

Conference Paper

The Limits and Possibilities of the ASEAN Way: The Case of Rohingya as Humanitarian Issue in Southeast Asia

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Abstract

The ASEAN Way has been considered by many academics as the most problematic, yet superior principles in ASEAN decision and policy-making process. The principles highly emphasize on traditional concept sovereignty of its member states, which leads to the perception of ASEAN's inability to reconcile the ASEAN Way and humanitarianism. In this research, despite the two competing perspectives of whether the ASEAN Way is hindering or enhancing the ability of ASEAN to settle conflicts, this research argues that the extent to which the ASEAN Way becomes limitation or accelerator depends on the nature of the conflict. Not to deny that the ASEAN Way may be the only possible mechanism to approach Myanmar, but the ASEAN Way itself is not enough because there is a tendency for ASEAN members turning 'a blind eye' towards a conflict that does not reach into the surface or there is no proper discussion about it. To support the argument, this research will illustrate the above-mentioned argument through the recent case of massive Rohingya human rights prosecution that results in the biggest crisis in sea after Indo-China. This research will do so by; first, exploring the nature of the ASEAN way and second, applying the conceptual discussion to the case of Rohingya in order to show the limits of the ASEAN way in this particular case.

Keywords: ASEAN, ASEAN Way, Humanitarian, Refugee, Rohingya, Southeast Asia

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1. Introduction

The Rohingya refugee crisis has stricken ASEAN before the regionalism among ASEAN member states was born. This implies when ASEAN welcomed Myanmar to become a member in 1997, this institution should have been ready to face this problem, in fact ASEAN is not being responsive in dealing with such conflict happening within a territory of its member states. In 2012, the issue became more severe as a riot erupted between Rakhine Buddhist and Muslims leaving more than 200 dead. Since

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then, many tragedy following the humanitarian crisis occurred, targeting Rohingya ethnic minority, until in January 2014, the United Nations informed that there were 40 Rohingya men, women and children killed in Rakhine state after being accused that Rohingyas killed a Rakhine policeman [1]. The human rights abuses was then caught by the international community. And due to the severity of the human rights violation, some international organization and non-governmental organization considered this case as crimes against humanity. Furthermore, some countries also urged the government of Myanmar to take serious action towards the humanitarian crisis and grant full citizenship to Rohingya people. However, sadly, Myanmar government has refused to do so.

Not to conclude ASEAN and its member states have done nothing to respond the Rohingya crisis. Many literatures claimed ASEAN has its own mechanism in dealing with problems faced by the organization, such as through the tool famously known as, "constructive engagement". This method adopted by ASEAN in order to foster democratization and human rights development in Myanmar and was initially proposed by Thailand in 1991. It also characterizes the organization's engagement in both bilateral and multilateral relations towards ASEAN States to solve domestic problems. The Foreign Minister of the Republic of Indonesia, Retno Marsudi, publicly stated, not only Indonesia in which has done constructive engagement with the country of origin and destination of the Rohingya refugees but also Italy, Thailand, and Malaysia [2]. However, constructive engagement is not enough to respond humanitarian crisis, especially when it is a "state-sponsored" humanitarian crisis. A tangible measure should be taken to respond this issue.

The ASEAN Way, defined as the principles or values governing the interaction of ASEAN Members, highly emphasizes on respect of sovereignty. The values are upholding the notion of non-interference in internal affairs, consensus-building, informality, and backdoor diplomacy; a non-harsh technique applied in dispute settlement mechanism, putting an emphasis in progressive changes, without harassing in public. In this research, despite the two competing perspectives of whether the ASEAN Way is hindering or enhancing the ability of ASEAN to settle conflicts, this research argues that the extent to which the ASEAN Way becomes limitation or accelerator depends on the nature of the conflict. Not to deny that the ASEAN Way may be the only possible mechanism to approach Myanmar, but the ASEAN Way itself is not enough because there is a tendency for ASEAN members turning 'a blind eye' towards a conflict that does not reach into the surface or there is no proper discussion about it.

Having emphasized on the ASEAN Way, this research aims to discuss the limits and the possibilities of the ASEAN Way whether it hinders or supports the capabilities of the institution as a regional organization in settling conflict within its area. This paper shall define 'the ASEAN Way' as defined as a set of principles or values governing ASEAN members in decision and/or policy-making process. This study is important to understand the behavior of ASEAN on improper treatment and human rights violation of the Rohingyas in Myanmar. To date, majority of research conducted in the similar field only sees the ASEAN Way from a strictly black and white perspective. However, it is nearly impossible to take a rigid approach on the ASEAN way. The fact is the ASEAN Way is dynamic, similar like ASEAN institution.

To support the argument provided, this research will conduct a historical analysis on ASEAN Way's formation, the ASEAN Way's limitation and possibilities in general context and the implication of the case of Rohingya. It is important to take note as this research will not elaborate on the Rohingya case but implies at the consequences (limits and possibilities) of the ASEAN way on the issue only. In order to do so, this paper will highly emphasize on the present literature sources for its findings and rely on qualitative research method. Some policy assessment will also be conducted given the fact additional suggestion of policies which be provided in this research.

2. The Nature of the ASEAN Way

Established on August 8, 1967 in Bangkok, ASEAN has chosen its own unique way as rules governing interactions of its member states. For many academics, the ASEAN Way is the organization's feature for conflict and dispute management, as well as, peace and security maintenance. However, for some others, the ASEAN Way has been problematic because of its informality and inability to 'stand firm' when sensitive issue is rising within the region. The aim of this section is to explore the ASEAN Way and its consequence in dealing with sensitive issues. For ASEAN and its members, sensitive issues are issues that would threaten the sovereignty on its members. The South China Sea and human rights violations for examples, are some issues touching the layer of sovereignty. In this section, the author tries to describe what norms or principles are being categorized as the ASEAN Way and why ASEAN has chosen to adopt these principles instead of the others.

Since the beginning of its informal construction, the ASEAN Way is evolving. However, the evolvement of the principles of the ASEAN Way do not contradict towards each other, yet, the principles are contending. In order to understand the nature of the

ASEAN Way, we must also understand that the ASEAN Way consists of two important norms; procedural norms and behavioural norms. Therefore, in explaining these two norms constructing the ASEAN Way, this section will be divided into two, explaining the nature of ASEAN procedural norms and behavioural norms.

A set of customs shared by ASEAN founding fathers governing how a policy-maker should pursue ASEAN negotiation and diplomacy shall be categorized as procedural norms [3]. These norms include the principle of seeking agreement and harmony, the principle of sensitivity, politeness, non-confrontation and agreeability, the principle of quiet, private and elitist diplomacy versus public washing of dirty linen, and the principle of being non-Cartesian, non-legalistic [4]. These norms do not specify any goals related to the preservation of territorial integrity or sovereignty, instead, they prescribe the manner in which the member states should manage their affairs and interact with one another within the context of ASEAN [5]. Before ASEAN's inception, the norms have already been shared by the founding fathers of ASEAN (Indonesia, Malaysia, Philippines, Singapore and Thailand) and reflected by the traditional domestic politics of Southeast Asia which has always been personalistic, informal and non-contractual [3]. Moreover, when explaining about the norms behind the formulation of ASEAN, there is also importance to bring up the case of the predecessor of Southeast Asian regionalism the Association of Southeast Asia (ASA) and Maliphindo.

As a matter of procedural norms shared by ASEAN, the predecessors, ASA and Maliphindo have already practiced similar norms on managing intra-regionalism affairs. Thanat Khoman, the key architect of ASA who was the Foreign Minister of Thailand firmly declared that ASA's norms were deeply rooted in "Asian Culture and Traditions [5]. Similar case goes for Maliphindo as how despite its failure, there was potential use of common culture in advancing Southeast Asian regionalism through political and strategic objectives. For Maliphindo, similar key principles are also seen in ASEAN's norms, including, the pledged commitment to the principle of consultation or *musyawarah* as the basis of settling differences among its members [5].

Apart from procedural norms, ASEAN also shared behavioral norms. ASEAN behavioral norms emphasize on its member states' commitment to the idea of state sovereignty [3]. The basic arguments delivered by scholars on the reason why ASEAN's are firmly raising "the banner" of sovereignty is because likewise any Third World countries which have experienced colonialism and imperialism the governments of Southeast Asia countries could not have forgotten this nightmare. Due to this matter, the normative idea of sovereignty had become the cornerstone of ASEAN's cooperation in establishing regional order. However, as many constructivists argue

that the ASEAN Way (including the great emphasis on sovereignty) are shared by its members' common identities, this research does not offer similar argument.

On the conceptual frameworks section of this research, the author uses the concept of intersubjective norm to understand whether the ASEAN Way is a result of shared values and common identities of ASEAN member states, or it is something else. If in accordance to the argument of intersubjective norms, thus, prior to the formation, ASEAN must have shared similar norms, common identity, and concerns on the problems situated in Southeast Asian region. This also applies for the adoption of sovereignty as a norm, which then leads to the adoption of non-interference in internal affairs principles upheld by ASEAN. The norm to respect ASEAN states' sovereignty was firstly enshrines on preambulatory clause of the Bangkok Declaration 1967, as follows;

Considering that the countries of Southeast Asia share a primary responsibility for strengthening the economic and social stability of the region and ensuring their peaceful and progressive national development *and that they are determined to ensure their stability and security from external interference* in any form or manifestation in order to preserve their national identities in accordance with the ideals and aspirations of their peoples;

The sentence on the preambulatory clause of the Bangkok Declaration is quite strong, arguing that Southeast Asian countries aware to share a primary responsibility to ensure their national stability and security are free from external affairs. At first glance, what is reflected on the sentence above, the word "share" emphasizes that Southeast Asian countries have similar norms rooted in their domestic policy. However, it should be noted that the formulation of the Bangkok Declaration was taking place during the Cold War, particularly in the awakening of communist ideology in Southeast Asian region. At this period, Southeast Asian countries had huge interests to prevent the spread of communist regime in their own national societies. Sovereignty as norm was adopted to prevent any spread of communist ideology and therefore the practice of interference should be eliminated. This is why then the adoption of the 'non-interference' principle as one of the foundations of the ASEAN Way did not reflect neutral desire of the Southeast Asian countries for international peace and stability [6] and the aim of Southeast Asian regionalism in the first place. Certainly, the non-interference principle was utilized to eliminate intra-ASEAN conflicts, but in priority, it is to permit elites advancing their preferred vision of social and political order by undercutting the appeal of communism.

Related to this matter, we can now see that regional integration was not the main objective behind ASEAN's formation. Instead, the formation of ASEAN regionalism was more of a response on the part of non-communist Southeast Asia to the Western abandonment of its role as a shield against communism [7]. If to be examined through the argument of 'intersubjective norm' concept, the norm-sharing process in integration of ASEAN did not come from the members' domestic norms, values, or identities. It is more of an external factor that leads ASEAN to construct a firm non-interference principle due to the members' historical experiences. It is an external aspect that triggered the awareness-raising among Southeast Asian countries to form a shield against external influence.

As Lee Jones argued, ASEAN and its non-interference principle thus should not be understood as primarily contributions to regional order or identity as many IR scholars [6], however, intersubjective norm still plays a significant role to understand that in the case of ASEAN external factors and experiences led to a significant impact that the members, thus, share such norms and values. If this is the fact, thus, it can now be examined that the challenges of the ASEAN Way nowadays are implications of the by the process of integration process of Southeast Asian regionalism.

3. The Limits of the ASEAN Way

When discussing about the limits of the ASEAN Way, scholars often make reference to the fundamental policies of the ASEAN Way, the non-interference and consensus-building traditions. As it has been explained, the ASEAN Way includes both procedural and behavioral norms and these norms do not contradict towards each other but rather contending. These two fundamental policies are also rooted from the formation of both procedural and behavioral norms. The non-interference and consensus-building traditions are completely supporting each other emphasizing on the high respect of national sovereignty. This section will examine the limits of the ASEAN Way, particularly the tradition of non-interference and consensus-building in decision-making process.

Firstly, for the non-interference principle, this principle is mostly seen by scholars and policymakers as strict limitations on state behavior to comment on domestic affairs of other states in order to avoid disrupting regional order [6]. This principle also creates a blurred line between the intention of whether states are not responding towards regional issues because they are unable to respond towards that issues or merely, not acting because they raise justification as weigh not to act against issues. Although the former secretary-general of ASEAN emphasized that the application of

non-interference principle has not been absolute [8], in reality, ASEAN is often hampered by the non-interference principle in its decision-making process.

Historically speaking, the principle of non-interference was formally coming into the surface in the sphere of ASEAN when the Treaty of Amity and Cooperation (TAC) was adopted by ASEAN members in 1976. Although in Bangkok Declaration the commitment of non-interference enshrined in the preambulatory clause are showing off ASEAN founders' strong political statement on establishing ASEAN with the mentioned principles, the declaration did not bind its constituents. It is even stronger when commitments and statements are being concluded in a form of treaty and it is when TAC was adopted in 1976. The TAC, surely stands as a legally-binding document for its constituents and in the TAC too, the principle of non-interference was formally adopted as one of the fundamental principles of the ASEAN Way. Art. 2(c) of the TAC emphasizes that,

In their relations with one another, the High Contracting Parties shall be guided by the following fundamental principles...non-interference in the internal affairs of one another;

Reflected from art. 2(c) of the TAC, the non-interference principle, has been chosen by ASEAN member states as a pathway in their working method when dealing with issues present within the territory. This article, too, has provided limitation for ASEAN members to step back when there are issues concerning the territory of ASEAN, yet it is existed under a sovereign member of the organization. Though, the fact is in the scope of international relations, a national or domestic issue spread beyond a state's border if there is no attempt or effort to dampen the problem from expanding. The demand to fulfill the obligation of ASEAN members to adhere towards the principles of non-interference should follow these four main aspects; (i) refraining from criticizing the actions of a member government towards its own people, including violation of human rights, and from making the domestic political system of states and the political styles of governments a basis for deciding their membership in ASEAN; (ii) criticizing the actions of states which were deemed to have breached the non-interference principle; (iii) denying recognition, sanctuary, or other forms of support to any rebel group seeking to destabilize or overthrow the government of a neighboring state; (iv) providing political support and material assistance to member states in their campaign against subversive and destabilizing activities [9].

The implications of the fulfillment towards the aspects following the principle of non-interference, limits the behavior of ASEAN to respond towards conflicts, especially

in issues that involve human rights and states' sovereignty. It is extremely difficult for ASEAN members to deal with human rights issues as being hampered by the non-interference principle which prohibits intervention from external parties. The difficulty remains on questioning how the ASEAN Way on non-interference reconciles with 'humanitarianism'. ASEAN does not have strict indicator to categorize to what extent member states' relations breach non-interference. However, what should be noted is non-interference contends with ASEAN's procedural norms, including consultation method or *musyawarah*. In the history of ASEAN, reconciling the principle of non-interference and states' responsiveness towards humanitarian issue remains as a challenge. The story of East Timor has become a witness of ASEAN's dilemma in responding towards the issue. East Timor was brutally invaded by Indonesia in 1974. Around 200 000 people of East Timor died under the Indonesian occupation before it finally gained independent in 1999 [10]. However, during this issue, ASEAN remained silent and generally supporting Indonesia's claims. ASEAN's refusal to comment and remain silent in the face of Indonesia's brutal military campaign against East Timor, has reflected its adherence to the principle of non-interference [11].

For consensus-building preference, the second fundamental principle of the ASEAN Way, also faces challenge when dealing with the issue of sovereignty and humanitarianism. Mechanism for consensus, if to be categorized, goes hand in hand with ASEAN's procedural norms; on how meetings of ASEAN members should be conducted based on informality and consultation. The consensus-building tradition, similar to the principle of non-interference, has become very problematic. In historical context, the term of consensus, if to be understood from ASEAN context, is being adopted from the Javanese tradition of decision-making process, which emphasized that a leader should not act arbitrarily on his behalf only, but make gentle suggestions that the society will follow and being careful to take other participants' views and feelings into consideration (*mufakat*) before taking the last conclusion [12]. In the case of *musyawarah* and *mufakat*, disagreements were not ruled out completely in the decision-making process in traditional villages, however, they would rarely surface [13]. Initially, the idea of consensus is rooted in a very good concept of solidarity. However, if to be dragged into the applications in ASEAN decision-making process, ASEAN is not a traditional village. It is a form of regional integration that unites Southeast Asian countries with their differences and interests.

Now, there are two main phases when consensus-building in ASEAN decision-making process becomes very problematic; at the agenda-setting process and post-decision-making process. The agenda-setting process of ASEAN includes a series of

phases where member-states of ASEAN are suggesting a number of cases to be discussed, however, the chairman of ASEAN shall determine if those cases are eligible to be discussed in ASEAN meetings. It is therefore should be understood that only ASEAN chairman of in that certain year determines what cases or issues should be taken onto the table. However, there is a tendency for ASEAN chairman not to only prioritize agenda that is seen to be essential for its members but cases which would not bring disputes or different views among the member countries or the chairman's own country. The role of ASEAN chairman affects the setting of agendas, by linking different issues to create a package that gives benefits for all the involved stakeholders [14]. Thus it can be assumed that the chairman of ASEAN cannot set any agenda that does not benefits all of ASEAN members, due to the consensus preference. Example can be taken when several proposals on the South China Sea issues in 2011 and 2012 were rejected by the ASEAN Chair, seeing that the proposal made by the Philippines would escalates the territorial dispute and the proposal submitted by Philippines and Vietnam was also rejected because it was seen by the chair as not preferred the initial interests of the Philippines and Vietnam [15]. Derived from the idea of *musyawarah* and *mufakat* that if there are disagreements, the leader should not rule out disagreements completely, therefore, it is similar in ASEAN's case that disagreements on agenda-setting should not be ruled out, due to consensus tradition. This is very problematic because then ASEAN chairman or ASEAN itself cannot conclude such an agreement to have an important issue to be discussed in high-level ASEAN meetings. This is how in agenda-setting ASEAN's consensus tradition overshadows the decision on agenda prioritization or selection.

For the post-decision-making process, certainly, we are assuming that if during the decision-making process, ASEAN member states do not reach consensus. If this case happens, consensus is seen problematic is basically not because there is no resolution or ASEAN cannot do anything about the case, but also ASEAN the limitation lies on if agreement cannot be reached, ASEAN members states agree to disagree and pursue their individual interests [16]. Therefore, if, for instance there are issues disputing the member states of ASEAN, the ASEAN Way encourages its member to cooperate around those contentious issues. This shows an advantages but also limitation at the same time. This is because, by concentrating on cooperation in less difficult areas, ASEAN members tend to leave matters aside when there is consensus among them [17]. We see in this case that if consensus is not reached between ASEAN members, thus, ASEAN cannot do anything. This leads to a problem where all the process from agenda-setting through decision-making process then become useless. Even in other international

organizations, majority rules tend to be adopted in order to avoid delay in making decisions [15]. If rationally, majority rules are being adopted to prevent delay, shall ASEAN not uphold the similar preference due to the organization's tendency to leave problems aside when there is no consensus.

4. The Superiority of the ASEAN Way

Despite the limits of the ASEAN Way explained above, for some, there are also exceptions in which is being seen as benefits or advantages in the sphere of ASEAN decision-making process. One, for example, Professor S. Jayakumar, the former Foreign Minister of Singapore put it as,

“ASEAN countries’ consistent adherence to this principle of non-interference is the key reason why no military conflict has broken out between any two ASEAN countries since the founding of ASEAN.”

Thus, some argue, the so-called peaceful situation in ASEAN is due to the tradition of informality, consultation and consensus mechanism in decision-making process. The success story of ASEAN has been always always correlated on how its member states interact in intra-ASEAN cooperation. The ASEAN Way has been a useful tool functioning as a conflict management through the tradition of consultation and consensus decision-making, by inducing cooperation among its member states [18]. The ASEAN way, with its traditionalist approach, at least have three main advantages to foster cooperation, includes; the negation of relative gains within ASEAN institution, promotion of a limited type of “issue linkage” and creates a cooperative norm and constructing shared interests from the ASEAN Way among its member states that leads to the establishment of a shared identity [18]. The method chosen by ASEAN member states in terms of their interaction resulted in what so called as the “normative power” of ASEAN. This “normative power” of ASEAN has always seen very beneficial for ASEAN member states or those who are cooperating with ASEAN because of the non-confrontational approach of the ASEAN Way does not interfere in any respect. Thus, how ASEAN conducts its intra or inter-ASEAN relations have become a model named as “Asian Diplomacy” [18].

Furthermore, the method frequently referred and falls under the greater umbrella of the ASEAN Way with its dialogue and informal approach includes a technique well-known as ASEAN's constructive engagement. The origin of ASEAN's constructive engagement, was not coming originally from ASEAN. It was originated from Reagan's

policy towards South Africa in 1980s. The aim of the policy is to foster the counterpart's government to change gradually without inducing any sanctions [19]. The principle of constructive engagement was adopted by ASEAN as one of the tools of the ASEAN Way, because ASEAN sees that a formal and sanction-modelled approach is too western-centric. ASEAN, as it has been previously mentioned, is being overshadowed by the experience of colonialism and western imperialism and thus sanction model is seen as a form of western product.

Similar to the case of U.S.-South Africa relationship, the method of constructive engagement was introduced by Thai government in 1991 [20]. This approach was then being adopted by ASEAN because its aim was to engage its member states bilateral or multilaterally by favouring dialogue, opposing the policies of compulsion including sanctions and diplomatic isolation employed by the west. The constructive engagement also, was being employed towards Myanmar in early 1990s, calling for a greater-greater economic and diplomatic ties between ASEAN member states and Burma [21]. This form of engagement is seen as ASEAN's superiority as the constructive engagement has provided a gradual change towards the countries engaged as it is perfectly suited to achieving the goals of increasing regional investment in Myanmar, while repelling criticism from its internal politics [22]. Reflected from this fact, ASEAN's constructive engagement provided a greater ability of ASEAN to engage or open a discussion towards some issues that is inappropriate to be discussed in public. The constructive engagement, also, will bring gradual progress towards the counterpart states. Although this method welcomes a discussion towards internal politics or domestic situation of the counterpart states, due to its respect towards the ASEAN Way of informality, dialogue and consultation, it is not being considered as a breach towards the principle of non-interference or sovereignty.

This method gives a good perception internal or externally, due to its high respect to the idea of state sovereignty and territorial integrity. Furthermore, the engaged states would not see it as a matter of domestic interference because the suggested or recommended pathways delivered by ASEAN would not force or bind the counterpart states. Although being suggested in a certain aspect to induce changes and development, the counterpart states would see it as a matter of assistance and thus, it is only the counterpart states who would only be responsible for their sovereign territory. At last, thus, the ASEAN Way shall be defined as principles or values utilized by ASEAN members which highly emphasize on non-interference, consensus-building and informality yet providing gradual changes in dispute-settlement mechanism without harassing in public.

5. The Historical Context of the Rohingya

When discussing the roots of Rohingya ethnic minority in Myanmar, its history traces back to early 7th century, when Arab Muslim traders settled around the area [23]. It is widely known nowadays, the population of the Rohingya is situated in the Northern Rakhine State of western Myanmar, which was formerly known as Arakan state [23]. The Rakhine region, as where it is located as “frontier culture” of the Muslim and Buddhist communities, had historic kingdoms subjected to Indic influences from the ninth century to 1785, when it was conquered by the Burmans [24]. Actually, the Rohingyas are the descendants of Arab Muslim traders who had come over early in the 7th century [24]. They have similarities in physical, linguistically and cultural towards the South Asians, especially the Bengalis [25] and the Rohingyas, practice Islam unlike the rest of Burmese who are Buddhists.

The term “Rohingya” is very problematic in Myanmar because only the members and the international community utilize this term [24]. The Myanmar population refers them as the Bengali migrants from Bangladesh, however, historically speaking, as the Rohingyas have settled in Rakhine over than centuries, a document indicating their presence in 1799 have referred to the Rohingya population in Myanmar [26] and an 1826 report estimates that 30 % of the population in Rakhine State was Muslim [27]. Therefore, it is nonsense that the Burmese population and Myanmar government always refer the Rohingya as illegal migrants from Bangladesh, because the historical evidence has indicated that they have existed before borders did. However, as a matter of fact that they previously lived happily within the region, in 1942, a large-scale genocide killing around 50,000 Muslims by the Buddhists [28]. This situation prevailed until around 1982 [28]. In around 1962, Ne Win, the military ruler of Burma, promoted nationalistic thought to eternalize his power ruling out democracy from Myanmar and bringing an end to the identity of Rohingya Muslims. And in 1971, when East Pakistan civil war broke out, a large number of Bengalis took refuge in India and simultaneously, around 500 000 Bengali Population tried to take refuge in Burma, which then why the military regime of Myanmar labelled Rohingya as the Bengali refugees [28].

Following this incident, the Myanmar government passed the 1982 Myanmar Citizenship Law and its 1983 procedures, replacing the 1948 Union Citizenship Act and its 1949 procedures, failing to accept the Rohingyas as the citizens of Myanmar [28]. The state-sanctioned discrimination against the Rohingya began when this 1982 Citizenship Law failed to recognize the ethnic group as a ‘national race’ and led to the condition of statelessness [29]. Led by the denial of the state towards the presence

of the Rohingyas, there are now at least nine issues of conflicts experienced by the minority groups, which are denial of citizenship, forced displacement, ban on travel, restriction on education and employment, marriage difficulties, discrimination against culture and religion, refugee problem and massacres [28]. The denial of citizenship was becoming the trigger factor of the conflict as tensions continue to rise afterwards. Systemic discrimination and Anti-Muslim violence occurred in 1978, 1992, 2001, 2009 and 2012 [30]. In 1978, Burma's military junta launched a systematic prosecution against the Rohingyas through campaign which destructs Rohinya's mosques with murder and rape [31], resulting in the exodus of an estimated 200 000 Rohingyas to Bangladesh [30]. The 2012 incident was also similar towards all the incidents happening beforehand. The violence of 2012 has displaced more than 120,000 Rohingyas and other Muslims, attacking homes, mosques and villages, supported by local Arakanese political party operatives, the Buddhist monkhood and ordinary Arakanese, at times directly supported by government security forces [32]. This operation has been called as a "chronic crisis." By the United Nations (UN) official [33].

However, although this violence continues to rise, even in January 2014 Arakanese security forces joined in attacking and killing at least 40 Rohingya, men, women and children [34], the government has turned blind eye to the tragedy and even making it seems like more as a state sponsored crimes against humanity. When Aung San Suu Kyi, Burma leader, was interviewed, her stance regarding the case of Rohingya was unclear. She argued that she did not know if the Rohingyas could be regarded as Burmese citizens, however, in another interview she refused to condemn the violence against the Rohingyas [35]. The treatment towards the Rohingya in Myanmar is still unclear, however, currently, the government of Myanmar has refused to use the term Rohingya to refer the prosecuted Muslim minority. Ms. Suu Kyi argued that the international community should stop using the term "Rohingya" to describe the prosecuted Muslim minority because it is a very emotive term [36]. She argued to, that the term "Rohingya" is not being included in the Citizenship Law and therefore, the term should be avoided due to the controversial term does not support the national reconciliation process and solving problems [37]. It remains to be unclear whether the avoidance of the term "Rohingya" the government of Myanmar is truly to foster reconciliation process between the Buddhist majority and the Muslims, or it is just merely to set aside the topic on the crimes against humanity and shut the issue over. What is certain about the Rohingya issue at the present time is that smuggling of the Rohingya and the impact of the prosecution against the Rohingya ethnic minority has burgeoned over the Southeast Asian region, mainly landing in Indonesia, Malaysia and Thailand [38].

Even though this problem has massively stricken out Myanmar's neighboring countries, ASEAN, the only regional organization unifying Southeast Asian countries has not done anything to deal problem or remained silent.

6. Rohingya and the Limits of the ASEAN Way

As it has been argued previously that if Myanmar is unable to seek solution for its internal problem the obligation moves one step higher. This is especially triggered also by the fact that, the mass influx of the Rohingya into other Southeast Asian region has also concerned the other of ASEAN members' sovereignty. But the answer to question whether ASEAN can do anything related to the case, should be traced back to the ability of the ASEAN Way to address this issue. The ASEAN Way is limited due to the non-interference and consensus-building principles. The non-interference principle of ASEAN has made this organization remain as a normative organization without being able to interfere towards the root of the problem. However, the consensus-building preference has also refrained ASEAN from opening the discussion and find tangible solution towards this problem. As we are discussing the limits of the ASEAN Way in addressing the Rohingya crisis, this section will remain focus on the inability of ASEAN when dealing with the Rohingya problem.

The non-interference principle refrained ASEAN on making the Rohingya Crisis as one of ASEAN's priorities. ASEAN's non-interference principle is refraining the organization from devising any strong policy that can prevent a member from harming its own people [39]. One major example can be seen when in 2014, Myanmar has taken advantage of ASEAN's chairmanship on the principle of non-interference to put aside the issue of aside of the regional high level meeting. The 24th ASEAN Summit, which took place in Nya U U, was not successful in opening discussion over the case of Rohingya humanitarian crisis, though, the mass atrocities towards the Rohingyas have reappeared massively since 2012. U Aung Htoo, the deputy director general of Myanmar's Ministry of Foreign Affairs put a justification that ASEAN has a non-interference agreement over the internal affairs of other countries [40]. In relation to the inability of ASEAN's issues prioritization, the case of Rohingya goes in line of what Acharya argued that the non-interference principle disallows ASEAN members to criticize the actions of a member government towards its own people, including human rights violations [9].

ASEAN Way's non-interference principle, become hindrance for its member states on making solidarity as prioritization. This phenomenon can be seen on how ASEAN

put aside justice than order, reflected from the case of Rohingya. Ideally, ASEAN, as an international society in Southeast Asia, comprised of Southeast Asian states, must put aside their individual interest to establish a just society. If we reflect the case of the Rohingya in Myanmar, indeed, the Rohingya needs humanitarian intervention. However, the term of 'intervention' is regarded as a taboo term among ASEAN states. As the English School Solidarism suggests states to accept the practice of unilateral military intervention as legitimate response to massive violations of human rights by a regime against the people it governs [41], however, the principle of non-interference' has limited the access of ASEAN to call for a united humanitarian intervention as a form of response towards the Rohingya Crisis. This phenomenon experienced by the ASEAN states, have also been triggered by the fact that they still adopt the traditional concept of sovereignty as explained previously. Though, actually, the world has moved one step forward, acknowledging the concept of "sovereignty as responsibility".

ASEAN, especially, in regards to sensitive issues, will try not to open discussion in public. This is also derived by the fact that sovereignty as their "fixed price". Meanwhile, the concept of "sovereignty as responsibility" has also emerged, fading away the traditional concept of sovereignty. In the wider international society, the UN, in support for humanitarian intervention has acknowledged humanitarian intervention interpreting Chapter VII of the UN Charter in maintaining international peace and security, where this argument re-characterized the notion of sovereignty in terms of normative principles [42]. Meanwhile, ASEAN is still too far away from this new conception of sovereignty. Though, this Rohingya problem should be dealt by ASEAN states, because there was already an attempt made in order to internationalize the issue of Rohingya in the wider international society through the UN Security Council, however, the UN meeting was not seen positively seeing that it is an internal matter [43]. Thus, the duty has been given back to ASEAN, yet, ASEAN is paralyzed by its Way on dealing with issue without being able to react towards this problem.

Furthermore, another limit of the ASEAN Way lies on the consensus-building preference. The consensus-building's limitation lies on the process of agenda-setting and policy-making process. Learning from the past experience when ASEAN could not produce any communiqué during the sensitive discussion over South China Sea in 2012. However, this cannot be used as moral justification to prevent discussion against Myanmar's crimes against humanity. It is funny to see ASEAN is unhappy to see any conflict to emerge in its territory, but it does not want ASEAN to have an intervention with it, therefore precedent cannot be made. Prevented by consensus policy of ASEAN to take actions, one of the weaknesses of ASEAN lies on how the regional organization

tends to always leave problems aside when there is no consensus among its members [17]. Due to this limitation, the international community perceived that the principle upheld by the organization as an “emergency exit” to turn blind eye on member states’ human rights abuses [44].

In accordance to the limit of the ASEAN Way in terms of non-interference and consensus-building preference, the ASEAN Intergovernmental Commission on Human Rights (AICHR), which also exists under ASEAN was unable to respond towards the case of intentional humanitarian crisis. The AICHR remains to be a normative regional body in ASEAN because it cannot act in accordance of its mandate to promote and protect human rights and fundamental freedoms of the peoples of ASEAN due to the principle of non-interference as how it is being adopted under the ASEAN Way. The limitation of this body to act in accordance of its mandate to promote and protect human rights value in Southeast Asia shows that there is a huge gap between the adoption of human rights value by ASEAN and its institutional implication by the birth of human rights institution under ASEAN [45]. AICHR as how it was established and purposed to be a human rights legal institution under ASEAN, should hold imperative role and become prominent actor regarding the human rights issues in Southeast Asia. However, sadly, there are no significant steps taken by this body in order to eliminate or reduce the act of human rights abuses within the region, especially in the case of Rohingya. In fact, ASEAN’s strong position to prefer sovereignty at the front line have been argued as a form of maintaining international system in an old model of real politics tradition [46]. Arguably, in terms of the concrete progress of human rights development made by AICHR, this body has been haunted by traditional problems that disrupt the decision-making process of this body. The two main fundamental issues that inhibit this commission from running effectively are the principle of non-interference and consensus building in decision-making [47]. Reflected from the statement before, it can be assumed and concluded that in terms of decision-making process regarding the crimes against humanity in Myanmar, two of these principles also playing a major role in the productivity of this organization.

The dilemma remains to be within holding non-interference principle and upholding human rights values. Due to this dilemma, ASEAN member states will tend to use the ASEAN norms to refuse any regional or international intervention related to human rights [48]. This is the most obstacle faced by the AICHR. Non-interference is one of the ASEAN values that highly respected by ASEAN member states since the formation of this regional organization. However, if AICHR did not do something significant towards the humanitarian crisis in Myanmar, there is a little chance for this commission to

maintain its legitimacy [49]. Therefore, there is a necessity to have a renewal on the decision-making process in ASEAN meeting and especially in AICHR, not in the sense to abandon it, but to strengthen the mandate of this commission. This is because within the context of normative way which reflected from the 'ASEAN Way', the principle of non-interference and consensus-building constitute a massive obstacle in enhancing human rights norm within the region, as it creates shield for rights-abusing governments from external criticism, investigation and monitoring [50]. The AICHR should not focus only on normative ways in handling human rights issues in Southeast Asia. When it comes to human rights issue whether there is human rights violation, abuses, or even crimes against humanity, if it becomes the mandate of this organization then the duty should be executed, without heavily considering the dilemma that has been faced by the past, especially when ASEAN has turned into a new phase of people-centered ASEAN.

7. Rohingya and ASEAN's Constructive Engagement

If ASEAN is being questioned whether the organization has done anything or not, indeed, ASEAN and its members are still making least progress responding to the case of Rohingya. The method chosen by ASEAN and its members have actually started since the beginning when ASEAN is encouraging Myanmar to become the member of ASEAN as explained in second section of this paper. Indonesia, for instance, is also one of ASEAN members which follows ASEAN's constructive engagement to open dialogue with Myanmar's government bilaterally [51]. Furthermore, in response towards the case of Rohingya massacre in 2012, the government of Indonesia has sent assistance in the form of aid for the Rohingyas [52].

From the never ending action conducted by ASEAN and its members from time to time, changes in Myanmar do occur. The country is now welcoming inputs and insights from the international community[53]. The treatment and action which has been done and going on currently by ASEAN and its members towards Myanmar, is indeed not only due to the Rohingya massacre. ASEAN's constructive engagement as, it has been explained, has started from early 1991, when the organization was trying to engage Myanmar in order to become ASEAN's member. The constructive engagement, offers bilateral and multilateral approach through dialogue and consultation [54]. However, this policy of ASEAN does not offer major change on Myanmar. Its advantages are circling around on respecting the principle of non-interference and consultation, without harassing or threatening Myanmar in public, yet changes on

Myanmar domestic policy remains to be very slow. Related to human rights development in Myanmar since ASEAN adopted the policy of constructive engagement, and until now, there are little changes, especially on the issue of Rohingya. It is true that Myanmar has turned to be more open towards international community. The development made by ASEAN's constructive engagement is also seen. For instance, one year after the constructive engagement was introduced by ASEAN towards the government of Myanmar, in order to become ASEAN's member, the Burmese regime allowed the repatriation of thousands of Muslim Rohingyas refugees from Bangladesh, although it did nothing to address the regime mistreatment towards the Rohingyas [55]. A little change on Myanmar's policy a year after the policy was being introduced.

However, since 1991 to 2008, it can be concluded that there is no significant change, until Myanmar was struck by Nargis Cyclone in 2008, which opened an opportunity for ASEAN to assist Myanmar through its constructive engagement approach. ASEAN's former Secretary-General Dr. Surin Pitsuwan, called upon all member states of ASEAN to act towards the urgency related to the strike of Cyclone Nargis and provide assistance to the victims of the cyclone. Truly, during this occasion ASEAN played a leading role in responding to a disaster type of humanitarian crisis, as it is the first play made by ASEAN offering humanitarian mission and Myanmar was at last opened to welcome. For Surin Pitsuwan, the disaster has 'baptised' ASEAN, as Nargis was the first humanitarian mission that ASEAN had played a leading role in coordinating its member states as well as the international community to respond, and it also left an important precedent role for ASEAN in crisis management within the region [56].

The humanitarian mission to Myanmar was through ASEAN's constructive engagement and did not relate to the Rohingya, as the mission was only focusing on disaster thus in 2008, Myanmar still refused to acknowledge Rohingya crisis as their problem [57]. Not until in 2009, when Indonesia had bilateral talk with Myanmar, Prime Minister Thein Sein finally acknowledge that he gives great attention to this issue [58]. He claimed that, "in principle the Myanmar is willing to accept the Rohingyas back if they can prove they are indeed the people of Myanmar". Reflected from this occasion, it needs more than a decade for Myanmar to acknowledge Rohingya as the country's problem. Bilateral talk, through constructive engagement, has given a little impact on changing Myanmar's blind eyes to open and recognized the problem as theirs. Another step has been seen in 2016 from ASEAN's constructive engagement, that, Aung San Suu Kyi, Myanmar's Leader, demanded the international community to stop referring the Muslim prosecuted in Myanmar by the term "Rohingya" [59]. It is not clear what

is her intention on this, however, she claimed that by stop referring the prosecuted Muslims as Rohingya, the communal tension will reduce step by step.

Furthermore, ASEAN as the initial foreign partner, which initiated international cooperation to be established with Myanmar in 1990s, has made Myanmar more open towards international cooperation and assistance. Due to what ASEAN has invested towards Myanmar through constructive engagement, now, Myanmar, for the first time, facilitated discussion and investigation to respond towards the Rakhine massacre [60]. This panel, was not directly established under the name of "Rohingya" but mentioned only "complex and delicate issues in the Rakhine state" [61]. This is a breakthrough for Myanmar to finally open a discussion in regards to Rohingya problem. Following the creation of this panel to investigate the complex situation in Rakhine, at last, Myanmar is also becoming more open towards its Southeast Asian counterparts. Aung San Suu Kyi, at the Inter-Parliamentary Assembly of ASEAN on September 30, 2016, finally asked "constructive support" from Myanmar's regional neighbors to resolve the crisis in the country's troubled western Rakhine state [62]. To conclude, we now see the journey of ASEAN's "constructive engagement" in the last 25 years. There are three phases when at first Myanmar denied Rohingya as their problem, began to acknowledge Rohingya as one of the government's concern, and to "more-or-less" respond towards this problem and asked for ASEAN's support in resolving this problem. ASEAN's constructive engagement, indeed, resulting and contributing in a little change of Myanmar's policy towards Rohingya.

8. Rohingya Paralyzed the ASEAN Way?

As it has been mentioned earlier in the first section of this research, the ability of ASEAN to respond towards conflicts existed within its region is depending on the nature of the conflict. It is no more a secret that ASEAN is always seen to be frozen when dealing with sensitive issue. And throughout the whole the analyses of this research it can be concluded there are several triggering factors of the nature of issue that hinders the ability of ASEAN to respond, or shall it be commonly known as sensitive issues. Firstly, human rights issue as the nature of conflict is considered as a very sensitive issue in ASEAN region. Not exclusively the case of Rohingya, however, all human rights issue in ASEAN is seen to be left behind by the organization. However, as it has been mentioned earlier, that the case of Rohingya has its own uniqueness and it lies on the stateless status of the refugees, which is why ASEAN should be directing its eyes towards the massacres more.

Secondly, another paralyzing factor of the nature of the Rohingya case towards the ASEAN Way to settle conflict, lies on the actor engage with the conflict. In this case, ASEAN-Myanmar is always a very sensitive and challenging issue for ASEAN since the very first time Myanmar was becoming the member of ASEAN. Not exclusive on the Rohingya, but domestic human rights situation in Myanmar has always become a major concern for ASEAN since the beginning. Although the Charter of ASEAN sets both, the principle of non-interference in the internal affairs of member-states and that of respect for fundamental freedoms and the promotion and protection of human rights, both directs towards Myanmar as sensitive issues [63]. The situation in Myanmar always puts concern and pressuring ASEAN to find answer on how to reconcile the principle of non-interference with internal problems of its member-states, particularly problems related to human rights [63]. This reflects how since early 21st century Myanmar always pose challenges towards ASEAN.

Lastly, the nature of refugee as an issue in Southeast Asia itself, is perceived as a very sensitive issue. A statement made by Dr. Surin Pitsuwan during the boat crisis period, he noted that, there is a lot of sensitivity, prejudices and mutual suspicion that make it difficult for any entity to do something about this situation [64]. Refugee crisis is identical with border, asylum-seeking and migration issue, which is to some extent, would pose a threat towards a country's sovereignty and will lead a country to act defensively.

9. Conclusions

This research finally contributed in analyzing the limits and possibilities of the ASEAN Way, its implication towards the Rohingya massacre, and the humanitarian consequences. This research finds that the non-interference principle, was adopted not because the founding fathers of ASEAN shared similar norm to establish ASEAN. However, it is more likely a shadow of the past, due to the experience of Southeast Asian countries towards colonialism and thus emerged as collective norm of ASEAN states. The non-interference principle, which highly emphasizes on the basic or traditional concept of sovereignty, is not suitable to be exercised in the 21st century as the world and international system has changed. This is because, the old or traditional concept of sovereignty does not recognize the notion of "sovereignty as responsibility". Thus, the ASEAN's non-interference principle is limiting ASEAN and its member states to act, have a strong position, and prioritize the case of Rohingya human rights violation as ASEAN's priority, although, ASEAN has already shown its commitment towards human

rights, namely through, the adoption of ASEAN Political-Security Community (APSC), ASEAN Human Rights Declaration and the establishment of AICHR.

Secondly, not only the non-interference principle, however, the consensus-building preference of ASEAN has also prevented ASEAN to open a discussion with regards to Rohingya issue. ASEAN meetings often fail to open discussion when the issue does not benefit all ASEAN members or too sensitive to be discussed in public sphere though it is a crucial issue. The issue of consensus-building, thus, become very problematic because the there has been no meeting specifically to address the Rohingya issue. As a form of result, ASEAN members had to agree to disagree to pursue their individual methods and leave things behind.

Indonesia, for example, has shown its concern towards the issue of Rohingya by constantly reaching the government of Myanmar through ASEAN's tool of constructive engagement. The result of constructive engagement is clear, that Myanmar is becoming more open towards suggestion and feedback. Within more than two decades since the inception of ASEAN's constructive engagement for Myanmar, there are at least three changes of development of Myanmar's policy towards Rohingya; from the denial that Rohingya was not Myanmar's problem, becoming to acknowledging Rohingya as one of Myanmar's problem and finally responding towards the massacre. Therefore, this research findings, acknowledges that the ASEAN Way is working as there has been progress, however it is now enough as it takes a very long time in comparison the the numbers of Rohinya died in Myanmar. Lastly, the ASEAN Way of non-interference and consensus-building preference has become a hindrance for ASEAN to do something bigger, influential and most importantly, maintaining legitimacy of the organization.

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