



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT



DEVELOPMENT OF THE ASEAN HUMAN RIGHTS MECHANISM

DROI



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

BRIEFING PAPER

DEVELOPMENT OF THE ASEAN HUMAN RIGHTS MECHANISM

Abstract

The study examines developments concerning human rights mechanism(s) in the Southeast Asian region, in the space known as the Association of Southeast Asian Nations (ASEAN), with a view to strengthening relations between the European Union and the region. The ASEAN Inter-governmental Commission on Human Rights (AICHR) has now been set up as the overarching body to promote and protect human rights in the ASEAN. Two sectoral bodies working on human rights have also appeared: the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC) and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW).

The study thus makes a number of recommendations to European institutions to help strengthen the mechanisms mentioned, while building also other checks and balances, including national human rights institutions. The door is open to a regional Declaration and or treaty on human rights, and a regional court. Various recommendations are also targeted to the European Parliament, including to help support parliamentarians in the ASEAN region to integrate human rights into their work.

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AUTHOR:

Vitit MUNTARBHORN, Professor at the Faculty of Law, Chulalongkorn University, Bangkok, THAILAND

ADMINISTRATOR RESPONSIBLE:

Anete BANDONE
Directorate-General for External Policies of the Union
Policy Department
WIB 06 M 85
rue Wiertz 60
B-1047 Brussels

Editorial Assistant: Pia VANNESTE

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EXECUTIVE SUMMARY

Established in 1967, the ten-member Association of South-east Asian Nations (ASEAN) is a key regional organization in the world today. While the original aims of the organization did not encompass human rights explicitly, the profile of the latter has been raised in recent years in relation to human rights. On a welcome note, it has now integrated human rights expressly into the ASEAN framework by means of the ASEAN Charter adopted in 2007. Consequently, various bodies have been established as part of the quest for a regional human rights mechanism. The ASEAN Inter-governmental Commission on Human Rights (AICHR) has been set up as the overarching body to promote and protect human rights in ASEAN. Two sectoral bodies working on human rights have also appeared: the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC) and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW).

However, when compared with other regions of the globe which have regional human rights systems, there is a key difference in developments to date: while Europe, the Americas and Africa have human rights treaties laying down the range of rights as well as the mechanisms, particularly a Court of human rights, coupled with procedures for individuals to seek redress at the regional level, ASEAN still lacks a human rights treaty entrenching those rights and there is as yet no regional court nor a regional procedure to enable individuals to seek redress. A key challenge currently is to view the implementation of human rights in the region from the angle of checks-and-balances in the exercise of power and the call for a more effective system for human rights protection, including at the national level.

This study thus recommends, as steps towards the future, the following priorities in relation to the relationship between the European Union (EU) and ASEAN:

1. European Union institutions, particularly with the support of the European Instrument for Democracy and Human Rights and other forms of aid, should:
 - Help to strengthen the work of the AICHR on the implementation of its Work Plan, such as on corporate social responsibility and migration issues, targeting the future five-year review of the AICHR to fortify its protection role;
 - Support the activities of the ACMW under its Work Plan, especially to address the issue of violence against women and children;
 - Enhance the work of the ACMW to underline the rights of migrant workers in the ASEAN and ensure that the standards adopted comply with international human rights standards;
 - Engage with the ASEAN Summits and various ministerial meetings to mainstream human rights into their deliberations and actions;
 - Support the role of national human rights institutions, such as national human rights commissions, and their regional network to respond to the protection needs of the peoples of the region;
 - Assist civil society and various informal channels, including through educational institutions, in the region to reinforce their role in human rights promotion and protection;
 - Provide space for a stronger UN presence, including assistance for UN-related programming through direct aid, in the region to overcome any protection gaps;
 - Help to propel the trajectory towards a regional court in the ASEAN which can offer binding adjudication and effective remedies, by supporting networking between key judicial institutions and personnel in the ASEAN and possibly a future ASEAN Human Right Convention;

- Access people directly and effectively so as to support local activities, mechanisms and processes for human rights protection, including through more networking between human rights defenders, inspired by a more people-oriented ASEAN.
2. The European Parliament , in particular as part of peer-to-peer support , should:
- Include in the periodic Asia-Europe Parliamentary Partnership Meetings (ASEP) the topic of regional/sub-regional human rights mechanisms, opening the door to strengthening the mechanisms in the ASEAN region;
 - Support the integration of human rights protection into the work of the ASEAN Inter-Parliamentary Assembly (AIPA) and advocate the setting up of an ASEAN Parliament as part of the checks and balances for human rights protection in the region, complemented by a human rights committee or ombudsman in the structure;
 - Strengthen the ties between the European Parliament and AIPA on the issue of regional human rights mechanisms, with the possibility of the AIPA inviting the various ASEAN human rights mechanisms to establish links with the AIPA and to brief the AIPA periodically on their activities and developments.

1. INTRODUCTION

The issue of regional mechanisms for the promotion and protection of human rights has risen to prominence since the end of the Second World War.¹ Developments in Europe and elsewhere have witnessed the birth of regional mechanisms established by governments. These mechanisms are to operate as independent and impartial bodies in the quest for the realization of (at least) basic minimum human rights standards. The main objective is to complement and supplement national systems for human rights protection - with a certain added value: to offer help at the regional level to those in need, especially where remedies are not forthcoming at the national level. The regional architecture can also help to address regional concerns and entrench standards and practices which help to propel reforms at the national level and nurture a mindset conducive to the fulfilment of human rights.

This is paralleled by national institutions (such as local courts, national human rights commissions and ombudspersons) and international mechanisms particularly through the United Nations (UN). The plurality of mechanisms and actors is important, given that human rights protection interplays with the issue of power and the need for checks-and-balances to prevent abuse of power. This panoply also provides inspiration for addressing the challenge of human rights in South-east Asia comprehensively and effectively, with key implications for the region and beyond.

2. INITIATION AND PROGRESSION

South-east Asia began to converge concretely in 1967 with the establishment of a regional organization known as the Association of South-east Asian Nations (ASEAN).² Initially, there were five members: Indonesia, Malaysia, Singapore, Thailand and the Philippines. Brunei Darussalam joined later, and in the mid 1990s, the organization expanded markedly with four new members: Cambodia, Lao People's Democratic Republic (PDR), Myanmar and Vietnam. Currently, the ASEAN embodies ten South-east Asian countries. It is salutary to remember that from the 1960s till the end of the 1980s, the Indochina war was raging in South-east Asia, positioning the early members of ASEAN against the later members of ASEAN, namely Cambodia, Lao PDR and Vietnam. Myanmar had its own problems at home with a hermetic, military-based regime and conflict with democracy groups and ethnic minorities. Yet, by bringing former foes together in the 1990s, a momentous achievement from the region should be well appreciated: the advent of the 'South-east Asia 10', as the broadened ASEAN, brought peace and convergence at the inter-State level to the previously fractious region. A favourite phrase in the region is 'unity in diversity' implying a variety of cultures, religions and polities in the region under one umbrella.

The ASEAN was established principally as a political organization. It is worth bearing in mind that it did not set out to be an organization focused on human rights. Its formative instrument - the 'Bangkok Declaration' 1967 - did not mention the term 'human rights', and the term itself was viewed with

¹ For general literature, see: Steiner, Henry, Alston, Philip & Goodman, Ryan, *International Human Rights Protection in Context*, Oxford University Press, Oxford, 2008; Sheldon, Dinah L., *Regional Protection of Human Rights*, Oxford University Press, Oxford, 2010. For details of the various regional systems on human rights protection, including the European, Inter-American and African systems, see: European Parliament, *The Role of Regional Human Rights Mechanisms*. EXP5/B/DROI/2009/25 (November 2010).

²See: Siddique, Sharon & Kumar, Sree (Compilers), *The 2nd ASEAN Reader*, Institute of South-east Asian Studies, Singapore, 2003; Severino, Rodolfo C., *South-east Asia in Search of an ASEAN Community*, Institute of South-east Asian Studies, Singapore, 2006.; <http://www.aseansec.org/>

hesitation by various governments in the region.³ Many were more concerned with national security rather than genuine implementation of human rights embodying the totality of civil, political, economic, social and cultural rights. Various civil and political rights, such as freedom of expression and peaceful assembly, were viewed as a threat to the political status quo at the national level, and remnants of this mindset still prevail in the region today. It should be noted that the region is eclectic. There is the democratic country with the world's biggest Muslim population – Indonesia, and there are also a number of undemocratic countries. There are liberal strands and conservative strands coexisting in the region, plagued in the past by coups d'états in some countries and hampered more recently by a reduction of space for civil society and cloistered interpretation of religion in some parts of the region. Yet, there is also burgeoning of democracy in some parts, as now being in tested in Myanmar.

The impetus for the establishment of a regional human rights mechanism came with the 1993 World Conference on Human Rights held in Vienna. Its Declaration and Programme of Action called for the setting up of national and regional mechanisms for human rights protection worldwide. ASEAN's Foreign Ministers responded by issuing a statement committing themselves to the possibility of a regional human rights mechanism. Yet, that commitment could have remained purely rhetorical, had civil society not acted to remind governments of their commitment and had civil society not provided some options as to what that mechanism could be. The earliest civil society group to take up this challenge was the civil society Working Group for an ASEAN Human Rights Mechanism ('Working Group') formed in the mid-1990s targeted specifically to this purpose.⁴ It acted (and still acts) as a constant reminder of the need for ASEAN mechanism(s) in this regard, and at the turn of the millennium it proposed to the ASEAN governments the idea of establishing an ASEAN Human Rights Commission. It even drafted a model agreement on this matter, suggesting the basic components of a mechanism for this region. However, there was no immediate response from the authorities to that proposal.

In the meantime, at the turn of the millennium, there began annual confidence-building conferences of an informal nature between civil society organizations and governments which aimed for a cooperative approach between both sectors, and the idea of a specific or sectoral Commission on the rights of women and children then started to emerge. Auspiciously, the ASEAN governments took up the idea explicitly in 2004 when they integrated the idea of a women's and children's commission in a general plan of action for the ASEAN adopted in Vientiane. It was followed by the first human rights Declaration of its kind in the region – the ASEAN Declaration on the Rights of Migrant Workers in 2007. This was propelled further by the promulgation of the ASEAN Charter as a kind of Constitution for the region in 2007.

A seminal article in the ASEAN Charter called for the establishment of a regional human rights 'body' as follows: (Article 14)

"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. The ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers' Meeting."⁵

³*Ibid.* Muntarbhorn, Vitit, *Legal Cooperation among ASEAN Countries*, Institute of Security and International Studies, Bangkok, 1997.

⁴ *Towards an ASEAN Human Rights Mechanism*, Working Group for an ASEAN Human Rights Mechanism, Manila, 1999.

⁵ *ASEAN Charter*, ASEAN Secretariat, Jakarta, 2008; <http://www.aseansec.org/>

The aspiration to set up a mechanism at the ASEAN level on human rights can perhaps be attributed to various factors. First, there is the call for a more rules-based organization. Second, notions such as democracy and human rights are now integrated into the ASEAN setting through its Charter. Third, leadership from key democratic countries in ASEAN, such as Indonesia, Thailand and the Philippines, has been important. However, there are strands in the region which still claim that human rights are eurocentric. There may also be an element of self-protection in setting up a regional human rights mechanism based on this perception: it is preferable to be monitored regionally than from outside the region.

The Foreign ministers then set up a High Level Panel to draft the Terms of Reference (TOR) for the body. This was finalised in 2009 and the principal human rights body – the ASEAN Inter-governmental Commission on Human Rights – was formally set up in 2009. This was paralleled by the establishment of two sectoral bodies – the ASEAN Commission on the rights of women and children and the ASEAN Committee on the rights of migrant workers. The functioning of these bodies is dealt with in the next section, together with other developments encircling these entities.

At this juncture, it is worth noting that expectations for building a regional system in the ASEAN should be modest. On the one hand, it should not be forgotten that there are various regional systems which can provide key lessons. These include the systems in Europe, the Americas and Africa. It is well known that these systems are based on key instruments, including treaties, which entrench a range of rights, while setting up key institutions to protect those rights. These include, in regard to Europe, the European Convention on Human Rights 1950; in regard to the Americas, the American Declaration on the Rights and Duties of Man 1948 and the American Convention on Human Rights 1989; and in regard to Africa, the African Charter of Human and Peoples' Rights 1986. These are coupled with regional commissions and or courts which can pressure States to respect human rights. Importantly, these systems provide access to and redress for individuals where there are no remedies at the national level. For example, individual complainants now have direct access to the European Court of Human Rights, and they have access to the Inter-American Commission and the African Commission on human rights which can then cross refer cases to their regional human rights courts. The regional courts offer binding judgements which can lead to compensation and other remedies.

On the other hand, the ASEAN approach is very much step-by-step and non-confrontational. Moreover, unlike the EU, the ASEAN itself is not a supra-national organization with the power to legislate regionally to have binding force and direct effect at the local level. Indeed, policy makers are still circumspect towards any movement towards supra-national institutions and the possible impingement on national sovereignty. This implies that any steps towards a regional human rights system in ASEAN would be gradualist.

3. FORMATION AND OPERATIONALIZATION

Currently, there have emerged a general human rights Commission and two sectoral bodies on specific human rights issues in the ASEAN. In the perspective of checks-and-balances, it is important also not to forget other actors at the regional level, including the role of parliamentarians noted below, which can contribute to the promotion and protection of human rights – both actually and potentially, and these are analysed below.

3.1 ASEAN Inter-governmental Commission on Human Rights (AICHR)

Under the TOR, the AICHR is a ten-member body with one representative per member State of the ASEAN.⁶ The adjective 'inter-governmental' highlights the fact that it is differentiated from civil society and based upon establishment by ASEAN governments. There is no guarantee for independence of action (namely, independence from government influence), although the members are supposed to act impartially. Each member has a three-year term, renewable once. It has a consultative function and has no binding powers. Decision-making is by consensus. The Commission is due to meet two times a year officially, although more meetings are possible. The AICHR reports directly to the ASEAN Foreign Ministers once a year. It is also mandated to prepare a work plan and a review of its mandate is due five years' after its formation.

The mandate of the AICHR is to promote and protect human rights. The homage to regional particularities in the face of the universality of human rights is found in Article 1 of its TOR:

'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.'⁷

While the notion of 'human rights' is undefined in the TOR, there is reference to universal standards as follows:

'1.6 To uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.'⁸

In relation to the guiding Principles, the TOR provide as follows in Article 2:

- '2.1 Respect for 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;
 - b. non-interference in the internal affairs of ASEAN Member States;
 - c. respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion;
 - d. adherence to the rule of law, good governance, the principles of democracy and constitutional government;
 - e. respect for fundamental freedoms, the promotion and protection of human rights and the promotion of social justice;
 - f. upholding the Charter of the United Nations and international law including international humanitarian law, subscribed to by ASEAN member States; and
 - g. respect for different cultures, languages and religions of the peoples of ASEAN, while emphasizing their common values in the spirit of unity in diversity.

⁶[http:// www.asean.org/DOC-TOR-AHRB.pdf](http://www.asean.org/DOC-TOR-AHRB.pdf). See also: Hsien-Li, Tan, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalizing Human Rights in South-east Asia*, Cambridge University Press, Cambridge, 2011.

⁷ *Ibid.*

⁸ *Ibid.*

2.2. 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 politicization;

2.3 Recognition that the primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member State;

2.4 Pursuance of a constructive and non-confrontational approach and cooperation to enhance promotion and protection of human rights; and

2.5 Adoption of an evolutionary approach that would contribute to the development of human rights norms and standards in THE ASEAN.”⁹

Thus the TOR refer to favourite principles already found in various ASEAN instruments, including national sovereignty, non-interference in the internal affairs of member States, and a non-confrontational approach, all of which have bearing on how human rights will be protected in the region.

The functions of the Commission indicate a propensity towards the promotion of human rights rather than protection. The powers include public-awareness raising of human rights; capacity building; encouragement of accession to human rights treaties; promotion of human rights implementation; provision of advisory services; preparation of research studies; promotion of common approaches; preparation and submission of annual report to the ASEAN.

With regard to protection powers, the lesson from other parts of the globe suggests that a regional commission should have the power to receive complaints from victims where local remedies have been exhausted; the power to investigate situations; the power to monitor human rights’ implementation; and the power to undertake country visits as part of fact-finding. By contrast, none of these powers appear in the TOR of the AICHR. In the preparation of the TOR, while the possibility of such powers was voiced by various representatives of the more progressive countries, they were rejected by the majority opinion. Therefore, the current provisions of the TOR only open the door to possibly some protection powers in an implied and muted manner, including the following in Article 4:

“4.8. To engage in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN, including civil society organizations and other stakeholders, as provided for in Chapter V of the ASEAN Charter;

4.9. To consult, as may be appropriate, with other national, regional and international institutions and entities concerned with the promotion and protection of human rights;

4.10. To obtain information from ASEAN Member States on the promotion and protection of human rights.”¹⁰

Since its operationalization, the record of the AICHR indicates these developments. From the very start, non-governmental organizations (NGOs) were trying to test whether it would receive complaints of human rights violations in the region from individuals/groups affected by negative situations. From the outset, the AICHR declined to accept these complaints, viewing them as beyond its powers. It spent the initial phase of its work preparing a Work Plan and deliberated upon various internal documents concerning its operations.

⁹ *Ibid.*

¹⁰ *Ibid.*

The most prominent pre-occupation of the Commission in 2011-2012 has been to prepare a non-binding ASEAN Declaration on human rights with a view to propounding the ASEAN perception of and position on human rights. The process has not been open to the public and has been criticized by non-governmental organizations (NGOs) for being shrouded in secrecy.¹¹ There is fear that various provisions in the proposed draft Declaration will be lower than international human rights standards, and some NGOs have advocated that the ASEAN Foreign Ministers should reject the draft that may be submitted to them in the middle of 2012 - for lack of transparency. It can be surmised that the most contentious issues will concern political rights, such as freedom of expression and freedom of assembly/association, and the limitations to be imposed on the exercise of these rights.¹²

In terms of activities, apart from its periodic meetings, the AICHR has been involved in some promotion and capacity-building work, including support for conferences on various human rights issues such as statelessness, maternal health, and preparations for the ASEAN Human Rights Declaration. It has evolved various terms of reference for undertaking some work on corporate social responsibility and for elaboration of the right to peace. It is also supportive of training programmes on human rights and access to justice. Its two most recent meetings were in Jakarta (March 2012) and Jakarta (April 2012), with the next meeting projected in Bangkok (May 2012).¹³ Its most recent activities include adoption of the Guidelines on the Operations of AICHR and discussions on guidelines for engagement with stakeholders, including civil society organizations. As it has not made the documents public, access to information on its activities and mind set is thus limited.

In reality, its activities to date are a testament to the promotional angle of human rights activities rather than active protection of human rights. In future, the test is to enable the AICHR to address more concretely some aspects of human rights protection. For instance, at the outset of its work, the AICHR was asked to provide advice on the testing for HIV/AIDS. To date, it has not aired its opinion on this and the issue remains dormant in its work. The answer should not be difficult, since internationally, there is already an established universal position anchored on human rights protection, for example, the universal principle that HIV/AIDS-testing should be based on a person's informed consent and that it should safeguard the person's right to privacy and confidentiality of data. Moreover, it is important to underline the principle of non-discrimination and access to health care for those living with HIV.

The range of issues identified for its initial five-year Work Plan (currently for the period 2013-2015) also offers opportunities for more actions to protect human rights. These include: corporate social responsibility, migration, human trafficking, child soldiers, women and children in conflicts and natural disasters, juvenile justice, right to health, right to education, right to life and right to peace. With some creativity, leadership and credibility, promotional activities may also incorporate protection-oriented actions.

In relation to outside support, the TOR of the AICHR allow support in relation to the promotion rather than protection of human rights. As the AICHR's mandate will also be reviewed by the ASEAN after five years, this will present an opportunity to assess its impact and hopefully to invigorate its role in the protection of human rights substantively. This was provided as a matter of compromise between the more liberal and less liberal countries at the 2009 Cha-am Hua Hin Declaration on the Inauguration of the ASEAN Inter-governmental Commission on Human Rights (in Thailand) as follows:

¹¹ *A Commission Shrouded in Secrecy*, Solidarity for Asian Peoples' Advocacies (SAPA) Task Force on ASEAN and Human Rights and Asia Forum for Human Rights and development (FORUM-ASIA), Bangkok, 2012.

¹² Muntarbhorn, Vitit, "Towards an ASEAN Declaration of Human Rights", *Bangkok Post Newspaper*, 20 January 2012, p.11.

¹³ <http://www.aseansec.org/26769.htm>. Accessed 12/4/2012.

“7. Recognise that the TOR of the AICHR shall be reviewed every five years after its entry into force to strengthen the mandate and functions of the AICHR in order to further develop mechanisms on both the **protection and promotion** of human rights. This review and subsequent reviews shall be undertaken by the ASEAN Foreign Ministers Meeting.” (emphasis added)¹⁴

On a welcome note, although the AICHR has not met formally with the range of NGOs working on human rights to date (apart from the Working Group above which is the only human rights NGO mentioned in the ASEAN Charter), it is planning to consult a range of NGOs on the draft human rights declaration in Kuala Lumpur in June 2012.

3.2 ASEAN Commission for the Promotion and Protection of the Rights of Women and Children (ACWC)

It is worth noting that the only two international human rights treaties to which all ASEAN countries are parties are the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). As this is a common platform for ASEAN countries, there are great opportunities for cooperation and convergent programming.

The TOR of the ACWC were finalised in 2010.¹⁵ This Commission is composed of twenty representatives, half specializing in women’s rights and half in children’s rights. They are to act impartially. The term of office is three years, renewable once. This Commission is due to have two meetings a year, and it reports annually the ASEAN Ministers Meeting on Social Welfare and Development. While the structure of its mandate follows the TOR of the AICHR to a large extent, its functions are more focused in several areas. For instance, in the initial section of the TOR, there are references to participation and empowerment. In terms of standards, its remit is as follows in Article 2:

“2.5. To uphold human rights as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC), Beijing Platform for Action (BPFA), World Fit for Children, International Humanitarian Law and other international human rights instruments and regional declarations related to women’s and children’s rights to which ASEAN Member States are parties.”¹⁶

In respect of its mandate and functions, there is an invitation to be proactive in Article 5, including to promote implementation of international instruments, advocate on behalf of women and children, assist in report preparation for human rights treaties and the UN’s Universal Periodic Review, encourage data collection, capacity building and review of national laws and practices, promote measures for the prevention and elimination of all forms of violence of the rights of women and children, including the protection of victims, and support women’s and children’s participation.¹⁷

The above powers provide several avenues for the promotion and protection of rights in a targeted manner. While there are no provisions for receiving complaints, for investigations and for country visits with a view to fact-finding, the relationship with the ground realities underlined in the powers

¹⁴ <http://www.dpiap.org/>

¹⁵ <http://www.aseansec.org/documents/TOR-ACWC.pdf>

¹⁶ *Ibid.*

¹⁷ *Ibid.*

mentioned above opens the door to creative avenues, interlinking between the promotion and protection of human rights concretely.

Since its formation, it has addressed the possibility of philanthropy to assist the realization of women's rights and child rights. It met with the AICHR for the first time in 2011. Its most recent meeting was in Vientiane in February 2012, with the next meeting to be held in Jakarta in July 2012.¹⁸

It has cooperated with the UN . It has evolved its initial Work Plan (2012-2016). This is much influenced by a Joint Statement of the ACWC and the Special Representative of the UN Secretary General on Violence against Children (January 2012) underlining the following future activities on action against violence such as research, advocacy and inter-sectoral collaboration.¹⁹

On a note of coordination, the mandates of the AICHR and ACWC are due to be aligned at some stage in the future. Perhaps the preferred entry point on this front is through some activities which converge through their respective Work Plans, ensuring that the comparative advantage of each mechanism is enjoyed to the fullest and obviating the possibility of duplication.

3.3 ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW)

In 2007 ASEAN adopted a Declaration on the rights of migrant workers, mentioned above. This laid the foundation for an ASEAN Committee on this front and the TOR of the ACMW were finalized in 2007, followed by the establishment of this sectoral body. Although it predated the establishment of the AICHR and ACWC, its scope is more narrow in that its mandate is to help implement the Declaration rather than undertake the role of promotion and protection of migrant rights in the broader sense. In terms of structure, the Committee is composed of ten persons (one per country) as well as a representative from the ASEAN Secretariat. It reports to the Senior Labour Officials Meeting of ASEAN . It meets at least once a year.

The functions of the Committee are identified in the TOR and include sharing of best practices, promotion of cooperation, and working towards a regional instrument on migrant worker rights.²⁰

In reality, this Committee differs from the AICHR and ACWC in that it is a coordinating committee between ASEAN countries, staffed with officials drawn from labour-related ministries, rather than a committee geared to promote and protect rights in the sense of the AICHR and ACWC. Its initial Work Plan is directed at the following issues:

- Step up protection and promotion of the rights of migrant workers against exploitation;
- Strengthen protection and promotion of the rights of migrant workers by enhancing labour migration governance in ASEAN countries;
- Regional cooperation to fight human trafficking in ASEAN;
- Development of an ASEAN instrument on the protection and promotion of the rights of migrant workers.

Much time is currently being spent on the drafting of a more elaborate instrument on the rights of migrant workers , potentially an ASEAN Convention in this regard. The challenges posed include the fact that several ASEAN countries are uncomfortable with advocating the range of rights pertinent to

¹⁸ <http://www.asean.org/26798.htm> Accessed 12/4/2012.

¹⁹ http://srsg.violenceagainstchildren.org/story/2012-01-183_423 Accessed 12/4/2012.

²⁰ <http://www.asean.org/20768.htm>

migrant workers and their families. Even the term 'migrant workers' is problematic for some, as they prefer to use other titles such as 'foreign workers'.

3.4 Network of national human rights institutions in South-east Asia

Given that internationally, it is well established that the primary responsibility for the implementation of human rights rests with the State, a pivotal area for human rights promotion and protection lies at the national level. There are a variety of checks-and-balances which come into play on this front, including effective and accessible judiciary, people's participation, active civil society, parliamentary democracies, and effective national human rights institutions. Interestingly, four ASEAN countries (namely, Indonesia, Malaysia, Thailand and the Philippines) now have national human rights commissions which are accepted internationally as independent, and they act as promoters and protectors of human rights in the most direct sense. Myanmar recently set up its national human right commission, but this is not yet internationally accepted as independent.

Importantly, the four national human rights commissions mentioned all receive complaints from victims; monitor human rights implementation; investigate situations; carry out field visits to fact-find; and offer remedies through recommendations. Thailand's national commission also has the power to take cases to court on behalf of the victims. It is thus important to reinforce these national human rights institutions as the most accessible mechanisms in the ASEAN, fulfilling a role most directly related to human rights protection in the most immediate sense. Some of them have tried to offer a liberal approach on the interpretation of religions and the protection of minorities (for example, the Indonesian and Malaysian Commissions), even when faced with conservative strands of society.

In 2007, they issued a Declaration of Cooperation with the following elements:

- "1. The four national human rights commissions shall do whatever possible to carry out jointly, either on bilateral or multilateral basis, programmes and activities in areas of human rights identified and agreed upon at the meetings.
2. Regional Strategies for the promotion and protection of human rights shall be gradually developed within and among the four national human rights commissions including advising their respective governments to take necessary steps to establish an appropriate human rights mechanism and/or any organ in the ASEAN Charter.
3. Formalization of cooperation should be further enhanced. More specific terms of references shall continue to be discussed among the four national human rights commissions.
4. The four national human rights commissions shall meet regularly, at least once a year. Host could be rotated on alphabetical basis or as otherwise agreed upon.
5. The four national human rights commission shall welcome and be open to considering any cooperation or joint efforts with other like-minded organizations, be they governmental or non-governmental or academic institutions , to pursue their commitments to promote respect for and protection on human rights in their respective countries, in the region and in the international community."²¹

On a propitious note, they have now set up a network which opens the door to other South-east Asian countries, such as Timor Leste, which are not yet part of the ASEAN. This is the South-east Asia National Human Rights Institutions Forum (SEANF). The four commissions have also agreed on a common plan of action targeted at the following: anti-terrorism, economic, social and cultural rights, human rights

²¹See further: <http://www.aseannhriforum.org/en/about-us.html>

education, and human trafficking/migrant workers. Interestingly, the AICHR has not yet agreed to meet with these national institutions, even though the latter have sought a meeting. It is worth bearing in mind the value added of national human rights institutions, especially when the regional system is weak or nascent: they are key to the promotion and protection of human rights at the ground level and are accessible to individuals where there are complaints of human rights violations.

3.5 Civil society actors and networks

The number of civil society actors, such as NGOs, working on the issue of ASEAN and human rights has grown considerably throughout the years. While some take a low-key approach, others adopt a more assertive role. While some are linked with academic institutions, others are more grassroots-oriented. While some are more local in inputs and networking, others are more from the international field. This spread of actors is welcome and provides a caucus for rich discourse and advocacy on human rights, complemented by a multitude of human rights defenders, in the region. Yet, it is worth remembering that at the national level, the panorama for democracy and for human rights defenders in ASEAN countries varies. There is the truism that some are more democratic than others, and this has a distinct impact on the enjoyment of human rights in the region. Likewise, the fluctuating space for the civil society of a region - in a state of flux. Yet, on a surprising and positive note, a range of opportunities are at the doorsteps of Myanmar as it opens up to democracy today, including for a more open civil society.

Various developments are instructive. Since the latter part of the 1990s, there have been periodic meetings of the ASEAN People's Assembly, a network of NGO actors, supported by the ASEAN network of strategic institutions. There are now the Annual Conferences of Civil Society (initiated by the Government of Malaysia), based upon a conglomeration of civil society actors in the ASEAN.²² The network known as Solidarity for Asian Peoples' Advocacies (SAPA), linked with another NGO known as Asian Forum for Human Rights and Development (FORUM-ASIA), has also been instrumental in advocating a strong role for the ASEAN human rights commission. The two main NGOs working directly on the ASEAN human rights mechanisms are the Working Group mentioned earlier and SAPA.

On another front, there is a more academic, dialogue-based track in the form of periodic informal meetings between Asia and Europe on human rights, supported in part by European funding through the Asia-Europe Foundation based in Singapore, which also covers developments in the ASEAN. The most recent meeting was in the Czech Republic, and it addressed the key issue of human rights mechanisms in the Asia-Pacific region, including the ASEAN.²³

A key message concerning the role of civil society is that in their plurality, they act as an important check-and-balance for the promotion and protection of human rights in the region and they deserve to be well supported as part of the building of a comprehensive human rights system for the region. This is subject to the consideration that NGOs vary in terms of dependency on outside aid and they also vary in their autonomy.

²² <http://acscapf2012.org/2012> Accessed 12/4/2012.

²³ www.aseminfoboard.org

3.6 Parliamentary role?

One of the longstanding features of the ASEAN is that it is basically an inter-governmental, inter-State organization. Despite the many references to people's participation in its various instruments, there is still no people's organ in the structure of ASEAN itself. There is no ASEAN Parliament or Assembly. This invites reflection on how to 'popularize' ASEAN in the more people-centred sense both structurally and substantively. From the angle of parliamentarians drawn from the national level in ASEAN and their relations with the European Parliament, it is to be noted that there is a forum where they now meet periodically, although in a broader framework than the ASEAN: the Asia-Europe Parliamentary Partnership Meeting (ASEP). The most recent meeting was in Brussels in 2010 and it tackled primarily the issue of economic and financial crisis. The next meeting will be in Vientiane in 2012.

More directly on the ASEAN parliamentarians, a useful entry point is possibly to interlink more closely with a network of parliamentarians which already exists, even though not yet part of the formal ASEAN structure. The ASEAN Inter-Parliamentary Assembly (AIPA) now has representation from parliamentarians from all ten ASEAN countries, and it may, one day, sow the seeds and open the door to the much needed presence of a regional parliament in the ASEAN structure. It has had links with the European Parliament since the 1970s. The European Parliament also enjoys observer status at the AIPA and was represented at its most recent General Assembly in Phnom Penh in September 2011.²⁴ The links have offered opportunities, particularly with the support of European parliamentarians, for highlighting the call for democracy in Myanmar and other parts of the region lacking in democracy (particularly in the now democratic Indonesia and Timor Leste).

The AIPA has various committees which indirectly cover human rights issues.²⁵ For instance, its Committee on Social Matters addressed these issues at the 2011 General Assembly: implementation of the Millennium Development Goals (MDGs); role of parliamentarians on the protection and promotion of the rights of migrant workers in the ASEAN; and action against illicit drugs. The AIPA has also established the Meeting of Women Parliamentarians of AIPA (WAIPA) which provides an avenue to raise gender sensibility. At its meeting in 2011, it raised these issues for action: accelerating the achievements of the MDGs through the role of women parliamentarians; increasing economic opportunities for women as family income earners; improving women's role on the environment. Discussions between the AIPA and observers in 2011 encompassed these topics: cooperation between the ASEAN and Observer Countries; integrated water resource management for sustainable development; disaster management and emergency responses; and 'Towards an ASEAN Free of Land Mines and Unexploded Ordnances (UXO)'. Clearly, support from outside would be welcome on these matters and they have a humanitarian undercurrent which facilitates cooperation between continents and stakeholders. Could the AIPA be invited to take up the issue of a possible ASEAN Parliament and to set up a specific committee on human rights or an ombudsperson (potentially to receive human rights communications) in its structure to complement the other initiatives?

On a forward-looking note, the dynamic which could be propelled as the next crucial step for ASEAN is to take the quantum leap to set up formally in the ASEAN structure a regional Parliament or Assembly, and the AIPA could be a platform for this. This would help to respond to the need for checks and balances at the ASEAN level in regard to human rights protection and be a possible voice of the peoples of the region in this regard.

²⁴Report of the Thirty Second AIPA General Assembly 18-24 September 2011, Phnom Penh, Cambodia. See further: <http://www.aipasecretariat.org/>

²⁵ *Ibid.*

3.7 UN role ?

In the absence of an effective and comprehensive human rights protection system in any country or region, it is internationally accepted that the UN has a key role to play in ensuring that there is no protection gap. Thus, the work of the various UN organs and related human rights treaties come into play as key components of a global human rights protection system. In regard to key human rights treaties, there is much room for ASEAN countries to accede to the whole range of these treaties beyond the CEDAW and CRC to which they are parties. In regard to the other parts of the UN system on human rights, it is salutary that all ASEAN countries have participated in the Universal Periodic Review under the UN Human Right Council , and there is a host of recommendations from that process for follow-up at the national level. The region is also opening more doors to UN human rights monitors from the Special Procedures' system, in the form of Special Rapporteurs, to visit the region.

At the field level, there is the presence of the UN country teams which should help to mainstream more concretely human rights into the national setting. Economic, social and cultural rights are relatively easy to address, and agencies like the UN Development Programme (UNDP) have at their disposal some means to help the region. Civil and political rights are more sensitive, and various UN agencies are well-positioned to offer a protection role in this regard, particularly the Office of the UN High Commissioner for Human Rights (OHCHR) and the Office of the UN High Commissioner for Refugees (UNHCR). With regard to the OHCHR, there is a regional office covering South-east Asia based in Bangkok, and its presence acts as a catalyst for the promotion and protection of human rights in ASEAN.²⁶ For instance, it provides back-up support for the field visits of the UN Special Rapporteur on Myanmar when he visits the region. It has supported a number of seminars on the issue of ASEAN human rights mechanism. Key issues can also be relayed to headquarters in Geneva and New York from the regional office for further actions. The continuing presence of the UN in the region is thus essential to overcome any protection deficits and acts as a multilateral check-and-balance for the various happenings in the region.

3.8 Other entry points ?

One of the welcome developments in the ASEAN Charter is that human rights appear several times in this treaty as a pervasive principle. Human rights have gained legitimacy by being incorporated explicitly into the Charter. As a principle and as a rule, they permeate the whole of the ASEAN and apply to the functioning of the ASEAN as a whole, all the more so in the ASEAN's claim to be a rules-based organization. From this perspective, it is thus essential to mobilize the totality of ASEAN to enhance the respect for and implementation of human rights. Concretely, at the topmost level, the ASEAN Summits of heads of government are an important entry point for key human rights issues, while the ASEAN Foreign Ministers also act as an key intermediary on this front. Engagement with the ASEAN on human rights matters should interlink with a variety of organs in the ASEAN. The message should thus be that a comprehensive approach - integrating human rights into all ASEAN organs - needs to be fostered to promote and protect human rights. The AICHR, the ACWC ad ACMW above help as a starting point, while the totality of the ASEAN also needs to be activated.

In such context, there remains an unspoken challenge. The deliberations of those three entities are recommendatory by nature and do not bind in an adjudicative sense. There is still no ASEAN court of justice or court of human rights to incorporate a regional judicial role at the ASEAN level, offering the added value of binding judicial settlement for disputes between States and other stakeholders. Encouragingly though, there are various entry possible to catalyse on this front. The Working Group for an ASEAN Human Rights Mechanism, mentioned above, is now exploring the possibility of supporting

²⁶ OHCHR Report2010, OHCHR, Geneva, 2011

more networking between high-ranking judges from the region. This may sow the seeds for progression towards a judicial organ in ASEAN where, one day potentially, finite responses of a binding nature, including effective remedies, may be offered to those whose lives are affected by human rights transgressions.

4. AID/ASSISTANCE

Aid and assistance for the ASEAN region from Europe are longstanding, and there is increasing emphasis on partnerships rather than donor/donee relationships. The relations can be traced back at the inter-regional level to the early 1970s. The 1980 Cooperation Agreement between the two regions also opened the door to various forms of cooperation and assistance in the commercial, economic and development fields.

Europe has a variety of instruments for engaging with the region in regard to aid and assistance. The European Instrument for Democracy and Human Rights is a major channel and the engagement with civil society in the ASEAN and other regions is provided its periodic reports.²⁷ Recipients in the ASEAN region include NGOs working on a variety of issues in ASEAN, such as NGOs in the Philippines, Indonesia and Cambodia working on child rights, women's rights, and enlarging the space for civil society and human rights defenders. With regard to NGOs working directly on the ASEAN human rights mechanisms (noted earlier), funding comes primarily from Canadian sources, the Open Society Institute and some UN agencies. From information received, they are not yet recipients of EU aid. With regard to partnership between the EU and national human rights commission in the region, there are some opportunities: the Philippine National Human Rights Commission has been a partner with EU funding. Interesting also is the fact that some civil society members have shied away from EU funding because of the range of conditions to be fulfilled, thus viewing other sources as more flexible.

UN and other international agencies have throughout the years been recipients of EU funding for human rights and humanitarian work in the region, such as on assistance for refugees. OHCHR provides funding for some projects with NGOs, while to date, no funding has been provided to the AICHR and the other ASEAN mechanisms mentioned above. However, OHCHR staff have engaged with the AICHR in regard to advocacy, training and outreach.

As for the question whether aid should be given directly to recipients or whether it should go through a third party, this is a case by case situation. One criterion could be that if the record of the potential recipient is uncertain from the angle of implementation, it is best to channel the aid through an established third party until the ultimate recipient's track record is well-established. This is potentially the case with a possible grant of EU aid to the Myanmar national human rights commission which is now being considered and which will potentially be channeled through a third party.

5. EXPECTATIONS AND ORIENTATIONS

The advent of the ASEAN Charter in 2007 has raised hopes in the region for the promotion and protection of human rights. Not only does the Charter refer to human rights several times as an axiom for the region but also it acts as an anchor for the setting up of a human rights body in the region. Currently, the overarching body has been set up in the form of the AICHR and this is complemented by two sectoral bodies – the ACWC and the ACMW. Beyond the current pre-occupation with the drafting of an ASEAN Human Rights Declaration, other avenues await in terms of more concrete entrenchment of

human rights in the region, including a potential ASEAN Human Rights Convention and or specific Conventions on particular issues.

The invitation of this study is to reach out further and to respond to the quest for a regional human rights mechanism, here or elsewhere, premised on the need for checks-and-balances in the exercise of power, and the need to build an effective and accessible system for the promotion and protection of human rights from the national to the regional, complemented by the multilateral. The simple philosophy behind this approach is that human rights are and should be the business of everyone.

The expectations facing ASEAN are thus high, especially as a consequence of the Charter and the birth of the various bodies mentioned. The challenge now is to progress beyond the legitimization of human rights through those entry points - to the actualization of human rights in terms of genuine protection and implementation of human rights. To this end, various orientations invite cooperation and assistance from within the ASEAN region and beyond, including by means of bilateral and inter-regional aid, pinpointing (possibly within a five-year timeframe) these **Priorities for European partners:**

1. European Union institutions , particularly with the support of the European Instrument for Democracy and Human Rights and other forms of aid, should:
 - Help to strengthen the work of the AICHR on the implementation of its Work Plan, such as on corporate social responsibility and migration issues, targeting the future five-year review of the AICHR to fortify its protection role;
 - Support the activities of the ACWC under its Work Plan, especially to address the issue of violence against women and children;
 - Enhance the work of the ACMW to underline the rights of migrant workers in the ASEAN and ensure that the standards adopted comply with international human rights standards;
 - Engage with the ASEAN Summits and various ministerial meetings to mainstream human rights into their deliberations and actions;
 - Support the role of national human rights institutions, such as national human rights commissions, and their regional network to respond to the protection needs of the peoples of the region;
 - Assist civil society and various informal channels, including through educational institutions, in the region to reinforce their role in human rights promotion and protection;
 - Provide space for a stronger UN presence, including assistance for UN-related programming as part of direct aid , in the region to overcome any protection gaps;
 - Help to propel the trajectory towards a regional court in the ASEAN which can offer binding adjudication and effective remedies, by supporting networking between key judicial institutions and personnel in the ASEAN and possibly a future ASEAN Human Right Convention;
 - Access people directly and effectively so as to support local activities, mechanisms and processes for human rights protection, including through more networking between human rights defenders, inspired by a more people-oriented ASEAN.
2. The European Parliament , in particular as peer-to-peer support, should:
 - Include in the periodic Asia-Europe Parliamentary Partnership Meetings (ASEP) the topic of regional/sub-regional human rights mechanisms, opening the door to strengthening the mechanisms in the ASEAN region;

²⁷ See , for example, *The European Instrument for Democracy and Human Rights (EIDHR) Compendium 2007-2009*. [Http://www.ec.europa.eu/europeaid/what/human-rights/index_en.htm](http://www.ec.europa.eu/europeaid/what/human-rights/index_en.htm)

- Support the integration of human rights protection into the work of the ASEAN Inter-Parliamentary Assembly (AIPA) and advocate the setting up of an ASEAN Parliament as part of the checks and balances to protect human rights in the region, complemented by a human rights committee or ombudsman in the structure;
- Strengthen the ties between the European Parliament and AIPA on the issue of regional human rights mechanisms, with the possibility of the AIPA inviting the various ASEAN human rights mechanisms to establish links with the AIPA and to brief the AIPA periodically on their activities and developments.

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