democracy was short-lived. In 1962, General Ne Win led a military coup, overthrowing the democratically elected government to force the country along the "Burmese Way to Socialism."<sup>8</sup> Win went on to rule for twenty-six years.<sup>9</sup>

¶4 The 1987 collapse of Burma's economy and the subsequent political and economic unrest led to massive protests against Win's government, culminating in the so-called "8888 Uprising" on August 8, 1988.<sup>10</sup> During the uprising, military forces lashed out violently against demonstrators who called for economic reform and regime change, killing over 1000 people.<sup>11</sup> Aung San Suu Kyi made her first political speech at a rally after the uprising and quickly emerged as a leader of the National League for Democracy ("NLD"), a group that opposed the military rule of Burma.<sup>12</sup> She won the Nobel Peace Prize in 1990 for her efforts, but the military junta has kept her under house arrest for much of their subsequent rule.<sup>13</sup> On August 11, 2009, the government extended her detention for eighteen months, a sentence that will prevent her from participating in Myanmar's 2010 elections.<sup>14</sup>

¶5 In the turmoil that followed the uprising, a new group of military leaders staged a coup against Ne Win, seized power, abolished the constitution, and established a ruling military junta called the State Law and Order Restoration Council ("SLORC").<sup>15</sup> As part of its effort to restore order and secure its hold on the country, the SLORC cracked down brutally on dissidents, killing thousands, and ruled by martial law until holding

<sup>6</sup> BURMA IN TURMOIL 11 (Alden T. Royce ed., 2008).

<sup>7</sup> *Id.* As an interesting note, a young Aung San Suu Kyi was among the Burmese to work at the UN while U Thant was Secretary General.

<sup>8</sup> *Id.* at 12.

<sup>9</sup> *Id.*

<sup>10</sup> DLA PIPER RUDNICK GRAY CARY, THREAT TO THE PEACE: A CALL FOR THE UN SECURITY COUNCIL TO ACT IN BURMA 2-3 (2005) [hereinafter THREAT TO THE PEACE].

<sup>11</sup> *Id.* See also U.S. DEPARTMENT OF STATE, BACKGROUND NOTE: BURMA (2008), <http://www.state.gov/r/pa/ei/bgn/35910.htm> (last visited Nov. 5, 2009) [hereinafter Background Note].

<sup>12</sup> THREAT TO THE PEACE, *supra* note 10, at 10.

<sup>13</sup> BURMA IN TURMOIL, *supra* note 6, at 15.

<sup>14</sup> See, e.g., *Myanmar's Suu Kyi Ordered Back Into House Detention*, REUTERS, Aug. 11, 2009, <http://www.reuters.com/article/topNews/idUSTRE57A04C20090811?sp=true> (last visited Nov. 5, 2009).

<sup>15</sup> Background Note, *supra* note 11.

parliamentary elections on May 27, 1990.<sup>16</sup> During this time, the SLORC officially changed the English version of the country's name from Burma to Myanmar.<sup>17</sup>

¶16 The NLD won 392 of the 485 seats in the elections, despite the fact that the SLORC had placed Aung San Suu Kyi under house arrest.<sup>18</sup> However, the SLORC refused to honor the results of the election, maintaining its grip on power and imprisoning many dissidents. In 1997, the SLORC changed its name to the State Peace and Development Council ("SPDC"), but did not change any of its autocratic and oppressive policies.<sup>19</sup> On June 23, 1997, Myanmar was admitted into ASEAN.<sup>20</sup>

¶17 In August 2007, high prices sparked a new wave of opposition by pro-democracy groups that protested the deteriorating economic situation.<sup>21</sup> The government imprisoned many of the protestors, and Buddhist monks began leading protest marches in response. Ordinary citizens joined the monks, culminating in a march of over 10,000 people in the capital city of Rangoon (Yangon) on September 24, 2007. On September 26, the government began to crack down violently on the marchers, using of "tear gas and smoke grenades, severe beatings with wooden and bamboo sticks, rubber batons and slingshots (catapults) ... rubber bullets and live rounds."<sup>22</sup> More than thirty people were killed.<sup>23</sup>

¶18 To address widespread international condemnation of the SPDC's response to the protests, the government held a constitutional referendum on May 10, 2008 (delayed until May 24 in some areas due to Cyclone Nargis).<sup>24</sup> However, the new constitution proffered by the SPDC contained some questionable provisions, including one that reserved one-fourth of parliament seats for members of the military, and another that barred anyone married to a foreigner from becoming president (Aung San Suu Kyi had been married to a British citizen).<sup>25</sup> Reports of widespread corruption and voter intimidation surfaced during the referendum, including pre-marked ballot papers, threats of physical violence, and forced voting.<sup>26</sup> Despite reports of low voter turnout, the government eventually announced that 98.12 percent of eligible voters had voted, with the SPDC's new constitution receiving an overwhelming 92.48 percent of the vote.<sup>27</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *See, e.g.*, ASEAN Secretariat, Political Achievement, <http://www.aseansec.org/11833.htm> (last visited Sep. 28, 2009).

<sup>21</sup> Background Note, *supra* note 11.

<sup>22</sup> U.N. Office of the High Comm'r of Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, 9, U.N. Doc. A/HRC/6/14 (Dec. 7, 2007), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/6session/A.HRC.6.14.doc>.

<sup>23</sup> *Id.*

<sup>24</sup> *Myanmar Says Referendum Will Go Ahead in Most Of Country – Update*, THOMPSON FINANCIAL NEWS, May 6, 2008, <http://www.forbes.com/afxnewslimited/feeds/afx/2008/05/06/afx4973005.html> (last visited Nov. 5, 2009).

<sup>25</sup> *See New Burma Constitution Published*, BBC NEWS, Apr. 9, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7338815.stm> (last visited Nov. 5, 2009); Marwaan Macan-Markar, *New Constitution Gives Impunity to Military*, IPS, Apr. 17, 2008; *Michael V. Aris, 53, Dies; Scholarly Husband of Laureate*, N.Y. TIMES, March 30, 1999, at C27, available at <http://query.nytimes.com/gst/fullpage.html?res=9406E4DE1E30F933A05750C0A96F958260>.

<sup>26</sup> *See* Yeni and Min Lwin, *Massive Cheating Reported from Referendum Polling Stations*, THE IRRAWADDY, May 10, 2008, [http://www.irrawaddy.org/article.php?art\\_id=11923](http://www.irrawaddy.org/article.php?art_id=11923) (last visited Nov. 5, 2009).

<sup>27</sup> *Myanmar Formally Announces Ratification of New Constitution Draft*, PEOPLE'S DAILY ONLINE, May

¶9 It is evident that the military has maintained its tight grip on all aspects of Myanmar society and politics. Although the worst of the violence has ceased, as of June 2008, “the situation of human rights in Myanmar . . . has not changed for the better.”<sup>28</sup>

### III. HUMAN RIGHTS IN MYANMAR AND EFFECTS ON ASEAN

¶10 The SLORC and SPDC have compiled a horrific and extensive record of human rights violations during their reign over Myanmar. Violations committed by the armed forces, primarily against ethnic minorities, have included extrajudicial and arbitrary killings, rape, torture, arbitrary arrests for political reasons, forced labor, forced conscription into the military, denial of freedom of movement, and tight restrictions on press, religion, speech, and assembly.<sup>29</sup> The U.S. Department of State assessed that the situation worsened during 2007 due to the government’s harsh crackdown on pro-democracy protests.<sup>30</sup> This deteriorating human rights record is due not to isolated acts of individuals; rather, it stems from policies set at the highest levels of government.<sup>31</sup> Moreover, the government’s numerous violations have adversely affected people not only in Myanmar, but also in neighboring countries.

¶11 The SPDC has claimed that they are fighting ethnic minority insurgents in areas of Myanmar and that its techniques are part of a “four cuts” strategy to quell the insurgency: cutting off food, funds, intelligence, and recruits to the insurgents.<sup>32</sup> As part of the four cuts strategy, the military has perpetrated widespread violations of economic, social, and cultural rights, including the deprivation of means of livelihood, the destruction of houses, excessive taxation, and extortion. The military has often used force against civilians far in excess of the level necessary for counter-insurgency operations.<sup>33</sup> Furthermore, armed forces are present even in ceasefire areas and areas not involved in counterinsurgency activity.<sup>34</sup>

¶12 A significant part of the four cuts strategy is the destruction of villages. The International Displacement Monitoring Centre estimates that between 1996 and 2007, over 3100 villages in eastern Myanmar were destroyed, relocated, or abandoned.<sup>35</sup> As a

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30, 2008, <http://english.people.com.cn/90001/90777/90851/6421254.html> (last visited Nov. 5, 2009).

<sup>28</sup> U.N. Office of the High Comm’r of Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, 15, U.N. Doc. A/HRC/H/12 (June 3, 2008), available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/8/12&Lang=E> [hereinafter Report of the Special Rapporteur, 2008].

<sup>29</sup> See, e.g., U.S. DEPARTMENT OF STATE, 2007 COUNTRY REPORT ON HUMAN RIGHTS IN BURMA, available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100515.htm> [hereinafter Department of State 2007 Report]; see also U.N. Office of the High Comm’r of Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, ¶ 59, U.N. Doc. A/53/654 (Sept. 10, 1998), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N98/270/28/PDF/N9827028.pdf> [hereinafter Report of the Special Rapporteur, 1998].

<sup>30</sup> Department of State 2007 Report, *supra* note 29.

<sup>31</sup> Report of the Special Rapporteur, 1998, *supra* note 29, at ¶ 59.

<sup>32</sup> Genocide Intervention Network: Eastern Burma, <http://www.genocideintervention.net/educate/crisis/burma> (last visited Nov. 5, 2009). See also THREAT TO THE PEACE, *supra* note 10, at 35.

<sup>33</sup> THREAT TO THE PEACE, *supra* note 10, at 35.

<sup>34</sup> Paulo Pinheiro, Statement on the Situation of Human Rights in Myanmar to the 61st Session of the Commission of Human Rights, Item 9 (Mar. 29, 2005).

<sup>35</sup> INTERNATIONAL DISPLACEMENT MONITORING CENTRE, MYANMAR (BURMA): NO END IN SIGHT FOR INTERNAL DISPLACEMENT CRISIS 5 (2008), <http://www.internal->

result, over half a million people have become internally displaced persons (“IDPs”) – people who have been unable to return, resettle, or reintegrate after being forced to leave their homes.<sup>36</sup> Forced relocations “are often accompanied by killings, forced labor, systematic rape, and wholesale destruction of villages, crops, and land.”<sup>37</sup> In addition, these forced relocations have resulted in a large number of externally displaced people. The 2009 World Refugee Survey states that Myanmar has produced over 750,000 refugees, including 361,100 in Thailand, 193,000 in Bangladesh, 100,000 in India, and 79,000 in Malaysia.<sup>38</sup> Millions more have fled Myanmar but are not officially documented as refugees.<sup>39</sup> In addition to being the victim of legal and human rights abuses in Myanmar,<sup>40</sup> these refugees and migrants have placed a considerable strain on the governments of neighboring countries. For instance, Thailand initially accepted thousands of refugees from Myanmar. Since the refugee camps along the Thailand-Myanmar border have existed for over three decades with increasing populations and few signs of progress, the Thai government has begun to lose patience.<sup>41</sup> Thailand is resisting additional refugee flows, even going so far as to forcibly repatriate some refugees.<sup>42</sup> Despite these problems, ASEAN has refused to address this decades-long exodus.<sup>43</sup>

¶13

The human rights crisis in Myanmar also has harmed neighboring countries through the production and distribution of illegal drugs. Myanmar is estimated to be the world’s second largest producer of opium and heroin and has recently begun to produce significant amounts of amphetamine-type stimulants.<sup>44</sup> The flow of narcotics out of Myanmar has made drug control all but impossible in neighboring countries such as China and Thailand. Thailand is currently experiencing an epidemic of amphetamine abuse,<sup>45</sup> and a “heroin trail” leads from Myanmar into China’s southern provinces.<sup>46</sup> Myanmar’s production and trafficking of drugs has likely contributed to a tragic secondary effect among its neighbors. The HIV/AIDS epidemic has rapidly spread in countries along Myanmar’s drug routes.<sup>47</sup> For instance, 80% of the HIV/AIDS cases in China can be traced back to Myanmar through drug trafficking.<sup>48</sup>

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[displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/7E2B10294B659C6EC12573EF004BE509/\\$file/Burma\\_Overview\\_Feb08.pdf](http://displacement.org/8025708F004BE3B1/(httpInfoFiles)/7E2B10294B659C6EC12573EF004BE509/$file/Burma_Overview_Feb08.pdf)

<sup>36</sup> *Id.*

<sup>37</sup> THREAT TO THE PEACE, *supra* note 10, at 36.

<sup>38</sup> U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS, WORLD REFUGEE SURVEY 2009: REFUGEES AND ASYLUM SEEKERS WORLDWIDE 32-33 (2009), <http://www.refugees.org/FTP/WRS09PDFS/RefuandAsylumseek.pdf>.

<sup>39</sup> See VERONIKA MARTIN, PROSPECTS FOR HOPE? MYANMARESE REFUGEES IN THAILAND 21 (2005), available at [http://www.refugees.org/uploadedFiles/Investigate/Publications\\_&\\_Archives/WRS\\_Archives/2005/veronika\\_martin.pdf](http://www.refugees.org/uploadedFiles/Investigate/Publications_&_Archives/WRS_Archives/2005/veronika_martin.pdf).

<sup>40</sup> Violations include problems with crime, corruption, poverty, and violence, among other things.

<sup>41</sup> Burma Lawyer’s Council, *Analysis of the Situation of the Refugee Camps from the Rule of Law Aspect*, 26 LAWKA PALA (LEGAL JOURNAL ON BURMA) 38, 56-57 (2007).

<sup>42</sup> *Id.* See also GUY HORTON, DYING ALIVE 509-10 (2005), <http://burmalibrary.org/docs3/Horton-2005.pdf>.

<sup>43</sup> See, e.g., David Scott Mathieson, *In Ignoring the Rohingyas, ASEAN Rejects a New Role*, THE JAKARTA GLOBE, May 25, 2009, <http://www.thejakartaglobe.com/opinion/in-ignoring-the-rohingyas-asean-rejects-a-new-role/277126> (last visited Nov. 5, 2009).

<sup>44</sup> *U.S. Takes Aim at Drugs in Burma, Afghanistan*, RADIO FREE ASIA, Mar. 4, 2005, [http://www.rfa.org/english/burma/us\\_drugs\\_asia-20050304.html](http://www.rfa.org/english/burma/us_drugs_asia-20050304.html) (last visited Nov. 5, 2009).

<sup>45</sup> ALTERNATIVE ASEAN NETWORK ON BURMA, A FAILING GRADE: BURMA’S DRUG ERADICATION EFFORTS 19 (2004), <http://www.altsean.org/Docs/PDF%20Format/Special%20Reports/Failing%20Grade.pdf>.

<sup>46</sup> THREAT TO THE PEACE, *supra* note 10, at 55.

<sup>47</sup> U.N. Office of Drugs & Crime, *Drugs and HIV/AIDS in Southeast Asia: Reducing HIV Vulnerability*

¶14 The SPDC claims to have undertaken substantial steps to reduce opium production. However, many international observers believe the regime is insincere in its commitment to curb the drug trade.<sup>49</sup> Others believe that the government has formed partnerships with drug producers and traffickers and raises funds through their operations.<sup>50</sup>

¶15 The human rights record of the SPDC and its predecessors in Myanmar is nothing short of deplorable. Citizens of Myanmar suffer horrific human rights violations, as summarized by the UN Commission on Human Rights:

Extrajudicial killings, rape and other forms of sexual violence persistently carried out by members of the armed forces, continuing use of torture, renewed instances of political arrests and continuing imprisonment and other detentions . . . destruction of livelihoods and confiscations of land by the armed forces; forced labor, including child labor; trafficking in persons; denial of freedom of assembly, association, expression and movement; discrimination and persecution on the basis of religious or ethnic background . . . systematic use of child soldiers; and violations of the rights to education and to an adequate standard of living, including food and medical care.<sup>51</sup>

This problem has spilled over into neighboring countries through the migration of refugees, the trafficking of illicit drugs, and the spread of the HIV/AIDS epidemic. Not only do the government's actions oppress its own people, but also they create destabilizing effects that threaten the peace, security, and prosperity of all of Southeast Asia.<sup>52</sup>

#### IV. INTERNATIONAL HUMAN RIGHTS LAW AND MYANMAR

¶16 Many significant human rights bodies, treaties, and charters apply directly to the current situation in Myanmar. This section will demonstrate that the SPDC violates the tenets of numerous bodies of numerous international treaties and charters to which Myanmar is a party, including United Nations rules, the 1949 Geneva Conventions, the Convention on the Prevention and Punishment of the Crime of Genocide, and the Convention on the Rights of the Child. Moreover, the SPDC contravenes numerous other instruments of customary international humanitarian law, including the Rome Statute defining Crimes against Humanity.

¶17 Myanmar is a member of the United Nations, having joined on April 19, 1948, shortly after its independence from Britain.<sup>53</sup> During the rule of the SPDC, the United

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*from Drug Abuse*, 33, U.N. Doc. AD/RAS/02/G22 (2004).

<sup>48</sup> THREAT TO THE PEACE, *supra* note 10, at 58.

<sup>49</sup> *Id.* at 51.

<sup>50</sup> *Id.* at 54.

<sup>51</sup> U.N. Econ. & Soc. Council, *Agenda Item 9: Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World – Situation of Human Rights in Myanmar*, Comm'n on Human Rights, 61st Sess., April 29, 2005.

<sup>52</sup> THREAT TO THE PEACE, *supra* note 10, at 34.

<sup>53</sup> U.N. Office of the High Comm'r for Human Rights, Member States of the United Nations, <http://www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx> (last visited Nov. 7, 2009).

Nations has devoted significant effort to promoting human rights and political change in Myanmar, without significant effect. Recent UN efforts have focused on national reconciliation and the promotion of democracy. However, the SPDC has shown no inclination to accept true democracy, having refused even to engage in dialogue with the NLD.<sup>54</sup> The UN Commission on Human Rights established a mandate on the situation of human rights in Myanmar in 1992 and has appointed a series of diplomats as Special Rapporteur to Myanmar to investigate the human rights conditions and facilitate dialogue.<sup>55</sup> However, the SPDC has reacted to the Special Rapporteur with disinterest, lack of engagement, or even outright stonewalling. The SPDC even prevented the Special Rapporteur from visiting Myanmar between 2004 and 2007,<sup>56</sup> demonstrating extreme disregard for the United Nations and a refusal to cooperate with its recommendations and sanctions.<sup>57</sup> Although Myanmar acceded to requests for visits from the Special Rapporteur in August 2008 and February 2009,<sup>58</sup> the Special Rapporteur reported that the situation in Myanmar remains “challenging” and the implementation and completion of UN human rights recommendations “has yet to be seen.”<sup>59</sup> Despite condemning the actions of the SPDC on numerous occasions, the UN has had limited effectiveness in promoting change in Myanmar.

¶18 In addition to joining the United Nations, Myanmar signed the Geneva Conventions of 1949 on August 25, 1992.<sup>60</sup> Article Three, common to all four Geneva Conventions, protects “persons taking no active part in hostilities in internal conflicts.”<sup>61</sup> An extensive report prepared by independent investigator Guy Horton, co-funded by the Netherlands Ministry for Development Co-Operation, found that the SPDC had likely violated the Conventions’ prohibitions on “[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, and outrages upon personal dignity in particular humiliating and degrading treatment.”<sup>62</sup>

¶19 While the Geneva Convention continues to dictate international laws of war, the International Criminal Court (“ICC”) has added teeth to those laws by providing for the punishment of individuals who violate them. Enacted in 2002 through the Rome Statute, the ICC has attracted the membership of 110 states.<sup>63</sup> Although by Myanmar has not

<sup>54</sup> THREAT TO THE PEACE, *supra* note 10, at 65.

<sup>55</sup> See generally U.N. Office of the High Comm’r for Human Rights, *Special Rapporteur on the Situation of Human Rights Myanmar*, <http://www2.ohchr.org/english/countries/mm/mandate/index.htm> (last visited Nov. 7, 2009); see also Report of the Special Rapporteur, 2008, *supra* note 28.

<sup>56</sup> BURMA IN TURMOIL, *supra* note 6, at 59.

<sup>57</sup> See, e.g., Report of the Special Rapporteur, 2008, *supra* note 28, at ¶ 71.

<sup>58</sup> U.N. Office of the High Comm’r for Human Rights, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, ¶ 15, UN Doc. A/HRC/10/19 (Mar. 11, 2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/A.HRC.10.19.pdf> [hereinafter Report of the Special Rapporteur, 2009].

<sup>59</sup> *Id.* at ¶¶ 86-87.

<sup>60</sup> Myanmar is hardly unique in this regard. In 2006, the Geneva Conventions of 1949 became the first treaties in modern history to be ratified by every state in the world. See HENRY J. STEINER, PHILIP ALSTON, & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 395-401 (3d ed. 2008) [hereinafter Steiner].

<sup>61</sup> Geneva Conventions of 1949, available at <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>.

<sup>62</sup> HORTON, *supra* note 42, at 170-71. For more information about the Horton report, see John Macgregor, *A Witness’ Plea to End Myanmar Abuse*, N.Y. TIMES, May 19, 2005, available at <http://www.nytimes.com/2005/05/18/world/asia/18iht-burma.html>.

<sup>63</sup> The States Parties to the Rome Statute, <http://www2.icc-cpi.int/Menu/ASP/states+parties/The+States+Parties+to+the+Rome+Statute.html> (last visited Sep. 16,

signed or acceded to it, it is “the international community's most authoritative statement of international law” and may be considered a part of customary international law.<sup>64</sup> For instance, during a trial of the International Criminal Tribunal for the former Yugoslavia, the prosecutor stated, “[d]epending on the matter at issue, the Rome Statute may be taken to restate, reflect, or clarify customary rules or crystallize them, whereas in some areas it creates new law or modifies existing law . . . the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.”<sup>65</sup>

¶20 The Rome Statute states that the Court “shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”<sup>66</sup> Many of the crimes under the purview of the ICC have been committed in Myanmar. However, as Myanmar is not a party to the Rome Statute, the ICC may not have jurisdiction over its citizens. Usually, the ICC has jurisdiction only over nationals of a state party or over crimes committed within the territory of a state party.<sup>67</sup> However, the ICC also may exercise jurisdiction over situations referred to the court by the United Nations Security Council,<sup>68</sup> a criteria which may eventually apply to the case of Myanmar. Nevertheless, even if the jurisdiction of the ICC does not apply directly to the crisis in Myanmar, the Rome Statute may be seen as an expression of customary international law due to the sheer number of countries that have ratified it, and it may provide a useful framework for understanding the severity of the SPDC’s human rights violations against the people of Myanmar.

¶21 Moreover, the independent Horton report alleges that due to the systematic targeting of certain ethnic minorities by the military, the SPDC may also be guilty of genocide.<sup>69</sup> The Convention on the Prevention and Punishment of the Crime of Genocide, which Myanmar ratified on March 14, 1956,<sup>70</sup> defines genocide as certain attacks against a group of people “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>71</sup> The attacks of the SPDC military have been focused almost exclusively on ethnic minorities, and the pattern of murder, rape, and displacement provides evidence of a larger goal that may fit the Convention’s definition of genocide.<sup>72</sup>

¶22 Myanmar has committed violations of numerous other treaties it has ratified or accessed. The government accessed the Convention on the Rights of the Child on July 15, 1991, yet twenty percent of its army is composed of child soldiers as young as eleven years old.<sup>73</sup> Myanmar is a party to the Convention concerning Forced or Compulsory Labor of 1930, yet the government compels more than 800,000 of its citizens to work for

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2009).

<sup>64</sup> HORTON, *supra* note 42, at 148.

<sup>65</sup> Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 227 (Dec. 10, 1998).

<sup>66</sup> Rome Statute of the International Criminal Court, art. 8(2)(a), *available at* [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf).

<sup>67</sup> *Id.* at art. 12(2).

<sup>68</sup> *Id.* at art. 13.

<sup>69</sup> See HORTON, *supra* note 42, at 152-57.

<sup>70</sup> United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 27.

<sup>71</sup> *Id.*

<sup>72</sup> See HORTON, *supra* note 42, at 152-57.

<sup>73</sup> See THREAT TO THE PEACE, *supra* note 10, at 61-64.

little or no pay.<sup>74</sup> Myanmar is a party to the Convention on the Elimination of All Forms of Discrimination against Women, yet the military perpetrates systemic sexual violence against rural women from minority ethnic groups, and in some regions the government denies birth certificates to women and prohibits them from serving in certain professions.<sup>75</sup> The government has also committed numerous and flagrant violations of the Convention concerning Freedom of Association and Protection of the Right to Organize of 1948, most recently visible during the protests of September 2007.

¶23 The atrocities committed by the SPDC violate the provisions of numerous sources of international law, creating the perception of Myanmar as a rogue nation.

#### V. THE ASEAN CHARTER, THE AICHR, AND HUMAN RIGHTS

¶24 This section will explore the effect of the human rights provisions in the recently implemented ASEAN Charter, including the creation of the ASEAN Intergovernmental Commission on Human Rights (AICHR), on international treatment of Myanmar. First, this section will outline history and purpose of ASEAN. Next, this section will discuss the new ASEAN Charter, including its intent, benefits, and human rights provisions, and the resulting creation of the AICHR. Finally, this section will examine the proposed human rights mechanism within ASEAN.

¶25 Indonesia, Malaysia, the Philippines, Singapore, and Thailand founded ASEAN in 1967 to “accelerate economic growth, social progress and cultural development in the region and . . . to promote regional peace and stability through abiding respect for justice and the rule of law.”<sup>76</sup> ASEAN initially met with success primarily in the political field, as it facilitated relations among member governments in the turmoil following the Vietnam War.<sup>77</sup> However, ASEAN has become an economic force in the wake of the 1992 ASEAN Summit, which introduced the idea of an ASEAN Free Trade Agreement.<sup>78</sup> This idea has progressed to the point where many observers envision a European Union-style single ASEAN market by 2015.<sup>79</sup>

¶26 Since its foundation as a loose confederation of five nations, membership in ASEAN has grown to ten countries, including Myanmar, which joined on July 23, 1997.<sup>80</sup> The inclusion of Myanmar in ASEAN was controversial and met with much international criticism. However, fears among ASEAN members regarding Myanmar’s economy and human rights practices ultimately were outweighed by greater fears that Myanmar’s continued exclusion from ASEAN would be an open invitation for China and other powers to seize a greater role in the region.<sup>81</sup> Internationally, ASEAN members

<sup>74</sup> *Id.* at 42-44.

<sup>75</sup> Report of the Special Rapporteur, 2009, *supra* note 58, at ¶¶ 61, 66.

<sup>76</sup> ASEAN Secretariat, Overview, Association of Southeast Asian Nations, <http://www.aseansec.org/64.htm> (last visited Nov. 7, 2009).

<sup>77</sup> Working Group for an ASEAN Human Rights Mechanism, *Toward an ASEAN Human Rights Mechanism – A Concept Paper*, <http://www.aseanhrmech.org/resolutions/concept-paper-towards-aseanhrmech.html> [hereinafter *Toward an ASEAN Human Rights Mechanism*].

<sup>78</sup> *Id.*

<sup>79</sup> See, e.g., *ASEAN Unveils Plans for 2015 Single Market*, PEOPLE’S DAILY ONLINE, Aug. 24, 2006, [http://english.peopledaily.com.cn/200608/24/eng20060824\\_296352.html](http://english.peopledaily.com.cn/200608/24/eng20060824_296352.html) (last visited Nov. 5, 2009).

<sup>80</sup> *Towards an ASEAN Human Rights Mechanism*, *supra* note 77.

<sup>81</sup> INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, CHALLENGES TO DEMOCRATIZATION IN BURMA: PERSPECTIVES ON MULTILATERAL AND BILATERAL RESPONSES 43,

defended the decision on the grounds that member states would be a positive influence on Myanmar.<sup>82</sup>

¶27 For much of its history, ASEAN has operated without a formal charter.<sup>83</sup> Members have traditionally preferred a structure with few binding agreements and decisions made only by consensus. However, in 2005, ASEAN members began discussing the construction of a formal charter for ASEAN. When these talks started, the Institute for Southeast Asian Studies (ISEAS) published a study that explained why such a charter would be beneficial to ASEAN:

ASEAN has no central institutions to uphold compliance with them. It has nobody to call a member-state to account for non-compliance with the agreements. ASEAN has no credible mechanisms for settling disputes in an objective and binding manner. . . . Without a comprehensive set of values and principles explicitly adopted, ASEAN cannot on the basis of objective and agreed-upon criteria call its members to account for acts that have adverse impacts on fellow-members or on the region as a whole. Without it, ASEAN cannot credibly set the direction in which it is headed.<sup>84</sup>

Motivated by concerns such as these, ASEAN member states overcame their reluctance to take any action that might compromise their state sovereignty and agreed to draft a charter.

¶28 The drafters of the ASEAN Charter stated that for the Charter to be legally binding, all ten member states had to ratify it before the 14th ASEAN Summit in December 2008. After the Charter was adopted at the 13th ASEAN Summit in November 2007, six of the ten ASEAN nations ratified it within four months.<sup>85</sup> Despite the human rights provisions included in the Charter, Myanmar ratified it on July 18, 2008.<sup>86</sup> However, Thailand, the Philippines, and Indonesia, all democracies, delayed signing the Charter to protest the lack of action taken to force change in Myanmar and the continued detention of Aung San Suu Kyi. Indonesia, in particular, threatened not to ratify the Charter until ASEAN had made concrete progress on the human rights body promised by the Charter.<sup>87</sup> Nevertheless, all three countries eventually ratified the Charter despite their objections.<sup>88</sup> The Charter took effect to great fanfare on December 15, 2008, yet concerns lingered about whether its focus on human rights was sufficiently comprehensive.<sup>89</sup>

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[http://burmalibrary.org/docs3/BURMA\\_beyond\\_2000.pdf](http://burmalibrary.org/docs3/BURMA_beyond_2000.pdf) [hereinafter CHALLENGES TO DEMOCRATIZATION].

<sup>82</sup> THREAT TO THE PEACE, *supra* note 10, at 68.

<sup>83</sup> FRAMING THE ASEAN CHARTER: AN ISEAS PERSPECTIVE, *supra* note 3, at 3.

<sup>84</sup> *Id.* at 6-7.

<sup>85</sup> ASEAN SECRETARIAT, THE RATIFICATION OF THE ASEAN CHARTER I (2008), <http://www.aseansec.org/AC-update.pdf>.

<sup>86</sup> See Christopher Bodeen, *Myanmar Ratifies ASEAN Charter*, THE ASSOCIATED PRESS, July 21, 2008.

<sup>87</sup> WALTER LOHMAN, INDONESIA HOLDS UP ASEAN CHARTER RATIFICATION FOR BURMESE PEOPLE (July 17, 2008), [http://www.heritage.org/research/AsiaandthePacific/upload/wm\\_1999.pdf](http://www.heritage.org/research/AsiaandthePacific/upload/wm_1999.pdf).

<sup>88</sup> *Indonesia Ratifies ASEAN Charter*, AFP, Oct. 21, 2008, [http://afp.google.com/article/ALeqM5inNPSjtYW6\\_BtlwnH9WBcl85h23g](http://afp.google.com/article/ALeqM5inNPSjtYW6_BtlwnH9WBcl85h23g) (last visited Nov. 5, 2009).

<sup>89</sup> See, e.g., *ASEAN Charter Comes Into Force*, INT'L HERALD TRIB., Dec. 15, 2008, available at <http://www.iht.com/articles/ap/2008/12/15/asia/AS-ASEAN-Charter.php>; Lucy Williamson, *South East*

¶29 ASEAN has historically espoused a policy of non-interference in the internal affairs of its member states, which has manifested itself in a policy toward Myanmar of “constructive engagement.”<sup>90</sup> The goal of the policy of constructive engagement is gradual change in the human rights situation of Myanmar through cooperation between ASEAN and Myanmar on a variety of issues.<sup>91</sup> However, critics have alleged that the true aim of the policy is to deflect pressure for EU and U.S. sanctions so that economic activities between ASEAN and the SPDC can continue unimpeded.<sup>92</sup> Regardless of the true ambition of the constructive engagement policy, the Charter contains some powerful language that dramatically affects this stance.

¶30 The ASEAN Charter states that the purposes of ASEAN are “[t]o strengthen democracy, enhance good governance and the rule of law ... to promote and protect human rights and fundamental freedoms,”<sup>93</sup> and “[t]o enhance the well-being and livelihood of the peoples of ASEAN by providing them with equitable access to opportunities for human development, social welfare, and justice.”<sup>94</sup> The Charter requires ASEAN member states to “adhere to the principles of democracy and constitutional government,”<sup>95</sup> and to have “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice.”<sup>96</sup> Member nations are also required to uphold the United Nations Charter and other forms of international law, explicitly international humanitarian law.<sup>97</sup> Criteria for admission to ASEAN include agreement to abide by the rules of the Charter and ability and willingness to carry out the conditions of membership.<sup>98</sup>

¶31 Perhaps the most dramatic change effected by the Charter is the newfound concern for human rights: “[i]n 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.”<sup>99</sup> To structure this human rights body, ASEAN created the Working Group for an ASEAN Human Rights Mechanism (“Working Group”) and charged it with examining several possible forms the human rights body could take.<sup>100</sup> Potential options included a simple declaration of principles, a commission with “monitoring, promotional, and recommendary functions,” or a court with the power to issue binding decisions.<sup>101</sup>

¶32 During the Working Group’s deliberations, some diplomats expressed the opinion that the new human rights body should not intervene in domestic human rights issues

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*Asia to Launch Charter*, BBC NEWS, Dec. 15, 2008, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7783073.stm>.

<sup>90</sup> See Phar Kim Beng, *Myanmar: ASEAN’s Thorn in the Flesh*, ASIA TIMES ONLINE, Jul. 25, 2003, [http://www.atimes.com/atimes/Southeast\\_Asia/EG25Ae01.html](http://www.atimes.com/atimes/Southeast_Asia/EG25Ae01.html) (last visited Nov. 5, 2009).

<sup>91</sup> Mann Bunyanunda, *Burma, ASEAN, and Human Rights: The Decade of Constructive Engagement, 1991-2001*, 2 STAN. J. OF E. ASIAN STUD. 118, 119 (2002).

<sup>92</sup> See, e.g., *id.* at 119-20; CHALLENGES TO DEMOCRATIZATION, *supra* note 81, at 50.

<sup>93</sup> ASEAN Charter, *supra* note 4, at art. 1(7).

<sup>94</sup> *Id.* at art. 1(11).

<sup>95</sup> *Id.* at art. 2(h).

<sup>96</sup> *Id.* at art. 2(i).

<sup>97</sup> *Id.* at art. 2(j).

<sup>98</sup> *Id.* at art. 6(2)(c)-(d).

<sup>99</sup> *Id.* at art. 14.

<sup>100</sup> Working Group for an ASEAN Human Rights Mechanism: About Us, <http://www.aseanhrmech.org/aboutus.html> (last visited Nov. 7, 2009).

<sup>101</sup> *Id.*

such as the current crisis in Myanmar at all, but instead should protect countries from foreign meddling.<sup>102</sup> As expected, Myanmar protested against the formation of a functional ASEAN human rights body, along with several other ASEAN member countries with authoritarian governments.<sup>103</sup> On the other side, a number of countries both inside and outside of ASEAN argued for a legitimate human rights body that would feature enforcement capabilities in addition to mere advisory capacity. The Working Group ultimately recommended that the human rights body be a commission, “constituting comprehensive human rights protection and reporting mechanisms.”<sup>104</sup> Such a body would have advisory and reporting functions, but no binding enforcement capabilities.<sup>105</sup> The Working Group proposed that the primary task of the nascent human rights body should be to “promote and protect human rights,” which in its view includes raising awareness, advising, sharing information, and advocating, but not to pass judgment regarding human rights in any member nation.<sup>106</sup>

¶33 The newly drafted Terms of Reference state that the purposes of the AICHR are “[t]o promote and protect human rights and fundamental freedoms of the peoples of ASEAN” and “[t]o uphold the right of the peoples of ASEAN to live in peace, dignity and prosperity.”<sup>107</sup> AICHR will serve these aims by “promot[ing] human rights,” “enhanc[ing] regional cooperation,” and “uphold[ing] international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments.”<sup>108</sup> However, noticeably absent from the AICHR Terms of Reference are any mention of enforcement power or ability to address country-specific human rights crises. In fact, one of the AICHR’s guiding principles is a continuation of ASEAN’s long-standing respect for non-interference in the internal affairs of ASEAN member states.<sup>109</sup>

¶34 The Terms of Reference drafted by the Working Group essentially removed any possibility that the new human rights body would have any enforcement power.<sup>110</sup> Indeed, when ASEAN formally approved the terms of reference for the AICHR on July 20, 2009, more than two years after the ASEAN Charter mandated the creation of a human rights body, the human rights community reacted with disappointment.<sup>111</sup> While Thai Prime Minister Abhisit Vejjajiva, host of the ASEAN summit at which the AICHR agreement was reached, noted that the commission would “first focus on the promotion

<sup>102</sup> *ASEAN Human Rights Body Told to Protect Members from Foreign Interference*, INT’L HERALD TRIB., Nov. 20, 2007, available at <http://www.iht.com/articles/ap/2007/11/21/asia/AS-GEN-ASEAN-Human-Rights.php>.

<sup>103</sup> See, e.g., *Thailand to Hold Postponed ASEAN Summit in February*, THE IRRAWADDY, Dec. 16, 2008, available at [http://www.irrawaddy.org/highlight.php?art\\_id=14801](http://www.irrawaddy.org/highlight.php?art_id=14801).

<sup>104</sup> WORKING GROUP FOR AN ASEAN HUMAN RIGHTS MECHANISM, PROPOSED ELEMENTS FOR THE TERMS OF REFERENCE OF AN ASEAN HUMAN RIGHTS BODY, ¶ 9 (2008), <http://aseanhrmech.org/downloads/WGsubmissiontoHLP.pdf>.

<sup>105</sup> *Id.*

<sup>106</sup> ASEAN SECRETARIAT, TERMS OF REFERENCE OF ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS §§ 10-12 (2009), available at <http://www.aseansec.org/Doc-TOR-AHRB.pdf> [hereinafter TERMS OF REFERENCE].

<sup>107</sup> *Id.* at §§ 1.1-1.2.

<sup>108</sup> *Id.* at §§ 1.4-1.6.

<sup>109</sup> *Id.* at § 2.1(b).

<sup>110</sup> *Id.* at § 2.5.

<sup>111</sup> See, e.g., *ASEAN’s Toothless Council*, WALL ST. J., July 22, 2009, at A7.

of human rights rather than its protection,”<sup>112</sup> pundits accused the AICHR of being “toothless,”<sup>113</sup> “outrageous,”<sup>114</sup> and having “little value.”<sup>115</sup> Even ASEAN Secretary-General Surin Pitsuwan admitted that the AICHR would not substantially affect Myanmar, stating that “ASEAN will continue to have a burden on its lap to explain to the world.”<sup>116</sup>

¶35 When it is formally established at the ASEAN Summit in October 2009, the AICHR will join a growing population of other regional (as opposed to global) human rights systems. Regional human rights bodies enjoy several distinct advantages over global bodies such as the United Nations: they capitalize on geographic, historical, and cultural bonds among neighboring states, their recommendations often meet with less resistance than those issued by a global body, they can publicize information about human rights more easily and effectively, and they are less prone to general compromises stemming from political intractability.<sup>117</sup> Such systems use a variety of methods to achieve their aim of promoting human rights within their given geographical area. For instance, the European system is focused on its productive court, the European Court of Human Rights (“ECHR”), and the resulting body of decisions has helped ease the addition of new and diverse members to the European community.<sup>118</sup> In contrast, although the Inter-American system includes a court, its key component is its Commission on Human Rights (“IACHR”), a body that does not have a parallel in the European system.<sup>119</sup> The African system may be instructive as a basis for comparison in the future as well, but its court is currently in the process of developing as an institution.<sup>120</sup>

¶36 The AICHR pales in comparison to other regional human rights bodies as an effective instrument to promote and enforce human rights. The enforcement powers of the ECHR have a far greater effect on human rights than any provision of the AICHR could have, and the IACHR’s combination of a commission and a court has much the same effect. Although the formation of the AICHR is a step in the right direction, as it formally recognizes the importance of promoting human rights among ASEAN member countries, it cannot have as significant an impact because it lacks any substantial means of penalizing human rights violators. The SPDC has not responded to the broad international condemnation of its actions, and there seems to be no reason to believe that the AICHR will be anything more than just another voice clamoring ineffectively for the SPDC to stop.

¶37 The ASEAN Secretariat has recognized that Myanmar is in the midst of “national reconciliation” and a “peaceful transition to democracy,” and it has called for Myanmar to release its political detainees, including Aung San Suu Kyi, and take bolder steps

<sup>112</sup> *ASEAN Defends Human Rights Body*, AL JAZEERA ENGLISH, July 21, 2009, <http://english.aljazeera.net/news/asia-pacific/2009/07/200972121831490591.html> (last visited Nov. 5, 2009).

<sup>113</sup> *ASEAN’s Toothless Council*, *supra* note 111.

<sup>114</sup> *Id.*

<sup>115</sup> *ASEAN Defends Human Rights Body*, *supra* note 112.

<sup>116</sup> *Id.*

<sup>117</sup> LOUIS SOHN & JAMES FREDERICK GREEN, TWENTY-EIGHTH REPORT OF THE COMMISSION TO STUDY THE ORGANIZATION OF PEACE 15 (1980).

<sup>118</sup> Steiner, *supra* note 60, at 925.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

toward a peaceful transition to democracy.<sup>121</sup> To this point, the SPDC has responded to this encouragement with reassurances of gradual change, but there exists little to no evidence that the SPDC actually intends to take the initiative in any progressive reforms. The new ASEAN Charter and the formation of the AICHR presented an opportunity for ASEAN to make a serious push for change in Myanmar. However, it appears that the AICHR as formed lacks the capability to do so by itself.

## VI. OPTIONS FOR ASEAN RESPONSE TO MYANMAR

¶38 This section will review the merits of the various approaches ASEAN could take to address the conflict between the provisions of the Charter and the human rights record of Myanmar. In this case, relevant language in the Charter includes not only Article 14, which calls for the formation of an ASEAN human rights body, but also the principles contained in Articles 1, 2, and 6 that mandate respect for international humanitarian law, fundamental freedoms, democracy, and social justice. The formation of the AICHR is an important step in ASEAN's effort to address human rights in Southeast Asia. However, since the AICHR focuses on simply promoting human rights, rather than addressing specific situations, it probably will have little immediate effect with regard to reducing the current human rights abuses occurring in Myanmar. To address the discrepancy between the letter and spirit of the Charter and the actions of the SPDC, ASEAN has several options, ranging from complete neglect to active sanctions or expulsion.

### *A. Constructive Engagement*

¶39 The first option entails ASEAN reverting back to the historic policy of constructive engagement despite the human rights language in its new charter and the formation of the AICHR. Although the AICHR will increase ASEAN's focus on the promotion of human rights, it explicitly continues the policy of non-interference and takes a non-confrontational approach toward human rights issues, as discussed above.<sup>122</sup> Without further changes, AICHR will not modify ASEAN's policy of constructive engagement with Myanmar. In practice, this means that ASEAN would likely do little or nothing to encourage democratic change and human rights progress in Myanmar, possibly going so far as to prevent interference from other international organizations.<sup>123</sup>

¶40 This option would be the most comfortable for the member states of ASEAN, as they have demonstrated a historical reluctance to interfere with, or even offer opinions on, internal affairs of other member states.<sup>124</sup> Moreover, although some Southeast Asian democracies such as the Philippines, Indonesia, and Thailand have spoken out against the human rights abuses in Myanmar, other ASEAN member states disagree over how to approach those issues.<sup>125</sup> Due to this disagreement, ASEAN as a whole has taken a soft

<sup>121</sup> Joint Communique of the 41st ASEAN Ministerial Meeting, *One ASEAN at the Heart of Dynamic Asia*, ¶ 50 (July 21, 2008), <http://www.aseansec.org/21771.htm> (last visited Nov. 9, 2009).

<sup>122</sup> TERMS OF REFERENCE, *supra* note 106, at §§ 2.1(b), 2.4.

<sup>123</sup> Bunyanunda, *supra* note 91, at 119-20.

<sup>124</sup> See, e.g., THREAT TO THE PEACE, *supra* note 10, at 68-69.

<sup>125</sup> See, e.g., *Romulo Asks: Can Myanmar Abide by ASEAN Charter?*, GLOBAL NATION, Nov. 18, 2007, [http://globalnation.inquirer.net/news/breakingnews/view\\_article.php?article\\_id=101698](http://globalnation.inquirer.net/news/breakingnews/view_article.php?article_id=101698) (last visited Nov. 5, 2009).

position toward the SPDC in an attempt to promote regional unity and minimize inter-country strife.<sup>126</sup> From ASEAN's perspective, maintaining constructive engagement between ASEAN and Myanmar is virtually frictionless, since it would merely continue the policy that has been in force since the SLORC rose to power.

¶41 Furthermore, the constructive engagement approach would probably result in the greatest immediate economic gain to ASEAN member states. They would continue to enjoy the benefits of effective exclusivity in trade with Myanmar, along with China, as most western countries have imposed severe restrictions on such trade.<sup>127</sup> Although Myanmar is economically underdeveloped, wealthier nations have found trade with Myanmar profitable, as it is rich in natural resources such as timber, natural gas, and precious stones.<sup>128</sup>

¶42 However, continuance of the constructive engagement approach would also create significant disadvantages. ASEAN drafted its Charter and formed the AICHR with the intention of becoming a more rules-based organization, which could then "be courted by the major powers as an economic power and valued as a partner for cooperation to deal with larger regional and global issues."<sup>129</sup> If ASEAN allows Myanmar to flout multiple provisions in the Charter without repercussions, while failing to take even the smallest steps toward openness and democracy, the Charter loses its effect. Perhaps more importantly, the Charter and the AICHR would squander their opportunity to build confidence among other treaty organizations, such as the European Union, NATO, and NAFTA, that ASEAN is a legitimate, respectable partner.

¶43 By virtue of the drafting and ratification of the Charter, it would appear that ASEAN intends to develop into a more tightly-knit, rules-based organization that will command worldwide respect. Therefore, the disadvantages of continuing the constructive engagement approach are significant. For the Charter to be anything more than an empty promise to the rest of the world, ASEAN must take a more active approach to combating Myanmar's human rights violations.

### *B. Creation of an ASEAN Human Rights Court*

¶44 To address the weaknesses in the historical approach of constructive engagement, ASEAN could modify the terms of the AICHR to include a human rights court with the power to issue binding judgments.<sup>130</sup> Such a court would provide a judicial, unbiased body to determine whether the SPDC violates the human rights and international humanitarian law provisions of the Charter. It would clearly demonstrate the commitment of ASEAN to take a more serious approach to the blatant human rights violations within Myanmar.

<sup>126</sup> See, e.g., THREAT TO THE PEACE, *supra* note 10, at 37. A prime example of ASEAN's unwillingness to take a stand against the SPDC's abuses arose when Myanmar was scheduled to chair the Association in 2006. Although many ASEAN members feared this prospect, they nevertheless asked Myanmar whether it wished to assume the chair. Members were quite relieved when Myanmar declined the position.

<sup>127</sup> See, e.g., Bunyanunda, *supra* note 91, at 119-20; THREAT TO THE PEACE, *supra* note 10, at 73-77; BURMA IN TURMOIL, *supra* note 6, at 91-92.

<sup>128</sup> Background Note, *supra* note 11.

<sup>129</sup> *One ASEAN at the Heart of Dynamic Asia*, *supra* note 121, at ¶¶ 4-5, 11.

<sup>130</sup> See, e.g., ASEAN Human Rights Mechanism, *supra* note 100.

¶45 The most prominent regional human rights court currently in existence is the ECHR. The ECHR, which provides for both individual petitions<sup>131</sup> and interstate complaints,<sup>132</sup> is an integral component of the European Convention, a broad regional charter conceived to promote multinational peace in the wake of World War II.<sup>133</sup> The ECHR is designed not to supplant domestic human rights laws, but rather to serve as a remedy only after domestic remedies have been exhausted.<sup>134</sup> The European Convention declares a clear preference for domestic resolution of complaints, mandating a full government consultation in the examination of complaints and encouraging “friendly settlement” whenever possible.<sup>135</sup> If the European Convention and the ECHR were used as the template for creation of an ASEAN human rights court, such provisions would assuage the concerns of member states over threats to national sovereignty and regional amicability.

¶46 Another possible structure for an ASEAN human rights court is exemplified by the Inter-American Commission on Human Rights. The IACHR is superficially similar to the ECHR in that it consists of a commission with investigatory and advisory powers and a court with contentious and advisory jurisdiction.<sup>136</sup> However, the IACHR process of addressing potential human rights abuses focuses much more on the investigation of the commission than on the prosecution in the court.<sup>137</sup> If the IACHR were used as the model for an ASEAN human rights court, the commission-first approach would help address members’ concerns about national sovereignty.

¶47 Unfortunately, the eventual formation of a human rights court within the AICHR does not look likely. Although the Working Group for an ASEAN Human Rights Mechanism initially considered such a court as an option for the human rights body provided in Article 14 of the Charter,<sup>138</sup> it was not included in the final Terms of Reference for the AICHR.<sup>139</sup> After ASEAN members struggled as much as they did to forge an agreement on the Terms of Reference as they stand, it seems unlikely that the AICHR would drastically change its structure to include a court in the near future.

### C. ASEAN Sanctions Outside the Human Rights Mechanism

¶48 ASEAN could address the human rights situation in Myanmar without creating a permanent court to issue enforceable judgments. Even without considering the principles of the nascent AICHR, Myanmar has still violated a number of the core principles in the ASEAN Charter. First, the Charter requires member states to practice democracy and

<sup>131</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art. 34, Nov. 4, 1950, Council of Eur., available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

<sup>132</sup> *Id.* at art. 33.

<sup>133</sup> Steiner, *supra* note 60, at 933.

<sup>134</sup> In fact, most complaints submitted to the European Court are rejected on the grounds that domestic law provides an effective remedy for the alleged violation. See, e.g., Steiner, *supra* note 60, at 938.

<sup>135</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 130, at arts. 13, 38.

<sup>136</sup> Cecilia Medina, *The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture*, 12 HUM. RTS. Q. 439, 440 (1990).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> PROPOSED ELEMENTS FOR THE TERMS OF REFERENCE OF AN ASEAN HUMAN RIGHTS BODY, *supra* note 104, at ¶ 9.

constitutional government.<sup>140</sup> Although Myanmar is not the only ASEAN country under a non-democratic government, its system represses the will of the people to a greater degree than any other, and it is the only member ruled by a government that forcibly seized power from a constitutionally elected body. Second, the Charter requires member states to promote human rights, fundamental freedoms, and social justice. The SPDC has perpetrated a pattern of extrajudicial killing and detention, systematic rape, and denial of numerous individual freedoms.<sup>141</sup> Finally, and perhaps most importantly, the Charter requires member states to uphold the United Nations Charter and other forms of international law, explicitly including international humanitarian law.<sup>142</sup> The SPDC flouts this requirement, consistently violating a plethora of such law as described above. The ASEAN Charter, which Myanmar ratified on July 18, 2008, includes a clause in which signatories must agree to abide by the rules of the Charter as a condition of membership.<sup>143</sup> Under this clause, ASEAN would be fully justified in placing sanctions on Myanmar in an attempt to force change.

¶49 If ASEAN took such an approach, other international organizations and nations would immediately accord it a much greater level of respect. A demonstrated willingness to hold its members responsible for following its rules would establish ASEAN as a political, economic, and social force on the world stage akin to NATO or the European Union. On the other hand, economic sanctions on Myanmar would create a real risk. Cutting off economic ties between Myanmar and its ASEAN trade partners would present an invitation for Chinese economic dominance of Myanmar, since China would be the only major economy still open to investment and trade with the SPDC.<sup>144</sup> Such a development would have a negative impact on the prospect of human rights progress in Myanmar, as China has historically shown little interest in the non-economic affairs of its trading partners.<sup>145</sup> However, it is uncertain whether ASEAN sanctions would significantly affect the level of Chinese influence in Myanmar, though, as Myanmar is increasingly dependent on China for economic support, regardless of ASEAN's involvement.<sup>146</sup> In the first ten years the SPDC held power, trade between Myanmar and China increased from \$15 million to \$800 million, a gain of over 5,300 percent.<sup>147</sup> Additionally, China already provides significant political, economic, and military assistance to the SPDC. For instance, rebels fighting the junta in the northern Kachin province of Myanmar consider China the primary force supporting the junta, on account of its hydroelectric and resource extraction contracts.<sup>148</sup> Since China already has free economic reign in Myanmar for all practical purposes, sanctions enacted by ASEAN may only cause a slight acceleration of Chinese influence.<sup>149</sup>

<sup>140</sup> ASEAN Charter, *supra* note 4, at art. 2(h).

<sup>141</sup> *See, e.g.*, Department of State 2007 Report, *supra* note 29; *see also* Report of the Special Rapporteur, 1998, *supra* note 29.

<sup>142</sup> ASEAN Charter, *supra* note 4, at art. 2(j).

<sup>143</sup> *Id.* at art. 6(2)(c)-(d).

<sup>144</sup> CHALLENGES TO DEMOCRATIZATION, *supra* note 81, at 43.

<sup>145</sup> *See, e.g., id.* at 35.

<sup>146</sup> *Id.* at 16.

<sup>147</sup> *Id.* at 41.

<sup>148</sup> Online Interview with Tim Patterson, journalist for the Pulitzer Center for Crisis Reporting who spent a month embedded with the Kachin Independence Army in northern Myanmar in November-December 2008 (Dec. 16, 2008) (on file with author).

<sup>149</sup> CHALLENGES TO DEMOCRATIZATION, *supra* note 81, at 19.

¶50 If ASEAN is too concerned about Chinese economic influence within Myanmar to implement effective economic sanctions, other sanctioning options may be available to send a message, both to the SPDC and to the world at large, that such human rights abuses will not be tolerated. For instance, the European Union has the power to employ “restrictive measures” to promote human rights, including diplomatic sanctions, boycotts of sports or cultural events, flight bans, and restrictions on admission;<sup>150</sup> ASEAN could use some of the same measures with respect to Myanmar. However, non-economic sanctions may have little effect on the activities of the SPDC, since Myanmar is socially insular, and the SPDC has thus far shown little response to international shaming. Moreover, ASEAN may be even more reluctant to impose non-economic sanctions than economic ones, given its members’ traditional focus on non-interference and the appearance of propriety.

¶51 In response to Myanmar’s extensive violations of the human rights and membership provisions of the Charter, ASEAN could take any one of several different tacks. ASEAN could simply maintain its historic posture of constructive engagement with the SPDC. Although that would be the simplest solution, it would significantly impede ASEAN’s development as a regional treaty organization with global cachet. Alternatively, ASEAN could modify the AICHR to include a human rights court that could issue enforceable judgments against member states that violate the human rights provisions in the Charter. Although this approach would build global confidence in ASEAN, it does not appear to be practical at this time. Finally, since Myanmar has violated many of the core principles of the Charter, ASEAN could legitimately impose sanctions outside the purview of the AICHR. Although such an approach would risk accelerating China’s economic inroads in Myanmar, it would send a message that ASEAN is a modern treaty organization concerned about human rights. The next section will discuss which of these approaches would be the best considering the interests of ASEAN, Myanmar, and the other member states.

## VII. WHAT SHOULD ASEAN DO?

¶52 The first approach outlined in the previous section, the continuance of the policy of constructive engagement, is inadvisable for a number of reasons. First, the implementation of the Charter presents a unique opportunity for ASEAN to move away from its historical policy of ignoring human rights abuses in member countries. Before implementing the Charter and creating the AICHR, ASEAN was the last regional body not to have a human rights mechanism.<sup>151</sup> If ASEAN simply ignores Myanmar’s blatant contravention of the human rights policies in the Charter, it would effectively negate its own human rights mechanism and lose an opportunity to become a peer of the other major regional organizations. More importantly, ASEAN previously pledged its support for human rights in the 1993 Bangkok Declaration, in which member states affirmed the principles contained in the 1948 United Nations Charter and the Universal Declaration on

<sup>150</sup> European Union, *Common Foreign and Security Policy Overview – Sanctions*, [http://ec.europa.eu/external\\_relations/cfsp/sanctions/docs/index\\_en.pdf](http://ec.europa.eu/external_relations/cfsp/sanctions/docs/index_en.pdf).

<sup>151</sup> See Pokpong Lawansiri, *ASEAN Must Deliver on Human Rights Body*, THE IRRAWADDY, June 16, 2008, available at [http://www.irrawaddy.org/print\\_article.php?art\\_id=12761](http://www.irrawaddy.org/print_article.php?art_id=12761).

Human Rights.<sup>152</sup> Reneging on the stand taken in the Bangkok Declaration would cripple ASEAN's international credibility. Although non-interference was one of ASEAN's goals at the time of its founding in 1967, world standards for activism in human rights have changed over the past four decades, and a human rights mechanism is now considered an essential part of any legitimate regional organization.<sup>153</sup> If ASEAN does not take some action against Myanmar's human rights abuses, there is no chance that its Intergovernmental Commission on Human Rights will maintain legitimacy. Therefore, inaction under the guise of "constructive engagement" is no longer a viable option.

¶153 The first path ASEAN could take to actually address the human rights violations in Myanmar would be the creation of a regional human rights court, with the ability to issue binding judgments on situations in member states. Similar to the European Court of Human Rights, the Inter-American Commission on Human Rights, and the African Commission for Human and People's Rights, such a court would provide a neutral forum to interpret the human rights standards defined in the Charter, investigate alleged abuses, and litigate charges of violations. An ASEAN human rights court, if agreed upon, would have the ability to firmly and definitively address the situation in Myanmar.

¶154 However, it does not appear that ASEAN member states will agree upon the establishment of such a court in the near future. The ten ASEAN nations are diverse in their histories, forms of government, and positions on human rights. Only four of the ten states have national human rights institutes, and they have taken varying positions on the most prominent issues of international human rights law.<sup>154</sup> Not all the states are party to such documents as the 1948 Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.<sup>155</sup> Therefore, finding common ground on the creation of a court with the ability to enforce specific laws rather than merely uphold general principles would be extremely difficult.

¶155 By contrast, political and economic sanctions could be developed and implemented quickly, and they would allow ASEAN to maintain flexibility in its dealings with Myanmar. Sanctions would create some negative effects, primarily increased Chinese economic involvement in Myanmar, but they would be the most effective way of forcing the junta to change its ways. Although repealing the unwritten policy of non-interference may be uncomfortable for the members of ASEAN, turning a blind eye to Myanmar by maintaining "constructive engagement" is no longer an option.

## VIII. CONCLUSION

¶156 The military junta that currently holds power in Myanmar has committed numerous horrific human rights violations. In addition to harming the people of Myanmar, these abuses create significant negative effects for other members of ASEAN. However, in

<sup>152</sup> See MARUAH SINGAPORE, POSITION PAPER ON THE PROPOSED ASEAN HUMAN RIGHTS BODY n. 3 (Sept. 10, 2008), available at <http://maruahsg.files.wordpress.com/2008/09/maruah-position-paper-10-sept-2008.pdf>.

<sup>153</sup> See *ASEAN Workshop Highlights Need for Greater Civil Society Involvement*, FORUM-ASIA, July 26, 2007, available at [http://www.forum-asia.org/index.php?option=com\\_content&task=view&id=844&Itemid=42](http://www.forum-asia.org/index.php?option=com_content&task=view&id=844&Itemid=42).

<sup>154</sup> See POSITION PAPER ON THE PROPOSED ASEAN HUMAN RIGHTS BODY, *supra* note 152, at ¶ 9.

<sup>155</sup> *Id.*

October 2008, ASEAN ratified a Charter that established formal human rights standards for its members and led to the formation of the AICHR as a tool for promoting those standards.

¶57 Having ratified the Charter, ASEAN could take one of three approaches: it could continue its non-interventionist policy of “constructive engagement,” it could modify the AICHR to include a court that could issue binding judgments on human rights violations, or it could impose sanctions on or expel Myanmar for violating core principles of the ASEAN Charter. The first option is inadvisable, since it would undermine ASEAN’s international credibility and negate the effectiveness of the human rights principles in the Charter and the legitimacy of the AICHR. The second is impractical, since agreement on the mechanics of such a court would be difficult due to the diversity of ASEAN member states. The third approach is the best, since it would prove to the world that ASEAN is a powerful, modern regional organization and still allow for flexibility in the future.