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Regional solution to international conflicts: the "ASEAN Way" of conflict management in the Myanmar Crisis

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CHAPTER 1
INTRODUCTION

The end of the Cold War has led to a vitalisation of the Chapter VIII of the UN Charter, delegating a peace-making role to "regional arrangements or agencies". Undoubtedly, there has been a growth in the number of Regional Organisations (ROs) and, thus, an increasing importance in the global scenario. Moreover, the ROs play a more pivotal role for their Member States, also thanks to their involvement in more frequent summit meetings that leaders have to attend to. Consequently, the consensus within the ROs has grown exponentially, whereas the credibility and consensus of the UN and of the UN Security Council have decreased extremely.

In fact, the increasing significance of ROs seems partly to be an effect of a lack of resources at the UN level.

More importantly, this new prominence is a result of increased globalisation pushing the ROs to take wider responsibilities in line with increased capacities and self-confidence.

Hence, the global system is now enriched with more participants, becoming less Eurocentric with the Third World States having now greater autonomy and involvement.

Therefore, the debate between the regionalist and the universalist scholars has intensified about who, between the UN and regional organisations, has to deal with the international peace and security.

From the study of this debate, the subsequent question has arisen:

"Does the increasing relevance of regional organisations constitute a challenge or a complement to the United Nations system in managing and maintaining peace and security in the world?"

This is the fundamental question that the Author attempted to give an answer in the first chapter of the thesis. Then, after providing the answer and the position of the Author, in the second part of the thesis, the Association of Southeast Asian Nations (ASEAN) as regional organisation and its conflict management mechanism is studied as to demonstrate the efficiency and capability of the regional organisation in conflict resolution.

The ASEAN has been defined as one of the most successful regional intergovernmental organisations in the world.[1] ASEAN, in fact, is widely praised for the establishment of

[1] *Regional Security in Southeast Asia: Beyond the ASEAN Way* (ISEAS–Yusof Ishak Institute 2005) <https://www.cambridge.org/core/books/regional-security-in-southeast-asia/C07C7733BE95BC152074BA9C2942D2FA>. 1.

regional cooperation among countries with the core objective of bringing peace and stability in the region and for the promotion of regional trade and investment followed by an unprecedented economic growth, at least until the Asian financial crisis in 1997.[2]

Precisely, what has made ASEAN a decisive actor in the bigger international area of the Asia-Pacific was its effort in maintaining peaceful relations either among its own Members and with States beyond the Southeast Asian region.

Since its founding, ASEAN has made considerable progress in meeting global demand.[3] Despite ASEAN is an active member of the international community, it remains the key driving force in promoting the regional collaboration and plays a significant role in cooperation mechanisms. Yet, during its existence, the region peace and stability have been threatened due to several inter- and intra-states conflicts.

Moreover, due to the challenges that region had to deal with since its establishment, namely the "growing uncertainties resulting from the changing geo-political dynamics in the regional and global landscape" and the more recent economic impact of COVID-19, the ASEAN Leaders during the celebration of the 53rd anniversary of the Regional Organisation (RO) reiterated their commitment to "maintaining Southeast Asia as a region of peace, security, neutrality and stability".[4] In doing so, they recalled at the principles enunciated in both the Declaration on Zone of Peace, Freedom and Neutrality (ZOPFAN), and the Treaty of Amity and Co-operation in Southeast Asia (TAC).

Recently, the Myanmar *coup d'état* threatened the peace and stability in the region. Since the *coup,* the peaceful protests have met disproportionate responses from the military junta, including "excessive and lethal force, live ammunition, grenades, and the so-called less-lethal weapons. Police and soldiers massacred protesters in cities and towns across the country."[5] This caught the attention of the international community, which condemned the junta's serious violations of international human rights law and humanitarian law, and now expects ASEAN to intervene efficiently to end the violence.

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[2] Naureen Nazar Phd, Sohni Siddiqui and Ronaque Behan, 'ASEAN('S) WAY OF CONFLICT MANAGEMENT: ACTIVE AND EFFECTIVE ROLE' (2019) 58 Journal of Social Sciences and Humanities. 139

[3] Akhmad Anugrah, 'The ASEAN "Crack": Myanmar Conflict as The Warning Sign of Peace Stability in South East Asia Region' (2021) 1 PROCEEDING INTERNATIONAL RELATIONS ON INDONESIAN FOREIGN POLICY CONFERENCE 37. 38.

[4] See "Economic Impact of COVID-19 Outbreak on ASEAN." 1st ASEAN Policy Brief, April 2020, ASEAN. And "ASEAN Foreign Ministers' Statement on the Importance of Maintaining Peace and Stability in Southeast Asia." 8 August 2020.

[5] Evelina U. Ochab, *One Year of the Military Junta in Power in Myanmar,* Forbes (Feb. 1, 2022), *at* *https://www.forbes.com/sites/ewelinaochab/2022/02/01/one-year-of-the-military-junta-in-power-in-myanmar/?sh=36ca286855b3.*

ASEAN's approach to regional security, since its establishment, has been based on a declaratory zone of peace, freedom, and neutrality as well as appeals to international law, and the institution of norms for state behaviour.[6] Its success relied on ASEAN capability of maintaining itself as an autonomous actor, avoiding to taking sides in political or strategic conflicts between great powers, while seeking to maximise the benefits through a good relationship with external parties, such as China and United States.[7]

Furthermore, ASEAN combines formal methods of conflict management with informal ones to achieve regional security and order.[8]

In fact, what makes ASEAN unique compared to others ROs is that alongside formal and binding instruments, it provides also informal mechanisms which confer ASEAN more discretion and dynamism when it comes to deal with conflicts within the region. These informal mechanisms originate from the Asian culture, which therefore represents the key in the absence of which the entire ASEAN system of conflict management could not be fully understood.

Asian cultural values, and especially their relationships with human rights, were subject of intense challenges. In fact, the debate between universalism and cultural relativism during the draft of the Universal Declaration of Human Rights (UDHR) reached the peak with the Asian values debates in 1990s.[9] The supporters of Asian values were China, Singapore, Malaysia, and Indonesia.[10] Because the UDHR was drafted while several Asian countries were not part of the United Nations (UN) due to colonialism, they argue that UDHR is the result of Western thought, and thus it cannot accurately reflect "universal" rights because of these biases.[11] The universalism supporters argue that UDHR is a universal document transcending culture and traditions to prescribe global standard, and culture is conceived as an obstacle or a barrier to the full human rights enjoyment.[12]

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[6] Donald E Weatherbee , 'ASEAN's Half Century : A Political History of the Association of Southeast Asian Nations' (2019) <https://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=2109684>. 6.

[7] Ibid.

[8] Kamarulzaman Askandar, Jacob Bercowtch and Mikio Oishi, 'The ASEAN Way of Conflict Management: Old Patterns and New Trends' (2002) 10 Asian Journal of Political Science 21. 22.

[9] Karen Engle, Culture and Human Rights: The Asian Values Debate in the Context (1999-2000) *New york University Journal of International Law and Politics* 32, p 33.

[10] Julie Fraser (ed), 'Human Rights and Their Cultural Connection', *Social Institutions and International Human Rights Law Implementation: Every Organ of Society* (Cambridge University Press 2020). 30.

[11] ibid. 24.

[12] ibid. 22.

The Asian values supporters challenged the dominant Western interpretation of rights which neglects legitimate cultural differences, rather than contest the system of human rights or, in principle, their universality.[13]

In the context of regional security, ASEAN informal mechanisms have always been criticised for restricting ASEAN from making efficient decisions in case of conflicts, especially regarding Myanmar. However, according to Fraser, the problem relies on the way in which international law conceives culture, namely as static and monolithic.[14] Reason is that culture is often confused with bigotry and closed-mindedness.

On the contrary, in the thesis I will argue that it is *because of* the cultural aspect of the ASEAN conflict management that the mechanisms are "eclectic, dynamic, and subject to significant alteration over time"[15]. Furthermore, due to the limitations of UN in dealing with internal matters of States[16], the role of ROs in peacekeeping and in peace-making has been intensified.

The regionalisation of conflict management and security, and the dynamism of ASEAN in dealing with conflicts, provide to the regional approach the potentiality of being the most effective in terms of time and result, also for the Myanmar's crisis.

Accordingly, in this thesis I seek to answer the following research question:

"Does the "ASEAN Way" of conflict management, as tested in the Myanmar case, provide viable mechanisms for regional conflicts?"

In pursuit of answering the research question, few sub-questions will be answered:

a) How the background and the history of ASEAN influenced its conflict management system?
b) What is the "ASEAN Way" of conflict management?
c) To what extent the culture influences the ASEAN decision-making process?
d) How the ASEAN approach to Myanmar conflicts has changed?
e) Can ASEAN go beyond the principle of non-interference?

1.1 Methodology and Structure

This thesis, in order to provide the answers to the above-mentioned questions, will study the ASEAN conflict management system, its mechanisms, their developments, and finally their

[13] ibid. 30.
[14] ibid. 38
[15] ibid.
[16] See Rajshree Jetly, "Conflict Management Strategies in ASEAN: Perspectives for SAARC", The Pacific Review, 16, no.1 (2003), 54.

application to the Myanmar *coup d'état*. According to the above, ASEAN conflict management mechanisms are highly influenced by the Southeast Asian culture, and for this reason, they are subject to variations and adaptations through the time. In order to apply ASEAN Way of conflict management to the Myanmar situation, and thus reply to my research question, is necessary to study their evolution in the application and analyse to what extent they can be modified and then adapted in order to effectively respond to Myanmar *coup*. For this reason, the application of these mechanisms is far to be easy to predict, as they are dependent on several factors that influence the ASEAN *modus operandi* and decision-making process. Hence, to provide a feasible and realistic application, this thesis will examine, as case-study, the ASEAN reaction to norms violations during the 1997 Cambodian *coup.*

Due to the double nature of the ASEAN legal system, namely a formal and informal one, the author will adopt a hybrid methodological approach to seek to provide an answer to the main research question.

Firstly, this thesis will adopt a doctrinal legal research methodology, in which a descriptive and detailed analysis of legal rules will be provided to present the "letter of the law". It will descriptively analyse the ASEAN conflict management system through primary sources, namely the ASEAN Charter and other legal instruments provided by the RO. Then, in describing the informal mechanisms secondary sources, as academic literature and commentary, will be used. The main objective of this research approach is to identify, organise, and describe ASEAN formal and informal norms and to provide the authoritative legal sources in light of which the RO manage conflicts within the region.

Secondly, this thesis will adopt a sociological approach, in which both qualitative and quantitative research approaches are included, to present the impact of the "law in action" in the ASEAN system and the role that the culture plays in the RO. As above mentioned, this approach is fundamental to fill the gap in understanding the "letter of the law" and thus to interpret and eventually apply ASEAN *modus operandi.*

Thirdly, the nature and the fact that the conflicts happened only one year ago, necessitates the research on 2021 Myanmar *coup* to rely also on news articles alongside academic sources. Furthermore, to deeply understand the humanitarian situation due to the military junta's violence against the population, I had the honour to collect important data and information through an interview with the Italian Ambassador in Myanmar. Due to the physical distance, the Western medias' disinterest, and the language differences, this interview allowed me to access to corroborated and impartial facts that have been fundamental to my research.

Other than this introductory chapter, this thesis consists of five other chapters.

The second chapter, after offering some theories in defining ROs in security law, will illustrate the relationship between the UN Security Council and ROs in the maintenance of international peace and security.
The third one will describe the founding of ASEAN and its background, as well as the formal and informal regional mechanisms of conflict management. The fourth chapter, after giving an historical background of Myanmar, will present the 2021 *coup* and the human rights violations happened in the last year. Then the fifth chapter will analyse how the ASEAN Way of conflict resolution has changed its approach to Myanmar and, taking into consideration the Cambodian case, future perspectives will be provided. Finally, the sixth chapter will conclude the thesis, providing the answer to the sub-questions and the main research question.

CHAPTER 2

THE RELATIONSHIP BETWEEN THE UN SECUIRTY COUNCIL AND REGIONAL ORGANISATIONS IN THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY

2.1 Defining Regional Organisations in security law

The Chapter VIII of the UN Charter "provides the constitutional basis for the involvement of regional organizations in the maintenance of international peace and security for which the Security Council is primarily responsible".[17] The UN Charter, however, used the terms "regional arrangements or agencies" in the Articles 52-54. Nevertheless, the phrase regional organisation is used in legal academic writing to refer to those entities named in the abovementioned Chapter VIII. There is a dearth of legal material by scholars about regionalism, particularly in the attempt to seek a precise definition of what constitutes a regional organisation. The scarcity of legal material in this area underlines the urgency to set guidelines for determining what "regional organisations" are. This is not only important to deep understand the relevant provisions of the UN Charter, but also to fully comprehend the relationship between the UN and these regional organisations.

Moreover, the growing demand for UN intervention, not only in inter-state conflicts, but also in serious internal conflicts, is challenging the capability for the international organisation to respond. The growing number of conflicts around the world is overwhelming the UN, which must find effective ways to strengthen and institutionalise preventive diplomacy, rather than try to find solution to crises that have spun out of control.

These new challenges are recently arising questions about the relationship between the UN as a global organisation and the several ROs related to it. There are concrete and constructive possibilities for coordinating the efforts of ROs and the UN in conflict management and resolution.[18]

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[17] Luk Van Langenhove, "Chapter VIII of the UN Charter: What it is and Why it matters", United Nations University, 2014, available at https://unu.edu/publications/articles/chapter-viii-of-the-un-charter-what-it-is-and-why-it-matters.html#:~:text=Chapter%20VIII%20of%20the%20United,Security%20Council%20is%20primarily%20responsible%E2%80%9D

[18] Connie Peck, "Sustainable Peace: The Role of the UN and Regional Organizations in Preventing Conflict".

In a world in which the UN is increasingly becoming dependent on the capacities of ROs in order to meet its growing agenda, it is necessary to determine which are these ROs that UN can rely on.

The formation of the UN in 1945 represented the turning point in the status, and consequently the study and interests, of ROs in international law. Indeed, the UN Charter not only provided the place of ROs in the emerging international legal order, but also allocated crucial roles to such organisations in the maintenance of international peace and security. Even though, there roles are performed within specific legal limits and parameters provided in the Chapter VIII of the UN Charter.

After the formation of the UN, the political importance of the regionalism increased due to several factors. In the 1960s, the regionalist wave has been attributed to the growth in the number, scope, and diversity of regionalist schemes.[19] This has caused an unprecedent network of microeconomic organisations and macroregional political organisations.[20] Some scholars argued that the failure of the universalism was directly responsible for the success of regionalism.[21]

The traditional conception of ROs as unidimensional entities was overcome by a new multidimensional conception of regional organisations, named "new regionalism". "New regionalism" is a term used by several writers to describe the set of regional arrangements that emerged immediately after the end of the Cold War. The main characteristics of the ROs born under the "new regionalism" have been identified in their rejection of the integrationist pretension of the older organisations, subscription to limited numbers and goals, and embrace a diversity of purpose.[22]

Since the establishment of the UN Charter, scholars have engaged in the task of defining and conceptualising regionalism. For international academics, the urgency to define regionalism grew with the relationship developing between the UN and ROs after the Cold War.

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[19] Paul Taylor, International Organization in the Modern World: The Regional and Global Process (London, Pinter, 1993) 24-28.
[20] See Joseph Nye, Peace in Parts: Integration and Conflicts in Regional Organizations (Boston, Little, Brown&Co, 1971).
[21] AH Robertson, The Law of International Institutions in Europe (Manchester, Manchester University Press, 1961) 4-5.
[22] James Mayall, 'National Identity and the Revival of Regionalism' in Louise Fawcett and Andrew Hurrell (eds), Regionalism in World Politics: Regional Organization and International Order (Oxford, Oxford University Press, 1995) 169.

2.2 Different approaches in conceptualising regionalism

Several theories have been developed in order to seek to define what regions and ROs mean.

2.2.1 Geographical Proximity

In 1945 in San Francisco, several States met to discuss the Dumbarton Oaks Proposals. Some of these attempted to define ROs in light of the UN Charter, laying down criteria for determining such. However, these efforts failed.

The Egyptian delegate to the San Francisco Conference had proposed an amendment relating to regional arrangements to the Dumbarton Oaks Proposal, stating that:

"there shall be considered as regional arrangements organizations of a permanent nature grouping in a given geographical area several countries which, by reason of their proximity, community of interest or cultural, linguistic, historical or spiritual affinities, make themselves jointly responsible for the peaceful settlement of any disputes which may arise between them and for the maintenance of peace and security of their region, as well as safeguarding of their interests and the development of their economic and cultural relations."[23]

This criterion relies on the idea that there should be a physical proximity between states which are part of the same regional organisation. The *ratio* consists in that territorial closeness justifies claims to regionality.

However, the United States objected to this criterion on the ground that it does not cover all possible cases of regional arrangements or agencies, nevertheless is founded on an undoubtedly objective factor.[24]

Nevertheless, several writers agreed with the Egyptian proposal. For instance, Joseph Nye defined ROs as limited number of States linked together by geographic relationship and by a degree of mutual interdependence.[25] Nye conceptualised a regional organisation as an entity whose membership is restricted in principle and in practice on the basis of geographical contiguity, which involves proximity and compactness.[26]

[23] United Nations Conference on International Organizations, Documents Vol XII, 850.
[24] Ibid.
[25] Nye, International Regionalism (Boston, Little, Brown&Co, 1968) xii.
[26] Ibid.

However, it could be argued that, even though the geographical criterion plays an important role in identify regions and ROs all around the world, the determinant test in defining a regional organisation as such cannot inhere solely or substantially in the physical proximity of States.

Accordingly, Nye himself noted that "physical contiguity can be misleading, not only because technology, history, and culture can make "effective distance" differ from linear distance, as some writers put it, but also because images of what constitutes a region are affected by different political interests."[27]

Indeed, consideration of national interests, namely political, social, cultural, economic, and military interests influence States "proximity" with one other more than the geographical distance.

2.2.2 Multidimensional Conception

A second theory proposed that as the main criterion for defining a region there is the operational scope of the regional organisation.

In fact, according to Taylor, in taking into consideration the geographical proximity as a criterion to identify a region, a selection must be made. However, it cannot be either ignored the "recurrent theme", namely the "concern with that particular scale of geographical area which is best fitted to the performance of tasks judged crucial for the welfare of individuals, or for the advantage of government. That area may extend beyond the boundaries of existing states, or be a part of their territory, or even be coterminous with their frontiers."[28]

Accordingly, the reason for seeking a definition in the region is a "concern with finding that area in which function might be most efficiently performed and because of this it is a utilitarian concept."[29]

Taylor affirmed that there is a particular connection between the geographical delimitation of a region and the dimensionality of the tasks that a regional organisation wants to perform. Therefore, if these tasks extend beyond the physical confines of Member States the region is logically extended beyond the geographical limits ordinarily set.

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[27] Ibid.
[28] Paul Taylor, International Organization in the Modern World: The Regional and Global Process (London, Pinter, 1993) 24-28.
[29] Ibid.

Ellen-Frey Wouters attempted to define a regional organisation, albeit admitting that "no generally accepted definition of regionalism exists".[30] She defined it as a "permanent, both inner- and outer-directed multifunctional association, located in a particular geographical area, serving a number of states which are mutually interdependent and share certain interests, needs, characteristics, and loyalties".[31]

2.2.3 Neo functionalist Approach

According with the Neo functionalist Approach, of which Ernst Haas is the leading voice, the main factor in conceptualising regionalism is deducible by reference to the dynamics of integration.[32] This theory studies the variables of situations which direct the course of regionalism.[33]

The main Neo functionalist's argument is built on the view of the expansive logic of integration.[34] Neo functionalists believe that, in order to bring sovereign states together, the joint activity has to be larger than the sum of the original independent activities.[35]

Moreover, Neo functionalist focuses its study on the understanding of the factors which tend to increase the propensity to tackle problems at regional levels.

2.2.4 Teleological Approach

The United States, during the San Francisco Conference, proposed that the purpose and principles in light of which the United Nation is founded should be the dominant criterion to guide the conceptualisation of regional organisations, in opposition to mere geography proposed by the Egyptian delegate which was above explained. Hence, the UN set the basis for the teleological approach to regionalism.

The Teleological approach connotes the method in accordance of which the meaning of a treaty provision or an idea is derived from the purpose for which that treaty is established or that idea

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[30] Ellen Frey-Wouters, "The Prospects for Regionalism in World Affairs" in Cyril E Black and Richard A Falk, "The Future of International Legal Order", Vol I (Princeton, Princeton University Press, 1969), 466.
[31] Ibid.
[32] Ernst Haas, "The Uniting of Europe: Political Social, and Economic Forces", 1950-1957 (Standford, California: Standford University Press, 1968).
[33] Ibid.
[34] See Leon Linderg, "The Political Dynamics of European Economic Integration", (Standford, Standford University Press, 1963)
[35] Ernst Haas, "The Uniting of Europe: Political Social, and Economic Forces", 1950-1957 (Standford, California: Standford University Press, 1968).

exists.[36] Bruce Russet was the leader of the scholars who focused on this approach. This approach seeks to measure the existence of a region by estimating the consequences of the practice of it.[37] In particular, Russet emphasized on "socio and cultural homogeneity; that is regions composed of states which are similar with respect to several kinds of internal attributes."[38] Moreover, he identified two elements of homogeneity: similarity of nations in grouping (rather than identity), and multidimensional rather than unidimensional, which means that the similarities have to cover more than a single set of cultural characteristics.[39] According to Russet, "close has to be sufficient criterion because, in the real world of social complexity, no two units are ever identical in anything of importance".[40]

However, what it can be argued is which cultural practices should be considered more important or even sufficient to define a region as such. Additionally, by what means may such a decision be reached? Which kind of cultural similarities would be the enough common denominator in light among a multitude of cultural values?

2.2.5 Structuralist perspective

The Structuralism perspective focuses on the distinction between the needs of the North and the South in regional integration and thus prescribes *ad hoc* modalities and levels of development in light of the outcomes of such differences. Structuralism stems from the idea that North and South were always going to engage in exploitative connections, hence the South should be encouraged to develop strong political and economic relationship among themselves.[41]

According to Rajni Kothari, "there is need for much greater regional co-operation among the various small and weak countries of the world, pooling their political and military resources,

[36] Abass, A 2004, Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the un Charter, Bloomsbury Publishing Plc, London, 16.
[37] Ibid.
[38] Bruce Russet, "International Regions and the International Systems: A Study in Political Ecology (Chigago, Rand McNally and Co, 1976) 3.
See also Bruce Russet, "World Handbook of Political and Social Indicators" (New Heaven, Yale University Press, 1964); and Bruce Russet, "Power and Community in World Politics" (San Francisco, WH Freeman, 1974).
[39] Ibid. 15
[40] Ibid.
[41] Andre Gunder Frank, "The Development of Underdevelopment", 1966, Monthly Review.

entering the world power structure on the basis, and ultimately upsetting the system through which a handful of states are able to dominate the world."[42]

2.2.6 Diversity Approaches

The approaches above studied do not represent an exhaustive list, as several other criteria have emerged from other theories, which several as a consequence of the criticism.

For the sake of brevity and since all these criteria cannot fit into the already identified conceptual framework, they are classified as "Diversity approaches" as they lack a unified theory approach.

Louise Wirth rejected all the above-mentioned attempts to generalise the conceptualisation of regionalism, especially the seeking of theorizing and identifying predetermined criteria for regional organisations. In fact, in accordance with his view, "regionalism is not one thing, but many things. The failure to discriminate the many distinct factors that underline the emergence and persistence of regions is a serious fault of present day research. Areas of homogeneity have been mistakenly represented as an area of integration."[43]

2.3 Regionalism and Collective Security

Traditionally writers have always linked the idea of collective security to the concept of international government. The functionalism, in objection to regionalism, has always considered regionalism as antithetical to collective security. David Mitrany, the leader exponent of functionalism, stated that "there is little promise of peace in the mere change from the rivalry of powers and alliances to the rivalry of whole continents […] Continental unions would have a more real chance than individual states to practise the autarky that makes for division."[44]

Thus, for the Functionalists and Universalists as well, regionalism is in open opposition to universalism and consequently there is no place for regionalism in the collective security.[45]

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[42] Rajini Kothari, "Footstep Into the Future: Diagnosis of the Present World and a Design for an alternative", (New York, The Free Press, 1974) 135.
[43] Rupert Vance, 'The Regional Concept as a Tool for Social Research' in Merrill Jensen (ed), Regionalism in America (Madison Wis, University of Wisconsin Press, 1951) 392 at 123.
[44] David Mitrany, "A Working Peace System", (Oxford, Oxford University Press, 1944), 45.
[45] Ibid.

However, the Functionalists thesis of collective security has been contradicted after the Second World War. In fact, as Stanley Hoffmann has observed, one post-world war politics reality was "the division of a huge and heterogeneous international system into subsystems in which patterns of co-operation and ways of controlling conflicts are either more intense or less elusive of controlling global system."[46]

In the study of regionalism in the context of collective security, some legal writers favour the use of ROs in managing conflicts and achieving peacekeeping operations in strict conformity with the provisions, principles, and purposes of the UN Charter.[47] Whereas, other scholars dismiss the idea of ROs in managing conflicts as they lack both in military and financial capacities to undertake collective security actions.[48] Contrarily, other writers are in favour of the total replacement of the UN with instead ROs dealing with conflicts and collective security.[49]

After the Cold War, many scholars continued to object regionalism in managing international security, without considering however the continuous growth in the popularity of regional actions among States. Indeed, the post-Cold War period has demonstrated a more favourable environment for regionalism in the field of collective security than previously.[50] According to Fawcett, there are some scholars who really believe that the growth of regionalism jeopardizes the potential of the UN, as is no more merely a halfway between nation-state and the global reality.[51]

This Author firmly believes that the future of regionalism in the context collective security can be tackled without conceiving regionalism as antagonistic to universalism.

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[46] Stanley Hoffman, "International Organization and the International System", in Janus and Minerva: Essays in the Theory and Practice of International Politics, (Boulder, Col, Westview Press, 1987) 293.
[47] See Christine Gray, "International Law and the Use of Force", (Oxford, Oxford University Press, 2000) 216.
[48] Ibid.
[49] Maurice Bertrand and Daniel Warner (eds), A New Charter for a Worldwide Organisation? (The Hague, Kluwer Law International, 1997); Maurice Bertrand, The United Nations: Past, Present and Future, (The Hague, Kluwer Law International, 1997). See also Louis Sohn, Broadening the Role of the United Nations in Preventing, Mitigating or Ending International or Internal Conflicts that threaten International Peace and Security, (Washington DC, International Rule of Law Center, The George Washington University Law School, 1997).
[50] See Peter Robson, "The New Regionalism and the Developing Countries", 1993, 31(3), Journal of Common Market Studies 335.
[51] Louise Fawcett, "Regionalism in Historical Perspective", in Louise Fawcett and Andrew Hurrell, Regionalism in World Politics: Regional Organization and International Order (Oxford, Oxford University Press, 1995). 19.

In fact, even former regional and subregional organisations whose original goals were purely economic are now reinventing themselves to include collective security on their agendas. This is because they acknowledged that there cannot be economic prosperity without political stability. ROs are now widely considered as a natural outgrowth of international cooperation, compatible with the UN, and, as Francis Wilcox stated, is an "indispensable element in its successful growth and functioning."[52]

2.4 Who has primacy: "regional arrangements or agencies" or UN Security Council?

In the last century, the relationship between global bodies and regional arrangements in international security has been object of intense debates.

More recently, the debate between the UN and ROs in the global security architecture has resurfaced.

The prevailing view has been for many years the so-called "dominant approach", in which a dominant UN would delegate tasks to the subordinate regional organisation. According to this view, the region is merely an intermediate actor between the UN and the State. Thus, the primary role of regional agencies is to contribute to a UNSC-controlled multilateral system. However, the dominant approach does not consider that UN and ROs tend to follow different logics and purposes which make them competing structures.

In accordance with Hettne and Söderbaum view, the UN model is based on a Westphalian nation-state logic, whereas the regional approach is more consistent with a post-Westphalian world order.[53]

In fact, this orthodox approach is based on the primacy of the UN, and it is focused on how ROs can contribute to a UN system which is based on a nation-state logic.

The UN Charter, made clear in its Article 24, paragraph 1, that "in order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council *primary responsibility*[54] for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf."

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[52] Francis Wilcox, "Regionalism and the United Nations" (1965), 19 (3), International Organization (789).
[53] Björn Hettne and Fredrik Söderbaum, "The UN and Regional Organizations in Global Security: Competing or Complementary Logic?", Global Governance 12 (2006), 227.
[54] Emphasis added.

The UN Charter, in its Chapter VIII, provides several provisions which made the organisation compatible with the so-called regional arrangements or agencies. However, is not accurately specified which organisations fall into the mentioned category. Article 52 paragraph 1 of the UN Charter provides that regional arrangements or agencies and their activities should be "consistent with the Purposes and Principles of the United Nations." According to this article and the dominant approach, the crucial point is to ensure that the ROs and the subsequent security operations are carried out within a UN framework and in accordance with the UN Charter.

Notwithstanding, the ROs are not hindered in any way to deal with "such matters relating to the maintenance of international peace and security".

Moreover, in the next paragraphs, the UN Charter encourages ROs to undertake conflict prevention as well as pacific settlement of local disputes, but still under the UN Security Council authority, approval, and oversight as far as a robust peace-keeping mandate and peace enforcement are concerned.

Similarly, Article 33, paragraph 1, states that "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, […] resort to regional agencies or arrangements, or other peaceful means of their own choice."

Furthermore, Article 53 of the UN Charter, confirms the primary responsibility of the UN Security Council in the maintenance of international peace and security, which is conferred to it by the above-mentioned Article 24. In fact, in accordance with the first paragraph of Article 53, the Security Council, where appropriate, shall utilize such ROs for enforcement action under its authority, but no action shall be taken without the authorization of the Security Council. Moreover, the enforcement powers laid down in the Article are based on the Chapter VII prerequisites for the action of the Security Council, directed to the aim of maintaining or restoring international peace and security.

The Article 53 recognises that such regional agencies may play an autonomous role, although preceded by an authorisation, thereby assuming an implicit exception to Article 2, paragraph 4, namely the general prohibition of the threat or use of force. The scope of this Article clarifies the complementary and subordinate positions of the ROs with respect to the Security Council. This relationship is also confirmed in the Preamble of "Declaration on the Enhancement of Cooperation between the UN and Regional Arrangements or Agencies in the Maintenance of

International Peace and Security" in which it is stressed that "the efforts made by regional arrangements or agencies, in their respective field of competence, in cooperation with the UN can usefully *complement*[55] the work of the Organization in the maintenance of international peace and security".[56]

Finally, Article 54 of the UN Charter provides a reporting obligation for the regional arrangements or agencies which must fully inform, at all times, the Security Council about the activities undertaken for the maintenance of international peace and security.

Thus, in the orthodox view, the UN is indispensable to provide legality and impartiality in international security operations. Who support this view proclaim that the UN constitutes the only possible and desirable foundation of a rules-based world order.

However, some proponents of this view like Thakur believes that UN cannot deliver a legitimate world order on its own. Accordingly, some regional organisations, like ASEAN, increasingly perceive the distant global UN as an "external imposition" on their internal affairs.[57] According to Thakur and other United Nations University scholars, ROs may have a more active role in dealing with international security and fill some of the UN gasps, but they must do it within the UN framework.[58] Thus, they emphasize the principle of the UN primacy in all crises.

The post-Cold War security environment and the necessity of the post-colonial States to take control on their own affairs, has reinforced the idea of regional contribution to UN security operation. In the recent decades, with the rise of the so-called new regionalism, the ROs have acquired greater importance, becoming actors of their own rights and institutionalizing mechanisms for conflict management. Regions has thus become subject into the relationship with the UN, which has no more a simply bilateral relationship with States but must consider the ROs too.

[55] Emphasis added
[56] Adopted by UNGA, A/RES/49/57, 9 December 1994.
[57] Ramesh Thakur, "The United Nations, Peace and Security", (Cambridge, Cambridge University Press, 2005).
[58] Speech by Ramesh Takhur at the conference "Regionalisation and the Taming of Globalisation", at Warwick University, 16-28 October 2005.

In 1992 the UN Secretary General's *Agenda for Peace* underlined the importance of regional organisations' involvement in preventive diplomacy, peacekeeping, peace-making, and post conflict resolution.[59]

Moreover, in the next years, there has been six high-level meetings with ROs about security matters.

The High-Level Panel on Threats, Challenges and Change, which has been set up by the Secretary General to consider UN reform, in its 2004 report acknowledged that regional agencies have made "important contributions to the stability and prosperity of their members."[60]

In 2005, the Secretary General's *In Larger Freedom* stated that "the United Nations and regional organisations should play complementary roles in facing the challenges to peace and security."[61]

The alternative view, in opposition to the dominant approach, has been defined as "regional multilateralism". This more pragmatic point of view takes into account the contemporary realities of the new regionalism which do not accommodate anymore the hierarchical order promoted by the dominant approach, in which the ROs play solely an intermediary role between the global and the national space. The new regionalism assumes a degree of legitimacy and actor capacity, which the past regional agencies lacked.

Moreover, the ROs derive their legitimacy no longer from the above (the UN) but from the inside, namely the Members States and the emergent regional civil societies. The "regions" are thus becoming the most relevant actors in the global security architecture.

In accordance with Hettne and Söderbaum, regional multilateralism expresses the desire of groups of states to control the global environment by pooling their sovereignty according to a

[59] Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992.
[60] Report of the Secretary-General's High Level Panel on Threats, Challenges and Change, "A More Secure World: Our Shared Responsibility", (New York: UN, 2004).
[61] Report of the Secretary-General entitled "In larger freedom: towards development, security and human rigths for all", A/59/2005.

post-Westphalian logic, rather than relying on the UN General Assembly's one-state-one-vote procedure or the UN Security Council's undemocratic plurilateralism.[62]

In fact, a UN based on nation-states is no more well suited to control the emerging strong regions, which are able to an extent to manage their own conflicts.

The region-centred approach can be more relevant than an UN-led approach in the emerging global security context. The reasons are several: regional solutions are necessary due to the regional spillovers and regionalization of many so-called domestic conflicts, which is especially true in situations like Kashmir or the West African conflict zone; in terms of closeness and commitment, the regional approach is also more effective than multilateral mechanisms; many times, regions are more capable of resolving their own conflicts than the UN, which is distant and often paralysed; additionally, ROs are frequently more effective than international efforts at conflict prevention as well as post-war reconstruction; finally, unresolved wars have repercussions that the region has to live with, this involvement is often the *motu* which lead ROs to seek efficient solutions in shorter times than UN, like the EU did in the Bosnia case.[63]

Undoubtedly what the two approaches, the dominant and the regional multilateralism, share is the potential competition between global and regional authority structures. Hence, the real challenge is to develop arrangements in which the two approaches can complement one another. In fact, the vertical UN approach will only reinforce the untrust and prejudice which, especially in much of the South, some ROs have about any UN intervention in internal affairs. Likewise, the regional approach cannot itself address the links between regional and wider global conflicts.

Furthermore, while the UN has recently suffered a decline in power and authority, some ROs are not completely developed and still need support from global arrangements.

Complementarity must be encouraged, but only through interregional agreements that uphold the values and guiding principles of the multilateralism concept. The UN would still be required, but it would operate differently than it does today.

[62] Björn Hettne and Fredrik Söderbaum, "The UN and Regional Organizations in Global Securiy: Competing or Complementary Logic?", Global Governance 12 (2006), 230.
[63] Ibid.

A more horizontal and balanced combination would assure the regional and global agencies to have their own basis of authority and should thus provide the future form of global security governance. This peer model assumes that both the UN and regional bodies will have shared responsibility in resolving security issues. Hence, the combined global-regional strategy provides the most feasible solution for the modern conflicts.

CHAPTER 3
THE "ASEAN WAY" OF CONFLICT MANAGEMENT

3.1 The Association of Southeast Asian Nations

3.1.1 History: the founding of ASEAN and the ASEAN Declaration

ASEAN was founded on 8 August 1967 in Bangkok, Thailand, with the signing of the ASEAN Declaration, also known as Bangkok Declaration, by the five Founding Fathers of ASEAN, namely Adam Malik for the Republic of Indonesia, Tun Abdul Razak for Malaysia, Narciso R. Ramos for the Republic of the Philippines, S. Rajaratnam for the Republic of Singapore, and Thanat Khoman for the Kingdom of Thailand.[64]

The ASEAN Declaration laid the foundation for a RO, and the *ratio* relied on the desire of the Southeast Asian countries to rebuild themselves economically and politically after they have gained independence from colonial rule.[65]

The Article 2 provides the aims and purposes of the Association, which are to accelerate the economic growth, social progress, and cultural development in the spirit of equality, and to promote regional peace and stability through abiding respect for justice and the rule of law and adherence to the principles of the UN Charter.

According to Article 4 of ASEAN Declaration, other States in South-East Asian Region which subscribed the aims, principles and purposes mentioned in the declaration could have been part of the Association. In fact, with the joining of the Government of Brunei Darussalam, the Socialist Republic of Viet Nam, the Lao People's Democratic Republic, the Union of Myanmar, and the Kingdom of Cambodia, the ASEAN Member States are currently ten.

The ASEAN Declaration represents the organisation's *modus operandi* of taking small steps, voluntary, and informal arrangements towards more binding and institutionalised arrangements.[66]

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[64] ASEAN History, at https://asean.org/about-us/.
[65] Kripa Sridharan, "Regional Organizations and Conflict Management: Comparing ASEAN and SAARC," Crisis States Working Papers Series No. 2 (2008): 5.
[66] Jamil Maidan Flores and Jun Abad, ASEAN at 30, ASEAN Secretariat, at https://asean.org/book/asean-at-30/.

Through the ASEAN Declaration, ASEAN has "outlined a new venture of regionalism and symbolised the beginning of a process of accommodation among its Members and the ASEAN conflict management process."[67]

The Southeast Asian region was historically characterised as a conflict-ridden, and akin as the "Balkans of the East".[68] The idea of the ASEAN Declaration was born while Thailand mediated for the reconciliation among Indonesia, the Philippines and Malaysia over certain disputes.[69] Thanat Khoman stressed the need of forming an organisation for regional dialogue and cooperation. The ASEAN Member States were deeply committed to resolve future disputes and differences through peaceful means and in the spirit of mutual accommodation.

ASEAN countries seem to have very little in common other than a geographic location. In fact, there is a great political, cultural, ethnical, and religious diversity among all the ASEAN Member States. However, cultural, and political homogeneity are not necessary for the establishment of a RO, as a regionalism need to be constructed through consistent and rule-based interactions, which would ensure peaceful relationship among the Member States.[70]

Furthermore, the ASEAN countries shared a history of dominance and colonialism of Western imperialism followed by Japanese occupation in World War II.[71]

3.1.2 The ASEAN Charter

Unlike other ROs, ASEAN was established without a charter.

During the 11th ASEAN Summit, the "Kuala Lumpur Declaration on the Establishment of the ASEAN Charter" was signed by the ASEAN heads which agreed to establish an Eminent Person Group (EPG) with the mandate of "examine and provide practical recommendations on the directions and nature of the ASEAN Charter relevant to the ASEAN Community as envisaged in the Bali Concord II."[72] At the 12th ASEAN Summit, the EPG presented its Report which became the basis for the ASEAN Charter.

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[67] Munmum Majumdar, "The ASEAN Way of Conflict Management in South China Sea," Strategic Analysis, 39, no. 1 (2015): 73.
[68] *Regional Security in Southeast Asia: Beyond the ASEAN Way* (n 1). 1.
[69] Jamil Maidan Flores and Jun Abad, ASEAN at 30, ASEAN Secretariat.
[70] Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order*. 54.
[71] Donald E Weatherbee, 'ASEAN's Half Century: A Political History of the Association of Southeast Asian Nations' (2019). 11.
[72] "Kuala Lumpur Declaration on the Establishment of the ASEAN Charter Kuala Lumpur, 12 December 2005," http://www.aseansec.org/18030.htm.

On the historic occasion of the 40th anniversary of ASEAN's foundation, the ASEAN Member States signed the ASEAN Charter.

Following the ratification of all Members, the ASEAN Charter entered officially into force on 15 December 2008. In accordance with the Article 102, paragraph 1, of the Charter of the UN, the ASEAN Charter was registered with the Secretariat of the UN.

The ASEAN Charter is legally binding among ASEAN Member States. It embraces the ASEAN community's principles and purpose, new organs and decision-making process, a new legal personality, a system for the settlement of disputes, and an ASEAN Human Rights Body. The ASEAN Member States committed to strengthening community building through enhanced regional cooperation and integration, inspired by "One Vision, One Identity, and One Caring and Sharing Community".[73]

The Chapter I of the ASEAN Charter lists the purposes and principles of the ASEAN Charter.[74]

The purposes of ASEAN listed in the Article 1 are fifteen, but for the sake of brevity only the most relevant one, considering the purpose of the thesis, are presented. These purposes are: (1) to maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region; (2) to enhance regional resilience by promoting greater political, security, economic and social-cultural cooperation; (4) to ensure that the peoples and Members 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. The last purpose was frequently connected to the Myanmar problem.[75]

The Article 2 presents the fourteen principles which ASEAN and its Member States shall act in accordance with. The relevant principles for the study of this thesis are: (a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States; (b) shared commitment and collective responsibility in enhancing regional peace, security and prosperity; (e) non-interference in the internal affairs of ASEAN Member

[73] "Charter of the Association of Southeast Asian Nations," http://www.aseansec.org/21069.pdf.
[74] Ibid.
[75] Kazushi Shimuzu, "The ASEAN Charter and the ASEAN Economic Community", Econ. J. of Hokkaido Univ., Vol. 40 (2011), p. 77.

States; (f) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion; (g) enhanced consultations on matters seriously affecting the common interest of ASEAN; (h) adherence to the rule of law, good governance, the principles of democracy and constitutional government; (i) respect for fundamental freedoms, the promotion and the protection of human rights, and the promotion of social justice.

The EPG Report suggested that the non-interference principle should have been "calibrated" when it comes to dealing with problems "where common interest dictates closer cooperation".[76]

Some of these principles and purposes embody those already enunciated by ASEAN in past documents. Thus, one of the purposes of the Charter was to codify and consolidate earlier principles and modalities that were already part of the region.[77]

According to Article 5.2, the Members States "shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provision of this Charter and to comply with all obligations of membership."

The Article 20 states that "As a basic principle, decision-making in ASEAN shall be based on consultation and consensus", however "where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made" and "in the case of a serious breach of the Charter or noncompliance, the matter shall be referred to the ASEAN Summit for decision."

3.2 ASEAN's mechanisms of conflict management

ASEAN was not the first attempt by Southeast Asian States to establish a RO.

In 1961, the Association of Southeast Asia (ASA) was formed between the Philippines, Malaysia, and Thailand. The ASA principles and the purposes have a lot in common with the ASEAN's one. The ASA's objectives emphasised the regional cooperation in the social, economic, cultural, and other several fields.[78] However, the dispute between Malaysia and

[76] Report of the Eminent Persons Group on the ASEAN Charter, December 2006, p. 13.
[77] Acharya (n 23). 270.
[78] *Regional Security in Southeast Asia: Beyond the ASEAN Way* (n 1). 50.

Philippines over the territory of North Borneo led to the deterioration of the relationship between the Members, and consequently to the ASA's collapse.

The next year, Malaysia, the Philippines, and Indonesia established MAPHILINDO, which lacked any institutional form. This RO was born with the diplomatic purpose of reconciliation between Malaysia and Philippines. However, Indonesia, through a coercive diplomacy known as *Kronfrontasi* (confrontation), opposed to the inclusion of the Borneo states of Sabah and Sarawak into the new formed Malayan Federation. President Sukarno's *Konfrontasi* represents the first example of the use of force by a postcolonial state in Southeast Asia against a neighbour.[79] This disagreement between the Member States led to the end of MAPHILINDO.

ASA and MAPHILINDO were established with the implicit intent to solve dispute between the Member States, however neither of them provided any mechanisms to solve conflicts in the region.[80]

Despite the lack of legal and institutional means to mediate in the Sabah dispute, Member States had a pivotal role in help to defuse the crisis through their own refusal to take sides and their efforts in diplomatic persuasion and moderation between the parties.[81] In fact, the Sabah dispute represents the milestone in ASEAN's approach to conflict avoidance through informal and non-legalistic style of conflict management.[82]

Hence, the establishment of ASEAN in 1967 could be considered the first attempt to institutionalise mechanisms of conflict management.

During the years, the organisation has succeeded in settling codes of conduct to manage disputes and to promote regional cooperation.[83] These codes of conducts included both written guidelines and unwritten norms.[84] Hence, ASEAN has become a "cooperative security regime, where disputes are managed within the parameters of consensus-based norms and procedures".[85]

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[79] Acharya (n 23). 58.
[80] *Regional Security in Southeast Asia: Beyond the ASEAN Way* (n 1). 54.
[81] Acharya (n 23). 61
[82] ibid.
[83] HOANG ANH TUAN, 'ASEAN Dispute Management: Implications for Vietnam and an Expanded ASEAN' (1996) 18 Contemporary Southeast Asia 61. 1.
[84] ibid.
[85] Sridharan, Kripa. "Regional Organisations and Conflict Management: Comparing ASEAN and SAARC." (2008). 4.

Considering the Alagappa's classification of mechanisms of conflict management,[86] the ASEAN mechanism for managing conflict can be divided in formal mechanisms and informal mechanisms.

3.2.1 Formal mechanisms

Concerning the formal mechanisms, two sub-categories can be identified: consultative mechanisms, and legal instruments.

I. Consultative mechanisms

ASEAN Charter requires Members to develop friendly relations and mutually beneficial dialogue cooperation and partnerships with countries at sub-regional, regional, and international level, as well as with others regional and international organisations and institutions.

The ASEAN Community Vision 2025 and the ASEAN Political-Security Community Blueprint 2025 stressed the importance for ASEAN to "deepen cooperation with Dialogue Partners, strengthen engagement with other external parties, reach out to new potential partners for mutually beneficial relations, and to respond collectively and constructively to global developments."[87]

ASEAN provides several consultative mechanisms, which consist in meetings that are held periodically both among ASEAN Member States and with external parties. These are:

1. ASEAN Summit, that is the highest policy and decision-making body in ASEAN which comprehend the Heads of State or Government of each Member State. The meetings are held twice annually. The ASEAN Summits have a pivotal role in promote political cooperation among Members, and in address regional issues more effectively.
2. ASEAN Foreign Minister Meetings (AMM) is responsible for ASEAN's political-security cooperation as well as ASEAN's relations with external parties.[88] In the years, ASEAN ministers of other sectors, such as health, education, labour, and environment started to meet regularly.[89]

[86] See Muthiah Alagappa, "Regionalism and Conflict Management: A Framework for Analysis", Review of International Studies (1995).
[87] ASEAN Political-Security Community Blueprint 2025, Section C.2.
[88] ASEAN Foreign Ministerial Meetings – Overview, at https://asean.org/asean-foreign-ministerial-meetings/.
[89] *Regional Security in Southeast Asia: Beyond the ASEAN Way* (n 1). 56.

3. ASEAN Post-Ministerial Conference usually follows the AMM and gives the opportunity to ASEAN Ministers to meet their counterparts and the ASEAN's Dialogue Partners, which are Australia, Canada, China, the European Union, India, Japan, New Zealand, the Republic of Korea, the Russian Federation, and the United States of America.[90]
4. ASEAN Senior Official Meeting, which assists the AMM in undertaking its functions. It is a subsidiary body of AMM, and, for this reason, its deliberations and recommendations are submitted to the AMM for further consideration.[91]
5. ASEAN Regional Forum (ARF) was launched in 1994 precisely for consultations on security matters, with the aim to promote peace and security through dialogue and cooperation in the Asia Pacific.[92] The objectives of the ARF are listed in the First ARF Chairman's Statement, which are: 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. This mechanism is extended also to non-ASEAN Member States.
6. ASEAN Plus Three cooperation process began in 1997 between the Leaders of ASEAN, China, Japan, and the Republic of Korea. The cooperation among these States is circumscribed to the three pillars, which are Political-Security Cooperation, Economic and Finance Cooperation, and Socio-Cultural Cooperation.[93] Since then, it has become an important element for fostering East Asian regionalism.[94]
7. EAST Asia Summit is an annual regional forum which includes 18 countries, namely the ASEAN Member States, Australia, China, India, Japan, New Zealand, Russia, South Korea, and United States. The EAS promotes peace, stability, and prosperity among its members.

These meetings represent the occasion for ASEAN Member States to build a solid regional foundation, to increase the political cooperation and trust among the Members, and to maintain a convivial regional environment, through consultation and consensus.

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[90] See Chairman's Statement of The ASEAN Post Ministerial Conference (PMC) 10+1 Sessions with The Dialogue Partners, at https://asean.org/chairmans-statement-of-the-asean-post-ministerial-conference-pmc-101-sessions-with-the-dialogue-partners-3/.
[91] *Supra note* 25.
[92] See ASEAN Regional Forum, at https://aseanregionalforum.asean.org/about-arf/#participants.
[93] Overview of ASEAN Plus Three Cooperation, 30 November 2021.
[94] Ibid.

During these meeting, that are meant to discuss both regional and international issues, particularly those related to political and security issues, they seek to reach agreements to the extent possible about disputes and contentious issues. Moreover, through these institutionalised meeting, ASEAN plays a more effective role on regional matters to the extent of which it exerts some influence about States' affairs. For example, the pivotal role that ASEAN had in the settlement of Cambodian conflict since the start in 1978.[95]

II. Legal Instruments

The ASEAN Community

In 1976, immediately after the end of the Vietnam War, ASEAN adopted the Bali Concord I which represented the first attempt to outline the purposes and aspirations of the organisation founded on peace, stability, and prosperity. In October 2003, during the 9th ASEAN Summit, the idea of an ASEAN Community was launched. The next year, the Bali Declaration of ASEAN Concord II was adopted, and ASEAN leaders agreed to establish an ASEAN Community by 2020 which would comprehend three pillars: ASEAN Political-Security Community (APSC), the ASEAN Economic Community, and the ASEAN Socio-Cultural Community. However, on 12th ASEAN Summit, ASEAN leaders decide to accelerate the establishment of ASEAN Community by 2015.[96]

The APSC's aim is to ensure that Member States live at peace with one another and with third countries in a "just, democratic, and harmonious environment".[97] Hence, the ASEAN Member States pledge to rely entirely on peaceful process in the settlement of disputes and consider their security as "fundamentally linked to one another and bound by geographic location, common vision, and objectives".[98] The establishment of an APSC and the modalities considered are certainly indicative of a more institutionalised and rule-based structure of managing conflicts.[99] Indeed, the APSC provides interesting insights of the ASEAN mechanisms to manage security.[100]

The APSC Blueprint (2009-2015) was adopted by ASEAN Leaders at the 14th ASEAN Summit and represented the *vademecum* to the establishment of the APSC. It envisaged three

[95] *Regional Security in Southeast Asia: Beyond the ASEAN Way* (n 1). 58.
[96] ASEAN POLITICAL-SECURITY COMMUNITY BLUEPRINT 2009, para 5.
[97] ASEAN Political Security Community, at https://asean.org/our-communities/asean-political-security-community/.
[98] Ibid.
[99] *Regional Security in Southeast Asia: Beyond the ASEAN Way* (n 1). 7.
[100] ibid. 270.

key elements to realise the idea of a security community: a) a Rules-based Community of shared values and norms; b) A Cohesive, Peaceful, Stable and Resilient Region with shared responsibility for comprehensive security; and c) A Dynamic and Outward-looking Region in an increasingly integrated and interdependent world.[101]

In this respect, it advocates other ASEAN instruments, namely ZOPFAN, TAC and the Treaty on the Southeast Asian Nuclear Weapon-Free Zone (SEANWFZ), which have a main role in pacific approaches to conflict resolution, preventive diplomacy and confidence building measures.

The APSC Blueprint (2009-2015) has consolidated over four decades of ASEAN political-security cooperation in the most comprehensive and concrete way possible, with the goal of ensuring that ASEAN peoples live in peace with one another and with the rest of the world in a just, democratic, and harmonious environment.[102]

The 2025 APSC Blueprint's goal is to preserve regional peace and stability, adopting a comprehensive approach to security and an outward-looking perspective to ASEAN's external relations, in a more relevant, contemporary, and responsive way to the challenges of the times.

The 2025 APSC Blueprint aims to build on the previous achievements that elevated ASEAN political and security cooperation to greater levels. This will result in a rule-based, people-oriented, and inclusive community, with the respect of human rights and fundamental freedoms, and with an enhanced centrality of ASEAN and an enhanced capacity to respond effectively to regional security threats.

Declaration on Zone of Peace, Freedom and Neutrality

The ZOPFAN has been adopted on 27 November 1971 at the Special ASEAN Foreign Ministers Meeting, by the Five Founding Fathers. Rather than a legal instrument, ZOPFAN can be identified as a political instrument, which however has a "pivotal role in the area of confidence building measures, preventive diplomacy and the approaches to conflict resolution."[103]

[101] ASEAN POLITICAL-SECURITY COMMUNITY BLUEPRINT 2009, para 10.
[102] ASENA POLITICAL-SECURITY COMMUNITY BLUEPRINT 2025, para 1.
[103] "Declaration of ASEAN Concord II (Bali Concord II), at https://asean.org/?static_post=declaration-of-asean-concord-ii-bali-concord-ii.

The States, in compliance to the aims and objectives of the UN, reaffirmed in the declaration their commitment to "the principles of respect for the sovereignty and territorial integrity of all states […] equal rights and self-determination and non-interference in affairs of States" and recognise "the rights of every State […] to lead its national existence free from outside interference in its internal affairs" or any interference that would affect its "freedom, independence and integrity."[104] Accordingly, the States agreed to pursue the desirable objective of the neutralisation of Southeast Asia.[105]

ZOPFAN was one of the first expression of the South-east Asian collective desire for a regional autonomy, after the protracted external interference from Western and Japanese colonialism and the US-Soviet Great Power security competition.[106]

ZOPFAN is an example of two approaches to regional security when threatened by external powers: security through regional order and cooperation, and security through non-alignment and neutrality.[107] The ZOPFAN was thus conceived to guide ASEAN Member States' relation *vis-à-vis* third States.

Treaty of Amity and Cooperation in Southeast Asia

ZOPFAN was mostly superseded by the adoption of the TAC.

The TAC was adopted in 1976, and it represents the cornerstone of the ASEAN approach to conflict management. The purposes are to promote regional peace and stability through abiding respect for justice and the rule of law and enhancing regional resilience, peace, friendship, and mutual cooperation among States, consistent with the spirit and principles of the Charter of the UN.[108] The TAC is legally binding among not only the ASEAN Member States, but also third parties. The TAC has been already amended in 1987, 1998, and 2020, to allow the accession by third States as well as ROs. At the time of writing, there are 43 High Contracting Parties.[109]

[104] 1971 ZONE OF PEACE, FREEDOM AND NEUTRALITY DECLARATION.
[105] Ibid.
[106] Laura Southgate, 'ASEAN: Still the Zone of Peace, Freedom and Neutrality?' (2021) 73 Political Science 31.
[107] See Hanggi, H. 1991. ASEAN and the ZOPFAN Concept. Singapore: Institute of Southeast Asian Studies.
[108] Treaty of Amity and Cooperation in Southeast Asia, 1976.
[109] Treaty of Amity and Cooperation in Southeast Asia (TAC) – Overview, at https://asean.org/our-communities/asean-political-security-community/outward-looking-community/treaty-of-amity-and-cooperation-in-southeast-asia-tac/.

The basic principles which guide the High Contracting Parties are listed in the Article 2, which are:

a. Mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations.
b. The right of every State to lead its national existence free from external interference, subversion, or coercion.
c. Non-interference in the internal affairs of one another.
d. Settlement of differences or disputes by peaceful means.
e. Renunciation of the threat or use of force.
f. Effective cooperation among themselves.

The TAC introduces a specific mechanism for the pacific settlement of disputes among the High Contracting Parties. In fact, Articles 14 and 15 provide that the High Council shall be constituted to settle disputes through regional processes and to "recommend to the parties in dispute appropriate means of settlements such as good offices, mediation, inquiry or conciliation", and shall be composed by the representative at ministerial level from each of the High Contracting Parties.

Even though the ASEAN Member States adopted also the "Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia" in 2001, the Council it has not yet been established.[110] The ASEAN Concord II stressed that the "High Council of the TAC shall be the important component in the ASEAN Security Community since it reflects ASEAN's commitment to resolve all differences, disputes and conflicts peacefully."[111]

Accordingly, the formal establishment of the High Council would provide a better management of disputes and enhance conflict management between the countries.[112]

Indeed, the possibility to offer a regional mechanism to settle disputes as an alternative to the international one, would strengthen the ASEAN conflict management. Furthermore, the TAC principles reaffirm the willing of the High Contracting Parties to settle the disputes to the

[110] See "Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia", at https://asean.org/rules-of-procedure-of-the-high-council-of-the-treaty-of-amity-and-cooperation-in-southeast-asia/.
[111] Declaration of ASEAN Concord II (Bali Concord II), para A(7) , at https://asean.org/speechandstatement/declaration-of-asean-concord-ii-bali-concord-ii/.
[112] Ramses Amer, "ASEAN and the Conflict Management: The Need for a High Council", Policy Brief, Institute for Security & Development Policy, No. 178, May 13, 2015, 2.

extent possible, and they remark, once again, that this should happen without outside interference. Hence, the author believes that a regional mechanism would be more effective in dispute settlement in terms of result and compliance.

For these reasons, the failure to establish, even in the future, the High Council would represent a shortcoming in the ASEAN framework for regional collaboration.[113]

3.2.2 Informal Mechanisms

According to Tuan and Cabellero-Antony,[114] the success of ASEAN's dispute management derives from five techniques:

1. adherence to ground rules enshrined in ASEAN's diverse declaration and communiqués.
2. stressing the virtue of self-restraint.
3. adoption of the practices of *musyawarah* and *muafakat* (consultation and consensus).
4. using third-party mediation to settle disputes.
5. agreeing to disagree or to shelve the settlement of conflicts.

The ASEAN Way

The ASEAN leaders' main aims in founding the RO were the avoidance and the management of the arising disputes, that could have been counter-productive to regional stability and thus affect the individual interests of each Member State. In managing these disputes, they developed the so called "ASEAN Way".[115]
The term "ASEAN Way" lacks a clear definition. However, it can be identified as a series of established guidelines and unwritten norms of dispute management which are observed by and binding on Member States.[116]

[113] Ibid.
[114] See HOANG ANH TUAN, 'ASEAN Dispute Management: Implications for Vietnam and an Expanded ASEAN' (1996) 18 Contemporary Southeast Asia 61-79 and *Regional Security in Southeast Asia: Beyond the ASEAN Way* (ISEAS–Yusof Ishak Institute 2005).
[115] ibid. 62.
[116] ibid.

Acharya defined it as a "continuing process of identity building which relies upon conventional 'modern' principles of interstate relations as well as traditional and culture-specific modes of socialisation and decision making prevalent in the region."[117]

The main principles that constitute the core of the "ASEAN Way" include the legal norms such as the principle of non-interference in internal affairs, the non-use of force, the peaceful resolution of conflict, regional autonomy and avoidance of military pacts, and the socio-cultural norms such as consultations and consensus and a preference for informality over legalistic mechanisms.[118]

The "ASEAN Way" of conflict management has been so far successful as ASEAN mostly succeeded in avoiding conflicts. What make "ASEAN Way" an effective mechanism in conflict management is its emphasis on dialogue and the practice "agree to disagree" for conflict settlement.[119]

Musyawarah and *Mufakat*

ASEAN's development has been interpreted as an expression of ASEAN's regional cultural willingness to cooperation and consensus. In fact, decision-making process within ASEAN is by *musyawarah* (deliberation) and *mufakat* (consensus). This way of dealing with problems has its origin in the traditional village model of governance by elders, which was the core of the idealisation by Indonesia's first President, Sukarno.[120] According to this mode, the public contestation is avoided, and it is preferred persistent efforts to find common ground in the unity of consensus. Despite the Sukarno's government was toppled in 1966, which was one of the reasons that made ASEAN possible, the entrance of Indonesia in ASEAN allowed Sukarno's cultural heritage, *musjawarah* and *mufakat,* to be part of ASEAN's decision-making process.

The notion of the "ASEAN Way" was founded on *musjawarah* and *mufakat*, that represent an Southeast Asia's unique cultural heritage. According to several ASEAN's documents, the cultural heritage represents the deep historical, linguistic, and cultural unity and linkages among Southeast Asian Nations peoples.[121] Furthermore, the ASEAN socio-cultural norms play a crucial role in the security field. Thamat Khoman stated that the foundation of any RO

[117] Acharya (n 23). 29.
[118] ibid. 43.
[119] Nazar Phd, Siddiqui and Behan (n 2). 148
[120] Weatherbee (n 6). 32.
[121] See ASEAN Declaration on Cultural Heritage, signed in Bangkok, Thailand, 25 July 2000.

in Southeast Asia would have Asian culture and tradition in common.[122] Hence, it was considering these norms that ASEAN overcame the initial contestations and reached compromises beyond the meaning and scope of the legal-rational norms and principles.

The ASEAN's central approach to regional interaction and cooperation, rather than using collective defence to preserve the Member States interests, rely on the principle of *musyawarah*, for settling differences among Members. This was already clear in the key principles of MAPHILINDO, that although not successful, it provided the main features of the "ASEAN Way".[123]

Musyawarah means the process of discussion and consultation through which the parts take a decision, and *mukafat* is the consensus reached through the process of *musyawarah.*

Practically the process starts "with intensive informal and discreet discussions, which in the end brings out the general consensus of the community. Later, at a more formal meeting, this consensus becomes the starting point of discussion which usually ends in acceptance of a unanimous decision".[124]

The *ratio* of this practice is to avoid the imposition of the majority view on the minority one, in an equality context between the parties in which each position has the same weight and thus is taken fairly into consideration, until a common point is reached. Furthermore, this has increased ASEAN unity and trust among the Member States and has served "to save face and maintain good relations between the parties."[125]

The "*Face*"

The concept of *face* (面子, "*mian zi*") derives from the Chinese culture and is an ancient concept of protocol and social behaviour, which rule the interaction with others, with foreigners, and the foreign policy and international behaviour.

Lin Yutang stated that *face* cannot be translated or defined as is "abstract and intangible, it is yet the most delicate standard by which Chinese social intercourse is regulated […] it is

[122] Nazar Phd, Siddiqui and Behan (n 2). 148
[123] Gillian Goh, "The 'ASEAN Way': Non-Intervention and ASEAN's Role in Conflict Management" Stanford Journal of East Asian Affairs 3, no. 1 (2003): 114.
[124] Kamarulzaman Askandar, "ASEAN and Conflict Management: The Formative Years of 1967-1976", Pacific Review 6, no. 2 (1994), p. 63.
[125] P. Thambipillai and J. Saravanamuttu, "ASEAN Negotiations: Two Insights" (Singapore: Institute of Southeast Asian Studies, 1985), p. 13.

prized above all earthly possessions. It is more powerful than fate and favour, and more respected than the constitution".[126]

The Western concept of *face* is more self-oriented and individualistic, as it correlated to the person's pride and ego which as to be protected and enhanced.

The Chinese concept of *face* is instead more other-directed and relational, and for this reason the *face* is mutable as it can be given or earned, as well as taken away or lost. The Chinese culture has a highly sensibility to preserve, and not humiliate, the *face* of others.

To *lose face* ("*diu lian*"), means to be humiliated, disgraced, to lose one's credit, good name, or reputation, and to feel embarrassment before a group.[127] For this reason, the restoration of the *face* must be done publicly.

D.Y.F. Ho defined the *face* as "the respectability and/or deference that a person can claim for him/herself from others, by virtue of the relative position he/she occupies in the social network and the degree to which he/she is judged to have functioned adequately in the position as well as acceptably in his social conduct."[128]

The concept is undoubtedly complex, as no definition would be enough to express its real meaning.

This concept derives from the teaching of Confucius, which taught that "if you lead people with excellence and put them in their place through roles and ritual practices, in addition to developing a sense of shame, they will order themselves harmoniously."[129]

Therefore, China developed a shame-based culture, in contrast to Western's, which relied more on the "guilt" and "conscious-based".

This concept is rarely associated with the ASEAN Way in the scholar literature, however from the study of ASEAN fundamental norms, it is evident how this concept has influenced the relations and decisions between the Member States, thus becoming a core part of the ASEAN decision-making, diplomacy, and conflict resolution system.

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[126] PETER LOEWENBERG, 'Matteo Ricci, Psychoanalysis, and "Face" in Chinese Culture and Diplomacy' (2011) 68 American Imago 689. 690.
[127] ibid. 691.
[128] Joo Yup Kim and Sang Hoon Nam, "The Concept and Dynamics of Face: Implications for Organizational Behavior in Asia,"Organization Science 9, no. 4 (August 1998): 522–34, https://doi.org/10.1287/orsc.9.4. 524.
[129] China Mike, The Culture of "Face" in China, 19 May 2020, at https://www.china-mike.com/chinese-culture/cult-of-face/.

In several speeches, interviews, and memoirs of ASEAN Leaders, the term *face* has always been used. For instance, Former Secretary General Ajit Singh noted that in the ASEAN Way "face is very important and every effort is made to ensure that no party feels hurt in an argument or a discussion."[130] Moreover, the Singapore diplomat Walter Woon recognised as "essential aspect" of the ASEAN Way the "desire to not lose face in public or to make other Members lose face".[131] Malaysia's former premier Najib Razak stated that Myanmar did not "lose face" and was pushed toward reforms as a result of ASEAN's dedication to putatively Asian family values.[132]

According to Nair, ASEAN's practitioners essentialize this concept, and it is "*because* of this essentialism that scholarship on ASEAN has broached this category so tentatively, under-theoretically, and even reluctantly".[133]

In conclusion, once again Asian culture is a key component that complements and enriches legal norms. Indeed, without considering these cultural customs, one could only partially understand how the system of this RO works. Hence, the Southeast Asian culture is the lens through which ASEAN legal system must be studied to be fully understood.

[130] Deepak Nair, 'Saving Face in Diplomacy: A Political Sociology of Face-to-Face Interactions in the Association of Southeast Asian Nations' (2019) 25 European Journal of International Relations 672. 682
[131] ibid.
[132] ibid.
[133] ibid.

CHAPTER 4
MYANMAR'S 2021 COUP D'ETAT

4.1 Historical background

Myanmar[134] is a country with a complex political, historical, and multi-ethnic background. It has a population of 57 million people and it is a country of enormous ethnic diversity, which contains around 135 major ethnic groups and seven ethnic minority states. In addition to it, there are seven divisions populated mainly by the Burmese majority, also known as Bamar, which represents the 68% of the population.[135] Further ethnic groups are: Shan, Karen, Rakhine, Chinese, Indian, others.[136]

Myanmar could be – and it was at least since the 1962 *coup* - one of the richest countries in the Southeast Asian region. The country possesses immeasurable primary resources, namely gold, precious stones, petrol, natural gas, and rare-earth elements, that have always grabbed the attention of neighbour countries. Myanmar has been defined as the "rice bowl of Asia", due to its strong agricultural vocation and the successful rice exports.[137] Undoubtedly, the potentiality to build a solid and prosperous economy are enormous.

However, Myanmar is currently defined as one of the poorest countries in Asia.[138] The reasons are several.

Firstly, Myanmar experienced several *coups* since it gained independence from British colonial rule in 1948, namely in 1958, 1962, 1988 and 2021. The 1962 Burmese *coup d'état* was commanded by General Ne Win, which held power for twenty-six years. The military junta established an isolationist foreign policy for approximately half century, which deteriorated the economic situation. In 1988, the revolutionary student movement and especially the violent reaction of the Burmese army which killed around 3 thousand civilians in one day, grabbed the attention of the international community.[139] However, the response of the international

[134] The ruling military changed the name of the country from "Burma" to "Myanmar", in 1989.
[135] Myanmar, World Directory of Minorities, and Indigenous Peoples, at https://minorityrights.org/country/myanmarburma/.
[136] CIA World Factbook, World Bank.
[137] See Aung Hla Tun, Myanmar faces uphill task to revive rice sector, 29 November 2011, at https://www.reuters.com/article/us-myanmar-rice-idUSTRE7AS0EU20111129.
[138] Poorest Asian Countries 2022, at https://worldpopulationreview.com/country-rankings/poorest-asian-countries.
[139] See Burma: Justice for 1988 Massacres, Human Rights Watch, at https://www.hrw.org/news/2013/08/06/burma-justice-1988-massacres.

community which sanctioned the country, have in fact worsened the economic situation of Myanmar.

Secondly, the COVID-19 cases in the last two years severely tested Myanmar's people and economy. The World Bank's Myanmar Economic Monitor estimates that the country's economy could be 30 percent bigger, in absence of COVID-19.[140] The situation and outlook for Myanmar's people has been described as "extremely worrying", especially for its high vulnerability to COVID-19 disease and low vaccination rate.

Thirdly, after the February 2021 *coup*, the increasing conflicts in the country are having severe consequences not only from a humanitarian perspective, but also for the economic activity, as the "private investment has fallen markedly, and previously viable projects are becoming unviable as demand remains weak, the cost of imports has risen, and kyat-denominated revenues are worth less in foreign currency terms."[141]Additionally, since the start of the *coup,* several foreign companies have withdrawn from Myanmar.[142] Moreover, the human rights violations committed by the junta will have in perspective severe consequences also for the economy of the country, as the lost months of education, and the large increases in unemployment and displacement, will considerably reduce human capital, skills, and productive capacity over the longer term.[143]

However, following the 2007 Saffron Revolution[144], Myanmar had also experienced a period of prosperity.

In 2011, the military junta was officially dissolved, and a military-dominated civilian parliament was established. A quasi-civilian government of the Union Solidarity and Development Party (USDP) ruled for five years (2010–2015).[145] During the phase of democratic transition, the country experienced a full transformation on several aspects, namely socio-economic, cultural, political, and legislative. In 2015, at the first nationwide, multiparty

[140] World Bank, Press Release No. 2022/056/EAP, January 26, 2022, at https://www.worldbank.org/en/news/press-release/2022/01/26/economic-activity-in-myanmar-to-remain-at-low-levels-with-the-overall-outlook-bleak.
[141] Ibid.
[142] Foreign companies withdrawing from Myanmar after coup, Reuters Staff, January 27, 2022, at https://www.reuters.com/article/myanmar-politics-foreign-companies-idUSL8N2U12AI.
[143] Ibid.
[144] See Activist Monk Gambira Looks Back to the Saffron Revolution, at https://www.rfa.org/english/news/special/saffron/.
[145] Noel M Morada, 'Myanmar' (2021) 24 Journal of International Peacekeeping 428. 432.

elections, the Aung San Suu Kyi's National League for Democracy (NLD) party won, and the USDP recognised the victory.[146]

Notwithstanding the above, the relationship between civilians and militaries in the parliament were still fragile, mainly due to the 2008 Constitution, which was clearly made by the militaries themselves to protect their dominance in view of the upcoming democratic transition.[147]

Accordingly, the Tatmadaw maintains key ministries, exercises control over domestic security and foreign relations, and reserves the 25% of appointed seats in both houses of the parliament as well as in regional or state legislature. According to Article 436 of the Constitution, the constitution shall be amended only with prior approval of more than 75% of all the representatives of the Pyidaungsu Hluttaw[148]. Considering this, the Tatmadaw technically reserved a veto over any constitutional change.[149]

The democratic transition was, however, firstly slowed down by the atrocities committed against the Rohingya. In 2012, there were two outbreaks of communal violence which resulted in 200 deaths and over 100,000 Rohingyas displaced.[150] Under NLD government, between 2016 and 2017, the military conducted clearing operations that resulted in more than 600,000 Rohingya refugees fleeing to Bangladesh, another 40,000 internally displaced persons, and over 1,000 killed that included militants and other non-Muslim civilians.[151] The international community condemned the violence perpetrated against the Rohingyas and applied once again several sanctions on the country.

The 2021 *coup* has finally interrupted the democratisation of Myanmar, plunging again the country in an emerging civil war, a collapsing economy, and a looming humanitarian crisis. Several scholars and public opinion have described this *coup* as "unexpected", "unpredictable", and that "took the world by surprise".

However, this author believes that, looking at the Myanmar's political history, this *coup* should have been predicted, as the relationship between the two parties was too fragile not to collapse, and the 2008 Constitution provisions were a clear symptom that the Tatmadaw were ready in

[146] The NLD party won the elections already in 1990, but the military party did not recognise the victory.
[147] See Constitution of the Republic of the Union of Myanmar, 2008.
[148] The Pyidaungsu Hluttaw is the *de jure* national-level bicameral legislature of Myanmar established by the 2008 National Constitution.
[149] Myo Myanmar and THE GROUP, *Responding to the Myanmar Coup CONFLICT AND CRISIS UPDATE 27-2-2021* (2021). 4.
[150] Morada (n 98).
[151] ibid.

any moment to take the control without interference. The international community, in this sense, was naïve to believe that the democratisation was fully achieved after the 2015 elections.

4.2 The 2021 Military *Coup d'état*

On February 1, 2021, the Myanmar's military– known as Tatmadaw - seized control and overthrew the democratically elected government, the day in which the newly elected Parliament was supposed to be sworn in.[152] The Tatmadaw, in the early hours of that day, detained the state counsellors and president, as well as several other leaders and declared the state of emergency.[153]

The first concerns about a possible *coup* began with the victory of the Aung San Suu Kyi's NLD party, on 8 November 2020.[154] The NLD victory was even more successful that the election in 2015, gaining it 83 percent of the elected seats in parliament. By contrast, the USPD won only the 7 per cent of the same pool of seats. The USPD, the military's proxy party, refused to recognise the election results and demanded a re-run of the vote, claiming "widespread violation of laws and procedures".[155] The Multiparty General Election, on 8 November 2020, were held under the supervision of the Union Election Commission (UEC).

The Domestic Election Observer Organisations found that the results of the election were "credible and reflected the will of the majority voters".[156] Only two days before the *coup,* they invited all other political parties and the Tatmadaw to respect the election result and that only meaningful discussion and dialogue among the parties would be the right way to address weaknesses and shortcomings to have a peaceful power transition.[157]

Differently, the military announced the reason of the *coup* on its Myawaddy Television, claiming that during the democratic general election, there was severe voter list fraud, which is incompatible with maintaining a stable democracy.[158] Furthermore, a refusal to settle the issue and to act goes against the article 417 of the 2008 Constitution, which refers to act or

[152] "Military Coup in Burma Draws International Condemnation and Pressure" (2021) 115 American Journal of International Law, 559.
[153] Kipgen, N. (2021). Democratisation of Myanmar (2nd ed.). Routledge India. 166
[154] Elliot Bynum, *Myanmar: At risk of dormant conflicts reigniting,* Armed Conflict Location & Event Data Project (2021).
[155] *Myanmar: what has been happening since the 2021 coup?* BBC (Feb. 1, 2022), *at* https://www.bbc.com/news/world-asia-55902070.
[156] Joint Statement by Domestic Election Observer Organization, January 29, 2021.
[157] *Ibid.*
[158] Elliot Bynum, *Myanmar: At risk of dormant conflicts reigniting,* Armed Conflict Location & Event Data Project (2021).

attempts to take over the sovereignty of the Union by wrongful forcible means. The Minister of Foreign Affairs reported that in scrutinising the official voter list issued by the UEC, "the findings showed that over 10.4 million votes, about one-fourth of eligible voters, might have caused voted-rigging".[159]

Therefore, as per Article 417, a one-year state of emergency was declared, announcing that it would reconstitute the Union Election Commission and eventually hold new elections at the end of the state of emergency.[160] Consequently, according to Article 418 (a), the Commander in Chief have the authority of the nation's law making, governance and jurisdiction.

In the attempt to create the appearance of legitimate rule, the Tatmadaw appointed Vice President Myint Swe, an ex-general, as interim president.[161] However, even the replacement of the president did not satisfy the constitutional requirement. This pretext allows Mynt Swe to exercise presidential power to invoke firstly the state of emergency, and then to transfer all State's power to military Commander-in-Chief Min Aung Hlaing.

Hence, Senior General Min Aung Hlaing took power as the head of government and formed a new cabinet, in which every minister was a former or current military general.[162]

Article 417 mentions three conditions under which the state of emergency shall be proclaimed, and indeed both Articles 417 and 418 allow the transfer of the executive, legislative and judicial powers to the commander-in-chief of the defence services during the state of emergency. The above-mentioned articles stated also that the president shall coordinate with the National Defence and Security Council (NDSC) to declare the state of emergency. However, the Tatmadaw violated both articles, as they did not allow the legitimate president to coordinate with the NDSC and they detained the president, along with other leaders, even before declaring emergency rule.[163]

In his first speech, on 8 February 2021, Min Aung Hlaing reiterated that the "hand the power to the one who wins in that election" is to guarantee a "true and disciplined democracy" and that this military's intervention is different from the previous era of its rule.[164]

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[159] MoFA issues 'Press Statement' on current situation of Myanmar, Myanmar News Agency, February 06, 2021, at https://www.gnlm.com.mm/mofa-issues-press-statementon-current-situation-of-myanmar/.
[160] *Ibid.*
[161] Ordinance No. 1/2021, Office of the President, 1 February 2021
[162] *Ibid.*
[163] Kipgen, N. (2021). Democratisation of Myanmar (2nd ed.). Routledge India. 167.
[164] Ibid.

However, after six months, the military government named itself "the caretaker government" and its leader declared himself Prime Minister and extended the state of emergency for further two years.[165] Senior General Min Aung Hlaing justified this decision by saying that "We must create conditions to hold a free and fair multiparty general election, we have to make preparations. I pledge to hold the multiparty general election without fail."[166]

On 2 February, the military announced the establishment of a State Administrative Council (SAC), pursuant the section 419 of the Constitution.[167] Furthermore, the Tatmadaw announced the formation of a seven-members Peace Talks Committee to negotiate which both signatories and non-signatories of the Nationwide Ceasefire Agreement (NCA). However, the Committee Representing the Pyidaungsu Hluttaw (CPRH) reported that "due to the atrocities and acts of terrorism of the military, streets and communities across Myanmar have become battlefields. There have been many civilian fatalities and the life, liberty and security of the people are under constant threats due to the acts of terrorism committed by the illegitimate military council."[168] In response, the SAC warned of seven years of imprisonment for anyone dealing with the CPRH.[169]

4.2.1 Human rights violations

"Myanmar is the scene of all the horrors and atrocities which a dictatorship can be responsible,
is the example of all the crimes a dictatorship can be made accountable for.
Myanmar is undoubtedly the number one for human rights violations."[170]

The UN High Commissioner for Human Rights (UNHCHR), Michelle Bachelet, called the situation in Myanmar as a "multi-dimensional human rights catastrophe".[171] She addressed the responsibility of this crisis exclusively to the military leadership.[172]

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[165] The Associated Press, *Myanmar's Military Leader Declares Himself Prime Minister and Promises Election,* NPR (Aug. 2, 2021), *at* *https://www.npr.org/2021/08/02/1023782084/myanmar-military-leader-prime-minister-elections?t=1644255810432*.
[166] *Ibid.*
[167] Ordinance No. 9/2021, 2 February 2021
[168] Myanmar Regime Outlaws Committee Representing Ousted Lawmakers and Its Associates, The Irrawaddy, 22 March 2021, at https://www.irrawaddy.com/news/burma/myanmar-regime-outlaws-committee-representing-ousted-lawmakers-associates.html.
[169] Kipgen, N. (2021). Democratisation of Myanmar (2nd ed.). Routledge India. 168
[170] Alessandra Schiavo, Italian Ambassador in Myanmar, Interview, 23 March 2022
[171] UN News, *UN rights chief urges accountability for escalating 'catastrophe' in Myanmar,* UN (Jun. 11, 2021), *at* https://news.un.org/en/story/2021/06/1093832.
[172] *Ibid.*

On the first anniversary of the military *coup* in Myanmar, the Special Rapporteur on the situation of the human rights in Myanmar, urged "the international community must take strong, meaningful steps to cut the junta's access to weapons, funds and legitimacy".[173] The UN expert reiterated his call for the UN Security Council (UNSC) to impose an arms embargo and increase financial pressure on the junta, saying that the fact that in one year no UNSC Resolution was imposed "is unacceptable".[174]

During the 49th regular session of the UN Human Rights Council, the UNHCHR warned that serious rights abuses uncovered in Myanmar may amount to war crimes and crimes against humanity and appealed once again to the international community to take "concerted, immediate measures to stem the spiral of violence".[175]

Evidence indicates that, since the 1 February 2021 military coup, crimes against humanity, including murder, persecution, imprisonment, sexual violence, enforced disappearance, and torture, have been committed.[176]

Violent repression of pacific protests

After the *coup*, pacific protest has started across the country to call for the military to relinquish power. Civil society activists formed the Civil Disobedience Movement (CDM) and the opposition National Unity Government (NUG), and organised mass protested the coup.[177] In the next weeks, millions of people joined the anti-coup CDM, peacefully protesting the junta.[178] Some protestors began appealing to the international community, calling for an intervention and the invocation of the Responsibility to protect, with the hashtag and signs with #R2P.[179]

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[173] Myanmar: One year into coup, a new and stronger course of international action is needed, UNHCHR, 1 February 2022, at https://www.ohchr.org/en/press-releases/2022/02/myanmar-one-year-coup-new-and-stronger-course-international-action-needed-un.

[174] *Myanmar: 'Meaningful action' needed to stop the slaughter,* UN News, (Feb. 1, 2022), *at* https://news.un.org/en/story/2022/02/1110992.

[175] Myanmar: 'Appalling' violations demand 'unified and resolute international response', UN News, 15 March 2022, at https://news.un.org/en/story/2022/03/1113972#:~:text=The%20report%2C%20released%20for%20the,or%20used%20as%20human%20shields.

[176] Report of the Independent Investigative Mechanism for Myanmar, Human Rights Council, Forty-eighth Session, 5 July 2021, A/HRC/48/18

[177] *Myanmar: what has been happening since the 2021 coup?* BBC (Feb. 1, 2022), *at* https://www.bbc.com/news/world-asia-55902070.

[178] News Release, *Myanmar: Year of Brutality in Coup's Wake*, Human Rights Watch (Jan. 28, 2022), *at* *https://www.hrw.org/news/2022/01/28/myanmar-year-brutality-coups-wake*.

[179] Timothy McLaughlin, *No One Is Saving Myanmar,* The Atlantic (Apr. 24, 2021), *at* *https://www.theatlantic.com/international/archive/2021/04/no-one-saving-myanmar/618658/*.

The new regime tried to suppress protests by issuing a curfew order and limited civil liberties.[180] For the first months, people started a "silent" protest slamming pots and pans, as per the Buddhism rituals to slam metals to drive away evil spirits. Until the military forces started arrest only for this reason.[181] In mid-February, the military escalated its response against protestor using lethal force.[182] On March 26, 2021, the junta's MRTV channel warned the citizens to "learn from the tragedy of earlier ugly deaths that you can be in danger of getting shot to the head and back […] let's not waste lives for nothing."[183]

The military had used both less-lethal weapons, such as tear gas, water cannons, and rubber bullets, and lethal tactics and weapons suitable only for battlefield use against peaceful protesters in cities and towns across the country, namely grenades on the crowd and shot indiscriminately with bullets in urban areas.[184]

Furthermore, as protests spread across the country, the military forces started using snipers against the protesters.[185] The military gives orders for snipers to shoot protestants in the head to strike terror into people and deter them from continuing protests in the streets.[186]

As of 8 February 2022, according to the Assistance Association for Political Prisoners (AAPP), 1529 people have been killed by the junta, 1974 people have been charged with a warrant and are evading arrest, and 677 people have been sentenced.[187] Furthermore, it has also been estimated that at least 100 children have been killed by the security forces.[188]

Arbitrary Restrictions on Freedom of Expression

The military took control over telecommunications on February 1, 2021, suspending telephone and Internet accesses in major cities, cancelling flights, and paralysing the stock market and

[180] *Responding to the Myanmar Coup,* International Crisis Group (2021), 2.
[181] Alessandra Schiavo, Italian Ambassador in Myanmar, Interview, 23 March 2022
[182] "Military Coup in Burma Draws International Condemnation and Pressure" (2021) 115 American Journal of International Law, 560.
[183] News Release, *Myanmar: Year of Brutality in Coup's Wake*, Human Rights Watch (Jan. 28, 2022), *at https://www.hrw.org/news/2022/01/28/myanmar-year-brutality-coups-wake.*
[184] Amnesty International, Myanmar, Rapporto 2021-2022, Asia e Pacifico, at https://www.amnesty.it/rapporti-annuali/rapporto-2021-2022/asia-e-pacifico/myanmar/.
[185] "Nowhere is Safe", The Myanmar Junta's Crimes Against Humanity Following the Coup D'état, Fortify Rights, 45.
[186] Alessandra Schiavo, Italian Ambassador in Myanmar, Interview, 23 March 2022
[187] Assistance Association for Political Prisoners.
[188] News Release, *Myanmar: Year of Brutality in Coup's Wake*, Human Rights Watch (Jan. 28, 2022), *at https://www.hrw.org/news/2022/01/28/myanmar-year-brutality-coups-wake.*

banks.[189] The following week, the military junta circulated a draft cybersecurity law to telecommunications and Internet companies that would allow the military to block websites, to access user's data, and to revoke access from inconvenient users.[190] On March 8, state television announced that the licenses of five independent media organisations had been revoked.[191] At least 98 journalists were arrested after the coup, including three foreigners. One journalist, Ko Soe Naing, died in custody.[192]

The military government announced changes to the Criminal Code to punish any intent to criticise government actions, including the addition of Section 505(a), which had criminalised making comments that "cause fear" and spread "false news," as well as to punish those who "commit or incite to commit, directly or indirectly, a crime against a government employee."[193] New provisions have also been introduced in the Code of Criminal Procedure to allow searches, seizures, arrests, surveillance, and interception of communications without a warrant.

The Human Rights Council expressed deep concern about the restrictions on and interruptions to the Internet and social media, and the attacks against and arrest and harassment of journalist and media workers, which unnecessarily and disproportionately restrict the right to freedom of opinion and expression, as well as the freedom to seek, receive and impart information and the right to freedom of association.[194]

Right to health

The health care system collapsed in the aftermath of the military's seizure of power.

Thousands of medical personnel and health care providers joined the civilian disobedience movement and refused to work under the military government, continuing nevertheless to assist injured protesters, as well as people affected by COVID-19. Health workers who were providing medical care clandestinely, including to injured protesters, were assaulted, and arrested by security forces. According to the World Health Organisation, more than 286 attacks on health care facilities and personnel occurred during the last year, accounting for more than

[189] "Military Coup in Burma Draws International Condemnation and Pressure" (2021) 115 American Journal of International Law, 560.
[190] *Ibid.*
[191] *Ibid.*
[192] Amnesty International, Myanmar, Rapporto 2021-2022, Asia e Pacifico.
[193] Ibid.
[194] Resolution adopted by the Human Rights Council on 24 March 2021, forty-sixth session, 29 March 2021, A/HRC/RES/46/21

one-third of attacks on health care worldwide. At least 26 health workers were killed, 64 were injured during the year and 86 detained.[195]

In the meantime, a third wave of COVID-19 hit the country. At the time of writing, the Coronavirus cases registered in Myanmar are 613,326.[196]

The military government has further weakened the fight against COVID-19 by confiscating already severely limited personal protective equipment and oxygen supplies in Chin, Kayin, and Yangon for use by the military.[197] Security forces reportedly opened fire in Yangon in July to disperse people queuing for oxygen cylinders.

Women have faced difficulties in accessing sexual and reproductive health care, especially in areas of armed conflict. There have been reported cases of displaced women giving birth without access to basic health services. In several cases reported in Kayah and Shan states, infants of displaced families died due to lack of adequate health care and shelter.[198]

According to UNICEF, more than 40,000 children are no longer getting treatment for severe acute malnutrition, and they do not have access to key vaccinations.[199] Since the *coup*, 75 children have been killed, about 1,000 arbitrarily detained and countless deprived of essential medical care.

Furthermore, Myanmar military authorities arbitrarily detained people whose right to health and life are at great risk, as they limited the accession to adequate medical treatment and health care. Several people detained for political reason in the Insein Prison reported poor conditions, including overcrowding and lack of protective measures and medical treatment for prisoners infected by COVID-19.[200] Myanmar has the obligation, under international human rights law, to respect, protect, and fulfil the right to health for anyone under its jurisdiction, including detainees.

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[195] Amnesty International, Myanmar, Rapporto 2021-2022, Asia e Pacifico.
[196] World Meters, Myanmar, at https://www.worldometers.info/coronavirus/country/myanmar/.
[197] The military junta in Myanmar weaponizes COVID-19 against its opponents, DIIS, 31 August 2021, at https://www.diis.dk/en/research/the-military-junta-in-myanmar-weaponizes-covid-19-against-its-opponents.
[198] Myanmar's Coup Has Put Women in Harm's Way, The Diplomat, 3 September 2021, at https://thediplomat.com/2021/09/myanmars-coup-has-put-women-in-harms-way/.
[199] Myanmar crisis risks damaging entire generation of children, UN Child Rights Committee warns, 16 July 2021, at https://www.ohchr.org/en/press-releases/2021/07/myanmar-crisis-risks-damaging-entire-generation-children-un-child-rights?LangID=E&NewsID=27318
[200] Myanmar: The right to life and health of prisoners must be protected amidst a worsening COVID-19 situation, ICJ, at https://www.icj.org/myanmar-the-right-to-life-and-health-of-prisoners-must-be-protected-amidst-a-worsening-covid-19-situation/.

Right to education

Nearly 12 million children and youth have been denied access to formal education due to the combined effects of the closure of primary, secondary and university schools for COVID-19, armed conflicts, and the actions of military authorities. Teachers who had participated in the CDM were arrested and at least 139 were reported to be detained at the end of the last November. It is estimated that more than 125,000 teachers who were standing up for democracy have been suspended.[201] Schools and other educational facilities were bombed. At least 103 such attacks were reported in May 2021 alone. The military has occupied and subsequently damaged in military actions both schools and university campuses throughout Myanmar, and there is photographic evidence of military forces carrying guns in primary schools in front of children.[202]

Detentions and Imprisonments

The military's junta, since the *coup*, detained civilian leaders like State Counsellor Daw Aung San Suu Kyi, President U Win Myint, cabinet ministers, and oppositions politicians.[203] Furthermore, at least 15 journalists have been convicted, many accused of having violated section 505A of the Penal Code, by publishing or circulating that cause fear or spread false news.[204] All these proceedings have raised serious concerns in relation to failing to comply with international fair trail standard.

Myanmar's military government detained the removed leader Aung San Suu Kyi for more than one year now. She has already been sentenced to six years in jail for incitement against the military, for having breached COVID-19 rules, and for the illegal possession and import of walkie-talkies.[205] Recently, the police has filed a further charge for corruption against her, for

[201] Burmese military junta crackdown on 1250,000 teachers and try to take over schools, Ei, 15 July 2021, at https://www.ei-ie.org/en/item/25058:burmese-military-junta-crackdown-on-125000-teachers-and-try-to-take-over-schools.
[202] Myanmar crisis risks damaging entire generation of children, UN Child Rights Committee warns, 16 July 2021, at https://www.ohchr.org/en/press-releases/2021/07/myanmar-crisis-risks-damaging-entire-generation-children-un-child-rights?LangID=E&NewsID=27318.
[203] "Military Coup in Burma Draws International Condemnation and Pressure" (2021) 115 American Journal of International Law, 559.
[204] Evelina U. Ochab, *One Year of the Military Junta in Power in Myanmar,* Forbes (Feb. 1, 2022), *at https://www.forbes.com/sites/ewelinaochab/2022/02/01/one-year-of-the-military-junta-in-power-in-myanmar/?sh=36ca286855b3*.
[205] News Agencies, *Myanmar's Aung San Suu Kyi faces new charge amid fresh violence* , Al Jazeera (Feb. 4, 2022), *at* https://www.aljazeera.com/news/2022/2/4/myanmars-aung-san-suu-kyi-faces-eleventh-corruption-charge.

having allegedly received $550,000 as a donation for a charity foundation.[206] She faces now more than 150 years in prison for dozen of charges, all of which she denies.[207] All the trials have been widely condemned as being unfair.[208] In response to the sentencing, Human Rights Watch called the proceedings a "courtroom circus of secret proceedings on bogus charges... so that she will remain in prison indefinitely".[209] The Asia director at HRW, Brad Adams, stated that the junta is using this obscure and unlawful proceedings to wipe out all opposition to military the dictatorship.[210] Additionally, the junta detains thousands of protesters, activists, journalists, and many others for charges that are similarly unjust as those against Aung San Suu Kyi.[211] Similarly, Amnesty International's Deputy Regional Director for Campaigns, Ming Yu Hah, reported the irregularity of the proceedings that are taking place in Myanmar and called on the international community to "act now to ensure an end to unlawful killings, arbitrary detention, torture and other gross violations, and to the decades-long pattern of impunity that has led us to where we are today."[212]

The UN High Commissioner for Human Rights, Michelle Bachelet, called for the Aung San Suu Kyi release, saying that "the conviction of the State Counsellor following a sham trial in secretive proceedings before a military-controlled court is nothing but politically-motivated, […] it is not only about arbitrary denial of her freedom – it closes yet another door to political dialogue."[213]

According to the Aapp, as of Dec. 31, at least 8,338 people arrested since Feb. 1 were still detained, including 196 minors.

Freedom from Torture and Inhuman or Degrading Treatment

As mentioned above, the military forces detained journalists, NLD party members and their relatives, peaceful protesters, members of the civil disobedience movement and other activists.

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[206] *Ibid.*
[207] *Aung San Suu Kyi; Ousted Myanmar leader jailed for another four years,* BBC (Jan. 10, 2022), *at* https://www.bbc.com/news/world-asia-59933706.
[208] *Ibid.*
[209] *Myanmar: Aung San Suu Kyi Sentenced,* Human Rights Watch, (Dec. 6, 2021), *at* https://www.hrw.org/news/2021/12/06/myanmar-aung-san-suu-kyi-sentenced.
[210] *Ibid.*
[211] *Ibid.*
[212] *Myanmar: Unbridled destruction of freedoms as Aung San Suu Kyi sentenced,* Amnesty International (Dec. 6, 2021), *at* https://www.amnesty.org/en/latest/news/2021/12/myanmar-aung-san-suu-kyi-sentenced/.
[213] *Myanmar: Bachelet deplores conviction and sentencing of Aung San Suu Kyi,* OHCHR (Dec. 6, 2021), *at* https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27909&LangID=E.

Since Tatmadaw's seizure of power, the UN reported arbitrary detentions, unnecessary and disproportionate use of force against peaceful protesters, extrajudicial killing, ill treatment, and torture in custody, which in some cases resulted in death of detainees.[214]

Deaths in detention occurred as a result of a lack of sufficient medical care for victims injured during crackdowns and raids, or as a result of torture or other cruel, inhuman, or degrading treatment or punishment, particularly during interrogations.[215] The death reported in custody were mostly happened within 48 hours since the have been detained.

Relatives who managed to visit family members in detention reported seeing wounds and other signs of torture or mistreatment on their bodies.[216]

It is estimated that over 10,000 persons have languished in prison, arbitrarily detained, with the majority have been subjected to torture.[217]

As party of several human rights treaties and according to principles of customary international human rights law, Myanmar shall refrain to arbitrary deprivation of life, torture and cruel, inhuman, or degrading treatment, deprivation of liberty, and respect the right of a fair trial.[218]

4.3 The United Nations mechanisms

4.3.1 Independent International Fact-Finding Mission on Myanmar

The United Nations Human Rights Council, on March 2017, decided to establish, through the Resolution 34/22, the Independent International Fact-Finding Mission on Myanmar (IIFFMM) in order to establish the facts and circumstances of the alleged human rights violations by military and security forces, and abuses in Myanmar.[219] The IIFFMM's aim was to collect the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State, including but not limited to arbitrary detention, torture and inhuman treatment, rape and other forms of sexual violence, extrajudicial, summary or arbitrary killings, enforced disappearances, forced displacement and

[214] 48th Regular Session of the Human Rights Council, A/HRC/48/67, paras. 21–41.
[215] 49th Session of the Human Rights Council, A/HRC/49/72, para 25.
[216] Amnesty International, Myanmar, Rapporto 2021-2022, Asia e Pacifico.
[217] 49th Session of the Human Rights Council, A/HRC/49/72, para 70.
[218] 43rd Session of the Human Rights Council, A/HRC/43/35, para. 4.
[219] United Nations Human Rights Council, Independent International Fact-Finding Mission on Myanmar, available at https://www.ohchr.org/en/hr-bodies/hrc/myanmar-ffm/index

unlawful destruction of property, with a view to ensuring full accountability for perpetrators and justice for victims.[220] The mandate of the IIFFMM ended in September 2019.

The IIFFMM turned over its evidence to the Independent Investigative Mechanism for Myanmar, which was also mandated by the Human Rights Council and has been operating since August 30, 2019. The IIMM gathers evidence and prepares files for criminal prosecution in the most serious international crimes and violations of international law.

4.3.2 Independent Investigative Mechanism for Myanmar

With the Resolution 39/2 adopted by the Human Rights Council in September 2018, the Independent Investigative Mechanism for Myanmar (IIMM) was established. The IIMM because operation on 30 August 2019.

The independent mechanism was instituted "to collect , consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011, and to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law standards, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law."[221] As above-mentioned, this mechanism used as basis for the preparation of files for criminal prosecution the information handed over it by the IIFFMM.

In its last Annual Report released in August 2022, the IIMM according to the evidence gathered, found that crimes against humanity continue to be systematically committed in Myanmar and it is even escalating.[222]

The conflict is severely and particularly impacting women and children, according to the more that three million information items that IIMM has collected. The available information indicates that sexual and gender-based crimes, including rape and other forms of sexual violence, and crimes against children have been perpetrated by members of the security forces and armed groups. According to the Report, children in Myanmar have been tortured, conscripted, and arbitrarily detained, including as proxies for their parents.

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[220] HRC, Resolution adopted by the Human Rights Council on 24 March 2017, A/HRC/RES/34/22
[221] Independent Investigative Mechanism for Myanmar, available at https://iimm.un.org/
[222] Press Release: Evidence of crimes against humanity in Myanmar escalate, with women and children severely impacted, according to Myanmar Mechanism Annual Report, 9 August 2022, available at https://iimm.un.org/press-release-evidence-of-crimes-against-humanity-in-myanmar-escalate-with-women-and-children-severely-impacted-according-to-myanmar-mechanism-annual-report/

4.3.3 Special Rapporteur on the situation of human rights in Myanmar

The mandate of the Special Rapporteur on the situation of human rights in Myanmar was first established in 1992 under the Commission on Human Rights Resolution 58. The mandate is extended annually. In April 2014, Human Rights Resolution 25/26 has broadened the mandate to include the progress in the electoral process and reform in the run-up to the 2015 election. Moreover, in March 2016, the Human Rights Resolution 31/24 broadened even more the mandate as to include identifying benchmarks for progress and priority areas for technical assistance and capacity-building.

In July 2022, the Special Rapporteur on the situation of human rights in Myanmar and the UN Special Rapporteur on extrajudicial summary or arbitrary executions, condemned the Myanmar junta's execution of four individuals. These individuals were patriots and champions of human rights and democracy, and they were tried, convicted, and sentenced by a military tribunal without the rights of appeal and reportedly without legal counsel, in grave violation of international human rights law. The UN Rapporteurs strongly appeal for an immediate and firm international response by Member States of the UN to the widespread and systematic murders of protesters, indiscriminate attacks against entire villages, and the execution of opposition leaders. They stated that "the status quo of international inaction must be firmly rejected."[223]

Moreover, in accordance with the Author's theory of complementarity between the UN and ROs mentioned in Chapter 2, the UN Rapporteurs believe that ASEAN and all UN Member States must take action in order to stop the violation of international human rights law that endures since the *coup* happened last year.

[223] UN Special Rapporteurs appeal for strong international response in the wake of 'devastating' executions by Mynamar junta, 25 July 2022, Press Release, available at https://www.ohchr.org/en/press-releases/2022/07/un-special-rapporteurs-appeal-strong-international-response-wake-devastating

CHAPTER 5
ASEAN APPROACH TO MYANMAR CRISIS: AN ANALYSIS OF HOW ASEAN HAS CHANGED THE WAY OF CONFLICTS RESOLUTION

5.1 The ASEAN "Soft Approach"

Myanmar has ever been source of both international and regional concerns, due to the several military coups happened in the country, the Saffron Revolution, and the most recent Rohingya Crisis which has been labelled as genocide by the UN.

This has also had a negative effect on ASEAN's "face", which has been highly criticised for the failure to intervene or apply any kind of significant mechanisms to effectively interrupt the humanitarian violence in Myanmar. These criticisms are interrelated with ASEAN principle of non-interference, which is seen as an obstacle to take any effective measure to approach interregional conflicts. In fact, the principle was accused of being the "culprit for unresponsive action to cease humanitarian violation and military coup".[224] The ASEAN decision-making process is thus considered as time-consuming, slow, and ineffective, and it makes difficult to dealt smoothly with conflicting issues.[225]

Indeed, the principle was taken to the extreme as any form of criticism was interpreted as an interference. However, during the years, ASEAN and its Members started to publicly express concerns for the human rights violations in Myanmar, stating that "human rights protection within the region are now a concern of ours".[226]

Nevertheless, the principle exercised still some kind of restriction, as no one can directly interfere in other States affairs by supporting or assisting rebels or secessionist movements.

After the Saffron Revolution in 2007, Indonesia not only complained about the Myanmar's human rights violations, but also criticized ASEAN's inertia which "lack the nerve to stand up for the people of Myanmar".[227] However, as the revolution developed a risk of territorial disintegration, Indonesia changed to a policy of non-interference. In fact, its president chose

[224] Akhmad Anugrah, 'The ASEAN "Crack": Myanmar Conflict as The Warning Sign of Peace Stability in Southeast Asia Region' (2021) 1 PROCEEDING INTERNATIONAL RELATIONS ON INDONESIAN FOREIGN POLICY CONFERENCE 37. 41.
[225] Ibid.
[226] ASEAN Human Rights Declaration (Phnom Penh: ASEAN, 18 November 2012)
[227] Kavi Chongkittavorn, Thailand's Policy of Cowardice on Burma, The Nation, 1 October 2007.

for what he called a "soft approach" to retain the regional validity of the non-interference norm as a standard of behaviour in internal circumstances with a risk of territorial disintegration.[228] This choice was adopted, in view of Myanmar's resistance, to avoid a precedent for the interference in States' internal affairs in case of secessionist movements.[229]

Traditionally, ASEAN's interpretation of the principle of non-interference included not only a strict prohibition of use of force and threat of force, but also prohibited any means such as "naming and shaming". As a result, reconciling non-interference principle and human rights protection also meant provide feasible alternatives to interfere in a way that did not jeopardize the sensitive structure of trust among ASEAN Members States.[230]

Consequently, the interconnection between the region and the East Asian cultural context, with the importance on publicly "saving face", has meant that shaming was significantly more damaging for Southeast Asian governments than their Western counterpart.[231]

ASEAN has practised dialogue and "constructive engagement" with the country, believing that a peer could have urged the country to comply with regional norms, including democracy and human rights. This policy was applied to avoid the country's total isolation, as to "keep the lines of communication open", and to "give Myanmar more diplomatic space", albeit still trying to achieve an internationally accepted codes of behaviour.[232]

According to Acharya, the essence of "constructive engagement" was to refrain from taking any actions which could have embarrassed and isolated the Burmese junta to not let it "lose face", to reject interference by the outside powers, especially the Western countries, in Myanmar's internal affairs, and consequently relied on the belief that the issue had to be handled by the region's countries themselves.[233]

The international sanctions against Myanmar have always had the secondary purpose to at first dissuade ASEAN from accepting the country as a Member State, and then, after the entrance

[228] Human Rights Watch, "Burma: Arbitrary Detention of Protesters", 22 August 2007, at http://www.hrw.org/sites/default/files /reports/burma1207web.pdf
[229] Anchalee Rüland, Norms in Conflict: Southeast Asia's Response to Human Rights Violations in Myanmar, The University Press of Kentucky, 2022, 76.
[230] Ibid., 142.
[231] Ibid.
[232] Kerstin Schembera, 'Understanding ASEAN's Approach to Sanctions against Norm Breakers' (2021) 42 International Political Science Review 531. 538
[233] Acharya (n 23). 129

of Myanmar in the RO, to suspend its membership.[234] Yet, this had on ASEAN the opposite effect. ASEAN leaders protected the region unity and self-autonomy and rejected outside powers interference in intra-regional issues. In fact, not only the acceptance of the sanctions on Myanmar would be an interference in the internal politics of the country, but also of the regional affairs itself, thus creating an unacceptable precedent.

Hence, what has been referred to as the ASEAN "soft approach" is nothing more than a combination of the core norms that characterise the RO, namely the principle of non-interference, the "saving face", as well as dialogue and constructive engagement, that so far have distinguished the ASEAN approach to Myanmar crisis.

5.2 ASEAN strategies to the 2021 *Coup d'état*

The ASEAN peace and stability is, once again, threatened by the on-going Myanmar conflict. This condition has forced ASEAN to seek to find prompt and precise solutions to establish peace within Myanmar. However, different circumstances require different solutions. Albeit the principle of non-interference can restrict its ability to act, ASEAN has the advantage of being willing and able to directly engage with its Member States, whilst the international community cannot when it comes to Myanmar. Furthermore, the measures that this time ASEAN had implemented seems to go beyond the "soft approach".

5.2.1 Five-Point Consensus

The ASEAN Leaders met on 24 April 2021 to discuss the development in Myanmar since the *coup* and expressed serious concerns about the situation in the country, particularly concerning the escalation of violence and the reports of fatalities.[235] They remarked the importance of pursuing regional solidarity and resilience, as well as the political stability of each Member State, in absence of which there would be no stable and prosperous ASEAN Community. ASEAN, in promoting peace and security within the region, acknowledges its positive and constructive role in developing a peaceful solution in the interest of the people of Myanmar.

[234] Elin Hellquist, 2014. "Regional Organizations and Sanctions Against Members: Explaining the Different Trajectories of the African Union, the League of Arab States, and the Association of Southeast Asian Nations," KFG Working Papers p0059, Free University Berlin. 18.
[235] *Chairman's Statement on the ASEAN Leader's Meeting,* ASEAN, (Apr. 24, 2021), *at* https://asean.org/wp-content/uploads/Chairmans-Statement-on-ALM-Five-Point-Consensus-24-April-2021-FINAL-a-1.pdf.

For these reasons, ASEAN, with the agreement of the *coup* leaders, has listed five-point strategy for restoring elected government in Myanmar:[236]

1. There shall be immediate cessation of violence in Myanmar and all parties shall exercise utmost restraint.
2. Constructive dialogue among all parties concerned shall commence to seek a peaceful solution in the interests of the people.
3. A special envoy of the ASEAN Chair shall facilitate mediation of the dialogue process, with the assistance of the Secretary General of ASEAN.
4. ASEAN shall provide humanitarian assistance through the ASEAN Coordinating Centre for Humanitarian Assistance on disaster management (AHA Centre).
5. The special envoy and delegation shall visit Myanmar to meet with all parties concerned.

However, so far, the junta has demonstrated no intent to respect nor to implement the Five-Point Consensus (5PC), whereas ASEAN has implemented each point agreed, particularly the humanitarian assistance. [237]

After one year since the *coup*, the ASEAN Member States remain deeply concerned with the on-going situation in Myanmar, considering the continued violence and the deterioration of humanitarian situation.[238]

Many argued that the failure of the 5PC derives from the ASEAN "soft approach" which, is once again allowing the junta to commit atrocities against Myanmar's people without obstruction. Undoubtedly, the 5PC presents some weaknesses.

Firstly, the AHA Centre was created to address natural disaster thus it does not provide any mechanisms in providing aid in context of conflicts and humanitarian crisis. Moreover, humanitarian aid should not be supplied through the junta. In fact, rely solely on the military junta as humanitarian channel prevents the aid accession to those who does not want to collaborate with them.[239]

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[236] *Ibid.*
[237] Naifa Rizani Lardo, *Myanmar Crisis and the Future of ASEAN,* Centre for Strategic and International Studies (2021), https://www.jstor.org/stable/resrep38825. See "On the Outcomes of the Consultative Meeting on ASEAN Humanitarian Assistance to Myanmar" Press Release, 6 May 2022.
[238] ASEAN Chairman's Statement on the Situation in Myanmar, 2 February 2022.
[239] Myanmar: ASEAN must move beyond consensus to facilitate cross-border humanitarian aid, Bangkok, 6 May 2022, at

This risk, however, could be mitigated by the presence of third parties, like UN agencies or NGOs, with can thus avoid that the junta can politicize or militarize humanitarian aid.

Secondly, the dialogue should be extended also to the representatives of the NUG, ethnic leaders, and the CDM. According to the Founder and Coordinator of ALTSEAN-Burma, the second- and fifth-point recall to establish a constructive dialogue among "all parties concerned", and in this sense it could be interpreted as to include also the "true representative of the Myanmar people" as they are the "elected legitimate governments members".[240]

According to several observes, one of the main reasons for the failure of the 5PC is because so far ASEAN engaged only with Myanmar's junta without consulting the NUG.[241]

Similarly, Malaysia's Foreign Minister and Indonesian Foreign Minister since the beginning urged ASEAN Special Envoy to engage with NUG. According to them, their involvement in the constructive dialogue is crucial to achieving peace in Myanmar. In fact, through the mediation of the ASEAN Special Envoy and a *musyawarah* between the parties, a common ground, a *mukafat*, could be achieved.

More recently, the Malaysian Foreign Minister decided to have an informal meeting with his counterpart from Myanmar's NUG to "express Malaysia's support and solidarity with the people of Myanmar and stands ready to work towards restoring peace and democracy in Myanmar."[242]

This decision has a great importance considering the circumstances. In fact, Myanmar authorities has repeatedly urged countries to not associate with NUG, which they have always labelled as "terrorists".[243] Even after this meeting, the Myanmar's SAC criticised Malaysian

https://policycommons.net/search/?q=Myanmar%3A+ASEAN+must+move+beyond+consensus+to+facilitate+cross-border+humanitarian+aid.

[240] ASEAN: Failure to meet with all parties neglects ASEAN's own five-point consensus, 7 June 2021, at https://policycommons.net/artifacts/1977897/asean/2729662/.

[241] The Latest on Southeast Asia: May 12, 2022, CSIS, at https://www.csis.org/blogs/latest-southeast-asia/latest-southeast-asia-may-12-2022.

[242] Saifuddin Abdullah, Twitter, 14 May 2022, at https://twitter.com/saifuddinabd/status/1525481991612801031.

[243] Malaysia foreign minister meets counterpart from Myanmar shadow government in Washington, 15 May 2022, Reuters, at https://www.reuters.com/world/asia-pacific/malaysia-foreign-minister-meets-counterpart-myanmar-shadow-govt-washington-2022-05-15/.

Foreign Minister for "violating international anti-terrorism agreement" by engaging with the outlawed NUG.[244]

Consequently, this could pressure Myanmar's military junta to further engage with ASEAN and follow through the agreed 5PC.

This is a clear sign of a change in approaching of ASEAN Members. As mentioned above, usually public accusation or embarrassment between Members would have been avoided, yet this time they decided to publicly go against a government will, as to stand for what they truly believe is right.

5.2.2 ASEAN Special Envoy

Pursuant to point three, ASEAN has nominated the Special Envoy (SE) of the ASEAN Chair on Myanmar which is the Cambodian Deputy Prime Minister and Minister of Foreign Affairs. Cambodia has experience in fostering national reconciliation, so there are high expectations that the country will promote discussion amongst all parties to resolve all disagreements through a constructive dialogue.[245]

The SE's first visit to Myanmar took place on March 2022 and was aimed to create the favourable conditions for the end of violence and the exercise of maximum restraint by all parties, distributing humanitarian aid with the assistance and coordination of ASEC and the AHA Centre, and encouraging political consultations and dialogue among all parties involved.[246]

However, the meetings held during the visit had as counterpart only representatives of the junta, as SAC rejected the request of the SE for access to NUG leading members, notwithstanding the request was fully within the terms of the 5PC.[247] For this reason, these meetings with the so

[244] Joseph Sipalan and Hadi Azmi, After Malaysia's NUG meeting, will ASEAN approach towards Myanmar shift?, 24 May 2022, at https://www.scmp.com/week-asia/politics/article/3178828/after-malaysias-nug-meeting-will-asean-approach-towards-myanmar.
[245] Naifa Rizani Lardo, *Myanmar Crisis and the Future of ASEAN,* Centre for Strategic and International Studies (2021).
[246] Kingdom of Cambodia, Nation Religion King, Ministry of Foreign Affairs and International Cooperation, Press Release, 18 March 2022, at https://www.mfaic.gov.kh/posts/2022-03-18-Press-Release-In-his-capacity-as-the-Special-Envoy--SE--of-the-ASEAN-Chair-on-Myanmar--His-Excellency-PRAK-Sokhonn-11-33-55.
[247]Sebastian Strangio, ASEAN Special Envoy Begins First Official Mission to Myanmar, The Diplomat, 21 March 2022, at https://thediplomat.com/2022/03/asean-special-envoy-begins-first-official-mission-to-myanmar/.

called "murders-in-chief" Min Aung Hlaing has been described as "shameful" by the observers.[248]

ASEAN SE is set to visit Myanmar in late June.[249] This second meeting will be longer than the first visit, and this could be a sign that the SE could meet more stakeholders while his visit.

The Cambodian Minister Delegate, Kao Kim Hourn, stated that by engaging with Myanmar junta "we are not legitimizing or recognizing the regime there. The whole purpose is that we have to work with someone who's in power. And in this is the only way that we can make progress."[250]

These bilateral and private meetings among the SE and the military junta should not be seen, according to the author, as an official recognition of the Tatmadaw as the legitimate power in Myanmar. Furthermore, the author strongly believes that the dialogue and confrontation through which hopefully peace and stability will be achieved in the country shall be engaged with the ones who are effectively exercising the power, albeit obtained by force, and consequently the main responsible of all the violations in the country.

5.2.3 ASEAN Summit

ASEAN does not allow military party representatives to participate in public occasions alongside Member States. This is a clear strategy of ASEAN to implement the above-mentioned mechanisms of conflict management, without however being directly linked with the junta or show any kind of support.

In fact, since last October, the Commander-in-Chief, Min Aung Hlaing is excluded from the ASEAN leaders' Summit.[251]

Furthermore, Cambodia, which assumed the ASEAN presidency in 2022, did not allow the Myanmar's Foreign Minister to participate in a meeting of the bloc's foreign minister due to

[248] Civil Disobedience Movement, Twitter, 21 March 2022, at https://twitter.com/cvdom2021/status/1505964758448721921?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1505964758448721921%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.aljazeera.com%2Fnews%2F2022%2F3%2F22%2Fasean-envoy-meets-generals-in-controversial-myanmar-visit.
[249] Youtube (video), CNA, ASEAN special envoy set to make second trip to Myanmar in late June, 7 June 2022, at https://www.youtube.com/watch?v=Y784O7yGBpA.
[250] Ibid.
[251] News Wires, *ASEAN excludes Myanmar's junta chief from upcoming regional summit,* France 24 (Oct. 10, 2021), *at* https://www.france24.com/en/asia-pacific/20211016-asean-excludes-myanmar-s-junta-chief-from-upcoming-regional-summit.

the lack of progress on the 5PC.[252] These are clear demonstrations of a willingness to apply pressure on the junta.

In May 2022, an ASEAN-U.S. Special Summit was held in Washington. Once again, there were no representatives for Myanmar, and the empty chair represents the "dissatisfaction with what's taken place" and the "hope for a better path forward".[253] Notwithstanding, Myanmar was a subject of intense deliberation throughout the meetings.

ASEAN reaffirmed its efforts to facilitate a peaceful solution in the interest of the people of Myanmar and for the peace and stability in the region through the coordinated work of ASEAN SE and the SE of the UN Secretary General in Myanmar, calling for the immediate cessation of violence in Myanmar, and for the release of all political detained, and reflects a continued commitment to human rights and fundamental freedoms, as outlined in the ASEAN Charter.[254]

5.2.4 External actors

The ASEAN efforts to address the issue clearly need the cooperation of external actors, such as neighbour states and other international organisations like the UN, which have always exercised a certain degree of influence on both the region and Myanmar.

Accordingly, key regional major power, such as Japan, India, South Korea, and China, that undoubtedly have a significant role in the future of Myanmar, expressed strong statements on Myanmar Crisis, and some of them even applied sanctions.[255] However, none has so far put enough effort to change the *status quo.*[256]

Myanmar has a geo-strategic importance for China, considering the numerous investment projects made in the country, the potential access to energy resources, and the geographical location that gives China direct access to Southeast Asia and to the Indian Ocean. China's policy is "pro stability".[257] Thus, China's priority is to maintain stability, seeking a certain level

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[252] News Agencies, *Myanmar military bred from ASEAN foreign ministers' meeting,* Al Jazeera, (Feb. 3, 2022), *at* https://www.aljazeera.com/news/2022/2/3/myanmar-military-barred-from-asean-foreign-ministers-meeting.
[253] Empty Chair for Myanmar in US-ASEAN Special Summit, 12 May 2022, at https://www.voanews.com/a/empty-chair-for-myanmar-in-us-asean-special-summit-/6569185.html.
[254] ASEAN-U.S Special Summit, 2022, Joint Vision Statement, para 26, at https://asean.org/wp-content/uploads/2022/05/Final-ASEAN-US-Special-Summit-2022-Joint-Vision-Statement.pdf.
[255] Lina Alexandra and M. Wa fa Kharisma, *ASEAN-Plus or Plus-ASEAN: The Roles of Regional Major Powers in Dealing with Myanmar Crisis,* Centre for Strategic an International Studies (2021), *at* *https://www.jstor.org/stable/resrep38823*.
[256] *Ibid.*
[257] *Ibid.*

of political compromise.[258] The main concern, however, that could lead to an immediate response from China, is the border security, that would be in danger in case the situation in Myanmar will collapse.

More recently, China started to show signals of concern for the increasingly unstable situation.

In September 2021, the Chinese Communist Party (CCP) invited a representative from Myanmar's NLD to its Summit for political parties in South and Southeast Asia, a clear will from China to maintain its rapprochement with the Aung San Suu Kyi's party.[259] Following a local resistance group's attack on electricity pylons supplying the China-backed Tagaung Taung nickel-processing plant in Sagaing's Tigyaing on January 7, the NUG Defence Minister, U Yee Mon, reported that China urged them to not harm Chinese investments in the country: a small step in the direction of Chinese engagement with the country's shadow administration.[260]

During the Special ASEAN-China Foreign Ministers' Meeting in Celebration of the 30th Anniversary of Dialogue Relations, the Foreign Minister of China, Wang Yi, expressed China's willingness to play a constructive role in Myanmar's situation, to promote all parties in Myanmar to take people's interest as their top priority, and to encourage all parties to conduct political dialogue under the constitution and legal framework.[261]

The Foreign Minister added that China urges the other countries to abide by the purposes and principles of the UN Charter, to avoid unilateral sanctions and improper intervention.[262]

Myanmar's crisis is now considered as of both a regional and international concerns. Up to now, international criticisms and threats of targeted sanctions against Myanmar contributed to a heightened defensive stance of the government and the military against interference in its domestic affairs, whether it is by the ASEAN or the UN.

Myanmar is the example that sanctions are not ever the best response to State's crisis. Sanctions imposed on a country that did not target the direct responsible but affect the country as a hole,

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[258] *Ibid.*
[259] John Liu and Thompson Chau, *China Warms Up to Myanmar's Generals,* Foreign Policy, (Nov. 17, 2021), *at* https://foreignpolicy.com/2021/11/17/china-myanmar-military-regime-recognition-investment/.
[260] *China tells Myanmar's Civilians Govt to Spare Projects from attack,* The Irrawaddy, (Jan. 24, 2022), *at* https://www.irrawaddy.com/news/burma/china-tells-myanmars-civilian-govt-to-spare-projects-from-attack.html.
[261] *Chinese foreign minister expounds stance on Myanmar situation,* Xinhuanet, (Jun. 8, 2021), *at* http://www.xinhuanet.com/english/2021-06/08/c_139994556.htm.
[262] *Ibid.*

have the opposite effect. External powers should adopt measures to seek to directly affect the military junta and to avoid penalising the country's population and economy.

However, this does not mean that in this case the outside powers cannot take useful steps to improve the situation in Myanmar. Albeit this author believe that a decisive intervention can derive only from ASEAN, the external actors can still have a complementary role.

5.3 ASEAN approach to Cambodian case applied to Myanmar

To further understand the ASEAN's approach to sanction against Member States, it would be taken as case study the measures that ASEAN has adopted in the case of 1997 Cambodian *coup.*

According to Schembera, there are three factors that influence ASEAN *modus operandi* and decision-making in dealing with norms violations.[263] These are:

a) The Regional Organisation concerns about its credibility and reputation.
b) The extra-regional pressure for regional democratisation.
c) The Regional Organisation geo-political interests.

5.3.1 Cambodian 1997 Coup d'état

When the *coup* happened, Cambodia had already been accepted as a Member in ASEAN. The ASEAN leaders discussed about the appropriate measures to adopt in reaction to the *coup*.[264] These consultations revolved around three ASEAN core norms: political stability, non-interference, and non-use of force.

During an *ad hoc* ASEAN meeting they decided that "while reaffirming the commitment to the principle of non-interference in the internal affairs of other states, in the light of unfortunate circumstances which have resulted from the use of force, the wisest course of action is to delay the admission of Cambodia into ASEAN until a later date." [265]

Firstly, this historical decision led to the first case of ASEAN conditions for membership. The *coup* threatened ASEAN's credibility and reputation, which had gained international acclaim and respect for its regional role in the diplomatic resolution of the Cambodian–Vietnamese

[263] Schembera (n 180). 532.
[264] ibid.
[265] UNGA Security Council, A/52/226, 11 July 1997, Annex, para 2.

conflict.[266] The concerns of ASEAN in "losing face" regarding the norm violations played a pivotal role in the management of the Cambodian case.

Secondly, the Cambodian *coup* was matter of concern of the international community, due to the several violations of international law.[267]

Finally, the ASEAN geo-political interests had a significant role in influencing its decision-making in the case. Cambodia became a regional threat for ASEAN, jeopardising its regional stability, due to domestic political instability and concerns about the country devolving into anarchy, and having a Member State on the edge of collapse did not help ASEAN's organisational goals. Concerns over the emergence of a regional power vacuum were equally crucial from a strategic standpoint.[268]

ASEAN's handling of the Cambodian crisis is a prime example of a RO norm dispute originating from a Member State's violation of an informal norm.[269] In fact, ASEAN's non-use of force principle originally applied only to interstate situations. However, ASEAN adapted this norm to the intrastate context, defining violent events as a norm violation of a latently existing behavioural standard of non-use of force for unconstitutional government change in intrastate concerns.[270]

Ultimately, in the Cambodian case, ASEAN decided to sacrifice the norm of non-interference for the norm of non-use of force.[271] ASEAN thus considered Cambodian *coup* as a violation of the regional norm of non-use of force, taking drastic measures to enforce the domestic behaviour in line with both international and regional norms.[272]

5.3.2 Sanctions mechanism

ASEAN does not provide a sanctioning mechanism in case of norm breaches. Yet, as above demonstrated, there were some occasions in which ASEAN has applied punitive sanctions albeit in an unofficial way. The idea of including sanctions, and consequently a condition of

[266] RC Severino, 'Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General' 1. 58
[267] See Cambodia: July 1997: Shock and Aftermath, Human Rights Watch, 27 July 2007, at https://www.hrw.org/news/2007/07/27/cambodia-july-1997-shock-and-aftermath.
[268] David Capie and Shaun Narine, 'Explaining Asean: Regionalism in Southeast Asia' (2003) 58 International Journal 472. 117.
[269] Schembera (n 180). 538.
[270] ibid.
[271] Severino (n 214). 65
[272] Schembera (n 180). 540

membership, was subject of discussion within the RO, sign that this option is not complete unreachable in the future, and hence it could be extended to Myanmar.

Mahathir bin Mohamad, then Malaysian leader, already threatened Myanmar with the expulsion from the RO in 2003.[273]

Inspired by this proposition, the EPG Report proposed that "ASEAN should have the power to take measures to redress cases of serious breach of ASEAN's objectives, major principles, and commitments to important agreements. […] Such measures may include suspension of any of the rights and privileges of membership."[274]

However, the High-Level Task Force refused this proposal, considering it in contrast with ASEAN approach as it did not previously provide any formal membership criteria, but only informal aspects.[275] Moreover, articles 5 and 20 of ASEAN Charter already provided that in case of a serious breaches of the Charter or non-compliance the matter shall be referred to the ASEAN Summit which should decide the approach to take.

Because of these reasons, ASEAN approached in the past Myanmar crisis in a different way compared to the Cambodian case, which, as a result, has led to allegations of double standard in the ASEAN Way.[276] In fact, during the years, ASEAN did never officially find a violation of regional norms in the case of Myanmar, and justified not sanctioning the country based on the principle of non-interference.[277]

5.3.3 Future Perspectives

Despite ASEAN efforts in finding a common ground with the military junta, after more than one year from the *coup* there was not any significant change and, in the meantime, the first to suffer the consequences are Myanmar people. As demonstrated above, the 5PC agreed between ASEAN and Myanmar has some weak points, and furthermore military junta decided to not collaborate whatsoever to comply with the plan. Consequently, this could mean that, in the next

[273] Bandoro, Bantarto and CPF Luhulima (2003) Mahathir's Myanmar Policy Not Just Empty Rhetoric. The Jakarta Post
[274] Report of the Eminent Persons Group on the ASEAN Charter, 22 November 2013.
[275] Schembera (n 180). 539.
[276] Haacke, J. (1999). The concept of flexible engagement and the practice of enhanced interaction: Intramural challenges to the 'ASEAN way'. The Pacific Review, 12(4), 596.
[277] Schembera (n 180). 540

future, ASEAN will probably change its approach to take more effective measures to restore the peace and stability in the region.

For these reasons, in giving my perspectives of how the "ASEAN Way" of conflict management apply to the Myanmar crisis, I will apply the Schembrera's three factors. These three factors alone are necessary but not sufficient, as all of them concur to understand the ASEAN approach to conflicts.

The three factors

In the past, the (b) and (c) factors, the external pressure and the geo-political interests, have played a counterproductive role in the ASEAN decision-making process.

In fact, as shown above, the extra-regional pressures for democratisation were considered by ASEAN as an undesirable interference in Member States internal affairs.

Another important factor in understanding ASEAN's stance on sanctioning Myanmar norm violations is geoeconomics and geopolitical interests. Myanmar represented an asset to ASEAN, with a significant natural resource endowment and the prospect of opening to foreign direct investment, which it did not want to jeopardise by imposing sanctions.[278] Furthermore, because Myanmar is strategically located between India and China, ASEAN was concerned that sanctions might push the country into the hands of these two rivals. According to Donno, geopolitical interest can concur as one of the factors in a RO's enforcement of democratic principle, which means that the enforcement is less likely in countries of high geopolitical importance.[279]

However, concerning the (a) factor, ASEAN's diplomacy in Myanmar has harmed the organization's credibility and reputation as a peacemaker, and the military junta's refusal to follow the 5PC is causing ASEAN to lose face even more.[280] In fact, the reputation costs should play an important role in dealing effectively with Myanmar crisis, as it was the motivation to act decisively in the Cambodia case.

The principle of non-interference has been periodically re-calibrated while dealing with the Myanmar crisis, as it is a vital component that keeps ASEAN together. Engagement in the

[278] ibid.
[279] Daniela Donno, 'Who Is Punished? Regional Intergovernmental Organizations and the Enforcement of Democratic Norms' (2010) 64 International Organization 593. 609.
[280] Naifa Rizani Lardo, Myanmar Crisis and the future of ASEAN, CSIS (2021), 5.

manner of a Member, with pressures and critiques given alongside support, is an effective means of fostering trust and confidence between ASEAN and Myanmar.

In fact, since the beginning ASEAN has complied with the principles of *musyawarah* and *mufakat*, establishing a constructive and non-hostile dialogue with Myanmar, as to not isolate or embarrass the country, and thus preserving its face, despite the international community pressure and the military junta violations of regional core norms, namely the non-use of force. Accordingly, even if an ASEAN Member adopts a position that is controversial with other Members, it will not behave in such a way that leads the Member to "lose face" publicly.[281] Moreover, the ASEAN way of settling disputes ensures that they are resolved objectively while not making *either side* lose face.[282]

However, because of the non-compliance of both the 5PC and regional core norms, Myanmar is making ASEAN losing face and its entire system of conflict resolution is highly criticized and contested at international level. Hence, Myanmar is not respecting its part in not embarrassing ASEAN and its Member States.

Therefore, considering how ASEAN approached the Cambodian case, the author argues that the conditions require ASEAN to move beyond the soft approach to eventually shift for a hard approach to Myanmar crisis.

To successfully do so, ASEAN needs to interpret the principle of non-interference less strictly. Based on the recent developments, ASEAN has begun to interfere more effectively in Myanmar internal affairs, to the extent that now consultations have partially involved also the NUG, in open opposition of military junta's will. As it was above demonstrated, ASEAN has always tried to strike a balance between non-interference (and thus saving face) with the protection of human rights. As the first principle was not reciprocated from the counterpart, the author believes that ASEAN will now move the needle in favour of the protection of human rights.

[281] Acharya (n 23). 83
[282] TUAN (n 36). 69

CHAPTER 6
CONCLUSION

The regionalisation of collective security has been subject to intensive debates, as above demonstrated. The functionalists, as well as universalists, have been sceptical about the possibility for regions to deal effectively with collective security, seeing regionalism in open opposition to universalism. Instead, IOs were considered to have more chances in managing international conflicts.

Although this position might have been considered acceptable in the past, the new global dynamics and the growing importance of ROs have made this vision outdated and obsolete. In fact, the post-Cold War era has shown a more promising environment for regionalism in the field of collective security, compared to the past.

More specifically, two main factors have been pivotal in the role of the UN and ASEAN in dealing with collective security: firstly, the UN increasing inadequacy in managing, preventing, and solving international conflicts on a global scale; secondly, the increasingly perception by ASEAN of a distant global UN, which led the RO to consider any intervention as an external imposition on their internal affairs.

However, the author firmly supports the idea that regionalism in the context of collective security can exist without necessarily being seen as antagonistic to universalism, but rather ROs can coexist with IOs in a framework of complementarity and mutual support. In fact, the post-Cold War security environment, as well as the need for post-colonial states to take charge of their own affairs, have reinforced the concept of regional participation to UN security operations.

The regionalisation of conflict management and security, as well as ASEAN's dynamism in dealing with crises, makes the regional approach, in the light of what was demonstrated in the thesis, the most effective in terms of time and result, specifically in the case of Myanmar's crisis.

The background, the history, and the reasons that led the Founding Fathers to establish ASEAN are fundamental to fully understand the rationale behind its legal system. The dominance and colonialism of Western imperialism profoundly affected the countries and represent the main reason of the development of the principle of non-interference, regulated by article 2 of TAC.

Despite the several intra- and inter-state regional conflicts, the said principle has successfully regulated the relationship between the Member States, as it allowed to slowly, but steadily, build up the trust amongst them. Furthermore, in the post-Cold War era, ASEAN modified its

"agree to disagree" strategy, as now the members can deal together with delicate issues without worrying that doing so will cause them to "lose face" when tackling emerging challenges.[283]
ASEAN promotes a comprehensive approach to security, renunciation of aggression and of threat or use of force or any other action that is in contrast with international law, and reliance on peaceful settlements of dispute.[284] The "ASEAN Way" of conflict management is the decision-making process through which the Member States come to an agreement to resolve any disputes that have arisen. In dealing with conflicts, it conducts constructive engagement through dialogue that involves all the members to refrain from any action that can embarrass and isolate the conflicted country.[285] ASEAN combines formal and informal mechanisms, in which the culture always influences upon conflict management, thus conferring to the RO dynamism and discretion in dealing with disputes.
Nowadays ASEAN's mechanisms of conflict management have evolved beyond the ASEAN Way and the principle of non-interference. Since the establishment of ASEAN, some Member States experienced democratic transition which had a significant impact on the entire region. In the case of Myanmar, the democratic transitions had dramatic consequences. Myanmar's shift in domestic politics, and especially the consequences and impact on the population, had salient effects on the "ASEAN Way" of conflict management. ASEAN always tried to strike the balance between the non-interference in internal affairs of Myanmar and pursuing the regional peace and stability, especially regarding non-use of force and constitutional change. As demonstrated in the last chapter, the ASEAN approach to Myanmar crisis has changed considerably, from a soft approach to a recent hard approach.
What have emerged in my empirical study of ASEAN and its mechanisms, is that they are far to be static. The dynamics between the Member States and their needs and approaches have evolved to the point of almost drastic change. Furthermore, despite the lack of an official sanctions policy in contrast with others ROs, ASEAN does interfere to some extent into Member States' internal affairs in cases of norm violations. ASEAN's informal mechanisms have always given the organisation the ability to adapt to the needs of the moment and have more discretion in taking *ad hoc* decisions in responding to Members' norms violations.
In pursuing to answer the main research question, the author has tested the "ASEAN Way" of conflict management on the Myanmar case. In doing so, the three Schembrera's factors

[283] TUAN (n 36). 78.
[284] ASEAN POLITICAL-SECURITY COMMUNITY BLUEPRINT 2009, para 9.
[285] Anugrah, A. (2021). *The ASEAN "Crack": Myanmar Conflict as The Warning Sign of Peace Stability in South East Asia Region*. Proceeding international relations on indonesian foreign policy conference, 1(1), 37-46.

have been applied to the Myanmar crisis. These principles represent the *motu* that steer ASEAN decision-making process in dealing with conflicts. Accordingly, ASEAN can decide to interfere in a different extent based on how much concerns it has about its credibility and reputation, how much extra-regional pressure is exercised, and how strong the geo-political interests are. As a result, the author believes that *rebus sic stantibus*, ASEAN will move toward a more active and hard approach with Myanmar, to provide a viable solution and thus interfere in the crisis.

Therefore, the author believes that the "ASEAN Way" of conflict management represent a viable mechanism for regional conflicts.

Notwithstanding the above, for the RO to continue to be effective when dealing with disputes, the principle of non-interference must be further adapted to the evolving circumstances, and possibly foresee some exceptions. Moreover, ASEAN, as a dynamics regional organisation, should reconsider the EPG proposal about suspension of any of the rights and privileges of membership in case of norm's violations.

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