The ASEAN Charter and the Promotion of R2P in Southeast Asia: Challenges and Constraints

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Abstract
This article examines the ASEAN Charter’s provisions that relate to the promotion of Responsibility to Protect (R2P) principles in Southeast Asia. It argues that the Charter essentially upholds the state-centered norms and traditions of ASEAN more than it provides for the transformation of the Association into a more people-centered regional organization. It also looks into the specific challenges and constraints faced by advocates of promoting human rights protection and R2P principles in the region, notwithstanding the limitations of the ASEAN Charter. Specifically, the article points to the importance of constituency-building at the national and regional levels, even as it also underscores the need to continue engaging in meaningful dialogue ASEAN bureaucrats on a range of people-centered security concerns.

Keywords
Association of Southeast Asian Nations (ASEAN), ASEAN Charter, ASEAN Security Community, ASEAN Summit, ASEAN Human Rights Body, ASEAN Way, Eminent Persons Group (EPG), High Level Task Force (HLTF), High Level Panel (HLP), Myanmar, Southern Thailand, Singapore, 2005 World Summit Outcome Document, civil society organizations

Introduction
The ten leaders of the Association of Southeast Asian Nations (ASEAN) signed the ASEAN Charter during their thirteenth Summit in Singapore in November 2007. It was supposed to be the highlight of the Summit, which coincided with the fortieth anniversary of the regional organisation. However, the celebration was overshadowed by international outrage against the military junta in Myanmar, whose violent crackdown against unarmed monks and their supporters in September of the same year raised serious concerns even among ASEAN leaders. All ASEAN member states ratified the Charter before the end of 2008, in time for the fourteenth Summit of Leaders in Bangkok.

This article attempts to examine the challenges and constraints in promoting the Responsibility to Protect (R2P) principle in ASEAN by looking into some
of the provisions of the ASEAN Charter and their limitations. Its main argument is that the ASEAN Charter caters mainly to the conservative members of ASEAN that still value the organisation’s traditional state-centered norms and consensus decision-making. Although it provides for the creation of a regional human rights body, not much may be expected from it because the majority of ASEAN members are opposed to giving this body monitoring and sanctioning powers. In its current form and substance, the Charter also cannot be viewed as enabling the evolution of a more people-centered ASEAN Community because it fails to provide for frameworks and mechanisms that would encourage meaningful engagement between ASEAN and civil society in the region.

What follows is an overview of the ASEAN Charter, which includes a discussion of the drafting process and responses by various groups in the region to the final output submitted by the High Level Task Force (HLTF) to the ASEAN Leaders.

The ASEAN Charter: An Overview

The idea of having an ASEAN Charter was formally enunciated in the thirty-seventh ASEAN Ministerial Meeting in Jakarta in June 2004, where the foreign ministers agreed to:

…work towards development of an ASEAN Charter which would inter alia reaffirm ASEAN’s goals and principles in inter-state relations, in particular the collective responsibilities of all ASEAN Member Countries in ensuring non-aggression and respect for each other’s sovereignty and territorial integrity; the promotion and protection of human rights; the maintenance of political stability, regional peace and economic progress; and the establishment of effective and efficient institutional framework for ASEAN (italics added).¹

The above portion of the communiqué was later incorporated into the ASEAN Security Community (ASC) Plan of Action under activities related to ‘shaping and sharing of norms’, which was adopted during the tenth ASEAN Summit in Vientiane in December 2004. In the subsequent eleventh ASEAN Summit in Kuala Lumpur in December 2005, the leaders formed the Eminent Persons Group (EPG) on the ASEAN Charter, which was tasked with drafting a

blueprint for the ASEAN Charter. Members of the EPG conducted a series of consultations with different sectors in ASEAN member countries, including civil society groups and think tanks, a process that was commended by the foreign ministers at the thirty-ninth Ministerial Meeting in Kuala Lumpur in July 2006. Specifically, the foreign ministers reiterated their support for the EPG ‘to continue to think “out of the box” and explore all bold and visionary ideas for the strengthening of ASEAN and its institutional framework (emphasis added)’. They also acknowledged that, ‘[t]he EPG report represents a significant contribution to the building of an ASEAN Community that is people-centered and resilient to challenges (emphasis added)’.

The EPG submitted its report to the leaders at their twelfth Summit in Cebu in January 2007. Among its important recommendations on the ASEAN Charter were the following: 1) the creation of a regional human rights mechanism; 2) inclusion of international humanitarian law as well as the R2P principle, which redefines the concept of sovereignty to include the obligation of states to protect their citizens; 3) non-consensus-based decision making; 4) creation of consultative mechanisms that engage different sectors in the region including civil society groups; 5) provisions against unconstitutional changes of government; and 6) sanctions against erring members, including the option of expulsion from the organization. These recommendations were considered quite bold and ambitious by many in the region, given ASEAN’s conservative and consensus-based track record. These recommendations also created high expectations from many in the region that the High Level Task Force (HLTF), which was subsequently formed to draft the ASEAN Charter, would include a number of these bold and innovative ideas in its final output.

The HLTF was composed only of ten people (foreign affairs bureaucrats and retired diplomats) from ASEAN member states. This number is certainly quite small compared to the its European counterpart – the European Convention – that drafted the aborted European Union (EU) Constitution, which was made up of about 100 people comprised of national and European parliamentarians, bureaucrats, and representatives from civil society organizations. More importantly, whereas the charter of the EU was drafted in a span

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4 Ibid.
5 Civil society groups were represented by some from the European Economic and Social Committee (EESC) of the European Commission.
of three years, the HLTF was given only nine to ten months to draft the ASEAN Charter in time for the thirteenth ASEAN Summit in Singapore and on the occasion of the Association's fortieth anniversary.

Like the EPG, the HLTF conducted a series of consultations with various sectors in the region, including think tanks, civil society, and non-governmental organizations (NGOs). It must be pointed out, however, that just as it was not bound to accept the recommendations of the EPG Report, the HLTF was also not required to incorporate inputs from these consultations. Be that as it may, many of the NGOs that participated in the consultation process nevertheless expected to have been given access to the draft ASEAN Charter before it was presented to and signed by the leaders during the thirteenth Summit in Singapore. This, however, did not happen. A copy of the final version of the Charter was made accessible to the public through Philippine and Thai media websites only a few days before the Singapore summit. Moreover, among national parliaments in ASEAN member states, the military-appointed members of the Thai parliament were apparently the only ones to receive advance copies of the draft Charter before the ASEAN leaders signed it in Singapore.

The secrecy that attended the drafting of the ASEAN Charter provided grounds for one of the major criticisms of the HLTF's work by NGOs in the region. Related to this was the haste in which the HLTF was mandated to finish its work. The HLTF's timetable did not allow time for public scrutiny and deliberation of the draft Charter even among its more democratic members. Ironically, while the ASEAN Charter opens with the preamble '[w]e, the Peoples of the member states of ASEAN…' and Article 5 obligates member states to 'take all necessary measures, including enactment of appropriate domestic legislation, to effectively implement the provisions of the Charter and to comply with all obligations of membership', informed publics were not given an opportunity to debate the document before it was signed by the ASEAN leaders. Some critics, especially from the Track II sector, have argued that new members of ASEAN held too much sway and influence in watering down the Charter as they insisted on preserving the association's traditional norms and consensus decision-making. Indeed, for many civil society groups in the region, the Charter that was signed by ASEAN leaders was a disappointment, as succinctly put in the following commentary:

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The Charter …is a document that falls short of what is needed to establish a ‘people-centered’ and ‘people-empowered’ ASEAN. It succeeds in codifying past ASEAN agreements, and consolidating the legal framework that would define the Association. However, it fails to put people at the center, much less empower them. The Charter is all about how [g]overnments will interact with each other, but not about how they also should interact with the people. There are no clear spaces created or procedures established to institutionalize the role of citizens and civil society organizations in regional community building. And where the Charter is able to protect sovereign interest of Governments, and enshrine confidence building through consensus, it lacks the necessary details for the settlement of disputes, dealing with internal conflicts, and disciplining or sanctioning [m]embers who are remiss in their obligations.7

For his part, Ambassador Barry Desker, a retired Singaporean diplomat and dean of the Rajaratnam School of International Studies, also criticised the Charter for falling short of expectations. His opinion piece in the Singapore Straits Times triggered a debate with a member of the HLTF, Ambassador Tommy Koh. According to Desker,

… [W]hile it moves ASEAN ahead, the charter is a disappointment because it codifies existing norms and maintains its historical identity as an inter-governmental organisation. Doing thus means that ASEAN did less than it could have and, in some areas, it has even gone backwards…

The decision to adopt the ‘ASEAN Way’, which prioritises agreement by consensus and the adoption of the lowest common denominator, means that its claim to become an increasingly rules-based organisation will remain just that. There is no assurance that compliance with its rules will be any better than it has been in the preceding 40 years when only 30 per cent of its agreements were implemented…

ASEAN’s conservative approach results from its practice of consensual decision-making. It is unlikely to move towards a people-centred organisation envisaged in the report tabled by the EPG appointed by ASEAN leaders.8

It is clear from the foregoing discussion that there was a big gap between the expectations of NGOs and civil society and the official track on what the substance of the ASEAN Charter should be. The process of drafting the Charter demonstrated that the bureaucrats and retired diplomats in the HLTF were unable to ‘think out of the box’ and follow through with the bold and
innovative ideas of the EPG. This was clearly a drawback for the evolution of ASEAN into a more people-centered organisation and a stumbling block to greater participatory regionalism in Southeast Asia.

The next section of this article identifies the constraints and problems with the ASEAN Charter with regard to the promotion of R2P in the region. Specifically, it will examine the Charter’s principles and related norms, as well as issues concerning decision-making and the absence of provisions for sanctions in the Charter, focusing especially on the Charter’s limitations vis-à-vis the region’s most serious political and humanitarian crisis, in Myanmar.

The ASEAN Charter and Promoting R2P: Challenges and Constraints

In order to understand the limitations of the ASEAN Charter, a comparison of its relevant provisions with the recommendations in the EPG Report needs to be made. In addition, inputs from track two and other NGOs in the region as they were presented to the EPG and HLTF during consultations will also be discussed in the analyses of issues related to the promotion of R2P.

ASEAN Charter Objectives and Principles

The EPG Report submitted to the leaders of ASEAN during the twelfth Summit in Cebu contained a number of recommendations on the objectives and principles that should be included in the ASEAN Charter. It is worth quoting at length some of these recommendations that were relevant to R2P:

Chapter I: Objectives

To bring ASEAN’s political and security cooperation to a higher plane to ensure that countries in the region live at peace with one another and with the world at large in a just, democratic and harmonious environment (emphasis added).\(^9\)

To cultivate ASEAN as a people-centered Organisation and to strengthen the sense of ownership and belonging among its people, including enhancing the participation of and interaction among Parliamentarians (AIPA), civil society organisations, academic institutions and private business sector and other non-governmental organisations of its Member States (emphasis added).\(^10\)

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Chapter II: Principles

Respect for and protection and promotion of human rights and fundamental freedoms, including self-determination and the right to development, without distinction as to race, creed, gender, or ethnicity (emphasis added).\(^{11}\)

Faithful observance of the principles contained in the Charter of the United Nations and other basic international treaties, conventions and agreements subscribed to by Member States (emphasis added).\(^{12}\)

Promoting and upholding generally accepted principles of international law, including international humanitarian law.

Rejection of acts of genocide, ethnic cleansing, torture, the use of rape as an instrument of war, and discrimination based on gender, race, religion and ethnicity (emphasis added).\(^{13}\)

Commitment to develop democracy, promote good governance and uphold human rights and the rule of law, and to establish appropriate mechanisms for these purposes (emphasis added).\(^{14}\)

In order to promote ASEAN as a ‘people-centered organization’, the EPG report recognized ‘the importance of rallying the people of ASEAN behind ASEAN’s goals…’ and encouraged ASEAN leaders, the Secretary General, the ASEAN Secretariat, and the ASEAN Foundation to ‘consciously adopt this objective as part of their work and mission’. It also suggested that the Charter provide channels and mechanisms for regular consultations between ASEAN and civil society groups and parliamentarians, including those that relate to the promotion of democracy, good governance, protection of human rights and upholding of the rule of law. Finally, it recommended that ASEAN ‘strengthen its links with civil society organizations and draw upon their networks and strengths as strategic partners for ideas and initiatives to develop the ASEAN Socio-Cultural Community’ (emphasis added) and called for the Secretary-General and ASEAN Secretariat to ‘establish consultative mechanisms with civil society organizations to interact regularly with these groups’.\(^{15}\) That the EPG clearly appreciated the importance of transforming ASEAN into a people-centered organization was also underscored in its admonition that:

\begin{quote}
ASEAN needs to shed its image of being an elitist organization comprising exclusively of diplomats and government officials. More should be done to strengthen
\end{quote}

\(^{11}\) Ibid., p. 28.
\(^{12}\) Ibid.
\(^{13}\) Ibid.
\(^{14}\) Ibid., p. 29.
\(^{15}\) Ibid., pp. 21-22.
people-to-people ties among ASEAN Member States, and to develop channels to consult ASEAN institutions, [p]arliamentarians in ASEAN member states and the people of ASEAN in all sectors of society.  

The above statement undoubtedly created high expectations for the Charter especially among think tank and civil society groups in the region. If anything, the EPG Report suggested that ASEAN was opening up to greater participatory regionalism. It was also thought that the people-oriented tone of the EPG Report was an important turning point and the culmination of the long and arduous attempts of actors in tracks two and three for secure recognition by ASEAN. This positive development also came on the heels of the first ASEAN-Civil Society Conference held in Kuala Lumpur in December 2005 where representatives of various NGOs in the region submitted a report to ASEAN leaders. Moreover, in January 2007, the Co-Chair of the ASEAN People’s Assembly (APA) was given the opportunity to report to ASEAN leaders at the twelfth Summit in Cebu. Though seen as being mainly symbolic, the interface between ASEAN leaders and representatives of think tanks and civil society groups was nevertheless perceived by non-government groups in the region as opening ‘spaces’ for meaningful engagement in the long-run.

It important to note that a number of objectives and principles incorporated in the EPG Report were derived from inputs provided by tracks two and three during the consultations. Specifically, the ASEAN Institutes of Strategic and International Studies (ASEAN ISIS) submitted a memorandum to the EPG in April 2006, which among other things included the following objectives and principles relevant to R2P:

1. Objectives of ASEAN…
   3) to ensure the well being of its people by enhancing human security, eradicating poverty, hunger, disease and illiteracy;
   8) to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms;
   9) to enhance good governance in all spheres – political, economic, and social;…

2. Principles of ASEAN Cooperation…
   1) Respect for the dignity, human rights and well being of all peoples, regardless of race, religion, or gender.
   4) Mutual consultation and cooperation on domestic matters that gravely affect the security and well-being of other Member States.
   9) Commitment towards the prevention and punishment of international crimes including genocide.

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16 Ibid., p. 5.
10) Adherence to constitutional and democratic change of government.
11) Strict observance of international norms and international law in relations with each other and with other States, and faithful fulfillment of obligations.\(^\text{17}\)

Civil society groups also submitted inputs to the EPG. In particular, the Solidarity for Asian People’s Advocacy’s (SAPA) paper presented in the April 2006 consultations in Bali contained among others the following R2P-relevant objectives and principles:

II. Perspectives on Regionalism…

Regionalism is a step towards the advancement of ASEAN people’s interest, by stressing mutual benefit and cooperation among states and people. The articulation of a people’s aspirations in a regional forum is a progressive step towards protecting and furthering those aspirations.

Regionalism should go beyond regional integration and incorporate genuine regional solidarity. The regionalism we opt for is people-centered and people-empowered. Regionalism should be a tool that will promote and strengthen ASEAN cohesion; carry provisions for catch-up mechanisms, and close the economic and political gaps among Member States and their citizens while recognizing diversity and promoting tolerance among Member States.

Regional monitors and regulatory mechanisms, and a progressive and democratic regional political and security system, are important elements of regionalism. It is not a tool by which Member States can retreat to the least common denominator but one which will facilitate the establishment of regional rights and standards aligned to internationally recognized and accepted norms. Therefore, regionalism is both an offensive and defensive tool (emphasis added)…

III. Regional Recognition of Human Rights and Human Dignity

Human rights and dignity are part of core values and guiding principles that ASEAN has sought to uphold. Promotion and protection of human rights and dignity should be the primary goal of all efforts for regional integration and cooperation undertaken by ASEAN (emphasis added).

There is a need for ASEAN to explicitly recognize all human rights – civil, cultural, economic, political and social – including recently developed international human rights norms and standards such as the Right to Development (1986) and the UN Declaration on Human Rights Defenders (1998) at the regional level by ratifying existing international human rights conventions.

The ASEAN Charter should reaffirm human and people’s rights as the basic foundation for ASEAN, and articulate them in terms of the promotion and protection of human rights in accordance with the principles of universality, indivisibility, interdependence, and inter-relatedness.

The ASEAN Charter should take into account emerging regional contexts and conditions in order to develop effective working modalities which are politically and legally binding and enforceable in terms of providing practical remedies for victims.

ASEAN should recognise the urgent need to establish an effective and viable ASEAN human rights mechanism which process has been too slow over the past decade. The ASEAN Charter should facilitate the establishment process of such a body which is compatible with globally accepted norms and standards.

IV. Institutions for Regional Policy and Cooperation.

Principle 1: Broader definition and reference to security
i. Security Framework of the People:…

The ASEAN Charter should define clearly that the responsibilities of the state to protect, promote and fulfill its obligations in respecting the rights of its citizens supersede the obligations it imposes on its citizens.

In addition to its recognition of women, children and migrant workers as defined in the ASC plan of action, the ASEAN Charter should also recognise the unique roles and rights of the Human Rights Defenders. In this regard, the ASEAN Charter should incorporate the norms and standards in accordance with the United Nations (UN) Declaration on the Rights and Responsibilities of Individuals, Groups and Organs of Society to Promote Universally Recognized Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders, 1998).\(^{18}\)

It is clear from the foregoing that inputs from both tracks two and three were adopted by the EPG with respect to the objectives and principles that must be incorporated in the ASEAN Charter. These inputs specifically underscored the importance of: 1) transforming ASEAN into a more people-centered organisation; 2) promoting and protecting human rights; and 3) recognising the responsibilities of states in complying with international norms, including those that relate to punishing international crimes such as genocide. In particular, civil society groups emphasised the need for the ASEAN Charter to incorporate norms and standards that are in accordance with pertinent United Nations declarations, especially in promoting and protecting human rights in the region, and for member states of the Association to ratify existing conventions in this regard.

It is against this backdrop that the final version of the ASEAN Charter that was signed by ASEAN leaders in Singapore needs to be examined. This section

\(^{18}\) Solidarity of Asian People’s Advocacy (SAPA) Submission to the Eminent Persons Group on the ASEAN Charter, 17 April 2006, Ubud, Bali, pp. 5-8.
of the article will focus mainly on provisions of the Charter that deal with the purposes and principles of ASEAN. Other provisions that deal with decision-making, the creation of a regional human rights body, and engagement with civil society will be discussed separately.

Under Chapter I (Purposes and Principles) of the Charter, the relevant provisions that may be linked to promoting R2P are as follows:

Article 1 – Purposes…

4. To ensure that the peoples and Member States of ASEAN live in peace with the world at large in a just, democratic and harmonious environment…

7. 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…

10. To develop human resources through closer cooperation in education and life-long learning, and in science and technology, for the empowerment of the peoples of ASEAN and for the strengthening of the ASEAN Community.

11. To enhance the well-being and livelihood of the peoples of ASEAN by providing them with equitable access to opportunities for human development, social welfare and justice…

13. To promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building…

Article 2 – Principles…

2. ASEAN and its Member States shall act in accordance with the following Principles:

   (h) adherence to the rule of law, good governance, the principles of democracy and constitutional government;
   (i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;
   (j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States;
   (l) [r]espect for the different cultures, languages and religions of the peoples of ASEAN, while emphasizing their common values in the spirit of unity in diversity.19

On the surface, the HLTF accommodated some pertinent inputs from the EPG Report as far as transforming ASEAN into a more people-centered (the HLTF instead preferred to use ‘people-oriented’) organisation. In fact, the Charter makes a clear distinction between the peoples and member states

19 Charter of the Association of Southeast Asian Nations (marked ‘Confidential’ Final draft adopted by the HLTF, 8:15 pm, 20 October 2007), pp. 3-5.
of ASEAN and recognises the importance of promoting and protecting human rights. It also incorporates principles of democracy and social justice, along with norms such as international humanitarian law and adherence to the rule of law, good governance, and constitutional government.

However, one must also take a look at the other principles included in the Charter to see the bigger picture. Of the fourteen principles in Article 2 of the Charter, only four – as quoted above – relate directly to the protection of peoples’ fundamental rights and freedom. The traditional state-centered norms of ASEAN are listed first in Article 2. They include, (1) ‘respect for the independence, sovereignty, equality, territorial integrity and national identity of ASEAN Member States’; (2) ‘non-interference in the internal affairs of ASEAN Member States’ and (3) ‘respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion’, among others. Even more interesting is the inclusion of another state-centered principle that, at the very least, may be in conflict with the people-oriented principles listed above. Specifically, Article 2 (k) expects both states and peoples in ASEAN to ‘[abstain] from participation in any policy or activity, including the use of territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States’. This principle, which may be liberally interpreted by non-democratic member states, may be used against the legitimate activities of non-state actors or groups in the region that, for example, criticise state policies or actions that violate human rights and fundamental freedoms of peoples, which are also upheld in the Charter. In the absence of clear provisions that would help determine which of these principles must take precedence, the state-centered norms are likely to prevail. This is so because another traditional ASEAN norm – consensus decision-making – is also strongly reaffirmed in the Charter.

**Consensus Decision-Making**

Article 20 of the ASEAN Charter clearly upheld the consensus decision-making principle in the Association. Specifically, it states that:

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20 It must be noted that, while this principle was also included in the EPG Report, it was listed far below the principle related to the promotion and protection of human rights and fundamental freedoms, as well as the promotion and upholding of international norms (such as international humanitarian law), among others. See Report of the Eminent Persons Group (EPG) on the ASEAN Charter, p. 28.
1. As a basic principle, decision-making in ASEAN shall be based on consultation and consensus.

2. Where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.

3. Nothing in paragraphs 1 and 2 of this Article shall affect the modes of decision-making as contained in the relevant ASEAN legal instruments.

4. In the case of serious breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for decision.\(^{21}\)

The Charter (Article 21 (2)) also states that even in matters that deal with the implementation of economic commitments, ‘a formula for flexible participation, including the ASEAN Minus X formula, may be applied where there is consensus to do so’.\(^{22}\) In other words, consensus is needed in order to make non-consensus decisions and for these to be valid.

These provisions are clearly contrary to the recommendations of the EPG Report, where alternative decision-making principles beyond the traditional ASEAN consensus approach were called for. In particular the EPG Report pointed out that the ASEAN Charter ‘should institutionalise a more effective decision-making process’, which includes ‘voting, either on the basis of a simple majority, or on the basis of a two-thirds or three-quarters majority’.\(^{23}\) As a general rule, the EPG recommended that decisions in ASEAN should be based on consultation and consensus, though it also suggested that consensus should only be insisted upon in relation to ‘more sensitive areas of security and foreign policy’.\(^{24}\) Moreover, the EPG recommended that the flexible participation formula (i.e. ‘ASEAN minus X’) ‘may be applied and decided upon by the relevant Councils of the ASEAN Community’.\(^{25}\) This was altogether more liberal than Articles 20 and 21 of the Charter that limit alternative decision-making to the ASEAN Summit. With regard to sanctions against erring members, the EPG Report was even bolder in recommending that ‘[d]ecisions on temporary suspension of rights and privileges of membership shall be taken by unanimity, without participation of the Member State or Member States to which the decision will be applied’.\(^{26}\) The ASEAN Charter does not even have provisions for suspension of members.

Consensus decision-making is a major constraint in the promotion of people-centered principles in ASEAN especially if these are in conflict with

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\(^{21}\) Charter of the Association of Southeast Asian Nations, ibid., p. 18.

\(^{22}\) Ibid.


\(^{24}\) Ibid.

\(^{25}\) Ibid.

\(^{26}\) Ibid.
state-centered principles. This is so because consensus provides each member state with a veto power, which may be exercised to effectively block issues being brought forward for discussion by ASEAN ministers or leaders. Two examples may be cited to demonstrate the problem of adhering to ASEAN’s traditional consensus approach. The first case is former Thai Prime Minister Thaksin Shinawatra’s threat to walk out of the ASEAN Summit in 2005 if the issue of violence in southern Thailand was raised. The second example is the prime minister of Myanmar’s opposition to the planned briefing, on the situation after the military junta’s crackdown against protesting Buddhist monks, by the UN Special Envoy during the ASEAN Summit in November 2007. In both instances, leaders invoked the traditional norms of state sovereignty and non-interference in the face of strong international concerns – including those of other ASEAN members – about serious violations of human rights in these countries.

Clearly, if sensitive domestic issues, including humanitarian crises, cannot be raised for discussion in ASEAN due to the consensus principle, the Charter’s people-centered principles are likely to be undermined due to the invocation of ASEAN’s state-centered traditional norms by member states. This certainly would not augur well for the promotion of R2P in the region if the opportunity to raise humanitarian concerns at the highest level of ASEAN decision-making was thwarted by concerned states. The same problem may be faced by ASEAN as it attempts to set up a regional human rights body, which will be discussed in the next section of this article.

**Regional Human Rights Body**

Article 14 of the ASEAN Charter provides for the creation of a human rights body that will ‘operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting’. Whereas the EPG Report recommended the creation only of a human rights mechanism, the HLTF went beyond this recommendation by pushing for a regional body that would promote the protection of human rights. The inclusion of this provision in the Charter, however, was fraught with much controversy, which was widely reported by the media during the ASEAN Ministerial Meeting in Manila in July 2007. Specifically, newer members such as Myanmar and Vietnam were opposed to the creation of a human rights body because of its potential to interfere with the domestic affairs of member states. Once again, this

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28 Other members not keen on creating a human rights body were Brunei, Cambodia, and Laos.
represented another attempt to invoking the traditional norms of ASEAN that put a premium on state sovereignty and non-interference in order to stem the move towards a people-centered approach. With such strong opposition from some ASEAN member states, a compromise was reached when all members agreed to simply include a second paragraph under Article 14 stating that such a regional body will ‘operate in accordance the terms of reference’ to be determined at a later stage by the foreign ministers. Subsequently, a High Level Panel (HLP) was created in July 2008, which was tasked with drafting the terms of reference for the ASEAN human rights body that was submitted to the ASEAN leaders at the fourteenth summit in Bangkok in December 2008.\(^{29}\)

The members of the HLP on Human Rights were mainly foreign affairs bureaucrats (including a former member of the HLTF), although Thailand designated a well-known academic expert on human rights as an alternate Thai member of the panel. During a press conference in Singapore in July 2008, the HLP Chairman indicated that the objective of the panel was to ‘achieve a result that is realistic, balanced and credible, and which would be in the best collective interest of ASEAN’. He further pointed out that ‘ASEAN has a history of discussing human rights’ and that the HLTF had ‘already achieved a fair degree of consensus on several issues’. The HLP, therefore, ‘will build upon the work of the HLTF, as well as ASEAN’s previous agreements and declarations on human rights’.\(^{30}\) Based on these comments alone, one could not expect much from the output of the HLP with regard to the terms of reference of the regional human rights body that will be set up by ASEAN. In bureaucratic parlance, ‘realistic’ basically means what is achievable given the current domestic and regional contexts and constraints. This includes such realities as: (1) variations in the political systems of ASEAN member states; (2) the absence of national human rights commissions in most ASEAN countries (only four members – Indonesia, Malaysia, the Philippines, and Thailand – have national human rights commissions); and (3) the continuing existence of internal armed conflicts in some member states. More importantly, the presence and reach of civil society groups that advocate human rights promotion and protection in each of the member states vary considerably, with some having quite limited influence, if any at all, in non-democratic member states.


The ‘balanced and credible’ terms of reference for a regional human rights body remains vague at this point given the lack of access to information on the deliberations that took place within the HLTF. Even so, given that the majority of ASEAN members are not fully in favour of a regional human rights body and the fact that these members have no national human rights commissions to draw some principles and reference from, it is likely that any attempts by civil society groups to lobby for the body to have sanctioning or monitoring powers would prove unsuccessful. Moreover, the phrase ‘in the best collective interest of ASEAN’ betrays the lowest common denominator principle that will most likely prevail in drafting the terms of reference of the regional human rights body. That is, consensus decision-making will ensure that the body does not create discomfort even for the least democratic members of the association. In the end, the perceived need for regional human rights body stemmed not so much from the ‘noisy’ human rights advocates in Southeast Asia as from the interest of governments in creating the appearance of ASEAN engaging on human rights issues. To some extent, this could also help the group parley international criticisms leveled against some of its members, especially the military junta in Myanmar.

Initial media reports indicate that ASEAN is divided on what kind of a regional human rights body should be created. On one hand, member states with national human rights commissions – Indonesia, Malaysia, the Philippines and Thailand – want the body to have monitoring and enforcement capacity. On the other hand, Singapore, Cambodia, Laos, Myanmar, and Vietnam prefer that the body have only an advisory function and focus on the promotion rather than protection of human rights. One anonymous ASEAN official was quoted as saying that, although the human rights body will not be empowered to impose sanctions, it will ‘work on peer pressure, will measure progress and seek periodic explanations for non-progress’. If this report is accurate, the ASEAN human rights body will simply be a ‘talk shop’ for member states on human rights issues.

Overall, the effectiveness of an ASEAN human rights body will depend on the following factors. First, the acceptability of the terms of reference to civil society groups and human rights advocates in the region. Second, the

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32 On this issue, civil society groups in the region appear to be divided. For some Philippine human rights advocates, for example, the limitations that may be observed in the ASEAN Charter and in the prospective terms of reference of the regional human rights body may still be
responsiveness of member states to the need to deal with human rights violations within their territories. Third, the willingness of other member states to set up their own national human rights commission even as those members that already have their own need to improve on their capabilities. The last factor obviously will be influenced by the domestic environment and degree of openness of the political systems in ASEAN member states. In this regard, constituency building in the promotion of human rights as well as R2P at various levels (community, local, and national) is important before one could expect a truly meaningful human rights body both at the national and regional levels to come about.

At the very least, an effective regional human rights body must be given monitoring functions that will allow member states to investigate allegations of human rights violations committed by other members against their own people. It should also be able to monitor compliance with international and regional treaties, conventions, and agreements on human rights and humanitarian law, among others, for which ASEAN states are party to. A good starting point, for example, is to ensure that the 2007 ASEAN Convention on Counter-Terrorism is ratified by all members and that its human rights provisions are complied with. The specific provisions in this Convention pertaining to human rights protection could also be incorporated in the prospective terms of reference of the ASEAN human rights body.

Accreditation of Civil Society Organizations: Enabling or Constraining a People-Centered ASEAN?

The evolution of ASEAN into a more-people centered organisation would depend largely on the willingness of ASEAN member states to engage civil society groups in the region. In this regard, the EPG Report recommended that the proposed ASEAN Council hold consultations with parliamentarians in ASEAN member states, representatives of private business sector, civil society organisations, human rights groups, and other stakeholders. Engagement with civil society and think tanks was viewed by the EPG as providing an opportunity to assist ASEAN in communicating its goals and objectives to the public, as well as offering a useful conduit for feedback on their current concerns. Thus, the EPG Report called on ASEAN to 'strengthen its links with

considered better than not having any at all. They point to the importance of sustained engagement with ASEAN through various 'open spaces' that are made available with a view over the long term towards a more effective human rights regime in the region.

civil society organizations and draw upon their network and strengths as strategic partners for ideas and initiatives to develop the ASEAN Socio-Cultural Community’.\textsuperscript{34} It also recommended that the ASEAN Charter ‘should provide channels at different levels for regular consultations through appropriate mechanisms that may be established for this purpose’.\textsuperscript{35} No preconditions were set by the EPG Report – either with regard to the types of civil society groups and other non-government organizations that could engage or in relation to whether individual groups fully supported the Charter.

The ASEAN Charter that was drafted by the HLTF, however, failed to include provisions for regular consultations with civil society groups. Instead, Article 16 (paragraph 1) simply provided that ‘ASEAN may engage with entities which support the ASEAN Charter, in particular its purposes and principles (emphasis added)’.\textsuperscript{36} A list of ‘associated entities’ was included in Annex 2 of the Charter. It is interesting to note the words used in Article 16(1): ‘ASEAN may engage’ (hence, it is solely upon the discretion of the Association) to consult ‘with entities which support the ASEAN Charter’ (which implies that it probably would not engage with other groups that may be critical of the Charter’s objectives and principles). During a World Bank-sponsored workshop on improving the quality of ASEAN-Civil Society engagement held at the ASEAN Secretariat in Jakarta, in June 2008, a number of participants (including this author) raised serious concerns about the precondition. In particular, they pointed out that there are civil society groups that are critical of the ASEAN Charter and some of ASEAN’s policies. When asked whether ASEAN would still be willing to engage with these groups nonetheless, a senior adviser to the ASEAN Secretary-General\textsuperscript{37} responded that ASEAN would give priority to those groups that fully supported the Charter and those that are accredited by ASEAN. Thus, accreditation adds another filter to the process of engagement.

Article 16(2) of the Charter provided for ‘rules of procedure and criteria for engagement’ that would be ‘prescribed by the Committee of Permanent Representatives upon the recommendation of the Secretary-General of ASEAN’.\textsuperscript{38} Apparently, the rules and criteria are already in place in the form of ‘Guidelines on ASEAN’s Relations with Civil Society Organizations’ (hereafter referred to as Guidelines), which was originally adopted by the ASEAN

\textsuperscript{34} Ibid., p. 21.
\textsuperscript{35} Ibid.
\textsuperscript{36} Charter of the Association of Southeast Asian Nations, ibid., p. 16.
\textsuperscript{37} The senior adviser is Mr. Termsak Chalermpalanupap, a long time bureaucrat in ASEAN.
\textsuperscript{38} Ibid.
Standing Committee in July 1986 and revised and adopted in April 2006. The Guidelines were presented to civil society participants during the World Bank-sponsored workshop on ASEAN-Civil Society Engagement in Jakarta in June 2008 for comment, ostensibly in order to make further revisions on it in accordance with the ASEAN Charter and in time for the fourteenth ASEAN Summit in Thailand.39

A number of issues may be raised regarding the contents of the Guidelines. First, the definition of civil society organisations is problematic because these were considered as those that ‘perform functions and activities that are governmental or quasi-governmental in nature but they are not part of the formal structure of ASEAN’ (emphasis added).40 This contradicts academic and commonly accepted notions of civil society organisations as autonomous from governments and whose activities could sometimes be adversarial to the state. It is no wonder therefore that most of the accredited ‘civil society organisations’ listed in the Charter’s Appendix 2 are professional, trade, and industry associations. Many of these groups have been inactive in tracks two and three dialogues with ASEAN.

Second, the Guidelines enumerate a number of requirements that CSOs (civil society organizations) are expected to comply with. These include: (1) ‘undertake in writing to abide by the policies, guidelines, directives, and other decisions of ASEAN’; (2) ‘undertake to advance ASEAN interests and promote the awareness of ASEAN’s principles and activities’; (3) ‘shall be held responsible for their actions, especially those found detrimental to ASEAN as a whole’; (4) ‘shall invite participation of officials in Member Countries at their meetings and activities, among others’; (5) ‘shall submit, annually, a written summary of their activities to the ASEAN Standing Committee through the ASEAN Secretariat’; and (6) ‘inform the ASEAN Secretariat of changes in their officials, memberships, as well as changes of address’ (emphasis added).41 Clearly, these requirements would essentially force accredited CSOs to conform with state-centered ASEAN principles and the association’s policies. Moreover, it is not clear whose definition or interpretation of what constitutes ‘ASEAN interests’ would prevail given that, under the ASEAN Charter, the purposes and

41 Ibid., paragraph 11.
principles uphold both state and people’s interests which at times may be in conflict.

Third, the Guidelines states that the affiliation of civil society groups with ASEAN may be terminated at the discretion of the ASEAN Standing Committee if they ‘engage in acts inimical to ASEAN or any of the ASEAN Member Country’, ‘act in ways contrary to the aims, objectives, and fundamental principles of ASEAN’, or ‘are found to have committed gross misconduct which brings disrepute to ASEAN’, among others. 42 Likewise, CSOs ‘shall not take legal action against any ASEAN Member Country or the ASEAN Secretariat’ if their affiliation is terminated…’. 43 It also provides certain rights to member states, through the ASEAN Secretariat, to ‘regularly monitor the activities of the CSOs and their relations with ASEAN, and recommend to the ASEAN Standing Committee appropriate measures to deal with CSOs that have not acted in accordance with the provisions in paragraph 11’. 44 These provisions would no doubt ensure that the interests of ASEAN member states are protected rather than contribute to the building of trust and confidence between states and civil society in the region. Given that the activities of some of the region’s civil society groups, such as those that promote human rights and democracy, may be deemed by some ASEAN members to be inimical to the security of the state, these organisations are not likely to see benefit from being accredited by ASEAN under the current terms and conditions set by the Guidelines. It is in this regard that initiatives by tracks two and three, such as the ASEAN People’s Assembly (APA) and ASEAN Civil Society Conference (ACSC), that aim at engaging ASEAN on their own terms could provide more meaningful venues for dialogue and confidence building. At least, they could still present their people-oriented concerns to ASEAN ministers and leaders through other avenues such as meetings with ASEAN leaders and national consultations.

Overall, in their current form, the Guidelines are a poorly crafted document written by ASEAN bureaucrats who were apparently unable to think ‘out of the box’ and whose mindsets have been shaped by ASEAN’s traditional norms. It also reflects the insecurity of some non-democratic ASEAN members that remain suspicious of autonomous civil society groups and think tanks in the region. They remain uncomfortable with non-government actors that take a critical stance on a range of issues and question or challenge government

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42 Ibid., paragraph 13.
43 Ibid., paragraph 14.
44 Ibid., paragraph 15.
policies that are considered inimical to people’s human security interests. Hence, the Guidelines – which promotes elite- and state-driven engagement with civil society organisations – are certainly more of a constraining than an enabling instrument towards the building of a truly people-centered ASEAN.

Absence of Sanctions and the Myanmar Problem

The absence of sanctions against erring members is another limitation of the ASEAN Charter. Whereas other regional organisations, such as the African Union (AU) and the Organisation of American States (OAS) have sanctions provisions in their respective charters, the HLTF opted to do away with this because it goes against the ‘ASEAN Way’. Interestingly, the EPG Report was at least open to the idea of suspending the rights and privileges of members in certain circumstances, including expulsion from ASEAN. In particular, the EPG recommended that: (1) ‘the ASEAN Council may consider taking any measure, including among others, the suspension of rights and privileges…for any serious breach by any Member State of the objectives, principles, and commitments’; (2) ‘a decision to take any measure…shall be taken by unanimity, without the participation of the Member State or Member States to which the measure will be applied’; and (3) ‘unless otherwise decided by the ASEAN Council in exceptional circumstances, there shall be no recourse to expulsion of membership’.

Even though the Charter does not include provisions for sanctions, some believe that it is still an unwritten option for ASEAN leaders to take especially in cases of serious breaches by member states. This option, however, is unlikely to fly given the consensus decision-making principle in the Charter, which grants each member state the veto power.

It is often said that the proof of the pudding is in the eating. The same goes for the ASEAN Charter. There is no doubt that Myanmar will become a test case for the ability of the Charter to move ASEAN towards a more people-centered and ‘rules-based’ organisation. For a long time, defenders of ASEAN’s ‘constructive engagement’ with the military junta in Myanmar have failed to convince the rest of the region and the international community that

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this strategy has worked. If anything, ASEAN has been embarrassed by Myanmar since the country was accepted as a member in 1997 to the point that it had to be pressured to skip the chairmanship of the association in 2006 in the face of threats by Western dialogue partners that they will boycott ASEAN meetings. More recently, the violent crackdown against unarmed Buddhist monks in September 2007 and the humanitarian crisis in the country following the devastation brought by cyclone Nargis in May 2008 effectively demonstrated ASEAN’s inability to reign in a recalcitrant member. Interestingly, during a Senate committee hearing in the Philippines attended by this author, a former member of the HLTF argued that the Myanmar issue is not the ‘end-all’ of the ASEAN Charter. She refused to acknowledge that Myanmar is and will continue to be a burning issue for ASEAN and an embarrassment to the organisation and its much-vaunted ‘people-oriented’ and ‘rules-based’ claims. Myanmar will also test the patience of ASEAN amidst its attempts to create a regional human rights body, which has been strongly opposed by the military junta.

In the absence of sanctions, it is difficult to see how ASEAN could realise one of its stated purposes, which is ‘to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms’. Without sanctions, there would be little to deter member states from committing violations of international norms, including international humanitarian law. Certainly, it is clear that tough talk on the part of ASEAN through collective statements expressing ‘deep disappointment’ over the lack of progress in Myanmar’s ‘roadmap to democracy’, has not worked either.

**Conclusion**

The ASEAN Charter no doubt caters to the conservative members of ASEAN. It is one step forward and thirty-nine steps back because the Charter still underscores the primary importance of ASEAN’s traditional state-centered norms and reaffirms consensus-decision making in the organisation. The Charter fails to provide for the establishment of clear and effective mechanisms that will ensure the promotion and protection of people’s rights and fundamental freedoms. More importantly, the Charter does not enable meaningful engagement with civil society and non-government groups in the region because it did not provide appropriate frameworks for their participation – even in a consultative capacity – in ASEAN’s decision-making process, as recommended by the EPG Report. The absence of provisions for sanctions,
including the option to expel errant member states, renders the Charter impo-
tent in addressing current and future problems related to serious breaches of
its stated purposes and principles by its member states.

In the face of these challenges and constraints, what are the implications of
a weak ASEAN Charter for promoting R2P in the region? First, it is impor-
tant to recognise that much work is still needed to build national constitu-
cies in Southeast Asian societies in order to push for people-oriented advocacies
such as human rights protection and other R2P related principles. Second,
notwithstanding the limitations of the ASEAN Charter, other avenues for
meaningful engagement between civil society groups and ASEAN are not
foreclosed and need to be further enhanced. This includes the strengthening
of national and regional networks of civil society organisations, sustaining
dialogue and confidence building through mechanisms such as APA, ACSC
and working groups on human rights, and ongoing consultations with the
non-government sector on various blueprints and plans of action related to
the three pillars of the ASEAN Community. Third, it would be wrong
to think that there are no officials or bureaucrats in ASEAN who are not open
to new ideas and emerging norms such as R2P. At the very least, one could
assume that if younger generations of ASEAN diplomats or bureaucrats get to
be engaged meaningfully through dialogues, training, and education, there is
hope for ASEAN to transform itself. But an important caveat should be stated:
younger bureaucrats, early in their careers, have already been socialised into
ASEAN’s traditional norms. Indeed, beyond the flawed ASEAN Charter, a
more serious challenge for ASEAN has to do with transforming the mindset
of its bureaucrats.