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THE ASEAN CHARTER AS “LEGS TO GO PLACES”: IDEATIONAL NORMS AND PRAGMATIC LEGALISM IN COMMUNITY BUILDING IN SOUTHEAST ASIA

by EUGENE K.B. TAN*

The Charter of the Association of Southeast Asian Nations (ASEAN) has been hailed as a legal instrument that would integrate the ten constituent members as a community and a regional organization. Ostensibly, the Charter has three strategic thrusts in support of the vision of the ASEAN Community. The first is to formalize ASEAN as an institution while streamlining its decision-making processes. Secondly, the Charter seeks to strengthen ASEAN institutions. Thirdly, it seeks to establish mechanisms to monitor compliance and settle disputes. The article considers the extent to which the Charter will help ASEAN achieve its aims. This is especially pertinent in light of the Charter’s reaffirmation of ASEAN’s longstanding policy of non-interference in members’ internal affairs and the retention of consultation and consensus as a fundamental tenet of decision-making. It also considers whether the Charter will facilitate the creation of new norms and values, and protect democracy and human rights.

“With the ASEAN Charter, ASEAN will have legs to go places.”¹

ASEAN Annual Report 2007-2008 (July 2008)

On 15 December 2008, the ASEAN Charter² (henceforth, “the Charter”) came into force in less than ideal circumstances. The event was supposed to be celebrated during the course of the 14th ASEAN Summit in Chiang Mai. Perhaps, as a reflection of the relative (un-)importance of ASEAN in the domestic agendas of member countries, that Summit was postponed, at the eleventh hour, to February 2009 as a result of the internal political crisis in Thailand (the current ASEAN Chair). Instead, a much smaller scale ceremony, involving foreign ministers of member states, was held on 15 December 2008 at the ASEAN Secretariat in Jakarta, Indonesia, to welcome the entry into force of the Charter.³ Earlier, Indonesia, a key member state, was the last member to ratify the Charter, and with conditions attached.⁴ The Preah Vihear temple border dispute between Thailand and Cambodia

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¹ Association of Southeast Asian Nations, *ASEAN Annual Report 2007-2008* (July 2008) at 7.

² *Charter of the Association of Southeast Asian Nations*, 20 November 2007, (entered into force 15 December 2008), online: ASEAN <<http://www.aseansec.org/AC.htm>> [ASEAN Charter].

³ ASEAN Secretariat, “Latest News—Ceremony to welcome the Entry Into Force of the ASEAN Charter” (15 December 2008), online: 14th ASEAN Summit <http://www.14thaseansummit.org/latest_news03.php>.

⁴ The addendum to the ratification legislation stated that the Indonesian government was to work for early amendments (including the implementation of a genuine human rights mechanism), a reform of decision-making procedures, and greater people involvement in ASEAN. See, further, helpful discussion on Indonesia’s

also cast a shadow on the centrality of the Charter *vis-à-vis* resolving disputes between member states.

A year earlier, on 20 November 2007, ASEAN heads of government signed the Charter at the 13th ASEAN Summit in Singapore. Although the signing was meant to be the “crowning achievement” of ASEAN’s 40th anniversary, it was anything but climactic at ASEAN’s so-called coming-of-age party.⁵ The signing was overshadowed, if not overwhelmed, by Myanmar military junta’s intransigence over its human rights abuses and its brutal crackdown on the so-called “Saffron Revolution” in September 2007.⁶ Specifically, the Myanmar debacle, which had been simmering in the last few years, marked ASEAN’s seeming helplessness as a regional organization in reining in a recalcitrant member. Prior to September 2007, the self-congratulatory hubris portrayed the Charter as a legal instrument that would bind the ten constituent nation-states in the Southeast Asian region together as a community. Despite the Charter coming into force, a significant pall continues to hang over ASEAN over the critical themes of regionalism, democracy, and security.⁷ The burning question is whether the Charter will be more rhetoric and form, rather than substance.

ASEAN was born out of idealism and necessity framed within a strategic context of preserving peace for the purpose of national and regional development in what was hitherto a tumultuous region in a turbulent period. Forty years on, ASEAN faces significant challenges in the economic and political spheres. The rise of China and India as regional powers in the twenty-first century has necessitated that ASEAN remains relevant and be firmly in the driving seat on matters concerning Southeast Asia and its immediate locale.⁸ Ostensibly the Charter has three strategic thrusts, all in support of the vision of the ASEAN Community. The first is to formalize ASEAN as an institution while also streamlining its decision-making processes. Secondly, the Charter seeks to strengthen ASEAN institutions, especially the Secretariat. Thirdly, it seeks to establish mechanisms to monitor compliance of ASEAN agreements and settle disputes between member states. Overall, the Charter aspires to strengthen ASEAN as a leading regional organization while catalyzing ASEAN’s integration efforts on various fronts.⁹

This article examines the ASEAN Charter’s ability to operate as the legal and institutional framework for Southeast Asia’s foremost inter-governmental organization. The article considers the extent to which the Charter will help ASEAN achieve the three strategic thrusts stated above. It will also consider whether the Charter will make ASEAN more effective and a rules-based organization. This is especially pertinent in light of the Charter’s reaffirmation of ASEAN’s longstanding policy of non-interference in members’ internal affairs

delayed ratification of the Charter in J. Ruland, “Deepening ASEAN Cooperation through Democratization? The Indonesian Legislature and Foreign Policymaking” (2009) 9 *Int’l Relat. Asia-Pac.* 373 at 381-388.

⁵ *Cebu Declaration on the Blueprint of the ASEAN Charter*, 13 January 2007, online: ASEAN <<http://www.aseansec.org/19257.htm>>.

⁶ The junta continues to scorn world opinion and ASEAN has had little impact on Myanmar’s conduct. See The International Crisis Group, “Burma/Myanmar: After the Crackdown” Asia Report No. 144 (31 January 2008).

⁷ For an erudite and incisive analysis on these themes, see the thought-provoking essay by D.K. Emmerson, “Critical Terms: Security, Democracy, and Regionalism in Southeast Asia” in D.K. Emmerson, ed., *Hard Choices: Security, Democracy, and Regionalism in Southeast Asia* (Stanford, CA: Walter H. Shorenstein Asia-Pacific Research Centre, Freeman Spogli Institute for International Studies, Stanford University, 2008).

⁸ This angst is probably most acutely felt by Singapore, which has often described itself as an oasis in a turbulent region: “PM calls on Asean to take decisive action” *Straits Times* (8 August 2007).

⁹ See T. Chalermphanupap, “Institutional Reform: One Charter, Three Communities, Many Challenges” in Emmerson, *supra* note 7. The UN Secretary-General has affirmed the shared role of regional organizations in resolving crises that occur in their regions and that regionalism as a component of multilateralism is necessary and feasible. See *Report of the Secretary-General on the relationship between the United Nations and regional organizations, in particular the African Union, in the maintenance of international peace and security*, UN SCOR, 7 April 2008, UN Doc. S/2008/186.

and the retention of consultation and consensus as a fundamental tenet of decision-making in ASEAN. Finally, it considers whether the Charter will be a driver in the creation of new norms, values, and a community protective of democracy, rule of law, good governance and the protection of human rights and fundamental freedoms.

In this article, I argue that, at a general level, the development and interpretation of ASEAN norms, in particular the “ASEAN Way”, evolves much like the same way the common law develops. Some norms such as non-interference in the domestic affairs of member states and consensual decision-making are presented, mistakenly, as iron-clad principles or laws that are non-negotiable and for which deviation is not possible. I argue that these norms are subject to change, even if that takes place incrementally. The norms, principles and values found in the ASEAN Charter should be seen in this light. I also put forth the proposition that the Charter while categorized as “hard law” was drafted with the purpose of encouraging the internalization and reflexive learning of ASEAN norms within the context of an organization that is charting new directions in a rapidly changing world. This is also in keeping with the character of ASEAN. The soft law approach seeks to generate norms and responsive conduct by member states of ASEAN that become self-enforcing and self-reinforcing and thus providing the substratum for ASEAN to be a relevant, responsive, and responsible player in regional affairs.

I. GENESIS OF THE CHARTER: INTEGRATING TO SURVIVE?

ASEAN is a potpourri of ten Southeast Asian nation-states held together by their commonality of membership in ASEAN but suitably distinguished by their immense diversity.¹⁰ Politically, Singapore, Cambodia and, to a lesser extent, Malaysia are dominated by a single party. The Philippines is a democracy although it has a history of military coups and extra-legal political changes. Indonesia has been rapidly democratizing since the end of Suharto’s 32-year reign in 1998. Thailand is undergoing perhaps its most severe democratic challenge in two decades. Vietnam and Laos are communist states while Brunei is a monarchy. Myanmar, ASEAN’s black sheep, is ruled by a repressive military junta that is also bent on isolationism. Economically, the countries are at different stages of economic development with fairly widespread human development challenges.¹¹ Nonetheless, ASEAN’s large market of half a billion people generates a gross regional product of US\$1.1 trillion, and accounts for a total trade of about US\$1.6 trillion.¹²

Over the last forty years, ASEAN has also developed good relations and maintained healthy engagements with existing and emerging powers such as the United States, Japan, Russia, China, India and Korea through its dialogue partner and “ASEAN-plus” platforms. There are also several bilateral and plurilateral free trade agreements between ASEAN member states and their economic partners. The concern, however, among the more economically advanced member states is over China (and increasingly India) continuing to draw

¹⁰ Useful primers on ASEAN include S. Siddique and S. Kumar, eds., *The 2nd ASEAN Reader* (Singapore: Institute of Southeast Asian Studies, 2003), R.C. Severino, *ASEAN* (Singapore: Institute of Southeast Asian Studies, 2008), and M. Beeson, *Institutions of the Asia-Pacific: ASEAN, APEC, and Beyond* (London: Routledge, 2009).

¹¹ For a good overview of the status and trends of human development in Southeast Asia, see UNESCAP, *Ten as One: Challenges and Opportunities for ASEAN Integration* (Bangkok: United Nations Economic & Social Commission for Asia & the Pacific, 2007); UNDP, *South-East Asia Regional Economic Integration and Cooperation: Deepening and Broadening the Benefits for Human Development* (Colombo: United Nations Development Programme Regional Centre, 2006). This article does not consider whether the Charter will help narrow the development gap between members, which range from newly-industrializing economies such as Singapore to poverty-stricken ones like Myanmar, Cambodia and Laos.

¹² Speech by Prime Minister Lee Hsien Loong at the Opening Ceremony of the 40th ASEAN Economic Ministers and Related Meetings, Singapore, 26 August 2008, para. 5.

a disproportionate share of foreign direct investments from Southeast Asia.¹³ ASEAN needs to tap into these growth engines and also remake itself as a desirable investment destination or risk economic marginalization.¹⁴

Not surprisingly, ASEAN has thus far not sought the pooling of sovereignty like the European Union, comprising 27 member states and 490 million citizens. Despite its fair share of difficulties and disagreements and lacking natural coherence, ASEAN has been a fairly cohesive grouping of member states. It has engendered intra-regional amity and comity within Southeast Asia by nurturing a culture of mutual respect and mutual accommodation in bilateral and multilateral interactions among ASEAN member states.¹⁵ To that extent, ASEAN has been facilitative of regional economic development by providing a stable regional political order. Although ASEAN has been likened to the European Union (EU), ASEAN members are realistic that the community-building will not be as intensive and extensive as the EU.¹⁶ The ASEAN leadership is alive to the reality and challenges of the diversity of history, culture, politics, language, religion and economic development within ASEAN for it to be integrated into a union like the EU with components such as a judiciary and legislature for the entire region.

The drive to ensure ASEAN's continued relevance was internally driven with the original members concerned, to varying degrees, that ASEAN was atrophying. Its lack of legal personality and clear rules of engagement were regarded as hampering its functionality as the foremost inter-governmental organization in Southeast Asia, and perhaps even in Asia generally. To put simply, ASEAN suffers from the perception of being less than the sum of its parts.¹⁷ There remains the concern that a weakened ASEAN could be a source of instability in Southeast Asia. Further, ASEAN's internal weaknesses will negate its effectiveness and relevance as a regional organization. Externally, much has been made of the rise of China and India and how important it is for ASEAN to position itself to leverage on these growth engines.¹⁸ In security matters, ASEAN was instrumental in establishing the ASEAN Regional

¹³ J. Ravenhill, "Is China an Economic Threat to Southeast Asia" (2006) 46 *Asian Sur.* 653; M. Bhaskaran, "The Economic Impact of China and India on Southeast Asia" in Daljit Singh and Lorraine Carlos Salazar, eds., *Southeast Asian Affairs 2005* (Singapore: Institute of Southeast Asian Affairs, 2006) at 62. In terms of purchasing power parity, ASEAN, China and India combined account for a quarter of the world's economy.

¹⁴ Because of its heavy dependence on trade and foreign investment, Singapore is probably the most anxious. Singapore's Prime Minister Lee Hsien Loong expresses it thus at the ASEAN Day Lecture on 7 August 2007 in Singapore, para. 9:

To stay in the game, ASEAN must take decisive action. We must become a strong and effective grouping, able to partner China and India effectively. Many investors today see ASEAN as ten isolated, scattered national economies, too small to be worth paying attention to. If ASEAN's integration stagnates while the rest of Asia forges ahead, we will be left behind and become irrelevant.

¹⁵ This has led to the self-congratulatory mantra that "no two ASEAN member states have ever gone to war with each other". However, the past is not a reliable guide to the future if ASEAN becomes increasingly fragmented.

¹⁶ For the similarities and differences between regionalism and integration in the EU and ASEAN, see L. Henry, "The ASEAN Way and Community Integration: Two Different Models of Regionalism" (2007) 13 *Eur. L. J.* 857. See also E. Moxon-Browne, "Political Integration in the European Union: Any Lessons for ASEAN?" in P. Murray, ed., *Europe and Asia: Regions in Flux* (New York: Palgrave Macmillan, 2008) 84.

¹⁷ As Singapore diplomat Tommy Koh puts it, "ASEAN suffers from a serious perception problem... policy-makers in Washington and Brussels do not take it seriously and continue to disrespect the institution." See Tommy Koh, "ASEAN at Forty: Perception and Reality" in D. Nair and Lee P.O., eds., *Regional Outlook Southeast Asia, 2008-2009* (Singapore: Institute of Southeast Asian Studies, 2008) at 8. See further, Shaun Narine, *Explaining ASEAN: Regionalism in Southeast Asia* (Boulder: Lynne Rienner, 2002).

¹⁸ ASEAN regionalism also has to be considered in light of other Asian regionalisms. The literature on Asian regionalism is a burgeoning one. Useful primers include N. Tarling, *Regionalism in Southeast Asia: To Foster the Political Will* (London: Routledge, 2006), and M. Beeson, *supra* note 10. See also H. Dieter, ed., *The Evolution of Regionalism in Asia: Economic and Security Issues* (London: Routledge, 2007); A. Hurrell, "One World? Many Worlds? The Place of Regions in the Study of International Society" (2007) 83 *Int'l Aff.*

Forum (ARF), the only regular multilateral platform for ASEAN and its stakeholders in the Asia-Pacific region to discuss security matters. For a region that has tacitly subscribed to the doctrine of a balance of powers, the fear is real among ASEAN leaders that ASEAN could become subordinate to external elements within its own backyard.¹⁹ ASEAN members realized, with varying degrees of urgency and commitment, that ASEAN could be eclipsed, or worse made marginal and irrelevant in East Asian international affairs.²⁰

Hence, the constant refrain that ASEAN must be “in the driver’s seat” and the ASEAN mantra of “regional solutions to regional problems”. Collectively, they seek to minimize external intervention in Southeast Asia, and for ASEAN to be in-charge of its own destiny rather than have its destiny and the rules of engagement determined by non-ASEAN players.²¹ This has been the *raison d’être* of ASEAN. To lose that ownership and leadership in their own backyard in a rapidly changing geopolitical landscape could mean a significant loss of control over the destiny of the region, and possibly external intervention in ASEAN affairs by external powers. To avoid such a scenario, ASEAN has to be sufficiently cohesive to be a key player in its own right in regional politics, and not be an arena for external elements to advance their strategic causes in self-interest. Singapore’s Defence Minister summarized the imperative for a broadening and deepening of regional integration within the larger quest for stability, peace and economic development:

An ASEAN that is diffused and uncoordinated can only lead to a Southeast Asian region that is eventually fragmented by the stresses and strains triggered by China and India’s rise, and the inter-play of tensions among them and the other major powers.²²

To that end, ASEAN has to move beyond dialoguing, informal workings, weak commitments to ASEAN agreements, and inadequate organizational set-up. The drafting of the Charter was part housekeeping, part aspiration and part goal-setting. It is still a work-in-progress given that the details over key institutions and processes, such as the human rights body and the dispute resolution mechanism, still need to be crafted, made workable, and relevant to key stakeholders. As it enters its fifth decade of existence, ASEAN patently needs to be more action-driven, organizationally responsive, effective, and cohesive. This entails that member states dutifully observe the rights and responsibilities of membership. The quest was, and is, for a more stable, cooperative and robust framework for ASEAN for internal use by member states as well as for meaningful engagement with external partners. The process of drawing up the constitution for ASEAN was long overdue. Indeed, ASEAN ought to have its Charter in place before enlarging its membership to include Myanmar, Laos, Vietnam and Cambodia. This could have avoided the competing and even conflicting interests, needs, and motivations in ASEAN matters between the founding and newer members.

127; D. Camroux, “Asia... whose Asia? A ‘Return to the Future’ of a Sino-Indic Asian Community” (2007) 20 Pac. Rev. 551. But see the analysis that ASEAN regionalism is an illusion and delusion in D.M. Jones and M.L.R. Smith, *ASEAN and East Asian International Relations: Regional Delusion* (Northampton: Edward Elgar, 2006).

¹⁹ See F. Frost, “ASEAN’s Regional Cooperation and Multilateral Relations: Recent Developments and Australia’s Interests”, Parliament of Australia Research Paper No. 12 (2008-2009), 9 October 2008. For a succinct discussion of the security challenges facing ASEAN, see S.W. Simon, *ASEAN and its Security Offspring: Facing New Challenges* (Carlisle: Strategic Studies Institute, US Army War College, 2007).

²⁰ Bill Emmott describes ASEAN’s fear as a “collective sentiment of being overshadowed by others: Japan, to the north-east, the United States, across the Pacific, but above all China, which sits all around their northern boundaries. Their problem, in other words, is of being small fish in a sea dominated by big ones”. See B. Emmott, *Rivals: How the Power Struggle between China, India and Japan will Shape Our Next Decade* (London: Allen Lane, 2008) at 45.

²¹ See further E. Goh, “Southeast Asian Perspectives on the China Challenge” (2007) 30 J. of Strategic Stud. 809; A. Collins, “Forming a Security Community: Lessons from ASEAN” (2007) 7 Int’l Relat. Asia-Pac. 203.

²² *Enhancing Security in a Time of Flux*, speech by Singapore Minister of Defence Teo Chee Hean, Third Asia-Pacific Security Conference, Singapore, 19 February 2006.

The formal legal origins of the Charter can be found in the Vientiane Action Programme (VAP) which was endorsed at the 10th ASEAN Summit in Vientiane on 29 November 2004. ASEAN leaders recognized that to strengthen ASEAN, the development of the Charter was necessary as part of the overall process of building collective responsibilities and to have a “common adherence to norms of good conduct”.²³ At the 11th ASEAN Summit in December 2005, ASEAN member states adopted the “Kuala Lumpur Declaration on the Establishment of the ASEAN Charter”.²⁴ The ASEAN collective leadership declared the following as the objectives of the proposed Charter:

- (1) To serve as a legal and institutional framework of ASEAN;
- (2) To codify all ASEAN norms, rules, and values;
- (3) To reaffirm principles, goals and ideals contained in ASEAN’s milestone agreements, *viz* the ASEAN Declaration (1967), the Treaty of Amity and Cooperation in Southeast Asia (1976), the Treaty on Southeast Asia Nuclear Weapon Free Zone (1995), the ASEAN Vision 2020 (1997) and the Declaration of ASEAN Concord II (2003);
- (4) To confer upon ASEAN a legal personality, determine the functions, develop areas of competence of key ASEAN bodies and their relationship with one another in the overall ASEAN structure.

ASEAN was mindful that the Charter must reaffirm “the principles of inter-state relations in accordance with the UN Charter and established international law that promote and protect ASEAN community interests as well as inter-state relations and the national interests of the individual ASEAN Member Countries”.²⁵ To expedite the process of drafting, the ASEAN Summit established an Eminent Persons Group (EPG) on the ASEAN Charter in December 2005, comprising highly distinguished and well-respected citizens from ASEAN member states, with the mandate “to examine and provide practical recommendations on the directions and nature of the ASEAN Charter relevant to the ASEAN Community as envisaged in the Bali CONCORD II and beyond”.²⁶ The KL Declaration also enabled the ASEAN Foreign Ministers to subsequently establish a High Level Task Force to carry out the drafting of the ASEAN Charter. The EPG consulted extensively Track 2 participants and civil society organizations, many of whom prepared detailed submissions and representations to the EPG. There was much enthusiasm, and perhaps over-expectation, that the Charter would be people-centered.

Although the ASEAN Summit endorsed the landmark EPG report at its 12th Summit in Cebu in January 2007, not all the recommendations were taken on board when the Charter was finally ready for signing. The EPG had boldly recommended that the Charter provide for sanctions, such as suspension of a member’s rights and privileges and, in “exceptional circumstances”, expulsion from membership.²⁷ Another recommendation was to have majority voting in important but less sensitive areas when consensus could not be achieved.²⁸ Unsurprisingly, there were some member states which lobbied to limit the impact and influence of the EPG report, worried that some of these recommendations would be incorporated into

²³ Singapore Minister of Defence Teo Chee Hean, *Enhancing Security in a Time of Flux* (Speech to the Third Asia-Pacific Security Conference, Singapore, 19 February 2006).

²⁴ *Kuala Lumpur Declaration on the Establishment of the ASEAN Charter*, 12 December 2005, online: ASEAN <<http://www.aseansec.org/18030.htm>>.

²⁵ *Ibid.*

²⁶ *Terms of Reference of the Eminent Persons Group (EPG) on the ASEAN Charter* (12-13 December 2005), online: ASEAN <<http://www.aseansec.org/18060.htm>>.

²⁷ The Eminent Persons Group on the ASEAN Charter, *Report of the Eminent Persons Group on the ASEAN Charter* (Jakarta, December 2006), online, ASEAN <<http://www.aseansec.org/19247.pdf>>. P. Chachavalpongpan, ed., *The Road to Ratification and Implementation of the ASEAN Charter* (Singapore: Institute of Southeast Asian Studies, 2009).

²⁸ *Ibid.*

the Charter.²⁹ The apparent disconnect between the EPG report and the Charter can be reconciled if we regarded them as representing what is “ideal” and “workable” respectively for ASEAN. But the EPG, with its bold vision for ASEAN, gave rise to expectantly exuberant expectations of the Charter.³⁰ This led to anticipation of a radical Charter. As such, the disappointment among the civil society activists was natural and to be expected when the Charter fell far short of the raised expectations.

II. OVERVIEW AND STRATEGIC THRUSTS OF THE ASEAN CHARTER

The Charter, as the constitution of ASEAN, comprises 55 articles in 13 chapters, and 4 annexes. Chapter 1 is a declaratory statement of ASEAN’s purposes and principles. Chapter 2 confers ASEAN legal personality. Chapter 3 deals with membership. Chapter 4 addresses the organs of ASEAN *viz* the ASEAN Summit, the ASEAN Coordinating Council, the ASEAN Community Councils, the ASEAN Sectoral Ministerial Bodies, the office of the ASEAN Secretary-General and the ASEAN Secretariat, the Committee of Permanent Representatives to ASEAN, the ASEAN national secretariats, the ASEAN Human Rights Body, and the ASEAN Foundation. Chapter 5 is concerned with the ASEAN-associated entities. Chapter 6 covers the immunities and privileges of ASEAN, the Secretary-General and Secretariat staff, as well as the permanent representatives and officials on ASEAN duties. Chapter 7 formalizes the decision-making process in ASEAN. The framework for dispute settlement process and mechanisms is provided for in Chapter 8. ASEAN’s budgetary and finance matters are dealt in Chapter 9, while Chapter 10 covers the organization’s administration and procedure. Chapter 11 states the identity and symbols of ASEAN. Chapter 12 deals with external relations, with Chapter 13 being concerned with general provisions and procedures such as ratification, amendments, interpretation of the Charter.

A. *Strategic Thrust 1: Formalizing ASEAN as an Institution*

The first strategic thrust of the Charter is to formalize ASEAN as an institution by providing it with the legal and institutional framework. This would also contribute towards streamlining its decision-making processes. Article 1 of the Charter elaborates on ASEAN’s purposes. It expands the seven “aims and purposes” in the ASEAN Declaration (also known as the Bangkok Declaration) adopted on 8 August 1967.³¹ The ASEAN Declaration describes ASEAN as an “Association for Regional Cooperation”.³² The Charter emphasizes that all member states have “equal rights and obligations”.³³ New members may be admitted by consensus.³⁴

In many respects, the Charter does not break new ground. It can be said that the Charter is generally concerned with formalizing the principles, values, workings of ASEAN. Prior to the Charter, ASEAN operated on conventions, informal diplomacy, and decision-making by consensus. The Charter seeks to formalize these practices. The institutionalization of ASEAN as an organization is an important aspect of it having legal personality. More

²⁹ “Way paved for ASEAN makeover” *Sunday Times*, (14 January 2007).

³⁰ See, generally, T. Koh, R.G. Manalo, and W. Woon, eds., *The Making of the ASEAN Charter* (Singapore: World Scientific, 2009). See also D. Seah, “The ASEAN Charter” (2009) 58 I.C.L.Q. 197.

³¹ *The ASEAN Declaration, done in Bangkok*, 8 August 1967, online: ASEAN <<http://www.aseansec.org/1212.htm>>.

³² *Ibid.*

³³ *ASEAN Charter*, *supra* note 2, art. 5(1).

³⁴ See generally *ibid.*, art. 6. Timor-Leste is a potential member of ASEAN. It acceded to ASEAN’s Treaty of Amity and Cooperation in 2007. In May 2008, President Jose Ramos-Horta stated that his country hoped to be able to join ASEAN by 2012.

importantly, the institutionalization of ASEAN can be regarded as the institutionalization of the ASEAN process, or more popularly known as the “ASEAN Way”. The core of the ASEAN Way can be found in Article 2 (see further discussion below).

Article 3 pointedly declares “ASEAN, as an inter-governmental organization, is hereby conferred legal personality”.³⁵ Giving ASEAN a definitive legal personality also helps clarify the purposes and principles that undergird the organization. It provides ASEAN with a legal framework, crystallizing long-standing practices into formal ones with legal backing. It also provides ASEAN with a much needed organizational framework and certainty, with the potential to enhance ASEAN’s effectiveness. However, as Simon Chesterman reminds us, “personality at the international level is not so much a status as a capacity. It matters less what you *claim* than what you *do*”.³⁶

To be sure, the Charter is not meant to make ASEAN a legalistic organization, but rather one that is rule-based. At least, this is the aspiration given that ASEAN’s “problem is one of ensuring compliance and effective implementation”.³⁷ Singapore’s Foreign Minister George Yeo attributed ASEAN’s problem of implementation to ASEAN’s lack of “legal basis” and there being “too many escape hatches”.³⁸ Only about 30 per cent of ASEAN’s agreements and commitments have been honoured and implemented.³⁹ ASEAN’s immediate past Secretary-General had said that, “It is unclear what is the legal status of ASEAN agreements within the national law of each member country. What is clear is that violation of ASEAN agreements seldom pains the guilty party. But it certainly hurts ASEAN as a whole”.⁴⁰

In the first twenty-five years of ASEAN’s existence, the focus of ASEAN was primarily internal. However, with the end of the Cold War and greater integration taking place across the globe as a result of globalization and expanded commerce, ASEAN’s orientation has to be increasingly geared to the external environment. Chapter 12 of the Charter stipulates the operating paradigm for the conduct of ASEAN’s external relations. In particular, the Charter provides the necessary impetus for ASEAN as the driver in Southeast Asia. Article 41(3) declares that “ASEAN shall be the primary driving force in regional arrangements that it initiates and maintain its centrality in regional cooperation and community building”. It urges ASEAN member states “on the basis of unity and solidarity” to “coordinate and endeavour to develop common positions and joint actions”.⁴¹ The ASEAN Summit, upon the recommendation of ASEAN Foreign Ministers Meeting, shall set the “strategic policy directions” in ASEAN’s external relations.⁴² The Charter also empowers ASEAN to conclude agreements with countries, regional and international organizations.⁴³

“Legalizing” ASEAN is seen as a definitive way of making ASEAN a legal entity in its own right. It clarifies that ASEAN is not an informal family grouping of Southeast Asian nation-states but one that has status under international law as well as domestic laws within member states, and can make agreements in its own right. To be sure, ASEAN had always existed even if it lacked a legal enabling clause on its existence. For instance, ASEAN’s role

³⁵ For a discussion of what ASEAN’s legal personality does or does not do, see S. Chesterman, “Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person” (2008) 12 S.Y.B.I.L. 199.

³⁶ *Ibid.*, at 14. Emphasis in original.

³⁷ *Report of the Eminent Persons Group on the ASEAN Charter*, *supra* note 27, para. 44 at 6.

³⁸ *Straits Times* (27 July 2007).

³⁹ Speech by Singapore Prime Minister Lee Hsien Loong, 41st ASEAN Ministerial Meeting, 21 July 2008, Singapore.

⁴⁰ Ong Keng Yong, “ASEAN: Challenges in the 21st Century” (Speech in the SIIA Forum Series 2006, delivered at Hwa Chong Institution, 29 June 2006).

⁴¹ *ASEAN Charter*, *supra* note 2, art. 41(4).

⁴² The ASEAN Foreign Ministers Meeting is responsible for ensuring “consistency and coherence in the conduct of ASEAN’s external relations”. See *ibid.*, art. 41(5)-(6).

⁴³ *Ibid.*, art. 41(7).

and standing as a convenor, facilitator and regional architect of key East Asian and Asia-Pacific intergovernmental organizations and forum such as the ASEAN Regional Forum (ARF), Asia-Pacific Economic Cooperation (APEC), and the East Asia Summit (EAS) was never in doubt even though it had no *de jure* legal personality.

However, ASEAN's "problem is not legal personality but a shared vision of the purpose of that existence, of its place in the world".⁴⁴ The Charter is conceived to help give ASEAN a sense of renewed purpose. Yet, shared purpose is real only if political will exists on that score among the member states. Clothing ASEAN with rules, as the Charter does, is the easy part. The harder part is whether the legal personality is meaningful and relevant to its stakeholders within and outside the region. Whether the Charter makes ASEAN a more rules-based and relevant organization remains to be seen. Here, action will speak louder than words.

With ASEAN acquiring a legal personality, it also acquires a formal decision-making capacity and contracting capacity in the international arena. This is important for countries and international organizations seeking to enter into formal relationships with ASEAN. Previously, it was not entirely clear that in negotiating with ASEAN, ASEAN was speaking authoritatively in one voice, or there was a cacophony of ten voices—some louder than others. Nevertheless, even with a legal personality, one should not expect ASEAN members to act in unison on all matters at all times, especially controversial issues. As Dunne observes of the European Union (EU), the expectation of complete agreement is unrealistic even in the EU's context:

... [H]aving agency does not mean the union will be able to mobilize a common position at all times. Indeed, the likelihood of this occurring has been reduced by the process of enlargement to a more numerous group in which consensus is harder to achieve and where the gap between the more powerful and the weaker members (especially when it comes to military capability) is enormous.⁴⁵

Whether ASEAN will be a mere collective of Southeast Asian nation-states or whether it will rise to be a moral and political agent will remain central to its *raison d'être*. This distinction is vital if ASEAN is to be relevant intra-regionally and a player in regional and international affairs. Dunne puts it well: "a moral agent possesses an identity that is more than an aggregate of the identities of its parts; and the collective agent has a decision-making capacity".⁴⁶ It is perhaps not too far-fetched to suggest that the Charter is a measure of self-help in regional integration as part of ASEAN's gradual development, in response to internal and external factors, and to help entrench ASEAN sovereignty. To be sure, much work remains to be done to clothe it with substance and ensure that ASEAN's collective sovereignty is distinct and separate from that of its constituent member states.

B. Strategic Thrust 2: Strengthening ASEAN Institutions

The Charter identifies the key constituent organs and states their roles and responsibilities *viz* the ASEAN Summit, the ASEAN Coordinating Council, the ASEAN Community Councils, the ASEAN Sectoral Ministerial Bodies, the ASEAN Secretary-General, the ASEAN Secretariat, the Committee of Permanent Representatives to ASEAN, the ASEAN National Secretariats, the ASEAN Human Rights Body, and the ASEAN Foundation. The Charter

⁴⁴ Chesterman, *supra* note 35. See also L. Hsu, "Towards an ASEAN Charter: Some Thought from the Legal Perspective" in R.C. Severino, ed., *Framing the ASEAN Charter: An ISEAS Perspective* (Singapore: Institute of Southeast Asian Studies, 2005) at 45.

⁴⁵ T. Dunne, "Good Citizen Europe" (2008) 84 *Int'l Aff.* 13 at 19.

⁴⁶ *Ibid.* It should be noted that ASEAN, even post-Charter, is not modeled on the EU.

vests the ASEAN Summit, comprising the Heads of State or Government of member states, with the authority of the supreme policy-making body of ASEAN.⁴⁷ Its wide-ranging powers include deliberating and providing policy guidance,⁴⁸ addressing emergency situations affecting ASEAN,⁴⁹ deciding on matters referred to it in connection with a serious breach or non-compliance of the Charter,⁵⁰ and dealing with unresolved disputes.⁵¹ The Summit also appoints the ASEAN Secretary-General upon the recommendation of the ASEAN Foreign Ministers Meeting.⁵² The Charter provides for the Summit to meet twice annually and to be convened as and when necessary.⁵³ The Summit is supported by the ASEAN Coordinating Council comprising the Foreign Ministers of member states.⁵⁴ To further the cause of establishing the ASEAN Community by 2015, the Charter provides for the establishment of three ASEAN Community Councils.⁵⁵ The ASEAN Community is the umbrella nomenclature incorporating the three pillars (or constituent sub-communities) *viz* the ASEAN Political-Security Community, the ASEAN Economic Community, and the ASEAN Socio-Cultural Community. In turn, each of the three Community Councils oversees the relevant ASEAN Sectoral Ministerial Bodies.⁵⁶

The Charter also beefs up the office of the Secretary-General and the ASEAN Secretariat. The Secretary-General, who shall be accorded the rank and status of Minister, is also the chief administrative officer of ASEAN.⁵⁷ The Secretary-General serves a non-renewable five-year term of office.⁵⁸ In recognition of the workload and to ensure better administrative support to superior ASEAN organs, the Charter provides for four (previously two) Deputy Secretaries-Generals, with the rank and status of Deputy Ministers.⁵⁹ They shall be of different nationalities from the Secretary-General and shall come from four different member states.⁶⁰

The Charter also specifically states that the Secretary-General and the Secretariat staff are tasked with “exclusively ASEAN character” responsibilities.⁶¹ As such, member states are required to respect their independence and not “seek to influence them” in the discharge of their responsibilities.⁶² The Charter also requires them to be apolitical and professional, and always “uphold the highest standards of integrity, efficiency, and competence” in the execution of their duties.⁶³ To better ensure that ASEAN’s officials are able to carry their work effectively, the Charter provides for immunities and privileges for ASEAN, the Secretary-General, the Secretariat staff, the Permanent Representatives to ASEAN, and officials of member states participating in official ASEAN activities.⁶⁴

⁴⁷ *ASEAN Charter*, *supra* note 2, art. 7(2)(a).

⁴⁸ *Ibid.*, art. 7(2)(b).

⁴⁹ *Ibid.*, art. 7(2)(d).

⁵⁰ *Ibid.*, c. 7.

⁵¹ *Ibid.*, c. 8.

⁵² *Ibid.*, art. 7(2)(g).

⁵³ *Ibid.*, art. 7(3)(a) & (b).

⁵⁴ *Ibid.*, art. 8.

⁵⁵ *Ibid.*, art. 9. See also *Declaration of ASEAN Concord II*, 24 February 1976, online, ASEAN < <http://www.aseansec.org/1216.htm> > [*Bali Declaration*]. On the Bali Declaration and its potential to reform ASEAN, see K. Freistein, “ASEAN after the Bali Summit 2003: From Paralysis to New Life?” (2005) 4 *Eur. J. E. Asian Stud.* 177.

⁵⁶ *Ibid.*, *ASEAN Charter*, arts. 9(2) and 10, and Annex 1.

⁵⁷ *Ibid.*, arts. 7(2)(g) and 11(3).

⁵⁸ *Ibid.*, art. 11(1).

⁵⁹ *Ibid.*, art. 11(4).

⁶⁰ *Ibid.*, art. 11(5).

⁶¹ *Ibid.*, art. 11(9).

⁶² *Ibid.*

⁶³ *Ibid.*, art. 11(8)(a).

⁶⁴ *Ibid.*, arts. 17, 18 and 19.

The Charter states that the ASEAN Secretariat shall be provided with the “necessary financial resources to perform its functions effectively”.⁶⁵ To better align ASEAN and the Secretariat with its member states, the Charter also requires members to appoint ambassadorial-rank Permanent Representatives to ASEAN resident in Jakarta where the ASEAN Secretariat is located. Collectively, the ten Permanent Representatives shall constitute the Committee of Permanent Representatives.⁶⁶ Member states are also required to establish their ASEAN national secretariats to serve as the focal point of ASEAN in member states, coordinate the implementation of ASEAN decisions nationally and promote ASEAN identity and awareness as well.⁶⁷ In addition, the Charter provides for the establishment of an ASEAN human rights body, and the ASEAN Foundation.⁶⁸

The description of the various ASEAN organs in the ASEAN Charter represents an attempt to overcome the valid criticism of institutional frailty. It attempts to put in place an organizational framework to help facilitate and coordinate the numerous activities and meetings under the auspices of ASEAN. They seek to provide ASEAN with the resources to further its objectives, and to enhance the institutionalization of the ASEAN framework. Chapter 5 of the Charter is primarily concerned with the formalization of the dealings with various organs, which hitherto had engaged with ASEAN with the permission of its relevant bodies. As ASEAN members still value institutional flexibility, the Charter discusses the mandates of the various organs without undue specificity, giving them the necessary room for flexible growth and development and yet achieve disciplined organizational work and purpose.⁶⁹

The Charter does not unequivocally address the issue of dealing with the member states’ differential capacity of integration. Given its consensual decision-making convention, this often means decisions based on the lowest common denominator. While useful in the fledgling days of ASEAN, this mode of decision-making is unduly restrictive and contains severe, inherent weaknesses. The original members took the position that the pace of integration should not be set by the slowest member. Hence, in the last few years especially in economic matters, a flexible approach towards the implementation or “flexible participation” has been taken. Two approaches commonly used are “2+X” and “ASEAN minus X”. This enables member states which are ready to proceed first. The former has a lower threshold and only requires two member states which are ready; those who are not ready can join in when they are ready. Similarly, in the “ASEAN minus X” approach, the focus is not on unanimity. Rather, the core idea is that no member should hold back the group. Either approach can help economic negotiations proceed without undue delay. ASEAN member states are aware of their different capacities, priorities and perspectives towards economic and political integration.

Although Article 21⁷⁰ provides for a flexible, two-tiered approach in economic matters, that approach has also been ingeniously applied in non-economic matters. For instance, ASEAN proceeded with implementing the Charter without waiting for all member states to ratify it. The 41st ASEAN Ministerial Meeting, which was held in Singapore in July 2008, started work on the Charter *viz* the dispute settlement mechanism under Article 25⁷¹ and the

⁶⁵ There are, nonetheless, constraints on the ASEAN Secretariat. One is the continuation of the practice of equal financial contributions by member states, rather than a sliding scale of contributions like in the United Nations. See *ibid.*, ASEAN Charter, art. 30(2).

⁶⁶ *Ibid.*, art. 12.

⁶⁷ *Ibid.*, art. 13.

⁶⁸ *Ibid.*, arts. 14 and 15. See pp. 182-85 below for further discussion on the ASEAN human rights body.

⁶⁹ This seems to be tack taken in many Asian inter-governmental organizations, see M. Kahler, “Legalization as Strategy: The Asia-Pacific case” (2000) 54 Int’l Org. 549. See further, E. Solingen, “The Genesis, Design and Effects of Regional Institutions: Lessons from East Asia and the Middle East” (2008) 52 Int’l Stud. Q. 261.

⁷⁰ ASEAN Charter, *supra* note 2, art. 21.

⁷¹ *Ibid.*, art. 25.

drafting of the terms of reference for the ASEAN Human Rights Body under Article 14.⁷² There is an emerging discourse that the “all-or-nothing” approach will not benefit member states and ASEAN. The shift towards flexible participation and implementation that is inclusive is discernible and is indicative of a nuanced re-calibration of the consensus approach.

What the Charter does is to facilitate the basic institutionalization and strengthening of the institutions of ASEAN. This can also help manage the danger of a bifurcated ASEAN in which member states are operating at two different speeds, where the gap between the original and new members is in constant danger of becoming a chasm that can leave ASEAN bereft of principle and purpose. This is the approach taken in two controversial topics: the regional human rights mechanism in ASEAN, and the relationship between Myanmar and ASEAN (discussed in Section IIIB below).

1. *ASEAN and human rights: Mutually exclusive?*

The issue of human rights is a controversial topic in ASEAN. Even so, the provision for a human rights mechanism in ASEAN in the Charter is a significant milestone in the life and times of ASEAN. The state of democratic development and commitment to democracy and rule of law varies from member state to member state. In the international *fora*, ASEAN is seen as an outlier, primarily because of its (in)action towards Myanmar. Nonetheless, ASEAN is sensitive to and cognizant of international concerns and developments on human rights. The first indication that ASEAN, as a grouping, was prepared to “consider the establishment of an appropriate regional mechanism on human rights” was in 1993.⁷³ ASEAN’s position on human rights was clearly enunciated following the World Conference on Human Rights in Vienna that year. The careful wording of the joint communiqué by the 26th ASEAN Ministerial Meeting in 1993 was evident and deliberate:

16. The Foreign Ministers welcomed the international consensus achieved during the World Conference on Human Rights in Vienna, 14-25 June 1993, and reaffirmed ASEAN’s commitment to and respect for human rights and fundamental freedoms as set out in the Vienna Declaration of 25 June 1993. They stressed that human rights are interrelated and indivisible comprising civil, political, economic, social and cultural rights. These rights are of equal importance. They should be addressed in a balanced and integrated manner and protected and promoted with due regard for specific cultural, social, economic and political circumstances. They emphasized that the promotion and protection of human rights should not be politicized.

17. The Foreign Ministers agreed that ASEAN should coordinate a common approach on human rights and actively participate and contribute to the application, promotion and protection of human rights. They noted that the UN Charter had placed the question of universal observance and promotion of human rights within the context of international cooperation. They stressed that development is an inalienable right and that the use of human rights as a conditionality for economic cooperation and development assistance is detrimental to international cooperation and could undermine an international consensus on human rights. They emphasized that the protection and promotion of human rights in the international community should take cognizance of the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states. They were convinced that freedom, progress and national stability are promoted by a balance between the rights of the

⁷² *Ibid.*, art. 14.

⁷³ *Joint Communiqué of the Twenty-Sixth ASEAN Ministerial Meeting in Singapore, 23-24 July 1993*, online: ASEAN <<http://www.aseansec.org/2009.htm>>.

individual and those of the community, through which many individual rights are realized, as provided for in the Universal Declaration of Human Rights.

18. The Foreign Ministers reviewed with satisfaction the considerable and continuing progress of ASEAN in freeing its peoples from fear and want, enabling them to live in dignity. They stressed that the violations of basic human rights must be redressed and should not be tolerated under any pretext. They further stressed the importance of strengthening international cooperation on all aspects of human rights and that all governments should uphold humane standards and respect human dignity. In this regard and in support of the Vienna Declaration and Programme of Action of 25 June 1993, they agreed that ASEAN should also consider the establishment of an appropriate regional mechanism on human rights.⁷⁴

In essence, ASEAN's position on human rights can be summarized as follows⁷⁵:

- (1) The equality, inter-relatedness and indivisibility of civil, political, economic, social and cultural rights.
- (2) The promotion of human rights must take into account the specific cultural, social, economic and political circumstances, and in the context of development and international cooperation.
- (3) The rejection of the politicization of human rights, including its use as a precedent condition for economic cooperation and development assistance.
- (4) The promotion and protection of human rights must respect the national sovereignty, territorial integrity and non-interference in the internal affairs of states.
- (5) The balance of individual rights and community rights.

Article 1(7) of the Charter states that one of ASEAN's purpose is to "strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN".⁷⁶ The Charter, however, does not give full effect to this aspiration in any significant manner. Article 14 merely states that "ASEAN shall establish an ASEAN human rights body".⁷⁷ This body "shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting".⁷⁸ At the foreign ministers level, they agreed to such a provision being included in the Charter although Myanmar (earlier, Cambodia, Laos and Vietnam) objected to such a body. Singapore's Foreign Minister noted the disagreement on the nature the ASEAN human rights organization should take. However, he assured Singapore parliamentarians that the body "will not be a toothless paper tiger":⁷⁹

Some ASEAN countries prefer a body which has no teeth because there is justifiable concern that Western countries and NGOs will make use of it to interfere in their

⁷⁴ *Ibid.*

⁷⁵ See also Thio L.A., "Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to go before I Sleep" (1999) 2 *Yale Hum. Rts. & Dev. L.J.* 1. See generally A.J. Langlois, *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory* (Cambridge: Cambridge University Press, 2001).

⁷⁶ *ASEAN Charter*, *supra* note 2, art. 1(7).

⁷⁷ *Ibid.*, art. 14.

⁷⁸ As expected, human rights was a key area of disagreement among ASEAN members in the draft Charter. See "ASEAN divided over regional charter" *Financial Times—Asia* (31 July 2007) 2. See also the efforts by the regional civil society Working Group for an ASEAN Human Rights Mechanism. The Group's primary goal is to establish a regional human rights commission for ASEAN. For more details, see online: <<http://www.aseanhrmech.org>>.

⁷⁹ Remarks in Singapore Parliament during Committee of Supply debate, 28 February 2008.

domestic politics. Others make the opposite argument, that a credible human rights body will help us address this issue on our own terms. It is precisely because of a lack of agreement among ASEAN countries that the human rights body was called a 'body' and not a 'commission'. My own guess is that we will have in the end a body which, while lacking in teeth, will at least have a tongue and a tongue will have its uses.⁸⁰

Given the varying human rights record of ASEAN member states, ASEAN itself also suffers from a credibility gap in that it is unable to assertively and resolutely defend human rights by example and through advocacy. There is also the issue of what the core human rights in ASEAN should be. Although Article 14⁸¹ may not go as far as it ought, the dynamics at work making the human rights body a sensitive topic should not be ignored either. At heart is the concern among some member states that the human rights body would be a segue for intervention by external parties in the internal affairs of a member state. Indeed, the die has been cast in that human rights have acquired recognition by the ASEAN leadership as an important issue that cannot be wished away.⁸² Clearly, ASEAN members now have to deal with the issue of human rights within member states and with ASEAN collectively. As Singapore's *Straits Times* editorialized, "The definition of that core has to be enlightened enough to maintain a steady pressure on member states, and practical enough so as not to be deemed an irrelevance".⁸³ More than just defining the core of human rights, the human rights body must have a viable reporting and monitoring mechanism, and be independent like other regional human rights commissions in Africa and Latin America. It may well be that the Charter and ASEAN will invariably be judged on their commitment to the issue of human rights. This, unfortunately, would be short-sighted but it is a matter that ASEAN would have to be cognizant of if it seeks to enhance its dealings with the US and the EU.

The principle of non-interference is a possible stumbling block. If this principle is given *de facto* overriding *veto* effect, then the Charter and ASEAN will be rendered toothless in this area of growing importance. Too often, critics fail to appreciate that even if ASEAN is not up to mark in this regard, it would be foolish and short-sighted to throw the proverbial baby (*i.e.* ASEAN) out with the bath water (*i.e.* the Charter). To expect the military junta in Myanmar and other member states to improve overnight and have flawless human rights record on account of the Charter smacks of unrealism. As Simon Tay observes, "The hard truth is that the international community does not easily deal with any country that willfully disregards norms."⁸⁴ North Korea, Sudan, Iran, and Israel are some other examples.

Instead, what the world community should be looking out for is whether ASEAN possesses the commitment, will, and gumption to take recalcitrant member states to task, even if this is done incrementally. The life and experience of international politics will be familiar with the distinction between form and substance. On either count, ASEAN still needs to be able to stand up to scrutiny. Requiring member states, through the Charter, to pull themselves up by their boot-straps sends a strong signal and sets the stage for concrete action even if this is juxtaposed with incremental change.

The challenge of giving effect to the protection of human rights in ASEAN is real. Because of their supposed universality, a genuine human rights regime would potentially supersede state sovereignty so cherished by ASEAN member states, and would potentially undermine

⁸⁰ *Ibid.*

⁸¹ ASEAN Charter, *supra* note 2, art. 14.

⁸² H.E.S. Nesadurai, "ASEAN and Regional Governance after the Cold War? From Regional Order to Regional Community?" (2009) 22 *Pac. Rev.* 91; R. Burchill, "Regional Integration and the Promotion and Protection of Democracy in Asia: Lessons from ASEAN" (2007) 13 *Asian Y. B. Int'l L.* 51. On the relationship between multilateralism and democracy, see R. Ohane, S. Macedo, and A. Moravcsik, "Democracy-Enhancing Multilateralism" (2009) 63 *Int'l Org.* 1.

⁸³ "ASEAN is maturing" *Straits Times* (1 August 2007).

⁸⁴ S. Tay, "ASEAN's Charter: Promises vs. Realities" *Today [of Singapore]* (2-3 August 2008).

the non-interference principle in ASEAN as well.⁸⁵ Thus, it is to be expected that ASEAN is treading very cautiously on the human rights body. The concern is that the human rights body becomes a Trojan horse by which human rights is admitted to the domestic and regional agenda, with member states losing the prerogative and control of the human rights debate domestically and regionally.

Allied to this is the emergence of the putative “responsibility to protect” (R2P) norm in humanitarian law. At the basic level, R2P requires a sovereign government to protect its people from mass atrocity crimes (e.g. ethnic cleansing, genocide). However, if the government is unable or unwilling to do so, then a wider responsibility lies with the international community to take the requisite action necessary to assist preventively, and if required, react effectively. This is the responsibility of all states. R2P focuses on assistance and prevention as well as non-military action before, during, and after a crisis. Use of force, specifically military intervention, is a last-resort option but only with the United Nations Security Council’s endorsement.⁸⁶ This emergent international norm adds pressure on ASEAN to intervene, when necessary, when an ASEAN member state is unable or unwilling to protect the welfare of its people in the event of a mass atrocity crime.⁸⁷

C. Strategic Thrust 3: Establishing Formal Mechanisms to Monitor Compliance and Settle Disputes

The settlement of disputes is provided for in Chapter 8 of the Charter. The Charter exhorts member states to “resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation”.⁸⁸ Prior to the Charter, dispute resolution was most advanced in the economic realm primarily through the 2004 ASEAN Protocol on Enhanced Dispute Resolution Mechanism (“the Vientiane Protocol”). The Charter requires that ASEAN establish and maintain dispute resolution mechanisms in all fields of ASEAN cooperation.⁸⁹ Where it is not provided for, the Charter stipulates that “appropriate dispute settlement mechanisms” be established.⁹⁰ In an affirmation of a peaceful and conciliatory approach to dispute resolution, the Charter urges disputing parties “to resort to good offices, conciliation or mediation” to resolve their disputes.⁹¹ The ASEAN Chairman and the ASEAN Secretary-General are specifically to provide “good offices, conciliation or mediation” if requested by the disputing parties.⁹²

The ASEAN Summit is the final arbiter if a dispute remains unresolved after prior prescribed dispute settlement efforts.⁹³ Many questions hang over this prescribed process of dispute resolution. As mentioned earlier, given ASEAN’s preference and practice of consensus and agreement, such an open-ended role and discretion given to the ASEAN Summit is highly unsatisfactory. It may well be that consultation, compromise, and consensus remains the bedrock of dispute resolution in ASEAN even under the Charter. If so, then the ASEAN

⁸⁵ The Kantians would also argue that a human rights regime can bring us closer to the state of perpetual peace.

⁸⁶ See further Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, DC: Brookings Institution Press, 2008). R2P was adopted at the UN World Summit in 2005.

⁸⁷ See the dismal prospects for R2P in ASEAN in N.M. Morada, “The ASEAN Charter and the Promotion of R2P in Southeast Asia: Challenges and Constraints” (2009) 1 *Glob. Resp. to Prot.* 185.

⁸⁸ *ASEAN Charter*, *supra* note 2, art. 22(1).

⁸⁹ *Ibid.*, art. 22(2). Art. 24(3) of the Charter reiterates the centrality of the Vientiane Protocol as a key mode of dispute resolution in ASEAN economic agreements.

⁹⁰ *Ibid.*, *ASEAN Charter*, art. 25. This allows ASEAN to create a formal regional court in future should litigation be seen as an appropriate mode of dispute resolution in certain conflicts.

⁹¹ *Ibid.* art. 23(1).

⁹² *Ibid.*, art. 23(2).

⁹³ *Ibid.*, art. 26.

Summit itself is likely to try to resolve the dispute. If it is unsuccessful, the ASEAN Summit would most likely refer that unresolved dispute to international arbitration in the first instance, or even direct parties to the International Court of Justice at the Hague.

Article 27 seeks to further the objective of making ASEAN more rules-based and effective in terms of managing the outcomes after a dispute has been resolved. The Secretary-General is tasked with the responsibility to monitor the compliance with the findings, recommendations or decisions of an ASEAN dispute settlement mechanism.⁹⁴ It also provides that the aggrieved party affected by the non-compliance may refer the matter to the ASEAN Summit.⁹⁵ A fair criticism of Chapter 8 of the Charter is that there is no meaningful enforcement mechanism provided for under the Charter, unless the ASEAN Summit takes upon itself, as a matter of principle, the role of enforcer. Even then, the lack of such a clearly delineated legal power is problematic.

A related criticism is that there is no provision in the Charter for sanctions in the event of a serious breach of Charter or non-compliance. No expulsion or suspension of membership is provided for in the Charter. While it can be argued that the Charter does not specifically preclude such extreme measures of suspension of or expulsion from membership, the lack of such a clear provision suggests that ASEAN is keeping steadfastly to its family approach, as well as keeping faith to its long-standing cardinal principle of non-interference. Long used to a glaring lack of an enforcement culture and institutional inertia, ASEAN's intended transformation from a "family club" to a rules-based organization is now showing up the heavy path dependence and long-standing inadequacies of its first forty years of existence. For ASEAN, a transformation is too revolutionary and an evolution is more realistic and achievable.

Yet the question persists whether ASEAN is changing fast enough, and whether the Charter lacks teeth in dealing with recalcitrant member states. Critics have regularly pounced on this open-ended, informal, less-than-definitive mode of dispute resolution. However, we should look at the substantive outcomes rather than the means of dispute resolution.⁹⁶ If resolution is arrived, peace is maintained and the disputing parties' substantive rights are not infringed upon, why begrudge the means if they are successful? In the process, certain putative norms and principles could acquire credence and legitimacy and could then subsequently be incorporated into the Charter.⁹⁷

III. THE HYBRID CHARTER: HARD LAW COMPLEXION WITH SOFT-LAW EFFECT

A key argument in this article is that the Charter should not be seen as an agreement cast in stone. Considering the change in organizational tack that ASEAN sought, ASEAN needed a Charter that would make this transition feasible through securing the buy-in of all member states. In other words, the Charter is a pragmatic response to the needs of the organization that has remained in danger of irrelevance. It is an attempt at organizational re-building as well as institutionalizing the values, norms and desired practices. Given ASEAN's background, the Charter plausibly offers a viable way forward for the organization. ASEAN can either have a Charter observed more in its breach or opt for a Charter that can gradually inculcate in member states the need to depart, where necessary, from the outmoded aspects of the ASEAN Way. The Charter codifies long-standing principles, norms, and values as an integral process of ASEAN's raising the bar on institutional performance and effectiveness.

⁹⁴ *Ibid.*, art. 27(1).

⁹⁵ *Ibid.*, art. 27(2).

⁹⁶ See also W. Woon, "The ASEAN Charter Dispute Settlement Mechanisms" in T. Koh, R.G. Manalo and W. Woon, eds., *The Making of the ASEAN Charter* (Singapore: World Scientific, 2009) at 69.

⁹⁷ The dispute settlement procedure under the Charter did not get off to a good start. In the Preah Vihear temple dispute, although ASEAN foreign ministers offered ASEAN's facilities at the disposal of Thailand and Cambodia, neither disputing party took up the offer.

Although the Charter is formally “hard law”, it is more “soft law” in posture, approach and effect. The Charter provides ASEAN with the hardware—a putative architecture for governance and a light-touch regulation. However, the Charter is not a typical “command and control” legal instrument; it may strike some as more of a non-binding code of conduct, organizational guidelines rather than a rule-book or constitution. It is submitted that the Charter should be viewed as a composite legal instrument: ostensibly hard law for its binding effect and its intent to create a viable organizational and governance structure. Yet it is has salient soft law elements in its treatment of the key organizational and ideational issues.

A similar approach can be seen in the Charter’s effort to crystallize and embody desired norms, values, and encourage certain patterns of conduct. A case can be made that the Charter also endows ASEAN with the software and attitudinal mindset of encouraging member states to imbibe the desired values, adopt the desired conduct so as to facilitate the attainment of the purposes and principles of ASEAN. The development of the Charter was seen as one of the strategies for the “shaping and sharing of norms” in the Vientiane Action Programme.⁹⁸

In the area of governance in the realm of international affairs and law, the use of hard law has been the main mode of legalization. However, increasingly, soft law has been adopted as a complementary mode of legalization. Hard law is generally understood as “legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law”.⁹⁹ Domestic legislation and international treaties are the tangible expressions of hard law. For example, international agreements and treaties stipulate—in varying degrees of clarity and precision—the legally-binding duties and obligations (accountability and compliance), and the punishment for transgression and non-compliance (sanctions).

However, given that the change sought within ASEAN is ideational at its core and incremental in approach, the structural power of hard law, if given full effect, is not only reactionary but also grossly inadequate as a means of adaptive socialization and social learning for some member states. Hence, hard law alone cannot make ASEAN a rules-based, effective and relevant inter-governmental organization. A blind application of hard law is merely a formalistic and coercive attempt at symptomatic treatment for ASEAN’s shortcomings. It certainly is not a silver bullet for the evolutionary but substantive changes deemed necessary to raise ASEAN’s profile, effectiveness and relevance.

On the other hand, soft law is less definitive and often does not create enforceable rights and duties. Soft law includes a variety of processes that attempt to set rules, guidelines, or codes of conduct that share the common trait of having non-legally binding normative content that may have actual regulative, practical effects similar to hard law.¹⁰⁰ Soft law’s inherent flexibility and potential discursive power can facilitate the setting of normative standards and enable social learning. This is particularly useful in situations where persuasion and reflexive adjustment, rather than rigid adherence or enforcement, are needed. In particular, soft law can assist in efforts to internalize the norms embedded in hard law.¹⁰¹ For instance, the ideational standards or expectations first enunciated in soft law mechanisms can subsequently form the basis on which the practical application of the hard law can subsequently acquire effectiveness, efficacy, and legitimacy. In the same way, the values promoted by ASEAN have a better chance of being institutionalized and acquiring buy-in from member states than by imposing them by *fiat* or coercion.

⁹⁸ *Vientiane Action Programme*, *supra* note 23, para. 1.2 at 7.

⁹⁹ K.W. Abbott and D. Snidal, “Hard and Soft Law in International Governance” in J.L. Goldstein, M. Kahler, R.O. Keohane and A-M Slaughter, eds., *Legalization and World Politics* (Cambridge: MIT Press, 2001) at 37.

¹⁰⁰ As such, it cannot be relied upon as a basis for deterrence, enforcement action and punitive sanctions.

¹⁰¹ D.M. Trubeck, P. Cottrell and M. Nance, “‘Soft Law’, ‘Hard Law’ and EU Integration” in G. de Búrca and J. Scott, eds., *Law and New Governance in the EU and the US* (Oxford: Hart, 2006) at 65.

Soft law can also be understood as law in the embryonic stage of formation—a precursor of emerging hard law, principles and norms that might eventually consolidate to become legally binding rules themselves. As such, soft law can contribute to the legal interpretation of hard law. In this regard, soft law can help knowledge, norms and values to be framed strategically and dovetail with existing normative frameworks. Specifically, soft law mechanisms can be adapted for the purposes of persuading ASEAN members of the importance of the norms that the Charter seek to promote, concretize and give effect to. In ASEAN’s context, this means the member states can use soft law attributes to attract, socialize and co-opt other member states on the imperative of observing the Charter as a means to and an end of preserving regional peace, stability and progress. These attributes of soft law may facilitate the socialization, the formation of consensual knowledge and a shared understanding of the way forward for ASEAN in terms of the desired norms, practices, and values.

The utility of a soft law approach is its transformative capacity in socializing stakeholders through a consensual and confidence-building process. More directly, soft law speaks to reason, understanding, strives to develop consensus, and encourage the internalization of desired values and interests. Soft law’s iterative, *quasi*-prescriptive nature can engage cognitive and informed responses. In contrast, hard law approaches tend to elicit reasoning and responses that are primarily egocentric, denominated in self-centered terms of punishment-avoidance, compliance with an authority, and group norms. Soft law approaches encourage the movement towards a level of conduct that factors the interests of affected parties based on impartial and reasonable principles. When successfully imbibed, soft law approaches result in actors adopting critical and reflective reasoning.¹⁰² This, in turn, would result in more compliance.

A. *Tweaking Common Values*

The reconfiguration of ASEAN and community building cannot be achieved solely by a mechanical construction of institutions. Institutional building is not about organizational architecture *per se* but needs to be complemented by a subscription to a core of common values. Common values give added meaning to the organizational architecture, and help bind the organization. The common values of ASEAN are found in Article 2 titled “Principles”. The Charter recognizes, given ASEAN’s diversity, respect for the different cultures, languages, and religions, while emphasizing “common values in the spirit of unity in diversity”.¹⁰³ The majority of the common values such as sovereignty, collective responsibility, renunciation of the use of force, peaceful settlement of disputes, adherence to rule of law, good governance, democratic principles and constitutional government are not problematic as they are in accord with universal values. To be sure, mere recognition of such values and norms is one thing but observing and living up to those values meaningfully is another matter altogether.

The Charter enshrines the so-called ASEAN Way of non-interference in the internal affairs. As such, it advocates enhanced consultations on matters that seriously affect ASEAN’s common interests, and consensual decision-making. These values have been often criticized for the excesses found in some ASEAN member states, particularly those with autocratic regimes. ASEAN’s supposed complicity in turning a blind eye to the Myanmar excesses is a major source of grievance for ASEAN’s critics. While this article does not make a defence of the constituent ingredients of the ASEAN Way, one should not be too hasty to regard their inclusion as a blatant codification of problematic values and norms.

¹⁰² See generally Goldstein *et al.*, *supra* note 99.

¹⁰³ ASEAN Charter, *supra* note 2, art. 2(2)(l).

As argued earlier, the Charter is not meant to make revolutionary changes to ASEAN. Instead, the Charter will have to catalyze change and inspire reforms if ASEAN is to maintain its geopolitical stature and relevance. To “outlaw” or scrub out of existence norms that have kept ASEAN relatively cohesive despite the vast differences between member states is to undermine the foundations of ASEAN. Further, it is abundantly clear that interdependence in today’s world does not make cooperation a foregone conclusion. This applies to ASEAN where cooperation has to be consciously worked upon, encouraged, and scaled-up in the years ahead. This paradox is profoundly manifested in ASEAN where bilateral spats are still common; indeed, enlargement has made some of these bilateral disagreements and tensions more marked.¹⁰⁴ Critics forget that ASEAN has throughout its history maintained its relevance by tinkering, not overhauling, then existing rules. ASEAN’s institutional path dependency, pivoting on the ASEAN Way, will necessarily mean that incrementalism is more likely to be accepted and implemented. It would be useful to bear in mind that the ASEAN Charter does not represent a “big bang” approach to changing the internal dynamics, workings, and *raison d’être* of ASEAN. A more nuanced interpretation is needed. Instead, the Charter is a calibrated approach that seeks to manage change amidst continuity.

Although the non-interference principle is maintained in the Charter, one could argue that non-interference is now no longer the same creature that it was before November 2007. Article 20(1) stipulates that, as “a basic principle”, consultation and consensus shall be the basis of decision-making in ASEAN. Where consensus cannot be achieved, the Charter provides that the ASEAN Summit “may decide how a specific decision can be made”.¹⁰⁵ This is significant. First, it recognizes that while the default approach is consultation and consensus, the Charter provides that the ASEAN Summit may decide on a basis other than consensus. In egregious cases such as a serious breach of the Charter or non-compliance, this means that the ASEAN Summit can possibly decide with a wider latitude the options available. Second, the deliberate use of “decide” in the Charter is significant because it connotes influencing or affecting resolutely the outcome of an issue. Consensus and consultation may occasionally lack the decisive edge as “decide” does. True, the ASEAN Summit is unlikely to deviate drastically from precedents and would be very mindful of not unnecessarily derogating from ASEAN’s principles enshrined in Article 2. But the option is there. This option is repeated for unresolved disputes (Article 26), and for non-compliance by a member state of findings, recommendations or decisions from an ASEAN dispute settlement mechanism (Article 27). Thus, a significant but under-stated inroad has been made in the consensual decision-making framework.

It is also noteworthy that the consensual decision-making has been over-hyped to the point that it ignores the understanding among ASEAN member states that this does not mean unanimity is necessary in every decision taken. What it means is that no member state objects to a decision so strongly that it feels compelled to register its dissent. As a face-saving gesture that is saliently necessary in associational life in Southeast Asia, consensual decision-making results in no member state “losing face” as a consequence of being in the minority camp. This is further supported by the fact that there are ASEAN agreements that have come into force without requiring the ratification of all signatories.¹⁰⁶ For example, the ASEAN Agreement on Transboundary Haze Pollution requires only six ratifications.¹⁰⁷ Likewise, the Treaty on Southeast Asia Nuclear Weapon Free Zone requires only seven

¹⁰⁴ N. Ganesan, *Bilateral Tensions in Post-Cold War ASEAN* (Singapore: Institute of Southeast Asian Studies, 1999).

¹⁰⁵ *ASEAN Charter*, *supra* note 2, art. 20(2).

¹⁰⁶ The ASEAN Charter, however, requires ratification by all member states. See *ibid.*, art. 47(2).

¹⁰⁷ *ASEAN Agreement on Transboundary Haze Pollution*, 10 June 2002 (entered into force 11 November 2003), online: ASEAN <http://www.aseansec.org/images/agr_haze.pdf>.

ratifications.¹⁰⁸ As discussed earlier, cognizant of the differential capacity of member states to participate in different ASEAN projects in the economic realm, ASEAN has adopted the “ASEAN minus X” or “2 + X” flexible participation formula so that economic projects are not delayed by one or more member states. These member states can always join in when they are ready. A good example is the ASEAN Free Trade Area where there is a two-track system for the abolishment of all import duties: the original six ASEAN member states are expected to comply by 2010 with the other four member states by 2015.

The Charter, without being explicit, has opened the door for a robust interpretation and application of the norm of non-interference. The Charter seeks to preserve the benefits of such a norm but is careful to manage the downsides.¹⁰⁹ To do away completely with the norm is to make the Charter’s signing and ratification untenable. More than that, associational life in ASEAN can become fraught with tension, suspicion and disunity. These are situations that the Charter seeks to avoid. By devolving the decision-making to the Summit, the Charter preserves the norm while at the same time ensures that the norm is not used to the collective detriment of ASEAN.

The original founding members¹¹⁰ of ASEAN, *viz* Indonesia, Malaysia, the Philippines, Singapore, and Thailand, adopted and religiously adhered to a policy of non-interference. It was then a pragmatic and strategic policy given the bilateral spats and conflicts between the founding members. The larger concern was the potential domino effect of communism in the aftermath of the Vietnam War at its door step. The strategic imperative was to develop national and regional resilience among the five non-communist original members of ASEAN. Thus, the abiding demand for the sovereignty norm, encompassing non-interference and consensual decision-making, was not surprising. There is a trade-off of course. The downside of unbridled pragmatism is the inherent tendency to veer towards acting without principle. Hence it is not unsurprising that keen observers have noted that “ASEAN’s core norms are affiliated with political realism, which might provide significant potential for intermittent backsliding and unilateral reversals in Southeast Asian regionalism”.¹¹¹

While ASEAN is keen to maintain the norm of non-interference as a means to sustain regional comity, it is alive to the reality that the norm cannot be applied inflexibly especially when internal developments in one member state affect other ASEAN members. Consultative and consensual decision-making had served ASEAN reasonably well in the early days when ASEAN was smaller. Although such a mode of decision-making can contribute to confidence-building, it can equally lead to indecision and incapacity to act resolutely and implement effectively. This has been evident with the addition of new member states in the 1990s, and with the geopolitical and geo-economic context being vastly different from 1967. Not only has decision-making become relatively more stymied and contentious but it also strained ASEAN’s reputed informal and cohesive way of getting things done. In turn, the practical effect has been to enable a determined or recalcitrant member to hold ASEAN to ransom. For example, Myanmar has been able to use this, in concert with the policy of non-interference, to prevent ASEAN from acting more decisively and substantively on the former’s atrocious human rights record. If recent experience is to go by, this norm is being re-interpreted and it is argued, in the following section, that this norm is not as sacrosanct as it is often made out to be.

¹⁰⁸ *Treaty on Southeast Asia Nuclear Weapon Free Zone*, 15 December 1995, (entered into force 28 March 1997, art. 16(1)), online: ASEAN <<http://www.aseansec.org/2082.htm>>.

¹⁰⁹ For the argument that the Charter is evidence of ASEAN’s “cautious liberal turn”, see J. Dosch, “ASEAN’s Reluctant Liberal Turn and the Thorny Road to Democracy Promotion” (2008) 21 *Pac. Rev.* 527. See also E.M. Kuhonta, “Walking a Tightrope: Democracy versus Sovereignty in ASEAN’s Illiberal Peace” (2006) 19 *Pac. Rev.* 337.

¹¹⁰ Brunei joined in 1984, Vietnam in 1995, Myanmar and Laos in 1997, and Cambodia in 1999.

¹¹¹ J. Ruland and A. Jetschke, “40 Years of ASEAN: Perspectives, Performance and Lessons for Change” (2008) 21 *Pac. Rev.* 397 at 406.

B. *Dealing with the Dilemma that Myanmar is: Non-interference
in Flux and in Retreat?*

ASEAN's weakest link is perhaps Myanmar. Its continued constructive engagement with Myanmar has resulted in no shortage of opprobrium, embarrassment, and angst to ASEAN. Myanmar is seen as the lowest common denominator in ASEAN for civil and political rights as well as human development. Despite the accusations of kids-glove treatment, complicity and cowardice, ASEAN has steadfastly stood by Myanmar as an ASEAN member, defending its "constructive engagement" policy. However, unhappiness within the ASEAN ranks has been evident in the last couple of years but suspending or expelling Myanmar from ASEAN, while talked about privately, has never been openly and seriously attempted as solutions.¹¹² For people inside and outside ASEAN, this is ASEAN's enigma: that its benign engagement with the junta is seemingly a cover for inaction and ineffectiveness rather than a real pathway of reform.¹¹³

ASEAN is increasingly mindful of international opinion and pressure, and how Myanmar's internal developments are undermining ASEAN's effectiveness and derailing its aspirations.¹¹⁴ As it is, in ASEAN's engagements with the US and EU, Myanmar has become a thorn in the flesh for all concerned. In the process, ASEAN's standing and reputation has suffered.¹¹⁵ Ultimately, it is about geopolitical imperatives that brought and has kept Myanmar within the ASEAN fold. Moral vanity, manifested primarily in economic sanctions by the US and EU, is not construed as a sensible policy for ASEAN. Expelling Myanmar, being isolated as it is, will not solve or lead to beneficial changes for ASEAN.¹¹⁶ Expelling Myanmar from ASEAN will not only exacerbate the problem for ASEAN but will unravel the inclusive community aspiration of ASEAN.

In maintaining Myanmar's ASEAN membership, ASEAN believes that it is provided with channels of communication with the military junta. A good example was in the aftermath of Cyclone Nargis which hit Myanmar in May 2008. ASEAN with the UN mediated in the stand-off between Myanmar and the international community over emergency relief to those affected.¹¹⁷ The metaphor ASEAN uses is a familial one, in tandem with its

¹¹² J. Drew, "Unity lacking on diplomatic approach to Burma's junta" *The Washington Post* (25 October 2007), online: <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/24/AR2007102402756.html>; Zaid I., "Losing Patience with Burma" *The Wall Street Journal Asia* (12 January 2006) 15; S. H. Albar (Foreign Minister of Malaysia) "It is not possible to defend Myanmar" *The Wall Street Journal Asia* (24 July 2006); "Suspend Myanmar from Asean" *Straits Times* (4 October 2007); "Disparate views in Asean on crisis in the family" *Straits Times* (10 October 2007); and "The gathering mild rebuke" *The Economist* (2 September 2006).

¹¹³ See damning indictment in M. Suryodiningrat, "Southeast Asian Nations Risk Dissension by Ignoring Human Rights" *YaleGlobal* (4 August 2009) online: <http://yaleglobal.yale.edu/content/southeast-asian-nations-risk-dissension-ignoring-human-rights>.

¹¹⁴ R. Katanyuu, "Beyond Non-Interference in ASEAN" (2006) 46 *Asian Sur.* 825; L.Z. Rahim, "Fragmented Community and Unconstructive Engagements: ASEAN and Burma's SPDC Regime" (2008) 40 *Crit. Asian Stud.* 67. A group of jurists has called on the UN Security Council to investigate into alleged crimes against humanity and war crimes in Myanmar: see *Crimes in Burma*, (Report by the International Human Rights Clinic at Harvard Law School, May 2009), online: <http://www.law.harvard.edu/programs/hrp/documents/Crimes-in-Burma.pdf>.

¹¹⁵ V. Maller, "Asia's former tigers are flirting with irrelevance" *Financial Times—Asia* (3 August 2006).

¹¹⁶ After all, the junta relies on isolation, and isolation will not lead to regime change. For a persuasive view of why sanctions would not work on Myanmar, see Thant M-U, "What to do about Burma" 29(3) *London Review of Books* 31, (8 February 2007). On the junta's intransigence post-September 2007, see A.M. Thawngmung and Maung A.M., "Myanmar in 2007: A Turning Point in the 'Roadmap'?" (2008) 48 *Asian Sur.* 13. See also G. Sheridan, "Isolating Burma doesn't help," *The Australian*, (15 May 2008) online: <http://www.theaustralian.news.com.au/story/0,25197,23699758-5013460,00.html>.

¹¹⁷ See M. Green and D. Mitchell, "Asia's Forgotten Crisis: A New Approach to Burma" 86 *Foreign Affairs* (November-December 2007) 147, for their 'coordinated engagement' proposal involving ASEAN, China, India, Japan, and the USA.

communitarian perspective: Whatever the behaviour of a family member, it is still a family member. Singapore's Foreign Minister discusses with frankness the challenge and dilemma that Myanmar poses:

The military will continue to have a strong role to play. We believe that it is a necessity, because while the military is part of the problem today, it has to be part of the solution tomorrow. ASEAN considers Myanmar to be part of the family, maybe an awkward member of the family but still a member of the family, and we will, from that perspective, always view Myanmar differently from the way outsiders view Myanmar... So from that perspective, our continued engagement of Myanmar may not be viewed with favour by some of our European friends, but it is a matter of absolute necessity and one which serves our long-term interest in the region, and which I believe will also serve European long-term interests in the region.¹¹⁸

This is notwithstanding ASEAN's pragmatic assessment that it has limited influence and leverage, compared with China or India, over Myanmar. However, ASEAN's view is that it has some moral influence since Myanmar would rather be part of the ASEAN family rather than be caught between India or China.¹¹⁹ During Singapore's chairmanship of ASEAN in 2007-2008, Singapore's Foreign Minister enunciated ASEAN's *realpolitik* approach well:

But let us push that hypothetical possibility, say we expel Myanmar from ASEAN, rid ourselves of a problem. What happens? Myanmar is the buffer state between China and India. China has vast interests in Myanmar; India has vast interests in Myanmar. If it is not a member of ASEAN, both sides will have to create options for themselves in that country. And if there is internal discord, in self-defence, each will have to interfere to protect its own self-interests. So if China and India are dragged in, I think the Americans, the Japanese and the others will also be alarmed. In the end, Myanmar can become an arena for big power conflicts. At that point in time, our own interests will be dragged in too. So it would be better that we pinch our noses, and bear with the problem, and keep Myanmar within ASEAN's table, than to come to the conclusion that jumping out from the frying pan will land us in a cooler situation.¹²⁰

Yet, in spite of ASEAN's determination to maintain ties with Myanmar, ASEAN has neither let Myanmar hold it back nor dictate the pace of ASEAN integration. Indeed, ASEAN has also been prepared to chastise Myanmar. On 27 September 2007, George Yeo, at the sidelines of the UN General Assembly and on behalf of ASEAN foreign ministers, stated that the ASEAN foreign ministers were "appalled" to learn of the use of automatic weapons and violence on the demonstrators.¹²¹ They also "expressed their revulsion" to their Myanmar counterpart.¹²² On the same day, Singapore's Prime Minister Lee Hsien Loong, in Singapore's capacity as Chairman of the ASEAN Standing Committee, in consulting with the leaders of Brunei, Indonesia, Malaysia, the Philippines, Thailand and Vietnam, noted that the confrontation in Myanmar "would have implications for ASEAN and the whole region. ASEAN therefore could not credibly remain silent or uninvolved in this matter".¹²³

¹¹⁸ Transcript of press conference of Singapore Minister for Foreign Affairs George Yeo and Czech Republic Minister of Foreign Affairs Karel Schwazenberg, at the Ministry of Foreign Affairs in Prague, Czech Republic (11 April 2008).

¹¹⁹ On Myanmar-ASEAN relations, see J. Haacke, *Myanmar's Foreign Policy: Domestic Influences and International Implications* (London: Routledge, 2006) at 41-60.

¹²⁰ *Supra* note 79.

¹²¹ Singapore Ministry of Foreign Affairs (MFA), "MFA Spokesman's comments on PM Lee Hsien Loong calls to ASEAN leaders on the Myanmar issue" (27 September 2007).

¹²² *Ibid.*

¹²³ *Ibid.*

Prime Minister Lee in a 29 September 2007 letter to Senior General Than Shwe (Myanmar's top military leader) expressed ASEAN's "deep concerns ... over the very grave situation in Myanmar".¹²⁴ He noted that media coverage of events in Myanmar "have evoked the revulsion of people throughout Southeast Asia and all over the world".¹²⁵ In giving recognition to non-interference principle, PM Lee ended his letter by emphasizing that "ASEAN's concerns are for the welfare of the people of Myanmar, for a return to stability and normalcy, and for Myanmar to take its place among the comity of nations. I hope you will consider these views in that spirit".¹²⁶

These expressions of criticism, chastisement and rebuke have been more frequent in the last few years. More recently, in May 2009, during the closed-door trial of Daw Aung San Suu Kyi, who was charged with breaking the terms of her house arrest, ASEAN expressed its "grave concern about recent developments... given her fragile health".¹²⁷ In calling again for the immediate release of Daw Aung San Suu Kyi, ASEAN stated that Myanmar "has the responsibility to protect and promote human rights".¹²⁸

It is clear that ASEAN has criticized Myanmar on its human rights record, especially in recent years. Dissent is over whether ASEAN has done enough to bring a recalcitrant member to task. Contrary to how it has been popularly presented in the media, non-interference is not always rigidly adhered to by ASEAN. ASEAN's relationship with Myanmar is an example. The Charter will give further impetus to this but it would be unrealistic to expect that the norm will be done away with immediately. ASEAN has also sought the UN's assistance, aware that it has little leverage and given how Myanmar has repudiated ASEAN in preference for the UN. The UN Secretary-General appointed Special Envoy Ibrahim Gambari, who consults ASEAN leaders regularly, to be a neutral interlocutor to all parties in Myanmar. In October 2008, Tomás Ojea Quintana, the UN Special Rapporteur on the situation of human rights in Myanmar, reported to the UN General Assembly that democracy will take decades to take root in Myanmar, and in the meantime tangible, step-by-step benchmarks should be set up to spur progress towards national reconciliation and promotion of democracy there.¹²⁹

Critics and media reports tend to portray the norm of non-interference as a non-negotiable principle. The reality is that the norm is not a sacred cow that it has been made out to be. ASEAN has undoubtedly "interfered" before, even if rarely and far between, in the internal affairs of its members: the Philippine political crisis of 1986 involving President Marcos, the forest fires and the haze in Indonesia in the late 1990s, and Myanmar's internal situation.¹³⁰

¹²⁴ MFA, Press Release, "Letter from Prime Minister Lee Hsien Loong to Senior General Than Shwe, Chairman, State Peace and Development Council, Union of Myanmar" (9 September 2007).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ See the ASEAN Chairman's statement issued by Thailand of 19 May 2009, online: ASEAN <<http://www.aseansec.org/PR-ASEANChairmanStatementonMyanmar.pdf>>.

¹²⁸ *Ibid.*

¹²⁹ See UN General Assembly (Third Committee—Social, Humanitarian, Cultural), Press Release GA/SHC/3926, (23 October 2008), online: United Nations <http://www.un.org/News/briefings/docs/2008/081023_Quintana.doc.htm>. The United Nations Human Rights Council's special procedures mandate on human rights in Myanmar began in 1992. See further the Myanmar homepage on the website of the United Nations Office of the High Commissioner for Human Rights, online: <<http://www.ohchr.org/en/countries/asiaregion/pages/mmindex.aspx>>. At a press conference, Tomás Ojea Quintana, Special Rapporteur on the situation of human rights in Myanmar said in response to reporters' questions, "To get a civil Government will take time. They [Myanmar] are not prepared for that. They are prepared for war." He added that the process to democracy can be helped by tackling the country's human rights challenges. He also urged the international community to speak in one voice as they nudged Myanmar towards a democratic Government and the elections scheduled for 2010.

¹³⁰ See also L. Jones, "ASEAN Intervention in Cambodia: From Cold War to Conditionality" (2007) 20 *Pac. Rev.* 523. Jones argues that ASEAN elites had regularly intervened in the Cambodia's internal political conflicts between 1979 and 1999.

A little articulated perspective on ASEAN's stance on non-interference is that ASEAN is coming to grips with the limitations of traditional sovereignty. Increasingly, the principle of "responsible sovereignty" is gaining currency. Responsible sovereignty is "the idea that states must take responsibility for the external effects of their domestic actions—that sovereignty entails obligations and duties towards other sovereign states as well as to one's own citizens".¹³¹ Kishore Mahbubani expresses the idea thus: "No village can accept a home whose actions endanger the village. Neither can the global village accept the behaviour of nations which endanger the globe".¹³² This emerging norm emphasizes the dual importance of sovereignty and responsibility. Sovereignty recognizes that states remain the primary actors of the international system. Responsibility highlights the need for international cooperation among states, rather than unilateral action, "to meet the most fundamental demands of sovereignty: to protect their people and advance their interests".¹³³

ASEAN must come to grips with this emerging international norm.¹³⁴ With closer and more intense scrutiny by EU, the United States of America, investors, and civil society organizations, ASEAN can ill-afford to ignore such a norm as well as international, regional, and local sentiments. Disregarding such a norm will undoubtedly present constraints in ASEAN's engagement with key political and economic partners. More fundamentally, ASEAN will also have difficulty justifying its non-observance of prevailing and emerging international norms to the domestic constituencies as well.

IV. THE CHARTER IN RECALIBRATING NORMS AND CATALYZING SOCIAL LEARNING

The soft law approach pivots on the centrality of developing commitment to common values and ideals that all member states can identify with and use to guide their policy responses, activities and interactions *vis-à-vis* ASEAN and other member states. Given the differing attitudes and interests of member states towards ASEAN, the Charter is arguably more effective in reinforcing, rather than enforcing, the normative environment of ASEAN.¹³⁵ Even if we do not accept that premise, we can appreciate the abiding commitment to the non-interference and consensus within ASEAN. These norms were the bedrock of ASEAN for much of its existence and enabled ASEAN to confidence-build in the tumultuous early years. It also enabled ASEAN to welcome into its fold the Indochinese members which subscribed to very different political ideologies and have vastly poorer socio-economic backgrounds. Crucially, these norms helped ameliorate suspicion, and reduced the tendency to resort to force in what was previously an endemically conflict-ridden region. As the constructivist school of international relations argues, it is the collective norms of non-violence in interstate relations, with consultation and consensus as critical elements that have shaped ASEAN member states' attitudes and identities.¹³⁶ The Charter has invited the reconsideration of the relevance and saliency of these norms in the current efforts to make ASEAN a rule-based

¹³¹ *Managing Global Insecurity (MGI), A Plan for Action: A New Era of International Cooperation for a Changed World: 2009, 2010, and Beyond* (Washington, DC, New York, Stanford: MGI, 2008) at 10-14. MGI is a joint project of the Brookings Institution, Stanford University's Center for International Security and Cooperation, and New York University's Center on International Cooperation.

¹³² *Ibid.*, at 11.

¹³³ *Ibid.*

¹³⁴ See, further, the discussion of the linkage between responsible sovereignty and intervention in E.M. Kuhonta, "Toward Responsible Sovereignty: The Case for Intervention" in D.K. Emmerson, ed., *Hard Choices: Security, Democracy, and Regionalism in Southeast Asia* (Stanford, CA: Walter H. Shorenstein Asia-Pacific Research Centre, Freeman Spogli Institute for International Studies, Stanford University, 2008).

¹³⁵ As Narine argues, ASEAN matters for its role in "reinforcing the normative environment of the region". See S. Narine, "Forty Years of ASEAN: A Historical Review" (2008) 19 *Pac. Rev.* 199.

¹³⁶ See, for example, A. Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (London: Routledge, 2001).

organization, and to renew its relevance in a rapidly changing geopolitical and economic environment.

While the Charter seeks to give substantive effect to the purposes and principles of ASEAN, it is its potential transformative capacity that should not be easily dismissed. This arises from the Charter's potential of promoting the internalization of the values that are deemed critical to ASEAN's growth and development. As ASEAN seeks to re-energize itself, the key challenge is to ensure that the Charter spearheads the generation of norms and behaviour that become self-enforcing and provide the substratum and impetus for engendering the desired norms. Self-enforcing norms and behaviour refer to the state of affairs in which the laws, when prudently applied, acquire legitimacy and increasingly become inviolable.

Although the Charter is a binding legal instrument, the way it was drafted enables a significant degree of flexible interpretation and room for negotiation. This inherent flexibility is an encapsulation of the ASEAN way, rendered as a principle of ASEAN governance, and continues to be the foundation for the common rules of engagement. Accordingly, the discursive power of soft law facilitates the socialization of ASEAN member states in imbibing the desired values and norms, and helps generate trust that can be more sustainable than a plethora of treaty law.

Crafting the Charter as hard law, but with soft law features and effects, is a calibrated measure to combine reflexive self-regulation on the part of member states and light-touch regulation on the part of ASEAN. Such an approach would promote constitutive processes such as persuasion, learning, cooperation and socialization, while also providing some assurance that ASEAN, as a legal personality, is not attempting to derogate the ASEAN Way.¹³⁷ The Charter's subtext is of a normative, desired state of inter-government governmentality but short of the pooling of sovereignty, which the EU epitomizes. On the other hand, the Charter, if properly internalized, can encourage and facilitate compliance. This in turn would enhance ASEAN's organizational efficiency and effectiveness. The norms that the Charter embodies are more likely to have greater traction and be sustainable through its calibrated response to a diverse range of interests, concerns, and priorities among member states. In this way, the incremental ASEAN governmentality will facilitate the development of the organization's cognitive and affective ability to deal with the myriad of complex issues and imperatives that domestic politics inflected by nationalistic sentiments can arouse.

To reiterate, the Charter has not done away with its cherished norms of non-interference and consensual decision-making.¹³⁸ At one extreme, the Charter codifies many of ASEAN's existing practices, values and norms. These norms were apt in the earlier years but have become anachronistic and quixotic in the last two decades. The Charter and the EPG report have made tentative inroads by questioning the relevance of these two much-vaunted norms. It would be unrealistic to expect that these norms will be done away in the short to medium term. The more likely scenario is that ASEAN and its individual members will be less insistent on using those norms as a crutch, or as a matter of political convenience. The norms will be titrated down by custom and practice within and outside ASEAN. The recalibration of the norms has been saliently incorporated into the Charter.

¹³⁷ Simon Tay argues that the espousal of the responsive Asian Way has enabled ASEAN to continue to evolve: S.S.C. Tay, "Institutions and Processes: Dilemmas and Possibilities" in S.S.C. Tay, J.P. Estanislao and H. Soesastro, eds., *Reinventing ASEAN* (Singapore: Institute of Southeast Asian Studies, 2001). See also A. Jetschke and J. Ruland, "Decoupling Rhetoric and Practice: The Cultural Limits of ASEAN Cooperation" (2009) 22 *Pac. Rev.* 179.

¹³⁸ On the origins and purposes of non-interference in ASEAN, see H.E.S. Nesarurai, "The Association of Southeast Asian Nations (ASEAN)" (2008) 13 *New Pol. Econ.* 225. For a more extensive discourse on ASEAN founding ethos and norms, see A.D. Ba, *(Re)Negotiating East and Southeast Asia: Region, Regionalism, and the Association of Southeast Asian Nations* (Stanford: Stanford University Press, 2009).

While one should not certainly view the Charter as the death knell for the challenged norms, the Charter still does not adequately guide ASEAN on how to deal with a situation in which local practice and policy is at odds with the purposes and principles of ASEAN. The Charter may then be relegated to secondary importance if the approach taken is one of ad-hoc decisions by ASEAN's supreme decision-making body. As such, the quest for a principles-based organization is hampered. This, however, is not a suggestion that a stridently bureaucratic and inflexible Charter for ASEAN is preferred. Rather, the lack of a clear, principled, and legitimate approach only denies the Charter and ASEAN of much needed credibility. The basic requirement is for the Charter to assist, to facilitate the institutionalization of a principled-based decision-making without fear or favour of encrusted norms being honoured as organizational relics that have long outlived their purpose.

ASEAN's relevance as a regional organization will ultimately hinge on its ability to entrench norms within ASEAN but also calibrate itself such that its practices can be reconciled with the normative orders outside ASEAN. It is a truism that "no man is an island"; likewise for ASEAN. ASEAN's geopolitical relevance is a function of internal and, increasingly, external developments. External developments—and whether ASEAN can keep pace—are more challenging since internal developments are largely within its control while the latter are not. In this regard, ASEAN's persistent and self-interested conceptions of community and its self-interests will find difficulty in having buy-in from internal and external stakeholders if that norm is out of sync with generally accepted international norms or lacks legitimacy. The Charter can be looked upon as a legal-political nudge in which ASEAN increasingly will have to calibrate its actions and policies to be in line with the prevailing normative framework globally. The Charter is a means to the end of regional integration in a region that is so diverse along geographical, socio-economic, political, historical, ethnic (race, language, and religion) lines that community building cannot be achieved by *fiat*. As it is, Southeast Asians do not think of ASEAN as a community.¹³⁹

The Economist had derisively described the Charter as "toothless", "contains little more than waffle" and commits ASEAN leaders "to nothing that matters".¹⁴⁰ Indeed, such strident criticisms of ASEAN are not new, and neither are they lacking in merit, as this article acknowledges. The aspirations in Chapter 1 of the Charter seem pious when juxtaposed against the processes, mechanisms and powers provided in the Charter. It is still early days and the Charter is but the first, albeit important, step in a long journey. Nevertheless, the inherent weakness of ASEAN and the Charter is its "one-for-all and all-for-one" mindset. For too long, ASEAN has moved at a pace that accommodated as many, if not all, members as possible. This is a real structural constraint and ideational rigidity not so much of ASEAN but of its member states. At that stage of its early to mid-development, ASEAN had rightly prioritized unity, manifested in consensus and non-interference, over separateness. But this realist approach is no longer sustainable as the Charter implicitly acknowledges.

The Charter also represents a compromise among ASEAN member states. The key recommendations by the EPG on human rights and civil society were watered-down or excluded from the final Charter document. The compromise also represents the ASEAN practice of not allowing a single issue to dominate the agenda. Singapore's Prime Minister Lee Hsien Loong gave a sense of how the Charter was readied so that it would be signed on by all members: "[The Charter] cannot compel the countries to do things which they do not want to agree to in the first place".¹⁴¹ While this approach might strike some as another example of the "lowest common denominator" approach, it is another institutional constraint that

¹³⁹ E. Thomson and C. Thianthai, *Awareness of and Attitudes toward ASEAN: Summary Findings from a Ten Nation Survey* (Jakarta: ASEAN Foundation, 2008).

¹⁴⁰ Cf. R. Stubbs, "The ASEAN Alternative? Ideas, Institutions and the Challenge to 'Global' Governance" (2008) 21 Pac. Rev. 451; S. Narine, "Forty Years of ASEAN: A Historical Review" (2008) 21 Pac. Rev. 411.

¹⁴¹ "Charter must be agreeable to all members: PM Lee" *Straits Times* (8 August 2007).

ASEAN has to manage and live with. The enigmatic priority is to keep all ten member states in ASEAN rather than to marginalize or exclude even one member.

But the Charter provides a normative framework for change amidst continuity that can be built upon. With the hardware in place, hard-nosed decisions will have to be made if the Charter is to be a springboard to renewed relevance and influence in a rapidly evolving geopolitical environment. All things considered, the promulgation of the Charter is necessary but insufficient in making ASEAN a strong and cohesive inter-governmental organization. The real test now that the Charter has been ratified is whether ASEAN and its members are committed to the principles, values, duties in both form and substance. If shared vision and shared purpose, grounded in shared values, are absent, the Charter will become a way station to ASEAN's irrelevance. The next phase of regional integration, as envisioned by the Charter, requires ASEAN's institutionalization of its institutions, processes, and values. The convergence of common values among the ASEAN member states is therefore a *sine qua non*.

V. CONCLUSION

ASEAN started life at the height of the Vietnam War as a united front Cold War political association, fighting the communist threat. This was its life-blood for a good part of its existence. Over the years, it has added economic and socio-cultural objectives to breathe new life into an organization that also enlarged with new members. ASEAN has set a deadline of 2015 (brought forward from 2020) for the creation of a regional community and a single market of more than 570 million people. Annually, ASEAN has more than 700 meetings at various levels. Despite the criticisms, member states believe that the Charter can help ASEAN along its development path. It appears, even if tentatively, that the Charter has given impetus to the requirement that community interests would prevail over national ones on matters that affect ASEAN. Secondly, the Charter has started the process of developing ASEAN's capacity to enforce decisions, resolve disputes, and implement policies. Thirdly, there is the reappraisal of common values, including that of non-interference. All things considered, the Charter provides a framework for gradual and structured change.

Despite the many hiccups, the Charter was adopted, ratified, and entered into force as anticipated. On 1 January 2009, the Committee of Permanent Representatives to ASEAN, comprising ambassadorial-ranked representatives from every ASEAN member based in Jakarta, was established. The incremental process towards bringing human rights, albeit ASEAN-style, continues. The first draft of the terms of reference of the ASEAN human rights body was presented at the postponed 14th Summit in Thailand. A High Level Panel (HLP) on an ASEAN human rights body has also been established.¹⁴² It has prepared the first draft of the terms of reference of the ASEAN human rights body. The plan is for the ASEAN Human Rights Body (AHRB) to be inaugurated and operationalized by the 15th ASEAN Summit at the end of 2009.¹⁴³

¹⁴² For the membership of the HLP on human rights body, see *List of Members of the High Level Panel on an ASEAN Human Rights Body*, online: ASEAN <<http://www.aseansec.org/HLP-Member.pdf>>. For the terms of reference, approved at the 41st ASEAN Ministerial Meeting in July 2008 see *Terms of Reference for the High Level Panel on an ASEAN Human Rights Body*, online: Association of Southeast Asian Nations <<http://www.aseansec.org/HLP-TOR.pdf>>.

¹⁴³ See the *Chairman's statement at the 14th ASEAN Summit*, online: ASEAN <<http://www.aseansec.org/22328.htm>>. The statement noted that "the establishment of the AHRB to promote and protect human rights of ASEAN's peoples would be one of the most important undertakings to make ASEAN a genuinely people-oriented community." See also *ASEAN Political-Security Community Blueprint*, para. A.1.5, online: ASEAN <<http://www.aseansec.org/22337.pdf>>. A High Level Legal Experts' Group on Follow-up to the ASEAN Charter (HLEG) is also likely to be established. See 14th ASEAN Summit, Press Release (27 February 2009) online: ASEAN <<http://www.asean.org/22313.pdf>>.

It is still premature to make a prognosis as to whether the Charter will catalyze the attainment of ASEAN's "One Vision, One Identity, One Community" by the year 2015. The ratification of the Charter is a major step towards the realization of ASEAN "as a concert of Southeast Asian nations, outward-looking, living in peace, stability and progress, bonded in partnership in dynamic development and in a community of caring societies".¹⁴⁴ The journey ahead is long and challenging. Too realist, too little idealism—is that the ASEAN Charter's fate? Is the ASEAN glass half-full or half-empty as a consequence? The fundamental question now is not whether ASEAN needs a Charter but rather *how* the Charter and its subsequent evolution will keep ASEAN firmly in the driver's seat in Southeast Asia. Whatever its flaws, the Charter provides a road-map. Whether the compass of the subtly modified ASEAN Way can take ASEAN to where it wants to go will depend on ASEAN recalibrating its norms, values and purpose to remain nimble, relevant, and effective in an increasingly uncertain world.

¹⁴⁴ *Cebu Declaration on the Blueprint of the ASEAN Charter*, *supra* note 5.