



Victims of development aggression

Indigenous Peoples in ASEAN



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■ ■ INTRODUCTION

Two-thirds of the approximate 370 million self-identified indigenous peoples are found in Asia, enriching the region's enormous cultural and linguistic diversity. They have strong cultural attachment to the land, forests and waters and their livelihood depends on the natural resources therein. They have their own distinct languages, cultures, customary laws and social and political institutions that are very different from those of the dominant ethno-linguistic groups in their countries.

While there is no “definition” of indigenous peoples, the ILO Convention 169 provides criteria for their protection under international law, referring to their self-identification, indigenous peoples' traditional life styles; their culture and way of life different from the other segments of the national population, their own social organization and political institutions; and the fact that they live in historical continuity in a certain area, or before others “invaded” or came to the area¹.

These common features are thereby what makes indigenous peoples different and distinct from the majority of the population in each country. In fact, they maintain their distinct identities such as *Karen*, *Kadazan Dusun*, *Mangyan*, *Toraja*, *Hmong*, *Bunung* among others and are commonly and collectively referred to as “ethnic minorities” in Vietnam, “ethnic nationalities” in Myanmar, “hilltribes” in Thailand, “masyarakat adat” in Indonesia and “Orang Asal” in Malaysia.

The Association of Southeast Asian Nations (ASEAN) is a political and economic organization of ten Southeast Asian countries namely: Indonesia, Malaysia, Philippines, Singapore, Thailand, Brunei, Cambodia, PDR Laos, Myanmar and Vietnam. ASEAN aims to accelerate economic growth and social progress among its member states.



However, among the ASEAN member states, the individual and collective rights of peoples who self-identify as indigenous peoples are being violated on a daily basis. All too often, their territories are sacrificed and expropriated for state-sponsored development and corporate projects that lead to gross and wide-scale violations of their collective rights, especially regarding their lands, territories, and resources.

Although all states in the ASEAN voted for the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, most of them still refuse to respect and implement the indigenous peoples' collective rights, especially to their lands, territories and resources and to self-determination. Several ASEAN states, underpinned by legal systems inherited from colonial times, have arrogated to themselves the right to allocate, regulate and determine ownership, use, control and development of land and resources. These systems that are imposed often do not recognize the historical and customary use of lands and resources that have been nurtured and managed for centuries based upon the inherent rights and traditions of indigenous peoples. This has also caused the loss of the indigenous peoples' cumulative and collective indigenous knowledge and worldview that have enabled them to sustainably develop their fragile homelands and unique cultures over the centuries.

¹ <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>.



In recent years, indigenous peoples in Southeast Asia have been engaging the ASEAN for the recognition and protection of their individual and collective rights. Pivotal to their engagement was the creation of an Indigenous Peoples Task Force (IPTF) in 2009 that served as a platform for solidarity and unity for indigenous peoples to lobby the ASEAN governments in the region. It directed its engagement with the ASEAN Intergovernmental Commission on Human Rights (AICHR), particularly the members of the commission who were friendly with civil society organizations (CSOs). The engagement focused on the legal recognition of indigenous peoples as distinct peoples with collective rights as already recognized internationally. It has been actively providing recommendations during the drafting of the ASEAN Human Rights Declaration, which was eventually adopted in November 2012.

However, despite the engagement, the AICHR and the ASEAN as a whole have not moved forward in recognizing indigenous peoples and their rights. The adopted ASEAN Human Rights Declaration, aside from falling below international standards with its flawed principles, has failed to include provisions recognizing indigenous peoples' rights. It contradicts the moral obligation to which the ASEAN member states committed by voting in favour of the UNDRIP, and runs counter to their obligations under the human rights conventions and treaties they signed and ratified. Some member states have legislation or policies that recognize indigenous peoples and their rights, still, most have none, as they claim that there are no indigenous peoples in their country or that everyone is indigenous.

■ ■ COMMON ISSUES

LEGAL RECOGNITION

The formal legal recognition and status granted by Asian states to indigenous peoples vary from country to country. In a number of countries, indigenous peoples have constitutional recognition, while in others they are invisible in the fundamental law of the land or the use and applicability of the term "indigenous peoples" remain contentious.² The non-recognition as indigenous peoples based on the claim that all citizens in Asian countries are "equally indigenous" betrays an underlying assimilationist attitude of the respective State, which is itself an expression of the still prevailing discrimination of Indigenous Peoples within mainstream society in most nations of Southeast Asia.³ However, legal recognition, even when conferred does not always guarantee the full range and enjoyment of individual and collective rights. In some Asian countries, it is limited, conditional or is not properly implemented.

² Overview of the State of Indigenous Peoples in Asia, AIPP 2014.

³ Who we are: ASEAN's indigenous peoples, AIPP and IWGIA, 2011.

In Indonesia, the Constitution (Article 18 B-2) recognizes and respects traditional communities and their customary rights where these exist and as long as these are in accordance with the societal development and principles of the state. Some laws on agrarian reform (Decree 9/2001), agrarian regulations (Act 5/1960) and human rights (Act 39/1999) give implicit, though conditional, recognition of some rights of “masyarakat adat” or custom law-based communities. The Constitution recognizes the cultural identity of indigenous peoples but in practice, this right is not enjoyed by many indigenous groups. However, the recently elected President Joko Widodo has shown a strong interest in addressing gross violations of human rights⁴ and therefore indigenous peoples expect a more intensive approach towards the recognition of their rights.



Malaysia’s Federal Constitution recognizes the notion of indigenous peoples to an extent in its Articles 160(2) and 161(A). However these articles are contentious in the case of Sabah natives, incomplete in the case of a number of Sarawak natives being left out in the detailed list, and non-inclusive in the case of the Orang Asli being completely omitted. The Federal Constitution of Malaysia specifically states who is a native of Sabah and Sarawak whereas the Orang Asli are made to ‘prove’ that they are indigenous peoples. The recognition in the Constitution however, does not go hand-in-hand with the measures to ensure they are given the necessary support and respect related to other recognized rights, including lands and territories, traditional ways of life or papers as proof of citizenship. Many indigenous peoples, especially from remote areas, have great difficulty getting their citizenship papers due to late registration of birth or to poor access to the registration department.

In the Philippines, the rights of “indigenous cultural communities/ indigenous people” are constitutionally guaranteed (Article 2, section 22) and enabled through Republic Act 8371 or the Indigenous Peoples’ Rights Act [IPRA]. The IPRA protects and promotes indigenous peoples’ cultural integrity, the right to own and develop their ancestral lands/domains, and the right to free and prior informed consent (FPIC). However, the implementation of FPIC and land rights has been very problematic and manipulated resulting to conflicts and gross violations of their land rights.

In Cambodia, the 2009 National Policy on Development of Indigenous Peoples uses the term “chuncheat daoem pheak tech” which literally means “minority original ethnicity” in its documents to refer to peoples who are not Khmers, Chams, Chinese, Laos, Thais, or Kinh (Vietnamese). This term is also used in the 2001 Land Law and in the 2002 Forestry Law. While aimed at providing a general framework for land ownership in the country, the Land Law also guarantees the recognition and protection of indigenous communities (“original ethnic minorities”), traditional natural resource management systems and traditional customary land, making it the only law with specific provisions recognizing indigenous peoples’ land rights. The Forestry Law 2002, governing the management of the country’s forests, contains provisions for the official recognition of community forestry.⁵

In Vietnam’s Constitution (Article 5), indigenous peoples are referred to as “ethnic minorities” who “have the right to use their own language and writing, to preserve their ethnic identity and to nurture their fine customs, traditions and cultures.” The Constitution of Myanmar mentions seven ethnic populations who are referred to as “national races” (art. 115, 161). They are grouped primarily according to the regions where they live rather than to linguistic or ethnic affiliation, according

⁴ <http://www.thejakartapost.com/news/2014/09/25/jokowi-should-apologize-ri-s-indigenous-peoples-aman.html#sthash.75wicBC2.dpuf>

⁵ Threatened lands, threatened lives: Human Rights Situation of the Indigenous Peoples in Cambodia, AIPP 2015.

to chapter 2 of the Constitution, article 49. Therefore, only the marginalized indigenous groups referred to as “national races,” including the Shan, Karen, Rakhine, Karenni, Chin, Kachin and Mon, are commonly considered to be indigenous. The government of Laos does not use the terminology, and under its Constitution, Laos is defined as a multi-ethnic society where all “ethnic groups” have the right to protect, preserve and promote the fine customs and cultures of their own tribes and of the nation (Article 8).

In Thailand, the 2007 Constitution has been replaced with the Interim Constitution 2014 which aims to establish a new Constitution. It does not expressly mention indigenous peoples, however, its Section 4 states: “Subject to the provisions of this Constitution, all human dignity, rights, liberties and equality of the people protected by the constitutional convention under a democratic regime of government with the King as the Head of State, and by international obligations bound by Thailand, shall be protected and upheld by this Constitution.” Therefore, Thailand is bound by its moral obligation both under the UNDRIP and its Interim constitution to acknowledge international instruments. The Cabinet Resolution of the Royal Thai Government of August 3, 2010, on “Recovering the Karen Livelihood in Thailand” proposed by the Ministry of Culture, aims for the recovery of the Karen livelihood in Thailand via policies and principals of implementation assigned to government agencies and organizations such as the support to the biodiversity of highland communities and the promotion and support the Karen people’s ethnic identity and culture.⁶ In Thailand, many of the over half a million⁷ stateless population are indigenous peoples, as almost half of them are not citizens. Due to the lack of citizenship rights, the indigenous peoples are considered “illegal aliens” and have been subjected to arbitrary arrest, discrimination, denial of basic rights and social services, such as education and health care, freedom of movement, and land ownership. Having no adequate documents such as birth registration, the absence of citizenship is one factor that renders the indigenous peoples in Thailand even more vulnerable to human rights violations.

The non-applicability of the concept of indigenous peoples as recognized under international human rights instruments remains a major and critical concern for millions of indigenous peoples. The idea that all citizens of a state are indigenous and thus entitled to the same rights has been used as a justification for denying recognition of particular indigenous peoples, as in Indonesia⁸ during the Universal Periodic Review by the UN Human Rights Council in 2012. Consequently, governments have rejected calls by groups identifying themselves as indigenous for the recognition of their collective rights. The states’ continuous denial of their indigenous peoples as distinct peoples who have been systematically discriminated and marginalized, is against the very principle of achieving social justice as affirmed by the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

>> *Violations to Indigenous Peoples’ Right to Land, Territories and Resources*

The concept of land and territories has many dimensions vital to indigenous peoples’ collective identity. The matter of historical connection and deep affinity to land and territories which the indigenous people have managed and controlled in their own sustainable ways is a reason for their persistence to hold on to these. The UNDRIP fully recognizes the importance of land, territories and resources for indigenous peoples. This is further emphasized by the recognition of indigenous peoples’ right to Free Prior and Informed Consent (FPIC) as requirement to safeguard their right over their land, territories, resources and their right to self-determination. This includes the right to define their own approaches to and plans for development.

⁶ <http://www.ikap-mmsea.org/thailand.htm>.

⁷ UNHCR, <http://www.unhcr.org/pages/49e489646.html>, accessed 4 April 2014.

⁸ General Assembly, Sixty-first General Assembly Plenary, 13 September 2007, *idem.*, In 2010, an indigenous community was granted a collective title for the first time. Protection of indigenous peoples’ land rights is, however, vastly inadequate and threatened by the increase in granting of concessions for plantations, mining and hydroelectric dams.

Development Aggression

Indigenous peoples live in areas rich in natural resources, which have become targets of resource extraction and development programs by governments and multinational companies. In the name of modernization and development of the nation, indigenous communities are faced with the impact of mining and logging, large-scale plantations and infrastructure programs. These projects are implemented without consultation and consent from the affected communities; cause massive displacement of indigenous communities, and consequently the loss of their livelihood, culture and identity. The following provides a few examples of the forms of imposed development on indigenous communities in the ASEAN region.⁹

Economic Land Concessions (ELCs) for commercial plantations such as rubber, cassava, corn for biofuel etc. have been granted on indigenous communities' lands. In Cambodia's Prey Lang Forest region, which is home to the Kui indigenous peoples, official land grants of tens of thousands of hectares of forest for mineral extraction, timber and rubber plantations have forced many to give up their traditional livelihoods.¹⁰ From 1996 to 2013, 117 companies were granted economic land concessions (ELC)¹¹ over 50% of the arable land in Cambodia, many of these indigenous lands. Although the Cambodia government declared a moratorium on ELC issuance in May 2012, the procedure for a review of existing ELCs has created conflicts within communities. These include privatization of traditional communal lands and threats and intimidation to communities and their representatives who refused individual land titles and fought to reclaim their communal land. In these conflicts, local and national authorities were supported by ELC companies.

Some indigenous communities in Cambodia have registered their protest against land concessionaires in 2014. In a complaint filed against the World Bank's private lending arm, International Finance Corporation (IFC), 17 indigenous communities of the Jarai, Tumpun and Katchok peoples in Ratanakiri province protested illegal land seizures by the Vietnamese company Hoang Anh Gia Lai (HAGL), in which IFC is an investor through a Vietnamese equity fund. HAGL's land concession took over the indigenous communities' farm and pasture lands and destroyed forests and sacred sites, resulting to the loss of territory, livelihoods and cultural practices. The complaint, which called for the return of their lands, accused IFC of investing in companies that are in violation of Cambodian and international law as well as its own environmental and social policy safeguards.

The Socio-economic Development Master Plan, initiated by the Vietnamese government and ratified by Cambodian and Laotian authorities is part of the ASEAN Integration Plan. This economic project is supposed to stimulate economic growth by increasing capital forces, attracting foreign investments, intensifying commercial relationships and any form of socio-economic activities that can provide monetary return among the concerned countries throughout 13 provinces (four in northeast Cambodia including Ratanakiri, four in south Laos and five in central Vietnam).¹² ELCs granted to Cambodians and overseas companies have facilitated the ASEAN Master Plan's quick, effective implementation not only in the region under scrutiny but everywhere in the country.¹³ As a result, the Indigenous Right Active Members (IRAM) claim that more than five million hectares of indigenous peoples' land have been taken away by the Cambodian government and given to the miners and developers of agricultural plantations.¹⁴

⁹ Who we are: ASEAN's indigenous peoples, AIPP and IWGIA, 2011.

¹⁰ Overview of the State of Indigenous Peoples in Asia, AIPP 2014.

¹¹ According to the Ministry of Agriculture, Forestry and Fisheries.

¹² Indigenous groups in Cambodia: an updated situation, Frederic Bourdier, AIPP 2015.

¹³ Solicited about indigenous participation in Ratanakiri, a top Cambodian official replied without hesitation in an interview that the local populations do not need to be consulted. The government only deals with competent ministries, official authorities, foreign and Cambodian investors. (Cambodia Daily, March 2010)

¹⁴ NGO forum 2013: 41.

There is increasing pressure in Laos' drive for development to exploit the land and its natural resources.¹⁵ In particular, mining projects, hydroelectric dams and tree plantations are sectors in which both Laos and international investors are showing increased interest. This is affecting indigenous peoples who are facing challenges to their traditional livelihoods as well as being forced to resettle at times. Moreover, since the government facilitates direct investment from China for rubber tree plantations, the lives of indigenous peoples have become more difficult as significant portions of their lands have been conceded to Chinese investors.¹⁶ At present, more than 150,000 hectares of land have been ceded to private investors for 30-50 years. Yunnan Natural Rubber Industrial Co. is the main investor with 66,700 hectares already allotted for rubber plantations. Furthermore, the company is aiming to double its planting, which will reach 133,300 hectares by 2010 and 333,300 hectares by 2015 according to its projections¹⁷. The Don Sahong dam which is going to be constructed without any consultation with the people at the Lao border will also have social and environmental impacts on indigenous territories. In Vietnam, over 90,000 people, mostly ethnic Thai, were relocated to make way for the Son La hydropower plant that Vietnamese scientists said left many without access to agricultural land by 2010.¹⁸

Malaysia is currently pursuing the ASEAN Power Grid (APG) project, the flagship program mandated in 1997 by the ASEAN Heads of States/Governments under the ASEAN Vision 2020.¹⁹ The APG aims to ensure regional energy security while promoting the efficient utilisation and sharing of resources for mutual benefit; enhancing electricity trade across borders through the integration of national power grids to meet the rising of electricity demand and improve access to energy services; and sharing of surplus reserve generation capacity between ASEAN member states to enhance overall system security and reduce system costs.²⁰ Malaysia, through the various interconnection projects with Thailand, Philippines, Singapore, Indonesia and Brunei is planning to sell 6,830 MW of electricity. Powering up this projects are mega dams to be built on indigenous territories such as the Bakun, Murum and proposed Baram dams in Sarawak, and several proposed dams in Peninsular Malaysia and Sabah. These dams will devastate ancestral lands and displace indigenous communities into resettlement shacks as seen in Bakun and Murum.²¹

The lands of indigenous peoples in Malaysia and Indonesia are being taken away for the expansion of oil palm plantations. Already miniscule, the state's land allocation for indigenous peoples' use is further being reduced by oil palm production, which accounted for 85% of total world palm oil production in 2009-2010 (FAO). Malaysia has an estimated 4 million hectares of oil palm plantations.²² In Indonesia, over 7.5 million hectares of land are already covered by oil palm plantations.²³ Land acquisition for the establishment of oil palm plantations has led to serious abuses of indigenous peoples' rights. Their land is often taken without their free, prior informed consent and without due payment. On March 6, 2014, a member of the Suku Anak Dalam indigenous community was killed and five others were injured during a clash with security forces at an oil palm concession owned by PT Asiatic Persada in Sumatra. In Indonesia, a recent Constitutional Court decision declaring that customary forests do not belong to the state is in danger of not seeing full and proper implementation.

¹⁵ From the Indigenous World 2009, Laos', which provides more details on these issues and how they are affecting ethnic groups in Laos: <http://www.iwgia.org/graphics/offentlig/pdf/Laos.pdf>

¹⁶ Lao people's Democratic Republic, Country technical notes on indigenous peoples' issues, IFAD, 2012.

¹⁷ Megan Goldin, Laos face thorny land issues in Asia's orchid, 2008.

¹⁸ Overview of the State of Indigenous Peoples in Asia, AIPP 2014.

¹⁹ <http://www.asean.org/communities/asean-economic-community/item/memorandum-of-understanding-on-the-asean-power-grid>.

²⁰ Ibrahim, Syaful. 2014. "Barriers and opportunities for electricity interconnection: The southeast asian experience". HAPUA Secretariat.

²¹ Indigenous Peoples in the ASEAN – Malaysia, JOAS, October 2014.

²² Colchester, Marcus 2010,;

²³ Colchester, Marcus 2010. Palm oil and indigenous peoples in South East Asia. Land acquisition, human rights violations and indigenous peoples on the palm oil frontier. Forest Peoples Programme. Draft, p.4, http://www.forestpeoples.org/documents/prv_sector/oil_palm/palm_oil_ips_se_asia_ILC_MC_jul10_eng.pdf

cultivation is one of the drivers of deforestation and a major source of carbon emission. Laws and policies were passed by many Asian states seeking to eradicate shifting cultivation in the name of forest conservation. Shifting cultivators are thereby heavily restricted if not prohibited in doing their livelihood activities in areas declared as national parks or conservation areas. In Thailand, many Karen villagers residing inside national parks have been evicted as in the case of the Karens in Keang Krachan³¹. Many were also arbitrarily arrested for practicing their traditional livelihood and charged with criminal offenses. Further, security guards and personnel of national parks committed cases of violence against indigenous women when indigenous women try to gather food items and non-forest products inside national parks.

The aforementioned views of shifting cultivation though has been proven inaccurate or outright wrong as this practice was actually found to be “an ideal solution for agriculture in the humid tropics, as long as the human population density is not too high and fallow periods are long enough to restore soil fertility. This agricultural system is ecologically sound including on carbon sequestration, and meets a variety of human needs with great efficiency, particularly with regard to labor and other agricultural inputs”.³² The results of the case studies conducted by AIPP with the Food and Agriculture Organization (FAO) confirmed that “despite profound changes taking place in indigenous communities across Asia and the overall decline of shifting cultivation, this practice still plays an important role in providing livelihood and food security in many communities. For these communities, the importance of shifting cultivation goes beyond mere economic concerns. It is the pivot around which annual work and ritual cycles revolve and thus an intricate part of their way of life and closely tied to their cultural identity”.³³ Further, shifting cultivation “has allowed not only a sustainable use of but also equity in access to land and resources, thus ensuring livelihood and food security for all”.³⁴.

>> VIOLATIONS OF THE RIGHTS OF INDIGENOUS WOMEN AND CHILDREN

Indigenous women and children belong to the most vulnerable sectors of society and thus should be given special protection. However, this is not the case as their rights are continuously violated by both the state and their own communities.

Despite their important contribution to agricultural production and the family’s subsistence activities, women in most traditionally male-dominated indigenous communities in the ASEAN region are only marginally involved or are fully excluded from decision-making processes at the local and national levels. Regarded as inferior and weak, they have virtually no voice in the political affairs of the community and country. Violence against indigenous women, like bride kidnapping, forced marriage and domestic violence, are also practices that still persist in some cultures. Indigenous women in the rural areas are hardest hit by poverty. In general, poverty affects women more severely than men since the burden to provide for the family rests more heavily on women, while decisions affecting domestic economy and even most crucial issues directly affecting women like reproduction are taken by men.³⁵

By virtue of their gender and ethnicity, indigenous women bear particular impacts and greater vulnerability from the consequent loss of traditional livelihoods, displacement, conflict and increasing poverty. In Laos, they have been forced to become migrant workers and daily wage earners in cash crop plantations. In countries with conflict areas, they fall prey to sexual harassment and rape by state security forces as in Myanmar and the Philippines. In Myanmar’s indigenous territories, trafficking of indigenous women and children for sexual exploitation and forced labour has become a major issue.³⁶ Trafficking of a growing number of indigenous women is encouraged, as they seek

³¹ See <http://www.aippnet.org/index.php/videos/1370-when-can-we-go-back>.

³² Ibid.

³³ Ibid p. 3-4.

³⁴ Ibid p. 8.

³⁵ Who we are: ASEAN’s indigenous peoples, AIPP and IWGIA, 2011.

³⁶ IWCF and AIPP 2010.

work in urban centres or overseas to support their families. With limited skills and knowledge of the realities of urban living, they frequently end up as abused domestic helpers or victims of sexual abuse including rape, are forced into prostitution or become mistresses.³⁷

One action plan of the ASCC was to work toward the establishment of an ASEAN Commission on the Promotion and Protection of the Rights of Women and Children. Since all of the ASEAN member states have signed the UN Convention on the Elimination of All Forms of Discrimination Against Women and the UN Convention on the Rights of the Child, ASEAN member states agreed to the establishment of the ASEAN Commission on Women and Children as an intergovernmental commission with two representatives from each country, one representing women and one representing children and youth. The commission was established in 2010 and the output and outcomes of the commission have yet to be evaluated. On the issue of violence against women, efforts are being made by UN Women, civil society organizations, and various government agencies through workshops and seminars. It is not certain, however, that the ASCC Work Plan to Operationalize the Declaration on the Elimination of Violence Against Women in ASEAN will be concretized.³⁸

At present, one of the critical issues affecting vulnerable groups is the trafficking of women and children from rural areas, therefore indigenous women and children represent a population particularly at risk. Human trafficking is a notorious phenomenon in Asia, and in recent decades, as globalization has progressed, human trafficking has become an increasingly transnational and organized crime, involving vast international and local crime networks. During its tenth meeting, the Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) adopted the Gender Sensitive Guideline for Handling Women Victims of Trafficking in Persons which aims to support the improvement and enhancement of practices in handling women and girl victims of trafficking by law enforcement agencies, social workers, health officers, service providers, and other frontline agencies and NGOs that are dealing with human trafficking cases.

WHAT ARE THE IMPLICATIONS OF THE ASEAN FOR INDIGENOUS PEOPLES IN SOUTHEAST ASIA?

To concretize the ASEAN Vision 2020, the ASEAN Heads of States/Governments adopted the Declaration of ASEAN Concord II (Bali Concord II) in 2003 to establish an ASEAN Community by 2020. The ASEAN Community is comprised of three pillars, namely the ASEAN Political-Security Community, ASEAN Economic Community and ASEAN Socio-Cultural Community. Each pillar has its own Blueprint, and, together with the Initiative for ASEAN integration (IAI) Strategic Framework and IAI Work Plan Phase II (2009-2015), they form the Roadmap for ASEAN Community 2009-2015. The ASEAN Vision 2020 agrees on a shared vision of ASEAN as “a concert of Southeast Asian nations, outward looking, living in peace, stability and prosperity, bonded together in partnership in dynamic development and in a community of caring societies”.³⁹

The ASEAN has made some progress in integrating human rights as part of its framework. In all its documents, however, it does not refer in any way to indigenous peoples and their recognition as *distinct peoples with inherent collective rights over our lands, territories and resources*. This despite the fact that all ASEAN member states have voted in favour for the adoption of the UNDRIP.⁴⁰

>> The ASEAN Charter

The ASEAN Charter was signed at the 13th ASEAN Summit in November 2007. After each country ratified the Charter, it went into effect on December 15, 2008. The Charter codifies past agreements within ASEAN and reiterates the principles of cooperation and relationship contained in its basic documents: declarations, agreements, conventions, concords, treaties and other instruments. These basic principles are: sovereignty, equality, territorial integrity, non-interference, consensus and unity

³⁷ Overview of the State of Indigenous Peoples in Asia, AIPP 2014.

³⁸ http://www.icie.org/japan/j/pdf/pub/publst/1451/15_amara.pdf.

³⁹ <http://www.asean.org/asean/about-asean/overview>.

⁴⁰ Who we are: ASEAN's indigenous peoples, AIPP and IWGIA, 2011.

in diversity. These principles define how member states relate with each other but not how to deal with their respective citizens or the collective constituency of the whole bloc. It lays down the rights of the member states but not of its citizens. It lacks clarity on the participation of its citizens in its structure and processes, and has no provision for disciplinary action and dispute resolution mechanisms for violations of its Charter by its member states.

The Charter contains an economic goal, listed as number 5 out of the 15 purposes listed : “To create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital.” This is the same content as the AEC’s, and reveals the establishing of the AEC, one of the main purposes of the ASEAN Charter. The Charter only provides the ASEAN with a legal personality as a bloc in its conduct of business with outside countries and other regional blocs, especially in seeking trade and economic agreements. It also allows it to develop its structure in order to achieve the regional community it envisions in the ASEAN Vision 2015.

It states the upholding of the UN Charter and international law to which the ASEAN member states subscribed to. While this is a progressive reference framework, most member states have poor performance record on their human rights obligations relating to the International Convention on Civil and Political Rights (ICCPR), Economic, Social and Cultural Rights (ESCR) and the International Convention for the Elimination of Racial Discrimination (ICERD) among others. Further, most member states also continue to ignore their moral obligation to implement the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) that is intended to pave the way for achieving social justice for indigenous peoples after centuries of oppression and exploitation. As parties to the adoption of the UNDRIP, the ASEAN member states have the moral obligation to implement the UNDRIP just as they do with the Universal Declaration on Human Rights, which is also a non-binding agreement. Furthermore, the various articles of the UNDRIP cover issues which are already included in other, directly binding international human rights instruments like covenants and conventions therefore, the UNDRIP is indirectly legally binding. Thus it is imperative to strengthen and broaden the lobby and advocacy of civil society organizations and indigenous peoples to pressure ASEAN to abide by the UN Charter and international human rights instruments not only in words but in action through national legislations, policy formulations and concrete measures for operationalization.

The second paragraph of Article 2 of the ASEAN Charter states the overarching principle and framework for cooperation and non-intervention in the internal affairs of the ASEAN member states. As a regional intergovernmental body, ASEAN cannot impose sanctions on any of its members even in cases of violation of their international human rights obligations, like in the case of Myanmar. The Charter promotes a people-oriented ASEAN and “encourages” all sectors of society to participate in and benefit from the integration and community building processes. However, it does not spell out specific mechanisms for the full and effective participation of the peoples of the ASEAN particularly of the leaders and representatives of peoples organizations and movements including indigenous peoples.

The criteria for representation in the ASEAN organs are not transparent and there are no clear mechanisms to ensure effective and inclusive representation. What are evident are political appointments not based on individual integrity relating to transparency and accountability, proven expertise or outstanding track record of good performance and professionalism and pro-poor commitment, among others. With this, the functioning of the ASEAN bodies will be dominated by the political agenda and personal interests of those appointed.

The Charter promotes a market-driven economy which poses serious threats to indigenous communities if there are no safeguards in place to protect their rights. In general, the Charter is completely devoid of any reference to measures for maintaining economic equity and social safeguards.

On 18 November 2012, ten Southeast Asian leaders signed the Association of Southeast Asian Nations Human Rights Declaration (AHRD), an apparent step in the development of regional human rights standards for its population. The AICHR is planning to come up with legally binding human rights conventions based on the Declaration.

However, indigenous peoples have expressed their disappointment with the AHRD due to its non-inclusion of indigenous peoples' rights.⁴¹ The AHRD makes no specific reference to indigenous peoples, which goes against the member states' reaffirmation of their commitment to the Universal Declaration of Human Rights, to the Charter of the United Nations and to the Vienna Declaration in the paragraph 3 of the preambular of the AHRD. Paragraph 20 of the Vienna Declaration calls upon States to take concerted positive steps to ensure « the full and free participation of indigenous people in all aspects of society », but also to « take concerted positive steps to ensure respect for all human rights and fundamental freedoms of Indigenous people, on the basis of equality and non-discrimination, and to recognise the value and diversity of their distinct identities, cultures and social organisation ».

All ASEAN member states voted in favor of the UNDRIP, therefore accepting their moral obligation to take appropriate measures to achieve the ends of the Declaration (article 38). According to the UNDRIP, article 3, all states have proclaimed the right of indigenous peoples to freely determine their political status and their economic, social and cultural development. However, contextualized recognition and protection of indigenous rights, given their unique historical background and social organization, which is an important aspect of the UNDRIP, are missing from the AHRD. The AHRD does not specifically address indigenous rights that are part of the UNDRIP and an emerging body of international norms, that is to say, indigenous identity and their lands, territories and resources; self-determination; and free, prior and informed consent in matters that concern indigenous people.⁴² Article 7 of the AHRD, states that « the realisation 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 » potentially permits a member state to place extensive restrictions on principles of equality and nondiscrimination contained in articles 3 and 9, respectively. Article 7 of the AHRD is therefore consistent with the principle of non-intervention contained in the ASEAN Charter, seemingly deferring indigenous rights to the State level. Article 8 provides that human rights and fundamental freedoms shall be subject to such limitations 'solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others' and to meet the 'just requirements' for among others, the 'general welfare of the peoples in a democratic society.' It is then up to the member state to determine what is 'just' in the context of human rights and fundamental freedoms. The 'general welfare' principle can be used to promote developmental policies upon indigenous communities that may not be acceptable to them but forced to give way to that referred as needed for the majority. In Malaysia, the Orang Asli land rights policy involving the grant of individual titles for cash crops was rejected by the Orang Asli community as there was no prior consultation and free, prior and informed consent⁴³ as well as because it involved the potential loss of customary lands. This is a situation that may repeat itself if the member state is left to determine what 'welfare' is for the indigenous minorities.

Article 35 of the AHRD states that 'The right to development is an inalienable human right' in 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. In the realization of the right to development, the article provides for 'developmental and environmental

⁴¹ Asian Indigenous Peoples Pact, 'Indigenous Peoples Statement on the ASEAN Human Rights Declaration' (Statement, 4 December 2012).

⁴² The AHRD and indigenous peoples rights, Yogeswaran Subramaniam, <http://www.austlii.edu.au/au/journals/ILB/2013/1.pdf>.

⁴³ See Yogeswaran Subramaniam, 'Rights Denied: Orang Asli and Rights to Participate in Decision-Making in Peninsular Malaysia' (2011) 19(2) Waikato Law Review 44, 63-4.

needs of present and future generations,' but it never refers to indigenous peoples' right to plan their own development. In addition to article 3 of the UNDRIP, the right to freely pursue economic, social and cultural development is entrenched in article 1 paragraph 1 of the ICCPR, an instrument ratified by 160 countries, including six ASEAN member states.

■ ■ 1. *The ASEAN Political Security Community (APSC)*

The ASEAN member states agreed on a Political-Security Community Blueprint in 2009, which consists of a series of measures grouped under three main aspirations to be attained by end-2015. These are: forming a rules-based community; becoming a cohesive, peaceful, stable and resilient region; and becoming a dynamic and outward-looking region within an increasingly integrated world. Unlike the ASEAN Economic Community Blueprint, the ASEAN Political-Security Blueprint does not contain any implementation schedule or scorecard. In fact, serious questions have been raised over the effectiveness of the blueprint, especially since it is a general document without quantifiable targets. ASEAN plans to form a Political-Security Community by the end of 2015 to coordinate regional security policies, but those efforts are hampered by rising tensions in the South China Sea and the bloc's inability to speak with one voice on the issue.⁴⁴

The ASEAN Political Security Community aims to promote cooperation in political development and inter-state solidarity (settlement of intra-regional differences). Its main elements are: political development, shaping and sharing of norms, conflict prevention, conflict resolution, post-conflict peace building, combating terrorism and implementing mechanisms. The principles of non-interference, consensus decision-making, national and regional resilience and respect for sovereignty are reiterated in this Community.⁴⁵

One of the aims of the Political Security Community is to promote and protect human rights and fundamental freedoms of the peoples of ASEAN. Non-discrimination is affirmed as to gender, race, religion, language, or social and cultural background in participating in, and benefiting from, the process of ASEAN integration and community building. Tolerance, respect for diversity, equality and mutual understanding are aspirational goals. Although human rights and fundamental freedoms, rule of law, good governance and democracy are mentioned, these are to be taken "with due regard to the rights and responsibilities of States."

The ASEAN Intergovernmental Commission on Human Rights (AICHR) is an ASEAN organ as stipulated in Article 14 of the ASEAN Charter. According to its Terms of References (ToR), its main objectives are « to promote and protect human rights and fundamental freedoms of the peoples of ASEAN.⁴⁶» The AICHR is the overarching body with cross-cutting mandate that handles matters related to human rights cooperation with other ASEAN bodies, external partners and stakeholders.

Despite being the human rights body of the ASEAN, there is no specific mechanism for the protection and promotion of indigenous peoples' rights within the AICHR. For indigenous peoples, there is no clear indication that the AICHR will start discussing and addressing the human rights situation of indigenous peoples in Southeast Asia in the near future.⁴⁷

Its present mandate is too weak in terms of human rights protection. Though the purposes of the AICHR is to emphasize the promotion and protection of human rights and to endorse the international standards of human rights, the work of AICHR is limited due to ASEAN's intention to secure the ASEAN norms. These include respect of "non-interference in the internal affairs of ASEAN Member states⁴⁸ » and « respect for the right of every member State to lead its national existence

⁴⁴ <http://www.iphrdefenders.net/country-updates/asean/992-asean-political-security-community-still-a-distant-goal>.

⁴⁵ Who we are: ASEAN's indigenous peoples, AIPP and IWGIA, 2011.

⁴⁶ ASEAN, ASEAN Intergovernmental Commission on Human Rights (Terms of Reference).

⁴⁷ <http://www.iwgia.org/human-rights/regional-bodies-and-mechanisms/asean-intergovernmental-commission-on-human-rights>

⁴⁸ Article 2.1.b, ToR of AICHR.

transform ASEAN into a region with free movement of goods, services, investment, skilled labour, and freer flow of capital.» The AEC is on track to eliminate tariffs on almost all goods by the end of the year. By the end of 2015, it is also expected that a comprehensive competition law will be in place in at least seven member states.⁵² Its Priority Integration Sectors are: agro-based products, air travel, automotives, e-ASEAN, electronics, fisheries, healthcare, rubber-based products, textiles and apparels, tourism, wood-based products, and logistics.

ASEAN state parties are therefore pushing for a free trade and investment plan that includes projects that threaten indigenous peoples' communities. These include interconnecting roads and highways, economic zones, mining, dams and power projects, palm oil plantation and other bio-fuel projects, commercial agriculture, as well as land concessions for economic purposes or for real estate development and commercial tourism.

For indigenous peoples, the projects mean further violations of their rights and the destruction of their ancestral lands. States and multi-transnational corporations have been targeting the rich natural resources of their communities for mineral extractions.⁵³ The market-driven economy being promoted by the AEC endangers indigenous communities as their lands and territories are being used and exploited in the name of development that does not benefit them. In fact, it is leading to increasing gaps between the rich and the poor, further marginalizing indigenous peoples. It completely ignores the right of indigenous peoples over their land and resources and gives no regard to the practices of self-sufficiency and sustainable resource management systems of indigenous communities. Further, it does not provide for measures for economic equity and social safeguards. The international standards include the requirement for the Free Prior and Informed Consent (FPIC) for indigenous communities on development projects, programs and policies that affect them and the AEC must conform to this as well. Policy against displacements of indigenous communities without their consent should be put in place and enforced.

The ASEAN senior officials are currently drafting the Post-2015 Economic Vision and Plan, supposed to contain a new plan to chart the direction for deeper regional integration for 2016 until 2025.⁵⁴

■ ■ 3. *The ASEAN Socio-Cultural Community (ASCC)*

The ASEAN Socio-Cultural Community (ASCC) envisages a community of caring societies and founded on a common regional identity, with cooperation focused on social development aimed at raising the standard of living of disadvantaged groups and the rural population, and it shall seek the active involvement of all sectors of society, in particular women, youth, and local communities.

Its main aims are the promotion of human rights and social justice, human development and security, narrowing the development gap, ensuring environmental sustainability, and building an ASEAN identity. The ASEAN Socio-Cultural Community (ASCC) Blueprint's primary goal is "to contribute to realising a people-centred and socially responsible ASEAN Community by forging a common identity and building a caring and sharing society."

The ASCC Blueprint covers a wide variety of issues such as poverty, health, disaster management, education, food security, social impact of integration, environmental sustainability, migrant labor, women and children's rights, science and technology. The ASCC Blueprint also includes references to respect for rights and fundamental freedoms and promotion and protection of human rights and social justice, with specific mention of disadvantaged, vulnerable and marginalized groups. Although there is no direct mention of indigenous peoples, the state neglect, non-recognition, human rights violations and discrimination that indigenous peoples are constantly facing make them fall within this category. The actions foreseen under Social Justice and Rights, however, are addressing symptoms

⁵² <http://www.asean.org/news/asean-secretariat-news/item/asean-formulates-a-post-2015-vision-and-strategic-action-plan-on-competition>.

⁵³ <http://iva.aippnet.org/sea-indigenous-people-to-media-give-voice-to-our-struggles/>

⁵⁴ <http://www.vietnambreakingnews.com/2015/02/asean-post-2015-economic-vision-draft-to-be-completed-in-mid-2015/>

in human rights abuses. The network also provides recommendations on the environment, labor and anti-corruption.

In June 2011, the UN Human Rights Council unanimously endorsed the UN Special Representative's "Guiding Principles for the Implementation of the UN 'Protect-Respect-Remedy' Framework." The guidelines establish an authoritative global reference point for preventing and addressing the risk of adverse impacts on human rights linked to business activities. As a consequence, in the same year, the International Coordination Committee (ICC) of the National Human Rights Institutions (NHRIs) adopted Business and Human Rights as a theme for ICC activities for the year 2012–2013. The aim of the ASEAN CSR network is to encourage corporations to develop and adopt a rights-based approach in their total production process rather than presenting CSR as a separate image-making activity. Despite CSR's rising profile and the emergence of a number of



CSR networks in ASEAN there is no agreed upon definition yet of CSR. Likewise, an authoritative assessment of the performance of CSR in the ASEAN region has not been undertaken to date.

CSR policies have the potential either to commit businesses to high standards of practice in the absence of rigorous legal requirements by the State, or act to hide poor practices behind public relations campaigns. There are stark contradictions between corporate mission statements and CSR policies on the one hand, and the company's practices on the ground in direct violation of indigenous peoples' rights, on the other hand. This further underscores the need to move beyond voluntary CSR mechanisms towards a legally-defined and binding corporate accountability as existing voluntary standards appear inadequate alone. It is important to emphasize that the regional economic liberalization agenda, which is the main political emphasis in ASEAN, should not undermine mechanisms within ASEAN that pursue Corporate Accountability, rather than weaken legal safeguards with voluntary arrangements.⁵⁹

CONCLUSION

Indigenous peoples in the ASEAN have advanced their engagement and participation in regional and international bodies, including with UN agencies and processes. They have been engaging, along with civil society organisations, with the ASEAN, particularly with the ASEAN Intergovernmental Commission on Human Rights (AICHR). The ASEAN has made some progress in integrating human rights as part of its framework. However, there is no reference to indigenous peoples and their recognition as distinct peoples with inherent collective rights over their lands, territories and resources in the blueprints of the ASEAN Charter, nor in the AHRD, nor in the work of the AICHR.

As a matter of fact, indigenous peoples in Asia are bracing for more land loss and destruction with the ASEAN economic integration. ASEAN economic growth involves massive infrastructure development in energy, transport and communications that will not only claim the indigenous peoples' traditional territories but exploit their natural resources such as minerals and river systems to boost power demand. Among the planned infrastructure are the ASEAN power grid, Trans-ASEAN Gas Pipeline, ASEAN Highway Network, Singapore-Kunming Rail Link and regional telecommunications networks. In the Mekong region, construction of long planned hydroelectric power projects in the Lower Mekong River in Laos and in Cambodia has started to displace indigenous communities. The resources needed to build the development projects are found in indigenous territories.

The failure of the ASEAN to address the plight of its indigenous peoples despite its expressed commitment to human rights and social justice is a shortcoming that needs to be corrected. Unless indigenous peoples are fully recognized as integral part of a culturally diverse ASEAN, and unless their

⁵⁹ <http://www.forum-asia.org/uploads/publications/2013/September/Corporate-AccountabilityASEAN-FINAL.pdf>.

collective rights and identity are respected, ASEAN's goal of development with equity, democracy and respect for human rights cannot be achieved.

RECOMMENDATIONS

- For the ASEAN Member States to implement their commitments in the WCIP Outcome document⁶⁰ to:

1. Consult and cooperate in good faith with indigenous peoples in order to obtain their free prior and informed consent (FPIC) before approval and implementation of projects in their territories and before adopting and implementing legislative or administrative measures that may affect them;
2. Establish at the national level, in conjunction with indigenous peoples concerned, fair, independent, impartial, open and transparent processes to acknowledge, advance and adjudicate the rights of indigenous peoples pertaining to lands, territories and resources;
3. Work with indigenous peoples to disaggregate data, as appropriate, or conduct surveys, and to utilize holistic indicators of indigenous peoples' well-being to address the situation and needs of indigenous peoples and individuals, particularly older people, women, youth, children and persons with disabilities;
4. Support the empowerment and capacity-building of indigenous youth, including their full and effective participation in decision making processes in matters that affect them;
5. Support measures which will ensure the full and effective participation of indigenous women in decision making processes at all levels and in all areas, and eliminate barriers for their participation in political, economic, social and cultural life;
6. Develop, in conjunction with indigenous peoples concerned, and where appropriate, policies, programmes and resources to support indigenous peoples' occupations, traditional subsistence activities, economies, livelihoods, food security and nutrition; and
7. Give due consideration to all the rights of indigenous peoples in the elaboration of the post-2015 development agenda.
8. Implement properly the national laws and policies recognizing the collective rights of indigenous peoples over their lands and resources; and to stop land grabbing and evictions caused by projects being implemented without the free prior and consent of indigenous peoples.
9. Ensure the effective implementation of social and environmental safeguards and measures, including the conduct of human rights due-diligence in the planning and implementation of the ambitious ASEAN Investment Plan and other related projects.

To the ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS -AICHR:

1. To establish open and transparent mechanisms for consultation and engagement with indigenous peoples at the national and regional levels for the promotion and protection of the human rights of indigenous peoples based on international human rights standards and instruments.
2. To include human rights protection measures in its mandate, such as receiving and investigating information/communications on human rights violations; and provide strong recommendations to ASEAN member-states to comply with their human rights obligations, including to indigenous peoples.
3. To designate a focal person for indigenous issues amongst the members of the AICHR towards the formation of a Working Group for indigenous peoples.

⁶⁰ <http://www.un.org/en/ga/president/68/pdf/letters/9152014WCIP%20-%20CFs%20on%20Draft%20Outcome%20Document.pdf>

AIPP at a glance

The Asia Indigenous Peoples Pact (AIPP) is a regional organization founded in 1988 by indigenous peoples movements as a platform for solidarity and cooperation. AIPP actively promotes and defends indigenous peoples rights and human rights, sustainable development and management of natural resources and environment protection. Through more than two decades, it has developed an expertise in grassroots capacity building, advocacy and networking from local to global levels and strengthening partnership with indigenous organizations, support NGOs, UN agencies and other institutions. At present, AIPP has 47 members from 14 countries in Asia with 14 National Formations, 15 Sub-national Formations and 18 Local Formations. Of this number, six are Indigenous Women's Organizations and four are Indigenous Youth Organizations.

Our Vision

Indigenous peoples in Asia are fully exercising their rights, distinct cultures and identities, are living with dignity and enhancing their sustainable management systems of lands, territories and resources for their own future and development in an environment of peace, justice and equality.

Our Mission

AIPP strengthens the solidarity, cooperation and capacities of indigenous peoples in Asia to promote and protect their rights, cultures and identities, and their sustainable resource management systems for their development and self-determination.

Our Goals

- To empower indigenous peoples in Asia to promote and defend their human rights and fundamental freedoms and claim legal recognition to their identities, collective rights under UNDRIP and other international human rights instruments
- To build the broadest solidarity and cooperation of indigenous peoples in Asia to strengthen indigenous movements
- To promote and protect the integrity of nature and the environment and enhance the sustainable resource management systems of indigenous peoples including their traditional knowledge, food sovereignty and biodiversity by having full control over their land, territories and resources.
- To attain full and effective participation and representation of indigenous peoples, particularly indigenous women and youth at all levels of decision-making
- To strengthen solidarity and cooperation with other social movements towards achieving equity, equality, peace, democracy and justice

AIPP Programme:

Human Rights Campaign and Policy Advocacy
Communication and Development
Regional Capacity Building
Environment
Indigenous Women
Organizational Strengthening

AIPP is accredited as an NGO in special consultative status with the UN Economic and Social Council (ECOSOC) and as observer organizations of the United Nations Framework Convention on Climate Change (UNFCCC), the Convention on Biological Diversity (CBD) and the World Intellectual Property Organization (WIPO).

AIPP is also a member of International Land Coalition and Global Environment Facility NGO Network.