



THE ASEAN HUMAN RIGHTS DECLARATION: A LEGAL ANALYSIS

American Bar Association Rule of Law Initiative

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Abbreviations

ACWC:	The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
AHRD:	ASEAN Human Rights Declaration
AICHR:	The ASEAN Inter-governmental Commission on Human Rights
ASEAN:	Association of Southeast Asian Nations
CAT:	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW:	Convention on the Elimination of All Forms of Discrimination against Women
CESCR:	U.N. Committee on Economic, Social and Cultural Rights
CPED:	International Convention for the Protection of All Persons from Enforced Disappearance
CRC:	Convention on the Rights of the Child
CRPD:	Convention on the Rights of Persons with Disabilities
HRC:	U.N. Human Rights Committee
ICCPR:	International Covenant on Civil and Political Rights
ICERD:	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICRMW:	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO:	International Labour Organisation
UDHR:	Universal Declaration of Human Rights
VCLT:	Vienna Convention on the Law of Treaties
VDPA:	Vienna Declaration and Programme of Action

Foreword

The Association of South-east Asian Nations (ASEAN) consists of ten countries, varying from democracies to non-democracies. It was created in 1967 and in the first decades of its work, concentrated mainly on political and security issues. This was followed later by economic issues such as the establishment of the ASEAN Free Trade Area in the 1990s. The advent of the ASEAN Charter in 2007 opened the door to integrating human rights into the ASEAN framework.

The ASEAN Intergovernmental Commission on Human Rights (AICHR) was set up pursuant to the adoption of its Terms of Reference in 2009. One of AICHR's major tasks was to help draft an instrument to offer a regional perspective on human rights. Thus, the ASEAN Human Rights Declaration (AHRD) was adopted in 2012.

The developments above help to legitimize human rights as part of the ASEAN agenda. Yet, the key challenge lies in the actualization and implementation of those rights, especially at the national level. The AHRD invites debate on how far it is consonant with international human rights standards and how it enriches or undermines those standards. For instance, the call to support people with communicable diseases, including HIV/AIDS, in Article 29(2) is welcome. By contrast, the Declaration omits to mention the right to self-determination and the right to freedom of association, while qualifying several rights by subjecting them to national law. The AHRD has to be read together with the subsequent statement from the ASEAN Heads of State and Government, propounded in Phnom Penh in 2012, which endeavoured to provide an assurance that the implementation of the AHRD will be in accordance with international standards.

The following publication sets the AHRD against the backdrop of international human rights law. It is an extremely valuable guide on the issues at stake and on the preferred interpretation and implementation of the AHRD to ensure its consonance with international law. It is thus a most timely and auspicious offering.

Needless to say, time will be the ultimate judge of the AHRD - an amicable premonition!

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Introduction

In November 2012, the ten Member States of the Association of Southeast Asian Nations (ASEAN) adopted the ASEAN Human Rights Declaration (AHRD or Declaration).¹ The AHRD marked a significant step in the establishment of a formal ASEAN human rights system, which may, like its counterparts in Africa, the Americas, and Europe, help to form a solid foundation for the development of those legal instruments and independent mechanisms required to strengthen human rights protection in the region.²

The AHRD text was the result of intense and protracted negotiations between the Member States, and reactions to it varied. Some commentators welcomed the Declaration, given the challenge of finding consensus on such a document among the different ASEAN states. Others, particularly human rights organizations, expressed disappointment about the omission of key rights and the inclusion of wording that appears to limit the enjoyment of rights in a manner inconsistent with international law. The AHRD reflects tensions between ASEAN governments' interests in preserving principles of sovereignty and non-interference and in promoting the development of a credible regional human rights system. From the point of view of international law, the AHRD contains both progressive and problematic elements.

As a non-binding declaration, the AHRD does not legally undermine ASEAN Member States' human rights obligations under United Nations (UN), International Labour Organisation (ILO) and other international treaties. Nevertheless, the AHRD represents the most recent articulation of human rights standards to which all ten ASEAN Member States have explicitly consented, and for that reason ought to carry substantial political weight and normative value. However, ASEAN governments have done little to engage with the AHRD at the national level, politically or legally. This perhaps is due to the vocal rejection of the AHRD by civil society organizations (CSOs) in the region, or reflects limited interest in applying it on the part of some ASEAN Member States. Although this does mean that Member States have not used the AHRD to actively undermine existing human rights protections, it also calls into question ASEAN's wider commitment to developing a credible regional human rights system, and the AHRD's utility as a foundation for such a system.

Thus, the AHRD's significance as a human rights text comes primarily from the fact that it represents the ASEAN Inter-governmental Commission on Human Rights' (AICHR) first attempt at human rights standard-setting. It does not create enforceable rights or protections for people within ASEAN, and does not create a body to interpret and apply the Declaration progressively, as was the case with the Inter-American Commission on Human Rights and its Declaration.

A regional human rights treaty, which members of the AICHR have already raised as a not-so-distant possibility, is another matter. A treaty, if not carefully drafted, could potentially undermine regional human rights standards by establishing lower expectations of compliance. Regional human rights treaties usually establish an independent body of experts to oversee treaty implementation and enforcement, and such lowered expectations could have an adverse impact on the development of

human rights norms in the region. Thus, while a regional treaty between ASEAN Member States would still not serve to restrict the states' obligations under international agreements to which they are parties, as a treaty interpreted and applied amongst the Member States, it could serve to weaken human rights protection in the region.

This publication provides a legal analysis of the AHRD, which is intended to assess the extent to which it is consistent with international law and ASEAN Member States' existing international legal obligations. It assumes that ASEAN will eventually develop a regional human rights convention similar to the American, African and European Conventions, and that the AHRD will form the basis of such a Convention. This is not to say that the development of a core, binding human rights treaty for ASEAN is a given, or even necessarily desirable at this stage, given the lack of independence of the ASEAN bodies that would lead development of such an instrument. Nonetheless, this publication integrates revisions and additions to the AHRD text into its analysis of each AHRD right in the hope that such constructive commentary will broaden the range of rights recognized by ASEAN and its associated human rights bodies, with an eye towards the development of a binding human rights instrument in the future.

The research underlying this publication arises out of a joint collaboration amongst lawyers of the American Bar Association Rule of Law Initiative (ABA ROLI), human rights experts from within the region and beyond, and researchers from the George Washington University Law School. Students from the Padjadjaran University in Indonesia, the University of the Philippines, and the National University of Singapore also provided valuable research support on constitutional protections and responses to the AHRD in their respective countries. This publication follows and supplements ABA ROLI's *Experts' Note on the ASEAN Human Rights Declaration* (May 2012), which aimed to serve as a resource in the drafting of the AHRD.

While this publication strives to be comprehensive, it is by no means exhaustive in its annotations and analysis. Its primary aim is to contribute to constructive, lively dialogue on how to promote an effective, responsive human rights system in ASEAN and beyond, where human rights are protected in practice as well as on paper.

This introductory chapter provides background on ASEAN's approach to human rights, explains the research methodology applied in this analysis, and includes an executive summary of the publication's main findings. The analysis proceeds with a discussion of the AHRD's General Principles and continues numerically by Article.

Precursors to the AHRD

ASEAN was first established in 1967 as a loose security entity involving Indonesia, Malaysia, Philippines, Singapore and Thailand. Faced with numerous communist insurgencies in the region and with some Member States undergoing processes of decolonization, ASEAN was intended to prevent the proliferation of communist ideology and support national development through the promotion of economic growth, regional security alliances and promotion of strong government. Consequently,

ASEAN placed a high premium on principles of sovereignty and non-interference in internal affairs, principles which arguably suited the interests of some of ASEAN's autocratic governments. ASEAN has expanded over the years to include Brunei, Cambodia, Laos, Myanmar, and Viet Nam.

It was not until the early 1990s that ASEAN as an institution began to cautiously adopt explicit human rights language. In April 1993, in preparation for the World Conference on Human Rights, a number of Asian nations including all the ASEAN Member States, adopted the Bangkok Declaration on human rights.³ The Declaration affirms the States' commitment to the UN Charter and the Universal Declaration of Human Rights (UDHR), and stresses principles such as respect for national sovereignty, non-interference in the internal affairs of States, non-confrontation, avoidance of politicization, emphasis on social and economic progress, and the right to development.⁴ Later that year, ASEAN Foreign Ministers agreed that "ASEAN should consider the establishment of an appropriate regional mechanism on human rights" to support implementation of the Vienna Declaration and Programme of Action (VDPA).⁵

At its General Assembly in September 1993, the ASEAN Inter-Parliamentary Organization (AIPO) adopted the Kuala Lumpur Declaration on Human Rights.⁶ The document states that human rights protection "should take place in the context of international cooperation based on respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states," and that "human rights have two mutually balancing aspects: those with respect to rights and freedom of the individual, and those which stipulate obligations of the individuals to society and state."⁷ The Declaration additionally recognized that "each country has inherent historical experiences, and changing economic, social, political, and cultural realities and value system[s]" can influence human rights.⁸

Both declarations reflect some resistance to claims concerning the universality of rights and the protection of individual civil and political rights, as well as an internalization of the concept of 'Asian Values'. This concept was propounded in the early 1990s by ASEAN leaders such as Prime Minister Mahathir Mohamad of Malaysia and Prime Minister Lee Kuan Yew of Singapore. Such leaders extolled the virtue of qualities such as respect for authority and communitarianism, and suggested that the emphasis placed on individual liberty in Western-style democracies did not lend itself well to the Asian cultural context. This framework lent itself to a view that Asian societies would tolerate constraints on certain individual freedoms in order to guarantee social stability and economic growth. Though the concept of 'Asian values' faded as a driving policy force in the wake of the 1997 Asian Financial Crisis, a "defensive and cautious attitude"⁹ towards human rights persists within ASEAN nearly 20 years later. It is reflected in part in the low ratification rates of core UN human rights treaties and the nature of the reservations entered against their provisions.¹⁰ It is against this background that the establishment of ASEAN human rights bodies and the AHRD must be assessed.

At the 13th ASEAN Summit in Singapore in November 2007, the ten heads of state adopted the ASEAN Charter, which established ASEAN as a formal legal entity. The Charter recognizes a number of foundational ASEAN principles, including respect for "territorial integrity and national identity" and "non-interference in the internal affairs of Member States."¹¹ However, it also calls for adherence to

democratic principles, the rule of law, and the promotion and protection of human rights.¹² The Charter stipulates that ASEAN shall establish a human rights body, which led to the creation of the ASEAN Intergovernmental Commission on Human Rights (AICHR) in 2009.

The AICHR consists of ten government-appointed representatives. It is an intergovernmental, consultative body, with no formal compliance or enforcement procedures. There is no mechanism through which states or individuals may submit complaints to the AICHR or pursue remedies for human rights violations, which differentiates it from the African, Inter-American and European regional systems.¹³ The AICHR's terms of reference provide it with a broad but vague mandate, tasking the entity with the development of an "ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights."¹⁴

The AICHR appointed a team of human rights experts from each of the ASEAN Member States to draft the AHRD. Once a final draft was produced, the AICHR entered into closed door discussions over its provisions. Despite repeated calls from civil society organizations (CSOs) to provide input on the AHRD text, it was not until September 2012 that a draft was formally circulated.¹⁵ Some individual AICHR Representatives conducted informal public consultations in their own countries, and the AICHR held two formal consultations with carefully selected CSOs in May and September 2012.¹⁶

The AHRD was adopted in November 2012 at the 21st ASEAN Summit in Phnom Penh, Cambodia. Adopted alongside the AHRD was the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration, which was designed to assuage concerns that the AHRD would weaken human rights protection in the region.¹⁷ In the Statement, ASEAN heads of state reaffirmed that the AHRD would be implemented "in accordance with our commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the VDPA, and other international human rights instruments to which ASEAN Member States are parties, as well as to relevant ASEAN declarations and instruments pertaining to human rights."¹⁸ Notably, the principle of "non-interference in the internal affairs of ASEAN Member States" is *not* included in the AHRD, in contrast to previous ASEAN human rights instruments.¹⁹

After its adoption, the AHRD drew criticism. The general principles relating to balancing human rights with corresponding duties, considering human rights within different regional and national contexts, and limiting human rights on the basis of national security and public safety and morality were cited as particularly problematic.²⁰ According to the UN Human Rights Council's Coordinating Committee on Special Procedures, "advocating a balance between human rights and duties creates much greater scope for Governments to place arbitrary, disproportionate and unnecessary restrictions on human rights."²¹ Similarly, the Committee stated that with respect to restrictions on rights on grounds of morality, public order, and national security, "special procedures mandate holders are acutely aware of the risk of these terms being used as a pretext by Governments to place arbitrary, disproportionate and unnecessary restrictions on human rights."²² Observers also criticized language in the Declaration that recognizes human rights only to the extent provided by national law.²³

Mixed responses to the AHRD have created some uncertainty over the future of ASEAN's relatively young human rights system. Because of its weaknesses, some CSOs reject any use of the AHRD so as to undermine its legitimacy.²⁴ Other observers view the AHRD as a "pragmatic compromise" among ASEAN's diverse members and argue that "the new normative standard for human rights in the region should not be underestimated."²⁵ AICHR Representative from the Philippines, Rosario Manalo, commented, "[i]t's not perfect but it's a new benchmark for ASEAN."²⁶

The subsequent sections on Methodology and Key Findings are intended to shed light on how the AHRD can be understood, and in turn how ASEAN's human rights system can move forward.

Methodology

This research aims to determine the extent to which the AHRD reflects ASEAN Member States' existing international obligations under human rights law, its consistency with general international human rights standards, and its ability to advance and expand the scope of the international human rights regime.

As a statement of commitment to a regional human rights agenda, it is important that the AHRD reflect, at minimum, its signatories' pre-existing human rights obligations. This principle drives the first part of this assessment. A second dimension of our assessment recognizes that a regional instrument has the capacity to affirm and amplify the normative influence of international human rights law within a particular social and cultural framework by laying out an aspirational "common standard of achievement"²⁷ which meets current international human rights standards. The AICHR Terms of Reference and the AHRD both profess to uphold those standards prescribed by the UN Charter, the UDHR, the VDPA, and international human rights treaties to which ASEAN members are parties.²⁸ By rigorously comparing the AHRD to these instruments, the second prong of our analysis will help to show where there are gaps in consistency and how they can be corrected. Furthermore, by referencing variances amongst states' current obligations as other regional rights instruments do,²⁹ this analysis will show the AHRD's capacity to elevate regional human rights standards above a minimum baseline.

The third element of analysis recognizes that, as a regional document, the AHRD can also advance human rights by addressing rights or principles of special relevance to the region³⁰ which may not be sufficiently accounted for in the wider international human rights regime. The AHRD drafters intended that the Declaration provide "added value beyond well-established international instruments,"³¹ and this analysis will consider how the document contributes to the progression of human rights.

An analytical framework was developed to guide analysis of each provision. For each provision, the research and analysis is divided into three sections. The first section analyzes the differences between the AHRD and the international human rights instrument it draws from, and assesses the extent to which the AHRD either expands or limits the underlying right. Where the AHRD could be strengthened

to better reflect ASEAN Member States' obligations under international human rights law, suggestions are provided for how this might be accomplished.

The second section will determine the extent to which the right enshrined in each AHRD provision is recognized across ASEAN by considering Member States' constitutional protections and treaty ratifications relating to the right, as well as other ASEAN declarations which address it. It is important to note that this analysis provides only a rough indication of the importance that Member States attach to a right, let alone the existence of an ASEAN-wide human rights standard. Ratifications of human rights treaties and the existence of constitutional rights do not necessarily correspond with *de facto* realization of such rights, both positively and negatively; indeed, domestic legislation may provide additional protections beyond those which are established by Member States' constitutions. However, when rights are consistently recognized in form and substance through widespread treaty ratification or constitutional endorsement, a strong basis to advocate for adequate regional protection of such rights in regional texts is provided. A more in-depth analysis of the legal systems of each ASEAN Member State was beyond the scope of this research, but would add considerably to an understanding of regional human rights norms. While this publication strives to be comprehensive in its approach, it is not exhaustive in its annotations and analysis on this issue, and further research on this matter is welcomed.

The final and third section provides a summary of the content and interpretation of the underlying right in international law. This is intended to serve as a reference for human rights analysts and advocates in providing input on the wording of ASEAN human rights texts and their subsequent interpretation. The section follows the framework articulated in the AICHR Terms of Reference and the AHRD, which both commit AICHR to upholding human rights standards as prescribed by the UDHR, the VDPA, and international human rights instruments to which ASEAN Member States are parties.³² The analysis considers how each right in the AHRD is reflected in the UDHR, VDPA, and regional and international human rights treaties, referring to case law where required to expand upon the right's content.

Key Findings

The AHRD includes both progressive and problematic elements. As mentioned above, it does not legally act to undermine ASEAN Member States' international treaty obligations. Article 40 of the AHRD and the Phnom Penh Statement adopted by ASEAN Heads of State alongside the Declaration furthermore require that the AHRD be interpreted in a manner consistent with the existing human rights obligations of ASEAN Member States. These elements provide grounds for reading down some of the Declaration's problematic provisions, and interpreting terms in favor of the right.

The AHRD includes a number of positive aspects:

- Highlights the importance of the rights of vulnerable and marginalised groups;³³
- Reinstates the UDHR right to property and protection against arbitrary deprivation of property which was omitted in the International Convention on Civil and Political Rights (ICCPR) and International Convention on Economic, Social and Civil Rights (ICESCR);³⁴

- Contains an expanded version of the right to an adequate standard of living which explicitly recognizes clean drinking water and sanitation, and a safe, clean and sustainable environment, as well as *adequate and affordable* housing and food, as elements of this right;³⁵
- Recognizes a need to prevent discrimination against persons with HIV/AIDS and other communicable diseases;³⁶
- Includes the right to development, while recognizing that the right to development must be exercised in a manner consistent with other human rights;³⁷
- Moves beyond the lowest common denominator as a standard for ASEAN human rights instruments, which in this case would be the UDHR, the Convention on Rights of the Child (CRC) and the Convention on the Elimination of Discrimination Against Women (CEDAW). The AHRD is largely based upon the UDHR, but elements of the ICESCR (special protection of motherhood, progressive realization of social, economic and cultural rights) and ICCPR (prohibition against double-jeopardy) are integrated into the AHRD text despite only six ASEAN Member States being party to the treaties.³⁸

The problematic elements of the AHRD include provisions that could be invoked to undermine human rights in the region, those which represent a mischaracterisation of international human rights law, and those which present an inconsistency with the international obligations of ASEAN Member States. The negative impact of such elements on human rights protection in the region could be mitigated, however, by the establishment of an independent human rights body tasked to apply and enforce the AHRD in a manner consistent with international law.

However, there are several key points of concern:

- The AHRD's general limitation clause in article 8 of its opening principles undermines its acknowledgement of the non-derogable or absolute nature of several human rights under customary law and the ICCPR.³⁹ Article 8 follows the UDHR,⁴⁰ but jurisprudence regarding rights limitations has developed since 1948 when the UDHR was adopted. International human rights instruments now tend to take a right by right approach, making the scope of permissible limitations narrower and more precise. In this context, the fact that the AHRD theoretically permits all enshrined rights to be limited "by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society"⁴¹ threatens to create inconsistency with ASEAN Member States' existing obligations. For example, freedom from slavery and torture are considered rights under customary law, and no state may permit torture or slavery to exist. However, the limitation clause could be used by Member States to justify their derogation from the established principle. Although there are few circumstances in which torture could imaginably assist to "secure" the human rights of others, it is arguably safer and legally correct to specify the absolute nature of the prohibition against torture and other non-derogable rights more generally.

- The AHRD calls for States to balance personal duties of an individual against their rights, and to take into account “national and regional contexts” in the realization of those rights. Articles 6 and 7 have their roots in previous Asian human rights declarations, and might constitute an attempt by ASEAN to infuse the AHRD with a regional flavour. Nevertheless, such language carries the risk of tying the realization of rights to unspecified “duties” or to social norms and mores which run counter to the requirements of international human rights treaties such as CEDAW and the CRC, both of which have been ratified by all ASEAN Member States.⁴² Whether these provisions will be interpreted and applied in a manner which violates international human rights norms remains to be seen, but the language raises some concerns.
- Absent from the AHRD are the right to self-determination, the right to freedom from forced labour, a clear prohibition against enforced disappearance, the freedom to manifest and change one’s religion, and the right to freedom of association, all of which various ASEAN Member States have recognized in international declarations or treaties.
- The AHRD provides that rights be regulated by law or national law. Domestic legislation is certainly an effective way of achieving human rights protections, as long as such legislation actually comports with international human rights standards. The AHRD contains no clear statement requiring this compliance or consistency, meaning that it in theory permits ASEAN Member States to, for example, “guarantee” the right to a nationality simply through compliance with domestic immigration and citizenship laws, regardless of their content, effect, and compliance with relevant international instruments.
- Additionally, the AHRD could have better incorporated the more detailed obligations of Member States under ILO and UN human rights treaties to which they are all signatories or parties, but perhaps this detail is best addressed in a future convention.

The inclusion of the right to peace in the AHRD, while novel, may not necessarily be a positive development, particularly insofar as it may shield from accountability alleged perpetrators of human rights abuse. Much depends upon how this right develops in international law, and how it is applied within the ASEAN region.

Conclusion

The AHRD provides an important foundation for the development of future binding human rights instruments in the ASEAN region, both in terms of lessons that can be learned from its drafting process as well as its substantive content.

From a process-based perspective, the drafting process for any further human rights instruments should be supported with substantial legal expertise from a team of individuals with in-depth knowledge of international human rights law, at all stages of the process. Although the AICHR’s team of experts was

present during the AHRD's initial drafting stages, they were not involved in the reformulation of the draft. Second, the process must include CSOs at all stages; such organizations bring substantial rights expertise to the table, as well as invaluable insight into the potential practical impacts of draft provisions.

From a content-based perspective, although the development of international legal texts is inevitably political and subject to negotiation, ASEAN should agree to a minimum set of human rights standards which future texts must at least meet and could conceivably surpass. This standard should be comprised of the complete international bill of human rights including the UDHR, ICCPR and the ICESCR. Additionally, explanatory notes could be provided alongside the text to allow for discussion of the meaning and interpretation of different terms, and to provide sufficient insight for human rights implementers who might look to the document for guidance.

Finally, ASEAN is fortunate in that it has decades of experience from other regional human rights systems to draw on which could serve as a model for its own. The basic components of the African, Inter-American and European regional human rights systems are:

- i) a binding human rights convention;
- ii) additional protocols to supplement the more general convention;
- iii) an independent body, established by treaty, to interpret and apply the convention; and
- iv) a range of treaty enforcement measures, including a complaint mechanism for individuals and/or states parties.

An ASEAN human rights convention must not only include a comprehensive bill of rights, but also the machinery required to establish an effective treaty enforcement mechanism. While text is an undeniably important first step, ultimately, the actual value of a human rights instrument – whether it be the AHRD or a later binding instrument – will be assessed by the role it plays in motivating concrete actions to improve human rights for the people of ASEAN.

The General Principles

The General Principles represent a problematic part of the AHRD. Although they incorporate customary human rights law principles such as universality, non-discrimination, equality, additional protection for vulnerable social groups, and state responsibility to uphold human rights, they also contain language that could be interpreted to impose unjustifiably broad limitations on rights. It is important, therefore, that the Declaration is interpreted and applied in accordance with established human rights jurisprudence which emphasizes the principle of effectiveness and the object and purpose of human rights instruments.⁴³ The European Court of Human Rights has described the principle of effectiveness as one requiring the interpretation and application the European Human Rights Convention “in a manner which renders its rights practical and effective, not theoretical and illusory,” and that the Convention “must be also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions.”⁴⁴ These interpretive principles, together with those international human rights instruments to which the ASEAN Member States are parties, require that the AHRD’s limiting and restricting clauses be read narrowly and in a manner which gives maximum effect to the rights it enshrines.

Universality, Non-discrimination, and Equality

AHRD Art. 1: All persons are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of humanity.

AHRD Art. 2: Every person is entitled to the rights and freedoms set forth herein, without distinction of any kind, such as race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth, disability or other status.

AHRD Art. 3: Every person has the right of recognition everywhere as a person before the law. Every person is equal before the law. Every person is entitled without discrimination to equal protection of the law.

AHRD Art. 4: The rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms.

The first three articles of the AHRD mirror provisions in the UDHR. The AHRD differs slightly from the UDHR, the ICCPR, and ICESCR-prohibited discrimination grounds by removing the word “colour,” replacing “sex” with “gender,” and “property” with “economic status.” The AHRD also includes age and disability as additional grounds of prohibited discrimination.⁴⁵ The efforts of LGBTQ activists to have “sexual orientation” included in this list were unsuccessful; however, the word “gender” can be interpreted to include transgendered persons, and the residuary language in Article 2 could be extended to cover other groups, including those within the LGBTQ framework.

Article 3 promulgates the right to recognition and equality before the law, borrowing its wording from articles 6 and 7 of the UDHR.

Article 4’s recognition that the rights of “vulnerable and marginalized groups are an inalienable, integral and indivisible part of human rights...” may have its roots in the 1993 Bangkok Declaration. The 1993 Declaration emphasizes “the importance of guaranteeing the human rights and fundamental freedoms of vulnerable groups such as ethnic, national, racial, religious and linguistic minorities, migrant workers, disabled persons, indigenous peoples, refugees and displaced persons.”⁴⁶ Although the AHRD’s drafters did not accept CSO suggestions that Article 4 explicitly recognize minorities, indigenous peoples, persons deprived of liberty, or LGBTQ persons as those “whose human rights have been under attack both within ASEAN and globally,”⁴⁷ read in light of the Bangkok Declaration’s language such groups would have reasonable grounds to demonstrate that they fall under the Article’s protection.

The Right to a Remedy

AHRD Art. 5: Every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law.

Article 5 is almost identical to the UDHR language on the right to a remedy.⁴⁸ The AHRD does not require signatories to provide remedies for violations of the rights recognized in the AHRD, a predictable feature for a non-binding instrument. However, in order to be consistent with Member States' existing international legal obligations, the word "law" in Article 5 must be interpreted to include human rights recognized by customary international law and human rights treaties that Member States have ratified.⁴⁹ For example, ASEAN Member States which are parties to the ICCPR, CRC, International Convention on the Elimination of Racial Discrimination (ICERD), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) have all agreed to ensure the right to a remedy for violations of the human rights contained in these conventions.⁵⁰

There is a distinction between a right inherently held by a person because they are human, and a right conferred upon a person by national law or constitutions. The ratification of an international human rights treaty does not always translate to domestic codification of the principles laid out in that treaty. As such, a narrow interpretation of Article 5 as a right to a remedy only for those rights otherwise protected by ASEAN Member States' national laws would run the risk of undermining an ASEAN resident's right to a remedy.

Any future ASEAN human rights convention should, like other regional human rights conventions, recognize the right to a remedy for violations of the rights it protects, and indeed facilitate the development of a tribunal to provide such a remedy. This is an important demonstration of states' commitment to protect and enforce the rights enshrined in a treaty which they sign, ratify and bind themselves under. A convention should also recognize the two elements of the right to a remedy: access to justice before an independent and competent tribunal, on the one hand, and substantive redress, on the other. Furthermore, it should evince a commitment to investigate, prosecute and punish gross human rights violations constituting crimes under international law.⁵¹ Finally, the convention should contain provision for an independent oversight body to monitor implementation of treaty obligations and provide a forum where individuals can seek remedies when national-level justice mechanisms fail. In the absence of such a well-resourced and independent enforcement body, a binding convention would have no more substantive impact than a non-binding declaration like the AHRD on the actual rights enjoyed by residents and citizens of ASEAN.

ASEAN Member States' International Legal and Constitutional Obligations

ASEAN Member States have a legal obligation to prevent and remedy violations of fundamental human rights (such as slavery and torture)⁵² which are established through customary law norms,⁵³ in addition to those rights which they have agreed to protect through treaty ratification. Six ASEAN Member States

have ratified the ICCPR and ICERD,⁵⁴ and CEDAW and the CRC have both been ratified by all the Member States. These conventions all require states parties to ensure the effective protection of people from discrimination and violations of their human rights through the mechanisms of law and the courts.⁵⁵ The Convention on the Rights of Persons with Disabilities (CRPD), signed by all ASEAN Member States and ratified by eight, requires states parties to make changes to their domestic legal system to protect the rights of persons with disabilities, and ensure that they have access to justice.⁵⁶

The Constitutions of Myanmar and Thailand provide a right to a remedy for violations of constitutional rights, and the Constitutions of Lao PDR, Cambodia, and Viet Nam provide a right to complain or petition against any violation of the law.⁵⁷ The Viet Nam Constitution includes a right to compensation for violations of citizens' rights.⁵⁸ The Philippine Constitution contains a right to access the courts, and the Constitution of Indonesia recognizes the right to recognition, protection, protection and certainty of the law, but not a specific right to a remedy.⁵⁹

Content and Interpretation of the Right in International Law

It is a long established principle that a right to a remedy exists for harm caused through breach of an international legal obligation.⁶⁰ The UDHR recognizes a right to a remedy for "acts violating the fundamental rights granted him by the constitution or by law."⁶¹ The VDMA widens this right to a remedy to include redress for all "human rights grievances or violations."⁶² The European Convention and Arab Charter on Human Rights include a right to a remedy for the rights enumerated in the respective conventions,⁶³ and the African Charter on Human and People's Rights and the American Convention on Human Rights acknowledge a right to a remedy for both convention-established rights and those fundamental rights recognized under domestic law.⁶⁴ States parties to these regional conventions must guarantee victims' rights to a remedy for violations of fundamental rights, whether enshrined in national law or not, by having in place administrative or judicial mechanisms for claim investigation and victim reparation.⁶⁵

In 2005, the UN General Assembly, through the adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparations, affirmed victims' right to a remedy and reparation for gross violations of international human rights law and serious violations of international humanitarian law, stressing in the preamble that the Basic Principles do not create new law but provide guidance on how states can comply with their "existing obligations under international human rights and international humanitarian law."⁶⁶

An *effective remedy* must be accessible and, once determined, enforceable.⁶⁷ It must provide the opportunity for domestic judicial or administrative body to consider the merits of a victim's claim,⁶⁸ guarantee the independence of the authority determining the remedy,⁶⁹ include mechanisms that are able to take into account the special vulnerability of certain categories of victims,⁷⁰ and provide access to the remedy without unreasonable delay.⁷¹

The exact content of an effective remedy depends largely upon the nature and circumstances of the violation. Remedies should be proportionate to and address the actual harm suffered.⁷² For example, an adequate remedy for enforced disappearance might involve locating the victim, securing his/her release from detention when possible, and ensuring payment of compensation. For undue restrictions on freedom of religion, an effective remedy might involve amending the unduly restrictive law or laws in question.

When a human rights violation constitutes a crime under national or international law, the violation must be investigated and its perpetrators prosecuted, in addition to providing reparation for victims.⁷³ The UN Basic Principles and Guidelines affirm these three elements and introduce an additional right for victims to access information about the violation.⁷⁴ The Inter-American human rights system has recognized victims' right to truth regarding violations suffered, particularly in cases of enforced disappearance.⁷⁵ Both the Inter-American Court of Human Rights and the African Commission on Human and People's Rights have held that the granting of amnesty to perpetrators of criminal violations violates victims' right to a to the investigation of the complaint, to the prosecution of the alleged perpetrators and the right to redress.⁷⁶

Victim reparations include a range of different measures designed to remedy the harm caused by the human rights violation. These may include measures to assist a victim in overcoming health, discrimination, or other problems caused by the violation; reinstatement of property or civil status; monetary compensation; recognition of the harm caused through apologies or other symbolic means; changes to laws to prevent recurrence of the violation; or the satisfaction caused by punishment of perpetrators.

The right to a remedy attaches to persons who have suffered harm as a result of a human rights violation, their immediate family or dependents, and persons who have suffered harm by intervening to assist victims.⁷⁷

Duties and Rights

AHRD Art. 6: The enjoyment of human rights and fundamental freedoms must be balanced with the performance of corresponding duties as every person has responsibilities to all other individuals, the community and the society where one lives.

It is ultimately the primary responsibility of all ASEAN Member States to promote and protect all human rights and fundamental freedoms.

Individual Duties

Article 6's use of the phrase "must be balanced" appears to subject an individual's enjoyment of his or her human rights to the performance of unspecified "corresponding duties." Such a broad reading of Article 6 would fundamentally conflict with the notion that human rights are universal and inalienable, and an integral aspect of one's humanity.⁷⁸ The principle of universality provides that all people have the same rights and is recognized in Articles 1 and 2 of the AHRD,⁷⁹ and the principle of inalienability ensures that an individual's human rights cannot be taken away. The suspension or limitation of human rights—even if permissible—cannot be presumed valid; rather, they must be justified by a compelling state interest, and put into place through law.⁸⁰

In using the term "balance" to describe the relationship between human rights and duties, the AHRD references the AICHR's Terms of Reference, which require the body to "promote human rights within the regional context" while "taking into account the *balance* between rights and responsibilities."⁸¹ A 1993 ASEAN Inter-Parliamentary Organization (AIPO) Declaration on Human Rights also contains similar language, providing that "the peoples of ASEAN recognize that human rights have two mutually balancing aspects: those with respect to rights and freedom of the individual, and those which stipulate obligations of the individuals to society and state."⁸²

A January 2012 draft of the AHRD included ten variations of Article 6 under the heading "Duties and Responsibilities," highlighting the importance that Member States attached to the inclusion of duties in the Declaration.⁸³ The closest formulation to Article 6 in this early draft read,

"The parameters of the enjoyment and exercise of human rights and fundamental freedoms is dependent on the fulfilment of duties and responsibilities towards other individuals, societies, future generations and the State. The rights of persons are inseparable from their duties. The State protects these rights and the persons fulfil their duties towards the State and society."⁸⁴

The Viet Nam Constitution, from which the above draft provision takes inspiration, provides that "[t]he rights of citizens are inseparable from citizen's duties",⁸⁵ and the Constitutions of Indonesia and Lao PDR also identify a relationship between rights and duties. The Constitution of Thailand includes a chapter on the "Duties of the Thai People" which immediately follows the chapter on fundamental rights and freedoms, but does not suggest that the grant of rights is dependent upon the performance of duties.⁸⁶

The notion of “duties” has been approached in different ways across the various international and regional human rights instruments. Rather than as a clearly defined limitation on rights or as somehow weighing against rights, duties are expressed as closely related to rights, whether expressed as “rights and responsibilities” of parents or spouses, or as a general duty to promote tolerance, non-discrimination, and social welfare. For example, the UDHR states that “[e]veryone has duties to the community” but clearly states that limitations on rights are permissible only for “securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”⁸⁷ The preambles of both the ICCPR and ICESCR recognize that the individual has “duties to other individuals and to the community to which he belongs, and is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.”⁸⁸ The CRPD, which all ASEAN Member States have at least signed, contains a similar provision.⁸⁹

The American Declaration on the Rights and Duties of Man and the African Charter on Human and Peoples’ Rights both contain lists of individual duties.⁹⁰ The list in the American Declaration was not reproduced in the later American Convention on Human Rights, which instead included a general responsibility to family, community, and mankind.⁹¹ Neither the Inter-American Court nor the Commission on Human Rights have ever invoked the duties provisions of the Convention and Declaration.

In order to allay concerns that Article 6 will be applied to unreasonably limit the application of human rights, any future ASEAN human rights texts should omit this notion of balancing rights and duties and clearly indicate that, to the extent that individuals owe each other duties, they are general duties intended to reinforce and support human rights and fundamental freedoms. Notably, the ASEAN Charter under Article 1(7) does not refer to this act of balancing, but rather to the promotion of human rights “with due regard to the rights and responsibilities of the Member States of ASEAN.” This language supports a broad construction of duties, and could serve as a useful starting point from which to review the duty provisions in future AICHR-drafted instruments.

State Duty to Respect, Protect and Fulfil

All states have an obligation to respect, protect, and fulfil human rights. *Respect* requires that state agents refrain from acting in a way that negatively affects the enjoyment of human rights. *Protection* requires the state to take proactive steps to prevent human rights abuses by private actors. *Fulfilment* demands the introduction of laws, policies, and judicial or administrative measures to realize human rights.

Even though the AHRD is a non-binding instrument, Article 6 contains an unequivocal statement of the state responsibility to “promote and protect all human rights and fundamental freedoms.” This is an improvement on early Declarations such as the UDHR and American Declaration on the Rights and Duties of Man, which make no reference to such an obligation. The AHRD may have taken inspiration

from the 1993 Bangkok Declaration, which asserts that “[s]tates have the primary responsibility for the promotion and protection of human rights through appropriate infrastructure and mechanisms.”⁹²

Under human rights treaties, the state’s obligation to guarantee economic, social, and cultural rights differs slightly from the obligation to protect civil and political rights. States have an immediate obligation to take steps to guarantee fundamental civil and political rights, whereas economic, social, and cultural rights must be guaranteed to a minimum standard initially, after which states must work progressively towards full realization of these rights.⁹³ This approach recognizes that not all states have sufficient resources to provide immediate and universal access to, for example, high-quality health and education services, but envisions that states will eventually have the capacity to do so. To that end, states are required to continuously improve enjoyment of economic, social, and cultural rights.⁹⁴ This obligation of progressive realization is reproduced in Article 33 of the AHRD.⁹⁵

An ASEAN human rights convention, as a binding treaty, would require a clear statement on signatory obligations. For example, the European Human Rights Convention provides that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined” in the convention, while the American Convention requires that states parties “undertake to respect the rights and freedoms recognized [therein] and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination,” and requires them to adopt “such legislative or other measures as may be necessary to give effect to those rights or freedoms.”⁹⁶

In order to give effect to Member States’ obligations under a regional human rights convention, as mentioned above in relation to the right to a remedy, ASEAN will also need to establish a mechanism to monitor and uphold human rights treaty obligations. In the African, American and European human rights systems, this has been done through the hearing and adjudication of individual complaints by treaty-established commissions or courts.

Universality and Regional and National Particularities

AHRD Art. 7: All human rights are universal, indivisible, interdependent and interrelated.

All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis.

At the same time, the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.

Article 7 is based on the Vienna Declaration and Program of Action, which states that

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”⁹⁷

International human rights discourse recognizes the “universal, indivisible and interdependent and interrelated” nature of human rights.⁹⁸ It accepts that economic, social, and cultural rights must be accorded equal priority to political and civil rights and that the failure to guarantee the enjoyment of one right will negatively impact the enjoyment of others.⁹⁹ The Vienna Declaration reinforces the universal nature of all human rights by making it clear that the duty of states to promote and protect human rights applies regardless of differences in their political, economic, and cultural systems. To this end, all international human rights conventions require states parties to take steps, including the alteration of domestic laws, to give effect to protected rights.¹⁰⁰ The Vienna Convention on the Law of Treaties asserts that states cannot use national law as a reason for failing to comply with their treaty obligations;¹⁰¹ nor can ‘local culture or tradition’ justify curtailing of human rights.¹⁰² CEDAW and the CRC particularly emphasize that states parties have an overriding obligation to uphold the principles of non-discrimination and equality and protect the rights of women and children even in the face of contrary traditional attitudes; to that end, states parties are obliged to adapt or eliminate laws that lead to violations of these principles.¹⁰³

In spite of this emphasis on universality in the international human rights framework, regional human rights instruments often acknowledge that local traditions, values, heritage and culture can inspire a commitment to follow international human rights precedents and strengthen regional unity. The African and European human rights systems, for example, explicitly acknowledge the importance of cultural diversity while nonetheless emphasizing the ultimate universality of human rights.¹⁰⁴ In this light, the AHRD’s requirement that the realization of human rights requires consideration of regional and national contexts does not wholly depart from other regional norms. Still, civil society organizations have

criticized this language as an attempt to revive arguments of cultural relativism that pit “Asian values” against Western individual rights, and see them as diametrically opposed.¹⁰⁵

The practical impact of Article 7 on the implementation of the AHRD depends greatly upon how it is interpreted and applied. The realization of human rights is influenced by a country or region’s political, cultural, and economic realities. Indeed, human rights tribunals have all developed doctrines or standards of review that accord some deference to local authorities (such as the European ‘margin of appreciation’ doctrine),¹⁰⁶ at least on issues where no regional or global consensus exists. Given the past prominence of the Asian values debate among the ASEAN Member States, however, civil society organizations are rightly wary of wording suggesting that rights be granted subject to national or regional particularities. When read together with the AHRD’s repeated endorsement of the UDHR, international human rights treaties to which ASEAN Member States are parties, and past practices in other regional rights systems, Article 7 does lend itself to an interpretation that recognizes diversity but does not allow it to trump universal rights.¹⁰⁷

In order to dispel any doubt regarding its commitment to universal, internationally recognized human rights, ASEAN would be wise, in a future convention, to underline the duty of states to promote and protect human rights regardless of aspects of their political, economic, and cultural systems that would otherwise serve to undermine the realization of human rights on the ground.

Limitation on Rights

AHRD Art. 8: The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others.

The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society.

Article 8 is problematic, as it fails to recognize that some human rights can never, under any circumstances, be restricted by the state. Its language is borrowed from the UDHR, which states that

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”¹⁰⁸

Since 1948, international law on derogation from treaty obligations and limitations of rights has developed significantly through the adoption of the ICCPR, ICESCR, and regional human rights conventions, as well as the work of the bodies tasked with overseeing treaty interpretation and implementation. Derogations are temporary, emergency suspensions of certain treaty obligations. Limitations are everyday restrictions on how a right is exercised or enjoyed. Limitation clauses in the ICCPR and ICESCR are designed to prevent imposing unrealistic obligations on state parties by recognizing that most human rights are not absolute, and that the public interest does in some circumstances require restrictions on individual rights. Additionally, they allow for resolution of potential conflicts between rights, such as that which exists between the right to freedom of expression and the right to privacy.¹⁰⁹

Derogations from civil and political rights protected in the ICCPR may only be made in strict accordance with the ICCPR itself.¹¹⁰ Some civil and political rights are non-derogable, meaning that there are no circumstances which justify states party restrictions on them. Non-derogable provisions in the ICCPR include those which cover the right to life; the right to freedom from torture or cruel, inhuman, or degrading treatment and punishment; the right to freedom from slavery and servitude; the right to not be imprisoned for contractual breach; the right to non-retroactive application of criminal law; the right to recognition as a person before the law; and the right to have or to adopt a religion or belief.¹¹¹ In 2001, the UN Human Rights Committee stated that several other rights have become non-derogable international legal norms, including the right of detainees to be treated with humanity, as well as prohibitions against taking of hostages, abductions, or unacknowledged detention.¹¹² The European

Convention on Human Rights recognizes the rights to life, freedom from torture, slavery, and non-retroactive application of criminal law as non-derogable, and the American and Arab human rights treaties contain a more expansive list of non-derogable rights surpassing even those recognized in the ICCPR.¹¹³

States parties are permitted to temporarily suspend derogable ICCPR rights in order to respond to officially declared “public emergenc[ies] which threaten[] the life of the nation,” as long as such derogations are limited to those necessary to address the emergency at hand, do not contravene international law, and are non-discriminatory.¹¹⁴ Such emergencies must be of an “exceptional and temporary nature,” and must cease as soon as the threat to the life of the nation has been addressed.¹¹⁵ Regional human rights conventions have adopted similar criteria for justifying derogations from convention rights, with the exception of the African Charter, which does not allow for any derogation by states parties.¹¹⁶

Emergency situations aside, the ICCPR provides that certain rights may be limited if done so by law and in specific circumstances. The rights to freedom of movement, expression, press and public access to court proceedings, manifestation of one’s religion or beliefs, and peaceful assembly and association may generally all be limited to the extent necessary to protect national security, public order or safety, public health, morals, or the rights of others.¹¹⁷ The rights to freedom of movement and peaceful assembly and association also require that the restriction be “necessary in a democratic society.”¹¹⁸ Limitations must be precisely and narrowly defined by law, be proportional to the legitimate public aim pursued by the limitation, be interpreted in favour of the right, and cannot act to destroy the right completely.¹¹⁹

The AHRD does not contain non-derogation provisions, which is consistent with the AHRD’s status as a non-binding declaration. However, the absolute nature of certain civil and political rights has become a principle of customary international law, binding upon even non-parties to the ICCPR.¹²⁰ Article 8, by allowing the enjoyment of *all* AHRD rights to be limited on grounds of national security, public order, public health, public safety, public morality, and the general welfare of the peoples in a democratic society, is inconsistent with all ASEAN Member States’ international obligations to guarantee absolutely freedom from torture, slavery and *ex post facto* laws.

The ICESCR does not specify circumstances in which individual convention rights may be derogated from or limited, except for the right to establish and participate in trade unions.¹²¹ Instead, the ICESCR provides that all convention rights may be limited by law but only “so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”¹²² During the drafting of the ICESCR, state delegates determined that the ICCPR’s permissible grounds for derogation—public order, morals, public health, and the rights of others—were not relevant to economic, social, and cultural rights.¹²³ The European Social Charter takes a different approach, recognizing limitations on the standard ICCPR grounds.¹²⁴ Subjecting all the rights in the AHRD to a broad set of limitations results in a more expansive limitation of economic, social and cultural rights than provided under the ICESCR, to which six ASEAN Member States are parties.

A future ASEAN human rights convention must clearly identify which rights are regionally perceived as important enough to be non-derogable, and clearly distinguish the conditions under which derogable rights may be suspended or limited by law. A limitation provision which applies to all enumerated rights under the AHRD would leave too much room for the possibility of state abuse, and would in addition fall below the international rights standards set by the ICCPR, ICESCR, and other regional human rights instruments. The adoption of a right-by-right approach would allow future drafters to carefully consider matters of regional importance, ensure that civil and political rights are limited in accordance with the ICCPR, and subject limitations on economic, social and cultural rights only to those to promote the general welfare in a democratic society.

Double Standards and Peoples' Participation

AHRD Art. 9: In the realisation of the human rights and freedoms contained in this Declaration, the principles of impartiality, objectivity, non-selectivity, non-discrimination, non-confrontation and avoidance of double standards and politicisation, should always be upheld.

The process of such realisation shall take into account peoples' participation, inclusivity and the need for accountability.

The meaning of Article 9 is ambiguous, and nothing of its kind appears in the UDHR. The first sentence seems to reiterate the principle of non-discrimination outlined in AHRD Article 2 by further stressing impartiality, objectivity, and non-selectivity in realizing human rights. Much of the language of this sentence first appeared in the Bangkok Declaration of 1993, which was aimed at eliminating “selectivity” and guaranteeing a “non-confrontational approach” in relation to other states and the UN when addressing human rights.¹²⁵ The Bangkok Declaration also called for the avoidance of double-standards and politicization in the implementation of human rights; this language was reproduced in U.N. General Assembly resolution 60/251 of 2006, which created the Human Rights Council.¹²⁶ The Vienna Declaration also includes the principles of objectivity and non-selectivity.¹²⁷

Much of the language of Article 9 also appears in the AICHR Terms of Reference. Article 2.2 states that a guiding principle of the Commission is “[r]espect for international human rights principles . . . impartiality, objectivity, non-selectivity, non-discrimination, and avoidance of double standards and politicisation.” The addition of non-confrontation to Article 9 reflects ASEAN’s origins as a regional security organization and the ASEAN Charter’s principles of peaceful resolution of conflict and rejection of aggression.¹²⁸

What is unclear, however, is whether the language of Article 9 is intended to address the formulation of domestic human rights law within AHRD signatory states, or the forces underlying the international human rights regime. “Avoidance of double standards” as a guiding principle for domestic incorporation would require that states avoid applying different standards of human rights protection to different individuals or groups within their territory. However, the AHRD’s drafters may have intended to stress that the same human rights standards be applied equally to all members of the international community. One commentary on the AHRD describes Article 9 as “an awkward negotiation of the competing interests of describing human rights standards while limiting the sovereignty costs of doing so.”¹²⁹ The inclusion of similar text in the UN resolution establishing the Human Rights Council demonstrates that such tension is not just of concern to the ASEAN Member States but also other nations.

The second sentence of Article 9 mentions “peoples’ participation,” with the plural “peoples” indicating the participation of groups in realizing human rights. It is unlikely that this refers to incorporating group rights into the process of realizing human rights, as Member States refused to mention indigenous rights

in the AHRD. Instead, it appears that this article was intended simply to indicate that popular participation in the process of realizing human rights is desirable, perhaps to counter criticism of the AICHR's failure to engage meaningfully with civil society in the region. Finally, the meaning of "the need for accountability" is unclear in the context of this article. Grammatically, it applies to "the process of . . . realization," but it likely simply indicates that Member States need to be held accountable for ensuring human rights in their countries, as well as the general need for transparency.

Before including this article as a general principle in a future ASEAN human rights convention, it should be more clear. If the language in the first sentence is truly directed at an external, non-ASEAN audience, then its inclusion in a regional convention is unnecessary. If it is aimed at ensuring the universal and objective application of human rights obligations to all ASEAN Member States, then it should state this fact. Alternatively, should Article 9 instead be a reiteration of the ideals of non-discrimination, impartiality, non-selectivity, and other principles of fairness in the realization of human rights within a state, then the drafters of a future convention should incorporate it into a general non-discrimination clause. If the second sentence means to emphasize the importance of broad public participation in the process of realizing the human rights and freedoms included in a convention and the need for the Member States' governments to be held accountable for their realization, then a convention should state these concepts clearly.

The Right to Life

AHRD Art. 11: Every person has an inherent right to life which shall be protected by law. No person shall be deprived of life save in accordance with law.

The first statement of Article 11, which provides for the legal protection of the “inherent right to life,” reflects the text of the UDHR and other international human rights instruments. However, the second statement that “[n]o person shall be deprived of life save in accordance with law,” differs from most international instruments, which require that deprivation of life be both lawful *and* non-arbitrary.¹³⁰ By omitting the prohibition on *arbitrary* deprivation of life which appears in the ICCPR, the AHRD leaves vague the procedural safeguards or restrictions that Member States must have in place to uphold the right to life in a meaningful way.¹³¹ Non-arbitrary application of the death penalty, for example, requires that the penalty not only be lawful but also reasonable in the circumstances of the case, protecting against unjust laws or the unreasonable application of the laws.¹³²

As mentioned above in relation to the AHRD right to a remedy, any reference to “law” should be interpreted broadly to include customary international law and human rights treaties ratified by ASEAN Member States; such an interpretation will help to ensure that national laws governing rights be consistent with a state’s international human rights obligations.¹³³

The right to life is a non-derogable right, but is also not absolute in the sense that there are limitations which attach to aspects of its implementation. In particular, the ICCPR establishes the right to be free from *arbitrary* deprivation of life, which implies that there are circumstances under which a non-arbitrary deprivation of life would not constitute a human rights violation.¹³⁴ For example, the state may legally end a person’s life in the course of legitimate law enforcement activity or in the legitimately sanctioned application of the death penalty. However, it is inconsistent with international human rights standards to place such liberal limitations on the right to life as provided for under the AHRD.¹³⁵

Any future ASEAN human rights convention should provide for more robust protection of the right to life by including a prohibition against unlawful *and* arbitrary deprivation of life, making it clear that the law governing issues related to deprivation of life must be consistent with international customary law and respective Member States’ human rights treaty obligations. It should also include procedural protections which may include a requirement that the death penalty only be applied with respect to the most serious crimes, pursuant to a final court judgment and never applied to pregnant women or minors.¹³⁶ Additionally, a future ASEAN human rights convention should not apply the limitations contained in the AHRD general principles to the right to life, but recognize the right as non-derogable.

ASEAN Member States’ International Legal and Constitutional Obligations

ASEAN Member States are obligated to protect the right to life as recognized under the UDHR provision for the right to “life, liberty and security of person,” which is widely recognized as a basis for international customary law and treaties.¹³⁷

In terms of human rights treaty obligations, six ASEAN Member States have ratified the ICCPR, which includes the inherent, non-derogable right to life and obligates parties to protect that right by law and prevent arbitrary deprivation of life.¹³⁸ The ICCPR also requires Member States that continue to impose capital punishment to limit its application to only the most serious crimes and to take necessary measures that protect defendants' dignity.¹³⁹ ASEAN Member States, with the exception of Cambodia and the Philippines, retain the death penalty for ordinary crimes, which is inconsistent with international law and the obligations of Indonesia, Thailand, Viet Nam and Lao PDR under the ICCPR.¹⁴⁰

All ASEAN Member States must protect the child's "inherent right to life," as stipulated in the CRC and are prohibited from imposing capital punishment on individuals below the age of eighteen.¹⁴¹ The CRPD, which has been ratified by eight member states, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), which has been ratified by two respectively recognize the right to life of persons with disabilities and migrant workers.¹⁴²

Importantly, the majority of ASEAN Member States—Cambodia, Indonesia, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam—protect the right to life in their national constitutions.¹⁴³ While Lao PDR does not provide specifically for the right to life, the Constitution recognizes the inviolability of Lao citizens' bodies.¹⁴⁴ Only the Indonesian constitution stipulates that the right to life is non-derogable and prohibits limitations under any circumstances. The constitutions of Malaysia, Singapore, and Myanmar allow for limitations on the right of life according to law, while the Philippines permits the death penalty only for compelling reasons involving heinous crimes.¹⁴⁵ The Cambodian constitution explicitly prohibits capital punishment.¹⁴⁶

Content and Interpretation of the Right in International Law

The right to life derives from the concept that a human being has the right to live and should not be unjustly killed by another human being, including agents of the state.¹⁴⁷ It is the "supreme" human right, without which other human rights have little meaning.¹⁴⁸ The right encompasses issues such as extrajudicial killings by state agents, imposition of the death penalty, and enforced disappearance. It also has special relevance in the contexts of law enforcement, prison and custodial settings, and health care.

The UDHR states that "[e]veryone has the right to life, liberty and security of person."¹⁴⁹ Building upon this principle, the ICCPR, CRC, CRPD and the ICRMW recognize this "inherent" right to life and require state protection of the right.¹⁵⁰ The African, Arab, American, and European regional human rights treaties also recognize this core right.¹⁵¹

The ICCPR and regional human rights conventions prohibit any derogation from the right to life, meaning that even in times of public emergency, the state cannot justify deprivation of life in a manner inconsistent with its human rights obligations.¹⁵² The UN Human Rights Committee has stated that

provisions in the ICCPR that represent customary international law, including the right not to be arbitrarily deprived of life, may not be subject to reservations.¹⁵³

Recognizing the importance of this right, international instruments impose both positive and negative obligations upon states. States must not only refrain from taking a life arbitrarily but also act to protect against the loss of life through preventive law and enforcement mechanisms.¹⁵⁴ State actions to protect the right to life may include training security forces to use deadly force only when necessary, investigating and punishing wrongful acts resulting in death, and protecting persons in state custody. Issues such as homelessness, infant mortality, and life expectancy are also relevant to the state obligation to protect the right to life.¹⁵⁵

The prohibition against arbitrary deprivation of life primarily relates to controlling and limiting the circumstances in which state authorities may use lethal force, and protecting against violent crimes committed by private citizens. It incorporates a procedural obligation to assure the right to life and to guarantee that any deprivation of life by the state occurs through a process that is clearly established by law and subject to due process.¹⁵⁶ "Arbitrary deprivation of life" includes killings committed for political reasons,¹⁵⁷ deaths as a result of torture or any other cruel, inhuman or degrading treatment,¹⁵⁸ and killings following kidnapping or forced disappearance.¹⁵⁹ Alleged state violations of the right to life must be thoroughly investigated and punished in a timely manner.¹⁶⁰

A deprivation of life resulting from the acts of law enforcement officials must comply with the principles of necessity and proportionality.¹⁶¹ The UN Code of Conduct for Law Enforcement Officials establishes that "[l]aw enforcement officials may use force only in exceptional circumstances and only to the extent required for the performance of their duty."¹⁶² In addition, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials emphasize that law enforcement officials, in carrying out their duties, should apply non-violent means before resorting to the use of force and firearms.¹⁶³

The imposition of the death penalty is not universally considered a violation of the right to life, although there is a clear trend towards its abolition and human rights treaties exist both globally and regionally that bar the use of this punishment by states parties. State policies to employ the death penalty can comply with international law if the crime is sufficiently serious, due process rights are respected, and the method of execution is not deemed cruel or inhuman treatment. Nevertheless, the ICCPR and CRC, in addition to African regional human rights instruments, stipulate at minimum a highly restrictive approach to applying the death penalty.¹⁶⁴ Additional protocols to the ICCPR and the American and European regional instruments encourage the abolition of the death penalty.¹⁶⁵

Most instruments provide that the death penalty can be imposed only for the "most serious crimes" in accordance with national law and in compliance with human rights provisions.¹⁶⁶ The imposition of such a harsh sentence must be accompanied by procedural guarantees to ensure the presumption of innocence, fair hearings by an independent tribunal, guarantees for an adequate defence, and the right to appeal.¹⁶⁷ Other requirements include accounting for whether the death penalty disproportionately

affects minorities¹⁶⁸ when applied, and exempting certain protected groups from the death penalty, such as children, the elderly, or pregnant women.¹⁶⁹

Right to Liberty and Security of Person

AHRD Art. 12: Every person has the right to personal liberty and security. No person shall be subject to arbitrary arrest, search, detention, abduction or any other form of deprivation of liberty.

Although Article 12 does not follow the UDHR and ICCPR's language relating to the "right to liberty and security of person,"¹⁷⁰ this does not necessarily mean that it limits the application of these rights in ASEAN. Article 12 adopts the language of the American Convention on Human Rights by recognizing the "right to personal liberty and security" instead of the more common "right to liberty and security of person." The Inter-American Human Rights system has interpreted "personal liberty and security" in a manner consistent with the UDHR and ICCPR's sister provisions, and relies on the American Convention's prohibitions against torture and inhuman treatment to define the right to security of person.¹⁷¹ Additionally, the AHRD's endorsement of all UDHR rights confirms that wording in this first sentence of Article 12 should not act to limit the rights' application.¹⁷²

However, the AHRD does omit the ICCPR prohibition on unlawful deprivation of liberty, which states that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."¹⁷³ This places an important positive obligation on states to define by law the conditions under which an individual may be deprived of his or her liberty.

Additionally, the AHRD lacks procedural protections designed to prevent unlawful or arbitrary arrest or detention, such as the right to be informed of the reasons for one's arrest, the right to challenge the legality of one's detention before the courts, the right to claim compensation from the state for unlawful detention, and—in the case of criminal charges—the right to a trial within a reasonable time and the right to be considered for bail.¹⁷⁴

The AHRD also subjects liberty and security of person to the limitations clauses in its general principles.¹⁷⁵ The UN Human Rights Committee and the UN Working Group on Arbitrary Detention have stated that there are no circumstances that would justify derogation from the right to freedom from arbitrary detention, *incommunicado* detention, abduction, and the right to challenge the legality of one's detention in court.¹⁷⁶ Any application of the general principles to allow arbitrary detention on grounds of national security, for example, is thus likely to be inconsistent with ASEAN Member States international human rights obligations.

A future ASEAN human rights convention should rephrase the right to include freedom from *unlawful* as well as arbitrary deprivation of liberty, imposing a positive obligation on Member States to put in place legislation governing arrest and detention. Incorporation of procedural rights allowing individuals to challenge and seek remedy for wrongful arrest and detention would ensure that a convention more accurately describes the scope of the state obligation to guard against unlawful and arbitrary arrest or detention.

Reportedly, the AHRD's drafting body inserted language regarding "abduction or *any other form of [arbitrary] deprivation of liberty*" as a compromise to offer protection against enforced disappearance

without explicitly using the term.¹⁷⁷ Enforced disappearance is a distinct human rights violation that cannot be equated with arbitrary detention and abduction,¹⁷⁸ although these violations may be subsumed by it. Any future convention should include an explicit right to freedom from enforced disappearance and take associated steps associated with its prevention, including state obligations to allow detainees to communicate with their families and to maintain registers of detainees.¹⁷⁹

ASEAN Member States' International Legal and Constitutional Obligations

Six ASEAN Member States have ratified the ICCPR, which guarantees the right to liberty and security of persons within their borders.¹⁸⁰ Five other core human rights treaties recognize and protect the right to liberty and security of person: the ICERD, CRC, CRPD, ICRMW, and the International Convention for the Protection of All Persons from Enforced Disappearance (CPED).¹⁸¹ Each ASEAN member state has ratified at least one of these treaties.¹⁸²

Although only one ASEAN member state has ratified the CPED,¹⁸³ the 1993 Declaration on the Protection of All Persons from Enforced Disappearance which the General Assembly adopted by consensus provides that States shall “take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction” .¹⁸⁴

Eight Member States' constitutions reinforce the international obligation to uphold liberty and security of person. With the exceptions of Brunei Darussalam and Indonesia, ASEAN Member States recognize a constitutional right to be protected against, at minimum, unlawful arrest and detention.¹⁸⁵ National constitutions protect procedural rights designed to protect against wrongful arrest and detention to varying extents. For example, only Malaysia and Singapore recognize the right to be informed about the reasons for one's arrest,¹⁸⁶ and only four member state constitutions include the right to challenge the legality of one's detention and/or be brought before a judge within a certain period of time.¹⁸⁷

Content and Interpretation of the Right in International Law

The UDHR includes the right to liberty and security in two articles. It first provides that “[e]veryone has the right to life, liberty and security of person,” and second that “no one shall be subjected to arbitrary arrest, detention or exile.”¹⁸⁸ The ICCPR combines these into a single provision.¹⁸⁹ The ICERD recognizes the right to security of person against violence or bodily harm in the context of eliminating racial discrimination,¹⁹⁰ and the CRC, CRPD, and ICRMW provide additional protections related to the security of person and liberty of children, persons with disabilities, and migrant workers. For example, the CRC provides that children's imprisonment is to be “a measure of last resort” and “for the shortest time possible,” the CPRD notes that having a disability cannot in itself justify deprivation of liberty, and the ICRMW establishes that migrant workers have rights to “protection against violence, physical injury, threats and intimidation” and consular assistance when detained.¹⁹¹

“Liberty of person” concerns freedom from confinement of the body, and “security of person” concerns freedom from bodily injury for both detained and non-detained persons. Liberty of person is a key right, as detention is often the precursor or enabler to other violations, such as torture or extra-judicial

killing.¹⁹² Although the right to liberty is not absolute, any type of deprivation of liberty, including police, immigration, psychiatric or prison detention, must be both lawful and non-arbitrary.¹⁹³

Arbitrary and unlawful detentions are not the same thing. An arrest or detention is unlawful if it is not based on grounds and carried out in accordance with procedures that are clearly established in domestic law.¹⁹⁴ An arrest or detention, even if in accordance with domestic law, can be arbitrary if not reasonable or necessary given the circumstances of the case. The UN Human Rights Committee has stated that “arbitrariness” involves “the inappropriateness, injustice, and lack of predictability” of the detention.¹⁹⁵

Procedural rights designed to prevent unlawful or arbitrary arrest or detention include a right to be immediately informed about the reasons for one’s arrest, to be promptly informed of any charges laid, and a right to a substantive and real review of grounds justifying detention and procedures through which a person was detained.¹⁹⁶ State suspension of the right to challenge the legality of one’s detention violates the right to liberty and security of person.¹⁹⁷ If an individual’s detention is found to be unlawful, then he or she is entitled to compensation.¹⁹⁸

Persons detained on criminal charges are entitled to a trial within a reasonable time and to release pending trial, if granting bail is in the public interest. An individual’s continued pre-trial detention can only be justified if there are clear public interest grounds, such as flight risk or danger to the community.¹⁹⁹ The “reasonableness” of the length of legal proceedings will depend on the circumstances of each case, but both the Inter-American and European human rights courts have agreed that the complexity of the case, procedural actions taken by the accused, and the diligence of the investigating and prosecuting authorities must be taken into account.²⁰⁰

Enforced disappearance is a distinct human rights violation that involves:

- i) deprivation of liberty in any form,
- ii) by the state or persons acting with the state’s authorization, support or acquiescence and accompanied by,
- iii) a refusal to acknowledge the victim’s detention or provide information about his or her whereabouts or fate,
- iv) which places a person outside the protection of the law.²⁰¹

The CPED outlines steps that states parties must take to prevent detention from leading to enforced disappearance, such as maintaining registers of prisoners, and allowing detainees to communicate with their families. The European and Inter-American human rights courts have both characterized enforced disappearance as a violation of the right to freedom from torture and the right to life.²⁰²

Prohibition of Slavery, Servitude, Smuggling, and Trafficking

AHRD Art. 13: No person shall be held in servitude or slavery in any of its forms, or be subject to human smuggling or trafficking in persons, including for the purpose of trafficking in human organs.

The AHRD's extension of the UDHR's right to freedom from servitude and slavery to include a prohibition against trafficking in persons and human organs is commendable;²⁰³ it expands upon the obligation imposed upon states by African, European and Arab regional human rights to prevent and prosecute trafficking in persons.²⁰⁴ Although trafficking is often linked to the imposition of forced labor, however, there are many circumstances constituting forced labor which do not qualify as human trafficking. Although the inclusion of trafficking in the AHRD as a prohibited human rights violation is an important first step, it does not remedy the failure to recognize the broader right to freedom from forced labor.

Freedom from forced labor was included in an earlier draft of Article 13;²⁰⁵ however, it was omitted from the final document on the grounds that AICHR representatives viewed servitude and forced labor as equivalent violations, and intended for Article 13 to prohibit both. However, "forced labor" is more clearly defined in international law than "servitude," and inclusion of forced labor in this AHRD provision would have reflected the existing legal obligations of ASEAN Member States as members of the International Labour Organization (ILO) and as signatories to the ILO Conventions on Forced and Child Labour.²⁰⁶ Article 27 of the AHRD does recognize the right to free choice of employment and just conditions of work, but the concept of forced labor in the ILO Conventions encompasses a wider range of violations than those envisaged in article 13 and 27 of the AHRD. For example, situations where a worker is not able to terminate a contract with reasonable notice, or where workers who are employed voluntarily are effectively coerced to work overtime, may constitute forced labor.

The AHRD could have contained a clearer statement regarding the absolute nature of the right to freedom from slavery and servitude.²⁰⁷ There are no circumstances under which a state can justify permitting conditions of slavery or servitude, and yet the application of the AHRD general principles to Article 13 could at least theoretically lead states to claim that they may restrict enjoyment of freedom from slavery and servitude in the name of, for example, national security.²⁰⁸

The AHRD's recognition of a right not to be subject to human smuggling is unique. However, it is debatable whether the creation of such a right is appropriate or provides any additional protection to migrants. Unlike trafficking, in which the victim is coerced or deceived into undertaking some form of travel or activity against his or her will, smuggling is undertaken with the migrant's consent. Smuggling also does not necessarily involve exploitation, although the irregular nature of the migration renders smuggled migrants more vulnerable to exploitation. For many asylum seekers, being smuggled out of their country into another is the only way in which they can escape persecution. It is hard to imagine circumstances falling short of trafficking in which an individual would insist upon his or her right not to be smuggled.

A future ASEAN human rights convention should disallow slavery and servitude unconditionally, as well as include an obligation to prohibit and eliminate forced labor consistent with international law. The right to freedom from smuggling should be removed, as this right does not exist in international law, nor does it make sense to create one.

ASEAN Member States' International Legal and Constitutional Obligations

Slavery and Servitude

All ASEAN Member States must prohibit slavery, as this is a customary international legal obligation binding all states.²⁰⁹ Slavery is prohibited in the constitutions of five ASEAN Member States, whereas the other five make no reference to slavery at all.²¹⁰

Forced Labor

All ASEAN Member States except Brunei Darussalam are party to the 1930 ILO Forced Labour Convention (No. 29), under which signatories commit to “suppress the use of forced or compulsory labour.”²¹¹ All Member States have ratified the 1999 ILO Worst Forms of Child Labour Convention (No. 182), and four Member States have adopted the 1957 ILO Abolition of Forced Labour Convention (No. 105).²¹² Singapore and Malaysia withdrew from the 1957 Convention over disagreement with the ILO view that compulsory prison labor could constitute forced labor.²¹³ As members of ILO, all ASEAN Member States have subscribed to the 1944 Declaration of Philadelphia which, as part of the ILO Constitution, recognizes that “labour is not a commodity,”²¹⁴ and the 1998 Declaration on Fundamental Principles and Rights at Work, which states that

“...all [ILO] Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the [ILO] to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.”²¹⁵

Six ASEAN Member States have ratified the ICCPR, which also prohibits forced labor.²¹⁶

On the basis of the widespread ratification of the ILO conventions and the recognition of the right to freedom from forced labor in international human rights instruments, the ILO believes that the prohibition of the use of forced or compulsory labor constitutes “a peremptory norm of international law on human rights . . . of an absolutely binding nature from which no exception is permitted.”²¹⁷

Malaysia, Myanmar, Singapore, and Thailand prohibit forced labor in their constitutions, and the Philippines Constitution provides a right to freedom from “involuntary servitude.”²¹⁸ The Constitution of

Indonesia recognizes the right of all citizens to work and earn a humane livelihood, which could be interpreted to prohibit forced labor for Indonesian citizens.²¹⁹ Only the Constitution of Myanmar prohibits trafficking in persons.²²⁰ ASEAN Member States' widespread ratification of the ILO Forced and Child Labour Conventions and the constitutional prohibitions in six ASEAN Member States is a strong indication of a regional consensus on the impermissibility of forced labor. As such, it would have made sense for the AHRD's drafters to explicitly include forced labor language in the document.

Trafficking and Smuggling in Persons

All ASEAN Member States have ratified the UN Convention against Transnational Organized Crime, and eight of the ten Member States have committed to prosecute traffickers and protect victims under the Convention's Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol).²²¹ Under the CRC, ASEAN Member States must take measures to prevent trafficking in children.²²² Only five ASEAN Member States have ratified the Transnational Organized Crime Convention Protocol against the Smuggling of Migrants by Land, Sea and Air.²²³

In 2004, the ASEAN heads of state and government adopted the ASEAN Declaration against Trafficking in Persons, Particularly Women and Children,²²⁴ followed by the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers in 2007.²²⁵ In these Declarations, ASEAN Member States commit to prevent trafficking and smuggling, but only so far as already provided for in their domestic laws.²²⁶ The ASEAN Senior Officials Meeting on Transnational Crime is currently leading the drafting of a convention on the prevention of human trafficking, which is due for adoption in 2015.²²⁷ Member States are also working to finalize the text of a binding instrument on migrant workers' rights.²²⁸

Content and Interpretation of the Right in International Law

Slavery and Servitude

Slavery is defined in the 1926 Slavery Convention as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."²²⁹ Servitude is not clearly defined in international law, but it does differ from slavery as it does not involve any claim of ownership over a person. The Special Rapporteur on Contemporary Forms of Slavery has stated that servitude is similar to slavery in that "the victim is economically exploited, totally dependent on other individuals and cannot end the relationship at his or her own volition."²³⁰ An early draft of the UN Protocol on Trafficking in Persons defined servitude as "the status or dependency of a person who is compelled by another person to render any service and who reasonably believes that he or she had no reasonable alternative but to perform the service."²³¹ The UDHR, ICCPR, the UN Slavery Conventions of 1926 and 1956, and the European, American, Arab, and African regional human rights instruments all prohibit slavery and servitude.²³²

Forced Labor

ILO Convention No. 29 defines forced labor as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."²³³ Forced labor is distinguished from slavery in that it omits the element of ownership; however, like

slavery, there is a degree of limitation on personal liberty which may be violently imposed.²³⁴ The three elements of forced labor are understood broadly. For example, “all work or service” means that the convention extends protection to all workers, including those in the informal economy. A “penalty” could include a loss of rights or privileges, physical violence or restraint, death threats addressed to the victim or relatives, threats to denounce victims working illegally to the police or immigration authorities, or economic penalties. “Voluntary” refers to an employment undertaken with the free and informed consent of the worker, and the freedom to terminate an employment relationship.²³⁵ Compulsory military service, normal civic obligations, work or service exacted from any person as a consequence of a conviction in a court of law, any work or service exacted in cases of emergency, and minor communal services are not considered forced labor under the 1930 ILO Convention.²³⁶

The ILO Abolition of Forced Labour Convention, 1957 (No. 105) was designed to supplement but not revise or replace the 1930 convention. The 1957 convention prohibits forced or compulsory labor “as a means of political coercion or education or as a punishment for holding or expressing political views...as a punishment for having participated in strikes...[or] as a means of racial, social, national or religious discrimination,” linking forced labor to the human rights principle of non-discrimination²³⁷ Complementing the ILO conventions, a number of core UN and regional human rights conventions also forbid forced labor.²³⁸

Trafficking and Smuggling in Persons

The internationally-recognized definitions of trafficking and smuggling are contained in two supplementary treaties to the UN Convention against Transnational Organized Crime.²³⁹ Of the core UN human rights treaties, only the CRC and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography contain express prohibitions against trafficking.²⁴⁰

Trafficking involves three elements:

- i) an act of recruiting, transporting, harboring, or receiving a potential victim;
- ii) the use of threats, payments, abuse of power, or deception; and
- iii) an intention to exploit the victim.

Exploitation includes, at minimum, “sexual exploitation, forced labour, slavery or practices similar to slavery, servitude or the removal of organs.”²⁴¹ Victim consent to the type of exploitation experienced is irrelevant if coercion, force or deceit was used in recruiting, transporting, harboring or receiving a victim.²⁴² With children, there is no need to establish that there was coercion of the victim. Trafficking of children occurs when there is any recruitment, transport or receipt of a child with intent to exploit.²⁴³

Smuggling of persons occurs when a smuggler receives a material benefit related to migration and the migrants illegally cross an international border.²⁴⁴ Due to their irregular status, smuggled persons are vulnerable to falling victim to trafficking, servitude, or forced labor. However, as smuggling most often involves voluntary migration, there is no *human right* to not be smuggled, although the Optional Protocol does impose obligations on state signatories to protect smuggled migrants against

exploitation.²⁴⁵ Trafficking, on the other hand, involves an element of coercion or deception which, in situations involving migration, renders the migration involuntary.

Prohibition against Torture

AHRD Art. 14: No person shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

The AHRD wording of the prohibition against torture or cruel, inhuman, or degrading treatment or punishment mirrors that of the UDHR and the ICCPR. However, it is concerning that the prohibition against torture may be subject to the AHRD's general limitations clause.²⁴⁶ International human rights law does not allow the state, under any circumstances, to place limitations on the right to freedom from torture. Indeed, the European Court of Human Rights, the Inter-American Court of Human Rights, and the International Criminal Tribunal for the Former Yugoslavia have all held that the prohibition of torture is an international *jus cogens* norm.²⁴⁷ However, though a January 2012 draft of the AHRD recognized that the freedom from torture was a non-derogable right and enshrined Member States' non-refoulement obligations, these provisions were omitted from the final version of the AHRD. These principles should nonetheless be seen as implicit in the general prohibition against torture and cruel, inhuman or degrading treatment or punishment.²⁴⁸

A future ASEAN human rights convention should explicitly recognize the non-derogable, absolute nature of the right to freedom from torture. The right could be further bolstered by including a prohibition on deportation of persons to countries where they are likely to suffer torture or inhuman treatment (the right to non-refoulement). Additionally, the convention should also contain a clear statement of Member States' obligation to investigate suspected acts of torture, to punish those found guilty and to take steps to prevent torture. These obligations derive from CAT, which states that "[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."²⁴⁹

ASEAN Member States' International Legal and Constitutional Obligations

The right to freedom from torture, cruel, inhuman, or degrading treatment or punishment, like the prohibition against slavery, is a *jus cogens* norm under customary international law.²⁵⁰ All ASEAN Member States have an international legal obligation to respect, protect, and fulfil the right to freedom from torture, regardless of whether they have ratified the human rights treaties that explicitly prohibit torture.

Five international human rights treaties—the ICCPR, CAT, CRC, ICRMW, and CRPD— explicitly protect the right to freedom from torture.²⁵¹ Only the CRC enjoys full ratification of all ten ASEAN Member States, followed by CRPD with eight, ICCPR with six, CAT with five, and ICRMW with two.²⁵²

Three ASEAN Member States have constitutions that prohibit torture and cruel, inhumane and degrading treatment or punishment. Only the Constitution of Indonesia recognizes this as a non-derogable right.²⁵³ The right to freedom from cruel, inhumane, and degrading treatment or punishment

is expressed in three other member state constitutions as either a guarantee against physical abuse and protection of citizens' dignity,²⁵⁴ or as a right to physical inviolability.²⁵⁵

Content and Interpretation of the Right in International Law

Torture is defined in the CAT as the:

- i) intentional infliction of
- ii) severe physical or mental pain or suffering,
- iii) either directly by or with the indirect involvement or acquiescence of a public official or any other person acting in an official capacity,
- iv) for a specific purpose, such as to obtain information.²⁵⁶

The CAT does not prevent regional human rights systems or national legislation from adopting a broader definition of torture.²⁵⁷

While it does clearly define torture, international law does not provide a precise definition of cruel, inhuman or degrading treatment or punishment. The UN Human Rights Committee has stated that whether an act constitutes torture, cruel, inhuman, or degrading treatment will depend upon "the nature, purpose and severity of the treatment applied."²⁵⁸ Case law from the UN and regional human rights systems has provided numerous examples of treatment or punishment that may be cruel, inhuman, or degrading. Freedom from torture or cruel, inhuman, or degrading treatment also includes freedom from medical or scientific experimentation without consent.²⁵⁹

The prohibition against torture and cruel, inhuman, or degrading treatment is absolute and is not subject to derogation, even in times war or threat of war, internal political instability, or any other public emergency.²⁶⁰ An order from an officer or other public authority may not be used as a defense against a charge of torture.²⁶¹

States must criminalize acts of torture, provide a range of legislative, administrative, and judicial measures to prevent and punish acts of torture and cruel, inhuman, and degrading treatment,²⁶² and ensure victims' access to effective remedies.²⁶³ States must also prohibit the admission of evidence obtained through torture in courts.²⁶⁴ Furthermore, states may not grant amnesty to those who perpetrate torture.²⁶⁵ Lastly, states have a non-refoulement obligation, under which they may not return or extradite a person to another country where there is a significant danger that he or she will be subjected to torture.²⁶⁶

States should pay particular attention to groups that are especially vulnerable to the harmful effects of torture. Certain prison conditions have been determined to amount to torture, including overcrowding²⁶⁷ and prolonged solitary confinement.²⁶⁸ To this end, states should cease practices of solitary confinement or incommunicado detention, and should create special regulations in domestic law for the treatment of detained people due to their vulnerability to acts of torture.²⁶⁹ The CRPD requires state parties to prevent torture and ill-treatment of persons with disabilities on an equal basis

with others.²⁷⁰ States should also give special consideration to the vulnerability of children, patients in medical institutions, women, and migrant workers to torture and ill-treatment.²⁷¹ Specifically, the Committee against Torture has recognized rape and gender-based violence as constituting torture in some circumstances.²⁷²

Freedom of Movement

AHRD Art. 15: Every person has the right to freedom of movement and residence within the borders of each State. Every person has the right to leave any country including his or her own, and to return to his or her country.

The AHRD mirrors the UDHR right to freedom of movement in providing for a more expansive interpretation than that which is provided under the ICCPR. The ICCPR limits the right to freedom of movement and abode within a state to “everyone lawfully within the territory,” whereas the UDHR grants this right to all people regardless of their legal status.

This right could be further strengthened in an ASEAN human rights convention by including additional protection against arbitrary, unlawful and collective expulsion from a country for both nationals and non-nationals. This would require that Member States establish predictable, transparent and fair legal procedures for determining whether an individual can stay within a country or not.

ASEAN Member States’ International Legal and Constitutional Obligations

Six ASEAN Member States have ratified the ICCPR. Therefore, they have binding international legal obligations to guarantee the right to freedom of movement of persons legally within their borders and to protect against the arbitrary expulsion of aliens.²⁷³ The ICERD, CRC, CRPD, and ICRMW also recognize and protect the right to freedom of movement.²⁷⁴ All ASEAN Member States have ratified at least two of these conventions, with the exception of Brunei Darussalam, which has ratified the CRC but as yet has only signed the CRPD.

The right to leave one’s country of origin in order to escape persecution and seek asylum in another country is a principle of customary international law that applies to all nations,²⁷⁵ regardless of whether they are signatory to the 1951 Convention and Protocol Relating to the Status of Refugees.²⁷⁶

All ASEAN Member States, except Brunei Darussalam, recognize a constitutional right to freedom of movement within the country.²⁷⁷ Indonesia, the Philippines, and Thailand extend the right to freedom of movement and residence within the state to all persons. In Cambodia, Lao PDR, Myanmar, Malaysia, Singapore, and Viet Nam, the right is held exclusively by citizens. Freedom to leave one’s country and return is recognized for all persons under the Indonesian constitution, and for citizens only constitutions of Cambodia, Malaysia, Thailand, Singapore and Viet Nam.²⁷⁸

Content and Interpretation of the Right in International Law

The right to freedom of movement is comprised of:

- i. the right to move freely and choose the location of one’s residence within the state (under ICCPR, this is restricted to those lawfully within the state’s territory);
- ii. the right to leave any country, including one’s own;

- iii. the right to return to one's own country; and
- iv. protection from arbitrary and unlawful expulsion for aliens.²⁷⁹

The right to move freely within a state relates to the whole territory of a state and cannot be contingent upon permission from, for example, a male relative or the state authorities.²⁸⁰ Arbitrary or unlawful house arrest, exile, or unreasonable prohibition on travelling to a particular region or town constitutes a breach of the right to freedom of movement.²⁸¹ The right to freedom of movement and choice of residence within a country is particularly important for internally displaced persons to ensure that they have the freedom to choose to return to their place of origin, or resettle in another part of the country.

The rights to leave a country and return to one's own encompass the right to travel documents. A refusal to issue a passport or travel documents or preventing an individual from leaving or returning to his or her own country can constitute a violation of the right to freedom of movement.²⁸² The UN Human Rights Committee has stated that the right to return to one's country as laid out under ICCPR is not one held exclusively by citizens, but also by "an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien."²⁸³

A state can only restrict freedom of movement if it is done by law, and only to the extent necessary for protecting national security, public order, public health or morals, or the rights and freedoms of others.²⁸⁴ Limitations on this right must be consistent with other civil political rights, be transparent and accessible, and not act to "impair the essence of the right [to freedom of movement], or reverse the relation between right and restriction, between norm and exception."²⁸⁵ The right to freedom of movement is derogable and can thus be suspended or limited on a temporary basis and only so far as necessary to address a "public emergency which threatens the life of the nation."²⁸⁶

The right to freedom of movement is recognized in the Arab, European, African, and Inter-American regional human rights charters in largely the same form as in the ICCPR, with an additional prohibition against collective expulsion of aliens.²⁸⁷

Right to Asylum

AHRD Art. 16: Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements.

The right to asylum in the AHRD is most similar to that enumerated in the 1948 American Declaration on the Rights and Duties of Man.²⁸⁸

The phrase “applicable international agreements” most broadly refers to the UDHR, the Vienna Declaration, and the Asian-African Legal Consultative Organization (AALCO) Bangkok Principles on the Status and Treatment of Refugees, as only two ASEAN Member States have acceded to the 1951 Refugee Convention.²⁸⁹ The UDHR, Vienna Declaration, and Bangkok Principles affirm the fundamental right to seek and enjoy asylum from persecution in another state and uphold refugees’ right to return to their country of origin.²⁹⁰ The Bangkok Principles additionally recognize the customary legal principle of non-refoulement, or the right not to be returned to a territory where one’s life, physical integrity or liberty is threatened.²⁹¹

The reference to applicable international agreements may anticipate that ASEAN will draft a specific asylum treaty in the future. At present, however, no ASEAN instruments exist to elaborate further on the right to asylum or to clarify the extent to which refugees and asylum-seekers are entitled to other rights in the destination state.

For the AHRD to accurately reflect ASEAN Member States’ existing international legal obligations with regards to the right to asylum, the phrase “applicable international agreements” must be interpreted expansively to include customary international law and particularly the right to non-refoulement. An early draft version of the AHRD did contain a right to non-refoulement, but it was removed from the final adopted text.²⁹²

The drafters of a future ASEAN human rights convention should strengthen the AHRD right to asylum by either removing the reference to “national law and applicable international agreements,” or by replacing this with the phrase “*national and applicable international law.*” This modification would require national asylum procedures to be consistent with both treaty and customary law.

Additionally, a convention should explicitly recognize the principle of non-refoulement, specify the grounds upon which asylum may be sought, and articulate other rights held by refugees and asylum-seekers.²⁹³ Finally, ASEAN Member States may consider the adoption of an exclusion clause which would prevent those persons seriously suspected of having committed an international crime from being granted refugee protection.

ASEAN Member States' International Legal and Constitutional Obligations

The right to non-refoulement, discussed more in depth below, is a principle of customary international law, binding all States, whether or not they have ratified the 1951 Refugee Convention. The right to non-refoulement is also a state obligation that arises as part of the duty to prevent torture and other cruel, inhuman or degrading treatment.²⁹⁴ Six ASEAN Member States have ratified the CAT, which prohibits expulsion, return or extradition of persons to a country where they are likely to be subjected to torture.²⁹⁵

An individual's right to leave his or her country of origin in order to seek asylum is likewise a principle of customary international law. However, ASEAN Member States are under no corresponding obligation to grant asylum. Receiving states may determine whether or not to grant asylum through their own procedures, as long as such procedures are fair, efficient and in accordance with applicable international standards.²⁹⁶

All ASEAN Member States have endorsed the UDHR and Vienna Declaration and Program of Action, which recognize the right to seek and enjoy asylum from persecution.²⁹⁷ All ASEAN Member States have also ratified the CRC, which recognizes the need to provide special protections to child asylum seekers and refugees and the prohibition against non-refoulement.²⁹⁸ However, Cambodia and the Philippines are the only two ASEAN states who are signatory to the 1951 Refugee Convention, and as such are the only ones who currently have established, government-administered status determination procedures for refugees.²⁹⁹

The right to seek asylum is guaranteed in the Constitutions of Indonesia, Lao PDR, and Viet Nam. The Constitution of Indonesia links the grant of political asylum to the right to be free from torture or inhumane and degrading treatment, while Lao PDR and Viet Nam allow asylum for those who are persecuted due to their "struggle for freedom and national independence, socialism, democracy and peace, and scientific work."³⁰⁰

Low ratification rates of the 1951 Refugee Convention and the absence of ASEAN instruments addressing asylum seekers or refugees reflect reluctance within the region to strengthen protections for these vulnerable groups.

Content and Interpretation of the Right in International Law

An asylum seeker is a person who, owing to a well-founded fear of persecution in his or her own country, is seeking refuge outside it, and whose formal legal status as a refugee has not yet been officially determined.

Refugees are defined in the 1951 Convention as persons who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion," are unable or unwilling to return to and seek the protection of their country of nationality or "habitual residence."³⁰¹ The UN High Commissioner for Refugees (UNHCR) also considers as refugees

persons who cannot return to their country of origin due to “serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.”³⁰² Regional instruments such as the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1984 Cartagena Declaration on Refugees also extend the definition of refugee to persons fleeing conflict.³⁰³

Refugee instruments also commonly contain exclusion clauses preventing some individuals from claiming refugee protections. For example, under the Refugee Convention, if there are serious reasons to believe that an individual has committed an international crime, committed a serious non-political crime prior to seeking refuge in the host country, or has acted contrary to the purposes and principles of the United Nations, he or she may be refused the protection of the Convention.³⁰⁴

The right of every individual to seek asylum from persecution can be found in the UDHR, the Vienna Declaration, and the core African, American, Arab and European human rights texts.³⁰⁵ The ICCPR does not explicitly mention the right to asylum, but instead provides for protection of the right to freedom of movement, guaranteeing the right to enter and leave one’s country.³⁰⁶

A key element of the right to seek and enjoy asylum is the principle of non-refoulement, which prohibits states from expelling or returning a refugee to a state where his or her life, freedom or bodily integrity would be threatened.³⁰⁷ Compliance with right to seek asylum and the absolute prohibition on refoulement requires states to provide asylum seekers access to a fair refugee status determination procedure.

Additionally, under the Refugee Convention, refugees have the right to free movement and access to courts within the asylum country, as well as the right to be free from punishment for illegal entry into that country. They also have the freedom to pursue work, housing, education, public relief and assistance, and the right to free religious expression. Finally, they must be issued with identity and travel documents.³⁰⁸ These rights are not accorded uniformly or without regard to immigration status. Rather, the enjoyment of certain rights requires a refugee to be lawfully within the host country’s territory; other rights are extended in accordance with “the most favourable treatment accorded to aliens in the same circumstances;” and in some circumstances, refugees are to be granted “the same treatment as nationals.”³⁰⁹

Right to Property

AHRD Art. 17: Every person has the right to own, use, dispose of and give that person's lawfully acquired possessions alone or in association with others. No person shall be arbitrarily deprived of such property.

The right to property as guaranteed in the AHRD is perhaps one of the clearest and most comprehensive statements of the right to property in a regional human rights instrument. An earlier draft of the AHRD included much more restrictive language, stating that the “law may subordinate such use and enjoyment in the general interest of society.”³¹⁰ However, some states objected to the limiting language, and it was removed. The right to property is subject to the AHRD's general limitation clause.³¹¹

The AHRD's language on the right to property is nearly identical to that of the UDHR, with the addition of the provision that everyone has the right not only to own possessions but also “use, dispose of and give” them. The AHRD guarantee of property rights in association with others is especially important in the context of indigenous peoples' rights, because many indigenous groups view land as communally owned. All of the other regional human rights instruments guarantee the right to property, but they are either more restrictive or not as comprehensive in their articulations of the right.³¹² As with other human rights instruments, intellectual property is included in the AHRD in a separate article.³¹³

A future ASEAN human rights convention should include the right to property as articulated in the AHRD.

ASEAN Member States' International Legal and Constitutional Obligations 1

Several ASEAN Member States' constitutions recognize the right to property with qualifications.³¹⁴ For instance, in Cambodia, only citizens have the right to own land.³¹⁵ The constitutions of Malaysia and Singapore expressly guarantee the right of religious groups to own property.³¹⁶ The Constitution of the Philippines acknowledges the property rights of indigenous communities, corporations, and small property owners and protects intellectual property, in addition to recognizing a general, individual right to property.³¹⁷

Of the international human rights treaties containing the right to property, eight Member States have ratified the CRPD, six have ratified the ICERD, two have ratified the ICRMW, and none have ratified the ILO Convention on Indigenous and Tribal Peoples.³¹⁸

Content and Interpretation of the Right in International Law

The right to property is complex and is interrelated with civil, political, economic, social, and cultural rights. Respect for property rights is often cited as the cornerstone of a successful market economy, and many development assistance projects in developing countries aim to strengthen this part of the countries' legal frameworks. Additionally, respect for the right to property is closely related to the right to an adequate standard of living, the right to work, and the right to development. The right of indigenous people to collective ownership and use of their lands is important for protecting their

culture, affording them an adequate standard of living, and often political control of their territories. The right is also seen as a civil and political right, particularly in the context of authoritarian regimes that solidify their hold on power through the confiscation of property and ghettoization of populations, such as Apartheid South Africa and Stalinist Russia.

While the right to property was included in the UDHR, controversy over its meaning and the obligations it implies kept it from being included in either the ICCPR or the ICESCR. The UDHR states that:

- (1) Everyone has the right to own property alone as well as in association with others, and
- (2) No one shall be arbitrarily deprived of his property.³¹⁹

However, the ideological debate over the nature of economic and political systems during the Cold War and the large-scale nationalization of banks, railways and industries in Western Europe in the 1950s kept the right to property out of the two core UN human rights treaties.³²⁰ Several other international human rights instruments do, however, include the right to property.³²¹ For instance, CEDAW grants women the same rights as men with regard to administering property and property within marriage but does not otherwise comment on women's right to property outside of marriage.³²²

All the regional human rights systems include the right to property. In the American and European systems, there is a significant amount of case law that has helped to define the right. The European system has ruled on deprivation and compensation, unjustified limitation of property rights, discrimination in inheritance, and continues to hear property confiscation cases from the period of WWII.³²³ The Inter-American Court has ruled that property also includes immovable, incorporeal, and intangible objects, and that property rights extend to communal property.³²⁴

Right to a Nationality

AHRD Art. 18: Every person has the right to a nationality as prescribed by law. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality.

The AHRD provision on the right to nationality is nearly identical the UDHR's, with the exception that the AHRD provision limits the right "as prescribed by law."³²⁵ This phrasing could be interpreted to mean that ASEAN Member States can fall into compliance with this provision simply by applying current nationality laws, regardless of their content.

The ratification of human rights treaties like the ICCPR and CRC gives rise to an obligation to change national laws in order to give effect to treaty-protected rights.³²⁶ As such, consistency with a state's international legal obligations requires that the word "law" in this context be interpreted to include both customary international law and those treaties which have been ratified by ASEAN Member States.

A future ASEAN human rights convention should reproduce the exact language of the UDHR and provide that national laws and procedures related to the "the acquisition, renunciation or loss of nationality" be consistent with state obligations under international law.³²⁷

Furthermore, such a convention would ideally include non-discrimination provisions relating to race and religion, guaranteeing women equal rights to nationality, and taking steps to avoid and reduce statelessness by, for example, granting a child nationality at birth if he or she would otherwise be stateless. Including an additional sub-provision regarding the importance of accessible birth registration procedures would further strengthen the convention protections against statelessness.

ASEAN Member States' International Legal and Constitutional Obligations

Of the ASEAN Member States, only the Philippines has ratified the 1954 Convention on the Status of Stateless Persons.³²⁸ No ASEAN member state has ratified the 1961 Convention on the Reduction of Statelessness;³²⁹ however, this does not mean that ASEAN Member States are free from nationality-related responsibilities under the international human rights regime. The 1954 Convention's definition of a stateless person is part of customary international law.³³⁰ Furthermore, the ICCPR, CRC, CEDAW, CPRD, ICERD, ICRMW, and the Convention on the Nationality of Married Women all provide protection of the right to a nationality,³³¹ and all ASEAN Member States have ratified at least two of these core human rights treaties.

Stateless populations are documented in six of the ten ASEAN Member States, with particularly high numbers of stateless persons in Myanmar and Thailand.³³² Migrant and indigenous populations face nationality-related difficulties in some ASEAN Member States. Additionally, the inadequacy of birth registration services in much of the region renders children vulnerable to statelessness, because they are unable to provide proof of place of birth, parentage, or other relevant information required to establish nationality.³³³

No ASEAN Member State's national constitution explicitly provides for the right to nationality, though Indonesia's comes the closest in stating that "[e]very person shall have the right to citizenship status."³³⁴ Where stateless persons and deprivation of nationality are mentioned in state constitutions, protections seem vague or limited. The Lao PDR Constitution guarantees that the "rights and freedoms of aliens and apatrids [stateless persons] are protected by [national laws]." In particular, they have the right to file claims in court and lodge petitions with government agencies.³³⁵ Under the Constitution of Cambodia, "Khmer citizens shall not be deprived of their nationality . . . unless there is a mutual agreement."³³⁶

Content and Interpretation of the Right in International Law

The 1954 Convention and the 1961 Convention, read together with relevant provisions from other international human rights instruments, form the international legal framework addressing statelessness, and the 1954 Convention's definition of a stateless person as "a person who is not considered as a national by any State under the operation of its law"³³⁷ is a part of customary international law. *De jure* statelessness occurs when an individual is "not considered as a national by any State under the operation of its law."³³⁸ *De facto* statelessness occurs when individuals may have a nationality by law, but as the result of being "outside the country of their nationality and unable or, for valid reasons, unwilling to avail themselves of the protection of that country,"³³⁹ cannot meaningfully access the rights and protections which derive from their nationality.

Nationality is a key right as, in practice, access to public services are often dependent upon membership of a particular national group. Nationality also protects against undue interference in one's family and private life, as loss of or refusal to grant nationality often leads to a loss of residency rights and vulnerability to expulsion from a state.

The UDHR states that "[e]veryone has the right to nationality" and that "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."³⁴⁰ The ICCPR and CRC require that children be registered immediately after birth and have the right from birth to acquire a nationality.³⁴¹ The UN Human Rights Committee has clarified that the obligation to register a birth derives partly from the need to ensure that children have legal personalities, which in turn helps to limit the risks of abduction, trafficking, or other violations. While states are not obligated to grant nationality rights to every child born in their territory, they are "required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he [or she] is born."³⁴²

CEDAW requires that states "grant women equal rights with men to acquire, change or retain their nationality," and to determine the nationality of their children.³⁴³ The CEDAW Committee's General Recommendation No. 21 further elaborates that "[n]ationality is critical to full participation in society. In general, states confer nationality on those who are born in that country. Nationality can also be acquired by reason of settlement or granted for humanitarian reasons such as statelessness."³⁴⁴ Women's nationality should not be automatically altered upon marriage or a spouse's change of

nationality, although they should have access to privileged naturalization procedures in order to adopt the nationality of their spouse.³⁴⁵

The CRPD and ICERD respectively guarantee the rights of persons with disabilities to a nationality “on an equal basis with others” and prohibit racial discrimination in relation to the granting of nationality.³⁴⁶

The 1954 Convention Relating to the Status of Stateless Persons establishes certain minimum standards for the protection of stateless persons. States parties to the Convention must guarantee that stateless persons have the same access as citizens to court systems, basic education, and working conditions, and the same access as lawfully-present aliens to employment, housing, and property.³⁴⁷ The rights which a stateless person may access increase as their degree of attachment to their state of asylum increases. That is to say, the most basic provisions of the 1954 Convention attach to all persons who fall within the definition of ‘stateless’ and are otherwise within or subject to the jurisdiction of a State.³⁴⁸ Additional rights attach to stateless persons on the basis of whether they are lawfully *present*, lawfully *resident*, or *habitual* residents of a particular State.³⁴⁹

The right to nationality encompasses the following principles:

- once born, regardless of gender, race, colour, religion, disability, or migrant status, a person has the right to acquire a nationality;
- marriage or a spouse’s change in nationality should not affect a woman’s nationality or render her stateless;
- men and women have equal rights to transmit nationality to their children;
- an individual should be granted nationality if he would otherwise be stateless; and
- an individual cannot be arbitrarily deprived of his or her nationality

International instruments make clear that national laws must conform to certain international standards and principles. The 1930 Convention on Certain Questions Relating to the Conflict of Nationality Law provides that “[i]t is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.”³⁵⁰ The 1997 European Convention on Nationality provides that “each state shall determine under its own law who are its nationals,” but that such laws are acceptable so far as they are “consistent with applicable international conventions, customary international law and the principles of law recognized with regard to nationality.”³⁵¹ The 2006 Resolution of the Asian-African Legal Consultative Organization on Legal Identity and Statelessness calls for a review of legislation with the purpose of reducing and avoiding statelessness “consistent with fundamental principles of international law,” and urges Member States to take measures to ameliorate the “precarious situation of stateless persons” in their countries.³⁵²

Jurisprudence from the Inter-American human rights system emphasizes the principles of non-discrimination, gender equality, and access to effective remedies in the application of citizenship laws,

and otherwise perceives violations of the nationality right as grave offenses.³⁵³ The African system's jurisprudence has emphasized measures to guarantee children's rights to nationality and non-discrimination against non-nationals.³⁵⁴ The European system's jurisprudence has linked deprivation of nationality, such as the erasure of 18,000 persons from the civil registry of the former Yugoslavia to violations of rights to private and family life, rights to an effective remedy, and non-discrimination.³⁵⁵

Right to a Fair Trial

AHRD Art. 20: Every person charged with a criminal offence shall be presumed innocent until proved guilty according to law in a fair and public trial, by a competent, independent and impartial tribunal, at which the accused is guaranteed the right to defence.

No person shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

No person shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure of each ASEAN Member State.

The AHRD contains many of the guarantees regarding the right to a fair trial that appear in international human rights instruments, including presumption of innocence, right to a fair and public trial by an independent and impartial tribunal, prohibition of *ex post facto* law making, and the right not to be tried or punished twice in criminal proceedings for the same offence.

While the AHRD does guarantee the right to defense, it does not specify whether this means the right of the accused to defend him or herself in person or the right to counsel. A January 2012 draft of the AHRD included the requirement that “[e]veryone charged with a criminal offence shall be presumed innocent until proven guilty according to the law and guaranteed with the right to defense, including the right to be defended by counsel of his or her choice,” but the latter part of this sentence was removed from the final version.

As a general declaration of rights, the AHRD does not include those procedural protections for individuals charged with criminal offences which have become standard fair trial requirements in human rights conventions since they first appeared in Article 14(3) of the ICCPR. These include a person’s right to:

- be informed promptly and in detail of the charges against him/her in a language he/she understands;
- have adequate time and facility to prepare a defense;
- not be compelled to testify against oneself or to confess guilt;
- examine and call witnesses under the same conditions as the prosecution;
- free language interpretation assistance in court; and
- have the case determined without undue delay and reviewed by a higher court.

Any future ASEAN human rights convention should clarify that individuals hold a right to defense

counsel, include the ICCPR's procedural protections, take into consideration the special needs of children accused of criminal offenses, and establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal code. Additionally, a convention should recognize the non-derogable nature of the prohibition against *ex post facto* application of the law.

Finally, this provision of the AHRD only addresses criminal proceedings, while both the UDHR and other instruments extend the right to a fair trial to civil proceedings.³⁵⁶ Any future convention should extend the right to a fair and public trial by an independent and impartial tribunal to both civil and criminal cases. In a similar vein, any future convention should incorporate provisions relating to the role and rights of victims in criminal proceedings, in line with current trends in international practice.

ASEAN Member States' International Legal and Constitutional Obligations

Six of the ASEAN Member States have ratified the ICCPR and thus have a binding international legal obligation to guarantee the right to a fair trial.³⁵⁷ At least two other core human rights treaties recognize and protect the right to a fair trial: the CRC and the ICRMW.³⁵⁸ All ASEAN Member States have ratified the CRC, while only the Philippines and Indonesia have ratified the ICRMW.

The international obligation to guarantee the right to a fair trial is reinforced by the constitutions of six of the ASEAN Member States, which prohibit *ex post facto* law enforcement and double jeopardy, presume that a person is innocent until proven guilty, and guarantee the right to a speedy and public trial by an impartial tribunal.³⁵⁹ Only the Philippines Constitution guarantees that individuals hold a right to counsel of their own choosing, and the right to be provided counsel if they are indigent. Viet Nam and Thailand's constitutions provide accused persons with the right to a defense, including assistance from a lawyer.³⁶⁰ The Philippines and Thailand recognize a constitutional right for an accused person not to be compelled to testify as a witness against him or herself, and the Philippines alone grants a right of confrontation.³⁶¹

Content and Interpretation of the Right in International Law

A person accused of or charged with a criminal offense has the right to be presumed innocent until proven guilty according to the law.³⁶² No one shall be found guilty of a criminal offense which did not constitute a criminal offense under national or international law at the time it was committed, and no greater punishment shall be imposed than prescribed by law at the time the offense or omission was committed.³⁶³ Furthermore, no one shall be tried or punished again for an offense for which he or she has already been finally convicted or acquitted in accordance with the law.³⁶⁴

Every person charged with a criminal offense has the right to have the matter determined without delay by a competent, independent, and impartial tribunal in a fair and public hearing according to law.³⁶⁵ An independent tribunal is one that has the power to make a binding decision that cannot be altered by a non-judicial authority and is free from interference by the executive.³⁶⁶ A military tribunal should be considered incompetent to try civilians, and members of the military who have committed human rights crimes should be tried in ordinary criminal courts.³⁶⁷ Impartiality requires freedom from bias on the part

of judges or jury members.³⁶⁸ Generally, criminal proceedings should be public, unless necessary to protect the interests of justice.³⁶⁹

Every person charged with a criminal offence or omission has at least the following rights guaranteed under international law:

- (1) To be informed promptly, in a language which he or she understands, of the nature and cause of the accusation against him;³⁷⁰
- (2) To have adequate time and facilities for the preparation of his or her defense;³⁷¹
- (3) To defend himself in person or through legal assistance of his or her own choosing;³⁷²
- (4) To not be compelled to testify against him or herself or to confess guilt;³⁷³
- (5) To have the decision reviewed by a higher court;³⁷⁴
- (6) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;³⁷⁵ and
- (7) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in court.³⁷⁶

The right to counsel is a fundamental right, enshrined in all major international rights systems and regional rights instruments. The ICCPR guarantees the right to counsel³⁷⁷ regardless of whether the accused does has sufficient means to pay for it. However, amongst regional human rights systems only the Arab Charter on Human Rights and European Convention on Human Rights require that states provide counsel it cannot be procured.³⁷⁸ The American Convention on Human Rights grants Member States discretion to decide whether counsel should be provided,³⁷⁹ though the Inter-American Court on Human Rights has held that States must provide counsel free of charge if the accused cannot afford one *and* the fairness of the hearing would be affected by a lack of representation, the Convention notwithstanding.³⁸⁰

The freedom from the application of *ex post facto* laws is a non-derogable right,³⁸¹ as such, some regional systems have stated that the principle of due process cannot be suspended during a state of emergency.³⁸²

In addition to the guarantees described above, children accused of a criminal offense are afforded additional protections. Any criminal charges entered against juvenile defendants should take into account the child's age, and focus on rehabilitation and reintegration into the child's family and society.³⁸³ Additionally, states should establish a minimum age below which children shall be presumed not to have the capacity to violate the penal code.³⁸⁴

Additionally, under the UDHR and various other human rights instruments, defendants have the right to access courts in civil proceedings, and have their rights determined through fair and public hearings.³⁸⁵ These rights are intrinsically linked to the realization of the right to remedy, enumerated in Article 8 of the AHRD.

Finally, developments in international law also increasingly recognize a role for victims in criminal proceedings. A requirement to enable victims to participate in their own in criminal proceedings is found in several soft law instruments³⁸⁶ and conventions.³⁸⁷ The European Court of Human Rights has also begun to recognize fair hearing rights for victims in criminal proceedings, at least where the proceedings will determine their right to compensation or the protection of their reputation.³⁸⁸

Article 21: The Right to Privacy

AHRD Art. 21: Every person has the right to be free from arbitrary interference with his or her privacy, family, home or correspondence including personal data, or to attacks upon that person's honour and reputation. Every person has the right to the protection of the law against such interference or attacks.

Article 21 of the AHRD is nearly identical to the provision on the right to privacy in the UDHR.³⁸⁹

It should be noted that core international treaties concluded after the UDHR extend protection to attacks against honour and reputation only to *unlawful* attacks, and recognize a right to freedom from arbitrary and *unlawful* attacks. This requires states to define by law when an invasion of privacy or attack against one's honour or reputation is unacceptable. The final sentence of Article 21 can be interpreted to extend the right to freedom from arbitrary and unlawful interference or attacks.

The ICCPR builds on the UDHR by prohibiting interference in one's privacy rights in the absence of legal justification.³⁹⁰ The prohibition against "unlawful interference" also appears in other international human rights treaties, such as the CRC,³⁹¹ ICRMW,³⁹² and CRPD.³⁹³

While other international human rights treaties consider privacy in the context of "family, home, and correspondence," the AHRD adds value to the existing international treaties through the inclusion of "personal data protection." This inclusion is important given the increased use of technology that allows for greater electronic data storage and speedy dissemination, which in turn corresponds to increasing levels of misuse of personal data. ASEAN has recognized the importance of harmonizing data protection legal frameworks in the region as it moves towards creation of the ASEAN Economic Community in 2015. The ASEAN community seeks to take on and establish best practices for privacy and data protection issues through the development of a "Roadmap for Integration of the e-ASEAN Sector."³⁹⁴

A future ASEAN human rights convention could, in order to reflect recent developments in soft law surrounding the right to privacy and ASEAN's own institutional planning documents, include a clearer formulation of Member States' obligation to "adopt legislative and other measures" to protect personal and confidential information against interception, collection and misuse by both state and private actors.³⁹⁵ For example, a CSO submission regarding the AHRD draft suggested that Article 21 include the following language:

Everyone has the right to have his or her personal data protected from arbitrary or unlawful use or interference. States may only acquire, store or access personal data in strict and narrowly construed circumstances defined in law, and access to such data shall be limited to the minimum number of officials or agencies necessary.³⁹⁶

ASEAN Member States' International Legal and Constitutional Obligations

The right to privacy is explicitly protected by four international human rights treaties, namely the ICCPR, CRC, ICRMW, and CRPD.³⁹⁷

Six ASEAN Member States' constitutions mention the right to privacy.³⁹⁸ However, the extent to which the right is protected is not uniform across these States. Protections against searches of the home, residence, or property,³⁹⁹ the individual's person,⁴⁰⁰ undue exploitation of personal data,⁴⁰¹ and protections of honour, dignity and reputation,⁴⁰² correspondence and other communications,⁴⁰³ and the right to family life⁴⁰⁴ are neither consistently protected, procedurally or substantively.

Content and Interpretation of the Right in International Law

The UDHR was the first human rights instrument to recognize the right to privacy by stating that

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.⁴⁰⁵

The ICCPR expanded upon this framework by adding language prohibiting "unlawful" interference with one's privacy, family, home, or correspondence. Furthermore, the ICCPR limited the ability of states parties to use spurious lawsuits which purportedly helped state officials to defend attacks against their reputation or honour while in fact served to silence political dissent restrict free speech by limiting the right to be free from such attacks only to those which were defined by state law as "unlawful." The ICCPR formulation of the right to privacy has been reproduced in the CRC, ICRMW, and CRPD.⁴⁰⁶ The Arab, European and American regional human rights instruments also recognize the right to privacy, but the right does not feature in the African Charter.⁴⁰⁷

The Human Rights Committee has explained that under the ICCPR, "the term "unlawful" means that no interference [in one's privacy] can take place except in cases envisaged by the law. . . . [t]he introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."⁴⁰⁸ Treaties recognizing the right to privacy impose positive obligations on states parties to "adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right."⁴⁰⁹ The law authorizing state inference with one's home, family or correspondence must be precise and any lawful interference "must be made only by the authority designated under the law, and on a case-by-case basis".⁴¹⁰ The state's failure to intervene may be regarded as a violation of the right to privacy.⁴¹¹

International and regional human rights bodies have broadly interpreted the terms "privacy" and "private life." The UN Human Rights Committee found a violation of the right to privacy when people were not allowed to choose and change their names, which constitutes an important part of a person's identity.⁴¹² The Committee also found that private relationships (including homosexual relationships) fall

under the protection of the right to privacy.⁴¹³ The European Court of Human Rights also ruled that the concept of private life covered “the physical and moral integrity of the person, including his or her sexual life.”⁴¹⁴ In other decisions, the Court has expanded the definitions of the terms “privacy” and “private life” to cover physical integrity, professional activities and the integrity of business premises, arbitrary interception of telephone conversations, interference with prisoner correspondence, and sexual orientation or sexual life.⁴¹⁵ The Parliamentary Assembly of the Council of Europe has recently adopted a resolution on mass communication media and human rights, which states that “the right to privacy consists essentially of the right to live one’s own life with a minimum of interference” and recognizes the right to privacy as one which protects interference in matters of family and home life, physical and moral integrity, and honour and reputation.⁴¹⁶

Unlike the European Court of Human Rights, the Inter-American Court of Human Rights has only dealt with a small number of cases concerning the right to privacy.⁴¹⁷ The Court has interpreted the privacy right to extend to the home, because “an individual’s home and private life are intrinsically connected, [and] the home is the space in which private life can evolve freely.”⁴¹⁸ As such, arbitrary or unlawful invasions of an individual’s home are interpreted as a violation of the right to privacy.

The protection of the right to privacy includes the protection of personal data. The UN Human Rights Committee has stated that the right to privacy requires legal protection of personal data in both the public and private sectors.⁴¹⁹ The UN Special Rapporteur for the Promotion and Protection of the Right to Freedom of Opinion and Expression notes that “privacy and freedom of expression are interlinked and mutually dependent; an infringement upon one can be both the cause and consequence of an infringement upon the other.”⁴²⁰ In a recent resolution, the UN Human Rights Council affirmed the need to protect human rights in the digital realm.⁴²¹ The UN General Assembly further adopted the Resolution on the Right to Privacy in the Digital Age, which expresses deep concern at the “negative impact that surveillance and/or interception of communications . . . may have on the exercise and enjoyment of human rights” and calls on states to ensure that any counter-terrorism efforts comply with international laws regarding the issue of privacy.⁴²² Though international laws relating to data and communications privacy are emerging, growing consensus clearly indicates that the area is one in which more robust protections will be required.⁴²³

Article 22: The Right to Freedom of Thought, Conscience, and Religion

AHRD Art. 22: Every person has the right to freedom of thought, conscience and religion. All forms of intolerance, discrimination and incitement of hatred based on religion and beliefs shall be eliminated.

The AHRD departs from other international human rights instruments by omitting the freedom to manifest one's religion or belief in teaching, practice, and worship and observance. Present in a January 2012 draft of the AHRD, the "right to practice one's religion or belief" was subsequently removed from the final AHRD text.⁴²⁴ Without this element, the AHRD recognizes only the internal aspect of having a religion or belief and does not protect a person's right to, for example, attend religious ceremonies, teach religion to their children, or wear clothing or symbols indicative of his or her faith.⁴²⁵ The ability to manifest one's religion - individually or in community with others and in public or private - is crucial to enjoyment of the right to freedom of thought, conscience and religion.

The AHRD's wording does not include a key component of the right to freedom of religion found in the UDHR and the ICCPR: the freedom to "have or to adopt a religion or belief of one's choice," meaning the ability to change or abandon one's religion or beliefs without fear of sanction.⁴²⁶

The right to freedom of religion is affected by the AHRD's general limitation clause. The right to freedom of religion is non-derogable under the ICCPR, but it is also not absolute – the UDHR allows for limitation of the entire right through its general limitations clause, and the ICCPR and CRC allow for limitations on the freedom to *manifest* religion, under limited circumstances.⁴²⁷ The AHRD's general limitation clause, however, would allow ASEAN Member States to limit individuals' rights to *have* beliefs or religions at all.⁴²⁸

For the AHRD to be consistent with Member States' existing international human rights obligations, Article 22 must be interpreted broadly to include right to manifest religion or belief, and the right to adopt or change religion which includes freedom from forced conversion. Additionally, the General Principles must not be used to unreasonably restrict enjoyment of all aspects of the right to freedom of thought, conscience and religion.⁴²⁹

A future ASEAN human rights convention should, at minimum, mirror the UDHR's formulation of the right to freedom of thought, conscience and religion to bring ASEAN's human rights texts in line with other international human rights texts. A more robust freedom of conscience provision would explicitly state its non-derogable nature, and draw on elements of the ICCPR to narrow the circumstances under which a state could permissibly limit the right to religious expression or belief, and acknowledge parents' rights to educate their children "in conformity with their own convictions."⁴³⁰

The AHRD contains a further requirement that "[a]ll forms of intolerance, discrimination and incitement of hatred based on religion and beliefs shall be eliminated."⁴³¹ This provision was inserted upon CSO recommendations during a regional consultation in June 2012. Though a non-paper submitted by the

United States Department of State expressed concern that this language could be used to undermine freedoms of expression and religion by justifying broad bans on speech,⁴³² the ICCPR contains a similar provision that prohibits “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”⁴³³ Additionally, freedom of expression and opinion are independently protected in the AHRD.⁴³⁴

ASEAN International Legal and Constitutional Obligations

All ASEAN Member States have endorsed the right to freedom of thought, conscience and religion as recognized in the UDHR, the Vienna Declaration, and other international human rights instruments to which ASEAN Member States are parties.⁴³⁵ The right to freedom of thought, conscience and religion is recognized in core human rights treaties and in the 1951 Refugee Convention.⁴³⁶ Six ASEAN Member States have ratified the ICCPR⁴³⁷ and all have ratified the CRC, which recognizes children’s rights to freedom of thought, conscience and religion and the right of their parents or legal guardians to provide guidance to their children in the exercise of these rights.⁴³⁸ However, Brunei has entered an express reservation against Article 14 of the CRC to the extent that its application conflicts with principles of Islam, and Malaysia and Singapore have entered similar reservations to the extent that the provision conflicts with national law.⁴³⁹

In addition to general freedom of conscience provisions, all ten ASEAN Member States recognize a constitutional right to the free practice of religion.⁴⁴⁰ The right to freedom of religion and belief is clearly widely recognized as a fundamental human right in the region.

Content and Interpretation of the Right in International Law

The UDHR states that “[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”⁴⁴¹ These same elements are recognized in the ICCPR, and the European and American Conventions on Human Rights.⁴⁴² The African Charter on Human and Peoples’ Rights and the Arab Charter on Human Rights do not specifically mention the right to change one’s religion.⁴⁴³

The UN Human Rights Committee has stated that “belief” and “religion” are to be broadly construed to include atheistic beliefs as well as beliefs restricted to traditional religions.⁴⁴⁴ States cannot restrict an individual’s freedom to have or adopt a religion or belief, which includes the freedom to replace one’s religion with another. Additionally, the state cannot force an individual to reveal his thoughts or adherence to a religion or belief.⁴⁴⁵ The UN Special Rapporteur on Freedom of Religion and Belief, in his 2012 interim report to the General Assembly, highlighted the importance of the right to freedom from coercion with regards to the freedom of religion. Although forcible conversion is not permissible, freedom of religion or belief includes the right to try to persuade others in a non-coercive manner as to the validity of a particular religion or belief. The State may restrict missionary activities by law, but only under narrow circumstances provided for in the ICCPR.⁴⁴⁶

“Manifestation” of religion and beliefs includes ritual and ceremonial acts giving direct expression to belief, building places of worship, displaying religious symbols, observing holidays and days of rest, observing dietary regulations, wearing distinctive clothing or head coverings, participating in rituals associated with certain stages of life, using a particular language, establishing seminaries or religious schools, and preparing and distributing religious texts or publications.⁴⁴⁷

Manifestation of a religion or belief can be limited by law but only to the extent necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. Limitations must be specific and proportional to the aim they seek to achieve, and must utilize the minimum degrees of interference required to accommodate one of the aforementioned public goals.⁴⁴⁸ These grounds of limitation, first expressed in the ICCPR,⁴⁴⁹ have also been adopted in core regional human rights treaties. The European Convention on Human Rights and Arab Charter on Human Rights further require that any restrictions on freedom to manifest one’s religion or belief must be “necessary in a democratic society”⁴⁵⁰ and must be “necessary in a tolerant society that respects human rights and freedoms.”⁴⁵¹

Unacceptable limitations on freedom of religion have been held to include:

- Requirements that individuals indicate their religion on their identity cards as a *de facto* requirement that they disclose their religion;⁴⁵²
- Prohibitions of workers from wearing religious jewellery where the prohibition served no public purpose (for example, an airline worker could not be prohibited from wearing religious jewellery, but a hospital worker could on hygiene-related grounds);⁴⁵³
- Punishments of conscientious objectors;⁴⁵⁴ and
- Forcible removal of indigenous peoples from lands where their religious sites are located.⁴⁵⁵

Article 23: The Right to Freedom of Expression and Opinion

AHRD Art. 23: Every person has the right to freedom of opinion and expression, including freedom to hold opinions without interference and to seek, receive and impart information, whether orally, in writing or through any other medium of that person's choice.

The AHRD recognizes the right to both freedom of expression and freedom of opinion; freedom of opinion in particular is affirmed as a right which must be held without interference. Unlike other human rights instruments, however, the AHRD does not establish a right to freely impart ideas and to seek, receive, and impart information “across frontiers.”⁴⁵⁶ “Information” is arguably broad enough to include “ideas,” but the failure to stress this important freedom to transmit information across frontiers is a significant oversight, given the importance of cross-border communications in alerting the international community of human rights abuses within a country, and the increasingly widespread use of technology by the state to block and filter internet communications.

The right to free opinion is subject to the AHRD's general limitation's clause; however, this right is non-derogable under the ICCPR.⁴⁵⁷ The AHRD is therefore inconsistent with the obligation of ASEAN states parties to the ICCPR to guarantee absolutely the freedom to hold opinions without interference. However, the AHRD's grounds for limiting freedom of expression are quite similar to the ICCPR's, which the single exception that the ICCPR does not permit restrictions on expressions on the grounds of general welfare.⁴⁵⁸ To the extent that free expression is a fundamental tenet of a democratic society, a narrowly-read general welfare restriction against free expression could result in the justification of excessive restrictions on the right; therefore, care must be taken to ensure that a more liberal view is taken on the AHRD's language as currently drafted.

On a positive note, the AHRD differs positively from the ICCPR in that it does not permit limitations of free expression and opinion on the grounds that individuals' reputation should be protected.⁴⁵⁹ Given the prolific use of defamation suits as a tool through which to stifle political speech in ASEAN, it is commendable that the AHRD's drafters chose not to stress the need to protect reputation over freedom of expression. Unlawful attacks against honour or reputation are protected as part of the AHRD right to privacy.

The AHRD provision on freedom of expression also does not contain any language prohibiting hate speech or war propaganda, consistent with more recent human rights instruments.⁴⁶⁰

The AHRD can be said to contain the most basic and necessary elements of the right to freedom of opinion and expression. A future ASEAN human rights convention, however, certainly has room to be more expansive in its conception of this right. A future convention should protect freedom of expression across frontiers, and provide a right to freedom of opinion free of any limitations. Additionally, as recommended in relation to the other civil political rights, permissible limitations on the right to freedom of expression should be right-specific. Finally, should ASEAN wish to reflect more recent developments in relation to the content of the right to seek, receive and impart information, it should

include a standalone right for individuals to access information from their government and prohibit criminal defamation.

ASEAN Member States' International Legal and Constitutional Obligations

Six of the ASEAN Member States have ratified the ICCPR, which contains a thorough guarantee of the right to freedom of expression and opinion.⁴⁶¹ Eight have ratified the CRPD, which requires states parties to use technology and other methods to ensure that persons with disabilities have the ability to seek, receive, and impart information to the same extent as non-disabled persons.⁴⁶² The right to freedom of opinion and expression is also recognized in the CRC, ICERD and the ICRMW⁴⁶³

Nine ASEAN Member States' constitutions address the right to freedom of expression in some form.⁴⁶⁴ Of those, six guarantee the right for citizens,⁴⁶⁵ and four place significant restrictions on the right by including clauses that the speech not violate other laws regarding a wide range of functions.⁴⁶⁶ The Philippines Constitution, in addition to freedom of speech and the press, also recognizes in the same provision the right to peaceful assembly and the right to petition the government.⁴⁶⁷ Unique among the ASEAN constitutions, the Viet Nam Constitution recognizes the right to access information.⁴⁶⁸ In general, the right to freedom of expression and opinion is widely covered in the domestic legal frameworks of ASEAN Member States,⁴⁶⁹ though the grants are extremely qualified and are not always consistent with the intention of the right as guaranteed under the international human rights regime.

Content and Interpretation of the Right in International Law

The right to freedom of expression and opinion, first expressed in the UDHR, has come to be considered the cornerstone of a democratic society. The UDHR provides that “[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”⁴⁷⁰ The right to freedom of expression and opinion was reformulated in more detail in the ICCPR and subsequently incorporated into the text of the CRC, ICERD, CRPD and ICRMW.⁴⁷¹ Among regional human rights instruments, the right to freedom of expression and opinion is recognized in the core European American, African and Arab human rights texts.⁴⁷²

Freedom to hold an opinion protects an individual's innermost thoughts.⁴⁷³ The UN Human Rights Committee has noted that the right to hold opinions without interference is a “right to which the Covenant permits no exception or restriction.”⁴⁷⁴ It also noted that freedom of opinion “extends to the right to change an opinion whenever and for whatever reason a person so freely chooses.”⁴⁷⁵ The Committee also affirms that all forms of opinion enjoy this unfettered protection, including scientific, political, historic, moral or religious opinions, and that it is a violation of the provision to criminalize the holding of an opinion.⁴⁷⁶ Accordingly, the Human Rights Committee found a violation of the right to hold an opinion, when the applicant had been detained for fourteen years in solitary confinement and had been forced into an “ideology conversion system” due to his political views.⁴⁷⁷

The right to freedom of expression is the right to impart information and ideas to others – both verbally and non-verbally, via any medium, and across frontiers.⁴⁷⁸ The protection extends “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb the State or any segment of the population.”⁴⁷⁹ All sorts of speech, including political views, pornography, commercial advertisements, science, and literature are worthy of protection.⁴⁸⁰ The UN Human Rights Committee has also affirmed that the ICCPR provides protection to “information and ideas of all kinds,” and that the prohibition of hate speech must be compatible with freedom of expression.⁴⁸¹

Human rights bodies differ in their attitude regarding the treatment of different speech types, however. Some, like the UN Human Rights Committee, refuse to differentiate between different speech types and do not afford greater protection to political speech than, for example, commercial speech. On the other hand, the European Court of Human Rights has afforded a greater margin of appreciation to states when they limit commercial speech than when they limit political speech, and the Court has traditionally emphasized the role of the media as “watchdogs” in a democratic society.⁴⁸² Additionally, the European Court has afforded artistic speech less protection than political speech to the extent that artistic speech is not itself political (in which case it will enjoy the same level of protection).⁴⁸³ The European Court of Human Rights has allowed for a considerable margin of appreciation when it comes to speech concerning the issue of public morals and obscenity, as the Court recognizes that the boundaries of public morals may vary across European countries.⁴⁸⁴

The right to freedom of expression is associated with the right to seek and receive information. Access to information held by government authorities has gained support in recent decades as a standalone right, and serves as a powerful tool for human rights activists and journalists. Several international documents in recent years have recognized the importance of the right to access of information as a core component of the right to freedom of expression.⁴⁸⁵ The UN Special Rapporteur on Freedom of Opinion and Expression and the OAS Special Rapporteur on Freedom of Expression have both expressed their support for the right to access to information held by public authorities, calling it “a fundamental human right which should be given effect at the national level through comprehensive legislation (for example Freedom of Information Acts) based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exceptions.”⁴⁸⁶ The UN Human Rights Committee has adopted a broad interpretation of the right to access to information, finding that it is a right protected on its own by Article 19 of the ICCPR. On the other hand, the European Court of Human Rights has found that access to information is protected under the European Convention only if the requested information is necessary for the fulfilment of another protected right.⁴⁸⁷

Key to freedom of expression and opinion in society is the existence of a free press. Freedom of the press and media is recognized explicitly in the Charter of Fundamental Rights of the European Union, and alluded to in the ICCPR.⁴⁸⁸ The European Court of Human Rights has also recognized the special role of the media in cases such as *Jersild v. Denmark* and *Observer and Guardian v. The United*

Kingdom.⁴⁸⁹ The UN Human Rights Committee has also reaffirmed the importance of an independent and diverse media.⁴⁹⁰

To the extent that limitations on freedom of expression are permissible, they must be:

- i. Prescribed by law;
- ii. Pursue a legitimate aim; and
- iii. Restricted to the extent necessary to attain the legitimate aim.⁴⁹¹

Legitimate aims under the ICCPR and the American Convention include upholding the rights and reputation of others, the protection of national security, public order and public health and morals. Under the European Convention, territorial safety, public safety, the prevention of disorder or crime, the prevention of release of information received in confidence, and the maintenance of the authority and impartiality of the judiciary are also seen as permissible aims. “Necessity” requires the state to demonstrate that a limitation is “required by a compelling public interest” or a “pressing social need,” and that freedom of expression is limited only to the extent required to achieve the public interest or need in question.⁴⁹²

State censorship frequently raises questions regarding the permissible limitation of freedom of expression. The American Convention on Human Rights prohibits prior censorship with the exception of state regulation of public entertainment for the moral protection of children.⁴⁹³ Speech that damages reputation or is considered contrary to public order, safety or morals shall be “subject to subsequent imposition of liability . . . expressly established by law.”⁴⁹⁴ The European Court does not prohibit prior censorship on expression, but it does evaluate such restrictions on expression with rigorous scrutiny.⁴⁹⁵

Defamation laws pose further challenges to freedom of expression and opinion, especially with respect to the criticism of public figures.⁴⁹⁶ The Human Rights Committee has shown a tendency to find violations of freedom of expression in communications challenging defamation laws.⁴⁹⁷ The Inter-American Court has also heard several cases regarding criminal defamation cases involving public officials; in each case, it has ruled that there had been a violation of the right to freedom of expression.⁴⁹⁸ The European Court of Human Rights has also recognized the need for public officials to show a greater degree of tolerance in terms of criticism aimed at them.⁴⁹⁹

In terms of balancing freedom of religion and freedom of expression, the European Court has significant jurisprudence on this issue. It has upheld limits on speech when speech is related to religion or belief, or privileges religious belief over freedom of expression, at times to the disadvantage of minority religious groups or nonbelievers.⁵⁰⁰ Since no uniform concept or understanding of religion exists in Europe, the Court has allowed for a large margin of appreciation for states when examining interference with freedom of expression as necessitated by religious reasons.

Over a relatively short period of time, the internet has enabled millions to exercise their right to freedom of expression to an unprecedented extent. Digital technologies enable information to be sent instantly to huge numbers of people. This new “frontier” is becoming the epicentre of legal battles surrounding the right to freedom of expression.⁵⁰¹ Developing case law from the European Court of Human Rights as well as recommendations from international organizations will be integral to the development of this new area of law.⁵⁰²

Article 24: The Right to Peaceful Assembly

AHRD Art. 24: Every person has the right to freedom of peaceful assembly.

Article 24 of the AHRD is identical to the UDHR's provision regarding peaceful assembly, but omits the corresponding right to free association.⁵⁰³ The right to freedom of association was included in draft versions of the AHRD, but was removed shortly before the Declaration's adoption in November 2012. The two rights are "interrelated, interdependent and mutually reinforcing."⁵⁰⁴ The exclusion of a specific right to association undermines the ability of the AHRD to support the development of truly healthy democratic societies in the ASEAN region.

Nonetheless, like free expression, the right of free association is a derogable right. Legal impositions on the right to peaceful assembly are permissible when they protect a state's interest in national security, public order, or public health. A future ASEAN human rights convention should specify, in accordance with the ICCPR, the circumstances under which the right may be limited. A convention should also include the right to freedom of association; however, the analysis of this omission is covered later.

ASEAN Member States' International Legal and Constitutional Obligations

Six ASEAN Member States have ratified the ICCPR, six the ICERD and all the CRC, meaning that all have a binding international obligation to recognize the right to peaceful assembly in some form.⁵⁰⁵

Nine ASEAN constitutions address the right to freedom of peaceful assembly; Brunei Darussalam is the only ASEAN Member State which does not enshrine a right to free assembly in any form in its Constitution.⁵⁰⁶

Content and Interpretation of the Right in International Law

The right to freedom of assembly is one of those rights which is essential for a healthy, functioning democracy; it also serves as a conduit for other rights.

The Special Rapporteur on the Right to Freedom of Assembly and of Association defines peaceful assembly as "an intentional or temporary gathering in a private or public space for a specific purpose" and asserts that "[a]ssemblies play a vibrant role in mobilizing the population and formulating grievances and aspirations, facilitating the celebration of events and, importantly, influencing States' public policy."⁵⁰⁷ Assemblies fulfil a critical role for civil society, and help to address important social issues spanning the entire spectrum of human rights.⁵⁰⁸ The right to participate in and hold peaceful assemblies entails a positive state obligation to take steps that facilitate the exercise of this right.⁵⁰⁹

The right to peaceful assembly and right to freedom of association are closely related but separate rights, often appearing in separate legislation or separate articles within the same legal instrument. However, they are distinct enough to warrant separate analytical treatment.⁵¹⁰ The UDHR recognizes the right to freedom of assembly and the right to freedom of association in the same article, stating simply

that “[e]veryone has the right to freedom of peaceful assembly and association.”⁵¹¹ In the ICCPR, the right to assemble peacefully appears in a separate article, as it does in the CRC and ICERD.⁵¹² Among regional human rights instruments, the right to freedom of peaceful assembly is recognized in the European Convention on Human Rights, the African Charter, the African Charter on the Rights and Welfare of the Child, the Arab Charter, the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights.⁵¹³

The right to freedom of assembly is not an absolute right and certain restrictions may be placed on it “in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.”⁵¹⁴ This provision establishes a three-part test when evaluating the lawfulness of restrictions placed on freedom of assembly:

- i. the restriction must be prescribed by law,
- ii. must be based on a legitimate interest, such as public order, and
- iii. must be necessary in a democratic society.⁵¹⁵

According to the Special Rapporteur on the right to freedom of assembly, laws which require state authorization for assembly are problematic. At best, national laws may have a requirement for prior notification, and even such provisions should be subject to a proportionality assessment to ensure that the right to free assembly is not unduly burdened.⁵¹⁶ The European Court of Human Rights has found that even unlawful demonstrations, where the participants did not comply with police orders, enjoyed protection as long as they were peaceful did not evince danger to the public order.⁵¹⁷ In addition to the duty not to interfere unduly with peaceful assemblies, states also have a duty in general to protect the right to peaceful assembly from undue interference by third parties.

One of the contexts in which the right to freedom of assembly gains particular significance is that of elections.⁵¹⁸ As the Special Rapporteur notes, the “right to freedom of peaceful assembly and of association are pertinent to the democratic process, both during the election period and between elections.”⁵¹⁹ The freedom to assemble peacefully is a prerequisite of effective campaigning, and serves as a primary means through which citizens can participate in public affairs.⁵²⁰ The right to freedom of assembly is implicit in one’s right to take part in the government of one’s country, as recognized by the UDHR and the ICCPR.⁵²¹

The right is also particularly important in terms of workers’ rights, including migrant workers and trade unions, and for those who are expressing a dissenting and minority view.⁵²² The principle of non-discrimination and equal protection are extremely significant in the context of dissent. With regard to right of workers to assemble peacefully, the UN Human Rights Council has repeatedly reaffirmed the importance of the International Labour Organization’s mandate.⁵²³

Article 25: The Right to Participate in Government

AHRD Article 25: (1) Every person who is a citizen of his or her country has the right to participate in the government of his or her country, either directly or indirectly through democratically elected representatives, in accordance with national law.

(2) Every citizen has the right to vote in periodic and genuine elections, which should be by universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electors, in accordance with national law.

The right to participate in government under international law has evolved into the right to democracy, and it is generally acknowledged that human rights can only be fully realized under democratic governance. The content of the right to participate in government as specified in the AHRD is generally consistent with the rights guaranteed in the UDHR and the ICCPR.⁵²⁴ However, a key difference is that the AHRD's grant is restricted to the terms of "national law." Some restrictions on political participation can be reasonable; for instance, many countries prohibit convicted or incarcerated felons from voting or running for office, and impose age requirements for enfranchisement. The AHRD provision here is problematic, however, because it allows states to pass national laws relating to political participation without regard to consistency with international human rights law. Consequently, a Member State may enact requirements for voting or running for office that significantly disadvantage a particular group and still act in compliance with Article 25 of the AHRD. Rather than including the qualification "in accordance with national law," a convention could require this right is exercised "without unreasonable restrictions" or "in accordance with national *and* relevant international law".

The AHRD also omits a key component of public participation: the right of access to employment in public services. The UDHR and ICCPR, and the Arab, American, and African instruments, guarantee the right of equal access to work in the public service of one's country.⁵²⁵ This right is integral to ensuring that government services and bureaucratic systems are not captured by political forces such that public positions are dispensed as rewards to supporters or bars to rivals; furthermore, the right ensures that privileged classes or groups cannot dominate public services and undermine other rights, such as minority group rights. The right guarantees that interested, able, and qualified citizens have the opportunity to serve their country as civil servants without undue restrictions.

Any future ASEAN human rights convention should include a provision regarding the right to equal access to employment in the public service of one's country which specifies that objective and reasonable criteria for appointment, promotion, suspension and dismissal be clearly stated.

ASEAN Member States' International Legal and Constitutional Obligations

Of the ASEAN Member States, six⁵²⁶ have ratified the ICCPR without reservation regarding the right to participate in government.⁵²⁷ Those states are obligated to ensure that all citizens are accorded the right to stand for office, vote in genuine periodic elections, and have equal access to public service. All ASEAN

Member States have ratified CEDAW, and eight the CRPD, which require them to take steps to ensure women and persons with disabilities have equal opportunities to participate in government.⁵²⁸

The constitutions of ASEAN Member States vary widely with regard to specific provisions for the right to participate in government and decision-making processes. Both the Philippines⁵²⁹ and Myanmar⁵³⁰ constitutionally guarantee all three components of the right in the ICCPR. Indonesia's provision for "equal opportunities in government"⁵³¹ may broadly be interpreted as the right to stand for office and equal access to public service, but the language is vague. The right to vote is governed by other legislation. The Constitutions of Cambodia, Lao PDR, Malaysia, Thailand and Viet Nam all include the right to vote and the right to stand for election but do not include the right to equal access to public service.⁵³² Thailand's Constitution provides for compulsory voting, which may violate other rights, such as freedom of expression, depending on how the requirement is implemented.⁵³³

Content and Interpretation of the Right in International Law

The right to democracy has its roots in the UDHR, which states that:

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
- (2) Everyone has the right of equal access to public service in his country.
- (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."⁵³⁴

The first provision protects the right of individuals to participate in governance directly through elected or other public office and to engage indirectly by choosing their public representatives. The second provision articulates that all individuals have the right to equal access to employment in the public service. The third provision asserts that government authority comes from the "will of the people," providing an expansive conceptualization of public participation in the form of democracy. Following this statement, the UDHR provides specific requirements which support an understanding of "will," such as holding genuine and periodic elections in which all qualified individuals are equally allowed to vote and polling choices are kept secret.

The ICCPR provides for the rights outlined in the UDHR, though it diverges from the UDHR's principles in key areas. While both instruments include the right to participate in government, the ICCPR expressly guarantees the right "to be elected."⁵³⁵ The ICCPR and UDHR stipulate that elections shall be periodic, genuine, universal and equal in suffrage through secret balloting, but the text of the ICCPR does not explicitly refer to the "will of the people" as the basis for the authority of government.⁵³⁶ However, the UN Human Rights Committee has since asserted that, to realize the right to participation intended by the ICCPR, states should conduct elections to "ensure that the authority of government continues to be based on the free expression of the will of electors."⁵³⁷ In addition, while the UDHR refers to the individual's right to participate in public life of "his country,"⁵³⁸ the ICCPR specifically limits the scope of

these rights to citizens.⁵³⁹ Additionally, unlike the UDHR, the ICCPR grants these rights “without unreasonable restrictions.”⁵⁴⁰ This provision allows states to impose practical limitations, such as a minimum age for voting or running for office.

The UN Human Rights Committee has highlighted that the right to vote also enables citizens to hold elected officials accountable through elections and that officials may only exercise constitutionally granted powers.⁵⁴¹ It also specifies that requiring candidates for election to be members of political parties violates their right to stand for election.⁵⁴² Additionally, the Committee affirms the need to “[base] access to public service on equal opportunity and general principles of merit, and [provide] secure tenure, ensure that persons holding public service positions are free from political interference or pressures.” It asserts that affirmative measures are necessary to open access for all citizens,⁵⁴³ and requires that the state must protect the working environment of public servants.⁵⁴⁴

Several other core human rights instruments also guarantee the right to participate in government in more specific contexts. CEDAW mandates not only that women be able to vote in elections, stand for election, and hold public office, but also that they must also have the right to vote in referenda, to participate in policy formulation and implementation, and to participate in non-governmental organizations.⁵⁴⁵ ICERD guarantees all people without distinction the right to vote, stand for election, and participate in public service.⁵⁴⁶ Under CRPD, persons with disabilities have equal rights to participate in government, and the Convention provides that states should ensure that technologies and facilities are accessible to all voters and public office holders.⁵⁴⁷

All the regional human rights instruments contain provisions granting the right to participate in government, and three also grant the right to equal access to public service.⁵⁴⁸ While the American Convention allows for restrictions on the right to access to public service, to vote, and to be elected based on age, nationality, language, and education,⁵⁴⁹ the Inter-American Democratic Charter specifically prohibits discrimination limiting citizen participation in government.⁵⁵⁰ The African Charter grants the right to participate but does not mention voting or elections specifically; this is instead dealt with in a separate Charter on Democracy, Elections and Governance.⁵⁵¹ Both the African and Arab human rights instruments include the requirement that these rights are granted in accordance with Member States’ laws, which may weaken them substantially. While the European Convention does not provide for access to public service, it does outline “conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”⁵⁵²

International case law has clarified the contours of the right to participate in government. The African Commission on Human and Peoples’ Rights has decided six cases that relate to the right to participate in government. The Commission found violations of the African Charter where states have required that both parents be nationals to qualify an individual to stand for election⁵⁵³ or prohibited naturalized citizens from being elected.⁵⁵⁴ Additionally, the Commission has found that excluding persons with mental disabilities from political participation violates their rights,⁵⁵⁵ has affirmed that election results must be respected by the government,⁵⁵⁶ and has ruled that all political parties cannot be banned.⁵⁵⁷

The European Court of Human Rights has held that limitations on voting rights of citizens who have not been resident in a country for a number of years are consistent with a right to participate in government,⁵⁵⁸ that states are not required to make arrangements for citizens living abroad to vote,⁵⁵⁹ and that restricting the ability of individuals to stand for election based on their connection to a country's past authoritarian regime is legitimate.⁵⁶⁰ The European Court has also ruled that blanket bans of the right to vote of those with mental disabilities are unacceptable.⁵⁶¹ The Inter-American Court, too, has ruled that requiring individuals to be members of political parties violates the right to participate in government⁵⁶² and that restrictions that limit representation of large populations of people, particularly indigenous populations, also violates the right.⁵⁶³

As the right to participate in government has evolved, it has gone beyond the minimal rights guaranteed in the core human rights texts and has become a right to democracy. Most regional organizations in their founding documents require Member States to adhere to the principles of democracy, rule of law, and human rights, as does ASEAN in the ASEAN Charter.⁵⁶⁴ Additionally, the Vienna Declaration invokes democracy fifteen times in asserting the link between respect for human rights and democratic governance, asserting that they are interdependent and mutually reinforcing.⁵⁶⁵ In the American context, in addition to the Charter and Convention, Member States have also adopted the Inter-American Democratic Charter, which enshrines democratic principles within the system and calls for punitive measures for unconstitutional alterations of political regimes.⁵⁶⁶ The Inter-American Commission on Human Rights has recently taken an active role in protecting democracy by monitoring the attempt to limit competition by political dismissal of rivals by sitting politicians.⁵⁶⁷

Article 27: The Right to Work

AHRD Art. 27:

- (1) Every person has the right to work, to the free choice of employment, to enjoy just, decent and favourable conditions of work and to have access to assistance schemes for the unemployed.*
- (2) Every person has the right to form trade unions and join the trade union of his or her choice for the protection of his or her interests, in accordance with national laws and regulations.*
- (3) No child or any young person shall be subjected to economic and social exploitation. Those who employ children and young people in work harmful to their morals or health, dangerous to life, or likely to hamper their normal development, including their education should be punished by law. ASEAN Member States should also set age limits below which the paid employment of child labour should be prohibited and punished by law.*

The AHRD is not particularly specific with regards to its approach to the right to work. Other human rights instruments explicitly recognize components of the right to just, decent and favorable conditions of work such as equal pay for work of equal value, remuneration sufficient to ensure a life of dignity, a healthy work environment, and limited working hours that allow for rest and leisure.⁵⁶⁸ The failure to include the right to equal pay for equal work represents a significant departure from international labor and human rights standards.

In relation to forced and child labor, although Article 27 prohibits the exploitative labor of children and provides a right to “free choice of employment,” this still falls short of ASEAN Member States’ obligations under the ILO conventions and core human rights treaties.⁵⁶⁹ The AHRD recognizes a need to punish persons complicit in exploitative child labor, but does not address stronger requirement to take action to eliminate such labor practices, as the ILO Convention requires.

It is problematic that the AHRD subjects the right to form and join trade unions to national law without requiring that law to be consistent with international labor standards. This provides room for Member States to use national law to weaken the already limited freedom of association provided for in the AHRD.

ASEAN Member States which are members of the ILO commit, through that membership, to respect and promote freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labor, the abolition of child labor and the elimination of discrimination in respect of employment and occupation.⁵⁷⁰ However, the AHRD does not adequately reflect these commitments. A future ASEAN human rights convention should recognize the same labor rights as contained in the ILO Conventions ratified by ASEAN Member States and the 1998 ILO Declaration on the Fundamental Principles and Rights at Work. To achieve this, the ASEAN human rights convention must include provisions on equal pay for work of equal value, just and adequate remuneration, limited working hours, non-discrimination, and the need to guarantee a healthy and safe

work environment. The right to form and join trade unions should be made subject to national law *and* applicable international law, and a right to collective bargaining explicitly recognized and protected.

Forced and the worst forms of child labor should also be prohibited in an ASEAN human rights convention, using language that accurately reflects the commitment made by ASEAN Member States to “suppress” and “eliminate” these types of exploitation.⁵⁷¹ Reference should also be made to the ILO Conventions, which require ASEAN Member States to specify a minimum age for different types of work.⁵⁷²

ASEAN Member States’ International Legal and Constitutional Obligations

All ten ASEAN countries are members of the ILO and have ratified at least two of the eight ILO fundamental labor conventions. Member States have universally ratified the Worst Forms of Child Labour (No. 182) Convention, and nine out of ten the Forced Labour Convention (No. 29).⁵⁷³ All except Myanmar are signatories to the Minimum Age Convention (No. 138) and have specified the age at which a child may begin work as 14, 15 or 16 years.⁵⁷⁴ Four ASEAN Member States have ratified the Freedom of Association and Protection of the Right to Organise Convention (No. 87) and five the Right to Organise and Collective Bargaining Convention (No. 98).⁵⁷⁵ These two conventions encompass the right to join and form trade unions, and engage in collective bargaining and industrial action.⁵⁷⁶ The Equal Remuneration (No. 100) and Discrimination Conventions (No. 111), which address equality and non-discrimination in relation to work, have been ratified by eight and six ASEAN Member States respectively.⁵⁷⁷

Of those international human rights instruments which are not part of the ILO rights framework, the ICESCR provides the fullest explanation of states’ obligations regarding the right to work and associated labor rights and has been ratified by six ASEAN Member States.⁵⁷⁸ Six ASEAN Member States have also ratified the ICCPR and ICERD, which recognize freedom from forced labor, just, favorable and decent conditions of work, and the right to form and join trade unions.⁵⁷⁹ All Member States are bound by CEDAW and CRC, and eight have ratified the CRPD. Together, these treaties require states parties to eliminate discrimination in the area of employment against women, persons with disabilities, and recognize the right of the child to freedom from economic exploitation and work harmful to his or her development.⁵⁸⁰ Indonesia and the Philippines are signatories to the ICRMW, which recognizes migrant workers’ labor and other human rights.⁵⁸¹

The right to work is guaranteed in eight ASEAN constitutions.⁵⁸² In general, the right to work is expressed as the right to work in humane conditions,⁵⁸³ the right to receive fair and equal opportunity and compensation,⁵⁸⁴ and the right to conduct business freely.⁵⁸⁵ The right to choose one’s employment and the right to rest are only guaranteed in two constitutions.⁵⁸⁶ The Constitution of the Philippines is unique in affording full protection to labor, both local and overseas, as well as organized and unorganized labor, and in guaranteeing the right to strike.⁵⁸⁷

Content and Interpretation of the Right in International Law

Article 23 of the UDHR states that,

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.
- (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- (4) Everyone has the right to form and to join trade unions for the protection of his interests.

Additionally, the UDHR also includes a separate article granting the right to rest and leisure through limitation of working hours.⁵⁸⁸

The ICESCR describes the right to work as “the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts,” and the right to enjoy just and favourable conditions of work, which include: wages sufficient to provide a decent standard of living; equal remuneration for work of equal value; merit-based promotion; safe and healthy working conditions; rest and leisure time; and the right to form and join labor organizations and strike.⁵⁸⁹

The ILO has identified four fundamental principles and rights of work, which include:

- (a) freedom of association;
- (b) the elimination of all forms of forced or compulsory labor;
- (c) the effective abolition of child labor; and
- (d) the elimination of discrimination in respect of employment and occupation.⁵⁹⁰

Details on the content of these fundamental principles can be found in ILO core conventions.

Freedom of Association

Workers and employers have a right to establish and join labor organizations of their own choosing and to draw up the constitutions and rules of these organizations, elect their representatives freely, and to organize their administration and activities.⁵⁹¹ The right to strike is protected in the ICESCR, and the ILO Committee of Experts has implied a right to strike in the ILO Freedom of Association Convention (No. 87).⁵⁹² Freedom of association includes protections of collective bargaining agreements, which occur when worker and employer organizations freely negotiate conditions of employment and regulate them through collective agreements.⁵⁹³

Non-Discrimination and Decent Work

Equality and non-discrimination are fundamental human rights. The ILO Equal Remuneration Convention promotes the right to ‘equal pay for work of equal value.’ It goes beyond protecting ‘equal pay for equal work’ or ensuring the same pay to those who are doing the same jobs. Women’s work – such as domestic work – tends to be undervalued. Different jobs may have a similar value, but with vastly different pay-scales, with higher pay for a job traditionally done by men, and lower pay for that done by

women. Overcoming gender inequality requires that work is valued and paid accordingly. The ILO Equal Remuneration Convention applies to all workers, both nationals and non-nationals, working in the public and private sectors and the formal and informal economy. These principles of non-discrimination in remuneration are also recognized in the ILO Convention concerning Discrimination, as well as the ICESCR, ICERD, CEDAW, and ICRMW, and finally the Arab and European regional human rights texts.⁵⁹⁴

The ICRMW and case law from the European Court of Justice provide that non-nationals are entitled to the same working conditions as nationals, although they do not have the same right to obtain work as nationals.⁵⁹⁵ The African Court of Human and Peoples' Rights has ruled that the right to work applies to citizens and non-citizens alike.⁵⁹⁶

The U.N. Committee on Economic, Social and Cultural Rights (CESCR) includes, as elements of the right to decent work, the right to worker safety, remuneration sufficient to support a family, and respect for the physical and mental integrity of the worker in the exercise of his or her employment.⁵⁹⁷ The ILO concept of decent work is somewhat broader, involving the realization of four decent work strategic objectives of, "full and productive employment, social protection, social dialogue, and rights at work."⁵⁹⁸

Elimination of Child Labor

There is general agreement in international law that children should not be required to perform certain types of exploitative labor.⁵⁹⁹ The ILO Minimum Age Convention provides flexibility in allowing signatories to specify a slightly lower age for the minimum age at which children can generally work, and to make specific provisions for particular industries.⁶⁰⁰ The ILO prohibition against the worst forms of child labor is absolute and states parties must abolish such labor practices for all persons under 18 years of age.⁶⁰¹ The worst forms of child labor include: slavery or practices similar to slavery, the use, offer or procurement of children for prostitution, pornography, illicit activities such as drug trafficking, and work which is likely to harm the health, safety or morals of children.⁶⁰²

Article 28: The Right to an Adequate Standard of Living

AHRD Art. 28: Every person has the right to an adequate standard of living for himself or herself and his or her family including:

- a. The right to adequate and affordable food, freedom from hunger and access to safe and nutritious food;*
- b. The right to clothing;*
- c. The right to adequate and affordable housing;*
- d. The right to medical care and necessary social services;*
- e. The right to safe drinking water and sanitation;*
- f. The right to a safe, clean and sustainable environment.*

This section serves as an introduction to Article 28, and the various subsets of the right to an adequate standard of living are discussed separately.

The formulation of the right to an adequate standard of living in the AHRD follows the lead of several core human rights documents in its affirmation that the right to an adequate standard of living must necessarily entail certain basic subsistence rights. The UDHR mentions everyone's right "to a standard of living adequate for the health and well-being of himself and his family."⁶⁰³ The elements of the right set out in the UDHR are in essence the same as under the AHRD (right to food, clothing, housing, medical care and necessary social services), but the AHRD, recognizing the evolution of human rights law that has taken place since 1948, adds the right to safe drinking water and sanitation, the right to food, and the right to a safe, clean, and sustainable environment. The inclusion of the right to a safe, clean and sustainable environment is particularly progressive, as this right is newly emerging in international human rights law.

The ICESCR also recognizes every person's right to an "adequate standard of living,"⁶⁰⁴ and the CESCR has elaborated on the specific sub-rights which are subsumed by it. These include the right to adequate housing, the right to food, the right to water, and the right to social security.⁶⁰⁵ The CRC, CEDAW, and ICERD also recognize the right to an adequate standard of living.⁶⁰⁶ In addition, several regional human rights instruments also affirm the human right to an adequate standard of living.⁶⁰⁷

Prohibiting discrimination of any kind with regard to the right to clothing, housing, food, water, social security and medical services, and a clean and safe, sustainable environment, on grounds of race, color, sex, language, age, religion, political or other opinion, national origin, or other status is essential for the realization of the right to an adequate standard of living. The prohibition on discrimination also entails an immediate obligation for states. Even though some aspects of these rights allow for progressive realization, the prohibition on discrimination is not one of them. Certain segments of the population, such as women, children, or indigenous peoples, may be particularly vulnerable to violations of the right to adequate standard of living or might be particularly dependent on the state to ensure complete fulfillment of the right. In these cases, states parties may be obliged to take on special protective measures to ensure the fulfillment of the right.

In order to ensure that the elements of the AHRD right to an adequate standard of living are extended to non-nationals and other vulnerable groups, Article 28 must be read alongside the AHRD non-discrimination provision and Article 4, which stresses that the “rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups” are an essential part of human rights.⁶⁰⁸

Article 28(A): The Right to Adequate and Affordable Food, Freedom from Hunger and Access to Safe and Nutritious Food

The AHRD's provision regarding the right to food is largely consistent with other binding and non-binding international and regional human rights instruments. By providing for the right to freedom from hunger and emphasizing that the right to food means access to *safe, nutritious, and adequate* food, the AHRD is progressive and moves beyond the scope of most other regional and international human rights instruments and towards the Millennium Development Goals' (MDGs') mission. However, Art. 28 (a) makes no mention of *availability*, which is another important facet of the right to food.

Additionally, international and regional cooperation is an important aspect of the realization of the right to food and could have particular relevance in the ASEAN context, particularly given the extent to which agricultural production in the region is interrelated. The AHRD refers to cooperation in relation to the realization of social economic rights in Article 33, and in relation to all rights in Article 39. A future ASEAN Human Rights Convention could improve upon the already progressive-nature of the articulation of the right to food and include the following provisions: special measures for certain vulnerable groups such as children, a requirement for states parties to ensure the availability of food, and specifically highlight the need for international and regional cooperation in guaranteeing the right to food.

ASEAN Member States' International Legal and Constitutional Obligations

Six ASEAN states have ratified the ICESCR, which includes the right to food.⁶⁰⁹ All have ratified the CRC, which requires states parties to fight disease and malnutrition of children "through the provision of adequate nutritious foods and clean drinking-water," and CEDAW, which provides that pregnant and lactating women must have access to adequate nutrition.⁶¹⁰ Eight have ratified the CRPD, which guarantees the right to adequate food for persons with disabilities.⁶¹¹ The right to food also appears in a few ASEAN instruments, including the Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children (2010),⁶¹² and the Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN (2009).⁶¹³

Among the ASEAN member state constitutions, several mention the regulation of food, but none guarantee it as a right. The Philippines Constitution mentions the state's obligation to "establish and maintain an effective food . . . regulatory system,"⁶¹⁴ and the Malaysian Constitution has a similar provision.⁶¹⁵ The Constitution of Brunei refers to the state's powers in a state of emergency to issue orders regarding the supply of food.⁶¹⁶ The Myanmar Constitution guarantees the right to "security and sufficiency of food" for civil servants⁶¹⁷ and includes the responsibility of preventing the adulteration of foodstuffs in the list of duties of the social sector.⁶¹⁸ All fall far short of a meaningful constitutional guarantee of the right to safe, nutritious, and adequate food for everyone.

Content and Interpretation of the Right in International Law

The UDHR includes the right to food as an element of the right to an adequate standard of living: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food . . .”⁶¹⁹ Similarly, in the ICESCR, the right to food appears under the right to an adequate standard of living.⁶²⁰ The ICESCR, however, goes further than the UDHR by adding an additional section in which state parties recognize “the fundamental right of everyone to be free from hunger” (the only instance in which the expression “fundamental right” is used).⁶²¹ State parties to the ICESCR are also called upon to “take, individually and through international cooperation, the measures, including specific programmes, which are needed” to ensure the right to food, including “methods of production, conservation and distribution of food, . . . disseminating knowledge of the principles of nutrition . . . developing or reforming agrarian systems in such a way as to achieve the most effective development and utilization of natural resources, [and aiming to ensure an] equitable distribution of world food supplies in relation to need.”⁶²² It is worth noting that international cooperation with regard to the right to food occupies a prevalent place in the international human rights agenda.

A definition of the right to food can be found in CESCR General Comment No. 12, according to which “the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.”⁶²³ General Comment No. 12 affirms that the right to food is “indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights . . .”⁶²⁴ The realization of the right to food entails the adequacy, availability, accessibility, safety, nutritional quality, and acceptability of food.⁶²⁵

The *adequacy* of food should be interpreted in a broad rather than a narrow sense. States have an obligation to mitigate and alleviate hunger even in times of natural and other disasters.⁶²⁶ Additionally, “the notion of *sustainability* is intrinsically linked to the notion of adequate food or food *security*,” which is particularly important in the context of climate change and environmental protection.⁶²⁷ This provision also implies that food should be accessible for both present and future generations. *Availability* means food is available in a “quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture.”⁶²⁸ It is important to emphasize that there is also a notion of cultural acceptability attached to the right to food, implying the need to take into account the “non-nutrient-based values attached to food and food consumption.”⁶²⁹

Of course, the right to food is interrelated with several of the other sub-rights which together comprise the adequate standard of living. CESCR’s General Comment No. 15 on the Right to Water states that the realization of the right to adequate food requires sustainable access to water resources for agriculture, thereby establishing the connection between the right to food and water.⁶³⁰ In addition to the General Assembly Resolution on the Right to Food,⁶³¹ General Assembly Resolution 54/175 on the right to development reaffirms that the full realization of the right to development creates a “moral imperative for both national Governments and for the international community . . . to full[y] realiz[e] . . . the rights to food and clean water.”⁶³² The Commission on Human Rights links clean water and food together as

fundamental rights.⁶³³ Freedom from hunger is also the first MDG, with the target of halving the proportion of people who suffer from hunger by 2015.⁶³⁴

The core normative aspects of the right to food apply with equal force to vulnerable groups, such as refugees, prisoners, indigenous and tribal peoples.⁶³⁵ Accordingly, the right to food appears in the CRPD,⁶³⁶ and the Refugee Convention⁶³⁷ and the Convention Relating to the Status of Stateless Persons, specifically in regard to rationing.⁶³⁸

Among the regional human rights treaties, the African Charter on Human and Peoples' Rights asserts the individual's right to "enjoy the best attainable state of physical and mental health,"⁶³⁹ though it makes no specific reference to a right to food. The Arab Charter, like the AHRD, mentions the right to food under the more general right to an adequate standard of living.⁶⁴⁰ The American Declaration of the Rights and Duties of Man also recognizes the link between the right to the preservation of health and the right to food, though limits it to the extent permitted by public and community resources.⁶⁴¹ The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights has a separate article dealing with right to food, linking the right to adequate nutrition with the right to enjoy "the highest level of physical, emotional and intellectual development."⁶⁴²

It is important to emphasize that the right to food is inextricably linked to other human rights, such as the right to life, the right to health, the right to water, the right to work and social security, the right to education, the right to adequate housing, the right to information, the right to freedom of association, the right to take part in public affairs, and freedom from torture, cruel, inhuman, and degrading treatment.⁶⁴³ The U.N. Human Rights Committee found a violation of the right to life when a detainee died in an overcrowded detention center without access to adequate food or health services.⁶⁴⁴ The Commission found that denying detainees food over the course of several days constitutes cruel, inhuman, and degrading treatment.⁶⁴⁵ The African Commission on Human and Peoples' Rights has found that destroying a group's food sources violates the right to food. Although the right to food is not explicit in the African Charter, the Commission held that it is implicit in such provisions as the rights to life, health, and economic, social, and cultural development.⁶⁴⁶ The Inter-American Court on Human Rights has also emphasized the link between the right to life and the right to food.⁶⁴⁷ In addition, both the Inter-American Court and the Inter-American Commission on Human Rights have developed extensive jurisprudence on the right to food as it applies to indigenous peoples, especially indigenous communities' claims to ancestral lands go unrecognized by the government and oblige such communities to turn to the government for subsistence.⁶⁴⁸ In such cases both the Court and the Commission have established the state's obligation to provide adequate food assistance.⁶⁴⁹

Article 28(B): The Right to Clothing

The AHRD's specific inclusion of the right to clothing as a subset of the general right to an adequate standard of living is mirrored in the UDHR, the Arab Charter, and the American Declaration of Human Rights. In so doing, it reinforces the interconnectedness of the right to clothing with other rights, such as the right to health and the right to life.⁶⁵⁰ However, the right to culturally appropriate clothing as well as the right to wear religious clothing are important and much contested facets of the right, and are not specifically mentioned in the AHRD. A future ASEAN human rights convention should address the right to culturally appropriate clothing.

ASEAN Member States' International Legal and Constitutional Obligations

As mentioned above, six Member States have ratified the ICESCR and all the CRC, both which recognize the right to clothing as part of the right to an adequate standard of living.⁶⁵¹ In terms of ASEAN regional obligations, the Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children, while not making a specific reference to the right to clothing, mentions improving "the proportion of women and children with access to . . . basic necessities."⁶⁵² Arguably, access to clothing is a basic necessity, though no ASEAN Constitution mentions the right to clothing specifically.

Content and Interpretation of the Right

The right to clothing represents part of the more general right to an adequate standard of living. As such, it is often subsumed under this more general right, failing to receive specific mention in many human rights instruments. The right to clothing as a separate element of the right to an adequate standard of living does appear in the UDHR,⁶⁵³ which recognizes that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services." The ICESCR mentions the right to clothing as part of the "right of everyone to an adequate standard of living for himself and his family."⁶⁵⁴ The CRC talks of "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development" and the state's obligation in terms of assisting parents and others responsible for the child to implement this right and "in case of need provide material assistance and support programmes, particularly with regard to . . . clothing."⁶⁵⁵

The Arab Charter⁶⁵⁶ and the American Declaration⁶⁵⁷ are the only regional human rights instruments which mention the right to clothing specifically. The American Declaration asserts the right to clothing in the context of the right to health and well-being through sanitary and social measures, while the Arab Charter places the reference to clothing in the general context of the right to an adequate standard of living. Among non-binding international or regional instruments, The Cairo Declaration on Human Rights in Islam mentions the right to clothing in two contexts: the right of an individual to a decent living⁶⁵⁸ and in the context of armed conflict, emphasizing the right of prisoners of war to clothing.⁶⁵⁹

As noted, the right to clothing is strongly connected to other core human rights, such as the right to life and health and the right to an adequate standard of living.⁶⁶⁰ As the CESCR noted in General Comment

14, “the right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights.”⁶⁶¹ While Committee does not refer to the right to clothing specifically in this context, without access to basic clothing the right to health as well as the right to life may be in danger.

The right to adequate clothing is particularly relevant for certain vulnerable groups, such as the elderly,⁶⁶² children,⁶⁶³ detainees, prisoners of war, and women, and it can have special relevance for workers, including migrant workers, in terms of adequate and appropriate clothing for work to provide for a safe and healthy work environment. The right to adequate clothing as it relates to refugees means that it must be suitable for the climate of the host state and should not stigmatize them.⁶⁶⁴ Since clothes can serve as a means to identify one as belonging to a certain religion, ethnicity, or culture, it is important to emphasize the importance of non-discrimination provisions in terms of the right to clothing,⁶⁶⁵ as well as the importance of the right as it relates to human dignity, especially with regard to vulnerable groups.⁶⁶⁶

The right to *culturally* adequate clothing is a relevant element of the right, especially as it relates to the right to freedom of expression and freedom of religion.⁶⁶⁷ For example, the European Court of Human Rights has addressed this issue, upholding Turkey’s ban on wearing the head scarf in universities, emphasizing the wide margin of appreciation of the national authorities as well as the importance of maintaining secularism.⁶⁶⁸ The Human Rights Committee considered a communication regarding the wearing of head covering on passport photos and, by reference to General Comment 22 concerning Article 18 of the ICCPR, which discusses freedom of expression and religion, held that the freedom to manifest one’s religion encompasses the wearing of distinctive clothing or head coverings.⁶⁶⁹ The Committee found that because the wearing of the Sikh turban is not only a religious duty but is also tied in with a person’s identity, wearing it in passport photos is a religiously motivated act, and the French law requiring bareheaded passport photographs is a disproportionate restriction on the freedom of religion.⁶⁷⁰ Although the right to clothing is not the explicit basis for these decisions, it shows the strong link between the right to religious freedom and culture and the right to clothing. The right to clothing is strongly tied to the realization of other rights, and a lack of fulfilment of the right to clothing can jeopardize other core rights.

Article 28(C): The Right to Adequate and Affordable Housing

The AHRD states that the right to housing should be “adequate” and “affordable,” and thus distinguishes itself from other international regional instruments. However, this AHRD provision is still consistent with the view of the CESCR that ‘the right to housing’ should refer not just to housing but *adequate housing*.⁶⁷¹

The Committee has interpreted adequate housing to include the principle of affordability, which requires that financial costs associated with housing should not threaten or compromise the attainment and satisfaction of other basic needs. The emphasis on the aspect of affordability in the AHRD suggests that ASEAN Member States should provide subsidized housing for those unable to obtain affordable housing.

If ASEAN wishes to further strengthen the right to housing in a future human rights convention, it could specifically draw on those principles elaborated by the CESCR to add to its list of housing rights legal security of tenure, availability of services, materials, facilities, and infrastructure, habitability, accessibility, location, and cultural adequacy.⁶⁷²

ASEAN International Legal and Constitutional Obligations

Six ASEAN Member States are parties to the ICESCR⁶⁷³ and are obliged to achieve progressively the full realization of the right to adequate housing.⁶⁷⁴ Additionally, under CEDAW, all ten ASEAN Member States shall undertake all appropriate measures to ensure women’s rights to housing.⁶⁷⁵

Unlike the other constitutions of the ASEAN Member States, the Constitutions of the Philippines and Viet Nam provide explicit guarantee of the enjoyment of the right to housing.⁶⁷⁶ The Constitution of the Philippines is also noteworthy for its inclusion of provisions on “affordable and decent housing”⁶⁷⁷ and the prohibition against forced eviction.⁶⁷⁸

Content and Interpretation of the Right in International Law

The ICCPR does not explicitly mention the right to housing, but it links the realization of the right to adequate housing to other basic human rights, such as the right to protection of one’s private life, family, and home.⁶⁷⁹ The right to adequate housing is integrally linked to other human rights and thus cannot be viewed in isolation from other human rights, such as the concept of human dignity and principles of non-discrimination.

The right to housing is also included in several regional human rights instruments, including the European Social Charter,⁶⁸⁰ the Charter of Fundamental Rights of the European Union,⁶⁸¹ the Charter of the Organization of American States,⁶⁸² and the American Declaration of the Rights and Duties of Man.⁶⁸³ The African Charter contains no specific guarantee of the right to housing, however.

International and regional instruments also pay particular attention to the housing rights of specific groups, including women,⁶⁸⁴ children,⁶⁸⁵ the elderly,⁶⁸⁶ refugees,⁶⁸⁷ persons with disabilities,⁶⁸⁸ migrant workers,⁶⁸⁹ and other minorities.

In interpreting the right to housing, the CESCR states that the right to housing should not be interpreted in a narrow or restrictive sense.⁶⁹⁰ The Committee further elaborates that arbitrary or unlawful interference with privacy, family, or home life would undermine the right to adequate housing. The Committee further notes that the concept of adequacy includes seven key aspects:

- legal security of tenure;
- availability of services, materials, facilities, and infrastructure;
- affordability;
- habitability;
- accessibility;
- location; and
- cultural adequacy.⁶⁹¹

Additionally, it asserts that “[a]dequate shelter means . . . adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities - all at a reasonable cost.”⁶⁹²

Protection against forced evictions is recognized as one of the key elements of the realization of the right to adequate housing, as forced evictions can have implications to the enjoyment of other human rights, such as the right to life, the right to personal security, and the right to health. The African Commission on Human and Peoples’ Rights recalls that “the United Nations Commission on Human Rights has recognized that forced evictions constitute gross violations of a range of human rights, in particular the right to adequate housing.”⁶⁹³

The African Commission has also held that although the right to housing is not explicitly guaranteed under the African Charter, the combined effect of violations of the right to health, the right to property, and the right to protection of the family constitute a violation of the right to housing.⁶⁹⁴ The European Committee of Social Rights has found that “the right to housing permits the exercise of many other rights (civil and political as well as economic, social and cultural) and is of central importance to the family.”⁶⁹⁵ This ruling also noted that “adequate housing requires a dwelling of suitable size.”⁶⁹⁶ Similarly, the Committee held that “in order to meet the criteria of adequacy, a dwelling must provide occupants with adequate space and protect them from harsh weather conditions or other threats to health.”⁶⁹⁷

Article 28(D): The Right to Medical Care and Social Services

While the AHRD's language on the right to social services and medical care mirrors that in the UDHR,⁶⁹⁸ it is important to acknowledge that the provision of social services and medical care to individuals who are at particular risk due to their vulnerable status merits special consideration, as is reflected in a number of regional and international instruments. The right to social services and medical care is particularly important for people living in rural areas and migrant workers, in addition to other vulnerable groups. For these groups, the non-discriminatory provision of medical care and social services is an absolute necessity, and governments may need to take positive measures to fulfil their obligations in implementing this right. As mentioned in the introductory section for Article 28, the right to social services and medical care must be read alongside the AHRD's non-discrimination and "vulnerable groups" provisions to ensure that persons with disabilities, refugees, migrant workers, indigenous and other groups are afforded equal and adequate access to this right.⁶⁹⁹

ASEAN Member States' International Legal and Constitutional Obligations

Six ASEAN Member States have ratified the ICESCR, which requires states parties to "assure to all medical service and medical attention in the event of sickness" as part of the right to health, and to guarantee the right to social security.⁷⁰⁰ All Member States have ratified the CRC and CEDAW, and eight the CRPD, which respectively recognize the importance of medical assistance and social security for children, particularly disabled children, women's need for medical care in relation to pregnancy, and the need to make medical facilities accessible for persons with disabilities.⁷⁰¹

The right to medical care and social services appears in some form in the constitution of seven ASEAN Member States.⁷⁰² Several of these constitutions have provisions regarding special measures to provide certain vulnerable groups with social services and medical care or to provide these services without any form of discrimination.⁷⁰³ The constitutions of Myanmar, Lao PDR, Viet Nam, and Cambodia mandate the provision of health care or social services only for their own citizens.⁷⁰⁴

Among ASEAN legal instruments, the Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children, the Declaration on the Commitments for Children in ASEAN, and the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers⁷⁰⁵ mention the right to social services and medical care. These declarations all reflect ASEAN Member States' intentions to provide social services and medical care to certain at-risk individuals by providing additional protective measures as necessary.

Content and Interpretation of the Right in International Law

The right to medical care and necessary social services is closely connected to the rights to life, health, and a dignified existence. It is also tied to the right to an adequate standard of living and often appears either as part of a more general right to an adequate standard of living – as in the AHRD – or as an aspect of the right to health or social security.

The right was first recognized in the UDHR, under the more general right to an adequate standard of living. The UDHR notes that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.”⁷⁰⁶ While no firm definition of the right to medical care and necessary social services exists in international human rights law,⁷⁰⁷ aspects of the right that are particularly important include availability and accessibility, dignity, quality, non-discrimination, and participation.⁷⁰⁸

The ICESCR recognizes the universal right to the highest attainable standards of health. States parties must take steps to realize this right through the prevention, treatment, and control of epidemic, endemic, occupational, and other diseases, and the creation of conditions which would ensure medical service and medical attention for all in the event of sickness.⁷⁰⁹ The ICCPR recognizes state parties’ obligations to protect every human being’s inherent right to life.⁷¹⁰ The CRC recognizes every child’s right to life, calls on states to establish the necessary social programs for the protection and support of the child, and recognizes the child’s right to the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.⁷¹¹ CEDAW also has several articles dealing with the right of women to necessary social services, medical care and healthcare services, and social security programs.⁷¹² The ICERD also recognizes the rights to public health, medical care, social security and social services, without discrimination.⁷¹³

The European Social Charter contains provisions on the right to protection of health, the right to social and medical assistance, and the right to social welfare services.⁷¹⁴ The African Charter on Human and Peoples’ Rights contains no specific provision regarding medical care and social services, though it does enshrine the individual’s right to the best attainable state of physical and mental health.⁷¹⁵ The Arab Charter mentions the right to an adequate standard of living, including “services,” and recognizes everyone’s right to the enjoyment of the highest attainable standard of physical and mental health, the right of the citizen to free basic healthcare services, and non-discriminatory access to medical facilities.⁷¹⁶ The Arab Charter also mentions states’ duty to provide social services and health services free of charge for all people with disabilities.⁷¹⁷ The American Declaration of the Rights and Duties of Man states that “every person has the right to the preservation of his health through sanitary and social measures relating to . . . medical care,” but only to the extent permitted by public and community resources.⁷¹⁸

The right has particular significance for vulnerable groups⁷¹⁹ such as women (for whom reproductive rights are particularly important),⁷²⁰ the elderly, people with disabilities,⁷²¹ children, minorities and indigenous and tribal peoples,⁷²² refugees, detainees,⁷²³ and stateless persons (for whom the non-discriminatory aspect of the right is especially relevant). States must also recognize the importance of free, prior, and informed consent for the provision of medical care. In addition, gender sensitivity is an important facet of the right to medical care.

Article 28(E): The Right to Safe Drinking Water and Sanitation

In light of wide recognition of the right to safe drinking water and sanitation in recent regional and international human rights instruments and the heightened profile of the right to water and sanitation as a result of the MDG, the AHRD's specific recognition of these rights is progressive and in line with recent binding and non-binding international human rights instruments. The acknowledgement of the right to water and sanitation is particularly important in the ASEAN contexts, given the region's many shared riparian systems and borders. However, the right to water and sanitation does not stand alone – it is protected only by ensuring that aspects of the right including access, availability, adequacy, sustainability and inter-generational equity are fulfilled.

The cultural aspect of the right to water is also important, as is the right to water in the development context. Free, prior, and informed consent and participation in decision-making processes regarding bodies of water and the right to effective review mechanisms and remedies are integral to the realization of the right.

A future ASEAN human rights convention could strengthen this right to clean drinking water and sanitation by specifying that the right requires persons have sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic uses, and highlighting the need for sustainable water usage.

ASEAN Member States' International Legal and Constitutional Obligations

Although not explicitly recognized in the ICESCR, the right to water has been recognized as an integral part of the right to an adequate standard of living. Additionally, all ASEAN Member States have ratified the CRC and CEDAW, which require states parties to ensure children have access to clean drinking water and that women have equal access to sanitation and water supply.⁷²⁴ The CRPD obligates states parties to “ensure equal access by persons with disabilities to clean water services.”⁷²⁵

The right to safe drinking water and sanitation does not appear in any of the ASEAN state constitutions, though several regional instruments address the right to water. Among ASEAN legal instruments, the Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children (2010)⁷²⁶ and the Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN)⁷²⁷ contain references to this right. The Ha Noi Declaration aims to “improve the proportion of children and women with access to housing, improved sources of safe drinking water and adequate sanitation facilities,”⁷²⁸ while the Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN mentions the goal of achieving “a balance between economic growth and social development and environmental sustainability in order to reduce and not to create negative impacts to the attainment of the Millennium Development Goals.”⁷²⁹

Content and Interpretation of the Right in International Law

The right to water includes the right of access to water. Access to water means water in the amount and quality that is sufficient for vital human needs, such as drinking, food production, and sanitation. Accessibility also requires that the water be within safe physical reach, affordable for all, and provided without discrimination. The obligation to provide access to sufficient water also entails an obligation to manage water resources effectively and in a sustainable manner.⁷³⁰

The right to water, like the right to food, is fundamentally interconnected with various other rights. It is associated with the right to life, the right to seek, receive, and impart information concerning public decisions and policies that impact the right to water, and the right to effective review mechanisms and remedies. The rights to food and health⁷³¹ are also relevant to the right to water. The right to an adequate standard of living also includes the right to basic sanitation and access to safe drinking water, as recognized in the AHRD.

The situation of vulnerable individuals, including people with disabilities,⁷³² women,⁷³³ children,⁷³⁴ minorities, indigenous peoples,⁷³⁵ refugees, stateless people, prisoners, migrant workers,⁷³⁶ those living in rural areas, and detainees also bears special recognition in relation to the right to water since they depend more—and sometimes completely—on the state to provide them with such resources.

The right to water resources is significant as a cultural right, especially as it relates to the rights of religious groups, indigenous communities, and cultural minority groups to the conservation and use of water-related sanctuaries.⁷³⁷ This element of the right has been addressed by the ICESCR, which calls for the recognition of water as a social and cultural good, rather than an economic good.⁷³⁸ The Human Rights Committee has also alluded to the cultural dimensions of the right.⁷³⁹ In the context of a broader ‘right to development,’ the right to water has special meaning for indigenous communities. When it comes to the planning and implementation of large development projects,⁷⁴⁰ the right to information, the right to participate in decision-making processes, the right to effective review mechanisms, and the right to remedy can also be directly relevant. The principle of free, prior, and informed consent as it applies to indigenous peoples is becoming more and more relevant in the context of the right to water and development.⁷⁴¹

The right to water does not appear in the UDHR, but the right to an adequate standard of living encompasses the right to water due to its link with health. “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”⁷⁴²

Neither the ICCPR nor the ICESCR contains a specific mention of the right to water, but the ICESCR’s provisions regarding the right to life, the right to an adequate standard of living, and the right to health are relevant here. The CESCR has elaborated on the right to water under the ICESCR. It reinforces that

the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease, and to provide for consumption, cooking, personal and domestic hygienic requirements.⁷⁴³ It also recognizes that the right to water includes both freedoms and entitlements. Freedoms include the right to maintain access to existing water supplies necessary for the right to water and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies, while entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.⁷⁴⁴ The CESCR also reaffirmed that the right to water must be adequate for human dignity and health; that the right to water should be treated as a social and cultural good, not primarily an economic good; and that the manner of realization of the right to water must be sustainable, thus ensuring the realization of the principle of intergenerational equity.⁷⁴⁵ The CESCR has also reinforced the importance of an adequate supply of safe and potable water and basic sanitation for the improvement of all aspects of environmental and industrial hygiene.⁷⁴⁶

Although there are only few references in international human rights instruments to a right to water, there are a number of General Assembly resolutions recognizing the right to water as a human right.⁷⁴⁷ General Assembly Resolution 54/175 on the right to development reaffirms that in the full realization of the right to development, “the rights to food and clean water are fundamental human rights and their promotion constitutes a moral imperative for both national Governments and for the international community.”⁷⁴⁸ Indeed, the MDGs include as a priority the need to halve the proportion of people who live without sustainable access to safe drinking water.⁷⁴⁹ By 2012, the proportion of people without sustainable access to safe drinking water had been halved, rendering the water access right the first MDG to reach its target. However, the sanitation goal has not yet been achieved.

Among regional human rights instruments, the European Social Charter does not speak of the right to water and sanitation specifically, though it does contain a right to housing.⁷⁵⁰ According to the European Committee of Social Rights, this right encompasses specific obligations related to the access to safe drinking water and sanitation.⁷⁵¹ While the African Charter does not contain a specific mention of the right to water and sanitation, the African Charter on the Rights and Welfare of the Child does include a right to safe drinking water,⁷⁵² and the Protocol to the African Charter on Human’s and Peoples’ Rights on the Rights of Women in Africa requires states to provide women access to safe drinking water.⁷⁵³ The Arab Charter contains an obligation not only to provide safe drinking water for all, but also proper sanitation systems.⁷⁵⁴ The American Declaration on the Rights and Duties of Man mentions the right to preservation of health through “social and sanitary measures,” but only to the extent permitted by public and community resources.⁷⁵⁵ Both the African Commission on Human and Peoples Rights and the Inter-American Court of Human Rights have established a link between the right to health and/or the right to life and the right to water in their jurisprudence.⁷⁵⁶

Article 28(F): The Right to a Safe, Clean and Sustainable Environment

By adopting the right to a safe, clean, and sustainable environment, ASEAN states have joined the African, Arab, and American systems as well as many national constitutions in recognizing the right to a clean and healthy environment. This recognition is progressive, since the right to a clean and healthy or safe environment is not yet firmly recognized in international law as a human right.

The right to a *sustainable* environment is an important inclusion in the AHRD, recognizing the inter-generational dimension of the right as well as the now well-established place of sustainability in the environmental law canon. The concept of sustainability is not new in the ASEAN context, however. In the ASEAN Declaration on Environmental Sustainability, Member States vow to “honour and implement commitments to multilateral and regional sustainable development and environmental agreements, so as to achieve the common goal of a clean and green ASEAN.”⁷⁵⁷

A future ASEAN convention should reproduce this right to a safe, clean and sustainable environment, and may even specify the content of this right through reference to the work of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.

ASEAN Member States’ International Legal and Constitutional Obligations

There are hundreds of multilateral treaties providing for environmental protection,⁷⁵⁸ many of which have been ratified by all ten ASEAN states, including the Convention on Biological Diversity,⁷⁵⁹ the Convention on the International Trade in Endangered Species of Wild Flora and Fauna,⁷⁶⁰ and the Framework Convention on Climate Change.⁷⁶¹

Five ASEAN Member States’ constitutions have provisions regarding environmental protection⁷⁶² though only the Indonesian constitution formulates a right to environment *per se*. It states that “[e]very person shall have the rights to live in physical and spiritual prosperity, to have a home and to enjoy a good and healthy environment.”⁷⁶³ The constitutions of Lao PDR, Myanmar, Thailand, and Cambodia contain provisions that mandate a duty for either citizens or the government to protect the environment, without granting a human right to safe, clean, and sustainable environment.

Among ASEAN legal instruments, the ASEAN Charter recognizes the promotion of sustainable development, as one of the purposes of ASEAN is to “ensure the protection of the region’s environment and the sustainability of its natural resources.”⁷⁶⁴ The Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN talks of a “continuous effort towards a balance between economic growth and social development and environmental sustainability in order to reduce and not to create negative impacts to the attainment of the Millennium Development Goals.”⁷⁶⁵ Additionally, as mentioned above, the ASEAN Declaration on Environmental Sustainability states that a clean and green ASEAN is a common goal of all Member States.⁷⁶⁶

Content and Interpretation of the Right in International Law

While the interrelationship of human rights and environmental protection is widely recognized, the existence of a right to an environment of a specified quality is a source of debate.⁷⁶⁷ The UDHR does not contain a human right to a clean environment. It broadly speaks of everybody's right to a "standard of living adequate for the health and well-being of himself and of his family."⁷⁶⁸ The ICESCR talks of the commitment of states to improve "all aspects of environmental and industrial hygiene."⁷⁶⁹ It was not until the 1972 Stockholm Declaration on the Human Environment that a human right to environment first emerged under Principle 1: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."⁷⁷⁰

Several recent regional conventions, including the African Charter, the Arab Charter, and the San Salvador Protocol have since similarly recognized a human right to a clean environment, as have more than a hundred national constitutions.⁷⁷¹ While the European Convention on Human Rights does not contain a right to a clean environment, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) mentions the "right of every person of present and future generations to live in an environment adequate to his or her health and well-being."⁷⁷²

Most instruments that provide for a right to a clean environment, with the exception of the Arab Charter, do not provide standards as to how a state must implement the right. Nor do they define what constitutes a "clean" or "healthy" environment. That said, there are hundreds of multilateral treaties that impose specific norms on states regarding environmental protection,⁷⁷³ and international case law suggests that compensation is required for environmental damage that meets a significant threshold.⁷⁷⁴ Any right to an environment of a specified quality must necessarily fall back on substantive environmental standards and would likely eventually require extensive international regulation of certain environmental sectors. This would help to fill the right to a clean environment with meaning while simultaneously its adaptability and dynamic nature.⁷⁷⁵ This approach is not unique in human rights law; similar standard-setting is used, for example, in the ILO's labour regulations.⁷⁷⁶

As noted, major UN human rights conventions and several regional conventions do not recognize a right to a clean environment. Interpretations of these conventions suggest that the right to a clean environment may be a precursor to or element of other rights such as the right to health⁷⁷⁷ or the right to life, which is recognized by all major human rights instruments. The International Court of Justice jurisprudence summarizes the linkages⁷⁷⁸ between environmental protection and other rights:

"The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage

to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.”⁷⁷⁹

Despite the lack of a specific right to a clean environment in the European Convention, the European Human Rights Court recognized the right to compensation for environmental harm under the European Convention as a violation of the right to life and right to private life.⁷⁸⁰ Other regional adjudicatory bodies have similarly resolved complaints related to environmental damage on the basis of rights to life, property, health, information, family, and life.⁷⁸¹

There is also an argument that the right to a clean environment should not be recognized. Critics of the right have argued, *inter alia*, that the identity of the right-holder, and thus her or his responsibilities, is ambiguous, and a simple right to the environment cannot address all the complexities associated with environmental issues. In addition, some argue that human rights bodies are not appropriate organs to supervise environmental protection obligations⁷⁸² and that the right to protect the environment is not enforceable in the same way as the right to vote, the right to freedom, or the right to freedom of movement.⁷⁸³ While the right to a clean and safe environment must necessarily be defined by referring to substantive standards that are by nature variable, this does not render the right so volatile or unfixed as to be without normative content. Rather, this variability gives the right dynamism and acknowledges that it must be able to react to changing circumstances as well as leave room for shifting economic and social priorities, within certain limits.⁷⁸⁴

Assuming the right to a clean environment exists, there is debate about what it encompasses. Based on his assessment of UN instruments, regional conventions, and case law, one scholar notes three broad categories of rights encompassed in the expansive human right to environment. First, the right to environment encompasses “a human right to live in an environment of minimum quality that still allows for the realization of a life of dignity and well-being.” Second, the right of environment “articulates the philosophical theory that the environment is entitled to rights based on its own intrinsic value, separate and distinct from those attributed to it through human use.” Finally, procedural environmental rights are a prerequisite for implementing the substantive components of the expansive right to environment.⁷⁸⁵ Procedural environmental rights include the right to information, the right to participate in decision-making relevant to environmental issues, the right to legal redress, and the right to effective remedies, among others.⁷⁸⁶ The importance of procedural environmental rights has been reaffirmed in the Aarhus Convention,⁷⁸⁷ Principle 10 of the Rio Declaration,⁷⁸⁸ and ILO Convention No. 169.⁷⁸⁹ The Rio Declaration also recognizes the role of certain vulnerable groups, such as women, indigenous peoples, and youth, in environmental policy-making.⁷⁹⁰ Regional human rights bodies have also reaffirmed the importance of procedural environmental rights.⁷⁹¹ Since environmental harm may affect certain vulnerable segments of the population more acutely, such as women, children, and indigenous peoples, non-discrimination provisions as well as possibly special procedural and substantive rights with respect to these groups may be in order; unfortunately human rights law is still not absolutely clear on this matter.⁷⁹²

Article 29: The Right to Health

AHRD Art. 29: (1) Every person has the right to the enjoyment of the highest attainable standard of physical, mental and reproductive health, to basic and affordable health-care services, and to have access to medical facilities.

(2) The ASEAN Member States shall create a positive environment in overcoming stigma, silence, denial and discrimination in the prevention, treatment, care and support of people suffering from communicable diseases including HIV/AIDS.

Article 29(1) of the AHRD replicates the ICESCR right to “enjoyment of the highest attainable standard of physical and mental health,” adding to the ICESCR wording by also recognizing the right to the highest attainable standard of reproductive health. The explicit recognition of reproductive rights is consistent with ASEAN Member States obligations under CEDAW, though a CSO submission calling for inclusion of sexual health in article 29(1) was rejected by the AHRD’s drafters.⁷⁹³ While reproductive health refers solely to reproductive functions, sexual health is a broader concept which encompasses “a state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity.”⁷⁹⁴

The CESR’s General Comment on the Right to Health notes that the right contains four elements: these are *availability* of a sufficient quantity of functioning public health and health care facilities, *accessibility* to health facilities, goods and services in a non-discriminatory way, *acceptability* of standards of medical ethics and cultural sensitivity, and *quality* of care.⁷⁹⁵ The AHRD explicitly recognizes the availability and accessibility prongs of the right to health; however, it makes no mention of the notion that such services, facilities and goods be also acceptable and of a sufficient quality.⁷⁹⁶

ASEAN has been progressive in terms of recognizing an international obligation to halt the spread of HIV/AIDS and end discrimination against those affected by it.⁷⁹⁷ The non-discrimination clause in article 29(2) is a positive addition to the right to health, but could be further strengthened. The provision commits ASEAN Member States to the creation of a non-discriminatory environment, but does not create affirmative obligations for the state, and applies only to individuals suffering from communicable diseases.

A future ASEAN human rights convention would ideally recognize of all four elements of the right to health – availability, accessibility (which includes nondiscrimination, affordability, physical access and access to information regarding health and health services), acceptability and quality. A convention should establish a clear state obligation to eliminate discrimination against and ensure care for those suffering from stigma-inducing diseases, whether communicable or not. In addition, to reflect the evolution of the right to health over the past few decades, the convention should include the individual’s right to access information regarding personal or public health matters. Finally, a convention should recognize a broader right to sexual health which falls in line with the liberal understanding

espoused by the World Health Organization (WHO), and includes access to family planning or post-natal health services.⁷⁹⁸

It is also important that a convention recognize the particular health-related needs of vulnerable populations. For instance, children are entitled to special treatment in relation to the right to health.⁷⁹⁹ Though the AHRD prohibits discrimination against persons with disabilities, it does not allude to their rights to particular health services related to their disability as required by CRPD, which all ASEAN members have signed and most have ratified.⁸⁰⁰ The rights of migrant workers and their families should also be given special consideration.⁸⁰¹ Migrant workers are entitled to the same treatment as nationals in relation to access to health services and have the right to receive any medical care that is urgently required to preserve their life or to avoid irreparable harm.⁸⁰² Similarly, indigenous peoples have an equal right to enjoy the highest attainable standard of physical and mental health, and may face problems with accessibility that would need to be addressed.⁸⁰³

ASEAN Member States' International Legal and Constitutional Obligations

All ASEAN Member States have endorsed the UDHR, which recognizes the right to an adequate standard of living that includes the right to health. All ten Member States have also accepted the WHO Constitution, which states that “enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being.”⁸⁰⁴ Six ASEAN Member States have ratified the ICESCR⁸⁰⁵ and acknowledged the right to health in relation to children, women, migrant workers, and disabled persons as recognized in the CRC, CEDAW, ICRMW, and CRPD respectively.⁸⁰⁶

All ASEAN Member States, with the exception of Brunei Darussalam, Singapore and Malaysia recognize a right to health or corresponding state obligation to provide health services in their constitutions.⁸⁰⁷ In Lao PDR, Viet Nam and Myanmar, only citizens' right to health is guaranteed by the state. Many ASEAN constitutions also recognize the need to respond to the particular health requirements of social groups such as children,⁸⁰⁸ women,⁸⁰⁹ persons with disabilities,⁸¹⁰ the elderly,⁸¹¹ people in remote or rural areas,⁸¹² and ethnic minorities.⁸¹³

Lao PDR, the Philippines, and Thailand all expressly recognize the need for health care to be affordable or accessible, while the universal nature of the right to health in Indonesia—that “every person” has the right—implies this accessibility.⁸¹⁴

Content and Interpretation of the Right in International Law

The right to health predates many of the other human rights in international law, as it is enshrined in the WHO Constitution that entered into force in 1948.⁸¹⁵ The right is also included in the UDHR as “a standard of living adequate for . . . health and well-being.”⁸¹⁶ The ICESCR requires state parties to recognize everyone's right to enjoy the highest attainable standard of physical and mental health. It also lays out the specific steps states parties must take to realize this right:

- “(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of

environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”⁸¹⁷

The right to health encompasses both physical and mental well-being and sometimes a right to spiritual or moral well-being.⁸¹⁸

The right to health is closely linked to and interdependent with the realization of many other human rights, such as the rights to food, housing, work, education, life, non-discrimination, privacy, access to information, and the prohibition against torture. The right is not a right to be healthy *per se*, but a right to have access to medical facilities, goods, services, and conditions that are conducive to attaining a high standard of physical and mental health. The right to health includes the freedom to make independent choices about one’s health and body as well as the right to a system of healthcare that provides equal opportunity for all people to enjoy a standard of health.⁸¹⁹

The right to health contains four essential elements: (1) availability: states must run a functioning public healthcare system; (2) accessibility: health facilities, goods, and services must be available to everyone on a non-discriminatory basis and be both physically accessible and affordable; (3) acceptability: health facilities, goods, and services must be respectful of medical ethics and individual cultures; (4) quality: health facilities, goods, and services must be scientifically and medically appropriate and of good quality.⁸²⁰

Medical services must be affordable and accessible. The CESCR has found that state parties are required to provide affordable healthcare for all, which means that poorer individuals should not be disproportionately burdened by healthcare expenses.⁸²¹ Medical care must also be culturally sensitive.⁸²² The Declaration on the Rights of Indigenous Peoples includes their right to use traditional medicine and maintain cultural healthcare practices.⁸²³ Lastly, the right to health includes a right to access information, meaning that everyone has the right to seek, receive, and impart information concerning health.⁸²⁴

Women’s right to health further includes a right to access to services and information regarding reproduction, family planning, and sexual health.⁸²⁵ Women maintain the right to make their own decisions about their reproductive health and future, including the right to utilize reproductive technology such as in vitro fertilization.⁸²⁶ Women’s right to appropriate medical services extends natal and post-natal care.⁸²⁷ Additionally, women have a right to be free from traditional harmful practices that have a detrimental effect on their health.⁸²⁸

The right to health also encompasses a state’s duty to prevent, treat, and control epidemic, endemic, occupational, and other widespread diseases, such as HIV/AIDS, by establishing prevention and educational programmes.⁸²⁹ The General Assembly has on several occasions recognized that in order to

attain a high standard of health, states must provide persons infected with HIV/AIDS with effective, affordable, and quality medication and treatment.⁸³⁰

Article 30: The Right to Social Security

AHRD Art. 30:

- (1) Every person shall have the right to social security, including social insurance where available, which assists him or her to secure the means for a dignified and decent existence.*
- (2) Special protection should be accorded to mothers during a reasonable period as determined by national laws and regulations before and after childbirth. During such period, working mothers should be accorded paid leave or leave with adequate social security benefits.*
- (3) Motherhood and childhood are entitled to special care and assistance. Every child, whether born in or out of wedlock, shall enjoy the same social protection.*

The language of article 30(1) is largely borrowed from the ICESCR, but includes a proviso that social insurance is subject to availability. This suggests that states are not under any obligation to provide such insurance. If so interpreted, this AHRD provision would be inconsistent with ASEAN Member States' obligations under the ICESCR and the CRC.⁸³¹

Article 30(2) is identical to article 10(2) of the ICESCR in providing special protection to mothers before and after childbirth as well as paid maternity leave. The AHRD arguably should have incorporated the more detailed CEDAW provisions on social security, given that all ASEAN Member States are party to CEDAW. For example, states parties to CEDAW are required to eliminate discrimination against women by prohibiting dismissal on the grounds of maternity leave, and ensuring that when women take maternity leave it does not result in loss of former employment, seniority or social allowances.⁸³² During the drafting process of the AHRD, civil society organizations submitted that the AHRD should additionally recognize paternity leave for working fathers, which is important for promoting gender equality in the rights and responsibilities of parents.⁸³³

The AHRD differs from the ICESCR by allowing the nature of this protection to be determined by national laws and regulations. This in itself is not a problem, provided national laws are consistent with the international legal obligations of the ASEAN Member States.

Article 30(3) is identical to article 25(2) of the UDHR.⁸³⁴ The “protection extended to motherhood and childhood” in article 30(3) complements the right to health in article 29 of the AHRD, and the right to social services in article 28.

A future ASEAN human rights convention should strengthen the social protections afforded to women, and better reflect Member States' obligations under CEDAW, by containing more detailed provisions on the elimination of discrimination related to motherhood. By recognizing paternity leave, ASEAN could make a progressive move in recognizing the equal rights and responsibilities of parents in child-rearing. A convention should also provide more guidance to ASEAN Member States as to the circumstances under which states must provide social security. In addition to motherhood, these circumstances include

unemployment, sickness, disability, widowhood, orphans, old age or other lack of livelihood in circumstances beyond an individual's control.⁸³⁵

With regard to social insurance, a convention should reflect the state duty to ensure access to social insurance, rather than recognizing this obligation only if there are social insurance services already in existence. "Special protections" provided to mothers before and after childbirth should be subject to national law and regulations consistent with applicable international law.

ASEAN Member States' International Legal and Constitutional Obligations

Six ASEAN Member States are state parties to the ICESCR; all ten have ratified or acceded to CEDAW, six are parties to ICERD and eight are parties to CRPD.⁸³⁶ These four core human rights treaties require states parties to guarantee the enjoyment of the right to social security without discrimination⁸³⁷ and to take steps, including through international assistance and cooperation, to progressively achieve the realization of the right with the maximum available resources.⁸³⁸

All ASEAN Member States, with the exception of Brunei Darussalam and Singapore, recognize the importance of social security in their constitutions.⁸³⁹

Content and Interpretation of the Right in International Law

The right to social security is well established in international law. The UDHR specifically guarantees the right to social security:

"Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."⁸⁴⁰

The UDHR also states that "[e]veryone has . . . the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."⁸⁴¹ The ICESCR mandates that states parties "recognize the right of everyone to social security, including social insurance."⁸⁴² It also gives special protection to mothers before and after childbirth, asserting that "[d]uring such period working mothers should be accorded paid leave or leave with adequate social security benefits."⁸⁴³

The CESCR has stated that the right to social security requires states parties to the ICESCR to establish a social security system administered by public authorities that is sustainable, so it is available to present and future generations, and provides benefits that mitigate against the impact of relevant social risks and contingencies.⁸⁴⁴ These social risks and contingencies include "health care, sickness, old age, unemployment, employment injury, family and child support, maternity, disability, and survivors and orphans,"⁸⁴⁵ and the benefits received in such cases must be adequate in amount and duration and accessible to all.⁸⁴⁶ The CESCR also calls for international assistance to states to realize the right.⁸⁴⁷ When

administering social security benefits, states may not discriminate against non-nationals, refugees, or migrant workers.

Numerous other conventions provide for social security for the unemployed,⁸⁴⁸ the aged,⁸⁴⁹ people with disabilities,⁸⁵⁰ pregnant and post-natal mothers,⁸⁵¹ and children.⁸⁵²

Other regions have handled the right to social security differently. In the European and American regional human rights systems, the right to social security, as an autonomous human right, is not contained in the core human rights conventions, but rather in their treaties on economic, social, and cultural rights.⁸⁵³ The African Charter does not specifically mention “social security” but provides special protection for the aged and people with disabilities, and alludes to assisting the family.⁸⁵⁴ The Arab Charter does include a brief but direct provision guaranteeing every citizen the right to social security and social insurance.⁸⁵⁵ Only the American Convention on Human Rights and the African Charter on the Rights and Welfare of the Child specifically provide for the welfare of children born to unmarried parents.⁸⁵⁶

The right to social security is not a right to be free from poverty, although this may be a goal of instruments providing for social security.⁸⁵⁷ For example, the Inter-American Human Rights Court has found that state reductions in old-age pension entitlements are not necessarily a violation of the right to social security, but that arbitrary termination of employment resulting in complete denial of social security benefits otherwise owed does constitute a violation.⁸⁵⁸ Conversely, European cases concerning Greece’s reductions in pensions have found that because workers have an expectation of getting a specific pension based on the laws in place, a state can change laws governing pensions only for compelling reasons.⁸⁵⁹

Article 31: The Right to Education

AHRD Art. 31:

(1) *Every person has the right to education.*

(2) *Primary education shall be compulsory and made available free to all. Secondary education in its different forms shall be available and accessible to all through every appropriate means. Technical and vocational education shall be made generally available. Higher education shall be equally accessible to all on the basis of merit.*

(3) *Education shall be directed to the full development of the human personality and the sense of his or her dignity. Education shall strengthen the respect for human rights and fundamental freedoms in ASEAN Member States. Furthermore, education shall enable all persons to participate effectively in their respective societies, promote understanding, tolerance and friendship among all nations, racial and religious groups, and enhance the activities of ASEAN for the maintenance of peace.*

The AHRD provisions regarding the right to education are in harmony with relevant international and regional human rights canons. The language of the AHRD regarding the right to education is almost identical to that of the UDHR. It contains the core elements of the right recognized by the majority of human rights instruments including the ICESCR, in that it provides for compulsory and free primary education that is available to all, secondary education that is available and accessible to all through different means, and education directed to the full development of the human personality and strengthening respect for human rights and fundamental freedoms.

The requirement in article 33(3) that education be directed towards development of an individual's sense of dignity should be interpreted in light of the CRC which requires states parties to "take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity."⁸⁶⁰

Several aspects of the right to education that are missing from the AHRD include:

- The parents' right to choose the kind of education that is to be given to their children;⁸⁶¹
- The state obligation to encourage or intensified fundamental education as far as possible for those persons who have not received or completed the whole period of their primary education;⁸⁶²
- The state's obligation to improve teachers' training and conditions of work, which is fundamental to guaranteeing an education of good quality;⁸⁶³ and
- Requirements under the CRC to make education and vocational information available to children, and take steps to encourage school attendance and reduce drop-out rates.⁸⁶⁴

Some instruments, such as the CRC, contain a provision regarding the importance of international cooperation in matters relating to education, emphasizing the importance of such cooperation particularly with regard to the needs of developing countries.⁸⁶⁵ While such an explicit provision is absent from the AHRD, it does allude to education strengthening the rights and fundamental freedoms in ASEAN as well as the education enhancing the activities of ASEAN for the maintenance of peace.

The AHRD right to education could be expanded on in a future ASEAN human rights convention to include the specific aspects noted above.

ASEAN Member States' International Legal and Constitutional Obligations

The ICESCR and the CRC together recognize all those aspects of the right to education which are protected in international human rights law. The ICESCR has been ratified by six ASEAN Member States, and all have ratified the CRC⁸⁶⁶ Singapore has entered a reservation against the CRC, stating that it “. . . does not consider itself bound by the requirement to make primary education compulsory because such a measure is unnecessary in our social context where in practice virtually all children attend primary school; and (b) reserves the right to provide primary education free only to children who are citizens of Singapore.”⁸⁶⁷ Malaysia has entered a similar reservation against same article, but has clarified that primary education is compulsory under Malaysian law and that monetary aid is available to “those eligible.”⁸⁶⁸

Under CEDAW, which also enjoys universal ratification amongst ASEAN Member States, signatories commit to eliminate discrimination in order to afford women equal rights with men in education.⁸⁶⁹ The ICERD, ratified by six Member States, prohibits racial discrimination in education and training, and requires that education promote racial tolerance, while the CRPD, ratified by eight Member States, requires states parties to take steps to facilitate persons with disabilities's right to education.⁸⁷⁰ Brunei Darussalam, Indonesia and the Philippines have ratified the UNESCO Convention against Discrimination in Education, which provides additional guidance with regards to ensuring equal access to quality education.⁸⁷¹

All ASEAN countries' constitutions, with the exception of Brunei Darussalam's, recognize the right to education in some form, usually in detailed provisions.⁸⁷² Among ASEAN legal instruments, the Declaration on the Commitments for Children in ASEAN,⁸⁷³ the Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children,⁸⁷⁴ and the Resolution on the ASEAN Plan of Action for Children⁸⁷⁵ all contain provisions relevant to the right to education.

Content and Interpretation of the Right in International Law

THE CESCR notes that “[e] ducation is both a human right in itself and an indispensable means of realizing other human rights.”⁸⁷⁶ While in the past it has been characterized as a social right, an economic right, and a cultural right, the CESCR rightly notes that it is, in addition to all of these, a civil and political right which epitomizes “the indivisibility and interdependence of all human rights.”⁸⁷⁷

The right appears in the UDHR, which states that:

“(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.”⁸⁷⁸

The UNESCO Convention against Discrimination in Education of 1961 was the first binding international human rights instrument which specifically addressed educational needs, and it provided inspiration for the recognition and expansion of the right to education under the ICESCR in 1966.⁸⁷⁹ The ICESCR adds to the UDHR’s provision on the right to education in three respects. First, it sees education as one of the keys to human dignity; second, it is seen as a tool through which inter-cultural understanding across ethnic, national, racial and religious lines can be promoted; and third, it enables all to participate effectively in a free society.⁸⁸⁰ Article 13 of the ICESCR, which discusses the right to education, is the longest provision in the entire Convention and one of the most detailed provisions on the right to education in human rights law. Article 14 of the ICESCR requires states parties, within two years of ratification, to adopt a plan of action for progressive implementation of compulsory and free primary education for all. Such action plans must be detailed enough to guarantee effective implementation of the right, and should be developed through participatory processes which include CSOs. This obligation is seen as absolute, and scarcity of allocatable resources is not viewed as a valid reason for failing to produce such an action plan.⁸⁸¹

The right to education also appears in five other core human rights treaties, the UN Declaration on the right of Indigenous Persons, and the UN Refugee and Stateless Persons Conventions.⁸⁸² The Arab, American, European and African human rights texts all recognize a right to education.⁸⁸³

The CESCR in General Comment No. 13 elaborates on the content of the right to education, emphasizing its role as an empowerment right. It states that education is “the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty.”⁸⁸⁴ The Committee notes that the right to receive education contains such elements as availability, accessibility, adaptability and acceptability.⁸⁸⁵ Availability means that functional educational institutions and programmes must be available in sufficient quantity. Accessibility has three dimensions: non-discrimination against any group, physical accessibility, and economic accessibility. Acceptability means that the form and substance of education must be acceptable (be of good quality and culturally appropriate), while adaptability means flexibility with regards to the changing needs of societies and communities.

While the right to education generally provides for progressive realization, certain aspects of the right are immediate, such as the guarantee of non-discrimination and the prohibition on retrogressive steps.⁸⁸⁶ The prohibition against discrimination applies to all levels of education, encompasses all internationally prohibited grounds of discrimination, and allows for the use of temporary special measures to assist certain vulnerable groups in realizing their right to education.⁸⁸⁷ A considerable amount of international jurisprudence exists regarding the tension between providing equal

opportunities for education and adhering to the principle of non-discrimination.⁸⁸⁸ However, it is acknowledged that the right to education for certain vulnerable groups – such as persons with disabilities or girl children – necessarily involves the privileging of certain communities with regards to certain types of access.⁸⁸⁹

Another area of contest within the right to education involves minority rights and language rights.⁸⁹⁰ The European Court of Human Rights has held that the right to education does not guarantee the right to education in a particular language, nor does it entail an obligation for states to subsidize education of a particular type.⁸⁹¹

The right to education is firmly entrenched in the human rights canon. While there is some variation regarding its normative content, the basic notions of free, compulsory primary education, the full development of the human personality, and the interdependency of the right with other human rights are recognized in most international human rights instruments.

Article 32: The Right to Cultural Life

AHRD Art. 32: Every person has the right, individually or in association with others, to freely take part in cultural life, to enjoy the arts and the benefits of scientific progress and its applications and to benefit from the protection of the moral and material interests resulting from any scientific, literary or appropriate artistic production of which one is the author.

The AHRD reproduces the text of the UDHR right to cultural life and right to intellectual property, but additionally recognizes the collective aspect of these rights.⁸⁹² The AHRD does not specifically provide for the cultural rights of minorities and indigenous groups. However, if Article 32 is read with ASEAN Member States' obligations under the ICCPR and CRC and their Constitutional protections of minority rights, it could be construed to cover such rights.⁸⁹³

As discussed previously, article 7 of the AHRD recognizes the potential for culture and tradition to conflict with human rights but does not contain a clear statement that culture and cultural diversity are not legitimate grounds upon which to deny fundamental rights and freedoms.⁸⁹⁴ As parties to CEDAW, ASEAN Member States are obliged to take measures "to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."⁸⁹⁵ A state may take measures to curtail cultural practices that infringe on other rights if the measures have a legitimate aim and are proportional.⁸⁹⁶

A future legal instrument should stress the universality of fundamental rights of national and regional particularities, including local cultural and religious practices. In addition, the rights of tribal and indigenous peoples and minorities to freely enjoy their own culture must be clearly recognized, including a reinforcement of positive obligations on the governments' part to take steps to ensure the fulfilment of the right.

ASEAN Member States' International Legal and Constitutional Obligations

Six ASEAN Member States have ratified both the ICESCR and the ICCPR, which respectively recognize a general right to participate in cultural life, and a specific protection for ethnic, religious or linguistic minorities to enjoy their own culture.⁸⁹⁷ All Member States have ratified CEDAW and the CRC, under which they must take steps to eliminate discrimination against women that prevents women's full participation in all aspects of cultural life, and the right of all children, including those from minority groups, to enjoy and participate freely and fully in a cultural life.⁸⁹⁸ Under the CRPD, the eight ASEAN states parties must guarantee that persons with disabilities can "take part on an equal basis with others in cultural life."⁸⁹⁹

Among the ASEAN Constitutions, only Myanmar and Indonesia recognize the right to culture as a right belonging to individuals.⁹⁰⁰ The constitutions of Viet Nam and Lao PDR recognize the concept of a national, uniform culture,⁹⁰¹ and Indonesia, Lao PDR, the Philippines, Singapore and Thailand recognize a

constitutional right to culture for local groups, indigenous groups, tribes, or minorities.⁹⁰² Malaysia and Brunei Darussalam do not recognize a constitutional right to cultural life.

The ASEAN Declaration on Cultural Heritage recognizes the right of traditional communities to have access, protection, and rights of ownership to their own heritage. It asserts that:

“Cultures with global reach must not deprive local, national and regional cultures of their own development dynamics and reduce them to relics of the past. Member Countries shall ensure that cultural laws and policies empower all peoples and communities to harness their own creativity towards human development.”⁹⁰³

The Declaration on the Commitments for Children expresses an intention to protect, respect, and recognize the rights of all children, including those in indigenous cultures, with the caveat that the different religious, cultural, and social values of different countries must be taken into consideration.⁹⁰⁴

Content and Interpretation of the Right in International Law

The UDHR, ICCPR, ICESCR, the African and Arab Charters, the American Declaration, and the San Salvador Protocol⁹⁰⁵ all recognize the right to cultural life. The European Convention does not explicitly provide for a right to cultural life or traditional lifestyle, though the right to respect for private and family life has been interpreted to include this right.⁹⁰⁶

While there is not a clearly recognized definition of “cultural life” in international law, the CESCR has interpreted it to include ways of life, language, oral and written literature, music and song, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, and customs and traditions through which individuals, groups of individuals, and communities express their humanity and the meaning they give to their existence.⁹⁰⁷

The right to cultural life is closely associated with (1) the right of access to cultural activities, entertainment, and monuments; (2) the right of a cultural (often indigenous) group to its traditional land or practices (such as hunting), which is often challenged by State-sponsored economic development; (3) the right of a cultural (often indigenous) group to participate in decisions about its welfare; (4) intellectual property rights⁹⁰⁸ belonging to an individual or cultural (often indigenous) group.⁹⁰⁹ The right to cultural life is related to the responsibility to protect cultural properties such as world heritage sites and indigenous artefacts.

The right takes on a communal aspect in the context of indigenous peoples and their relationship to land and traditional practices. The ICESCR,⁹¹⁰ the United Nations Declaration on the Rights of Indigenous Peoples,⁹¹¹ the ILO Convention on Indigenous Rights,⁹¹² the African Commission,⁹¹³ the Inter-American Commission, and the Inter-American Court⁹¹⁴ have all recognized indigenous peoples’ cultural rights associated with their ancestral lands and their way of life, including their means of subsistence and dependence on natural resources. The right to cultural life and the right to property are seen as

intertwined in the case of indigenous peoples, giving them the right to prior consultations and, in some instances, prior informed consent for development projects concerning their ancestral lands.⁹¹⁵

The right requires states to take positive action, ensuring preconditions for participation, facilitation, and promotion of cultural life and access to and preservation of cultural goods.⁹¹⁶ The ASEAN Declaration on Cultural Heritage calls on each ASEAN state to identify and to conserve cultural heritage within its territory.⁹¹⁷ Conversely, states must refrain from interfering with the exercise of cultural practices and with access to cultural goods and services.⁹¹⁸ International conventions including the ICCPR, the ICESCR, and the CRC⁹¹⁹ provide that the state must not deny minorities the right to practice their culture.

Article 33: State Obligations: Economic, Social, and Cultural Rights and Non-Nationals

AHRD Art. 33: ASEAN Member States should take steps, individually and through regional and international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of economic, social and cultural rights recognised in this Declaration.

Article 34: ASEAN Member States may determine the extent to which they would guarantee the economic and social rights found in this Declaration to non-nationals, with due regard to human rights and the organisation and resources of their respective national economies.

Article 33 and 34 are a variation on the ICESCR's characterization of states parties' obligations to implement convention-protected rights.⁹²⁰

Article 33 is identical to ICESCR article 2(1), except that it omits the requirement for states parties to take steps to realize economic, social and cultural rights through "*all appropriate means, including particularly the adoption of legislative measures.*" This imposes an important obligation on states parties to take steps to protect ICESCR-espoused rights, particularly through legislation.⁹²¹

Article 34 likewise reproduces the ICESCR text with omissions of several key terms. Article 2(3) of the ICESCR provides that *developing countries* may choose the extent to which they will guarantee ICESCR rights to non-nationals, whereas the AHRD allows all ASEAN Member States, no matter how prosperous, to do the same.⁹²² The AHRD also extends this state discretion to economic and social rights, whereas the ICESCR only permits it with regards to economic rights.

A future ASEAN human rights convention should strengthen and clarify ASEAN member state obligations in relation to social economic and cultural rights by making it clear that: (a) the discretion to deny economic rights to non-nationals is dependent upon resources, not political will; (b) discretion cannot be applied discriminatively – for example, to deny Muslim non-nationals access to work permits but provide them to Buddhist non-nationals; (c) discretion cannot operate to rob economic, social and cultural rights of their entire content; and (d) regardless of a nation's economic standing, the obligation to guarantee social, economic and cultural rights requires each State "to move as expeditiously and effectively as possible" using all available resources towards realization of these rights.⁹²³

The convention should additionally recognize the rights of certain vulnerable groups of non-nationals such as refugees, stateless persons, migrant workers and victims of trafficking to some minimum guarantees. The 1951 Refugee Convention, the ICRMW, the Convention on Statelessness, and the Palermo Protocol provide guidance on such guarantees. The AHRD's recognition of migrant workers as a

group of non-nationals requiring state protection is positive, but could be built upon with recognition of the need to protect stateless persons and refugees.⁹²⁴

ASEAN Member States' International Legal and Constitutional Obligations

Six ASEAN Member States have ratified the ICESCR, from which articles 33 and 34 are taken.⁹²⁵ Six ASEAN Member States have ratified the ICERD, which allows states to make distinctions between citizens and non-nationals.⁹²⁶ Such distinctions, however, cannot operate to undermine the basic prohibition against discrimination, and states parties must “guarantee equality between citizens and non-citizens in the enjoyment of [their civil, political, *economic, social and cultural*] rights to the extent recognized under international law.”⁹²⁷ Two ASEAN Member States have ratified the 1951 Refugee Convention and the ICRMW, obligating them to afford certain rights to non-nationals such as asylum seekers, refugees, and migrant workers.⁹²⁸ The Philippines is the only ASEAN state party to the 1954 Convention relating to the Status of Stateless Persons.⁹²⁹ In addition, though not a binding instrument, the ASEAN Declaration on the Rights of Migrant Workers requires Member States to safeguard the fundamental rights and dignity of migrant workers across the region.⁹³⁰

The constitutions of several ASEAN Member States—Indonesia, Malaysia, Myanmar, Philippines, and Thailand—do not articulate any distinction between citizens and non-nationals, referring to “person” or “people,” instead of “citizen,” in their respective bills of rights.⁹³¹ In contrast, the Cambodian and Lao PDR constitutions contain a bill of *citizen* rights and duties, while Viet Nam recognizes both human and citizen rights.⁹³² The Lao PDR Constitution guarantees that the “rights and freedoms of aliens and apatrids [stateless persons] are protected by [national laws].” In particular, non-nationals have the right to file claims in court and lodge petitions with government agencies.⁹³³

Content and Interpretation of the Right in International Law

Although economic, social and cultural rights are to be fully realized progressively over time, the ICESCR states parties – including six ASEAN Member States – are required to devote all available resources to move “expeditiously and effectively as possible” towards realizing convention rights for every person within their territory.⁹³⁴ States parties have a core obligation to ensure minimum compliance levels with each ICESCR right, and may violate the convention if a “significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education.”⁹³⁵ Resource constraints do not justify derogation from this minimum core obligation.

International law allows for some distinctions between the economic, social and cultural rights of nationals and non-nationals but at the same time prohibits discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, *national or social origin*⁹³⁶, property, birth or other status.⁹³⁷

The CESCR has defined discrimination as “any distinction, exclusion, restriction or preference or other differential treatment . . . based on the prohibited grounds of discrimination and which has the intention

or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of [ICESCR] rights.”⁹³⁸

Under the ICESCR, developing countries may determine the “extent to which they guarantee *economic* rights to non-nationals,” but must take into account their national economic needs and human rights in making this decision.⁹³⁹ This provides a narrow exception to the non-discrimination clause, allowing poorer countries to make a distinction between nationals and non-nationals (national origin) in provision of economic rights when: (a) state resources do not permit the granting of equal rights to non-nationals, and (b) this distinction would not operate to nullify the content of these rights, or breach minimum core obligations under the ICESCR. Differentiation between nationals and non-nationals may still constitute discrimination if a state restricts the economic rights of a particular nationality, as opposed to those of all non-nationals.⁹⁴⁰ Article 2(3) of the ICESCR does not permit a complete denial of economic rights to non-nationals, and it does not allow well-resourced, developed states to exercise this discretion.

The ICERD allows states parties to make distinctions between citizens and non-citizens, provided this does not constitute discrimination against a particular nationality. The Committee on the Elimination of Racial Discrimination has stressed that human rights are universal and that states parties must “guarantee equality between citizens and non-citizens in the enjoyment of [civil, political, social, economic and cultural] rights to the extent recognized under international law.”⁹⁴¹

Regional human rights systems also provide for the general principle of equality, with the African, American and European instruments and case law articulating that states should make no distinction between citizens and non-nationals on fundamental human rights.⁹⁴² The African Commission on Human and Peoples' Rights has stated that, “[i]n the face of such [economic] difficulties, States often resort to radical measures aimed at protecting their nationals and their economies from non-nationals. Whatever the circumstances may be, however, such measures should not be taken at the detriment of the enjoyment of human rights.”⁹⁴³ The American Court of Human Rights has asserted that the principles of equality and non-discrimination have achieved the status of a *jus cogens* norm, such that neither the nationality nor the migratory status of an individual is relevant for the purpose of requiring the state to respect and ensure these principles. While states can still make distinctions on the basis of nationality or migratory status, these distinctions should be reasonable, objective, and proportionate, and should not harm human rights.⁹⁴⁴

The Arab Charter of Human Rights, on the other hand, guarantees certain economic and social rights only to citizens.⁹⁴⁵

While not binding, the UN Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live provides an expansive conceptualization for the rights of non-nationals.⁹⁴⁶ Non-nationals are entitled to the same treatment with respect to the rights to, *inter alia*, life and

security of person; protection against arbitrary or unlawful interference with privacy, family, home or correspondence; equality before the courts; family; freedom of thought, opinion, and religion; and language, culture, and tradition.⁹⁴⁷ The Declaration also specifies rights that must be granted to non-nationals to the extent that they do not interfere with national security, public safety, public order, public health or morals, or the rights and freedoms of others.⁹⁴⁸ As long as they observe the state's laws, non-nationals lawfully residing in the country should be granted safe, fair, and healthy working conditions, the right to join trade unions, as well as access to social services, health care, education, and social security.⁹⁴⁹ Importantly, the Declaration asserts that regardless of immigration status—that is, whether or not an individual is in the country legally—states are obligated to ensure protections from torture, inhuman, or degrading treatment; arbitrary or unlawful expulsion from the country; and arbitrary deprivation of lawfully acquired assets.⁹⁵⁰

Conventions regarding migrant workers and their families, stateless people, and refugees affirm the human rights of non-nationals. The Conventions on Stateless Persons and Refugees do allow certain rights to be recognized only for those non-nationals *lawfully* residing or present in the host country. Furthermore, the extent to which states parties must recognize certain rights of refugees and stateless persons varies between the same treatment afforded to aliens and that provided to nationals.⁹⁵¹

Articles 35 - 37: The Right to Development

AHRD Art. 35: The right to development is an inalienable human right by virtue of which every human person and the peoples of ASEAN are entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development. The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations. While development facilitates and is necessary for the enjoyment of all human rights, the lack of development may not be invoked to justify the violations of internationally recognised human rights.

AHRD Art. 36: ASEAN Member States should adopt meaningful people-oriented and gender responsive development programmes aimed at poverty alleviation, the creation of conditions including the protection and sustainability of the environment for the peoples of ASEAN to enjoy all human rights recognised in this Declaration on an equitable basis, and the progressive narrowing of the development gap within ASEAN.

AHRD Art. 37: ASEAN Member States recognise that the implementation of the right to development requires effective development policies at the national level as well as equitable economic relations, international cooperation and a favourable international economic environment. ASEAN Member States should mainstream the multidimensional aspects of the right to development into the relevant areas of ASEAN community building and beyond, and shall work with the international community to promote equitable and sustainable development, fair trade practices and effective international cooperation.

By adopting these three articles, ASEAN has joined the African and Arab systems in recognizing a specific right to development.

The language of the right to development in the AHRD largely mirrors that included in the Vienna Declaration,⁹⁵² with a few important exceptions. The AHRD emphasizes the need for equity in realization of the right to development as well as the need for sustainability.⁹⁵³ The inclusion of sustainability implies that the right to development contains an intergenerational dimension, which is progressive among human rights instruments. It states that development is necessary for the enjoyment of all human rights, that development programs should be gender-responsive, and that there is a need for regional and international cooperation to encourage development.⁹⁵⁴ Given the amount of manufacturing of products for foreign export, the inclusion of fair trade practices is also an important provision.⁹⁵⁵

What is noticeably absent from the AHRD formulation of the right to development is the right to self-determination as well as rights of indigenous and tribal peoples. While the absence of the right to self-determination is discussed elsewhere in this document,⁹⁵⁶ several of the main international treaties and human rights instruments link the right to self-determination to the right to development, including the UN Charter,⁹⁵⁷ the ICCPR,⁹⁵⁸ the ICESCR,⁹⁵⁹ the Vienna Declaration,⁹⁶⁰ and the Declaration on the Right to

Development.⁹⁶¹ The AHRD grants the right to development to “every human person and the peoples of ASEAN,”⁹⁶² which could be interpreted as applying to indigenous groups, but is ambiguously worded. At minimum, this provision indicates that the Member States view development as both an individual and collective right, which is consistent with existing international standards.

This right to development could be strengthened through the inclusion of provisions that recognize the importance of consultation with communities affected by large-scale development projects, and the requirement that the free, prior and informed consent of indigenous peoples’ is obtained prior to proceeding with a project affecting their lands or way of life. Importantly, there is a need to recognize an individual right to adequate and just remedy for harm or loss arising from such development projects.

ASEAN Member States’ International Legal and Constitutional Obligations

Although no binding international human rights treaties guarantee development as a specific right, many of them include social, economic, and cultural development as an important goal, creating soft law regarding the right to development.⁹⁶³ Additionally, several non-binding international and regional declarations⁹⁶⁴ do include the right to development as a specific right, most notably the 1986 Declaration on the Right to Development. Asian states endorsed this Declaration and the right to development as “a universal and inalienable right” in the 1993 Bangkok Declaration, which was incorporated also into the Vienna Declaration at the 1993 World Conference on Human Rights.⁹⁶⁵

Several ASEAN Member States’ constitutions recognize the responsibility of the state to promote development in some way,⁹⁶⁶ but none explicitly guarantees the right to development. The ASEAN Charter makes a strong statement about development in its preamble and includes the promotion of sustainable development as one of the purposes of the organization.⁹⁶⁷ Member States also committed themselves to achieving the MDGs in a joint statement.⁹⁶⁸ The Ha Noi Declaration recognizes the importance of development for women and children,⁹⁶⁹ and the Declaration on Cooperation⁹⁷⁰ specifically recognizes the right to development.

Content and Interpretation of the Right in International Law

While the concept of a right to development emerged in the 1950s, it was not until relatively recently that it has come to be recognized as a specific right, and it remains controversial. As decolonization proceeded following World War II and an increasing number of developing countries joined the UN system as members, they pushed for greater recognition of the right to development. However, wealthier countries resisted, fearing that a right to development would burden them with funding the development of the poorer countries.⁹⁷¹ As the Cold War unfolded, the importance of civil and political rights became pitted against economic, social and cultural rights, and little progress regarding the right to development occurred.⁹⁷²

In the 1980s, the right to development regained momentum. In 1986, the UN Declaration on the Right to Development provided detailed normative content to the right. It defines development as “a

comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.”⁹⁷³ It places the human person at the center of the right,⁹⁷⁴ states that development implies self-determination,⁹⁷⁵ places responsibility for creating conditions and policies favorable to development on states,⁹⁷⁶ and recognizes that all rights are interdependent.⁹⁷⁷ The Vienna Declaration affirmed the principles and rights in the Development Declaration. It even exceeded the scope of the Development Declaration by linking environmental and developmental needs and adding that future generations were also entitled to the right to development, introducing the notion of sustainability and intergenerational equity into the right to development.⁹⁷⁸ In addition to recognizing the interdependence of all rights, the Vienna Declaration proclaimed that democracy is interdependent with development and respect for human rights.⁹⁷⁹ It also called on states to protect the right to development for indigenous peoples and to involve them in decisions on all matters that might concern them.⁹⁸⁰

Whether the right to development is recognized under international law, and what the components of the right actually are, are subject to debate.⁹⁸¹ Some contend that the right to development could conflict with the right to a clean environment. In response to this argument, advocates for the right to development have reframed it as a right to *sustainable* development, as reflected in the AHRD and implied in the Vienna Declaration. Others contend that it is unclear who is entitled to the right, who has obligations to fulfill the right, and what those obligations might be.⁹⁸² The Development Declaration assigns to all states “the primary responsibility for the creation of national and international conditions favorable to the realization of the Right to Development,”⁹⁸³ but elsewhere indicates that “all human beings have a responsibility for development, individually and collectively.”⁹⁸⁴ The declaration suggests that developed countries must provide developing countries “with appropriate means and facilities to foster their comprehensive development.”⁹⁸⁵ The Rio Declaration also suggests that developed countries have greater duties in fulfilling the rights to development and the environment than developing countries.⁹⁸⁶ This progressive position remains highly controversial.⁹⁸⁷

Among the regional human rights instruments, both the African and Arab Charters specifically grant the right to development. The African Charter recognizes the right to development as a collective right, stating “[a]ll peoples shall have the right to their economic, social and cultural development. . . .” and calls on states individually and collectively to ensure the right. However, it does not specify by what means.⁹⁸⁸ The Arab Charter grants the right to development to individuals, calls on states to establish development policies to guarantee the right, and calls for regional and international cooperation.⁹⁸⁹

The right to development encompasses the rights of indigenous and local groups to be consulted regarding the development process. The group should give “free, prior, informed consent” (FPIC) prior to development. The FPIC standard was recognized for projects sponsored by the World Bank Group International Finance Corporation,⁹⁹⁰ was discussed in UN documents⁹⁹¹ as well as the *Saramaka* case from the Inter-American system,⁹⁹² and occupies a central place in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

(Aarhus Convention).⁹⁹³ Additionally, The Committee on the Elimination of Racial Discrimination calls on state parties to not only promote the sustainable economic and social development of indigenous peoples but also take “no decisions directly relating to their rights and interests . . . without their informed consent.”⁹⁹⁴

The right of indigenous or local people to benefit from resource exploitation on lands that they have traditionally used has been set forth on several occasions but is primarily recognized in the regional context. The ILO Convention on Indigenous Peoples notes that “peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”⁹⁹⁵ This principle has also been promulgated by the African Commission and the Inter-American Court of Human Rights. The African Commission has found that the state should ensure “reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival” of the indigenous community.⁹⁹⁶ Similarly, in the *Saramaka* case, the Inter-American Court said that the state must “reasonably share the benefits” of development with the affected community.⁹⁹⁷ Aside from these pronouncements, the right of indigenous and local communities to share in the benefits of development has not been firmly established. The UN Declaration on Indigenous Rights does not clearly address sharing economic benefits from development, although it does state that indigenous peoples have the right to redress or compensation for the lands and resources that have been used or damaged without their free, prior, informed consent.⁹⁹⁸

Article 38: The Right to Peace

AHRD Art. 38: Every person and the peoples of ASEAN have the right to enjoy peace within an ASEAN framework of security and stability, neutrality and freedom, such that the rights set forth in this Declaration can be fully realised. To this end, ASEAN Member States should continue to enhance friendship and cooperation in the furtherance of peace, harmony and stability in the region.

The AHRD recognizes that because armed conflict restricts peoples' enjoyment of other human rights, peace is linked to exercise of the full range of rights. Recognizing an individual's as well as a "peoples'" right to peace implies that both individuals and peoples can invoke the right. The AHRD does not impose clear obligations on the state to uphold peace. It simply says that states "should" continue to enhance friendship and cooperation in the region. The recognition of the right to peace in the AHRD is not surprising, given ASEAN's historical focus on preserving peace and stability in the region, and the UN Human Rights Council's push over the last few years to develop a UN Declaration on the Right to Peace.⁹⁹⁹

However, the exact content of the right to peace has not been defined in international law, leading to ambiguity as to what this right entails. During the development of the AHRD, CSOs raised concerns about the potential for ASEAN Member States to use this provision to justify reprisals against dissident groups on the grounds that they pose a threat to other peoples' right to peace. The argument that violence must be used to secure "peace" is frequently used by states involved in internal or international armed conflict. Furthermore, an examination of ASEAN constitutions reveals that some Member States use the term "peace" to refer to something more akin to the maintenance of domestic law and order, and as legitimate grounds for limiting constitutional rights, giving credence to CSO concerns that this language could give rise to misinterpretation or anti-democratic usage.

The concept of regional peace in ASEAN has long been associated with the principle of non-intervention, meaning that Member States are able to do as they like within their own borders, including commit gross human rights violations, without fear of criticism or interference from their neighbors. Attempts to ensure accountability for past conflicts in the region through truth commissions, prosecutions, or reparations have also met with strong opposition from governments. One of the arguments against such transitional justice mechanisms is that revisiting past conflicts risks reopening old wounds and reigniting conflict.

To address these issues, the "ASEAN Peoples' Declaration," a civil society alternative to the AHRD, states that the right to peace cannot be used as a justification for state avoidance of its duty to protect against and remedy human rights abuses.¹⁰⁰⁰ An additional sub-provision regarding the use of force in the maintenance of law and order stipulates that such force must always be exercised in compliance with international human rights law.

The international community is only just beginning to discuss mechanisms for enforcement of an individual and collective right to peace in the context of the UN Draft Declaration. Since the content of the right to peace is still in flux and without clear contours, its inclusion in a binding human rights instrument might be premature, particularly as certain interpretations of the right can even lead to the sanctioning of human rights abuses by governments. A more prudent solution might be to keep the right to peace as a guiding principle for the purposes of a future binding legal instrument.

ASEAN Member States' International Legal and Constitutional Obligations

Although there is no distinct "right to peace" in international law, ASEAN, which was initially established as a regional security group, has made the maintenance of peace and stability within the region one of its founding principles.¹⁰⁰¹ The 2008 ASEAN Charter that a part of ASEAN's purpose is to:

- maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region;
- preserve Southeast Asia as a Nuclear Weapon-Free Zone and free of all other weapons of mass destruction; and
- ensure that the peoples and Member States of ASEAN live in peace ... and a harmonious environment.¹⁰⁰²

In fact, the Treaty of Amity and Cooperation in Southeast Asia mentions "peace" 12 times, and it established the "ASEAN principles," including the principle of non-interference, the settlement of differences or disputes by peaceful manner, and the renunciation of threat or use of force.¹⁰⁰³ In addition to the Treaty of Amity and Cooperation, the ASEAN Charter, the Declaration on the Commitments for Children, and the ASEAN Peoples' Declaration mention the right to peace, firmly embedding it in the ASEAN legal landscape.¹⁰⁰⁴

ASEAN Member States have universally ratified the Treaty on the Non-Proliferation of Nuclear Weapons¹⁰⁰⁵ and have concluded their own regional treaty on the topic.¹⁰⁰⁶ In addition, both ASEAN human rights commissions, the AICHR and ACWC, have a declared their purpose of upholding the right of the peoples, and in the case of ACWC, the right of women and children, to live in peace.¹⁰⁰⁷

"Peace" is referred to in the ASEAN member state constitutions primarily in relation to the conduct of foreign affairs and ensuring peaceful relations with other nations.¹⁰⁰⁸ None of the constitutions recognize a right to peace for individuals, and only the Lao PDR Constitution comes close to recognizing a collective right by declaring support for "the struggle of the world's people for peace, national independence, democracy and social progress."¹⁰⁰⁹ The Constitutions of Lao PDR, Myanmar, Singapore, and the Philippines refer to "peace" in the sense of national,¹⁰¹⁰ community,¹⁰¹¹ or public¹⁰¹² peace, with the Myanmar Constitution recognizing the maintenance of this peace as a citizen obligation and, along with the Singapore Constitution, a justification for restriction of constitutional rights.¹⁰¹³

Content and Interpretation of the Right in International Law

One of the first references to the right to peace appeared in the 1978 UN Declaration on the Preparation of Societies for Life in Peace,¹⁰¹⁴ which states that every nation as well as every individual has a right to peace. The right of “peoples” to peace appeared in the 1984 UN Declaration of the Right of Peoples to Peace.¹⁰¹⁵ There is no clear requirement under international law for states to take measures to uphold the *peace* of an individual, although several instruments¹⁰¹⁶ suggest that states are obliged to refrain from actions that would disrupt regional or international peace.

While many regional and international instruments recognize rights related to peace (such as the right to security), there is debate regarding the existence of a specific right to peace.¹⁰¹⁷ The AHRD is the first regional instrument to recognize an individual person’s right to peace within the individual’s society, in addition to providing a right to peace for “ASEAN peoples.” Aside from the AHRD, the only other regional human rights instruments to refer specifically to a right to peace are the African Charter¹⁰¹⁸ (granting all peoples the right to peace) and its Maputo Protocol¹⁰¹⁹ (granting women the right to a peaceful existence).

Some states view peace not as a human right, but as a goal that can be best realized through the enforcement of existing identifiable and distinguishable human rights.¹⁰²⁰ There is concern that a specific right to peace would undermine the UN Charter, which sets out the legitimate reasons for the use of force,¹⁰²¹ and that the issues of disarmament, peacekeeping, and weapons of mass destruction should be addressed by specialized bodies such as the UN Security Council.¹⁰²² There are currently efforts underway within the UN to create a draft Declaration on Peace, but the right to peace currently has no clear contours.

The right to *security* of an individual is clearer than the right to peace. The UDHR, ICCPR and all of the regional conventions provide that everyone has the right to liberty and security of person.¹⁰²³ As stated by the Human Rights Committee, “[s]ecurity of person concerns freedom from injury to the body, or bodily integrity.”¹⁰²⁴ The right to security is an individual right, whereas the right to peace implies duties to individuals as well as “peoples”¹⁰²⁵ and nations.¹⁰²⁶

Other rights of “peoples” (as opposed to just individuals) have achieved recognition in international human rights law, including the rights to development, cultural life, a clean environment, and self-determination. As has been the case with these rights, there will likely be debate as to which “peoples” are entitled to assert the right. One potential aspect of the right to peace that is clearly individualistic is the right to conscientious objection. This concept, which is not well established in international law, was proposed in Article 5 of the draft Declaration on the Right of Peace. Many delegations did not support this proposal, although some linked conscientious objection to freedom of thought, conscious, and religion.¹⁰²⁷

Article 40 Savings Clause

AHRD Art. 40: Nothing in this Declaration may be interpreted as implying for any State, group or person any right to perform any act aimed at undermining the purposes and principles of ASEAN, or at the destruction of any of the rights and fundamental freedoms set forth in this Declaration and international human rights instruments to which ASEAN Member States are parties.

Article 40 is a “savings clause” often included in human rights instruments to prevent states parties from interpreting the text of a Convention or Declaration in a manner that undermines existing human rights obligations. Article 40 is taken from a provision in the UDHR, which reads:

“Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.”¹⁰²⁸

The ICCPR and the ICESCR contain similar provisions prohibiting interpretation of the conventions in a manner that justifies acts aimed at either the “destruction” of Convention rights or limiting rights to a greater extent than provided for in the Convention.¹⁰²⁹ The European and American Conventions on Human Rights contain comparable provisions, and the American Convention and Arab Charter, like the AHRD, provide that their provisions cannot be interpreted to undermine rights recognized under signatories’ domestic law or existing international treaty obligations.¹⁰³⁰

A joint CSO submission to the AICHR on the AHRD recommended that Article 40 be reworded to also prohibit of interpretations of the AHRD that “undermine the UDHR, the Vienna Declaration and Programme of Action or international law subscribed to by Member States.”¹⁰³¹ Although the AHRD was not amended to reflect this suggestion, ASEAN Member States responded to criticism by adopting the Phnom Penh Statement alongside the AHRD. The statement stresses that the AHRD will be implemented “in accordance with [Member States’] commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Program of Action, and other international human rights instruments to which ASEAN Member States are parties, as well as to relevant ASEAN declarations and instruments pertaining to human rights.”¹⁰³² The AHRD itself explicitly endorses all rights recognized in the UDHR in its preamble, article 10 (civil political rights) and article 26 (social, economic and cultural rights).

Article 40, read together with articles 10, 26, the AHRD preamble, and the Phnom Penh Statement, provide strong grounds for reading down problematic limitations imposed on rights in the General Principles and for interpreting rights such as the right to freedom of religion expansively to include elements not explicitly recognized in the AHRD (such as the freedom to adopt, change and manifest religion).

As a non-binding Declaration, the AHRD has no legal effect on the existing international obligations of the ASEAN Member States. However, there still exists the risk that ASEAN governments will seek to use the ambiguous, and at some places restrictive, language of the AHRD to justify impermissible derogations from their human rights treaty responsibilities. Such attempts could be countered by arguing that the AHRD's affirmation of international human rights law requires it to be interpreted in line with international standards. It would be preferable, however, if such arguments over interpretation are avoided through the development of a binding human rights convention accurately reflecting the human rights obligations of ASEAN Member States. This would require taking into account the contents of all core human rights and ILO conventions as each convention has been ratified by at least one or more member state.

The Missing Rights

Two rights present in the international bill of rights and conspicuously absent in the AHRD are the right to self-determination and the right to freedom of association. Both rights were included in initial drafts of the AHRD but failed to make it through negotiations between the ASEAN member state representatives over the AHRD text. A consideration of the importance and content of both rights is included here with the expectation that both rights will be explicitly recognized in future ASEAN human rights texts.

The Right to Self-Determination

There is no provision for the right to self-determination under the AHRD, though the declaration recognizes several rights connected to the right of self-determination, including the right for individuals to take part in cultural life in association with others and the right to development.¹⁰³³ Certainly, as recognized under article 7 of the AHRD, all human rights are “interdependent and interrelated.”¹⁰³⁴ Yet, while these specific rights are related, they do not exemplify the general nature of the right of self-determination. Nor do they capture the core components of the right as defined under international law, namely for people to assert collectively their political and social rights within a state as well as to decide their own destiny in the international order.¹⁰³⁵ Self-determination refers to the right for peoples to determine freely their political status and freely pursue their economic, social and cultural development.¹⁰³⁶ Without the inclusion of a specific provision for the right of self-determination, the AHRD maintains a critical gap in the human rights framework of the Southeast Asian regional system. This suggests that groups – racial, ethnic, indigenous, etc. – seeking to protect rights to political freedoms, control over lands and natural resources, and economic autonomy will have to rely on related provisions of AHRD, including those related to cultural life and development.

Notably, the AHRD also fails to mention ethnic groups, minority groups or indigenous populations. An early draft of the AHRD from January 2012 did include multiple references to the rights of these groups. This certainly would have bolstered the interpretations of self-determination provided above. However, several states objected to the inclusion of these groups specifically. Given the diversity of the ASEAN region, and some of the contemporary tensions that Member States have had with ethnic, minority or indigenous groups within their territories, the source of these apprehensions are clear. However, failing to include these groups and excluding the right to self-determination does not absolve Member States of their international legal obligations.

Any future ASEAN human rights convention should contain a specific and distinct provision regarding the right of self-determination. A meeting of CSOs in Manila in September 2012 recommended not only that a universal right to self-determination be included in the AHRD, but also that this right should apply broadly to individuals and groups that were not mentioned in the document. Such a provision would make it clear that this right applies to indigenous, ethnic and minority groups, none of whom are specifically mentioned in the AHRD. Articulating the right of self-determination for all groups would reaffirm the commitment to implement the instrument “in accordance with our

commitment to the Charter of the United Nations, the Universal Declaration of Human Rights, the Vienna Declaration and Program of Action, and other international human rights instruments to which ASEAN Member States are parties.”¹⁰³⁷

ASEAN Member States’ International Legal and Constitutional Obligations

ASEAN Member States are obligated to protect the right of self-determination of peoples, as it is recognized as a fundamental principle of international human rights law. In terms of treaty obligations, ASEAN Member States have ratified several international human rights instruments that explicitly provide for the right to self-determination. All Member States have ratified the UN Charter, through which states commit to, *inter alia*, realizing the “principle of equal rights and self-determination of peoples.”¹⁰³⁸ Six Member States have ratified the ICERD, which recognizes self-determination of peoples and obligates states to take measures for adequate development and protection of racial and ethnic groups.¹⁰³⁹ The same six countries have also ratified the ICCPR and the ICESCR, which both explicitly recognize the right to self-determination.¹⁰⁴⁰ While not binding, all ASEAN Member States signed on to the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), which explicitly guarantees the right to self-determination to indigenous peoples.¹⁰⁴¹

Member States also have obligations in the ASEAN legal framework. Both the ASEAN Charter and the mandate of the ASEAN Inter-Governmental Commission on Human Rights include upholding the UN Charter as a guiding principle, and the UN Charter includes the principle of self-determination of peoples.¹⁰⁴²

There is also some support for the right to self-determination within the national constitutions of some Member States, and more recognition of the general rights of indigenous, ethnic and minority groups. Five Member States’ constitutions articulate the rights of traditional communities and cultural identity in general.¹⁰⁴³ These constitutions refer to peoples’ right to conserve or restore their customs, local knowledge, languages, arts and culture of their communities.

The recognition of *principles* of self-determination is narrower, however. The Lao PDR Constitution affirms that the constitutive document is the “first time in the history of our nation that the right of self-determination of the people has been defined in the fundamental law of the country.”¹⁰⁴⁴ However, this reference applies to the Lao people as a whole and does not apply to individual nationalities within the country. Myanmar and the Philippines, on the other hand,¹⁰⁴⁵ provide for recognition of self-administered or autonomous regions. The Philippines also recognizes the rights of indigenous communities to their ancestral lands.¹⁰⁴⁶ Additionally, Thailand provides for the right of local traditional communities to preserve and exploit natural resources and their environment in a sustainable manner.¹⁰⁴⁷

Content and Interpretation of the Right in International Law

The right to self-determination of all peoples is established in international law.¹⁰⁴⁸ “[R]espect for the principle of self-determination of peoples” was established as a core purpose of international cooperation a fundamental tenet of international law in the UN Charter.¹⁰⁴⁹ The principle enables a people to choose its own political status and to determine its own form of economic, cultural and social development.¹⁰⁵⁰ Both the ICCPR and ICESCR provide in a common article that “All peoples

have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹⁰⁵¹ As such, self-determination is a right on its own; yet, it is also recognized that compliance with the right of self-determination is a fundamental condition for the enjoyment of other human rights and fundamental freedoms, be they civil, political, economic, social or cultural.¹⁰⁵² The right to self-determination may be subject to limitations. Under the ICCPR, for instance, states may derogate from certain obligations “in time[s] of public emergency . . .” but such measures may only be taken “to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.”¹⁰⁵³

The definition of this right is, nevertheless, subject to debate; in particular, there is controversy regarding the identity of rights holders (sovereign states or “peoples” within states) and which outcomes are justified by the exercise of this right. The UN Charter, ICESCR, and ICCPR recognize the right of “peoples” to self-determination but do not clarify what constitutes a “people.” “People” may be equivalent to members of a nation-state, or to a group formerly colonized by Europeans; alternatively “people” may constitute ethnic minorities or indigenous groups within a nation-state. The ILO Convention on Indigenous Peoples¹⁰⁵⁴ and the Proposed American Declaration on the Rights of Indigenous Peoples¹⁰⁵⁵ refer to “peoples” as those whose social, cultural and economic conditions distinguish them from others within a state, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations. Both instruments state that self-identification is the fundamental criterion for determining whether someone is part of a “people.”¹⁰⁵⁶ However, both specify that the term “people” used in the instrument is not the same as the term used elsewhere in international law (presumably in the ICESCR and ICCPR).¹⁰⁵⁷ The right to self-determination has also been referenced in the context of rights of minorities to political participation.¹⁰⁵⁸ ICERD refers specifically to “certain racial groups or individuals belonging to them,”¹⁰⁵⁹ as well as to indigenous peoples.¹⁰⁶⁰ While self-determination is not recognized within the European Convention, the European Court of Human Rights¹⁰⁶¹ has reviewed the right as it pertains to minority groups. Alternatively, the Human Rights Committee distinguishes the right to self-determination from the rights of minorities under article 27 of the ICCPR.¹⁰⁶²

Exercise of the right to self-determination can result in a variety of different outcomes, ranging from political independence through to full integration within a state. While claims to cultural autonomy may be more readily recognized by states, they are more likely to reject political claims. For some groups, particularly occupied or colonized nations, the only acceptable outcome is full political independence. For other groups, the goal is a degree of political, cultural and economic autonomy, sometimes in the form of a federal relationship. For others yet, the right to live on and manage a people's traditional lands and resources, free of external interference and incursion, is the aim of a struggle for self-determination.

The Committee on the Elimination of Racial Discrimination refers to an “internal aspect” of self-determination, meaning that peoples have the right to pursue freely their economic, social and cultural development without outside interference.¹⁰⁶³ One element of this right is to retain some measure of control over governance, which may range from increased participation in public affairs

to autonomous government.¹⁰⁶⁴ The Human Rights Committee suggests that states describe in their reports “the constitutional and political processes which in practice allow the exercise of this right.”¹⁰⁶⁵ Another element concerns participation in the development of a state’s natural resources.¹⁰⁶⁶

The external aspect of self-determination indicates that all peoples have the right to determine freely their political status and their place in the international community — in other words, people must be free from foreign domination, exploitation, and colonialism.¹⁰⁶⁷ The Committee on the Elimination of Racial Discrimination emphasizes that self-determination does not mean taking action that would impair the territoriality of a sovereign state.¹⁰⁶⁸ The Committee suggests that there is no unilateral right to secede from a state, but secession may be appropriate when there is mutual agreement.¹⁰⁶⁹ On the other hand, a 2010 ICJ advisory opinion states that international law does not prohibit unilateral secession, suggesting that there may be cases where unilateral secession is appropriate.¹⁰⁷⁰ In addition, the African Commission, which has considered claims of external self-determination, has held that secession could be permissible when the will of a people is denied through massive human rights violations.¹⁰⁷¹ Overall, there seems to be more acceptance of the disruption of territorial integrity when it relates to a former colony seeking independence than when it concerns an ethnic or indigenous group seeking to carve out its own state, absent some grave human rights violation.¹⁰⁷² Thus, while the world has accepted the independence of former European colonies since World War II, there is less willingness to accept unilateral claims of sovereignty by ethnic groups within these states.¹⁰⁷³

Recognizing the importance of this right, international instruments impose both positive and negative obligations upon states with respect to a peoples’ right to self-determination. The Human Rights Committee suggests that the right to self-determination imposes an obligation on state parties to people within and outside of their borders who have been deprived of exercising their right to self-determination.¹⁰⁷⁴ At the same time, states are obligated not to interfere in the internal affairs of other states.¹⁰⁷⁵ An important obligation of the state is to ensure that people are able to participate, and benefit from, natural resource development on their traditional or demarcated lands. This concept is outlined in the Convention on Indigenous People, the UN Declaration on Development, the UN Declaration on the Rights of Indigenous Peoples, and the jurisprudence of the Inter-American Court and the African Commission.¹⁰⁷⁶ In this sense, the right to self-determination is closely tied to the rights to development and property discussed by the Inter-American Court¹⁰⁷⁷ and the African Commission.¹⁰⁷⁸ This connection is expressed in the Development Declaration that the right to development indicates the “full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.”

The Right to Freedom of Association

The AHRD does not contain a general right to freedom of association. It does recognize several rights connected to the freedom of association, such as the right for individuals to use property in association with others; the right of individuals to participate in peaceful assembly; the right of

workers to join trade unions; and the right for individuals to take part in cultural life in association with others.¹⁰⁷⁹ While these specific rights are related, they do not exemplify the general nature of the right to freedom of association; nor do they capture the core components of the right as defined under international law, namely the individual's freedom to join or leave groups – whether cultural, economic, political, or social – and the freedom of such groups to take collective action to pursue the interests of its members.¹⁰⁸⁰ Without the inclusion of a specific provision for the right to freedom of association, the AHRD maintains a critical gap in the human rights framework of the ASEAN regional system.

The right to individual or collective property ownership, use, and dispossession¹⁰⁸¹ is related to the freedom of association, as it pertains to organizing collective economic interests; the right to property, however, is inherently limited to such economic interests and cannot extend to the individual's choice to join groups for other purposes. Similarly, while the AHRD provides for the individual's right to join trade unions, the article is confined to associations within the scope of employment and labour, particularly for the purpose of collective bargaining and organizing. It is important to note that, under the AHRD, the right to join trade unions can be limited by "national laws and regulations," which may or may not sufficiently protect the right.

Because the right to assembly is often stipulated in conjunction with the right freedom of association,¹⁰⁸² the AHRD's specific provision for the right to peaceful assembly¹⁰⁸³ could be interpreted to include freedom of association. Nevertheless, the freedom of association is a separate and distinct right, which should be given its due recognition in a human rights instrument.

In addition, the AHRD's provision for the individual's right to "freely take part in cultural life,"¹⁰⁸⁴ individually or in association with others, could be interpreted to include the right to freedom of association. Coupled with the recognition that individuals are "entitled to participate in, contribute to, enjoy and benefit equitably and sustainably from economic, social, cultural and political development,"¹⁰⁸⁵ the right to take part collectively in cultural life could support a broad interpretation of the right to freedom of association within the AHRD for the purpose of development. Yet, as with other relevant rights discussed in this section, this provision does not extend to the general concept of an individual's right to associate freely, for any legal purpose, and for the freedom of association to organize collective interests.

Thus, although there may be a legal basis for exercising the right under other articles, by excluding the right to freedom of association the AHRD falls short of international standards. Specifically providing for this right and extending it to all individuals – beyond the status of property ownership, peaceful assembly, trade union membership, or cultural life – would be consistent with ASEAN states' obligations under international law, and specifically the statements made upon signing the AHRD. Articulating the right to freedom of association would reaffirm the commitment to implement the instrument "in accordance with [their] commitment to the Charter of the United Nations, the UDHR, the Vienna Declaration and Program of Action, and other international human rights instruments to which ASEAN Member States are parties, as well as to relevant ASEAN declarations and instruments pertaining to human rights."¹⁰⁸⁶ Any future ASEAN human rights instrument should, therefore, contain a specific, and distinct, provision right to freedom of association.

ASEAN Member States' International Legal and Constitutional Obligations

ASEAN Member States have ratified several international human rights instruments which specifically provide for the right to association. Six Member States have ratified the ICCPR,¹⁰⁸⁷ which recognizes the right to freedom of association and specifically limits any restrictions to this right to those that are “necessary in a democratic society in the interest of national security or public safety, public order . . . or the protection of the rights and freedoms of others.”¹⁰⁸⁸ All Member States are obligated to protect the child’s right to associate freely with others, as stipulated in the CRC.¹⁰⁸⁹ Under CEDAW, all Member States are obligated to take appropriate measures to ensure that women can equally participate in non-governmental organizations and associations “concerned with the public and political life of the country.”¹⁰⁹⁰ With respect to this right within the scope of labour, four Member States have ratified the ILO Freedom of Association Convention (No. 87) and five the Right to Organise and Collective Bargaining Convention (No. 98), which recognizes the freedom of association for workers and employers;¹⁰⁹¹ similarly the ICESCR, to which six Member States are party,¹⁰⁹² provides for the obligation to ensure the right to form, join, and leave trade unions, as well as the right to strike and bargain collectively.¹⁰⁹³

Importantly, the overwhelming majority of ASEAN Member States provide within their national constitutions for the general right to freedom of association, as well as the right of association within the scope of political parties, trade unions, and property ownership. Nine Member States’ constitutions¹⁰⁹⁴ articulate the individual’s right to form, join, and leave associations, in general.¹⁰⁹⁵ Indonesia further provides for the individual’s right to “improve him/herself” through “collective struggle for his/her rights to develop his/her society, nation and state.”¹⁰⁹⁶ In addition to the general provision for the right to freedom of association, the majority of Member States’ articulate that the right extends to the freedom to join political parties,¹⁰⁹⁷ trade unions,¹⁰⁹⁸ collective property ownership,¹⁰⁹⁹ and other community organizations.¹¹⁰⁰ While all Member States providing for freedom of association require that the exercise of that right be in accordance with the law, several states articulate limitations on the right for purposes such as national security, public order, morality, friendly relations with other countries, and preventing economic monopoly as well as requirements for imposing such limitations.¹¹⁰¹ The Constitution of the Philippines stipulates that the right to assembly and association “shall not be abridged.”¹¹⁰² Given that the majority of ASEAN Member States recognize the right to freedom of association as well as the breadth of the right as defined in state constitutions, AHRD’s exclusion of that right is particularly problematic, because it does not comport with state practice within the region.

Content and Interpretation of the Right in International Law

The UDHR provides that “(1) [e]veryone has the right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association.”¹¹⁰³ The ILO Freedom of Association Conventions, ICERD, ICCPR, ICESCR, CEDAW, CRC, and ICRMW provide for the right to freedom of association, including the right to join trade unions and community organizations.¹¹⁰⁴ In addition to these international instruments, the African,¹¹⁰⁵ Arab,¹¹⁰⁶ American,¹¹⁰⁷ and European¹¹⁰⁸ regional human rights instruments incorporate this right. Now widely recognized as a fundamental human right in international and regional human rights instruments, the freedom of association

pertains to the right to join or leave groups upon the individual's choice, and for groups to take collective action to pursue the interests of members.¹¹⁰⁹

As such, the freedom of association is recognized as both an individual and collective right, applying to individuals wishing to form a group as well as to the group formed.¹¹¹⁰ The ability to organize is an important means by which citizens can influence their governments and leaders. The right enables individuals to join together through associations or peaceful gatherings in order to express their views on matters of public concern and to protect their economic, legal, political, and social interests.¹¹¹¹

Recognizing the importance of this right, international instruments impose both positive and negative obligations upon states with respect to the freedom of association. This right guarantees associations formed have rights to operate freely and without interference.¹¹¹² The UN Human Rights Council calls upon states to:

“ . . . respect and fully protect the rights of all individuals to assemble peacefully and associate freely, including in the context of elections, and including persons espousing minority or dissenting views or beliefs, human rights defenders, trade unionists and others, including migrants, seeking to exercise or to promote these rights . . . ”¹¹¹³

Thus, states should ensure that public authorities do not prevent, hinder or restrict the formation, membership, or departure from an association or arbitrarily interfere with associations. States are also required to take reasonable and appropriate measures to secure the right to freedom of association in “public and political life.”¹¹¹⁴ States must extend the right to all individuals, including non-citizens.¹¹¹⁵

In addition, international instruments and case law specifically extend the right to freedom of association to trade unions, political parties, religious groups, and other associations. The ILO Freedom of Association Convention, ICCPR, ICESCR, and ICRMW articulate that the right freedom of association includes the right to form and join trade unions, to strike, and to engage in collective bargaining.¹¹¹⁶ Alternatively, the UDHR, the African Charter, the American Convention, and international case law recognize that freedom of association includes the right *not* to join a union or association.¹¹¹⁷

The right to freedom of association is, nevertheless, subject to limitations. The ICCPR, ICESCR, and American Convention recognize narrow exceptions to the freedom of association: any restriction must be lawful and in pursuit of a legitimate aim such as national security, public safety, the prevention of disorder or crime, or the protection of the rights and freedoms of others.¹¹¹⁸ The UN Human Rights Committee states that the restriction “must cumulatively meet the following conditions: (a) it must be provided by law; (b) it may only be imposed for one of the purposes set out in paragraph 2; and (c) it must be ‘necessary in a democratic society; for achieving one of these purposes.’”¹¹¹⁹ It is not enough for a state party to have a reasonable objection for limiting the freedom of association. The state party must further demonstrate that the restriction is “necessary

to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose.”¹¹²⁰

¹ The ten Member States of ASEAN include Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

² Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD), Preamble (Nov. 19, 2012), *available at* <http://www.asean.org/news/asean-statement-communicues/item/phnom-penh-statement-on-the-adoption-of-the-asean-human-rights-declaration-ahrd> [hereinafter Phnom Penh Statement].

³ Bangkok Declaration, Preamble (April 2, 1993). Cambodia joined ASEAN in 1999.

⁴ Bangkok Declaration, Preamble (April 2, 1993). Article 4 discourages “any attempt to use human rights as a conditionality for extending development assistance.”

⁵ Joint Communique of the 26th ASEAN Ministerial Meeting (AMM), para. 18 (July 23-24, 1993).

⁶ Kuala Lumpur Declaration on Human Rights, ASEAN Inter-parliamentary Organization (AIPO) 14th General Assembly, art. 21 (Sept. 1993), *available at* http://www.hurights.or.jp/archives/other_documents/section1/2010/03/kuala-lumpur-declaration-on-human-rights1993.html [hereinafter Kuala Lumpur Declaration].

⁷ Kuala Lumpur Declaration, at para. 6.

⁸ Kuala Lumpur Declaration, at para. 5.

⁹ Tan Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia* 25 (2011).

¹⁰ Tan Hsien-Li, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalising Human Rights in Southeast Asia* 24-25 (2011).

¹¹ Association of Southeast Asian Nations (ASEAN), *Charter of the Association of Southeast Asian Nations*, Nov 20, 2007, entry into force Dec 15, 2008, arts. 2(2)(a), (e) (2008).

¹² Among the purposes of ASEAN is “[t]o 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.” See ASEAN Charter, art. 1 (2008) for the complete list of principles.

¹³ African [Banjul] Charter on Human and Peoples’ Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986 requires states to “opt in” and specifically allow individual complaints.

¹⁴ ASEAN Intergovernmental Commission on Human Rights (AICHR), *Terms of Reference*, Jul. 20, 2009, arts. 3, 4.2 & 7.1 [hereinafter AICHR TOR].

¹⁵ See, e.g., Forum Asia, “Civil Society Demands Transparency and Consultation on the ASEAN Human Rights Declaration” (Apr. 8, 2012), *at* <http://www.forum-asia.org/?p=12449>. This press release references a joint statement of 122 civil society organizations and networks across Southeast Asia calling for release of the draft ASEAN Human Rights Declaration. Yap Swee Seng, Executive Director of the Bangkok-based Asian Forum for Human Rights and Development (FORUM-ASIA), stated that, “[The peoples of ASEAN] are not being given any meaningful way to ensure that their concerns are presented, received and reflected in the Declaration.” As stated in the press release, although civil society groups had submitted recommendations on the Declaration, they had received no official response from the AICHR. See also International Federation for Human Rights Joint Statement, “The ASEAN Human Rights Declaration: Drafts Must Be Published and Subject to Meaningful Consultations with Local, National and Regional Civil Society and Human Rights Defenders” (May 2, 2012), *at* <http://www.fidh.org/en/asia/asean/The-ASEAN-Human-Rights-Declaration> (joint statement of 14 organizations noting that AICHR “has yet to take the necessary steps to ensure that the process of drafting the [AHRD] is transparent and fully consultative with civil society organizations” and stating that “Consultations will be meaningless if the draft declaration is kept confidential and out of reach of the peoples”).

¹⁶ ABA ROLI co-sponsored meetings for civil society groups in Kuala Lumpur, Malaysia and Manila, Philippines in preparation for these formal consultations.

¹⁷ Phnom Penh Statement, art. 2.

¹⁸ Phnom Penh Statement, art. 3. The carefully worded “in accordance with our commitment to . . .” instead of simply stating, “in accordance with the Vienna Convention . . .”

¹⁹ See Renshaw, C “The ASEAN Human Rights Declaration 2012,” 13(3) HUMAN RIGHTS L.R. 557, 563 (2013), available at <http://hrhr.oxfordjournals.org/content/13/3/557.full.pdf+html> (observing that “[i]t is significant that the Preamble specifically reaffirms only those principles in the ASEAN Charter that are positively related to human rights” and that previous ASEAN human rights instruments included provisions which are adverse to human rights, citing in particular that non-interference is listed among the principles of the AICHR TOR).

²⁰ See, e.g., “Pillay encourages ASEAN to ensure Human Rights Declaration is implemented in accordance with international obligations,” United Nations Office of the High Commissioner for Human Rights Press Release (Nov. 19, 2012), available at

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12809&LangID=E>. The Commissioner stated that “[l]ooking ahead, it is essential that ASEAN ensures that any language inconsistent with international human rights standards does not become a part of any binding regional human rights convention;” International Commission of Jurists Press Release, “ICJ condemns fatally flawed ASEAN Human Rights Declaration” (Nov. 19, 2012), available at <http://www.icj.org/icj-condemns-fatally-flawed-asean-human-rights-declaration/>.

²¹ “ASEAN Human Rights Declaration Should Maintain International Standards,” An Open Letter from the Coordination Committee of the Special Procedures of the Human Rights Council on the draft ASEAN Human Rights Declaration, United Nations Office of the High Commissioner for Human Rights [hereinafter “Coordination Committee Letter”], 1 (Nov. 2012), available at http://www.ohchr.org/Documents/HRBodies/SP/LetterASEAN_Nov2012.doc.

²² Coordination Committee Letter at 2. The Committee therefore encouraged “inclusion of language which makes explicit that the restrictions must be provided by law and conform to the strict tests of necessity and proportionality, and that these restrictions may not put in jeopardy the right itself or apply to rights that are non-derogable under international law.” *Id.* The Committee further expressed hope that the declaration would address “human rights concerns that are particularly pertinent to the region,” such as rights of asylum seekers and the principle of non-refoulement “(to prevent persons from being returned to countries where, for instance, they will be subjected to torture),” as well as norms against statelessness, providing access to citizenship and “birth registration for children who would otherwise be stateless.” *Id.* See also “‘ASEAN Human Rights Declaration should maintain international standards,’ urge key U.N. expert group,” United Nations Office of the High Commissioner for Human Rights Press Release (Nov. 16, 2012), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12796&LangID=E>.

²³ US State Department Press Statement, “ASEAN Declaration on Human Rights,” (Nov. 20, 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/11/200915.htm>.

²⁴ See, e.g., International Commission of Jurists Press Release, “ICJ condemns fatally flawed ASEAN Human Rights Declaration” (Nov. 19, 2012), available at <http://www.icj.org/icj-condemns-fatally-flawed-asean-human-rights-declaration/>; Asian Forum for Human Rights and Development (Forum-Asia) Press Release, “Civil society denounces adoption of flawed ASEAN Human Rights Declaration: AHRD falls far below international standards” (Nov. 19, 2012), available at <http://www.forum-asia.org/?p=15609> (statement endorsed by 62 international and regional civil society organizations);

²⁵ Ng, J RSIS Commentaries, “ASEAN Human Rights Declaration: A Pragmatic Compromise,” p. 1 (Nov. 21, 2012). See also Severino, R “ASEAN’s declaration advances human rights in Asia,” East Asia Forum (Feb. 8, 2013), available at <http://www.eastasiaforum.org/2013/02/08/aseans-declaration-advances-human-rights-in-asia/>.

²⁶ Gomez, R Associated Press, “ASEAN Leaders to Adopt Rights Pact despite Protest” (Nov. 16, 2012), available at <http://www.irrawaddy.org/cambodia/asean-leaders-to-adopt-rights-pact-despite-protest.html>.

²⁷ Universal Declaration of Human Rights [hereinafter UDHR], G.A. res. 217A (III), U.N. Doc. A/810 at 71 (1948), available at <http://www.un.org/en/documents/udhr/> (stating that the purpose of the UDHR is to provide “a common understanding” of the human rights and fundamental freedoms set out in the UN Charter and to serve “as a common standard of achievement for all peoples and all nations”).

²⁸ See AICHR TOR, art. 1(6); ASEAN Human Rights Declaration [hereinafter AHRD], Preamble (2012).

²⁹ ABA ROLI, *Experts' Note on the ASEAN Human Rights Declaration* 6 (May 2012). The non-binding quality of the AHRD recognizes that the ASEAN human rights system, like other regional systems, will evolve over time.

³⁰ See American Bar Association Rule of Law Initiative, *Experts' Note on the ASEAN Human Rights Declaration* 5-6 (May 2012). This assessment approach tracks the purposes of a declaration originally identified in ABA ROLI's 2012 publication on the AHRD. As noted in that publication, a regional declaration "can first, affirm and consolidate international and national human rights obligations already subscribed to by ASEAN Member States; second, articulate a 'common standard of achievement' for the region; and third, show leadership in the advancement of human rights through reference to rights and principles of special relevance to the region" (quoting UDHR, at Preamble (1948)).

³¹ International Federation for Human Rights, "Civil Society Organisations Meet ASEAN Intergovernmental Commission on Human rights on the ASEAN Human Rights Declaration, Call for Universal Standards to Be Upheld" (June 22, 2012), at <http://www.fidh.org/en/asia/asean/Civil-society-organisations-meet>.

³² See AICHR TOR, art. 1(6); AHRD, Preamble (2012). These texts also reaffirm ASEAN Member States' commitment to the UN Charter..

³³ AHRD, art. 4.

³⁴ AHRD, art. 17.

³⁵ AHRD, art. 28.

³⁶ AHRD, art. 29(2).

³⁷ AHRD, art. 35-37.

³⁸ AHRD, art. 30(2)-(3); art. 33, art. 20(2).

³⁹ AHRD, art. 8.

⁴⁰ UDHR, art. Need to insert full citation here

⁴¹ AHRD, art. 8. By contrast, see International Covenant on Civil and Political Rights [hereinafter *ICCPR*], G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, at art. 4, *available at* <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.art.

⁴² Convention on the Elimination of All Forms of Discrimination against Women [hereinafter *CEDAW*], G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sep. 3, 1981, at art. 5, *available at* <http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm>; see also Committee on the Rights of the Child, General Comment No. 5 on General Measures of Implementation of the Convention on the Rights of the Child, U.N. Doc. CRC/GC/2003/5 (2003), para. 20, *available at* http://www.unicef-irc.org/portfolios/general_comments/GC5_en.doc.html.art.

⁴³ Art. 31(1) of the 1969 Vienna Convention on the Law of Treaties provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." In ascertaining the purpose of a treaty, reference should be made to the treaty text, including the preamble and annexes, and any agreement made by all parties in relation to that treaty. Context that may aid interpretation includes relevant rules of international law, including the Vienna Convention on the Law of Treaties [hereinafter *VCLT*], May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969), art. 31(2). The *VCLT* has been recognized as a codification of customary international law and applied in regional human rights systems. See *Loizidou v. Turkey* (preliminary objections), Application No. 15318/89, Mar. 23, 1995, para. 72, European Court of Human Rights, *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57920> ("... the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.")

⁴⁴ *Demir and Baykara v. Turkey*, Application no. 34503/97, Nov. 12, 2008, para. 88, European Court of Human Rights 2007-, *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89558>.

⁴⁵ UDHR, art. 1; ICCPR, art. 26; International Covenant on Economic, Social and Cultural Rights [hereinafter *ICESCR*], G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976, at art. 2(2), *available at* <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx> ("race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

⁴⁶ Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights in U.N. General Assembly, *Report of the Regional Meeting for Asia of the World Conference on Human Rights* [hereinafter *Bangkok Declaration*], A/CONF.157/ASRM/8 A/CONF.157/PC/59, Mar 29-Apr 2 1993, para. 11.

⁴⁷ Civil Society Organisations and People's Movements Participating in the Civil Society

Forum on ASEAN Human Rights Declaration, Joint submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration, Sep. 12, 2012 (referencing art. 4 of the AHRD).

⁴⁸ UDHR, art. 8.

⁴⁹ This interpretation would also be consistent with the AHRD's savings clause (art. 40) and the ASEAN Phnom Penh Statement, adopted alongside the AHRD, by which ASEAN member states affirmed that the AHRD would not be interpreted so as to undermine their existing human rights treaty obligations.

⁵⁰ ICCPR, art. 2(3). See also International Convention on the Elimination of All Forms of Racial Discrimination [hereinafter *ICERD*], G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force Jan. 4, 1969, at art. 6, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter *CAT*], G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force Jun. 26, 1987, at art. 14, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>; Convention on the Rights of the Child [hereinafter *CRC*], G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sep. 2, 1990, at art. 39, available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. art. art. art. art.

⁵¹ U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law [hereinafter U.N. Basic Principles on the Right to a Remedy], U.N. Doc. A/RES/60/147, 21 March 2006, at arts. 1, 2 & 3 on the general state obligation to respect, ensure respect for and implement international human rights law and international humanitarian law, and at art. 4 in relation to state obligations to prosecute and punish crimes under international law.

⁵² The International Court of Justice in the *Barcelona Traction Case: Belgium v Spain* (Second Phase) ICJ Rep 1970 3 at 34 recognized freedom from slavery and racial discrimination as erga omnes rights, meaning rights so fundamental that they enforceable against all states. See also Yearbook of the International Law Commission, 1999, vol. II, part II, UN Doc. A/CN.4/SER.A/1999/Add.1 at para. 311. The ICTY, European and Inter-American courts have recognized the prohibition against torture as either a jus cogens norm or fundamental right from which no derogation is ever permissible. See *Furundzija Case*, JL/PIU/372-E, The International Criminal Tribunal for the former Yugoslavia, December 10, 1998, at 144; *Soering v. United Kingdom*, Application no. 14038/88, 7 July 1989, para. 88, European Court of Human Rights; *Goiburú and Others v Paraguay*, I/A Court H.R., Merits, Reparations and Costs, Judgment of Sept. 22, 2006, para. 128.

⁵⁴ ⁵⁴ ICCPR, arts. 2(3), 9(5); ICERD, art. 6 (ratified by Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.)

⁵⁵ CEDAW, art. 2; CRC, art. 39.

⁵⁶ Convention on the Rights of Persons with Disabilities [hereinafter *CRPD*], G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008, at arts. 4(1) & 13, available at <http://www.un.org/disabilities/convention/conventionfull.shtml>.

⁵⁷ Constitution of Myanmar (2008), at art. 377, available at http://www.mofa.gov.mm/wp-content/uploads/2013/08/Constitution_of_Myanmar.pdf; Constitution of the Kingdom of Thailand (2007), at art. 28, available at http://www.senate.go.th/th_senate/English/constitution2007.pdf; Constitution of the Lao People's Democratic Republic (2001) amend. May 6, 2003, at art. 41, available at https://www.constituteproject.org/constitution/Laos_2003.pdf; Constitution of the Kingdom of Cambodia, (1993), amend. Mar. 2008, at art. 39, available at http://www.senate.gov.kh/home/constitution/constitution_english.pdf; Constitution of the Socialist Republic of Viet Nam (2013), at art. 30(1), available at http://www.constitutionnet.org/files/final_constitution_of_vietnam_2013-english.pdf.

⁵⁸ Constitution of Viet Nam, art. 30(2)-(3).

⁵⁹ Constitution of the Philippines (1987), at art. III(11) & (16), available at <http://www.gov.ph/the-philippine-constitutions/the-1987-constitution-of-the-republic-of-the-philippines/>; Constitution of the Republic of Indonesia, (1945), amend. Aug. 10, 2002, at art. 28D, available at <http://www.embassyofindonesia.org/about/pdf/IndonesianConstitution.pdf>.

⁶⁰ Permanent Court of Arbitration, Chorzow Factory Case (Ger. V. Pol.), (1928) P.C.I.J., Sr. A, No.17, at 47 (September 13); International Court of Justice: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), Merits 1986 ICJ Report, 14, 114 (June 27); Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, ICJ Reports 1949, p. 184

⁶¹ UDHR, art. 8.

⁶² U.N. General Assembly, Vienna Declaration and Programme of Action [hereinafter *Vienna Declaration*], July 12, 1993, U.N. Doc. A/CONF.157/23, at para. 27, available at <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>.

⁶³ Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter *European Convention on Human Rights*], entered into force Sep. 3, 1953, as amended by Protocols No. 11 and No. 14, which entered into force on May 11, 1994, and Jun. 1, 2010, respectively, at art. 13, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>; Arab Charter on Human Rights [hereinafter *Arab Charter on Human Rights*], May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force Mar. 15, 2008, at art. 23, available at <http://www1.umn.edu/humanrts/instree/loas2005.html>.

⁶⁴ African [Banjul] Charter on Human and Peoples' Rights [hereinafter *African Charter on Human and Peoples' Rights*], adopted Jun. 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, at art. 7, available at <http://www.achpr.org/instruments/achpr/>; American Convention on Human Rights [hereinafter *American Convention on Human Rights*], O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force Jul. 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), at art. 25, available at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

⁶⁵ See *Velasquez Rodriguez Case*, I/A Court H.R., Judgment (1988), Series C. No. 4, para. 166, available at http://www1.umn.edu/humanrts/iachr/b_11_12d.htm; *Loayza Tamayo Case*, I/A Court H.R., Reparations (1998), Series C. no. 42, para. 170-71. See also *The case of 97 members of the Gdani Congregation of Jehovah's Witnesses and 4 Others v. Georgia*, Application no. 71156/01, para. 96-97, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80395>; *Egyptian Initiative for Personal rights and Interights v. Egypt*, Communication No. 323/2006, African Commission on Human and Peoples' Rights, Twenty-First Annual Activity Report (2011), Annex II, p. 275, available at http://www.achpr.org/files/sessions/9th-eo/comunications/334.06_/achpreos9_334_06_eng.pdf.

⁶⁶ U.N. Basic Principles on the Right to a Remedy and Reparation, at Preamble.

⁶⁷ *Sir Dawda V. Jawara v. The Gambia*, Communications 147/95 & 149/96, African Commission on Human and Peoples' Rights, 13th Annual Activity Report (2000), Annex V, para. 36, available at http://www.worldcourts.com/achpr/eng/decisions/2000.05.11_Jawara_v_Gambia.htm (noting that "[a] remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint"); *Mandić and Jović v. Slovenia*, Application Nos. 5774/10, 5985/10, para. 106, ECHR 2011, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107139#%22itemid%22:%22001-107139%22>] ("an effective remedy is one that is enforceable"); *Štruč and others v. Slovenia*, Application Nos. 5903/10, 6003/10, 6544/10, para. 119, ECHR 2011, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#%22appno%22:%225903/10%22,%22itemid%22:%22001-107141%22>] ("[T]he decisive question in assessing the effectiveness of a remedy concerning a complaint of ill-treatment is whether the applicant can raise this complaint before domestic courts in order to obtain direct and timely redress").

⁶⁸ See, e.g., *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39630/09, para. 255, ECHR 2012, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621#%22itemid%22:%22001-115621%22>}, noting that "[the right to a remedy] require[s] the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief."

⁶⁹ Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 15.

⁷⁰ *Id.*

⁷¹ *Kudła v. Poland*, Application No. 30210/96, para. 130, ECHR 2000- XI, available at <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=001-58920#%22itemid%22:%22001-58920%22> *Muñoz Hermoza v. Peru*, Communication No. 203/1986, Human Rights Committee, U.N. Doc.

CCPR/C/34/D/203/1986 (1988), at para. 11.3, *available at* <http://www1.umn.edu/humanrts/undocs/session44/203-1986.htm>.

⁷² *U.N. Basic Principles on the Right to a Remedy and Reparation*, at para. 18.

⁷³ Human Rights Committee, General Comment No. 31 (2004), paras. 15-18. In *Aksoy v. Turkey*, Application No. 21987/93, 18 December, ECHR 1996-VI, *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58003>, the Court held that the serious nature of torture required Parties to the European Human Rights Convention to carry out a thorough and effective investigation of torture incidents, even though this was not specified in the Convention.

⁷⁴ *U.N. Basic Principles and Guidelines on the Right to a Remedy and Reparation*, art. 11, recognizes a victim's right to a remedy as including: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation mechanisms.

⁷⁵ *Velasquez Rodriguez Case*, I/A Court H.R. (1988), at para. 75 ; The Inter-American Court has resisted Commission efforts to find an autonomous right to truth in the Convention. See *Barrios Altos v. Peru*, I/A Court H.R., Merits, Judgment (2001), Series C No. 75, para. 48, *available at* <http://www1.umn.edu/humanrts/iachr/C/75-ing.html>, and *Case of the Pueblo Bello Massacre v. Colombia* I/A Court H.R., Merits, Reparations and Costs (2006), Series C No. 140, para. 219, *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_140_ing.pdf ("The right to the truth is subsumed in the right of the victim or the next of kin to obtain from the competent State bodies the clarification of the illegal facts and the corresponding responsibilities, by investigation and prosecution.")

⁷⁶ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication 245/2002, African Commission on Human and Peoples' Rights, Twenty-First Annual Activity Report (2000), Annex III, pp. 160 -161, *available at* http://www.achpr.org/files/sessions/39th/comunications/245.02/achpr39_245_02_eng.pdf ("[A] state can be held complicit where it fails systematically to provide protection of violations from private actors who deprive any person of his/her human rights . . . To avoid such complicity, states must demonstrate due diligence by taking active measures to protect, prosecute and punish private actors who commit abuse"). See also *Barrios Altos v. Peru*, I/A Court H.R. (2001), at paras. 41-43.

⁷⁷ U.N. General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, A/RES/40/34, Nov. 29, 1985, art. 2; *U.N. Basic Principles on the Right to a Remedy and Reparation*, para. 8.

⁷⁸ UDHR, preamble, art. 1. Also see the Office of the High Commissioner for Human Rights website on the universal and inalienable nature of human rights, at <http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx>

⁷⁹ AHRD, art. 1, stating that "All human beings are born free and equal in dignity and rights", and art. 2, non-discrimination clause.

⁸⁰ Discussed further below in relation to art. 9 of the AHRD.

⁸¹ AICHR TOR, at art. 1.4.

⁸² Kuala Lumpur Declaration, at para. 4.

⁸³ Renshaw, C "The ASEAN Human Rights Declaration 2012," 13(3) HUMAN RIGHTS L.R. 557 (2013)

⁸⁴ AHRD Draft, January 2012, art. 27.

⁸⁵ Constitution of Viet Nam, art. 15.

⁸⁶ Constitution of Indonesia, art. 28J(1); Constitution of Lao PDR, Chapter IV; Constitution of Thailand, Chapter IV.

⁸⁷ UDHR, arts. 29(1)-(2).

⁸⁸ ICCPR, Preamble, para. 6; ICESCR, preamble para. 6.

⁸⁹ CRPD, preamble para. w.

⁹⁰ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948) [hereinafter *American Declaration of the Rights and Duties of Man*], *reprinted* in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992), at Preamble, arts. 30-38, *available at* <http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm>; African Charter on Human and Peoples' Rights, arts. 27-29.

⁹¹ American Convention on Human Rights, art. 32.

⁹² Bangkok Declaration, para. 9.

⁹³ Committee on Economic, Social, and Cultural Rights, *General Comment No. 3: The nature of States parties' obligations*, U.N. Doc. RI/GEN/1/Rev.6 at 14 (1991), paras. 9-10, available at <http://www1.umn.edu/humanrts/gencomm/epcomm3.htm>.

⁹⁴ ICCPR, art. 2(1); ICESCR, art. 2(1); American Convention on Human Rights, Art. 26.

⁹⁵ Art. 33 is identical to ICESCR art. 2(1), with the exception of the omission of, “. . .by all appropriate means, including particularly the adoption of legislative measures.”

⁹⁶ European Convention on Human Rights, art. 1; American Convention on Human Rights, arts. 1 & 2.

⁹⁷ Paragraph 5 of the Vienna Declaration reverses the Asia Delegation's stress on national and legal particularities as contained in art. 8 of the Bangkok Declaration, stating that “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious background.” See Vienna Declaration, para. 5.

⁹⁸ The Committee on Economic, Social and Cultural Rights, in its *General Comment No. 3*, stressed the “interdependence and indivisibility” of economic, social and cultural rights and civil-political rights in its interpretation of the ICESCR's Preamble which, like the ICCPR, refers to the equal importance of both sets of rights. See Committee on Economic, Social, and Cultural Rights, *General Comment No. 3* (1991), para. 8, See also Committee on Economic, Social, and Cultural Rights, *General Comment No. 2 on International Technical Assistance Measures*, U.N. Doc. E/1990/23, annex III (1990) at para. 6, available at <http://www1.umn.edu/humanrts/gencomm/epcomm2.htm>. Of the nine core treaties, only the CRPD reproduces the Vienna Declaration text in its preamble, recognizing the “universality, indivisibility, interdependence and interrelatedness of all human rights”; see Vienna Declaration, para. 5. See also *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Jan. 22-26, 1997, at para. 4, available at http://www1.umn.edu/humanrts/instreet/Maastrichtguidelines_.html.

⁹⁹ For example, see Committee on Economic, Social, and Cultural Rights, *General Comment No. 7 on Forced Evictions, and the Right to Adequate Housing*, U.N. Doc. E/1998/22, annex IV (1997), para. 4, available at <http://www1.umn.edu/humanrts/gencomm/escgencom7.htm>.

¹⁰⁰ For example, ICCPR, art. 2; ICESCR, art. 2; American Convention on Human Rights, art. 2.

¹⁰¹ VCLT, art. 27.

¹⁰² UNESCO Universal Declaration on Cultural Diversity, Nov. 2, 2001, UNESCO Doc. 31C/Res 25, Annex 1 (2001), art. 4, “No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope”; Vienna Declaration (1993), para. 5.

¹⁰³ CEDAW, art. 5; UN Committee on the Rights of the Child, *General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, U.N. Doc. CRC/GC/2003/5 (2003), para. 20 (“[i]ncorporation by itself does not avoid the need to ensure that all relevant domestic law, including any local or customary law, is brought into compliance with the Convention.”).

¹⁰⁴ African Charter on Human and Peoples' Rights, Preamble & arts. 29(7) & 60; Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012/C 326/02, Preamble, para. 3.

¹⁰⁵ Renshaw, *C The ASEAN Human Rights Declaration – Cause for Celebration?*, Jan. 25, 2013 on parallels between art. 7 and the 1993 Bangkok Declaration, available at <http://asiapacific.anu.edu.au/regarding-rights/2013/01/25/the-asean-human-rights-declaration-cause-for-celebration/>.

¹⁰⁶ The Margin of Appreciation is a doctrine developed by the European Human Rights Court that provides member states some discretion with regards to legislative or other measures taken with regards to Convention Rights. The doctrine was first recognized in the *Handyside v. United Kingdom*, Application no. 5493/72, 7 December 1976, paras 48-49, European Court of Human Rights.. See Open Society Justice Initiative summary of this doctrine at <http://www.opensocietyfoundations.org/sites/default/files/echr-reform-margin-of-appreciation.pdf>.

¹⁰⁷ AHRD, preamble, arts. 10, 26 (affirming all rights in the UDHR) & 40 (savings clause).

¹⁰⁸ UDHR, art. 29(2).

¹⁰⁹ Müller, *A Limitations to and Derogations from Economic, Social and Cultural Rights*, *Human Rights Law Review* (2009), Vol. 9, Issue 4, pp. 557-601, at 559.

¹¹⁰ ICCPR, art. 5. Derogations are temporary, emergency suspensions of certain treaty obligations. Limitations are everyday restrictions on how a right is exercised.

¹¹¹ ICCPR, art. 4(2). No derogation is permitted from arts. 6, 7, 8 (1)(2), 11, 15, 16 & 18.

¹¹² Human Rights Committee, *General Comment No. 29 on Article 4: Derogations during a state of emergency*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 13, available at <http://www1.umn.edu/humanrts/gencomm/hrc29.html>.

¹¹³ European Convention on Human Rights, art. 15(2); American Convention on Human Rights, art. 27(2); Arab Charter on Human Rights, art. 4(2).

¹¹⁴ ICCPR, art. 4.

¹¹⁵ Human Rights Committee, *General Comment No. 29* (2001), para. 2.

¹¹⁶ Arab Charter on Human Rights, Art. 4(1); American Convention on Human Rights, aArt. 27(1); European Convention on Human Rights, art. 15(1); *Commission Nationale des Droits de l'Homme et des Libertes v. Chad*, Communication 74/92, African Commission on Human and Peoples' Rights, 9th Annual Activity Report (1995), para. 21, available at

http://www.achpr.org/files/sessions/18th/comunications/74.92/achpr18_74_92_eng.pdf

¹¹⁷ ICCPR, arts. 12, 14, 18, 19, 21, 22. See the general comments in relation to rights listed for further discussion of limitations. *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985), adopted in 1984 by the U.N. Sub-commission on Protection of Minorities, defines terms such as public order and morals in more detail, available at <http://www1.umn.edu/humanrts/instree/siracusaprinciples.html>.

¹¹⁸ Limitations on the right to freedom of movement must also be consistent with other rights in the ICCPR.

¹¹⁹ Human Rights Committee, *General Comment No. 27 on Freedom of Movement (Art. 12)*, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), para. 13, available at <http://www.refworld.org/docid/45139c394.html>; Human Rights Committee, *General Comment No. 22 on The right to freedom of thought, conscience and religion (art. 18)*, CCPR/C/21/Rev.1/Add.4 (1993), para. 8, available at <http://www1.umn.edu/humanrts/gencomm/hrcom22.htm>. Art. art.

¹²⁰ Only the right to life, freedom from torture, freedom from slavery, and freedom from ex post facto laws are universally held as non-derogable.

¹²¹ ICESCR, art. 8 (“subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others”).

¹²² ICESCR, art. 4.

¹²³ Müller, A Limitations to and Derogations from Economic, Social and Cultural Rights, *Human Rights Law Review* (2009) p. 571.

¹²⁴ European Social Charter (revised), E.T.S. 163 (1996), entered into force Jan. 7, 1999, at art. G, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/035.htm>.

art.

¹²⁵ Bangkok Declaration, art. 3.

¹²⁶ Bangkok Declaration, preamble and art. 7. The preamble of General Assembly Resolution 60/251 on the Human Rights Council recognizes that “the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization”, U.N. Doc. A/RES/60/251, April 3, 2006.

¹²⁷ Vienna Declaration, para. 32.

¹²⁸ Charter of the Association of Southeast Asian Nations, at art. 2, Nov. 20, 2007 [hereinafter *ASEAN Charter*].

¹²⁹ Doyle, N *The ASEAN Human Rights Declaration and the Implications of Recent Southeast Asian Initiatives in Human Rights Institution-Building and Standard-Setting*, *International and Comparative Law Quarterly*, 63, pp. 67-101, p. 85.

¹³⁰ UDHR, art. 3; ICCPR, art. 6; CRC, art. 6,

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families [hereinafter *ICRMW*], G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force Jul. 1, 2003, at art. 26, available at <http://www2.ohchr.org/english/bodies/cmw/cmw.htm>;

art. ; African Charter on Human and Peoples' Rights, art. 4; American Convention on Human Rights, art. 4; Arab Charter on Human Rights, art. 5; European Convention on Human Rights, art. 2.

¹³¹ Human Rights Committee, *General Comment No. 6: Article 6 (Right to Life)*, U.N. Doc HRI/GEN/1/Rev.9 (Vol. I) (1982) para. 3, noting that “[t]he protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties

should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.”

¹³² *H. van Alphen v. the Netherlands*, Communication No. 305/1988, Human Rights Committee, U.N. Doc. CCPR/C/39/D/305/1988 (1990), at para. 5.8, available at <http://www1.umn.edu/humanrts/undocs/session39/305-1988.html>.

¹³³ Open Letter from the Coordination Committee of the Special Procedures of the Human Rights Council on the draft ASEAN Human Rights Declaration, November 12, 2012. “In relation to the right to life,” the Committee Chair warned, “provisions such as ‘in accordance with national law’ could be used to shield States against scrutiny by international human rights mechanisms concerning the excessive use of force by law enforcement officers, state failure to protect people against non-state actors and the continuation of the use of the death penalty.” Also see analysis of article 5, right to a remedy above on this point.

¹³⁴ See

<http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx>.

¹³⁵ AHRD, art. 8. See also discussion of article 8 in this document.

¹³⁶ As contained in ICCPR, arts 6(2)-(5).

¹³⁷ UDHR, art. 3.

¹³⁸ ICCPR, arts. 6(1), 4; ratified by Cambodia, Indonesia, Lao PDR, Philippines, Thailand, and Viet Nam.

¹³⁹ ICCPR, arts. 6(2-6).

¹⁴⁰ Serious crimes include crimes under international criminal law, and exceptional crimes such as those such those under military law. Murder and drug-related offences are considered, ‘ordinary’ crimes. Amnesty International classifies Lao PDR and Myanmar as, “Abolitionist in practice”, meaning that they retain the death penalty for ordinary crimes but have not executed prisoners in over 10 years. Brunei, Indonesia, Malaysia, Thailand, Singapore and Viet Nam retain and apply the death penalty for ordinary crimes. See <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>.

¹⁴¹ CRC, art. 6; CRC, art. 37(a). Malaysia submitted a declaration, stipulating that art. 37(a) is applicable only in “conformity with the Constitution, national laws and national policies of the Government of Malaysia.” Singapore issued a declaration noting that Article 37 does not prohibit that application of “prevailing measures prescribed by law for maintaining law and order” or any measures “necessary in the interests of national security, public order, the protection of public health or the protection of the rights and freedoms of others . . .”

¹⁴² CRPD, art. 10, ratified by eight ASEAN member states and signed by Singapore and Brunei Darussalam; ICRMW, arts. 26 & 40, ratified by Indonesia and the Philippines.

¹⁴³ Constitution of Cambodia, arts. 32, 38; Constitution of Indonesia, arts. 28A, 28I(1); Constitution of Malaysia, art. 353, Constitution of the Philippines, arts. III(1) & III(19-1); Constitution of Singapore, art. 9(1); Constitution of Thailand, art. 32; Constitution of Viet Nam, art. 19.

¹⁴⁴ Constitution of Lao PDR, art. 42.

¹⁴⁵ Constitution of Malaysia, art. 5(1); Constitution of Myanmar, art. 353; Constitution of Singapore, art. 9(1); Constitution of Philippines, arts. III(1) & III(19-1).

¹⁴⁶ Constitution of Cambodia, art. 32.

¹⁴⁷ UDHR, art. 3; ICCPR, art. 6(1); Vienna Declaration, para. 63. International law generally does not take a position on when life begins - see Hegarty & Leonard, *Human Rights: An Agenda for the 21st Century*, Routledge-Cavendish; 1 edition (July 1, 1999), pp xxviii.

¹⁴⁸ Human Rights Committee, General Comment No. 6 (1982), para. 1.

¹⁴⁹ UDHR, art. 3.

¹⁵⁰ ICCPR, art. 6(1); CRC, art. 6; CRPD, art. 10; ICRMW, arts. 26, 40.

¹⁵¹ African Charter on Human and Peoples’ Rights, art. 4; American Convention on Human Rights, art. 4; Arab Charter on Human Rights, art. 5; European Convention on Human Rights, art. 2.

¹⁵² ICCPR, art. 4(2); American Convention on Human Rights, art. 27(2); European Convention on Human Rights, art. 15(2); Arab Charter on Human Rights, art. 4(2). The African Charter does not permit derogation from any charter obligations. Also see Human Rights Committee, General Comment No. 29 (2001).

¹⁵³ Human Rights Committee, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 8, available at <http://www.refworld.org/docid/453883fc11.html>.

¹⁵⁴ Human Rights Committee, General Comment No. 6 (1982), para. 5.

¹⁵⁵ Human Rights Committee, *Concluding observations of the Human Rights Committee*; Canada, U.N. Doc. CCPR/C/79/Add.105 (1999), available at <http://www.refworld.org/docid/3df378764.html>; Human Rights Committee, General Comment No. 6: Article 6 (1982), paras. 3 & 5 (“It would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.”).

¹⁵⁶ Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, UN Economic and Social Council Resolution 1989/65, Annex, (1989). See also United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc. E/ST/CSDHA/.12 (1991).

¹⁵⁷ See U.N. Economic and Social Council, *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary, and Summary Executions*, U.N. Doc. E/1989/89 (1989), available at <http://www1.umn.edu/humanrts/instreet/i7pepi.htm> (“In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure”).

¹⁵⁸ See CRC, art. 37(a); Vienna Declaration, para. 30. See also Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa [hereinafter *Maputo Protocol*], adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sep. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, entered into force Nov. 25, 2005, at art. 4(1), available at <http://www.achpr.org/instruments/women-protocol/>.

¹⁵⁹ See Human Rights Committee, General Comment No. 6 (1982), para. 4; Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M. 1429 (1994), entered into force Mar. 28, 1996, at art. II; International Convention for the Protection of All Persons from Enforced Disappearance [hereinafter *CPED*], G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006), entered into force Dec. 23, 2010, at arts. 1, 2. See also *Velasquez Rodriguez Case*, I/A Court H.R. (1988); *Mezine v. Algeria*, Communication No. 1779/2008, Human Rights Committee, U.N. Doc. CCPR/C/106/D/1779/2008 (2012), at para. 8.4, available at <http://www1.umn.edu/humanrts/undocs/1779-2008.html>.

¹⁶⁰ *Hugh Jordan v. United Kingdom*, Application No. 24746/94, para. 105, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59450#{%22itemid%22:\[%22001-59450%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59450#{%22itemid%22:[%22001-59450%22]}) (“The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.”); *Sudan Human Rights Organization and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communications 279/03 & 296/05, African Commission on Human and Peoples’ Rights, Twenty-Eighth Annual Activity Report (2009-2010), Annex V, p. 147, available at http://www.achpr.org/files/activity-reports/28/achpr47eo8_actrep28_20092010_eng.pdf; *Case of Ximenes-Lopes v. Brazil*, I/A Court H.R., Merits, Reparations, and Costs, Judgment (2006), at 246.

¹⁶¹ U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (Aug. 27 Sept. 7, 1990), at principles 1-5, 7, 9-10, 12-15.

¹⁶² U.N. Code of Conduct for Law Enforcement Officials, Adopted by General Assembly resolution 34/169, Dec. 17, 1979, art. 3; U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, principles 2-4.

¹⁶³ U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, principles 7, 9-10.

¹⁶⁴ ICCPR, arts. 6(2),(5)&(6); Human Rights Committee, General Comment No. 6 (1982), paras. 6-7; CRC, art. 37(a); Maputo Protocol, art. 4(1); African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999, at art. 5(3).

¹⁶⁵ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty [hereinafter *ICCPR OP-2*], G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), *entered into force* Jul. 11, 1991. Seventy-eight States have ratified or acceded to the Second Optional Protocol as of January 2014. American Convention on Human Rights, arts. 2-6; Protocol to the American Convention on Human Rights to Abolish the Death Penalty; Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty [hereinafter Protocol No. 6 to the ECHR], E.T.S. 114 (1983), *entered into force* Mar. 1, 1985, at preamble; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances, E.T.S. 187 (2002), *entered into force* Jul. 1, 2003, at preamble; Charter of Fundamental Rights of the European Union, art. 2(2).

¹⁶⁶ ICCPR, art. 6(2); American Convention on Human Rights, art. 4(2). *See also*, UN Economic and Social Council Resolution 1984/50, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, U.N. Doc. E/1984/50, 05/25/1984 (1984).

¹⁶⁷ Human Rights Committee, General Comment No. 6 (1982), paras. 6-7. *See also* UN Economic and Social Council Resolution 1984/50, Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.

¹⁶⁸ Committee on the Elimination of Racial Discrimination, *General Comment No. 31 on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, U.N. Doc. A/60/18 (2005), *available at* <http://www.refworld.org/docid/48abd56dd.html>.

¹⁶⁹ ICCPR art. 6(5); CRC, art. 37(a); African Charter on the Child art. 5(3).

¹⁷⁰ American Convention on Human Rights, art. 7(1); UDHR, arts.3 & 9; ICCPR, art. 9(1); the European Convention on Human Rights, art. 5(1); and the African Charter on Human and Peoples' Rights, art. 6, refer to the right to, "liberty and security of person".

¹⁷¹ *See* Inter-American Commission on Human Rights, Report on Citizen Security and Human Rights (2009), Chapter V: Rights at Stake in Public Policy on Citizen Security for a discussion of personal liberty and security, *available at* <http://www.oas.org/en/iachr/pdl/reports/thematic.asp>, and *Case of Bulacio v. Argentina*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2003), Series C. No. 100, para. 127, *available at* <http://www1.umn.edu/humanrts/iachr/C/100-ing.html> ("Vulnerability of the detainee worsens when the detention is illegal or arbitrary. Then the person is in a situation of complete defencelessness, which causes a definite risk of abridgment of other rights, such as those to humane and decent treatment.").

¹⁷² The AHRD affirms all rights in the UDHR in its preamble and arts. 10, 26, and 40.

¹⁷³ ICCPR, art. 9(1).

¹⁷⁴ ICCPR, art 9(2)-(5).

¹⁷⁵ AHRD Articles 6, 7, and 8 permit limitations on all the rights included in the Declaration.

¹⁷⁶ *See* ICCPR, art. 4(1) on derogations from treaty obligations; Human Rights Committee, General Comment No. 29 (2001), paras. 13, 16; Report of the Working Group on Arbitrary Detention, *Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law*, U.N. Doc. A/HRC/22/44, 24 December 2012, paras.38 & 51.

¹⁷⁷ A January 2012 draft of the AHRD made reference to enforced disappearance but this was subsequently removed and substituted with the current text. On the face of it, Article 12 of the AHRD prohibits all types of deprivation of liberty, but will be read as, "no person shall be subject to... any other form of arbitrary deprivation of liberty". This drafting mistake, along with the omission of enforced disappearance from Article 12, were raised in a September CSO submission to the AICHR on the draft AHRD. *See* <http://www.forum-asia.org/?p=15341>.

¹⁷⁸ UN Working Group on Enforced or Involuntary Disappearances, *General Comment on the definition of enforced disappearance*, U.N. Doc. A/HRC/7/2, January 10, 2008 at para. 3 ("Although States are not bound to follow the definition contained in the Declaration strictly in their criminal codes, they shall ensure that the act of enforced disappearance is defined in a way that clearly distinguishes it from related offences such as abduction and kidnapping").

¹⁷⁹ CPED, art. 2 contains the definition of enforced disappearance.

¹⁸⁰ Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.

¹⁸¹ ICERD, art. 5(b); CRC, art. 37; CRPD, art. 14(1)(b); ICRMW, art. 16. The U.N. Working Group on Arbitrary Detention believes that the prohibition on arbitrary deprivation of liberty has become a principle of customary international law, universally binding on all states. Report of the Working Group on Arbitrary Detention, A/HRC/22/44, 24 December 2012, Deliberation No. 9 concerning the definition and scope of arbitrary deprivation of liberty under customary international law, paras. 38, 51.

¹⁸² Brunei has lodged a reservation against all provisions in the CRC "which may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam, the State, religion..." CRPD has been ratified by eight ASEAN member states. Malaysia and Singapore have lodged reservations against article 37 of the CRC recognizing a child's right to freedom from torture and unlawful or arbitrary detention, so far as article 37 conflicts with national law.

¹⁸³ Cambodia has ratified CPED while Indonesia, Lao PDR and Thailand have signed but not yet ratified.

¹⁸⁴ General Assembly, Declaration on the Protection of All Persons from Enforced Disappearance, U.N. Doc. A/RES/47/133, February 12, 1993, art. 3.

¹⁸⁵ Constitution of Cambodia, art. 32 (right to freedom and personal security), art. 38 (protection against unlawful arrest and detention); Constitution of Malaysia, arts. 5(1-4), Constitution of Myanmar, art. 21; Constitution of Singapore, art. 9(1); Constitution of the Philippines, art. III, sect 2; Constitution of Viet Nam, art. 20(2). The Constitution of Indonesia, art. 28G(1), contains a right to "protection of his/her person" but makes no mention of arrest or detention. The Constitutions of Viet Nam, Lao PDR and Myanmar restrict protection from wrongful arrest and detention to citizens, which is inconsistent with Lao PDR and Viet Nam's ICCPR treaty obligation to grant this right universally.

¹⁸⁶ Constitution of Malaysia, art. 5(3); Constitution of Singapore, art. 9(3).

¹⁸⁷ Constitution of Malaysia, art. 5(4); Constitution of Myanmar, art. 376; Constitution of Singapore art. 9(4); Constitution of Thailand, art. 32. The Viet Nam Constitution includes right to a lawyer if detained, art. 31(4).

¹⁸⁸ UDHR, arts. 3 & 9.

¹⁸⁹ ICCPR, art. 9.

¹⁹⁰ ICERD, art. 5(b).

¹⁹¹ CRPD, art. 14(1)(b); CRC, art. 37; ICRMW, art. 16.

¹⁹² Human Rights Committee, *Draft General Comment No. 35 on Article 9: Liberty and security of person*, UN Doc. CCPR/C/107/R.3 (2013), paras. 3, 8, & 2, available at http://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/DGC_Article9_RighttoLiberty.doc.

¹⁹³ ICCPR, art. 9 (1); African Charter on Human and Peoples' Rights, art. 6; Arab Charter on Human Rights, art. 14(3), 14(6-7); American Convention on Human Rights, art. 7 (2-3); European Convention on Human Rights, art. 5(1). The European Convention is somewhat unique in that it lists the specific circumstances in which deprivation of liberty is permissible, as opposed to simply stating the deprivation must not be arbitrary or unlawful.

¹⁹⁴ *C. McLawrence v. Jamaica*, Communication No. 702/1996, Human Rights Committee, U.N. Doc. CCPR/C/60/D/702/1996 (1997), at para. 5.5, available at <http://www1.umn.edu/humanrts/undocs/702-1996.html>; *Gridin v. Russian Federation*, Communication No. 770/1997, Human Rights Committee, U.N. Doc. CCPR/C/69/D/770/1997 (2000), at para. 8.1, available at <http://www1.umn.edu/humanrts/undocs/session69/view770.htm>.

¹⁹⁵ *H. van Alphen v. the Netherlands*, Human Rights Committee (1990) at para. 5.8.

¹⁹⁶ ICCPR, art. 9(2)&(4); Arab Charter on Human Rights, art. 14(3)&(6); European Convention on Human Rights, arts. 5(2)&(4); American Convention on Human Rights, arts. 7 (4),(5)&(6); *Gerashchenko v. Ukraine*, Application no. 20602/05, European Court of Human Rights (2013) at 105. Also see *A v. Australia*, Communication No. 560/1993, (1997) Human Rights Committee, U.N. Doc. CCPR/C/59/D/560/1993 (1997), at para. 9.5, available at <http://www1.umn.edu/humanrts/undocs/html/vws560.html>.

¹⁹⁷ *Juan Humberto Sanchez v. Honduras*, I/A Court H.R., Judgement, (2003), Series. C No. 99, at 85 and 122; *Constitutional Rights Project and Another v. Nigeria*, Communication 60/91, African Commission on Human and Peoples' Rights, Eighth Annual Activity Report(1994-1995), Annex IV, available at http://www.achpr.org/files/activity-reports/8/achpr16and17_actrep8_1994_eng2.pdf; African Commission on Human and Peoples' Rights. 13th Annual Activity Report (2000), at 31.

¹⁹⁸ ICCPR, art. 9(5); Arab Charter on Human Rights, art. 14(7); European Convention on Human Rights, art. 5(5).

¹⁹⁹ ICCPR, art. 9(3); Human Rights Committee, Draft General Comment No. 35 on Article 9 (2014); *Yagci and Sargin v. Turkey*, Application No. 16419/90, 8 June 1995, para. 52, European Court of Human Rights, Series A, No. 319-A.

²⁰⁰ *Suárez-Rosero v. Ecuador*/A Court H.R., Judgement (1997) Series C No. 35, at.72; *Motta v Italy*, Application No. 11557/85, European Court of Human Rights, Feb. 19, 1991, at 17.

²⁰¹ CPED, art. 2.

²⁰² *Velasquez Rodriguez Case*, I/A Court H.R. (1988), at paras. 194.

²⁰³ UDHR, art. 18.

²⁰⁴ African Charter on the Rights and Welfare of the Child, art. 29; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa [hereinafter *Maputo Protocol*], adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sep. 13, 2000); *reprinted* in 1 Afr. Hum. Rts. L.J. 40, *entered into force* Nov. 25, 2005, at art. 4(2)(g); Arab Charter on Human Rights, art. 9 & 10; Charter of Fundamental Rights of the European Union, art. 5.

²⁰⁵ A January 2012 draft of the AHRD read, "No one shall be held in slavery, servitude [forced labour] or be subjected to human smuggling or trafficking or any other forms of slavery", suggesting that inclusion of the words 'forced labour' was, at the time, still under negotiation or that servitude was indeed considered equivalent to forced labor.

²⁰⁶ ILO members, including all ASEAN member states, universally adopted the ILO Declaration on Fundamental Principles and Rights at Work on June 18, 1998. Article 2 of the Declaration prohibits forced labor. Convention concerning Forced or Compulsory Labour (ILO No. 29), 39 U.N.T.S. 55, entered into force May 1, 1932 [hereinafter *ILO Forced Labour Convention*]; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182), 2133 U.N.T.S.161, entered into force Nov. 19, 2000 [hereinafter *ILO Child Labour Convention*].

²⁰⁷ Under art. 4 of the ICCPR the right to freedom from slavery and servitude is non-derogable.

²⁰⁸ It is difficult to conceive of any circumstances that would justify servitude or slavery upon grounds of non-performance of individual duties (art. 6), a particular culture (art. 7) or for the purposes of "securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society" (art. 8).

²⁰⁹ The International Court of Justice in the *Barcelona Traction Case: Belgium v Spain* (Second Phase) ICJ Rep 1970 3 at 34 recognized freedom from slavery and racial discrimination as erga omnes rights, meaning rights so fundamental that they enforceable against all states. Also see Yearbook of the International Law Commission, 1999, vol. II, part II, UN Doc. A/CN.4/SER.A/1999/Add.I at para. 311

²¹⁰ Slavery is prohibited in the Constitution of Cambodia, art. 46; Constitution of Indonesia, art. 28(1); Constitution of Malaysia art. 6(1); Constitution of Myanmar, art. 328; Constitution of Singapore, art. 10(1).

²¹¹ ILO Forced Labour Convention, 1930 (No. 29) 320 U.N.T.S. 291, entered into force Jan. 17, 1959, at art. 1(1).

²¹² ILO Worst Forms of Child Labour, 1999 (No. 182). Myanmar was the last ASEAN Member State to ratify the convention in December 2013. The ILO Abolition of Forced Labour Convention, 1957 (No. 105), has been ratified by Cambodia, Indonesia, the Philippines and Thailand.

²¹³ Ed. Crawford, J *The British Yearbook of International Law*, 2008, p. 180. Article 1 of the 1953 ILO Abolition of Forced Labour Convention prohibits forced or compulsory labour as a punishment for expressing a political opinion, for participation in a labor strike and as a means of discrimination against a particular group. It also does not permit the forced mobilization of labour for purposes of economic development.

²¹⁴ ILO, *Constitution of the International Labour Organisation (ILO)*, 1 April 1919, entered into force June 28, 1919, Annex I, Declaration concerning the aims and purposes of the International Labour Organization (the Philadelphia declaration), May 10, 1944, at art. 1(a).

²¹⁵ ILO Declaration on Fundamental Principles and Rights at Work, art. 2.

²¹⁶ ICCPR, art. 8(3). Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Viet Nam are parties to the ICCPR.

²¹⁷ ILO Committee of Experts, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, "Giving Globalization a Human Face", 2012, para. 252.

²¹⁸Constitution of Malaysia; art. 6(2)-(4); Constitution of Myanmar, art. 359; Constitution of Singapore, art. 10(2)-(3); Constitution of Thailand, art. 38; Constitution of the Philippines, article III, section 18(2).

²¹⁹Constitution of Indonesia, art. 27(2).

²²⁰Constitution of Myanmar (2008), at art. 358.

²²¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children [hereinafter *the Palermo Protocol*], G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001), entered into force Dec. 25, 2003. Only Brunei and Singapore are non-signatories amongst the ASEAN member states.

²²² CRC, art. 35.

²²³ Cambodia, Indonesia, Lao PDR, Myanmar, and the Philippines.

²²⁴ ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children, Nov 29, 2004.

²²⁵ ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, para. 17, 2007.

²²⁶ For example, the ASEAN Declaration against Trafficking states that, "All Member Countries reaffirm their commitment to accomplish the elements of this Declaration through maximum efforts by such appropriate instruments as may be necessary *and consistent with their respective national laws and policies.*" The ASEAN Declaration on Migrant Workers similarly states, "For purposes of protecting and promoting the rights of migrant workers, ASEAN Member Countries *in accordance with national laws, regulations and policies, will...*"

²²⁷ The 4th Experts Working Group Meeting on the ASEAN Convention on Trafficking in Persons and the Regional Plan of Action against Trafficking was held in Manila in September 2013. More information about the meeting is available at <http://www.iacat.net/index.php/121-phl-hosts-the-4th-asean-experts-meeting-to-combat-human-trafficking>.

²²⁸ The ASEAN instrument on migrant worker rights has stalled because some countries which host a large number of migrant workers are either unwilling to commit to a binding legal instrument, or do not wish to extend protections to the families of migrant workers or undocumented migrants.

²²⁹ Convention to Suppress Slavery and the Slave Trade [hereinafter *the Slavery Convention*], 60 LNTS 253 (1926), entered into force Mar. 9, 1927, at art. 1.

²³⁰ Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, U.N. Doc.A/HRC/15/20, Jun 18, 2010, para 25.

²³¹ Weissbrodt, D and Slavery International, 2002, *Abolishing Slavery and its Contemporary Forms*, Office of the United Nations High Commissioner for Human Rights (OHCHR), New York and Geneva, note 111.

²³² UDHR, art. 4; ICCPR, art. 8; the Slavery Convention (1926), art. 2; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, (1956), 226 U.N.T.S. 3, entered into force Apr 30, 1957; African Charter on Human and Peoples' Rights, art. 5; Arab Charter on Human Rights, art. 10(1); American Convention on Human Rights, art. 6(1); Convention for the Protection of Human Rights and Fundamental Freedoms, art 4(1).

²³³ ILO Forced Labour Convention (1930) art. 2(1). ILO Convention No. 29 has been ratified by 177 of the 185 ILO member countries.

²³⁴ "Captive Communities: Situation of the Guaraní Indigenous People and Contemporary Forms of Slavery in the Bolivian Chaco," Report by the Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 58, 24 December 2009.

²³⁵ ILO Committee of Experts, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, "Giving Globalization a Human Face", 2012, para 269 – 271.

²³⁶ ILO Forced Labour Convention (1930), art. 2(2) lists exceptions to the prohibition of forced labour.

²³⁷ ILO Abolition of Forced Labour Convention (1957), art 1. See ILO Committee of Experts, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, "Giving Globalization a Human Face", 2012, para 308 -315 on the interpretation of article 1.

²³⁸ ICCPR, art. 8(3)(a); ICRMW, art. 11(2); Arab Charter on Human Rights, art. 10(2); American Convention on Human Rights, art. 6(2); European Convention on Human Rights, art. 4(2) (prohibition of forced or compulsory labour); ICESCR, art. 10(3) and CRC art. 32 (protection against economic and social exploitation of children).

²³⁹ UN Convention against Transnational Organized Crime, G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001), entered into force Sept. 29, 2003.

²⁴⁰ CRC, art. 35.

²⁴¹ Palermo Protocol, art. 3(a) contains the internationally recognized definition of trafficking in persons.

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- ²⁴² Palermo Protocol, art. 3(b).
- ²⁴³ Palermo Protocol, art. 3(c).
- ²⁴⁴ Protocol against Smuggling, art. 3(a).
- ²⁴⁵ Protocol against Smuggling, art. 16 on protection and assistance measures for smuggled migrants.
- ²⁴⁶ AHRD Articles 6, 7, and 8 permit limitations all the rights included in the Declaration.
- ²⁴⁷ *Soering v. United Kingdom*, Application no. 14038/88, Jul. 7, 1989, European Court of Human Rights, para. 88. *Goiburu and Others v Paraguay* (2006), Inter-American Court of Human Rights, para. 128. *Tibi v Ecuador*, (2004), Inter-American Court of Human Rights, para. 143. *Gomez-Paquiyaury Brothers v Peru* (2004), Inter-American Court of Human Rights, para. 112. *Urrutia v Guatemala* (2003), Inter-American Court of Human Rights, para. 92. *Furundzija Case*, JL/PIU/372-E, The International Criminal Tribunal for the former Yugoslavia, Dec. 10, 1998, at 144, available at <http://www.icty.org/sid/7609>.
- ²⁴⁸ *Soering v. United Kingdom*.
- ²⁴⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter CAT], G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force Jun. 26, 1987, at art. 2(1).
- ²⁵⁰ UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, Jan. 24, 2008, U.N. Doc. CAT/C/GC/2, at para 1.
- ²⁵¹ ICCPR, art. 7; CAT, art. 2; CRC, art. 37(a); CRPD, art. 15; ICRMW, art. 10.
- ²⁵² Brunei and Viet Nam have signed but not ratified the CRPD. Malaysia made a reservation against article 15 of the CRPD, which provides for the freedom from torture or cruel, inhuman or degrading treatment or punishment. Cambodia, Indonesia, Lao, Philippines, and Thailand have ratified and Viet Nam has signed the CAT.
- ²⁵³ Constitution of Indonesia, art. 28(G)(2); Constitution of the Philippines, at art. III sect. 12(2), art. 19(1); Constitution of Thailand, art. 32; Constitution of Indonesia, art. 28I.
- ²⁵⁴ Constitution of Cambodia, art. 38.
- ²⁵⁵ Constitution of Lao PDR, art. 42; Constitution of Viet Nam, art. 20(1).
- ²⁵⁶ CAT, art. 1.
- ²⁵⁷ The 1985 Inter-American Convention to Prevent and Punish Torture defines torture as any pain or suffering, regardless of its severity, inflicted for the purposes of criminal investigation, intimidation, punishment or penalty. Inter-American Convention against Torture, O.A.S. Treaty Series No. 67, entered into force Feb. 28, 1987, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 83 (1992), at art. 2.
- ²⁵⁸ Human Rights Committee, *General Comment No. 20, Article 7 (Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, U.N. Doc. HRI/GEN/1/Rev/1 at 30 (1994) para. 4, available at <http://www1.umn.edu/humanrts/gencomm/hrcom20.htm>.
- ²⁵⁹ ICCPR, art. 7; Vienna Declaration, para. 50; CRPD, art. 15(1); Arab Charter on Human Rights, art. 9.
- ²⁶⁰ CAT art. 2(2); *Martín de Mejía v. Perú*, Case 10.970, Inter-Am. Comm'n H.R., Report No. 5/96, OEA/Ser.L/V/II.91, doc. 7 (1996); *Saadi v Italy* App. No. 37201/06 (Eur. Ct. H.R. Feb. 28, 2008); Human Rights Committee, *General Comment No. 20* (1994), para. 3.
- ²⁶¹ CAT, art 2(3).
- ²⁶² Human Rights Committee, *General Comment No. 20* (1994), para. 8; African Commission on Human and Peoples' Rights, *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* [hereinafter *Robben Island Guidelines*], 32d Sess. (2002)
- ²⁶³ ICCPR, art. 2(3); CAT, art. 14.
- ²⁶⁴ CAT art. 15; Human Rights Committee, *General Comment No. 20* (1994), para. 12.
- ²⁶⁵ ICCPR, art. 1; CAT, arts. 2 & 3; UN Committee Against Torture, *General Comment No. 2 on the Implementation of Article 2 by States Parties*, para. 2.
- ²⁶⁶ CAT, art. 3; *Robben Island Guidelines* art. 15; European Convention on Human Rights, art. 19(2).
- ²⁶⁷ See *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998, Human Rights Committee, U.N. Doc. CCPR/C/74/D/845/1998 (2002), at paras. 7.7-7.8, available at <http://www1.umn.edu/humanrts/undocs/845-1998.html>.
- ²⁶⁸ See Human Rights Committee, *General Comment No. 20* (1994), para 6.
- ²⁶⁹ Human Rights Committee, *General Comment No. 20* (1994), paras. 6, 11..
- ²⁷⁰ CRPD, art. 15(2).

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- ²⁷¹ CRC, art. 37; African Charter on the Rights and Welfare of the Child, art. 16; Human Rights Committee, General Comment No. 20 (1994), para. 5;; Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women “Convention of Belem do Pará” [hereinafter *Convention of Belem do Pará*], 33 I.L.M. 1534 (1994), entered into force Mar. 5, 1995, at art. 4; ICRMW art. 10.
- ²⁷² UN Committee against Torture, *General Comment No. 2 on Implementation of Article 2 by States Parties*, at 18.
- ²⁷³ Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.
- ²⁷⁴ ICERD, art. 5(b); CRC, art. 37; CRPD, art. 14(1)(b); ICRMW, art. 16
- ²⁷⁵ UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, at para. 8; Boed, *The State of the Right of Asylum in International Law*, 1994, Duke Journal of Comparative and International Law, Vol 5:1, p. 3.
- ²⁷⁶ Add citation here
- ²⁷⁷ Constitution of Cambodia, art. 40; Constitution of Indonesia, art. 28E (1); Constitution of Lao PDR; art. 40; Constitution of Malaysia art. 9; Constitution of Myanmar, art. 355; Constitution of the Philippines art. III, sect. 6; Constitution of Singapore, art. 13; Constitution of Thailand, art. 34, Constitution of Viet Nam, art 23.
- ²⁷⁸ Constitution of Indonesia, art. 28E (1); Constitution of Cambodia, art. 40; Constitution of Malaysia art. 9; Constitution of Singapore, art. 13; Constitution of Thailand, art. 34, Constitution of Viet Nam, art 23.
- ²⁷⁹ ICCPR, art. 12 & 13. A non-national refers to “any individual who is not a national of a State in which he or she is present.” U.N. Declaration on the human rights of individuals who are not nationals of the country in which they live, A/RES/40/144 (13 Dec. 1985), art. 1, available at <http://www.un.org/documents/ga/res/40/a40r144.htm>. There are different categories of non-nationals, including permanent residents, migrants, refugees, asylum-seekers, victims of trafficking, foreign students, temporary visitors, other kinds of non-immigrants and stateless people.
- ²⁸⁰ Human Rights Committee, General Comment No. 27 (1999), paras. 5, 6.
- ²⁸¹ *Gorji-Dinka v. Cameroon*, Communication No. 1134/2002, Human Rights Committee, U.N. Doc. CCPR/C/83/D/1134/2002 (2005), available at <http://www1.umn.edu/humanrts/undocs/1134-2002.html>; *Mpandanjila et al. v. Zaire*, Communication No. 138/1983, Human Rights Committee, U.N. Doc. CCPR/C/OP/2 (1990), at para.164, available at <http://www1.umn.edu/humanrts/undocs/newscans/138-1983.html>; *Ackla v. Togo*, Communication No. 505/1992, Human Rights Committee, U.N. Doc. CCPR/C/51/D/505/1992 (1996), available at <http://www1.umn.edu/humanrts/undocs/html/VWS50556.htm>.
- ²⁸² *El Ghar v. Libyan Arab Jamahiriya*, Communication No. 1107/2002, Human Rights Committee, U.N. Doc. CCPR/C/82/D/1107/2002 (2004), available at <http://www1.umn.edu/humanrts/undocs/html/1107-2002.html>; *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, Human Rights Committee, U.N. Doc. CCPR/C/83/D/1128/2002 (2005), available at <http://www1.umn.edu/humanrts/undocs/1128-2002.html>.
- ²⁸³ Human Rights Committee, General Comment No. 27 (1999), para. 20.
- ²⁸⁴ ICCPR, art. 12(3).
- ²⁸⁵ Human Rights Committee, General Comment No. 27 (1999), para. 13..
- ²⁸⁶ ICCPR, art. 4. The public emergency must be officially proclaimed and derogations cannot be inconsistent with other state obligations under international law or involve discriminatory measures.
- ²⁸⁷ Arab Charter on Human Rights, arts. 26 & 27 (prohibiting collective expulsion in general); African Charter, art. 12; American Convention on Human Rights, art. 22(9); European Convention, Protocol 4, 1963, arts. 2 (freedom of movement); 3 (prohibition on expulsion of nationals) & 4. (prohibition on collective expulsion of aliens).
- ²⁸⁸ American Declaration of the Rights and Duties of Man, art. 27. The AHRD does not, like the American Declaration, specifically exclude ordinary criminals fleeing pursuit from seeking asylum. This exclusion was not included in the subsequent American Convention on Human Rights.
- ²⁸⁹ Only the Philippines and Cambodia have ratified the Convention relating to the Status of Refugees [hereinafter *Refugee Convention*] July 28, 1951, 189 U.N.T.S.150, entered into force April 22, 1954.
- ²⁹⁰ UDHR, art. 14; Vienna Declaration, para. 23; Asian-African Legal Consultative Organization (AALCO), *Bangkok Principles on the Status and Treatment of Refugees (“Bangkok Principles”)*, Dec. 31, 1966, revised 2001, art. II (asylum). Brunei Darussalam, Indonesia, Myanmar, Malaysia, Singapore and Thailand are AALCO members.

²⁹¹ Bangkok Principles, art. III. Non-refoulement is declared as a principle of customary international law in the *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of States Parties*, Geneva, Switzerland, 12-13 December 2001, UN Doc. HCR/MMSP/2001/09, Jan. 16, 2002, welcomed by the UN General Assembly in resolution A/RES/57/187, para. 4, adopted on Dec. 18, 2001. UNHCR, *The Scope and Content of the Principle of Non-Refoulement (Opinion) [Global Consultations on International Protection/Second Track]*, 20 June 2001, para 219, available at: <http://www.refworld.org/docid/3b3702b15.html>.

²⁹² AHRD draft dated January 2012, art. 50. Article 12, in its current form, appeared in a September 2012 draft. A Joint-CSO submission on this second draft recommended that the text, "in accordance with the laws of such State and applicable international agreements," be removed and that an explicit right to non-refoulement be included. Submission is available at <http://www.forum-asia.org/?p=15341>.

²⁹³ For example, the 1951 Refugee Convention recognizes the rights of refugees to: housing (art. 21), education (art. 22), public relief and assistance (art. 23), freedom of religion (art. 4); access the courts (art. 16), freedom of movement within the territory (art. 26); and to be issued identity and travel documents (art. 27 and 28).

²⁹⁴ ICCPR, art. 7; Human Rights Committee, General Comment No. 20 (1994), para. 9. Also see *Soering v. the United Kingdom* (Application no. 14038/88), European Court of Human Rights, Judgment July 7, 1989 at 111. The Court held that extradition to the U.S., where the applicant could face a long period on death row, violated the European Convention's prohibition against inhuman and degrading treatment and punishment.

²⁹⁵ CAT, art. 3. Cambodia, Indonesia, Lao PDR, the Philippines and Thailand have ratified and Viet Nam has signed the CAT.

²⁹⁶ Boed, A State of the Right of Asylum in International Law, 1994, *Duke Journal of Comparative and International Law*, Vol 5:1, p. 3; UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, at para. 8.

²⁹⁷ ASEAN member states affirm all rights in the UDHR through articles 10 and 26 of the AHRD. The preamble of the AHRD reaffirms ASEAN member state commitment to the UDHR and the Vienna Declaration.

²⁹⁸ CRC, art. 22. Also see UN Committee on the Rights of the Child, *General Comment No 6 - Treatment of unaccompanied and separated children outside their country of origin*, UN Doc CRC/GC/2006/6 (2005), para 27.

²⁹⁹ Thailand previously operated Provincial Admissions Boards (PABs) to assess whether asylum-seekers from Myanmar were eligible to be registered as displaced persons and admitted into temporary shelters or camps. This process was not equivalent to a refugee status determination. Also see UNHCR 2012 Global Report, available at <http://www.unhcr.org/51b1d6410.html>.

³⁰⁰ Constitution of Indonesia, art. 28G(2); Constitution of Lao PDR, art. 51; Constitution of Viet Nam, art. 49.

³⁰¹ Refugee Convention, art. 1 A.

³⁰² UNHCR, Providing International Protection Including Through Complementary Forms of Protection, Executive Committee of the High Commissioner's Programme, Standing Committee, UN Doc. EC/55/SC/CRP.16, 2 June 2005, paragraph 26, <http://www.unhcr.org/excom/EXCOM/42a005972.pdf>.

³⁰³ Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, art III(3) and the Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45, art. 1(2).

³⁰⁴ Refugee Convention, art. 1F. The OAU Convention contains the same exclusion clause but also allows for exclusion of those who act contrary to the purposes and principles of the OAU.

³⁰⁵ UDHR, art. 14; Vienna Declaration, para. 23; African Charter on Human and Peoples' Rights, art. 12; Arab Charter on Human Rights, art. 28; American Convention on Human Rights, art. 22(7)&(8); Charter of Fundamental Rights of the European Union, arts. 18, 19. The European Human Rights Convention does not include a right to asylum but provides that aliens may not be expelled from a country without due process.

³⁰⁶ ICCPR, art. 12.

³⁰⁷ Refugee Convention, art. 33; CAT, art. 3.

³⁰⁸ Refugee Convention arts, 4, 14, 31, 17-19, 21, 22, 23, 26, 27 & 28.

³⁰⁹ The Refugee Convention affords the same treatment accorded to aliens in similar circumstances with respect to: property rights for all refugees (art. 13), right of association for lawful refugees (15), right to wage earning and self-employment—lawful (art. 17 & 18), housing—lawful (art. 21); public education other than

primary education—all (art 22(2)), labor conditions and social security—lawful (art 24), administrative assistance—all (art. 25). Refugees are to be afforded the same treatment as nationals for: intellectual property rights—all (14), access to the courts—all (art 16); rationing— all (art. 20), primary education—all (art. 22(1)), public relief—lawful refugees (art 23), freedom of movement—lawful refugees (art. 26). Refugee specific rights include the right to identity (art. 27) and travel documents – lawful (art. 28); and fiscal charges – all (art. 29).

³¹⁰ AHRD draft version dated January 8, 2012, p. 12.

³¹¹ AHRD Articles 6, 7, and 8 permit limitations all the rights included in the Declaration.

³¹² European Convention on Human Rights, Protocol 11, art. 1; American Convention on Human Rights, art. 21; African Charter on Human and Peoples' Rights, art. 14; and Arab Charter on Human Rights, art. 31.

³¹³ AHRD, art. 32.

³¹⁴ Constitution of Cambodia, art. 44; Constitution of Indonesia, art. 28H(4); Constitution of Lao PDR, art. 16; Constitution of Malaysia, art. 13; Constitution of Myanmar, art. 37(c); Constitution of Thailand, part 5; Constitution of Vietnam, art. 22 and 23.

³¹⁵ Constitution of Cambodia, art. 44.

³¹⁶ Constitution of Malaysia, art. 11(3)(c); Constitution of Singapore, art. 15(3)(c).

³¹⁷ Constitution of the Philippines, art. XII(5), art. XII(6), art. XIII(9), art. XIV(13).

³¹⁸ CRPD: Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore and Thailand; ICERD: Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, Viet Nam; ICRMW: Indonesia and the Philippines

³¹⁹ UDHR, art. 17.

³²⁰ Icelandic Human Rights Centre, "The Right to Property," available at <http://www.humanrights.is/>.

³²¹ CEDAW, art. 15(2) and 16(1)(h); ICERD, art. 5(d)(v); ICRMW, art. 15; CRPD, art. 12(5).

³²² CEDAW, arts. 15(2), 16(1)(h).

³²³ *Avellar Cordeiro Zagallo v. Portugal*, Application No. 30844/05, June, 8, 2010, European Court of Human Rights and *Korkmaz and Others v. Turkey*, Application No. 35979/97, 21 March 2006; *Chassagnou v. France*, [GC], Application Nos. 25088/94, 28331/95 and 28443/95, ECHR 1999-III; *Mazurek v. France*, Application No. 34406/97, ECHR 2000-II; *Jahn and Others v. Germany* [GC], Application No. 46720/99, 72203/01 & 72552/01, ECHR 2005-VI; *Broniowski v. Poland*[GC], Application No. 31443/96, ECHR 2004-V.

³²⁴ *Mayagna (Sumo) Awastingni Community v. Nicaragua*, I/A. Court H.R., Ser. C No. 79 (2001).

³²⁵ UDHR, art. 15.

³²⁶ ICCPR art. 2; CRC, art. 4; VCLT, art. 26. See Human Rights Committee, General Comment No. 31 (2004), para. 13 ("... unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees." Also see *Olmedo-Bustos et al. v. Chile*, I/A Court H.R., Judgment of February 5, 2001, Merits, Reparations and Costs, Series C 73, paragraph 87. Also, the Convention on Certain Questions Relating to the Conflict of Nationality Law [hereinafter *Hague Convention*], April 3, 1930, Treaty Series, vol. 179, p. 89, No. 4137, entered into force Jul. 1, 1937, at art. 1 provides that, "It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality."

³²⁷ See UN Human Rights Council, Resolution, *Human rights and arbitrary deprivation of nationality*, 16 July 2012, A/HRC/RES/20/5, preamble, "Recognizing the authority of States to establish laws governing the acquisition, renunciation or loss of nationality in accordance with international law."

³²⁸ Convention relating to the Status of Stateless Persons, 360 U.N.T.S. 117 (1954), entered into force June 6, 1960 [hereinafter *Stateless Persons Convention (1954)*].

³²⁹ Convention on the Reduction of Statelessness, 989 U.N.T.S. 175 (1961), entered into force Dec. 13, 1975 [hereinafter *Convention on the Reduction of Statelessness (1961)*]. The Philippines has pledged to accede to the 1961 Convention. See UN High Commissioner for Refugees (UNHCR), *Ministerial Intergovernmental Event on Refugees and Stateless Persons - Pledges 2011*, October 2012, p34.

³³⁰ Guidelines on Statelessness No. 1: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons, HCR/GS/12/01, 20 February 2012, p. 1, referencing p. 49 of the International Law Commission, *Articles on Diplomatic Protection with commentaries*, 2006.

³³¹ CRC, art. 7 and CEDAW, art. 9: Ratified by all ASEAN member states; CRPD, art. 18: Ratified by 8 ASEAN member states and signed by Brunei and Singapore; ICERD, art. 5: Ratified by Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Viet Nam; ICRMW: Ratified by Indonesia and the Philippines; Convention on the Nationality of Married Women, G.A. res. 1040 (1957) 309 U.N.T.S. 65, *entered into force* Aug. 11, 1958: Ratified by Malaysia and Singapore and signed by Cambodia. Article 24(3) of the ICCPR, ratified by six ASEAN member states provides that “Every child has the right to acquire a nationality”.

³³² UNHCR Global Trends 2012: Displacement, The New 21st Century Challenge, 19 June 2013, Table 1. Myanmar has a recorded 808,075 stateless persons, and Thailand 506,197.

³³³ UNICEF, The State of the World’s Children 2014 In Numbers: Every Child Counts Revealing disparities, advancing children’s rights, Table 9 Child Protection, Birth registration. Cambodia (62% of children), Indonesia (67%), Myanmar (72%) and Lao PDR (75%) fall below the regional average of 80%. This average does not include data from Malaysia, Brunei and Singapore which was unavailable.

³³⁴ Constitution of Indonesia, art. 28D(4).

³³⁵ Constitution of the Lao PRD, art. 50..

³³⁶ Constitution of Cambodia, art. 33. The Viet Nam constitution recognizes the right of Vietnamese citizens to determine their nationality, which allows them to forfeit their Vietnamese citizenship in order to adopt another. See Constitution of Viet Nam, art. 40.

³³⁷ Stateless Persons Convention (1954), art. 1(1).

³³⁸ Stateless Persons Convention (1954), art. 1(1).

³³⁹ Expert Meeting: The Concept of Stateless Persons under International Law Summary Conclusions, Expert meeting organized by the Office of the United Nations High Commissioner for Refugees, Prato, Italy, May 27-28, 2010, pp. 6, *available at* <http://www.unhcr.org/4cb2fe326.html>

³⁴⁰ UDHR, art. 15.

³⁴¹ CRC, art. 7(1); ICCPR, art. 24(2)-(3); CRC art. 7(2).

³⁴² Human Rights Committee, *General Comment No. 17: The Rights of the Child (Article 24)*, U.N. Doc. HRI/GEN/1/Rev.6 at 144 (1989, 2003), paras. 7-8.

³⁴³ CEDAW, art. 9(1)-(2).

³⁴⁴ CEDAW Committee, General Recommendation No. 21: Equality in Marriage and Family Relations, U.N. Doc. A/39/48 (1994), para. 6.

³⁴⁵ Convention on the Nationality of Married Women, arts.1 & 3(1).

³⁴⁶ CRPD,18(2); ICERD, art. 5.

³⁴⁷ Stateless Persons Convention (1954), arts. 12 - 24; UNHCR, *Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level*, Jul. 17, 2012, UN Doc. HCR/GS/12/03, para. 11, *available at*: <http://www.refworld.org/docid/5005520f2.html>.

³⁴⁸ See UNHCR, *Guidelines on Statelessness No. 3*, paras 13 – 20. Stateless Persons Convention (1954), art. 12 personal status, art. 13 property, art 16(1) access to courts, art. 20 rationing, art. 22 public education, art. 25 administrative assistance, art. 32 facilitated naturalization and if in the State, art. 4 freedom of religion, and art. 27 the right to identity papers.

³⁴⁹ “Lawfully in”: Art. 18. self-employment, art. 26 freedom of movement, and art. 31 protection from expulsion (Article 31) “Lawfully staying”: art. 15 right of association, art. 17 right to work, art. 19 practice of liberal professions, art. 21 access to public housing, art. 23 right to public relief, art. 24 labour and social security rights, and art. 28 travel documents. “Habitually resident”: art. 14 artistic rights and art. 16(2) legal assistance.

³⁵⁰ *Hague Convention*, 1930, art. 1 and *Advisory Opinion No. 4, Nationality Decrees Issued in Tunis and Morocco*, Permanent Court of International Justice, Feb. 7, 1923.

³⁵¹ European Convention on Nationality, E.T.S. No. 166 (1997), *entered into force* Mar. 1, 2000 art. 3(3)-(4).

³⁵² Asian-African Legal Consultative Organization (AALCO), *Resolution on the Half-Day Special Meeting on “Legal Identity and Statelessness”*, RES/45/SP.I (2006), *available at* <http://www.refworld.org/docid/44eaddc54.html>.

³⁵³ *Case of the Girls Yean and Bosico v. Dominican Republic*, I/A Court H.R., Preliminary Objections, Merits, Reparations and Costs, Judgment (2005), Series C No. 130, paras. 260(2)-(4) and 260(7)-(9) addressed Haiti’s discrimination against residents originally from the Dominican Republic. *Juridical Condition and Rights of the Undocumented Migrants*, I/A Court H.R., Advisory Opinion OC-18/03 (2003), Series A No. 18, paras. 101 and 119.

³⁵⁴ Institute for Human Rights and Development in Africa (IHRDA) and Open Society Institute Justice Initiative (on behalf of the children of Nubian descent in Kenya) v. Kenya, Decision No. 002/Com/002/2009, African Committee of Experts on the Rights and Welfare of the Child (2011), paras. 57, 62, 65, 69; *Union Interafricaine des Droits de l'Homme v. Angola*, Communication 159/96, African Commission on Human and Peoples' Rights, 11th Annual Activity Report (1997), Annex II, p. 40, available at http://www.achpr.org/files/activity-reports/11/achpr22and23_actrep11_19971998_eng.pdf.

³⁵⁵ *Kuric and Others v. Slovenia*, Application No. 26828/06, European Court of Human Rights (2012), paras.319, 372, and 396.

³⁵⁶ UDHR, art. 10; African Charter on Human and Peoples' Rights, art. 7(1); European Convention on Human Rights], art. 6(1).

³⁵⁷ Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.

³⁵⁸ CRC, art. 40; ICRMW, art. 18.

³⁵⁹ Constitution of Cambodia, art. 38; Constitution of Malaysia, art. 7; Constitution of the Philippines, art. III, sect. 14(2), 21, & 22; Constitution of Singapore, art. 11; Constitution of Thailand, arts. 39 & 40; Constitution of Viet Nam, art. 31(1)-(2).

³⁶⁰ Constitution of the Philippines, art. III, sect. 12(1); Constitution of Viet Nam, art. 31(4).

³⁶¹ Constitution of the Philippines, art. III, sect. 17 & 14(2); Constitution of Thailand, Section 40(4).

³⁶² UDHR, art. 11; ICCPR, art 14; European Convention on Human Rights, art. 6(2).

³⁶³ UDHR, art. 11(2); ICCPR art. 15(1); European Convention on Human Rights art. 7; ICRMW, art. 19; American Convention on Human Rights, art. 9.

³⁶⁴ ICCPR art. 14(7); Arab Charter on Human Rights, art. 19.

³⁶⁵ UDHR, art. 11(1); ICCPR art. 14; Arab Charter on Human Rights art. 13; European Convention on Human Rights art. 6(1).

³⁶⁶ *Findlay v. United Kingdom*, 110/1995/616/706, Council of Europe: European Court of Human Rights, 25 February 1997, para. 77; *Oló Bahamonde v. Equatorial Guinea*, Communication No 468/1991, U.N. Doc. No. CCPR/C/49/D/468/1991 (1993), at para. 7.2, available at <http://www1.umn.edu/humanrts/undocs/html/vws468.htm>

³⁶⁷ Genie Lacayo Case, Inter-American Court of Human Rights., Merits, January 29, 1997, para. 53.

³⁶⁸ *Piersack v Belgium* [ECTHR] Series A No 53 paras 28–32; *Malawi Association and Others v. Mauritania*, Communications Nos. 54/91, 61/91, 98/93, 164/97 - 196/97 and 210/98, African Commission on Human and Peoples' Rights, Thirteenth Annual Activity Report (1999-2000), Annex V, p. 154, available at http://www.achpr.org/files/activity-reports/13/achpr26and27_actrep13_19992000_eng.pdf; *Kartunnen v. Finland*, Communication No. 387/1989, U.N. Doc. CCPR/C/46/D/387/1989 (1992), at para. 7.2, available at <http://www1.umn.edu/humanrts/undocs/html/dec387.htm>. *De Mejía v Peru Case* 10.970 IACommHR Report No 5/96 [1 March 1996] Section V (B) (3) (c).

³⁶⁹ American Convention on Human Rights art. 8(5). Although the African Charter does not mention the right to a public trial, the African Commission on Human and Peoples' Rights has stated that this is required to ensure trial fairness. See *Civil Liberties Centre, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication 218/98, African Commission on Human and Peoples' Rights, Fourteenth Annual Activity Report (2001), Annex V, p. 103, available at http://www.achpr.org/files/activity-reports/14/achpr28and29_actrep14_20002001_eng.pdf.

Art. 14(1) of the ICCPR and Art. 6(1) of the European Convention on Human Rights specify that 'interests of justice' could be for moral or security reasons, or for cases concerning juveniles.

³⁷⁰ European Convention on Human Rights art. 6(3)(a); ICRMW art. 18(3)(a).

³⁷¹ American Convention on Human Rights art. 8(2)(c); European Convention on Human Rights art. 6(3)(b).

³⁷² ICCPR art. 14(3)(d); ICRMW art. 18(3)(b); American Convention on Human Rights art. 8(2)(d).

³⁷³ ICCPR art. 14(3)(g); ICRMW art. 18(3)(g); Convention on the Rights of the Child [hereinafter CRC], G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sep. 2, 1990, at art. 40(2)(b)(iv), available at <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

³⁷⁴ ICCPR art. 14(5).

³⁷⁵ ICCPR 14(3)(e); European Convention on Human Rights art. 6(3)(e); Arab Charter on Human Rights art. 16(5); American Convention on Human Rights art. 8(2)(f).

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- ³⁷⁶ ICCPR art. 14(3)(f); ICRMW art. 18(3)(f).
- ³⁷⁷ ICCPR art. 14(3)(d).
- ³⁷⁸ Arab Charter on Human Rights art. 13; European Convention on Human Rights art. 6(3)(d).
- ³⁷⁹ American Convention on Human Rights art. 8(2)(e).
- ³⁸⁰ Exceptions to the Exhaustion of Domestic Remedies [Articles 46 (1), 46 (2) (a) and 46 (2) (b) American Convention on Human Rights] [Advisory Opinion] IACtHR Series A No 11 [10 August 1990] paras 25–27.
- ³⁸¹ Human Rights Committee, General Comment No 29: Derogations from Provisions of the Covenant during a State of Emergency [24 July 2001] GAOR 56th Session Supp 40 vol 1, 202, para. 16.
- ³⁸² Report on Terrorism and Human Rights of 22 October 2002 (paras 245 and 247); Judicial Guarantees in States of Emergency [Arts 27 (2), 25 and 8 of the American Convention on Human Rights] [Advisory Opinion] IACtHR Series A No 9 [6 October 1987]; *Civil Liberties Organization v. Nigeria*, Communication 129/94, African Commission on Human and People’s Rights, Ninth Annual Activity Report (1995), Annex V, p. 34 . The European Court of Human Rights has not had the opportunity to consider the issue of derogability of the right to a fair trial directly as no Member State has tried to derogate from article 5 of the ECHR during a state of emergency.
- ³⁸³ CRC art. 40; ICRMW art. 18(4); African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999, at art. 3, *available at* <http://www.achpr.org/instruments/child/>.
- ³⁸⁴ CRC art. 40(3); African Charter on the Rights and Welfare of the Child art. 4.
- ³⁸⁵ UDHR, art. 10; African Charter on Human and People’s Rights, art. 7(1); European Charter on Human Rights, art. 6(1); American Declaration, art. 18.
- ³⁸⁶ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Article 6; Updated Set of principles for the protection and promotion of human rights through action to combat impunity, principle 19; Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 4.
- ³⁸⁷ United Nations Convention against Transnational Organized Crime, Article 25; Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Article 6(2). See also regarding practice in international courts: Rome Statute for the International Criminal Court, Article 68(3); Statute of the Special Tribunal for Lebanon, Article 17.
- ³⁸⁸ *Rantsev v Cyprus and Russia*, App. No. 25965/04 (European Court of Human Rights, Judgment of 7 January 2010).
- ³⁸⁹ UDHR, art. 12, “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.
- ³⁹⁰ UDHR, art. 17.
- ³⁹¹ CRC, art. 16.
- ³⁹² ICRMW, art. 14.
- ³⁹³ CPRD, art. 22.
- ³⁹⁴ *ASEAN Sectoral Integration Protocol for e-ASEAN* (Nov. 29, 2004), *available at* <http://www.asean.org/news/item/asean-sectoral-integration-protocol-for-e-asean>.
- ³⁹⁵ Human Rights Committee, *General Comment No. 16 on Article 17: (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, U.N. Doc. HRI/GEN/1/Rev.1 at 21 (1988), paras. 1 & 10, *available at* <http://www1.umn.edu/humanrts/gencomm/hrcom16.htm>;
- ³⁹⁶ Civil Society Organisations and People’s Movements Participating in the Civil Society Forum on ASEAN Human Rights Declaration, Joint submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration, Sep. 12, 2012 on AHRD, art. 15.
- ³⁹⁷ ICCPR, art. 17; CRC, art. 16; CRPD, art. 22; ICRMW, art. 14.
- ³⁹⁸ Constitution of Cambodia, art. 40; Constitution of Lao PDR, art. 42; Constitution of Myanmar, art. 357; Constitution of the Philippines, art. III(2-3); Constitution of Thailand, arts. 33, 35 & 36; and Constitution of Viet Nam, art. 73.
- ³⁹⁹ Constitution of Cambodia, art. 40; Constitution of Lao PDR, art. 42; Constitution of Myanmar, art. 357; Constitution of the Philippines, art. III(2); Constitution of Thailand, art. 33; and Constitution of Viet Nam, art. 73.

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- ⁴⁰⁰Constitution of Cambodia, art. 40 and Constitution of Lao PDR, art. 42.
- ⁴⁰¹Constitution of Thailand, art. 35.
- ⁴⁰²Constitution of Lao PDR, art. 42 and Constitution of Thailand, art. 35.
- ⁴⁰³Constitution of Cambodia, art. 40; Constitution of Myanmar, art. 357; Constitution of the Philippines, art. III(3); Constitution of Thailand, art. 36; and Constitution of Viet Nam, art. 73.
- ⁴⁰⁴Constitution of Thailand, art. 35.
- ⁴⁰⁵UDHR, art. 12.
- ⁴⁰⁶ICCPR, art. 17; CRC, art. 16; ICRMW, art. 14; CRPD, art. 22.
- ⁴⁰⁷American Declaration of the Rights and Duties of Man, arts. V, IX & X; American Convention on Human Rights, art. 11; European Convention on Human Rights, art. 8; and Arab Charter on Human Rights, arts. 16(8) & 21.
- ⁴⁰⁸Human Rights Committee, General Comment No. 16 (1988), paras. 3 & 4
- ⁴⁰⁹*Id.*, para. 1.
- ⁴¹⁰*Id.*, para. 8.
- ⁴¹¹*M.C. v. Bulgaria*, Application No. 39272/98, 4 March 2004, Judgment, European Court of Human Rights; *Hatton and Others v. United Kingdom*, (dec.) [GC], Application No. 36022/97, 8 July 2003, European Court of Human Rights; *Rees v. United Kingdom*, Application No. 9532/81, 17 October 1986, Judgment, European Court of Human Rights; *X and Y v. Netherlands*, Application No. 8978/80, 26 March 1985, Judgment, European Court of Human Rights.
- ⁴¹²*Leonid Raihman v. Latvia*, Communication No. 1621/2007, Human Rights Committee, U.N. Doc. CCPR/C/100/D/1621/2007 (2010), available at <http://www1.umn.edu/humanrts/undocs/1621-2007.html>; *Coeriel et al. v. The Netherlands*, Communication No. 453/1991, Human Rights Committee, U.N. Doc. CCPR/C/52/D/453/1991 (1994), available at <http://www1.umn.edu/humanrts/undocs/html/vws453.htm>.
- ⁴¹³*Toonen v. Australia*, Communication No. 488/1992, Human Rights Committee, U.N. Doc. CCPR/C/50/D/488/1992 (1994), at para. 33, available at <http://www1.umn.edu/humanrts/undocs/html/vws488.htm>.
- ⁴¹⁴*X and Y v. Netherlands*, European Court of Human Rights (1985), at para. X?
- ⁴¹⁵*M.C. v. Bulgaria*, European Court of Human Rights (2004); *Niemietz v. Germany*, Application No. 13710/88, 16 December 1992, Judgment, European Court of Human Rights, Series A No. 251-B; *Huvig v. France*, Application No. 11105/84, 24 April 1990, Judgment, European Court of Human Rights; *Campbell v. United Kingdom*, Application No. 13590/88, 25 March 1992, Judgment, European Court of Human Rights, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57771>; *Dudgeon v. United Kingdom*, Application No. 7525/76, 22 October 1981, Judgment, European Court of Human Rights, Series A No. 45.
- ⁴¹⁶Parliamentary Assembly of Council of Europe, *Resolution 428 (1970)* containing a declaration on mass communication media and human rights, at para. C.2.
- ⁴¹⁷*Herrera Ulloa v. Costa Rica*, I/A Court H.R., Judgment of July 2, 2004; *Kimel v. Argentina*, I/A Court H.R., Judgment of May 2, 2008; *Tristan Donoso v. Panama*, I/A Court H.R., Judgment of January 27, 2009; *Fontevicchia and D'Amico v. Argentina*, I/A Court H.R., Judgment of November 29, 2011.
- ⁴¹⁸*Ituango Massacres v. Colombia*, I/A Court H.R., Preliminary Objection, Merits, Reparations and Costs, Judgment (2006), Series C No. 148; *Escué Zapata v. Colombia*, I/A Court H.R., Merits, Reparations and Costs, Judgment (July 4, 2007), Series C No. 165.
- ⁴¹⁹Human Rights Committee, General Comment No. 16 (1988), paras. 7 & 10.
- ⁴²⁰UN Office of the High Commissioner for Human Rights, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Reports of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, *Frank La Rue*, U.N. Doc. A/HRC/23/40 (Apr. 17, 2013), at para. 79 and U.N. Doc. A/HRC/17/27 (May. 16, 2011), at para. 53.
- ⁴²¹U.N. Human Rights Council, The promotion, protection and enjoyment of human rights on the Internet, U.N. Doc A/HRC/20/L.13 (Jun. 29, 2012).
- ⁴²²UN General Assembly Resolution 68/167, "The Right to Privacy in the Digital Age," December 18, 2013, preamble.
- ⁴²³"International Principles on the Application of Human Rights to Communications Surveillance," July 10, 2013, <https://en.necessaryandproportionate.org/text>.
- ⁴²⁴A January 2012 version of the AHRD read, "Everyone has the right to freedom of thought, conscience and the right to practice one's religion or belief." A Joint Civil Society Submission to the AICHR on a subsequent

draft highlighted article 12's omissions but the AHRD was not amended accordingly. The full submission is available at <http://www.forum-asia.org/?p=15341>.

⁴²⁵ Human Rights Committee, General Comment No. 22 (1993), para. 4.

⁴²⁶ The Human Rights Committee has interpreted article 18 of the ICCPR to include the right to change one's religion. This right has always been contentious due to Islam's restrictions on apostasy and its omission may be at the behest of Brunei, Malaysia and Indonesia.

⁴²⁷ Ratified by six (ICCPR) and all ten ASEAN member states (CRC).

⁴²⁸ AHRD, art. 8.

⁴²⁹ UDHR, art. 18; ICCPR, art. 18.

⁴³⁰ ICCPR, arts. 18(3) (limitation clause), 4(2) (non-derogation clause) & 18(4) (rights of parents).

⁴³¹ AHRD, art. 16.

⁴³² The non-paper is not available online but the U.S. Department of State's reaction to the AHRD is available at, <http://www.state.gov/r/pa/prs/ps/2012/11/200915.htm>.

⁴³³ ICCPR, art. 20(2).

⁴³⁴ AHRD, art. 23.

⁴³⁵ AHRD, art. 10 and the Phnom Penh Statement on the Adoption of the ASEAN human Rights Declaration (AHRD), 18 November 2012.

⁴³⁶ ICCPR, arts. 9 & 27; CRC, art. 14; ICRMW, art. 12; Convention Relating to the Status of Refugees, art. 4.

⁴³⁷ Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.

⁴³⁸ CRC, art. 14. The CRC does not explicitly recognize a child's right to change his or her religion but instead provides for legal guardians to provide direction on religious matters, "in a manner consistent with the evolving capacity of the child", recognizing that as a child develops, he or she is increasingly able to make independent decisions regarding religion.

⁴³⁹ Reservations available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en#EndDec.

⁴⁴⁰ Constitution of Brunei, art. 3(1); Constitution of Cambodia, art. 43; Constitution of Indonesia, art. 28E; Constitution of Malaysia, art. 11(1); Constitution of Myanmar, art. 34; Constitution of the Philippines, art. III sect. 5; Constitution of Singapore, art. 15; Constitution of Thailand, art. 37; Constitution of Viet Nam, art. 70. Article 9 of the Lao PDR Constitution permits all "lawful religious activities", leaving room for criminalization of religions or acts of worship.

⁴⁴¹ UDHR, art. 18.

⁴⁴² ICCPR, art. 18; European Convention on Human Rights, art. 9; American Convention on Human Rights, art. 12.

⁴⁴³ African Charter on Human and Peoples' Rights, art. 8; Arab Charter on Human Rights, art. 30.

⁴⁴⁴ Human Rights Committee, General Comment No. 22 (1993), para. 2.

⁴⁴⁵ *Id.*, at para. 3.

⁴⁴⁶ Interim report of the Special Rapporteur on freedom of religion or belief, U.N. Doc. A/67/303, Aug 13, 2012, para. 22 & 26.

⁴⁴⁷ Human Rights Committee, General Comment No. 22 (1993), para. 4.

⁴⁴⁸ *Id.*

para. 8.

⁴⁴⁹ ICCPR, art. 19(3)(b).

⁴⁵⁰ European Convention on Human Rights, art. 9 (2).

⁴⁵¹ Arab Charter on Human Rights, art. 30(2).

⁴⁵² *Sinan İşik v Turkey*, Ct. Hm. Rts. No.21924/05, (2 February 2010).

⁴⁵³ *Eweida and Others v. The United Kingdom* Application No. 48420/10, 59842/10, 51671/10 and 36516/10, European Court of Human Rights, 2013.

⁴⁵⁴ Human Rights Committee, General Comment No. 22 (1993), para. 11; *Yoon et al. v. Republic of Korea*, Communications Nos. 1321/2004 and 1322/2004, Human Rights Committee, views adopted on 3 November, 2006; *Jeong et al. v. Republic of Korea*, Communications Nos. 1642–1741/2007, Human Rights Committee, U.N. Doc. CCPR/C/101/D/1642/1741/2007 (2007), available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=CCPR/C/101/D/1642-1741/2007&Lang=E>; *Hasan and Eylem Zengin v. Turkey*, Application No. 1448/04, European Court of Human Rights, 2007.

⁴⁵⁵ *Ctr. for Minority Rights Dev. v Kenya*, Communication 276/2003, African Commission on Human and Peoples' Rights, 27th Annual Activity Report (2009), Annex V, at pp. 145-46, *available at* http://www.achpr.org/files/activity-reports/27/achpr46eo7_actrep27_2009_eng.pdf.

⁴⁵⁶ The meeting of regional CSOs in Manila in September 2012 recommended correcting this omission as did a consortium of freedom of expression advocates and journalists in a joint statement dated June 19, 2013 found here: http://cjfe.org/resources/protest_letters/cjfe-ifex-and-co-signatories-call-asean-protect-free-expression-southeast-

⁴⁵⁷ ICCPR, art. 19(1).

⁴⁵⁸ AHRD, arts. 7 & 8.

⁴⁵⁹ ICCPR, art. 19(3)(a)

⁴⁶⁰ However, AHRD, art. 22 on freedom of religion does call on the state to eliminate incitement to hatred related to religion and beliefs.

⁴⁶¹ ICCPR, art. 19, ratified by Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.

⁴⁶² CRPD, art. 21, ratified by all ASEAN member states except for Singapore and Viet Nam.

⁴⁶³ CRC, art. 13; ICERD, art. 5(d)(viii); ICRMW, art. 13.

⁴⁶⁴ Constitution of the Republic of Philippines, art. III; Constitution of the Kingdom of Cambodia, art. 41; Constitution of the Republic of Indonesia, art. 28; Constitution of the Lao PDR, art. 44; Constitution of Malaysia, art. 10; Constitution of Myanmar, art. 354(a); Constitution of the Republic of Singapore, art. 14; Constitution of the Kingdom of Thailand, arts. 36 & 45; Constitution of the Socialist Republic of Viet Nam, art. 69. Brunei is the one ASEAN member state that does not contain a right to freedom of expression and opinion in any form in its constitution.

⁴⁶⁵ Constitutions of Cambodia, Lao PDR, Myanmar, Malaysia, Viet Nam and Singapore.

⁴⁶⁶ Constitutions of Lao PDR, Myanmar, Singapore and Thailand.

⁴⁶⁷ Constitution of the Republic of Philippines, art. III.

⁴⁶⁸ Constitution of Viet Nam, art. 25.

⁴⁶⁹ With the exception of Brunei.

⁴⁷⁰ UDHR, art. 19.

⁴⁷¹ ICCPR, arts. 19 & 20; CRC, arts. 12 & 13; ICERD, arts. 4 & 5; ICRMW, art. 13.

⁴⁷² European Convention on Human Rights, art. 10; American Declaration of the Rights and Duties of Man, art. IV; American Convention on Human Rights, arts. 13 & 14; African Charter on Human and Peoples' Rights, art. 9; Charter on the Rights and Welfare of the Child, art. 7; Arab Charter on Human Rights, art. 32.

⁴⁷³ Wenzel, N International Protection – Freedom of Opinion and Expression, Max Planck Encyclopaedia of Public International Law, March 2009.

⁴⁷⁴ Human Rights Committee, *General Comment No. 34 on Article 19: Freedoms of opinion and expression*, U.N. Doc. CCPR/C/GC/34 (2011), para. 9, *available at* <http://www1.umn.edu/humanrts/gencomm/hrcom34.html>.

⁴⁷⁵ *Id.* Human Rights Committee, *General Comment No. 10: Article 19 (Freedom of Opinion)*, U.N. Doc. HRI/Gen/1/Rev.1 at 11 (1983), para. 1, *available at* <http://www1.umn.edu/humanrts/gencomm/hrcom10.htm>.

⁴⁷⁶ Human Rights Committee, *General Comment No. 34* (2011), para. 10.

⁴⁷⁷ *Yong-Joo Kang v. Republic of Korea*, Communication No. 878/1999, Human Rights Committee, U.N. Doc. CCPR/C/78/D/878/1999 (2003), *available at* <http://www1.umn.edu/humanrts/undocs/878-1999.html>.

⁴⁷⁸ Wenzel, *supra.* (on non verbal communications) *Hasman and Harrup v. The United Kingdom*, Application No. 25594/94, European Court of Human Rights 1999-VIII; *Kivenmaa v. Finland*, Communication No. 412/1990, Human Rights Committee, U.N. Doc. CCPR/C/50/D/412/1990 (1994), *available at* <http://www1.umn.edu/humanrts/undocs/html/vws412.htm> (on raising a banner); *Thorgeison v. Iceland*, Application No. 13778/88, 25 June 1992, European Court of Human Rights, Series A No. 239.

⁴⁷⁹ *See Handyside v. The United Kingdom*, Application No. 5493/72, 12 July 1976, European Court of Human Rights, Series A No. 24.

⁴⁸⁰ Wenzel, *supra.*

⁴⁸¹ *See Ballantyne, Davidson, and McIntyre v. Canada*, Communications. Nos. 359/1989, 385/1989, Human Rights Committee, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993), *available at* <http://www1.umn.edu/humanrts/undocs/html/v359385.htm>.

⁴⁸² *Id.*; Shelton, Balancing Rights and Responsibilities.

⁴⁸³ *See Alinak v. Turkey*, Application No. 40287/98, European Court of Human Rights 2005 (finding a violation when the work was a novel with limited mass appeal). For more on artistic speech enjoying more protection if

it is also political speech, see Paul Kearns, *The Judicial Nemesis: Artistic Freedom and the European Court of Human Rights*, at 75-83, available at: <http://irishlawjournal.com/wp-content/uploads/2013/05/The-Judicial-Nemesis-Artistic-Freedom-and-the-European-Court-of-Human-Rights.pdf>.

⁴⁸⁴ Monitoring of Journalistic Self-Regulatory Bodies in Montenegro, “European Court of Human Rights Judgments on the right to freedom of expression: Bulletin XXIX: Focus on obscenity, public morals and freedom of expression.” 20 January 2014. <http://www.hraction.org/wp-content/uploads/Bulletin-XXIX-Obscenity-and-public-morals.pdf>; For cases regarding freedom of speech, public morals and obscenity, see *id.*, referencing *Müller and others v. Switzerland*, Application No. 10737/84, 24 May 1988, European Court of Human Rights; *Akdas v. Turkey*, Application No. 41065/04, February 2010, European Court of Human Rights; *Vereinigung Bildender Künstler v. Austria*, Application No. 68354/01, 25 January 2007, European Court of Human Rights.

⁴⁸⁵ See e.g., Council of Europe, *Convention on Access to Official Documents*, 2009 (not yet in force); Lima Principles, 16 November 2000; The Johannesburg Principles on National Security, Freedom of Expression, and Access to Information, November 1996; The Bucharest Declaration on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), 30 October 2001.

⁴⁸⁶ International Mechanisms for Promoting Freedom of Expression, Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 2004, available at: <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=319&IID=1>.

⁴⁸⁷ Human Rights Committee, General Comment No. 34 (2011), para. 18; European Court of Human Rights judgments on the right to freedom of expression: Bulletin 7, 2012, 16 December 2012. The most important judgments from the ECHR on access to information are: *Kenedi v. Hungary*, Application No. 31475/05, 26 May 2009; *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05, 14 April 2009. These decisions concern the right to access to information that is held by public bodies other than private information, which is protected under Article 8 (respect for private life). See *id.*

⁴⁸⁸ Charter of Fundamental Rights of the European Union, art. 11.

⁴⁸⁹ *Jersild v. Denmark*, Application No. 15890/89, 23 September 1994, European Court of Human Rights, Series A No. 298; *Observer and Guardian v. The United Kingdom*, Application No. 13585/88, 26 November 1991, European Court of Human Rights, Series A No. 216; *Caso Herrera Ulloa vs. Costa Rica*, I/A Court H.R., Preliminary Objection, Merits, Reparations and Costs, Judgment (2004), Series C No. 107.

⁴⁹⁰ Human Rights Committee, General Comment No. 34, para. 14.

⁴⁹¹ ICCPR, art. 19(3); European Convention on Human Rights, art. 10(2); and American Convention on Human Rights, art. 13(2).

⁴⁹² Shelton, at 228, quoting *Herrera Ulloa vs. Costa Rica*, I/A Court H.R., Preliminary Objection, Merits, Reparations and Costs, Judgment (2004), Series C No. 107, at p.122; *Canese v. Paraguay*, Judgment of August 31, 2004, I/A Court H. R., (Ser. C) No. 111 (2004), available at: http://corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf; *The Observer and Guardian v. the United Kingdom*, Application No. 13585/88, 26 November 1991n European Court of Human Rights.

⁴⁹³ American Convention on Human Rights, art. 31(2), 31(4).

⁴⁹⁴ American Convention on Human Rights, art. 31(2).

⁴⁹⁵ See Shelton, *D Balancing Rights and Responsibilities*; see e.g., *Erdal Tas v. Turkey*, Application No. 77650/01, European Court of Human Rights (2006); *Selisto v. Finland*, Application No. 56767/00, European Court of Human Rights (2004); *Colombani v. France*, Application No. 51279/ 99, European Court of Human Rights 2002-V.

⁴⁹⁶ See e.g. *Desacato* laws, or insult/contempt laws that criminalize an expression that offends, insults or threatens a public functionary in the performance of his or her duties, Shelton, *Balancing Rights and Responsibilities*.

⁴⁹⁷ See, e.g., *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, Communications Nos. 422/1990, 423/1990 and 424/1990, Human Rights Committee, U.N. Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990 (1996), available at <http://www1.umn.edu/humanrts/undocs/html/VWS422R1.htm> (professors and a civil servant alleged they had been detained for defaming the head of state because of criticism they expressed regarding the Togolese government).

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- ⁴⁹⁸ See *Canese v. Paraguay*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2004), Series C No. 111; *Herrera Ulloa v. Costa Rica*, I/A Court H.R. (2004); *Humberto Antonio Palamaralribarne v. Chile*, Case 11.571, Report No. 77/01, I/A Commission H.R. (2001).
- ⁴⁹⁹ See *Bowman v. The United Kingdom*, Application No. 24839/94, European Court of Human Rights 1998-I..
- ⁵⁰⁰ *Id.* at 232; *Otto Preminger - Institut v. Austria*, Application No. 13470/78, 20 September 1994, European Court of Human Rights, Series A No. 295.
- ⁵⁰¹ European Court of Human Rights judgments on the right to freedom of expression Bulletin 12. 10 March 2013.
- ⁵⁰² *Id.*, referencing ECHR cases regarding republishing information found on the internet; blocking and filtering internet access and websites; political debate and the internet; trademark and copyrights violations online; license to provide internet access; jurisdiction; protection of minor; access to government information. International organizations that have developed guidelines for this area of the law include the Council of Europe and the Permanent Council of the Organisation for Security and Cooperation in Europe (OSCE), among others. See *id.*
- ⁵⁰³ UDHR, art. 20(1).
- ⁵⁰⁴ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, 21 May 2012, at para. 4, *available at*: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf.
- ⁵⁰⁵ ICCPR, art. 21; ICERD, art. 5(d)(ix); CRC, art. 15. The ICCPR and ICERD have been ratified by Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Viet Nam, the CRC by all ASEAN member states.
- ⁵⁰⁶ Constitution of the Philippines, art. III sect. 4; Constitution of Cambodia, art. 41; Constitution of Indonesia, art. 28; Constitution of Lao PDR, art. 44; Constitution of Malaysia, art. 10; Constitution of Myanmar, art. 354(a); Constitution of Singapore, art. 14; Constitution of Thailand, art. 63; Constitution of Viet Nam, art. 25.
- ⁵⁰⁷ Report of the Special Rapporteur (2012), at para. 24.
- ⁵⁰⁸ Human Rights Council, Resolution 24/5, A/HRC/RES/24/5, 8 October 2013, at para.5, *available at* <http://daccess-ods.un.org/TMP/451538.637280464.html>.
- ⁵⁰⁹ Report of the Special Rapporteur (2012), at para. 27.
- ⁵¹⁰ Report of the Special Rapporteur (2012), at para. 4.
- ⁵¹¹ UDHR, art. 20
- ⁵¹² ICCPR, art. 21; CRC, art. 15; ICERD, arts. 4 & 5.
- ⁵¹³ European Convention on Human Rights, art. 11; African Charter on Human and Peoples' Rights, art. 11; African Charter on the Rights and Welfare of the Child, art. 8; Charter on Human Rights, art. 32; American Declaration of the Rights and Duties of Man, art. XI; American Convention on Human Rights, art. 15.
- ⁵¹⁴ ICCPR, art. 21.
- ⁵¹⁵ Report of the Special Rapporteur (2012), at para. 16.
- ⁵¹⁶ Report of the Special Rapporteur (2012), at para. 28.
- ⁵¹⁷ *Oya Ataman v. Turkey*, Application No. 74552/01, European Court of Human Rights 2006-XIV.
- ⁵¹⁸ See *e.g.* HRC Resolution 24/5, at para. 2; Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, A/68/299, 7 August 2013, at para. 1.
- ⁵¹⁹ *Id.*, at para.5.
- ⁵²⁰ *Id.*, at para. 6.
- ⁵²¹ UDHR, art. 21(3); ICCPR, art. 25.
- ⁵²² HRC Resolution 24/5, at para. 2.
- ⁵²³ See *id.*; HRC Resolution 21/L.25, A/HRC/ RES/21/L/25, 21 September 2012.
- ⁵²⁴ UDHR, art. 21; ICCPR, art. 25.
- ³ UDHR, art. 21(2); ICCPR, art. 25(c); Arab Charter on Human Rights, art. 24(4); American Convention on Human Rights, art. 23(1c); and African Charter on Human and Peoples' Rights, art. 13(2).
- ⁵²⁶ Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.
- ⁵²⁷ Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.
- ⁵²⁸ CEDAW, art. 7; CRPD, art. 29.
- ⁵²⁹ Constitution of the Philippines, arts. II, sect.26 & V, sect. 1.
- ⁵³⁰ Constitution of Myanmar, arts. 349 & 391.
- ⁵³¹ Constitution of Indonesia, art. 28D(3).

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- ⁵³² Constitution of Cambodia, art. 34; Constitution of Lao PRD, arts. 4 & 36; Constitution of Malaysia, arts. 119 & 120, Constitution of Thailand, art. 72; Constitution of Viet Nam, arts. 27 & 29.
- ⁵³³ Constitution of Thailand, art. 72.
- ⁵³⁴ UDHR, art. 21.
- ⁵³⁵ ICCPR, art. 25(b).
- ⁵³⁶ UDHR, art. 21(3). *Id.*
- ⁵³⁷ Human Rights Committee, *General Comment No. 25 on Article 25: The right to participate in public affairs, voting rights and the right of equal access to public service*, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), para. 9, available at <http://www.refworld.org/docid/453883fc22.html>.
- ⁵³⁸ See UDHR, art. 21.
- ⁵³⁹ See ICCPR, art. 25.
- ⁵⁴⁰ See ICCPR, art. 25.
- ⁵⁴¹ See Human Rights Committee, *General Comment No. 25* (1996), para. 7.
- ⁵⁴² *Id.*, at, at para. 17.
- ⁵⁴³ *Id.*, at para. 23.
- ⁵⁴⁴ *Paez v. Colombia*, Communication No. 195/1985, Human Rights Committee, U.N. Doc. CCPR/C/39/D/195/1985 (1990), at para. 5.9, available at <http://www1.umn.edu/humanrts/undocs/session39/195-1985.html>.
- ⁵⁴⁵ CEDAW, art. 7.
- ⁵⁴⁶ CERD, art. 25(c).
- ⁵⁴⁷ CRPD, art. 29.
- ⁵⁴⁸ Arab Charter on Human Rights, art. 24(4); American Convention on Human Rights, art. 23(1c); African Charter on Human and Peoples' Rights, art. 13(2).
- ⁵⁴⁹ American Convention on Human Rights, art. 23(2).
- ⁵⁵⁰ Inter-American Democratic Charter, art. 9.
- ⁵⁵¹ African Charter on Human and Peoples' Rights, art. 13; African Charter on Democracy, Elections and Governance.
- ⁵⁵² Protocol 1 to European Convention, art. 3.
- ⁵⁵³ *Legal Resources Foundation v. Zambia*, Communication 211/98, African Commission on Human and Peoples' Rights, Fourteenth Annual Activity Report (2000-2001), Annex V, p. 86, available at http://www.achpr.org/files/activity-reports/14/achpr28and29_actrep14_20002001_eng.pdf.
- ⁵⁵⁴ *Mouvement Ivoirien des Droits Humains v. Côte d'Ivoire*, Communication 246/02, African Commission on Human and Peoples' Rights, Twenty-fifth Annual Activity Report (2008), Annex IV, p. 65, available at http://www.achpr.org/files/activity-reports/25/achpr44and50_actrep25_2008_eng.pdf.
- ⁵⁵⁵ *Purohit and Moore v. Gambia (The)*, Communication 241/01, African Commission on Human and Peoples' Rights, Sixteenth Annual Activity Report (2002-2003), Annex VII, p. 62, available at http://www.achpr.org/files/activity-reports/16/achpr32and33_actrep16_20022003_eng.pdf.
- ⁵⁵⁶ *Constitutional Rights Project v. Nigeria*, Communication 102/93, African Commission on Human and Peoples' Rights, Twelfth Annual Activity Report (1998-1999), Annex V, p. 45, available at <http://caselaw.ihrda.org/doc/102.93/view/>.
- ⁵⁵⁷ *Lawyers of Human Rights v. Swaziland*, Communication 251/02, African Commission on Human and Peoples' Rights, Eighteenth Annual Activity Report (2005), Annex III, p. 12, available at <http://caselaw.ihrda.org/doc/251.02/view/>.
- ⁵⁵⁸ *Shindler v. the United Kingdom*, Application No. 19840/09, European Court of Human Rights, 2013, available at <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-119229>.
- ⁵⁵⁹ *Sitaropoulos and Giakoumopoulos v. Greece*, Application No. 42202/07, European Court of Human Rights, 2012, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109579>.
- ⁵⁶⁰ *Zdanoka v. Latvia*, Application No. 58278/00, European Court of Human Rights, 2006, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72794#%22itemid%22:\[%22001-72794%22\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72794#%22itemid%22:[%22001-72794%22]}).
- ⁵⁶¹ *Alajos Kiss v. Hungary*, Application No. 38832/06, European Court of Human Rights, 2010, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98800>.
- ⁵⁶² *Casteneda v. Mexico*, No. 113/06, Inter-American Court of Human Rights, 2008, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_184_ing.pdf.

⁵⁶³ *Yatama v. Nicaragua*, Petition No. 12,388, Inter-American Court of Human Rights, 2005, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_127_ing.pdf.

⁵⁶⁴ Council of Europe Statute, preamble para. 3, OAS Charter, preamble para. 3, arts. 2, 3 & 9; Constitutive Act of the African Union, arts. 3(g) and (h) & 4(m); ASEAN Charter, preamble para. 8, art. 2(2)(h).

⁵⁶⁵ Vienna Declaration, para. 8.

⁵⁶⁶ Inter-American Democratic Charter, arts. 18-22.

⁵⁶⁷ The Inter-American Commission on Human Rights awarded precautionary measures on March 18, 2014, in favor of the Mayor of Bogota whom the government subsequently dismissed. *Matter Gustavo Francisco Petro Urrego concerning Colombia*, Petition 1742-13, Resolution No. 5/2014, I/A Commission H.R., Precautionary Measures (2014).

⁵⁶⁸ UDHR, arts. 23 (2) (everyone, without any discrimination, has the right to equal pay for equal work), 23 (3) (everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection) & art. 24 ("everyone has the right to rest and leisure..."); ICESCR, arts. 7 & 8; ILO, Equal Remuneration Convention, 1951 (No. 100), June 29, 1951, entered into force: May 23, 1953, art. 2.

⁵⁶⁹ ILO Forced Labour Convention, 1930 (No. 29); ILO Worst Forms of Child Labour, 1999 (No. 182); ILO Abolition of Forced Labour Convention, 1957 (No. 105); ILO Equal Remuneration Convention, 1951 (No. 100), entered into force: 23 May 1953; ILO Minimum Age Convention, 1973 (No. 138), entered into force: 19 Jun 1976; CCPR, art. 8(3)(a); ICRMW, art. 11(2); ICESCR, art. 10(3) and CRC, art. 32.

⁵⁷⁰ ILO Declaration on Fundamental Principles and Rights at Work, 1998.

⁵⁷¹ ILO Forced Labour Convention 1930 (No. 29), ratified by 9 ASEAN member states, art. 1(1) "Each Member of the ILO which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period". ILO Worst Forms of Child Labour Convention 1999 (No. 182), ratified by all ASEAN member states, art. 1 "Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour ..".

⁵⁷² ILO Minimum Age Convention 1973 (No. 138), entered into force Jun 19, 1976. Ratified by all ASEAN member states except for Myanmar.

⁵⁷³ Brunei Darussalam has not ratified the Forced Labour Convention 1930 (No. 29).

⁵⁷⁴ 16 years: Brunei Darussalam; 14 years: Cambodia, Lao PDR; 15 years: Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Viet Nam.

⁵⁷⁵ ASEAN removed the right to freedom of association from the AHRD shortly before adopting the final text. As such, the AHRD recognizes freedom of association only in this right to form and join trade unions. ILO, Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), entered into force Jul 4, 1950, at art. 8(1) In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land; (2) The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention."

⁵⁷⁶ ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) ratified by Cambodia, Indonesia, Myanmar and Philippines and overall ratified by 153 out of 185 ILO Members; ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98) ratified by Cambodia, Indonesia, Malaysia, Philippines and Singapore and overall ratified by 164 out of 185 ILO Members.

⁵⁷⁷ ILO Equal Remuneration Convention, 1951 (No. 100), entered into force Jun 29, 1951 ratified by all except for Brunei Darussalam and Myanmar and overall ratified by 171 of 185 ILO Members; ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111), entered into for June 15, 1960, ratified by Cambodia, Indonesia, the Philippines, Lao PDR and Viet Nam. Five of the 13 members who have not ratified No. 111 are ASEAN member states.

⁵⁷⁸ ICESCR, arts. 6-8. Cambodia, Indonesia, Lao PDR, Philippines, Thailand, and Viet Nam have ratified the ICESCR.

⁵⁷⁹ ICCPR, art. 8(3)(a) and ICERD, art. 5(e)(i) & (ii). The same six ASEAN Member States have ratified or acceded to the ICCPR and ICERD, namely Cambodia, Indonesia, Lao PDR, Philippines, Thailand, and Viet Nam.

⁵⁸⁰ CEDAW, art. 11; CRC, art. 32; CRPD art. 27. Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, and Thailand have ratified or acceded to the CRPD.

⁵⁸¹ ICRMW, arts. 11, 25, 52 & 54. Two ASEAN Member States have ratified the ICRMW, namely Indonesia and Philippines.

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- ⁵⁸² Constitutions of Cambodia, Indonesia, Lao PDR, Myanmar, Philippines, Singapore, Thailand, and Viet Nam.
- ⁵⁸³ Constitution of Indonesia, art. 27(2); Constitution of Philippines, art. XIII, section 3; and Constitution of Thailand, art. 44.
- ⁵⁸⁴ Constitution of Cambodia, art. 36, Constitution of Indonesia, art. 28(D)(2), and Constitution of Myanmar, arts. 349 & 350.
- ⁵⁸⁵ Constitution of Myanmar, art. 370; Constitution of Singapore, art. 12(2); Constitution of Viet Nam, art. 33 (but note that freedom of enterprise is permitted only in “branches and trades not banned by the law”).
- ⁵⁸⁶ Constitution of Indonesia, art. 28(E)(1) and Constitution of Lao PDR, art. 39.
- ⁵⁸⁷ Constitution of the Philippines, art. XIII, section 3:
- ⁵⁸⁸ UDHR, art. 24.
- ⁵⁸⁹ ICESCR, arts. 6, 7 & 8.
- ⁵⁹⁰ ILO Declaration on Fundamental Principles and Rights at Work, 1998.
- ⁵⁹¹ ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No.87), art. 2 & 3; ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98). The right to join and form labor organisations is also recognized in ICESCR, art. 8; Arab Charter on Human Rights, art. 34(1); American Convention on Human Rights, art. 16(1);
- ⁵⁹² ILO Committee of Experts, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, “Giving Globalization a Human Face”, 2012, para. 119; ICESCR, art. 8(1)(d)
- ⁵⁹³ ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98), art. 54.
- ⁵⁹⁴ ILO Constitution, Annex I. art. 5; CEDAW, art. 11(1); ICRMW, art. 7 & 25; Arab Charter on Human Rights, art. 34(4); European Social Charter (Revised), arts. 2, & 4; Charter of Fundamental Rights of the European Union, art. 23; ILO Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111).
- ⁵⁹⁵ ICRMW, art. 25. *See also Rui Alberto Pereira Roque v His Excellency the Lieutenant Governor of Jersey*, Case No. C-171/96 (1997), European Court of Justice, Opinion of Mr Advocate General La Pergola, para. 39.
- ⁵⁹⁶ *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 others) v. Angola*, Communication No. 292/04, African Commission on Human and Peoples’ Rights, Twenty-fourth Annual Activity Report (2007-2008) Annex II, p. 86, available at http://www.achpr.org/files/activity-reports/24/achpr43_actrep24_20072008_eng.pdf.
- ⁵⁹⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 18 on Article 6: the equal right of men and women to the enjoyment of all economic, social and cultural rights*, U.N. Doc. E/C.12/GC/18 (2006), para. 7.
- ⁵⁹⁸ ILO Declaration on Social Justice for a Fair Globalization adopted by the International Labour Conference at its Ninety-seventh Session, Geneva, 10 June 2008, pp. 9-10.
- ⁵⁹⁹ ICESCR, art. 10(3); CRC, art. 32; Arab Charter on Human Rights, art. 10(2); European Social Charter (Revised), art. 7. *See also* ILO Declaration on Fundamental Principles and the Right to Work, art. 2(c); ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, art. 1; ILO Convention No. 138, Convention concerning Minimum Age for Admission to Employment art. 1; Maputo Protocol, art. 13(g); African Charter on the Rights and Welfare of the Child, art. 15(1), July 11, 1990, CAB/LEG/24.9/49.
- ⁶⁰⁰ ILO Minimum Age Convention, 1973 (No. 138), art. 2(3) & (4); art. 4, art. 8.
- ⁶⁰¹ ILO Worst Forms of Child Labour, 1999 (No. 182), art. 1 & 2.
- ⁶⁰² *Id.*, art. 3.
- ⁶⁰³ UDHR, art. 25(1).
- ⁶⁰⁴ ICESCR, art. 11.
- ⁶⁰⁵ *See generally* Committee on Economic, Social and Cultural Rights, *General Comment No. 4 on the right to adequate housing (Art. 11(1))*, U.N. Doc. E/1992/23 (1991), available at <http://www1.umn.edu/humanrts/gencomm/epcomm4.htm>; Committee on Economic, Social and Cultural Rights, *General Comment No. 7 (1997)*; Committee on Economic, Social and Cultural Rights, *General Comment No. 12 on the right to adequate food (Art. 11)*, U.N. Doc. E/C.12/1999/5 (1999), available at <http://www1.umn.edu/humanrts/gencomm/escgencom12.htm>; Committee on Economic, Social and Cultural Rights, *General Comment No. 15 on the right to water (Arts. 11 and 12)*, U.N. Doc. E/C.12/2002/11 (2003), available at <http://www1.umn.edu/humanrts/gencomm/escgencom15.htm>; Committee on Economic, Social

and Cultural Rights, *General Comment No. 19, The Right to Social Security (Art. 9)*, U.N. Doc. E/C.12/GC/19 (2008), available at <http://www1.umn.edu/humanrts/gencomm/escgencom19.html>.

⁶⁰⁶ CRC, art. 27; CEDAW, art. 14; ICERD, art. 47.

⁶⁰⁷ European Social Charter, arts. 4(1) & 31. (Art 4(1) talks about the recognition of the right of workers to remuneration that will give them and their families a decent standard of living, while Art. 31 recognizes the right to housing). While the African Charter does not contain a right to an adequate standard of living, the African Commission has found violations to the right to housing and food, neither recognized specifically in the Charter, through an expansive interpretation of existing rights in the Charter, such as the right to life and health. See *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96, African Commission on Human and Peoples' Rights, Fifteenth Annual Activity Report (2001-2002), Annex V, pp. 31-44 available at http://www.achpr.org/files/activity-reports/15/achpr30and31_actrep15_20012002_eng.pdf. The American Convention on Human Rights does not contain a specific right to an adequate standard of living, but the Protocol of San Salvador does at art. 12(1).

⁶⁰⁸ AHRD, arts. 2 & 4.

⁶⁰⁹ ICESCR, art. 11. Cambodia, Indonesia, Lao PDR, Malaysia, the Philippines, Thailand and Viet Nam have ratified the ICESCR.

⁶¹⁰ CRC, arts. 24(1)(c) & 27(3); CEDAW, art. 12(2).

⁶¹¹ CRPD, art. 28(1).

⁶¹² ASEAN, Ha Noi Declaration on the Enhancement of Welfare and Development of Women and Children, No. 9, Ha Noi, 28 October 2010.

⁶¹³ ASEAN, Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN (Mar. 1 2009).

⁶¹⁴ Constitution of the Republic of Philippines, art. XIII.

⁶¹⁵ Constitution of Malaysia, art. 8(a).

⁶¹⁶ Constitution of Brunei Darussalam, art. 83(4)(f).

⁶¹⁷ Constitution of Myanmar, art. 26(b).

⁶¹⁸ Constitution of Myanmar, art. 9(k).

⁶¹⁹ UDHR, art. 25(1).

⁶²⁰ ICESCR, arts. 1, 11 & 12.

⁶²¹ *Id., at*, art. 11(2).

⁶²² *Id., at*, art. 11.

⁶²³ Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), para. 6.

⁶²⁴ *Id., at*, para. 4.

⁶²⁵ *Id., at*, para. 8.

⁶²⁶ *Id.*

⁶²⁷ *Id., at*, para. 7.

⁶²⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), para. 8.

⁶²⁹ *Id., at*, para. 11.

⁶³⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2003).

⁶³¹ Resolution adopted by the General Assembly on the Right to Food, UA/RES/67/174.

⁶³² Resolution adopted by the General Assembly on the Right to Development 54/175, arts 8 & 12(a), A/RES/54/175.

⁶³³ UN Commission on Human Rights, Human Rights Resolution 2005/24: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, para. 17, 15 April 2005, E/CN.4/RES/2005/24.

⁶³⁴ United Nations Millennium Declaration, Resolution Adopted by the General Assembly, 18 September 2000, A/RES/55/2.

⁶³⁵ *Womah Mukong v. Cameroon*, Communication No. 458/1991, Human Rights Committee, U.N. Doc. CCPR/C/51/D/458/1991 (1994), available at <http://www1.umn.edu/humanrts/undocs/html/vws458.htm> (concerning detainees and deprivation of food or no access to adequate food); *Länsman et. al v. Finland*, Communication No. 511/1992, Human Rights Committee, U.N. Doc. CCPR/C/52/D/511/1992 (1994), available at <http://www1.umn.edu/humanrts/undocs/html/vws511.htm> (concerning indigenous groups and the destruction of their ancestral lands and thus food source); *Sawhoyamaya Indigenous Community v. Paraguay*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2006), Series C No. 146, (case concerning limited access to food as well as irregular and inadequate provision of food assistance from the government to

indigenous peoples, the Court found a violation of the right to life and to food); *Yakye Axa Indigenous Community v. Paraguay*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2005), Series C No 125, (case concerned loss of access to ancestral lands and thus means of subsistence; the Court obliged the state to adopt positive measures towards a dignified life, particularly when vulnerable groups were concerned); *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights (2001) (The Nigerian government violated the right of the Ogoni communities by destroying their food sources, the Commission stated that the government should neither destroy, nor contaminate food sources. The Commission found that although the right to food is not explicit in the African Charter, it is there implicitly in such provisions as the right to life, health and to economic, social and cultural development). See *Saramaka People v. Suriname*, I/A Court H.R., Preliminary Objections, Merits, Reparations and Costs, Judgment (2007), Series C No. 172. The Saramaka people are a tribal group, not indigenous to the region in question, but share similar characteristics with indigenous peoples, including a special relationship with their land and territories.

⁶³⁶ CRPD, arts. 25 & 28.

⁶³⁷ Refugee Convention, art. 20.

⁶³⁸ Stateless Persons Convention, art. 20.

⁶³⁹ African Charter on Human and Peoples' Rights, art. 16.

⁶⁴⁰ Arab Charter on Human Rights, arts. 38-39.

⁶⁴¹ American Declaration of the Rights and Duties of Man, art. XI.

⁶⁴² Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"), arts. 12 & 16.

⁶⁴³ Office of the High Commission for Human Rights, The Right to Adequate Food, Fact Sheet No. 34.

⁶⁴⁴ *Lantsova v. Fédération de Russie*, Communication No. 763/1997, Human Rights Committee, U.N. Doc. CCPR/C/74/D/763/1997 (2002), available at <http://www1.umn.edu/humanrts/undocs/763-1997.html>.

⁶⁴⁵ *Womah Mukong v. Cameroon*, Human Rights Committee, (1994).

⁶⁴⁶ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights (2001).

⁶⁴⁷ *Sawhoyamaxa Indigenous Community v. Paraguay*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2006), Series C No. 146; *Xákmok Kásek Indigenous Community v. Paraguay*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2010), Series C No. 214 .

⁶⁴⁸ *Xákmok Kásek Indigenous Community v. Paraguay*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2010), Series C No. 214; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2001), Series C No. 79 (2001); *Sawhoyamaxa Indigenous Community v. Paraguay*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2006), Series C No. 146; *Enxet-Lamenxay and Kayleyphapopyet (Riachito) v. Paraguay*, Case No. 11.713, Report No. 90/999, I/A Commission H.R.; *Yanomami v. Brazil*, Case No. 7615, Resolution 12/85, I/A Commission H.R., 8 March 1985.

⁶⁴⁹ *Enxet-Lamenxay and Kayleyphapopyet (Riachito) v. Paraguay*; *Sawhoyamaxa Indigenous Community v. Paraguay*; *Xákmok Kásek Indigenous Community v. Paraguay*.

⁶⁵⁰ UDHR, art. 25(1); Arab Charter on Human Rights, art. 38; American Declaration of the Rights and Duties of Man, art. XI.

⁶⁵¹ ICESCR, art. 11; CRC, art. 27(3).

⁶⁵² ASEAN, Ha Noi Declaration on the Enhancement of Welfare and Development of Women and Children, No. 9, Ha Noi, 28 October 2010.

⁶⁵³ UDHR, art. 25(1).

⁶⁵⁴ ICESCR, art. 11.

⁶⁵⁵ CRC, art. 27(3).

⁶⁵⁶ Arab Charter on Human Rights, art. 38.

⁶⁵⁷ American Declaration of the Rights and Duties of Man, art. XI.

⁶⁵⁸ Cairo Declaration on Human Rights in Islam, art. 17, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993).

⁶⁵⁹ *Id.*, at art. 3.

⁶⁶⁰ Matthew Craven notes that the right to adequate clothing is part of the right to an adequate standard of living that is "of paramount importance not least because at minimum levels it represents a question of

survival.” Craven, M *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, 1995, Clarendon Paperbacks, at p. 287.

⁶⁶¹ Committee on Economic, Social and Cultural Rights, *General Comment No. 14 on Article 12, The Right to the Highest Attainable Standard of Health*, U.N. Doc. E/C.12/2000/4 (2000), para. 3, available at <http://www.umn.edu/humanrts/gencomm/escgencom14.htm>.

⁶⁶² Committee on Economic, Social and Cultural Rights, *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, U.N. Doc. E/1996/22 (1996), para. 5, available at <http://www.umn.edu/humanrts/gencomm/epcomm6e.htm>.

⁶⁶³ CRC, art. 27.

⁶⁶⁴ *Id.*, at art. 5.

⁶⁶⁵ UDHR, art. 2. “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

⁶⁶⁶ See e.g. UDHR, art. 1.

⁶⁶⁷ James, S A Forgotten Right? The Right to Clothing in International Law, p. 3.

⁶⁶⁸ *Leyla Sahin v. Turkey*, Application no. 44774/98, European Court of Human Rights 2005-XI.

⁶⁶⁹ Human Rights Committee, Comm. no. 1928/2010: Human Rights Committee: views adopted by the Committee at its 108th session, 8-26 July 2013, 26 September 2013, CCPR/C/108/D/1928/2010.

⁶⁷⁰ The European Court of Human Rights’ jurisprudence diverges from this view. See e.g.: *Mann Singh v. France*, Application no. 24479/07, European Court of Human Rights 2008.

⁶⁷¹ Committee on Economic, Social and Cultural Rights, General Comment No. 4 (1991), para. 7.

⁶⁷² *Id.*, at para. 8.

⁶⁷³ Cambodia, Indonesia, Lao PDR, Philippines, Thailand, and Viet Nam.

⁶⁷⁴ ICESCR, art. 2(1).

⁶⁷⁵ CEDAW, art. 14(2)(h).

⁶⁷⁶ Constitution of the Philippines, art. XIII (9); Constitution of Viet Nam, arts. 32(1) & 59(3).

⁶⁷⁷ Constitution of the Philippines, art. XIII (9).

⁶⁷⁸ Constitution of the Philippines, art. XIII (10).

⁶⁷⁹ ICCPR, art. 17(1).

⁶⁸⁰ European Social Charter, art. 31; Additional Protocol to the European Social Charter, art. 4(2)(a).

⁶⁸¹ Charter of Fundamental Rights of the European Union, art. 34(3).

⁶⁸² Charter of the Organization of American States, art. 34(k).

⁶⁸³ American Declaration of the Rights and Duties of Man, art. XI.

⁶⁸⁴ CEDAW, arts. 14(2)(h) & 15(2); Maputo Protocol, art. 16. See also Committee on Economic, Social and Cultural Rights, *General Comment No. 16, Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights*, U.N. Doc. E/C.12/2005/3 (2005), para. 28, available at <http://www1.umn.edu/humanrts/gencomm/escgencom16.html>.

⁶⁸⁵ CRC, art. 27(3); African Charter on the Rights and Welfare of the Child, art. 20(2)(a).

⁶⁸⁶ European Social Charter (revised), art. 23; Additional Protocol to the European Social Charter, art. 4(2)(a); Committee on Economic, Social and Cultural Rights, General Comment No. 6 (1995).

⁶⁸⁷ Refugee Convention, art. 21.

⁶⁸⁸ CRPD, arts. 5(3) & 9(1)(a); European Social Charter (revised), art. 15(3). See also Committee on Economic, Social and Cultural Rights, *General Comment No. 5, Persons with disabilities*, U.N. Doc. HRI/GEN/1/Rev.6 at 24 (1995), paras. 15, 22, 33, available at <http://www.umn.edu/humanrts/gencomm/epcomm5e.htm>.

⁶⁸⁹ ICRMW, art. 43(1)(d); European Convention on the Legal Status of Migrant Workers, (ETS No. 093), entered into force May 1, 1983, art. 13.

⁶⁹⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 4 (1991), para. 7.

⁶⁹¹ Committee on Economic, Social and Cultural Rights, General Comment No. 4 (1991), para. 8.

⁶⁹² *Id.*, at para. 7.

⁶⁹³ African Commission on Human and Peoples’ Rights, Resolution on the right to adequate housing and protection from forced evictions, 52nd Ordinary Session, 2012, available at <http://www.achpr.org/sessions/52nd/resolutions/231/>.

⁶⁹⁴ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples’ Rights (2001).

⁶⁹⁵ *European Roma Rights Centre v Greece*, Complaint No. 15/2003, European Committee of Social Rights (2004), at para. 24.

⁶⁹⁶ *Id.*

⁶⁹⁷ *European Roma Rights Centre v. Portugal*, Complaint No. 61/2010, Decision on the Merits (2011), European Committee of Social Rights, at para. 37.

⁶⁹⁸ UDHR, art. 25(1).

⁶⁹⁹ AHRD, arts. 2 & 4.

⁷⁰⁰ ICESCR, arts. 12 (2)(d) & 9. Ratified by Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Viet Nam.

⁷⁰¹ CRC, arts. 23, 24 & 26; CEDAW, art. 12; CRPD, art. 9(1). Brunei Darussalam and ???

⁷⁰² Constitution of the Republic of Philippines, art. XIII; Constitution of Thailand, arts. 51-55; Constitution of Viet Nam, arts. 34 & 38; Constitution of Myanmar, art. 367; Constitution of Lao PDR, art. 25; Constitution of Indonesia, arts. 28H & 34; and Constitution of Cambodia, arts. 36, 46, & 72-75.

⁷⁰³ Constitution of the Philippines, art. XIII, sect. 11 & 13; Constitution of Thailand, arts. 51-55; Constitution of Cambodia, arts. 46, 72-74; Constitution of Indonesia, art. 34.

⁷⁰⁴ Constitution of Myanmar, art. 367; Constitution of Viet Nam, art. 38; Constitution of Cambodia, art. 36, Constitution of Lao PDR, art. 39.

⁷⁰⁵ Declaration on the Commitments for Children in ASEAN, Singapore, 2 August 2001; ASEAN, Ha Noi Declaration on the Enhancement of Welfare and Development of Women and Children, No. 9, Ha Noi, 28 October 2010; ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, Cebu, Philippines, 13 January 2007.

⁷⁰⁶ UDHR, art. 25(1).

⁷⁰⁷ The WHO's Declaration of Alma-Ata defines primary health care as "essential health care based on practical, scientifically sound and socially acceptable methods and technology made universally accessible to individuals and families in the community through their full participation and at a cost that the community and country can afford to maintain at every stage of their development in the spirit of self-reliance and self-determination. It forms an integral part both of the country's health system, of which it is the central function and main focus, and of the overall social and economic development of the community. It is the first level of contact of individuals, the family and community with the national health system bringing health care as close as possible to where people live and work, and constitutes the first element of a continuing health care process." See WHO, Declaration of Alma Ata, art. VIII, 6-12 September 1978.

⁷⁰⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), paras. 12 & 17. On aspects of the right to health and health-care facilities, such as availability, accessibility, acceptability, affordability and non-discrimination.

⁷⁰⁹ ICESCR, art. 12. The CESCR has elaborated on the this right to encompass the right to medical care as well as the underlying determinants of health in General Comment No. 14. See Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000).

⁷¹⁰ ICCPR, art. 6.

⁷¹¹ CRC, arts. 6, 19 & 24.

⁷¹² CEDAW, arts. 11, 12 & 14(2).

⁷¹³ ICERD, art. 5.

⁷¹⁴ European Social Charter, art. 4.

⁷¹⁵ African Charter on Human and Peoples' Rights, art. 16.

⁷¹⁶ Arab Charter on Human Rights, arts. 38-39.

⁷¹⁷ *Id.*, at art. 40.

⁷¹⁸ American Declaration of the Rights and Duties of Man, art. XI.

⁷¹⁹ UN Commission on Human Rights, Human Rights Resolution 2005/24: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, 15 April 2005, E/CN.4/RES/2005/24. The Commission calls upon states to guarantee that the right of everyone to the enjoyment of the highest attainable standard of physical and mental health will be exercised without discrimination of any kind; to pay attention to the health of vulnerable groups, including positive measures, and calls on them to recognize the particular needs of people with disabilities by reflecting their needs in national health and social policies and presses for community-based health care for them.

⁷²⁰ *María Mamérita Mestanza Chávez v. Peru*, No. 71/03, Case 12,191, Inter-American Commission on Human Rights (2003) available at <http://www1.umn.edu/humanrts/cases/71-03.html>. In this case, an indigenous woman was forcibly sterilized in a state hospital and then denied medical care for her post-operation infection from which she died.

⁷²¹ CRPD, arts. 25 & 28.

⁷²² United Nations Declaration on the Rights of Indigenous Peoples, arts. 7, 21, 23-24; ILO Indigenous and Tribal Peoples Convention, art. 25 (affirms the commitment of governments to ensure adequate health services to indigenous and tribal peoples, and maintains that such services must be community-based, and indigenous and tribal peoples must be provided with resources that allow them to design and deliver such services under their own responsibility and control). For regional jurisprudence regarding the right of indigenous and tribal peoples to social services and medical care, see *Yanomami v. Brazil*, Case No. 7615, Resolution 12/85, I/A Commission H.R., 8 March 1985; *Lamenxay and Kayleyphapopyet (Riachito) v. Paraguay*, Case No. 11.713, Report No. 90/999, I/A Commission H.R.; *Sawhoyamaya Indigenous Community v. Paraguay*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2006), Series C No. 146; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2001), Series C No. 79 (2001); *Xákmok Kásek Indigenous Community v. Paraguay*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2010), Series C No. 214; *Yakye Axa Indigenous Community v. Paraguay*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2005), Series C No 125.

⁷²³ *Lantsova c. Fédération de Russie*, Human Rights Committee (2002).

⁷²⁴ CRC, art. 24(2)(c); CEDAW, art. 14(2)(h).

⁷²⁵ CRPD, art. 28(2)(a).

⁷²⁶ ASEAN, Ha Noi Declaration on the Enhancement of Welfare and Development of Women and Children, No. 9, Ha Noi, 28 October 2010

⁷²⁷ Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN (Mar. 1 2009).

⁷²⁸ Ha Noi Declaration on the Enhancement of Welfare and Development of Women and Children, at 9.

⁷²⁹ Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN, at No. 2.

⁷³⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2003), para. 11.

⁷³¹ For the connection to the right to health, see e.g. UN Commission on Human Rights, Human Rights Resolution 2005/24: The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, 15 April 2005, E/CN.4/RES/2005/24. The Commission on Human Rights affirmed that access to a sufficient amount of safe, clean water for personal and domestic use “is fundamental to the realization of the right of everyone to the enjoyment of the highest attainable standard of health.” Also see, *Free Legal Assistance Group and others v. Zaire*, Communications 25/89, 47/90, 56/91 and 100/93, African Commission on Human and Peoples’ Rights, Ninth Annual Activity Report (1995-1996), Annex VII, available at http://www.achpr.org/files/activity-reports/9/achpr1819e02_actrep9_19951996_eng.pdf (the African Commission found that the right to enjoy the best attainable state of physical and mental health in article 16 of the Charter, the Government to provide basic services such as safe drinking water, electricity and medicine); *Mapuche Paynemil and Kaxipayiñ Communities v. Argentina*, Case No. 12.010, I/A Commission H.R. (2013) (Inter-American Commission on Human Rights found a failure by the Argentine state to comply with a court decision ordering the provision of drinking water to an indigenous population exposed to water contaminated by heavy metals. Access to necessary fresh water was considered a basic human right, and the Government was found in neglect of its duty to safeguard the health of the population).

⁷³² CRPD, art. 28.

⁷³³ CEDAW, art. 14(2). See also CEDAW, *General Recommendation No. 24: Article 12 of the Convention (Women and Health)*, U.N. Doc. A/54/38/Rev.1 (1999), para.28.

⁷³⁴ CRC, art. 24. See also CRC, General comment No. 7 on implementing child rights in early childhood, CRC/C/GC/7/Rev.1 (2006).

⁷³⁵ United Nations Declaration on the Rights of Indigenous Peoples, at art. 21. For relevant regional jurisprudence, see e.g.: *Xákmok Kásek Indigenous Community v. Paraguay*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2010), Series C No. 214 (Inter-American Court of Human Rights dealt with the state’s international responsibility for the lack of a guarantee regarding the indigenous community’s right to their ancestral land. As a result of the community being unable to access the property, its members were kept in a vulnerable state as far as food, medicine and sanitary needs were concerned. The State did not provide the basic assistance necessary for protecting the community’s right to a dignified existence, and thus violated the

right to life. The water supplied by the state was not sufficient to meet all basic needs per person and the government failed to provide the community with water of sufficient quantities and adequate quality). The Inter-American Commission on Human Rights has recently admitted a case from Chile concerning the Diaguita Huascoalinos indigenous population's right to water and the impact of mining upon wetlands and freshwater resources on their ancestral lands. See: <http://protestbarrick.net/article.php?id=570>.

⁷³⁶ ILO Convention concerning Occupational Health Services (No. 161), art. 5(b).

⁷³⁷ Benvenisti, E Water, Right to, International Protection, October 2010, May Planck Encyclopedia of Public International Law.

⁷³⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2003), para. 11.

⁷³⁹ Human Rights Committee, *General Comment No. 23 on Article 2: the Rights of Minorities*, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994), available at <http://www1.umn.edu/humanrts/gencomm/hrcom23.htm>.

⁷⁴⁰ Benvenisti, *supra*.

⁷⁴¹ See e.g., United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, at art. 19; The International Finance Corporation Sustainability Framework, Performance Standard 7, 1 January 2012.

⁷⁴² UDHR, art. 25(1).

⁷⁴³ Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2003), para. 2.

⁷⁴⁴ *Id.*, at para. 10.

⁷⁴⁵ *Id.*, at para. 11.

⁷⁴⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), para. 15.

⁷⁴⁷ The human right to water and sanitation: resolution / adopted by the General Assembly, 3 August 2010, U.N. Doc. A/RES/64/292; Resolution of the General Assembly on the Right to Development 54/175, 17 August 2000, U.N. Doc. A/RES/54/175, at para.12.

⁷⁴⁸ Resolution of the General Assembly on the Right to Development 54/175, 17 August 2000, A/RES/54/175.

⁷⁴⁹ United Nations Millennium Declaration, Resolution Adopted by the General Assembly, 18 September 2000, A/RES/55/2. This was reaffirmed by the Johannesburg Plan of Implementation of the World Summit on Sustainable Development. Johannesburg Plan of Implementation of the World Summit on Sustainable Development (2002).

⁷⁵⁰ European Social Charter, art. 31(1).

⁷⁵¹ "Article 31 (1) guarantees access to adequate housing, which means a dwelling which is structurally secure; safe from a sanitary and health point, i.e., it possesses all basic amenities, such as water, heating, waste disposal, sanitation facilities, electricity; not overcrowded and with secure tenure supported by law." *European Roma Rights Centre v. Italy*, Complaint No. 27/2004, European Committee of Social Rights, Decision on the Merits, 7 December 2005.

⁷⁵² African Charter on the Rights and Welfare of the Child, art. 14.

⁷⁵³ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa [*Maputo Protocol*], art. 15.

⁷⁵⁴ Arab Charter on Human Rights, arts. 38-39.

⁷⁵⁵ American Declaration of the Rights and Duties of Man, art. XI.

⁷⁵⁶ *Mapuche Paynemil and Kaxipayiñ Communities v. Argentina*, Case No. 12.010, I/A Commission H.R. (2013) *Free Legal Assistance Group and others v. Zaire*, African Commission on Human and Peoples' Rights (1995); *Xákmok Kásek Indigenous Community v. Paraguay*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2010), Series C No. 214.

⁷⁵⁷ ASEAN Declaration on Environmental Sustainability (20 Nov. 2007), available at <http://www.asean.org/news/item/asean-declaration-on-environmental-sustainability>.

⁷⁵⁸ Declaration of the United Nations Conference on the Human Environment, Adopted 16 June 1972 by the United Nations Conference on the Human Environment ["Stockholm Declaration"].

⁷⁵⁸ Ksentini, F Report prepared for Commission on Human Rights Review of Further Developments in Fields with which the Sub-Commission Has Been Concerned, Annex I E/CN.4/Sub.2/1994/9 (6 July 1994) available at http://www1.umn.edu/humanrts/demo/HRandEnvironment_Ksentini.pdf [hereinafter "Ksentini Report"].

⁷⁵⁹ Convention on Biological Diversity, adopted 22 May 1992, effective 29 Dec. 1993.

⁷⁶⁰ Convention on the International Trade in Endangered Species of Wild Flora and Fauna, adopted 22 May 1992, effective 29 Dec. 1993.

⁷⁶¹ Framework Convention on Climate Change, adopted 9 May 1992, effective 21 Mar. 1994.

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- ⁷⁶² Constitution of Cambodia, art. 59; Constitution of Indonesia, art. 28H; Constitution of Lao PDR, art. 19; Constitution of Myanmar, art. 45; Constitution of Thailand, arts. 66, 67, 73, 85 & 290.
- ⁷⁶³ Constitution of Indonesia, art. 28H.
- ⁷⁶⁴ ASEAN Charter, 2007, art. 1(9).
- ⁷⁶⁵ Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN (Mar. 1 2009).
- ⁷⁶⁶ ASEAN Declaration on Environmental Sustainability (20 Nov. 2007).
- ⁷⁶⁷ Anton, D & Shelton, D *Environmental Protection and Human Rights*, 2011, at p. 131-132.
- ⁷⁶⁸ UDHR, art. 25.
- ⁷⁶⁹ ICESCR, art. 12(2)(b).
- ⁷⁷⁰ Stockholm Declaration on the Human Environment, 16 June 1972.
- ⁷⁷¹ Knox, J *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, U.N. Doc. A/HRC/22/43 (24 Dec. 2012), para. 12; Anton & Shelton, *supra*, at p. 149, noting that the constitutions of over 100 states recognize a right to a clean environment.
- ⁷⁷² Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, [“Aarhus Convention”]. Adopted 25 June 1998, Effective 30 Oct. 2001, approved on behalf of the European Community by Council Decision 2005/370/EC (17 Feb. 2005), at art. 1.
- ⁷⁷³ The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, Adopted 16 Sep. 1987, effective 1 Jan. 1989; U.N. Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), reprinted in 21 I.L.M. 1261, 1308 (1982) (article 194(2) provides that “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment.”).
- ⁷⁷⁴ *Gabcikovo-Nagymaros Project*, I.C.J. (25 Sep. 1997); *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples’ Rights (2001) (the African Commission found that the Charter’s guarantee of the right to a healthy environment or “a general satisfactory environment” imposed a number of “clear obligations upon a government” which it framed as obligations to respect, protect, and fulfil).
- ⁷⁷⁵ Anton & Shelton, *supra*, at p. 132-133.
- ⁷⁷⁶ *Id.*, at 133.
- ⁷⁷⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), para. 11 (“The Committee interprets the right to health ...as an inclusive right extending not only to timely and appropriate health care but also to the determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.”)
- ⁷⁷⁸ From the perspective of advocates for a stand-alone right, these linkages should not negate a stand-alone right, since all human rights are linked. See Vienna Declaration, para. I(5); Rio Declaration at 25; Draft Principles on Human Rights and the Environment (1994) at 2.
- ⁷⁷⁹ *Gabcikovo-Nagymaros Project*, I.C.J. (25 Sep. 1997).
- ⁷⁸⁰ *Öneryıldız v. Turkey*, European Court of Human Rights (2004), *Lopez Ostra v. Spain*, European Court of Human Rights (1994).
- ⁷⁸¹ Shelton, D *Human Rights and the Environment: Jurisprudence of Human Rights Bodies*, Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, 14-16 January 2002, Geneva: Background Paper No. 2.
- ⁷⁸² See *Beanal v. Freeport McMoran, Inc.*, 197 F.3d 161, 167 & n.6 (5th Cir. 1999) (U.S.A.) (rejecting argument that there was right to healthful environment at customary international law, in part on ground that precise contours of any such obligation remained entirely unclear); Luis E. Rodríguez-Rivera, *Is the Human Right to the Environment Recognized under International Law? It Depends on the Source*, 12 COLO. J. INT’L ENVTL. L. & POL’Y 1 (2001) (responding to criticism on the idea of a right to the environment); Cf. Justice Susan Glazebrook, *Human Rights in the Pacific, Human Rights and the Environment*, 40 VICT. U. WELLINGTON L. REV. 2 (2009).
- ⁷⁸³ Freda Talao, *Papua New Guinea: Country Report on Human Rights*, 40 VICT. U. WELLINGTON L. REV. 1 (2009).
- ⁷⁸⁴ Anton & Shelton, *supra* at 133.
- ⁷⁸⁵ Luis E. Rodríguez-Rivera, *The Human Right to Environment and the Peaceful Use of Nuclear Energy*, 35 DENV. J. INT’L L. & POL’Y 17 (2006).
- ⁷⁸⁶ Anton & Shelton, *supra* at 137.

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- ⁷⁸⁷ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters [“Aarhus Convention”].
- ⁷⁸⁸ Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I), Adopted by the General Assembly 12 Aug. 1992.
- ⁷⁸⁹ ILO Indigenous and Tribal Peoples Convention (No. 169).
- ⁷⁹⁰ Knox, J Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/22/43 (24 Dec. 2012), at para 32,
- ⁷⁹¹ *Saramaka People v. Suriname*, I/A Court H.R., Preliminary Objections, Merits, Reparations and Costs, Judgment (2007), Series C No. 172; *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples’ Rights (2001); *Taskin v. Turkey*, Application No. 46117/99, European Court of Human Rights 2004.
- ⁷⁹² See Knox, *supra* para. 46.
- ⁷⁹³ Civil Society Organisations and People’s Movements Participating in the Civil Society Forum on ASEAN Human Rights Declaration, Joint submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration, Sep. 12, 2012, available at <http://www.forum-asia.org/?p=15341>.
- ⁷⁹⁴ World Health Organization, *Defining sexual health: Report of a technical consultation on sexual health*, 28–31 January 2002.
- ⁷⁹⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), para. 12.
- ⁷⁹⁶ *Id.*
- ⁷⁹⁷ See generally 7th ASEAN Summit Declaration on HIV/AIDS Brunei Darussalam, 5 November 2001; 9th ASEAN Summit 2003; Declaration on the Elimination of Violence against Women in the ASEAN Region; Hanoi Call to Action for Children and HIV/AIDS in East Asia and the Pacific Region, March 2006; ASEAN Vientiane Action Programme; ASEAN Declaration of Commitment: Getting to Zero New HIV Infections, Zero Discrimination, Zero AIDS-Related Deaths.
- ⁷⁹⁸ Under the CRC and CEDAW, which all ASEAN member states have ratified, states must provide access to family planning education and services. See CRC, art. 24(2)(f); CEDAW, art. 10(h).
- ⁷⁹⁹ UDHR, art. 25(2); ICESCR, art. 12(2)(a); CRC, arts. 23 & 24; African Charter on the Rights and Welfare of the Child, art. 14.
- ⁸⁰⁰ CRPD, art. 25.
- ⁸⁰¹ Vienna Declaration, para. 24.
- ⁸⁰² ICRMW, arts. 28, 43 & 45.
- ⁸⁰³ United Nations Declaration on the Rights of Indigenous Peoples, art. 24(2).
- ⁸⁰⁴ Constitution of the World Health Organization, International Health Conference held in New York from 9 June to 22 July 1946, preamble.
- ⁸⁰⁵ Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Viet Nam.
- ⁸⁰⁶ CRC, arts. 24 & 23(3) regarding children with disabilities; CEDAW, art. 12; CRPD, art. 25 and ICRMW, art. 25, same right to health as nationals
- ⁸⁰⁷ Constitution of Cambodia, art. 72; Constitution of Indonesia, art. 28H(1); Constitution of Lao PDR, art. 25, Constitution of Myanmar arts. 28 & 367; Constitution of the Philippines, art. III, sect. 11; Constitution of Thailand, arts. 51 & 80; Constitution of Viet Nam, arts. 38 & 58.
- ⁸⁰⁸ Constitution of Cambodia, art. 48; Constitution of Lao PDR, art. 25; Constitution of Thailand, art. 52.
- ⁸⁰⁹ Constitution of Lao PDR, art. 25; Constitution of Viet Nam, art. 58.
- ⁸¹⁰ Constitution of Cambodia, art. 74; Constitution of the Philippines, art. III, sect. 13; Constitution of Thailand, art. 54 (right to welfare and appropriate aid); Constitution of Viet Nam, art. 59(2).
- ⁸¹¹ Constitution of Viet Nam, arts. 37(3) & 59(2).
- ⁸¹² Constitution of Lao PDR, art. 25; Constitution of Cambodia, art. 72; Constitution of Viet Nam, art. 58(1).
- ⁸¹³ Constitution of Viet Nam, art. 58(1).
- ⁸¹⁴ Constitution of Cambodia, art. 72; Constitution of Lao PDR, art. 25; Constitution of Thailand, art. 51.
- ⁸¹⁵ Constitution of the World Health Organization, International Health Conference held in New York from 9 June to 22 July 1946.
- ⁸¹⁶ UDHR, art. 25.
- ⁸¹⁷ ICESCR, art. 12.

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- ⁸¹⁸ CRC, art. 17; African Charter on the Rights and Welfare of the Child, art. 14; American Declaration on Rights of Man, art. V(1).
- ⁸¹⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), paras. 3 & 8.
- ⁸²⁰ *Id.*, at para. 12.
- ⁸²¹ *Id.*, at para. 12(b)(iii).
- ⁸²² *Id.*, at para. 12(c) & 12(d); Vienna Declaration, para. 12(c).
- ⁸²³ United Nations Declaration on the Rights of Indigenous Peoples, art. 24.
- ⁸²⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), para. 12(b)(iv); CRC, arts. 16 & 23(4).
- ⁸²⁵ CEDAW, preamble & art. 10(h).
- ⁸²⁶ *Gretel Artavia Murillo v. Costa Rica*, Case 12.361, Inter-Am. Ct. H.R., Report No. 85/10 (2011), available at <http://www.cidh.oas.org/demandas/12.361Eng.pdf>.
- ⁸²⁷ *Id.*, at art. 12(2).
- ⁸²⁸ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa [*Maputo Protocol*], art. 5.
- ⁸²⁹ CECSR, General Comment No. (2000), para 12.2(c).
- ⁸³⁰ Political Declaration on HIV/AIDS, G.A. Res. 60/262, P 26, U.N. GAOR, 60th Sess., A/RES/60/262 (2006); Political Declaration on HIV and AIDS: Intensifying our Efforts to Eliminate HIV/AIDS, G.A. Res. 65/277, P 43, U.N. GAOR, 65th Sess., U.N. Doc. A/RES/65/277 (2011).
- ⁸³¹ ICESCR, art. 9; CRC, art. 26.
- ⁸³² CEDAW, art. 11(2). CEDAW, art. 11(1) also specifies that social security is particularly required in cases of particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave.
- ⁸³³ Civil Society Organisations and People's Movements Participating in the Civil Society Forum on ASEAN Human Rights Declaration, Joint submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration, Sep. 12, 2012, available at <http://www.forum-asia.org/?p=15341>.
- ⁸³⁴ UDHR, art. 25(2).
- ⁸³⁵ UDHR, art. 25(1)
- ⁸³⁶ ICESCR & ICERD: Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam; CRPD: All member states except for Brunei Darussalam and Viet Nam, which have signed but not yet ratified the convention.
- ⁸³⁷ ICESCR, art. 2(2); ICERD, art. 5(e)(iv); CEDAW, art. 11(1); CRPD, art. 28(2); and ICRMW, art. 27(1).
- ⁸³⁸ ICESCR, art. 2(1).
- ⁸³⁹ Constitution of Indonesia, arts. 28H(3) & 34(2); Constitution of Cambodia, arts. 36 & 75; Constitution of Lao PDR, art. 28; Constitution of Malaysia, art. 15; Constitution of Myanmar, art. 96(9q); Constitution of the Philippines, art. XV, sect. 4; Constitution of Thailand, sect. 84(7); Constitution of Viet Nam, arts. 34 & 59(2).
- ⁸⁴⁰ UDHR, art. 22.
- ⁸⁴¹ UDHR, art. 25(1).
- ⁸⁴² ICESCR, art. 9.
- ⁸⁴³ ICESCR, art. 10(2).
- ⁸⁴⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 19 (2008), para. 11.
- ⁸⁴⁵ *Id.*, at paras. 13-21.
- ⁸⁴⁶ *Id.*, at paras. 22-27.
- ⁸⁴⁷ *Id.*, at para. 55.
- ⁸⁴⁸ Refugee Convention, art. 24; CEDAW, art. 11; ILO Convention on Social Security, art. 19.
- ⁸⁴⁹ Refugee Convention, art. 24; CEDAW, art. 11; ILO Convention on Social Security, art. 25; African Charter on Human and Peoples' Rights, art. 18; Arab Charter on Human Rights, art. 33; and the European Social Charter (revised), art. 23.
- ⁸⁵⁰ Refugee Convention, art. 24; ILO Convention on Social Security, art. 53; CEDAW, art. 11; African Charter on Human and Peoples' Rights, art. 18; Arab Charter on Human Rights, art. 33.
- ⁸⁵¹ Refugee Convention, art. 24; ICESCR, art. 10 (obliging states to provide mothers paid leave before and after childbirth); ILO Convention on Social Security, art. 46 (same requirement); CEDAW, art. 11 (same requirement); ILO Convention on Maternity Protection (Revised) (specifies paid leave of at least 14 weeks and daily breaks for breastfeeding), *cf.* European Social Charter (revised), art. 8; Arab Charter on Human Rights, art. 33.

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- ⁸⁵² Refugee Convention, art. 24 (child survivors); CRC, art. 26; ILO Convention on Social Security, art. 61 (child survivors); on the Rights and Welfare of the Child, art. 18 (child support); Arab Charter on Human Rights, art. 33; European Social Charter (revised), art. 17.
- ⁸⁵³ European Social Charter (revised), art. 12; Protocol of San Salvador, arts. 9 & 15.
- ⁸⁵⁴ African Charter on Human and Peoples' Rights, art. 18.
- ⁸⁵⁵ Arab Charter on Human Rights, art. 36.
- ⁸⁵⁶ American Convention on Human Rights, art. 17(5); African Charter on the Rights and Welfare of the Child, art. 18..
- ⁸⁵⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 19 (2008), para. 2 ("3. Social security, through its redistributive character, plays an important role in poverty reduction and alleviation..."); see also Charter of the Association of Southeast Asian Nations, at art. 1(6), Nov. 20, 2007 [hereinafter *ASEAN Charter*] ("[The Purposes of ASEAN are: To alleviate poverty ...]").
- ⁸⁵⁸ "Five Pensioners" Case, I/A Court H.R., Judgment (2003), Series C No. 98; *Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru*, I/A Court H.R., Judgment of Nov. 24, 2006, Series C No. 158.
- ⁸⁵⁹ *Ichtigiaroglou v. Greece*, Application No. 12045/06 (2008), European Court of Human Rights, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87098>.
- ⁸⁶⁰ CRC, art. 28(2). Singapore has not entered a reservation against art. 28(2) but has declared that, "the judicious application of corporal punishment in the best interest of the child." See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en
- ⁸⁶¹ UDHR, art. 26(3); ICESCR, art. 13(3).
- ⁸⁶² ICESCR, art. 13(2)(c), ratified by Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Viet Nam. UN Educational, Scientific and Cultural Organisation (UNESCO), Convention Against Discrimination in Education, Dec. 14, 1960, entered into force May 22, 1962, at art 4(c), ratified by Brunei Darussalam, Indonesia and the Philippines.
- ⁸⁶³ ICESCR, art. 13(2)(e); UNESCO Convention against Discrimination in Education, art. 4(d).
- ⁸⁶⁴ CRC, art. 28(1)(d) & (e).
- ⁸⁶⁵ CRC, art. 28(3).
- ⁸⁶⁶ ICESCR, art. 13; CRC, arts. 28 & 29.
- ⁸⁶⁷ Reservation against CRC, art. 28(a). CRC ratification status is available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.
- ⁸⁶⁸ Brunei Darussalam maintains a sweeping reservation against any provision in the CRC or CEDAW that conflicts with the constitution and the beliefs and principles of Islam. This reservation has been rejected by several states parties as acting to defeat the purpose and object of the Conventions, and allowing national law to be used as a grounds for escaping Brunei's international treaty obligations.
- ⁸⁶⁹ CEDAW, art. 10.
- ⁸⁷⁰ ICERD, arts. 5 & 7. Ratified by the same ASEAN member states who have also ratified the ICCPR and the ICESCR: Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Viet Nam.
- ⁸⁷¹ UNESCO Convention against Discrimination in Education, ratification information available at <http://www.unesco.org/eri/la/convention.asp?KO=12949&language=E&order=alpha>.
- ⁸⁷² Constitution of the Philippines, arts. II & XIV; Constitution of Cambodia, arts. 48, 65-68; Constitution of Indonesia, arts. 28 & 31; Constitution Lao PDR, art. 22; Constitution of Malaysia, arts. 12 & 94; Constitution of Myanmar, arts. 22, 28, 366 & 368; Constitution of Viet Nam, arts. 37 & 61; Constitution of Thailand, arts. 49, 50, 52 & 73.
- ⁸⁷³ ASEAN, Declaration on the Commitments for Children in ASEAN, Singapore, 2 August 2001, at 11 & 12.
- ⁸⁷⁴ ASEAN, Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children, Ha Noi, 28 October 2010, at 18 .
- ⁸⁷⁵ ASEAN, Resolution on the ASEAN Plan of Action for Children, Manila, Philippines, 2 December 1993.
- ⁸⁷⁶ Committee on Economic, Social and Cultural Rights, *General Comment No. 13 on Article 13: The right to education*, U.N. Doc. E/C. 12/1999/10 (1999), para. 1, available at <http://www.umn.edu/humanrts/gencomm/escgencom13.htm>.
- ⁸⁷⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 11 on Article 14: Plans of action for primary education*, U.N. Doc. E/C. 12/1999/4 (1999), para. 2, available at <http://www.umn.edu/humanrts/gencomm/escgencom11.htm>.

⁸⁷⁸ UDHR, art. 26.

⁸⁷⁹ UNESCO Convention against Discrimination in Education, art. 3 (non-discrimination in education), art. 4 (equal opportunity, access primary, secondary and tertiary education, and quality of education), & art. 5 (education to promote human rights and the rights of parents regarding their child's education); ICESCR, arts 13 & 14.

⁸⁸⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 13 (1999), para. 4.

⁸⁸¹ Committee on Economic, Social and Cultural Rights, General Comment No. 11 (1999), paras. 8 & 9.

⁸⁸² CRC, arts. 28 & 29; ICERD, arts. 5 & 7; CEDAW, arts. 10 & 14; CRPD, art. 24, (ICCPR recognizes parent's right to determine religious and moral education of children); *ICRMW* arts. 12(4) & 30 (Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned); 1956 Stateless Persons Convention, art. 22; Refugee Convention, art. 22 (stateless persons and refugees have same rights as nationals with regards to primary education, and are entitled to the same treatment as aliens in similar circumstances for other types of education) United Nations Declaration on the Rights of Indigenous Peoples, General Assembly Resolution, adopted Oct. 2, 2007, U.N. Doc. A/RES/61/295, at art. 16.

⁸⁸³ Arab Charter on Human Rights, arts. 40 & 41; American Declaration of the Rights and Duties of Man, art. 12; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador", arts. 13 & 1; African Charter on Human and Peoples' Rights, art. 17; The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, art. 12; African Charter on the Rights and Welfare of the Child, art. 11; European Convention on Human Rights, art. 2; European Social Charter, arts. 7(3)-(4), 9, 10, 15(1), & 17.

⁸⁸⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 13 (1999), para. 1.

⁸⁸⁵ *Id.*, at para. 6.

⁸⁸⁶ *Id.*, at paras. 43 & 45.

⁸⁸⁷ *Id.*, at para. 31.

⁸⁸⁸ Report of the Special Rapporteur on the right to education, Kishore Singh, A/HRC/23/25, May 10, 2013, at p. 13, available at:

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.35_en.pdf. Also see *Brown v. Board of Education* (US Supreme Court, 1954, 1955) The Supreme Court ruled that separate educational facilities for white and black children are "inherently unequal". Even where physical facilities and other objective factors are equal, a segregated school system denies equal educational opportunities to the minority group. The European Court of Human Rights has also made a number of decisions regarding segregation and discrimination against the Roma in education. See *Case of Horvath and Kiss v Hungary* [2013], ECHR Application no. 11146/11.

⁸⁸⁹ *International Association Autism Europe vs. France*, Complaint No. 13/2002. European Committee on Social Rights, Nov. 4, 2003, available at

http://www.coe.int/t/dghl/monitoring/socialcharter/complaints/CC13Merits_en.pdf.

⁸⁹⁰ Report of the Special Rapporteur on the right to education, A/HRC/23/25, 10 May 2013, at p. 15.

⁸⁹¹ See *Id.* In relation to the Belgian Linguistic Case (Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium), Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, European Court of Human Rights, Jun. 23, 1968. See also Report of the Special Rapporteur on the right to education, A/HRC/23/25, 10 May 2013, at p. 49.

⁸⁹² UDHR, art. (1) "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

⁸⁹³ Arab Charter on Human Rights, art. 25.

⁸⁹⁴ The Vienna Declaration cautions that "[w]hile the significance of ... cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms". The UNESCO Universal Declaration on Cultural Diversity, adopted 2 November 2001, art 4, states that no one may invoke cultural diversity to infringe upon human rights guaranteed by international law or to limit their scope.

⁸⁹⁵ CEDAW, arts. 11, 12 & 14(2).

⁸⁹⁶ Committee on Economic, Social and Cultural Rights, *General Comment No. 21 on Article 15: Right of everyone to take part in cultural life*, U.N. Doc. E/C.12/GC/21 (2009), para. 19, available at <http://www1.umn.edu/humanrts/gencomm/escgencom21.html>.

⁸⁹⁷ ICESCR, art. 15; ICCPR, art. 27. Both covenants have been ratified by Cambodia, Indonesia, Lao PDR, the Philippines, Thailand and Viet Nam.

⁸⁹⁸ CRC, arts. 30 (minorities) & 31 (general right to a cultural life).

⁸⁹⁹ CRPD, arts. 30(1) & 30(4). Of the ASEAN member states, only Brunei Darussalam and Viet Nam are not yet state parties to the CRPD.

⁹⁰⁰ Constitution of Myanmar, arts. 354 & 365; Constitution of Indonesia, art. 28C.

⁹⁰¹ Constitution of Viet Nam, art. 60(1) (“The State and the society shall take care of the construction and development of the Vietnamese culture, which is modern and deeply imbued with the national identity, and absorbs the mankind’s cultural quintessence.”); Constitution of Lao PDR, art. 23, (“The State promotes preservation of the national culture which is representative of the fine tradition of the country and its ethnic people..”).

⁹⁰² Constitution of Indonesia, art. 32; Constitution of Lao PDR, art. 8; Constitution of the Philippines, art. XIV, sect. 17; Constitution of Singapore, art. 152 (minorities and special position of Malays); Constitution of Thailand, art. 66.

⁹⁰³ ASEAN Declaration on Cultural Heritage, July 2000, arts 8 & 9.

⁹⁰⁴ Declaration on the Commitments for Children in ASEAN, Singapore, 2 August 2001, at Nos. 3-4.

⁹⁰⁵ UDHR, arts. 22 & 27(2); ICCPR, arts. 1(1) & 27; ICESCR, arts. 1(1), 3, 6(2) & 15; African Charter on Human and Peoples’ Rights, arts. 17(2)(3) & 18(2); African Charter on Human and Peoples’ Rights, arts. 17(2)(3) & 18(2); Arab Charter on Human Rights, arts. 25 & 42; American Declaration of the Rights and Duties of Man art. XIII(1)(2); and San Salvador Protocol, art. 14(1).

⁹⁰⁶ Charter of Fundamental Rights of the European Union, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (OJ C 364/01), at arts. 13 & 22. *Chapman v. United Kingdom*, Application No. 27238/95, European Court of Human Rights, 2001-1; *G and E v. Norway*, Application Nos. 9278/81 and 9415/81, European Court of Human Rights 23 October 1983.

⁹⁰⁷ Committee on Economic, Social and Cultural Rights, *General Comment No. 21* (2009), paras. 11-13; see also definitions of “culture” and “cultural heritage” in the ASEAN Declaration on Cultural Heritage (July 2000), available at <http://www.aseansec.org/641.htm>; Collective Dimensions of the Right to Take Part in Cultural Life, 2, U.N. Doc. E/C.12/40/17, 9 May 2008, submitted by Mr. Ephraim Nimni to the Comm. on Econ., Soc. and Cultural Rights, Fortieth Session, available at <http://www2.ohchr.org/english/bodies/cescr/docs/discussion/EphraimNimni.pdf> (culture is “the distinctive set of ideas, social behaviour, way of life and patterns of communication of a particular society or people”, id. at 2.).

⁹⁰⁸ The term “intellectual property rights” in this document is shorthand for the material and moral rights of authors and creators recognized in instruments such as UDHR. These human rights are not necessarily the same as the temporal rights afforded by a State’s patent or copyright regime. For a discussion on this distinction, see Committee on Economic, Social and Cultural Rights, *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant)*, U.N. Doc. E/C.12/GC/17 (2005), available at <http://www1.umn.edu/humanrts/gencomm/escgencom17.html>.

⁹⁰⁹ Committee on Economic, Social and Cultural Rights, *General Comment No. 21* (2009), paras. 2-3.

⁹¹⁰ *Id.*

⁹¹¹ United Nations Declaration on the Rights of Indigenous Peoples, arts. 5, 8, 10, 11, 12, 13, 15, 25, 26, 29, 31 & 32.

⁹¹² ILO, Indigenous and Tribal Peoples Convention (No. 169).

⁹¹³ *Centre for Minority Rights Development (Kenya) v. Kenya*, Communication 276/03, African Commission on Human and Peoples’ Rights, Twenty-Seventh Annual Activity Report (2009), Annex V, p. 109, available at http://www.achpr.org/files/activity-reports/27/achpr46eo7_actrep27_2009_eng.pdf (Feb. 10, 2010).

⁹¹⁴ *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2001), Series C No. 79 (2001); *Saramaka Peoples v. Suriname*, I/A Court H.R., Preliminary Objections, Merits, Reparations and Costs, Judgment (2007) Series. C No. 172 (concerning not an indigenous, but a minority population’s rights to property and culture).

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- ⁹¹⁵ *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Report No 40/04, I/A Commission H.R., Merits (2004); *Kichwa Peoples of Sarayaku Cmty. v. Ecuador*, I/A Court. H.R., Merits and Reparations, Judgment (2012). Series C , No.245.
- ⁹¹⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 21 (2009).
- ⁹¹⁷ ASEAN Declaration on Cultural Heritage, art. 3.
- ⁹¹⁸ CESCR, General Comment No. (2009).
- ⁹¹⁹ ICCPR, arts. 1(1) & 27; ICESCR, arts. 1(1) & 15(1); and CRC, arts. 6, 19, 24 & 27.
- ⁹²⁰ ICESCR, art. 2.
- ⁹²¹ Committee on Economic, Social and Cultural Rights, General Comment no. 3 (1990), para. 9.
- ⁹²² A non-national refers to “any individual who is not a national of a State in which he or she is present.” U.N. Declaration on the human rights of individuals who are not nationals of the country in which they live, A/RES/40/144 (13 Dec. 1985), art. 1. There are different categories of non-nationals, including permanent residents, migrants, refugees, asylum-seekers, victims of trafficking, foreign students, temporary visitors, other kinds of non-immigrants and stateless people. See U.N. High Commissioner for Human Rights, *The Rights of Non-Citizens*, United Nations, 2006.
- ⁹²³ Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1990), para. 9.
- ⁹²⁴ AHRD, art. 4., “The rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalized groups are inalienable, integral and indivisible part of human rights and fundamental freedoms”.
- ⁹²⁵ ICESCR, arts. 2(1) & 2(3); ratified by Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, and Viet Nam.
- ⁹²⁶ ICERD, arts. 1(2) & 1(3); ratified by Brunei, Cambodia, Indonesia, Lao PDR, the Philippines, Thailand.
- ⁹²⁷ Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination Against Non-Citizens*, U.N. Doc. A/59/18, (2004), para. 1, available at <http://www.refworld.org/docid/45139e084.html>.
- ⁹²⁸ Refugee Convention, ratified by Cambodia and the Philippines; ICRMW, ratified by Indonesia and the Philippines.
- ⁹²⁹ Stateless Persons Convention (1954). No ASEAN Member State has ratified the Convention on the Reduction of Statelessness (1961).
- ⁹³⁰ ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, adopted 13 Jan 2007.
- ⁹³¹ Constitution of Indonesia, Chapter. XI; Constitution of Malaysia, art. 10(1); Constitution of Myanmar, art. 347; Constitution of the Kingdom of Thailand, Chapter. III; Constitution of Philippines, art. III.
- ⁹³² Constitution of Cambodia, Chapter. 3: The Rights and Obligations of Khmer Citizens; Constitution of Lao PDR, Chapter. 4: Fundamental Rights and Obligations of Citizens; Constitution of Viet Nam, Chapter 2: Human Rights and Citizens’ Fundamental Rights and Duties.
- ⁹³³ Constitution of the Lao PRD, art. 50.
- ⁹³⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 3 (1991), para. 9; Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, Jan. 22-26, 1997, paras. 9 &10.
- ⁹³⁵ *Id.*
- ⁹³⁶ Emphasis added.
- ⁹³⁷ UDHR, art. 2; ICCPR, art. 2; ICESCR, art. 2(2).
- ⁹³⁸ Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2)*, U.N. Doc. E/C.12/GC/20, Jul. 2, 2009, para. 7, available at <http://www1.umn.edu/humanrts/gencomm/escgencom20.html>.
- ⁹³⁹ ICESCR, art. 2(3).
- ⁹⁴⁰ ICERD, art. 2(2); Committee on the Elimination of Racial Discrimination, General Recommendation No. 30 (2004), para. 1.
- ⁹⁴¹ ICERD, arts. 1(2) & 1(3); Committee on the Elimination of Racial Discrimination, General Recommendation No. 30 (2004), para. 3.
- ⁹⁴² African Charter on Human and Peoples’ Rights, arts. 2, 3 & 19; American Declaration of the Rights and Duties of Man, at preamble art. XXXVIII does provide that aliens should refrain from political activities reserved for citizens; American Convention on Human Rights, at preamble arts. 1(1) & 24; European Convention on Human Rights, art. 14 (art. 16 allows state parties to place restrictions on the political activities of aliens); European Social Charter, arts. 12(4) &13(4); Charter of Fundamental Rights of the European Union, arts. 15(3)

& 21(2). See also, *Lithgow and Others v. The United Kingdom*, Eur. Ct. Hm. Rts. Nos. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81 (24 June 1986); *Rui Alberto Pereira Roque v His Excellency the Lieutenant Governor of Jersey*, Eur. Ct. J., Case C-171/96, Opinion of Mr Advocate General La Pergola (23 Sep. 1997).

⁹⁴³ *Union Interafricaine des Droits de l'Homme v. Angola*, African Commission on Human and Peoples' Rights (1997), para. 16 (mass expulsion of non-nationals violated African Charter Art. 2 prohibiting discrimination on grounds of national origin and other reasons).

⁹⁴⁴ Juridical Condition and Rights of the Undocumented Migrants, Inter-Am. Ct. Hm. Rts. Advisory Opinion OC-18/03 (17 Sep. 2003), available at http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf.

⁹⁴⁵ Arab Charter on Human Rights, arts. 34, 36, 39 & 41(2).

⁹⁴⁶ U.N. Declaration on the human rights of individuals who are not nationals of the country in which they live, A/RES/40/144 (13 Dec. 1985), [hereinafter *U.N. Declaration on Human Rights and Non-Nationals*].

⁹⁴⁷ U.N. Declaration on Human Rights and Non-Nationals, art. 5.

⁹⁴⁸ U.N. Declaration on Human Rights and Non-Nationals, art. 2. These rights include: right to leave the country; right to freedom of expression; right to peaceful assembly; right to own property individually or in association with others; Liberty of movement and freedom to choose their place of residence within the borders of the country; and right of spouse and minor or dependent children to join a lawful alien, as provided by national law.

⁹⁴⁹ U.N. Declaration on Human Rights and Non-Nationals, art. 8.

⁹⁵⁰ U.N. Declaration on Human Rights and Non-Nationals, arts. 6-7.

⁹⁵¹ See the text of the 1951 Refugee Convention; 1954 Stateless Persons Convention; ICRMW

⁹⁵² Vienna Declaration, paras. 10-11.

⁹⁵³ AHRD, arts. 35-37.

⁹⁵⁴ AHRD, arts. 35, 36, & 37, respectively.

⁹⁵⁵ AHRD, art. 37.

⁹⁵⁶ See "Omitted Rights."

⁹⁵⁷ UN Charter, art. 55.

⁹⁵⁸ ICCPR, art. 1(1).

⁹⁵⁹ ICESCR, art. 1(1).

⁹⁶⁰ Vienna Declaration, para. 2.

⁹⁶¹ UN Declaration on the Right to Development, art. 1(2).

⁹⁶² AHRD, art. 35.

⁹⁶³ UN Charter, art. 55; ICCPR, art. 1(1); ICESCR, art. 1(1); CEDAW, art. 14; CRPD, Preamble (g); ILO Indigenous and Tribal Peoples Convention, art. 7.

⁹⁶⁴ Vienna Declaration, paras. 8-14 & 72-74; UN Declaration on the Right to Development, arts. 1 & 2; UN Millennium Declaration, para. 11.

⁹⁶⁵ Bangkok Declaration, art. 17; Vienna Declaration, para. 10.

⁹⁶⁶ Constitution of Cambodia, art. 61; Constitution of Indonesia, art. 28(c); Constitution of Lao PDR, art. 21; Constitution of Malaysia, art. 92; Constitution of Myanmar, art. 22; Constitution of Philippines, arts. XIV & XX; Constitution of Singapore, arts. 142 & 148; Constitution of Thailand, arts. 57 & 258; Constitution of Viet Nam, arts. 50, 51, 54 & 62.

⁹⁶⁷ ASEAN Charter, art. 9.

⁹⁶⁸ Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN, March 2009.

⁹⁶⁹ Ha Noi Declaration on the Enhancement of Welfare and Development of ASEAN Women and Children.

⁹⁷⁰ Declaration of the Cooperation among the Four Human Rights Institutions in ASEAN.

⁹⁷¹ Sengupta, Arjun. 2001. "Right to Development as a Human Right." *Economic and Political Weekly* 36 (27): 2527-36.

⁹⁷² Kirchmeier, Felix. 2006. "The Right to Development: Where Do We Stand." *Dialogue on Globalization* 23. <http://www.fes-globalization.org/publicationsGeneva/FESOccPapers23.pdf>.

⁹⁷³ UN Declaration on the Right to Development, Preamble.

⁹⁷⁴ *Id., at*, art. 2(1).

⁹⁷⁵ *Id., at*, art. 1(2).

⁹⁷⁶ *Id., at*, art. 3(1) & 4(1).

⁹⁷⁷ *Id., at*, art. 6(2).

⁹⁷⁸ Vienna Declaration, para. 11.

⁹⁷⁹ *Id.*, at, para. 8

⁹⁸⁰ *Id.*, at, para. 20.

⁹⁸¹ Maria Green & Susan Randolph, *Bringing Theory into Practice: Operational Criteria for Assessing Implementation of the International Right to Development* [hereinafter Green & Randolph], U.N. Human Rights Council, Working Group on the Right to Development, U.N. Doc. A/HRC/15/WG.2/TF/CRP.5 (Jan. 14, 2010), para. 54, available at http://www2.ohchr.org/english/issues/development/right/docs/A-HRC-15-WG-2-TF-CRP-5_en.pdf (“Despite these advances, however, the right is in many ways still in a formative stage, with views not yet entirely fixed about the meanings and practical implications of some of its provisions.”).

⁹⁸² Green & Randolph, para. 54 (“Despite these advances, however, the right is in many ways still in a formative stage, with views not yet entirely fixed about the meanings and practical implications of some of its provisions.”)

⁹⁸³ UN Declaration on the Right to Development, art. 3.

⁹⁸⁴ *Id.*, at, art. 2.

⁹⁸⁵ *Id.*, at, art. 4.

⁹⁸⁶ Rio Declaration, Principle 7.

⁹⁸⁷ The right to development faces many of the same challenges to international acceptance as the right to a clean environment. Both have been recognized in numerous UN declarations and some regional conventions, but not explicitly in an international human rights treaty. Both can be seen as individual as well as collective rights, and both impose duties on actors other than the state in which an individual resides. Finally, both are closely intertwined with and may be inseparable from other rights. The right to development is linked to the concepts of sustainable development, the right of peoples to participate in the decision-making process, and the right to share the benefits of development related to lands and resources they have traditionally used.

⁹⁸⁸ African Charter on Human and Peoples’ Rights, art. 22.

⁹⁸⁹ Arab Charter on Human Rights, art. 37.

⁹⁹⁰ International Finance Corporation Policy and Performance Standards on Social and Environmental Sustainability, Performance Standard 7, 1 Jan. 2012.

⁹⁹¹ International Workshop on Methodologies regarding Free Prior and Informed Consent and Indigenous Peoples (New York, 17-19 January 2005) PFII/2005/WS.2/10, available at www.un.org/esa/socdev/unpfii/documents/workshop_FPIC_IFAD.doc.

⁹⁹² *Saramaka People v. Suriname*, I/A Court H.R., Preliminary Objections, Merits, Reparations, and Costs, Judgment (2007), Series C No. 172.

⁹⁹³ UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus (Aarhus Convention), Denmark, 25 June 1998, available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

⁹⁹⁴ Committee on the Elimination of Racial Discrimination, *General Recommendation 23, Rights of indigenous peoples*, U.N. Doc. A/52/18, Annex V at 122 (1997), available at <http://www1.umn.edu/humanrts/gencomm/genrexxiii.htm>.

⁹⁹⁵ ILO, Indigenous and Tribal Peoples Convention (No. 169), art. 15(2), 27 June 1989.

⁹⁹⁶ *Centre for Minority Rights Development (Kenya) v. Kenya*, African Commission on Human and Peoples’ Rights (2009) at para. 296.

⁹⁹⁷ *Saramaka People v. Suriname*, I/A Court H.R. (2007).

⁹⁹⁸ United Nations Declaration on the Rights of Indigenous Peoples, art. 28.

⁹⁹⁹ Documents related to the Draft U.N. Declaration on the Right to Peace are available at <http://www.ohchr.org/EN/HRBodies/HRC/RightPeace/Pages/WGDraftUNDeclarationontheRighttoPeace1stsession.aspx>.

¹⁰⁰⁰ *Id.*

¹⁰⁰¹ The Treaty of Amity and Cooperation in Southeast Asia, 24 February 1976, at art. 2 In their relations with one another, the High Contracting Parties shall be guided by the following fundamental principles: (d) Settlement of differences or disputes by peaceful manner, and (e) renunciation of the threat or use of force.

¹⁰⁰² ASEAN Charter, art. 1(1), (3) &(4).

¹⁰⁰³ Treaty of Amity and Cooperation in Southeast Asia, arts. 1, 2, 4, 6, & 13.

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- ¹⁰⁰⁴ Charter of the Association of Southeast Asian Nations, Singapore, 20 November 2007, at art. 1; Declaration on the Commitments for Children in ASEAN, Singapore, 2 August 2001, No (16); and Declaration of the Basic Duties of the ASEAN Peoples and Governments, at art. 45.
- ¹⁰⁰⁵ Treaty on the Non-Proliferation of Nuclear Weapons, Adopted 1 July 1968, Effective 5 Mar. 1970.
- ¹⁰⁰⁶ The Southeast Asian Nuclear-Weapon-Free Zone Treaty (SEANWFZ) or the Bangkok Treaty of 1995
- ¹⁰⁰⁷ AICHR TOR, art. 1.2; ACWC Terms of Reference, 2010, art. 2.2.
- ¹⁰⁰⁸ Constitution of Indonesia, preamble, Constitution of Cambodia, art. 53; Constitution of Lao PDR, art. 12; Constitution of Myanmar, preamble & art. 41; Constitution of the Philippines, art. ?, section 2; Constitution of Viet Nam, arts. 12 & 64.
- ¹⁰⁰⁹ Constitution of Lao PDR, art. 12.
- ¹⁰¹⁰ Constitution of Lao PDR art. 32; Constitution of the Philippines, art. ?, section, 5 & 21 refer to “peace and order” within the Philippines.
- ¹⁰¹¹ Constitution of Myanmar, arts. 278 & 354
- ¹⁰¹² Constitution of Myanmar, art. 387 & 21(c); Constitution of Singapore
- ¹⁰¹³ Constitution of Myanmar, art. 21(c); Constitution of Singapore, arts. 9 & 129(3).
- ¹⁰¹⁴ Declaration on the Preparation of Societies for Life in Peace, art. 1. 15 December 1978, A/RES/33/73.
- ¹⁰¹⁵ Declaration of the Right of Peoples to Peace, 12 November 1984, A/RES/39/11.
- ¹⁰¹⁶ Charter of the United Nation (UN Charter) s, 24 24 October 1945, 1 UNTS XVI. Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968, 729 UNTS 161/(1973) ATS3/7 ILM 8809 (1968).
- ¹⁰¹⁷ Report of the Open-ended Inter-Governmental Working Group on the Draft UN Declaration on the Right to Peace (2013) (“23. Delegations debated as to whether the right to peace is an individual or collective right. Some believed that there is no legal basis for the right to peace either as an individual or a collective right. ...”).
- ¹⁰¹⁸ African Charter on Human and Peoples’ Rights, art. 23(1).
- ¹⁰¹⁹ Maputo Protocol, art. 10.
- ¹⁰²⁰ *Id.* at 21.
- ¹⁰²¹ *Id.* at 40.
- ¹⁰²² *Id.* at 47.
- ¹⁰²³ UDHR, arts. 3 & 28; ICCPR, art. 9(1); African Charter on Human and Peoples’ Rights, art. 6; American Convention on Human Rights, art. 7; Charter of Fundamental Rights of the European Union, 7 December 2000; Official Journal of the European Communities, 18 December 2000 (OJ C 364/01), art. 6.
- ¹⁰²⁴ Human Rights Committee, Draft General Comment No. 35 on Article 9 (2014).
- ¹⁰²⁵ African Charter on Human and Peoples’ Rights, arts. 23(1) & 18(2) (“All peoples shall have the right to national and international peace and security. ...”); Declaration of the Right of Peoples to Peace, art. 1; Draft declaration on the right to peace, art. 1, 16 April 2012, A/HRC/20/3.
- ¹⁰²⁶ Declaration on the Preparation of Societies for Life in Peace, art. 1 (“Every nation and every human being, regardless of race, conscience, language or sex, has the inherent right to life in peace.”).
- ¹⁰²⁷ Report of the Open-ended Inter-Governmental Working Group on the Draft UN Declaration on the Right to Peace (2013), at 54-56.
- ¹⁰²⁸ UDHR, art. 30.
- ¹⁰²⁹ ICCPR, art 5(1).
- ¹⁰³⁰ European Convention, art. 17; American Convention, art. 29; Arab Charter on Human Rights, art. 43.
- ¹⁰³¹ Civil Society Organisations and People’s Movements Participating in the Civil Society Forum on ASEAN Human Rights Declaration, Joint submission to the ASEAN Intergovernmental Commission on Human Rights on the ASEAN Human Rights Declaration, Sep. 12, 2012.
- ¹⁰³² Phnom Penh Statement on the Adoption of the Asean Human Rights Declaration (AHRD), March 19, 2012, at art. 3, *available at* <http://www.asean.org/news/asean-statement-communiqués/item/phnom-penh-statement-on-the-adoption-of-the-asean-human-rights-declaration-ahrd>.
- ¹⁰³³ AHRD, arts. 32 & 35.
- ¹⁰³⁴ AHRD, art. 7.
- ¹⁰³⁵ UN Charter, arts. 1(2) & 73; UDHR, art. 2; ICCPR, art. 1(1); ICESCR, art. 1; ICERD, art. 2(2).
- ¹⁰³⁶ ICCPR, art. 1(1); ICESCR, art. 1; ICERD, art. 2(2); Indigenous and Tribal Peoples Convention, arts. 1 & 7.
- ¹⁰³⁷ Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD) (19 Nov. 2012).

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- ¹⁰³⁸ UN Charter, art. 1(2). The purpose of the Charter is to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.”
- ¹⁰³⁹ ICERD, art. 2(2); Committee on the Elimination of Racial Discrimination, *General Recommendation No. 21: Right to self-determination*, U.N. Doc. A/51/18, annex VIII at 125 (1996), available at <http://www1.umn.edu/humanrts/gencomm/genrexxi.htm>. Cambodia, Indonesia, Laos, Philippines, Thailand and Viet Nam have ratified ICERD.
- ¹⁰⁴⁰ ICCPR, art. 1; ICESCR, art. 1.
- ¹⁰⁴¹ UN Declaration on the Rights of Indigenous Peoples, arts. 3 & 4.
- ¹⁰⁴² ASEAN Charter, preamble & art. 2(2); UN Charter, arts. 1(2) & 55.
- ¹⁰⁴³ Constitution Indonesia, arts. 18B & 28I(3); Constitution of Lao PDR, art. 8; Constitution of Philippines, art. XIV, sect. 17; Constitution of Thailand, art. 66; Constitution of Viet Nam, art. 5.
- ¹⁰⁴⁴ Constitution of the Lao PDR, Preamble.
- ¹⁰⁴⁵ Constitution of Myanmar, art. 17(C); Constitution of the Philippines, art. X, sections. 15-21.
- ¹⁰⁴⁶ Constitution of the Philippines, art. XIII, sect. 6.
- ¹⁰⁴⁷ Constitution of Thailand, Ch. III, Part 12, sect. 66.
- ¹⁰⁴⁸ UN Charter, arts. 1(2) & 73; ICCPR, art. 1(1); ICESCR, art. 1(1); ICERD, art. 2(2); Indigenous and Tribal Peoples Convention (No. 169), Gen. Con. ILO (June, 27 1989), entered into force Sep. 5, 1991, at art. 1.
- ¹⁰⁴⁹ U.N. Charter, art. 1(2).
- ¹⁰⁵⁰ ICCPR, art. 1(2); ICESCR, art. 1(2); ICERD, art. 2(2); ILO Convention No. 169, 7(1); African Charter on Human and Peoples’ Rights, art. 19; Arab Charter on Human Rights, art. 2; UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, G.A. Res. 1514 (XV), UN Doc. A/4684, at art. 2; UN Assembly, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among states in Accordance with the Charter of the United Nations, Oct. 24, 1970, Res. 2625 (XXV), 25 UN GAOR, Supp. (No. 28), UN Doc. A/5217 at 121 (1970); UN General Assembly, Vienna Declaration, para. 1(2); UN General Assembly, Declaration on the Rights of Indigenous Peoples, art. 3.
- ¹⁰⁵¹ ICCPR, art. 1; ICESCR, art. 1.
- ¹⁰⁵² UN Declaration on the Right to Development, at art. 1(2).
- ¹⁰⁵³ ICCPR, art. 4.
- ¹⁰⁵⁴ Indigenous and Tribal Peoples Convention (No. 169), art. 1(1).
- ¹⁰⁵⁵ Proposed American Declaration on the Rights of Indigenous Peoples, (Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th Regular Session), OEA/Ser/L/V/.II.95 Doc.6 (1997), at art. 1(1).
- ¹⁰⁵⁶ Proposed American Declaration on the Rights of Indigenous Peoples, at art. 1(2); ILO Convention No. 169, at art. 1(2).
- ¹⁰⁵⁷ Proposed American Declaration on the Rights of Indigenous Peoples, at art. 1(3); ILO Convention No. 169, at art. 1(3).
- ¹⁰⁵⁸ UN General Assembly, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Dec. 18, 1992, A/RES/47/135, at art. 2.
- ¹⁰⁵⁹ See ICERD, art. 2(2).
- ¹⁰⁶⁰ CERD, *General Recommendation No. 23: Rights of Indigenous Peoples*, UN Doc. A/52/18, annex V at 122 (1997), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.6 at 212 (2003).
- ¹⁰⁶¹ *United Communist Part of Turkey (TBKP) and Others v. Turkey*, Application No. 133/1996/752/951, Jan. 30, 1998, European Court of Human Rights.
- ¹⁰⁶¹ *Id.*; *Loizidou v. Turkey*, Application No. 15318/89, Dec. 18, 1996, European Court of Human Rights.
- ¹⁰⁶² Human Rights Committee, General Comment No. 23 (1994).
- ¹⁰⁶³ Committee on the Elimination of Racial Discrimination, General Recommendation No. 21 (1996), at para. 4.
- ¹⁰⁶⁴ Erica-Irene A. Daes, Special Rapporteur on the Rights of Indigenous Peoples, Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples’ Permanent Sovereignty over Natural Resources: Final Report of the Special Rapporteur, United Nations, U.N. Doc. E/CN.4/2004/30 (13 July 2004), at 17.
- ¹⁰⁶⁵ Human Rights Committee, *General Comment No. 12, Article 1*, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1984), para. 4, available at <http://www1.umn.edu/humanrts/gencomm/hrcom12.htm>.

¹⁰⁶⁶ Human Rights Committee, General Comment No. 12 (1984), para. 5; Indigenous Peoples' Permanent Sovereignty over Natural Resources: Final Report of the Special Rapporteur (2004), at 17; ICJ, Advisory Opinion No. 53, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, para. 52 (21 June 1971); ICJ, Advisory Opinion, *Western Sahara*, (Oct. 16, 1975).

¹⁰⁶⁷ Committee on the Elimination of Racial Discrimination, General Recommendation No. 21 (1996), para. 4.

¹⁰⁶⁸ *Id.*, at para. 6.

¹⁰⁶⁹ *Id.*

¹⁰⁷⁰ International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, (22 July 2010).

¹⁰⁷¹ *Kevin Mgwanga Gunme v. Cameroon*, Communication 266/2003, African Commission on Human and Peoples' Rights, Twenty-Sixth Annual Activity Report (2008-2009) Annex IV, at p. 36 ("The Commission states that secession is not the sole avenue open to Southern Cameroonians to exercise the right to self-determination") [emphasis added].

¹⁰⁷² *Loizidou v. Turkey*, Application No. 15318/89, 18 December 1996, ECHR, Series A No. 310, concurring opinion of Judge Wildhaber.

¹⁰⁷³ *Kevin Mgwanga Gunme v. Cameroon*, African Commission on Human and Peoples' Rights (2009), at para. 191.

¹⁰⁷⁴ Human Rights Committee, General Comment No. 12 (1984), para. 6.

¹⁰⁷⁵ *Id.*

¹⁰⁷⁶ ILO Convention No. 169, at art. 15; Declaration on the Right to Development, art. 1(2); United Nations Declaration on the Rights of Indigenous Peoples, art. 26; and see *Centre for Minority Rights Development (Kenya) v. Kenya*, African Commission on Human and Peoples' Rights (2010); *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96, African Commission on Human and Peoples' Rights (2001-2002); *Saramaka Peoples v. Suriname*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2007), Series. C, No. 172.

¹⁰⁷⁷ *Mayagna (Sumo) AwasTingni Community v. Nicaragua*, I/A Court H.R., Judgment (2001), Series C No. 79; *Sawhoyamaya Indigenous Community v. Paraguay*, I/A Court H.R., Merits, Reparations, and Costs, Judgment (2006), Series C No. 146; *Saramaka Peoples v. Suriname*, I/A Court H.R., Preliminary Objections, Merits, Reparations, and Costs, Judgment (2007), Series. C No. 172.

¹⁰⁷⁸ *Id.*

¹⁰⁷⁹ AHRD, arts. 17, 24, 27 & 32.

¹⁰⁸⁰ See, UDHR, art. 20; Freedom of Association and Protection of the Right to Organize Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organize, Gen. Con. ILO (9 July 1948), effective 4 July 1950; ICCPR, art. 22; ICESCR, art. 8.

¹⁰⁸¹ See AHRD, art. 17.

¹⁰⁸² See, e.g., UDHR, art. 20; ICERD, art. 5; CRC, art. 15; U.N. General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms [hereinafter Declaration on Human Rights Defenders], March 8, 1999, U.N. Doc A/RES/53/144, at art. 5.

¹⁰⁸³ See AHRD, art. 24.

¹⁰⁸⁴ See AHRD, art. 32.

¹⁰⁸⁵ See AHRD, art. 35.

¹⁰⁸⁶ Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD) (19 Nov. 2012).

¹⁰⁸⁷ Cambodia, Indonesia, Lao, the Philippines, Thailand and Viet Nam.

¹⁰⁸⁸ See ICCPR, art. 22.

¹⁰⁸⁹ See CRC, art. 15(1).

¹⁰⁹⁰ CEDAW, art. 7; see also Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 23: Political and Public Life*, 1997, U.N. Doc. A/52/38, available at .

¹⁰⁹¹ ILO Freedom of Association and Protection of the Right to Organise Convention (No. 87), arts. 1-3, ratified by Cambodia, Indonesia, Myanmar and the Philippines, and the ILO Right to Organise and Collective Bargaining Convention (No. 98), ratified by Cambodia, Indonesia, Malaysia, the Philippines and Singapore.

¹⁰⁹² Cambodia, Indonesia, Lao, the Philippines, Thailand and Viet Nam.

¹⁰⁹³ ICESCR, art. 8.

- ¹⁰⁹⁴ Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam.
- ¹⁰⁹⁵ Constitution of Cambodia, art. 42; Constitution of Indonesia, art. 28E; Constitution of Lao PDR, art. 44; Constitution of Malaysia, art. 10(1); Constitution of Myanmar, art. 354; Constitution of the Philippines, art. II, sect. 23, art. III, sect. 4 & 8; Constitution of Thailand, arts. 63-64; Constitution of Viet Nam, art. 25.
- ¹⁰⁹⁶ Constitution of Indonesia, art. 28c.
- ¹⁰⁹⁷ Constitution of Cambodia, art. 42; Constitution of Lao PDR, art. 10; Constitution of the Philippines, art. II, sect. 23; Constitution of Thailand, art. 65.
- ¹⁰⁹⁸ Constitution of Cambodia, art. 36-37; Constitution of Lao PDR, art. 7; Constitution of the Philippines, art. III, sect. 8, art. XIII sect. 3; Constitution of Thailand, art. 64; Constitution of Viet Nam, art. 10.
- ¹⁰⁹⁹ Constitution of Cambodia, art. 44; Constitution of Lao PDR, arts. 16-17; Constitution of the Philippines, art. XII, sect. 6; Constitution of Viet Nam, art. . 32.
- ¹¹⁰⁰ Constitution of Lao PDR, art. 7; Constitution of Indonesia, art. 28c; Constitution of the Philippines, art. II, sect. 23; Constitution of Thailand, art. 64; Constitution of Viet Nam, art. 9.
- ¹¹⁰¹ Constitution of Malaysia, art. 10; Constitution of Myanmar, art. 354; Constitution of Singapore, art. 14; Constitution of Thailand, arts. 64-65.
- ¹¹⁰² Constitution of the Philippines, art. III, sect. 4, 8.
- ¹¹⁰³ UDHR, art. 20.
- ¹¹⁰⁴ ILO Freedom of Association and Protection of the Right to Organise Convention (No. 87), arts. 2-5, 11; arts. 1-3; ratified by Cambodia, Indonesia, Myanmar and the Philippines, and the ILO Right to Organise and Collective Bargaining Convention (No. 98), ICERD, art. 5; ICCPR, art. 22; *Lee v. Republic of Korea*, Communication No. 1119/2002, Human Rights Committee, U.N. Doc. CCPR/C/84/D/1119/2002(2005), available at <http://www1.umn.edu/humanrts/undocs/1119-2002.html>; *Korneenko v. Belarus*, Communication No. 1226/2003, Human Rights Committee, U.N. Doc. CCPR/C/105/D/1226/2003 (2012), available at http://www2.ohchr.org/english/bodies/hrc/docs/CaseLaw/CCPR-C-105-D-1226-2003_en.doc; ICESCR, art. 8; CEDAW, art. 7; CRC, art. 15(1); see also, Committee on the Rights of the Child, *General Comment No. 17 on Article 31: Right of the child to rest, leisure, play, recreational activities, cultural life and the arts*, U.N. Doc. CRC/C/GC/17 (2013); ICRMW, art. 26.
- ¹¹⁰⁵ African Charter on Human and Peoples' Rights, art. 10; African Charter on the Rights and Welfare of the Child. See also *Civil Liberties Organisation (in respect of Bar Association) v. Nigeria*, Communication 101/93, African Commission on Human and Peoples' Rights, Eighth Annual Activity Report (1994-1995), Annex IV, p. 267, available at http://www.achpr.org/files/activity-reports/8/achpr16and17_actrep8_1994_eng2.pdf; *Huri-Laws v Nigeria*, Communication 225/98, African Commission on Human and Peoples' Rights, Fourteenth Annual Activity Report (2000-2001), Annex V, p. 273, available at http://www.achpr.org/files/activity-reports/14/achpr28and29_actrep14_20002001_eng.pdf; *Interights and Others v. Mauritania*, Communication 242/2001, African Commission on Human and Peoples' Rights, Seventeenth Annual Activity Report (2003-2004), Annex VII, p. 87, available at http://www.achpr.org/files/activity-reports/17/achpr34and35_actrep17_20032004_eng.pdf.
- ¹¹⁰⁶ Arab Charter on Human Rights, arts. 24(5-6) & 35.
- ¹¹⁰⁷ American Declaration of the Rights and Duties of Man, arts. XXI & XXII; American Convention on Human Rights, arts. 15 & 16; Protocol San Salvador, art. 8. See also, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, I/A Court H.R., Advisory Opinion OC-5/85 (1985); *Manuel Cepeda Vargas v. Colombia*, I/A Court H.R., Preliminary Objections, Merits, Reparations and Costs, Judgment (2010); *Huilca Tecse v. Peru*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2005).
- ¹¹⁰⁸ European Convention on Human Rights, art. 11; European Social Charter, arts. 5 & 6; Charter of Fundamental Rights of the European Union, 2000/C 364/01, entered into force Dec. 1, 2009. See also, *Sidiropoulos and Others v. Greece*, Application No. 57/1997/841/1047, July 10, 1998, European Court of Human Rights; *RefahPartisi (The Welfare Party) and Others v. Turkey*, Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98, Feb. 13, 2003, European Court of Human Rights; *United Communist Part of Turkey (TBKP) and Others v. Turkey*, Application No. 133/1996/752/951, Jan. 30, 1998, European Court of Human Rights.
- ¹¹⁰⁹ UDHR, art. 20; ICCPR, art. 22; CEDAW, art. 7; U.N. General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms [hereinafter Declaration on Human Rights Defenders], March 8,

1999, U.N. Doc A/RES/53/144, at arts. 1, 5, 12, 13 & 15 – 18. *See also, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, I/A Court H.R., Advisory Opinion OC-5/85 (1985).

¹¹¹⁰ *Huilca Tecse v. Peru*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2005), Series C No. 121; *Interights and Others v. Mauritania*, African Commission on Human and Peoples' Rights (2004); *Manuel Cepeda Vargas v. Colombia*, I/A Court H.R., Merits, Reparations and Costs Judgment (2010), Series C No. 213; Commentary to the Declaration on Human Rights Defenders, UN Special Rapporteur on the Situation of Human Rights Defenders, July 2011, ("The right to freedom of association has an individual and a collective dimension.").

¹¹¹¹ ILO, Qs & As on Business and Freedom of Association, Feb. 1, 2012, *available at* http://www.ilo.org/empent/areas/business-helpdesk/faqs/WCMS_DOC_ENT_HLP_FOA_FAQ_EN/lang-en/#Q1; *see also* Maina Kiai, Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, May 12, 2012, A/HRC/20/27.

¹¹¹² Report submitted by the UN Special Representative of the Secretary-General on human rights defenders, Hina Jilani, in accordance with General Assembly resolution 58/178 (1 Oct. 2004) p. 21, *available at* <http://olddoc.ishr.ch/hrdo/secretariat/AnnualReportsGA/2004.pdf>: *Sidiropoulos*, para. 40, *supra*; Inter-American Commission on Human Rights, *Report of the Situation of Human Rights Defenders in the Americas*, Doc: OEA/Ser.L/V/II.124Doc.5rev.1 (March 7, 2006), Recommendation 17. (the Venezuelan government should "Refrain from promoting laws and policies for the registration of human rights organizations that use vague, imprecise, or broad definitions regarding legitimate grounds for restricting the possibility of their establishment and operation.")

¹¹¹³ U.N. Human Rights Council, Resolution 15/21, The Rights to Freedom of Peaceful Assembly and Association, (Sep. 30, 2010).

¹¹¹⁴ CEDAW, art 7. The Committee on the Elimination of Discrimination Against Women defines political and public life as including: "many aspects of civil society, including public boards and local councils and the activities of organizations such as political parties, trade unions, professional or industry associations, women's organizations, community-based organizations and other organizations concerned with public and political life" (CEDAW, *General Recommendation No. 23: Political and Public Life*, A/52/38 (1997)).

¹¹¹⁵ UDHR art. 2(1); ICCPR art. 2(1); ICRMW, art. 26.

¹¹¹⁶ *Sidiropoulos and Others v. Greece*; *United Communist Part of Turkey (TBKP) and Others v. Turkey*; *Interights and Others v. Mauritania*; *Church of Scientology Moscow v. Russia*; Commentary to the Declaration on Human Rights Defenders, UN Special Rapporteur on the Situation of Human Rights Defenders, July 2011, p. 35; ILO Freedom of Association Convention, arts. 2-3 & 11; ICCPR, art. 22; ICESCR, art. 8; ICRMW, arts. 26 & 40. ¹¹¹⁷ UDHR, arts. 20(2) & 23(4); *Young v. United Kingdom*, Application Nos. 7601/76, 7806/77, Aug. 13, 1981, European Court of Human Rights; *Baena Ricardo v. Panama*, I/A Court H.R., Merits, Reparations and Costs, Judgment (2001) Series C No.7; Report Submitted by the UN Special Representative of the Secretary-General on Human Rights Defenders, Hina Jilani, in Accordance with General Assembly Resolution 58/178, 21 (Oct. 1, 2004).

¹¹¹⁸ ICCPR, art. 22 (2); ICESCR, art. 8(a).; ACHR, art. 16(2).

¹¹¹⁹ *See Lee v. South Korea*, at para.7.2; *Izmir SavasKarsitlariDernegi & Others v. Turkey*, Application No. 46257/99, ECHR 2006.

¹¹²⁰ *Id.*