

# 10 Facts about ASEAN Human Rights Cooperation

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The media gave a great deal of attention to ASEAN's cooperation on human rights during the 14<sup>th</sup> ASEAN Summit in Cha-am/Hua Hin, Thailand. Unfortunately, some media reports contained misinformation that could create misunderstanding. Several critics gave their one-sided views without looking at the whole picture. This article attempts to set the record straight.

## 1. *Context and Mandate*

First of all, some historical background and conceptual context. The six ASEAN Member States (Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, and Thailand) stated in the Joint Communiqué at the 26<sup>th</sup> ASEAN Ministerial Meeting (AMM) in Singapore, 23-24 July 1993, their collective view about human rights – which remains valid and relevant today:

*The Foreign Ministers welcomed the international consensus achieved during the World Conference on Human Rights in Vienna, 14-25 June 1993, and reaffirmed ASEAN's commitment to and respect for human rights and fundamental freedoms as set out in the Vienna Declaration of 25 June 1993. They stressed that human rights are interrelated and indivisible comprising civil, political, economic, social and cultural rights. These rights are of equal importance. They should be addressed in a balanced and integrated manner and protected and promoted with due regard for specific cultural, social, economic and political circumstances. They emphasized that the promotion and protection of human rights should not be politicized.*

*The Foreign Ministers agreed that ASEAN should coordinate a common approach on human rights and actively participate and contribute to the application, promotion and protection of human rights. They noted that the UN Charter had placed the question of universal observance and promotion of human rights within the context of international cooperation. They stressed that development is an inalienable right and that the use of human rights as a conditionality for economic cooperation and development assistance is detrimental to international cooperation and could undermine an international consensus on human rights. They emphasized that the protection and promotion of human rights in the international community should take cognizance of the principles of respect for national sovereignty, territorial integrity and non-interference in the internal affairs of states. They were convinced that freedom, progress and national stability are promoted by a balance between the rights of the individual and those of the community, through which many individual rights are realized, as provided for in the Universal Declaration of Human Rights.*

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With the admission of Viet Nam into ASEAN in 1995, Lao PDR and Myanmar in 1997, and Cambodia in 1999, ASEAN's political diversity has increased, making it more difficult for all the 10 Member States to agree on how to cooperate on human rights. Nevertheless, the drafters of the ASEAN Charter, with guidance of the 10 ASEAN Foreign Ministers, managed to provide for promotion and protection of human rights in the ASEAN Charter as follows:

*“ADHERING to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms;”* [in the Preamble]

*“7. To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN;”* [Article 1: Purposes]

*“2 (i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;”* [Article 2: Principles] and

*“1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.*

*“2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.”* [Article 14]

*And the informal Working Group for an ASEAN Human Rights Mechanism is recognized as one of the “other stakeholders in ASEAN” in Annex 2 of the ASEAN Charter.*

Since the Charter already entered into force on 15 December 2008, follow-up actions are being undertaken to fulfill the commitment on promotion and protection of human rights, including the establishment of the ASEAN human rights body (AHRB), based on the relevant provisions in the Charter and the prevailing collective view of the ASEAN Foreign Ministers.

## **2. High Level Panel**

A High Level Panel (HLP) was appointed at the 41<sup>st</sup> AMM in Singapore in July 2008 to draft the TOR for the AHRB. The HLP Members are:

*Dato Shofry Abdul Ghafor, Permanent Secretary, Ministry of Foreign Affairs and Trade, Brunei Darussalam*

*Mr. Om Yentieng, Senior Minister and President of Cambodian Human Rights Committee, Cambodia*

*Mrs. Wiwiek Setyawati Firman, Director for Human Rights and Humanitarian Affairs Department of Foreign Affairs, Indonesia*

*Mr. Bounkeut Sangsomsak, Vice Minister of Foreign Affairs of Lao PDR*

*Tan Sri Ahmad Fuzi Abdul Razak, Ambassador-at-Large, Ministry of Foreign Affairs, Malaysia*

*Mr. Myat Ko, Secretary of Myanmar Human Rights Group, Director-General, General Administration Department, Ministry of Home Affairs, Myanmar*

*Ambassador Rosario G. Manalo, Special Envoy, Department of Foreign Affairs, the Philippines*

*Mr. Bilahari Kausikan, Second Permanent Secretary, Ministry of Foreign Affairs, Singapore*

*Ambassador Sihasak Phuanketkeow, Permanent Representative of Thailand to the UN Office in Geneva; Chairman of the HLP, who is assisted by Prof. Viti Muntarbhorn (HLP Alternate), Faculty of Law, Chulalongkorn University*

*Mr. Pham Quang Vinh, Assistant Minister of Foreign Affairs, Viet Nam*

The HLP has convened eight meetings since last July. It plans to meet in Kuala Lumpur from 18-20 March 2009; in Cambodia in April, Viet Nam in May, Myanmar in June, and Thailand in July 2009. After each meeting, the HLP Chairman would issue a press statement summarizing progress in the drafting of the TOR.

The first draft of the TOR was already submitted to the ASEAN Foreign Ministers before they met the HLP Members in Cha-am on 27 February 2009. Some media reports mentioned a 5-page long draft TOR. But that may be an older draft; the current working draft is much longer than 5 pages. Some old ideas in the earlier drafts may have already been discarded and some new ideas incorporated into newer versions of the draft. The HLP is working on the understanding that nothing in the draft is final until everyone on the HLP had agreed on every point.

This is the same understanding used during the drafting of the ASEAN Charter. And in fact, the HLP Members from Lao PDR, Malaysia, the Philippines, Thailand, and Viet Nam also represented their respective Governments in the High Level Task Force drafting the ASEAN Charter.

### **3. *Official name of the body?***

There is still no official name for the body to promote and protect human rights in ASEAN. Article 14 of the ASEAN Charter just refers to “*an ASEAN human rights body*” with the understanding that the official name will be determined along with the terms of reference by the AMM.

So far, the following have been mentioned as possible choices: ASEAN Human Rights **Mechanism** (too passive and mechanical); ASEAN Human Rights **Body** (because it is now well-known); ASEAN Human Rights **Commission** (it conveys some mission by experts); ASEAN Human Rights **Council** (it gives the impression of being a policy decision-making entity); ASEAN Human Rights **Consultative Council** (no policy decision-making, just consultations); ASEAN Human Rights **Forum** (just a venue for discussion), etc. For ease of reference in this article, the ASEAN human rights body shall be referred to as the AHRB.

#### **4. Time Frame**

Article 14 (2) states that “...*the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.*” The final draft TOR is scheduled to be considered by the ASEAN Foreign Ministers during the 42<sup>nd</sup> AMM in Thailand, 20-21 July 2009. The first draft TOR was never meant to be considered by the ASEAN Leaders at the 14<sup>th</sup> ASEAN Summit in Cha-am/Hua Hin.

Once the TOR is in place, each Member State shall appoint its Representative to the AHRB. Thailand is eager to see the launch of the AHRB in 2009 while ASEAN is under its chairmanship.

#### **5. Status of the AHRB**

This is one key aspect that needs emphatic clarification. The AHRB will be an organ inside the organization structure of ASEAN; the direct mandate for its establishment is in Article 14 which is part of ASEAN Charter’s Chapter IV: Organs. As such, the AHRB is never intended to be any “independent watchdog”. To moan on the AHRB’s “lack of teeth” is to bark up the wrong tree.

Like all other ASEAN organs or bodies, the AHRB shall operate through consultation and consensus, with firm respect for sovereign equality of all Member States. Good points can be made and constructive actions can be agreed upon in friendly discussion and persuasion. No “biting” is ever required. ASEAN would not have come this far if its Member States want to bite one another with sharp teeth just to get things done their own way.

#### **6. Participation on the AHRB**

Being an inter-governmental organization, ASEAN has only States (and their Governments) as its Members. Consequently, the HLP is consisted of representatives of the Member States. The drafting of the TOR is an inter-governmental exercise.

Civil society and human rights organizations in ASEAN Member States that wish to put forth their views about the TOR for the AHRB can get in touch

with the HLP or meet with individual HLP Members. The HLP already had a dialogue with representatives of ASEAN civil society and other relevant stakeholders (the informal Working Group for an ASEAN Human Rights Mechanism (WG AHRM), the Network of Four National Human Rights Institutions (4 NHRIs), the Solidarity for Asian People's Advocacy (SAPA), and the Women's Caucus for the ASEAN Human Rights Body) on 11 September 2008 in Manila. The second of such dialogue with the HLP is scheduled for 20 March 2009 in Kuala Lumpur.

## **7. Promotion without Protection?**

Article 14 (1) states : ***“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.”*** The mandate of the AHRB shall, therefore, include both promotion and protection of not only human rights but also fundamental freedoms.

The HLP Chairman has explained that the work of the AHRB would have to strike a balance between promotion and protection of human rights. But he has also stated that under the existing circumstances, the HLP was of the view that the AHRB should focus mainly on promotion of human rights first.

The caveat ***“In conformity with the purposes and principles of the ASEAN Charter ...”*** is the key to understanding the scope of the AHRB's functions. However, one must not read too much into the principle of ***“non-interference”*** (Article 2, paragraph 2, letter e) and overlook the principles of ***“shared commitment and collective responsibility in enhancing regional peace, security and prosperity;”*** (Article 2, paragraph 2, letter b) and ***“enhanced consultations on matters seriously affecting the common interest of ASEAN;”*** (Article 2, paragraph 2, letter g), among others. None of the 14 principles in Article 2 can be read exclusively; they should all be embraced and applied collectively, and in conjunction with the realization of the purposes of ASEAN in Article 1 of the ASEAN Charter.

ASEAN is operating in the real world and has to be realistic about what it can or cannot do. Human rights cooperation requires full participation of all its Member States. It is not desirable to try to do it on the basis of “ASEAN minus X”.

## **8. New Added Value of the AHRB**

Owing to the unique political diversity in ASEAN's membership, cooperation on human rights has to begin somewhere, at a point where every Member State is comfortable and agreeable. This is not to say the AHRB will overlook human rights protection completely. Human rights promotion, including human rights

education, is such practical starting point. We can help inform and remind all peoples in our emerging Community that human rights belong to them.

The establishment of the AHRB is not an end in itself; it is merely the new beginning. After its launch, the most important added value of the AHRB is in providing a new venue and a new learning process for the diverse ASEAN Member States to cooperate on human rights at the regional level. In so doing, the AHRB is expected to develop and gradually take on new and more difficult functions, including various aspects of human rights protection.

At the global level, ASEAN Member States, being members of the United Nations, have been engaging in human rights cooperation in the UN Human Rights Council in Geneva. The protection of human rights is closely scrutinized by all other UN members, the Office of the UN High Commissioner for Human Rights, other relevant UN agencies, and other stakeholders, including national human rights institutions and civil society organizations. In 2009, Brunei Darussalam, Cambodia, Malaysia, and Viet Nam are due to submit their 20-page report for the Universal Periodic Review. In 2010, it will be Lao PDR's turn; and in 2011, Myanmar, Singapore, and Thailand.

Whether or not such periodic scrutiny and the so-called "protection tools" at the UN Human Rights Council's disposal is effective remains debatable. The process in the UN Human Rights Council has both its critics and admirers. But it is generally agreed that the process is not aimed at naming or shaming alleged violators. Rather, the process seeks to encourage cooperation to improve respect for and protection of human rights in every UN member state.

Can the AHRB emulate the UN Human Rights Council in scrutinizing each other's human rights records or adopt its "protection tools"? Can we expect the AHRB to be more effective than the UN Human Rights Council? These are interesting questions that no one may have any satisfactory answers just yet. When the HLP undertakes a working visit to Geneva in the third week of April 2009, the HLP can try to find out what ASEAN can learn from the Office of the UN High Commissioner for Human Rights and the UN Human Rights Council.

## ***9. Women, Children, Migrant Workers***

Efforts in ASEAN to promote and protect the rights of women, children, and migrant workers were made long before the drafting of the ASEAN Charter and they are gaining momentum in their own separate processes. A Working Group has been set up to draft the TOR for an ASEAN Commission on the Promotion and Protection of the Rights of Women and Children. The cooperation here can be based on the 2004 Declaration on the Elimination of Violence Against Women in the ASEAN Region, as well as the UN Convention on the Elimination of All Forms of Discrimination Against Women

(CEDAW), and the UN Convention on the Rights of the Child, which all ASEAN Member States have ratified. In other words, ASEAN has clear firm ground for cooperation on the protection of women's rights.

Likewise, the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of Rights of Migrant Workers is working towards the development of an ASEAN instrument on the protection and promotion of the rights of migrant workers. Among the 10 ASEAN Member States, only the Philippines has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Cambodia and Indonesia have signed but not yet ratified it. Hence, the added significance of having an ASEAN instrument for the protection of the rights of migrant workers.

Under the ASEAN Political-Security Community Blueprint, the AHRB shall cooperate with existing human rights mechanisms. However, how the cooperation between the AHRB shall be undertaken with the Commission (on the rights of women and children) and the Committee (on the rights of migrant workers) has yet to be determined. Another question concerns the AHRB's relations with the national human rights institutions in Cambodia, Indonesia, Malaysia, the Philippines, and Thailand.

Since its TOR is determined by the AMM, the AHRB is expected to report to the ASEAN Foreign Ministers in their capacity either as the AMM, or the ASEAN Coordinating Council (ACC). The Commission is expected to work closely with the ASEAN Committee on Women and the ASEAN Senior Officials on Social Welfare and Development; the Committee reports to the ASEAN Senior Labour Officials Meeting. How, then, are they going to work together without duplicating one another's efforts?

### ***10. Ensuring Effectiveness***

The effectiveness of the AHRB does not depend on only what will go into the TOR. Proper coordination and innovative collaboration with other relevant ASEAN bodies is needed to ensure effectiveness in ASEAN human rights cooperation. Also needed are resources and expertise for both the AHRB and the ASEAN Secretariat that will support the AHRB.

The HLP is thus exploring ways and means of efficient resource mobilization to support programmes, projects and activities of the AHRB. Good ideas require concrete resources and expertise to translate them into beneficial actions.

All in all, ASEAN is heading towards the right direction as far as cooperation on human rights is concerned. ASEAN welcomes constructive criticisms, as

long as critics get all the facts right and try to see the whole picture. ASEAN is not a single-issue entity. Neither is it an omnipotent supra-regional government.

ASEAN is building an inclusive and comprehensive community for all of the peoples of its Member States. This requires patience and long-term plan. Effective promotion and protection of human rights and fundamental freedoms will make the ASEAN Community stronger, the peoples of ASEAN happier. ASEAN deserves encouragement and support in this endeavour.

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