



Received: 19 January 2023

Revised: 15 February 2023

Accepted: 17 April 2023

IS THERE A SERIOUS BREACH OF ASEAN CHARTER?: A CASE STUDY OF THE MYANMAR MILITARY COUP 2021 VIOLENCE AGAINST CIVILIANS

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Handling Editor:

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(This article belongs to the Theme 1: Law and Crime in the Digital Age)

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Abstract

This article is written from the perspective of ASEAN Charter to explain that a serious breach of ASEAN Charter does not exist in the case of the Myanmar military coup violence against civilians in February 2021. To analyze why article 5(3) could not be activated in practice to address the Myanmar military coup 2021 violence against civilians as a serious breach of ASEAN Charter, there are three elements to analyze and found that (1) no definition of serious breach and non-compliance of charter, (2) the final responsible body to address an issue of serious breach and non-compliance of ASEAN Charter is ASEAN Summit under article 20(4) but in practice this article pass a duty to interpret its definition of serious breach of charter to ASEAN Secretariat which has a very limit power under article 51(2) and Rule 2(1) of Rules of procedure for the interpretation of the ASEAN Charter 2012, and (3) decision making mode for applying article 5(3) is belong to article 20(1) (consultation and consensus method) which is based on politic compromise way more than legal binding way. Hence to unlock article 5(3) for addressing an issue of serious breach of ASEAN Charter, ASEAN needs to revise the decision-making mode under article 20(1) of ASEAN Charter by applying the majority vote or negative consensus (reverse consensus) method for the ASEAN Summit instead of consultation and positive consensus.

Keywords: Non-interference Principle, ASEAN Charter, ASEAN Human Rights

Citation Information: Limsiritong, N., & Sookhakich, P. (2023). Is there a Serious Breach of ASEAN Charter?: A Case Study of the Myanmar Military Coup 2021 Violence Against Civilians. *International Journal of Crime, Law and Social Issues*, 10(1), 1-8. <https://doi.org/10.14456/ijclsi.2023.1>

Introduction

ASEAN was established in 1967 in the cold war era between the United States and the Soviet Union with their respective allies that developed after World War II. Since 2008 ASEAN Charter was entered into force on 15 December 2008 and made ASEAN to be the most present successful rule-based regional intergovernmental organization in Southeast Asia region (ASEAN, 2007). Many fundamental principles of ASEAN were recognized since the Bangkok Declaration in 1967 and are set through article 2 of ASEAN Charter in 2008 as a key fundamental of the establish of ASEAN to promote democracy and human rights among ASEAN Member States. Article 5(3) of ASEAN Charter is designed to deal with the matter of serious breach and non-compliance of ASEAN Charter (ASEAN, 2015).

The Myanmar military coup violence against civilians in 2021 led a debate of arisen issue among ASEAN Member States on a big question of balancing between principle of democracy, human rights value, and ASEAN norm such as the non-interference principle (United Nations, 2021). ASEAN should consider and address the Myanmar crisis as a serious breach or non-compliance under article 5(3) of ASEAN Charter or not. In theory, there is a conflict of principles between the principle of non-interference in the internal affairs of ASEAN Member States under article 2(2)(e) and the principle of respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice under article 2(2)(i). However the applying of article 5(3) has never happened before in the history of ASEAN. So this article will answer the question that “*is the Serious breach of ASEAN Charter under article 5(3) exist?*” through the case of Myanmar military coup violence against civilians in 2021.

ASEAN, ASEAN Charter, and Article 5(3) of ASEAN Charter

ASEAN

On 8 August 1967, Indonesia, Malaysia, Philippines, Singapore, and Thailand signed ASEAN Declaration (Bangkok Declaration) to establish the Association of Southeast Asian Nations (ASEAN) at Bangkok, Thailand. Then Brunei Darussalam joined ASEAN in 1984. After the end of Cold War in 1991, Vietnam joined in 1995, followed by Lao PDR and Myanmar in 1997 and Cambodia in 1999. ASEAN was reconstructed by ASEAN Charter on 15 December 2008 and created ASEAN Community (AC) which comprising three pillars, namely ASEAN Economic Community (AEC), ASEAN Political-Security Community (APSC), and ASEAN Socio-cultural Community (ASC) (ASEAN, n.d.).

ASEAN Charter

ASEAN Charter was entered into force on 15 December 2008 after adoption at the 13th ASEAN Summit (ASEAN, 2007). ASEAN Charter mainly presents as the key ASEAN instrument by reorganizing the institutional framework of ASEAN through the rule of law (Wong, 2012: 671-672; Koh et al., 2009). It consisted of 13 chapters and 55 articles as; Chapter 1 (Article 1-2) purposes and principles of Charter, Chapter 2 (Article 3) Legal personality, Chapter 3 (Article 4-6) Membership, Chapter 4 (Article 7-15) Organization organs, Chapter 5 (Article 16) Entities associated with ASEAN, Chapter 6 (Article 17-19) Immunities and privileges, Chapter 7 (Article 20-21) Decision making, Chapter 8 (Article 22-28) Settlement of disputes, Chapter 9 (Article 29-30) Budget and finance, Chapter 10 (Article 31-34) Administration and procedure, Chapter 11 (Article 35-40) Identity and symbols, Chapter 12 (Article 41-46) External relations, and Chapter 13 (Article 47-55) General and final provision.

As the key fundamental ASEAN instrument, ASEAN Charter explains the ideals of ASEAN norms, rules, and values aim for ASEAN and offers accountability and compliance of ASEAN. ASEAN Charter is now being questioned because it is non-progressive and out-of-date (Limsiritong, 2018: 37; Singapore Institute of International Affairs, 2014; Wong, 2012: 671-672). The Philippines, as Chairman of the 30th ASEAN Summit, announced that the ASEAN

Senior Officials' Meeting (SOM) and Committee of Permanent Representatives to ASEAN (CPR) will consider factual updates and revisions to the ASEAN Charter under the supervision of ASEAN Ministers. (ASEAN, 2017; Singapore Institute of International Affairs, 2014; Leviter, 2010: 200-201).

Article 5(3) of ASEAN Charter

Article 5(3) is principally about the matter in case of a serious breach or non-compliance of ASEAN Charter among ASEAN Member States shall be referred to ASEAN Summit for decision. It was designed to address and find the solution when there is a matter related to serious breach or noncompliance of ASEAN Charter. The case of principle's conflicts between human rights norms, democracy promotion, and non-interference will be a good example to apply article 5(3). In fact, article 5(3) should apply since the persecution of Rohingya and ASEAN collusion with traffickers led to migrant crisis (Limsiritong, 2017: 76-77; Sharom, 2016: 52). Unfortunately, it did not happen. Hence the case of Myanmar military coup violence against civilian in 2021 will force ASEAN to reconsider article 5(3) of ASEAN Charter again.

Myanmar Military Coup Violence Against Civilian in 2021

Since Myanmar's military coup on 1 February 2021, it has returned Myanmar to full military rule after a short period of quasi-democracy after the first democratic election with a win for the National League for Democracy (NLD) led by Aung San Suu Kyi. She was a 1991 Nobel Peace Prize laureate, State Counsellor of Myanmar, and the de facto civilian leader in Myanmar transition from military junta to democracy between 2016 to 2021. She has been charged with 11 charges and found guilty of inciting dissent and breaking Covid rules with two years imprisonment. Many human rights agencies and the U.N. special rapporteur on Myanmar, condemned the verdict of Aung San Suu Kyi had no rule of law and was against the basic human right to speak and assemble freely. Millions of people took to the streets in protest against the military coup. More than 1,100 civilians have been killed since the coup. According to the United Nations, many were killed during a crackdown by security forces on pro-democracy strikes and protests, during which thousands have been arrested and sentenced. However ASEAN Member States show different views on the military coup. Singapore, Malaysia and Indonesia raised up concerns over the takeover and urged dialogue between the military and the NLD while Thailand, Cambodia and Philippines confirmed that the military coup was Myanmar's internal affair under the non-interference principle of ASEAN Charter (Maizland, 2022; BBC, 2021; CNN, 2021; United Nations, 2021; Andrews, 2021).

Under global pressure, ASEAN was deep in discussions about not inviting the junta to the ASEAN Summit on October 26-28, 2021, because the junta violated a fundamental human rights principle enshrined in the ASEAN Charter (Ng & Gomez, 2021). Lastly ASEAN officially appointed Erywan Yusof, the Brunei diplomat as the ASEAN special envoy, to Myanmar. However, Myanmar denied the ASEAN special envoy to meet Aung San Suu Kyi based on the principle of non-interference. (Strangio, 2021; Latiff & Allard, 2021) This fact has definitely challenged ASEAN fundamental principle of non-interference (Article 2(2)(e)) and Myanmar situation became ASEAN's riskiest issue testing the limits of its unity and the principle of non-interference in each other ASEAN's affairs.

According to the mentioned fact, there are three issues to consider, such as (1) Myanmar's military coup violence against Aung San Suu Kyi and civilians is considered as a serious breach and non-compliance under article 5(3) of ASEAN Charter or not, (2) What procedure and who will be in charged to address an issue in case of a serious breach and the non-compliance under article 5(3) of ASEAN Charter?, and (3) what a decision making mode for applying article 5(3) of ASEAN Charter is.

Analysis of Addressing the Serious Breach of ASEAN Charter under Article 5(3) of ASEAN Charter: Case Study of Myanmar's Military Coup 2021 Violence Against Civilian

There are three elements of an analysis framework to consider when determining what types of actions will be considered a serious breach and non-compliance under article 5(3) of ASEAN Charter: (1) definition, (2) procedure and the responsible body, and (3) the body's mode of decision-making.

Definition of a Serious Breach and the Non-Compliance of ASEAN Charter

To consider issue (1) about definition, article 5(3) of ASEAN Charter states that "(3). In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to Article 20." (ASEAN, 2015). As a result, there are two definitions to discover. One is a serious breach of ASEAN Charter. The other is the non-compliance of its Charter. Unfortunately, there is no definition of these terms in ASEAN Charter. When an issue of lacking definition arises, the process of law interpretation is normally requested.

Bryan A. Garner, the editor of Black Law dictionary defines "Law interpretation" as the process of discovering and expounding the intended meaning of the language used in a statute, will, contract, or any other written document (Garner, 2009: 894). That is, whenever the meaning of a legal document needs to be determined, law interpretation will take place. As same as in case of article 5(3) of ASEAN Charter, whenever there is a doubt on the definition of a serious breach and non-compliance under ASEAN Charter, the interpretation process of ASEAN Charter is needed. ASEAN Charter interpretation is the process of discovering and expounding the intended meaning of the language used in ASEAN Charter whenever the contents of ASEAN Charter must be determined.

According to article 51(1) of ASEAN Charter, it states that "Upon the request of any Member State, the interpretation of the Charter shall be undertaken by the ASEAN Secretariat in accordance with the rules of procedure determined by the ASEAN Coordinating Council." (ASEAN, 2015). When the interpretation is requested, the power to interpret ASEAN Charter will belong to ASEAN Secretariat and a scope of interpretation will be focused on (1) the provisions of ASEAN Charter, and (2) the specific questions on which the interpretation is sought according to Rule 3(2) of Rules of Procedure for the Interpretation of the ASEAN Charter (RoP) 2012 (ASEAN, 2012).

Unfortunately, due to limitation of ASEAN Secretariat's power to interpret ASEAN Charter, it has been found three difficulties for ASEAN Secretariat to interpret ASEAN Charter such as (1) the appropriation of Charter interpreter, (2) legal binding of interpretation, and (3) new arising dispute of ASEAN Secretariat (Limsiritong, 2016: 22-23).

The interpretation processes of ASEAN Charter under article 51 of ASEAN Charter and Rule 2(1) of ROP 2012 which is not applicable in reality because article 51 of ASEAN Charter puts a wrong man to a wrong job and also creates makes the odd situation between ASEAN Secretariat and ASEAN Submit. Then according to Rule 2(1) of ROP 2012, without the legal binding interpretation, any decision of ASEAN Secretariat's interpretation is worthless because any given decision could not be enforced to the parties. Finally, with the previously mentioned issues of an inappropriate interpreter and a non-legally binding decision, article 51(2) of the ASEAN Charter will result in a new dispute between the ASEAN Secretariat and any ASEAN Member State (Sookhakich & Limsiritong, 2021).

After analyzing of ASEAN interpretation process to address and consider the case of a serious breach and non-compliance against ASEAN Charter, it was found that no even one of ASEAN Member State requested ASEAN Secretariat to interpret this situation under article 51(1) of ASEAN Charter since ASEAN Charter was enforced in 2008 because all ASEAN Member States relied on the non-interference principle under ASEAN Way more than other principles, and decided to use diplomatic way instead of legal action under ASEAN Charter to fix all

situation. Hence without an exact definition, article 5(3) of ASEAN Charter could not be applied to any issues.

Procedure and Responsible Body to Address a Serious Breach of ASEAN Charter



Figure 1 The procedure of applying article 5(3) under ASEAN Charter

To consider issue (2) about the procedure of applying article 5(3) under ASEAN Charter, as shown on Figure 1, from stage A to stage B, according to article 5(3) of ASEAN Charter, in the case of a serious breach of ASEAN Charter or non-compliance, the matter shall be referred to article 20(4) which empowers ASEAN Submit for making decision. And ASEAN Submit must make decision on a basic principle of consultation and consensus at stage C under article 20(1). Furthermore, at stage D, article 20(2) serves as an exception to article 20(1) in the event that ASEAN Submit cannot reach a consensus on its issues. All these facts obviously show that ASEAN Charter was designed to empower ASEAN Submit as the key responsible body to make decisions in all matters, especially the matter of serious breach of ASEAN Charter or non-compliance. Hence the achievement of a procedure for applying its article 5(3) would belong to the decision making of ASEAN Submit.

However, the characteristic of ASEAN Submit is not designed to make decisions on any disputes based on a fundamental principle of consultation and consensus. All of decision-making mode of ASEAN Submit is relied on ASEAN way which is preferable the politic approach over the legal method (Limsiritong, 2016: 20-21). To exercise their authority, ASEAN Summit officially places the meeting twice a year and makes a decision based on their method of decision making under article 21 of ASEAN Charter (ASEAN, 2015). In reality, ASEAN Summit is the supreme policy-making body of organization which consists of the ten heads of government of each ASEAN Member States and normally has duties to set the direction for ASEAN policies and objectives which include deliberating, providing policy guidance, and taking decisions on critical issues relating to the objectives of ASEAN, as well as important matters of interest such as the signing or endorsement of agreements, and the issuance of declarations by ASEAN Member States. For this reason, the real responsible unit to address the serious breach of Charter is not the ASEAN Secretariat under RoP 2012 but ASEAN Submit.

Decision Making Mode for Applying Article 5(3)

To consider issue (3) about the decision-making mode in case of a serious breach of ASEAN Charter, the nature of fundamental principle of consultation and consensus of ASEAN is mostly a positive consensus which requires all ASEAN Member States in ASEAN Summit to agree with the decision. When consensus cannot be reached, ASEAN Summit can do nothing because this rule of law was designed to respect and protect the ASEAN principle of non-interference (Limsiritong, 2018: 37; 2016: 22-23). Moreover, this decision making mode of ASEAN is mostly the prerogative of ASEAN Summit which is the supreme body of ASEAN and is composed of the heads of state of each Member State who generally take decisions based on their own political interests, not ASEAN interests. Hence it obviously shows that ASEAN decision-making mode under ASEAN Charter is designed to confirm a principle of ASEAN Way which promises that all ASEAN decisions will be decided by positive consensus and none of ASEAN Member State will interfere in the activities of another no matter what the situation is (Limsiritong et al., 2019: 30-31; Limsiritong, 2018: 35-36). As a result, the ASEAN Summit

always bases its decisions on ASEAN's non-interference principle, which extends far beyond human rights and democracy protection.

Conclusion and Recommendation

To summarize, until now the crisis in Myanmar has not yet been resolved. Myanmar military coup violence against civilians in 2021 is one kind of violence and possibly not be the last of violence to civilians not only in Myanmar but also in other ASEAN countries. ASEAN, as the most successful intergovernmental organization in this region as they claimed, has a direct role and obligation under ASEAN Charter to promote regional peace and development. Despite the fact that the principle of non-interference is one of the ASEAN way and has been applied to all rule of law under the ASEAN Charter, including a serious breach under article 5(3), the military coup against civilians in Myanmar has demonstrated the limitations of the ASEAN Charter, not just article 5(3).

Article 5(3) of ASEAN Charter is not designed to use in complicated politic situation especially in case of Myanmar's military coups violence civilians because (1) no definition of serious breach and non-compliance of ASEAN Charter, (2) the real final responsible body to address an issue of serious breach and non-compliance of ASEAN Charter is ASEAN Summit under article 20(4) but in practice this article pass a duty to interpret its definition of serious breach of charter to ASEAN Secretariat which has no real power in practice under article 51(2) and Rule 2(1) of ROP 2012, and (3) decision making mode for applying article 5(3) is belong to article 20(1) (consultation and consensus method) which is based on politic compromise way more than legal binding way. Moreover, the criticisms of ASEAN organization structure and ASEAN decision making perspective are still in question as to their effectiveness in a practical sense. Because these factors are influenced and designed by giving supreme power to ASEAN Summit based on ASEAN Way concept. From the above reason, it is confirmed that a serious breach of ASEAN Charter under article 5(3) does not exist in reality because it could not work against the non-interference principle of ASEAN Way.

For recommendations on how to use article 5(3) to address the issue of serious breach of Charter and non-compliance, there are three options for ASEAN Summit to consider. First option is ASEAN Summit should apply a majority vote or negative consensus method to unlock article 20 on decision making mode instead of positive consensus. The second approach is that ASEAN Submit should create a detailed definition of serious breach and non-compliance of ASEAN Charter. For instance, any actions by ASEAN Member States that have a major negative impact on the principle of human rights are considered as serious breaches and non-compliances of the ASEAN Charter. The last possibility is that ASEAN Submit should establish a human rights-related exclusionary rule to limit the ASEAN Way's non-interference norm.

Another recommendation is for ASEAN members to respect the Charter's body in order to run the ASEAN Summit's structure for open discussion, lead to respectful voting, and follow decision-making. The second is to establish additional enforcement bodies and forums that are not already included in ASEAN Charter or to grant ASEAN Intergovernmental Commission on Human Rights (AICHR) more authority in this area.

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Data Availability Statement: The raw data supporting the conclusions of this article will be made available by the authors, without undue reservation.

Conflicts of Interest: The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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