

Introduction

The security landscape of Southeast Asia is rapidly changing. While many Southeast Asian nations remain steadfast in maintaining their political regime stability against external interference, the region's contemporary security landscape has diversified with the emergence of various non-traditional security issues.¹ Transnational security challenges such as terrorism, piracy, cyber-attacks, human trafficking and people smuggling require concerted or collective responses. The rise of the People's Republic of China (PRC) as a regional great power is adding complexity to the regional security dynamics, which is illustrated by the increased tensions in the South China Sea involving multiple parties over territorial and maritime disputes. These dynamic changes to the region's security landscape pose challenges to the ability of Southeast Asian nations to steer through multilateral processes for regional integration.

The Association of Southeast Asian Nations (ASEAN) has achieved deeper regional market integration to lay a socio-economic foundation for the development of a regional community, yet interstate trust is by no means assured as Southeast

¹ Mely Caballero-Anthony and Alistair D. B. Cook (eds.), *Non-Traditional Security in Asia: Issues, Challenges and Framework for Action* (Singapore: Institute of Southeast Asian Studies, 2013); Mely Caballero-Anthony, Ralf Emmers and Amitav Acharya (eds.), *Non-Traditional Security in Asia: Dilemmas in Securitization* (Aldershot: Ashgate, 2006).

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Asian nations remain jealously observant of the vested interests of their state security apparatus.² The notion of state sovereignty is prominent as a means to guarantee security and stability in societies confronting cultural, ethnic and religious diversity. For these reasons, the region is generally known for its preference for a ‘soft’ form of international law – vague, informal and non-binding instruments and arrangements – as the mode of multilateral cooperation,³ of which ASEAN has become the pivot.

United for fear of Communist expansion in Southeast Asia,⁴ Indonesia, Malaysia, the Philippines, Singapore and Thailand established ASEAN on 8 August 1967 to promote regional peace and stability.⁵ It was designed to provide a political platform with a dual function of collectively maintaining the political stability of each member state and protecting regional security from external interference at the height of Cold War politics.⁶

² Jörg Friedrichs, ‘East Asian Regional Security: What the ASEAN Family Can (Not) Do’ (2012) 52(4) *Asian Survey* 754, 761.

³ See Pablo Pareja-Alcaraz, ‘International Law and East Asia’s Regional Order: The Strengthening of a Fundamental Institution’ in Matthew Happold (ed.), *International Law in a Multipolar World* (Abingdon: Routledge, 2012) 224, 239–40.

⁴ Kishore Mahbubani and Jeffery Sng, *The ASEAN Miracle: A Catalyst for Peace* (Singapore: NUS Press, 2017) 51–9; Rodolfo C Severino, *ASEAN* (Singapore: Institute of Southeast Asian Studies, 2008) 5.

⁵ Declaration Constituting an Agreement Establishing the Association of South-East Asian Nations, adopted 8 August 1967, 1331 UNTS 235 (entered into force 8 August 1967).

⁶ For details, see e.g., Alice D. Ba, *(Re)Negotiating East and Southeast Asia: Region, Regionalism, and the Association of Southeast Asian Nations* (Stanford, CA: Stanford University Press, 2009) 42–100; Shaun Narine,

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Its existence was threatened several times, for example, by the Sabah dispute between the Philippines and Malaysia, a decade-long struggle against Vietnam's occupation of Cambodia from 1978 to 1989, and the Asian financial crisis of 1997. ASEAN survived all these challenges and even thrived with the expansion of membership to include Brunei Darussalam in 1984, Vietnam in 1995, Lao People's Democratic Republic (Lao PDR) and Myanmar in 1997, and Cambodia in 1999. The political platform provided by ASEAN has further expanded with a wider geographical reach through ASEAN Plus Three, the ASEAN Regional Forum (ARF) and, most recently, the East Asia Summit (EAS), while maintaining 'ASEAN centrality' at the core of this regional order.

As a regional organisation to promote – rather than maintain or restore – peace and stability, ASEAN sets itself apart from the United Nations (UN) collective security system in that it does not have powers to maintain and restore international peace and security through centralised mechanisms to adopt and enforce mandatory decisions.⁷ Although it may function as one of 'regional arrangements or agencies' for peaceful settlement of regional disputes,⁸ its legal authority to

'ASEAN and the Management of Regional Security' (1998) 71(2) *Pacific Affairs* 195, 196–201; P Saipiroon, *ASEAN Governments' Attitudes towards Regional Security 1975–1979* (Bangkok: Institute of Asian Studies, 1982) 5–7.

⁷ The literature on the UN collective security system is voluminous, but see especially, Nicholas Tsagourias and Nigel D. White, *Collective Security: Theory, Law and Practice* (Cambridge: Cambridge University Press, 2013).

⁸ Charter of the United Nations, opened for signature 26 June 1945, 1 UNTS xvi (entered into force 24 October 1945) (hereinafter UN Charter) art. 52.

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deal with regional conflicts is limited.⁹ In lieu of a UN-like regional collective security organisation, ASEAN has arguably emerged as an alternative model of ‘security institution’ or as a ‘security community-building institution’.¹⁰ Rather than adopting or enforcing mandatory decisions, ASEAN manages intra-regional relations through a diplomatic convention known as the ‘ASEAN Way’ – intra-mural dialogues and consultations based on close working relationships between senior government officials.¹¹

Due to these characteristics of the association’s foundation and its mode of operation, ASEAN’s role in and contribution to regional security has been extensively studied and debated.¹² These debates often proceed on the basis of a pre-determined

⁹ Alexander Orakhelashvili, *Collective Security* (Oxford: Oxford University Press, 2011) 78. For detailed analysis, see Robert Beckman, Leonardo Bernard, Hao Duy Phan, TAN Hsien-Li and Ranyta Yusran, *Promoting Compliance: The Role of Dispute Settlement and Monitoring Mechanisms in ASEAN Instruments* (Cambridge: Cambridge University Press, 2016) ch 2.

¹⁰ Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (3rd edn, Abingdon: Routledge, 2014) 19. For debates about the characterisation of ASEAN, see Chapter 1.2.

¹¹ For historical development of the ‘ASEAN Way’, see e.g., Jürgen Haacke, *ASEAN’s Diplomatic and Security Culture: Origins, Development and Prospects* (Abingdon: Routledge, 2003).

¹² See e.g., Acharya, above n. 10; Alan Collins, *Building a People-Oriented Security Community in the ASEAN Way* (Abingdon: Routledge, 2013); Christopher B. Roberts, *ASEAN Regionalism: Cooperation, Values and Institutionalisation* (Abingdon: Routledge, 2012); Mely Caballero-Anthony, *Regional Security in Southeast Asia: Beyond the ASEAN Way* (Singapore: Institute of Southeast Asian Studies, Singapore, 2005); See Seng Tan, *The Making of the Asia Pacific: Knowledge Brokers and the*

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paradigm of what a security institution ought to be doing in making an assessment of ASEAN's various activities, or the lack thereof, under the prevailing political and diplomatic circumstances of the region.¹³ There has been little reflection upon how these disparate activities help us understand the legal nature and form of ASEAN's authority that has become clearer over the course of its development.

In contrast to the extensive debate and study of security institution-building in Southeast Asia by political scientists, little attention has been given to the legal analysis of ASEAN's authority to address contemporary regional security issues. The absence of a legal perspective in this debate means that the legal nature and form of ASEAN's authority, and the corresponding legal relationship with its member states, in dealing with various regional security issues remains unclear. This leaves a critical gap in understanding ASEAN's commitment to the building of a 'rules-based' community.¹⁴

Following the adoption of the ASEAN Charter in 2007,¹⁵ only a handful of legal commentaries have emerged. They have tended to critique the ASEAN Charter's legal regime – rather misleadingly – by comparing it with

Politics of Representation (Amsterdam: Amsterdam University Press, 2013).

¹³ See Chapter 1.2.

¹⁴ ASEAN Political-Security Community Blueprint 2025, in Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together, adopted at the 27th ASEAN Summit, Kuala Lumpur, Malaysia, 2 November 2015, Section A.

¹⁵ Charter of the Association of Southeast Asian Nations, adopted 20 November 2007, 2624 UNTS 223 (entered into force 15 December 2008).

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supranational, constitutionalised bodies such as the European Union (EU) and identifying the lack of enforcement mechanisms as a weakness.¹⁶ Instead, the legal debate about ASEAN's role in regional security must proceed on the premise that ASEAN is neither equipped nor designed to operate as a collective security institution with a delegation of enforcement powers (the first model of security institution as represented by the UN and African Union),¹⁷ or as an integrated regional institution directed towards a centralised common defence and security mechanism (the second model of security institution as represented by the EU).¹⁸

ASEAN, on the other hand, is built upon alternative security approaches such as cooperative security and comprehensive security, which acknowledges the multidimensional nature of security that spans across political, economic and

¹⁶ See e.g., Diane A. Desierto, 'ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter' (2011) 49 *Columbia Journal of Transnational Law* 268, 295–305; LIN Chun Hung, 'ASEAN Charter: Deeper Regional Integration under International Law?' (2010) 9 *Chinese Journal of International Law* 821, 829–36.

¹⁷ See generally, Tsagourias and White, above n. 7; Orakhelashvili, above n. 9; Ademola Abass, *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (Oxford and Portland, OR: Hart Publishing, 2004); Dan Sarooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers* (Oxford: Oxford University Press, 1999).

¹⁸ See generally, Panos Koutrakos, *The EU Common Security and Defence Policy* (Oxford: Oxford University Press, 2013); Martin Trybus and Nigel D. White (eds.), *European Security Law* (Oxford: Oxford University Press, 2008).

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social realms. These alternative approaches provide the conceptual and normative foundation upon which ASEAN is to form concerted or collective responses to contemporary security issues through more decentralised, dynamic processes of decision-making and implementation.¹⁹

Free from preconceptions of collective security or regional integration models, this study examines the legal nature and form of ASEAN's authority as the basis for a distinct model of security institution, built on mutually constitutive interactions between ASEAN and its member states in dealing with diverse regional security issues. By looking beyond the veneer of diplomacy and prevailing political circumstances, this study identifies the ways in which ASEAN can exercise its legal authority through detailed examination of its engagement with select security challenges in Southeast Asia. The 'legal authority' of ASEAN in the context of this study encompasses, in a broad meaning of the term, ASEAN's institutional ability to engage in normative processes, which has been nurtured through its engagement and interactions with its member states in response to shared security threats in practice.

To that end, the study engages in both a textual and contextual examination of relevant ASEAN instruments, guided by the governing principles of non-interference, comprehensive security, the 'ASEAN Way', and shared commitment and

¹⁹ For these alternative security approaches, see especially, Hitoshi Nasu, 'The Expanded Conception of Security and International Law: Challenges to the UN Collective Security System' (2011) 3(3) *Amsterdam Law Forum* 15, 30–2.

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collective responsibility. This is done through a careful examination of ASEAN instruments and the corresponding practice of its member states, with a particular focus on the ways in which ASEAN contributes to the development, localisation and internalisation of relevant norms and rules of international law in dealing with contemporary security challenges confronting the region.

For the purpose of this book, ASEAN instruments consist of ASEAN treaties, declarations, communiqués and other documents that are adopted at an ASEAN official forum. These instruments, as well as their internalisation into domestic law and policy, inform the contextual analysis of ASEAN's legal authority. The term 'norm development' refers to ASEAN's adoption of its own legal response to a regional security issue in the form of an ASEAN instrument, whereas 'norm localisation' means adaptation of international norms and rules as they are applied within ASEAN's legal contexts.²⁰ The term 'norm internalisation' is distinguished from the mere domestic implementation of international law; instead, it encompasses the process of incorporating global or regional norms and rules as collectively interpreted and translated into a set of concrete actions for domestic implementation.

The primary regional focus of this study consists of ASEAN and its member states: Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam. However, the analysis also encompasses

²⁰ See Amitav Acharya, 'How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism' (2004) 58 *International Organization* 239, 245–53.

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a wider geographical reach through ASEAN's external relations in various related forums with other countries in the Asia-Pacific and influential extra-regional powers such as Australia, the PRC, the United States (US) and the United Kingdom (UK),²¹ to the extent that activities in these forums inform the legal nature and form of ASEAN's authority in addressing regional security challenges.

The following regional security issues are selected for examination: nuclear security (Chapter 2), counter-terrorism (Chapter 3), maritime security (Chapter 4), cyber security (Chapter 5), human trafficking and people smuggling (Chapter 6) and food security (Chapter 7). These issues are representative – but by no means a comprehensive list – of a range of traditional and non-traditional security challenges across different spatial domains where significant regional attention has been drawn.²²

There are other areas that are not necessarily characterised as regional security issues, in which ASEAN has facilitated regional cooperation: for example, environmental problems such as haze;²³ public health threats such as the

²¹ For ASEAN's external relations in general, see Marise Cremona et al., *ASEAN's External Agreements: Law, Practice and the Quest for Collective Action* (Cambridge: Cambridge University Press, 2015). See also, ZOU Keyuan, *China-ASEAN Relations and International Law* (Oxford: Chandos Publishing, 2009).

²² Energy and resource security will be dealt with in the context of nuclear security (Chapter 2) and also in comparison with ASEAN's approach to food security (Chapter 7).

²³ ASEAN Agreement on Transboundary Haze Pollution, adopted 11 June 2002 (entered into force 25 November 2003).

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spread of Avian Influenza in 2004;²⁴ and disaster management and emergency relief,²⁵ as highlighted with the critical role that ASEAN played in facilitating humanitarian relief to Myanmar after Cyclone Nargis struck the southern part of the country on 2 May 2008.²⁶ While regional cooperation in these areas may raise similar legal issues such as the interpretation and application of the principle of non-interference, the inquiry made in this book is essentially distinct in that it focuses on how the commonly shared interest to address a regional security issue has informed the way in which ASEAN establishes and exercises its legal authority within the parameters set by the governing principles.

Chapter 1 discusses the legal context in which ASEAN has established itself as a regional ‘security institution’. It assesses the various views expressed by commentators as to how ASEAN’s role in regional security can appropriately be characterised, a debate which, this chapter argues, often proceeds on the basis of prevailing geopolitical conditions in the region, rather than what the member states have committed themselves to in legal terms. It then introduces the legal, normative and institutional framework underpinning ASEAN’s legal authority

²⁴ ASEAN established a task force to address the threat of Avian Influenza: see Chairman’s Statement of the 11th ASEAN Summit, Kuala Lumpur, Malaysia, 12 December 2005, para. 17.

²⁵ ASEAN Agreement on Disaster Management and Emergency Response, adopted 26 July 2005 (entered into force 24 December 2009).

²⁶ For details, see e.g., Collins, above n. 12, 137–46; Karin Loevy, ‘The Legal Politics of Jurisdiction: Understanding ASEAN’s Role in Myanmar’s Disaster, Cyclone Nargis’ (2015) 5 *Asian Journal of International Law* 55; Jürgen Haacke, ‘Myanmar, the Responsibility to Protect, and the Need for Practical Assistance’ (2009) 1 *Global Responsibility to Protect* 156.