

## SPECIAL NOTE

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# The Roadmap toward the Creation of ASEAN Security Community in 2015: Legal Perspectives

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I.B.R. Supancana\*

### 1. Introduction

The first idea of establishing ASEAN Security Community was first raised by Indonesia in mid of 2003 in a seminar in New York sponsored by the Ministry of Foreign Affairs of the Republic of Indonesia.<sup>1</sup> During the 9th ASEAN Summit in Bali IN 2003, the ASEAN Concord II was declared in which member states form consensuses that future ASEAN cooperation in the realm of security relies "exclusively on peaceful processes in the settlement of intra regional differences", that their security is "fundamentally linked to one another and bound by geographic location, common vision and objectives...."<sup>2</sup> Since then the idea has been exercised to materialize ASC. ASC is designed as one of the three pillars of ASEAN Community, together with ASEAN Economic Community (AEC) and ASEAN Social-Cultural Community (ASCC). The idea of ASC also reflects paradigmatic changes in the organization of ASEAN, from bureaucratic approach to people's approach.

\* Chairman/Founder of Center for Regulatory Research Jakarta-Indonesia. Ph. D. (Leiden)

<sup>1</sup> For further detail see Rizal Sukma, *The Future of ASEAN: Toward a Security Community*, Paper presented at a Seminar on ASEAN Cooperation: Challenges and Prospects in the Current International Situation, NEW YORK TIMES, Jun. 3, 2003. Compare the concept of Security Community with other concepts such as: Defense Pact, Military Alliance, and Security Regime. The Idea of ASC was also reflected in another presentation made by former Minister of Foreign Affairs of Republic of Indonesia with the title US-Indonesian Relations: Toward a New Era of Partnership, USINDO Tenth Lecture Series, Washington, D.C, March 23, 2004.

<sup>2</sup> For further detail, see Kwei-Bo Huang, *Managing Southeast Asian Security: The ASEAN Security Community and Institutional Change in ASEAN*, Paper presented at the 46th Annual Convention of the International Studies Association, Honolulu-Hawaii, USA, 4, March 1-5, 2005.

In addition to the many approaches from perspectives of international politics/relations, it is important to see the issue of ASC formation from legal perspectives, particularly in the framework international law. It is understood that legal approach would be a very important approach to secure that once it is established ASC would be effective and have strong legal basis for its implementations. This paper is aimed at exploring some legal aspects of ASC, like it legal basis; basic principles; and the relation between national law of individual member countries and ASEAN Law.

## 2. The Concept, Aim and Components of ASEAN Security Community

The concept of Security Community is often defined as a group of states that has achieved a condition, as a result of flow of communication and the habit of cooperation, where members share “expectations of peaceful change” and rule out “the use of force as a means of problem solving.” State that belong to a Security Community come to see their security as fundamentally linked to other states and then destiny bound by common norms, history, political experience, and regional location. A Security Community exists when states reach the level of confidence that security can only be attained if they cooperate with each other.<sup>3</sup>

Almost five decades ago Karl Deutsch defined a Security Community as a group that has “become integrated,” where integration is defined as the attainment of a sense of community, accompanied by formal or informal institutions or practices, sufficiently strong and widespread to assure peaceful change among members of a group with “reasonable” certainty over along period of time.” Such communities could either be “amalgamated” through the formal political merger of the participating units, or remain “pluralistic,” in which case the members retain their independence and sovereignty.<sup>4</sup> A Security Community is also characterized by:<sup>5</sup>

- (a) The absence of a competitive military build-up among the regional

<sup>3</sup> *Id.* at 2.

<sup>4</sup> Karl W Deutsch, *Security Communities*, in JAMES ROSENAU (ed.), *INTERNATIONAL POLITICS AND FOREIGN POLICY*, (Free Press 1969) as cited by ACHARYA AMITAV, *CONSTRUCTING A SECURITY COMMUNITY IN SOUTHEAST ASIA: ASEAN AND THE PROBLEM OF REGIONAL ORDER* (Routledge 2001) as further cited by DONALD K EMMERSON, *WILL THE REAL ASEAN PLEASE STAND UP? SECURITY, COMMUNITY, AND DEMOCRACY IN SOUTHEAST ASIA*, Southeast Asia Forum, Stanford University, Mar. 2005.

<sup>5</sup> *Supra* note 1.

- actors;
- (b) Total absence of armed inter-state conflict;
- (c) The presence of formal and informal institutions and practices which serve to reduce, prevent, manage, and resolve conflict and disorder;
- (d) High degree of economic integration; and
- (e) The absence of territorial dispute among member states.

An ASEAN Security Community (ASC) designed both to enhance the cooperative and comprehensive security of all Southeast Asian countries and to be open to all extra-regional countries probably best meets ASEAN and its member states' need.<sup>6</sup> The ASC shall aim to ensure that countries in the region live at peace with one another and with the world in a just, democratic and harmonious environment.<sup>7</sup> ASC has the following components:<sup>8</sup>

- (a) Political development;
- (b) Shaping and sharing of norms;
- (c) Conflict prevention;
- (d) Conflict resolution;
- (e) Post-conflict peace building; and
- (f) Implementing mechanisms.

The above components will be built on the strong foundation of ASEAN processes, principles, agreements and structures.

### 3. Security Challenge as Common Grounds for Establishing ASC

The ASC plays extremely important role in the current stage as ASEAN is now facing many opportunities and at the same time confronting lots of new challenges such as international terrorism, trans-national crimes, and epidemic outbreaks during its process of development and cooperation for peace, stability, wealth and prosperity of the entire region.

There are some other structural challenges that confront ASEAN internationally and internally among the member states. Internationally the collapse of bipolar international system and the downfall of the Soviet Union and a seemingly "power vacuum" in the

<sup>6</sup> Huang, *supra* note 2, at 8.

<sup>7</sup> ASEAN Secretariat, *ASEAN Security Community*.

<sup>8</sup> ASEAN Security Community Plan of Action, Annex.

region of Southeast Asia after the cold war era even brought more attention to the development of the security device that can result in a peaceful and prosperous environment for ASEAN countries.<sup>9</sup> In addition, the setback of the financial crisis in 1997 awakens some Southeast Asian countries' desire for rejuvenating ASEAN.<sup>10</sup>

Internally there are some factors that can be viewed as driving force for the establishment of ASC: past effort of ASEAN to maintain peace and stability; domestic political development and leadership change in several ASEAN countries; the admission of the new ASEAN member countries; and familiarization and enhance mutual understanding of the "ASEAN Way"<sup>11</sup> among its member countries<sup>12</sup>. Some non-traditional challenges also confront ASEAN, such as: terrorism, illicit drug, piracy, people smuggling and human trafficking, HIV/AIDS and cyber crime<sup>13</sup>.

#### 4. Legal Basis for Establishing ASEAN Security Community

Legal basis for the establishment are ranging from Hard Laws and Soft Laws. These legal instruments have laid down some important principles in the formation process of ASC and would eventually be used to make ASC effective. Below are some of those instruments:

##### A. ASEAN Declaration, Bangkok, 8 August 1967

The text of the Bangkok Declaration that founded ASEAN places heavy emphasis on economic, social and cultural cooperation. The only item in the Bangkok's Declaration "aims and purposes" that refers to regional security calls for the promotion of "regional peace and stability," not through any kind of cooperation or joint action but "through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter."<sup>14</sup>

<sup>9</sup> *Id.*

<sup>10</sup> Amitav Acharya, *The Role of Regional Organizations: Are Views Changing?*, Paper presented for the Pacific Symposium, 2004, National Defense University, Washington, D.C., as cited by Huang, *supra* note 2, Apr. 22-23, 2004.

<sup>11</sup> "ASEAN Way" is the core of the ASEAN security culture which consists of the following elements: Sovereign Equality; Non-Recourse to the Use of Force; Non-Interference and Non-Intervention; Non-Involvement of ASEAN in Bilateral Conflict; Quiet Diplomacy; and Mutual Respect and Tolerance. For more analysis on the "ASEAN Way," see JOHAN SARAVANAMUTTU, *WITHER THE ASEAN SECURITY COMMUNITY? SOME REFLECTIONS*, 1 IJAPS 46-47 (2005).

<sup>12</sup> For further elaboration, see Huang, *supra* note 2, at 3-8.

<sup>13</sup> ASEAN Annual Report 2004-2005 at 15.

<sup>14</sup> For further analysis and elaboration about the contribution of Bangkok Declaration toward ASEAN Security Community, see RUDOLFO C. SEVERINO, *TOWARD AN ASEAN SECURITY COMMUNITY* 2-3 (ISEAS 2004).

### B. Zone of Peace, Freedom and Neutrality (ZOPFAN), Kuala Lumpur, 27 November 1971

The ZOPFAN Declaration explicitly pledged ASEAN, for the first time, to cooperate in security matters, specifically to keep the region insulated, to the extent possible, from big power conflicts.<sup>15</sup>

### C. Declaration of ASEAN Concord, Bali 24 February 1976

The Declaration of ASEAN Concord had only one phrase reference to security cooperation, mentioning, with exceeding caution, “continuation of cooperation on a non-ASEAN basis between the member states in security matters in accordance with their mutual needs and interests.”<sup>16</sup>

### D. Treaty of Amity and Cooperation (TAC) in Southeast Asia, Bali 24 February 1976

The 1976 Treaty of Amity and Cooperation in Southeast Asia is a legally binding instrument to promote perpetual peace, everlasting amity and cooperation in the region. This Treaty has been accepted by a growing number of countries outside Southeast Asia. Japan, Pakistan, Republic of Korea, Russia, Papua New Guinea, China and India have acceded the Treaty. These accessions are a show of political support for ASEAN’s principles of peaceful coexistence, friendly consultation and resolution of conflict, and goodwill cooperation.

### E. ASEAN Declaration on the South China Sea, Manila, 22 July 1992

The Declaration on the South China Sea gave notice of ASEAN’s solidarity behind peaceful and constructive approaches to the problem of the South China Sea despite the conflicting territorial and jurisdictional claims of some of its members. The ASEAN stands in the Declaration lead to the conclusion of ASEAN-China code of conduct for the South China Sea.<sup>17</sup>

### F. Treaty on the Southeast Asia Nuclear Weapon-Free Zone, Bangkok, 15 December 1997

The Treaty on the Southeast Asia Nuclear Weapon-Free Zone (SEANWFZ) is crucial to both confidence building in Southeast Asia and to worldwide nuclear disarmament. The ten ASEAN member countries have continued to seek ways and means of

<sup>15</sup> *Id.* at 5.

<sup>16</sup> *Id.* at 6.

<sup>17</sup> *Id.* at 7.

enhancing the importance of SEANWFZ, and to secure the support of all nuclear weapon states (NWS) for the SEANWFZ Treaty through their signing of the protocol of the Treaty.

#### G. ASEAN Vision 2020, Kuala Lumpur, 15 December 1997

ASEAN Vision 2020 clearly states that ASEAN shall have, by the year 2020, established a peaceful and stable Southeast Asia where each nation is at peace with itself and where the causes for conflict have been eliminated, through abiding respect for justice and the rule of law and through the strengthening of national and regional resilience.<sup>18</sup>

#### H. Declaration of ASEAN Concord II, Bali 7 October 2003

The ASEAN Concord II stipulates the establishment of an ASEAN Community resting on three pillars: an ASEAN Security Community, an ASEAN Economic Community and an ASEAN Socio-Cultural Community. The ASEAN Concord II further states that the ASEAN Security Community is envisaged to bring ASEAN's political and security cooperation to a higher plane to ensure that countries in the region live at peace with one another and with the world at large in a just, democratic and harmonious environment.<sup>19</sup>

#### I. The ASC Plan of Action, Vientiane Summit of 2004

This document set out five "strategic thrusts": political development,<sup>20</sup> shaping and sharing of norms,<sup>21</sup> conflict prevention,<sup>22</sup> conflict resolution,<sup>23</sup> and post-conflict peace-building.<sup>24</sup>

<sup>18</sup> *Supra* note 13, at 13. See also Brian L Job, *The ASEAN Security Community: Processes of Institutional Socialization in a Contested Context*, Paper presented at 48th Annual Convention of the International Studies Association, (2007) Appendix A.

<sup>19</sup> *Id.*

<sup>20</sup> Promotion of a just, democratic and harmonious environment; promotion of human rights and obligations; and promotion of people-to-people contacts.

<sup>21</sup> Strengthening the TAC regime; working toward development of an ASEAN Charter; resolving all outstanding issues; ASEAN Treaty on Mutual Legal Assistance (MLA) Agreement; ASEAN Extradition Treaty as envisaged by the 1976 Declaration of ASEAN Concord; Ensuring the implementation of the Declaration on the Conduct of Parties in the South China Sea (DOC); ASEAN Convention on Counter Terrorism.

<sup>22</sup> Strengthening confidence building measures; strengthening preventive measures; strengthening the ARF process in support of the ASEAN Security Community; enhancing cooperation on non-traditional security issues; strengthening efforts in maintaining respect for territorial integrity, sovereignty and unity of member countries; strengthening cooperation to address threats and challenges posed by separatism.

<sup>23</sup> Strengthening dispute resolution mechanism; developing regional cooperation for maintenance of peace and stability; developing supporting initiatives.

<sup>24</sup> Strengthening ASEAN Humanitarian assistance; developing cooperation in post-conflict reconstruction and rehabilitation in affected; establishing a mechanism to mobilise necessary resources to facilitate post-conflict

J. “One Vision, One Identity, One Community” Statement, 11th ASEAN Summit, Kuala Lumpur, December 2005

In the Statement it was stated that head of member states’ governments noted the steady progress made in the implementation of the ASEAN Security Community (ASC) related activities through the Vientiane Action Program (VAP) and the ASC Plan of Action (PoA).

K. Declaration on the Establishment of the ASEAN Charter, 11th ASEAN Summit, Kuala Lumpur, December 2005

The Declaration among other states that the ASEAN Charter will reaffirm principles, goals and ideals contained in ASEAN’s Milestone Agreements.... as well as the principles of inter-state relations in accordance with the UN Charter and established international law that promote and protect ASEAN Community interests as well as inter-state relations and the national interests of the individual ASEAN Member Countries... The ASEAN Charter will confer a legal personality to ASEAN and determine the functions, develop areas of competence of key ASEAN bodies and their relationship with one another in the overall ASEAN structure.

L. Report of the Eminent Person Group on the ASEAN Charter, December 2006

In their report the EPG endorsed 28 “bold and visionary” recommendations for the proposed ASEAN Charter. The recommendation include promotion of ASEAN’s peace and stability through the active strengthening of democratic values, good governance, rejection of unconstitutional and undemocratic changes of government, respect of the rule of law, including international humanitarian law, human rights and fundamental freedoms.

M. Joint Declaration of The ASEAN Defence Ministers (ADMM) on Enhancing Regional Peace and Stability, Singapore 2007

The joint declaration among others reaffirms ADMM’s commitment to contribute to the establishment of an ASEAN Security Community (ASC) and to promote the implementation of Vientiane Action Program on the ASC. It also reaffirm that the ASC embodies ASEAN’s aspirations to bring ASEAN’s political and security cooperation to a higher plane to ensure ASEAN member countries live at peace with one another and with the world at large. Commit to contribute to the realization of an ASEAN Security Community that is open, dynamic, and Resilient by 2015.

## N. The ASEAN Charter, December 2007

The ASEAN Charter was signed on 20th November 2007 at ASEAN Summit Meeting in Singapore. When it enters into force, the ASEAN Charter will create ASEAN as an International Legal personality. With such legal status, ASEAN will have more freedoms to cooperate with their counterparts, particularly from the business sectors. ASEAN may also have its own assets and instruments to materialize its vision and mission.<sup>25</sup>

## 5. Basic Principles of ASEAN to Deal with Regional Security Issues

The above ASEAN Legal instruments in the form of Hard Laws and Soft Laws have laid down core principles of ASEAN as its approach to deal with issues on regional security. Some of the core principles were also taken from relevant international legal instruments as formulated in both The UN Charter, Dasa Sila Bandung (Ten Principles of Bandung)<sup>26</sup> and UNGA Resolutions No. 2625 of 1970 concerning Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.<sup>27</sup> Some of the core principles cover, among others:<sup>28</sup>

### A. The Peaceful Settlement of Disputes

Under the framework of Public International Law, particularly as stated in the Charter of the United Nations, dispute settlement mechanism can be divided into: peaceful settlement and settlement of the disputes by the use of force.<sup>29</sup> Peaceful settlement of international disputes covers several procedures, such as: negotiation; enquiry;

peace building.

<sup>25</sup> For further detail about ASEAN Charter, see I.B.R. Supancana, *Charter of the Association of Southeast Asian Nations*, 1 JEAIL 188-190 (2008).

<sup>26</sup> These ten principles were agreed during Asia-Africa Conference in Bandung in 1955.

<sup>27</sup> The UNGA Declaration consist of 7 principles, namely: principle of prohibition of the threat or use of force; principle that state shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; the principle of sovereign equality of states; the principle of non-intervention in the internal affairs of other states; the principle of the duty of states to cooperate with one another in accordance with the charter; the principle of equal rights and self-determination of peoples; and the principle of fulfilment in good faith of obligation assumed in accordance with the Charter. For further analysis of the above principles, see MILAN SAHOVIC (ed), *PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND COOPERATION* (New York 1972).

<sup>28</sup> To get more insight information about ASEAN Basic Principles and Policies relevant to ASC, see RODOLFO C. SEVERINO, *TOWARDS AN ASEAN SECURITY COMMUNITY* (IEAS 2004).

<sup>29</sup> For further information and analysis about dispute settlement mechanism under the framework of international law, see J.G MERRILS, *INTERNATIONAL DISPUTE SETTLEMENT* (Cambridge 2nd ed. 1993).



mediation; conciliation; good offices, arbitration and judicial settlement.<sup>30</sup> Since its establishment, ASEAN has incorporated the principle of peaceful settlement of disputes into their various instruments, particularly in TAC and instrument on Settlement of Disputes. In order to secure peaceful settlement of disputes some specific mechanism is applies such as through High Council of TAC; through ASEAN Regional Forum (ARF) and ASEAN summit meeting.

## B. The Renunciation of the Use or Threat of Force in Resolving Differences

As a logical consequence of implementing the principle of peaceful settlement of disputes, member states shall refrain from using threat or force in resolving differences and/or disputes among them. Article 2(4) of Charter of the United Nations clearly states that all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. During the discussion on the formulation of UNGA Resolution No. 2625 of 1970, there were two (2) different interpretations concerning the phrase “the use of force.” One<sup>31</sup> was of the opinion that the word “force” referred to the use of “arm forces” while another<sup>32</sup> was of the opinion that the word “force” is not confined to the use of force, but cover all kinds of pressure, including political and economic pressure which would eventually threat the territorial integrity and political independence of a country.

In the formulation of UNGA Resolution No. 2625 of 1970, the word “threat” covers certain acts such as aggression, war propaganda, violation to the borderline of other country or international borderline, reprisals, occupation, etc. The ASEAN member countries are committed to refrain from applying/implementing/executing the use of force and threat in settling any possible disputes among them.

## C. Respect for the Sovereign Equality of States

It is a very basic principle that sovereignty of a nation/country shall be respected in a proper manner. This principle has so far been respected by ASEAN member countries. This principle also reflects equality among the ASEAN member countries. Charter of the United Nations has clearly elaborates elements of sovereign equality of state, namely: the state are juridically equal; each state enjoys the rights inherent in full sovereignty; the personality of state is respected as well as its territorial integrity and political

<sup>30</sup> U.N. Charter art. 33.

<sup>31</sup> Mostly from developed and Western Countries.

<sup>32</sup> Mostly from developing countries. For further detail, see Shaovic, *supra* note 27.

independence.<sup>33</sup> The principle of sovereign equality of states was more elaborated in the UNGA Resolution No. 2625 of 1970 in the formulation that each state has the rights freely to choose and develop its principle to respect sovereign equality of states among ASEAN members shall be guided by and in line with elements and interpretation of such principle as formulated both in the UN Charter and in UGA Resolution No. 2625 of 1970.

In the ASEAN Charter the principle of respect for the sovereign equality of states was emphasized together with the principles of inter-state relations in accordance with the UN Charter. In another world, the interpretation and implementation of this principle shall comply with existing general public international law.

#### D. Non-interference in the Internal Affairs of other Countries

The study on the principle of non interference in the internal affairs of other countries can be perceived as having more theoretical focus as it is based on the fact that international law theories concerning such principle are not uniform. In general such theories can be divided into two (2) concepts. The first concept reflects a narrow interpretation over this principle, while the second concept reflects a broader interpretation.

The main distinction between the 2 (two) concepts lies on the meaning of “intervention.” The first concept always correlate the word “intervention” with the use of armed forces, while the second concept interprets “intervention” not only to the use of armed forces, but also include other activities both in the field of politic, economy and culture that can be deemed as a form of intervention. The broader concept also closely related to other principles such as: respect of sovereignty, territorial integrity, political independence and self determination.

Under existing international law, some restrictions are applied to non-interference principle, particularly to certain situations like: collective intervention; protection of rights, interests and personal security of its nationals; self defence; act of reprisals, etc.

The principle of non-interference in the internal affairs of other countries have so far been respected by ASEAN member countries. Nevertheless, in the context of formation of ASEAN Security Community (ASC) this principle might be applied in a more flexible way since there will be made possible for a limited intervention from member countries in the case of human rights violations, and in the case that the idea of having a regional (ASEAN) peace-keeping forces can be agreed by member countries.<sup>34</sup>

<sup>33</sup> U.N. Charter art. 2(1).

<sup>34</sup> See ASEAN Charter which reaffirms some important principles, goals and ideals of ASEAN, including promotion of human rights by establishing a regional human rights body.

### E. Consensus-based Decisionmaking

The principle of consensus-based decision making is one of very important principles among the core principles under what is called as “ASEAN Way”. With the addition of some new member countries of ASEAN, it seems that this principle in certain situation can no longer be effective. It is therefore important to consider the application of voting system to different situations when it is deemed fit to do that. For the above purpose, there is a need to draw some parameters that can be used as guidelines on the application consensus-based or voting-based on the decision making process for the sake of practicality or for certain objectives.

## 6. The Possibility of Transforming Parts of ASEAN Law into Supranational Law

The question of relations between national law and international law has been a hot and continuing debate in the modern international law. One characteristic of modern international law of the post World War II is the international law regime based on coordination. Coordination among existing and new independent countries. This characteristic implies that international law is not based on supra-national law, but based on the willingness of sovereign countries to comply with international law, rules and principles in order to accommodate their national interest. Thus, sovereign countries voluntarily comply with international law rules and principles.

In the globalization era where the degree of interdependency among countries is quite high, there is an evolution toward possible application of supra-national law. Some field of international law has moved toward such direction, such as in the field of human rights and international criminal law.

In the context of anticipating the entry into force of ASEAN Charter by the end of this year and in the process of establishing ASEAN Security Community (ASC) in 2015, it is important to explore the possibility of transforming a part of existing ASEAN Law into Supra-national law. When we refer to traditional security issues, for example, it seems that the existing system known as “ASEAN Way” shall still be preserved, for certain period of time, that is based on coordination. Meanwhile for some non-traditional issues such as terrorism, drug-trafficking, human rights, corporate crime and other issues, it should be made possible for the application of parts of ASEAN Law as supra-national law to its member countries.

Intensive discussion, consultation, negotiation, and considerations among member countries both at governmental level as well as non-governmental level (such as ASEAN People’s Assembly/ APA) will contribute to find a comprehensive solution to

this question.

## **7. Concluding Remarks**

As the establishment of ASEAN Security Community (ASC) in 2015 should be materialized, it is important to consider such establishment from both political and security perspectives as well as legal perspectives.

Proper legal considerations to the establishment of ASC will provide substantial contribution to the effectiveness of ASC to deal with both traditional and non-traditional security issues.

There are at least three legal issues that should be dealt with, namely its legal basis, its core principles, and the possibility transform parts of ASEAN Law into Supra-national Law while preserving other parts of ASEAN Law based on coordination rather than subordination.