The Unfinished Business:
The ASEAN Intergovernmental Commission on Human Rights

Dr. Gorawut Numnak, Miklos Romandy, Jonas Trapp¹

The ASEAN Intergovernmental Commission on Human Rights is the newest regional human rights mechanism. For over a decade, the Friedrich Naumann Foundation for Liberty has been supporting the efforts leading to the establishment of this commission. The other such mechanisms include the African Commission on Human and People’s Rights, the African Court on Human and People’s Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and the European Court of Human Rights.

Human rights are the core of liberalism. Respect for human dignity and justice is the ultimate precondition of a society where people can live freely and in peace. After the 1993 World Conference on Human Rights, the idea of setting up regional human rights bodies in every region suffused. It is believed that, with seemingly fewer parties involve and more homogenous than international mechanisms, a regional body is more accessible. However, a crucial question arises out of such assumption. Does this also hold true for a region with the great diversity like Southeast Asia?

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It is true that the establishment of the ASEAN Intergovernmental Commission on Human Rights marks a significant milestone in the struggle to advance human rights in the region. Still, there seem to be many miles to go before it can function effectively. In this paper, the authors attempt to broadly sketch the basic features of the newly established Commission, its composition, powers and procedure. The authors also analyse the Commission’s activities to date, current prospects and future challenges. Finally, recommendations are given to the three main stakeholders: ASEAN member-states, civil society and human rights organisations as well as the Commission.

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Southeast Asia is one of the world's most diverse regions. It is home to half a billion people and offers unparalleled cultural richness. With a range of assorted economic and political structures, it is a region of uneven capacities and resources. The Association of Southeast Asian Nations (ASEAN) now comprises all ten countries in the region, excluding East Timor.

Forty years after its formation, the existing ten nations of ASEAN adopted their first charter at the fourteenth ASEAN Summit in December 2008, finally, making the regional entity a rule-based body. However, ASEAN's standing and its weight in international affairs rest very much on enshrined benchmarks in the Charter and, even more on their implementation. One of the pledges of the Charter is the establishment of a regional human rights body.

In October 2009, the ASEAN human rights body was inaugurated to a mixed reception. Although the ASEAN Intergovernmental Commission on Human Rights or AICHR, as the body is formally named, may be conceived of as a step forward, the criticism that the body has limited enforcement functions is often stridently voiced. This paper offers a comprehensive account of the establishment of the ASEAN human rights body.

Developments of ASEAN Human Rights System

With its archaic image, it is common to perceive ASEAN as somewhat innately disinclined to change. ASEAN was an outgrowth of the Association of Southeast Asia (ASA) and officially formed in 1967, during a period of regional conflict and political irascibility. ASEAN has always been an 'exclusive club' with a secretive decision-making process. It was originally established with the aim of silencing political conflicts and avoiding raging wars between countries in the region, which hitherto seems to have been its only achievement.

Only when ASEAN celebrated its thirtieth anniversary, did it finally formulate the region's shared vision, the so-called 'ASEAN Vision 2020', piecing together the region's future. ASEAN Vision 2020 commits to establishing 'caring societies' in which 'all people enjoy equitable access to opportunities for total human development regardless of gender, race, religion, language, or social
and cultural backgrounds’. It also asserts ASEAN as an ‘outward-looking’ organisation and ‘an effective force for peace, justice and moderation in the Asia-Pacific and in the world’.²

It took another ten years for ASEAN to launch its first charter, at its thirteenth summit in December 2008. Among other things, the charter paved the way for the establishment of an ASEAN human rights body, which was inaugurated at the fifteenth summit in October 2009. The body was officially named the ASEAN Intergovernmental Commission on Human Rights.

The political shift towards the ASEAN human rights mechanism

The adoption of the ASEAN Charter in December 2008 marked the beginning of a new era in the field of human rights in the region. The idea of establishing an ASEAN human rights body was first developed after the World Conference on Human Rights, in Vienna in June 1993. At the conference, the Vienna Declaration and Programme of Action was endorsed. This document emphasises the need to establish a regional human rights protection mechanism where it has not yet existed. It was believed that a regional body would be more accessible than an international mechanism, since fewer, more culturally and linguistically homogenous parties would be involved. Accordingly, the political decision to create an ASEAN human rights body was taken in July 1993. The twenty-sixth Ministerial Meeting declared in a Joint Communiqué that ‘the Foreign Ministers welcomed the international consensus achieved during the World Conference on Human Rights’. In support of the Vienna Declaration and Programme, ASEAN considered ‘the establishment of an appropriate regional human rights mechanism’.³ This declaration created a surge of debates and hopes among human-rights advocates.

The process of considering the establishment of a regional mechanism on human rights slowed down after 1995, in part due to the increased political diversity following the admission of four new members (Vietnam joined ASEAN in 1995, Laos and Myanmar in 1997, and Cambodia in 1999). Moreover, the Asian Economic and Financial crisis, which broke out in 1997, posed a significant challenge. ASEAN member-states responded to the crisis by sacrificing democratic accountability to economic recovery. Consequently, ASEAN’s main priority became curtailing the economic development gap in the region.

Nevertheless, the ASEAN Vision 2020, which was adopted in Kuala Lumpur in December 1997, managed to incorporate many principles of human rights. It includes, for example, the principle of non-discrimination and the promotion of democratic societies. In 2004, ASEAN member-states agreed to the Vientiane Action Programme (VAP) for the period 2005-2010. Among other things, the VAP commits to several areas of human rights work, including a stock-taking of existing human rights mechanisms and bodies, education and public awareness on human rights, a network of cooperation among existing human rights mechanisms, an ASEAN instrument on the protection and promotion of the rights of migrant workers and an ASEAN commission on the promotion and protection of the rights of women and children.

The first human rights structure established by ASEAN was the Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. This body was created at the fortieth Ministerial Meeting in Manila on 30 July 2007. The creation of this body was not unexpected. ASEAN member states benefit a great deal from migrant workers, both as hosts and/or sending countries.

The Terms of Reference of ASEAN's agreement on the Rights of Women and Children is reportedly completed. A body has been scheduled to be set up as a commission in 2010. It is interesting to note that because all (or most) of ASEAN member states have ratified the two international conventions concerning women and children (namely the Convention on the Elimination of Discrimination against Women and Convention on the Rights of the Child), ASEAN governments seem to feel more comfortable discussing women and children's rights issues. They could quickly reach a consensus on these Terms of Reference, without many civil societies realising the new development is taking place.

To date, ASEAN has adopted five declarations concerning human rights:

- Jakarta Declaration on the Elimination of Violence against Women in ASEAN Region (Jakarta, 13 June 2004)
- ASEAN Declaration Against Trafficking in Persons, Particularly Women and Children (Vientiane, 29 November 2004)
- Vientiane Action Programme (Vientiane, 29 November 2004)
- Declaration on the Establishment of the ASEAN Charter (Kuala Lumpur, 11 December 2005)
- ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (Cebu, 13 January 2007)

Nevertheless, these declarations are not legally binding, and do not ensure that concerted steps will be taken.

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International Human Right Treaties Ratified by ASEAN Member-states (as of 2009)

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<tr>
<th>Treaty/Majority of Rights</th>
<th>Brunei</th>
<th>Burma</th>
<th>Cambodia</th>
<th>Indonesia</th>
<th>Laos</th>
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Note: • Signed and ratified:
1 except Article 14

The ASEAN Way and Human Rights

Despite the inaugural declaration that the Commission is ‘a vehicle for progressive social development and justice, the full realisation of human dignity and the attainment of a higher quality life for ASEAN people’, the AICHR seems to have no enforcement functions. The Commission is perceived as a ‘toothless’ paper tiger.

The blame for the establishment of such a weak body is largely attributed to the so-called ‘ASEAN way’. Three of these attributes are of particular significance to the establishment of the Commission and the draft of the Terms of Reference (TOR), namely:

- sovereignty and territorial integrity of all States
- equal rights and non-interference in the internal political affairs of States
- consensus-based decision making

It is instructive to note that ASEAN's way of regional interactions and cooperation 'contrasts with the adversarial posturing, majority vote and other legalistic decision-making procedures in Western multilateral negotiations'.

ASEAN often deflects criticism of the ASEAN way by emphasising that it has in the past enabled member states to cooperate and resolve issues, maintain peace in the region and achieve impressive economic development.

With its insistence on the ASEAN way, there is no doubt that the Commission was created through political negotiations and compromises. The role of the Commission is subject to political feasibility. Governments will surely work to ensure that any action taken by the Commission does not interfere with their own interests and domestic policies. As a corollary, the TOR intend the main role of the Commission to be 'consultative'. Inevitably this leads to the further question of what 'consultative' means.

The TOR seem to use the term loosely. Generally, consultative status can be defined in three different ways.

- Firstly, under the United Nations' protocol, an organisation with consultative status is listed and able to deliver oral and written reports. It can also make complaints.
- Secondly, a more general definition implies that a consultative body can make recommendations and be consulted.
- Thirdly, and politically more pessimistically, a consultative body needs to consult and gain consensus between its members when making a decision.

Even though the word is not defined in the TOR, under the ASEAN way one may not expect the ASEAN’s Commission to be able to make complaints. Nevertheless, what is not prohibited is not forbidden.

Human Rights – deeds, not words

There is no doubt that ASEAN has traditionally lacked a strong ‘rights’ culture. For a long time, human rights issues have not been central to ASEAN’s policy agenda. Nevertheless the region has reportedly faced (and continues to face) a number of severe human rights challenges, including exploitation of children, people trafficking, internal displacement, discrimination against vulnerable and disadvantaged groups, forced labour, armed conflict and violation and corruption. As one might expect, this is because of:

- the great diversity in the region resulting in a lack of common standards for human rights;

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7 Professor Vitit Muntarbhorn, one of the drafters of the TOR, put forward this idea, in 'Development an ASEAN Human Rights Regime', at the Eight Workshop on the ASEAN Regional Mechanism on Human Right, on 14-15 July 2009, Bangkok Thailand.
the priority on nation-building and poverty alleviation; and more importantly
the presence of authoritarian governments in the region.\(^8\)

In addition, the resistance to according legal recognition to human rights has been (and continues to remain) high in the region because of the belief in the hierarchy of rights. ASEAN seems to consider the most fundamental rights to be economic. This became especially apparent after the 1997 Asian Economic and Financial Crisis.

However, it needs to be re-emphasised here that ASEAN is an 'intergovernmental' organisation, ruled by governments as diverse as the flourishing democracy in Indonesia, the stern one-party regime in Laos and the repressive military junta in Myanmar. Keeping this fact in view, one might argue that, at this nascent stage in its development, the aims of the Commission should be regarded more as aspiration than prescription. Nevertheless, the current developments in ASEAN may probably be considered progressive.

In addition, the ratification of the Charter is a good indication of the region's ongoing shift from a consensus-based to rule-based policy. ASEAN is gradually transforming from being a state-centric organisation to a more people-oriented one. The ASEAN Secretary General, Dr. Surin Pitsuwan, declared: 'eventually, we want to be an inclusive ASEAN, an engaged ASEAN, a compassionate, sharing and caring ASEAN'.\(^9\)

It seems likely that the speeded-up cooperation among ASEAN countries on political and economic issues will eventually extend to human rights. It is hoped that with increased economic cooperation, the gap between rich and poor economies within the region will be narrowed. As has happened elsewhere, a larger, more educated and politically-conscious middle-class population is more likely to stand up against socio-political wrongs and compel governments to perform responsibly. In time, human rights will no longer be considered as a domestic affair but a transnational issue, to be promoted and protected by the regional body.

In short, our preoccupation with the establishment of the body in the past few years has not been a waste of time: there now appears to be the will and the way of ensuring the effective promotion and protection of human rights in the region. The question remains how the Commission can or should capitalise on its given mandate.

Existing Regional human rights mechanisms

In order to properly evaluate the Commission, it is useful to consider similar bodies in other regions, namely Africa, Americas and Europe. The type, composition, and mandate of these bodies are discussed below.

Prior to the fifteenth ASEAN summit, the Asia-Pacific was the only region in the world without a regional human-rights mechanism. With great social, economic and especially political diversity,

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\(^9\) Dr. Surin Pitsuwan speaking at the Foreign Correspondents Club of Thailand on 25 February 2009.
the creation of such a mechanism in the region seemed unlikely. At the time hope lay with the ten-nation Southeast Asian sub-region. After its establishment, reservations about ASEAN's human rights Commission being on a par with other regional rights mechanisms abounded.

Africa

The African Charter on Human and Peoples' Rights (Banjul Charter) entered into force in 1986 and gradually gained support from all 53 member-countries of the African Union (Organisation of African Union) by 1996. In 1998, the Protocol to the Charter on the Establishment of an African Court of Human Rights was adopted: a court was later created in 2007. It is noteworthy that according to the Banjul Charter, not only individual human rights but also rights of peoples are protected.

Because of the recent inclusion of the African Court on Human and Peoples' Rights into the African system, it may be too early to assess precisely how the whole system works in practice. (So far, there has still not been a court hearing.) According to the Charter, the African Commission on Human and Peoples' Rights consists of eleven members serving in their personal capacity. The Commission has two functions:

- firstly, it is qualified to promote human rights by collecting documents, undertaking studies, disseminating information, making recommendations, formulating rules and principles and cooperating with other institutions.
- secondly, the Commission ensures the protection of human and peoples' rights by receiving inter-state communications, communications from sources other than those of the state's parties, and periodic reports from state parties.

The African Court on Human and Peoples' Rights is comprised of eleven judges elected by the member states of the African Union to a one-time renewable term of six years. In the Court as a whole there should, in principle, be an equitable representation of the main regions of Africa and their principal legal traditions, as well as adequate gender representation. Equally of note is that the Court is given broad jurisdiction. It has a mandate to make binding determinations on any international treaty which a member state has ratified and is not constrained to those within the African system. Nevertheless, there is no direct access to the Court by an individual. The venue is only available for states and the Commission. In that respect, the Commission also acts as a porter, screening and advancing individuals' complaints to the Court. Unlike to Commission's recommendations, the Court's decision is binding.
Americas

Similar to the African human rights system, the inter-American system for the protection of human rights comprises two mechanisms: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Both mechanisms are autonomous organs of the Organization of American States (OAS).

The Commission was created in 1959. It has seven members elected by the General Assembly of the OAS for a four-year term of office, which can be renewed once only. While the Commission represents all member-states of the OAS, its members act independently, without representing any particular country. Each member of the Commission takes responsibility as a rapporteur on specific themes (for instance, gender, children, migrants and indigenous peoples). According to the OAS Charter and the American Convention on Human Rights, the Commission has a mandate to promote respect for and defence of human rights. In carrying out its mandate, the Commission, among other things:

- receives, analyses and investigates complaints;
- observes the general human rights situation in the member states and produces special reports if deemed appropriate;
- carries out onsite visits;
- develops an awareness of human rights in the Americas; and
- recommends the adoption of specific or special 'precautionary' measures by the member states if it considers such action advisable.

Since the creation of the Inter-American Court of Human Right in 1979, the Commission may submit cases to and seek advisory opinions from that Court. The Commission can hold a hearing during the proceedings of a case in which both parties are asked to set forth their legal and factual arguments. Normally, the Commission also assists the parties in negotiating an amicable settlement. Thus, the Inter-American Commission on Human Rights is not only the porter of the Court, but also the investigatory and diplomatic enforcement branch.

The Inter-American Court of Human Right consists of seven judges. Like the members of the Commission, judges are elected in their individual capacity. The Court is competent to examine cases submitted to it by the states, parties and the Commission. The Court's rulings are legally binding. However, the Court cannot hear cases against states that are not party to the American Convention on Human Rights, from which the court's jurisdiction derives. Unlike the African Court on Human and Peoples' Rights, the Inter-American Court has the authority to award compensation to an injured party, although the OAS General Assembly needs to enforce these rulings.
Europe

The European human rights system initially comprised a European Commission and a European Court of Human Rights. However, the European Commission was abolished in 1998 when the Court’s jurisdiction became binding on all state parties and the restrictions placed on the control machinery established under the European Convention on Human Rights (The European Convention) came into force. It is interesting to note that the European Convention was modelled to a great extent on the United Nations’ Universal Declaration of Human Rights. The European Court of Human Rights currently comprises 47 justices (one from each member state). The Court is a permanent, full-time body. It may sit in committees of three judges, Chambers of seven judges or a Grand Chamber of 17 judges. In accordance with the European Convention, the Court is competent to receive and examine inter-state cases and claims of any person, non-governmental organisation or group of individuals. The implementation of the court’s ruling is monitored by the Committee of Ministers.

Even though the European court is considered to be the most advanced, and known for employing stringent enforcement measures, it has some limitations. Like the other courts of human rights, the European court may handle only cases that have exhausted domestic options. The Court does not have its own enforcement mechanism. It performs more like a court of appeal than trial court, even though it has the power to call witnesses and to make onsite visits. It is true that the Court’s decisions are binding. However, its rulings depend on the respondent state’s domestic law to mandate the result. In addition, the Court is not the best institutional mechanism for implementing preventative measures. Thus, additional human rights bodies, such as a European Commissioner on Human Rights and the Office for Democratic Institutions and Human Rights, have joined the system.

Towards a functional Human Rights body

As discussed above, the existing regional human rights mechanisms are various in terms of type, composition, mandate and enforcement procedures. They range from a commission of experts formulating policy advice and recommendations, to an all-out commission with investigative and enforcement functions, to a court with jurisdiction to hear complaints and to issue rulings.

Potentially, all regional human rights mechanisms can have the power to bring about change in a region. However, the mechanisms were created for, and assumed to operate under, an international order based on sovereign states, whose own governments have the ultimate responsibility of putting them into effect. Regardless of how strong the mandate given to the bodies is, the success of the bodies depends very much upon the will of member states.

It might be too early to assess the effectiveness of the ASEAN’s Commission. Nevertheless, in the content of the charter and the Terms of Reference (TOR) can give us a partial view of the Commission’s structure and its responsibilities.
Charter

After the thirteenth ASEAN Summit, the ASEAN Charter was sequentially ratified by the heads of all 10 member states. It is worth noting that the charter mentions human rights three times, as follows:

- 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’.10 (Preamble)

- The purpose of ASEAN is ‘to strengthen democracy, [to] 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’.11 (Purpose)

- ASEAN and the member states shall act in accordance with the ‘respect for fundamental freedom, the promotion and protection of human rights, and the promotion of social justice’.12 (Principles)

The Charter also refers to the establishment of the ASEAN human rights body in Article 14, stating that:

- in compliance with ‘the purpose and principle of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedom, ASEAN shall establish an ASEAN human rights body’.13

However, prior to the deadline for submission of the draft of the charter to the ASEAN Foreign Ministers, there was still no ‘consensus’ on the details of the body. Thus, the Foreign Ministers instructed the High Level Task Force14 to draft the Terms of Reference (TOR) of the body, and appended the following statement to Article 14:

- The ASEAN human rights body ‘shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting’.15

Terms of Reference (TOR)

In July 2009, the ASEAN foreign ministers passed the Terms of Reference (TOR) of the ASEAN human rights body, which was called for in the Charter. The TOR gives the name to the body and

10 See The ASEAN Charter, p.1.
11 Ibid., p.4.
12 Ibid., p.7.
13 Ibid., p.19.
14 The High Level Task Force consisted of Dato Shofry Abdul Ghafor (Brunei), Mr. Om Yentieng (Cambodia), Ms Wiwik Setyawati Firman (Indonesia), Mr. Bounkeut Sangsomsak (Laos), Tan Sri Ahmad Fuzi Abdul Razak (Malaysia), Mr. Myat Ko (Myanmar), Ambassador Rosario G. Manalo (the Philippines), Mr. Bilahari Kausikan (Singapore), Ambassador Sihasak Phuangketkeaw and Professor Vittit Muntarbhorn (Thailand), and Mr. Pham Quang Vinh (Vietnam)
15 See the ASEAN Charter, p.19.
provides it a mandate. There is no doubt that, as a result of the ASEAN Way, the TOR is the product of stiff political negotiation among member states.

The result was nothing if not predictable, given the mandate of the Commission. Despite the Commission's purpose being to 'promote and protect human rights and fundamental freedoms of the people of ASEAN' and 'to uphold the right of the peoples of ASEAN to live in peace, dignity and prosperity', the Commission was given an unclear protection mandate by the TOR.

As its name suggests, the Commission is an 'intergovernmental' body. This means that the Commission has no authority over the governments of the member states. Unlike other regional mechanisms discussed above, the ASEAN's Commission has no power to impose sanctions or conduct investigative visits. Although the commission is requested to submit its studies and annual report to the ASEAN Foreign Ministers Meeting, the TOR does not specify any obligation for further action. It appears that the Commission can only count on 'peer pressure' to bring recalcitrant members into line. Taken at face value, this presents the worrying message that the ASEAN region's human rights problems can be limited to issues of promotion.

'It was never intended to be an "independent watchdog"... much less to be anything with "sharp teeth"', said Mr. Termsak Chalermpalanupap, ASEAN Secretariat's Director of Political and Security Cooperation.

It can be argued that the Commission is still evolving. "We shall not only demonstrate to the world that human rights [are] a priority but also show them realistic and constructive ways to deal with it", said the Chair of ASEAN when the Commission was launched.

It seems that the emphasis of the TOR has been more on pragmatism and practicality than on lofty declarations (which may never be implemented). The breakthrough to a common position was undoubtedly the result of intense negotiations and compromises.

It is true that the Commission has been given a mandate to serve primarily as an advisory, coordinating and consultative body. At one remove, the Commission also has an important 'catalytic effect' on human rights advocacy and reform in the region. In the next five years, the Commission is mandated to:

- develop strategies;
- draw up an ASEAN Human Rights Declaration;
- enhance public awareness of human rights;
- promote capacity building;

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16 See ASEAN Intergovernmental Commission on Human Rights (Terms of Reference), p.3.
19 See Analysis from the East-West Center No. 90, 'The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step?', AsiaPacific, by Michelle Staggs Kelsall.
• provide advisory and technical assistance;
• receive information from member states; and
• develop common approaches to and positions on human rights.

To a certain extent the outcome of these tasks will provide a foundation on which the future organisation and functions of the Commission can build. In addition, the TOR contains some provisions to strengthen the Commission, especially the reviewing of its mandate and function every five years, and the encouraging contribution of all stakeholders to the promotion and protection of human rights in the region.

According to the TOR, the Commission comprises representatives of each member state, who are appointed by and accountable to their respective governments. Even though the TOR specifies that, when appointing representatives member states ‘shall give due consideration to gender equality, integrity and competence in the field of human rights’, it begs the crucial procedural question of which method to use for the appointment of representatives.

A brief rundown of the first panel of the Commission is as follows:

Brunei – Pehin Dato Hamid Bakal was a Syar’ie Chief judge. He is also a member of the Privy Council, Brunei Religious Council, Royal Meeting Council and Adat Istiadat Council.

Cambodia – Dr. Om Yentieng is a journalist with a background in law. He is a senior advisor to the Cambodian Prime Minister and the president of the Cambodian Human Rights Committee, the government organisation for the defence of human rights in Cambodia. He was also appointed a member of the High Level Panel that drafted the TOR.

Indonesia – Mr. Rafendi Djamin is a well-known human rights advocate. He serves as the coordinator of a national NGO coalition for International Advocacy. The scope of his work on human rights covers national and regional levels in ASEAN and Asia-Pacific.

Laos – Mr. Bounkeut Sangsomsak is the Vice Minister of Foreign Affairs. His career in the Minister of Foreign Affair has spanned more than 30 years. He was a member of the High Level Panel which drafted the TOR.

Malaysia – Mr. Muhammad Shafee Abdullah is a commissioner for the Human Rights Commission of Malaysia and a member of the Commonwealth Lawyers Association. He is a lawyer known to have good connections with the ruling party. He spent over 30 years in the legal profession.

Myanmar – Mr. Kyaw Tint Swe is the Ambassador and Permanent Representative of Myanmar to the United Nations. His career in the Minister of Foreign Affair has spanned more than 40 years.

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20 See ASEAN Intergovernmental Commission on Human Rights (Terms of Reference), p.8.
The Philippines – Ms. Rosario Gonzalez Manalo is currently a lecturer, *inter alia*, at the University of the Philippines. She was an ambassador to a number of countries, including Belgium, Luxembourg, Sweden, Norway, Denmark, Finland and the Baltic States of Estonia, Latvia and Lithuania. Her diplomatic career has spanned more than 20 years. She was an advisor to President Fidel V. Ramos before chairing the High Level Panel which drafted the TOR.

Singapore – Mr. Richard Magnus is a retired Senior District Judge. His legal profession has spanned over 40 years. He is now, *inter alia*, the Chairman of the Public Guardian Board, Chairman of the Casino Regulatory Authority, the Chairman of Political Films Advisory Panel and the Chairman of Temasek Cares CLG Limited.

Thailand – Dr. Sriprapha Petcharamesree is a lecturer and the founder of the Center for Human Rights Studies and Social Development, Mahidol University. She is a member of the Working Group for an ASEAN Human Rights Mechanism. Her career in academic and human rights has spanned over 30 years.

Vietnam – Mr. Do Ngoc Son is the Ambassador to Spain. He was an Assistant Minister of Foreign Affairs and Head of ASEAN Department in the Ministry of Foreign Affairs. His diplomatic career has spanned over 30 years.

From the above roster, it is very interesting to note that the majority of the representatives come from legal or diplomatic professions. Three of the representatives were also the drafters of the TOR. Only the representatives of Indonesia and Thailand are members of civil societies. It is also interesting to note that only Indonesia and Thailand used participatory approaches when appointing the representatives. There the positions were publicly advertised.

**Key actors in engagement and development of the body**

It is true that the idea for setting up an ASEAN Human Rights body came about after the World Conference and the ASEAN Ministerial Meeting in 1993. However, there were many member states who felt uncomfortable with the idea of a human rights body. Evidently, the same communiqué that put forward the creation of the regional human rights body, emphasised 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’.

With respect to the process of the establishment of the Commission, many groups played key roles in monitoring and advocacy for the creation of the ASEAN human rights body. The two most influential are the Working Group for an ASEAN Human Rights Mechanism (the Working Group), and national human rights institutions (NHRIs).

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The Working Group for an ASEAN Human Rights Mechanism

With the support of the Friedrich Naumann Foundation for Liberty, the Working Group for an ASEAN Human Rights Mechanism (the Working Group) was formed in 1995. It is a coalition of national working groups, consisting of representatives of government institutions, parliamentary human rights committees, national human rights institutions, the academe, and non-governmental organisations. Every year, the Working Group convenes to enable relevant parties, namely governments, NHRIs, the ASEAN Secretariat, and non-governmental organisations, to discuss the implementation of the VAP and the ASEAN human right body, and subsequently to produce recommendations.

On many occasions, the Working Group has recommended to ASEAN that its regional human rights system should include a declaration of principles; a commission with monitoring, promotional, and recommendatory functions; and a court with a mandate to render binding decisions.

National Human Rights Institutions

Of 10 member states, only four countries (Indonesia, Malaysia, the Philippines and Thailand) have established a national human rights institution (NHRI). The four NHRIs set up their network and regularly convene the ASEAN NHRI Forum. Prior to the ratification of the TOR, the NHRIs also put forward their recommendations of what should be included in the TOR. Among other things, the NHRIs’ recommended that:

- the ASEAN human rights body shall advise and assist ASEAN in formulating directives and procedures and recommend measures to be taken in addressing human rights issues as well as the ratification of international treaties;
- the body shall promote, protect and monitor human rights in accordance with the Universal Declaration of Human Rights;
- the body will cooperate with NHRIs, non-governmental organisations, civil society organisations, regional institutions and international institutions concerned with human rights; and that
- the body shall receive, analyse, investigate and take action on complaints of alleged violations by individuals or groups of individuals and others.

It is clear that the newly established Commission is far from being what the Working Group and the NHRIs anticipated. Because ASEAN is now a rule-based organisation, there is no doubt that the Working Group and the NHRIs will continue to play a significant role in advancing the Commission. They are officially recognised as stakeholders according to the Charter. The Terms of Reference (TOR) expect the Commission to 'work with all ASEAN sectoral bodies dealing with human rights'.
The Commission 'shall closely consult, coordinate and collaborate with such bodies in order to promote synergy and coherence in ASEAN's promotion and protection of human rights'.

Conclusion

It has indeed been a long and onerous journey towards an effective ASEAN human rights system, which is arguably still a long way for being realised. ASEAN's system still falls far behind the systems of other regions.

Recently, ASEAN has the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers. Both the Commission and the Committee, in their current form, are best understood as fora for cooperation on human rights. At the national level, only four of the ten member states have their own national human rights institutions.

There is no doubt that the establishment of AICHR has laid the ground for great advances. It is true that the Commission has been given a weak and broad mandate. However, high regard must be given to the fact that the Commission is a logical outcome of the ASEAN Charter. The Charter formalises norms of conduct not only in the relations between member states, but also in the conduct of states towards their citizens. The rule of law, good governance, constitutional government, democracy, human rights and fundamental freedom as well as social justice are embraced in their purpose and principles. Clearly, the Commission is still evolving. In simple terms, the Commission is an 'unfinished business'.

Challenges and the way forward

From the early discussion, there appear to be four significant challenges facing the AICHR, which will also impact on its future development.

1. The lack of common standards of human rights: Different member states have different stances on human rights because there are large differences of development, of potential and of socio-political value within the region.

2. The policy of sovereignty, non-interference and consensus: The Terms of Reference (TOR) states that 'decision-making in the AICHR shall be based on consultation and consensus'. This implies that actions of the Commission require the agreement of each country's representative. Since countries with the lowest human rights standards can use their veto power, human rights standards of the region might be compromised. It is true that other regions also exercise the policy of sovereignty and non-interference. However, unlike other regions, ASEAN regards human rights as a domestic concern.

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22 See ASEAN Intergovernmental Commission on Human Rights (Terms of Reference), p.11.
23 See ASEAN Intergovernmental Commission on Human Rights (Terms of Reference), p.10.
3. **The independence of the Commission:** The TOR requires the Commission to act impartially. Nevertheless, the independence of the Commission can be compromised because, according to the TOR, the ASEAN foreign ministers 'appoint a Representative to the AICHR who shall be accountable to the appointing Government'.

4. **The broad and weak mandate:** The Commission will not only be faced by the challenge of implementation but also of 'interpretation' of the mandate.

Indeed, the success of the Commission will not only depend on what it can do (with regard to its given mandate), but also on what it will do. The development of a credible and effective regional human rights mechanism will take time and will require support from all levels:

The challenges underpin the importance of the political will of member states. To be effective the governments should:

- adhere to the Charter and the TOR;
- endow the Commission with the necessary means to truly fulfil its mandate;
- allow the Commission at least, to make recommendations;
- engage and consult all sections of society in the selection of the representatives and in other decision-making processes;
- establish (or empower) an independent national human rights institution in line with the Paris Principles;
- ratify all core international human rights treaties; and
- recognise the changing nature of ASEAN, and adapt their domestic policies accordingly.

In turn, the engagement of civil society, human rights organisations and national human rights institutions (NHRIs) should be encouraged. This section of the society provides the so-called 'check and balances', ensuring that the Commission’s work is efficient and effective. Civil society, human rights organisations and NHRIs can support the Commission by:

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24 Ibid., p.8.
25 The Paris Principles are the principle source of normative standards for national human rights institutions, adopted by the UN General Assembly on 20 December 1993.
• engaging with the operational process of the Commission through research, lobbying and educating governments and the public;

• assisting the Commission in harnessing expertise, skills, information and 'on-the-ground' intelligence to enhance its research capacity;

• shielding the Commission from any possible threat to its independence;

• intensifying efforts to lobby members states to empower the Commission, its responsibilities and structure, at least in line with the UNHR's Principles for Regional Human Rights Mechanism.27

Similarly the initiatives of the members of the Commission must be activated. The commission should:

• carry out its 'broad' mandate with vision and creativity (keeping in mind that 'what is not prohibited is not forbidden');

• develop those common standards of human rights (through the ASEAN Human Rights Declaration) that enhance the universal standards;28

• exhibit and maintain independence from political interference for the member states and ASEAN;

• create a structure for dialogue and engagement with civil society, human rights organisations, academic institutions and the public;

• coordinate with (and complement the work of) national and international human rights institutions; and

• maintain visibility and presence through dissemination of its work through the media and modern technology in order to directly and indirectly enhance awareness of the human rights issues in the region.

In short, in order to overcome the challenges and to become an effective protection and promotion mechanism, the ASEAN Intergovernmental Commission on Human Rights requires the political will of member-states, the engagement of human rights organisations and the initiative of the members of the Commission.


28 The best known transmitters of the human rights tradition are modern United Nations documents such as the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).
Reference:


"ASEAN Vision 2020", available at www.aseansec.org/1814.htm


