

## Southeast Asian Hesitation: ASEAN Countries and the International Criminal Court

By Lasse Schuldt\*

### A. Introduction

In one of his final press releases,<sup>1</sup> the former United Nations Special Rapporteur on the human rights situation in Myanmar, Tomás Ojea Quintana, urged that greater attention be given to the further deterioration of the human rights situation in Rakhine State. He submitted that the discrimination and persecution against the Rohingya community in Rakhine could amount to crimes against humanity. In his final report,<sup>2</sup> prior to the end of his six-year mandate, Quintana states that “extrajudicial killing, rape, and other forms of sexual violence, arbitrary detention, torture, and ill-treatment in detention, denial of due process and fair trial rights, and the forcible transfer and severe deprivation of liberty of populations has taken place on a large scale and has been directed against” the Rohingya Muslim population in Rakhine State.<sup>3</sup> However, there is no sign that any of the alleged crimes are being adequately investigated by the competent domestic authorities. Furthermore, the ICC does not have jurisdiction as Myanmar is not a State Party to the Rome Statute.

In a very different context, another Southeast Asian spotlight is continuously shining on Thailand, one of Myanmar’s neighbors. Throughout the past two years, the country has been experiencing particularly heavy political turmoil. Since the second half of 2013 critics and supporters of the then Pheu Thai government had been entangled in a fight for power that resulted in the military coup d’état of 22 May 2014. Before the coup, the Pheu Thai

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<sup>1</sup> Press Release, Office of the High Commissioner for Human Rights, Myanmar: UN Expert Raises Alarm on Rakhine State, U.N. Press Release (Apr. 7, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14476&LangID=E>.

<sup>2</sup> Special Rapporteur on the Situation of Human Rights in Myanmar, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, Human Rights Council, U.N. Doc. A/HRC/25/64 (Apr. 2, 2014) (by Tomás Ojea Quintana), <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Pages/ListReports.aspx>.

<sup>3</sup> *Id.* at 13.

government and their supporters revived the idea of requesting an ICC investigation into the deaths of 91 “Red Shirt” protesters in 2010.<sup>4</sup> While possibly part of a political maneuver, it was publicly debated as to how such an investigation would be legally feasible, given the fact that Thailand is not a State Party to the Rome Statute of the ICC.<sup>5</sup> In this regard, the possibility of an ad-hoc acceptance of the Court’s jurisdiction was raised.<sup>6</sup> However, this option has not been taken so far, and there are currently no signs that Thailand will lodge the pertaining declaration with the Court’s Registrar in the near future.

Concerning yet two other sets of circumstances, there are news about steadily increasing violence against religious minorities in Indonesia<sup>7</sup> as well as reports of continuing attacks by militant insurgents and in turn harsh military crackdowns in the southern provinces of Thailand.<sup>8</sup> All of these incidents may or may not involve crimes within the scope of the Rome Statute of the ICC. In any event, it is quite unlikely that any of these situations will be referred to the ICC because none of these countries have ratified the Rome Statute.<sup>9</sup> Thailand signed the Statute in 2000, but has not yet proceeded to ratification. Cambodia and the Philippines are the only two countries among the ten Member States of ASEAN<sup>10</sup> that have joined the ICC. Apart from these two states, the overall relationship between Southeast Asia and the ICC can be described as one of particular hesitation.

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<sup>4</sup> Thanida Tansubhapol, *Surapong Renews Case for ICC Intervention in Clashes*, BANGKOK POST, Nov. 8, 2012; see also Achara Ashayagachat, *Rally Will Be Litmus Test for Both Sides*, BANGKOK POST, Apr. 17, 2014.

<sup>5</sup> Thailand signed the Rome Statute on 2 October 2000, but has not yet ratified it.

<sup>6</sup> According to Article 12(3) of the Rome Statute, a State which is not a Party to the Statute “may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court.” Rome Statute of the International Criminal Court art. 12, para. 3, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

<sup>7</sup> *Indonesia: Religious Minorities Targets of Rising Violence*, HUM. RTS. WATCH, Feb. 28, 2013, <http://www.hrw.org/news/2013/02/28/indonesia-religious-minorities-targets-rising-violence>.

<sup>8</sup> See Mark McDonald, *Teachers Being Targeted and Murdered in Thailand*, N.Y. TIMES, Dec. 16, 2012; see also *Bomb Kills Three Policemen in Thai South*, NEW STRAITS TIMES, Apr. 26, 2014, [http://cached.newslookup.com/cached.php?ref\\_id=433&siteid=2354&id=5818638&t=1398488301](http://cached.newslookup.com/cached.php?ref_id=433&siteid=2354&id=5818638&t=1398488301).

<sup>9</sup> For the referral mechanisms under the Rome Statute, see *infra* Part C.II.1.

<sup>10</sup> The ten Member States of ASEAN are: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

## B. International Criminal Justice in Southeast Asia

### 1. From Ad-Hoc Tribunals to the ICC

The recent history of international criminal tribunals has long been dominated by so-called ad-hoc tribunals. The International Criminal Tribunal for the former Yugoslavia ("ICTY"), the International Criminal Tribunal for Rwanda ("ICTR"), the Special Court for Sierra Leone ("SCSL"), and the Special Tribunal for Lebanon ("STL") have all been set up by the international community in order to achieve justice with regard to particular situations. The same holds true for the two tribunals that have been established in Asia.

The Special Panels for Serious Crimes ("SPSC") in Timor-Leste were set up in 2000 to deal with crimes allegedly committed by Indonesian-backed militia groups and military forces following the 1999 referendum that resulted in the independence of the Democratic Republic of Timor-Leste.<sup>11</sup> The Special Panels were part of the District Court in Dili and they were each composed of two international judges and one East-Timorese judge.<sup>12</sup> They had the mandate to exercise jurisdiction *ratione materiae* with respect to genocide, war crimes, crimes against humanity, murder, sexual offences, and torture.<sup>13</sup> In 2005, the SPSC completed their mandate after having handed down 84 convictions and three acquittals. However, most of the convicted perpetrators were low-level militia soldiers as opposed to those high-rank army and militia members who are considered the most responsible for the crimes.<sup>14</sup>

The other international tribunal on Asian soil can be found in the Extraordinary Chambers in the Courts of Cambodia ("ECCC") dealing with crimes committed between 1975 and 1979 by the Khmer Rouge, which resulted in the death of an estimated 1.7 million people, accounting for about 20 percent of the Cambodian population at the time.<sup>15</sup> The ECCC was put into operation in 2006 pursuant to an agreement between the United Nations and the

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<sup>11</sup>The Special Panels were set up by the United Nations Transitional Administration in East Timor (UNTAET). U.N. Transitional Administration in East Timor, *On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences*, Regulation No. 2000/15 (June 6, 2000), <http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR/Reg0015E.pdf>.

<sup>12</sup>*Id.* at § 22.1.

<sup>13</sup>*Id.* at § 1.3.

<sup>14</sup>Steven Freeland, *International Criminal Justice in the Asia-Pacific Region: The Role of the International Criminal Court Treaty Regime*, 11 J. INT'L CRIM. JUST. 1029, 1043 (2013).

<sup>15</sup>See *Introduction to the ECCC*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/about-eccc/introduction>.

Royal Government of Cambodia, and is still in operation.<sup>16</sup> The trial chambers are each composed of three Cambodian judges and two international judges.<sup>17</sup> The subject-matter jurisdiction of the ECCC is confined to the crimes of genocide, crimes against humanity, and grave breaches of the 1949 Geneva Conventions.<sup>18</sup>

In 2010, the ECCC handed down a judgment holding Kaing Guek Eav, the former head of the S-21 prison, guilty of crimes against humanity and grave breaches of the Geneva Conventions of 1949. A second case (Nuon Chea, Khieu Samphan) is pending while the opening of other cases is being debated.<sup>19</sup> Due to governmental interference and disputes between the Cambodian and the international judges, even resulting in the resignation of judges as well as defense lawyers,<sup>20</sup> the ECCC is confronted with major obstacles in its work. The outcome of the ECCC has already been criticized as unsatisfactory. However, the potential of “hybrid” international tribunals to make a positive contribution to ongoing reform processes in the domestic justice sector of the respective country is still being emphasized.<sup>21</sup>

To widen the scope of international criminal justice to the whole world and to complement the work of ad-hoc tribunals, the 1998 United Nations Diplomatic Conference of Plenipotentiaries in Rome (Rome Conference) established the ICC in The Hague. During the conference, the Thailand delegation supported establishing a permanent court by stating that “tribunals set up to deal with specific situations did not offer an appropriate means of

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<sup>16</sup> G.A. Res. 57/228, *Khmer Rouge Trials*, U.N. Doc. A/RES/57/228 B (22 May 2003) [hereinafter ECCC Agreement], <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Cam%20ARES%2057%20228B.pdf>.

<sup>17</sup> ECCC Agreement art. 3(2)(a).

<sup>18</sup> ECCC Agreement art. 9.

<sup>19</sup> For the proceedings against Kaing Guek Eav, see *Kaing Guek Eav: Biography*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/indicted-person/kaing-guek-eav>; for proceedings against Nuon Chea, see *Nuon Chea: Biography*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/indicted-person/nuon-chea>.

<sup>20</sup> *UN Voices Concern as Second Judge Resigns from Cambodia Genocide Court*, U.N. NEWS CENTRE (Mar. 19, 2012), <http://www.un.org/apps/news/story.asp?NewsID=41578&Cr=Cambodia&Cr1=#.U2ckl6LBeDY>; see also Joe Freeman, *Pauw, Pestman and Ianuzzi Leave Khmer Rouge Court “Farce” Behind*, THE PHNOM PHEN POST (Dec. 21, 2012), <http://www.phnompenhpost.com/national/pauw-pestman-and-ianuzzi-leave-khmer-rouge-court-farce-behind>.

<sup>21</sup> Christoph Sperfeldt, *From the Margins of Internationalized Criminal Justice: Lessons Learned at the Extraordinary Chambers of Cambodia*, 11 J. INT’L CRIM. JUST., 1111, 1136 (2013); see also Suzannah Linton, *Putting Cambodia’s Extraordinary Chambers into Context*, 11 Singapore Year Book of Int’l Law 195, 256 (2007) (“Disturbingly substandard as it is, this form of court was the best that could be agreed upon.”).

prosecuting all international crimes. [Thailand] hoped to see the establishment of a permanent, independent and truly impartial international criminal court.”<sup>22</sup>

On 1 July 2002, the Rome Statute of the ICC entered into force, thus putting into operation the first permanent international court with jurisdiction over the most serious crimes of concern to the international community; namely genocide, crimes against humanity, and war crimes.<sup>23</sup> To date, the ICC is dealing with nine “situations.” Four States Parties to the Rome Statute—Uganda, the Democratic Republic of the Congo, the Central African Republic, and Mali—have referred situations occurring on their territories to the Court. The United Nations Security Council has referred the situations in Sudan (Darfur) and Libya—both non-States Parties. Furthermore, the Prosecution has been authorized to open investigations *proprio motu* into the situations of Kenya and Côte d’Ivoire.<sup>24</sup> At the time of writing, the ICC has handed down three verdicts, all pertaining to the situation in the Democratic Republic of the Congo.<sup>25</sup>

## II. Particular Hesitancy Towards ICC-Participation

The ICC’s tenth anniversary in 2012 sparked applause as well as criticism.<sup>26</sup> Among the critical issues that have been discussed are the ICC’s political role<sup>27</sup> as well as questions

<sup>22</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15–July 17, 1998, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, U.N. Doc. A/CONF.183/13 (Vol. II), 106 [hereinafter Rome Conference] (statement of Sombhoon Sangiambut, Head of the Thailand Delegation), [http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings\\_v2\\_e.pdf](http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf).

<sup>23</sup> On 11 June 2010, the Assembly of States Parties, on its review conference in Kampala, Uganda, adopted amendments of the Rome Statute on the definition of the crime of aggression. However, the Court will not exercise its jurisdiction before 1 January 2017. For the amendments, see Review Conference of the Rome Statute, Kampala, Uganda, May 31–June 11, 2010, ICC Doc. RC/9/11 (2010).

<sup>24</sup> For all current situations and cases, see *Situations and Cases*, INTERNATIONAL CRIMINAL COURT, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx).

<sup>25</sup> Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf>; Prosecutor v. Mathieu Ngudjolo Chui?, Case No. ICC-01/04-02/12, Judgment (Dec. 18, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1579080.pdf>; Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07 (Mar. 7, 2014), [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/Pages/democratic%20republic%20of%20the%20congo.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/Pages/democratic%20republic%20of%20the%20congo.aspx).

<sup>26</sup> See Payam Akhavan, *The Rise, and Fall, and Rise, of International Criminal Justice*, 11 J. INT’L CRIM. JUST. 527, 527–536 (2013); Mireille Delmas-Marty, *Ambiguities and Lacunae: The International Criminal Court Ten Years On*, 11 J. INT’L CRIM. JUST. 553, 553–561 (2013); Joseph M. Isanga, *The International Criminal Court Ten Years Later: Appraisal and Prospects*, 21 CARDOZO J. INT’L & COMP. L. 235, 235–323 (2013); William A. Schabas, *The International Criminal Court at Ten*, 22 CRIM. L.F., 493, 493–509 (2011).

circling around the still rather opaque exercise of the principle of complementarity by the Prosecutor.<sup>28</sup>

Another pressing issue is the relative reluctance of Asian, and particularly ASEAN countries, to join the Rome Statute.<sup>29</sup> Among the ASEAN states, Cambodia was the first to ratify the Rome Statute,<sup>30</sup> despite not having participated in the Rome Conference. The Philippines became the second ASEAN country to join when it ratified the Statute on 30 August 2011.<sup>31</sup> Thailand signed the Statute on 2 October 2000 but has yet to ratify it.<sup>32</sup> However, by virtue of Article 18(a) of the Vienna Convention on the Law of Treaties, Thailand is obliged to refrain from acts which would defeat the object and purpose of the Statute.

At the time of writing, 123 countries have become States Parties to the Rome Statute. 34 are African states, 19 are Asia-Pacific states, 18 are from Eastern Europe, 27 are from Latin American and Caribbean states, and 25 are from Western European and other states. According to the regional grouping of the United Nations,<sup>33</sup> the Asia-Pacific group is made up of 54 countries, representing half of the world's population. Thus, about one third of this group joined the Rome Statute. ASEAN countries are even less represented as only two of the ten members (20 percent) are States Parties. In contrast, the African group is represented by more than 60 percent of its members, the Latin American and Caribbean States by more than 80 percent, and more than 85 percent of the Western European and other states are States Parties to the Rome Statute.

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<sup>27</sup> William A. Schabas, *The Banality of International Justice*, 11 J. INT'L CRIM. JUST. 545, 545–551 (2013); Michael J. Struett, *Why the International Criminal Court Must Pretend to Ignore Politics*, 26 ETHICS & INT'L AFF. 83, 83–92 (2012).

<sup>28</sup> See, e.g., Amrita Kapur, *Asian Values v. The Paper Tiger: Dismantling the Threat to Asian Values Posed by the International Criminal Court*, 11 J. INT'L CRIM. JUST. 1059, 1087 (2013). For a review of the ICC's practice in this regard, see Daniel Nsereko, *The ICC and Complementarity in Practice*, 26 LEIDEN J. INT'L L., 427, 427–447 (2013).

<sup>29</sup> See Symposium, *Justice for All? Ten Years of the International Criminal Court in the Asia-Pacific Region*, 11 J. INT'L CRIM. JUST. 1023, 1023–1137 (2013).

<sup>30</sup> Cambodia signed the Rome Statute on 23 October 2000 and deposited its instrument of ratification on 11 April 2002.

<sup>31</sup> The Philippines signed the Rome Statute on 28 December 2000.

<sup>32</sup> In November 2012, a Government panel that was set up in 1999 in order to consider ratification of the ICC Statute had been revived but did not reach a consensus. See Thanida Tansubhapol & King-Oua Laohong, *Panel Revived to Mull ICC Cover*, BANGKOK POST (Nov. 30, 2012).

<sup>33</sup> *United Nations Regional Groups of Member States*, DEP'T FOR GEN. ASSEMBLY & CONF. MGMT., <http://www.un.org/depts/DGACM/RegionalGroups.shtml> (last modified May 9, 2014).

### *III. Official Statements at the 1998 Rome Conference*

The lack of commitment of ASEAN countries may seem surprising given their active participation in the Rome Conference in 1998. While Cambodia and Myanmar did not attend, the remaining Southeast Asian participants issued an impressive number of statements clarifying their views on a variety of legal and political topics, except for the Lao People's Democratic Republic of which not a single statement can be found on the Official Records.

Despite taking place almost 17 years ago, these statements still provide valuable hints as to which issues are the most pressing among ASEAN countries. The analysis further demonstrates that it would be erroneous to think that Southeast Asia is a homogenous block. Instead, with regard to some of the issues concerned, the respective positions differ substantially.

#### *1. National Sovereignty and Investigations Proprio Motu*

National sovereignty and the question of whether it will be in conflict with the principles of the Statute is the nucleus around which the most pressing issues at the Rome Conference circled. For instance, the delegation of Indonesia submitted:

In drafting the Statute, the Conference must uphold the principle of respect for national sovereignty and join the emerging consensus that the Court's jurisdiction should be complementary to that of national courts and based on the consent of the States concerned. . . . However, that principle [of complementarity] still had to be defined unambiguously.<sup>34</sup>

Vietnam echoed that "[a]ny action by the Court without the prior consent of the States concerned would constitute an encroachment on State sovereignty."<sup>35</sup> However, the delegation of Brunei Darussalam emphasized that "[t]he Court should have jurisdiction in internal as well as in international conflicts, as most war crimes currently occurred in internal conflicts."<sup>36</sup>

With regard to the Prosecutor's power to initiate investigations by his own decision (*proprio motu*) as opposed to a referral by a State Party, there is a divisive line separating

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<sup>34</sup>Rome Conference, *supra* note 22, at 73 (statement of Muladi, Head of the Indonesia delegation).

<sup>35</sup>*Id.* at 111 (statement of Nguyen Ba Son, Head of the Vietnam delegation).

<sup>36</sup>*Id.* at 91 (statement of Pengiran Maidin Pengiran Haji Hashim, Head of the Brunei Darussalam delegation).

those countries in favor of a powerful Prosecutor and those countries that oppose this concept. According to Indonesia's position, "[t]he Prosecutor should not be able to initiate investigations *proprio motu*."<sup>37</sup> The delegation of Malaysia concurred "in view of the principle of complementarity and the danger of adverse effects on the integrity and credibility of the office and possible accusations of bias."<sup>38</sup> Finally, "[t]o give the Prosecutor power to initiate proceedings *proprio motu* was unacceptable" for Vietnam, too.<sup>39</sup>

The Philippines submitted that "[t]he Prosecutor should be independent and be entitled to investigate complaints *proprio motu*, subject to the safeguards provided by a supervisory pre-trial chamber."<sup>40</sup> Equally, Thailand "could agree to the Prosecutor initiating investigations *ex officio* on the basis of information obtained from any source, including non-governmental organizations. . . . It . . . endorsed the role of the Pre-Trial Chamber in considering the basis on which the Prosecutor should be allowed to proceed further with an investigation."<sup>41</sup>

## 2. Politicization and Regional Interests

Another, more general issue that was brought up by ASEAN countries was the fear that the ICC could be used as a political weapon in order to drag a country before it. The power of the U.N. Security Council to refer a situation to the ICC sparked criticism among some of the Southeast Asian countries. At a very early stage, three years before the Rome Conference, Malaysia already asserted "[t]he role written in for a politicized Security Council is incompatible *vis-à-vis* that of a judicial institution like the ICC. In addition, the permanent members through their veto powers can in any case render [former] Article 23 ineffective by blocking the referral of any case to it."<sup>42</sup> At the conference, the delegation of Indonesia declared "that the Court must be independent of political influence of any kind, including that of the United Nations and in particular the Security Council, which must not direct or hinder its functioning."<sup>43</sup>

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<sup>37</sup> *Id.* at 200 (statement of Arizal Effendi, Deputy Head of the Indonesia delegation).

<sup>38</sup> *Id.* at 109 (statement of R. Vengadesan, Head of the Malaysia delegation).

<sup>39</sup> *Id.* at 308 (statement of Nguyen Ba Son, Head of the Vietnam delegation).

<sup>40</sup> *Id.* at 82 (statement of Lauro L. Baja, Jr., Head of the Philippines delegation).

<sup>41</sup> *Id.* at 199 (statement of Piyawat Niyomrerks, Deputy Director-General, Dep't of Treaties and Legal Affairs, Thai Ministry of Foreign Affairs).

<sup>42</sup> S. Thanarajasingam, Deputy Permanent Representative of Malaysia, Statement on Agenda Item 142 (Nov. 1, 1995), <http://www.iccnw.org/documents/Malaysia1PrepCmt1Nov95.pdf>.

<sup>43</sup> Rome Conference, *supra* note 22, at 73 (statement of Muladi, Head of the Indonesia delegation).



In another statement, Indonesia intertwined the fear of a politicized ICC with the notion of regional particularities:

The danger of investigations being initiated for political motives could not be disregarded. While some had argued that the integrity of the Prosecutor and the filtering role of the Pre-Trial Chamber would provide safeguards against such investigations, neither Prosecutor nor judges could be expected to have a full understanding of the situation and internal security problems of each and every developing society.<sup>44</sup>

Aiming in the same direction, the delegation of Singapore stated that “account must be taken of the diversity of regional interests, different stages of development and social and cultural traditions, and the positions of the major Powers, in order to achieve a broad consensus and build an effective, working institution.”<sup>45</sup> In this context, it should be mentioned that Singapore was one of the few countries that “regretted the non-inclusion of the death penalty.”<sup>46</sup>

### 3. *The Non-Inclusion of “Treaty Crimes”*

Even if the non-inclusion of so called “treaty crimes” in the Statute of the ICC were not quite as controversial as the above-mentioned issues, this topic serves as another example for the differing approaches among the ASEAN countries. The term “treaty crimes” is used for those international crimes that are not considered “core” crimes, but that are established in domestic laws due to an obligation to criminalize resulting from a multilateral suppression convention (for example, treaties relating to drug trafficking or the suppression of terrorism). The participants of the Rome Conference finally decided to limit the scope of the ICC’s jurisdiction to the core crimes of genocide, crimes against humanity, war crimes, and the crime of aggression, and thus did not incorporate any treaty crimes in the Statute.

However, this question was treated differently among Southeast Asian states. On the one hand, the delegation of Malaysia “did not . . . support the inclusion of the so-called treaty crimes because they were best left to the national courts.”<sup>47</sup> Vietnam submitted that

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<sup>44</sup> *Id.* at 337–38 (statement of Arizal Effendi, Deputy Head of the Indonesia delegation).

<sup>45</sup> *Id.* at 81–82 (statement of Lionel Yee, Deputy Head of the Singapore delegation).

<sup>46</sup> *Id.* at 124 (statement of Lionel Yee, Deputy Head of Singapore delegation).

<sup>47</sup> *Id.* at 109 (statement of R. Vengadesan, Head of the Malaysia delegation).

“[t]reaty crimes might be punished by the international community, but, owing to time constraints, those crimes should be left, for the time being, to the national jurisdiction of the States concerned.”<sup>48</sup> On the other hand, the delegation of Thailand opined that “[t]he Court could be a credible alternative mechanism in the suppression of crimes relating to narcotic drugs, since cooperation through bilateral agreements or Interpol was ineffective. . . . [Thailand] had therefore proposed that illicit traffic in narcotic drugs and psychotropic substances should fall within the jurisdiction of the Court.”<sup>49</sup>

This example demonstrates that Thailand had a rather favorable attitude towards the ICC because it supported broadening the scope of the ICC’s jurisdiction *ratione materiae*. In contrast, Malaysia and, to a certain degree, Vietnam were rather skeptical. Given that both countries have not yet signed the Statute, this attitude could reflect a general hesitancy with regard to the ICC.

#### *IV. Current Developments Within ASEAN Countries*

At the moment, the Asia-Pacific is the fastest growing regional group of ICC States Parties.<sup>50</sup> It is possible that this momentum will pull more ASEAN countries to sign the Rome Statute.<sup>51</sup> However, the analysis of the relevant political processes makes future accessions in the region difficult to predict.

According to Indonesia’s National Human Rights Plan of Action, joining the Rome Statute was envisaged for the period of 2011 to 2014.<sup>52</sup> Furthermore, the government of Indonesia accepted the relevant recommendations from the Human Rights Council in 2012.<sup>53</sup> In March of 2013, a delegation of government officials led by Law and Human Rights Deputy Minister Denny Indrayana visited the ICC in The Hague. The Minister stated

<sup>48</sup> *Id.* at 287 (statement of Pham Truong Giang, First Secretary, Vietnam Permanent Mission).

<sup>49</sup> *Id.* at 106–07 (statement of Somboon Sangiambut, Head of the Thailand Delegation).

<sup>50</sup> Bangladesh joined on 23 March 2010, the Philippines on 30 August 2011, the Maldives on 21 September 2011, Vanuatu on 2 December 2011, and Palestine on 2 January 2015. See *Asia Pacific States*, INT’L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/asian%20states/Pages/asian%20states.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/asian%20states.aspx).

<sup>51</sup> Kapur, *supra* note 28, at 1061; Sang-Hyun Song, *Preventive Potential of the International Criminal Court*, 3 *ASIAN J. INT’L L.*, 203, 212 (2013).

<sup>52</sup> See U.N. Human Rights, Office of the High Commissioner for Human Rights, *National Plans of Action for the Promotion and Protection of Human Rights*, <http://www.ohchr.org/EN/Issues/PlansActions/Pages/PlansofActionIndex.aspx>.

<sup>53</sup> U.N. Human Rights, Office of the High Commissioner for Human Rights, *Report of the Working Group on the Universal Periodic Review: Indonesia*, U.N. Doc. A/HRC/21/7, 14–22 (July 5, 2012), [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-7\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-7_en.pdf).

that “[t]his will be an important initial step toward the ratification of the Statute, which will serve to protect all Indonesians from any possible extraordinary crimes in the future and to ensure that they are subject to the ICC and international law.”<sup>54</sup>

However, in order to join the Rome Statute, the Minister demanded clarification whether “crimes that were committed in the past but categorized as ongoing without a statute of limitations, such as forced disappearances, be subject to ICC scrutiny.”<sup>55</sup> This prompted the answer of the President of the ICC, Judge Song Sang-Hyun: “There is absolutely no retroactivity. . . . You don’t have to worry about this.”<sup>56</sup> Still, media reports expect that the Indonesian Military (TNI) is leading the rejection of the Statute’s ratification due to the fear that it might pave the way for the prosecution of generals allegedly involved in rights abuses.<sup>57</sup> Furthermore, the Indonesian Minister of Defense, Purnomo Yusgiantoro, claimed that “[w]e’ve already got a law on human rights, a law on human rights tribunals and the Constitution, all of which govern the rights and responsibilities of all citizens.”<sup>58</sup> Currently, due to changes within the Indonesian legislative structure, the academic paper and the draft bill for ratification prepared in 2011 need to be revised.<sup>59</sup>

Lao People’s Democratic Republic faces similar challenges. One of the obstacles for the country’s accession is that the process of ratifying or acceding to international treaties

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<sup>54</sup> Bagus B.T. Saragih, *Denny to leave for The Hague for Study on Rome Statute*, JAKARTA POST (Mar. 4, 2013).

<sup>55</sup> *Id.*

<sup>56</sup> *Don’t Worry, We Don’t Look Back: ICC President Ensures*, JAKARTA POST (Dec. 18, 2013). According to Article 11(1), the Court has jurisdiction *ratione temporis* only with respect to crimes committed after the entry into force of the Statute; Article 11(2) further provides that the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Statute for each respective state; additionally, according to Article 124, a State may declare that, for a period of seven years after the entry into force of the Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to war crimes when a crime is alleged to have been committed by its nationals or on its territory. See Rome Statute, *supra* note 6, art. 12, para. 3.

<sup>57</sup> Saragih, *supra* note 54, at para. 11.

<sup>58</sup> Markus Junianto Sihaloha, *Defense Minister Dodges Question on Blocking ICC Treaty’s Ratification*, JAKARTA GLOBE (May 21, 2013), <http://www.thejakartaglobe.com/news/defense-minister-dodges-question-on-blocking-icc-treatys-ratification/>.

<sup>59</sup> See Human Rights Resource Centre (HRRRC), The Institute for Policy Research and Advocacy (ELSAM) & Indonesian Coalition for the International Criminal Court (CICC), *Progress Report: Indonesia Efforts to Ratify the 1998 Rome Statute of the International Criminal Court*, 7 (Dec. 14, 2012), [http://www.elsam.or.id/downloads/1357181136\\_Bahan\\_Untuk\\_Diplomatic\\_Briefing\\_14\\_Des\\_2012.pdf](http://www.elsam.or.id/downloads/1357181136_Bahan_Untuk_Diplomatic_Briefing_14_Des_2012.pdf).

involves enacting a domestic implementing legislation first.<sup>60</sup> Furthermore, Lao PDR must review its current law, which imposes the death penalty on the most serious crimes.<sup>61</sup>

Similarly, the Malaysian government indicated that it would not accede to the Rome Statute until all relevant domestic laws are in place.<sup>62</sup> Furthermore, the government voiced concerns regarding the irrelevance of official capacity and submitted doubts as to whether the Rome Statute is compatible with Sharia Law.<sup>63</sup> However, in 2011 the Malaysian Cabinet agreed “in principle” to accede to the Rome Statute. A spokesperson for the Prime stated that “[d]iscussions are still underway with the Attorney-General Chambers on the matter and I give the assurance that Malaysia will eventually accede to the Rome Statute.”<sup>64</sup>

As mentioned in the introductory remarks, Thailand’s policy towards the ICC gained momentum during the recent political turmoil. Aside from calls for an ad-hoc acceptance of the ICC’s jurisdiction, a government panel established in 1999 and charged with determining whether to ratify the Rome Statute was revived.<sup>65</sup> However, Thai media reported fears within the government that the irrelevance of official capacity might affect the monarchy.<sup>66</sup> Furthermore, according to a Justice Ministry source, several agencies were worried that other countries would think the Thai judicial system was flawed if ICC jurisdiction was accepted.<sup>67</sup>

For the remaining Non-States Parties from ASEAN—Brunei Darussalam, Myanmar, Singapore, and Vietnam—current updates on any steps towards the signing or ratification

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<sup>60</sup> Press Release, Coalition for the International Criminal Court (CICC), Laos: Acceding to Rome Statute Is in Line with Commitment to Rule of Law (Sept. 27, 2013), [http://www.iccnw.org/documents/CICC\\_PR\\_URC\\_Laos\\_ENG.pdf](http://www.iccnw.org/documents/CICC_PR_URC_Laos_ENG.pdf).

<sup>61</sup> For an early assessment, see Valeriane Taon, *International Criminal Court: Reservations of Non-State Parties in Southeast Asia*, 26 CONTEMP. SOUTHEAST ASIA, 218, 224 (2004).

<sup>62</sup> See Coalition for the International Criminal Court, *Country Factsheet Malaysia*, <http://www.iccnw.org/?mod=country&iduct=106>.

<sup>63</sup> *Id.*

<sup>64</sup> Martin Carvalho, *Nazri: Moves to Accede to Rome Statute of International Criminal Court*, STAR ONLINE (June 12, 2012), <http://www.thestar.com.my/News/Nation/2012/06/12/Nazri-Moves-to-accede-to-Rome-Statute-of-International-Criminal-Court/>.

<sup>65</sup> Tansubhapol & Laohong, *supra* note 32.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

of the Rome Statute were not available at the time of this writing. Vietnam, however, has already incorporated the statutory crimes into its domestic criminal law.<sup>68</sup>

### C. Assessing the Contentious Issues

The overview of current national activities shows that official statements tend to emphasize the difficulties in adjusting domestic laws in order to comply with the requirements of the Rome Statute. However, the need for adjustments is not singular to Southeast Asian countries. Rather, it holds true for most of the countries of the world, which have already ratified the Statute,<sup>69</sup> and cannot satisfactorily explain the overall hesitancy of the Southeast Asian region. Further inquiry will reveal whether the initial concerns voiced during the 1998 Rome Conference still hinder the majority of ASEAN members. These concerns involve questions about national sovereignty and the principle of complementarity. In particular, ASEAN's policy of non-interference must be assessed in this context. Additionally, the fear of politicization and disregard of regional ("Asian") values may play a role.

#### I. ASEAN's Policy of Non-Interference

According to the preamble of the ASEAN Charter, the ASEAN countries respect "the fundamental importance of amity and cooperation, and the principles of sovereignty, equality, territorial integrity, non-interference, consensus, and unity in diversity."<sup>70</sup> The combination of these principles—but particularly the concept of non-interference—is commonly called the "ASEAN Way."<sup>71</sup> ASEAN's policy of non-interference evolved over time. Consequently, the "ASEAN Way" will be introduced in a historical perspective before turning to its significance today.

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<sup>68</sup> See Press Release, CICC, *supra* note 60, at 1.

<sup>69</sup> Southeast Asian countries may consider Australia's and New Zealand's experiences with regard to the adjustment of their domestic legal systems. See Gideon Boas, *An Overview of Implementation by Australia of the Statute of the International Criminal Court*, 2 J. INT'L CRIM. JUST. 179 (2004); Juliet Hay, *Implementing the ICC Statute in New Zealand*, 2 J. INT'L CRIM. JUST. 191 (2004).

<sup>70</sup> Charter pmb., para. 7, <http://www.asean.org/archive/publications/ASEAN-Charter.pdf>.

<sup>71</sup> See Gillian Goh, *The "ASEAN Way," Non-Intervention and ASEAN's Role in Conflict Management*, 3 STAN. J. E. ASIAN AFF. 113 (2003).

### 1. *The Historical Scope of Non-Interference*

Founded in 1967 in Bangkok (Bangkok Declaration), ASEAN first comprised five countries: Indonesia, Malaysia, the Philippines, Singapore, and Thailand.<sup>72</sup> According to the Bangkok Declaration, ASEAN prioritized accelerating economic growth and promoting regional peace and stability.<sup>73</sup> Its preamble declared that the founding countries were determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities.<sup>74</sup> As ASEAN was founded against the historical background of Southeast Asia's colonization by Western powers, it can be inferred that "external interference" primarily targeted interference by countries from outside of Southeast Asia.<sup>75</sup> However, due to mounting ideological conflicts within the region, the Bangkok Declaration was already designed to prevent interference among ASEAN countries as well.<sup>76</sup>

The 1976 Treaty of Amity and Cooperation in Southeast Asia, concluded in Bali between the five ASEAN countries, formally adopted several principles of cooperation and turned the policy of non-interference into a legal principle.<sup>77</sup> According to the Treaty, the contracting parties shall be guided by mutual respect for independence, sovereignty, and equality, by the principle of non-interference in the internal affairs of one another, by the settlement of differences or disputes by peaceful means, and by the renunciation of the threat or use of force.<sup>78</sup> The practical implementation of non-interference historically

<sup>72</sup> Brunei Darussalam joined in 1984, Vietnam in 1995, Laos and Myanmar in 1997, and Cambodia in 1999. *Overview, ASSOCIATION OF SOUTHEAST ASIAN NATIONS*, <http://www.asean.org/asean/about-asean/overview> (last visited Feb. 13, 2015). In 2011, Timor-Leste submitted an application to become the eleventh member of ASEAN. Press Release, ASEAN Secretariat News, *Timor-Leste Remains Committed to Join ASEAN* (Nov. 4, 2014), <http://www.asean.org/news/asean-secretariat-news/item/timor-leste-remains-committed-to-join-asean>. Timor-Leste ratified the Rome Statute in 2002. *Timor-Leste*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/asian%20states/Pages/timor%20leste.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/timor%20leste.aspx).

<sup>73</sup> The Asean Declaration (Bangkok Declaration), §§ 1–2, Aug. 8, 1967, 6 I.L.M. 1223, *available at* <http://www.asean.org/news/item/the-asean-declaration-bangkok-declaration>.

<sup>74</sup> *Id.* at pmb1., para. 4.

<sup>75</sup> Kapur, *supra* note 28, at 1063; Hitoshi Nasu, *Revisiting the Principle of Non-Intervention: A Structural Principle of International Law or a Political Obstacle to Regional Security in Asia?*, 3 *ASIAN J. INT'L L.*, 25, 46 (2013).

<sup>76</sup> Nasu, *supra* note 75, at 36. The ASEAN principles are particularly being expressed when faced or challenged by the views of other states or organizations. Goh, *supra* note 71, at 115.

<sup>77</sup> Goh, *supra* note 71, at 114; Nasu, *supra* note 75, at 36.

<sup>78</sup> Treaty of Amity and Cooperation in Southeast Asia, art. 2, Feb. 24, 1976, 27 I.L.M. 610, *available at* <http://www.asean.org/news/item/treaty-of-amity-and-cooperation-in-southeast-asia-indonesia-24-february-1976-3>. These principles have been reiterated by the ASEAN Bali Concord II (2003) and III (2011).

implied that ASEAN countries refrained from any criticism with regard to matters occurring in one of their fellow member countries, even in cases of systematic suppression of human rights. Thus, ASEAN as an organization as well as ASEAN's individual member states remained mostly silent not only with regard to the suppressive incidents in East Timor but also in face of the crimes of genocide committed by the Khmer Rouge in Cambodia.<sup>79</sup>

From this practice, it can be inferred that "non-interference" as used by ASEAN countries needs to be distinguished from "non-intervention" under conventional and customary international law.<sup>80</sup> According to the U.N. Friendly Relations Declaration:

[N]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.<sup>81</sup>

With regard to the question of which actions constitute acts of intervention, the International Court of Justice clarified in the *Nicaragua* case that "intervention is wrongful when it uses methods of coercion in regard to such choices which must remain free ones."<sup>82</sup> Thus, the scope of an unlawful "intervention" is rather narrow whereas ASEAN's "non-interference" encompasses not only acts of coercion, such as the use of force or sanctions, but also otherwise lawful acts such as condemning statements or criticizing comments.

However, during the 1990s, the policy of non-interference developed a more open approach that was labeled "enhanced interaction."<sup>83</sup> This shift can be understood as a response to Western criticism as well as a reaction to ASEAN's inability to engage

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<sup>79</sup> Kapur, *supra* note 28, at 1074; Nasu, *supra* note 75, at 36; Sheldon Simon, *ASEAN and Multilateralism: The Long, Bumpy Road to Community*, 30 CONTEMP. SOUTHEAST ASIA, 264, 269 (2008). After Vietnamese troops entered Cambodia in 1978, ASEAN called for the withdrawal of all foreign troops from Cambodia. Goh, *supra* note 71, at 117.

<sup>80</sup> Nasu, *supra* note 75, at 36.

<sup>81</sup> G.A. Res. 25/2625, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970), <http://www.un-documents.net/a25r2625.htm>.

<sup>82</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 108 (June 27).

<sup>83</sup> For an analysis of this development, see Hiro Katsumata, *Why is ASEAN Diplomacy Changing? From "Non-Interference" to "Open and Frank Discussions,"* 44 ASIAN SURV. 237 (2004).

constructively with the situations in Myanmar and Cambodia.<sup>84</sup> Whereas Laos and Myanmar were admitted to ASEAN in 1997, Cambodia's admission was delayed until 1999 to demonstrate ASEAN's disapproval of the coup by Cambodia's Second Prime Minister Hun Sen against his coalition partner.<sup>85</sup> Additionally, Indonesia, the Philippines, and Thailand mediated between the Hun Sen government and the opposition to restore democratic legitimacy.<sup>86</sup> Further narrowing the principle of non-interference in 1999, several ASEAN countries called on Indonesia to take the necessary measures to restore law and order with regard to the situation in East Timor.<sup>87</sup> Finally, in 2007, the U.N. Human Rights Council discussed the human rights situation in Myanmar, but the ASEAN countries did not raise the principle of non-interference as a legal obstacle to international and regional engagement with the issues in Myanmar. Rather, the ASEAN countries emphasized the need for constructive dialogue and cooperation.

## 2. Assessing Non-Interference Today

On 15 December 2008, the ASEAN Charter entered into force. The Charter provides the legal status and institutional framework in order to achieve the ASEAN Community.<sup>88</sup> The preamble emphasizes the principles of sovereignty, equality, territorial integrity, non-interference, consensus, and unity in diversity.<sup>89</sup> Article 2(2)(e) expressly stipulates that ASEAN and its member states shall act in accordance with non-interference in the internal affairs of ASEAN member states. The new ASEAN contemplated in the ASEAN Charter has its own legal personality because the organization's existence satisfies the legal requirements of an international organization.<sup>90</sup> Despite the consensus principle, ASEAN may even have a distinct will apart from that of its members because the failure to achieve a consensus will give the ASEAN Summit the authority to "decide how a specific decision can be made" under Article 20(2).<sup>91</sup>

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<sup>84</sup> Nasu, *supra* note 75, at 38; Carlyle A. Thayer, *Re-inventing ASEAN: From Constructive Engagement to Flexible Intervention*, 3 HARV. ASIA PAC. REV. 67, 70 (1999).

<sup>85</sup> Nasu, *supra* note 75, at 39.

<sup>86</sup> Goh, *supra* note 71, at 118.

<sup>87</sup> See Nasu, *supra* note 75, at 41.

<sup>88</sup> By the end of the year 2015, the ASEAN Economic Community (AEC)—envisaged as ASEAN's most integrated pillar—shall be achieved.

<sup>89</sup> ASEAN Charter pmbl. para. 7.

<sup>90</sup> Diane A. Desierto, *Universalizing Core Human Rights in the "New" ASEAN: A Reassessment of Culture and Development Justifications Against the Global Rejection of Impunity*, 1 GOTTINGEN J. INT'L L. 77, 92 (2009).

<sup>91</sup> *Id.* at 91.



Against this background, Indonesia's reaction to the Thai military coup of 22 May 2014 might shine a light on a new approach to non-interference. Indonesia's Foreign Minister, Marty Natalegawa, voiced "deep concern" and stated that "silence on this issue is a very deafening silence and therefore we must express our view."<sup>92</sup> While acknowledging that the coup was an internal matter of Thailand, Natalegawa emphasized that, "since ASEAN was now a community," it would be only natural that the latest political development in that member country was a situation of tremendous concern.<sup>93</sup>

The Thai military coup sparked further reactions by ASEAN and fellow ASEAN countries. ASEAN's Secretary-General, Le Luong Minh, stated that "the coup will have an impact on the stability of Thailand, so of course it will impact ASEAN as well, because if a member is experiencing instability then ASEAN as a whole would be impacted."<sup>94</sup> The Philippines' Ministry of Foreign Affairs issued a statement according to which the government "hopes for an early return to normalcy consistent with the democratic principles, the rule of law and the will and interest of the Thai people."<sup>95</sup> Furthermore, a bipartisan group of members of the House of Representatives of the Philippines filed a resolution urging "the Royal Thai Army to immediately relinquish the political leadership of Thailand to the duly constituted civilian authority under the constitution and existing laws of the country, with the end view of restoring democracy and the full political and civil rights of all the citizens of Thailand."<sup>96</sup> Finally, Singapore's Ministry of Foreign Affairs expressed its "grave concern" with regard to the situation in Thailand after the coup and added that "prolonged uncertainties will set back Thailand and the region as a whole."<sup>97</sup>

In contrast to these statements, it should be noted that so far neither ASEAN nor any of its Member States have criticized Myanmar's role regarding the situation of Rohingya Muslims in Rakhine state. One reason for the more recent silence may have been Myanmar's position as Chair of ASEAN in 2014. More importantly though, the overall restraint reflects

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<sup>92</sup> *ASEAN Should Voice Concern Over Thai Coup: Natalegawa*, GLOBALPOST (May 23, 2014, 8:33 AM), <http://www.globalpost.com/dispatch/news/kyodo-news-international/140523/asean-should-voice-concern-over-thai-coup-natalegawa-0>.

<sup>93</sup> *Id.*

<sup>94</sup> Umesh Pandey, Achara Ashayagachat & Thanida Tansubhapol, *World Leaders: Return Democracy*, BANGKOK POST (May 24, 2014).

<sup>95</sup> *Id.*

<sup>96</sup> *Philippines House Resolution No 1175: Grave Concern Over Thai Military Coup*, ASEAN PARLIAMENTARIANS FOR HUM. RTS. (May 28, 2014), <http://www.aseanmp.org/?p=3081>.

<sup>97</sup> *Id.*

ASEAN's traditional policy of non-interference with domestic issues.<sup>98</sup> When a political advisor to Myanmar's President was asked prior to the 24th ASEAN Summit in Nay Pyi Taw whether the violent attacks on the Rohingya minority in Rakhine will be discussed at the Summit, he replied that "the Bengali issue is not a regional issue, just a local issue. No one will try to raise this issue at the Summit because, in keeping with ASEAN practice, it will not be discussed if a member opposes the issue."<sup>99</sup> Indeed, the Summit did not issue a statement on the situation in Rakhine.

Thus, ASEAN conceptions of non-interference have consistently been influenced by the imperative of security concerns.<sup>100</sup> In the perception of ASEAN, the widespread violence against Rohingya Muslims thus far does not constitute a threat to regional security. Therefore, the principle of non-interference is adhered to in a rather strict way. The situation in Thailand stirred up fears of regional instability among Thailand's fellow ASEAN members resulting in the respective statements of "concern." Even before the coup, the ASEAN Summit issued an official statement on the developments in Thailand.<sup>101</sup> Apparently, the fear of instability made the principle of non-interference far more permeable.

Against this background, ASEAN's principle of non-interference still serves as an explanation for Southeast Asia's hesitancy towards the ICC. Once a country ratifies the Rome Statute, the ICC has the power to investigate whether crimes within its jurisdiction have been committed in the respective country, regardless of whether or not the alleged crimes constitute a threat to regional security. This rationale differs from the security-centered approach of ASEAN. The Rome Statute considers the perpetration of genocide, crimes against humanity, and war crimes in and of themselves a concern of the international community. Thus, the Statute enshrined a principle never classifying the crimes within the ICC's jurisdiction as an internal affair—a notion that may be particularly hard for ASEAN countries to digest. However, in order to fully assess the "threat" posed by

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<sup>98</sup> In its "Statement of ASEAN Foreign Ministers on the Recent Developments in the Rakhine State, Myanmar" (August 17, 2012), ASEAN "welcomed the steps the Government of Myanmar has taken to address the domestic issue", <http://www.asean.org/images/archive/documents/Statement%20of%20ASEAN%20FM%20on%20Recent%20Developments%20in%20the%20Rakhine%20State.pdf>.

<sup>99</sup> *Myanmar's New Challenges*, BANGKOK POST (May 5, 2014, 9:42 AM), <http://www.bangkokpost.com/most-recent/408178/myanmar-day-in-the-sun-overshadowed-by-new-challenges>.

<sup>100</sup> Nasu, *supra* note 75, at 46.

<sup>101</sup> *ASEAN Foreign Ministers' Statement on the Developments in Thailand*, ASS'N OF SOUTHEAST ASIAN NATIONS (May 11, 2014), [http://www.asean.org/news/asean-statement-communicues/item/asean-foreign-ministers-statement-on-the-developments-in-thailand?category\\_id=26](http://www.asean.org/news/asean-statement-communicues/item/asean-foreign-ministers-statement-on-the-developments-in-thailand?category_id=26).

the ICC, it is indispensable to consider the respective referral mechanisms according to the Rome Statute.

## *II. The Referral Mechanisms and the Principle of Complementarity*

At the 1998 Rome Conference, several ASEAN countries emphasized their strict stand on national sovereignty. Some of them feared that a powerful ICC could interfere with their internal affairs by investigating into crimes committed within one of their territories. The participants of the Rome Conference took these concerns into account and installed two safeguards in order to leave the responsibility for avoiding any intervention in internal affairs up to the States Parties. On the one hand, the Statute contains a strict regime of referral mechanisms, thus barring the ICC from exercising its jurisdiction by way of arbitrary decisions. On the other hand, the ICC's jurisdiction is subject to the principle of complementarity, meaning that the ICC may only exercise its jurisdiction under the precondition of the inability or unwillingness of the respective member state to investigate.

### *1. Referral Mechanisms*

According to Article 12(1) of the Rome Statute, a state that becomes a party to the Rome Statute thereby accepts the jurisdiction of the ICC with respect to the crimes referred to within the Statute. Except for one constellation, which will be dealt with shortly, the ICC may exercise its jurisdiction only with regard to those countries which have signed and ratified the Statute or which have accepted the ICC's jurisdiction on an ad-hoc basis according to Article 12(3). Furthermore, the conduct must have occurred on the territory of that State Party or the person accused of the crime must be a national of that State Party.<sup>102</sup> Until this point, the rule seems to be very clear: No jurisdiction is present without ratification or acceptance of the ICC's jurisdiction.

There are three referral mechanisms. First, the ICC may exercise its jurisdiction if a situation in which one or more of the crimes under the ICC's jurisdiction appears to have been committed is referred to the Prosecutor by a State Party.<sup>103</sup> This is the so-called "state referral." At the present time, four States Parties to the Rome Statute—Uganda, the Democratic Republic of the Congo, the Central African Republic, and Mali—have referred situations occurring in their territories to the ICC. All of these referrals have thus been self-referrals.

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<sup>102</sup> Rome Statute, *supra* note 6, art. 12(2)(a)–(b).

<sup>103</sup> *Id.* art. 13(1).

Second, the ICC's jurisdiction is triggered if one or more crimes referred to in the Statute appear to have been committed and the situation is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.<sup>104</sup> This referral mechanism neither requires that the alleged crime be committed within the territory of a State Party nor that the alleged perpetrator be a national of a State Party. Thus, the power of the U.N. Security Council renders these requirements void. At the time of writing, the Security Council has referred the situations in Sudan (Darfur) and Libya—both non-States Parties—to the ICC.

Third, the ICC may exercise jurisdiction if the Prosecutor has initiated an investigation with regard to a State Party (according to Article 12(2)(a)–(b)) and the Pre-Trial Chamber has authorized the commencement of the investigation upon his request (under Article 15(4)). This is the so-called “investigation *proprio motu*” (on his or her own impulse). Currently, the Prosecution has been authorized to open investigations *proprio motu* concerning the situations in Kenya and Côte d'Ivoire.

Several ASEAN countries expressed their concerns both with regard to the Security Council referral as well as to the Prosecutor's right to initiate investigations *proprio motu*. In contrast, the State referral mechanism did not attract a great deal of attention at the Rome Conference. The reasons are obvious. On the one hand, each State Party is in control of its own referring power. Thus, a self-referral is subject to the respective government's own decision. On the other hand, referrals from a fellow ASEAN country or from outside of the region seem to be rather unlikely. The ASEAN countries are basically shielded by ASEAN's policy of non-interference, which clearly disapproves of a fellow referral. Likewise, the political and potential economic costs render a referral from outside of ASEAN rather improbable.<sup>105</sup>

With regard to the Security Council referral, Indonesia and Malaysia were at the forefront in expressing their concerns of a politicized Security Council that may or may not initiate proceedings, following purely political considerations. Indeed, recent history in this regard shows that the decisions of the Security Council are not always consistent and that the notion of double standards is not totally unfounded.<sup>106</sup> Whereas the situation in Libya was referred to the ICC, the Sri Lankan, Syrian, and Gaza situations have not yet been referred.<sup>107</sup> This opaque selectiveness becomes even more of a problem given the fact

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<sup>104</sup> *Id.* art. 13(2).

<sup>105</sup> Kapur, *supra* note 28, at 1078.

<sup>106</sup> *Id.*

<sup>107</sup> This has been criticized by Human Rights Watch. See *UN Security Council: Address Inconsistency in ICC Referrals*, HUM. RTS. WATCH (Oct. 16, 2012), <http://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals-0>.

that the Security Council referral does not require the involvement of a State Party. But, regarding the ASEAN countries, there seems to be very little risk that a country from this region may be subjected to ICC jurisdiction by the Security Council. This is because all of the Southeast Asian states traditionally maintain close strategic ties either with the United States or with China (or both). Both of these countries occupy a permanent seat on the U.N. Security Council and thus have the (veto) power to shield their allies from any referral.<sup>108</sup>

Finally, the Prosecutor's competence to initiate investigations *proprio motu* was one of the most controversial issues among ASEAN countries during the 1998 Rome Conference. The delegations of Indonesia, Malaysia, and Vietnam outright rejected the pertaining proposals, while the Philippines and Thailand voiced their support for a strong Prosecutor having the power to launch his own investigations after authorization by the Pre-Trial Chamber. The *proprio motu*-competence of the Prosecutor is the only referral mechanism that is not subject to the consent of any government. According to the rationale of this mechanism, no State Party can shield a fellow State Party. Thus, the role of the Prosecutor can be compared to the role of domestic public prosecutors who have the power to initiate investigations whenever it appears that a crime has been committed. Particularly in this regard, the ICC has "teeth."<sup>109</sup>

But, as can be seen from Indonesia's and Malaysia's present efforts in order to ratify the Rome Statute, the Prosecutor's power *proprio motu* does not seem to be an insurmountable obstacle with regard to a country's decision whether or not to join the Rome Statute. Indonesia and Malaysia's rejections in 1998 have changed towards a more pragmatic attitude, possibly resulting from realizing that the ICC is not as politicized as initially suspected. As such, the sharp divide between proponents and critics of the *proprio motu*-competence among ASEAN countries seems to have softened over time. Today, the Prosecutor's power *proprio motu* is not as contentious as it was in 1998.

## 2. The Principle of Complementarity

The fundamental principle designed to guarantee the national sovereignty of the parties to the Rome Statute is the principle of complementarity. Enshrined in the Statute's preamble and in Article 1, the principle of complementarity permits the ICC to take up cases only when the respective State Party is unwilling or unable to prosecute the alleged perpetrators within their domestic criminal law system. Article 17 further defines the scope of the principle.

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<sup>108</sup> See Kapur, *supra* note 28, at 1078.

<sup>109</sup> Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT'L ORG. 225, 244 (2010).

According to Article 17(1)(a), a case is inadmissible to the ICC when it is being investigated or prosecuted by a State that has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution. Likewise, the ICC will not exercise its jurisdiction if the case has been investigated by a State that has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.<sup>110</sup>

In order to determine unwillingness in a particular case, the ICC can consider different aspects. According to Article 17(2), a State can be considered unwilling if it tries to shield the person concerned from criminal responsibility for the alleged crimes, if there has been an unjustified delay in the proceedings, or if the proceedings were not or are not being conducted independently or impartially. With regard to inability, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.<sup>111</sup>

In practice, the principle of complementarity is being applied particularly by the Office of the Prosecutor (“OTP”) during the stage of preliminary investigations. According to Article 53(1), before initiating an investigation, the Prosecutor shall consider whether the information available to him or her provides a reasonable basis to believe that a crime within the jurisdiction of the ICC has been or is being committed. During this preliminary investigation, the Prosecutor must also assess whether the case is or would be admissible under the principle of complementarity. Currently, the OTP is conducting preliminary investigations with regard to eight situations (Afghanistan, Honduras, Republic of Korea, and Registered Vessels of Comoros, Greece and Cambodia in phase two; Colombia, Georgia, Guinea, and Nigeria in phase three).<sup>112</sup>

While conducting preliminary investigations, the Prosecutor examines the existence of relevant national proceedings in relation to the potential cases being considered for investigation. For instance, with regard to the situation in Colombia, the OTP determined that there is a reasonable basis to believe that crimes against humanity as well as war crimes have been committed.<sup>113</sup> With regard to relevant national domestic proceedings,

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<sup>110</sup> Rome Statute, *supra* note 6, art. 17(1)(b).

<sup>111</sup> *Id.* art. 17(3).

<sup>112</sup> The Office of the Prosecutor, *Report on Preliminary Examination Activities 2013*, INT’L CRIM. CT. (Nov. 2013), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20Preliminary%20Examination%20Activities%202013.pdf](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20Preliminary%20Examination%20Activities%202013.pdf).

<sup>113</sup> *Id.* at para. 124.

the OTP received 354 judgments from the government of Colombia related to members of the FARC and ELN armed groups, members of paramilitary armed groups, army officials, and members of successor paramilitary armed groups. The OTP is currently analyzing the relevance of these decisions with regard to whether they focus on those most responsible for the most serious crimes within the jurisdiction of the ICC and whether they are genuine.<sup>114</sup> On the basis of this analysis, the Prosecutor will decide whether to leave the proceedings to the Colombian authorities or whether to open an investigation.

But the OTP has been criticized for ignoring qualitative elements, for failing to focus on those individuals most responsible, and for limiting its assessment to open proceedings.<sup>115</sup> As a message for ASEAN countries, Kapur concluded that “the threshold set by Colombia is low, inconsistent and uncertain, without a guarantee that those most responsible will face justice.”<sup>116</sup> Indeed, the standards for the application of the principle of complementarity still need to be refined.<sup>117</sup> However, the Prosecutor’s scrutiny of domestic proceedings—or the threat of such scrutiny—prompts States Parties to realign their domestic criminal law system to the prerequisites of the Rome Statute. This is the actual, or underlying, goal of complementarity. Therefore, the OTP introduced the policy of so-called “positive complementarity” according to which the OTP encourages genuine national proceedings.<sup>118</sup> Likewise, the OTP’s current strategic plan for 2012 to 2015 aims at enhancing complementarity and emphasizes that complementarity also includes investigations and prosecutions by national authorities outside of situations under preliminary examination or investigation.<sup>119</sup>

Thus, with regard to the concerns of ASEAN countries that the ICC might touch upon their national sovereignty, the principle of complementarity would place the responsibility for prosecuting crimes under the Rome Statute foremost in their own hands. The “price to pay”<sup>120</sup> in return is the incorporation of the pertinent substantive as well as procedural

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<sup>114</sup> For details about the investigation, see *id.* at para. 130.

<sup>115</sup> For further citations, see Kapur, *supra* note 28, at 1087.

<sup>116</sup> *id.* at 1087.

<sup>117</sup> Freeland, *supra* note 14, at 1050.

<sup>118</sup> Office of the Prosecutor, *Report on Prosecutorial Strategy*, INT’L CRIM. CT., 5 (Sept. 14, 2006), [http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf).

<sup>119</sup> Office of the Prosecutor, *Strategic Plan: June 2012–2015*, INT’L CRIM. CT., 29 (Oct. 11, 2013), [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf).

<sup>120</sup> Freeland, *supra* note 14, at 50.

law into the domestic criminal law system. In this regard, Indonesia's Law Establishing the Ad Hoc Human Rights Court (2000) incorporated provisions on genocide, crimes against humanity, and command responsibility from the Rome Statute.<sup>121</sup> Similarly, Malaysia amended its Penal Code in 2012 to include command responsibility as a mode of abetting to a crime.<sup>122</sup>

Conversely, as can be seen from the statements given above, the incorporation of the Rome Statute's law into domestic law still confronts many Southeast Asian countries with substantial difficulties. This holds especially true with regard to constitutional challenges surrounding the extradition of nationals as in the case of Cambodia,<sup>123</sup> or the incompatibility of the Rome Statute with Sharia law.<sup>124</sup>

### *III. "Asian Values" and the Universality of Core International Crimes*

At the Rome Conference in 1998, the delegation of Singapore reminded the other participating countries that "account must be taken of the diversity of regional interests, different stages of development and social and cultural traditions."<sup>125</sup> According to this view, countries with differing levels of development or varying sets of social and cultural backgrounds should be treated differently with respect to the prosecution of ICC crimes. This notion has not been introduced into the Rome Statute. Rather, the Statute's preamble recognizes "that such grave crimes threaten the peace, security and well-being of the world" and affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished."<sup>126</sup> Due to the lacking incorporation of a "cultural clause," it shall be assessed whether this issue can actually play a role with regard to the attitude of Southeast Asian countries towards the ICC. Therefore, the debate circling around so-called "Asian values" shall be shortly visited before turning to the legal framework relevant to Southeast Asian countries in the field of human rights.

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<sup>121</sup> Establishing the Ad Hoc Human Rights Court, Law No. 26, arts. 8, 9, 42 (2000), 208 STATE GAZETTE 23 (Indon.). For the criticism surrounding this law, see Kapur, *supra* note 28, at 1072.

<sup>122</sup> Laws of Malaysia, Act A1430, Penal Code (Amendment) Act 2012, § 107, [http://54.251.120.208/doc/laws/Act\\_A1430\\_Penal\\_Code\\_\(amendment\).pdf](http://54.251.120.208/doc/laws/Act_A1430_Penal_Code_(amendment).pdf).

<sup>123</sup> See Taon, *supra* note 61, at 225.

<sup>124</sup> In the case of Malaysia, see Coalition for the International Criminal Court, *supra* note 62.

<sup>125</sup> Lionel Yee, Deputy Head of Singapore delegation, Rome Conference, 82.

<sup>126</sup> Rome Statute, *supra* note 6, pmbli., paras. 3–4.



### 1. *The Notion of “Asian Values”*

It has long been debated whether there is such a thing as “Asian values,” particularly with regard to the concept of the universality of human rights.<sup>127</sup> In short, the notion of Asian values can be summarized as a culturally specific interpretation of certain rights and values within Asian societies, thereby taking into account the characteristics of the respective country. Common examples by proponents of Asian values include the notion that the community takes precedence over individuals and that economic and social rights have priority over civil and political rights.<sup>128</sup> However, first, a clear distinction needs to be made between the values embedded in Asian societies on the one hand, and the thinking and practices of Asian states on the other hand.<sup>129</sup> Both can differ substantially. Opinions and traditions maintained on the community level may not be entertained as much by governmental institutions. Second, and more importantly, recent studies have put into doubt the whole notion of Asian values and even revealed with regard to certain issues that the differences between East Asia and South Asia may be bigger than those between Asia in general and the West.<sup>130</sup> Thus, even within Asia, societal perceptions may not be suitable for treatment under the common heading of “Asian values.”

Consequently, the present article will refrain from any further dwelling upon the mostly sociological question of whether Asian values influence Southeast Asian governments in their position towards the ICC. Rather, the purpose of this article requires the analysis of the pertinent conventional law, declarations, and regional human rights mechanisms in force in ASEAN countries. Within this framework, special attention will then be given to the region’s legal particularities as opposed to the concept of the universality of human rights.

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<sup>127</sup> WILLIAM THEODORE DE BARY, *ASIAN VALUES AND HUMAN RIGHTS: A CONFUCIAN COMMUNITARIAN PERSPECTIVE* (2000); Francis Fukuyama, *Confucianism and Democracy*, 6 J. DEMOCRACY 20 (1995), [http://www.u.arizona.edu/~zshiple/pol437/docs/fukuyama\\_1995.pdf](http://www.u.arizona.edu/~zshiple/pol437/docs/fukuyama_1995.pdf); So Young Kim, *Do Asian Values Exist? Empirical Tests of the Four Dimensions of Asian Values*, 10 J. E. ASIAN STUD. 315 (2010); Kapur, *supra* note 28; Herman Joseph S. Kraft, *Human Rights, ASEAN and Constructivism: Revisiting the “Asian Values” Discourse*, 22 PHILIPPINE POL. SCI. J. 33 (2001); Christian Welzel, *The Asian Values Thesis Revisited: Evidence from the World Values Surveys*, 12 JAPANESE J. POL. SCI. 1 (2011).

<sup>128</sup> For a deeper analysis of the Asian values debate and its impact on international criminal law, see Kapur, *supra* note 28, at 1064.

<sup>129</sup> B.S. Chimni, *Asian Civilizations and International Law: Some Reflections*, 1 ASIAN J. INT’L L. 39, 41 (2011).

<sup>130</sup> Kim, *supra* note 127, at 338; Welzel, *supra* note 127, at 29.

## 2. Human Rights in Southeast Asia

Whereas human rights were not even mentioned in the 1976 Bangkok Declaration (ASEAN's founding document),<sup>131</sup> the preamble of the 2007 ASEAN Charter pledges to adhere to the principles of "respect for and protection of human rights and fundamental freedoms."<sup>132</sup> Moreover, the Charter commands the member states to set up an ASEAN human rights body.<sup>133</sup> Finally, in 2012, the ASEAN member states adopted the ASEAN Human Rights Declaration, which, while not being a binding regional convention, constitutes a prominent human rights document.

However, the Charter and the Human Rights Declaration contain certain reservations. According to Article 1(7) of the Charter, ASEAN's purpose to promote and protect human rights and fundamental freedoms is subject to "the rights and responsibilities of the Members States of ASEAN."<sup>134</sup> The Human Rights Declaration stipulates that, whereas "[a]ll human rights are universal, indivisible, interdependent and interrelated . . . [a]t the same time, the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds."<sup>135</sup> Criticism of the content of the ASEAN Human Rights Declaration<sup>136</sup> prompted even the U.N. High Commissioner for Human Rights, Navi Pillay, to state that it "retains language that is not consistent with international standards."<sup>137</sup>

Still, the contentious provisions of the ASEAN Human Rights Declaration are consistent with ASEAN's prior positions. The Association's somewhat ambivalent attitude towards human rights can be traced back to an official statement at the Twenty-Sixth ASEAN Ministerial Meeting held in Singapore in 1993.<sup>138</sup> In the wake of the World Conference on

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<sup>131</sup> Yuval Ginbar, *Human Rights in ASEAN—Setting Sail or Treading Water?*, 10 HUM. RTS. L. REV. 504, 506 (2010).

<sup>132</sup> ASEAN Charter pmb., para. 8.

<sup>133</sup> *id.* art. 14.

<sup>134</sup> *id.* art. 1(7).

<sup>135</sup> ASEAN Human Rights Declaration § 7, <http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>.

<sup>136</sup> Phil Robertson, *Betraying Human Rights, ASEAN Style*, NATION (May 14, 2012, 1:00 AM), <http://www.nationmultimedia.com/opinion/Betraying-human-rights-ASEAN-style-30181860.html>.

<sup>137</sup> *Pillay Encourages ASEAN to Ensure Human Rights Declaration is Implemented in Accordance with international Obligations*, OFFICE HIGH COMMISSIONER FOR HUM. RTS. (Nov. 19, 2012), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12809&LangID=E>.

<sup>138</sup> Ginbar, *supra* note 131, at 506.

Human Rights in Vienna in June 1993, the (then six) ASEAN countries declared that human rights shall be “protected and promoted with due regard for specific cultural, social, economic and political circumstances” and that “the promotion and protection of human rights should not be politicized.”<sup>139</sup> Furthermore, they emphasized that “the protection and promotion of human rights in the international community should take cognizance of the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states.”<sup>140</sup>

In the same manner, the Terms of Reference (“ToR”) of the ASEAN Intergovernmental Commission on Human Rights that was inaugurated in 2009 pursuant to Article 14 of the Charter<sup>141</sup> contain ambivalent language. On the one hand, the ToR pledge to “uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.”<sup>142</sup> On the other hand, the promotion of human rights shall take place “within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities.”<sup>143</sup>

In summary, ASEAN countries do not cherish a view that seeks to promote human rights regardless of the Association’s other fundamental principles. Rather, according to the aforementioned legal texts, human rights need to be balanced with national sovereignty, territorial integrity, and non-interference, as well as with specific cultural, social, economic, and political circumstances. This approach is in conflict with the Universal Declaration of Human Rights adopted by the U.N. General Assembly in 1948.<sup>144</sup> According to Article 2 of the Declaration, “[e]veryone is entitled to all the rights and freedoms set forth in this

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<sup>139</sup> *Joint Communique of the Twenty-Sixth ASEAN Ministerial Meeting Singapore, 23–24 July 1993*, ASS’N OF SOUTHEAST ASIAN NATIONS, para. 16, <http://www.asean.org/news/item/joint-communique-of-the-twenty-sixth-asean-ministerial-meeting-singapore-23-24-july-1993>.

<sup>140</sup> *Id.* at para. 17.

<sup>141</sup> The Commission has been criticized for its inability to protect individuals’ human rights. See Ginbar, *supra* note 131, at 514; Kapur, *supra* note 28, at 1064.

<sup>142</sup> ASEAN INTERGOVERNMENTAL COMM’N ON HUM. RTS., TERMS OF REFERENCE, § 1.6 (Oct. 2009), [http://aichr.org/?dl\\_name=TOR-of-AICHR.pdf](http://aichr.org/?dl_name=TOR-of-AICHR.pdf).

<sup>143</sup> *Id.* § 1.4.

<sup>144</sup> Those Southeast Asian countries that were independent at the time all voted for the adoption of the Declaration, namely the Union of Burma, the Republic of the Philippines, and the (then) Kingdom of Siam.

Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>145</sup>

### 3. Existing Obligations Under International Law

It needs to be assessed whether this cultural approach towards human rights also touches upon the purpose of the Rome Statute. The Statute’s preamble emphasizes that the crimes which are defined in Articles 6–8 “threaten the peace, security and well-being of the world,” and that crimes “of concern to the international community as a whole must not go unpunished.”<sup>146</sup> Thus, most of the crimes incorporated in the Rome Statute form the very core of international human rights law. They have not been disputed by ASEAN countries.<sup>147</sup> Rather, most of the ASEAN countries have signed or ratified the treaties and conventions codifying the core human rights norms such as the *jus cogens* prohibitions on genocide, crimes against humanity, war crimes (grave breaches of the Geneva Conventions in international armed conflicts), torture, slavery, or acts of aggression.<sup>148</sup> Furthermore, most of the statutory crimes constitute crimes under international customary law and are thus binding law for any country. For instance, the obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (1948) are considered obligations *erga omnes*<sup>149</sup> that have to be observed also by those ASEAN members that did not sign the Convention.<sup>150</sup>

Some provisions of the Rome Statute regarding crimes against humanity and war crimes may go beyond what is already part of international customary law.<sup>151</sup> During the 1998 Rome Conference, Thailand submitted that “when considering the inclusion of war crimes under the Statute, it was first necessary to see what was established by the Geneva Conventions and what in the opinion of jurists would constitute customary international law.”<sup>152</sup> In this regard, particularly, the obligation to prosecute war crimes committed in

<sup>145</sup> G.A. Res. 217A (III), U.N. Doc. A/RES/217A(III) (Dec. 10, 1948), <http://www.un.org/en/documents/udhr/>.

<sup>146</sup> Rome Statute, *supra* note 6, pmbi., paras. 3–4.

<sup>147</sup> Kapur, *supra* note 28, at 1068.

<sup>148</sup> Desierto, *supra* note 90, at 95, 108; Kapur, *supra* note 28, at 1069.

<sup>149</sup> Barcelona Traction (Belg. v. Spain), Judgment, 1970 I.C.J. 3, paras. 33–34 (Feb. 5, 1970).

<sup>150</sup> Currently, Brunei, Indonesia, and Thailand have not signed the Genocide Convention. See *Convention on the Prevention and Punishment of the Crime of Genocide*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-1&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en).

<sup>151</sup> See Kapur, *supra* note 28, at 1070.

<sup>152</sup> Rome Conference, *supra* note 22, at 163 (statement of Puyawat Niyomrerks, Deputy Director-General, Department of Treaties and Legal Affairs, Thai Ministry of Foreign Affairs).

non-international (internal) armed conflicts may raise concerns among ASEAN states with regard to the principle of non-interference.<sup>153</sup>

Nevertheless, it can be stated that the vast majority of the crimes under the jurisdiction of the ICC form part of the undisputed core of international criminal and human rights law. Therefore, it appears rather unlikely that the ASEAN countries will raise concerns such as cultural, social, economic, or political circumstances with regard to the material content of the Rome Statute. While it is true that the prosecution of the most serious international crimes makes requests on the internal order of states,<sup>154</sup> the substantive criminal law of the Rome Statute constitutes in large part obligations already existing under international criminal law.

#### D. Conclusion and Outlook

The reasons for Southeast Asia's hesitancy towards the International Criminal Court can be traced back to the Rome Conference in 1998. Most of the concerns raised at that time may still play a role in today's considerations. This holds especially true for ASEAN's principle of non-interference with internal affairs and the region's emphasis on national sovereignty. However, the Rome Statute's referral mechanisms do not substantially pose a "threat" to Southeast Asian nations. There is no sign that the Prosecutor's competence *proprio motu* is being exercised in a politicized manner. Furthermore, most of the substantive criminal law enshrined in the Statute already forms part of existing obligations under conventional or customary international law.

As current efforts with regard to joining the ICC are rather mixed throughout the ASEAN countries, it is hardly predictable which country, if any, will be the next to ratify the Rome Statute. However, vivid debates and first legal steps can be observed in Indonesia, Malaysia, and also in Thailand. Indeed, only those countries that ratify the Rome Statute may take part in the sessions of the ICC's Assembly of States Parties ("ASP"), thus participating in shaping the future of the ICC as an institution as well as in reviewing the provisions of the Statute itself.<sup>155</sup> Furthermore, as the President of the International Criminal Court, Judge Sang-Hyun Song, indicated, the significance of the Rome Statute framework may not only be found in the punishment of past atrocities but also in its

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<sup>153</sup>Kapur, *supra* note 28, at 1070.

<sup>154</sup>See Christian Tomuschat, *Asia and International Law—Common Ground and Regional Diversity*, 1 *ASIAN J. INT'L L.* 217, 227 (2011).

<sup>155</sup>Currently, Brunei Darussalam, Indonesia, Malaysia, Singapore, Thailand, and Vietnam are observer states to the ASP.

potential for the prevention of future crimes, particularly under the headings of deterrence, timely intervention, stabilization, and norm setting.<sup>156</sup>

This potential for prevention may also be one reason why the European Union has introduced a so-called “ICC clause” in its negotiations of Partnership and Cooperation Agreements (“PCA”) with third countries. Thus, for instance, Indonesia and the EU agreed to cooperate on the “preparations for the ratification and implementation of . . . the Rome Statute on the International Criminal Court,”<sup>157</sup> while the EU and Vietnam considered “that the International Criminal Court is a progressive and independent institution operating for the purpose of international peace and justice. The Parties agree . . . to consider the possibility of adherence to the Rome Statute.”<sup>158</sup> The political repercussions of not ratifying the Rome Statute may therefore move Southeast Asian states into the direction of the ICC.

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<sup>156</sup>Song, *supra* note 51, at 206.

<sup>157</sup>Framework Agreement on Comprehensive Partnership and Cooperation Between the European Community and Its Member States, of the One Part, and the Republic of Indonesia, of the Other Part, Apr. 26, 2014, 2014 O.J. (L 125/17), art. 4(3), [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.125.01.0017.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.125.01.0017.01.ENG); the EU-Indonesia PCA entered into force on 1 May 2014.

<sup>158</sup> Framework Agreement on Comprehensive Partnership and Cooperation Between the European Union and Its Member States, of the One Part, and the Socialist Republic of Vietnam, of the Other Part, June 27, 2012, art. 11(4), [http://eeas.europa.eu/delegations/vietnam/documents/eu\\_vietnam/pca.pdf](http://eeas.europa.eu/delegations/vietnam/documents/eu_vietnam/pca.pdf).