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Assessing an ASEAN Human Rights Regime

A New Dawn for Human Rights in Southeast Asia?

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Contents

SUMMARY	IV
PREFACE	V
ABBREVIATIONS	VIII
CHAPTER I	1
1. Introduction: The Birth of a New Regional Human Rights Regime	1
1.2 BACKGROUND	1
1.1.1. The ASEAN Human Rights Regime and Early Implications	4
1.1.2. Purpose and Focus of the Thesis	7
1.1.3. The Quest to Measure Effectiveness - Methodological Concerns	8
1.1.4. Disposition	11
1.2. METHODOLOGY	11
1.2.1. Research Material	11
1.2.2. Minor Field Study	12
1.2.3. Interviews	12
1.2.4. Interview Method	13
1.2.5. Respondents	13
1.2.6. Interview Delimitations	13
CHAPTER II	15
2. Human Rights in Southeast Asia: In Search for a Regional Standard	15
2.1. PROSPECTS FOR HUMAN RIGHTS COOPERATION AND THE LACK OF A REGIONAL HUMAN RIGHTS REGIME	15
2.1.1. Assessment of the Human Rights Situation in Southeast Asia and the Need for Better Human Rights Protection	15
2.1.2. Reasons for the Lack of Regional Human Rights Cooperation	19
2.1.3. Regional Diversity	19
2.1.4. Democracy, Development and Human Rights	22
2.1.5. Cultural Relativism and Asian Values	25
2.1.5.1 <i>What are Core Asian Values?</i>	26
2.2 CONCLUDING REMARKS - PERCEPTIONS OF HUMAN RIGHTS IN SOUTHEAST ASIA	28
2.2.1. An Ambivalent Human Rights Stance	28
CHAPTER III	31
3. Association of Southeast Asian Nations (ASEAN)	31
3.1. A BRIEF HISTORICAL OVERVIEW	31

3.1.1. ASEAN's Core Norms and Principles	32
3.1.1.1. 1976 Treaty of Amity and Cooperation and Other Important Agreements	33
3.1.1.2. The ASEAN Way	34
3.1.2. The ASEAN Way – a Weak Way in Terms of Legal Cooperation	35
3.1.3. ASEAN's Human Rights Approach in Practice - Constructive Engagement Strategy	36
3.2. CONCLUDING REMARKS	37
CHAPTER IV	38
4. International Human Right Regimes	38
4.1 NORMATIVE FRAMEWORK	38
4.1.1. The United Nations Human Rights Framework	38
4.2 INTERNATIONAL HUMAN RIGHT REGIMES	40
4.2.1. The United Nations Global Human Rights Regime	40
4.2.2. Regional Human Rights Regimes	42
4.2.3. Fundamental Principles for Regional Human Right Regimes	45
4.2.3.1 Common Features among Regional Human Right Regimes	46
4.2.4. Establishing Some General Standards for Regional Human Right Regimes	47
4.2.4.1. Monitoring	47
4.2.4.2. Communications	48
4.2.4.3. Capacity Building and Education	48
4.2.4.4. Composition	48
4.2.4.5. Support	49
4.2.5. Assessing Human Right Regimes	49
4.3. CONCLUDING REMARKS	49
CHAPTER V	51
5. The ASEAN Human Rights Regime – Key Instruments and Structures	51
5.1 THE ASEAN CHARTER	51
5.1.1. Legal Implications	51
5.1.2. Contents of the Charter	53
5.1.3. Key Institutions	54
5.1.3.1. The ASEAN Summit.	55
5.1.3.2. ASEAN Ministerial Councils	55
5.1.3.3. ASEAN Secretariat and Secretary General	55
5.1.3.4. Committee of Permanent Representatives	55
5.1.4. Decision Making and Dispute Settlement	56
5.1.5. The ASEAN Charter and Human Rights	56

5.1.5.1. <i>A Human Rights Body</i>	57
5.1.6. Norms of Non-Interference and Consensus – Much Ado about Nothing?	58
5.2. THE ASEAN HUMAN RIGHTS COMMISSIONS – THE AICHR AND ACWC	59
5.2.1. The Terms of Reference of the AICHR	59
5.2.1.1. <i>Composition of the AICHR</i>	60
5.2.1.2. <i>Mandates of the AICHR</i>	61
5.2.2. The Terms of Reference of the ACWC	62
5.2.3. The Relationship Between the two Commissions	63
5.2.4. Support of the ASEAN Human Rights Regime	63
5.3 CONCLUDING REMARKS	65
CHAPTER VI	67
6. Effective Promotion and Protection of Human Rights within ASEAN?	67
6.1 IMPLEMENTING THE MANDATES OF THE TWO COMMISSIONS	67
6.1.1. Some Limitations to Keep in Mind when Assessing the Potentials of the Commissions	67
6.1.2. Using Limited Mandates to the Widest Extent Possible	68
6.1.3. The Formulation of the Mandates Opens up Possibilities for Wide Interpretation	69
6.1.3.1 <i>The Mandates of the AICHR</i>	70
6.1.3.2 <i>The Mandates of the ACWC</i>	71
6.1.4. Inclusion of and Engagement with Civil Society in ASEAN and its Human Rights Process	71
6.1.5. Ratification of Core International Human Rights Instruments by ASEAN Member States	73
6.2. CONCLUDING REMARKS	74
CHAPTER VII	75
7. Assessing an ASEAN Human Rights Regime - Conclusion	75
7.1 MAIN CHALLENGES TO THE ASEAN HUMAN RIGHTS REGIME	75
7.1.1. Fundamental Challenges	75
7.1.2. Ambiguities within the Regime	78
7.2. THE WAY FORWARD	80
7.2.1. Member States, the Commissions and Civil Society	80
7.3 SOME FINAL WORDS	82
7.3.1 A New Dawn for Human Rights in Southeast Asia?	82
BIBLIOGRAPHY	84

Summary

This thesis is devoted to examining the recently established human rights regime within the Association of Southeast Asian Nations (ASEAN), consisting of the ASEAN Charter, the ASEAN Intergovernmental Commission on Human Rights (AICHR), and the ASEAN Commission on the Promotion and Protection of Women and Children (ACWC). The overall purpose is study if the regime will ensure better adherence of human rights amongst Southeast Asian nations. Can this human rights regime have any effective impact on state behaviour? In an attempt to assess this issue, the thesis looks at: (1) the history and approaches to human rights in the Southeast Asian region with ASEAN as the framework for human rights cooperation; (2) international standards for human right regimes in general and how they can be assessed; (3) and, against this framework, the ASEAN Charter and the ToRs to the AICHR and ACWC. It is through the legalised and institutionalised framework of the Charter that the AICHR and ACWC will operate with more specific mandates provided in their respective Terms of Reference (ToRs). What institutional framework does the ASEAN Charter create and what potential measures can the commissions adopt to enhance the protection of human rights? The thesis concludes by examining and analyzing the main challenges at the initial stages and what steps the ASEAN human rights regime needs to take to engender a framework for human rights protection in the region.

Preface

Human rights have always been a sensitive issue amongst the states in Southeast Asia and in large absent on the agenda of the Association of Southeast Asian Nations (ASEAN). Thus, when the Member States in 2008 through the ASEAN Charter committed themselves to create a “human rights body” which in 2009 emerged as the ASEAN Intergovernmental Commission on Human Rights (AICHR) it was considered to be somewhat a historic momentum and a possibility to pave the way for growth of democracy and human rights in the region. The emerging human rights framework was also bolstered by the establishment of the ASEAN Commission on the Promotion and Protection of Women and Children (ACWC) in 2010. However, with the adoption of the Terms of Reference (ToR) to the Commissions, it was clear that these two human rights bodies were going to focus primarily on the promotion of human rights rather than on protecting them. While it was a welcome sign that human rights were now a part of the ASEAN agenda, at the same time it was clear that the AICHR and the ACWC, being bodies within the ASEAN framework rather than being independent from the same, would also be permeated by the consensus-based, non interference approach that has become a well known corner stone in ASEAN decision making process, more formally known as the ‘ASEAN Way.’ ASEAN has always been a rather loose organisation based on soft institutions and informal agreements. While this approach arguably might have had effective implications in attaining the purposes of security and economic growth in the region, it is an ineffective approach when it comes to ensuring effective protection and implementation of human rights.

This thesis examines the recently established ASEAN human rights regime, consisting of the ASEAN Charter, the AICHR and the ACWC, to see if it can have any effective impact on state behaviour when it comes to human rights. In order to assess the potential of the ASEAN human rights regime, premature as it may seem, the thesis scrutinizes the ASEAN Charter and the ToR’s to the AICHR and ACWC. It is through the institutionalised framework provided in the ASEAN Charter that these two commissions will operate with the specific mandates provided in each commissions ToR. What institutional framework does the ASEAN Charter create and what are the potential for the AICHR and the ACWC to engender a framework for human rights protection in the region?

There is considerable information written on human rights instruments and enforcement in the three already existing regional regimes: the European, the Inter-American and the African. Since no regional human rights regime has existed in Southeast Asia, it is very interesting to study the one established by ASEAN in its initial stages. It is however important to emphasize here, due to the early phase of development and the many differences between the Southeast Asian region and other regions in the world, that a direct comparison between the ASEAN human rights regime

and other regional human right regimes is not feasible or even possible to make. However, it is unenviable not to consider other regional regimes together with the global UN human rights system. Even though there are no concrete norms on how a regional human rights regime should be framed, the very purpose with regional approaches have always been to address human rights within the regional context in order to strengthen national protection and further supplement the UN system. At the same time, all trans-national regimes must be founded upon shared values, since international institutions reflect their creators' willingness to adopt a cooperative approach to toward common concerns. Against such a framework, the essential challenge for ASEAN is to address human rights from the standpoint of ASEAN without letting the ASEAN human rights regime be reduced into something insignificant.

Indeed, the new cooperative framework, formalised through the ASEAN Charter together with the recently established AICHR and ACWC, marks a step in the struggle to advance human rights in the region. Whether this step is a significant one and what implications it will have for ASEAN and its Member States is far from easy to predict at this early stage in development. While conclusions can only be speculative, it is hardly realistic or feasible to see that ASEAN will in the nearest construct a system of intervening in one another's affairs on the grounds of violations of human rights. Rather, what the AICHR and the ACWC can do is focus on specific human concerns that all can share, or at least no one can publicly reject, like the protection of minorities, women and children. Such developments have already been visible. The thesis further recognises that there are three key stakeholders involved in the process for the human rights regime to further develop and function well: the Member States of ASEAN; ASEAN itself through the Commissions; civil society, mainly through various human rights organisations and national human rights institutions (NHRIs).

Much of the research was conducted during a field trip to Thailand between September and December 2010 funded by a Minor Field Study scholarship from the Swedish International Development Cooperation Agency (SIDA). During this period, I met and interviewed various stakeholders with experience from working with human rights in the region. Thailand's representative on the AICHR pointed out to me, a sense of scepticism permeating her tone, that conducting interviews with stakeholders only in Thailand will not be representative for the entire region. To make things clear, the intentions with this thesis however is not to give a representative view on the standpoint on human rights and the new human rights regime from stakeholders in all ten ASEAN nations. The purpose is rather to speculate from the standpoint of what the nations have produced- the ASEAN Charter, the commissions and their ToRs- to see what potential changes they can bring about. In that sense, the interviews has been a source of inspiration and reality check in support of some of the ideas put forward in this paper. The interviews are however not in any way by themselves meant to serve as a basis on which any factual conclusions can be substantiated.

Since most of the research and writing of this thesis was done between October 2010 and January 2011, subsequent developments with regards to the ASEAN human rights regime have not been covered.

Lastly, I would like to thank my supervisor Dr. Karol Nowak for his support. I am also grateful to all the persons who took some of their valuable time to take part in an interview and provided me with valuable inputs.

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Abbreviations

ACWC	ASEAN Commission for the Protection and Promotion of Women and Children
AICHR	ASEAN Inter-governmental Commission on Human Rights
APSC	ASEAN Political-Security Community
ASEAN	Association of Southeast Asian Nations
AU	African Union
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CSO	Civil Society Organisation
ECHR	European Convention on Human Rights
EU	European Union
HLTF	High Level Task Force
ICCPR	International Convention on Civil and Political Rights
NGO	Non-governmental Organisation
NHRI	National Human Rights Institution
OAS	Organisation of American States
TAC	Treaty of Amity and Cooperation
ToR	Terms of Reference
UDHR	Universal Declaration on Human Rights
UN	United Nations
VAP	Vientiane Action Programme
WW II	World War II

CHAPTER I

1. Introduction: The Birth of a New Regional Human Rights Regime

1.2 BACKGROUND

This thesis is devoted to examining the effectiveness of the recently established human rights regime within the Association of Southeast Asian Nations (ASEAN).¹ In Southeast Asia and elsewhere, the national framework remains the number one factor for the promotion and protection of human rights. Today, the systems consist of a variety of mechanisms, such as the national court systems, national human rights institution (NHRIs) and ombudsmen. Yet, many times the national systems have proven insufficient especially if they are unable or unwilling to monitor, act and offer redress to individuals in case of violations. There is thus a need for regional arrangements to overcome or prevent *lacunae* and further enhance promotion and protection of human rights.² Regional human right regimes have proven to be more effective and useful in promoting and protecting human rights than the United Nations global human rights regime because they cannot only be complementary to the UN system but also operate in the regional context, reflecting regional particularities.³ While regional human right regimes have been in operation for some time in Europe, the Americas, and Africa, in Southeast Asia such a regime has been absent. Southeast Asia is one of the world's most ethnically, politically and religiously diverse and complex regions. It is a region where many human rights violations have been reported to occur.⁴ With almost 600 million citizens, Southeast Asia has been one of the last regions in the world, with a regional cooperation embodied in ASEAN, which at the same time clearly lacked a unifying legal framework as well as a human rights regime.

The term 'ambivalence' has been used to best describe the physiognomy of human rights in Southeast Asia,⁵ and the absence of human rights

¹ The term 'human rights regime' is taken from Jack Donnelly who defines an international regime as: "a set of principles, norms, rules and decision-making procedures accepted by states (and other actors) as binding within an issue area" Jack Donnelly, *International Human Rights* (3rd ed) (Westview Press 2007) p. 79. Other terms that commonly appear, and are sometimes used interchangeably, even throughout this work, are human right bodies, human rights mechanisms and human rights systems.

² Vitit Muntarbhorn 'Human Rights Monitoring in the Asia-Pacific Region' in Gudmundur Alfredsson (et. al) (eds.) *International Human Rights Monitoring Mechanisms: Essays in Honour of Jakob Th. Möller* (2nd ed.) (Martinus Nijhoff Publishers 2009) p. 641.

³ Weston, Lukes and Hnatt, 'Regional Human Rights Regimes: A Comparison and Appraisal' *Vanderbilt Journal of Transnational Law* (Volume 20, No 4 1987) pp. 589-590.

⁴ See for example the Asia Pacific Forum webpage Available at: <<http://www.asiapacificforum.net/issues>> (Accessed on May 17, 2010)

⁵ Vitit Muntarbhorn, *Dimensions of Human Rights in Asia Pacific*, Office of the National Human Rights Commission in Thailand, Bangkok, (2002) p. 56. See also Li-ann Thio, 'Implementing Human Rights in ASEAN Countries: Promises to Keep and Miles to Go

cooperation at the regional level may be explained due to a number of factors. First, the region has been considered too large and heterogeneous to have such cooperation or formulate a common stance on human rights, and any attempt to examine the human rights situation in the ASEAN region and the prospects for human rights regime must take into account the political culture of the region. The Member States to ASEAN speak for themselves on this account. They range from democratic countries to dictatorships, from relatively developed countries to underdeveloped countries, from countries with a fairly openness to human rights to countries with a denial to many aspects of human rights.⁶ Second, human rights have always been conceived as a threat to the sovereignty of the state and therefore considered a domestic issue and concern. According to many Southeast Asian states, no one can dictate and make judgements on others about human rights, and the international community has no right to intervene.⁷ Third, the relationship between human rights, democracy and economic development have played a crucial role in that many states believe that individual rights must give way to the demands of national security and economic growth.⁸ Finally, cultural relativism, embodied in the notion of 'Asian values' has often been used as an argument to dismiss the western concept of democracy and human rights as not suitable for the Southeast Asian context.⁹

The prospects for developing a human rights regime within the ASEAN framework has been the subject of a number of studies,¹⁰ all of which have highlighted the difficulties of pushing human rights cooperation within ASEAN. The first reason for this, as highlighted above, is the diversity of Member States and their ambivalence towards human rights. The second reason has been the architecture of ASEAN itself. ASEAN has been a rather loosely structured organisation mainly focused on economic development and political security. This, together with the core norms of consensus based decision-making and non-interference in the internal affairs of Member States, more formally known as the ASEAN Way, has made the prospects

Before I Sleep' in Dinah L. Shelton *Regional Protection of Human Rights* (Oxford University Press 2008) p. 1067. First published in *Yale Human Rights and Development Journal* 2, no 1. (1999). And Maznah Mohammad 'Towards a Human Rights Regime in Southeast Asia' *Contemporary Southeast Asia* Volume 24, Number 2 (2002) p. 230.

⁶ Heu Yee Leung, 'ASEAN and Human Rights: The prospects of implementing a regional mechanism for the promotion and protection of human rights in Southeast Asia' p. 9-10 Available at: <<http://www.lawanddevelopment.org/articles/seapaper.html>> (Accessed on May 17, 2011).

⁷ Mely Caballero-Anthony 'Human Rights, Economic Change and Political Development' in James T.H. Tang (ed.) *Human Rights and International Relations in the Asia Pacific* (Pinter, London 1995) pp. 47-48.

⁸ Yash Gai 'Asian Perspectives on Human Rights' in James T.H. Tang, *ibid*, pp. 58-60.

⁹ Diane K. Mauzy, 'The human rights and 'Asian values' debate in Southeast Asia: Trying to clarify the key issues.' *The Pacific Review* (Volume 10, No 2, 1997) pp. 210-236. See also Close & Askew, *Asia Pacific and Human Rights: A Global Political Economy Perspective* (Ashgate Publishing Limited 2004) p. 12.

¹⁰ See for example Hidetoshi Hashimoto, *The prospects for a Regional Human Rights Mechanism in East Asia* (Routledge, New York, 2004), Li-ann Thio, *supra* note 5; Maznah Mohammad, *supra* note 5; and Heu Yee Leung *supra* note 6.

for more firm cooperation highly doubtful.¹¹ Of course, ASEAN is merely a reflection of the Member States' degree of willingness to cooperate with each other. The few legally binding agreements reached by this organisation, non in the field of human rights, also shows the states' reluctance to vest power into more firm cooperation. Human rights by their very nature require legally binding treaties and political will to enforce those treaties and sanction by states against states when failing to do so. While a regional human rights regime within ASEAN has been considered possible, it is at the same time no surprise that the conclusions reached by previous studies argues that such a regime would merely focus on promotion of human rights rather than of protection and enforcement mechanisms. In that way governments can participate without fear of sacrificing their sovereign rights.¹²

For several decades, there have been initiatives, both through the UN, different human right workshops, and even ASEAN itself, for establishing a regional arrangement and cooperation to protect human rights in the region.¹³ The more concrete impetus for developing a regional human rights regime within ASEAN was however initially provided by the 1993 World Conference on Human Rights where ASEAN states endorsed the Vienna Declaration and the Vienna Programme of Action, which reiterated that there is "the need to consider the possibility of establishing regional and sub-regional arrangements for the promotion and protection of human rights where they do not already exist".¹⁴ At the 26th ASEAN Ministerial Meeting, held in Singapore, a joint Communiqué was issued, which declared that the ASEAN, in support of the Vienna Declaration and Programme of Action "should also consider the establishment of an appropriate regional mechanism on human rights".¹⁵ The development has since then been a slow and on-going process with several landmarks featuring the push and pull factor which finally led to the establishment of the new ASEAN human

¹¹ Hao Duy Phan, 'The ASEAN Intergovernmental Commission on Human Rights and Beyond' *Asia Pacific Bulletin* Number 40, July 20, 2009. While ASEAN is far from the only organization upholding the principle of non-interference, the principle is interpreted and applied quite rigidly, especially when it comes to human rights. This is one of the major reasons why pushing human rights under ASEAN has been a very difficult process.

¹² Hidetoshi Hashimoto, *supra* note 10, p. 144; Li-ann Thio, *supra* note 5, p. 1067.

¹³ For instance, in the middle of the 1980s, the UN General Assembly began to pass resolutions more specifically on the Asia-Pacific region. Resolution 41/153 titled *Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region* is an example and called upon states from the region to respond to the call for "regional arrangements". (UN Doc. A/RES/41/153, 4 December 1986)

¹⁴ 1993 Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights, Vienna, 14-25 June, 1993, Article 37. Available at: <[http://www.unhcr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhcr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en)> (Accessed on May 20, 2011). See also Vitit Muntarbhorn 'A Roadmap for an ASEAN Human Rights Mechanism' Available at: <<http://www.fnf.org.ph/liberallibrary/roadmap-for-asean-human-rights.htm>> (Accessed on May 17, 2011)

¹⁵ Quoted in Yuyun Wahyuningrum 'ASEAN's Road Map Towards Creating a Human Rights Regime in Southeast Asia' in *Human Rights Milestones: Challenges and Developments in Asia* (Forum Asia, Bangkok, 2009), p. 71.

rights regime.¹⁶ In this process, civil society organisations (CSOs) have played an important role providing many of the initiatives to explore possible mechanisms, most notably the Working Group for an ASEAN Human Rights Mechanism.¹⁷ The regime may thus not come as a total surprise, but is the fruits of persistent engagement between civil society and ASEAN.¹⁸

1.1.1. The ASEAN Human Rights Regime and Early Implications

Much of the above described criticism directed towards ASEAN and its Member States on the issue of regional human rights cooperation has in large remained unanswered, or been met with a variation of the same old arguments. The ASEAN Working Group captured one of the essential concerns by stating that “the lack of an ASEAN mechanism implies that while the region is exposed to monitoring from sources outside the region, there are few opportunities for the region to take stock of human rights developments in the region from the standpoint of ASEAN”¹⁹ This display that one of the most central concerns for ASEAN in creating a human rights regime has been to address human rights from within, without letting external pressure shape their framework too much. Essentially, the response from ASEAN and its Member States towards the critique on human rights now lies in the recently established human rights regime.

The current ASEAN human rights regime consists of the ASEAN Charter,²⁰ the ASEAN Intergovernmental Commission on Human Rights (AICHR) with its mandates provided in the Terms of Reference (ToR)²¹, and the ASEAN Commission on the Protection of Women and Children (ACWC) and its ToR.²² The ASEAN Charter, which entered into force in 2008 serves as the Association's constitution and provides it with a legal personality under international law, turning it into a more rule-based organisation. The ASEAN Charter, setting out to be more people oriented, also reinforced the Member States commitment to the promotion and protection of human rights and fundamental freedoms, introducing it both in its purposes and

¹⁶ For a comprehensive background to the creation of the ASEAN human rights regime, see Hao Duy Phan, ‘The Evolution Towards an ASEAN Human Rights Body’ *Asia-Pacific Journal of Human Rights and the Law*, Volume 9, Issue 1 (2008), pp. 1-12. See also Yuyun Wahyuningrum, *supra* note 15.

¹⁷ Vitit Muntarbhorn, *supra* note 2, p. 646.

¹⁸ Sriprapha Petcharamesree ‘The Human rights Body: A Test for Democracy Building in ASEAN’ (International IDEA, 2009) p. 9.

¹⁹ Working Group for an ASEAN Human Rights Mechanism, quoted in Close & Askew, *supra* note 9, p. 113.

²⁰ ASEAN Charter, Signed on November 20, 2007 Available at: <<http://www.aseansec.org/21861.htm>> (Accessed on May 17, 2011) See Article 2 (i).

²¹ Terms of Reference of ASEAN Intergovernmental Commission on Human Rights, Available at:

<<http://www.aseansec.org/22769.htm>> (Accessed on 17 May, 2011).

²² Terms of Reference of the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC) Available at: <<http://www.aseansec.org/documents/TOR-ACWC.pdf>> (Accessed on May 17, 2011).

principles.²³ The ASEAN Charter Article 14 also provides the mandate to establish a “human rights body”.

In 2009, the AICHR was inaugurated. Mandated through the ASEAN Charter, the AICHR was born out of the ASEAN Political-Security Community. The Political-Security Community, together with ASEAN’s economic and socio-cultural communities, will form the foundation of an ASEAN Community, which is set to be established by 2015. ASEAN’s emerging human rights framework was also bolstered by the establishment of the ACWC in 2010. This commission however is mandated not through the Charter, but established under the Socio-Cultural Community blueprint, which is not a legally binding document.²⁴ The Terms of Reference (ToR) establishes the purposes, principles and mandates of these two commissions. The ToRs sets out to mutually promote and protect human rights in the community building process of ASEAN.

While the recent developments now provides an unprecedented possibility and platform to include human rights on the ASEAN agenda, the implications of the ASEAN human rights regime are many and a few main questions can be raised with regards to the functions and effectiveness of this new regime. First, the ambivalence towards human rights captured by the ASEAN Way of decision-making has been reproduced in the ambiguous language of the ASEAN Charter as well as the ToRs. A striking example is Article 14 of the Charter, which merely provides for “a human rights body” to be established without any further precision as to the features of this body. It shows that the states did not want to further precise the nature of this body in the Charter, running the risk of undertaking obligations to which they were not ready to commit. The absence of a dispute settlement mechanism within ASEAN against states who violates the Charter also display the consensus based approach as the core norm of ASEAN decision making and imply that Member States with the lowest human rights standards can use their veto to set the bar for human rights cooperation.

Second, the broad and weak mandates of the ToRs make it clear that the ASEAN human rights regime will be mainly focused on promoting human rights rather than protecting them. This might not come as a surprise considering ASEAN’s history. The most obvious fallacy in this regard is the absence of a complaint and remedy mechanism for individuals. At the same time, it is unclear what some of these mandates actually imply. What does a mandate such as “develop strategies for the *promotion* and *protection* of human rights” (emphasis added) entail?²⁵ This raises questions about the possibilities of the ASEAN human rights regime, its overall effectiveness, and whether it will live up to international human rights standards. Will the ASEAN human rights regime be complementary, bringing something in

²³ ASEAN Charter, Articles 1.7 and 2(i).

²⁴ ASEAN Socio-Cultural Community Blueprint, Section C.1, Article 27. Available at: <<http://www.aseansec.org/5187-19.pdf>> (Accessed on May 17, 2011).

²⁵ AICHR ToR Article 4.1.

addition to the UN human rights regime, bearing in mind the strong notion of sovereignty and territorial integrity in these countries?

Third, any sort of effective mechanism for the protection of human rights requires independence. It is crucial that the representatives that sit on the commissions serve in their personal capacity independent from their governments. While the ToRs to the AICHR and ACWC provide that each representative shall act impartially, they also provide that the representatives are accountable to their respective governments who may, at their own discretion, replace their representative.²⁶ This raises the question whether the regime can promote and protect human rights, both in terms of the rather weak mandates, but also in terms of how the representatives will be able to interpret, use and enforce those mandates.

Finally, any type of human rights regime needs involvement of civil society organisations (CSOs) to ensure its independence and provide checks and balances. If ASEAN wants to transform itself from a state centric entity to a more peoples based organisation, it must open up and expand its dialogue with civil society. When it comes to the commissions in particular, the lack of engagement has been visible since only two of the commissioners, those from Indonesia and Thailand, have been appointed with an open and inclusive selection process, whereas in the rest of the Member States the selection was exclusively done by government officials.

The above undeniably open up room for criticism. Early comments made with regards to the ASEAN human rights regime also shared one overall common feature, as ASEAN Secretary General Surin Pitsuwan noted- that is, “a sense of reservation”; a doubt to whether ASEAN actually intends to implement the ASEAN Charter and if human rights truly has emerged as an important concern for ASEAN and its Member States.²⁷

Such scepticism seems justified bearing in mind the history and approach to human rights by many of the states in the region. Realistically, we may ask ourselves; “what other mechanism is possible at this stage?”²⁸ Establishing an effective human rights regime undoubtedly takes time and will not happen overnight, certainly not in Southeast Asia. At the same time, the central question and concern remain, “whether the commission will be robust and do what it can, or whether it will end up becoming a servant of regimes that are very unfriendly to human rights”.²⁹ Clearly, even a weak human rights regime may contribute, in a way acceptable to states, to

²⁶ See AICHR ToR Chapter 5, and ACWC ToR Chapter 6.

²⁷ Surin Pitsuwan made this comment during his opening speech at ‘the 1st International conference on human rights in southeast Asia’, organized by the Southeast Asian Human Rights Studies Network (SEAHRN), October 14-15, 2010, Bangkok, Thailand. For more information see SEAHRN website, available at: <<http://www.seahrn.org/>> (Accessed on May 19, 2011).

²⁸ Interview with Dr. Festo Kavishe, Deputy Regional Director, UNICEF, Bangkok, Thailand.

²⁹ Interview with Ms. Erin Shaw, Regional Legal Advisor, Asia-Pacific Programme, International Commission of Jurists, Bangkok, Thailand.

improve national practice.³⁰ However, if the regime is too weak, it may lack so much in credibility that it becomes an obstacle for any subsequent credible human rights cooperation. Therefore, the initial steps of the ASEAN human rights regime will give a hint of how much the Member States are committed to improve human rights or whether it is set up to fail.

1.1.2. Purpose and Focus of the Thesis

The overall purpose of this thesis is to examine the implications of the recently established human rights regime within ASEAN. More clearly, the effort is to study if the regime will ensure better adherence of human rights amongst Southeast Asian nations. Can this human rights regime have any effective impact on state behaviour?

In an attempt to assess the ASEAN human rights regime the thesis examines: (1) the history and approaches to human rights in the region with ASEAN as the framework for human rights cooperation; (2) international standards for human right regimes in general and how they can be assessed; (3) and, against this framework, the ASEAN human right regime, consisting of the ASEAN Charter and the ToR's to the AICHR and ACWC. It is through the legalised and institutionalised framework of the Charter that the AICHR and ACWC will operate with more specific mandates provided in their respective ToR. What measures can these commissions adopt to improve the protection and promotion of human rights and what are the main challenges at the initial stages?

The thesis further recognizes that there are three key stakeholders for the subsequent development and effective implementation of the ASEAN human rights regime. First, and most important, it requires the political will of the Member States to ASEAN from above. If we consider human rights enforcement and protection, it is clear that effective implementation ultimately rests within the framework of the national state. For this to happen, political will is needed. Second, it requires the initiative of the representatives to the commissions from within. The commissioners must be independent and take initiatives to use the mandates wisely in order for the regime to be effective. Third, it requires the engagement of civil society, mainly through human rights organisations and national human rights institutions (NHRIs), from below. Civil society ultimately provides the checks and balances ensuring that the work of the commissions is effective.³¹

³⁰ See Chapter 4 on human right regimes and Jack Donnelly, *supra* note 1, pp. 105-106.

³¹ Homayoun Alizadeh 'ASEAN and Human Rights: Closing the Implementation Gap' OHCHR Regional Office for South-East Asia (22 October 2009) Available at: <<http://bangkok.ohchr.org/programme/asean/asean-human-rights-closing-implementation-gap.aspx>> (Accessed on May 18, 2011).

1.1.3. The Quest to Measure Effectiveness - Methodological Concerns

Some general remarks need to be made about the effectiveness of regional human right regimes and effective implementation of human rights to further explain the methodological framework chosen for this thesis. What is meant by effectiveness, and how does one measure the effectiveness of a regional human rights body and what criteria can be used?

In general, effectiveness is a complex issue and difficult to assess, and the study of regime effectiveness lacks a common precisely defined core.³² Evaluation of the effective protection of human rights in any regime or at any level varies given different assumptions and definitions of what constitutes effective protection. This is compounded by the difficult issue of causality, meaning the problem of identifying whether it was the subject of study, other factors, or a combination of both that contributed to enhance human rights protection and implementation. However, any regime is conventionally defined as a set of norms, rules and regulations and all research on the effectiveness of a regime has to try to determine how and to what extent this body of norms and rules can influence the behaviour of the parties to the regime.³³ When assessing effectiveness of any institution or regime, Underdal and Young (2004) holds that: “Any attempt to develop some kind of methodological framework must at least address three fundamental questions.” First, what is the object to be addressed? Second, against which standards is this object to be evaluated? Third, how do we compare the object to the standards we have defined?³⁴ When examining *effectiveness* it can be seen as sub-field of the broader study what *consequences* a regime will have. The notion of regime *strengths* in turn focuses on the properties of the regime itself rather than on the consequences it produces. Of course, strengths as properties are of considerable interest within themselves because strengths are essential to enhance effectiveness.³⁵ In that sense one can pin point certain strengths and weaknesses of a human rights regime to conclude how effective it will be and what needs to be improved.

When it comes to human rights in particular, the quest for effectiveness lies at the heart of every human rights system. Using the European system as an example, the preamble to the European Convention on Human Rights explicitly demonstrates this by stating that the Convention: “aims at securing *effective* recognition and observance” (emphasis added) of the rights set forth in the Universal Declaration on Human Rights.³⁶ It is clear

³² Arild Underdal and Oran R. Young (Eds.): *Regime Consequences – Methodological Challenges and Research Strategies*. (Kluwer Academic Publishers 2004) p. 27.

³³ *Ibid*, p. 32.

³⁴ *Ibid*, p. 31.

³⁵ *Ibid*, p. 32.

³⁶ Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *Available at*:

that the European Convention on Human Rights sets out to protect real and substantive rights, not just rhetorical ones. Case law from the European Court of Human Rights has shown that the Court has progressively established that the Convention is not a static but a living instrument³⁷ designed to “guarantee not rights that are theoretical or illusory but rights that are practical and effective”.³⁸ In doing so its contents must be read to secure effective rights protection for individuals as European societies evolves.³⁹

Obstacles to ensure effectiveness can in very broad terms be divided into two main categories - fundamental and structural ambiguities within the regime. Fundamental obstacles to ensure effective protection of human rights in any human rights regime are constituted mainly by resistance from states.⁴⁰ This is because human rights are ultimately a national issue. States are the principal violators of human rights and the principal actors governed by the regime’s norms. Donnelly (2007) observes that national commitment is the single most important factor to a strong human rights regime, and it is often held that it is “political will” that underlines most strong regimes.⁴¹ Similar, Keller and Sweet (2008) underlines that the European Court of Human Rights cannot on its own give agency to its jurisprudence in national legal orders. For a human rights regime to make a difference domestically, officials have to take decisions to strengthen its effectiveness.⁴² Thus, the effectiveness of the norms of an international human rights regime does not mainly depend on refined provisions or an excessive amount of case law, but the reception and implementation of these norms and decisions in the domestic legal order with regards to the particular characteristics of the contracting states.⁴³ In order to enable the individual to enjoy his or her rights, these rights must be effectively protected by domestic legal and justice systems with appropriate implementation and enforcement procedures.⁴⁴

< <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> > (Accessed on, May 18, 2011).

³⁷ *Tyrer v. United Kingdom* (appl. no. 5856/72) Judgement (Chamber) 25 April, 1978, para. 31.

³⁸ See for example *Öcalan v. Turkey* (appl. no. 46221/99) Judgement (Grand Chamber) 12 May, 2005, para. 135.

³⁹ The Court requires national authorities to interpret Convention rights so as to make them effective for individuals. *Soering v. United Kingdom* (appl. no. 14038/88) Judgement (Chamber) 7 July 1989.

⁴⁰ Mireille Delmas-Marty, *The European Convention for the Protection of Human Rights: International Protection versus National Restrictions*. (Martinus Nijhoff Publishers 1992) pp. 101-103.

⁴¹ Jack Donnelly, *supra* note 1, p. 105.

⁴² Hellen Keller and Alec Stone Sweet (eds.) *A Europe of Rights – The Impact of th ECHR on national legal systems* (Oxford University Press, 2008) p. 8.

⁴³ Francois Tulkens in Mireille Delmas-Marty, *supra* note 40, p. 106.

⁴⁴ The principle of the rule of law is for example considered crucial and can also be described as an overarching principle in the field of human rights protection because, where it does not exist, effective implementation and respect for human rights becomes theoretical and illusory.

Structural ambiguities on the other hand entails that a regime has structural weaknesses. These can be of many different kinds. An example is the case overload and time span to render decisions in the European Court of Human Rights.

In attempt to assess effectiveness of regional human rights regimes, some previous studies have taken different approaches. Weston Lukes and Hnatt (1987) for example examine two factors when measuring the effectiveness of the three already existing regional human rights regimes. The first is from the standpoint of *accessibility* of each regime for individual petitions. The second is from the standpoint of *admissibility* of human rights cases.⁴⁵ J.-F. Perrin (1992) on the other hand considers that if the objective with a rule is compared with the degree to which it is achieved, this provides a measure of efficiency.⁴⁶ The impact of a human rights convention in national legal orders can thus for example be measured by studying how different provisions such the right to a fair trial or freedom of speech have been implemented at state level. Keller and Sweet (2008) perhaps provide the most recent and comprehensive study.⁴⁷ While recognizing that no well specified theory to assess the impact of ECHR exists, they attempt to study the impact of the ECHR on national legal systems by looking at different mechanisms titled *reception* - that is how national officials in governments, legislature and judiciaries have chosen to incorporate the ECHR into domestic law and what mechanisms they have developed to adopt the national systems to the ECHR as it evolves.⁴⁸ The ECHR can be said to be effective, domestically, to the extent that national officials recognize, enforce, and give full effect to Convention rights and the interpretive authority of the Court, in their decisions.

Given the above, it is important to be realistic what this thesis can and cannot do. It is no more than reasonable to conclude other than that it would be all but impossible to model the ASEAN human rights regime impact on ASEAN States in any scientifically approved and parsimonious way. The reasons are obvious. First, and most importantly, is that the ASEAN human rights regime is very new. It is too soon to talk about any real accomplishments to assess the effectiveness (other than the establishment of the regime is an accomplishment in itself since human rights are now on the ASEAN agenda and a subject for discussion in states that previously resented them). Second, there is currently no framework or tool that would actually systematically assess the respective degree of existing political will for human rights implementation or, more importantly, to track changes in this. Third, since the commissions are not open to individual petitions, arguably a huge shortcoming in itself, this measurement method is not possible. Fourth, there is no regional “ASEAN human rights instrument” against which impact at the national level may be studied. Finally, given that the commissions 2010-2015 Work Plan has not yet been circulated

⁴⁵ Weston, Lukes and Hnatt, *supra* note 3, p. 614.

⁴⁶ Francois Tulkens in Mireille Delmas-Marty, *supra* note 40, p. 106.

⁴⁷ Hellen Keller and Alec Stone Sweet, *supra* note 42.

⁴⁸ *Ibid*, p. 17.

publicly and no Rules of Procedure are formalised yet it seems premature to draw any more firm conclusions.

On the other hand, the content of the ASEAN Charter and the ToRs to the AICHR and ACWC can provide us with initial insight to assess the ASEAN human rights regime. In this sense, one can pin point some strength and weaknesses with the regime and also make conclusions of the main challenges. Of course, other regional human right regimes are of considerable interest. A strict comparison is however unfair and unfeasible at this point because of the tender age of the ASEAN human right regime and the contextual framework against which it is created varies a lot from other regions and their regional human right regimes. However, since all human right regimes should not go below international human rights standards and also complement the global UN human rights regime, some general principles on what regional regimes ought to be able to do will still be considered to evaluate the ASEAN human rights regime.

1.1.4. Disposition

Besides this chapter, the thesis is divided into six chapters. Chapter two gives an overview of human rights perception in Southeast Asia and the reasons for the long-term absence of a regional human rights regime. Chapter three gives a background on ASEAN, its core norms and how this regional has dealt with human rights in the past. Chapter four examines the UN normative framework for establishing regional human right regimes. The chapter briefly lays out some of the main functions a regional human rights regime should be able to perform and how we can assess human right regimes. Chapter five turns to examine the fundamentals of the ASEAN human rights regime, the ASEAN Charter, the AICHR and its ToR and the ACWC and its ToR. What are the legal implications of the Charter when it comes to human rights and what functions and mandates do these commissions have? Chapter six looks closer at a few specific mandates and analyse how they open up for potentially stronger promotion and protection of human rights. Finally, chapter seven considers some of the main challenges and gives a few recommendations on the way forward together with some general conclusions.

1.2. METHODOLOGY

1.2.1. Research Material

This thesis has been researched using a qualitative method.⁴⁹ Albeit there is no single standardized qualitative method, a qualitative approach in general allows more flexibility and deeper insight and analysis of the material, the

⁴⁹ For a more comprehensive explanation of what a qualitative method is, see Peter Esaiasson, *Metodpraktikan: konsten att studera samhälle individ och marknad* (Norstedts juridik 2007) chapters 11-12.

main aim for this thesis is to better understand how the ASEAN human rights regime is set up and will operate in the ASEAN context. The material has been collected in two different ways. The first might be thought of as more traditional where material have been collected from literature, articles and documents for background research and background parts for the essay. Information about ASEAN and human rights has of course been of high relevance, but also information about regional human rights systems in general and how we can measure human rights effectiveness and performance. Most of the literature have been collected from the RWI Library and the Asia Library (Centre for East and South-East Asian Studies) at Lund University. There is a vast amount of literature about ASEAN, but most literature is focused on the more historical and political aspects of the Association. Material on ASEAN and its institutions from a legal perspective is in general very scarce. A few books bring the human rights, but very few, if any, deal with the normative framework created by the ASEAN human rights regime from a legal aspect. Furthermore, articles and documents have been collected from various internet sources. Moreover, relevant articles in primary sources such as the ASEAN Charter, the ToRs as well as the 1967 Bangkok Declaration have been closely examined and analysed.

1.2.2. Minor Field Study

The second method is a Minor Field Study (MFS) funded by a scholarship from the Swedish International Development Cooperation Agency (SIDA). The study was conducted in Thailand between September and December 2010. While part of the time during this study was used to collect more written material about ASEAN and human rights, the focus however, was to conduct interviews with relevant stakeholders concerning the ASEAN human rights regime. It is very important to underline here that the purpose with the study and the interviews as such, has been to provide the author with inspiration and inputs as a reality check to write this thesis. Together with written sources and legal documents, the interviews have been used to highlight some problems and underline some arguments. The interviews are however not in any way by themselves meant to serve as a basis on which any factual conclusions can be substantiated.

1.2.3. Interviews

The purpose with the interviews has been to explore the views of different actors regarding the ASEAN human rights regime and its prospects in the ASEAN context, whether it can be independent and effective as a human rights mechanism and whether it meets their expectations. There are two main reasons for an expert based study. First, due to the lack of time and resources any large-scale investigation would be impossible and maybe not even desirable for this kind of thesis. The purpose with qualitative interviews as opposed to a more quantitative research approach (where for

example a questionnaire could have been sent out) is to get more in-depth with a lower number of relevant respondents to explore their view on the subject in order to have relevant information to assess the questions asked in this thesis. Second, expert participants will be more closely engaged in human rights work and know how it is protected on the national and regional levels. They will also be familiar with the social, cultural and economical conditions in the region as well as the major human right themes.

1.2.4. Interview Method

The interviews were based on a few questions as a point of departure. The stakeholders were informed beforehand of the overall purpose with the interview, but not in detail about the specific contents of the questions. This was to ensure that the answers given were more spontaneous, openhearted and truthful, reflecting the stakeholder's individual opinion rather than giving a rehearsed answer that might reflect a more official standpoint. The interviews were conducted on a semi-standardized basis and therefore progressed differently with different questions depending on the answers given. All interviews however covered the same main aspects.

1.2.5. Respondents

Respondents were selected based on mainly two criteria: First, that they had knowledge and experience with regard to human rights issues in Southeast Asia and could give substantive opinions on AICHR. Second, that they, given the geographical limitations, were able to meet in person.

The list of possible participants was created from various sources. Some were chosen because of their writings on the subject in books or articles. Many names of individuals and organisations have also been found by looking at protocols from workshops on a human rights mechanism for ASEAN. The Working Group for an ASEAN Human Rights Mechanism has for example organised conferences, roundtable discussions and workshops annually where people representing governments, NHRIs, NGOs, ASEAN and the UN participated. Some of the stakeholders interviewed for this thesis also took part in the First International Conference on Human Rights in Southeast Asia, organized in Bangkok on October 14-15, 2010. During this conference, several presentations were also given on related topics. This material has also been used as an inspiration for this thesis.

1.2.6. Interview Delimitations

Due to the lack of time and resources the Minor Field Study has obvious limitations. One limitation is of course that it would be impossible to

conduct interviews with all relevant stakeholders in the region. In the end, the interviews were dependent on the willingness and possibility of these individuals to participate. Another limitation is the lack of participants from various sectors. My initial hope was to conduct interviews with stakeholders from different sectors of society in order to provide as broad and nuanced view of the ASEAN human rights regime as possible. However, due to the reluctance from some stakeholders the main inputs were provided by representatives from NGOs working with human rights. Lastly, and as pointed out above, the entire study and the interviews have been meant to serve foremost as inspiration and not as a basis for any factual conclusions.

CHAPTER II

2. Human Rights in Southeast Asia: In Search for a Regional Standard

This chapter gives a brief overview of the history and traditions, development and application of human rights in Southeast Asia with focus on the ten countries comprising ASEAN.⁵⁰ Some facts and figures are used to illustrate the current situation. The regions diversity together with the nexus between democracy, human rights and economic development is central to understand the discourse of human rights in this region. So is the 'Asian value' concept that has been used to dismiss the Western concept of human rights and that closely interrelates with the Southeast Asian states approaches to democracy and economic development. Although the term Asian values is not invoked to the same extent these days, concerns about different values and other circumstances continue to surface ongoing discussion about human rights. Within this discourse, ASEAN has been standing out as the potential framework where regional human rights cooperation could take place. Given the diversity in Southeast Asia, the important question is whether there is some consistency and unity in the policies and articulation of the states when it comes to human rights?

2.1. PROSPECTS FOR HUMAN RIGHTS COOPERATION AND THE LACK OF A REGIONAL HUMAN RIGHTS REGIME

2.1.1. Assessment of the Human Rights Situation in Southeast Asia and the Need for Better Human Rights Protection

First, it might be worth giving a brief overview of the human rights situation in Southeast Asia. Assessing this issue is not an easy task since human rights progress, violations, or the degree to which certain human rights claims are realized and realizable is extremely difficult to measure. Attempts to develop composite measures to rank countries human rights performance usually run in to problems and both quantitative and qualitative studies have shortcomings.⁵¹ One such index, indicated by Table 1.1, is the *Humana human rights country rating*. With the last update from 1991, the index is poorly outdated and therefore very limited as a measurement tool. However, it is the only specific comprehensive index the author could find as a source of human rights monitoring that provides an example in measuring human rights conditions. The index ranked most of the ASEAN

⁵⁰ Southeast Asia is usually synonymous with the ten states comprising ASEAN and Timor Leste. The countries are Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

⁵¹ Randall Peerenboom (et al.) (eds.) *Human Rights in Asia: A comparative legal study of twelve Asian jurisdictions, France and the USA* (Routledge New York, 2006) pp. 2-6.

Nations below average with some at the very bottom of the scale.⁵²

Table 1.1 Humana human rights rating of the ASEAN states in 1991.

Country	Human rights rating (%)	
	World average is 62	
	Above average	Below average
Cambodia		33
Indonesia		34
Malaysia		61
Myanmar		17
Philippines	72	
Singapore		60
Thailand		62
Vietnam		27

Brunei and Laos did not appear in the rating which did not cover countries with a population below one million or countries where the information obtained did not satisfy the evaluation criteria.

Source: Charles Humana, *World Human Rights Guide* 3rd ed. (Oxford: Oxford University Press 1992).

A more recent and updated measurement index is provided by the *World Justice Project*.⁵³ Although this index is strictly limited to measuring the adherence to the rule of law in practice in different countries, it can still provide some degree of indication of human rights conditions since adherence to the rule of law is an indispensable cornerstone in achieving accountable governments and the protection of human rights.⁵⁴ Being a rather new project, the 2010 report has obvious limitations in that it only rates four of the ASEAN countries. According to the report, Indonesia, Thailand and the Philippines rate significantly lower than wealthier countries in the region and to the western world; however, they perform relatively well in comparison to countries from other regions of the world with similar income levels. As a contrast, Singapore is top ranked amongst the indexed countries in providing security and access to civil justice to its citizens. Yet it ranks very low in terms of open government, limited government powers, and fundamental rights.⁵⁵ This tells us that, at least within these four countries, the rule of law is relatively strong, creating potential foundation for human rights protection.

Another source of indication to the human rights situation in ASEAN countries is of course country reports from different human rights organisations. The human rights conditions in many ASEAN countries have commonly been rated as poor by international human rights monitoring

⁵² The rating is based on questions such as: Can one travel free in one's country? Is there a risk of extrajudicial killings? The evaluation is then translated into points which are converted into a human rights rating of 100 %. The Humana ranking is in some ways problematic, and reflects a Western bias, since economic, and social rights have not been properly incorporated. For a discussion on the report's methodology and limitations, see the introduction in Charles Humana, *World Human Rights Guide* 3rd ed. (Oxford: Oxford University Press 1992).

⁵³ The World Justice Project Rule of Law Index 2010, *Available at:* <<http://www.worldjusticeproject.org/rule-of-law-index/>> (Accessed on May 18, 2011).

⁵⁴ *Ibid*, p 1.

⁵⁵ *Ibid*, p 25.

groups.⁵⁶ Documentation from worldwide NGOs like Amnesty International, Human Rights Watch, regional and national human rights organisations still reveals a wide range of human rights violations across the ASEAN region.⁵⁷

The Asia Pacific Forum (APF), one of the leading regional human rights organisations in the Asia Pacific region, holds that, despite good progress in recent years, the region continues to face significant human rights challenges. Some are specific to individual countries, while others span the region. Ethnic conflicts and discrimination against minorities are problems in most of the countries. Unlawful detention, torture or other cruel, inhumane or degrading treatment are also common in many of the Member States. Child pornography, child soldiers, complaint handling, the death penalty, HIV-AIDS, internationally displaced persons, women's rights, protection of migrant workers and human trafficking are all pressing issues.⁵⁸ The member states of ASEAN also display a varied human rights record. While Myanmar usually has been considered one of the most unfriendly human rights states in the world, Thailand and the Philippines, not free from human rights abuses, have been more receptive than the rest of the ASEAN states to human rights issues and democratic overtures.

The need for stronger commitment to human rights and a regional human rights regime has for long been visible among the ASEAN Member States, both from the aspect of positive developments in this region, but also from the aspect of lack thereof. On the positive side is the fact that in the national context, certain ASEAN States have made human rights a part of their national agendas. Several constitutions include provisions on human rights and some states have also developed national plans of action on human rights.⁵⁹ In addition, four of the nations also have human rights institutions set up on the national level, Indonesia (known by its acronym Komnas HAM), Malaysia (SUAKHAM), the Philippines (CHRP) and Thailand (Khamakarn Sit). Such institutions provide a key check and balance against abuse of power.

At the international level, the ASEAN Member States have over the years increasingly become parties to the key UN international human rights treaties. Participation in human rights instruments can be seen as a necessary but not sufficient condition in assessing states' commitment to universal human rights. While ratification of instruments by states does not correspond and represent their performance, it represents at least *prima facie* acceptance of international accountability.⁶⁰ In view of establishing a regional human rights regime, ratification of international human rights

⁵⁶ James T.H. Tang, *supra* note 7, p. 186.

⁵⁷ See Amnesty Country Reports Available at: <<http://thereport.amnesty.org/regions/asia-pacific>> (Accessed on May 17, 2011), and Human Rights Watch Country Reports Available at: <<http://www.hrw.org/en/publications/reports>> (Accessed on May 17, 2011).

⁵⁸ Asia Pacific Forum, *supra* note 4.

⁵⁹ Li-ann Thio, *supra* note 5, p. 1065.

⁶⁰ Philip J Eldridge *The Politics of Human Rights in Southeast Asia* (Routledge, London, 2002) p. 63.

treaties can be considered crucial. As indicated by Table 1.2, all ASEAN countries have ratified the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In the past few years, more ASEAN countries have signed or acceded to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Muntarbhorn (2003) argues that such development has provided “added weight to the need for an ASEAN human rights regime”.⁶¹ Several of the states have also undergone the UN Universal Periodic Review,⁶² and permitted special rapporteurs from thematic UN human rights committees to conduct on-site investigations.⁶³

Ratification of International Human Rights Instruments as of November 2010													
	NHRIs	ICERD	ICCPR	ICCPR OP I	ICCPR OP II	ICESCR	CRC	CRC OP I	CRC OP II	CEDAW	CEDAW OPI	CAT	CAT OP
Singapore							X	X		X			
Brunei							X		X	X			
Malaysia	2000						X			X			
Thailand	2001	X	X			X	X	X	X	X	X	X	
Philippines	1987	X	X	X	X	X	X		X	X	X	X	
Indonesia	1993	X	X			X	X			X		X	
Vietnam		X	X			X	X	X	X	X			
Lao PDR		X	X			X	X	X	X	X			
Cambodia		X	X			X	X	X	X	X		X	X
Myanmar							X			X			

NHRIs – National Human Rights Institutions
 ICERD – Convention on the Elimination of all Forms of Discrimination
 ICCPR – International Covenant on Civil and Political Rights
 ICCPR OP I - The Optional Protocol to the International Covenant on Civil and Political Rights
 ICCPR OP II - The Second Optional Protocol to the International Covenant on Civil and Political Rights
 ICESCR – International Covenant on Economic Social and Cultural Rights
 CRC – Convention on the Rights of the Child
 CRC OP I - Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

CRC OP II - Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
 CEDAW – Convention on the Elimination of all Forms of Discrimination against Women
 CEDAW OPI - Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women
 CAT – Convention Against Torture
 CAT OP - Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Source: <http://www.bayefsky.com/> (Accessed on May 17, 2011)

At the Sub-regional level, ASEAN states have departed from previous practices. Ever since the Vienna Conference on Human Rights and the 1993 joint Communiqué issued at the 26 Annual Ministerial Meeting, which laid the incentives for creating a regional human rights regime, human rights have been included on ASEAN’s agenda.⁶⁴ All countries from ASEAN also participate in the UN supported annual workshops on human rights in the Asia-Pacific region.⁶⁵

⁶¹ Vitit Muntarbhorn, *supra* note 14.

⁶² UN Universal Periodic Review Available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx> (Accessed on May 17, 2011).

⁶³ Li-ann Thio, *supra* note 5, p. 1074.

⁶⁴ *Ibid*, p. 1066.

⁶⁵ Vitit Muntarbhorn, *supra* note 14.

On the negative side is of course the fact that human right abuses still occur to a wide extent, albeit to a various degree in the ASEAN Member States. This shows that including concepts of human rights in national constitution does not mean that human rights provisions will be properly respected in practice. On the international level remains the fact that almost none of the states are parties to the optional protocols to the core international human rights treaties. So in fact, no complaints can go to the UN human rights bodies. Furthermore, some states have made extensive reservations to these treaties indicating a lack of will to fully submit to international human rights norms.⁶⁶ The compliance with these bodies in terms of reporting has also been varying greatly with many states submitting reports too late or not at all. The fact that it took about 15 years from incentive to action to establish a regional human rights framework also reveal that in general, human rights progress in the region is slow.

2.1.2. Reasons for the Lack of Regional Human Rights Cooperation

Why is it that Southeast Asian states seem to have been slow or reluctant, relative to other regions, to establish more firm human rights cooperation at the regional level? Essentially, there are a number of factors that can explain the slow progress towards human rights in the region. Carlos Medina has captured some of the main reasons usually put forward to explain the lack of a Southeast Asian human rights regime:

“Human rights issues are considered by many states as internal affairs; while states accept the concept of universality of human rights, it is argued that substantial differences exists between international human right norms and the customs and practices within the region; many states believe individual rights must give way to demands of national security and economic growth, or that human rights can be realized only after a certain level of economic advancement has been achieved; and any human rights mechanism cannot possibly encompass the entire range of diversity among states within the region in terms of historical background, cultures and traditions, religions and level of economic and political development.”⁶⁷

Such objections might be considered more or less poor excuses for not implementing human rights. The following sections will consider some of these arguments.

2.1.3. Regional Diversity

“Southeast Asia, Southeast Asia. What is Southeast Asia, to you and to me?” Professor Vitit Muntarbhorn, a prominent Thai international human rights lawyer and co-chairperson of the Working Group for an ASEAN

⁶⁶ On this issue *see* ‘Reserving the Right Not to Comply: ASEAN Legal Reservations to CRC and CEDAW’ NTS Alert June 2010 (Issue 1) *Available at*: <http://www.rsis.edu.sg/nts/HTML-Newsletter/alert/NTS-alert-jun-1001.html> (Accessed on May 18, 2011), *see also* Li-ann Thio, *supra* note 5, p. 1074.

⁶⁷ Carlos Medina, quoted in Close & Askew, *supra* note 9, p. 112.

Regional Human Rights Mechanism, asked at the very first International Conference on Human Rights in Southeast Asia.⁶⁸ No doubt, the question is a justified and essential one to study and understand the prospects for human rights cooperation in this region. Muntarhorn went on to state:

“Is it a state of geography? Ten countries of ASEAN but more. Should we include East Timor? Or could we even include China, maybe Hong Kong, some say India even. Or is Southeast Asia a state of ethnicity? According to one rapporteur there are more than 400 ethnic groups in Southeast Asia. Or is Southeast Asia a state of mind, a state of art? To me, a state of poetry.”

Besides the geographical delimitations incorporated into the phrase Southeast Asia, whether how one chooses to look at this region, it is inevitable to come to another conclusion than that this region is exceptionally diverse in many respects. It is important to be aware of this fact in order to better understand the prospects for cooperation in this region, not at least when it comes to human rights. It is hard to define this diversity. When it comes to the ten nations comprising ASEAN they differ in culture, religion, philosophical, and social structures. Their political ideologies, legal systems and degrees of economic development vary greatly. Peerenboom (2006) asserts that these are some of the most common factors linked in empirical studies to better understand human rights protection, and it is often held that Southeast Asian countries share neither a political history nor common values needed to establish any firm human rights cooperation.⁶⁹

Just a brief overview would illustrate this diversity.⁷⁰ Historically, the region has been filled with turmoil with centuries of competing colonial interests of the British, French, Dutch, Americans, Spanish and Portuguese that somewhat cut off the historical web of connections in Southeast Asia. The colonial past and the countries vigorous pursuit of self-determination is of course a crucial factor when considering human rights cooperation. As Yasuki (1999) points out, “For those who have experienced colonial rule and interventions under such beautiful slogan as ‘humanity’ and ‘civilisation’, the term human rights looks like nothing more than another beautiful slogan by which great powers rationalize their interventionist policies”.⁷¹ When ASEAN was conceived in 1967, the Cold War was at its height, the region far from spared with violence. Regional disputes were fresh, and communist insurgencies were raging inside some Member States.⁷²

⁶⁸ The 1st International conference on human rights in southeast Asia, *supra* note 27.

⁶⁹ For an overview of the diversity and different factors linked to human rights protection, see Randall Peerenboom *supra* note 51, pp. 17-36.

⁷⁰ A good introduction and overview of the Southeast Asian States and ASEAN is provided in Rodolfo C. Severino (et. al) (eds.) *Southeast Asia in a New Era: Ten Countries, One Region in ASEAN* (ISEAS, Singapore 2010); See also The U.S. State Department’s Human Rights Report for a good overview of the differences of these countries, Available at: <<http://www.state.gov/g/drl/rls/hrrpt/>> (Accessed on May 17, 2011).

⁷¹ Onuma Yasuki, quoted in Bauer & Bell, Bauer & Bell, *The East Asia Challenge for Human Rights* (Cambridge University Press 1999) p. 9.

⁷² Rodolfo C. Severino, *supra* note 70, p. 12-13

After independence, most Southeast Asian states were preoccupied with two central concerns: creating national unity and enhancing economic development.⁷³ With the plural societies divided by race, language and religion, this was not an easy task. A great source of political violence in post-colonial Southeast Asia has therefore been incomplete and unsuccessful nation-building and the political and socio economic marginalisation of minorities.⁷⁴ The reasons for instability in the region are therefore nowadays mainly domestic.⁷⁵ Difference in population size, ranging from more than 240 million in Indonesia to less than half a million in Brunei⁷⁶ helps explain divergences in instability among the nations. Population size is also a proxy for ethnic diversity, which has led to conflict, both against the state, but also between different minority groups. Such instability has been invoked to support broad state powers with strict national security laws, thus justifying more restriction on rights.⁷⁷

Southeast Asia also clearly boasts a wide diversity of religious systems and cultural practices. While Thailand, Myanmar, Cambodia, Laos and Vietnam for example are predominantly Buddhist, a considerable proportion of the populations of Brunei, Malaysia and Indonesia are Muslim while in the Philippines, Christianity is the dominant religion.⁷⁸ The role of religion in society as well as the relationship between government and religion also differs between nations. According to Fox (2008) and in very generalized terms, Muslim states tend to be more supportive of state religions and, on average, place more restrictions on religious minorities while Buddhist and Christian states tend to be more tolerant.⁷⁹

While heritage from colonial history and religion is visible throughout the societies, it also permeates the legal systems among the ASEAN Member States, and there is a great variation among the states on key legal institutions and practices that help ensure protection of human rights. Even just a brief survey would readily illustrate the intricate mosaic of legal systems. While all the national legal systems have been influenced from a variety of sources, Brunei, Malaysia and Singapore carry strong features from the English common law system. Islamic legal influences are also visible in Brunei and Malaysia. Myanmar's legal system is also based on the common law system inherited from the British era even though the military regime now rules by decree without an independent judicial system. The legal systems in Vietnam, Laos and Cambodia carry influences from French civil law as well as communist theory. In Indonesia, a mix of traditional customary law, Dutch colonial law and modern Indonesian law makes up

⁷³ *Ibid*, p. 13.

⁷⁴ *Ibid*, p. 14.

⁷⁵ Randall Peerenboom, *supra* note 51, p. 18.

⁷⁶ See US State Department Human Rights Country Report, *Available at*: <http://www.state.gov/g/drl/rls/hrrpt/> (Accessed on May 17, 2011).

⁷⁷ Randall Peerenboom, *supra* note 51, p. 34.

⁷⁸ See US State Department Human Rights Country Report, *supra* note 76.

⁷⁹ Jonathan Fox, *A World Survey of Religion and the State* (Cambridge University Press, New York, 2008) p. 216.

the legal structure. The Philippines have a blend between civil law system and common law system inherited in part by colonization by Spain and the United States. In Thailand, the legal system is very much influenced by the European civil law system, but traces of common law are also visible as well as Muslim laws.⁸⁰

2.1.4. Democracy, Development and Human Rights

Levels of democracy and economic development are usually considered the most significant factors influencing the approach to human rights in ASEAN states and explaining the slow development.⁸¹ The political systems and democratic situation in the states display a great variety. In terms of democracy, they have been categorized as democratic to semi-democratic, semi-authoritarian to authoritarian.⁸² Countries like the Philippines, Indonesia and Thailand have undergone political regime transition from authoritarian to democratic. Cambodia, Malaysia and Singapore have their own unique brands of illiberal Asian democracy. Dissidence and advocacy of alternative systems are marginalised in Malaysia while practically outlawed in Singapore. Communist single state parties exist in Vietnam and Laos. Myanmar is ruled by its authoritarian military junta while Brunei is under the benign but authoritarian rule of its Sultan.⁸³ Table 1.3 shows the *Freedom in the World* survey ranking, a tool that can be used to assess the democratic situation in states.⁸⁴ The index from 2010 rates Indonesia as 'free', Malaysia, Philippines, Singapore and Thailand as 'partly free', and the rest of the countries as 'not free'.⁸⁵

⁸⁰ See US State Department Human Rights Country Report, *supra* note 76.

⁸¹ Randall Peerenboom states that the nature of the political regime is important, but level of economic development is usually the most significant factor, *supra* note 51, p. 37

⁸² See Marlay and Neher for the categorisation, in Philip J Eldridge, *supra* note 60, p. 40.

⁸³ See US State Department Human Rights Country Report, *supra* note 76; See also Marlay and Neher for the categorisation, in Philip J Eldridge, *supra* note 60, p. 40. See also pp. 58-59.

⁸⁴ The Freedom in the World survey provides an annual evaluation of the state of global freedom as experienced by individuals. The survey measures freedom-the opportunity to act spontaneously in a variety of fields outside the control of the government and other centers of potential domination-according to two broad categories: political rights and civil liberties. The survey does not rate governments or government performance per se, but rather the real-world rights and freedoms enjoyed by individuals. Each country is assigned a numerical rating-on a scale of 1 to 7-for political rights and an analogous rating for civil liberties; a rating of 1 indicates the highest degree of freedom and 7 the lowest level of freedom. These ratings determine whether a country is classified as Free, Partly Free, or Not Free by the survey.

⁸⁵ Freedom House index, *Available at:*

<<http://www.freedomhouse.org/template.cfm?page=25&year=2010>> (Accessed on November 24, 2010).

Table 1.3	
Freedom House combined average rating	Score
FREE	
Indonesia	2,5
PARTLY FREE	
Philippines	3,5
Malaysia	4,5
Singapore	4,5
NOT FREE	
Brunei	5,5
Cambodia	5,5
Lao PDR	6
Vietnam	6
Myanmar	7
<i>Source:</i> Freedom House Data < http://www.freedomhouse.org/template.cfm?page=25&year=2010 > (Accessed on November 24, 2010)	

The economies and levels of development display an equally visible divergence. Singapore can be found at one end of the spectrum while Myanmar and Cambodia at the other and the rest of the countries at various levels. Table 1.4 presents figures from *The Human Development Index* (HDI) combined by the Gross Domestic Product per capita in each of these States. The HDI is devised by the United Nations Development Programme (UNDP) and measures development by combining indicators of life expectancy, educational attainment and income.⁸⁶

Table 1.4		
Human Development Index Ranking 2010	HDI Ranking	GDP per capita USD
Very High Human Development		
Singapore	27	50266
Brunei	37	49915
High Human Development		
Malaysia	57	14410
Medium Human Development		
Thailand	92	8328
Philippines	97	3061
Indonesia	108	4394
Vietnam	112	3097
Lao PDR	122	2404
Cambodia	124	1952
Low Human Development		
Myanmar	132	1596
<i>Source:</i> Human Development Index, http://hdr.undp.org/en/humandev/ (Accessed on November 24, 2010)		

Democracy and human rights are distinct but related concepts. Neither has a single definition – both are complex and depend on different interpretations

⁸⁶ The Human Development Index measures development by combining indicators of life expectancy, educational attainment and income into a composite human development index, the HDI. Available at: <<http://hdr.undp.org/en/humandev/>> (Accessed on November 24, 2010).

in different societies. David Beetham asserts that “democracy and human rights occupy different areas of the political sphere: one is a matter of the organisation of government while the other a question of individual rights and their defence.”⁸⁷ According to Robert Dahl, “democracy guarantees citizens a number of fundamental rights that nondemocratic systems do not, and cannot grant.”⁸⁸ Democratic forms of government can be conceived as an essential mean for achieving human rights. Elements of democracy and human rights of each individual country can be assessed by examining their national constitution, as constitutions contains basic ideas and aspirations and shows how each country approaches human rights. A closer glance at constitutions in ASEAN Member States reveals that rights and freedoms of the people are recognized quite well, at least in some of the states.⁸⁹ However, including such concepts in national constitutions does not mean that human rights provisions will be properly respected in practice. Democracy is often held to be understood differently between Western states and those in Southeast Asia. For some countries, the Western definition of democracy, human rights and political pluralism has been, and still is, considered a threat to the security and stability within the state.⁹⁰ In most, if not all ASEAN Member States, press freedom, the political and civil rights of individuals, and the freedom of expression and assembly in particular have been curtailed.⁹¹

Democracy and human rights is also related to development and economic growth, much so within the Member States of ASEAN. Jones (2008) even argues that “the greatest challenge facing regional integration lies in addressing the development divide, not the democratic deficit, among the member states”.⁹² Strive for economic development has always been considered the primary objective amongst the states in ASEAN. Most of them have rated economic development more highly than human rights and argued that economic growth should come before democratic reforms.⁹³ Singapore’s former Foreign Minister, Wong Kan Seng, for example asserted that “poverty makes a mockery of all civil liberties”.⁹⁴ Some of the governments have used the importance of a growing economy as an argument to defend the need to rule with a strong hand.⁹⁵ States like Singapore, Malaysia and Indonesia provide striking examples that rapid growth can take place under authoritarian leadership. Especially Singapore has challenged the notion that democracy is a key to economic growth, or, put differently, that economic growth would inevitably lead to political

⁸⁷ David Beetham, quoted in Sriprapha Petchamseree, *supra* note 18, p. 11.

⁸⁸ Robert Dahl, quoted in Sriprapha Petchamseree, *Ibid*, p. 11.

⁸⁹ *Ibid*, p. 12.

⁹⁰ *Ibid*, p. 12.

⁹¹ *Ibid*, p. 12.

⁹² David Martin Jones ‘Security and Democracy: the ASEAN Charter and the dilemmas of Regionalism in Southeast Asia’ *International Affairs* 84:4 (2008), p. 742.

⁹³ Randall Peerenboom, *supra* note 51, p. 25.

⁹⁴ Wong Kan Seng, quoted in Mely Caballero-Anthony ‘Human Rights, Economic Change and Political Development’ in James T.H. Tang, *supra* note 7, p. 43.

⁹⁵ Randall Peerenboom, *supra* note 51, p. 19.

reforms, democratisation and improved protection of human rights.⁹⁶ As a contrast stands the Philippines, which faced democratic reforms before many of the other ASEAN countries, but still does rather poorly when it comes to economic growth and national security. Lastly, countries like Myanmar and Laos display a lack of both democratisation and economic growth and improvement in the protection of human rights.

The relationship between democracy, development and human rights tends to be very complex, lacking any precise formula for when, and in combination with what, an improvement in any of the three will take place. They are all related in the sense that growth in one may boost a growth in the other, but there is definitely not any linear relationship. While democracy may be considered an essential pre-requisite for the realisation of human rights, Peerenboom (2006) argues that human rights progress only occurs once democracy has reached a certain stage.⁹⁷ The diversity in the political systems of governments and level of development, together with a general lack of consolidated democracy, which reflects the ASEAN Member States view on democracy and the attitude towards economic development, in many ways explains the policies and practices in the field of human rights in ASEAN countries.⁹⁸ It is probably the most crucial factor why national human rights records remain poor and the reason for lack of regional human rights cooperation within ASEAN. In addition, while concepts like democracy, respect for human rights and fundamental freedoms are now included in the ASEAN Charter, this is certainly no guarantee for implementation.

2.1.5. Cultural Relativism and Asian Values

Notions of 'Asian democracy' and development are closely interwoven with Asian values discourse. The concept of specific 'Asian values' is often used as an explanation why Asian states did not adopt human rights but instead justified more authoritarian regimes. Although not specific to Southeast Asia, in the beginning of the 1990s many ASEAN countries propounded 'Asian values' and regional approaches to human rights and democracy that emphasized difference in culture and level of development. The Asian values a debate was especially fuelled much due to provocative remarks by strong political leaders from Singapore and Malaysia. It also gained geopolitical support from China's issuance of its White Paper on Human Rights in 1991 and the issuance of the 1993 Bangkok Declaration.⁹⁹

In essence, Asian values have been used to promote cultural relativism as an argument against the universality of human rights. In the run up to the 1993

⁹⁶ Randall Peerenboom, *supra* note 51, p. 1.

⁹⁷ *Ibid*, p. 24.

⁹⁸ Sriprapha Petcharamseree, *supra* note 18, p. 12.

⁹⁹ Randall Peerenboom, 'Beyond Universalism and Relativism: The Evolving Debates About Values in Asia' in Dinah L. Shelton, *Regional Protection of Human Rights* (Oxford University Press 2008) p. 1057. First published in *IND. International Comparative Law Review* (2003).

World Conference on Human Rights Asian governments adopted the Bangkok Declaration, which is frequently cited to illustrate the relativist stance, or *situational uniqueness*, of Asian governments when it comes to human rights. The Bangkok Declaration Article 8 holds that Asian governments:

“recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of internal norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.”¹⁰⁰

A similar respect for regional particularities appears in the Terms of Reference to the AICHR.¹⁰¹ In his opening speech during the International Conference of Human Rights in Southeast Asia in 2010, the Secretary General of ASEAN Dr. Surin Pitsuwan reconfirmed this position again by stating:

“I think we have to go back to the very fundamental concept of individual rights and human rights where I think the two traditions, east and west have some fundamental differences. I am saying this not arguing that we do not have universal norms for human rights. I’m just saying that universal norms are being evolved and developed to serve our particular stages of social, economical and political development.”¹⁰²

It is not quite clear whether such statements, or legal formulations, merely qualifies or in effect denies the idea of universality, since they are contradicted by the notion of regional particularities. Some have argued that it merely entails that Southeast Asian nations does not have an alternative concept of human rights but rather a different approach to how these rights should be interpreted and implemented.¹⁰³ However, if more weight is attached to particularistic considerations, the more likely it is that the universality of human rights is stripped of its substantive content.¹⁰⁴

2.1.5.1 What are Core Asian Values?

Although there is no exact definition of what constitute Asian values, key Asian values asserts emphasis on communitarian values, such as family, rather than individual ones, communal peace, social harmony, greater

¹⁰⁰ 1993 Bangkok Declaration, *Available at*: <http://law.hku.hk/lawgovtsociety/Bangkok%20Declaration.htm> (Accessed on May 21, 2011).

¹⁰¹ AICHR ToR Article 1.4 “To promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities.”

¹⁰² Secretary General of ASEAN, Surin Pitsuwan, at ‘the 1st International conference on human rights in southeast Asia’, *supra* note 27.

¹⁰³ Mely Caballero Anthony ‘Human rights, economic change and political development: a Southeast Asian Perspective’ in James T.H. Tang, *supra* note 7, p. 50.

¹⁰⁴ Joseph Chan ‘The Asian Challenge to Universal Human Rights: A Philosophical Appraisal’ in James T.H. Tang, *Ibid*, p. 25.

reverence for traditions, strong leadership and respect for authority.¹⁰⁵ Such values are claimed by many governments as a key factor to economic success.¹⁰⁶ The main stance on human rights from the Asian values debate can be summarized in the following points:

First, Southeast Asian states have preferred to deal with human rights within their own jurisdiction. Amitav Acharya (1995) has explained the reluctance towards human rights as partially an “instrument by the West to dominate the East. Human rights have been considered a threat by ASEAN states [...]. Thus a new challenge for them is to take collective action to protect regional norms and autonomy against ‘external’ pressure.”¹⁰⁷ International supervision by human rights mechanisms is viewed as a threat to national sovereignty. In relations to this, the states have been reluctant to engage in a direct confrontation with the UN, stressing national sovereignty and protested against western dominance in the UN.¹⁰⁸ Furthermore, several ASEAN governments have also criticised the 1948 Universal Declaration on Human Rights because many states were not yet independent and could therefore have no part in its formulation.¹⁰⁹

Second, most ASEAN states have also emphasised the primacy of economic development over human rights. This argument is, in part, that civil and political rights are neither meaningful nor feasible in conditions of want and poverty.¹¹⁰ Human rights can be implemented only after a country reaches a certain level of development. Thus, there is a linkage between human rights, democracy and economic development in that the States have argued that economic development and success requires political stability, which in turn requires authoritarian governments and respect for traditional cultural values.¹¹¹

Third, and closely related to the second point, is that many ASEAN states have not been comfortable with one category of human rights prioritized over another. They claim that civil and political rights can be a hindrance to economic development and public order. Thus, many prefer advocating for economic social and cultural rights.¹¹²

Fourth, in most ASEAN countries there is a concern that western concept of human rights puts too much emphasis on the individual rather than the community. In many Member States, communal rights are considered

¹⁰⁵ Bruun and Jacobsen (eds.) *Human rights and Asian Values: Contesting national Identities and Cultural Representations in Asia*. (Curzon Press, London, 2003) p. 2.

¹⁰⁶ Philip J Eldridge, *supra* note 60, p. 33.

¹⁰⁷ Amitav Acharya ‘Human Rights and Regional Order: ASEAN and Human Rights Management in Post-Cold War Southeast Asia’ in James T.H. Tang, *supra* note 7, p. 167.

¹⁰⁸ Philip J Eldridge, *supra* note 60, p. 60.

¹⁰⁹ *Ibid*, p. 60

¹¹⁰ Yash Ghai ‘Asian Perspectives on Human Rights’ in James T.H. Tang, *supra* note 7, p. 58.

¹¹¹ Jack Donnelly, *International Human Rights in Theory and Practice* (2nd ed.) (Cornell University Press 2003) pp. 109-110.

¹¹² *Ibid*, pp. 110-111.

equally important as the rights of the individual who are responsible to the society. There need not to be any clear-cut contradiction of individual versus communal rights in promoting human rights. However, in achieving this balance within the context of ASEAN Member States it is sometimes inevitable that individual rights are limited for the best of the community.¹¹³ There has been an extensive on-going debate regarding the Asian values discourse. Some scholars put great emphasis on them. Mauzy (1997) argues that there is no single Asian view or set of values, no uniform ideology and no single cultural system. However, when the term is applied to Southeast Asia, there are a considerable number of shared values and important commonalities. These common values, along with shared regional interests, serve to give the ASEAN states a bond, which in turn helps provide a basis for cooperative endeavours and for arriving at consensual decisions.¹¹⁴ Other commentators have made the point that it is oversimplified and even absurd to talk about Asian values since the region is known for the diversity of its cultures, religions, traditions, and histories.¹¹⁵ Especially within ASEAN, those values may have gained more attention than they deserve much thanks to authoritarian leaders in mainly Singapore, Malaysia and Indonesia who do not represent the entire region.¹¹⁶ Peerenboom (2006) underlines that, the discussions about human rights, Asian values have many times been politicized, and “clearly, some authoritarian regimes have used the rhetoric of Asian values for self-serving ends, playing the cultural card to deny citizens their rights and fend off foreign criticism”.¹¹⁷ Today, however, many argue that the Asian values discourse has lost some of the significance it played in the human rights debate in Southeast Asia, especially after the 1997 financial crisis.¹¹⁸

2.2 CONCLUDING REMARKS - PERCEPTIONS OF HUMAN RIGHTS IN SOUTHEAST ASIA

2.2.1. An Ambivalent Human Rights Stance

What does this overview tell us about the human right stance in Southeast Asia? It is clear that both human rights situations and performances vary widely among the states. The tremendous diversity also makes unified human rights stance and cooperation very difficult. Southeast Asian states, much like their cultures, approach to human rights have been and are different from other parts of the world. In relations to democracy and development, most ASEAN states have rated economic development more

¹¹³ Mely Caballero-Anthony ‘Human Rights Economic Change & Political Development’ in James T.H. Tang, *supra* note 7, p. 42.

¹¹⁴ Diane K. Mauzy, *supra* note 9, pp. 215-216.

¹¹⁵ *Ibid*, p. 215.

¹¹⁶ Especially leaders from Singapore and Malaysia have led the way in articulating contemporary Asian values concepts, *see* Philip J Eldridge, *supra* note 60, p. 33.

¹¹⁷ Randall Peerenboom, *supra* note 51, p. 2.

¹¹⁸ Joseph S. Kraft ‘Human Rights in Southeast Asia: The Search for Regional Norms’ *East-West Center Washington*, No 4, July 2005, p. 4. *See also* Randall Peerenboom, *supra* note 51, p. 2.

highly than human rights.¹¹⁹ The role of the state in the development and the appropriateness of democratic relative to authoritarian systems of government in its achievement are closely inter-linked issues and the approach differs from those of the west.¹²⁰

On the other hand, the situational uniqueness is not something particularly unique to Southeast Asia. In Europe for example when balancing between the individual's interest and the public interest and morals of a country, the European Court of Human Rights has developed a "margin of appreciation". In this, the Court display that it is impossible to find a uniform European stance on moral issues to guide its interpretations.¹²¹ Similar, in Africa, the African Charter on Human and People's Rights clearly considers regional particularities, both in its preamble and its provisions. It also emphasizes the duty of the individual towards the community and to preserve particular African values.¹²² Clearly, every region displays a tremendous diversity and within this diversity, there are some dominant trends and common patterns, which, under the right circumstances, allows for human rights cooperation. Taking this into consideration, the important question, when examining the prospects for an ASEAN human rights regime, is whether there is some consistency and unity in the policies and articulations of the states when it comes to human rights?

Tommy Koh, the Singaporean member of the High Level Task Force (HLTF), a group of government officials convened to draft the ASEAN Charter, reaffirmed that: "[t]here was no issue that took up more of our time, no issue as controversial and which divided the ASEAN family so deeply as human rights".¹²³ The statement shows that much of ASEAN's credibility to the outside world and cooperation opportunities lies foremost within the economic sphere. Other strong points have been security concerns, stability in the region and a good measure of cohesion amongst its members. Most of the success and cohesion are based on at least two pillars which include the written norms of non-interference and the principle of consensus. These norms, as we shall see in the next chapter, find a prominent place in ASEAN and are thus core norms within the new human rights regime.

¹¹⁹ Philip J Eldridge, *supra* note 60, p. 38.

¹²⁰ *Ibid*, p. 38.

¹²¹ Randall Peerenboom, *supra* note 51, p. 39.

¹²² African Charter on Human and People's Rights, Concluded at Banjul, June 26, 1981.

The Preamble for example states "*Taking into consideration* the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and people's rights. Article 29 for example states that the individual has the duty to "preserve and strengthen positive African cultural values in his relations with other members of society (...)"

¹²³ Tommy Koh, 'Consensus needed on human rights' *The Strait Times* (Singapore) 13 June 2008. He also held that member nations remained divided on mainly three issues, namely, whether the proposed mechanism "should have the power to investigate and monitor the human rights situation in member countries; whether it should consider rights and also responsibilities; and how to reconcile the principle of human rights with that of non-interference".

Tommy Koh also observed that the ASEAN family is divided into two groups on the issue of human rights. Indonesia, Malaysia, the Philippines and Thailand are positive more open to human rights and norm change. They have ratified many of the core international human right treaties, have national human rights institution in place, and in terms of democracy and development at least they are not at the bottom of the scale. On the other side, Jones (2008) points out, are Cambodia, Laos, Myanmar and Vietnam who constitute a distinct group whose standard of living, GDP, human rights and standards of rule-based governance are substantially below the other ASEAN members.¹²⁴ Brunei and Singapore are somewhere between the camps.¹²⁵

It is clear that local circumstances including cultural differences, religious traditions, economic development, and the nature of legal and political institutions are clearly relevant and must be considered with respect to implementing human rights. Implementation will only be effective and enforceable when it finds support in the local and regional particularities. The diversity and ambivalence clearly poses a formidable obstacle to advancement of human rights in the region. It illustrates that there is no official, clear or comprehensive position on human rights and clear divergences exist amongst individual ASEAN Member States.¹²⁶ Although some core values have been articulated through the Asia values discourse, these have stressed for the sovereignty of States over human rights and that regional particularities must be taken under consideration when addressing human rights issues. This might be considered poor excuses for not implementing human rights. However, with the ratification of the ASEAN Charter and the emerging human rights regime, a tendency towards change can be observed in that at least now all States agree that human rights can be discussed. However, it would be wrong to assume from this alone that ASEAN member states are close to having a uniform approach to interpreting human rights norms.

¹²⁴ David Martin Jones, *supra* note 92, p. 749.

¹²⁵ Tommy Koh, *supra* note 123.

¹²⁶ Mauzy (1997) argues that human rights policy positions of the states in ASEAN have not been monolithic, but there has been considerable unity - less than they claim, but more than their detractors admit. Diane K. Mauzy 'The human rights and 'Asian values' debate in Southeast Asia: Trying to clarify the key issues' *supra* note 9, p. 219. Others have contended that, although there may be a relatively unified human rights position among ASEAN governments, there is no similar ASEAN wide people-position. Acharya makes the point that: "while some common elements in the ASEAN member governments attitude towards human rights can be identified, the very idea of what constitute cultural norms is not uniform between or within ASEAN societies." This goes back to the diversity within the region. Singapore's Confucian values is not shared by Islamic Malaysia or Catholic Philippines. Amtiav Acharya 'Human Rights and Regional Order: ASEAN and Human Rights Management in Post-Cold War Southeast Asia' in James T.H. Tang, *supra* note 7, p. 172.

CHAPTER III

3. Association of Southeast Asian Nations (ASEAN)

This chapter gives an overview of ASEAN as a regional cooperation and its normative structures to better understand the prospect for human rights cooperation. It also gives a brief overview on how ASEAN traditionally has tried to deal with human rights situations in practice.

3.1. A BRIEF HISTORICAL OVERVIEW

ASEAN was established in 1967 by the Bangkok Declaration.¹²⁷ The key aims can be found in the two first paragraphs of the very brief declaration:

1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations;
2. To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter.

Intriguingly, human rights were not mentioned in the declaration, but it can be argued that the aims, such as justice and the rule of law, interrelate closely with the need to promote human rights in the region.¹²⁸ By affirming adherence to the principles of the UN Charter the founding members also accepted its purposes and principles. Even though the main purpose was to create an organisation for economic, social and cultural cooperation, security issues implicitly played a role much due to the then prevailing circumstances in Southeast Asia.¹²⁹ The five founding members were Thailand, Malaysia, Indonesia, Singapore and the Philippines. Brunei joined ASEAN in 1984 as the sixth member. In 1995 Vietnam became a member, and in 1997 Laos and Burma/Myanmar followed. The membership of Cambodia was delayed until 1999 because of internal political turmoil. East Timor is expected to join in 2012 as the 11th member.

Given the diversity of member states in terms of size, colonial experiences, culture, ethnic composition, and identity, and that the founding members also lacked any significant previous experience in multilateral cooperation,

¹²⁷ 1967 Bangkok Declaration, Established on August 8, 1967. Available at: <<http://www.aseansec.org/1212.htm>> (Accessed on May 17, 2011).

¹²⁸ Carlos P. Medina [et al.] (eds.) *Towards an ASEAN human rights mechanism: proposals, declarations and related documents*. (Working Group for an ASEAN Human Rights Mechanism, 1999) p. 1.

¹²⁹ Jörn Dosch 'Southeast Asia and the Asia-Pacific: ASEAN' in Michael K. Connors [et al.] (eds.) *The New Global Politics of the Asia-Pacific* (Routledge, 2004) p. 72.

the creation of ASEAN was somewhat of a surprise.¹³⁰ When the foreign ministers of the five founding countries established ASEAN they presented a very different picture of what they had launched, showing the early ambiguities in this regional cooperation.¹³¹ Singapore's Sinnathamby maybe best signalled what typical ASEAN cooperation would look like by stating: "that we have now erected the skeleton and must give flesh and blood to it".¹³² This statement mirrors the "evolutionary approach" that has been frequently adopted within ASEAN. It suggests starting small and developing towards something more significant - the progressive realisation of something over a period of time.¹³³ The recently established human rights framework is no exception to this approach.

ASEAN was not envisioned to be a supranational institution nor was it intended to be a stepping stone towards integration. In brief, it was established as an association, which would encourage and facilitate understanding and cooperation based on mutual benefit.¹³⁴ Even though early expectations for ASEAN were low, over the plus 40 years of existence, the Association has successfully institutionalised a network on regular meetings amongst its Member States that enabled the governments to better cooperate on problems and challenges the region faced.¹³⁵ Until today, ASEAN has made a considerable progress and evolved into what some consider being one of the most successful examples of regional cooperation in the developing world.¹³⁶

3.1.1. ASEAN's Core Norms and Principles

Ever since its establishment the ASEAN Member States have embraced a number of principles that have defined the parameters of their interaction with each other. To understand the normative framework of ASEAN that has now been formalized through the Charter it is important to understand what these norms are as well as where they came from. According to Acharya (2001): "regional institution, including those who exhibit the characteristics of a security community, may learn their norms from global organisations, or other regional groups. Their norms also derive from the local, social, cultural and political milieu. ASEAN's norms came from a mix of these two sources".¹³⁷

¹³⁰ Richard Stubbs 'ASEAN: Building Regional Cooperation' in Mark Beeson (ed.) *Contemporary Southeast Asia* (Palgrave MacMillan 2004) p. 216.

¹³¹ Jörn Dosch, *supra* note 129, p. 72.

¹³² *Ibid*, p. 74.

¹³³ Richard Stubbs, *supra* note 130, p. 223-224. See also Rodolfo C. Severino, 'The ASEAN Way and the Rule of Law' (Kuala Lumpur, 3 September 2001) Available at: <<http://www.aseansec.org/3132.htm>> (Accessed on May 18, 2011).

¹³⁴ Heu Yee Leung, *supra* note 6, p. 4.

¹³⁵ Jörn Dosch, *supra* note 129, p. 71.

¹³⁶ Joseph S. Kraft, *supra* note 118, p. 2.

¹³⁷ Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the problem of regional order*, (Routledge, New York, 2001) p. 47.

3.1.1.1. 1976 Treaty of Amity and Cooperation and Other Important Agreements

The great differences amongst the nations together with outside turmoil in the world made ASEAN face a number of challenges over the years. The fall of colonialism left states with difficult tasks such as nation-building as well as economic, social and political consolidation. Sources of instability were both internal and external. With the Cold War intensified through the Indochina Wars; internally, several states faced threats of communist subversion and ethnic separatism, while externally, they faced the threat of becoming engulfed by rivalling super powers.¹³⁸ In 1976 the Treaty of Amity and Cooperation (TAC) was signed. The agreement strengthened the members' commitment to ASEAN by establishing the principles of non-interference in the domestic affairs of member states; the settlement of disputes among members by peaceful means; the development of a regional identity; and continuing cooperation in regional economic and social development.¹³⁹ The same year, the Declaration of ASEAN Concord was adopted which urged member states to "vigorously develop an awareness of regional identity and exert all efforts to create a strong ASEAN community".¹⁴⁰ While the 1967 Bangkok Declaration had assured its members that the grouping would preserve their national identities, this objective needed to be reconciled with the development of a regional existence.¹⁴¹

In the wake of the 1997 financial crisis ASEAN summits launched a number of initiatives to enhance the region's security and increase the integration. One of the most notably, the ASEAN Concord II, adopted in Bali 2003, established a framework for achievement of an integrated ASEAN community built on three pillars of economic, security and socio-cultural cooperation and integration. It also reaffirmed that the TAC is the key code of conduct governing relations between states and a diplomatic instrument for the promotion of peace and stability in the region.¹⁴²

Most ASEAN norms, although of central importance to the political security role of ASEAN, are by themselves hardly something unique. The doctrine of non-interference, non-intervention and peaceful settlement of disputes are all enshrined in the Charter of the United Nations (Article 2) as well as other international treaties. What made ASEAN really distinctive were the combination of norms and decision making which came to be known as the 'ASEAN Way'.¹⁴³

¹³⁸ Heu Yee Leung, *supra* note 6, p. 5.

¹³⁹ See the Treaty of Amity and Cooperation, *available at*: <http://www.aseansec.org/1217.htm> (Accessed on May 18, 2011).

¹⁴⁰ Declaration of ASEAN Concord, 24 February 1976, Article 8, *Available at*: <http://www.aseansec.org/1216.htm> (Accessed on May 17, 2011).

¹⁴¹ Amitav Acharya, *supra* note 137, p. 71.

¹⁴² <http://www.aseansec.org/15159.htm>

¹⁴³ Amitav Acharya, *supra* note 137, p. 63.

3.1.1.2. *The ASEAN Way*

Although not explicitly defined, the ASEAN Way can be seen as the ASEAN members' distinctive approach to political and security cooperation. It usually refers to a particular style of decision-making, but some scholars have defined it as both norms and style.¹⁴⁴ According to Acharya, "the ASEAN Way is a term favoured by ASEAN's leaders themselves to describe the process of intra-mural interaction to distinguish it from other, especially Western, multilateral settings. But there is no official definition of the term. It is a loosely used concept whose meaning remains vague and contested."¹⁴⁵ Former Secretary-General of ASEAN, H.E. Dato' Ajit Singh in 1996 offered an explication of the ASEAN Way by stating that:

[The ASEAN Way] ... is that indefinable expression that readily comes to mind when we want to explain how and why we do the things the way we do. Although the expression seems instinctive and intuitive, yet it is based on some very firm principles and practices. We respect each other's sovereignty and independence and do not interfere in each other's internal affairs. Bilateral issues are avoided. We treat each other as equals. Decisions are taken only when all are comfortable with them. Close consultations precede these decisions. Consensus is the rule. The question of face is very important and every effort is made to ensure that no party feels hurt in an argument or a discussion. This does not mean that we do not have disagreements. We often do, but we do not, as a rule, air them in public. It also means that knowing each other as well as we do, we can disagree strongly and yet, at the end of the day, play golf together, eat Durians or do the Karaoke. And ASEAN is none the worse for it."¹⁴⁶

Former Secretary General of ASEAN, Rodolfo C. Severino has added that the Southeast Asian way of dealing with one another "is not just a matter of history; it is a matter of culture".¹⁴⁷ At the core of the ASEAN Way stand six core norms.

- Sovereign equality
- The non-recourse to the use of force and peaceful settlement of conflicts
- Non-interference in the internal affairs of member states, non intervention
- Non involvement of ASEAN to address unresolved bilateral conflicts between members
- Guided diplomacy
- Mutual respect and tolerance between the Member States

First, ASEAN members value and respect each other's sovereignty, meaning that they do not interfere in each other's internal affairs. They always seek non-recourse to the use of force and peaceful settlement of

¹⁴⁴ *Ibid*, p. 63. See also Jürgen Haacke: *ASEAN's Diplomatic and Security Culture: Origins, development and prospects* (Routledge, New York, 2003) pp. 3-7.

¹⁴⁵ Amitav Acharya, *Ibid*, p. 63.

¹⁴⁶ A. Singh, quoted in Jürgen Haacke, *supra* note 144, p. 6.

¹⁴⁷ Rodolfo C. Severino, Former Secretary-General of ASEAN, 'The ASEAN Way and the Rule of Law' (Kuala Lumpur, 3 September 2001) Available at: <<http://www.aseansec.org/3132.htm>> (Accessed on May 18, 2011).

disputes, norms that can be found in the 1976 Treaty of Amity and Cooperation. Second, the ASEAN states emphasize consultation and consensus in relations at the regional level. Consultation process is often informal, steeped in the principle of quiet diplomacy, and negotiations with respect to specific issues are non-confrontational with the overall goal of finding a position that all parties finds acceptable.¹⁴⁸ Moreover, among ASEAN members there is an understanding that regional cooperation is to be brought about by first negotiating a politically acceptable framework, and then working out the formal institutions, legal obligations and technical issues later. This “evolutionary approach” to regional relations is arguably what has ensured a regional stability within Southeast Asia that has helped to foster economic growth and social stability, while at the same time increasing the sense of security among all ASEAN member states.¹⁴⁹ This approach is also chosen for the ASEAN human rights regime. While the ASEAN Way has proven to have its advantages, harsh criticism has also been directed towards it. This is especially true when it comes to human rights in the region.

3.1.2. The ASEAN Way – a Weak Way in Terms of Legal Cooperation

When it comes to prospects for human rights cooperation within ASEAN, it is also worth considering the Association in terms of legal obligations and norms, “At a pace comfortable to all” is a common phrase in ASEAN documents showing the Member States preference for caution and gradualism in developing regional institutions and legally binding agreements.¹⁵⁰ ASEAN has been able to produce a myriad of declarations, concords, instruments, agreements or arrangements that have neither required formal ratification nor been legally binding and had relied on consultation and consensus instead.

That it took the organisation almost nine years to conclude its first legally binding treaty, foremost in the area of peace and security, with the Treaty of Amity and Cooperation in 1976 serve as a good example of the loose forms of cooperation. Since then most agreements carrying some measure of legal obligations have been overwhelmingly economic in nature.¹⁵¹

¹⁴⁸ Jürgen Haacke, *supra* note 144, p. 1.

¹⁴⁹ Richard Stubbs, *supra* note 130, p. 223-224.

¹⁵⁰ Rodolfo C. Severino, *Southeast Asia In Search of An ASEAN Community: Insights from the former ASEAN Secretary General*, (ISEAS 2006) p. 151.

¹⁵¹ It took another ten years for ASEAN to produce the next agreement that carried some binding force. This was the 1977 Preferential Trading Arrangements. Yet another ten years were to pass before ASEAN was to conclude, at the third ASEAN Summit in 1987, the Agreement for the Promotion and Protection of Investments and the agreement on the standstill and rollback of non-tariff barriers, both of which conferred legal rights and obligations upon their signatories. The conclusion of the CEPT/AFTA agreement in 1992 launched the economic integration. Besides the TAC, another key agreement mainly concerning peace and security, is the 1995 Southeast Asia Nuclear Weapons-Free Zone treaty legally committing their states not to “develop, manufacture or otherwise acquire,

In terms of human rights, since its establishment, ASEAN has been able to produce five declarations: the Declaration of Advancement of Women in the ASEAN region (1988), Declaration of the Commitment for Children in ASEAN (2001), Declaration against Trafficking in Persons Particularly Woman and Children (2004), Declaration on the Elimination of Violence Against Women in the ASEAN Region (2004), and the Declaration on the Protection of the Rights of Migrant Workers (2007). These instruments are declarations and not legally binding. They merely indicate political commitments.

3.1.3. ASEAN's Human Rights Approach in Practice - Constructive Engagement Strategy

While formulating an official stance on the meaning and scope of human rights is one thing, managing real human rights problems has been an entirely different exercise.¹⁵² ASEAN has traditionally adopted a policy of 'constructive engagement' when addressing the human rights practices of its Member States. Like its origin, the scope and policy of constructive engagement remains obscure, but it has been most notable in response towards the situation in Myanmar. The country remains the most pressing issue even today when it comes to human rights cooperation. When the military junta (SLORC) in 1988 seized power in Myanmar the developments posed a new challenge for ASEAN. The Association responded with a policy that "seeks not to embarrass the object of engagement through isolation or condemnation," but, rather, to ensure that "change is induced through peer pressure." This policy was much in line with the ASEAN Way core principle of non-interference in the internal affairs of a state, but also a pragmatic move to respond to other concerns as well, such as security, political and economic interests.¹⁵³

The action (or inaction) of ASEAN's constructive engagement policy has generally been met with criticism from civil society groups, many of whom view ASEAN's human rights stance with mistrust. These groups argue that the policy has been used to allow the association and its various subcommittees to ignore pervasive human rights abuses being committed against the peoples it purports to represent.¹⁵⁴ The policy illustrates the unwillingness of ASEAN to exclude one of its members on the notion of human rights and that other interests are of more important concern.

possess or have control over nuclear weapons," station nuclear weapons within or transport them through the treaty's zone of application, or test or use nuclear weapons.

¹⁵² Amtiav Acharya 'Human Rights and Regional Order: ASEAN and Human Rights Management in Post-Cold War Southeast Asia' in James T.H. Tang, *supra* note 7, p. 173.

¹⁵³ *Ibid*, p. 173.

¹⁵⁴ Michelle Staggs Kelsall 'The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step?' *Asia Pacific Issues* No 90 (East-West Center, November 2009), p. 2.

3.2. CONCLUDING REMARKS

Considering what type of cooperation ASEAN originally was intended to be, and what it has become, it is not hard to see why establishing a regional human rights regime within such a framework has been difficult. In terms of legal obligations and norms, ASEAN has never been associated with international law and treaties. The institutions (norms, principles, rules, decision-making procedures) that do exist within ASEAN are ‘soft institutions’ which are not legally binding because they are based on convention and informal agreement rather than formal treaties. What can be concluded about ASEAN’s commitment to agree upon legally binding agreements is that they are few and overwhelmingly economic and security oriented in nature, reflecting the Association’s original intentions. Thus, the cornerstone of ASEAN has been voluntarism not legalism.¹⁵⁵ In that sense, even though ASEAN has developed into more than just a group of friends holding annual meetings to promote regional stability and economic growth, the Association is not comparable to the highly institutionalized EU, and clearly less than the UN that asserts the power to impose binding obligations on its Member States. Although changes may now be visible with the ASEAN Charter- turning the Association into a more rules based, institutionalized organization, and even introducing human rights on the ASEAN agenda, suggesting a small deviation from the ASEAN Way- no one can deny that human rights issues and the establishment of an ASEAN human right regime are still challenging matters within this Association.

¹⁵⁵ Jörn Dosch, *supra* note 129, p. 72.

CHAPTER IV

4. International Human Right Regimes

This chapter gives a brief overview of human right regimes and their normative framework. Donnelly (2007) defines a regime as “a set of principles, norms, rules, and decision-making procedures accepted by states (and other international actors) as binding within an issue area.”¹⁵⁶ The definition is broad, but regimes are essentially political creations to overcome perceived problems arising from inadequately regulated or insufficiently coordinated national action.¹⁵⁷ While there are no existing international legalised standards on how a regional human rights regime should be framed, it is simple to answer at least what it should not do, and that is to function below international human rights standards. A full-scale comparison between different human right regimes, foremost the regional ones, is not possible to make here. Rather, some general principles and common features will be highlighted to illustrate how they can be assessed. When examining the ASEAN human rights regime in the coming chapter, this examination is of relevance to assess the regime, what tools it can adopt, whether it meet international standards, and what it can bring in addition to the already existing monitoring systems outside the ASEAN region.¹⁵⁸

4.1 NORMATIVE FRAMEWORK

4.1.1. The United Nations Human Rights Framework

The ongoing process of development of international human rights law has its normative basis in the Charter of the United Nations (UN Charter).¹⁵⁹ The UN Charter has given rise to a vast body of international and regional human rights law and the establishment of a number of institutions and

¹⁵⁶ Jack Donnelly, *supra* note 1, p. 79. The term is also used for ASEAN’s human rights cooperation in: Yuval Ginbar, ‘Human Rights in ASEAN - Setting Sail or Treading Water?’ *Human Rights Law Review* 10:3 (2010), 504-518.

¹⁵⁷ Jack Donnelly ‘International human rights: a regime analysis’ *International Organization* 40, 3, (1986)

¹⁵⁸ Vitit Muntarbhorn, *supra* note 14. The UN system has several monitoring mechanisms, the Universal Periodic Review mechanism which assesses the human rights situations in all 192 UN Member States. Cambodia, Laos and Vietnam have for example been reviewed under the UPR. Another mechanism is the Complaints Procedure mechanism which allows individuals and organizations to bring complaints about human rights violations to the attention of the UN Human Rights Council.

¹⁵⁹ Charter of the United Nations (UN Charter), entered into force on 24 October, 1945, Available at: <<http://www.un.org/en/documents/charter/index.shtml>> (Accessed on May 18, 2011).

mechanism with the purpose to promote and supervise its implementation.¹⁶⁰

The three major human rights provisions of the Charter are Article 1(3), 55(c) and 56. The first of these provisions recognizes that one of the purposes of the United Nations is international cooperation in solving various international problems and “promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”¹⁶¹ This provision is amplified by Article 55 (c) which states:

With a view to the creations of stability and well-being which are necessary for the peaceful and friendly relations among nations based on the respect for the principles of equal rights and self-determination of peoples, the United Nations shall promote...

(c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex language, or religion.

Article 56 imposes these obligations on the Member States by providing that: “all Members pledge themselves to take joint action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55.” What can be concluded about these rather short provisions is that the Member States obligation under Article 56 is limited to the promotion of human rights. Consequently, they did not undertake to observe, respect or protect human rights identified in Article 55(c). Neither did the Charter define or list the rights and freedoms that are to be promoted.¹⁶² Despite the vagueness of human rights efforts in these provisions, they still had important consequences in that they internationalised the concept of human rights and provided the UN with the requisite legal authority to define and codify human rights.¹⁶³

While the UN Charter internationalised human rights, the 1948 Declaration of Human Rights (UDHR)¹⁶⁴ has become the centrepiece for international human rights enumerating the basic rights of the individual. All states are deemed, by virtue of UN membership, to be bound by the UDHR – a situation prompting some states, particularly Asian, to call for its review.¹⁶⁵ The Universal Declaration is however not a treaty. It was adopted by the General Assembly in form of a resolution creating no real legal obligations and established no enforcement machinery. It was designed, as its preamble indicates, to provide “a common understanding” of the human rights and

¹⁶⁰ Thomas Burgenthal ‘The Normative and Institutional Evolution of International Human Rights’ *Human Rights Quarterly* vol. 19 (1997) 703-723, p. 704.

¹⁶¹ UN Charter Article 1(3).

¹⁶² Henry J. Steiner, Philip Alston, Ryan Goodman, *International Human Rights in Context* (Oxford University Press, 3d ed. 2007) pp. 925-926.

¹⁶³ Thomas Burgenthal, *supra* note 160, p. 708.

¹⁶⁴ The Universal Declaration of Human Rights (UDHR), adopted on December 10, 1948. Available at:

<<http://www.un.org/en/documents/udhr/index.shtml>> (Accessed on May 18, 2011).

¹⁶⁵ Philip J. Eldridge, *supra* note 60, p. 19.

fundamental freedoms referred to in the United Nations Charter.¹⁶⁶ Although the Universal Declaration is a non-binding instrument, few would deny that it nonetheless imposes some legal obligations. Whether all the rights it proclaims are binding and under what circumstances is debated. It can however be argued that the legal obligations which the Universal Declaration as a whole creates for governments derive from the duty the UN Charter imposes on them to “promote” human rights.¹⁶⁷

The second set of documents- the International Covenants on Human Rights- entered into force in 1976. Unlike the UDHR, they are legally binding instruments designed to transform the general principles proclaimed in the UDHR into binding treaty obligations.¹⁶⁸ Together with the Covenants a number of international human rights treaties in a wide range of issue areas have emerged.

4.2 INTERNATIONAL HUMAN RIGHT REGIMES

4.2.1. The United Nations Global Human Rights Regime

The United Nations can be considered to be the global human rights regime. During the years after the adoption of the Universal Declaration there were two distinct developments taking place within or in relation to the UN framework that today in large make up the two monitoring arrangements- the *Charter-based* organs and the *Treaty-based* organs- this regime can adopt.¹⁶⁹ The first, the Charter-based organs developed through ECOSOC resolutions 1235¹⁷⁰ and 1503,¹⁷¹ have paved the way to an ever-growing institutional mechanism within the UN framework for dealing with human rights violations of various art and magnitude. At the centre of today’s UN human rights regime is the UN Human Rights Council (which in 2006 replaced the UN Commission on Human Rights). The Council’s special procedures enables mandate holders to examine, monitor, advise and publicly report on human rights situations in specific countries or territories. The revised Complaints Procedure mechanism allows individuals and organizations to bring complaints about human rights violations to the

¹⁶⁶ UDHR Preamble

¹⁶⁷ Thomas Burgenthal ‘International Human Rights Law and Institutions: Accomplishments and Prospects’ *Washington Law Review* Vol. 63:1 (1988) pp. 8-9. Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms (UDHR Preamble)

¹⁶⁸ *Ibid*, p. 10.

¹⁶⁹ For a more comprehensive overview on these organs, see Henry J. Steiner, Philip Alston, Ryan Goodman, *supra* note 162, p. 737 ff.

¹⁷⁰ Resolution 1235 authorized the UN Commission on Human Rights to discuss human rights violations in particular countries, see Jack Donnelly, *International Human Rights* (3rd ed) (Westview Press 2007) p. 81.

¹⁷¹ Resolution 1503 that authorised the UN Commission on Human Rights to investigate “communications” that suggested “a consistent pattern of gross and reliable attested violations of human rights and fundamental freedoms”, see Jack Donnelly, *supra* note 1, p. 81.

attention of the Council. Furthermore, the Universal Periodic Review mechanism will assess the human rights situations in all 192 UN Member States. So far, a few ASEAN countries have undergone the Universal Periodic Review, but the Council has for example failed to address the current situation in Myanmar.

The second development was the emergence of universal and regional *treaty-based* institutions for the protection of human rights. Today there are eight human rights treaty bodies (committees) that monitor implementation of the core international human rights treaties. The major difference between the various committees is the ability to treat individual communications and make on-site inquiry visits.¹⁷² In this regard, the committees to the CRC and the CEDAW, the two treaties that all ASEAN states have ratified, have limited powers. The committee to the CRC has no power to receive individual complaints or make inquiry visits. The committee to the CEDAW received such powers under the Optional Protocol. As we have seen, the problem with the treaty bodies is that many ASEAN Member States have not ratified the core treaties, and almost none have acceded to the Optional Protocols. Another problem is that even when states have ratified treaties, thus accepting them on a formal level, they still do not live up to the provisions or engage with the bodies, either as a result of lack of capacity or political will.¹⁷³

Conclusively, the different UN human right mechanisms in broad terms utilize mainly three methods to enforce protection of human rights. (1) Reporting procedures and on site visits which obliges state parties to report on their implementation and enables supervisory bodies to evaluate their performance; (2) Inter-state procedures through which one state party may claim that another state party is not fulfilling its obligations; (3) Individual communications where an individual may submit that his rights has been violated.¹⁷⁴ The UN human rights regime has filled an important role in developing and elaborating on the meaning of an ever-growing body of international human rights standards for the promotion and protection of human rights. However, the abilities of actual implementation and enforcement remain weak.¹⁷⁵ Therefore, much of the work has been merely promotional, leaving the implementation and enforcement in the hands of the Member States. The reason for the rather weak enforcement and implementation is much due to that the organisation is a political body

¹⁷² See comparison between the different bodies in Henry J. Steiner, Philip Alston, Ryan Goodman, *supra* note 162, p.930.

¹⁷³ *Ibid*, p. 922.

¹⁷⁴ Hidetoshi Hashimoto, *supra* note 10, pp. 65-67.

¹⁷⁵ In large, the enforcement mechanism available to the UN is through the Security Council (SC) which is give primary responsibility for the maintenance of international peace and security under Article 24.. It can act under Chapter VI of the Charter (Articles 33-38) where it is powered to investigate any dispute which is likely to endanger the maintenance of international peace and security and recommend appropriate procedures. It can also act under Chapter VII whenever it determines that of any threat to peace, breach of peace or act of aggression. In such cases the SC can call on states to apply sanctions of various kinds. Henry J. Steiner, Philip Alston, Ryan Goodman, *supra* note 162, p. 836.

composed of sovereign states with different interests.¹⁷⁶ Submission to the regime is in large voluntary.

4.2.2. Regional Human Rights Regimes

The United Nations normative human rights framework has also played a crucial role in the establishment of regional human rights regimes. Foremost three regional human right regimes have developed in response to the difficulties to ensure effective protection and implementation of human rights; the European (centred on the Council of Europe and the European Court of Human Rights), the Inter-American (centred on the Organization of American States, the Inter American Commission of Human Rights and the Inter-American Court of Human Rights) and the African system (centred on the African Union and the African Charter of Human and People's Rights).¹⁷⁷

The legal origins for establishing human right regimes at the regional level remain a bit obscure and there are no set of international standards on how a regional human rights regime should be framed or designed. The UN Charter chapter VIII Article 52 for example makes provision for regional arrangements only in relations to peace and security, but it is silent as to human rights cooperation at that level.¹⁷⁸ Yet Article 52 is the only provision that could be seen as providing support for regional arrangements. The Article refers to a union of states or an international organisation based upon a collective treaty or a constitution consistent with the purpose and principles of the UN Charter whose primary task is the maintenance of peace and security. Its members must be so closely interlinked in territorial terms that effective dispute settlement by means of specially provided procedure is possible.¹⁷⁹ Examples include the Council of Europe, the OAS and the AU. Within ASEAN the TAC has previously provided such an example with dispute settlement stated in Articles 13-17.¹⁸⁰ Today it is made up by the ASEAN Charter.

Since the UN system has worldwide competence, one may legitimately ask why it has been possible, necessary or even desirable to arrange for human rights protection at the regional level as well. Regional approaches, many believed at the birth of the UN, may detract from the perceived universality

¹⁷⁶ Jack Donnelly, *supra* note 1, p. 80.

¹⁷⁷ Thomas Burgenthal, *supra* note 167, p. 15.

¹⁷⁸ Henry J. Steiner, Philip Alston, Ryan Goodman, *supra* note 162, pp. 925-926. Article 52 (1) of the UN Charter reads: "Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations."

¹⁷⁹ Bruno Simma (et.al.) (eds.) *UN Charter: A Commentary* (2nd ed.) Volume 1 (Oxford University Press 2002) p. 828.

¹⁸⁰ *Ibid*, p. 837.

of human rights.¹⁸¹ In essence each regional human rights regime has originated from shared interest and demand for establishing a framework for human rights protection.¹⁸² The European system came into being as a natural reaction to a gross human rights violation during WWII and a defence against all forms of totalitarianism.¹⁸³ The Inter-American regional human rights system was designed to be an ideological framework to make a coalition against communist threats and thought to be a springboard to defend effective political democracy in this region.¹⁸⁴ Common interests also lay behind the creation of the African regional human rights regime; these were safeguarding independence, collective security, territory, integrity and promoting solidarity.¹⁸⁵ It is obvious that regional cooperation originates from shared interests and collective vision to the solution of a problem, something that has in large been considered lacking in Southeast Asia.

With time, opposition against regional arrangements cooled off and vanished. The 1993 Vienna Declaration provides an example of the changed attitude and highlighted the importance of regional arrangements in the promotion and protection of human rights.¹⁸⁶ This is because regional human right regimes proved to hold a greater promise of effective protection of human rights. Why is this so? First, relatively high socioeconomic, political, cultural, shared judicial traditions and institutions are prerequisites for an effective human rights system. These requirements are more likely to be met at the regional level. Second, states cannot be forced to submit themselves to a system. They will do so only if they have confidence in that system. This confidence is more likely to be attained if the system has been set up by a group of fairly likeminded countries, which are already cooperating through a regional organisation. Third, regional human right regimes are more likely to be able to exercise authority and apply pressure on states to redress violations. Recommendations are more likely to meet with less resistance. Fourth, publicity about human rights will be wider and more effective at the regional level.¹⁸⁷

¹⁸¹ Henry J. Steiner, Philip Alston, Ryan Goodman, *supra* note 162, pp. 925-926.

¹⁸² Jina Kim, 'Development of Regional Human Rights Regime: Prospects for and Implications to Asia' p. 60 Available at: <http://www.sylff.org/wordpress/wp-content/uploads/2009/03/sylff_p57-1022.pdf> (Accessed on May 20, 2011).

¹⁸³ *Ibid* p. 60.

¹⁸⁴ *Ibid*, p. 60.

¹⁸⁵ *Ibid*, p. 60.

¹⁸⁶ Article 37 of the Vienna Declaration and Plan of Action states, "Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection. [...] The World Conference on Human Rights reiterates the need to consider the possibility of establishing regional and sub-regional arrangements for the promotion and protection of human rights where they do not already exist."

Available at:

<[http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/a.conf.157.23.en](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/a.conf.157.23.en)> (Accessed on May 20, 2011).

¹⁸⁷ Weston, Lukes and Hnatt, *supra* note 3, pp. 589-590; See also Office of the High Commissioner of Human Rights: <<http://bangkok.ohchr.org/programme/regional-systems.aspx>> (Accessed on May 18, 2011).

In essence, regional human right regimes exist in closer proximity to the people that needs to access them. Furthermore, where the global regime contain the minimum normative standards, the regional regimes can go further, add further rights, more stringent standards and operate within the needs, priorities and conditions of a specific region. Regional human right regimes are therefore more likely to be effective in implementing, applying and afford sanctions in defence of human rights.¹⁸⁸

Turning to Southeast Asia and ASEAN conclusively, a regional human rights regime in Southeast Asia can be considered important for several reasons. Most importantly, Southeast Asia remain a region where many human rights abuses are reported to occur and it is clear that the UN human rights framework falls short of affording necessary protection and implementation. A human rights regime within ASEAN thus has the ability to address human rights issues from the geographical, cultural and historical circumstances of it Member States.

“Governments are going to be more responsive with a regional mechanism than they are in an international mechanism. I guess there is also the thought process of some of the governments in the region that the UN system is very western led.” (Interview with Ms. Kate Lappin, Regional Coordinator, Asia Pacific Forum on Women Law and Development (APWLD), Chiang Mai, Thailand).

“At the practical level, the UN is just too far from our home [...] There is also the issue that, there are issues that are much more pressing and hopefully would be given more space within a regional process than an international.” (Interview with Ms. Misun Woo, Programme Officer APWLD, Chiang Mai, Thailand).

“There are several reasons [*for an ASEAN human rights regime*]. The first reason is that all these international conventions need to be domesticated. The first level of domestication is actually the national level and I would also think that the second level for domestication would be in the regional groupings. So therefore, in ASEAN you have a regional grouping which then essentially would promote human rights among its Member States [...] the second reason is that many people are not familiar with these international conventions so you need some kind of an advocacy. [...] I think advocacy is really a crucial part of the implementation” (Interview with Dr. Festo Kavishe, Deputy Regional Director, UNICEF, Bangkok, Thailand).

“A lot of countries in ASEAN are not party to the core United Nations human rights treaties, and even Thailand, which is party to 8 major human right treaties has been reluctant to give UN treaty bodies jurisdiction over individual complaints – it is only party to the optional protocol of CEDAW [...] so in most cases no complaints can actually go to those bodies. The ASEAN human rights mechanism is, at least, a way to start discussing human rights in an environment that is extremely sceptical to international obligations” (Interview with Ms. Erin Shaw, Regional Legal Advisor, Asia-Pacific Programme, International Commission of Jurists, Bangkok, Thailand).

¹⁸⁸ Weston, Lukes and Hnatt, *supra* note 3, pp. 589-590. See also Hidetoshi Hashimoto, *supra* note 10, p. 101-103. And Henry J. Steiner, Philip Alston, Ryan Goodman, *supra* note 162, p. 930.

4.2.3. Fundamental Principles for Regional Human Right Regimes

The lack of clear standards for human rights cooperation at regional level does not necessarily mean that no principles from previous experiences may be detracted for what regional human rights regimes ought to look like. Dinah Shelton (2008) has for example observed some broad requirements for any human rights regime (not just regional ones). All human rights regimes that exist today consist of a few fundamental components. These are: (1) A list or lists of internationally guaranteed human rights and corresponding state duties; (2) Permanent institutions; (3) Compliance and enforcement procedures.¹⁸⁹

Some general principles may perhaps be detracted from international instruments. One example is the *Declaration on Human Rights Defenders*, adopted to address the rights and responsibilities of everyone, including states, individuals, groups and organs.¹⁹⁰ The Declaration outlines some specific duties of States and the responsibilities of everyone with regard to defending human rights, in addition to explaining its relationship with national law. Another example is of course the *Principles Relating to the Status of National Institutions* (The Paris Principles).¹⁹¹ Although the principles are focused on National human rights institutions, they contain some general principles that could serve as guidelines for what any kind of human rights body should look like and what functions it ought to be able to perform. These include, among other things, autonomy and independence from the Government, a capability of collectively promoting, protecting and monitoring the implementation of human rights. Furthermore, effective promotion and protection of human rights includes the capacity to hear and investigate complaints and transmit them to the competent authorities, reporting and making recommendations to the Government on human rights matters. Finally, there must be adequate financial support.¹⁹²

¹⁸⁹ Dinah L. Shelton, *Regional Protection of Human Rights* (Oxford University Press 2008) p. 15.

¹⁹⁰ Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Right Defenders) See preamble and Article 2. The Declaration is not, in itself, a legally binding instrument. However, it contains a series of principles and rights that are based on human rights standards enshrined in other international instruments that are legally binding – such as the International Covenant on Civil and Political Rights. Moreover, the Declaration was adopted by consensus by the General Assembly and therefore represents a very strong commitment by States to its implementation. Available at: <<http://www2.ohchr.org/english/issues/defenders/declaration.htm>> (Accessed on May 18, 2011).

¹⁹¹ The Paris Principles, Available at: <<http://www2.ohchr.org/english/law/parisprinciples.htm>> (Accessed on May 18, 2011).

¹⁹² The Paris Principles, *Ibid*.

4.2.3.1 Common Features among Regional Human Right Regimes

The obvious source for normative standard is of course provided by drawing experience from already existing regional human right regimes. When the Asia-Pacific governments in 1990 carefully examined the three already existing human right regimes they concluded some fundamental aspects on which regional system differ from that of the UN. First, the extent to which they go further and adopt even more stringent standards than the international system. Second, the extent to which the standards and decisions are binding upon states or are merely persuasive. Third, the extent of limitations allowed in the interest of national security or in declarations of states of emergency, such as the European system's power of judicial review to determine whether an emergency exists or not. Fourthly, what happens in conflict of national law and regional law, where usually, the latter would prevail. Last, the extent of access and ability for NGOs to provide their inputs. For Europe, the access of NGOs was most significant.¹⁹³

Despite their very different paths of development, the previously existing regional human right regimes share, albeit put in very general terms, some certain features in two main areas. First, is the *organisational structure*. The three regional human right regimes are all centred around a regional organisation that establish the general framework for the scope of their cooperation, including permanent institutions, conditions for membership and exclusion, rules for decision making and dispute settlement. Second, are the *human rights protectional features*. More specific human rights related features include a regional human rights instruments (charter) that reflect international standards; a commission with independent and impartial representatives mandated to do both promotional and protectional work, such as receive both inter-state and individual complaints; a court (in Europe the Commission and Court was merged and in Africa, the court is very new); full time secretariats; rules of procedure which include rules for interaction with both civil society and national human rights institutions, and cooperation with international human rights mechanisms.¹⁹⁴

Of course, the success of the European, the American and African human right regimes varies to a great extent. The state parties have steadily upgraded the different regimes' scope and capacities in successive treaty revisions. Jack Donnelly (2007) has classified human right regimes into declaratory, promotional, implementation and enforcement regimes. All regimes, by definition, have standard norms, or at least guidelines. It is their capacities to monitor and/or enforce the norms that vary. Declaratory regimes have international norms but no international decision-making. Promotional regimes involve international exchange of information and efforts to promote the national implementation of norms. Implementation regimes involve monitoring procedures and policy coordination which are

¹⁹³ Surya Deuja 'Establishing a Robust Regional Human Rights Mechanism in South Asia' *Asian Human Rights Defender* Vol. 6 No. 1 (2010) p. 5.

¹⁹⁴ Hodayoun Alizadeh, *supra* note 31.

weak and entirely under national control. Enforcement regimes involve binding international decision-making and strong international monitoring and compliance mechanisms.¹⁹⁵

Tracing the evolution of regimes back to the end of WWII Donnelly concludes that no international human right regimes existed. When the UN was established it was merely a declaratory regime. By 1965 it had turned to a strong declaratory regime, a promotional regime by 1975, and a strong promotional regime by 1985. With the fairly recently established UN Human Rights Council it may hopefully turn into something more. Among the regional regimes the European constituted the only enforcement regime by 1985. The Inter-American regime was only a declaratory regime in 1965 but had become a strong promotional regime by 1985 and today constitutes an enforcement regime. The African regime began as a declaratory regime in the early 1980s. With the setting up of a court it may however transforming to something more.¹⁹⁶

4.2.4. Establishing Some General Standards for Regional Human Right Regimes

Based on previous experiences, the UN have formulated some general principles (not legally binding instruments) on what regional human right regimes ought to be able to do in order to promote and protect human rights in accordance with human rights commitment of individual State Parties.¹⁹⁷ As a point of departure all regimes should be subsidiary to national human rights protection systems and not go below international human rights standards. A human rights regime shall furthermore have the mandates, responsibilities and structures in the following areas as a minimum:¹⁹⁸

4.2.4.1. Monitoring

Every regional human rights regime should be able to monitor the general human rights situation and publish reports, which include recommendations for action at the regional level. A regime should be equipped with mandates to request State Parties to provide information in relation to promotion and protection of human rights, including information on specific human rights situations. Furthermore, a regional human rights regime should be able to carry out on site visits to State Parties to investigate specific human rights

¹⁹⁵ Jack Donnelly, *supra* note 1, pp. 105-106.

¹⁹⁶ Jack Donnelly, *supra* note 1, pp. 105-106.

¹⁹⁷ Principles for Regional Human Rights Mechanisms (Non-Paper) Available at: <<http://bangkok.ohchr.org/programme/asean/principles-regional-human-rights-mechanisms.aspx>> (Accessed on May 18, 2011). Principles were also summarized in a workshop on regional human rights mechanisms in Africa, the Americas and Europe held in Jakarta. See 'Report of Expert Dialogue with Civil Society and NHRIs on Regional Human Rights Mechanisms in Africa, the Americas and Europe' (Jakarta, 4-5 May 2009) Available at: <<http://bangkok.ohchr.org/programme/asean/report-jakarta-workshop.aspx>> (Accessed on May 18, 2011).

¹⁹⁸ *Ibid.*

concerns. The findings shall result in some sort of reports that are made public and widely circulated.¹⁹⁹

4.2.4.2. *Communications*

Regional human right regimes shall also be able to receive, investigate, analyse and decide on communications from any person, group of persons or NGO alleging human rights violations by a State Party or from a State Party *vis-à-vis* another State Party. In the course of investigation, the regime shall be able to obtain all necessary information required. Where the mechanism finds that there has been a violation of human rights, recommendations shall be made to the specific State Party who must comply with the findings and report on the steps they have taken to give effect to the findings.²⁰⁰ Regional human rights regimes should furthermore always be secondary to national human rights protection.

4.2.4.3. *Capacity Building and Education*

Other important functions of a regional human right regime are to clarify the meaning of human rights standards, harmonize them and disseminate the information regionally. In doing so, there are a number of tools that can be used. On a very general level the regime should encourage ratification and accession to all core international human rights treaties including their optional protocols. The regional human rights regime should also be able to advise, and respond to request on advice from Member States, on national and regional policies and legislation to ensure harmonization and compliance with international human rights norms and standards. When it comes to cooperation and interaction, the regime should be able to cooperate and engage with state officials as well as civil society including NGOs and other institutions and contribute to human rights training programmes for everyone. Furthermore, a regional human rights regime should be able to develop wider public awareness and knowledge about human rights in the region.²⁰¹

4.2.4.4. *Composition*

The composition of the different mechanisms making up the regime is crucial for its effectiveness. The representatives must on the one hand be independent from their respective governments, and on the other, be impartial persons of integrity with recognized competence in the field of human rights. Representatives must be elected following a fair and transparent selection process at national level, which should include consultation with civil society. Membership of the regime shall reflect representation of geographical areas and aim to achieve gender balance.

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

Representatives shall also be accorded necessary privileges and immunities in order to carry out their work.²⁰²

4.2.4.5. Support

State Parties shall provide the regime with adequate resources and the authority to use these resources freely and independently, to properly fulfil its mandate. In this regard, the work of the representatives shall be supported by a secretariat.²⁰³

4.2.5. Assessing Human Right Regimes

How do we assess different human right regimes? The different criteria above undeniably provide a yardstick against which human rights cooperation can be measured, both from their organisational structure and from the human rights protectional features. Jack Donnelly (2007) has focused on the differences in regimes that arise from the source of their authority (based on a treaty or rooted in a wider international organisation), their range or focus, and the character of their powers. First, the organisation it structures around is essential because human rights institutions can either draw strength from the influence of the broader organisation or be victim to its politicization.²⁰⁴ Second, the different implementations and enforcement mechanisms the regime is equipped with together with its composition and funding gives indications if it has the necessary preconditions to have an effective impact on human rights. In examining the implementation and enforcement mechanisms, the principal tools available to various regimes are: (1) state reports; (2) information-advocacy procedures such as country rapporteurs; (3) individual and state complaints mechanisms.²⁰⁵

4.3. CONCLUDING REMARKS

Against this background, a few general conclusions can be made. First, the UN framework initially only established an obligation to promote human rights. The UN human rights regime has revealed its limitations mainly when it comes to enforcing and implementing human rights since the notion of the sovereignty of the nation state is still very strong. Second, regional cooperation's have proven much more effective in protecting human rights since they are closer to the people to be protected and can operate within the geographical, cultural and historical context. They also go further and complement rather than duplicate the work of the global UN human rights regime. While there are no real norms for establishing regional human right regimes, previous experiences has made it possible to establish some

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ Jack Donnelly, *supra* note 1, p. 88.

²⁰⁵ *Ibid.* p. 108.

general principles on what functions a regional human rights regime should be able to perform and what fundamental elements are required for a human rights regime to function effectively. Third, when assessing human right regimes, the type of organisation it is structured around and its institutions are of great importance. Similar, the tools of protection and implementation together with the composition and support of the regime provides criteria for measurement. Fourth, the evolution of human right regimes has been gradual displaying that even weak human right regimes can contribute to improve national practice, and subsequently, develop into stronger regimes over time.

CHAPTER V

5. The ASEAN Human Rights Regime – Key Instruments and Structures

The emerging ASEAN Human Rights Regime is structured around the institutional framework of ASEAN. It is made up by three core instruments; the ASEAN Charter, the Terms of Reference (ToR) to the AICHR, and the Terms of Reference to the ACWC. To get a perception of the prospects for better protection of human rights these instruments will be examined here with the starting point in the ASEAN Charter. Like other ASEAN institutions, the commissions are an integrated part of ASEAN, the AICHR established within its Political-Security Pillar,²⁰⁶ the ACWC within its Socio-Cultural Pillar²⁰⁷, embedded in the diverse regional context laid out in previous chapters. The concluding part of the chapter will consider the regime against the core principles for regional human right regimes laid out in the previous chapter.

5.1 THE ASEAN CHARTER

5.1.1. Legal Implications

The ASEAN Charter, which entered into force on December 15 2008, explicitly creates a legal and institutional framework with a legal personality for the Association. The overall purpose with the Charter is to make ASEAN a more rules-based organisation. As Tommy Koh pointed out “The ASEAN Way of relying on networking, consultation, mutual accommodation and consensus will not be done away with. It will be supplemented by a new culture of adherence to rules”²⁰⁸ Article 3 of the Charter certainly confirms this by stating: “ASEAN, as an inter-governmental organisation, is hereby conferred legal personality”. With the 1967 Bangkok Declaration as the only founding document, ASEAN has rested on somewhat uncertain legal grounds. In fact, the Bangkok Declaration has been considered a quite controversial document when it comes to the legal status of ASEAN, raising questions whether ASEAN could be regarded as an international entity at all.²⁰⁹

²⁰⁶ ASEAN Political-Security Blueprint, *Available at:* <<http://www.aseansec.org/18741.htm>>

²⁰⁷ ASEAN Socio-Cultural Blueprint, *Available at:* <<http://www.aseansec.org/18770.htm>>

²⁰⁸ Tommy Koh *et. al.* quoted in Simon Chesterman ‘Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person’ New York University School of Law, *Public Law and Legal Theory Research Paper Series Working Paper NO 08-26* (2008) p. 205.

²⁰⁹ *Ibid*, p. 200.

The fact that ASEAN now claims international legal personality in the Charter does not mean that it lacked such personality previously. ASEAN's legal status can hardly be considered to have transformed over night from being just ten separate Member States hoping to promote regional stability and economic growth into a unified supranational entity.²¹⁰ However, the more interesting question is, whether the presence of such provision now means that it possesses such personality with any new significant implications, especially when it comes to human rights?

As chapter two laid out, ASEAN was never intended to become a supranational institution acting independently of its members, and it has clearly lacked the power to impose binding obligations on all its Member States. The mere fact that an organisation has legal status under international law may be more interesting from a legal theoretical standpoint than from a practical. In theory, legal status implies that the organisation possesses rights and duties enforceable by law and for example the capacity to conclude treaties, which is necessary for the exercise of their functions and the fulfilment of their purposes.²¹¹ Furthermore, as far as resolving disputes within the Charter, as a matter of treaty law, the principles enumerated in the Vienna Convention on the Law of Treaties will apply, as its principles are applicable as a matter of customary international law.²¹² In practice however, the legal status reveals nothing about what powers such entity may in fact exercise. In the *Reparations for Injuries Suffered in the Service of the United Nations* case²¹³, the International Court of Justice has elaborated on this issue with regards to the legal status of the UN:

“The Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is “a super-State”, whatever that expression may mean... Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.”²¹⁴

In essence, the implications of the ASEAN Charter in terms of legal personality are limited because the scope of its cooperation will still be determined based on the willingness of the Member States to cede more power to its centre or to keep it as it has always been. The significance of the Charter lies in the fact that it does formalize the goals, purposes and principles of ASEAN that are legally binding on the Member States. Before, ASEAN has operated largely by what former Secretary General Rodolfo R.

²¹⁰ *Ibid*, p. 200.

²¹¹ *Ibid*, p. 204.

²¹² Article 5 of the Convention states that: “The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization”.

²¹³ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, (1949) I.C.J. Rep. 174 [*Reparations case*].

²¹⁴ *Ibid*, para. 179

Severino called *oíd* -, a Spanish speaking term for playing music by ear rather than following a score.²¹⁵ In that sense, the Charter provides formal obligations, or a score, for the Member States. To many it also provides a sign of positive development that human rights at least now are on the agenda of ASEAN.

“Within the ASEAN structure, now human rights are officially recognized as an agenda of ASEAN. This has never happened before. Previously human rights were like dirty words. You did not talk about human rights in the government meetings within ASEAN because it is a western value imported to undermine governments in the region, to topple governments. So it is that kind of negative perception on human rights. But now, quoted in the ASEAN Charter and even established institutions to address human rights issues. So no matter how flawed it is, this process, it is still a recognition officially and you can use this recognition and then the institutions to campaign and advocate for human rights to be implemented by governments” (Interview with Mr. Yap Swee Seng, Executive Director, Forum Asia, Bangkok, Thailand).

While the purposes and principles contained in the ASEAN Charter may be considered essential in order for the organisation to pursue its purposes and obtain its goals, problem still remains in the fact that, first, it is up to the Member States to choose to abide by those principles. Second, if the purposes and principles are in contradiction to one another or if some purposes and principles are more important than others, the prospects for ASEAN to make any effective inroads into the development of human rights become difficult.

5.1.2. Contents of the Charter

In many ways and for obvious reasons, the ASEAN Charter simply reasserts, in legal form, what ASEAN has already become. It restates goals, principles and ideals already contained in previous ASEAN agreements.²¹⁶ The first and second purposes of the Charter are thus related to enhancing peace and security and economic cooperation as laid out in the 1967 Bangkok Declaration.²¹⁷

In conducting inter-state relations, the ASEAN Charter’s first principles capture many of the traditional ASEAN norms established by the Treaty of Amity and Cooperation (TAC) and the ASEAN way of decision-making. In Article 2, the first principle that ASEAN and its Member States shall adhere to is the respect for independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States (Article 2.2 a) It is followed by the principles of non-interference in the internal affairs of the Member States (Article 2.2 e).

At the same time, the ASEAN Charter’s 55 Articles formalizes some of the trends that have been visible in ASEAN development. First, the Charter codifies ASEAN’s objective and principles, which include norms of

²¹⁵ Rodolfo C. Severino, *supra* note 70 p. 258.

²¹⁶ David Martin Jones, *supra* note 92, pp. 735-756.

²¹⁷ ASEAN Charter, Article 1.1 and 1.2.

behaviour not only for inter-state relations, but also between the state and its citizens. It articulates broad goals such as a commitment to become more peoples-oriented organisation; an ASEAN Community underpinned by the values of good governance, democracy and the rule of law. Its initial words: “WE, THE PEOPLES of the Member States of the Association of Southeast Asian Nations (ASEAN)”²¹⁸ makes a clear statement of this. It continues on the same path with the ASEAN peoples at the centre of the ASEAN community-building process; at least 10 of the 15 “purposes” of ASEAN are directly related to the peoples of ASEAN.²¹⁹ It also introduces the concept of human rights in a binding legal document of ASEAN.

Second, the Charter binds the Member States to a legalised framework and makes ASEAN more institutionalised. The ASEAN Summit for example becomes biannual rather than annual. It also establishes the Foreign Ministers Meeting as a Coordinating Council. Another distinct feature of the Charter is the creation of an ASEAN Community that rests on three pillars; the Security Community, the Economic Community and, the Socio-Cultural Community.²²⁰ The AICHR and the ACWC find themselves under the Security Community and Socio-Cultural Community respectively.

5.1.3. Key Institutions

To discern a clear picture on ASEAN’s institutional structures and their respective functions from the Charter is quite hard. The ASEAN institutional system set out in the Charter incorporates key existing institutions, while creating new structures which are being phased in to ASEAN’s operations. In general terms however, the Association remains very state-centric with little engagement and insight from CSOs and lack of representation through for example a peoples represented assembly.

The main organs are provided in Chapter IV of the Charter:

- The ASEAN Summit (Article 7)
- The ASEAN Coordinating Council (Article 8)
- ASEAN Community Councils (Article 9)
- ASEAN Sectoral Ministerial Bodies (Article 10)
- Secretary General of ASEAN and ASEAN Secretariat (Article 11)

²¹⁸ ASEAN Charter, Preamble.

²¹⁹ See Article 1.4, and 1.6 – 14.

²²⁰ A number of these goals were laid out already in 1997 in when the heads of states in the region signed a document entitled ‘ASEAN Vision 2020.’ These goals focused mostly on economic development and cooperation, but the document also contained a section on creating a community of “caring societies” and creating rules of behaviour and cooperation to address transnational problems including trafficking in women and children. In addition, the document envisioned members being “governed with the consent and greater participation of the people with its focus on the welfare and dignity of the human person and the good of the community.” The statement of such goals may provide a foundation on which future regional human rights instruments can be built. See Carolyn M. Shaw, ‘The Evolution of Regional Human Rights Mechanisms: A Focus on Africa’ *Journal of Human Rights*, 6:209–232, 2007, p. 213.

- Committee of Permanent Representatives to ASEAN (Article 12)
- ASEAN National Secretariats (Article 13)
- ASEAN Human Rights Body (Article 14)
- ASEAN Foundation (Article 15)

The following will give a brief description of a few of these organs.

5.1.3.1. The ASEAN Summit.

The ASEAN Summit is the supreme policy making body of ASEAN and comprises the heads of government of the ten Member States. As the highest level of authority in ASEAN, the Summit sets the direction for ASEAN policies and objectives. It signs or endorses agreements, and the issuance of declarations. The Summit authorizes the establishment or dissolution of ASEAN sectoral bodies for specific areas of cooperation. The Summit also functions as final decision-making body in matters referred to it by ASEAN ministerial bodies or the Secretary-General, and plays the role of an appellate body for disputes and cases of non-compliance that cannot be resolved by ASEAN's dispute settlement mechanisms. Under the Charter, the Summit meets twice a year.

5.1.3.2. ASEAN Ministerial Councils

The Charter established four important new Ministerial bodies to support the Summit. They are the ASEAN Coordinating Council to support the ASEAN Summit's meetings and to oversee overall implementation and coordination in the ASEAN Community, the ASEAN Political-Security Community Council, ASEAN Economic Community Council, and ASEAN Socio-Cultural Community Council to ensure coordination of the activities under each of the three areas. Together, the Councils supervise the sectoral activities of ASEAN.

5.1.3.3. ASEAN Secretariat and Secretary General

Administrative support for ASEAN's official activities is provided by the ASEAN Secretariat, which was established in 1976. The Secretariat is headed by the ASEAN Secretary-General, and staffed by nationals from ASEAN member states and located in Jakarta. The Secretariat is also responsible for monitoring implementation of ASEAN commitments and maintaining the organisation's official records.

5.1.3.4. Committee of Permanent Representatives

For the day-to-day working level coordination of ASEAN activities, the Charter established a Committee of Permanent Representatives (CPR) in Jakarta, comprising ambassadorial-level representatives from the member states. The CPR will take over the work of the ASEAN Standing

Committee, which was established in 1967 to perform the coordinating role for ASEAN.

5.1.4. Decision Making and Dispute Settlement

The decision-making procedure prescribed in chapter VII of the Charter is still based on the basic principles of consultation and consensus that clearly reflects the traditional ASEAN Way (Article 20.1). In the absence of consensus, “the ASEAN Summit may decide how a specific decision can be made” (Article 20.2). The implications of this are certainly unclear, given that the Summit itself uses consensus based decision-making. The question of Myanmar has for example always been pressing and ASEAN’s inability to deal with the country in a more firm way display an inability of the Association to act. While the formulation in the provision may open up the room for interpretation and measures of flexibility in decision-making on sensitive issues, it is still very vague.

If a dispute arises Chapter VIII of the Charter is applicable. The starting point is Article 22(1), which states that “Member States shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation”. However, Article 22(2) further requires that “ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation”. If a dispute remains unresolved it shall be referred to the ASEAN Summit for decision under Article 26.

Would a dispute arise on how a provision, or any other provision, should be interpreted, 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 (Article 51). Any dispute with regards to interpretation shall be settled in accordance with the dispute settlement provisions in chapter VIII.

In large, Chapter VIII of the Charter reveals the lack of a clear enforcement mechanism and that there is no provision for suspension or expulsion of members that do not comply with the Charter. The Charter only states that: “in the case of a serious breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for decision” (Article 20.4). Again, since the Summit is consensus driven it raises the question whether decisions could be taken against a state without consensus. This of course undermines the significance of other provisions, not at least when it comes to the ones dealing with human rights.

5.1.5. The ASEAN Charter and Human Rights

The ASEAN Charter is obviously no human rights instrument and does not refer to any international human rights standards, for example the Universal Declaration (UDHR). However, it brings forward the principles to

strengthen democracy, human rights and the rule of law. The Charter further includes references to human rights in three different places, as follows:

1. ASEAN will adhere “to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms”. (Preamble)
2. Out of the purposes of ASEAN, the seventh is “to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN”. (Article 1 p.7, Purposes)
3. Out of the principles, ASEAN and the Member States shall act in accordance with “respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of justice (Article 2 (i), Principles)

These provisions are quite remarkable since they explicitly recognise rights and freedoms for individuals, protection for people and democratic forms of government. As shown in chapter three, the 1967 Bangkok Declaration already did include the words “respect for *justice* and the *rule of law*” (emphasis added), but this was merely “in the relationship among countries of the region”.²²¹ This new undertaking to promote and protect human rights and fundamental freedoms, provided by the Charter, signals, if only on paper, that the ASEAN countries acknowledge that such concepts are important. It further supports that the Asian values debate has lost some of its credibility and that ASEAN is turning from being an organisation merely focused on the cooperation between states, to taking the rights of individuals more seriously.

The above provisions are however flanked with more traditional principles emphasising “independence, sovereignty, non-interference in internal affairs’ and ‘respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion”. Considering how prominent these principles have been in the cooperation between the Member States of ASEAN, the language of the Charter can be considered ambiguous. With the introduction of human rights in the ASEAN Charter, some argue that the Charter can even be considered to promote two opposite sets of incompatible norms.²²² While, the Charter does not explicitly subordinate its human rights provisions to those on national sovereignty or non-interference,²²³ the human rights provisions are however found beneath these norms indicating that they may be of less importance.

5.1.5.1. A Human Rights Body

Since human rights traditionally have been outside the ASEAN agenda one of the most sensitive issues was the drafting of the enabling provision

²²¹ 1967 Bangkok Declaration, Established on August 8, 1967, Article 2. Available at: <<http://www.aseansec.org/1212.htm>> (Accessed on May 17, 2011). See also chapter 3.1.

²²² David Martin Jones, *supra* note 92, p. 737.

²²³ Yuval Ginbar, *supra* note 156, p. 513.

pertaining to the establishment of an “ASEAN Human Rights Body.”²²⁴ The Charter provides for the establishment of the ASEAN human rights body in Article 14 stating:

1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.

2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.

Any further precision in the Charter on how this human rights body should be structured is not provided. However, since the body’s structure was to be decided by the ASEAN Foreign Ministers Meeting it was no surprise that the shape of this body would be the result of the ASEAN Way of decision making and the ToR the product of stiff political negotiation and compromises amongst its Member States.

5.1.6. Norms of Non-Interference and Consensus – Much Ado about Nothing?

The Charter has received a wide range of criticism that it is inadequate to bring about any real changes. First, it merely captures ASEAN’s existing principles and agreements already developed and in force over the last four decades with the core principle of non-interference. Second, procedurally, it provides that decision-making in ASEAN shall be based on consultation and consensus without any real dispute settling mechanism. The principles of non-interference and consensus remain central and have also been echoed in the ToRs to the two human rights bodies.

The principle of non-interference is hardly something unique to ASEAN, but finds prominent places in other organisational structures as well, most notably other regional human right regimes organisations such as the OAS and the AU.²²⁵ While the principle of non-interference remains strong in other regional human right regimes, they have been able to consolidate it, at least to some extent, with the abilities of human rights organs to scrutinize and render binding decisions. So in principle at least, there does not have to be a complete contradiction between accepting, by the political will of a state, the decisions of an international body and the principle of non-interference. However, when it comes to ASEAN, it is obvious that the principle is interpreted and applied quite rigidly, especially when it comes to

²²⁴ Tommy Koh, *supra* note 123.

²²⁵ The Charter of the Organisation of American States, Article 3 e) (principles) reads: “Every State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State. Subject to the foregoing, the American States shall cooperate fully among themselves, independently of the nature of their political, economic, and social systems”. The Constitutive Act of the African Union, Article 4 (g) (principles) reads: “Non-interference by any Member State in the internal affairs of another”.

human rights. This is one of the major reasons why pushing human rights under ASEAN has been a very difficult process.²²⁶

Similarly, the principle of consensus-based decision-making is hardly controversial. Of course, such a principle is needed, because without a shared view on principles and values, no regional cooperation would be able to take place in Southeast Asia or anywhere else for that matter.

“What is the problem with consensus? Even the development of the international conventions was actually achieved through consensus. That is actually how the UN normally works, bringing all of the parties together and then (...) on the basis of a consensus you find a way of monitoring. So I think consensus on its own should not be seen as something that is bad because without a consensus (...) you will not really be able to move forward” (Interview with Dr. Festo Kavishe, Deputy Regional Director, UNICEF, Bangkok, Thailand.).

Yet, the problem lies in the fact that within ASEAN, as showed above, every single important decisions needs to be taken by consensus. No lower standard exists - no two-thirds majority or simple majority is prescribed in cases where consensus cannot be reached. In short, the Southeast Asian ‘culture’ of dealing with one another- the ASEAN Way²²⁷ - will make it very difficult to move forward in sensitive issues such as human rights.

Criticism thus seems justified. Yet, it might be considered unrealistic to think that the Charter would reflect anything other than the prevailing regional realities. As Tan Sri Dato, Malaysia’s representative on the High Level Task Force (HLTF) to draft the Charter, states: “No Charter can be perfect. The language in the Charter too can never be simpler or clearer. Any resemblance of ambiguity that exists is creatively intended to achieve consensus, which can only be understood and appreciated within ASEAN. The Charter is also as bold and as visionary as it can be as to ensure compliance. Pragmatism, ultimately is the key word”.²²⁸ Obviously, the Charter represents the lowest common denominator that the Member States could realistically agree upon.

5.2. THE ASEAN HUMAN RIGHTS COMMISSIONS – THE AICHR AND ACWC

5.2.1. The Terms of Reference of the AICHR

As the name indicates, and as Article 3 of the ToR explicitly spells out, “the AICHR is an inter-governmental body and an integral part of the ASEAN organisational structure. It is a consultative body.” The mandate for its establishment derives directly from the ASEAN Charter (Article 14). Like all other ASEAN organs or bodies, the AICHR shall operate through

²²⁶ Hao Duy Phan, *supra* note 11.

²²⁷ See chapter 3.1.1.2.

²²⁸ Tan Sri Dato, ‘Facing Unfair Criticisms’ in Tommy Koh *et. al.* (ed.), *The Making of the ASEAN Charter* (World Scientific Publishing, Singapore, 2009), p.25.

consultation and consensus, with firm respect for sovereign equality of all Member States. Article 2.4 of the ToR also underlines that the AICHR shall have a constructive and non-confrontational approach and cooperation to enhance promotion and protection of human rights.

The purposes of the Commission are provided in Article 1. The first is “to promote and protect human rights and the fundamental freedoms of the peoples of ASEAN”(Article 1.1) Article 1.3 makes reference to the ASEAN Charter by stating that the purpose of the Commission is “to contribute to the realisation of the purposes of ASEAN as set out in the Charter [...]”. Article 1.4 reaffirms the relativist standpoint, or *situational uniqueness*, towards human rights articulated in the Bangkok Declaration during the 1993 Vienna World Conference on Human Rights by emphasising on the “national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities”.²²⁹ Furthermore, Article 1.6 makes references to uphold international human rights standards proscribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action and international human rights instruments to which ASEAN Member States are parties.

The AICHR is set out to respect the principles provided in Article 2 of the ToR. This provision first of all makes an overall reference that the AICHR shall respect the principles found in Article 2 of the ASEAN Charter. It further precise which of these principles should be respected more in particular. Just like the Charter, the ToR captures the ASEAN fundamental norms laid out in the TAC and manifested through the ASEAN Way. The first principles underline the respect for independence, sovereignty, equality and non-interference followed by the respect for human rights and fundamental freedoms. (Article 2.1 a-g).

5.2.1.1. Composition of the AICHR

The composition of the AICHR is set out in Article 5 of the ToR. The Commission is comprised of ten representatives, one from each Member State of ASEAN. Each will serve a three-year term and may be consecutively re-appointed for only one more term. The representatives are required to act impartially in accordance with the ASEAN Charter and the ToR (Article 5.7). However, the representatives are not independent, but appointed by- and accountable to their respective governments. Each appointing government may also decide, at its own discretion, to replace its representative (Article 5.2 and 5.6)

As for decision-making, the Commissions decisions shall be based on consultation and consensus in accordance with Article 20 of the ASEAN Charter (ToR Article 6.1). Such an arrangement means that each state would be able to reject any criticism of its own human rights record by veto.

²²⁹ See Chapter 2.1.5.

Clearly, this could either lead to hampered progress or to the adoption of weak positions based on the lowest common denominator.²³⁰

The ToR stipulates that AICHR shall respect for international human rights principles, including universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms, as well as impartiality, objectivity, non-selectivity, non-discrimination, and avoidance of double standards and politicisation (Article 2.2) At the same time it also makes clear that the primary responsibility to promote and protect human rights rests with each Member State (Article 2.3).

5.2.1.2. Mandates of the AICHR

While there is no closer definition on what a consultative mandate exactly encapsulates, in more general terms it can be defined in three different ways:²³¹

1. First, under the United Nations' protocol, an organisation with consultative status is listed and able to deliver oral and written reports. It can also make complaints.
2. Second, a more general definition implies that a consultative body can make recommendations and be consulted.
3. Third, a consultative body needs to consult and gain consensus between its members when making a decision.

Even though consultative is not further defined in the ToR, as an integral part of ASEAN with the ASEAN Way consensus bases decision-making process, the third option seems to be the closest to a correct definition. However, the explicit mandates and functions of the AICHR, proscribed in Article 4 of the ToR, reveals more in detail what this commission is empowered to do. There are 14 mandates in total and the AICHR's functions can be summarized as follows:

1. Develop strategies for the promotion and protection of human rights.
2. Develop an ASEAN Human Rights Declaration.
3. Raise awareness of human rights amongst the peoples.
4. Promote capacity building for the effective implementation of human rights.
5. Encourage ASEAN Member States to consider acceding to and ratify international human rights instruments.
6. Promote the full implementation of ASEAN instruments related to human rights.
7. Provide advisory services on human rights matters to ASEAN sectoral bodies upon request.

²³⁰ Yuval Ginbar, *supra* note 156, p. 514.

²³¹ Gorawut Numnak (et al.) 'The Unfinished Business: The ASEAN Intergovernmental Commission on Human Rights' Freidrich Naumann Stiftung Für die Freiheit, *Hintergrundpapier* (Nr 14 2009) p. 6.

8. Engage in a dialogue and consultation with other ASEAN and other entities associated to ASEAN including civil society.
9. Consult with other national, regional and international institutions and entities concerned with the promotion and protection of human rights.
10. Obtain information from ASEAN Member States on the promotion and protection of human rights.
11. Develop common approaches and positions on human rights matters of interest to ASEAN.
12. Prepare studies on thematic issues on human rights.
13. Submit an annual report on the Commission's activities to the ASEAN Foreign Ministers Meeting.
14. Perform any other tasks as may be assigned to it by the ASEAN Foreign Ministers Meeting.

Only three mandates (1, 9 and 10) actually include the word protection, but more importantly most of the mandates are focused with promoting, encouraging, advising, awareness raising etc, which makes it clear that the AICHR will be more, focused on the areas of promotion rather than protection of human rights. Strikingly visible is the lack of authority for the AICHR to issue binding decisions, receive complaints, consider cases, or conduct investigative visits. It is also clear that there is a strong interconnection with the ASEAN Foreign Ministers Meeting and thus the Member States.

5.2.2. The Terms of Reference of the ACWC

The ASEAN Commission on Women and Children was established through a different route than the AICHR that could be described as a much shorter and smoother one. This is due mainly to the fact that all ASEAN member states are already parties to the two relevant UN treaties CEDAW and CRC (see chapter 2), but also to its establishment following closely that of the AICHR, in time, process and to a large extent in substance.²³² Unlike the AICHR, which is established through the legally binding ASEAN Charter and placed under the political-security pillar, the ACWC is created under the non-legally binding 2004 Vientiane Action Plan (VAP) and placed under the socio-cultural pillar which blueprint has replaced the VAP and is not a legally binding instrument.²³³ The reason for this is unclear and such a solution may imply that the ACWC is weaker from a legal perspective. At the same time, it may also imply that the protection of children and women are considered to be “softer” human rights, ones that can easier be discussed and decided upon.

There is much resemblance in the ToR of the ACWC to that of the AICHR. The ACWC is also limited to being an inter-governmental body and an

²³² Yuval Ginbar, *supra* note 156, pp. 504-518.

²³³ ASEAN Socio-Cultural Community Blueprint, Section C.1, Article 27. Available at: <<http://www.aseansec.org/5187-19.pdf>> (Accessed on May 17, 2011).

integral part of ASEAN. It is a consultative body (Article 4). Its decision-making shall be based on consensus in accordance with the ASEAN Charter (Article 7). Likewise, while the representatives shall act impartially, they are at the same time accountable to their respective governments who may decide to replace the representative. Its mandates, prescribed in Article 5 are, similar to the AICHR, also limited to mainly promotion.

A distinct difference however is that the ACWC is more specific in what is set out to do and in the fact that it rests on solid legal grounds of treaty obligations, the CEDAW and the CRC. In that sense it holds greater promise since more consensus exist on these issues, something also displayed by previous declarations on these issues in ASEAN.²³⁴ Many references are also made to these two instruments, both in the purposes (Article 2.5), principles (Article 3.2 and 3.4) and in the specific mandates and functions of the ACWC (Article 5.7 and 5.11). The ACWC has 16 explicit mandates set out in Article 5 of the ToR. These include assisting Member States who so request in writing reports to UN human rights bodies; similarly assisting member states in implementing the concluding observations of the CEDAW and CRC committees; and ‘to enhance the effective implementation of CEDAW and CRC through, among others, exchange of visits, seminars and conferences’. The ToR also emphasises that the ACWC is “[t]o complement, rather than duplicate, the function of CEDAW and CRC Committees”. Unlike the AICHR the ACWC is not required to submit annual reports to the Foreign Ministers Meeting, but to the lower level ASEAN Ministerial Meetings.

5.2.3. The Relationship Between the two Commissions

How these two bodies can work in coordination and collaboration is not clear. The ToR to the AICHR reveals that the AICHR is the overarching human rights body (Article 6.6) As such Article 6.9 further requires:

“The AICHR shall work with all ASEAN sectoral bodies dealing with human rights to expeditiously determine the modalities for their ultimate alignment with the AICHR. To this end, the AICHR shall closely consult, coordinate and collaborate with such bodies in order to promote synergy and coherence in ASEAN’s promotion and protection of human rights.”

However, how such alignment should be framed is at the time of writing yet to be determined.

5.2.4. Support of the ASEAN Human Rights Regime

There are no clear indications from either the ASEAN Charter or the ToRs how much will be spent to support these commissions. ASEAN currently has to contend with the USD 904 000 of annual contribution from each

²³⁴ See Chapter 3.1.2.

Member State for its operating budget and whatever additional funds voluntary contributed towards the ASEAN Development Fund.²³⁵ In establishing the AICHR, each Member State contributed USD 20,000 as a seed fund for the operation of AICHR.²³⁶ No parallel figures have been found for the ACWC.

Relative to the three other regional human rights systems, ASEAN's total budget as well as the budget for the AICHR is comparatively very small. As a comparison, the Council of Europe total budget for 2011 amounted to €217 million²³⁷; the Organisation of American State's total budget for 2011 amounted to USD 85 million²³⁸; the African Union's total budget for 2009 amounted to USD 162 million.²³⁹ Thus, the financial support given to the ASEAN human rights regime can be considered nothing else but inadequate when taking into account the human rights situation in the region that needs to be addressed by the commissions. The insufficient funding can only be explained by a lack of intention to truly provide the commissions with enough resources as to enable them to perform any serious work. It provides yet another question mark as to whether the Member States of ASEAN are truly committed to establishing a fully functional human rights regime.

When it comes to secretarial support, the AICHR does not have an independent secretariat but is supported by the ASEAN Secretariat, more specifically by the Director-General of the Political Security Community of ASEAN and its team. A new position, the Assistant Director for the Promotion and Protection of Human Rights was created in 2010 within ASEAN Secretariat to support the work AICHR. However, it must be noted that the whole team, including the Assistant Director for the Promotion and Protection of Human Rights, is not responsible only for AICHR, but a whole range of issues and institutions under the Political and Security Community of ASEAN.²⁴⁰

²³⁵ Tan Sri Dato, *supra* note 228, p. 22.

²³⁶ SAPA-Task Force on ASEAN and Human Rights, 'Hiding behind Its Limits: A Performance Report on the first year of the ASEAN Intergovernmental Commission on Human Rights' p.9, *Available at*: <http://forum-asia.org/2010/AICHR@1_web.pdf> (Accessed on May 21, 2011).

²³⁷ Council of Europe Budget, *Available at*: <<http://www.coe.int/aboutCoe/index.asp?page=budget>> (Accessed on May 19, 2011). The budget of the European Court of Human Rights amounts to around 59 million euros, *Available at*: <<http://www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/Budget/>> (Accessed on May 19, 2011).

²³⁸ OAS 'Program Budget' for 2011 with the Inter-American Court and Commission for Human rights at approx USD 6,6 million, pp. 13-14, *Available at*: <<http://www.oas.org/budget/2011/FINAL%20Approved%20Program%20Budget%202011%20English.pdf>> (Accessed on May 19, 2011).

²³⁹ 'African Union budget shows a 17% increase over last year' The African Court and Commission of Human Rights received approx USD 11 million, (Tuesday, 03 February 2009), *Available at*: <<http://emergingminds.org/African-Union-budget-shows-a-17-increase-over-last-year.html>> (Accessed on May 19, 2011).

²⁴⁰ SAPA-Task Force, *supra* note 236, pp. 9-10.

5.3 CONCLUDING REMARKS

From this overview of the ASEAN human rights regime, some general remarks can be made. First, when it comes to *organisational structure*, the ASEAN Charter does make ASEAN a more rules-based, institutionalized organisation, rerouting it somewhat from the ASEAN Way. The introduction of human rights in the Charter is clearly a significant development, as Vitit Muntarbhorn held, in the way that:

“At the regional level, the ASEAN Charter is the first instrument, a treaty legally binding on all ten countries that involves human rights expressly as a permeated principle binding to everyone under the sun in ASEAN, including its leaders.”²⁴¹

However, at the same time many of ASEAN’s core norms and principles remain unchanged. The institutions reveal that ASEAN still is a very state-centric Association without any representation from civil society through for example an assembly. Furthermore, the core principles of non-interference and consensus remain at the centre of ASEAN’s normative framework.

“[The ASEAN Charter] is the beginning of creation of new norms, [...] but then you have the concept of how does that work with non-interference and of course that is the very critical key dialectic between this emerging human rights architecture and traditions of the past.” (Interview with Melinda MacDonald, Program Manager South East Asian Regional Cooperation in Human Development Project (SEARCH), Bangkok, Thailand).

Without any clear provisions on how agreements should be met when consensus is lacking, or how to settle disputes in the case of a serious breach of the Charter, or how to expel Members for not complying with the provisions, makes the organisational structure weak when it comes to upholding principles of human rights.

What the inclusion of human rights on the ASEAN agenda further entails is also far from certain, considering that the ASEAN human rights regime is framed around a very politicized organisation, dominated by sovereign Member States with mainly poor human rights records. Obviously, this has been reflected on the two human rights commissions:

“We were part of the drafting of the ToR, both of the AICHR and the ACWC, and we saw that it was watered down a lot” (Interview with Ms. Misun Woo, Programme Officer, APWLD, Chiang Mai, Thailand).

That the core principles of non-interference and consensus have remained so strong within ASEAN implies that the ASEAN human rights regime is drafted with ambiguous language, which reinforces the ambivalent human rights stance. How shall for example the AICHR “contribute to the realisation of the purposes of ASEAN as set out in the ASEAN Charter in order to promote stability and harmony in the region, friendship and cooperation among ASEAN” (Article 1.3) when the purposes, on the one hand, is “to promote and protect human rights and fundamental freedoms of

²⁴¹ Vitit Muntarbhorn, ‘the 1st International conference on human rights in southeast Asia’, *supra* note 27.

the peoples of ASEAN” (Article 1.1), and on the other, “to respect the principles of ASEAN as embodied in Article 2 of the ASEAN Charter, in particular: a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States”?

Second, the *human right features* also display some essential shortcomings in the human rights regime. Although it is clear that the commissions will be subsidiary and that the purpose is to uphold international standards, it is still the action of the commissions that will determine if they are actually able to do so. In terms of the specific mandates vested in the commissions they reveal that the ability to monitor and protect human rights is very limited. Strikingly visible is the lack of explicit authority for the commissions to issue binding decisions, receive complaints, consider cases, or conduct investigative visits. The focus is more on capacity building and educational measures. Another shortcoming is that the composition of the commissions and the independence of the representatives can be questioned. Finally the limited financial support shows that ASEAN provides a very limited organisational framework to establish a human rights regime under, at least comparative to other regional organisations. With a limited support from the secretariat, the conclusion is that the ASEAN human rights regime so far rates poor against international standards.

CHAPTER VI

6. Effective Promotion and Protection of Human Rights within ASEAN?

Southeast Asia continues to be a region where many human rights abuses occur, be they national or trans-national.²⁴² The ASEAN human rights regime is supposed to play an important role of human rights development in the region from the standpoint of ASEAN. After all, the very essence of creating a human rights regime, as someone so nicely put it, “is to protect the human rights of the people.”²⁴³ But what are the prospects of the ASEAN human rights regime to actually have any effective impact, to bring about any changes and improve human rights? As the previous chapter displayed, the initial perception of the ASEAN human rights regime is that it rates poorly against international standards. This chapter will however give a closer examination of some of the mandates given to the AICHR and the ACWC to see what potential impact they can have on engendering the human rights situation in the Member States. This is followed by a review of some of the main challenges to the new human rights regime. The chapter ends with some brief recommendations.

6.1 IMPLEMENTING THE MANDATES OF THE TWO COMMISSIONS

6.1.1. Some Limitations to Keep in Mind when Assessing the Potentials of the Commissions

There are a few factors that need to be taken into consideration when assessing the effectiveness of the ASEAN human rights regime. First, only a short period of time has elapsed since the establishment of the AICHR and even less since the establishment of the ACWC, wherefore no real accomplishments can measure their performance.

Second, neither the AICHR nor the ACWC are mandated to receive and investigate individual complaints of human rights violations; their respective roles and mandates are, as the previous chapter laid out, much more limited than that. There have been 16 cases of human rights violations submitted to the AICHR. The cases submitted concern the following issues:

Issues	Number of Cases	Concerned Countries
Migrant workers	9	Indonesia
Press freedom and freedom of expression	2	Indonesia

²⁴² See Chapter 2.1.1.

²⁴³ Yuyun Wahyuningrum, *supra* note 15, p. 75.

Past human rights violations on crimes against humanity	3	Indonesia
Killings in Maguindanao	1	Philippines
Women's rights	1	Indonesia
Death Penalty	1	Singapore/Malaysia
Total	16	
<i>Source: SAPA-Task Force on ASEAN and Human Rights, 'Hiding behind Its Limits: A Performance Report on the first year of the ASEAN Intergovernmental Commission on Human Rights' pp. 12-13, Available at: <http://forum-asia.org/2010/AICHR@1_web.pdf> (Accessed on May 21, 2011).</i>		

During the meeting of the AICHR in March 2010, civil society organisation who made the submissions were informed that the Commission was not able to receive these cases on the grounds that the Commission has yet to adopt the Rules of Procedure on how to handle cases of human rights violations submitted to them.²⁴⁴ This is of course a huge shortcoming in itself.

Third, there is no ASEAN human rights instrument. In Europe, the Americas and Africa, the courts and commissions have substantive rights to implement through their respective human rights conventions. An essential, or at least highly desirable, pre-requisite, is that there exist a human rights instrument for ASEAN to define what it means with human rights. The AICHR is mandated to draft an ASEAN Human Rights Declaration under Article 4.2 of its ToR. The Commission is however still discussing the terms of reference of the drafting team and its processes and there is little information available to the public on this issue.²⁴⁵

6.1.2. Using Limited Mandates to the Widest Extent Possible

The potential possibility of the mandates derives from the legal obligations in the ASEAN Charter where the Member States in both the purposes and principles, among other things, have undertaken to promote and protect human rights. The terms 'promotion and protection' commonly appear in the same order and together in human rights instruments.²⁴⁶ The terms are similarly used simultaneously and appear 13 times together throughout the ToR of the AICHR. They inevitably raise the difficult questions, what do they imply, and whether one can exist without the other? Recalling the obligations arising under the UN Charter foremost to promote human rights,

²⁴⁴ SAPA-Task Force, *supra* note 236, p. 13.

²⁴⁵ *Ibid*, p. 12.

²⁴⁶ Principles relating to the Status of National Institutions (The Paris Principles). See Article 1. Available at: <<http://www2.ohchr.org/english/law/parisprinciples.htm>> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Right Defenders) See preamble and Article 2. Available at: <<http://www2.ohchr.org/english/issues/defenders/declaration.htm>> The Declaration is not, in itself, a legally binding instrument. However, it contains a series of principles and rights that are based on human rights standards enshrined in other international instruments that are legally binding – such as the International Covenant on Civil and Political Rights. Moreover, the Declaration was adopted by consensus by the General Assembly and therefore represents a very strong commitment by States to its implementation.

a state could not be considered to promote human rights if it was at the same time violating them.²⁴⁷ Through the ASEAN Charter the Member States have taken upon themselves to uphold the UN Charter, but without any references to any other international human rights instruments the legal obligation is a rather weak and undefined one. However, one can argue that at least in spirit, the Member States should be obligated to adopt the necessary tools to both promote and protect human rights to remain true to the ASEAN Charter and not go below international standards.

At the same time, such language is too ambiguous and weak to really imply anything. It is rather the mandates vested in the AICHR and ACWC that will ultimately determine the scope of their abilities. Previous chapter revealed that the mandates are relatively weak. The lack of a clear complaints mechanism and with a language that adopts a formula of promotion first and protection later, the mandates display the lack of political will to adopt a strong regime.

However, there are a few factors that open possibilities for a more effective human rights regime. First, some of the mandates are constructed quite openly, opening up for wide interpretation and the possibility to create stronger protectional mechanisms. Second, the mandates call for more inclusiveness of civil society, something that so far to a large extent has been lacking and which is important as checks and balance of the regime. Third, the mandates call for ratification of core international human rights treaties, which is an essential first step to be in conformity of international human rights standards and to further implement human rights. Finally, ASEAN has adopted an evolutionary approach to the development of human rights in the region. Both the ASEAN Charter and the ToRs of the AICHR and ACWC shall be reviewed after five years, which enables for amendments and improvements.²⁴⁸ Establishing a human rights regime does not happen overnight wherefore such considerations are important.

6.1.3. The Formulation of the Mandates Opens up Possibilities for Wide Interpretation

There are a few Articles in the respective ToRs that have been constructed quite openly thus opening up for the possibility to expand the scope of possibilities for the two human rights commissions. The mandates of the commissions could therefore have the potential to be strong if used wisely and interpreted widely to tackle sensitive issues in the region. As Vitit Muntarbhorn underlined: “what is not forbidden is not prohibited under the ToR”.²⁴⁹

²⁴⁷ See Chapter 4.2.1. This principle was formally established with ECOSOC resolution 1235. The meaning of the obligation to promote human rights, however vague in abstract, was defined defined in the sense that a Member of the UN employing such a policy could not be considered promoting human rights.

²⁴⁸ ASEAN Charter, Article 50. AICHR ToR, Article 9.6. ACWC ToR, Article 10.6.

²⁴⁹ He stated this during ‘the 1st International conference on human rights in southeast Asia’, *supra* note 27.

6.1.3.1 The Mandates of the AICHR

First, Article 4.1 provides an example of such an openly formulated Article and is perhaps the strongest provision in this sense.

“The first mandate (Article 4.1) is a broad mandate that can actually include so many things. If the commission has the political will they can develop protection mechanisms like country visits to investigate, to do detention centre visits and to receive complaints” (Interview with Mr. Yap Swee Seng, Executive Director, Forum Asia, Bangkok, Thailand).

Article 4.1 states that the AICHR has the mandate “to develop strategies for the *promotion* and *protection* of human rights and fundamental freedoms to complement the building of the ASEAN Community” (emphasis added). While the following Articles mostly concerns promotion, here is clearly a broadly formulated mandate with potential protectional features. The indication of this mandate is to be further specified by the Commission but it opens a window to include whatever the Commission wants it to include as long as there is political will to back it up.

Second, Article 4.10 states that the AICHR is mandated to “obtain information from ASEAN Member States on the promotion and protection of human rights.” What kind of information is not specified and could potentially be what the AICHR desires. The provision is significant in that it provides the AICHR with a mandate to request information of general or specific concern. This provision comes closely to what could be thought of as a “fact finding” mandate. Taking Myanmar as an example, such possibilities are much needed since the UNs performance in this area so far has been modest. However, it is likely that the norm of non-interference in the internal affair of Member States will be a hard one to side step when deciding upon such matters.²⁵⁰

Third, and closely connected to Article 4.10, is Article 4.12 mandating the AICHR “to prepare studies on thematic issues of human rights in ASEAN”. Used together with Article 4.10 the thematic studies can be on anything the Commission desires and contain the information they decide to gather.²⁵¹

Finally, the above also provides an example of how the different Articles can be combined to further expand the mandates. Article 4.10 can for example be combined with Article 4.8 stating that AICHR shall “engage in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN, including civil society [...]” This opens up for a consultation with other stakeholders to determine the thematic issues in ASEAN. Combining Article 4.8 and Article 6.2 providing that “AICHR shall convene

²⁵⁰ NTS Alert, ‘Advancing Protection of Civilians Through the ASEAN Intergovernmental Commission on Human Rights’ *NTS Alert* November 2010 (Issue 2) Available at: <<http://www.rsis.edu.sg/nts/HTML-Newsletter/alert/NTS-alert-nov-1002.html>> (Accessed on May 18, 2011).

²⁵¹ According to the 2010-2015 Work Plan, yet to be published, the AICHR has decided to do thematic studies on business and human rights and migration.

two regular meetings per year” also gives room for other stakeholders to take part in the meetings.²⁵²

6.1.3.2. *The Mandates of the ACWC*

With a language mandating the body to “assisting”, “encouraging” and “promoting”, much like the AICHR, the ACWC mandates and functions are limited to mainly promote human rights. Similar to the AICHR ToR Article 4.1, the ACWC ToR however also contain an Article, which mandates it to “develop policies, programs and innovative strategies to *promote* and *protect* the rights of women and children to complement the building of the ASEAN Community (Article 5.2) This Article opens up for interpretation to include wider promotional and protectional measures.

Furthermore, the ToR to the ACWC is constructed with more specific mandates, especially when it comes to the implementation of human rights. While addressing human rights in legal text is one thing, implementing them by raising awareness, provide training, institutionalising behavioural change etc is another.²⁵³ On this issue, the ACWC is for example tasked with building capacities of relevant stakeholders at all levels e.g. administrative, legislative, judicial, civil society etc. through the provision of technical assistance, training and workshops, towards the realization of the rights of woman and children (Article 5.5). Another mandate is to assist in implementing the concluding observations of CEDAW and CRC and other treaty bodies related to the rights of women and children (Article 5.7). The ACWC also has stronger language in terms of addressing the root causes of human rights violations, with Article 5.12 mandating the ACWC “To propose and promote appropriate measures, mechanisms and strategies for the prevention and elimination of all forms of violations of the rights of women and children, including the protection of victims”.

6.1.4. Inclusion of and Engagement with Civil Society in ASEAN and its Human Rights Process

Another important issue is the possibility for civil society organisations (CSOs) to engage with the ASEAN human rights regime. CSOs have played an important role in bringing human rights and the human security discourse into ASEAN’s agenda.²⁵⁴ However, at present, ASEAN is still a very state centric organisation. The lack of inclusion of civil society and other stakeholders are visible in a few ways. First, ASEAN’s 1986 “Guidelines for ASEAN Relations with NGOs” state that “Approval of application for affiliation of an NGO with ASEAN shall be based primarily upon the assessment of the positive contribution which such an NGO could make to

²⁵² Yuyun Wahyuningrum, *supra* note 15, p. 77.

²⁵³ NTS Alert ‘Reserving the Right Not to Comply: ASEAN Legal Reservations to CRC and CEDAW’, *supra* note 66.

²⁵⁴ NTS Alert, ‘Advancing Protection of Civilians Through the ASEAN Intergovernmental Commission on Human Rights’ *supra* note 250.

the enhancement, strengthening and realisation of the aims and objectives of ASEAN.”²⁵⁵ Chapter V of the ASEAN Charter softened this approach somewhat, with article 16 stating that “ASEAN may engage with entities which support the ASEAN Charter, in particular its purposes and principles. The associated entities remain limited mainly to groups of a technical or business nature and there are extremely few organisations that work with human right issues.”²⁵⁶ Second, CSOs roles are very limited in the work of the AICHR and the ACWC and it has not been possible, up to this point, to institutionalise civil society engagement with ASEAN, which is why the design of the Rules of Procedure that will be agreed on by AICHR and the ACWC are of high importance.

There is thus a large possibility for ASEAN to engage with a wider selection of groups, including human rights NGOs, particularly as ASEAN seeks to fulfil its Charter commitment in Article 1.13 “To promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building”. Article 4.8 of the AICHR ToR provides that AICHR must engage in dialogue with other ASEAN bodies, including CSOs and other stakeholders. Clearly, there is a demand for wider civil society participation, and the provisions create an opportunity for the commissioners to engage in a dialogue with different civil society groups, NGOs and other organisations.

Closely connected to Article 4.8 is Article 4.9, which provides that the AICHR shall “consult, as may be appropriate, with other national, regional and international institutions and entities concerned with the promotion and protection of human rights”. The national human rights commissions of Indonesia, Malaysia, Thailand and the Philippines are examples of such institutions that can be a way for the AICHR to gain more close information from individual countries on specific issues. The four national human rights commissions have also formed a network, which aims to develop collective strategies on issues such as human rights education (specifically for the military and the police); the rights of migrant workers; the rights of trafficked persons; anti-terrorism; and the promotion and protection of economic and social rights.²⁵⁷ A closer interaction with such sub-regional groupings can provide the AICHR with insight in both national and trans-national human rights issues.

The ToR to the ACWC is fairly silent on this issue, but Article 5.14 calls for the participation of women and children in dialogue and consultation processes related to the promotion and protection of women.

²⁵⁵ The ASEAN Secretariat’s Guidelines for ASEAN Relations with NGOs, *available at*: <<http://www.aseansec.org/6069.htm>> (Accessed on May 18, 2011).

²⁵⁶ See ASEAN Charter Article 16.1 and Annex 2 to the ASEAN Charter. Basically there is only one CSO related to human rights listed - the Working Group for an ASEAN Human Rights Mechanism.

²⁵⁷ NTS Alert, ‘Advancing Protection of Civilians Through the ASEAN Intergovernmental Commission on Human Rights’ *supra* note 250.

6.1.5. Ratification of Core International Human Rights Instruments by ASEAN Member States

In the view of establishing a regional human rights regime and improving human rights standards, ratification of international human rights treaties is a critical factor,²⁵⁸ because it at least displays a *prima facie* acceptance to international human right norms. Of course, mere ratification is no guarantee for acceptance or implementation of international human right norms. According to Eldridge (2002), “Together with reservations and declarations against various treaties, it can shed light on states’ underlying outlook, idiosyncrasies and understanding of national interest in dealing with human right obligations”.²⁵⁹ Visible from Table 1.2 in chapter two was that many of the states still have not ratified some of the core treaties, and almost none have acceded to the Optional Protocols of different treaties. The ASEAN Charter reaffirms that the Member States must uphold “the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States.” (Article 2. (j)). Article 14.5 of the AICHR ToR states that the body shall “encourage ASEAN Member States to consider acceding to ratifying international human rights instruments.” This is followed by Article 4.6, which calls for the AICHR to “promote the full implementation of ASEAN instruments related to human rights.” Ratification and subsequent implementation of more international human right treaties will create a more uniform understanding and approach to human right norms among the ASEAN states. This will be especially important in the drafting of an ASEAN human rights instrument.

According to the ACWC ToR, Women’s socio-cultural rights are to be realized by implementing already existing agreements, upgrading regional mechanism, and institutionalise gender statistics. Children’s rights are to be protected too by full implementation of the Convention on the rights of the Child (Articles 5.1 and 5.13). All ASEAN Member States have ratified the CEDAW and CRC. However, some of the states have substantive reservations to both of the treaties.²⁶⁰ While the ACWC focuses on the issues of protecting woman and children, this is an example how both commissions can complement each other and pursue important human rights issues together, educating and raising awareness of the CEDAW and CRC and the reservations. They can highlight certain problem areas and encourage a regional effort to withdraw those reservations, and create a uniform regional stance on protection for women and children.²⁶¹

²⁵⁸ Hidetoshi Hashimoto, *supra* note 10, p. 105.

²⁵⁹ Philip J. Eldridge, *supra* note 60, p. 63.

²⁶⁰ On this issue see ‘Reserving the Right Not to Comply: ASEAN Legal Reservations to CRC and CEDAW’, *supra* note 66.

²⁶¹ *Ibid.*

6.2. CONCLUDING REMARKS

The arguments and ideas put forward in this chapter have been rather speculative. There are different roles and functions that the ASEAN human right regime might perform, now and in the future. On the one hand, it is clear that the textual interpretation of some of the mandates enables for much wider possibilities for the ASEAN human rights regime when it comes to promotion and protection of human rights. Indeed, “ambiguity can be as much a friend as a foe when interpreting legal instruments”.²⁶² On the other hand, reality reveals that such possibilities are very limited much because the political will in some of the Member States is very limited. Thus, for now it is likely that the commissions will serve primarily advisory, coordinating, and consultative bodies. Reviewing Surin Pitsuwan's words in chapter one with regards to the scepticism against this new human rights framework, “a sense of reservation” against the ASEAN human rights regime thus seems justified. It is created yes, but what will the further development look like?

“Beyond the obvious, which is that it is wonderful that they created the AICHR, it is hard to obviously see what they will be able to do in their current state” (Interview with Melinda MacDonald, Program Manager South East Asian Regional Cooperation in Human Development Project (SEARCH), Bangkok, Thailand).

“Expectations need to be reasonable. You have to think about the countries in the world that are involved in this inter-governmental organisation. But the fact that countries like Thailand were able to even have incentives on human rights included in this agreement is really quite an accomplishment and it may, over time, provide a foothold for human rights to be considered juridically, particular in the context of economic development. But I think that's a long term goal” (Interview with Ms. Erin Shaw, Regional Legal Advisor, Asia-Pacific Programme, International Commission of Jurists, Bangkok, Thailand).

²⁶² Michelle Staggs Kelsall, *supra* note 154, p. 4.

CHAPTER VII

7. Assessing an ASEAN Human Rights Regime - Conclusion

The purpose of this thesis has been to examine the prospects of the recently established ASEAN human rights regime to have an effective impact on human rights protection in its Member States. Undoubtedly, the process of establishing the ASEAN human rights regime has been with quite some unease and no one can deny that human rights issues and the realisation of a credible and effective ASEAN human rights regime are still very challenging matters for ASEAN. The difficulties have been due to a number of factors, some more prominent than others, and while institutions for the promotion and protection of human rights now undeniably exist, the ambivalent approach to human rights within ASEAN and its Member States has been reflected upon these institutions casting doubts as to whether human rights has emerged as a serious concern for ASEAN. This final chapter will closer examine and analyse some of these challenges and make some general conclusions on the way forward.

7.1 MAIN CHALLENGES TO THE ASEAN HUMAN RIGHTS REGIME

When examining challenges, as chapter one laid out, those can be fundamental challenges constituted mainly by resistance from Member States, or structural ambiguities within the system itself. Usually they tend to overlap somewhat since a general lack of political will in Member States will impact on all subsequent cooperation.

7.1.1. Fundamental Challenges

With regional order built on norms of non-interference and consensus and a perception that sovereignty of each state has been the condition for successful cooperation, it is obvious that the main challenge against establishing an effective ASEAN human rights regime still lies with the political will of the Member States to ASEAN. Thai Prime Minister Abhisit Vijjajiva acknowledged this fact by stating: “Ultimately, it is about the commitment of Member States to enhancing the quality of the life of ASEAN peoples, empowering and engaging them in ASEAN’s community building process, all of which form the fundamental basis of genuine community for peoples”.²⁶³ Without the will to implement and enforce democracy and human rights at the domestic level there is no reason to expect that promotion through the ASEAN Charter will enhance such

²⁶³ Abhisit Vijjajiva, quoted in Forum Asia, *Human Rights Milestones: Challenges and Developments in Asia* (Forum Asia, Bangkok, 2009), p. 79.

values, and even harder to see how such powers will be given to a regional human rights body.

“When you get right down to it, it is only when you have a domestic enforcement mechanism that governments are forced to adhere to international standards and we are a long way from that in ASEAN” (Interview with Ms. Erin Shaw, Regional Legal Advisor, Asia-Pacific Programme, International Commission of Jurists, Bangkok, Thailand).

Clearly, traditional perception of human rights, democracy and their limitation for economic development and stability still remain very strong in most ASEAN Member States. As a paradox, the ASEAN states have considered values of democracy, respect for the rule of law and protection and promotion of human rights and fundamental freedoms important enough to include in the ASEAN Charter, indicating that such values may still be beneficial or even necessary for successful development of the state. Such undertakings, however, become somewhat eroded when one considers the situation in some of the Member States, and even more so bearing in mind the central objectives on which ASEAN was founded - to enhance economic development and sustain regional order. That a state like Myanmar was allowed to sign the ASEAN Charter despite the fact that the current situation in the country displays a policy of the government, which can be held to go against some of the core principles in the Charter, illustrates that unity and concerns for other issues than human rights are far more important within ASEAN.

This leaves us with a few central questions; first, why ASEAN Member States even included concepts of democracy and human rights if they never intended to uphold and implement the Charter, and, second, if the establishment of the ASEAN human rights regime was ever intended to have any possibilities to improve human rights protection? In the establishment of the AICHR George Yeo, Singapore’s Minister of Foreign Affairs, conceded that “some countries preferred a body ‘which has no teeth’ because of the concern that Western countries and NGOs will make use of it to interfere in their domestic politics. However, other countries preferred a credible human rights body.”²⁶⁴

The statement display that, as seen in chapter two, there seem to be a division within ASEAN between the two groups when it comes to human rights. The first one comprised of Indonesia, Malaysia, the Philippines and Thailand and the second one comprised of Myanmar, Laos, Cambodia, and Vietnam.²⁶⁵ Singapore and Brunei being somewhere in between. Issues on domestic political security concerns, internal circumstances, the discussion on the Asian values, the debate over an ASEAN human rights mechanism,

²⁶⁴ Chio Su-Mei, Channel News Asia, Posted: 29 February 2008, *Available at:* <<http://www.channelnewsasia.com/stories/singaporelocalnews/view/331796/1.html>> (Accessed on May 18, 2011).

²⁶⁵ Agence France-Presse, ASEAN rights body should include all members: panel, *Available at:* <<http://www.asiaone.com/News/Latest%2BNews/Asia/Story/A1Story20080613-70743.html>> (Accessed on May 18, 2011).

the principle of non-interference, and the ASEAN way have made the first group rethink traditional norms or even call for norm changes. Among the ten ASEAN members, Indonesia, Malaysia, the Philippines and Thailand currently have their own independent national human rights bodies. The NGOs networks, an important force behind any idea of human rights evolution, are also stronger in these four countries. The adherence to the rule of law is relatively better here than elsewhere in Southeast Asia. They also have a long history of cooperating with each other in many fields since they were all original members of ASEAN.²⁶⁶

The second group tries to preserve the status quo, which could best serve their political interests.²⁶⁷ Democracy in these countries is far from consolidated and the institutions for protecting and promoting human rights are few. In this group concerns over the threats that human rights pose to sovereignty against the nation state still remain strong and constitutes the major stumbling block for human rights cooperation. That these countries had no interest in creating a strong human rights regime comes as no surprise. That they agreed to create a human rights regime at all, without teeth, might be considered no more than an action to reduce some pressure from other ASEAN states and appease the outside world.

Human rights cooperation clearly holds greater promise between some of the ASEAN Member States. Phan (2009) for example argues for a selective approach to human rights, rather than inclusive, where this sub-regional group with better human rights records and stronger political will that may have conditions to establish a more effective human rights mechanism goes ahead and do so.²⁶⁸ One might even go further and humbly propose, with the risk of being laughed at, that an effective and credible human rights regime would require some fundamental prerequisites in terms of level of democratisation, adherence to the rule of law and protection of human rights, as a condition for membership.²⁶⁹ In this regard, valuable lessons can certainly be learned by examining other regional human right regimes. Because it is essentially here, at the birth of human rights cooperation, that such necessary elements would play a vital role for an effective and credible human rights regime. With such requirements, states with better human rights record can put pressure on states with poor human rights record to improve themselves. Furthermore, such requirements would also signal to states who are already members of the human rights regime that they

²⁶⁶ Hao Duy Phan 'A Blueprint For a Southeast Asian Court Of Human Rights' *Asian-Pacific Law & Policy Journal* Vol. 10:2 (2010) p. 388, note 14.

²⁶⁷ *Ibid*, p. 388. James Munro, 'Why States Create International Human Rights Mechanisms: The AICHR and Democratic Lock-in Theory' *ASIA-Pacific Journal on Human Rights and the Law* (10:1 2009) p. 5 ff.

²⁶⁸ Phan argues that these states would be able to establish a human rights court. *Ibid*, p. 388.

²⁶⁹ As an example, membership to the Council of Europe, according to Article 3 of the Statute of the Council of Europe provides that "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms(...)" *Available at*: <http://conventions.coe.int/Treaty/en/Treaties/html/001.htm> (Accessed on May 21, 2011).

continuously need to meet the requirements or otherwise running the risk of being excluded from the co-operation. In that way the regime would begin to assure accountability, not only at the national level but also at the regional level. It would also give more weight to the principles in the ASEAN Charter.

The reality, however, is that excluding ASEAN Member States from regional human rights cooperation was never an option since such an arrangement could disrupt the regional order. “A human rights body for ASEAN should go ahead with all 10 members of the group including Myanmar” experts held in the meetings preceding the drafting of the Terms of Reference to the AICHR.²⁷⁰ Clearly, a regime must be based on common interests and shared values, and represents a politically acceptable solution to a collective problem. Here lies the major difficulty for the development of this human rights regime and its credibility to the outside world. It contains too many states with poor democracy and human rights practices and with little interest in human rights cooperation. It is created within a regional framework that seeks to uphold old norms that with current practices are incompatible with the new norms they are trying to promote. In such context, the ASEAN Charter is, as Jones (2008) puts it, “worryingly ambivalent”.²⁷¹ The reality is thus that the ASEAN human rights regime includes ten members which, for the moment, all have to agree to advance human rights cooperation in the region.

7.1.2. Ambiguities within the Regime

While it is undisputed that a human rights regime established within the framework of ASEAN is a step in the right direction, the framework can be considered a great ambiguity in itself. These ambiguities are really no more than an extension of the Member States lack of political will to create an effective human rights regime and enforced by the fact that ASEAN is an extremely politicized organisation.²⁷² However, identifying certain weaknesses as well as strengths makes it easier to pin point what changes can possibly be made.

First, the ambiguities in the language of the instruments clearly illustrates that there is ambivalence towards human rights. Like with all other ASEAN bodies, the principles of consultation and consensus, with firm respect for sovereign equality of all member states permeates the AICHR and the ACWC. This implies that the action of any of these Commissions initially requires the agreement of each country’s representative and secondly a consensus by the Member States. Since countries with the lowest human

²⁷⁰ ‘Experts say ASEAN rights body should include all members’ Channel News Asia, (Posted: 13 June 2008), *Available at*: <http://www.channelnewsasia.com/stories/singaporelocalnews/view/353900/1.html> (Accessed on May 18, 2011).

²⁷¹ David Martin Jones, *supra* note 92, p. 744.

²⁷² On the issue of politicization and human rights mechanisms *see* Jack Donnelly, *supra* note 1, p. 107.

rights standards can use their veto power, human rights advancement may be compromised. The principle of non-interference is not something unique to ASEAN but rather a universally excepted norm under international law. However, when it comes to human rights ASEAN Members particularly regards it as a domestic concern and can use the principle to avoid scrutiny of their human rights performance. The lack of a clear enforcement mechanism and dispute settlement procedure in the ASEAN Charter makes it difficult to deal with members' whose actions goes against the principles of the Charter in the first place.

Second, the lack of independence of the commissions might be the most pressing issue for their effectiveness.

“The most important one is that the members of the commission need to be independent. Only Indonesia and Thailand appointed independent experts into the commissions. Then the rest of the countries have appointed either government officials or former civil servants of the government. This is going to compromise the work of the commission and how effective it is going to be. If the commission is not able to be critical about government positions then the commission will become more like a mouthpiece for the government rather than a institution that will promote and protect human rights” (Interview with Mr. Yap Swee Seng, Executive Director, Forum Asia, Bangkok, Thailand).

“You need some kind of independence. If you look at international principles on the protection and promotion of human rights and the constitution of institutions charged with these tasks, it is crucial that the people who sit on these bodies serve in their personal capacities, that they have a defined, relatively stable tenure, and that they are independent from their governments. In the case of Burma, Vietnam and Cambodia I can't see how that could possibly happen” (Interview with Ms. Erin Shaw, Regional Legal Advisor, Asia-Pacific Programme, International Commission of Jurists, Bangkok, Thailand).

While it is important that the commissions comprises of experts competent in the field of human rights, it is equally important that the representatives are able to act independently and propose suitable recommendations. Thus, the effectiveness of the commissions depends largely on the composition of the commissions on the one hand, and the ability of the representatives to act independently on the other. While representatives can be selected through national process of selection, eight of the ten representatives are currently government appointees. Only Thailand and Indonesia are represented by non-government members. Furthermore, all the representatives are accountable directly to their governments.

Third, the broad and weak mandates of the commissions pose challenges both in terms of effective implementation of human rights standards but also in terms of interpretation of the mandates. Especially the absence of a complaints mechanism can be considered the most obvious fallacy when it comes to the possibility of the ASEAN human rights regime to effectively protect human rights. Without a individual complaint mechanism, the system lacks one of the essential features of a human rights regime with regards to meeting the fundamental requirements in a democratic society and adheres to international human rights standards – that is, that those who have had their rights violated have the chance to participate, and that those

who have committed transgressions should be held accountable to their citizens for their acts.

Fourth, the above is also closely related to the fact that the possibility for civil society to engage is still very limited. Right now, most of the meetings are closed and there is very little consultation on different issues that involves civil society. This reflects that ASEAN and its human rights commissions are still too state-centric institutions.

Finally, the resources provided to the ASEAN human rights regime have not been sufficient. Without adequate funding, little matters how effective the regime is could potentially be. Without sufficient funding the regime has no prospects of functioning effectively.

7.2. THE WAY FORWARD

7.2.1. Member States, the Commissions and Civil Society

Indeed, the possibilities of the ASEAN human rights regime to have any effective impact on human rights will depend on what it can do (with regards to the actual mandates vested in the commissions), but also on what it is willing to do. The further development of a credible and effective regional human rights mechanism will take time and requires support on several levels.²⁷³ Essentially, to overcome the challenges and to develop effective mechanisms for the promotion and protection of human rights, the ASEAN human rights regime requires the political will of the Member States, the initiative of the representatives on the commissions and the engagement of civil society.²⁷⁴

All challenges for the ASEAN human rights regime are underpinned by the political will of the Member States of ASEAN. In order to allow for an effective and credible human rights regime to develop the states must adhere to the principles enshrined in the ASEAN Charter and the ToRs without using the ambiguities to their own advantage. First, when it comes to ASEAN the Member States must allow it to change with the new developing framework. In fact, one can argue that the Association is already deviating from some of the traditional norms with the inclusion of human right norm in the ASEAN Charter and the establishment of the human rights regime. But the process is very slow. In this development, ASEAN needs to open up to its people, and also to external actors, to offer something more than just a solution between ten Member States to promote economic growth and stability. This is important in order to make the human rights framework more relevant and credible. An important factor in the reformation of ASEAN, one that is not often mentioned, is the Secretary General. Much like the Secretary General within the UN, the Secretary

²⁷³ Homayoun Alizadeh, *supra* note 31; See also Gorawut Numnak *supra* note 231, p. 17.

²⁷⁴ Gorawut Numnak *Ibid*, p. 18.

General of ASEAN is the face and spokesperson of the Association. The Secretary General can be requested to provide good offices, conciliation or mediation in a dispute.²⁷⁵ Being the face outwards he has the possibility to advocate for human rights and to make it a more important concern on ASEAN's agenda. The current Secretary General, Surin Pitsuwan showed some good will by attending the First International Conference on Human Rights in Southeast Asia where he shared his views. Second, the Member States must endow the commissions with the necessary means to truly fulfil their mandates. At the first stage, this includes making the representatives on the commissions independent. It also includes engaging and consulting all sections of civil society in the selection process of the representatives and other decision-making processes. Third, when it comes to human rights in general the state must ratify all core international human right treaties including their optional protocols.

The initiatives of the representatives to the commissions must also be activated. This includes interpreting and making use of the "broad" mandates in the widest possible sense and while at the same time maintain the independence from political interference of the Member States and ASEAN. Some of the mandates, as shown above, opens up for a wide interpretation that makes it possible to develop at least stronger monitoring mechanisms. Furthermore, independence is of course especially important in the development of common standards of human rights (especially through the drafting of the ASEAN Human Rights Declaration) that does not go below international UN standards enshrined in the UDHR and other instruments. It also includes opening up and creating a structure for dialogue and engagement with civil society at the regional level through human rights organisations, and at national level through organisations, academic institutions NHRIs and the general public.

Without any doubt, the process must be undertaken with a high level of engagement of civil society, human rights organisations and NHRIs, since it is civil society that provides the so called "check and balances" ensuring that the work of the commissions is effective.²⁷⁶ The work of ASEAN has hardly ever been monitored or evaluated by its people. Without any accountability, the undertakings by ASEAN and its human rights regime it runs the risk of being no more than empty words. A priority from the commissions at this stage should be to raise people's awareness of their existence as well as human rights in general. In this work, representatives from civil society have an important role to play and can engage with the commissions through research, lobbying and education. They can assist the commissions by providing expertise on specific issues and "on the ground" experience to enhance the research capacity. Civil society representatives can also lobby member states to empower the commissions to enhance its protective mandate.

²⁷⁵ ASEAN Charter, Article 23(2)

²⁷⁶ *Ibid*, p. 17.

7.3 SOME FINAL WORDS

7.3.1 A New Dawn for Human Rights in Southeast Asia?

While criticism against ASEAN and its human rights practices lies close at hand, it is also easy to forget the positive progress and implications. Going back to chapter one, we may indeed ask ourselves what other mechanism would have been possible at this stage?²⁷⁷ The ASEAN human rights regime may rate poorly against international standards, but the fact that all ten ASEAN governments have agreed to establish even the most rudimentary of human rights commissions is more progress than many would have expected only a few years ago. A human rights regime would never have been realised in the first place without the consensus of all ASEAN Member States. That a country like Myanmar now at least officially talk and interact in a human rights dialogue must be considered a distinct step forward. Moreover, despite that the ASEAN human rights regime has limited authority to ensure that Member States comply with human rights norms, its very existence together with possible functions such as issuance of statements and findings has the potential to serve as a catalyst to greater reform.

At the same time, the central concern still remain, whether these bodies will be robust to do what they can or merely become servant of regimes that are much unfriendly to human rights? One author made the following comment with regards to the next important step for the AICHR, the drafting of an ASEAN Declaration on Human Rights, but the words can however be applied to the ASEAN human rights regime in large:

“[...] the only thing worse than having no regional human rights instruments at all is having one riddled with restrictions, caveats, provisos and balancing acts, and it is not difficult to imagine such a document emerging from ASEAN, if some of its member states have it their way. However, there are strong enough, and certainly dedicated enough, forces within ASEAN working in the opposite direction for that dread to be justifiably tempered by a healthy dosage of hope.”²⁷⁸

Is it maybe so, that a too weak human rights regime is worse than having no regime at all? Certainly, such cooperation can be misused by states to advance other interests than human rights. Moreover a too weak framework will lack relevance and credibility, and, if it fails, perhaps become a serious obstacle to any future human rights cooperation with little interest to support by the outside world. Creating a human rights regime just for the sake of creating one, without any real intentions to empower it with the necessary tools for it to be able to perform any relevant work, seem meaningless. However, as was shown in chapter four, all human right regimes have undergone transformation and gradually developed, some from being merely declaratory or promotional to becoming implementation and

²⁷⁷ See section 1.1.1.

²⁷⁸ Yuval Ginbar, *supra* note 156, p. 518.

enforcement regimes.²⁷⁹ A weak international human rights regime may contribute to improve national practice, gradually developing consensus and mutual understanding of norms among its members. It has the potential to convince states, even the worst, to gradually accept regime norms and procedures, especially norms that do not appear immediately threatening. Even if it is not likely that ASEAN will in the nearest construct a system of intervening in each other's affairs based on human rights, the ASEAN human rights regime can, for the time being, focus on specific human rights concerns that all can agree upon and try to elaborate a more common stance on human rights norms.

Indeed, much progress is needed for the ASEAN human rights regime to be able to effectively promote and protect human rights within the region. While the ASEAN Charter and the ToRs to the AICHR and the ACWC marks a step forward towards realisation of human rights, without serious dedication that begins with the Member States, a serious risk is that this human rights regime will stagnate and become irrelevant. The challenges are many and the first few years will reveal if the Member States are serious about their human rights undertakings. For the question if the new ASEAN human rights regime marks a new dawn in Southeast Asia, the answer is, hopefully at worst, and maybe possibly at best. The development of credible and effective regional human rights mechanisms does take time, and the way toward this end is never an easy one.

²⁷⁹ See Chapter 4.2.3.

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