



The ASEAN Intergovernmental Commission on Human Rights (AICHR) and the Responsibility to Protect: Development and Potential

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Executive Summary

At the World Summit in 2005, the largest ever gathering of Heads of State and government unanimously endorsed the Responsibility to Protect (R2P).¹ United Nations Member States affirmed that each State has a primary responsibility to protect its populations from war crimes, ethnic cleansing, crimes against humanity and genocide; that the international community has a responsibility to assist States build the capacity to provide such protection; and that when a State is ‘manifestly failing’ to protect its populations, the international community has a collective responsibility to take ‘timely and decisive’ action to do so.

Since 2005 there has been a discernible trend towards translating R2P into implementable strategies and practices. This move has been accompanied by increasing calls for regional and sub-regional arrangements to adopt a leading role. As such, this report examines the newly inaugurated Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights (AICHR) by assessing its prospects for making meaningful contribution to implementing R2P.

This report is the first of two working papers on the ASEAN Intergovernmental Commission on Human Rights and implementing the Responsibility to Protect in the region. The aim of this first report is to explore the important role of regional organisations, such as ASEAN, in implementing R2P and, in particular, how the AICHR can facilitate the promotion and protection of human rights in the region. As such, close attention is paid to the Terms of Reference (TOR) of the Commission and the process by which the AICHR was established.

The report proceeds in two main sections:

- **Section One** explores the conceptual development of R2P and the opportunities for regional and sub-regional arrangements to play a leading role in its implementation.
- **Section Two** outlines the normative rise of human rights in Southeast Asia which provides the historical background for the establishment of the AICHR.

By providing an analysis of the conditions and context in which the AICHR was set up, this report forms the background for the second report which will, in turn, offer a number of creative and strategic ways to optimise the Commission’s TOR. Together, the core argument of the two reports is that the most promising strategic value offered by the Commission for the prevention of mass atrocities lies in its ability, through a regional framework and approach, to facilitate individualised programs of assistance to encourage and support individual ASEAN Member States to improve their national capacities for human rights promotion and protection.



1. The Responsibility to Protect and the Role of Regional Arrangements

1.1 The Responsibility to Protect: Conceptual Development

In the aftermath of the Second World War and the horrors of the Holocaust, and then again after the tragedies of Rwanda and Srebrenica, the international community came together to declare ‘never again.’ Yet sadly, genocide, war crimes, ethnic cleansing and crimes against humanity are still all too prevalent as the first decade of the twenty-first century draws to a close. One needs only to look to Darfur to see the durability of mankind’s capacity for acts of conscience shocking inhumanity. Time and time again the international community has failed to prevent genocide and mass atrocity crimes and failed to protect vulnerable populations.

In recent years the international community has found common ground in the conviction that all States have a responsibility to protect their populations from these egregious abuses, that the international community must support States in meeting these responsibilities, and that if the State fails, it is the duty of the international community to take appropriate measures to protect vulnerable populations.² This concept of the Responsibility to Protect (hereafter R2P) draws on a conceptual history that includes a number of initiatives developed in the early 1990s and twenty-first century. These include rights and duties enumerated in the 2000 Constitutive Act of the African Union (Articles 4(h) and 4(g)), the concepts of ‘human security’, ‘comprehensive security’ and ‘cooperative security’ pioneered in the Asia-Pacific region³ and the notion of ‘sovereignty as responsibility’ developed by Roberta Cohen and Francis Deng⁴, which was built upon in the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS) entitled ‘The Responsibility to Protect’.⁵ R2P was subsequently endorsed by the Secretary-General’s High-Level Panel on Threats, Challenges and Change Report ‘A More Secure World: Our Shared Responsibility’ in 2004,⁶ and adopted again by Secretary-General Kofi Annan in his 2005 Report ‘In Larger Freedom: Towards Security, Development and Human Rights For All.’⁷ After much intensive consultation and negotiation, world leaders unanimously adopted R2P at the 2005 UN World Summit, the largest ever gathering of heads of State and government. Paragraphs 138-140 of the Summit’s Outcome Document declare that:

138. Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help

States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter of the United Nations, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

140. We fully support the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.⁸

Secretary-General Ban Ki-moon has identified the World Summit consensus on R2P rests on three equally important and non-sequential pillars:

- (1) The responsibility of the State to protect its own population from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement;
- (2) The commitment of the international community to assist States in meeting these obligations; and
- (3) The responsibility of United Nations Member States to respond in a timely and decisive manner, using Chapters VI (Pacific Settlement of Disputes), VII (Action with Respect to Threats to the Peace), and VIII (Regional Arrangements) of the UN Charter as appropriate, when a State is manifestly failing to provide such protection.⁹

The United Nations Security Council unanimously reaffirmed Paragraphs 138-139 of the World Summit in Resolutions 1674 (2006)¹⁰ and 1894 (2009)¹¹ on Protection of Civilians in Armed Conflict and in Resolution 1706 (2006)¹² on the crisis in Darfur. Secretary-General Ban Ki-moon vowed to make translating R2P from 'words to deeds' a cornerstone of his leadership,¹³ undertaking an extensive investigation into operationalising R2P with the assistance of his Special Adviser on the Responsibility

to Protect, Edward Luck. The Secretary-General's report, 'Implementing the Responsibility to Protect' was issued in January 2009 and presented to the General Assembly for its consideration on 21 July 2009.¹⁴ The General Assembly convened an informal interactive dialogue followed by a plenary debate which produced a clear commitment to the responsibilities articulated at the World Summit and heralds a new focus on implementation.¹⁵ Dialogue has now turned to the most appropriate and effective ways in which to operationalise the norm, with a core focus on prevention and capacity-building through multifaceted approaches that draw on the cooperation of the UN, Member States, international, regional and sub-regional organisations, the private sector and other civil society actors.

1.2 Regional and Sub-Regional Structures and R2P

Since the mid-1990s the UN and regional organisations have been engaged in a process to forge closer partnerships in the pursuit of peace and security. High level discussions and the trend of thematic debates at the Security Council have focused on deepening cooperation particularly in the fields of conflict prevention, mediation and crisis management, peacekeeping and peace building.¹⁶ In recent years, there has also been a notable emphasis on the importance of capacity building at regional and sub-regional levels in order to facilitate the effective utilisation of regional structures to compliment the work of the UN and also to support and assist States in need.¹⁷ The development of this 'regional-global security partnership'¹⁸ is significant for R2P as it provides a framework into which collaborative efforts for implementing R2P may be integrated.

In his report to the General Assembly, Secretary-General Ban Ki-moon underscored that the implementation of R2P should be 'narrow but deep' – narrow in terms of its scope remaining strictly limited to genocide, war crimes, ethnic cleansing and crimes against humanity in order to ensure R2P remains conceptually coherent, operationally sound and politically sustainable; but deep, in terms of utilizing the whole prevention and protection toolkit available to the UN, its regional, sub-regional and civil society partners, and Member States. As such, it is widely recognised that regional and sub-regional organisations have an important role to play in operationalising R2P. Secretary-General Ban Ki-moon identifies regional arrangements as one of the key partners, along with Member States and the UN, who can seek to give 'a doctrinal, policy and institutional life to the responsibility to protect.'¹⁹ Additionally, Special Adviser Edward Luck lists collaboration with regional and sub-regional organisations as one of the four programmatic dimensions of the norm (along with capacity building and rebuilding, early warning and assessment, and timely and decisive response).²⁰

The role of regional and sub-regional organisations within R2P lies primarily in Pillars Two (international duty to assist) and Three (timely and decisive response). The Asia-Pacific Centre for the Responsibility to Protect has identified at least seven distinct roles for regional organisations arising from the World Summit Outcome Document that span across both these Pillars:

1. Encourage and assist States to fulfil their primary responsibility to protect (para. 138);
2. Support the UN in establishing an early warning capability (para. 138);
3. Help States build the capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity (para. 139);
4. Assist States under stress before crises break out (para. 139);
5. Support the mission of the Special Adviser of the UN Secretary-General on the Prevention of Genocide (para. 140);
6. Utilise peaceful measures under Chapter VIII of the UN Charter to respond to crises involving genocide, war crimes, ethnic cleansing and crimes against humanity (para. 139); and
7. Cooperate with the Security Council in the application of measures, including Chapter VII measures, when peaceful means are inadequate and national authorities are manifestly failing to protect their populations (para. 139).²¹

In fulfilling these roles, there are three modes of behaviour in which regional and sub-regional organisations can operate. The first is *as actors within their own region* by assisting their Member States and adopting appropriate peaceful means. The second is through *horizontal cooperation* with other regional arrangements to work together, build capacity and facilitate region-to-region learning. The third is through *vertical cooperation* to add value to efforts spearheaded and authorised by the UN.²² While it is acknowledged that more investigation is needed to enumerate the most effective and appropriate ways for regional organisations to fulfil all of these roles,²³ regional human rights institutions provide a unique opportunity for regional arrangements to make a significant contribution to core aspirations of Pillar Two encompassed in the first and third roles articulated above—namely encouraging and helping States to fulfil their primary responsibility to protect by building state prevention and protection capacities.

International human rights standards are the foundation of R2P. Genocide, war crimes, ethnic cleansing and crimes against humanity are, by definition, gross and systematic violations of the most fundamental human rights to life, physical integrity, security and freedom from violence. Similarly, long-term violations of human rights constitute a significant structural precondition for genocide and mass atrocities.²⁴ Thus, the development of mechanisms that seek to identify violations early and assist in addressing and preventing further abuses through the promotion and protection of human rights would support and aid the implementation of R2P. It is widely recognised that regional and sub-regional organisations can play a fundamental role in the promotion and protection of human rights, particularly through the establishment of human rights institutions.²⁵ The Secretary-General's report on implementing R2P specifically recognises that respect for human rights is 'an essential element of responsible sovereignty' and that regional organisations can play an instrumental role in assisting States with the 'crafting of legislation or the establishment of credible monitoring groups or independent national institutions to help oversee the implementation of relevant international human rights and humanitarian standards.'²⁶

The unique role that regional human rights mechanisms can play in implementing R2P through the promotion and protection of human rights is fivefold:

1. They provide a common platform for States with varying socio-political characteristics to articulate concerns and cooperate to address collectively human rights issues. This can involve playing an instrumental role in making use of the deep political and economic relationships among States in the region to assemble the resources, technical capacity and political will necessary to provide appropriate and effective assistance to States in addressing human rights issues or in building the capacity to do so.
2. Regional human rights institutions are best placed to localise international human rights norms to reflect regional values and take account of regional circumstances, sensitivities and norm behaviour in adapting measures to suit national and local situations and cultures. Such arrangements, by definition, have geographically limited mandates, thus enabling their human rights promotion and protection work to be more effectively targeted, which also makes it less likely that early warning efforts involving the collection and analysis of information will be undermined by the sheer mass of information extending across regions and the world.²⁷
3. They are often already integrated within, or able to collaborate with and compliment the work of, existing regional bodies and structures through similar rules of procedure, shared mandates and mechanisms for information sharing and reporting. Such arrangements can also capitalise on the areas in which those regional organisations enjoy support and have made gains in human rights promotion and protection, including cooperating with national human rights institutions and other non-governmental regional and national rights organisations.
4. Regional human rights mechanisms also present a useful opportunity to both compliment UN human rights efforts in the region and support and encourage States to implement their human rights responsibilities. In this respect, regional human rights mechanisms bridge the divide between the local and global. They also provide more accessible mechanisms for the protection of human rights once national remedies have been exhausted.
5. The institutionalisation of human rights promotion and protection at a regional level provides an opportunity for the development of region-to-region learning processes, the transfer of best practices and lessons learned in order to better enable regional arrangements and their Member States to effectively prevent mass atrocities and protect their populations from R2P crimes.

While the institutionalisation of human rights in Southeast Asia may have commenced at a slower pace than in other regions,²⁸ the recent inauguration of the ASEAN Intergovernmental Commission on Human Rights (AICHR) is an important

step in the right direction. The Commission has been hailed as an ‘historic milestone in the ASEAN community-building process, and as a vehicle for progressive social development and justice [and] the full realisation of human dignity’²⁹ and represents an opportunity for the implementation of R2P. It has the potential to play an integral role in promoting and implementing prevention, capacity-building and protection strategies within the region as well as in designing and adapting such measures to be specific to the regional context. Southeast Asia faces diverse human rights challenges, and the terms of the establishment of the AICHR is not without its critics, yet the commitment of ASEAN leaders to the promotion and protection of human rights through regional cooperation in the form of the AICHR is encouraging. At the General Assembly debate on the implementation of R2P in July 2009, strengthening the role of regional arrangements in, *inter alia*, providing assistance for national capacity-building was a key theme of Southeast Asian contributors.³⁰



2. The Establishment of the ASEAN Intergovernmental Commission on Human Rights (AICHR)

There are two broad perspectives on the establishment of the AICHR. On the one hand, given the less than glowing human rights record of some ASEAN States, the extent of the institutionalisation of the time honoured norm of non-interference and its requisite obligation to refrain from criticising the actions of neighbours concerning the treatment – or mistreatment – of their populations, the establishment of a regional Commission with a mandate to promote and protect human rights is a significant achievement in and of itself. On the other hand, the establishment of the Commission with its current Terms of Reference (TOR) is a considerable disappointment to many international and Southeast Asian civil society organisations and has sparked much criticism for failing to create a body sufficiently independent and adequately mandated to protect human rights in the region.

The purpose of this section is to locate the establishment of the AICHR within the broader context of the growing salience of human rights on the ASEAN agenda. It will do so in two parts. First, it will examine the momentum for the establishment of an ASEAN human rights body (AHRB³¹) driven by civil society initiatives and reflected in ASEAN's apparent growing responsiveness to the needs of peoples in the region. Second, the TOR drafting process, reasons for its articulation in the present form, and civil society and government expectations of the Commission will be explored. This section suggests that both of the perspectives outlined above—one which privileges the significance of the establishment of the Commission and the other which is disappointed with, and critical of, its constitution and mandate—have merit and both contribute to a pragmatic and realistic understanding of its establishment, which will inform prospects for its capacity to promote and protect human rights in the region.

2.1 Momentum for the Establishment of an ASEAN Human Rights Body

Since the early 1990s there has been an upsurge of momentum for the establishment of an ASEAN human rights mechanism that has been driven by civil society initiatives and reflected in ASEAN's modest progress in policy areas that evince a growing responsiveness to the needs of peoples in the region. The creation of an ASEAN human rights body was envisaged for the first time in 1993. The Bangkok Declaration of the Preparatory Regional Meeting for Asia of the World Conference on Human Rights, at which six ASEAN States³² took an active role, highlighted 'the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia.'³³ At the World Conference three months later in June 1993, participants adopted the Vienna Declaration and Programme of Action, which recognised that '[r]egional

arrangements play a fundamental role in promoting and protecting human rights' and reiterated 'the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist.'³⁴ The outcome of the World Conference influenced the 26th ASEAN Ministerial Meeting (AMM) in Singapore in July 1993 where the ASEAN Foreign Ministers, in support of the Declaration and Programme of Action, agreed to 'consider the establishment of an appropriate regional mechanism on human rights.'³⁵ Two months later in September, the ASEAN Inter-Parliamentary Organisation (AIPO)³⁶ adopted the Kuala Lumpur AIPO Declaration on Human Rights which states that 'it is the task and responsibility of [ASEAN] Member States to establish an appropriate regional mechanism on human rights.'³⁷

Civil society organisations capitalised on these political commitments by hosting various interdisciplinary consultations which sustained the necessary momentum that led to the eventual setting up of the region's first mechanism on human rights. Since 1993, these consultations have been spearheaded by the Working Group for an ASEAN Human Rights Mechanism (WGAHRM or 'the Working Group'), a coalition of national working groups from ASEAN States comprised of government representatives, national human rights institutions (NHRIs), parliamentary human rights committees, as well as members of academia and NGOs. The Working Group has facilitated a series of workshops and thematic roundtable discussions on the establishment of a regional human rights body and has met regularly with ASEAN officials since the 29th AMM in Jakarta in 1996.³⁸ The ASEAN Institute of Strategic and International Studies (ASEAN-ISIS) has also organised a series of Colloquiums on Human Rights which have been held in the Philippines each year since 1993. They focus on, *inter alia*, the issue of a sub-regional mechanism for human rights within ASEAN and how the Colloquium's participating academic institutions can draw on the experience of members and human rights networks to influence the form and structure of the ASEAN human rights.³⁹ Further, since 2007 the Asian Forum for Human Rights and Development (FORUM-ASIA⁴⁰) has also played an active role in conjunction with the Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TF-AHR⁴¹), by organising a series of Regional Consultations on ASEAN and Human Rights to bring together civil society organisations, NHRIs, international aid agencies, academia, government representatives and the Office of the High Commissioner of Human Rights (OHCHR) to determine the best ways to intensify sustained engagement with ASEAN about the proposed human rights body.⁴² In addition, throughout the 1990s and 2000s the need for a regional rights mechanism was given further visibility in the broader Asia-Pacific Region and on the world stage by the OHCHR and its convening of a series of Regional Workshops on Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region.⁴³ The Workshops brought together senior government representatives, NHRIs and NGOs to facilitate regional cooperation towards the possible establishment of regional human rights arrangements and were annually reported on by the UN Secretary General and High Commissioner for Human Rights (HCHR) to the Human Rights Commission and the Human Rights Council (HRC).⁴⁴

Many members of civil society had high hopes for the seeming shift in the human rights posture of the region. This was attributable in part to ASEAN leaders' receptivity to, and acknowledgement of, the importance of civil society consultations on human rights⁴⁵ and also to ASEAN's proclaimed move towards becoming a more 'people-oriented' organisation manifested in its endeavours to build an ASEAN community. The central aim of ASEAN's community building is found in the ASEAN 'Vision 2020' adopted in 1997 and elaborated on by the Bali Concord II in 2003. This 'Vision 2020' conceives ASEAN as a concert of outward looking nations 'living in peace, stability and prosperity, bonded together in dynamic development and in a community of caring societies,' which includes a vision of ASEAN 'nations being governed with the consent and greater participation of the people with its focus on the welfare and dignity of the human person and the good of the community.'⁴⁶ The Vision 2020 was deemed best pursued through the establishment of an ASEAN Community founded on three pillars: a Political-Security Community (APSC), an Economic Community (AEC) and a Socio-Cultural Community (ASCC).⁴⁷ The Hanoi Plan of Action (1999-2004), the Vientiane Action Programme (2004-2010) and the Roadmap for an ASEAN Community (2009-2015) constitute a series of successive plans designed to facilitate the implementation of these three pillars and the creation of this ASEAN Community, and have led to a number of significant advancements in functional human rights cooperation, particularly within the areas of women's, children's and migrant workers' rights.⁴⁸

At the 12th ASEAN Summit in Cebu, for instance, ASEAN leaders signed the 2007 Declaration on the Promotion and Protection of the Rights of Migrant Workers. Six months later, the Foreign Ministers then called for the establishment of an ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW).⁴⁹ The ACMW was formally established in September 2008 where it adopted a broad work plan aimed at protecting migrant workers from exploitation, enhancing labour migration governance and drafting an ASEAN legal instrument for the protection and promotion of the rights of migrant workers.⁵⁰

Additionally, various ASEAN bodies have made significant progress towards protecting the rights of women and children. Building on agreements such as the 1988 Declaration on the Advancement of Women in the ASEAN Region, the 2004 Declaration on the Elimination of Violence Against Women in the ASEAN Region and the 2004 ASEAN Declaration Against Trafficking in Persons Particularly Women and Children, the ASEAN Committee on Women (ACW) and the ASEAN Senior Officials Meeting on Social Welfare and Development (SOMSWD) undertook the ground work for the establishment of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children. The ACW and SOMSWD established a multidisciplinary working group that drafted the Terms of Reference on the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children which were adopted at the 15th ASEAN Summit in October 2009.⁵¹ The Commission on the Promotion and Protection of the Rights of Women and Children was inaugurated in April 2010⁵² and represents a step towards mainstreaming the rights of women, children and migrant workers into all ASEAN policies – a core focus of the

social justice and human rights agenda of the Socio-Cultural Community Blueprint (2009-2015) which forms part of the Roadmap for an ASEAN Community.⁵³

ASEAN cooperation on the promotion and protection of the rights of women and children has the added advantage of a shared platform of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC), to which all ten Member States are parties. Civil society engagement by groups such as the SAPA Task Force on Migrant Workers and the Women's Caucus for an ASEAN Human Rights Body, have been instrumental in these policy areas. Therefore, as can be seen in the above examples of improved protection of migrants' rights and the rights of women and children, much progress has been made within ASEAN towards strengthening its new 'people-focused' agenda. Such progress has suggested a growing responsiveness of the ASEAN to the needs and concerns of the people in the region and further served to reinforce a shifting expectation of ASEAN's increasing receptivity to human rights.

Since the late 1990s there has also been a subtle shift in some Member States' understanding of what constitutes 'non-interference' in the context of human rights. In 1998 Thai Foreign Minister Surin Pitsuwan proposed a reinterpretation of the principle of non-interference to allow for 'flexible engagement' or open and frank discussions of the internal affairs of Member States that had transboundary effects.⁵⁴ Pitsuwan's suggestion was the result, on the one hand, of the recognition that non-interference was an ineffectual basis for addressing transnational challenges such as the 1997 Asian Financial Crisis, transboundary atmospheric pollution, refugee flows and human rights. On the other hand, it was also the result of a growing realisation by some ASEAN Members that meaningful cooperation with the international community would require narrowing the gap between them on the understanding of human rights and democracy.⁵⁵ Despite formal rejection of 'flexible engagement' in favour of a watered down policy of 'enhanced interaction' that allowed individual States to *comment* on their neighbours' domestic activities if they effected regional concerns,⁵⁶ some ASEAN States continued to move towards a more accommodating understanding of non-interference. Traditionally having refrained from criticising or condemning one another for human rights violations in deference to the cornerstone norm of non-interference, 1998 marked the first instance in which two ASEAN States, the Philippines and Indonesia, openly spoke out against a neighbour when Malaysian Prime Minister Mahathir Mohamad sacked and jailed Deputy Prime Minister Anwar Ibrahim.⁵⁷ The following year, humanitarian justifications were espoused by Malaysia, Thailand and the Philippines when they welcomed and participated in the International Force for East Timor (INTERFET) in the wake of mass killings by Indonesian militias around the time of East Timor's 1999 referendum favouring independence.⁵⁸ Furthermore, in July 2005 in light of Myanmar's declining human rights situation and increasing international pressure,⁵⁹ ASEAN leaders took their first collective action against a Member State by calling for Myanmar to forego the 2006 ASEAN Chairmanship,⁶⁰ signaling a transformation of human rights from a matter of exclusive domestic competence into a legitimate concern and feature of regional discourse.

Another way in which ASEAN's concept of sovereignty has been evolving is through the strengthening of principles such as democracy, good governance and the rule of law, and the promotion and protection of human rights as core political development aspirations under the ASEAN Political-Security Community Blueprint (APSC).⁶¹ The Blueprint reflects ASEAN's desire to be responsive to the needs of the peoples of the region by adopting a comprehensive concept of security which involves not only traditional threats to the State, but also human security orientated threats and transnational challenges.⁶² In doing so it facilitates the broadening of the traditional security framework of the Association and provides a platform for non-traditional security focused civil society groups, academe and track two dialogues, such as the Consortium of Non-Traditional Security Studies in Asia, to advance ASEAN institutional capacity building in such people-oriented policy areas.

The establishment of NHRIs in some Member countries has also enabled more progressive States in the region to contribute to the advancement of human rights promotion and protection domestically while also providing support for the momentum towards a regional rights mechanism. The establishment of National Human Rights Commissions in the Philippines (1987), Indonesia (1993), Malaysia (1999) and Thailand (1999) has served to reinforce the rising visibility of human rights in the region. All of the institutions are independent and mandated with the competence to promote and protect human rights, including through a number of investigative, reporting and publicizing functions.⁶³ All are accredited "A status" institutions, the highest level of accreditation in accordance with the Paris Principles Relating to the Status of Institutions awarded by the International Coordinating Committee of National Human Rights Institutions.⁶⁴ In 2007 the four National Human Rights Institutions (NHRIs) signed a Declaration of Cooperation to enhance coordinated human rights promotion and protection and sustained engagement in supporting the establishment of an ASEAN human rights body under a framework institutionalised in the ASEAN NHRI Forum.⁶⁵ Additionally, Indonesia, Malaysia and the Philippines all gained membership at the inaugural elections of the Human Rights Council (HRC) in 2006. Indonesia and the Philippines also secured a second term until 2010 and the Philippines was appointed Vice President of the HRC in 2008. In June 2010, Thai ambassador Sihasak Phuangkitkeow was appointed President of the Council. To some, this appeared to be a 'telling testimonial' for the progress on human rights' issues in a number of Southeast Asian States.⁶⁶

The lead up to the adoption of the ASEAN Charter in the early years of the twenty-first century provided further encouragement to growing civil society expectations that an ASEAN human rights mechanism would soon be formed. The ASEAN Charter was designed to provide 'the legal and institutional framework for ASEAN to be a more rules-based, effective and *people-centred* organisation paving the way for realising the ASEAN Community by 2015.'⁶⁷ Established at the 11th ASEAN Summit in Kuala Lumpur in December 2005, the Eminent Persons Group (EPG) was tasked with providing recommendations on the direction and nature of the ASEAN Charter. For the following year, the EPG engaged extensively with relevant stakeholders and its Report reflected a number of bold and ambitious proposals which included 'the possibility of setting up of an ASEAN human rights mechanism.'⁶⁸ In January 2007,

ASEAN leaders endorsed the EPG Report and instructed a High-Level Task Force (HLTF) to draft the ASEAN Charter.⁶⁹ There was a common consensus among the HLTF drafters that the human rights mechanism was 'the single most sensitive issue.'⁷⁰ At one point, it jeopardised the entire Charter when a member threatened to walk out and heated exchanges almost led to physical blows.⁷¹ There was a notable division between the newer and older members of ASEAN on the human rights question, including at one point physical separation into different rooms with Cambodia, Laos, Vietnam and Myanmar in one room and Thailand, Philippines, Malaysia, Indonesia and Brunei in another and the Singaporean Chair and member commuting between them to try to reach an agreement.⁷² It took three ministerial interventions by the ASEAN Foreign Ministers before a compromise was reached with the inclusion of a promise to establish a human rights body and an additional paragraph stipulating that the Foreign Ministers would decide the Terms of Reference for the proposed Commission.⁷³ Despite extensive civil society efforts to influence the drafting process, when it was adopted in November 2007, the Charter was heavily criticised by civil society as falling short of what is required to establish a 'people-centred' and 'people-empowered' ASEAN. It was denounced as lacking provision for an institutionalised role for citizens and civil society in regional community building and failing to provide adequate provision for human rights' protection.⁷⁴ Instead it codifies and prioritises sovereign interests and traditional State-centred principles of the Association over the need to create an organisation that is sensitive and responsive to human rights, dignity and concerns of the people.⁷⁵

The Charter mentions human rights four times:

1. ASEAN will adhere *'to the principles of democracy, the rule of law, and good governance, respect for and protection of human rights and fundamental freedoms'* (Preamble).
2. One purpose of ASEAN is *'to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN'* (Purpose).
3. ASEAN and its Member States shall act in accordance with *'the respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice'* (Principles).
4. Article 14 provides for the creation of an ASEAN human rights body:
 - 14.1 *In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.*
 - 14.2 *This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.*

Despite its criticisms, the Charter represents the first ASEAN instrument to codify the protection and promotion of human rights as a guiding purpose and principle of the organisation. It also breaks new ground by adding another dimension to the regional normative framework. The Charter lays down two sets of norms. First, it enshrines long standing norms governing *interstate* behaviour such as the non-use of or threat of force, peaceful settlement of disputes and non-interference in the internal affairs of Member States.⁷⁶ It also lays down a second set of norms that govern relations *between the State and its people*, which include good governance, the rule of law, human rights and fundamental freedoms, constitutional governance, democracy, social justice and equal access to opportunities.⁷⁷ As an intergovernmental organisation originally established to mend fences, build political confidence and resolve intra-regional disputes within an institutional framework of non-confrontational pacific security management, ASEAN has traditionally accepted only interstate relations as the sole dimension of the regional discourse. As Amitav Acharya acknowledges, the doctrine of non-interference as ‘the single most important principle underpinning ASEAN regionalism’ is founded on an obligation to refrain from criticising the actions of a Member government *towards its own people*.⁷⁸ Thus the inclusion of a set of commitments that introduce the relationship between a State and its people as a legitimate feature of the regional discourse and normative framework is unprecedented. Specifically, it involves not only a regional affirmation of responsibilities to the ASEAN peoples, but it also frames each State’s responsibilities to its people as an imperative⁷⁹ commitment to the region. In doing so it provides an opportunity for improving transparency by making a State’s treatment of its people open to regional oversight – even if the only accountability mechanism is peer pressure to conform to the new regional norms and resist holding back regional progress.

The Charter provided, by way of Article 14, for the official institutionalisation of human rights in ASEAN. The mandatory obligation that ‘ASEAN *shall* establish a human rights body’⁸⁰ represented the manifestations of one of ASEAN’s core commitments to building a people-oriented organisation and of achieving the goals enumerated in the ASEAN Political-Security Community Blueprint (APSC). It was in July 2008, six months before the Charter even came into force, that the ASEAN Foreign Ministers commissioned a High-Level Panel (HLP) to draft the Terms of Reference (TOR) for the ASEAN Human Rights Body.⁸¹

2.2 The HLP Drafting Process and Expectations of the TOR

Unlike the EPG for the ASEAN Charter who were mandated to put forward ‘bold and visionary recommendations’⁸², the HLP was given no such license. The HLP was mandated to draft the TOR ‘in conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights.’⁸³ It was composed of one representative from each of the ten Member States, most of whom held official positions within Foreign Affairs Ministries and as such protected the interests of, and essentially acted as mouthpieces for, their respective States. It must be noted, however, that Thailand was the exception and appointed a well-known academic expert on human rights, Professor Vitit Muntarbhorn, as an

alternate Thai member of the panel. The representatives from Malaysia, the Philippines and Thailand had also been members of the HLTF on the ASEAN Charter, and had pushed for the inclusion of Article 14 which provided for the establishment of the human rights body.⁸⁴ Yet their presence was balanced by the member from Laos, who was also a HLTF member but one who had been opposed to the inclusion of a strong human rights body.⁸⁵ Additionally, the member for Cambodia, Om Yentieng, had been a continual critic of both international human rights organisations as well as the previous Special Representative of the Secretary-General on Human Rights in Cambodia, Yash Ghai. Om Yentieng claimed the Special Representative had made wildly exaggerated reports on the human rights situation in Cambodia, denouncing him at UN forums which eventually led to the Special Representative's resignation in September 2008.⁸⁶

At the outset of the drafting process, the initial Chair of the HLP, Bilahari Kausikan, indicated the Panel's aim was 'to achieve a result that is realistic, balanced and credible, and which would be in the best collective interests of ASEAN.'⁸⁷ Based on these comments alone some academics did not expect much. Regional expert Noel Morada labelled these aims as 'bureaucratic parlance' for what would be achievable given the variations in the political systems of ASEAN Member States, the absence of national human rights commissions in most ASEAN countries and the continuing existence of internal armed conflict in some Member States.⁸⁸ Initial media reports confirmed the expected divisions between ASEAN States on what kind of regional human rights body should be created. On the one hand, Member States with national human rights commissions – Indonesia, Malaysia, the Philippines and Thailand – wanted the body to have monitoring and enforcement capacities. On the other hand, Singapore, Cambodia, Laos, Myanmar and Vietnam preferred the body only have an advisory function and focus on the promotion rather than protection of human rights.⁸⁹

The initial meetings were reportedly held in a 'very constructive and cooperative spirit' in which all HLP Members had 'shown their determination to move the process forward.'⁹⁰ Yet after approximately half the meetings, there was no such sign of cordiality in the Chairman's press releases. The second Chairman, Sphasak Phuangketkeow from Thailand, issued periodic releases following each meeting which noticeably lacked details on deliberations and instead characteristically downplayed the intramural differences by giving the impression that a certain level of unity has been achieved on particular issues. Yet sentiments of consensus must not be confused with unanimity. Consensus decisions represent a commitment to finding a way of moving forward by establishing what has broad support and in doing so must 'either contribute to or be neutral, but not detract from, the perceived national interests of the individual ASEAN Member States.'⁹¹ As such many expected that consensus-based decision making in the 'best collective interests of ASEAN'⁹² would defer to a lowest common denominator agreement which would ensure that the body did not create discomfort even for the least democratic members.⁹³

Yet the HLP's deliberations regarding the protection mandate of the AICHR demonstrated that there remains a large gap between even ASEAN's more

progressive and democratic States' verbal commitments to human rights and their political will to operationalise effectively their human rights responsibilities. It has been reported that the TOR was only able to be adopted at the AMM in July 2009 when, after the meeting was extended for two hours, the Indonesian Foreign Minister Hasan Wirayudha finally withdrew proposals for a broader protection mandate that Rachmat Budiman, the Indonesian HLP member, had been pushing for months. It appeared that Indonesia was the only representative not satisfied that there was enough balance between promotion and protection and was imploring the nine other members to accept three proposals: allow the AICHR to meet and discuss human rights with other credible institutions; observe situations and give recommendations to Member States; and conduct periodic reviews of Member States human rights' practices.⁹⁴ Budiman and Wirayudha found no support from the other ASEAN States – even Thailand and the Philippines who are self-professed supporters of human rights would not support Indonesia's proposals. While the Philippines and Thailand resigned themselves to supporting the gradual evolution of the human rights body to a more protectionist body in the future, it is not unreasonable to speculate that current domestic situations have affected their desire for the Commission to have investigatory powers. In the Philippines, the rising levels of extra-judicial killings and enforced disappearances caused the government quite a blow when its involvement featured glaringly in the Secretary-General's Special Representative on Extra-Judicial, Summary and Arbitrary Executions Philip Alston's 2007 Report. Further renewed fighting in Mindanao since the collapse of an historic peace in October 2008 has led to what some have termed a humanitarian crisis.⁹⁵ In the same vein, Thailand is being widely questioned about its handling of the situation in the South where more than 3,500 people have been killed along with daily abductions, murders and extra-judicial killings of Muslim insurgents since violence intensified in 2004.⁹⁶ While Cambodia, Laos, Myanmar and Vietnam also rejected the proposed extension of the AICHR's mandate, the lack of support from Thailand and the Philippines merely demonstrates that it is not just the less democratic ASEAN States that are hesitant to embrace a more strongly mandated human rights body.

The HLP held eight meetings between July 2008 and February 2009 when the first draft of the TOR was completed. One might speculate whether eight months⁹⁷ is a sufficient amount of time to negotiate adequately the terms for a body which was the most divisive issue and which threatened to derail the entire ASEAN Charter drafting process. Only one part of one meeting was required to finalise the provisions concerning the mandate and functions of the human rights body. In contrast, over four full days were needed to discuss the composition, modalities, secretarial support and funding.⁹⁸ Perhaps disconcertingly, this seems to indicate that there was less intensive negotiation over giving the human rights mechanism robust protection powers than there was over who would foot the bill.

Despite frustrations between HLP members concerning the protection mandate, a positive aspect of the drafting process was its inclusiveness. The HLP recognised the importance of engaging with all relevant stakeholders, holding consultations with civil society organisations, senior ASEAN officials from the Economic, Political-

Security and Socio-Cultural Community, as well as meeting with representatives from regional human rights mechanisms in the Americas, Africa and Europe during a trip to Geneva in April 2009.⁹⁹ Acknowledging the positive and meaningful role civil society organisations (CSOs) could play in the drafting process of the TOR,¹⁰⁰ the HLP held three consultations with major human rights stakeholders and CSOs, including the Working Group on an ASEAN Human Rights Mechanism (WGAHRM), the Network of Four National Human Rights Institutions (ASEAN NHRI Forum), Solidarity for Asian People's Advocacy Task Force on ASEAN and Human Rights (SAPA TF-AHR) and the Women's Caucus on an ASEAN Human Rights Body (WCAHRB).

The first dialogue in September 2008 provided the organisations with an opportunity to present proposals and statements on the composition of the human rights body and the mandate and powers it should include. Many of these proposals were the product of the numerous regional roundtables, workshops and national consultations organised by the civil society groups themselves throughout the region. The general sentiment amongst the CSOs was that the body should be able to investigate, monitor, advise and report on human rights violations by Member States, as well as have capacity-building, education, awareness raising and human rights promotional functions. While the CSOs recognised it would be the government that appoints the members, they sought a transparent and consultative selection process and the appointment of independent and impartial members with recognised competence in the field of human rights. Adequate funding, fiscal autonomy and sufficient staffing by an independent secretariat were also considered important. CSOs also advocated that the body maintain close ties with NHRIs and civil society groups through regular consultations and be mandated to uphold the standards of international human rights treaties in covering civil and political, cultural, economic and social rights.¹⁰¹ Some groups proposed including programs or sub-committees for priority sectors such as indigenous people and migrant workers, developing an early warning system for gross violations of human rights and considering the eventual establishment of a regional human rights court.¹⁰² Additionally, in its submission to the HLP, the Working Group for an ASEAN Human Rights Mechanism used the Responsibility to Protect principle to call on the HLP to recognise that, despite the Charter's reaffirmation of sovereignty and non-interference, the TOR for the AHRB should accord proper acknowledgement 'to the internationally recognised responsibility to protect its populations, on the part of individual States, from genocide, war crimes, ethnic cleansing and crimes against humanity.'¹⁰³

During the drafting process, human rights activists feared that the doctrine of non-interference and the principle of consensus-based decision making would prevent the HLP from establishing a rights mechanism that was anything but toothless and ineffective.¹⁰⁴ Many did not expect that civil society efforts to lobby for the body to have sanctioning or monitoring powers would be successful and predicted the Commission's primary roles would be limited initially to advocacy, capacity building and drawing up conventions and declarations on specific areas of human rights.¹⁰⁵ Such pessimistic views were confirmed when the HLP's draft TOR for the proposed ASEAN Intergovernmental Commission on Human Rights was leaked to the

Philippine press in February 2009. The draft TOR fell far short of the key demands raised by human rights groups and was heavily balanced in favour of promotion over protection of human rights. It attracted immediate criticism from rights proponents and media outlets in the region who saw the TOR as a disappointing lowest common denominator that all ASEAN Members could agree on concerning the promotion and protection of the human rights of their own people.¹⁰⁶

The weak draft galvanised groups such as the SAPA TF-AHR who conducted a series of national workshops and thematic regional workshops in Myanmar, Cambodia, Indonesia, Malaysia, the Philippines, Thailand and Vietnam to comment on the draft TOR. The SAPA Task Force, along with other rights groups such as the Working Group and the ASEAN NHRI Forum, were given a chance to submit their concerns regarding the draft TOR in the second HLP-civil society dialogue held on 20 March 2009 in Kuala Lumpur. The two chief concerns for these groups were the lack of a clear protection mandate and provision for the Commission's independence. The SAPA TF-AHR presented thirteen key concerns and recommendations on the draft, which included the CSO consensus that the Commission's mandate must include protective functions such as assessing and reviewing the general human rights' situation in the region, carrying out on-site visits and issuing urgent letters of inquiry, press statements, progress reports and recommendations to Member States. It was also forwarded that the Commission should develop an early warning system to prevent gross violations of human rights and establish independent and impartial coordination mechanisms for dealing with transboundary human rights issues and concerns.¹⁰⁷ The submission argued that representatives to the Commission should be human rights experts appointed in their personal capacity and who are independent from and not accountable to their governments. It was expressed that the Commission should adopt rules of procedure for the removal of members in accordance with principles of transparency, accountability and justice.¹⁰⁸

The ASEAN NHRI Forum also presented a position paper that focused on the necessary independence and effective protection mandate and powers of the AHRB. The NHRI Forum argued that the Commission ought to be in compliance with the minimum standards as stipulated in the Paris Principles and that representatives be appointed through a transparent and consultative process and be barred from simultaneously holding any official government position or post. It also proposed the Commission be able to receive, analyse, investigate and take action on complaints of alleged human rights violations and cooperate to develop effective partnerships with NHRIs as well as other regional and international human rights mechanisms.¹⁰⁹ In an open letter to the HLP on 22 June 2009, two hundred CSOs warned against rendering the AICHR unable to realise effectively the purpose and principles of the ASEAN Charter to promote and protect human rights. The letter also stated their support for the previous call for the Commission to include protective functions such as the ability to conduct country visits, receive complaints, initiate investigations and conduct periodic reviews of Member States; as well as reiterating the need to ensure the body's independence through the selection and appointment of independent human rights experts.¹¹⁰

Civil society efforts at influencing the HLP to alter substantively the draft TOR proved largely unsuccessful. The TOR was officially adopted by the ASEAN Foreign Ministers at their 42nd AMM in Phuket in July 2009¹¹¹ with the only significant change being the inclusion of a purpose for the five year review date being to ‘further enhancing promotion and protection of human rights in ASEAN.’¹¹² Despite political rhetoric touted by the HLP regarding the importance of striking a balance between promotion and protection, in his remarks at the Inauguration of the AICHR, Thai Prime Minister Abhisit Vejjajiva stated frankly what the TOR reflected: that ‘the HLP was of the view that the ASEAN human rights body should focus mainly on the promotion of human rights.’¹¹³ He continued, ASEAN leaders ‘realize there are concerns that the mandate and functions of the AICHR do not go far enough’ but have attempted to appease calls for a stronger protection mandate by emphasising that the TOR is an ‘enabling document’ which will ‘lay the groundwork for further development on the promotion and protection of human rights and [the body will] continually be strengthened in the future.’¹¹⁴ The Thai Chair of the HLP, Ambassador Sihasak Phuangketkeow, declared that the establishment of the AICHR would be based on three principles: ‘to realistically take into account the actual situation in ASEAN, to establish a credible ASEAN human rights body through consistency with internationally accepted human rights standards and norms, and to make the ASEAN human rights body an evolutionary process to be continually strengthened in the future.’¹¹⁵ The HLP has continually reiterated that ‘the establishment of an ASEAN human rights body must start somewhere and should not be judged by high expectations on its mandate or power to address specific situations, but rather should be seen as a process that will evolve and develop over the long term.’¹¹⁶

This evolutionary approach is seen by many civil society organisations in the region as a way of evading human rights responsibilities by accepting a deficient and weak TOR with a vague caveat that protection functions might be fulfilled sometime in the future.¹¹⁷ Continual references to the ‘evolutionary approach’ are ambiguous and lack substantial and progressive benchmarks against which to judge the institutional development of the Commission. Some CSOs have created an expectation that while the body may focus on promotion functions at the outset, that the body will be progressively capable of effective human rights protection as part of its evolutionary process.¹¹⁸ Yet in reality, given the ingrained histories of suppression of political freedoms, ongoing cultures of impunity and internal conflict in many ASEAN States, it is highly probable that that Member State governments are nowhere near allowing protection functions into the AICHR’s mandate, certainly not within five years which is when the mandatory review is set.

It is politically astute, however, to recognise that in an intergovernmental Association in which decisions are made by consensus, to push hard and try to establish a strong human rights body with a robust protectionist mandate would be immediately dismissed by States that have dubious human rights records and resist external oversight and accountability. Such a stance would be counter-productive and would prevent the establishment of any rights body at all, not to mention adversely affect functional rights cooperation in areas in which ASEAN has made substantial progress. In this respect, it is at least a positive development that a

compromise could even be reached on a human rights body at all and that its mandate includes somewhat vague — and therefore potentially broad ranging — promotion powers. Additionally, by allowing the AICHR to focus on promotion will at least serve to raise the visibility of human rights in the region and force countries such as Cambodia, Laos, Vietnam and Myanmar to deal with human rights regularly as part of the legitimate regional discourse and agenda. It has the potential to increase these countries' willingness to deal with human rights issues, which provides an avenue for diplomatic and political pressure to respect human rights as well as the platform upon which to extend gradually the Commission's functions. Whether this takes five, ten or twenty years, slow progress in the right direction is better than no progress at all.

It was expected that the political declaration on the Commission at its inauguration at the 15th ASEAN Summit in October 2009 would lay down guidelines on how to further strengthen its mandate and functions in accordance with its evolutionary approach.¹¹⁹ Yet the Declaration on the AICHR at its inauguration was devoid of any roadmap or progression guidelines for the evolution of the Commission's mandate and function apart from a recognition of the five year review which would 'further develop mechanisms to both the protection and promotion of human rights.'¹²⁰ This was a disappointment to CSOs.

Moreover, despite the fact that the declaration acknowledged the contribution of civil society stakeholders in the creation of the Commission, attempts by ASEAN leaders to gag civil society representatives at the inauguration of the AICHR does not bode well for a broadening of the space for meaningful and continuing government-civil society dialogue and engagement. On the day of the AICHR's inauguration, thirty minutes was allocated for ten democratically selected civil society representatives to interface with ASEAN leaders. However, just before midnight on the night prior to the meeting, the representatives from Cambodia, Laos, Myanmar, the Philippines and Singapore were informed that they had been rejected from the interface meeting by their governments. The remaining representatives from Brunei, Thailand, Indonesia, Malaysia and Vietnam were allowed to attend the interface but were informed that they would not be permitted to speak at the event. The moderator of the interface would be the only representative to present a statement. When Singapore and Myanmar hand-picked substitute delegates, one of whom was a former high-ranking police officer, representatives from Thailand, Malaysia and Indonesia walked out in protest.¹²¹ Civil society groups felt ASEAN rendered the interface virtually meaningless, violating their own Charter commitment by attempting to 'kill' the spirit of a people-oriented community and sabotaging the credibility of the AICHR.¹²² There is a sentiment among official ASEAN circles that such displays are because CSOs push progress far too fast, instead of adopting an incremental step-by-step approach.¹²³ Some predict this declining trend will only gather pace with Vietnam as the current ASEAN Chair who, along with a number of other ASEAN States, questions the legitimacy of CSOs and their mandates as non-state actors, 'to clip the CSOs' ever expanding wings of progressive ideas.'¹²⁴



Conclusion

The Commission has been welcomed with mixed feelings. Civil society groups regret that the Commission has adopted the formula of “promotion first, protection later” and view this as a sign that ASEAN lacks the commitment to uphold its Charter commitments to human rights in the region, labelling it a talk shop, toothless and a paper tiger.¹²⁵ Yet some are still prepared to recognise that while not perfect, the establishment of the Commission as a ‘significant hallmark’ of ASEAN’s move towards becoming a more people-oriented organisation. The Commission’s establishment also shows the potential to provide a platform where opportunities are present for Member States to move to a ‘comfort level’ where they will recognise the need to have a stronger body.¹²⁶ Civil society groups see this as a challenge to reaffirm their own commitment to promote and protect human rights in the region by directing sustained efforts at operationalising the TOR and focusing on specific areas in which the AICHR can be continually engaged, most importantly the selection process for the Commissioners representatives.¹²⁷

It is prudent to remember that the Commission was designed as an intergovernmental body that would respect the sovereign equality of all Member States. It was never designed to have teeth or function as an independent watchdog.¹²⁸ The TOR for the AICHR must be recognised for what it is: a political compromise between ASEAN Member States in light of their diverse political systems and varying willingness to deal with human rights issues. Yet the imbalance between promotion and protection should not completely overshadow the establishment of the Commission as a significant achievement and advancement for ASEAN in terms of placing human rights on the Association’s agenda. There exist windows of opportunity to use the TOR wisely and strategically to optimise the space provided under its functions, and to encourage the development of effective forward-looking promotional as well as protective activities.

In conclusion, this report has examined the crucial role that regional organisations such as ASEAN must play in turning R2P from ‘words into deeds’. The development of human rights norms within the ASEAN context and the setting up of the AICHR have also been analysed. In the second report of this working paper series, ‘The ASEAN Intergovernmental Commission on Human Rights (AICHR) and the Responsibility to Protect: Optimisation and Strategic Aims,’ the potential of the new Commission to improve the protection and promotion of human rights in the region will be assessed. Strategies to optimise the AICHR’s Terms of Reference for the protection of human rights will be outlined as will the Commission’s potential in implementing the Responsibility to Protect in Southeast Asia.



8. Author Details and Notes

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Notes

¹ A/RES/60/1, 16 September 2005, p. 30.

² Ibid.

³ Asia-Pacific Centre for the Responsibility to Protect, 'Implementing the Responsibility to Protect: Understanding the Principle and the Role of Regional Arrangements', paper presented by Sarah Teitt at the Consortium for Non-Traditional Security in Asia, Singapore, 3 November 2009, p. 1 of transcript.

⁴ Roberta Cohen and Francis M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Washington, DC: The Brookings Institution, 1998).

⁵ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: IDRC, 2001).

⁶ High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, A/59/565, 2 December 2004, p. 66.

⁷ Kofi Annan, *In Larger Freedom: Towards Security, Development and Human Rights For All*, A/59/2005, 21 March 2005, p. 33.

⁸ A/RES/60/1, 16 September 2005, p. 30.

⁹ Ban Ki-moon, *On Responsible Sovereignty: International Cooperation for a Changed World*, SG/SM/11701, 15 July 2008.

¹⁰ S/RES/1674, 28 April 2006.

¹¹ S/RES/1894, 11 November 2009.

¹² S/RES/1706, 31 August 2006.

¹³ Ban Ki-moon, *Address by the Secretary-General to the General Assembly: A Stronger United Nations For a Better World*, A/62/PV.4, 25 September 2007, p. 4.

¹⁴ Ban Ki-moon, *Implementing the Responsibility to Protect: Report of the Secretary General*, A/63/677, 12 January 2009.

¹⁵ Global Centre for the Responsibility to Protect, 'Implementing the Responsibility to Protect - The 2009 General Assembly Debate: An Assessment', August 2009, <http://globalr2p.org/resources/>, accessed 29 November 2009, pp. 1-2.

¹⁶ Kofi Annan, *In Larger Freedom: Towards Security, Development and Human Rights For All*, A/59/2005, 21 March 2005, p. 52; United Nations Department of Public Information, *Press Release: United Nations, Regional Organisations to Agree on Stronger Partnerships in Facing Peace, Security Challenges*, PI/668, 21 July 2005; S/RES/1625, 14 September 2005; A/RES/60/1, 16

September 2005, pp. 21, 23, 25, 37; S/RES/1631, 17 October 2005; Ban Ki-moon, *Implementation of Decisions From the 2005 World Summit Outcome for Action By the Secretary-General: Report of the Secretary-General*, A/60/430, 25 October 2005, p. 12; Statement by the President of the Security Council, S/PRST/2006/39, 20 September 2006; Security Council Report, 'Update Report No. 3: The UN and Regional Organisations', 23 March 2007, http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.2616247/k.893B/Update_Report_No_3BR_The_UN_and_Regional_OrganisationsBR_23_March_2007.htm, accessed 20 December 2009.

¹⁷ A key example of this is the UN-AU Ten Year Capacity Building Programme for Peace and Development established in 2006.

¹⁸ United Nations Security Council (2007), 'The UN and Regional Organizations', *Update Report*, No. 3, New York: United Nations, 23 March.

¹⁹ Ban Ki-moon, *Implementing the Responsibility to Protect: Report of the Secretary General*, A/63/677, 12 January 2009, p. 4.

²⁰ Edward Luck, *The United Nations and the Responsibility to Protect*, (Muscatine: Stanley Foundation Policy Analysis Brief, 2008).

²¹ Asia-Pacific Centre for the Responsibility to Protect, 'Implementing the Responsibility to Protect: Understanding the Principle and the Role of Regional Arrangements', paper presented by Sarah Teitt at the Consortium for Non-Traditional Security in Asia, Singapore, 3 November 2009, p. 7 of transcript. These seven roles encompass the four forms of international assistance that Secretary-General Ban Ki-moon outlined under Pillar II. See Ban Ki-moon, *Implementing the Responsibility to Protect: Report of the Secretary General*, A/63/677, 12 January 2009, p. 15. See also: Council for Security Cooperation in the Asia Pacific Study Group on the Responsibility to Protect, *First Meeting, February 26-27, 2010 Final Report* (Jakarta: CSCAP 2010), pp. 4, 7.

²² Asia-Pacific Centre for the Responsibility to Protect, 'Implementing the Responsibility to Protect: Understanding the Principle and the Role of Regional Arrangements', paper presented by Sarah Teitt at the Consortium for Non-Traditional Security in Asia, Singapore, 3 November 2009, pp. 7-8 of transcript.

²³ *Ibid.*, p. 8 of transcript.

²⁴ Office of the Special Adviser of the Secretary-General on the Prevention of Genocide, *Analysis Framework*, 19 October 2009; Asia-Pacific Centre for the Responsibility to Protect, *Preventing Genocide and Mass Atrocities: Causes and Paths of Escalation*, 8 June 2009, p. 24.

²⁵ Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 25 June 1993, para. 37; 15th Workshop of the Framework on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region Outcome Document: Bangkok Action Points 23 April 2010, available at <http://bangkok.ohchr.org/news/events/asia-pacific-regional-framework-workshop-2010/>.

²⁶ Ban Ki-moon, *Implementing the Responsibility to Protect: Report of the Secretary General*, A/63/677, 12 January 2009, pp. 11-13; Office of the High Commissioner for Human Rights Regional Office for South-East Asia, 'Press Release: UN Human Rights Chief Welcomes Important Step Towards Establishment of ASEAN Commission on Human Rights', 22 July 2009, http://bangkok.ohchr.org/asean/press_establishment_asean_commission_human_rights.aspx, accessed 21 December 2009.

²⁷ Although it must be acknowledged that there may very well be a wealth of overwhelming information on large regions with numerous ongoing conflicts, such as Africa.

²⁸ Most other regions adopted human rights declarations and institutional regional rights mechanisms long before Southeast Asia. For instance, the European Convention on Human Rights was adopted in 1950, the European Commission on Human Rights (now defunct) was established in 1954 and the European Court of Human Rights came into being in 1953. The African Charter of Human and Peoples' Rights was adopted in 1981, the African Commission on Human and Peoples' Rights was inaugurated in 1987 and the African Court on Human and Peoples' Rights was established in 2004 which subsequently merged into the African Court of Justice in 2006. The Inter-American Commission on Human Rights was formed in 1959, the American Convention on Human Rights was adopted in 1969 and the Inter-American Court of Human Rights came into being in 1973. The Arab Charter of Human Rights was adopted in 2004. In contrast, ASEAN only established the AICHR in the latter part of 2009 and has yet to adopt a human rights declaration.

²⁹ ASEAN, *Cha-am Hua Hin Declaration on the Intergovernmental Commission on Human Rights*, 23 October 2009.

³⁰ A/63/PV.97, 23 July 2009, pp. 8 (Statement by H.E. R.M. Marty M. Natalegawa, Permanent Representative of the Republic of Indonesia to the United Nations), 11-12 (Statement by H.E. Hilario G. Davide Jr., Permanent Representative of the Republic of the Philippines to the United Nations); A/63/PV.98, 24 July 2009, p. 28 (Statement by H.E. Ambassador Bui The Giang, Deputy Permanent Representative of Viet Nam to the United Nations).

³¹ This was the terminology used by civil society organisations and advocates of a regional human rights body prior to the establishment of the AICHR by ASEAN. It will be used to refer to the concept of a regional human rights mechanism prior to October 2009 when the AICHR was inaugurated.

³² Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand were ASEAN members at the time. Vietnam joined the Association in 1995, Lao PDR and Myanmar in 1997 and Cambodia in 1999.

³³ Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights ('Bangkok Declaration'), A/CONF.157/ASRM/8 A/CONF.157/PC/59, 7 April 1993, para 26.

³⁴ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna, 25 June 1993, para. 37.

³⁵ Joint Communiqué of the Twenty-Sixth ASEAN Ministerial Meeting, 23-24 July 1993, Singapore, paras. 16-18 (p. 3).

³⁶ As of 2006, the AIPO changed its name and is now known as the ASEAN Inter-Parliamentary Assembly (AIPA).

³⁷ Hidetoshi Hashimoto, *The Prospect for a Regional Human Rights Mechanism in East Asia* (New York: Routledge, 2004), p. 120.

³⁸ Working Group for an ASEAN Human Rights Mechanism, 'Synopsis of a Policy Initiative for the Establishment of an ASEAN Human Rights Mechanism', paper presented to ASEAN Senior Officials at the ASEAN Ministerial Meeting in Manila, 24-25 July 1998. The ASEAN Foreign Ministers have recognised the creation of and the importance of continued dialogue with the Working Group, officially having taken note of their proposals and workshops every year in their Joint Communiqués since 1998 up until the acceptance of the Terms of Reference for the AICHR. See the Joint Communiqués from the following ASEAN Ministerial Meetings: 31st AMM, 24-25 July 1998, Manila, para. 28; 32nd AMM, 23-24 July 1999, Singapore, para. 50; 33rd AMM, 24-25 July 2000, Bangkok, para. 33; 34th AMM, 23-24 July 2001, Hanoi, para. 30; 35th AMM, 29-30 July 2002, Bandar Seri Begawan, para. 32; 36th AMM 16-17 June 2003, Phnom Penh, para. 36; 37th AMM, 29-30 June 2004, Jakarta, para. 30; 38th AMM, 26 July 2005, Vientiane, para. 11; 39th AMM 25 July 2006, Kuala Lumpur, para. 22; 40th AMM, 29-30 July 2007, Manila, para. 25; 41st AMM, 21 July 2008, Singapore, para. 10.

³⁹ Singapore Institute of International Affairs, 'ASEAN Institute of Strategic and International Studies (ASEAN-ISIS)', March 2009, <http://www.siiainline.org/?q=node/2040>, accessed 23 December 2009.

⁴⁰ FORUM-ASIA is a coalition of over 46 regional human rights organisations in Asia that was founded in 1991 and which seeks to facilitate dialogue, capacity-building and networking among human rights defenders, civil society actors and organisations in Asia to achieve the full realisation of all human rights and human development in the region. It has held consultative status with the UN Economic and Social Council (ECOSOC) since 2004.

⁴¹ Solidarity for Asian People's Advocacy (SAPA) is a network of Asian national and regional NGOs and people's organisations who aim to improve communication, cooperation and coordination between Asian civil society groups in order to enhance the influence of regional intergovernmental structures. It has a Working Group on ASEAN under which a Task Force on ASEAN and Human Rights (SAPA TF-AHR) was established in 2007 to coordinate efforts to support the creation of an ASEAN human rights body.

⁴² Asian Forum for Human Rights and Development (FORUM-ASIA), 'Submission to the Australian Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into Human Rights Mechanisms and the Asia-Pacific', 28 November 2008, Annex II, pp. 1-4.

⁴³ It should be noted that the first workshop was for the Asian region only and occurred in 1982 in Colombo, but regular meetings did not begin until the 1990s. The workshops were held in Manila (1990), Jakarta (1993), Seoul (1994), Kathmandu (1996), Amman (1997), Tehran (1998), New Delhi (1999), Beijing (2000), Bangkok (2001), Beirut (2002), Islamabad (2003), Doha (2004), Beijing (2005), Bali (2007) and Bangkok (2010). Office of the High Commissioner for Human Rights, Regional Office for Southeast Asia, '15th Workshop of the Framework on Regional

Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region', available at <http://bangkok.ohchr.org/news/events/asia-pacific-regional-framework-workshop-2010/>, accessed 20 August 2010.

⁴⁴ Louise Arbour, *Report of the High Commissioner Containing the Conclusion of the 14th Annual Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region*, A/HRC/7/35, 7 January 2007; Kofi Annan, *Regional Arrangements for the Promotion and Protection of Human Rights in the Asian and Pacific Region: Report of the Secretary General*, E/CN.4/2006/100, 9 December 2005; E/CN.4/2004/89, 29 March 2004; E/CN.4/2003/109, 23 March 2003; E/CN.4/2001/98, 23 March 2001; E/CN.4/2000/102, 23 March 2000; E/CN.4/1999/94, 15 March 1999; E/CN.4/1998.50, 12 March 1998.

⁴⁵ The ASEAN Foreign Ministers have recognised the creation of and the importance of continued dialogue with the Working Group, officially having taken note of their proposals and workshops every year in their Joint Communiqués since 1998 up until the acceptance of the Terms of Reference for the AICHR. See the Joint Communiqués from the following ASEAN Ministerial Meetings: 31st AMM, 24-25 July 1998, Manila, para. 28; 32nd AMM, 23-24 July 1999, Singapore, para. 50; 33rd AMM, 24-25 July 2000, Bangkok, para. 33; 34th AMM, 23-24 July 2001, Hanoi, para. 30; 35th AMM, 29-30 July 2002, Bandar Seri Begawan, para. 32; 36th AMM 16-17 June 2003, Phnom Penh, para. 36; 37th AMM, 29-30 June 2004, Jakarta, para. 30; 38th AMM, 26 July 2005, Vientiane, para. 11; 39th AMM 25 July 2006, Kuala Lumpur, para. 22; 40th AMM, 29-30 July 2007, Manila, para. 25; 41st AMM, 21 July 2008, Singapore, para. 10.

⁴⁶ *ASEAN Vision 2020*, 15 December 1997, Kuala Lumpur, Malaysia.

⁴⁷ *Declaration of ASEAN Concord II (Bali Concord II)*, 7 October 2003, Bali, Indonesia.

⁴⁸ Hanoi Plan of Action, 16 December 1998, Hanoi, Vietnam; Vientiane Action Plan, 29 November 2004, Vientiane, Laos; Initiative for ASEAN Integration, 22-25 November 2000, Singapore; Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community (2009-2015), 1 March 2009, Cha-am Hua Hin, Thailand.

⁴⁹ ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, 13 January 2007, Cebu, Philippines; Joint Communiqué of the 40th ASEAN Ministerial Meeting, 29-30 July 2007, Manila, Philippines.

⁵⁰ Work Plan of the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW), November 2008.

⁵¹ ASEAN Senior Officials Meeting on Social Welfare and Development (SOMSWD) and the ASEAN Committee on Women (ACW), 'Terms Of Reference (TOR) For The Working Group That Will Work Towards The Establishment Of An ASEAN Commission On The Promotion And Protection Of The Rights Of Women And Children (WG-ACWC)', 29 April 2009, Manila, Philippines; Abhisit Vejjajiva, 'Remarks by H.E. Abhisit Vejjajiva, Prime Minister of the Kingdom of Thailand, on the Occasion of the Inaugural Ceremony of the ASEAN Intergovernmental Commission on Human Rights (AICHR)', 23 October 2009, Cha-am Hua Hin, Thailand, <http://www.aseansec.org/23531.htm>, accessed 15 January 2010; ASEAN Bulletin October 2009, 'ASEAN Commission on the Promotion and Protection of the Rights of Women and Children to be Established', 23 October 2009, Cha-am Hua Hin, Thailand, <http://www.aseansec.org/23112.htm#Article-13>, accessed 15 January 2010.

⁵² ASEAN Bulletin, 'Inaugurated: ASEAN Commission on the Promotion and Protection of the Rights of Women and Children', Ha Noi, 7 April 2010, <http://www.aseansec.org/24447.htm#Article-2>, accessed 11 April 2010.

⁵³ Blueprint for the ASEAN Socio-Cultural Community (2009-2015), 1 March 2009, Cha-am Hua Hin, Thailand.

⁵⁴ Surin Pitsuwan, 'Opening Statement by His Excellency Dr. Surin Pitsuwan, Minister of Foreign Affairs of Thailand at the 31st ASEAN Ministerial Meeting', Manila, Philippines, 24 July 1998.

⁵⁵ Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (New York: Routledge, 2nd ed. 2009), pp. 176-178.

⁵⁶ Shaun Narine, 'Humanitarian Intervention and the Question of Sovereignty: the Case of ASEAN', *Perspectives on Global Development and Technology* 4(3-4): 465-485 (2005), p. 480.

⁵⁷ Amitav Acharya, 'Southeast Asia's Democratic Moment', *Asian Survey* 39(3): 418-432 (2009), p. 430; Hiro Katsumata, 'Why is ASEAN Diplomacy Changing? From "Non-Interference" to "Open and Frank Discussions"', *Asian Survey* 44(2): 237-254 (2004), p. 244; 'Anwar Trial Will Hurt ASEAN Unity – Surin', *The Nation*, 4 November 1999.

⁵⁸ Asia-Pacific Centre for the Responsibility to Protect, *The Responsibility to Protect In Southeast Asia* (Brisbane: Asia-Pacific Centre for the Responsibility to Protect, 2009), p. 33; Shaun Narine, 'Humanitarian Intervention and the Question of Sovereignty: the Case of ASEAN', *Perspectives on Global Development and Technology* 4(3-4): 465-485 (2005), pp. 478-479. It should be noted although INTERFET enjoyed formal Indonesian consent, it is important to stress that this consent was coerced by US threats to veto the extension of World Bank loans, which would have crippled the Indonesian economy so soon after the financial crisis. See Alex J. Bellamy, *The Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge: Polity Press, 2009), p. 147-148; Mary Locke and Jason Ladnier, 'Perspectives from Asia on Military Intervention: Conference Summary', The Fund for Peace, 2002,

<http://www.fundforpeace.org/publications/reports/reports.php>, accessed 27 March 2009.

⁵⁹ In opposition to the then projected Myanmar Chairmanship the EU cancelled scheduled economic and financial ministerial meetings with ASEAN in 2004 and the US Secretary of State Condoleezza Rice declined to attend the 2005 ARF held in Laos. ASEAN stood to lose tremendously in political and economic terms during what was still a period of economic recovery from the financial crisis somewhat interrupted by the tsunami disaster and the bird flu epidemic. See Ruukun Katanyuu, 'Beyond Non-Interference in ASEAN: The Association's Role in Myanmar's National Reconciliation and Democratization', *Asian Survey* 46(6): 825-845 (2006), pp. 842-883.

⁶⁰ Ruukun Katanyuu, 'Beyond Non-Interference in ASEAN: The Association's Role in Myanmar's National Reconciliation and Democratization', *Asian Survey* 46(6): 825-845 (2006), p. 839.

⁶¹ Blueprint for the ASEAN Political-Security Community (2009-2015), 1 March 2009, Cha-am Hua Hin, Thailand.

⁶² Ibid.

⁶³ Commission of Human Rights of the Philippines (CHRP), 'Legal and Investigative Office, 2009, http://www.chr.gov.ph/MAIN%20PAGES/services/hr_protect1_lto.htm, accessed 3 January 2010; The Indonesian Human Rights National Commission (Komnas HAM), 'About Us', 16 September 2008, <http://www.komnasham.go.id/portal/en/content/about-komnas-ham>, accessed 3 January 2010; Human Rights Commission of Malaysia (Suruhanjaya Hak Asasi Manusia Malaysia) (SUHAKAM), 'Functions and Power', 2009, <http://www.suhakam.org.my/info/jawatan>, accessed 3 January 2010; The National Human Rights Commission (NHRC) of Thailand, 'National Human Rights Commission Act B.E. 2542 (1999)', 2009, http://www.nhrc.or.th/menu_content.php?doc_id=172, accessed 3 January 2010.

⁶⁴ *Principles Relating to the Status of National Institutions*, A/RES/48/134, 4 March 1994; International Coordinating Committee of National Human Rights Institutions, 'Chart of the Status of National Institutions Accredited by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights', 2 June 2009, <http://www.nhri.net/?PID=605&DID=0>, accessed 6 January 2010.

⁶⁵ ASEAN National Human Rights Institutions Forum (ASEAN NHRI Forum), *Declaration of Cooperation*, 28 June 2007; ASEAN National Human Rights Institution Forum (ASEAN NHRI Forum), 'About Us', 2009, <http://www.aseannhriforum.org/en/about-us.html>, accessed 6 January 2010.

⁶⁶ Philippine Department of Foreign Affairs, 'Press Release: Philippines Wins Seat in UN Human Rights Council', 10 May 2006, <http://www.dfa.gov.ph/news/pr/pr2006/may/pr346.htm>, accessed 14-1-10. However, it should be noted that membership of the Council is open to all UN Member States regardless of their human rights record, but when voting Member States *may* take into account the contribution of candidates to the promotion and protection of human rights. See A/RES/60/251, 3 April 2006. As such, gaining membership on the Council is not necessarily indicative of a glowing human rights record. Since 2006 a number of states with questionable human rights records practices have won seats including Algeria, Azerbaijan, Cameroon, Cuba, China, Pakistan, Saudi Arabia, Tunisia, and Russia. Similarly, the Philippines election was not without criticism. See Gerry Albert Corpuz, 'Manila Unsited to U.N. Human Rights Seat', UPI Asia News, 25 July 2008, http://www.upiasia.com/Human_Rights/2008/07/25/manila_unsited_to_un_human_rights_seat/7864/, accessed 14 January 2010. See also Nick Cheesman, 'Thailand: Diplomacy Trumps Human Rights at U.N. Rights Council', *Asian Human Rights Commission*, 30 June 2010, AHRC-FAT-035-2010.

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- ⁶⁷ Abhisit Vejjajiva, *Chairman's Statement of the 14th ASEAN Summit, 'ASEAN Charter for ASEAN Peoples'*, 28 February – 1 March 2009, Cha-am Hua-Hin, Thailand. The community building process was accelerated from 2020 to 2015. See *Cebu Declaration for the Acceleration of the ASEAN Community by 2015*, 13 January 2007, Cebu, Philippines. Emphasis added.
- ⁶⁸ Report of the Eminent Persons Group on the ASEAN Charter, December 2006, p. 22. It should be noted that the Report 'noted that this worthy idea should be pursued further' yet did not specifically propose the establishment of a regional human rights body in its official recommendations.
- ⁶⁹ Cebu Declaration on the Blueprint of the ASEAN Charter, 13 January 2007.
- ⁷⁰ Tommy Koh, Rosario G. Manalo and Walter Woon (eds.), *The Making of the ASEAN Charter* (Singapore: World Scientific Publishing Co, 2009), pp. 13, 21, 58, 102, 143.
- ⁷¹ Tommy Koh, Rosario G. Manalo and Walter Woon (eds.), *The Making of the ASEAN Charter* (Singapore: World Scientific Publishing Co, 2009), pp. 32-33, 63.
- ⁷² *Ibid.*, pp. 58-62.
- ⁷³ *Ibid.*, pp. 13, 22, 57-60, 63.
- ⁷⁴ Solidarity for Asian People's Advocacy (SAPA), 'Analysis of the ASEAN Charter', 18 November 2007, available from Southeast Asian Committee for Advocacy at <http://www.seaca.net/viewArticle.php?aID=1029>, accessed 9 December 2009. See also Noel M. Morada, 'The ASEAN Charter and the Promotion of R2P in Southeast Asia: Challenges and Constraints', *Global Responsibility to Protect*, 1(2): 185-207 (2009), pp. 188-190.
- ⁷⁵ Solidarity for Asian People's Advocacy (SAPA), 'Analysis of the ASEAN Charter', 18 November 2007, available from Southeast Asian Committee for Advocacy at <http://www.seaca.net/viewArticle.php?aID=1029>, accessed 9 December 2009. See also Noel M. Morada, 'The ASEAN Charter and the Promotion of R2P in Southeast Asia: Challenges and Constraints', *Global Responsibility to Protect*, 1(2): 185-207 (2009), pp. 188-190.
- ⁷⁶ *ASEAN Charter*, November 2007, Articles 2(2)(a)-(f).
- ⁷⁷ *Ibid.*, Articles 1(7), (11), 2(2)(h)-(i).
- ⁷⁸ Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (New York: Routledge, 2nd ed. 2009), pp. 70, 72. Emphasis added.
- ⁷⁹ The use of the term 'shall' is accepted to be an imperative, rather than permissive term in treaty interpretation. See generally Article 31(1) Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331.
- ⁸⁰ *ASEAN Charter*, November 2007, Article 14(1) (emphasis added).
- ⁸¹ Joint Communiqué of the 41st ASEAN Ministerial Meeting, 'One ASEAN at the Heart of Dynamic Asia', 21 July 2008, Singapore; 'Terms of Reference for the High Level Panel on an ASEAN Human Rights Body', approved by the ASEAN Ministerial Meeting, 21 July 2008. It was even earlier, at their February 2008 retreat in Singapore where the ASEAN Foreign Ministers actually decided they would establish the High-Level Panel in July.
- ⁸² 'Terms of Reference of the Eminent Persons Group on the ASEAN Charter', 12 December 2005.
- ⁸³ 'Terms of Reference for the High Level Panel on an ASEAN Human Rights Body', approved by the ASEAN Ministerial Meeting, 21 July 2008.
- ⁸⁴ Tommy Koh, 'The Negotiating Process' in Tommy Koh, Rosario G. Manalo and Walter Woon (eds.), *The Making of the ASEAN Charter* (Singapore: World Scientific Publishing Co, 2009), p. 63.
- ⁸⁵ *Ibid.*, p. 63.
- ⁸⁶ Asian Human Rights Commission, 'The State of Human Rights in Cambodia 2008: A Turning Point For the Worse?', 2008, http://74.125.153.132/search?q=cache:Z3t7ZNo8t4kl:material.ahrchk.net/hrreport/2008/AHR-C-SPR-010-2008-Cambodia_AHRR2008.pdf+%E2%80%98The+State+of+Human+Rights+in+Cambodia+2008:+A+Turning+Point+For+the+Worse%3F%E2%80%99&cd=1&hl=en&ct=clnk&gl=au, accessed 19 January 2010; Om Yentieng, 'Statement by H.E. Om Yentieng President of the Human Rights Committee on The Report of the Special Representative of the Secretary-General of the UN for HR in Cambodia', statement to the Human Rights Council, Geneva, 19 March 2008; Uk Sav Bory (Radio Free Asia), 'Om Yentieng: Amnesty International Exaggerating the Truth', 24 May 2007, <http://ki-media.blogspot.com/2007/05/om-yentieng-amnesty-international.html>, accessed 18 January 2010; Heng Reaksmey (VOA Khmer), 'Top Advisor Accuses Amnesty International of Colonialism', 25 May 2007, <http://ki-media.blogspot.com/2007/05/om-yentieng-hun-sens-top-wisecrack.html>, accessed 18 January 2010.

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- ⁸⁷ 'Press Comments by the Chairman of the High Level Panel (HLP) on the Establishment of an ASEAN Human Rights Body', Singapore, 21 July 2008, <http://www.aseansec.org/21782.htm>, accessed 18 January 2010.
- ⁸⁸ Noel M. Morada, 'The ASEAN Charter and the Promotion of R2P in Southeast Asia: Challenges and Constraints', *Global Responsibility to Protect*, 1(2): 185-207 (2009), pp. 199-200.
- ⁸⁹ 'ASEAN Rights Body To Rely on "Peer Pressure"', *Agence France Press*, 21 July 2008, as reported by the Singapore Working Group for an ASEAN Human Rights Mechanism, <http://maruah.org/2008/07/29/asean-human-rights-body-to-rely/>, accessed 22 January 2010; Working Group for an ASEAN Human Rights Mechanism (WGAHRM) Press Release, 'ASEAN Rights Panel Aims to Finish Work Next Year', 2008, <http://www.aseanhmech.org/news/singapore-hosts-7th-workshop.html>, accessed 22 January 2010.
- ⁹⁰ 'Press Release by the Chair of the High Level Panel on an ASEAN Human Rights Body at the Conclusion of the 3rd Meeting of the HLP on AHRB', 12 September 2008, Manila; 'Press Release by the Chair of the High Level Panel on an ASEAN Human Rights Body at the Conclusion of the 4th Meeting of the HLP on AHRB', 14 October 2008, Singapore.
- ⁹¹ Amitav Acharya, *Constructing a Security Community in Southeast Asia: ASEAN and the Problem of Regional Order* (New York: Routledge, 2nd ed. 2009), pp. 83-84.
- ⁹² 'Press Comments by the Chairman of the High Level Panel (HLP) on the Establishment of an ASEAN Human Rights Body', Singapore, 21 July 2008, <http://www.aseansec.org/21782.htm>, accessed 18 January 2010.
- ⁹³ Noel M. Morada, 'The ASEAN Charter and the Promotion of R2P in Southeast Asia: Challenges and Constraints', *Global Responsibility to Protect*, 1(2): 185-207 (2009), p. 200.
- ⁹⁴ Veby Mega, 'Long Way to Fight for ASEAN HR Body', *International Institute of Journalism (IJ) of InWent (Capacity Building International Germany)*, 30 July 2009 <http://inwent-ijj-lab.org/Webl og/2009/07/30/long-way-to-fight-for-aseans-human-rights-body/>, accessed 20 January 2010; Asian Forum for Human Rights and Development (FORUM-ASIA), 'Can AICHR Promote and Protect Human Rights?' *Human Rights Defender* 5(2): 6-10, p. 8.
- ⁹⁵ International Crisis Group, 'The Philippines: The Collapse of Peace in Mindanao', 23 October 2008, <http://www.crisisgroup.org/home/index.cfm?id=5740>, accessed 22 January 2010; 'Quarter of a million Filipino's Displaced by Mindanao Fighting', *Radio Australia*, 18 May 2009.
- ⁹⁶ 'Thailand Can Do Better on Human Rights', *The Nation*, 10 December 2009; Supalak Ganjanakhundee, 'Would Thailand Allow ASEAN to Check its Human Rights?', *The Nation*, 22 July 2009; 'Official US Report Highlights Thai Human Rights Failings', *The Nation*, 27 February 2009.
- ⁹⁷ Originally the time allocated for the first draft was only six months. It was extended to eight when the 14th ASEAN Summit was moved from December 2008 to February 2009. See 'Terms of Reference for the High Level Panel on an ASEAN Human Rights Body', approved by the ASEAN Ministerial Meeting, 21 July 2008. There was not a significant amount of difference between the draft TOR finalised in February and the final TOR submitted to the Foreign Ministers in July 2009. The full time for drafting the TOR was twelve months from July 2008 to July 2009.
- ⁹⁸ 'Press Release by the Chair of the High Level Panel on an ASEAN Human Rights Body at the Conclusion of the 4th Meeting of the HLP on AHRB', 14 October 2008, Singapore; 'Press Release by the Chair of the High Level Panel on an ASEAN Human Rights Body at the Conclusion of the 5th Meeting of the HLP on AHRB', 15 November 2008, Bali; 'Press Release by the Chair of the High Level Panel on an ASEAN Human Rights Body at the Conclusion of the 6th Meeting of the HLP on AHRB', 13 December 2008, Jakarta.
- ⁹⁹ 'Press Release by the Chair of the High Level Panel on an ASEAN Human Rights Body at the Conclusion of the 3rd Meeting of the HLP on AHRB', 12 September 2008, Manila; Working Group for an ASEAN Human Rights Mechanism (WGAHRM) Press Release, 'HLP Dialogues with Representatives of Regional Human Rights Systems', 2009, <http://www.aseanhrmech.org/news/hlp-dialogues-with-representatives.htm>, accessed 22 January 2010. The trip to Geneva also included an optional information program on the Council of Europe and its human rights institutions as a relevant example of how a possible human rights system in ASEAN could evolve. The optional session was attended by Brunei, Indonesia, Laos, Malaysia, the Philippines and Thailand. Cambodia, Myanmar, Singapore and Vietnam declined the invitation. See Friedrich Naumann Foundation Press Release, 'HLP Meets with Regional Human Rights Institutions of the Council of Europe', 2009, <http://www.fnf.org.ph/news/HLP-meets-regional-human-rights-institutions-of-europe.htm>, accessed 22 January 2010.

¹⁰⁰ 'Press Release by the Chair of the High Level Panel on an ASEAN Human Rights Body at the Conclusion of the 3rd Meeting of the HLP on AHRB', 12 September 2008, Manila.

¹⁰¹ Working Group for an ASEAN Human Rights Mechanism (WGAHRM), 'Proposed Elements for the Terms of Reference of an ASEAN Human Rights Body', paper submitted to the High Level Panel on an ASEAN Human Rights Body at its Third Meeting, 12 September, Manila, the Philippines; SAPA Task Force on ASEAN and Human Rights, 'Submission from the Second Regional Consultation on ASEAN and Human Rights to the High Level Panel on the Establishment of the ASEAN Human Rights Body', 7 August 2008, paper presented to the High Level Panel on an ASEAN Human Rights Body at its Third Meeting, 12 September 2008, Manila, the Philippines; ASEAN NHRI Forum, 'Report on Preparatory Meeting: Consortium on the ASEAN NHRI Forum and 3rd Meeting of the High Level Panel on the Drafting of the Terms of Reference (TOR) of an ASEAN Human Rights Body', 10-11 September 2008, Manila, Philippines; ASEAN NHRI Forum, 'Proposed Terms of Reference of the ASEAN Human Rights Commission', paper submitted to the High Level Panel on an ASEAN Human Rights Body at its Third Meeting, 12 September, Manila, the Philippines; Working Group for an ASEAN Human Rights Mechanism (WGAHRM) Press Release, 'PWG Popularizes ASEAN Charter, Consults with Grassroots for Human Rights Body', 2008, <http://www.aseanhrmech.org/news/pwg-popularizes-ASEAN-charter.html>, accessed 22 January 2010; Working Group for an ASEAN Human Rights Mechanism (WGAHRM) Press Release, 'The Working Group Meets the High Level Panel on ASEAN Human Rights Body', 2008, <http://www.aseanhrmech.org/news/working-group-meets-high-level-panel.html>, accessed 22 January 2010.

¹⁰² Working Group for an ASEAN Human Rights Mechanism (WGAHRM), 'Proposed Elements for the Terms of Reference of an ASEAN Human Rights Body', paper submitted to the High Level Panel on an ASEAN Human Rights Body at its Third Meeting, 12 September 2008, Manila, the Philippines; SAPA Task Force on ASEAN and Human Rights, 'Submission from the Second Regional Consultation on ASEAN and Human Rights to the High Level Panel on the Establishment of the ASEAN Human Rights Body', 7 August 2008, paper presented to the High Level Panel on an ASEAN Human Rights Body at its Third Meeting, 12 September 2008, Manila, the Philippines; Working Group for an ASEAN Human Rights Mechanism (WGAHRM) Press Release, 'Visayan Civil Society Organizations Meet, Give Recommendations for ASEAN Human Rights Body', 2008, <http://www.aseanhrmech.org/news/visayan-civil-society-organizations.html>, accessed 22 January 2010.

¹⁰³ Working Group for an ASEAN Human Rights Mechanism (WGAHRM), 'Proposed Elements for the Terms of Reference of an ASEAN Human Rights Body', paper submitted to the High Level Panel on an ASEAN Human Rights Body at its Third Meeting, 12 September, Manila, the Philippines.

¹⁰⁴ Working Group for an ASEAN Human Rights Mechanism (WGAHRM) Press Release, 'ASEAN Rights Panel Aims to Finish Work Next Year', 2008, <http://www.aseanhrmech.org/news/singapore-hosts-7th-workshop.html>, accessed 22 January 2010; Working Group for an ASEAN Human Rights Mechanism (WGAHRM) Press Release, '15th AICOHR: Human Rights Advocates Discuss Opportunities for ASEAN Human Rights Body', 2008, <http://www.aseanhrmech.org/news/human-rights-advocates-discuss-hr-body.html>, accessed 22 January 2010.

¹⁰⁵ Rodolfo C. Severino, 'The ASEAN Charter' in Pavin Chachavalpongpun (ed.), *The Road to Ratification and Implementation of the ASEAN Charter* (Singapore: Institute of Southeast Asian Studies (ISEAS), 2008), p. 26; Noel M. Morada, 'The ASEAN Charter and the Promotion of R2P in Southeast Asia: Challenges and Constraints', *Global Responsibility to Protect*, 1(2): 185-207 (2009), p. 200.

¹⁰⁶ Kavi Chongkittavorn, 'ASEAN Human Rights Body: Taking the Slow Boat', *The Nation*, 23 February 2009; Supalak Ganjanakhundee and Pravit Rojanaphruk, 'Ministers Explore Ways to Give Proposed Human Rights Body Some Credibility', *The Nation*, 28 February 2009.

¹⁰⁷ SAPA Task Force on ASEAN and Human Rights (SAPA TF-AHR), 'Submission to the High Level Panel on the Establishment of an ASEAN Human Rights Body (HLP) During the HLP-Civil Society Dialogue Session During 9th HLP Meeting', 20 March 2009, Kuala Lumpur, Malaysia.

¹⁰⁸ SAPA Task Force on ASEAN and Human Rights (SAPA TF-AHR), 'Submission to the High Level Panel on the Establishment of an ASEAN Human Rights Body (HLP) During the HLP-Civil Society Dialogue Session During 9th HLP Meeting', 20 March 2009, Kuala Lumpur, Malaysia.

¹⁰⁹ ASEAN NHRI Forum, 'Position Paper on Terms of Reference of the ASEAN Human Rights Body', paper submitted at the 2nd Consultation Meeting with the High Level Panel (HLP), 20 March 2009, Kuala Lumpur, Malaysia.

¹¹⁰ 'Open Letter to the High Level Panel (HLP) on the Establishment of the ASEAN Human Rights Body', 22 June 2009.

¹¹¹ *Joint Communiqué of the 42nd ASEAN Foreign Ministers Meeting 'Acting Together to Cope with Global Challenges'*, 20 July 2009, Phuket, Thailand.

¹¹² High Level Panel for an ASEAN Human Rights Body, 'Confidential Draft Terms of Reference of the ASEAN Human Rights Body', 13 February 2009. Available at http://www.forum-asia.org/index.php?option=com_content&task=view&id=2153&Itemid=42, accessed 8 January 2010. Additional positive changes between the draft and final TOR include a reference to a framework of human rights cooperation under the ASEAN Declaration on Human Rights, the inclusion of a mandate to provide advisory services and technical assistance to ASEAN Sectoral Bodies, the inclusion of capacity building as an activity which could be funded by voluntary contributions, the requirement that representatives attend meetings and the inclusion of a mandate to develop common approaches on human rights. Key changes of a negative nature include the removal of a reference that the promotion and protection of human rights be compatible with the rule of law and the limiting of what activities voluntary contributions may fund including the specific removal of 'protection and education' and its replacement with 'capacity building and education'.

¹¹³ 42nd ASEAN Ministerial Meeting Press Release, 'HLP Chair: ASEAN Body to Take Evolutionary Approach in Promoting and Protecting Regional Human Rights', Phuket, Thailand, 20 July 2009.

¹¹⁴ Abhisit Vejjajiva, 'Remarks by H.E. Abhisit Vejjajiva, Prime Minister of the Kingdom of Thailand, on the Occasion of the Inaugural Ceremony of the ASEAN Intergovernmental Commission on Human Rights (AICHR)', 23 October 2009, Cha-am Hua Hin, Thailand; Working Group for an ASEAN Human Rights Mechanism (WGAHRM) Press Release, 'High Level Panel Conducts Second Civil Society Consultation', 2009, <http://www.aseanhrmech.org/news/high-level-panel-conducts-consultation.htm>, accessed 22 January 2010; Working Group for an ASEAN Human Rights Mechanism (WGAHRM), 'High Level Panel Holds Second Consultation with CSOs', *Human Rights Herald*, July 2009, p. 2.

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