



A Decade in Review:

Assessing the Performance of the ASEAN Intergovernmental Commission on Human Rights (Volume 2)

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ACRONYMS AND ABBREVIATIONS

ACMW	ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers
ACSC/APF	ASEAN Civil Society Conference/ ASEAN People’s Forum
ACTIP	ASEAN Convention against Trafficking in Persons, Especially Women and Children
ACW	ASEAN Committee on Women
ACWC	ASEAN Commission on the Protection of the Rights of Women and Children
AHA Centre	ASEAN Coordinating Centre for Humanitarian Assistance
AHRD	ASEAN Human Rights Declaration
AICHR	ASEAN Intergovernmental Commission on Human Rights
AMM	ASEAN Ministerial Meeting/ ASEAN Foreign Ministers’ Meeting
AMS	ASEAN Member States
AMMSWD	ASEAN Ministerial Meeting on Social Welfare and Development
APA	ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children
APSC	ASEAN Political Security Community
ASBs	ASEAN Sectoral Bodies
ASEAN	Association of Southeast Asian Nations
BHR	Business and Human Rights
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment
CEDAW	UN Convention on the Elimination of All Forms of Discrimination Against Women
CPR	Committee of Permanent Representatives
CRC	UN Convention on the Rights of the Child
CRPD	UN Convention on the Rights of Person with Disabilities
CSO	Civil Society Organisation
ECOWAS	Economic Community of West Africa
ECOWAS Court	Community Court of Justice of Economic Community of West Africa
ECOSOC	UN Economic and Social Council
EVAW	End Violence Against Women
EVAC	End Violence Against Children
FORUM-ASIA	Asian Forum for Human Rights and Development
GP	General Principles
ICCPR	International Covenant on Civil and Political Rights

ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
INGOs	International Non-Governmental Organisations
LGBTIQ	Lesbian, Gay, Bisexual, Transgender, Intersex and Questioning
MNP	Martinus Nijhoff Publishers
M & E	Monitoring and Evaluation
NGOs	Non-Governmental Organisations
NHRIs	National Human Rights Institutions
OHCHR	Office of the UN High Commissioner for Human Rights
RPA on EVAC	ASEAN Regional Plan of Action on the Elimination of Violence Against Children
RPA on EVAW	ASEAN Regional Plan of Action on the Elimination of Violence Against Women
PP Statemet	Phnom Penh Statement on the Adoption of the AHRD
SAPA	Solidarity for ASEAN Peoples' Advocacies
SDGs	Sustainable Development Goals
SOMSWD	Senior Officials Meeting on Social Welfare and Development
SOMTC	ASEAN Senior Officials Meeting in Transnational Crime
TIPs	Trafficking in Persons
ToR	Terms of Reference
UN	United Nations
UNHCR	UN Refugee Agency
UDHR	Universal Declaration of Human Rights
UPR	Universal Periodic Review
Working Group	Working Group for an ASEAN Human Rights Mechanism

Foreword

As part of its advocacy on the ASEAN human rights mechanisms, FORUM-ASIA and the Solidarity for ASEAN People's Advocacy (SAPA) produce an annual assessment of the performance of the ASEAN human rights mechanisms: the ASEAN Intergovernmental Commission on Human Rights (AICHR), and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). To date, FORUM-ASIA and SAPA have produced eight annual assessments of the performance of the ASEAN human rights mechanisms with a summary of their performance and recommendations to strengthen the institutions. This year, 2019, marks the 10-year anniversary of the AICHR's creation, and provides a timely opportunity to assess and review its promotion and protection function. As part of the 10 years anniversary of the AICHR's creation, FORUM-ASIA and SAPA publish two report to evaluate the AICHR's effectiveness and roles in implementing its protection mandates.

The first volume, titled 'A Decade in Review: Assessing the Performance of the AICHR to Uphold the Protection Mandates' is focus on the result of interviews and content analysis of the impact, flaws and key recommendations to the ASEAN member states and AICHR to advance AICHR's protection mandates. This report is the second volume of the AICHR+10 performance evaluation. This report consist of collections of articles and essays by CSOs, Member of Parliament, Academician and select AICHR's representatives on the performance of AICHR. As such, this report presents a review of the performance of the AICHR from 2009-2019 and assesses the AICHR's evolution, milestones, key activities and challenges to address youth and migrant issues, refugee crisis, freedom of opinion and expressions as well as human rights defenders issues.

The views and opinions expressed in the articles and essays are those of the authors and do not necessarily reflect the official policy or position of FORUM-ASIA and SAPA. At the same time, this performance review was designed not as an exhaustive audit of the ASEAN human rights mechanisms, but rather as a qualitative assessment from the viewpoint of CSOs, Member of Parliament, Academician and select AICHR's representatives with the aim of contributing to the accountability and effectiveness of the AICHR in its service of human rights.

Writers Profile



Vitit Muntarbhorn is a Professor Emeritus at the Faculty of Law, Chulalongkorn University. He has helped the UN in a variety of capacities, including as a former UN Special Rapporteur, UN Independent Expert and member of UN Commissions of Inquiry on human rights. He was the alternate Thai member of the ASEAN High-Level Panel which drafted the terms of reference establishing the AICHR. He is currently a member of the UN Secretary General's Civil Society Advisory Board on Prevention of Sexual Exploitation and Sexual Abuse. Parts of this article are derived from an earlier paper for the conference organized by the University of the Philippines in cooperation with the University of Swansea, held in Manila, October 2016 (preceded by an earlier conference held in Swansea).



Eric Paulsen is the Representative of Malaysia to the ASEAN Intergovernmental Commission on Human Rights (AICHR). He was formerly the Legal Director at Fortify Rights, a human rights organisation based in Southeast Asia. He was called to the Malaysian Bar in 1998 and started legal practice at Messrs Karpal Singh & Company, a criminal and public interest law firm in Malaysia. He co-founded Lawyers for Liberty in 2011, a human rights organisation in Malaysia and was its Adviser until becoming the Executive Director from 2014 to June 2018.

Eric previously worked at Suara Rakyat Malaysia (SUARAM) and was involved in civil society movements in Malaysia to abolish the Internal Security Act 1960 (Gerakan Mansuhkan ISA), the Sedition Act 1948 (Gerakan Hapuskan Akta Hasutan), and the National Security Council Act 2016 (#TakNakDiktator). He also previously worked with UN agencies in Cambodia, Bangladesh, Nepal and Myanmar on various human rights issues, particularly on statelessness and the Rohingya.



Charles Santiago is a Malaysian politician and is Member of the Parliament of Malaysia for the Klang constituency in Selangor. He is a member of the Democratic Action Party (DAP) party in the Pakatan Harapan (PH) coalition. Santiago was first elected to Parliament in the 2008 election winning the seat of Klang from the governing Barisan Nasional (BN) coalition. Prior to his election, Santiago was an economist and worked for non-governmental organisations such as the Coalition Against Water Privatisation and Monitoring Sustainability of Globalisation Malaysia. Santiago was re-elected to Parliament for Klang constituency in the consecutive 2013 and 2018 general elections. Santiago is also Chairman of ASEAN Parliamentarians for Human Rights (APHR). He was appointed chairman of the National Water Services Commission (SPAN) and his appointment is effect from 1 November 2018 until 31 October 2020.



Joel Mark Baysa-Barredo considers himself as a queer-feminist academic-activist from Southeast Asia. He pursued an International Master's Degree in Human Rights at the Institute of Human Rights and Peace Studies, Mahidol University (Thailand). He was Programme Manager for Research for the SHAPE-SEA Programme (2015-2019), and is currently the Programme Director for the transition period towards the Second Phase of the said programme. He been working with the ASEAN Youth Forum (AYF) as regional think tank member and has led the organization towards critically constructive engagements with ASEAN bodies on youth. Mr. Barredo actively takes part in several international and regional advocacy and academic exercises with the aim of helping realize sexuality-embracing, youth-driven, rights-centred societies. In his spare time, he indulges in solo travelling in pursuit of witnessing and understanding complex lived realities in the global south.



Ratna Mathai-Luke is the Asia programme officer at the Global Alliance Against Traffic in Women (GAATW). GAATW sees the phenomenon of human trafficking intrinsically embedded in the context of migration for the purpose of labour; while the members promote and defend the rights of all migrant workers, the International Secretariat which is based in Bangkok, focuses on issues relating to women migrant workers. Previously Ratna worked for the Asia-Europe Foundation (ASEF) where she managed the Informal ASEM Seminar on Human Rights which was the official human rights dialogue for the 53 members of the Asia-Europe Meeting (ASEM). As a result of her experience, Ratna has been working on human rights, migration, rule of law in Asia for over 10 years. Ratna has degrees in forced migration (Oxford University) and human rights law (University of London); she is currently completing her LLM in public international law (University of London). All views are the author's own.



Edmund Bon Tai Soon is the Representative of Malaysia to the ASEAN Intergovernmental Commission on Human Rights (AICHR) [2016 to 2018]; Advocate & Solicitor, Messrs AmerBON, Advocates; and Director, Malaysian Centre for Constitutionalism & Human Rights (MCCHR).

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Findings from the FORUM-ASIA and SAPA AICHR+10 Review

By Rachel Arinii Judhistari,
Cornelius Damar Hanung
and Desi Hanara

During the first decade of the existence of the ASEAN Intergovernmental Commission of Human Rights (AICHR), the ASEAN region has witnessed widespread and systemic human rights violations perpetrated by state authorities through the region, as well as abuses by non-state actors.¹ In Myanmar, the ethnic minority Rohingya have faced systematic violence, discrimination and segregation, which the Human Rights Council-mandated Fact-Finding Mission on Myanmar reported could amount to genocide. Crimes against humanity² and war crimes³ are being perpetrated in Kachin and Shan States, as well as against the Rohingya in Rakhine State. ⁴ In the Philippines, aside from increasing restrictions on freedom of expression, largely through the curtailment of online and offline press, and moves toward populist authoritarian policies,⁵ large-scale extrajudicial killings in the name of ‘war on drugs’ have reportedly resulted in the death of over 27,000 people, most of them from poor and marginalised communities.⁶

A majority of ASEAN Member States (AMS) governments have suppressed a vast array of human rights, including the rights to life and to political participation; freedom of expression; peaceful assembly and association; freedom from torture, arbitrary arrest, prosecution, and punishment; as well as the rights to adequate standard of living and highest attainable standard of health.⁷ In many AMS, discrimination in various forms persists, often manifested in violence, intimidation and persecution of minorities and other vulnerable groups.⁸ From 2010-2018, AICHR have conducted 121 activities (not inclusive of AICHR’s meeting or ad-hoc programmes, but includes the task force/ working group meeting) and have spent 6 million USD for the implementation of the activities⁹. Unfortunately, the activities have not yet answered to the human rights situation on the ground and failed to provide human rights protection for ASEAN people. After a decade of its existence, the AICHR has yet to mature into an effective regional human rights mechanism. Unfortunately, to date, it has failed to provide protection and serve as a regional recourse for victims of human rights violations for people whose own states have failed to protect them.¹⁰

¹ See e.g. Human Rights Watch (HRW), World Report from 2009 to 2019 <<https://www.hrw.org/previous-world-reports>> accessed 6 April 2019; ASEAN Parliamentarians for Human Rights (APHR), Related statements and press releases on human rights issues in the region <<http://aseanmp.org>> accessed 6 April 2019; Amnesty International (AI), Relevant International Annual Report <<http://amnesty.org>> accessed 6 April 2019.

² Amnesty International, Report: “Caged without a Roof”: Apartheid in Myanmar’s Rakhine State (Index: ASA 16/7484/2017), 2017.

³ See e.g. United Nations Human Rights Council (UNHRC) (17 September 2018) UN Doc A/HRC/39/CRP.2.

⁴ *ibid.*

⁵ See e.g. The Guardian, ‘Duterte’s Philippines drug war death toll rises above 5,000’ (19 December 2018) <<https://www.theguardian.com/world/2018/dec/19/dutertes-philippines-drug-war-death-toll-rises-above-5000>>

⁶ *ibid.*

⁷ See e.g. HRW, World Report from 2009 to 2019; APHR, Related statements and Press Release; AI, Relevant Reports.

⁸ *ibid.*

⁹ Presentation of H.E. Edmund Bon Tai Soon, ‘Workshop on Access to Justice: Lessons Learnt and Pathways Forward’. 29-30 April 2019.

¹⁰ See e.g. Hsien-Li TAN, The AICHR; Institutionalizing Human Rights in Southeast Asia (CUP 2011); Nicholas Doyle, ‘The ASEAN Human Rights Declaration and the Implication of Recent Southeast Asian Initiatives in Human Rights Institutions-Building and Standard Setting’ (2014) 63(1) ICLQ; Forum Asia and SAPA TFHAR, Annual Report on the Performance of ASEAN Human Rights Mechanisms from 2010 – 2017 <<https://www.forum-asia.org/?cat=153>> accessed 6 April 2019.

On 23 October 2009, the AICHR was established as an overarching institution mandated to promote and protect human rights in ASEAN. Article 14 of the ASEAN Charter, which provides for the establishment of “an ASEAN human rights body,” does not specify the type or nature of this body, only that it would operate under Terms of Reference (ToR) “to be determined by the ASEAN Foreign Ministers Meeting (AMM).”¹¹ The AMM created and tasked the High-Level Panel to draft the ToR, and they concluded its task with a consensus of establishing the AICHR with intergovernmental and consultative characteristics.¹²

This report has been prepared by FORUM-ASIA and SAPA to review the performance of the AICHR from 2009 to 2019. It seeks to examine AICHR’s evolution, milestones, key activities, and challenges during the past decade, and proposes strategies and recommendations for stronger human rights protections in the region. Some interviewees whose views contributed to this report, including Ms. Debbie Stothard, Coordinator of ALTSEAN-Burma, recalled differing views among AMS during the drafting of the Terms of Reference (ToR) of the AICHR. Some AMS actively sought for the establishment of an independent, professional and empowered human rights body, while others wanted the AICHR to be established as an exclusive intergovernmental body whose members follow instructions from the capitals, and with one of its main roles being “a defender against criticism of human rights situations in ASEAN at international human rights forums.”¹³ H.E. Hassan Wirajuda, who was Indonesia’s Foreign Minister during the drafting of the AICHR’s ToR, described Indonesia’s disappointment at the way the negotiations concluded, highlighting the imbalance between the Commission’s promotion and protection mandates in the document. He argued that the AICHR’s main flaws lie within the ‘intergovernmental’ nature of the body. The AICHR needed to be independent and impartial if it was to successfully fulfill its protection mandate, and so this model was always going to be detrimental to such fulfillment. He stated that the protection capacity under the AICHR’s ToR is inferior even to the protection capacity of the Indonesian National Human Rights Commission, which enables investigations and has the right to call witness, let alone compared with the other regional human rights mechanisms which are equipped by enforcement mechanisms to ensure justice and remedy for victims. He highlighted that Indonesia sought to address the gaps in the ToR by drafting a political declaration, the known as the Cha Am Hua Hin Declaration on the AICHR,¹⁴ as a condition to accepting the ToR. The Declaration was subsequently adopted by the ASEAN leaders the same year and emphasized, among other clauses, the need to review the ToR “every five year after its entry into force to strengthen the mandate and functions of the AICHR in order to further develop mechanisms on both the protection and promotion of human rights”.

¹¹ ASEAN Charter (adopted 20 November 2007 entered into force 15 December 2008) art 14 < http://www.asean.org/wp-content/uploads/2012/05/11.-October-2015-The-ASEAN-Charter-18th-Reprint-Amended-updated-on-05_-April-2016-IJP.pdf> accessed 7 April 2019.

¹² ToR of the AICHR (adopted July 2009) art 3 < <https://aichr.org/wp-content/uploads/2018/10/TOR-of-AICHR.pdf>> accessed 7 April 2019. The ToR appears as ANNEX 1.

¹³ Interview with H.E. Yuyun Wahyuningrum, the Representative of Indonesia to the AICHR 2019 – 2020 (Jakarta, 8 April 2019); Phone interview with Debbie Stothard (Jakarta, 8 April 2019).

¹⁴ Cha Am Hua Hin Declaration on the AICHR (adopted 23 October 2009) < <http://hrlibrary.umn.edu/research/Philippines/Cha-Am%20Hua%20Hin%20Declaration%20of%20the%20AICHR.pdf>> accessed 7 April 2019.

To this day, however, there has never been such a review despite calls from both CSOs and AICHR itself to strengthen AICHR's protection mandate. H.E. Hassan Wirajuda underlined that now would be a critical time for the AICHR ToR to be implemented in line with the Cha Am Hua Hin Declaration, in order to strengthen its protection mandate.¹⁵ FORUM-ASIA and SAPA however, have not seen any indications of this happening. Instead, despite the considerable political clout of Indonesia in the region, those Member States who hold more restrictive views of AICHR's mandates appear to have had the upper hand, despite their relative political weakness.¹⁶

H.E. Dr. Seree Nonthasoot, the Representative of Thailand to the AICHR between 2013-2018, mentioned that during the AICHR's first ten years of operation, the intergovernmental and consultative characteristics of the AICHR posed a number of structural and operational challenges. There was no common understanding among Representatives on the AICHR's functions within the parameters of its ToR, and very little synchronization with relevant ASEAN Sectoral Bodies.¹⁷ The AICHR is composed of states' representatives, often long-serving government officials with differing levels of expertise and understanding of human rights, not to mention disparity in their political will, commitment, and impartiality in fulfilling their role in promoting, and in particular protecting, human rights in the region.¹⁸

As captured by the annual performance reports by FORUM-ASIA and SAPA, and collectively expressed by a number of experts and interviewees, another reason for AICHR's continued passivity and inaction in the face of egregious human rights violations in the region has been the lack of political will of AMS. This has manifested in a selected and inflated invocation of ASEAN's non-interference principle, strict adherence to the consensus decision-making principle, and, also, the aforementioned opaque and undemocratic selection process of its Representatives in the majority of member states.

To address this aspect, it is important to establish a comprehensive independent and transparent selection process of the AICHR representatives, with the active engagement of CSOs. FORUM-ASIA and SAPA, together with other organizations including the Indonesia Coalition for the AICHR Selection Process, have developed a suggested selection process and criteria which was adopted by the Malaysian government in 2018 as the foundation of their first open selection process.

As expressed by Dr. Yuval Ginbar, Legal Adviser of Amnesty International (AI), ASEAN's principles of non-interference and consensus-based decision-making are not superior to other principles upheld under article 2 of the ASEAN Charter and the AICHR ToR; rather, they are equally

¹⁵ Interview with H.E. Hassan Wirajuda, Minister of the Republic of Indonesia 2001 – 2009 (Jakarta, 27 March 2019).

¹⁶ Online Consultations of Forum Asia and members of SAPA TFHAR (15 April 2019).

¹⁷ Phone Interview with H.E. Dr. Seree Nonthasoot, (Jakarta, 30 March 2019).

¹⁸ *ibid*; See e.g. Tan, The AICHR; Doyle, 'The AHRD and the Implication'; SAPA Forum Asia and TFHAR, Annual Report from 2010 to 2017.

provided for along with other principles, including human rights, fundamental freedoms, social justice, and democracy as well as regional peace, security and prosperity. However, in practice, the non-interference principle has often been invoked by some AMSs in order to preserve their perceived national interests, using “consensus” as a way of imposing a veto on any AICHR protection activities, even when grave violations of human rights have occurred.¹⁹ AICHR’s failure to even look for, let alone find, a way out of the debilitating consensus has been widely deemed to have diminished AICHR’s ability to encourage AMSs to abide by their obligation to implement international human rights law in the region or to tackle disagreements among its member states.²⁰ Interestingly, H.E. Hassan Wirajuda emphasized the opportunity of the consensus-based decision-making for progressive governments to ensure AICHR’s alignment with the highest attainable international norms. He argued that the alternative decision-making process, such as voting, would be more detrimental for AICHR, especially with the aim of strengthening their protection mandates. In order for this to be effective, however, the Indonesian Ministry of Foreign Affairs and AICHR Representative need to lead on negotiations to use the ‘reasoning process’ and consensus-making to galvanize such strengthening of AICHR’s protection mandate.

The impartiality of AICHR Representatives, non-interference principle, and lack of political ownership have collectively allowed AMS to hold tight control over the AICHR, hindering its responsiveness, works efficiency, institution-building ability and protection capacity. Compared to other regional and international human rights mechanisms, the AICHR has the weakest protection record – in fact it has no protection record to speak of.²¹ This is not least because the majority of the Representatives have consistently refused to implement even the limited protection mandate provided by its ToR, let alone interpret them creatively and progressively, for instance by developing strategies for the protection of human rights, or obtaining information from member states regarding gross violations of human rights under their jurisdiction, or creating a complaint and communications mechanism.²²

The result of the above has been a resounding silence of the AICHR on any human rights violations, in the years that saw the deterioration of human rights in the region, some of which amount to the worst crimes under international law.²³ Another result is the widely criticized ASEAN Human Rights Declaration (AHRD)²⁴, with a large number of stakeholders criticizing the fact that it has attempted to water down international human rights standards, not least by imposing wide-ranging restrictions. Under the AHRD’s General Principles (GPs), the enjoyment of the rights

¹⁹ Phone interview with Dr. Yuval Ginbar (Jakarta, 16 March 2019)

²⁰ SAPA Forum Asia and TFHAR, Annual Report from 2010 to 2017; Statements from a number of interviewees and concurrences from a number of respondents to Forum Asia’s questionnaire.

²¹ *ibid.*

²² The sentence were adjusted and developed from Forum Asia and SAPA TFHAR, Reasonable Doubt, The Journey Within, 20 <<https://www.forum-asia.org/uploads/wp/2018/11/ASEAN-Human-Rights-Institution-Performance-Report-2017-Final-2-1.pdf>> accessed 6 April 2019.

²³ *ibid.*

²⁴ AHRD and the Phnom Penh Statement (PP Statement) on the Adoption of the AHRD (adopted 18 November 2012) <http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf> accessed 8 April 2019.

provided in the Declaration is to be “balanced with the performance of duties” (GP 6), subjected to “national and regional contexts” and to considerations of “different cultural, religious and historical backgrounds” (GP 7). Moreover, all of the rights provided in the Declaration would be subject to restriction on a wide array of grounds including “national security” and “public morality” (GP 8). It has been suggested that these terms provide Governments with wide discretionary powers to violate even non-derogable human rights.²⁵

There were varied opinions from the interviewees and respondents on the state of the AHRD and the ways forward for post-AHRD standard setting priorities in light of those criticism. The International Commission of Jurists (ICJ), Amnesty International, FORUM-ASIA, SAPA and other CSOs actors expressed the view that the AHRD, being the departure point of ASEAN standards on human rights, needs to be amended to ensure that it accords with international human rights treaties and other universally accepted standards.²⁶ H.E. Edmund Bon Tai Soon, the Representative of Malaysia to AICHR between 2016-2018 and H.E. Yuyun Wahyuningrum preferred to elevate the existing agreements in the AHRD by translating them into general comments, position papers, advisory notes, human rights guidelines and principles.²⁷ H.E. Rafendi Djamin, the Representative of Indonesia to the AICHR between 2009-2015 and others stated that future standard setting under article 4(2) of the ToR should rather be focused on the development of a general legally-binding human rights instrument which duly upholds universal standards.²⁸ Prof. Vitit Muntarbhorn emphasized that the AHRD can never be read without its overriding statement, namely the Phnom Penh Statement on the Adoption of the AHRD.²⁹ He reminded that the overriding Statement formed a compromised consensus that was reached in light of the heavy criticism towards the AHRD, and that it has nevertheless grounded the AHRD in the international standards.³⁰ It should be noted that CSO legal experts disagree with the latest view, arguing that the Phnom Penh Declaration refers, in its Article 3, not only to universal standards but also to “relevant ASEAN declarations and instruments pertaining to human rights” thus creating a legal loop where the AHRD is also a basis for its own implementation.³¹

²⁵ See e.g. ‘AHRD Should Maintain International Standards’, An Open letter from the Coordination Committee of the Special Procedures of the human Rights Council on the Draft AHRD <www.ohchr.org/Documents/HRBodies/SP/LetterASEAN_Nov2012.doc> accessed 6 April 2019; Mong Palatino, ‘Human Rights Declaration Falls Short’ The Diplomat (Washington D.C. 28 November 2012) <<https://thediplomat.com/2012/11/human-rights-declaration-falls-short/>> accessed 6 April 2019; Human Rights Watch, ‘Civil Society Denounces Adoption of Flawed AHRD’ (11 November 2012) <<https://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration>> accessed 10 September 2017; ICJ, ‘The AHRD; Questions and Answer’ <<https://www.icj.org/wp-content/uploads/2013/07/ASEAN-leaflet-240713.pdf>> accessed 6 April 2019; Statements (n 13). ‘The AHRD; Questions and Answers’ appears as ANNEX 2.

²⁶ Phone interview, Dr. Yuval; Consultations of Forum Asia and SAPA TFHAR; See also ICJ, ‘Memorandum on the ToR of the AICHR’ <<https://www.icj.org/wp-content/uploads/2014/06/Memorandum-on-TOR-of-AICHR.pdf>> accessed 6 April 2019. ‘The Memorandum on the ToR of the AICHR’ appears as ANNEX 3.

²⁷ Interview with H.E. Edmund Bon Tai Soon (Jakarta 13 March 2019); Interview, H.E. Yuyun.

²⁸ Interview with H.E. Rafendi Djamin (Jakarta, 26 March 2010); Statements from a number of interviewees and concurrences from a number of respondents to Forum Asia’s questionnaire.

²⁹ AHRD and PP Statement.

³⁰ Consultation with Prof Vitit Muntarbhorn at the Forum Asia Expert Meeting on the Preparation of 10 Years Evolution of AICHR Report, Jakarta, 25-26 February 2019.

³¹ ICJ, ‘The AHRD’; Phone Interview, Dr. Yuval.

AICHR activities during the past decade included standard setting and institution building, capacity building, public awareness, engagements with various actors, human rights mainstreaming as well as alignment with relevant ASEAN Sectoral Bodies.³² Along with the challenges presented above, some achievements are noteworthy, including the adoption of ASEAN Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities³³ which has manifested an example, on how an overarching institution should lead the development of key policy actions for the three ASEAN community pillars with close consultations with relevant sectoral bodies and stakeholders, and due regard to universally accepted standards.³⁴ FORUM-ASIA and SAPA expressed their expectation that the key policy actions under the Masterplan will be implemented nationally and that Monitoring and Evaluation (M & E) system will be put in place to measure their implementation.³⁵ On human rights mainstreaming, it is notable that the AICHR has undertaken a number of activities with a view to mainstreaming human rights across the three community pillars of ASEAN, as well as into the works of other stakeholders including ASEAN Sectoral Bodies, Judiciary and Law Enforcement Officials.³⁶ To effectively leverage the momentum of AICHR's 10 years anniversary, AICHR should go beyond implementing activities and conduct an impact assessment to assess the extent to which its activities have improved human rights mainstreaming in the ASEAN countries, and how its activities have impacted those who participate in them.

According to the Annual Report of AICHR activities in 2017, the increasing number of applications from CSOs for Consultative Relationships with the AICHR was a testament to the increasing visibility of the AICHR's work and the interest of civil society to engage with it. Currently, there are at least 30 CSOs with Consultative Relationships to the AICHR, working on areas of civil and political rights, rights of women, the rights of persons with disabilities, the rights of children, indigenous peoples, migrant workers, labour rights, the right to development, and the right to peace – among others.

The AICHR has ostensibly strengthened its relations with accredited CSOs over the past few years. It organised an interface meeting with CSOs in November 2017 as part of a Roundtable

³² See e.g.: AICHR, AICHR Annual Report 2016-2018 <https://aichr.org/reports/> accessed 7 April 2019; AICHR, AICHR Five-Year Work Plans <https://aichr.org/> accessed 7 April 2019; AICHR, AICHR Website < <https://aichr.org/our-work/> > accessed 7 April 2019. The AICHR Five-Year Work Plan 2012-2015 appears as ANNEX 4 and the AICHR Five-Year Work Plan 2016 – 2020 appears as ANNEX 5.

³³ ASEAN Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities (Adopted at the 33rd ASEAN Summit) < <https://asean.org/storage/2018/11/ASEAN-Enabling-Masterplan-2025-Mainstreaming-the-Rights-of-Persons-with-Disabilities.pdf> > accessed 7 April 2019.

³⁴ Phone interview, H.E. Dr. Seree; See also Seree Nonthasoot, 'ASEAN Enabling Masterplan 2025: A New Horizon for Persons with Disabilities' The Jakarta Post (Jakarta, 2 January 2019) < <https://www.thejakartapost.com/news/2019/01/02/asean-enabling-masterplan-2025-a-new-horizon-persons-with-disabilities.html> > accessed 7 April 2019; ASEAN Enabling Masterplan 2025.

³⁵ Consultations of Forum Asia and SAPA TFHAR

³⁶ See e.g.: AICHR, Annual Report 2016-2018; AICHR, Five-Year Work Plans.

Discussion on the AHRD and the AICHR-CSO Symposium in 2018. These meetings, with financial support allocated for the travel expenses of the CSOs, was not initially in the 2017 and 2018 work plan but was added later in the spirit of collaboration between the AICHR and CSOs. Participants from both the AICHR and CSOs agreed that such meetings could be improved in the future by providing additional time for discussions and interactions, and that future meetings should be based on the principles of mutual respect and open collaboration.

Under the Guidelines on the AICHR's Relations with CSOs, the AICHR can leverage its relations with accredited CSOs³⁷ by regularising the communications between CSOs and the AICHR through conducting an annual meeting with CSOs. According to the AICHR, this will enhance the value of the consultative relationship for both the AICHR and the accredited CSOs and contribute to the ASEAN community-building process.³⁸

Nonetheless, there remain significant concerns among members of civil society regarding their relationship with the AICHR. Perhaps most seriously, interviews with CSOs showed that there is a feeling of apprehension by CSOs over their interactions with the AICHR, particularly on sensitive human rights issues. On a more structural level, the consultative relationship mechanism, which sets the parameters within which the AICHR representatives determine whether to grant civil society organisations a consultative relationship, is very vague. This implies that CSOs are not seen as meaningful partners within the regional mechanism – in contrast with their counterparts within international mechanisms such as the Universal Periodic Review (UPR) process, in which CSOs have a defined role and opportunity to raise even the most sensitive human rights issues.

According to one CSO interviewee, the AICHR fails institutionally to recognise the engagement of the national and regional CSOs as an added value which can ensure the sustainability and institutional strengthening of the body. Some AICHR representatives initiate and organise national meetings with CSOs but as invitees to such meetings are limited, as are systematic and clear follow-up plans, there is much room for improvement. One interviewee reported that even when CSOs are invited to various meetings by the AICHR Representatives, severe limitations are imposed on their participatory role. The national and regional CSOs demanded more active participation, not least by being granted the possibility to speak and comment on the human rights situation on the ground. CSOs have also faced financial constraints which prevented them from attending the AICHR's activities.

Engagement of CSOs with the AICHR is, in theory, set out through the AICHR's CSO Participation Guidelines and its ToR, but in practice it relies on the assessment and proactivity of individual representatives. Instead, the AICHR can, and should, model its involvement with CSOs on the norms, attitude, and access granted by the UN Human Rights Council, which allow CSOs to actively engage with, and thus strengthen, sessions as key stakeholders.

³⁷ See <http://aichr.org/press-release/press-release-25th-meeting-of-the-aichr-26-27-november-2017-bohol-philippines/>, accessed on 7 April 2019.

³⁸ See AICHR Annual Report 2017, pp. 14-15.

According to interviews, another key challenge was the absence of or limitations in CSOs participation in, or at least input into, the development of the AICHR's work plan. Although the work plan was circulated in regional and/or national workshops, CSOs did not have any opportunity to provide input, analyse, or strengthen it in view of their familiarity with the human rights situation on the ground. In the instance that CSOs were invited to propose projects and activities to the AICHR work plan at the national level, the timeframe between the announcement of calls for proposal and the deadline of submission was quite limited (e.g., around five working days).

CSOs in the region also believed that AICHR Representatives could better act for the protection of human rights nationally and regionally if took the opportunity to hear the perspectives on the actual situation of human rights on the ground in their respective countries, through taking part in fact-finding missions and/or field visits to areas that tend towards human rights violations – such as grassroots community areas or conflict areas.

As for the usefulness of the consultative relationship given by the AICHR to CSOs, the interviewees' responses significantly varied. While some interviewees applauded the AICHR's effort to provide a formal mechanism for CSOs engagement, others expressed concerns about the mechanism's lack of transparency in providing consultative relationships, and pointed to a significant risk of excluding groups who hold dissenting positions and question national governments.

The Guidelines on the AICHR's Relations with CSOs are a significant milestone in further advancing the AICHR's mandate on engagement with CSOs, as provided in Article 4.8 of its ToR. Through the Guidelines, CSOs can formally request information from the AICHR (and vice versa), which is a valuable mechanism. However, the level of engagement between CSOs and the AICHR representatives was mixed and remained dependant on the willingness of the AICHR representatives.

The AICHR should be commended for its initiative, in 2014, to undertake its own assessment of its own record, through stock-taking and analyzing its programs and activities during the first five years of its establishment. Although there is some criticism of the process of the review, it is somewhat encouraging that the AICHR undertook two consultation meetings with a range of stakeholders on the review of its ToR at all.³⁹ This is undermined, however, by the fact that the review has not been published to this day.

With a decade having passed since its establishment, a number of stakeholders highlighted the need for the AICHR to submit another review to the AMM, including recommendations for changes in the TOR based on AICHR's own assessment on the extent to which its mandate have

³⁹ Forum Asia and SAPA TFHAR, Report: The Future of Human Rights in ASEAN; Public Call for Independence and Protection Mandates (Bangkok 2014).

helped or hindered the Commission in promoting and particularly protecting human rights in the region.⁴⁰ H.E. Yuyun Wahyuningrum emphasized that the AICHR needs to submit specific recommendations to the ASEAN Foreign Ministers, as opposed to a general assessment, by directly identifying the provisions that need to be amended for the consideration of the AMM.⁴¹

It is to be acknowledged that the creation of the AICHR and the implementation of its activities have generated discourse on human rights within the ASEAN system, its member states and the wider public. Further, they have also created spaces for human rights discussions within ASEAN, and to some extent and in certain situations may have positively changed AMS' attitudes towards human rights.⁴² However, some CSOs are of the view that such changes in attitudes remain to be seen, given the consistent patterns of resistance employed by some AMSs towards any attempts to strengthen of the AICHR.⁴³

Some progressive AICHR Representatives have made considerable efforts in creatively using their "regional hats". The trust-building and collegial nature of some former and current Representatives has to some extent contributed towards the increase of some AMS' acceptance of human rights. The diplomacy of some progressive former and current Representatives, notably from Indonesia, Malaysia, the Philippines and Thailand, has also gradually furthered cooperation on human rights among the 10 very different nations.⁴⁴ These Representatives have sought to mainstream protection practices within the AICHR by conducting mini-UPRs to mirror the international mechanism, proposing various formula to possibly set up complaints and correspondence procedures for the AICHR, and enhancing AICHR's standard setting functions in a number of human rights fields. They have built a consensus with AICHR to conduct activities on sensitive human rights issues such as torture, and enhanced AICHR's relations with various actors.⁴⁵ Finally, in 2018, two AICHR Representatives issued a joint statement after failing to reach consensus within the AICHR to respond to egregious human rights violations against the Rohingya in Myanmar,⁴⁶ though their statement failed to mention either the Rohingya or human rights violations.⁴⁷ It is to be hoped that the AICHR Representatives will continue their efforts to break the silence and in trying to unlock the barriers that keep the AICHR from engaging in human rights protection, given that these efforts have not yet succeeded in transforming the AICHR into a body that actually protects human rights.⁴⁸

⁴⁰ Phone Interview, Dr Yuval; ICJ, 'Memorandum'; Consultations of Forum Asia and SAPA TFHAR.

⁴¹ Interview, H.E. Yuyun.

⁴² Interview, H.E. Rafendi; Interview, H.E. Yuyun.

⁴³ Consultations of Forum Asia and SAPA TFHAR.

⁴⁴ Desi Hanara, 'Seeking RI Figure for ASEAN Rights Body' The Jakarta Post (Jakarta, 27 August 2018) <<https://www.thejakarta-post.com/news/2018/08/27/seeking-ri-figure-asean-rights-body.html>> accessed 6 April 2019.

⁴⁵ Interview, H.E. Yuyun; Phone Interview, H.E. Dr. Seree; Interview, H.E. Rafendi; AICHR, Annual Report 2016-2018; AICHR, Five-Year Work Plans.

⁴⁶ Human Rights in ASEAN, 'Joint Media Statement by H.E. Associate Prof. Dinna Wisnu and H.E. Mr. Edmund Bon Tain Soon, Representatives of AICHR' (23 April 2018) <<https://humanrightsinasean.info/campaign/joint-media-statement-he-associate-prof-dinna-wisnu-and-he-mr-edmund-bon-tai-soon>> accessed 13 April 2019.

⁴⁷ Phone interview, Dr. Yuval.

⁴⁸ Consultations of Forum Asia and SAPA TFHAR.

At the international level, AMSs tend to show limited adoption of international human rights laws and standards, particularly of those which provide for strong monitoring procedures or those which could be considered sensitive given AMS' domestic politics.⁴⁹ Although all AMS have ratified the treaties they consider to be less politically sensitive,⁵⁰ namely the CRC, the CEDAW and the CRPD, the commitment to even these of several AMSs is still greatly limited by their reservations and declarations. In addition, a majority of AMSs have yet to ratify most of the Optional Protocols (OPs) to these three treaties, especially those that involve communication procedures. Furthermore, the status of AMS' ratification of and reservations to other core human rights treaties, including their OPs, reflect an even a lower level of commitment by many AMSs.⁵¹ The human rights situation in the AMSs has revealed serious discrepancies between the ratification to international human rights treaties, notably the International Covenant on Civil and Political Rights (ICCPR), and the implementation of human rights protection guaranteed under those treaties.⁵²

Ideally, where gaps are identified in implementing human rights treaties or in respecting and protecting human rights more generally, every attempt should be made to address such gaps, including at the regional level. In ASEAN, AICHR is the regional body that should be taking up this task, while AMSs should ensure that it has the mandate, resources, expertise and independence needed to carry it out.⁵³

AICHR, AMSs and ASEAN as a whole have so far failed, individually and collectively, to create or develop a viable human rights mechanism.⁵⁴ Regional human rights mechanisms elsewhere in the world are above all protection mechanisms, where those whose rights have been violated can lodge their complaint. These regional human rights body, be they in Africa, America or Europe, would have complaints investigated and considered; states submitting their positions in response; and a mechanism taking steps to prevent and stop violations, provide redress and accountability, and ensure that violations are not repeated.⁵⁵

⁴⁹ See OHCHR, 'Status of Ratification' <<http://indicators.ohchr.org/>> accessed 7 April 2019; See e.g. Mathew Davies, 'States of Compliance?: Global Human Rights Treaties and AMS' (2014) 13 JHR 414-433; Li-ann Thio, 'Implementing Human Rights in ASEAN Countries' (1999) 2(1) YHRDLJ 1-86.

⁵⁰ All AMS have ratified Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Convention on the Rights of the Child (CRC) and Convention on the Rights of Persons with Disabilities (CRPD).

⁵¹ See OHCHR, 'Status of Ratification'; Davies, 'States of Compliance?'

⁵² See e.g. HRW, World Report from 2009 to 2019; APHR, Related statements and Press Release; AI, Relevant Reports; See also Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference' (2002) 111(8) YLJ 1935.

⁵³ SAPA Forum Asia and TFHAR, Annual Report from 2010 to 2017; Statements from a number of interviewees and concurrences from a number of respondents to Forum Asia's questionnaire; ICJ, 'Memorandum'.

⁵⁴ *ibid.*

⁵⁵ See e.g. Steven Greer, 'Europe' in Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (OUP 2014) 416 - 440; Jo Pasqualucci, 'The Americas' in Sivakumaran 398 - 415; Christof Heyns and Magnus Killander, 'Africa' in Sivakumaran 441 - 457; Viljoen, *International Human Rights Law in Africa* (OUP 2012); Douglass-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11(4) HRLR 645-682; Harris and Livingstone (eds), *The Inter-American System of Human Rights* (OUP 1998).

AICHR, by contrast, has consistently refused to even listen to or discuss complaints, let alone try to protect complainants from human rights violations or seek justice for victims. Even in the face of some of the worst atrocities so far in this century, AICHR's has remained passive, silent, indifferent. This has to change.⁵⁶



Key recommendations

Member states of other regional mechanisms have granted robust powers to their relevant institutions to ensure human rights respect, protection and fulfilment of their people. They have adopted binding human rights instruments, and established strong monitoring, communication and enforcement mechanisms. Likewise, AMSs should ensure that AICHR is capable of fulfilling its current protection mandate while working to expand it, and ensure a human rights system that provides protection at least on a par with international and other regional human rights systems. By doing so AMSs could meaningfully work towards making a people-centered and people-oriented ASEAN Community as it has proclaimed to be in various statements and documents.⁵⁷

Moving forwards, it is critical for both the AICHR and AMSs to step up to the task. AICHR's current ToR includes an explicit protection mandate, and it is high time that the AICHR puts this into practice it, while seeking to strengthen the mandate and the Commission's professionalism, independence and decision-making capacities.

Specifically, the AICHR should:

1. Respond to human rights crises by requesting information from relevant AMS, conducting investigations and studies, issuing statements and consulting with UN human rights bodies and National Human Rights Institutions;
2. Establish a robust complaints mechanism that would receive individual communications, look into them, request responses from the relevant AMS, seek solutions and follow up;
3. Enhance engagement with CSOs, including allowing attendance of CSOs in AICHR meetings, consulting CSOs in their activities and major decisions making, sharing the agenda in advance and providing a role for CSOs in communicating complaints of human rights violations; and

⁵⁶ SAPA Forum Asia and TFHAR, Annual Report from 2010 to 2017; Statements from a number of interviewees and concurrences from a number of respondents to Forum Asia's questionnaire; ICJ, 'Memorandum'.

⁵⁷ See e.g.: Kuala Lumpur Declaration on People-Centred, People Oriented ASEAN (adopted 27 April 2015) <http://www.asean.org/storage/images/2015/april/26th_asean_summit/KUALA%20LUMPUR%20DECLARATION%20ON%20A%20PEOPLE-ORIENTED%20PEOPLE-CENTRED%20ASEAN%20-%20Final.pdf> accessed 7 April 2019; Relevant speeches of Secretary-General of ASEAN and his Deputy-Secretaries General < <http://asean.org/resource/speeches-statements/>> accessed 7 April 2019.

4. Pressure the AMS to revise the ToR to ensure:
 - a. A more elaborate and detailed protection mandate,
 - b. Professionalism and independence of representatives, and
 - c. A decision-making procedure that would rely on a majority where consensus cannot be reached.

The AMSs, and specifically the ASEAN Ministries of Foreign Affairs who are tasked with overseeing the AICHR, must abide by their obligations under Article 9(6) of the AICHR ToR and paragraph 7 of the Cha-Am Hua Hin Declaration on the AICHR and review the AICHR ToR with a view to strengthening and detailing AICHR's protection mandate, as well as ensuring that AICHR is more independent, professional and capable of effective decision-making.

Specific measures taken by the AMS should include:

1. In consultation with AICHR, revise its ToR to ensure:
 - a. A more elaborate and detailed protection mandate,
 - b. Professionalism and independence of representatives,
 - c. A decision-making procedure that would rely on a majority where consensus cannot be reached.
4. Provide the AICHR with both a clear mandate and the resources to establish expert working groups, to assist the AICHR in the maximum implementation its mandates related to (1) the development of strategies for the promotion and protection of human rights and fundamental freedoms; (2) the obtainment of information from member states pertaining to its promotional and protective mandates; and (3) the development of a common approach and position on human rights matters.
5. Task the AICHR with drafting an ASEAN convention on human rights, while providing explicitly that rights protections under this convention must not fall below international human rights law and standards;
6. Agree and clarify that the principle of non-interference does not extend to allowing AMS to violate the human rights of their people.



ASEAN Instruments and Mechanisms as Pathways to Human Rights Protection?

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The Association of South-east Asian Nations (ASEAN) is now over half a century old. Founded in 1967, it consists of 10 countries, namely: Brunei Darussalam, Cambodia, Lao People's Democratic Republic, Indonesia, Malaysia, Myanmar, Singapore, Thailand, the Philippines, and Vietnam. In recent decades, the region has progressed politically in building peace between the ten countries and economically in fostering close ties across the region, yielding much fruit with the ASEAN ranking now as the 5th largest economy globally.⁵⁸ Yet, several of the member countries are non-democracies, thus witnessing governmental reticence towards aspects of human rights, particularly civil and political rights, while socio-economic disparities remain in many parts of the region.

Bearing in mind that the organization is essentially a political and economic inter-governmental regional organisation, to what extent might it also encompass human rights, particularly from the angle of effective protection? Similarly, to the experience of many other political and economic regional organisations, human rights have now arrived on ASEAN's doorsteps; human rights are very much part of the ASEAN agenda today. Yet, it is the promotion-oriented aspect rather than the protection-based dimension which has prevailed to date. Human rights promotion tends to be concerned with awareness raising, capacity building, conferencing, workshop hosting, education and training. By contrast, human rights protection requires action to shield people from harm, to ensure access to justice, to address complaints, in particular from affected individuals and groups, to undertake investigations and fact-finding to ascertain the truth, and to provide remedies, with the backdrop of responsibility or accountability at least on the part of the State towards the aggrieved parties.⁵⁹

In reality, the latter is the more challenging part of the human rights equation and if an organization can offer such protection, it will earn credibility and show a more genuine value added to the people of the region and beyond.

Instruments:

The term "instruments" is used in the international sense to cover key written commitments on human rights, emanating from the State, such as Declarations/Resolutions (non-binding by nature) and Treaties/Charters/Conventions (binding by nature). The discussion below will also bear in mind some Plans of Action emerging from the region. Meanwhile, the term "mechanisms" here implies a variety of organs with a mandate to address human rights issues.

58 ASEAN Key Figures (Jakarta: ASEAN Secretariat, 2018), p.27. For background reading on the ASEAN, see: Alison Broinowski (ed.), *Understanding ASEAN* (Hong Kong: Macmillan, 1982); Vitiit Muntarbhorn, *The Challenge of Law: Legal Cooperation among ASEAN Countries* (Bangkok: Institute of Security and International Studies, 1987); Sharon Siddique and Sree Kumar (Compilers), *The 2nd ASEAN Reader* (Singapore: Institute of Southeast Asian Studies (ISEAS), 2003); Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community* (Singapore: ISEAS, 2006); Vitiit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region* (Boston/Leiden: Brill/Nijhoff, 2013); ASEAN, *A Resilient and Innovative ASEAN Community: Annual Report 2017-2018* (Jakarta: ASEAN Secretariat, 2018); ASEAN Annual Report (annual) at www.asean.org

59 For the components of regional organisations with a protection role, see guidance from the UN: www.ohchr.org

At the outset, it should be noted that all ASEAN countries accept the Universal Declaration of Human Rights 1948 and the Vienna World Conference on Human Rights Declaration and Programme of Action 1993.⁶⁰ They are all parties to the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD).

What then are the key instruments from the ASEAN itself and how do they fare on the protection front?

(a) ASEAN Charter

The ASEAN Charter 2007 is the mini-Constitution of the group. It refers to human rights explicitly several times and legitimizes human rights as part and parcel of the ASEAN mandate. However, the Charter is mostly concerned with the functioning of the ASEAN as a regional organization and it mentions human rights without much elaboration. For example, Article 1 states the purposes of ASEAN as including: among others,

“7. To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN.”⁶¹

Human rights are then listed with many other principles pertinent to the ASEAN: per Article 2(2): among others,

“(a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;

(b) shared commitment and collective responsibility in enhancing regional peace, security and prosperity;

(c) renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law;

(d) reliance on peaceful settlement of disputes;

(e) non-interference in the internal affairs of ASEAN Member States;

(f) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion;

⁶⁰ ASEAN Intergovernmental Commission on Human Rights Terms of Reference (TOR) (Jakarta: ASEAN Secretariat, 2009). See also: Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region*. Strong monitoring of the performance of the AICHR is also offered consistently by FORUM-Asia: www.forum-asia.org

⁶¹ For text, see: www.asean.org

(g) enhanced consultations on matters seriously affecting the common interest of ASEAN; (h) adherence to the rule of law, good governance, the principles of democracy and constitutional government;

(i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;.....”⁶²

The Charter is thus not, in substance, a human rights instrument. It is also riddled with other challenging concepts such as non-interference in the internal affairs of a State which has an uneasy relationship with human rights. The only substantive article on human rights in the ASEAN Charter is Article 14 which calls for the establishment of an ASEAN human rights body. Subsequently, the ASEAN Intergovernmental Commission on Human Rights (AICHR) was established pursuant to this Article and the mandate of this mechanism is discussed below.

(b) ASEAN Human Rights Declaration (AHRD)

One of the first tasks of the AICHR was to draft the AHRD, as this had been envisioned by its Terms of Reference (TOR). The Declaration was adopted in 2012 and it consists of 40 articles, structured as follows: general principles; civil and political rights; economic, social and cultural rights; right to development; right to peace; cooperation in the promotion and protection of human rights. It has some innovative elements, such as the call to protect persons with HIV/AIDS, and advocacy of the right to development and peace. However, the AHRD has been heavily criticized by analysts as not being consistent with international standards. The stumbling blocks include the appearance of regional particularities in the text which might undermine universally recognized human rights. These include the overt mentioning of “duties/obligations” (of persons) instead of paramount emphasis on human rights and reference to “national and regional context” which might override universal standards, with components of cultural relativism. The ominous shadow of the latter is found particularly in the wording in the General Principles: Principle 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 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.”⁶³

There are also omissions of various internationally guaranteed rights, particularly the right to freedom of association; overly broad limitations on human rights in the guise of “morality”; emphasis on “non-confrontation” which interplays with the ASEAN governmental attachment to national sovereignty and their claim that human rights-related action should not interfere in the internal affairs of States; and subjection of human rights, particularly the right to seek asylum,

⁶² Ibid.

⁶³ Ibid, Principle 7.

to national law (bearing in mind that most ASEAN states are not parties to the international refugee agreements).⁶⁴

Problems concerning the text were borne out by the fact that the ASEAN leaders had to issue the Phnom Penh Statement in 2012 to accompany the AHRD, underlining that implementation of the latter had to be in accordance with international standards and reaffirming the Universal Declaration of Human Rights, the Vienna Documents and the human rights treaties (instruments) to which ASEAN countries are parties.⁶⁵

(c) ASEAN Convention against Trafficking in Persons, especially Women and Children (ACTIP)

The only Convention or Treaty emerging from the ASEAN with bearing on human rights, to date, is the ACTIP 2015 (accompanied by its ASEAN Plan of Action).⁶⁶ While it is an anti-crime instrument, the elements of protection and recovery offered to victims invites a human-rights oriented approach. The provisions of this regional Convention underline a broad definition of human trafficking based on “exploitation”, the need for criminalization of the trafficking, criminalization of related money-laundering, obstruction of justice and corruption, possible universal jurisdiction, prevention measures, cross-border cooperation, protection of victims such as measures on victim identification, medical and other assistance, safety of return, effective law enforcement, confiscation of assets of the culprits, mutual legal assistance and cooperation.

While more commitment to help victims of human trafficking is welcome, it is important to note that the ACTIP itself omits the issue of refugee protection which is covered by the international treaty on human trafficking – The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol) attached to the UN Convention against Transnational Organized Crime, to which most ASEAN countries are parties.

(d) Other Instruments

There is a large number of other Declarations and Plans of Action with bearing on human rights. Some instruments of recent origin can be singled out for further analysis.

There is prominently the ASEAN Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children 2013,⁶⁷ advocating more cooperation to tackle the violence through responsive laws, policies and practices, with national focal points. The strategies include investigation, prosecution and punishment of perpetrators; protection of women/child victims and survivors/witnesses; access to justice; counselling; awareness against revictimization; and family support services. This has been complemented by training sessions and seminars, and practical programming, such as improving standards for service delivery.

⁶⁴ See, for example, comments from the International Commission of Jurists (ICJ): ICJ condemns fatally flawed ASEAN Human Rights Declaration www.icj.org

⁶⁵ ASEAN, ASEAN Human Rights Declaration and the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD) (Jakarta: ASEAN Secretariat, 2014).

⁶⁶ www.asean.org

⁶⁷ Ibid.

There is, in addition, the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers 2007, which acts as a gentle call for cooperation between source and destination countries. After an impasse of several years concerning the preparation of another instrument on the issue, that Declaration has now been supplemented by the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers 2018.⁶⁸ There is an update on migrant workers' rights (especially that now more ASEAN countries are becoming parties to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families), followed by a section on the obligations of sending States and another section on obligations of receiving States. However, many of the provisions are subject to national legislation which means that the guarantees for the rights of migrant workers are likely to be lower than international standards. For example, in various ASEAN settings, migrant workers do not enjoy fully the right to freedom of association since they are not allowed to form or sit on the boards of Trade Unions. Yet, arguably, the main value added of the Consensus is to support the mechanism established pursuant to the 2007 Declaration - the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW), to adopt a more concrete action plan to implement the consensus and share best practices on the matter.

Parallel to the above, there is the 2016-25 ASEAN Community framework for the ASEAN beyond 2015 under the caption "Forging Ahead Together". Human rights appear particularly in the ASEAN Political Security Blueprint and the ASEAN Socio-cultural Community Blueprint.⁶⁹ Most recently, there emerged in 2018 the ASEAN Enabling Masterplan 2025 Mainstreaming the Rights of Persons with Disabilities; this helps to integrate into the regional context the CRPD.⁷⁰ The strength of the Masterplan is that the drafting process of this plan brought together key mechanisms from both the regional and national levels to work together on an issue of common concern. Thus the AICHR worked hand in hand with one of the sectoral bodies, the ASEAN Commission on the Rights of Women and Children (ACWC) and the Senior Officials of the Ministries on Social Welfare and Development (SOMSWD) to concretise the Masterplan with a shared sense of ownership. Yet, in practice, there has been a tendency to neglect the issue of persons with mental disabilities and the highly dubious methods which are employed in some settings, such as electroconvulsive shocks and detention or equivalent.

In retrospect, the overall picture is that verbal commitments through numerous instruments are aplenty in the ASEAN. Several, however, fall short of international standards. In the meantime, the instruments themselves have to be tested from the angle of whether they genuinely offer substantive protection from the dimension of access to justice noted earlier. This depends much on the powers of the various mechanisms to accord human rights protection – and the quandary concerning whether they truly render justice or merely create an illusion of justice.

68 Ibid.

69 ASEAN, ASEAN 2025: Forging Ahead Together (Jakarta: ASEAN Secretariat, 2015)

70 www.asean.org

(e) Mechanisms:

A. AICHR

Its mandate per its TOR is to “promote and protect human rights” (Articles 1 and 4) with various stipulated functions, including:

- “ 4.7. To provide advisory services and technical assistance on human rights matters to ASEAN sectoral bodies upon request;
- 4.8. To encourage in dialogue and consultation with other ASEAN bodies and entities associated with ASEAN, including civil society organizations and other stakeholders, as provided for in Chapter V of the ASEAN Charter;
- 4.9. To consult, as may be appropriate, with other national, regional and international institutions and entities concerned with the promotion and protection of human rights;
- 4.10. To obtain information from ASEAN Member States on the promotion and protection of human rights;
- 4.11. To develop common approaches and positions on human rights matters of interest to ASEAN;...”⁷¹

The members of the Commission (numbering one per State) are “representatives” rather than independent experts. In form, the underlying rationale of the body is to promote and protect human rights. However, there is no explicit provision for a protection role in the sense of ensuring access to justice, undertaking investigations, receiving complaints/communications/petitions from those affected negatively by the human rights situation, making findings of violations, and offering remedies, especially where the national system is unable or unwilling to act. Since its inception, the Commission has thus been more involved with promotion-related activities, e.g. conferences and studies, coupled with the current orientation towards more standard-setting rather than addressing human rights issues from the protection angle. Its operationalization is visible from its latest work plan, with 2016-2020 as the time frame. A key lacuna is its failure to address crimes committed against Rohingyas in Myanmar and the subsequent massive refugee outflows into neighbouring countries.⁷²

The directions are increasingly clear: AICHR will undertake more promotion-related activities (e.g. more information sharing, discourse, training and conferencing), more capacity building for itself and with its partners, more research and study for reflection and self-reflection, singling

⁷¹ ASEAN Intergovernmental Commission on Human Rights Terms of Reference (TOR).

⁷² www.ohchr.org; Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar. UN Doc. A/HRC/39/CRP/2 (September 2018). For refugee related reports, see the web of UN High Commissioner for Refugees: www.unhcr.org See further: Press Statement by the Chairman of the ASEAN Foreign Ministers' Retreat with a soft call to help Myanmar and use of the ASEAN Humanitarian Action Centre for this purpose, Chiang Mai, 17-18 January 2019: www.asean.org

out themes rather than countries, and more standard setting, possibly with more ASEAN Declarations and Treaties. These are all cooperative activities, based on the ASEAN praxis of consensus-building, avoiding confrontation as part of the governmental “ASEAN way.” There is a paucity of activities for ensuring access to justice, reception of complaints, investigations and provision of remedies on the protection front.

B. Sectoral Bodies: ACWC and ACMW

The ACWC came into existence just after the AICHR, although the seeds for its establishment dated back to an earlier commitment through an Action Programme adopted by ASEAN leaders in Vientiane in 2004.

The Purposes and functions of the ACWC are stated its TOR, including to:

“2.1. To promote and protect the human rights and fundamental freedoms of women and children in ASEAN, taking into consideration the different historical, political socio-cultural, religious and economic context in the region and the balances between rights and responsibilities.”⁷³

Perhaps the most important activity undertaken by the ACWC, to date, has been the push for the Declaration on the Elimination of Violence Against Women and Elimination of Violence Against Children in ASEAN, with plans of action for strengthening implementation measures, in 2013. While this Commission has also been involved in many promotion-related activities, such as through training sessions and seminars, and standard setting, it has targeted more practical programming, such as improving standards for service delivery.

The emphases of its current Action Plan 2016-20 includes the following: elimination of violence against women and children; child participation; action against human trafficking; rights of women and children with disabilities; child protection systems; early childhood and quality education; social impact of climate change on women and children; gender equality in education; adolescent health; strengthening of economic rights of women; women’s participation in politics; action to address early marriage.⁷⁴

With regard to the other sectoral body, the ACMW was established to follow up the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers 2007 which was the first ASEAN declaration to deal with specific aspects of human rights. The TOR are brief and they state as the purpose of the Committee is basically to ensure effective implementation of the Declaration and facilitate the development of another instrument on the promotion and protection of migrant workers.⁷⁵ 18/ This sectoral body has a specific, limited mandate and a lower profile than the AICHR and ACWC. The ACMW is basically a committee of officials interlinking between various labour ministries (or equivalent) and their partners. With the adoption of the

73 www.asean.org

74 www.asean.org;

75 See further: Vitit Muntarbhorn, *Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region*.

new Consensus document, this sectoral body has a role in concretizing an updated action plan to address the issue under the mandate.

In sum, the transversal, common feature intersecting between all these mechanisms is that in essence, they deal more with human rights promotion than with human rights protection. What then could be some vistas for strengthening the latter in future?

Orientations:

Clearly there is a need for the ASEAN instruments and mechanisms to evolve a more human rights protection role. Conceptually, it should be emphasized also that such role is not to be considered as interference in the internal affairs of a State. Human rights advocacy is part of international jurisdiction and advocacy of protection at the national level assists States to rectify negative situations in fulfilling their obligations, given the universally accepted principle that it is the primary responsibility of States to protect human rights.⁷⁶

There are three options in terms of next steps, particularly targeted to the AICHR but also with a message to the sectoral bodies. The maximal approach is to advocate that the ASEAN mechanism(s) should pursue a more ambitious path to undertake these activities:

- Monitor human rights situation in the region;
- Carry out site visits of alleged violations;
- Undertake Investigations and fact-finding;
- Hold thematic public hearings;
- Receive and act on individuals' complaints, perhaps to adopt an ASEAN Protocol/ Guideline on this;
- Issue recommendations for remedies;
- Proffer advice, potentially on interpretation of ASEAN instruments, such as the AHRD, by means of General Comment and or Advisory Opinion.

Another less ambitious agenda could comprise these components as the middle path:

- Couple the meetings of ASEAN mechanism(s) with site visits;
- Hold thematic public hearings, e.g. on persons with mental disabilities;

⁷⁶ This is the formula found in many UN Security Council (SC) Resolutions and it is universally accepted. See, for example, UN SC Resolution 2106 (2013) on sexual violence against women and children which states: among others, "Recognizing that States bear the primary responsibility to respect and ensure the human rights of all persons within their territory and subject to their jurisdiction as provided for by international law..."

- Give advice, such as on interpretation by means of General Comment and or Advisory Opinion;
- Cross-refer complaints from aggrieved parties, such individuals, to national human rights commissions or equivalent (possibly UN related mechanisms such as Special Rapporteurs).

The minimal approach, in the next phase, is to call for action to follow these modest stepping stones apropos the ASEAN mechanism(s):

- Give advice, such as interpretation by means of General Comment and or Advisory Opinion;
- Cross-refer complaints from aggrieved parties to national human rights commissions or equivalent.

With such vision in mind, much will depend on enlightened leadership from the ASEAN entity to leave the dusty trail behind and to project a greener pathway towards an expectant future, overcoming substantively the disquieting region-wide “protection deficit”.

<http://www.asean.org/><http://www.ohchr.org/><http://www.forum-asia.org/>

Protecting Freedom of Speech and Expression in ASEAN

By Eric Paulsen

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Freedom of speech and expression is a fundamental freedom which, to a degree, underpins all other human rights. It gives people the opportunity to seek, receive and impart information and ideas of all kinds, to have important conversations on issues of public concern, instigate change and hold those in power to account. Freedom of speech must include the right to express unpopular or challenging views without fear of reprisals or persecution.

But like all freedoms, it comes with responsibilities and can legitimately be restricted in accordance with international law. Governments have an obligation to prohibit hate speech and incitement. Restrictions can also be justified if they protect specific public interest or the rights of others. Any restrictions on freedom of speech must however be necessary, proportionate and set out in laws that must in turn be clear and concise so everyone can understand them.

ASEAN has a fractious history with human rights, which were initially of limited importance in an organisation set up primarily for economic purposes in 1967. The subject of human rights was considered “taboo” in ASEAN,⁷⁷ so establishing a robust mechanism to guarantee any rights on a regional level was always going to be an uphill battle. Even once ASEAN later developed interests in the broader cultural and social wellbeing of its people, every stage of ASEAN’s human rights journey has been arduous and challenging. The inclusion of an enabling human rights clause in the ASEAN Charter has been described as the most challenging task which “almost derailed the whole process” of negotiating the Charter, and was considered a “very delicate and sensitive issue”.⁷⁸ From establishing the ASEAN Intergovernmental Commission on Human Rights (AICHR) itself, to agreeing upon its Terms of Reference, to the drafting of the ASEAN Human Rights Declaration (AHRD), each was characterised by the watering down and compromising of fundamental principles of human rights protection. With this historical context in mind, the establishment and the continuing progress of the AICHR, though it may be limited, are achievements in themselves.

Yet after 10 years of AICHR activities in the name of promoting and protecting human rights, freedom of speech is not guaranteed in any of the ASEAN Member States. In fact, freedom of speech, including press freedom, is rapidly deteriorating in the region.

One of the first tasks of the AICHR, and included in its limited Terms of Reference, was to develop the AHRD with a view to establishing a framework for human rights cooperation. The negotiations behind the drafting of this document were intense and fraught with difficulty. However, freedom of speech made the cut and appears in Article 23, which states that every person in ASEAN has “the right to freedom of opinion and speech, 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”. But what exactly does this

⁷⁷ Tan Sri Ahmad Fuzi Bin Abdul Razak, ‘Facing Unfair Criticisms’, *The Making of the ASEAN Charter* (Singapore, World Scientific Publishing Co. Pte. Ltd, 2009), 21

⁷⁸ Aung Bwa, ‘The Jewel in my Crown’, *The Making of the ASEAN Charter* (Singapore, World Scientific Publishing Co. Pte. Ltd, 2009), 32-33

mean in the context of a human rights mechanism which cannot receive complaints, conduct investigations, on-site visits or fact-finding missions? In fact, the AICHR itself suffers from its own dangerous form of censorship, often finding itself unable to speak out against human rights violations committed in ASEAN Member States.

The founding principles of ASEAN, such as non-interference in the internal affairs of a Member State and consensus decision making, also apply to the AICHR. In practice, this means that the ability of the AICHR to speak out about human rights violations is seriously restricted. How can the AICHR guarantee the right of ASEAN citizens to express their views and opinions openly, when it cannot do so itself? The AICHR cannot ensure any of the rights contained within the AHRD if it does not, in practice, have the freedom to comment, make statements or condemn, let alone take action against human rights abuses in its own jurisdiction. The peoples of ASEAN have suffered from serious human rights violations during the 10 years of the AICHR's existence, which has too often been quiet as these abuses occur. This resulting silence is fundamentally inconsistent with the stated purposes of the AICHR to promote and protect fundamental freedoms and of having a human rights mechanism in the first place.

Despite being a landmark document in many ways, the AHRD has been criticised for espousing principles which are not normally found in human rights declarations which adhere to international standards. In addition to the restrictive principles of non-interference and consensus, the text of the AHRD itself allows for considerable compromising of the rights contained within it. While it does provide for the right to freedom of speech on paper, the General Principles of the AHRD appear to make all rights subject to national laws and contexts. General Principle 6 states that the enjoyment of human rights must be balanced with corresponding state duties, while General Principle 7 states that human rights must be considered in the regional and national context, bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds. Perhaps most worrying is General Principle 8, which allows for broad justification to limit fundamental freedoms on grounds of national security, public order, public morality as well as the general welfare of the peoples in a democratic society.

Human rights protection has not progressed as much as it should have in the region, in part because Member States have not fully embraced human rights and have been able to cite broad religious, historical and cultural exceptions and hide behind the sweeping justifications provided in the AHRD. While it is inherent in the nature of the AICHR as a regional body that it must take account of the differences in the institutions and laws of the Member States, "religion, history and culture must not be an excuse for violating human rights".⁷⁹

The AICHR has struggled to protect freedom of expression when it can only make decisions with the consensus of all Member States, many of which still enforce laws that actively repress free speech. All ASEAN countries, with the exception of Brunei Darussalam, contain some reference

⁷⁹ FORUM-ASIA, A Decade in Review: Assessing the Performance of the AICHR to Uphold the Protection Mandate, May 2019, 29

in their constitutions to ensuring freedom of speech and, by extension, of the press. But in different ways these rights are undermined by a plethora of laws and policies which restrict them. Most Southeast Asian nations still have laws that affect free speech, often misused to silence legitimate criticism or comment on governments or state rulers.

Maria Ressa, founder of online news outlet Rappler, has faced numerous lawsuits and arrests under the defamation, sedition and cyber-laws of the Philippines.⁸⁰ The Sedition Act in Malaysia was frequently used by the previous government to silence critics, including satirical cartoonist Zunar who faced multiple charges and a travel ban.⁸¹ Sedition laws exist and continue to be used across the region, including in Singapore, Brunei and Myanmar. In Thailand, it is an offence to insult the monarchy under the strict lese-majeste laws, which were used to sentence a man to 70 years in jail, reduced to 35 years after he confessed, for Facebook posts deemed to insult the royal family.⁸² A young single mother who had no history of political activism was sentenced to 56 years in jail, reduced to 28 years after a confession, for posting allegedly anti-monarchy content online.⁸³

Freedom of speech cannot be guaranteed without freedom of the press. Southeast Asia has never been held up as a global leader when it comes to press freedom, but things have taken a disturbing turn for the worse in recent years, despite the apparent guarantees in the AHRD and national constitutions of the ASEAN Member States. The Reporters Without Borders (RSF) Press Freedom Index 2019 ranks all 10 ASEAN countries as having “difficult” or “very serious” situations in terms of freedom of the media.⁸⁴ This is not surprising upon analysis of the hostile legal and political environments in which many journalists, publishers and broadcasters are forced operate.

In Vietnam, private ownership of media outlets is prohibited, and in Lao PDR the media is used as a way to disseminate government policies, meaning that journalists practice heavy self-censorship.⁸⁵ Over 30 radio stations and newspapers were cancelled or forced to shut down in Cambodia in the lead up to the July 2018 elections, with the result that most Cambodians now receive information from news agencies with direct ties to Prime Minister Hun Sen.⁸⁶ In Myanmar, charges continue to be brought against journalists and activists, particularly those

⁸⁰ 'Maria Ressa: Philippines journalist is arrested again', BBC News, 29 March 2019, <https://www.bbc.com/news/world-asia-47742641> (accessed 29 May 2019)

⁸¹ 'Cartoonist Zunar barred from leaving the Malaysia', The Star Online, 17 October 2016, <https://www.thestar.com.my/news/nation/2016/10/17/zunar-barred-from-leaving/> (accessed 29 May 2019) Under the new government which came into power in May 2018, the sedition charges and travel ban against Zunar were withdrawn.

⁸² 'Man jailed for 35 years in Thailand for insulting monarchy on Facebook', The Guardian, 9 June 2017, <https://www.theguardian.com/world/2017/jun/09/man-jailed-for-35-years-in-thailand-for-insulting-monarchy-on-facebook> (accessed 29 May 2019)

⁸³ 'Military court sends mother of two to 28 years for lese majeste', Prachatai English, 7 August 2015, <https://prachatai.com/english/node/5377> (accessed 29 May 2019)

⁸⁴ Reporters Without Borders, 2019 World Press Freedom Index, <https://rsf.org/en/ranking/2019> (accessed 28 May 2019)

⁸⁵ FORUM-ASIA, Instruments of Repression: A Regional Report on the Status of Freedoms of Expression, Peaceful Assembly and Association in Asia, 2018, <https://www.forum-asia.org/uploads/wp/2019/02/Instruments-of-Repressions-final-edited.pdf> (accessed 28 May 2019)

⁸⁶ Reporters Without Borders, 2019 World Press Freedom Index, <https://rsf.org/en/cambodia> (accessed 28 May 2019)

who report on human rights violations against ethnic minorities in Rakhine State and other parts of the country. Although Reuters journalists Wa Lone and Kyaw Soe Oo were recently released after more than 500 days in custody for trumped-up convictions under the Official Secrets Act,⁸⁷ the press is still very much in danger in Myanmar.

Media workers still face harassment and intimidation in Indonesia, particularly in West Papua where violence against local journalists and arrests of foreign journalists are still an issue.⁸⁸ In Malaysia, the Printing Presses and Publications Act remains in force, requiring all publishers, broadcasters and journalists to apply for a license which can be granted or revoked at any time by the Home Minister.⁸⁹ The Communications and Multimedia Act has been frequently used in the past to silence criticism from independent broadcasters, including the website Sarawak Report, which was shut down by the previous government.⁹⁰

With advances in technology and connectivity in the region, the online world has the potential to become a space where journalists, bloggers and members of the public could express themselves more freely, bypassing some of the region's most archaic laws restricting free speech. But the ASEAN governments have caught up, with many of them enacting specific laws for cyber-libel and offensive postings online. This rise in "digital authoritarianism"⁹¹ is further depleting and undermining the apparent guarantee of freedom of speech in ASEAN. Cambodia and Myanmar have enacted cyber-communication laws which allow their governments to monitor private conversations and communication services, while Thailand's Computer Crime Act criminalises a variety of acts associated with online content.⁹² Internet users who criticise the government online can be jailed in Lao under a 2014 Decree, while new cybercrime laws in Vietnam require foreign platforms to store data on Vietnamese users in the country and surrender that information to the authorities on request.⁹³ Most recently, Singapore's parliament approved the Protection from Online Falsehoods and Manipulation Act which gives broad, unchecked powers to government ministers to determine what online information is "false" and demand that it be censored or corrected.⁹⁴

⁸⁷ 'Two Reuters Reporters Freed in Myanmar after more than 500 days in jail', Reuters, 7 May 2019, <https://www.reuters.com/article/us-myanmar-journalists/two-reuters-reporters-freed-in-myanmar-after-more-than-500-days-in-jail-idUSKCN1SD056> (accessed 28 May 2019)

⁸⁸ Reporters Without Borders, 2019 World Press Freedom Index, <https://rsf.org/en/indonesia> (accessed 28 May 2019)

⁸⁹ 'Groups welcome review of Printing Presses and Publications Act', The Star Online, 14 March 2018, <https://www.thestar.com.my/news/nation/2018/03/14/groups-welcome-review-of-printing-presses-and-publications-act/> (accessed 29 May 2019)

⁹⁰ 'MCMC blocks access to Sarawak Report website', The Star Online, 19 June 2015, <https://www.thestar.com.my/news/nation/2015/07/19/mcmc-block-sarawak-report/> (accessed 29 May 2019)

⁹¹ Freedom House, Freedom on the Net 2018: The Rise of Digital Authoritarianism, 1 October 2018, https://freedomhouse.org/sites/default/files/FOTN_2018_Final%20Booklet_11_1_2018.pdf (accessed 28 May 2019)

⁹² FORUM-ASIA, Instruments of Repression: A Regional Report on the Status of Freedoms of Expression, Peaceful Assembly and Association in Asia, 2018, <https://www.forum-asia.org/uploads/wp/2019/02/Instruments-of-Repressions-final-edited.pdf> (accessed 28 May 2019)

⁹³ Reporters Without Borders, 2019 World Press Freedom Index, <https://rsf.org/en/laos> and <https://rsf.org/en/vietnam> (accessed 28 May 2019)

⁹⁴ 'Singapore fake news law polices chats and online platforms', BBC News, 9 May 2019, <https://www.bbc.com/news/world-asia-48196985> (accessed 29 May 2019)

Against this backdrop of sedition, defamation, lese-majeste and other cyber laws and state control over the media, self-censorship is common in ASEAN. With such severe and widespread restrictions, it is not surprising that the state of freedom of speech is poor across the region. While it may be easy to question what the AICHR with its institutional flaws can do, it does have the distinct and unique advantage of being a regional body. What has been lacking to date, and what the AICHR could provide, is an overarching, collaborative, cross-border approach to protecting freedom of speech.

Despite its limited Terms of Reference, the AICHR has nevertheless used its power to organise high level dialogues, workshops, consultations and other activities to engage governments, the press, civil society, national human rights institutions, law enforcement agencies and ASEAN sectoral bodies in the cause of promoting and hopefully protecting freedom of speech. Greater engagement with regional, national and local civil society organisations, journalists, broadcasters and defenders of free speech is necessary, to bring their real experiences and expertise to the regional debate. National-level activities coordinated by AICHR Representatives who have passion and expertise in the subject is also to be encouraged.

The attention given to free speech in the AICHR's previous activities has been limited. To establish regional consistency when it comes to promoting and protecting freedom of speech, what is needed is a definitive interpretation of Article 23 of the AHRD. A General Comment, such as those issued by the treaty bodies of the United Nations, could provide a valuable and authoritative declaration on its meaning and scope. Clarifying what freedom of speech means in the context of the AHRD is a critical first step in fostering a regional approach to the issue. But it is only a first step. It is imperative that any outcomes and recommendations are followed up with further activities to ensure progress on the ground.

There have been calls for a more creative interpretation of AICHR's protection mandate and for the review of the Terms of Reference, which was supposed to have happened after five years of AICHR coming into existence. But these arguments have been made for many years now and very little has changed. The review of the Terms of Reference has still not been carried out, and there has been no improvement in the ability of the AICHR to protect human rights. This is nowhere more apparent than with the regression of free speech in Southeast Asia despite the existence of the AICHR and the apparent guarantees in the AHRD. It is time to acknowledge that encouraging the AICHR to interpret the AHRD, its Terms of Reference and the principles of ASEAN more creatively has not worked. While the principles of non-interference and consensus decision-making prevail in the AICHR, efforts to advocate for stronger interpretation of the Terms of Reference will always be frustrated.

The AICHR has been silent on many human rights violations which have occurred within the last 10 years. A human rights mechanism which is so constrained that it is unable to speak out about issues within its jurisdiction cannot be relied upon to protect human rights for anyone. The AICHR certainly has the potential to achieve this, but only with significant institutional change and a revision of its Terms of Reference.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) has issued Principles for Regional Human Rights Mechanisms, setting out the powers, responsibilities and structures that are expected from these bodies.⁹⁵ The OHCHR principles outline the minimum requirements for an independent human rights mechanism, including requirements for monitoring, communications, capacity building and education, and composition and support. The AICHR falls short in many of these areas, from not being able to receive complaints and conduct investigations, to being unable to request information from Member States or make recommendations.

The effectiveness and relevance of the AICHR pales into insignificance when compared to other regional human rights mechanisms across the world. Those of Europe, the Americas and Africa all have much more robust protection mechanisms than Southeast Asia. Although the AICHR functions under a restrictive mandate, it can and should continue with its promotional activities to bring the issue of freedom of speech to the collective consciousness of the ASEAN public, institutions and governments. While the promotion of human rights is a valuable function of the AICHR and should be continued, it must also push for a meaningful review of its Terms of Reference to strengthen its protection mandate.

As the AHRD itself states, all human rights are universal, indivisible, interdependent and interrelated.⁹⁶ To improve ASEAN's overall human rights track record whether on the right to life, right to nationality, right to peace, right to development or any other fundamental rights, the people of ASEAN need to be able to talk about those issues, voicing their concerns and ambitions freely. No matter where our passion lies in human rights, it is essential that the AICHR moves towards a true protection of human rights. However, while the push for these changes is ongoing, the AICHR and those of us who are concerned about human rights must use the freedoms that we do have, however limited or restricted they might still be, to promote and protect human rights, and that might just make a difference.

⁹⁵ Office of the United Nations High Commissioner for Human Rights, Principles for Regional Human Rights Mechanisms, <https://bangkok.ohchr.org/programme/asean/principles-regional-human-rights-mechanisms.aspx> (accessed 28 May 2019)

⁹⁶ ASEAN Human Rights Declaration, General Principle 7



The Role of Parliamentarians in Safeguarding Human Rights in ASEAN

By Charles Santiago

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The role of Parliamentarians to Advance Human Rights

There are many people who would scoff at the idea of a politician being a human rights defender. Parliamentarians are - sometimes rightly, it has to be said - viewed with suspicion and distrust, and as sources of corruption and self-aggrandizement whose main interests are themselves and their parties. Civil society organizations (CSOs) often tend to think of elected representatives as mere “advocacy targets” who need to be convinced to take a certain course of action. This is a shame, since parliamentarians are in reality often natural partners for CSOs in the human rights field. Many of us began our careers as activists and later decided to pursue public office as the best path to affect positive change. We share the same goals as many CSOs: creating just and equitable societies where people’s human rights are protected and realised, regardless of their ethnicity, religion, sexuality or gender.

I myself have a background in the Malaysian NGO sector, where I campaigned against the privatisation of water due to its crippling effect on poorer communities. Another example is one of the newest members of ASEAN Parliamentarians for Human Rights (APHR), Maria Chin Abdullah. She is the former Chair of the Coalition for Clean and Fair Elections (Bersih, in its Bahasa acronym) that played a significant role in leading popular protests against Malaysia’s authoritarian Barisan Nasional government. Maria Chin Abdullah suffered years of official harassment as a result of her activism and was in 2016 briefly detained under the draconian Security Offences, Special Measures Act (SOSMA).⁹⁷ In May 2018, she was elected as an independent Member of Parliament in Malaysia, representing the Petaling Jaya constituency. It is difficult to think of someone more worthy of the epithet of “human rights defender”.

As elected representatives of the people, parliamentarians have both an opportunity and a duty to use their mandates to protect and uphold human rights. There are several ways in which they can do so, including: by ensuring that national legislation reflects human rights norms; by using budgetary powers to allocate resources in a way that enhances people’s enjoyment of their rights; by using their oversight powers to ensure other branches of government respect rights; and by using their public platforms to create a culture of acceptance for human rights values. Furthermore, strong, transparent and accountable institutions are vital for a functioning democracy. Parliamentarians themselves play an important role in upholding the integrity and effectiveness of legislative assemblies, as well in scrutinising executive power.

Select committees and caucuses are other important tools allowing parliaments to strengthen human rights protections. Such bodies lead to the drafting of better-quality legislation and are instruments of oversight. The Malaysian Parliament in 2018 established its first ever select committees, including one specifically focused on Human Rights and Gender.⁹⁸ Elsewhere in ASEAN, similar committees already exist in countries such as Indonesia and the Philippines.

⁹⁷ <https://www.hrw.org/news/2016/11/21/malaysia-drop-charges-and-release-bersih-organizers-and-supporters>

⁹⁸ <https://www.malaysiakini.com/news/439144>

On a global level, there is a growing consensus that parliaments and parliamentarians should be engaged to play a more active part in the UN human rights system. Parliamentarians can, for example, be considered key actors in the UN Universal Periodic Review (UPR) process, as well as in other treaty bodies. Although there is no formal role for them in the process yet, between 60 and 70 percent of recommendations stemming from UPR Reviews call for legislative action.⁹⁹ Related to this, parliaments can also play important parts in monitoring national governments' compliance with their international human rights obligation or other key treaties, such as the Paris Agreement on Climate Change. A recent study by the University of Oxford recommended developing internationally agreed principles on the role of parliaments in realising human rights and their contribution to the UN treaty body system.¹⁰⁰

There are already several international bodies carrying out important work to foster solidarity and co-operation on human rights between lawmakers across continents. These include, but are not limited to, the Inter-Parliamentary Union (IPU), Parliamentarians for Global Action, the Commonwealth Parliamentary Association and the International Panel of Parliamentarians for Freedom of Religion or Belief. In our region, the ASEAN Inter-Parliamentary Assembly aims to enhance cooperation between lawmakers, but its role in promoting human rights has so far been minimal.

A Mixed Landscape: Parliaments in Southeast Asia

In Southeast Asia, the ability of parliamentarians to exercise their mandates to protect and promote human rights varies considerably between countries. The region is home to closed, one-party states (such as Laos and Vietnam); pseudo-democratic countries where the military still wields significant influence (Myanmar and Thailand); and consolidating and relatively open democracies (Indonesia and Malaysia). The legislative assemblies in these countries reflect the political system, ranging from opaque bodies controlled by a single party, to well-functioning parliaments where MPs can act freely.

The IPU has identified three core roles of parliamentarians: representation, oversight and lawmaking.¹⁰¹ Even in more democratic countries, however, parliamentarians' ability to exercise these mandates vary hugely. In Timor-Leste and Singapore, for example, parliamentarians in theory have the ability to table legislation, but in practice this rarely happens as most bills are drafted and proposed by ministries. In Myanmar, MPs are nominally free to exercise their mandates, but in practice those that belong to the ruling National League for Democracy are strictly controlled in the positions their party allows them to take.

The growing authoritarian trend across Southeast Asia in recent years has made the work of

⁹⁹ <http://thecommonwealth.org/media/news/parliaments-and-parliamentarians-significant-role-promotion-and-protection-human-rights>

¹⁰⁰ https://www.law.ox.ac.uk/sites/files/oxlaw/brian_chang_-_an_emerging_consensus.pdf

¹⁰¹ <https://www.ipu.org/file/3502/download?token=MLXYMu51>

parliamentarians more difficult in many countries. The starkest example of this is Cambodia, where Prime Minister Hun Sen's government in 2017 – facing potential defeat in the upcoming general election – orchestrated the arbitrary disbandment of the opposition Cambodia National Rescue Party (CNRP) through the Supreme Court. The CNRP's 55 MPs were stripped of their seats, with most of them fleeing into exile to avoid politically motivated arrests. Running essentially unopposed, the ruling Cambodian People's Party (CPP) won all seats in the 2018 general election, cementing Cambodia as a de facto one-party state. A once relatively vibrant National Assembly has since been reduced to a rubber-stamping body for the CPP.

In the Philippines, harassment of opposition lawmakers has increased markedly under the tenure of President Rodrigo Duterte. Government officials have openly threatened opponents with arrest or even violence, while at least seven lawmakers have faced politically-motivated criminal charges as a result of their work. The most high-profile example of this is Senator Leila De Lima, who is a vocal critic of the Duterte administration's "war on drugs" in which thousands of mainly poor Filipinos have been extrajudicially killed by police or their proxies. Senator De Lima has been detained since February 2017 on charges that human rights groups and UN experts have denounced as politically motivated.

Authoritarian governments are also relying on more subtle forms of harassment to sideline opposition lawmakers. In the Philippines, for example, ACHR has documented how the government has arbitrarily stripped lawmakers in both houses of Congress of committee memberships, and has manipulated Congress Rules to create an opposition bloc in the House of Representatives that mainly supports the government's legislative agenda.¹⁰² This speaks to a worrying, wider regional trend where authoritarian governments increasingly rely on more sophisticated means of repression. This often includes manipulating democratic process, the judiciary or the legal books.¹⁰³

ASEAN parliamentarians and human rights

In light of the worsening climate for human rights in Southeast Asia, there is a need for genuine regional pressure to address these serious issues. In reality, however, ASEAN's "non-interference principle" and emphasis on "consensus" has meant that states and government officials have shied away from speaking out about their neighbours' affairs. This has largely been true even in cases of atrocity crimes and other gross human rights violations, such as against the Rohingya minority in Myanmar, or in the context of the "war on drugs" in the Philippines. Similar dynamics have of course also hampered the work of the ASEAN human rights mechanisms, including the ASEAN Inter-Governmental Commission on Human Rights (AICHR) and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC).

This situation in part explains how the idea for ASEAN Parliamentarians for Human Rights was

¹⁰² "In the Crosshairs of the Presidency": Attacks on Opposition Lawmakers in the Philippines", ACHR (forthcoming report)

¹⁰³ <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=0d6806b6-402c-493c-bcee-64b858400396>

born. APCR grew out of the ASEAN Inter-Parliamentary Myanmar Caucus (AIPMC), a network formed in 2004 by and for regional MPs to advocate for human rights change in Myanmar, which was then under outright military rule. When the political reform process in Myanmar started in 2011, discussions began on how a similar network could be established on a regional level. We identified a need for an organisation that formally brought together government officials who were equally alarmed by the human rights situation in ASEAN and the harmful effects of the “non-interference principle” .

APHR in its current form eventually became operational in 2015. The organisation is, in its essence, a network of current and former regional parliamentarians using their mandates to promote human rights and democracy. It is unique in Southeast Asia in that we sit somewhere between the CSO and government sectors. We aim to work closely with CSO networks and victims of abuses in the region to use our positions of influence to amplify human rights groups’ advocacy efforts. Crucially, we also try to work across borders, and ensure that parliamentarians are aware of and raise concerns about human rights violations in ASEAN neighbour countries.

We have grown rapidly since 2015, and today have close to 100 members in eight Southeast Asian countries: Timor-Leste and all ASEAN states except Brunei, Laos and Vietnam (due to APCR policy to only accept democratically elected members). APCR uses a range of tools and tactics to advocate for better human rights protections in the ASEAN region, including public and private advocacy initiatives, workshops and policy dialogues, and fact-finding missions to give MPs first-hand knowledge of areas where human rights violations occur. We have also established a number of Working Groups - essentially regional caucuses - for lawmakers on select thematic issues.

Our work on the existential threat facing the Rohingya minority in Myanmar is an illustrative example of how APCR tries to intervene. The situation in Rakhine State has been one of the organisation’s priorities since its early days, and already in 2015 and 2016 we organised fact-finding missions to the region and issued reports warning ASEAN of the harmful consequences of inaction. APCR scaled up its efforts significantly from August 2017, when the Myanmar security forces launched a “clearance operation” in Rakhine State in which thousands of Rohingya people were killed and more than 700,000 fled to Bangladesh in the space of a few months. In January the following year, APCR sent an MP delegation to Bangladesh to meet with refugees, government officials and other stakeholders. The trip greatly informed our subsequent advocacy efforts, as several of our members engaged on a private level with their respective governments, stressing the severity of the violations taking place in Myanmar.

In August 2018, APCR coordinated a joint statement by more than 130 sitting MPs in Southeast Asia, calling on the UN Security Council to refer the situation in Myanmar to the International Criminal Court. The UK newspaper The Guardian called it “the most united condemnation from

the region since the violence began against the Rohingya a year ago.” While ASEAN as a body has remained silent in the face of the crisis, individual countries – notably from Indonesian and Malaysia – have since spoken out against Myanmar’s atrocities. This shows what is possible when MPs work jointly across borders to show that “non-interference” is not a universally accepted principle in the ASEAN region.

Parliamentarians and the ASEAN human rights mechanisms

Strong and responsive human rights mechanisms within ASEAN would be important instruments in improving people’s lives across our region. In this sense, it is all the more disappointing that what should be the most important current such mechanisms, AICHR, has had such negligible impact.

The shortcomings of AICHR have been well-documented elsewhere, but they bear repeating. The body lacks a strong protection mandate including the ability to receive and investigate complaints from people whose rights have been violated. The selection process of AICHR Representatives is largely untransparent and undemocratic, resulting in Representatives who put their national governments’ agendas first (Malaysia and Indonesia are notable exceptions). As a result, political concerns are almost always more important than human rights concerns within AICHR, as states hide behind the “non-interference” principle to shield themselves from scrutiny. As FORUM-ASIA bluntly (but rightly) put it in its assessment of AICHR’s first decade: “After ten years, the AICHR cannot as yet point to a single woman, man or child whose human rights it has protected – or even attempted to protect. It has not even protested or expressed concern when the rights of people in ASEAN were violated.”

The lack of regular, formal engagements with CSOs is also troubling. While CSOs can apply for consultative status with AICHR, there are many examples of organisations being rejected on arbitrary grounds, or simply because they have been critical of ASEAN as a body in the past. Refusing to interact with other actors because they have been raising human rights concerns of course defeats the purpose of CSO engagement in the first place. Even CSOs that have received accreditation report that their interactions with AICHR are ad-hoc and lack substance. In APHR, as in many other CSOs, our engagements with AICHR mainly consists of informal interactions with the more progressive Representatives who have a genuine interest in advancing human rights. While these individual Representatives deserve much credit for trying to make the best out of a bad situation, their efforts cannot replace the need for a genuinely independent ASEAN human rights body.

What can we as parliamentarians do to help achieve this? We can play an important role in advocating with our own governments, and in particular Foreign Ministries, on the need to support the strengthening of AICHR’s mandate. This must include granting the body the capacity to receive and assess complaints; increasing the transparency of the selection process for Representatives; and ensuring regular and meaningful interaction with CSOs. We can also raise awareness among the electorate of the benefits of a strong regional human rights mechanism.

At the moment, AICHR’s “name recognition” within ASEAN outside of human rights circles is woefully low, and as politicians with a public platform we are in a position to change this. To help this, we should provide space for progressive AICHR Representatives to give briefings in parliaments across the region. We can also invite representatives from other regional human rights mechanisms – such as from those of the African Union, the European Union or the Organization of American States – to speak in national assemblies and share best practices. These regions can all point to strong and independent mechanisms with genuine “teeth” that have the power to improve people’s lives.

Conclusion

Parliamentarians in Southeast Asia both can and should play a major role in improving our region’s human rights situation. Lawmakers have the ability to craft legislation, set budgets, provide oversight and create a culture of human rights. At APHR, we have tried to do this on a national and regional level, using our growing network of members. We have also tried to some extent to fill the gap left by ASEAN when it comes to ensuring regional pressure on the human rights crises playing out across in Southeast Asian countries. While we know that our work has had impact, it is far from enough on its own. ASEAN needs strong and independent human rights mechanisms, while the body as a whole must forego its “non-interference principle” and actively take a stand on serious situations unfolding in its backyard. As a parliamentarian, I will continue to help civil society and governments to achieve these aims. As a member of APHR, I will continue to be a thorn in the side of authoritarian states until they change course.

More Than Just Amplifying Voices:

Locating the Power of Young
People within and beyond
the AICHR and the ASEAN
Human Rights Agenda

Joel Mark Barredo

*ASEAN Youth Forum*¹⁰⁴

“We, the young people of ASEAN, must always freely access and shape local, national, and regional spaces to lead, claim our rights, and drive a people-centered ASEAN community”

-- ASEAN Youth Yangon Declaration 2014

¹⁰⁴ An independent, youth driven regional institution that has the aim to represent the voices of young Southeast Asians, and to monitor and evaluate the implementation of youth-related rights-based policies, agenda at the national and regional levels.

I. Introduction: A Region defined (and still being defined) by Young People

In recent decades, the struggle to redeem democracy and human rights have become a staple in Southeast Asia. Social movements have led the way in toppling down repressive governments and in empowering societies to claim their rights and freedoms. Young people have been instrumental in disrupting corrupted policies and norms, and in realizing changes during the darkest, most desperate periods in many countries of the Region. In the Philippines, young people, together with religious luminaries, bravely orchestrated two non-violent people power revolutions (in 1986 and 2001) against the tyrannical regimes of Ferdinand Marcos and Joseph Estrada. In a similar spirit, Indonesia witnessed the wrath of young people hungry for a free and democratic society during the Reformasi revolution in 1998. The 8888 Uprising in Burma, activated by student leaders, sought to address basic rights, which were time suppressed by the Military Junta; “People who could no longer bear to stand the economic hardship they were facing wanted a new government that could help improve the economy and their lives by setting the country on a path to democracy.¹⁰⁵”

On the regional front, social movements for human rights driven by young people have been flourishing, more prominently in the past ten years. The ASEAN Youth Forum (previously known as the ASEAN Youth Movement) has been pushing for a youth focused-human rights agenda both in civil society spaces and with relevant ASEAN bodies on youth. Furthermore, young people have taken leadership roles within sectoral groups, such as human rights defenders, urban and rural poor, LGBTIQ, women, children, working on some of the most sensitive and urgent issues in Southeast Asia.

It is clear that despite contributing to social human rights agenda at the national and regional levels, it has still been a challenge for young people to penetrate and work closely with formal human rights mechanisms within ASEAN, in particular, establishing a meaningful working relationship with the ASEAN Intergovernmental Commission on Human Rights (AICHR.) This paper’s purpose is to dissect and analyse aspects of young people’s position and participation in protecting and promoting human rights from within the ASEAN and from outside its formal system.

II. Keeping it up with AICHR: Young People and the Formal Regional Human Rights Space

Young people, defined by ASEAN Member-States (AMS) as those aged between 15 to 35 years old,¹⁰⁶ are perceived to be at the heart of every nation’s, society’s, community’s progress and sustainability. They are considered by the Association of Southeast Asian Nations (ASEAN), as “an

¹⁰⁵ Chan Tar (2018), “The 8888 Uprising: An Unfinished Business” in Myanmar Times. Available at <https://www.mmtimes.com/news/8888-uprising-unfinished-revolution.html> (accessed 25 May 2019)

¹⁰⁶ ASEAN (2017), “Executive Summary” in The First ASEAN Youth Development Index. Available at https://asean.org/storage/2017/10/ASEAN-UNFPA_report_web-final-05sep.pdf, p. 3 (accessed 16 July 2019)

important section of the population in any country and are in need of attention as they are both our current and future leaders and the catalyst for economic, social and cultural development.”¹⁰⁷ Moreover, it recognizes “the important role of the youth in ASEAN and in consideration of the various thrusts and initiatives of AMS¹⁰⁸”

Zeroing in on human rights, this twenty-year lifespan covers multiple political, social and economic realities, and a plethora of identities and lived-experiences throughout the region. Hence, young people have a great stake in the human rights agenda of the ASEAN. The ASEAN Human Rights Declaration (AHRD) sees the value of protecting young people from existing and potential abuses and harms. It specified that, “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.”¹⁰⁹ This, together with all other human rights principles in the AHRD, have to be valued and taken into account by its main human rights body, the AICHR.

In alignment with a decade of AICHR’s existence, AICHR is far from being youth-friendly with respect to its willingness to include young people within its structure and agenda. Despite that there are no age requirements for becoming an AICHR national representative, only one person so far, Polyne Hean of Cambodia (33 years old as of this writing, has been appointed/elected into the commission. This is apart from the fact that it has been difficult to even contest to be an independent representative, due to the restrictive nature of most selection processes in many ASEAN member-countries.

In 2015, AICHR opened its doors to Civil Society Organizations (CSOs) and Non-Government Organizations (NGOs) willing to contribute to regional agenda and affairs on human rights. Though this comes with a caveat. Applicants should satisfy the five-page accreditation guideline¹¹⁰, making it difficult for many, specifically loosely run and unregistered groups and organizations to qualify for a slot. As of this writing, progressive regional youth movements, many of which are ill-resourced and voluntary, such as the ASEAN Youth Forum (AYF) have yet to penetrate this space. This prohibits young people from being consulted by the AICHR as a regional body. Although, it has to be noted that informal meetings or consultations between young people and certain AICHR representatives (Edmund Boon Tai Soon of Malaysia (2017) and Yuyun Wahyuningrum of Indonesia (2019) took place.

In terms of activities, it is only the ASEAN Youth Debates on Human Rights, which is being

¹⁰⁷ ASEAN (2017), The First ASEAN Youth Development Index. Available at https://asean.org/storage/2017/10/ASEAN-UNFPA_report_web-final-05sep.pdf (accessed 18 May 2019.)

¹⁰⁸ ASEAN (2017), ASEAN Declaration on the Adoption of the ASEAN Youth Index. Available at https://asean.org/wp-content/uploads/2017/11/6.-ADOPTION_Final-Draft-ASEAN-Declaration-on-ASEAN-YDI_CLEAN.pdf (accessed 18 May 2019)

¹⁰⁹ ASEAN (2012), “Article 27(E)” in the ASEAN Human Rights Declaration. Available at <https://asean.org/asean-human-rights-declaration/> (accessed on 18 May 2019.)

¹¹⁰ AICHR, Guidelines on the AICHR’s Relations with Civil Society Organizations, Available at https://aichr.org/wp-content/uploads/2019/01/Guidelines_On_The_AICHRs_Relations_With_CSOs.pdf

organized annually since 2013, which allows for direct engagement between AICHR and selected young people. It is perceived as a way to expand knowledge and promote human rights to a wider and young audience; “AICHR debate competition is just one of the effective ways of raising awareness about the human rights situation in ASEAN and letting the youth be involved in the process of upholding such rights. With the active participation of the young generation, there is something to look forward to in terms of political cohesiveness, economic integration and social connections in the region.¹¹¹” But this only caters to a specific elite audience: university educated, English speaking young people, which only marginalizes a greater population of young people (grassroots, undereducated, non-English literate), who are more likely to face human rights violations on a daily basis.

III. Never Say Never: Taking Alternative Routes towards a Youth-Driven Human Rights Agenda

Notwithstanding their weak positioning in the ASEAN human rights space, young people have been carving ways to making their concerns known and voices heard by ASEAN leaders and other sectoral bodies. Since 2009¹¹², young activists and grassroots leaders have been meeting to discuss their respective human rights issues and to develop concrete recommendations through the ASEAN Youth Forum, an annual gathering organized by and for progressive youth in Southeast Asia.

2014 marked a monumental turning point in young people’s agenda for human rights in the region. The development of the ASEAN Youth Yangon Declaration¹¹³ or the ASEAN Youth Statement 2014 was put forward by the AYF. The Declaration sought to guide governments and stakeholders in the promotion and protection of non-discrimination, equality, protection, sustainability, and inclusive development of the ASEAN youth community; and grounded in a strong rights-based, inclusive, people-centered, and youth-driven regional approach. It was presented to the ASEAN summit during an interface meeting with young people in Naypyidaw, Myanmar. Their representation at the ASEAN Summit is a departure from the traditional methods of youth representation in the ASEAN policy infrastructure. This recognition given by the ASEAN leadership through AYF’s participation in the ASEAN Summit 2014, represents the first time where the youth agenda is being expressed and, more importantly, claimed by young people themselves at the regional level of representation. This also led to a formal partnership between the ASEAN Youth Forum and with the Senior Official’s Meeting on Youth (SOMY)—focusing on a greater involvement of grassroots youth in ASEAN development agenda.

¹¹¹ Som, K (2018), “Hearing the Voices of Asean Youth” in The Khmer Times. Available at <https://www.khmertimeskh.com/533448/hearing-the-voices-of-the-asean-youth/> (accessed on 19 May 2019)

¹¹² The first AYF was held in Cha-am, Thailand in 2009. Succeeding AYFs were held in Hanoi (2010), Jakarta (2011), Phnom Penh (2012), Bandar Seri Begawan (2013), Yangon (2014), Kuala Lumpur (2015), Phnom Penh (2016), and Manila (2017) Except in 2016, 2018, and 2019, AYF was usually organized in parallel with the ASEAN Peoples’ Forum/ASEAN Civil Society Conference (APF/ACSC)

¹¹³ see <https://aseanyouthforum.org/asean-youth-statement/>

IV. What AICHR could've done for Young People's Human Rights

Despite formal engagements forged between ASEAN and ASEAN Youth, AICHR's potential contribution to elevating a regional youth-driven human rights agenda seems to be elusive. Such absence is a reflection of the principle of non-interference, decision making based on consensus, siloed working approaches within the ASEAN system. Two examples are proof of this missed opportunity: The Mary Jane Veloso campaign and the ASEAN Youth Development Index.

In 2015, AYF launched a campaign to save the life of Mary Jane Veloso, a young Filipino mother, who was tricked into being drug mule and was to be executed by firing squad, during the ASEAN Summit in Kuala Lumpur. A letter of appeal was handed over by an Indonesian youth representative to President Joko Widodo.¹¹⁴ Her unfortunate narrative cuts across issues of trafficking, poverty, and gender-based violence. Yet, AICHR, which works and decides based on consensus, kept silent due to the fact that death penalty remains to be a sensitive and divisive issue amongst ASEAN member-states. In the end, Mary Jane was saved from her death on the 11th hour, mainly due to efforts by the Philippine government and pressure from national and regional CSOs.

The ASEAN Youth Development Index (YDI) is an initiative by ASEAN, through the SOMY, to take stock on four key issues pertaining to young people: Education, Health and Wellbeing, Employment and Opportunities, and Participation. This Report, based on analyzed government data, intended to be the basis for formulating related policies and programmes on youth development both at ASEAN and AMS levels¹¹⁵. Furthermore, it sought to achieve the aspiration "for people to enjoy human rights and fundamental freedoms, a higher quality of life and the benefits of community building, to reinforce the sense of togetherness and common identity."¹¹⁶ Ironically, despite such aspiration, processes leading to the report lacked depth and substance when it comes to human rights approach. It failed to include sensitive issues of vulnerable young people such as Sexual Reproductive Health and Rights (SRHR), Sexual Orientation, Gender Identity and Expression (SOGIE) and Political participation. In terms of procedures, young people, specifically from key vulnerable populations, did not participate in the designing and implementation of the project. The report's weak grip on human rights made the report unrelatable, irrelevant, and misrepresentative of the reality faced by ASEAN youth. AICHR, with its mandates to "enhance public awareness of human rights among the peoples of ASEAN through education, research and dissemination of information", "provide advisory services and technical assistance on human rights matters to ASEAN sectoral bodies upon request and, "develop common approaches and positions on human rights matters of interest to ASEAN," could have effectively guided the SOMY in conducting a more inclusive, expanded, and responsive study on young people living in the region¹¹⁷.

¹¹⁴ Rappler (2015), "ASEAN Youth to Jokowi: #SaveMaryJane." Available at <https://www.rappler.com/move-ph/91287-asean-youth-letter-jokowi-save-mary-jane>. (accessed on 18 May 2019)

¹¹⁵ ASEAN (2017), The First ASEAN Youth Development Index. Available at https://asean.org/storage/2017/10/ASEAN-UNFPA_report_web-final-05sep.pdf (accessed 18 May 2019.)

¹¹⁶ Ibid, p. 9

¹¹⁷ ASEAN (2009), ASEAN Intergovernmental Commission on Human Rights: Terms of Reference. pp. 6-7. Available at <https://www.asean.org/storage/2009/05/ASEAN-Intergovernmental-Commission-on-Human-Rights-Terms-of-Reference.pdf>

As of this writing, AICHR's inability to address human rights abuses against the youth has enabled a number of collateral damage throughout the region. For over a decade, the dearth of regional voices responding to the extrajudicial killings in the Philippines¹¹⁸, freedom of expression in Singapore¹¹⁹, freedom of the press in Myanmar¹²⁰, repression of sexual minorities in Brunei Darussalam¹²¹ and Aceh¹²² has impacted the lives of vulnerable young people and their trust in a regional human rights system.

V. Moving Away from Tokenism, Moving Forward towards Partnerships: ASEAN Youth and AICHR

Former ASEAN Secretary General, the Late Dr. Surin Pitsuwan was once quoted, "As a people, we have the power to manage our lives and community. In modern communities even the power of one individual can be considerable. When people realize they have a role in the governance of their own communities, big and small, it is the beginning of a revolution for all of us to improve our lives."¹²³ No doubt, ASEAN sees the potential of young people, which make up a third of the Region's growing population, to contribute to realizing a more connected, prosperous, and integrated regional community. It has, through a number of expressions and platforms, included youth among its many important development initiatives. However, these attempts to include young people have often been representation via proxy which typically involves the view that young people are the beneficiaries, and not the active agents of change capable of self-representation; and, this has mainly been the case in the regional human rights process.

Young people have done their part in amplifying their voices, expressing their concerns, providing solutions, and reaching out to AICHR. As a way of ushering the new decade, AICHR must see the value of partnering with young people. The following recommendations aim to develop, strengthen and sustain such partnership:

- AICHR should acknowledge and be guided by the ASEAN Yangon Declaration in strategizing ways in working with young people.
- National representatives must actively promote ASEAN human rights agenda to young people through regular dialogues, visits to schools and communities, and through social media platforms.

asean.org/storage/images/archive/publications/TOR-of-AICHR.pdf (accessed on 19 May 2019)

¹¹⁸ see the murder of Kian Delos Santos, at <https://www.bbc.com/news/world-asia-46381697>

¹¹⁹ see the case of Amos Yess at <https://www.amnesty.org/en/latest/news/2015/07/singapore-amos-ye-sentence-a-dark-day-for-freedom-of-expression/>

¹²⁰ see the case of Wa Lone and Kyaw Soe Oo at <https://www.fortifyrights.org/publication-20181211.html>

¹²¹ see the Brunei Sharia Law effect on young gay people at <https://www.theguardian.com/global-development/2019/apr/06/brunei-lgbt-people-law-scared-dangerous>

¹²² see caning of gay couple in Aceh at https://www.vice.com/en_asia/article/wjkd4z/two-gay-men-caned-under-sharia-law-in-aceh-once-again

¹²³ Surin Pitsuwan (2009), "Welcome Address at the ASEAN Secretariat Symposium on Methods of Stakeholder Involvement in Regional Organizations." Available at https://asean.org/?static_post=welcoming-address-by-dr-surin-pitsuwan-at-the-asean-secretariat-symposium-on-methods-of-stakeholder-involvement-in-regional-organisations (accessed on 20 May 2019)

- In lieu of the ASEAN Youth Debate on Human Rights, AICHR should regularly conduct a regional townhall meetings with various groups of young peoples focussing on strategies and solutions addressing daily human rights issues.
- AICHR should prioritise the passage of a regional policy on human rights education for both formal and informal learning systems.
- AICHR should work with SOMY in ensuring that the Workplan on Youth and its related activities are in-line with international human rights principles and standards.
- AICHR should relax its accreditation requirements to accommodate regional youth organizations, specifically one who have loose working structures, who have scarce resources, and carry progressive human rights agenda.

Trafficking victim or labour migrant: the missing rights' framework in ASEAN's migration governance

By Ratna Mathai-Luke

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Against Traffic in Women*

Introduction

Over the last 20 years, we have come to recognise that the trafficking of human beings is a matter of grave concern not only because it is organised crime but also because it entails a variety of serious human rights violations of those who are subjected to it. There has been global acknowledgement that the effective countering of trafficking in persons requires coordinated cooperation between many different stakeholders, (both governmental and non-governmental) and also a range of responses, stopping not only at criminalisation and prosecution but also respecting, defending and promoting the rights of trafficked persons. The 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol) marked a watershed moment. A former UN Special Rapporteur on Trafficking in Persons later explained why: “[it was] a major shift in the international approach to the exploitation of individuals for private profit and has a higher threshold for rights obligations than the narrowly focused 1949 UN Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others”¹²⁴.

The ASEAN Convention Against Trafficking in Persons, especially Women and Children (ACTIP) draws its definitions from the Palermo Protocol. It was adopted in 2015 and entered into force in 2017, with nine out of ten member States having ratified the treaty¹²⁵. Although ACTIP was formulated without the inclusion of civil society inputs, the treaty has been seen as concrete indicator of ASEAN’s political commitment to address human trafficking. With ratification comes the legal obligations on States Parties to implement ACTIP’s provisions into domestic laws, and with it comes the promise that regional coordination of anti-trafficking efforts will receive a boost.

Neither the Palermo Protocol nor ACTIP are human rights instruments; they are by their nature, suppression conventions.¹²⁶ So why then do we call on ASEAN to apply a human rights-based approach to anti-trafficking? This is because the anti-trafficking discourse recognises that criminal justice and victim protection are both equally important. Victim protection is not limited to rehabilitation alone but also requires the respect and protection of the human rights of trafficked persons. And in a region with no human rights treaties and with no other legally binding conventions related to migrant protection, ACTIP is often regarded with promise for being able to extend similar standards of human rights protection across the region, for all trafficked persons.

¹²⁴ Ezeilo, J. (2015), “Debate - Achievements of the Trafficking Protocol: Perspectives from the former UN Special Rapporteur on Trafficking in Persons”, *Anti-Trafficking Review* Issue no. 4, April 2015, available at <http://www.antitraffickingreview.org/index.php/atrjournal/article/view/94>

¹²⁵ Although Brunei had drafted legislation in 2017 that would enable it to ratify ACTIP, it has yet to do so and progress on the draft legislation has stalled. The 2019 US Trafficking in Persons report classified the country as “Tier 2 Watch List”

¹²⁶ Boister provides a succinct explanation of suppression treaties as “multilateral treaties that oblige states to criminalise certain forms of conduct and to provide legal assistance to other states in order to suppress these ‘treaty crimes’”. See Boister, N. (2002), “Human Rights Protections in the Suppression Conventions”, *Human Rights Law Review*, Volume 2, Issue 2, Autumn 2002, Pages 199–227

Both the Palermo Protocol as well as ACTIP recognise rights; both conventions require victim protection and assistance to be with “full respect for their human rights”. In the ACTIP context, the references to international and regional human rights instruments are found in the accompanying ASEAN Plan of Action Against Trafficking in Persons, Especially Women and Children (APA), including a requirement to respect the provisions of the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).¹²⁷ Notably, the Bohol Workplan (2017-2020) has for the first time included coordinating roles for both AICHR and ACWC in the implementation of ACTIP.¹²⁸

Anti-trafficking and migration governance in ASEAN

Following the Palermo Protocol, the human rights link to anti-trafficking framework has become much stronger. Soon after the Palermo Protocol, in a set of guidelines issued about human trafficking and human rights, the UN High Commissioner for Human Rights noted the primacy of human rights in anti-trafficking measures, highlighting that the latter “shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, IDPs, refugees and asylum-seekers”.¹²⁹ The guidelines recognised the intersectionality of rights and protection frameworks that trafficked persons may be entitled to.

This linking is important because migration governance in recent years has received a lot of attention. International migration frameworks¹³⁰ create different policy categories of migrants – refugees, trafficking victims, migrant workers (documented/undocumented) etc. While such distinctions help “manage” migration, looking at the movement of people from an exclusive governance lens does not acknowledge migration as a human experience, where people can have multiple identities that are inter-related or overlapping with each other. Unfortunately, different policy categories tend to be governed by different silos of legislation, frameworks and mechanisms. For example, at the domestic level, immigration and labour laws tend to cover issues related to labour migration, while anti-trafficking legislation will apply to only those persons who have been identified as “traffickers”, and “trafficking victims”. Irregular migrants and migrant workers suffering from labour exploitation becomes a murky policy area; instead of being entitled to recourse from either jurisdiction of law, they are often excluded from protection from both.

¹²⁷ For the detailed list of the references in the APA, see <https://asean.org/wp-content/uploads/2012/05/APA-FINAL.pdf>

¹²⁸ The responsibility for the implementation of ACTIP lies within the ASEAN Security Pillar with the Senior Officials on Transnational Crime.

¹²⁹ UN Office of the High Commissioner for Human Rights (OHCHR), Recommended Principles and Guidelines on Human Rights and Human Trafficking, 20 May 2002, E/2002/68/Add.1, available at: <https://www.ohchr.org/Documents/Publications/Trafficking-gen.pdf>

¹³⁰ For example the 10th objective of the Global Compact for Safe, Orderly and Regulation Migration (GCM) is on the prevention, combat and eradication of trafficking in persons. All ten ASEAN member States signed the GCM. <https://undocs.org/A/CONF.231/3>

Although labour migration is included in all three of the 2025 ASEAN Blueprints¹³¹, for the most part migration governance in ASEAN concentrates on skilled or documented workers, ignoring the fact that 87% of intra-ASEAN labour migration is for unskilled and irregular work.¹³² The lack of protections and the lack of legal status in the informal work sector makes migrant workers more vulnerable to abuse and exploitation.

Women comprise nearly half of all intra-regional migrants in ASEAN, yet ASEAN's labour migration regime is discriminatory to ASEAN's women migrant workers. In addition to the restrictions imposed on women migrant workers by individual countries (discussed below), the current ASEAN Economic Community (AEC) blueprint limits the free mobility of skilled labour to eight occupations.¹³³ This effectively excludes the majority of women migrant workers from the benefits of the AEC – not only are these eight occupations more male-dominated¹³⁴ but also in general, more women are engaged in informal, unskilled work, especially in domestic and care work.

Exploitation as the axis for victim support and assistance

ACTIP adopted the same definition of trafficking as contained in the Palermo Protocol. The definition is comprehensive, combining elements of both older legal definitions of trafficking and slavery, with requirements for both law enforcement and victim protection. Article 2(a) of ACTIP defines trafficking in persons as “...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs[.]”

The definition of trafficking contains three elements –the “act”, “means” and the “purpose” of trafficking. And as the definition makes clear, trafficking in its most essential form is about the exploitation of a human being – whether it is sexual exploitation, labour exploitation, slavery or servitude, the act and means can differ but the purpose of trafficking is exploitation.

Anti-trafficking initiatives aimed at women are still broadly interpreted as efforts to “rescue” women from sex work. Apart from the need to develop the understanding that not all sex work is

¹³¹ The ASEAN Economic Community (AEC) Blueprint focuses on skilled labour flows; the ASEAN Social-Cultural Community (ASCC) Blueprint seeks to improve multi-stakeholder cooperation on social protection measures for migrant workers; and the ASEAN Political-Security Community (APSC) Blueprint seeks to develop a regional instrument to protect the rights of migrant workers.

¹³² Sugiyarto and Agunias (2014), “A ‘Freer’ Flow of Skilled Labour within ASEAN: Aspirations, Opportunities and Challenges in 2015 and Beyond”, IOM and MPI Issue in Brief, December 2014 Issue No. 11, http://publications.iom.int/system/files/pdf/mpi_issue11_2dec2014.pdf

¹³³ The eight occupations are engineering, nursing, architecture, surveying, accountancy, dentistry, medicine and tourism

¹³⁴ With the exception of the nursing occupation.

forced prostitution, there is also the need to improve our reflexive understanding that trafficking of women is not solely for sexual exploitation; labour exploitation is included in the trafficking definition. Reducing trafficking to a “women & children” problem ignores a gender-sensitive analysis of how trafficking affects all populations. Furthermore, the exploitation of female workers in other sectors, such as domestic work, is usually never considered as a trafficking situation. Victim assistance provisions provided under the binding provisions of ACTIP are rarely afforded to other female trafficking victims of labour exploitation.¹³⁵

The implementation of ACTIP continues to follow the traditional “3P” paradigm of prosecution, protection and prevention, with the emphasis on criminal prosecutions and security and not on victims’ rights. As a DFAT report acknowledged, while all the ASEAN members have strong domestic frameworks for human trafficking “these frameworks are not always implemented consistently and/or consistent with international standards (for example, in protecting victim rights as per ACTIP)”.¹³⁶ There is indeed no monitoring and review mechanism of anti-trafficking efforts in ASEAN, no means of holding States accountable for their implementation of ACTIP, nor for evaluating the effectiveness of the measures undertaken.

Consultations with trafficked persons and civil society organisation repeatedly show that the current criminalisation focus of anti-trafficking efforts criminalises victims as well and can stigmatise them further. One of the reasons why the conviction rates of traffickers remains low is because trafficked persons are wary of the consequences of reporting. Many migrants in this region may not have the necessary documentation to be in the country they work in, and therefore they could have irregular status; they are more likely to be deported for violating immigration laws instead of being offered any protection. Depending on how their work is classified (for example, if sex work is not legalised), they could be criminalised for engaging in these activities. Malaysia, Philippines and Thailand are the only ASEAN Members that currently have non-punishment clauses in their anti-trafficking laws.

Current measures for victim protection (as usually articulated via the “4R” approach of rescue, recovery, repatriation and rehabilitation) usually become “needs” v “rights of trafficked persons”, but there is little review about who is determining these needs? Detention and deportation are the outcomes of most “rescue operations” thus penalising victims for speaking out against exploitation. For example, not all sex workers necessarily identify themselves as trafficking victims nor would they want to be officially recognised as trafficking victims; the stigma and legal implications of being identified as victims can be overwhelming.¹³⁷

¹³⁵ Conversely, male workers who have been subjected to labour exploitation are recognized as trafficked victims but are very rarely acknowledged as being victims of sexual exploitation. In 2010, the ACWC introduced its Gender Sensitive Guidelines for Handling Women Victims of Trafficking in Persons which provide details on a rights-based approach to assistance for trafficked women; however, gender sensitive approaches should be applied to all trafficking victims, not just for women and girls.

¹³⁶ DFAT Australia (2018), ASEAN-Australia Counter-Trafficking – Investment Design, <https://dfat.gov.au/about-us/business-opportunities/Documents/asean-australia-counter-trafficking-investment-design.pdf>

¹³⁷ In many countries, once “victims” are “rescued”, they are sent to a shelter for recovery and then deported back to their home country – the entire process can take up to a year which is a long time to be without a source of income. For a more nuanced discussion on the impact of anti-trafficking and sex work, see GAATW (2018), Sex Workers Organising for Change: Self-representation, community mobilisation, and working conditions, available at: <https://www.gaatw.org/publications/SWorganising/SWorganising-complete-web.pdf>

The anti-trafficking discourse does not yet acknowledge adequately enough that even documented workers can also be caught in a trafficking situation. Regulated migration does not protect people from being trafficked - a person on a valid work visa who may have followed regular migration channels can still find themselves vulnerable to exploitation and suffer the same harms of trafficking. One of the challenges here lies in the fact that ACTIP does not contain any explicit provisions for employers' liability;¹³⁸ mention of the liability of legal persons appears once in the accompanying Plan of Action.¹³⁹ It is up to individual national legislation to protect migrant workers from exploitative labour practices of employers, including ensuring corporate accountability to prevent and address trafficking and forced labour in supply chains.

The APA also notes labour exploitation as a particular form of trafficking, and under the chapter on "Prevention" – requires that States "adopt and implement appropriate labour laws or other mechanisms that promote and protect the interests and rights of workers to reduce their risk of being trafficked". Migrant workers however are routinely excluded from labour law protections; the main destination countries in ASEAN (Malaysia, Singapore and Thailand) impose restrictions on migrants' freedom of association and the right to collective bargaining. The inability to negotiate for safer working conditions, decent work hours and minimum wages and renders workers more vulnerable to exploitative conditions.

While sending countries may introduce provisions for the protection of migrant workers, the enforceability of these rights stops at borders. Indonesia and the Philippines are the only two ASEAN members to have ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Destination countries need to enact legislation that protects migrant workers from exploitation, and regional coordination between the ASEAN member states is the only way to ensure that equal standards of protection from labour exploitation are offered to all ASEAN workers.

For migrant domestic workers, the majority of whom are women¹⁴⁰, the challenges are compounded. The Philippines remains the only ASEAN country to have ratified the ILO Convention on Domestic Workers (C189). Malaysia, Singapore and Thailand are the largest destination countries for migrant domestic workers in Southeast Asia and currently none of these countries recognise domestic work under their employment laws. Domestic workers are not entitled to minimum pay nor social security benefits. Isolated from other workers and employed in private homes, violence against migrant domestic workers in this region has been well documented¹⁴¹. But because the exploitation of migrant domestic workers tends to fall under

¹³⁸ As a point of comparison with another regional anti-trafficking convention, see Article 22 of Council of Europe Convention on Action against Trafficking in Human Beings which provides for the criminal and civil liability of companies in cases of human trafficking <https://rm.coe.int/168008371d>

¹³⁹ See section C.i. of the ASEAN Plan of Action <https://asean.org/wp-content/uploads/2012/05/APA-FINAL.pdf>

¹⁴⁰ 8.4 million (73.4%) of migrant domestic workers (MDWs) are women or adolescent girls. ILO (2015), ILO Global estimates of migrant workers and migrant domestic workers: results and methodology / International Labour Office - Geneva: ILO, 2015

¹⁴¹ See for example, Cook (2018), "ASEAN must confront its domestic workers abuse problems", published in The Diplomat on 22 February 2018, at <https://thediplomat.com/2018/02/asean-must-confront-its-domestic-workers-abuse-problem/>

the silo of rules applicable to “labour migrants”, assistance to such victims of forced labour, abuse and labour exploitation comes under a separate set of protection measures, which often offer lower protection standards than those that are offered to recognised “victims of trafficking”. As with other migrant workers whose permission to stay in a country is tied to a specific employer, they can suffer the consequences of complaining against their employers. Many migrant workers who report abusive working conditions and attempt to escape it are deported under immigration regulations before their case can come to court, making it prohibitively expensive for individuals to then pursue legal justice from another country.

Traditional attitudes towards women’s mobility also has an effect on trafficking. The assumption that only irregular migration places workers, especially women migrant workers, at risk while safe migration protects them, is incorrect. Knowledge of, or practices of “safe, orderly and regular” migration does not stop trafficking. Very often the constrictive migration architectures that are in place, supposedly to prevent women from being trafficked, actually force women to use alternative, irregular means for finding work abroad.

Almost all the countries in ASEAN, including sending and receiving countries, have imposed some travel restriction on women workers. These range from age restrictions to travel bans to certain countries, to restrictions to work in certain occupations. There are restrictions placed on women’s reproductive rights as well as their right to marry.¹⁴² Such restrictions are a violation of States’ obligations under CEDAW to ensure equal opportunities for employment and to eliminate gender-based discrimination – such discrimination also applies to travel and employment as noted specifically by CEDAW General Recommendation 26 on women migrant workers which calls on States to lift gender-based restrictions on employment and migration.¹⁴³ It should be recalled that all ten ASEAN members are state parties to CEDAW.

Many ASEAN members have adopted bilateral Memoranda of Understanding (MoUs) in an effort to reduce trafficking and ensuring safe migration. While in theory these MoUs do offer protection, in practice they make it difficult for both employers and employees to navigate the administrative process of labour migration, increasing the dependency on middle men and recruitment agencies. Even when MoUs attempt to regulate the behaviour of recruiting agencies, the implementation of such regulations have been difficult. Many women migrant workers have shared how recruiters and middle men charge high recruitment fees for finding them employment abroad, resulting in a high debt burden for migrant workers seeking to migrate – the pressures to pay off these fees makes it difficult for some workers to complain about labour abuse. When recruiting agencies become the abuser, it can be even more difficult to report or even escape the abuse because of the fundamental dependency of workers on these agencies to stay employed or to find work placements.

¹⁴² For a comparison of the labour restrictions on ASEAN women’s rights to mobility, see ILO (2017), Protected or put in harm’s way? Bans and restrictions on women’s labour migration in ASEAN countries, available at https://www.ilo.org/asia/publications/WCMS_555974/lang--en/index.htm

¹⁴³ See paragraphs 10, 13, 24(a), 26(b) of CEDAW General Recommendation 26 on the obligations of both sending and destination countries. Available at https://www2.ohchr.org/english/bodies/cedaw/docs/GR_26_on_women_migrant_workers_en.pdf

Conclusion

Migration governance, as it currently stands in the region, tends to assume that all migrants, apart from trafficked persons or refugees, have choice in their migration – it ignores the reasons of why people migrate or even stay in abusive work environments. The inflexibility of, and inaccessibility to legal migration pathways mean that many migrant workers, especially women, may have little recourse but to use irregular routes. As the lived experiences of migrant workers tell us, by denying rights’ protection to migrant workers from labour exploitation, our migration regimes are failing workers¹⁴⁴.

ASEAN’s human rights mechanisms should champion a rights-based approach to the implementation of ACTIP. Designing anti-trafficking measures that address the exploitative aspects of trafficking, as contained in the ACTIP definition, would allow us to recognise that trafficking can happen to anyone; it does not require cross-border movement, it is not limited to the irregular movements of people. It is not limited to women and children nor is it exclusive to forced prostitution. Until we focus on reviewing and amending our current exploitative system of contract labour migration¹⁴⁵, anti-trafficking measures as they currently stand, will make little dent on human trafficking.

Key takeaways for consideration:

1. Do not reduce trafficking to a purely “women and children problem” or as an issue that affects only those women who are in forced prostitution. The regional human rights bodies (AICHR, ACWC and ACMW) can highlight gender discriminatory practices and attitudes in anti-trafficking and safe migration interventions as they are currently applied in the region. They could emphasise that the implementation of ACTIP needs to emphasise on the exploitative aspects of trafficking, highlighting the links between trafficking and labour and migrant rights protection;
2. ACTIP implementation requires monitoring and review, especially to ensure that a rights-based approach is adopted for victim identification and protection. Civil society provides good evidence-based resources for monitoring and evaluation, and AICHR, ACWC and ACMW should work with them to utilise the recommendations and the reports of implementation failures to push States to honour their commitments;
3. When it comes to safe migration and decent work, in addition to requiring member States to ratify key UN and ILO instruments protecting labour and migrant rights, including ILO Convention 189, AICHR could develop minimum decent work and protection standards for all migrant workers in ASEAN, both in countries of origin and destination, including their right to organise;

¹⁴⁴ See GAATW (2019), “Demanding Justice: Women Migrant Workers Fighting Gender-Based Violence”, available at <https://www.gaatw.org/resources/publications/996-demanding-justice-women-migrant-workers-fighting-gender-based-violence>

¹⁴⁵ This reflection was shared by participants during GAATW’s ASEAN civil society consultation on “Women, Labour Migration and Trafficking” on 26-27 November 2018.

4. Since Business and Human Rights is already a priority area for AICHR, it would be well within their mandate to push for corporate accountability on labour and migrant workers' rights region wide;
5. Many civil society organisations build their work through consultations with women migrant workers and partners who work on the ground. Understanding their perspectives has helped us develop our advocacy. In order to develop clear guidance on what is a rights-based approach to anti-trafficking, ASEAN policy makers should try a similar approach. Instead of limiting their consultations to only government agencies, they could sit down with the people at the heart of the debate – migrant workers and trafficked persons themselves - to understand what works (and does not) and why.

Pushing Boundaries and Expanding Space in Institutionalising and Setting Standards for Human Rights in Southeast Asia: The AICHR 2016 – 2018 Experience

By Edmund Bon Tai Soon¹⁴⁶

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Connecting the dots

Concerns about the efficacy, effectiveness and relevance of the ASEAN Intergovernmental Commission on Human Rights (AICHR) have often been repeated. This essay looks at the work of the AICHR over the past three years between 2016 and 2018. Some progress has been made. Weaknesses still exist but the nuances are often overlooked.

I will attempt to 'connect the dots' of the AICHR's work in the past ten years by utilising the last three years as a longitudinal case study. In doing so, observations are made as to the progress made, and challenges faced, by the Commission, coupled with insights on the factors that contributed to either of these. I outline my observations in the form of lessons learned during my tenure as the Representative of Malaysia to the AICHR. I hope to provide an insight and a deeper understanding into the workings of the AICHR as well as to make suggestions that would hopefully enhance the Commission's role to better institutionalise human rights practices in the region.

There are six lessons.

Lesson 1: The AICHR's programming and implementation thereof reveal a lack of congruence between that which is ideal and the reality on the ground.

The strengths of the AICHR are in two areas.

First, its convening power. It has the ability when hosting programmes to invite and gather senior officials from the governments of ten countries to talk about human rights. It is part of Track 1 diplomacy. We should not lose sight of this fact.

Second, its consensus power. Once a decision is made, it would be one taken by the ten Representatives. The representation to the world at large and other governmental agencies in the implementation of such a decision is readily accepted, and cannot be easily undermined.

Between 2010 and 2018, the AICHR recorded about 121 completed activities. This figure does not include the AICHR's meetings or ad hoc activities. Using a highly conservative back-of-the-envelope calculation, more than USD6 million was spent to run the said activities.

From 2016 to 2018, the AICHR conducted 53 activities and 33 reports were produced and noted. This indicated that more than 40% of the total activities were completed between 2016 and 2018. It can safely be said that there was a sense of heightened interest among the Representatives in contributing to the work of the AICHR. The 33 reports generated within only three years is a feat and they contain a wealth of information including progressive recommendations. In these activities, the attendees would generally be composed of government officials representing the relevant national agencies, and several independent experts (including former diplomats, academics and representatives of civil society organisations [CSOs]) as resource persons.

I would express some concerns.

First, these activities are usually high-level activities. They are insufficiently participatory. Until 2016, there was no consistent practice of inviting or allowing representatives of marginalised communities or vulnerable groups to attend the events or to speak at the same. Objections would be taken to their participation in fear that some governments would be subjected to critique or admonishment for their actions.

In 2016, there were eight new Representatives. There seemed to be some degree of openness allowing for more opportunities to have human rights survivors and defenders attending the activities to share their stories. This improvement enriched the discussions as the voices of those who worked at the grassroots level and who were often directly affected by human rights violations could be heard.

Second, in spite of the number of good reports containing recommendations that stemmed from the AICHR's activities, there was no real indication of the AICHR's proactive approach towards implementing them in a more programmatic manner. The feeling I had – and I may be wrong on this – was that most of the activities were 'tick-the-box' exercises to show that something was done with the funds the AICHR had at hand.

Third, there was no mechanism to check if the recommendations were implemented domestically by each Member State or if there were any follow up actions taken. CSOs could also not independently verify the progress because the majority of the AICHR's reports, particularly those before 2016, were not made available for public consumption. Even the AICHR's Annual Reports were not made public until 2016. The argument was that the AICHR's reports are considered internal and the recommendations therein could only be published if they were adopted by consensus. The reports would only be noted for the record.

When I came on board the AICHR, I reviewed all of the reports since its establishment and found that only one recommendation was adopted. It was a recommendation to establish an 'ASEAN Inter-Sectoral (Bodies) Technical Working Group on Women and Girls' Human Rights' adopted at the AICHR's Special Meeting from 2 to 5 August 2015 in Kuala Lumpur, Malaysia. But to date, there has yet been any movement on this recommendation. I presented a proposal by way of a Concept Note on this to be implemented in 2019 and I hope it will be adopted.

While some of the Representatives supported a more open sharing of information of the AICHR's work to increase our connectivity with the public, there was still much resistance. We persisted and after much debate, the AICHR agreed on a middle position. Annual Reports could be published on a case-by-case basis, and after they were approved by the ASEAN Foreign Ministers' Meeting (AMM). As a result, we managed to publish the Annual Reports for 2016, 2017 and 2018 after much editing and sanitising of their contents. For activity reports to be published, they had to be summarised to five pages and no recommendations could be included. As such, some of us chose not to publish the reports as we would have had to compromise on some of the information while being unable to present a full picture of the discussions.

Overall, we managed to change the situation for the better to a noticeable degree although further work needs to be done for the AICHR to be more in touch with the lives of the people on the ground.

Lesson 2: The AICHR's modalities of programming require a stocktaking exercise that culminates in a strategic framework to enhance the Commission's work in the region.

It is often said that the AICHR is more concerned with the 'promotion' than in the 'protection' of human rights. Some Representatives have argued that in promoting human rights, the AICHR would also be protecting human rights because we would be raising the level of awareness among government officials on the rights. Some, of course, have argued that the AICHR's Terms of Reference (TOR) – in practical terms – does not provide for a protection mandate.

Here is the nub of the matter. While the AICHR's TOR is broad, each Representative seems to have a different understanding of what the AICHR ought to do given the limited amount of available resources. This may be due to the different levels of acceptance of human rights in each country regarding a particular human rights issue. For example, some governments may be more disturbed by the 'right to a fair trial' while some may be more emotive about the 'right to freedom of religion'.

Moving away from this quagmire, I venture to suggest grouping the AICHR's activities into three clusters: (a) socialisation, (b) institutionalisation, and (c) legitimisation. Not all of the activities may fit neatly into each cluster, and therefore the 'why' question regarding the design of the activities should be asked:

Socialisation cluster: Is the programme designed to increase awareness or understanding of a particular human right issue?

Institutionalisation cluster: Is the programme designed to achieve a particular consensus on an issue by way of a negotiated and agreed outcome document, for example, a policy brief, a position paper, a general comment, a plan of action, a thematic study report, a model law, a set of guidelines, a declaration or a convention?

Legitimation cluster: Is the programme designed to validate or further the use of the AICHR's outcome document or adopted human rights position?

A majority of the AICHR's activities fall under the socialisation cluster. Programmes regarding vulnerable groups (such as on the rights of children, women, persons with disabilities and trafficked persons) and thematic issues (such as on right to education, business and human rights, the Sustainable Development Goals, and the judicial implementation of the Convention on the Elimination of All Forms of Discrimination Against Women 1981, the Convention on the Rights of Child 1990 and the Convention on the Rights of Persons with Disabilities 2008) were held in the form of dialogues, consultations and workshops to exchange information and share good practices. The AICHR's consensus to host socialisation programmes is often straightforward.

These programmes continue to play an important function to ramp up greater support and acceptance of the normative principles of the relevant subject matter while maintaining the space for human rights discussions in the region.

In the institutionalisation cluster, the AICHR's proposed programme would usually seek to achieve an outcome document that may be adopted and touted as containing the official human rights position of the AICHR. Several activities were conducted towards this end including those culminating in what is now known as the 'ASEAN Enabling Masterplan 2025: Mainstreaming the Rights of Persons with Disabilities' (Disabilities EM2025) adopted by the Association of Southeast Asian Nations (ASEAN) Leaders at the 33rd ASEAN Summit in 2018.

Others included developing an ASEAN legal human rights instrument (led by the Philippines); a set of regional guidelines on a rights-based approach for environmental impact assessments (led by Myanmar) and on corporate social responsibility (CSR) and human rights (led by Singapore); adopting a general comment-like position paper on Article 28(e) of the ASEAN Human Rights Declaration 2012 (AHRD) regarding the right to safe drinking water and sanitation (led by Malaysia) and on Article 23 of the AHRD on the right to freedom of opinion and expression (jointly led by Indonesia and Malaysia); and formulating a model law on the rights of accused persons in criminal trials based on Articles 5, 11 and 12 of the AHRD (led by Malaysia). The AICHR's thematic studies on CSR and human rights, women in natural disasters, legal aid, juvenile justice, the death penalty, the right to education and the right to peace also fall within this cluster. Guided by the AHRD, the activities under this cluster seek to find a baseline agreement towards adopting a common standard or approach for the region.

The final cluster – legitimisation – is the one where the AICHR has its least presence. What would be envisaged under this cluster is to see programmes that evaluate and monitor, and further support the utilisation of the AICHR's outcome documents, recommendations or adopted human rights positions. For example, Members States should be able to report on how they have implemented, for example, the Disabilities EM2025 and to share cases, success stories, failures, challenges, gaps and possible improvements. Here, the Commission would then be able to validate its views and make further recommendations for improvement. For example, documenting the AICHR's views and observations in a case digest or report is one possible initiative that would increase the AICHR's relevance among the peoples.

Programmes under the legitimisation cluster can also act as a self-regulating mechanism working as a feedback loop. In the case of the AICHR, this would be ideal as there is currently an absence of an effective monitoring and evaluation system. The matrix which is used by the AICHR is one that is provided by the ASEAN Secretariat for implementing agencies under the ASEAN Political-Security Community (APSC) pillar. It focuses primarily on monitoring and there is a lack of an evaluation component. The matrix functions simply as a recording device and does not provide any means to track the implementation of the AICHR's work by national agencies, and whether the desired impact and outcomes have been met by the particular activity.

In light of the above, the AICHR should internally undertake a stocktaking exercise to categorise the relevant human rights enunciated in the AHRD according to the level of acceptance by each Member State or Representative. It then decides if its future activities should still remain at the socialisation stage, or should be designed for the institutionalisation or legitimisation phases. It would assist the Commission to be more strategic and focused on how it functions. For the AICHR to strengthen its role as a regional human rights body, it needs to move out of the socialisation cycle. When its work is seen through these three clusters, the AICHR would avoid having to wade in what seems to be the now protracted 'promotion versus protection' debate.

Lesson 3: The AICHR needs to decide what it is meant to do and focus on what it should do.

It is my view that the AICHR should use its resources to draft authoritative written explications to interpret and elaborate on the provisions of the AHRD. I had previously articulated this point repeatedly at the AICHR's meetings. The jurisprudential documents generated will give life to the words declared in the AHRD and fill abstract concepts with meaning. They will list a set of criteria to orientate Member States in their implementation of human rights and at the same time provide a platform to monitor the progress of such measures. Although some may perceive the AHRD as flawed, it was the AICHR which drafted it and hence to the AICHR that people will look to for guidance.

It was in this vein that as the Representative of Malaysia, I drafted my view on the AHRD and on 23 September 2016 issued Malaysia's 'General Observation No. 1/2016: Interpretation of Articles 6, 7 & 8 of the ASEAN Human Rights Declaration 2012'.¹⁴⁷ While it may not be a perfect document, it formed a liftoff for our work around the AHRD. An academic opined that my interpretation of the AHRD 'is an example of argumentative discourse to reinforce AICHR's commitment to international standards of human rights and ward against backtracking'.¹⁴⁸

After Malaysia hosted the AICHR's 'Regional Consultation on the Right to Safe Drinking Water and Sanitation (with an emphasis on rural communities)' held from 25 to 27 October 2017 in Kota Kinabalu, Sabah, Malaysia,¹⁴⁹ a team of experts¹⁵⁰ worked with me to draft a general comment-like document which became known as a 'Consultation Position Paper Regarding Article 28(e) of the ASEAN Human Rights Declaration 2012 (AHRD)'¹⁵¹ [CPPA28(e)]. It was to elaborate on the meaning of the right as well as to show how far ASEAN had progressed in terms of securing the right to safe drinking water and sanitation for the peoples of the region.

¹⁴⁷ See: <https://www.facebook.com/aichr-malaysia/posts/2014433755460940> and <https://www.forum-asia.org/uploads/wp/2017/12/Performance-Report-AICHR-2016-FORUM-ASIA.pdf>. Accessed August 20, 2019.

¹⁴⁸ Collins, Alan. 'From commitment to compliance: ASEAN's human rights regression?' (2019) *The Pacific Review*, Volume 32, Issue 3, pages 365-394. Accessed August 20, 2019. <https://www.tandfonline.com/doi/full/10.1080/09512748.2018.1476402>.

¹⁴⁹ See the AICHR's press release titled 'ASEAN Meets to Develop a Common Approach and Position on the Right to Safe Drinking Water & Sanitation Under Article 28(e) of the ASEAN Human Rights Declaration 2012 (AHRD)', November 7, 2017: <https://aichr.org/news/press-release-asean-meets-to-develop-a-common-approach-and-position-on-the-right-to-safe-drinking-water-sanitation-under-article-28e-of-the-asean-human-rights-declaration-2012-ahrd/>. Accessed August 20, 2019.

¹⁵⁰ The team consisted of Virginia Dandan, Apichai Sunchindah, Amanda Loeffen, Helena Olsson, Matthew Scott, Solene Le Doze, Marie Joyce Godio and Ding Jo-Ann.

¹⁵¹ See: <https://m.facebook.com/notes/aichr-malaysia/consultation-position-paper-regarding-article-28e-of-the-asean-human-rights-decl/2293214520916194/>. Accessed August 20, 2019.

I wanted it to be adopted by the AICHR as an expression of our position on a particular human rights issue given that the AICHR had never articulated itself on the AHRD. I then presented the CPPA28(e) for a discussion.¹⁵² One Representative said that it is only for governments to decide on how the AHRD is to be interpreted, not for the AICHR to do so; and another Representative said that the AICHR was not ready to adopt such a document. We had a lively exchange of views.

It was telling that no one objected to the language, tone or human rights interpretation of Article 28(e) contained in the CPPA28(e). I said that if there were any objections to the content of the document, amendments to the text should be proposed and I would be happy to consider the proposed revisions. Time was given but no comments were ever received. I suppose it would have been rather difficult for any Representative to state in writing that safe drinking water and sanitation should not be available, adequate, accessible, acceptable and be of a certain quality.

There are two more examples.

In respect of the regional refugee and human rights crises resulting from the situation in the Rakhine State, I had, with the Representative of Indonesia, Associate Professor Dinna Wisnu, issued a joint media statement on 23 April 2018.¹⁵³ We used language from the AHRD and the ASEAN instruments to recommend developing a 'whole-of-ASEAN' approach in cooperation with Myanmar to meet its challenges. We released the carefully worded statement after consulting with some of the Representatives and inviting them to sign on to the same. It would have come as no surprise to others on the AICHR that we issued the statement. Both of us were regularly raising the issues at the plenary sessions and sidelines of our AICHR meetings. No agreement could be reached. It came to a point that we had exhausted the avenues available within the AICHR. We had to say something. Subsequently, in one of the meetings, I was taken aback when one Representative said that we should not have made such a public statement because it interfered with the affairs of a Member State. Another Representative said that all members of the Commission had the right to express themselves and the matter rested there.

In the area of disaster management, Dinna and I once sought for a briefing on the work of the ASEAN Coordinating Centre for Humanitarian Assistance on Disaster Management (AHA Centre) in the region. It was good to learn about the commendable work of the AHA Centre and at the end of the briefing on 31 July 2018, the AICHR expressed an interest to assist the ASEAN Committee on Disaster Management (ACDM) to refine its proposal to define the term 'human induced disasters'. We were informed that the ACDM was attempting to agree on such a definition.

¹⁵² At the AICHR's 26th Meeting held from 24 to 26 January 2018 in Singapore.

¹⁵³ See: <https://www.facebook.com/aichrmalaysia/posts/2116189738618674>. Accessed August 20, 2019.

After consulting several CSOs and on behalf of Malaysia, I responded by providing a proposed definition.¹⁵⁴ The AICHR could not agree on making the definition its official own. The AICHR then transmitted my proposal written in my capacity as the Representative of Malaysia. This was probably the first advisory service and technical assistance provided to a Sectoral Body pursuant to the AICHR's mandate under paragraph 4.7 of the TOR.

I am sharing these episodes because some of us feel that as a standard-setting body, the AICHR should be more mindful of the design and purpose of its activities. These examples highlight the different ways the AICHR can effectively function if it wishes to do so. We must accept that the AICHR is not an implementing body because it does not have a governmental agency to specifically implement human rights domestically under the supervision of the Representatives. Rather, as a consultative body, the AICHR's strength is in providing opinions, guidance, technical know-how and recommendations regarding the AHRD and other related human rights instruments. There is a great divergence of views on the AHRD, but no one has taken a step back to consider what the provisions really mean for the realisation of human rights in the region.

To me, the AHRD serves as a human rights guidebook and the AICHR is best placed to expound on its meaning to give it life to the peoples of Southeast Asia. Providing technical human rights advice on the aspects of the AHRD should be the AICHR's forte and this function makes the AICHR unique as the overarching human rights standard-setting body in ASEAN.

Lesson 4: Some of the AICHR's Representatives fear the unknown or know the fear causing the AICHR to practice self-censorship.

It is an open secret that the AICHR functions more in a way of 'human rights diplomacy'. But there is a paradox. One would have thought that if it was only about diplomacy, then there should be no hesitation for the Representatives to make progressive statements on human rights or to inculcate global human rights protection standards. Unfortunately, there is some hesitation. Throughout the process of negotiating issues and documents, I noticed that there was a high degree of cautiousness among some of the Representatives. Such restraint is to be expected as some of them perceive themselves as acting on behalf of their governments. The example on the CPPA28(e) process illustrates the challenge and how it plays out in practice. The AICHR had to

¹⁵⁴ A human induced disaster is a disaster:

- resulting – whether partially or fully – from a human made hazard / risk as opposed to a natural hazard / risk;
- caused – predominantly or otherwise – by State and/or non-State actors whether deliberately, intentionally, negligently, by omission, by accident, or otherwise;
- seriously or significantly impacting or affecting a segment or whole of a population of one or more ASEAN Member States directly or indirectly; and,
- manifesting in any form of human suffering, or disruption of the functioning of a community or a society at any scale, or a breach of the peace.

Elaboration (a) Examples of human induced disasters include environmental pollution, industrial accidents, acts of terrorism, inter-communal violence and armed or non-armed conflict. (b) The impact or manifestation of human induced disasters may be seen through human, material, economic and environmental loss, damage or degradation such as death, injury to persons, loss of property, disruption to basic services or to the means of livelihood, disease, and other negative health – physical, mental, emotional and social – occurrences.'

cancel itself even though it appeared that there were no objections to the text or content of the document.

Setting that aside, it became apparent that there were only four of us who would regularly speak as the 'more independent-minded' Representatives without needing to reflect the views of our governments. Three of us were from outside of our respective governmental institutions. One Representative among the four of us was a sitting government official, and it was refreshing that the said Representative could align with us on a human rights position even though it may not necessarily have been the Representative's government position. At some of the meetings, we were able to have open discussions on the situation in the Rakhine State, the rights of the indigenous peoples and the rights of the lesbian, gay, bisexual, transgender, transsexual, intersex and queer communities. There were also times at the sidelines of meetings when I was told that the Representative had to take a certain position even though he or she did not personally agree with it.

When I was first appointed, I clearly said that I do not represent the Malaysian Government. I represent my country: Malaysia.¹⁵⁵ Some say that governments can hire and fire the Representatives, and therefore we lack independence but I see no contradiction in this. One may be appointed, terminated or replaced by the government but it does not mean that one cannot still act independently. Paragraph 5.7 of the TOR demands that each Representative acts 'impartially' in the discharge of his or her duties.

I was free to lead and take a certain human rights position even when the Malaysian Government had not adopted it. I could share how we were trying to improve the human rights situation in Malaysia while acknowledging our weaknesses. The Ministry of Foreign Affairs of Malaysia understood my position and we worked well together in close consultation on all matters pertaining to the AICHR. I was even asked by observers, friends, colleagues and some of the AICHR's Representatives how I could operate under the then Barisan Nasional (National Front) administration in Government which was not known to be particularly enthused about human rights. They expressed some surprise that I could adopt the positions I took or say the things I said at the AICHR. To their credit, the then Minister of Foreign Affairs of Malaysia, Dato' Sri Anifah Aman, the current Minister, Dato' Saifuddin Abdullah, and the Ministry all understood that I had to act impartially. That was how I viewed my role and it could not be in any other way for otherwise I would not have wanted to continue serving the Commission. And therein lies the difference. I did not have to censor myself.

But given the current mindset within ASEAN, we had to work with what was before us. While self-censorship was evident in the internal workings of the AICHR even in the way Representatives

¹⁵⁵ Koshy, Shaila. 'Improving Malaysia's profile'. The Star, July 10, 2016. Accessed August 20, 2019. <https://www.thestar.com.my/news/nation/2016/07/10/improving-malysias-profile>.

drafted documents to be presented to the Commission, there was another fear: rejection. Do not ask for something you perceive you may face rejection on. One example I remember was the commendable idea to come up with a set of regional guidelines on a certain matured human rights issue. Work on the guidelines led by the AICHR supported by an Entity Associated With ASEAN (under Annex 2 of the ASEAN Charter 2007) was in full swing. Numerous programmes were held. A set of guidelines was then adopted and was due to be presented to the AICHR for adoption. It never came. It was later understood that there would have been an objection by a Representative under the pretext that the AICHR was not ready to adopt such guidelines. In the end, the document was not presented even for discussion although there already had been a significant amount of work, time and resources invested on it.

Over the three years, we had long discussions and embarked on an arduous journey to reach a consensus every year to publish our Annual Reports in 2016, 2017 and 2018. Not only had we to hold our corner to make the AICHR's work more accessible to the public, but the version that was published had our recommendations and some robust statements removed due to the sensitivities expressed by some of the Representatives. There was a sense of apprehension that the AICHR would be bound by our own recommendations once they were made public and it would have been strange if we did not implement them. This fear resulted in a conscious act of self-censorship.

Lesson 5: The AICHR's correspondence procedure needs to be expedited to regularise and institutionalise the way the AICHR handles complaints and cases of human rights violations.

The AICHR has been consistently plagued by the critique that it is unable or unwilling to respond to human rights violations. I requested the ASEAN Secretariat to provide me with a list of all the letters of complaints and cases received by the AICHR. As of 28 July 2017, the AICHR received no less than 34 letters. The complaints and cases highlighted a wide range of violations that alleged breaches of the AHRD. It was quite surprising to know that the AICHR had not dealt with the letters in a way befitting a regional human rights commission.

There was an absence of consistency in the way the letters were being treated. The position of the Chairperson of the AICHR is actually quite powerful. While the Chairperson is only supposed to regulate the affairs and meetings of the AICHR and to stay neutral during the discussions, he or she wields a great deal of unseen power. During our time, each Chairperson adopted different practices including the degree of flexibility in managing and responding to issues. Because the conduct of the AICHR as a group differed from year to year depending on who chaired the AICHR, some complaints and cases would be shared with all the Representatives while some would not be. If they were not shared, we would not know about them. Some letters would receive a response while others would not. From the outside, CSOs continued to complain that the AICHR was unresponsive.

What then did I have to do? It was to put in place certain procedures to ensure the more effective functioning of the AICHR.

First, I encouraged the Malaysian CSOs to continue sending their letters on complaints and cases of human rights violations to the AICHR. When they send the same, they should copy all of the individual Representatives as well. It would then come to our attention.

As a second step, I drafted a set of guidelines to institutionalise the AICHR's practice of handling the letters it received. After consultations with the Ministry of Foreign Affairs and CSOs, and on behalf of Malaysia, I had in 2017 presented the AICHR with a set of draft 'Guidelines on Correspondence' (GOC). The draft went through some seven revisions. I admit that the GOC was not sufficiently robust and what CSOs would deem as ideal. But I decided that I would have to compromise on certain modalities to 'float a trial balloon', so to speak.

I proposed that the GOC handle three types of letters: (a) requests to meet, (b) proposals to cooperate or collaborate on joint activities, and (c) complaints and cases of human rights violations. On the modality regarding letters of complaints and cases, the GOC provided that individual Representatives may at his or her discretion follow up on the matters at home. Should there be any action taken, he or she may report it to the AICHR for a response to be sent to the complainant to inform of the progress regarding the complaint or case. This procedure, while not the best for a human rights commission, was to be a starting point for the practice to gradually evolve.

The GOC was then discussed at our retreats and in several meetings. It was encouraging that some of the Representatives supported the GOC while some expressed caution. One Representative was of the view that letters that pertained to the situation of a country should be sent only to the country's Representative and to no one else for otherwise it would be an interference in the domestic affairs of the Member State. Another Representative said that the AICHR had no power to receive complaints and cases of human rights violations. The argument was that only once the Secretary-General of ASEAN raises with the AICHR such complaints and cases can the AICHR then consider them.¹⁵⁶

One Representative attempted to water down the GOC further to gain consensus. The draft was revised again and discussions ensued for almost a year. Still, the AICHR could not find a consensus. This failure was partly due to several other factors such as the attempt to place a budgetary cap on the AICHR's sources of funding and to limit the number of our activities. Because some of us did not want to budge, the AICHR failed to agree on the said cap and limit, and also on the GOC.

I left the latest version of the GOC with the AICHR and I hope that the new group of Representatives would have the guidelines adopted as it is a sorely needed mechanism. The AICHR should be more flexible to effectively manage and respond to complaints and cases particularly on pressing or difficult human rights issues. In the future, the AICHR should host a website containing a database accessible to the public documenting all of the complaints and

¹⁵⁶ The Representative made this argument by reading paragraph 7.1 of the TOR with Article 11.2(a) and (b) of the ASEAN Charter 2007.

cases it has handled and its responses thereto. Having such a database would be a move that marches in lockstep towards making the AICHR more credible as the premier standard-setting institution of the region.

Lesson 6: The AICHR is only one part of the ASEAN human rights architecture and it faces the dilemma of multiple decision-makers.

In the context of the AICHR and its decision-making processes, it is not 'one size fits all'. ASEAN is not one, but ten. There are many different considerations for a particular Representative to lead an activity as its proponent. Some of the activities are implemented because the particular country needs to do it, some because it is a 'soft topic', some because it is evidence that 'something is being done', and some because the individual Representative is interested in the issue acting as its 'champion'.

There are several reasons attributable to why some of the AICHR's Representatives may not wish to act on certain matters:

Their governments do not agree with the human rights standards or recommendations that may be propounded as a result of the proposed activities.

Their governments agree with the standards and recommendations but do not want to be bound to implement them; failing which, they will be embarrassed.

Their governments do not have the capacity to take on the activities or to implement the standards or recommendations.

Their governments fear that the proposed activities would expose their failures or violations to the public.

It would be too simplistic to dismiss the actions of the AICHR without taking into account how governments operate. Governments may be pushed to take certain positions because of their internal political and security constraints, development status and to some extent, the need to ensure the continuation of their rule in office.

Having said that, the AICHR heavily relies on the relevant national line agencies to support its work. If the agencies say no, there is nothing much that the AICHR can do. For example, since the adoption of the Disabilities EM2025, the national agencies in charge of persons with disabilities bear the responsibility to implement the Disabilities EM2025 domestically. These agencies form ASEAN's Senior Officials Meeting on Social Welfare and Development (SOMSWD).

Further, without the buy-in from the relevant Sectoral Bodies, the AICHR would be paralysed. Cooperation with the Sectoral Bodies is not only seen as ideal but as necessary. Many of the cross-cutting initiatives often require the approval of the said Bodies.

When Thailand first conceived the idea to work on the rights of persons with disabilities, the proposal was to have a 'Regional Plan of Action' (RPA). The SOMSWD had a strong sense of ownership over matters in relation to persons with disabilities. It did not sit well with them that the AICHR intended to spearhead the initiative. The problem was resolved through a sideline meeting that allowed for candid exchanges. Finally, the initiative was to be jointly led by the AICHR and the SOMSWD. A 'Task Force on the Mainstreaming of the Rights of Persons with Disabilities in the ASEAN Community' was established comprising members of the AICHR, the SOMSWD and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). The Task Force led the drafting of the Disabilities EM2025.

If the AICHR failed to secure the SOMSWD's cooperation and decided to go it alone, the initiative would have stalled. There were other details which were factored into the eventual adoption of Disabilities EM2025 including a name change (from the original 'Plan of Action' to 'Enabling Masterplan') proposed by the SOMSWD for it to be more palatable to the ASEAN Leaders.

Similarly, in respect of the drafting of the CPPA28(e) and the preceding consultation in Kota Kinabalu, I had to ensure that my AICHR office worked in close cooperation and collaboration with the ASEAN Senior Officials on the Environment (ASOEN), the ASEAN Working Group on Water Resources Management (AWGWRM), ASEAN's Senior Officials Meeting on Rural Development and Poverty Eradication (SOMRDPE) and ASEAN's Senior Officials Meeting on Health Development (SOMHD).

Given the ASEAN human rights ecosystem, one notable progress in the past few years was the increasing number of partnerships and engagement the AICHR had with the Sectoral Bodies. It was a remarkable effort by the AICHR to widen its scope of engagement with internal and external stakeholders with the aim of moving away from working in silos. During this process, the AICHR stood out as one of the more proactive ASEAN bodies that were advocating for cross-pillar activities. This process was without its challenges, however. There were difficulties with some Sectoral Bodies that were still wary of the AICHR. It means that after some ten years, the AICHR's role is still hazy to some within ASEAN.

What is the point I am making here? While the AICHR was meant to have a pervasive influence across the ASEAN architecture, its implementing power has been diffused. It will not be able to advance human rights without the support of the Sectoral Bodies. Not only are there ten Representatives who must work in concert, but there are also other bodies of ten officials who need to work together. At the domestic level, the AICHR's work will not progress further if the local implementers refuse to act. The consequence of this situation is that multiple decision-makers need to be consulted and even then, there are occasions when no decision can be made. It is very easy to hamper the work of the AICHR.

Nevertheless, this weakness of the AICHR is also its strength. The AICHR is still able to involve government officials to discuss human rights issues on the same table while CSOs are rarely able to do so. The contrast between how the AICHR engages governments and how CSOs engage the same governments is good evidence. On this note, CSOs may wish to leverage on the AICHR's power to convene to influence officials from the various governments.

With regard to the AICHR's engagement with CSOs during my time, we made sure some key matters were enhanced.

First, by encouraging more applications for CSOs to be in a consultative relationship with the AICHR. I was a member of the AICHR's Screening Panel together with the Representatives of Singapore and Indonesia. We saw a good number of applications and based on our recommendations, the AICHR granted more than 30 CSOs the consultative status as at the end of 2018. This was a commendable increase from only six CSOs in 2016.

Second, some of us pushed for an institutionalised annual interface and dialogue with the accredited CSOs. There was really no other benefit for CSOs to be in a consultative relationship with the AICHR and some of us proposed new ideas. Finally, on 28 November 2017, the AICHR held a 'Roundtable Discussion on the ASEAN Human Rights Declaration' in Bohol, the Philippines with all of the accredited CSOs. It was an activity jointly led by the Philippines, Indonesia and Malaysia. The second occasion where the interface and dialogue occurred was at Thailand's 'AICHR CSO Symposium' held from 13 to 15 October 2018 in Chiang Rai, Thailand.

Both programmes were useful in that they allowed CSOs to put across their concerns, but more importantly, it behaved as a face-to-face modality to raise cases of human rights violations. I hope that this annualised practice which has enhanced the AICHR's relationship with CSOs will continue in the years to come.

A 'fit-for-purpose' AICHR

How has the AICHR impacted or changed the lives of the peoples of Southeast Asia for the better? Who have we assisted? How many lives have we touched?

How is the AHRD being used in the region or across the world? Who uses it to fight for their rights?

How many times have the AICHR's reports or documents been cited to deal with cases of human rights violations?

Is there evidence that the AICHR's meetings, discourses and conversations have advanced the protection of human rights?

With the many internal challenges to the AICHR, it is easy to fathom why some do not see the value of the AICHR or its relevance. This needs to be said as a reminder to the AICHR that it needs to be bolder.

I hope that the current batch of Representatives would lead the Commission to remove many of the self-imposed inhibitions. They need to work within the current parameters but at the same time test the boundaries.

I genuinely want to see the AICHR improve. And in a way, I hope that having been part of a group that moved the needle a little more evidently in the past three years,¹⁵⁷ we have set the Commission on the right path to greater things.

¹⁵⁷ See my media statement titled 'AICHR Malaysia must continue to be the beacon of hope for human rights and democracy in Southeast Asia', January 14, 2019: <https://www.malaysiakini.com/news/460194>. Accessed August 20, 2019.



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