From Constructive Engagement to Collective Revulsion: The Myanmar Precedent of 2007

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FROM CONSTRUCTIVE ENGAGEMENT TO COLLECTIVE REVULSION, THE MYANMAR PRECEDENT OF 2007

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Twenty years on Myanmar has come full circle, repeating the events of 1988. Myanmar’s Saffron Revolution has come to a brutal halt amidst public outrage worldwide. Violent repression, where the State turns its guns on its own citizens, has come into twenty-first century news screens, causing ASEAN to issue its most strongly worded statement thus far in reaction to these events. The lecture explores the true causes for ASEAN’s latest policy shift and evaluates the assumptions underpinning the policy of constructive engagement in the past and whether the ASEAN should now adopt a coercive or “sanctions” model of international law and expel Myanmar or take the view that membership of ASEAN would eventually alter Myanmar’s behaviour. Against popular public opinion, the 21st Singapore Law Review Lecture will argue that there is both the means and opportunity today for a coherent, cautiously optimistic, regional response to the Myanmar crisis.

I. THE POLICY SWITCH

A. Historic Tipping Point, Diplomatic Shift & Legal Precedent

Ladies and gentlemen, while the global press suggested a tipping or inflexion point in relation to the Myanmar situation when they proclaimed a Saffron Revolution, for people like me, for whom legal precedents matter more than tipping points, 27 September 2007 is important not because it was the day, following the massive crackdown of the previous twenty-four hours, when the junta began raiding monasteries. Instead 27 September was also the day when ASEAN’s collective membership, in addressing Myanmar’s Foreign Minister, expressed revulsion at the violent repression of demonstrators in Myanmar.

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I see a shift from ASEAN’s well-known policy of constructive engagement. Up until the ASEAN Foreign Ministers’ retreat in Cebu in April 2005, Singapore’s Minister for Foreign Affairs explained ASEAN’s position on Myanmar as follows:

We re-affirmed that ASEAN cannot interfere in the domestic affairs of Myanmar. Indeed, whatever steps Myanmar decides to take, it will be the Myanmars [sic] themselves who will bear the consequences, be they good or bad.¹

Non-interference in the domestic affairs of states is sacrosanct, especially in the eyes of so many of those nations born from the United Nations decolonization era of the ’50s, ’60s and ’70s. It is legally enshrined in ASEAN’s Treaty of Amity and Cooperation of 1976.² Article 2 states that:

In their relations with one another, the High Contracting Parties shall be guided by…

b. The right of every State to lead its national existence free from external interference, subversion or coercion [sic].…

c. Non-interference in the internal affairs of one another…³

By its placement and location in the treaty text, these principles go to the very purpose of ASEAN “to promote perpetual peace, everlasting amity and cooperation among their peoples which would contribute to their strength, solidarity and closer relationship”.⁴

ASEAN’s latest practice, the “collective revulsion” statement, affects how we should now interpret and understand ASEAN’s treaty.

In my view, both ASEAN’s diplomatic language and the legal bedrock upon which that language and its policy rest on, should now be understood differently, particularly in the way the two sets of clauses above – the purpose clause and the principles clauses – relate to each other. In the past, the role of non-interference in contributing to the purpose of promoting amity and cooperation within ASEAN was taken as an inflexible, mathematical theorem. Today, the means are adjusted to their purpose, when non-interference threatens to undermine ASEAN, either internally or in the eyes of the world, the means and not the aim have to be adjusted. Even if amity and cooperation, or ASEAN solidarity, are not seriously threatened by these differences of opinion, ASEAN is trying to do some important things at the moment. ASEAN wants to be plugged into wider East Asian and Asian regional trade integration, wants to have an ASEAN Charter by this month, and these kinds of aspirations require that the world should take ASEAN more seriously.

This is all as it should be but my point is that the Myanmar precedent also contains broader, more important, lessons for ASEAN in the future. So there are two stories in this lecture. One about Myanmar, the other about ASEAN.

³ Ibid. art. 2(b), (c).
⁴ Ibid. art. 1.
B. From Post-Independence Burma to Myanmar

Let me say a few quick words to give you my understanding and assumptions about Myanmar. I just want to highlight some key events which have taken place since independence in 1948 from British rule.

Myanmar achieved independence on 4 January 1948 after uncertainty on the part of the British Government about the decision to recognize the Anti-Fascist People’s Freedom League (AFPFL). The AFPFL had been led by Aung San and other leaders who were assassinated in July 1947. With recognition of the AFPFL and independence, a fledgling Burma was left to deal with its own separatist problems and ethnic complexities. 4,000 Kuomintang soldiers fleeing China into Burma in 1950 and the threat of China’s civil war spilling into Burma led Burma to dissociate itself from Britain and the United States. The Anglo-Burmese Defence Treaty and American aid came to an end at Burma’s behest.

General Ne Win, formerly the Chief of Staff of the Burmese Armed Forces (the Tatmadaw) and caretaker prime minister from 1958-60 seized power in a virtually bloodless coup on 2 March 1962. He ruled for the next twenty-six years. The new military regime suppressed democracy, political parties and student dissent, including the famous attack on the Rangoon University Student Union building.

There was then little international or domestic criticism of the new military government. What has been fateful, according to one view, is not military rule but the isolation strategy which Ne Win initiated – the “Burmese Way to Socialism”. Private property was confiscated; the mercantile elite which were largely Indian and Chinese and virtually all the foreign corporations had to leave. With autarky, the economy suffered. Domestic consumption was rationed in 1966. By then, exports had fallen to a tenth of the pre-war figure. So, basically, by the mid-60s the die was cast.

Professor Ian Holliday, Dean of the Faculty of Social Sciences at the University of Hong Kong, a widely acknowledged expert on Myanmar, emphasizes that this is what makes Myanmar today different from a large part of Southeast Asia, not the fact that it has been under military rule, or that it faces enormous ethnic complexities. Military rule and ethnic complexities in other Southeast Asian nations have not prevented them from setting themselves on a path to economic growth during the 1960s and 1970s. Moreover, Myanmar cannot be treated as simply another kleptocracy, like Mbutu’s Zaire. The ideological dimension is a real factor. The belief that only the military can hold Burma/Myanmar together explains the junta’s visceral dislike of Aung San Su Kyi as well as its own self-conviction. This is the New York Times quoting Professor David Steinberg at Georgetown’s School of Foreign Service:

We tend to think everything they do is for propaganda or personal ag-

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5 “Myanmar” was only adopted in 1989.
8 Ian Holliday, “Political Crisis in Burma/Myanmar: What if to be Done?” (Seminar, Department of Politics & Public Administration, University of Hong Kong, 9 October 2007) [unpublished]. Kishore Mahbubani, Dean of the Lee Kuan Yew School of Public Policy, puts it in broader terms and sees this as a problem of bringing modernity to Myanmar (Kishore Mahbubani, “Engage, Don’t Isolate, Myanmar”, South China Morning Post (Hong Kong) (5 October 2007)).
grandizement...Of course there is that. But there’s a real belief in what they do. They really believe the country would fall apart without them.\(^9\)

So far as the ethnic dimension is concerned, the Tatmadaw is almost uniformly Burman, and thus represents one ethnic group suppressing the others\(^10\). Today, the combined armed services number 400,000 personnel\(^11\).

There are only two national institutions – the monks and the military, and here you have the essence of the present situation. The junta has put itself forward as the protector of Buddhism. Religion has therefore been critical in legitimizing the junta, and what we have now is a delegitimization process\(^12\). Some see it as the beginning of the end\(^13\). But we should not underestimate military discipline. In 1988 only one officer broke ranks\(^14\). This time, again, only one officer I am told defected to Thailand, saying he could not issue the order to fire on monks\(^15\).

The junta came into being in 1988 with the violent suppression of the “8888 Uprising” of 8 August 1988. The 1988 counter-coup led by General Saw Maung saw the establishment of the State Law and Order Restoration Council (SLORC), which declared martial law in 1989. The Burmese Way to Socialism was abolished. As one commentator on Myanmar describes it: “perhaps to appease the international community”\(^16\). But in essence it gave way to what has also been dubbed the Burmese Way to Capitalism, essentially the model of a military-dominated economy. Private enterprise and foreign investment were once more allowed\(^17\). So far as law and politics were concerned, the 8888 uprising also led to a promise on the part of the junta to put Myanmar on the path to constitutional reform. This is now a familiar story in Southeast Asia. It makes Myanmar, in a sense, not that different from Indonesia. But there the similarity ends.

One of the first steps the junta took proved to be a tactical error\(^18\). It decided to hold elections in 1990 and ended up with 20% of the votes and about two percent of the seats. Aung San Su Kyi’s National League for Democracy (NLD), formed shortly after the 8888 Uprising, won 392 out of the 485 seats\(^19\). The SLORC annulled the election, and one reason given for saying the results could not stand was that there was an absence of a constitution. General Than Shwe took over the junta in 1992 and in January 1993 initiated Myanmar’s current slow-moving constitutional reform process with the establishment of the National Convention. In 1997, SLORC changed its name to its present State Peace and Development Council (SPDC).


\(^{10}\) Holliday, *supra* note 8.

\(^{11}\) Lintner, *supra* note 6 at 11; Mydans, *supra* note 9.

\(^{12}\) Quoted in Dennis D. Gray, “Crackdown May Haunt Junta”, *Guardian* (United Kingdom) (7 October 2007).


\(^{14}\) Mydans, *supra* note 9.

\(^{15}\) Holliday, *supra* note 8.

\(^{16}\) Lintner, *supra* note 6 at 10.

\(^{17}\) Ibid.

\(^{18}\) Holliday, *supra* note 8.

\(^{19}\) Electoral figures given in Fuller, *supra* note 13.
In the midst of the 8888 Uprising too there were initial hopes of democratic reform. In 1988 too many were killed and wounded. On 23 June 1997, Myanmar became a High Contracting Party, in other words, a member of ASEAN. It has been described by Ambassador Barry Desker, Dean of the S. Rajaratnam School, as an albatross around ASEAN’s neck since.  

C. The Transformation of Constructive Engagement

Let us get back to ASEAN. Our story begins in 1991 when Thailand initiated what became ASEAN’s policy of constructive engagement. That policy is often seen as an extension of the so-called ASEAN Way which puts a premium on pragmatic, flexible, informal diplomacy, often at the summit level. In time, both constructive engagement and the ASEAN Way came under attack by ASEAN’s critics. ASEAN and constructive engagement became interwoven with the debate in the early 90s onwards about human rights. The effect of it was that ASEAN, which chose to stand firm in that debate, became even more entwined with what was happening in Myanmar. I would say that Myanmar would have been less of an annoying burden but for the fact that it was the price which ASEAN chose to pay in the global human rights debate. ASEAN became bound to a policy of saying, and I quote: “very quietly, in a Southeast Asian way, without any fanfare, without any public statements: ‘Look you are in trouble, let us help you. But you have to change, you cannot continue like this.” Those words, by an Indonesian Foreign Ministry spokesperson, have been quoted as the very definition of constructive engagement. Western states argued for firmer, louder, action; namely, sanctions.

In the face of diplomatic controversy, ASEAN’s policy of constructive engagement could at least claim reliance on bedrock legal principles. When countries, indeed entire regions of countries, put their foreign policies on a legal footing, they usually mean to indicate their seriousness. Conversely, when a country’s foreign policy is under attack, that country tends to fall back on the law. In this sense, disputes between nations tend to be similar to disputes between private individuals. If someone tells you to get your car off their lawn and you refuse, they will soon assert their legal rights.

So when constructive engagement came to be debated, even criticized, in the world press, it came to reveal the legal principle on which it rested – the UN Charter and ASEAN treaty language of non-interference in the domestic affairs of states. The legal policy of ASEAN towards Myanmar became joined at the hip with the bedrock principle of legal sovereignty and the legal right against non-interference. We have seen that these legal principles go to the very heart of ASEAN’s formal purpose as an organization – they are ASEAN’s foundational principles. Sovereignty and non-interference were also especially important to the countries of ASEAN for historical

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20 Quoted in “Lee Objects to ASEAN Slapping Sanctions on Myanmar”, Associated Press (4 October 2007).


22 Ibid. at 109.
reasons. Originally, their legal policy was that of non-interference and sovereignty because their foreign policy was such, even if today foreign policy and legal policy positions tend to be mutually self-reinforcing in the way I have just described. As Ambassador Desker has pointed out, historically, the ASEAN nations needed to build confidence between themselves against the backdrop of Konfrontasi between Malaysia and Indonesia, the separation of Singapore from Malaysia, the Philippines’ claim to Sabah and Thailand’s security concerns with its neighbours. Non-interference and an emphasis on sovereignty were key to that confidence-building process, as well as in the relations of ASEAN countries fighting communist insurgents in their own backyard with China.

So what are we to make of ASEAN’s recent “revulsion”? Had Myanmar been expelled from ASEAN, revulsion would have been a perfectly understandable word. It would have meant that ASEAN member countries no longer wish to be associated with Myanmar. Sovereignty and non-interference would have been preserved; Myanmar’s club membership card would have been withdrawn. But if you let Myanmar keep its membership, and you tell Myanmar that you are revulsed, in other words you tell Myanmar what to do, or what not to do, and if you say that your policy is constructive engagement, then it seems to me that constructive engagement does not mean all that it meant before.

Let us observe the transformation. I have already described the words of Foreign Minister George Yeo, following the Cebu meeting in April 2005, reaffirming that ASEAN cannot interfere in Myanmar’s domestic affairs. But earlier in March, Minister George Yeo had explained to Parliament in Singapore that this is only because:

> It is not the ASEAN way to put things in such a stark and confrontational manner. I am sure we will have meetings behind closed doors, and our words will be suitably lubricated with courtesies and acknowledgements of respect. But I think in the end... some hard messages may have to be put across because ASEAN and the ARF are being affected by what is happening in Myanmar. If these are just domestic political problems, with no impact on the world outside, then it is for the Myanmar people to resolve them themselves. But there is an impact on us.

That impact had to do with the Chairmanship of ASEAN which Myanmar was entitled to in 2006. In the end, Myanmar chose to waive that right, and it seemed that the problem, which saw ASEAN telling Myanmar that it was not only Myanmar but also ASEAN which had to defend Myanmar, had been addressed. According to Minister George Yeo, speaking to the media during the 38th Ministerial Meeting in July, 2005, “the two issues have been disentangled”. That was the beginning of a refinement on constructive engagement – some issues cannot be considered purely

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25Ministry of Foreign Affairs, “Transcript of Singapore Foreign Minister George Yeo’s Media Conference
within Myanmar’s domestic sphere when they have an impact on ASEAN. If that is still ASEAN diplomatic doctrine today then one would have thought that recent events would fall on that side of the line which ASEAN could simply characterize as the internal or domestic affairs of Myanmar. But, startling as it might be to some long-time observers, it seems that ASEAN will no longer tolerate the violent suppression of domestic protest either, at least on the scale that we have recently witnessed in Myanmar. Singapore’s Minister Mentor has called Myanmar a “time bomb”.

On September 17th, the monks overturned their alms bowls, indicating that they would no longer receive alms from the junta, and this sparked the truly mass protests. A couple of hundred thousand people took to the streets. The regime says, implausibly, that ten people were killed, and 2,000 have been detained. Others estimate that it was more likely 200 killed and 6,000 detained, thereabouts. Perhaps violence and brutality against monks in the streets was the last straw for ASEAN. But is this truly the case? It is hard to say. After all, the 1988 event was even larger, and the “CNN effect” was present here too. Could it be that ASEAN now finds it hard to stomach the idea of rule by fear? Blaring speakers in the night, declaring: “We have photographs, we know who you are.” The jury is still out on why recent events have become ASEAN’s business, and not simply Myanmar’s.

I shall attempt another explanation here, but what we have, for whatever reason, is a policy switch. And since the previous policy operated under the colour of law, it means that ASEAN has also reached a tipping point in the realm of legal policy – what common lawyers might call a new precedent. ASEAN’s legal relationship with Myanmar has changed, and the events of 2007 surrounding Myanmar now stand for a new ASEAN legal precedent.

II. LAWYERS’ THEORIES ABOUT BEHAVIOUR

A. How ASEAN behaves

The Singapore Law Review Lecture is Singapore’s longest running public lecture series. A public lecture is meant to stimulate public thought and discourse on the great issues of the day. When a law professor is called to give the lecture, he has to say something about how his field contributes towards an understanding of today’s issues.

The practical or technical aspect of my subject is one which concerns itself with discovering the international rules that can provide useful guidance in the foreign policy process, as well as the design of new rules, principles, organizational frameworks and institutions that could serve a useful purpose in international life. That is what I


27 Figures, quoting dissident sources, given in “Singapore University Students Petition Myanmar Junta”, Straits Times (Singapore) (4 October 2007).

28 Holliday, supra note 8.
did as an international law practitioner. But as university law teachers, international lawyers are also involved in explaining the behaviour of countries, and international behaviour more generally. One important way of looking at how countries behave has to do with how having an organizational setting affects their foreign policy behaviour. If you belong to a club with rules of conduct, and you want to belong to that club, you end up internalizing the rules of that club. We call that the “liberal” model of international legality, and we contrast that with sanctions or what we call a “coercive” model of international law.

Now, let me try and explain ASEAN’s recent behaviour. ASEAN has got to that point where it is like a company wanting to sell its stock in the open market. It wants to go for a public listing. Potential stock-holders need to know what sort of company they are buying into, how the company is run, and so on. They want transparency and sunshine. ASEAN knows that if it wants a good price for its stock, its strategy is to reassure the market. Now put the analogy aside.

ASEAN wants to be a part of a wider effort to integrate the Asian economies. We already have a lot of ASEAN regional economic integration, with the ASEAN Free Trade Area (AFTA) and the ASEAN Investment Area (AIA). In a couple of weeks ASEAN will have a Charter. But ASEAN wants more. Some years ago, at a breakfast meeting here in Singapore, this was how the Secretary-General of ASEAN, Mr. Ong Keng Yong put it:

[C]ollectively we are a market of 520 million with a combined GDP of US$580 billion and total two-way trade of US$781 billion (in 2000). In other words, ASEAN is about half the size of China in population and GDP. But we are a bigger trader than China: China’s external trade in 2000 was only US$474 billion. ASEAN is the fourth biggest trader in the world after the EU-15, the US and Japan. … all major economic powers in the world are our key cooperation partners.

Today, those key cooperation partners are all ASEAN’s potential stockholders. There has been a lot of attention, for example, on the China-ASEAN Free Trade Agreement (CAFTA). That has been a catalyst in getting Japan and South Korea into the picture. India soon came hot on the heels of the China-ASEAN deal. There are now a whole host of possibilities – the East Asia Summit, which includes India, Australia and New Zealand, the idea of an East Asian OECD, and even renewed talk of a 21-member Free Trade Area of the Asia Pacific. Put aside what ASEAN, collectively, might prefer. Whichever option succeeds in shaping Asia and the Asia-Pacific in the future, ASEAN needs to be plugged in. To be credible to the world outside, ASEAN needs to speak with a single voice. That is what internal integration and the ASEAN Charter are about. The bottom line is that a more ambitious ASEAN needs to sell its stock worldwide.

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30Ong Keng Yong, ASEAN Secretary-General (Speech at Ballroom of the Regent Hotel, Singapore, 22 March 2003) (on file).
I believe that ASEAN’s current ambitions have something important to do with the Myanmar policy switch. ASEAN may not succeed in changing Myanmar’s behaviour anytime soon, but it can at least change, or appear to change, its own behaviour.

B. How Others Behave: Sanctions, Smart Sanctions, Lawsuits, and Corporate Social Responsibility

But others have traditionally refused to let ASEAN off the hook so easily. We have seen some of the reasons why – one of which is human rights. These countries want to change the way Myanmar behaves. So we have sanctions, talk of smart sanctions, and even laws that allow private law-suits to be brought in America against American companies for doing business in Myanmar. Corporate social responsibility is no longer about people not wanting to buy your products because you do business with the junta. Putting sanctions aside, you could also get sued for doing business with the junta because you have committed a tort in violation of the law of nations. American companies are putting a lot of money into law firms to figure out their exposure to these kinds of suits, not just in Myanmar but worldwide.

All of this has to do with the assumption that a carrot and stick approach could work with Myanmar. We have seen that the reality may be more complex. As someone put it, the junta realize that if they do not hang together, they will hang separately. We can expect Myanmar to dig in for the long haul. I think the various foreign ministries and chancelleries the world over know that, but they have to respond to public pressure. To look as if they are doing something. Part of that doing something is to put pressure on ASEAN, and on a whole bunch of countries that have bought into ASEAN’s policy of constructive engagement but for different reasons.

China has strategic interests. India soon realized that if China has a stake in Myanmar, India does too and recently signed a USD 150 million deal for a stake in Myanmar’s gas fields on the Rakhine Coast of the Bay of Bengal. Japan’s aid and trade stands at USD 453 million, not a huge sum but nonetheless significant. It has a strong role to play too. Then there is France, and there is Russia with strong economic ties, and finally ASEAN, where Thailand and Singapore have been singled out as potential key players.

In the Security Council, you can count on China and Russia blocking any serious collective action against Myanmar. Long gone were the immediate Post-Cold War days of the early 90s when you could get the Security Council to agree on collective action. Unilaterally, if you are the United States and you think Iraq is

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31 This is usually a reference to the European Union’s sanctions policy, see Michael Ewing-Chow, “First Do No Harm: Myanmar Trade Sanctions and Human Rights”, (2007) 5 Nw. J. Int’l H.R. 154 at 159.
32 “Delhi Trades its Soul for Myanmese Deals”, South China Morning Post (Hong Kong) (22 October 2007).
34 Frank Ching, “Position of Influence”, South China Morning Post (Hong Kong) (3 October 2007); Jamie Metzel, “Beijing Holds the Key to Myanmar”, South China Morning Post (Hong Kong) (4 October 2007).
hard to run, Myanmar will likely prove worse. So the hawks insist only on what they can – sanctions. In the absence of international like-mindedness, it is unclear if the military which has weathered isolationism for so long will truly feel the difference. Indeed, some charge that it was IMF pressure to get rid of fuel subsidies and to put fuel sales on a market footing that ultimately led to the recent atrocities. Everyone hopes, even if some cannot say so, that Myanmar will undergo some sort of internal change arising out of internal differences. That gets everyone off the hook. Even with all the pressure that has been put on China, only a vocal minority seriously argue that China is somehow directly responsible for recent events. Beijing has described linking what happened in Myanmar with the Olympics as “totally irresponsible”, and it has a point.

There is an incisive letter in the *International Herald Tribune* where the author locates the tendency to link Beijing to Myanmar as having to do with the historic patron-vassal relationship between the two. But if we are concerned with who could exercise some influence, we can just as easily point to France and India. The question is not whether China is to blame for Myanmar, but about what China wishes to do as a matter of its chosen policy. What role does China want to play and how does it wish to be perceived? There is every sign that Beijing is just as frustrated with the junta, but cannot say so publicly. Part of the public perception problem is that China has consistently applied a long-standing doctrine on the question of intervention, and which as such is used as something of a one size fits all doctrine to explain its position generally; including its latest position on Myanmar. Let me quote a well-known scholar on China’s international law policies:

> Despite the twists and turns in international conduct over the years, the Chinese Government has remained compulsively sovereignty-bound on most basic global issues and problems. In the normative domain of global politics, China is perhaps beyond compare. Some wayward stranger from another planet, doing a content analysis of the annual UN debate on the state of the world, could easily take sovereignty as a quintessentially Chinese idea.

So in a sense, asking China to say something different affects China’s position in relation to other issues. At the same time, China’s insistence on non-interference and sovereignty, just like ASEAN’s usual reliance on non-interference and sovereignty, cannot be taken too literally to mean that nothing can or should be done about trying to improve the situation in Myanmar. A form of explicit policy language to cover situations as different as Iraq and Myanmar is most suited towards emphasizing one’s foreign policy coherence, and is least suited towards differentiating between different

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38 China’s position is quoted in the report “UN Envoy ‘Cautiously Optimistic’”, supra note 35.

situations. \footnote{See also highly critical lead article in the Economist, “The Saffron Revolution”, \textit{Economist} (U.K.) (29 September – 5 October 2007) at 13, saying of China’s emphasis on non-interference: “It trots out this formula so often... even if it supports change, it is hard for it to utter more than platitudes”.
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Others say that because of resource and strategic considerations, China and India have cancelled out the effect of Western sanctions. This view offered by Michael Green, former senior Asia Advisor at the National Security Council, puts the blame for the bluntness of American and European sanctions on China and India, but at the same time argues that the United States should take some sort of lead, and that Washington should choose a policy of direct diplomatic access to the junta against the backdrop, or stick, of continued sanctions. \footnote{Quoted in Paul Eckert, “US Urged to Bolster Myanmar Curbs with Diplomacy”, \textit{Reuters} (1 October 2007).}
In other words, Green has called for American leadership.

At present, what we have therefore is a musical chairs scenario. Japan, China, India and even the United States and others each hope that when the music stops, it won’t be the one left standing. ASEAN knows this, and it has wisely taken a hard line on Myanmar. Some in ASEAN have accepted that this might also be the best way of dealing with the pressure on ASEAN to do something. For the moment, the music has stopped and ASEAN has grabbed a chair. What now?

III. Choosing Between Sanctions & Engagement

A. Response and Responsibility

Two questions matter in the public debate over Myanmar. What kind of response is likely to be more effective – sanctions or engagement? Who are the parties which should be primarily responsible for bringing about the proper response? I call the first the “response” question, and the second the “responsibility” question.

1. Response: A Question of Scale

Let me make a quick preliminary remark about the response question, which is that sanctions and constructive engagement are middle-ground responses. Possible responses to human rights violations can be placed on a spectrum of measures, seen in terms of their severity or intrusiveness. Lying at the most extreme end is regime change, because it is the most intrusive way of fixing a human rights problem. No one is seriously talking about that at the moment. Then come sanctions, engagement and finally, domestic legal measures on a decreasing scale of intrusiveness. \footnote{The categories are not water-tight. If you use sanctions, such as asset freezing, you would still rely on the need for national legislation. But let us ignore these details for now. In the United States, principally the \textit{Customs and Trade Act 1990}, Pub. L. No. 101-382, § 138 (1990); \textit{Foreign Operations Act of 1997}, § 570, 110 Stat. 3009-166 to 3009-167 (codified at Omnibus Consolidated Appropriations Act, § 101(c), 110 Stat. 3009-121 to 3009-172 (1997) (Cohen-Feinstein Amendment); \textit{Burmese Freedom and Democracy Act of 2003}, Pub. L. No. 108-61, §§ 1-9, 117 Stat. 864 (2003) (codified as U.S.C. § 1701 (2000)). See further Ewing-Chow, \textit{supra} note 31 at 156–58.}
(a) **Domestic Legal Measures:** I want to talk about sanctions and constructive engagement, but I should first explain how one might also use domestic legal measures. I am assuming that everyone knows what regime change is by now so I do not need to talk about that.

By domestic legal measures I mean letting your laws and your courts be used to pursue human rights violators. I have already mentioned the *Alien Tort Statute* in the United States. If someone gets tortured in Myanmar, they can try and sue their torturer in a United States court. Similarly, if a corporation is closely involved in human rights violations in Myanmar, it too can potentially be sued in a United States court. It does not matter whether the corporation is a U.S. corporation or some other corporation. Using domestic law measures is less intrusive because if you are a human rights violator, you just don’t go to the United States, and the United States can have whatever laws, and legal procedures it chooses in its own sovereign territory. In a sense, its courts would be exercising long-arm jurisdiction by claiming to be able to decide on something that happened far away in Myanmar, but virtually all countries do this. They exercise some form of prescriptive extra-territorial jurisdiction where extraterritoriality itself is not violative of international law; all the more so when prescriptive extraterritoriality is exercised in the name of international law. Human rights activists welcome this as an additional way of responding to rights violations. People who negotiate human rights treaties, diplomats and international lawyers who have the job of deciding how to provide a legal remedy for human rights violations, also tend to like domestic remedies and using domestic courts because such piggybacking on domestic legal resources is cheap. You shift the financial cost of policing rights violations to national institutions and resources, and even to private parties in the case of private law claims.

(b) **Sanctions** Now putting regime change and domestic law measures aside, the debate about Myanmar centres on sanctions and engagement. There are a lot of people who have argued, and I think convincingly, that sanctions are relatively ineffective when measured against what we say we are trying to do with them – *i.e.* behavioural modification. Or at least that they tend to work with regimes which are not so deeply dug in as the junta is in Myanmar. This tends towards saying that the more

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serious the violator, the less effective sanctions will be. The experts say that if you are dealing with a regime that might even be prepared to get into a conflict with you, then sanctions would not work. 49

There are also other factors such as the fact that the present raft of unilateral sanctions by the United States and the European Union lack comprehensiveness, partly because others have not bought into them. 50 Others are even more skeptical and there was a study published in the Columbia Journal of Transnational Law a few years ago which tried to show that the United States cherry picked the countries which it would truly target, and that it targeted Myanmar only because Myanmar is not so important. Basically, the argument is that sanctions get mixed up with all kinds of motives and that they tend to be subjectively based as a result. Only two categories of states will meet with a harsh U.S. policy response, so-called rogue states 51, and those which are strategically unimportant to the United States, with Myanmar being one of them. 52

So these are all the usual arguments against sanctions. Some have said that Singapore should go down the road of sanctions. Singapore should “cut off ties” with Myanmar. 53 Let us take a closer look because here you have a number of interrelated but potentially quite different ideas. You could mean cutting off diplomatic ties. You could mean cutting off legal or treaty ties. Sanctions can mean cutting off diplomatic ties, cutting off legal ties, both or neither as in the case of an asset freeze. Sanctions come in all shapes and sizes.

Let us say you mean to cut diplomatic ties. That is the traditional way of signalling displeasure but we know that when one country chooses to cut off diplomatic ties, it will usually have to rely on the embassy of a third country, some other form of unconventional representation such as a trade mission, consular representation, or a front mission, or simply rely on secret meetings at airports, to get on with the business of having to talk to another country with which formal diplomatic ties have been cut. 54 In that sense, talking about cutting off Singapore’s ties is in fact more severe than talk of expelling Myanmar from ASEAN because that still leaves the option, in principle, of having diplomatic relations with Myanmar.

Now let us say that cutting off ties means something more than cutting diplomatic ties. Cutting trade ties, for example, can be more severe. This is going to be difficult too because it can involve complex treaty obligations. Certain trade and investment treaties, including ASEAN treaties, might prohibit you from doing so. You need to get the international lawyers in the capitals to take a look at how much room you have to cut off these treaty ties as part of economic sanctions, and in this sense you

51 For the origins of the terms “pariah”, “outlaw” and “rogue” state in U.S. foreign policy, see Anthony Lake, “Confronting Backlash States”, (1994) 73 Foreign Affairs 45 at 45–46, 55.
are a victim of ASEAN’s success in forming AFTA and the AIA.\textsuperscript{55} The treaty law problem is, however, a general one. It is equally unclear how far Singapore would be able to act alone as an ASEAN member.\textsuperscript{56}

\begin{itemize}
\item[(c)] \textit{“Constructive” and Other Forms of Engagement} Because of such problems, constructive engagement becomes the fall-back position. We turn to it because all else has failed, or is likely to do so. I am not talking about why ASEAN originally chose constructive engagement, but about whether we have a true choice today between engagement and sanctions. Theoretically, only cutting off ties requires no engagement at all, whereas imposing asset freezes and even expelling Myanmar from ASEAN do not necessarily mean that diplomatic ties are cut off. But as I have said, even in the case where you cut off ties, you will find as all countries do that you will just need to find some secret, informal way of talking to that country. At best, you end up downgrading ties – removing representation at the ambassadorial level, for example. What if one of your citizens goes missing while trekking in Myanmar? What if pollutants originating in Myanmar start floating across its borders into other ASEAN countries? No country in the world finds that it can realistically cut off the possibility of not talking to another country. So it is a policy of cutting off all ties which risks hypocrisy.

Non-engagement is not a true policy option, whereas engagement of some sort is simply a realistic part of conducting foreign affairs through diplomacy.

\end{itemize}

\section*{B. Responsibility}

The whole question of appropriate response shades into the question of responsibility. Some people think that because there has been engagement all these years by ASEAN, and now we have these horrific images on the television screen, and we must therefore choose sanctions or even “cut off ties”. The assumption is that if constructive engagement does not work, then sanctions must work. You can see that the one does not follow logically from the other because if sanctions are not fully effective, the choice of sanctions over engagement can amount to our washing our hands entirely of the matter. There is a real risk, all things considered, that choosing sanctions may do more for us to feel good than it does any real good. Mr. Ong Keng Yong said recently that “you should bring the Myanmar guy… and tell him straight to the face that you cannot go on like that.”\textsuperscript{57} His statement suggests two

\begin{itemize}
\item \textsuperscript{55}For the treaty obligations and legal policies comprising AFTA and the AIA, see Lok Hwee Chong, Christopher H. Lim, Ng Lyn, eds., \textit{A Guide to Free Trade in ASEAN} (Singapore: CCH Asia Pte. Ltd./Kluwer, 2007). See further, for ASEAN regional integration, C.L. Lim, “‘A Mega Jumbo-Jet’: Southeast Asia’s Experiments with Trade and Investment Liberalization”, in APEC Human Resources Development Working Group Capacity Building Network, \textit{The New International Architecture in Trade and Investment: Current Status and Implications}, (Tokyo/Singapore: APEC Secretariat, 2007), 115. For more general trade obligations under the World Trade Organization’s covered agreements, see Ewing-Chow, supra note 31 at 161ff.
\item \textsuperscript{56}Cf. Treaty of Amity and Cooperation in Southeast Asia, supra note 2.
\item \textsuperscript{57}Jim Gomez, “US, Indonesian Leaders Say China, India Should Do More to Convince Myanmar on Human Rights”, \textit{Associated Press} (8 September 2007)
\end{itemize}
things. First, that this is harder to do. Secondly, that “the Myanmar guy” will have

to be in the same room.

IV. Conclusion: The New Revulsion Rule

With the Myanmar precedent, ASEAN now finds itself in a different phase. It has

a new, publicly expressed rule. What matters is not whether ASEAN is calling it

a new rule, an old rule, or not even a rule at all. What matters is that revulsion is

ASEAN’s newly expressed position. Let me just call it the “revulsion rule” then, and

let us talk about it.

But first, let us think about where ASEAN is today. In the past, neither ASEAN

nor Myanmar could quit the other’s side. Non-interference in Myanmar, non-interference

in ASEAN, and non-interference with ASEAN nations were all joined together. That
doctrine applied to Myanmar, to the relation of ASEAN nations with each other, and
to relations with countries outside ASEAN. There are signs that these terms have

changed.

Think of the new revulsion rule in the following terms. Two teenage drivers are

hurting headlong at each other, and the objective is to see who will blink first. It is a

game of chicken, and Ambassador Desker has raised this issue by raising the question

of expelling Myanmar. You may not agree with him, but the basic point which his

argument reveals, and which deserves serious consideration, is that ASEAN cannot

be seen to be ineffectual. However, it would also be inauspicious if Myanmar were to

be expelled on the eve of the ASEAN Charter. However much this might seem like
cutting one’s losses, it could be far more damaging to ASEAN as a piece of negative
advertising. The question is whether ASEAN and Myanmar both swerve, whether

one swerves first in which case it loses face, or neither do so and there is a headlong

crash.

One way out is if ASEAN and the junta were to work out a common solution. It
goes against calling for Myanmar’s expulsion or suspension. One way of doing this
is by having an agreed, detailed and visible roadmap for democratic transition, pegged
to Myanmar’s constitutional reform process. The seeds are already there. Earlier this
year, Myanmar’s Foreign Minister Nyan Win felt obliged to explain the junta’s timetable
for democratic reform, saying they will wrap up the National Convention within

two months and that they wish to begin drafting the new constitution after that. It
came in the midst of reports that ASEAN members were facing internal differences,
with the Philippines and Indonesia taking a harder stand against Myanmar in their

proposed language for last year’s 39th ASEAN Foreign Ministers’ statement. The

eventual compromise statement, as well as this year’s statement, expressed “concern”

(Tokyo), 4 October 2007. Singapore Foreign Minister George Yeo and Dean Kishore Mahbubani have
also spoken out against expulsion as the solution; see John Burton, “Burmese Conundrum for ASEAN”,
Financial Times (U.K.) (4 October 2007); Mahbubani, supra note 8.

59On suspension, see the call from the “88 Generation Students” in “ASEAN Urged to Suspend Myan-
mar”, Straits Times (Singapore) (2 November 2007).


61Ibid.
over the pace of Myanmar’s reform process.  

Last month, Myanmar wrapped up its National Convention and ASEAN, post-revulsion, needs a new arrangement with Myanmar. When ASEAN chose not to go down the sanctions road many years ago, it chose to forego a coercive model of international law in favour of a liberal model. That liberal model assumes that membership of international organizations and participation in institutionalized procedures can change how a country behaves. I believe that ASEAN has no good reason now to abandon the liberal model, and I shall explain why it should now take that model further. Put aside the fact that it is the better view simply because it does not end up casting Myanmar out of the zone of law, which is what more extreme sanctions will only achieve. In this case, it amounts to ASEAN casting aside an unwanted burden, or simply put, washing its hands. Put aside the fact also that ASEAN cannot afford to reject both the liberal and the coercive viewpoint at the same time. If so, ASEAN will be left with no policy at all, and this is likely to affect ASEAN’s credibility just as seriously as Myanmar has.

So what should ASEAN do? There is the suggestion that ASEAN should send its own envoy. What will the envoy do which the United Nations envoy has not been able to do? As a first step, I would favour a fact-finding mission, resulting in an impartial report, and instituting a system for settling any differences that should arise between Myanmar and the rest of ASEAN over its content. For example, should there be disagreement over the content of the report, the whole report should at that point be made public. This would only be a prelude to a supervised democratic transition process. Such supervision could take the form of periodic progress reports by Myanmar and scrutiny of such periodic reporting by ASEAN. What we, and ASEAN, would look for is real progress and the whole process should be reasonably transparent, and thus publicly accountable.

Yet reports and public scrutiny are clearly not enough. The basic assumption on all sides must be that real change will result. Ironically, years of constructive engagement have changed ASEAN’s own behaviour, but not Myanmar’s. There is a two-level game going on here, between ASEAN and Myanmar, and between ASEAN

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62ASEAN Secretariat, Joint Communique, “Joint Communique of the 40th ASEAN Ministerial Meeting (AMM), Manila, 29-30 July 2007” (30 July 2007) online: <http://www.aseansec.org/20764.htm> at para. 75; ASEAN Secretariat, Joint Communique, “Joint Communique of the 39th ASEAN Ministerial Meeting (AMM), Kuala Lumpur, 25 July 2006” (25 July 2006) online: <http://www.aseansec.org/18561.htm> at para. 79. Even then, they were more strongly worded than the statement only two years ago which had expressed ASEAN’s “complete understanding of” and “sincere appreciation to” Myanmar for deciding to forego the chairmanship of ASEAN. Then came this September’s statement by Singapore, as the ASEAN Chair, expressing the other ASEAN Foreign Ministers’ “revulsion”, and citing the “serious impact on the reputation and credibility of ASEAN.”

63For the view that constructive engagement has proven to be a barren policy, see for e.g., Gomez, supra note 57, citing Indonesian Foreign Minister, Hassan Wirayuda. Ian Holliday has been quoted for taking the same view: “After Myanmar Crackdown, Some Wonder: Isolate or Engage?”, Reuters (5 October 2007).


65The statement is attributed to Razali Ismail, the former U.N. envoy to Myanmar, in Burton, supra note 58.

and the rest of the world, and ASEAN is the one feeling the heat. So why has Myanmar not changed? Is it simply because the liberal theory is a poor theory? That conclusion is too quick. The reason, when you think about it, is because the social rule which ASEAN membership imposed has been straightforward non-intervention, even if it is wrapped in the language of “constructive intervention”. Myanmar knows and ASEAN’s statements as recently as 2005 show that when push comes to shove, non-intervention is the operative legal rule. The true question is whether the new ASEAN rule, the rule of revulsion, might lead to better results.

The revulsion rule would require a deeper commitment from Myanmar than the old non-intervention rule. Non-intervention was the very antithesis of asking for a true commitment. Instead, it immunized Myanmar from rigorous ASEAN social pressure. Revulsion must work differently.69 It should signify that a deeper commitment to ASEAN is now required of Myanmar – preferably a commitment to inquiry, reporting, scrutiny, criticism and, in a word, supervision. Call it constructive supervision, if you like.

I realize that it is only once in every few years that the organizers ask a professor to speak in this series of lectures. I take it that members of the public who attend during these occasions do so knowing that they are likely to be confronted with some latest academic theory. I do not wish to disappoint such expectations, so allow me to finish up by describing the theory underlying all that I have just said. It goes to the heart of the controversy over constructive engagement and sanctions, and was presented in the mid-90s by three authors, George Downes, David Rocke & Peter Barsoom, in the pages of the 1996 issue of the journal International Organization.70 They pointed out that deeper commitments raise the cost of a membership of an international organization. Applied here, deeper commitments would raise the cost of ASEAN membership for Myanmar. This would increase the temptation to defect from one’s commitments, because they are actually starting to hurt. Previously, you could say that ASEAN membership cost Myanmar nothing. Here then comes the theory. It is only at that point, where the commitments have become so deep, that sanctions will be needed to push up, or shore up the costs of defection from those commitments. This is needed so as to balance out the increased costs of ASEAN membership for Myanmar, to keep the alternative costs of competing policy choices balanced, and to keep Myanmar on track.

The moral of the story is that coercive sanctions make more sense when they supplement a liberal, non-immediately coercive strategy such as ASEAN’s new revulsion rule – a rule of liberal legality. Putting sanctions first risks putting the cart before the horse. In any case, even here in Singapore, we can already see the effect of the latest wave of U.S. sanctions on Singapore-based companies71, and to some extent, this suggests a different leadership role for ASEAN, and ASEAN members

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69 Indonesian Presidential Spokesman for Foreign Affairs, Dino Patti Djalal, recently said of constructive engagement that “We know it has limitations” (“After Myanmar Crackdown, Some Wonder: Isolate or Engage?”, Reuters (5 October 2007)).


71 See for e.g., Nirmal Ghosh, “Businessmen with Ties to Junta Face Force of Sanctions”, Straits Times (Singapore) (2 November 2007).
like Singapore.

So here is my proposal for ASEAN. Not sanctions. Not just the old constructive engagement we have witnessed from 1997 to 2007. But something a little more, if we want to see real change, hopefully before 2017. It requires ASEAN, which will soon be undergoing a landmark institutional overhaul, and which is presently chaired by Singapore, to take the lead. As Oliver Wendell Holmes once said, time has upset many fighting faiths. We must not underestimate the constant loss of prestige on the part of ASEAN in the eyes of the people of Myanmar.

Thank you and good night.