Regional Security and Human Rights Interventions

A Global Governance Perspective on the AU and ASEAN

Andreas Stensland, Walter Lotze and Joel Ng

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Executive Summary

Through the creation of the OAU/AU and ASEAN, the recently independent states of Africa and Southeast Asia strengthened the 'defence' of their newly acquired sovereignty by developing norms of non-intervention and regional security. By doing so, the member states essentially shifted the discourse on security from the national to the regional levels. After the Cold War, human rights came to take a larger place in international security discourse. To avoid external interference in regional affairs under the pretext of human rights (an explicit concern in both AU and ASEAN), the regional organizations needed to devise normative frameworks for action and avoid perceptions that they were unable to deal with problems in their own backyard.

In Africa, the willingness of member states to legislate beyond their capacity to implement contributed to the OAU establishing a regional human rights charter as early as 1987. With the creation of the AU in 2002, human rights considerations were embedded into the security architecture of the organization. The inclination to assert regional primacy became complicated when the response of the AU fell short of global standards embedded in the wider international community or in regional economic communities like ECOWAS. The AU's tendency to favour political engagement and dialogue aimed at negotiated settlements, with human rights considerations largely playing a secondary role, has created tensions with external as well as internal actors (the UN system, traditional powers, sub-regional institutions and emerging powers). In Côte d'Ivoire and Libya, the AU was not able to withstand external pressure and was ultimately bypassed by these actors. The AU's primacy over continental affairs has thus become threatened both from the top (global institutions, traditional powers) and from below (sub-regional institutions and emerging powers that question the primacy of the AU). The overlapping membership of all AU member states in the UN and numerous sub-regional organizations further fuels this dynamic.

When only the outcomes are analysed, critics might argue that AU responses to specific conflict situations have not changed since the OAU days. However, as the Constitutive Act and the many political interventions by the AU in Africa have shown, non-interference is no longer sanctified. The need to assert primacy at the regional level has opened up space for a stronger emphasis on human rights principles, from individual member states as well as sub-regional groupings, even if the original impetus of many member states was to strengthen non-

intervention. Whether this will eventually affect the outcomes of AU responses hinges largely on the political will to draw closer links between AU's security architecture and the African human rights architecture.

In Southeast Asia, political diversity led to an 'ASEAN way' of lowest-common-denominator approaches and the tendency to legislate behind implementation capacity. In recent years, ASEAN has been developing into a more robust regional institution, where the development of a human rights architecture is seen as necessary in order to assert primacy on all aspects of regional relations. The ambitious 'ASEAN Community' plan has spurred new institutional structures, including the ASEAN Intergovernmental Commission on Human Rights (AICHR) and a human rights declaration. As yet, however, these developments are in their early stages and are still largely guided by older institutional practices of closed-door negotiations, security and non-interference.

The Southeast Asian case studies on Myanmar and southern Thailand similarly illustrate ASEAN's inclination to keep conflict management at the regional level. Due to the specific features of the organization, particularly its historical role as an inter-governmental association, ASEAN has been less willing to interfere in intrastate conflict than the AU. The continued emphasis on non-interference obstructs ASEAN and its member states from responding to regional crises, politically and on human rights grounds. In ASEAN, primacy over regional affairs is thus mainly threatened by external actors (the UN system, traditional powers) as there is no continental institution that could intervene within ASEAN states. Moreover, the member states are few and, though politically diverse, committed to maintaining ASEAN – and its institutional norms – at the centre of their foreign policies. In the case of Myanmar, ASEAN's response would have followed non-interference norms had it not been for external pressure, which led member states to reassess their response. That conclusion is strengthened by the case of southern Thailand, which can illustrate the position ASEAN would take in the absence of pressure – its preferred default posture of deferring internal issues to the member state, regardless of the state's role in exacerbating conflict.

The tensions that arise when balancing human rights and security concerns in these situations are not unique to AU and ASEAN. Rather, they are a regular – albeit not necessarily inevitable – consequence of weighing concerns for stability against the rights of individuals. If the AU and member states cannot find a meaningful way of addressing these tensions, through existing legislation, institutions and political mechanisms, they are likely to face similar challenges when respond-

ing to future conflict situations characterized by human rights violations. Under such circumstances, the legitimacy and credibility of the AU may be further questioned – not only by the international community, but also by member states. Indeed, the AU might find itself bypassed by other actors. By contrast, the nature of conflict in Southeast Asia is less acute, more structural in nature and more subdued. This heightens the threshold for external interference in ASEAN's responses – or lack of such – to regional conflict situations. In the development of stronger human rights architecture, old practices still create impasses and slow down the processes, but the rise of democratic member states, Indonesia in particular, may create promising dynamics in the future.

For policy recommendations, see the complementing NUPI Policy Briefs:
No. 6 Linking Regional Security and Human Rights in the AU, 2012
No. 7 Linking Regional Security and Human Rights in ASEAN, 2012

Acronyms

ACHPR	African Commission on Human and People's Rights
ACWC	ASEAN Commission on the Protection of the Rights of Women and Children
ADMM+8	ASEAN Defence Ministers Meeting plus Eight
AfCHPR	African Court on Human and People's Rights
AICHR	ASEAN Intergovernmental Commission on Human Rights
AIPR	ASEAN Institute for Peace and Reconciliation
APSA	African Peace and Security Architecture
ARF	ASEAN Regional Forum
ASEAN	Association of Southeast Asian Nations
AU	African Union
AUC	African Union Commission
BNPP	National Liberation Front of Papani (Thailand)
BRN	National Revolution Front (Thailand)
CLV	Cambodia, Laos, Vietnam
CSSDCA	Conference on Security, Stability, Development and Cooperation in Africa
EAS	East Asia Summit
ECOWAS	Economic Community of West African States
EPG	Eminent Persons Group (ASEAN)
HLC	High-Level Committee
ICC	International Criminal Court
NGO	Non-Governmental Organization
NLD	National League for Democracy (Myanmar)
NTC	National Transitional Council (Libya)
OAU	Organization of African Unity
OHCHR	Office of the High Commissioner for Human Rights (UN)
OIC	Organization of the Islamic Conference
PSC	Peace and Security Council (AU)
REC	Regional Economic Community
SLORC	State Law and Order Restoration Council
SPDC	State Peace and Development Council
UNDP	United Nations Development Program
UNOCI	United Nations Mission to Côte d'Ivoire
USDP	Union Solidarity Development Party (Myanmar)

Introduction

Over the past decade, the African Union (AU) and the Association of Southeast Asian Nations (ASEAN) have taken notable steps towards internalizing and promoting human rights as international norms within their regional organizations. The AU Constitutive Act (2000) calls for 'Respect of democratic principles, human rights, the rule of law and good governance; [and] Promotion of social justice' (Article 4(m, n)), while the ASEAN Charter (2007) require member states to adhere 'to the rule of law, good governance, the principles of democracy and constitutional government; [and] respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;' (Article 2(h, i)). In the AU, the institutionalization of human rights norms represents a significant shift from the approach taken by the Organization of African Unity (OAU), the AU's predecessor, where human rights were deemed sovereign matters and left to the discretion of individual member states. Similarly, in ASEAN the institutionalization of human rights norms constituted a shift from the previous stance in what was termed the 'Asian values' debate, wherein human rights were framed in relativistic terms.

From their beginnings, both organizations served to promote and protect the sovereignty and security of their member states, with human rights playing a secondary role. As one author has noted, these '[r]egional organisations were founded not as instruments for conveyance and enforcement of international directives or ideas, but rather as [...] bulwarks of local politics against external forces.'[1] Intended primarily to serve as security-oriented safeguards against external interference, the AU and ASEAN held separate clusters of institutional norms relating to member-state behaviour. In the OAU this took the form of anti-colonial struggles, and the promotion of decolonization and regional solidarity, while in ASEAN the Vietnam War and post-colonial conflict was a major concern in region security considerations. Regional security discourses thus elevated the Westphalian concepts of non-interference and sovereignty to the regional level, with the development of corresponding maxims like 'African solutions to African challenges' or 'the ASEAN Way'.

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[1] Alden, C. (2010) "'A Pariah in Our Midst': Regional organizations and the problematic of Western-designated pariah regimes – the case of SADC/Zimbabwe and ASEAN/Myanmar". *Crisis States Research Centre Working Paper*. London: Destin Development Studies Institute.

After the Cold War, 'human security' and human rights entered into global discourses on peace and security. The OAU/AU and ASEAN came to consider human rights within their own security discourse and organizational *raison d'être,* but these were still largely framed within the existing state-centric security discourse. By emphasizing greater responsibility for human rights at the regional level, member states sought to avoid external interference from outside the region.

The inclusion of human rights in the mandates of the AU and ASEAN required significant adjustments to the existing human rights and security architectures. Human rights are fundamentally concerned with the relationship between states and their populace, placing these in tension with traditional interpretations of the concepts of non-interference and sovereignty. The transformation from the OAU to the AU in the early 2000s and the resultant development of the African Peace and Security Architecture (APSA) sought to address this challenge. In ASEAN, this was manifested in the adoption of the ASEAN Charter in 2007 and the resultant establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR).

Relevance of the report

International norms are understood contextually and are thus applied unevenly in different regions. As guidelines for appropriate conduct for the member states of a given community like the AU or ASEAN, they evolve at different levels, based on the prevailing political realities and in response to specific circumstances. While both the AU and ASEAN have sought to elevate their role in the maintenance of regional security and in the promotion of human rights, both organizations have struggled to articulate how member states should address tensions that arise between their human rights and security architectures. Particularly in instances where human rights violations are elevated to regional or global security concerns, the AU and ASEAN have struggled to maintain their position as primary actors within their regions. In Africa, interventions in Côte d'Ivoire and Libya in 2011 significantly affected perceptions of how the organization should respond to grave violations of human rights within member states, and highlighting gaps within its human rights and security frameworks. In Southeast Asia, long-standing challenges in southern Thailand and Myanmar have resulted in divergent responses from regional actors, highlighting similar challenges. Where human rights violations and regional security concerns have coincided, both the AU and ASEAN have struggled to maintain their legitimacy as primary actors within their regions.

The role and impact of regional organizations in global governance – especially those situated in the global South – is often neglected, or measured in terms of what they fail to achieve rather than what they actually do. This report examines processes and practices for developing a comprehensive understanding of institutional dynamics. Thus it deals with questions of global governance, institutional development and legitimacy that have emerged from the tensions between regional human rights and security norms in two significant regional organizations. It investigates the AU's and ASEAN's developing human rights and security architectures to gain insight into the normative frameworks established by these organizations to govern the behaviour of their member states and fend off external interference in their regions.

The key question is how regional human rights architectures (the sum of norms and institutions) within the AU and ASEAN impact on regional security discourse and practice. To this end, the report analyses the manner and degree to which human rights norms have impacted on decision-making and the formulation of regional responses to human rights violations in four cases: Myanmar, southern Thailand, Côte d'Ivoire and Libya. The report identifies how the AU and ASEAN member states have managed the emerging nexus between regional human rights and security norms in response to conflict situations involving wide-spread human rights abuses. The study investigates where tensions arose, how these were managed and reconciled, and how both organizations sought to maintain their centrality and legitimacy as regional actors.

On a cautionary note, we acknowledge that ASEAN and the AU are not directly comparable. The AU is a continental organization: ASEAN is a sub-regional one. They differ in institutional structure and working methods, but one objective remains strikingly similar – to assert themselves as the primary actor and interlocutor of the region and ward against external interference, be it in the ambit of security, human rights or other areas of engagement. The fact that there exists no larger Asian regional institution above ASEAN and the fact that it sits at the centre of most of the Asian security architecture allows a useful comparison to be made for the purposes of this study. We do not compare the two organizations directly, as in terms of institutional structure or physical similarities, but in terms of how they manage the emerging nexus between human rights and security and the tensions that arise when these two corresponding normative architectures come into play in responses to conflict situations characterized by wide-spread human rights abuses.

Main argument

Through the creation of the OAU/AU and ASEAN, the recently independent states of Africa and Southeast Asia strengthened the 'defence' of their newly acquired sovereignty by developing norms of non-intervention and regional security. These norms were promoted and defended at the collective regional level by newly established regional or sub-regional organizations. By doing so, the member states essentially shifted the discourse on security from the national to the regional levels. This was possible in an era where security was understood as state security, where interstate conflict was perceived as the major threat, and where sovereignty was understood as a right – not a duty – of states. After the Cold War, this changed as human rights came to take a larger place in international security discourse. Post-Cold War conflicts increasingly defined the responsibility for external actors, particularly the responsible regional organizations, to intervene in humanitarian crises involving wide-spread human rights abuses. To avoid external interference in regional affairs under the pretext of human rights (an explicit concern in both AU and ASEAN), the regional organizations needed to devise normative frameworks for action and avoid perceptions that their organizations were unable to deal with problems in their own backyard.

In Africa, the willingness of member states to legislate beyond their capacity to implement contributed to the OAU establishing a regional human rights charter as early as 1987. With the creation of the AU in 2002, human rights considerations were embedded into the security architecture of the organization. In practice however, few links were drawn to the existing African human rights architecture, which consisted of the African Commission of Human and People's Rights and the African Court on Human and People's Rights. The case studies presented here show that the inclination to assert regional primacy became complicated when the response of the AU fell short of global standards embedded in the wider international community or in regional economic communities like ECOWAS. The AU's tendency to favour political engagement and dialogue aimed at negotiated settlements, with human rights considerations largely playing a secondary role, has created tensions with external as well as internal actors (the UN system, traditional powers, sub-regional institutions and emerging powers). In Côte d'Ivoire and Libya, the AU was not able to withstand external pressure and was ultimately bypassed by these actors. The AU's primacy over continental affairs has thus become threatened both from the top (global institutions, traditional powers) and from below (sub-regional institutions and emerging powers that question the primacy of the AU). The overlapping membership of all AU member states in the UN and numerous sub-regional organizations further fuels this dynamic.

When only the outcomes are analysed, critics might argue that it is not immediately evident that the original OAU dynamics in AU responses to specific conflict situations have changed. However, as the many political interventions by the AU in Africa and the AU Constitutive Act today have shown, non-interference is no longer sanctified. The need to assert primacy at the regional level has opened up space for a stronger emphasis on human rights principles, from individual member states as well as sub-regional groupings, even if the original impetus of many member states was to strengthen non-intervention. Whether this will eventually affect the outcomes of AU responses hinges largely on the political will to draw closer links between AU's security architecture and the African human rights architecture.

In Southeast Asia, political diversity led to an 'ASEAN way' of lowest-common-denominator approaches and the tendency to legislate behind implementation capacity. In recent years, ASEAN has been developing into a more robust regional institution, where the development of a human rights architecture is seen as necessary in order to assert primacy on all aspects of regional relations. The ambitious 'ASEAN Community' plan has spurred new institutional structures, including the ASEAN Intergovernmental Commission on Human Rights (AICHR) and a human rights declaration. As yet, however, these developments are in their early stages and are still largely guided by older institutional practices of closed-door negotiations, security and non-interference.

The Southeast Asian case studies on Myanmar and southern Thailand similarly illustrate ASEAN's inclination to keep conflict management at the regional level. Due to the specific features of the organization, particularly its historical role as an inter-governmental association, ASEAN has been less willing to interfere in intrastate conflict than the AU. The continued emphasis on non-interference obstructs ASEAN and its member states from responding to regional crises, politically and on human rights grounds. In ASEAN, primacy over regional affairs is thus mainly threatened by external actors (the UN system, traditional powers) as there is no continental institution that could intervene within ASEAN states. Moreover, the member states are few and, though politically diverse, are committed to maintaining ASEAN – and its institutional norms – at the centre of their foreign policies. In the case of Myanmar, ASEAN's response would have followed non-interference norms had it not been for external pressure, which led member states to reassess their response. That conclusion is strengthened by the case of southern Thailand, which can illustrate the position ASEAN would take in the absence of pressure – its preferred default posture of deferring internal issues to the member state, regard-

less of the state's role in exacerbating conflict – much like a 'control case'.

Method and Structure

The report is based on interviews with practitioners, policy-makers and researchers from civil society, academia and government, working in and with the AU and ASEAN, in addition to policy documents, print media, reports and academic texts. Interviews were conducted in Addis Ababa, Singapore, Jakarta and Bangkok between November 2011 and January 2012. To ensure an open and confidential atmosphere in the interviews, informant requests of anonymity have been respected.

The report first presents the development of the human rights and security architectures in the AU, highlighting where potential discrepancies exist and tensions may arise in the nexus between the security and human rights architectures. It then goes on to analyse the AU's most recent responses to the conflicts in Côte d'Ivoire and Libya, two crises in which the regional human rights and security architectures were clearly in tension with one another. We then turn to ASEAN and the development of its security and human rights architectures, before similarly analysing the organization's responses to on-going conflicts in Myanmar and southern Thailand. Through all four case studies, we investigate where tensions arose (at the institutional level and among member states), how these were reconciled, and how both organizations sought to maintain their legitimacy as primary regional actors when responding to such crises. The study concludes with observations and recommendations for how the AU and ASEAN mighty work to bridge the gaps between their human rights and security architectures and address future tensions.

The AU: the Nexus between the Human Rights and Security Architectures

Both the AU and ASEAN were formed primarily as regional security arrangements in the context of Cold War geopolitics, ostensibly as regional safeguards against external interference. However, in the AU context, the human rights architecture – which was established under the auspices of the OAU and which still functions as Africa's continental human rights architecture today – preceded the security architecture that was established with the transition from the OAU to the AU, and through the creation of the African Peace and Security Architecture (APSA). Our analysis of the AU will follow the chronology of developments, while exploring the nexus between these two normative architectures.

Developing a Regional Human Rights Architecture

Since the 1960s, the importance of human rights has been increasingly acknowledged on the African continent, and human rights norms have become codified and entrenched at both the continental and sub-regional levels. Given this level of institutionalization, it could be argued that the AU has gone further, most notably in its legislative framework, than any other regional or sub-regional body in articulating the link between human rights and security, and in asserting the role of the regional community in protecting its citizens from gross violations of human rights.[2]

However, the continental human rights architecture, and therefore the manner in which the AU deals with human rights violations committed within the territories of member states has remained heavily influenced by the normative frameworks that underpinned the workings of the OAU. Founded in 1963, the OAU was established primarily to promote the interests and security (understood in the traditional state-centric sense) of its member states during decolonization and while Cold War politics dominated security thinking on the continent. Key in this regard was the anti-colonial struggle and efforts to contain the influence of foreign powers. Regional security discourses thus elevated Westphalian concepts of non-interference and sovereignty, where

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[2] The African Union (2000) "Constitutive Act". Addis Ababa: African Union. calls for 'Respect of democratic principles, human rights, the rule of law and good governance; [and] Promotion of social justice' (Article 4(m, n)).

they became entrenched and reinforced.[3] The OAU Charter paid scant attention to human rights, save for provisions on self-determination, in the context of decolonization, and condemnation of apartheid in South Africa. Threats to human rights were conceptually understood as emanating from outside the continent, and could best be addressed through African solidarity.[4] With concepts of non-interference in the internal affairs of member states and the sovereign equality of states deemed inviolable, human rights concerns were viewed largely as domestic affairs and not as the business of the OAU. Member states were mostly left to deal with human rights concerns as they saw fit.[5]

The dominant view was that the OAU should work to preserve and defend the new national borders established through decolonization, and to foster a sense of nationalism within each state. This understanding later became enshrined in the 1964 Cairo Declaration, and was reinforced through membership in the UN. States were to be given a free hand to address domestic matters whilst they sought to find their place in an international order dominated by sovereign states. However, stark contradictions were soon to emerge within the work of the OAU.

Whereas the organization had been created to articulate and defend the values of the liberation movements across the continent and to promote African democratization and development, its emphasis on state sovereignty and non-intervention meant that the organization could neither uphold nor advance those values. As one observer notes, it became increasingly clear that the central tenets of the OAU's security culture were contradictory, or at least provided considerable scope for rival interpretations in particular settings.[6] It was the resolution of these contradictions that would eventually spur the further development of the AU's security culture.

Of particular importance were the OAU's stance on secession, non-interference and African autonomy. Where human rights violations could not be ignored, the OAU papered over them by considering human rights largely in connection with self-determination or the end of colonial rule. Problematic, for example, was the OAU's willingness to criticize the internal affairs of some states, like the minority regimes in

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3   Alden, C. (2010) "'A Pariah in Our Midst': Regional organizations and the problematic of Western-designated pariah regimes - the case of SADC/Zimbabwe and ASEAN/Myanmar". *Crisis States Research Centre Working Paper*. London: Destin Development Studies Institute. p. 20.
4   Article 2(1) and 2(2), The OAU charter sought to "preclude external intervention in African affairs" Naldi, G. J. (1999) *The Organization of African Unity: an analysis of its role*: Mansell. p. 3-4.
5   Organization of African Unity (1963) "Constitutive Charter".
6   Williams, P. D. (2007b) "From non-intervention to non-indifference: the origins and development of the African Union's security culture". *African Affairs* 106 (423): 253–279. p. 266.

South Africa and Rhodesia, while remaining silent on large-scale human rights violations in others.[7] This selective posture on non-intervention underscored, as John Akokpari argues, the *raison d'être* of the organization, dedicated as it was to hastening the decolonization process in Africa and to protecting the territorial integrity of states rather than the individual and collective rights of African citizens.[8]

The first human rights declaration for the African continent came in 1969 through the adoption of the *Convention Governing Specific Aspects of Refugee Problems in Africa*, which entered into force in 1974. However, the Convention was largely ignored at the time, and did not impact significantly on how the OAU approached human rights concerns, specifically concerns related to cross-border displacement during times of conflict. The 1970s witnessed the proliferation of regimes that were anything but human-rights respecting, but the OAU remained silent. Worse still, as the chairmanship of the OAU was rotational, many of these leaders also came to chair the organization at some point in time during their rule.

The Cold War dynamics further served to ensure that no external pressure was placed on the regimes or on the OAU. Indeed, where complacent regimes were in place, the West and the Soviet Union displayed no inclination to criticize human rights abuses, and continued to provide the resources necessary for regimes to remain in power. It was thus with the direct support of the USA that Mobutu Sese Seko in Zaire and Samuel Doe in Liberia were able to suppress internal dissent routinely, and most often violently.[9] The political will to criticize such actions did not exist in the OAU at the time, and when states might have felt inclined to criticize others, this was often quickly suppressed through fear of counter-accusations of human rights violations, since that hardly any African country could lay claim to a positive human rights record during this time.[10]

Yet already by the 1970s, fundamental changes began to take shape, hastened perhaps by the demise of strongmen like Amin in Uganda, Bokassa in the Central African Republic and Nguema in Equatorial Guinea. Amin's abuses made it onto the OAU agenda in 1975, when the heads of state of Botswana, Mozambique, Tanzania and Zambia refused to attend the organization's annual summit in Kampala, citing

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7   Ibid. p. 268.
8   Akokpari, J. (2008) "Introduction: Human Rights Actors and Institutions in Africa". In Akokpari and Zimbler (eds) *Africa's Human Rights Architecture.* Auckland Park: Fanele. p. 2.
9   Ibid. p. 1-2.
10 Sarkin, J. (2008) "Humanitarian Intervention and the Responsibility to Protect in Africa". In Akokpari and Zimbler (eds) *Africa's human rights architecture.* Auckland Park, South Africa: Fanele. p. 45-46.

Amin's 'disregard for the sanctity of life' as the reason.[11] Amin was nevertheless elected to the Chair of the OAU, and served out his term – a decision that would later return to haunt the organization. When Ugandan President Yoweri Museveni took the floor for his maiden speech to the Ordinary Session of Heads of State and Government at the OAU summit in 1986, he accused the organization of condoning the wholesale massacre of Ugandans by Amin, under the guise of non-interference in the affairs of member states.[12]

Institutionalizing Human Rights in the OAU

In 1981 the OAU moved to reinforce its stance on the promotion and protection of human rights, adopting the *African Charter on Human and Peoples' Rights* (hereafter: *African Charter)*. It provided for the establishment of the African Commission on Human and Peoples' Rights (ACHPR) as a supervisory body for the promotion and protection of the rights set out in the Charter. Following ratification of the Charter in 1986, the Commission was established in Banjul, the Gambia, in 1987, composed of 11 human rights experts. The Commission was charged with interpreting the Charter, and protecting and promoting human and people's rights under a mandate to collect documents, undertake research, organize seminars, disseminate information, collaborate with relevant organizations, lay down principles and give recommendations to governments.

Some commentators hailed the African Charter as a progressive document that recognized the indivisibility of civil and political rights, including economic, social and cultural rights, as distinct from other international human rights treaties. Others, however, criticized it for its many shortcomings, including 'claw-back' clauses which made certain rights subject to domestic law. Paramount among the criticisms was the non-binding nature of the decisions of the African Commission, and the failure of member states to implement its recommendations when these were generated. The OAU was also criticized for failing to monitor the implementation of the recommendations in its member states.[13]

The African Charter was followed in rapid succession by a range of other human rights frameworks for the African continent, including the *African Charter on the Rights and Welfare of the Child* (adopted in

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11   Williams, P. D. (2007a) "From non-intervention to non-indifference: the origins and development of the African Union's security culture". *Afr Aff (Lond)* 106 (423): 253-279. p. 269.

12   Kioko, B. (2003) "The Right of Intervention under the African Union's Constitutive Act: From Non-Interference to Non-Intervention". *International Review of the Red Cross* 852. p. 813.

13   Motala, A. (2008) *The African Court on Human and Peoples' Rights: Origins and Prospects,* Auckland Park, South Africa: Fanele. p. 272-273.

1990, entry into force 1999), the *Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa* (adopted in 2003, entry into force 2005) and the *African Union Convention for the Protection and Assistance to Internally Displaced Persons* (adopted in 2009, not yet entered into force).

The Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA), launched in Kampala in 1991, has been seen as a first attempt at articulating a new definition of security in Africa that would decouple security and sovereignty from one another. The Conference set out core values that African governments were expected to uphold, including the acceptance of the central character of security which, as a multidimensional phenomenon, was defined as transcending military considerations and encompassing all aspects of human existence, including economic, political and social dimensions of the lives of individuals, the family, community and the nation.[14] Importantly, the CSSDCA articulated the first notion of what would later come to be known as the concept of 'human security', preceding even the 1994 UNDP Human Development Report, often credited with having concretized the concept. Despite initially resisting engagement with the CSSDCA, the OAU relented, and in July 1999 the process was endorsed by the OAU summit in Algiers.[15]

The agreement in July 1988 to create an African Court on Human and Peoples' Rights (the African Court) to complement and reinforce the remit of the ACHPR further strengthened the regional human rights architecture. In an attempt to better link the work of the ACHPR and the Court with the work of the OAU Secretariat, the Grand Bay Declaration and Plan of Action and the Algiers Declaration were adopted in 1999, with the latter recognizing shortcomings in the implementation of the regional human rights architecture and articulating the OAU's commitment to transcend these. Simultaneously, the Algiers Declaration (1999) called upon the international community to 'ensure that [human rights] are not used for political purposes', articulating the prevailing fear in the OAU that human rights abuses could become politicized and utilized to justify external intervention in African affairs.

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[14] Mwanasali, M. (2008) "From Non-Interference to Non-Indifference: The Emerging Doctrine of Conflict Prevention in Africa". In Akokpari, Ndinga-Muvumba, Murithi and Centre for Conflict (eds) *The African union and its institutions.* Auckland Park, South Africa: Fanele. p. 49.

[15] Hutchful, E. (2008) "From Non-Interference to Non-Indifference: The Emerging Doctrine of Conflict Prevention in Africa". In Akokpari, Ndinga-Muvumba, Murithi and Centre for Conflict (eds) *The African union and its institutions.* Auckland Park, South Africa: Fanele. p. 76.

Entrenching Human Rights in the African Union

The transition from the OAU to the AU in 2002 brought renewed impetus to strengthen the regional human rights architecture, and firmer human rights provisions were embedded in the Constitutive Act of the AU. However, a concern has been that provisions – even those that are legally binding – lack enforcement mechanisms that can motivate implementation.

The establishment of a functioning court to rule on human rights issues has been riddled with delays. In preparation for the establishment of the African Court on the basis of the 1999 Protocol, the AU Assembly of Heads of State and Government in 2004 agreed to merge the African Court with the proposed African Court of Justice provided for in the AU Constitutive Act, so as to form the African Court of Justice and Human Rights (hereafter the Permanent Court).[16] Following 12 years of delay, the African Court came into being in 2006, when the first set of judges were appointed and the Court commenced its operations from Arusha, Tanzania. The Protocol to establish the African Court of Justice was adopted in 2003 and entered into force in 2009. Efforts to merge both institutions into the Permanent Court with two chambers, one for general legal matters and one for human rights treaties, have been even slower.[17] For the foreseeable future, the African Court will remain the ultimate guardian of the African Charter, until such a time when the Permanent Court is established.

The restriction on the admission of cases to the African Court have recently been somewhat softened through an innovative move by the Court and the ACHPR.[18] If violations of the African Charter have occurred, the ACHPR, member states, African inter-governmental organizations, non-governmental organizations (NGOs) and even individuals may now submit cases directly to the Court. The Protocol of the African Court also contains a mechanism allowing states to permit individuals and NGOs to initiate cases against them.[19] Of the 24 states that have ratified the Protocol to date, six – Mali, Burkina Faso, Tanzania, Ghana, Malawi and most recently Rwanda (April 2012) – have entered into the necessary declaration allowing for such cases to be initiated.[20] However, a revision of court procedures effectively argues

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[16]   Sceats, S. (2009) "Africa's New Human Rights Court: Whistling in the Wind?". *Chatham House briefing paper.* London: Chatham House. p. 5.

[17]   As of June 2010, 21 states had signed the Protocol, but only two of 15 necessary states had ratified it.

[18]   The new Rules of the Court replace the Interim Rules of Procedure of 20 June 2008, following the harmonization of the Interim Rules of the Court and the Commission.

[19]   OAU (1998) *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).* art 34(6)

[20]   For cases to be admissible before this Court, individual and NGO applicants must show that they have exhausted local remedies, or explain why this would take an inordinate amount of time.

that, because the African Court is an extension of the African Charter, ratification of the Charter is regarded as sufficient acceptance of the competence of the Court. Where grave violations of human rights occur, the ACHPR can now submit a case directly to the African Court. In addition, non-implementation of ACHPR recommendations on individual communications by member states can now be followed up through referral by the ACHPR to the African Court.[21] The Court is in turn empowered to order provisional measures in cases of extreme gravity and ACHPR urgency, and when necessary to avoid irreparable harm to persons. Such measures must be implemented by member states and the AU Commission.[22]

In addition, member states are now required to submit to the ACHPR reports every two years, on legislative and other measures they have taken to implement the Charter. The ACHPR can also receive complaints from member states, and has developed a mechanism whereby individuals and NGOs may make submissions in cases where member states violate the Charter.[23] The ACHPR also undertakes visits and fact-finding missions under its promotional and its protective mandate. To date, it has been difficult to establish a modicum of consistency in the priorities set by the ACHPR, but practice seems to show that the gravity of the situation and lobbying by NGOs are important factors.[24]

As indicated above, a regional human rights architecture was established first under the auspices of the OAU in 1981, and then continued by the AU after 2002. The transformation from the OAU to the AU brought with it renewed efforts to bolster and strengthen the regional human rights architecture, in particular through the establishment of the African Court, and the 2004 decision to merge the African Court and the African Court of Justice and Human Rights into the Permanent Court. Importantly, the Constitutive Act of the AU contained numerous human rights provisions, and elevated human rights violations to the status of regional peace and security concerns.

There exist several other legal documents related to, but not explicitly addressing, the linkage between human rights and regional security, including the African Charter on Democracy, Elections and Governance which entered into force in February 2012. The document stipulates possible sanctions against states that fail to respect its principles.

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[21] In line with Rule 118 (3) of the Rules of Procedure of the Commission.
[22] Under Article 27 (2) of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights, and Rule 51 or the Court Rules.
[23] Articles 47-59.
[24] The Commission has to date visited Togo, Sudan, Senegal, Nigeria, Mauritania, Darfur and Zimbabwe. See Murray, R. (2008) "Evidence and Fact-finding by the African Commission". In Evans and Murray (eds) *The African Charter on Human and Peoples' Rights : The System in Practice, 1986-2006, Second Edition.* Cambridge: Cambridge University Press, 139–170. p. 146.

However, when the cases presented in this report were being studied, the Charter had not entered into force, so it has not been accorded a larger role in our analysis.

Developing a Regional Security Architecture[25]

Debates around good governance, transparency, human rights and democratization intensified throughout the 1990s, increasingly linked to efforts aimed at conflict prevention on the African continent. During the Harare Summit in June 1997 and again at the Algiers in July 1999, debate among member states centred on whether the OAU should be vested with the right to intervene in the internal affairs of member states in order to protect human rights and constitutional order. Increasingly, consensus was established that the original OAU concepts of sovereignty and non-interference should be revised in line with the view of sovereignty as responsibility.[26] Following the Algiers Summit in July 1999, it was Libyan leader Muammar Gaddafi who called for an extraordinary summit to discuss making the OAU more effective and relevant to the continent. After heated exchanges, leaders agreed to a process that involved transitioning the OAU into the AU, negotiating a new Constitutive Act and strengthening the scope and mandate of the organization.[27]

During the discussions leading up to the adoption of the Constitutive Act in July 2000, negotiating teams had reflected on the inadequacies of the OAU's peace and security arrangements. They noted that the AU should work to ensure the protection of civilians in conflict situations, in particular as regards war crimes, crimes against humanity and genocide – atrocities that had haunted the continent even through the 1990s. It was also during the Lomé Summit that the OAU's *Panel on the Rwandan Genocide* presented its report, which contained scathing criticism of the OAU, the UN and the international community at large. The release of the report focussed discussion in Lomé on two issues in particular; the authorization of interventions in situations where atrocities are committed; and the need to add the preservation of political stability as a legitimate reason for intervention, especially in post-conflict settings. It was decided that interventions conducted by the new AU in the most extreme of circumstances would need to be authorized at the highest political level, the Assembly of Heads of

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Other mechanisms include the New Partnership for Africa's Development (NEPAD) which is voluntary and the African Peer-Review Mechanism (APRM) which currently consists mainly of SADC members.

26 Mwanasali, M. (2006) "Africa's Responsibility to Protect". In Adebajo and Scanlon (eds) *Dialogue of the Deaf – Essay on Africa and the United Nations.* Auckland Park: Fanele. p. 90.

27 Baimu, E. and K. Sturman (2003) "Amendment to the African Union's Right to Intervene – A Shift from Human Security to Regime Security?". *African Security Review* 12 (2). p. 38.

State and Government, and that the preservation of political stability constituted a legitimate reason for intervention.[28]

When the AU was launched in 2002, the Constitutive Act reflected a far more interventionist peace and security architecture than that of its predecessor. According to Article 3(b) of the Constitutive Act, a primary objective of the AU is to defend the sovereignty, territorial integrity and independence of its member states – yet Article 3(f) clearly states that a further primary objective is the promotion of peace, security and stability on the continent, while Article 3(h) mandates the AU to promote and protect human and people's rights in accordance with the African Charter on Human and People's Rights and other relevant international human rights instruments. The principles by which the AU is to operate to reconcile these apparently contradictory objectives are laid out in Article 4 of the Constitutive Act. Article 4(a) upholds the sovereign equality and interdependence among member states, while Article 4(f) prohibits the use of force or threat of use of force among member states, and Article 4(g) prohibits member states from intervening in the affairs of one another. However, Article 4(h) provides the AU with the right to intervene in a member state in grave circumstances: war crimes, genocide and crimes against humanity. Article 4(j) further provides member states with the right to request the AU to restore peace and security in other member states. Therefore, while the Constitutive Act prohibits member states from interfering in each other's affairs, the Union is vested with full rights of intervention on behalf of member states, once authorized by the Assembly. Article 4(m) mandates the AU to uphold respect for democratic principles, human rights, the rule of law and good governance, while Article 4(o) mandates the Union to respect the sanctity of human life, and to condemn and reject impunity, political assassination, acts of terrorism and subversive activities.[29]

To operationalize this new interventionist security architecture, the first ordinary session of the AU Assembly established what is often referred to as the African Peace and Security Architecture (APSA). On 9 July 2002, the AU member states adopted the *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, which set out the entry points, determined the modalities for action and identified the institutional arrangements that would support the work of the Council in the fulfilment of its responsibilities for conflict prevention and management in Africa. The Protocol established

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[28] This decision was incorporated into the Constitutive Act at the Maputo Summit in 2003. See Mwanasali, M. (2006) "Africa's Responsibility to Protect". In Adebajo and Scanlon (eds) *Dialogue of the Deaf – Essay on Africa and the United Nations.* Auckland Park: Fanele. p. 92.
[29] African Union (2000) "Constitutive Act". Addis Ababa: African Union. Signed at Lomé, Togo. 11 July.

the Peace and Security Council (PSC), as well as its supporting structures. The PSC was intended to replace the defunct Central Organ of the Mechanism for Conflict Prevention, Management and Resolution established in 1993, and would be the central standing decision-making organ for the prevention, management and resolution of conflicts, supported by collective arrangements to facilitate timely and efficient responses to conflict and crisis situations in Africa.

The effectiveness and credibility of AU response to conflict situations has often been challenged by the unclear division of labour between the AU and the level of the Regional Economic Communities (REC). The RECs are the building blocks of the African peace and security architecture, responsible for dealing with issues of peace and security within their respective regions.[30] It is only when the RECs are unable to handle a conflict situation – or when they request the assistance of the AU – that the continental level of the APSA is to take over. Several of the regional mechanisms, particularly the Economic Community of West African States (ECOWAS), have their own protocols with detailed provisions on how to act in the event of human rights violations or unconstitutional changes of government. In practice, the regional and continental levels often work in parallel. However, discrepancies between the normative standards embedded in the AU and the RECs complicate this – as in the case of Côte d'Ivoire, where ECOWAS came to play an important role.

While several organs were mandated with a peace and security role,[31] the PSC was to be the primary political organ within the APSA, with decision-making responsibility for how the AU should respond to conflict situations on the continent. The PSC is vested with the authority to take initiatives and action deemed appropriate in response to potential or actual conflict situations, to impose sanctions on member states, to suspend member states in case of unconstitutional changes of government, and to authorize the deployment of peace support operations. The Council is further mandated to recommend to the AU Assembly authorization for intervention in cases of grave circumstances, including war crimes, crimes against humanity, ethnic cleansing and genocide.[32] Importantly, the decisions of the 15-member Council are to be

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[30] Currently there are eight RECs recognized by the AU, each established under a separate regional treaty: the Arab Maghreb Union (UMA); the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel-Saharan States (CEN-SAD); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD); the Southern Africa Development Community (SADC).

[31] Including the Assembly of Heads of State and Government, the Executive Council of the African Union, the Pan-African Parliament, the Chairperson of the African Union Commission, the Panel of the Wise, the African Standby Force and the Military Staff Committee.

[32] Article 7 of the Protocol and art 4 (h) AU Constitutive Act.

binding on member states.[33] In its work, the PSC can draw upon a range of declarations and treaties that draw the link between the maintenance of peace and security and the promotion and defence of human rights, including on democratic institutions and good governance. The *Solemn Declaration on a Common African Defence and Security Policy*, for instance, acknowledges the 'fundamental link and symbiotic relationship' between security, stability, human security, development and cooperation, in a manner that allows each to reinforce the other.

When creating the APSA, the AU and member states were well aware that they were legislating beyond their own capacity to implement. However, the AU's capacity has developed over time. To date, the Council has proved extremely active, addressing a range of conflict situations across the African continent and formulating innovative responses to complex conflict situations, at times individually and at times in unison with other international actors, the UN in particular. The AU has become increasingly adept at utilizing mediation and good offices on the one hand and the deployment of peace support operations on the other, in dealing with conflict situations in Burundi, Sudan, the Comoros, Somalia, Madagascar, Mali, and Guinea Bissau among others. However, as the AU has come to play a more active and prominent – if not primary – role in the management of conflict situations within its region, tensions have increasingly emerged between the regional human rights and security architectures. While these tensions were perhaps initially noticed in the AU's response to the conflict in Darfur from 2004 onwards, they came starkly to the fore in 2011, when the AU found itself responding to conflicts characterized by human rights violations first in Côte d'Ivoire and then in Libya, in rapid succession.

Case Studies

The following case studies illustrate the AU's inclination to keep conflict management at the regional level and to avoid interference from actors outside the continent. However, this dynamic becomes complicated when the AU response falls short of global standards embedded in the larger international community or in regional economic communities like ECOWAS. Attempts by the continent-level human rights institutions, ACHPR and the African Court, to raise human rights concerns were largely ignored and never entered the AU's decision-making process in a meaningful way. In Côte d'Ivoire and Libya, the

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[33]   As of October 2011, the members of the PSC were Benin, Burundi, Chad, Côte d'Ivoire, Djibouti, Equatorial Guinea, Kenya, Libya, Mali, Mauretania, Namibia, Nigeria, Rwanda, South Africa and Zimbabwe.

AU proved unable to withstand the pressure from external actors and was ultimately bypassed.

Election Violence in Côte d´Ivoire

Following decades of political – and intermittently violent – conflict, a four-year transition period brought about by the Ouagadougou Peace Agreement of 2007 set the stage for the Ivorian Presidential Elections of November 2010. The primary contenders were incumbent President Laurent Gbagbo, already in power for ten years, and his opposition challenger, Alassane Ouattara.

While the second round of elections on 28 November proceeded in a relatively calm manner, tensions soon erupted when the Independent Electoral Commission declared Ouattara the winner of the elections. Incumbent President Laurent Gbagbo refused to acknowledge the electoral results, and instead had the Constitutional Court swear him in as president once more. Ouattara and his entourage, based at a hotel in Abidjan, soon found themselves surrounded by a military blockade, and cut off from the rest of the world.

In its initial meetings, the PSC was uncertain of how to act, and Côte d'Ivoire's presence in the Council complicated its ability to develop a position.[34] While the Council on 4 December urged all parties to respect the outcomes of the presidential elections as proclaimed by the Independent Electoral Commission, it did not go much further in proclaiming itself. Instead, it was ECOWAS, on 7 December 2010, that first declared Ouattara the winner of the presidential election and suspended Côte d'Ivoire from all decision-making in the organization until a transfer of power had been effected. With the ECOWAS decision endorsed by the UN Security Council on 8 December, the PSC followed suit, recognizing Ouattara as president-elect on 9 December and calling on Gbagbo to respect the results of the election and facilitate the transfer of power. The Council also suspended Côte d'Ivoire from all AU activities until such time as the transfer of power to Ouattara had been effected.[35]

Initially, the AU, ECOWAS and the international community were working in parallel. Taking an uncharacteristically firm stance, the AU PSC was quick to call for a political solution to the crisis, and requested the Security Council to fully support the efforts of ECOWAS and the AU in this regard. As the situation on the ground continued to

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[34]   Côte d'Ivoire had commenced a two-year term on the Council on 1 April 2010, Lotze, W. (2011) "A Tale of Two Councils – The African Union, the United Nations and the Protection of Civilians in Côte d'Ivoire". *Global Responsibility to Protect* 3. p. 366.

[35]   AU Peace and Security Council (2010) *Communiqué of the 252nd Meeting og the Peace and Security Council PSC/PR/COMM.1(CCLII), 9 December 2010,* Addis Ababa.

worsen, the Chairperson of the AU Commission, Jean Ping, together with the Commissioner for Peace and Security, Ramtane Lamamra, and the President of the ECOWAS Commission, Victor Gbeho, on 16 December embarked on a whirlwind tour of Abuja and Abidjan, meeting with ECOWAS stakeholders, notably Nigerian President Goodluck Jonathan, and in Abidjan, with President Gbagbo and President-elect Ouattara, in an effort to ease tensions and find a political solution to the increasingly tense stalemate.[36] That same day, the ACHPR issued a statement, expressing its concern at the unfolding situation, and deploring the loss of life and the violations being committed against the civilian population in Côte d'Ivoire.

As the crisis spilled into the early months of 2011, and Gbagbo refused to hand over power, the positions of the AU, ECOWAS and the UN increasingly came to diverge.[37] Whereas ECOWAS and the UN expressed concerns about the protection of civilians and the escalating human rights violations committed by the forces of Gbagbo as well as Ouattara, the AU viewed the conflict primarily from a political perspective, and kept calling for a negotiated solution. Interestingly, while the PSC did express civilian protection concerns in its decisions on Côte d'Ivoire, these were not made with the same sense of urgency within ECOWAS or the UN. Seeking to avoid military escalation, the Council met again on 28 January; it reminded the international community that Africa held primary responsibility for the management and resolution of the crisis, and established a High-Level Panel, chaired by Mauritanian President Mohammed Ould Abdel Aziz and composed of the presidents of Burkina Faso, Chad, Tanzania and South Africa as well as the Chairperson of the AU Commission, to find a negotiated settlement to the conflict.[38]

The establishment of the panel and the election of panel members were controversial also within the AU. First, while the Council was to have been convened at the level of heads of state and government, it was in fact convened before all of these had arrived in Addis Ababa. Only the presidents of Namibia, Nigeria, South Africa and Zimbabwe were present, with the remaining delegations being represented at ambassadorial level.[39] Second, although both South Africa and Nigeria had come to assume leading roles in resolving the crisis in Côte d'Ivoire, South African President Jacob Zuma came to be on the pan-

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36 Lotze, W. (2011) "A Tale of Two Councils – The African Union, the United Nations and the Protection of Civilians in Côte d'Ivoire". *Global Responsibility to Protect* 3. p. 367.

37 Ibid. p. 365-375.

38 The High Level Panels established by the AU usually consist of representation from each of Africa's five security regions.

39 Personal interview 1 (2011). Addis Ababa. see also, AU Peace and Security Council (2011d) *Communique: The Peace and Security Council of the African Union (AU), at its 259th meeting held on 28 January 2011, at the level of the Heads of State and Government,* Addis Ababa: African Union.

el, but not Nigerian President Goodluck Jonathan.[40] This was in part related to Jonathan's on-going efforts to be re-elected, but it also reflected the tensions that had been emerging between the AU and ECOWAS positions on how best to resolve the crisis, and the continent-level power politics at play. Finally, the decision proved controversial, as the AU had decided to establish a panel to pursue a political process at a time when ECOWAS and the UN were deploring the grave violations in Côte d'Ivoire, and were pushing for more robust action to be undertaken to halt further atrocities.

After some delays, the High-Level Panel finalized its recommendations on 9 March, and on 10 March the PSC met again to deliberate the recommendations. While strongly condemning the on-going attacks against the civilian population and the atrocities, the Council reaffirmed its decision that the crisis in Côte d'Ivoire required a political solution. Accordingly, the Council requested the Chairperson of the AU Commission to appoint a High Representative for implementation of the Panel's recommendations, tasked with convening, under the auspices of the AU and ECOWAS, negotiations between the parties to the conflict and aimed at facilitating a political transition. The Council, again seeking to assert African primacy as regards Côte d'Ivoire, requested the Chairperson to transmit its decision to the UN Security Council.[41] On 15 March, Ouattara accepted the decisions of the PSC, and signalled his intent to participate in a process of political dialogue. On 17 March, however, Gbagbo's cabinet issued a communiqué rejecting the decision of the Peace and Security Council. That same day, frustrated by the apparent failure of efforts aimed at achieving a political way forward, and convinced that Gbagbo could not be coaxed into ceding power, Ouattara issued an ordinance to the former rebel forces of the Forces Nouvelle. Fighting immediately commenced in the west of the country between Ouattara's forces and those forces loyal to Gbagbo. Within four days, Ouattara's forces succeeded in capturing most of the country, and were approaching Abidjan. Gbagbo unleashed his own forces indiscriminately against those thought to be supporting Ouattara, as well as Africans from Mali and Burkina Faso. There were even attacks on personnel of the UN Operation in Côte d'Ivoire, UNOCI, and, to a lesser extent, foreign embassies.[42]

In light of the deteriorating situation, the ACHPR in March 2011 reiterated its concern about the political deadlock, and issued a resolution against the targeting of civilians by defence and security forces that had resulted in hundreds of deaths. The ACHPR also strongly con-

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[40] AU Peace and Security Council (2011c) *Communiqué. 263rd Meeting of the Peace and Security Council. PSC/PR/COMM (CCLXIII). 28 February 2011,* Addis Ababa.

[41] AU Peace and Security Council (2011a) *Communiqué 265th Meeting of the Peace and Security Council, PSC/AHG/COMM.1 (CCLXV), 10 March,* Addis Ababa.

[42] Lotze, W. (2011) "A Tale of Two Councils – The African Union, the United Nations and the Protection of Civilians in Côte d'Ivoire". *Global Responsibility to Protect* 3. p. 369-370.

demned the threats and attempts at intimidation directed against ONUCI, strongly opposed the deliberate obstruction of its mission, and further called on all parties to work towards restoration of peace and security.[43] Despite its relatively strong stance, the ACHPR resolution was largely ignored by the AU and ECOWAS alike, and was not referred to again in later decisions on Côte d'Ivoire.

As the AU refused to address the on-going human rights abuses in a more direct manner – arguing that only political negotiations could bring about a lasting solution to the crisis – it was bypassed by ECOWAS in its meeting on 23–24 March 2011. ECOWAS called on the UN Security Council to take measures to assist in bringing an end to the violence and to effect the transfer of power from Gbagbo to Ouattara.[44] On 30 March the UN Security Council unanimously adopted Resolution 1975, which condemned the serious and on-going abuses and violations of international law in Côte d'Ivoire, and reaffirmed the primary responsibility of states to protect their civilian populations. While calling for all parties to the conflict to seek a political solution, as outlined by the AU Peace and Security Council, acting under Chapter VII of the Charter gave full support to UNOCI, while impartially implementing its mandate, to use all means necessary to carry out its mandate to protect civilians under imminent threat of physical violence, within its capabilities and areas of deployment.[45] The day after, Ouattara's forces entered Abidjan. Simultaneously, UNOCI attack helicopters and Force Licorne infantry (French forces deployed to support the UN mission) engaged pro-Gbagbo forces, destroying heavy weapons and seizing military and strategic installations in Abidjan. By 5 April, with offensive operations underway across the country and President Gbagbo swiftly losing control in Abidjan, the AU Peace and Security Council urged Gbagbo to cede power to Ouattara immediately, to bring an end to the suffering of the Ivorian people. The Council further encouraged UNOCI, within the framework of the relevant resolutions of the UN Security Council, to vigorously implement its mandate to protect civilians.[46] By 11 April, Gbagbo had been forced out of power – at a cost of between 500[47] and 3,000[48] civilians killed and 800,000 displaced, with countless atrocities having been committed on both sides.

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[43] African Commission for People's and Human's Rights (2011b) *Resolution on the Human Rights Situation in Côte d'Ivoire, 3 March 2011, ACHPR/RES.182(EXT.OS/IX)2011,* Banjul.

[44] UN Security Council (2011a) *Proceedings of the 6506th Meeting of the United Nations Security Council. S/PV/.6506 (Provisional). 25 March 2011,* New York. p. 4.

[45] UN Security Council (2011c) *United Nations Security Resolution 1975. 30 March 2011,* New York.

[46] AU Peace and Security Council (2011e) *Press Statement. 270th Meeting of the Peace and Security Council, SC/PR/BR.1(CCLXX),5 April,* Addis Ababa.

[47] AU Commission (2011) *Report of the Chairperson of the Commission on the Situation in Côte d'Ivoire, PSC/PR/2(CCLXXIII), 21 April,* Addis Ababa: African Union.

[48] Human Rights Council (2011) "Report of the independent, international commission of inquiry on Côte d'Ivoire. A/HRC/17/48". United Nations.

Following the end of the armed conflict, the ACHPR planned to undertake a fact-finding mission to Côte d'Ivoire, but was unable to do so independently due to lack of funding. In view of this shortcoming, the UN Office of the High Commissioner of Human Rights (OHCHR) included the ACHPR Commissioner and Special Rapporteur, Reine Alapini-Gansou, on its team for a fact-finding mission to Côte d'Ivoire in May 2011.[49] The mission was mandated to investigate the facts and circumstances surrounding the allegations of serious abuses and violations of human rights committed following the presidential election, in order to identify those responsible and bring them to justice. The inclusion of an ACHPR Commissioner in the fact-finding mission helped to bring in an African perspective and legitimize the role of the ACHPR. However, the conduct of an OHCHR as opposed to an ACHPR mission to Côte d'Ivoire inhibited the ability of the AU to integrate its human rights and security architectures in its future dealings with Côte d'Ivoire. Similarly, while the PSC sent a group of diplomats and technical staff from the AU Commission to Côte d'Ivoire to gather views from the Ivorian authorities and other relevant stakeholders – and this team was tasked specifically with investigating human rights concerns – the ACHPR was not invited to take part in the mission.

As has been shown above, the AU response to the crisis in Côte d'Ivoire was dominated by a desire to find a political solution to the conflict. While human rights concerns did feature in the discourse of the Peace and Security Council and its subsequent decisions, these concerns were ancillary to concerns for regional stability. While ECOWAS and the UN initially supported the AU's political approach, they quickly came to elevate human rights concerns over the need to find a political solution to the stalemate, thus adopting a more strongly interventionist approach to bring about an end to the conflict. The AU, on the other hand, continued to advocate for more time to be given to finding a political solution for Côte d'Ivoire throughout its engagement, despite the escalation of grave atrocities. Further, whereas the security architecture of the AU was prioritized in the case of Côte d'Ivoire, the human rights architecture was generally marginalized in decision-making processes. Indeed, the role of the ACHPR proved marginal at best, and when the Commission did seek to play a role in addressing concerns related to the conflict, it was largely disregarded by other AU decision-making bodies. As will be seen below, despite greater activism on the part of the ACHPR and the African Court in the case of Libya, the outcomes basically the same.

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49 Ibid.

Popular Uprising in Libya

Following years of political isolation and economic decline, Libya from 1999 onwards came to re-engage with the international community, and diplomatic and trade relations were established on an increasing basis from the mid-2000s. Then Libyan leader Muammar Gaddafi's rising status in the international community came to an abrupt end in early 2011 when, in the wake of the Arab Spring, protests erupted in eastern Libya. The reprisals sparked a more serious armed rebellion a month later, and the country rapidly descended into civil conflict. By mid-March, the government had launched a full offensive against the opposition, and Gaddafi vowed to crush not only the uprising, but also the town and the citizens of Benghazi, which had rebelled against the Tripoli regime.

The international community expressed growing unease at the Libyan government's brutal clamp-down of the rebellion. On 22 February 2011, the League of Arab States took a decisive move by suspending Libya's membership. As the sub-region does not have a fully functional REC, the AU was the default African organization to address the situation. The AU response was complicated by the fact that, as in the case of Côte d'Ivoire, Libya was a member of the Peace and Security Council at the time of the conflict. Two core concerns overshadowed the decision-making of the Council: that Africa should retain primacy in the resolution of the conflict, and that Libyan sovereignty should not be violated. Therefore, in its meeting on 23 February, the Council both condemned the indiscriminate and excessive use of force and the use of lethal weapons against peaceful protesters, while recognizing the legitimate aspirations of the Libyan people and at the same time condemning the transformation of pacific demonstrations into an armed rebellion against the Tripoli regime.[50]

The AU's security architecture was quickly activated to develop a political solution. Viewing the Libyan crisis primarily as a domestic matter, the Council rejected any foreign military intervention, and endorsed an AU-developed roadmap for political resolution to the conflict. The roadmap called for the immediate cessation of all hostilities, the cooperation of the Libyan authorities in facilitating the delivery of humanitarian assistance, the protection of foreign nationals including African migrants living in Libya, and the adoption and implementation of political reforms designed to address the root causes of the crisis.[51] The predicament of the African migrants in Libya, and the con-

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[50] AU Peace and Security Council (2011g) *PSC/PR/COMM(CCLXI), 23 February,* Addis Ababa: African Union.

[51] AU Peace and Security Council (2011b) *Communiqué 265th Meeting of the Peace and Security Council, PSC/PR/COMM.2(CCLXV),* Addis Ababa: African Union.

sequences for the Sahel region of an exodus of people and arms, were elevated as primary concerns for the AU.[52]

Also the regional human rights architecture swiftly came to play an active role. In contrast to the PSC, the ACHPR and the African Court viewed the human rights violations being perpetrated in Libya as a primary concern; and instead of a political solution, advocated that measures be taken against Libya such abuses. Taking advantage of the newly established rules of procedure, three NGOs (the Egyptian Initiative for Personal Rights, Human Rights Watch and Interrights) reported Libya to the ACHPR. The Commission issued a statement on 25 February 2011, expressing concern about 'the serious and massive violations' taking place in the country and urging the Libyan government to put an immediate end to violence against the civilian population. That same day, the UN Human Rights Council adopted a resolution condemning the gross and systematic violations of human rights taking place in the country, and called upon the Libyan government to meet its responsibility to protect its population.[53] The following day, the UN Security Council adopted Resolution 1970, demanding an immediate end to the violence and establishing, among other measures, an arms embargo. Several regional organizations swiftly followed suit.[54]

The AU, similar to its reaction to Côte d'Ivoire, dismissed discourse on military intervention and argued that an African-led political solution to the crisis was the only viable course of action. The AU approach, however, failed to garner much international support, and it was clear that the AU's favoured approach would not serve to halt the atrocities in the short term. With the situation rapidly deteriorating, and with Gaddafi's forces on the outskirts of Benghazi, the League of Arab States on 12 March requested the UN Security Council to establish a no-fly zone over Libya. In response to this request, the UN Security Council on 17 March 2011 adopted Resolution 1973, demanding the immediate establishment of a ceasefire and an end to violence perpetrated against the civilian population; the Council imposed a no-fly zone over Libya, and authorized all necessary means to protect civilians and civilian-populated areas other than through the deployment of a foreign occupation force.[55] The three African members of the Council – Nigeria, South Africa and Gabon – all voted in favour of the

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52   Personal interview 2 (2011). Addis Ababa.
53   UN Human Rights Council (2011) "Resolution S-15/1, Situation of human rights in the Libyan Arab Jamahiriya, 3 March 2011".
54   AFP (2011) "OIC chief backs no-fly zone over Libya, 8 March".
55   UN Security Council (2011b) *United Nations Security Council Resolution 1973. 17 March 2011,* New York.

resolution, despite the AU PSC having previously rejected any foreign military intervention in the crisis.[56]

According to the coalition of states participating in the operations, military action was to be restricted to the enforcement of UNSCR 1973, but it soon became clear that NATO sought to topple the Gaddafi regime.[57] The operations were initiated by a coalition of Western states joined by Qatar and the United Arab Emirates, with all operations under NATO command.[58] Airstrikes were limited to targets linked to the Gaddafi regime, and were conducted in support of armed movements which came to form the National Transitional Council (NTC), armed and supported by Western and Arab powers.[59]

Receiving no response from Libya to its statement, the ACHPR in March 2011 moved to condemn the actions of the Libyan government and instituted proceedings in the African Court on Human and Peoples' Rights for 'serious and massive violations of human rights guaranteed under the African Charter on Human and Peoples' Rights'.[60] That same month, the Court, for the first time in its history, ordered provisional measures against a member state, requiring Libya to 'immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the African Charter on Human and Peoples' rights or of other international human rights instruments to which it is a party'.[61] One of the elements cited in the African Court's decision to order provisional measures, was the response of international organizations, both universal and regional, of which Libya is a member. The ruling cited the decisions of the AU Peace and Security Council, the statements of the Secretary General of the Arab League, and UN Security Council Resolution 1970.[62] The Libyan delegate present during the Court's session argued that Libya was prepared to cooperate with the African Court and implement the provisional measures. In its response to the Court on 9 April 2011, the Libyan government denied the claims against it, but simultaneously expressed its willingness to subject itself to investigations by the Court. Subsequently, however, the Libyan government ignored the Court.

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56 AU Peace and Security Council (2011f) PSC/AHG/ COMM.2 (CCLXV), 10 March, Addis Ababa: African Union.

57 See for example, Obama, B., D. Cameron and N. Sarkozy (14 April 2011) "Libya's Pathway to Peace". New York Times.

58 Initially, 10 states from Europe and the Middle East participated in the intervention, later expanding to 17.

59 Jolly, D. and K. Fahim (2011) "France Says It Gave Arms to the Rebels in Libya". New York Times. New York. , Levinson, C. and M. Rosenberg (2011) "Egypt Said to Arm Libya Rebels ". Wall Street Journal. New York.

60 Dolidze, A. (2011) "African Court on Human and Peoples' Rights – Response to the Situation in Libya". *Insights* 15 (20).

61 Ibid.

62 African Commission for People's and Human's Rights (2011a) ACHPR on Human and Peoples' Rights v Great Socialist People's Libyan Arab Jamahiriya. Application No. 004/2011. Order for Provisional Measures., Banjul.

The report of the ACHPR and the verdict of the Court were subsequently placed on the agenda of the AU Summit in Malabo in July 2011 for follow-up, although the ACHPR reportedly came under fire from several member states because it had openly criticized the Gaddafi government.[63] As in previous situations, the ruling was not endorsed by the AU Summit, and the matter was deferred through calls for further investigation.[64] Notably, neither the report of the ACHPR nor the verdict of the Court was mentioned in the outcome document of the Summit.[65] Despite this disconnect between the orders of the Court and the actions of AU member states, it is important to note that, for the first time in their history, the Commission and the Court had found that a member state was failing to protect its population, and had ordered measures to be taken against the member state on that basis. Further, although the report of the Commission and the decision of the Court did not impact on the manner in which the AU sought to deal with the Libyan crisis, it was noteworthy that NGOs gained access to the African Court through the ACHPR in a case of grave violations of human rights.

While the ACHPR and the African Court were proceeding with their actions against Libya, the Peace and Security Council established a High-Level Committee (HLC) on Libya mandated to engage with all parties to the conflict and assess the evolution of the situation on the ground. It sought to facilitate an inclusive dialogue among the Libyan parties on the appropriate reforms, and to engage AU partners, in particular the League of Arab States, the Organization of the Islamic Conference (OIC), the EU and the UN, to coordinate efforts and seek their support for resolution of the crisis.

At a relatively early stage, the AU emerged with a principled and robust approach to the crisis, but the special dynamics of the organization's political organs made the approach of the HLC static and poorly attentive to developments on the ground. The HLC visited Libya on 10 and 11 April, meeting with both Gaddafi and the NTC to broker a ceasefire as a prerequisite for further negotiations. However, the NTC was unwilling to negotiate with Gaddafi and was generally distrustful of the AU, given Gaddafi's prominent role in the creation and leadership of the organization.[66]

Disturbed, yet seeking to assert its primacy, the AU rejected the Western-led Libya Contact Group and refused to attend the initial meetings hosted by the group in Paris and London, attempting instead to craft a

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63   Personal interview 7 (2011). Addis Ababa.
64   Personal interview 3 (2011). Addis Ababa.
65   African Union (2011) *Decisions Adopted During the 17th African Union Summit,* Addis Ababa: Directorate of Information and Communication.
66   Personal interview 7 (2011). Addis Ababa.

political solution independently. When this approach failed to generate meaningful results, the AU Deputy Chairperson finally travelled to the third meeting of the contact group in Istanbul. But the AU appeared to be too late. A widely supported UN roadmap for the Libyan crisis had already been developed, so there was now no support for the AU roadmap.[67] By the time the AU was willing to engage with the international community on the future of Libya, its concerns on foreign military intervention being utilized to bring about regime change had already rung true.[68] Following seven months of conflict, and what was in effect a deadlock in the AU, Muammar Gaddafi was killed in Sirte on 20 October 2011, and the NTC was swiftly installed in Tripoli.

By the time of the Malabo Summit in July 2011, the AU had lost the ability to promote a common position on Libya. Some member states, notably Ethiopia and Nigeria, pushed for a withdrawal of recognition for Gaddafi – but, on the advice of the HLC, Libya was not suspended from the organization. Concurrently, the recommendations of the ACHPR and the decisions of the African Court were sidelined, and the Summit adopted a decision that AU member states would not cooperate with the International Criminal Court (ICC) in its proceedings against Gaddafi. While this latter decision was not widely endorsed, only Botswana and South Africa later stood forth and rejected the outcomes of the Summit, stating that they would not cease their cooperation with the ICC. Once again, member states sought to use the regional organization as a shield against external interference in regional affairs. However, since consensus is required for enforcement of the decisions of the regional human rights mechanisms, the ACHPR and the African Court, no regional alternative to the ICC investigation emerged either.

Thus, in responding to the conflict in Libya, the AU acted in a manner similar to the case of Côte d'Ivoire: it gave priority to its security architecture, and promoted political engagement when human rights violations were rapidly escalating. In particular, at a time when members of the international community were most concerned about the commission of atrocities, the AU failed to utilize its own human rights architecture in unison with its security architecture to deal with these concerns. Despite the more active role of the ACHPR and the African Court in the case of Libya, the recommendations of the Commission and the decisions of the Court were largely ignored by AU member states.

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[67] ISS (2011) "Peace and Security Council Report. No. 25, August 2011". Addis Ababa: Institute for Security Studies. p. 10.

[68] AU Peace and Security Council (2011h) *Report of the Chairperson of the Commission on the Activities of the AU High Level ad hoc Committee on the Situation in Libya, PSC/PR/2(CCLXXV), 26 April,* Addis Ababa: African Union. p. 12.

Observations

Under the aegis of the AU, the regional human rights and security architectures are closely linked, indeed mutually constitutive and reinforcing. However, a major discrepancy exists between the stated aspirations of the continent's leaders and their responses to conflict situations in practice. This may be a result of several factors.

First, there is the discrepancy between the human rights and security architectures in the region. While the regional human rights architecture governing the work of the AU was developed under the auspices of the OAU, the regional security architecture governing how the AU responds to conflict situations was developed under the newly established AU, from 2002 onwards. Efforts have been made to align the human rights architecture to organizational changes undertaken over the course of the past decade, notably through linking the ACHPR to the African Court and in turn merging the African Court with the African Court of Justice and Human Rights. However, no significant efforts have been made to link these architectures with the APSA, or with decision-making in the AU through the Peace and Security Council or the Assembly of Heads of State and Government. Whereas the designated human rights actors, the ACHPR and the African Court, are nominally detached from member states, the PSC is an inherently political organ, led by member states. On the one hand this is positive, because it gives the Commission and the Court independence and legitimacy. On the other hand, it leaves the Commission and the Court with little direct power to enforce decisions. While violations of human rights have technically been elevated as a primary security concern for the region, the roles and responsibilities between decision-making bodies and the procedures to be employed are not entirely clear, and regional human rights and security decision-making processes have tended to bypass one another.[69]

Second, and related to the above, the linkages are extremely weak between the AU Commission, which functions as the organization's secretariat, and the ACHPR and the African Court. While interaction does take place at the level of individuals,[70] perhaps in part as a result of geographical separation (the AU Commission being located in Addis Ababa, the ACHPR in Banjul and the African Court in Arusha), there is no institutionalized interaction. Neither the ACHPR nor the AU Commission has permanent representation or liaison functions with one another. Neither does the ACHPR have a presence in Addis Ababa, the centre of political gravity on the African continent.[71] Thus,

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[69] Murray, R. (2004) *Human rights in Africa: from the OAU to the African Union,* Cambridge: Cambridge University Press. p. 48.
[70] Personal interview 1 (2011). Addis Ababa.
[71] Murray, R. (2004) *Human rights in Africa: from the OAU to the African Union,* Cambridge: Cambridge University Press. p. 70.

despite key AU documents highlighting the need for AU organs to seek close cooperation with the ACHPR and the African Court in matters relevant to their objectives and mandate,[72] there is considerable concern that the ACHPR and the African Court are rarely invited to participate in AU activities. Both the AU Commission and the ACHPR have in the past highlighted the benefits of greater cooperation and information-sharing, but the practical measures for doing so have not yet been established.[73] As a result, political procedures geared for dealing with human rights abuses within member states are de-linked and stove-piped.

Third, despite the prominent role accorded the ACHPR, it has been largely sidelined by AU member states, for political reasons. Whereas the ACHPR is a quasi-judicial body and can hear individual complaints, its recommendations, unlike the decisions of the Court, are not binding: it is up to individual member states to implement recommendations. Despite this shortcoming, the Commission is required to submit a report of its activities to each session of the AU Assembly of Heads of State and Government, giving its work more weight. To date, however, the reports of the ACHPR have not been made public until approved by the AU Assembly. For several years, the ACHPR's reports were adopted without much scrutiny, which lessened their effectiveness.[74] This modus operandi then changed, and the AU Assembly routinely postponed the publication of reports that contained allegations against member states. In 2008 the procedure changed once again – and, since then, no report of the ACHPR has been approved by the AU Assembly.[75] The Commission, chronically under-resourced, has had neither the means nor the political access to elevate this as a concern to AU member states.[76]

Fourth, while the African Court has been provided with a broad remit to address human rights concerns and to take decisions that are binding on member states, the Court commenced operations only in 2006, and has not heard sufficient cases to assert its role vis-à-vis AU member states or AU decision-making bodies. While its decisions regarding Libya give an indication of the potential role which the Court can play, more time is required to determine whether the Court will be

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[72] African Union (2000) "Constitutive Act". Addis Ababa: African Union. art. 3 (h) and 4 (m) African Union (2002) *Protocol Relating to the Establishment of the Peace and Security Council of the African Union,* Durban: African Union. Article 19: African Union (2004) *Protocol on the Statute of the African Court of Justice and Human Rights,* Addis Ababa: African Union. African Union (2007a) *African Charter on Democracy, Governance and Elections,* Addis Ababa: African Union. Art 45 (c) African Union (2009) *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa,* Kampala: African Union. Art 3 (e) and (f).

[73] Personal interview 3 (2011). Addis Ababa.

[74] Murray, R. (2004) *Human rights in Africa: from the OAU to the African Union,* Cambridge: Cambridge University Press. p. 58.

[75] Personal interview 5 (2011). Addis Ababa.

[76] Sceats, S. (2009) "Africa's New Human Rights Court: Whistling in the Wind?". *Chatham House briefing paper.* London: Chatham House. p. 4. and Human Rights Monitor (2012) "Human Rights Monitor Quarterly". 1. p. 33.

able to enforce the powerful mandate it has been provided with. In addition, the planned merger of the Court with the African Court of Justice and Human Rights involves considerable unpredictability, and may further delay the institutionalization of an empowered human rights judicial body.

Finally, it should be noted that while significant investment has been made in the development of the regional security architecture, no such investment has been made in the regional human rights architecture. This discrepancy is particularly evident at the level of the AU Commission. While the Peace and Security Department is well-staffed and funded, the Political Affairs Department, which deals, *inter alia,* with human rights and humanitarian issues, is poorly staffed and resourced.[77] (At the time of writing, the Political Affairs Department had only one staff member tasked with human rights matters.) This imbalance in funding has resulted in sub-optimal coordination among the various departments in the AU Commission tasked with human rights and peace/security matters. An audit from 2007 generated similar findings when it described the relationship between the Chairperson, Deputy Chairperson, the Commissioners and the Directors of the AU Commission as 'dysfunctional with overlapping portfolios, unclear authority and responsibility lines and expectations'.[78]

Thus it seems clear that the human rights and security architectures of the AU, while mutually constitutive and reinforcing on paper, in reality remain largely divorced from one another. As shown by the cases of Côte d'Ivoire and Libya, this has resulted in tensions between the human rights and security architectures of the organization, and has impacted on the ability and the manner in which the AU has been able to deal with conflict situations characterized by human rights violations. This has in turn affected the legitimacy and credibility of the organization as well as its ability to assert itself as a primary actor in the domains of human rights as well as peace and security in the region.

The tensions that arise when balancing human rights and security concerns in response to crisis situations are not unique to the AU and ASEAN. They are a regular – albeit not necessarily inevitable – consequence of weighing concerns for stability against the rights of individuals. However, if the AU and member states cannot find a meaningful way of dealing with these tensions, through existing legislation, institutions and political mechanisms, the AU is likely to face similar

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[77] Donors are reluctant to fund the PAD unless it shows improvements in management and implementation. Personal interview 6 (2011). Addis Ababa.

[78] African Union (2007b) *Audit of the African Union: Towards A People-Centred Political and Socio-economic Integration and Transformation of Africa* Addis Ababa: African Union. p. 44.

challenges when responding to future conflict situations involving human rights violations. Under such circumstances, the AU's legitimacy and credibility may be further questioned – not only by the international community, but also by its own member states. The AU may well find itself bypassed by other actors.

ASEAN: the Nexus between the Human Rights and Security Architectures

While ASEAN cannot be considered as robust a regional security organization as the AU and is sub-regional, the organization was nevertheless established primarily with regional security concerns in mind as a bulwark against external intervention in regional affairs.[79] The development of a regional security architecture began only with the adoption of the ASEAN Charter in 2007. The inclusion in the Charter of the commitment to promote and protect human rights in the region was seen as ground-breaking and marked a decisive turn in the 'Asian values' debate. However, progress in institutional strengthening to create a framework for the protection of human rights has been considerably slower. Our analysis of ASEAN institutional development below will follow the chronology of developments, exploring the nexus between the organization's security and human rights architectures.

Developing a Regional Security Architecture

ASEAN was initially formed in 1967 with the ASEAN (Bangkok) Declaration signed by five countries – Indonesia, Malaysia, the Philippines, Singapore and Thailand, The Declaration contained just five articles, and emphasized growth, cooperation, and peace and stability as the basis of association.[80] The organization served to promote and protect the sovereignty and security of its member states. One major concern at the formation of ASEAN in 1967 was the Vietnam War, and the organization later took a strong stance in opposition to the Vietnamese invasion of Cambodia. The emphasis remained primarily on security, with declarations such as the Zone of Peace, Freedom and Neutrality (ZOPFAN, 1971).

Institutionally, ASEAN remained relatively dormant until 1976, a year that saw the promulgation of two formative documents: the first Declaration of ASEAN Concord and the Treaty of Amity and Cooperation (TAC). ASEAN Concord I was the first regional attempt to define a common political, economic, and social agenda, while TAC created a legal document to bind security cooperation and establish a code of conduct.

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[79] Alden, C. (2010) "'A Pariah in Our Midst': Regional organizations and the problematic of Western-designated pariah regimes - the case of SADC/Zimbabwe and ASEAN/ Myanmar". *Crisis States Research Centre Working Paper.* London: Destin Development Studies Institute.

[80] Bangkok declaration 1967

Member states favoured a low pace of normative development, subjecting legislation to political will and implementing capacity. Decisions were made on the basis of consensus. A lowest-common-denominator approach, known as the 'ASEAN Way' based on consultation, inclusiveness, organizational minimalism, and the peaceful resolution of disputes, was taken to move agendas forward.[81] Thus, ASEAN retained the informal characteristics as an intergovernmental organization, rather than a regional institution. At the same time, this elevated the importance of diplomatic engagement and compromise prior to any formal decision-making. As will be shown, institutional developments often took the form of declarations rather than formal treaties or complex institutional structures like those of the AU.

Security discourses elevated the Westphalian concepts of non-interference and sovereignty to the regional level, whereas human rights concerns were largely left to the discretion of member states. In the early 1990s, human rights were viewed with great scepticism and as a tool for external influence or even interference. It was against the backdrop of the World Conference on Human Rights in Vienna in 1993 that ASEAN first committed to a common framework on human rights. In what became known as the Bangkok Declaration of 1993, Asian leaders accepted the universality of human rights, but also inserted significant qualifiers while giving priority to economic, social and cultural rights. In the 1993 Bangkok Declaration, ASEAN members typically emphasized '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.' Furthermore, the Declaration contained a caveat: '[human rights] 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.' A senior Singaporean foreign ministry official's description of human rights as 'an easy, cheap, and popular way to exercise influence or maintain the illusion of involvement'[82] indicates the prevailing mood in ASEAN at the time.

As an alternative to the human rights agenda with the individual as the reference point, ASEAN members subscribed to the alternative 'Asian Values', which had the community as the reference point, emphasiz-

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81   Severino, R. (2001) "The ASEAN Way and the Rule of Law". *International Law Conference on ASEAN Legal Systems and Regional Integration, 3 September 2001*. Asia-Europe Institute and Faculty of Law, University of Malaya, Kuala Lumpur. and Narine, S. (2008) "Forty years of ASEAN: a historical review". *The Pacific Review* 21 (4): 411–429.

82   Kausikan, B. (1993) "Asia's Different Standard". *Foreign Policy* (92): 24–41. p. 26-27.

ing the right to development, to freedom from terrorism, etc..[83] One of the primary sources of criticism from the West in this period was the detention of political prisoners in numerous Asian states. The Bangkok Declaration of 1993 noted that 'terrorism in all its forms and manifestations, as distinguished from the legitimate struggle of peoples under colonial or alien domination and foreign occupation, has emerged as one of the most dangerous threats to the enjoyment of human rights and democracy, threatening the territorial integrity and security of States and destabilizing legitimately constituted governments.' In positing that 'terrorists' posed a threat to the enjoyment of human rights Asian states justified the derogation of certain individual rights under specific circumstances.

The addition of less-developed Southeast Asian states was seen as necessary for regional security, yet also had an impact on ASEAN norms. Brunei joined upon independence in 1984, and Cambodia, Laos, Myanmar, and Vietnam (the 'CLMV' countries) joined the organization in the late 1990s. The need to define ASEAN norms took on greater urgency. Singaporean Foreign Minister S. Jayakumar eventually outlined them in 1998 at the ASEAN Foreign Ministers Meeting in Manila as follows:

- sovereign equality and decisions by consultation and consensus;
- non-interference in each other's internal affairs;
- avoidance of the use of force to change established governments or an internationally recognized political order;
- open economies;
- making ASEAN the cornerstone of member states' foreign policies.[84]

Initiatives intended to nuance the strict focus on sovereignty and non-interference emerged. At the same 1998 meeting, and concerned with the cross-border problems spilling over from Myanmar, then Thai Foreign Minister (now ASEAN Secretary-General) Surin Pitsuwan put forward a document titled *Thailand's Non-Paper on the Flexible Engagement Approach*. The paper proposed that non-interference was valid, but that it was not absolute: 'as the region becomes more interdependent, the dividing line between domestic affairs on the one hand and external or trans-national issues on the other is less clear.'[85] There

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[83] Dunn, L., Nyers, P. and Stubbs, R. (2010) "Western Interventionism versus East Asian non-interference: competing global norms in the Asian century". *The Pacific Review* 23 (3): 295-312. p. 298.

[84] Quoted in Acharya, A. (2009) *Constructing a security community in Southeast Asia : ASEAN and the problem of regional order, 2nd Edition,* London: Routledge. p. 140.

[85] Quoted in Bunyanunda, M. (2002) "Burma, ASEAN, and Human Rights: The decade of constructive engagement, 1991-2001". *Stanford Journal of East Asian Affairs* 2. p. 124.

could be a constructive role for ASEAN in dealing with 'domestic issues with regional implications.' However, this attempt at reframing non-interference was ultimately rejected in Manila, and a weaker alternative nomenclature of 'enhanced interaction' was used.[86]

As ASEAN grew, it became increasingly difficult to reach consensus on decisions, due not least to the disparity in levels of development between the older members and the CLMV countries. Informal solutions such as 'ASEAN minus X' (meaning ASEAN less the dissenting members) would often be used to permit the development of economic arrangements without full consensus within the group. Somewhat paradoxically, however, under Article 21 of the ASEAN Charter, consensus is required in order to proceed on the 'ASEAN minus X' principle.[87] While the Charter does allow for an 'ASEAN minus X' formula, this is expressly limited to economic agreements.

A separate trajectory was opened with the emergence of the 'human security' paradigm espoused by the UNDP in 1994. ASEAN arguably had prefigured the notion through its own conception of 'comprehensive security' that included a range of ideas beyond traditional military security, such as economic development and political stability. In any case, *human security* encompassed a fully-developed scope for human rights and was methodologically focused on the individual, as opposed to the state or society– in contrast to ASEAN's comprehensive security concept that emphasized the primacy of the state or society.[88]

Despite some developments, the debate over human security and the shaping of a regional human rights mechanism and discourse remained fairly dormant in the aftermath of the East Asian financial crisis of 1997/98. Vocal leaders of the Asian Values debate, like Mahathir Mohamed of Malaysia and Lee Kuan Yew of Singapore, were retiring or taking lesser roles, but it was the overthrow of Suharto in Indonesia that had the most pronounced effect on the region. Indonesia turned democratic, withdrew from Timor-Leste and became an active promoter of human rights regionally, even as it continued to be dogged by accusations of violations in conflict areas like Aceh and West Papua.

ASEAN has been relatively successful at preventing interstate war, and security problems have tended to revolve around issues at the fringes.[89] Unlike Africa, Asia lacks a continent-level body, and

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[86] Simon, S. (2008) "ASEAN and Multilateralism: The Long, Bumpy Road to Community". *Contemporary Southeast Asia* 30 (2): 264–292. p. 272.
[87] Desker, B. (2008) "Is the ASEAN Charter necessary?". *RSIS Commentaries* 78.
[88] Acharya, A. and A. Acharya (2000) "Human Security in the Asia Pacific: Puzzle, Panacea, or Peril?". *CANCAPS Bulletin* 27 (December 2000).
[89] Most notably border disputes in areas such as the Spratly Islands and Preah Vihear temple on the Thai-Cambodia border.

ASEAN has been the most prominent among regional organizations in Asia. Informal arrangements centred on ASEAN but including states beyond its membership have become the preferred venue for discussing security issues in Asia. Significant among these is the East Asia Summit (EAS) which includes the 10 ASEAN members as well as Australia, China, India, Japan, New Zealand, Russia, South Korea and the USA (thereby including all major powers of the Asia-Pacific). The same members also participate in the ASEAN Defence Ministers Meeting Plus Eight (ADMM+8). Beyond these groupings is the ASEAN Regional Forum (ARF), with those eighteen countries as well as Canada, the EU, North Korea, Mongolia, Pakistan, Timor-Leste, Bangladesh and Sri Lanka, with Papua New Guinea as an observer state. Both ADMM+8 and the ARF have explicit security agendas, although the EAS has a broader remit relating to multilateral cooperation. These arrangements, particularly the ARF and EAS, have occasionally been used by Western states to voice concerns over human rights issues in member states, particularly Myanmar and North Korea.

An institution that could deal with security explicitly is also being set up. An ASEAN Institute for Peace and Reconciliation (AIPR) was originally mooted in 2009,[90] and was formally proposed for establishment at the 18th ASEAN Summit in May 2011. Recommendations were submitted to ASEAN ministers in November 2011 and March 2012, with a view to establishing AIPR at the 2012 ASEAN Summit. AIPR is conceived as a network of think-tanks or second-track institutions across the Southeast Asia region. The AIPR will allow a process where any conflict can be responded to through non-state mechanisms.[91] However, its scope and functions are yet to be established and agreement on the terms of reference has typically been slow.

Developing a Regional Human Rights Architecture

ASEAN has been primarily concerned with regional security ever since its inception, but the organization has also increasingly sought to develop a human rights role. As greater attention came to be placed on democratization and liberal governance by Western states in the post-Cold War period, ASEAN members were often criticized for their human rights records. It was not until the signing of the ASEAN Charter in 2007, however, that a human rights architecture in a meaningful sense started to take form. The ASEAN Charter of 2007 was signed after a consultative process involving an Eminent Persons Group (EPG) of senior officials from all member states. The EPG recognized

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90   ASEAN (2009) *Political-Security Community Blueprint Section B2.2i, ASEAN, Roadmap for an ASEAN Community 2009-2015,* Jakarta: ASEAN Secretariat.

91   Alexandra, L. A. (2011) "Bringing peace and reconciliation to ASEAN, 31 May". *The Jakarta Post.* Jakarta.

that ASEAN needed to move from being a diplomatic community to a 'people-centred organization', and stated that this could not happen without the promotion of human rights. While primarily outlining the objective of a single market and 'protection of the interests of consumers in ASEAN', it held that ASEAN's objectives must include 'the strengthening of democratic values, ensuring good governance, upholding the rule of law, respect for human rights and international humanitarian law, and achieving sustainable development.'[92] The ASEAN Charter thus states that the objective and purpose of ASEAN is, *inter alia,* 'to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms,' (Art. 1(7)) and provides for the establishment of a regional human rights body under Article 14.

The creation of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009 formalized the above-mentioned intentions of the Charter and marked an important step towards the establishment of a regional human rights architecture. Whereas most institutional bodies relating to ASEAN had economic or security functions, this was the first institution explicitly supporting a codification of norms set out in the ASEAN Charter. Moreover, it was set up precisely as a *consultative* body.[93] In AICHR's Terms of Reference a clear link is made between security and human rights, stating *inter alia* that its purpose is:

> To contribute to the realisation of the purposes of ASEAN as set out in the ASEAN Charter in order to promote stability and harmony in the region, friendship and cooperation among ASEAN Member States, as well as the well-being, livelihood, welfare and participation of ASEAN peoples in the ASEAN Community building process.[94]

Arguably however, the contribution of human rights to security was not seen as a strong connection by the framers of the Charter and the AICHR Terms of Reference. Article 2 of the AICHR Terms of Reference, which quotes seven of fourteen ASEAN Charter Principles that as to guide AICHR, omits mention of Article 2(b) of the ASEAN Charter, which explicitly states a 'shared commitment and collective responsibility in enhancing regional peace, *security* and prosperity' (emphasis added).

Unlike the ACHPR in Africa, the AICHR is tightly connected to ASEAN as an organization and its individual member states. The Commission consists of ten nationally-appointed commissioners, with

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92   ASEAN (2006) *Report of the Eminent Persons Group on the ASEAN Charter,* Jakarta: ASEAN Secretariat.
93   AICHR (2009) *Terms of Reference,* Jakarta: ASEAN. Article 3
94   Ibid. section 1.3, emphasis added

the Chairperson appointed from the nation that holds the ASEAN Chair. The Commission's tasks include the promotion and protection of human rights, developing an ASEAN Human Rights Declaration, raising public awareness, capacity building for the implementation of human rights obligations, encouraging ASEAN member states to accede and ratify international human rights instruments, providing advisory services and technical assistance to ASEAN sectorial bodies, engaging civil society, consulting national and international human rights bodies, developing common approaches and positions on human rights, and preparing studies on thematic issues of human rights. It is complemented by the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) and the ASEAN Committee on the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW).

AICHR and the sectorial bodies are bound by ASEAN institutional norms which specifically state that these entities will be guided by 'non-interference in the internal affairs of ASEAN Member States' and must have 'respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion.'[95] Observers have pointed out that the intrinsic function of a human rights body is to mediate between a state and its citizenry, yet the principles of non-interference and respect for sovereignty obstruct this very function.[96] One ASEAN official has tried to reconcile these principles, stating 'one must not read too much into the principle of 'non-interference' (...) and overlook the principles of 'shared commitment and collective responsibility in enhancing regional peace, security and prosperity;' (...) and 'enhanced consultations on matters seriously affecting the common interest of ASEAN' (...), among others. None of the 14 principles in Article 2 can be read exclusively; they should all be embraced and applied collectively.'[97] In practice, however, the norms of non-interference and sovereignty have tended to take precedence, as will be seen from the case studies below.

Civil society groups have requested that investigative powers be assigned to AICHR, but these do not exist in the current Terms of Reference. Thus, AICHR has no formal mechanism for receiving complaints or allegations of human rights violations, even though it has already informally received cases for consideration.[98] The ability to interpret its mandate more liberally is constrained by the need for con-

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[95] Ibid. Section 2.1b, e.
[96] Munro, J. (2011) " The relationship between the origins and regime design of the ASEAN Intergovernmental Commission on Human Rights (AICHR)". *The International Journal of Human Rights* 15 (8). p. 1192-1193.
[97] Chalermpalanupap, T. (2009) *10 Facts about ASEAN Human Rights Cooperation,* Jakarta: ASEAN Secretariat. undated document available at www.asean.org/HLP-OtherDoc-1.pdf (accessed 3 November 2011).
[98] Personal interview 11 (2011). Jakarta.

sensus in the body. Some groups have also criticized the Commission for declining to meet with them, and for its general lack of engagement with civil society.[99] Despite efforts in 2010 and 2011, AICHR could not reach consensus on formal rules of procedure, eventually deeming the Terms of Reference to be sufficient. This has drawn further criticism from rights groups.

AICHR has also been criticized for its lack of transparency, having issued only short press releases of some meetings with no indication of decisions made; and while it is known to have a five-year work plan for 2010–2015, this has not been made public.[100] However, AICHR has 10 commissioners, one from each of the ASEAN states, and their individual positions on human rights issues vary. Certain commissioners have been praised for being open and progressive, and appear willing to engage civil society in informal settings. The Commission also has a five-year review clause in its Terms of Reference to allow for substantive changes, and thus has generally interpreted its first five years to focus on promotion rather than protection.

Although AICHR has no formal relationship with national human rights commissions, it engages informally with them on an ad hoc basis. Originally, only four ASEAN states had national human rights structures (Indonesia, Malaysia, the Philippines and Thailand). Since then, Myanmar has established a national human rights commission. Cambodia committed to establishing such an institution in 2006, but the procedure has remained stuck in the National Assembly, and civil society groups have voiced reservations about the efficacy of a national institution, as other human rights bodies already exist.

Despite the lack of visible progress, there is tentative optimism with regard to the creation of AICHR and its possible impact on policies in the region. Informants for this study expressed sympathy with respect to the restrictions the body faced in its operations. Nevertheless, concerns were voiced that AICHR will have to begin to move more firmly once the ASEAN human rights declaration is promulgated. As yet, AICHR is still in the process of starting its first thematic study, on corporate social responsibility and human rights in ASEAN. The process of drafting the ASEAN human rights declaration is expected to be completed by the end of 2012.

The drafting process of the human rights declaration has been conducted in a closed manner by AICHR members, although a draft was

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99   SAPA TFAHR (2010a) "Civil Society Condemns AICHR for Refusing to Meet, Calls for Draft Rules of Procedure to be Made Public and Hold Wider Consultation – Press release dated 29 March 2010".

100 SAPA TFAHR (2010b) *Hiding Behind its Limits: A Performance Report on the first year of the ASEAN Intergovernmental Commission on Human Rights (AICHR) 2009–2010,* Bangkok: Forum Asia. p. 7, 10.

leaked early in 2012. The draft purported to show a considerable section on limitations of rights as well as insertions or alternate proposals of various ASEAN countries. Following the leak, civil society groups became increasingly vocal in their condemnation of the process, concerned that regressive legislation would seek to undermine human rights. A joint statement signed by over 130 civil society groups in the region called for the draft to be made public. It commended Thailand, Indonesia, Malaysia and the Philippines for holding national consultations, but voiced concern that this had not been done in the other six ASEAN countries.[101] Whereas ASEAN officials have stated that some form of consultations will take place, they have not set a date or agreed on the format. It is unclear how much public input will be taken into consideration. This illustrates the tensions of ASEAN's internal practices, typically conducted by diplomats behind closed doors, and the expectations of civil society on issues they argue will have direct impacts on their communities.

Case Studies

Beyond these organizational impasses at the regional level, the following case studies on Myanmar and southern Thailand illustrate the challenges to ASEAN in addressing regional conflict situations characterized by human rights abuses. The continued emphasis on non-interference obstructs ASEAN and member states from responding to regional crises, both politically and on human rights grounds. Primacy over regional affairs is thus mainly threatened by external actors (the UN system, great powers) as there is no continent-level institution that would intervene within ASEAN states. Moreover, member states are few and, though politically diverse, committed to maintaining ASEAN and its institutional norms at the centre of their foreign policies. In the case of Myanmar, external pressures led member states to reassess their response. This conclusion is strengthened by the case of southern Thailand, which shows the preferred default posture of ASEAN and member states: deferring internal issues to the member state, regardless of that state's role in exacerbating conflict.

Authoritarianism in Myanmar

Myanmar's status as a pariah in the region developed as a result of the military's authoritarian grip on the country from 1962, and whose influence continues today. Pro-democracy protests erupted in 1988 but were brutally suppressed. Nevertheless, the military promised elections in 1990; these were overwhelmingly won by the opposition National League for Democracy (NLD) led by Aung San Suu Kyi. The

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101   Forum Asia (2012) *Joint Statement on Calling AICHR to release ASEAN Human Rights Declaration - 8 April 2012*.

military subsequently annulled the elections and continued to rule until 2010, when it held its first elections in two decades. Under the military's State Law and Order Restoration Council (SLORC – later the State Peace and Development Council or SPDC), it suppressed political activity and imprisoned political activists. It also continued to engage in armed conflict with insurgent ethnic rebellions which began following independence and continued through the successive regimes, moving from Communist-inspired revolts into ethnic conflicts. Democratization and liberalizing the political space thus became a central issue of improving the human rights situation in the country.

ASEAN's engagement with Myanmar has proven a difficult and in many ways formative experience for the regional organization and its members. Despite Western sanctions on Myanmar after 1988, Thailand continued to maintain economic relations with the country, allegedly allowing the junta's forces to carry out operations against rebel groups within Thailand's borders well into the 1990s. ASEAN's inclusion of Myanmar in foreign relations and its subsequent acceptance into the organization took place against a complex political backdrop that would be definitive for its international standing. As Acharya writes: 'The Burmese crisis unfolded at a time when human rights and democracy were emerging as a major issue in the relationship between the ASEAN members and their Western "dialogue partners".''[102] He indicates that European and American sanctions and threats to extend these to the whole of ASEAN were interpreted as 'interference', making any rejection of Myanmar a sign of caving to Western pressure. However, ASEAN had never stipulated rules on the nature of the political systems of its members. In 1997, and following the inclusion of Communist Vietnam, Myanmar joined, despite the country's economic and political isolation by the West.

The inclusion of Myanmar led ASEAN member states to seek to strengthen the primacy of the organization in the management of regional security issues. In 2003, Aung San Suu Kyi's convoy was attacked; this was widely thought to have been directed by military junta officials, sparking international condemnation. Following the incident, Thailand drafted a roadmap for democratization, forcing Myanmar's hand and causing it to issue its own roadmap, in a remarkable playing out of Thai Foreign Minister Surakiart Sathirathai's observation that 'ASEAN had to 'play an increasingly creative role' to avoid 'other groups tak[ing] up the issue and then order[ing] ASEAN to do as they say.''[103]

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102   Acharya, A. (2001) *Constructing a security community in Southeast Asia: ASEAN and the problem of regional order,* London: Routledge. p. 129.

103   Quoted in Jones, L. (2008) "ASEAN's Albatross: ASEAN's Burma Policy, from Constructive Engagement to Critical Disengagement". *Asian Security* 4 (3). p. 280.

Myanmar's 7-step roadmap – with no deadlines – became the guiding document for reforms and tracking progress of its democratization process. It involved reconvening the National Convention, drawing up a new constitution and holding a national referendum on it, followed by national elections and appointment of a representative leadership to carry out the new reforms. The pace of the roadmap reforms was slow, however, and set back by the 'Saffron Revolution' in 2007, when Buddhist monks led a wave of protests against the regime. Then in May 2008, Cyclone Nargis hit Myanmar, causing devastation and drawing further criticism of the government for its sluggish response. (Surprisingly, the constitutional referendum went ahead, having started only days before Nargis hit.)

In November 2010, Myanmar held general elections. Boycotted by the NLD, the Union Solidarity and Development Party (USDP), the civilian successor to the SPDC, won an overwhelming majority. The elections and the process leading up to them, as well as the first sitting of Myanmar's new *Hluttaw* (the national convention, with a bicameral legislature), were widely criticized by Western observers as neither free nor fair.[104] However, Aung San Suu Kyi was released from house arrest immediately after the elections. Thein Sein, a former general and leader of the USDP, assumed the presidency in May, and held closed discussions with Suu Kyi in August.

What happened next surprised nearly everyone – Thein Sein's maiden speech to the *Hluttaw* on 22 August 2011 contained numerous references to the need for good governance and reform in the country. Many might have dismissed these initially as a politically-correct veneer for the tightly controlled reforms in the country,[105] but a rapid set of changes followed – with a national human rights commission established, a loosening of the country's censorship laws, and the revoking of an agreement with China to build a controversial dam. Aung San Suu Kyi then pledged to work with the new government at the end of September, and the government in turn began the release of political prisoners and legalized the formation of unions and participation in strike action in October. By December 2011, it claimed to be negotiating ceasefires with the major insurgent groups in the country. The NLD was permitted to register; it ran in by-elections on 1 April 2012 and won decisively, taking 43 of 46 available seats. Myanmar's reforms and political developments were at once praised by ASEAN and world leaders, but among Western leaders praise always came with the caveat that the reforms would have to be sustained and irreversible to demonstrate Myanmar's commitment to real change. In November

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104 ICG (2011) "Myanmar's Post-Election Landscape". *Asia Briefing No. 118.* Jakarta/Brussels: International Crisis Group.

105 The Independent (2011) *Burma's leader is bringing military regime in from cold,* 12 October 2011.

at the ASEAN Summit, Myanmar was accepted to take the ASEAN
Chairmanship in 2014, having been bypassed in 2005 over its human
rights record.

Throughout the 1990s, Myanmar's authoritarian rule sat uncomforta-
bly in ASEAN circles, even as questions were left unanswered as the
Asian financial crisis hit and member-state priorities turned inward.
The spillover effects of the junta's political suppression led several
countries to continue to voice concerns about Myanmar. As early as
1992, Malaysia had been opposed to Myanmar membership, with
some officials privately suggesting this was in response to persecution
of the Rohingya Muslims, although Malaysia eventually became a
supporter of Myanmar's inclusion in ASEAN.[106] Thailand, wary of
the growing refugee numbers on its borders, also urged a policy of
'constructive engagement' in 1991 (the term had earlier been used in
the context of US foreign policy towards apartheid-era South Africa)
that would encourage moderate reforms within the regime.[107]

The Asian financial crisis wreaked havoc on Thailand and brought
down the Chavalit government. New Foreign Minister Surin Pitsuwan
urged ASEAN to adopt a new policy of 'flexible engagement', argu-
ing that ASEAN's 'cherished principle of non-intervention [should be]
modified to allow ASEAN to play a constructive role in preventing or
resolving domestic issues with regional implications.'[108] An anteced-
ent of the responsibility to protect concept, flexible engagement em-
phasized 'responsibilities for engagement, that is for contributing to
the achievement of common regional goals and for managing bilateral
differences or improving bilateral relations (sic).'[109] Nevertheless the
proposal was struck down, at least in name, and 'constructive en-
gagement' continued to be the preferred term for interactions with the
junta. The demise of the 'Asian values' argument also meant less re-
sistance to external pressure. Moreover, ASEAN members were less
ready to protect Myanmar from international sanctions as they found
themselves preoccupied with tackling internal economic crises.

With the situation in Myanmar unchanged, external pressure from the
EU and the international community at large contributed to ASEAN
member states softening their stance on non-interference. Despite a
lack of apparent progress towards democratization or the improvement
of human rights in the country, ASEAN officials claimed credit for
slow reforms in Myanmar, and they were officially encouraged by the

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106   Acharya, A. (2001) *Constructing a security community in Southeast Asia: ASEAN and
        the problem of regional order,* London: Routledge. p. 131.
107   Jones, L. (2008) "ASEAN's Albatross: ASEAN's Burma Policy, from Constructive
        Engagement to Critical Disengagement". *Asian Security* 4 (3). p. 273.
108   Quoted in ibid. p. 275.
109   Quoted in ibid.

ASEAN Regional Forum (ARF) leaders.[110] Overt criticism by ASEAN officials on the situation in Myanmar became increasingly the norm following well-publicized incidents in the country, such as the attack on Aung San Suu Kyi's convoy and the suppression of the 2007 Saffron Revolution. Indeed the SPDC's handling of this revolution, against a backdrop of stalled negotiations with the EU on an ASEAN-EU free trade agreement, led to calls by some ASEAN officials for the suspension of Myanmar from the organization.[111]

The fallout from Cyclone Nargis also caused a fundamental shift. The scale of destruction and international attention put a great onus on the government of Myanmar to react more proactively, and on ASEAN states to assist. Initially, the government denied visas and access to non-resident international humanitarian agencies and Western naval assets to assist in the relief operations. This triggered a petition by French Foreign Minister Bernard Kouchner to invoke the responsibility to protect (also known as R2P) as grounds for intervention, although it was rejected on the grounds that the responsibility to protect was meant to be applicable only to genocide and crimes against humanity, not natural disasters.[112] ASEAN deployed its first Emergency Rapid Assessment Team (ERAT) and devised a Post-Nargis Recovery and Preparedness Plan directly overseen by the Secretary-General, leading the ASEAN Humanitarian Task Force. In 2007, ASEAN was pressed to condemn the crackdown of the Saffron Revolution after the UN Security Council and other international organizations had done so.[113]

In the process of engaging Myanmar, ASEAN has come to recognize that there are limits to how states may behave, and that it must deal with the international community's tolerance towards certain kinds of behaviour, also human rights abuses that do not amount to atrocity crimes. ASEAN's engagement in human rights discourse thus may have been necessary to demonstrate its willingness to be counted as responsible members of the international community.[114]
This response clearly followed the lines known as the 'ASEAN Way', continuously emphasizing non-interference while simultaneously acting in ways that might ordinarily be interpreted as interference. The

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110   ASEAN (2001) *Chairman's Statement, the Eighth Meeting of ASEAN Regional Forum. 25 July 2001,* Hanoi.
111   Desker, B. (2007) "Suspend Myanmar from Asean". *The Straits Times.* 4 October.
112   The responsibility to protect is a controversial normative framework for how the international community may in last resort use strong measures, including the collective use of force through the UN Security Council, if a state fails to protect its populations or is in fact the perpetrator of crimes against humanity. See Asia-Pacific Centre for the Responsibility to Protect (2008) "Cyclone Nargis and the Responsibility to Protect". *Myanmar/Briefing Paper No. 2.*
113   McCarthy, S. (2009) "Chartering a New Direction? Burma and the Evolution of Human Rights in ASEAN". *Asian Affairs* 36 (3).
114   Thio, L. (1999) "Implementing Human Rights in ASEAN Countries: 'Promises to keep and miles to go before I sleep'". *Yale Human Rights & Development Journal* 2. p. 25.

Chairman's Statement of the 2010 East Asia Summit was illustrative of this contradictory stance: 'We underscored the importance of national reconciliation in Myanmar and the holding of the elections in a free, fair, and inclusive manner, thus contributing to Myanmar's stability and development.'[115] In this sense, informal pressures were placed on Myanmar in order to avoid more overt forms of intervention or damaging the credibility of the grouping. Indonesia was especially proactive in pushing Myanmar on a reformist path, in part due to pressure within its own parliament as a newly-democratic state seeking to exert its new vision in ASEAN.[116] Nevertheless, until 2011, it was difficult to observe any impact from ASEAN's overtures.

Several geopolitical factors have been noted as underpinning the opening of the country: Its desire to assume the ASEAN Chairmanship in 2014, a reaction to the Arab Spring, and its need to counterbalance China's rapidly expanding influence in Myanmar with other international actors. While China has been a strong ally of Myanmar, it was starting to be seen as too influential, and that led to the dramatic cancellation of large-scale infrastructure projects that had been provided with few conditions. The actual calculations leading to liberalization by the previous military rulers are harder to determine; in the absence of strong indications of the reasons, this provides an interesting scenario where everyone can now claim victory.[117]

The clearest penalty Myanmar faced concerned the ASEAN Chairmanship in 2005. Pressure was exerted by the USA and EU, and it was increasingly deemed untenable for Myanmar to be the international face of the organization. Eventually, Myanmar offered to forego the Chair to concentrate on democratization, but only on the condition that it could take up the post whenever it was ready to do so. In 2011, Myanmar began to make strong overtures of seeking the 2014 Chairmanship of ASEAN, finally granted in November 2011. After the signing of the ASEAN Charter (and the Saffron Revolution), Myanmar has not committed fresh reprisals or introduce harsher restrictions. These institutional commitments may well have led it to temper massive human rights abuses.[118]

ASEAN's promises to Myanmar to assume the ASEAN Chairmanship was not viewed necessarily as negative by civil society, and Aung San Suu Kyi has welcomed the move publicly. With a two-year horizon to taking the Chair, the presence of AICHR and the recent establishment

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115   ASEAN (2010) *Chairman's Statement of the East Asia Summit, Issued at the 5th East Asia Summit in Ha Noi. Vietnam, 30 October*.

116   Haacke, J. (2008) "ASEAN and Political Change in Mynamar: Towards a regional initiative?". *Contemporary Southeast Asia: A journal of international and strategic affairs* 30 (3). p. 364.

117   Economist, T. (4 February 2012) "Myanmar and Singapore: Among Friends".

118   Personal interview 12 (2011). Jakarta.

of a national human rights commission, Myanmar's government is unlikely to want to give ASEAN political capital to revoke those credentials or encourage human rights investigations. ASEAN civil society organizations working on Myanmar have also expressed the hope that, as ASEAN Chair, Myanmar will be forced to open up space for such organizations at sideline events such as the ASEAN People's Assembly and the Heads of State meetings with civil society organizations. Myanmar's democratization process is likely to be even more keenly observed than those of other states in the region, like Indonesia and the Philippines. The most optimistic hope that these processes may cause Myanmar to lead the grouping, from behind, on human rights, as in the case of the democratic change in Indonesia.[119]

ASEAN has taken credit for continued engagement with Myanmar as the key to success in its opening up of the country – more concretely through repeatedly exposing its diplomats to the rapid economic development of the region that Myanmar missed out on while in isolation. This view is presented as opposing that of Western states who claim that the heavy costs of sanctions were the key, though the points are not as mutually exclusive as they may appear. While both explanations are defensible, the detente between Aung San Suu Kyi and Thein Sein appears to be the key driving force in breaking the political deadlock. Neither ASEAN nor Western methods of pressure should be overplayed in terms of their contribution to resolving the crisis, ineffectual as both were for decades.

What is significant is the way ASEAN and the West have interacted with each other over the issue. Despite criticism of their human rights records ASEAN states have enjoyed good economic relations with Western states since the end of the Cold War. The imperative behind stalling the EU-ASEAN free trade negotiations over Myanmar forced a change in posture by ASEAN towards one of outwardly condemning the junta, even if it had little impact on the junta itself at the time. It is also significant that these developments preceded the signing of the ASEAN Charter and establishment of AICHR, both of which have as yet had very little impact on ASEAN's approach to Myanmar. It could be argued that the preventive posture of these instruments influences the behaviour of the Myanmar government, but as yet there is little evidence of direct causation.

Violent Conflict in southern Thailand
Conflict in southern Thailand has old roots, but a very modern dimension. The conflict has been overlain with a range of discursive ele-

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119   Chongkittavorn, K. (2012) "Burma and democratic pendulum's swing in ASEAN". *The Nation.* 5 March.

ments such as self-determination, ethnic discrimination, religious extremism or jihad, as well as wars on terror or drugs. This mix of competing and sometimes incommensurable narratives – explained through frameworks of grievance, ideology, politics, or criminality – has hindered clarity in policy responses. Actors on different sides have harnessed global and local discourses and networks to further their somewhat unclear goals.

The conflict areas in southern Thailand consist of the Pattani,[120] Yala, and Narathiwat provinces, while two other Malay-majority provinces of Songkhla and Satun have largely escaped the violence (although Hat Yai in Songkhla was bombed on 31 March 2012). The Muslim Patani kingdom was annexed by Siam in 1902, though it had come under the Thai sphere of influence as far back as 1768. Modern separatism took on nationalist tones during successive waves of independence after World War II, with armed resistance developing in the 1960s through separatist organizations such as the *Barisan Nasional Pembebasan Patani* (National Liberation Front of Patani or BNPP), the *Barisan Revolusi Nasional* (National Revolution Front or BRN) and the Pattani United Liberation Organization (PULO). The region was also host to Communist guerrillas seeking refuge from Malaya, and divisions arose over the BRN's support for the Communists, as well as internal divisions over the support for Malaysia or Indonesia during the *Konfrontasi* clashes in the 1950s and 1960s.

Analysts indicate three policy roots in current grievances that go back to the annexation of the Patani kingdom: these are the proscription of the use of the Malay language; the restriction of religious practices, particularly *sharia* law; and the regulation or policing of *pondok* or Islamic schools (madrassahs) by the central government.[121] Others have characterized the tension as originally an ethnic Thai–Malay divide that eventually took on aspects of religious (Buddhist–Muslim) cleavages.[122] The troubled South nevertheless warranted a different approach, and in the 1990s the Thai government began a policy of *Tai Rom Yen,* or 'South under a Cool Shade', that attempted to introduce more holistic development policies for the impoverished area. Combined with an amnesty programme, the policy gradually managed to erode popular support for the armed groups, several of which splintered into smaller groups. Nevertheless, successive administrations

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[120] 'Pattani' is used to refer to the current Thai province, whereas 'Patani' refers to the historical Malay kingdom and the area generally affected by insurgency. See Melvin, N. J. (2007) "Conflict in Southern Thailand: Islamism, Violence and the State in the Patani Insurgency". *Stockholm International Peace Research Institute Policy Paper* 20 (September 2007). p. v.

[121] Liow, J. C. and D. Pathan (2010) "Confronting ghosts: Thailand's shapeless southern insurgency". *Lowy Institute Paper* 30. p. 2.

[122] Harish, S. P. (2006) "Ethnic or Religious Cleavage? Investigating the Nature of Conflict in Southern Thailand". *Contemporary Southeast Asia* 28 (1).

maintained uneven levels of commitment to the area as domestic political turmoil led to a rapid succession of shifting regimes.

Attacks on the police occurred at a low but consistent level from 2001 onwards, though lack of an apparent political agenda behind the violence led then Prime Minister Thaksin Shinawatra to deny the role of religion, asserting that the violence was more likely associated with drug trafficking.[123] Proximity to Myanmar's drug triangle and low level of law enforcement made for a convincing narrative that eventually culminated in Thaksin's 'War on Drugs' campaign in 2003. While this was not confined to the south, nearly 3,000 people were estimated to have been killed, mostly extra-judicially. This was seen as part of a major expansion in powers for the police and military.

A separate trend at the national level was sparked by the US global push to fight a 'War on Terror' after the events of 9/11. The arrest of Ridduan Isamuddin (alias Hambali), a member the terrorist group Jemaah Islamiyah (JI) in Ayutthaya in 2003 provided the political impetus to pass emergency decrees on terrorism and money laundering after a previously non-committal stance towards the US-led War on Terror.[124] Thai Muslims in the South protested the laws as undemocratic, but the Constitutional Court ruled them constitutional in February 2004.

Violence again escalated after a raid on an army camp in 2004 by armed gunmen. In contrast to earlier attempts to downplay the role of religious extremism, the January 2004 raid was well organized and immediately drew allegations that JI were behind the violence (a more recent raid on a base in Narathiwat in January 2011, however, was not connected to the global jihadist movement, despite showing high levels of militant organization). Subsequent murders of Buddhist monks and students in 2004 led to martial law being imposed in the South even as the murders were condemned by Muslim and Buddhist communities alike. Twin bombings on 31 March 2012 in Yala and Hat Yai reinforced the continuing if sporadic nature of the violence.

The insurgents' lack of a coherent front, the absence of demands and uncertain connections with terrorism or criminal elements have made this a difficult conflict to deal with, domestically or internationally. Because of its traditional animosity towards Bangkok, the region had been used as a refuge to other groups such as Communists and Islamic extremists. The political divisions among dissident groups are significant: PULO was established by a descendant of the Patani Malay sul-

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[123] BBC News (2002) "Thailand tackles violence in south, 11 July, Available at:". *http://news.bbc.co.uk/2/hi/asia-pacific/2120589.stm (accessed 13 February 2012).*
[124] Chongkittavorn, K. (2004) "Thailand: International Terrorism and the Muslim South". *Southeast Asian Affairs.* p. 270.

tanate, while the *Barisan Islam Pembebasan Patani* (BIPP, the successor to the BNPP) is associated with local Malay elites, and the BRN and its offshoots have a much stronger grassroots base, perhaps learnt from their earlier association with Communist groups. There has thus never been consensus on the political aims among these discontents. The only known initiative to merge the various groups occurred in 1997 through an umbrella group known as *Bersatu* – but it failed, and there appears to be wariness of attempting such an endeavour again.[125]

Furthermore, although the older groups of insurgents from the 1960s may provide moral leadership, they are unlikely to have direct command and control of the loose network of cadres involved in the current wave of violence.[126] Turbulent domestic politics, corruption and a policy of rotating regional commanders has also hampered relationship-building on the government side, according to some informants.[127] This combination of factors has complicated attempts at diplomacy, like those brokered by former Malaysian Prime Minister Dr Mahathir Mohamad in 2006, which proved inconclusive.

The closest the southern conflict has come to getting on the regional agenda was when Malaysia and Indonesia sought to raise the issue at the 2005 ASEAN Summit. That prompted then Thai Prime Minister Thaksin Shinawatra to threaten to walk out. Eventually Malaysia issued a watered-down statement of concern, and the issue did not resurface in 2005.[128] Following ASEAN norms, the other member states have largely stayed aloof, except for some Malaysian and Indonesian officials typically working in unofficial capacities. Some observers feel that these discreet efforts have helped to keep space open for discussion and cooperation,[129] but there is otherwise little to show. Engagement has been limited to bilateral talks through Malaysia, even as such interactions are coloured by local politics.[130]

Malaysia has voiced human rights concerns in the context of Thailand's heavy-handed approach to the conflict, but rarely with sustained pressure or credibility for Bangkok. Malaysia's role has often been distrusted, with numerous accusations over the years of harbouring insurgents, or allowing insurgents with dual nationalities to avoid the Thai authorities. During the Cold War, the Malaysian government

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125   Liow, J. C. and D. Pathan (2010) "Confronting ghosts: Thailand's shapeless southern insurgency". *Lowy Institute Paper* 30. p. 17.
126   Ibid. p. 9.
127   Personal interview 13 (2011). Bangkok.
128   Funston, J. (2010) "Malaysia and Thailand's southern conflict: reconciling security and ethnicity". *Contemporary Southeast Asia.*: Institute of Southeast Asian Studies (ISEAS), 245-246.
129   Personal interview 14 (2011). Singapore.
130   The opposition PAS party in Malaysia is a major proponent of southern Thailand autonomy, for example.

had supported the insurgents in order to retain leverage against Thailand's alleged support of the Communist Party of Malaya (CPM). However, Malaysian support waned after the CPM stood down in 1989.[131] There has been little spillover from the conflict, and that limits the attention afforded to it by Malaysia, despite expressed sympathies with their neighbours

As long as ASEAN defers authority of the situation in southern Thailand to Bangkok, it is unlikely that its publicly-stated views will differ from the stance taken by the central government. Thailand has consistently maintained that the conflict is an internal matter.[132] Indeed, the main factors surrounding the conflict continue to be domestic, and in large degree dependent on the political situation in the Thai capital. Some have argued that the Thai military have sought to downplay the scale of the problem by 'labelling it instead an inconvenient "law and order problem".'[133] Politics in Bangkok have not only led to an ad hoc or even incoherent approach to the region, but also overshadowed the south, whose issues are complex and difficult to define for the rest of the nation.

There is little extra-regional pressure on ASEAN to resolve the situation or assume a more proactive role, despite the direct interest of notable ASEAN leaders in the area (such as Mahathir Mohamed or Surin Pitsuwan, who is a Muslim Thai). The conflict in southern Thailand serves as a stark contrast with Myanmar on the difference between necessary and sufficient conditions for regional focus to be brought to bear on a security issue with human rights dimensions. While abuses have been well-documented by human rights groups, they have rarely been sustained enough to attract international attention in the same way as those in Myanmar. Observers have remarked that the Thai press is itself complicit in covering the conflict superficially and avoiding discussing the root causes of the conflict.[134] International human rights groups have reported consistently on the conflict, they enjoy little clout in the region and questionable impact beyond.

ASEAN's stance towards the southern Thailand problem may thus be inferred as a 'default' position with respect to human rights and security, and an indicator of how the organization would respond in the absence of external pressure, cross-border spillover, or gross violations of human rights. Similar low-intensity problems relating to hu-

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[131]   Funston, J. (2010) "Malaysia and Thailand's southern conflict: reconciling security and ethnicity". *Contemporary Southeast Asia.*: Institute of Southeast Asian Studies (ISEAS), 245-246. p. 58-59.

[132]   Personal interview 14 (2011). Singapore.

[133]   Liow, J. C. and D. Pathan (2010) "Confronting ghosts: Thailand's shapeless southern insurgency". *Lowy Institute Paper* 30. p. 4.

[134]   Thammasathien, N. (2010) "The Thai Press and the Southern Insurgency: Nothing More to Report". *Contemporary Southeast Asia* 32 (2).

man rights in Cambodia, Vietnam, Papua (Indonesia) and Mindanao (Philippines) have also received scant attention from the regional body.

Observations

ASEAN stands at an interregnum as its new institutions and legal personality emerge against the backdrop of a more globally open world. In recent years, ASEAN has been developing into a more robust regional institution, where the development of a human rights architecture is seen as a necessary stepping stone towards asserting primacy on regional relations. ASEAN's current emphasis is to maintain its own centrality at the heart of Asian geopolitics, and it requires these normative frameworks to operate as the primary actor in this environment.[135] However, the analysis of ASEAN responses – or lack of such – to regional conflict involving human rights violations reveals tensions between the stated aspiration of member states and organizational practices. Several observations can be drawn in this regard.

First, while current debates over human rights and security are now causing an institutional rethink,[136] the development of legislation and enforcement mechanisms at the regional level can be characterized as sluggish. The forming of the 'ASEAN Community' plan has spurred the creation of new institutional structures, such as the ASEAN Intergovernmental Commission on Human Rights (AICHR) and a human rights declaration. However, these developments are as yet in their infancy, still largely guided by old institutional practices of closed-door negotiation, and traditional concepts of security and non-interference. The 'ASEAN Way' that tends towards lowest-common-denominator outcomes, and the practice of legislating behind implementation capacity, provides the basis of cooperation on future ASEAN conventions dealing with human rights. However, it is not only on the issue of human rights that the pace of reforms is slow. Today's regional security architecture consists of a number of overlapping but non-identical forums and meetings – the EAS, the ARF, APEC, and other regional groupings. While the emphasis on slow process and consensus is unlikely to change, an evolutionary legislative development may make it possible for member states to explore ways to link up the evolving human rights and security architectures of the region. As the Myanmar case study shows, it has become in-

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135 Pitsuwan, S. (2011) "The ASEAN Heart of Asia". *Project Syndicate, 13 Jun 2011, available at http://www.project-syndicate.org/commentary/the-asean-heart-of-asia (last accessed 29 March 2011).*

136 See for example Desker, B. and J. Ng (2011) "Responsibility to Protect: Tensions between Sovereignty and Security". *RSIS Commentaries* 142.

creasingly recognized that ASEAN's stance on 'non-interference' is rather more fluid in practice than in rhetoric.[137]

Second, external pressure on ASEAN members seems to have an effect on regional responses to conflict situations, but this can go both ways. Peer pressure and quiet diplomacy have often been used to effect changes in lieu of greater commitments to resolve threats to regional security. However, the results are uneven: relatively successful cases like those of Aceh and Myanmar can be contrasted with unsuccessful efforts, as in southern Thailand, southern Philippines or Papua. Interactions in the ASEAN–EU free trade negotiations and the perceived inaction over Myanmar's inaction over Cyclone Nargis seem to have contributed to ASEAN stepping up its pressure on Myanmar. Other regional forums, however, serve as more neutral settings where states under scrutiny are able to push back, often through reformulations of 'Asian values' or by referring to the particularities of their national contexts (especially drawing on the language of 'security'). Understanding the nature of institutional norms and regional security concerns that preceded the current commitment to human rights is vital to managing the tensions between ASEAN's evolving regional human rights and security architectures.

Third, the apparent lack of systematic consideration of security or human rights issues in regional forums may mean that certain security or human rights concerns can be overlooked, most notably conflicts like those in southern Thailand. Human rights abuses in Laos, Vietnam and Cambodia have attracted far less attention than those of Myanmar, perhaps because these countries do not have a symbolic figure like Aung San Suu Kyi for political reform to coalesce around. This plays into claims that Western pressure is selective and indeed that 'human rights is an easy, cheap, and popular way to exercise influence or maintain the illusion of involvement.'[138] Forging stronger links between ASEAN's nascent human rights architecture (AICHR) and regional forums may be one step in addressing the impression of uneven application.

Fourth, the fact that AICHR is tightly connected to ASEAN and to its individual member states gives important political buy-in – but also weakens the potential role of the AICHR. As noted, AICHR consists of ten nationally-appointed commissioners, with the Chairperson appointed from the nation currently holding the ASEAN Chair. There is thus still scope to formalize limitations on the human rights norms being established in the region. Indications can be traced in the lack of

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137   Jones, L. (2010) "ASEAN's unchanged melody? The theory and practice of 'non-interference in Southeast Asia". *The Pacific Review* 23 (4). p. 479-502.
138   Kausikan, B. (1993) "Asia's Different Standard". *Foreign Policy* (92): 24–41. p. 26-27.

transparency surrounding the draft ASEAN human rights declaration, and the alleged inclusion of a section on the limitation of human rights. Simultaneously, the ostensibly liberal democratic states have been at the forefront of pushing for greater emphasis on rights-based approaches in policy, despite acknowledged problems within their borders. A key driver within ASEAN will be the newly-democratic and resurgent Indonesia, looking to re-establish a global footprint for itself. Democratic or liberalizing states within ASEAN, such as the Philippines and Thailand will be assertive allies.

Fifth, the lack of inclusiveness in the development of ASEAN's human rights architecture threatens to weaken the legitimacy of the resulting instruments or declarations. ASEAN's regional diplomacy has always been inclusive, yet it has not extended this principle of inclusiveness to its own civil society. On the other hand, it must also be recognized that ASEAN is a region of vast political and cultural diversity, where instituting such changes or recognizing the value of these norms is difficult. Having until recently, lacked official consultations with a cross-section of civil society organizations in the region, there is a significant risk that they will reject the ASEAN human rights declaration The AICHR's recent commencement with civil society consultations as of May 2012 are however a positive indication. If momentum can be sustained, this could provide a possibility for changing perceptions about the openness ASEAN has towards engaging with civil society.

Conclusions

How have regional human rights norms within the AU and ASEAN impacted on regional security discourse and practice? Because the human rights and security architectures were developed at separate times and to varying degrees in both organizations, the process of reconciling them has proved cumbersome. This becomes particularly evident in instances where the organizations are faced with conflict situations involving wide-spread violations of human rights. The tensions that arise when balancing human rights and security concerns in these situations are not unique to AU and ASEAN. Rather, they are a regular – albeit not necessarily inevitable – consequence of weighing concerns for stability against the rights of individuals. Based on the previous analysis, including case studies of AU and ASEAN crisis response in Côte d'Ivoire, Libya, Myanmar and southern Thailand, a number of conclusions can be drawn.

While the nature and type of conflict situations facing the AU and ASEAN differ in important ways, there are strong similarities in *how* conflict situations are framed and responded to. Neither organization prefers to emphasize the human rights concerns arising out of conflict situations, but tend to frame conflicts and their solutions as primarily political in nature, and address human rights concerns under the rubric of 'political engagement', as opposed to utilizing a more strongly interventionist approach. Whereas the AU seems to legislate ahead of its capacity to implement decisions taken by member states to develop ambitious human rights and security architectures, ASEAN has moved more cautiously, legislating only as far as its capacity to implement allows. Nevertheless, their capacity to deal with the tensions at the nexus between regional human rights and security architectures will be central to their future ability to develop responses to conflict within member states.

When responding to regional crisis involving human rights abuses, the AU and ASEAN must increasingly compete with a range of actors (external, sub-regional, emerging powers and civil society). Both organizations will have to pay greater attention to the nexus between regional human rights and security architectures if they are to maintain their legitimacy as primary actors in their regions, and if they wish to continue to guard against external interference. Hence, both organizations need to further investigate the roles and responsibilities assigned to their human rights and security institutions and decision-making bodies. In particular, the ways in which these institutions and organs

are to relate to one another as regards decision-making, must be prioritized and further investigated if they are to avoid procedural stovepiping and successfully address conflict situations in their regions.

The AU has a relatively robust human rights and security architecture in place on paper. In practice, however, these have not been able to interact in the manner envisioned in policy frameworks. It remains to be seen whether and how this challenge can be addressed by the recently launched African Governance Architecture and the African Human Rights strategy.[139] If it wishes to avoid developing paper tigers, ASEAN can draw valuable lessons from the AU in this regard, in particular as it further develops its own human rights and security architectures.

The human rights architecture in the AU – the ACHPR in particular – is detached from member-state influence. An important task for the future will therefore be to increase member state's interest in the work of the ACHPR – something that requires greater ownership and acknowledgement. The danger is that member states might seek to make the ACHPR less intrusive, as opposed to working towards further empowering the Commission, not least in response to the assertiveness of the Commission and the Court in the Libyan case. In Southeast Asia, AICHR's close connection to ASEAN and to the individual member states provides important political buy-in, but also weakens the independent role of the AICHR and may curb the access of and interaction with civil society and regional/national human rights NGOs.

It is important to further empower independent organs that can influence the work of the organizations and member states, such as the ACHPR and the African Court in Africa, and civil society organizations and – potentially – the AIPR in Southeast Asia. The ACHPR and the African Court still suffer from a lack of political will on the part of member states. Encouraging a judicial identity and creating a space for ambitious and creative judges and commissioners can prove central for further developing the African human rights architecture, and for setting a new pace for the entrenchment of human rights on the continent. This process could generate important insights for ASEAN, as it seeks to develop the AICHR, the AIPR and the regional human rights declaration and works to further develop its regional human rights architecture.

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[139] Gumedze, S. (2011) "The Challenges Facing Africa's Emerging Governance Architecture". Pretoria: Insitute for Security Studies. , Personal interview 7 (2011). Addis Ababa.

If the AU and member states cannot find a meaningful way of addressing these tensions, through existing legislation, institutions and political mechanisms, they are likely to face similar challenges when responding to future conflict situations characterized by human rights violations. Under such circumstances, the legitimacy and credibility of the AU may be further questioned – not only by the international community, but also by member states. Indeed, the AU might find itself bypassed by other actors. By contrast, the nature of conflict in Southeast Asia is less acute, more structural in nature and more subdued. This heightens the threshold for external interference in ASEAN's responses – or lack of such – to regional conflict situations. In the development of stronger human rights architecture, old practices still create impasses and slow down the processes, but the rise of democratic member states, Indonesia in particular, may create promising dynamics in the future.

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