CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

Edited by Dominic McGoldrick

I. The ASEAN Charter
II. The Arrest and Impending Trial of Radovan Karadžić
III. The 2008 Cluster Munitions Convention: Stepping Outside the CCW Framework (Again)

I. THE ASEAN CHARTER

A. Introduction

For 40 years the Association of Southeast Asia Nations (ASEAN), an intergovernmental organization of 10 Member States, has had a sort of double life in the international system: both with the appearance of being an international organization and the reality of not acting like an international organization. It continues to suffer from a fundamental problem of perception.[1] However, it has now tried to bring appearance and reality closer together with the adoption in treaty form of the ASEAN Charter in 2007, an important document that seeks to establish a legal and institutional framework for the Association[2] This note surveys the Charter's key provisions and offers some remarks about its broader strategic imperatives.

B. Asean As Intergovernmental Organization

1. Membership

ASEAN was founded on 8 August 1967.[3] The founding Member States included Indonesia, Philippines, Malaysia, Singapore and Thailand. The Association was first enlarged after Brunei was admitted on 7 January 1984, after attaining independence from the United Kingdom.[4] That there are no permanent friends or foes in international relations was reaffirmed when Vietnam became an ASEAN member on 28 July 1995,

[1] See Tommy Koh, 'ASEAN at Forty: Perception and Reality' in *Regional Outlook (Southeast Asia 2008–2009)*, (Singapore: ISEAS Publishing, 2008) at 8.

[2] The Charter was signed by the heads of government/State from the 10 ASEAN member States on 20 November 2007 during the 13th ASEAN Summit in Singapore. See 'Landmark Document Has Come a Long Way', *The Straits Times* (Singapore), 20 November 2007, at 6.

[3] Also see http://www.aseansec.org/64.htm (accessed 5 September 2008).

[4] See http://www.aseansec.org/1219.htm (accessed 23 August 2008).

[*ICLQ* vol 58, January 2009 pp 197–212] doi:10.1017/S0020589308000882

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press

despite a decade of antagonisms.[5] Laos and Myanmar became Member States on 23 July 1997. Cambodia was the last to join on 30 April 1999.[6]

2. Stabilising Southeast Asia, facilitating regional stability

ASEAN's purpose fundamentally lies in its ability to reduce intra-mural conflict within Southeast Asian States and also in its strategic role as a facilitator of regional stability within East Asia. The former was and is the Association's primary accomplishment. One should recall the strident claims on Northern Borneo (Sabah) made by the Philippines against newly independent Malaysia in 1962.[7] Noteworthy, too, are the tensions generated by confrontation between Indonesia and Malaysia, as well as the fear of tiny Singapore in that climate.[8] Moreover, as late as November 1977, Malaysia had challenged Brunei's international status with belligerence before the Fourth Committee at the UN General Assembly.[9]

Major powers are also jockeying for influence in Southeast Asia. This region bestrides the South China Sea and Pacific Ocean, where major powers such as India, China, Japan and the United States (US) will assert their commercial and military interests. ASEAN is of geopolitical significance to them because great powers, as Condoleeza Rice rightly noted, 'do not just mind their own business'.[10] It is imperative that the Association is able to act in a reasonably cohesive manner by serving as a platform to accommodate the (sometimes divergent) interests of these major powers in a reliable, relevant and fair way.[11] These observations form the wider context on which the Charter, by consolidating ASEAN on a legal basis, could enhance the Association's 'catalytic role' in regional security.[12]

3. Consensus, consultation and compromise: The 'ASEAN Way'

It is worth discussing ASEAN's quiet diplomacy in some detail because it remains central to the Association's modus operandi. The 'ASEAN Way', as it is known in the

[5] ASEAN took a tough stand against Vietnam's invasion of Cambodia (formerly Democratic Kampuchea) on 25 December 1978 especially at the United Nations (UN) from 1978–1989. Especially instructive, then, was Vietnam's accession of the Treaty of Amity and Cooperation by Vietnam in July 1992, a treaty which it had rejected during the Cambodia conflict. See generally Ralf Emmers, *Cooperative Security and the Balance of Power in ASEAN and the ARF* (London: RoutledgeCurzon, 2003) at 20.

[6] See generally Rodolfo C Severino, Southeast Asia in Search of an ASEAN Community (Insights from the former ASEAN Secretary-General), (Singapore: ISEAS Publishing, 2006) at 57–67.

[7] See Lela Garner Noble, *Philippine Policy Toward Sabah: A Claim to Independence*, (Tucson: University of Arizona Press, 1977).

[8] Generally see Michael Leifer, *Singapore's Foreign Policy* (*Coping with Vulnerability*), (London: Routledge, 2000).

[9] Generally see Michael Leifer, 'Decolonisation and International Status: The Experience of Brunei', *International Affairs* (*Royal Institute of International Affairs, 1944–*) Vol 54, No 2 (April 1978) at 240.

[10] Condoleezza Rice, 'Promoting the National Interest', *Foreign Affairs*, Vol 79, No 1 (January/February 2000) 45 at 49.

[11] 'ASEAN: Still Attractive at 40', *Straits Times*, 8 August 2007, at 24.

[12] Surin Pitsuwan, 'A New Miracle for Tigers and Dragons' in *The World in 2008* (*Economist*), (Plymouth, St Ives PLC, 2007) at 94.

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press

vernacular, is characterized by an informal, personal working style. Policymakers and politicians have evolved habits of compromise, consensus and consultation. Consensus in decision-making has a protean quality. Consensus does not necessarily require unanimity.[13] Explicit consent to a decision is not necessary for consensus to be forged, although the latter might be blocked if one or more ASEAN members felt the decision would militate against their national interests. Consensus on a decision can also be reached despite misgivings from one or more member States.[14] Other international or regional organizations such as the UN and European Union (EU) also operate on the basis of consensus. Where they differ from ASEAN is that these organizations have formal voting or procedural mechanisms to break the impasse, if consensus fails.[15]

Context is important. ASEAN is a set of States noted more for its ethnic, religious and political heterogeneity than its homogeneity. The 'ASEAN Way' has helped to increase the comfort level between founding members, who had been kept apart for over a century by different colonial spheres of influence.[16] Its relevance is undiminished today. The older members now face the challenge of raising the comfort level with the newer members—Cambodia, Myanmar, Laos and Vietnam (CMLV).[17]

4. The 'ASEAN Way': rule against non-use of force & non-interference in internal affairs

Sovereignty in its internal aspect refers to the State as the ultimate authority that enacts and enforces law, to the exclusion of other competing sources of authority. It is in this sense that UN General Assembly Resolution 2625 provides a right for sovereign States to define their plural identities, such as their political, social and economic systems, in a manner of their choice.[18] For members of ASEAN sovereignty and sovereign equality, from which legal rules such as non-intervention flow from, continue to represent the 'basic constitutional doctrine' of international law.[19] This is the deeper basis of consensus, compromise and consultation in decision-making by ASEAN's members. It is precisely because individual ASEAN States, such as Singapore and Indonesia, are materially and physically unequal that Member States take advantage of

[13] But many ASEAN decisions are in practice reached on the basis of 'genuine unanimity'. See Severino, above, n 6, at p 34.

[14] In this respect Rodolfo Severino, the former Secretary-General of ASEAN, explains that consensus is reached when 'enough members support it—six, seven, eight or nine, no document specifies how many . . .', ibid.

[15] Generally see Henry G Schermers, *International Institutional Law: Unity Within Diversity* (4th ed), (Netherlands: Brill, 2004).

[16] Lee Kuan Yew, *From Third World to First* (*The Singapore Story 1965–2000*), (Singapore: Times Editions, 2000) at 371. I refer to comfort level in the sense that ASEAN leaders still attach importance to cultivating personal relations through elite diplomacy by conducting, for example, '*empat mata*' meetings (Bahasa expression for 'four-eyes') where leaders meet preferably without a formal agenda or interlocutors. To this extent, comfort level is a goal in itself and anterior to the expression of confidence in either bilateral or multilateral relations between ASEAN members.

[17] See Hiro Katsumata, 'Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the 'ASEAN Way'', *Contemporary Southeast Asia*, Vol 25, Number 1, April 2003, 104 at 117.

[18] UNGA Resolution 2625 (XXV): Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (1970).

[19] Ian Brownlie, *Principles of International Law*, (6th ed), (Oxford, OUP, 2003) at 287.

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press

and defend their sovereign equalities under international law. The 'ASEAN Way' demonstrates the welding of global legal doctrine to 'local' conditions, in which decisions reached by consensus are indicative of the sovereign equality and hence extensive consultations, as well as comfort level, between Member States.

The legal rule against forcible and non-forcible intervention (interference in the internal affairs of a sovereign State[20]) is a fundamental rule of international law. This is why ASEAN's Treaty of Amity and Cooperation (TAC) of 1976 is an important document.[21] The TAC, which legally binds its signatories against both forcible and non-forcible intervention,[22] was unusual and striking because ASEAN members had preferred loose and informal agreements to legally binding documents, especially during the first decade of the Association's founding.

The form of the TAC, as a binding document which requires ratification,[23] represents a firm endorsement of ASEAN's commitment to the importance of the rule against non-intervention. This rule provides some legal protection for the plural identities of Southeast Asian States, which are extremely useful for small States such as Singapore and Brunei, in an anarchical system of States in international politics. It was not a coincidence that the TAC was signed on 24 February 1976. The communist victory and reunification of Vietnam in 1975 had already unsettled ASEAN. This development rallied Member States and gave the Association a sense of purpose which had hitherto been desultory. A code of conduct, an 'international society' with common interests, was established to regulate intra-mural relations and regional order for Southeast Asia.[24]

These observations do not suggest that intervention, either forcible or non-forcible, has not occurred in Southeast Asia.[25] What needs emphasis, however, is that ASEAN members continue to regard the rule of non-intervention as fundamentally important to their national interests.[26] Although the interpretation of this rule has become less stringent, for example, in relation to human rights for States who participate in the Conference/Organization of Security and Cooperation in Europe (OSCE/CSCE) process, this is not a valid reason for ASEAN to follow suit.[27] ASEAN's embrace of global legal doctrine to its local conditions must ultimately be consistent with the national interests of the individual Member States.

[20] UNGA Resolution 2625 makes it clear that non-intervention is broader than armed intervention and includes 'the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.' See generally Lori Fisler Damrosch, 'Politics Across Borders: Non-Intervention and Non-forcible Influence Over Domestic Affairs', 83 (1989) *AJIL* 1.

[21] Available at http://www.aseansec.org/1217.htm (accessed 5 September 2008).

[22] See Arts 1 and 2, TAC, ibid.

[23] Arts 18 and 19, TAC.

[24] See generally Emmers, above, n 5, at 87. On 'international society' by the 'English School', which argues that State behaviour must be understood in the context of norms, rules (including international law) and institutions, see generally Hedley Bull, *The Anarchical Society* (*A Study of Order in World Politics, 3rd ed*), (London: Palgrave, 2002).

[25] Indonesia's annexation of East Timor as the former's province in July 1976 and Vietnam's invasion of Cambodia in December 1978 are examples.

[26] But cf Tan Lay Hong, 'Will ASEAN's Economic Integration Progress Beyond a Free Trade Area' (2004) 53 *ICLQ* 935 at 949 and 967; Yongwook Ryu, 'The Asian Financial Crisis and ASEAN's Concept of Security', S *Rajaratnam School of International Studies* (RSIS) *Working Papers*, No 148, 2 January 2008, available at http://www.rsis.edu.sg/publications/workingpapers.asp?selYear=2008 (accessed 30 March 2008).

[27] See Katsumata, above, n 17, at 110.

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press

5. Need for reforms

As ASEAN matures, its preference for loose arrangements over legally binding documents has created practical problems. The measured pace of institutional building, itself indicative of the consensual approach in which such decisions are made, has struggled to keep up with the nature and pace of integration (especially its economic agenda) within the Association.

The economic power of rising powers such as India and China in the region, of which they have become strong competitors for foreign direct investment inflow, forced ASEAN to establish a single market and production base.[28] The latter necessitates streamlining its institutions such as giving the ASEAN Secretariat more responsibilities to cope with deeper regional integration. It was not until 1976 that an ASEAN Secretariat was established in Jakarta. In 1992, the Secretariat was augmented to its pre-Charter form in order to coordinate and implement ASEAN activities such as the ASEAN Free Trade Agreement (AFTA).[29]

Another basic issue was the uncertainty surrounding ASEAN's legal personality under international law. Neither the Bangkok Declaration of 1967[30] nor subsequent instruments such as the TAC clarified this issue as these documents did not expressly provide for ASEAN's legal personality.[31]

C. Asean Charter: some key provisions[32]

1. General

The Charter must be ratified by all member States.[33] Singapore, as Chairman of the 13th Summit, has expressed cautious optimism about the progress of the Charter's ratification.[34] By concluding a legally binding agreement, ASEAN's leaders have signalled their commitment to a catalogue of legal obligations and rights. However, the Charter's design elements are correlated, that is to say, its substantive (deep or shallow obligations), structural (binding or non-binding) and review (strong or weak

[28] See Declaration on the ASEAN Economic Community Blueprint (2007), at http://www.aseansec.org/21081.htm (accessed 5 September 2008).

[29] Severino, above, n 6, at 20–23.

[30] A non-binding document, the Bangkok Declaration is nevertheless ASEAN's founding document. Available at http://www.aseansec.org/1212.htm (accessed 5 September 2008).

[31] Other instruments such as the Zone of Peace, Freedom and Neutrality Declaration (ZOPFAN, 1971) or Treaty on the Southeast Asia Nuclear Weapon-Free Zone (SEANWFZ, 1995) also did not provide for ASEAN's legal personality, at http://www.aseansec.org/1215.htm and http://www.aseansec.org/2082.htm respectively (accessed 5 September 2008).

[32] Unless otherwise stated, all article numbers in this note refer to the ASEAN Charter. Full text of the Charter is available at http://www.aseansec.org/21069.pdf (accessed 5 September 2008).

[33] Art 47. Art 47(4) provides that the Charter comes into force when the 10th instrument of ratification (all existing members) is deposited with the Secretary-General of ASEAN. As of 8 September 2008, only the Philippines, Thailand and Indonesia have not ratified the Charter, see http://www.aseansec.org/21762.htm (accessed 8 September 2008).

[34] See 'ASEAN Charter "makes each member that bit stronger"', *Straits Times*, 18 July 2008, at H8.

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press

enforcement) elements are closely linked.[35] We must expect trade-offs in one or more of these elements when a document is legally binding.[36]

Also the Charter has been carefully drafted to preserve the sovereignty of each member State as the ultimate source of authority that enacts and enforces laws within their territorially defined units. The ASEAN Charter is designed to be respectful of sovereignty and sovereign equality under international law.[37]

2. Consolidating & streamlining ASEAN institutions

a) Organs

Article 7 states that the ASEAN Summit shall be the Association's supreme policy-making body[38] and will comprise its heads of state or governments.[39] ASEAN's leaders are empowered to 'deliberate, provide policy guidance and take decisions on key (ASEAN) issues'.[40] Crucially, the Summit is the final arbiter on matters related to the failure to reach a consensus and settlement of disputes between member States.[41] Article 7(3)(a) stipulates that Summit meetings shall be held twice annually.[42] Since its founding in 1967, ASEAN Summits were only held in 1976, 1977 and 1987. Thereafter ASEAN leaders experimented with a system of 'formal' and 'informal' meetings and it was not until the 7th ASEAN Summit in 2001 that this tenuous distinction was abandoned.[43]

Noteworthy, too, is the facilitative role of the ASEAN Coordinating Council (comprising ASEAN foreign ministers) under Article 8. Some of this Council's responsibilities, which must meet at least twice a year,[44] include undertaking 'other tasks' or 'such functions as may be assigned by the ASEAN Summit'[45] and coordination with the ASEAN Community Councils 'to enhance policy coherence, efficiency and co-operation among them'.[46]

In relation to the ASEAN Community Council, Article 9(1) states that it shall comprise the ASEAN Political-Security Community Council, ASEAN Economic Community Council and ASEAN Socio-Cultural Community Council. These councils will meet at least twice a year[47] and are tasked (among other things) to ensure implementation of relevant decisions by the ASEAN Summit,[48] as well as coordinate work of different sectors under their purview and issues which cut across other Community Councils.[49]

Finally, it is also significant that each Member State must now appoint a Permanent Representative (with the rank of Ambassador) to be based in Jakarta.[50] This

[35] On the relationship between the design elements of international agreements, see Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99 *AJIL* 581.

[36] Ibid, at 608. For instance, pursuant to Art 25, the interpretation of the Charter will not be resolved by a judicial organ (such as the European Court of Justice) but through 'appropriate dispute settlement mechanisms, including arbitration, (which) shall be established . . .'.

[37] Also see Art 5 which stipulates 'Member States shall have equal rights and obligations under this Charter'.

[38] Art 7(2)(a).

[39] Art 7(1).

[40] Art 7(2)b).

[41] Art 7(2)(e).

[42] Under Art 31(2)(a), the ASEAN Chairmanship, which is rotational (Art 31(1)), will host the Summit.

[43] Severino, above, n 6, at 19.

[44] Art 8(1).

[45] Art 8(2)(h).

[46] Art 8(2)(c).

[47] Art 9(5).

[48] Art 9(4)(a).

[49] Art 9(4)(b).

[50] Art 12(1).

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press

Committee of Permanent Representatives will serve as a vital interface between the various national ASEAN secretariats, the Community Council and the Coordinating Council.

b) Legal personality

An international organization's legal personality affects its capacity under international law to enter into relations with other organizations or States and also their competence to conclude treaties.[51] Article 3 expressly confers legal personality on ASEAN, which will help to buttress external perceptions of ASEAN as a political actor on the international plane even though the precise nature of its legal character might still be unclear.[52] This is true even if one accepts the view that the Charter (when it enters into force) does not radically alter the substance of ASEAN's competence under international law.[53] A former ASEAN Secretary-General has described the 'real handicap' of persuading multinational corporations to contribute funding support to ASEAN projects since the Association, which apparently lacked legal personality, could not claim tax exemption status as a non-profit organization in the domestic laws of the Member States.[54]

c) Conclusion of treaties/agreements

An international organization's legal personality indicates that it is a valid subject of international law and is capable of assuming its rights and obligations. But it is the constituent instrument, ie ASEAN's Charter, on which its legal competence to conclude treaties with either States or other international organizations rests, that is critical. There is some force in the observation that international personality is not so much a status as a capacity: it matters less what you claim than what you do (or cannot do) at the international level.[55]

In its conduct of external relations, the Association's 'procedures for concluding such (international) agreements shall be prescribed by the ASEAN Coordinating Council in consultation with the ASEAN Community Councils.'[56] Three remarks are noteworthy. First, whereas the EU Commission may within its area of competence represent and act for the Union[57] in trade negotiations, the ASEAN Charter pointedly

[51] See Brownlie, above, n 19, at 57.

[52] A supplementary protocol will be drafted to clarify the ambit of what ASEAN 'can or cannot do with its legal personality', see media release at http://www.aseansec.org/21085.htm. For the debate on whether ASEAN already had legal personality on the basis of subsequent practice or implied powers, see Wang Jiang Yu, 'International Legal Personality of ASEAN and the Legal Nature of the China-ASEAN Free Trade Agreement' in *China-ASEAN Relations: Economic and Legal Dimensions* (John Wong, Zou Keyuan and Zeng Huaquan, eds), (Singapore: World Scientific, 2006), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=893764; Simon Chesterman, 'Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person' at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113612. (accessed 5 September 2008).

[53] For this view, see Chesterman, ibid.

[54] 'ASEAN and the 3 L's: Leaders, Laymen and Lawyers' at http://www.aseansec.org/17356.htm (accessed 5 September 2008).

[55] See Chesterman, above, n 52.

[56] Chapter XII, Art 41(7).

[57] Articles 133 and 300, European Community (EC) Treaty. But its competence to conclude international agreements is very limited, as indicated in the case of *France v Commission* [1994] ECR I – 3641.

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press

does not include these specific powers for its institutions, such as the ASEAN Secretariat.

Secondly, the ASEAN Secretary-General has in practice concluded agreements on behalf of the Association. For example, a Memorandum of Understanding (MOU) which was concluded between the governments of ASEAN member States and China on cultural cooperation was signed on behalf of ASEAN by the Secretary-General and a Chinese representative on 3 August 2005.[58] This pragmatic approach is unlikely to change after the Charter is ratified and in force even though it is not explicitly stated in the document.[59] The ASEAN Eminent Persons Group (EPG), which was tasked to make recommendations for the Charter,[60] confirmed this ad hoc practice of allowing the ASEAN Secretariat to conclude 'non-sensitive' agreements on behalf of the Association.[61] Though it reflected the EPG's desire for a stronger Secretariat, this recommendation, which would only institutionalize past practice, was not directly included in the Charter. In this sense, the trade-off in substance (empowering the Secretariat) for form (a legally binding Charter) should be noted.

Thirdly, there are no clear provisions in the Charter, especially in Articles 11[62] or 41,[63] on the manner in which important agreements such as the China-ASEAN Free Trade Agreement (CAFTA) would be concluded in future.[64] There are tentative signs in the framework agreement (FA) that CAFTA might be a collection of bilateral agreements concluded between China and ASEAN member States in their *individual* capacities and not with ASEAN as an entity.[65] This is because it was the various heads of government (or States) from China and individual ASEAN States (and not a representative of ASEAN's Secretariat) who affixed their signatures on the FA as contracting parties.[66] Also it is perhaps notable that the FA carefully and individually referred to member States and China as a 'Party.'[67] We should not, though, make too much of these observations as conclusive indications of whether ASEAN's legal personality is distinct from its Member States until the actual terms of the agreements

[58] Available at http://www.aseansec.org/17842.htm. Though an informal instrument, some aspects of it are probably legally binding: copyright protection, for instance, will be 'enforced . . . in conformity . . . with international agreements' of which ASEAN members and China are participants. Contrast the MOU signed by ASEAN's Secretary-General on behalf of the ASEAN Secretariat with the Shanghai Cooperation Organization Secretariat on functional cooperation at http://www.aseansec.org/ASEAN-SCO-MOU.pdf, with the explicit recognition that this MOU 'shall not be legally binding under international law' (accessed 3 September 2008).

[59] Arts 11(2)(a) and (b) state that the Secretary-General shall carry out its duties and responsibilities in accordance with ASEAN's 'established practices' and 'facilitate and monitor progress in the implementation of ASEAN agreements' respectively.

[60] See Report of the Eminent Persons Group on the ASEAN Charter (EPG Report, 2006), at http://www.aseansec.org/19247.pdf (accessed 5 September 2008).

[61] Para 37, EPG Report, ibid.

[62] Secretary-General and Secretariat.

[63] ASEAN's conduct of external relations.

[64] The Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People's Republic of China was signed on 4 November 2002, at http://www.aseansec.org/13196.htm (accessed 5 September 2008).

[65] See Wang and Chesterman, above, n 52.

[66] Contrast the specific reference that the Secretariat signed an agreement 'for the governments of ASEAN member countries' in the MOU on culture, above, n 58.

[67] See preambular para 3, above, n 64. There are similar preambles in ASEAN's FAs with India and Japan, at http://www.aseansec.org/15278.htm and http://www.aseansec.org/15274.htm respectively (accessed 3 September 2008).

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press

are concluded, particularly on the separation (or not) of legal rights and obligations between ASEAN and member States and also on aspects of international responsibility.

However, there is some basis to doubt whether ASEAN's leaders would be willing to empower the Secretariat to represent all 10 members in concluding important agreements.[68] Member States, including active participants such as Singapore, fear the possibility that both the Secretary-General and Secretariat could become 'a powerful body which can have its own life and influence, which will mean that they (secretariat) can determine the agenda of the grouping and the outcome of all these issues to be deliberated.'[69] The Secretariat's representatives have thus privately conceded that ASEAN's leaders have firmly rejected the creation of a supra-national body.[70]

3. *Decision-making: importance of consensus*

Article 20(1) enshrines consultation and consensus in decision-making as a 'basic principle' of ASEAN. The recognition that member States are sovereign equals under international law, who enjoy procedural parity within ASEAN, is also underscored in the equal annual contributions to the operational budget of the ASEAN Secretariat.[71] This also implies that the funding of the Secretariat, whose responsibilities include facilitating and monitoring progress in the implementation of ASEAN agreements,[72] has to be determined by the ability to contribute of the poorest Member State.

The ASEAN Summit's responsibilities are two-fold as the supreme policy-making body. First, ASEAN's leaders have the discretion to decide how a 'specific decision can be made' if consensus cannot be achieved.[73] It is striking that some of the EPG recommendations in this respect were rejected by ASEAN's leaders. The EPG was careful to distinguish decision-making on sensitive areas such as security and foreign policy (for which consensus should continue to obtain) from 'other areas' where decisions might be taken through voting if consensus cannot be achieved.[74] Of course, the option to force a vote is left open: the Charter neither endorses nor prohibits the ASEAN Summit from voting to break an impasse in decision-making. In practice, it would be surprising if this option is exercised in the areas of foreign policy and security. Diplomatic persuasion during the Foreign Ministers' retreat, such as the relinquishment of Myanmar's chairmanship in 2005,[75] is consistent with the 'ASEAN Way' and more likely to achieve a successful outcome.[76]

In relation to economic matters, instead of taking a vote, Article 21(2) specifically provides for flexible participation on the basis of the 'ASEAN Minus X' formula. In other words, the slowest member State should not impede the Association's overall

[68] The Charter does not address this issue.

[69] 'ASEAN Revamp: From Family Business to Global Player', *Straits Times*, 12 January 2007, at 33.

[70] See Tan, above, n 26.

[71] Art 30(2).

[72] Art 11(2)(b).

[73] Art 20(2).

[74] The EPG recommended that the Summit prescribe rules of procedure to govern situations in which either a simple majority, a 2/3 or 3/4 majority might be applied. See para 63, EPG Report, above, n 60.

[75] This was for the ASEAN Chairmanship in 2006, of which the Philippines consequently assumed on the basis of rotation by alphabetical order.

[76] For an account, see Severino, above, n 6, at 139–143.

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press

economic goals and would be allowed to opt out of any economic agreement as long as there is 'a consensus to do so'.[77] It is thus difficult to escape the wider conclusion that ASEAN's integration is a 'two-track process' between the older and CMLV members.[78] It is also perhaps noteworthy that other forms of flexible participation in economic agreements might be envisaged by ASEAN since the 'ASEAN Minus X' formula is inclusive and not exhaustive of flexible participation.[79] To resolve disputes, there is also recourse to 'good offices, conciliation or mediation'[80] and specific instruments such as the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (2004).[81]

Secondly, under Article 20(4), a 'serious breach' of the Charter or non-compliance shall be referred to the Summit. In this respect, Article 22(1) further states that Member States 'shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation.' In terms of the Charter's design elements (form, structure and substance), then, its review structure is weak: there is no express provision for sanctions in the event of non-compliance. This was extensively discussed by ASEAN leaders and it was ultimately decided that the Summit shall be given the widest flexibility on how they might wish to proceed with violations, which includes human rights issues.[82]

4. Membership

a) Admission

The Charter confirms the criterion laid down in the Bangkok Declaration that admission and membership of ASEAN is based on 'location in the recognised geographical region of Southeast Asia.'[83] ASEAN's definition of itself in this manner has settled matters of self-perception and international recognition.[84] This is why States such as Myanmar and Timor-Leste cannot be excluded from the Association.

Unlike the Commonwealth, for example, admission to ASEAN is not contingent on the requirement of democratic governance. Membership based on democratic governments, to the extent that it is politically relevant and possible for members to agree meaningfully on its content, would have discounted many States in Southeast Asia. [85]

[77] Art 21(2).

[78] See Ellen L Frost *Asia's New Regionalism* (Singapore: NUS Press, 2008) at 223.

[79] Art 21(2): 'In the implementation of economic commitments, a formula for flexible participation, *including* the ASEAN Minus X formula, may be applied where there is a consensus to do so.' (emphasis supplied).

[80] Art 23.

[81] Art 24. The 2004 protocol is available at http://www.aseansec.org/16754.htm (accessed 5 September 2008).

[82] See 'Landmark Document Has Come a Long Way', above, n 2.

[83] Art 6(2)(a). The Bangkok Declaration states that ASEAN is 'open for participation to all States in the South-East Asian Region'.

[84] Andrew Harding, 'Global Doctrine and Local Knowledge: Law in South East Asia' (2002) 51 ICLQ 35 at 48 (note 45). For a historiographical view that 'Southeast Asia' is a name that simultaneously describes and invents reality, see Donald K Emmerson, 'Southeast Asia: What's in a Name?', Journal of Southeast Asian Studies, Vol 15, No 1 (March 1984), at 1.

[85] As a matter of law, there is no valid basis in State practice to claim that democratic government is required by the traditional criteria of statehood. But for the view that international law can help to measure the legitimacy of a government and the democratic process in which they operate, see Thomas Franck, 'Emerging Right to Democratic Governance' 86 (1992) AJIL 44.

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press

It is true that under Article 2 of the Charter, member States have committed themselves to 'principles of democracy and constitutional government'. ASEAN might become more 'westernistic',[86] but it is not obvious why a full embrace of 'Western' perspectives of liberal democracy or that of democratic governance should be an inevitable outcome for Southeast Asia.

In relation to Timor-Leste, its prospects of admission to ASEAN in the short term appear to have been influenced by reservations about the State's lack of material ability to carry out the obligations of ASEAN.[87] Since gaining independence in 2000, its Government is still struggling to exert effective public power over the people in its territory. The violence perpetrated by martial arts clubs and quasi-political organizations, of which some are allegedly linked to leading political figures and have even infiltrated the security forces, have destabilized the State.[88] In the light of Timor-Leste's history of social and communal violence, its people have perhaps not grasped the necessity of only allowing public authorities the monopoly of exercising legitimate force.[89] Put simply, this is a juridical State.[90]

D. Concluding Observations

1. Global versus local

If our conceptual map of Southeast Asian law is 'essentially a map of our own ignorance', then remedying it necessitates a serious commitment to understanding local knowledge and global doctrine.[91] The ASEAN Charter gives material for this urgent task. It is in this sense that the Charter is not merely the preserve of the lawyer. A fuller understanding of its form and substance, as well as the political process in which this document has been adopted by Member States, requires a sociological and (even) 'non-technical' approach.[92] As noted already, the Southeast Asian context is important.

a) Fundamental rights & human rights body

The Charter does not lack references to the imperatives of fundamental rights as legal principles. Pursuant to Article 2 (2)(i), Member States shall respect 'fundamental freedoms, the promotion and protection of human rights and the promotion of social justice'. Under 'Purposes' in Article 1(7), ASEAN seeks (among other things) to 'promote human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN'. These 'rights and responsibilities' must surely include sovereignty in both its internal and external aspects. Members, as sovereign States, remain the ultimate source of authority within their territorially defined units to promulgate and enforce laws. Whereas internally it is now common for

[86] See generally Barry Buzan and Gerald Segal, *Anticipating the Future* (London: Simon & Schuster, 1998).

[87] Art 6(2)(d) states that admission should be based on 'ability and willingness to carry out the obligations of membership'.

[88] Damien Kingsbury, 'Timor-Leste: The Harsh Reality After Independence' in *Southeast Asian Affairs 2007* (Singapore: ISEAS Publishing, 2007) 363 at 369.

[89] Also see Kingsbury, ibid, at 373.

[90] On the juridical State see Robert H Jackson, *Quasi-States: Sovereignty, International Relations and the Third World*, (UK, CUP, 1990).

[91] Harding, above, n 84, at 38 and 49.

[92] Ibid, at 49.

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press

this authority to be subjected to its Constitution as the supreme law of the State, from an external standpoint the ultimate authority must be exercised in a way that is consistent with its international legal obligations. This would now include the ASEAN Charter.

In this respect, it is significant that Article 14 provides for the establishment of an ASEAN human rights body whose terms of reference will be determined at the ASEAN Foreign Ministers Meeting.[93] Though the creation of a human rights body was strongly opposed by the CMLV members, ASEAN nevertheless persisted and included it in the Charter.[94] This outcome is significant because it suggests that the Association is able to make an important decision without a taking a vote or clear consensus.

b) Human rights body: tongue and teeth

While ASEAN is committed to respect for human rights as set out at the Vienna World Conference on Human Rights in 1993, the Association made it clear that these rights 'should be addressed in a balanced and integrated manner and protected and promoted with due regard for specific cultural, social, economic and political circumstances.'[95]

It is unclear what these fundamental rights would entail although the Universal Declaration of Human Rights (UDHR) should at least be the basic referent.[96] Singapore's foreign minister has already hinted that ultimately the ASEAN human rights body 'while lacking in teeth, will at least have a tongue, and a tongue will have its uses'.[97] This supports suggestions that its activities are likely to be declaratory and promotional.[98] It is also unlikely that this body will include a (robust) review mechanism to enforce the catalogue of fundamental rights. The pressure from non-ASEAN States and interests groups on the Association to accept their hegemonic conceptions of 'global' human rights should not distract ASEAN from the serious task of discerning the 'local' core rights for itself, which must comport with the variegated political, social and economic conditions in Southeast Asia.

[93] Art 14 (2). A High Level Panel has been established to submit a first draft of the Body's terms of reference for the 14th ASEAN Summit in December 2008. See Joint Communiqué of the 41st ASEAN Ministerial Meeting at http://www.aseansec.org/21771.htm (accessed 26 August 2008).

[94] 'ASEAN is Maturing', *Straits Times*, 1 August 2007 at 24. But see 'Past it At 40?', *Economist*, 4 August 2007, at 47.

[95] Joint Communiqué, ASEAN Ministerial Meeting 1993 at http://www.aseansec.org/3666.htm (accessed 5 September 2008).

[96] Singapore's Second Minister for Foreign Affairs neither confirmed nor denied this point in Parliament, stressing instead that the body is at an 'early stage' and its development must be taken 'a step at a time.' See *Singapore Parliamentary Reports, Vol 83* (27 August 2007) at cols 1313–1314, at http://www.parliament.gov.sg/Publications/sprs.htm (accessed 9 September 2008). But see ASEAN's reference to the UDHR in Joint Communiqué, ibid.

[97] Statement by Foreign Minister George Yeo in *Singapore Parliamentary Reports, Vol 84* (28 February 2008), at http://www.parliament.gov.sg/Publications/sprs.htm (accessed 5 September 2008).

[98] Rodolfo Severino has suggested that the body will probably focus on capacity building such as helping member States to train prosecutors and judges to be more aware about human rights issues, see 'Judge My ASEAN Work? No Problem', *Straits Times*, 18 July 2008, at 31.

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press

2. The limits of non-interference

a) Haze and severe acute respiratory syndrome (SARS)

ASEAN members have not been shy to 'interfere' in the domestic affairs of other ASEAN States when there are regional implications which affect their national interests. Two examples might suffice. First, the haze pollution that affected other ASEAN States was brought about by land and forest fires in Indonesia.[99] Powerful domestic interests were at play because Indonesia's national policies had encouraged the conversion of their forests into oil palm or agricultural land. The most cost-effective means of land clearance was by burning. Bilateral relations between Indonesia, Brunei, Singapore and Malaysia were tested. Officially, though not publicly, at a meeting (in 1998) for ASEAN environment ministers, the latter complained that Indonesia's land-clearing activities were socially irresponsible and that the perpetrators were deserving of punishment. Relations were sufficiently strained for the late President Suharto to offer Indonesia's 'sincere apologies'. Though the ASEAN Agreement on Transboundary Haze Pollution came into force on 25 November 2003[100], Indonesia has not ratified this agreement.[101]

Secondly, and in marked contrast, ASEAN reacted swiftly and with success to combat the SARS in 2003.[102] Together with China, South Korea and Japan, the various agencies across these States were able to cooperate and coordinate measures such as strict quarantine measures, as well as thermal screening at entry and exits points, to contain the disease without any legal agreements.[103] The point to note is that non-interference is not upheld by ASEAN members for disinterested reasons. Nor are legal agreements necessarily more effective in securing a desired outcome. Ultimately it is the national interests of the individual Member States that obtain.

b) Myanmar

Myanmar is an embarrassment for ASEAN but also an inescapable fact of Southeast Asia. This is why Singapore's UN Permanent Representative said, 'whatever we may think about the behaviour of a family member, it (Myanmar) is still a family member'.[104] When Myanmar's junta ruthlessly crushed the protests, which were led by monks and pro-democracy activists, after the regime unexpectedly raised fuel prices in August 2007, ASEAN issued a strong statement that expressed its 'revulsion' over the use of violence against its citizens.[105] Before the UN Security Council, Singapore

[99] The rest of this paragraph draws on the account by Severino, above, n 6, at 110.

[100] Art 29 provides that this agreement enters into force on the 60th day after the deposit of the 6th instrument of ratification, available at http://www.aseansec.org/agr_haze.pdf (accessed 9 September 2008).

[101] See http://www.aseansec.org/15129.htm (accessed 9 September 2008).

[102] A respiratory disease in humans caused by the SARS coronavirus which probably originated in Guangdong province in China.

[103] For an account, see Severino, above, n 6.

[104] See statement by Singapore's Representative during a UN Security Council meeting on Myanmar (S/PV.5753) on 5 October 2007, at http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.2802231/ (accessed 5 September 2008).

[105] See Statement by ASEAN Chair (September 2007) at http://www.aseansec.org/20974.htm (accessed 5 September 2008).

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press

repeated that this episode had implications for ASEAN's credibility and could not be an internal matter for Myanmar.[106]

Furthermore, when Cyclone Nargis struck and devastated Myanmar in May 2008, of which tens of thousands died and at least a million are displaced,[107] the Government's initial intransigence towards external humanitarian relief forced ASEAN to ask Myanmar 'point-blank' what the Association meant to this Member State.[108]

These are strong indications of ASEAN's departure from its adherence to the rule against non-interference. It is instructive that the ASEAN Chair publicly revealed the extent in which Myanmar has exasperated the Association and the manner in which its foreign ministers have expressed it, whereas previously ASEAN has been fairly discreet about the substance of its discussions with Myanmar.[109] Such a move partly reflected a necessary response to the magnitude of the humanitarian disaster which has affected Myanmar, but it was also calculated to demonstrate ASEAN's credibility as an effective organization just as it sought to ratify the Charter.

It is also notable that neither the Security Council nor ASEAN endorsed the characterization of Myanmar's actions as a threat to international peace or security.[110] Indeed, it is precisely because the junta has been able to sustain a fragile ceasefire with the various armed ethnic groups (within this heterogeneous State) that the collapse of the leadership would lead to a power vacuum that is potentially a threat to Southeast Asia's regional peace and security.[111] It is emphatically not in Southeast Asia's interests to allow Japan, India, China or the US to be drawn into an arena for big powers conflict over Myanmar. Unpalatable a prospect though it is, the Myanmar Government will play an important role in managing the State's problems[112], which are likely to be intractable of a conclusive resolution.[113] This is because the junta represents the only viable, ultimate authority in effective control over a significant part of its territory, with the realistic prospect of remaining so.

[106] Above, n 104. The Secretary-General's Special Adviser on Myanmar has said that he intends to continue to engage the ASEAN States in his activities because Myanmar is a member of ASEAN, at http://www.un.org/apps/news/story.asp?NewsID=24314&Cr=myanmar&Cr1 (accessed 10 September 2008).

[107] ASEAN cites 53,836 persons are missing, 2.4 million as affected and 84,537 are dead at http://www.aseansec.org/21765.pdf. (accessed 9 September 2008).

[108] See opening address by Singapore Prime Minister Lee Hsien Loong during 41st ASEAN Ministerial Meeting, 'ASEAN as Partner of Major Powers', *Straits Times*, 22 July 2008, at 19.

[109] Compare for instance the quiet but strenuous diplomacy which was used to persuade Myanmar to give up its Chairmanship of ASEAN in 2005, as noted above. Singapore's foreign minister briefed the media with a transcribed account of an 'intimate and private discussion among close family members on a sensitive matter' in which the ASEAN foreign ministers conveyed their 'frank views' to their Myanmar counterpart. See Severino, n 6, at 141.

[110] But contrast the position taken by the US and UK during the Security Council meeting in 2007, above, n 104.

[111] Chapter VII, Art 39 of the UN Charter.

[112] The junta's role is acknowledged in the establishment of the Yangon-based Tripartite Core Group, an ASEAN-led coordinating mechanism, comprising the Myanmar government, ASEAN and UN that facilitates humanitarian assistance into Myanmar after Cyclone Nargis, whose model of collaboration has been endorsed as 'effective' by the UN Secretary-General's Special Adviser, at http://www.aseansec.org/21880.htm (accessed 31 August 2008).

[113] Also see statement by Singapore's representative, above, n 104.

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press

3. ASEAN: facilitator of security within Southeast & East Asia

The fundamental purpose of ASEAN is to act as a platform on which it is able to promote security within Southeast and East Asia. It is essential to grasp this point. It bears repetition that Southeast Asia is of strategic importance to the major powers. The latter will seek to assert their military and economic interests in Southeast Asia and this is why ASEAN has assiduously tried to facilitate an open regional architecture.[114] The Association has strived to take the 'driver's seat' in ASEAN-led processes (such as the ASEAN Regional Forum and ASEAN + 3[115]) not because ASEAN is powerful but because it is 'completely non-threatening' and is able to engage the major powers in a fair and reliable way.[116]

The ASEAN Charter, despite its attenuated substance and enforcement mechanism, is nevertheless a legally binding document which has generated some political momentum for ASEAN's objectives. It is a manifestation of 'regional ego' to (not least) the major powers that ASEAN is capable of forging common positions on key issues that matter to the parties and is also serious about its role in the regional architecture.[117] These aspirations raise expectations about ASEAN and must now be supported by genuine and sustained political commitment. There are already possible alternative platforms to challenge the Association's role in Southeast Asia such as the six-party mechanism,[118] the Shanghai Cooperation Organization (SCO)[119] and even an 'Asia-Pacific community'.[120]

Ultimately, without a stable balance of power, ie US superpower overlay to prevent a putative hegemonic power such as China from disturbing the existing distribution of power,[121] economic integration (which depends on stability) and international law are flights of fantasy. These are the strategic calculations of the ASEAN Charter.

Size is destiny. Big powers with the greatest capabilities will radically affect international peace, stability and prosperity.[122] Southeast Asian States are and must be thoroughly realistic about ASEAN's limited capacity to influence the ability and

[114] See 'Pragmatic But Never Passive', *Straits Times*, 12 March 2008, at 28.

[115] An ASEAN-led process that includes ASEAN, China, Japan and the Republic of Korea since December 1997 committed to cooperation at various levels and in various areas, especially in the economic, social and political fields, at http://www.aseansec.org/16580.htm (accessed 5 September 2008).

[116] See remarks by Singapore's foreign minister in 'Good US-China Ties Vital for Asian Peace', *Straits Times*, 19 January 2007, at 6.

[117] See above, n 69.

[118] There are suggestions of converting the six-party talks on North Korea's nuclear programme into a permanent framework for East Asia which would be led by the US, China and Japan, and without ASEAN's involvement. See Simon Tay, 'It's Time for ASEAN to Deliver', *Straits Times*, 16 July 2008, at 20.

[119] An intergovernmental organization, the SCO was established in June 2001 and includes China, Russia, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan.

[120] A regional architecture proposed by Australian Prime Minister Kevin Rudd that includes the entire Asia-Pacific region, especially the US, China, India and Japan. The idea has received a cool but polite response from ASEAN, which reiterated its centrality in any regional architecture. See 'Rudd Makes a Plug for his Asia-Pacific Vision', *Straits Times*, 13 August 2008, at A8.

[121] See E Goh, 'Great Powers and Southeast Asian Regional Strategies: Omni-Enmeshment, Balancing and Hierarchical Order', *RSIS Working Papers*, No 84, July 2005, at http://www.rsis.edu.sg/publications/workingpapers.asp?selYear=2005 (accessed 30 March 2008).

[122] See Rice, above, n 10.

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press

willingness of major powers to assert their interests in this region. But if ASEAN demonstrates a sense of purpose, as it did during the Kampuchean conflict,[123] it should be capable of playing at least a constructive role in sustaining regional security in a manner that comports with the national interests of its member States. The hostility between Cambodia and Thailand over the *Preah Vihear* in 2008 suggests that internal political pressures within member States and the opportunistic antagonisms that ensue between them are political facts, which will occasionally threaten the Association's collective purpose.[124] They will require both political equanimity and careful tending by ASEAN's leaders.

Perceptions of ASEAN and the Charter exceed what is possible to achieve in reality.[125] Whether it is the apparent contradiction between deeper integration and non-interference,[126] or if the Charter only deferred the important questions about ASEAN's place in the world,[127] it is fortunate that in practice we need not respond to these issues in a principled or conclusive manner. ASEAN's integration must never be achieved at the expense of weakening bilateral relations between individual States in Southeast Asia and other States in the international system. The continued survival of ASEAN, especially its smaller members, greatly depends on its ability to cohere as a regional organization and yet remain steadfastly open to the world. This might be a political contradiction, but more importantly it is also the art of the possible.

DANIEL SEAH*

The Charter has since entered into force on 15 December 2008.

II. THE ARREST AND IMPENDING TRIAL OF RADOVAN KARADŽIĆ

A. Introduction

On 21 July 2008, Radovan Karadžić, the former president of the separatist Bosnian Serb entity, the Republika Srpska, and one of the most sought-after fugitives from international criminal justice, was arrested by Serbian authorities in the Serbian capital, Belgrade. He was surrendered to the custody of the International Criminal Tribunal for the former Yugoslavia (ICTY) several days later, where he will be tried for genocide, crimes against humanity and war crimes committed by Bosnian Serb forces during the 1992–1995 conflict in Bosnia-Herzegovina. He appeared before a pre-trial judge on 31 July 2008, and has to date had several pre-trial status conferences. His case was

[123] Above, n 5.

[124] There is no space to rehearse the developments here, save to say that the decision of the *Temple of Preah Vihear (Merits)*, [1962] ICJ Rep 6, which granted sovereignty over the temple to Cambodia, did not conclusively resolve the matter. See Achara Ashayagachat, 'Outmanoeuvred at Every Turn', *Bangkok Post*, 27 July 2008, at http://www.bangkokpost.com/topstories/topstories.php?id=129100 (accessed 2 September 2008).

[125] Though amendments to the Charter in future are not foreclosed: see K Kesavapany, 'Robust Exchange Good for ASEAN and Charter', *Straits Times*, 25 July 2008, at H23.

[126] See Ryu, above, n 26.

[127] Chesterman, above, n 52.

* Advocate & Solicitor (Singapore).

[*ICLQ* vol 58, January 2009 pp 212–219] doi:10.1017/S0020589308000894

https://doi.org/10.1017/S0020589308000882 Published online by Cambridge University Press