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THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN) UNDER SCRUTINY: A NEW REGIONAL ORGANIZATION FOR THE PROTECTION OF HUMAN RIGHTS AND THE PEACEFUL SETTLEMENT OF DISPUTES?

1. *Introductory remarks*

Amongst the numerous examples of regional integration established by treaty, the Association of South-East Asian Nations, better known as ASEAN, is one deserving interest for a number of different reasons. If the recent events concerning the treatment of the *Rohingya* minority group on behalf of Burmese authority undoubtedly raised concerns worldwide and prompted the International Court of Justice to issue provisional measures (*infra*, para 7), other factors justify a focus on this group of Asian States. To European legal scholars, used to deal with the Council of Europe legal order or with the European Union, it may sound curious to hear about an association of States operating thousands of kilometres far away the European legal space. Questions pertaining to the theory of international organization do arise: is ASEAN a true international organization or, rather, a weaker form of integration? Does it possess its own organs? Is it vested with international legal personality? Does it have powers to settle disputes amongst its Member States? At a first sight, an affirmative response could be plausible by simply assuming that the European model was so successful that it found imitators on the other face of the globe.

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Understanding the nature of ASEAN, through both its progressive evolution and the task assigned to it, will thus be the first element to be ascertained. Along this pathway, the ASEAN functioning with a particular focus on the settlement of disputes machinery, will be analysed at some length in order to grasp whether such an apparatus is really fit for the purpose of creating an area of long-lasting peace and prosperity among its members. A second noteworthy element is ASEAN involvement in human rights protection. How deep, if any, is this Association commitment in fostering human rights within its territorial space? Was ASEAN born to emulate in parallel the European, Inter-American, African and Arab experiences in their efforts to promoting and protecting human rights? After describing some salient ASEAN substantial and procedural law, the recent judgment of International Court of Justice in the case opposing the Gambia to Myanmar for alleged genocide against Rohingya minority will be reported, in order to give a partial and limited answer to the question.

2. *The establishment of ASEAN and the first ten years of its activity: the so-called "ASEAN way" as a model for decision making*

The ASEAN, which recently (August 2017) marked a significant milestone as it commemorated its 50th anniversary, is the main important regional organization of the South east Asia[1]; it has its site in Jakarta (Indonesia) and has gained observer status at the UN General Assembly[2].

ASEAN includes today ten members States (Brunei Darussalam, Cambodia, the Philippines, Laos, Malaysia, Indonesia, Singapore, Vietnam, Myanmar, Thailand), even if at the moment of its creation (1967), only five among those States (Indonesia, Thailand Singapore, Malaysia and the Philippines) were part of it: Brunei joined on 1984, Vietnam on 1995, Laos and Myanmar on 1997 and Cambodia on 1999[3]. All of them experienced the influence of western colonial Powers[4], although they are now multicultural and multi-ethnic entities, with distinct characteristic in terms of political systems, population, culture,

[1] According to D. DESIERTO, *International Law, Regional Developments: South and South-East Asia*, in *Max P. Enc. Pub. Int. Law,* 2010, ASEAN did prove to be Asia's South-east most enduring regional association. See also W. M. CHOI, G. BAETENS, *Regional Cooperation and Organization: Asian States*, *ibid.*, 2017; S. HAMAMOTO, *Regional Cooperation and Organization: Pacific Region*, *ibid.,* 2017; G. MURTI, *ASEAN's One Identity and One Community: A Slogan or a Reality?,* in *Yale Journal of International Affairs,* vol. 11, 2016, p. 87 ff.; J. PELKMANS *The ASEAN Economic Community: A Conceptual Approach,* Cambridge 2016; P. NGUITRAGOOL, J. RULAND (eds.), *ASEAN as an Actor in International Fora. Reality, Potential and Constraints,* Cambridge, 2015.

[2] United Nations General Assembly Res. 61/44, 18 December 2018.

[3] According to art. 6 of the fundamental ASEAN Charter (see *infra*, para 5), membership is open to other South-East Asian States recognized by all ASEAN members agreeing to be bound and to abide by the Charter, being able and willing to perform the obligations of membership.

[4] For a history of the regionalism in Southeast Asia, see D. DESIERTO, *Postcolonial International Law Discourses on Regional Developments in South and Southeast Asia,* in *International Journal of Legal Information,* vol. 36, n. 3, 2008, p. 388 ff. (p. 413-420), which mentions also ASEAN countries life during cold war era. The differences amongst the countries in the area are slightly evoked in the official ASEAN annual report 2018-2019 *Advancing Partnership for Sustainability,* Jakarta, 2019, according to which «despite fast-changing shifts and increasing competition between some of its major partners, ASEAN remains the driving force» in South-East region of Asia (p. 13).

religion, geography and GDP[5]. Unfortunately, corruption is a major hurdle to their social development[6]. Despite the strong differences between them, ASEAN countries remain committed to strengthen existing mutual similarities in order to achieve certain goals: they are tied by a number of agreements and soft law on economic, social and security issues but since dwelling with precision on each of those legal acts does not fall within the purposes of this contribution, in the following pages I will mention some profiles only just for the sake of clarity.

The ASEAN founding act was the ASEAN Declaration, adopted at Bangkok (1967)[7]. In this soft law act, the above mentioned five States «in the spirit of equality» and «determined to ensure their stability and security from external interference in any form or manifestation»[8] set up an «association for regional cooperation» whose aims and purposes were, *inter alia*: to accelerate the economic growth, social progress and cultural development in the region; to promote regional peace and stability through respect for the rule of law and adherence to the principles of the United Nations Charter; to promote collaboration and mutual assistance on matters of common interest; to provide assistance to each other in the form of training and research facilities; to collaborate for the expansion of their trade and the raising of the living standards of their peoples; to maintain cooperation with existing international and regional organizations. Academics do agree that the ASEAN was created, at least initially, as a security community[9]: a political choice dictated by both the will of the Members to be free from external threats[10], and the necessity of managing the coexistence with other major Asian powers, notably India, Japan and China. The wish of building up their States after the colonialist era, also fighting against domestic secessionist movements, was also a major security concern. The security cooperation still exists today as one of the three pillars on which ASEAN rests upon.

As for the institutional framework, the Bangkok Declaration provided for informal mechanism such as the Meeting of Foreign Ministers, a Standing Committee having as its members the Ambassadors of State parties, Ad-Hoc Committees and Permanent Committees charged with specific tasks, and a National Secretariat in each member country. As loose at it was, this machinery developed a specific cooperative model, known

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[5] Currently, Cambodia, Laos and Myanmar (buddhism) are designated by the United Nations as least-developed countries while GDP per capita of Brunei, Singapore and Malaysia (muslim) are above the world average (www. unctad.org). The Republic of Philippines (catholic) and Singapore (confucian) are democratic States, as well as Indonesia (muslim); Thailand (buddhist) and Myanmar are ruled by a military junta, Both Vietnam (atheist) and Laos are communist countries, while Brunei (muslim), Cambodia and Malaysia are a monarchy.

[6] According to the 2019 corruption perception Index generated by Transparency International, which uses a scale of 0 to 100 where 0 is highly corrupted, ASEAN States rank amongst the world's most corrupted countries, with some notable exceptions: Singapore (85/100), Brunei Darussalam (60/100), Malaysia (53/100), Philippines (34/100), Indonesia (40/100), Vietnam (37/100), Laos (29/100), Cambodia (20/100), Myanmar (29/100), Thailand (36/100). See R. ARIFIN, *Combating Corruption Under ASEAN Cooperation: the Emerging Issues*, in *Political and Security Issues,* in *ASEAN*, cited, Giakarta, 2014, p. 23 ff.

[7] Available at: https://ASEAN.org/the-ASEAN-declaration-bangkok-declaration-bangkok-8-august-1967.

[8] Preamble, *considering* nn. 1; 4.

[9] A. COLLINS, *Forming a Security Community: Lessons from ASEAN*, in *International Relations of the Asia-Pacific*, vol. 7, 2007, p. 203 ff.; D. EMMERSON, *Security, Community and Democracy in Southeast Asia; Analyzing ASEAN,* in *Japanese Journal of Political Science,* 2005, p. 165 ff.; E. SOLIDUM, *The Politics of ASEAN: an Introduction to Southeast Asian Regionalism*, Singapore, 2003, p. 70 ff.

[10] A. ACHARYA, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order*², New York, 2009, p. 54; B. LOKE, *The "ASEAN Way": Towards Regional Order and Security Cooperation*?, in *Melbourne Journal of Politics*, vol. 30, 2005, p. 8 ff.

as the "ASEAN way" of decision making, which has never been formally defined. It was grounded on mutual confidence between ASEAN leaders, who took decisions due to their personal relations instead of giving way to formally negotiated and enforceable agreements[11]. Typical of "ASEAN way" are informal summits and closed-door policy at top State or Government level. By so doing, ASEAN Member wished to prevent quarrels amongst them, keeping at a low level any possible confrontation. The "ASEAN way", imbued with flexibility and pragmatism[12], was anchored to two basic principles: non-intervention in the domestic affairs of other member States and mutual *consensus*. Both principles are worth being summarised. As for non-intervention, it must be said that this principle is not peculiar of ASEAN[13] (where it is also enshrined in another fundamental ASEAN document, the Charter of the Association of Southeast)[14]; rather, as it is well known, it is a pillar of International law embodied both in treaty and customary law[15]. Within ASEAN area, non-intervention developed on a double side: on the one hand, as a legal reaction to various external challenges member States had to cope with, like territorial disputes or communist threat after the end of Vietnam war (the fall of South Vietnam and the communist takeovers in Cambodia and Laos, for instance). On the other hand, it was a response to certain domestic concerns such as weak State structure or separatist tendencies

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11 R. MUSHKAT, *"Loose" Regionalism and Global Governance: the Association of Southeast Asian Nations (ASEAN) Factor*, in *Melb. Jour. Int. Law,* 2016, p. 238 ff.; H. KATSUMATA, *Reconstruction of Diplomatic Norms in Southeast Asia: The Case for Strict Adherence to the "ASEAN Way"*, in *Contemporary Southeast Asia: A Journal of International and Strategic Affairs,* 2003, p. 104 ff.

12 According to Y. NEGISHI, *From Liberal and Equal to Fraternal International Legal Order? Eastphalian Synthesis of Sovereignty and Governmentality*, (in https://voelkerrechtsblog.org, 2 January 2019), «we are witnessing a sunrise of an Eastphalian order based upon the Asian spirit of *brotherhood*, as an alternative to western liberal order resting on equal sovereignty of States». See also R. KUNZ, S. SPITRA, *Are We Living in the 'Eastphalian' Moment? South and East-Asian Perspectives on International Law*, (in https://voelkerrechtsblog.org, 10 December 2018); L. KULAMADAYIL S. AGARWAL, *Are We Living in an Eastphalian Moment?*, *ibid.,* 8 January 2018); E. RINGMAR, *Performing International System: two East-Asian Alternatives to the Westphalian Order*, in *Int. Org.,* 2012, p. 1 ff.

13 Though not typical of ASEAN only, the *consensus* rule evidences how strong is «the attachment of ASEAN members to the principles of sovereignty and sovereign equality of States, which are also the foundation of the principle of non-intervention. The disadvantage of an extreme application of the *consensus* principle in its peculiar ASEAN manifestation is, of course, that it allows progress only on the basis of the smallest common denominator». See P. MALANCZUK, *Association of Southeast Asian Nations (ASEAN)*, in *Max P. Enc. Pub. Int. Law* (October 2007).

14 Adopted at 13th summit of ASEAN Heads of State or Government, Singapore, 20 November 2007, and entered into force on 15 December 2008 after ratification by member States. See art. 2, para. 2, *e*, calling upon the Association and its Member States to act in accordance with the principle of non-interference in the internal affairs of other Members.

15 Since it is not the purpose of this contribution to linger on this fundamental tenet of international legal order, I will only remind that non-intervention has found expression in bilateral, multilateral and regional treaties and that, above all, the International Court of Justice has discussed it in very well-known case law; the 1949 *Corfu Channel* case (I.C.J. *Reports* 1949, p. 35), where it found that «the alleged right of intervention as the manifestation of a policy of force has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law»; and the 1986 case concerning *Military and Paramilitary Activities in and Against Nicaragua* (I.C.J. *Reports* 1986 p. 14, paras 202 ff.), in which the Court said that «the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference […] consider(ing) it part and parcel of customary international law […] it forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States». The UN General Assembly has also adopted resolutions addressing the principle of non-intervention, often used as an evidence of customary law. Among these, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (U.N. Doc. A/RES/25/2625, 24 October 1970).

perceived to be as threats to the security of States[16]. In both cases, the strategy of managing the crises was successful, as long as governments were able to invest the «"peace dividend" thus generated in poverty reduction and economic development, which in turn created further a favourable condition for peace and stability»[17].

As for the *consensus* method of decision making, it should be noted that it is not specific to ASEAN: it is largely used by international organizations as well, where it is complemented by majority voting if it is impossible to reach an agreement[18]. So, at the outset, ASEAN was marked by two distinguishing features: the wariness of its Member States to manage conflict through a formal apparatus devoted to the settlement of disputes[19], and the lack of any regulation concerning human rights. One of ASEAN's evolutionary path in the years to come, will be trying to reconcile the informal "ASEAN way" with a rule-based organisation progressively geared to have human rights as a distinctive flagship.

Ten years after the Bangkok Declaration another soft law act came: the Declaration of ASEAN Concord (Bali Concord I), adopted at Bali during the first ASEAN summit[20], which *inter alia* laid down extensively the basic foundation of the political, economic, social and security cooperation in the pursuit of political stability of the region, in order to contribute to international peace ant the welfare of the area. To that end, Member States set forth a programme of action in six parts[21] the main component of which are the signing of the Treaty of Amity and Cooperation (see *infra*, para. 3) and the settlement of intra-regional disputes by peaceful means (para. 6). In order to promote development and growth, economic cooperation was also established, by allowing preferential trade arrangements and market access. Lastly, concerning the cooperation in the social field, the paragraph C of the Declaration set forth a «Cooperation in the field of social development, with emphasis on the well-being of the low-income group […] with fair remuneration», though human rights concerns seem likely to be superseded by economic reasons aimed at speeding economic performances.

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[16] The State building or regime maintenance function played by "ASEAN way" enabled States to concentrate on domestic problems without fearing of any criticism whatsoever from neighbouring Members, thus fostering mutual solidarity among leaders and even the maintenance of some dictatorship. See I. DEINLA, *The Development of the Rule of Law in ASEAN*, Cambridge, 2017, p. 10.

[17] M. OISHI, *Introduction: the ASEAN Way of Conflict Management Under Challenge*, in M. OISHI, *Contemporary Conflicts in Southeast Asia. Towards a New ASEAN Way of Conflict Management,* Berlin, Singapore, 2016, p. 3 ff.

[18] Since majority voting is a concept that is clearly alien to ASEAN's history of decision-making, ASEAN has been termed as a mere «talking shop». See P. MALANCZUK, *Association*, cited.

[19] According to a former Secretary-General, «ASEAN is not and was not meant to be a supranational entity acting independently of its members. It has no regional parliament or council of ministers with law-making powers, no power of enforcement, no judicial system». See R. SEVERINO, *Asia Policy Lecture: What ASEAN is and what it stands for*, University of Sydney, 1988 (www.asean.org).

[20] Bali, 24 February 1976.

[21] A) Political, B) Economic, C) Social, D) Culture and Information, E) Security, F) Improvement of ASEAN Machinery.

3. *The deepening of cooperation and the move towards progressive institutionalisation: the Treaty of Amity and Cooperation (1976) and the ensuing achievements in political and security fields*

The first legally binding act for ASEAN States came in 1976, with the signature of the Treaty of Amity and Co-operation[22] (the Treaty), and the setting up of a Secretariat which undoubtedly initiated the ASEAN structural evolution into the form of a true international organization.

According to chapter I, art. 1 (*Purpose and Principles*) of the Treaty, States purport to promote peace, amity (chapter II, art. 3) and cooperation (chapter III, art. 4) in the economic, social, technical, scientific and administrative fields as well as in matters of common ideals and aspirations by laying down some principles (chapter I, art. 2). Amongst them lies the mutual respect for their independence, sovereignty, equality, territorial integrity and national identity; the right of every State to lead its national existence free from external interference, subversion or coercion; the non-interference in the internal affairs of one another; the renunciation of the threat or use of force; the settlement of differences or disputes by peaceful means. As in the previous Bangkok and Bali Declarations, no specific statements on human rights promotion are made: so, the pledge to achieve social justice raising the standards of living of the people of the region (chapter III, art. 7) made by the parties to the treaty, flows as a consequence of the economic cooperation and not an end in itself. This should not come as a surprise, since the principle of non-intervention prevented a development of human rights theories within ASEAN States[23].

As for institutional machinery, the Treaty marks a step forward if compared to that of the two abovementioned Declarations: with regard to disputes, whose pacific settlement is a «fundamental principle», a permanent body – the High Council – (consisting of Foreign Ministers of ASEAN countries) shall recommend to the Parties to settle the dispute by resorting to diplomatic means, provided that all parties agree to it[24]. Should the Parties agree, the High Council may offer its good offices or it may turn into a Committee of mediation, inquiry or conciliation; it shall render its decisions by consensus, but there are no rules compelling Parties to a dispute to comply with its decision. Moreover, a final clause (art. 17) allows Parties to have recourse to whatsoever mode contained in UN Charter art. 33 (1), so permitting States to choose a judicial way: but there is a clear preference for «initiatives to solve by friendly negotiations before resorting to other procedures»[25]. Anyway, the lack of enforcement capacities made the Treaty unused as

[22] The Treaty was also adopted during the above-mentioned summit held in Bali. (www.asean.org).

[23] See E. CORTHAY, *The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention*, for whom «States are often seen as having a very broad understanding of the principle of non-interference, prohibiting even public challenges, comments or criticisms of other regimes' legitimacy», domestic systems, conduct, policies, or style», in *Asian Pacific Law & Policy Journal*, vol. 17, n. 2, 2016, p. 1 ff.

[24] Chapter IV (*Pacific settlement of disputes*), art. 13-16.

[25] This not surprising, since the Preamble of the Treaty (para. 4) clearly make a preference for informal modes of dispute settlement: «convinced that the settlement of differences or disputes […] should be regulated by rational, effective and sufficiently flexible procedures, avoiding negative attitudes which might endanger or hinder cooperation». One commentator has termed the Treaty's lack of adjudicatory body as a «glaring weakness». See W. WOON, *Dispute Settlement,* in *ASEAN*, in *Korean Journal of International and Comparative Law,* 2013, p. 92 ff. (pp. 96-97).

evidenced *inter alia* from the dispute between Indonesia and Malaysia about the sovereignty over the islets of Sipadan and Ligitan[26], where Malaysia was unconvinced of Indonesia's proposals to bring the matter before the High Council of the Treaty for fear of other ASEAN members being partial towards Indonesia[27]. Arguably, the political nature of the Treaty's High Council, joint to the *consensus* rule in decision making, did not raise confidence in member States *vis-à-vis* a purely political proceeding. More generally, as it will be demonstrated, ASEAN States practice shows their willingness to settle their disputes towards adjudicatory means, either in territorial and maritime delimitation, in trade or monetary/fiscal matters (see *infra*, paras 5-6).

The subsequent ASEAN Regional Forum[28] gave impetus to political and security cooperation, whose objective were: 1) to foster constructive dialogue and consultation on political and security issues of common interest and concern; and 2) to make significant contributions to efforts towards confidence-building and preventive diplomacy in the Asia-Pacific region[29]. Under this framework, important regulations have been adopted. In fact, the ASEAN Regional Forum paved the way to the signing of the Treaty on the establishment of Southeast Asia Nuclear Weapon-Free Zone[30], the Declaration on Transnational Crime[31], the Declaration on Joint Action to Counter Terrorism[32], the Convention on Counter Terrorism[33], and the Declaration on the Conduct of Parties in the South China Sea[34]. It remains to be seen, however, whether the repeated commitments under the political cooperation to enhance the creation of a security community[35] have eased ASEAN to managing border or political disputes between its members States.

The ASEAN approach to dispute settlement has been referred to as «diplomacy of accommodation» by M. CABALLERO-ANTHONY, *Mechanisms of Dispute Settlement: the ASEAN Experience*, in *Contemporary Southeast Asia,* vol. 20, n. 1, 1998, p. 51 ss.

[26] *Sovereignty over Pulau Ligitan and Pulau Sipadan* (Indonesia v. Malaysia), judgment of 17 December 2002, *I. C. J. Reports* 2002, p. 625.

[27] R. SEVERINO, *Southeast Asia in Search of an ASEAN Community: Insights from the Former Secretary General*, Singapore, 2007, p. 12-14. See also J. G. MERRILS, *Sovereignty over Palau Ligitan and Pulau Sipadan* (Indonesia v. Malaysia), Merits, Judgment of 17 December 2002, in *Int. Comp. Law Quart.* 2003, p. 797 ff.

[28] First ASEAN Regional Forum Chairman's Statement, Bangkok 25 July 1994.

[29] See R. BUENDIA, *Revisiting the ASEAN Political-Security Community Blueprint*, Manila, 2016 (https://www.academia.edu).

[30] Bangkok, 15 December 1995. The Treaty was meant to implement the Zone of Peace, Freedom and Neutrality Declaration, adopted in Kuala Lumpur on 27 November 1971 by the then ASEAN five Foreign ministers. Art. 3, paras 1-2 of the Treaty (*Basic undertakings*) requires contracting parties «not to develop, manufacture or acquire, possess or have control over nuclear weapon». A Commission and an Executive Committee as its subsidiary organ are set in order to oversee the implementation of this Treaty and ensure compliance with its provisions (artt. 8-9)

[31] Manila, 20 November 1997.

[32] Bandar Seri Begawan, 5 November 2001.

[33] Cebu, 13 January 2007. The Convention «shall provide for the framework for regional cooperation to counter, prevent and suppress terrorism in all its forms and manifestations…» (art. 1). Unlike the Declaration on Transnational Crime, the Treaty (art. XVI, *Implementation, Monitoring and Review*) requires «ASEAN sectoral bodies involved in ASEAN cooperation on countering terrorism shall be responsible for monitoring and reviewing the implementation» of the convention.

[34] Phnom Penh, 4 November 2002.

[35] See again the Declaration of ASEAN Concord II, para. A, n. 12: «ASEAN shall explore innovative ways to increase its security and establish modalities for the ASEAN Security Community, which include, inter alia, the following elements: norms-setting, conflict prevention, approaches to conflict resolution, and post-conflict peace building».

4. *The ASEAN Vision 2020 and the Bali Concord II Declarations: the establishment of the three ASEAN Communities*

Even if for some legal scholars the abovementioned achievements were quite unconvincing[36], the ensuing "ASEAN Vision 2020"[37] displayed ASEAN willingness to move quite expeditiously towards progressive institutionalization of the cooperation in the political, economic and social field: in the Declaration envisioning it, Member States purported to creating a «region to be, in 2020 […] a Zone of Peace, Freedom and Neutrality […] (with) the Treaty of Amity and Cooperation […] functioning fully as a binding code of conduct […] envisioning the ASEAN Regional Forum as an established means for […] promoting conflict-resolution […] where territorial and other disputes are resolved by peaceful means»[38]. Once again, no mention regarding the promotion and the protection of human rights was explicitly made, except for a certain emphasis put on «sustainable and equitable growth», «economic development and reduced poverty and socio-economic disparities», the «enhancement of food security», the «quality of education, the health, safety and environmental needs», the «poverty and socio-economics disparities»: but all those wide goals are dealt with a view to building a «Partnership in dynamic development», rather than creating a human rights based entity.

Another step towards institutionalisation was further accomplished with the adoption of the Declaration of ASEAN Concord II[39], which establishes an ASEAN Community by 2020. It brings to completion the evolution of the ASEAN cooperation inasmuch as it lays down the ASEAN Community project, which is based on three different and mutually reinforcing cooperative pillars, each of them providing the framework where a number of different treaties are negotiated[40]: the economic, socio-cultural, political and security ones: the above-mentioned "Communities". On each of them, some words are to be said, in order to better ascertain the room allowed to human rights.

To begin with the political and security cooperation[41], it mainly develops along the ASEAN Charter, the ASEAN Security community Plan of Action, and two Blueprints. According to the Blueprint 2009-2015[42], ASEAN cooperation in political and security «aims at strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms» (para. A, n. 12). Focussing

[36] D. M. JONES, N. JENNE, *Weak States regionalism: ASEAN and the limits of security cooperation in Pacific Asia*, in *International Relations of the Asia-Pacific,* 2016, p. 209 ff.
[37] Kuala Lumpur, 15 December 1997.
[38] *ASEAN Vision 2020*, quot., «*A Concert of Southeast Asian Nations*».
[39] Bali, 7 October 2003,
[40] S. F. PUVIMANASINGHE, *Foreign Investment, Human Rights, and the Environment: A Perspective from South Asia on the Role of Public International Law for Development,* Leiden, 2007, p. 250. For an overview of the treaties, protocols, ministerial understandings, memorandum of understanding, adopted in areas as various as trade, finance, political security, energy, environment, food security, cultural exchanges and health (www.agreement.ASEAN.org/home/index).
[41] ASEAN was never meant to be comparable to a collective self-defence organization, like NATO. Within ASEAN the concept of security was very broad, acknowledging that threats to security could come even in a non-armed way. See S. CHESTERMAN, *From Community to Compliance? The Evolution of Monitoring Obligations in ASEAN*, Cambridge, 2015, p. 33.
[42] Singapore, 21 November 2007.

on human rights, member States pledge through the Blueprint «to establish an ASEAN human rights body […] encourage(ing) cooperation between it and existing human rights mechanisms» (para. A.1.5). Conflict avoidance and settlement of disputes are also considered to be important, as the document calls upon States «to establish appropriate dispute settlement mechanism, including arbitration as provided for by the ASEAN Charter»[43]. The ensuing Blueprint 2025[44] highlights the importance of the Charter being effectively implemented (para. A.1.1), while upholding International law principles governing the peaceful conduct of relations which are also the foundations of the "ASEAN way" (independence, sovereignty, equality, territorial integrity, non-interference (paras. A.1.3, A.1.4). Arguably, those principles guide the settlement of disputes between Member states also, through the activity of *ad hoc* organs and institutions[45]. Regarding human rights protection, the Blueprint 2025 makes a step forward if compared to the Blueprint 2009: not only does the document «encourage ASEAN member states to ratify or to accede to core international human rights instruments and ensure their effective implementation», thus pushing ASEAN States to participating to UN and relevant treaty bodies monitoring mechanism, but it also «support the ASEAN Intergovernmental Commission on human rights»[46].

Time has come to resume now the economic cooperation[47], which increased significantly over time also due to the impasse of the WTO Doha Round. ASEAN economic cooperation has as one of its centrepieces in the ASEAN Free Trade Area[48] a powerful engine which boosted the economic performance of the region as a whole by lowering tariff and non-tariff rate with the aim to promote its competitive advantage. Under Free Trade Area, which administered a common preferential tariff mechanism, ASEAN was able to conclude a number of free trade agreements[49], and some years later to

[43] Paras. B.2, B.2.1. para. III (A, D) is devoted to Blueprint's implementation and review. On monitoring, see. S. CHESTERMAN, *From Community to Compliance?*, cited, p. 59-74 according to which «monitoring is often understood as the gathering of information on compliance with or implementation of certain obligations». The author distinguishes five different kinds of monitoring: compliance *sensu stricto*, implementation, interpretation, facilitation.

[44] Kuala Lumpur, 22 November 2015.

[45] Paras B.4, B.4.3. See R. BECKMAN, L. BERNARD, H. D. PHAN, T. H. LI, R. YUSRAN, *Promoting Compliance The Role of Dispute Settlement and Monitoring Mechanisms,* in *ASEAN Instruments*, Cambridge 2016, p. 121 ff., also for the effectiveness of monitoring within ASEAN (p. 153-159).

[46] Para. A.2.5. (ii, iii, iv) On the Commission, see *infra* para 6.

[47] P. DAVIDSON, *The ASEAN Way and Role of Law in ASEAN Economic Cooperation*, in *Singapore Yearbook of International Law,* 2004, p. 165 ff.; P. L. HSIEH, B. MERCURIO, *ASEAN Law in the New Regional Economic Order: an Introductory Roadmap to the ASEAN Economic Community*, in P. L. HSIEH, B. MERCURIO (eds.), *ASEAN Law in the New Regional Economic Order. Global Trends and Shifting Paradigms*, Cambridge, 2019, p. 3 ff.; T. S. YEAN, S. BASU DAS, *Introduction: Economic Interests and the ASEAN Economic Community*, in S. Y. THAM, S. BASU DAS (eds.), *Moving the AEC Beyond 2015: Managing Domestic Consensus for Community-Building*, 2018, p. 1 ff.; S. Y. CHIA, *The ASEAN Economic Community: Progress, Challenges, and Prospects*, ADBI Working Paper 440, Tokyo: Asian Development Bank Institute (www.adbi.org/working-paper/2013); J. DAVIDSON, *The Role of International Law in the Governance of International Economic Relations,* in *ASEAN*, in *Singapore Yearbook of International Law and Contributors,* 2008, p. 213 ff.

[48] Singapore, 9th ASEAN summit, 28 January 1992. The ASEAN Free Trade Area would be created within a time frame of 15 years beginning 1 January 1993. See P. KENEVAN, A. WINDEN, *Flexible free trade: the ASEAN Free Trade Area*, in *Harv. Int. Law. Jour.* It was notified to the WTO on October 1992 as a free trade agreement under the Enabling Clause (http://rtai.wto.org). See L. H. TAN, *Will ASEAN Economic Integration Progress Beyond a Free Trade Area?*, in *Int. Comp. Law Quart.,* 2004, p. 935 ss.

[49] It is not my purpose to dwell on ASEAN trade agreements either concluded among member States, or between ASEAN and third States. Within this second typology, it has been argued that three categories of

also opening negotiations for the setting of a Regional Comprehensive Economic Partnership with China, Japan, South Korea, Australia and New Zealand as well[50]. As for recent developments, in the Declaration on the ASEAN Economic Blueprint Members 2007 ASEAN Members declare their will to «transform ASEAN into a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy»[51]; and in the subsequent ASEAN Economic Blueprint 2025[52], more attention to sustainable economic development through the protection of the environment, good agriculture practices (paras 40-41) is paid, with the view of ensuring food and nutrition security, food safety and better nutrition (paras 55-56). As for monitoring the obligations[53], the ASEAN Economic Community Council is being tasked with the implementation of the measures covered (paras. 81-83), but as far as the idea of Economic Community progressed, monitoring proceedings enhanced as well: so, after the Protocol on Dispute Settlement Mechanism[54] with a mix of diplomatic and arbitral machinery thereto[55], a subsequent optional Protocol on Enhanced Dispute Settlement Disputes was adopted[56], largely modelled on the WTO Dispute Settlement Understanding[57]. Though it was in theory applicable to disputes arising from the interpretation and application of forty-six ASEAN economic agreements listed under appendix 1 of the Protocol, and to disputes arising from ASEAN economic agreements adopted after 2004 (art.1 (1)), ASEAN members did not so far resort to it, similarly to the 1976 Treaty of Amity and Cooperation[58].

A strong commitment for human rights promotion and protection is tabled in the third ASEAN Community, the socio-cultural cooperation centred around the Blueprint

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agreements can be depicted: treaties concluded by ASEAN States as if they were a sort of ASEAN organ; agreements concluded by ASEAN as an autonomous party; agreements concluded by ASEAN and its member states together (a sort of "mixed agreements"). See P. J. KUIJPER, J. H. MATHIS, N. Y. MORRIS-SHARMA, *From Treaty-Making to Treaty-Breaking. Models for ASEAN External Trade Agreements*, Cambridge, 2015.

[50] See, in general, A. TEVINI, *Regional Economic Integration and Dispute Settlement in East Asia: The Evolving Legal Framework*, London, 2018.

[51] Singapore, 11 November 2007, para. 1.

[52] Kuala Lumpur, 22 November 2015.

[53] M. EWING-CHOW, *Culture club or chameleon: Should ASEAN adopt legalisation for economic integration?* In *Singapore Yearbook of International Law*, 2008, p. 1 ff.; N. LIMSIRITONG, *The Deadlock of ASEAN Dispute Settlement Mechanisms and Why ASEAN Cannot Unlock It?* in Inte*rnational Journal of Crime, Law and Social Issues*, 2016, p. 18 ff.

[54] Manila, 20 novembre 1996. See P. SOOKHAKICH, *La mise en œuvre du mécanisme de règlement des différends commerciaux de l'ASEAN pour la préparation de la Communauté économique de l'ASEAN (AEC)*, Thèse de doctorat, Toulouse 2017 (http://www.theses.fr/2017TOU10013).

[55] Artt. 1-2; 4-5; 8; 9. According to H. D. PHAN, *Procedures for Peace: Building mechanism for dispute settlement and conflict management within ASEAN*, in *UC Davies Journal of International Law and Policy* 2013, 1, p. 49 ff. «In the ASEAN context, dispute management is usually aimed at de-escalating the dispute».

[56] Vientiane, 29 November 2004.

[57] A Senior Economic Official Meeting, looking alike the WTO Dispute Settlement Body, administers the new Protocol which does not preclude member States to bringing their disputes before other mechanisms (art. 1, para. 3). It may set up panels and adopts their reports, authorizing suspension of concessions and other obligations under ASEAN economic agreements also (art. 2, para. 2).

[58] The above-mentioned proceedings did largely go unused. According to M. EWING-CHOW, R. YUSRAN, *The ASEAN Trade Dispute Settlement Mechanism*, in R. HOWSE, H. RUIZ-FABRI, G. ULFSTEIN, M. ZANG (eds.), *The Legitimacy of International Courts and Tribunals,* Cambridge, 2018, p. 365 ff. the disputes were never filed because ASEAN trade provisions were not as comprehensive as WTO one's, and also because of a limited time frame for the adjudication process if compared to WTO) pp. 393-396).

2009[59], which aims at promoting human and social development, respect for fundamental freedoms, gender equality, the promotion and protection of human rights and the promotion of social justice (para. 6). This commitment is specified in the ensuing Blueprint 2025[60], with human rights being given emphasis regarding specific categories of subjects[61]. As for review mechanisms, while under the ASEAN Socio-Cultural Community Blueprint 2009 implementation was to be monitored by the ASEAN Secretariat[62], the new Blueprint 2025 sets up a more comprehensive system with each sectoral bodies being tasked to overseeing strategies and approaches that will maximise the role of ASEAN organs and bodies[63]. This shift towards a more technical-oriented and structured approach is a consequence of the ASEAN progressive evolution as a legal person, epitomized by the adoption of the abovementioned ASEAN Charter in 2007, a really fundamental stage in the human rights politics of the Association (see below).

5. *The ASEAN Charter and the Protocol on Dispute Settlement Mechanism: ASEAN's turning into an international legal person on the stage of international relations*

Undoubtedly, one of ASEAN's flagship is the celebrated ASEAN Charter[64], which marks a crucial turning point in the ASEAN life mainly for its institutional structure, decision making, monitoring proceedings and human rights protection as well[65]: this explains the ratification on behalf of the ten Members States soon after its adoption and its ensuing entering into force on 2008. According to a reputed legal scholar, the ASEAN Charter was a breakthrough in the progressive ASEAN constitutionalization, due to the rules pertaining to normative, executive and judicial function contained therein[66]. Against this background, this binding instrument makes ASEAN a true international organization compared to the simple regional association it was prior to its adoption: it now possesses legal personality, enjoying functional immunities and privileges necessary for the fulfilment

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[59] Cha-Am (Thailand) 23 October 2009.

[60] Kuala Lumpur, 22 November 2015. See M. EWING-CHOW, T. HSIEN-LI, *The Role of the Rule of Law in ASEAN Integration,* EUI Working Paper, Florence, 2013, p. 28.

[61] *Inter alia,* people with disabilities, migrant workers, ethnic minority groups, and vulnerable and marginalised groups: paras 5.2, 10-12.

[62] ASEAN Socio-Cultural Community Blueprint 2009, section III. D. paras7-9.

[63] ASEAN Socio-Cultural Community Blueprint 2025, Section III, A, paras 22-27.

[64] Quoted. See W. WOON, *The ASEAN Charter: A Commentary*, Singapore, 2015; M. EWING-CHOW, L. BERNARD, *The ASEAN Charter: The Legalization of ASEAN?* in S. CASSESE and others (eds.), *Global Administrative Law: The Casebook*, Rome, 2012, p. 115 ff.; L. LEVITER, *The ASEAN Charter: ASEAN Failure or Member Failure?*, in *New York University Journal of International Law and Politics*, vol. 43, 2010, p. 159 ff.; C. H. LIN, *ASEAN Charter: Deeper Regional Integration under International Law?*, in *Chin. Jour. Int. Law,* 2010, p. 821 ff.; R. BURCHILL, *Regional Integration and the Promotion and Protection of Democracy in Asia: Lessons from ASEAN*, in *Asian Yearbook of international Law,* 2007, p. 135 ff.

[65] See the Preamble (n.7), where the Peoples of ASEAN States declare to adhere to the «principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms». See H. MAHASETH, *Discussing the Difference in the Pre-Charter and Post-Charter Modalities of ASEAN*, in *Groningen Journal of International Law blog* (https://grojil.org/2019/11/25).

[66] D. DESIERTO, *ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter*, in *Col. Jour. Trans. Law,* 2011, p. 268 ff. (p. 272-273). S. S. TAY, *The ASEAN Charter: Between National Sovereignty and the Region's Constitutional Moment,* in *Singapore Yearbook of International Law,* 2008, p. 158 ss.

of its purposes (Art. 17)[67]. Chapter IV of the Charter (articles 7-14) is devoted to ASEAN institutional structure, whose most important features are now shortly evoked. The main organs are the ASEAN Summit, composed of the Heads of State or Governments of the Member States, the supreme policy-making body of ASEAN, with powers *inter alia* to deliberate, provide policy guidance and take decisions on key issues pertaining to the realization of the objectives of ASEAN (art. 7, paras 1-2, *a*, *b*)[68]; the ASEAN Coordinating Council, composed of Foreign Ministers of the Member States, which coordinates the implementation of agreements and decisions of the ASEAN Summit (art. 8, para. 2, *b*); the ASEAN Community Councils, made of the ASEAN Political-Security Community Council, ASEAN Economic Community Council, and ASEAN Socio-Cultural Community Council, implementing ASEAN Summit decisions (art. 9, para. 4, *a*)[69]. A Human Rights Body is also created (art. 14), acting in conformity with ASEAN purposes and principles, and according to its own terms of reference (see *infra*). The ASEAN Charter lacks of a Court; this is quite striking, if one considers the extension of the goals of the Organization and the principles which it is grounded upon. This failure is a true missed opportunity, and it should be considered as a remnant of the ASEAN member States wariness to settling disputes by to third-party adjudication (see *infra*, para. 6).

For the attainment of Charter purposes, amongst which lay the respect for fundamental freedoms and the protection of human rights[70], fourteen principles are set forth[71]. Amongst them, new principles are established such as the strengthening of the democracy, promotion of the rule of law, respect for fundamental freedoms, promotion and protection of human rights, and promotion of social justice), but more traditional founding principles are also laid down: respect for national sovereignty, non-interference and renunciation of aggression, abstention from activity which threatens other member States' sovereignty and territorial integrity, reliance on peaceful settlement of disputes[72]. While the latter category encompasses basic international law rules relating to the sovereign equality of States and non-intervention enshrined in the United Nations Charter, they may raise reciprocal conflicts with the former ones: for example, non-interference vs. democracy and the rule of law.

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[67] While not reviewing here the well-known theories on legal personality of international organization (subjectivist or objectivist mode of acquisition), nor International Court of Justice case-law (mainly, the advisory opinion rendered in 1949 *Reparation for Injuries Suffered in the Service of the United Nations* case), it seems to me that even if the express conferral of legal personality by art. 3 of the Charter does not mean that ASEAN is an international legal person, such a prerogative can be recognized when considering the extension of its external relations, and the fact of acting with its organs as a permanent and distinct entity from its member States. For a more cautious position, see S. CHESTERMAN, *Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person*, in *Singapore Yearbook of International Law,* 2008, p. 199 ff. (p. 207-210).

[68] It is noteworthy that decision-making is still guided on consultation and consensus (art. 20, para. 1) except where otherwise provided, for instance in relevant and specific ASEAN legal instruments (para. 3). But the decision-making unchanged nature does not alter the novelty of the Charter.

[69] Others organs such as The ASEAN Sectoral Ministerial Bodies (art. 10), the ASEAN Secretary-General and Secretariat (art. 11); the Committee of Permanent Representatives (art. 12), National Secretariats (art. 13), and the ASEAN Foundation (art. 15), are not dealt with here.

[70] Art. 1, para 7. The purposes seem rather aspirational and need future action to be undertaken.

[71] *Ibid.,* art. 2.

[72] The ASEAN leader maintenance of the principles of mutual respect and non-interference makes unlikely the surrender of their national sovereignty to enhance ASEAN role. See C. H. LIN, *ASEAN Charter: Deeper Regional Integration under International Law?* in *Chin. Jour. Int. Law,* 2010, p. 821 ff. (p. 837).

That being said, a compatibility issue may arise in the event of a conflict between ASEAN and its member States practice prior to the Charter, and the legal obligations contained thereto. In fact, art. 2 of the ASEAN Charter states that «ASEAN and its Member States reaffirm and adhere to the fundamental principles contained in the declarations, agreements, conventions, concords, treaties and other instruments of ASEAN», and art. 52, para. 1 posits that «all treaties, conventions, agreements, concords, declarations, protocols and other ASEAN instruments which have been in effect before the entry into force of this Charter shall continue to be valid». So, in case of any inconsistency between the rights and obligations of ASEAN States under pre-Charter life and the rights and obligations thereto, the Charter shall prevail (art. 52, para. 2)[73]. That having said, two remaining issues are to be examined within the Charter: compliance mechanism and settlement of disputes. As for compliance, art. 5 (para. 2) makes clear that Member States shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of the Charter[74] and to comply with all obligations of membership, with the ASEAN Summit deciding in the event of a serious breach of the Charter or non-compliance (art. 20)[75].

With regard to the settlement of disputes, this is the field where Member States have displayed strong willingness to steer clear of their heretofore "informal-orientated" way of conduct: in fact, the rule-based approach of the Charter is further enriched with the adoption of a Protocol on Dispute Settlement Mechanism (the Protocol, see below)[76]. Chapter VIII (*Settlement of Disputes*) complements the pledge on «reliance on peaceful disputes» enshrined in art. 2, para. 2, d) by putting in place a diplomatic system of disputes settlement (good offices, conciliation or mediation: art. 23). It has been stated that those proceedings are residual[77] since the disputes relating to specific ASEAN instruments must be arranged «through the mechanisms and procedures provided for in such instruments» (art. 24, para.1), whereas disputes not concerning ASEAN instruments will be resolved peacefully in accordance with the 1976 aforementioned Treaty (art. 24, para. 2). Moreover, as for disputes which concern ASEAN economic agreements, ASEAN Protocol on Enhanced Dispute Settlement Mechanism (the Vientiane Protocol, see *supra*), comes into play (art. 24, para. 3).

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[73] I do not dwell here on the distinct matter of whether ASEAN is entitled to conclude treaties on behalf of its Member States, as argued by C. ZHIDA, *ASEAN and its Problematic Treaty-Making Practice: Can International Organizations Conclude Treaties 'On Behalf of' Their Member States?* in *Asian Journal of International Law,* 2014, p. 391 ff.

[74] See D. DESIERTO, *ASEAN's Constitutionalization of International Law*, cited, p. 272-273 on whether to recognize a direct effect of the Charter within Member States.

[75] According to H. D. PHAN, *Promoting Compliance: an Assessment of ASEAN Instruments since the ASEAN Charter*, in *Syracuse Journal of International Law & Commerce*, vol. 4, n. 2, 2014, p. 379 ff. (p. 387-388), «It is not clear, however, who may refer the matter to the ASEAN Summit and what procedure must be followed. There are no criteria to determine when a breach is serious enough to merit being referred to the ASEAN Summit. Further, it is unclear whether the term "non-compliance" applies to any of the ASEAN instruments or only the ASEAN Charter».

[76] The Protocol was adopted in Hanoi on 8 April 2010, and entered in force on 28 July 2017 (www.ASEAN.org).

[77] G. NALDI, *The ASEAN Protocol on Dispute Settlement Mechanism: An Appraisal*, in *Journal of International Dispute Settlement,* 2014, p. 105 ff. (p. 120). See also R. BECKMAN et als., *Promoting Compliance*, cited, p. 182 ff.

In the event of a dispute concerning the interpretation of the Charter, and except as provided for in art. 28[78], art. 25 of the Charter sets forth «appropriate dispute settlement mechanism, including arbitration». To implement article 25, ASEAN Foreign Ministers signed the aforementioned Protocol, which in the intention of its proponents should make ASEAN looking like other regional organization where machinery tasked with the interpretation of applicable role does exist (European Union, for instance)[79]: the Protocol is to be interpreted «in accordance with the customary rules of treaty interpretation of public international law», instead of the Vienna Convention on the Law of Treaties, since Brunei, Singapore, Indonesia and Thailand are not contracting parties to it[80]. Bearing in mind that Parties to a dispute «are encouraged ad every stage to make every effort to reach a mutually agreed solution» (Protocol, art. 3, para. 2), request of consultation to be presented by the complaining party to the respondent party is understood as a first step[81]: but should the consultation fail, the complainant can request to submit the dispute to arbitration. to arbitration (Protocol, art. 8, para. 1, c) or, if the respondent does not agree to the request of establishment of an arbitral tribunal, he can refer the dispute to ASEAN Coordinating Council (Protocol, art. 8, para. 4) which «may direct the Parties to resolve their dispute through good offices, mediation, conciliation or arbitration» (Protocol, art. 9). The result of one of those proceedings is a settlement agreement, which is binding upon Parties, unless there is no agreement: should this happen, the Coordinating Council «…may refer the dispute to the ASEAN Summit as an unresolved dispute under art. 26 of the Charter» (Protocol, art. 9).

Coming back now to arbitral tribunal proceedings, in which both the provision of the ASEAN Charter and applicable rules of Public International law will be mainly applied (Protocol, art. 14, para. 1), the award (which is final and with no appeal) will be binding upon Parties (Protocol, art. 16, para. 1). In case of non-compliance, the matter will be referred to ASEAN Summit for consideration and decision (Charter, art. 27, para. 2). In conclusion, the Protocol is important since it allows for the first time ASEAN States to have a machinery of arbitration for political and security disputes.

6. *ASEAN's achievements and weaknesses: settlement of disputes*

We have so far depicted ASEAN as an international organization resting on purposes and principles such as (*inter alia*) respect for territorial integrity of the other Member States, reliance on peaceful settlement of disputes, promotion and protection of human rights, respect for the rule of law. It remains to be seen whether ASEAN has used its institutional apparatus in order to uphold those goals.

[78] The rule establishes for Member States «…the right of recourse to the modes of peaceful settlement contained in art. 33(1) of the Charter of the United Nations or any other international legal instruments to which the disputing Member States are parties».

[79] According to H. D. PHAN, *Towards a Rules-Based ASEAN: The Protocol to the ASEAN Charter on Dispute Settlement Mechanisms*, in *Yearbook on Arbitration and Mediation*, 2013, p. 254 ff. (p. 259), the importance of the Protocol should not be underestimated even if does not create a permanent judicial body for ASEAN like Courts of justice of other regional organization.

[80] See https://treaties.un.org, accessed on 27 February 2020.

[81] Anyway, this is without prejudice to the Parties' rights to agreeing to good offices, mediation or conciliation, which are provided by ASEAN Secretary-General (art. 6).

As previously seen, ASEAN was created to regulate, amongst other things, respective border between neighbouring States inherited from colonialist era with the purpose to avoid territorial conflicts potentially dangerous for the maintenance of peace and security at the regional level. Nevertheless, despite ASEAN embarked on a continuous effort to strengthen its structure by equipping itself with dispute settlement mechanisms, never did member State successfully resort to them. In the previous pages it has been pointed out the ASEAN States willingness to bring their disputes before judiciary bodies external to the Organization, in territorial[82] or maritime delimitation[83], trade[84] or monetary/fiscal[85] matters, rather than choosing a means within the ASEAN system. Neither of those just mentioned cases reached a particular threshold of gravity with the notable exception of the *Temple of Preah Vihear* affair, which spiralled into armed clashes between soldiers and thousands of people displaced from nearby villages[86]. Though foundational ASEAN principles (such as respect for territorial integrity and peaceful settlement of disputes) were infringed in the *Temple* affair[87], the contracting Parties did never rely upon the ASEAN proceedings umbrella as the appropriate forum where their dispute could be settled. They did not seem to consider the ASEAN rules on settlement of disputes as the most suitable ones to be resorted to. This choice seems justified, since neither relevant 1967 Treaty rules pertaining to settlement of disputes[88], nor the Charter[89], give exclusive way to the mechanism contained therein in order to solve legal claims. Conversely, art. 28 of the Charter explicitly

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[82] The Hague Court was asked to decide the following territorial delimitation cases (besides the above mentioned case *Sovereignty over Palau Ligitan and Pulau Sipadan*): *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand) judgment of 15 June 1962, *I.C.J. Reports* 1962, p. 6; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia vs. Singapore), judgment of 23 May 2008, *I.C.J. Reports* 2008, p. 12; *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand), judgment of 11 November 2013, *I.C.J. Reports* 2013, p. 281; *Application for Revision of the Judgment of 23 May 2008 in the Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v. Singapore), order of 29 May 2018, *I.C.J. Reports* 2018, p. 284; *Request for Interpretation of the Judgment of 23 May 2008 in the Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v. Singapore), order of 29 May 2018, *I.C.J. Reports* 2018, p. 288. See H. OWADA, *The Experience of Asia with International Adjudication*, in *Singapore Yearbook of International Law,* 2005, p. 9 ff.

[83] *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), decision of 1 September 2005 of the International Tribunal of the Law of the Sea.

[84] *Thailand cigarettes (Philippines)*, WTO DS371, 15 July 2011; *Malaysia – Prohibition of Imports of Polyetylene and Polypropylene*, WTO DS1, 19 July 1995. In this dispute, Malaysia and Singapore managed to resolve their dispute through consultation and Singapore withdrew its complaint.

[85] *The Railway Land Arbitration* (Malaysia/Singapore), Permanent Court of Arbitration case n. 2012-01, 30 October 2014.

[86] H. D. PHAN, *Institutional Design and Its Constraints: Explaining ASEAN's Role in the Temple of Preah Vihear Dispute*, in *Asian Journal of International Law,* 2015, p. 7 ff.; S. CHESTERMAN, *The International Court of Justice in Asia: Interpreting the Temple of Preah Vihear Case*, in *Asian Journal of International Law,* 2015, p. 2 ff.; A. BUSS, *The Preah Vihear Case and Regional Customary Law*, *Chin. Jour. Int. Law*., 2010, p. 111 ff.

[87] See R. Q. TURCSANYI, Z. KRIZ, *ASEAN and the Thai-Cambodian Conflict: The Final Stage at Preah Vihear?*, in A. GERSTL, M. STRASAKOVA, *Unresolved Border, Land and Maritime Disputes in Southeast Asia. Bi-and Multilateral Conflict Resolution Approaches and ASEAN's Centrality*, Leiden, 2017, p. 85 ff.

[88] Art. 13 recalls the duty to refrain from the threat or use of force settling disputes through friendly negotiations, while art. 15 allows the High Council to recommend appropriate means such as good offices, mediation, inquiry or conciliation. Art. 16 states that the foregoing provision shall not apply to a dispute «unless all the parties agree to their application to that dispute».

[89] Art. 22, para. 1: «Member States shall endeavour to resolve peacefully all disputes […] through dialogue, consultation and negotiation»; art. 22: «Member States […] may […] agree to resort to good offices, conciliation or mediation…» (para. 1); «Parties to a dispute may request the Chairman of ASEAN or the Secretary-General of ASEAN […] to provide good offices, conciliation or mediation».

reckons the right of ASEAN States «to have recourse to the modes of peaceful settlement of disputes contained in art. 33(1) of the Charter of the United Nations, or any other international legal instruments to which the disputing Member States are parties». This may help explain why ASEAN countries chose the International Court of Justice, despite many Asian States having «the lowest rate of acceptance of the compulsory jurisdiction of the Court and of the membership of the International Criminal Court»[90]. If any concluding remarks can be drawn, one cannot refrain from noting that ASEAN States are prone to extra-ASEAN law modes of disputes settlement despite their strong commitment towards "domestic" diplomatic ways. This risks undermining the "speciality" of "ASEAN way", *vis-à-vis* the "generality" of "ordinary" means to disputes settlement, thus raising doubts as their effectiveness.

6.1 *ASEAN and human rights*

Human rights promotion and protection in ASEAN countries is a highly contentious issue, given the heterogeneity amongst them in terms of political system and economic development[91], as well their enduring adherence to "ASEAN way" which seems to be at variance with internationally recognized human rights standards. Are the ASEAN Communities resting upon the three abovementioned pillars good enough to guarantee the rule of law and the respect for human rights? Was the ASEAN Charter supported by *ad hoc* organs or institutions charged with the task of monitoring and enforcing it? Prior to give an answer, some introductory remarks on the ASEAN conception of human rights must be made.

The origins of ASEAN's interest for human rights can be dated back to the Bangkok Declaration[92], preparing the World Conference on human rights held in Vienna (1993). Before 1993, ASEAN has steered clear of any human rights concern. At first glance the document, which outlined the regional approach to human rights, seems quite contradictory. On the one hand, it stresses «*the universality, objectivity and non-selectivity of all human rights* and the need to avoid the application of double standards in the implementation of human rights and its politicization, and that no violation of human rights can be justified» (para. 7), but on the other hand it recognizes that «…human rights […] must be considered in the context of a dynamic and evolving process of international norm-setting, *bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds*» (para. 8) (italics added). The Bangkok declaration recalls again both «the principles of respect for national sovereignty and territorial integrity as well as non-interference in the internal affairs of States, and the non-use of human rights

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[90] S. CHESTERMAN, *Asias Ambivalence About International Law and Institutions: Past, Present and Futures*, in *Eur. Jour. Int. Law,* 2017, p. 945 ff. (p. 946); T. KOH, *International Law and the Peaceful Resolution of Disputes: Asian Perspectives, Contributions, and Challenges*, in *Asian Journal of International Law,* 2011, p. 57 ff.

[91] See, in general, J. DUPOUEY, *Les droits de l'homme au sein de l'ASEAN, un régime protecteur en construction*, in *Rev. dr. Homme*, 14, 2018; W. J. JONES, *Theorising Human Rights: An Analytical Framework for ASEAN*, in *Journal of Alternative Perspectives in the Social Sciences,* 2015, p. 461 ff.; ID., *Universalizing Human Rights The ASEAN Way*, in *International Journal of Social Sciences,* 2014, p. 71 ff.;

[92] The Declaration was adopted on 2 April 1993 by Representatives of Asian States, pursuant to General Assembly resolution 46/116 of 17 December 1991. See Doc. A/CONF.157/ASRM/8. See O. YESSI, *Effectiveness of the ASEAN Human Rights Regime*, in *Political and Security Issues,* in *ASEAN*, Conference Proceedings, Jakarta, 2014, p. 3 ff. (p. 10-11); J. D. CIORCIARI, *Institutionalizing Human Rights in Southeast Asia*, in *Hum. Rights Quart.,* 2012, p. 695 ff. (p. 698-703).

as an instrument of political pressure» (para. 5); but in the context of human rights, this basic ASEAN tenet takes on a different meaning, that is a stark difference between a western universalistic conception of human rights and the ASEAN relativistic approach, with the latter philosophy privileging the duties owed to the State instead of being centred of individual rights against State. ASEAN human rights doctrine emerged as a reaction to universal, individualistic approach pushed by western countries primarily focussed on civil and political rights. More analytically, ASEAN way of human rights rests upon a relativistic system of values, which are appropriate in local contexts only; on a stable society, where the individual is subject to communities; on a preference for economic and social rights, the civil and political ones being considered as a mere manifestation of western imperialism[93].

Entering into details, and putting aside some soft law acts adopted within ASEAN context which are of lesser interest for this study[94], ASEAN Member States are contracting parties to the two international Covenants on human rights: in particular, six States over ten have become Parties to International Covenant of Civil and Political rights (ICCPR: Cambodia, Philippines, Laos, Thailand, Vietnam, Indonesia), and six (Cambodia, Philippines, Laos, Thailand, Vietnam, Myanmar) are parties to International Covenant on Economic, Social, and Cultural rights (ICESCR)[95]. Moreover, they are parties to the most important universal treaties on human rights[96], such as the Convention on the Elimination of all Forms of Discrimination against Women (1981), the Convention on the Rights of the Child (1990)[97], the Convention on the Rights of Persons with Disabilities (2008) and the Convention Against Trafficking in Persons, Especially Women and Children (2015); seven States are parties to the Convention on the Elimination of All Forms of Racial Discrimination (1969)[98], and seven to the Convention on the Prevention and Punishment of the Crime of Genocide (1948)[99]. Only six States are parties to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (Indonesia, Philippines, Cambodia, Laos, Thailand, Vietnam); Cambodia and Philippines are parties to the Convention Relating to the Status of Refugees (1951) and its 1967 Protocol; only Indonesia and Philippines are parties to International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990), and

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[93] C. H. WU, *Human Rights in ASEAN Context: Between Universalism and Realism*, in C. LO, N. LI, T. LIN (eds.), *Legal Thoughts between the East and the West in the Multilevel Legal Order: A Liber Amicorum in Honour of Professor H. Han-Pao*, Berlin, 2016, p. 277 ff.; Y. TEW, *Beyond "Asian Values": Rethinking Rights*, Centre of Governance and Human Rights Working paper 5, University of Cambridge, 2012, p. 4-7; P. MALANCZUK, *Regional Protection of Human Rights in the Asia-Pacific Region*, in *Germ. YB Int. Law*, 2010, p. 116 ff.; R. PEERENBOOM, *Beyond Universalism and Relativism: The Evolving Debates about "Values in Asia"*, in *Indiana International & Comparative Law Review*, 2003, p. 1 ff.

[94] See A. DUXBURY, T. H. LI, *Can ASEAN Take Human Rights Seriously,* Cambridge, 2019, p. 140-143.

[95] It is noteworthy that Cambodia has signed the first optional Protocol to ICCPR enabling the Human Rights Committee to receive individual communications, the Philippines have ratified it, while no State has signed or ratified the optional Protocol to ICESCR giving the Committee on Economic, Social and Cultural Rights the way to consider individual communications.

[96] M. DAVIES, *States of Compliance? Global Human Rights Treaties and ASEAN Member States*, in *Journal of Human Rights*, 2014, p. 414 ff.

[97] All States except Myanmar are parties to the Optional Protocol on the Involvement of Children in Armed Conflicts (2000), and all States except Singapore are parties to the Optional Protocol on the Sale of Children, Child Pornography and Child Prostitution (2002).

[98] Cambodia, Philippines, Laos, Thailand, Vietnam, Singapore, Indonesia.

[99] Cambodia, Philippines, Laos, Malaysia, Myanmar, Vietnam, Singapore.

only Cambodia has ratified the International Convention for the Protection of All Persons from Enforced Disappearance (2007).

Apart from what has previously been said regarding human rights within the three ASEAN Communities (see para 3), ASEAN States participation to the aforementioned treaties should be linked with three distinct but related normative phenomena[100]: A) Charter artt. 1 (para. 7), 2 (i, j), enshrining the goal of promoting and respecting human rights and humanitarian law (which is a founding principle also) and art. 14, setting forth «an ASEAN human rights body (which) shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting»; B) the creation in 2009 of the Intergovernmental Commission on Human Rights[101]; C) the adoption (2012) of ASEAN Human Rights Declaration (the Declaration).

It is now necessary to focus on both the Commission and the Declaration, since although the seemingly wide scope of their application its effectiveness remains weak. This is particularly striking if one looks at the rules relating to the establishment and the functioning of Intergovernmental Commission on Human Rights, whose purpose is «to promote and protect human rights […] as prescribed by the Universal Declaration of Human Rights…»[102]. Regarding the Commission, as the name of this merely consultative body (art. 3) seems to suggest, its members are appointed by respective governments, and it is accountable to governments, which may decide at discretion to replace them[103]. Moreover, it is neither equipped with a Secretariat, nor does it have the powers of investigation, monitoring or enforcement, thus looking quite fragile on the institutional side[104].

Noteworthy, Article 4.2 asks the Commission «to develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights». The document, which incorporates the three generations of human rights[105], is not to be understood as a legally binding one; nor does the Commission, as we have seen, possesses any power of supervision or enforcement. This infringes art. 5 of the Declaration, which states: «Every person has the right to an effective and enforceable remedy, to be determined by a Court or other competent authorities»[106]. So, the Commission mandate to

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100 The shift towards human rights has also been explained as a means to garner legitimacy in the world community and as a response to political pressure from western countries because of the international concern for situation in Myanmar: see H. KATSUMATA, *ASEAN and Human Rights: Resisting Western Pressures or Emulating the West?*, in *The Pacific Review,* 2009, p. 619 ff.

101 Other organs, such as the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (2010), are not discussed here. On the Commission, see T. S. LI, *The ASEAN Human Rights Body: Incorporating Forgotten Promises for Policy Coherence and Efficacy*, in *Singapore Yearbook of International Law,* 2008, p. 239 ff.

102 Commission Terms of Reference, art. 1.1-1.6 (www.ASEAN.org).

103 *Ibid.* art. 5.2, 5.6.

104 Proposals for a reform of the Commission have been made, amongst other, by Y. X. WANG, *Contextualizing Universal Human Rights: An Infringed Human Rights Framework for ASEAN*, in *Duke Journal of Comparative & International Law*, 2015, p. 385 ff. (p. 409-410).

105 M. DAVIES, *The ASEAN Synthesis: Human Rights, Non-Intervention and the ASEAN Human Rights Declaration*, in *Georgetown Journal of International Affairs*, 2013, p. 27 ff. (https://www.georgetownjournalofinternationalaffairs.org/); C. RENSAW, *The ASEAN Human Rights Declaration 2012*, in *Hum. Rights Law Rev.*, 2013, p. 557 ff.

106 The possible domestic enforcement by courts of the rights stated in the Declaration will not be dealt with here, since it is very difficult to me to have all relevant information concerning ASEAN States domestic legal orders.

promoting human rights as a way to «…sanctioning the development of some form of control machinery»[107] of the Declaration, seems to be too optimistic a view: the then High Commissioner for Human Rights critical statement seems, rather, a more realistic way to look at the document[108]. Moreover, as it will be shown later, the Commission proved to be toothless in the genocide of Rohingya people by Myanmar. To put it simply, I think that had the ASEAN system been equipped with some truly effective monitoring machinery, no concern about its credibility would have been raised following human rights crises like political oppression against political oppositions in Cambodia, extrajudicial killings in the Philippines, lack of freedom of expression in Thailand and discrimination and violence against Muslim Rohingya in Myanmar, with the latter being simply considered a mere Myanmar domestic affair. So, important as it may be for the advancement of human rights in ASEAN and its evolution towards accountability, the Declaration does not seem fitting internationally recognized standards of protection. To sum up, should ASEAN effective commitment in the field of human rights be grounded on the sole existence of the rules contained in the aforementioned instruments, no optimism is allowed, as the *Gambia vs. Myanmar* case at the Hague will demonstrate.

7. *The International Court of Justice decision on* Gambia vs Myanmar *case: a benchmark for human rights in ASEAN States?*

On January 23, 2020, the International Court of Justice unanimously released an order on the request for provisional measures in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar*) (in www.icj-cij.org)[109]. In this case, the African State of Gambia asked the Court, *inter alia*, to declare that Myanmar has breached and continues to breach its obligations under the 1848 Genocide Convention (the Convention), and that it must cease any ongoing internationally wrongful act; moreover, Myanmar must hold individuals who committed acts in alleged violation of the Convention criminally accountable within its domestic legal system; to make reparation in the interest of the Rohingya group victims of genocidal acts; to give assurances and guarantees of non-repetition of violations of the Convention. Before entering into details of the judgment, a concise framing of the issue may be helpful. According to the fourth reports of the United Nations Fact-Finding Mission[110],

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[107] G. NALDI, K. MAGLIVERAS, *The ASEAN Human Rights Declaration*, in *International Human Rights Review,* 2014, p. 183 ff (p. 204). In the same vein, Y. WAHYUNINGRUM, *The ASEAN Intergovernmental Commission on Human Rights: Origins, Evolution and the Way Forward*, Stockholm, 2014, p. 20: «By consolidating and pronouncing the existing norms, the AHRD contributes to human rights protection by aiming to ensure progress rather than regress, as often witnessed in ASEAN's turbulent past».

[108] *Pillay urges ASEAN to set the bar high with its regional human rights declaration*, (www.ohchr.org, 11 May 2012).

[109] D. W. RIST, *What Does the ICJ Decision on the Gambia v. Myanmar Mean?* (www.asil.org, 28 february 2020); D. SCHEFFER, *Why the ICJ Is Trying to Protect Myanmar's Rohingya* (www.cfr.org, 24 January 2020).

[110] This independent organ was set up in 2017 by the United Nations Human Rights Council in order to establish the facts and circumstances of the alleged human rights violations by military and security forces in Myanmar (https://www.ohchr.org/en/hrbodies/hrc/myanmarffm/pages/index.aspx). See C. CARLETTI, *La messa alla prova della Human Rights Machinery di Ginevra: l'evolversi della situazione dei diritti umani nel caso-Paese Birmano*, in *OIDU*, 2019, p. 144 ff.: M. A. BECKER, *The Challenges for the ICJ in the Reliance on UN Fact-Finding Reports in the Case against Myanmar* (https://www.ejiltalk.org, 14 December 2019). More generally, on the ASEAN States adherence to the Universal Periodic Review of the United Nations, see H. QUANE, *The*

discrimination[111], mass killing, gender violence, rape, torture, large-scale deportation and displacement took place against Rohingya, a Muslim minority within the State of Rakhine being accused by Myanmar government of separatist rebellion. Widespread violence forced them to flee into Bangladesh because they «remain at serious risk of genocide», due to Myanmar failure to comply with its obligations to prevent and investigate genocide, and to enact effective legislation criminalizing and punishing this crime. On these grounds the Gambia asked for provisional measures designed *inter alia*: a) to require Myanmar to immediately refraining to commit all acts that could possibly infringe the Convention; b) to order Myanmar to exert control over any military and non-state actors that might be committing such acts; c) to keep evidence related to genocidal acts[112]. While not purporting to examine here Myanmar's defence, one can't help but critically consider the lack of any argument on behalf of Myanmar based on the ASEAN Human Rights Declaration[113].

The Gambia lodged the case against Myanmar on the basis of the common status as signatories to the Convention, whose art. IX[114] provides that any contracting party may submit a dispute between it and another contracting party relating to the interpretation, application or fulfilment of the Convention to the ICJ, including disputes about the responsibility of a state for genocide. Once established its jurisdiction pursuant to art. IX of the Convention (para. 37 of the order), the Court had to decide about the standing of the Gambia, whose interest in bringing claims against Myanmar frames the invocation of State responsibility by a non-injured State. As the Gambia argued, the allegedly infringed obligations stemming from the outlawing of genocide are *erga omnes* obligations, owed to the international community as a whole because of the peremptory nature of the rules enshrined in the Convention: thus, each contracting party has a common interest in seeing the Convention respected. Those views were shared by the

Significance of an Evolving Relationship: ASEAN States and the Global Human Rights Mechanisms, in *Hum. Rights Law Rev.*, 2015, p. 283 ff.

111 This is even more serious since the ASEAN Charter of Human Rights lists among its General principles: «The rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms» (n. 4).

112 It is noteworthy that the Hague Court is not the only international judge being charged with the affair, whose seriousness prompted Pre-Trial Chamber III of the International Criminal Court to authorise the Prosecutor to proceed with an investigation for the alleged crimes. More particularly, the Chamber found that when the crime of deportation under Article 7(1)(d) of the Rome Statute is initiated in the territory of a state not party to the Rome Statute (Myanmar), and completed within the territory of a state party (the Bangladesh), the Court has jurisdiction over the crime under Article 12(2)(a) of its Statute. Only a United Nations Security Council referral to the International nominal Court may lift this territorial limitation, but this appears unlikely since the veto of China and Russia. Coming back to the issue before the Hague Court, the Gambia initiated proceedings against Myanmar based on their shared status as signatories to the Genocide Convention. See Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, 14 November 2019 (www.icc-cpi.int). This authorisation was given upon the request submitted on 4 July 2019 by the Prosecutor to open an investigation. See S. ANGIOI, *Aspetti sostanziali e procedurali della questione Rohingya di fronte alla Corte penale internazionale*, in *OIDU*, 2019, p. 264 ff.; H. DIJKSTAL, *Victim Rights and the ICC Pre-Trial Chamber's Decision on the Jurisdiction of the Court over the Crime of Deportation Against the Rohingya People* (https://www.asil.org/insights, 26b November 2018)

113 For instance, art. 8 lists a number of grounds upon which governments may limit rights: «national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society». Myanmar considers Rohingya as a threat for its stability, but never such a subject was formally argued.

114 Neither the Gambia, nor Myanmar made a reservation to art. IX, but Myanmar made a reservation to artt. VI and VIII, neither of which prevented the Court to release the order.

Court, which for the first time reckons that any State party to the Convention, and not only a specially affected State, may invoke the responsibility of another State party[115]. It is not my purpose to dwell on some key points of the judgment, such as the plausibility of right claimed by the Gambia in view of the function of the provisional measures (para. 56), the nature of the evidentiary material, or the risk of irreparable prejudice that can be caused to the rights at stake (para. 75)[116]: suffice it to say that the Court considers that the conditions required by its Statute for it to indicate provisional measures in order to protect rights claimed by the Gambia are met (para.76). So, Myanmar must take all measures to prevent the commission of genocide, ensuring that its military and irregular armed units which may be directed by it do not commit act of genocide; Myanmar must also take effective measures to prevent the destruction of evidence related to allegations, submitting a report to the Court on all measures taken to give effect to the order (paras 79-82). According to art. 41 of the Statute, the provisional measures are binding on Myanmar, but only the United Nations Security Council can enforce them: this appears to be remote, because of possible veto from China and Russia. Anyway, the order does not prejudge the Court jurisdiction to deal with the merits of the case.

What are the lessons to be drawn from the *Rohingya case* for ASEAN States? The Indonesian representative to the ASEAN Intergovernmental Commission on Human Rights said both ASEAN and the Commission must take the necessary steps to hold Myanmar accountable for the atrocity committed in the State of Rakhine. The idea was openly supported by representatives from Thailand, Malaysia and the Philippines but rejected by Myanmar. Thus, no Intergovernmental Commission on Human Rights meetings were so far held, nor scheduled. The ensuing inaction raise doubts on the Commission willingness to upholding human rights statutory engagements. This open disregard of the Rohingya tragedy can be maybe explained by recalling the still strong influence of *consensus* on decision-making, with ASEAN summit of Head of State and Governments being the organ atop the Organization, thus prevailing on the Commission. Undoubtedly, a lost chance for ASEAN human rights policy, and a confirmation of enduring "ASEAN way"

8. *Concluding Remarks*

Even before the International Court judgment in the *Rohingya case*, both ASEAN as an international Organization and its States acting *uti singuli* have patently failed in affording

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115 Para. 41. In its judgment in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the Court found the relevant provisions contained in the Convention against Torture similar to those in the Genocide Convention, since they enshrined obligations which may be defined as obligations *erga omnes partes*, in I.C.J. Reports 2012 (II), p. 449, para. 68. According to S. R. SINGH, *Standing on "Shared Values": The ICJ's Myanmar Decision and its Implications for Atrocity Prevention* (http://opiniojuris.org/2020/01/29/), «In so finding, the Court brought to life what was formerly a technical term of art. It took the concept of *erga omnes partes*, long understood to apply to the Genocide Convention, and held that it conferred not only interests, but specific standing for even the most distant, "unaffected" State Party to raise claims before the ICJ. Indeed, the existence of The Gambia's case takes the concept of *erga omnes partes* to its logical extreme, indicating that the obligations arising under the Genocide Convention permit even the smallest country in continental Africa to assert that a genocide is occurring on the opposite side of the world».

116 See L. ACCONCIAMESSA, F. SIRONI DE GREGORIO, *Genocidio dei Rohingya? Sulle misure cautelari della Corte internazionale di giustizia nel caso Gambia c. Myanmar* (www.sidiblog.org, 13 February 2020); M. MILANOVIC, *ICJ Indicates Provisional Measures in the Myanmar Genocide Case* (www.ejil.talk, 23 January 2020).

their people the enjoyment of human rights, at least in the way those are internationally recognized in other regional organizations, such as the Council of Europe. Recent ASEAN official documents seem ignoring the seriousness of the Rohingya genocide, treating it as second-class domestic issue[117]. It has been shown that ASEAN's shortcomings in promoting and protecting human rights are both substantial and procedural, clearly reflecting the distance from the European model, with an independent Court to protect citizens rights. This leads to an obvious question: would the European model be suitable for ASEAN? A neutral judicial body would certainly be at the opposite side of the well rooted doctrine of "ASEAN way", but this seems being the only way to give art. 5 of the ASEAN Human Rights Declaration (stating the right to an effective and enforceable remedy, to be determined by a Court) a full meaning. Once the Court established, the need of whether to have a political organ executing its judgment, like the Committee of Ministers within the Council of Europe, should also be discussed. But, at this stage, this latter development is too far to be discussed.

[117] *Advancing Partnership for Sustainability*, quot.: «…on the humanitarian situation in Rakhine state, ASEAN is willing to play a more active role – something that the government of Myanmar has welcomed. ASEAN leaders […] supported Myanmar in the repatriation of refugees. Human rights continue to be mainstreamed across the three pillars of ASEAN with the ASEAN Intergovernmental Commission on Human Rights at the forefront, ensuring the implementation of the ASEAN Human Rights Declaration».